

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate ) DOCKET NO. 960502-GU  
increase by City Gas Company of ) ORDER NO. PSC-96-1340-PCO-GU  
Florida ) ISSUED: November 7, 1996  
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ORDER DENYING DISCOVERY

On September 15, 1996, City Gas Company of Florida (City Gas or Company) filed its objections to Staff's Second Request for Production of Documents to City Gas Company of Florida (No. 15). City Gas declined to provide the document, asserting that it is protected by the attorney-client privilege and the work product doctrine. On October 3, 1996 Staff filed its Motion to Compel Discovery (Motion to Compel), to which City Gas responded on October 10, 1996 with its Response to Staff's Motion to Compel and Motion for Protective Order (Response to Motion to Compel), attaching the Affidavit of Mary Patricia Keefe, dated October 10, 1996 (Affidavit). Staff thereafter filed a Motion for In Camera Inspection of Documents on October 16, 1996, followed by the Company's filing of Response to Staff's Motion for In Camera Inspection (Response to In Camera Inspection) on October 23, 1996. Oral argument on the Motion for In Camera Inspection was heard on October 24, 1996. Staff's Motion for In Camera Inspection was granted, ore tenus, on October 24, 1996. The document in question was thereupon duly tendered by the Company for in camera inspection on October 25, 1996. Though the Motion for In Camera Inspection and the Response thereto addressed whether or not such an inspection should be held, those pleadings also analyzed the application, vel non, of the attorney-client privilege and work-product immunity doctrine to the document at issue. It is the privilege question which is the subject of this Order.

In its Motion for In Camera Inspection, at page 5, staff argued that City Gas' claim of attorney-client privilege was unsupported because the company had "an independent business purpose in directing the preparation of the investigative report" at issue. Staff also noted, at page 2, its need for the document as relevant to the issue of determining "the actual legitimate costs of property of the utility."

In its Response to Motion for In Camera Inspection, City Gas denied the independent business purpose ascribed to the document by staff, noting that the Company had hired a law firm to provide legal counsel with respect to potential litigation between the Company and a former officer. City Gas asserted at page 3 that the investigation which the report memorializes "was requested by the Company for the sole purpose of receiving legal services, and the report would not have been created but for the Company's need for and request for legal services." It was further noted in the

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Affidavit that the Company limited the access to the document to "the Company's legal counsel, the Chairman, the then Executive Vice President and the Director of Internal Audit and the Audit Committee...."

In evaluating these conflicting claims and the authorities cited in support, I am guided by the opinion of the 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 evident that the communication in question falls within the parameters of the privilege as set out in Deason, supra. The first of those parameters is the most directly relevant, since the document at issue was communicated from the attorney to the client rather than from the corporate employee to the attorney. The investigative report was commissioned in response to the prospect of future litigation between the Company and a former officer. The report set out relevant facts and drew legal conclusions based on those facts. There was no evidence of any purpose other than to communicate those legal conclusions to the client. A statement of

facts, along with conclusions based on those facts, is within the area protected by attorney-client privilege. Moreover, the communications containing these legal conclusions 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.]

Here, City Gas

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... counsel.

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 communication at issue here.

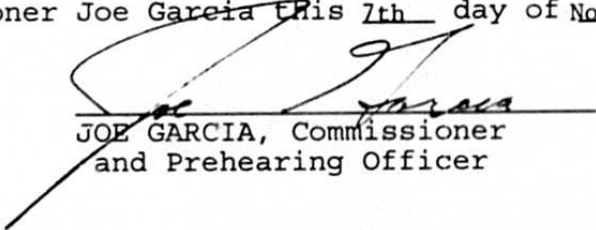
In light of the privileged nature of the communication as herein determined, it is unnecessary to reach the issue of determining the applicability of work-product immunity to the document.

In view of the above, it is

ORDERED by Joe Garcia, as Prehearing Officer, that discovery of the report described above is denied. It is further

ORDERED that this docket remain open.

BY ORDER of Commissioner Joe Garcia This 7th day of November,  
1996

  
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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.