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November 7, 2003

**VIA HAND DELIVERY**

Blanca S. Bayo, Director  
Division of Records and Reporting  
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Re: Docket No.: 030001-EI

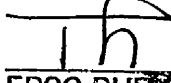
Dear Ms. Bayo:

On behalf of the Florida Industrial Power Users Group (FIPUG), enclosed for filing and distribution are the original and 15 copies of the following:

- ▶ The Florida Industrial Power Users Group's Response in Opposition to Tampa Electric Company's Motion to Compel Discovery.

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

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FPSC-BUREAU OF RECORDS

Sincerely,



Timothy J. Perry

VGK/bae  
Enclosure

AUS \_\_\_\_\_  
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DOCUMENT NUMBER-DATE

McWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A. 11138 NOV-7 8

FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

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

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Docket No. 030001-EI  
Filed: November 7, 2003

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

The Florida Industrial Power Users Group (FIPUG), pursuant to rule 28-106.204, Florida Administrative Code, files its response in opposition to Tampa Electric Company's (TECo) Motion to Compel Discovery filed November 4, 2003. TECo's motion seeks the disclosure of a document clearly protected by the work product privilege and exempt from discovery pursuant to rule 1.280(b)(3), Florida Rules of Civil Procedure. TECo's motion must be denied. In support thereof, FIPUG states:

**Introduction**

1. On October 30, 2003, pursuant to the Notice of Deposition Duces Tecum ("Deposition Notice"), TECo deposed FIPUG witness, Sheree L. Brown. The Deposition Notice requested that Ms. Brown bring with her all documents that she used in the preparation of her testimony, all documents referred to in her testimony, and all mathematical calculations that formed the basis of her testimony or the numbers used in her testimony. Pursuant to the Notice, Ms. Brown brought with her two six cubic foot containers of documents. TECo counsel examined the papers and withdrew the document in dispute entitled "TECO Fuel Hearing, Preparation for Deposition and Cross, Motions to Strike." Counsel for FIPUG stated that it appeared that the document from its title might constitute privileged attorney work product. Counsel for TECo responded that the privilege did not run to such documents in the possession of an expert and proceeded to examine the document.

DOCUMENT NUMBER-DATE

11138 NOV-7 8

FPSC-COMMISSION CLERK

2. During the deposition, TECo's attorney asked the court reporter to mark the disputed item as Exhibit 3 to the deposition. At the time the request was made, FIPUG's counsel objected to the admission of the document on the grounds that it contained attorney work product and is privileged. Counsel for FIPUG said: "I'm going to object to that document on the grounds that it's attorney work product and is privileged."<sup>1</sup> Prior to the deposition's conclusion, FIPUG's counsel took custody of the document marked Exhibit 3 to prevent its disclosure. Further, counsel for FIPUG explained that the document was prepared from notes taken in Ms. Brown's discussions with FIPUG's counsel, Ms. Kaufman, and that the document contained privileged, work product information.<sup>2</sup>

3. On November 4, 2003, TECo filed its Motion to Compel FIPUG to produce the privileged document. TECo raises two claims in its quest for the privileged document. First, TECo alleges that the document is not trial preparation material containing the mental impressions and theories of counsel and other party representatives. Second, TECo claims that even if the materials sought are privileged, the privilege has been waived. Both these arguments are without merit.

**The Document is Work Product and is Absolutely Privileged**

4. TECo claims that Ms. Brown's preparation for deposition and hearing, *based upon and prepared in consultation with FIPUG attorneys*, is not protected work product.<sup>3</sup> TECo's position is at odds with the law and important public policy which clearly protects such materials.

5. Pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure, materials prepared

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<sup>1</sup> See Attachment A, Excerpts of the Deposition of Sheree L. Brown, page 16, lines 6-8.

<sup>2</sup> Attachment A, page 42, line 18- page 43, l. 4; page 44, l. 13-15.

<sup>3</sup> The document TECo inappropriately seeks is titled "TECO Fuel Hearing, Preparation for Deposition and Cross, Motions to Strike."

in anticipation of litigation, by or for a party or its representative are absolutely protected from discovery. The rule provides that when discovery of particular materials is allowed, “*the court shall protect against* disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation.” *Id.*, emphasis added. As explained in *Southern Bell Telephone and Telegraph Company v. Deason*, 632 So.2d 1377, 1384 (Fla. 1994), such work product is generally protected from disclosure:

Opinion work product consists primarily of the attorney's mental impressions, conclusions, opinions, and theories. . . . opinion work product generally remains protected from disclosure..

