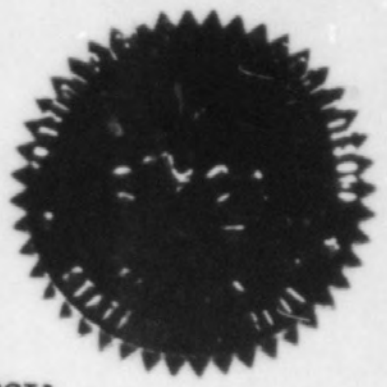


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

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In the Matter of : DOCKET NO. 960502-GU
 :
 Application for :
 Rate Increase by City :
 Gas Company of Florida :



PROCEEDINGS: MOTION HEARING

BEFORE: COMMISSIONER JOE GARCIA
 PREHEARING OFFICER

DATE: Thursday, October 24, 1996

TIME: Commenced at 3:00 p.m.
 Concluded at 3:45 p.m.

PLACE: Room 152
 Betty Easley Conference Center
 4075 Esplanade Way
 Tallahassee, Florida

REPORTED BY: H. RUTHE POTAMI, CSR, RPR
 Official Commission Reporter

DOCUMENT NUMBER - DATE
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 FPSC-RECORDS/REPORTING

1 **APPEARANCES:**

2 **JOSEPH A. MCGLOTHLIN, McWhirter, Reeves,**
3 **McGlothlin, Davidson, Rief and Bakas, 117 South**
4 **Gadsden Street, Tallahassee, Florida 32301, Telephone**
5 **No. (904) 222-2525, appearing on behalf of City Gas**
6 **Company of Florida.**

7 **VICKI JOHNSON, Florida Public Service**
8 **Commission, Division of Legal Services, 2540 Shumard**
9 **Oak Boulevard, Tallahassee, Florida 32399-0850,**
10 **appearing on behalf of the Commission Staff.**

11

12 **ALSO PRESENT:**

13 **MIKE PALECKI**

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I N D E X

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PROCEEDINGS

(Hearing convened at 3:00 p.m.)

1
2
3 COMMISSIONER GARCIA: Good afternoon. Do we
4 have to read anything, or do you want to just --

5 MS. JOHNSON: First, just for the record,
6 this is Docket 960502-GU, in re petition of City Gas
7 Company of Florida for an increase in its rates and
8 charges.

9 Today we're here for oral argument on the
10 Commission Staffs' Motion to Compel and Motion for In
11 Camera Inspection and the Company's request for
12 protective order. Oral argument was requested by the
13 party, that is City Gas Company. City Gas Company is
14 the only party to this docket.

15 This oral argument was not noticed, and it's
16 my understanding that the Company would waive any
17 rights that it might have pursuant to notice
18 requirements.

19 MR. MCGLOTHLIN: That's correct.

20 COMMISSIONER GARCIA: All right. We're
21 going to give each side 15 minutes to argue this, if
22 that's all right, unless we'd like to go shorter; or
23 is 15 minutes about where you're at?

24 MR. MCGLOTHLIN: If I could have the 15
25 minutes to work with, I'll try to take less than that,

1 but I'd like to have that available.

2 MS. JOHNSON: This is an unusual situation
3 in that Staff filed the motions; however, the Company
4 requested oral argument. Fifteen minutes is
5 sufficient. I would just like to reserve three
6 minutes for rebuttal if necessary.

7 COMMISSIONER GARCIA: Very good. Okay.

8 MS. JOHNSON: I would also like to add
9 before I begin, Commissioner Garcia, that the document
10 at issue with respect to these motions has been
11 requested -- the Company has requested that it be
12 treated as privileged. However, there are some
13 related documents that the Company has requested
14 confidentiality. It's not my intent to refer to any
15 of those, but I just wanted to state that on the
16 record.

17 COMMISSIONER GARCIA: Okay.

18 MS. JOHNSON: I'll begin. The subject of
19 the motions filed by Staff is the report of an
20 investigation conducted by a law firm concerning the
21 personal business relationship of Jack Langer, who is
22 the former president of the City Gas Company, and Ed
23 Ball, who is the owner of Medley Construction Company.

