



## APPEARANCES:

JOHN ELLIS, ESQUIRE, Rutledge, Ecenia, Purnell & Hoffman, P.A., P.O. Box 551, Tallahassee, Florida 32302, on behalf of Allied Universal Corporation and Chemical Formulators, Inc.

JAMES D. BEASLEY, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; and HARRY W. LONG, JR., Tampa Electric Company, Regulatory Affairs, P.O. Box 111, Tampa, Florida 33601-0111, on behalf of Tampa Electric Company.

WAYNE SCHIEFELBEIN, ESQUIRE, Wiggins & Villacorta, P.A., 2145 Delta Boulevard, Suite 200, Tallahassee, Florida 32303, on behalf of Odyssey.

MARLENE K. STERN, ESQUIRE and ROBERT V. ELIAS, ESQUIRE, Florida Public Service Commission, 2540 Shumard Oak boulevard, Tallahassee, Florida 32399-0850, on behalf of the Commission Staff.

## P R O C E E D I N G S

1  
2 COMMISSIONER JACOBS: We'll go on the  
3 record. Counsel, read the notice.

4 MS. STERN: By notice issued June 8, 2000,  
5 this time and place have been set for a prehearing  
6 conference in Docket 000061-EI, the complaint by  
7 Allied Universal Corporation and Chemical Formulators,  
8 Inc. against Tampa Electric Company for violations of  
9 sections 366.03, 366.06(2), and 366.07 of the Florida  
10 Statutes.

11 COMMISSIONER JACOBS: We'll take  
12 appearances.

13 MR. ELLIS: John Ellis for petitioners,  
14 Allied Universal Corporation and Chemical Formulators,  
15 Inc.

16 MR. LONG: Harry Long appearing on behalf  
17 of Tampa Electric Company. And with me is Mr. James  
18 D. Beasley of Ausley & McMullen, also appearing on  
19 behalf of Tampa Electric Company.

20 MR. SCHIEFELBEIN: Good afternoon. Wayne  
21 Schiefelbein of the firm of Wiggins & Villacorta,  
22 appearing on behalf of Odyssey Manufacturing Company.

23 COMMISSIONER JACOBS: Okay. Great.

24 MS. STERN: Marlene Stern on behalf of the  
25 Commission Staff.

1 MR. ELIAS: Bob Elias on behalf of the  
2 Commission Staff.

3 COMMISSIONER JACOBS: All right. Are there  
4 any preliminary matters?

5 MS. STERN: No, there are no preliminary  
6 matters that I know of.

7 COMMISSIONER JACOBS: Okay. I just  
8 received these motions. I assume they were just filed  
9 today.

10 MR. LONG: Yes, Commissioner. They were  
11 filed about 15 minutes ago.

12 COMMISSIONER JACOBS: Okay. What I would  
13 like to do is go ahead and go through the issues, and  
14 then we'll come back to this.

15 Okay. If there are no preliminary matters,  
16 why don't we just walk through the Prehearing Order  
17 and figure out how that stands.

18 Any revisions to the appearances? None.

19 Let's go section by section then. Section  
20 I, any revisions?

21 Section II.

22 Section III. I know we've had a lot to do  
23 with confidential issues in this docket. Is this  
24 procedure going to work?

25 MR. LONG: Well, Commissioner, in

1 compliance with the order on discovery that was issued  
2 on June 27th, tomorrow we will be filing a  
3 supplemental request for confidential treatment of  
4 documents. And pursuant to the order, we will list by  
5 Bates stamp page number each of the documents in the  
6 original 1,800 or so pages that we filed with the  
7 Commission that we believe are entitled to  
8 confidential treatment.

9 I would just note at this point that a  
10 number of the documents that are listed later on in  
11 the order as being exhibits are documents for which we  
12 will be requesting confidential treatment. So it's  
13 nothing that has to be dealt with right at the moment.  
14 But to the extent that our request is granted, these  
15 documents, some of the exhibits that are noted later  
16 on will have to be treated pursuant to the procedures  
17 that are set forth in Part 3 of the order.

18 COMMISSIONER JACOBS: Okay. One point that  
19 I wanted to raise, and again noting a substantial  
20 presence of confidential materials, there is the  
21 prospect that at hearing, parties may want to deal  
22 with confidential matters at hearing. I am very  
23 adamant that we would want to avoid having to close  
24 down the hearing in order to do that, and I want the  
25 parties to explore ways that they can take care of

1 their issues that might entail confidentiality issues  
2 outside of having to do that at the hearing.

3 You had a point, Staff?

4 MR. ELIAS: And I was just going to add  
5 that one device that may be helpful to that end is  
6 that we consider deposing a witness who may be  
7 testifying to confidential information, where there  
8 may be some cross examination on confidential matters  
9 that cannot reasonably be handled by reference to a  
10 document before the hearing, and protect the -- close  
11 the deposition and then treat the deposition  
12 transcript as a hearing exhibit. That may be one way  
13 to facilitate addressing that concern, but at the same  
14 time still fully affording the parties the opportunity  
15 to test the evidence that's presented.

16 COMMISSIONER JACOBS: Do you anticipate  
17 there will be any particular concerns on this point?

18 MR. LONG: Well, Commissioner, once we've  
19 resolved some of the issues that we raised in our  
20 motion for rehearing, I think that we'll be able to  
21 work with Staff and the parties through sealed  
22 depositions or other devices to accomplish what you  
23 would like.

24 COMMISSIONER JACOBS: Okay. Okay.

25 MR. ELLIS: we'll take care to take note of

1 the request that the hearing remain open and conduct  
2 cross examination on confidential information to the  
3 extent possible by deposition in advance of the  
4 hearing.

5 COMMISSIONER JACOBS: Okay. Very well.  
6 Very well. Okay.

7 MR. ELLIS: I would note there is certainly  
8 a potential that two depositions of one witness or  
9 more than one deposition per witness may be necessary  
10 as a result of that request, and that's something that  
11 we would expect to apply to our witnesses as well as  
12 to opposing witnesses.

13 COMMISSIONER JACOBS: Okay. Other than  
14 noticing, hopefully that wouldn't impose too much of a  
15 problem, I guess. Do you have to notice separately if  
16 part of the deposition is closed? I don't know.

17 MR. ELIAS: I don't think that we would  
18 notice it separately. I mean, John, you're talking in  
19 terms of conducting two separate depositions?

20 MR. ELLIS: There could be two ways to  
21 accomplish it. One would be to conduct a deposition  
22 of one witness at one time and part of the transcript  
23 of the deposition sealed. Another would be to conduct  
24 a discovery deposition and conduct cross examination  
25 at a separate time.

1           With all due respect, given the number of  
2 documents and the amount of information that's  
3 involved, I think it's reasonable to expect on behalf  
4 of Allied and CFI that we're going to need some time  
5 to formulate cross examination after conducting  
6 discovery depositions, and therefore it's reasonable  
7 to expect that we're going to need to depose at least  
8 some witnesses on two separate occasions.

9           COMMISSIONER JACOBS: I think we can  
10 explore that. I would again urge as much cooperation  
11 amongst the parties as possible. I don't think that  
12 there would be any problem doing both the same day,  
13 just, you know, different times. But again, I would  
14 encourage as much cooperation as possible on that.

15           MR. ELLIS: We will certainly do so.

16           COMMISSIONER JACOBS: Okay. That takes us  
17 to Section IV, post-hearing procedures. Any  
18 revisions?

19           Section V, prefiled testimony procedure and  
20 witnesses.

21           And then Section VI, order of witnesses.  
22 Any modifications there?

23           Have we determined whether or not we would  
24 like to have direct and rebuttal testify at the same  
25 time? I guess there's no overlap, though, is there?

1 Oh, yes, there is, Mr. Namoff.

2 MR. ELLIS: Yes, Commissioner. We would  
3 prefer to present Mr. Namoff as a witness at one time,  
4 both as to direct and rebuttal.

5 COMMISSIONER JACOBS: Okay.

6 MR. LONG: Commissioner?

7 COMMISSIONER JACOBS: Yes.

8 MR. LONG: I think we would like to change  
9 the order of witnesses for Tampa Electric.

10 COMMISSIONER JACOBS: Okay.

11 MR. LONG: But if I could maybe report at  
12 the end of this hearing on the preferred order.

13 COMMISSIONER JACOBS: Okay. We'll defer  
14 that.

15 Next comes basic positions.

16 MR. ELLIS: There's a typographical error  
17 in the third paragraph of Allied's statement of basic  
18 position that was in the submittal we made on Friday.  
19 I noted it in advance of this conference to Ms. --

20 COMMISSIONER JACOBS: Staff already has  
21 that? Okay.

22 MR. LONG: Commissioner --

23 COMMISSIONER JACOBS: I'm sorry.

24 MR. LONG: I'm sorry.

25 COMMISSIONER JACOBS: Did you already have

1 that? staff already has your modification?

