BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

ORIGINAL

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, 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

INTERVENORS'
MOTION TO STRIKE

ODYSSEY MANUFACTURING COMPANY and SENTRY INDUSTRIES, INC. (collectively referred to as "Intervenors"), by and through undersigned counsel, hereby files this Motion to Strike certain prefiled testimony and allegations in the Complaint in this matter. This Motion to Strike addresses three categories of allegations which should be stricken: (a) statements in the prefiled testimony or Complaint which should be stricken because they are hearsay and because they are statements on which discovery has been denied, (b) portions of the prefiled testimony or Complaint specifically related to alleged reductions of environmental hazards, on which discovery has also been denied, and (c), portions of the testimony of Mr. Namoff and Mr. DeAngelis which are not proper rebuttal. In support thereof, Intervenors would state and allege as follows:

1. The Complainants in this proceeding, in the prefiled testimony of Robert Namoff and in their Complaint, have directed at Intervenors several unfounded, scandalous and specious allegations. There is no factual basis for these defamatory allegations. Complainants nonetheless

recklessly asserted them as a red herring to overcome the presumption of confidentiality to which Odyssey was entitled under the CISR tariff[1] and thereby persuaded the Commission to provide them access to Odyssey's CISR rate and terms and conditions of service. On information and belief, Intervenors assert that Complainants have used their knowledge of Odyssey's CISR rate (obtained through their scandalous and uninformed allegations), inter alia, in formulating their bidding strategy for the provision of sodium hypochlorite to municipal water and wastewater treatment facilities in Florida, in violation of the Protective Agreement and to the prejudice of Odyssey. The Prehearing Officer has however recently ruled that "compliance with the non-disclosure agreement is not an issue on which we will admit evidence at the hearing". Order No. PSC-01-0231-PCO-E1 (January 24, 2001) at p.8 .

Mr. Namoff's deposition was held on February 7-8, 2001. The deposition transcript and exhibit have been deemed confidential by stipulation among counsel pursuant to the Prehearing Officer's direction. Order No. PSC-00-1171-CFO-E1 (June 27, 2000) at p. 20. The transcript first became available to the Intervenors on February 14, 2001. The relevant attempted examination of Mr. Namoff, and related matters of record regarding the allegations of improper conduct can be found inter alia, at Vol. 1, pp. 99-103; and Vol. 2, pp. 173-195 and pp. 235-246 of the sealed transcript of Mr. Namoff's deposition. Due to the confidential nature of this testimony, further argument will be made on the same at the time of the hearing on this Motion.

2. The following statements and allegations should be stricken from Complainants' prefiled testimony and Complaint:

---

[1]See paragraph 20 of the Complaint.

From Robert M. Namoff's prefiled direct testimony:

Page 2, Lines 17 - 20.

> Q. What is the purpose of your testimony?
>
> A. . . . I note that the TECO employee who offered the preferential rates to Odyssey has since been rewarded by an offer of employment with Odyssey and has been actively soliciting Allied/CFI's customers on behalf of Odyssey.

Page 12, Lines 14 - 22:

> Q. Has anything else caused you to question whether TECO responded in good faith to Allied/CFI's request for rates for the new plant?
>
> A. Yes. I have heard from industry sources that the TECO employee who offered the preferential rates to Odyssey for Odyssey's Tampa plant, Patrick Allman, was rewarded by Odyssey with a job providing him with a guaranteed annual salary in excess of $100,000; and that Mr. Allman has had little success in his employment with Odyssey and has been transferred between three different job titles in approximately one year, but that Odyssey guaranteed him a job for a period of years because "they owe him."

Complaint

> Paragraph 19. Allied has learned the TECO employee who negotiated the CISR tariff rates for Odyssey has been offered and has accepted employment with Odyssey; and the TECO employee who negotiated the CISR tariff rates for Odyssey has been actively soliciting existing Allied customers for Odyssey. These circumstances strongly suggest that TECO's undue discrimination may have been deliberately intended, by one or more of the participants in the CISR tariff rate negotiations between TECO and Odyssey, to affect the non-electric marketplace as warned of by the Commission staff.
>
> . . .
>
> Paragraph 20. . . . (b) the unique circumstances of the CISR tariff rate negotiations between TECO and Odyssey and between TECO and Allied/CFI and subsequent conduct by the mutual employee of TECO and Odyssey, strongly suggest that the undue discrimination in rates is a product of collusion.

