

1 APPEARANCES:

2 JOHN R. ELLIS and KENNETH HOFFMAN,
3 Rutledge, Ecenia, Underwood, Purnell and Hoffman,
4 P.O. Box 511, 215 South Monroe Street, Suite 420,
5 Tallahassee, Florida 32302-0551, appearing on
6 behalf of Allied Universal Corporation and Chemical
7 Formulators, Inc.

8 JAMES D. BEASLEY, Ausley & McMullen, P.O.
9 Box 391, Tallahassee, Florida 32302, appearing on
10 behalf of Tampa Electric Company.

11 HARRY W. LONG, JR., P.O. Box 1657, Tampa,
12 Florida 33601, appearing on behalf of TECO Energy,
13 Inc.

14 WAYNE SCHIEFELBEIN, P.O. Box 15856,
15 Tallahassee, Florida 32317-5856, appearing on behalf
16 of Odyssey Manufacturing Company and Sentry
17 Industries.

18 ROBERT ELIAS and MARLENE STERN, FPSC
19 Division of Legal Services, 2540 Shumard Oak
20 Boulevard, Tallahassee, Florida 32399-0850,
21 appearing on behalf of the Commission Staff.

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P R O C E E D I N G S

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2 COMMISSIONER JACOBS: Let's call the Status
3 Conference to order. Counsel, read the Notice.

4 MS. STERN: By Notice issued on October 6th,
5 2000, this time and place were set for a Status
6 Conference. The purpose of the Status Conference was set
7 forth in the Notice.

8 COMMISSIONER JACOBS: Take appearances.

9 MR. LONG: Commissioner, Harry Long, appearing
10 on behalf of Tampa Electric Company. And with me is James
11 Beasley from the law firm of Ausley & McMullen, also
12 appearing for Tampa Electric.

13 MR. ELLIS: John Ellis for Allied Universal
14 Corporation and Chemical Formulators, Inc. And working
15 with me on the case is Kenneth Hoffman, who is not with me
16 today.

17 MR. SCHIEFELBEIN: Wayne L. Schiefelbein, Post
18 Office Box 15856, Tallahassee, Florida 32317-5856,
19 appearing on behalf of Odyssey Manufacturing Company and
20 Sentry, that's S-E-N-T-R-Y, Industries, Incorporated.

21 COMMISSIONER JACOBS: Very well. As I
22 understand it, we're here today on a series of pleadings.
23 Let me just be clear that I have them all. I have a
24 petition to intervene by Sentry, I have an amended motion
25 for protective order by Odyssey, I have a motion to compel

1 by TECO. I should mention that the petition to intervene
2 has been amended so, I guess, we only have amended
3 petition to intervene. I have a motion for continuance of
4 final hearing, and motion for extension of time for filing
5 of rebuttal testimony and exhibits by Allied. I have a
6 motion for leave to file supplemental testimony by TECO.
7 And I have a request for confidential classification of
8 supplemental testimony by TECO. Anything that I missed of
9 any significance?

10 MR. LONG: Commissioner, I believe, there's one
11 other pending motion, it was an application for rehearing
12 of the Commission's decision from the last Agenda
13 Conference.

14 COMMISSIONER JACOBS: I missed it. That was at
15 the very top, that's why, motion for reconsideration by
16 TECO.

17 MR. LONG: That's correct.

18 COMMISSIONER JACOBS: Very well.

19 MR. ELLIS: Commissioner, I beg your pardon.
20 With respect to the motion to compel, I believe, that was
21 filed in the last couple of days and the time for the
22 response by Allied and CFI has not come up yet.

23 COMMISSIONER JACOBS: Right. And I may have
24 been in error in stating that's for decision today. That
25 is not. You're correct.

1 MR. ELLIS: Thank you.

2 COMMISSIONER JACOBS: Very well. Why don't we
3 figure out what's at issue and what's not. It's my
4 understanding that the motion to intervene is not in
5 controversy?

6 MR. ELLIS: That's correct, we don't oppose it.

7 COMMISSIONER JACOBS: Okay. So, show that the
8 motion for intervention is granted.

9 Now, there is a request for confidential
10 classification by Odyssey. And unless there is some
11 recent objection, I understand that can be granted. So,
12 we'll show that Odyssey's motion for confidential
13 classification or amended order for protective order -- or
14 amended motion for protective order, we'll grant the
15 confidentiality.

16 MR. ELLIS: Commissioner, I'd just like to make
17 one comment with respect to Odyssey's request for
18 confidential classification. We had filed an opposition
19 on September 25th. The grounds of the opposition is that
20 the premise for the motion appears to be a misstatement of
21 fact, the premise being that the documents for which the
22 protective order is sought were submitted by Odyssey's
23 affiliate, Sentry, to Tampa Electric in support of
24 Odyssey's efforts to obtain an electric rate under Tampa
25 Electric's Commercial Industrial Service Rider tariff.

1 The documents themselves show that they were not submitted
2 by support of any application under the Commercial
3 Industrial Service Rider tariff.

4 In fact, they were submitted in support of an
5 application for service under TECO's rate schedules IS-3
6 and IST-3, which are not confidential rate schedules. And
7 as we have examined the documents, we see no basis for
8 confidential classification of many of the documents
9 submitted during the time period from March of 1998
10 through and including July of 1998 before the tariff was
11 approved by the Commission.

12 The specific documents, which are the subject of
13 Odyssey's request for confidential classification, concern
14 financial information which Allied/CFI does not seek
15 disclosure of in this proceeding. We do not object to
16 confidential classification of the documents, which are
17 the subject of Odyssey's recent request.

18 We do object to the statement of grounds for
19 that confidential classification being that they were
20 submitted with respect to the Commercial Industrial
21 Service Rider tariff, because the documents themselves
22 reflect that they were not.

23 COMMISSIONER JACOBS: Okay. Well, we can
24 conform the ruling to simply state that they fall within
25 the guidelines of the confidentiality provisions. The

1 basis of it won't have any relevance.

2 MR. LONG: Commissioner, if Allied is not
3 objecting, then, there's really no cause for a long
4 discussion. I would just like to note, for the record,
5 that we disagree with Allied's last statement with regard
6 to the status of the documents in question. However, we
7 don't have to argue it, if they're not opposing the
8 motion.

9 COMMISSIONER JACOBS: Sounds like that's where
10 we are.

11 MR. LONG: Fine.

12 MR. SCHIEFELBEIN: May I be heard on my motion?

13 COMMISSIONER JACOBS: Very briefly. Sounds like
14 you're winning so far.

15 MR. SCHIEFELBEIN: I'll try not to screw that
16 up..

17 COMMISSIONER JACOBS: All right.

18 MR. SCHIEFELBEIN: Without belaboring the point,
19 it is our contention that those documents are, in any
20 event, protected. And we're talking about, I think, at
21 this point, two of three pages -- portions of two of three
22 pages of a company profile regarding Sentry.

23 And it is our position that, in any event, those
24 are protected under a confidentiality and nondisclosure
25 agreement entered into between Sentry Industries and Tampa

1 Electric in March of 1998. So, on whatever grounds,
2 without belaboring it, we think there's ample protection
3 by that agreement.

4 COMMISSIONER JACOBS: Okay. Sounds like we can
5 go back and simply state that we're granting -- show the
6 documents as being granted confidentiality treatment, and
7 we will just simply state that because they fall within
8 the scope of the existing provisions.

9 MS. STERN: Can I just make a clarification?

10 COMMISSIONER JACOBS: All righty.

11 MS. STERN: Yes, that they are confidential
12 under Chapter 366. Whether or not they are confidential
13 under the CISR tariff is not really pertinent to this
14 motion, this specific motion.

15 COMMISSIONER JACOBS: Right.

16 MR. LONG: Well, Commissioner, again, I'm
17 reluctant to waste our time arguing a point, if it's not
18 necessary, but counsel's last qualification does cause me
19 some concern. Our position is that these documents are
20 confidential, because they were provided pursuant to our
21 CISR tariff.

22 COMMISSIONER JACOBS: Right.

23 MR. LONG: Now, if we need to clarify that
24 point, we can.

25 COMMISSIONER JACOBS: Haven't we ruled on that,

1 though?

2 MS. STERN: That's currently -- the effect of
3 the CISR tariff and the confidentiality statement and the
4 CISR tariff is a question that TECO raised in its second
5 motion for reconsideration. That has to be addressed by
6 the full Commission.

7 COMMISSIONER JACOBS: Okay. But in the first --
8 I see, I understand. So, you still want to retain an
9 opportunity to make that argument, okay.

10 MR. SCHIEFELBEIN: May I?

11 COMMISSIONER JACOBS: I think, this probably --
12 well, I don't think. This is not where we want to deal
13 with that. We want to deal with it in its proper place.

14 MR. LONG: That's correct.

15 MR. SCHIEFELBEIN: May I offer a clarification
16 also that I would appreciate the order being reflective
17 of? Sentry -- having been granted intervenor status by
18 your first ruling, Sentry would join in Odyssey's request
19 for confidential classification. And we would ask that
20 the order reflect that both of those parties requested
21 confidential classification, and that request has been
22 granted.