2 MS. STERN: Yes.

3 MR. ELLIS: Yes. Thank you.

4 COMMISSIONER JACOBS: Very well. Mr. Long?

5 MR. LONG: Commissioner, I have a point  
6 that I would like to raise. It's on page 6 of the  
7 draft order, and it's the last paragraph in Allied's  
8 statement of position. That last paragraph seems to  
9 suggest that part of the issue in this case and part  
10 of what Allied intends to provide testimony on is the  
11 question of whether or not Tampa Electric's CISR  
12 tariff should be amended, and if so, in what manner.

13 To the extent that I'm correctly  
14 interpreting that last paragraph, I would like to move  
15 that it be stricken, and I would ask for a ruling that  
16 modification of Tampa Electric's CISR tariff is beyond  
17 the scope of this proceeding. I believe we had that  
18 discussion very early on in this case, and I would ask  
19 that you consider our motion.

20 MR. ELLIS: In response to the motion, in  
21 the initial statement of issues by the parties,  
22 Allied/CFI had provided a statement of an issue that  
23 squarely framed this subject and agreed to withdraw  
24 that statement of issue, with the understanding that  
25 our evidence and argument concerning the

1 implementation by Tampa Electric of its CISR tariff  
2 was contradictory to the goals and objectives of that  
3 tariff. And as I understand it, we will be -- not be  
4 subject to a motion to strike such evidence and  
5 argument. I think the motion to strike today, if it  
6 is one, is to argument and not a statement of issue,  
7 and therefore is unnecessary.

8 COMMISSIONER JACOBS: Okay. Do you have  
9 anything, Mr. Schiefelbein?

10 MR. SCHIEFELBEIN: Nothing to add at this  
11 time. Thank you.

12 COMMISSIONER JACOBS: Okay. Staff?

13 MS. STERN: I want to check some notes from  
14 our issue ID meeting. We discussed this at our last  
15 issue ID meeting, I believe. Let's see what --

16 Okay. We agreed that Allied would be able  
17 to make an argument that TECO's actions with respect  
18 to Allied and Odyssey don't comply with the goals of  
19 the tariff and that that argument could be made under  
20 what's now Issue 4.

21 MR. ELLIS: If I might add, I guess the  
22 motion to strike would be to the last phrase of the  
23 last sentence.

24 COMMISSIONER JACOBS: If I understand you,  
25 you're not -- you're willing to agree with the last

1 sentence being stricken -- well, being modified.

2 MR. ELLIS: Yes. We'll withdraw the last  
3 sentence if that resolves the issue.

4 COMMISSIONER JACOBS: Okay. Does that take  
5 care of your issue, Mr. Long?

6 MR. LONG: well, in the most immediate  
7 sense it does, Commissioner. But my understanding of  
8 the import of that is that testimony with regard to a  
9 proposed amendment or change in Tampa Electric's CISR  
10 tariff is beyond the scope of this proceeding. And if  
11 that's the sense in which this last sentence is being  
12 stricken, then, yes, it does resolve the issue that  
13 I'm raising.

14 COMMISSIONER JACOBS: Okay. What we'll do  
15 is, we'll go ahead and agree to the modification of  
16 the position, and then we'll have to deal with the  
17 testimony as deemed necessary.

18 Let me say, however, that I think I agree  
19 with the statement that Mr. Ellis made, that they can  
20 argue as to your implementation of the tariff.

21 MR. LONG: Commissioner, I take no issue  
22 with that. That's certainly within the bounds of this  
23 proceeding.

24 COMMISSIONER JACOBS: Okay. With that  
25 understanding, then we'll modify the basic position

1 consistent with that. Do you need any further  
2 clarification on that?

3 MS. STERN: Are we --

4 MR. ELLIS: There would be a period after  
5 the word "objective" then.

6 COMMISSIONER JACOBS: Okay. I would like  
7 to bring up one point. I see that -- and I assume  
8 this is consistent with your Prehearing Statement,  
9 that you've included confidential issues in your  
10 Prehearing Statement, and I see that it's subject to a  
11 motion for -- a petition for confidential treatment.

12 MR. LONG: That's correct, Commissioner.

13 COMMISSIONER JACOBS: There's a concern  
14 that traditionally the prehearing statements have been  
15 meant as sort of an announcement as to your basic  
16 positions to the parties in the litigation, albeit the  
17 parties here are very knowledgeable of each other's  
18 positions.

19 I'm leery of the precedent, however, of  
20 making prehearing statements confidential. I'll let  
21 you know that up front. And what I wanted to inquire  
22 of you today is if there are means by which we can  
23 achieve your ends without that, and the thought  
24 occurred to me that I don't have a problem with you  
25 referencing confidential documents in your Prehearing

1 Statement such that if someone wanted to review  
2 whatever the exact context and text of the  
3 confidential materials might be, they would still have  
4 to go to those confidential documents.

5 MR. LONG: Right.

6 COMMISSIONER JACOBS: But I think in the  
7 spirit of how we've treated that document, it gives me  
8 concern that we would set a precedence of making the  
9 prehearing statements confidential. Do you  
10 understand?

11 MR. LONG: I understand, Commissioner. And  
12 it certainly wasn't our intent that the entire  
13 statement be taken as being confidential. In our  
14 filing, we redacted a few sentences here and there  
15 that touched directly on information that we contend  
16 is confidential, information that we would certainly  
17 make available to the parties pursuant to a  
18 nondisclosure agreement once the issues raised in our  
19 petition for a hearing are addressed. But this case  
20 is somewhat unusual, given the circumstances.

21 We've tried to really keep the confidential  
22 statements to a bare minimum in what we've filed. I  
23 mean, we're willing to consider whether or not, you  
24 know, we can do without those redacted portions or  
25 whether there's some other way to make those

1 statements. But I think in those places where the  
2 statements are missing, it refers to sort of the  
3 ultimate point based on the evidence that we intend to  
4 present, the ultimate conclusion. And it's difficult  
5 to state the ultimate conclusion based on confidential  
6 evidence without disclosing the confidential  
7 information itself. That's what we're up against.

8 COMMISSIONER JACOBS: I understand. Do you  
9 think it would be possible to achieve a statement of  
10 your positions such that we would not have to render  
11 your entire Prehearing Statement confidential, but  
12 gives you the flexibility for making the references  
13 that you need?

14 MR. LONG: I would certainly attempt to do  
15 that, Commissioner. I'll work with the Staff and see  
16 if we can --

17 COMMISSIONER JACOBS: And again, I'm not  
18 going to, you know, strike or anything of that  
19 nature. I'm not even bringing scrutiny to that,  
20 except for the point that I raised. And so I'll leave  
21 that -- you can work that out with Staff.

22 MR. LONG: All right. We'll attempt to do  
23 that, Commissioner.

24 COMMISSIONER JACOBS: Okay. Great. So  
25 that -- that takes care of the basic positions. No

1 one else has any modifications?

2 Great. We'll move to the issues themselves  
3 then, Section VIII. Any changes to the positions in  
4 Issue 1?

5 MR. LONG: Commissioner, I would like to  
6 raise a general concern that really runs through the  
7 responses to all of the stated issues.

8 The staff has indicated that they have no  
9 position pending evidence adduced at hearing and the  
10 arguments, and Tampa Electric finds that to be very  
11 troubling. I understand the staff has discretion as  
12 to whether or not they're going to take a position.  
13 But in this instance, we provided literally every  
14 piece of paper that there is that's relevant to the  
15 issues in this hearing back in March, and we did that  
16 so that the staff and the Commission would have an  
17 opportunity to see all of the information that was in  
18 our possession and at least get a sense of what this  
19 case was all about.

20 The issues as we've framed them are fairly  
21 direct, have we violated our tariff or not. And with  
22 all due respect to the staff, I think it's a real  
23 disservice to the Commission and to the parties for  
24 the staff not to give us the benefit of their views on  
25 those basic questions when really there is no more

1 information to be adduced, quite literally. I mean,  
2 we have provided every single piece of paper.

