BEFORE THE PUBLIC SERVICE COMMISSION

In re: 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, by Allied Universal Corporation and Chemical Formulators, Inc.	DOCKET NO. 040086-EI ORDER NO. PSC-04-1115-FOF-EI ISSUED: November 9, 2004

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON

BY THE COMMISSION:

ORDER DISMISSING PETITION TO VACATE

BACKGROUND

On January 30, 2004, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a petition to vacate Commission Order No. PSC-01-1003-AS-EI (settlement order), which approved a comprehensive settlement agreement between Allied and Tampa Electric Company (TECO).[1] The settlement agreement resolved Allied's complaint against TECO for allegedly providing preferential rates under TECO's Commercial Industrial Service Rider (CISR) tariff to Odyssey Manufacturing Company (Odyssey). Odyssey is Allied's competitor in the manufacture of chlorine bleach. The agreement and the settlement order approving it provided a CISR contract to Allied on terms comparable to the CISR contract that TECO had executed with Odyssey, with the condition that Allied would build a new bleach plant within two years of approval of the settlement agreement. The settlement and the settlement order also resolved all aspects of the complaint before the Commission, determined the prudence of TECO's CISR contracts for electric service with both Odyssey and Allied, and precluded Allied and TECO from further litigation of the subject matter before the Commission. The settlement did not, however, preclude Allied from litigating an appropriate claim in an appropriate judicial forum against Odyssey, and thereafter, on November 19, 2001, Allied filed suit against Odyssey

[1] Order No. PSC-01-1003-AS-EI, issued April 24, 2001, in Docket No 000061-EI, In re: Complaint by Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Section 366.03, 366.06(2), and 366.07, F.S. with respect to rates offered under commercial/industrial service rider tariff; amended petition to examine and inspect confidential information; and request for expedited relief.

in circuit court in Miami for state antitrust violations and other allegations of interference with business relationships.[2]

In December of 2003, Allied conducted several depositions of Odyssey's representatives for its circuit court case, including Odyssey's president, Mr. Sidelko, and one of its employees, Mr. Allman, a former TECO employee. The depositions contain statements that Allied alleges contradict statements that Mr. Sidelko made in 1998 in an affidavit to TECO as part of the application for the CISR rate, and in prefiled testimony before the Commission in the earlier complaint docket in June, 2000. On the basis of these alleged contradictory statements, Allied filed a petition to vacate in which it asked us to: vacate its settlement order; declare the settlement agreement between Allied and TECO unenforceable; terminate the existing CISR contract between Odyssey and TECO; require Odyssey to refund to TECO or its ratepayers the difference between the rate Odyssey currently pays TECO under the CISR contract and a new rate that the Commission would establish in this proceeding; and provide that Allied receive service from TECO at the same rate established for Odyssey.

On February 19, 2004, both Odyssey and TECO filed motions to dismiss Allied's petition, and Odyssey requested oral argument on the motions. On February 23, 2004, Odyssey also filed a motion for attorney's fees and sanctions against Allied. Allied responded to the TECO and Odyssey motions on March 12, 2004. On March 1, 2004, the Office of Public Counsel (OPC) intervened in the case, and on April 23, 2004, OPC filed a Motion for Public Service Commission to examine the contract between TECO and Odyssey. TECO and Odyssey objected to OPC's motion. We deferred consideration of the motions to dismiss from our July 6, 2004, Agenda Conference pending review of Allied's July 2, 2004, Motion for Leave to File Amended petition, which the Prehearing Officer granted by Order No PSC-04-0714-PCO-EI, issued July 20, 2004. TECO and Odyssey filed motions to dismiss the amended petition on August 20, 2004, and Odyssey filed another motion for attorney's fees and request for oral argument. Allied filed its response to the motions to dismiss on September 10, 2004, and we considered them at our October 19, 2004, Agenda Conference. We denied oral argument on the motions, finding that we were well-informed of the issues in the case and the parties positions, and we dismissed Allied's amended petition to vacate our settlement order. We found that Allied had failed to state a cause of action upon which we could grant the relief requested. The reasons for our decision to dismiss the petition are explained in detail below. We deferred consideration of Odyssey's motions for attorney's fees and sanctions until our decision to dismiss the petition to vacate becomes final. We have jurisdiction over this matter pursuant to sections 366.04, 366.05, and 366.07, Florida Statutes, and pursuant to our inherent authority to enforce and review our own orders.

