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September 10, 2004

HAND DELIVERY

ORIGINAL

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

Re: Docket No. 040086-EI - Allied Universal Corporation and Chemical Formulators, Inc.'s Petition to Vacate Order No. PSC-01-1003-AS-EI Approving, Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc. and Tampa Electric Company and Request for Additional Relief

Dear Ms. Bayo:

Enclosed herewith for filing on behalf of Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI") are the original and fifteen copies of Allied/CFI's Response in Opposition to Motions to Dismiss and Motion for Attorney's Fee and Sanctions.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me. Thank you for your assistance with this filing.

Sincerely,

Kenneth A. Hoffman

CMP _____
COM _____
CTR _____
ECR _____
GCL _____
OPC _____
MMS _____
RCA ___KAH/tls
SCR ___Enclosures
SEC 1
OTH kmp

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Allied Universal Corporation and Chemical Formulators, Inc.'s Petition to Vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc. and Tampa Electric Company and Request for Additional Relief.	)	Docket No. 040086-EI Filed: September 10, 2004

ALLIED UNIVERSAL CORPORATION AND CHEMICAL FORMULATORS, INC.'S RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS AND MOTION FOR ATTORNEY'S FEE AND SANCTIONS

Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI"), by and through their undersigned counsel, and pursuant to Rule 28-106.204(1), Florida Administrative Code, hereby files this Response in Opposition to the Motions to Dismiss filed by Tampa Electric Company ("TECO") and Odyssey Manufacturing Company ("Odyssey"), and the Motion for Attorney's Fee and Sanctions filed by Odyssey.

I. INTRODUCTION

1. On January 30, 2004, Allied/CFI filed a Petition to Vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc. and Tampa Electric Company and Request for Additional Relief. On July 2, 2004, Allied/CFI filed a Motion for Leave to File its Amended Petition to Vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc. and Tampa

Electric Company and Request for Additional Relief (the "Amended Petition"). Allied/CFI's Motion was granted by the Prehearing Officer on July 20, 2004.

2. Allied/CFI's Amended Petition requests the Commission to vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc. and Tampa Electric Company ("the Order Approving Settlement Agreement"), Allied/CFI's Amended Petition also requests the Commission to: determine that the Settlement Agreement is unenforceable; terminate the existing Contract Service Agreement ("CSA") between TECO and Odyssey, or in the alternative, modify the CSA; order that TECO's general body of ratepayers be reimbursed and held harmless in view of Odyssey's unlawful procurement under false pretenses of a discounted rate under TECO's Commercial/Industrial Service Rider ("CISR") Tariff, or, in the alternative, require that TECO provide electricity to Allied/CFI upon the same rates, terms and conditions as Odyssey pursuant to the "force majeure" provision of the TECO/Allied/CFI Settlement Agreement and CSA; re-examine the TECO/Odyssey CSA to determine whether it comports with the requirements of the filed tariff and/or Order No. PSC-98-1081-FOF ("the CISR Order"); and determine whether the CSA as subsequently interpreted by TECO serves the interests of TECO's aggregate customer base.[1]

[1] On August 10, 1998, the Commission issued Order No. PSC-98-1081-FOF, ("the CISR Order") approving the CISR and Pilot Study Implementation Plan for TECO. The CISR Tariff authorized TECO to negotiate a discount, but only on base energy and/or base demand charges, with commercial/industrial customers who could demonstrate that they had viable alternatives to taking electric service from TECO. As discussed below, Allied/CFI has alleged that recent revelations demonstrate that the TECO/Odyssey CSA has been interpreted in a manner that exceeds the CISR Order and that the CSA was obtained based on faulty or misleading representations.

3. On August 20, 2004, TECO filed an Answer and Motion to Dismiss Allied/CFI's Amended Petition. TECO, apparently unconcerned that it: (a) was misled in granting a substantially discounted rate in violation of the CISR Order; and (b) has essentially required its other ratepayers to subsidize Odyssey's discounted rate; asks the Commission to dismiss the Amended Petition. TECO characterizes Allied/CFI's Amended Petition as "illogical" and "pathetic."[2] Yet, by TECO's own admission, it is not a party to Allied's civil suit against Odyssey and, therefore, has no first-hand knowledge of the record in that proceeding, and it is that record which gives rise to Allied/CFI's Amended Petition.[3] TECO's rhetoric aside, TECO's basic position is that the Settlement Agreement is binding on Allied/CFI. In other words, TECO believes it should prevail on the merits of the case -- an argument prematurely and inappropriately lodged in a motion to dismiss. TECO offers no legal authority in support of its request for dismissal without a hearing.

4. It is apparent that TECO's primary goal is to avoid an evidentiary hearing on the facts surrounding the issuance of the Odyssey CSA, an investigation of whether the Odyssey CSA, as interpreted by TECO, comports with the CISR Order, and whether Odyssey's discounted rate has resulted in a forced subsidy upon other ratepayers. TECO's apparent lack of concern for its ratepayers has not escaped the Office of Public Counsel ("OPC"). In addition to being granted intervention as a formal party to this docket, on April 23, 2004, OPC filed its Motion for Public Service Commission to Examine the Contract Service Agreement Between TECO and Odyssey. OPC's Motion requests the Commission to determine whether the CSA entered into between TECO and Odyssey comports with the CISR Order and/or results in a forced subsidy upon other ratepayers.

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[2]TECO Motion to Dismiss, at 3, 11(¶16).

[3]TECO Motion to Dismiss, at 12.

5. On August 20, 2004, Odyssey filed its Motion to Dismiss Allied/CFI's Amended Petition. Like TECO, Odyssey's Motion hurls insults at Allied/CFI for raising the issues set forth in its Amended Petition. Also on August 20, 2004, Odyssey filed and served its Notice of Filing and Service of its Motion for Attorney's Fees and Sanctions pursuant to Section 57.105, Florida Statutes.[4] Odyssey's Motion to Dismiss is replete with invective, speculation, arguments that go to the merits of the allegations, and incorrect statements of the law.

6. Obscured by the hyperbole in the Motions to Dismiss is the fundamental, controlling legal issue before the Commission: whether the facts alleged within the four corners of Allied/CFI's Amended Petition (which must be considered true for purposes of these motions) are sufficient to state a basis for relief.

