BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of City Gas Company of Florida for an Increase in its Rates and Charges.	Docket No. 960502-GU Filed: October 23, 1996

City Gas Company of Florida's
Response to Staff's Motion For In Camera Inspection

Pursuant to rule 25-22.037, Florida Administrative Code, City Gas Company of Florida (City Gas or the Company), files its Response to Staff's Motion for In Camera Inspection. For the following reasons, Staff's motion should be denied.

Introduction

City Gas filed its petition for authority to increase rates which initiated this docket on June 18, 1996. Discovery has been ongoing since June 12, 1996. The Staff completed its audit on August 16, 1996. The Commission is scheduled to vote on proposed agency action designed to dispose of the rate case petition on October 29, 1996.

On October 3, 1996, Staff filed a motion to compel City Gas to produce a copy of the investigative report prepared by the law firm of Pitney, Hardin, Kipp and Szuch (Pitney Hardin) concerning certain business relationships and related activities of a former president of City Gas. Pitney Hardin is a New Jersey law firm which was retained by NUI Corporation (NUI) to provide legal counsel to the Company with respect to potential litigation between the Company and the former president. The investigative report was

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prepared by the law firm at the request of the Company. The investigation was requested by the Company for the sole purpose of receiving legal services, and the report would not have been created but for the Company's need for and request for legal services.

In response to Staff's motion to compel, City Gas asserted that the law firm's report is absolutely protected by the attorney/client privilege and the attorney work product doctrine. City Gas attached to its response the Affidavit of Mary Patricia Keefe, Senior Vice President and General Counsel of Elizabethtown Gas Company (an operating division of NUI), substantiating the factual basis for City Gas' assertion of privilege. In its response, City Gas pointed out that in its motion to compel Staff had not requested an in camera inspection of the document. City Gas asserted that the uncontroverted Affidavit of Ms. Keefe demonstrated the basis for the application of the privileges claimed by City Gas and obviated the necessity of an in camera inspection.

On October 16, 1996, Staff filed a Motion for In Camera Inspection. In its motion Staff reiterates, and attempts to enlarge upon, its original motion to compel. Staff disputes City Gas' assertion of the attorney/client privilege as well as the work product privilege.

I.
City Gas Has Fully Demonstrated That It Is Entitled to Assert the Attorney/Client Privilege.

As City Gas stated in its response to Staff's motion to

compel, the report Staff seeks was prepared by a law firm retained by NUI for the purpose of providing NUI with legal advice regarding potential litigation between NUI and a former City Gas executive. See Affidavit attached to City Gas' response to Staff's motion to compel. Accordingly, the document is absolutely protected by the attorney/client privilege.

In its response to the original motion to compel, City Gas addressed each of the criteria governing the application of the attorney/client privilege set forth in Southern Bell Telephone & Telegraph Co. v. Deason, 632 So.2d 1377 (Fla. 1994). In its motion for in camera inspection, Staff argues that City Gas' assertion of the attorney/client privilege[1] is "without support," because the Company did not describe in sufficient detail the alleged activities of the former executive that gave rise to the possibility of litigation. Apparently, Staff would require City Gas to divulge the contents of the document to show that it is privileged! As the list of criteria quoted in each of Staff's two motions on the subject make clear, the Deason decision imposes no

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[1] City Gas does not take issue with the notion that it has the burden to support its assertion of the privilege. However, the Company has done so in detail in its response to Staff's motion to compel. There, the Company demonstrated that all five of the criteria set out in Southern Bell Telephone & Telegraph Co. v. Deason, 632 So.2d 1377 (Fla. 1994), were met. See pages 4-6 of City Gas' response to Staff's motion to compel; City Gas incorporates the response in its entirety by reference.

Further, Staff's reliance on Consolidated Gas Corp., 17 F.E.R.C. ¶63,048 is misplaced. The statement quoted by Staff referred to a claim regarding proprietary business information for which the party asserting the privilege had provided no affidavits.

such requirement. City Gas' response was more than sufficient to satisfy the requirement that the Company demonstrate the document would not have been prepared but for the contemplation of legal services. Deason, supra, at 1383.

