

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission )  
 ) 02-0461  
Citation to show cause for continued QSWEF )  
Certification of Pontiac Facility and to Investigate )  
Compliance with the final order in Dockets 97-0031 )  
Through 97-0045 consolidated )

STAFF OF THE ILLINOIS COMMERCE COMMISSION RESPONSE  
TO TRUSTEE'S MOTION TO COMPEL

The Staff of the Illinois Commerce Commission ("Staff"), by its counsel, hereby responds to Greg E. Szilagy's, as Chapter 11 Trustee for Resource Technology Corporation ("RTC"), motion to compel the production of the draft testimony and comments thereon of the Commission Staff's expert witness, Michael J. Carolan and to stay the proceeding pending resolution of Trustees Motion and in the alternative, request for an additional sixty (60) days to file its direct testimony, up to and including May 20, 2005 and to postpone the July 12 and 13, 2005 hearing date for sixty (60) days ("Trustee's Motion"). Staff respectfully requests that the Administrative Law Judge ("ALJ") deny Trustee's Motion to compel and deny Trustee's Motion to stay the proceeding. However, Staff has no objection to the filing date for RTC's testimony being changed from March 21, 2005 to May 20, 2005 and that the evidentiary hearings be postponed provided that the currently scheduled due date for Staff's rebuttal testimony be cancelled and rescheduled to a later date to be determined at a status hearing held subsequent to the filing of RTC's direct testimony. In further support of its position, Staff responds as follows:

1. Trustee's Motion arises from Staff's responses to RTC Data Request 4 directed to Staff's witness Michael J. Carolan. RTC Data Request 4 stated the following:

Produce any and all documents constituting, memorializing, relating to, or referring to any oral or written communication between Staff and Mr. Carolan.

Staff responded to Data Request 4 as follows:

Initial Response

Without waiving any objection, Staff states that it is reviewing materials in its possession for documents that comport with the request.

Supplemental Response

Please see the attached. In addition, documents exist which are responsive to Request No. 4 but which contain confidential information and therefore those documents will be provided to RTC under separate cover. Also, Staff continues to review materials in its possession for documents that comport with the request.

Second Supplemental Response

Please see the attached documents J1 to J100.

Third Supplemental Response

Please see the attached documents RY-1 to RY-89 and Y-1 to Y-24.

2. In support of its motion, RTC argues that: (1) all materials authored or shared with an expert witness are discoverable and not privileged. See Ill. S. Ct. R. 213(f)(3), (2) discovery is liberal and intended to ensure that "each party knows as much about the controversy as is reasonably practicable." Mistler v. Mancini, 111 Ill. App. 3d 228, 231 (2<sup>nd</sup> Dist. 1983), (3) the Commission's Rules of Practice support the policy of full disclosure of all relevant material facts to a proceeding and (4) an administrative agency is required to disclose all evidence that "might be helpful to an accused". (Trustee's Motion, pp 2-3). Attached to this response as Attachment A

(Public/Protected, RY 109-RY110) and Attachment B (Public/Protected, J38-J56) are two examples of the types of documents Staff understands RTC to be seeking.

3. RTC is mistaken that Mr. Carolan's draft testimony and the comments made on it are not protected by the attorney-client privilege. Illinois Supreme Court Rule 201(b)(2) states, in part, "[a]ll matters that are privileged against disclosure on the trial, including privileged communications between a party or his agent and the attorney for the party, are privileged against disclosure through any discovery procedure." Ill. S. Ct. R. 201(b)(2). The purpose of the attorney-client privilege is "to encourage and promote the full and frank consultation between a client and legal advisor by removing the fear of compelled disclosure of information." Consolidation Coal Co., v. Bucyrus-Erie Co., 89 Ill.2d 103, 118-119 (Ill. 1982). A claimant must meet three requirements to trigger the privilege: (1) the statement must originate in the confidence that it will not be disclosed; (2) it must be made to an attorney acting in his official capacity<sup>1</sup> and (3) the statement must remain confidential. See Hayes v. Burlington Northern & Santa Fe Ry. Co., 323 Ill.App.3d 474 (1st Dist. 2001) (citing Consolidation Coal, 89 Ill.2d at 119). In addition, although the attorney asserts the attorney-client privilege on behalf of his client, the privilege belongs to the client, rather than the attorney. Thus, only the client may waive the privilege. See In re Marriage of Decker, 153 Ill.2d 298, 313 (Ill. 1992). Generally, a client's voluntary disclosure of privileged information will waive the

