

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase by City Gas Company of Florida.) DOCKET NO. 960502-GU
) FILED: OCTOBER 16, 1996

STAFF'S MOTION FOR IN CAMERA INSPECTION OF DOCUMENTS

The staff of the Florida Public Service Commission by and through its undersigned counsel, pursuant to Rule 25-22.037(2), Florida Administrative Code, hereby requests that the Prehearing Officer conduct an in camera inspection of all documents withheld by City Gas Company of Florida (City Gas or Company) relating to Staff's Second Request for Production of Documents to City Gas Company of Florida (No. 15). City Gas, to date, has refused to produce this material based on its claim of attorney/client privilege and work product privilege.

A. BACKGROUND

1. On August 9, 1996, the staff of the Florida Public Service Commission served City Gas with Staff's Second Request for Production of Documents to City Gas Company of Florida (No. 15).

- ACK _____
- AFA 2 _____
- APP _____
- CAF _____
- CMU _____
- CTR _____

Staff requested a copy of the investigative report prepared by Pitney, Hardin, Kipp, and Szuch concerning the relationship between Jack Langer and Edgar Ball.

2. On September 15, 1996, City Gas 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

- EAG _____
- LEG 1 _____
- LIN 5 _____
- OPC _____
- RCH _____
- SEC 1 _____
- WAS _____
- OTH _____

DOCUMENT NUMBER-DATE
11056 OCT 16 96
FPSC-RECORDS/REPORTING

report because it asserts the report is protected by attorney/client privilege and work product privilege. The Company stated that "Pitney, Hardin, Kipp and Szuch is a law firm that was retained by NUI to provide legal counsel regarding matters related to Jack Langer."

3. Edgar Ball is an officer of Medley Construction, Inc. (Medley). Medley received a contract from City Gas to perform construction services.

4. Jack Langer is a former officer of City Gas. Mr. Langer also had a personal business relationship with Edgar Ball.

5. This proceeding involves City Gas' request for an increase in its rates. The Company's requested revenue requirement includes an approximately \$9 million increase in the Company's rate base. The increase in rate base includes the Company's \$4.6 million investment in infrastructure to serve its franchise in the City of Port St. Lucie.

6. Pursuant to Section 366.06, Florida Statutes, in fixing fair, just and reasonable rates, the Commission shall investigate and determine the actual legitimate costs of property of the utility.

7. 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.

8. On October 3, 1996, staff filed a Motion to Compel Discovery seeking an Order from the Commission compelling City Gas

to produce the documents requested in Staff's Second Request for Production of Documents (No. 15).

9. On October 10, 1996, City Gas filed a Response to Staff's Motion to Compel and Motion for Protective Order. As Attachment A to the response, City Gas included an affidavit of Mary Patricia Keefe, Senior Vice President and General Counsel of Elizabethtown Gas Company, an operating division of NUI. In its Response, City Gas stated that staff's motion should be denied and the Commission should enter a protective order determining the subject document should be absolutely protected from discovery.

10. Staff, therefore, asks that the Prehearing Officer conduct an in camera inspection of the documents in order to determine if the documents are, in fact, privileged documents.

**B. CITY GAS' ASSERTION OF ATTORNEY/CLIENT
PRIVILEGE IS WITHOUT SUPPORT**

11. City Gas asserts that the Pitney, Hardin report meets all of the criteria governing application of the attorney/client privilege to a corporation. These criteria, which were set forth in Southern Bell Telephone & Telegraph Co. v. Deason, 632 So.2d 1377 (Fla. 1994), are as follows:

- (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.

12. City Gas asserts that it engaged Pitney, Hardin to provide the investigative report because prior to Jack Langer's departure from City Gas, "the relationship between Mr. Langer and NUI senior management had become increasingly strained. NUI anticipated that the falling out between Mr. Langer and the Company could possibly lead to litigation." The Company further states, "based upon certain activities of Mr. Langer while he was President of City Gas, NUI also believed that it might have legal grounds on which to assert causes of action against Mr. Langer or with which to defend actions brought by Mr. Langer."

13. The burden of establishing attorney/client privilege rests on the party which claims it. Deason 632 So.2d at 1383. The party resisting discovery must "show necessity by a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." Consolidated Gas Supply Corp. 17 F.E.R.C. ¶ 63,048, at 65,239 (Dec. 2, 1981). City Gas has not provided the details of Mr. Langer's activities which gave the Company reason to believe that litigation was threatened. Rather, City Gas has only made a blanket statement that legal action by Mr. Langer was possible. The facts contained in City Gas' motion are

insufficient to support its claim that the subject document is protected by attorney/client privilege.

14. City Gas states that staff contests only the first criteria of the Deason test relating to whether the investigative report would not have been prepared but for the contemplation of legal services. While staff did in fact only reference the first criteria in its motion, this is of no import. As discussed above, it is not staff's responsibility to show that the Pitney, Hardin report is not privileged.

15. City Gas asserts that staff's motion suggests that the Pitney, Hardin report may have been prepared for a "business purpose." According to City Gas, staff's view is speculative and is refuted by the affidavit of Ms. Keefe. According to Ms. Keefe, the document was prepared by Pitney, Hardin at the direction of the Audit Committee of NUI concerning potential bases for legal actions and/or defenses against Jack Langer in the event of litigation between Mr. Langer and NUI.

