BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| Allied Universal Corporation and Chemical Formulators, Inc.'s Petition to Vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc., and Tampa Electric Company and Request for Additional Relief. | ) | Docket No. 040086-EI |

**ODYSSEY MANUFACTURING COMPANY'S MOTION TO DISMISS PETITION OF ALLIED UNIVERSAL CORPORATION AND CHEMICAL FORMULATORS, INC.**

ODYSSEY MANUFACTURING COMPANY ("Odyssey"), by and through undersigned counsel, hereby files this Motion to Dismiss Petition of Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI"), and in support thereof would state and allege as follows:

It should be noted from the outset that Odyssey is clearly a party, and not an intervenor, in this proceeding as Odyssey meets the definition of "Party" found in § 120.52(12)(a), Fla. Stat (providing that "party" means "specifically named persons whose substantial interests are being determined in the proceeding"); Odyssey is specifically named a party by Allied/CFI in their Petition (which Allied/CFI served on Odyssey's undersigned counsel); it is abundantly clear from the relief sought that Odyssey's substantial interests will be determined in this proceeding; and Allied/CFI's Petition makes it inescapable that Odyssey is an indispensable party to these proceedings.

Allied/CFI's Petition, reduced to its essence and characterized for what it really is, requests that the Commission vacate a final administrative order, so that Allied/CFI can breach a promise it

made in a Commission-approved Settlement Agreement by requesting that this Commission issue an order which is outside its jurisdiction, all in order to place a competitor at an economic disadvantage.[1] For the reasons set forth herein, the Commission should dismiss, with prejudice, Allied/CFI's legally insufficient Petition and award Odyssey the costs and fees of responding to Allied/CFI's Petition, as such pleading was filed for facially and demonstrably improper purposes as outlined herein. *See, e.g.*, § 120.569(2)(e) (providing for sanctions and the award of fees under such circumstances).

## I.

## STATEMENT OF THE CASE

On January 20, 2000, Allied/CFI filed with the Commission a formal Complaint against Tampa Electric Company ("TECO") alleging, *inter alia*, that TECO had offered a discriminatory rate in the form of a CISR tariff to Odyssey. Odyssey and its related company, Sentry Industries, intervened. After the parties collectively expended what may be reasonably assumed to be many hundreds of thousands of dollars in fees and costs and underwent a year of discovery, TECO and Allied/CFI reached a settlement agreement in principle on the day of the scheduled hearing (February 19, 2001). In their Complaint, Allied/CFI had requested, *inter alia*, suspension of the CISR tariff offered by TECO to Odyssey. (In fact, Allied/CFI's own counsel stressed this particular point home to the Commission prior to executing the Settlement Agreement.) This Complaint, which was the subject of Docket No. 000061-EI and Order No. PSC-01-1003-AS-EI, was ultimately

[1] It is noteworthy that Allied/CFI, as recently as Febraury 9, 2004, in a Circuit Court "Supplemental Motion for Protective Order," state, "[Allied/CFI] and [Odyssey] are fierce competitors in the bleach industry." (Emphasis added.).

deemed withdrawn, with prejudice, upon issuance of the Commission's Order on April 24, 2001 (*see* Exhibit "C" to Petition at ¶ 6 of the Settlement Agreement).

Thirty-two months later, on January 13, 2004, Allied/CFI filed with the Commission what was, in substance, all but identical to the Petition in this case, the only noticeable difference being that it was titled a "Motion to Reopen Docket" and it was filed in Docket No. 000061-EI–though that docket had been closed since December 24, 2001. Allied/CFI dismissed that "motion" on January 16, 2004. On that same date, Allied/CFI filed a document that was all but identical to its withdrawn "motion," the only discernable differences being that the document was filed in a Docket No. 040050-EI and bore the pseudonym, "Petition."[2] On January 29, 2004, the January 16, 2004 Petition was dismissed by Allied/CFI. On January 30, 2004, the instant "Petition" was filed by Allied/CFI.[3]

Notwithstanding the crabbed procedural history prefacing its filing, it is quite simple to summarize the instant Petition: Allied/CFI have interpreted recent statements made to Allied/CFI by Mr. Stephen Sidelko, president of Odyssey, in an incomplete deposition in a pending circuit court

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[2] While Allied/CFI has chosen to call their filing a "Petition," it fails to satisfy the minimum legal requirements governing the filing of an administrative Petition. *See, e.g.*, Rules 28-106.301(2) and 28-106.301(2), F.A.C. (requiring a Petition to include, *inter alia*, "an explanation of how the petitioner's substantial interests will be affected"; "a statement of all disputed issues of material fact. If there are none, the petition must so indicate"; and "[a] statement of the specific rules or statutes the petitioner contends require" the Commission's action (emphasis added)). Odyssey submits that, as the Petition fails to substantially comply with these essential requirements, and as "it conclusively appears from the face of the petition that [these] defect[s] cannot be cured," the "Petition" must be dismissed with prejudice. Rules 28-106.201(4) and 28-106.301(2), F.A.C.

[3] Each of the aforementioned filings was accompanied by Allied/CFI's filing of a Notice of Intent to Seek Special Confidential Classification of unredacted attachments to the Motion. The repeated filing and discussion of portions of Mr. Stephen Sidelko's incomplete December 18, 2003, deposition taken in a circuit court case between the parties–which filings Odyssey believes to be in violation of a Protective Order entered in that action (Exhibit "A" hereto)–is the subject of a pending Emergency Motion for Contempt and for Sanctions filed by Odyssey on February 13, 2004, in *Allied Universal Corporation, et al. v. Odyssey Manufacturing Company*, Case No. 01-27699 CA 25, in the Circuit Court in and of the 11th Judicial Circuit in and for Miami-Dade County, Florida. A copy of that circuit court Motion is attached as an exhibit to Odyssey's Emergency Motion for Abeyance filed with the Commission on February 13, 2004.

action, to be inconsistent with nearly six-year-old statements Mr. Sidelko made to TECO. Allied/CFI contend that this alleged inconsistency provides a legal basis for the Commission's (1) vacating an Order it entered more than two and a half years ago; (2) deeming a voluntary settlement agreement between Allied/CFI and TECO executed contemporaneously with the Order to be "unenforceable" (for reasons unstated in Allied/CFI's Petition); (3) terminating TECO's Contract Service Agreement with Odyssey; and (4) ordering Odyssey to pay sums of money to people and entities wholly apart from Allied/CFI (for Odyssey's allegedly having been undercharged for electricity) and to pay such sums retroactively.[4]

Thus, it is clear that Allied/CFI are relying upon a fatally flawed premise: to wit, that if Mr. Sidelko's statements were determined by the Commission to be inconsistent, the Commission would thereby be empowered and required to grant the "relief" Allied/CFI have requested. However, it is ineluctable that any such legal determination regarding the substance of Mr. Sidelko's statements cannot be made and, even if it were, it would be woefully insufficient to justify the Commission's granting any of Allied/CFI's requests due to several niceties Allied/CFI have deliberately ignored: e.g., the requirements of standing and jurisdiction, the doctrine of administrative finality, and the law of settlements. Allied/CFI's feigned ignorance of these well-settled legal principles demonstrates their improper and frivolous purpose in filing its Petition. Hence Allied/CFI must be sanctioned.

Moreover, Allied/CFI's filing of their Petition assumes a gullibility on the part of this Commission that is, in a word, insulting: Allied/CFI unfathomably state, in essence, that they have initiated this proceeding for purely altruistic reasons–as Allied/CFI have claimed no injury to

[4] It is of note that, in Paragraph 18 of its Petition, Allied/CFI also asserts that, if TECO had granted Odyssey an improper rate, the revenue difference could be imputed to TECO, not Odyssey.

themselves for which they seek redress by Commission action. This, too, makes Allied/CFI's Petition both sanctionable and problematic as it is beyond any reasonable interpretation of the law or the facts (even as stated by Allied/CFI) to find that Allied/CFI possess the requisite standing to request relief in this, or any forum, on behalf of anyone but themselves. In fact, and in a light that is flattering beyond favorable, Allied/CFI's Petition is paramount to a claim that, by the very Settlement Agreement they now seek to avoid, Allied/CFI gained the right to receive a better rate for electricity than that to which they were entitled. For Allied/CFI to claim that such a benefit equals an injury at all, much less an injury sufficient to confer standing upon them, exceeds folly. Thus, Allied/CFI's Petition must be viewed as an improper, frivolous, sanctionable, poorly veiled attempt to use this Commission to gain an economic and competitive advantage over an entity with which Allied/CFI claims to be in "fierce" competition by coercing the Commission into raising Odyssey's electrical rates and providing Allied/CFI with fodder for its equally groundless civil action it has pending against Odyssey.

Furthermore, assuming, *arguendo*, that the Commission could legally grant any of Allied/CFI's requests, Allied/CFI are further flouting the law by, *inter alia*, (1) calling into question the Commission's independent finding that the CSA between TECO and Odyssey is prudent where the Commission has made it clear that such a finding of prudence does not affect the substantial interests of a competing TECO customer; (2) second-guessing the Commission's prudence determination, which was based upon RIM analyses provided it by TECO, by claiming that the rate paid TECO by Odyssey "is insufficient to cover TECO's incremental cost to serve Odyssey and, therefore, is contrary to the interests of TECO and its ratepayers"; and (3) asserting that Allied/CFI possess the legal right to compel the Commission to act on Allied/CFI's baseless Petition. The law

is abundantly clear that these positions are as untenable, and sanctionable, as those chronicled above and elsewhere herein.

