



# Public Service Commission

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RECORDS AND REPORTING

**DATE:** April 12, 2000

**TO:** DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYO)

**FROM:** DIVISION OF LEGAL SERVICES (STERN, ELIAS) MKS  
DIVISION OF ELECTRIC AND GAS (DRAPER) ED DPW JDJ

**RE:** DOCKET NO. 000061-EI - COMPLAINT BY ALLIED UNIVERSAL CORPORATION AND CHEMICAL FORMULATORS, INC. AGAINST TAMPA ELECTRIC COMPANY FOR VIOLATION OF SECTIONS 366.03, 366.06(2) AND 366.07, F.S., WITH RESPECT TO RATES OFFERED UNDER COMMERCIAL/INDUSTRIAL SERVICE RIDER TARIFF; PETITION TO EXAMINE AND INSPECT CONFIDENTIAL INFORMATION; AND REQUEST FOR EXPEDITED RELIEF.

**AGENDA:** 04/18/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

**CRITICAL DATES:** NONE

**SPECIAL INSTRUCTIONS:** NONE

**FILE NAME AND LOCATION:** S:\PSC\LEG\WP\000061.RCM

### CASE BACKGROUND

On January 20, 2000, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a formal complaint against Tampa Electric Company (TECO). The complaint alleges that: 1) TECO discriminated against Allied by failing to offer Allied the same rate offered to a competitor under TECO's Commercial Industrial Service Rider (CISR) Tariff; 2) TECO did not properly adhere to the CISR process in its arrangements with Allied's competitor; and 3) a TECO employee colluded with the competitor of Allied in setting rates.

The CISR tariff allows TECO to attract or retain commercial/industrial customers who, in the absence of a negotiated rate below average embedded cost, would not be served by the

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utility (at-risk load). The Commission recognized that the retention or attraction of load was beneficial to the general body of ratepayers as long as the customer was at risk and the rate paid by the customer was greater than the incremental cost to serve the customer. The concept of negotiated rates is a significant departure from traditional embedded cost rate design in recognition of the need to encourage businesses to locate, remain, or expand in Florida.

In granting the utility the opportunity to depart from traditional costing principles by negotiating CISR rates, the tariff requires that the utility demonstrate to this Commission that it acted prudently in negotiating the contract by showing that the customer had a verifiable offer from another utility or source of power such as cogeneration, and that the rate offered covered the incremental cost to serve the customer plus a contribution to fixed cost. The Commission decided that confidentiality of the CISR negotiations was necessary to allow the utility to offer the smallest discount from firm rates necessary to retain each customer and thus protect the general body of ratepayers from unnecessary revenue loss.

The hearing is now scheduled for July 31, 2000. The Order Establishing Procedure, Order No. PSC-00-0392-PCO-EI, was issued on February 23, 2000. However, after issuance of that order, the procedural schedule was suspended by the prehearing officer, pending the Commission's decision on this recommendation.

Since the opening of this docket, Allied has vigorously pursued discovery of information pertaining to TECO's CISR negotiations and Contract Service Agreement (CSA) with Odyssey Manufacturing Company (Odyssey), a competitor of Allied. In addition to propounding discovery, Allied filed a Motion to Examine and Inspect Confidential Information, and a Motion to Compel Deposition. TECO has steadfastly objected to providing any CISR information to Allied, claiming the information is both confidential and privileged. TECO filed Motions for Protective Order in response to Allied's discovery requests.

On February 14, 2000, TECO filed a Request for Approval of Proposed Procedures for a Disposition of This Proceeding Without Disclosing Confidential Information, and Summary Disposition. Through this filing TECO proposed a procedure by which the Commission could review the necessary information outside of the hearing format and make a final decision on the Complaint. On February 28, 2000, Allied responded in its Response in Opposition

to TECO's Motion for Protective Order, for Suspension of Procedural Schedule, and for Summary Disposition.

At the March 28, 2000, Agenda Conference staff recommended that TECO's Request for Approval of Proposed Procedures be denied. The Commission deferred its decision on the recommendation and requested that staff, the parties, and Odyssey attempt mediation. The mediation was conducted on April 5, 2000. The participants did not reach a settlement, but submitted statements of their positions after mediation and suggestions on how the case should proceed. The post-mediation positions of TECO, Allied and Odyssey are summarized below. Staff's recommendation on TECO's Request for Proposed Procedures and Allied's Response in Opposition follows the summary.