23 COMMISSIONER JACOBS: Okay. Unless there's some
24 objection --

25 MR. ELLIS: No objection.

1 COMMISSIONER JACOBS: -- we'll show that
2 granted; a verbal motion by Sentry that they join in the
3 original motion and that they be granted under that
4 ruling.

5 Okay. We now have the motion for -- to provide
6 supplemental testimony and the motion for continuance.
7 What I'd like to do is -- and I understand there's been
8 requests for oral arguments on both of those. What I'd
9 like to do is let's take the motion for filing of
10 supplemental testimony first and then, second, we'll do
11 the motion for continuance. I'd like to allow 10 minutes
12 per side for oral arguments. Is that okay?

13 MR. LONG: That's fine with us, Commissioner.

14 COMMISSIONER JACOBS: And then, we'll go from
15 there. So, I guess, you can go first, TECO.

16 MR. LONG: Commissioner, could I ask a
17 procedural question?

18 COMMISSIONER JACOBS: Yes.

19 MR. LONG: The argument that we're about to make
20 involves information that is confidential. I would like
21 to have the freedom to be able to discuss these issues,
22 and I'm sure the other parties would, without fear of
23 violating the confidentiality of the information. And I
24 would request that the argument, at least, a portion of
25 this record, be sealed and available only to those who

1 have signed the nondisclosure agreement and, of course, to
2 the Staff and the Commissioners.

3 MR. ELLIS: We would object to that,
4 Commissioner. These are the kinds of limitations that
5 Allied will find itself faced with at the time that we
6 come to the final hearing. In many respects, particularly
7 with respect to the documents initially submitted by
8 Sentry and Odyssey in support of their request for rates
9 under TECO's interruptible tariffs, we find no basis for
10 confidential classification, again.

11 And at this time, our chief executive officer,
12 Mr. Namoff, is one of the persons prohibited from
13 considering and previewing confidential information. We
14 will be filing today, a motion to seek authorization to
15 disclose confidential information to Mr. Namoff. But to
16 the extent possible, we wish to limit the procedures and
17 opportunities for discussion of confidential information
18 that cannot be revealed to Mr. Namoff and that are the
19 same sorts of limitations that are going to be imposed on
20 us.

21 We're prepared to discuss the merits of TECO's
22 motion for leave to file supplemental testimony without
23 reference to confidential information, and I'd presume
24 that TECO would be as well. So, for that reason, we
25 oppose the request to seal the transcript.

1 COMMISSIONER JACOBS: Mr. Schiefelbein.

2 MR. SCHIEFELBEIN: We would have no objection to
3 sealing the transcript.

4 MR. LONG: Commissioner, again, without
5 belaboring this procedural point, I think that there would
6 be great benefit to the Commission of being able to have a
7 discussion, a very candid discussion, of the facts as they
8 exist now.

9 I understand why Allied would not want that to
10 happen. I would point out that this is legal argument at
11 this point with regard to the motions that have been
12 filed. I don't see that that creates any prejudice with
13 regard to Mr. Namoff. And I think, again, that the
14 parties and the Commission would benefit from a candid and
15 open discussion of the record as it exists right now.

16 COMMISSIONER JACOBS: Staff, any recommendation?

17 MS. STERN: We don't think it should be sealed,
18 because the requests for confidentiality have been filed,
19 and until they're ruled on, they are deemed confidential.
20 But if all the parties here have signed a nondisclosure
21 agreement and TECO is not -- you're not asking that Allied
22 or Odyssey not be allowed to hear this.

23 MR. LONG: No. I'm simply saying we're keeping
24 a transcript of what's going on here. All the parties
25 present, I believe, are either Commission Staff, Tampa

1 Electric employees, or parties who have signed the
2 nondisclosure agreement.

3 So, I have no objection to any of the parties
4 present hearing what I intend to say. I'm merely asking
5 that the transcript, which would otherwise be a public
6 record, be sealed and be available only to those who have
7 signed the nondisclosure agreement. And I can't see that
8 that prejudices anyone's interests.

9 MR. ELIAS: If I can make a couple of
10 observations. The first is that with respect to the P.A.
11 system in this room, it's available besides this room. If
12 we discuss it on mike in this room today, it will no
13 longer be confidential, because it will be disclosed.

14 The second thing is I don't quite understand the
15 need to interject factual matters into what, admittedly,
16 are legal arguments. And that gives me some concern as to
17 what exactly it is we're going to be considering.

18 The third thing is that this Commission has a
19 longstanding policy of keeping its proceedings open to the
20 public, except in the most extreme circumstances. And I
21 don't think that they're present here.

22 MR. LONG: Commissioner, I don't understand what
23 it is that we're afraid of, I really don't. This
24 proceeding has been going on for nine months, in large
25 part, because the parties have not been willing to deal

1 with the facts as they exist.

2 Now, if this proceeding is being broadcast, I'm
3 sure, there's a switch that can be flipped, and that
4 broadcast can be terminated if, in fact, it's being
5 broadcast, and I'm not sure that it is.

6 My point is that a simple look at the facts,
7 which pertain to the motions that are at hand, I think,
8 will be very helpful to the Commission in deciding the
9 future course of this proceeding. And I think that it's
10 time to do something that may be a little bit outside of
11 the Commission's normal routine, because all of us have
12 been burdened by a case which, in my view, is totally
13 without merit for nine months and gives every promise of
14 continuing for another nine months, unless we break this
15 cycle and start to look at the facts and look at the
16 record and make decisions that will move this case along.

17 And I'm merely asking for the opportunity to
18 discuss with you, in front of the parties, the record of
19 this case as it pertains to the motions that have been
20 filed. And I don't think that that's asking very much.
21 And I don't see the harm.

22 MR. SCHIEFELBEIN: Commissioner, I don't know if
23 this is helpful or not. It's offered to be helpful, but I
24 was advised just prior to this status conference beginning
25 that my client had intended to listen in by telephone

1 under the normal number. And I was told that opportunity
2 was not available for this event. I don't know if that,
3 in fact, is related at all to its broadcast for the
4 building.

5 MR. ELIAS: It will be --

6 COMMISSIONER JACOBS: Let's -- that's not really
7 an issue here, really. It is a longstanding -- more so
8 than tradition, it is a longstanding principle of law that
9 the sunshine provisions are particularly appropriate for
10 the proceedings that are ongoing before the Commission.
11 And, I believe, that applies to all proceedings and should
12 only be deviated from with great care and for particular
13 reasons.

14 What I understand to be the reasons today are
15 that it would facilitate a more detailed discussion of
16 sensitive facts. From my experience with this, I think,
17 you can take assurance that I've reviewed those -- at
18 least for today's purposes, I've reviewed the confidential
19 issues and will be able to consider those in due course.

20 But more importantly, I do not think that the
21 concerns that would be raised by -- to honor the
22 confidentiality of the information that I know is before
23 us today, it rises to the level of compromising the time
24 honored and, I believe, very appropriate adherence to
25 openness and sunshine provisions. And so, for those

1 reasons, I would deny that request.

2 MR. LONG: All right. Thank you, Commissioner.

3 I would like to distribute an item which is
4 subject to pending motion for confidential treatment --

5 COMMISSIONER JACOBS: Very well.

6 MR. LONG: -- to facilitate the discussion. I
7 am passing out envelopes marked confidential with this
8 item, which I will collect at the end of our argument.

9 Commissioner, what you have before you is a
10 revised exhibit that is attached to the supplemental
11 testimony of Mr. William Ashburn. And it is a revision of
12 an exhibit that appeared with his prepared direct
13 testimony.

14 Commissioner, first, let me make clear that this
15 supplemental testimony, in no way, changes or modifies the
16 position that Tampa Electric has taken in this proceeding.
17 As you may know, from the outset, our view of this case is
18 that under our CISR tariff, we are permitted -- in fact,
19 we are expected to negotiate with each customer who,
20 otherwise, qualifies for a CISR rate for the highest
21 possible rate within the range bounded by our incremental
22 cost to serve the customer on the low end and the,
23 otherwise, applicable rate on the high end and that no two
24 customers are entitled to the same rate, unless those two
25 customers are similarly situated. That is our view of the

1 case. It remains our view of the case.

2 In the original exhibit to Mr. Ashburn's
3 testimony, which we've provided, we offered a comparison
4 of what had been negotiated with Odyssey Manufacturing and
5 what had been negotiated or at least left on the
6 negotiating table with Allied/CFI.

7 In that original exhibit, on Line 8, there was a
8 comparison of the overall rate that resulted from the
9 negotiations in each instance. And at Lines 13 through 16
10 of that exhibit, we noted items that either customer had
11 offered, which created additional value and benefit to our
12 ratepayers and was, therefore, taken into consideration in
13 developing the rate offer that was ultimately made.

14 Our view, based on that original exhibit was,
15 and still is, that if you look at Lines 13 through 16,
16 there is no undue discrimination. Because to the extent
17 that there are any differences, they are directly
18 attributable to benefits that one customer was able to
19 provide our ratepayers that the other customer was not.
20 And we stand ready to have the Commission and the Staff
21 examine that in as much detail as they see fit.