## II.

## ALLIED/CFI LACK STANDING TO REQUEST A HEARING, MUCH LESS TO REQUEST THE RELIEF THEY SEEK

As a threshold matter, this Commission must determine whether Allied/CFI have alleged standing sufficient to receive a hearing on the "relief" it has requested; if Allied/CFI have not, the law is clear that Allied/CFI are entitled to no such hearing, much less the action they are attempting to provoke the Commission into taking. This is an easy matter to resolve, as any reasonable reading of Allied/CFI's Petition demonstrates that their allegations are insufficient to confer standing upon Allied/CFI and, thus, they are neither entitled to a hearing nor the relief they request. Hence, the analysis of Allied/CFI's Petition both begins and ends with the determination that Allied/CFI lack standing, the Petition must be dismissed, and Allied/CFI must be sanctioned for their improper and frivolous filing.

In *Agrico Chemical Co. v. Dept. of Environmental Regulation*, 406 So.2d 478, 482 (Fla. 2d DCA 1981), Florida's seminal case on administrative standing, the court articulated the requirements for such standing, stating

> [B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

(emphasis added).

Regarding the first of the *Agrico* test's two prongs, the "injury-in-fact" test for entitlement to a § 120.57 hearing, Florida's courts have refined the standard to require, *inter alia*, that a Petitioner demonstrate a "real and immediate injury" to himself that exceeds "indirect economic loss" or the Petitioner's mere status as a "business competitor" (fierce or otherwise). *E.g.*, *Montgomery v. Dept. of Health and Rehabilitative Services*, 468 So.2d 1014, 1015-1016 (Fla. 1st DCA 1985) (stating under an injury-in-fact analysis that one is "required to show an injury which is both real and immediate, not conjectural or hypothetical."); *Dept. of Corrections v. Van Poyck*, 610 So.2d 1333, 1336 (Fla. 1st DCA 1992) (enunciating that a party can satisfy the injury-in-fact test only by "demonstrating either that he had sustained actual injury at the time of filing the petition, or that he is immediately in danger of sustaining some direct injury") (internal citation omitted, emphasis added); *Florida Soc'y of Ophthalmology v. State Board of Optometry*, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988) (holding that some degree of indirect economic loss is of insufficient "immediacy" to establish standing); *Maverick Media Group, Inc., v. Dept. of Transportation*, 791 So.2d 491 (Fla. 1st DCA 2001) (finding standing due to the fact that the appellant was not a third-party business competitor while stating that third-party-business-competitor status would have been insufficient to confer standing upon appellant). Moreover, the injury complained of must be specific to the Petitioner as opposed to one "suffered by any member of the general public." *Centrust Sav. Bank v. The City of Miami*, 491 So.2d 576 (Fla. 3d DCA 1986) ("The plaintiff Centrust makes no claim, however, that it has suffered a special injury, apart from the injury suffered by any member of the general public.... Centrust therefore lacks standing to bring the instant action....") (emphasis added).

Allied/CFI's Petition, on its face, fails to allege any factual basis that would satisfy the injury-in-fact test and confer standing upon Allied/CFI. Thus, it is clear that, even if one takes Allied/CFI's Petition in a light most favorable to Allied/CFI and assumes the Petition's factual allegations to be true, none of these allegations can be viewed as a legally cognizable injury in fact. Hence, Allied/CFI's Petition must be dismissed with prejudice as Allied/CFI have not, and cannot, allege the most bedrock of legal requirements–that Allied/CFI seek redress for an injury in fact sufficient to confer upon them standing to maintain an action under § 120.57, Fla. Stat. Moreover, as the law on this issue is so well settled, and Allied/CFI's Petition is so infirm in this regard, Odyssey is entitled to the fees and costs it has incurred in responding to Allied/CFI's improper and frivolous filings.

As for the second prong of the *Agrico* test for administrative standing, known as the "zone-of-interest" test, even assuming that Allied/CFI had alleged a legally cognizable injury in fact, Allied/CFI's failure to follow Florida's Administrative Procedure Act and the Uniform Rules of Administrative Procedure–by failing to name any statute or rule that "requires" the Commission to act in accordance with Allied/CFI's wishes–precludes any analysis of whether Allied/CFI's nonexistent, alleged injury was of a type designed to be prevented by its uncited statutes.

In short, Allied/CFI have alleged no basis whatsoever for granting them standing in this matter. Thus, their Petition must be dismissed with prejudice and Odyssey must be awarded its fees and costs associated with its defense of this improper and frivolous action.



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## III.

## THE RELIEF REQUESTED BY ALLIED/CFI CANNOT BE GRANTED

### *A. THE COMMISSION SHOULD NOT VACATE ORDER NO. PSC-01-1003-AS-EI:*

#### 1. Allied/CFI's Request for Relief Should Be Dismissed Because the Law of Administrative Finality Precludes the Vacation of Order No. PSC-01-1003-AS-EI.

*a. Applied to the Order at Issue in This Case, the Case Law in Florida Clearly and Unequivocally Mandates that the Order is Final, Has Passed Out of the Commission's Control, and Is Not Subject to Modification or Vacation.*

Under Florida law, agencies have an inherent, though limited, power to reconsider final orders still under their control. *People's Gas System v. Mason*, 187 So.2d 335, 338 (Fla. 1966). However, administrative orders must eventually become final and pass out of the agency's control, disallowing the agency from any further modifications thereto. *Id.* at 339. To that end, once an order is final, an agency may only modify or reconsider an administrative order if a petitioner demonstrates particular and substantial changes in circumstances, extraordinary circumstances, or a demonstrated public need or interest, and even then only for a reasonable period of time. *Id.*; *Austin Tupler Trucking, Inc. v. Paula Hawkins*, 377 So.2d 679, 681 (Fla. 1979); *see also, e.g.*, *Florida Power Corporation v. Garcia*, 780 So.2d. 34 (Fla. 2001) (change in law regarding primary issue did not qualify as sufficiently "changed circumstance" to reopen order); *Russell v. Department of Business and Professional Regulation*, 645 So.2d 117 (Fla. 1st DCA 1994) (where appellant's argument for reopening case was predicated on extraordinary-circumstances exception to administrative finality, yet the claimed extraordinary circumstances had no substantial relation to

the reason for his professional censure, appellant's attempt to re-open case was unsuccessful); and *Richter v. Florida Power Corporation*, 366 So.2d 798 (Fla. 2d DCA 1979) ("daisy chaining" resulting in excessive fuel adjustment charges passed on to consumers, when FPC knew or should have known of fraud being perpetrated, was extraordinary circumstance allowing modification of final order to award refund to consumers). In the instant case, Commission Order No. PSC-01-101-AS-EI has become final and has therefore passed out of the Commission's control. Accordingly, the Commission should place an onerous burden upon Allied/CFI in determining whether Allied/CFI have alleged the exceptional bases necessary for modification or reconsideration of that Order.[5]

An additional basis upon which the Commission should deny Allied/CFI's request for vacation of the Order is the period of time that has passed since the Commission entered Order No. PSC-01-101-AS-EI on April 24, 2001. The timing of such a request is an important consideration when determining whether an agency can modify, much less vacate, an administrative order. In this case, Allied/CFI seek not modification, but vacation *in toto* of an order issued 32 months prior to the filing of the instant Petition. Periods of two years (*Austin Tupler, supra*) and four years (*People's Gas, supra*) between an initial order and attempted modification have been found to be excessive and administrative finality to have irrevocably attached. This Commission should determine that the period of nearly three years that has elapsed since issuance of Order No. PSC-01-101-AS-EI, alone, precludes its vacation.

In *People's Gas,* 187 So.2d at 335, the court laid out the rule that has remained the governing principle in Florida for 38 years. The Commission in that case had modified an order four and a half

[5] It is notable in this case that Allied/CFI do not request modification of the Order. It is not Allied/CFI's desire to tinker with a certain provision of the Order. Instead, Allied/CFI ask that *the entire Order be vacated* such that it will then be deemed–for the purposes of the Settlement Agreement approved therein–to have never existed.

years after its issuance. The petitioner appealed this modification and the court found that the dispositive inquiry in the case was whether the Commission had the power to modify a final order after it had become final by the passage of time. The Supreme Court held that, although Florida is a state wherein agencies have the inherent power to reconsider final orders which are still under their control, "this authority to modify is a limited one." *Id.* at 339 (emphasis added). The court then ruled that there must be a "terminal point in every proceeding at which the parties and the public may rely on the decision of...an agency as being final and dispositive of the rights and issues involved therein." (Emphasis added.) The court went on to hold that the passage of four and a half years between the original and the modified order mandated deeming the original decision final. The court further stated that it was experiencing "no qualms in holding that in entering the order under review the commission went far beyond any power it has to modify an order previously entered."

In *Austin Tupler, supra*, the court revisited the issue dealt with in *People's Gas*. In that case, the defendant sought to transfer a certificate. The plaintiff argued that the certificate in question had been ruled dormant by a Commission order in 1972. 377 So.2d at 680. In 1974, however, the Commission had revisited the issue of the certificate's dormancy and had modified its 1972 order, reversing its position and finding that the certificate was not dormant. *Id.* The issue before the court in 1978 was whether the Commission had the power to modify an order in 1974 that was initially issued in 1972. Citing to *People's Gas* (and reiterating that, although agencies have the authority to modify prior orders, administrative orders must at some point pass out of the agencies' control and become final) the court found that the two-year gap between the original (1972) and modified (1974) orders was too long. Commenting on the passage of this two-year period, the court held that "[t]o allow the Commission to revisit an issue disposed of long ago would contravene the sound

principles of finality enunciated in People's Gas." *Id.* at 681.

