

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

In re: Complaint of Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Sections 366.03, 366.06(2) and 366.07, Florida Statutes, 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

Filed: July 13, 2000

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ALLIED/CFI'S RESPONSE IN OPPOSITION TO MOTIONS FOR RECONSIDERATION AND MOTIONS FOR ORAL ARGUMENT

Allied Universal Corporation ("Allied") and Chemical Formulators, Inc. ("CFI"), hereinafter referred to collectively as "Allied/CFI," by and through their undersigned counsel, and pursuant to Rule 25-22.0376, Florida Administrative Code, submit their response in opposition to the motions for reconsideration and motions for oral argument filed by Tampa Electric Company ("TECO") and Odyssey Manufacturing Company ("Odyssey") as to Order No. PSC-00-1171-CFO-EI, issued on June 27, 2000 ("the Order"), and state:

- 1. The applicable standard of review for a motion for reconsideration is stated in a recent

Commission order in a pending docket in which TECO is a party:

The applicable standard of review for a motion for reconsideration is whether the motion identifies some point of fact or law that was overlooked or not considered by the decision maker in rendering its order. Diamond Cab Co. v. King, 146 So.2d 889 (Fla. 1952). The mere fact that a party disagrees with the order is not a valid basis for reconsideration. Id. Further, reweighing of the evidence is not a sufficient basis for reconsideration. State v. Green, 104 So.2d 817 (Fla. 1st DCA 1958).

Order No. PSC-00-0911-FOF-EI, issued May 8, 2000 in Docket No. 000001-EI, In re: Fuel and purchased power cost recovery clause and generating performance incentive factor; see also, Order

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No. PSC-00-0619-PCO-EU, issued March 31, 2000 in Docket No. 991462-EU, In re: Petition for determination of need for an electrical power plant in Okeechobee County by Okeechobee Generating Company, L.L.C. (applying the same standard for review by the Commission of Prehearing Officer's order deciding a motion to compel production of documents and motion for a protective order). Despite its familiarity with the applicable standard of review, TECO's motion does not even make a pretense of attempting to identify a point of fact or law that was overlooked or not considered in the Order. Instead, TECO's motion simply reargues and asks the Commission to reverse the Prehearing Officer's decisions on six matters which are considered in detail in the Order. As such, TECO's motion is frivolous and serves no purpose other than to further delay the disclosure to Allied/CFI of information requested in Allied/CFI's Petition to Examine and Inspect Confidential Information filed with its Complaint in this proceeding on January 20, 2000, and in Allied/CFI's discovery requests served on February 2, 2000.

2. The first two matters raised in TECO's motion are simply the consequences of its misguided attempt to dismiss Allied/CFI's Complaint based on a secret showing of evidence to the Commission. On March 10, 2000, TECO filed and requested confidential classification of over 1,800 pages of documents in connection with its Motion for Protective Order, Request for Approval of Proposed Procedures for Disposition of this Proceeding Without Disclosing Confidential Information and Summary Disposition ("TECO's motion for summary disposition"). The filed documents evidently include copies of newspaper articles, tariff sheets, and materials available on the Internet. Such materials obviously do not meet the requirements of Section 366.093, Florida Statutes, for classification as proprietary confidential business information. The requirement to establish the confidentiality of the filed documents individually never would have arisen, and all of

the documents would have remained confidential generally as provided in the CISR tariff, if TECO had simply responded in good faith to Allied/CFI's discovery requests and produced the documents to Allied/CFI pursuant to a Protective Agreement, rather than filing them with the Commission in support of its motion for summary disposition. Having chosen instead to file the documents, TECO was required to comply with the terms of Section 366.093, Florida Statutes, in support of its request for confidential classification.

3. Allied/CFI is primarily concerned with the third and fourth matters raised in TECO's motion: (1) Allied/CFI's right to conduct discovery on the issue of whether Odyssey complied with the eligibility requirements of the CISR tariff; and (2) disclosure of confidential information to Allied/CFI's principal witness in this proceeding, Robert Namoff.

