

REQUEST FOR CHANGE TO AGENDA CONFERENCE  
HAND DELIVER

RECEIVED-FPSC

Date of Request: 6/29/2004 Date of Agenda Conference: 7/6/2004 Item No. 5  
*04 Jul - PM 2:39*

Docket No.: 040086-EI Brief Title: Allied's petition to vacate settlement order

Requested by:  Staff  Other Allied's attorney  
(Name) **COMMISSION CLERK**

Please attach a copy of the written documentation **filed (IF OTHER)**

STAFF's Recommendation to Executive Suite (IF OTHER)  Approve Request  Deny Request

**ACTION REQUESTED [see APM 2.11]**

- Defer Item to Agenda Scheduled
- Change Order of Item or Take Up at Time Certain
- Withdraw Item (not expected to return to Agenda)
- Late Filed Recommendation (must be filed no later than 3:00 p.m. on the date approved for late filing) **A copy of the front page of the recommendation must be provided to CCA by 12 noon on the regular filing date for use as a place-holder during agenda preparation.**
- Add Item to Published Agenda [see Section 120.525(2), F.S.] - Issue an ADDENDUM and give Legal NOTICE **CMP** \_\_\_\_\_
- Add Emergency Item to Published Agenda [see Section 120.525 (3), F.S.] - Issue an ADDENDUM and Give Fair NOTICE **COM** \_\_\_\_\_

Date: *pending review of motion for leave to amend and responses.*

Concise explanation, justification or comments (attach additional sheet if necessary):

This item addresses motions to dismiss Allied's petition filed by TECO and Odyssey. Staff has recommended that the petition be dismissed. Allied states in its request for deferral that it intends to file a motion for leave to amend its petition this week. TECQ and Odyssey have objected to the deferral. Allied's request and the parties' objections are attached. The item should be deferred to allow time to address the motion for leave to amend the petition.

- CTR** \_\_\_\_\_
- ECR** \_\_\_\_\_
- GCL** \_\_\_\_\_
- GPC** \_\_\_\_\_
- MMS** \_\_\_\_\_
- RCA** \_\_\_\_\_
- SCR** \_\_\_\_\_
- SEC** 1

Signature (Technical Staff): *Christine Dugre*

Initials (Division Director or Designee): *OTJ Bayo Wang*

Signature (Legal Staff): *Marta Carter Brown*

Initials (General Counsel or Designee): *ROM Thompson*

**EXECUTIVE DIRECTOR:**

Recommendation to the Chairman's Office  Approve Request  Deny Request

Initials: *MAB* Date: *7/1/04*

Comments: *I support legal's recommendation to grant the deferral. This will allow time to address the motion for leave to amend the petition.*

**CHAIRMAN's OFFICE:**

Approve Request  Deny Request

Initials: *BB* Date: *7/1/04*

Executive Suite will send the original to the Division of Commission Clerk & Administrative Services and return copy to the requesting staff after the Chairman's Office takes action on this request. Requesting staff should distribute copies to the Division Directors (OPR & OCR) and Attorney assigned to the docket.

DOCUMENT NUMBER-DATE

**07228 JUL-14**

**RUTLEDGE, ECENIA, PURNELL & HOFFMAN**

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June 29, 2004

**VIA TELECOPIER AND HAND DELIVERY**

The Honorable Braulio L. Baez  
Chairman  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: Allied Universal Corporation and Chemical Formulators, Inc. v. Tampa Electric Company; Docket No. 040086-EI

Dear Chairman Baez:

I represent Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI"), the Petitioners in the above-referenced **docket**.

On June 24, 2004, the Staff issued a recommendation in the above-referenced **docket** recommending that Allied/CFI's Petition be dismissed with prejudice. The Recommendation is currently scheduled for consideration by the Commission at the July 6, 2004 **Agenda** Conference. The Office of Public Counsel ("OPC") has been granted intervention in the docket. OPC has filed an independent request with the Commission in this docket asking that the Commission investigate the Contract Service Agreement between Tampa Electric Company ("TECO") and Odyssey Manufacturing Company ("Odyssey").<sup>1</sup> The recently issued Staff Recommendation offers no analysis of OPC's independent request but instead indicates that OPC's independent request should be considered at a later **stage** in the proceeding - - a notion that appears inconsistent with Staff's recommendation that the Allied/CFI Petition be dismissed with **prejudice** and the docket closed.

The purpose of this letter is to request that the Commission defer consideration of the Staff

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<sup>1</sup>OPC's Motion for Public Service Commission to Examine the Contract Service Agreement between TECO and Odyssey filed April 23, 2004.