22 Now, drawing your attention to Line 8, as I
23 said, those numbers represent an overall or average rate.
24 What we realized, in reviewing our underlying data in the
25 course of discovery, is that we had made an error in

1 calculating this overall number for Allied.

2 Now, that error had nothing to do with the
3 detailed information that we provided to Allied during our
4 negotiations with them. And an exhibit to Mr. Ashburn's
5 supplemental testimony is, in fact, the term sheet that
6 was provided to Allied in the course of our negotiations
7 with them. A review of that term sheet will show a number
8 of detailed rates.

9 In coming up with the average, which would be
10 the number for Allied appearing at Line 8, we discovered
11 that we had made an erroneous assumption with regard to
12 how much of their usage would be on peak versus how much
13 of their usage would be off-peak.

14 Since off-peak rates are generally much lower
15 than on-peak rates, that ratio gets to be pretty important
16 in coming up with what you think the average or overall
17 rate is.

18 The fact of the matter is that the ratio that
19 was mistakenly used in the analysis cannot be attained.
20 It is a mathematical impossibility. It is an error. If
21 one were to add up the total number of on-peak hours that
22 could possibly exist in a year, the on-peak ratio -- the
23 proper on-peak ratio for Allied would be much lower than
24 the erroneous number that was used in the model.

25 So, what this revised comparison represents is

1 an accurate comparison of the overall rates negotiated
2 with Odyssey and Allied. It is nothing more than the
3 correction of an error. It provides the Commission with
4 the facts.

5 COMMISSIONER JACOBS: As I understood it from
6 Mr. Ashburn's testimony, it's an underlying assumption as
7 opposed to a rate component.

8 MR. LONG: That's correct.

9 COMMISSIONER JACOBS: Okay.

10 MR. LONG: And there is no -- we're not making
11 any change with regard to what we're saying was on the
12 table with Allied. The numbers in that term sheet
13 attached to Mr. Ashburn's testimony are the numbers that
14 were provided to Allied during the negotiation.

15 And to get to this overall number, all one had
16 to do was to assume some ratio of usage on peak to
17 off-peak, something that certainly Allied would have a
18 better sense of than Tampa Electric, since we're talking
19 about their operation.

20 COMMISSIONER JACOBS: I see.

21 MR. LONG: So, my point is that to object to
22 this on the ground that somehow it changes our case or
23 changes our theory of the case misses the point entirely.
24 These are the facts. This is the math. To argue that
25 this information should not be provided is to argue that

1 the Commission should decide the issues in this case based
2 upon fictitious circumstances. And, of course, that would
3 be an absurd thing to do or to ask the Commission to do.

4 Now, I mentioned earlier that our theory of this
5 case has not changed. The fact that in the revised sheet
6 these numbers are what they are, to us, simply reinforces
7 our original point that Allied's complaint, in this case,
8 is totally completely without merit.

9 We felt that way based on the earlier sheet,
10 because of the difference that it showed on Lines 13
11 through 16. Those differences were entirely explainable,
12 entirely justifiable, and entirely substantiated. And we
13 submitted that those differences prevented Allied's claim
14 of undue discrimination. Any differences were justified.

15 What this revised testimony shows is that while
16 that principle remains as true as ever, Allied really had
17 nothing to complain about to begin with, nothing
18 whatsoever. And, Commissioner, that's what really adds to
19 our concern.

20 COMMISSIONER JACOBS: If I may, I think, you may
21 be venturing more into a motion for dismissal now than a
22 motion for --

23 MR. LONG: Well, you can't blame me, but I
24 will --

25 COMMISSIONER JACOBS: Given the history, I

1 understand, I certainly can understand that, but --

2 MR. LONG: All right. Well, essentially, with
3 regard to the supplemental testimony, I've mentioned
4 Mr. Ashburn's testimony. With regard to Ms. Westra's
5 testimony, again, the subject matter there is an attempt
6 to explain to the Commission the significance of
7 correcting the error in Mr. Ashburn's testimony.

8 And it simply makes an observation about
9 Allied's continued eligibility. It is a matter of fact
10 that simply can't be changed and can't be ignored. Now,
11 we would never refuse to negotiate with a customer. And
12 that is not the point of that testimony.

13 We are simply saying that given the information
14 that we have, the conclusion that's reached there, with
15 regard to eligibility, is something that seems obvious.
16 And for that reason, I think that it's important for the
17 Commission to have that information before it.

18 COMMISSIONER JACOBS: Now, as I understood it
19 from Mr. Ashburn's testimony as well, this same error was
20 made in your negotiations with Odyssey; is that correct?

21 MR. LONG: Well, it was, in a sense, but the
22 reason that it doesn't matter is that in the case of
23 Odyssey, what was negotiated was the fixed fee.

24 COMMISSIONER JACOBS: Right, I saw that. They
25 opted for the fixed rate. And so, the varying component

1 didn't become a factor.

2 MR. LONG: Didn't make any difference there.

3 COMMISSIONER JACOBS: Okay.

4 MR. LONG: I understand from Allied's pleading
5 opposing our motion to file supplemental testimony that
6 they do not take issue with the correction contained in
7 Mr. Sweat's testimony. And given that, I will not take up
8 your time with any discussion of that change.

9 COMMISSIONER JACOBS: Very well. Mr. Ellis?

10 MR. ELLIS: Thank you, Commissioner.

11 Allied does not oppose the motion with respect
12 to the proposed supplemental testimony of Mr. Sweat.
13 Turning to the testimony of Ms. Westra, it's plainly an
14 attempt to reargue and revise TECO's statement of position
15 with respect to whether Allied and CFI qualified for the
16 offer of a CISR tariff rate that was made to them on
17 October 18th, '99.

18 There is no basis for TECO to attempt to change
19 its position at this time. It's simply an attempt to
20 reargue, an attempt to introduce a ground for a motion to
21 dismiss. There's no procedure that permits TECO to do
22 that. And we certainly object to it.

23 COMMISSIONER JACOBS: That's the portion of
24 Mr. Ashburn's testimony, which raises the idea of a --

25 MR. ELLIS: Actually, I was referring to the

1 testimony of Ms. Westra.

2 COMMISSIONER JACOBS: Oh, I'm sorry, you're
3 right. That was the one. Let me make sure I'm not at a
4 place where I might be risking undue disclosure. Well, I
5 just had it. What did I do with it? Oh, that's in my
6 package, that's why.

7 MR. ELLIS: Our position that it's just another
8 attempt by TECO to retaliate against Allied/CFI for filing
9 this proceeding. It's inconsistent with the stated goals
10 and purposes of the CISR tariff, which requires legal
11 attestation by the customer to the effect that but for the
12 application of the rider to the new or retained load, such
13 load would not be served by the company.

14 Ms. Westra's proposed supplemental testimony is
15 an attempt to revise that tariff term to state that not
16 only that the new load would not be served by TECO, but
17 also that it would be served by another supplier within a
18 fixed period of time. They're attempting to reinterpret
19 the tariff term and raise a new ground for a motion to
20 dismiss without any basis to do so. And we oppose the
21 motion with respect to Ms. Westra's testimony.

22 Turning to Mr. Ashburn's testimony, this is an
23 issue of some amusement to us. After having heard many
24 entitlements for many months about the impregnable defense
25 of the document filed as document number 03142-00 on March

1 10th, TECO began by saying that it had evidence so
2 conclusive of the issues raised in this proceeding that
3 the filing of it to the Commission and the Staff alone
4 should be determinative of the case. That was TECO's
5 position in February. And they represented that the
6 document would be filed in March.

7 The document filed as 03142-00, which is also
8 Exhibit 2 to the original testimony of Mr. Ashburn filed
9 on June 28th, is a side-by-side comparison of what TECO
10 contends is the rates offered to Odyssey compared to the
11 rates offered to Allied.

12 Briefly, without arguing the merits, we believe
13 that neither the rates that TECO contends were offered to
14 Odyssey are, in fact, the rates for which Odyssey is
15 receiving service nor does TECO's representation of the
16 rate offered to Allied represent, in fact, the rate
17 requested by Allied.

18 A brief comment in response to your last
19 question to counsel for TECO. We sincerely disagree with
20 the proposition that Allied opted for the rate based on
21 peak and off-peak demand. We have said, in testimony we
22 filed and many times in this case, we specifically asked
23 for the rate TECO gave Odyssey and would certainly not
24 agree with the characterization that we requested a rate
25 based on peak and off-peak service.

1 In March, this document was filed with a
2 side-by-side comparison. Again, we hadn't seen the
3 document. It was asserted as a basis for TECO's motion
4 for procedures for summary disposition of this action
5 without disclosure to us of that information. That motion
6 was rejected.

7 Your discovery order issued in June ordered TECO
8 to produce this document to us. It was filed as Exhibit 2
9 to the testimony of Mr. Ashburn on June 28th, one day
10 after the order was issued, still had not been produced to
11 us. TECO moved for reconsideration of the order requiring
12 disclosure to Allied/CFI of confidential information.
13 That motion was decided on August 1st. At that time, we
14 still had not seen the side-by-side comparison of TECO's
15 version of the rates offered Allied and CFI versus the
16 rates offered Odyssey.

