

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 000061-EI - Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Sections 366.03, 366.06(2), and 366.07, F.S., with respect to rates offered under commercial/industrial service rider tariff; petition to examine and inspect confidential information; and request for expedited relief.

BEFORE: CHAIRMAN J. TERRY DEASON
COMMISSIONER E. LEON JACOBS, JR.
COMMISSIONER LILA A. JABER

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 26**

DATE: Tuesday, August 1, 2000

PLACE: 4075 Esplanade Way, Room 148
Tallahassee, Florida

REPORTED BY: MARY ALLEN NEEL
Registered Professional Reporter

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RECEIVED 10-25-00

DOCUMENT NUMBER-DATE

13698 OCT 26 8

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PARTICIPANTS:

JOHN ELLIS, on behalf of Allied/CFI.
ROBERT ELIAS, Commission Staff.
HARRY LONG, on behalf of Tampa Electric Company.
STEPHEN SIDELKO, Allied/CFI.
MARLENE STERN, Commission Staff.
PATRICK WIGGINS, on behalf of Odyssey
Manufacturing Company.

STAFF RECOMMENDATION

Issue 1: Should TECO's and Odyssey's requests for oral argument be granted?

Recommendation: The requests for oral argument do not need to be ruled on because the docket has not been to hearing. Each party should be allowed ten minutes to address the Commission.

Issue 2: Should the Commission grant the motions for reconsideration filed by TECO and Odyssey?

Recommendation: The Commission should deny TECO's motion because it does not identify any points of fact or law that were overlooked or not considered by the Prehearing Officer. The Commission should deny part of Odyssey's motion for the same reason, and does not need to rule on that portion of the motion to which Allied has no objection.

Issue 3: Should this docket be closed?

Recommendation: No. This docket should not be closed.

1 CHAIRMAN DEASON: Item 26. Staff, you can
2 introduce the item.

3 MS. STERN: Item 26 is Staff's
4 recommendation on two motions for
5 reconsideration filed in Docket 000061-EI, which
6 is the complaint by Allied Universal Corporation
7 and Chemical Formulators, Inc. against Tampa
8 Electric Company. Odyssey Manufacturing Company
9 is an intervenor in the docket. And Staff has
10 recommended that each of the parties be given
11 ten minutes to address the panel.

12 CHAIRMAN DEASON: Okay. That's Issue 1;
13 correct? There has been a request for oral
14 argument. Is that what you're recommending,
15 that oral argument be allowed, and ten minutes
16 per side?

17 MS. STERN: Yes.

18 CHAIRMAN DEASON: Okay. Any objection,
19 Commissioners?

20 All right. We will proceed then with oral
21 argument. Who's prepared -- who should go
22 first?

23 MR. LONG: I'm prepared to go forward.

24 CHAIRMAN DEASON: All right. Very well.
25 Are the parties okay with ten minutes? That's

1 fine?

2 All right. Please proceed.

3 MR. LONG: Good afternoon. My name is
4 Harry Long, and I'm representing Tampa Electric.

5 I would first of all like to thank the
6 Commission for entertaining oral argument on our
7 motion for rehearing. We know this proceeding
8 has taken up quite a bit of the Commission's
9 time on what appear to be procedural issues, and
10 we would not have asked for rehearing of what
11 appears to be a procedural order if we were not
12 convinced that the order seriously and
13 unnecessarily damages our ability to use the
14 CISR tariff and as a tool to create benefits for
15 our ratepayers.

16 There are six points in particular that we
17 ask the Commission to reconsider in the June
18 27th order. And the first thing I would like to
19 do is to put the arguments that I'll make into
20 the proper context.

21 I've given each of you and the Staff an
22 envelope containing one of the documents that we
23 filed with the Commission back in March. This
24 document is also essentially the same as the
25 exhibit to the testimony of Mr. William Ashburn

1 that we filed with the Commission in this case.

2 MR. ELLIS: I'm sorry, but I must object to
3 your asking the Commission to consider documents
4 and material you haven't provided to us. That's
5 absolutely improper.

6 MR. LONG: well, I think it's entirely
7 proper, because I'm not asking the Commission to
8 consider this document with regard to the
9 ultimate issues in this case. This document is
10 relevant to my argument on my motion for
11 rehearing, and I offer it for that purpose. And
12 under the Commission's rules, it's entirely
13 appropriate for the Commission and the Staff to
14 review this document, which presumably they've
15 already done, since it was filed with the
16 Commission back in March.

17 If I can continue --

18 CHAIRMAN DEASON: Hold on just a second,
19 Mr. Long. I'm going to defer to Staff. This is
20 in a -- this is obviously confidential
21 information. It's in an envelope. I've not yet
22 looked at it, even though I started to, but I
23 put it back --

24 MR. ELIAS: I think that we need to focus
25 on why we are here, which is a motion for

1 reconsideration to demonstrate a mistake of law
2 or fact in the Prehearing Officer's order
3 concerning discovery. I think it's quite a leap
4 of faith, based on what I've heard so far and
5 based on what was in Tampa Electric Company's
6 motion, to get into the substance of some
7 exhibits that are the subject of this discovery
8 dispute, and I'm not sure how they're reasonably
9 related to the arguments on the question of
10 whether or not there was a mistake of law or
11 fact. So subject to Mr. Long demonstrating that
12 there's information in there that is essential
13 to the Commission's understanding of the legal
14 issue that's before it, I would suggest that --

15 CHAIRMAN DEASON: Mr. Long, can you
16 describe to me how this document, whatever is on
17 here, is relevant to the matter before the
18 Commission?

19 MR. LONG: Yes, I can, Mr. Chairman. In
20 the June 27th order, the Commission recognized
21 that in this case, the essential element is to
22 balance the interests of Allied, who claims to
23 have been harmed by some action of Tampa
24 Electric, and the interests of the ratepayers in
25 maintaining the integrity of the CISR tariff. I

1 think that in making that balance, it's
2 imperative that the Commission keep in mind the
3 policy context in which those decisions are
4 being made.

5 One of the points to be made by this
6 document is that the issues raised in this case
7 are frivolous. It is that straightforward. In
8 one of our earlier discussions, we pointed out
9 that in this document, which we filed back in
10 March, we provided a side-by-side comparison
11 with what was done in the case of Allied and in
12 the case of Odyssey. And I would submit for the
13 purpose of determining the weight to be accorded
14 the interests that Allied is advancing, it's
15 first of all important for the Commission to
16 take into account what the bottom line is.

17 That one sheet of paper before you is where
18 this case will end up when the dust settles.
19 That is where we will end up. And on line 19 of
20 that document, that is the bottom line that
21 we'll get to after all the time and effort that
22 has been made. So for purposes of considering
23 these procedural issues, I think it's important
24 for at least the Commission to have that in
25 mind.

1 Second of all, that document bears on one
2 of the issues that we have raised, and that is
3 the proper form of the nondisclosure agreement.
4 Allied has made an argument that its due process
5 rights are somehow violated and its ability to
6 participate in this proceeding is somehow
7 impaired if there are reasonable limits placed
8 on who can view confidential information. I
9 think that it's important for the Commission to
10 see the confidential information that we're
11 talking about and to make its own assessment as
12 to how complicated a task it is for someone to
13 look at that information and evaluate it.

14 I think the point to be made is that once
15 you see this information, it will be crystal
16 clear that certainly Allied has ample resources
17 to review this information and participate
18 intelligently in this proceeding without
19 unnecessarily disclosing this information to
20 individuals who are directly involved in
21 competitive activities and who present the
22 greatest danger of accidental disclosure, in the
23 best case, of this information.

24 COMMISSIONER JABER: Can I ask you a
25 clarifying question?

1 MR. LONG: Certainly.

2 COMMISSIONER JABER: You said early on that
3 you attached this information to someone's
4 testimony?

5 MR. LONG: That was attached to the
6 testimony of Mr. William Ashburn which was filed
7 a couple of weeks ago in accordance with the
8 procedural schedule in this case. We proposed
9 to redact that testimony and make it available
10 -- at least that portion of it, and make it
11 available to those individuals who sign an
12 appropriate nondisclosure agreement.

13 COMMISSIONER JABER: What exactly then did
14 you attach to the testimony if you proposed --
15 so I'm assuming you didn't redact anything. You
16 asked for confidential treatment.

17 MR. LONG: We asked for confidential
18 treatment and filed in a sealed envelope an
19 unredacted copy of Mr. Ashburn's testimony and
20 filed with the parties a redacted version.

21 COMMISSIONER JABER: I see.

22 CHAIRMAN DEASON: And there has been an
23 objection to the Commission looking at this for
24 purposes of this reconsideration. Can you more
25 fully state the basis for the objection, please?

1 MR. ELLIS: Yes. And I begin by quoting a
2 comment that you made in the most recent
3 telecommunication matter you were considering.

4 CHAIRMAN DEASON: well, that's a sore
5 point. You may not want to do that.

6 I'm kidding. Go ahead.

7 MR. ELLIS: We are here on
8 reconsideration. We're not retrying this. I
9 understood we were here on a motion for
10 reconsideration of the order issued by the
11 Prehearing Officer on June 27th deciding a
12 number of discovery matters. Now I find we're
13 here on reconsideration of TECO's motion to have
14 this case decided based on a secret showing of
15 evidence that's going to be excluded from my
16 consideration. This is just another attempt by
17 TECO to violate Allied's due process rights and
18 prevent us from being able to examine evidence
19 and confront witnesses. It's totally improper.

20 MR. LONG: Mr. Chairman, I might point out
21 that counsel for Allied has not alluded to a
22 single Commission rule or regulation that
23 prevents what I'm proposing to do, and he has
24 been unable to do that because there is none.

25 CHAIRMAN DEASON: well, Mr. Long, what I'm

1 going to do at this point is, I'm going to allow
2 you to discuss this document without divulging
3 any confidential information. But in an
4 abundance of caution, I personally -- I'm not
5 going to look at. Now, if you can make your
6 relevant points without me looking at the
7 document, please feel free to do so without
8 divulging any confidential information.
9 Obviously, there's something contained in this
10 document that you think has a bearing upon this
11 particular motion. If you wish to pursue that
12 under those terms, I will allow it.

13 MR. LONG: Thank you, Mr. Chairman. I'll
14 proceed.

15 The document in question, which is Bates
16 stamp page number 1933, as I mentioned before,
17 is a side-by-side comparison of what was
18 proposed to both Allied and Odyssey. One can
19 clearly see at line 8 of that document what the
20 rates were that were proposed.

21 To the extent that each customer offered
22 items of value to our ratepayers, those items
23 are listed in lines 13 through 17. The value
24 associated with those items is listed at line
25 18. And adjusted for the value of the items

1 presented, the rates, excluding taxes and
2 franchise fees, are stated at line 19.