RUTLEDGE, ECENIA, PURNELL & HOFFMAN

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June 29, 2004

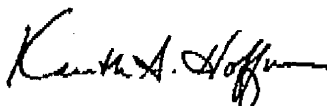
Recommendation. Allied/CFI intends to file a Motion for Leave to file an Amended Complaint and a Proposed Amended Complaint by the end of this week. It is, of course, within Allied/CFI's procedural rights to move to file an Amended Complaint and the parties to this proceeding may wish to file responses to that Motion. In addition, OPC has filed a Motion that raises the issue of whether the Commission should treat certain documents and deposition transcripts as confidential information when such documents are filed as unsealed, public records in related litigation between Allied/CFI and Odyssey in Miami-Dade County Circuit Court.<sup>2</sup>

It should be readily apparent that OPC and Allied/CFI require a ruling on the issue of whether certain information should be treated as confidential as a prerequisite to a full and open forum at an Agenda Conference on Allied/CFI's proposed Amended Petition and OPC's independent motion requesting the Commission to examine the CSA between TECO and Odyssey.

Accordingly, Allied/CFI requests deferral of the consideration by the Commission of the Staff Recommendation issued on June 24, 2004 in this docket and that **Staff issue a revised recommendation** addressing:

- (1) OPC's pending motions referenced above; and
- (2) Allied/CFI's anticipated Motion for Leave to File Amended Petition, **proposed Amended Petition**, and *my* responses to the Motion for Leave to File Amended Petition.

Respectfully submitted,



Kenneth A. Hoffman

KAH/rl

cc: Commissioner Lila A. Jaber, via hand delivery  
Commissioner J. Terry Deason, via **hand** delivery  
Commissioner Charles M. Davidson, via **hand** delivery  
Commissioner Rudolph Bradley, via hand delivery  
Manuel Arisso, Aide to Chairman Baez, via hand delivery  
JoAnn Chase, Aide to Commissioner Jaber, via hand delivery  
Cayce Hinton, Aide to Commissioner Deason, via hand delivery

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<sup>2</sup>OPC's Motion for Determination of the Proper Treatment of Deposition Transcript of Mr. Patrick Allman filed May 21, 2004.

**RUTLEDGE, ECENIA, PURNELL & HOFFMAN**

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June 29, 2004

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Katrina Tew, Aide to Commissioner Davidson, via hand **delivery**  
Larry Harris, Aide to Commissioner Bradley, via hand **delivery**  
Dr. Mary Bane, via hand delivery  
Richard Melson, General Counsel, via hand delivery  
Martha Carter-Brown, Esq., via hand delivery  
Stephen Burgess, Esq., via hand **delivery**  
Wayne Schiefelbein, Esq., via hand delivery  
Daniel K. Bandklayder, Esq., via U.S. Mail  
Harry W. Long, Jr., Esq., via telecopier  
James D. Beasley, Esq., via hand delivery

Allied\baez.ltr



**TAMPA ELECTRIC**

July 1, 2004

The Honorable Braulio L. Baez  
Chairman  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

Re: Allied Universal Corporation and Chemical Formulators, Inc. v. Tampa Electric Company; Docket No. 040086-EI

Dear Chairman Baez:

In a letter addressed to you on June 29, 2004, counsel for Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI") asked that the Commission defer consideration of Staff's June 24, 2004 recommendation that Allied/CFI's Petition in this proceeding be dismissed with prejudice. In support of this request, Allied/CFI contends that the Commission's failure to address contemporaneously certain independent motions filed by the Office of Public Counsel in this proceeding and Allied/CFI's stated intention to file for leave to amend its Petition require that the Commission's planned consideration of the Staff's June 24<sup>th</sup> recommendation at the July 6<sup>th</sup> Agenda Conference be deferred indefinitely. For the reasons discussed below, Tampa Electric respectfully submits that Allied/CFI's request is devoid of merit and should be denied.

As you may recall, Allied/CFI initiated this proceeding on January 30, 2004, with its Petition asking the Commission to set aside the settlement approved by the Commission in Order No. PSC-01-1003-AS-EI, issued on April 24, 2001 in Docket No. 000061-EL. On February 19, 2004 both Tampa Electric and Odyssey filed motions to dismiss Allied/CFI's petition. On February 20, 2004, Allied/CFI requested an additional 15 days to respond to the motions to dismiss, "in order to adequately and fully respond to Odyssey's Motion to Dismiss, which is over forty pages, and TECO's Motion to Dismiss which is fourteen pages." On March 2, 2004, Commissioner Jaber, as the Prehearing Officer, granted Allied/CFI's motion based on her stated belief that the Commission would benefit in its deliberations from the more thorough responses to *the motions* to dismiss that might result from granting Allied/CFI additional time to consider and prepare its responses.

On March 12, 2004, Allied/CFI filed a detailed, twenty-five page response to the Motions to Dismiss. Over the next 16 weeks, the Commission Staff carefully considered the relevant pleadings and, On June 24, issued its recommendation that Allied/CFI's petition be dismissed, with prejudice.

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The Honorable Braulio L. Baez  
July 1, 2004  
Page 2

Allied/CFI was given additional time **to** respond to the Motions to Dismiss **precisely** so **that** it would have time to thoroughly address the issues raised. **If**, after contemplating the arguments raised in those motions, **Allied** felt that it needed to request permission amend its **P**etition, it could have and should have done **so** in March. **Instead**, Allied/CFI **filed** a lengthy response **in** opposition to the Motions. The June 24<sup>th</sup> Staff recommendation raised no new facts or arguments. **Instead**, **the Staff's** recommendation was based **on a** reasoned evaluation of the facts **and** arguments raised by the **Parties**. Allied/CFI's **sudden and urgent desire to** amend its Petition is nothing more than **a** delaying **tactic** in response **to an adverse but factually and legally sound Staff** recommendation.

