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McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, RIEF & BAKAS, P.A.

LAW OFFICES

100 NORTH TAMPA STREET, SUITE 2800
TAMPA, FLORIDA 33602-5126

MAILING ADDRESS: TAMPA
P.O. Box 3350, TAMPA, FLORIDA 33601-3350

TELEPHONE (813) 224-0800

FAX (813) 221-1854

CABLE GRANDLAW

PLEASE REPLY TO
TALLAHASSEE

TALLAHASSEE OFFICE
117 S. GADSDEN
TALLAHASSEE, FLORIDA 32301

TELEPHONE (904) 222-2525

FAX (904) 222-5606

LYNWOOD F. ARNOLD, JR.
JOHN W. BAKAS, JR.
HARRY LEE COE, IV
LINDA DARNEY HARTLEY
C. THOMAS DAVIDSON
STEPHEN O. DECKER
LINDA E. JORGE
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JOSEPH A. MCGLOTHLIN
JOHN W. McWHIRTER, JR.
RICHARD W. REEVES
FRANK J. RIEF, III
DAVID W. STEEN
PAUL A. STRANKE

October 10, 1996

HAND-DELIVERED

Blanca S. Bayo, Director
Division of Records and Reporting
Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0870

Re: Application for rate increase by City Gas Company of Florida
Docket No.: 960502-GU

Dear Ms. Bayo:

Enclosed for filing and distribution are the original and fifteen copies of City Gas Company of Florida's Response to Staff's Motion to Compel and Motion for Protective Order in the above docket.

Please acknowledge receipt of the above on the extra copy enclosed herein and return it to me. Thank you for your assistance.

Yours truly,

Vicki Gordon Kaufman
Vicki Gordon Kaufman

- ACK _____
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- APP _____
- CAF _____
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- CTR _____ VGK/pw
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FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

10882 OCT 10 1996

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of City Gas Company
of Florida for an increase in its
Rates and Charges.

) Docket No. 960502-GU
)
)
)

Filed: October 10, 1996

CITY GAS COMPANY OF FLORIDA'S RESPONSE
TO STAFF'S MOTION TO COMPEL
AND
MOTION FOR PROTECTIVE ORDER

Pursuant to rules 25-22.035(3) and 25-22.037, Florida Administrative Code, and rule 1.280(c), Florida Rules of Civil Procedure, City Gas Company of Florida (City Gas or the Company) files its response to Staff's motion to compel discovery regarding Staff Production Request No. 15. For the following reasons, Staff's motion should be denied and the Commission should enter a protective order determining the subject document to be absolutely protected from discovery.

Introduction

Production Request No. 15 states:

Please provide a copy of the investigative report prepared by Pitney, Hardin, Kipp and Szuch concerning the relationship between Jack Langer and Ivan (sic) Ball.

The report which Staff seeks was prepared by the law firm of Pitney, Hardin, Kipp and Szuch (Pitney Hardin). Pitney Hardin is a New Jersey law firm that was retained by NUI Corporation (NUI) to provide legal counsel to the Company with respect to pending controversies and potential litigation involving a former President of City Gas. The report was prepared by the law firm at the request of the Company and would not have been requested by the Company but for the prospect of litigation

and the associated need for legal advice.

The document is privileged and is not discoverable for two reasons. First, the report is absolutely protected by the attorney/client privilege. Second, the report is privileged because it is attorney work product which was prepared in anticipation of litigation. The applicability of each privilege to the Staff request is discussed below.

Background

Prior to 1988, City Gas was owned by the Langer family. Mr. Jack Langer replaced his father as President of City Gas. In 1988, City Gas was acquired by NUI.¹ Mr. Langer was relieved of his duties on December 6, 1994, and resigned on February 28, 1995. Prior to Mr. Langer's departure, the relationship between Mr. Langer and NUI's senior management became increasingly strained. NUI anticipated that the falling out between Mr. Langer and the Company could possibly lead to litigation.² Based upon certain activities of Mr. Langer while he was President of City Gas, NUI also believed it might have legal grounds on which to either assert causes of action against Mr. Langer or with which to defend against actions brought by Mr. Langer. To assess its legal rights vis-a-vis its relationship to Mr. Langer, the Audit Committee of NUI's Board of Directors engaged a law firm to investigate and analyze the situation and provide legal advice on the subject to the Company. Attachment A, Affidavit of Mary Patricia Keefe, Senior Vice President and General Counsel of Elizabethtown Gas

¹ When City Gas was originally acquired, it became part of a subsidiary of NUI. It is now part of NUI's Southern Operating Division.