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<sup>1</sup> The language of the second trigger requires that the confidence "be made to an attorney..." (emphasis added). The Second District Court has read this to mean that the attorney-client privilege does not attach to a confidential communication sent from the attorney to the client. See Dalen v. Ozite Corp., 230 Ill.App.3d 18, 27 (2nd Dist. 1992). The First District Court disagrees with this interpretation, and has held that the privilege applies to the advice of an attorney to his client. See Midwesco-Paschen Joint Venture For Viking Projects v. IMO Indus., Inc., 265 Ill.App.3d 654, 661 (1st Dist. Ct. 1994). In doing so, the court noted that Rule 201(b)(2) protects "communications between a party or his agent and the attorney for the party." See *id.* (emphasis added).

attorney-client privilege. See In re Grand Jury January 246, 272 Ill.App.3d 991, 997 (1st Dist. 1995). Staff has not and is not waiving the attorney-client privilege in this matter.

Certainly the ALJ after reviewing Attachment A (Protected) and Attachment B (Protected) will agree with Staff that Mr. Carolan's draft testimony and similar comments made on that testimony meet all three requirements of the attorney-client privilege. Mr. Carolan provided Staff counsel along with certain other Staff members with a draft of his testimony in his role as the hired outside expert for Staff in this matter. Staff counsel and certain Staff members made comments on that draft testimony through email. That draft testimony and comments thereon were provided to certain Staff members and Staff counsel with the understanding that the draft testimony and comments would not be shared with others outside of Staff. Consistent with that assumption, the draft testimony and the comments have not been disclosed to any one outside of the Commission.

4. Not only are Staff counsel's comments on the Draft testimony protected by the attorney-client privilege, Staff counsel's comments on that draft testimony are protected by the work product doctrine. Illinois Supreme Court Rule 201(b)(2) sets the parameters for the scope of discovery of work product materials. It states, in relevant part, "[m]aterial prepared by or for a party in preparation for trial is subject to discovery only if it does not contain or disclose the theories, mental impressions, or litigation plans of the party's attorney." Ill. S. Ct. R. 201(b)(2). This type of protected material is known as "opinion" work product, and is discoverable only "upon a showing of impossibility of

securing similar information from other sources.”<sup>2</sup> See Waste Mgmt., Inc. v. Int’l Surplus Lines Ins. Co., 144 Ill.2d 178, 196 (Ill. 1991). In explaining the rationale behind the work product doctrine, the Illinois Supreme Court has stated, “the work product doctrine provides a broader protection than the attorney-client privilege and is designed to protect the right of an attorney to thoroughly prepare his case and to preclude a less diligent adversary attorney from taking undue advantage of the former’s efforts.” Fischel & Kahn v. Van Straaten Gallery, Inc., 189 Ill.2d 579, 591 (2000). Staff counsel’s comments on Mr. Carolan’s draft testimony contain the mental impressions of Staff counsel.

5. Despite RTC’ claims, Staff has complied with Ill. S. Ct. R. 213(f)(3). The rule provides that:

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**(f) Identity and Testimony of Witnesses.** Upon written interrogatory, a party must furnish the identities and ~~location~~ addresses of witnesses who will testify at trial, ~~together with the subject of their testimony.~~ and must provide the following information:

(1) Lay Witnesses. A "lay witness" is a person giving only fact or lay opinion testimony. For each lay witness, the party must identify the subjects on which the witness will testify. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the witness.

(2) Independent Expert Witnesses. An "independent expert witness" is a person giving expert testimony who is not the party, the party’s current employee, or the party’s retained expert. For each independent expert witness, the party must identify the subjects on which the witness will testify and the opinions the party expects to elicit. An answer is sufficient if it gives reasonable notice of the testimony, taking into account the limitations on the party’s knowledge of the facts known by and opinions held by the witness.

