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February 19, 2004

HAND DELIVERED

Ms. Blanca S. Bayo, Director  
Division of Commission Clerk  
and Administrative Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Re: 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; FPSC Docket No. 040086-EI

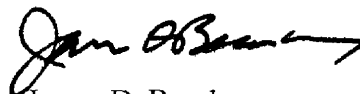
Dear Ms. Bayo:

Enclosed for filing in the above docket are the original and fifteen (15) copies of Motion to Dismiss and Answer of Tampa Electric Company to the Petition of Allied Universal Corporation and Chemical Formulators, Inc. 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.

Please acknowledge receipt and filing of the above by stamping the duplicate copy of this letter and returning same to this writer.

Thank you for your assistance in connection with this matter.

Sincerely,



James D. Beasley

JDB/pp  
Enclosure

cc: All Parties of Record (w/enc.)

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

Allied Universal Corporation and	)	
Chemical Formulators, Inc.'s Petition to	)	Docket No. 040086-EI
Vacate Order No. PSC-01-1003-AS-EI	)	
Approving, As Modified and Clarified, the	)	Filed: February 19, 2004
Settlement Agreement Between Allied	)	
Universal Corporation and Chemical	)	
Formulators, Inc. and Tampa Electric	)	
Company and Request for Additional	)	
Relief	)	
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**Motion to Dismiss and Answer of Tampa Electric  
Company to the Petition of Allied Universal  
Corporation and Chemical Formulators, Inc. 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**

Pursuant to Rule 28-106.204, F.A.C., Tampa Electric Company ("Tampa Electric") hereby files its Answer and Motion to Dismiss the *Petition of Allied Universal Corporation and Chemical Formulators, Inc. ("Allied") 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*, filed with the Commission on January 30, 2004 (the "Petition"). Allied's Petition represents a direct and blatant violation of the Settlement Agreement adopted by the Commission in Order No. PSC-01-1003-AS-EI. Essentially, Allied's request for relief amounts to a demand that Tampa Electric be deprived of the benefits of the above-mentioned settlement even though Tampa Electric has fully performed and Allied has received all of the benefits that it bargained for under

the settlement. To add insult to injury, Allied's demand for relief is not premised on an allegation that Tampa Electric has acted improperly or that the Company has, in some way, failed to fully perform its obligations under the settlement. Instead, Allied has attempted to absolve itself of the obligation to abide by the terms of the Settlement Agreement on the basis of alleged fraudulent conduct by Odyssey Manufacturing Company ("Odyssey"), who was not a party to the Settlement Agreement in question and provided no part of the consideration that induced Allied to enter into the Settlement Agreement. Allied's accusations against Odyssey, whether or not factual, provide no reasonable basis for vacating Order No. PSC-01-1003-AS-EI and declaring the settlement approved therein to be unenforceable. Under these circumstances, Allied's Petition is frivolous, at best and constitutes a serious abuse of the regulatory process. Therefore, Tampa Electric respectfully submits that Allied's Petition should be dismissed and that the Commission should consider the imposition of appropriate sanctions on Allied and its legal representatives. In support whereof, Tampa Electric says:

1. Pursuant to Order No. PSC-98-1081-FOF-EI, issued on August 10, 1998, this Commission approved Tampa Electric's Commercial Industrial Service Rider ("CISR") tariff and Pilot Study Implementation Plan. The CISR tariff was intended to allow Tampa Electric to avoid uneconomic bypass of its system. Uneconomic bypass was presumed to occur when a customer left or avoided the company's system to take advantage of a price for electric service elsewhere that was lower than Tampa Electric's normally applicable rate but above the Company's marginal cost to serve the customer in question. The CISR tariff permitted Tampa Electric to negotiate a rate between its marginal cost to serve a

particular customer and the rate otherwise applicable to that customer in order to preserve, for its general body of ratepayers, a contribution to fixed costs represented by such “at risk” loads. Negotiated rates within the above-mentioned range were to be based on the cost of electric service alternatives available to the customer outside of Tampa Electric’s service territory rather than on Tampa Electric’s cost of service. Ratepayer benefits were maximized by Tampa Electric’s negotiating the smallest possible discount from the otherwise applicable rate that would secure the “at risk” load. The CISR Tariff Pilot Program expired as of December 31, 2003 and Tampa Electric did not request extension or renewal of the program.