7. As the argument and authorities set forth below amply demonstrate, Allied/CFI's Amended Petition alleges facts that: (a) demonstrate beyond question that Allied/CFI is a proper party to initiate this proceeding and that Allied/CFI has standing to assert these claims; (b) bring this case squarely within the well-established, judicially recognized exceptions to the doctrine of administrative finality; and (c) clearly articulate a legally cognizable basis to vacate the Order Approving Settlement Agreement. Because Allied/CFI's Amended Petition adequately alleges judicially recognized bases for exceptions to the doctrine of administrative finality, the Commission should deny the Motions to Dismiss and schedule a hearing to answer the fundamental question that lies at the heart of this case:

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[4] In its Motion to Dismiss, Odyssey also refers to Section 120.569(2)(e), Florida Statutes, and appears to be saying that this statute provides an independent basis for an award of attorney's fees although Odyssey fails to cite any supporting facts, arguments, or case law to support an award of fees under that statute.

> Whether this Commission should allow Odyssey to continue to reap the benefits of a fraudulently obtained "sweetheart" contract for electricity that provides unjustified, preferential discounts worth millions of dollars, to the detriment of TECO, Allied/CFI and other ratepayers, and which was procured as a direct result of Odyssey's submission of false testimony to this Commission.

8. Both TECO's and Odyssey's Motions to Dismiss avoid any mention of this Commission's inherent authority to protect the public interest. Odyssey and TECO seek to steer the Commission into a misdirected focus on the terms and conditions of the Settlement Agreement and on the question of whether Allied/CFI, who justifiably relied on a sworn affidavit and prefiled testimony of Odyssey's President which has subsequently been repudiated, should be precluded from seeking a determination that the Settlement Agreement be terminated or modified. Odyssey's and TECO's misguided legal contentions and their vitriolic arguments should not distract the Commission from fulfilling its duty to protect the public interest and the interests of the TECO ratepayers by a thorough investigation of the TECO/Odyssey CSA - - an investigation also requested by the statutory representatives of TECO's ratepayers (the Office of Public Counsel) and a request that can and should be undertaken without regard to the impact or effect of the Settlement Agreement. The Commission should not allow TECO and Odyssey to hide behind the terms and conditions of a Settlement Agreement that was facilitated by the inaccurate statements and testimony of Odyssey's President. Instead, the Commission should ensure that TECO's ratepayers, including Allied/CFI, are protected by a thorough investigation and full airing of all of the facts and implications concerning the TECO/Odyssey CSA. Based on the now recanted testimony of Mr. Sidelko, TECO and Odyssey have already dodged a hearing in Docket 000061-EI on whether Odyssey's CSA satisfies the terms of the CISR Order. They should not be allowed to rely upon the

tainted Settlement Agreement to permanently avoid any investigation or scrutiny of the sweetheart contract by the Commission.

II. BACKGROUND

9. On January 20, 2000, Allied/CFI filed a Complaint against TECO with the Commission asserting, among other things, that TECO's action in granting preferential rates and terms to Odyssey under TECO's CISR tariff and its refusal to make the same rates and terms available to Allied/CFI constituted unlawful rate discrimination in violation of Sections 366.03, 366.06(2) and 366.07, Florida Statutes. Allied/CFI's Complaint was assigned Docket No. 000061-EI (the "Initial Docket"). Odyssey filed a Petition for Leave to Intervene in the case and was granted intervention.

10. Allied/CFI and TECO ultimately settled the prior case. As alleged in the Amended Petition, in making its decision to dismiss its complaint and settle the case, Allied/CFI justifiably relied on the sworn affidavit and prefiled testimony of Odyssey's president, Mr. Sidelko, in the Initial Docket who attested that Odyssey's CSA met the requirements of the CISR Order and more specifically, that: (a) Odyssey required a specific electric service rate without which Odyssey would have no alternative other than to locate its plant in an area outside of TECO's service area where it could obtain such a rate; and (b) that Odyssey's lender required that rate. The Commission approved that Settlement Agreement, as modified and clarified in the Order Approving Settlement Agreement issued April 24, 2001.

11. Subsequently, in November 2001, Allied/CFI filed a civil action against Odyssey and its affiliate, Sentry Industries, Inc., in Miami-Dade County Circuit Court. As alleged in the Amended Petition, during discovery in that circuit court case, Odyssey's President, Mr. Sidelko, contradicted

his prior sworn affidavit as well as his prefiled direct testimony by stating in his December 18, 2003 deposition that:

a. Odyssey would have built its new plant in Tampa and taken service from TECO even if the electric rate had been higher than the rate Odyssey told TECO it required;

b. When he submitted his CISR affidavit to TECO, he had not identified any specific electric rate necessary to make Odyssey's proposed plant economically feasible;

c. It was TECO, not Odyssey, that proposed a specific electric rate;

d. The rate requested in his affidavit and referred to in his prefiled direct testimony in the Initial Docket was not important to Mr. Sidelko (Mr. Sidelko attempted to recant that testimony by filing an errata sheet to his deposition in the circuit court case);

e. That Odyssey could operate its proposed Tampa plant profitably if it had a higher electric rate than that reflected in its CSA with TECO; and

f. That he did not know if Odyssey's Tampa plant would have been feasible had TECO offered Odyssey a higher CISR rate.

12. The Amended Petition further alleges that as a result of recent depositions from former TECO employee Patrick Allman and current TECO employees Robert Jennings and William Ashburn in the circuit court action, it has now been revealed that TECO has interpreted and applied Odyssey's fixed rate under the TECO/Odyssey CSA in a manner that exempts Odyssey from paying fuel charges and other adjustment clause charges that are traditionally and consistently passed through separately to and recovered from all other TECO ratepayers. The fact that Odyssey would not be required to pay fuel charges under the TECO/Odyssey CSA was not known, and thus not considered by Allied/CFI in evaluating its prospects of success in the Initial Docket and deciding to

settle and dismiss its complaint. Likewise, these factors were not presented to or considered by the Commission when it approved Odyssey's CSA or the TECO/Allied/CFI Settlement Agreement. In other words, the recent deposition testimony of Mr. Sidelko and the TECO employees in the circuit court case reveal significant new circumstances that were not disclosed prior to the Settlement Agreement and were not considered as part of the Commission's approval of the Settlement Agreement.

13. Based on this deposition testimony, Allied/CFI filed its Amended Petition asking the Commission to investigate these newly discovered facts and issues and to reexamine the special treatment granted by TECO to Odyssey. Allied/CFI's Amended Petition alleges that TECO, Allied/CFI and the Commission were misled by Odyssey, that, in determining to enter into the Settlement Agreement, Allied/CFI justifiably relied on Mr. Sidelko's statements that Odyssey met the criteria for the CISR rate that it was granted by TECO, that the recent sworn testimony of Mr. Sidelko shows that Odyssey failed to meet the criteria for the discounted rate under the CISR Order, and that Allied/CFI would not have agreed to dismiss its Complaint and enter into the Settlement Agreement had the actual circumstances concerning the Odyssey CSA and TECO's post-contract interpretation of the CSA, all of which were revealed in the circuit court action, been known to Allied/CFI at the time of the settlement of the prior case.

