

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of Tampa Electric Company's waterborne transportation contract with TECO Transport and associated benchmark)))))	Docket No. 031033-EI Filed May 21, 2004
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MOTION FOR PROTECTIVE ORDER

1. Consumer Federation of the Southeast, Inc. (CFSE), Walter Dartland in his capacity as Executive Director of Consumer Federation of the Southeast, Inc., and Walter Dartland in his individual capacity (Dartland), hereby move for a protective order as to all Notices of Deposition, Notices of Intent to Serve Subpoena directed to them, including the Notices filed May 12, 13, and 20, 2004, as well as the subpoenas served May 13 and 20, 2004.

I. Factual Basis for Protective Order

2. In the late evening hours of May 19, 2004, Dartland returned from traveling in Europe to discover that a subpoena directed to him in his capacity as Executive Director of CFSE had been delivered to his wife on May 13, 2004. The subpoena required him to appear at the offices of TECO's attorneys the following morning, May 20, 2004, with a variety of CFSE's records.

3. Dartland also found in his mail a letter dated May 13, 2004 from TECO's attorney

JMP _____ JOM _____ JTR _____ JCR _____ JCL _____ JPC _____ JMS _____	_____ (John Fons of Ausley McMullen) recognizing that he knew Dartland was traveling in Europe and would not return until the evening of May 19, 2004. This letter enclosed a "Notice of Intent to Serve Subpoena" pursuant to Rule 1.351, Fla. R. Civ. P. The subpoena attached to this letter was directed to CorpDirect, as registered agent for CFSE but was otherwise identical to the subpoena served on Dartland's wife.
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4. Dartland ascertained that both the subpoena attached to Fons' letter and the subpoena

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served on his wife had been filed with the Commission pursuant to Rule 1.351 and that the Residential Customers had objected to the proposed subpoena. No notice or subpoena directed to Dartland individually had been served.¹

5. On the morning of the proposed deposition (May 20, 2004), Dartland learned that despite the Residential Customers' objection and his absence from the United States, Ausley McMullen had communicated with the Residential Customers' attorney, Michael B. Twomey, and advised him that they intended to conduct the deposition at the noticed time as scheduled. Because Dartland had just returned from a lengthy overseas trip and had had no opportunity to review the papers, consult with an attorney, gather the requested documents, or even to recover from jet lag, Dartland called TECO's attorneys at the offices of Ausley McMullen at approximately 9:15 a.m. on May 20, 2004, and advised them that he would not appear for the deposition, but would be back in touch with them at a later time.

6. Later in the day on May 20, 2004, Dartland received a flurry of amended subpoenas and deposition notices seeking to reset the deposition for Monday May 24, 2004. The amended notices (and cover letters sent with them) appear to: (i) change the deposition from a notice of intent pursuant to Rule 1.351 to a standard notice of corporate deposition pursuant to Rule 1.310(b)(5); and (ii) clarify that Dartland's deposition is sought in his official capacity as executive director of CFSE.

7. In general, TECO seeks, through its subpoena duces tecum, a variety of records relating to financial contributions and communications between CFSE/Dartland and companies or

¹ On May 12, 2004, a notice of taking deposition of Walter Dartland in his individual capacity gave notice for May 17, 2004, but this notice was apparently withdrawn due to Dartland's absence from the United States and were replaced by the notices pursuant to Rule 1.351.

individuals with an interest in coal transportation costs. The documents sought may be roughly divided into the following categories:

- financial contributions to CFSE by certain named corporations, one of which is a party to this case (CSX Corporation) (Requests # 1, 2);
- payments to or from certain named individuals and corporations, including an attorney for a group of parties (Michael Twomey); an expert witness (Dr. Anatoly Hochstein), and other entities related to parties (Request #2);
- communications between CFSE or Dartland and various persons and companies, both parties and nonparties to the case, as well as their attorneys and certain affiliated parties (Requests #3 - #6);
- communications with a potential expert witness once consulted about certain aspects related to the case, but not being called as an expert witness in the case (Request #7 and #9);
- contracts and engagement letters between CFSE and Michael Twomey, an attorney for some of the parties, as well as with affiliated parties (Request #8, #10, #11, and #12);
- documents provided to and reviewed by an expert witness in the case (Requests #15 and #16).

