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-00-1530-PCO-EI ISSUED: August 23, 2000

The following Commissioners participated in the disposition of this matter:

J. TERRY DEASON, Chairman
E. LEON JACOBS, JR.
LILA A. JABER

ORDER DENYING MOTIONS FOR RECONSIDERATION, DECLINING TO RULE ON REQUESTS FOR ORAL ARGUMENT, AND CLARIFYING PARTS OF ORDER NO. PSC-00-1171-CFO-EI

BY THE COMMISSION:

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 31, 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 Order addresses these filings.

A. REQUESTS FOR ORAL ARGUMENT

The Discovery Order is a non-final order. 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. Each party presented its position at the August 1, 2000, Agenda Conference, thereby obviating the need for a ruling on the Requests for Oral Argument.

B. MOTIONS FOR RECONSIDERATION

The proper standard of review applied to the Motions for Reconsideration is whether the Motions identify a point of fact or law which was overlooked or not considered in rendering the Discovery 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. Each point begins with a summary, in boldface type, of the part of the Discovery Order being challenged. The summary is followed by the positions of the parties and then by our ruling.

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.**

In their Motions, 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.

Allied's position is 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.

According to the Discovery Order, the tariff can not grant confidentiality under Section 366.093, Florida Statutes. That is, the tariff can not make a document that would be considered a public record, immune from disclosure to the public. 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.

Based on this reasoning, the Discovery Order determined that the language in the tariff could not bind us and future Commissioners and requiring issuance of an order with a predetermined outcome. The Discovery Order concluded that to the extent that the tariff conflicts with existing statutes and rules, the tariff is superseded.

At the Agenda Conference TECO sought clarification of the import of the confidentiality language in the CISR tariff. The specific provision of concern to TECO is as follows:

> The CSA shall be considered a confidential document. The pricing levels and procedures described within the CSA, as well as any 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.

TECO was unsure if this language obviated the need for a ruling on confidentiality. Further, TECO was unsure of the interplay of this tariff provision with: 1) Section 366.093, Florida Statutes, (which addresses the confidentiality of certain information filed with the Commission); and, 2) discovery in administrative proceedings pursuant to Rules 1.280, 1.400 and other related provisions of the Florida Rules of Civil Procedure.

The answer is that the tariff provision is consistent with Section 366.093, Florida Statutes, and does not obviate the need for a finding that the materials are confidential, if and when the materials are filed with the Commission. Further, a finding that the materials are confidential is separate from the question of whether the information is discoverable in an Administrative Proceeding.

The tariff imposes an affirmative obligation on TECO not to disclose the information to anyone other than the Commission or Commission staff. Thus, the customer or potential customer can negotiate a rate pursuant to the CISR tariff assured that the information will be protected from disclosure by TECO. The types of information which TECO must obtain during a CISR negotiation (i.e., an energy audit, information concerning the customer's existing or new incremental load, and information concerning the customer's alternative energy sources and associated prices) would

appear to meet the definition of proprietary business information in Section 366.093(3), Florida Statutes, which is:

> [Information, regardless of form or characteristics, which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or private agreement that provides that the information not be released to the public.

If the information is filed with the Commission and TECO or its customer makes the requisite showing that the information meets the standard is the statute, the information will not be considered a public record and will be exempt from disclosure under the public records statute. Moreover, Section 366.093(4), Florida Statutes, requires this Commission to return such information when it is no longer needed to conduct the Commission's business. This provides additional protection for the customer.

As reflected in the Discovery Order, the question of whether certain information is discoverable in an administrative proceeding is a separate issue from the question of confidentiality. See Department of Professional Regulation v. Shiva, 478 So. 2d 382, 383 (Fla. 1st DCA 1985) ("We do not equate the acquisition of public documents under chapter 119 with the rights of discovery afforded a litigant by judicially created rules of procedure..."). As detailed above, this tariff provision is consistent with Section 366.093, Florida Statutes, and the applicable discovery rules.

TECO and Odyssey have failed to show a point of fact or law which was overlooked or not considered. Reconsideration on this point is denied.

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

This issue of confidentiality, as it pertains to the CSA and the other documents identified in the CISR tariff, is addressed in item #1, above.

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.

We find that the requested documents are relevant to Allied's claims and deny the Motions on this point. First, we note 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.

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. The Motions for Reconsideration are denied on this point.

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.

After some discussion the parties agreed to a stipulation. Allied proposed that, in place of Robert Namoff, Mr. Palmer and Mr.

Koven would have access to the information. Allied noted that, like Mr. Namoff, these individuals are involved in marketing aspects of the business. In addition, Allied's expert witness Mr. Phillips, and Allied's attorney's, Mr. Ellis and Mr. Hoffman, would have access to the information. Allied stated that if this proposal was not acceptable to Mr. Namoff, it would come back before us. TECO and Odyssey agreed to this stipulation.

A ruling on this issue is not necessary at this time. We will revisit this issue if Allied brings it back before us.

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. We find that 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. We find that TECO and Odyssey have shown no issue of fact or law that was overlooked or not considered.

C. CLARIFICATION

Odyssey raised two points that TECO did nor raise. From Odyssey's Motion, it is not entirely clear whether these are points for reconsideration or clarification. From discussion at the July 31, 2000, Agenda Conference it appears that Odyssey wanted clarification, and we therefore treat them as requests for clarification.

First, 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 had no objection on this point and it appears that the issue is being resolved informally. No vote is necessary on this issue since it is being resolved informally. We note that Allied initially suggested this procedure several months ago and renewed this offer on several occasions since that time.

Odyssey's other concern was that the term "financial status" was not adequately defined in the Discovery Order. 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.

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.

We believe that the term "financial status" as used in the Discovery Order includes most of the items Odyssey lists. However, 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 for Odyssey to follow. Therefore, this request for reconsideration should be denied.

We note 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, 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.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Motions for Reconsideration filed by Tampa Electric Company and Odyssey Manufacturing Company are denied as detailed in the body of this order.

By ORDER of the Florida Public Service Commission this 23rd day of August, 2000.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn, Chief
Bureau of Records

(S E A L)

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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.