

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and purchased power cost recovery clause and generating performance incentive factor.

DOCKET NO. 990001-EI
FILED: AUGUST 4, 1999

STAFF'S RESPONSE TO MOTION FOR PROTECTIVE ORDER, REQUEST FOR IN CAMERA INSPECTION, AND MOTION TO COMPEL DISCOVERY

The staff of the Florida Public Service Commission, by and through its undersigned counsel, pursuant to Rule 28-106.206, Florida Statutes, hereby (1) responds to Tampa Electric Company's ("TECO" or "the company") Motion for Protective Order concerning Staff's Second Set of Interrogatories (Nos. 21-34) and Staff's First Request for Production of Documents (Nos. 1-4); (2) requests that the Prehearing Officer conduct an in camera review of all documents withheld by TECO relating to Staff's Document Request No. 1; and (3) moves the Prehearing Officer to compel TECO to provide all documents or portions thereof withheld by TECO relating to Staff's Document Request No. 1, to the extent that those documents or portions thereof are not protected as privileged information or constitute discoverable fact work product.

BACKGROUND

1. On July 13, 1999, the staff of the Florida Public Service Commission served TECO with Staff's Second Set of Interrogatories (Nos. 21-34) and Staff's First Request for Production of Documents

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DOCUMENT NUMBER-DATE

09251 AUG-4 99

FPSC-RECORDS/REPORTING

(Nos. 1-4).¹ In Staff's Document Request No. 1, staff requested that TECO "provide all investigative documents or reports produced by or for TECO concerning the cause(s) of the explosion which occurred at Gannon Unit 6 on April 8, 1999."

2. On July 28, 1999, TECO filed its Objections, Motion for Protective Order, and Written Response to Staff's Second Set of Interrogatories (Nos. 21-34) and Staff's First Request for Production of Documents (Nos. 1-4) ("Motion for Protective Order"). With regard to Staff's Document Request No. 1, TECO identified one responsive document, an internal investigative report. TECO declined to provide the report based on its assertion that the report "was prepared by and under the direction and supervision of TECO's legal counsel" and, therefore, is protected under the attorney-client privilege.²

¹Staff's Second Set of Interrogatories (Nos. 21-34) was incorrectly titled "Staff's First Set of Interrogatories (Nos. 21-34)" when it was served upon TECO. Thus, TECO's Motion for Protective Order refers to these interrogatories as Staff's First Set of Interrogatories (Nos. 21-34). To avoid confusion, this pleading refers to the subject interrogatories as Staff's Second Set of Interrogatories (Nos. 21-34), as they should have been titled.

²Additionally, in its Motion for Protective Order, TECO objected to Staff Interrogatory No. 28 and Staff Document Requests Nos. 3 and 4. Staff is currently working with TECO to resolve these objections informally, to avoid the time and expense of unnecessary litigation before the Commission.

3. In this proceeding, the Commission will be asked to approve fuel and capacity cost recovery factors and generating performance incentive factors for each of Florida's investor-owned electric utilities, including TECO. In setting these factors, the Commission must consider whether the costs for which recovery is sought were prudently incurred. Section 366.06, Florida Statutes.

4. Staff needs the investigative report identified in TECO's Motion for Protective Order to assist the Commission in its determination of whether fuel and capacity costs incurred as a result of the explosion at Gannon Unit 6 on April 8, 1999, were prudently incurred.

5. The investigative report identified by TECO is relevant to this proceeding and falls within the scope of discovery for this docket.

RESPONSE TO MOTION FOR PROTECTIVE ORDER

6. As the party claiming attorney-client privilege, TECO has the burden of establishing that privilege. Southern Bell Telephone & Telegraph Company v. Deason, 632 So. 2d 1377, 1838 (Fla. 1994). Further, pursuant to Rule 1.280(b)(5), Florida Rules of Civil Procedure, a party withholding information otherwise discoverable by claiming that it is privileged or otherwise protected as trial preparation material must "describe the nature of the documents,

communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection."

7. In Deason, the Florida Supreme Court set forth the criteria governing application of the attorney-client privilege to a corporation's communications 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.

7. In its Motion for Protective Order, TECO asserts that the investigative report is protected under the attorney-client privilege because it "was prepared by and under the direction and supervision of Tampa Electric's legal counsel"

8. Staff submits that TECO has not pled sufficient facts to meet its burden of establishing attorney-client privilege for the investigative report or to enable staff to assess the applicability of the privilege to the report. Further, it is not clear from TECO's Motion for Protective Order whether the report is based entirely on privileged attorney-client communications or whether it is comprised, in whole or in part, of fact work product which may be made subject to discovery upon a showing of "need" and "undue hardship." Deason, at 1384.

REQUEST FOR IN CAMERA INSPECTION

9. It is not staff's intent to compel TECO to disclose material legitimately protected by attorney-client privilege or, if applicable, work product privilege. Whether either privilege applies to a particular document, however, requires a legal and factual determination. Thus, when a privilege is claimed, the tribunal 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 (Fla. 4th DCA 1985); Boca Raton Hotel and Club v. Dunn, 563 So. 2d 218 (Fla. 4th DCA 1990).