### Positions After Mediation

#### **A. TECO**

TECO maintains that the allegations set forth in Allied's complaint are unfounded. On March 10, 2000, TECO provided the Commission with the following information:

1. A side-by-side comparison of the rates, terms and conditions that TECO and Odyssey negotiated and those that TECO offered to Allied. (Confidentiality requested.)
2. The documentation and correspondence supporting Odyssey's application under the CISR tariff. (Confidentiality requested.)
3. The documentation and correspondence supporting Allied's application under the CISR tariff. (Confidentiality requested.)
4. A timeline showing the timing of events during Odyssey's negotiation process and during Allied's negotiation process. (Confidentiality requested.)

This information was filed with a request for confidentiality. TECO contends that this information demonstrates that it did not discriminate against Allied.

The procedure originally proposed by TECO is described in Issue 1. At this point, TECO is open to any procedure that is

satisfactory to the Commission and that does not disclose, to the public or parties, information which the CISR tariff requires to be confidential. TECO emphasizes that the confidential treatment of CSAs and CSA-related information is essential to successful operation of the CISR tariff. If CSAs and CSA negotiations are not kept confidential, at-risk customers will either leave TECO's service territory without attempting CSA negotiations, or the deal offered to one customer will be expected by others who seek a lower rate from TECO under the CISR tariff. In either case, the general body of ratepayers is harmed.

## **B. Allied**

Allied contends that the lowest CISR rate offered to a customer in a particular industry must be offered to any other customer in the same industry that qualifies for the CISR tariff. This approach would eliminate litigation to the extent that it eliminates the potential for discrimination.

Allied maintains that rules governing confidential information (Rule 25-22.006, Florida Administrative Code) and the Order Establishing Procedure, provide an appropriate mechanism for ensuring confidentiality of CISR information offered to customers who are not parties to this case. Allied offered to enter into a protective agreement to ensure that CISR information pertaining to Odyssey will not be disclosed to customers who are not parties to this proceeding. Allied agrees with Odyssey's claim that certain information provided by Odyssey to TECO is trade secret information and states that it does not seek disclosure of trade secret information.

If TECO's comparison of the rates, terms and conditions offered to Odyssey and Allied show any disparity, then this comparison should be produced to Allied immediately. Then, TECO should give to Allied the documents and correspondence that TECO gave to the Commission on TECO's negotiations with Allied. Likewise, TECO should give Odyssey the filing of documents and correspondence on TECO's negotiations with Odyssey. Both companies should then have the opportunity to review the documents and redact information on trade secrets. At the same time, TECO should answer the first set of interrogatories propounded by Allied and Staff.

Within seven days of TECO's disbursement of documents and responses to interrogatories, Allied and Odyssey would exchange the documents TECO gave them (having already redacted any trade secrets). Thereafter, an in camera inspection would be held before

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the prehearing officer if any party challenged a claim of trade secret information.

The scheduled prehearing and hearing dates should remain and new dates for filing testimony should be scheduled.

**C. Odyssey**

Odyssey's primary concern is that its trade secrets and other proprietary business information it submitted to TECO during the CSA negotiations be kept confidential. Odyssey suggests that the Commission staff complete its review of the information TECO submitted on March 10, 2000, and prepare a recommendation on the merits of the case. The Commission's decision should be issued as proposed agency action.

If the Commission's decision is protested, in camera discovery proceedings should be conducted to allow for a careful balancing of Odyssey's trade secret privilege and Allied's due process rights. It would be appropriate to hold these proceedings before an Administrative Law Judge from the Division of Administrative Hearings. All parties would be allowed to participate in the in camera proceeding subject to procedures ensuring that privileged information will not be disclosed.

**DISCUSSION OF ISSUES**

**ISSUE 1:** Should the Commission grant TECO's Request for Approval of Proposed Procedures for a Disposition of This Proceeding Without Disclosing Confidential Information?

**RECOMMENDATION:** No. The Commission should deny TECO's Request because it violates fundamental principles of due process, and denies Allied the rights granted to parties to a formal hearing in Section 120.57(1)(b), Florida Statutes.

**STAFF ANALYSIS:**

**TECO's Request for Proposed Procedures and Motion for Summary Disposition**

TECO's proposed procedure is described below.

