

BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 040086-EI
ORDER NO. PSC-04-0714-PCO-EI
ISSUED: July 20, 2004

ORDER GRANTING MOTION FOR LEAVE TO FILE AMENDED PETITION

BY THE COMMISSION:

On July 2, 2004, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a Motion for Leave to File Amended Petition in this docket. Allied states that it needs to amend its petition to allege additional facts that have come to light through discovery in a related, pending circuit court proceeding, Allied Universal Corp. and Chemical Formulators, Inc. v. Odyssey Manufacturing Co., and Sentry Industries, Inc.¹ Allied contends that this new information will remedy purported deficiencies identified by Tampa Electric Company (TECO) and Odyssey Manufacturing Company (Odyssey) in their Motions to Dismiss Allied's original petition, and by the Commission staff in its recommendation on the motions to dismiss.² Allied argues that amendments of pleadings, in the courts and before this Commission, are to be liberally granted to ensure that cases are resolved on their merits, unless a party has abused its right to amend. Allied argues that it has not abused its right to amend its petition in this case, because this is its first request. Allied also argues that procedurally this case is in its initial stage. A hearing has not been set and discovery has not begun. Therefore, Allied states, the parties will not be prejudiced if Allied's request is granted. The Office of Public Counsel informed Allied that it did not object to the motion. On July 14, 2004, TECO and Odyssey timely filed responses in opposition to the motion.

TECO responds that Allied's motion is deficient on its face and should be denied. TECO claims that the motion does not provide a statement of the ultimate facts that show it is entitled to relief, as Rule 1.110, Florida Rules of Civil Procedure, require. TECO contends that Allied has failed to allege a single relevant fact disclosed in the recent civil case depositions that was not known to the Commission at the time it approved the settlement agreement between Allied

¹ Case No. 01-27699-CA-25, In the Circuit Court of the eleventh Judicial Circuit, in and for Miami-Dade County, Florida.

² Staff's June 24, 2004, recommendation to dismiss Allied's petition with prejudice was deferred by the Commission to allow Allied additional time to file its motion for leave to amend.

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and TECO and issued Order No. PSC-01-1003-AS-EI. TECO explains that Allied's claim that it has new facts does not satisfy the requirement for alleging new facts. TECO also argues that Allied should have been able to identify any deficiencies in its original petition in March, and should have sought leave to amend then. Given the timing of Allied's motion, and Allied's failure to allege new facts, TECO contends that there is no reason to believe that Allied's Petition can be rehabilitated through amendment. TECO requests that Allied's motion be denied and the June 24 staff recommendation be scheduled for consideration at the next Agenda Conference.

Odyssey asserts that Allied's current motion is actually its fourth attempt to draft a pleading that would state a cognizable claim for relief before the Commission, and, according to Odyssey, Allied's latest petition does not state a cause of action any more than the others. Odyssey claims that Allied's actions amount to an abuse of administrative process, and while Florida law does encourage amendment of pleadings to address cases on their merits, amendment of pleadings should not be abused or permitted where harm will occur to the opposing parties. Odyssey claims that it will be harmed because of the protracted nature and great expense it continues to incur to defend against this litigation, which Odyssey asserts really extends back to the initial case Allied filed in 2000, and because Allied is using this Commission case to repeatedly delay trial in the Miami-Dade circuit court case.

TECO and Odyssey both claim that Allied has redacted key portions of its amended petition under a notice of intent to claim confidential treatment of those portions, making it virtually impossible to clearly discern the amended factual basis on which Allied's claim for relief from the Commission is based. They claim that Allied refuses to agree to a non-disclosure agreement that would permit them to review the accusations against them in a timely manner. They contend that they are greatly prejudiced by the inability to know the new allegations against them. Odyssey requests that if the Prehearing Officer determines that Allied's motion for leave to amend should be granted at all, the Order should abate the time for filing a response to the amended petition until such time as Odyssey and TECO have access to its full contents.

Florida law and this Commission's policies allow pleadings to be freely amended so that disputes may be decided on their merits, as long as the privilege to amend has not been abused. Adams v. Knabb Turpentine Co., 435 So.2d 944, 946 (Fla. 1st DCA 1983); Order No. PSC-03-0721-PCO-TP, issued June 17, 2003, in Docket No. 030349-TP; Order No. PSC-03-1305-PCO-TP, issued November 14, 2003, in Docket No. 034746-TP. Pursuant to Rule 28-106.202, Florida Administrative Code, the petitioner may amend its petition after the designation of the presiding officer only upon the order of the presiding officer. Allied has filed its motion for leave to amend consistent with the requirements of Rule 28-106.202. Consistent with the Commission's policy to permit amendment where the privilege to amend has not been abused, I will approve the motion. As Allied points out, this docket is in its early stages and in terms of scheduling a hearing or establishing other procedural dates, the parties will not be harmed. While Allied filed two earlier petitions to bring this case to the Commission, it withdrew them

quickly to protect the parties' confidential information, before any responses or other actions were required. Those actions do not amount to an abuse of a privilege to amend its petition here. Allied has not filed any other amended petition in this docket.

I am concerned, however, that Allied's amended petition contains redacted factual allegations that it refuses to permit Odyssey and TECO to see. The information is supposedly Odyssey's and TECO's proprietary confidential business information, but Allied will not execute a proprietary agreement with them to provide them the information. This is not acceptable, and could be sufficient reason to dismiss the amended petition for failure to inform the opposing parties of the nature of the cause of action against them.³ TECO and Odyssey must have the opportunity to know the allegations in order to defend against them, and they must know the allegations quickly in order to prepare that defense. Therefore, I will grant Allied's motion for leave to file amended petition on the condition that Allied provide Odyssey and TECO with copies of the unredacted amended petition and exhibits subject to a proprietary agreement protecting the confidentiality of the documents within 7 days of the issuance of this Order. TECO and Odyssey shall have 27 days from the date of issuance of this Order to file motions to dismiss the amended petition. If Odyssey and TECO do not receive the unredacted documents within the prescribed time, they may file a motion for a protective order, which will be addressed forthwith.

Based on the foregoing, it is

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that Allied Universal Corporation and Chemical Formulators, Inc.'s Motion for Leave to File Amended Petition is granted, with the condition that Allied provide Odyssey Manufacturing Company and Tampa Electric Company with copies of the unredacted amended petition and exhibits subject to a proprietary agreement protecting the confidentiality of the documents within 7 days of the issuance of this Order. **It is further**

ORDERED that Odyssey Manufacturing Company and Tampa Electric Company shall have 27 days from the issuance of this Order to file motions to dismiss Allied's amended complaint.

³ See Greiner v. General Electric Credit Corporation, 215 So. 2d 61 (Fla. 4th DCA 1968), (citing Kislak v. Kredian, 95 So. 2d 510 (Fla. 1957)), "While the Rules of Civil Procedure provide that the complaint shall be sufficient if it informs the defendant of the nature of the cause against him, the complaint must sufficiently allege the ultimate facts which, if established by competent evidence, would support a decree granting the relief sought under law.")

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 20th day of
July, 2004.

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LILA A. JABER

Commissioner and Prehearing Officer

(SEAL)

MCB

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; 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, 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.