6. The privileged document contains the mental impressions, conclusions, opinions, theories and trial strategy of FIPUG’s attorney prepared for litigation of this case. Therefore, the document is exempt from disclosure pursuant to Rule 1.280(b)(3). The fact that the document was transcribed by Ms. Brown from her handwritten notes of a telephone conversation with FIPUG counsel, and was in Ms. Brown’s possession does not change the privileged nature of the document. *See, Deason*, 632 So.2d at 1386 (Southern Bell was allowed to redact any notes, thoughts, or impressions of its counsel from documents created by Southern Bell prior to production of the documents); *Panzer v. Johnson*, 384 So.2d 58, 59 (Fla. 4th DCA 1980)(the trial court was required to protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney concerning the litigation contained in an expert witness’s trial preparation materials); *Krisa v. The Equitable Life Insurance Policy*, 196 F.R.D. 254, 260 (M.D. PA 2000)(notes of a telephone conversation between an expert witness and attorney that encompassed attorney’s mental impressions was not subject to discovery); *Moore v. R.J. Reynolds Tobacco Company*, 194 F.R.D. 659 (S.D. IA 2000)(attorney opinion work product is to be protected against disclosure even when it has been shared with an expert witness in preparation for testifying at trial).

### **There Was No Waiver of the Work Product Privilege**

7. In its second argument, based on waiver, TECo appears to admit that the document is privileged. It then argues that any such privilege has been waived because TECo was inadvertently allowed to briefly inspect the privileged document. The privileged document was in a box containing a large volume of documents, most of which were responsive to TECo's Deposition Notice request. However, the privileged document was outside the scope of TECo's Deposition Notice. It was not used in the preparation of Ms. Brown's testimony, it was not referred to in her testimony, and it did not contain any mathematical calculations that form the basis of her testimony or the numbers used in her testimony. Thus, the privileged document should not have been included among the responsive documents brought to the deposition and its brief, inadvertent disclosure when TECo counsel reviewed the large boxes of responsive documents does not result in waiver of the privilege.

8. Under Florida law, courts have determined that an inadvertent disclosure of a privileged document does not constitute a waiver of the privilege when several factors are weighed. *See, General Motors Corporation v. McGee*, 837 So.2d 1010, 1040 (Fla. 4th DCA 2002) *rev. denied* 851 So.2d 728 (Fla. 2003); *Abamar Housing and Development, Inc. v. Lisa Daly Lady Decor, Inc.*, 698 So.2d 276, 279 (Fla. 3d DCA 1997) *rev. denied* 704 So.2d 520 (Fla. 1997). Based on the above case law, there has been no waiver of the work product privilege in the circumstances described herein.

9. The circumstances in this case do not rise to the level of a waiver because any disclosure was only brief and inadvertent. Importantly, FIPUG immediately rectified the brief, inadvertent disclosure by objecting to the admission of the exhibit both at the time it was identified and again at the conclusion of the deposition. Counsel for FIPUG retained the documents for safekeeping and to any prevent further disclosure of the document. Finally, the

overriding interests of justice require that this document, containing the mental impressions and opinions of counsel, be protected. To do otherwise, would contravene important public policy goals governing trial preparation and strategy embodied in Rule 1.280(3)(b) which explicitly protects against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or its representative.

