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, 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 FOR SUMMARY FINAL ORDER

ODYSSEY MANUFACTURING CO. and SENTRY INDUSTRIES, INC. (collectively referred to as "Intervenors"), pursuant to Rule 28-106.204(4), Fla. Admin. Code, and by and through undersigned counsel, hereby files this Motion for Summary Final Order, and in support thereof would state and allege as follows:

1. The Complaint of Allied Chemical Corporation and Chemical Formulators, Inc. ("Complainants") requests, among other things, that the Commission Order TECO to offer the Complainants the same CISR tariff rates offered by TECO to Odyssey, and also requests that this Commission suspend the CISR tariff rates offered by TECO to Odyssey.

2. It is axiomatic that in order to have standing, Complainants must show that they will suffer actual and immediate injury. Both the Commission and its staff have referenced the applicability of the case of *Agrico Chemical Company v. Department of Environmental Protection*, 406 So2d. 478, 482 (Fla. 2nd DCA 1981), to this proceeding. Commission Order No. PSC-01-0231-PCO-EI, issued in this proceeding, referenced the requisite showing necessary to

ROSE, SUNDSTROM & BENTLEY, LLP
2548 BLAIRSTONE PINES DRIVE, TALLAHASSEE, FLORIDA 32301

establish standing. Additionally, Staff's February 2, 2001 recommendation states, in relevant part, that:

> Allied would not have standing if the only relevant harm occurs if the "plant had been built". This type of harm is theoretical not actual.

In its recommendation, Staff correctly reduces to their essence the holdings of a plethora of PSC orders and Florida appellate cases. In Florida, a participant in a formal administrative proceeding must not rely upon allegations (to state the requisite harm necessary to participate in such proceedings) which are theoretical or speculative.

3. Complainants' statements, representations, and deposition testimony demonstrate that the standards established in *Agrico*, *supra*, have not been met and cannot be met in this case.

4. In its January 29, 2001 Motion for Reconsideration of Order No. PSC-01-0231-PCO-EI, the order that recited the legal requirements for standing as referenced herein above, Complainants allege that the harm that is relevant in this proceeding:

> • • •
>
> ... is the economic disadvantage to Allied/CFI's ability to compete with Odyssey if Allied/CFI's plant had been built, not the harm to Allied/CFI resulting from the fact that Allied/CFI's plant has not yet been built ...
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> • • •
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> Allied/CFI 's ability to compete with Odyssey with a new plant but served at a substantial disparity in disadvantage in TECO's rates compared to Odyssey's rates, that is the harm which must be proved in this proceeding. (emphasis supplied in original; footnote omitted).

5. The wholly speculative and theoretical nature of the harm which Complainants allege was also clearly revealed in depositions which only recently occurred in this case. Mr. Robert Namoff, CEO of Allied, was deposed in this case on February 7 and 8, 2001. See Attachment A.

The use of attachments to this Motion is intended to preserve the confidentiality of the sealed deposition of Mr. Robert Namoff.

6. See Attachment B. The use of attachments to this Motion is intended to preserve the confidentiality of the sealed deposition of Mr. Robert Namoff.

7. The Complainants' own pleadings, statements, and testimony conclusively and clearly reveal that they cannot satisfy the first prong of *Agrico*. *Agrico*'s requirement that "before one can be considered to have a substantial interest in the outcome of the proceeding" he must show, as an initial matter, that he will suffer injury in fact which is "of sufficient immediacy" to entitle him to a formal administrative proceeding, is a test which "deals with the degree of injury".[1] The "degree of injury" which the Complainants allege they will suffer in this case is speculative, theoretical and is really nothing more than Complainants' belief that they may suffer economic damages at some unknown point in the future.

8. This Commission, as well as the appellate courts in the State of Florida, have often had occasion to consider the necessity that any party attempting to establish an effect on its substantial interest in an administrative proceeding must prove an "injury in fact which is of sufficient immediacy" to entitle that same party to a formal administrative hearing. What follows is a selected sample of the Commission orders on point.

