State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: September 23, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Brown, Stern) MCB MKS
Division of Economic Regulation (Draper) ELD DRD JDJ

RE: Docket No. 040086-EI – 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, by Allied Universal Corporation and Chemical Formulators, Inc.

AGENDA: 10/05/04 – Regular Agenda – Motions to Dismiss Amended Petition and Motion for Attorney's Fees - Oral Argument Requested

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040086.RCM.DOC

CASE BACKGROUND

On January 30, 2004, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a petition to vacate Commission Order No. PSC-01-1003-AS-EI (settlement order), which approved a comprehensive settlement agreement between Allied and Tampa Electric Company (TECO).[1] The settlement agreement resolved Allied's complaint against TECO for allegedly providing preferential rates under TECO's Commercial Industrial Service Rider (CISR) tariff to Odyssey Manufacturing Company (Odyssey). Odyssey is Allied's competitor in the manufacture of chlorine bleach. The agreement and the settlement order approving it

[1] Order No. PSC-01-1003-AS-EI, issued April 24, 2001, in Docket No 000061-EI, In re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Section 366.03, 366.06(2), and 366.07, F.S. with respect to rates offered under commercial/industrial service rider tariff; amended petition to examine and inspect confidential information; and request for expedited relief.

(Attachment A to this recommendation) provided a CISR contract to Allied on terms comparable to the CISR contract that TECO had executed with Odyssey, with the condition that Allied would build a new bleach plant within 2 years of approval of the settlement agreement. The settlement and the settlement order also resolved all aspects of the complaint before the Commission, determined the prudence of TECO's CISR contracts for electric service with both Odyssey and Allied, and precluded Allied and TECO from further litigation of the subject matter before the Commission. The settlement did not, however, preclude Allied from litigating an appropriate claim in an appropriate judicial forum against Odyssey, and thereafter, on November 19, 2001, Allied filed suit against Odyssey in circuit court in Miami for state antitrust violations and other allegations of interference with business relationships.[2]

In the course of the circuit court proceeding, in December of 2003, Allied conducted several depositions of Odyssey's employees, including its president, Mr. Sidelko, and one of its employees, Mr. Allman, a former TECO employee. The depositions contain statements that Allied alleges contradict statements that Mr. Sidelko made in 1998 in an affidavit to TECO as part of the application for the CISR rate, and in prefiled testimony before the Commission in the earlier complaint docket in June, 2000. On the basis of these alleged contradictory statements, Allied filed the petition to vacate in which it asked the Commission to: vacate its settlement order; declare the settlement agreement between Allied and TECO unenforceable; terminate the existing CISR contract between Odyssey and TECO; require Odyssey to refund to TECO or its ratepayers the difference between the rate Odyssey currently pays TECO under the CISR contract and a new rate that the Commission would establish in this proceeding; and provide that Allied receive service from TECO at the same rate established for Odyssey .

On February 19, 2004, both Odyssey and TECO filed motions to dismiss Allied's petition, and Odyssey requested oral argument on the motions. On February 23, 2004, Odyssey also filed a motion for attorney's fees and sanctions against Allied. Allied responded to the TECO and Odyssey motions on March 12, 2004. On March 1, 2004, the Office of Public Counsel (OPC) intervened in the case, and on April 23, 2004, OPC filed a Motion for Public Service Commission to examine the contract between TECO and Odyssey. TECO and Odyssey objected to OPC's motion. The Commission deferred consideration of the motions to dismiss from its July 6, 2004, Agenda Conference pending review of Allied's July 2, 2004, Motion for Leave to File Amended petition, which the Prehearing Officer granted by Order No PSC-04-0714-PCO-EI, issued July 20, 2004. TECO and Odyssey filed motions to dismiss Allied's amended petition on August 20, 2004, and Odyssey filed another motion for attorney's fees. Allied filed its response to the motions to dismiss on September 10, 2004.

This recommendation addresses the motions to dismiss the amended petition filed by Odyssey and TECO, and Odyssey's motions for attorney's fees and sanctions. OPC's motion to examine the CISR contract between TECO and Odyssey will be addressed during the course of the proceeding after the Commission makes its determination on the motions to dismiss. The Commission has jurisdiction over this matter pursuant to sections 366.04, 366.05, and 366.07, Florida Statutes, and pursuant to its inherent authority to enforce and review its own orders.

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[2] Case No. 01-27699-CA-25, in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the request for oral argument?

RECOMMENDATION: Yes. (Brown, Stern)

STAFF ANALYSIS: Rule 25-22.058, Florida Administrative Code, provides that the Commission may grant oral argument upon the request of any party to a formal proceeding under Section 120.57, Florida Statutes. The rule requires that the oral argument request be made in a separate document that accompanies the pleading on which argument is requested. The rule also requires that the request for oral argument state with specificity why argument would aid the Commission in comprehending and evaluating the issues before it. Odyssey filed a separate request for oral argument in which it stated that the issues raised in Allied's amended petition and in its motion to dismiss were complex, technical and detailed. Odyssey asserted that oral argument would assist the Commission in the consideration of the issues raised.

Allied's amended petition to vacate the Commission's order approving the settlement agreement is contentious and complicated and it implicates important Commission policies that encourage settlements and protect the finality and effectiveness of Commission orders. Staff recommends that oral argument on the motions would assist the Commission in resolving these matters. Staff suggests 15 minutes per side for the oral argument.

ISSUE 2: Should the Commission dismiss Allied's amended petition?

RECOMMENDATION: Yes. Allied's amended petition fails to state a cause of action upon which the Commission can grant the relief requested. The Commission should dismiss the amended petition with prejudice. (Brown, Stern, Draper)

STAFF ANALYSIS:

Allied's Amended petition

In its amended petition Allied states that it competes with Odyssey in the manufacture and sale of chlorine bleach in the Tampa Bay area. In 2000, Odyssey constructed a new manufacturing facility in Tampa that uses electrolysis of salt and water to produce chlorine and caustic soda, which are then combined to produce chlorine bleach. Allied is involved in several bleach manufacturing facilities in Florida, including a facility of its affiliate CSI in Tampa, which uses a process called the "Powell process" to manufacture chlorine bleach. The cost of raw materials is the most significant manufacturing cost in the Allied facility's Powell process, while the cost of electricity is the most significant manufacturing cost in the Odyssey facility's electrolysis ("cell") process.

In the summer of 1998, before beginning construction of its new plant, Odyssey negotiated a contract for electric service with TECO under TECO's CISR tariff, which the Commission had approved in Order No. PSC-98-1081-EI (CISR Order).[3] The CISR Order (Attachment B to this recommendation) permitted TECO to negotiate a rate for electric service with potential customers that would be lower than its regularly tariffed rates, providing the customer could demonstrate that if it did not receive the lower rate from TECO it would leave TECO's service territory and locate its operations elsewhere. If the customer demonstrated by legal attestation or affidavit that but for the special rate TECO would not serve the customer's load, and provided documentation that the customer had a viable lower cost alternative to taking service from TECO, the CISR tariff permitted TECO to negotiate a contract service agreement (CSA) with the customer. The CSA could offer electric service at a rate no lower than TECO's incremental cost to serve the load, plus a contribution to fixed costs. The negotiated discount rate would only apply to base energy and or demand charges, and the customer would pay all otherwise applicable adjustment charges. (CISR Order, p. 2) According to Allied, the CISR Order did not authorize TECO to negotiate a discounted rate guarantee for variable fuel charges and other adjustment clause costs. The CISR Order also provided that TECO would carry the burden of proof that the CSA was negotiated in the interest of TECO's general body of ratepayers. TECO was to conduct specific analyses of each CISR customer to calculate the net benefits to TECO's general body of ratepayers on a cumulative net present value basis over the life of the contract, and as long as the revenues exceeded the costs the ratepayers would benefit.

According to Allied, Odyssey's president, Stephen Sidelko, provided an affidavit to TECO which stated that if Odyssey were unable to obtain a specific rate from TECO, "Odyssey

[3] Order No. PSC-98-1081-FOF-EI, issued August 10, 1998, in Docket No. 980706-EI, In re: Amended petition for approval of Commercial/Industrial Service Rider Tariff by Tampa Electric Company. Order No. PSC-98-1081 approved the tariff as an experimental tariff for 4 years. It expired Jan 1, 2004.

will have no alternative but to locate its manufacturing facility in a different service area where it can obtain such a rate." (quoted in Allied Amended petition, pps.8-9) Mr. Sidelko attached this affidavit to his prefiled testimony in Allied's original complaint against TECO, where he again asserted that if Odyssey were unable to obtain a certain rate from TECO, Odyssey would have no alternative but to locate its plant in a different service area where it could obtain a satisfactory rate. In its amended petition in this docket, Allied quoted the testimony of Mr. Sidelko as follows:

> Q. Were you required to furnish a sworn affidavit to TECO?
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> A. I was, and I did. The affidavit confirmed that our choice of a site for our manufacturing facility was largely dependent upon the electric service rate for that location, because electricity comprises half of Odyssey's variable manufacturing costs. Further, the affidavit provided that if we were unable to obtain a certain rate, Odyssey would have no alternative but to locate its plant in a different service area where it could obtain a satisfactory rate.
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> Q. Did Odyssey and TECO reach an agreement?
>
> A. Yes. On September 4, 1998, Odyssey executed a Contract Service Agreement. We received the Contract as executed by TECO in late September, 1998. I will sponsor the executed contract as Exhibit SWS-1. An easement in the substation site was later conveyed by Odyssey to TECO.
>
> Q. **Would Odyssey have agreed** to receive service from TECO at a rate higher than that provided under the CISR?
>
> A. No.
>
> Q. Why is that?
>
> A. It would not have made good business sense. Odyssey is a for profit company, and, as its CEO, my job is to ensure that our investors achieve an acceptable return on investment. Further, the condition regarding the electric rate set forth in our lender's loan commitment would not have been satisfied.