14. CFI, as a ratepayer of TECO, as well as TECO's general body of ratepayers, have been harmed because the TECO/Odyssey CSA exempts Odyssey from payment of fuel charges and other adjustment clause charges, and because Odyssey's rate is insufficient to cover TECO's incremental costs to serve Odyssey, and is insufficient to provide a contribution to TECO's fixed costs. At a minimum, as alleged in the Amended Petition, TECO has failed to charge and collect

the tariffed level of revenue that TECO was entitled to if Odyssey failed to meet the eligibility criteria for a CISR rate.[5]

III. ARGUMENT

15. Both TECO's and Odyssey's Motions to Dismiss argue at length a number of disputed factual and legal issues. The extensive portions of the Motions dedicated to the position that Allied/CFI's Amended Petition should not be granted on the merits are not ripe for resolution. Whether Allied/CFI's Amended Petition should be granted on the merits is not the issue before the Commission in its consideration of the pending motions to dismiss. In resolving the motions to dismiss, the Commission should consider only two issues:

(a) whether Allied/CFI is a proper party and/or has standing to file its Amended Petition; and

(b) whether Allied/CFI has alleged a sufficient legal basis for the relief it seeks in its Amended Petition under recognized exceptions to the doctrine of administrative finality.

The answer is yes to both questions.

A. Allied/CFI Has Standing to File this Cause of Action

16. Odyssey asserts that Allied/CFI lacks standing to file its Amended Petition.[6] In support of its argument, Odyssey relies primarily upon Agrico Chemical Co. v. Department of

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[5] Although TECO now contends that a rim analysis conducted back in 1999/2000 was sufficient to demonstrate that the Odyssey contract benefits TECO's ratepayers, it is readily apparent that increased fuel costs constitute a significant change in circumstance, in view of the unique nature of the Odyssey CSA which precludes TECO from passing these costs through to Odyssey.

[6] Odyssey Motion to Dismiss, at 1, 7-11, 30-32, 35, 49.

Environmental Regulation, 406 So.2d 478 (Fla.2d DCA 1981). Although Allied/CFI's Amended Petition meets the criteria for standing outlined in the Agrico decision, the Commission should recognize that the Agrico criteria are not applicable to Allied/CFI's Amended Petition.

17. The test for standing applicable to Allied/CFI's Amended Petition was framed by the Supreme Court of Florida in Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966) where the court held:

> Nor can there be any doubt that the commission may withdraw or modify its approval of a(n)... agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.

187 So.2d at 339 (emphasis supplied). The Peoples Gas decision established the test for standing to file a petition seeking the vacation of a prior Commission order and/or modification or termination of an agreement previously approved by the Commission under exceptions to the doctrine of administrative finality.

18. The Agrico decision, although often and appropriately cited by the Commission in dockets involving petitions challenging proposed agency action or petitions for leave to intervene, does not apply to Allied/CFI's Petition. In Agrico, the court addressed a set of facts where Agrico applied for a construction permit for an air pollution source with the Department of Environmental Regulation ("DER"). DER issued a letter of intent, a form of proposed agency action, to grant that permit. Two competitors of Agrico, Freeport and Sulfur Terminals, filed petitions objecting to DER's letter of intent to grant the permit and requested a formal administrative hearing. DER transferred the competitors' petitions to the Division of Administrative Hearings. The hearing

officer assigned to the case granted standing to Freeport and Sulfur Terminals to challenge the permit and DER adopted the hearing officer's recommendation on that issue. On appeal, the First District Court of Appeal reversed and, in doing so, established the oft-cited Agrico standard.[7]

19. The Amended Petition does not protest proposed agency action. Nor does Allied/CFI seek to intervene in an action affecting another party seeking affirmative relief such as a certificate or rate relief from the Commission. Thus, the Agrico standard is not the relevant or controlling precedent. Instead, the Amended Petition need only comply with the holding in Peoples Gas which authorizes a party to a Commission approved agreement (or any member of the public such as OPC) to seek Commission vacation, modification or withdrawal of such agreement. In any event, even though the Agrico test for standing does not apply to Allied/CFI's Amended Petition, the Amended Petition sets forth sufficient allegations to satisfy that test.

20. Allied/CFI is a customer of TECO and a competitor of Odyssey and, as such, Allied/CFI's interests are directly and substantially affected by the TECO/Odyssey CSA, which does not comply with the CISR Order. As alleged in the Amended Petition, Allied/CFI, like TECO's other ratepayers, are subsidizing Odyssey's discounted electric rate because TECO is providing electricity to Odyssey at a rate that fails to enable TECO to sufficiently recover its incremental costs. All of TECO's customers, including Allied/CFI, are substantially impacted as a result of this deficiency in cost recovery. Furthermore, Allied/CFI and the rest of TECO's customers are

[7] "Before one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitled him to a Section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect." Agrico, 406 So.2d at 482.

substantially and directly affected by TECO's interpretation of Odyssey's CSA in a manner which relieves Odyssey from payment of fuel charges.

21. Allied/CFI's interests are also directly and substantially affected as a direct competitor of Odyssey. The original complaint filed in the Initial Docket was predicated on Allied/CFI's statutory right, as a customer of TECO similarly situated to Odyssey, to rates that are not unjustly discriminatory, preferential or otherwise in violation of law as mandated by under Section 366.03, 366.06(2) and 366.07, Florida Statutes. These statutes provide an additional basis for Allied/CFI's standing in the instant proceeding.

22. Allied/CFI has a substantial interest in enforcing its statutory right to obtain an electric service rate that is not unduly prejudicial, disadvantageous or discriminatory under Section 366.03 and 366.06(2), Florida Statutes. The CISR tariff pilot program is no longer available to Allied/CFI, yet its competitor, Odyssey, remains under a discounted CISR rate procured as a result of fraudulent, deceptive and/or misleading statements by Odyssey's president. At the same time, TECO hides behind the Settlement Agreement to ensure that Allied/CFI is not able to operate under a CSA similar to Odyssey's -- a CSA that is not recovering incremental costs plus a contribution to fixed costs. TECO and Odyssey's actions as alleged in the Amended Petition contravene the statutory assurance of non-prejudicial, non-discriminatory rates. For purposes of the pending motions to dismiss, these allegations must be accepted as true. The competitive harm to Allied/CFI due to the illegal, discriminatory rates is an independent basis for standing which also satisfies the Agrico test.

