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November 4, 2003

HAND DELIVERED

Ms. Blanca S. Bayo, Director
Division of Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Fuel and Purchased Power Cost Recovery Clause with Generating Performance
Incentive Factor; FPSC Docket No. 030001-EI

Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and ten (10) copies of Tampa Electric Company's Motion to Compel Discovery from the Florida Industrial Power Users Group.

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

Thank you for your assistance in connection with this matter.

Sincerely,


Lee L. Willis

LLW/pp
Enclosures

APPROVAL NUMBER - DATE

10989 NOV-4 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Fuel and Purchased Power Cost Recovery)
Clause with Generating Performance Incentive) DOCKET NO. 030001-EI
Factor.) FILED: November 4, 2003
_____)

**TAMPA ELECTRIC COMPANY'S MOTION TO COMPEL
DISCOVERY FROM THE FLORIDA INDUSTRIAL POWER USERS GROUP**

Tampa Electric Company ("Tampa Electric" or "the company"), pursuant to Rule 28-106.204, Florida Administrative Code, files this Motion to Compel the Florida Industrial Power Users Group ("FIPUG") to provide Tampa Electric with a document produced by a FIPUG witness and entered into evidence as part of the witness's deposition. Subsequently, while the attorneys for Tampa Electric were out of the room during a recess, counsel for FIPUG took the document from the court reporter and refused to return it. As grounds therefore, Tampa Electric says:

1. On October 30, 2003, pursuant to a Notice of Deposition Duces Tecum (the "Deposition Notice"), Tampa Electric took the deposition of Sheree Brown, a proposed witness for FIPUG in this proceeding. FIPUG has prefiled prepared direct testimony of Ms. Brown addressing issues relating to Tampa Electric's shutdown of its Gannon Units.

2. The Deposition Notice asked Ms. Brown to produce at her deposition all documents she used in the preparation of her testimony, all documents referred to in her testimony and all mathematical calculations that form the basis for her testimony or numbers used in her testimony.

3. At the October 30 deposition, Ms. Brown produced and tendered to Tampa Electric certain documents in response to the Deposition Notice. Prior to and during Ms.

Brown's deposition, Tampa Electric's counsel and representatives were provided the document at issue to review. Certain of the documents supplied by Ms. Brown were later entered into evidenced as deposition exhibits.

4. One such document, identified as Ms. Brown's Deposition Exhibit No. 3, was a 10-page document prepared by Ms. Brown. This document sets forth, among other things, her assessment of certain issues relating to the shutdown of Gannon Units, background information pertaining to matters specifically included in Ms. Brown's prepared direct testimony and Ms. Brown's evaluation and opinion of the merits of positions asserted by Tampa Electric. Exhibit No. 3 also includes her analysis of Ms. Jordan's rebuttal testimony and/or statements about errors in her own pre-filed testimony. The document is clearly designed to provide the basis for Ms. Brown's testimony during her deposition and during her cross-examination at the hearing. See Depo. of Sheree L. Brown, page 15, lines 15-24.

Legal Standards Pertaining to Work Product

5. Rule 1.280(b)(4), Florida Rules of Civil Procedure, sets forth the conditions upon which facts known and opinions held by an expert may be discovered. Rule 1.280(b)(4) divides experts into those who will testify at trial, 1.280(b)(4)(A), and those who, though retained in anticipation of litigation, will not testify at trial, 1.280(b)(4)(B). According to Rule 1.280(b)(4), the substance of the facts and opinions, (and the grounds for the opinions) to which an expert is expected to testify are necessarily discoverable, whereas the facts and opinions of non-testifying experts are discoverable only upon a showing of exceptional circumstances.

6. Here, it is undisputed that FIPUG plans to call Ms. Brown as an expert witness and that the materials sought to be produced were created by Ms. Brown herself in the preparation for her testimony. In such a circumstance, courts interpreting Rule 1.280, and its

federal counterpart, Rule 26, Federal Rules of Civil Procedure, have held that such materials cannot be considered work product and must be produced. Mims v. Casademont, 464 So.2d 643 (Fla. 3d DCA 1985) (materials prepared by an expert retained to testify are not protected by work product and must be produced); Peck v. Messina, 523 So.2d 1154 (2d DCA 1988) (same); Smith v. Gardy, 569 So.2d 504, 507 (4th DCA 1990) (same); Oil Refining, Inc. v. Consolidated Edison Co., 171 F.R.D. 57, 62 (S.D.N.Y. 1997) (documents generated by experts are not work product within the meaning of Rule 26(b)(3), Federal Rules of Civil Procedure); Beverage Marketing Corp. v. Ogilvy & Mather Direct Response, Inc., 563 F.Supp. 1013, 1014 (S.D.N.Y. 1983) (“The weight of the authority is to the effect that the work product rule does not apply to experts who are expected to testify.”); Quadrini v. Sikorsky Aircraft Div., United Aircraft Corp., 74 F.R.D. 594, 595 (D.Conn. 1977) (defendants were entitled to discover reports, memoranda, notes, studies, graphs, charts, analyses, summaries, data sheets, and statistical or informational accumulations of plaintiff’s experts). See also Fed.R.Civ.P. 26 Advisory Committee Note (rejecting decisions that have sought to bring expert information within the work product doctrine as “ill-considered”).