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[2] Case No. 01-27699-CA-25, in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida. The case is still in progress.

DECISION

This case implicates important Commission policies that encourage settlements and protect the finality and effectiveness of Commission orders. After careful review of the allegations in the amended petition and the arguments of the parties, we find that Allied's allegations do not support vacation of a final Commission order and voidance of the underlying settlement agreement the order approved. Allied has not alleged a cause of action upon which the Commission can grant the relief requested.

Allied's Amended petition

In its amended petition Allied states that it competes with Odyssey in the manufacture and sale of chlorine bleach in the Tampa Bay area. In 2000, Odyssey constructed a new manufacturing facility in Tampa that uses electrolysis of salt and water to produce chlorine and caustic soda, which are then combined to produce chlorine bleach. Allied is involved in several bleach manufacturing facilities in Florida, including a facility of its affiliate CSI in Tampa, which uses a process called the "Powell process" to manufacture chlorine bleach. The cost of raw materials is the most significant manufacturing cost in the Allied facility's Powell process, while the cost of electricity is the most significant manufacturing cost in the Odyssey facility's electrolysis ("cell") process.

In the summer of 1998, before beginning construction of its new plant, Odyssey negotiated a contract for electric service with TECO under TECO's CISR tariff, which the Commission had approved in Order No. PSC-98-1081-EI (CISR Order).[3] The CISR Order permitted TECO to negotiate a rate for electric service with potential customers that would be lower than its regularly tariffed rates, providing the customer could demonstrate that if it did not receive the lower rate from TECO it would leave TECO's service territory and locate its operations elsewhere. If the customer demonstrated by legal attestation or affidavit that but for the special rate TECO would not serve the customer's load, and provided documentation that the customer had a viable lower cost alternative to taking service from TECO, the CISR tariff permitted TECO to negotiate a contract service agreement (CSA) with the customer. The CSA could offer electric service at a rate no lower than TECO's incremental cost to serve the load, plus a contribution to fixed costs. The negotiated discount rate would only apply to base energy and demand charges, and the customer would pay all otherwise applicable adjustment charges. According to Allied, the CISR Order did not authorize TECO to negotiate a discounted rate guarantee for variable fuel charges and other adjustment clause costs. The CISR Order also provided that TECO would carry the burden of proof that the CSA was negotiated in the interest of TECO's general body of ratepayers. TECO was to conduct specific analyses of each CISR customer to calculate the net benefits to TECO's general body of ratepayers on a cumulative net

[3] Order No. PSC-98-1081-FOF-EI, issued August 10, 1998, in Docket No. 980706-EI, In re: Amended petition for approval of Commercial/Industrial Service Rider Tariff by Tampa Electric Company. Order No. PSC-98-1081 approved the tariff as an experimental tariff for 4 years. It expired Jan 1, 2004.

present value basis over the life of the contract, and as long as the revenues exceeded the costs the ratepayers would benefit.

According to Allied, Odyssey's president, Stephen Sidelko, provided an affidavit to TECO which stated that if Odyssey were unable to obtain a specific rate from TECO, "Odyssey will have no alternative but to locate its manufacturing facility in a different service area where it can obtain such a rate." (quoted in Allied Amended petition, pps.8-9) Mr. Sidelko attached this affidavit to his prefiled testimony in Allied's original complaint against TECO, where he again asserted that if Odyssey were unable to obtain a certain rate from TECO, Odyssey would have no alternative but to locate its plant in a different service area where it could obtain a satisfactory rate. In its amended petition in this docket, Allied quoted the testimony of Mr. Sidelko as follows:

> Q. Were you required to furnish a sworn affidavit to TECO?
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> A. I was, and I did. The affidavit confirmed that our choice of a site for our manufacturing facility was largely dependent upon the electric service rate for that location, because electricity comprises half of Odyssey's variable manufacturing costs. Further, the affidavit provided that if we were unable to obtain a certain rate, Odyssey would have no alternative but to locate its plant in a different service area where it could obtain a satisfactory rate.
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> Q. Did Odyssey and TECO reach an agreement?
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> A. Yes. On September 4, 1998, Odyssey executed a Contract Service Agreement. We received the Contract as executed by TECO in late September, 1998. I will sponsor the executed contract as Exhibit SWS-1. An easement in the substation site was later conveyed by Odyssey to TECO.
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> Q. Would Odyssey have agreed to receive service from TECO at a rate higher than that provided under the CISR?
>
> A. No.
>
> Q. Why is that?
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> A. It would not have made good business sense. Odyssey is a for profit company, and, as its CEO, my job is to ensure that our investors achieve an acceptable return on investment. Further, the condition regarding the electric rate set forth in our lender's loan commitment would not have been satisfied.

