

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Gulf Power)	DOCKET NO. 881167-EI
Company for Rate Increase.)	ORDER NO. 21157
)	ISSUED: 5-3-89

ORDER ON GULF POWER'S MOTION FOR PROTECTIVE ORDER
AS TO PORTIONS OF CITIZENS FOURTH SET OF INTERROGATORIES
AND CITIZENS FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS

On November 14, 1988, Gulf Power Company (Gulf) petitioned the Commission for a rate increase. As part of its discovery as to the petition, the Citizens of the State of Florida (Citizens), as intervenor through Public Counsel, filed a Fourth Set of Interrogatories and a Fourth Request for Production of Documents on January 25, 1989. On March 3, 1989, Gulf, pursuant to Rules 1.280 and 1.351, Florida Rules of Civil Procedure, 25-22.006, Florida Administrative Code, and Section 366.093, Florida Statutes, filed a Motion for Protective Order as to Portions of Citizens' Fourth Set of Interrogatories and an Objection and Motion for Protective Order as to Citizens' Fourth Request for Production of Documents. On March 14, 1989, Citizens, pursuant to Rules 25-22.037 and 25-22.034, Florida Administrative Code, filed Responses to both of Gulf's Motions for Protective Order and to Gulf's Objection.

I. PORTIONS OF CITIZENS' FOURTH SET OF INTERROGATORIES

Interrogatory No. 100 states:

Please identify by full name, job title, employer and current business address each person (including, but not limited to, employees of Gulf Power or affiliates of Gulf Power) who has been contacted, interviewed, or otherwise approached by employees or agents of Gulf Power or affiliates of Gulf Power regarding any investigation (conducted since January 1, 1980) of allegations or inferences (whether formally or informally raised) of inventory shortages, asset misappropriations, or theft by either employees of non-employees of Gulf.

Interrogatory No. 102 states:

Please identify each document (see definition) in your possession, custody, or control memorializing, recording or otherwise relating to any conversation or interview with each person, company or entity identified in interrogatory 100 above, including, but not limited to, audits, reports, memoranda and the relevant files of such persons, companies or entities so identified.

1. THE STANDARD FOR A PROTECTIVE ORDER AND HAS GULF MET IT?

First, the Citizens argue that Gulf has not made the necessary showing for a finding that a protective order should

DOCUMENT NUMBER-DATE

04409 MAY-3 1989

FPSC-RECORDS/REPORTING

ORDER NO. 21157
DOCKET NO. 881167-EI
PAGE 2

issue. Citizens rely on Rule 25-22.006(5)(a), Florida Administrative Code, which provides:

Discovery of confidential material by parties of record in the course of a formal proceeding is governed by Rule of Civil Procedure 1.280.

Rule 1.280(c), Florida Statutes, states that:

Upon motion by a party or by a person to whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense that justice requires... . (Emphasis added)

The Citizens, relying on Docket No. 880069-TL, Order No. 18975, argue that the burden of proof placed on the movant for a specified confidential classification by Rule 25-22.006(4)(a), Florida Administrative Code, should be similarly imposed on a movant for a protective order. We disagree. Rule 25-22.06(4)(a) provides:

- (a) A request for classification of material as specified confidential shall be filed in writing and shall identify the specific information which justifies the classification. The classification of material as proprietary confidential business information is to be justified by demonstrating how the information it contains falls under one or more of the statutory examples or, if no statutory example is applicable, by including justifying statement indicating what penalties or ill effects upon the company or its ratepayers will result from disclosure of the information to the public. The justification shall include a date by which the material is no longer proprietary confidential business information or a statement that such a date cannot be determined and the reasons therefore. [Emphasis added]

We disagree. Movant's lesser burden remains as expressed in Rule 1-280(c), "for good cause shown." We find, however, movant has failed to meet this lesser burden.