17 That is a period of almost eight months during
18 which TECO had sole possession of the information upon
19 which that document was based. We received a copy of the
20 document following the August 1st Agenda Conference and
21 copies of documents produced in response to our discovery
22 request on August 14th.

23 Without any filing by us, without any production
24 of documents by us, low and behold, for the first time,
25 TECO decides that the impregnable defense stated in this

1 document filed in March as a basis for summary disposition
2 of the case was an error.

3 The basis for the error, according to TECO, is
4 an assumption concerning the peak and off-peak consumption
5 for Allied/CFI proposed new membrane cell plant. In fact,
6 that subject was discussed with TECO's representative,
7 Mr. Rodriguez, at a meeting at Allied's facility in Miami
8 in September of 1999.

9 Mr. Rodriguez was told that Allied's proposed
10 new facility could not be operated on the assumptions of
11 peak and off-peak demand represented in Mr. Ashburn's
12 proposed supplemental testimony. And after being told
13 that, Mr. Rodriguez provided the offer of rates to
14 Allied/CFI, that is stated in Mr. Ashburn's original
15 Exhibit 2 and the document filed in March.

16 TECO is attempting to revise and restate what
17 its offer was to Allied in October of 1999 after having
18 had sole and exclusive possession of all information upon
19 which to state that comparison and after having
20 represented to the Commission that the statement of it
21 would be a basis for a final disposition of this action.

22 If Mr. Ashburn wishes to explain his testimony
23 before the Commission, that's certainly his right, but
24 this is, in no way, a correction. It is a restatement and
25 a revision of the testimony that he filed on June 28th.

1 And there is no basis for it, other than TECO's attempt to
2 introduce a new issue into this action, and we certainly
3 object to it.

4 MR. LONG: Commissioner, may I be heard briefly?
5 And I will be brief.

6 COMMISSIONER JACOBS: Did you --

7 MR. SCHIEFELBEIN: Commissioner, we just support
8 TECO on their motion. Thank you.

9 COMMISSIONER JACOBS: Okay. Mr. --

10 MR. LONG: Let me just make a few points, and I
11 won't dwell on this.

12 In its pleadings and, again, here this
13 afternoon, Allied has referred to the long and drawn out
14 process that we've all gone through with regard to
15 discovery and complains that Tampa Electric had this
16 information in its sole possession until August.

17 I would just like to remind the Commission that
18 the nondisclosure agreement that we ultimately signed was
19 very close to the arrangement that we offered to Allied in
20 May, several months earlier. In fact, even though we had
21 motions pending before the Commission with regard to the
22 proper scope of a nondisclosure agreement, Tampa Electric
23 offered to allow Allied access to all the confidential
24 information pursuant to the agreement that ultimately we
25 executed pending Commission resolution of the discovery

1 dispute.

2 Allied could have had access to this information
3 as early as May of this year. And it chose to drag this
4 thing out and make these absurd arguments. And,
5 ultimately, in August, we ended up agreeing on a
6 nondisclosure agreement that was not identical, but very
7 close, in important respects, to what we proposed to them
8 in May.

9 And the very afternoon that we agreed to that
10 nondisclosure agreement, we walked out of the Commission
11 hearing room, and we gave Allied a copy of this comparison
12 sheet. We were anxious for them to have this information.

13 Now, just a few other points I'd like to make.
14 First, in terms of Ms. Westra's testimony, all that
15 Ms. Westra is saying is that certainly at the time that we
16 were negotiating with Allied, we had every reason to
17 believe that they weren't at risk load, but the fact is
18 here we are over a year later, and Allied has not gone
19 anywhere.

20 So, that has to tell you something about how at
21 risk that load is. That's all that Ms. Westra is saying.
22 It's not a change in any of our testimony or any of our
23 positions. It's a statement of the obvious. If they're
24 at risk, why haven't they gone?

25 With regard to Mr. Ashburn's testimony, we did

1 not say that Allied asked for time of use rate. What we
2 said, and what is the case, is that what was left on the
3 negotiating table when Allied broke off these negotiations
4 was a time of use rate.

5 And if you look at Line 8 of Mr. Ashburn's
6 supplemental comparison, it tells you what that
7 supplemental rate meant, vis-a-vis what was offered to
8 Odyssey. If you look at Line 19 and you remove the
9 benefits that you see on Lines 13 through 16, it shows you
10 what the two rates were in comparison the overall rates.

11 So, when Mr. Ellis tells you that somehow Tampa
12 Electric has changed its testimony, the fact of the matter
13 is that the underlying time of use rates with the rates
14 that were left on the negotiating table when Allied left.
15 And for better or for worse, this exhibit, Line 8 and Line
16 19, tells you how those rates compare with what was
17 negotiated with Odyssey. That's fact.

18 Thank you, Commissioner.

19 COMMISSIONER JACOBS: Very well. Staff?

20 MS. STERN: With respect to Mr. Ashburn's
21 testimony, Staff is really disturbed that it was submitted
22 at all and that the numbers are changing at this point.
23 But having said that, it's a policy at this Commission to
24 allow in testimony when it purports to be correcting an
25 error. Whether or not there actually is an error is

1 something that can be fleshed out down the road. So,
2 Staff would suggest letting Mr. Ashburn's testimony to be
3 admitted or to grant the motion with respect to that.

4 Mr. Sweat's testimony wasn't contested.

5 With respect to Ms. Westra's testimony, it
6 doesn't purport to correct an error. It more introduces a
7 new issue than correct an error. And we recommend that
8 the motion not be granted with respect to her testimony.

9 COMMISSIONER JACOBS: Okay. As to Ms. -- is it
10 mister, yeah, Mr. Sweat's testimony, we'll grant the
11 motion that it is not contested.

12 As to Mr. Ashburn's testimony, I would echo the
13 concerns presented by Staff, more so because it sounds
14 very much that had this -- and as parties have indicated,
15 it sounds very much that had this been entered into the
16 discussion and debate as early as possible, it could have
17 worked very well to ease a lot of the -- what's that fancy
18 word, litigiousness of this proceeding. And it's very
19 regrettable that -- well, it's not so much this specific
20 information, it's getting to this level of candor is
21 really the issue.

22 But I would also agree that it appears that it
23 is correcting an underlying assumption. It is not
24 modifying the rate elements, it is not adjusting any part
25 of the analysis as to either -- well, I take that back.

1 It did adjust a bit of the analysis, but it was -- it was
2 my understanding that that analysis was -- that it was a
3 fallout, really. I should digress even further. When I
4 say analysis. I mean, the analysis of which one would
5 have qualified for the CISR rate.

6 It did address a bit of the qualification factor
7 for Odyssey's qualification, but not to the extent that my
8 mind was of a significant nature. So, as to Mr. Ashburn's
9 testimony, we will allow that to be filed. Show that
10 motion granted.

11 As to Ms. Westra's testimony I'm persuaded to
12 grant in part and to deny in part. As I review the
13 testimony from pages -- from lines -- Page 1, Line 6,
14 through Page 3, Line 16, that seems to be Ms. Westra's
15 reflection on the amendments done in Mr. Ashburn's
16 testimony; is that correct, Staff?

17 In other words, she's simply giving her
18 reflections on the corrections made in Mr. Ashburn's
19 testimony. And it does not appear to be while there is
20 one statement I don't like, it does not appear to bolster
21 or boost any position at all. It really is reflecting on
22 the change that was made.

23 Well, I tell you what, so that it's not really
24 -- let's just --

25 MS. STERN: Sorry. Yes, Staff agrees with you.

1 COMMISSIONER JACOBS: As to the testimony
2 included on Page 3, Line 18 through to Page 4, Line 15 --
3 or actually, Page 4, Line 13, I would deny the motion. I
4 would state that in balancing the interest with regard to
5 allowing this testimony in, it drifts too far into a realm
6 of adding or bolstering -- actually, adding a different
7 slant on a position. It could arguably have been raised
8 in a motion to dismiss, no doubt, but that's not what this
9 is. And so, I would deny the motion as to that testimony.
10 That disposes of the TECO motions, correct?

11 MR. LONG: Commissioner, may I be heard briefly?

12 COMMISSIONER JACOBS: Briefly.

13 MR. LONG: We also regret that this information
14 could not have been brought forward earlier. I would
15 point out that when we discovered the error, we
16 immediately brought it to the Commission's attention
17 through supplemental testimony as opposed to attempting to
18 spring this on the parties at hearings.

19 COMMISSIONER JACOBS: We can concur with that.

20 MR. LONG: Thank you, Commissioner.

21 COMMISSIONER JACOBS: Very well. Mr. Ellis.

22 MR. ELLIS: Just a response, thank you,
23 Commissioner. And that is to address the notion that the
24 protective agreement, ultimately, executed in August was
25 very similar to the one offered in May.

1 COMMISSIONER JACOBS: Right.

2 MR. ELLIS: The one offered in May was to allow
3 disclosure to Allied/CFI's counsel only and not to any of
4 its officers or employees. To suggest that that's nearly
5 the same as what we wound up with in August is no closer
6 to actual fact than this document submitted with
7 Mr. Ashburn's supplemental testimony is to what the rates
8 that Odyssey currently receives are based, in fact, or at
9 the rates that were offered Allied/CFI.