2. On January 20, 2000, Allied filed a complaint against Tampa Electric with the Commission in Docket No. 00006-EI asserting that Tampa Electric had negotiated a preferential CISR rate with Allied’s competitor, Odyssey, and asserting entitlement, as a matter of law, to precisely the same CISR rates, terms and conditions that Odyssey had obtained as the result of its negotiations with Tampa Electric. In response, Tampa Electric vehemently denied Allied’s allegations of favoritism and improper dealings by Tampa Electric in its CISR negotiations with Odyssey. To the contrary, Tampa Electric expressed its intention to demonstrate that its CISR negotiations with both Allied and Odyssey and the Contract Service Agreements (“CSA”) offered to each of them had been fair, reasonable, unbiased and entirely consistent with the provisions of Tampa Electric’s CISR Tariff.

3. Given the explicit requirement in the Commission-approved CISR Tariff that all information exchanged in the course of CISR negotiations and any resulting CSAs were to be treated as confidential information, the discovery process associated with Allied's complaint was both protracted and contentious.
4. After many months of multi-party interrogatories, document requests, depositions, objections to discovery and motions to compel, the matter was set for hearings before the Commission on February 19, 2001. On the morning that hearings were to commence, the assigned Commissioners asked the parties to make one, last attempt to settle the matters at issue. In order to facilitate such settlement discussions, the hearings were temporarily suspended. In response, Tampa Electric and Allied engaged in settlement discussions that culminated in the filing of a Settlement Agreement and related settlement documents with the Commission on March 22, 2001.
5. In Relevant part, the Settlement Agreement reached between Allied and Tampa Electric contained the following provisions:

*"WHEREAS, Allied/CFI and TECO desire to resolve their differences and conclude the PSC litigation on terms which do not affect Odyssey's rates, terms and Conditions for electric service from TECO;*

*NOW, THEREFORE, Allied/CFI and TECO hereby agree to conclude the PSC litigation on the following terms:*

*2. Pursuant to its Commercial Industrial Service Rider ("CISR") tariff, TECO and Allied/CFI shall execute a Contract Service Agreement ("CSA") for electric service to a new sodium hypochlorite manufacturing facility to be constructed and operated by Allied/CFI and/or their affiliate(s) in TECO's service territory, upon the same rates, terms and conditions as those contained in the CSA between TECO and Odyssey,*

*provided that the new sodium hypochlorite manufacturing facility must begin commercial operation within 24 months from the date of the PSC order approving this settlement agreement....*

*3. Allied/CFI shall assert no further challenge, before the PSC, to the rates, terms and conditions for electric service provided by TECO to Odyssey and set forth in the TECO/Odyssey CSA.*

*4...TECO requests that the PSC make the following findings of fact:*

- a. Both the existing Odyssey CSA and the proposed Allied/CSA provide benefits to Tampa Electric's general body of ratepayers and, therefore, the Commission finds that both CSAs are in the best interests of ratepayers.*
- b. The Commission finds that Tampa Electric's decision to enter into the Odyssey CSA and the CSA itself, were prudent within the meaning of Order No. 98-1081-FOF-EI in so far as they provide benefits to Tampa Electric's general body of ratepayers.*
- c. The Commission finds that Tampa Electric's decision to enter into the Allied/CFI CSA, and the CSA itself, were prudent within the meaning of Order No. 98-1081-FOF-EI in so far as they provide benefits to Tampa Electric's general body of ratepayers.*

*5. Allied/CFI agrees not to contest the findings of fact, rulings and determinations requested in paragraphs 4 and 7 of this Settlement Agreement, provided that no findings of fact or conclusions of law shall be made with respect to the allegations of Allied/CFI's complaint in this proceeding.*

*6. Allied/CFI's Complaint in the PSC litigation shall be deemed withdrawn, with prejudice, upon: (a) the execution of this Settlement Agreement by TECO and Allied/CFI; and (b) the issuance of an order by the PSC approving this settlement agreement, as proposed.*

*7. Allied/CFI and TECO request that the PSC include in its order approving this Settlement Agreement the following rulings and determinations:*

*a. The Commission shall not entertain any further challenge to the existing Odyssey or the proposed Allied/CFI CSA or the rates, terms or conditions contained therein...*

*d. The parties shall abide by the various General Release agreements executed among them.*

*8. Allied/CFI shall execute the General Release attached as Exhibit "C" hereto...."*

6. On April 24, 2001, the Commission issued Order No. 000061-EI approving the above-quoted Settlement Agreement. After carefully describing each provision of the proposed Settlement Agreement and noting Odyssey's objections to various aspects of the proposed settlement, the Commission approved the Settlement Agreement, with several clarifications and modifications.