In 1996, this Commission denied intervention to Florida Steel Corporation after determining that Florida Steel's Petition for Intervention contained a number of allegations concerning its failed attempts to negotiate a lower rate with Florida Power & Light, and the resulting threat to the survival

[1] The second prong of *Agrico*, discussed *infra*, deals with "the nature of the injury".

of its Jacksonville mill. *In re: Petition of Jacksonville Electric Authority*, Order No. PSC-96-0158-PCO-EU (February 5, 1996). Florida Steel asserted that if it were not allowed to negotiate a lower rate with JEA, it would consider relocating the Jacksonville mill. Florida Steel claimed that the City of Jacksonville's economic well-being would suffer if the mill were relocated. In an order denying intervention, Commissioner Julia Johnson found that:

> [a]fter consideration, I find that Florida Steel has not shown that it will suffer an injury in fact which is of sufficient immediacy to warrant a Section 120.57 hearing. ... as explained in Order No. PSC-95-0348-FOF-GU, the Commission has already determined that such conjecture as to future economic detriment is too remote to establish standing. Citing *International Jai-Alai Players Assoc. v. Florida Pari-Mutual Commission*, 561 So.2d 1224, @ 1225-1226 (Fla. 3rd DCA 1990). See also, *Village Park Mobile Home Park Association, Inc. v. State, Dept. of Business Regulation*, 506 So.2d 426, 434 (Fla. 1st DCA 1987), rev. denied, 513 So.2d 1063 (Fla. 1987) (speculations on the possible occurrence of injurious events are too remote to warrant inclusion in the administrative review process).

Similarly, in this case, conjecture on the part of Complainants as to future economic detriment is too remote to establish that they have standing.

In the case of *In re: Joint Application of MCI WorldCom, Inc. and Sprint Corporation*, Order No. PSC-00-0421-PAA-TP (need date, 2000 order), the Commission, referencing a prior order, stated:

> ... [s]peculation as to the effect that the merger of MCI and WorldCom will have on the competitive market amounts to conjecture about future economic detriment ... [s]uch conjecture is too remote to establish standing.

Later, in that same Order, the Commission noted:

> [A]ccordingly, we find that TRA's speculation as to the effect that the merger of MCI WorldCom and Sprint will have on the competitive

> market amounts to conjecture about future economic detriment. Such conjecture is too remote to establish standing". See *Ameristeel Corp. v. Clark*, 691 So2d. 473 (Fla. 1977) (threatened viability of plant and possible relocation do not constitute injury in fact of sufficient immediacy to warrant a Section 120.57 Florida Statutes hearing); citing *Florida Society of Ophthalmology v. State Board of Optometry*, 532 So2d. 1279, 1285 (Fla. 1st DCA 1988) (some degree of loss due to economic competition is not of sufficient immediacy to establish standing). See also Order No. PSC-96-0755-FOF-EU. We find that this standard is equally applicable whether TRA is arguing its substantial interests as a competitor or as a customer.

The legal necessity of demonstrating an injury in fact of "sufficient immediacy" to be entitled to a hearing has also been referred to as the necessity for demonstrating "sufficient immediacy and reality to support ... standing". *Freeport Sulphur Company v. Department of Environmental Regulation*, Case No. 78-527 (Final Order November 9, 1978). In this case, Complainants have not even attempted to demonstrate that their claims are anything other than conjecture and speculation as to unknown future events and results which may befall their "proposed" plant, (if in fact it is ever built and if in fact it is ever located in Tampa). Complainants assertions in this regard fail to establish either that they will suffer an injury in fact, or that such injury in fact would be of a sufficient immediacy "and reality" to support their standing.

9. See Attachment C. The use of attachments to this Motion is intended to preserve the confidentiality of the sealed deposition of Mr. Robert Namoff.

10. Further, the Complainants' projection of potential harm at some unknown and nebulous point in the future cannot, even on its face, be accepted by this Commission when it is obvious that the existence (or non-existence) and the degree of such theoretical harm will be substantially altered by a myriad of unknown factors which lie in the unknown future (e.g., changes

in the economy, technological advances, the introduction of new competitors in the marketplace, the imposition of new laws or regulations, etc.).