23. To support its ill-conceived motion to dismiss, Odyssey cites to case law regarding the Commission's limited authority to modify a private contract.[8] Such authority does not abrogate the statutory right to non-discriminatory rates and certainly does not provide a basis for dismissal without a hearing on the unique factual allegations of the Amended Petition. Indeed, a close reading of the United Telephone decision cited by Odyssey confirms the authority of the Commission to modify or abrogate a Commission-approved contract when necessary to protect the public interest. The exercise of that authority is part of the relief requested in the Amended Petition.

24. Furthermore, as previously discussed, Allied/CFI's interests are directly and substantially affected as a party to the Settlement Agreement that was approved by the Commission in the Initial Docket. As confirmed by the Florida Supreme Court in its decision in Peoples Gas System, Inc. v. Mason, 187 So.2d 335 (Fla. 1966), a party to an agreement approved by the Commission may file a petition with the Commission to vacate, modify, or withdraw the prior approval of that agreement or order.

B. Allied/CFI's Amended Petition States a Basis for Relief Under Exceptions to the Doctrine of Administrative Finality

25. It is well-established that "[m]otions to dismiss are looked on with disfavor . . . and are granted sparingly and with care." Oguz v. Oguz, 478 So.2d 437 (Fla. 5th DCA 1985). See also, Midflorida Schools Federal Credit Union v. Fansler, 404 S0.2d 1178 (Fla. 2nd DCA 1981) (holding that cases are generally to be tried on their proofs rather than the pleadings. . .) Furthermore, "[d]ismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high

[8]Odyssey Motion to Dismiss, at 33, citing United Telephone Company of Florida v. Public Service Commission, 496 So.2d 116, 119 (Fla. 1986).

mortality rate." International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Service, 400 F.2d 465, 471 (5th Cir. 1968).

26. Both TECO's and Odyssey's Motions to Dismiss omit reference to the well-established standards for disposition of a motion to dismiss. The relevant court decisions have been cited time and again by the Commission. As stated in Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993):

> The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. (Citations omitted). In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. (Citations omitted). Significantly, all material factual allegations of the complaint must be taken as true. (Citations omitted).

See also, McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss, 704 So.2d 214, 215 (Fla. 2nd DCA 1998). The above legal principles have been consistently applied by the Commission in ruling on motions to dismiss. See, e.g., Order No. PSC-03-0828-FOF-TP, issued July 16, 2003, in Docket No. 030300-TP; Order No. PSC-02-1237-FOF-TP, issued September 9, 2002, in Docket No. 020578-TP; and Order No. PSC-99-0648-PCO-WS, issued April 6, 1999, in Docket No. 981609-WS.

27. TECO's Motion to Dismiss does not argue that the Amended Petition fails to state a legal cause of action. Instead, TECO urges dismissal on the grounds that it entered into the Settlement Agreement in exchange for a binding determination that both the Allied and Odyssey CSAs were prudent, that Allied/CFI agreed to forego further litigation regarding either CSA, and that

Allied executed a general release of TECO.[9] These arguments do not address the threshold issue at this juncture, which is whether Allied/CFI has stated a legal basis for the relief it seeks in its Amended Petition. Instead, these factual assertions by TECO go to the substantive reasons why TECO believes that Allied/ CFI should not be granted the relief it seeks. At this point in the proceedings, all of Allied/CFI's allegations must be accepted, including its contentions regarding the misleading statements made by Odyssey and the reliance by Allied/CFI on the accuracy of the testimony in the Initial Docket in reaching its settlement discussion. The resolution of these contentions requires a hearing on the merits.[10]

28. In its Motion to Dismiss, Odyssey sets forth a detailed discussion of selected cases addressing the doctrine of administrative finality. Odyssey's soliloquy misstates three important points of law. First, Odyssey concocts the notion that a prior administrative order may only be modified or reconsidered if a petition is filed with the agency within a certain (unstated) period of time following the prior order. There is no such statement in the case law, including the cases cited by Odyssey. In fact, in multiple instances agency decisions have been reopened and reconsidered upon the filing of petitions well after the time frame involved in this case. See, Sunshine Utilities v. Public Service Commission, 577 So.2d 663 (Fla. 1st DCA 1991) and McCaw Communications of Florida, Inc. v. Clark, 679 So.2d 1177 (Fla. 1996), discussed below. Odyssey's motion omits any reference to those cases. Second, Odyssey erroneously contends that an order of the Commission may not be revisited under an exception to the doctrine of administrative finality based on a showing

[9]TECO Motion to Dismiss, at page 10.

[10] TECO's factual assertion in paragraph 11 of its Motion to Dismiss regarding recovery of incremental costs, including projected fuel expense are obviously disputed factual issues that cannot be resolved through a motion to dismiss.

of fraud, deceit, surprise, mistake or inadvertence with respect to the initial order.[11] Third, Odyssey's misleading discussion of the Florida Power Corporation v. Garcia decision[12] and principles of res judicata fails to recognize that "the doctrine of decisional finality" does not apply if an exception to administrative finality is alleged and established. 780 So.2d at 44.

29. Odyssey begins its discussion of administrative finality by correctly pointing to the seminal case of Peoples Gas System v. Mason, 187 So.2d 335, 338 (Fla. 1966). As conceded by Odyssey, Peoples Gas recognized the inherent power of the Commission to modify a prior order. The court held:

> Nor can there be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed circumstances not present in the proceedings which led to the order being modified.

Peoples Gas, 187 So.2d at 339-40. (emphasis supplied).

30. The authority of the Commission to modify a prior order upon a demonstration of a change in circumstances or if the modification is required in the public interest is a principle that has been consistently confirmed by Florida appellate courts including the decisions cited by Odyssey. See, e.g., Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979); Florida Power Corporation v. Garcia, 780 So.2d 34 (Fla. 2001).

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[11]Odyssey Motion to Dismiss, at 20-21.

[12]780 So.2d 34 (Fla. 2001). See, Odyssey Motion to Dismiss, at 18.

31. In Richter v. Florida Power Corporation, 366 So.2d 798 (Fla. 2d DCA 1979), the court held that an agency may reopen and reconsider a prior decision under "extraordinary circumstances," such as "a substantial change in circumstances, or (where) fraud, surprise, mistake, or inadvertence is shown." 366 So.2d at 800. The court went on to hold:

> Likewise, Florida decisions recognize that an administrative agency may alter a final decision under extraordinary circumstances. (Citations omitted). This rule of law seems especially appropriate in light of the purposes of Chapter 366, and the broad power granted to the PSC under §366.05(1) "to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements."

Richter, 366 So.2d at 800.