3 The exercise that we're going to go through  
4 tomorrow in response to the June 27th order is to cull  
5 through that pile of information and try to be more  
6 precise about which documents are relevant and which  
7 documents in particular we believe are confidential.  
8 But the point is, we're not going to be adding  
9 information. We're going to be taking extraneous  
10 information away.

11 So under those circumstances, I would just  
12 like to register our concern and to implore the staff  
13 to consider giving us the benefit of their views.

14 COMMISSIONER JACOBS: Staff? I'm sorry.  
15 Mr. Ellis, you had something?

16 MR. ELLIS: If I could respond to that, I  
17 think staff's position is entirely appropriate.  
18 They've heard, according to TECO, one side of the  
19 story, and they've refused to reach any positions on  
20 the basis of having only heard one side of the story.  
21 I think that's very appropriate, and I would be very  
22 troubled if their position were any otherwise.

23 COMMISSIONER JACOBS: Anything to add,  
24 Mr. Schiefelbein?

25 MR. SCHIEFELBEIN: No, thank you.

1 MR. LONG: Well, Commissioner, when  
2 Mr. Ellis says they've seen one side of the story,  
3 they've seen all the documents. It's not a question  
4 of seeing one side of the story. They've seen  
5 everything that there is in the way of documentary  
6 evidence on this case, you know.

7 And I would point out that at the agenda  
8 conference that was held almost two months ago,  
9 then-Chairman Garcia I think implored the staff to go  
10 forward and investigate some of these questions. His  
11 comments I think appear starting at page 30 of the  
12 Tuesday, April 18th agenda conference transcript.

13 In particular, the discussion there was  
14 with regard to the question of Odyssey's eligibility,  
15 and Commissioner Garcia pointed out that that was  
16 really not a matter for Allied to delve into, but it  
17 was the Commission's responsibility to make its own  
18 determination as to whether or not on that particular  
19 question Odyssey was eligible for a CISR rate, and I  
20 believe directed the staff to go forward and conduct  
21 an investigation.

22 COMMISSIONER JACOBS: Okay. Let me allow  
23 staff to respond.

24 MS. STERN: Well, TECO did submit a lot of  
25 information, and staff has gone through a good bit of

1 it, not all of it. It's 1,800 plus pages. And after  
2 looking through that, I can honestly say Staff does  
3 not have a definite position. I think there was  
4 discussion, you know, how to evaluate certain things,  
5 for example, how to evaluate dealing in good faith.

6 In addition, we just got the direct  
7 testimony from the Odyssey witnesses and the TECO  
8 witnesses. We haven't gotten rebuttal testimony yet  
9 from Allied. So there are things out there that we  
10 haven't had a chance to look at yet. There has been  
11 no discovery and no depositions either. And it's my  
12 understanding that Staff really does not have a  
13 position at this point. There is no consensus.

14 COMMISSIONER JACOBS: Let me ask you this,  
15 Mr. Long. What's the nature of the harm you see by  
16 not having the benefit of Staff's position at this  
17 time?

18 MR. LONG: Well, to be quite frank with  
19 you, Commissioner, our view is that the evidence is  
20 very clear on the matter at hand as to whether or not  
21 we have violated our tariff. In the information that  
22 we provided to the Staff and the Commission back in  
23 March, we lay out every single step that was taken in  
24 our discussions with both Odyssey and Allied. We  
25 compare side by side the offers that were extended,

1 and we explain in great detail any differences that  
2 may exist. And to me, the issue in this case is  
3 whether or not there's undue discrimination.

4 COMMISSIONER JACOBS: My question goes --  
5 let me step back for a moment. Normally, it's my  
6 understanding that the purposes of the prehearing  
7 announcement of positions is that parties are aware  
8 and there's no undue surprise. Staff I've always  
9 viewed as in somewhat of a different role. They're  
10 advisors to the Commission. They're not necessarily  
11 advocating any particular position. So the potential  
12 harm or the potential that there will be undue  
13 surprise to the parties is greatly reduced.

14 MR. LONG: Right.

15 COMMISSIONER JACOBS: I'm looking to get  
16 your view as to how the failure, or the absence -- not  
17 the failure, the absence of a preliminary view from  
18 staff derives a particular harm for you.

19 MR. LONG: Well, Commissioner, I think that  
20 the harm to Tampa Electric and the harm to the  
21 Commission and the other parties, quite frankly, is a  
22 waste of the Commission's time. And I say that with  
23 all respect to Allied, but the point is that the  
24 evidence is that clear. And we're going through this  
25 incredibly complicated process, spending a lot of the

1 Commission's valuable time and resources, and my  
2 contention is that the evidence is sufficiently clear  
3 so that the Staff could save the Commission and the  
4 parties quite a bit of time and expenditure of  
5 resources. I mean, that is my concern.

6 COMMISSIONER JACOBS: Okay. Anything else,  
7 briefly?

8 MR. ELLIS: Commissioner, this is a  
9 reargument of the motion for summary adjudication that  
10 was previously denied by the full Commission. It's a  
11 reargument of an attempt to have the case decided  
12 without affording Allied any due process rights, and  
13 it's entirely inappropriate in this context.

14 COMMISSIONER JACOBS: I think I'm prepared  
15 to go forward on this. Albeit it's a tradition, but I  
16 think it's well founded that Staff has been able to  
17 reserve its final positions until it has the benefit  
18 of the full record in a proceeding. And that is the  
19 goal here, is that Staff is able to gather a well  
20 developed record in order to present its final  
21 positions to the Commission for its final decision.

22 I'm not persuaded that there is any undue  
23 harm to the Company by Staff retaining that ability to  
24 do that here, so I'm going to deny that motion. I  
25 think at the hearing you'll have ample opportunity to

1 explore whatever positions that your witnesses bring  
2 out, and staff can make no decision outside of the  
3 scope of the record in the proceeding.

4 MR. LONG: Thank you, Commissioner.

5 COMMISSIONER JACOBS: Can make no  
6 recommendation outside of the scope of the evidence.

7 MR. LONG: Thank you, Commissioner.

8 MR. ELLIS: Commissioner, I have one  
9 concern also that's a general concern with respect to  
10 the statements of issues and positions, and this is  
11 with respect to our statements of issues and  
12 positions, which are necessarily preliminary until we  
13 are able to conduct discovery. I would anticipate  
14 being able to provide additional details, certainly,  
15 or statements of position once discovery is completed,  
16 and perhaps in an excess of caution, but to avoid any  
17 argument over a claim of surprise, would be certainly  
18 willing to provide additional or amended statements of  
19 issues and positions upon completion of discovery.

20 COMMISSIONER JACOBS: I'm hoping that there  
21 will be minimal need for that. But if that's  
22 something that the parties can work out, I don't think  
23 we would be opposed to that.

24 MR. LONG: We're willing to work with the  
25 staff and the parties on that, Commissioner.

1                   COMMISSIONER JACOBS: Okay. I appreciate  
2 that offer.

3                   MR. SCHIEFELBEIN: Pardon me. We're  
4 certainly willing to work together with everyone on  
5 that as well. I've just realized that there's an  
6 error that originated in our own Prehearing  
7 Statement. It's not Staff's error.

8                   Back on page 5, if this is an appropriate  
9 time to do that --

10                  COMMISSIONER JACOBS: Okay.

11                  MR. SCHIEFELBEIN: We indicate our  
12 witnesses Sidelko and Winters as addressing Issue 2.  
13 That's erroneous at this point. That may change after  
14 the discovery conducted in this case, but at this  
15 point in time, neither of our witnesses have any  
16 knowledge of what the terms of the negotiations or the  
17 offer made to Allied are. So that's my error, and I  
18 apologize for it.

19                  We would continue to maintain no position  
20 at this time for Issue 2 and 3, 2 being the specifics  
21 of Allied's situation and 3 being a comparison of  
22 Odyssey's and Allied's. We certainly know about our  
23 own situation, but at this point we don't have a  
24 witness on those two issues.

25                  COMMISSIONER JACOBS: Very well.

1 MR. SCHIEFELBEIN: Thank you.

2 COMMISSIONER JACOBS: So show that change  
3 made in Section VI.

4 Okay. We're now back to Section VIII, and  
5 that discussion that we just had had to do with Issue  
6 1. Any other modifications to Issue 1?