Further, City Gas' expectation that the strained relationship between the Company and Mr. Langer might result in litigation materialized. Mr. Langer and his brother did file suit against the Company. That law suit remains pending at this time.

At page 5 of the motion for in camera inspection, Staff renews its effort to invoke the portion of the Deason decision that is devoted to a discussion of documents which have an "independent business purpose" apart from the rendition of legal services. Such an approach must hurdle the affidavit of Ms. Keefe, who states that the investigation and report were authorized by the highest levels of NUI senior management for the sole purpose of obtaining legal services. Staff deals with Ms. Keefe's affidavit by ignoring it. Staff substitutes its own speculation:

> Despite Ms. Keefe's affidavit, staff believes that City Gas had an independent business purpose in directing the preparation of the investigative report.

Staff motion at 5, emphasis supplied.

At page 5, Staff states, "on its face, a personal business relationship between the utility executive and a (sic) officer in a firm holding utility construction contracts is a matter which requires heightened scrutiny." Staff motion at 5. Staff's effort to fashion a "separate business purpose" is full of irony, and Staff's attempt to bolster its effort to obtain the document

involves reasoning that is circular at best. The scrutiny which the Commission gave the relationship between the former executive and the head of the construction company in City Gas' last two rate cases (1990 and 1994) resulted in the adoption by the Company of a strengthened conflict of interest policy,[2] and ultimately contributed in significant measure to the removal of the former president from office, the termination of City Gas' relationship with the construction company, and the letting of bids for the work formerly performed by that company. As a direct result of these actions, City Gas was sued by the construction company and, subsequently, by the former president. It was in the milieu of actions taken <u>after</u> this "heightened scrutiny" that the senior management of NUI recognized the potential for litigation and requested its legal advisor to investigate certain allegations and relationships, and prepare a report. The document is therefore a <u>result</u> of <u>past</u> scrutiny by the Commission and related actions by the Company.

More importantly, however, the function to which Staff attributes an "independent business" purpose is not that at all. In an effort to show a separate business purpose, Staff states:

> As a public utility regulated pursuant to Chapter 366, Florida Statutes, the management of City Gas has an obligation ensure (sic) that the costs of providing service are honestly and prudently incurred . . . [A] regulated utility should (and did in this case) investigate to determine that the facilities the ratepayers are being asked to

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[2] The policy was required by the Commission in Order No. PSC-94-1570-FOF-GU. City Gas submitted it on February 17, 1995.

pay for are worth what by the company paid. Staff motion at 5-6.

Clearly, the obligation to which Staff attributes the creation of the document -- and on which Staff bases its claim that City Gas had an "independent business purpose" in authorizing the creation of the document -- instead relates directly to the application of Chapter 366 to the Company's regulated operations. Accordingly, assuming arguendo that the document treats to some extent the ramifications of the matters investigated to the Company's legal obligations as a regulated utility or its relationship with the Commission, such aspects would constitute -- not a "separate business purpose" -- but legal considerations and purposes.

In addition to its failure to show a "business" purpose as opposed to a legal purpose, Staff's motion attempts to invoke, albeit obliquely, a rationale for obtaining a privileged document that was rejected by the Florida Supreme Court in the Deason case. Staff's argument that communications to or from an attorney that relate to a corporation's responsibilities as a regulated utility are not privileged is really no different than the argument that the regulator is entitled, by virtue of its regulatory authority, to have access to all such documents. In Deason at page 1382, footnote omitted, the Florida Supreme Court said:

> In another case involving a regulated company, *United States v. Louisville & Nashville Railroad Co.*, 236 U.S. 318, 35 S. Ct. 363, 59 L.Ed. 598 (1915), the Interstate Commerce Commission (ICC) attempted to examine confidential communications between a railroad and its attorneys. The ICC argued that its power to examine records and correspondence

> under the Interstate Commerce Act authorized such an inspection, but the Court concluded that disclosure of the company's communications "would be a practical prohibition upon professional advice and assistance." Id. at 336, 35 S.Ct. at 369. To a certain extent, all companies operating in the United States are regulated by some governmental agency and have an obligation to abide by general laws and/or specific administrative rules. Southern Bell's status as a regulated company does not entitle the regulating body to unfettered access to Southern Bell's confidential communications.