10. Staff submits that in this case, where TECO has not pled sufficient facts to establish that the investigative report is

protected by the attorney-client privilege, an in camera review of the report is particularly appropriate.

11. Accordingly, staff requests that the Prehearing Officer in this docket conduct an in camera review of the investigative report identified by TECO to determine whether the entire report or any portion thereof is protected as privileged material.

MOTION TO COMPEL DISCOVERY

12. If the Prehearing Officer determines upon review that the entire report or any portion thereof is not protected under the attorney-client privilege, staff moves the Prehearing Officer, pursuant to Rule 1.380, Florida Rules of Civil Procedure, to issue an order compelling TECO to produce those portions of the report.

13. Rule 1.280(b)(3), Florida Rules of Civil Procedure, provides that trial preparation materials, i.e., work product, relevant to the subject matter of a proceeding may be obtained through discovery "upon a showing that the party seeking discovery has need of the materials in preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." This provision is limited to discovery of fact work product. It does not provide for discovery of opinion work product, which includes mental impressions, conclusions,

opinions, or legal theories of an attorney or party representative.
See, Rule 1.280(b)(3), Fla.R.Civ.Pro.; Deason, at 1384.

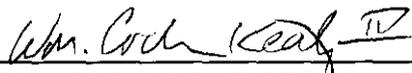
14. To the extent the investigative report contains fact work product, staff submits that it needs these materials to prepare this case, i.e., to advise the Commission on the issue of cost prudence, and will be unable to obtain the substantial equivalent of the materials by other means without undue hardship. Staff anticipates that this report will contain the best information available concerning the explosion at Gannon Unit 6. Obtaining a substantial equivalent of this information would be so difficult and consume so much of the Commission's resources that it would create an undue hardship.

15. Staff does not seek information pertaining to the mental impressions, conclusions, opinions, or legal theories of TECO's attorneys. Staff only seeks factual information solely within TECO's control and relevant to this case.

16. Staff moves the Prehearing Officer, pursuant to Rule 1.380, Florida Rules of Civil Procedure, to compel TECO to produce all portions of the investigative report that, upon in camera review, the Prehearing Officer determines to be discoverable fact work product under Rule 1.280(b)(3), Florida Rules of Civil Procedure.

17. Pursuant to Rule 28-106.204, Florida Administrative Code, staff has conferred with counsel for TECO to determine whether TECO is opposed to staff's request for in camera review and motion to compel discovery. TECO's counsel informed staff that TECO will file a response it deems appropriate.

WHEREFORE, staff respectfully requests that the Prehearing Officer (1) conduct an in camera review of the internal investigative report responsive to Staff Document Request No. 1 for which Tampa Electric Company claims attorney-client privilege and (2) compel Tampa Electric Company to produce the entire report or any portion thereof to which no valid claim of attorney-client privilege applies or which constitutes discoverable fact work product.


WM. COCHRAN KEATING, IV
Staff Counsel
Florida Bar No. 0064017

Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6199

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DOCKET NO. 990001-EI
FILED: JULY 13, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and fifteen copies of Staff's Response to Motion for Protective Order, Request for in Camera Inspection, and Motion to Compel Discovery have been filed with the Division of Records and Reporting, Florida Public Service Commission, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399; and that one true and correct copy of the foregoing has been furnished by U.S. Mail to the following this 4th day of August, 1999:

Ausley & McMullen
James Beasley
Post Office Box 391
Tallahassee, FL 32302

Office of Public Counsel
John Roger Howe
111 West Madison Street
Room 812
Tallahassee, FL 32399

Beggs & Lane
Jeffrey Stone
P.O. Box 12950
Pensacola, FL 32576

Florida Power & Light Company
Bill Walker
215 S. Monroe Street, Suite 810
Tallahassee, FL 32301

Florida Public Utilities Co.
John English
P.O. Box 3395
W. Palm Beach, FL 33402

FIPUG
McWhirter Reeves McGlothlin
John W. McWhirter, Jr.
P.O. Box 3350
Tampa, FL 33601

Gulf Power Company
Susan Ritenour
One Energy Place
Pensacola, FL 32520

FL Industrial Power Users Group
McWhirter Reeves McGlothlin
Vicki Gordon Kaufman
117 South Gadsden Street
Tallahassee, FL 32301

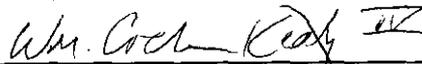
Certificate of Service
Docket No. 990001-EI

Messer Caparello & Self
Norman Horton
P.O. Box 1876
Tallahassee, FL 32302

Tampa Electric Company
Angela Llewellyn
Regulatory & Business
Strategy
P.O. Box 111
Tampa, FL 33601

Steel Hector & Davis
Matthew M. Childs
215 S. Monroe Street, Suite 601
Tallahassee, FL 32301

Florida Power Corporation
James McGee
P.O. Box 14042
St. Petersburg, FL 33733



WM. COCHRAN KEATING, IV
Staff Counsel
Florida Bar No. 0064017

Florida Public Service Commission
Gerald L. Gunter Building
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6199