

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Sections 366.03, 366.06(2) and 366.07, Florida Statutes, with respect to rates offered under Commercial/Industrial Service Rider tariff; petition to examine and inspect confidential information; and request for expedited relief.
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Docket No. 000061-EI

Filed: February 28, 2000

ALLIED/CFI'S RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S MOTION FOR PROTECTIVE ORDER, FOR SUSPENSION OF PROCEDURAL SCHEDULE, AND FOR SUMMARY DISPOSITION

Allied Universal Corporation ("Allied") and Chemical Formulators, Inc. ("CFI") hereinafter referred to collectively as "Allied/CFI", by and through their undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, submit the following response in opposition to the motion of Tampa Electric Company ("TECO") for a protective order, for suspension of the procedural schedule, and for summary disposition of this proceeding, and state:

1. Allied/CFI's Complaint in this proceeding alleges undue discrimination in rates offered by TECO under its Commercial/Industrial Service Rider ("CISR") tariff to Allied/CFI in October, 1999, compared with rates offered by TECO and accepted by Allied/CFI's business competitor, Odyssey Manufacturing Company ("Odyssey"), in October, 1998. The Complaint alleges that TECO has violated Sections 366.03, 366.06(2) and 366.07, Florida Statutes, and Order No. PSC-98-1081A-FOF-EI, issued August 27, 1998, in Docket No. 980706-EI, In re: Petition for Approval of Commercial/Industrial Service Rider Tariff by Tampa Electric Company, by giving an

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undue or unreasonable preference and advantage to Odyssey and subjecting Allied/CFI to an undue or unreasonable prejudice and disadvantage.

2. In summary, the Complaint alleges that Allied and its affiliate CFI compete with Odyssey in the manufacture and sale of liquid chlorine bleach and related products in Florida; that Odyssey is constructing new manufacturing facilities in Tampa in order to use a newer and more efficient manufacturing process in which the cost of electricity is approximately 50% of the variable cost of manufacture; and that Allied/CFI are attempting to convert their existing manufacturing facilities in Tampa, at an estimated cost of fifteen million dollars over three years, in order to use the newer and more efficient manufacturing process, but cannot do so as a result of TECO's undue discrimination. The Complaint alleges that Allied/CFI have complied with the eligibility requirements for service under the CISR tariff, and on information and belief that Odyssey has not complied with the eligibility requirements for rates under TECO's CISR tariff and that there is no justification for TECO's undue discrimination based on TECO's incremental cost to serve Odyssey compared to its incremental cost to serve Allied/CFI. The Complaint further alleges that the TECO employee who negotiated Odyssey's preferential CISR tariff rates was subsequently rewarded by an offer of employment with Odyssey and has been soliciting Allied/CFI's customers on behalf of Odyssey.

3. The Complaint includes a Petition to Examine and Inspect Confidential Information pursuant to Rule 25-22.006(7), Florida Administrative Code. Allied/CFI's Petition asks the Commission to order TECO to disclose the Contract Service Agreement with Odyssey and all documentation supporting the CISR tariff rates offered to Odyssey, including documentation demonstrating that Odyssey met all requirements and preconditions of the CISR tariff and

documentation supporting TECO's determination of its incremental cost to serve Odyssey.

4. In response to these allegations of undue discrimination and collusion, TECO's motion asks the Commission to: (1) suspend fundamental principles of due process of law established for the protection and enforcement of private rights and codified in Section 120.57(1)(b), Florida Statutes, providing that all parties to administrative hearings involving disputed issues of material fact shall have an opportunity to present evidence and argument on all issues and to conduct cross-examination; and (2) debar Allied/CFI from acting as a litigant against TECO. No precedent is cited in TECO's motion for the novel proposition that the subject matter of this action requires that Allied/CFI be prohibited from conducting relevant discovery and that Allied/CFI's complaint be dismissed based on a secret showing made by TECO only to the Commission, nor would there appear to be any precedent for such a suspension of due process other than a national emergency.

5. The prohibition of secret agreements by public utilities favoring one commercial or industrial customer among similarly situated competitors is generally considered to be the driving force behind the movement for regulation of public utilities in the United States in the late nineteenth and early twentieth centuries. Rather than exempting such agreements from scrutiny by private litigants, as TECO's motion asks the Commission to do, the law is clear that agreements resulting in undue discrimination are strictly prohibited. Homestead v. Des Moines Electric Co. (8th Cir. 1918), 248 Fed. 439; Bromer v. Florida Power & Light Co. (Fla. 1950), 45 So. 2d 658, 660; Main Valley Realty Co. v. Blackstone Valley Gas & Elec. Co. (1937), 59 RI 29, 193 A. 879; American Aniline Products v. City of Lock Haven (1927), 288 Pa. 420, 135 A. 726; Barringer v. Louisville Gas & Electric Co. (1922), 196 Ky. 268, 244 SW 690; Salisbury & S. Ry. Co. v. Southern Power Co., 179 N.C. 18, 330, 101 SE 593, 102 SE 625; Western Union Tel. Co. v. Call Pub. Co. (1900),

198 U.S. 92, 21 S.Ct. 561, 45 L.Ed. 765).

6. The Commission recognized the potential for undue discrimination in the negotiation of rates pursuant to CISR tariffs in the first docket opened to consider such a tariff: In re: Petition for approval of proposed optional Commercial/Industrial Service Rider by Gulf Power Company, Docket No. 951161-EI ("Gulf I"). Neither the Commission's decision in Order No. PSC-96-0845-FOF-EI in Gulf I, declining to address issues concerning the potential for undue discrimination and the effect on the non-electric marketplace of CISR tariff rates, nor the Commission's approval of TECO's CISR tariff, can reasonably be interpreted to be an expression of intent by the Commission to limit the due process rights of a private litigant alleging undue discrimination and collusion in the negotiation of such rates.