(Allied amended petition, p. 11.) Allied alleges that in order to compete with Odyssey's new plant, Allied planned to construct a new facility in Tampa that also used electrolysis technology to produce chlorine bleach, and by August of 1999 it also requested a CSA from TECO. According to Allied, the rates and conditions TECO first offered Allied, however, were higher and less favorable than the rates in the CSA with Odyssey, and Allied filed its original complaint alleging discriminatory treatment at the Commission in January of 2000. In February of 2001, Allied and TECO entered into the settlement agreement which is the subject of this docket. Allied alleges that it justifiably relied on the sworn affidavit and testimony of Mr. Sidelko that Odyssey required a certain rate for service from TECO without which Odyssey would have no alternative other than to locate its plant in another area, and that Odyssey's lender required that

Odyssey receive that rate. (Allied Amended petition, pps.11-12.) The settlement agreement was approved by the Commission in April of 2001.

According to Allied, the settlement agreement offered Allied a CSA under TECO's CISR tariff that was essentially the same as the CSA with Odyssey, but required Allied to begin commercial operations at its new bleach plant within two years of the Commission's Settlement Order.[4] Allied asserts that Odyssey prevented Allied from meeting the two year deadline, because Odyssey refused to release the only builder qualified to construct "cell process" chlorine bleach plants in the United States from an illegal restrictive covenant that precluded the builder from constructing a plant within 150 miles of Odyssey's plant for a period of ten years. Allied notified TECO that this circumstance constituted a "force majeure event" under the TECO/Allied CSA and requested an extension of time to build its new plant. Allied alleges that TECO arbitrarily and capriciously denied Allied's request and terminated Allied's CSA.

On November 19, 2001, Allied had filed suit against Odyssey in circuit court in Miami. Allied alleges that Mr. Sidelko contradicted his sworn affidavit and testimony before the Commission by statements he made in a deposition given in the circuit court case December 18, 2003. Allied claims that Mr. Sidelko contradicted his Commission testimony by stating that:

> (a) At the time he submitted his affidavit to TECO, he had not identified a specific electric rate that was necessary to make Odyssey's proposed plant economically feasible;
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> (b) It was TECO, not Odyssey, that proposed the per kwh electric rate;
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> (c) The per kwh rate included in his affidavit and referred to in his testimony was not important to Mr. Sidelko;[5]
>
> (d) Odyssey could operate its Tampa plant profitably if it had an electric rate of [confidential number higher than the rate in Mr. Sidelko's affidavit] per megawatt hour.

(Allied amended petition, p. 14.) Allied attached portions of Mr. Sidelko's deposition to its amended petition in this docket to support its allegations of inconsistency. (Allied amended petition, Exhibit D.) According to Allied, the statements from Mr. Sidelko and recent depositions taken in the Miami-Dade Circuit Court case[6] show that Allied relied

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[4] The settlement agreement and the Commission's Settlement order approving it, are referenced, incorporated and attached to Allied's amended petition, as are portions of the deposition of Mr. Sidelko to be discussed below. Odyssey has provided the entire deposition of Mr. Sidelko. The Commission may consider those documents and the facts they contain, in their entirety and for all purposes, in evaluating the legal sufficiency of Allied's amended petition. Rule 1.130, Fla. Rules of Civil Procedure; Harry Pepper & Associates v. Lasseter, 247 So. 2d 736 (Fla. 3d DCA 1971).

[5] Allied mentions that Mr. Sidelko changed this statement in the errata sheet to his deposition, asserting instead that the per kwh rate was important to Odyssey. See, Allied Amended petition p. 14.

[6] Allied refers to the depositions of former TECO employee Patrick Allman and current TECO employees Robert Jennings and William Ashburn taken in the Circuit Court case. Allied has filed the depositions of Mr. Allman under confidential cover in this docket. Allied has not filed the other depositions in this docket.

on false statements to reach its settlement agreement with TECO, that TECO was misled by Odyssey in entering into the CSA with Odyssey, and the Commission's Order approving the settlement agreement and the prudence of the Odyssey and Allied CSAs was predicated on fraud, deceit, surprise, mistake or inadvertence. Allied contends that the alleged contradiction in Mr. Sidelko's testimony and deposition and the information contained in the other depositions constitutes a substantial change in circumstances that would warrant Commission action to vacate its Order in the public interest pursuant to the long-recognized exception to the doctrine of administrative finality articulated in People's Gas v. Mason, 187 So. 2d 335 (Fla. 1966).

In its amended petition Allied also contends that because of Odyssey's allegedly false statements, the significant difference between the base rate TECO has recently offered Allied to serve its proposed new plant and the Odyssey CSA rate, and the recent new information gathered in the circuit court case, Allied believes that Odyssey's rate is insufficient to cover TECO's incremental costs, Odyssey's CSA is not consistent with the Commission's CISR Order, and thus TECO's ratepayers have been harmed.

Allied alleges that its substantial interests as a TECO ratepayer are affected by TECO's actions, because Allied is adversely affected by the revenue shortfall created by Odyssey's "discount" contract. Allied states that it would not have entered into the Settlement agreement had it known that Odyssey's CSA forced a subsidy on Allied and other ratepayers. Allied also asserts that as a competitor/ratepayer it has standing to challenge TECO's post-settlement interpretation of Odyssey's CSA that "essentially exempts Odyssey from payment of fuel charges, an issue which this Commission has not previously considered, and which directly and substantially affects Allied and other ratepayers." Allied's Amended petition, p.16. Allied claims that its interests as a direct competitor of Odyssey are affected in this proceeding, because it has a statutory right to electric service that is not unduly discriminatory pursuant to sections 366.03 and 366.06(2), Florida Statutes. Finally Allied claims that its interests as party to the Settlement Agreement entitle it to bring this action under Peoples Gas.

Odyssey's Motion to Dismiss

Contending that Allied's amended petition is based on the flawed premise that the alleged inconsistent statements of Mr. Sidelko support the relief Allied has requested, Odyssey urges dismissal of Allied's amended petition with prejudice. Odyssey argues that Allied lacks standing to initiate this proceeding, because Allied has not alleged any harm to itself for which the Commission could grant relief. Odyssey also argues that the doctrine of administrative finality and the law of settlements preclude Commission action on the amended petition. Odyssey claims that Allied's amended petition is an improper attempt to use a Commission proceeding to gain an economic advantage over its competitor, and to bolster Allied's circuit court case.

With respect to standing, Odyssey argues that Allied's substantial interests are not affected, as required by Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), where the Court said:

> [B]efore 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 entitle 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. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Odyssey claims that even if one assumes the allegations in the amended petition to be true, and views them in a light most favorable to Allied, Allied has failed to allege a legally cognizable injury of sufficient immediacy to support an administrative proceeding in this case. Odyssey also claims that Allied's failure to cite any statute or rule that requires the Commission to grant Allied relief precludes any analysis of the type of injury required by Agrico. Further, Odyssey argues that Allied lacks standing to request, and the Commission lacks jurisdiction to impose, any of the relief against Odyssey outlined in its amended petition, including the request to vacate Odyssey's CSA with TECO, and the request to order Odyssey to refund to TECO monies Odyssey saved under its CSA.

With respect to the doctrine of administrative finality, Odyssey argues that the Commission's settlement order, issued almost three years before this amended petition was filed, cannot be revisited absent sufficient demonstration of substantially changed circumstances that would warrant modification in the public interest. Odyssey contends that in its amended petition Allied asserts the conclusion that circumstances have changed substantially, but Allied does not provide factual allegations material to that conclusion. Odyssey also contends that the issues ostensibly raised by Allied's current amended petition concerning the appropriateness and prudence of the TECO/Odyssey CSA were fully resolved in the prior proceeding pursuant to the settlement agreement and the settlement order approving it. Odyssey claims that Allied is attempting to relitigate Docket No. 000061-EI in spite of the fact that Allied agreed to, and the Commission approved, a dismissal with prejudice three years ago. Odyssey argues that the doctrine of administrative finality would preclude the Commission's reconsideration of those issues. Finally, Odyssey argues that Allied's Amended petition, which Odyssey claims is based entirely on the alleged fraudulent statements of Mr. Sidelko, amounts to a claim of "intrinsic" fraud, which according to Rule 1.540(b), Fla. R. Civ. P. must be raised within a year of the determination based on the alleged fraud.