24 Medley Construction Company performed
25 construction services for City Gas Company, and up

1 until 1994 Medley was the exclusive provider of
2 construction services in City Gas Company's Brevard
3 division.

4 The audit committee of the NUI board of
5 directors directed that the investigation be
6 performed. During the committee Staff's audit and
7 again during formal discovery, the Company has
8 asserted that the report is protected from discovery
9 by the attorney/client and work product privilege.

10 Staff views today's hearing as a need for
11 the prehearing officer to answer two questions.
12 Number one is whether Staff's request for in camera
13 inspection should be granted; and the second question
14 is whether City Gas has met its burden of proof that
15 the document prepared was prepared solely for the
16 purpose of obtaining legal advice and/or in
17 preparation of litigation.

18 With respect to the in camera inspection,
19 Staff submits that it's clear when a party claims a
20 privilege it is routinely found that an in camera
21 inspection should be performed. Staff has cited two
22 cases which support this proposition. The Company has
23 not cited any authority to the contrary.

24 The Company has said that an affidavit that
25 was filed in its response to the Motion to Compel by

1 an assistant general counsel with NUI obviates the
2 need for an in camera inspection. Staff disagrees.

3 Just recently in a docket involving TECO's
4 Polk power plant, the prehearing officer granted a
5 similar request for an in camera inspection. Staff
6 believes that such an inspection would, likewise, be
7 appropriate here, and notes that City Gas would not be
8 prejudiced or harmed by allowing inspection of the
9 document.

10 With respect to any privilege, the party
11 that resists discovery has the burden of proof.
12 That's consistent with the Deason decision which we've
13 cited in our papers, which is a recent opinion by the
14 Supreme Court of Florida.

15 City Gas Company has continued to assert
16 that the affidavit of Ms. Keefe, that's K-E-E-F-E,
17 demonstrates that there was a factual basis for
18 application of the privileges. Staff disagrees.
19 Staff views Ms. Keefe's affidavit as being short on
20 facts and long on conclusions.

21 With respect to the attorney/client
22 privilege, the criteria for such privilege are set
23 forth in the Supreme Court's decision in Deason.
24 Probably the first requirement, the first criteria set
25 forth in that decision is the one at issue, and that's

1 concerning whether or not the investigation was
2 initiated by City Gas for the sole purpose of
3 obtaining legal advice.

4 I'll quote the Court's decision for the
5 record. It states that: We set forth the following
6 criteria to judge whether a corporation's
7 communications are protected by the attorney/client
8 privilege. Number one -- which is the one at issue --
9 is that the communication would not have been made but
10 for the contemplation of legal services.

11 Because Ms. Keefe's affidavit is so short on
12 facts, Staff has had to consider what would be
13 reasonable under the circumstances. Staff submits
14 that it is reasonable to expect that City Gas Company
15 had other motives with such an investigation other
16 than solely legal advice.

17 As a regulated utility, City Gas Company has
18 an obligation to ensure that the cost of its
19 facilities, including those constructed by Medley,
20 were honestly and prudently incurred. In a
21 circumstance where a contract has not been
22 competitively bid and the president of that Company
23 has a personal relationship with the president of the
24 utility Company, Staff believes that it is reasonable
25 for such a utility to investigate.

1 COMMISSIONER GARCIA: Let me ask you,
2 Ms. Johnson, though, the investigation here that the
3 Company performed, they could have done it with
4 someone else, yet they chose a law firm to do this.
5 Don't you think that the Company contemplated
6 litigation and that's why they moved in that
7 direction?

8 MS. JOHNSON: It is true that they did
9 contact the law firm to perform these services.

10 COMMISSIONER GARCIA: Which could have
11 probably been performed using standard PSC operation.
12 This company could have probably hired an accounting
13 firm to do the very same thing.

14 MS. JOHNSON: That's correct. And the cases
15 are consistent, including the Deason decision, that
16 every time a lawyer provides a service, it is not
17 necessarily protected by the attorney/client
18 privilege. It has to be solely for legal advice.