3. *The statements alleging collusion or fraud should be stricken because they are*

uncorroborated hearsay. The obvious purpose of the statements alleging collusion or fraud is to suggest that Intervenors have somehow unfairly influenced the negotiation of its CISR rate through fraud or collusion. The statements alleging collusion or fraud are not only untrue and unsupported, they are clearly uncorroborated hearsay and therefore inadmissible in this proceeding. Section 120.57(1)(c), Fla. Stat., provides that "hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall be insufficient in and of itself to support a finding unless it would be admissible over objection in civil actions." Such hearsay is therefore inadmissible in an administrative proceeding, under Section 120.57(1)(c), Fla. Stat. unless it "corroborate(s) otherwise competent testimony or evidence".[2]

4. On its face, the prefiled testimony filed by Complainants suggests that there will be no other evidence to support or corroborate the statements alleging collusion or fraud. Additional argument on this issue, related both to information revealed in the sealed depositions and which demonstrates how Complainants effectively frustrated any discovery on these matters, will be presented at oral argument in support of this Motion.

5. The Commission could not, and will not, legitimately base a finding of fact upon this unreliable hearsay. Even so, it is not enough that the Commission merely ignore these statements (only according to them that weight to which they are entitled – which is zero). Intervenors should not have to suffer damages to their reputations or to expose themselves to even the smallest possibility that a finding of fact in the Order will be based upon these irrelevant, unsupportable, and

---

[2] *Curry vs. United Parcel* (DOAH Case No. 98-1722, June 24, 1999). Accord *Wark vs. Home Shopping Club, Inc. and Florida Unemployment Appeals Commission*, 715 So.2d 323 (2d DCA 1998). In the *Wark* case, the District Court of Appeals determined that "because these documents were the only evidence presented of Ms. Wark's misconduct, they do not supplement or explain other evidence". *Wark* at 325.

untested allegations. Likewise, it is insufficient for the Commission to merely direct the questions be answered at the time of hearing, since Intervenors have been denied any opportunity to effectively prepare for such cross-examination. Cross-examination by Intervenors under those circumstances would be ill-advised, at a minimum. Clearly, the statements alleging collusion or fraud are nothing more than an attempt by the Claimants to perpetuate a fraud on this Commission by and through their claim that the statements alleging collusion or fraud must not be cross-examined or to the "confidentiality" of the underlying information tested. The statements alleging collusion or fraud should be stricken in their entirety and the Complainants ordered not to refer or mention the unproven and unsubstantiated charges contained within the statements alleging collusion or fraud when this matter proceeds to hearing.

6. *The statements alleging collusion or fraud should be stricken because Intervenors will be unable to conduct cross-examination on them.* Not only should the statements alleging collusion or fraud be stricken because they are rank and uncorroborated hearsay, but the statements alleging collusion or fraud should also be stricken on the independent basis that the Complainants' refusal to allow any discovery with regard to the statements alleging collusion or fraud at Mr. Namoff's deposition has effectively deprived Intervenors of any ability or basis to cross-examine these statements alleging collusion or fraud.

7. The Administrative Procedure Act provides, and this Commission has recently recognized, that parties to formal administrative hearings have certain inalienable rights. Section 120.569(2)(j), Fla. Stat. provides that a party shall be permitted to conduct cross examination when testimony is taken or documents are made a part of the record. Section 120.57(1)(b), Fla. Stat. further provides that all parties shall have an opportunity to respond, to present evidence and

argument on all issues involved, to conduct cross-examination and to submit rebuttal evidence.[3]

8. Intervenors' rights have been denied in this case by the refusal of witness Namoff to answer questions at his deposition intended to discover information about the statements alleging collusion or fraud.

9. The incontrovertible facts are: (a) that because the Complainants refused to answer any discovery which attempted to establish the basis (or lack thereof) for the statements alleging collusion or fraud and (b) that the Intervenors have been unable, despite diligent efforts, to uncover that information from the only source from which the information could be obtained (the Complainants themselves). The Complainants refusal to respond to any questions on these matters not only denies Intervenors the ability to adequately and fairly prepare for cross-examination but, in point of fact, it is only logical to assume the Complainants will similarly refuse to respond to cross-examination questions (even if they are asked "cold" at the time of hearing) on these same statements and allegations[4].