10 MR. LONG: Commissioner --

11 COMMISSIONER JACOBS: I'm going to close it
12 down. I think, the motion is there and a ruling is there
13 and they can speak for themselves.

14 Now, there remains the request for
15 confidentiality. I am not going to rule on that now.
16 And, specifically, I'd like for Staff to -- there is a
17 concern here that some of the text for which
18 confidentiality is requested, there may be some question
19 as to whether or not it really, indeed, should be granted.
20 So, I'm going to allow time for Staff to review, and I'm
21 going to indicate to them the sections that -- I can tell
22 you the sections, on the record, that I'm concerned with.
23 Page 4, Lines 8 through 21 --

24 MR. LONG: Commissioner, which document are
25 you --

1 COMMISSIONER JACOBS: This is Mr. Ashburn's
2 supplemental rebuttal.

3 MR. LONG: Okay.

4 COMMISSIONER JACOBS: Page 5, Lines 18 through
5 24; Page 6, Lines 5 through 12; Page 7, Lines 7 through
6 17. And an order will be coming out on those.

7 Mr. Ellis, your motion.

8 MR. ELLIS: Thank you, Commissioner.

9 Allied and CFI have moved for continuance of the
10 final hearing date of October 31st and for additional time
11 to file rebuttal testimony and exhibits, based on the fact
12 that we first received production of documents from TECO
13 on August 14th in response to discovery requests we sent
14 on February 2nd.

15 That is, we spent six months waiting to get the
16 first document and giving us six weeks from that date to
17 complete discovery and file rebuttal testimony is more
18 than we could do, particularly, with two additional
19 limitations, which are being addressed in a motion that
20 will be filed today.

21 And that is the refusal to allow Mr. Namoff, our
22 chief executive officer, principle witness, and the person
23 who participated in the majority of Allied/CFI's dealings
24 with TECO, to review that confidential information and the
25 refusal of TECO and Odyssey to permit additional attorneys

1 for Allied/CFI to review confidential information. That
2 is the subject of a motion we're filing this afternoon.

3 The documents produced on August 14th reveal
4 significant new issues concerning the value of the service
5 TECO -- excuse me, the value of the service that Odyssey
6 is receiving from TECO. We sincerely disagree that that
7 value is reflected in either of the documents attached as
8 exhibits to Mr. Ashburn's testimony, either Exhibit 2 to
9 his testimony filed June 28th or the exhibit to his
10 testimony that the Commission -- that you have approved to
11 be filed today, particularly Sections 2.6 and 2.7 of the
12 contract service agreement, we believe, to be terms that
13 have significant economic value, independent of the value
14 attributed to them in Mr. Ashburn's analysis.

15 Further discovery is necessary to determine that
16 value. We have issued interrogatories to TECO. They've
17 served objections to them. It's clear they're not going
18 to permit discovery on that subject. This is something
19 they certainly don't want to have to deal with, but we
20 believe it's essential to determine the value of the
21 guarantee stated at Sections 2.6 and 2.7 of the contract
22 service agreement.

23 And our expert witness and consultant,
24 Dr. Philips, has also indicated that this information is
25 necessary to come to an evaluation of the value of the

1 rate offered by TECO to Odyssey. That is one of the
2 subjects revealed in the documents produced by TECO on
3 August 14th that additional discovery is necessary to
4 finalize.

5 Additionally, there are a number of documents
6 that were produced by TECO on August 14th that were
7 received by TECO from Sentry and Odyssey between the
8 period of time of late February 1998 to the summer of 1998
9 before the CISR tariff was approved which, we believe, do
10 not have a basis to be considered confidential.

11 We will move to withdraw confidential
12 classification as to those documents so that they can be
13 discussed in a public hearing and in testimony filed
14 publicly and not be a source of limitation on the
15 discussion of the facts on those issues.

16 We also are faced with the dilemma of being
17 required to, insofar as possible, comply with your
18 directive at the prehearing conference in July and conduct
19 as much cross examination of TECO witnesses as possible by
20 deposition in order to avoid a closed public hearing.

21 While, at the same time, having been advised
22 that only one deposition per witness will be allowed and
23 not having been able to complete discovery, we have also
24 been expecting that at some point TECO would serve answers
25 to Staff's first set of interrogatories, which were served

1 on TECO in February. And as of this date, no answers have
2 been provided, at least to us.

3 We reissued those six interrogatories as part of
4 Allied/CFI's second set of interrogatories and understand
5 that at least some of them are not objected to. And we'll
6 need to receive the answers to those interrogatories so
7 that we can complete depositions of witnesses and file
8 rebuttal testimony.

9 We wish to proceed with the case. We do not
10 seek an open-ended extension or continuance of the final
11 hearing date. We recognize that the matter has to be
12 brought to conclusion. We sincerely disagree with TECO's
13 statement of the merits of the case, but we'll save those
14 arguments for the hearing and not make them at this time.
15 I think, we've made them sufficiently today.

16 I would like to make a couple more points, if
17 you could give me just a moment to find some notes here.

18 COMMISSIONER JACOBS: Okay.

19 MR. ELLIS: Again, our principle witness in this
20 case is Allied's chief executive officer and the person
21 who, personally, conducted most of the negotiations with
22 TECO, Mr. Namoff. Mr. Namoff, at this time, has not been
23 permitted to review confidential information.

24 There are a number of issues raised in the
25 documents produced by TECO and in the testimony filed by

1 TECO that only Mr. Namoff can respond to and that the two
2 persons currently authorized on behalf of Allied/CFI to
3 review confidential information cannot respond to.

4 Further, Mr. Namoff has recently undergone
5 surgery and would not be --

6 MR. LONG: Excuse me, Commissioner, I fail to
7 see how this pertains to the motion for continuance. It
8 seems that counsel is arguing this motion that he intends
9 to file to have the Commission revise its earlier
10 decision. I'd be happy to address that at the proper time
11 once I see his motion, but I think it's inappropriate to
12 get into that here.

13 COMMISSIONER JACOBS: Mr. Ellis?

14 MR. ELLIS: I was trying to --

15 COMMISSIONER JACOBS: The argument is that your
16 arguments tend to go to whether or not Mr. Namoff should
17 be covered by the protective order or not as opposed to,
18 per se, on your motion for continuance.

19 MR. ELLIS: Yes. The connection is that we have
20 to have Mr. Namoff available to file rebuttal testimony
21 and testify at the final hearing. And he needs to review
22 the confidential information to be able to do so.

23 COMMISSIONER JACOBS: You indicate he's in ill
24 health?

25 MR. ELLIS: And he recently underwent surgery

1 and has been advised by his doctor that he must not travel
2 by airplane for a period that will conclude through the
3 month of October. And so, in any event, would not be able
4 to be here for the scheduled hearing date of October 31st.

5 We have consulted with our expert witness,
6 Dr. Philips. His availability is open for the period of
7 30 to 90 days in which we have requested a continuance of
8 the hearing, with the exception of December 15th through
9 25th, with respect to his --

10 COMMISSIONER JACOBS: Tell him those dates are
11 pretty safe.

12 MR. ELLIS: Good, all right.

13 To conclude, we spent six months getting the
14 first document in this case. We've had six weeks since
15 that time. That's not a sufficient amount of time to
16 complete discovery and file rebuttal testimony,
17 particularly, when our primary witness has been prevented
18 from seeing the information and when we have requested and
19 been refused an opportunity to have additional attorneys
20 review the information. We do not seek an open-ended
21 extension of time. We seek a continuance of 30 to 90
22 days, and we're prepared to move forward with the case.

23 COMMISSIONER JACOBS: Very well.

24 MR. ELLIS: Thank you.

25 COMMISSIONER JACOBS: Mr. Long?

1 MR. LONG: Commissioner, I think that you've
2 just heard reasons that explain why this proceeding has
3 been strung out to the extent that it has. I want to
4 refer, first of all, to one of the points that counsel
5 made about some of the Odyssey documents not being
6 confidential and his intent to file yet another procedural
7 motion asking the Commission to withdraw confidential
8 treatment. The idea is absurd.

9 The point is that Tampa Electric's negotiations
10 began in March of '98 with Odyssey's predecessor, Sentry
11 Industries. Odyssey didn't exist at the time. The
12 negotiations were for a special rate, not an interruptible
13 rate, for a special rate for a new bleach plant that
14 Sentry was intending to build in Tampa or elsewhere.

15 Tampa Electric entered into a nondisclosure
16 agreement with Sentry covering materials that would be
17 provided as part of the discussions for a special rate for
18 that bleach plant. Subsequently, those negotiations
19 continued, Odyssey was formed some months later, Tampa
20 Electric's CISR tariff was approved in August of '98, and
21 an agreement was reached with Odyssey and CSA executed in
22 September of '98.

23 All of the documents that we're talking about
24 here were documents that were submitted pursuant to
25 discussions for a special bleach plant. All of these

1 documents form the basis for the CSA that was ultimately
2 executed between Tampa Electric and Odyssey.

