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March 12, 2004

Ms. Blanca S. Bayo, Director
Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

HAND DELIVERY

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Re: Docket No. 040086-EI

Dear Ms. Bayo:

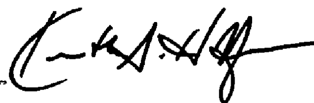
Enclosed herewith for filing on behalf of Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI") are the following documents:

1. Original and fifteen copies of Allied/CFI's Response in Opposition to Motions to Dismiss and Motion for Attorney's Fee and Sanctions; and

2. Original and fifteen copies of Allied/CFI's Notice of Filing Portion of Transcript of Deposition of Patrick Henry Allman, III.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me. Thank you for your assistance with this filing.

Sincerely,



Kenneth A. Hoffman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Allied Universal Corporation and Chemical Formulators, Inc.'s Petition to Vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, the Settlement Agreement between Allied Universal Corporation and Chemical Formulators, Inc. and Tampa Electric Company and Request for Additional Relief.	)	Docket No. 040086-EI Filed: March 12, 2004

ALLIED UNIVERSAL CORPORATION AND CHEMICAL FORMULATORS, INC.'S RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS AND MOTION FOR ATTORNEY'S FEE AND SANCTIONS

Allied Universal Corporation and Chemical Formulators, Inc. ("Allied/CFI"), by and through its undersigned counsel, and pursuant to Rule 28-106.204(1), Florida Administrative Code, hereby files this Response in Opposition to the Motions to Dismiss filed by Tampa Electric Company ("TECO") and Odyssey Manufacturing Company ("Odyssey"), and Odyssey's Motion for Attorney's Fee and Sanctions.

I. INTRODUCTION

1. On January 30, 2004, Allied/CFI filed a Petition (the "January 30 Petition") to Vacate Order No. PSC-01-1003-AS-EI Approving, as Modified and Clarified, a Settlement Agreement between Allied/CFI and TECO (the Order Approving Settlement Agreement). The January 30 Petition also requested the Commission to determine that the Settlement Agreement is unenforceable; that the existing Contract Service Agreement ("CSA") between TECO and Odyssey be terminated; and that TECO's general body of ratepayers be reimbursed and held harmless in view

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of Odyssey's unlawful procurement of its discounted rate under TECO's Commercial/Industrial Service Rider ("CISR") Tariff under false pretenses.

2. TECO filed an Answer and Motion to Dismiss. TECO, apparently unconcerned that it may have been misled in granting a substantially discounted rate in violation of the CISR Order,[1] asks the Commission to dismiss the January 30 Petition. TECO characterizes Allied/CFI's Petition as "frivolous" and "pathetic."[2] Yet, by TECO's own admission, it is not a party to Allied's civil suit against Odyssey and, therefore, has no first-hand knowledge of the record in that proceeding."[3] TECO's rhetoric aside, TECO's basic position is that the Settlement Agreement is binding on Allied/CFI. In other words, TECO believes it should prevail on the merits of the case - - an argument prematurely and inappropriately lodged in a motion to dismiss. TECO offers no legal authority in support of dismissal. TECO's apparent lack of concern for its ratepayers has not escaped the Office of Public Counsel ("OPC"). OPC requested and has been granted intervention.

3. Odyssey filed a Motion to Dismiss of over forty pages in length. Like TECO, Odyssey's Motion hurls insults at Allied/CFI for raising the issues set forth in the January 30 Petition. Odyssey seeks attorney's fees and sanctions under Section 57.105, Florida Statutes.[4]

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[1]See Order No. PSC-98-1081-FOF-EI.

[2]TECO Motion to Dismiss, at 2, 9(¶13).

[3]TECO Motion to Dismiss, at par. 14.

[4]On page 2 of its Motion to Dismiss, Odyssey makes its one and only reference to Section 120.569(2)(e), Florida Statutes, and appears to be saying that this statute provides an independent basis for an award of attorney's fees although Odyssey does not explicitly request costs and fees pursuant to this statute.

Odyssey's Motion to Dismiss is replete with invective, speculation, arguments that go to the merits of the allegations, and incorrect statements of the law.

4. Lost in the vitriol of the Motions to Dismiss is the fundamental controlling legal issue before the Commission: whether the facts alleged within the four corners of Allied/CFI's January 30 Petition (which must be considered true for purposes of these motions) are sufficient to state a cause of action.

5. As the argument and authorities set forth below amply demonstrate, the January 30 Petition alleges facts that: (a) clearly state a cause of action to vacate the Order Approving Settlement Agreement; (b) bring this case squarely within the well-established, judicially recognized exceptions to the doctrine of administrative finality; and (c) demonstrate, beyond question, Allied/CFI's standing to assert these claims.

