

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-04-0547-PCO-EI
ISSUED: May 26, 2004

ORDER DENYING MOTION TO COMPEL

Background

On April 19, 2004, Tampa Electric Company ("Tampa Electric") filed a motion to compel Catherine L. Claypool, Helen Fisher, William Page, Edward A. Wilson, Sue E. Strohm, Mary Jane Williamson, Betty J. Wise, Carlos Lissabet, and Lesly A. Diaz ("Residential Customers") to fully respond to Tampa Electric's First Set of Interrogatories (Nos. 1-8) and First Request for Production of Documents (Nos. 1-17) served February 6, 2004, in this docket. On April 26, 2004, the Residential Customers filed a response to the motion to compel and request for protective order related to this discovery.

In its motion, Tampa Electric asserted that upon information and belief, Mr. Michael Twomey, attorney for the Residential Customers, is also directly or indirectly representing one or more suppliers of coal or coal transportation services who have sought to remain anonymous and who have funneled funds through various entities, including the Consumer Federation of the Southeast ("CFSE") and Sachs Communication ("Sachs"), to remain anonymous. Tampa Electric contended that the information it seeks is relevant in developing testimony on the market for coal transportation and in understanding the "true interests" represented by Mr. Twomey in this case. Tampa Electric stated that it is handicapped in seeking a resolution of this matter when the real party in interest is not revealed.

In response, the Residential Customers asserted that the focus of this docket is the reasonableness of the charges paid by Tampa Electric to its affiliated transportation company for the waterborne transportation of coal, which charges are passed on to customers through the fuel adjustment clause. The Residential Customers further asserted that this docket does not concern customers and how their participation in the case is funded. The Residential Customers contended that such questions about customers are not relevant to the issues in this proceeding, are not admissible, and are not reasonably calculated to lead to the discovery of admissible evidence in this proceeding. The Residential Customers asserted that many, although not all, of the outstanding discovery requests for which Tampa Electric seeks an order to compel will be answered through the production of several late-filed exhibits to the deposition of the Residential Customer's expert witness, Dr. Anatoly Hochstein, which took place April 22, 2004. Further, the Residential Customers asserted attorney-client or work product privilege in response to some of Tampa Electric's discovery requests. The Residential Customers stated that they and their counsel have no contractual relationships with any of the various entities discussed in Tampa

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Electric's motion that would allow Tampa Electric to obtain the third-party information it seeks even if it were legally discoverable.

Standard of Review

Rule 1.280(b)(1), Florida Rules of Civil Procedure, provides that the scope of discovery extends to "any matter, not privileged, that is relevant to the subject matter of the pending action." The rule goes on to state that "it is not ground for objection that the information sought will be inadmissible at the trial if the information is reasonably calculated to lead to the discovery of admissible evidence."

Section 90.502, Florida Statutes, establishes the attorney-client privilege and provides that communications between attorney and client are confidential if not intended to be disclosed to third persons other than "[t]hose to whom disclosure is in furtherance of the rendition of legal services to the client" or "[t]hose reasonably necessary for the transmission of the communication." Rule 1.280(b)(3), Florida Rules of Civil Procedure, provides that "a party may obtain discovery of documents . . . prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." That rule goes on to state that "[i]n ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney . . . concerning the litigation."

Analysis

This discovery dispute was first addressed by Order No. PSC-04-0498-PCO-EI, issued May 13, 2004, which found, in pertinent part:

Tampa Electric's motion to compel seeks many documents from the Residential Customers that, on their face, appear to be privileged attorney-client communications or work product. While these documents may have some limited relevance to this proceeding in terms of testing the basis of the opinions stated in Dr. Hochstein's prefiled testimony on behalf of the Residential Customers, Tampa Electric has not shown why it has not had an adequate opportunity to do so through questioning Dr. Hochstein himself at deposition and obtaining the late-filed exhibits to that deposition that provide substantial source data used by Dr. Hochstein.

