

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Sections 366.03, 366.06(2), and 366.07, F.S., with respect to rates offered under commercial/industrial service rider tariff; petition to examine and inspect confidential information; and request for expedited relief.

DOCKET NO. 000061-EI  
ORDER NO. PSC-01-0231-PCO-EI  
ISSUED: January 24, 2001

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS TO COMPEL  
RESPONSES TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

I. BACKGROUND

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

On October 4, 2000, Allied filed its responses to TECO's First Set of Interrogatories (Nos. 1-24) and TECO's First Request for Production of Documents (Nos. 1-12). Allied objected and did not respond to Interrogatory Nos. 2(b)-(e), 3, 5, 6, 7, 8, 9 and 13, and POD Nos. 1, 2 and 3. Allied claimed the information requested by these requests was trade secret, not relevant or both. On October 9, 2000, TECO filed a Motion to Compel Responses to Interrogatories and a Motion to Compel Production of Documents. On October 18,

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2000, Odyssey filed its response to TECO's motions. Allied filed a Response in Opposition to TECO's motions on October 23, 2000.

Part II of this Order provides the legal standards used in disposing of the motions. Parts III and IV rule on the interrogatories and PODs, respectively. Part V of this Order addresses the timeframe for production of information. Part VI of this Order addresses compliance with the non-disclosure agreement.

## II. LEGAL STANDARDS

The legal standards pertaining to Allied's objections are those on the scope of discovery, and on production of trade secret information. With respect to scope of discovery, the information requested must appear reasonably calculated to lead to production of information that will be admissible at the hearing. See Rule 1.280(b)(1), Florida Rules of Civil Procedure.

Disposing of objections based on trade secret requires a two step process. First a determination of whether the information is confidential under Section 366.093, Florida Statutes, must be made. Section 366.093, Florida Statutes, defines "proprietary confidential business information" as:

[I]nformation, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public.

If the information is not confidential, then it can not be withheld from discovery on grounds that it is trade secret. If the information is confidential, the second step of the analysis must be undertaken.

Confidential information may be protected from discovery. See Rule 1.280(c)(7), Florida Rules of Civil Procedure. In deciding whether confidential information should be protected from discovery

two opposing interests must be balanced: the harm that occurs from revealing trade secret information, and the harm that occurs from withholding information from discovery. See Order No. PSC-00-1171-CFO-EI issued on June 27, 2000 in this docket (Discovery Order) at 7-8.

Broad discretion is granted in balancing the competing interests of the parties and a wide variety of factors can be considered. See id. The Discovery Order identifies factors that have been deemed important in this proceeding. The factors include, but are not limited to, whether production would: 1) directly harm Odyssey's ability to compete in its native market; 2) reveal TECO's negotiating floor for CISR customers; and, 3) dissuade other at risk customers from pursuing a CISR rate with TECO.

### III. INTERROGATORIES

#### A. Interrogatory Nos. 2(b)-(e) and 3

The parties' arguments on Interrogatory Nos. 2(b)-(e) and 3 are the same.

Interrogatory Nos. 2(b)-(e) and 3 are as follows:

2. For each product identified in response to Interrogatory No. 1,<sup>1</sup> please provide the following information:
  - b. The annual volume of each product produced by Allied/CFI, by manufacturing facility;
  - c. Allied/CFI's market share in Florida for each product;
  - d. Allied/CFI's 15 largest customers (by volume sold) for each product; and

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<sup>1</sup> Interrogatory No. 1 asks Allied to list each of the bleach products and related specialty chemicals it produces.

- e. Allied/CFI's annual gross revenue derived from the sale of each product in Florida.
3. Please identify Allied/CFI's competitors in Florida for each of the products identified in response to Interrogatory No. 1.

Allied objects to providing this information on grounds that it is trade secret and not relevant to the issues in this docket.

In its Motion to Compel, TECO argues that the information is relevant because it will shed light on issues such as: 1) the genuineness of Allied's interest in locating its proposed new plant in Tampa; and, 2) the nature and extent of any competitive disadvantage caused by Allied's negotiations with TECO for a CISR rate. TECO further argues that because Allied claims it is economically disadvantaged and its ability to compete with Odyssey is compromised by TECO's discriminatory implementation of the CISR tariff, these claims are subject to verification through discovery.

