

State of Florida



Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

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

DATE: JULY 20, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYÓ)

FROM: DIVISION OF LEGAL SERVICES (STERN/ELIAS) *MKS RVE RNT*
DIVISION OF ECONOMIC REGULATION (E. DRAPER) *ED OK*

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: *8/1/00* 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 violated Sections 366.03, 366.06(2), and 366.07, Florida Statutes, by offering discriminatory rates under its Commercial/Industrial Service Rider (CISR) tariff; and, 2) TECO breached its obligation of good faith under Order No. PSC-98-1081A-FOF-EI in that the CISR rate granted Odyssey was the product of collusion. On March 28, 2000, Odyssey Manufacturing Company (Odyssey) requested permission to intervene, and that request was granted on April 18, 2000, in Order No. PSC-00-0762-PCO-EI. Odyssey has a rate under the CISR tariff and, like Allied, is a bleach manufacturer. The hearing is currently scheduled for October 11, 2000.

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On June 27, 2000, the prehearing officer issued Order No. PSC-00-1171-CFO-EI (Discovery Order) which addressed numerous issues pertaining to discovery in this docket. TECO and Odyssey filed Motions for Reconsideration of the Order and Requests for Oral Argument. Allied filed a Response in Opposition to the motions. This recommendation addresses these filings.

Discovery can not proceed in this docket until the Motions are ruled on. In addition, since issuance of the Discovery Order, the parties have submitted several additional requests for confidential classification and one request for a protective order. Discovery can not proceed until these filings are ruled on and they can not be ruled on until the Motions for Reconsideration are decided.

DISCUSSION OF ISSUES

ISSUE 1: Should TECO's and Odyssey's Requests for Oral Argument be granted?

RECOMMENDATION: The Requests for Oral Argument do not need to be ruled on because the docket has not been to hearing. Each party should be allowed ten minutes to address the Commission.

STAFF ANALYSIS: With respect to reconsideration of non-final orders, oral argument may be granted at the discretion of the Commission. See Rule 25-22.0376(5), Florida Administrative Code. On this type of non-final order, the parties are allowed to participate at the Agenda Conference. Participation at the Agenda Conference is the most expeditious way to proceed in this docket. There is a backlog of filings that can not be disposed of until the Motions for Reconsideration are decided. The case can not progress to discovery until the backlog of filings is disposed of. The August 1, 2000, Agenda Conference provides the earliest opportunity for the full Commission to hear the positions of the parties.

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ISSUE 2: Should the Commission grant the Motions for Reconsideration filed by TECO and Odyssey?

RECOMMENDATION: The Commission should deny TECO's Motion because it does not identify any points of fact or law that were overlooked or not considered by the Prehearing Officer. The Commission should deny part of Odyssey's Motion for the same reason, and does not need to rule on that portion of the Motion to which Allied has no objection.

STAFF ANALYSIS: The proper standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which the Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 161 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959); citing State ex. rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted "based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review." Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315, 317 (Fla. 1974). (emphasis added).

Information sought through discovery does not have to be admissible at a hearing, but only reasonably calculated to lead to the discovery of admissible evidence. See Rule 1.280(b)(1), Florida Rules of Civil Procedure (made applicable to the Commission Rule 28-106.206, Florida Administrative Code). In addition, when deciding what is not discoverable because it is a trade secret or confidential commercial information, the Prehearing Officer was allowed to exercise broad discretion. See Fortune Personnel Agency of Ft. Lauderdale, Inc. V. Sun Tech Inc. Of South Florida, 423 So. 2d 545, 547 (Fla. 4th DCA 1982); Inrecon v. The Village Homes at Country Walk, 644 So. 2d 103, 105 (Fla. 3rd DCA 1994). In short, the scope of discovery is broad, as is the discretion of the Prehearing Officer to decide what may be discovered and what may not.

TECO's Motion raises six points for reconsideration, numbered 1-6 below, all of which Odyssey incorporated by reference into its Motion. Odyssey raised two additional points, numbered 7 and 8 below, in its Motion. Each item begins with a summary, in boldface

type, of the part of the Discovery Order being challenged. The summary is followed first by the position of TECO and Odyssey and then by Allied's position. The staff recommendation follows the positions of the parties.