² After they left the Company, Mr. Jack Langer and his brother, Mr. David Langer, did in fact file suit against NUI. That suit is presently pending.

Company, an operating division of NUI. The report which Staff seeks comprises the law firm's factual research, analysis, and advice.

Attorney/Client Privilege

The attorney/client privilege is the oldest of the privileges for confidential communications known at common law. Ehrhardt, Florida Evidence § 502.1, n. 1 (1995 Edition). The purpose of the attorney/client privilege is to encourage full and frank communication between attorneys and their clients. Fisher v. United States, 425 U.S. 391, 403 (1976). "The lawyer-client privilege rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." Trammel v. United States, 445 U.S. 40, 51 (1976). The privilege applies to corporations. United States v. Upjohn Co., 449 U.S. 383, 390 (1980).

Florida jurisprudence recognizes the privilege. In Dean v. Dean, 607 So.2d 494, 496 (Fla. 4th DCA 1992), the court delineated the scope of the attorney/client privilege 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.

The document at issue falls within this definition.

The Florida Supreme Court recently considered the criteria governing the application of the attorney/client privilege to a corporation in Southern Bell Telephone & Telegraph Co. v. Deason, 632 So.2d 1377 (Fla. 1994). In Deason, the Court set

out the following criteria:

- (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.

Deason at 1383. The report at issue here meets all these criteria. Therefore, it must be absolutely protected from disclosure.

First, the services provided by Pitney Hardin and the communications between Pitney Hardin and City Gas were expressly for the purpose of securing legal advice in regard to litigation involving Mr. Langer.³ Staff suggests in its motion that the Pitney Hardin report may have been prepared for a "business purpose."⁴ Staff's assertion of a possible "business purpose" is speculative, completely unsupported, and

³ Significantly, of the Deason decision's five criteria applicable to a claim of privilege, the Staff puts only the first criterion at issue in its motion.

⁴ The fact that the report may contain factual information does not pierce the attorney/client privilege. "The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant." Upjohn at 391.

incorrect. The unsupported assertion is refuted by the Affidavit of Ms. Keefe, attached.

Staff cites two cases in support of its speculative suggestion of a "business purpose." One has no relevancy to the issue of attorney/client privilege; the other supports City Gas' claim of attorney/client privilege. In Soeder v. General Dynamics Corp., 90 F.R.D. 253 (D. Nev. 1980), the court found that an in-house report that was routinely prepared after every airline crash was not work product because it was prepared in the ordinary course of business. It is therefore irrelevant to a consideration of the application to this case of the attorney/client privilege. (The case will be discussed in the separate section on work product, below).

The other case cited by Staff is directly on point; however, it supports City Gas, not Staff. In First Chicago International v. United Exchange Co. Ltd., 125 F.R.D. 55 (S.D.N.Y. 1989), a bank sued a former employee over a conspiracy involving a check kiting scheme. The employee sought certain documents from the bank. The bank claimed the documents were protected by the attorney/client privilege.

The documents the employee sought concerned an investigation of the conspiracy scheme which was initiated so that First Chicago could assess its legal options. The court protected the requested documents and said:

I find that each document was created at counsel's request, to provide counsel with the facts concerning the overdraft, so that counsel would be able to render a legal opinion.

...

... the documents withheld by plaintiff would not have been created but for in-house counsel's initiation of an

investigation of the facts surrounding the overdraft.
Id. at 58, emphasis provided. Similarly, the report provided by Pitney Hardin was the result of an investigation that was initiated to determine the legal ramifications of Mr. Langer's actions during his tenure with City Gas, as they related to possible litigation involving the Company. Pitney Hardin would not have been retained by City Gas and the report would not have been prepared but for the anticipated litigation involving Mr. Langer. Attachment A, Affidavit of Mary Patricia Keefe.

