

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Prudence review to) DOCKET NO. 960409-EI
determine regulatory treatment) ORDER NO. PSC-96-0890-PCO-EI
of Tampa Electric Company's Polk) ISSUED: JULY 9, 1996
Unit)
_____)

ORDER DENYING DISCOVERY

On May 20, 1996, Tampa Electric Company (Tampa Electric) filed an Identification of Documents Withheld Pursuant to the Lawyer/Client Privilege Set Forth in Section 90.502 of the Florida Evidence Code (Identification). Attachment I. On May 24, 1996, staff filed a Request For In Camera Inspection of Documents (Request), to which Tampa Electric responded on May 31, 1996 with a Memorandum In Opposition (Opposition). By Order dated June 14, 1996, staff's Request was granted. The documents listed in Tampa Electric's Identification were thereupon duly tendered for in camera inspection on June 26 and July 2, 1996. Though the Request and Opposition formally addressed whether or not an in camera inspection should be held, the legal analysis within each more specifically concerned whether or not the documents should be shielded from discovery pursuant to the lawyer-client privilege. It is the latter question which is the subject of this Order.

In its Request, staff argued that Tampa Electric's claim of privilege was unsupported because the memoranda at issue were prepared, primarily, for business purposes and because the Company failed to describe reasons why each memorandum is privileged. Staff also noted its need for the documents as relevant to the issue of whether the availability of certain tax credits could reasonably be assumed. Staff further noted its belief that the documents contained no mental impressions, conclusions, litigation strategies, legal theories, or litigation files of Tampa Electric's attorneys.

In its Opposition, Tampa Electric denied the business purpose ascribed to the documents by staff, noting that the Company had relied on the legal advice of experts in the field of taxation and tax legislation to define the best legal course of action for the company to pursue in an effort to avail itself and its customers of certain tax benefits. The Company further noted its confidential treatment of the documents and its reliance on the privileged nature of the communications as the basis for engaging in open and candid dialogue with tax counsel.

In evaluating these conflicting claims and the authorities cited in support, I am guided by the recent pronouncements of the

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

Florida Supreme Court in Southern Bell Telephone and Telegraph Company v. Deason, 632 So. 2d 1377 (1994), on the subject of attorney-client privilege claims in the corporate context:

...we set forth the following criteria to judge whether a corporation's communications are protected by the attorney-client privilege:

- 1) the communication would not have been made but for the contemplation of legal services;
- 2) the employee making the communication did so at the direction of his or her corporate superior;
- 3) the superior made the request of the employee as part of the corporation's effort to secure legal advice or services;
- 4) the content of the communication relates to the legal services being rendered, and the subject matter of the communication is within the scope of the employee's duties;
- 5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents.

Upon inspection of the documents in camera, it is clear that these communications fall within the parameters of the privilege as set out in Deason, supra. First, the documents contain the legal opinions themselves, communicated by the lawyer to the client's attorneys who solicited the advice on behalf of the corporation. Second, the communications containing these legal opinions were created with the expectation of confidential treatment and maintained in confidence. This is in contrast to the tax pool analysis at issue in United States v. El Paso Co., 682 F.2d 530, 540 (1982), where

Confidentiality as to these documents is neither expected nor preserved, for they are created with the knowledge that independent accountants may need access to them to complete the audit. [e.s.]

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Here, Tampa Electric

treated as confidential the information contained in the listed documents. The Company has relied upon the privileged nature of these communications as the basis for engaging in open and candid dialogue with tax counsel.

Having concluded that the communications at issue are privileged pursuant to Section 90.502, Florida Statutes, I further note that the significant need for the documents articulated by staff would only be relevant to a claim of work-product immunity, not, as here, attorney-client privilege. See, Florida Rule of Civil Procedure 1.280(b) and (d).

Finally, in contrast to Southern Bell, where the use of allegedly privileged documents for such business purposes as disciplining employees led the Court to find that, in that case

the line between law-related communications and business communications is especially blurry[,]

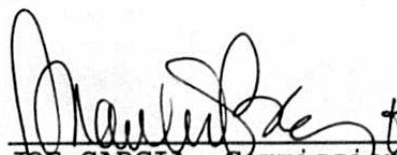
632 So. 2d at 1385, there is no such multiple use of, or purpose to, the communications at issue here.

In view of the above, it is

ORDERED by Joe Garcia, as Prehearing Officer, that discovery of the documents listed in Attachment I is denied. It is further

ORDERED that this docket remain open.

BY ORDER of Commissioner Joe Garcia this 9th day of July, 1996.


JOE GARCIA, Commissioner
and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

From Mr. Woodroffe's Files

1. May 10, 1995 Fax Memo from Hooper, Hooper, Owen & Gould (HHO&G) to D. A. Mulligan.
2. June 17, 1994 Memorandum from J. H. Woodroffe to Mr. Mulligan and attached Memorandum (and two page attachment thereto) from Mr. James Gould of HHO&G (hereinafter, "Mr. Gould") to Mr. Mulligan.
3. June 28, 1995 Memorandum from Mr. Gould to Mr. Mulligan and Mr. Woodroffe.
4. June 15, 1995 Memorandum from Mr. Gould to Mr. Mulligan (with one page attachment).
5. June 29, 1995 Memorandum from Mr. Gould to Mr. Mulligan and Mr. Woodroffe.
6. June 29, 1995 Memorandum from Mr. Gould to Mr. Mulligan and Mr. Woodroffe (with four page attachment).