4. The attempt in TECO's motion to prevent discovery by Allied/CFI on the issue of Odyssey's eligibility for CISR tariff rates is in effect a belated attempt to dismiss part of Allied/CFI's Complaint. Allied/CFI's Complaint alleges that TECO has violated Sections 366.03, 366.06(2) and 366.07, Florida Statutes, and Order No. PSC-98-1081A-FOF-EI, issued August 27, 1998, in Docket No. 980706-EI, In re: Petition for Approval of Commercial/Industrial Service Rider Tariff by Tampa Electric Company, by giving an undue or unreasonable preference and advantage to Odyssey and subjecting Allied/CFI to an undue or unreasonable prejudice and disadvantage, in TECO's disparate responses to Odyssey's and Allied/CFI's requests for CISR tariff rates. Paragraph 19 of the Complaint alleges that Allied/CFI complied with the eligibility requirements for service under the CISR tariff, and on information and belief that Odyssey did not comply with those eligibility; and further alleges that the TECO employee who negotiated Odyssey's preferential CISR tariff rates was subsequently rewarded by an offer of employment with Odyssey and had been soliciting Allied/CFI's

customers on behalf of Odyssey. The Petition to Examine and Inspect Confidential Information filed with the Complaint asks the Commission to order TECO to disclose the Contract Service Agreement with Odyssey and all documentation supporting the CISR tariff rates offered to Odyssey, including documentation demonstrating that Odyssey met all requirements and preconditions of the CISR. The relief requested in the Complaint includes a request that the Commission suspend Odyssey's CISR tariff rates. Thus, the contention in TECO's motion that the issue of Odyssey's eligibility for CISR tariff rates is somehow "irrelevant to Allied/CFI's complaint in this docket" ignores the allegations of the Complaint and is in effect a belated attempt to dismiss part of the Complaint. Even if TECO had timely filed a motion to dismiss, its attempt to prevent Allied/CFI from raising this issue must fail. Section 366.07, Florida Statutes, provides that the Commission may find upon complaint that the rates proposed by any public utility for any service "... are unjust, unreasonable, insufficient, excessive, or unjustly discriminatory or preferential, or in any wise in violation of law..." and may determine and set the appropriate rates to be imposed in the future. It now appears from the list of documents filed by TECO on July 7, 2000, in support of its request for confidential classification and pursuant to the Order, that Allied/CFI's information and belief concerning Odyssey's noncompliance was correct: the list does not appear to contain any reference to any documentation concerning Odyssey's alternatives to taking service from TECO. The issue of Odyssey's compliance with the eligibility requirements for CISR tariff rates is of vital interest to Allied/CFI in responding to a competitive threat which appears to be a product of collusion, and Allied/CFI must be allowed to conduct discovery concerning this issue. TECO's motion fails to identify any point of fact or law overlooked or not considered in the determination of this matter in the Order, and must be denied.

5. TECO continues to attempt to prevent Allied/CFI from exercising its due process rights by attempting to prevent disclosure of confidential information to Mr. Namoff. Mr. Namoff is Allied/CFI's principal witness in this proceeding and is the person who negotiated with TECO for CISR tariff rates. Mr. Namoff's direct testimony filed on February 21, 2000 details his negotiations with TECO and substantiates Allied/CFI's claims of undue discrimination and apparent collusion. Despite TECO's knowledge of Allied/CFI's officers and operations gained as a result of Allied/CFI's request for CISR tariff rates, TECO makes no effort to show that there is any other representative of Allied/CFI capable of representing Allied/CFI's interests in this litigation. In fact, Allied/CFI has only three officers who are capable of analyzing the confidential information to be produced in this proceeding, developing rebuttal testimony, and representing Allied/CFI's interests in this litigation: its Chief Executive Officer, Mr. Namoff; its Chief Operating Officer, Jim Palmer; and its Chief Financial Officer, Michael Koven. All three individuals are involved in the development of business strategy for Allied/CFI and there is no officer of Allied/CFI capable of representing its interests in this litigation who is not also involved in the development of its business strategy. The limitation sought by TECO concerning the business duties of the Allied/CFI representatives to whom confidential information will be disclosed, is unreasonable and unworkable. There is no comparison between the areas of specialization of Allied/CFI's officers and those of telecommunications companies such as BellSouth and Intermedia, nor are the issues of product development and intellectual property involved in the proffered sample protective agreement between those two telecommunications companies comparable to the issues in this litigation. There is no justification for imposing on Allied/CFI the kinds of limitations sought by TECO based on an analogy to a protective agreement between telecommunications companies such as BellSouth and Intermedia.