32. Despite the very clear and unambiguous holding of the Richter court,[13] Odyssey erroneously argues that this test does not apply in Florida.[14] Odyssey's misinterpretation of the law completely disregards the Commission's recognition and application of these very exceptions to the doctrine of administrative finality:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a commission ruling approving cost recovery under a negotiated contract. Once an order approving a negotiated contract becomes final by operation of law, we may not at a later date deny cost recovery to the utility, absent a showing that our approval was induced through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information.

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[13]Richter relied on and cited a similar fraud and deceit exception to administrative finality discussed by the Florida Supreme Court in Davis v. Combination Awning & Shutter Co., 62 So.2d 742 (Fla. 1953).

[14]Odyssey Motion to Dismiss, at 20-21.

In re: Implementation of Rules 25-17.080 through 25.17091, F.A.C., Regarding Cogeneration and Small Power Production, 92 F.P.S.C. 2:24, 38 (February 3, 1992) (emphasis supplied).

33. Allied's Amended Petition seeks relief based on allegations that meet the recognized exceptions to the doctrine of administrative finality that have been applied by the courts and this Commission. Paragraph 49 of the Amended Petition alleges that "the false, misleading and/or fraudulent sworn statements of Odyssey's President, Mr. Sidelko, demonstrate and justify a determination by the Commission that TECO, Allied/CFI and the Commission were misled by the false, misleading and/or sworn statements of Odyssey's President, Mr. Sidelko."

34. Paragraphs 50 and 51 of the Amended Petition contain the type of allegations recognized by the courts as sufficient to constitute, at minimum, a substantial change in circumstance, and perhaps even fraud or deceit. Paragraph 50 alleges that the sworn deposition testimony of Mr. Sidelko in the circuit court case contradicts the Sidelko Affidavit and Sidelko Prefiled Direct Testimony filed in the Initial Docket.

35. The Amended Petition also asserts that the facts and circumstances surrounding Odyssey's subsequent refusal to timely release Chemetics from the illegal restrictive covenant imposed upon it by Odyssey and TECO's arbitrary and capricious refusal to extend the time within which Allied/CFI could build its plant and commence commercial operations so as to obtain the benefit of the CISR rate under the TECO/Allied CSA, constitute substantial changes in the circumstances that justify the Commission's reconsideration of its approval of the Settlement Agreement. The Sidelko testimony in the Initial Docket created the impression that Odyssey's CSA complied with all aspects of the CISR Order which was an important consideration relied upon by Allied/CFI in agreeing to settle that case. Again, at this stage of the proceeding for purposes of a

motion to dismiss, the law requires the Commission to accept Allied/CFI's claim that it relied on these prior representations and circumstances in entering into the Settlement Agreement and dismissing its complaint.

36. Paragraph 51 of the Amended Petition adds significant new allegations demonstrating a substantial change in circumstances which indicate that the public interest would be served by an investigation of the TECO/Odyssey CSA. Paragraph 51 alleges that recent depositions in the circuit court case confirm that TECO's post-settlement implementation of Odyssey's CISR rate essentially exempts Odyssey from paying fuel charges and other adjustment changes, and that Odyssey has not paid such charges under the TECO/Odyssey CSA, which is a violation of the CISR Order. In addition, Paragraph 51 alleges that TECO's fuel costs have substantially increased over the last few years and TECO has not conducted an analysis to determine whether it is recovering its incremental costs to provide service to Odyssey under the TECO/Odyssey CSA and/or whether Odyssey's CISR rate provides a contribution to fixed costs as required by the CISR Order. A further allegation contained in Allied/CFI's Amended Petition is that TECO breached its obligations under the CISR Order and acted to the detriment of TECO's general body of ratepayers by failing to negotiate with Odyssey a rate as close as possible to TECO's tariffed rate.

37. In sum, Allied/CFI has properly alleged exceptions to the doctrine of administrative finality within the four corners of its Amended Petition. Accordingly, the Motions to Dismiss must be denied.

38. There remains one additional point to be discussed. As indicated in paragraph 27, supra, Odyssey attempts to create a new legal standard by arguing that Allied/CFI's Amended Petition is untimely. It should be noted that Odyssey's argument on this point is actually an

affirmative defense to the Amended Petition - - not a basis for a motion to dismiss. In any event, in view of the Commission's inherent authority to modify a prior order under the above-discussed exceptions to the doctrine of administrative finality, it should come as no surprise that there is no hard and fast rule regarding the timeliness for filing such a petition. Odyssey's recitation of case law on this topic is both selective and misleading. For example, in its discussion of the Peoples Gas case, Odyssey states that "[t]he [Peoples Gas] court went on to hold that the passage of four and a half years between the original and the modified order mandated deeming the original decision final."[15] In fact, the passage of time was not the controlling factor in the Peoples Gas decision. The court's decision "emphasize[d] that the order under review contains no finding that the public interest required the partial abrogation of the prior approval of the agreement." Peoples Gas, 187 So.2d at 340. Similarly, the passage of time was not the controlling factor in the Austin Tupler decision cited by Odyssey. Instead, the holding in that case was "... respondents have failed to show any significant change in circumstances or great public interest which would be served by permitting the 1974 proceedings to supercede the finding of the dormancy in the 1972 order." 377 So.2d at 681.

39. As previously stated, there is no hard and fast rule regarding the timeliness for a petition seeking to modify a prior Commission order based on an exception to the doctrine of administrative finality. While Odyssey cites the Commission to cases involving periods of time shorter than the time that passed between the April 24, 2001 Order Approving Settlement Agreement and Allied/CFI's January 30, 2004 Petition, the time period was not the controlling factor. Numerous hearings have been conducted on petitions alleging an exception to the doctrine of administrative finality which were filed after the passage of substantially longer periods of time than

[15]Odyssey Motion to Dismiss, at 13.

the one in the instant case. For example, in Sunshine Utilities v. Public Service Commission, 577 So.2d 663 (Fla. 1st DCA 1991), the court upheld a Commission order which prospectively corrected a rate base computation contained in a prior Commission order entered five years earlier which required the utility to make refunds. Citing Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), as well as the Richter, Peoples Gas and Austin Tupler decisions, the court emphasized the Commission's inherent authority to modify its orders where there is a: (1) substantial change in circumstances, or fraud, surprise, mistake, or inadvertence; or (2) demonstrated public interest. Sunshine Utilities, 577 So.2d at 666.

40. More recently, the Florida Supreme Court addressed a situation where the Commission, in 1995, revisited its policy and methodology regarding the interconnection rates paid by mobile telephone companies to landline telephone companies reflected in a 1988 order. Cautioning against a "too doctrinaire" application of the doctrine of administrative finality, and quoting the landmark Peoples Gas decision, 187 So.2d at 339, the court upheld the Commission's revisitation and modification of the 1988 order emphasizing:

> We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated.... [W]hereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies....

