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ORIGINAL
FILE COPY

May 31, 1996

HAND DELIVERY

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Prudency Review to Determine Regulatory
Treatment of Tampa Electric Company's
Polk Unit; FPSC Docket No. 960409-EI

Dear Ms. Bayo:

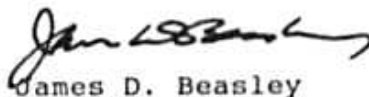
Enclosed for filing in the above docket, on behalf of Tampa Electric Company, are the original and fifteen (15) copies of each of the following:

1. Tampa Electric Company's Memorandum in Opposition to Staff's Request for In Camera Inspection of Documents.
2. Tampa Electric Company's Memorandum in Opposition to Staff's Motion for Extension of Filing Dates.

ACK Please acknowledge receipt and filing of the above by stamping
APA the duplicate copy of this letter and returning same to this
AFM writer.

CAJ Thank you for your assistance in connection with this matter.

Sincerely,



James D. Beasley

EA *Beasley*
LD
LF JDB/pp
CI Enclosures

cc: All Parties of Record (w/encls.)

WAR *[Signature]*
TTL *[Signature]*

DOCUMENT NUMBER-DATE

06038 MAY 31 1996

FPSC-RECORDS/REPORTING

DOCUMENT NUMBER-DATE

06037 MAY 31 1996

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Prudency Review to Determine)
Regulatory Treatment of Tampa Electric)
Company's Polk Unit.)

DOCKET NO. 960409-FI

FILED: May 31, 1996

**TAMPA ELECTRIC COMPANY'S MEMORANDUM IN OPPOSITION TO
STAFF'S REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS**

Tampa Electric Company ("Tampa Electric" or "the company") submits this, its Memorandum in Opposition to Staff's Request for In Camera Inspection of Documents filed by Staff in the above proceeding on May 24, 1996, and says:

1. Tampa Electric disagrees with Staff's contention that the company has not supported its assertion of attorney/client privilege. As stated in the company's identification of documents withheld pursuant to the attorney/client privilege, the documents in question consist primarily of notes, memoranda, letters and other written communications between Tampa Electric and its Washington, D. C. attorneys, Hooper, Hooper, Owen & Gould, who have counseled Tampa Electric regarding federal tax law and tax legislation pertaining to the tax credits available under Section 29 of the Internal Revenue Code. The company's identification of withheld documents goes on to identify other tax law and tax legislation related communications between Tampa Electric and other specifically identified legal counsel.

The Importance of the Attorney/Client Privilege

2. The integral role played by the attorney/client privilege is discussed in 1 McCormick on Evidence 316 as follows:

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Our system of litigation casts the lawyer in the role of fighter for the party for whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business.

See, also, Upjohn Company v. United States, 449 U.S. 383 (1981) wherein the Court observed that the purpose of the privilege is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The Court went on to state that the privilege exists to protect not only the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice. Id. at 390

3. The importance of the attorney/client privilege is discussed in detail in Dean v. Dean, 607 So.2d 494 (Fla. 4th DCA 1992). The Court noted that the privilege rests on the theory that:

[i]n order to freedom of consultation of legal advisers by clients the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit the disclosure except on the client's consent.

4. The Court in Dean, citing *Wigmore on Evidence*, describes the development of the attorney/client privilege which in time was extended:

to include communications made, first during any other litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, in any consultation for legal advice, wholly

irrespective of litigation or even of controversy. (emphasis supplied)

Dean, at 607 So.2d 496

5. The Court in Dean explained that the policy of the privilege rests on the need for the attorney to be fully and openly apprised of all of the facts of his client's situation in order to provide effective legal advice. Citing *Wigmore* at Section 2291, the Court and Dean observed:

In short, since its modern development, the privilege is found in wholly owned subjective considerations:

'[i]n order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed. . .

6. The Court went on to cite Trammel v. United States, 445 U.S. 40, 51 1980, for the proposition that the attorney/client privilege rests on the need for advocate and counsellor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out.

Staff Mislabels the Communications

7. The Staff's request erroneously attempts to disallow the attorney/client privilege by characterizing the legal services provided by counsel to Tampa Electric as "business advice." This ill-defined characterization does not detract from the true nature of the communications in question. Tampa Electric has sought and relied on the legal advice of experts in the field of taxation and tax legislation to define the best legal course of action for the company to pursue in an effort to avail itself and its customers to

certain tax benefits. As stated in the company's May 20, 1996 identification of documents withheld, Tampa Electric has 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 tax counsel.

8. In Paragraph 19 of its request Staff similarly attempts to characterize the documents in question as having been prepared primarily for business purposes. Staff does not really define "business purposes" or "business advice." Virtually all of Tampa Electric's activities are business related, but that does not extinguish the company's privilege with regard to confidential communications with attorneys acting within their professional role as attorneys.

9. In Skorman v. Hovnanian of Florida, Inc., 382 So.2d 1376 (Fla. 4th DCA 1980) the appellate court reversed a lower court ruling that communications between an attorney and his client in connection with a real estate transaction did not qualify for attorney/client privilege. If advice concerning real estate transactions cannot be classified as business advice, then certainly the subject matter of the communications at issue here cannot be. On the contrary, the legal service provided by these expert tax attorneys was to advise the company on the most appropriate ways of amending the tax code so as to maximize Tampa Electric's rights thereunder and to further advise the company of the best means of achieving these changes in the tax law. Such

efforts by expert tax attorneys cannot be dismissed as constituting merely "business purposes." If the attorneys in question had advised Tampa Electric as to their favorite stock picks or how to more efficiently operate the company's generating units, Staff's "business purposes" argument might have merit. Staff has cited no authority for the proposition that tax lawyers advising tax clients on how to improve their legal rights under the tax code and how best to achieve those improvements does not constitute acting in the professional capacity of an attorney.

10. It is only logical that Tampa Electric's communications with outside tax law experts regarding the company's tax status, the status of current tax law and the nature and effect of possible changes in that law are primarily related to legal advice. Outside counsel would not ordinarily be involved in the business decisions of a corporation. Why would a business hire an outside lawyer when there would be others who in most instances would be more qualified to deal with non-legal business issues than lawyers.

11. Staff's efforts to have the Commission ignore the fundamental and essential principle of attorney/client privilege simply in hopes of obtaining more information is inappropriate and should be set aside. As the Supreme Court of Florida has observed:

The confidential relationship of attorney and client is a sacred one, and one that is indispensable to the administration of justice. It cannot so lightly be brushed aside.

Seaboard Airline Railroad Company v. Timmons, 60 So.2d 426 (Fla. 1952)

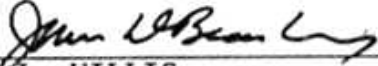
In Camera Inspection

12. Tampa Electric submits that the above reply to Staff's request in and of itself should obviate the need for an in camera review of the privileged attorney/client communications here at issue. However, if the Commission determines that such a review is necessary, Tampa Electric would urge that the above matters be considered as grounds for concluding that the documents in question are, indeed, privileged and should not be produced.

WHEREFORE, Tampa Electric submits the foregoing as its Memorandum in Opposition to the Staff's Request for In Camera Inspection of Documents.

DATED this 31st day of May, 1996.

Respectfully submitted,



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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Staff's Request for In Camera Inspection of Documents, filed on behalf of Tampa Electric Company, has been furnished by U. S. Mail or hand delivery (*) on this 31st day of May, 1996 to the following:

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Florida Public Service
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