

BEFORE THE 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
ORDER NO. PSC-04-0515-PCO-EI
ISSUED: May 21, 2004

ORDER DENYING MOTION FOR PROTECTIVE ORDER

On January 26, 2004, the Florida Industrial Power Users Group (FIPUG) filed a Motion for Protective Order, requesting that the Prehearing Officer issue an order protecting FIPUG work product from disclosure in response to Tampa Electric Company's (Tampa Electric) First Request for Production of Documents to the Citizens of the State of Florida (OPC). No person filed a response in opposition to FIPUG's motion.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case . . ." Based upon this authority, and having considered the Motion, the rulings are set forth below.

FIPUG states that on January 9, 2004, Tampa Electric served its First Request for Production of Documents (Nos. 1-8) on OPC, and on January 26, 2004, OPC served Tampa Electric with its responses. FIPUG states that in response to Document Request No. 6, OPC identified a certain document in its possession, an analysis of the testimony of Tampa Electric witness JoAnn Wehle, which contains the work product of FIPUG's attorneys. FIPUG requests that this information be protected from discovery by Tampa Electric.

FIPUG cites Rule 1.280(b)(3), Florida Rules of Civil Procedure, which provides that materials prepared in anticipation of litigation by or for a party or its representative are protected from discovery. The rule provides that when discovery of particular materials is 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." In support of its position, FIPUG cites Southern Bell Telephone and Telegraph Co. v. Deason, 632 So.2d 1377, 1384 (Fla. 1994), which states:

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

FIPUG asserts that the document in OPC's possession contains the mental impressions, conclusions, opinions, theories, and trial strategy of FIPUG's attorney prepared for litigation in

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this proceeding and is exempt from disclosure pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure.

In further support of its position, FIPUG cites Visual Scene, Inc. v. Pilkington Brothers, 508 So.2d 437 (Fla. 3rd DCA 1987). In that case, 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.” The court 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 442-443 (quoting United States v. American Telephone & Telegraph Co., 642 F.2d 1285, 1299-1300 (D.C. 1980)). FIPUG asserts that it shares common interests with OPC in this proceeding as both are litigating against Tampa Electric. FIPUG states that in pursuit of their common interests, FIPUG and OPC have jointly retained witnesses and occasionally share information with regard to their common strategy in this proceeding. FIPUG states that the document for which it seeks protection was provided in furtherance of trial preparation efforts and is therefore work product that should be protected from disclosure.

Upon review of the pleadings and consideration of the arguments, FIPUG’s Motion for Protective Order is denied. Although the document would ordinarily be protected by the work product doctrine pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure, the privilege has been waived. Section 90.507, Florida Statutes, states:

A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person’s predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy...

In Visual Scene, the disclosure of work product information was made in confidence. Because OPC is an entity subject to Florida’s public records law, Section 119, Florida Statutes, OPC could not make a guarantee of confidentiality and FIPUG could not have had a reasonable expectation of privacy for the document provided. While Section 119.07(3)(1)1. provides an exemption for an agency attorney’s opinion work product prepared exclusively for adversarial administrative proceedings, the document at issue was not prepared by OPC’s attorney and, thus, is not exempted. Despite the common interests of OPC and FIPUG in this proceeding, the law is clear that exemptions to Florida’s public records law are to be narrowly construed so they are


ORDER NO. PSC-04-0515-PCO-EI
DOCKET NO. 031033-EI
PAGE 3

limited to their stated purpose. Based on the foregoing, FIPUG's Motion for Protective Order is denied.

It is therefore,

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that FIPUG's Motion for Protective Order is denied.

By ORDER of Chairman Braulio L. Baez, as Prehearing Officer, this 21st day of May, 2004.

 for Chairman Braulio Baez

BRAULIO L. BAEZ
Chairman and Prehearing Officer

(SEAL)

JAR/WCK

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in

ORDER NO. PSC-04-0515-PCO-EI
DOCKET NO. 031033-EI
PAGE 4

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 the Commission Clerk and Administrative Services, 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.