3 And I think that if one looks at those
4 rates, there is no difference, no meaningful
5 difference whatsoever. And I think that's
6 important to keep in mind in light of the
7 allegations of improper conduct. The numbers
8 indicate that there was no improper conduct,
9 that these customers were treated precisely the
10 same way, that the numbers on line 19 are almost
11 identical, in a situation where they're not cost
12 based numbers, they're negotiated numbers. And
13 I think that fact alone demonstrates that we
14 have acted fairly and impartially with both of
15 these customers.

16 Now, against that background, I would ask
17 the Commission to reconsider six points that
18 were raised in the June 27th order.

19 The first point that I would like to bring
20 to your attention is the determination that
21 evidence with regard to the eligibility of
22 Odyssey for a CISR rate must be disclosed to and
23 shared with Allied for its review. Let me start
24 by saying on that point, we certainly have no
25 problem with the Commission and the staff

1 examining Odyssey's eligibility for a CISR
2 rate. We welcome that. We asked for it months
3 ago.

4 The point here is that Odyssey's
5 eligibility for a CISR rate really has nothing
6 to do with Allied. In this instance, Allied is
7 not claiming that we found them ineligible for a
8 CISR rate and somehow disadvantaged them.
9 That's not an issue here. The question of
10 whether or not Odyssey is eligible is one for
11 the Commission to determine. Allied has no
12 private right of enforcement with regard to that
13 statutory provision, which is essentially what
14 it's claiming. You know, it had no basis for
15 claiming damage.

16 So under that line of reasoning, it's our
17 view that documents with regard to Odyssey's
18 eligibility are really of no use or relevance to
19 Allied in its case. And we would ask the
20 Commission to direct the Staff, as I think the
21 Staff has already been directed at the last
22 agenda conference where this matter was raised,
23 to conduct its own investigation as to the
24 eligibility of Odyssey. And, as we have been,
25 we are anxious to cooperate in every way.

1 But that is simply not an appropriate
2 matter for Allied to delve into. The information
3 is potentially sensitive, and it is not Allied's
4 assessment to make. It is for the Commission to
5 make that determination.

6 The second issue that we would like to ask
7 you to reconsider is the nature and scope of the
8 nondisclosure agreement through which
9 confidential documents will be shared in this
10 proceeding. Tampa Electric proposed a provision
11 that in our view represented a very reasonable
12 balance of the competing concerns, the need to
13 protect the integrity of the CISR tariff on the
14 one hand, and Allied's legitimate interest in
15 having reasonable access to relevant facts.

16 We proposed a provision which in the June
17 27th order the Commission recognized is
18 frequently used in practice before this
19 Commission in the telecommunications industry,
20 where matters of confidentiality in a
21 competitive environment are addressed on a daily
22 braces. Quite simply, that provision provided
23 that individuals within the Allied organization
24 who were directly involved in competitive
25 activities, both in negotiations with Tampa

1 Electric for CISR rates and in conducting the
2 competitive aspects of the company's business,
3 would not be permitted to review information,
4 simply because the risk of their accidentally
5 disclosing or inadvertently making use of that
6 information was too high.

7 Now, Allied asserted that it simply had no
8 one else in the company aside from Mr. Namoff,
9 the person who has been directly involved in
10 competitive activities, who could carry out
11 those responsibilities. In their most recent
12 filing, they've acknowledged that there are at
13 least two other individuals within Allied who
14 are competent to review that information and
15 adequately represent Allied's interests.

16 COMMISSIONER JABER: Mr. Long, someplace in
17 here, I know you're trying to show me that the
18 Prehearing Officer made a mistake of fact or
19 law. I think I should tell you right now that I
20 am not getting that point.

21 MR. LONG: Well, the mistake of fact was
22 that there was no one in the Allied organization
23 other than Mr. Namoff who could adequately
24 represent the company's interests in reviewing
25 this confidential information, and that

1 determination was made based on the
2 unsubstantiated assertion of counsel in various
3 proceedings. I mean, there was certainly no
4 offer of proof in that regard. And my point is
5 that counsel's subsequent statements in their
6 response to our petition for rehearing bears
7 that out, because now they've acknowledged that
8 there are at least two other people in addition
9 to Mr. Namoff who are competent to represent
10 Allied's interests in this regard.

11 In addition, I might point out that Allied
12 has also hired Professor Phillips, who has
13 written several books on public utility
14 regulation, presumably to advise them and appear
15 as a witness for them in this proceeding. I
16 find it very difficult to believe that with that
17 kind of assistance and the admitted existence of
18 others within the organization who are not as
19 directly involved in competitive activities,
20 that the kind of reasonable restriction that we
21 have proposed that the Commission employs
22 routinely is not appropriate for use in this
23 case.

24 Under those circumstances, I would ask the
25 Commission to reconsider, especially in light of

1 the additional information which Allied has been
2 kind enough to provide.

3 The next issue that I would like the
4 Commission to consider -- and this may be just a
5 matter of clarification as opposed to
6 reconsideration. But in the June 27th order,
7 there was a great deal of discussion to the
8 effect that there's language in the CISR tariff
9 which indicates that the CSA and the documents
10 generated in the course of CISR negotiations are
11 not confidential until they are subsequently
12 found to be so pursuant to a motion filed under
13 366.093 of the Florida Statutes.

14 Now, to the extent that the import of the
15 language was that it is incumbent upon the
16 utility to identify the documents as CISR
17 documents that were developed in the course of
18 negotiations in a 366 filing, and that having
19 identified those documents as CISR related
20 documents, that that satisfies the requirement,
21 then we certainly don't take issue with that and
22 are comfortable with that.

23 But to the extent that the import of the
24 ruling was that those documents are not
25 confidential until at some subsequent point some

1 additional justification is offered besides the
2 fact that those documents were provided in the
3 context of CISR negotiations, we think that is
4 at odds with the clear language of the
5 Commission decision accepting our CISR tariff
6 and subsequent decisions with regard to Gulf
7 Power's CISR tariff, which is very similar. The
8 tariff says what it says on its face, that the
9 CSA and the documents that are generated in the
10 course of negotiation are confidential.

11 And, Commissioner Jaber, as you pointed out
12 in discussion on an earlier case, I think that
13 the company and the customers that we deal with
14 under the CISR tariff are entitled to rely on
15 the clear and unambiguous language both in the
16 tariff and in various Commission orders that
17 have dealt with the matter of confidentiality.
18 My --

19 COMMISSIONER JABER: What exactly is that
20 language in the tariff? Read that to me.

21 MR. LONG: I'll read it to you. Bear with
22 me for a moment.

23 Okay. This is the section entitled
24 "Service Agreement." It says, "For purposes of
25 the CSA, the requirements for electric service

1 may exclude certain electric service
2 requirements served by the customer's own
3 generation as of the date shown on the CSA. The
4 CSA shall be considered a confidential
5 document. The pricing levels and procedures
6 described within the CSA, as well as any
7 information supplied by the customer through an
8 energy audit or as a result of negotiations or
9 information requests by the company, and any
10 information developed by the company in
11 connection therewith, shall be made available
12 for review by the Commission and its staff only,
13 and such review shall be made under
14 confidentiality rules of the Commission."

15 That's the language of the tariff, and that
16 language was not adopted in isolation. There
17 was a great deal of discussion when the tariff
18 was adopted.

19 CHAIRMAN DEASON: Do you want us to clarify
20 that that language in the tariff is operative,
21 is controlling?

22 MR. LONG: Well, controlling in the sense
23 that documents that are identified there are
24 confidential, subject to specific identification
25 of those documents in a specific case such as

1 this one. To say that those documents, even
2 though the tariff says they're confidential, are
3 really not confidential unless a subsequent
4 decision is made under 366.093 I think does a
5 great disservice to the parties, because Tampa
6 Electric, Odyssey, and others that we may have
7 talked to proceeded in reliance on what I think
8 is very clear language.

9 CHAIRMAN DEASON: Does the order say that?

10 MR. ELIAS: The order approving TECO's
11 CISR tariff does not address confidentiality of
12 documents.

13 CHAIRMAN DEASON: No, I'm talking about --
14 apparently there's concern -- you mentioned the
15 6/27 order, which he says there's language
16 within that order which could be misinterpreted
17 which would require you to affirmatively
18 demonstrate and prove confidentiality, even
19 though there's language in the tariff which
20 indicates if it's labeled CISR related, it's
21 assumed to be confidential, and that's to
22 protect customers.

23 MR. ELIAS: Yes.

24 CHAIRMAN DEASON: I just want to make
25 sure. I think that we may -- it just may be a

1 misunderstanding. If the tariff says that,
2 that's what is going to control, is it not?

3 MR. ELIAS: The tariff cannot supersede a
4 statute or a rule, and the statute addresses
5 materials that are filed with the Commission.

6 CHAIRMAN DEASON: Okay.

7 MR. ELIAS: The question of discoverability
8 deals with a whole different set of issues. We
9 cannot per se in a tariff declare something to
10 be confidential and thus privileged and exempt
11 from discovery in the face of the civil rules
12 and the case law --

13 CHAIRMAN DEASON: He's not saying that it
14 cannot be discoverable. He's just saying if it
15 is represented that it is being filed pursuant
16 to the CISR tariff, then it has a presumption of
17 confidentiality, and there has to be -- and for
18 it be treated as such until there's a finding to
19 the contrary.

20 MR. ELIAS: You know, what means
21 confidentiality in that context I'm not sure. I
22 think the reasonable interpretation is that the
23 company is not free to disclose that information
24 on the part of the customer. But when --

25 COMMISSIONER JABER: Hang on, Mr. Elias.

1 Read that last sentence again, because you read
2 the last part quickly.

3 MR. LONG: I'll read it. "The CSA shall be
4 considered a confidential document. The pricing
5 levels and procedures described within the CSA,
6 as well as any information supplied by the
7 customer through an energy audit or as a result
8 of negotiations or information requests by the
9 company, and any information developed by the
10 company in connection therewith, shall be made
11 available for review by the Commission and its
12 staff only, and such review shall be made under
13 the confidentiality rules of the Commission."

14 But again, I would stress that this was not
15 adopted in isolation. There was a great deal of
16 discussion about the fact that potential CISR
17 customers would have no reason to talk with us
18 to reveal the kind of confidential information
19 that they would have to reveal --

20 COMMISSIONER JABER: But don't the last few
21 words of that tariff acknowledge that you have
22 to go through the Commission's confidentiality
23 procedures?

