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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Prudence Review to Determine Regulatory Treatment of Tampa Electric Company's Polk Unit.) DOCKET NO. 960409-EI) FILED: May 24, 1996

ORIGINAL FILE COPY

STAFF'S REQUEST FOR IN CAMERA INSPECTION OF DOCUMENTS

The staff of the Florida Public Service Commission by and through its undersigned counsel and pursuant to Rule 25-22.037(2), Florida Administrative Code, move the Florida Public Service Commission (Commission) to conduct an in camera inspection of all documents and portions of documents withheld by Tampa Electric Company (TECO) based on its claim of attorney/client privilege.

A. BACKGROUND

1. On April 12, 1996, the staff of the Florida Public Service Commission served TECO with Staff's First Request for Production of Documents to Tampa Electric Company (Nos. 1-9) in this docket.

2. On April 22, 1996, TECO filed its Objections and Motion for Protective Order relative to Staff's First Request for Production of Documents to Tampa Electric Company (Nos. 1-9). Staff contacted TECO regarding this Motion and was informed that it was preliminary in nature and was filed in order to comply with the 10 day notice requirement which was discussed at the April 9, 1996,

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issue identification meeting in this docket and set forth in Order No. PSC-96-0567-PCO-EI, issued April 30, 1996. TECO also represented to staff that it would produce for inspection and copy all relevant documents which reasonably related to staff's request.

3. On May 2, 1996, TECO filed Tampa Electric Company's Written Response And Objections to Staff's First Request for Production Of Documents to Tampa Electric Company. Therein, TECO specifically objected to Staff's First Request for Production of Documents Nos. 6 and 7.

4. Request Number 6 asks TECO to produce "...copies of all internal memos and correspondence with tax consultants, CPA's, or the Internal Revenue Service dealing with the use of a seven year tax life for the Polk IGCC (Integrated Gasified Combined Cycle) Unit."

5. Request Number 7 asks TECO to produce "...copies of all internal memos and correspondence with tax consultants, legislators or their assistants, legislative committees, or the Internal Revenue Service concerning revisions to IRC (Internal Revenue Code) Section 29 through legislative changes."

6. In the cost-effectiveness analyses offered to support its assertion that the construction of Polk Unit 1 was prudent, TECO

relied on a 7-year tax life and IRC Section 29 credits for the Polk IGCC Unit.

7. TECO objected to the disclosure of documents described in Staff's First POD Requests Nos. 6 and 7, stating that disclosure of the requested documents "would be harmful to the interests of Tampa Electric and its customers."

8. On May 9, 1996, staff filed a Motion to Compel Discovery seeking an Order from the Commission compelling TECO to produce the documents requested in Staff's First POD Requests Nos. 6 and 7.

9. On May 17, 1996, TECO filed a Response to Staff's Motion to Compel. In its Response, TECO indicated that it would produce any non-privileged documents in response to Staff's First POD Requests Nos. 6 and 7. TECO stated, however, that it intends to withhold various documents. TECO contends that the withheld documents contain opinions of legal experts and are, therefore, within the scope of the attorney/client privilege set forth in the Florida Evidence Code, Section 90.502, Florida Statutes. TECO further stated that a list of the withheld documents would be filed on May 20, 1996.

10. On May 20, 1996, TECO filed an Identification of Documents Withheld Pursuant to the Lawyer/Client Privilege Set Forth in Section 90.502 of the Florida Evidence Code

(Identification of Documents). Therein, TECO set forth the various memoranda and letters, requested pursuant to Staff's First POD Requests Nos. 6 and 7, that would be withheld. A copy of the document list is included with this motion as Attachment A.

11. TECO did, however, agree to produce a company representative to discuss with staff the subject matter covered by the requested documents and to informally respond to staff's questions. Pursuant that agreement, an informal meeting was conducted on May 22, 1996.

