

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-01-0618-PCO-EI
ISSUED: March 13, 2001

ORDER CONTINUING HEARING, GRANTING UNOPPOSED MOTION FOR EXTENSION OF TIME, AND SECOND MOTION FOR EXTENSION OF TIME

I. Background

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 February 15, 2001, TECO filed a Motion to Dismiss Allied's Complaint. At the final hearing in this proceeding, held on February 19, 2001, the parties agreed to a settlement in principle and requested additional time to work out the terms. They stated that settlement agreement would be provided on February 23, 2001. It was also agreed at the hearing that if a settlement was not reached by that date, Allied would respond to the Motion to Dismiss by February 28, 2001. It was decided that the hearing would be continued until March 13, 2001, at which time either the Motion to Dismiss or the Settlement Agreement would be taken up. After the

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hearing, on February 23, 2001, Odyssey filed a Motion for Summary Final Order.

On February 28, 2001, Allied and TECO had not yet finalized the language for a settlement agreement. On February 28, 2001, Allied filed a Motion for Extension of Time for Filing of Responses to Motion to Dismiss, Motion to Strike, and Motion for Summary Final Order. The Motion to Strike is not addressed in this Order. Allied asked for an extension of time to file responses to the motions so that it could focus on finalizing the settlement agreement. Allied asked for permission to file a response to the Motion to Dismiss on March 1, 2001, and to the Motion for Summary Final Order on March 2, 2001. Allied stated that the parties did not object to this time extension, and no opposing responses have been filed.

On March 1, 2001, Allied filed a response in opposition to TECO's Motion to Dismiss. However, at that time Allied and TECO had still failed to finalize the language of the settlement agreement. On March 2, 2001, Allied filed a Second Motion for Extensions of Time for Filing of Responses to Motion to Strike and Motion for Summary Final Order. The Intervenors filed a response in opposition on March 5, 2001.

At this time, Allied and TECO have yet to file a settlement agreement, despite their assertions that a settlement would be provided over two weeks ago. Allied's response to the Motion for Summary Final Order was filed at the close of business on March 9, 2001.

Order No. PSC-00-2537-PCO-EI, issued on December 29, 2000, in this docket, requires that responses to motions be filed within five days. Absent a favorable ruling on the Motions for Extension of Time, Allied's responses to the two motions would be considered late.

II. Allied's first Motion for Extension of Time

Allied asked for permission to respond to the Motion to Dismiss by March 1, 2001, and to the Motion for Summary Final Order, by March 2, 2001, so that it could focus on the settlement agreement. This Motion was unopposed. Because settlement is

preferable to litigation in this docket, and because no party would be prejudiced by the extension, this Motion is granted.

III. Allied's Second Motion for Extension of Time

Allied responded to the Motion to Dismiss on March 1, 2001, but did not respond to the Motion for Summary Final Order by March 2, 2001. Allied requested an extension until March 9, 2001, to respond to the Motion for Summary Final Order because Allied and TECO were still finalizing the settlement agreement. Allied explained that if the settlement agreement is finalized as expected, the motions will be moot; if the settlement agreement is not finalized, there is no urgency to rule on the motions immediately. Allied also claims that Rule 28-106-204, Florida Administrative Code, does not contemplate or provide for the filing of a motion for summary final order after a final hearing has begun.

Odyssey and Sentry filed a response in opposition on March 5, 2001. The Intervenorers state that they have not been a party to the settlement negotiations. They state that they filed the Motion for Summary Final Order on February 23, 2001, because that was the date that the settlement agreement was initially due and because no agreement was submitted.

The Intervenorers argue that Rule 28-106.204, Florida Administrative Code, does not preclude a request for summary final order after a hearing has started. They also argue that the Second Motion for Extension of Time should be deemed a response to the Motion for Summary Final Order. They explain that under Rule 28-106.204, one cannot respond to a pending motion with a request for more time.