3 Now, counsel wants to waste more of the
4 Commission's time trying to argue that the documents that
5 were provided before the CISR tariff was approved don't
6 deserve confidential treatment.

7 Well, we can spend another month or two arguing
8 that absurdity or we can get to the facts and deal with
9 this case and dispose of it, as it should have been
10 disposed of several months ago. This is an example of why
11 this case is being strung out.

12 Now, I made the point earlier that as early as
13 May, we offered the compromise with counsel on this
14 discovery issue so that his clients could have access to
15 the information to present their case. If you recall, we
16 made a number of compromises.

17 Our initial position was that our tariff said
18 the information was only available to the Commission and
19 Staff. That's what the tariff says. And we were simply
20 trying to enforce the tariff as written.

21 But in the interest of trying to move this
22 proceeding along, yes, we compromised and said, well,
23 counsel for Allied can see the information and represent
24 Allied's interest. Counsel said no, that won't work. We
25 then said, well, counsel and outside experts can review

1 the information and represent Odyssey's interest -- I
2 mean, Allied's interest. Counsel said, no, that's not
3 going to work.

4 We then said, well, gee whiz, counsel, outside
5 experts, and employees who aren't involved in the
6 competitive activities of the company can review the
7 information. Counsel said, no, that's not going to work.
8 There is no one, aside from Mr. Namoff, who can adequately
9 represent the company's interest. That's where we were
10 back in May or June.

11 We offered to allow Allied and its experts to
12 review this information, begin taking depositions, move
13 the case forward with the understanding that if the
14 Commission subsequently determined that broader access to
15 the information was appropriate that that broader
16 information could be afforded, but at least we could get
17 going and get into discovery and move this case along.

18 Allied said no, we don't want to do that. So,
19 where did we find ourselves? We found ourselves into
20 August when finally, Allied agreed, well, okay, Mr. Namoff
21 is an essential, there are other people at Allied,
22 employees of Allied, who are capable of reviewing this
23 information and adequately representing the company's
24 interest. That's what counsel for Allied said.

25 So, on that basis, finally, he agreed to enter

1 into a nondisclosure agreement so we could get this
2 discovery process on the road. That very day, that
3 afternoon, we walked out of this hearing room and provided
4 counsel with the comparison sheet that we mentioned
5 earlier. And several days later gave him access to all
6 the documents that had been passed on by the Commission.
7 That was August 14th.

8 Now, the issues that counsel raises in its
9 request for a continuance are all issues that were, in our
10 view, red herrings, but at least obvious from a review of
11 the comparison document, which they got in early August
12 and the CSA, which they got in mid August. It took them
13 six weeks to decide, well, gee whiz, we can't move
14 forward.

15 During that period, I had several conversations
16 with counsel for Allied offering to make our witnesses
17 available here in Tallahassee for depositions. Now, on
18 several occasions, counsel told me, well, no, that's okay,
19 never mind, we're not ready to go. We were ready to go.
20 We were ready to make our witnesses available six, seven
21 weeks ago for depositions. It's Allied that didn't want
22 to take those depositions.

23 Now, we get to a point that two days, two
24 business days, before the rebuttal testimony is due and
25 all of a sudden, they decide, well, gee whiz, there are

1 these big issues that have just occurred to us and we're
2 totally unable to move forward.

3 Well, you know, what are these big issues?

4 Well, one is a claim that there is some provision in the
5 CSA with Odyssey that's unprecedented. Well, there's
6 nothing unprecedented. It's a special agreement. You
7 negotiate the terms, the terms are what they are. Now,
8 what makes it unprecedented? Well, is Allied saying that
9 we refused to offer them those terms? Well, they didn't
10 negotiate with us. They walked away from the table. Who
11 knows what could have been negotiated, if they'd continued
12 to negotiate with us? To me, that's not an issue. It's
13 entirely irrelevant.

14 Their next issue is that there are things of
15 value that somehow, you know, weren't taken into account
16 in this comparison sheet. Well, I think, the technical
17 Staff can certainly advise the Commission on that. I
18 think the Staff understands entirely the RIM analysis that
19 was done and the way those numbers were used and what
20 assumptions were made.

21 And I think that anyone with any understanding
22 of that analysis can tell you right off the bat that
23 Allied's assertions are totally without merit. In other
24 words, what you have been given are a whole kettle full of
25 red herring in an effort to disguise the fact that Allied

1 has no case. They have no case. And that is the bottom
2 line here. And we could go on with discovery from here
3 until doomsday. And that's not going to change.

4 You know, what are their allegations? Their
5 allegations are there's been nefarious activity between a
6 former Tampa Electric employee and Odyssey. Well, you've
7 got the testimony of Mr. Sidelko that tells you that the
8 employee in question was not the first choice for this job
9 at Odyssey. That job was offered to someone else. And
10 Tampa Electric's employee wasn't approached until
11 December, several months after the CSA had been signed.

12 And once that person was approached, he left the
13 company, he left Tampa Electric several weeks later. So,
14 where is this terrible conspiracy that they allege? You
15 have the comparison sheet. You know, Mr. Ellis says that
16 there's a terrible crack in our case, because we admitted
17 an error in the exhibit that we said was conclusive.

18 Well, I fail to see that. We said the original
19 exhibit showed that Allied had no case. The revised
20 exhibit shows they absolutely have no case. So, to
21 suggest that the revision somehow represents a weakness in
22 our case really escapes me. It makes no sense whatsoever.

23 You know, counsel also alludes to another red
24 herring that he intends to drag before the Commission, the
25 notion of having additional counsel qualified to review

1 the documents that are subject to the nondisclosure
2 agreement.

3 Well, my conversation with counsel was that to
4 the extent that Allied had other counsel who were
5 representing it in this proceeding that we would certainly
6 not object. But the counsel that he mentioned to me are
7 counsel that have no expertise with regard to Commission
8 regulatory matters. They have expertise in antitrust,
9 federal criminal litigation, which may serve some other
10 purpose that counsel has in mind.

11 But my point to him was that our nondisclosure
12 agreement, in this case, is not to be used as a basis for
13 gathering information to be used in possible other
14 litigation. And I would submit that that is exactly what
15 counsel intended to do and Tampa Electric objected to it.

16 So, again, he is raising issues with you to try
17 to make you think that, gee whiz, there are all these
18 insurmountable hurdles that have been placed in Allied's
19 way when, in fact, they have had the opportunity to move
20 forward with discovery for months, and they have delayed.
21 They have delayed because they realize that they have no
22 case. And our point is, simply, that the Commission
23 should not allow this process to be extended and dragged
24 out for no useful purpose. And I submit that that's where
25 we are today.

1 Thank you, Commissioner.

2 COMMISSIONER JACOBS: Mr. Schiefelbein.

3 MR. SCHIEFELBEIN: Commissioner, at this point,
4 I'd refrain and stifle myself, other than to say that
5 substantively we agree with TECO's arguments. We've
6 indicated, previously, and we'll stand by our agreement
7 that as a matter of courtesy we would not independently
8 oppose the motion for continuance.

9 All that I would ask is that depending on what
10 your decision is on that, there are either ways certain
11 ramifications that affect Odyssey and the presentation of
12 their case, and at that time I'd like to address them.
13 But at this point I'd stand at ease.

14 COMMISSIONER JACOBS: Very well. Staff?

15 MS. STERN: Staff thinks that Allied is facing
16 at least two serious obstacles to be able to be ready for
17 a hearing by October 31st. One is that TECO submitted
18 supplemental testimony just a week, week and a half ago,
19 and it changes some important assumptions. And Allied
20 should be able -- we've admitted that testi-- we've
21 granted the motion to admit the testimony. Allied should
22 be given the chance to file rebuttal testimony against it,
23 do discovery on it. I think, it's unreasonable to think
24 Allied could do that by October 31st.

25 Also, Staff has just completed its in-camera

1 review of the 2,000-plus pages that TECO submitted back in
2 March. Staff had to do that in order to respond to
3 Allied's PODs to TECO, PODs number 6, 7 and 8. TECO won't
4 be able to produce that information to Allied until that
5 order is issued.

6 It's quite a bit of information to be produced,
7 quite a bit of information to go through. So, Allied
8 needs the time to do that. Staff recommends that the
9 motion for continuance and the extension of time to file
10 rebuttal testimony be granted.

11 COMMISSIONER JACOBS: Very well. This is an
12 especially challenging docket and needs to come to some
13 resolution very quickly. However, I do concur with the
14 idea that as this docket has evolved, the complication
15 factor has increased considerably. And as we sit today,
16 there are important challenges that I believe need to be
17 overcome primarily by Allied.

18 It is important as we resolve this issue that we
19 do so with a full discussion of the facts and the law.
20 And while I do not agree with all of the rationale put
21 forward by Allied, there are certain and limited numbers
22 of those that I do think warrant a limited continuance.

23 And so, on that basis, I would grant Allied's
24 motion for a continuance. We do not have a date for
25 which, but it would absolutely be within the 30 to 90-day

1 time frame and preferably much sooner. We're looking for
2 scheduling to give us that date, because we will probably
3 have to adjust existing events on Commission calendar.

