

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate) DOCKET NO. 950495-WS
increase and increase in service) ORDER NO. PSC-96-0240-PCO-WS
availability charges by Southern) ISSUED: February 19, 1996
States Utilities, Inc. for)
Orange-Osceola Utilities, Inc.)
in Osceola County, and in)
Bradford, Brevard, Charlotte,)
Citrus, Clay, Collier, Duval,)
Highlands, Lake, Lee, Marion,)
Martin, Nassau, Orange, Osceola,)
Pasco, Putnam, Seminole, St.)
Johns, St. Lucie, Volusia, and)
Washington Counties.)
_____)

ORDER GRANTING OPC'S TENTH MOTION TO COMPEL AND RULING ON OPC'S
TENTH MOTION TO POSTPONE DATE FOR FILING INTERVENOR TESTIMONY

On November 3, 1995, the Office of Public Counsel (OPC) filed its Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony, and Request for *In Camera* Inspection of Document (Tenth Motion). On November 13, 1995, Southern States Utilities, Inc., (SSU or utility) filed its Response to OPC's Tenth Motion to Compel, Tenth Motion to Postpone Date for Filing Intervenor Testimony and Request for *In Camera* Inspection of Document (Response). OPC filed a Reply on November 16, 1995. SSU filed a Motion to Strike OPC's Reply on November 22, 1995. Finally, OPC filed a Response and Opposition to SSU's Motion to Strike on November 27, 1995,

In its Tenth Motion, OPC seeks to have produced a letter dated December 14, 1993, from Laura A. Holquist, an officer of Lehigh Corporation (Lehigh), to Ron Sorenson, an attorney retained by Lehigh, which, OPC alleges, discusses the status of escrow funds relating to Lehigh (Holquist-Sorenson letter). The subject letter was made available for inspection by Price Waterhouse, SSU's accountant, but a copy was not produced by SSU on the basis of privilege. OPC further moves the Commission to postpone the filing date for intervenor testimony one day for each day SSU fails to produce the document. Finally, OPC requests the Commission conduct an *in camera* inspection of the document should SSU claim it to be privileged. OPC contends that SSU waived the right to assert privilege since it asserted no such claim in response to the initial document request and since the document was in fact made available for inspection.

DOCUMENT NUMBER-DATE

01931 FEB 19 96

FPSC-RECORDS/REPORTING

In its response, SSU asserts that the Holquist-Sorenson letter is a privileged communication, pursuant to Section 90.502, Florida Statutes, and that SSU may properly assert the attorney-client privilege available to Lehigh under the "common interests" doctrine adopted by the court in *Visual Scene v. Pilkington Bros., PLC*, 508 So.2d 437 (Fla. 3d DCA 1987). SSU further asserts that a failure to make a timely objection based on privilege does not constitute a waiver of the objection, and that neither does the inadvertent production of privileged material waive the attorney-client privilege, especially in the context of voluminous expedited discovery proceedings.

In addition, SSU asserts that the Holquist-Sorenson letter is a privileged accountant-client communication, pursuant to Section 90.5055, Florida Statutes. SSU contends that the accountant-client privilege belongs to the client, here, SSU, and may not be waived except if authorized by the client.

Moreover, SSU asserts that in the depositions of SSU witnesses Vierima and Bencini, OPC obtained non-privileged information related to the relationship of SSU and Lehigh, the Lehigh escrow agreements with the states of Michigan and New York and to other pertinent matters sufficient to prepare its testimony, and that, consequently, OPC has no need to inspect the Holquist-Sorenson letter. Finally, SSU asserts that OPC does not dispute the privileged character of the Holquist-Sorenson letter, obviating the need for *in camera* inspection, and that OPC, in the instant request, produces no more support for an extension of time to file testimony than in four earlier requests in this docket, each of which was denied.