Similarly, Staff's claim amounts to a demand for "unfettered access" to City Gas' confidential attorney/client communications. To grant Staff's motion to compel under these circumstances would be to institute exactly the type of "practical prohibition upon professional advice and assistance" that has been rejected by the United States Supreme Court and the Florida Supreme Court.

The prejudicial effect of ruling in favor of Staff's efforts to obtain the document in the present situation would be exacerbated by the fact that the ruling could fuel a claim by those who were the subjects of the investigative report that the document is non-privileged and discoverable as to <u>them</u>. Under Staff's theory, each time the Company took responsible action to prepare for potential litigation, Staff would gain access to documents that it would not otherwise have; and, each time Staff pursued this "new avenue" by overcoming the claim of privilege, the Company's ability to evaluate or prepare for litigation without intrusion by its potential adversaries would be placed in jeopardy. Staff's approach is, in short, reckless. It would work intolerable violence upon the sanctity of the attorney/client privilege -- a

privilege that has been espoused and affirmed by the highest legal authorities, including the United States Supreme Court and the Florida Supreme Court. Staff has wholly failed to demonstrate a basis on which to deny the attorney/client privilege.

Nor can it. The Deason case involved the request of the Commission and Public Counsel to see numerous documents. The documents ranged from documents prepared directly by counsel, to statistical analyses of massive amounts of data performed by auditors, to summaries made by personnel managers of interviews conducted by security personnel for the purpose of evaluating possible disciplinary actions against certain employees. In this case, however, there is no such "variety", and no such divergence of purposes. The Staff is attempting to compel City Gas to produce a single document, that was prepared solely by legal counsel, for the express purpose of rendering legal services requested by the client. The document clearly falls within the category deemed by the Deason Court to be privileged.

II.
City Gas has Fully Supported its Claim of Work Product Privilege.

In support of its assertion that City Gas is not entitled to assert the work product privilege, Staff states that it "believes" the report at issue was prepared for a business purpose. It then cites three cases in support of its position.

The first case cited by Staff, United States v. El Paso Co., 682 F.2d 530 (5th Cir. 1982), has no applicability to this case.

In El Paso, the Internal Revenue Service issued a summons related to the audit of a corporate taxpayer. One of the items sought was a tax pool analysis for which the taxpayer asserted the work product privilege. In finding that the analysis was not protected, the Court found that the tax pool analysis was not prepared in anticipation of litigation. The court said "the work was not primarily motivated to assist in future litigation over the return." Id. at 543. This is to be contrasted with the Pitney Hardin report which was prepared in anticipation of litigation.

The second case Staff relies on, Consolidated Gas Supply Corp., 17 F.E.R.C. ¶63,048, supports City Gas' work product claim. In discussing the statements of parties seeking access to work product documents, the motion judge said:

> Participants' conclusory arguments for discovery of an attorney's work product, particularly as it pertains to an attorney's mental impressions, opinions, conclusions, and the like falls far short of a showing of rare or extraordinary circumstances noted as necessary by the Supreme Court and many lower federal courts to justify an intrusion into the adversary process that is protected by the work product doctrine. . . . The arsenal of discovery is vast. Mere inconvenience of any party authorized to pursue discovery in any of its myriad forms does not suffice to merit discovery of an attorney's work product. . . .

Id. at ¶65,238. Similarly, in this case, Staff's conclusory arguments are wholly insufficient to abrogate the work product privilege.

Last, Staff cites Black Marlin Pipeline Co., 9 F.E.R.C. ¶63,015. That case concerned whether information collected at the direction of the Administrative Law Judge was covered by the work

product doctrine. Obviously, no data collection ordered by a court is at issue here.

Staff states that it is not attempting to gain the mental impressions and theories of NUI's attorneys. Staff also concedes that it has the ability to audit the books and records of City Gas Company. Staff's sole attempt to satisfy its burden to show "hardship" consists of the statement that it cannot audit the books and records of City Gas' vendors. In view of the burden to show hardship and need that rule 1.280(b)(3), Florida Rules of Civil Procedure, places on the party seeking attorney work product, this statement amounts to an acknowledgment by Staff that it is not even attempting to justify access to any other aspect or portion of the document.