1. **The Discovery Order states that the CISR tariff does not, in and of itself, make any CISR-related documents confidential or grant such documents immunity from discovery. The CISR tariff does not supersede Florida Statutes or case law on discovery.**

TECO and Odyssey contend that the plain language of the tariff makes some or all CISR-related information confidential, and that the Commission's approval of the CISR tariff represented a Section 366.093 determination that such information was confidential. Similarly, the two parties contend that the plain language of the tariff makes certain information available for review by the Commission and staff only, and therefore the tariff makes that information immune from discovery.

In its response, Allied notes that the requirement to establish confidentiality of the documents filed by TECO with the Commission would not have arisen if TECO had simply responded in good faith to Allied's discovery requests and produced information subject to a non-disclosure agreement. When TECO chose to file the documents with the Commission, TECO became obligated to comply with Section 366.093, Florida Statutes.

The Discovery Order addressed this issue at page 5. The notion that the CISR tariff could classify documents as confidential, pursuant to Section 366.093, Florida Statutes, was rejected. TECO and Odyssey have not raised an issue that was overlooked or not considered.

Section 366.093, Florida Statutes, and Rule 25-22.006, Florida Administrative Code, provide the procedure and standard for determining confidentiality. Neither of these provisions allow for a confidentiality determination to be made before the documents have been inspected by the Commission and its staff. A determination of confidentiality removes the public's right to inspect a document and can only be made by order of the Commission. The language in the tariff can not bind Commissioners and require them to issue an order with a predetermined outcome. To the extent that the tariff conflicts with existing statutes and rules, the tariff is superseded.

2. **The Discovery Order states that the CISR tariff does not render the entire Contract Service Agreement (CSA) confidential.**

TECO and Odyssey claim that the tariff clearly states that the entire CSA is confidential. The parties note that the Commission previously determined, in Order No. PSC-98-0854-CFO-EI, that Gulf Power's CSAs were confidential. The parties assert that the Prehearing Officer's basis for distinguishing between the confidentiality decision in the Gulf docket and the decision in this docket is not reasonable.

Allied indicates that its position on this issue is the same as that for the previous issue. That is, once TECO submitted the CSA, it became subject to Section 366.093, Florida Statutes.

This issue is addressed at pages 5, 14-15, and 17-18 in the Discovery Order. As was explained in the Discovery Order, Order No. PSC-98-0854-CFO-EI was issued in connection with a Commission audit of Gulf Power's CISR activities. Commission staff requested the CSAs along with other documents. It was not an adversarial proceeding. Under those circumstances there was no need to determine if parts of the CSAs might not be confidential. In addition, Odyssey's CSA incorporates the language of the CISR tariff, a public document, to a great extent while Gulf Power's CSAs did not. Finally, the tariff can not supersede Florida Statutes and the Florida Administrative Code, as explained in the Discovery Order and in #1, above. TECO and Odyssey raise no issue that was overlooked or not considered, and are simply restating their arguments.

3. **The Discovery Order requires that TECO must respond to Allied's discovery request for production of documents on Odyssey's eligibility for a CISR rate. The documents must be produced subject to a non-disclosure agreement.**

TECO and Odyssey argue that information on Odyssey's eligibility is not relevant to Allied's complaint. They maintain that the question of whether TECO complied with the CISR tariff requirements in offering Odyssey and Allied rates is for the Commission to decide, not Allied. They further argue that Allied's only cognizable claim in this proceeding is that it was the subject of undue discrimination by TECO. In addition, they argue that Allied can not claim that TECO unduly discriminated against Allied with respect to eligibility for a CISR rate because TECO found both Odyssey and Allied eligible. Therefore, Allied should not be able

to review information on Odyssey's eligibility for a CISR rate, even under a non-disclosure agreement. If Allied were to view this information, they contend that Allied would be able to undermine Odyssey's business.

Allied characterizes this issue as an attempt by TECO to ignore the allegations in its Complaint and to belatedly dismiss part of its Complaint. Allied's Complaint alleges that Allied complied with the CISR eligibility requirements, that to the best of Allied's knowledge Odyssey did not comply with those requirements, and consequently Allied was subject to undue prejudice. One form of relief Allied requested was that Odyssey's CISR rate be suspended.

Allied argues that Section 366.07, Florida Statutes, provides that the Commission may find, upon complaint, that a utility's rates are preferential and the Commission may set appropriate rates. Allied maintains that whether Odyssey satisfied the eligibility requirements of the CISR tariff is of vital importance to Allied's competitive interests.