II. Deposition Inconvenient and Does Not Allow Adequate Time For Preparation

8. TECO was aware that Dartland was on vacation in Europe and unavailable at the time it set this deposition. Rather than awaiting his return to determine his availability, TECO set the deposition for the morning of his return, allowing him no time to study the subpoena, obtain counsel, review documents, gather the documents sought by the subpoenas duces tecum, or even to rest

sufficiently to allow him to testify coherently. TECO made no effort in advance to clear the time of the deposition with the deponent. Such violates the Florida Bar's Standards of Professional Conduct.

9. Having realized the impropriety of its prior conduct and the procedural errors in the prior notices, TECO sent a flurry of amended notices and subpoenas both to Dartland directly and to CorpDirect, CFSE's registered agent, on May 20, 2004, re-noticing the deposition for May 24, 2004 at 10:30 a.m. Under the circumstances, the time allowed remains inadequate to retain counsel, file objections, clear time on an attorney's schedule, review documents, prepare privilege logs, etc.

10. TECO has been aware of Dartland and his involvement in the activities sought to be discovered for many months, yet waited until the eve of the hearing to seek discovery. The documents, if deemed relevant, should have been sought sufficiently in advance of the hearing to allow for reasonable advance notice of a deposition and consideration of objections in the ordinary course of such proceedings. TECO's procrastination cannot be converted into Dartland's emergency. The standard rules of discovery recognize that 30 days should generally be allowed to respond to document requests, yet TECO seeks to allow Dartland only two business days and no time to review documents or to retain counsel and secure their attendance. Rule 1.280(c) provides that protective orders may be issued to protect a party from "annoyance, embarrassment, oppression or undue burden or expense."

11. Accordingly, a protective order should be granted so that Dartland and CFSE has sufficient time to gather documents and prepare for the deposition.

III. Procedural Flaws in Notices and Subpoena

12. TECO has created great confusion for Dartland and apparently for other parties² by filing inconsistent pleadings. Because of this, Dartland was initially uncertain of exactly who TECO wished to depose, in what manner and in what capacity.

13. The Notices of Intent filed with the Commission on May 13, 2004, including the notice that attached the subpoena with which Dartland's wife was ultimately served, state that the subpoenas are to be served pursuant to Rule 1.351, Fla. R. Civ. P. TECO's attorneys sent a letter to Dartland simultaneously with serving the subpoena that also attached the subpoena to a Notice of Intent to Serve Subpoena pursuant to Rule 1.351.

14. Rule 1.351 is designed, among other things to allow parties to object to records requests to non-parties. See Committee Notes to Rule 1.351. When records are noncontroversial and do not involve privacy rights or privilege (for example, when medical records are sought in personal injury cases), Rule 1.351 provides a logical procedure. However, when the records sought are privileged or confidential, parties have a right to object prior to production. TECO did not, however, comply with Rule 1.351. Accordingly, because of the ambiguity as to whether the deposition was proper under Rule 1.351, CFSE/Dartland could not be required to attend a deposition until such issue had been resolved.

15. Apparently, because of other parties' objections under Rule 1.351, TECO issued a flurry of amended subpoenas on May 20, 2004. The amended subpoenas call for a corporate deposition pursuant to Rule 1.310(b)(6). One amended subpoena was directed "To Walter Dartland, Executive Director, Consumer Federation of the Southeast;" another was directed to CorpDirect as

² See Residential Customers' Objection to Notice of Intent to Serve Subpoena on Non-party Pursuant to Rule 1.351, Florida Rules of Civil Procedure filed May 19, 2004.

registered agent for CFSE. These subpoenas do not comply with the requirements for a corporate subpoena under Rule 1.310(b)(6) and are still objectionable.

16. Rule 1.310(b)(6), Fla. R. Civ. P., provides that, “A party may name as the deponent a public or private corporation . . . **and designate with reasonable particularity the matters on which examination is requested.** The organization so named shall designate one or more officers . . . to testify on its behalf and may state the matters on which each person designated will testify.” The subpoena does not list any “matters on which examination is requested.”

