

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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DATE: MARCH 26, 2001

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

FROM: DIVISION OF LEGAL SERVICES (STERN) MKS RVE DPU
DIVISION OF ECONOMIC REGULATION (DRAPER) EJD RMC

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: 4/03/01 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000061r6.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 (Odyssey) and Sentry Industries (Sentry) are intervenors. They are separate companies but have the same president. Allied, Odyssey and Sentry manufacture bleach.

At the hearing on February 19, 2001, TECO and Allied agreed to a settlement in principle. The parties requested a continuance of

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the hearing to allow time to complete a Settlement Agreement. On March 22, 2001, Allied and TECO filed a Settlement Agreement. Odyssey and Sentry are not parties to the Agreement.

The Commission has jurisdiction under Sections 366.04, 366.06, and 366.07, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should the Settlement Agreement between TECO and Allied be approved?

RECOMMENDATION: The Settlement Agreement should be approved if Staff's concerns, discussed in the analysis below, are resolved to the mutual satisfaction of all parties, or if Staff's concerns are resolved in a manner acceptable to TECO and Allied. If neither of these two scenarios occurs, then the Commission should reject the settlement, and proceed to hearing as scheduled, the day after the Agenda Conference.

STAFF ANALYSIS: Staff agrees with the overall approach of the TECO and Allied settlement. However, certain provisions should be deleted and clarification of some provisions is needed before a recommendation for approval of the settlement can be made. A copy of the Settlement Agreement is attached to this recommendation as Attachment A. A summary of the Agreement is provided below.

I. Summary of the Settlement Agreement

Each paragraph of the Settlement Agreement is summarized below.

Paragraph 1

All prefiled testimony and deposition testimony shall be moved into evidence to serve as a basis for the Commission's prudence review. The testimony and depositions shall remain subject to previously issued orders on confidential classification. Nothing shall limit or abridge the right of any party to petition the Commission to unseal or declassify the evidence.

Paragraph 2

TECO and Allied shall execute a Contract Service Agreement (CSA) in accordance with TECO's CISR tariff. The rates, terms and conditions of the CSA shall be

substantially the same as those in Odyssey's CSA, provided Allied opens a plant within two years of the date the Settlement Agreement is approved by the Commission. The CSA shall include a force majeure clause for which confidentiality, pursuant to Section 366.093, Florida Statutes, will be requested.

Paragraph 3

Allied shall assert no further challenge against Odyssey's CSA before the Commission.

Paragraph 4

Order No. PSC-98-1081-FOF-EI, issued August 10, 1998 in Docket No. 980706-EI, allows TECO to request a prudence review of its CSA from the Commission. In light of this provision, TECO requests that the Commission make the following findings of fact:

- A. Odyssey's CSA and Allied's CSA provide benefits to TECO's ratepayers and therefore both CSAs are in the best interests of ratepayers.
- B. TECO's decision to enter a CSA with Odyssey and the CSA itself are prudent, within the meaning of Order No. PSC-98-1081-FOF-EI, in so far as they provide benefits to the ratepayers.
- C. TECO's decision to enter a CSA with Allied and the CSA itself are prudent, within the meaning of Order No. PSC-98-1081-FOF-EI, in so far as they provide benefits to the ratepayers.

Paragraph 5

Allied agrees not to contest the findings of fact requested in ¶4, above, and the rulings requested in ¶7, below, provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied's Complaint.

Paragraph 6

Allied's Complaint shall be deemed withdrawn, with prejudice, upon execution of the Settlement Agreement and issuance of an order approving the Agreement by the Commission.

Paragraph 7

The following rulings shall be included in the Commission's order approving the Settlement Agreement:

- A. The Commission shall not entertain any further challenge to Odyssey's existing CSA and Allied's proposed CSA.
- B. In light of the findings that both CSAs are prudent, TECO shall not have to report the potential effect of the two CSAs on revenues in its monthly surveillance reports.
- C. The order approving the Settlement will have no precedential value.
- D. The parties shall abide by the General Release Agreements executed among them.

