

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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

DOCKET NO. 030001-EI
ORDER NO. PSC-03-1288-PCO-EI
ISSUED: November 12, 2003

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

On November 4, 2003, Tampa Electric Company (Tampa Electric) filed a Motion to Compel Discovery from the Florida Industrial Power Users Group (FIPUG), requesting that the Prehearing Officer issue an order requiring FIPUG to immediately return Ms. Brown's Deposition Exhibit No. 3 to Tampa Electric so that it may be included with the transcript of that deposition and made use of by Tampa Electric in preparing for hearing. On November 7, 2003, FIPUG filed a response opposing Tampa Electric's Motion to Compel Discovery.

Rule 28-106.211, Florida Administrative Code, grants broad authority to "issue any orders necessary to effectuate discovery, to prevent delay, and to promote the just, speedy, and inexpensive determination of all aspects of the case" Based upon this authority, and having considered the Motion and Response, the rulings are set forth below.

Tampa Electric states that it took the deposition of FIPUG witness Sheree Brown on October 30, 2003. Tampa Electric further states that Ms. Brown produced and tendered to Tampa Electric certain documents in response to the Deposition Notice and certain of the documents were later entered into evidence as deposition exhibits. Tampa Electric asserts that prior to and during the deposition, its counsel and representatives were provided the document at issue to review. According to Tampa Electric, while 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. Tampa Electric states that Deposition Exhibit No. 3 was a 10-page document prepared by Ms. Brown which sets forth, among other things, her assessment of certain issues relating to the shutdown of Gannon Units, background information

DOCUMENT NUMBER-DATE

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pertaining to matters specifically included in her prepared direct testimony and her evaluation and opinion of the merits of positions asserted by Tampa Electric. Tampa Electric states that Exhibit No. 3 also includes Ms. Brown's analysis of Ms. Jordan's rebuttal testimony and/or statements about errors in her own prefiled testimony. Tampa Electric asserts that Exhibit No. 3 is clearly designed to provide the basis for Ms. Brown's testimony during her deposition and during her cross-examination at hearing.

Tampa Electric cites Rule 1.280(b)(4), Florida Rules of Civil Procedure, which provides that 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. Tampa Electric states that 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 of her testimony. According to Tampa Electric, courts interpreting Rule 1.280, Florida Rules of Civil Procedure, in such circumstances have held that such materials cannot be considered work product and must be produced.

Tampa Electric also cites to Section 90.507, Florida Statutes, to further assert that 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. Tampa Electric states that counsel for FIPUG made an objection to Exhibit No. 3 on the grounds that it is attorney work product and privileged. Tampa Electric asserts that the objection was evidentiary in nature, as counsel for Tampa Electric thereafter questioned Ms. Brown about the contents of Exhibit No. 3 without further objection. According to Tampa Electric, it was only much later in the deposition and, after the court reporter had marked and attached Exhibit No. 3 to the deposition, that counsel for FIPUG physically removed Exhibit No. 3 from the court reporter's possession. Tampa Electric asserts that any privilege that may have existed with respect to Exhibit No. 3 was waived long before counsel for FIPUG physically removed the exhibit from the record. Tampa Electric argues that 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. According to

Tampa Electric, it is entitled to the immediate return of Ms. Brown's Deposition Exhibit No. 3 in order to prepare for hearing.

FIPUG responds that it opposes Tampa Electric's Motion to Compel. FIPUG states that Tampa Electric'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. FIPUG asserts that it stated that the document in dispute, "TECO Fuel Hearing, Preparation for Deposition and Cross, Motions to Strike," appeared, from its title, to constitute privileged attorney work product. FIPUG states that Tampa Electric responded that the privilege did not run to such documents in the possession of an expert and proceeded to examine the document. According to FIPUG, at the time that Tampa Electric's attorney asked the court reporter to mark the disputed document as Exhibit No. 3 to the deposition, FIPUG's counsel objected to the admission of the document on the grounds that it contained attorney work product and is privileged. FIPUG states that prior to the deposition's conclusion, it took custody of the document marked Exhibit No. 3 to prevent its disclosure. FIPUG further states that it explained that the document was prepared from notes taken in Ms. Brown's discussions with FIPUG's counsel and that the document contained privileged work product information. FIPUG argues that since the document contains the mental impressions, conclusions, opinions, theories and trial strategy of FIPUG's attorney prepared for litigation in this case, it is exempt from disclosure pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure.

FIPUG asserts that the document was in a box containing a large volume of documents, most of which were responsive to Tampa Electric's Deposition Notice request; however, the document was outside the scope of Tampa Electric's Deposition Notice request. According to FIPUG, the document 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. FIPUG argues that the document should not have been included among the responsive documents brought to the deposition and its brief, inadvertent disclosure when Tampa Electric's counsel reviewed the large boxes of responsive documents does not result in waiver of the privilege. FIPUG asserts that the circumstances in this case

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do not rise to the level of a waiver because any disclosure was only brief and inadvertent.

Upon review of the pleadings and consideration of the arguments, Tampa Electric's Motion to Compel Discovery from FIPUG is denied. The disputed document is protected by the work product privilege and exempt from discovery pursuant to Rule 1.280(b)(3), Florida Rules of Civil Procedure. 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), quoting 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). In Abamar, the court identified a five-part test to determine whether production of a document is inadvertent:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosures; and (5) whether the overriding interests of justice would be served by relieving a party of its error

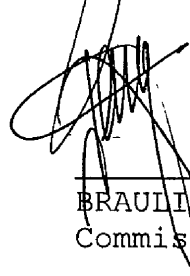
Based on the foregoing, there has been no waiver of the work product privilege.

It is therefore,

ORDERED by Commissioner Braulio L. Baez, as Prehearing Officer, that Tampa Electric's Motion to Compel Discovery from FIPUG is denied.

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By ORDER of Commissioner Braulio L. Baez, as Prehearing Officer, this 12th day of November, 2003.

 for Commissioner Braulio L. Baez

BRAULIO L. BAEZ
Commissioner and Prehearing Officer

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and

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Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.