The remainder of the Deason criteria are also met in this case (and have not even been contested by Staff). Pitney Hardin was retained by NUI's senior management for the purpose of advising City Gas in regard to the potential Langer litigation. Pitney Hardin's advice is contained in the report that is the subject of Staff's request. The retention and direction of Pitney Hardin were part of NUI's efforts to retain legal services relating to possible litigation involving Mr. Langer. Communications with Pitney Hardin related to the legal services being rendered.

Finally, the Pitney Hardin report is kept strictly confidential by NUI. After submission to the Audit Committee, only the Company's legal counsel, the Chairman, the then Executive Vice President, the Director of the Internal Audit and the Audit Committee within NUI who "need to know" have had access to the document. Attachment A, Affidavit of Mary Patricia Keefe. NUI has relied upon the attorney/client privilege in its communications with its counsel, Pitney Hardin, in regard to the report.

Significantly, the Commission recently considered and denied a similar request

by Staff for information claimed by a utility to be absolutely privileged under the attorney/client privilege. In In re: Prudence review to determine regulatory treatment of Tampa Electric Company's Polk Unit, Order No. PSC-96-0890-PCO-EI (Order Denying Discovery), Docket No. 960409-EI, Staff sought documents relating to Tampa Electric's ability to secure certain tax credits. These documents were notes, memoranda and letters between Tampa Electric and its outside counsel.

In seeking the Tampa Electric documents, Staff made a claim similar to the one it makes here--that the documents were prepared for business purposes and that Staff needed the documents to ascertain whether Tampa Electric had reasonably relied on the availability of the tax credits. Tampa Electric asserted that the requested documents were protected by the attorney/client privilege.

Commissioner Garcia, Prehearing Officer in the case, applied the Deason decision and concluded Tampa Electric's claim of privilege was valid. He denied Staff's request for discovery:

. . . it is clear that these communications fall within the parameters of the privilege as set out in Deason, supra. First, the documents contain the legal opinions themselves, communicated by the lawyer to the client's attorneys who solicited the advice on behalf of the corporation. Second, the communications containing these legal opinions were created with the expectation of confidential treatment and maintained in confidence.

Id. at 2. The findings of the Prehearing Officer in the TECO case are equally applicable to the Pitney Hardin report. This document must be protected to the same degree as

the Tampa Electric materials.⁶

Work Product

The Pitney Hardin report clearly meets the requirements for the absolute attorney/client privilege discussed above and should be protected on that basis.

In addition, the report is attorney work product and is protected by rule 1.280(b)(3), Florida Rules of Civil Procedure. Rule 1.280(b)(3) provides that material prepared in anticipation of litigation is not discoverable unless the requesting party shows that it needs the materials to prepare its case and cannot obtain the substantial equivalent of the requested materials without undue hardship. Neither showing has been made by Staff in this case.

In Upjohn, the U. S. Supreme Court discussed and reaffirmed the strong public policy underlying the work product doctrine. Quoting Hickman v. Taylor, 329 U.S. 495, 510 (1947), the Court found it essential that "a lawyer work with a certain degree of privacy. . . ." That privacy would be violated if the law firm's report were subject to discovery.

The Florida Supreme Court broadly defined work product in Surf Drugs, Inc. v. Vermette, 236 So.2d 108, 112 (Fla. 1970). Work product includes the:

[p]ersonal views of the attorney as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams

⁶ The Affidavit of Ms. Keefe confirms that the report meets the Deason test. Staff did not request an in camera inspection of the report; nor is one necessary to establish any of the prongs of the test.

and charts he may refer to at trial for his convenience, but not to be used as evidence. . . .

The Pitney Hardin report fits squarely within this definition of work product.

As discussed above, there can be no doubt that the Pitney Hardin report was prepared due to the anticipated Langer litigation. Pitney Hardin would not have been retained by City Gas to conduct the investigation and prepare the report were it not for the prospect and threat of litigation. Thus, the Pitney Hardin report meets this aspect of the work product test.

The Soeder case cited by Staff has no application to the instant situation because the Pitney Hardin report is not a report which City Gas routinely prepares. It was done solely because of the potential Langer litigation.

