

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's
2004-2008 waterborne transportation contract
with TECo Transport and associated benchmark.

Docket No.: 031033-EI
Filed: January 26, 2004

**THE FLORIDA INDUSTRIAL POWER USERS GROUP'S
MOTION FOR PROTECTIVE ORDER REGARDING
CITIZENS OF THE STATE OF FLORIDA'S RESPONSES
TO TAMPA ELECTRIC COMPANY'S
FIRST REQUEST FOR PRODUCTION OF DOCUMENTS (NO. 6)**

The Florida Industrial Power Users Group (FIPUG), pursuant to rule 28-106.204, Florida Administrative Code, and rule 1.280(b)(3) and (c), Florida Rules of Civil Procedure, moves this Commission for an order protecting its work product from disclosure in response to Tampa Electric Company's (TECo) First Request for Production of Documents to the Citizens of the State of Florida (Public Counsel). As grounds therefore, FIPUG states:

Introduction

1. On January 9, 2004, TECo served its First Set of Interrogatories (Nos. 1-6) and First Request for Production (Nos. 1-8) on Public Counsel. On January 26, 2004, Public Counsel served TECo with its responses. In its response to TECo's Request for Production of Documents No. 6, Public Counsel identified a certain document in its possession — an analysis of the testimony of TECo witness JoAnn Wehle — which contains the work product of FIPUG's attorneys. Pursuant to rule 1.280(b)(3) and (c), Florida Rules of Civil Procedure, FIPUG requests that this information be protected from discovery by TECo.

The Work Product Doctrine

2. Rule 1.280(b)(3), Florida Rules of Civil Procedure, provides that materials prepared in anticipation of litigation, by or for a party or its representative are absolutely protected from discovery. The rule provides that when discovery of particular materials is

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allowed, “the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.*, emphasis added. As explained in *Southern Bell Telephone and Telegraph Company v. Deason*, 632 So.2d 1377, 1384 (Fla. 1994), such work product is generally protected from disclosure:

Opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions, and theories. . . . opinion work product generally remains protected from disclosure.

3. The document in Public Counsel’s possession contains the mental impressions, conclusions, opinions, theories and trial strategy of FIPUG’s attorney prepared for litigation of this case. Therefore, the document is exempt from disclosure pursuant to Rule 1.280(b)(3).

**The Work Product Doctrine Applies to Information Shared
with Parties that have Common Interests**

4. In *Visual Scene, Inc. v. Pilkington Brothers*, 508 So.2d 437 (Fl. 3d DCA1987), the court ruled that the work product privilege is not waived when the work product information is shared with a party that has “common interests”, such as the common interests between FIPUG and Public Counsel in this case. As to the sharing of work product information, the court in *Visual Scene* stated:

So long as transferor and transferee anticipate litigation against a common adversary on the same issue or issues, they have strong common interests in sharing the fruit of the trial preparation efforts. Moreover, with common interests on a particular issue against a common adversary, the transferee is not at all likely to disclose the work product material to the adversary. When the transfer to a party with such common interests is conducted under a guarantee of confidentiality, the case against waiver is even stronger.

Id. at 442-43 (quoting *United States v. American Telephone & Telegraph Co.*, 642 F.2d 1285, 1299-1300 (D.C. 1980).

5. FIPUG and Public Counsel share common interests in this case as both are litigating against TECo in this case. In pursuit of their common interests, FIPUG and Public Counsel have jointly retained witnesses and occasionally share information with regard to their common strategy in this case. The document for which FIPUG seeks protection was provided in furtherance of these trial preparation efforts and is therefore work product which should be protected from disclosure.

WHEREFORE, FIPUG's Motion for Protective Order should be granted and FIPUG's trial strategy document should be protected from disclosure.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Florida Industrial Power Users Group's to Motion for Protective Order Regarding Citizens of the State of Florida's Responses to Tampa Electric Company's First Request for Production of Documents No. 6 has been furnished by (*) hand delivery, (**) email, and U.S. Mail this 26th day of January 2004, to the following:


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