24 MR. LONG: Well, Commissioner, as I said,
25 to the extent that what the June 27th order is

1 saying is that in a specific case where there
2 are questions raised, we have an obligation to
3 identify the specific documents that are CISR
4 documents, I certainly don't take issue with
5 that. But the distinction that I would make is
6 that if the argument is that at the same time,
7 we have to subsequently establish
8 confidentiality on some basis other than that
9 these documents are CISR documents, I think that
10 requirement is at odds with the tariff and the
11 Commission's decision.

12 COMMISSIONER JACOBS: Could we by tariff
13 supersede a statute?

14 MR. LONG: Well, Commissioner, I think that
15 that's a little bit of a red herring, in that
16 we're not talking about the tariff superseding
17 the statute. The point is that when the
18 Commission considered this tariff, it made the
19 policy determination that's required under the
20 tariff that this kind of information is
21 deserving of protection because of the context
22 in which it would be received. So it's not a
23 question of the tariff superseding the statute.
24 The statutory determination was made at the time
25 this tariff was adopted.

1 CHAIRMAN DEASON: Okay. You may proceed to
2 your next point.

3 MR. LONG: Thank you.

4 The next point that I would like to raise
5 is the question of revealing the salary of one
6 of Tampa Electric's former employees. As you
7 may recall, one of the allegations made by
8 Allied is that the Tampa Electric employee who
9 negotiated the contract with Odyssey
10 subsequently became an Odyssey employee, and
11 that is asserted as some proof of nefarious
12 activity on the part of the company.

13 Well, I think there certainly is no
14 evidence, no basis for making that assumption in
15 the record. In the June 27th order, I think
16 that the Commission quite correctly pointed out
17 that there's a balancing test that goes on when
18 you talk about disclosing the personal employee
19 information that a company holds. I mean,
20 there's no absolute privilege or right to
21 protection, but there's got to be some
22 reasonable balancing of the interest in
23 disclosure of relevant information and the
24 individual's interest in privacy.

25 Here the request for the salary history of

1 the person who was a former employee of the
2 company is totally and completely irrelevant.
3 There has been no kind of showing in this
4 proceeding to indicate why that information
5 would be useful or appropriate. To the extent
6 that there have been insinuations of improper
7 conduct, I think the Commission now has
8 testimony filed before it by Odyssey that should
9 certainly lay that to rest.

10 As I said before, I think that the one-page
11 exhibit that you have before you gives you the
12 numbers, which, regardless of verbal testimony,
13 I think makes clear that there is no room for
14 favoritism the way those negotiations actually
15 played out and what was ultimately negotiated
16 with the customers in question. There is
17 absolutely no basis for asking for this
18 information, and I would suggest that it sets an
19 unfortunate precedent in terms of unnecessarily
20 invading the privacy of employees.

21 The last item that I would ask you to
22 consider is the determination in the June 27th
23 order that Tampa Electric disclose to Allied the
24 number of CISR contracts that the company has
25 entered into.

1 I would submit that unless the Commission
2 is of the view that Allied is entitled to the
3 same CISR rate that any other customer has
4 received, that the number of CISR contracts in
5 existence is really not at all relevant to this
6 proceeding. As we've discussed before, I think
7 the appropriate legal standard here is whether
8 or not there was undue discrimination. And
9 under the undue discrimination standard, which
10 this Commission is very familiar with, there is
11 nothing that suggests or certainly requires that
12 any two customers in the context of this CISR
13 tariff be given the same rate. This is not a
14 cost-based rate. It's based on the customer's
15 alternative cost within a floor and ceiling that
16 have been defined by the Commission.

17 Under those circumstances, the existence of
18 other CISR customers and what rates they might
19 receive is of no probative value and totally
20 irrelevant. Quite frankly, the only reason in
21 my view that the case has proceeded this far in
22 this instance is because of these unfounded
23 allegations of improper conduct. But barring
24 that, I think it's clear that what Tampa
25 Electric has done is consistent with the tariff.

1 We're not trying to hide behind procedural
2 issues. I mean, back in March we filed with the
3 Commission every single document we had on this
4 case and stood ready and willing to work with
5 staff to answer any questions that they had.
6 We're willing to share that information with the
7 parties, assuming that a nondisclosure agreement
8 can be worked out that does not unnecessarily
9 damage the usefulness of this tariff, which we
10 believe is a useful tool to create benefits for
11 our ratepayers. It's certainly a tool that the
12 co-ops and the munis around us have and are
13 using very effectively.

14 CHAIRMAN DEASON: Mr. Long, in my notes, I
15 have five points. You indicated you had six.

16 MR. LONG: Well, the other --

17 CHAIRMAN DEASON: Now, I'm not asking for
18 number six, but --

19 MR. LONG: No, no. I gave it to you, so --
20 the CSA, that was rolled into our larger
21 discussion. Another point was that the entire
22 CSA is not a confidential document, and we had
23 raised that as a separate point. But I think
24 that was included in our discussion of what the
25 tariff says and what the tariff requires.

1 CHAIRMAN DEASON: Very well. Mr. Wiggins?

2 MR. WIGGINS: Yes, sir. Good afternoon.

3 CHAIRMAN DEASON: Good afternoon.

4 MR. WIGGINS: We're here, to be focused, to
5 ask for reconsideration or for clarification of
6 the discovery order with respect to the process
7 by which it contemplates that we'll bring
8 disputes to the Prehearing Officer over
9 documents we wish to preserve as confidential.

10 CHAIRMAN DEASON: Mr. Wiggins, you're
11 representing Odyssey?

12 MR. WIGGINS: I'm sorry. I apologize.
13 Odyssey Manufacturing.

14 CHAIRMAN DEASON: Please proceed.

15 MR. WIGGINS: So our focus here is to ask
16 for clarification or reconsideration of the
17 discovery order with respect to if there are any
18 remaining disputes when we get down to brass
19 tacks.

20 And we want to acknowledge at the outset
21 that we understand there's a balancing of
22 interests that goes here. I believe it was
23 Commissioner Jaber who mentioned that at the
24 last agenda conference we were at. And it's not
25 always easy. You have the due process rights of

1 Allied, but you also have the interest of
2 protecting the confidential business information
3 of --

4 COMMISSIONER JABER: Can I just say that
5 Commissioner Jaber also suggested mediation?

6 MR. WIGGINS: As did I. And in considering
7 the whole process of trying to accommodate these
8 conflicting interests, whether through mediation
9 or the more stringent due process approaches, we
10 have tried at all times to follow the rules.
11 And we're a little concerned at this point that
12 our interests are not being protected, and the
13 discovery order is an example of this.

14 Now, if we go back to the very beginning,
15 Odyssey, when they entered into the CISR,
16 followed the rules and entered into a contract,
17 and now are facing litigation where they're
18 accused of collusion, bad things are being said
19 about Mr. Sidelko and about the company, and the
20 like. We've been involved in this litigation
21 for about eight months and there has not been a
22 quick resolution of it.

23 If we get to the discovery order, we see
24 that the tariff which Mr. Long spoke of says
25 categorically that this information is

1 confidential, but now we find that there are two
2 parts to that. Some may be confidential, and
3 some may not be. But when you go to balance the
4 interests, it's important to us for you to
5 recognize that in our litigation here, we're
6 attempting to basically preserve Odyssey's
7 rights, which we feel are being -- have the
8 potential of being overlooked here.

9 And the part of this that has not been
10 brought to the Commission's attention yet was
11 who Odyssey is, how they got this tariff, and
12 where they are at this point. And I would like
13 to just take about two minutes or three minutes
14 and have Mr. Sidelko address that part of it.
15 And with that background information, I can wrap
16 up very quickly with a precise request of what
17 we would like to do, and then you'll see where
18 we'll be participating in this from here on out.

19 CHAIRMAN DEASON: Okay. You may proceed.
20 Yes?

21 MR. ELLIS: I don't mean to be an
22 obstructionist, but I'm curious how comments
23 offered by Mr. Sidelko would demonstrate a
24 mistake of fact or law, which is the standard on
25 this motion for reconsideration. It seems again

1 that now Odyssey is attempting to offer some
2 evidence that would be a basis for the
3 Commission's decision, and that would not be
4 appropriate on a motion for reconsideration.

5 MR. WIGGINS: Well, I'm a little chagrined,
6 first of all because at the last discovery
7 agenda, Mr. Ellis brought Mr. Namoff, who was
8 free to say his piece for a few minutes about
9 where he was coming from so the Commission could
10 learn about his background, and that's what
11 we're offering to do here.

12 But I'm also chagrined that it's being
13 overlooked that we're also asking for
14 clarification of the order, not just
15 reconsideration, and that's not necessarily a
16 mistake of law or fact. And in that context, I
17 believe that Mr. Sidelko's presentation will be
18 of use. And if you feel for any reason he goes
19 astray, I'm sure that we can cut him off.

20 MR. ELLIS: I'll withdraw the objection.

21 CHAIRMAN DEASON: Very well.

22 MR. WIGGINS: Thank you.

23 MR. SIDELKO: My name is Stephen Sidelko.
24 Stephen is with a ph-h. Sidelko is
25 S-i-d-e-l-k-o. I'm the founder and president of

1 Odyssey Manufacturing. I'm also the founder and
2 president of Century Industries in Miami.
3 Century Industries is a sodium hypochlorite
4 company in Miami. We started in 1984. When we
5 opened, the market leader and our major
6 competition was Allied Chemical, the same Allied
7 as the complainant in this trial.

8 I want to go on record as saying that any
9 success that I've had in this business, I've
10 earned it, that I'm a good engineer, that I've
11 worked hard, that I've delivered to my customers
12 what -- you know, what I promised, that I've
13 treated my employees with dignity and respect,
14 that I have a good safety record and a good
15 environmental record. In 16 years in business,
16 I haven't hurt anyone or anything in trying to
17 make a few dollars, and I'm proud of my record.

18 Five years ago I had an idea for a new kind
19 of chlorine company. There were two differences
20 with the new company. One was, I needed a
21 particular rate for electric power. Because the
22 power consumption was so much higher, I had to
23 buy power at a certain rate. The other
24 difference was the investment was far greater
25 than what I was used to.

1 I talked to FP&L in Miami, and I couldn't
2 come up with a suitable -- a rate with which I
3 could work. I called Tampa Electric and thought
4 I had a good deal with interruptible power at
5 \$36 per megawatt. It turned out that that
6 wasn't an available tariff. That was a waiting
7 list.

8 As I was waiting, TECO contacted me and
9 asked if I would be a test case, more or less,
10 with a business development tariff called the
11 CISR, that if I qualified, I could get a fixed
12 rate. And I said, "Certainly. I would like to
13 try to qualify." So TECO qualified me. I
14 studied the tariff. I made sure that I
15 qualified. They informed me that I could sign
16 the deal.