The Discovery Order addressed the discovery requests at issue at pages 18-23 (and Attachment A) and the non-disclosure agreement at pages 10-14. The Discovery Order does not directly address whether the information requested is relevant to Allied's claims. Relevance is presumed in the Discovery Order, as is apparent by the following statement: "If production is withheld, Allied will likely experience direct harm because its ability to prove its case is likely to be impaired." This relevancy issue was not raised by TECO in its Motions for Protective Order so there was no need for the Prehearing Officer to elaborate on why the requested documents were relevant to Allied's claims.

Staff believes the requested documents are relevant to Allied's claims. First, staff notes that TECO's reasoning is flawed. TECO seems to presume that its compliance with the CISR tariff and undue discrimination against Allied are unrelated issues and that information relevant to one can not be relevant to the other. In fact, the two issues are related and will require review of similar information.

TECO indicates the documents Allied requested on eligibility of Odyssey aren't relevant because both customers were deemed eligible. Whether the customers were deemed eligible by TECO, and whether the customers fulfilled the specific eligibility requirements of the tariff are two different issues.

Allied's concern is that Odyssey did not fulfill the eligibility requirements but was deemed eligible. If TECO did not require Odyssey to make the required eligibility showing yet required Allied to do so, then Odyssey's CISR rate could be the result of preferential treatment by TECO. For customers who are competitors, like Allied and Odyssey, discrimination in establishing eligibility may directly harm the customer who was not favored. Furthermore, documents on Odyssey's eligibility may be relevant to Allied's discrimination claim because they may contain the rate that Odyssey was offered by another utility. This information bears on whether Odyssey and Allied were similarly situated and may be useful to substantiate a claim of undue discrimination. For these reasons, information on Odyssey's eligibility may be discovered by Allied.

The Commission's concern at the hearing will be whether TECO complied with its CISR tariff. Evaluating whether TECO required Odyssey to make the requisite eligibility showing is one element of compliance. To fulfill its responsibility, the Commission will likely review some of the same information that Allied needs to substantiate its claim against TECO.

Section 366.07, Florida Statutes, allows a complaint alleging undue discrimination in rates to be filed. It is incumbent upon the party filing the complaint to prove that undue discrimination occurred. Allied requested information relevant to substantiating its complaint under Section 366.07, Florida Statutes. That information is also relevant to whether TECO complied with its CISR tariff when it determined that Odyssey was eligible for a CISR rate. TECO and Odyssey have not shown any error or omission of fact or law.

4. **The Discovery Order imposes no restriction on the types of employees at Allied who can review confidential information requested by Allied through discovery. Allied's due process rights would be violated if its employees who are directly involved in competitive activities are not allowed to review confidential CISR-related information.**

TECO and Odyssey assert that this requirement of the order is "based on an uncritical acceptance of Allied/CFI's unsupported assertion that Allied's president, Mr. Robert Namoff, is the only person within the Allied and CFI corporate entities that can effectively work with Counsel in reviewing confidential information." They claim the Commission relied on Allied's assertion without having evidentiary support for that assertion.

Allied argues that to prevent disclosure of confidential information to Mr. Namoff denies Allied due process. Mr. Namoff is the individual who conducted CISR negotiations and is Allied's principal witness. Allied notes that TECO names no other individuals who can represent Allied's interests in this litigation. Allied states that only three of its employees are capable of representing its interests, all of whom are involved in business strategy and therefore unacceptable to TECO.

Allied states that TECO's first purported rationale for opposing Allied's discovery requests was to protect Odyssey's trade secrets. Allied questions this rationale given that Allied has been willing to allow Odyssey to redact any information it wants from documents that TECO provides through discovery. Allied states that the parties are now working on a formal stipulation on this issue.

Allied states that TECO's second purported rationale for opposing Allied's discovery requests was that Allied would use the confidential information in possible renegotiations for a CISR rate. To address this concern, Allied proposed that its representatives who are given access to confidential information would not represent Allied or any potential CISR customer in CISR negotiations with TECO for three years. Allied notes however that TECO's purported rationale is inconsistent with the policy underlying CISR tariffs because it would prevent TECO from negotiating for Allied's at-risk load.

TECO has not shown any fact or law that was overlooked or not considered by the Prehearing Officer. There has been no hearing in this docket and no opportunity to take evidence. The filings contained no information contrary to Allied's assertions about its size and organizational structure.

5. **The Discovery Order states that information on the salary of Patrick Allman is relevant and material to this proceeding and can be discovered.**

TECO and Odyssey assert that this ruling is based on a misapplication of law. They claim that Mr. Allman's rates of pay have no bearing on whether TECO unduly discriminated against Allied. The information is therefore not necessary for Allied to litigate its case and should not be discoverable.