Paragraph 8

Allied shall execute the General Release Agreement attached to the Settlement. Except as provided in ¶3, above, the Settlement Agreement shall not impair any claims that Allied may have against Odyssey and Sentry.

Paragraph 9

In any subsequent litigation against Odyssey or Sentry, Allied will attempt to avoid imposing unduly burdensome discovery requests on TECO.

Paragraph 10

TECO will not disclose the force majeure provision of the Settlement to Odyssey or Sentry unless the Commission authorizes or Allied approves of such disclosure.

Paragraph 11

The Settlement Agreement, and the attachments (Allied's CSA, the force majeure provision, and the General Release Agreements) constitute the entire Settlement Agreement and may only be modified in writing.

General Release

The General Release states that, as an inducement to TECO, Allied releases TECO from any claims, liabilities, promises, damages, attorney's fees, debts (and a long list of similar items), related to the CISR tariff, and TECO's dealings with Odyssey, Sentry and Allied. The release also covers all as yet unforeseen liabilities. The release applies for all time up until the date it is signed.

II. Intervenors' Comments

Odyssey notes that it was excluded from the settlement negotiations. Odyssey's comments on the Settlement Agreement are provided below. Odyssey has not seen the CSA or force majeure provision.

Paragraph 2

This paragraph states that Allied's CSA will be "substantially identical" to Odyssey's. The phrase "substantially identical" is imprecise and therefore inappropriate. The Intervenors state that the Commission should not have to determine what the phrase means.

Paragraph 5

The Intervenors note that this paragraph provides that Allied agrees not to contest certain findings of fact, rulings and determinations, "provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied/CFI's Complaint in this proceeding." The Intervenors maintain that more precision as to what allegations are being referred to is needed for this paragraph to have any coherence.

Paragraph 7(b)

The Intervenors object to the requirement that the Settlement Agreement shall have no precedential value. They argue that this requirement cannot be reconciled with the provisions requiring substantive findings of fact, conclusions of law and other assurances intended to bind the parties and the Commission. The Intervenors claim that ¶7(b) "is an effort to accord some sort of second-rate status to a Commission order in this case, which would not be fairly applied to other comparable Commission orders." Given the possibility of litigation related to this docket in courts, the Intervenors believe that ¶7(b) will complicate litigation because judges will not know what significance to assign to the order.

Paragraph 10

The Intervenors object to the nondisclosure of the force majeure clause. They state that they suspect the clause may deviate substantially in scope from the traditional type of force majeure clause. The Intervenors state that they object to providing greater protection to Allied's CSA than that which was provided to Odyssey's CSA.

The Intervenors state that if the Commission determines that the force majeure clause should not be disclosed to them, then they will oppose the provisions listed below.

- A. Paragraph 1 - The provision that an evidentiary record be created is objectionable because denies Intervenors the right to cross-examine witnesses and to object on other relevant grounds.
- B. Subparagraphs 4(a) and (c) - These subparagraphs allow for findings of fact favorable to Allied's CSA.
- C. Subparagraph 7(a) - This subparagraph attempts to foreclose further challenges to Allied's CSA.

III. Staff Comments and Recommendations

Our comments on each provision and the general release are provided below:

Paragraph 1

The first provision of the agreement should be modified because, we do not believe an evidentiary record will provide any benefits to TECO, Allied or the Commission. On the contrary, it might be detrimental and misleading for the following reasons:

- A. Creating a hearing record without holding a hearing forecloses the possibility of cross-examination by Odyssey and Staff. As noted above, Odyssey objects to this provision unless it is afforded an opportunity to view the force majeure clause. If all parties agreed to creating an evidentiary record, as proposed by TECO, then lack of an opportunity for cross-examination would not be a problem.
- B. Limiting the record to only the prefiled testimony and depositions precludes the use of relevant information in the discovery responses to make the finding of prudence required by the settlement.
- C. Although all parties agreed to treat the depositions confidentially, there has been no finding that the depositions are confidential under Section 366.093, Florida Statutes, and the settlement alone cannot make them so. The statute requires that the Commission make a ruling on confidentiality and issue an order. Rule 25-22.006, Florida Administrative Code, requires that the party seeking confidential classification must identify each page and line at which confidential material appears and explain why that material satisfies the requirements in Section 366.093.
- D. The previously issued orders on confidentiality only grant confidentiality for 18 months. This provision reads as though it extends the period of confidentiality indefinitely. To address this concern, staff suggests that: 1) the phrase in the first sentence of the paragraph, "and shall remain

subject to orders previously issued concerning confidential classification of information in PSC litigation" be deleted; and, 2) the last sentence of the paragraph, "Nothing herein shall limit or abridge the right of any party to petition the Commission to unseal or declassify portions of this evidence," be deleted. In addition, it is questionable whether anyone actually has a "right" to have confidential documents "unsealed" or "declassified."

Paragraph 2

Staff finds the CSA to be acceptable.

Paragraph 3 - Acceptable.

Paragraph 4

Subparagraph (a) of this provision seems superfluous in light of subparagraphs (b) and (c). We can accept each subparagraph if read separately, but before we can recommend approval of ¶4, we need to understand why all three subparagraphs are necessary.

Paragraph 5

This paragraph seems internally contradictory. The first clause requires Allied to agree not to contest ¶4 (a finding by the Commission that both CSAs are prudent and provide benefits to the general body of ratepayers) and ¶7 (a determination that the Commission will not entertain any further challenge to either CSA). The second clause says Allied is only required to agree to the findings of fact and rulings listed in the first clause as long as those findings of fact and conclusions of law do not pertain to Allied.

It appears that Allied is trying to reserve something that is not covered by the findings and ruling in ¶4 and ¶7, but we can not discern what that something is. The Commission cannot prohibit other persons from complaining.

Paragraph 6 - Acceptable.

Paragraph 7

Subsection (a) - We can recommend approval of ¶7a provided all parties agree that it does not foreclose a new party (e.g. a third bleach manufacturer) from filing a challenge and that it does not bind a future Commission.

Subsection (b) - This provision is consistent with previous Commission actions and is acceptable. The Commission has recently accepted a similar provision for Gulf Power Company's two executed CSAs pursuant to its CISR tariff. The Commission found that with respect to Gulf's two currently executed CSAs, Gulf has adequately demonstrated that the two CSAs are prudent, and it is no longer necessary for Gulf to report the revenue shortfall for the existing CSAs in the monthly surveillance reports. See Order No. PSC-01-0390-TRF-EI, issued February 15, 2001. Staff recommends that it be made clear that TECO is still required to provide the revenue shortfall associated with any subsequently executed CSAs until such time as they have been subject to a prudence review by the Commission.

Subsection (c) - This provision should be deleted. The Commission cannot make a commitment that will nullify the precedential value of one of its orders. First, this would bind future Commissions. Second, the order would have precedential value if customers similarly situated to Allied and Odyssey came before the Commission.

Subsection (d) - This provision should be deleted. The Commission can only enforce the General Release Agreement to the extent that Allied brings claims before the Commission which the Commission determines are within the Commission's jurisdiction.

Paragraph 8 - Acceptable.

Paragraph 9 - Acceptable.

Paragraph 10

In ¶10, TECO promises to Allied that it will not disclose the force majeure provision to Odyssey or Sentry unless Allied approves disclosure or the Commission approves disclosure. Because the force majeure provision is part

of the Settlement Agreement, it was filed with the Commission but with a Notice of Intent to Seek Confidential Classification. Staff is unable to make a recommendation on confidentiality until TECO files a Request for Confidential Classification that explains the harm that will occur from disclosure of the provision to the public and to Odyssey. At this time, staff cannot readily discern how TECO or Allied will be harmed by disclosure of the force majeure provision.