In determining whether an order restricting discovery should issue, a court must balance the state's interest in a fair and efficient resolution of the dispute against the countervailing privacy interest of the party seeking protection. South Florida Blood Service v. Rasmussen, 467 S2 798, 803 (3 DCA 1985). Gulf's bare assertion that public disclosure of the requested information would "jeopardize" Gulf's position in its current litigation against a former employee fails to provide a useful nexus between Gulf's listing

ORDER NO. 21157
DOCKET NO. 881167-EI
PAGE 3

of documents and interviewees regarding inventory shortages, asset misappropriation, and employee and non-employee theft, and harm to Gulf by which a protective order could be supported. We find Gulf has failed to show good cause for a protective order to issue.

2. SPECIFIED CONFIDENTIALITY

Gulf alternatively argues that the requested information falls within two statutory exemptions, Sections 366.093(b) and (c), Florida Statutes, relating to internal audits and security measures, respectively.

The Citizens counter that Gulf has failed to allege the requested information constitutes internal auditing controls or reports of internal auditors. Moreover, they argue, Gulf's responses to Interrogatories Nos. 101 and 102, requesting information about individuals participating in the investigations which are the subject of the objectionable Interrogatory No. 100, and identification of documents relating to same, neither identify any individual to be an internal auditor of Gulf nor identify any internal auditing control or report of an internal auditor. The Citizens concede there is listed in response to Interrogatory No. 102 a document of Grover A. Mallini identified in Interrogatory No. 97 as "Manager of Audits, Internal Auditing," under the heading "present Gulf Power employees." The Citizens note, however, that the document is a deposition taken by Croft's attorney, a copy of which is in Public Counsel's possession and, therefore, not privileged. The Citizens also argue that Gulf has made no showing that the requested information constitutes existing security measures, systems, or procedures taken by Gulf to protect itself from loss as contemplated by exemption (c) and not post-loss investigations in the ordinary course of business.

The Commission finds that Gulf has failed to meet its burden as established by Rule 25-22.06(4)(a); Gulf has failed to identify the specific information which justifies classification as specified confidential and to demonstrate how the requested information falls within either statutory exemption or, absent an applicable exemption, to provide a statement indicating what ills will befall Gulf upon disclosure. Instead, Gulf seeks to benefit from broad and un contemplated constructions of narrowly carved exemptions by merely invoking them. We find such use contrary to the intent of the Public Records Law, Florida Statutes.

Based on the above, we find that Responses to Interrogatories Nos. 100 & 102 are not entitled to specified confidentiality classification and must be provided to Citizens.

II. CITIZENS' FOURTH REQUEST FOR PRODUCTION OF DOCUMENTS

Concurrent with Gulf's Motion for Protective Order as to Interrogatories No. 100 and 102, is Gulf's Motion for Protective Order as to Citizens' Fourth Request for Production of Documents identified in Interrogatory Nos. 99, 102 and 106.

ORDER NO. 21157
DOCKET NO. 881167-EI
PAGE 4

The documents relate to Gulf's investigations of allegations of improper, illegal, or excessive payments by Gulf to contract vendors; inventory shortages, asset misappropriations, theft by Gulf employees and non-employees, and certain payments to Gulf executives.

1. RELEVANCY

Gulf objects arguing that the requests in Interrogatory Nos. 97, 98, 99, 101, 102, and 103, relating to Gulf's internal investigations of improper vendor payments, inventory shortages, asset misappropriation, or employee and non-employee theft, and certain payments to Gulf executives are not relevant to Gulf's entitlement to a rate increase. The Citizens counter that not only are issues of imprudent spending, fraud, and theft relevant to Gulf's burden of proof before the Commission as to its expenditures and rate base, an uncovered long-term high level pattern of abuse or misconduct could impeach the validity of Gulf's filing or provide a basis for imposing a penalty on Gulf's authorized return on equity as well as for disallowing O&M expenses beyond benchmark. We agree. Investigations as to the reasonableness of claimed or alleged expenses are made inherently relevant to rate changes by Section 366.06(1), Florida Statutes; if property is claimed, it must be "used and useful," and if money is invested, it must be done "honestly and prudently."