McCaw Communications of Florida, Inc. v. Clark, 679 So.2d 1177, 1179 (Fla. 1996).

41. A proper application of the case law concerning motions to dismiss in the context of a petition that invokes an exception to the doctrine of administrative finality can be found in Docket No. 971399-TP. In that docket, BellSouth Telecommunications, Inc. ("BellSouth") filed a petition on October 21, 1997, to lift the intraLATA presubscription marketing restrictions imposed by the Commission pursuant to an order issued on February 13, 1995 in a different docket. BellSouth's October 1997 petition was met by a joint motion to dismiss by parties who had participated in the prior docket. The joint motion to dismiss argued that the doctrine of administrative finality precluded further consideration of the issues decided in the February 13, 1995 Order. BellSouth responded that its petition alleged, and it was prepared to demonstrate, a sufficient change in circumstances - - one of the exceptions under the doctrine of administrative finality. The Commission denied the joint motion to dismiss concluding that BellSouth had alleged sufficient facts to demonstrate changed circumstances and that BellSouth was entitled to a hearing on its request to lift the intra-LATA presubscription restrictions imposed by the February 1995 order. See Order No. PSC-98-0293-FOF-TP issued February 17, 1998.

42. Likewise, in the instant case, the Amended Petition alleges sufficient facts which must be taken as true for purposes of the Motions to Dismiss, i.e., that the Settlement Agreement and Order Approving Settlement Agreement were predicated or obtained based on the false or deceptive statements of Odyssey's president, that there has been a significant change in the circumstances upon which the Commission's approval of the CSAs and the Settlement Agreement were predicated, and that the public interest would be served by ensuring that non-discriminatory rates are uniformly and consistently charged and that TECO's ratepayers do not subsidize a preferred customer. A proper

and correct application of the case law and prior Commission precedent clearly dictate that the Motions to Dismiss should be denied.

D. Odyssey's Other Arguments Provide No Basis for Dismissal

1. Allied/CFI's Amended Petition is not untimely under Rule 1.540(b), Florida Rules of Civil Procedure.

43. Odyssey asserts that the Amended Petition is untimely based on the application of Rule 1.540(b), Florida Rules of Civil Procedure. Rule 1.540(b) requires that a motion for relief from a final judgment on grounds of fraud be filed "not more than 1 year after the judgment, decree, order, or proceeding was entered or taken." Neither the rule nor the case cited by Odyssey[16] lend any support to Odyssey's Motion to Dismiss. Rule 1.540, Florida Rules of Civil Procedure, is not binding on the Commission and the strict application of a judicial rule such as Rule 1.540(b) would undermine the body of precedent under Florida law that provides for exceptions to administrative finality, without rigid adherence to a one year time frame, and would fly in the face of the Florida Supreme Court's McCaw decision which admonished against a rigid approach to the application of the doctrine of administrative finality

2. The Settlement Agreement approved by the Commission is Also Subject to Challenge under the Exceptions to the Doctrine of Administrative Finality.

44. Odyssey's Motion to Dismiss asserts that, even if the Commission were to vacate the Order Approving Settlement Agreement, the Settlement Agreement and General Release are not subject to challenge. Here again, Odyssey's argument is not a basis for dismissal without a hearing on the merits.

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[16] Cerniglia v. Cerniglia, 679 So.2d 1160 (Fla. 1996).

45. Odyssey and TECO point to provisions in the Settlement Agreement precluding Allied/CFI from initiating any further challenges to the Odyssey CSA.[17] Allied/CFI does not dispute what these documents say. However, Odyssey and TECO's references to the Settlement Agreement and General Release overlook the point of the Amended Petition. The point and focus of the Amended Petition is that the Settlement Agreement, the General Release and the Order Approving Settlement Agreement were predicated on: (a) false and/or misleading statements of Odyssey's president which were justifiably relied upon by Allied/CFI in entering into the Settlement Agreement and executing the General Release and seeking Commission approval of the Settlement Agreement; and (b) significant new information that was not disclosed (i.e., the post-contract interpretation of the Odyssey CSA).

46. The notion advanced by Odyssey that the Settlement Agreement is not subject to challenge is not supported by logic or the law. The dismissal of Allied/CFI's complaint in the Initial Docket was conditioned on Commission approval of the Settlement Agreement. No party to the Initial Docket, including Odyssey, ever took the position that the Commission lacked authority to approve the Settlement Agreement. It defies logic to claim, as Odyssey now does, that the Commission lacks the power to modify or abrogate an agreement that it had jurisdiction to approve. If the Commission had the power to approve the Settlement Agreement, the Commission has the power to rescind that approval and/or condition it on a modifications that ensure compliance with the Commission's policies and goals. See, People's Gas, supra.

47. Furthermore, the Commission's authority to modify or terminate the Settlement Agreement is consistent with the Commission's broad police power and authority to modify

[17]Odyssey Motion to Dismiss, at 25; TECO Motion to Dismiss, at 4-5.

contracts between a regulated utility and its customer in the interest of the public welfare. See, H. Millier & Sons, Inc. v. Hawkins, 373 So.2d 913, 914 (Fla 1979). The previously discussed exceptions to the doctrine of administrative finality provide a basis for the Commission to vacate the Order Approving the Settlement Agreement, determine that the Settlement Agreement itself is unenforceable, and determine that its prior approval of the TECO/Odyssey CSA was based on the non-disclosure of pertinent terms.

4. The Commission has the Authority to Require TECO to Hold its General Body of Ratepayers Harmless

48. The Amended Petition requests that the Commission's final order require Odyssey to refund to TECO or TECO's general body of ratepayers the difference between the CSA rate granted to Odyssey and the new rate approved by the Commission for Odyssey for the period of time beginning with the effective date of Odyssey's CSA and terminating on the date of the new Commission approved rate for Odyssey. Odyssey, but not TECO, contends that the Commission lacks the authority to grant this relief on the ground that Odyssey is not a regulated public utility under Chapter 366, Florida Statutes. Allied/CFI agrees that the Commission does not regulate Odyssey; however, it does regulate TECO. The Commission has comprehensive regulatory authority over TECO's retail revenues, revenue requirements, and earnings and establishes TECO's return on common equity and overall rate of return. Further, all CSAs entered into under the CISR pilot program were subject to the regulatory authority (although not specific approval) of the Commission.