(Allied amended petition, p. 11.) Allied alleges that in order to compete with Odyssey's new plant, Allied planned to construct a new facility in Tampa that also used electrolysis technology to produce chlorine bleach, and by August of 1999 it also requested a CSA from TECO.

According to Allied, the rates and conditions TECO first offered Allied, however, were higher and less favorable than the rates in the CSA with Odyssey, and Allied filed its original complaint alleging discriminatory treatment at the Commission in January of 2000. In February of 2001, Allied and TECO entered into the settlement agreement which is the subject of this docket. Allied alleges that it justifiably relied on the sworn affidavit and testimony of Mr. Sidelko that Odyssey required a certain rate for service from TECO without which Odyssey would have no alternative other than to locate its plant in another area, and that Odyssey's lender required that Odyssey receive that rate. The settlement agreement was approved by the Commission in April of 2001.

According to Allied, the settlement agreement offered Allied a CSA under TECO's CISR tariff that was essentially the same as the CSA with Odyssey, but required Allied to begin commercial operations at its new bleach plant within two years of the Commission's Settlement Order.[4] Allied asserts that Odyssey prevented Allied from meeting the two year deadline, because Odyssey refused to release the only builder qualified to construct "cell process" chlorine bleach plants in the United States from an illegal restrictive covenant that precluded the builder from constructing a plant within 150 miles of Odyssey's plant for a period of ten years. Allied notified TECO that this circumstance constituted a "force majeure event" under the TECO/Allied CSA and requested an extension of time to build its new plant. Allied alleges that TECO arbitrarily and capriciously denied Allied's request and terminated Allied's CSA.

By November 19, 2001, Allied had filed suit against Odyssey in circuit court in Miami. Allied alleges that Mr. Sidelko contradicted his sworn affidavit and testimony before the Commission by statements he made in a deposition given in the circuit court case two years later, on December 18, 2003. Allied claims that Mr. Sidelko contradicted his Commission testimony by stating that:

> (a) At the time he submitted his affidavit to TECO, he had not identified a specific electric rate that was necessary to make Odyssey's proposed plant economically feasible;
>
> (b) It was TECO, not Odyssey, that proposed the per kwh electric rate;

[4] The settlement agreement and the Commission's Settlement order approving it, are referenced, incorporated and attached to Allied's amended petition, as are portions of the deposition of Mr. Sidelko to be discussed below. Odyssey has provided the entire deposition of Mr. Sidelko. The Commission may consider those documents and the facts they contain, in their entirety and for all purposes, in evaluating the legal sufficiency of Allied's amended petition. Rule 1.130, Fla. Rules of Civil Procedure; Harry Pepper & Associates v. Lasseter, 247 So. 2d 736 (Fla. 3d DCA 1971).

(c) The per kwh rate included in his affidavit and referred to in his testimony was not important to Mr. Sidelko;[5]

(d) Odyssey could operate its Tampa plant profitably if it had an electric rate of [confidential number higher than the rate in Mr. Sidelko's affidavit] per megawatt hour.

Allied attached portions of Mr. Sidelko's deposition to its amended petition in this docket to support its allegations of inconsistency. According to Allied, the statements from Mr. Sidelko and recent depositions taken in the Miami-Dade Circuit Court case[6] show that Allied relied on false statements to reach its settlement agreement with TECO, that TECO was misled by Odyssey in entering into the CSA with Odyssey, and the Commission's Order approving the settlement agreement and the prudence of the Odyssey and Allied CSAs was predicated on fraud, deceit, surprise, mistake or inadvertence. Allied contends that the alleged contradiction in Mr. Sidelko's testimony and deposition and the information contained in the other depositions constitutes a substantial change in circumstances that would warrant Commission action to vacate its Order in the public interest pursuant to the long-recognized exception to the doctrine of administrative finality articulated in Peoples Gas v. Mason, 187 So. 2d 335 (Fla. 1966).

In its amended petition Allied also contends that because of Odyssey's allegedly false statements, the significant difference between the base rate TECO has recently offered Allied to serve its proposed new plant and the Odyssey CSA rate, and the recent new information gathered in the circuit court case, Allied believes that Odyssey's rate is insufficient to cover TECO's incremental costs, Odyssey's CSA is not consistent with the Commission's CISR Order, and thus TECO's ratepayers have been harmed.