Odyssey notes that, with respect to the trade secret privilege, the Commission must weigh the importance of protecting Allied's trade secrets against the interest in facilitating the hearing and promoting justice. Odyssey further notes that some corporate communications may be discoverable even though they are trade secrets. Odyssey believes the information TECO seeks is relevant because Allied claims it suffered undue and unreasonable prejudice and disadvantage as a result of the difference in CISR rates TECO offered to Allied and to Odyssey.

Allied argues, in its Response in Opposition to TECO's motion, that the information is not relevant because it is directed to the issue of consequential damages caused by TECO's violation of Sections 366.03, 366.06(2), and 366.07, Florida Statutes. Allied states that the Commission has no jurisdiction to award damages to Allied. See Southern Bell T&T v. Mobile America Corp., Inc., 291 So. 2d 199 (Fla. 1974). Allied notes that its Request for Relief does not ask for any finding or determination of damages. Allied states that it agrees with the presumption underlying TECO's discovery requests, that the measure of damages for violation of the above mentioned statutes is determined by market-based losses rather than the amount by which TECO overcharged or undercharged in rates multiplied by the amount of consumption.

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In addition, Allied argues that the information TECO requests about Allied's business operations is the same type of information that Odyssey was protected from disclosing. See Order No. PSC-00-1171-CFO-EI issued June 27, 2000 (Discovery Order). Allied points out that, in deciding whether to compel responses to discovery, two important factors to be weighed are the impact of disclosure on business operations and whether a fair trial can be had without the information. See id.

The information TECO seeks is relevant to determining whether Allied has standing, an issue in this case. To have standing, an entity's substantial interests must be affected by the proceeding. An entity's substantial interests are affected when the entity will suffer actual and immediate injury as a result of the proceeding, and when the injury is of a type that the proceeding is designed to protect against. See Agrico Chemical Co. V. Dep't of Environmental Protection, 406 So. 2d 478, 482 (Fla 2d DCA 1981). The information requested is relevant to assessing harm to Allied, and is therefore relevant to determining whether Allied's substantial interests are affected.

With respect to Allied's claim that the information sought is trade secret, I agree. The information TECO requests is proprietary confidential business information under Section 366.093, Florida Statutes. The information is controlled by Allied, Allied treats it privately because disclosure would cause harm to its business operations, and Allied has presumably not disclosed this information in the past.

Allied's ability to compete would be greatly harmed if the requested information were disclosed to Odyssey. In addition, allowing disclosure to Odyssey could create a chilling effect on potential CISR customers. Customers might prefer to move out of TECO's service area rather than pursue CISR negotiations if they perceive such negotiations carry a risk of disclosure of trade secrets to competitors. Finally, Odyssey will not be harmed by not seeing the information. Therefore, the requested information shall not be disclosed to Odyssey.

However, Allied has not explained how it would be harmed by disclosure of this information to TECO. Allied argues that Allied should not have to provide confidential information on its business operations because Odyssey did not have to provide such

information. In the Discovery Order, confidential information on Odyssey's business operations was ruled to be not discoverable by Allied. Here, confidential information on Allied's business operations is being ruled not discoverable by Odyssey. Therefore, with respect to production of confidential business information, Odyssey and Allied are being treated the same.

Allied will not be harmed by disclosure of the information to TECO. Any information produced to TECO in this docket is subject to the non-disclosure agreement, so Allied can be assured that TECO will not reveal that information to competitors. In addition, TECO shall not reveal the information to any representatives of Odyssey.

While production of the information to TECO will not harm Allied directly, it could create a chilling effect on potential CISR customers. As was discussed in the Discovery Order, the potential for release of confidential information which does not directly harm a customer may make some potential CISR customers less likely to use the CISR tariff than if secrecy of all information was a certainty. See Discovery Order at 9.

If the information is withheld from TECO, its ability to prepare for the hearing would be significantly impaired. I find that the harm of producing the information is small and not outweighed by the harm to TECO of withholding the information. Therefore, Allied must provide the requested information to TECO.

