

ORIGINAL

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: July 16, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Brown, Stern) *MCB MKS W&T*
Division of Economic Regulation (Draper) *AM 1/9/04*

RE: Docket No. 040086-EI – 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, by Allied Universal Corporation and Chemical Formulators, Inc.

AGENDA: 07/20/04 – Regular Agenda – Prehearing Request for Confidential Classification – Interested Persons May Participate

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040086.RCM2.DOC

Case Background

On January 30, 2004, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a petition to vacate Commission Order No. PSC-01-1003-AS-EI, in Docket No 000061-EI, which had approved a comprehensive settlement agreement between Allied and Tampa Electric Company (TECO).¹ The settlement agreement and the order approving it had resolved Allied's complaint against TECO for allegedly providing preferential rates under TECO's Commercial Industrial Service Rider (CISR) tariff to Odyssey Manufacturing Company (Odyssey). The settlement agreement and order precluded further litigation on the matter before

¹ Order No. PSC-01-1003-AS-EI, issued April 24, 2001, In re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Section 366.03, 366.06(2), and 366.07, F.S. with respect to rates offered under commercial/industrial service rider tariff; petition to examine and inspect confidential information; and request for expedited relief.

DOCUMENT NUMBER-DATE

07720 JUL 16 04

FPSC-COMMISSION CLERK

the Commission, but it did not preclude Allied from litigating an appropriate claim in an appropriate judicial forum against Odyssey. Thereafter, on November 19, 2001, Allied filed suit against Odyssey in circuit court in Miami-Dade County for state antitrust violations and other allegations of interference with business relationships.² In the course of the circuit court proceeding, Allied has conducted depositions of several Odyssey representatives, including Odyssey's president, Mr. Sidelko, and Odyssey's employee, Mr. Allman, a former TECO employee.⁴ The circuit court proceeding is still pending.

This recommendation addresses requests by Allied and Odyssey for confidential classification of certain information contained in or taken from the circuit court depositions.

Based on the information contained in Mr. Sidelko's deposition, Allied filed its January 30 petition in which it asked the Commission to vacate its settlement order, claiming that Odyssey had provided misleading statements that induced Allied to enter into the settlement agreement with TECO.³ Allied included a deposition exhibit to Mr. Sidelko's deposition, portions of the deposition and the deposition errata sheet as exhibits A, D and E to its petition, and referred to certain information from the exhibits in the petition itself. Allied filed the petition and exhibits, Document No. 1404-04, under confidential cover, and requested confidential treatment of the highlighted portions on February 19, 2004. Allied asserted that the redacted information in the petition and Mr. Sidelko's deposition documents related to and arose from negotiations between TECO and Odyssey for a Contract Service Agreement (CSA) for electric power under TECO's CISR tariff. Allied claimed that the information was confidential business information entitled to confidential treatment under section 366.093(3)(d) and (e), Florida Statutes. Allied explained that the information was confidential to TECO and Odyssey and the CSA between TECO and Odyssey had been declared confidential by Order No. PSC-01-1442-CFO-EI, issued July 5, 2001, in Docket No. 000061-EI. Allied also explained that TECO's CISR tariff itself provides that negotiations, rates and the CSA document shall be kept confidential.

On May 12, 2004, Allied filed in this docket portions of Mr. Allman's April 19, 2004, deposition taken in the Miami-Dade circuit court proceeding. On June 1, 2004, Allied filed its request for confidential treatment of redacted portions of that deposition, Document No. 05528-04. Allied asserted that the redacted information would be entitled to confidential treatment as proprietary confidential business information arising out of TECO's and Odyssey's CSA.

Finally, on May 13, 2004, Odyssey filed the entire deposition transcript of Mr. Sidelko, Document No. 04796-04, with a request for confidential classification of the same negotiation and rate information regarding TECO and Odyssey's contract.

² Case No. 01-27699-CA-25, in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida.