6. In this Response, Allied/CFI will demonstrate that it has stated a legal cause of action under the judicially recognized exceptions to the doctrine of administrative finality and that it has standing to file the January 30 Petition. If the Commission concurs that Allied has standing and has properly stated a cause of action for relief, the Motions to Dismiss must be denied. Alternatively, in the event that this Commission determines that Allied/CFI's allegations somehow are deficient, this Commission should grant Allied/CFI leave to amend its Petition, so that this matter can be

determined on the merits,[5] and this Commission can answer the fundamental question that lies at the heart of this case:

> Whether this Commission should allow Odyssey to continue to reap the benefits of a fraudulently obtained "sweetheart" contract for electricity that provides unjustified, preferential discounts worth millions of dollars, to the detriment of TECO, Allied/CFI and other ratepayers, and which was procured as a direct result of Odyssey's submission of false testimony to this Commission.

II. STATEMENT OF THE CASE

7. On January 20, 2000, Allied/CFI filed a Complaint against TECO with the Commission, asserting, among other things, that TEPCO's action in granting preferential rates and terms to Odyssey under TECO's CISR tariff, while refusing to make the same rates and terms available to Allied/CFI, constituted unlawful rate discrimination in violation of Sections 366.03, 366.06(2) and 366.07, Florida Statutes. Allied/CFI's Complaint was assigned Docket No. 000061-EI. Odyssey filed a Petition for Leave to Intervene in the case and was granted intervention.

8. Allied/CFI and TECO ultimately settled the prior case. As alleged in the January 30 Petition, in making its ultimate decision to settle the case, Allied/CFI justifiably relied on the sworn affidavit and prefiled testimony of Odyssey's president, Mr. Sidelko, in Docket No. 000061-EI that:

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[5]Pursuant to Rule 28-106.202, Florida Administrative Code, a petitioner may amend its petition after the designation of the presiding officer only upon the order of the presiding officer. The longstanding policy in Florida, and of the Commission in particular, is to allow pleadings to be freely amended so that disputes may be resolved on their merits. See Adams v. Knabb Turpentine Co., 435 So.2d 944, 946 (Fla. 1st DCA 1983). In addition, it is well established that the Commission has broad discretion to allow amendment of pleadings, if the privilege to amend has not been abused. See, Order No. PSC-03-1305-PCO-TP, issued November 14, 2003, in Docket No. 030746-TP, Order No. PSC-01-1168-PCO-TP, issued May 22, 2002, in Docket No. 010098-TP, and Order No. PSC-93-0332-PCO-TP, issued February 28, 1998, in Docket No. 970730-TP.

(a) Odyssey required a specific electric service rate without which Odyssey would have no alternative other than to locate its plant in an area outside of TECO's service area where it could obtain such a rate; and (b) that Odyssey's lender required that rate. Under the settlement, TECO agreed to enter into a CSA with Allied/CFI on essentially the same terms as those given to Odyssey. The Commission approved that Settlement Agreement, as modified and clarified in the Order Approving Settlement Agreement. The Order Approving Settlement Agreement was issued April 24, 2001.

9. Subsequently, in November 2001, Allied/CFI filed a civil action against Odyssey and its affiliate, Sentry Industries, Inc., in Dade County Circuit Court. As alleged in the January 30 Petition, Mr. Sidelko contradicted his prior sworn affidavit as well as his prefiled direct testimony by stating in a December 18, 2003 deposition in the circuit court case that:

a. When he submitted his CISR affidavit to TECO, he had not identified any specific electric rate necessary to make Odyssey's proposed plant economically feasible;

b. It was TECO not Odyssey, that proposed a specific electric rate;

c. The rate requested in his affidavit and referred to in his prefiled direct testimony in the prior PSC case was not important to Mr. Sidelko (Mr. Sidelko recently attempted to recant that testimony by filing an errata sheet to his deposition in the circuit court case);

d. That Odyssey could operate its proposed Tampa plant profitably if it had a higher electric rate than that reflected in its CSA with TECO; and

e. That he did not know if Odyssey's Tampa plant would have been feasible had TECO offered Odyssey that higher CISR rate.

10. Based on this deposition testimony, Allied/CFI filed its January 30 Petition essentially asking the Commission to investigate these issues and provide the relief requested in the Petition. Allied/CFI's January 30 Petition alleges that TECO, Allied/CFI and the Commission were misled by Odyssey, that the new testimony of Mr. Sidelko shows that Odyssey failed to meet the criteria for the discounted rate under the CISR Order, and that Allied/CFI would not have agreed to dismiss its Complaint and enter into the Settlement Agreement had Mr. Sidelko's affidavit and prefiled testimony reflected his more recent inconsistent statements in the civil case.

11. In addition, Allied's January 30 Petition alleges that the recent deposition testimony of Mr. Sidelko in the circuit court case constitutes a substantial change in circumstances from those conveyed by Mr. Sidelko prior to and at the time of the Settlement Agreement and the approval of the Settlement Agreement by the Commission. The Petition alleges that Allied/CFI has been harmed by entering into the Settlement Agreement based on its justifiable reliance on Mr. Sidelko's statements that Odyssey met the criteria for the CISR rate that it was granted by TECO. The January 30 Petition also alleges that TECO's general body of ratepayers have been harmed in view of new information indicating that Odyssey's rate is insufficient to cover TECO's incremental costs to serve Odyssey. At minimum, as alleged in the January 30 Petition, TECO failed to charge and collect the tariffed level of revenue that TECO was entitled to if Odyssey failed to meet the eligibility criteria for a CISR rate.