7. With regard to paragraph 1 of the Settlement Agreement, the Commission stated at Page 7 of its Order that:

*"Paragraph 1 of the Agreement requires that an evidentiary record be created from the prefiled testimony, depositions and the exhibits referenced in each of those documents. The Agreement shall be modified to include all of TECO's discovery responses in the evidentiary record, because those responses are needed to support a finding that Allied and Odyssey's CSA's are prudent.*

8. With regard to paragraph 4 of the Settlement Agreement, the Commission stated at Page 8 of its Order that:

*"Paragraph 4 of the Settlement Agreement requires this Commission to find that Allied's and Odyssey's CSAs are prudent and provide benefits to the general body of ratepayers. Subparagraph 4(a) appears duplicative in light of subparagraphs (b) and (c). TECO believes that each subparagraph demonstrates that this Commission has actively supervised TECO's implementation of the CISR tariff. With that clarification, the paragraph is acceptable. With the inclusion in the evidentiary record of all of TECO's discovery responses, there is sufficient information to conclude that both Allied and Odyssey are "at risk" within the meaning of Order No. PSC-98-1081-FOF-EI. Further, based on the RIM analysis provided by TECO, there is sufficient information to conclude that the rates offered to Odyssey and Allied exceed the incremental cost to serve those customers. Accordingly, the requested findings are supported by competent substantial evidence and are approved.*

9. With regard to paragraph 5 of the Settlement Agreement, the Commission stated also at Page 8 of the Order that:

*“ Paragraph 5 seems internally contradictory. The first clause requires Allied to agree not to contest the factual findings contained in paragraph 4 and paragraph 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 in the first clause as long as those findings of fact and conclusions of law do not pertain to Allied. Allied explains that it believes the findings and rulings in paragraphs 4 and 7 do not address the allegations of Allied’s complaint. We take no position on whether the findings and rulings in paragraphs 4 and 7 address the allegations in Allied’s Complaint, but with Allied’s clarification we find that the paragraph is acceptable.*

10. Finally, the Commission stated at Page 8 of its Order that:

*“With respect to subparagraph 7(a), TECO and Allied clarified that the importance of this paragraph is to settle, for all time, the prudence of Allied’s and Odyssey’s CSA with respect to matters within our jurisdiction. We agree that, based on the findings in this order, this is appropriate. This is consistent with our past decisions concerning prudence and the doctrine of administrative finality.*

11. The above-quoted excerpts from the Settlement Agreement and the Commission Order approving the Settlement Agreement make several conclusions inescapably clear:

- a. Allied’s sole inducement to enter into the Settlement Agreement was Tampa Electric’s agreement to provide electric service to Allied’s proposed new bleach manufacturing facility at the same rates and under the same terms and conditions as those negotiated with Odyssey, provided that Allied’s proposed new facility achieved commercial operation within 24 months of the Commission order approving the Settlement Agreement..



- b. Odyssey was not a party to the settlement and offered Allied no inducement to enter into the Settlement Agreement.
- c. Allied's obligation to abide by the terms of the Settlement Agreement was not contingent upon or tied in any way to the veracity of any representations made by Odyssey.
- d. Tampa Electric's inducement to enter into the Settlement Agreement was Allied's agreement to acquiesce in the Commission's determination that both the Allied and Odyssey CSAs were prudent, Allied's agreement not to initiate or pursue any future litigation before the Commission concerning either the Allied or Odyssey CSAs, and Allied's execution of a formal Release insulating Tampa Electric from any and all claims that Allied might otherwise assert against Tampa Electric in connection with the matters raised in Allied's complaint.
- e. The Commission, in reviewing the prudence of Tampa Electric's dealings with Allied and Odyssey under the CISR tariff, concluded that the record contained ample evidence to support a finding that Tampa Electric had acted in a prudent manner.
- f. In approving the Settlement Agreement, the Commission confirmed that the essence of the agreement between Allied and Tampa Electric was that Allied would not initiate or pursue and the Commission would not entertain any future challenge by Allied to the Odyssey CSA or Tampa Electric's CISR negotiations with Odyssey.