4 My preference would be that it occur before the
5 end of the year. Was that -- no, in January -- late
6 January or early February is what we thought would be it?

7 MS. STERN: Yes. We thought that perhaps late
8 January, mid February, be an appropriate time, but if
9 Allied believes they can be ready within 30 to 90 days
10 and, I think, they're the party with the most work to do
11 at this point and --

12 COMMISSIONER JACOBS: No. We're going to put
13 this on as precise a track today as we absolutely can. We
14 must move forward with all deliberate speed in this
15 docket. It will go no -- it's obvious, at least to
16 myself, that this docket will go nowhere, unless we just
17 absolutely make sure we get it taken care of. And so --

18 MR. LONG: Commissioner, I would suggest -- I
19 mean, if there's going to be a continuance, that it not be
20 anymore than 30 days. I mean, the supplemental testimony
21 that we've just admitted, granted, it further
22 substantially weakens Allied's case, but it's old news.
23 Nothing's changed.

24 COMMISSIONER JACOBS: My problem, Mr. Long, is
25 it's not so much convenience to Allied, it is our

1 calendar. It is, particularly, complex right now. And I,
2 quite frankly, would rather the shortest possible time.
3 I'd indicate to you that would be my preference to the
4 schedule is that we get the most immediately available
5 date as possible to reschedule this hearing.

6 MR. LONG: We would concur with that,
7 Commissioner, definitely.

8 COMMISSIONER JACOBS: Off the record for a
9 moment.

10 (Discussion off the record.)

11 COMMISSIONER JACOBS: So, we're clear as to the
12 ruling on Allied's motion. It's granted for a limited
13 continuance, the time certain to be determined when we
14 have a date given to us from the Commission scheduler. It
15 will probably not be less than 30 days. I can say that
16 probably now.

17 MR. ELLIS: Commissioner --

18 COMMISSIONER JACOBS: Now --

19 MR. ELLIS: -- I beg your pardon.

20 COMMISSIONER JACOBS: -- that imposes on us
21 immediately some consequences. Mr. Schiefelbein, you
22 indicated that you had some concern about that.

23 MR. SCHIEFELBEIN: In the grand scheme of
24 things, perhaps they're minor, but they're relatively
25 important to us. Some of them are mooted by your decision

1 to grant a continuance. Basically, at this point, what I
2 would just bring to your attention is that we have -- one
3 of our witnesses is Odyssey's banker. She's up in
4 Michigan. I hope it's not that she keeps banker's hours,
5 but she has a calendar that is not enviable, and we have
6 extreme difficulty in producing her on a predictable
7 basis.

8 I think on that, we may need to wait and see
9 what hearing date is actually set to determine her
10 availability. And we may need to address that by a
11 request to have her testimony broadcast via
12 closed-circuit, instead, of having her come down, which
13 will greatly open up her calendar.

14 I think, we can cross that bridge when we come
15 to it when we have a known procedural schedule and hearing
16 date.

17 COMMISSIONER JACOBS: Very well.

18 MR. SCHIEFELBEIN: But one of the other
19 complications is we are considering filing a motion for
20 leave to file, if you'll pardon the expression,
21 supplemental testimony of Mr. Sidelko, solely for the
22 purpose of adopting the guts of Ms. Winters' testimony.
23 As far as but for the negotiated rate, Odyssey would not
24 have obtained financing.

25 That would simplify our own lives a great deal,

1 if we did not have to deal with a witness who is not under
2 our control, not under our employ. If we were able to
3 satisfactorily convince ourselves that we can adequately
4 address that solely through Mr. Sidelko's testimony.

5 And, I think, given the parameters of a new
6 hearing date that you've laid out, I don't think I need to
7 belabor that now, but it would be my intention in the
8 coming week to file a motion with supplemental testimony
9 attached to it that would demonstrate to everyone what
10 kind of changes we're talking about.

11 COMMISSIONER JACOBS: Sounds like from your
12 discussion that while, I assume, it's not possible to
13 stipulate Mr. Sidelko's testimony -- or is it?

14 MR. SCHIEFELBEIN: Well, I would suspect that
15 there are numerous matters in Mr. Sidelko's testimony
16 which would be open to contention.

17 COMMISSIONER JACOBS: We'll proceed, then, and
18 we'll see what happens.

19 MR. SCHIEFELBEIN: So, at this point, given the
20 parameters of your decision, I'd just like to let you know
21 in good faith and the parties that it would be our
22 intention within the coming week to make some hard
23 choices, certainly after we are aware of what the new
24 schedule is. And we may be coming forward with that sort
25 of a motion, but no need for a determination today.

1 COMMISSIONER JACOBS: Okay.

2 MR. SCHIEFELBEIN: Thank you.

3 COMMISSIONER JACOBS: That segues very well into
4 what we'd like to do now. Given my comments just now, I
5 am especially concerned with the course and conduct of
6 this docket. And it would be my intent and my focus to
7 see that we resolve this in as short a time as possible.

8 And in keeping with that, I understand that
9 there is outstanding discovery. I would want that
10 discovery to be completed, if possible, within a week.
11 And if not possible, I'd like to know -- give the
12 explanations why. It's my understanding most of the
13 requests have been out for several months on that
14 discovery, is that correct?

15 MR. LONG: Well, Commissioner, in terms of
16 discovery for Staff, we have given them everything that we
17 have. So, their request is a subset of what we've already
18 given. And, I believe, all that remains to be done is to
19 identify which of the documents and information we've
20 already provided are responsive to those requests. We
21 have outstanding discovery from Allied, some of which
22 we've objected to. And we would need a ruling from you on
23 those objections.

24 COMMISSIONER JACOBS: Are those the orders that
25 you gave me today, the rule on that motion?

1 MS. STERN: Yes.

2 COMMISSIONER JACOBS: Okay. I have orders that
3 I'm reviewing, and those will be signed today before I
4 leave.

5 MS. STERN: Oh, I'm sorry, no. Those orders are
6 confidentiality and the POD 6, 7 and 8. I --

7 COMMISSIONER JACOBS: Okay.

8 MS. STERN: The Staff's review of POD 6, 7 and
9 8, but we did give you a copy of TECO's motion to compel,
10 and that's what I thought you were talking about.

11 MR. LONG: Commissioner, there's one other
12 piece. We have filed motions to compel responses from
13 Allied to several requests for production of documents and
14 several interrogatories. Those pleadings were filed, I
15 believe, Monday or Tuesday of this week.

16 COMMISSIONER JACOBS: Okay. So, the responses
17 aren't in on them?

18 MR. LONG: No.

19 COMMISSIONER JACOBS: Okay. Let's do this,
20 then. Let's -- responses are due, I guess, next week,
21 then. We'll rule on those. Unless there's some absolute
22 extreme condition, I would expect the responses in on the
23 due date. We'll rule on those on the due date, and then
24 expect compliance with those within a week after to close
25 out the discovery that's outstanding, okay?

1 Now, as to the motions -- you indicated I have
2 TECO's. I don't have TECO's. I have Odyssey's motion for
3 protective order. I don't think I have TECO's.

4 MS. STERN: Right. You do have motion for
5 protective order from Odyssey.

6 COMMISSIONER JACOBS: Right.

7 MS. STERN: You have a motion to compel,
8 production of documents from Allied, and you also have
9 objections that one party made against the other parties.

10 COMMISSIONER JACOBS: Okay, I can't rule today.

11 MS. STERN: Yeah, you can't.

12 COMMISSIONER JACOBS: Let's go ahead and try and
13 get those ruled on, as early as possible, next week. .

14 Mr. Long?

15 MR. LONG: Commissioner, with regard to those
16 pending motions to compel, I think, there's some fairly
17 important issues inherent in those. We would certainly
18 welcome --

19 MR. ELLIS: I must object to argument of a
20 matter that's before the Commission --

21 COMMISSIONER JACOBS: Wait a minute. Let me
22 hear.

23 MR. ELLIS: -- the same objection, and I will
24 have to agree with you with respect to argument of motions
25 you have filed, I have not filed a response to. And I do

1 not wish to permit argument --

2 COMMISSIONER JACOBS: Well, is his
3 explanation --

4 MR. LONG: Counsel has proven that he is not
5 clairvoyant, Commissioner.

6 My point was, simply, that I think the
7 Commission would benefit from a very brief argument on
8 those motions to compel before a decision is issued. And
9 I was going to ask whether or not you'd be willing to
10 create an opportunity for that.

11 MR. ELLIS: You're correct. I was not
12 clairvoyant. I thought you were about to argue them now.
13 I apologize to the --

14 MR. LONG: I wouldn't do that, counsel.

15 COMMISSIONER JACOBS: I'm hesitant to do that.
16 However, I'd be willing to do a conference call motion
17 argument what day? I don't know. Do we have to notice
18 that? It does have to be noticed, right? Can you all
19 waive notice?

20 MR. LONG: We're certainly willing to do
21 anything that would speed this process along.

22 MR. ELLIS: We'll be filing a motion to compel
23 as well. I'll just briefly respond to this statement that
24 TECO has already provided responses to Staff's discovery
25 requests. The discovery requests for interrogatories,

1 there have been no answers served.

