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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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 Filed: August 20th, 2004

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

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

As set forth herein, Allied's and CFI's Amended Petition is legally insufficient for several reasons: e.g., it fails to allege any legally sufficient basis for standing or jurisdiction; it is barred by the doctrine of administrative finality, the law of settlements, and the law of contracts; it fails to include allegations legally sufficient to state a cause of action for any of the relief for which Allied and CFI pray; and it fails to include the legally required elements of an administrative petition. Furthermore, none of these deficiencies can be cured.

Even assuming, *arguendo*, that the Commission could grant any of Allied's and CFI's prayers, Allied and CFI are further flouting the law by, *inter alia*, (1) calling into question the Commission's independent finding that the Contract Service Agreement ("CSA") between Tampa Electric Company ("TECO") and Odyssey is prudent where the Commission has made it clear that

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such a finding of prudence does not affect the substantial interests of a competing TECO customer and ratepayer; (2) second-guessing the Commission's independent prudence determination, which determination was based upon RIM analyses provided it by TECO, by admittedly speculating that the rate paid TECO by Odyssey "is insufficient to cover TECO's incremental costs and provide a contribution to TECO's fixed costs," and from that rank speculation making a Herculean leap, unsupported by any legally cognizable allegations, to the "conclusion" that "CFI and other ratepayers are being forced to subsidize Odyssey's discounted electric rate" (which, even if assumed to be true would still fail to provide Allied or CFI any legal basis to challenge Odyssey's rate); and (3) asserting that Allied and CFI possess the legal right to compel the Commission to act on Allied's and CFI's baseless Amended Petition. The law is abundantly clear that these positions are untenable and sanctionable.

For these and additional reasons more fully addressed *infra*, the Commission should dismiss, with prejudice, Allied's and CFI's legally insufficient Amended Petition and award Odyssey the costs and fees of responding thereto, as the Amended Petition was filed for facially and demonstrably improper purposes. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

I.
PROCEDURAL HISTORY

On January 20, 2000, Allied and CFI filed with the Commission a formal complaint against TECO alleging, *inter alia*, that TECO had offered a discriminatory rate in the form of a Commercial Industrial Service Rider ("CISR") tariff to Odyssey. Odyssey and its related company, Sentry Industries, intervened. After the parties collectively expended what may be reasonably assumed to

have been many hundreds of thousands of dollars in fees and costs and underwent a year of discovery and motion practice, TECO and Allied and CFI reached a settlement agreement in principle on the day of the scheduled hearing (February 19, 2001). In their complaint, Allied and CFI had requested, *inter alia*, suspension of the CISR tariff offered by TECO to Odyssey. (In fact, Allied's and CFI's own counsel stressed this particular point 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 deemed withdrawn by Allied and CFI, with prejudice, upon issuance of the Commission's Order on April 24, 2001 (*see* Attachment A to Exhibit C of Amended Petition at ¶ 6 of the Settlement Agreement).

Nearly three years later, on January 13, 2004, Allied and CFI filed with the Commission what was, in substance, all but identical to their first 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 and CFI dismissed that "motion" on January 16, 2004. On that same date, Allied and CFI filed a document that was all but identical to its withdrawn "motion," the only discernible differences being that the document was filed in Docket No. 040050-EI and bore the pseudonym, "Petition." On January 29, 2004, the January 16, 2004 petition was dismissed by Allied and CFI. On January 30, 2004, Allied and CFI filed another, all-but-identical, "Petition" (the "Initial Petition").

Odyssey and TECO timely filed Motions to Dismiss the Initial Petition on February 19, 2004. On February 23, 2004, Odyssey filed a Motion for Attorneys Fees and Sanctions against Allied and CFI. On March 12, 2004, Allied and CFI filed their Response in Opposition to Motions to Dismiss and Motion for Attorney's Fees and Sanctions. Thereafter, Odyssey's and TECO's Motions were

set for hearing at the Commission's July 6, 2004, Agenda Conference. In the interim, Commission Staff ("Staff") recommended that the Initial Petition be "dismissed with prejudice" (Staff Memorandum of June 23, 2004, at p.13 (Commission Document No. 06928-04) (the "Staff Recommendation")). Thereafter, on July 2, 2004, four days before the Motions to Dismiss and for Fees and Sanctions were to be heard, Allied and CFI filed a Motion for Leave to File Amended Petition to which they attached their heavily redacted Amended Petition.

This filing resulted in the hearing date being deferred and was opposed in separate filings by Odyssey and TECO (both on July 14, 2004). Without hearing, Allied's and CFI's Motion for Leave to amend the Initial Petition was granted on July 20, 2004 by Order No. PSC-04-0714-PCO-EI, which Order additionally required Allied and CFI to provide Odyssey and TECO with copies of the unredacted Amended Petition and exhibits thereto by July 27, 2004, and required Odyssey and TECO to file Motions to Dismiss by August 16, 2004.

II.
INTRODUCTION TO ARGUMENT

Allied and CFI have graciously been allowed by the Commission to amend their legally insufficient Initial Petition, though the amendment thereof was only requested and deemed necessary by Allied and CFI more than five months after their filing of the Initial Petition and only after the Commission Staff recommended that the Initial Petition be "dismissed with prejudice." (Staff Recommendation at p.13.) Nonetheless, Allied and CFI have squandered the Commission's grace by amending their cryptic and disjointed Initial Petition to demonstrate their true purpose in filing it.

In amending their Initial Petition, Allied and CFI have now made it abundantly

clear–throughout each and every section of their Amended Petition and the prayers for relief therein–that the driving, improper purpose for Allied's and CFI's filing of the Amended Petition is that they are attempting to re-litigate Commission Docket No. 000061-EI, notwithstanding the facts that (1) the Commission issued its Final Order dismissing Allied's and CFI's Complaint with prejudice in that matter over three years ago (Commission Order No. PSC-01-1003-AS-EI (Exhibit C to the Amended Petition)); (2) Allied and CFI voluntarily and knowingly dismissed that case with prejudice pursuant to a distinct and contractual settlement agreement (the "Settlement Agreement," Attachment A to Exhibit C to the Amended Petition); (3) Allied and CFI voluntarily and knowingly entered this distinct and contractual Settlement Agreement, the terms of which unequivocally bar them even from raising the issues in the Amended Petition; and (4) Allied and CFI additionally entered a distinct and contractual general release (the "General Release" (attached to the Amended Petition as Exhibit C to the Settlement Agreement)) that, like the Settlement Agreement, though independent thereof, unequivocally bars them even from raising the issues in the Amended Petition.

Moreover, and notwithstanding the blatant impropriety of Allied's and CFI's above-chronicled actions, equally improper is their attempt to use the Amended Petition (concerning only issues that they voluntarily dismissed with prejudice over three years ago and which they voluntarily agreed to be legally barred from raising) opportunistically and unethically to harass their business competitor, Odyssey, by attempting, however clumsily, to use Odyssey as a straw man to avoid the terms of the Settlement Agreement and General Release which preclude any litigation such as this directly against TECO[1]–though any plain reading of the Amended Petition reveals that each and

[1] It must be noted herein that Allied and CFI make no claim in their Amended Petition that the General Release (discussed, *infra*) should be avoided.

every prayer for relief is either directed at, or would directly affect, TECO in a manner that is violative of the General Release and that all such prayers are predicated upon barred and insufficient allegations of misfeasance or malfeasance by TECO.