**WHEREFORE**, the Commission TECo's motion should be denied.



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<p style="text-align: right;">Page 15</p> <p>1 changed to reflect the first number shown on line 12, 2 page 19? 3 A. Yes. 4 Q. Any other changes to your testimony? 5 A. Well, as I said, this is something I haven't gone 6 all the way through with legal counsel yet, but I have 7 prepared a modified table to replace the table on 26 to 8 reflect the change we just discussed. 9 Q. Do you have that table with you? 10 A. Yes. 11 MR. HART: Thank you. I'd like to have this table 12 marked as Exhibit No. 2, please. 13 (Exhibit No. 2 was marked for identification.) 14 BY MR. HART: 15 Q. Any other changes that you're aware of? 16 A. Not at this time. 17 Q. Are there any other substantive changes that you're 18 considering making? 19 A. Not at this time. 20 Q. Now, in your materials you brought with you 21 today - can I look at these, please? - are some additional 22 documents and a written analysis of Ms. Jordan's rebuttal 23 testimony, is that correct? 24 A. Yes. 25 Q. This is a document consisting of a number of pages.</p>	<p style="text-align: right;">Page 17</p> <p>1 in subsidies of certain subsidiaries"; is that correct? 2 A. No, I didn't say "certain." 3 Q. Okay. You said "those"; is that - 4 A. Yes, I did. 5 Q. That's the change? 6 In any case, you've stated affirmatively, haven't 7 you, that there have been subsidies from Tampa Electric to 8 other subsidiaries of TECO Energy, is that correct? 9 A. Yes. 10 Q. Can you tell me what subsidiaries have been 11 subsidized and in what amounts? 12 A. I believe that there has been a subsidy of TECO 13 Energy, then going to TPS, if you would, as a result of the 14 gain on the sale of HPP. And also I believe that there has 15 been a subsidy related to the acquisition of the turbine 16 rights that were then subsequently canceled. 17 Q. Are those the two subsidies that you're talking 18 about? 19 A. Those are the two contractual relationships that I 20 believe resulted in subsidies. I believe there are other 21 subsidies that are just created by the transfer of funds from 22 Tampa Electric earnings. 23 Q. Did you identify any of those in your testimony? 24 A. Specifically, no. 25 Q. So that's just a general statement by you, your</p>
<p style="text-align: right;">Page 16</p> <p>1 MR. HART: I'd like to take a short break to look 2 at this for a second. It's got a number of pages. 3 (Brief recess was taken.) 4 MR. HART: I would like to ask that these ten pages 5 be marked as Composite Exhibit No. 3, please. 6 MR. McWHIRTER: I'm going to object to that 7 document on the grounds that it's attorney work product 8 and it's privileged. 9 (Exhibit No. 3 was marked for identification.) 10 MR. HART: The last document, Exhibit No. 3, that 11 we just identified, I think we need to have that put 12 under seal at this point. It contains a lot of 13 information that's confidential. 14 THE REPORTER: Yes, sir. 15 MS. RODAN: This is Jennifer Rodan. What is 16 Exhibit 3? 17 MR. HART: It is an analysis by Ms. Brown of 18 Ms. Jordan's rebuttal testimony. 19 MS. RODAN: Can you say that again? 20 MR. HART: It's an analysis by Ms. Brown of 21 Ms. Jordan's rebuttal testimony. 22 BY MR. HART: 23 Q. Ms. Brown, on page 2 of your testimony, you make 24 the statement that "Contractual relationships between Tampa 25 Electric and TECO Energy's other subsidiaries have resulted</p>	<p style="text-align: right;">Page 18</p> <p>1 testimony doesn't support or analyze or demonstrate what 2 those subsidies are, does it? 3 A. Which subsidies? 4 Q. The ones that you're referring to other than the 5 Hardy Power sales and the turbines that you just raised. 6 A. I discuss the fact that there is a free flow of 7 cash created and that it also creates incentives, but I do 8 not put numbers on it, no. 9 Q. Well, what I want to talk about is your testimony 10 on page 2, line 16 that refers to contractual relationships 11 between Tampa Electric and other subsidiaries of TECO Energy. 12 I mean, that's what the statement refers to, doesn't it? 13 A. Yes. 14 Q. Okay. Now, from Tampa Electric, what subsidies go 15 to what subsidiaries of TECO Energy that you're referring to 16 in that statement? 17 A. As I said before, it would be the acquisition of 18 the turbine rights, the rights to purchase the turbines, that 19 were then subsequently canceled, and also I believe that the 20 relationship with the Hardy Power Partners created the 21 opportunity to result in the sale which subsidized TECO 22 Energy, to use in whatever manner they want to use it. 23 Q. Do you think there was or there could have been a 24 subsidy from Tampa Electric to TECO Energy? 25 A. I believe there absolutely was in terms of the</p>

6 (Pages 15 to 18)

