

State of Florida



Public Service Commission

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DATE: NOVEMBER 16, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYC)

FROM: DIVISION OF ECONOMIC REGULATION (E. DRAPER)
DIVISION OF LEGAL SERVICES (STERN/ELIAS)MKS

RE: DOCKET NO. 000061-EI - COMPLAINT BY ALLIED UNIVERSAL CORPORATION AND CHEMICAL FORMULATORS, INC. AGAINST TAMPA ELECTRIC COMPANY FOR VIOLATION OF SECTIONS 366.03, 366.06(2) AND 366.07, F.S., WITH RESPECT TO RATES OFFERED UNDER COMMERCIAL/INDUSTRIAL SERVICE RIDER TARIFF; PETITION TO EXAMINE AND INSPECT CONFIDENTIAL INFORMATION; AND REQUEST FOR EXPEDITED RELIEF.

AGENDA: 11/28/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\ECR\WP\000061.RCM

CASE BACKGROUND

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

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DOCKET NO. 000061-EI
DATE: November 16, 2000

On June 27, 2000, the Prehearing Officer issued Order No. PSC-00-1171-CFO-EI (Discovery Order). TECO and Odyssey filed motions for reconsideration of the discovery order. On August 23, 2000, the Commission denied those motions, in part, in Order No. PSC-00-1530-PCO-EI (Order on Reconsideration). One issue raised in the motions was stipulated but with agreement that it could come back before the Commission. That issue pertained to review of confidential information by Mr. Robert Namoff, Allied's president.

On September 6, 2000, TECO filed a second Motion for Reconsideration, challenging the Order on Reconsideration. Allied filed a response in opposition. Issue 1 is Staff's recommendation on TECO's second Motion for Reconsideration.

On October 13, 2000, Allied filed a Motion for Authorization to Disclose Confidential Information Pursuant to Protective Agreement (Motion for Authorization). TECO and Odyssey filed responses in opposition on October 18, 2000. In its motion Allied requests that Mr. Namoff be allowed to review confidential information produced through discovery.

The review of confidential information by Mr. Namoff is an issue for reconsideration, because it was raised on reconsideration and not resolved. Issue 2 disposes of the issue on reconsideration. However, the facts surrounding Mr. Namoff's review of confidential information have changed since the Discovery Order was issued. Whether Mr. Namoff should be allowed to review confidential information, in light of the new facts raised in the Motion for Authorization, is addressed in Issue 3. Although the Motion for Authorization can be ruled on by the Prehearing Officer, he directed Staff to bring it before the full Commission in an effort to expedite matters.

The Commission has jurisdiction over the subject matter pursuant to Sections 366.04, 366.05 and 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant TECO's second Motion for Reconsideration?

RECOMMENDATION: No. Pursuant to Rule 25-22.0376(1), Florida Administrative Code, "the Commission shall not entertain a motion for reconsideration of an order disposing of a motion for reconsideration."

STAFF ANALYSIS: In its second Motion for Reconsideration, TECO claims that the Order on Reconsideration perpetuates ambiguity on how the confidentiality provision of the CISR tariff should be interpreted.

As authority for its Motion, TECO cites Rule 25-22.060, Florida Administrative Code. This rule allows for motions for reconsideration to be filed in response to final orders. However, the Order on Reconsideration that TECO challenges is a non-final order. In addition, the rule TECO cites states: "The Commission will not entertain any motion for reconsideration of any order which disposes of a motion for reconsideration."

Allied filed a Response in Opposition to TECO's second Motion for Reconsideration, arguing that TECO's second motion is prohibited by Rule 25-22.0376(1), Florida Administrative Code.

Rule 25-22.0376(1), Florida Administrative Code, allows a party to file a motion for reconsideration in response to non-final orders. This rule also states: "The Commission shall not entertain a motion for reconsideration of an order disposing of a motion for reconsideration."

Rule 25-22.0376(1), Florida Administrative Code, is the correct rule to apply in this situation, because the order originally challenged and the Order on Reconsideration are non-final orders. TECO violates this rule because its second Motion for Reconsideration requests reconsideration of Order No. PSC-00-1530-PCO-EI, which is an order denying a Motion for Reconsideration (TECO's first Motion for Reconsideration). For this reason, TECO's second Motion for Reconsideration should be denied.

ISSUE 2: Should the motions for reconsideration filed by TECO and Odyssey on July 6 and 7, 2000, respectively, be granted with respect to the issue of Mr. Namoff's ability to review confidential information.