With respect to the portion Staff says it "needs," i.e., that bearing on audits of vendors, Staff claims it must have the document to ensure that the amounts City Gas paid Medley are reasonable. To that end, Staff has complete access to City Gas' accounting information. While it is true that Staff does not have the authority to audit the utility's (unaffiliated) vendors, the Legislature did not deem such authority necessary to enable the Commission to carry out its responsibilities -- with respect to any regulated utility. There are numerous regulated utilities, each of whom deals with a multitude of unaffiliated vendors. The Commission Staff cannot audit their books, either. However, to date, City Gas is unaware of any claim by either the Commission or its Staff that the Commission cannot perform its function of

gauging the reasonable fees or costs incurred by the utilities. That Staff is attempting, through its efforts to intrude on City Gas' preparation for litigation, to exceed the bounds of its statutory authority should indicate the discovery attempt is inappropriate. Nonetheless, with respect to the issue of vendor payments, Staff has not shown why it could not obtain the information it says it "needs" through the exercise of the Commission's subpoena powers.

Staff's attempt to invoke the "hardship-substantial equivalent" feature of Rule 1.280(b)(3), Florida Rules of Civil Procedure, fails for another reason. The provision of the rule that makes certain attorney "fact" work product prepared in anticipation of litigation or in preparation for trial, discoverable in limited circumstances involving a required showing applies only to a "party" having a need to prepare "the case:"

> . . . a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that party's representative, including that party's attorney, consultant, surety, indemnitor, insurer, or agent, only upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of the materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. Without the required showing a party may obtain a copy of a statement concerning the action or its

> subject matter previously made by that party. Upon request without the required showing a person not a party may obtain a copy of a statement concerning the action or its subject matter previously made by that person.

The references in the rule to "the case" and to the very different discovery rights that "parties" and "non-parties" have under the rule make it clear that the rule relates only to the particular litigation in anticipation of which the materials sought to be discovered were prepared. The subject document was prepared -- not for rate case purposes -- but in anticipation of possible litigation with the former president. Staff is not a "party" to such litigation, is not preparing "the case" within the meaning of the rule, and thus has no standing to attempt to acquire the Company's attorney work product by claiming the inability to acquire the "substantial equivalent." To construe the rule otherwise would yield the absurd result of making available to Staff, who is a spectator to any dispute between the Company and former executives or vendors, privileged materials to which even the party litigants in the litigation which the materials anticipated ("parties" within the meaning of Rule 1.280 (b)(3)) could not acquire under the rule.

Finally, neither the Staff nor the ratepayers will be prejudiced by the Prehearing Officer's decision to respect the privileged nature of the law firm's report. Apart from its effort to obtain a privileged document, Staff has conducted no investigation of the issue that it says is related to the document. Staff has at its disposal the "vast arsenal" of discovery tools

noted in Consolidated Gas. If Staff believes the issue calls for further attention, it can request the Commission to open a separate docket for the purpose; if City Gas believes such a measure is unwarranted, it can respond to Staff's initiative in the way its interests indicate would be appropriate.

Conclusion

City Gas submits that there is no need for an in camera inspection; that City Gas has demonstrated that both the attorney/client privilege and the attorney work product privilege operate to protect the subject report by the law firm from discovery; and that the motion to compel should be denied.

In the event the Prehearing Officer decides to conduct an in camera inspection of the document to confirm its privileged nature, City Gas requests that the inspection be made at the earliest practicable time, so that the discovery issue will be resolved prior to the Agenda Conference of October 29, 1996, when the Commission will consider City Gas' rate case petition. City Gas does not waive either privilege by alluding to the possibility of such an in camera inspection.

WHEREFORE, City Gas requests the Prehearing Office to deny Staff's request for an in camera inspection and rule that the Pitney Hardin report is absolutely protected from discovery.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Staff's Motion for In Camera Inspection has been furnished by hand delivery (*) or U.S. Mail to the following parties of record, this 23rd day of October, 1996:

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