III. ARGUMENT ON MOTIONS TO DISMISS

12. The Motions to Dismiss raise a number of disputed legal issues and legal arguments. The Motions are almost entirely dedicated to the position that Allied/CFI's Petition should not be

granted on the merits. However, that is not the issue before the Commission on a motion to dismiss. On a motion to dismiss, there are only two issues:

(a) has Allied/CFI stated a legal cause of action for the relief it seeks under the recognized exceptions to the doctrine of administrative finality; and

(b) does Allied/CFI have standing to file the January 30 Petition?

The answer is yes to both questions.

A. <u>The January 30 Petition states a Legal Cause of Action under Exceptions to the Doctrine of Administrative Finality</u>

13. The Motions to Dismiss fail to cite the basic applicable case law regarding a tribunal's disposition of a motion to dismiss. These court decisions have been cited time and again by the Commission.

14. As stated in the oft-cited case of <u>Varnes v. Dawkins</u>, 624 So.2d 349, 350 (Fla. 1st DCA 1993):

> The function of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. (Citations omitted). In determining the sufficiency of the complaint, the trial court may not look beyond the four corners of the complaint, consider any affirmative defenses raised by the defendant, nor consider any evidence likely to be produced by either side. (Citations omitted). Significantly, all material factual allegations of the complaint must be taken as true. (Citations omitted).

<u>See also</u> <u>McWhirter, Reeves, McGothlin, Davidson, Rief & Bakas, P.A. v. Weiss</u>, 704 So.2d 214, 215 (Fla. 2nd DCA 1998). The above legal principles have been consistently applied by the Commission in ruling on motions to dismiss. <u>See, e.g.</u>, Order No. PSC-03-0828-FOF-TP, issued July 16, 2003, in Docket No. 030300-TP; Order No. PSC-02-1237-FOF-TP, issued September 9,

2002, in Docket No. 020578-TP; and Order No. PSC-99-0648-PCO-WS, issued April 6, 1999, in Docket No. 981609-WS.

15. TECO's Motion to Dismiss does not event attempt to argue that the January 30 Petition fails to state a legal cause of action. Instead, TECO urges dismissal on the grounds that it entered into the Settlement Agreement in exchange for a binding determination that both the Allied and Odyssey CSAs were prudent, that Allied agreed to forego further litigation regarding either CSA, and that Allied executed a general release of TECO.[6] Each of these arguments goes to the merits of the January 30 Petition and TECO's position that Allied/CFI should not be granted the relief it seeks. None of these arguments even attempt to demonstrate that Allied/CFI has failed to state a legal cause of action for the relief it seeks in the January 30 Petition.

16. Odyssey similarly fails to focus on the requisite standard for a motion to dismiss and instead engages in a detailed discussion of selected cases that have discussed and applied the doctrine of administrative finality and the exceptions thereto. A comprehensive overview of this area of the law demonstrates that Odyssey has misstated three important points of law in its discussion. The first is Odyssey's concocted notion that a prior administrative order may only be modified or reconsidered if a petition is filed with the agency within a certain (unstated) period of time following the prior order. There is no such statement in the case law, including the cases cited by Odyssey, and, in fact, agency decisions have been reopened and reconsidered upon the filing of petitions well after the time frame involved in this case. Odyssey failed to cite those cases to the Commission. Second, Odyssey completely misstates the law when it argues that an order of the

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[6]TECO Motion to Dismiss, at page 8.

Commission may not be revisited under an exception to the doctrine of administrative finality based on a showing of fraud, deceit, surprise, mistake or inadvertence with respect to the initial order.[7] Third, Odyssey's misleading discussion of the Florida Power Corporation v. Garcia decision[8] and principles of res judicata fails to mention the court's recognition that "the doctrine of decisional finality" may not apply if an exception to administrative finality is alleged and established. 780 So.2d at 44.

17. Odyssey begins its discussion of administrative finality by correctly pointing to the seminal case of Peoples Gas System v. Mason, 187 So.2d 335, 338 (Fla. 1966). As conceded by Odyssey, Peoples Gas recognized the inherent power of the Commission to modify a prior order. The court held:

> Nor can there be any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public. However, this power may only be exercised after proper notice and hearing, and upon a specific finding based on adequate proof that such modification or withdrawal of approval is necessary in the public interest because of changed circumstances not present in the proceedings which led to the order being modified.

Peoples Gas, 187 So.2d at 339-40. (emphasis supplied).

18. The authority of the Commission to modify a prior order upon a demonstration of a change in circumstances or if the modification is required in the public interest is a principle that has been consistently confirmed by Florida appellate courts including the decisions cited by Odyssey.

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[7]Odyssey Motion to Dismiss, at 16-17.

[8]780 So.2d 34 (Fla. 2001). See Odyssey Motion to Dismiss, at 14.