19 In that case the Court pointed out that if
20 the attorney's investigation -- one of the reasons for
21 requesting such an investigation was to determine
22 whether or not to discipline an employee, which is a
23 business function that is not protected by
24 attorney/client privilege. Staff would submit that
25 that is also a reasonable motivation for City Gas to

1 request such an investigation.
2

3 In its response the Company has said that
4 they were concerned that Mr. Langer's action --
5 Mr. Langer might possibly file some type of legal
6 action. However, they stated that prior to his
7 departure from the Company, the relationships between
8 him and NUI senior management were strained. So it is
9 quite reasonable to expect the investigation -- one of
10 the reasons for the investigation may have been to
11 determine whether or not disciplinary actions were
12 appropriate. We all know that subsequently Mr. Langer
13 was terminated or resigned.

14 But I mentioned that Ms. Keefe's affidavit
15 was short on facts. I'll read some of the portions of
16 her affidavit. And one of the things I wanted to
17 point out in particular, that nowhere in the Company's
18 response in the affidavit have they ever made mention
19 of any dates. We have no idea when the investigation
20 was performed, when it was requested, and when the
21 report was made to the audit committee.

22 Ms. Keefe states that "I have personal
23 knowledge of the facts surrounding the decision of the
24 audit committee to engage the law firm of Pitney,
25 Harten to render advice to NUI concerning potential
bases for legal actions and/or defenses against Jack

1 Langer, former president of City Gas, in the event of
2 litigation between Mr. Langer and NUI."

3 She goes on to state that the Pitney, Harten
4 law firm was engaged by the audit committee to conduct
5 an investigation of legal matters involving Mr. Langer
6 and to communicate its assessment to senior NUI
7 management and the audit committee. She goes on to
8 state that "The report would not have been prepared
9 but for the decision of the audit committee to conduct
10 an investigation.

11 From this affidavit, I don't think that the
12 prehearing officer can make a determination that this
13 report was, in fact, prepared solely for legal advice.
14 It is somewhat conclusory. As I stated earlier, it
15 doesn't provide any specific information. I know that
16 the Company's position is that to provide any specific
17 information concerning the report would be to disclose
18 what they feel is a privileged document; but, however,
19 that I think some information, such as the dates,
20 would be informative and would have a bearing on
21 whether or not the document was prepared for any other
22 reasons.

23 With respect to work product -- and it is
24 important to remember that a document is not subject
25 to work product privilege, as well, if it was prepared

1 for any other purpose than solely in anticipation of
2 litigation.

3 COMMISSIONER GARCIA: Continue.

4 MS. JOHNSON: City Gas states that the cases
5 cited by Staff are inapplicable or supports the
6 Company's claim of privilege. That may be true in
7 that it supports the Company's claim for privilege.
8 The cases were cited for the principle, that is that
9 if the investigative report was prepared for a
10 business purpose, it is not work product.

11 COMMISSIONER GARCIA: Ms. Johnson, wouldn't
12 we have, through this Commission's oversight, the
13 ability to find out this information in another manner
14 than through these documents?

15 MS. JOHNSON: Well, part of the problem
16 Commissioner Garcia, is I'm not certain what's in the
17 documents. Unfortunately, you know, the documents
18 have not been disclosed, so that's precisely the
19 reason for requesting the in camera inspection.

20 The determination of whether a privilege is
21 appropriate is highly factual. It is not surprising
22 that many of the cases that were cited, the Courts
23 there found that the privilege was in fact -- the
24 claim was valid. And Staff at no time has requested
25 or intends to view documents that we would otherwise

1 not be able to view.

2 However, the Company has made blanket
3 assertions, conclusory assertions that a document is
4 privileged. And as I stated with respect to the
5 affidavit, have not provided specific details that we
6 think would obviate the need for an in camera
7 inspection.

8 With respect to work product privilege, if a
9 document is privileged, it is not absolutely protected
10 from discovery. There are instances when a party can
11 obtain those documents. The requirements are one of
12 need. A party must show need and must show undue
13 hardship. Staff has shown need, and the Company
14 concedes that in its response to our Motion to Compel.

15 There they state that they agree that
16 Staff's inquiry into the reasonableness and legitimacy
17 of payments made to Medley is appropriate. Staff has
18 also shown undue hardship with respect to what we
19 believe the report contains as it relates to City Gas'
20 audits of its vendors.