7 On to Issue 2. Any modifications?

8 Okay. No modifications in Issue 3? Any  
9 modifications there?

10 Issue 4.

11 MR. ELLIS: Well, this would raise the same  
12 issue that Mr. Long raised earlier with respect to  
13 actions the Commission could or should take concerning  
14 TECO's CISR tariff.

15 COMMISSIONER JACOBS: Okay. So your  
16 statement to that effect here, you would be willing  
17 to --

18 MR. ELLIS: We'll withdraw the third  
19 numbered reference in our statement of position on  
20 Issue 4.

21 COMMISSIONER JACOBS: So show that the  
22 third option in Allied's position is stricken.

23 Any other modifications?

24 Issue 5.

25 MS. STERN: I think there was some

1 disagreement as to whether this should be an issue.  
2 Odyssey proposed the issue, and I guess -- would you  
3 like to explain?

4 COMMISSIONER JACOBS: Are there objections  
5 to the issue?

6 MR. ELLIS: Yes, we certainly object to  
7 the issue. The law is well settled that an intervenor  
8 takes --

9 COMMISSIONER JACOBS: well, before you go  
10 on, let me have Mr. Schiefelbein give his -- advocate  
11 his position.

12 MR. SCHIEFELBEIN: well, certainly,  
13 Commissioner, I think the law in Florida is well  
14 settled that a party maintaining a proceeding such as  
15 Allied has to prove up its entitlement to standing at  
16 hearing, and if it does not prove that up, then its  
17 case can be dismissed.

18 And so I think this is a -- my research  
19 indicates that so long as standing is raised below,  
20 it's preserved. We've raised it as early as the issue  
21 ID meeting. We have not filed at this point a motion  
22 to dismiss any of the claims. But it would be our  
23 position that this is a live issue in the case, and we  
24 also would indicate that we would like to broaden our  
25 position. For purposes of the Prehearing Order, our

1 position should be reflected as no.

2 And by way of explanation, but not for  
3 inclusion in the prehearing, to be very concise, we  
4 expect, depending upon the evidence adduced at  
5 hearing, that Allied's economic detriment in this case  
6 will be shown to be remote and speculative. In  
7 addition, its attempt to strip Odyssey of its rate, a  
8 secondary claim other than trying to get as good a  
9 rate as Odyssey, that they don't have standing,  
10 because that's sort of -- they are not a private  
11 Attorney General, essentially, that that's a job for  
12 the Commission to and Staff to do.

13 That's a long-winded way of explaining  
14 somewhat our position. But this is a live issue. We  
15 do intend to pursue it, and our position would simply  
16 be no.

17 COMMISSIONER JACOBS: Mr. Ellis?

18 MR. ELLIS: Thank you, Commissioner. The  
19 law is well settled that an intervenor takes the case  
20 as they find it. Standing is a challenge that is to  
21 be raised by a motion to dismiss or else is waived.  
22 That issue was waived, and we certainly object to the  
23 attempt to raise it at this time.

24 MR. SCHIEFELBEIN: Certainly -- if I may,  
25 certainly the opportunity would be available to Allied

1 to argue that in their briefs.

2 MR. ELLIS: Well, I don't believe we need  
3 to brief it. I believe it would be Odyssey's  
4 obligation to raise that challenge by a motion to  
5 dismiss if it believed that it had such a challenge,  
6 and the time in which it could do so has expired.

7 MR. SCHIEFELBEIN: And we think that is not  
8 consistent with Florida case law.

9 COMMISSIONER JACOBS: Okay. Does TECO have  
10 anything?

11 MR. LONG: We support leaving this issue in  
12 as it is. The parties can argue that in briefs to the  
13 extent it's a legal issue. We support Odyssey on  
14 this.

15 COMMISSIONER JACOBS: Staff?

16 MS. STERN: Well, I think that to the  
17 extent -- I think it would be appropriate to file a  
18 motion to dismiss. And to the extent that factual  
19 issues have to be proved, that might be something that  
20 goes to hearing. If there are questions of their  
21 right to certain types of relief, that's more a legal  
22 issue that wouldn't have to go to hearing. I think  
23 that -- I think that Issue 5 is really sort of  
24 subsumed under Issue 4, when you get right down to it.

25 COMMISSIONER JACOBS: I was thinking the

1 same thing. And I guess what I want to ask  
2 Mr. Schiefelbein is, are the legal subtleties so  
3 important here, particularly given your explanation of  
4 it? Are the legal subtleties here so important? When  
5 I say legal subtleties, i.e., you're holding onto the  
6 -- I assume that's the main thing here, you want to  
7 hold onto raising this issue in case of an appeal.

8 MR. SCHIEFELBEIN: Yes, sir, that's right.  
9 And not to be obstreperous about it, but it would be  
10 our preference to maintain it as a distinct issue to  
11 be briefed by the parties at the appropriate time.

12 COMMISSIONER JACOBS: Did I cut you off,  
13 staff? Were you done?

14 MR. ELIAS: I think we were finished.

15 MR. ELLIS: I'll just conclude by saying  
16 the appropriate time has long since passed, and we  
17 certainly object to being met with this claim at this  
18 time and date.

19 COMMISSIONER JACOBS: I want to explore the  
20 legalities here a bit. In terms of raising the issue  
21 of standing for a party, is that limited to the  
22 pleadings? Must the -- I guess pleadings may be too  
23 broad of a statement here, because I guess issue ID  
24 might be included. But what I mean here is the  
25 petition and the responses.

1 MS. STERN: I think standing -- I'm not  
2 sure if this answers your question, but you can tell  
3 me. I think the factual basis for standing can be  
4 questioned at any time in a proceeding.

5 COMMISSIONER JACOBS: Okay.

6 MS. STERN: But the legal basis -- if it's  
7 a question of fact, like immediacy of injury, that's a  
8 question of fact.

9 COMMISSIONER JACOBS: Right.

10 MS. STERN: You can't really get at that  
11 with a motion to dismiss, because all facts are  
12 assumed to be true in a motion to dismiss, so it goes  
13 forward. But if they're raising legal questions about  
14 the relief that Allied is entitled to, that's legal,  
15 and that should have been raised way back when they  
16 intervened. I mean, you could possibly argue that  
17 they didn't have a right to intervene.

18 I think there are possibly two  
19 interpretations of the intervenor takes the case as he  
20 finds it. One is that whatever orders have been  
21 issued in the case cannot be collaterally attacked.  
22 Another is the sense that Mr. Ellis is using, in that  
23 TECO never challenged Allied's standing, so it's too  
24 late for Odyssey to challenge that standing. Does  
25 that --

1                   COMMISSIONER JACOBS: Yes. That gets to  
2 where I want --

3                   MR. SCHIEFELBEIN: May I?

4                   COMMISSIONER JACOBS: Very briefly.

5                   MR. SCHIEFELBEIN: Yes. I think what we're  
6 suggesting here, though, is that the obligation to  
7 prove up one's entitlement to have standing is akin to  
8 subject matter jurisdiction and has not been waived in  
9 this case.

10                  COMMISSIONER JACOBS: Here's how I would  
11 like to proceed. I think this issue should proceed  
12 pretty much as described by staff, that the facts --  
13 you have the opportunity to challenge the factual  
14 basis upon which Allied's standing may rest. And to  
15 the extent that this issue does that, I think that's  
16 the scope of this issue. I don't think you can  
17 necessarily challenge legal standing at this point. I  
18 agree that that should have been done at an entry  
19 phase.

20                  However, I think that gets you where you  
21 want to be anyway, perhaps, because if the facts don't  
22 prove up, then you have that issue. You know, you  
23 have that issue to challenge. If you believe that the  
24 facts aren't proven up, let me put it that way, then I  
25 think you still have an issue that you can go on. I

1 agree that there's probably a broader issue in terms  
2 of actual standing there, but I'm persuaded that at  
3 this stage of the proceeding, we would be more at risk  
4 allowing a standing challenge at this stage, and I  
5 think we would accomplish most of what you're looking  
6 to do by allowing the issue to stand as your challenge  
7 to the factual basis of Allied's standing. Am I clear  
8 enough, I hope?

9 MR. SCHIEFELBEIN: I certainly follow you,  
10 Commissioner.

11 If I might, there's one practical outgrowth  
12 of this problem which goes to the legal aspect of it.  
13 And not to get ahead of ourselves, but Allied is  
14 seeking discovery of information that goes beyond  
15 their desire to avoid undue discrimination, but to --  
16 in my terminology, to strip Odyssey of its rate. And  
17 we continue to maintain, and may in fact do so in a  
18 motion filed tomorrow, that they don't have standing  
19 to seek that sort of information in the discovery  
20 context. So I don't mean to belabor the point.