16. Despite Ms. Keefe's affidavit, staff believes that City Gas had an independent business purpose in directing the preparation of the investigative report. As a public utility regulated pursuant to Chapter 366, Florida Statutes, the management of City Gas has an obligation ensure that the costs of providing service are honestly and prudently incurred. On its face, a personal business relationship between a utility executive and a officer in a firm holding utility construction contracts is a matter which requires heightened scrutiny.

In the instant case, prior to 1994, Medley was City Gas' exclusive contractor for the Company's Brevard division. In City Gas' last rate case, the Commission ordered the Company to competitively bid these contracts. (Order No. PSC-94-1570-FOF-GU, issued December 19, 1994, in Docket No. 940276) Apart from any threat of litigation or desire to pursue a legal remedy, in this type of circumstance, a regulated utility should (and did in this case) investigate to determine that the facilities the ratepayers are being asked to pay for are worth what the company paid.

17. Where a document is created for a business purpose, as well as a legal purpose, that document is not protected by either the attorney/client privilege or the work product doctrine. First Chicago International v. United Exchange Co. Ltd., 125 F.R.D. 55 (S.D.N.Y. 1989), Soeder v. General Dynamics Corporation, 90 F.R.D. 253 (D.Nev. 1980). Staff submits that is clearly the case with this report, prepared at the direction of the Audit Committee.

**C. CITY GAS'S ASSERTION OF WORK PRODUCT
IS NOT SUPPORTED**

18. As discussed in Deason, there are two types of 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. Opinion work product is absolutely protected from disclosure. Fact work product, however, may be disclosed if there is a showing of "need" and "undue hardship." Deason, 632 So.2d at 1384

19. City Gas contends that the Pitney, Hardin report contains both types of work product.

20. Staff does not seek information pertaining to City Gas' attorneys' mental impressions, conclusions, litigation strategies, legal theories, or litigation files. Staff only seeks through its requests to obtain factual information solely within the control of City Gas and relevant to this case.

21. As discussed above, staff believes that the investigative report was prepared, in part, for a business purpose. Documents which have been prepared for business purposes are exempted from work product immunity. United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982), Consolidated Gas Supply Corp. 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981); and Black Marlin Pipeline Co., 9 F.E.R.C. ¶ 63,015 (Oct. 18, 1979).

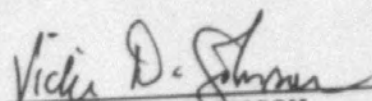
22. In its response, City Gas concedes that staff has a need to verify that the payments City Gas has made to Medley are appropriate. The Company argues, however, that staff has not shown it would create an undue hardship if staff was unable to review the subject report. City Gas states that staff could complete its inquiry of the payments in any number of ways. While it is true that staff has the authority and ability to audit City Gas' books and records, staff believes the report may contain information provided to City Gas by its vendors. Staff cannot obtain the substantial equivalent of that information, therefore, to the extent the subject report contains such information, those portions of the report are clearly discoverable.

D. CONCLUSION

It is not staff's intent to compel City Gas to disclose material which is legitimately protected by attorney/client privilege and work product privilege. Whether either privilege should attach to a document, however, requires a legal and factual determination. Thus, when a privilege is claimed, the court should review the withheld discovery documents in camera to determine if the privilege claimed is valid. Austin v. Barnett Bank of South Florida, N.A., 472 So. 2d 830 (4th DCA 1985); Boca Raton Hotel and Club v. Dunn, 15 F.L.W. d1742 (4th DCA July 13, 1990).

WHEREFORE, staff respectfully requests that the Prehearing Officer compel City Gas Company of Florida to produce the document responsive to Staff's Second Request for Production of Documents (No. 15), and conduct an in camera review of all documents withheld based on a claim of privilege in order to determine whether the claim is valid.

Respectfully submitted,


VICKI D. JOHNSON
Staff Attorney

Florida Public Service Commission
2540 Shumard Oak Boulevard, Suite 370
Tallahassee, Florida 32399
(904) 413-6199

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

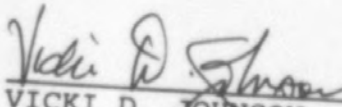
In Re: Application for rate increase by City Gas Company of Florida.) DOCKET NO. 960502-GU
) FILED: OCTOBER 16, 1996

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one true and correct copy of Staff's Request for In Camera Inspection of Documents has been furnished by U. S. Mail to Mr. Joseph McGlothlin, McWhirter Reeves McGlothlin Davidson Rief and Bakas, 117 South Gadsden Street, Tallahassee, Florida 32301, on behalf of City Gas Company of Florida and that one true and correct copy has been furnished by U. S. Mail this 16th day of October, 1996, to the following:

City Gas Company of Florida
Michael A. Palecki, Esquire
V. P. of Regulatory Affairs
955 East 25th Street
Hialeah, FL 33013

Office of Public Counsel
H. F. Mann, Esquire
111 West Madison Street
Room 812
Tallahassee, FL 32399


VICKI D. JOHNSON
Staff Counsel

Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(904) 413-6199