1. TECO would submit to the Commission and staff comparable packages of information and sworn affidavits reflecting all of the relevant CISR negotiations between TECO and Odyssey, and TECO and Allied. A time line for the two sets of negotiations would also be submitted. All information would be submitted on a confidential basis. (This information has been submitted.)
2. The Commission would review the information, without disclosing it to Allied, and hold the procedural schedule in abeyance pending the outcome of the review. The review would be expedited. (Staff is reviewing the information.)
3. At the end of the review, the Commission would either grant TECO's Request for Summary Disposition, thereby resolving the case, or deny the Request and allow normal hearing procedures to resume.

In support of its proposal TECO relies on the following provision of its CISR tariff:

The CSA [customer service agreement] shall be considered a confidential document. The pricing levels and procedures described within the CSA, as well as any information supplied by the customer through an energy audit or as a result of negotiations or information requests by the Company and any information developed by the Company in connection therewith, shall be made

available for review by the Commission and its staff only and such review shall be made under the confidentiality rules of the Commission.

This CISR tariff was approved by the Commission in Order No. PSC-98-1241-S-EI. Staff does not believe that the tariff provision obviates the need for a confidentiality determination under Section 366.093, Florida Statutes. A request to determine confidentiality of this information is pending.

TECO claims its proposed procedure will enable the Commission to reach the merits of the complaint, save time, and preserve the confidentiality of CISR related information. Allied attempted to review this information in its Request to Examine and Inspect Confidential Information, submitted with the Complaint, and also through discovery served shortly after the Complaint.

TECO argues that contracts negotiated under the CISR tariff contain highly proprietary information the public disclosure of which would harm the utility, its general body of rate payers, and the CISR customer. TECO further argues that the Commission determined that similar information warranted confidential treatment under Gulf Power's CISR. In Order No. PSC-99-0274-CFO-EI, a ruling on a confidentiality request from Gulf Power, the Commission stated:

This information is regarded as sensitive and confidential by the CISR customer because public disclosure of this information would impact the customer's ability to compete in its "native market." In the event such information is made public, it appears as if future potential CISR customers could avoid the risk of public disclosure of their confidential information by refusing to negotiate with Gulf. This may lead to uneconomic bypass of Gulf's facilities. Therefore the information is entitled to confidential classification under Section 366.093(4), Florida Statutes.

Furthermore, notes TECO, Allied and Odyssey insisted on entering into binding nondisclosure agreements with TECO before starting CISR negotiations. Staff notes that order quoted above granted confidentiality to a section of Gulf Power's earnings surveillance report which showed the revenue shortfall due to CSAs over a given time period.

Allied is willing to enter a binding nondisclosure agreement with TECO regarding information on the Odyssey CISR negotiations.

TECO claims Odyssey will not be protected by such an agreement because Allied and Odyssey compete in the same market. Furthermore, if Allied is allowed access to the information, potential CISR customers may decide that bypassing TECO poses less economic risk than negotiating with TECO.

#### Allied's Objection to Proposed Procedures

Allied argues that TECO's proposed procedure violates principles of due process codified in Section 120.57(1)(b), Florida Statutes, and it would prevent Allied from acting as a litigant and from conducting discovery. Section 120.57(1)(b), Florida Statutes, grants all parties to formal administrative hearings the opportunity to present evidence and argument on all issues, and to conduct cross-examination. Allied maintains there is no precedent to support the legitimacy of TECO's proposal and notes that TECO cites no precedents.

Allied argues that implementing TECO's proposal would allow Allied's complaint to "be dismissed on a secret showing made by TECO to the Commission." Allied cites numerous cases to support the proposition that "[t]he prohibition of secret agreements by public utilities favoring one commercial or industrial customer among similarly situated competitors is generally considered the driving force behind the movement for regulation of public utilities." See Homestead v. Des Moines Electric Co., 248 F. 439 (8th Cir. 1918); Bromer v. Florida Power & Light Co., 45 So. 2d 658 (Fla. 1950); Main Valley Realty Co. V. Blackstone Valley Gas & Electric Co., 59 RI 29, 193 A. 879 (1937); American Aniline Products v. City of Lock Haven, 288 Pa. 420, 135 A. 726 (1927); Barringer v. Louisville Gas & Electric Co., 196 Ky. 268, 244 SW 690, (1922); Western Union Tel. Co. V. Call Pub. Co., 198 U.S. 92, 21 S. Ct. 561, 45 L. Ed. 765 (1900). Allied maintains that private agreements between utilities and commercial or industrial customers should not be shielded from scrutiny by private litigants.

