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August 1, 1997

Public Service Commission
Division of Records & Reporting
Capitol Circle Office Center
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Attention: Rosanne Capeless, Staff Legal Counsel

RE: DOCKET # 961321-WS-Application for certificates to provide water and wastewater service in Clay County by Point Water and Sewer, Inc.

Dear Rosanne:

This letter responds to Kathleen Johnson's correspondence dated June 5, 1997. Kathleen's characterizations regarding our contact with Ms. DeFalco, her file and her statement are incorrect. Respectfully, it is our position that the Public Service Commission ("PSC") does **not** have the right to assert any attorney work-product privilege with regard to any public records maintained by the Department of Environmental Protection ("DEP").

In contrast to the attorney-client privilege, which is designed to protect the confidential relationship between the client and his counsel, the work-product privilege is designed to promote the adversary system by protecting an attorney's trial preparation, not necessarily from the rest of the world, but from an opposing party in litigation. Visual Scene v. Pilkington Brothers, 508 So.2nd 437 (Fla. 3rd DCA 1987). The sharing of information by parties who have no common interest is a waiver of work-product privilege.

Section 119.07 (3)(l)(2), Florida Statutes, states that the attorney work-product under the public records law "...is not waived by the release of such public record to another public employee or officer of the same agency or any person consulted by the agency attorney....if a court finds that the document or other records have been improperly withheld...the party seeking access...shall be awarded reasonable attorney's fees and costs." (Emphasis added). In the present case the PSC waived any purported right to the public records exemption for the attorney work-product privilege by releasing Ms. DeFalco's statement to the DEP, another public agency.

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Once Ms. DeFalco's witness statement was filed with the DEP, the PSC waived its alleged claim to work-product privilege as described under Section 119.07 (l)(1), as Kathleen was not an attorney representing the interest of the agency having custody of the record. Clearly, the DEP, not the PSC, had custody of Ms. DeFalco's statement. Nothing precluded the DEP from disclosing to third parties the nature or content of its conversations with the PSC. Interestingly, the PSC never marked the subject documents as "confidential" or took precautionary steps to keep the subject documents from public disclosure.

Statutory exemptions to disclosure of public records under Section 119 do **not** apply if the information has already been made public. Staton v. McMillan, 597 So.2nd 940 (Fla. 1st DCA 1992). In Downs v. Austin, 522 So.2nd 931 (Fla. 1st DCA 1988), the court held that once the state has gone public with information which could have previously been protected from disclosure under the public record exemption, no further purpose is served by preventing full access to the desired documents and information due to the overwhelming preference for complete public access to documents. Therefore, assuming arguendo, that the PSC had a right to claim a work-product privilege regarding Ms. DeFalco's statement, that right was waived once her statement was made public or the PSC filed Ms. DeFalco's pre-hearing testimony, which in fact occurred.

Also, Section 119.07 (l)(1) states that the exemption applies to public records prepared at the attorneys express direction which reflect a "mental impression, conclusion, litigation strategy or legal theory of the attorney or the agency." At issue were Ms. DeFalco's handwriting and thoughts. In Duck v. M.L. Warren, 160 F.R.D. 80 (E. D. Va. 1995) the court held that statements of witnesses were not work-product where the plaintiff did not request any evaluative material by the attorney. The court held that the work-product privilege did not apply because the witness statements were not mental impressions, conclusions, opinions or legal theories of the attorney or other representative of the party concerning litigation, neither of the statements were by the party's representatives at the time they were prepared and because the statements would aid in impeaching the witness. This was so even though the plaintiff had the opportunity to take his own witness statements and depositions.

Hopefully, you appreciate our position on this interesting issue, which is now moot in light of the filing of Ms. DeFalco's prehearing statement. Thank you for your consideration of the above.

Sincerely,

DOUGLAS H. REYNOLDS

DHR/rab

cc: Scott Schildberg, Esq.
Point Water & Sewer, Inc.