2. OVERLY BROAD AND UNDULY BURDENSOME

The Citizens, in Interrogatory No. 103, ask Gulf to:

Please identify each instance of the payment of money by Gulf or provision of goods, services or things of monetary value by Gulf to any of your executives, officers or directors where such payment or provision was not in strict accordance with your established written, standard company compensation policies.

In addition to an objection based on relevancy, Gulf objects complaining that the request is overly broad and unduly burdensome because "no time frame is provided." Gulf indicated that in addition to a written policy on executive compensation, several relevant unwritten corporate policies have evolved since incorporation in 1928. Gulf's second objection is legitimate. While we find the Citizens' inquiry to be relevant to this docket, we find they should limit their inquiry into such payments to the period that would be relevant to the petition for rate increase. If such limitation is made, we find that this information must be produced.

3. PRIVILEGE

a) Work Product

Gulf argues that its documentation of interviews and memos relating to its investigation of improper vendor payments

ORDER NO. 21157
DOCKET NO. 881167-EI
PAGE 5

identified in Interrogatory No. 99 is protected from discovery under the work product doctrine. Gulf maintains that it conducted such investigations in anticipation of ongoing litigation brought by Kyle Croft against Gulf, rendering use of the doctrine even more compelling. Gulf also argues that forced disclosure of internal corporate investigations would deter corporations from investigating allegations of wrongdoing in the future. The Citizens counter that Gulf has not provided a basis for the Commission to determine whether the documents in dispute are work product because it failed to file an affidavit setting forth the dates upon which and the purpose for which the items subject to the discovery request were obtained as required by the court in Cotton States Mutual Insurance Company v. Turtle Reef Associates, Inc., 444 So.2d 595, 596 (Fla. 4th DCA 1984); Selected Risks Insurance Co. v. White, 447 So.2d 455, 456 (Fla. 4th DCA 1984). We agree.

Without this information, the Commission is unable to make a threshold determination as to whether the disputed documents are either work product, undiscoverable absent a showing of a party's need for the materials in preparing his case and undue hardship to obtain substantially equivalent materials by other means, or discoverable information assembled either in the ordinary course of business or in the mere likelihood of litigation. Cotton States at 596. While Gulf filed a list of 75 documents in response to Interrogatory No. 99 as Exhibit A and a list of 153 documents in response to Interrogatory No. 102 as Exhibit B, the date when each document was obtained is not always included, the purpose for which the listed document was obtained is never provided, and neither exhibit is in the form of an affidavit. Gulf has failed to provide a basis upon which we can make a finding as to whether all or some of the disputed documents are immune from discovery under the work product doctrine.

As the Citizens noted in their Response to Gulf's Motion, the documents listed in the exhibits which were dated revealed two general periods of activity, one in early 1984, around the time of Croft's January, 1984 termination from Gulf for theft, and another period beginning on January 27, 1986, about six months before Croft filed his June 26, 1986 civil complaint against Gulf. If Gulf files a properly prepared motion for protective order, we advise we find documents prepared in the first, or 1984 cluster, without more, to be prepared in the ordinary course of business; an internal investigation of reoccurring allegations of employee theft and, therefore, excludable from work product and discoverable. As to the balance of the documents, we need not address whether the Citizens have met their 1.280(b)(2) FRCP burden of showing need and undue hardship unless Gulf files a properly prepared and successful motion for protective order.

We also find Gulf's policy argument regarding the deterrent effect of the forced disclosure of internal corporate investigations unpersuasive in light of the logical conclusion of that argument; corporations chilled against pursuing, and paralyzed by, allegations of internal wrongdoing.

