



Public Service Commission

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RECORDS AND REPORTING
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DATE: MARCH 26, 2001

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

FROM: DIVISION OF LEGAL SERVICES (STERN)
DIVISION OF ECONOMIC REGULATION (DRAPER) *RUE For MTS
JW for ED*

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.

DOCUMENT NUMBER-DATE

04078 APR-25

FPSC-RECORDS/REPORTING

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

After this recommendation was filed on March 26, 2001, Staff had two teleconferences with the parties to try to resolve Staff's concerns. All of Staff's concerns were resolved. The resolutions are provided below, following the applicable concern.

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: Yes. ~~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 initially filed this recommendation on March 26, 2001. The recommendation identified several concerns. Subsequently, Staff engaged in extensive discussions with the parties and all of Staff's concerns were resolved. The resolution of each concern is provided below in underlined text. 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 Intervenor's state that the Commission should not have to determine what the phrase means.

Paragraph 5

The Intervenor's 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 Intervenor's 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 Intervenor's 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 Intervenor's 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 Intervenor's believe that ¶7(b) will complicate litigation because judges will not know what significance to assign to the order.

Paragraph 10

The Intervenor's 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 Intervenor's state that

they object to providing greater protection to Allied's CSA than that which was provided to Odyssey's CSA.

The Intervenor states 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 it denies Intervenor 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.

Allied agrees to provide the force majeure clause, with redactions, to Odyssey.

- 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.

All discovery responses provided by TECO will be made part of the record. With this information, Staff's recommendations on the prudence findings will be supported by evidence in the record.

- 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.

The parties have agreed that each will submit requests for confidential treatment for the information in the evidentiary record which each party seeks to protect. This includes deposition transcripts. The requests will be filed within 21 days of the Commission's vote on the Settlement Agreement, assuming the vote approves the Settlement Agreement. Consistent with Rule 25-22.006, Florida Administrative Code, all parties will have an opportunity to respond to or supplement any request for confidential treatment.

- 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.

Tampa Electric Company believes that each subparagraph demonstrates that the Florida Public Service Commission has actively supervised Tampa Electric Company's implementation of Tampa Electric Company's CISR tariff. Staff takes no position on that question, but with that information, the paragraph is acceptable to staff. With the inclusion in the evidentiary record of all the discovery responses, Staff believes that there is sufficient information to conclude that both Odyssey and Allied were/are "at risk" within the meaning of Order No. PSC-98-1081-FOF-EI, issued August 10, 1998, in Docket No. 980706-EI. Further, based on the RIM analyses provided by Tampa Electric Company, Staff believes there is sufficient information to conclude that the rates offered to Odyssey and Allied exceed the incremental cost to serve those customers. Accordingly, Staff recommends that the requested findings are supported by competent substantial evidence and should be approved. Further, the parties agree that the correct order number in the first line of paragraph 4 is PSC-98-1081-FOF-EI.

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.

Allied indicates that it believes the Findings in Paragraphs 4 and 7 do not address the allegations of Allied's Complaint. Staff takes no position on that question, but with that information, this paragraph is acceptable to staff.

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.

The parties clarified that the importance of this paragraph is to settle, for all time, the prudence of these two CSA's with respect to matters within the Commission's jurisdiction. Staff agrees that, based on the findings in paragraph 4, this is appropriate. This is consistent with past Commission decisions concerning prudence and the doctrine of administrative finality. This does not foreclose any other party from asserting any right it may have concerning the CISR tariff.

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 references this Order only for the purpose of illustrating that the Commission made a similar determination with respect to reporting the revenue shortfall for Gulf's CSAs. 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.

The parties clarified that what has no precedential value is the Settlement Agreement itself.

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.

The parties clarified that they understand and agree with this concern. The Commission can only enforce any General Release to the extent that a party 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.

As stated previously, Allied has agreed to disclose portions of the force majeure clause to Odyssey. Further, the parties recognize that confidential treatment is only available after the requisite showing pursuant to Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code.

Paragraph 11

With respect to the addition of TECO's discovery responses to the evidentiary record and the correction to the Order Number referenced in Paragraph 4, the parties waive the requirement of Paragraph 11 that all modifications to the Settlement Agreement must be in writing.

With the foregoing clarifications, changes and corrections, which are underlined, Staff recommends that the Settlement Agreement be approved.

~~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.