There are three possible courses of action. One possibility is that the concerns identified above are resolved to the mutual satisfaction of all parties and the Commission. In this case the Commission should issue a final order approving the Agreement.

A second possibility is that the concerns are addressed to the satisfaction of TECO, Allied and the Commission but Odyssey does not agree or acquiesce. Under this scenario the Commission should also issue a final order approving the Agreement. Assuming the Settlement Agreement retains the provision for Allied to withdraw its Complaint, an order on proposed agency action would not be appropriate. Under those circumstances, Odyssey would have no basis for protest because Odyssey intervened in the case, and the underlying Complaint would no longer exist.

A third possibility is that the Commission rejects the Settlement Agreement. In that case, the Commission should issue a procedural order denying the proposed Settlement Agreement and proceed to hearing on April 4-5, 2001.

DOCKET NO. 000061-EI
DATE: March 26, 2001

ISSUE 2: Should this docket be closed?

RECOMMENDATION: If the Commission approves a Settlement Agreement, the docket should be closed. If the Commission does not approve a Settlement Agreement, the docket should remain open.

STAFF ANALYSIS: If the Commission approves a Settlement Agreement, then a final order approving the Agreement should be issued and the docket should be closed. If the Commission does not approve a Settlement Agreement, then the Commission should proceed to hearing on April 4-5, 2001, and the docket should remain open pending the outcome of the hearing.

SETTLEMENT AGREEMENT

This agreement is made between Allied Universal Corporation, a Florida corporation (“Allied”), Chemical Formulators, Inc., a Florida corporation (“CFI”), (hereinafter jointly referred to as “Allied/CFI”), and Tampa Electric Company (“TECO”), a Florida public utility corporation, effective March 2, 2001.

WHEREAS, Allied/CFI and TECO are parties to that certain matter pending before the Florida Public Service Commission (“PSC”), styled “In Re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company, etc.,” Docket No. 000061-EI (“the PSC Litigation”); and

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:

1. All prefiled testimony, deposition testimony, and exhibits thereto, which have been filed in the PSC litigation to date, shall be moved into evidence in this docket and shall remain subject to orders previously issued concerning confidential classification of information in the PSC litigation. This evidence shall be permanently retained as a part of the record in Docket No. 000061-EI, to serve, among other things, as a record basis for the PSC's prudence review in this docket. Nothing herein shall limit or abridge the right of any party to petition the Commission to unseal or declassify portions of this evidence.

2. Pursuant to its Commercial Industrial Service Rider (“CISR”) tariff, TECO and Allied/CFI shall execute a Contract Service Agreement (“CSA”) for electric service to a new sodium hypochlorite manufacturing facility to be constructed and operated by Allied/CFI and/or their affiliate(s) in TECO’s service territory, upon the same rates, terms and conditions as those contained in the existing CSA between TECO and Odyssey, provided that the new sodium hypochlorite manufacturing facility must begin commercial operations within 24 months from the date of the PSC’s order approving this settlement agreement. The TECO-Allied/CFI CSA shall be in a form substantially identical to the CSA attached hereto as Exhibit “A”, and shall include the force majeure clause attached to this settlement agreement as Exhibit “B”.

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.

4. Order No. PSC-98-1181-FOF-EI, issued August 10, 1998 in Docket No. 980706-EI, approving TECO's CISR tariff, provides in part that: (1) TECO may request a prudence review subsequent to signing a CSA; (2) TECO will have the burden of proof that the company's decision to enter into a particular CSA was made in the interest of the general body of ratepayers; and (3) if the Commission finds that a particular CSA was not a prudent decision, then the revenue difference between the standard rate and the CISR rate could be inputted to TECO. Accordingly, TECO requests that the PSC make the following findings of fact:
 - a. Both the existing Odyssey CSA and the proposed Allied/CFI CSA provide benefits to Tampa Electric's general body of ratepayers and, therefore, the Commission finds that both CSAs are in the best interests of ratepayers.
 - b. The Commission finds that Tampa Electric's decision to

enter into the Odyssey CSA, and the CSA itself, were prudent within the meaning of Order No. 98-1081-FOF-EI in so far as they provide benefits to Tampa Electric's general body of ratepayers.

c. The Commission finds that Tampa Electric's decision to enter into the Allied/CFI CSA, and the CSA itself, were prudent within the meaning of Order No. 98-1081-FOF-EI in so far as they provide benefits to Tampa Electric's general body of ratepayers.