Even more disturbing is that, if Allied and CFI truly felt it proper to bring this action at all,[2] they should, and certainly would, have known that conditions precedent to bringing any such action before the Commission would be, at a minimum (1) to obtain from a court of competent jurisdiction an order somehow voiding the distinct and contractual (and conspicuously unmentioned) General Release; and (2) to obtain from a court of competent jurisdiction an order somehow voiding the distinct and contractual Settlement Agreement. The fact that, instead, Allied and CFI are asking the Commission to grant Allied's and CFI's prayers, all of which either implicitly or explicitly require such prior determinations (when it is clear that only a circuit court would have jurisdiction to make such rulings[3]) betrays an unfounded and insulting presumption on the parts of Allied and CFI that the Commission will apply a lesser degree of scrutiny to Allied's and CFI's abuse of the system by their filing of an improper, frivolous Amended Petition and allow Allied and CFI, without sanction (1) to bring barred claims against Odyssey and TECO; (2) to milk Odyssey and TECO of needlessly increased costs of litigation; (3) to use this forum to unnecessarily delay the circuit court case initiated by Allied and CFI against Odyssey; and (4) to harass their business competitor.

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[2] As discussed throughout this Motion, Odyssey believes that Allied's and CFI's filing of their Amended Petition and their bringing this action to be wholly and inescapably improper.

[3] As discussed *infra*, the fact that the Commission initially approved the settlement of Docket No. 000061-EI does nothing to change this. Both the General Release and the Settlement Agreement are, plain and simple, contracts, the construction or invalidation of which is a matter of law within the exclusive original jurisdiction of the circuit court. §*See* 26.012, F.S. ("Jurisdiction of Circuit Court"), Subsection (2) of which states that the circuit court "shall have exclusive original jurisdiction: (a) In all actions at law not cognizable by the county courts;...[and] (c) In all cases in equity including all cases related to juveniles except traffic offenses as provided in chapters 316 and 985;...."

However, Odyssey is neither so cynical nor dismissive of the Commission's legal acumen and believes that justice will carry the day.

III.

ALLIED AND CFI LACK STANDING TO PETITION FOR A HEARING OR TO REQUEST THE RELIEF THEY SEEK

As discussed in Section V, *infra*, Allied and CFI have attacked no proposed agency action, and cannot do so, as there is no such proposed action to attack; hence, the Administrative Procedure Act disallows even their filing of the Amended Petition. However, in the event that the Commission disagrees, it must determine whether Allied and CFI have alleged standing sufficient to receive a hearing on the "relief" they have requested; if Allied and CFI have not, the law is clear that Allied and CFI are entitled to no hearing, much less the action they are attempting to provoke the Commission into taking. This issue is both dispositive and easy to resolve, as any reasonable reading of Allied's and CFI's Amended Petition demonstrates that their allegations are insufficient to confer standing upon either Allied or CFI. Therefore, the analysis of Allied's and CFI's Amended Petition may both begin and end with four simple, though ineluctable, determinations: that Allied and CFI lack standing, that the Amended Petition must be dismissed, that Allied and CFI must be sanctioned for their improper and frivolous filing, and that Odyssey must be awarded its costs and fees associated with defending against the Amended Petition. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

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 "economic damage" or the petitioner's mere status as a "business competitor." *E.g.*, *In re: Petition of Monsanto Company*, Commission Order No. 16581 at p.3 in Docket No. 860725-EU (1986) ("Economic damage alone does not constitute 'substantial interest'.") (citing *Agrico*); *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); *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).

When Allied's and CFI's Amended Petition is examined, the only "injuries" they purport to allege are (1) economic injury as a TECO ratepayer (which allegation is specific to CFI only) and (2) that Allied and CFI are suffering injury due to their status as Odyssey's business competitors. As for the first alleged injury, it must fail because, e.g., (1) as presented in the Amended Petition, it does not even rise to the level of a legally cognizable allegation as it is, admittedly, based purely upon rank speculation; (2) even if it were a proper allegation, it would be one of purely economic (and decidedly insubstantial) injury; and (3) even if true (and non-economic and properly alleged), it would be no "special injury, apart from the injury suffered by any member of the general public." With regard to Allied and CFI's second alleged basis for standing–that they are "business competitors" with Odyssey–this too, based upon the aforecited cases, forms no legally cognizable basis to assert administrative standing.

Moreover, insofar as Allied's prayers are aimed at challenging, or requesting that the Commission inspect, the TECO/Odyssey CSA, Commission Order No. PSC-98-1081-FOF-EI (the "CISR Order") provides only five circumstances under which any review of a CSA may be initiated–none of which allow for Allied or CFI to do so. The CISR Order at pages 3-4 states that a review of a CSA (such as that independently completed by the Commission on the TECO/Odyssey CSA over three years ago) would only be triggered (1) if TECO requested a base rate increase; (2)

if TECO's CSAs resulted in TECO's receiving a higher rate of return on equity than it was allowed; (3) if TECO, on its own motion, requested a prudence review after entering a CSA; (4) if the Commission chose, on its own motion, to initiate such a review; or (5) if a utility requested a prudence review by the Commission. Thus, any prayer by non-TECO, non-Commission, and non-utility Allied or CFI for any such review is wholly improper as, under the CISR Order, they lack the requisite standing to make such a request.

Thus, it is clear that, even if one takes Allied's and CFI's Amended Petition in a light most favorable to Allied and CFI and assumes the Amended Petition's proper factual allegations to be true, none of these allegations can be viewed as a legally cognizable injury in fact. Hence, Allied's and CFI's Amended Petition must be dismissed with prejudice as Allied and CFI have not, and cannot, allege the most bedrock of legal requirements–that Allied or 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's and CFI's Amended Petition is so infirm in this regard, Odyssey is entitled to the fees and costs it has incurred in responding to Allied's and CFI's improper and frivolous filing.

Even if the Commission somehow finds that Allied's or CFI's alleged injuries are sufficient to satisfy *Agrico*'s first prong, since the injuries alleged by Allied and CFI in the Amended Petition are, in essence, business tort claims, it is inconceivable to think that it would be proper to seek redress for such alleged injuries in an administrative proceeding before the Commission where *Agrico* clearly states that the alleged injury must be "of a type or nature which the proceeding is designed to protect." *Id.* at 482. And while the merits of such alleged injuries–assuming their sufficiency–could in some instances be proper to confer standing to bring a circuit court action for

unfair competition or antitrust violations (such as that filed by Allied and CFI and currently pending against Odyssey), the Commission does not exist to settle such decidedly civil claims and the proceedings before it are not designed to protect such interests.

Allied and CFI will almost surely argue that their cavalier nods to the same statutes they claimed were violated in the complaint that they voluntarily dismissed with prejudice in Docket No. 000061-EI are sufficient to provide them standing herein–since there are no other statutory references lurking anywhere in the Amended Petition. However, this argument is, likewise, of no avail as they have waived standing–in both the General Release and the Settlement Agreement–to bring an action, such as the instant one, for violation of those statutes.

