BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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: March 9, 2001

ALLIED/CFI'S RESPONSE IN OPPOSITION TO INTERVENORS' MOTION FOR SUMMARY FINAL ORDER

Allied Universal Corporation ("Allied") and its affiliate, Chemical Formulators, Inc. ("CFI"), hereinafter referred to collectively as "Allied/CFI," by and through their undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, hereby submit their response in opposition to the Motion for Summary Final Order filed by Intervenors, Odyssey Manufacturing Company and Sentry Industries, Inc. ("Odyssey"), and state:

1. Odyssey's motion contends that Allied/CFI has no standing to assert that the Commission should suspend the CISR tariff rates offered by Tampa Electric Company ("TECO") to Odyssey. Odyssey's motion is moot as a result of the settlement entered into between TECO and Allied/CFI at the final hearing on February 19, 2001, and stated on the record in relevant part:

> [Mr. Long]:...Allied has agreed that it will not pursue any action against Odyssey at this Commission with regard to Odyssey's CISR rate or the CSA.
> ******
> Mr. Ellis: On behalf of Allied/CFI, we are in agreement in principle with the features of the settlement that Mr. Long has outlined, pursuant to which Allied/CFI agrees to withdraw its complaint in this proceeding based on a settlement with TECO.

See, Transcript of Proceedings on February 19, 2001 in Docket No. 000061-EI, at 49:10-16 and

50:23-51:2.

2. Odyssey's Petition for Leave to Intervene filed March 28, 2000 requested the following relief:

> WHEREFORE, Petitioners requests that the Commission...uphold or otherwise approve the CISR tariff rate agreed to by Tampa Electric and Petitioners, and the terms and conditions of the CSA between the parties... .

Sentry's Petition for Leave to Intervene did not request any relief with respect to Odyssey's CISR tariff rates or the CSA between TECO and Odyssey.

3. The written Settlement Agreement between Allied/CFI and TECO provides as follows concerning Allied/CFI's forbearance from challenging Odyssey's CISR rates and Contract Service Agreement ("CSA") before the Commission:

> WHEREAS, as part of the relief it has sought in the PSC litigation, Allied/CFI has requested that the PSC suspend the rates for electric service provided by TECO to Allied/CFI's business competitor, Odyssey Manufacturing Company ("Odyssey"); and
>
> WHEREAS, Odyssey and its affiliate, Sentry Industries, Inc. ("Sentry"), have intervened in the PSC litigation to request that the PSC uphold or otherwise approve Odyssey's rates, terms, and conditions for electric service from TECO; and
>
> WHEREAS, Allied/CFI and TECO desire to resolve their differences and conclude the PSC litigation on terms which do not affect Odyssey's rates, terms and conditions for electric service from TECO;
>
> NOW, THEREFORE, Allied/CFI and TECO hereby agree to conclude the PSC litigation on the following terms:
>
> ******
>
> 3. Allied/CFI shall assert no further challenge, before the PSC, to the rates, terms and conditions for electric service provided by TECO to Odyssey and set forth in the TECO/Odyssey CSA.

Thus, the Settlement Agreement provides the relief requested by Odyssey in this proceeding, and

Odyssey's motion is moot.

4. Like TECO's motion to dismiss, Odyssey's motion for summary final order is based in part on the premise that Allied/CFI's statement of its contention (in its January 29, 2001 motion for reconsideration) concerning the relevance of certain discovery sought by TECO on issues of damages, must be considered to be an admission that Allied/CFI has not been damaged and, therefore, that Allied/CFI lacks standing to seek any relief in this proceeding. As stated in Allied/CFI's opposition to TECO's motion to dismiss, this premise is absurd on its face. Allied/CFI's contention as to the relevance of discovery on damages issues is obviously not an admission that Allied/CFI has not been damaged.

5. This docket involves the disparity between TECO's responses to: (1) Odyssey's 1998 request for discounted CISR tariff rates for electric service to a liquid chlorine bleach manufacturing plant which Odyssey proposed to build; and (2) Allied/CFI's 199 request for the same discounted CISR tariff rates for electric service to an essentially identical liquid chlorine bleach manufacturing plant which Allied/CFI proposed to build. The five issues to have been presented to the Commission for decision in this proceeding, as stated in the draft Prehearing Order, were:

Issue 1: Has TECO acted in violation of its CISR tariff, Commission Order No. PSC-98-1081A-FOF-EI, or relevant sections of the Florida Statutes in its response to Odyssey's request for CISR tariff rates?