With respect to the law of settlement agreements, Odyssey contends that the public policy of the state of Florida, as articulated in numerous court decisions, encourages and supports settlement agreements. Odyssey contends that the settlement agreement approved by the Commission specifically precluded further Commission litigation on the prudence of Odyssey's and Allied's CSAs with TECO, and Odyssey also contends that the general release incorporated in the settlement agreement precluded any further litigation against TECO regarding the CSAs or TECO's CISR tariff. Odyssey urges the Commission to honor public policy supporting settlement agreements by declining to reopen the Allied/TECO litigation.

Odyssey argues that even if the factual allegations of Allied's amended petition are taken as true, on their face they do not prove facts contradictory to those upon which the Commission based its initial decision to approve the prudence of the CSAs and the terms of the parties' settlement. According to Odyssey those allegations do not provide any legally cognizable basis to provide relief. Odyssey also argues that on their face the statements by Mr. Sidelko are not contradictory and are not material to Allied's demands for relief. According to Odyssey, Mr.

Sidelko's affidavit and testimony filed in the earlier Commission case addressed whether Odyssey would construct its plant in TECO's service territory if it did not receive the identified CISR rate from TECO. Mr. Sidelko's deposition statements addressed the economic feasibility of Odyssey's plant at a particular rate for electric service, and at a different point in time than the time the affidavit was executed. In any event, according to Odyssey, those allegations and the new allegations included in Allied's amended petition regarding TECO's current fuel costs do not support a finding of changed circumstances that would require the Commission to vacate its order approving the Allied/TECO settlement agreement.

TECO's Motion to Dismiss

TECO's motion centers upon the settlement agreement between Allied and TECO that was approved by the Commission in the earlier case. According to TECO, the settlement agreement resolved all outstanding claims by Allied against it for discriminatory treatment related to TECO's CISR tariff, and dismissed the case with prejudice. TECO also relies on the General Release that Allied signed relieving TECO of any further liability for any matter arising out of the TECO/Odyssey CSA. TECO claims that Allied's amended petition attempts to reopen the issues resolved by the agreement in direct violation of its terms, thereby depriving TECO of the benefits of the agreement, even though TECO has fully performed under the agreement and even though Allied makes no material allegation of wrong-doing on TECO's part. According to TECO, Allied has provided no new facts and raised no new issues that would cure the flaws in its original petition to vacate. TECO argues that the factual allegations that purportedly support Allied's request to vacate the Commission's settlement order and rescind the settlement are based on claims of alleged misstatements by Odyssey, who was not a party to the settlement agreement and provided no part of the consideration for Allied's agreement to settle its case against TECO. TECO argues that Allied's accusations against Odyssey, whether true or not, are immaterial to the settlement reached between Allied and TECO and cannot form the basis for vacating the settlement order and declaring the underlying agreement it approved unenforceable.

Further, TECO suggests that Allied's amended petition is internally inconsistent because it asserts continued entitlement to the Odyssey CSA rate from TECO while claiming that the rate is harmful to TECO's general body of ratepayers.

Citing the settlement agreement, the settlement order approving it, and the General Release, which are attached to Allied's amended petition, TECO shows that Allied and TECO executed a CSA for electric service to Allied's proposed new bleach plant under the same rates, terms, and conditions provided to Odyssey, but with the additional condition that Allied would construct its new plant within two years of approval of the settlement agreement:

> WHEREAS, Allied/CFI and TECO desire to resolve their differences and conclude the PSC litigation on terms which do not affect Odyssey's rates terms and conditions for electric service from TECO;
>
> NOW, THEREFORE, Allied/CFI and TECO hereby agree to conclude the PSC litigation on the following terms. . . .
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> * * *

> 2. Pursuant to its Commercial Industrial Service Rider ("CISR") tariff, TECO and Allied/CFI shall execute a Contract Service Agreement ("CSA") for electric service to a new sodium hypochlorite manufacturing facility to be constructed and operated by Allied/CFI and/or their affiliate(s) in TECO's service territory, upon the same rates, terms and conditions as those contained in the CSA between TECO and Odyssey, provided that the new sodium hypochlorite manufacturing facility must begin commercial operation within 24 months from the date of the PSC order approving this settlement agreement . . . .

(TECO Motion to Dismiss Amended Petition, pps. 5-6.) TECO also shows that Allied agreed to forego any further challenge to the TECO/Odyssey CSA:

> 3. Allied/CFI shall assert no further challenge, before the PSC, to the rates, terms and conditions for electric service provided by TECO to Odyssey and set forth in the TECO/Odyssey CSA. . . .
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> * * *
>
> 6. Allied/CFI's Complaint in the PSC litigation shall be deemed withdrawn, with prejudice, upon: (a) the execution of this Settlement Agreement by TECO and Allied/CFI ; and (b) the issuance of an order by the PSC approving this settlement agreement, as proposed.
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> 7. Allied/CFI and TECO request that the PSC include in its order approving this settlement agreement the following rulings and determinations:
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> a. The Commission shall not entertain any further challenge to the existing Odyssey or the proposed Allied/CFI CSA or the rates, terms or conditions contained therein. . . .

(TECO Motion to Dismiss Amended Petition pps. 6-6.) TECO also refers to those portions of the Commission's settlement order that approved the prudence of both Odyssey's and Allied's CSAs; specifically found that the rates offered to Odyssey and Allied exceeded TECO's incremental cost to serve them and; approved the agreement not to entertain any further challenge to the prudence of the CSAs.

> The Commission made an explicit determination, based on undisputed competent and substantial evidence that the Odyssey CISR rate would be sufficient to recover all incremental costs, including projected fuel expenses which were specifically included in the RIM analysis, for the proposed ten-year term of the CSA. . . . Allied has failed to identify any contemporaneous information about the rates in question that was not known to the Commission at the time of the deliberation that lead to the issuance of Order No. PSC-01-1003-AS-EI.

(TECO Motion to Dismiss Amended Petition pps. 7-8)

TECO argues that the allegations in Allied's amended petition fail to demonstrate on their face that Mr. Sidelko made inconsistent statements in his Commission testimony and in his deposition in the circuit court proceeding. Even if that assertion is accepted, however, TECO argues, the statements are immaterial, and Allied's amended petition does not establish that Allied was in any way injured by reliance upon those statements. According to TECO:

> Under the Settlement Agreement, Allied bargained for and received the opportunity to enjoy the same rates, terms and conditions for electric service that had been negotiated with Odyssey, provided that Allied commenced commercial operation at its new bleach manufacturing facility within 24 months of the Commission order approving the Settlement Agreement. Regardless of what rate Odyssey might have been willing to accept, Allied was given the opportunity to receive the same rate that Odyssey did in fact accept.

(TECO Motion to Dismiss, pps. 13-14.) TECO contends that Allied has alleged no facts that would support a finding that TECO's CSA was imprudent or that the Commission was in any way mistaken in approving the settlement agreement between TECO and Allied. According to TECO, Allied's allegations about the veracity of Mr. Sidelko's affidavit are immaterial to the question of whether Allied should be required to abide by the written terms of its settlement agreement with TECO. TECO asserts that the doctrine of administrative finality requires dismissal of Allied's amended petition with prejudice.

Allied's Response

Allied contends that both motions have provided ample argument on the legal and factual substance of Allied's amended petition and why the Commission should not vacate its settlement order, but both have failed to address the controlling standard by which the Commission must review the amended petition; that is, whether the facts alleged within the four corners of the amended petition, considered true for purposes of the motions to dismiss, state a cause of action upon which relief can be granted. Allied argues that its petition alleges facts that state a cause of action under well-established exceptions to the doctrine of administrative finality, demonstrate Allied's standing to assert its claims and support the relief requested.

In response to TECO's and Odyssey's argument that the terms of the settlement agreement, the order approving it and the general release preclude further litigation on the CSAs, Allied states that this argument misses the point of its amended petition. Allied states that it does not contest that the settlement agreement and the settlement order say what they say. Allied argues that the point of its amended petition is that Odyssey made false statements in the Commission's earlier proceeding, and Allied – as well as TECO and the Commission -- justifiably relied on those false statements in executing or approving the settlement agreement. Reasserting the allegations it made in its amended petition, Allied claims that these allegations are sufficient to invoke the exception to the doctrine of administrative finality, which provides that the Commission can modify its orders where material changed circumstances, including fraud, mistake, or misrepresentation, require the modification in the public interest. Allied also asserts that the new information in its amended petition regarding TECO's administration of the Odyssey CSA, specifically its treatment of energy and fuel costs and other recovery clause charges, amounts to material changed circumstances requiring vacation of the Commission's

settlement order. In response to Odyssey's argument that in fact the doctrine of administrative finality supports dismissal of Allied's Petition, and too much time has elapsed to invoke the exception to the doctrine, Allied argues that there is no time limit beyond which the Commission is precluded from modifying its order where the public interest requires it, and the factual allegations of its amended petition, taken as true, support modification.