In short, Allied and CFI have alleged no legally cognizable basis for conferring upon either of them standing in this matter. Thus, their Amended 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. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

IV.
THE RELIEF REQUESTED BY ALLIED AND CFI CANNOT BE GRANTED

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

1. Allied's and 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); and *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). In the instant case, Commission Order No. PSC-01-1003-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 and CFI in determining whether Allied and CFI have alleged the exceptional bases necessary for modification or reconsideration of that Order.[4]

An additional basis upon which the Commission should deny Allied's and CFI's request for

[4] It is notable in this case that Allied and CFI do not request modification of the Order. It is not Allied's and CFI's desire to tinker with a certain provision of the Order. Instead, Allied and 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.

vacation of the Order is the period of time that has passed since the Commission entered Order No. PSC-01-1003-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 and CFI seek not modification, but vacation *in toto* of an order issued 32 months prior to the filing of the Initial 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-01-1003-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 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 decision 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-01-1003-AS-EI should be applied by the Commission in this case and Allied's and 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 and CFI have made no credible allegation of such circumstances or significant public need or interest in this matter, and Allied's and CFI's suggestion that testimony only recently elicited 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's and CFI's Initial and Amended Petitions. 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 and CFI had ample opportunity in Docket No. 000061-EI to ask the same questions of Mr. Sidelko, and the other deponents referenced in paragraph 38 of the Amended Petition, and to probe the same subject matters with those deponents, as they did in the *ex post facto* depositions on which they now rely. Thus, the Commission should not now allow Allied and 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's and CFI's and Odyssey's CSAs with respect to matters within our jurisdiction."[5]

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

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."

Id. at 43-44 (emphasis added).

Thus, the Commission should also deny Allied's and CFI's request to vacate Order No. PSC-01-1003-AS-EI because the Amended 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 Amended Petition and Docket No. 000061-EI, Allied and CFI are

conclusively barred from raising the issues therein.

Allied and 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 (in the case of Mr. Sidelko) or to be somehow "newly discovered" (in the cases of Mr. Allman, Mr. Jennings, and Mr. Ashburn) – through cross examination or other methods of proof. In fact, Allied and 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.) Mr. Sidelko was deposed in Docket No. 000061-EI. Mr. Allman was deposed in Docket No. 000061-EI. Mr. Ashburn was deposed in Docket No. 0000061-EI. And Mr. Jennings' predecessor (Lawrence W. Rodriguez) was deposed in Docket No. 000061-EI.[6] Even if the allegations set forth in paragraph 38 of the Amended Petition must be accepted as true for the purposes of this Motion, each either addresses circumstances which existed in 2001, at which time TECO was already providing service to Odyssey pursuant to the Odyssey CSA, or is an allegation upon which this Commission could never find a substantial change in circumstances.[7] Even if the allegations in paragraph 38 are deemed by this Commission to be "substantial" and to set forth "circumstances" which somehow relate to the Order which Allied and CFI seek vacated, each and every allegation therein is one as to which the only appreciable "change" is the fact that Allied and CFI have only recently elected to delve into subjects which either were or could have been previously discovered in Docket No.

[6] Mr. Jennings and Mr. Rodriguez were TECO's account representatives for Allied and CFI.

[7] The allegation in paragraph 38(d) that TECO's cost of fuel has increased, is apropos of nothing. Are Allied and CFI suggesting that fuel costs must remain constant in order for Commission Orders to be free from the specter of vacation? The allegation in paragraph 38(j) that TECO refused to extend Allied's CSA is an "allegedly" factual incongruity which is neither "substantial" nor a "change" of any relevant circumstance to the Amended Petition.

000061-EI. There is no doubt that the issue in this proceeding and Docket No. 000061-EI are substantially the same and that it is Allied and CFI's own lack of either due diligence or competence which resulted in the "discovery" of the information in "recent depositions". In the case at bar, not only is the issue raised by Allied's and CFI's Amended 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] Allied and CFI should not now be rewarded for a lack of due diligence in Docket No. 000061-EI, for settling Docket No. 000061-EI as completely and as clearly as is legally possible, for then instituting litigation against Odyssey in Circuit Court, for thereafter deposing the same individuals who were deposed in Docket No. 000061-EI, and for then coming before this Commission and having the unmitigated gall to assert that this chain of events is a proper basis for reopening the previously decided, previously litigated, and previously settled issues in Docket No. 000061-EI.

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,

[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 review." No amount of artful articulation can change the fact that Allied's and 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.

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's and CFI's Amended Petition, sanction Allied and CFI, and award Odyssey its costs and fees in defending this improper, frivolous action, because Allied's and CFI's Amended Petition seeks vacation of an order which is final and because the Amended Petition utterly fails to allege the existence of any material fact or circumstance which was not previously subject to thorough discovery and litigated in Docket No. 000061-EI and which would lawfully support the Commission's granting any of the "relief" requested therein. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

b. The Cases Cited by Allied and CFI, in Fact, Do Not Support Allied's and CFI's Request that Order No. PSC-01-1003-AS-EI Be Vacated.

Allied and CFI cite to three cases in their Amended 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 forth below, Allied's and 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

[9]Allied and CFI argue 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; 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

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's and 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 such modification or reopening is requested within "several months" after entry of a final order. *See id.* at 119.

Finally, Allied and 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's and CFI's reliance on *Richter* is an attempt to impose upon the Commission their tortured reading of the passage in *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

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reasonable period of time.

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 and CFI have clearly misstated the specific circumstances under which finality may be avoided. The reasons for this are obvious since Allied's and CFI's desires to re-litigate Docket No. 000061-EI and that the Commission injure Allied's and CFI's competitor, Odyssey, in an unregulated marketplace, so that Allied and CFI can gain an economic advantage, do not, and cannot, constitute "extraordinary circumstances," "changed circumstances," or "public interest or public need." The aggressively misleading allegations in Allied's and CFI's Amended Petition are categorically necessitated by the lack of any credible, legally cognizable basis for Allied and CFI to attack Order No. PSC-01-1003-AS-EI.

As demonstrated by Allied's and CFI's own Amended 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 and CFI have utterly failed to demonstrate, or even properly 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 and CFI's Amended Petition should be dismissed, Allied and CFI sanctioned, and Odyssey awarded the costs and fees associated with its defense of this improper and frivolous

action. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

c. *Under Florida Law, Allied and 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 and CFI's sole basis predicated upon fraud for its requesting that the Commission vacate Order No. PSC-01-1003-AS-EI and the other "relief" requested in the Amended 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 and CFI are, at best, allegations of intrinsic fraud, and subject to the same one-year limitation.

Accordingly, and to the extent that Allied and 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 and 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 and 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 and CFI the "relief" from Order No. PSC-01-1003-AS-EI sought in their Amended Petition.