See, e.g., Austin Tupler Trucking, Inc. v. Hawkins, 377 So.2d 679 (Fla. 1979); Florida Power Corporation v. Garcia, 780 So.2d 34 (Fla. 2001).

19. In Richter v. Florida Power Corporation, 366 So.2d 798 (Fla. 2d DCA 1979), the court held that a Florida state agency may reopen and reconsider a prior decision under "extraordinary circumstances," such as "a substantial change in circumstances, or (where) fraud, surprise, mistake, or inadvertence is shown." 366 So.2d at 800. The court went on to hold:

> Likewise, Florida decisions recognize that an administrative agency may alter a final decision under extraordinary circumstances. (Citations omitted). This rule of law seems especially appropriate in light of the purposes of Chapter 366, and the broad power granted to the PSC under §366.05(1) "to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements."

Richter, 366 So.2d at 800.

20. Despite the very clear and unambiguous holding of the Richter court,[9] Odyssey attempts to convince the Commission that this test does not apply in Florida.[10] Odyssey's attempt to misstate the law should be rejected. In fact, this very exception has been recognized and applied by the Commission:

> The doctrine of administrative finality is one of fairness. It is based on the premise that the parties, as well as the public, may rely on Commission decisions. We, therefore, find that a utility and a QF should be able to rely on the finality of a commission ruling approving cost recovery under a negotiated contract. Once an order

[9]Richter relied on and cited a similar fraud and deceit exception to administrative finality discussed by the Florida Supreme Court in Davis v. Combination Awning & Shutter Co., 62 So.2d 742 (Fla. 1953).

[10]Odyssey Motion to Dismiss, at 17.

> approving a negotiated contract becomes final by operation of law, we may not at a later date deny cost recovery to the utility, absent a showing that our approval was induced through perjury, fraud, collusion, deceit, mistake, inadvertence, or the intentional withholding of key information.

In re: Implementation of Rules 25-17.080 through 25.17091, F.A.C., Regarding Cogeneration and Small Power Production, 92 F.P.S.C. 2:24, 38 (February 3, 1992) (emphasis supplied).

21. The January 30 Petition alleges causes of action for relief under both exceptions to the doctrine of administrative finality recognized by the courts and this Commission. Paragraph 34 of the January 30 Petition alleges that "the false, misleading and/or fraudulent sworn statements of Odyssey's President, Mr. Sidelko, demonstrate and justify a determination by the Commission that TECO, Allied/CFI and the Commission were misled by the false, misleading and/or sworn statements of Odyssey's President, Mr. Sidelko." Paragraph 35 of the January 30 Petition alleges that the sworn deposition testimony of Mr. Sidelko in the circuit court case contradicts the Sidelko Affidavit and Sidelko Prefiled Direct Testimony filed in the prior docket, thus constituting a substantial change in the circumstances that purportedly supported Odyssey's CISR rate and that Allied/CFI relied on those prior representations in dismissing its complaint, entering into the Settlement Agreement and seeking Commission approval of the Settlement Agreement. Simply put, Allied/CFI has stated a legal cause of action within the four corners of the January 30 Petition and the Motions to Dismiss must be denied.

22. There remains one additional point to be discussed. Odyssey attempts to create a rule of law supporting Odyssey's position that the January 30 Petition is untimely. Odyssey's argument on this point is actually an affirmative defense to the January 30 Petition - - not a basis for dismissal. In view of the Commission's inherent authority to modify a prior order under the above-discussed

exceptions to the doctrine of administrative finality, it should come as no surprise that there is no hard and fast rule regarding the timeliness of such a filing. Odyssey's recitation of case law on this topic is both selective and misleading. For example, in its discussion of the Peoples Gas case, Odyssey states that "[t]he [Peoples Gas] court went on to hold that the passage of four and a half years between the original and the modified order mandated deeming the original decision final."[11] In fact, the passage of time was not the controlling factor in the Peoples Gas decision. The court's decision "emphasize[d] that the order under review contains no finding that the public interest required the partial abrogation of the prior approval of the agreement." Peoples Gas, 187 So.2d at 340. Similarly, in the Austin Tupler decision cited by Odyssey, once again, the amount of time was not the controlling factor in the decision. Instead, it was the fact that "... respondents have failed to show any significant change in circumstances or great public interest which would be served by permitting the 1974 proceedings supercede the finding of the dormancy in the 1972 order." 377 So.2d at 681.

23. As previously stated, there is no hard and fast rule regarding the timeliness of a petition seeking to modify a prior Commission order based on an exception to the doctrine of administrative finality. Odyssey cites the Commission to cases involving periods of time shorter than the time that passed between the April 24, 2001 Order Approving Settlement Agreement and January 30 Petition. Odyssey was evidently unaware that petitions have been filed and taken to hearing under exceptions to the doctrine of administrative finality after the passage of substantially longer periods of time than the one in the instant case.

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[11]Odyssey Motion to Dismiss, at 11.