To the extent that Tampa Electric seeks materials concerning contacts between Mr. Twomey and the Residential Customers, including contacts concerning funding, such materials are privileged attorney-client communications and are simply not discoverable. To the extent Tampa Electric seeks materials concerning contacts between Mr. Twomey and third parties such as CFSE, Sachs, Dr. Lynch, Common Cause of Florida, other Florida electric utilities, or providers of bulk commodity transportation services, such material is work product. If the materials reflect opinion work product, they are not discoverable. Further, I find that Tampa Electric has not made the demonstration required under the Florida Rules of Civil Procedure to compel production of such materials to the extent those materials reflect fact work product, i.e., that Tampa Electric has need of those materials in preparation of its case and is unable to obtain the substantial equivalent without undue hardship. Given the limited relevance of such materials to the substantive issues in this docket, I do not believe that Tampa Electric has a need for otherwise protected materials that could at best be used to do what has largely been done through Dr. Hochstein's deposition. To the extent Tampa Electric seeks materials concerning contacts between third parties such as CFSE, Sachs, Dr. Lynch, or Common Cause of Florida and other Florida electric utilities or providers of bulk commodity transportation services, such material does not appear to be in the possession, custody, or control of the Residential Customers. To the extent Tampa Electric seeks to compel information concerning funding of the Residential Customers' litigation efforts, the decision in Estate of McPherson makes clear that such information is not discoverable. Finally, it should be made clear that the issues in this case will be decided on the merits based on the record evidence and arguments put forward by the parties, regardless of what motivations may or may not lay behind the parties' litigation efforts.

Although Tampa Electric's motion to compel seeks materials from the Residential Customers that, on their face, appear to be privileged attorney-client communications or work product, the Residential Customers have not provided the Commission with the information necessary to determine whether the materials withheld as privileged attorney-client communications or work product are indeed privileged. Rule 1.280(b)(5), Florida Rules of Civil Procedure, provides as follows:

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected,

will enable other parties to assess the applicability of the privilege or protection.

The Residential Customers' claims that certain materials are "protected by the attorney-client privilege, the work product doctrine, or any other applicable privilege" do not provide the specificity required by the rule and do not provide the Commission the information necessary to determine whether any specific privilege or protection applies. In their response to Tampa Electric's motion, the Residential Customers suggest that this information cannot be identified even in general terms in a manner that does not compromise the asserted privilege. Accordingly, the Residential Customers shall contact the Commission's counsel for this docket to arrange an in camera inspection of all materials withheld by the Residential Customers on the basis of privilege. The Residential Customers shall identify these materials in connection with the specific discovery requests to which they are responsive. To expeditiously resolve this dispute, the Residential Customers shall comply with this requirement by the close of business Monday, May 17, 2004. Ruling on Tampa Electric's motion to compel is withheld pending the outcome of the in camera inspection.

Consistent with this requirement, the Residential Customers provided those documents being withheld as privileged attorney-client communications or protected work product information for an in camera inspection.¹ Based on this in camera review, I find that the materials asserted by the Residential Customers to be attorney-client communications or work product are indeed attorney-client communications or work product. Consistent with the findings in Order No. PSC-04-0498-PCO-EI, I find that those materials comprising attorney-client communications and opinion work product are not discoverable. Further, consistent with the findings in Order No. PSC-04-0498-PCO-EI, I find that Tampa Electric has not demonstrated a need for those materials comprising fact work product given its adequate opportunity to test the basis of the opinions stated in Dr. Hochstein's prefiled testimony through questioning Dr. Hochstein himself at deposition and obtaining the late-filed exhibits to that deposition that provide substantial source data used by Dr. Hochstein.


¹ While Order No. PSC-04-0498-PCO-EI could have required the Residential Customers to produce a privilege log, it chose to require production of the materials for an in camera inspection instead. See, e.g., Viveiros v. Cooper, 832 So. 2d 868 (Fla. 4th DCA 2002) (remanded to trial court to require privilege log or conduct in camera review of records to determine whether privilege applied); Nationwide Mutual Fire Insurance Company v. Hess, 814 So. 2d 1240 (Fla. 5th DCA 2002) (trial court could not order production of materials that, on their face, required disclosure of privileged information without first conducting an in camera inspection).

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Based on the foregoing, it is

ORDERED by Chairman Braulio L. Baez, as Prehearing Officer, that Tampa Electric Company's motion to compel Residential Customers to respond to discovery is denied.

By ORDER of Chairman Braulio L. Baez, as Prehearing Officer, this 26th day of May, 2004.



BRAULIO L. BAEZ
Chairman and Prehearing Officer

(SEAL)

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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 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,

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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.