5. Allied/CFI agrees not to contest the findings of fact, rulings and determinations requested in paragraphs 4 and 7 of this Settlement Agreement, provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied/CFI's Complaint in this proceeding.
6. Allied/CFI's Complaint in the PSC litigation shall be deemed withdrawn, with prejudice, upon: (a) the execution of this settlement agreement by TECO and Allied/CFI; and (b) the

issuance of an order by the PSC approving this settlement agreement, as proposed.

7. Allied/CFI and TECO request that the PSC include in its order approving this Settlement Agreement the following rulings and determinations:
 - a. The Commission shall not entertain any further challenge to the existing Odyssey or the proposed Allied/CFI CSA or the rates, terms or conditions contained therein.
 - b. In light of the above findings that both CSAs are prudent and in the best interests of ratepayers, Tampa Electric shall be relieved of any further obligation to report on its surveillance report the potential impact on revenues of these two CSAs.
 - c. The Commission order approving the settlement proposed herein shall have no precedential value.
 - d. The parties shall abide by the various General Release agreements executed among them.
8. Allied/CFI shall execute the General Release attached as Exhibit

“C” hereto. Except as stated in paragraph 3 above, this Settlement Agreement shall not in any way waive, release, discharge, limit or impair any claims that Allied/CFI may have against Odyssey and Sentry, as provided in the General Release.

9. In any subsequent litigation against Odyssey, Sentry, and related parties, Allied/CFI will make good faith efforts to avoid imposing unduly burdensome discovery requests on Tampa Electric and its related parties as set forth in the General Release which is Exhibit “C” hereto, without unreasonably restricting the ability of Allied/CFI’s counsel to conduct appropriate discovery necessarily involving Tampa Electric and its related parties in such litigation.
10. Tampa Electric has agreed not to disclose to Odyssey or Sentry, absent Commission authorization or Allied/CFI’s express written approval, the force majeure provision attached hereto as Exhibit “B” in light of Allied/CFI’s position that this provision constitutes confidential, proprietary business information. To the

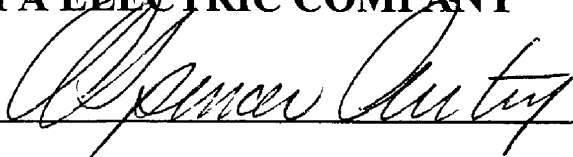
extent it may be deemed necessary to file Exhibit "B" with the PSC in connection with the PSC's approval of this settlement agreement, it shall be filed under seal and protected against disclosure to Odyssey, Sentry and others.

11. This settlement agreement and the exhibits hereto constitute the entire agreement between the parties and may not be modified except by a writing, signed by all parties.

AGREED TO AND ACCEPTED this _____ day of _____,

2001.

TAMPA ELECTRIC COMPANY

By: 

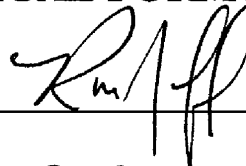
Title: VP Customer Services & MKT

ALLIED UNIVERSAL CORPORATION

By: 

Title: CEO

CHEMICAL FORMULATORS, INC.