RECOMMENDATION: No. The motions for reconsideration should be denied with respect to the issue of Mr. Namoff's ability to review confidential information.

STAFF ANALYSIS: This issue now comes before the Commission via Allied's Motion for Authorization to Disclose Confidential Information and the responses in opposition of TECO and Odyssey. However, the issue was initially addressed in the Discovery Order and subsequently challenged in motions for reconsideration filed by TECO and Odyssey on July 6 and 7, respectively. The Commission has not yet ruled on the challenge against Mr. Namoff in the motions for reconsideration, although it has disposed of the other issues raised in those motions for reconsideration. The Namoff issue was stipulated with a contingency, as will be described in this analysis.

On June 27, 2000, the Prehearing Officer issued Order No. PSC-00-1171-CFO-EI, the Discovery Order. One requirement of the Discovery Order was that representatives of TECO, Allied and Odyssey sign a nondisclosure agreement. The purpose of the nondisclosure agreement was to allow the representatives of Allied access to confidential information on TECO and Odyssey, and to allow Odyssey access to confidential information on TECO and Allied. The Discovery Order further specified that the president of Allied, Robert Namoff, should be allowed to sign the nondisclosure agreement. Mr. Namoff must sign the agreement in order to review discoverable but confidential information.

Both TECO and Odyssey filed motions for reconsideration of the Discovery Order, challenging the decision to allow Mr. Namoff to enter into the nondisclosure agreement. Staff recommended that the motions be denied because the parties did not identify an error of fact or law in the Discovery Order, and the parties did not raise issues that were not considered in the Discovery Order. The motions for reconsideration were taken up at the August 1, 2000, Agenda Conference. The Commission denied all issues raised on reconsideration except that pertaining to Mr. Namoff.

The Namoff issue was not resolved because Allied proposed a stipulation; Allied would forego Mr. Namoff's signing the nondisclosure agreement if its Chief Operating Officer, Jim Palmer, and its Chief Financial Officer, Michael Koven, were allowed to

sign the agreement. Allied reserved the right to raise the issue before the Commission if Mr. Namoff found the stipulation unacceptable. TECO and Odyssey agreed to the stipulation.

Mr. Namoff found the stipulation unacceptable, and Allied brought the issue back to the Commission through its Motion for Authorization. However, the issue must be resolved as one on reconsideration because the Prehearing Officer already ruled on the same issue. TECO's Motion for Reconsideration, filed on July 6, 2000, and Odyssey's Motion for Reconsideration, filed on July 7, 2000, challenged the Prehearing Officer's decision to allow Mr. Namoff to review confidential information. Allied filed a response in opposition on July 13, 2000.

The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974).

Staff recommends that the motions for reconsideration be denied with respect to whether Mr. Namoff can sign the nondisclosure agreement. TECO and Odyssey fail to identify a point of fact or law which was overlooked or which the Prehearing Officer failed to consider in rendering the Discovery Order.

The Discovery Order imposes no restriction on the types of employees at Allied, Odyssey or TECO who can review confidential information requested through discovery. The Discovery Order specifically addressed whether Mr. Namoff could sign the nondisclosure agreement.

TECO and Odyssey asserted that allowing Mr. Namoff to sign the nondisclosure agreement was "based on an uncritical acceptance of Allied/CFI's unsupported assertion that Allied's president, Mr. Robert Namoff, is the only person within the Allied and CFI corporate entities that can effectively work with Counsel in

reviewing confidential information." They claimed the Commission relied on Allied's assertion without having evidentiary support for that assertion.

Allied argued that to prevent disclosure of confidential information to Mr. Namoff denies Allied's right to due process. Mr. Namoff is the individual who conducted CISR negotiations and is Allied's principal witness. Allied noted that TECO names no other individuals who can represent Allied's interests in this litigation. Allied stated that only three of its employees are capable of representing its interests, all of whom are involved in business strategy and therefore unacceptable to TECO.

Allied stated that TECO's expressed reasons for excluding Mr. Namoff from the nondisclosure agreement were to protect Odyssey's trade secrets, and to prevent a chilling effect on TECO's ability to negotiate at-risk load. Allied maintained that these concerns were addressed in the Discovery Order at pages 10-14. Allied stated that the concern regarding Odyssey was addressed by Allied allowing Odyssey to inspect any documents responsive to Allied's discovery requests before they are produced to Allied. Through the inspection, Odyssey would have the opportunity to redact its trade secrets. Even those individuals who signed the nondisclosure agreement would not be able to review the redacted information because that information would never be produced.