24. For example, in Sunshine Utilities v. Public Service Commission, 577 So.2d 663 (Fla. 1st DCA 1991), the court upheld the Commission's order which prospectively corrected a rate base computation affected by a five year old Commission order, and which required the utility to make refunds. Citing Reedy Creek Utilities v. Florida Public Service Commission, 418 So.2d 249 (Fla. 1982), as well as the Richter, Peoples Gas and Austin Tupler decisions, the court emphasized the Commission's inherent authority to modify its orders where there is a: (1) substantial change in circumstances, or fraud, surprise, mistake, or inadvertence; or (2) demonstrated public interest. Sunshine Utilities, 577 So.2d at 666.

25. More recently, the Florida Supreme Court addressed a situation where the Commission, in 1995, revisited its policy and methodology regarding the interconnection rates paid by mobile telephone companies to landline telephone companies reflected in a 1988 order. Cautioning against a "too doctrinaire" application of the doctrine of administrative finality, and quoting the landmark Peoples Gas decision, 187 So.2d at 339, the court upheld the Commission's revisitation and modification of the 1988 order emphasizing:

> We understand well the differences between the functions and orders of courts and those of administrative agencies, particularly those regulatory agencies which exercise a continuing supervisory jurisdiction over the persons and activities regulated.... [W]hereas courts usually decide cases on relatively fixed principles of law for the principal purpose of settling the rights of the parties litigant, the actions of administrative agencies are usually concerned with deciding issues according to a public interest that often changes with shifting circumstances and passage of time. Such considerations should warn us against a too doctrinaire analogy between courts and administrative agencies....

McCaw Communications of Florida, Inc. v. Clark, 679 So.2d 1177, 1179 (Fla. 1996).

26. Ultimately, a proper application of the case law concerning motions to dismiss and exceptions to the doctrine of administrative finality dictate that the Commission follow the approach it took in a case involving BellSouth Telecommunications, Inc. ("BellSouth") in Docket No. 971399-TP. In that docket, BellSouth filed a petition on October 21, 1997, to lift the intraLATA presubscription marketing restrictions imposed by the Commission pursuant to an order issued on February 13, 1995, in a different docket. BellSouth's October 1997 petition was met by a joint motion to dismiss by parties who had participated in the prior docket. The joint motion to dismiss argued that the doctrine of administrative finality precluded further consideration of the issues decided in the February 13, 1995 Order. BellSouth responded that its petition alleged and BellSouth was prepared to demonstrate a sufficient change in circumstances - - one of the exceptions under the doctrine of administrative finality. The Commission denied the joint motion to dismiss concluding that BellSouth had alleged sufficient facts to demonstrate changed circumstances and that BellSouth was entitled to a hearing on its request to lift the intra-LATA presubscription restrictions imposed by the February 1995 order. See Order No. PSC-98-0293-FOF-TP issued February 17, 1998.

27. Likewise, in the instant case, the January 30 Petition alleges sufficient facts, which must be taken as true for purposes of the Motions to Dismiss, that the Settlement Agreement and Order Approving Settlement Agreement were predicated on false or deceptive statements of Odyssey's president, that the recent deposition testimony of Odyssey's president contradicting statements made in the prior proceeding reflect a significant change in circumstances and that the public interest would be served by granting the relief requested in the January 30 Petition. A proper and correct application of the case law and prior Commission precedent clearly support an order denying the Motions to Dismiss.

B. Odyssey's Other Arguments Provide No Basis for Dismissal

1. The January 30 Petition is not untimely under Rule 1.540(b), Florida Rules of Civil Procedure.

28. Odyssey asserts that the January 30 Petition is untimely based on the application of Rule 1.540(b), Florida Rules of Civil Procedure. Rule 1.540(b) requires that a motion for relief from a final judgment on grounds of fraud be filed "not more than 1 year after the judgment, decree, order, or proceeding was entered or taken." Neither the rule nor the case cited by Odyssey[12] lend any support to Odyssey's Motion to Dismiss. Rule 1.540, Florida Rules of Civil Procedure, is not binding on the Commission and the strict application of a judicial rule such as Rule 1.540(b) would undermine the body of precedent under Florida law that provides for exceptions to administrative finality, without rigid adherence to a one year time frame, and would fly in the face of the Florida Supreme Court's admonition against a rigid approach to the application of the doctrine of administrative finality in the McCaw decision.

2. The Settlement Agreement approved by the Commission is Also Subject to Challenge under the Exceptions to the Doctrine of Administrative Finality.

29. Odyssey's Motion to Dismiss asserts that even if the Commission were to vacate the Order Approving Settlement Agreement, the Settlement Agreement and General Release are not subject to challenge. Here again, this is not a basis for dismissal for failure to state a cause of action; it is an argument on the merits.

[12] Cerniglia v. Cerniglia, 679 So.2d 1160 (Fla. 1996).