Issue 2: Has TECO acted in violation of its CISR tariff, Commission Order No. PSC-98-1081A-FOF-EI, or relevant sections of the Florida Statutes in its response to Allied's request for CISR tariff rates?

Issue 3: Do the differences, if any, between the rates, terms and conditions stated in TECO' s letter of October 18,1999, to Allied and those agreed to between TECO

and Odyssey constitute a violation of relevant Florida Statutes, the requirements of Commission Order No. PSC-00-1081A-FOF-EI, or the CISR tariff?

Issue 4: Based on the resolution of Issues 1-3, what actions, if any, should the Commission take with respect to Odyssey, Allied and TECO?

Issue 5: Does Allied have standing to maintain their complaint in this proceeding?

6. Allied/CFI's motion for reconsideration filed January 29, 2001, stated Allied/CFI's contention that the only relevance of any issues of damages to the issues to be decided by the Commission in the proceeding, involved the economic disadvantage to Allied/CFI's ability to compete with Odyssey if Allied/CFI's plant had been built and had been served at discriminatory rates, rather than the harm to Allied/CFI resulting from the fact that Allied/CFI's plant has not yet been built. Allied/CFI's contention was based on the acknowledged fact that the Commission lacks jurisdiction over any claim for damages. Therefore, Allied/CFI stated its contention that its ability to compete without a new plant, and the voluminous information sought by TECO's discovery requests including trade secret information concerning Allied/CFI's competition since 1998 with Odyssey and other companies in Florida, was not relevant to the issues being presented to the Commission for decision in this proceeding. Allied/CFI respectfully disagrees with the position stated in February 2, 2001 recommendation on Allied/CFI's motion for reconsideration and in the Commission's decision on reconsideration, and cited in Odyssey's motion for summary final order:

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

However, Odyssey's motion fails to note the immediately preceding sentences of the same recommendation and decision:

> With respect to the type of harm relevant in this proceeding, Allied's Complaint and the direct testimony of Robert Namoff allege that Allied's existing business is likely to be harmed if it can't build a new plant. See Complaint at paragraph 13, Testimony at pages 4-5. The direct testimony of Allied's president indicates that if Allied built the new plant and used the CISR rate initially offered by TECO, Allied would also suffer harm. See Direct Testimony of Robert M. Namoff at pages 4-5. Allied can not now claim that only one type of harm is at issue, when it has alleged harm both with and without the new plant.

See, Order No. PSC-01-0131-PCO-E1, issued February 26, 2001.

Similarly, Odyssey's motion ignores its own cross-examination of Mr. Namoff at his deposition on February 8, 2001 (at 201:11 to 202:16), and its cross-examination of Allied/CFI witness James W. Palmer at his deposition on February 2, 2001 (at 151:17-178:4), confirming the existence of actual injury to Allied/CFI caused by the preferential response given by TECO to Odyssey's request for discounted rates and the discriminatory response given by TECO to Allied/CFI's request for the same discounted rates.

7. On January 22, 2001, Allied/CFI filed the rebuttal testimony of four witnesses demonstrating, among other matters: (1) that Allied/CFI complied with the CISR tariff requirement that an applicant must demonstrate that existence of a viable, lower cost alternative to taking electric service from TECO; (2) that Odyssey did not comply with this requirement; (3) that Allied/CFI knew that it was being offered a higher CISR tariff rate than Odyssey's, although it did not know how much higher its offered rate was; and (4) that the dollar difference in just two of the terms of the CISR tariff rates offered to and accepted by Odyssey, and the CISR tariff rates offered to and rejected by Allied/CFI, is a very substantial and significant amount over the periods of the two offers. As stated in the prefiled rebuttal testimony of Allied/CFI's expert witness, Dr. Charles F. Phillips, no public utility should have such authority or power over the success or failure of two

business competitors, and economic regulation of public utilities was undertaken in part to prevent just such price discrimination.

8. The excerpts of Mr. Namoff's deposition testimony referenced in Attachments A, B and C to Odyssey's motion reflect Allied/CFI's legitimate demand that Allied/CFI must know what rates it is being offered for electric service before it chooses where to locate its new plant. This is exactly the situation that tariffs like the CISR tariff are designed to give utilities the flexibility to respond to, and Odyssey's refusal to acknowledge this fundamental principle only shows that it wishes it could somehow influence Allied/CFI's choice by its participation in this proceeding.