10. This Commission has repeatedly commented upon the absolute right which must be afforded litigants to conduct cross-examination of opposing witnesses and evidence. In the case of *In Re: Application for transfer of Certificates in Citrus County from J & J Water and Sewer Corporation to Meadows Utility Company, Inc.*, Order No. PSC-98-0043-FOF-WS, January 6, 1998,

---

[3] Recently, this Commission, in the case of *In Re: Complaint of Mother's Kitchen, Ltd. vs. Florida Public Utilities Company regarding refusal or discontinuance of service*, Order No. PSC-99-0186-FOF-GU (February 3, 1999) agreed to strike attachments to a Motion for Reconsideration, noting that: [A]dditionally, Section 120.57(1)(b), Fla. Stat. mandates that all parties have an "opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination, and submit rebuttal evidence. **Consideration of these documents in this context would deny FPUC these rights.** (emphasis added)

[4] Obviously, the Complainants will have engaged in sanctionable conduct if they have refused to answer these questions at the time of deposition and in discovery, but suddenly have a "change of heart" and answer cross-examination questions on the same issues at the time of hearing.

the Commission, when reviewing whether a late-filed objection should be allowed into evidence in that proceeding, found that:

> It is long-standing Commission policy that late-filed exhibits are subject to objection by parties of record. **This is because parties have not had an opportunity to conduct cross-examination** so as to determine the reliability and credibility of that evidence. In Order No. PSC-95-1247-FOF-TL . . . [we] stated that **"in and of itself, the inability to conduct cross-examination is a sufficient basis to deny the admission into evidence of this exhibit".**
>
> Likewise, we find that the Jones' inability to conduct cross-examination on Late-Filed Exhibit No. 11 constitutes a sufficient basis to deny admission of that exhibit. (emphasis added)

The earlier case the Commission referred to above was the case of *In Re: Investigation into the rates for interconnection of mobile service providers with facilities of local exchange companies*, Order No. PSC-95-1247-FOF-TL, October 11, 1995. In that case, the Commission specifically noted that their ruling was based upon the fact that "parties have not had an opportunity to conduct cross-examination of the late filed exhibit so as to determine the reliability or credibility of that evidence" and "in and of itself" that inability is a sufficient basis to deny admission into evidence of the exhibit.

11. The prejudicial effect of the inability to cross-examine, and its irreversible effect on a party's ability to advance its position with regard to issues in litigation (or expose the falsity of adverse evidence) has been recognized by the United States Supreme Court as a judicial concept which has existed for over two thousand years. In the case of *Greene vs. McElroy, et al.*, 360 U.S. 474 (1959), the Supreme Court noted that the ability to cross-examine was perhaps most important where the evidence consists of the testimony of individuals whose memory might be faulty, or who, **in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance,**

prejudice, or jealousy. *Greene* at 496. In making the statements alleging collusion or fraud, it is the position of the Intervenors that Allied, and specifically Mr. Namoff, are similarly motivated and the Intervenors will be effectively denied any ability to cross-examine the statements alleging collusion or fraud so as to reveal that motivation for what it is. The Supreme Court, noting that "we have formalized these protections in the requirements of confrontation and cross-examination" further stated that "[t] his Court has been zealous to protect these rights from erosion" and that these protections, not only in criminal cases "but also in all types of cases where administrative and regulatory actions were under scrutiny". The Supreme Court noted that this right to confront one's accuser has existed for 2,000 years, since the time of King Agrippa, and cited Professor Wigmore as follows:

> For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safe guard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test has found increasing strength in lengthening experience. *Green at 497.*

12. The right of cross-examination and its role in achieving an evidentiary record which is reliable to the finder of fact is equally important (and may be equally denied) by government regulation denying the accused access to the information (as in the *Greene* case), by late-filed exhibit which cannot be cross-examined because the record is closed, or by a party's refusal to answer discovery questions or to allow any inquiry into matters which **that very party itself** has brought to issue.

13. If the statements alleging collusion or fraud are allowed to stand, Complainants will

have abused this administrative process (and will have made a mockery of the legitimate protections which the confidentiality rules provide, with the Commission as their unwilling cohorts) by making these reckless allegations without any attendant obligation to establish or demonstrate that the statements alleging collusion or fraud pass even minimal muster as to their reliability or truthfulness. Such serious allegations should be made to withstand the glaring light of day. However, if the Complainants have their way, not even the dimmest light will illuminate the lack of basis for the statements alleging collusion or fraud.[5] The fact that Intervenors will be unable to cross-examine the statements alleging collusion or fraud, in and of itself, is a sufficient basis to deny the admission into evidence of the prefiled testimony and is a sufficient basis to provide that the allegations in the Complaint, as referenced herein above, should be stricken.

14. *Mr. Namoff 's prefiled testimony and allegations in the Complaint as to alleged reduction of environmental hazards should be stricken.* The following portions of Mr. Namoff's testimony and the Complaint should be stricken:

Complaint

> Paragraph 14.... and would reduce potential environmental hazards involved in the handling of bulk chlorine and caustic soda.

Testimony

Page 5, Lines 14-19.