Allied alleges that its substantial interests as a TECO ratepayer are affected by TECO's actions, because Allied is adversely affected by the revenue shortfall created by Odyssey's "discount" contract. Allied states that it would not have entered into the Settlement agreement had it known that Odyssey's CSA forced a subsidy on Allied and other ratepayers. Allied also asserts that as a competitor/ratepayer it has standing to challenge TECO's post-settlement interpretation of Odyssey's CSA that "essentially exempts Odyssey from payment of fuel charges, an issue which this Commission has not previously considered, and which directly and substantially affects Allied and other ratepayers." Allied claims that its interests as a direct competitor of Odyssey are affected in this proceeding, because it has a statutory right to electric service that is not unduly discriminatory pursuant to sections 366.03 and 366.06(2), Florida

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[5] Allied mentions that Mr. Sidelko changed this statement in the errata sheet to his deposition, asserting instead that the per kwh rate was important to Odyssey.

[6] Allied refers to the depositions of former TECO employee Patrick Allman and current TECO employees Robert Jennings and William Ashburn taken in the Circuit Court case. Allied has filed the depositions of Mr. Allman under confidential cover in this docket. Allied has not filed the other depositions in this docket.

Statutes. Finally Allied claims that its interests as party to the Settlement Agreement entitle it to bring this action under Peoples Gas.

Odyssey's Motion to Dismiss

Contending that Allied's amended petition is based on the flawed premise that the alleged inconsistent statements of Mr. Sidelko support the relief Allied has requested, Odyssey urges dismissal of Allied's amended petition with prejudice. Odyssey argues that Allied lacks standing to initiate this proceeding, because Allied has not alleged any harm to itself for which the Commission could grant relief. Odyssey also argues that the doctrine of administrative finality and the law of settlements preclude Commission action on the amended petition. Odyssey claims that Allied's amended petition is an improper attempt to use a Commission proceeding to gain an economic advantage over its competitor, and to bolster Allied's circuit court case.

With respect to standing, Odyssey argues that Allied's substantial interests are not affected, as required by Agrico Chemical Co. v. Dept. of Environmental Regulation, 406 So. 2d 478, 482 (Fla. 2d DCA 1981), where the Court said:

> [B]efore one can be considered to have a substantial interest in the outcome of the proceeding he must show 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and 2) that his substantial injury is of a type or nature which the proceeding is designed to protect. The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury.

Odyssey claims that even if one assumes the allegations in the amended petition to be true, and views them in a light most favorable to Allied, Allied has failed to allege a legally cognizable injury of sufficient immediacy to support an administrative proceeding in this case. Odyssey also claims that Allied's failure to cite any statute or rule that requires the Commission to grant Allied relief precludes any analysis of the type of injury required by Agrico. Further, Odyssey argues that Allied lacks standing to request, and the Commission lacks jurisdiction to impose, any of the relief against Odyssey outlined in its amended petition, including the request to vacate Odyssey's CSA with TECO, and the request to order Odyssey to refund to TECO monies Odyssey saved under its CSA.

With respect to the doctrine of administrative finality, Odyssey argues that the Commission's settlement order, issued almost three years before this amended petition was filed, cannot be revisited absent sufficient demonstration of substantially changed circumstances that would warrant modification in the public interest. Odyssey contends that in its amended petition Allied asserts the conclusion that circumstances have changed substantially, but Allied does not provide factual allegations material to that conclusion. Odyssey also contends that the issues ostensibly raised by Allied's current amended petition concerning the appropriateness and prudence of the TECO/Odyssey CSA were fully resolved in the prior proceeding pursuant to the

settlement agreement and the settlement order approving it. Odyssey claims that Allied is attempting to relitigate Docket No. 000061-EI in spite of the fact that Allied agreed to, and the Commission approved, a dismissal with prejudice three years ago. Odyssey argues that the doctrine of administrative finality would preclude the Commission's reconsideration of those issues. Finally, Odyssey argues that Allied's Amended petition, which Odyssey claims is based entirely on the alleged fraudulent statements of Mr. Sidelko, amounts to a claim of "intrinsic" fraud, which according to Rule 1.540(b), Fla. R. Civ. P. must be raised within a year of the determination based on the alleged fraud.