ORDER NO. 21157
DOCKET NO. 881167-EI
PAGE 6

b) Attorney-Client Privilege

Gulf argues that "many of the documents" identified in its responses to Interrogatory Nos. 99 and 102, relating to improper vendor payments, inventory shortages, asset misappropriation, and employee theft, "pertain to conversations between attorneys representing Gulf in the ongoing Croft litigation and Gulf Power's agents and employees," entitling the responses to protection under the attorney-client privilege. The Citizens counter that Gulf has failed to identify which of the listed documents include attorney-client communications thereby precluding the Commission from finding any privileged communication. We agree. Without an affirmative showing of which of the 228 documents listed in Gulf's responses to Interrogatory Nos. 99 and 102 arguably constitute an attorney-client communication (rather than "pertain to" one), we cannot make a determination as to whether any of them meet the statutory requirements of Section 90.502, Florida Statutes, regarding confidential communications.

Specified Confidential

Gulf alternatively argues that if the documents identified in Interrogatories No. 99 and 102 are not found to be privileged, they are entitled to specified confidential classification pursuant to Section 366.093(3)(b) and (c), exempting internal audits and security measures, respectively, from public disclosure. The Citizens, incorporating by reference their response to Gulf's similar argument in Gulf's concurrent Motion for Protective Order as to Portions of Citizens Fourth Set of Interrogatories, counter that Gulf makes no reference to either internal audits, internal auditing controls or internal auditing reports, or to security measures, systems, or procedures in its responses to Interrogatories No. 99 and 102. Instead, it only seeks to benefit from an overbroad and unintended construction of the narrowly crafted exemptions simply by invoking them. We agree.

One of the 75 documents listed in Gulf's response to Interrogatory No. 99 and one of the 153 listed in its response to Interrogatory No. 102 is "Deposition of Grover A. Mallini 10/29/87" who is identified in Gulf's response to Interrogatory No. 97, regarding persons interviewed about improper vendor payments, as "Manager of Audits, Internal Auditing" under the heading "Present Gulf Power employees." This is insufficient to bring the 75 documents listed in its response to Interrogatory No. 99 regarding documentation of improper payments to vendors within exemption (b). In addition, Gulf's responses to Interrogatory Nos. 99 and 102 list many interviews and memos involving six persons identified in Gulf's response to Interrogatory No. 98, regarding persons participating in investigations of improper vendor payments, as "Security" under "Present Gulf Power employees." These indicia of after-the-fact investigations are insufficient to bring the 153 documents listed in Gulf's response to Interrogatory No. 102 within exemption (c).

Interrogatory No. 106 of the Citizens' Request for Production of Documents identified all documents relating to conversations regarding Gulf's investigations of payments to

ORDER NO. 21157
DOCKET NO. 881167-EI
PAGE 7

Gulf executives which were not in strict accordance with established written company compensation policies. Gulf's response was "none" and we need not, therefore, address objections, motions, or requests for confidentiality in relation to Interrogatory No. 106.

In consideration of the foregoing, it is

ORDERED that Gulf Power Company's responses to Interrogatory Nos. 100 and 102 in Citizens' Fourth Set of Interrogatories are not entitled to a protective order. It is further

ORDERED that such responses are also not entitled to specified confidential classification. It is further

ORDERED that Gulf Power Company's response to Interrogatory No. 103 in Citizens' Fourth Set of Interrogatories is entitled to protective order until such time as the Citizens limit their inquiry to the period relevant to the petition for a rate increase. It is further

ORDERED that the documents identified in Interrogatory Nos. 99 and 102 of the Citizens' Fourth Request for Production of Documents are not entitled to protective order. It is further

ORDERED that such documents are also not entitled to specified confidential classification. It is further

ORDERED that if a protest is filed within 14 days of the date of this order it will be resolved by the appropriate Commission panel pursuant to Rule 25-22.006(3)(d), Florida Administrative Code.

By ORDER of Thomas M. Beard, Commissioner and Prehearing Officer, this 3rd day of MAY, 1989.


THOMAS M. BEARD, Commissioner
and Hearing Officer

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