21 Staff does not have the ability or the
22 authority to audit the records of City Gas's vendors;
23 thus, Staff could not obtain the substantial
24 equivalent of this document as it pertains to that
25 type of information.

1 City Gas has now stated that Staff's attempt
 2 to invoke the hardship/substantial equivalent
 3 exception fails because Staff is not a party to the
 4 case for which the documents were prepared. That is
 5 wrong. Pursuant to Alachua General Hospital v.
 6 Zimmer, which is at 403 So.2d 1087, and it is a
 7 1st DCA 1991 case, it's clear that information that is
 8 obtained in anticipation of an action or litigation
 9 retains its immunity in later litigation. In later
 10 litigation a party can again attempt to overcome the
 11 privilege by showing that the party has a need and
 12 there is undue hardship. So that argument that was
 13 made by City Gas Company is incorrect in Staff's view.

14 Again, I think that our motions speak for
 15 themselves. Staff at no time has intended to review
 16 the attorneys' opinions, trial strategies. We're
 17 simply seeking information that was prepared for other
 18 than legal purposes, and we think that an in camera
 19 inspection is required, or certainly the cases suggest
 20 that it would be appropriate. And I'll reserve any
 21 balance of time that I have for rebuttal.

22 COMMISSIONER GARCIA: Thank you,
 23 Ms. Johnson. Mr. McGlothlin.

24 MR. MCGLOTHLIN: I'm Joe McGlothlin. I'm
 25 from McWhirter, Reeves, McGlothlin, Davidson, Rief and

1 Bakas appearing for City Gas of Florida.

2 Commissioner, I would like to begin by
3 giving you a bit of background, because I want you to
4 understand and consider this request in context.
5 Staff counsel has alluded to the relationship between
6 a former president of City Gas Company and certain
7 vendors that are the subject of the investigatory
8 report. That relationship has been known to the
9 Commission and to the Staff since at least the time of
10 the City Gas 1989, 1990 rate case.

11 The concern with respect to the relationship
12 between the former president and the head of a vendor
13 with which the Company did business was at issue in
14 that case. It did not result in any type of
15 ratemaking adjustment in the rate case orders. It was
16 an issue again in the 1994 rate case, and the final
17 order in that case -- which was a settled case, by the
18 way -- as a result of the concerns expressed, City Gas
19 agreed to take certain actions and agreed to submit a
20 plan to put out all of its work for bidding.

21 It submitted a strengthened conflict of
22 interest policy, and the Company made good on those
23 commitments that appear in the filing in the case. In
24 addition to that, shortly after the 1994 rate case,
25 while I've been speaking of a former president, the

1 individual was relieved of his duties as president, is
2 no longer with the Company in any capacity.

3 So that is the history of the relationship,
4 and it was in that time frame when the former
5 president and senior management of NUI found
6 themselves in an increasingly strained relationship,
7 that the Company felt it would be well advised to
8 engage a law firm to investigate and assess some of
9 the relationships and some of the allegations that had
10 grown up over time, and it is for that reason that the
11 investigation was conducted and that the report that's
12 now the subject of the second request to produce was
13 prepared.

14 I'd like to point out that our rate case
15 petition was filed in this case in June of 1996. The
16 Commission is scheduled to consider the recommendation
17 or disposition of this rate case petition on October
18 29th. Staff's motion to compel the production of this
19 particular document was filed on October 3rd. So that
20 is the timing and the history of how we came to appear
21 before you today.

22 I'd like to point out, also, that as far as
23 I know, the efforts of Staff to inquire into these
24 relationships and to consider the impact of the
25 relationships on its recommendation for ratemaking

1 treatment doesn't go beyond a request to see this
2 particular document. There have been no
3 interrogatories relating to the relationship. There
4 have been no notices of the deposition of witnesses
5 relating to this issue. Everything that's happened so
6 far is that Staff has requested to see the
7 investigatory report prepared by counsel at the
8 direction of NUI senior management.