In response to Odyssey's argument that Allied does not have standing to proceed with its amended petition, Allied contends that because it was a party to the original agreement and a party to the settlement agreement approved by the Commission it has standing in this case. Citing Peoples Gas, 187 So. 2d 339, Allied argues that a party to an agreement approved by the Commission may file a petition with the Commission to vacate or modify a prior approval of that agreement, and the law regarding standing to request a hearing under Florida's Administrative Procedures Act, Chapter 120, Florida Statutes, is not controlling. Further, Allied claims that it has standing as a customer of TECO and a competitor of Odyssey to file this Petition, which, it claims, raises the issues of competitive harm to Allied and financial harm perpetrated on TECO's general body of ratepayers.

Analysis

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the amended petition taken as true and construed in the light most favorable to the amended petitioner, the amended petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In determining the sufficiency of the amended petition the Commission should confine its consideration to the amended petition and documents incorporated therein, and the grounds asserted in the motions to dismiss. See, Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So.2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure. Further, the law provides that where there is an inconsistency between the allegations of material fact in the amended petition and the specific facts revealed by the incorporated exhibits and they have the effect of neutralizing each other, a motion to dismiss should be granted. Schweitzer v. Seaman, 38 3 So. 2d 1175 (Fla. 4th DCA 1980). See also, Harry Pepper & Assoc., Inc. v. Lasseter, 247 So. 2d 736 (Fla. 3d DCA 1971), cert. den., 252 So.2d 797 (Fla. 1971) and Padgett v. First Federal Savings and Loan Association of Santa Rosa County, 378 So. 2d 58 (Fla. 1st DCA 1979).

Upon review of all the pleadings and the documents referenced in Allied's amended petition, staff recommends that the facts Allied has alleged in the amended petition, even taken as true and viewed in the light most favorable to Allied, do not support a cause of action upon which the Commission can grant the relief requested. Further, we believe that another amended petition would not cure the fundamental defects of the case. Staff recommends that the Commission should dismiss the amended petition with prejudice.

The facts contained in Allied's amended petition and described in detail above - specifically the statements by Mr. Sidelko that form the basis of the amended petition - are not contradictory on their face, and are insufficient to support a finding of fraud or misrepresentation, even if taken as true and viewed in a light most favorable to Allied. They do

not address the same subject. The subject of Mr. Sidelko's statements contained in his affidavit and testimony was whether Odyssey would construct its plant in TECO's service territory if it did not receive the particular rate identified. The subject of Mr. Sidelko's statements in his deposition was the economic feasibility of the plant. Mr. Sidelko's statements are not mutually exclusive, and on their face do not appear to be inconsistent or misleading.

Even if they are considered inconsistent or misleading, however, the inconsistency is not material to any issue the Commission considered when it approved the Allied/TECO settlement and the prudence of the CSAs. As Allied states in its amended petition, the issues of relevance to the Commission in approving the prudence of the CSAs were: 1) whether the industrial customer asserted that it would not build its plant in TECO's service territory unless it received a discounted rate for service; 2) whether the customer showed that it had a viable offer for service elsewhere at that rate; and, 3) whether the identified rate covered TECO's incremental costs plus a contribution to fixed costs. The economic feasibility of the Odyssey plant was not relevant to any determination made in the Commission's settlement order; nor was TECO's future administration of the contract. If TECO is not implementing the Odyssey CSA appropriately, the remedy for that would be a review of TECO's actions in the fuel clause, not a revocation of the Commission's initial determination of the prudence of the CSA itself. Therefore, an alleged inconsistency regarding the plant's economic feasibility or an alleged inappropriate implementation of the CSA would not affect the validity of the Commission's settlement order, or the Commission's initial determination that the CSA complied with the CISR Order and was prudent. Thus, it would be insufficient to support a determination that a substantial change in circumstances has occurred that would require vacation of the settlement order.

Also, the alleged inconsistency does not support the finding that Allied has suffered an injury in fact as a result of the inconsistent statements. As Odyssey explains in detail in its motion to dismiss, the law of standing to participate in a formal administrative proceeding under Florida's APA requires that a participant show a substantial interest that would entitle it to relief. In order to show such an interest, the participant must demonstrate that it will suffer an actual injury of sufficient immediacy which the proceeding was designed to protect. Agrico Chemical Co., supra. Allied has not alleged facts in its amended petition to show either that it has suffered an actual and immediate injury, or that the injury is of the kind this proceeding is designed to protect.[7] If Allied did rely on Mr. Sidelko's statements, Allied has not alleged facts to show that it did so to its detriment. The facts alleged in the amended petition and in incorporated documents show that Allied received essentially the same rates, terms and conditions in its CSA that Odyssey received. It is true that Allied was recently offered a higher rate for service from TECO than offered in the CSA, but that is because Allied's settlement agreement with TECO contained the condition precedent that Allied would receive the same CISR rates as Odyssey if it constructed a new electrolysis technology bleach plant within 2 years of approval of the settlement and the CSA. Allied has not constructed the plant and thus has not complied with the

[7] Staff disagrees with Allied's assertion that Peoples Gas provides the only measure of standing in this case. A party is not automatically entitled to standing to request modification of an approved agreement because it was a party to the original agreement. Florida's APA, enacted in 1972, and the case law interpreting it, govern standing in all administrative proceedings. A party to an agreement does not acquire a superior right to an administrative hearing simply by being a party to an agreement. A party must still show a substantial interest in the new proceeding pursuant to the requirements of Agrico in order to proceed.

settlement. If Allied's failure to comply with the agreement was caused by Odyssey's agreement with a bleach plant builder, Allied's complaint is cognizable in the ongoing Miami-Dade circuit court case for interference with business opportunity, not in a proceeding before this Commission to overturn a settlement agreement between Allied and TECO to which Odyssey was not a signatory. The written terms of the settlement agreement, which is the subject of Allied's amended petition, set out the consideration provided and the entire agreement between the parties to dismiss Allied's case with prejudice before the Commission. They control TECO's and Allied's obligations in this dispute. The representations of a non-party to the settlement do not appear anywhere in the document as a basis upon which the settlement agreement was reached.

Conclusion

Allied has not alleged sufficient facts in its amended petition to support the relief it has requested. As mentioned above, Allied's allegations of contradictory statements by Odyssey do not support vacation of a Commission order approving Allied's written settlement agreement with TECO. Allied's complaint against Odyssey is cognizable in circuit court. Further, Allied has not alleged any actions by TECO that would warrant vacation of the Commission's settlement order. Allied's allegation that TECO arbitrarily and capriciously refused to invoke the force majeure clause of the settlement agreement would support a claim to enforce the terms of the agreement, not to void it. Similarly, Allied's claim that TECO is not properly administering its CSA with Odyssey does not support vacation of the TECO/Allied settlement agreement itself.

Allied has not alleged sufficient facts to show misrepresentation, detrimental reliance, harm, or any significant changed circumstances that would warrant vacation of a Commission order in abrogation of the doctrine of administrative finality or the Commission's longstanding commitment to the support and encouragement of negotiated settlements. See Peoples Gas v, Mason, supra.; Order No. PSC-98-1620-FOF-EQ, issued December 4, 1998, in Docket No. 980283-EQ (doctrine of administrative finality precluded readjudication of declaratory statement issues); Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731 (legal system favors settlement of disputes by mutual agreement between contending parties); and, Order No. 22094, issued October 26, 1989, in Docket No. 881518-SU (Commission has longstanding policy to encourage settlement agreements). Allied's amended petition should be dismissed for failure to state a cause of action upon which the Commission can grant the relief requested. Pursuant to Rule 28-106.201, Florida Administrative Code, it is clear on the face of the amended petition that amendment will not cure its defects, and therefore staff recommends that the amended petition be dismissed with prejudice.

ISSUE 3: Should the Commission grant Odyssey's Motions for Attorney's Fees and Sanctions?