From Ms. McDevitt's Files

1. December 28, 1995 Fax Cover Sheet from Mr. Gould to Sheila McDevitt.
2. May 8, 1995 Memorandum from Mr. Gould to Mr. Mulligan.
3. May 26, 1995 Memorandum from Mr. Gould to Mr. Mulligan.
4. June 15, 1995 Memorandum from Mr. Gould to Mr. Mulligan (with one page attachment).
5. June 23, 1995 Memorandum from Mr. Gould to Mr. Mulligan.
6. June 28, 1995 Memorandum from Mr. Gould to Mr. Mulligan.
7. June 29, 1995 Memorandum from Mr. Gould to Mr. Mulligan.
8. October 20, 1995 Memorandum from Mr. Gould to Mr. Mulligan and Mr. Woodroffe.
9. April 11, 1996 Memorandum from Mr. Gould to Mr. Mulligan.

From Mr. Mulligan's Files

1. May 13, 1996 Memorandum from Mr. Gould to Mr. Mulligan.

2. February 17, 1993 Memorandum from Mr. Gould to Mr. Mulligan, et al.
3. April 23, 1993 two page Fax from Mr. Gould to Mr. Mulligan, et al.
4. April 23, 1993 two page Fax from Mr. Gould to Mr. Woodroffe.
5. June 22, 1993 Memorandum from Mr. Gould to Mr. Mulligan, et al.
6. June 25, 1993 one page Fax from Mr. Gould to Mr. Mulligan.
7. October 21, 1993 Memorandum (with attachment) from Mr. Gould to Mr. Mulligan.
8. November 11, 1993 Memorandum from Mr. Gould to Mr. Mulligan.
9. October 18, 1993 Fax from Mr. Gould to Mr. Mulligan.
10. November 8, 1993 Fax from Mr. Gould to Mr. Mulligan.
11. June 10, 1994 Memorandum plus two one-page attachments from Mr. Gould to Mr. Mulligan.
12. July 22, 1994 one page Fax from Mr. Gould to Mr. Mulligan.
13. August 5, 1994 five page Fax from Mr. Gould to Mr. Mulligan.
14. August 8, 1994 six page Fax from Mr. Gould to Mr. Mulligan, et al.
15. September 6, 1994 four page Fax from Mr. Gould to Mr. Mulligan, et al.
16. August 9, 1994 six page memorandum from Reid & Priest to Don Mulligan.
17. September 22, 1994 Memorandum plus one page Attachment from Mr. Gould to Mr. Mulligan, et al.
18. October 27, 1994 Memorandum from Mr. Gould to Section 29 Clients.
19. December 19, 1994 one page Fax from Mr. Gould to Mr. Mulligan.
20. January 4, 1996 three page Fax from Mr. Gould to Mr. Mulligan.
21. January 25, 1996 one page Fax from Mr. Gould to Mr. Mulligan.
22. March 4, 1996 two page Fax from Mr. Gould to Mr. Mulligan.

43. October 13, 1993 one page Memorandum from Mr. Gould to Mr. Mulligan.
44. November 11, 1993 two page Memorandum from Mr. Gould to Mr. Mulligan.
45. September 8, 1992 five page Fax from Mr. Gould to Roy Eustace.
46. August 6, 1992 four page Fax from Mr. Gould to Mr. Mulligan.
47. June 25, 1992 three page Fax from Mr. Gould to Roy Eustace.
48. June 19, 1992 two page Fax from Mr. Gould to Mr. Mulligan.
49. May 19, 1992 Fax from Mr. Gould to Roy Eustace, Mr. Mulligan and other clients.
50. March 4, 1992 three page Fax Memorandum from Mr. Gould to Roy Eustace.
51. February 27, 1992 two page Fax from Mr. Gould to Roy Eustace.
52. October 28, 1991 three page Fax Memorandum from Thomas Crichton to TECO File.
53. October 27, 1994 three page Memorandum from Mr. Gould to Section 29 Clients.
54. September 23, 1994 two page Fax from Mr. Gould to Mr. Mulligan.
55. September 22, 1994 two page Memorandum plus one page Attachment from Mr. Gould to Mr. Mulligan, et al.
56. September 14, 1994 one page Memorandum from Mr. Gould to Mr. Mulligan, et al.
57. September 6, 1994 one page Fax with three pages of Attachments from Mr. Gould to Mr. Mulligan, Mr. Woodroffe, et al.
58. August 9, 1994 Memorandum from Reid & Priest to Mr. Mulligan, et al.
59. July 21, 1994 two page Letter from Reid & Priest to Mr. Mulligan.
60. June 10, 1994 one page Memorandum with two pages of Attachments from Mr. Gould to Mr. Mulligan.
61. May 9, 1996 one page Fax Memorandum from Mr. Gould to Mr. Mulligan.

62. April 11, 1996 two page Memorandum from Mr. Gould to Mr. Mulligan.
63. April 26, 1996 three page Fax from Mr. Gould to Mr. Mulligan.
64. March 28, 1996 one page Fax from HHO&G to Mr. Mulligan.
65. March 5, 1996 one page Letter from Sheila McDevitt to Paul Delaney, Esq.
66. March 14, 1996 one page Fax from HHO&G to Mr. Mulligan.
67. March 4, 1996 two page Fax from HHO&G to Mr. Mulligan.
68. February 18, 1996 two page Memorandum from Mr. Gould to Mr. Mulligan.
69. January 25, 1996 one page Fax Memorandum from Mr. Gould to Mr. Mulligan.

From Mr. T. L. Guzzle's Files

The only privileged documents in Mr. Guzzle's file are duplicate copies of memoranda previously listed from Mr. Gould to Mr. Mulligan and/or Mr. Woodroffe dated June 15, June 28 and June 29, 1995.