6. TECO's original purported justification for refusing to disclose confidential information to Allied/CFI was the alleged need to preserve the trade secrets of Allied/CFI's competitor, Odyssey. However, TECO's attempt to prevent disclosure based on this justification was completely undermined by Allied/CFI's proposal that Odyssey may first review all confidential information concerning its CISR tariff rate negotiations with TECO before disclosure of that information is made to Allied/CFI, allowing Odyssey to redact any information it considers to be trade secrets prior to disclosure to Allied/CFI. The process of Odyssey's prior review and redaction of confidential information has begun, and Allied/CFI has provided Odyssey with a proposed stipulation concerning the terms of Odyssey's prior review. A copy of the proposed Stipulation was filed on June 22, 2000, as an exhibit to Allied/CFI's response to Odyssey's Motion for Protective Order.

7. TECO's subsequent purported justification for non-disclosure of confidential information to Allied/CFI's representatives was that Allied/CFI would use the confidential information for the allegedly improper purpose of attempting to renegotiate CISR tariff rates with TECO. Therefore, TECO suggested that the Allied/CFI representatives who are given access to confidential information must not be allowed to represent Allied/CFI or any other existing or potential TECO customer in negotiations for a CISR rate or a special negotiated rate for a period of three years. Allied/CFI's Response to TECO's Motion for Supplemental Protective Order, filed on May 10, 2000, noted that this subsequent purported justification for non-disclosure is inconsistent with the policy underlying CISR tariffs, in that it would prevent TECO from being able to negotiate for Allied/CFI's at-risk load. Nevertheless, Allied/CFI offered to agree to TECO's requested limitation in order to expedite discovery and assure Allied/CFI's due process rights in this litigation.

The Order carefully weighs the direct harm to Allied/CFI's due process rights against the speculative harm to TECO's ability to obtain the maximum benefits possible in future CISR tariff rate negotiations, and strikes a reasonable balance by adopting and modifying the limitation proposed by TECO to prohibit participation by Allied/CFI representatives to whom confidential information is disclosed in future CISR tariff rate negotiations for a period of three years as to any other existing or proposed CISR tariff customers. Again, TECO's motion cannot identify any point of fact or law overlooked or not considered in the Order with respect to this issue, and instead simply reiterates the same arguments it has made on several occasions.

8. The fifth subject of TECO's motion is the requirement that TECO disclose Patrick Allman's rates of pay during his employment with TECO. Mr. Allman is the former TECO employee who negotiated Odyssey's CISR tariff rates on behalf of TECO, and subsequently was offered and accepted employment with Odyssey. Mr. Allman's rates of pay before and after his acceptance of Odyssey's offer of employment clearly is relevant to Allied/CFI's claim that Odyssey's CISR tariff rates appear to be a product of collusion. The Order sustained TECO's objection to production of Mr. Allman's personnel file, and TECO's motion concedes that the Order identified the applicable rule of law in denying the motion to compel production of the personnel file but granting the motion to compel disclosure as to Mr. Allman's rates of pay. Again, TECO's motion cannot identify any point of fact or law overlooked or not considered in the determination of this issue in the Order, and Allied/CFI must be permitted to conduct appropriate discovery concerning its claim that Odyssey's rates are a product of collusion.

9. The sixth subject of TECO's motion is the requirement that TECO must state the numbers of CSAs executed by it as of March 1, 1999, and February 1, 2000. This information is

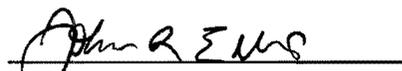
directly relevant to the issue raised in the prefiled direct testimony of Mr. Namoff concerning the misrepresentations by TECO employee Larry Rodriguez, that the CISR tariff rates offered by TECO to Odyssey were "closed down" and that Allied/CFI was "locked out" of obtaining electric service from TECO at rates equal to Odyssey's. The concern expressed in TECO's motion, that Allied/CFI will issue further discovery requests concerning other CSAs, is premature. No such discovery requests have been made by Allied/CFI.

10. Odyssey's motion for reconsideration requests that it be afforded an opportunity to review and, as necessary, redact portions of documents containing certain confidential information related to Odyssey, before production of those documents is made to Allied/CFI. As noted in Odyssey's motion, this matter is being resolved informally.

11. Allied/CFI opposed TECO's and Odyssey's requests for oral argument on the ground that further argument of these matters is unnecessary.

WHEREFORE, for the foregoing reasons, Allied/CFI requests that the Motions for Reconsideration and Motions for Oral Argument filed by TECO and Odyssey be denied.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing Allied/CFI's Response in Opposition to Motions for Reconsideration and Motions for Oral Argument was furnished by hand delivery or by facsimile telecopier(\*) to the following this 13<sup>th</sup> day of July, 2000:

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