Rule 28-106.204 states in relevant part:

(4)Any party may move for summary final order whenever there is no genuine issue as to any material fact....Any party moving for summary final order later than twelve days before the final hearing waives any objection to the continuance of the final hearing.

(5) Motions for extension of time shall be filed prior to the expiration of the deadline sought to be extended and shall state good cause for the request.

The plain language of this rule does not preclude the filing of a motion for summary final order after the hearing starts. It simply provides that a party may not object to the continuance of the hearing if it files the motion 12 days or less before the final hearing. In addition, it allows for time extensions. Allied's Second Motion meets the requirements of the rule because it was filed before a response was due and states good cause for the request. In addition, the Second Motion for Extension of Time was filed prior to the deadline sought to be extended.

Even though the parties' failure to timely file a settlement agreement has delayed action in this case, the delays must be tolerated because it is preferable to resolve this case by settlement rather than litigation. The Motion for Summary Final Order could be dispositive of the case and fairness requires that Allied be given an opportunity to respond. In addition, no party will be harmed by the delayed response.

III. Continuance of Hearing

The hearing was continued until March 13, 2001, at which time we would address either a settlement or TECO's Motion to Dismiss. That date was contingent on the filing of a settlement by February 23, 2001. TECO and Allied have not yet filed a settlement agreement, although they have stated that it will be filed today, March 12, 2001. Even if the agreement is filed today, it will not be productive to address it at tomorrow's Agenda Conference. Staff will have to file a recommendation on the agreement today and this leaves little time for the Commissioners on the panel to review the agreement and Staff's comments. In addition, it will leave the parties little time to address Staff's comments. For these reasons, a new schedule is necessary.

At the Agenda Conference on April 3, 2001, we will take up either the settlement agreement or the two motions. These will be handled as regular agenda items. If a hearing is still needed after the April 3, 2001, Agenda Conference, the hearing will be

ORDER NO. PSC-01-0618-PCO-EI
DOCKET NO. 000061-EI
PAGE 5

continued on April 4 and 5, 2001. The hearing time and location of the hearing are as follows:

April 4, 2001, at 9:30 a.m.*
Betty Easley Conference Center, Room 148
4075 Esplanade Way
Tallahassee, FL

* If additional time is needed, the hearing will continue on April 5, 2001, at 9:30 a.m., in the same location.

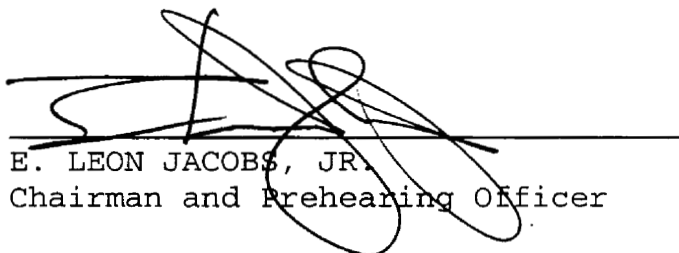
Based on the foregoing, it is

ORDERED by E. Leon Jacobs, as Prehearing Officer, that the Motion for Extension of Time for Filing of Responses to Motion to Dismiss, Motion to Strike, and Motion for Summary Final Order filed by Allied Universal Corporation and Chemical Formulators, Inc., is granted. It is further

ORDERED that Second Motion for Extension of Time for Filing of Responses to Motion to Strike, and Motion for Summary Final Order filed by Allied Universal Corporation and Chemical Formulators, Inc., is granted. It is further

ORDERED that the hearing shall be continued to April 4 and 5, 2001.

By ORDER of Chairman E. Leon Jacobs, Jr. as Prehearing Officer, this 13th day of March, 2001.


E. LEON JACOBS, JR.
Chairman and Prehearing Officer

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ORDER NO. PSC-01-0618-PCO-EI
DOCKET NO. 000061-EI
PAGE 6

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.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.