2. The Commission Should Dismiss Allied and 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.

Allied's and CFI's new theory, that the Commission should "examine the TECO/Odyssey CSA," represents a classic case of settler's remorse and should not be entertained by this Commission. Requesting that the Commission (re)examine the Odyssey CSA is so clearly volative of the Settlement Agreement, so obviously inconsistent with Allied's and CFI's stipulated dismissal **with prejudice** of a Complaint filed by Allied and CFI in Docket No. 000061-EI and so contrary to Order No. PSC-01-1003-AS-EI, that such request hardly merits detailed discussion. This Commission should not tolerate this attempt by non-regulated and self-professed competitors (Allied and CFI) of another non-regulated entity (Odyssey) to attack this other non-regulated entity before the Commission in breach of a covenant Allied and CFI made (both procedurally by the dismissal with prejudice and contractually by the Settlement Agreement and General Release), that it would not do exactly what it is now attempting to do. The Commission should not allow itself to be used by Allied and CFI, now skulking behind the facade of its newly discovered concern for TECO's ratepayers, to revisit the appropriateness of the Odyssey CSA which Allied and CFI have bound

[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).

themselves not to revisit and which the Commission has previously found to be prudent in any case.

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 *Robbie 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 and CFI and TECO "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, at least in part, to prevent the filing of an Amended Petition like that Allied and CFI now put before the Commission. As Order No. PSC-01-1003-AS-EI states, at page 8 thereof, TECO and Allied and CFI clarified for the Commission that the Settlement Agreement was intended, in part, "to settle, for all time, the prudence of Allied and CFI's and Odyssey's CSAs with respect to matters within [the Commission's] jurisdiction."[13] The Settlement Agreement itself provides that:

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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] One of Allied's and CFI's new claims, in its Amended Petition, is that Allied and CFI and TECO cannot, by contract, delegate or undermine the Commission's authority to vacate the Order and to amend, modify or terminate the TECO/Odyssey CSA. Even if true, Allied can (and has) by execution of the Settlement Agreement waived its own right to advance that very argument. For Allied and CFI to assert that they have the right to urge the Commission to exercise its "independent" judgment to do indirectly what Allied and CFI itself cannot do directly is more than just the height of disingenuousness. It is patently improper and should be found by this Commission to be conduct which is sanctionable.

- Allied and 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 and 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 and CFI; and (b) the issuance of an Order by the PSC approving the Settlement Agreement;[14]

- Allied and 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 and CFI CSA or the rates, terms or conditions contained therein"; and

- Allied and CFI and TECO promised to abide by the various "general release" agreements executed among them.[15]

The Settlement Agreement modestly extends from the date of the Agreement back to "the beginning of the world." Odyssey cannot help but wonder why it must retain attorneys once again to defend against the claims of Allied and CFI 32 months after the closure of the last case, given Allied's and CFI's promises 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's and CFI's purported reason for breaching their promise (which they unequivocally, unambiguously, and undeniably made in the Settlement Agreement and General Release) is that they had an epiphany at a deposition of Mr. Stephen Sidelko taken on December 18, 2003 and that they "discovered" new information when re-deposing certain other individuals. Allied's and CFI's claim

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

[15] The General Release attached to the Settlement Agreement contains 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.)

that these testimonies somehow change 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 and 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 and CFI represented to the Commission on February 19, 2001, that they were ready to prove their entitlement to the same relief they now assert can only be achieved by the presentation of "newly discovered" evidence where, actually, Allied and CFI do not now know anything now that they did not know, should not have known, or could not have known three years ago.

Even assuming the truth of Allied and CFI's misrepresentation of what Mr. Sidelko said in the deposition and their misguided attempt to now rely upon other depositions in the circuit court case, it is disingenuous, at best, to claim that something said in December of 2003 and early 2004, given Allied's and 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 allegations in the Amended Complaint (which are actually little more than paraphrased and subjective synopses of supposed testimony allegedly based upon the recent circuit court depositions), referenced in paragraph 38 thereof, neither address circumstances which are substantial (in fact they are entirely immaterial) nor which have changed. All of those facts as they relate to Odyssey or the relief requested in Allied and CFI's Amended Petition, even when accepted as true for the purpose of this Motion, could have been delved into in discovery and woven into the very litigation which Allied has so thoroughly, completely, and explicitly settled and dismissed in Docket No. 000061-EI. The only true "change in circumstances" Allied and CFI have experienced is an intensification of

their dismay that Odyssey, their competitor, has continued to survive despite Allied's and 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. The fact that the record reveals that Allied and CFI believed they knew in 2001 what they are now alleging they did not learn until recently 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.

This Commission should decline to allow Allied and CFI to breach the promises, covenants, and representations which they negotiated over a period of "six weeks" in early 2001 based on the recent and slapdash charade of a "substantial change in circumstances." The claims that Allied and CFI now make in the Amended Petition–e.g., that Odyssey does not qualify for its CISR rate with TECO and that the CSA should be ended–is the exact same claim Allied and CFI made to the Commission in Docket No. 000061-EI. In fact, the newly conceived allegations made for the first time in the Amended Petition, as well as those that survived the several iterations which were filed by Allied and CFI in January of 2004 in its initial attempts to launch this litigation, which relate to a revisitation of the TECO/Odyssey CSA, are all entirely inconsistent with the spirit, intent and letter of the Settlement Agreement, the statements made by Allied's and CFI's counsel in Docket No. 000061-EI, and the concept of dismissal "with prejudice," which Black's Law Dictionary describes as a "final disposition, barring the right to bring or maintain an action on the same claim or cause . . ." and "res judicata as to every matter litigated".

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 Amended 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, the Settlement Agreement remains in effect between Allied and CFI and TECO, regardless of whether or not the Commission vacates the Order.

There is no doubt that Allied and CFI and TECO could have entered into this Settlement Agreement, resulting in the dismissal of Allied's and CFI's Complaint in Docket No. 000061-EI, without Commission approval. While the entire Settlement Agreement itself is not contingent upon the Commission's approval, Paragraph 6 thereof does provide that Allied's and 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 and CFI cannot lawfully breach the Settlement Agreement–as they have by filing the instant Amended Petition–unless the Commission can exercise non-statutory powers of legerdemain and make the Settlement Agreement vanish. Neither can Allied and CFI obtain the relief they request as long as the Order, in and of itself, stands, since in the Order the Commission makes an independent finding of the prudence of Odyssey's CISR rate with TECO. Accordingly, Allied and CFI's Amended 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 and CFI. Obviously, no credible claim can be made that the Settlement Agreement and the Order are somehow inextricably intertwined when TECO and Allied and 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 and CFI posed no objection). After informing the Commission that TECO and Allied and CFI had reached an "agreement in principle," the following exchange occurred:

> MR. LONG: Well, Commissioner, Allied and CFI and Tampa Electric have agreed that Allied and CFI will provide Tampa Electric with a General Release with regard to any future

litigation....

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 and CFI's Amended Petition fails as a matter of law for that reason alone. The Commission should dismiss Allied and CFI's Amended Petition based on the negotiated, clear, unequivocal, and unambiguous terms of the Settlement Agreement and the General Release, should sanction Allied and CFI, and should award Odyssey its fees and costs associated with defending this sham action. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

3. Because Allied and CFI's Actual Purpose in Seeking Vacation of Order No. PSC-01-1003-AS-EI is to Re-Litigate the Complaint Dismissed with Prejudice in Docket No. 000061-EI and as Allied and CFI Can Articulate No Injury Specific to Either of Them, Neither Has Standing to Seek Vacation of the Order.

[16] Even 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 certain claims before the Commission which the Commission determines are within the Commission's jurisdiction, which claims do not include those in the Amended Petition.