11. Even assuming, *arguendo*, that the Complainants could satisfy the first prong of *Agrico's* requisite test to establish standing, the Complaint utterly fails to establish standing under the second prong of *Agrico*. This Commission has also often held, consistent with *Agrico*, that mere economic interest is insufficient to demonstrate standing. *Agrico* provides that any injury alleged by a party in a formal administrative proceeding must be of the type or nature that the proceeding is designed to protect.[2]

This Commission, in the case of *In re: Petitions for Extended Area Service for Various Locations in the State of Florida*, Order No. 16391 (July 21, 1986), found that:

> Finally, it is clear that potential economic injury alone, as alleged by St. Joe, is not sufficient to establish standing. (*Agrico* citation omitted).

In the case of *In re: Petition of Monsanto Company for a Declaratory Statement Concerning the Lease Financing of a Co-generation Facility*, Order No. 16581 (September 11, 1986), the Commission determined that the Petition to Intervene filed by Gulf Power Company should be denied and stated:

> Gulf currently provides all of Monsanto's electric power needs. Its assertion of "substantial interest" is based on the economic consequences of Monsanto's proposed co-generation facility's output on Gulf's load. *Economic damage alone does not constitute "substantial interest".* (emphasis supplied, *Agrico* citation omitted).

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[2] This is the second prong of *Agrico*, characterized by the court as addressing "the nature of the injury".

12. This case involves application of the CISR tariff which the Commission authorized so that it could be applied in circumstances which would provide a benefit to the general body of TECO's ratepayers. In this case, the Complainants engage in no pretense that their Complaint is about anything other than the profit margin they hope to achieve at their "proposed" plant. Complainants' case, reduced to its essence, is that (failing acceptance by this Commission of their position) they may suffer some future economic detriment. These asserted interests do not fall within the zone of interest that this proceeding is designed to protect. Complainants do not particularly care whether the rates, terms, and conditions they seek from TECO will benefit the general body of TECO's ratepayers. Complainants' overt concern is with their own bottom line and the "economic detriment" they may suffer if they don't receive the rates, terms, and conditions they desire.

13. Even if the Complainants are deemed to have standing to assert that TECO should be ordered to offer the Complainants the same CISR tariff rates offered by TECO to Odyssey, the Complainants have no standing to assert that this Commission should suspend the CISR tariff rates offered by TECO to Odyssey. As to the latter request for relief by the Complainants, it is clear that the same is nothing more than an attempt to gain a competitive advantage over Odyssey if the "proposed" plant is ever built. The Complainants cannot hold themselves out as some "private Attorney General". This type of proceeding was surely not designed to allow a potential competitor to attempt to gain an advantage over its potential competition.

14. The Commission has before it, in the form of Complainants' own statements in the pleadings, in the prefiled testimony, in the testimony at deposition in this case, and in the Complaint itself, all of the information and factual representations necessary to determine that a) the

Complainants can neither demonstrate that they will suffer an injury in fact of sufficient immediacy to establish standing in this proceeding, and b) that the Complainants are not alleging a type of injury which this proceeding was designed to protect. The Complaint should be dismissed because the Complainants have no standing to participate in this proceeding.

WHEREFORE, and in consideration of the above, the Intervenors respectfully request that this Commission enter a Summary Final Order dismissing the complaint of Allied/CFI for lack of standing. Pursuant to and consistent with the directives of the Prehearing Officer at the October 13, 2000 Emergency Status Conference, all responses to this Motion are requested to be filed no later than the close of business on Wednesday, February 28, 2001.

Dated this 23rd 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.
JOSEPH P. PATTON, ESQ.
ROSE, SUNDSTROM & BENTLEY, LLP
2548 Blairstone Pines Drive
Tallahassee, FL 32301
(850) 877-6555
(850) 656-4029 (Fax)

Attorneys for
ODYSSEY MANUFACTURING CO.
and SENTRY INDUSTRIES, INC.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Summary Final Order has been furnished by U.S. Mail(*), or by Hand Delivery(**) to the following on this 23rd 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
215 South Monroe Street, Suite 420
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
227 South Calhoun Street
Tallahassee, FL 32301

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.

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ATTACHMENT "A"

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ATTACHMENT "B"

6. This attachment is redacted in its entirety.

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ATTACHMENT "C"

9. This attachment is redacted in its entirety.

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