21 COMMISSIONER JACOBS: I understand.

22 MR. SCHIEFELBEIN: Certainly, hopefully,  
23 it's my intention to preserve on the record that we  
24 attempted to raise both aspects of standing on the  
25 record here. And with that, I'll try to be quiet.

1           COMMISSIONER JACOBS: Okay. We can deal  
2 with that. I think you would have a legitimate --  
3 well, let me not state that. That might sound like  
4 prejudice. But I understand that that document and  
5 whatever protective orders that come with that we can  
6 deal with, requests for protective orders we can deal  
7 with. But as to this issue, what I think we're saying  
8 is that we would rephrase this issue. And do you have  
9 any language that you would want to propose now, or  
10 could you just get together with the parties and  
11 figure out what the language would be to achieve what  
12 we just discussed?

13           MR. ELIAS: I think we would like the  
14 opportunity to confer before we do that.

15           COMMISSIONER JACOBS: Okay.

16           MR. ELIAS: And I would suggest that when  
17 we do, we switch it and the ultimate issue, or what is  
18 now Issue 4. It probably makes more sense to include  
19 this as Issue 4.

20           COMMISSIONER JACOBS: As Issue 4, and then  
21 that will be renumbered to Issue 5. If there are no  
22 objections, then we'll grant that.

23           Okay. That takes care of Section VIII.  
24 Section IX, the exhibit list, any modifications?

25           MR. ELLIS: There's a typographical error

1 that we are responsible for in the issue of  
2 preliminary -- excuse me, in the document  
3 preliminarily identified as RMN-14. It's a November  
4 6, 1999 letter, from -- it should be Allman rather  
5 than Alliance.

6 COMMISSIONER JACOBS: Say that again.  
7 Allman?

8 MR. ELLIS: Yes, A-l-l-m-a-n.

9 COMMISSIONER JACOBS: Okay. Any other  
10 changes?

11 MR. LONG: Commissioner, no changes, but I  
12 would just note again that some of the documents that  
13 are listed here as exhibits are documents that we will  
14 be requesting confidential treatment for.

15 COMMISSIONER JACOBS: Very well. Very  
16 well.

17 MR. ELLIS: And I would note again that we  
18 would fully expect on behalf of Allied/CFI that there  
19 will be a number of documents that we will seek to  
20 introduce in evidence at the hearing that we simply  
21 have not had an opportunity to examine and inspect  
22 yet.

23 COMMISSIONER JACOBS: Very well.

24 MR. SCHIEFELBEIN: And if I might, just for  
25 the record also, the one exhibit that we've

1 pre-identified here, which is on page 12, we've also  
2 asserted confidentiality for that exhibit in its  
3 entirety.

4 COMMISSIONER JACOBS: Very well. Okay.  
5 Duly noted.

6 Next we have proposed stipulations.

7 MR. SCHIEFELBEIN: May I, Commissioner?

8 COMMISSIONER JACOBS: Sure.

9 MR. SCHIEFELBEIN: I apologize for being a  
10 little slow on the -- if you can give me one moment.

11 COMMISSIONER JACOBS: Sure.

12 MR. LONG: Commissioner, while we're  
13 paused, would it be convenient to go back to the  
14 witness list, and I could give you our proposed order  
15 of witnesses.

16 COMMISSIONER JACOBS: Yes, we can do that.

17 MR. LONG: That's on page 5 of the order.  
18 Our first witness will be Ms. Westra, followed by  
19 Mr. Rodriguez, followed by Mr. Sweat, and Mr. Ashburn  
20 will be our last witness on direct.

21 MR. SCHIEFELBEIN: Mr. Long, could you  
22 repeat the first two?

23 MR. LONG: Yes. Westra and Rodriguez would  
24 be first two witnesses in that order.

25 MR. SCHIEFELBEIN: Thanks.

1 MR. LONG: And then Mr. Sweat, followed by  
2 Mr. Ashburn.

3 MR. ELLIS: No objection.

4 COMMISSIONER JACOBS: We'll go off the  
5 record for a moment.

6 MR. SCHIEFELBEIN: Certainly.

7 (Short recess.)

8 COMMISSIONER JACOBS: Okay. We'll go back  
9 on the record. Mr. Schiefelbein?

10 MR. SCHIEFELBEIN: I appreciate the time,  
11 and that time afforded me the opportunity to assure  
12 myself I don't need to belabor something. So, thank  
13 you.

14 COMMISSIONER JACOBS: All right. Time well  
15 spent.

16 Okay. That takes us then to stipulations,  
17 Section X.

18 MR. ELLIS: I would just add that we have  
19 provided -- on behalf of Allied/CFI, we provided  
20 counsel for TECO and Odyssey with a proposed  
21 protective agreement pursuant to the terms of your  
22 order issued last week and are anxiously awaiting that  
23 matter to be concluded so that we can go forward with  
24 discovery.

25 COMMISSIONER JACOBS: Do we need to take

1 any actions at this time, or --

2 MR. LONG: Well, Commissioner, with regard  
3 to the nondisclosure agreement, one of the items that  
4 we've asked the Commission to reconsider has to do  
5 with the nature and scope of the nondisclosure  
6 agreement. We have a couple of other issues that we  
7 need to work through besides that one. But based on  
8 my discussions with Mr. Ellis, I think that those  
9 other issues are things that we can manage. The issue  
10 that we raise in our motion for reconsideration is not  
11 one that I think Allied and Tampa Electric can agree  
12 on, so we would like the benefit of the Commission's  
13 review on that point.

14 COMMISSIONER JACOBS: Okay. For purposes  
15 of today, I think I would like to go ahead and say  
16 that -- and put the proposed -- make the -- make it a  
17 stipulation that we have the -- well, I guess I can't,  
18 though, because you're contesting a part of it, so we  
19 can't make it a stipulation. Do I have to make it an  
20 order, part of this as an order?

21 MR. LONG: Well --

22 COMMISSIONER JACOBS: I'm speaking to the  
23 protective agreement now.

24 MR. LONG: Well, we're anxious to --

25 COMMISSIONER JACOBS: I want to leave you

1 your -- I'm not trying to take away any right that you  
2 obviously would have to ask for reconsideration, but  
3 I'm trying to move forward with some clarity as to  
4 what's the status of the protective agreement absent  
5 what you've challenged.

6 MR. LONG: well, if I understand your  
7 question, Commissioner, I think that the other  
8 outstanding issues that we have, based on my brief  
9 conversation with Mr. Ellis, I think we can work  
10 through those.

11 COMMISSIONER JACOBS: okay.

12 MR. LONG: So really it's just the issue  
13 that we raise in the motion for reconsideration that's  
14 outstanding.

15 COMMISSIONER JACOBS: So then I guess I'm  
16 back to my original position. Can we make that a  
17 stipulation and then just exclude that provision until  
18 it's ruled on at reconsideration? I guess we can do  
19 that. which would be the better route?

20 MR. ELLIS: I would prefer to go forward as  
21 you're suggesting and resolve as many issues as  
22 possible at this time.

23 COMMISSIONER JACOBS: I don't have a  
24 problem excluding your provisions from the protective  
25 order until it's resolved on reconsideration, but I

1 want to get the resolution of what other provisions,  
2 what status they have going forward.

3 MR. LONG: Could we go off the record for a  
4 moment, Commissioner?

5 COMMISSIONER JACOBS: Sure.

6 (Discussion off the record.)

7 COMMISSIONER JACOBS: Pursuant to  
8 discussions with the parties, what I would like to do  
9 is to go ahead and list as a stipulation the  
10 confidential -- proposed confidential protective  
11 order, absent those provisions that are still at issue  
12 with the parties, and I would leave for the parties to  
13 bring forward a fully agreed-to protective order  
14 within a week, within seven days.

15 MR. LONG: That's fine, Commissioner.

16 MR. SCHIEFELBEIN: By that you mean -- I'm  
17 not sure I follow you. Are you saying enter into one  
18 within a week?

19 COMMISSIONER JACOBS: Right. It's my  
20 understanding that they were going to come together  
21 and come up with an agreement on the provisions that  
22 are still at issue.