In *Florida Power Corporation v. Garcia, supra*, the court examined the preclusive effect of a prior determination by the Commission that it lacked jurisdiction to address a contract dispute. 780 So.2d 34. The Commission had determined in 1995 that it lacked such jurisdiction and, when the plaintiff attempted to reopen the same issues in 1998, the Commission properly afforded its 1995 judgment preclusive effect in accord with the doctrine of administrative finality. The court affirmed the Commission's determination, citing the principles enunciated in *Austin Tupler* and *People's Gas, supra.*

Thus, the well-founded presumption in Florida law that a Final Order should neither be modified nor vacated when it has been in existence as long as Order No. PSC-01-1300-AS-EI should be applied by the Commission in this case and Allied/CFI's request to vacate said Order must be denied.

Based on the principles enunciated in *People's Gas,* and echoed in, *e.g.*, *Austin Tupler* and *Florida Power*, once finality has attached to an administrative order it may, though only within a reasonable period of time, be amended or modified if and only if a petitioner demonstrates particular and substantial changes in circumstances, extraordinary circumstances, or a demonstrated public need or interest. However, Allied/CFI have not even made the most basic allegation of such circumstances or significant public need or interest in this matter, and Allied/CFI's suggestion that Mr. Sidelko's testimony in a December, 2003, deposition in a circuit court case constitutes a "change in circumstances" would be laughable–but for the great and unnecessary expenditures of time and money made necessary by Allied/CFI's Petition. Merely parroting these concepts is not, by any means, a demonstration, or even a sufficient allegation, of their existence. This Commission must

stand by Order No. PSC-01-1003-AS-EI.

Moreover, there can be no dispute that Allied/CFI had ample opportunity in Docket No. 000061-EI to ask the same questions of Mr. Sidelko and to probe the same subject matters with Mr. Sidelko as they did in the December, 2003 deposition from which they have improperly attached selected and misleading excerpts.[6] Thus, the Commission should not now allow Allied/CFI, 32 months later, to launch another assault on Odyssey, despite this Commission's proclamation in Order No. PSC-01-1003-AS-EI that it is "appropriate" "to settle, for all time, the prudence of Allied/CFI's and Odyssey's CSAs with respect to matters within our jurisdiction."[7]

The *People's Gas* decision, discussed, *supra*, relative to the preclusive effect of prior agency determinations, also closely examined the law governing "issues actually determined" and "issues that could have been determined" in the initial litigation of a matter, circumstances wholly applicable to this case as discussed in the preceding paragraph. In ruling that the issue the appellant wished to re-litigate could not be re-opened, the court stated that

> "...[e]ven if the jurisdictional issue raised by appellant in its 1998 petition was not actually determined by the PSC's prior decision regarding jurisdiction over the 1994 petition, it appears that it could have been resolved by the PSC at that time...In reviewing the two petitions, there is no question that they are substantively the same, despite the semantical difference ...because there is an identity of essential facts common to FPC's 1994 and 1998 petitions, along with an identity of the substance of the issue presented, the same issue of subject matter jurisdiction implicated by the 1998 petition, even if not actually raised in 1994, could have been raised at that time. A decision, once final, may only be modified if there is a significant change in circumstances or if modification is required in the public interest."

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[6] See footnote 3, *supra*.

[7] Apparently, Allied/CFI's interpretation of settling a matter "for all time" only encompasses a period of approximately 32 months.

*Id.* at 43-44 (emphasis added).

Thus, the Commission should also deny Allied/CFI's request to vacate Order No. PSC-01-1003-AS-EI because the Petition in the present docket clearly and merely turns ground which was previously and throughly plowed in the prior proceeding. When the issues at hand in both the initial proceeding and the subsequent request to reopen or modify are substantially the same (i.e., if the issue currently at bar was actually determined or could have been determined in the initial proceeding), the doctrine of administrative finality applies conclusively *Florida Power Corporation v. Garcia*, 780 So.2d. 34, 44 (Fla. 2001). Similarly, if there is "an identity of essential facts common to (both proceedings)" the doctrine of administrative finality irrevocably attaches. *Id.* As such an identity exists between the current Petition and Docket No. 000061-EI, Allied/CFI are conclusively barred from raising the issues therein.

Allied/CFI had ample opportunity to address these precise issues in Docket No. 000061-EI by attacking the various statements they now allege to be false–through cross examination or other methods of proof. In fact, Allied/CFI represented to the Commission at hearing in Docket No. 000061-EI, the same day the settlement was reached, that they were ready to present evidence demonstrating entitlement to the same relief for which they now claim they have newly discovered evidence. (Document No. 02573-01, Tr. 29.) In the case at bar, not only is the issue raised by Allied/CFI's Petition one that "could have been resolved" by the PSC at that time, it is an issue which was resolved in plain, clear and unequivocal language in both the Settlement Agreement and the Commission's Order.[8]

[8] For instance, the Settlement Agreement states that "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"; that "the Odyssey and Allied/CFI CSAs are prudent"; and that this finding is "consistent with those typically made in a prudence

Also of note is the fact that the court in *Florida Power Corporation* relied upon cases discussing, and applied logic similar to, what the court called the "counterpart of administrative finality": *res judicata*. *Id.* at 44. In bolstering its holding that the issue then at bar could not be litigated, the court cited to cases dealing specifically with *res judicata*, applying the reasoning from those cases to preclude litigation of the issue before the Commission. In particular, the court relied on the test for *res judicata* enunciated in *Albrecht v. State*, 444 So.2d 8, 11-12 (Fla. 1984), that "several conditions must occur simultaneously, one of which is an identity of the cause of action, and...the determining factor in deciding whether the cause of action is the same is whether the facts or evidence necessary to maintain the suit are the same in both actions."

Thus, the Commission should dismiss Allied/CFI's Petition, sanction Allied/CFI, and award Odyssey its costs and fees in defending this improper, frivolous action, because Allied/CFI's Petition seeks vacation of an order which is final and because the Petition utterly fails to demonstrate, or in fact even allege, the existence of any fact or circumstance which was not previously litigated in the prior docket and which would lawfully support the Commission's granting any of the "relief" requested therein.

*b. The Cases Cited by Allied/CFI, in Fact, Militate Against Allied/CFI's Request that Order No. PSC-01-1003-AS-EI Be Vacated.*

Allied/CFI cite to three cases in their Petition in arguing that the Commission should vacate Order No. PSC-01-1003-AS-EI in contravention of the doctrine of administrative finality.[9] As set

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review." No amount of artful articulation can change the fact that Allied/CFI's challenge to Odyssey's CSA in this docket, to the effect that the CSA is not prudent and should be terminated, is an issue which was addressed by the parties during the prior litigation and by this Commission in Order No. PSC-01-1003-AS-EI.

[9]Allied/CFI argues that these three cases stand for the proposition that an order may be modified, notwithstanding its finality, when the PSC's order was "predicated on fraud, deceit, surprise, mistake, or inadvertence;

forth below, Allied/CFI's reliance on these cases is misplaced.

*Reedy Creek Utilities v. Florida Public Service Commission*, 418 So.2d 249 (Fla. 1982), essentially held that two and a half months was not sufficient for administrative finality to attach. The case does not reach at all the question as to what circumstances abrogate administrative finality once it *has* attached.[10] Moreover, a period of two and a half months is hardly analogous to the situation in the case at bar.

*Russell v. Dept. of Business and Prof. Regulation*, 645 So.2d 117 (Fla. 1st DCA 1994), presents even less support for Allied/CFI's frivolous demands, as the *Russell* court failed to find the requisite "extraordinary circumstances" present to reopen a final order when alleged new evidence came to light in the case. At best, *Russell* stands for the proposition that "extraordinary circumstances," "changed circumstances," or a "significant public need or interest" may–under certain conditions absent in this matter–be cited for reopening or modifying a final order or closed case where same is applied for "several months" after entry of a final order. *See id.* at 119

Finally, Allied/CFI appear to place significant reliance on *Richter v. Florida Power Corp.*, 366 So.2d 798 (Fla. 2d DCA 1979), to support their contention that "fraud, deceit, surprise, mistake, or inadvertence" are bases upon which decisional finality may be circumvented, as neither *Reedy Creek* nor *Russell* even mention any such possibility. However, it appears that Allied/CFI's reliance on *Richter* is an attempt to impose upon the Commission their tortured reading of the passage in

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where there is a demonstrated public need or interest; or, where there is otherwise a substantial change in circumstances."

[10] See, *supra*, discussion that *People's Gas* and *Austin Tupler* established the rule that once attached, administrative finality can only be circumvented and modifications or amendments made under "extraordinary circumstances," "changed circumstances," or "significant public need or interest" and, even then, only within a reasonable period of time.

*Richter* wherein the court mentions in *dicta*, but does not rely upon, 73 A.L.R.2d 939, 951-52 (1960) (presenting a survey of the laws of various states around the country on the power of administrative agencies to alter final orders). In referring to this portion of the A.L.R., the court quotes from the reporter that in some states, "some courts have recognized exceptions to the rule under extraordinary circumstances, as where a substantial change in circumstances, or fraud, surprise, mistake, or inadvertence is shown." However, the court does not rely on this reference–the court simply makes use of its examples. This is made clear by the next line in the opinion, wherein the court states that "[l]ikewise, Florida decisions recognize that an administrative agency may alter a final decision under extraordinary circumstances" (emphasis added). By the use of the word, "likewise," the court indicates that Florida does not explicitly recognize the string of situations quoted by the A.L.R., but has instead recognized "extraordinary circumstances," rather than any instance of fraud, deceit, surprise, mistake, or inadvertence, as the prerequisite for circumventing administrative finality.