49. Odyssey's citation to cases that stand for the general prohibition against retroactive ratemaking have no application to the Amended Petition.[18] The Amended Petition invokes the

[18]See Odyssey Motion to Dismiss, at 37

inherent authority of the Commission to address a prior decision based on new evidence of fraud or deceit, a substantial change in circumstances, and/or the need to ensure that the public interest is served in the regulation of a public utility such as TECO. In this case, that inherent authority includes the authority to address and adjust TECO's revenues to insure that its general body of ratepayers are not harmed from the circumstances detailed in the Amended Petition.

50. Under the CISROrder, TECO was required to report the difference between the revenues which would have been received under the otherwise applicable tariff rate and the Odyssey/TECO CISR rate in its monthly surveillance reports and in quarterly filings with the Commission. This reporting requirement was required by the Commission to track the amount of revenue that would be imputed to TECO in the event a particular CSA was found to be imprudent.[19] Allied/CFI has suggested in its Amended Petition that the most appropriate source to impute or restore this "lost" revenue to TECO's general body of ratepayers is from the benefactor of the improper rate - - Odyssey. The Commission has the authority to modify the Odyssey CSA to ensure that TECO customers are not being required to subsidize service under an improper sweetheart deal and that electric service rates are not unduly prejudicial or discriminatory.

5. The Facts Alleged in the Amended Petition Provide a Legally Cognizable Claim for Relief

51. On pages 37-50 of its Motion to Dismiss, Odyssey delves into extensive argument on the merits of Allied/CFI's allegations. Notably absent from Odyssey's 58-page diatribe is any discussion regarding Odyssey's status as a TECO ratepayer who does not pay fuel charges and the factual, legal and policy implications arising therefrom. In any case, Odyssey's factual contentions

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[19]See 98 F.P.S.C. 8:153 at 155.

are not appropriate for a motion to dismiss. Odyssey's contentions actually confirm the existence of disputed factual issues demonstrating the need for a hearing. For example, TECO's CISR tariff and the CISR Order required Odyssey to demonstrate that, but for the granting of the CISR rate , the new load from Odyssey's plant would not be served by TECO. TECO's CISR tariff and the CISR Order also required Odyssey to demonstrate to TECO's satisfaction that Odyssey had a viable lower cost alternative to taking service from TECO. The allegations of the Amended Petition challenge whether accurate information was presented to satisfy these criteria and justify the CISR rate.

52. As outlined in the Amended Petition and attached exhibits, Odyssey's president stated in Prefiled Direct Testimony in the Initial Docket that he provided a sworn affidavit to TECO confirming that Odyssey's choice of a site for its new facility was largely dependent upon the electric rate for that location (ultimately reflected in Odyssey's CISR rate), and that if Odyssey were unable to obtain a certain rate, it would have to locate its new plant to a different service area. Mr. Sidelko's Prefiled Direct Testimony went on to state that Odyssey would not have taken service from TECO at a rate higher than the CISR rate granted by TECO to Odyssey under the TECO/Odyssey CSA. According to Mr. Sidelko's Prefiled Direct Testimony, it would not have made good business sense to take service from TECO at a higher rate than that in the CSA, and further, that Odyssey's lender required that rate in a loan commitment. Mr. Sidelko made essentially these same statements in his August 5, 1998 Affidavit provided to TECO to secure Odyssey's CISR rate.

53. The Amended Petition brings to the Commission new testimony of Mr. Sidelko which contradicts and is inconsistent with the above representations. This new testimony is delineated in the Amended Petition which asks the Commission to conduct a hearing to determine whether the facts support an exception to the general doctrine of administrative finality Odyssey's disagreement

with Allied/CFI's factual allegations and/or Odyssey's belief that the new testimony can be reconciled with the prior representations and/or the new evidence is not relevant are not matters to be resolved on a motion to dismiss.

54. The Amended Petition also raises the existence of significant new circumstances that have been brought to light by recent depositions of former and current TECO employees in the circuit court action. Based on these witnesses' deposition testimony, it has become apparent that TECO has interpreted and applied Odyssey's fixed rated under the TECO/Odyssey CSA in a manner that exempts Odyssey from paying fuel charges and other adjustment clause charges that are traditionally passed through separately to and recovered from all other TECO ratepayers. See, additional allegations raised in Paragraphs 50-51 of Allied/CFI's Amended Petition

55. Allied/CFI is entitled to a hearing to fully develop the factual record to support its claims. Allied/CFI should be allowed to present evidence at hearing in support of the allegations in the Amended Petition and to further bring to the Commission's attention the recent testimony of other relevant witnesses that bear on the Odyssey/TECO transaction.

56. The parties' dispute as to the weight and meaning of the evidence are appropriately considered and determined by the Commission following the evidentiary stage of this proceeding, not through legal briefs on motions to dismiss. Odyssey's slanted characterizations of Allied/CFI's allegations and the type of evidence it would present do not constitute a basis for dismissal of the Amended Petition.

6. Allied/CFI's Amended Petition Satisfies the Requirements of Rule 25-22.036(3), Florida Administrative Code

57. In its Motion to Dismiss, Odyssey asserts that Allied/CFI's Amended Petition should be dismissed because it fails to satisfy the minimum requirements of Rule 28-106.201, Florida Administrative Code. According to Odyssey, "under all applicable law, the filing of an administrative petition by one claiming injury to their substantial interests requires as a prerequisite, that there be some proposed agency action to challenge."[20] Odyssey claims that, because there is no proposed agency action in the present case, there is nothing that can be properly protested through the Amended Petition. Odyssey's Catch 22 argument and its citation to Rule 25-22.029(3), Florida Administrative Code, which specifically addresses a party's point of entry and right to protest a Proposed Agency Action ("PAA") Order by the Commission, are off-base.

58. Obviously, Allied/CFI's Amended Petition is not being filed in response to proposed agency action by the Commission. Instead, Allied/CFI is affirmatively requesting the Commission to vacate the Order Approving Settlement Agreement pursuant to the judicially recognized exceptions to the doctrine of administrative finality and to rescind or modify its prior approval of the TECO/Odyssey CSA. As a party to the Order Approving Settlement Agreement, Allied can properly file a petition with the Commission to vacate, modify, or withdraw the Commission's prior approval of the Settlement Agreement. See, Peoples Gas, supra. That Settlement Agreement purported to resolve Allied/CFI's prior challenge to the Odyssey CSA. If the Commission finds grounds to revisit

[20] Odyssey Motion to Dismiss at 51.

its approval of the Settlement Agreement, Allied/CFI's underlying challenge to the CSA should be reopened as well.[21]

59. Adoption of Odyssey's argument would preclude a party from ever being able to seek any kind of relief from the Commission absent the issuance of a PAA Order. Odyssey's argument completely ignores the express language of Rule 25-22.036, Florida Administrative Code, which expressly provides vehicles other than the protest of a PAA Order for a party to initiate a formal proceeding before the Commission. Specifically, that rule provides:

> A complaint is appropriate when a person complains of an act or omission by a person subject to Commission jurisdiction which affects the complainant's substantial interests and which is in violation of a statute enforced by the Commission, or of any Commission rule or order.