23 MR. LONG: Right. That's correct,  
24 Commissioner. Other than those issues that are raised  
25 in our motion for rehearing, we will resolve all other

1 issues and put together a nondisclosure agreement that  
2 we will attempt to function under on an interim  
3 basis.

4 And just to be clear on the record with  
5 regard to that discussion, the issue that we raise in  
6 our motion for rehearing is the question of whether or  
7 not employees of Allied and CFI who are directly  
8 involved in competitive activities should have access  
9 to confidential information under the nondisclosure  
10 agreement. And I think that what Mr. Ellis and I  
11 discussed was on an interim basis, pending a  
12 Commission ruling on that motion, that counsel for  
13 Allied and Allied's outside expert could be  
14 signatories to a nondisclosure agreement that would  
15 give them access to nonredacted confidential  
16 information, and then pending the Commission's ruling  
17 on the motion, the question of whether other Allied  
18 employees would have access would be addressed, and to  
19 the extent necessary, the nondisclosure agreement  
20 would be revised at that time.

21 COMMISSIONER JACOBS: Very well.

22 MR. ELLIS: I would just add briefly in  
23 response that it's our interest to resolve as many  
24 issues as expeditiously as possible, and to the extent  
25 we can, we'll try to resolve all issues with respect

1 to the protective agreement, other than those raised  
2 by Tampa Electric's motion for reconsideration this  
3 afternoon, and certainly to have them resolved by the  
4 date you propose to set.

5 It's a separate question whether we would  
6 be willing to accept documents and information under  
7 such an agreement. We were not in April when you  
8 first proposed it. We were not in June when you  
9 proposed it again. And that's an issue we'll have to  
10 face in light of the order that was issued last week  
11 and our evaluation of your motion for  
12 reconsideration. But regardless of whether we would  
13 accept the documents, it's certainly in our interest  
14 to agree to as many terms of a protective order as we  
15 can as soon as possible, and we will do so.

16 MR. LONG: Well, Commissioner, we're  
17 anxious to move forward. And as Mr. Ellis notes, we  
18 offered to do this, precisely this thing weeks ago.

19 COMMISSIONER JACOBS: We're close. We're  
20 close. So given those great bounds of gratuities, I'm  
21 sure we'll be done next week.

22 Okay. That I believe completes the  
23 Prehearing Order.

24 MR. ELIAS: Yes.

25 COMMISSIONER JACOBS: And the pending

1 confidentiality matters, because so much else is out  
2 there, we'll leave those pending.

3 MR. SCHIEFELBEIN: Well, may I briefly ask  
4 for you to reconsider that?

5 COMMISSIONER JACOBS: Okay. Is there one  
6 in particular? Oh, you --

7 MR. SCHIEFELBEIN: That would be Section XI  
8 at the very bottom of page 12.

9 COMMISSIONER JACOBS: Yes. Well, you  
10 probably have -- you must have a different version. I  
11 have Section XI on page 13.

12 Oh, you have the motion for protective  
13 order.

14 MR. SCHIEFELBEIN: Yes. It's a little bit  
15 different than what we've just talked about.

16 COMMISSIONER JACOBS: Okay. I don't think  
17 I've seen that. Do you all have that?

18 MS. STERN: I think so. I think it should  
19 be on your page 13.

20 MR. SCHIEFELBEIN: If I could -- do you not  
21 have it?

22 At this point, if I could, rather than  
23 engage in any particular argument, which I suspect  
24 there may not be any on, but just to sort of paint a  
25 little background to this motion in broad strokes,

1 that might be helpful.

2           Okay. TECO made a filing in March, March  
3 10th, I think, of the 1,800 documents. We've never  
4 seen any of those documents or any part of that filing  
5 identified as such. What has been shared with us  
6 pursuant to our request is a stack of roughly 300  
7 pages, 60 discretely identified documents that TECO  
8 has indicated to us is a complete collection of what  
9 Odyssey gave to TECO during the course of the CISR  
10 negotiations. We have that.

11           we've looked through that, and we were  
12 comfortable with TECO's May 2nd supplemental motion  
13 for protective order, which would have allowed access  
14 to most of that information to a limited subset of  
15 Allied's representatives. We were comfortable with  
16 that on all documents except for what I like to say,  
17 four and a half documents. The purpose of this motion  
18 is to address those four and a half documents, which I  
19 think there's an honest difference of opinion between  
20 Staff and I as to whether the order issued last week  
21 covers.

22           That's painting it in broad strokes rather  
23 than engaging in any kind of argument on it. I know  
24 that my client's blood pressure would be much lower if  
25 they knew that those four and a half documents were

1 taken off the table and were not the subject of the  
2 vagaries of this process. So I'm trying to censor  
3 myself rather than getting to the merits of it.

4 But it would certainly be our first choice  
5 if we were to conduct an in camera proceeding today  
6 here at this prehearing where you would be given an  
7 opportunity to look at these documents to verify that  
8 they are as I have represented what they are in my  
9 description of them in our motion and that we could  
10 get a ruling.

11 I'll try to wrap this up and give someone  
12 else a chance to say something, but it's my  
13 understanding that if given some assurance from an  
14 objective third party such as yourself that these  
15 documents are what I've identified them as, that  
16 Allied has no objection to taking those four or five  
17 documents off the table entirely. They relate to  
18 terms and conditions of bank loans. They relate to  
19 information regarding sales, revenues, employees,  
20 staffing, product line, and so forth of Odyssey's --  
21 of a company called Century Industries, which is  
22 headed by the same gentleman that heads Odyssey. And  
23 it's our position that it's not adequately covered by  
24 the order.

25 And I think I'll try to give someone else a

1 chance to say something, but that gives you a broad  
2 idea of where I'm coming from.

3 COMMISSIONER JACOBS: Before the parties  
4 address it, Staff, would you respond to the idea that  
5 they are indeed not covered by the order as it stands?

6 MS. STERN: We can't be certain whether  
7 they are or they aren't, because the way they're  
8 referred to in the motion, they're numbered in a way  
9 that does not correspond to the numbering of the  
10 documents we have. I don't know what documents for  
11 sure he's asking for protection for.

12 COMMISSIONER JACOBS: Sounds like we need  
13 to do that then first, figure out what the documents  
14 are, and come to a conclusion whether or not it's a  
15 reasonable interpretation that they're covered by the  
16 order as it stands. Does it sound like that would be  
17 reasonable?

18 MR. SCHIEFELBEIN: Yes. And --

19 COMMISSIONER JACOBS: Is that what you're  
20 proposing for the in camera?

21 MR. SCHIEFELBEIN: Yes. And Staff is quite  
22 right that they have no -- what Staff has access to at  
23 this point is TECO's own Bates stamp system and the  
24 1,800 pages. I'm operating under a Bates stamp system  
25 that we devised ourselves when we got those 60

1 documents. And so Staff is in the dark, I guess, as  
2 to what specifically we're talking about.

3 COMMISSIONER JACOBS: Okay.

4 MR. SCHIEFELBEIN: So I've brought copies  
5 with me that -- and I apologize. I'm somewhat  
6 springing this -- I mean, everyone knew that this was  
7 a pending motion, but the proposal to pursue this in  
8 an in camera fashion today, this is the first that  
9 folks are hearing about it. I think maybe they got  
10 ten minutes notice.

11 COMMISSIONER JACOBS: Okay.

12 MR. SCHIEFELBEIN: But it's -- Mr. Ellis?

13 MR. ELLIS: We proposed a stipulation that  
14 would have resolved the matter without the motion. In  
15 response to the motion, we stated that we don't  
16 object. I don't know what more we can do. I don't  
17 see that --

18 COMMISSIONER JACOBS: You don't object.

19 MR. ELLIS: -- it's necessary. I don't see  
20 that the in camera inspection is necessary. I think  
21 the only problem is that we're working with two  
22 different sets of numbered documents. But subject to  
23 an opportunity to sometime verify the representations,  
24 I don't think that needs to be done today or at any  
25 time. We don't object to any of the documents that

1 he's referring to.

2 MR. LONG: Commissioner, I think that  
3 perhaps some of the confusion will be alleviated  
4 tomorrow. When we make our filing, we will list all  
5 of the confidential documents using the original Bates  
6 stamp page numbers with a description of each  
7 document. With that filing in hand, I think the four  
8 documents that Odyssey is referring to can be  
9 identified using the original Bates stamp numbers.  
10 And perhaps given Mr. Ellis's comment, once those  
11 documents are identified using the original Bates  
12 stamp page numbers, perhaps that would be a basis for  
13 a stipulation that those documents would then not have  
14 to be produced.