RECOMMENDATION: The Commission should not address Odyssey's Motions for Attorney's Fees at this time. If the Commission grants the motions to dismiss, the Commission should address the motions when its Order becomes final and any appellate proceedings are concluded. **If the Commission denies the motions to dismiss, it should address the motions** during the course of the hearing procedure. (Brown, Stern)

STAFF ANALYSIS: Odyssey filed its Motion for Sanctions and Attorney's Fees regarding Allied's initial petition and its renewed Motion for Sanctions and Attorney's Fees regarding Allied's amended petition pursuant to section 57.105(5), Florida Statutes, Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation, which was amended in 2003 to provide relief in administrative proceedings before an administrative law judge. Section 57.105(5) provides as follows:

> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1) - (4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

Subsection (1) of the statute provides the standard for determining sanctions and attorney's fees. It provides, in pertinent part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

Odyssey alleges that Allied and its counsel are aware that the claims made in Allied's amended petition are unsupported as a matter of fact and law. Odyssey claims that Allied filed its amended petition at the Commission for improper purposes: to delay its pending litigation against Odyssey in Miami, to harass Odyssey, and to cause Odyssey undue expense to gain

competitive advantage. Allied responds that Odyssey's statements are conclusory and without factual support. Allied asserts that courts have consistently required trial courts to make an explicit finding, on the record, that the losing party did not raise any justiciable issue of law or fact. Courts must determine that the claim was completely untenable and frivolous, and they must base an award of attorney's fees and costs on competent, substantial record evidence.

Staff recommends that it is premature to address these motions at this time. A decision either to grant or to deny sanctions is not supportable by the present record. If the Commission grants the motions to dismiss Allied's amended petition, the appropriate time to consider the motions for fees and sanctions would be when that decision is final. Until then it will not be possible to adjudge who has prevailed, and without that judgment the Commission cannot determine whether Allied's amended petition meets the criteria for sanctions in sections 57.105(1) and (5), Florida Statutes. See, Edward Graef, Jr. v. Dames & Moore Group, Inc., 857 So.2d 257, 262 (Fla. 2d. DCA 2003), where the court said:

> Our supreme court has advised that it is appropriate for a litigant to wait until the conclusion of litigation before filing a claim under section 57.105(1) to insure that such a claim is not precipitously filed. Ganz v. HZ, Inc., 605 So.2d 871, 872 (Fla. 1992) It is only after the case has been terminated that a sensible judgment can be made by a party as to whether the adverse party's action or defense was completely frivolous.

Likewise, if the Commission denies the motions to dismiss and schedules an evidentiary hearing on Allied's amended petition, the proper time to consider Odyssey's motions for sanctions would be at the conclusion of the proceedings.[8] Staff is not suggesting that Odyssey's motions were filed prematurely. They appropriately inform Allied of Odyssey's pending claim, but it is too early in the course of the proceeding to effectively address their substance.

[8] Subsection (6) of section 57.105 provides that the remedies therein are supplemental to other sanctions or remedies available under law or court rules. Section 120.569(2) and section 120.595, Florida Statutes, provide fees and sanctions for cases and pleadings filed for an improper purpose, available to the prevailing party at the appropriate time.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. If the Commission dismisses Allied's amended petition with prejudice, this docket should remain open pending consideration of the outstanding motions for attorneys fees and sanctions. If the Commission dismisses Allied's amended petition with further leave to amend, or denies the motions to dismiss, the docket should remain open for further proceedings. (Brown, Stern)

STAFF ANALYSIS: If the Commission dismisses Allied's amended petition with prejudice, the docket should remain open pending consideration of the outstanding motions for attorneys fees and sanctions. If the Commission dismisses Allied's amended petition with further leave to amend, or denies the motions to dismiss the amended petition, the docket should remain open for further proceedings.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.	DOCKET NO. 000061-EI ORDER NO. PSC-01-1003-AS-EI ISSUED: April 24, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
LILA A. JABER
BRAULIO L. BAEZ

ORDER APPROVING SETTLEMENT AGREEMENT

BY THE COMMISSION:

On January 20, 2000, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a formal complaint against Tampa Electric Company (TECO). The complaint alleges that: 1) TECO violated Sections 366.03, 366.06(2), and 366.07, Florida Statutes, by offering discriminatory rates under its Commercial/Industrial Service Rider (CISR) tariff; and, 2) TECO breached its obligation of good faith under Order No. PSC-98-1081A-FOF-EI. Odyssey Manufacturing Company (Odyssey) and Sentry Industries (Sentry) are intervenors. They are separate companies but have the same president. Allied, Odyssey and Sentry manufacture bleach.

On March 22, 2001, Allied and TECO filed a Settlement Agreement, which is attached to this Order as Attachment A and is incorporated herein by reference. Odyssey and Sentry are not parties to the Agreement.

The Commission has jurisdiction under Sections 366.04, 366.06, and 366.07, Florida Statutes.

I. Summary of the Settlement Agreement

Each paragraph of the Settlement Agreement is summarized below.

Paragraph 1

All prefiled testimony and deposition testimony shall be moved into evidence to serve as a basis for the Commission's prudence review. The testimony and depositions shall remain subject to previously issued orders on confidential classification. Nothing shall limit or abridge the right of any party to petition the Commission to unseal or declassify the evidence.

Paragraph 2

TECO and Allied shall execute a Contract Service Agreement (CSA) in accordance with TECO's CISR tariff. The rates, terms and conditions of the CSA shall be substantially the same as those in Odyssey's CSA, provided Allied opens a plant within two years of the date the Settlement Agreement is approved by the Commission. The CSA shall include a force majeure clause for which confidentiality, pursuant to Section 366.093, Florida Statutes, will be requested.

Paragraph 3

Allied shall assert no further challenge against Odyssey's CSA before the Commission.

Paragraph 4

Order No. PSC-98-1081-FOF-EI, issued August 10, 1998 in Docket No. 980706-EI, allows TECO to request a prudence review of its CSA from the Commission. In light of this provision, TECO requests that the Commission make the following findings of fact:

A. Odyssey's CSA and Allied's CSA provide benefits to TECO's ratepayers and therefore both CSAs are in the best interests of ratepayers.

B. TECO's decision to enter a CSA with Odyssey and the CSA itself are prudent, within the meaning of Order No. PSC-98-1081-FOF-EI, in so far as they provide benefits to the ratepayers.

C. TECO's decision to enter a CSA with Allied and the CSA itself are prudent, within the meaning of Order No. PSC-98-1081-FOF-EI, in so far as they provide benefits to the ratepayers.

Paragraph 5

Allied agrees not to contest the findings of fact requested in ¶4, above, and the rulings requested in ¶7, below, provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied's Complaint.

Paragraph 6

Allied's Complaint shall be deemed withdrawn, with prejudice, upon execution of the Settlement Agreement and issuance of an order approving the Agreement by the Commission.

Paragraph 7

The following rulings shall be included in the Commission's order approving the Settlement Agreement:

A. The Commission shall not entertain any further challenge to Odyssey's existing CSA and Allied's proposed CSA.

B. In light of the findings that both CSAs are prudent, TECO shall not have to report the

potential effect of the two CSAs on revenues in its monthly surveillance reports.

C. The order approving the Settlement will have no precedential value.

D. The parties shall abide by the General Release Agreements executed among them.

Paragraph 8

Allied shall execute the General Release Agreement attached to the Settlement. Except as provided in ¶3, above, the Settlement Agreement shall not impair any claims that Allied may have against Odyssey and Sentry.

Paragraph 9

In any subsequent litigation against Odyssey or Sentry, Allied will attempt to avoid imposing unduly burdensome discovery requests on TECO.

Paragraph 10

TECO will not disclose the force majeure provision of the Settlement to Odyssey or Sentry unless the Commission authorizes or Allied approves of such disclosure.

Paragraph 11

The Settlement Agreement, and the attachments (Allied's CSA, the force majeure provision, and the General Release Agreements) constitute the entire Settlement Agreement and may only be modified in writing.

General Release

The General Release states that, as an inducement to TECO, Allied releases TECO from any claims, liabilities, promises, damages, attorney's fees, debts (and a long list of similar items), related to the CISR tariff, and TECO's dealings with Odyssey, Sentry and Allied. The

release also covers all as yet unforeseen liabilities. The release applies for all time up until the date it is signed.

II. Intervenors' Comments

Odyssey and Sentry filed comments on the Settlement Agreement on March 20, 2001. The Intervenors note that they were excluded from the settlement negotiations, and have not been permitted to see the CSA or force majeure provision. Their comments on the Settlement Agreement are provided below.

Paragraph 2

This paragraph states that Allied's CSA will be "substantially identical" to Odyssey's. The phrase "substantially identical" is imprecise and therefore inappropriate. The Intervenors state that the Commission should not have to determine what the phrase means.

Paragraph 5

The Intervenors note that this paragraph provides that Allied agrees not to contest certain findings of fact, rulings and determinations, "provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied/CFI's Complaint, in this proceeding." The Intervenors maintain, that more precision as to what allegations are being referred to is needed for this paragraph to have any coherence.

Paragraph 7(b)

The Intervenors object to the requirement, that the Settlement Agreement shall have no precedential value. They argue that this requirement cannot be reconciled with the provisions requiring substantive findings of fact, conclusions of law and other assurances intended to bind the parties and the Commission. The Intervenors claim that ¶7(b) "is an effort to accord some sort of second-rate status to a Commission order in this case, which would not be fairly applied to other comparable

Commission orders." Given the possibility of litigation related to this docket in courts, the Intervenors believe that ¶7(b) will complicate litigation because judges will not know what significance to assign to the order.