30. Odyssey and TECO point to provisions in the Settlement Agreement precluding Allied/CFI from bringing a subsequent challenge to the Odyssey CSA.[13] TECO's Motion to Dismiss similarly points to provisions in the Settlement Agreement for the same purpose. Odyssey and TECO's references to the Settlement Agreement and General Release overlook the point of the January 30 Petition. Allied/CFI does not debate what these documents say. Allied/CFI does not debate that the Settlement Agreement precluded Allied/CFI from asserting a further challenge before the Commission to the rates, terms and conditions for electric service provided by TECO to Odyssey and set forth in the TECO/Odyssey CSA; that the existing Odyssey CSA provides benefits to TECO's general body of ratepayers and is in the best interest of ratepayers; that TECO's decision to enter into the Odyssey CSA was prudent; and that Allied/CFI executed a general release of any and all claims against TECO related to TECO's CISR tariff and dealings with Odyssey. The point and focus of the January 30 Petition is that the Settlement Agreement, the General Release and the Order Approving Settlement Agreement were predicated on false and/or misleading statements of Odyssey's president justifiably relied upon by Allied/CFI in entering into the Settlement Agreement, executing the General Release and seeking Commission approval of the Settlement Agreement as a predicate to dismissal of its complaint in Docket No. 000061-EI. The previously discussed exceptions to the doctrine of administrative finality provide a point of entry for Allied/CFI to pursue its request that the Commission vacate the Order Approving the Settlement Agreement and determine that the Settlement Agreement itself is unenforceable.

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[13]Odyssey Motion to Dismiss, at 20; TECO Motion to Dismiss, at 4-5.

31. The notion advanced by Odyssey that the Settlement Agreement is not subject to challenge is not supported by logic or the law. Allied/CFI and TECO structured the Settlement Agreement so that the withdrawal of Allied/CFI's complaint in the prior proceeding was conditioned on Commission approval of the Settlement Agreement. No party to the prior proceeding ever took the position, nor could it, that the Commission lacked authority to approve the Settlement Agreement. It defies logic to claim, as Odyssey does, that the Commission lacks the power to modify or abrogate an agreement that it has approved. If the Commission had the power to approve the Agreement, the Commission has the power to modify or nullify the Agreement. Under the Settlement Agreement, the dismissal of Allied/CFI's complaint in the prior proceeding was predicated on Commission approval of the Settlement Agreement. Clearly, the Settlement Agreement and the Order Approving Settlement Agreement are inextricably tied together.

3. Allied has Standing to File this Cause of Action

32. Odyssey asserts that Allied/CFI lacks standing to file the January 30 Petition.[14] Odyssey is incorrect. Allied/CFI was a party in Docket No. 000061-EI and a party to the Settlement Agreement approved by the Commission. As confirmed in the Peoples Gas decision, a party to an agreement approved by the Commission may file a petition with the Commission to vacate, modify, or withdraw the prior approval of that agreement or order ("Nor can be there any doubt that the commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public."). 187 So.2d at 339.

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[14]Odyssey Motion to Dismiss, at 6-8, 25-26 and 28-29.

33. Odyssey's citation to case law regarding the Commission's limited authority to modify a private contract[15] does not affect Allied/CFI's standing to bring this action nor does it provide a basis for dismissal. If anything, the citation to the United Telephone decision confirms the authority of the Commission to modify or abrogate a Commission approved contract when necessary to protect the public interest, consistent with the allegations in the January 30 Petition.

34. Odyssey's discussion of the case law regarding standing to request a hearing under Chapter 120, Florida Statutes, is not controlling. The standard set forth in the Peoples Gas decision discussed above reflects the controlling rule of law concerning Allied/CFI's standing in connection with the instant January 30 Petition.

35. In addition, Allied/CFI notes that it is a customer of TECO and a competitor of Odyssey. The original complaint filed in Docket No. 000061-EI was predicated on Allied/CFI's statutory right under Section 366.03, 366.06(2) and 366.07, Florida Statutes, as a customer of TECO similarly situated to Odyssey, to rates that are not unjustly discriminatory, preferential or otherwise in violation of law. Those very same statutes support Allied's standing in the instant proceeding. The CISR tariff pilot program is no longer available to Allied/CFI. Allied/CFI's competitor, Odyssey, remains under a discounted CISR rate procured as a result of fraudulent, deceptive and/or misleading statements of Odyssey's president. The January 30 Petition filed by Allied/CFI raises these issues, the competitive harm to Allied/CFI, and the financial harm perpetrated on TECO's general body of ratepayers.

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[15]Odyssey Motion to Dismiss, at 27, citing United Telephone Company of Florida v. Public Service Commission, 496 so.2d 116, 119 (Fla. 1986).

36. As a final point, Allied/CFI notes the irony of Odyssey questioning Allied/CFI's standing to file the January 30 Petition. Odyssey argues that it has "party" status under Chapter 120, Florida Statutes, on page 1 of its Motion to Dismiss yet Odyssey has failed to file a petition for leave to intervene in this proceeding. Allied/CFI has treated Odyssey as a party and has provided it with copies of all documents with the understanding that it would petition to intervene, as it did in Docket No. 000061-EI. The fact that Odyssey would qualify as a party under Chapter 120, does not relieve Odyssey of the requirement that it file a petition for leave to intervene. Until it does so, Odyssey's Motion to Dismiss should not be heard by the Commission.