In light of the standing argument presented in Section III, *supra*, and notwithstanding Allied's and CFI's attempted chicanery in claiming that it has filed its Amended Petition for purposes other than re-litigating the complaint long-ago dismissed with prejudice in Docket No. 000061-EI, it is beyond peradventure that Allied and CFI have brought this action for a decidedly improper purpose and that their attempt to use the Commission to assist in this regard 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 Amended Petition in this matter–absent the articulation of a substantial injury specific to Allied and CFI, Allied and CFI have no standing to insist that the Commission do 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 p.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's and CFI's Amended Petition must be dismissed with prejudice, Allied and CFI should be sanctioned harshly 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. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

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

In light of the Amended Petition's tendency to argue every point and issue in the alternative to the extremity, no discussion about the continued viability of the Settlement Agreement is complete without consideration of Allied's and CFI's newly developed theory that even if the Settlement Agreement does survive its assault, then the "force majeure" provision of the same should be construed by the Commission as the basis for requiring TECO to provide electricity to Allied and CFI upon the same rates, terms and conditions as Odyssey. Even if the Commission somehow chooses to discount the fact that this theory attacks Commission action which Allied and CFI agreed not to contest[17], and is being made before a forum in which Allied and CFI contractually promised not to raise the issue[18], and was one of the precise claims which Allied and CFI previously dismissed before the Commission "with prejudice"[19], Allied's and CFI's position is one which should be summarily rejected by the Commission. Not only does the Commission have no jurisdiction to interpret the "force majeure" provision of the Settlement Agreement in the way or manner Allied and

[17]See, e.g., ¶ 5 of the Settlement Agreement.

[18]See, e.g., ¶ 7(a) of the Settlement Agreement.

[19]See, e. g., ¶ 6 of the Settlement Agreement.

CFI suggest, nothing in the "force majeure" provision could leave any reasonable person, signatory thereto, or judicial or quasi-judicial body to conclude that the Commission can or should under any circumstances compel TECO to provide electricity at a certain rate under any scenario contemplated therein.[20]

As demonstrated herein, the voluntary Settlement Agreement has been acknowledged by the Commission and Allied and CFI to be 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...."[21] 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

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[20] Allied's and CFI's attempt to cover every base in its Amended Petition have caused it to bend so far backwards that its spine is in danger of snapping. To make an argument under the "force majeure" clause of the Settlement Agreement necessarily means that the Commission has declined to determine that the Settlement Agreement is unenforceable. If the Settlement Agreement is, therefore, enforceable, then assumably the numerous provisions where Allied and CFI agreed to "assert no further challenge against Odyssey's CSA before the Commission" and that "TECO's decision to enter a CSA with Odyssey and the CSA itself are prudent" and that "the Commission shall not entertain any further challenge to Odyssey's existing CSA . . ." are all in full force and effect. This attempt by Allied and CFI to have their cake and eat it too cannot form the legitimate basis for any Commission action.

[21] *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).

(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 and between Allied and CFI and TECO, but which Allied and CFI now unilaterally seek to avoid, provides that the parties agreed, *inter alia*:

- that Allied and CFI would refrain from challenging the TECO/Odyssey CSA before the Commission (¶ 3)[22];
- that Allied and CFI would refrain from contesting any Commission determination that the TECO/Odyssey CSA is prudent (¶ 5)[23];
- that Allied and CFI's complaint was to be deemed withdrawn with prejudice in PSC Docket No. 000061-EI (¶ 6);
- that Allied and 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 and 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" thereto);
- 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 and CFI and TECO (¶ 11).

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

[23] *See* footnote 24.

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 and CFI Have No Standing to Request that the Commission Terminate or Modify the Existing Contract Service Agreement between TECO and Odyssey.

While the arguments demonstrating Allied's and CFI's lack of standing in Sections III and IV(A)(3), *supra*, apply with equal force to Allied's and CFI's demand that the Commission terminate or modify the existing CSA between TECO and Odyssey, at 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 already and independently 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's or CFI's substantial interests. And as Allied's and CFI's substantial interests are unaffected by this finding, Allied and CFI have no colorable claim that they have standing to request that this Commission terminate or modify, or take any other 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 discussed, *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 detailing and governing the entities and subjects of the Commission's jurisdiction[24] provide no basis for ordering Odyssey to "refund" or pay a sum of money to anyone for anything, Allied's and CFI's prayer that the Commission order same–as compensation for alleged harm caused CFI as but one in more than a million ratepayers–must be denied as being beyond this Commission's jurisdiction.

Odyssey, as a chemical manufacturer and not 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 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 hoodwinked into accepting the spurious argument that it has jurisdiction over Odyssey and the power and authority to impose a

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[24] *See* §§ 366.02(1) (defining the entities over which the Commission has jurisdiction as a group to which bleach 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).

penalty upon it–notwithstanding the well-settled law to the contrary–Allied's and 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 and 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 certain that the Commission lacks the jurisdiction, power, or authority to order Odyssey to "refund" anything to anyone; that Allied and 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 and CFI's sham Amended Petition. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

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

Were the Commission somehow to decide that the myriad incontestable legal arguments presented in this Motion, each of which, alone, mandates dismissal of Allied's and CFI's Amended Petition, are somehow, together, insufficient to require such dismissal, the Commission must nevertheless determine that Allied's and CFI's allegations, even if accepted as true,[25] are wholly

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

without merit and state no legally cognizable basis upon which to grant any of the relief requested and that the Amended Petition must be dismissed on this basis.

The Amended Petition includes no disputed issues of fact, material or otherwise (*see* Section V, *infra*), and, at best, presents only statements of not-yet-disputed and immaterial fact and misinterpretations of law labeled "facts" by Allied and CFI (which issues of law, as has long been recognized, cannot be transformed into facts, regardless of their given title). Nevertheless, and in an abundance of caution, Allied's and CFI's "allegations" will be addressed briefly herein.

Hence, and for the reasons stated throughout this Motion, the Amended Petition must be dismissed, Allied and CFI sanctioned, and Odyssey awarded its fees and costs in this matter. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

1. Allied's and CFI's Allegations Regarding Statements by Mr. Stephen Sidelko

In their Amended Petition, Allied and CFI have misrepresented and misinterpreted recent statements made to Allied and CFI by Mr. Stephen Sidelko, president of Odyssey (in an incomplete deposition in a pending circuit court action) to be inconsistent with six-year-old statements Mr. Sidelko made to TECO. Hence, even if Allied's and CFI's Amended Petition is taken in a light most favorable to it, it is beyond question that all prayers for relief in the Amended Petition that are in any way based upon Mr. Sidelko's statements hinge upon a series of three exclusively legal[26] questions:

> (1) whether statements made by Mr. Sidelko, at various times over a period of more than five years, "contradict" one another;

[26] It is uncontested that Mr. Sidelko made the statements in the context in which they appear in the relevant documents.

(2) if, and only if, said statements are determined to "contradict" one another, whether any such "contradictions" are material to Allied and 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 and CFI has demanded.

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

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

- Mr. Sidelko's August 1998 affidavit and/or his June 2000 prefiled, 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

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

With regard to their Amended Petition, it is noteworthy that Allied and CFI never cite to any specific differences between the Recent Deposition and Mr. Sidelko's Prior Statements. Allied and 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's and CFI's unfounded and unsupported conclusions that phantom contradictions exist are clearly insufficient to warrant any relief, of any variety, in any light.

a. Whether Odyssey Would Have Built Its Plant In Tampa at a Higher Rate than $[redacted] per mwh.