With respect to the law of settlement agreements, Odyssey contends that the public policy of the state of Florida, as articulated in numerous court decisions, encourages and supports settlement agreements. Odyssey contends that the settlement agreement approved by the Commission specifically precluded further Commission litigation on the prudence of Odyssey's and Allied's CSAs with TECO, and Odyssey also contends that the general release incorporated in the settlement agreement precluded any further litigation against TECO regarding the CSAs or TECO's CISR tariff. Odyssey urges the Commission to honor public policy supporting settlement agreements by declining to reopen the Allied/TECO litigation.

Odyssey argues that even if the factual allegations of Allied's amended petition are taken as true, on their face they do not prove facts contradictory to those upon which the Commission based its initial decision to approve the prudence of the CSAs and the terms of the parties' settlement. According to Odyssey those allegations do not provide any legally cognizable basis to provide relief. Odyssey also argues that on their face the statements by Mr. Sidelko are not contradictory and are not material to Allied's demands for relief. According to Odyssey, Mr. Sidelko's affidavit and testimony filed in the earlier Commission case addressed whether Odyssey would construct its plant in TECO's service territory if it did not receive the identified CISR rate from TECO. Mr. Sidelko's deposition statements addressed the economic feasibility of Odyssey's plant at a particular rate for electric service, and at a different point in time than the time the affidavit was executed. In any event, according to Odyssey, those allegations and the new allegations included in Allied's amended petition regarding TECO's current fuel costs do not support a finding of changed circumstances that would require the Commission to vacate its order approving the Allied/TECO settlement agreement.

TECO's Motion to Dismiss

TECO's motion centers upon the settlement agreement between Allied and TECO that was approved by the Commission in the earlier case. According to TECO, the settlement agreement resolved all outstanding claims by Allied against it for discriminatory treatment related to TECO's CISR tariff, and dismissed the case with prejudice. TECO also relies on the General Release that Allied signed relieving TECO of any further liability for any matter arising out of the TECO/Odyssey CSA. TECO claims that Allied's amended petition attempts to reopen the issues resolved by the agreement in direct violation of its terms, thereby depriving TECO of the benefits of the agreement, even though TECO has fully performed under the agreement and

even though Allied makes no material allegation of wrong-doing on TECO's part. According to TECO, Allied has provided no new facts and raised no new issues that would cure the flaws in its original petition to vacate. TECO argues that the factual allegations that purportedly support Allied's request to vacate the Commission's settlement order and rescind the settlement are based on claims of alleged misstatements by Odyssey, who was not a party to the settlement agreement and provided no part of the consideration for Allied's agreement to settle its case against TECO. TECO argues that Allied's accusations against Odyssey, whether true or not, are immaterial to the settlement reached between Allied and TECO and cannot form the basis for vacating the settlement order and declaring the underlying agreement it approved unenforceable.

Further, TECO suggests that Allied's amended petition is internally inconsistent because it asserts continued entitlement to the Odyssey CSA rate from TECO while claiming that the rate is harmful to TECO's general body of ratepayers.

Citing the settlement agreement, the settlement order approving it, and the General Release, which are attached to Allied's amended petition, TECO shows that Allied and TECO executed a CSA for electric service to Allied's proposed new bleach plant under the same rates, terms, and conditions provided to Odyssey, but with the additional condition that Allied would construct its new plant within two years of approval of the settlement agreement:

> WHEREAS, Allied/CFI and TECO desire to resolve their differences and conclude the PSC litigation on terms which do not affect Odyssey's rates terms and conditions for electric service from TECO;
>
> NOW, THEREFORE, Allied/CFI and TECO hereby agree to conclude the PSC litigation on the following terms. . . .
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> * * *
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> 2. Pursuant to its Commercial Industrial Service Rider ("CISR") tariff, TECO and Allied/CFI shall execute a Contract Service Agreement ("CSA") for electric service to a new sodium hypochlorite manufacturing facility to be constructed and operated by Allied/CFI and/or their affiliate(s) in TECO's service territory, upon the same rates, terms and conditions as those contained in the CSA between TECO and Odyssey, provided that the new sodium hypochlorite manufacturing facility must begin commercial operation within 24 months from the date of the PSC order approving this settlement agreement . . . .

TECO also shows that Allied agreed to forego any further challenge to the TECO/Odyssey CSA:

> 3. Allied/CFI shall assert no further challenge, before the PSC, to the rates, terms and conditions for electric service provided by TECO to Odyssey and set forth in the TECO/Odyssey CSA. . . .