2 COMMISSIONER JACOBS: We can't work this out
3 today. Let's do this. What I'd like you guys to do is
4 get with Staff, and let's figure out what the discovery
5 will be, okay?

6 MR. ELLIS: Yes.

7 COMMISSIONER JACOBS: And then, what I want, is
8 if there's need for oral arguments, I want to schedule
9 that oral argument post-haste, then we will give a date,
10 and then we would expect that all discovery requests would
11 be answered, I would prefer seven days, but we'll allow 10
12 days, given that we don't have a date certain yet cast in
13 stone. But every discovery request, we would expect
14 response within 10 days.

15 Mr. Schiefelbein.

16 MR. SCHIEFELBEIN: You're referring to written
17 discovery requests?

18 COMMISSIONER JACOBS: Yes. I would assume all.
19 We're going to ask for an expedited response time to all
20 motions cut down to five days. So, any motion we're going
21 to ask for responses in five days.

22 MR. SCHIEFELBEIN: May I interject?

23 COMMISSIONER JACOBS: Mr. Schiefelbein.

24 MR. SCHIEFELBEIN: I also may not be
25 clairvoyant, but sizing up the situation here, I think, at

1 the conclusion of the status conference Mr. Ellis is going
2 to be hand-delivering certain motions. And I have an
3 interesting weekend and date with destiny on Monday that,
4 I think, you're familiar with, and that is the Chesapeake
5 rate case.

6 So, if you were to apply that five-day response
7 period to the motions that I clairvoyantly think are about
8 to be handed to me, that would really leave me about a
9 day, a day and a half, to respond. And I suspect that we
10 will be opposing those motions. So, I would ask that you
11 take that into consideration in your ruling. Thank you.

12 MR. LONG: Commissioner, we will make every
13 effort to comply with the 10-day rule. Some of the recent
14 requests that we've gotten that we're objecting to may be
15 more time consuming. We need to take a closer look at
16 that, but we will make every effort to meet that 10-day
17 rule.

18 COMMISSIONER JACOBS: If you have a problem, I
19 would ask you to get your concerns to Staff as soon as you
20 come across those issues.

21 MR. LONG: We will certainly work with the Staff
22 on that.

23 COMMISSIONER JACOBS: Mr. Schiefelbein, I hear
24 you. Let's do this. When it gets painful, then, scream
25 for us, and we'll see if we can extend you some

1 consideration.

2 MR. SCHIEFELBEIN: Perhaps we might be able to
3 work something out with Mr. Ellis on today's crop.

4 COMMISSIONER JACOBS: That would be great.

5 Now, in my mind, it would be important, I think,
6 useful, given the course of this docket to bring out some
7 points. It's always our anticipation that the parties are
8 here to resolve ultimately the issues. And to the extent
9 that the parties become overly ambitious in their
10 litigation strategies, I think, it does damage to both the
11 process and obviously to the resolution of the interest.

12 I'm absolutely convinced that there should be
13 ample opportunity for due process, ample opportunity for
14 parties to litigate the issues, but I would admonish the
15 parties in this case. We seem to be reaching a point
16 where we're going beyond reasonable pursuit of issues.

17 And I would call to the attention of the parties
18 Section 120.595, which addresses that realm of activity
19 and ask you to be particularly cognizant as we proceed
20 from this point forward of that. I believe that we can
21 resolve this issue and we can do it in a timely manner.
22 And I will expect that that's how we'll proceed. And
23 we'll have that as a very real consideration in any
24 motions that come before us.

25 And I don't think we can sit here, and it does

1 no service to sit here and try and evaluate parties'
2 actions.

3 I'm assuming that everybody has proceeded in
4 good faith, but what I want to make clear today is that
5 this docket is reaching a point where we would begin to
6 question where parties have had months and months to look
7 at the issues, no real new issues, no real new facts.
8 We're getting to a point where more detailed and involved
9 complexities of this case could cause one good faith into
10 question. And, I think, duly noted, duly said.

11 Having said that, are there any other matters?

12 MS. STERN: I'd just like to go back and talk
13 about one thing that was talked about, we discussed
14 earlier today, and that's Bob Namoff. If Allied is
15 planning on filing some sort of motion to get him to
16 review the informa-- allow him to review the information,
17 I think, that's something that has the potential to really
18 draw out this proceeding, because --

19 COMMISSIONER JACOBS: Correct. And, I think,
20 that's what Mr. Schiefelbein was just speaking about as
21 well, correct?

22 MS. STERN: Okay.

23 COMMISSIONER JACOBS: I'm not going to ask you
24 to be clairvoyant today. What I would suggest is that you
25 take note of my comments just now and give careful

1 consideration. But if you wish to pursue that, I'm not
2 going to cut that off today, but I'm going to let you be
3 consistent with the comments that I just gave in
4 evaluating those pleadings.

5 MR. ELLIS: If I could briefly respond at this
6 time.

7 The frustration that everyone feels with respect
8 to the delay in this docket is attributable to TECO alone.
9 We can't proceed, if we're not permitted to conduct
10 discovery. We can't proceed if our principle witness is
11 not permitted to be made aware of the information upon
12 which the decisions in this docket are going to be based.
13 That is solely attributable to TECO.

14 And by reducing the time in which we're
15 permitted to conduct discovery in good faith and present
16 testimony in good faith, you would be -- the Commission
17 would be rewarding TECO for its intransigence in refusing
18 to permit this case to be litigated on the merits.

19 I must sincerely state, on behalf of Allied, we
20 wish to move forward. We have been waiting from January
21 to August to see the first most basic, most essential
22 information. And the suggestion that parties can't see
23 it, attorneys can, does not meet the good faith, in my
24 view.

25 I am filing a motion -- it has been filed today

1 to permit Mr. Namoff and Mr. Bandklayder and Mr. Allen,
2 two additional attorneys, to view this information and
3 must respectfully request that the frustration,
4 understandably felt by the Commission and its Staff with
5 respect to the delay in this case, not be attributed to
6 Allied/CFI.

7 COMMISSIONER JACOBS: That is absolutely not the
8 case, I can assure you. If I were to begin to assign
9 blame, we'd be here for days. That's exactly a context in
10 which I hope my comments are taken is that we are not
11 trying to do that. What we are trying to do is reach a
12 resolution in as timely a manner as possible.

13 And as to your position of Mr. Namoff, again,
14 I'm not going to prejudge that but, again, except to say
15 that if the parties can't resolve that issue to some
16 resolution, we're going to have to, because in my mind, we
17 have to begin to bring this to some resolution.

18 And I would encourage, if Staff and you can sit
19 down and talk about how to bring that forward in the
20 quickest manner possible, that would be helpful.

21 MS. STERN: Can I just say one thing? If we
22 can't resolve it, I think, no matter what decision is
23 made, it's likely that a motion for reconsideration is
24 going to be filed and that has to go to the whole
25 Commission. And I just see that -- just that alone could

1 eat up the 30 days that we're talking about, so...

2 COMMISSIONER JACOBS: What we may want to do is
3 go ahead and take that -- if that rises to that level, and
4 that's where you're going to pursue that, let's just take
5 it to the Commission.

6 MS. STERN: Okay. What about imposing a time
7 limitation on filing a motion for reconsideration?

8 COMMISSIONER JACOBS: No. What I suggest we do
9 is take his motion before the Commission, not wait for a
10 reconsideration.

11 MS. STERN: All right. So, we'd write a
12 recommendation and go right there.

13 COMMISSIONER JACOBS: Yeah, and get it on the
14 next available agenda.

15 Very well. Anything else?

16 MS. STERN: No.

17 COMMISSIONER JACOBS: Anything from the parties?

18 Thank you. We're adjourned.

19 MR. LONG: Thank you, Commissioner.

20 (Status Conference concluded at 3:40 p.m.)

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1 STATE OF FLORIDA)

2 : CERTIFICATE OF REPORTER

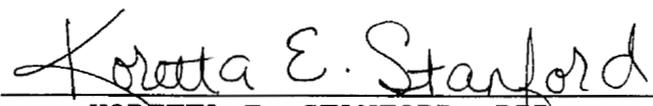
3 COUNTY OF LEON)

4
5 I, KORETTA E. STANFORD, RPR, Official FPSC Commission
6 Reporter, do hereby certify that the Prehearing Conference
7 in Docket Number 000061-EI was heard by Commissioner Leon
8 Jacobs at the time and place herein stated.

9 It is further certified that I stenographically
10 reported the said proceedings; that the same has been
11 transcribed under my direct supervision; and that this
12 transcript, consisting of 63 pages, constitutes a true
13 transcription of my notes of said proceedings.

14 I FURTHER CERTIFY that I am not a relative, employee,
15 attorney or counsel of any of the parties, nor am I a
16 relative or employee of any of the parties' attorney or
17 counsel connected with the action, nor am I financially
18 interested in the action.

19 DATED this 19th DAY OF OCTOBER, 2000

20
21 
22 KORETTA E. STANFORD, RPR
23 FPSC Official Commission Reporter
24 (850) 413-6734
25