9 Now, Staff counsel is correct in that we
10 have refused to provide that particular document, and
11 we've asserted two grounds; the attorney/client
12 privilege and the attorney work product privilege.
13 And it was in support of that assertion of privilege
14 that we asked the senior vice-president and general
15 counsel to prepare the affidavit, because the criteria
16 governing the availability of the privilege has been
17 set out in the Deason case to which Staff counsel
18 alluded, and we believe that the sworn affidavit of an
19 individual who has personal knowledge of the decision
20 of senior management to engage a law firm and can
21 state of her own knowledge and under oath the intent
22 and the purpose of senior management in hiring that
23 law firm to conduct the investigation is pertinent to
24 your consideration of whether it is privileged or not.

25 And she says under oath that there was only

1 one reason for the investigation, and that was for the
2 rendition of legal services. That satisfies one of
3 the criteria of the Deason decision.

4 She also says that since the investigation
5 was performed and the report submitted, senior
6 management has closely guarded and kept confidential
7 the report. That satisfies another criteria. These
8 are matters that may or may not appear on the face of
9 the document itself, so we think it is very germane to
10 have an affidavit of someone verifying based upon
11 personal knowledge that the criteria are met; and we
12 believe that the affidavit does suffice to demonstrate
13 that the privilege is available to the Company, and
14 that no in camera inspection is necessary.

15 Staff counsel says "But there are no dates;
16 if we had dates we would know whether there's dual
17 purpose." I think the logical question is, how would
18 a date indicate a purpose other than that identified
19 by the affiant to the affidavit.

20 However, if in your judgment, an in camera
21 inspection is needed to confirm that the privilege is
22 available, we will abide by that decision with the
23 understanding that we're not waiving either privilege
24 by agreeing to that, and with the request that that
25 inspection be conducted prior to the agenda item

1 that's scheduled for October 29th.

2 Now, Staff counsel cited some case law. I'd
3 like to cite about three cases that I think bear on
4 this particular issue. In addition to the Deason
5 case, involving the Southern Bell situation, I'd like
6 to cite the United States Supreme Court case of Upjohn
7 that's treated in our pleadings.

8 The Upjohn case has some parallels to this
9 situation. It involved an instance in which a
10 corporation learned of allegations that certain of its
11 officers or employees were making questionable
12 payments to overseas governments, and the corporation
13 hired an attorney to conduct an investigation.

14 The attorney conducted interviews under the
15 direction of senior management. Those interviews were
16 conducted pursuant to the attorney/client privilege
17 and were treated by upper management as highly
18 confidential. In that situation the corporation
19 provided to regulators certain information that was
20 pertinent to the inquiries, but shielded the report
21 itself, and the Court held that the report was subject
22 to the attorney/client privilege.

23 That is a parallel to this situation,
24 because among the activities of the law firm that was
25 engaged by NUI, the law firm conducted some interviews

1 with the expectation that they would be confidential,
2 with the knowledge of the client, of the employees,
3 that the corporate client requested their assistance
4 in conducting the information. And for that reason we
5 think that the report itself is subject to the
6 privilege.

7 In the Upjohn case the United States Supreme
8 Court articulated the reason for the privilege, stated
9 that the attorney/client privilege is the oldest of
10 the privileges for confidential communications known
11 to the common law. Its purpose is to encourage full
12 and frank communication between attorneys and their
13 clients, and thereby promote broader public interest
14 in the observance and administration of justice.

15 The principle rests on the need for the
16 advocate and counselor to know all that relates to the
17 client's reason for seeking representation if the
18 professional mission is to be carried out, and so
19 legal authorities at the very highest level have
20 guarded the attorney/client privilege because of the
21 very important public policies that it embodies.

22 Staff suggested that the privilege is not
23 applicable to this situation because of the
24 possibility of an individual business purpose. First
25 of all, we've refuted that by the affidavit.

1 Secondly, consider the second purpose that
2 they think may be involved here. They allude to the
3 obligation of City Gas to ensure that amounts paid to
4 vendors are fair and reasonable. That's no different
5 than saying that we're a regulated company and we have
6 to abide by Chapter 366.

7 And in my estimation, if NUI Corporation
8 engaged a law firm to check that out, then that is as
9 legal a consideration as anything that you can
10 imagine. Anything dealing with the obligation of a
11 public utility or its relationship with a regulator,
12 the Public Service Commission, surely falls within the
13 charge of an attorney to provide legal services. So
14 they have failed to show a separate business purpose
15 by that reference.

