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-00-2430-PCO-EI ISSUED: December 18, 2000

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ

ORDER GRANTING IN PART MOTION FOR AUTHORIZATION TO DISCLOSE CONFIDENTIAL INFORMATION PURSUANT TO PROTECTIVE AGREEMENT, GRANTING MOTION FOR LEAVE TO FILE RESPONSE OUT OF TIME, AND GRANTING IN PART AND DENYING IN PART MOTION FOR RECONSIDERATION

I. 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 June 27, 2000, the Prehearing Officer issued Order No. PSC-00-1171-CFO-EI (Discovery Order). On July 6 and 7, 2000, TECO and Odyssey, respectively, filed motions for reconsideration of the Discovery Order. On August 23, 2000, the Commission denied those motions, in part, in Order No. PSC-00-1530-PCO-EI (Order on Reconsideration).

One issue raised in the motions pertained to review of confidential information by Mr. Robert Namoff, Allied's president. That issue was stipulated. The parties agreed to allow two corporate officers at Allied to review documents in place of Mr. Namoff, under the condition that the issue could come back before the Commission if the stipulation was unacceptable to Mr. Namoff. The officers allowed to review the information were Mr. Palmer and Mr. Koven.

Mr. Namoff found the stipulation unacceptable and Allied brought the issue back to the Commission via its Motion for Authorization to Disclose Confidential Information Pursuant to Protective Agreement (Motion for Authorization) filed on October 13, 2000. TECO and Odyssey filed responses in opposition on October 18, 2000. In its motion Allied requests that Mr. Namoff be allowed to review confidential information produced through discovery. Part II of this Order addresses Allied's Motion for Authorization.

On October 27, 2000, TECO filed a Motion for Reconsideration of Order No. PSC-00-1901-PCO-EI (Order on In Camera Review). 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. Part III of this Order addresses Allied's Motion for Leave to File Response Out of Time. Part IV addresses TECO's Motion for Reconsideration of the Order on In Camera Review.

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

II. Motion for Authorization to Disclose Confidential Information Pursuant to Protective Agreement

Allied requests, in its Motion for Authorization, that Mr. Namoff and two additional lawyers be allowed to sign the nondisclosure agreement between the parties so that they can review confidential information produced through discovery. This motion could be ruled on by the Prehearing Officer alone. However, in an effort to expedite matters, he requested that the panel assigned to this docket rule on that part of the motion pertaining to Mr. Namoff. Whether the two additional lawyers may review confidential information is not addressed in this Order.

In its Motion for Authorization, Allied states that it attempted in good faith to prepare its case without allowing Mr. Namoff to review confidential information produced through discovery. However, because Mr. Palmer and Mr. Koven did not participate in CISR negotiations with TECO, they cannot respond to a number of issues raised by the documents produced to date. Therefore, they cannot address certain issues in the rebuttal testimony that Allied must file. Allied contends that Mr. Namoff was the only officer who negotiated with TECO and must be allowed to review confidential information produced through discovery so that Allied can adequately prepare its rebuttal testimony.

Allied argues that the distinctions TECO draws between Allied's President and its Chief Financial and Operating Officers are not justified. Allied states that TECO objects to Mr. Namoff because he is involved in marketing and business strategy, yet the other two officers are also involved in these activities. Therefore argues Allied, if TECO had no objection to Mr. Palmer and Mr. Koven, it has no reason to object to Mr. Namoff.

TECO and Odyssey object to Mr. Namoff reviewing confidential information for several reasons. First, they argue that the issue was resolved at the August 1, 2000 Agenda Conference and that nothing warranting a different result has occurred since that time. Second, they claim that allowing Mr. Namoff to review proprietary information on Odyssey would cause competitive harm to Odyssey and undermine the usefulness of the CISR tariff. Third, they argue that Mr. Namoff's role in CISR negotiations does not make him better able to interpret confidential information.

Upon consideration, we grant the Motion for Authorization with respect to Mr. Namoff. First, the issue was not conclusively

resolved at the August 1, 2000, Agenda Conference; the issue was stipulated conditionally and the condition was not satisfied. Allied was therefore justified in bringing the issue back to the agency. Second, the facts have changed since the August 1, 2000 Agenda Conference in that discovery has been produced to Allied, making Allied aware of issues that it could not anticipate but that it must address in rebuttal testimony. In addition, Allied attempted to address the issues without Mr. Namoff but found his involvement necessary. For these reasons, Allied's Motion for Authorization is granted with respect to Mr. Namoff.

Our ruling on the Motion for Authorization renders the motions for reconsideration filed by TECO and Odyssey on July 6, 2000, and July 7, 2000, respectively, moot.

III. Motion for Leave to File Response Out of Time

Allied's Motion for Leave to File Response out of Time requests additional time to respond to TECO's Motion for Reconsideration, which is addressed in Part III of this Order. Allied explains that the Motion for Reconsideration was served 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. No party opposed Allied's Motion.

Allied's Motion is granted. 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.

IV. Motion for Reconsideration of Order on In Camera Review

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 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. 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, we agree with TECO that, under the Discovery Order, additional information should be redacted from some of the documents. We note that in the majority of documents ordered to be produced, this information was ordered to be redacted. There were, however, some oversights. We agree 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 is 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, we find 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.
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> 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.
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> 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, TECO's Motion for Reconsideration is 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, we find 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, TECO's Motion for Reconsideration is 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. We find that production of this

information is inconsistent with the Discovery Order. Because TECO has demonstrated a matter of fact which was overlooked in rendering the decision, TECO's Motion for Reconsideration is granted with respect to these pages.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motion for Authorization to Disclose Confidential Information Pursuant to Protective Agreement filed by Allied Universal Corporation and Chemical Formulators, Inc. is granted in part, as described in Part II of this Order. It is further

ORDERED that the Motion for Leave to File Response Out of Time filed by Allied Universal Corporation and Chemical Formulators, Inc. is granted. It is further

ORDERED that Tampa Electric Company's Motion for Reconsideration is granted in part and denied in part as described in Part IV of this Order.

By ORDER of the Florida Public Service Commission this 18th day of December, 2000.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

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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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) 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 or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.