12. The May 22, 1996, meeting did not fully address staff's concerns pertaining to the tax issues being evaluated in this docket. Staff, therefore, asks that the Commission conduct an in camera inspection of the documents in order to determine if the documents are, in fact, privileged documents.

**B. TECO'S ASSERTION OF ATTORNEY/CLIENT
PRIVILEGE IS WITHOUT SUPPORT**

13. In its Identification of Documents, TECO merely identifies dated memoranda, and names the authors and recipients of the subject memoranda. TECO lists various attorneys' names who were either the authors or recipients of this correspondence, but fails to describe any content or reasons why each memorandum is privileged. Thus, staff cannot adequately challenge TECO's withholding of these documents.

14. Staff does not believe that the withheld documents contain TECO's attorneys' mental impressions, conclusions, litigation strategies, legal theories, or litigation files, nor does staff seek this sort of information. Staff only seeks the production of documents which contain facts solely within the control of TECO and which are relevant to this case.

15. All elements of the attorney/client privilege must be present before the privilege itself becomes available. International Telephone & Telegraph Corp. v. United Telephone Co. of Florida, 60 F.R.D. 177, 184 (M.D. Fla. 1973). The necessary elements are present only when: 1. there has been a communication between lawyer and client; 2. for the purposes of obtaining legal advice (not business advice); 3. that was intended to be confidential. William R. Eleazer, and Glen Weissenberger, Florida Evidence: 1995 Courtroom Manual, p. 237 (Anderson 1995).

16. "[T]he burden is upon the party resisting discovery to show necessity by a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." Consolidated Gas Supply Corp. 17 F.E.R.C. ¶ 63,048, at 65,239 (Dec. 2, 1981).

17. TECO has not demonstrated that these memoranda meet all the elements required to establish a valid privilege.

18. In addition, staff has a significant need for the documents requested in Staff's First POD Requests Nos. 6 and 7. These memoranda and letters are directly relevant to the issue of whether it was reasonable for TECO to assume that certain tax credits would be available to it in the 1994 and 1995 cost-effectiveness evaluations.

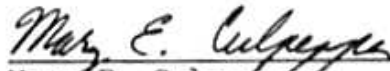
19. Furthermore, these memoranda were prepared, primarily, for business purposes, rather than for litigation. The withheld documents pertain to TECO's efforts to lobby support for a tax bill that would have been beneficial in TECO's efforts to maintain the cost-effectiveness of its Polk IGCC unit. In the federal courts, documents which have been prepared mainly for business purposes have been exempted from work product immunity. United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982) (tax pool analysis made primarily for business needs was discoverable). See also Consolidated Gas Supply Corp., 17 F.E.R.C. ¶ 63,048 (Dec. 2, 1981) (document summarizing company's business practices which did not contain legal opinions was discoverable); and Black Marlin Pipeline Co., 9 F.E.R.C. ¶ 63,015 (Oct. 18, 1979) (advice from attorney which was mainly business related was not privileged).

20. When a privilege is claimed, the court should review the withheld discovery documents in camera to determine if the privilege claimed is valid. Austin v. Barnett Bank of South

Florida, N.A., 472 So. 2d 830 (4th DCA 1985); Boca Raton Hotel and Club v. Dunn, 15 F.L.W. d1742 (4th DCA July 13, 1990).

WHEREFORE, staff respectfully requests that the Florida Public Service Commission compel Tampa Electric Company to produce each of the documents responsive to Staff's First Request for Production of Documents (Nos. 6 and 7), and conduct an in camera review of all documents withheld based on a claim of privilege in order to determine whether the claim is valid.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that one true and correct copy of Staff's Request for In Camera Inspection of Documents has been furnished by Hand Delivery, to Mr. Lee Willis, Macfarlane Ausley Ferguson and McMullen, 227 South Calhoun Street, Tallahassee, Florida 32301, on behalf of Tampa Electric Company and that one true and correct copy has been furnished by U. S. Mail this 24th day of May, 1996, to the following:

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