Paragraph 10

The Intervenors object to the nondisclosure of the force majeure clause. They state that they suspect the clause may deviate substantially in scope from the traditional type of force majeure clause. The Intervenors state that they object to providing greater protection to Allied's CSA than that which was provided to Odyssey's CSA.

The Intervenors state that if the Commission determines that the force majeure clause should not be disclosed to them, then they will oppose the provisions listed below.

A. Paragraph 1 - The provision that an evidentiary record be created is objectionable because denies Intervenors the right to cross-examine witnesses and to object on other relevant grounds.

B. Subparagraphs 4(a) and (c) - These subparagraphs allow for findings of fact favorable to Allied's CSA.

C. Subparagraph 7(a) - This subparagraph attempts to foreclose further challenges to Allied's CSA.

Between the filing of these comments and the April 3, 2001, Agenda Conference, the Intervenors were able to see redacted copies of Allied's CSA and the force majeure provision. At the Agenda Conference, the Intervenors had additional comments, some of which related to these documents.

First, the Intervenors claim that the Settlement Agreement forecloses their ability to challenge Allied's CSA. The Intervenors claim that such foreclosure denies them a point of entry. They note, however, that if they were to challenge the CSA,

it would only be to those portions which they have not yet been able to see.

Second, with respect to creation of the evidentiary record, the Intervenors object to admission into the record of "scandalous, irrelevant, and defamatory allegations" against Odyssey made by Mr. Namoff and Mr. Palmer in their depositions.

III. Decision

In accordance with discussions at the Agenda Conference and meetings with the parties prior to the Agenda Conference, our approval of the Settlement Agreement is contingent on acceptance by the parties of the clarifications and modifications discussed below. TECO and Allied agreed to accept these clarifications and modifications. Odyssey objected but agreed to accept them.

Paragraph 1 of the Agreement requires that an evidentiary record be created from the prefiled testimony, depositions and the exhibits referenced in each of those documents. The Agreement shall be modified to include all of TECO's discovery responses in the evidentiary record, because those responses are needed to support a finding that Allied's and Odyssey's CSA's are prudent. Paragraph 11 of the Settlement Agreement requires that all modifications to the Agreement be in writing, however, Allied and TECO waived the writing requirement with respect to the inclusion of all of TECO's discovery responses in the evidentiary record.

Also, with respect to the evidentiary record, TECO, Allied and the Intervenors shall each submit requests for confidential clarification of the information in the evidentiary record which each party seeks to protect. This includes deposition transcripts. The requests shall be filed within 21 days of April 3, 2001, the date of our vote on the Settlement Agreement. Consistent with Rule 25-22.006, Florida Administrative Code, all parties will have an opportunity to respond to or supplement any request for confidential treatment.

Finally, the parties shall have the opportunity to file motions to strike information in the evidentiary record that they believe violates the rules of evidence.

Paragraph 4 of the Settlement Agreement requires this Commission to find that Allied's and Odyssey's CSAs are prudent and provide benefits to the general body of ratepayers. Subparagraph 4(a) appears duplicative in light of subparagraphs (b) and (c). TECO believes that each subparagraph demonstrates that this Commission has actively supervised TECO's implementation of the CISR tariff. With that clarification, the paragraph is acceptable. With the inclusion in the evidentiary record of all of TECO's discovery responses, there is sufficient information to conclude that both Odyssey and Allied are "at risk" within the meaning of Order No. PSC-98-1081-FOF-EI, issued August 10, 1998, in Docket No. 980706-EI. Further, based on the RIM analyses provided by TECO, there is sufficient information to conclude that the rates offered to Odyssey and Allied exceed the incremental cost to serve those customers. Accordingly, the requested findings are supported by competent substantial evidence and are approved. Further, the parties agree that the correct order number in the first line of paragraph 4 is PSC-98-1081-FOF-EI.

Paragraph 5 seems internally contradictory. The first clause requires Allied to agree not to contest the factual findings contained in paragraph 4 and paragraph 7 (a determination that the Commission will not entertain any further challenge to either CSA). The second clause says Allied is only required to agree to the findings of fact and rulings listed in the first clause as long as those findings of fact and conclusions of law do not pertain to Allied. Allied explains that it believes the findings and rulings in paragraphs 4 and 7 do not address the allegations of Allied's Complaint. We take no position on whether the findings and rulings in paragraphs 4 and 7 address the allegations in Allied's Complaint, but with Allied's clarification we find that the paragraph is acceptable.

With respect to subparagraph 7(a), TECO and Allied clarified that the importance of this paragraph is to settle, for all time, the prudence of Allied's and Odyssey's CSAs with respect to matters within our jurisdiction. We agree that, based on the findings in this Order, this is appropriate. This is consistent with our past decisions concerning prudence and the doctrine of administrative finality. This does not foreclose any other party from asserting any right it may have concerning the CISR tariff.

With respect to subparagraph 7(b), the provision is consistent with previous Commission actions and is acceptable. We recently accepted a similar provision for Gulf Power Company's two executed CSAs pursuant to its CISR tariff. We found that Gulf adequately demonstrated that its two CSAs were prudent, and it is therefore no longer necessary for Gulf to report the revenue shortfall for the existing CSAs in the monthly surveillance reports. See Order No. PSC-01-0390-TRF-EI, issued February 15, 2001. We reference this Order only to illustrate that we made a similar determination with respect to reporting the revenue shortfall for Gulf's CSAs. TECO is still required to provide the revenue shortfall associated with any subsequently executed CSAs until such time as they have been subject to a prudence review by the Commission.

Subparagraph 7(c) deals with the precedential value of the Settlement Agreement. The parties state that under this subparagraph, the Settlement Agreement itself, not the Order approving the Settlement Agreement, has no precedential value. With this clarification, we find the Settlement Agreement to be acceptable.

Subparagraph 7(d) concerns the General Release provision of the Settlement Agreement. The parties agree that we can only enforce the General Release to the extent that a party brings claims before the Commission which the Commission determines are within the Commission's jurisdiction. With this clarification, we find the Settlement Agreement to be acceptable.

In paragraph 10, TECO promises to Allied that it will not disclose the force majeure provision to Odyssey or Sentry unless Allied approves disclosure or we approve disclosure. Since the filing of the Settlement Agreement, Allied provided a redacted copy of the force majeure provision to the Intervenors.

Because the force majeure provision is part of the Settlement Agreement, it was filed with our Division of Records and Reporting but with a Notice of Intent to Seek Confidential Classification. As required by Rule 25-22.006, Florida Administrative Code, TECO must file a Request for Confidential Classification that explains how the force majeure provisions meets the criteria in Section 366.093, Florida Statutes. Further, the parties recognize that confidential treatment is only available after the requisite

showing pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code.

Paragraph 11 requires that any modifications to the Settlement Agreement be written. With respect to the addition of TECO's discovery responses to the evidentiary record and the correction to the Order Number referenced in Paragraph 4, the parties waive the requirement of Paragraph 11 that all modifications to the Settlement Agreement must be in writing. With this modification, we find the Settlement Agreement is acceptable.

The Intervenors argue that the Settlement Agreement prevents them from ever challenging Allied's CSA. The Intervenors have consistently argued that Allied has no standing to challenge Odyssey's CSA. If this is true, then based on their own legal arguments, Odyssey has no standing to challenge Allied's CSA. Our findings in this Order that the Odyssey and Allied CSAs are prudent are consistent with those typically made in a prudence review. Moreover, the finding that Allied's CSA is prudent does not affect Odyssey's substantial interests.

The Settlement Agreement appears to be a reasonable resolution of the issues raised in Allied's Complaint. Further, the findings of prudence with respect to these CSAs are supported by the record evidence in this proceeding. For these reasons, and consistent with the discussion in this Order, we find that the Settlement Agreement should be approved.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Settlement Agreement between Tampa Electric Company and Allied Universal Corporation and Chemical Formulators, Inc. is approved as modified and clarified in the body of this Order. It is further

ORDERED that all prefiled testimony and exhibits filed in this docket, all depositions and associated exhibits taken in this docket, and all discovery responses provided by Tampa Electric Company shall be admitted as evidence. It is further

ORDERED that any Requests for Confidential Classification of material in the evidentiary record created in this Order shall be filed no later than April 24, 2001. It is further

ORDERED that this docket shall remain open.

By ORDER of the Florida Public Service Commission this 24th day of April, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

MKS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee,

Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

SETTLEMENT AGREEMENT

This agreement is made between Allied Universal Corporation, a Florida corporation ("Allied"), Chemical Formulators, Inc., a Florida corporation ("CFI"), (hereinafter jointly referred to as "Allied/CFI"), and Tampa Electric Company ("TECO"), a Florida public utility corporation, effective March 2, 2001.