4. The Commission has the Authority to Require TECO to Hold its General Body of Ratepayers Harmless

37. The January 30 Petition requests that the Commission's final order require Odyssey to refund to TECO or TECO's general body of ratepayers the difference between the CSA rate granted to Odyssey and the new rate approved by the Commission for Odyssey for the period of time beginning with the effective date of Odyssey's CSA and terminating on the date of the new Commission approved rate for Odyssey. Odyssey, but not TECO, contends that the Commission lacks the authority to grant this relief on the ground that Odyssey is not a regulated public utility under Chapter 366, Florida Statutes. Allied/CFI agrees that the Commission does not regulate Odyssey; however, it does regulate TECO. The Commission has comprehensive regulatory authority over TECO's retail revenues, revenue requirements, and earnings and establishes TECO's return on common equity and overall rate of return. Further, all CSAs entered into under the CISR pilot program were subject to the regulatory authority (although not specific approval) of the Commission.

38. Odyssey's citation to cases that stand for the general prohibition against retroactive ratemaking have no application to the January 30 Petition.[16] The January 30 Petition speaks to the inherent authority of the Commission to address a prior decision based on new evidence of fraud or deceit, a substantial changes in circumstances, and/or ensuring that the public interest is served in the regulation of a public utility such as TECO. In this case, that inherent authority includes the authority to address and adjust TECO's revenues to insure that its general body of ratepayers are not harmed as a result of the facts alleged in the January 30 Petition. Under the CISR Order, TECO was and is required to report the difference between the revenues which would have been received under the otherwise applicable tariff rate and the Odyssey/TECO CISR rate in its monthly surveillance reports and in quarterly filings with the Commission.[17] This reporting requirement was required by the Commission to track the amount of revenue that would be imputed to TECO in the event a particular CSA was found to be imprudent.[18] Allied/CFI has suggested in its January 30 Petition that the most appropriate source to impute or restore this "lost" revenue to TECO's general body of ratepayers is from the perpetrator of the fraud or deceit - - Odyssey. In any case, the Commission has the authority to grant this item of relief sought by Allied/CFI in the January 30 Petition.

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[16]See Odyssey Motion to Dismiss, at 30.

[17]That requirement was terminated for the TECO/Odyssey CSA pursuant to paragraph 7(b) of the Settlement Agreement.

[18]See 98 F.P.S.C. 8:153 at 155.

5. The Facts Alleged in the January 30 Petition Provide a Legally Cognizable Claim for Relief

39. As previously discussed herein, the January 30 Petition states a legal claim for relief under the judicially recognized exceptions to the doctrine of administrative finality. On pages 31-39 of its Motion to Dismiss, Odyssey offers substantial argument on the merits of Allied/CFI's allegations. These arguments are appropriate for hearing but do not provide a basis for dismissal.

40. TECO's CISR tariff and the CISR Order required Odyssey to demonstrate that but for the granting of the CISR rate , the new load from Odyssey's plant would not be served by TECO. TECO's CISR tariff and the CISR Order also required Odyssey to demonstrate to TECO's satisfaction that Odyssey had a viable lower cost alternative to taking service from TECO.

41. As outlined in the January 30 Petition and attached exhibits, Odyssey's president stated in Prefiled Direct Testimony in Docket No. 000061-EI that he provided a sworn affidavit to TECO confirming that Odyssey's choice of a site for its new facility was largely dependent upon the electric rate for that location (ultimately reflected in Odyssey's CISR rate), and that if Odyssey were unable to obtain a certain rate, it would have to locate its new plant to a different service area. Mr. Sidelko's Prefiled Direct Testimony went on to state that Odyssey would not have taken service from TECO at a rate higher than the CISR rate granted by TECO to Odyssey under the TECO/Odyssey CSA. According to Mr. Sidelko's Prefiled Direct Testimony, the reason for that is that Odyssey is a for profit company and it would not have made good business sense to take service from TECO under a higher rate than that granted by TECO to Odyssey, and, Odyssey's lender required that rate in a loan commitment. This testimony reiterated certain sworn statements of Mr. Sidelko in his August 5, 1998 Affidavit provided to TECO in securing Odyssey's CISR rate.

42. The January 30 Petition brings to the Commission new testimony of Mr. Sidelko which is contradictory to and inconsistent with the above statements and it is this new testimony that forms the basis for the filing of the January 30 Petition under the exceptions to the doctrine of administrative finality. The fact that Odyssey disagrees with Allied/CFI's allegations and/or that Odyssey believes that the new testimony is not inconsistent or is completely irrelevant goes to the weight of evidence that will be presented at hearing and forms no basis for dismissal. It is Allied/CFI's intention to present evidence at hearing in support of the allegations in the January 30 Petition and to further bring to the Commission's attention the recent testimony of other relevant witnesses that bear on the Odyssey/TECO transaction. For example, according to former TECO employee and now Odyssey employee, Patrick Allman, TECO granted a CISR rate to Odyssey to attempt to avoid thorough scrutiny and review by the Commission and the Office of Public Counsel of an anticipated subsequent CSA with a company by the name of National Gypsum. See excerpt of November 25, 2003 deposition of Patrick Henry Allman, III, in Dade County Circuit Court Case No. 01-27699-CA-25 filed with the Commission on March 12, 2004.