17. A party seeking to take a deposition of a corporate officer must be clear in the notice as to whether the deposition is sought in an individual or corporate capacity. If the deposition is of a corporation, it must list areas of inquiry as required by Rule 1.310, and should not designate a specific officer. For example, in Chiquita International, LTD v. Fresh Delmonte Produce, 705 So. 2d 112 (Fla. 3d DCA 1998), the court held that a party failed to correctly request a corporate deposition pursuant to this rule where the deposition notice named a particular corporate employee and failed to designate with reasonable particularity the matters on which examination was requested.

18. Here, TECO has sent mixed signals as to whether it wishes to take Dartland’s deposition individually or in his corporate capacity. TECO has sent multiple subpoenas but has not followed Rule 1.310’s requirement that the areas of inquiry be designated. The initial service on Dartland was individual service.³

³Section 48.031, Florida Statutes, provides the method for serving individuals and allows leaving process with a spouse at the individuals usual place of abode as was done here, however, section 48.081 governs service on a corporation and requires service directly on a corporate officer in a specified order of hierarchy or on the registered agent. Under 48.081, service may not be obtained by leaving a subpoena with a corporate officer’s wife.

19. TECO has clarified the confusion somewhat through its amended subpoenas, as a result of which it seems clear TECO seeks to depose Dartland in his capacity as a corporate officer and not in his individual capacity, and seeks to obtain documents that are within the possession of the corporation. Based on these filings, Dartland assumes he will be asked to testify solely in his official capacity. Hafer v. Melo, 502 U.S. 21, 25 (1991) (official-capacity suits are merely another way of pleading an action against the entity of which the officer is an agent).

20. The distinction between testimony given in an individual and corporate capacity is not one to be quickly glossed over. A designated corporate representative's testimony binds a corporation. A privilege may exist in one capacity and not in the other. For example in State v. Wellington Precious Metals, Inc., 510 So.2d 902 (Fla.,1987), the Supreme Court of Florida held that a subpoena duces tecum directed to a corporation placed the burden on the corporation and its officers to timely produce and authenticate the corporate records as to which the individual sole shareholder would have a fifth amendment right to refuse to produce. The individual's privilege did not apply.

21. As such, a deponent has the right to know the precise capacity in which he is called to testify. A corporate deponent has the right to know in advance what questions will be asked and to designate the most appropriate person to answer the designated questions. Since the subpoena fails to comply with Rule 1.310(b), a protective order should be granted.

22. TECO failed to deliver witness fees with any of the subpoenas. Witness fees are required pursuant to sections 92.142 and 92.151, Florida Statutes. See also Engel v. Rigot, 434 So. 2d 954 (Fla. 3d DCA 1983). As such, neither Dartland nor CFSE can be compelled to respond to the subpoena.

IV. Substantive Objections

A. Subpoena Seeks Confidential and Financial Records of Non-Parties

23. Florida recognizes a privacy interest in financial records. Art I, Sec. 23, Fla. Const.; Voytish v. Ozycz, 695 So. 2d 1301 (Fla. 4th DCA 1997); Frank Medina Trading Company v. Blanco, 553 So. 2d 285 (Fla. 3d DCA 1989). For example in Woodward v. Berkery, 714 So.2d 1027, 1035 (Fla. 4th DCA 1998), the Court said: "The constitution of the State of Florida contains an express right of privacy. Although there is no catalogue in our constitutional provision as to those matters encompassed by the term privacy, it seems apparent to us that personal finances are among those private matters kept secret by most people." Likewise, in Alterra Healthcare Corp. v. Estate of Francis Shelley, 827 So.2d 936 (Fla.2002), in the context of considering a relevancy objection, the Court indicated the right to financial privacy must always be balanced against discovery rights.

24. A party in litigation may give up some privacy interests and thus subject their financial records to discovery, but where the deponent is a *non-party*, Florida courts recognize greater protection. For example, where a spouse sought records in domestic litigation concerning the finances of her husband's law practice, the court held his non-party law partners were entitled to protection against discovery that "unnecessarily violates their privacy rights." Pyszka, Kessler, Massey, Walden, Cabri, Hilton, & Douberley v. Mullin, 602 So. 2d 955 (Fla. 3d DCA 1991).