Allied/CFI have clearly misstated the specific circumstances under which finality may be avoided. The reason for this is obvious since Allied/CFI's desire that the Commission injure Allied/CFI's "fierce" competitor, Odyssey, in an unregulated marketplace so that Allied/CFI can gain an economic advantage, does not, and cannot, constitute "extraordinary circumstances," "changed circumstances," or "public interest or public need." The aggressively misleading allegations in Allied/CFI's Petition are categorically necessitated by the lack of any credible, legally cognizable basis for Allied/CFI to attack Order No. PSC-01-1003-AS-EI.

As demonstrated by Allied/CFI's own Petition, the record (such as it is exists), and the arguments and references to facts known to the Commission as advanced within this Motion, Allied/CFI have utterly failed to demonstrate, or even allege, that any change, discovery, or

occurrence (extraordinary or otherwise) has come to pass that could legally justify vacation of Order No. PSC-01-1003-AS-EI and the effective reopening of a case that has been litigated, settled, and the subject of a dispositive final order by this Commission nearly three years ago. Hence, Allied/CFI's Petition should be dismissed, Allied/CFI sanctioned, and Odyssey awarded the costs and fees associated with its defense of this improper and frivolous action.

*c. Under Florida Law, Allied/CFI's "Fraud" Theory for Vacating Order No. PSC-01-1003-AS-EI Is Untimely.*

The allegedly "false, misleading and/or fraudulent sworn statements" of Odyssey's President, Mr. Sidelko, is Allied/CFI's sole basis for its requesting that the Commission vacate Order No. PSC-01-1003-AS-EI and the other "relief" requested in the Petition (all of which is, of course, contingent upon the vacation of the Order).

Initially, and as set forth above, an allegation of fraud is an insufficient basis upon which to request that an administrative order be vacated.

Moreover, when such issues are before a court for resolution and the complaining party could have addressed the issue in a prior proceeding, such as attacking alleged false testimony or misrepresentation by cross-examination or other evidence, then the improper conduct, even "though it may be perjury," is "intrinsic" fraud and an attack on a final judgment based on such fraud must be made within one year of the entry of the judgment. *Cerniglia v. Cerniglia*, 679 So.2d 1160, 1163 (Fla. 1996); *cf.* Fla. R. Civ. P. 1.540(b). Just as Florida's Supreme Court determined in *Cerniglia* that a husband's allegedly "fraudulent affidavit" was an allegation of intrinsic fraud, and therefore subject to the one-year limitation, this Commission should determine that the allegations of Allied/CFI are, at best, allegations of intrinsic fraud, and subject to the same one-year limitation.

Accordingly, and to the extent that Allied/CFI's claim of fraud is predicated upon a belief that, under Fla. R. Civ. P. 1.540(b), Order No. PSC-01-1003-AS-EI should be vacated based upon such alleged "fraud," Allied/CFI's argument must be rejected by the Commission as it is untimely.[11] Just as an appropriate application of the doctrine of administrative finality prohibits the Commission from vacating the Order and mandates that Allied/CFI's request for same be denied, Fla. R. Civ. P. 1.540 also clearly demonstrates a separate basis upon which the Commission should find that no circumstances exist for the Commission to grant Allied/CFI the "relief" from Order No. PSC-01-1003-AS-EI sought in their Petition.

**2. The Commission Should Dismiss Allied/CFI's Request to Vacate Order No. PSC-01-1003-AS-EI Pursuant to Florida Law Governing Settlement Agreements Such as That Here at Issue.**

The public policy of the State of Florida, as articulated in numerous court decisions, highly favors settlement agreements among parties and directs courts to seek to enforce them whenever possible. *Sun Micro Systems of California v. Engineering and Manufacturing Systems, C.A.* 682 So.2d 219, 220 (3d DCA 1996), citing *Robby v. City of Miami*, 469 So.2d 1384 (Fla. 1985) and *American Express Travel Related Svcs. Co. v. Marrod, Inc.*, 637 So.2d 4 (Fla. 3d DCA 1994). Further, a settlement agreement must be interpreted in accordance with its terms and underlying intent. *Sun Micro Systems* at 220, citing *Morales v. Metropolitan Dade County*, 652 So.2d 925 (Fla. 3d DCA).

This Settlement Agreement was drafted, negotiated and finalized by Allied/CFI and TECO

[11] This Commission has, several times in the past, followed Rule 1.540, Fla. R. Civ. P., within the context of pending Commission administrative proceedings. See, *e.g.*, *In Re: Petition by Bell South Telecommunications*, Order No. PSC-02-0878-FOF-TP (2002).

"as a result of very focused efforts over . . . six weeks."[12] This thoroughly negotiated and carefully worded Settlement Agreement could not be more clear, or less equivocal, that its execution was designed to prevent, at least in part, the filing of a Petition like that Allied/CFI now put before the Commission. As Order No. PSC-01-1003-AS-EI states, at Page 8 thereof, TECO and Allied/CFI clarified for the Commission that the Settlement Agreement was intended, in part, "to settle, for all time, the prudence of Allied/CFI's and Odyssey's CSAs with respect to matters within [the Commission's] jurisdiction." The Settlement Agreement itself provides that:

- 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;

- Allied/CFI's Complaint in Docket No. 000061-EI was deemed withdrawn, with prejudice upon: (a) the execution of the Settlement Agreement by TECO and Allied/CFI; and (b) the issuance of an Order by the PSC approving the Settlement Agreement;[13]

- Allied/CFI and TECO specifically requested that the Commission enter an order providing that it would "not entertain any further challenge to the existing Odyssey or the proposed Allied/CFI CSA or the rates, terms or conditions contained therein"; and

- Allied/CFI and TECO promised to abide by the various "general release" agreements executed among them.[14]

The Settlement Agreement modestly extends from the date of the Agreement back to "the

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[12] Statement of Counsel for TECO before the Commission on Tuesday, April 3, 2001(Docket No. 000061-EI, Document No. 04394-01, Tr. 4).

[13] There can be no doubt that Allied/CFI's Complaint in that docket, which was deemed withdrawn "with prejudice," addressed the same issues that are now the subject of the Petition in this case. Allied/CFI's own counsel, in addressing the Hearing Panel, stated that Allied/CFI "sought to have...Odyssey's rates suspended...." Document No. 02573-01, Tr. 29. Nevertheless, Allied/CFI make that claim again in the instant Petition.

[14] The release attached to the Settlement Agreement contained language which is as encompassing as any ever conceived, stating by its own terms that it extended, applied to, covered and included, "all unknown, unforseen, unanticipated, and unsuspected injuries, damages, loss and liability, and the consequences thereof, as well as those now disclosed and known to exist." (Emphasis added.)

beginning of the world." Odyssey cannot help but wonder why it must retain attorneys once again to defend against the claims of Allied/CFI 32 months after the closure of the last case, given Allied/CFI's promise that they would not revisit this issue based upon any circumstance which arose between March 2, 2001 (the date of the General Release) and approximately six billion years ago (based upon current scientific consensus).

Allied/CFI's purported reason for breaching their promise (which they unequivocally, unambiguously, and undeniably made in the Settlement Agreement) is that they had an epiphany at a deposition of Mr. Stephen Sidelko taken on December 18, 2003. Allied/CFI's claim that Mr. Sidelko's statement somehow changes everything is a specious, contradictory, and guileless attempt to mislead this Commission. When the parties came before the panel for the administrative hearing in Docket No. 000061-EI (on February 19, 2001) Allied/CFI's own attorney stated, "we also sought to have...Odyssey's rates suspended and we believe we have evidence to prove it and standing to assert it." (Document No. 02573-01, Tr. 29.) In other words, Allied/CFI informed the Commission on February 19, 2001, that they were ready to present the same evidence which they now pretend to have discovered in December, 2003, to wit: evidence which would allegedly justify the suspension of Odyssey's CISR rate with TECO.

Even assuming the truth of Allied/CFI's representation of what Mr. Sidelko said in the deposition, it is disingenuous, at best, to claim that something said in December of 2003, given Allied/CFI's statement in a case they agreed to settle in 2001 that they had the evidence to prove the same thing that they now claim constitutes "a substantial change in circumstances." The only true "change in circumstances" Allied/CFI have experienced is an intensification of their dismay that Odyssey, their "fierce competitor," has continued to survive despite Allied/CFI's repeated abuse of

the judicial system and ongoing attempts to destroy their much smaller competitor through every means other than the provision of a superior product in an unregulated marketplace.[15]

This Commission should decline to allow Allied/CFI to breach the promises, covenants, and representations which they negotiated over a period of "six weeks" in early 2001 based on the recently and slapdash facade of a "substantial change in circumstances" in December of 2003. There has, in fact, been no change in circumstances at all with regard to the prudence and legality of Odyssey's CISR, much less a "substantial one." The claim that Allied/CFI now make in the Petition–that Odyssey does not qualify for its CISR rate with TECO and that the same should be ended–is the exact same claim Allied/CFI made to the Commission in Docket No. 000061-EI.

No discussion about the Settlement Agreement would be complete without considering the following important question: even if the Commission's Order is vacated, does the Settlement Agreement survive (therefore clearly barring the filing of the Petition in this case and foreclosing the relief requested therein) or does the Settlement Agreement somehow disappear into thin air if Order No. PSC-01-1003-AS-EI is "vacated"? Under Florida law, it is unquestionable that the Settlement Agreement remains in effect between Allied/CFI and TECO, regardless of whether or not the Commission vacates the Order.