9. Allied/CFI unquestionably has standing to pursue its claims in this proceeding because the obvious purpose of Sections 366.03, 366.06(2) and 366.07, Fla. Stat., is to protect a disfavored customer such as Allied/CFI from economic damages caused by the granting of preferential rates to the customer's business competitor. This purpose is demonstrated by the history of the interpretation of such statutory provisions in Florida and other states since the turn of the last century. See, e.g., Bromer v. Florida Power & Light Co. (Fla. 1950), 45 So. 2d 658, 660 ("Public service corporations cannot give to particular customers special favors to the detriment of others."); Tampa Electric Co. v. Cooper (Fla. 19438), 14 So. 2d 388, 389 ("The rule of the common law was that utility rates must be reasonable and nondiscriminatory...if the legislature has not provided a means...for one injured to seek redress, then he may seek redress under the common law and the court may determine what is a reasonable rate under the facts shown."); United Gas Corporation v. Shepherd Laundries Co., 189 S. W. 2d 485, 488 ("[The American rule] requires equality where the favored and disfavored parties are competitors in business and allows a recovery for actual los or damage, if any, that may be alleged and proved by the disfavored competitor."); Homestead v. Des

Moines Electric Co. (8th Cir. 1918), 248 F. 439:

> It is the duty of a public service corporation, lawfully authorized to use the streets and public places of a municipality in order to furnish to consumers water, gas, electricity, light, heat, power, or any other public utility, to render like contemporaneous service for like compensation to consumers conducting like operations under like conditions and circumstances. For unjust discrimination between competitors, and substantial injury to one of them caused by a breach of this duty, the injured competitor may maintain an action in tort against the public service corporation for the pecuniary loss inflicted upon him by such discrimination. Curtis on Electricity, § 36; Western Union Telegraph Co. v. Call Publishing Co., 181 U.S. 92, 99, 100, 21 Sup. Ct. 561, 45 L. Ed. 765; Pennsylvania R. R. Co. v. International Coal Co., 230 U.S. 184, 203, 204, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Armour Packing Co. v. Edison Electric Illuminating Co., 115 App. Div. 51, 100 N.Y. Supp. 605, 607; St. Paul Book & Stationery Co. v. St. Paul Gaslight Co., 130 Minn. 71, 153 N. W. 262, 266, Ann. Cas. 1916B, 286.

See also, Re Gulf States Utility Company (Texas Public Utility Commission 1989), 104 PUR 4th 509, 522; Washington Utilities and Transportation Commission v. Puget Sound Power and Light Company (Washington Utilities and Transportation Commission 1996), 172 PUR 4th 304, 310-311.

10. None of the cases cited in Odyssey's motion involve the standing of a complainant such as Allied/CFI under statutes comparable to Sections 366.03, 366.06(2) and 366.07, Fla. Stat. Instead, the cases cited in Odyssey's motion involve the standing of an intervenor in a proceeding brought by other parties. Nor does Odyssey's motion even mention the legal standard that a moving party is required to meet on a motion for summary final order under Section 120.57(1)(h), Fla. Stat.: that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order. The applicable standard is the same as that required on a motion for summary judgment under Rule 1.510, Fla. R. Civ. P.: "The law is well settled in Florida that a party moving for summary judgment must show conclusively the absence of any genuine issue of material fact and the court must draw every possible inference in favor of the party against whom

a summary judgement is sought." Henderson v. CSX Transportation, Inc., 617 So.2d 770, 773 (Fla. 1st DCA 1993), quoting Moore v. Morris, 475 So.2d 666, 668 (Fla. 1985). Furthermore, "[w]hen acting upon a motion for summary judgement, if the record raises the slightest doubt that material issues could be present, that doubt must be resolved against the movant and the motion for summary judgment must be denied." Henderson, 617 So.2d at 773, quoting Jones v. Directors Guild of America, Inc., 584 So.2d 1057, 1059 (Fla. 1st DCA 1991). Moreover, even when the facts are uncontroverted, entry of a summary judgement is erroneous if different inferences can be drawn from the facts. See, Crandall v. Southwest Florida Blood Bank, Inc., 581 So.2d 593, 595 (Fla. 2nd DCA 1991). Odyssey's motion does not even pretend to be able to meet this standard, and must be denied.

WHEREFORE, Allied CFI requests that Odyssey's motion for summary final order be denied.

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AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Allied/CFI's Response in Opposition to Intervenors' Motion for Summary Final Order was furnished by U. S. Mail, or by hand delivery (*), or telecopier (**), to the following this 9th day of March 2001:

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