Allied's and CFI's first misguided conclusion regarding Mr. Sidelko's statements is that, in his Recent Deposition, he "contradicted" his affidavit wherein he stated the necessary rate for Odyssey to build its Tampa plant was [redacted] cents per kwh. However, any reasonable interpretation

of Mr. Sidelko's deposition shows that, at the time he signed the affidavit, he believed only three rates to be available to him–(1) $36 per mwh for interruptible electric service; (2) $[redacted] per mwh under a CISR tariff; or (3) a residential rate between $70 and $80 per mwh–and that he could not commence to build his plant with interruptible service (as there was a waiting list) or at the residential rate. This is amply shown even by reference only to those handpicked sections of the Recent Deposition (taken nearly six years after the affidavit was signed) attached to the Amended Petition:

> Q. You don't recall what number was in the affidavit, if any?
>
> A. The number was not important to me. I was signing that I need -- conceptually that I needed the CISR tariff offer and not the rate that people pay in their houses and not the interruptible rate because there was a waiting list.

(Exhibit "B" to Amended Petition at p.205, lines 8-15.)

Then, when asked the same question an hour later:

> A. This document came from TECO. The language was suggested to me by TECO. Since I didn't know how to apply for CISR and didn't know the workings of the regulated utility industry, I used the language they suggested, and what I was signing in my mind is what I just told you an hour ago, that if I didn't get the CISR, I would not build my plant in TECO's territory. And the language they suggested included their proposed rate of $[redacted].

(Exhibit "B" to Amended Petition at p.248, line 22 through p.249, line 6.)

And when asked, once again:

> A. I told you what I assumed. I assumed I had three choices; $36 for interruptible power, $[redacted] for a CISR rate or seven or eight cents, whatever people pay in their houses, so unless I got this one [the CISR rate], I wouldn't build.
>
> Q. Well, but--

A. The CISR and the $[redacted] were tied together.

(Exhibit "B" to Amended Petition at p.249, line 19 through p.250, line 1.)

And when asked, yet again:

Q Why was [redacted] cents per kilowatt hour the threshold that you referred to in your affidavit?

MR. SMITH: Object to the form. Argumentative, asked and answered.

A: TECO put it in there because that was the rate they were going to offer me if the CISR was approved, and being an individual trying to start a company that had a lot of complicated work to do, I had no reason not to trust them filing, doing the paper work to file for the CISR. I did whatever they told me. This paper came, and I signed it. I read it and I believed it and I signed it, and in my mind the $[redacted] was the CISR. If I got the CISR, it would be $[redacted] If I didn't get the CISR, I wasn't going to build the plant. It's not contradictory in my mind.

(Exhibit "B" to Amended Petition at p.251, lines 4-21.)

Thus, any claim that Mr. Sidelko's testimony is "contradictory" to his affidavit in this regard is plainly unfounded.

b. Economic Feasibility.

The next misguided conclusion regarding Mr. Sidelko's statements that is proffered by Allied and CFI in their improper and frivolous Amended Petition is that Mr. Sidelko, "contradicted the sworn affidavit he furnished to TECO and his direct testimony filed with the Commission[27]..." with respect to economic feasibility.

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

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[27] Allied and CFI have materially omitted from their Amended Petition any mention of the nearly three-hour deposition of Mr. Sidelko by Allied and CFI taken in December 2000 in Docket No. 000061 at which Allied and 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.

- nowhere in Mr. Sidelko's affidavit does Mr. Sidelko make any statement regarding economic feasibility (*see* Exhibit "A" to the Amended Petition);

- nowhere in Mr. Sidelko's unsworn, prefiled direct testimony does Mr. Sidelko make any statement regarding economic feasibility (*see* Exhibit "B" to the Amended 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 blindingly apparent 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

c. Who Proposed the CISR Rate?

Allied's and 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's and CFI's conclusion is baseless and irrelevant as:

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

- the prefiled, direct testimony is silent as to which party "proposed" the CISR rate (*See* Exhibit "B" to the Amended 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–or was required to propose–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 and 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);
- 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
- Mr. Sidelko was thereafter contacted by TECO, which offered the possibility of a negotiated rate.

d. The "Importance" of the CISR Rate.

The next "contradiction" Allied and CFI offer as a pretext for their Amended Petition is that Mr. Sidelko "contradicted" his Prior Statements regarding the importance to him of the CISR rate. The actual snippet upon which Allied and CFI apparently rely is yet another curve in the long arc of truth-bending labeled "Amended Petition" by Allied and CFI and such will be implacably clear to the Commission in its evaluation of Allied's and CFI's filing.

e. Odyssey's Present-Day Profitability.

Allied and 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 reasonably 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.[28]

f. General "Feasibility."

Allied and 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 and CFI's conclusion is baseless and irrelevant as:

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

Moreover, an inspection of Mr. Sidelko's December 1, 2000, deposition[29] in Commission Docket No. 00061-EI shows that Allied and CFI had ample opportunity to explore any and all issues regarding the "feasibility" of rates with regard to Odyssey. In fact, Allied and CFI inquired in

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

[29] This deposition transcript was received into evidence in Docket No. 000061-EI. (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.

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.[30]

g. Allied's and 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 and 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 apocryphal arguments potentially underlying Allied's and CFI's makeshift and mendacious Amended Petition, herein will be addressed Allied's and CFI's final improper and frivolous intimation regarding Mr. Sidelko's statements: that Allied and 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 and CFI's Amended Petition, Mr. Sidelko stated:

> 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.

[30] Document No. 16399-00, p.17, line 17, through p.19, line 5. *See also* footnote 29.

(Exhibit "B" to Amended 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 be unable to obtain financing–only that the commitment would have to be reevaluated and rewritten. If Allied and 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 and 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 and 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 and 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.[31] Any failure to inquire further is clearly Allied's and 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. 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 and CFI deposed, over the course of two days, Ms. Pamela Winters, the loan officer who had arranged Odyssey's financing. The transcript of that

[31] Document No. 16399-00, pp. 68-72. *See also* footnote 29.

deposition was received in evidence by the PSC in that proceeding.[32] Allied and 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's and 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.

2. Allied's and CFI's Allegations Regarding the Manufacturing Processes Employed by CFI and Odyssey.

In addition to Allied's and CFI's lacking standing due to their status as "business competitors," as discussed in detail in Section III hereof, none of the discussion or "allegations" in the Amended Petition regarding the manufacturing processes employed respectively by CFI and Odyssey forms any legally cognizable basis for any of the relief requested in the Amended Petition. Likewise, any allegation in the Amended Petition that TECO would be required to serve CFI with a CISR rate (alleged by Allied and CFI to be necessary for CFI to build a cell membrane plant) by reason of anything other than a contractual agreement (which, as discussed throughout this Motion, is a matter to be determined by a circuit court with exclusive jurisdiction over such questions) is utterly groundless by the very terms of the CISR Order and CISR Tariff (which both state that TECO's offering of a CISR rate is subject to TECO's discretion–an inarguable fact "overlooked" by Allied and CFI, though they consistently refer to these documents and attached them to their Amended Petition). Thus, any prayer for relief based thereon is unsupported by required legally

[32] *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.

sufficient allegations, the Amended Petition must be dismissed, Allied and CFI should be sanctioned, and Odyssey awarded its fees and costs in this matter. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S.