17 And my next step was, I had to reinvest
18 everything that I had made up until then. I had
19 to mortgage my house, borrow against my business
20 and the real estate under my business, put my
21 savings and my kids' college fund at risk. The
22 good news is that the whole thing worked.
23 Odyssey Manufacturing started up in March. It's
24 a beautiful company. And, you know, I think
25 that the tariff, the business development tariff

1 did its job.

2 But I'm not here as a proponent of business
3 development. I'm here for my own narrow
4 specific interests, which I think are being lost
5 between the Commission and the -- there are a
6 lot of grand things taking place here. I have
7 two very narrow interests. One is, I wanted to
8 respond in person to the charges that Allied has
9 made against me. We haven't done anything
10 unfair or illegal, and everything we've done has
11 been honest and aboveboard.

12 The second thing is, I would like to ask
13 the Commission to review my qual -- Odyssey's
14 qualifications for the tariff that we received.
15 If you open the page and look at our
16 qualifications, you'll see that we qualified.
17 Tell me that I qualify, and I can go back to
18 work. The rest of the proceedings don't really
19 pertain to me.

20 Thank you.

21 MR. WIGGINS: And I'll just segue back to
22 the discovery issue. So with that narrow focus
23 in mind, we will take the documents and go over
24 them, and we'll take the Bates stamped documents
25 as soon as TECO can get it to us, and we'll look

1 at them, and we'll try to narrow it. Maybe
2 we'll only come up with five documents that we
3 don't want to give them, and maybe we -- we'll
4 get it as narrow as we can. we'll work in good
5 faith. we always do. we'll do that, and we'll
6 do it as timely as possible.

7 But what we ask is that if Mr. Ellis and
8 Mr. Schiefelbein and I can't all agree, and more
9 particularly, if Mr. Schiefelbein and Mr. Ellis
10 can't agree, when we take it to the Prehearing
11 Officer, we would like that to be looked at
12 de novo. The standard in this order, financial
13 status, is so clumsy and vague, with all due
14 respect to Staff, that I think it's better if we
15 just take it on a fresh look and just say,
16 "Look, Commissioner Jacobs, this is how we think
17 it works. This is why it should be protected,"
18 and Mr. Ellis can say, "This is why they're
19 wrong," and you can make it based on the
20 traditional test rather than trying to hold it
21 up to this standard of financial -- this
22 financial status standard, which I'm not quite
23 sure where it ends and where it begins. And
24 that's what we would request, that the order be
25 clarified to that effect. And we appreciate

1 your time and attention.

2 CHAIRMAN DEASON: Let me be sure I
3 understand. There is a financial status
4 standard which you're uncomfortable with, and
5 you would prefer that whenever there is a
6 dispute that it just be de novo, and whatever
7 the standard is that applies for that, it would
8 just be considered.

9 MR. WIGGINS: Yes, sir. We're under an
10 agreement where we're pledged to keep secret the
11 information. We cannot violate that, and we
12 will not. TECO, Tampa Electric and Allied and
13 the Commission can fight that out. What we're
14 saying is, when the dust clears and we're
15 supposed to go through a pile of documents and
16 say, "These are the ones that we don't want to
17 let you have, Allied," we'll do that, and we'll
18 do it expeditiously. We'll work in good faith
19 with Mr. Ellis. We have a good working
20 relationship with him. And we'll bring it to
21 the Prehearing Officer crystallized for a
22 decision, but we would like that decision to be
23 made without he and I having to argue about what
24 financial status is, but rather right to the
25 heart of that document.

1 CHAIRMAN DEASON: Thank you.

2 MR. WIGGINS: Thank you.

3 CHAIRMAN DEASON: Mr. Ellis?

4 MR. ELLIS: Thank you Mr. Chairman and
5 Commissioners. In response to the latest point,
6 we have no objection to the request made by
7 Mr. Wiggins. I think it is fair to say we have
8 a good working relationship. Allied has offered
9 everything it can think of to accommodate
10 Odyssey's concerns with respect to
11 confidentiality.

12 In particular, we offered Odyssey the
13 opportunity to prereview documents when TECO has
14 concluded its review of those documents and
15 redacted them according to his interpretation of
16 the order. And that process I had understood
17 would have occurred by now, except I gather TECO
18 has refused to produce the documents to Odyssey.
19 But Allied in no way objects to this prereview
20 by Odyssey, and I have no objection to the
21 procedure for resolution of any disputes
22 following that that Mr. Wiggins proposes.

23 Next I would like to respond to
24 Mr. Sidelko. And I expect there must be some
25 misunderstanding, because none of the documents

1 filed by Allied in this case have mentioned
2 Mr. Sidelko's name. We have not said anything
3 bad about him. And evidently this is an
4 interpretation he has placed on some other
5 allegations, but there is no reference to
6 Mr. Sidelko in anything we have said in this
7 case.

8 The suggestion that Odyssey is facing
9 litigation as a result of Allied is also
10 curious, since Odyssey was not named as a party
11 to this action, but rather intervened of its own
12 accord.

13 In conclusion, to the points made by
14 Mr. Wiggins, again, we offer to work with his
15 office in good faith to resolve any disputes
16 concerning confidentiality without bringing
17 those to the Commission.

18 To turn to the motion for reconsideration
19 filed by TECO, the order entered by the
20 Prehearing Officer on June 27th presents a very
21 thorough and very carefully reasoned analysis of
22 the many issues involved following the discovery
23 requests served by Allied, the motion to compel
24 production of documents served by Allied, the
25 motions for protective orders filed by Odyssey

1 and TECO, and the request for confidential
2 classification filed by TECO.

3 The order reflects that Staff has reviewed
4 several hundred pages of documents filed by TECO
5 page by page, and in some cases, line by line,
6 to determine the relevance of those documents to
7 the issues raised by Allied's complaint, the
8 responsiveness of the documents to Allied's
9 discovery requests, and in some cases, the
10 justification for TECO's request for
11 confidential classification of those documents,
12 page by page and line by line. That's a task
13 that ordinarily should have been performed by
14 the parties and should have been resolved
15 informally between the parties insofar as
16 possible, but the task was imposed on the
17 Commission and its Staff by TECO's unprecedented
18 filing of all of the documents with a blanket
19 request for confidential classification in
20 support of a motion to have this proceeding
21 dismissed without Allied having any opportunity
22 to confront witnesses and evidence.

23 You have denied that attempt to have this
24 proceeding dismissed, and the Prehearing
25 officer's order has resolved the many issues

1 raised, beginning with the service of Allied's
2 initial discovery request six months ago on
3 February 2nd. TECO's motion for reconsideration
4 presents no new issues and fails to identify a
5 single point of fact or law that was not
6 considered and decided in the Prehearing
7 officer's order. TECO is simply rearguing the
8 same points that it has argued before, and that
9 is exactly what is not an appropriate purpose of
10 a motion for reconsideration. TECO's motion
11 invites exactly the exercise in second-guessing
12 that your orders on motions for reconsideration
13 in numerous cases in the past have repeatedly
14 and consistently rejected. You should reject
15 TECO's improper attempt to reargue these matters
16 and deny the motions for reconsideration.

17 There are two issues in TECO's motion which
18 are of primary importance to Allied. One is
19 disclosure of confidential information to
20 Allied's chief executive officer and principal
21 witness in this proceeding, Mr. Namoff. The
22 second is Allied's right to conduct discovery on
23 the issue of whether Odyssey complied with the
24 eligibility requirements of the CISR tariff.
25 Mr. Namoff's comments made to you on April 18th

1 addressed both of those issues, and I can refer
2 you to a section of those comments now.

3 You may remember Mr. Namoff began by
4 displaying a notebook containing the engineering
5 plans for the same kind of bleach manufacturing
6 plant that Odyssey had built and that Allied
7 proposed to build. Mr. Namoff said, "When I
8 went to TECO last year with these engineering
9 plans, I was ready to invest \$15 million in this
10 new plant technology, and the one thing I asked
11 TECO for was that Allied get the same rate for
12 electric power that Odyssey got. And this is
13 very important, because power is 50% of the cost
14 of manufacturing. Georgia Power Company had no
15 problem offering me a discount rate for electric
16 power if I built the plant in Georgia. Georgia
17 Power made their offer of a discount rate two
18 weeks after I applied to them, but with TECO I
19 was delayed many months waiting for an answer,
20 until the one person at TECO I get to negotiate
21 with tells me and three other officers of our
22 company to our faces that it's too bad we didn't
23 come to TECO sooner, because the special rate
24 that TECO gave Odyssey is closed down now, and
25 Allied is locked out from getting that rate. I

1 want to know why, if Odyssey and Allied both
2 qualify for a discount rate from TECO, why
3 Odyssey's negotiations ended up with them
4 getting the best rate and hiring the TECO
5 negotiator, and Allied gets some guy who thinks
6 he's supposed to act like a used car salesman
7 and keep us from getting the same rate, while
8 the other TECO negotiator is out working for
9 Odyssey taking away my company's business. I
10 know now that what TECO told me about the rate
11 they gave Odyssey being closed down and Allied
12 being locked out because we came to TECO too
13 late wasn't the truth. I want to know what the
14 truth is about the rate TECO gave Odyssey and
15 whether Odyssey even qualified for that discount
16 rate in the first place."

17 Commissioners, the proposition that TECO is
18 advancing in their motion for reconsideration is
19 that this CISR tariff you approved is too
20 important for somebody like Mr. Namoff to ever
21 question and that TECO doesn't have to answer to
22 him. That argument was properly rejected by the
23 Prehearing Officer, and the motion for
24 reconsideration does no more than to raise the
25 same arguments again and ask you to second-guess

1 the Prehearing Officer. You should reject
2 TECO's argument again and deny the motion for
3 reconsideration.

4 In specific response to the points made in
5 the oral argument today by counsel for TECO on
6 these two matters, concerning the suggestion
7 that there were three people at Allied capable
8 of considering this matter, TECO's counsel
9 neglected to mention that the second part of
10 that showing was that all three people failed to
11 meet the eligibility requirement for disclosure
12 that TECO seeks. Every one is involved in the
13 development of competitive business strategy.
14 There is no one at Allied who can work with
15 counsel and achieve any resolution of this case
16 who meets the criterion that TECO seeks to
17 impose. And there's no reason or basis for
18 imposing this requirement on Allied except to
19 prevent Allied's principal witness and the
20 person who negotiated with TECO and who is
21 asking to find out about what happened in these
22 negotiations from being able to respond to
23 TECO's attempt to provide exculpatory
24 testimony.

25 TECO's contention that it is none of

1 Allied's business whether Odyssey complied with
2 the eligibility requirements for the tariff is
3 properly considered and rejected in Staff's
4 recommendation with the following comment.