WHEREAS, Allied/CFI and TECO are parties to that certain matter pending before the Florida Public Service Commission ("PSC"), styled "In Re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company, etc.," Docket No. 000061-EI ("the PSC Litigation"); and

WHEREAS, as part of the relief it has sought in the PSC litigation, Allied/CFI has requested that the PSC suspend the rates for electric service provided by TECO to Allied/CFI's business competitor, Odyssey Manufacturing Company ("Odyssey"); and

WHEREAS, Odyssey and its affiliate, Sentry Industries, Inc. ("Sentry"), have intervened in the PSC litigation to request that the PSC

uphold or otherwise approve Odyssey's rates, terms and conditions for electric service from TECO; and

WHEREAS, Allied/CFI and TECO desire to resolve their differences and conclude the PSC litigation on terms which do not affect Odyssey's rates, terms and conditions for electric service from TECO;

NOW, THEREFORE, Allied/CFI and TECO hereby agree to conclude the PSC litigation on the following terms:

1. All prefiled testimony, deposition testimony, and exhibits thereto, which have been filed in the PSC litigation to date, shall be moved into evidence in this docket and shall remain subject to orders previously issued concerning confidential classification of information in the PSC litigation. This evidence shall be permanently retained as a part of the record in Docket No. 000061-EI, to serve, among other things, as a record basis for the PSC's prudence review in this docket. Nothing herein shall limit or abridge the right of any party to petition the Commission to unseal or declassify portions of this evidence.

2. Pursuant to its Commercial Industrial Service Rider ("CISR") tariff, TECO and Allied/CFI shall execute a Contract Service Agreement ("CSA") for electric service to a new sodium hypochlorite manufacturing facility to be constructed and operated by Allied/CFI and/or their affiliate(s) in TECO's service territory, upon the same rates, terms and conditions as those contained in the existing CSA between TECO and Odyssey, provided that the new sodium hypochlorite manufacturing facility must begin commercial operations within 24 months from the date of the PSC's order approving this settlement agreement. The TECO-Allied/CFI CSA shall be in a form substantially identical to the CSA attached hereto as Exhibit "A", and shall include the force majeure clause attached to this settlement agreement as Exhibit "B".

3. Allied/CFI shall assert no further challenge, before the PSC, to the rates, terms and conditions for electric service provided by

TECO to Odyssey and set forth in the TECO/Odyssey CSA.

4. Order No. PSC-98-1181-FOF-EI, issued August 10, 1998 in Docket No. 980706-EI, approving TECO's CISR tariff, provides in part that: (1) TECO may request a prudence review subsequent to signing a CSA; (2) TECO will have the burden of proof that the company's decision to enter into a particular CSA was made in the interest of the general body of ratepayers; and (3) if the Commission finds that a particular CSA was not a prudent decision, then the revenue difference between the standard rate and the CISR rate could be inputed to TECO. Accordingly, TECO requests that the PSC make the following findings of fact:

   a. Both the existing Odyssey CSA and the proposed Allied/CFI CSA provide benefits to Tampa Electric's general body of ratepayers, and, therefore, the Commission finds that both CSAs are in the best interests of ratepayers.

   b. The Commission finds that Tampa Electric's decision to

enter into the Odyssey CSA, and the CSA itself, were prudent within the meaning of Order No. 98-1081-FOF-EI in so far as they provide benefits to Tampa Electrics general body of ratepayers.

c. The Commission finds that Tampa Electric's decision to enter into the Allied/CFI CSA, and the CSA itself, were prudent within the meaning of Order No. 98-1081-FOF-EI in so far as they provide benefits to Tampa Electric's general body of ratepayers.

5. Allied/CFI agrees not to contest the findings of fact, rulings and determinations requested in paragraphs 4 and 7 of this Settlement Agreement, provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied/CFI's Complaint in this proceeding.

6. Allied/CFI's Complaint in the PSC litigation shall be deemed withdrawn, with prejudice, upon: (a) the execution of this settlement agreement by TECO and Allied/CFI; and (b) the

issuance of an order by the PSC approving this settlement agreement, as proposed.

7. Allied/CFI and TECO request that the PSC include in its order approving this Settlement Agreement the following rulings and determinations:

   a. The Commission shall not entertain any further challenge to the existing Odyssey or the proposed Allied/CFI CSA or the rates, terms or conditions contained therein.

   b. In light of the above findings that both CSAs are prudent and in the best interests of ratepayers, Tampa Electric shall be relieved of any further obligation to report on its surveillance report the potential impact on revenues of these two CSAs.

   c. The Commission order approving the settlement proposed herein shall have no precedential value.

   d. The parties shall abide by the various General Release agreements executed among them.

8. Allied/CFI shall execute the General Release attached as Exhibit

"C" hereto. Except as stated in paragraph 3 above, this Settlement Agreement shall not in any way waive, release, discharge, limit or impair any claims that Allied/CFI may have against Odyssey and Sentry, as provided in the General Release.

9. In any subsequent litigation against Odyssey, Sentry, and related parties, Allied/CFI will make good faith efforts to avoid imposing unduly burdensome discovery requests on Tampa Electric and its related parties as set forth in the General Release which is Exhibit "C" hereto, without unreasonably restricting the ability of Allied/CFI's counsel to conduct appropriate discovery necessarily involving Tampa Electric and its related parties in such litigation.

10. Tampa Electric has agreed not to disclose to Odyssey or Sentry, absent Commission authorization or Allied/CFI's express written approval, the force majeure provision attached hereto as Exhibit "B" in light of Allied/CFI's position that this provision constitutes confidential, proprietary business information. To the

extent it may be deemed necessary to file Exhibit "B" with the PSC in connection with the PSC's approval of this settlement agreement, it shall be filed under seal and protected against disclosure to Odyssey, Sentry and others.

11. This settlement agreement and the exhibits hereto constitute the entire agreement between the parties and may not be modified except by a writing, signed by all parties.

AGREED TO AND ACCEPTED this _____ day of _____, 2001.

TAMPA ELECTRIC COMPANY

By: _____

Title: VP Customer Services & MKT

ALLIED UNIVERSAL CORPORATION

By: _____

Title: CEO

CHEMICAL FORMULATORS, INC.

By: _____

Title: CEO

Revised 03/01/01

EXHIBIT "A"

Contract Service Agreement

(Separately filed on a confidential basis with a Notice of Intent to Seek Confidential Classification)

Exhibit "B"

Force Majeure Clause

(Separately filed on a confidential basis with a Notice of Intent to Seek Confidential Classification)

GENERAL RELEASE

KNOW ALL PERSONS BY THESE PRESENTS:

That, as of March 2, 2001, Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI") and Tampa Electric Company ("Tampa Electric"), for good and valuable considerations the receipt and adequacy of which is hereby acknowledged, including the mutual covenants and agreements the parties hereto have made in effecting the settlement of their disputes in Allied/CFI's complaint proceeding in Docket No. 000061-EI before the Florida Public Service Commission, AGREE AS FOLLOWS:

As a material inducement to Tampa Electric to enter into this Settlement Agreement and General Release, Allied/CFI and their respective officers, directors, employees, affiliates, subsidiaries, general or limited partners, successors, predecessors, assigns, agents, representatives, and attorneys hereby irrevocably and unconditionally release, acquit and forever discharge Tampa Electric and each of Tampa Electric's predecessors, successors, assigns, agents, officers, directors, employees, representatives, attorneys, divisions, subsidiaries, affiliates, parent company, general and limited partners (and agents, officers, directors, employees, representatives and attorneys of such divisions, subsidiaries, affiliates, parent company and general and limited partners) and all persons acting by, through, under or in concert with them or any of them [*except*: Odyssey Manufacturing Company ("Odyssey"), Sentry Industries, Inc. ("Sentry"), and each of Odyssey's and Sentry's predecessors, successors, assigns, agents, officers, directors, employees, representatives, attorneys, divisions, subsidiaries, affiliates, parent company, general and limited partners, including but not limited to Stephen W. Sidelko and Patrick H. Allman], from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of

action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this agreement from or in any manner related to Tampa Electric's Commercial Industrial Service Rider (CISR) Tariff, Tampa Electric's dealings with Odyssey Manufacturing Company, Sentry Industries, Allied Universal, Chemical Formulators or their respective officers, directors, agents, employees, affiliates, subdivisions, successors or assigns, which Allied/CFI or any of its officers, directors, employees, affiliates, subsidiaries, general or limited partners, successors, predecessors, assigns, agents, representatives, and attorneys have, own or hold, or which at any time heretofore had, owned or held, or claimed to have had, owned or held, whether known or unknown, vested or contingent.

This release extends and applies to, and also covers and includes, all unknown, unforeseen, unanticipated and unsuspected injuries, damages, loss and liability, and the consequences thereof, as well as those now disclosed and known to exist. The provisions of any state, federal, local or territorial law or statute providing in substance that releases shall not extend to claims, demands, injuries or damages which are unknown or unsuspected to exist at the time, to the person executing such release, are hereby expressly waived.