B. Interrogatory Nos. 5, 6 and 7

Interrogatory Nos. 5, 6 and 7 are as follows:

5. Please describe in detail the substance of all conversations, correspondence, meetings, comments offers or contacts of any kind between Allied/CFI representatives who have executed the Non-Disclosure agreement in this proceeding and existing or potential customers related, in whole or in part, to Odyssey Manufacturing Company, its products, prices, operations or representatives since August 1, 2000.
6. Please describe in detail the substance of all conversations, correspondence, meetings, comments offers or contacts of any kind, other than those

identified in response to Interrogatory No. 4,<sup>2</sup> between Allied/CFI and existing or potential customers related, in whole or in part, to Odyssey Manufacturing Company, its products, prices, operations or representatives since August 1, 2000.

7. For each event described in response to Interrogatory Nos. 5 and 6, provide the following information:
  - a. Identify the Allied/CFI representative and the Customer representative involved in each event;
  - b. State when and where the event took place; and
  - c. Identify any documents that refer to or memorialize the event.

The positions of Allied and TECO on these interrogatories are the same as described in Section A, above. In addition to its basic position, summarized in Section A, Odyssey suggests that responses to these interrogatories be required to the extent that Allied may have used this proceeding as a competitive tool in the marketplace.

These interrogatories appear calculated to produce information more relevant to whether Allied violated the non-disclosure agreement than information on harm to Allied. For example, the only communications of interest to TECO are those that occurred after August 1, 2000, when the Commission determined that Allied could review confidential information in TECO's CISR files. If TECO's primary interest was in competitive harm to Allied, the relevant time frame would start when Odyssey received the CISR rate and could begin marketing efforts with that rate, which was in

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Interrogatory No. 4 is as follows:

4. Please identify the products identified in response to Interrogatory No. 1 that Allied/CFI sells in competition with Odyssey Manufacturing Company in Florida.

1998. In fact, Odyssey addresses these interrogatories specifically by noting that the information should be produced to the extent it was used competitively in public.

Compliance with the non-disclosure agreement is not an issue on which we will admit evidence at the hearing. Although the questions may ultimately provide some sort of information on competitive harm to Allied, they are not reasonably calculated to do so and are therefore beyond the scope of discovery. See In re: Investigation of utility rates of Aloha Utilities, Inc. in Pasco County, 99 FPSC 10:78 (reviewing interrogatories and determining whether they are reasonably calculated to lead to admissible evidence). Allied need not respond to these interrogatories.

C. Interrogatory Nos. 8 and 9

Interrogatory Nos. 8 and 9 are as follows:

8. List each bid or written offer made in direct competition with Odyssey Manufacturing Company by Allied/CFI since October 1, 1998, for the sale of one or more of the products identified in response to Interrogatory No. 4.
9. For each bid or offer identified in response to Interrogatory No. 8, provide the following information:
  - a. The identity of the customer to whom the bid or offer was submitted;
  - b. The product to be sold;
  - c. The date on which the bid or offer was submitted to the customer;
  - d. A detailed description of the price, terms and conditions bid or offered;
  - e. An explanation of how the price offered or bid was calculated;



- f. The identity of the person or persons who formulated the bid or offer;
- g. The identity of the person or persons who presented or delivered the bid or offer to the customer;
- h. The price, terms and conditions bid or offered by Odyssey Manufacturing Company;
- i. The Customer's response to Allied/CFI's bid or the offer or current status of the bid or offer; and
- j. The substance of any communications between Allied/CFI and the customer with regard to Odyssey Manufacturing's bid or offer.

The positions of Allied and TECO on these interrogatories are the same as described in Section A. In addition to its basic position, summarized in Section A, Odyssey suggests determining whether bid information sought by these interrogatories is public record or has otherwise been disclosed.

With respect to relevance, I find that these questions are reasonably calculated to lead to evidence admissible at the hearing. Specifically, the questions may produce evidence on harm to Allied as a result of TECO's implementation of the CISR tariff. Therefore, the questions are within the scope of discovery.

The information TECO requests is proprietary confidential business information under Section 366.093, Florida Statutes. The information is controlled by Allied, Allied treats it privately because disclosure would cause harm to its business operations, and Allied has presumably not disclosed this information in the past.

Allied shall provide TECO, but not Odyssey, with responses to Interrogatory Nos. 8 and 9. Only TECO representatives who signed the non-disclosure agreement and Commission Staff may see the information. This assures that Allied's competitive interests will not be harmed. Production of such information under these conditions may still have a limited chilling effect on some potential CISR customers. If the information is not produced,

TECO's ability to offer evidence addressing the allegations in the complaint against the Complaint could be impaired, because the questions will provide information on harm to Allied starting from the time Odyssey signed a contract service agreement. I find that the harm of producing the information to TECO is not outweighed by the harm to TECO of withholding the information.

