

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: 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.

DOCKET NO. 000061-EI  
ORDER NO. PSC-00-0908-FOF-EI  
ISSUED: May 8, 2000

The following Commissioners participated in the disposition of  
this matter:

JOE GARCIA, Chairman  
J. TERRY DEASON  
SUSAN F. CLARK  
E. LEON JACOBS, JR.  
LILA A. JABER

ORDER DENYING TECO'S REQUEST FOR APPROVAL OF PROPOSED PROCEDURES  
FOR A DISPOSITION OF THIS PROCEEDING WITHOUT DISCLOSING  
CONFIDENTIAL INFORMATION, AND SUMMARY DISPOSITION

BY THE COMMISSION:

I. 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.

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05709 MAY-88

FPSC-RECORDS/REPORTING

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 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.

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, the parties, Odyssey and staff agreed to mediate the dispute. The mediation was conducted on April 5, 2000. The participants did not reach a settlement.

II. TECO's Request for Approval of Proposed Procedures, and Summary Disposition

A. TECO's Request

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. We do 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.

B. Allied's Objections to TECO's Request

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.

### C. Analysis

After considering the arguments of the parties, we have determined that TECO's proposed procedure must be denied because it denies Allied's rights under Section 120.57(1)(b), Florida

Statutes. This 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 we reviewed all the information and determined that Allied was correct, we could not summarily rule in favor of Allied, but would have to conduct a hearing.

We believe this case can be handled without resorting to special procedures. First, both parties have filed requests that information submitted to this Commission be deemed confidential and exempt from public disclosure pursuant to Section 366.093, Florida Statutes. 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. Information found to be privileged would not be produced for discovery.

After the discovery phase of this docket ends, the scheduled hearing will be held. All parties will be allowed to present evidence and to cross-examine witnesses. After the hearing, we will consider the evidence and argument, and make a ruling on the merits of the case. In light of the foregoing analysis, we must deny TECO's Request for Approval of Proposed Procedures, and Summary Disposition.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that TECO'S Request for Approval of Proposed Procedures for a Disposition of this Proceeding Without Disclosing Confidential Information, and

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Summary Disposition is hereby denied for the reasons stated in the body of this Order. It is further

ORDERED that this docket shall remain open pending completion of the hearing.

By ORDER of the Florida Public Service Commission this 8th day of May, 2000.

BLANCA S. BAYÓ, Director  
Division of Records and Reporting

By: Kay Flynn  
Kay Flynn, Chief  
Bureau of Records

( S E A L )

MKS

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director,



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Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.