5 "whether the customers were deemed eligible" --
6 I'm sorry. "TECO indicates that the documents
7 that Allied requested on eligibility of Odyssey
8 aren't relevant because both customers were
9 deemed eligible. whether the customers were
10 deemed eligible by TECO and whether the
11 customers fulfilled the specific eligibility
12 requirements of the tariff are two different
13 issues. It is a matter of vital interest to
14 Allied, in considering an investment in new
15 plant technology at an expense of \$15 million,
16 if its competitor obtained a rate for electric
17 power that gives it a significant competitive
18 advantage without having to meet those
19 requirements." And based on my brief review of
20 identification of documents provided by TECO in
21 the last month, I don't see any reference to an
22 alternative or bypass threat that would have met
23 the eligibility requirements for the CISR
24 tariff.

25 The points made by TECO are reargument of

1 points it has argued on several occasions in the
2 past. Essentially, it is saying the Prehearing
3 officer considered this matter, he weighed the
4 rights of the parties, he weighed the rights of
5 TECO, or he weighed the interests of TECO in
6 attracting future CISR tariff customers, he
7 weighed the interest of privacy with respect to
8 TECO employees, and he weighed the rights and
9 deeds of Allied to conduct discovery in this
10 case, and he reached a decision. Now by this
11 motion for reconsideration, he is and TECO is
12 asking you to reweigh those matters, to retry
13 this case. That is an improper purpose on a
14 motion for reconsideration, and it should be
15 rejected.

16 Thank you.

17 COMMISSIONER JABER: Mr. Ellis, has your
18 client refused to sign a nondisclosure
19 agreement?

20 MR. ELLIS: No. And I thank you for
21 bringing up that point. On July 13th, we filed
22 a nondisclosure agreement which is agreed and
23 final as to all of its terms upon the denial of
24 the motions for reconsideration. That is, six
25 months after we sent our initial discovery

1 request out on February 2nd, upon the denial of
2 these motions for reconsideration, the
3 protective agreement is final, and we are
4 finally prepared to go forward with discovery.

5 COMMISSIONER JABER: Say that again. So
6 are you saying there's no issue?

7 MR. ELLIS: TECO seeks to add terms to that
8 protective agreement by its motions for
9 reconsideration. With the denial of the motions
10 for reconsideration, the issue is moot, and the
11 agreement is final. And we have signed it, I
12 should add. We do have it signed here and will
13 provide it to TECO today.

14 COMMISSIONER JABER: Staff, you're going to
15 have to help me out on this one, because I
16 really don't understand the nature of the
17 problem here. Someone is alleging
18 confidentiality, and we've got procedures in
19 place to go forward. I keep -- this is like
20 deja vu. They're agreeing to a nondisclosure
21 agreement. What is the problem here?

22 MS. STERN: There are two different
23 nondisclosure agreements. TECO wants a
24 nondisclosure agreement which would limit --
25 which has a lot of limitations on who could

1 review the confidential information put into
2 evidence, or the confidential information
3 produced through discovery.

4 COMMISSIONER JABER: And the Prehearing
5 officer considered that?

6 MS. STERN: Yes. And in the discovery
7 order which is at issue here now, it was decided
8 that that was too restrictive, TECO's proposal
9 was too restrictive, and while many
10 telecommunications companies have similar
11 nondisclosure agreements, the Commission has
12 never ordered them. They've always been entered
13 into voluntarily.

14 So when Allied said we don't have enough
15 personnel, you know, to comply with TECO's
16 proposal, I mean, that would wipe out all our --
17 you know, we're not that big a company, and we
18 don't have enough managerial people to spare,
19 you know, who could work on this tariff thing,
20 so we said, okay, we're going to have to pare
21 down the nondisclosure agreement where whoever
22 signs it -- the nondisclosure agreement
23 basically requires that the people who sign it
24 can't disclose the information to anyone else
25 outside of these proceedings.

1 COMMISSIONER JABER: Let me ask specific
2 questions from the recommendation. On page --

3 CHAIRMAN DEASON: Let me interrupt just
4 for a second. Who -- under the decision of the
5 Prehearing Officer, who can get this
6 information?

7 MS. STERN: Who?

8 CHAIRMAN DEASON: Who at Allied can receive
9 this information?

10 MS. STERN: Robert Namoff. Whoever signs
11 the disclosure agreement would be able to get
12 the information from --

13 CHAIRMAN DEASON: But what if everybody in
14 the company signs it?

15 MS. STERN: No, no. No, no.

16 CHAIRMAN DEASON: I mean, they would have
17 signed it, but there's no need to disclose it,
18 because everybody in the company already has it.

19 MS. STERN: Only the people who are -- who
20 the company authorizes to sign it can sign it.
21 I mean, they -- Allied has to limit who can sign
22 it. But that's -- maybe I don't know the answer
23 to that question.

24 MR. ELLIS: I think that presumes Allied
25 might proceed in bad faith. I can assure you

1 they won't. Only Mr. Namoff has signed it, and
2 -- he has signed it, and I have it here.

3 CHAIRMAN DEASON: So one individual will
4 sign that, and he would be under an obligation
5 not to disclose that to anyone else?

6 MS. STERN: He could disclose it to the
7 counsel, to the lawyers.

8 MR. LONG: Well, Mr. Chairman, if I might,
9 I think --

10 CHAIRMAN DEASON: Let Mr. Ellis answer, and
11 then I'll give you an opportunity.

12 MR. ELLIS: Thank you. If the question is,
13 should Allied be limited to one witness and one
14 witness only, first of all, I would have to say
15 that's a far better proposition than the one
16 TECO argued for and the Prehearing Officer
17 rejected. And again, I had understood we're not
18 retrying it, but --

19 CHAIRMAN DEASON: Well, no, no. I want to
20 know what the order said. And apparently
21 there's disagreement as to what the order says.

22 MR. ELLIS: The order does not limit the
23 number of persons who can consider the matter.
24 On behalf of Allied, I will submit that there
25 will be a total of three persons who will

1 consider it, and no more. We can add that term
2 and incorporate it into whatever submission is
3 required.

4 CHAIRMAN DEASON: Can you name those three
5 individuals?

6 MR. ELLIS: Yes. Robert Namoff, Michael
7 Koven, K-o-v-e-n, and Jim Palmer, P-a-l-m-e-r.

8 COMMISSIONER JABER: And you as counsel?

9 MR. ELLIS: Yes, counsel for Allied, and
10 its expert witness and consultant. I was
11 referring to officers of Allied and not to
12 non-officers or non-employees. Thank you.

13 MS. STERN: I would also just like to add
14 that that's a pretty standard nondisclosure
15 agreement, the one that Allied has proposed. I
16 think the telecom types of agreements are
17 actually more unusual. They're not the norm.
18 This is more the basic nondisclosure agreement.

19 I also would like to add that I don't think
20 there's any error of fact or law that has been
21 pointed out in the order with respect to the
22 nondisclosure agreement.

23 CHAIRMAN DEASON: I'm trying to understand
24 what the order says so we don't get back in
25 another argument at the next agenda. Okay? The

1 order does not specify who can sign the
2 nondisclosure agreement and get the information;
3 is that correct?

4 MS. STERN: That's right. We don't name
5 names. I can read you the three or four
6 sentences from the order.

7 CHAIRMAN DEASON: Please do.

8 MS. STERN: Okay. "Pursuant to Rule
9 1.280(c), Florida Rules of Civil Procedure,
10 TECO, Allied, and Odyssey shall execute a
11 nondisclosure agreement. The nondisclosure
12 agreement must, at a minimum, prohibit the
13 parties from revealing the confidential
14 information exchanged in this proceeding to any
15 person or entity who is not a signatory to the
16 nondisclosure agreement and require that
17 signatories to the nondisclosure agreement
18 certify they are authorized by TECO, Allied, or
19 Odyssey to sign the nondisclosure agreement."

20 CHAIRMAN DEASON: Read that last sentence
21 again.

22 MS. STERN: Okay. That's a long one.

23 COMMISSIONER JABER: What page are you on,
24 Marlene?

25 MS. STERN: Fourteen, at the top of the

1 page.

2 CHAIRMAN DEASON: Well, the last -- not
3 necessarily the last sentence, but the last
4 phrase which indicates that they certify they
5 are authorized by TECO, Allied, or Odyssey to
6 sign the nondisclosure agreement, does that mean
7 that TECO has the ability to determine who at
8 Allied can receive the information, or what does
9 that language mean?

10 MR. ELIAS: And I would say that it means
11 that the appropriate individual on behalf of the
12 entity that it works for or represents must be
13 authorized to sign the agreement. I don't think
14 it gives the other parties veto power over who
15 may sign it.

16 CHAIRMAN DEASON: Just that they have the
17 ability to sign the agreement and bind the party
18 to the terms of that agreement? That's what
19 that means?

20 MR. ELIAS: Yes, that's my reading.

21 MS. STERN: And prohibit -- those parties
22 who sign can't disclose that information to
23 anyone.

24 CHAIRMAN DEASON: So for someone to receive
25 this information, they actually have to be a

1 signatory to the nondisclosure agreement?

2 MS. STERN: Yes.

3 MR. ELIAS: Yes.

4 CHAIRMAN DEASON: Okay. And, Mr. Ellis,
5 you're indicating that it is your desire to have
6 four individuals, or three individuals within
7 the management of Allied to sign it, with the
8 understanding that you and any outside
9 consultant retained could have access to the
10 information?

11 MR. ELLIS: That's correct, Mr. Chairman.
12 And again, I would add that the terms of the
13 protective agreement have been reviewed and
14 approved by Odyssey and TECO. They contain many
15 restrictive terms as to how, when, and why the
16 information can be reviewed, and all these terms
17 have been agreed. And the only remaining
18 question is whether the officers at Allied
19 should or should not have any involvement in
20 competitive business activities. That is a term
21 TECO sought to add. The Prehearing Officer
22 rejected it, and properly so.

23 CHAIRMAN DEASON: And so it is -- well,
24 I'll ask TECO. There's a problem with Mr. Koven
25 and Mr. Palmer because they're involved in

1 competitive activities?

2 MR. LONG: Mr. Chairman, my main concern
3 was with Mr. Namoff, who is the person who
4 actually negotiated with Tampa Electric, who
5 actually is in charge of the competitive
6 activities of the company. And our point simply
7 was that, in an effort to minimize the potential
8 for damage, it made sense to avoid providing
9 this information to someone who was in a
10 position to use it inadvertently, or who might
11 forget in the heat of some discussion that
12 there's a protective order.

