

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for rate increase by Tampa
Electric Company.

DOCKET NO. 080317-EI

FILED: November 25, 2008

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

The Florida Industrial Power Users Group (FIPUG), by and through its undersigned attorneys, moves to compel Tampa Electric Company (TECO) to the interrogatories and production requests discussed below.

Introduction

1. In this case, TECO is seeking a rate increase of over \$ 228 million, is seeking to eliminate the interruptible rate schedules, and is proposing to implement a new cost of service methodology.
2. On September 12, 2008, FIPUG propounded its First Set of Interrogatories and First Request for Production of Documents on TECO.
3. On October 2, 2008, TECO served objections to the requests and on October 13, 2008, TECO served responses to some of the requests.
4. Upon receipt of TECO's objections, FIPUG contacted counsel for TECO to attempt to resolve the discovery dispute as to the requests discussed in this motion. However, TECO stated it intended to maintain its objections.
5. TECO should be required to respond to the discovery requests discussed below.

Discovery Standard

6. The Commission has broad authority to compel discovery, as this motion requests. “The Commission shall have access to all records...that are reasonably necessary for the disposition of matters within the commission’s jurisdiction.” *In re: Investigation of Vilair Communications, Inc.* Order No. PSC-08-0304-PCO-TX; *see also*, Order No. PSC-08-0258-PCO-TX at p.2 (“this Commission has consistently recognized that discovery is proper and may be compelled if it is not privileged and is, or likely will lead to, relevant and admissible evidence.”)

Interrogatory Nos. 27-28 and Production Request Nos. 26, 27, 28

7. In this docket, TECO has asked the Commission to approve the use of a cost of service methodology that would use a 12 coincident peak and 25% average demand production capacity cost allocation methodology (12 CP and 25% AD).¹ This methodology differs significantly from the cost of service methodology used in TECO’s last rate case² and from methodologies that this Commission has approved in prior rate cases.

8. In the discovery requests at issue,³ FIPUG has asked TECO whether it is aware of whether this Commission or any other jurisdictions have approved the use of the cost of service methodology TECO proffers in this case. FIPUG then requests that if TECO is aware of such orders, it produce them.

9. As to each of these requests, TECO has objected and stated:

The company objects to this request on grounds that it cannot respond to the request without disclosing materials prepared in anticipation of litigation and the mental impressions and trial strategies of its attorneys all of which are privileged and beyond the scope of discovery. Tampa Electric also objects to performing legal research at the request of FIPUG.

¹ See direct testimony of William Ashburn at 4, 20-37.

² Order No.PSC-93-0165-FOF-EI.

³ The discovery requests are attached hereto as Attachment A.

10. The guiding principle underlying discovery is found in rule 1.280(b)(1), Florida Rules of Civil Procedure. Parties may obtain discovery as to any matter, not privileged, that is relevant to the subject matter of the pending action or reasonably calculated to lead to the discovery of admissible evidence. *See*, Rule 1.280(b)(1), *Florida Rules of Civil Procedure*; *see also*, *Amente v. Newman*, 653 So. 2d 1030 (Fla. 1995) (holding that inadmissible evidence is discoverable so long as it may lead to admissible evidence); *Davich v. Norman Brothers Nissan*, 739 So. 2d 138 (Fla. 5th DCA 1999) (holding that the concept of relevancy is broader in the discovery context than in the litigation context, and a party may be permitted to discover relevant evidence that would be inadmissible at trial, so long as it may lead to the discovery of admissible evidence).

11. In this rate case, TECO seeks Commission approval of a new cost of service methodology. FIPUG is entitled to test the basis for this affirmative request. Each of the discovery requests TECO has objected to are: 1) relevant to the issues before the Commission; and 2) reasonably calculated to lead to relevant evidence.

12. Without specifically stating, it appears that TECO is attempting to claim some sort of work product privilege. However, TECO has not appropriately specified whether it asserts the “fact work product” privilege or the “opinion work product privilege.”