Signed, sealed and delivered in the presence of:

ALLIED UNIVERSAL CORPORATION

and

CHEMICAL FORMULATORS, INC.

By: _____

Robert M. Namoff

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of Commercial/Industrial Service Rider tariff by Tampa Electric Company.	DOCKET NO. 980706-EI ORDER NO. PSC-98-1081-FOF-EI ISSUED: August 10, 1998

The following Commissioners participated in the disposition of this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
JOE GARCIA
E. LEON JACOBS, JR.

ORDER APPROVING COMMERCIAL INDUSTRIAL SERVICE RIDER AND PILOT STUDY IMPLEMENTATION PLAN FOR TAMPA ELECTRIC COMPANY

I. CASE BACKGROUND

On June 2, 1998, Tampa Electric Company (TECO) petitioned for Approval of a Commercial/Industrial Service Rider tariff (CISR or Rider) and Pilot Study Implementation Plan. If approved, the proposed Rider allows TECO to negotiate a discount on the base energy and/or base demand charges with commercial/industrial customers who can show that they have viable alternatives to taking electric service from TECO (at-risk load). The effective date of the tariff is January 1, 2000. The reason for the delayed implementation is that the Commission previously approved a stipulation between TECO, the Office of Public Counsel, and the Florida Industrial Power Users Group. *See* Order No. PSC-96-1300-S-EI, issued October 24, 1996. This stipulation represented a settlement covering TECO's base rates and rate of return for the period January 1, 1999 through December 31, 1999.

II. OPERATION OF PROPOSED TARIFF

The proposed tariff is available to new customers (new load) or to existing customers (retained load). Specifically, non-residential customers currently taking firm service or qualified to

take firm service under rate schedules GSD, GSDT, GSLD or GSLDT qualify. New customers must have at least 1,000 kW of connected demand. For existing customers, two minimum levels of demand are required: (1) For customers whose highest demand in the past 12 months was less than 10,000 kW, the minimum qualifying load is 500 kW; (2) for customers whose highest demand in the past 12 months was greater than or equal to 10,000 kW, the minimum qualifying load is 2,000 kW. The Rider can be applicable to all, or a portion of the customer's existing or projected load.

The negotiated discount will only apply to base energy and/or base demand charges. The customer will pay all otherwise applicable adjustment clauses. To ensure that the other ratepayers are not being harmed through the adjustment clauses, TECO proposes to allocate all revenues received from CISR customers first to all applicable cost recovery clauses at the rate which the customer would have been charged in the absence of the CISR. The CISR customer will also pay the otherwise applicable customer charge and an additional $250 customer charge. The additional customer charge is intended to cover incremental CISR customer-related costs.

Customers must make a written request to TECO for service under the CISR and provide the following documentation. First, a legal attestation or affidavit stating that, but for the application of the Rider, the load would not be served by TECO. Second, documentation demonstrating that the applicant has a viable lower cost alternative to taking service from TECO. Third, an existing customer must provide TECO with the results of a recent energy audit or request that TECO conduct such audit. The audit will provide information on potential energy efficiency improvements which could reduce the customer's cost in addition to the lower CISR rate. All CISR applications will be reviewed and approved by TECO's standing committee. The standing committee is comprised of TECO's President and four Vice Presidents.

For customers meeting the eligibility criteria described above, TECO seeks approval to offer a negotiated rate with the incremental cost plus a contribution to fixed costs to serve the customer as the price floor. Incremental costs are the additional costs TECO incurs to serve the CISR load. The rate offered may also take the form of a rate guarantee for a specific time period. If TECO and the customer are able to agree on the price and other

terms and conditions the customer will be required to execute a Contract Service Agreement (CSA). By signing the CSA, the customer commits to taking electric service from TECO for the negotiated term.

In addition to the CISR tariff sheets, TECO submitted a Pilot Study Implementation Plan (implementation plan). The implementation plan sets out additional conditions of the tariff, which are described below.

TECO proposes to offer the CISR to eligible customers until one of three conditions has occurred: (1) total capacity subject to all CSAs reaches 300 megawatts of connected load; (2) the company has executed 25 CSAs; or, (3) 48 months have passed from the tariff's effective date. In addition, the implementation plan states that TECO will not use the CISR to shift existing load currently served by another Florida electric utility to TECO's service territory.

TECO's tariff will not require that the Commission approve each CSA. TECO will include in its monthly surveillance reports the difference between the revenues which would have been received under the otherwise applicable tariff rate and the CISR rate and will also file quarterly reports. The implementation plan sets forth three conditions which would trigger a review of the contracts by the Commission: (1) a request by TECO for a base rate increase; (2) if the difference in revenues resulting from the CSAs causes TECO's achieved jurisdictional return on equity to exceed the top of the Company's authorized range, the Commission will review all executed CSAs which have not yet been reviewed; or, (3) TECO may on its motion request a prudence review subsequent to signing a CSA. We note that nothing precludes this Commission from initiating a prudence review, at any time, on its own motion. The Commission also finds that the absence of the third condition does not in any way preclude a utility from petitioning the Commission for a prudence review of any signed CSA's.

TECO will have the burden of proof that the company's decision to enter into a particular CSA was made in the interest of the general body of ratepayers. If the Commission finds that a particular CSA was not a prudent decision, then the revenue difference between the standard rate and the CISR rate could be

imputed. TECO's implementation plan as originally filed contained language that if the review resulted in the CSA being found prudent, then TECO would no longer be required to report the associated revenue shortfall on the monthly surveillance report. At TECO's request, at the Agenda Conference, this provision was deleted. The Commission, therefore, makes no findings with respect to how the Commission would treat TECO's reporting of associated revenue shortfall on the monthly surveillance reports if a CSA's were found to be prudent.

III. APPROVAL OF PROPOSED TARIFF

The Commission has recognized that rate discounts can be appropriate for investor-owned electric utilities. In Docket No. 960789-EI, we approved Gulf Power Company's CISR. See Order No. PSC-96-1219-FOF-EI, issued September 24, 1996. More recently, we approved Florida Power and Light Company's Economic Development Rider. See Order No. PSC-98-0603-FOF-EI, issued April 28, 1998, in Docket No. 980294-EI. TECO's proposed CISR tariff and implementation plan are essentially the same as Gulf's CISR tariff and implementation plan with only a few minor modifications. Gulf's CISR is available for 12 customers or a total load of 200 megawatts, while TECO's CISR is available for 25 customers or a total load of 300 megawatts.

This proposed CISR is experimental. The success or failure of this experiment will be determined on the experience of CSAs offered, accepted or rejected during the four years of the pilot study period. TECO will report to the Commission at the end of the pilot study regarding the failure or success of the CISR and at that time recommend that the CISR end or be renewed.

TECO will conduct specific analyses for each CISR customer to calculate the net benefits to the general body of ratepayers. TECO will compare, on a cumulative net present value basis over the life of the CSA, the revenues received under the CISR to the incremental costs to serve the customer. As long as the revenues exceed the costs, the general body of ratepayers will benefit.

Between rate cases, this proposal will not affect base rates or the adjustment clauses since the CISR customers will pay the otherwise applicable adjustment clause. This proposal does affect

TECO's reported earnings and return on equity on the monthly surveillance report.

Whether TECO's reported earnings and return on equity on the monthly surveillance report will be higher or lower due to a CISR customer depends on whether the customer was truly at risk. If it is presumed that the customer would not have remained or become a TECO customer absent the lower electric rate and if revenues exceed incremental costs, then reported earnings will be higher than what they otherwise would have been. On the other hand, if it is presumed that the customer was not truly an "at-risk" customer, the reported earnings will be lower than they otherwise would be.

Given that: 1) this tariff filing is essentially the same as Gulf's approved CISR tariff; 2) rates to the general body of ratepayers will not increase due to the operation of this tariff; and, 3) the prudence of each CISR is subject to determination at a later time, we find that the proposed tariff and implementation plan should be approved, effective January 1, 2000. Since the tariff will not be effective until after any protest is resolved, the issue of holding revenues subject to refund is moot.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Tampa Electric Company's petition for approval of its Commercial Industrial Service Rider (CISR) Tariff and Pilot Study Implementation Plan is approved. It is further

ORDERED that the CISR shall be effective January 1, 2000. It is further

ORDERED that if no protest is filed, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 10th day of August, 1998.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of Records and Reporting

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-850-413-6770.

(S E A L)

JCB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The Commission's decision on this tariff is interim in nature and will become final, unless a person whose substantial interests are affected by the proposed action files a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on August 31, 1998.

In the absence of such a petition, this Order shall become final on the day subsequent to the above date.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this Order becomes final on the date described above, any party adversely affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days of the date this Order becomes final, pursuant to Rule 9.110, Florida Rules of

Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.