Waiver

7. Any privilege that might have existed with respect to Deposition Exhibit No. 3 has been waived by Ms. Brown’s voluntary disclosure of the exhibit to Tampa Electric.

8. Even if the information contained in Deposition Exhibit No. 3 might have been entitled to a work product privilege (which Tampa Electric disputes), Ms. Brown waived any claim of privilege by voluntarily disclosing the information in Deposition Exhibit No. 3 to Tampa Electric in response to the Deposition Notice.

9. Section 90.507, Florida Statutes, states that a privilege against the disclosure of certain information is waived if the information is voluntarily disclosed. Here, Ms. Brown voluntarily disclosed the information during her deposition testimony:

Q. Now, in your materials you brought with you today – can I look at these please? – are some additional documents and a written analysis of Ms. Jordan’s rebuttal testimony; is that correct?

A. Yes

Q. This is a document consisting of a number of pages. I’d like to take a short break to look at this for a second. It’s got a number of pages.

(Brief recess was taken.)

Q. I would like to ask that these ten pages be marked as Composite Exhibit No. 3, please.

Mr. McWhirter: I’m going to object to that document on the grounds that it’s attorney work product and it’s privileged.

(Exhibit No. 3 was marked for identification.)

Mr. McWhirter’s objection was evidentiary in nature, as counsel for Tampa Electric thereafter questioned Ms. Brown about the contents of Exhibit No. 3 without further objection. Indeed, it was only much later in the deposition and, after the court reporter had marked and attached Exhibit No. 3 to the deposition, that Mr. McWhirter physically removed Exhibit No. 3 from the court reporter’s possession.

10. Any privilege that may have existed with respect to Exhibit No. 3 was waived long before Mr. McWhirter physically removed the exhibit from the record. In Florida, “[i]t is black letter law that once the privilege is waived, and the horse is out of the barn, it cannot be reinvoked.” Hamilton v. Hamilton Steel Corp., 409 So.2d 1111, 1114 (Fla. 4th DCA 1982). Clearly, voluntarily disclosing the alleged privileged information prior to making an objection

waives the privilege. H.J.M. v. B.R.C., 603 So.2d 1331 (Fla. 1st DCA 1992) (petitioners waived the psychotherapist-patient privilege when they provided the information prior to first raising an objection).

11. Here, prior to and during Ms. Brown's deposition, Tampa Electric's counsel and representatives were allowed to review documents supplied by Ms. Brown. During her deposition, Ms. Brown acknowledged Exhibit No. 3 and its contents, and counsel for Tampa Electric was permitted to take a recess to review the contents of Exhibit No. 3. Thereafter, after one evidentiary objection, no further objection was made when Tampa Electric questioned Ms. Brown about Exhibit No. 3. Under these circumstances, it is clear that any privilege with respect to Exhibit No. 3 was waived, and FIPUG should not be permitted to reinvoke the privilege.

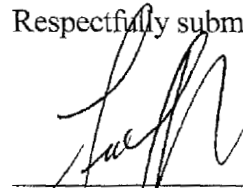
Relief Requested

12. It is clear that Ms. Brown's Deposition Exhibit No. 3 was prepared by her and directly relates to the subject matter of her testimony in this proceeding. Tampa Electric is entitled to the immediate return of Ms. Brown's Deposition Exhibit No. 3 in order to prepare for hearing. If there is any doubt about Tampa Electric's entitlement to this document, the hearing officer shall conduct an in camera inspection of the document.

WHEREFORE, Tampa Electric moves the Commission for entry of an order requiring FIPUG to immediately return to Tampa Electric Ms. Brown's Deposition Exhibit No. 3, so that it may be included with the transcript of that deposition and made use of by Tampa Electric in preparing for hearing.

DATED this 4th day of November 2003.

Respectfully submitted,



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ATTORNEYS FOR TAMPA ELECTRIC COMPANY

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Request for Confidential Classification has been furnished by U. S. Mail or hand delivery (*) on this 4th day of November 2003 to the following:

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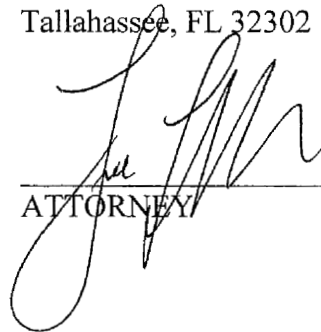
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A handwritten signature in black ink, appearing to read "John T. LaVia, III", is written over a horizontal line. The signature is stylized and cursive.

ATTORNEY

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