There is no doubt that Allied/CFI and TECO could have entered into this Settlement Agreement, resulting in the dismissal of Allied/CFI's Complaint in Docket No. 000061-EI, without Commission approval. While the entire Settlement Agreement itself is not contingent upon the

[15] The fact that the record reveals that Allied/CFI believed they knew in 2001 what they are now alleging they did not learn until December of 2003 should also be considered in the context of our Supreme Court's declaration: if the theory of the renewed proceeding could have been pursued in the initial proceeding, administrative finality attaches, and the petitioner is barred from re-opening the decision.

Commission's approval, Paragraph 6 thereof does provide that Allied/CFI's Complaint would not be deemed to have been withdrawn, with prejudice, until the Commission issued an Order approving the Settlement Agreement. Hence, Allied/CFI cannot lawfully breach the Settlement Agreement–as they have by filing the instant Petition–unless the Commission can exercise non-statutory powers of legerdemain and make the Settlement Agreement vanish. Neither can Allied/CFI obtain the relief they request as long as the Order, in and of itself, stands, since the Order makes certain findings about the prudence of Odyssey's CISR rate with TECO. Accordingly, Allied/CFI's Petition must be denied if this Commission determines either that the Order should not be vacated or if it determines that vacation of the Order does not effectively rescind the Settlement Agreement–which, by law, no such vacation can accomplish.

As a matter of law, the Settlement Agreement continues in force and effect whether or not the Commission vacates Order No. PSC-01-1003-AS-EI. Settlement agreements are interpreted and governed by the law of contracts. *Spiegel v. H. Allen Holmes, Inc.*, 834 So.2d 295, 297 (4th DCA 2002). While there exist some decisions holding that certain settlement agreements approved by Commission Orders have no existence apart from the Orders approving them, these decisions address only the narrow subject of territorial agreements, an issue over which the Commission has both jurisdiction and a statutory obligation of review. In this case, the Settlement Agreement itself provides, at Paragraph 11, that it "may not be modified except by a writing, signed by all parties." (Emphasis added.) Order No. PSC-01-1003-AS-EI also specifically notes that the Settlement Agreement may be modified in writing by TECO and Allied/CFI. Obviously, no credible claim can be made that the Settlement Agreement and the Order are somehow inextricably intertwined when TECO and Allied/CFI may make any modifications to the Settlement Agreement without

Commission approval and at any time that they see fit (especially where the Commission has expressly acknowledged this provision). The Commission's approval of the Settlement Agreement does not render the Agreement as one that has no independent existence apart from the Commission's Order approving it.

Even should this Commission somehow decide that vacation of Order No. PSC-01-1003-AS-EI does magically dissolve the Settlement Agreement, the "General Release" still bars this action by its own terms. (Exhibit "C" to the Settlement Agreement.) That the Release is not a part of the Settlement Agreement was made clear by the statements of counsel for TECO to the Commission on February 19, 2001 (to which Allied/CFI posed no objection). After informing the Commission that TECO and Allied/CFI had reached an "agreement in principle," the following exchange occurred:

> MR. LONG: Well, Commissioner, Allied/CFI and Tampa Electric have agreed that Allied/CFI will provide Tampa Electric with a General Release with regard to any future litigation, and that would be an agreement signed by Tampa Electric.
>
> CHAIRMAN JACOBS: And that's outside of the settlement?
>
> MR. LONG: Yes.
>
> CHAIRMAN JACOBS: That's the only point I wanted to make.
>
> MR. LONG: But that is a key element in our agreeing to the settlement.

(Document No. 02573-01, Tr. 56-57, emphasis added.)

The fact that the General Release stands on its own legs, separate and apart from the Settlement Agreement, is also consistent with Order No. PSC-01-1003-AS-EI, which discussed the

Settlement Agreement at length, but does not discuss the General Release other than the context in which it is referenced in Paragraph (7(d)) of the Settlement Agreement.[16]

Because the Settlement Agreement and General Release survive whether or not the Commission vacates Order No. PSC-01-1003-AS-EI, Allied/CFI's Petition fails as a matter of law for that reason alone. The Commission should dismiss Allied/CFI's Petition based on the negotiated, clear, unequivocal, and unambiguous terms of the Settlement Agreement and the General Release, should sanction Allied/CFI, and should award Odyssey its fees and costs associated with defending this sham action.

**3. Because Allied/CFI's Actual Purpose in Seeking Vacation of Order No. PSC-01-1003-AS-EI is to Advance Their Own Economic Interests Against a "Fierce Competitor," Allied/CFI Have No Standing to Seek Vacation of the Order.**

In light of the standing argument presented in Section II, *supra*, and notwithstanding Allied/CFI's attempted chicanery in claiming that it has filed its Petition for the benefit of only others, it is beyond peradventure that Allied/CFI's decidedly improper purpose in bringing this action is to attempt to gain an advantage over its "fierce competitor" by enlisting the assistance of this Commission in, *inter alia*, raising the rate Odyssey pays for electricity. Allied/CFI's attempt to use the Commission to this end is neither lawful nor proper. *See, e.g.*, *Centrust Sav. Bank*, 491 So. 2d at 576; *see also, e.g.*, *Maverick Media Group*, 791 So.2d at 491.

Even assuming, *arguendo*, that Odyssey's rate with TECO were too low–and no such conclusion is supported by any proper reading of the Petition in this matter–absent the articulation of an injury specific to Allied/CFI, Allied/CFI, has no standing to insist that the Commission do

[16] There, the Commission merely noted that the parties agreed that the Commission could only enforce the General Release to the extent that a party brings claims before the Commission which the Commission determines are within the Commission's jurisdiction.

anything relative to the enforcement of its regulations. *See, e.g., City of Sarasota v. Windom*, 736 So. 2d 741, 742-43 (Fla. 2nd DCA 1999) (holding that citizens had no private cause of action to challenge city's allegedly improper traffic control devices). Moreover, no third party possesses the right to compel the government to enforce regulations. *See, e.g., Centrust Sav. Bank* at 576 (holding that action could not be maintained by private citizen to require enforcement of building or zoning codes); *see also, e.g., RHS Corp. v. City of Boynton Beach*, 736 So. 2d 1211 (Fla. 4th DCA 1999) (holding that city could not be compelled to enforce land development regulations against a private property owner); *compare Agrico*, 406 So.2d at 482 ("Chapter 403 was simply not meant to redress or prevent injuries to a competitor's profit and loss statement.") *with* Ch. 366, Fla. Stat., *generally* (likewise including no such purpose); *see also* Order No. PSC-01-1003-AS-EI at Page 10 (stating that a finding that one commercial TECO customer's CSA is prudent does not affect the substantial interests of a competing commercial TECO customer).

Therefore, Allied/CFI's Petition must be dismissed with prejudice, Allied/CFI should be sanctioned for wasting this Commission's and Odyssey's resources for an improper purpose, and Odyssey should be awarded the fees and costs associated with having to prepare this Motion.

### *B. WHETHER OR NOT THE COMMISSION VACATES ITS PRIOR ORDER, THE COMMISSION CANNOT, AND SHOULD NOT, DETERMINE THAT THE SETTLEMENT AGREEMENT BETWEEN ALLIED/CFI AND TECO, IS UNENFORCEABLE.*

As demonstrated herein, the voluntary Settlement Agreement has been acknowledged by both the Commission and Allied/CFI as distinct from the Order.

"The Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the state. Any reasonable doubt as to the lawful existence of a

particular power that is being exercised by the Commission must be resolved against the exercise thereof...."[17] Moreover, even where an agreement between two regulated entities includes language permitting the Commission to intervene in the contractual relationship, the Commission cannot "modify or abrogate private contracts unless such action [is] necessary to protect the public interest." *United Telephone Co. of Florida v. Public Svc. Comm'n*, 496 So.2d 116, 119 (Fla. 1986) (emphasis added) (citing *Arkansas Natural Natural Gas Co. v. Arkansas RR Comm'n*, 261 U.S. 379, 382-83 (1923)). Hence, as abrogation of the settlement provisions detailed below cannot reasonably be said to be necessary to protect the public interest, and as there is no statutory basis for the Commission to abrogate these provisions, the Commission lacks jurisdiction to do so. *See also, e.g., id* at 118 ("Parties to a contract...can never confer jurisdiction" where none exists by statute).

As discussed, *supra*, the Settlement Agreement and General Release attached thereto, entered voluntarily by both Allied/CFI and TECO, but which Allied/CFI now unilaterally seek to avoid, provides that the parties agreed, *inter alia*:

- that Allied/CFI would refrain from challenging the TECO/Odyssey CSA before the Commission (¶ 3)[18];
- that Allied/CFI would refrain from contesting any Commission determination that the TECO/Odyssey CSA is prudent (¶ 5)[19];

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[17] *Florida Bridge Co. v. Bevis*, 363 So.2d 799, 802 (Fla. 1978); *see also, e.g., Aloha Utilities v. the Florida Public Svc. Comm'n*, 376 So.2d 850, 851 (Fla. 1979); *cf. Deltona Corp. v. Mayo*, 342 So.2d 510, 511 (reversing Commission action and stating, "The basis for the action taken by the Commission in this case appears to be, as public counsel has urged and the Commission's order recites, that Deltona engaged in fraudulent land sales practices.... If Deltona has engaged in an unfair business practice or committed fraud, however, it may be a concern of other state agencies or the basis for private law suits (on which we express no opinion), but it is not a matter of statutory concern to the Public Service Commission. That agency has no authority to vindicate breaches, if any, of the land sales laws or private contracts....") (footnotes omitted).

[18] The very filing of the instant Petition is a violation of this provision.

