



Public Service Commission

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DATE: NOVEMBER 27, 2000

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

FROM: DIVISION OF LEGAL SERVICES (STERN, ELIAS)
DIVISION OF ECONOMIC REGULATION (E. DRAPER)

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: 12/05/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000061R5.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. Odyssey Manufacturing Company and Sentry Industries are intervenors; they are separate companies but have the same president. Allied, Odyssey and Sentry manufacture bleach.

On October 27, 2000, TECO filed a Motion for Reconsideration of Order No. PSC-00-1901-PCO-EI (Order on In Camera Review).

DOCUMENT NUMBER-DATE

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Allied filed a Response in Opposition on November 9, 2000. Allied's Response was due on November 3, 2000, and Allied filed a Motion for Leave to File Response Out of Time along with its Response in Opposition. Allied's motion was unopposed.

Issue 1 in this recommendation addresses Allied's Motion for Leave to File Response Out of Time. Issue 2 addresses TECO's Motion for Reconsideration.

The Commission has jurisdiction over the subject matter pursuant to Sections 366.04, 366.05 and 366.06, Florida Statutes.

DISCUSSION OF ISSUES

ISSUE 1: Should Allied's Motion for Leave to File Response Out of Time be granted?

RECOMMENDATION: Yes. Allied's Motion should be granted because it will cause no prejudice to any party.

STAFF ANALYSIS: Allied explains that TECO's Motion for Reconsideration was served by mail on Allied's counsel on October 27, 2000, and was received by Allied's counsel on October 30, 2000. Allied's counsel erroneously calculated its response time from the date TECO's Motion was received, instead of from the date the Motion was served.

Staff recommends that Allied's Motion be granted because no party would be prejudiced by the delay in Allied's response to TECO's Motion for Reconsideration. In addition, Allied's counsel caught the mistake in a timely fashion so that Allied's response was only four working days late.

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ISSUE 2: Should TECO's Motion for Reconsideration be granted?

RECOMMENDATION: TECO's Motion should be granted in part and denied in part.

STAFF ANALYSIS: On June 27, 2000, the Prehearing Officer in this docket issued Order No. PSC-00-1171-CFO-EI (Discovery Order). That order set out the standards and framework for deciding which documents should be withheld from discovery and which should be produced. That order required that an in camera review be conducted of documents submitted by TECO to determine which documents should be produced in response to Allied's Requests for Production of Documents (PODs) Nos. 6, 7 and 8. Based on the in camera review, a decision on the material to be produced for POD 6 was provided in Order No. PSC-00-1901-PCO-EI (Order on In Camera Review), issued on October 17, 2000.

TECO claims that the Order on In Camera Review requires production of documents which the Discovery Order requires to be withheld from production. TECO identifies two categories of inconsistencies.

First, TECO claims that the Discovery Order requires that information on Odyssey's plant size, plant design, electricity consumption and financial status be withheld, while the Order on In Camera Review allows such information to be produced.

Second, TECO claims that the Discovery Order requires that information on TECO's incremental costs to serve Odyssey be withheld, yet the Order on In Camera Review requires such information to be produced. The documents in question contain information on incremental costs associated with construction and maintenance of a substation TECO built, part of which serves Odyssey.

In its Response, Allied argues that the CISR tariff rates offered to Odyssey and Allied should differ only by the absolute amount of the differences in TECO's incremental cost to serve Odyssey and Allied. Allied states that costs associated with the substation are an element of TECO's incremental cost to serve Odyssey. Allied claims that disclosure of this information is needed to fairly evaluate the differences in rates that TECO offered to each party.

Allied states that, according to the Discovery Order, the purposes of withholding information on incremental costs is to protect Odyssey's ability to compete and TECO's negotiating floor.

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Allied states that producing the documents in question will not conflict with either of these purposes. Allied did not address TECO's claim on withholding information on Odyssey's plant size, plant design, electricity consumption and financial status.

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).

With respect to information on Odyssey's plant size, plant design, electricity consumption and financial status, Staff agrees with TECO that, under the Discovery Order, additional information should be redacted from some of the documents. Staff notes that in the majority of documents ordered to be produced, this information was ordered to be redacted. There were, however, some oversights. Staff agrees with the redactions TECO identified for the following pages: 75-O, 316-O, 650-O, 1047-O, 1107-O, 1112-O, 1500-O, 1606-A, 1972-O, and 1993-O. TECO's Motion for Reconsideration should be granted with respect to these pages.