16 They also refer to the possibility that
17 documents could be used to evaluate disciplinary
18 action. That's a direct reference to the Deason case.
19 While the Deason case involved numerous types of
20 documents in addition to anything prepared by the
21 attorney, the Deason case involved the preparation of
22 analyses of massive amounts of data by accountants.
23 It involved interviews conducted not by the attorney,
24 but by security personnel, and then reviewed not by
25 the attorney, but by personal managers for the purpose

1 of considering possible disciplinary action.

2 And there's no suggestion that anything like
3 that is true of our case. In fact, we've represented
4 that this document was prepared solely by counsel and
5 solely for the purpose of providing legal advice.

6 With respect to the claim that we're not
7 entitled to the work product privilege, the work
8 product privilege flows from one of the Rules of Civil
9 Procedure, 1.280, which contemplates that parties'
10 representatives, including the lawyer that prepares
11 information in anticipation of litigation or in
12 preparation for trial, is entitled to have that
13 treated as confidential.

14 COMMISSIONER GARCIA: But doesn't that have
15 an exception in terms of if the party cannot obtain
16 the substantial evidence without due hardship?

17 MR. MCGLOTHLIN: There is the exception, but
18 it relates -- first of all, it doesn't relate to
19 anything in the way of mental impressions or theories
20 of the case or that type of product. It relates only
21 to the availability of facts.

22 COMMISSIONER GARCIA: Aren't we here under a
23 certain amount of time crunch for the Commission in
24 doing its labors, and isn't it this the most efficient
25 way for Staff to get this information?

1 MR. MCGLOTHLIN: Well, there's been no time
2 crunch, because the petition was filed in June, so any
3 desire by the Staff to investigate the reasonableness
4 of costs incurred by the utility, they've had ample
5 time to do that.

6 But beyond that, the rule speaks in terms of
7 the showing of need and the burden to show that
8 there's hardship. Consider this: Staff counsel said
9 in her statement that City Gas conceded that there was
10 a need. We didn't concede that there was a need to
11 the document. All we agreed to was that the Staff and
12 the Commission in the carrying out of the regulatory
13 responsibilities review the reasonableness of costs
14 incurred by City Gas.

15 We've never agreed that they need to see
16 this particular document to do that. They say, well,
17 we have a need because we can't audit the records of
18 vendors. Consider the implications of that. Given
19 that they had a burden to demonstrate why they should
20 have access to the report, the only thing that they've
21 indicated they have a need for relates to information
22 received from vendors.

23 The immediate impact of that is to take
24 anything else that's included in the investigation or
25 in the report investigation off the table, because

1 they've made no effort to show a need for it.

2 Now, the remaining question is, have they
3 satisfied their burden to obtain information received
4 from vendors. Well, if the proposition is that they
5 need that before they can assess whether the cost
6 incurred by City Gas was prudent and reasonable, then
7 how in the world has the Commission survived in its
8 regulation of numerous utilities who deal with
9 probably hundreds of vendors over dozens of years?

10 The Commission has no statutory authority
11 to -- except where there's affiliated arrangements,
12 has no statutory authority to regulate or to audit
13 unaffiliated vendors of utilities, and yet in rate
14 case after rate case, somehow does its job. So why in
15 this instance is it essential for the Staff to seek
16 information received by City Gas from vendors?

17 We submit that the Staff, first of all, is
18 perfectly capable of assessing the reasonableness of
19 costs incurred by City Gas without the document and
20 without information from vendors, but even if it had a
21 need to do that, there's been no attempt by way of
22 deposition, by way of subpoena, to receive any of the
23 information that it says it wants to carry out that
24 function.

25 And, finally, I continue to assert that

1 Staff really has no standing to assert the
2 hardship/substantial equivalent exception of the Rule
3 of Civil Procedure, because that situation -- that
4 rule contemplates a situation in which party A either
5 anticipates litigation with or is in a lawsuit with
6 party B, and in preparation for litigation or
7 preparation for trial, the representative for A
8 prepares some information.