MICHAEL MUsETTA &amp; ASSOCIATES, INC (813) 221-3171

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1 felt like it was conservative compared to the purchased power  
 2 costs that were utilized, which I believe Mr. Smith discusses  
 3 that it was replaced with purchased power. Those costs were  
 4 all higher than five cents. And the Commission also had used  
 5 a number of about \$52.  
 6 Q. Is it your testimony that you believe based on the  
 7 information you used that the price per kilowatt hour for gas  
 8 will be the same at different levels of generation?  
 9 A. No, that's not my testimony.  
 10 Q. Well, whether it's higher or lower, then, for  
 11 purposes of this discussion, you would agree that the number  
 12 that you've used is not the accurate number?  
 13 A. The accurate number could only be derived by  
 14 running a pro-moed or something like that to determine the  
 15 dispatch with and without Gannon. I had to use a proxy. I  
 16 chose to use a proxy of what the fuel costs were for Bayside.  
 17 Q. Do you know the megawatt hours that was used in  
 18 that calculation?  
 19 A. In the company's calculation of the 4.6 cents? Is  
 20 that the question?  
 21 Q. The company's - yes.  
 22 A. I do not have the summary with me; however, it  
 23 would be the sum of all of the kilowatt hours shown on  
 24 Schedule E4 for each month from January through December  
 25 of - Schedule E4 of Ms. Jordan's testimony.

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1 Q. Let me ask it another way. In your assumption in  
 2 your calculation, you assume that that price will stay the  
 3 same if Bayside 5 is not run; is that correct?  
 4 A. I'm not following you. Bayside 5 will not run?  
 5 Q. Excuse me. Bayside 2. Bayside 2 is not run.  
 6 Let's start over again. Are you trying to capture  
 7 the difference that results in fuel costs between coal and  
 8 gas and to compare the scenario that's actually occurring  
 9 with what you think would have been the costs if the units  
 10 had stayed there and been run longer?  
 11 A. Yes, I'm comparing the cost of replacing Gannon  
 12 generation with gas fire generation, using the Bayside cost  
 13 as a proxy for gas fire generation.  
 14 Q. And in these calculations, you're assuming that a  
 15 portion of the transportation costs can be avoided if  
 16 Bayside 2 is not run; is that correct?  
 17 A. I am assuming that it is very likely that when the  
 18 company doubles their gas requirements, they would also  
 19 change their transportation contract, and that in that  
 20 instance, that would make that a variable cost.  
 21 Q. Is the answer to my question you're assuming that  
 22 that portion of the transportation costs associated with the  
 23 gas used in Bayside 2 can be avoided if the Bayside Unit 2 is  
 24 not run; is that correct?  
 25 A. No, I didn't go in and assume anything related to

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1 Bayside 2 running or not running.  
 2 Q. Well, if Bayside 2 does not run and the  
 3 transportation costs cannot be avoided, then the cost of the  
 4 gas for Bayside 1 will be higher; will it not?  
 5 A. In that instance, I'm not even sure that you would  
 6 be replacing it with gas. You would probably be replacing it  
 7 with purchased power, which would have an even higher cost.  
 8 That's why I chose to use the lower cost.  
 9 Q. Do you have a calculation that shows the  
 10 conclusions you reached at the bottom of page 20 and the top  
 11 of page 21 on lines 19 through line 5 on 21 - excuse me,  
 12 line 3 on 21?  
 13 A. Yes, it was filed with my original testimony.  
 14 Q. Which calculation would that be?  
 15 A. If you look on Exhibit SLB-6, page 4 of 4.  
 16 MR. HART: Let's go off the record for just one  
 17 second.  
 18 (Discussion was held off the record.)  
 19 BY MR. HART:  
 20 Q. Ms. Brown, would you show me - for example, on  
 21 page 21 line 2, there's a number - the first number that's  
 22 there, show me where that is in your calculations.  
 23 A. It's the first row where it says "Total 1 through  
 24 4," the far right-hand number.  
 25 Q. On my copy, that seems to be the number that's on

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1 line 1 at the end, not the number that's on the beginning of  
 2 line 2.  
 3 A. Oh, I'm sorry. I misunderstood you. The beginning  
 4 of line 2 would be the third number over from where it says  
 5 "Total 1 to 4." That's the 2004 number, and the far right  
 6 number is the 2003 number.  
 7 Q. Okay.  
 8 MR. HART: Let's go off the record for just a  
 9 second.  
 10 (Brief recess was taken.)  
 11 MR. HART: I think that's all the questions we have  
 12 at this time.  
 13 MR. McWHIRTER: Staff have any questions?  
 14 MS. RODAN: No.  
 15 MR. VANDIVER: We have no questions.  
 16 MR. McWHIRTER: All right. FIPUG has no - I guess  
 17 you would call it cross-examination of the witness, our  
 18 own witness. We do, however, object to two documents  
 19 that have been marked as exhibits. Exhibit 1 is the  
 20 expert witness' personal notes taken in a discussion  
 21 with the attorney in preparation for the hearing, and  
 22 the second is her transcribed notes of a discussion with  
 23 Attorney Kaufman in Tallahassee concerning the use of a  
 24 deposition.  
 25 We think these items are attorney work product.