60. There is no requirement under Rule 25-22.036, Florida Administrative Code, that a petition such as the one filed by Allied/CFI can be initiated only in response to a PAA Order by the Commission. Allied's Amended Petition complies with the specific requirements of Rule 25-22.036, Florida Administrative Code. The rule specifically allows a party, such as Allied, to complain of an act or omission by a person subject to Commission jurisdiction, in this case TECO, which affects Allied/CFI's substantial interests and is in violation of a statute or Commission rule or order. Allied/CFI has alleged in its Amended Petition that by granting preferential rates and terms to Odyssey under TECO's CISR Tariff and by refusing to offer Allied/CFI those same rates and terms, TECO is in violation of Sections 366.03, 366.06(2), Florida Statutes. Allied/CFI further alleges in

[21] As discussed above, public interest concerns, including but not limited to, the impacts to TECO ratepayers, independently support the Commission's investigation of the TECO/Odyssey CSA.

its Amended Petition that TECO's implementation of Odyssey's CISR rate is in violation of the CISR Order.

61. Rule 25-22.036(b), Florida Administrative Code, also requires that a complaint contain: (1) the rule, order, or statute that has been violated; (2) the actions that constitute the violation; (3) the name and address of the person against whom the complaint is lodged; and (4) the specific relief requested, including any penalty sought. A reading of Allied's Amended Petition reveals that it clearly satisfies those requirements.

62. To the extent that the Commission looks to Rule 28-106.201, Florida Administrative Code, as a guideline for the requirements of a formal petition, Allied's Amended Petition also complies with that rule. Allied's Amended Petition contains the name and address of the petitioner and the petitioner's representative, and explanation of how the petitioner's substantial interests are affected, a statement of disputed issues of material fact, a concise statement of the ultimate facts alleged; a statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, and a statement of the relief sought by the petitioner.

63. The Commission has on at least one prior occasion rejected a motion to dismiss that was premised in part on the argument that Odyssey has advanced here. In Docket No. 000121A-TP, Supra, a competitive local exchange company, argued that because Rule 25-22.029, Florida Administrative Code, allows a party to protest a PAA Order, then all formal hearings under Administrative Procedures Act must be based on the issuance of a PAA Order, and therefore, BellSouth could not initiate a proceeding pursuant to Rule 28-106.201 and Rule 25-22.036, Florida Administrative Code. The Commission found that Supra's interpretation of the Rules was contrary to the plain meaning of the Rules and longstanding Commission precedent and also agreed with

BellSouth's argument that its Petition was appropriately filed pursuant to Rule 25-22.036, Florida Administrative Code, since BellSouth was seeking relief from an Order of the Commission, which was subject to the Commission's jurisdiction. See, Order No. PSC-02-1082-FOF-TP, issued August 8, 20042. Odyssey's specious argument that a PAA Order is a prerequisite to initiating a formal proceeding before the Commission reflects its desperation to avoid a hearing and should be rejected.

IV. ODYSSEY'S MOTION FOR ATTORNEY'S FEE AND SANCTIONS

64. As noted above, Odyssey has also filed and served a Motion for Attorney's Fee and Sanctions pursuant to Section 57.105(5), Florida Statutes.

65. Odyssey's Motion for Attorney's Fee and Sanctions reflects only conclusory allegations with a repeat of some of the invective spread across Odyssey's Motion to Dismiss. Odyssey's Motion provides no factual support for its request for an attorney's fee and sanctions, and cites no case law or precedent in support of its request.

66. Florida appellate courts have consistently held that as a prerequisite to an award of attorney's fees pursuant to Section 57.105, the trial court must make an explicit finding that there was a complete absence of a justiciable issue of law or fact raised by the losing party. See, Langford v. Ferrera, 823 So.2d 795 (Fla. 1st DCA 1002) citing Lambert v. Nelson, 573 So.2d 54, 56 (Fla. 1st DCA 1990); Skalniak v. Dey, 737 So.2d 635 (Fla. 1st DCA 1999), Broad & Cassel v. Newport Motel, Inc., 636 So.2d 590 (Fla. 3rd DCA 1994). Furthermore, in order to award attorney's fees against a losing party, there must be a showing that the claim was so clearly devoid of merit both on the facts and the law as to be completely untenable and frivolous. See, Pappalardo v. Richfield Hospitality Services, Inc., 790 So.2d 1226 (Fla. 4th DCA 2001) citing Berman & Feldman v. Winn Dixie, Inc., 684 So.2d 320, 322-323 (Fla. 4th DCA 1996). In addition, there must be a finding on

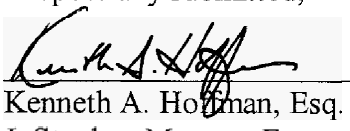
the record, supported by substantial competent evidence, in order for the trial court to award attorney's fees and costs. See, Vasquez v. Provincial South, Inc., 795 So.2d 216 (Fla. 4th DCA 2001) citing Valdes v. Lovaas, M.D., 784 So.2d 474 (Fla. 3rd DCA 2001).[22]

67. Odyssey's Motion for Fee and Sanctions fails to meet the standard established by the courts. Odyssey's hyperbole and invective throughout its Motion to Dismiss are no substitute for meeting the legally established standards for an award of fees and sanctions under Section 57.105, Florida Statutes. Odyssey's Motion for Attorney's Fee and Sanctions should be denied.

V. CONCLUSION

WHEREFORE, for the foregoing reasons, Allied/CFI respectfully requests that the Commission enter an Order DENYING: (1) TECO's Motion to Dismiss; (2) Odyssey's Motion to Dismiss and accompanying request for imposition of sanctions, costs and/or fees against Allied/CFI; and (3) Odyssey's Motion for Attorney's Fee and Sanctions.

Respectfully submitted,



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[22]As previously mentioned, Odyssey refers to Section 120.569(2)(e), Florida Statutes, purportedly in further support of its request for attorney's fees. Odyssey cites no supporting facts, arguments or case law in support of any award of fees under this statute.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail and hand-delivery (*), this 10th day of September, 2004, to the following:

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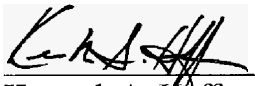

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