9 The rule -- and this is a discovery rule, by
10 the way -- and the rule has as its purpose the
11 opportunity for B to get access to certain factual
12 information from A upon a showing. It makes no sense
13 to suggest that someone who is a bystander to this
14 litigation can say, well, that looks interesting to
15 me, I need that, and somehow have access to
16 information that was prepared not for any
17 confrontation or litigation with that individual or
18 that entity, but for the other party.

19 It suggests that you could have a situation
20 in which B, who is a party to a litigation, can't get
21 the work product, but somebody on the outside looking
22 in can. And I'd like to point out that in the process
23 of doing that, what the Commission would be doing
24 would be jeopardizing City Gas's ability to keep it
25 confidential from the entities and the parties and the

1 past employees with whom anticipation was contemplated
2 in the first place; because if it's discoverable by
3 Staff, that's going to field the argument that it's
4 discoverable by others as well. And that puts us in a
5 severely precarious position, and for that reason, and
6 this is not a time --

7 COMMISSIONER GARCIA: Mr. McGlothlin, that
8 isn't true, though, if it is an in camera inspection.

9 MR. MCGLOTHLIN: It doesn't go to the in
10 camera inspection. It goes to the impact if a
11 decision were made that Staff is entitled to have the
12 document. But it is for that reason, and with all
13 respect, we suggest that this particular attempt by
14 Staff to gain access to confidential data is reckless
15 in its impact.

16 COMMISSIONER GARCIA: Thank you.
17 Ms. Johnson.

18 MS. JOHNSON: I'll address Mr. McGlothlin's
19 comments with respect to Staff's standing to show need
20 and undue hardship. First, I'd like to point out that
21 that argument was made by City Gas Company for the
22 first time in its response to the motion for in camera
23 inspection that was filed yesterday.

24 Since that time, I have done some research,
25 and the case that I cited earlier, Alachua General

1 Hospital refutes that proposition. In this case it
2 involved a second litigation that was filed against
3 Zimmer USA by a hospital that in prior litigation had
4 an investigation done by its investigator of a fire
5 that resulted in a wrongful death action.

6 The Court found that in the first
7 litigation, the wrongful death action, the document,
8 the investigation, was work product. And it also
9 stated, and I quote, on page -- this is the third page
10 of the case: "It is clear that the information
11 obtained by Mr. Smith in his investigation of the
12 hospital fire was work product as to the initial
13 wrongful death litigation, and retains its qualified
14 immunity as to the present litigation. This
15 privilege, of course, would be subject to a showing by
16 Zimmer that the materials in question are needed in
17 preparation of its case, and that it is unable,
18 without undue hardship, to obtain the substantial
19 equivalent of the materials by other means."

20 Mr. McGlothlin made repeated reference to
21 the fact that Staff has not met its burden of showing
22 that it should have access to the report. With
23 respect to the work product privilege, which I
24 indicated earlier could be overcome by a showing of
25 need and undue hardship, the threshold question has to

1 be answered --

2
3 COMMISSIONER GARCIA: What about
4 Mr. McGlothlin's distinction that this has to do
5 between two parties that are involved in litigation
6 directly against each other?

7 MS. JOHNSON: And I would submit that this
8 is also litigation involving City Gas Company. In
9 this instance, Staff can be viewed as an adversarial
10 with respect to the discovery dispute. So this is
11 very consist with the Alachua case that I cited to
12 you, and I'll provide a copy for you.

13 COMMISSIONER GARCIA: Thank you.

14 MS. JOHNSON: Staff does not have the burden
15 of proving that privilege should attach to this
16 document. It is a burden that is City Gas Company's.
17 Before we get to the question of whether
18 Staff has shown need and undue hardship, we have to
19 address the initial question of whether or not City
20 Gas Company has satisfied the burden that the document
21 is work product or attorney/client privilege. Staff
22 would submit that it has not.

23 Mr. McGlothlin early in his argument gave a
24 history of this, the transactions that are at issue
25 here. He made reference to the fact that there was a
1989 rate case and a 1994 rate case. Staff views that

1 as beyond the scope of this motion. Mr. McGlothlin is
2 attempting to argue that the issue is not appropriate,
3 and we feel that the issue is appropriate. We're
4 solely here to determine whether the documents should
5 be protected.