Allied contends that Mr. Allman's salary history with TECO is relevant to whether Odyssey's CISR rate resulted from collusion.

Mr. Allman was the TECO employee who negotiated the rate with Odyssey and then accepted employment with Odyssey.

The salary history is addressed at page 15 of the Discovery Order. The Prehearing Officer found the alleged actions of Mr. Allman to be relevant to Allied's claim of undue discrimination. TECO and Odyssey have not shown an issue of fact or law that was overlooked or not considered.

- 6. The Discovery Order states that the total number of CSAs executed by TECO is not confidential, is relevant to this proceeding, and is discoverable.**

TECO and Odyssey assert that this information is not relevant, has no probative value, and is confidential because it is commercially sensitive. The Prehearing Officer stated that Allied "might wish to attempt to obtain information on other CSAs to aid in its assessment of discrimination." The two parties claim that such use of the information is exactly why it should be deemed confidential. Such information could be used to seek out proprietary information from CISR customers, which would discourage even the most interested potential CISR customers.

Allied maintains that the number of CSAs is relevant to the issue raised in Mr. Namoff's prefiled direct testimony "concerning the misrepresentations by TECO employee Larry Rodriguez, that CISR tariff rates offered by TECO to Odyssey were 'closed down' and that Allied/CFI was 'locked out' of obtaining electric service at rates equal to Odyssey's."

The decision to allow discovery of the number of CSAs was well within the discretion of the Prehearing Officer. The Discovery Order explains why this information is discoverable and TECO and Odyssey simply disagree. TECO and Odyssey have shown no issue of fact or law that was overlooked or not considered.

- 7. The Discovery Order does not require that Odyssey be given the chance to redact whatever it deems appropriate from documents that TECO produces to Allied and that pertain to Odyssey.**

Odyssey objects to the Discovery Order "to the extent that it requires Tampa Electric to produce documentation, in redacted or unredacted form, to the Complainants, or for in camera inspection, unless and until Odyssey is given a reasonable opportunity to first inspect the documents, both in redacted and unredacted form, with

the further opportunity as may be necessary to assert the need for further redactions.

Allied has no objection on this point and indicates the issue is being resolved informally.

No vote is necessary on this issue since it is being resolved informally. Staff notes that Allied initially suggested this procedure after the mediation held in this docket several months ago. Allied renewed this offer on several occasions since that time.

8. **The Discovery Order prohibits TECO from producing information on the "financial status" of Odyssey to Allied.**

With respect to production of financial information, Odyssey asserts that:

To the extent that such term does not encompass any and all information regarding the respective financial condition of Odyssey and Sentry Industries, Inc., its affiliate, past, present, and projected, including those companies' accounts; assets and liabilities; sources of equity; amounts and terms and conditions of debt and equity financing; and data pertaining to sales and **manufacturing costs**, sales, income and revenue, production, distribution, process description, and customer base ... the Order as a matter of law provides insufficient protection from disclosure of proprietary confidential information. (emphasis added)

Allied did not specifically address this issue in its Response in Opposition to the Motions for Reconsideration. Allied presumably does not object to this definition of "financial status" because it is willing to let Odyssey redact documents before TECO produces them.

Staff believes that the term "financial status" as used in the Discovery Order includes most of the items Odyssey lists. A Motion for Reconsideration is not the proper method of addressing this concern. Odyssey must specifically allege that information requested by Allied is "financial information." If requested, the Prehearing Officer will then conduct an *in camera* inspection to determine if it is in fact "financial information" and therefore not discoverable. As a matter of law, this is the proper procedure

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for Odyssey to follow. Therefore, this request for reconsideration should be denied.

Staff notes that the relationship between Odyssey and Sentry is unclear. Only Odyssey was granted party status in this case. See Order No. PSC-00-0762-PCO-EI. Therefore, the definition should not include any reference to Sentry. In addition, staff notes that Odyssey's definition of "financial information" can not exclude information that has already been deemed discoverable. For example, "manufacturing costs" would likely include the rate Odyssey pays TECO, which was deemed discoverable.

ISSUE 3: Should this docket be closed?

RECOMMENDATION: No. This docket should not be closed.

STAFF ANALYSIS: This docket should remain open pending the outcome of the hearing which is currently scheduled for October 11, 2000.