* * *

> 6. Allied/CFI's Complaint in the PSC litigation shall be deemed withdrawn, with prejudice, upon: (a) the execution of this Settlement Agreement by TECO and Allied/CFI ; and (b) the issuance of an order by the PSC approving this settlement agreement, as proposed.
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> 7. Allied/CFI and TECO request that the PSC include in its order approving this settlement agreement the following rulings and determinations:
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> a. The Commission shall not entertain any further challenge to the existing Odyssey or the proposed Allied/CFI CSA or the rates, terms or conditions contained therein. . . .

TECO also refers to those portions of the Commission's settlement order that approved the prudence of both Odyssey's and Allied's CSAs; specifically found that the rates offered to Odyssey and Allied exceeded TECO's incremental cost to serve them and; approved the agreement not to entertain any further challenge to the prudence of the CSAs.

> The Commission made an explicit determination, based on undisputed competent and substantial evidence that the Odyssey CISR rate would be sufficient to recover all incremental costs, including projected fuel expenses which were specifically included in the RIM analysis, for the proposed ten-year term of the CSA. . . . Allied has failed to identify any contemporaneous information about the rates in question that was not known to the Commission at the time of the deliberation that lead to the issuance of Order No. PSC-01-1003-AS-EI.

(TECO Motion to Dismiss Amended Petition pps. 7-8)

TECO argues that the allegations in Allied's amended petition fail to demonstrate on their face that Mr. Sidelko made inconsistent statements in his Commission testimony and in his deposition in the circuit court proceeding. Even if that assertion is accepted, however, TECO argues, the statements are immaterial, and Allied's amended petition does not establish that Allied was in any way injured by reliance upon those statements. According to TECO:

> Under the Settlement Agreement, Allied bargained for and received the opportunity to enjoy the same rates, terms and conditions for electric service that had been negotiated with Odyssey, provided that Allied commenced commercial operation at its new bleach manufacturing facility within 24 months of the Commission order approving the Settlement Agreement. Regardless of what rate Odyssey might have been willing to accept, Allied was given the opportunity to receive the same rate that Odyssey **did in fact accept.**

(TECO Motion to Dismiss, pps. 13-14.) TECO contends that Allied has alleged no facts that would support a finding that TECO's CSA was imprudent or that the Commission was in any way mistaken in approving the settlement agreement between TECO and Allied. According to TECO, Allied's allegations about the veracity of Mr. Sidelko's affidavit are immaterial to the question of whether Allied should be required to abide by the written terms of its settlement agreement with TECO. TECO asserts that the doctrine of administrative finality requires dismissal of Allied's amended petition with prejudice.

Allied's Response

Allied contends that both motions have provided ample argument on the legal and factual substance of Allied's amended petition and why the Commission should not vacate its settlement order, but both have failed to address the controlling standard by which the Commission must review the amended petition; that is, whether the facts alleged within the four corners of the amended petition, considered true for purposes of the motions to dismiss, state a cause of action upon which relief can be granted. Allied argues that its petition alleges facts that state a cause of action under well-established exceptions to the doctrine of administrative finality, demonstrate Allied's standing to assert its claims and support the relief requested.

In response to TECO's and Odyssey's argument that the terms of the settlement agreement, the order approving it and the general release preclude further litigation on the CSAs, Allied states that this argument misses the point of its amended petition. Allied states that it does not contest that the settlement agreement and the settlement order say what they say. Allied argues that the point of its amended petition is that Odyssey made false statements in the Commission's earlier proceeding, and Allied – as well as TECO and the Commission -- justifiably relied on those false statements in executing or approving the settlement agreement. Reasserting the allegations it made in its amended petition, Allied claims that these allegations are sufficient to invoke the exception to the doctrine of administrative finality, which provides that the Commission can modify its orders where material changed circumstances, including fraud, mistake, or misrepresentation, require the modification in the public interest. Allied also asserts that the new information in its amended petition regarding TECO's administration of the Odyssey CSA, specifically its treatment of energy and fuel costs and other recovery clause charges, amounts to material changed circumstances requiring vacation of the Commission's settlement order. In response to Odyssey's argument that in fact the doctrine of administrative finality supports dismissal of Allied's Petition, and too much time has elapsed to invoke the exception to the doctrine, Allied argues that there is no time limit beyond which the Commission is precluded from modifying its order where the public interest requires it, and the factual allegations of its amended petition, taken as true, support modification.