With respect to the second group of documents, those containing information on incremental cost and benefits associated with the substation, TECO identified these documents as being responsive to POD 6. It is inconsistent for TECO to now claim they are responsive to POD 9. The Discovery Order stated that documents responsive to POD 9 did not have to be produced. IN any event, Staff believes TECO's first assessment, that the documents were responsive to POD 6, is correct.

In addition, TECO misconstrues the Discovery Order. Allied requested, in POD 9, that TECO produce "[a]ll documents reflecting estimates of TECO's incremental cost to provide service under the CISR tariff to Odyssey." In the Discovery Order, this was interpreted as a request for the actual runs of the Rate Impact Analysis (RIM) model used to generate the incremental cost to

serve. Because the POD 9 refers to a single incremental cost, it was assumed the question was not directed to the component incremental costs and benefits that result in a final, integrated incremental cost to serve.

The Discovery Order states at page 25:

TECO shall not be required to respond to this request. TECO used the Rate Impact Measure (RIM) to calculate incremental costs and net benefits to the general body of ratepayers. While the RIM methodology is not confidential, the application of the methodology to a specific customer requires input of customer specific data, such as coincident peak demand, load shape, load factor, and annual energy consumption. Thus, operational information on Odyssey is integral to the incremental cost analysis. Discovery of this information by Allied would harm Odyssey's ability to compete in its native market and the non-disclosure agreement would not mitigate the harm appreciably.

In addition, production of the incremental cost analysis will harm TECO because it will disclose TECO's negotiating floor. This would adversely affect TECO's ability to negotiate the most favorable rates, terms and conditions with future CISR customers, which could ultimately harm the ratepayers. This harm could be mitigated to some extent by a non-disclosure agreement between TECO and Allied.

Allowing the information to be protected harms Allied because Allied will not be able to determine whether Odyssey has a rate below the incremental cost to serve. Two factors mitigate this harm. First, TECO has no rational incentive to charge below the incremental cost to serve. Second, TECO's compliance with the CISR tariff will be an issue for the Commission to evaluate at the hearing...

From this response it is clear that production of the RIM analyses was to be withheld, because they contained projections of the final incremental cost to serve Odyssey. It is also clear that the purpose of withholding the analyses was to protect Odyssey's ability to compete and to protect TECO's negotiating floor.

The Discovery Order does not prohibit production of the incremental costs and benefits associated with the substation.

These costs and benefits are just one component of the final incremental cost to serve Odyssey and do not merit the level of protection afforded the RIM analyses. Production of this information will not disclose TECO's negotiating floor or proprietary information on Odyssey. Allied will not be able to calculate TECO's negotiating floor because Allied will not have access to customer specific data, such as coincident peak demand, load shape, load factor, and annual energy consumption. Therefore, producing the information in question does not conflict with the ruling of the Discovery Order or its rationale.

In addition, TECO has already produced information on incremental costs and benefits associated with the substation. This information appears in the side-by-side comparison of rates offered Odyssey and Allied, which was first produced on August 14, 2000. It appears inconsistent for TECO to object to the production of documents containing information on the incremental costs and benefits associated with the substation when it has already produced documents that contain the same type of information.

For these reasons, Staff recommends that TECO's Motion for Reconsideration be denied with respect to the documents that TECO identifies as containing information on incremental costs and benefits associated with the substation. Those documents include all 61 pages listed in Attachment A to TECO's Motion and the following pages listed in Attachment B to TECO's Motion: 88-O, 175-O, 324-O, 1042-O, 1479-O, 1944-O.

With respect to document 180-O, listed in Attachment B to TECO's Motion, Staff believes that, consistent with the Discovery Order, the only information on that page that should be produced is the line labeled Orient Park N 3rd Ckt and the associated value. Therefore, Staff recommends that TECO's Motion for Reconsideration be granted for all of the page except the line labeled Orient Park N 3rd Ckt and its associated value.

The information on pages 75-O, 316-O, 650-O, 1047-O, 1107-O, 1112-O, 1500-O, 1606-A, 1972-O, and 1993-O contain information which relate to Odyssey's plant size, plant design, electricity consumption or financial status. Staff believes that, consistent with the Discovery Order, this information should not be produced. Since TECO has demonstrated a matter of fact which was overlooked in rendering the decision, Staff recommends that TECO's Motion for Reconsideration be granted with respect to these pages.

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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 a hearing on the merits of the case.