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1 The people came across them because Mrs. Brown brought  
 2 with her two large boxes of materials, and we allowed  
 3 the attorneys to go through those materials, and we  
 4 found work product in there.  
 5 Mr. Hart assures me that the law permits you to  
 6 invade attorney's work product, and I'll be pleased to  
 7 see his written position on that, because we may want to  
 8 use it ourselves in the future. But if he gives us that  
 9 information and adequately points out the law, we'll be  
 10 happy to furnish these two exhibits.  
 11 MR. HART: What do you mean "furnish these two  
 12 exhibits"? Have you taken them back?  
 13 MR. VANDIVER: I have not entered an appearance,  
 14 but I would like to have the court reporter get a  
 15 transcript to me at some point. The court reporter can  
 16 contact me off-line. My name is Robert Vandiver. And  
 17 she can give me a call at her convenience. I can be  
 18 reached at (850) 487-8258.  
 19 THE REPORTER: Thank you.  
 20 MR. VANDIVER: I'm attorney for the citizens of the  
 21 state of Florida. And my address is Room 812, 111 West  
 22 Madison Street, Tallahassee, Florida 32399-1400.  
 23 MR. HART: Johnny, I just object to you taking the  
 24 exhibits off the table that the court reporter has  
 25 already marked and attached to the deposition,

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1 especially when your characterization of it -- it wasn't  
 2 important until now -- is not correct.  
 3 That document -- that ten-page document includes  
 4 numerous analysis by your expert witness regarding her  
 5 testimony and what she intends to say and what she  
 6 intends to testify to and why, and that's not work  
 7 product. That's a testifying expert's analysis of the  
 8 other side's deposition and her own testimony.  
 9 MR. McWHIRTER: Under Section 90.705 of the  
 10 evidence code, you can inquire into the underlying facts  
 11 of an expert's testimony, but you cannot inquire into  
 12 the attorney's work product. Those were notes taken of  
 13 her discussion with Ms. Kaufman and notes taken in her  
 14 discussions with me with respect to the preparation of  
 15 this case.  
 16 Now, it may be that my understanding of the law is  
 17 incorrect, and if it is, we'll turn the documents over  
 18 to you, but we're not going to turn them over to you  
 19 pending either results from you telling us that they are  
 20 admissible or an order of the Commission.  
 21 MR. HART: But we don't have a fair  
 22 characterization of the documents. You're referring to  
 23 those as her notes on this ten-page typed paper. Those  
 24 aren't notes. That's a ten-page typed document. It's  
 25 not notes. It's a ten-page document that includes all

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1 kinds of analysis unrelated to any conversations.  
 2 MR. McWHIRTER: We can extract -- if that is the  
 3 case -- and I haven't looked at the document, other than  
 4 what she has told me it is. If it is underlying facts  
 5 that she's developed independently that she bases her  
 6 opinion on and don't arise as a result of trial  
 7 preparation with the attorney, we will let you have  
 8 those. But we won't let you have -- invade our trial  
 9 preparation activities, because that's work product and  
 10 privileged.  
 11 MR. HART: We have nothing else to add at this  
 12 point.  
 13 (Deposition concluded at 3:00 p.m.)  
 14  
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1 WITNESS' SIGNATURE PAGE

2  
 3  
 4  
 5 I have read the foregoing pages, and,  
 6 except for any changes or  
 7 amendments I have indicated on the  
 8 sheet attached for such purposes,  
 9 I hereby subscribe to the accuracy  
 10 of the transcript.  
 11  
 12  
 13  
 14 \_\_\_\_\_  
 15 SHEREE L. BROWN  
 16  
 17 \_\_\_\_\_  
 18 DATE  
 19  
 20 \_\_\_\_\_  
 21 WITNESS TO SIGNATURE  
 22  
 23  
 24  
 25

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Industrial Power Users Group's Response in Opposition to Tampa Electric Company's Motion to Compel Discovery has been furnished by (\*) hand delivery, or U.S. Mail this 7th day of November 2003, to the following:

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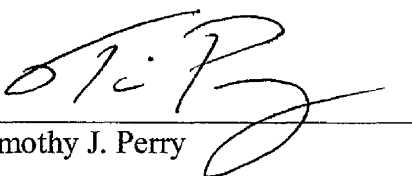
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