[19] *See* footnote 18, *supra*.

- that Allied/CFI's complaint was to be deemed withdrawn with prejudice in PSC Docket No. 000061-EI (¶ 6);

- that Allied/CFI would release TECO (in short) from any claims "....of any nature whatsoever...from the beginning of the world to the date of [the Settlement Agreement]...from or in any manner related to Tampa Electric's Commercial Industrial Service Rider (CISR) Tariff, Tampa Electric's dealings with Odyssey...or their respective officers...which Allied/CFI or any of its officers...have, own or hold, or which at any time heretofore had, owned or held, or claimed to have had, owned or held, whether now known or unknown, vested or contingent...extend[ing] and appl[ying] to, and also cover[ing] and includ[ing], all unknown, unforeseen, unanticipated and unsuspected injuries, damages, loss and liability...." (General Release referenced in ¶ 8 and attached as Exhibit "C");

- and that the Settlement Agreement and the exhibits attached thereto constituted the entire agreement between the parties and may not be modified except in a writing signed by both Allied/CFI and TECO (Paragraph 11).

As parties are free to make such covenants, and such covenants are clearly beyond the scope of the Commission's statutory powers and authority, even if the Commission vacates Order PSC-01-1003-AS-EI, the Commission cannot void these provisions of the Settlement Agreement and General Release.

### *C. THE COMMISSION SHOULD NOT TERMINATE THE EXISTING CONTRACT SERVICE AGREEMENT BETWEEN TECO AND ODYSSEY.*

#### 1. Allied/CFI Have No Standing to Request that the Commission Terminate the Existing Contract Service Agreement between TECO and Odyssey.

While the arguments demonstrating Allied/CFI's lack of standing in Sections II and III(A)(3), *supra*, apply with equal force to Allied/CFI's demand that the Commission terminate the existing CSA between TECO and Odyssey, on Page 10 of Order PSC-01-1003-AS-EI, the Commission expressly and specifically held that a finding of prudence with regard to one commercial TECO customer's CSA does not affect the substantial interests of a competing TECO commercial customer. As the Commission has determined that the TECO/Odyssey CSA is prudent,

based upon, *inter alia*, TECO's RIM analyses, it follows that such a finding has no effect upon Allied/CFI's substantial interests. And as Allied/CFI's substantial interests are unaffected by this finding, Allied/CFI have no colorable claim that they have standing to request that this Commission terminate, or take any action with regard to, the TECO/Odyssey CSA.

### *D. THE COMMISSION LACKS THE JURISDICTION, AUTHORITY, AND POWER TO REQUIRE ODYSSEY TO "REFUND" ANYTHING TO ANYONE.*

As demonstrated in Section III(B)(2), *supra*, the Commission's powers, duties and authority are those, and only those, that are conferred upon it by statute and if there exists any reasonable doubt as to the existence of a particular power said doubt must be resolved by a finding that no such power exists. *See, e.g., Florida Bridge Co.*, 363 So.2d at 802; *Aloha Utilities*, 376 So.2d at 851; *cf. Deltona Corp.*, 342 So.2d at 511. As the statutes governing the entities and subjects of the Commission's jurisdiction[20] provide no basis for ordering Odyssey to "refund," or even to pay, a sum of money to anyone, Allied/CFI's demand must be denied as being beyond this Commission's jurisdiction.

Odyssey, as a chemical manufacturer and <u>not</u> a public utility, is not independently subject to Commission jurisdiction. *Cf.* § 366.02 (1) (defining "Public utility"). Therefore, the Commission cannot impose a penalty upon it. *Cf.* § 366.095, Fla. Stat. (authorizing the Commission to penalize only entities subject to its jurisdiction). Furthermore, Art. I, § 18, Fla. Const. ("Administrative penalties."), states that, "No administrative agency...shall impose...any...penalty except as provided by law," and no such law exists that would allow the Commission to impose a penalty upon

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[20] *See* §§ 366.02(1) (defining the entities over which the Commission has jurisdiction as a group to which chlorine manufacturers do not belong), 366.04(1) (defining and governing the Commission's jurisdiction, generally) and 366.04(2) (governing the Commission's specific powers relative to electric utilities); *see also* Ch. 367, *generally*.

Odyssey. *See also, e.g., Southern Bell Telephone and Telegraph Co. v. Mobile America Corp., Inc.*, 291 So.2d 199, 201 (Fla. 1974) (holding that "the PSC has no authority to award money damages" and that the award of such damages is "a judicial function within the jurisdiction of the circuit court pursuant to Art. V, § 5(b), Fla. Const." ). Simply put, Odyssey is a utility customer and there is no authority or precedent for the Commission to confiscate its assets.

Even assuming, *arguendo*, that the Commission were to accept the spurious argument that it has jurisdiction over Odyssey and the power and authority to impose a penalty upon it–notwithstanding the well-settled law to the contrary–Allied/CFI's demand must nevertheless be denied, as it is impermissible, even where the Commission possesses jurisdiction, for the Commission retroactively to impose changes akin to that demanded by Allied/CFI. *See, e.g., Southern Bell Telephone and Telegraph Co. v. Florida Public Service Comm'n, et al.*, 453 So.2d 780, 781 (Fla. 1984); *City of Miami v. Florida Public Svc. Comm'n*, 208 So.2d 249, 259 (Fla. 1968); *cf. Citizens of the State of Florida v. Florida Public Svc. Comm'n*, 415 So.2d 1268; *also cf.* §§ 366.06(2) and 366.07 (both allowing only prospective rate changes).

Hence, it is so far beyond a reasonable doubt as to be a certainty that the Commission lacks the jurisdiction, power, or authority to order Odyssey to "refund" anything to anyone; that Allied/CFI's demand for same, with no legal or factual basis therefor, must be dismissed; and that Odyssey should be awarded the costs and fees associated with its answering Allied/CFI's sham Petition.

### *E. EVEN IF ACCEPTED AS TRUE, THE FACTS RECITED IN ALLIED/CFI'S PETITION FAIL TO PROVIDE ANY LEGALLY COGNIZABLE BASIS UPON WHICH TO GRANT ANY OF THE RELIEF REQUESTED THEREIN.*

Odyssey hereby states that it is unable to fully respond to the Petition due to the Protective Order entered in *Allied Universal Corporation, et al. v. Odyssey Manufacturing Company*, Case No. 01-27699 CA 25, in the Circuit Court in and of the 11th Judicial Circuit in and for Dade County, Florida. Exhibit "A."[21] Paragraph 1 of the Protective Order, to which Odyssey and its counsel are subject, defines and deems as confidential, "[a]ny written, recorded or graphic material or documents, tangible items or any other form of information that a party produces in [the circuit court] case, which a party, in good faith, believes to contain trade secrets or confidential, sensitive or proprietary commercial information as provided by Rule of Judicial Administration 2.051[c](9)(A)(ii)" ("Confidential Information"). *Id.* Paragraph 3(C) of the Protective Order states that such Confidential Information "shall not" "[b]e used in any manner in connection with any other action or proceeding...." (Emphasis added.) *Id.* The balance of the Protective Order gives a non-exhaustive laundry list of the banned "uses" of the circuit court Confidential Information. Thus, Odyssey and its counsel believe in good faith that they cannot discuss the contents of any Confidential Information improperly disclosed to the Commission by Allied/CFI without running the unacceptable risk of violating the Protective Order themselves. Therefore, and with this in mind, Odyssey will make the following argument as best as it can without violating the Protective Order, unlike Allied/CFI, and Odyssey reserves the right to supplement this Motion should the Protective Order be amended in any way that would allow Odyssey to do so.

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[21] *See also* footnote 3, *supra.*

Were the Commission somehow to decide that the myriad incontestable legal arguments presented above are insufficient to require dismissal of Allied/CFI's "Petition," the Commission must nevertheless determine that Allied/CFI's allegations, even if accepted as true,[22] are wholly without merit and state no legally cognizable basis upon which to grant any of the relief requested. Hence, the Petition must be dismissed, Allied/CFI sanctioned, and Odyssey awarded its fees and costs in this matter.

Even if Allied/CFI's Petition is taken in a light most favorable to it, it is beyond question that all demands for relief in the Petition hinge upon a series of three exclusively legal[23] questions:

> (1) whether statements made by Mr. Sidelko, at various times over a period of more than five years, "contradict" one another;
>
> (2) if, and only if, said statements are determined to "contradict" one another, whether any such "contradictions" are material to Allied/CFI's requests for relief; and
>
> (3) if, and only if, said statements are determined to be both contradictory and material, whether such determinations support the Commission's granting any of the relief Allied/CFI has demanded.

The Commission must answer all three of these questions with a resounding, "No."

In their Petition, Allied/CFI have concluded that there exist "contradictions" between:

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[22] The acceptance of Allied/CFI's factual allegations, which factual allegations are uncontested for present purposes, should by no means be interpreted as Odyssey's acceptance of Allied/CFI's legal conclusions and arguments which Odyssey firmly contends are improper, frivolous, misleading, spurious, and sanctionable. Moreover, any attempt by Allied/CFI to mischaracterize said legal conclusions and arguments as "facts" should be flatly rejected.

[23] As it is uncontested that Mr. Sidelko's made the statements as they appear in the relevant documents, there are no disputed issues of material fact and all that remain to be adjudicated are legal issues.

- Mr. Sidelko's August 1998 affidavit and/or his June 2000 prefiled,[24] direct testimony in Docket No. 000061-EI (collectively, Mr Sidelko's "Prior Statements") (neither of which are, nor have they been alleged to be, inconsistent with one another); and

- craftily selected improperly attached excerpts from the transcript of a deposition given in December 2003 by Mr. Sidelko in a pending civil proceeding[25] (Mr. Sidelko's "Recent Deposition").