13 The point is that in the June 27th
14 decision, it recognizes that this kind of
15 provision is used frequently in the
16 telecommunications industry, simply because you
17 have a competitive environment where there is
18 also a lot of highly sensitive business
19 information. And the model that we've proposed
20 for this protective order is used for exactly
21 that purpose. We have a very sensitive
22 competitive situation, and yet you have a need
23 to disclose, at least to some reasonable extent,
24 critical information.

25 Now, the factor that wasn't before the

1 Prehearing Officer is that Mr. Namoff is not the
2 only one within Allied who can protect the
3 company's interests in reviewing this
4 information, which are the words that Allied
5 used in their response to our request for
6 rehearing.

7 Second of all, I don't think that it was
8 clear --

9 CHAIRMAN DEASON: Okay. I understand.

10 Mr. Ellis, why -- if Mr. Koven and
11 Mr. Palmer can access this information, have
12 access to this information and utilize it to
13 protect Allied's interests, why does Mr. Namoff
14 have to have it?

15 MR. ELLIS: The point is that TECO is
16 requesting that the information be limited to
17 persons who have no involvement in the
18 development of competitive business strategy.
19 The showing I made was that there is no such
20 person I can deal with as a lawyer in resolving
21 this case. There are only three people at that
22 company I could talk to to have a hope of being
23 able to transmit advice in this case. All three
24 of them are involved in the development of
25 competitive business activity.

1 CHAIRMAN DEASON: Okay.

2 COMMISSIONER JABER: Legally, can TECO
3 restrict viewing of the confidential information
4 to certain people? It's obvious that they don't
5 have to enter into the agreement, but is there
6 any sort of case law that says that -- that
7 supports the notion that they can restrict?

8 MS. STERN: The standard I think is --
9 maybe what you're asking is, they can't do it.
10 The Commission can, if it's requested through a
11 discovery request. If Allied requests
12 information from TECO which is confidential, you
13 know, the confidential status is sort of the
14 first step in the analysis, and then it's up to
15 the Commission to decide if that information is
16 discoverable or not.

17 MR. ELIAS: Depending on under what terms
18 it may be disclosed.

19 COMMISSIONER JABER: Let me go back to the
20 other questions, and maybe we'll revisit this in
21 a minute.

22 On page 5, it goes to Mr. Long's point that
23 there is language regarding confidentiality in
24 the CISR tariff. My question to Staff is this.
25 When we issued an order that approved the

1 tariff, were we, in effect, approving the
2 confidentiality language in that tariff as well?

3 MR. ELIAS: And what does confidential mean
4 in that context? Does that mean that if it's
5 filed here, it's per se confidential and exempt
6 from public records disclosure, which is what
7 366.093 means? Does that mean that TECO shall
8 not of its own free will, absent an order of the
9 Commission, disclose it to third parties and use
10 it for other purposes? Does it mean that the
11 information --

12 COMMISSIONER JABER: Bob, let me ask this
13 question a different way. There's language in
14 that tariff that addresses the confidentiality
15 of documents that fall under the CISR tariff.
16 When we issued an order that addressed that
17 tariff, did we, in a sense, bless off on that
18 language. Regardless of the interpretation, did
19 the order grant --

20 MR. ELIAS: The order approved the tariff.

21 MS. STERN: And it also bound every -- if
22 we're to interpret the tariff as TECO interprets
23 the tariff, it would bind every Commissioner,
24 you know, who sits here for however long that
25 tariff is in effect to find that certain things

1 are confidential.

2 COMMISSIONER JABER: Was that the intent of
3 the tariff because of the competitive nature of
4 the industry and what we were trying to
5 accomplish with the CISR tariff?

6 MS. STERN: I think the intent was that
7 there should be confidentiality. I wasn't there
8 when you did the intent, but the information was
9 to be closely guarded. And I think really when
10 you get right down to it, even if we -- what
11 we're going to find -- what Staff has
12 recommended to be confidential is very similar
13 to what is in the tariff, and Staff has
14 recommended that even more be considered
15 confidential. The tariff, you know, doesn't --
16 it contains a limited number of documents that
17 should be confidential. TECO submitted us
18 1,800. And in reviewing those, you know, Staff
19 is thinking more than what's in the tariff
20 should be confidential.

21 COMMISSIONER JABER: Okay. And on page 8,
22 the whole --

23 CHAIRMAN DEASON: Just a second. Mr. Long,
24 do you have a problem with what Staff has
25 determined to be confidential after their

1 thorough review?

2 MR. LONG: Well, I don't have that final
3 determination yet, Mr. Chairman. There's still
4 a pending request for confidential designation
5 of documents that we submitted in response to
6 the June 27th order, and we are awaiting the
7 decision with regard to that supplemental filing
8 that we made.

9 MR. ELIAS: And again, let's not confuse
10 confidential with respect to the public records
11 law with discoverability under the Rules of
12 Civil Procedure and the Administrative
13 Procedures Act. They're two separate things,
14 and it's real easy to get all bollixed up in
15 trying to equate the two. They're two separate
16 and distinct things.

17 The analysis in this discovery dispute goes
18 to the discovery rules under the Florida Rules
19 of Civil procedure that are applicable to
20 administrative procedures, administrative
21 proceedings. It balances the rights of the
22 parties and the harms that will ensue from
23 discovering certain information against the harm
24 -- against not discovering certain information.
25 Even apart from those findings, the use of that

1 information at a further Commission proceeding
2 may be exempt from the public records -- from
3 public disclosure if it meets the requirements
4 of the public records law. That's the piece of
5 the puzzle that -- TECO recently submitted a
6 filing for us to consider and evaluate, and --

7 COMMISSIONER JABER: Here's your point.
8 It's discoverable if it's reasonably calculated
9 to lead to the discovery of admissible
10 evidence.

11 MR. ELIAS: And not privileged.

12 COMMISSIONER JABER: Everything we get in
13 this building is a public record. There are
14 exceptions to the public records law if a party
15 can show that it's proprietary business
16 information.

17 MR. ELIAS: Yes.

18 COMMISSIONER JABER: Okay. I'm clear on
19 that. But I think what we're trying to do is
20 reach some sort of resolution for the parties so
21 that we don't revisit this again.

22 On page 5 -- no. what was the page?

23 MS. STERN: Five of the recommendation or
24 5 of the discovery order?

25 It's not the discovery order. It's page

1 8. In the discussion of salary, I'm not clear,
2 Staff, why the salary of Patrick Allman is
3 relevant in terms of --

4 MR. ELIAS: Reasonably calculated to lead
5 to admissible evidence. One of the allegations
6 is undue discrimination. The question of
7 whether the negotiations with Odyssey were
8 conducted appropriately is something that
9 arguably is raised in Allied's pleading. They're
10 entitled to, the Prehearing Officer found,
11 discover information concerning those
12 allegations or that might tend to prove those
13 allegations.

14 COMMISSIONER JABER: If I'm looking at
15 whether the Prehearing Officer made a mistake of
16 fact or law, shouldn't I be thinking about
17 whether the salary of Mr. Allman relates to an
18 allegation of undue discrimination?

19 MR. ELIAS: Yes.

20 COMMISSIONER JABER: Okay. And what I'm
21 saying to you is, I'm not clear on where the
22 salary of Mr. Allman relates to an allegation of
23 undue discrimination.

24 MR. ELIAS: And the question is -- the
25 allegation is that Mr. Allman negotiated on

1 behalf of TECO with Odyssey and then
2 subsequently took employment with Odyssey.
3 Allied has alleged disparity in the rate
4 treatment afforded to Odyssey and Allied. The
5 Prehearing Officer found that the salary could
6 be relevant to the question of whether there was
7 some --

8 COMMISSIONER JABER: That it could be?

9 MR. ELIAS: Could be. I mean, we've not
10 reached that conclusion. Remember, the
11 discovery standard is considerably broader than
12 what may be admissible.

13 COMMISSIONER JABER: Okay.

14 well, Mr. Chairman, you know, I've gone
15 issue by issue. I don't believe there was
16 anything overlooked by the Prehearing Officer,
17 no mistake of fact or law. What I do hear,
18 though, from the parties is that there certainly
19 is room to compromise. You know, legally what
20 we have before us is a motion for
21 reconsideration.

22 By the way, Odyssey filed a motion for
23 clarification?

24 MS. STERN: I don't think so.

25 MR. WIGGINS: If you look at our pleading,

1 it says motion for reconsideration or
2 clarification.

3 MS. STERN: Oh, okay.

4 MR. ELIAS: And if you look at page --

5 MR. WIGGINS: In an abundance of caution,
6 my understanding was that the clarification I
7 requested was acceptable. Did I get that?

8 MR. ELLIS: Technically, the motion only
9 says motion for reconsideration, but I have no
10 objection to the procedure that Mr. Wiggins
11 requested for the resolution of --

12 MR. ELIAS: I think if you look at the
13 procedure that was discussed today, that's
14 entirely consistent with what we've said on page
15 10 of the Staff recommendation concerning the --
16 it's the last full paragraph or the last
17 paragraph on page 10 concerning an in camera
18 inspection of any documents which are at issue.

19 MR. WIGGINS: And just to be clear,
20 paragraph 2 of our pleadings says request
21 reconsideration and modification or
22 clarification. And if we were to do it over
23 again, we would have put it in the heading. I'm
24 sorry.

25 MS. STERN: Basically, that's -- Odyssey's

1 points on clarification are number 7 and 8 in
2 the recommendation. And if you look in the
3 recommendation at the actual -- under Issue 2,
4 at the actual recommendation summary, it says
5 the Commission should deny part of Odyssey's
6 motion, that part which is the same as TECO's,
7 and Staff does -- and the Commission does not
8 need to rule on that portion of the motion to
9 which Allied has no objection. Those were the
10 -- those were 7 and 8.

11 COMMISSIONER JABER: What I was going to
12 say is that I think the room or the place to
13 reach some sort of compromise is that there is
14 agreement with respect to the three individuals
15 other than Mr. Namoff, that an agreement can be
16 reached. With respect to Mr. Namoff, I would
17 suggest that Allied come back to us if they
18 think that Mr. Namoff has to be someone that has
19 to view the documents again.

20 MR. ELLIS: I'm sorry. I can shortcut
21 that. We do have to have Mr. Namoff. I can't
22 proceed without him. He's my chief witness.
23 The point of saying that there are only two
24 other people I could deal with was to say, and
25 neither one of them meets Mr. Long's proposed

1 additional term in the protective agreement.
2 This is my chief witness. This is the man who
3 negotiated with them. This is the man who can
4 respond to whatever exculpatory evidence they
5 may attempt to come up with, and I don't want to
6 proceed without him.