Q. Would Allied/CFI build a new plant in Tampa if TECO's CISR tariff rates for electric service were non-discriminatory?

[5] It is interesting to note how energized the Complainants become whenever they believe that they may be damaged by any revelation, including the most basic facts which would be necessary to support the statements alleging collusion or fraud. Clearly, Complainants are much less reluctant to damage the reputation and business of Intervenors than they are to reveal even the most elementary facts about their own testimony.

A. . . . and would reduce potential environmental hazards involved in the handling of bulk chlorine and caustic soda.

15. Mr. Namoff's deposition was held on February 7-8, 2001. The deposition transcript and exhibits of Mr. Namoff have been deemed confidential pursuant to stipulation among counsel pursuant to the Prehearing Officer's directions. Order No. PSC-00-1171-CFO-EI (June 27, 200) at p. 26. The transcript first became available to Intervenors on February 14, 2001. Attempted examination of Mr. Namoff related to the allegations that Complainants' new proposed Tampa operation would reduce environmental hazards, can be found at, inter alia, Vol. 2, pp. 152-153, 155-168, 229-230, in conjuction with Deposition Exhibits No. 2 and 4. There was a complete denial of discovery attempting to explore the extent, if any, to which the proposed Tampa plant modification would reduce the environmental hazards at the plant.

16. *Mr. DeAngelis's entire prefiled rebuttal testimony and certain portions of Mr. Namoff's rebutall testimony should be stricken*. The prefiled rebuttal of Peter DeAngelis in its entirety and p. 1, line 18 through p. 9, line 27 of prefiled rebuttal of Robert Namoff (as well as Exhibit RMN 15 through RMN 19) should be stricken. Complainants filed a Notice of Intent to seek confidential classification of the bulk of their rebuttal testimony and exhibits on January 22, 2001. Because of a pending request for confidential classification on these matters, more specific arguments on this issue will be made at the time of oral argument in support of this motion. Mr. DeAngeliss' prefiled rebuttal simply does not "rebut" any direct testimony in this proceeding and is therefore improper and should be stricken. Similarly, (in p.1, line 18, through p. 9, line 27 of his prefiled rebuttal), Mr. Namoff merely restates, refines and attempts to bolster his prefield direct testimony. Said testimony and exhibits simply do not "rebut" any direct testimony in this

proceeding, and are therefore improper and should be stricken.

WHEREFORE, and in consideration of the above, Intervenors respectfully request that this Commission strike the statements alleging collusion or fraud as uncorroborated hearsay, on which a finding of fact could not be based, or in the alternative, on the basis that the Complainants' own actions have deprived Intervenors of any opportunity to engage in cross-examination of the statements alleging collusion or fraud. Further, the testimony of Robert Namoff regarding the alleged reduction in environmental hazards should also be stricken because Complainants' actions deprived Intervenors of the opportunity to engage in cross-examination as to that issue. Finally, the prefiled rebuttal testimony of Peter DeAngelis and portions of Mr. Namoff's prefiled rebuttal testimony should be stricken in their entirety, as they are not valid "rebuttal" testimony.

Dated this 16th day of February, 2001.

WAYNE L. SCHIEFELBEIN, ESQ.
P.O. Box 15856
Tallahassee, FL 32317-5856
(850) 422-1013
(850) 531-0011 (Fax)

And

JOHN L. WHARTON, ESQ.
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555
(850) 656-4029 (Fax)

Attorneys for Intervenors, ODYSSEY MANUFACTURING COMPANY and SENTRY INDUSTRIES, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike has been furnished by Facsimile and U.S. Mail to the following on this 16th day of February, 2001:

Robert V. Elias, Esq.
Marlene K. Stern, Esq.
Division of Legal Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Kenneth Hoffman, Esq.
John Ellis, Esq.
Rutledge Law Firm
P.O. Box 551
Tallahassee, FL 32302

Patrick K. Wiggins, Esq.
Katz, Kutter, Haigler, et al.
106 East College Avenue
Tallahassee, FL 32301

Harry W. Long, Jr., Esq.
Tampa Electric Company
P.O. Box 111
Tampa, FL 33601

Lee Willis, Esq.
James D. Beasley, Esq.
Ausley & McMullen
P.O. Box 391
Tallahassee, FL 32303

Daniel K. Bandklayder, Esq.
Anania, Bandklayder, et al.
100 S.E. 2nd Avenue, Suite 4300
Miami, FL 33131-2144

Philip A. Allen, III, Esq.
Lucio, Bronstein, et al.
80 S.W. 8th Street, Suite 3100
Miami, FL 33131

Scott J. Fuerst, Esq.
Ruden, McClosky, et al.
200 East Broward Boulevard
Ft. Lauderdale, FL 33301

JOHN L. WHARTON, ESQ.

odyssey\strike.mot