With respect to the chilling effect, Allied argued that such an effect on TECO would be purely speculative even if Mr. Namoff were allowed to review confidential information. However, if Mr. Namoff is prevented from reviewing confidential information, the harm to Allied would be concrete, and would infringe on Allied's right to due process. Allied further argued that the Discovery Order adopted these arguments as part of its rationale for allowing Mr. Namoff to sign the nondisclosure agreement.

Allied correctly summarizes the Discovery Order. TECO implies that accepting statements Allied made in its pleadings to this agency is somehow an error of fact or law. However, TECO provides no evidence to refute Allied's statements and TECO cites no law that was violated.

It was not error for the Prehearing Officer to accept as true, statements that Allied made in signed pleadings filed with this agency. The accuracy of filings with this agency is ensured by regulations that hold attorneys to a certain standard of conduct. See Section 120.569(e), Florida Statutes (requiring that counsel conduct a reasonable inquiry to ensure that a filing is not

interposed for an improper purpose); see also Rule 4-3.3, Rules of Professional Conduct (prohibiting counsel from making a false statement of material fact before a tribunal). Furthermore, staff has no reason to believe that counsel for Allied violated any regulation or misstated facts, and TECO offered no such evidence.

Therefore, Staff recommends that the motions for reconsideration filed July 6 and 7, 2000, by TECO and Odyssey, respectively, be denied with respect to Mr. Namoff's ability to review confidential information, as there has been no showing of error or omission of fact or law.

ISSUE 3: Should Allied's Motion for Authorization be granted with respect to Mr. Namoff's ability to review confidential information?

RECOMMENDATION: Yes. Allied's Motion for Authorization should be granted with respect to Mr. Namoff's ability to review confidential information.

STAFF ANALYSIS: Allied requests, in its Motion for Authorization, that Mr. Namoff and two additional lawyers be allowed to sign the nondisclosure agreement between the parties so that they can review confidential information produced through discovery. This motion could be ruled on by the Prehearing Officer alone. However, in an effort to expedite matters, he requested that the full Commission rule on that part of the motion pertaining to Mr. Namoff.

In its Motion for Authorization Allied states that it attempted in good faith to prepare its case without allowing Mr. Namoff to review confidential information produced through discovery. However, because Mr. Palmer and Mr. Koven did not participate in CISR negotiations with TECO, they cannot respond to a number of issues raised by the documents produced to date. Therefore, they cannot address certain issues in the rebuttal testimony that Allied must file. Allied contends that Mr. Namoff was the only officer who negotiated with TECO and must be allowed to review confidential information produced through discovery so that Allied can adequately prepare its rebuttal testimony.

Allied argues that the distinctions TECO draws between Allied's President and its Chief Financial and Operating Officers are not justified. Allied states that TECO objects to Mr. Namoff because he is involved in marketing and business strategy, yet the

other two officers are also involved in these activities. Therefore argues Allied, if TECO had no objection to Mr. Palmer and Mr. Koven, it has no reason to object to Mr. Namoff.

TECO and Odyssey object to Mr. Namoff reviewing confidential information for several reasons. First, they argue that the issue was resolved at the August 1, 2000 Agenda Conference and that nothing warranting a different result has occurred since that time. Second, they claim that allowing Mr. Namoff to review proprietary information on Odyssey would cause competitive harm to Odyssey and undermine the usefulness of the CISR tariff. Third, they argue that Mr. Namoff's role in CISR negotiations does not make him better able to interpret confidential information.

Staff recommends that the Motion for Authorization be granted with respect to Mr. Namoff. First, the issue was not conclusively resolved at the August 1, 2000 Agenda Conference; the issue was stipulated conditionally and the condition was not satisfied. Allied was therefore justified in bringing the issue back to the Commission. Second, the facts have changed since the August 1, 2000 Agenda Conference in that discovery has been produced to Allied, making Allied aware of issues that it could not anticipate but that it must address in rebuttal testimony. In addition, Allied attempted to address the issues without Mr. Namoff but found his involvement necessary. For these reasons, Staff recommends that Allied's Motion for Authorization be granted with respect to Mr. Namoff.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: No. This docket should not be closed.

STAFF ANALYSIS: This docket should remain open pending the outcome of a hearing on the merits of the case.