In response to Odyssey's argument that Allied does not have standing to proceed with its amended petition, Allied contends that because it was a party to the original agreement and a party to the settlement agreement approved by the Commission it has standing in this case. Citing Peoples Gas, 187 So. 2d 339, Allied argues that a party to an agreement approved by the

Commission may file a petition with the Commission to vacate or modify a prior approval of that agreement, and the law regarding standing to request a hearing under Florida's Administrative Procedures Act, Chapter 120, Florida Statutes, is not controlling. Further, Allied claims that it has standing as a customer of TECO and a competitor of Odyssey to file this Petition, which, it claims, raises the issues of competitive harm to Allied and financial harm perpetrated on TECO's general body of ratepayers.

Analysis

A motion to dismiss raises as a question of law the sufficiency of the facts alleged in a petition to state a cause of action. The standard to be applied in disposing of a motion to dismiss is whether, with all factual allegations in the amended petition taken as true and construed in the light most favorable to the amended petitioner, the amended petition states a cause of action upon which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In determining the sufficiency of the amended petition the Commission should confine its consideration to the amended petition and documents incorporated therein, and the grounds asserted in the motions to dismiss. See, Flye v. Jeffords, 106 So. 2d 229 (Fla. 1st DCA 1958), overruled on other grounds, 153 So.2d 759, 765 (Fla. 1st DCA 1963), and Rule 1.130, Florida Rules of Civil Procedure. Further, the law provides that where there is an inconsistency between the allegations of material fact in the amended petition and the specific facts revealed by the incorporated exhibits and they have the effect of neutralizing each other, a motion to dismiss should be granted. Schweitzer v. Seaman, 38 3 So. 2d 1175 (Fla. 4th DCA 1980). See also, Harry Pepper & Assoc., Inc. v. Lasseter, 247 So. 2d 736 (Fla. 3d DCA 1971), cert. den., 252 So.2d 797 (Fla. 1971) and Padgett v. First Federal Savings and Loan Association of Santa Rosa County, 378 So. 2d 58 (Fla. 1st DCA 1979).

Upon review of all the pleadings and the documents referenced in Allied's amended petition, we find that the facts Allied has alleged in the amended petition, even taken as true and viewed in the light most favorable to Allied, do not support a cause of action upon which the Commission can grant the relief requested. Further, we believe that another amended petition would not cure the fundamental defects of the case. The facts contained in Allied's amended petition and described in detail above - specifically the statements by Mr. Sidelko that form the basis of the amended petition - are not contradictory on their face, and are insufficient to support a finding of fraud or misrepresentation, even if taken as true and viewed in a light most favorable to Allied. They do not address the same subject. The subject of Mr. Sidelko's statements contained in his affidavit and testimony was whether Odyssey would construct its plant in TECO's service territory if it did not receive the particular rate identified. The subject of Mr. Sidelko's statements in his deposition was the economic feasibility of the plant. Mr. Sidelko's statements are not mutually exclusive, and on their face do not appear to be inconsistent or misleading.

Even if they are considered inconsistent or misleading, however, the inconsistency is not material to any issue the Commission considered when it approved the Allied/TECO settlement

and the prudence of the CSAs. As Allied states in its amended petition, the issues of relevance to the Commission in approving the prudence of the CSAs were: 1) whether the industrial customer asserted that it would not build its plant in TECO's service territory unless it received a discounted rate for service; 2) whether the customer showed that it had a viable offer for service elsewhere at that rate; and, 3) whether the identified rate covered TECO's incremental costs plus a contribution to fixed costs. The economic feasibility of the Odyssey plant was not relevant to any determination made in the Commission's settlement order; nor was TECO's future administration of the contract. If TECO is not implementing the Odyssey CSA appropriately, the remedy for that would be a review of TECO's actions in the fuel clause, not a revocation of the Commission's initial determination of the prudence of the CSA itself. We do not believe that an alleged inconsistency regarding the plant's economic feasibility or an alleged inappropriate implementation of the CSA would not affect the validity of the settlement order, or the Commission's initial determination that the CSA complied with the CISR Order and was prudent. Thus, it would be insufficient to support a determination that a substantial change in circumstances has occurred that would require vacation of the settlement order.