With regard to their Petition, it is noteworthy that Allied/CFI never cite to any specific differences between the Recent Deposition[26] and Mr. Sidelko's Prior Statements. Allied/CFI simply imply that there are mysterious (and, apparently, unspeakable) contradictions between these things that somehow rise to the level of "fraud" or "a change of circumstances" sufficient to warrant the Commission's vacating Order No. PSC-01-1003-AS-EI. However, Allied/CFI's unfounded and unsupported conclusions that phantom contradictions exist are clearly insufficient to warrant any relief, of any variety, in any light.

*a. Economic Feasibility.*

The first conclusion regarding Mr. Sidelko's statements that is proffered by Allied/CFI in their improper and frivolous Petition is that Mr. Sidelko, "contradicted his sworn affidavit provided

[24] It bears noting that, consistent with their other blatant attempts to mislead the Commission, Allied/CFI have mischaracterized this prefiled testimony as "sworn" testimony. As Allied/CFI are doubtlessly aware of the longstanding Commission procedure which provides witnesses the opportunity to make corrections or changes to their prefiled testimony prior to it being "inserted in the record as though read"–as well as the fact that the proceedings in Docket No. 000061 never reached the point at which Mr. Sidelko was to have been given this opportunity due to Allied/CFI's own action in entering a settlement with /TECO–their mischaracterization of the legal force and effect of Mr. Sidelko's prefiled testimony, made in its transparent attempt to create a case where none exists, is insulting, improper, frivolous, and sanctionable.

[25] *See* footnote 3, *supra.*

[26] *See* footnote 3, *supra.*

to TECO and sworn[27] direct testimony filed with the Commission[28]..." with respect to economic feasibility.

However, an inspection of Mr. Sidelko's Prior Statements demonstrates this conclusion to be baseless and irrelevant:

- nowhere in Mr. Sidelko's affidavit does Mr. Sidelko make any statement regarding economic feasibility (*see* Exhibit "A" to the Petition);
- nowhere in Mr. Sidelko's unsworn, prefiled direct testimony does Mr. Sidelko make any statement regarding economic feasibility (*see* Exhibit "B" to the Petition);
- nowhere in Commission Order No. PSC-98-1081-FOF-EI (approving TECO's CISR tariff) is there any requirement that an applicant identify a specific electric rate necessary to make the conduct of its operations economically feasible in order to receive service under the CISR tariff ; and
- nowhere in TECO's then-approved tariff is there a requirement that an applicant identify a specific electric rate necessary to make the conduct of its operations receiving service thereunder economically feasible.

Hence, it is self-evident that none of the foregoing "authorities" even remotely addresses economic feasibility and it is therefore impossible that Mr. Sidelko could contradict them were he ever to speak of economic feasibility.

*b. Who Proposed the CISR Rate?*

Allied/CFI's next fallacious conclusion regarding Mr. Sidelko's statements is that Mr. Sidelko "contradicted" his Prior Statements as to who proposed the CISR rate. However, again, Allied/CFI's conclusion is baseless and irrelevant as:

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[27] *See* footnote 24, *supra.*

[28] Allied/CFI have materially omitted from their Petition any mention of the nearly three-hour deposition of Mr. Sidelko by Allied/CFI taken in December 2000 in Docket No. 000061 at which Allied/CFI were afforded a full opportunity to question Mr. Sidelko under oath on the substance of both his affidavit and his unsworn, prefiled direct testimony.

- the affidavit is silent as to which party "proposed" the CISR rate (*See* Exhibit "A" to the Petition);

- the prefiled, direct testimony is silent as to which party "proposed" the CISR rate (*See* Exhibit "B" to the Petition);

- Commission Order No. PSC-98-1081-FOF-EI (approving TECO's CISR tariff) is silent as to whether the applicant or TECO must "propose" the rate ultimately agreed to; and

- TECO's CISR tariff is silent on whether the applicant or TECO must "propose" the rate ultimately agreed to.

Hence, it is self-evident that none of the foregoing "authorities" even remotely addresses which party proposed the CISR rate and it is therefore impossible that Mr. Sidelko could ever contradict them were he ever to speak of who first proposed the CISR rate.

Moreover, and notwithstanding any ill-founded conclusion or "analysis" offered by Allied/CFI, deposition testimony in Docket No. 000061-EI (*e.g.*, Document No. 16399-00) makes it repeatedly and abundantly clear that:

- the negotiations six years ago–which culminated in the CISR rate proposed by TECO and accepted by Odyssey–progressed first with Mr. Sidelko and his consultant seeking from TECO a certain tariffed interruptible rate (for which Odyssey entered into a confidentiality agreement and was added to a waiting list);

- that when Mr. Sidelko was told that the tariffed rate would not be available to Odyssey, he gave every indication to TECO that negotiations were terminated; and

- that Mr. Sidelko was thereafter contacted by TECO, which offered the possibility of a negotiated rate.

*c. The "Importance" of the CISR Rate.*

The next "contradiction" Allied/CFI offer as a pretext for their Petition is that Mr. Sidelko "contradicted" his Prior Statements regarding the importance to him of the CISR rate. The actual snippet upon which Allied/CFI apparently rely is yet another curve in the long arc of truth-bending

labeled a "Petition" by Allied/CFI and such will be implacably clear to the Commission in its evaluation of Allied/CFI's filing.

*d. Odyssey's Present-Day Profitability.*

Allied/CFI's next irrevocably flawed contention is that Mr. Sidelko "contradicted" his Prior Statements regarding Odyssey's present-day profitability. Whether Odyssey operated its plant profitably several years after it began receiving service under the CISR rate was not the subject of Mr. Sidelko's Prior Statements and it could not have been as Mr. Sidelko was not qualified as an expert soothsayer and could not speculate about such matters. Therefore, it is impossible that Mr. Sidelko could ever contradict his Prior Statements were he ever to speak of Odyssey's present-day profitability.

Moreover, whether any applicant might have operated "profitably" with a higher rate than that negotiated under its CISR tariff simply has no bearing on whether it would qualify for the CISR rate under Commission Order No. PSC-98-1081-FOF-EI (approving TECO's CISR tariff) and TECO's underlying tariff.[29]

*e. General "Feasibility."*

Allied/CFI's next absurd conclusion regarding Mr. Sidelko's statements is that Mr. Sidelko "contradicted" his Prior Statements with regard to the general feasibility of Odyssey's Tampa plant. However, again, Allied/CFI's conclusion is baseless and irrelevant as:

- Mr. Sidelko's 1998 affidavit makes no statement about whether the plant would have been "feasible," at any rate; and

[29] One hastens to add that one of the fundamental avowed purposes of the CISR tariff, however repugnant it may be to Allied/CFI, is to foster economic development within TECO's service area.

- Mr. Sidelko's prefiled direct testimony makes no statement about whether the plant would have been "feasible," at any rate.

Moreover, an inspection of Mr. Sidelko's December 1, 2000, deposition[30] in Commission Docket No. 00061-EI shows that Allied/CFI had ample opportunity to explore any and all issues regarding the "feasibility" of rates with regard to Odyssey. In fact, Allied /CFI inquired in December 2000 whether Odyssey would have built the plant at a hypothetical higher rate and Mr. Sidelko's December 2000 deposition is clear and unambiguous in that regard.[31]

*f. Allied/CFI's Alleged "Justifiable Reliance" on Mr. Sidelko's Statements Relative to Odyssey's Lender.*

There is no legal authority to support a claim by Allied/CFI that they "justifiably relied" on anything said by an agent of an independent third-party (i.e., Odyssey) in making their decision to settle their administrative action against TECO. Nonetheless, in order to fully address the panoply of arguments potentially underlying Allied/CFI's scanty Petition, herein will be addressed Allied/CFI's final improper and frivolous intimation: that Allied/CFI "justifiably relied" on "the affidavit and testimony of Mr. Sidelko...that Odyssey's lender required [the CISR] rate, in making [their] ultimate decision to settle" the Commission proceeding in Docket 000061-EI.

It should first be noted that Mr. Sidelko's affidavit does not address the loan commitment in any way. With regard to the specific fragment of Mr. Sidelko's prefiled direct testimony attached to Allied/CFI's Petition, Mr. Sidelko stated:

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[30] This deposition transcript was received into evidence in the initial PSC proceeding. (Document No. 16399-00). The proprietary business information within said transcript has been the subject of PSC Orders granting confidential classification, which classification has been extended. *See* Order No. PSC-03-0532-CFO-EI.

[31] Document No. 16399-00, p.17, line 17, through p.19, line 5. *See also* footnote 30.

Q. Would Odyssey have agreed to receive service from TECO at a rate higher than that provided under the CISR?

A. No.

Q. Why is that?

A. It would not have made good business sense. Odyssey is a for profit company, and, as its CEO, my job is to ensure that our investors achieve an acceptable return on investment. Further, the condition regarding the electric rate set forth in our lender's loan commitment would not have been satisfied.

(Exhibit "B" to Petition at p. 19, lines 22-23, through p. 20, line 7.) Likewise, it should be noted that the failure to satisfy a "loan commitment" does not mean that a person or entity will not be able to obtain financing–only that the commitment would have to be reevaluated and rewritten. If Allied/CFI routinely, honestly and "justifiably relied" upon such third-party information in making what they truly consider to be important business decisions, it is incomprehensible that they have not gone belly-up. Moreover, no such reliance is ever mentioned in the Settlement Agreement and the law does not recognize such fictive reliance. It is nothing short of scandalous that Allied/CFI would even allege this as a basis for anything.