By: 

Title: CEO

Revised 03/01/01

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EXHIBIT "A"

Contract Service Agreement

**(Separately filed on a confidential basis with a
Notice of Intent to Seek Confidential Classification)**

Exhibit "B"

Force Majeure Clause

**(Separately filed on a confidential basis with a
Notice of Intent to Seek Confidential Classification)**

GENERAL RELEASE

KNOW ALL PERSONS BY THESE PRESENTS:

That, as of March 2, 2001, Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI") and Tampa Electric Company ("Tampa Electric"), for good and valuable considerations the receipt and adequacy of which is hereby acknowledged, including the mutual covenants and agreements the parties hereto have made in effecting the settlement of their disputes in Allied/CFI's complaint proceeding in Docket No. 000061-EI before the Florida Public Service Commission, AGREE AS FOLLOWS:

As a material inducement to Tampa Electric to enter into this Settlement Agreement and General Release, Allied/CFI and their respective officers, directors, employees, affiliates, subsidiaries, general or limited partners, successors, predecessors, assigns, agents, representatives, and attorneys hereby irrevocably and unconditionally release, acquit and forever discharge Tampa Electric and each of Tampa Electric's predecessors, successors, assigns, agents, officers, directors, employees, representatives, attorneys, divisions, subsidiaries, affiliates, parent company, general and limited partners (and agents, officers, directors, employees, representatives and attorneys of such divisions, subsidiaries, affiliates, parent company and general and limited partners) and all persons acting by, through, under or in concert with them or any of them [*except*: Odyssey Manufacturing Company ("Odyssey"), Sentry Industries, Inc. ("Sentry"), and each of Odyssey's and Sentry's predecessors, successors, assigns, agents, officers, directors, employees, representatives, attorneys, divisions, subsidiaries, affiliates, parent company, general and limited partners, including but not limited to Stephen W. Sidelko and Patrick H. Allman], from any and all charges, complaints, claims, liabilities, obligations, promises, agreements, controversies, damages, actions, causes of

action, suits, rights, demands, costs, losses, debts and expenses (including attorneys' fees and costs actually incurred) of any nature whatsoever for, upon or by reason of any matter, cause or thing whatsoever, from the beginning of the world to the date of this agreement from or in any manner related to Tampa Electric's Commercial Industrial Service Rider (CISR) Tariff, Tampa Electric's dealings with Odyssey Manufacturing Company, Sentry Industries, Allied Universal, Chemical Formulators or their respective officers, directors, agents, employees, affiliates, subdivisions, successors or assigns, which Allied/CFI or any of its officers, directors, employees, affiliates, subsidiaries, general or limited partners, successors, predecessors, assigns, agents, representatives, and attorneys have, own or hold, or which at any time heretofore had, owned or held, or claimed to have had, owned or held, whether known or unknown, vested or contingent.

This release extends and applies to, and also covers and includes, all unknown, unforeseen, unanticipated and unsuspected injuries, damages, loss and liability, and the consequences thereof, as well as those now disclosed and known to exist. The provisions of any state, federal, local or territorial law or statute providing in substance that releases shall not extend to claims, demands, injuries or damages which are unknown or unsuspected to exist at the time, to the person executing such release, are hereby expressly waived.

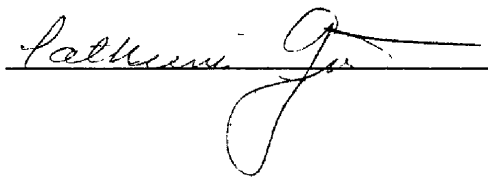
Signed, sealed and delivered

ALLIED UNIVERSAL CORPORATION

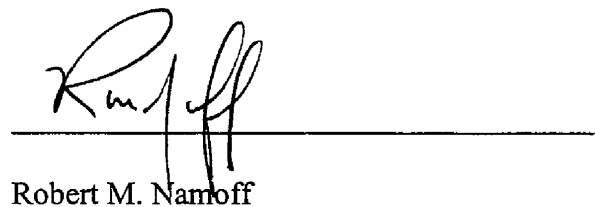
in the presence of:

and

CHEMICAL FORMULATORS, INC.



By:



Robert M. Namoff