12. In keeping with both the letter and the spirit of the Settlement Agreement, Tampa Electric worked diligently with Allied to assist Allied in finding a suitable location for its proposed new bleach manufacturing facility in Tampa Electric's service territory. However, despite this effort and through no fault of Tampa Electric's, Allied was unable to commence commercial operation or even begin construction of its proposed new bleach manufacturing facility within the 24 month period specified in the Settlement Agreement. Accordingly, Tampa Electric notified Allied that, pursuant to the terms of the Settlement Agreement, the rates, terms and conditions negotiated with Odyssey several years earlier would no longer be available to Allied.

13. In its Petition, Allied now asks the Commission to ignore all of the circumstances described above and declare the Settlement "unenforceable" based on the allegation that Odyssey's president, Mr. Stephen W. Sidelko, provided deposition responses in Allied's civil litigation against Odyssey that directly contradict statements made by Mr. Sidelko in an affidavit provided to Tampa Electric as part of Tampa Electric's CISR negotiations with Odyssey. In a pathetic effort to find some nexus between its Settlement Agreement with Tampa Electric and the alleged contradictory statement attributed to Mr. Sidelko, Allied asserts at page 10 of its Petition that it "justifiably relied" on the representations made in Mr. Sidelko's CISR affidavit in making its decision to enter into the Settlement Agreement. Allied then asserts that because Tampa Electric was fraudulently induced to enter into a CSA with Odyssey and Allied was fraudulently induced to enter into the Settlement agreement with Tampa Electric and the Commission was

fraudulently induced to approve the Settlement Agreement, the Commission should vacate its order approving the Settlement Agreement and the Agreement should be declared unenforceable. In an attempt to prop up this ersatz logic with some semblance of legal authority, Allied cites several cases that stand for the proposition that the Commission can and should modify its prior final orders “where there is a demonstration by an injured party that the Commission’s prior order was predicated on fraud, deceit, surprise, mistake, or inadvertence, where there is a demonstrated need or public interest; or where there is otherwise a substantial change in circumstances.” However, Allied has failed to identify any “injury”, “ fraud”, “demonstrated need or public interest” or any relevant “substantial change in circumstances” sufficient to overcome the doctrine of administrative finality. As discussed below, Allied has attempted to apply legal precedents to a series of faulty assumptions and misrepresented “facts”.

14. Allied’s assertion of entitlement to relief is based on its assertion that Odyssey, through Mr. Sidelko, has perjured itself as the result of conflicting statements in Odyssey’s CISR affidavit and deposition testimony offered by Mr. Sidelko in Allied’s civil litigation against Odyssey. Tampa Electric is not a party to Allied’s civil litigation against Odyssey and, therefore, has no first-hand knowledge of the record in that proceeding. However, the sketchy information provided by Allied in its Petition is contradictory, on its face, as to the question of whether or not Mr. Sidelko has, in fact, made contradictory statements. At page 11 of its Petition, Allied provides redacted excerpts from Mr. Sidelko’s deposition in the civil proceeding that Allied argues seem to suggest the CISR rate specified in

Odyssey's CISR affidavit was "not important" to Mr. Sidelko as an inducement to enter into a CSA with Tampa Electric. However, in footnote 2 on that same page of its Petition, Allied acknowledges that Mr. Sidelko corrected the deposition excerpt cited by Allied in an errata sheet dated January 23, 2004, to say "that obtaining the CISR tariff rate was what was important to him and the CISR rate offered by TECO was \_\_\_\_." Given this errata sheet, it is far from clear that Mr. Sidelko has committed perjury or even that he has made inconsistent statements. In any event, this dispute should be left to be resolved in the civil litigation where it belongs.

15. Even if one were to accept Allied's unsubstantiated assertion that Mr. Sidelko has made inconsistent statements, the next leap of logic that Allied asks the Commission to make is patently unreasonable. Allied would have the Commission believe that it has been "injured" by merit of its "justifiable reliance" on the statements made in Odyssey's CISR affidavit and was induced thereby to enter into the Settlement Agreement with Tampa Electric and agree to the dismissal of its complaint with prejudice. The relief requested by Allied in its original complaint was to be given the same rates, terms and conditions for electric service that had been extended to Odyssey. Under the Settlement Agreement, Allied bargained for and received the opportunity to enjoy the same rates, terms and conditions for electric service that had been negotiated with Odyssey, provided that Allied commenced commercial operation at its new bleach manufacturing facility within 24 months of the Commission order approving the Settlement Agreement. Regardless of what rate Odyssey might