6 Again, before I close I just want to point
7 out that when privilege is claimed it's routinely
8 granted, in camera inspections are routinely granted;
9 and we simply wanted to bring this to the prehearing
10 officer's attention and the Commission's attention;
11 and if something is entitled to be protected, Staff
12 certainly understands that and has no intent to have
13 access to documents that would prejudice City Gas
14 Company in subsequent litigation.

15 COMMISSIONER GARCIA: Very well. I'm going
16 to rule that we're going to take an in camera
17 inspection look at this. So I would imagine you've
18 got to draft an order of that and direct it to the
19 Company, and let's do that as quickly as possible, if
20 it is all right with the Company, because I know that
21 we've got this pending already.

22 So you will get together with my Staff for
23 the date certain on which we'll do that, and if that's
24 it, Mr. McGlothlin --

25 MR. PALECKI: Commissioner Garcia --

1
2 COMMISSIONER GARCIA: Why don't you identify
3 yourself for the record real quick.

4 MR. PALECKI: Mike Palecki with City Gas
5 Company of Florida. Commissioner, we understand your
6 ruling. We also understand your need to have it
7 memorialized by Staff, but because of the tight time
8 frame here, we would be perfectly willing to go ahead
9 and proceed to turn over the document for in camera
10 inspection at this time so we don't have to wait on
11 the ministerial task of memorializing your order.

12 COMMISSIONER GARCIA: Is that all right with
13 you, Ms. Johnson?

14 MS. JOHNSON: That's fine.

15 COMMISSIONER GARCIA: Okay. Then we'll do
16 that. Do we need to pick a date today. because I
17 don't have my calendar in front of me, but let's go
18 ahead and do it as soon as possible. Do you have the
19 documents with you, by any chance?

20 MR. MCGLOTHLIN: I have it in my car.

21 COMMISSIONER GARCIA: Well, you know what;
22 maybe we can -- let me take a moment and look at my
23 calendar. Maybe we can find some quick time right
24 now, and that way we're set.

25 (Brief pause.)

COMMISSIONER GARCIA: All right. Let's go

1 back on. In an effort to save some money and time, we
2 have everyone we need here, so why don't we do this
3 first thing tomorrow morning, if it is all right with
4 the parties. Obviously, that will be done with my
5 office and the Company to go through the documents.
6 And do we have to get a different member of Staff if
7 we want counsel on this? I believe we do.

8 MS. JOHNSON: That's correct.

9 COMMISSIONER GARCIA: So I'll contact the
10 General Counsel's Office of the Commission and we'll
11 see if we can set something up for early tomorrow
12 morning, if that's all right with the Company; and
13 maybe, let's say, 8:00 tomorrow morning at my office.
14 And that way Mike gets to spend another day in
15 Tallahassee, and we'll take care of that first thing,
16 and I'll ask my Staff to set up one of the attorneys
17 from appeals to be there.

18 COMMISSIONER GARCIA: Thank you very much.

19 (Thereupon, the hearing concluded at 3:45
20 p.m.)

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1 STATE OF FLORIDA)
2 COUNTY OF LEON)

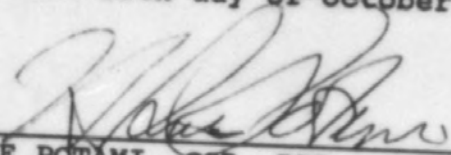
CERTIFICATE OF REPORTER

3 I, RUTHE POTAMI, CSR, RPR, Official
4 Commission Reporter,

5 DO HEREBY CERTIFY that the Motion Hearing in
6 Docket No. 960502 was heard by Commissioner Garcia at
7 the time and place herein stated; it is further

8 CERTIFIED that I stenographically reported
9 the said proceedings; that the same has been
10 transcribed under my direct supervision; and that this
11 transcript, consisting of 31 pages, constitutes a true
12 transcription of my notes of said proceedings.

13 DATED this 25th day of October, 1996.



14 H. RUTHE POTAMI, CSR, RPR
15 Official Commission Reporter
16 (904) 413-6734

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