7. The rationale expressed by the Commission for confidential classification of information concerning Contract Service Agreements entered into pursuant to Gulf Power Company's earlier and similar CISR tariff, is to protect the utility's ability to negotiate favorable terms and conditions with future CISR tariff customers who may otherwise be deterred from disclosing confidential information to the utility, and thus to avoid uneconomic bypass of the utility's facilities. However, TECO's exercise of its ability to negotiate CISR tariff rates has resulted in litigation within the first month of the effective date of the tariff. TECO's conduct is so egregious as to call into question whether its experimental CISR tariff should be suspended or canceled unless adequate safeguards to prevent undue discrimination in future negotiations can be identified and adopted. In contrast, the speculative potential harm to TECO's ability to negotiate favorable terms and conditions with future CISR tariff customers, is far outweighed by the need to prevent undue discrimination and to remove incentives to collusion in future CISR tariff negotiations.

8. Allied/CFI has no objection to entering into an appropriate protective order under Rule 25-22.006, Florida Administrative Code, which would: (1) limit the distribution of proprietary confidential business information in this proceeding to the parties and their counsel and witnesses and to the Commission and its staff; and (2) limit the use of such confidential information to litigation, and provide for the return to TECO of all such confidential information received by Allied/CFI from TECO, upon the conclusion of all litigation involving claims arising from the CISR tariff negotiations. The Order Establishing Procedure and Responding to Complainant's Motion for Expedited Responses to Discovery Requests, Order No. PSC-00-0392-PCO-EI, issued February 23, 2000, provides procedures for use of proprietary confidential business information in the Commission hearing. There is nothing exceptional about the kinds of confidential information involved in this proceeding which cannot be accommodated within the Commission's procedures governing proprietary confidential business information. However, the procedures proposed by TECO must be rejected because they would: (1) deny Allied/CFI the ability to examine and inspect the CISR tariff information which is the subject matter of this proceeding; (2) deny Allied/CFI the ability to conduct further discovery in preparation for the hearing; and (3) deny Allied/CFI the ability to cross-examine TECO witnesses in the hearing. TECO's proposal to conduct a secret hearing where the only evidence would be that offered by TECO, including TECO's self-serving affidavits, would blatantly violate the due process rights afforded to all parties under Section 120.57(1)(b), Florida Statutes.

9. Many of the kinds of information and documents sought by Allied/CFI with respect to TECO's CISR tariff negotiations with Odyssey are provided in the Direct Testimony of Robert M. Namoff, filed on behalf of Allied/CFI on February 21, 2000, with respect to TECO's negotiations


with Allied/CFI. Mr. Namoff's testimony summarizes the negotiations between TECO and Allied/CFI and provides, as confidential exhibits Nos. RMN 1-13, copies of relevant correspondence and other documents in connection with the CISR tariff negotiations, including TECO's October 18, 1999 offer of CISR tariff rates to Allied/CFI. A brief review of Mr. Namoff's direct testimony and the attached exhibits demonstrates that the kinds of proprietary confidential business information contained in the documents are quite limited. For example, the only items of information redacted in the non-confidential copy of Mr. Namoff's direct testimony filed with the Commission are the price terms of TECO's and Georgia Power's offers of rates to Allied/CFI, and certain additional terms and conditions of TECO's offer; the price terms of Allied/CFI's vendors' proposals for engineering and construction of Allied/CFI's proposed new plant; and certain information concerning Allied/CFI's financial projections of its estimated return on its investment in the proposed new plant at various rates for electric service. Aside from the vendors' price terms and the financial projections, Allied/CFI is not aware of any information in TECO's possession which Allied/CFI would object to being produced to Odyssey if the situation were reversed.

10. To the extent that TECO is in possession of some limited subset of the confidential information concerning its CISR tariff rate negotiations with Odyssey, such as financial projections prepared by Odyssey or Odyssey's vendors' quotations, that limited subset of the confidential information and documents could be produced by TECO initially to the Commission for *in camera* inspection and determination whether production to Allied/CFI should be made. The balance of the confidential information and documents relating to TECO's negotiations with Odyssey and with Allied/CFI, particularly the terms and conditions of TECO's offer or offers of CISR tariff rates to Odyssey, TECO's analysis of its incremental cost to serve Allied/CFI and Odyssey, and

documentation concerning whether Odyssey met all requirements and preconditions of the CISR tariff, should be produced by TECO to Allied/CFI immediately in response to Allied/CFI's Petition to Examine and Inspect Confidential Information and in response to Allied/CFI's discovery requests.

WHEREFORE, Allied/CFI respectfully requests that the Prehearing Officer issue an Order denying TECO's Motion for Protective Order, Request for Approval of Proposed Procedures for a Disposition of this Proceeding Without Disclosing Confidential Information and Summary Disposition, and specifically requiring TECO to: (1) produce proprietary confidential business information to Allied/CFI in response to Allied/CFI's Petition to Examine and Inspect Confidential Information and in response to Allied/CFI's and staff's discovery requests, subject to an appropriate protective agreement between TECO and Allied/CFI; and (2) identify and produce to the Commission and staff for *in camera* review and determination, certain information and documents such as financial projections prepared by Odyssey and Odyssey's vendors' quotations given to TECO, if any, for the purposes outlined in paragraph 10 above.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Allied/CFI's Response in Opposition to TECO's Motion for Protective Order, for Suspension of Procedural Schedule, and For Summary Disposition was furnished by hand delivery(*) and/or U. S. Mail to the following this 28th day of February, 2000:

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