7 COMMISSIONER JACOBS: May I ask a question?

8 COMMISSIONER JABER: You know, Mr. Ellis,
9 you may not have a choice. Where is it that you
10 see a compromise?

11 COMMISSIONER JACOBS: Before you go there,
12 let me ask this question. And I guess Staff
13 would be best to address it. In a non -- it
14 could be in a generic nondisclosure agreement,
15 but just the general tenor of the document, when
16 it prohibits disclosure, that means -- you tell
17 me what -- I want to pose a scenario, and you
18 tell me what it means. In the event that a
19 party gets access to the information, they use
20 it for the issues and the scope of the
21 proceeding that they're seeking discovery for.
22 That disclosure agreement then limits any other
23 disclosure of that or use of that. Is that the
24 case?

25 MR. ELIAS: I'm struggling with your

1 question for this reason. It's tough get
2 something out of your brain once it's in there
3 and to factor it into --

4 COMMISSIONER JACOBS: You don't have to
5 keep it in, but you just can't use it in any
6 application other than proving the issues in
7 that case. Does nondisclosure -- is it that
8 narrow? If we're unclear about it, then at
9 least it's an arguable point. And if that's the
10 case, Commissioner Jaber, I would be willing to
11 make a motion to clarify that -- Staff, make
12 sure I'm not stepping out of time here. To at
13 least clarify our order as to its statement of a
14 nondisclosure agreement to make clear that any
15 disclosure granted by any party is only to prove
16 the issues in that case.

17 MR. ELIAS: I think that's entirely
18 appropriate.

19 MS. STERN: And can I just say one thing?
20 The discovery order says at a minimum, the
21 nondisclosure agreement must include that
22 sentence, that long sentence that I read. So at
23 a minimum -- the nondisclosure agreement does
24 not have to include a provision that says you
25 can only use this information at the hearing.

1 You can't use this information anywhere else.
2 But I suppose you wanted to -- if the parties
3 wanted to put in a provision like that, or if
4 the Commission wanted to.

5 MR. ELLIS: Commissioner, could I --

6 CHAIRMAN DEASON: One second. One second.
7 Are you finished with your question?

8 COMMISSIONER JACOBS: Yes.

9 CHAIRMAN DEASON: Okay. Mr. Long and
10 Mr. Ellis both want to speak. Is it in response
11 to Commissioner Jacobs' question?

12 MR. LONG: Yes, sir.

13 MR. ELLIS: Please.

14 CHAIRMAN DEASON: Okay. Mr. Ellis, then
15 Mr. Long.

16 MR. ELLIS: Thank you. There is such a
17 term in the agreement, and it has been approved
18 by all parties. It's paragraph 3, page 3. "The
19 use of any information obtained by Allied/CFI or
20 Odyssey pursuant to this agreement will be made
21 solely for the purpose of litigation and for no
22 other purpose. Use in any litigation other than
23 this proceeding of any information obtained by
24 Allied/CFI or Odyssey pursuant to this agreement
25 shall be accompanied by an appropriate request

1 for confidential classification and treatment of
2 the information."

3 Thank you.

4 CHAIRMAN DEASON: Mr. Long.

5 MR. LONG: I think in response to
6 Commissioner Jacobs, staff counsel really hit
7 the nail on the head. Once you see the
8 information, it's in your head, and it's hard
9 not to make use of it. And, you know, I think
10 that that's our point with regard to Mr. Namoff.

11 Now, we're -- I mean, we're willing to
12 compromise. I mean, we've -- I think we've had
13 a track record of looking for compromises here.
14 For the first time, to my knowledge, Allied has
15 indicated that there are others within the
16 company who are capable of representing Allied's
17 interests, and those people are not as directly
18 involved in negotiations and competitive
19 activities as Mr. Namoff, and we're willing to
20 have them sign the agreement, and their utility
21 regulation expert as well, you know, to get this
22 moving and to get the facts out, because I think
23 the sooner that happens, the sooner we can all
24 look at that page and see that this complaint
25 has absolutely no merit. But the insistence

1 that the very person who inadvertently could do
2 the most damage with that information has to see
3 the information I think is patently
4 unreasonable.

5 COMMISSIONER JACOBS: If I may,
6 Mr. Chairman.

7 CHAIRMAN DEASON: Sure.

8 COMMISSIONER JACOBS: Mr. Ellis, as I
9 understood it, your concern is that you retain
10 the ability to have Mr. Namoff as a witness.

11 MR. ELLIS: (Nodding head affirmatively.)

12 COMMISSIONER JACOBS: There may be some
13 room here. We'll see. If his analysis and his
14 testimony can rely on the analysis of his
15 subservients of this information, that could be
16 provided to Mr. Namoff, the benefit of their
17 analysis?

18 MR. LONG: Well, Commissioner, as I
19 understand it, Allied has indicated that they're
20 going to have Mr. Phillips as a witness, and
21 Mr. Phillips can sponsor anything that he thinks
22 is appropriate.

23 COMMISSIONER JACOBS: And if his analysis
24 comes into the record, Mr. Namoff can rely on
25 that?

1 MR. LONG: Certainly he can rely on it,
2 but I guess the significance is that Mr. Namoff
3 would not have access to the confidential
4 information. Allied would be able to introduce
5 any evidence that it wants to through
6 Mr. Phillips as the witness who would have
7 access to the information. And there would be
8 one or both of these other Allied
9 representatives who Allied indicates are capable
10 of representing their interests in this matter
11 who would also have access to the information
12 and who could consult with counsel and Allied's
13 outside consultant. I think by any reasonable
14 standard, that covers any conceivable interest
15 that Allied could have in due process here.

16 COMMISSIONER JABER: Mr. Ellis, you did say
17 that there were three in-house people in
18 addition to several expert witnesses that you
19 anticipated could view the documents and perhaps
20 file testimony. You did say that. What is
21 Mr. Namoff's position with your company?

22 MR. ELLIS: I did say that, Commissioner
23 Jaber. Mr. Namoff is the chief executive
24 officer. It's a family company. It was started
25 by Mr. Namoff's father, and he in his prefiled

1 direct testimony describes his background and
2 experience, having started working on trucks and
3 filling boxes, and going on to be CEO.

4 COMMISSIONER JABER: So you're --

5 MR. ELLIS: I was trying to suggest that
6 the only two people I can think of that I could
7 talk to to try to make decisions on the case on
8 a day-by-day basis aren't any less objectionable
9 under TECO's standard than he is.

10 COMMISSIONER JABER: I understand your
11 point, but your goal is to have the information
12 so that you could build your case, and you're
13 going to build your case by filing testimony,
14 and you need this information so that you can
15 either include it in the testimony or reject it
16 as unnecessary. So if that's your goal, what
17 difference does it make who actually reviews it
18 and uses it and files it in testimony?

19 MR. ELLIS: I guess it's Bob Namoff's
20 company, and he's the one that negotiated with
21 TECO face to face, and he's the one that should
22 be able to see their documents as to what they
23 were really doing when they were talking with
24 him.

25 COMMISSIONER JABER: And if he's the one

1 that personally negotiated with the company,
2 then he can testify as to what he recalls the
3 subject of the negotiations were and the terms
4 of the negotiation; right?

5 MR. ELLIS: Yes, and he has provided his
6 testimony on those points.

7 COMMISSIONER JABER: And you can do
8 whatever depositions you deem appropriate prior
9 to Mr. Namoff filing testimony, or anyone else
10 you intend to file testimony for.

11 MR. ELLIS: I certainly hope to, yes.

12 CHAIRMAN DEASON: Okay. Commissioners,
13 let's see what we can --

14 MR. WIGGINS: Mr. Chairman, I hope this
15 will be useful. I just want to make it clear
16 what we're going to do, and then if everyone
17 says, yeah, that's fine, then we know at least
18 this little piece right here is not going to be
19 back before you.

20 When TECO produces for us the Bates
21 stamped redacted and nonredacted information, we
22 will review it very quickly. We'll get with
23 Mr. Ellis and in good faith try to work out any
24 differences we can. What remaining items that
25 we have a dispute over what they want to see and

1 we want to preserve, irrespective of whether
2 they're financial or whatever, we will bring to
3 the Prehearing Officer and make our case, and
4 the Prehearing Officer will make his ruling, and
5 that's what we'll do. That's what I anticipate
6 the process being.

7 CHAIRMAN DEASON: Any objection to that?

8 MR. ELIAS: When you say bring to the
9 Prehearing Officer, you mean in the form of a
10 motion for an in camera inspection or in camera
11 review? Is that what you're contemplating?

12 MR. WIGGINS: Yes. And I would contemplate
13 doing that with Mr. Ellis jointly in a way that
14 would create the least disruption to the
15 process.

16 MR. ELIAS: And do so in the most timely
17 manner possible?

18 MR. WIGGINS: Certainly.

19 MR. ELIAS: Okay. That's fine.

20 CHAIRMAN DEASON: That sounds fine.

21 Okay, Commissioners.

22 COMMISSIONER JABER: I think I actually --
23 if I didn't, it feels like I moved Staff. And I
24 would encourage the parties to re-enter into
25 these agreements or revisit the agreements and

1 not address the Namoff issue right now. Do I
2 need to make that part of the motion, or can I
3 just encourage them to do that?

4 MR. ELIAS: Part of the --

5 COMMISSIONER JACOBS: Commissioner Jaber,
6 my -- I have the utmost confidence in these
7 parties, but I'm afraid on this issue, they are
8 facing some particularly tough -- and I don't
9 think there's anyone to blame or anything.
10 These two companies are highly competitive.
11 These are very close quarters which they're
12 competing in, so I understand the fervor with
13 which they pursue their interests.

14 But at the same time, I think that fervor
15 argues against a quick resolution of this issue.
16 I think ultimately there could be. But in my
17 understanding, we're facing some time pressures
18 here, and we may want to go ahead and make that
19 a part of your motion, or I can suggest a
20 modification or friendly amendment, if I may.

21 COMMISSIONER JABER: I have no problem
22 making it part of the motion if it's necessary.

23 MR. ELIAS: Well, the recommendation does
24 address the Prehearing Officer's decision
25 concerning the nondisclosure agreement, so --

1 COMMISSIONER JABER: But it doesn't name
2 anyone. I thought that in response to Chairman
3 Deason's questions with respect to what the
4 order said --

5 COMMISSIONER JACOBS: No. In point of
6 fact, we rejected the idea of TECO being able to
7 veto a choice of signatories to the agreement.

8 But I would be willing to make a friendly
9 amendment, I guess, and you tell me. And here
10 would be my rationale. I quite frankly had not
11 -- I had not anticipated what I just described,
12 the fervor with which this proceeding will go
13 forward. I thought when we came up with the
14 format for a disclosure agreement that it would
15 meet the needs of the parties, for that
16 particular fact, maybe.