Also, the alleged inconsistency does not support the finding that Allied has suffered an injury in fact as a result of the inconsistent statements. As Odyssey explains in detail in its motion to dismiss, the law of standing to participate in a formal administrative proceeding under Florida's APA requires that a participant show a substantial interest that would entitle it to relief. In order to show such an interest, the participant must demonstrate that it will suffer an actual injury of sufficient immediacy which the proceeding was designed to protect. Agrico Chemical Co., supra. Allied has not alleged facts in its amended petition to show either that it has suffered an actual and immediate injury, or that the injury is of the kind this proceeding is designed to protect.[7] If Allied did rely on Mr. Sidelko's statements, Allied has not alleged facts to show that it did so to its detriment. The facts alleged in the amended petition and in incorporated documents show that Allied received essentially the same rates, terms and conditions in its CSA that Odyssey received. It is true that Allied was recently offered a higher rate for service from TECO than offered in the CSA, but that is because Allied's settlement agreement with TECO contained the condition precedent that Allied would receive the same CISR rates as Odyssey if it constructed a new electrolysis technology bleach plant within 2 years of approval of the settlement and the CSA. Allied has not constructed the plant and thus has not complied with the settlement. If Allied's failure to comply with the agreement was caused by Odyssey's agreement with a bleach plant builder, Allied's complaint is cognizable in the ongoing Miami-Dade circuit court case for interference with business opportunity, not in a proceeding before this Commission to overturn a settlement agreement between Allied and TECO to which Odyssey was not a signatory. The written terms of the settlement agreement, which is the subject of

[7] We disagree with Allied's assertion that Peoples Gas provides the controlling measure of standing in this case. A party is not automatically entitled to standing to request modification of an approved agreement because it was a party to the original agreement. Florida's APA, enacted in 1972, and the case law interpreting it, govern standing in all administrative proceedings. A party to an agreement does not acquire a superior right to an administrative hearing simply by being a party to an agreement. A party must still show a substantial interest in the new proceeding pursuant to the requirements of Agrico in order to proceed.

Allied's amended petition, set out the consideration provided and the entire agreement between the parties to dismiss Allied's case with prejudice before the Commission. They control TECO's and Allied's obligations in this dispute. The representations of a non-party to the settlement do not appear anywhere in the document as a basis upon which the settlement agreement was reached.

Conclusion

Allied has not alleged sufficient facts in its amended petition to support the relief it has requested. As mentioned above, Allied's allegations of contradictory statements by Odyssey do not support vacation of a Commission order approving Allied's written settlement agreement with TECO. Allied's complaint against Odyssey is cognizable in circuit court. Further, Allied has not alleged any actions by TECO that would warrant vacation of the Commission's settlement order. Allied's allegation that TECO arbitrarily and capriciously refused to invoke the force majeure clause of the settlement agreement would support a claim to enforce the terms of the agreement, not to void it. Similarly, Allied's claim that TECO is not properly administering its CSA with Odyssey does not support vacation of the TECO/Allied settlement agreement itself.

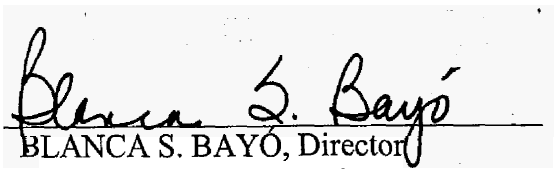
Allied has not alleged sufficient material facts to show misrepresentation, detrimental reliance, harm, or any significant changed circumstances that would warrant vacation of a Commission order in abrogation of the doctrine of administrative finality or the Commission's longstanding commitment to the support and encouragement of negotiated settlements. See Peoples Gas v. Mason, supra.; Order No. PSC-98-1620-FOF-EQ, issued December 4, 1998, in Docket No. 980283-EQ (doctrine of administrative finality precluded readjudication of declaratory statement issues); Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731 (legal system favors settlement of disputes by mutual agreement between contending parties); and, Order No. 22094, issued October 26, 1989, in Docket No. 881518-SU (Commission has longstanding policy to encourage settlement agreements). Allied's amended petition fails to state a cause of action upon which the Commission can grant the relief requested. Pursuant to Rule 28-106.201, Florida Administrative Code, it is clear on the face of the amended petition that amendment will not cure its defects, and therefore we dismiss the amended petition with prejudice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the 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, by Allied Universal Corporation and Chemical Formulators, Inc. is dismissed. It is further

ORDERED that this docket shall remain open pending consideration of the outstanding motions for attorneys fees and sanctions.

By ORDER of the Florida Public Service Commission this 9th day of November, 2004.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

MCB

DISSENT: Commissioner Deason dissented from the Commission's decision to deny oral argument on this matter at the October 19, 2004, Agenda Conference.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District

Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.