15 COMMISSIONER JACOBS: Well, here's what --  
16 based on -- what I'm hearing you say is that if the  
17 representation is as you've heard, you don't object.

18 MR. ELLIS: That's correct.

19 COMMISSIONER JACOBS: Okay. So I'm going  
20 to grant the motions, but I would like Staff to  
21 confirm tomorrow, and if there's any questions, then  
22 you can get back to me. So I'll go ahead and grant  
23 that based on that discussion.

24 MR. ELLIS: That's fine.

25 MR. SCHIEFELBEIN: If I might suggest --

1 and I guess I'm acting like a former staff counsel,  
2 but staff might need a little bit more time than that  
3 to do that, if that's your preference. I would like  
4 it to be as little as possible, but still reasonable.

5 MR. ELIAS: If they don't file their  
6 amended or supplemental confidentiality request until,  
7 say, tomorrow afternoon, it may be tough for us to  
8 turn that around tomorrow.

9 COMMISSIONER JACOBS: I'll leave it to your  
10 discretion.

11 MR. ELIAS: I think that we've discussed a  
12 lot of stuff here in the last half hour that probably  
13 the four parties/interested persons can get together  
14 and resolve more expeditiously than in this forum.

15 COMMISSIONER JACOBS: Okay. So we resolved  
16 that motion then.

17 Mr. Ellis, do you have something?

18 MR. ELLIS: Yes. Thank you, Commissioner  
19 Jacobs. We have a filing date currently of July 13th  
20 for our rebuttal testimony, and obviously we're in no  
21 position to be able to file rebuttal testimony without  
22 having been able to examine and inspect the documents  
23 that are the essential evidence of the most important  
24 facts in the case. And is our concern that we could  
25 not accomplish discovery, file rebuttal testimony, and

1 proceed to final hearing by the date currently set for  
2 final hearing of July 31st.

3 We certainly want to proceed as  
4 expeditiously as possible, and in fact, had requested  
5 an expedited hearing with the filing of our original  
6 complaint, but simply are not in a position to be able  
7 to file rebuttal testimony by next wednesday and  
8 complete discovery and proceed to final hearing by  
9 July 31st, and so would ask to continue those dates to  
10 the next or earliest available dates for final  
11 hearing, and would be filing a motion accordingly  
12 after this prehearing conference.

13 COMMISSIONER JACOBS: For a continuance of  
14 the hearing dates?

15 MR. ELLIS: Yes.

16 COMMISSIONER JACOBS: Okay. Why don't I  
17 deal with that in conjunction with the motions filed  
18 today with -- well, actually, I can't resolve TECO's  
19 motions. Is that correct?

20 MR. ELIAS: That's reconsideration of your  
21 order, which is addressed by the full Commission.

22 COMMISSIONER JACOBS: Okay. Given that,  
23 we're at a point of departure in any regard.

24 Now, let me first ask Staff. It's my  
25 understanding that it's not possible to make this an

1 emergency item for agenda next week, i.e. TECO's --

2 MR. ELIAS: I don't think it's reasonable.  
3 We've got two business days to digest this pleading.  
4 And while the --

5 COMMISSIONER JACOBS: I scanned through it,  
6 because that was my first thought, is to try and make  
7 it an emergency item. But I've scanned through it,  
8 and I think there will be a need to give careful  
9 thought to the legal arguments that are made. And so  
10 I think I kind of agree with your conclusion.

11 MR. ELIAS: The problem that that engenders  
12 is the fact that the next regularly scheduled  
13 Commission agenda conference is August 1st, which is  
14 the day after the scheduled hearing in this matter.  
15 Even if Allied and Odyssey were to reply by the 13th,  
16 seven days from today, that still only gives us a week  
17 to consider their responses and file a recommendation  
18 in the normal time frame, which still wouldn't get the  
19 matter resolved until the day after the hearing, which  
20 obviously I don't think is going to be satisfactory to  
21 Allied in terms of their ability to prepare for the  
22 hearing.

23 COMMISSIONER JACOBS: There are discovery  
24 issues outstanding as well, as I understand it.

25 MR. SCHIEFELBEIN: And if I may, obviously

1 -- I'm always good at the obvious stuff. Once  
2 Mr. Ellis's witnesses are up to speed, we would  
3 certainly want the opportunity to take their  
4 depositions and to seek -- it would seem impractical  
5 under the current schedule.

6 COMMISSIONER JACOBS: Do we have an  
7 alternative date?

8 MR. ELIAS: We have a tentative date of  
9 September 6th, which if this matter is -- if the  
10 motion for reconsideration is decided by the  
11 Commission at the August 1st agenda conference, I  
12 believe that approximately five weeks would be a  
13 reasonable amount of time to require that -- or to  
14 incorporate the results of the Commission's decision  
15 into any discovery that's produced or into any  
16 documents that are produced, provide for an  
17 opportunity to review those documents, file testimony,  
18 and conduct depositions to the extent desirable prior  
19 to a hearing on September 6th.

20 COMMISSIONER JACOBS: well, I don't think  
21 that there's any -- absent any extraneous  
22 circumstances, I don't think there's really very many  
23 options I have today. My preference would be not to  
24 wait that long. I'll be up front with you about that.

25 I'm going to try and search out a day that

1 we can do a special agenda, if at all possible. If  
2 not possible, I'm not -- let's do this. Go ahead and  
3 confirm that date. We'll not set that date for the  
4 moment. We're going to continue -- I'm granting oral  
5 argument to continue the hearing, but not -- well, how  
6 should I do that? Let's go ahead and make it for that  
7 -- I don't want to preclude the ability to get the  
8 earliest possible date. Let's just say that, to the  
9 earliest possible date, with the understanding that  
10 the latest date will be September 6th that we  
11 discussed, and with also the understanding that the  
12 full Commission will consider the motion for  
13 reconsideration on the earliest possible agenda, which  
14 we anticipate being the 1st of August.

15 MR. ELIAS: August 1st.

16 COMMISSIONER JACOBS: Let me say this. I  
17 would encourage the parties to resolve the discovery  
18 issues as amicably and as quickly as possible. And we  
19 have enough time to get the responses to the motions  
20 in, to this motion -- well, the motion for oral  
21 argument and this motion as well.

22 MR. ELIAS: On that point, today is the  
23 6th, and the motions indicate that they were served by  
24 U.S. Mail, but all the other parties were provided a  
25 copy here today.

1 I would request, and it's within the  
2 hearing officer's discretion, that the responses be  
3 filed no later than the -- if any, be filed no later  
4 than the close of business next Thursday, the 13th,  
5 which is the time period that's customarily afforded  
6 for service by hand delivery. And I would also  
7 further note that the uniform rules don't require an  
8 opportunity to respond, but provide that a response  
9 may be filed where it's practicable. But that will  
10 give us a full week to consider the arguments and  
11 provide the Commissioners with a recommendation in the  
12 normal course of business for consideration on the  
13 1st.

14 COMMISSIONER JACOBS: Okay. I would adopt  
15 that as a ruling.

16 Mr. Schiefelbein?

17 MR. SCHIEFELBEIN: I think that's  
18 reasonable. I have one fly to toss in the ointment,  
19 though. I think the deadline for filing motions  
20 responsive to the order, such as rehearing or  
21 clarification, is tomorrow. And at this point, I  
22 think I should be candid that we are considering  
23 filing our own motion, which, of course, if we do so,  
24 would be filed by the close of business tomorrow.

25 COMMISSIONER JACOBS: Okay. So we can have

1 it on that same time line, it sounds like.

2 MR. ELIAS: I think that's fair too, that  
3 if there's a motion filed tomorrow that we still --

4 COMMISSIONER JACOBS: We would ask that you  
5 -- can we authorize facsimile --

6 MR. ELIAS: Well, I think Mr. Schiefelbein  
7 will probably commit to providing service by hand  
8 delivery or by facsimile.

9 MR. SCHIEFELBEIN: Yes, I will.

10 COMMISSIONER JACOBS: Okay.

11 MR. ELIAS: So that the responses to any  
12 motion for reconsideration that's filed tomorrow would  
13 also be due by the close of business July 13th.