³ Allied filed a Motion for Leave to File Amended Petition and an Amended Petition on July 2, 2004. TECO and Odyssey filed objections to Allied's motion on July 14, 2004. In the amended petition Allied also relies upon statements made by Mr. Allman in his deposition to support its claims. The Motion for Leave to Amend is pending at this time.

It should be noted here that several confidentiality orders were issued in Docket No. 000061-EI that granted confidentiality to documents relating to the negotiations and CSAs of both Allied and Odyssey. Many of those documents have been returned to their source and are no longer subject to confidential treatment under the Commission's rules, but some are. Most recently, on April 22, 2003, the prehearing officer in that docket issued Order No. PSC-03-0532-CFO-EI, which extended confidentiality for an additional 18 months to several documents in the evidentiary record that formed the basis of the settlement order Allied seeks to vacate. Those documents contain the information regarding the rates, negotiations and CSA contract that is the subject of Allied's and Odyssey's request for confidential treatment here. Confidential treatment will expire in 3 months and those documents will become public records unless the prehearing officer grants an additional extension. Presently, however, the information is subject to Order No. PSC-03-0532-CFO-EI.

It should also be noted that the confidential status of these depositions in the Miami-Dade circuit court proceeding is the subject of a dispute between Allied and Odyssey. Information received by the Commission in this docket shows that:

- On September 3, 2002, an Agreed Protective Order was issued in the Miami-Dade circuit court proceeding. That order, among other things, provided that information claimed by a party to be confidential would not be made a part of the public record in that case and that depositions containing confidential information would not be filed in the proceeding unless the party had first obtained a court ruling on the confidentiality claim and a resulting court order specifying the form of the filing.
- On January 21, 2004, Allied filed the unredacted Sidelko deposition transcript with the court.
- On April 22, 2004, an Agreed Order on (Odyssey's) Emergency Motion for Contempt and Sanctions permitted the parties to file deposition transcripts in this docket "subject to said party seeking confidential classification thereof pursuant to Rule 25-22.006, F.A.C."
- On April 27, 2004, Allied filed the unredacted Allman deposition transcript with the court.
- In late April, the Office of Public Counsel obtained a copy of the Allman deposition transcript from the court's public files.
- On July 13, 2004, Odyssey filed with the court a Motion to Seal Documents in Court File, alleging that the Sidelko and Allman depositions were filed with the court in direct violation of the Agreed Protective Order.

As noted above, Allied filed portions of the Allman deposition with the Commission on May 12 and filed its related request for confidential classification on June 1. Although Allied's request purports to seek confidential protection for the Allman deposition, it asserts that the deposition is part of the public record of the Miami-Dade circuit court proceeding, and the Office

of Public Counsel (OPC) procured an unsealed copy of that deposition from the court file. Allied asserts that while the redacted portions of Mr. Allman's deposition would have been entitled to confidential treatment under section 366.093, Florida Statutes, and the Commission's confidentiality rules, they are not entitled to that treatment now that the deposition has been made public. In related motions, the Motion for Determination of the Proper Treatment of Deposition Transcript of Mr. Patrick Allman, filed May 21, 2004, and the Motion to Expedite Determination of the Proper Treatment of Deposition Transcript of Mr. Patrick Allman, filed June 30, 2004,⁴ OPC confirms that OPC possesses a copy of the April 19 deposition of Mr. Allman that ". . . was obtained as a public record from the Dade County Circuit Court. The entire transcript – totally unredacted – is being treated as a public record by the Circuit Court, openly obtainable by any citizen." (OPC's Motion to Determine Proper Treatment, p.2) The same is apparently true of Mr. Sidelko's deposition, which was filed in the circuit court without confidential protection and thus has become part of the public court record. As noted above, Odyssey has a motion pending in the court to seal those documents in the court file.