Notwithstanding Allied's and CFI's Melvillian discussion of the various processes used to manufacture bleach, and their "allegation" that they are unable to "compete" with Odyssey due to Allied's and CFI's inability to build a cell plant in Tampa, nowhere in the Amended Petition does there appear the most scanty, legally significant allegation that CFI is unable to "compete" with Odyssey using CFI's current technology or that the cell process used by Odyssey is even in any way less expensive, more productive, more profitable, or in any other manner "better" than the Powell Process used by CFI. The closest Allied and CFI come even to the scent of any such allegation is their presentation of the bare claim that those entities using the cell process are somehow better able to predict their long-term future production costs than those using the Powell Process–though any such "allegation," without any additional allegation that this alleged ability makes the cell process less expensive or more profitable (to a degree that would somehow defeat the arguments against standing presented in Section III, *supra*)–can only be viewed as unquantifiable and speculative and can nowise be considered a legally cognizable "allegation" to support anything, much less the prayers in the Amended Petition.

Further, it is inarguable that (1) CFI has admitted that it manufactures bleach in Tampa already, using a method to which the cost of electricity is marginal, and (2) the questions of whether Allied and CFI or TECO or Odyssey was the cause of any inability on the part of Allied and CFI to construct a cell membrane plant (assuming there was any such inability) and, based upon the outcome of this question, whether this was (a) illegal and (b) the proximate cause of any inability

of CFI to "compete" with Odyssey are squarely contract questions for a circuit court and have, in fact, by Allied's and CFI's own admission, already been raised by them in a pending circuit court action.

3. Allied's and CFI's Allegations Regarding the CISR Order, the CISR Tariff, and the Odyssey/TECO CSA.

First and foremost, it must be noted–as discussed at length in Section III, *supra*, there is absolutely **no** basis to find the prerequisite standing for Allied or CFI to challenge the Odyssey/TECO CSA. Further, one must acknowledge that the unseemly challenges mounted by Allied and CFI to the Odyssey/TECO CSA in the instant proceeding are based upon not only the CSA, but also the CISR Order and CISR tariff. Moreover, and as also discussed *supra*, this Commission has already and independently found the Odyssey/TECO CSA to be prudent–thus even assuming Allied or CFI might have somehow, at some time, had standing to challenge the CSA (1) this issue is *res judicata* by virtue of Commission Order No. PSC-01-1003-AS-EI and (2) Allied and CFI have contractually agreed not to challenge the CSA (which contractual agreements remain in full force and effect–and breached by the instant action). Thus, any analysis relative to any claims raised in the Amended Petition regarding the CISR Order, the CISR tariff, or the Odyssey/TECO CSA should end here and the Commission should not waste its time or effort analyzing anything further purported by Allied and CFI to support any claim for relief based on any allegations regarding the Odyssey/TECO CSA or any request that the Commission (again!) analyze same.

Nonetheless, Allied and CFI have devoted much discussion in their Amended Petition to the CISR Order, the CISR Tariff, and the Odyssey/TECO CSA–and the alleged comments on the interpretations thereof by Mssrs. Allman, Ashburn, and Jennings–though all such discussion is (1)

irrelevant and immaterial to any claim that could legally be brought by Allied or CFI or (2) a conglomeration of either immaterial or, insufficient[33] factual allegations, or erroneous legal conclusions (many of which are purported–in error–to be "facts" by Allied and CFI).

Given Allied's and CFI's apparent belief that these ubiquitous, legally inconsequential statements by them somehow give rise to the instant action, Odyssey will, as briefly as possible, address them below; however, contrary to Allied's and CFI's obvious wishes, Odyssey will not make the sophomoric, and legally unnecessary, mistake of correcting any such infirmities in the Amended Petition by, *inter alia*, disputing even the most outlandish of allegations. The Amended Petition must be judged on its own, and Odyssey is certain that it will be amply clear to the Commission what "allegations" fail even to rise to the level of a legally cognizable "allegation" of fact at all, what "allegations" are simply irrelevant or immaterial, that no "allegations" were disputed or material at the time of the filing of the Initial Petition, and what "allegations" are matters of law, not fact.

In short–and no more need be said–all of Allied's and CFI's allegations in the Amended Petition, beyond those already addressed herein, are aimed at three subjects–none of which are material to any legally cognizable interest of Allied or CFI:

(1) interpretation of the CISR Order;

(2) interpretation of the CISR tariff; and

(3) interpretation of the Odyssey/TECO CSA.

Moreover, no such interpretations can, by any stretch of the imagination, form the basis of any "factual" question–much less a material or disputed one. Each of these documents speaks for itself and any interpretation of them–necessarily legal determinations–may be performed by the

[33] This includes all allegations of which Allied and CFI have claimed no personal knowledge.

proper tribunal without the "assistance" of Allied's and CFI's misconstructions thereof. Thus, such interpretations are not legally cognizable factual allegations, they do not entitle Allied or CFI to any of the relief for which they have prayed, they are certainly not the "disputed issues of material fact" required in an administrative petition, and they cannot save the Amended Petition from the dismissal the law requires. Hence, the Amended Petition must be dismissed, Allied and CFI should be sanctioned, and Odyssey should be awarded its costs and fees incurred in this matter.

V.
EVEN IF THE COMMISSION FINDS ALL OTHER ARGUMENTS HEREIN TO BE INSUFFICIENT TO WARRANT DISMISSAL, WITH PREJUDICE, OF THE AMENDED PETITION, RULE 28-106.201, F.A.C., UNEQUIVOCALLY MANDATES SUCH DISMISSAL

As demonstrated hereinabove, numerous legal bases mandate dismissal of the Amended Petition. Additionally, there is yet another basic and dispositive flaw in the Amended Petition: it fails to satisfy even the minimum requirements of Rule 28-106.201, F.A.C. (listing the required contents of all administrative petitions such as that advanced in this matter). This is so because the Administrative Procedure Act was never intended to allow an unregulated entity to hail another unregulated entity before an agency to settle any and all alleged beefs the first such entity may have with the second.

Under all applicable law, the filing of an administrative petition by one claiming injury to their substantial interests requires, as a prerequisite, that there be some **proposed** agency action to challenge. Here, no such proposed agency action exists and there is nothing remotely close to a contrary allegation in the Amended Petition. *See generally*, § 120.569, F.S.; Part II of Chapter 28-106, F.A.C.; *see also* Rule 25-22.029(3), F.A.C. Thus, Allied's and CFI's Amended Petition should be unceremoniously dismissed by the Commission–just as an appellate court would dismiss a "brief"

seeking relief when no underlying decision was being challenged therein–with no more wasted time, effort, or money by those whom have been so taxed (including the Commission and its Staff (and the citizens who fund them[34])) by Allied's and CFI's abuses of the administrative legal system.