13. Nonetheless, under either scenario, FIPUG is not seeking work product. Fact work product is information which relates to the case and is specifically compiled in anticipation of litigation. *See*, *General Motors Corp. v. McGee*, 837 So. 2d 1010 (Fla. 4th DCA 2002). Opinion work product is the personal views of an attorney as to how and when to present evidence, his knowledge of which witnesses will give certain testimony, personal notes of attorneys, and documents created by attorneys in anticipation of litigation. *See*, *Surf Drugs, Inc.*

v. Vermette, 236 So. 2d 108 (Fla. 1970). Asking TECO to identify regulatory decisions that support its request is neither fact nor opinion work product. FIPUG's discovery is merely intended to uncover the basis upon which TECO relies for its request.

14. If TECO intends to properly assert the work product privilege, it must allege that the documents were *created*, not merely *learned* of by its attorneys. *See, Grindnel Corp. v. Palms 2100*, 924 So. 2d 887 (Fla. 4th DCA 2006) (the court stated, "the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has *learned*..." (emphasis added); *see also, United States v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 697 (S.D.Fla.1990) (where the court observed that, "facts gathered from documents by a party's representative are not protected as fact work product.") Because the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, it does not protect facts concerning the creation of work product or facts contained within work product." *Resolution Trust v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995).

15. Clearly, FIPUG is not requesting any information TECO's attorneys or representatives created in anticipation of litigation. However, FIPUG is rightfully entitled to legal and regulatory authority *gathered* by TECO which TECO will rely on before the Commission to support its petition.

16. Nor is identification of regulatory decisions which support TECO's claim attorney-client privileged. The attorney-client privilege in Florida protects *communications* between the attorney and his/her client from disclosure. Rule 1.21(b), 1.27, *Florida Rules of Civil Procedure*. The Commission has applied section 90.502(1)(c), *Florida Rules of Evidence*, to administrative actions. As such, the attorney-client privilege applies only to those

communications not intended to be disclosed to third parties other than (1) those to whom disclosure is in furtherance of the rendition of legal services to the client; and (2) those reasonable necessary for the transmission of the information.

17. FIPUG seeks regulatory information, not communications, from TECO. Documents in an attorney's possession which speak to the regulatory structure for ratemaking decisions are not privileged. FIPUG's purpose in seeking TECO's administrative authority is to avoid unfair surprise and understand the basis for TECO's cost of service request

Interrogatory No. 22

18. Interrogatory No. 22 requests a "breakdown of total variable costs for the base and intermediate-load units referred to in the direct testimony of witness Ashburn." Rather than providing the information on a \$/MWh basis, TECO simply provided a narrative of the various categories. Clearly, a request for a breakdown of "costs" indicates a request for the information to be provided on a "cost" basis. Further, despite the language in Order No. PSC-08-0557-PCO-EI that parties seek clarification, if necessary, of discovery requests, TECO simply failed to appropriately respond. When TECO was asked by FIPUG about its response to this question, FIPUG was told to ask the question again.

19. The information FIPUG has requested is clear and TECO should be provided to respond appropriately.

WHEREFORE, FIPUG requests that:

1. TECO be directed to immediately respond to the above discovery; and
2. To the extent necessary, FIPUG be permitted to supplement its testimony as to any new information provided.

s/ Vicki Gordon Kaufman

Vicki Gordon Kaufman
Jon C. Moyle, Jr.
Anchors Smith Grimsley
118 North Gadsden Street
Tallahassee, FL 32301
(850) 681-3828 (Voice)
(850) 681-8788 (Facsimile)
vkaufman@asglegal.com
jmoyle@asglegal.com

John W. McWhirter, Jr.
P.O. Box 3350
Tampa, FL 33601-3350
(813) 224-0866 (Voice)
(813) 221-1854 (Facsimile)
jmcwhirter@mac-law.com

Attorneys for FIPUG

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Florida Industrial Power User's Group's Motion to Compel has been furnished by electronic mail and U.S. Mail this 25th day of November, 2008, to the following:

Keino Young
Florida Public Service Commission
Office of the General Counsel
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Lee Willis
James Beasley
Ausley Law Firm
Post Office Box 391
Tallahassee, FL 32302

J.R. Kelly
Public Counsel
Patricia Christensen
c/o The Florida Legislature
111 W. Madison Street, Room 812
Tallahassee, FL 32399-1400

R. Scheffel Wright
Young Law Firm
225 S. Adams Street
Suite 200
Tallahassee, FL 32301

Mike Twomey
P.O. Box 5256
Tallahassee, FL 32314-5256

Cecilia Bradley
Office of the Attorney General
400 S. Monroe St # PL-01
Tallahassee, Florida 32399-6536

s/ Vicki Gordon Kaufman
Vicki Gordon Kaufman

**TAMPA ELECTRIC COMPANY
DOCKET NO. 080317-EI
FIPUG'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS
DOCUMENT NO. 27
BATES STAMPED PAGES: 1977
FILED: OCTOBER 13, 2008**

27. With reference to Interrogatory No. 27, provide a copy of all regulatory decisions approving the 12CP and 25% AD methodology.
- A. The company objects to this request on grounds that it cannot respond to the request without disclosing materials prepared in anticipation of litigation and the mental impressions and trial strategies of its attorneys all of which are privileged and beyond the scope of discovery. Tampa Electric also objects to performing legal research at the request of FIPUG.

Attachment A
1977

**TAMPA ELECTRIC COMPANY
DOCKET NO. 080317-EI
FIPUG'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS
DOCUMENT NO. 28
BATES STAMPED PAGES: 1978
FILED: OCTOBER 13, 2008**

- 28.** Provide the documents identified in response to Interrogatory No. 28.
- A.** The company objects to this request on grounds that it cannot respond to the request without disclosing materials prepared in anticipation of litigation and the mental impressions and trial strategies of its attorneys all of which are privileged and beyond the scope of discovery. Tampa Electric also objects to performing legal research at the request of FIPUG.

**TAMPA ELECTRIC COMPANY
DOCKET NO. 080317-EI
FIPUG'S FIRST REQUEST FOR
PRODUCTION OF DOCUMENTS
DOCUMENT NO. 26
BATES STAMPED PAGES: 1976
FILED: OCTOBER 13, 2008**

- 26.** With reference to Interrogatory No. 27, provide a copy of all Commission orders that approve the use of the 12 CP and 25 percent AD methodology for allocating production demand costs.
- A.** The company objects to this request on grounds that it cannot respond to the request without disclosing materials prepared in anticipation of litigation and the mental impressions and trial strategies of its attorneys all of which are privileged and beyond the scope of discovery. Tampa Electric also objects to performing legal research at the request of FIPUG.

TAMPA ELECTRIC COMPANY
DOCKET NO. 080317-EI
FIPUG'S FIRST SET OF
INTERROGATORIES
INTERROGATORY NO. 27
PAGE 1 OF 1
FILED: OCTOBER 13, 2008

27. Identify all Commission orders that approve the use of the 12 CP and 25% AD methodology for allocating production demand costs.
- A. The company objects to this request on grounds that it cannot respond to the request without disclosing materials prepared in anticipation of litigation and the mental impressions and trial strategies of its attorneys all of which are privileged and beyond the scope of discovery. Tampa Electric also objects to performing legal research at the request of FIPUG.

TAMPA ELECTRIC COMPANY
DOCKET NO. 080317-EI
FIPUG'S FIRST SET OF
INTERROGATORIES
INTERROGATORY NO. 28
PAGE 1 OF 1
FILED: OCTOBER 13, 2008

28. Identify all regulatory commission orders approving the 12CP and 25% AD methodology for allocating production demand costs.
- A. The company objects to this request on grounds that it cannot respond to the request without disclosing materials prepared in anticipation of litigation and the mental impressions and trial strategies of its attorneys all of which are privileged and beyond the scope of discovery. Tampa Electric also objects to performing legal research at the request of FIPUG.