In view of the unique situation presented by the publication of the information contained in these depositions in the circuit court in Miami-Dade County and the prior treatment of the information at the Commission, the Prehearing Officer believes that this matter should be determined by the full Commission and that the Commission would benefit from oral presentations by the parties. The Commission has jurisdiction pursuant to section 366.093, Florida Statutes.

⁴ These motions will be effectively addressed by the Commission's decision on this recommendation.

Discussion of Issues

Issue 1: Should the Commission deny the requests for confidential classification of the highlighted portions of Document Nos. 01404-04, 04796-04 and 05528-04?

Recommendation: Yes. The information contained in these documents has been disclosed without seal in the court record of the Allied-Odyssey lawsuit in the Miami-Dade circuit court, and thus does not meet the criteria for confidential treatment found in section 366.093(3), Florida Statutes, or Commission Rule 25-22.006(4)(d), Florida Administrative Code.

Staff Analysis: Section 366.093(3), Florida Statutes, defines proprietary confidential business information as:

. . . information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information will not be released to the public.

Likewise, subsection (4)(d) of the Commission's confidentiality rule, Rule 25-22.006, Florida Administrative Code, provides that a request for confidential classification ". . . shall include an affirmative statement that the material for which confidential classification is sought is intended to be and is treated by the utility or other person as private and has not been disclosed."

Both the Sidelko deposition and the Allman deposition were filed in the public record of the Miami-Dade circuit court proceeding. They have been disclosed to the public and they were not filed pursuant to a statutory provision or order of a court or administrative body. In light of that fact, even though the information contained in those documents has been treated by the Commission as confidential in the past – and is presently being treated by the Commission as confidential in Docket No. 000061-EI, at least for the immediate future – changed circumstances now restrict the Commission's ability to exempt the information from disclosure as a public record. The documents and the information contained therein no longer meet the criteria for confidential business information found in the statute and the Commission's rule. For these reasons staff recommends that these requests for confidential treatment should be denied.

Staff believes that denying confidential treatment will not unduly prejudice any party. In addition to the fact that the information is known to both Allied and Odyssey, and is currently available to the public from the court's files, TECO's CISR tariff offering has been discontinued, so there would appear to be little, if any, adverse impact on TECO or its ratepayers if the information is not protected in the Commission's hands. To the extent that Odyssey could suffer any harm by further public disclosure of the information, it presumably has a remedy against

Allied in court if the initial disclosure in the court files in fact violated the court's protective order.⁵

Staff recognizes that notwithstanding its strict reading of Section 366.093, there may be a policy reason to continue confidential protection in this docket, at least until the circuit court has ruled on Odyssey's pending motion to seal documents in court file. If the court ultimately rules that the documents were made public by Allied in violation of the protective order, and requires them to be sealed, it may be inappropriate for the Commission to compound the public disclosure problem by having the same documents publicly available in its files. Further, it appears that Odyssey, whose confidential information is at issue, took reasonable steps to protect its information from public disclosure. The information has not been disclosed *by Odyssey* except pursuant to "an order of a court ... that provides the information will not be released to the public."⁶

If the Commission wishes to protect this information permanently, it could construe Section 366.093 to extend confidential protection to documents that have been made public in a limited way, so long as that public disclosure was not the result of action or inaction on the part of the owner of the information. If the Commission wishes to protect this information temporarily, pending the circuit court's resolution of Odyssey's motion to seal documents, it could simply defer ruling on the pending requests for confidential classification.

⁵ If the Commission denies the request for confidential classification, the documents on file with the Commission do not immediately become public. They remain confidential until the time for filing reconsideration and/or appeal has expired, and during the pendency of any such review.

⁶ See, Agreed Protective Order dated September 3, 2002.

Docket No. 040086-EI

Date: July 16, 2004

Issue 2: Should this docket be closed?

Recommendation: No. This docket should remain open.

Staff Analysis: This docket should remain open to address other substantive and procedural matters pending in the case.

4