The Deason decision discusses two types of work product: "fact work product" and "opinion work product." "Fact work product" protects information which relates to the case and is gathered in anticipation of litigation. "Opinion work product" consists of the attorney's mental impressions, conclusions, opinions, and theories. The Pitney Hardin report contains both types of work product.

Deason holds that "opinion work product" is protected from disclosure. Thus, any opinion work product is absolutely protected from disclosure, regardless of need or hardship. As to "fact work product," before disclosure will be permitted, there must be a showing of "need" and "undue hardship." Id. at 1384. As mentioned above, no such showing has been made in this case.

The only reference to "need" can be found in one sentence of Staff's motion: "Staff needs the investigative report to determine that the amounts paid by City Gas

to Medley are legitimate costs which are appropriate for recovery from City Gas' ratepayers." Motion at 2. City Gas does not question the right of Staff to inquire into the reasonableness of the payments City Gas has made to Medley; however, this can be done in any number of ways which do not require the production of the privileged Pitney Hardin report. For example, Staff has the ability to audit the records of City Gas;⁶ to promulgate interrogatories to City Gas;⁷ and to subpoena witnesses for depositions. There are many alternative ways for Staff to obtain information pertinent to its evaluation of the utility's costs without violating the work product privilege. Staff has not even made an allegation that it would be an "undue hardship" for it to explore this area in other ways. This is understandable, since Staff has available to it many diverse avenues of discovery through which to secure the information it needs.

Conclusion

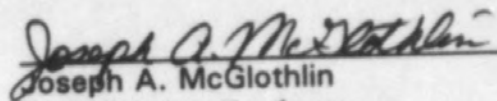
The highest legal authorities, including the United States Supreme Court, have consistently articulated and confirmed the attorney/client privilege. In the course of doing so, they have underscored the need to serve the compelling rationales and public policies embodied in the privilege. Decisions of the Florida Supreme Court and this Commission's own rulings demonstrate that the document sought by Staff is not discoverable because it falls within, and is entitled to the full protection of, the absolute attorney/client privilege. Independently, the document also constitutes

⁶The Staff conducted an extensive rate case audit in this case.

⁷The Staff has served 105 interrogatories in seven sets in this docket.

attorney work product. Staff has not met its burden to show good cause to violate this privilege. Nor could it, as Staff has available numerous alternative means of obtaining the information it requires to carry out its responsibilities regarding the prudence and reasonableness of costs incurred by City Gas.

WHEREFORE, City Gas requests that Staff's motion to compel be denied and that the Commission enter a protective order holding the Pitney Hardin report to be absolutely protected from discovery.


Joseph A. McGlothlin
Vicki Gordon Kaufman
McWhirter, Reeves, McGlothlin,
Davidson, Rief & Bakas
117 South Gadsden Street
Tallahassee, Florida 32301
(904) 222-2525

Attorneys for City Gas Company
of Florida

conduct an investigation of legal matters involving Mr. Langer and to communicate its assessment to the senior NUI management and the Audit Committee in order to render legal advice concerning potential litigation, and for no other purpose. The report would not have been prepared but for the decision of the Audit Committee to conduct an investigation designed to assess and prepare for potential litigation with Mr. Langer.

5. Since the Pitney Hardin report was submitted to the Audit Committee, NUI has carefully guarded its confidentiality. Only the Company's legal counsel, the Chairman, the then Executive Vice President and the Director of Internal Audit and the Audit Committee within NUI who "need to know" have had access to the document.

FURTHER AFFIANT SAYETH NAUGHT.

Mary Patricia Kuge

Sworn to and subscribed before
me this 11th day of October, 1996.

Sandra D. Downing
SIGNATURE OF NOTARY PUBLIC

PRINTED NAME OF NOTARY PUBLIC
SANDRA D. DOWNING
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 9, 1997

Personally Known _____ or Produced Identification _____
Type of Identification Produced _____



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Staff's Motion to Compel has been furnished by hand delivery (*) or U.S. Mail to the following parties of record, this 10th day of October, 1996:

*Vicki Johnson
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850



Joseph A. McGlothlin