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<sup>2</sup> Illinois’ work product doctrine is narrower in scope than the federal work product doctrine, which protects all work performed by an attorney or his agent in anticipation of litigation. See *id.* (citing Fed. R. Civ. P. 26(b)(3)).

(3) *Controlled Expert Witnesses.* A "controlled expert witness" is a person giving expert testimony who is the party, the party's current employee, or the party's retained expert. For each controlled expert witness, the party must identify: (i) the subject matter on which the witness will testify; (ii) the conclusions and opinions of the witness and the bases therefor; (iii) the qualifications of the witness; and (iv) any reports prepared by the witness about the case.

Mr. Carolan, who is under contract with the Commission, is in essence a controlled expert witness. By serving Mr. Carolan's prefiled testimony on the parties Staff has met the requirements of Ill. S. Ct. R. 213(f)(3) (i), (ii) and (iii). The prefiled testimony sets forth: (i) the subject matter of Mr. Carolan's testimony, (ii) Mr. Carolan's conclusions and opinions and the bases for those conclusions and opinions and (iii) Mr. Carolan's qualifications. With regards to (iv), Mr. Carolan's draft testimony is not a report and therefore does not fall under 213(f)(3)(iv). Even if one were to assume the draft testimony was a report, which it clearly is not, RTC's cites to no authority for the position that draft testimony provided to counsel and no one outside of Staff must be turned over to the opposing party not withstanding the attorney-client privilege.

6. Contrary to RTC's claims the draft testimony of Michael J. Carolan is not relevant. Unlike the trial courts for which the Supreme Courts Rules of Practice were designed for, the Commission's common practice is to require prefiled testimony. The practice of prefiled testimony must be taken into account when considering RTC's motion. It is the prefiled testimony which a witness swears to under oath to at the evidentiary hearing. The practice of prefiled testimony results in there being no surprise to the parties as to what the testimony will be for a particular witness at a hearing. A piece of draft testimony is simply that a draft. It is not what the witness will swear to under oath, it is not what the witness will be cross examined on at the hearing and it is

not evidence upon which the Commission will base its final order. What is relevant is the prefiled testimony and RTC has had that since October 28, 2004.

7. RTC will not be prejudiced if it is not provided a copy of Mr. Carolan's draft testimony. The sole main issue in this proceeding is whether RTC's Pontiac facility no longer is using methane gas generated from landfills as its primary fuel<sup>3</sup>. It is nonsensical for RTC to argue that Staff's failure to turnover drafts of Mr. Carolan's testimony has prevented RTC from preparing its direct testimony. RTC fails to acknowledge that Mr. Carolan used RTC's reports to prepare his testimony. Those reports supported Staff's position that RTC Pontiac did not use methane gas generated from landfills as its primary fuel. For RTC to argue that it needs Mr. Carolan's draft testimony to prepare its direct testimony is not reasonable. The reports are at issue and RTC has those reports.

8. Finally, while Staff does not support a stay of the proceeding, Staff has no objection to the procedural schedule in this matter being revised to allow RTC to file its direct testimony on May 20, 2005 and that the hearing dates in July be cancelled, provided that the June 15, 2005 due date for Staff's rebuttal is cancelled as well and is rescheduled at a status hearing to be held the second week of June 2005 or some other mutually convenient time for all the parties. At such a status hearing following the filing of RTC's direct testimony, the parties and the ALJ can then determine mutually agreeable dates for the filing of Staff' rebuttal testimony and the evidentiary hearings.

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<sup>3</sup> There are issues which flow from RTC not using landfill methane gas as it primary fuel including RTC's repayments for power sold in 2002 and 2003 in excess of the utility's avoided cost and future compliance procedures for RTC should the Commission decide to not revoke RTC's QSWEF status.

WHEREFORE, Staff respectfully requests that the ALJ deny Trustee's Motion to compel and stay, however Staff has no objection to the ALJ canceling the March 21, 2005 due date for RTC's direct testimony and canceling the hearing dates in July, provided that the due date for Staff's rebuttal testimony is cancelled as well and that a status hearing is held the week of June 6, 2005 or some other mutually agreeable time so that the parties can then determine a schedule for the filing of Staff's rebuttal and the evidentiary hearings.

Respectfully submitted,

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