25. Non-party finances are generally presumed to be unrelated to any claim or defense in litigation. See Walker v. Page, 638 So. 2d 1030 (Fla 2d DCA 1994) (quashing discovery order as to corporate officer of party); McCarty v. Estate of Schultz, 372 So. 2d 210 (Fla. 3d DCA 1979) (quashing order that required nonparty to disclose finances to determine location of estate assets).

26. Even where the non-party deponents are affiliated with the parties as in Voytish (parents of minor party) and Pyszka (law partners), the court typically exercises greater caution to avoid unnecessary disclosure when dealing with records production from non-parties.

27. TECO has no basis whatsoever to seek CFSE's financial records. The subpoena duces tecum in this case is a mere "fishing expedition" with a view to harassing those TECO deems to be hostile to its position. TECO's subpoena is improper. McCarthy v. Estate of Schultz, 372 So. 2d 210 (Fla. 3d DCA 1979) (citing Imparato v. Spicola, 238 So. 2d 503 (Fla. 2d DCA 1970)).

B. CFSE's Business and Financial Records Are Confidential and Proprietary

28. CFSE is a private organization that is not required by law to open its records or report its funding sources or contributors. CFSE regards such records as confidential, proprietary and trade secret. Disclosure of the identity of contributors would have a chilling effect on future contributions.

29. The Commission has already ruled that information concerning funding of the litigation efforts of the parties themselves not discoverable (Order No. PSC-04-0498, Issued May 13, 2004). If the litigation efforts of the parties are not discoverable, then the funding of a *nonparty*, being even more distant from the case, would be equally non-discoverable.

30. TECO's efforts to obtain discovery from CFSE are harassment on a par with the filing of a SLAPP suit (strategic lawsuit against public participation). TECO's efforts are typical of a powerful litigant with unlimited funding seeking to discourage opposition by harassing members of the public deemed to be hostile to its position.

C. CFSE Documents are Irrelevant to the Issues in the Case

31. Prehearing Officer Braulio Baez has already ruled that information of the type sought by TECO in the subpoena is irrelevant and non-discoverable. See Order No. PSC-04-0498, Issued May 13, 2004 ("It should be made clear that the issues in this case will be decided on the merits based on the record evidence and arguments put forward by the parties, regardless of what motivations may or may not lay behind the parties' litigation efforts").

32. The subpoena to Dartland and CFSE is an end run around the May 13, 2004 Order. Arguably, TECO was not aware of the Order at the time of issuance of the initial subpoenas since they were issued the same day as the Order; however, TECO has issued amended subpoenas which continue to seek the documents despite full knowledge of the Order. TECO's attorney, Richard Doran, on May 19, 2004, stated that he was standing by the subpoena and "prepared to handle any assertions of privilege CFSE or any party raises." Accordingly, CFSE and Dartland require a protective order to prevent TECO's further efforts to require improper discovery.

D. Subpoena Invades Work-Product Privilege

33. For the reasons expressed by the Residential Customers in their Response to Motion to Compel, the current subpoena seeks to discover the parties' communications with potential witnesses and thus invade the parties' work product. The May 13, 2004 order agreed that the specified documents previously sought from the Residential Customers' attorney appeared to be protected by the work product privilege, yet the present subpoenas seek many of the same documents. In fact, TECO seeks to discover CFSE's funding information and involvement in trial preparations, as well as confidential communications from attorneys for the parties, even though CFSE is not a party.

34. TECO also seeks to review documents provided to and reviewed by a potential expert witness who was not designated as a witness at trial. Such is improper expert witness discovery and constitutes a further effort to discover the work product of the attorneys so as to learn their litigation strategy.

35. For all these reasons, Dartland and CFSE request a protective order directing that the proposed discovery not be had and that the subpoenas issued to Dartland and CFSE be quashed; if the subpoena is not quashed in its entirety, TECO should be directed to reschedule the deposition

at a time convenient to CFSE and Dartland and their counsel, allowing sufficient time for gathering documents, witness preparation, and analysis and preparation of privilege logs. Two weeks is the minimum reasonable advance notice for the proposed deposition.

Respectfully submitted,

S/ Susan W. Fox

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this objection has been served by U.S. Mail and email this 21 day of May, 2004 on the following:

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