Rule 28-106.201, F.A.C., enacted pursuant to §§ 120.54(5), 120.569, and 120.57, F.S., and governing the required contents of administrative petitions, provides ample legal support for both (1) the irrefutable proposition that a petition is a legally improper vehicle for Allied and CFI to bring their "prayers" (assuming, *arguendo*, that such prayers could properly be brought by any means) and (2) the unassailable truth that it is impossible for Allied and CFI to amend their already-once-Amended Petition to satisfy any of several legal requirements incumbent upon one who files such a petition. Subsection (2) of Rule 28-106.201 reads, in pertinent part

> (2) **All** petitions filed under these rules **shall** contain:
>
> * * *
>
> (d) A statement of all disputed issues of material fact. If there are none, the petition must so indicate;
>
> (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's **proposed** action;
>
> (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's **proposed** action; **and**
>
> (g) A statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's **proposed** action.
>
> * * *

[34] In light of Allied's and CFI's purported purposes behind their prayers for relief, it is beyond ironic that Allied's and CFI's abuses have forced TECO to expend substantial sums to the potential detriment of its ratepayers.

(Emphasis added.) *See also* § 120.54(5)(b)(4) (mandating that the specific requirements of Rule 28-106.201 be included in the Uniform Rules of Administrative Procedure governing the contents of petitions).

First, where, as here, Allied and CFI purport to dispute issues of material fact, Rule 28-106.201(d) plainly requires the petition to include a statement of all such disputed issues. However, just as Rules 28-106.201(e), (f), and (g) explicitly refer to the required existence of proposed agency action to give rise to the filing of a petition, Rule 28-106.201(d), when read *in pari materia* with the balance of Rule 28-106.201, makes a similar implicit reference of equal force: any facts disputed by a petitioner must be related to those put forth by an agency in its proposed action; if no such action has been proposed by an agency **nothing** exists to dispute.

Hence, even where, as in the Amended Petition, a petitioner drones on for pages purporting to list "disputed issues of material fact and law (sic)," if there has been no proposed action by an agency to be disputed, the list is, at best, nothing more than legally insufficient shadow-boxing. Thus, this screed in the Amended Petition, regardless of its title or "content," cannot possibly be a list of **disputed** issues of material fact even when viewed in a light most favorable to Allied and CFI (presumably candlelight, given the abundance of flaws in the Amended "Petition"). The irrefutable import of this is that Allied and CFI had no legal basis even to file their Amended Petition and even Einstein could posit no theory by which Allied or CFI could cure it in this regard. The Amended Petition does not, and cannot, satisfy the requirements of Rule 28-106.201(d); hence, it must be dismissed with prejudice.

Second, Rule 28-106.201(e) requires that a petitioner include in its petition a "concise statement of the ultimate facts alleged, including the **specific** facts the petitioner contends warrant

reversal or modification of the agency's **proposed** action." (Emphasis added.) Presumably, this is what Allied and CFI were attempting to fake their ways through in the Amended Petition when listing what they labeled as "ultimate facts entitling Allied/CFI to relief." Nevertheless, and in any light, Allied and CFI have failed even to approach satisfaction of the requirement found in the final clause of Rule 28-106.201(e) as, regardless of the length or content of their list, where there is no proposed agency action to challenge, it is impossible to make any legally cognizable list of such non-existent "facts." Thus, it is incontrovertible that Allied and CFI had no legal basis even to file their Amended Petition and even Oliver Wendell Holmes, Jr., could find no manner by which the Amended Petition could be cured in this regard. The Amended Petition does not, and cannot, satisfy the requirements of Rule 28-106.201(e); hence, it must be dismissed with prejudice.

Third, Rule 28-106.201(f) requires every petition to include a "statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's **proposed** action." (Emphasis added.) Allied and CFI did not, and could not, even pretend to list any such rules or statutes in the Amended Petition as, without any proposed agency action to challenge, it was impossible for them to do so. In any light, the best Allied and CFI did was unintelligibly murmur about the identical statutes they raised as the bases for their complaint against TECO in Docket No. 000061-EI–a certain sign of fatigue from their repeated attempts to fit a circuit-court-shaped peg in an administrative-forum-shaped hole. Hence, even Harry Houdini could not escape the facts that Allied and CFI had no legal basis to file their Amended Petition and that there is no means known to man or attorney by which Allied or CFI could cure their filing in this regard. The Amended Petition does not, and cannot, satisfy the requirements of Rule 28-106.201(f); hence, it must be dismissed with prejudice.

Finally, Rule 28-106.201(g) requires that every petition include a "statement of the relief sought by the petitioner, stating precisely the action petitioner wishes the agency to take with respect to the agency's **proposed** action." (Emphasis added.) At the risk of beating a dead horse–but with no choice other than to play the hand Allied and CFI have dealt upon the stable floor–it must be duly noted that Allied and CFI have failed in their Amended Petition to list any action they wish the Commission to take relative to any action the Commission has proposed to take. In the absence of any such proposed agency action, it is as impossible as riding a fish to the moon for Allied or CFI to make any such required statement. Therefore, all reasonable minds would agree that Allied and CFI had no legal basis to file their Amended Petition and that no sentient being could imagine any legally cognizable scheme by which Allied or CFI could cure their filing in this regard. The Amended Petition does not, and cannot, satisfy the requirements of Rule 28-106.201(g); hence, it must be dismissed with prejudice.

In sum, Rule 28-106.201(4) clearly states, "A petition **shall** be dismissed if it is not in substantial compliance with subsection (2) of this rule.... Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." (Emphasis added.) As demonstrated above, the Amended Petition falls far short even of minimal, much less substantial, compliance with Subsection 28-106.201(2) and, on its face, and in a light so favorable as to be flattering, it could not appear more conclusively that none of the multiplicity of defects in the Amended Petition can be cured. The Amended Petition must be dismissed with prejudice and without leave to re-amend.

VI.

CONCLUSION

Though Allied and CFI may consider the filing of a baseless Amended Petition, like that at issue here, their brand of "competition," the law considers same an inescapably improper and frivolous attempt to abuse Odyssey, TECO, and the Commission. Allied's and CFI's Amended Petition, taken in a light most favorable to them, reduced to its essence, and characterized for what it really is, requests that the Commission vacate a long-final administrative order and enter another beyond its jurisdiction so that Allied and CFI can breach promises they made in a contractual and binding Settlement Agreement and attempt to avoid–by inartfully using Odyssey as a strawman–Allied's and CFI's obligations under the General Release to abstain from bringing any such action against TECO. For the reasons set forth above, the Commission should dismiss with prejudice Allied's and CFI's legally insufficient Amended Petition and award Odyssey the costs and fees of responding to same, as such pleading was filed for facially and demonstrably improper purposes and without a legally cognizable basis in law or in fact as outlined above. *See, e.g.*, § 120.569(2)(e), F.S. (providing for sanctions and the award of fees under such circumstances); *see also, e.g.*, § 57.105, F.S. Therefore, Odyssey respectfully urges the Commission to summarily deny, with prejudice, Allied's and CFI's collective and untenable attempt to obtain a "do-over" of their Complaint in Docket No. 000061-EI.

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

to further consider same; and (4) grant to Odyssey such other relief as the Commission deems appropriate.

Dated this 20th day of August, 2004.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Dismiss Amended Petition has been furnished via hand delivery* and/or U.S. Mail to the following on this 20th day of August, 2004:

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