Both Allied and TECO believe that the Commission's rationale for confidentiality of CISR related information is to deter bypass of the utility by potential customers who would be harmed by public disclosure of such information. However, Allied contends that the process lacks adequate safeguards against undue discrimination. Allied asserts that, to date, TECO's conduct under its CISR tariff is so egregious that suspension or cancellation of the tariff should be considered until adequate safeguards against undue discrimination are established. Allied further contends that the



speculative harm to TECO of potential, future bypass is outweighed by the need to prevent undue discrimination.

Allied claims that there is nothing exceptional about the kinds of confidential information involved in this proceeding, and that the Commission's standard procedures for handling proprietary information are appropriate for use in this case. Allied notes, for example, that it has already submitted, via direct testimony, the same types of information it requested TECO to produce concerning Odyssey. Allied's direct testimony was submitted with a request for confidential treatment. The information redacted from the nonconfidential copy are the rates, terms and conditions of TECO's and Georgia Power's proposals, proposals from engineering companies for construction of Allied's new plant, and certain information on Allied's financial projections of estimated return on investment in its new plant at various rates for electric service. In addition, Allied requested confidentiality for correspondence and other documents related to CISR tariff negotiations with TECO and Georgia Power.

Allied is willing to enter into a protective order under Rule 25-22.006, Florida Administrative Code, which would: 1) limit the distribution of proprietary, confidential, business information to the parties, witnesses, the Commission and Commission staff; and, 2) limit the use of such information to litigation, and provide for the return to TECO of all such information upon the conclusion of all litigation involving claims arising from the CISR tariff negotiations.

Allied concedes that a limited subset of Odyssey's CISR related information may not be appropriate for disclosure to Allied. This subset of information would include the types of items Allied redacted from its own direct testimony. Allied proposes that this type of confidential information could be produced by TECO to the Commission, for *in camera* review, to decide if the information should be made available to Allied. Allied maintains however, that certain information should not be deemed confidential and should be produced immediately. Such information includes the terms and conditions of TECO's offer(s) of CISR rates to Odyssey, TECO's analysis of its incremental cost to serve Allied and Odyssey, and documentation pertaining to Odyssey's satisfaction of all the requirements and preconditions of the CISR tariff.

#### Staff Analysis

TECO's proposed procedure should be denied because it denies Allied's rights under Section 120.57(1)(b), Florida Statutes. This

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section pertains to hearings involving disputed issues of material fact and provides:

All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence...

Under TECO's proposal, Allied would be precluded from responding, presenting argument and cross-examining witnesses if the Commission decided to rule in TECO's favor. Therefore, the Commission would violate the requirements of the Florida Statutes if it granted TECO's proposal.

In addition, TECO's proposal is unfair in that a summary decision can only be made in TECO's favor, not Allied's. Under TECO's proposal, if the Commission reviewed all the information and determined that Allied was correct, it could not summarily rule in favor of Allied, but would have to conduct a hearing.

Staff believes this case can be handled without resorting to special procedures. First, both parties have filed requests that information submitted to the Commission be deemed confidential and exempt from public disclosure pursuant to Section 366.093, Florida Statutes. Staff believes this information clearly meets the requirements of the statute.

A ruling under Section 366.093, Florida Statutes, does not address the question of whether the information is privileged, and therefore undiscoverable. This question will have to be addressed in a ruling on TECO's Motion's for Protective Order, and Allied's Motion to Compel Discovery, and its Motion to Examine and Inspect Confidential Information. The prehearing officer can inspect the material in camera to determine the question of privilege. He can also defer the question of privilege to the full Commission, which could conduct an in camera review of the requested information before making a decision. Information found to be privileged would not be produced for discovery.

After the discovery phase of this docket ends, the scheduled hearing would be held. All parties would be allowed to present evidence and to cross-examine witnesses. After the hearing, the Commission would consider the evidence and argument, and make a ruling on the merits of the case.

For the above reasons, staff recommends that TECO's request be denied.

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**ISSUE 2:** Should this docket be closed?

**RECOMMENDATION:** No. This docket should not be closed.

**STAFF ANALYSIS:** This docket should remain open pending completion of the hearing.