In their December 1, 2000, deposition of Mr. Sidelko in Commission Docket No. 000061-EI, Allied/CFI had ample opportunity to examine Mr. Sidelko regarding his prefiled testimony relative to Odyssey's CISR electric rate in light of the loan commitment Odyssey had obtained to finance its plant. In fact, Allied/CFI did so inquire, but solely in a labored, albeit unsuccessful, attempt to discover other Odyssey proprietary confidential information, to wit, the identity of Odyssey's investors.[32] Any failure to inquire further is clearly Allied/CFI's to bear and they must live with

[32] Document No. 16399-00, pp. 68-72. *See also* footnote 30.

whatever consequences, real or imagined, that may have resulted from their failure to ask proper questions on a relevant topic. Nevertheless, any rational interpretation of Mr. Sidelko's testimony at that deposition would find it to be consistent with his prefiled testimony.

Likewise in Docket No. 000061-EI, Allied/CFI deposed, over the course of two days, Ms. Pamela Winters, the loan officer who had arranged Odyssey's financing. The transcript of that deposition was received in evidence by the PSC in the initial proceeding.[33] Allied/CFI had ample opportunity at that deposition to examine Ms. Winters regarding her prefiled testimony with respect to the import of Odyssey's CISR electric rate to the loan commitment her bank had issued Odyssey. Again, any failure to inquire further of Ms. Winters is clearly Allied/CFI's to bear and they must live with whatever consequences, real or imagined, that may have resulted from their failure to ask proper questions on a relevant topic.

Were the Commission inconceivably to decide that the myriad incontestable legal grounds for dismissing Allied/CFI's Petition are somehow insufficient, the Commission must nevertheless determine that Allied/CFI's allegations, even if accepted as true, fail even to state a legally cognizable basis for the Commission to do anything. Hence, Allied/CFI's improper and frivolous Petition must be dismissed, Allied/CFI sanctioned, and Odyssey awarded its fees and costs in this matter.

## CONCLUSION

Though Allied/CFI may consider the filing of a Petition such as that at issue here their brand of "fierce competition," the law considers same an inescapably improper and frivolous attempt to

[33] *See* Document No. 02197-01. The proprietary business information within this document has been the subject of PSC Orders granting confidential classification, which classification has been extended. *See* Order No. PSC-03-0532-CFO-EI.

abuse the Commission. However, even if Allied/CFI's Petition is taken in a light most favorable to it, it is beyond question that Mr. Sidelko's statements were not "contradictory"; even if the statements were contradictory, the contradictions are in no manner legally material to Allied/CFI's demands for relief; and even if said statements were determined to be both contradictory and material, they could not support the Commission's granting any of the relief Allied/CFI has demanded due to Allied/CFI's lacking standing, the Commission's lacking jurisdiction, the doctrine of administrative finality, the law of settlements, and the other law cited herein.

And though Odyssey has limited its analysis and argument herein to that which it deems necessary to rebut Allied/CFI's incomprehensibly vague Petition and *non-sequitur* exhibits, the likelihood that Allied/CFI might attempt in the future to mislead the Commission and attempt to justify its sanctionable filings in the instant docket (by, e.g., torturing other, as-yet-undisclosed portions of Mr. Sidelko's transcript) compels Odyssey to reserve the right to address same if later raised. However, as Odyssey has herein fully addressed the intellectually bankrupt goulash that Allied/CFI has thus far slathered across this docket, Odyssey will refrain from further argument at this time and simply and respectfully urge the Commission to summarily deny Allied/CFI's baseless attempt to obtain a "do-over."

**WHEREFORE**, for all of the reasons hereinbefore outlined, Odyssey respectfully requests that the Commission (1) dismiss Allied/CFI's Petition with prejudice; (2) under all applicable statutes and rules, levy sanctions against Allied/CFI for its maintaining this frivolous action; (3) tax against Allied/CFI Odyssey's costs and fees made reasonably necessary by Allied/CFI's filing of its Petition in the instant matter or retain jurisdiction to further consider same; (4) grant Odyssey

leave to amend or supplement this Motion should the circuit court Protective Order be modified; and (5) grant to Odyssey such other relief as the Commission deems appropriate.

Dated this 9th day of February, 2004.

Wayne L. Schiefelbein

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Petition has been furnished via fax and U.S. Mail to the following on this 19th day of February, 2004:

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IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 01-27699 CA 25



ALLIED UNIVERSAL CORPORATION, a Florida Corporation; and CHEMICAL FORMULATORS, INC., a Florida Corporation,

Plaintiffs,

vs.

ODYSSEY MANUFACTURING [illegible] a Delaware Corporation; and SENTRY INDUSTRIES, INC., a Florida Corporation,

Defendants.

Agreed BB

**PROTECTIVE ORDER**

**THIS CAUSE** having come on to be heard upon Defendants', Odyssey Manufacturing Company and Sentry Industries, Inc., Motion for Protective Order, and upon the consent and agreement of Plaintiffs Allied Universal Corporation and Chemical Formulators, Inc., it is hereby ORDERED that the parties to this action, in order to provide protection of confidential and proprietary information and trade secrets of the parties and facilitate the discovery in this action, shall be governed by the following:

1. The following materials shall be deemed confidential (the "Confidential Information"):

A. Any written, recorded or graphic materials or documents, tangible items or any other form of information that a party produces in this case, which a party, in good faith,

believes to contain trade secrets or confidential, sensitive or proprietary commercial information, as provided by Rule of Judicial Administration 2.051(9)(A)(ii);

2. The herein-described Confidential Information shall be designated as such by stamping the word "Confidential" on the document or by any other reasonable method as agreed to by the parties.

3. That Confidential Information shall not:

A. Be disclosed, disseminated, published or made public to anyone but the parties and attorneys of record in this case, their personnel, agents and staff of counsel, expert witnesses, lay witnesses, court reporters and deponents, as is necessary for the conduct of the case. Attorneys of record and the parties hereto shall see that each person to whom this information is disclosed has read this agreement, and signs an affidavit in the form attached hereto as Exhibit "A" agreeing to be bound thereby;

B. Be used for any purpose whatsoever, except for pretrial preparation and trial of this action;

C. Be used in any manner in connection with any other action or proceeding, except in accordance with the terms hereof;

D. Be copied, duplicated or reproduced in whole or in part for any purpose whatsoever, except for pretrial preparation and trial of this action, without the prior written consent of counsel for party designating the subject Confidential Information as confidential or prior Order of this Court upon notice;

E. Be made any part of the public record of this case, whether in evidence or otherwise, except as provided herein, although this agreement does not prohibit its use as evidence in the trial of this case. If Confidential Information are used in any deposition

testimony, or interrogatory answer, or other discovery response, or as evidence, or is quoted or disclosed in any affidavit, brief, deposition, transcript or other paper filed in this action, such materials and papers shall be filed only as provided by this Order or such further order as may be entered by the Court. In the event a party wishes to file a document, transcript, or thing containing Confidential Information described in this Order with the Court for any purpose, the party shall first serve the opposing party with the document, transcript, or thing containing the alleged Confidential Information. After service, the parties agree to consult with each other to discuss whether the document, transcript or thing actually contains Confidential Information as described herein. If the parties agree that the document, transcript or thing does not include Confidential Information, the document, transcript, or thing may be filed with the Court. If any of the parties believe that the material served contains Confidential Information, then any of the parties, prior to any filing of the document, transcript, or thing involved, shall apply to the Court pursuant to Rule of Judicial Administration 2.051 for a determination of whether the Confidential Information are confidential as described herein, and the document, transcript or thing involved shall be filed only in a form as specified pursuant to the resulting Court Order; or;

F. Be analyzed, summarized, or contained in any report, summary or analysis, unless such report, summary or analysis or any document containing any such designated information or documentation is considered and treated as Confidential Information subject to this Stipulation and to the protection of the Order of this Court entered pursuant hereto.

4. The attorneys of record and the parties hereto shall be responsible for the actions of their personnel and staff and expert witnesses in the event the provisions of this Order are violated.

5. Any party may dispute a designation of confidentiality and bring before the Court a request for the Court to determine whether or not confidentiality should or should not apply to particular discovery.

6. Where confidentiality is disputed, the discovery shall be deemed confidential pending the ruling of the Court on the dispute.

7. All Confidential Information furnished to a party pursuant to disclosure or discovery in this action shall be returned to the designating party at the conclusion of this litigation, including any and all copies of such document or documents which in whole or in part contain any such Confidential Information;

8. Any and all documents which contain summaries, reports or analyses of the Confidential Information shall be returned to the designating party at the conclusion of this matter, and any copy of any such summary, report, or analysis retained shall be redacted to exclude all reference, discussion, or analysis of such designated documents or information.

9. Nothing in this Order shall prevent any party from seeking modification of this Order with either written consent of both parties or Court order.

10. It is further and specifically stipulated and agreed by the parties that the Court enter the Order submitted herewith adopting and incorporating the terms of this Confidentiality Agreement and Protective Order and that the Court may use its contempt powers or any other sanctions to enforce the terms of this Agreement and the Order entered pursuant hereto upon the request of any party.

SEP 0 3 2002

**DONE AND ORDERED** in Chambers at Miami-Dade County, Florida, this ____ day of _____, 2002.

Philip Bloom

Honorable Philip Bloom
Circuit Court Judge

Copies furnished to:
Glenn N. Smith, Esq.
Bryan S. Greenberg, Esq.
Lawrence D. Silverman, Esq.
Daniel K. Bandklayder, Esq.
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