have been willing to accept, Allied was given the opportunity to receive the same rate that Odyssey did, in fact, accept. Therefore, it is difficult, if not impossible, to understand the nature of the “injury” Allied claims to have sustained as the result of Odyssey’s alleged fraud or the sense in which Allied “justifiably relied” on Allied’s CISR affidavit. Odyssey was not a party to the Settlement Agreement nor did Odyssey provide any of the consideration that induced Allied to enter into the Settlement Agreement. Therefore, the accuracy of Odyssey’s CISR affidavit is completely irrelevant to the question of whether Allied should be required to abide by the terms of the Settlement Agreement that it urged this Commission to approve.

16. Finally, Allied suggests that that the Commission must vacate its Order approving the Settlement Agreement and that the Settlement Agreement itself must be declared unenforceable since Tampa Electric was fraudulently induced to enter into a CSA with Odyssey and the Commission was fraudulently induced to approve the Settlement Agreement. Both contentions are devoid of merit and evidence a profound misunderstanding of the record compiled in Docket No. 000061-EI and the nature of the Commission’s approval of the Settlement Agreement.

17. Allied’s assertions to the contrary notwithstanding, as the record indicates, Tampa Electric decision to enter into a CSA with Odyssey was the result of a multitude of data. Information with regard to the requirements imposed by Odyssey’s lenders, the rates available from other potential suppliers of electric service and

the benefits projected as the result of attracting the incremental load represented by Odyssey's new facility were all taken into account by Tampa Electric. As noted in the above-mentioned excerpts from the Commission's order approving the settlement, all of this information was contained in the data request responses provided by Tampa Electric and included in the record to substantiate the prudence of Tampa Electric's actions. Allied has alleged no facts that would support a finding that Tampa Electric's extension of a CSA to Odyssey was imprudent or that the Commission committed an error of fact or law in concluding that Tampa Electric's CSA with Odyssey was imprudent and not in the best interests of ratepayers. In any event, the opportunity to seek rehearing of Order No. PSC-01-1003-AS-EI has long since expired and the doctrine of administrative finality demands that Allied's attempt to re-litigate matters that it expressly agreed to resolve through settlement be firmly and swiftly rebuffed.

18. Allied's Petition is precisely the kind of frivolous and needlessly litigious pleading that the Settlement Agreement explicitly bars. Now that Allied has extracted the full benefit of the Settlement, it is asking the Commission to declare the Settlement Agreement unenforceable, thereby depriving Tampa Electric of all of the benefits that Tampa Electric bargained for. Allied's extraordinary request for relief is based on unsubstantiated allegations of misconduct directed at a party who opposed the Settlement Agreement and whose misconduct, even if substantiated, would be irrelevant to the settlement reached between Allied and Tampa Electric. Both as a matter of law and as a matter of basic fairness, Allied's Petition should be summarily dismissed.

**WHEREFORE**, Tampa Electric respectfully requests that Allied's Petition in this Docket be dismissed with prejudice, that no relief be granted to Allied and that the Commission consider the imposition of appropriate sanctions on Allied and its legal representatives for Allied's blatant violation of the Settlement Agreement and for the patently frivolous nature of Allied's filing. Furthermore, should the Commission decide to entertain oral argument with regard to the matters raised in Allied's Petition, Tampa Electric respectfully requests that it be permitted to participate in any such oral argument.

DATED this 19<sup>th</sup> day of February, 2004.

Respectfully Submitted,

HARRY W. LONG JR.  
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And

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By:  \_\_\_\_\_

ATTORNEYS FOR TAMPA ELECTRIC  
COMPANY

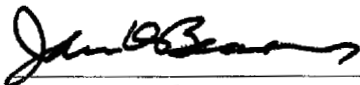
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Motion to Dismiss and Answer, filed on behalf of Tampa Electric Company, has been furnished by hand delivery(\*) or U. S. Mail on this 19<sup>th</sup> day of February 2004 to the following:

Ms. Martha Carter Brown\*  
Ms. Marlene Stern  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, FL 32399-0860

Mr. Kenneth A. Hoffman  
Mr. J. Stephen Menton  
Rutledge, Ecenia, Purnell & Hoffman, P.A.  
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ATTORNEY