17 But more pointedly, I'm considering more
18 precisely the nature of these two companies and
19 the idea that there isn't a great deal of
20 sensitivity here in terms of how they come away
21 from this proceeding and what gets disclosed to
22 a third party. I mean, the critical thing about
23 this thing that struck me is, outside of this
24 thing here, they're going to go out and
25 probably, hopefully, take one another on in a

1 fair market fight. This has a high degree of
2 potential to inadvertently intrude on that.

3 That's what -- that's the little bit of
4 rationale that I can gain here. Now, tell me is
5 that enough.

6 MR. ELIAS: Well, let me make this
7 suggestion. If I get the sense of where
8 Commissioners Jaber and Jacobs want to go, it
9 would be to approve Staff's recommendation to
10 deny the motion for reconsideration, save for
11 the part that addresses the protective
12 agreement, reserve ruling on that portion of the
13 motion, and direct the parties to attempt to
14 further negotiate an agreement, a protective
15 agreement that's acceptable. Does that do what
16 you want to do?

17 COMMISSIONER JABER: Yes. I wasn't going
18 to defer ruling on it, but if it will get us
19 there, that's fine.

20 Here's what I'm trying to do. I'm saying
21 there has been no mistake of law or fact;
22 therefore, the motions for reconsideration
23 should be denied.

24 I thought in response to Chairman Deason's
25 questions you said no individuals were named, so

1 what I'm saying to that is, I'm naming that
2 there are three or four individuals in the
3 company that all parties agree to can sign the
4 agreement, with the exception of Mr. Namoff.
5 And what I'm saying is, let's leave him out of
6 any sort of an agreement that's signed,
7 confidentiality agreement that's signed. And if
8 Allied believes they have to have Mr. Namoff
9 approve or view the documents, then they need to
10 come back and file something else with us at a
11 later time.

12 I think I just got Mr. Ellis to acknowledge
13 that that may not be necessary.

14 MR. ELIAS: I'm just trying to think in
15 the context of the motion for reconsideration if
16 that's consistent all the way through.

17 COMMISSIONER JABER: I don't know. You
18 tell me.

19 COMMISSIONER JACOBS: well, we didn't know
20 there were other parties that were going to
21 sign, if that's enough.

22 COMMISSIONER JABER: How can that involve
23 the motion for reconsideration if you all didn't
24 name in the order addressing --

25 MR. ELIAS: Because TECO seeks to restrict

1 the individuals -- in its motion, they seek to
2 restrict the individuals that can sign the
3 protective agreement. And if we're denying that
4 motion, but at the same time saying this
5 particular individual can't --

6 COMMISSIONER JACOBS: I understand the
7 predicament, because we rejected the issue
8 outright, and now they're asking us to
9 reconsider. But what we're kind of saying is,
10 we can reconsider, but we really don't want to
11 give them a veto right. What we want to do is
12 say, hey, here are the people you go forward and
13 march and deal with.

14 CHAIRMAN DEASON: Can't the Prehearing
15 Officer reconsider his decision on his own
16 motion? That sounds like what he's doing, based
17 upon new information.

18 MR. ELLIS: Could I propose a stipulation?
19 I'll propose a stipulation that the signatories
20 on behalf of Allied will be his counsel --
21 that's Mr. Hoffman and myself -- our expert
22 consultant, Mr. Phillips, and for the present
23 time, Mr. Palmer and Mr. Koven. I will need to
24 speak with Mr. Namoff, and if it's not going to
25 be acceptable to us to go forward, we'll come

1 back to the Commission. But for now, I proposed
2 a stipulation that there will be at most six,
3 and for the present time, five signatories,
4 Mr. Hoffman and myself, Dr. Phillips,
5 Mr. Palmer, and Mr. Koven. I propose that
6 stipulation to TECO and Odyssey.

7 MR. LONG: We have no problem with that.

8 CHAIRMAN DEASON: Very well.

9 MR. LONG: Mr. Chairman, I would like to
10 ask for clarification on one of the earlier
11 points that I raised. In terms of the
12 significance of the language in the tariff, that
13 clearly indicates that the CSA and the materials
14 that are generated through the CISR negotiations
15 are confidential.

16 I think that it's important, because the
17 company and, in this case, Odyssey and others,
18 have relied on that language, which is not
19 ambiguous. And I think it's important to
20 clarify that when those documents are
21 subsequently identified in a proceeding like
22 this as being CISR documents or as being a CSA,
23 that those documents are entitled to
24 confidential treatment.

25 If the Commission wants to change its view

1 on that prospectively, that might be a matter to
2 be handled in another proceeding, and perhaps
3 more generically, since it involves more than
4 just Tampa Electric. But for our purposes here,
5 I think it's vital that the Commission provide
6 that clarification.

7 CHAIRMAN DEASON: I think that the tariff
8 speaks for itself. Okay? And I'm going to give
9 you my point of view on it, and then Mr. Elias
10 can tell me where I'm wrong. The tariff speaks
11 for itself. The information is confidential.
12 It is filed under such. It is presumed to be
13 confidential. But there are certain due process
14 rights. There are certain statutory provisions,
15 and if a party believes that information is not
16 confidential and does not meet the statutory
17 standards, I presume that they are free to
18 pursue that and that that information will be
19 reviewed, but would be held confidential during
20 that review process.

21 Is there a problem with that, Mr. Elias?

22 MR. ELIAS: No, with the understanding that
23 when it's filed here, which these -- and
24 understand that these contracts and the
25 supporting information is not filed as a matter

1 of course with us. We only get them when
2 there's a dispute. And when there's a dispute
3 or when they are filed here, at that point,
4 section 366.093, which deals with the standard
5 for approval of confidential documents and
6 exemptions from the public records law, comes
7 into play.

8 CHAIRMAN DEASON: And I believe that it is
9 incumbent upon TECO or any other utility which
10 has a CISR tariff to identify that they are
11 filing pursuant -- if there's a dispute, that
12 they are filing it as confidential pursuant to
13 the provisions within tariff, and then if
14 there's any challenge to that, it would have to
15 go through the normal process of determining
16 whether it in fact is confidential.

17 I understand what Mr. Long wants. He does
18 not want the obligation of having to go through
19 and identify every little piece of information
20 on an up-front basis that it should be presumed
21 confidential pursuant to the terms of the
22 tariff.

23 MR. LONG: That's right. And that's the
24 basis, Mr. Chairman, on which a customer would
25 show us the information in the first place.

1 CHAIRMAN DEASON: And that is another
2 concern, is that I'm sure that there are
3 customers who avail themselves of this, and by
4 definition, provide benefits to the general body
5 of ratepayers, who are comforted by the fact
6 that this information is being provided under a
7 confidential basis. And I would not want to
8 undermined that confidence that currently exists
9 within the tariff.

10 COMMISSIONER JABER: So --

11 COMMISSIONER JACOBS: Do we have that
12 luxury, though? If somebody challenges that
13 tariff under the statute, where are we then?

14 MR. ELIAS: I think we're in the same place
15 we are now. You have to --

16 COMMISSIONER JACOBS: Do you think we have
17 that luxury?

18 MR. ELIAS: -- apply the standards provided
19 for in the civil rules and balance the interests
20 of the parties, and at the same time, to the
21 extent the information is in the building, in
22 the possession of this agency, apply the
23 standard in the confidentiality statute to see
24 if it's exempt from disclosure under the public
25 records law.

1 MR. LONG: But Mr. Chairman, that ignores
2 the point that that language, as I said before,
3 was not adopted in isolation. The Commission
4 made the policy determination. Those words are
5 there because the Commission explicitly
6 discussed the fact that the kind of information
7 that one would need to verify that a customer
8 has alternatives and to verify the cost of
9 those, the price of those alternatives, is the
10 kind of sensitive, proprietary information that
11 no customer in his right mind would release if
12 there was any danger of that information being
13 released publicly. So the policy determination
14 that that kind of information should be kept
15 confidential has already been made by the
16 Commission.

17 CHAIRMAN DEASON: I agree with that. And
18 if the information you file meets that policy,
19 it will be determined to be confidential if
20 there is a challenge. And what I'm saying is
21 that under the terms of the tariff, the way I
22 view it, if you represent to this Commission
23 that this is valid CISR tariff information which
24 meets that standard, that it would be determined
25 to be confidential. And if there is a

1 challenge, then they would have to demonstrate
2 that the information you filed does not fall
3 within that definition with the tariff, and it
4 should be disclosed.

5 MR. LONG: That's our understanding of the
6 statute and the tariff.

7 COMMISSIONER JABER: Staff, I want to
8 acknowledge the stipulation and move Staff's
9 recommendation that the motion for
10 reconsideration be denied. Is that what you
11 need me to say?

12 MR. ELIAS: Yes.

13 CHAIRMAN DEASON: And can we also offer the
14 clarification that we just discussed here
15 concerning Mr. Long's concern about the
16 confidentiality provision within the tariff?

17 MR. ELIAS: I believe so.

18 CHAIRMAN DEASON: Very well.

19 COMMISSIONER JACOBS: Second.

20 CHAIRMAN DEASON: It's moved and seconded.
21 All in favor say "aye."

22 COMMISSIONER JABER: Aye.

23 COMMISSIONER JACOBS: Aye.

24 CHAIRMAN DEASON: Aye. Show then that
25 motion carries unanimously, and that then

1 concludes --

2 MR. LONG: Mr. Chairman, one more point.
3 The stipulation that we agreed to, will that
4 also be referenced in the order?

5 CHAIRMAN DEASON: Yes.

6 COMMISSIONER JABER: Yes. That's why I
7 acknowledged it on the record.

8 Mr. Ellis, Thank you.

9 MR. ELLIS: Thank you very much.

10 CHAIRMAN DEASON: That concludes Item 26.
11 (Conclusion of consideration of Item 26.)
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1
2 CERTIFICATE OF REPORTER
3


4 STATE OF FLORIDA)

5 COUNTY OF LEON)
6

7 I, MARY ALLEN NEEL, do hereby certify that the
8 foregoing proceedings were taken before me at the time
9 and place therein designated; that my shorthand notes
10 were thereafter transcribed under my supervision; and
11 that the foregoing pages numbered 1 through 85 are a
12 true and correct transcription of my stenographic
13 notes.

14 I FURTHER CERTIFY that I am not a relative,
15 employee, attorney or counsel of any of the parties,
16 or relative or employee of such attorney or counsel,
17 or financially interested in the action.

18 DATED THIS 8th day of August, 2000.
19
20

21 
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24 Tallahassee, Florida 32301
25 (850) 878-2221