43. The parties' competing contentions regarding the evidence are appropriately considered and weighed by the Commission during the evidentiary stage of this proceeding. Odyssey's characterizations of Allied/CFI's allegations and the type of evidence it would present do not constitute a basis for dismissal of the January 30 Petition.

IV. ODYSSEY'S MOTION FOR ATTORNEY'S FEE AND SANCTIONS

44. On February 23, 2004, Odyssey filed and served a Motion for Attorney's Fee and Sanctions pursuant to Section 57.105(5), Florida Statutes. In its Motion to Dismiss, TECO asked

the Commission to consider imposition of appropriate sanctions on Allied/CFI and its legal representatives; however, on March 4, 2004, TECO formerly withdrew its request for sanctions.

45. Odyssey's Motion for Attorney's Fee and Sanctions reflects only conclusory allegations with some of the invective spread across Odyssey's Motion to Dismiss. Odyssey's Motion provides no factual support for its request for an attorney's fee and sanctions. Odyssey cites no case law or precedent in support of its request.

46. Florida appellate courts have consistently held that as a prerequisite to an award of attorney's fees pursuant to Section 57.105, the trial court must make an explicit finding that there was a complete absence of a justiciable issue of law or fact raised by the losing party. See Langford v. Ferrera, 823 So.2d 795 (Fla. 1st DCA 1002) citing Lambert v. Nelson, 573 So.2d 54, 56 (Fla. 1st DCA 1990); Skalniak v. Dey, 737 So.2d 635 (Fla. 1st DCA 1999), Broad & Cassel v. Newport Motel, Inc., 636 So.2d 590 (Fla. 3rd DCA 1994). Furthermore, in order to award attorney's fees against a losing party, there must be a showing that the claim was so clearly devoid of merit both on the facts and the law as to be completely untenable and frivolous. See Pappalardo v. Richfield Hospitality Services, Inc., 790 So.2d 1226 (Fla. 4th DCA 2001) citing Berman & Feldman v. Winn Dixie, Inc., 684 So.2d 320, 322-323 (Fla. 4th DCA 1996). In addition, there must be finding on the record, supported by substantial competent evidence, in order for the trial court to award attorney's fees and costs. See Vasquez v. Provincial South, Inc., 795 So.2d 216 (Fla. 4th DCA 2001) citing Valdes v. Lovaas, M.D., 784 So.2d 474 (Fla. 3rd DCA 2001).[19]

[19] As previously mentioned, Odyssey makes one reference to Section 120.569(2)(e), Florida Statutes, purportedly in further support of its request for attorney's fees. Odyssey cites no supporting facts, arguments or case law in support of any award of fees under this statute.

47. Odyssey's Motion for Fee and Sanctions fails to even attempt to meet the standard established by the courts. Odyssey's hyperbole and invective throughout its Motion to Dismiss are no substitute for meeting the legally established standards for an award of fees and sanctions under Section 57.105, Florida Statutes. Indeed, it is ironic that the party in this case who has failed to follow the rudimentary procedure that it followed in the prior proceeding of filing a petition for leave to intervene and who has misstated key aspects of the doctrine of the law of administrative finality and exceptions thereto seeks an attorney's fee for their efforts. Odyssey's Motion for Attorney's Fee and Sanctions should be denied.

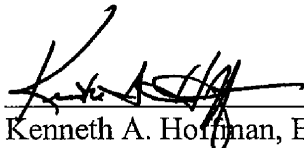
V. CONCLUSION

48. As a final point, Odyssey indicates that it may attempt to amend its Motion to Dismiss in the event the circuit court modifies the Protective Order attached as Exhibit "A" to its Motion to Dismiss. Allied/CFI will not address this potential request except to say that any attempt by Odyssey to amend its Motion to Dismiss must be preceded by a Motion requesting the opportunity to do so and that Allied/CFI should have the opportunity to respond to that Motion and a ruling entered by the Prehearing Officer before any amended motion to dismiss is filed by Odyssey.

WHEREFORE, for the foregoing reasons, Allied/CFI respectfully requests that the Commission enter an Order DENYING: (1) TECO's Motion to Dismiss; (2) Odyssey's Motion to Dismiss and accompanying request for imposition of sanctions, costs and/or fees against Allied/CFI; and (3) Odyssey's Motion for Attorney's Fee and Sanctions. Further, Allied/CFI respectfully requests that the Commission refrain from addressing any future proposed Amended Motion to

Dismiss filed by Odyssey until such time as Odyssey requests leave to file a proposed Amended Motion to Dismiss and Allied/CFI has had its opportunity to respond to that request.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail, this 12th day of March, 2004, to the following:

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