Common Interests Doctrine

Section 90.502(1)(c), Florida Statutes, provides that a communication between lawyer and client is confidential if it is not intended to be disclosed to third persons. If the Holquist-Sorenson letter is to be protected by the attorney-client privilege, then the privilege must be asserted by the client, *i.e.*, Lehigh. SSU's argument that it may assert the privilege in this instance under the "common interests" doctrine is flawed. In *Visual Scene, supra*, the court, having stated the general proposition that a voluntary disclosure to a third party of privileged material waives the privilege, enunciated the "common interests" exception as follows:

Under this exception, clients and their respective attorneys sharing *common litigation interests* may exchange information freely among themselves without fear

that by their exchange they will forfeit the protection of the privilege. (footnote omitted) Since persons with *common litigation interests* are likely to have an equally strong interest in keeping confidential this exchanged information, the common interests exception to the waiver is entirely consistent with the policy underlying the privilege, that is, to allow clients to communicate freely and in confidence when seeking legal advice. (emphasis supplied)

Id. at 440.

SSU and Lehigh Acquisition Corporation are both subsidiaries of Topeka Group, Inc., itself a wholly owned subsidiary of Minnesota Power & Light, Inc. Lehigh is a wholly owned subsidiary of Lehigh Acquisition Corporation. The utility operations of Lehigh Acquisition Corporation, Lehigh Utilities, Inc., were merged with SSU in 1993. Of the these, only SSU is a litigant in this proceeding. SSU has not made a showing in its pleadings, nor do the facts of this case support a finding, that SSU shares common litigation interests with Lehigh in regards to the Holquist-Sorenson letter. Therefore, the privilege SSU claims does not apply to the Holquist-Sorenson letter.

We have required SSU in this proceeding to produce documents of its parents and siblings, for which it has possession, custody, or control, and which are within the scope of Rule 1.280(b), Florida Rules of Civil Procedure. See, e.g., Order No. PSC-95-1258-PCO-WS. The Holquist-Sorenson letter is repositied in the audit workpaper files maintained for SSU at Price Waterhouse. Therefore, the letter is within the control of SSU. Accordingly, OPC's Tenth Motion to Compel the production of the Holquist-Sorenson letter is granted. Furthermore, SSU shall deliver the document to the possession of OPC within three days of the issuance of this Order. OPC shall have ten days from the day of receipt of the Holquist-Sorenson letter to file supplemental testimony related to the Holquist-Sorenson letter, if deemed necessary and appropriate after production. Rebuttal testimony shall be filed within ten days after service of such testimony. OPC's request that the filing date for intervenor testimony be postponed is granted to the extent set forth above.

Other Matters

SSU also argues that the Holquist-Sorenson letter is protected under the accountant-client privilege. The assertion cannot be sustained. SSU may not assert an accountant-client privilege to protect the Holquist-Sorenson letter from disclosure, unless first

ORDER NO. PSC-96-0240-PCO-WS
DOCKET NO. 950495-WS
PAGE 4

SSU establishes that the letter in its hands is subject to privilege. As just determined, that is not the case. Therefore, the document is not protected under the accountant-client privilege.


As a final matter, Rule 25-22.037(2)(b), Florida Administrative Code, does not contemplate the filing of a reply to responses to motions, nor was a reply necessary in this instance in order to make an informed decision. Therefore, the reply filed by OPC, the related motion to strike filed by SSU, and the response filed by OPC have not been considered herein.

Based on the foregoing, it is

ORDERED by Commissioner Diane K. Kiesling, as Prehearing Officer, that OPC's Tenth Motion to Compel is granted and that SSU is hereby compelled to produce the Holquist-Sorenson letter, as set forth in the body of this Order. It is further

ORDERED that OPC's Tenth Motion to Postpone Date for Filing Intervenor Testimony is granted as to the filing of supplemental testimony, as set forth in the body of this Order.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 19th day of February, 1996.


DIANE K. KIESLING, Commissioner and
Prehearing Officer

(S E A L)

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

ORDER NO. PSC-96-0240-PCO-WS
DOCKET NO. 950495-WS
PAGE 5

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.