14 MR. ELLIS: No objection.

15 COMMISSIONER JACOBS: Very well. Does that  
16 get us through everything?

17 MR. ELLIS: We still -- let's see. The  
18 motion to continue the date of July 13th for filing of  
19 rebuttal testimony by Allied/CFI then is continued to  
20 a date to be set in the future?

21 COMMISSIONER JACOBS: Can we make that now?

22 MR. ELIAS: We can certainly continue -- we  
23 can do as Mr. Ellis suggested, but --

24 COMMISSIONER JACOBS: what I'm thinking is,  
25 can we say ten days after we rule on this, or what?

1 MR. ELLIS: I would prefer --

2 COMMISSIONER JACOBS: No, not after we  
3 rule. If we rule, it will be whether or not they have  
4 to disclose the documents, so it would be ten days  
5 after the documents -- or a certain number of days,  
6 whatever, after they --

7 MR. ELIAS: I think you can probably give  
8 an indication that that's what your intention would  
9 be. I think it would probably be reasonable to see  
10 what the Commission does on the --

11 COMMISSIONER JACOBS: Okay. Let's leave  
12 that pending for the Commission's decision on  
13 reconsideration, but it would be my desire that you  
14 would be able to file your rebuttal within a specified  
15 period of time after you received the documents, if  
16 the decision is that you receive them. Okay?

17 MR. LONG: Commissioner, I would just like  
18 to make sure that whatever time frame is set would  
19 afford us a reasonable amount of time once their  
20 testimony is filed to do whatever discovery is  
21 appropriate.

22 COMMISSIONER JACOBS: we're probably going  
23 to have to be on a very expedited schedule, cutting  
24 down the notice times and all that sort of thing, but  
25 given that caveat, I don't think that's an

1 unreasonable request.

2 MR. LONG: Commissioner, I have one  
3 additional issue if we're finished with this subject.

4 COMMISSIONER JACOBS: I think that's pretty  
5 much all of them. Any other matters regarding the  
6 motions and discovery, related thereto?

7 Okay. Mr. Long?

8 MR. LONG: Commissioner, as I mentioned  
9 earlier, in compliance with the order, we will be  
10 filing a supplemental request for confidential  
11 treatment of documents. One of the things noted in  
12 the order was that in the original set of papers that  
13 we filed with the Commission, there were things that  
14 appeared to be duplicates, things that in the wake of  
15 the June 27th order are really not relevant.

16 In trying to figure out how to most  
17 efficiently comply with the order, I discussed with  
18 staff counsel the possibility of simply getting the  
19 return of all of the documents provided and then  
20 allowing us to file with our motion for confidential  
21 treatment only those documents that were (a) relevant  
22 and not duplicates, and (b) documents for which we  
23 felt confidential treatment was warranted.

24 staff felt that, all things considered,  
25 that it was better for the Commission to retain all of

1 the documents that were originally filed.

2 Now, we don't have a problem with that, but  
3 it does create an additional wrinkle. There are  
4 documents that are duplicates, and there are documents  
5 that are now not relevant, but for which we would  
6 assert confidential treatment. Simply being able to  
7 get those documents back was a quick way of dealing  
8 with that problem. And I would still like to ask that  
9 you consider that as a possibility.

10 what I've done is basically to go through  
11 the documents that we originally provided, and using  
12 the Bates stamp page numbers -- (distributing  
13 documents.)

14 COMMISSIONER JACOBS: Maybe we can do this  
15 very quickly. what I understand you to be saying is  
16 that where there are documents that you've submitted,  
17 we by our order have determined that they're not  
18 relevant, so we don't need to have them, and you would  
19 like to get them back.

20 MR. LONG: That's correct, Commissioner.

21 COMMISSIONER JACOBS: However, if we keep  
22 them, you want to have them confidential.

23 MR. LONG: That's correct.

24 COMMISSIONER JACOBS: Okay.

25 MR. LONG: Now, the way I'm proceeding, in

1 the motion that we'll be filing tomorrow, I have not  
2 included the documents that I've listed on the sheet  
3 that I've just given even out. These are the  
4 documents that in our view are either duplicates or  
5 documents that are no longer relevant, for instance,  
6 documents that relate to the period after the contract  
7 with Odyssey was signed.

8 It would be simpler, in our view, if we  
9 could just get those documents back, and then we don't  
10 have to make a request for confidential treatment for  
11 those documents. Now, in the alternative, if the  
12 Staff or the Commission feel that these documents need  
13 to stay in the record, we don't necessarily have a  
14 problem with that, but we will have to make a request  
15 for confidential treatment then for the documents in  
16 this list.

17 Now, we're not prepared to do that for  
18 tomorrow, in the hope that we can just get these  
19 documents back. But if the decision is that the  
20 Commission wants to retain these documents, then we  
21 would ask leave of you, Commissioner, to file a  
22 supplement to the motion that we're filing tomorrow to  
23 cover those documents in this list that we deem to be  
24 confidential.

25 COMMISSIONER JACOBS: Okay. I think that's

1 reasonable. I would hope that we can figure out how  
2 you can get them back. But in the absence of that, I  
3 don't have a problem with you asking that it be  
4 confidential.

5 MR. ELIAS: We have a Commission-approved  
6 procedure governing the return of documents that were  
7 received pursuant to a request for confidential  
8 treatment which are no longer necessary for the  
9 Commission's business. And we weren't at a point that  
10 we could make that determination with respect to any  
11 of the documents that were --

12 COMMISSIONER JACOBS: Do you think by  
13 tomorrow you would be?

14 MR. ELIAS: I don't know about tomorrow. I  
15 think after we see the request, after we've had an  
16 opportunity to go through this, after we've had an  
17 opportunity to see the motion that they file tomorrow,  
18 that we'll be in a position to say either you need to  
19 file for confidential treatment of the documents that  
20 are not on here, or we don't need them anymore and we  
21 can return them to you.

22 COMMISSIONER JACOBS: Very well.

23 MR. LONG: That's fine, Commissioner, as  
24 long as it's understood that in our filing tomorrow,  
25 we will not be requesting confidential treatment for

1 these, but we will if the Commission wants to retain  
2 these documents.

3 COMMISSIONER JACOBS: I think we all  
4 understand that.

5 Okay. Any other matters to come before us  
6 today?

7 MR. SCHIEFELBEIN: Yes, Commissioner.

8 COMMISSIONER JACOBS: Yes.

9 MR. SCHIEFELBEIN: And hopefully the most  
10 uncontroversial moment of the day. Recently our firm  
11 represented a client which attempted at hearing to  
12 make an opening statement, and they were denied the  
13 opportunity to do so because they had not asked for  
14 leave to make an opening statement at the prehearing.  
15 So I would -- having I guess learned that lesson, I  
16 would like to ask for an opportunity to make an  
17 opening statement at whatever hearing is held in this  
18 case.

19 COMMISSIONER JACOBS: Objections?

20 MR. LONG: Well, Commissioner, I have no  
21 objection, but if we're going to follow that  
22 procedure, I would certainly at least like to reserve  
23 the opportunity make an open statement.

24 COMMISSIONER JACOBS: Mr. Ellis?

25 MR. ELLIS: If all sides are afforded an

1 equal opportunity to make an opening statement, we  
2 certainly have no objection.

3 COMMISSIONER JACOBS: Okay. Sounds like --  
4 what would you say? Three minutes?

5 MR. LONG: It's always a mistake to give a  
6 lawyer a chance to talk.

7 MR. SCHIEFELBEIN: It takes me three  
8 minutes to spell my name.

9 COMMISSIONER JACOBS: Okay. We'll say time  
10 limited. I'll leave it to the discretion of whoever  
11 is the presiding officer to determine the exact time,  
12 but time limited for certain.

13 MR. SCHIEFELBEIN: At the outside, I think  
14 I would need ten minutes, and I would probably be  
15 pushing it at ten.

16 COMMISSIONER JACOBS: Okay.

17 MR. ELIAS: All right. That's fine.

18 COMMISSIONER JACOBS: Very well. That  
19 being done, I guess we're all done. The prehearing is  
20 adjourned. Thank you all.

21 (Proceedings concluded at 3:07 p.m.)

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CERTIFICATE OF REPORTER

STATE OF FLORIDA)  
COUNTY OF LEON )

I, MARY ALLEN NEEL, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter transcribed under my supervision; and that the foregoing pages numbered 1 through 60 are a true and correct transcription of my stenographic notes.

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

DATED THIS 12th day of July, 2000.

  
\_\_\_\_\_  
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