Allied will not have to produce this information to Odyssey because that would greatly harm Allied's ability to compete in its native market. It could also create a serious chilling effect that could lead potential CISR customers to prefer relocation over negotiating a CISR rate. Furthermore, Odyssey has not alleged that it would be harmed if the information is withheld, and I can not identify any harm to Odyssey if the information is withheld. For these reasons, the requested information shall not be disclosed to Odyssey.

D. Interrogatory No. 13

Interrogatory No. 13 is as follows:

13. Please identify the "industry sources" referred to at page 12 of Mr. Robert M. Namoff's direct testimony who provided him information regarding Mr. Allman's position, title changes and salary level with Odyssey and who indicated that Mr. Patrick Allman was rewarded by Odyssey by providing him with a job for giving "preferential rates" while in the employ of Tampa Electric.

Allied objects to this interrogatory on grounds that it requires production of trade secrets. TECO argues that Allied's failure to object based on lack of relevance is a tacit admission that the information is relevant and should be produced. TECO indicates that the non-disclosure agreement between the parties addresses Allied's concern about disclosing trade secrets.

The information TECO requests is proprietary confidential business information under Section 366.093, Florida Statutes. The information is controlled by Allied, Allied treats it privately because disclosure would cause harm to its business operations, and Allied has presumably not disclosed this information in the past.

Allied shall not be required to produce the information to TECO. First, producing this type of information is likely to have a significant chilling effect on potential CISR customers. Second, TECO's ability to defend itself against Allied's Complaint will not be significantly impaired by lack of this information. I find that the harm of production outweighs the harm of withholding the information.

Allied shall not be required to produce the information to Odyssey because production would harm Allied's ability to compete in its native market. It would also create a chilling effect on other potential CISR customers. Odyssey has not alleged that it would be harmed if the information is withheld and I can think of no harm that would occur to Odyssey if the information is withheld from it. The harm from producing the information to Odyssey therefore outweighs the harm of withholding the information from Odyssey.

#### IV. REQUESTS FOR PRODUCTION OF DOCUMENTS (PODs)

Allied objects to PODs 1,2 and 3 on grounds that they request information that is not relevant and that is regarded as trade secret. The parties' positions and arguments are the same as for the interrogatories, and are summarized in Part II, Section A of this Order. With respect to POD No. 3, Odyssey adds the suggestion that it should be determined whether bid information sought by these PODs is public record or has otherwise been disclosed.

PODs 1,2 and 3 are as follows:

1. Provide all documents created by or for Allied/CFI that relate to the topic of competition between Allied/CFI and Odyssey Manufacturing Company ("Odyssey") in Florida, including but not limited to: market analyses, marketing strategies or evaluations of competitors, to the extent that such documents discuss or pertain to Odyssey.
2. Provide all documents created by or for Allied/CFI that relate to Allied/CFI's ability to compete in the Florida market for the sale of bleach or bleach products.
3. Provide all documents that relate to competitive bids or formal proposals made by Allied/CFI for the sale of

bleach to customers in Florida, including, but not limited to: request for proposals, bids or offers submitted, work papers detailing development of bids or offers, bidding strategy, timing of submission of bids or offers, acceptance of bids or offers by customers and information with regard to competing bids or bidders.

These requests are likely to shed light on any competitive disadvantage that Allied suffered due to TECO's implementation of the CISR tariff. They are therefore relevant.

The information requested is proprietary confidential business information under Section 366.093, Florida Statutes. The information is controlled by Allied, Allied treats it privately because disclosure would cause harm to its business operations, and Allied has presumably not disclosed this information in the past.

Allied shall produce the information to TECO and Commission Staff but does not have to produce it to Odyssey. Because the information is confidential it must be produced subject to the non-disclosure agreement, so the only potential for competitive harm to Allied is through disclosure to Odyssey. TECO shall not disclose the information to Odyssey and may only disclose the information to TECO's representatives who have signed the non-disclosure agreement. If the information is not produced to TECO, TECO's ability to defend against Allied's complaint will be impaired. I therefore find that the harm of producing the information to TECO is not outweighed by the harm of withholding the information from TECO.