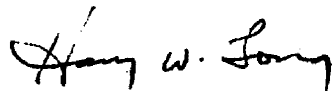
As noted above, the **Staff** recognized that, under the **facts** presented in this matter, it would **be impossible for Allied/CFI to amend** its Petition in a manner that **would cure the fatal defects in its** pleading. In his June 29<sup>th</sup> Letter, Mr. **Hoffman failed** to make even the most modest offer **of proof as** to what kind of **amendment** Allied/CFI could **offer** that would rehabilitate its Petition **in light of the Staff's** conclusion.

As an afterthought, **Allied/CFI** suggests that the Commission cannot rule **on** the Motions to Dismiss without addressing the **Office of Public Counsel's ("OPC")** April 24, 2004 Motion **at the same time**. **While it is** not clear why **Allied/CFI** feels compelled and empowered to speak for OPC, the asserted insoluble linkage between the OPC motion and Allied/CFI's petition does not exist.

**It is clear that OPC** did not intend to link its **April 24<sup>th</sup> Motion to Allied/CFI's** January 30<sup>th</sup> Petition in this proceeding. **Therefore**, the Staff's **proposal** to address the OPC **motion as a separate matter is entirely** appropriate and provides no reasonable justification for deferring consideration of the Staff's recommendation to dismiss the Allied/CFI Petition with prejudice.

**For the reasons discussed above, Tampa Electric** urges the **Commission** to adhere to its announced intention to consider the **Staff's** June 24<sup>th</sup> recommendation in this proceeding **at the Commission's July 6<sup>th</sup> Agenda Conference**.

Respectfully submitted,



Harry W. Long, Assistant General Counsel  
Tampa Electric Company

HWL/ck

**The Honorable Braulio L. Baez**

**July 1, 2004**

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*cc*      **Commissioner Lila A. Jaber**  
**Commissioner J. Terry Deason**  
**Commissioner Charles M. Davidson**  
**Commissioner Rudolph Bradley**  
✉ **Manual Arisso, Aide to Chairman Baez**  
**JoAnn Chase, Aide to Commissioner Jaber**  
**Cayce Hinton, Aide to Commissioner Deason**  
**Katrina Tew, Aide to Commissioner Davidson**  
**Larry Harris, Aide to Commissioner Bradley**  
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June 30, 2004

VIA TELECOPY AND HAND DELIVERY

The Honorable Braulio L. Baez  
Chairman  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850Re: **Allied Universal Corporation and Chemical Formulators, Xrc. v. Tampa  
Electric Company; Docket No. 040086-EI  
Our File No. 37018.01**

Dear Chairman Baez:

We represent Odyssey Manufacturing Company, a party in the above-referenced administrative hearing.

On June 29, 2004, Petitioner, Allied Universal Corporation and Chemical Formulators, Inc., requested deferral of the Commission's consideration of a staff recommendation recommending that Allied's Petition be dismissed with prejudice which was scheduled for consideration by the Commission at the July 6, 2004 Agenda Conference. Allied's stated basis for this request is its intention to file a Motion for Leave to File an Amended Complaint and a proposed Amended Complaint by the end of this week

Allied's Motion for Leave will essentially request a fourth attempt to properly and lawfully state a cognizable claim in this docket since its initial filing on January 13, 2004. Staff has recommended that the Commission should dismiss Allied's Petition for failure to state a cause of action and has properly determined that the dismissal should be with prejudice because "it is clear on the face of the Petition that amendment will not cure its defects".



The Honorable Braulio L. Baez  
June 30, 2004  
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The Commission should decline to defer **this five-and-a-half-month-old matter** and thus **delay its resolution** even further. **Allied's as-yet-unfiled Motion for Leave to Amend** can only request **two things**: either a chance to amend an **unamendable** Petition, or a chance to **file an entirely new Petition which states new issues based on new facts and which should properly be brought in a new docket.**

For these reasons, Odyssey **opposes** the requested deferral.

Sincerely,



JOHN L. WHARTON  
For the Firm

JLW/brm

cc: Commissioner **Lila A. Jaber**, via hand delivery  
Commissioner **J. Terry Deason**, via hand delivery  
Commissioner **Charles M. Davidson**, via hand delivery  
Commissioner **Rudolph Bradley**, via hand delivery  
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**Richard Melson**, **General Counsel**, via hand delivery  
**Martha Carter-Brown**, **Esquire**, via hand delivery and telecopy  
**Stephen Burgess**, **Esquire**, via telecopy  
**Harry W. Long, Jr.**, **Esquire**, via telecopy  
**Kenneth Hoffman**, **Esquire**, via telecopy

Odyssey\baez