#### V. TIMEFRAMES

Given that the hearing is less than one month away, all documents shall be produced by the close of business on January 26, 2001. In addition, under the authority of Rule 28-106.206, Florida Administrative Code, the time for filing a motion for reconsideration and response to such motion shall be shortened. Any motion for reconsideration of this order must be filed by January 29, 2001, at noon, and any response to such motion must be filed by the close of business on January 31, 2001.

VI. COMPLIANCE WITH NON-DISCLOSURE AGREEMENT

At the December 5, 2000, Agenda Conference TECO and Odyssey indicated that Allied was violating the non-disclosure agreement. Possible violation of the agreement concerns me greatly. Of equal concern are ungrounded allegations of violations. The primary focus of Interrogatory Nos. 5-7 appears to be Allied's compliance with the non-disclosure agreement. Discovery is not the proper method for collecting information on compliance with the non-disclosure agreement. Compliance with the agreement is not an issue for the hearing on which evidence will be taken.

Compliance with the agreement, however, is essential to assure the fairness of this proceeding. Order No. PSC-00-1171-CFO-EI (Discovery Order), issued on June 27, 2000, in this docket requires that confidential information in this docket be produced subject to a non-disclosure agreement. The Discovery Order states that the non-disclosure agreement between the parties must, at a minimum, prohibit parties to this proceeding from disclosing confidential information produced in this to proceeding to anyone other than the individuals who signed the agreement.

Beginning with the issuance of the Discovery Order, controversies over allowable discovery have arisen and orders have been issued compelling production of confidential material. If confidential information produced pursuant to order has been willfully disclosed to individuals who have not signed the non-disclosure agreement, then the order compelling production has been violated. Section 366.095, Florida Statutes, allows for penalties to be imposed on any entity subject to the Commission's jurisdiction that has willfully violated an order of this Commission. Any allegations of non-compliance shall be officially filed with the Division of Records and Reporting.

Based on the foregoing, it is

ORDERED by E. Leon Jacobs, as Prehearing Officer, that Allied Universal Corporation and Chemical Formulators, Inc. shall respond to Interrogatory Nos. 2(b)-(e) and 3, propounded by Tampa Electric Company. The information shall be provided only to representatives of Tampa Electric Company who have signed the non-disclosure agreement and to Commission Staff. It is further

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ORDERED that Allied Universal Corporation and Chemical Formulators, Inc. shall not be required to respond to Interrogatory Nos. 5, 6 and 7, propounded by Tampa Electric Company. Its is further

ORDERED that Allied Universal Corporation and Chemical Formulators, Inc. shall respond to Interrogatory Nos. 8 and 9, propounded by Tampa Electric Company. The information shall be provided only to representatives of Tampa Electric Company who have signed the non-disclosure agreement and to Commission Staff. It is further

ORDERED that Allied Universal Corporation and Chemical Formulators, Inc. shall not be required to respond to Interrogatory No. 13, propounded by Tampa Electric Company. It is further

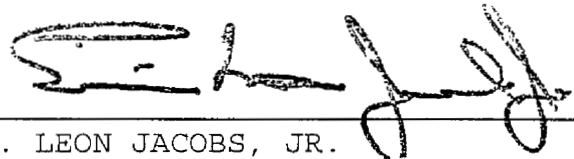
ORDERED that Allied Universal Corporation and Chemical Formulators, Inc. shall respond to Tampa Electric Company's Request for Production of Documents, Nos. 1, 2 and 3. The information shall be provided only to representatives of Tampa Electric Company who have signed the non-disclosure agreement and Commission Staff. It is further

ORDERED that all information that Allied Universal Corporation and Chemical Formulators, Inc. is ordered to produce herein shall be produced by the close of business on January 26, 2001, any motion for reconsideration of this order shall be filed by January 29, 2001, at noon, and any response to such motion shall be filed by the close of business on January 31, 2001. It is further

ORDERED that any allegations of non-compliance with the non-disclosure agreement required in Order No. PSC-00-1171-CFO-EI, issued on June 27, 2000, in this docket, shall be officially filed with the Division of Records and Reporting.

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By ORDER of Commissioner E. Leon Jacobs, Jr. as Prehearing Officer, this 24thDay of January, 2001.



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E. LEON JACOBS, JR.  
Commissioner and Prehearing Officer

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration no later than noon on January 29, 2001; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060,

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Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.