

State of Florida



Public Service Commission

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RECORDS AND REPORTING

DATE: MARCH 16, 2000

TO: DIRECTOR, DIVISION OF RECORDS AND REPORTING (BAYD)

FROM: DIVISION OF LEGAL SERVICES (STERN/ELIAS) *RVE MKS*
DIVISION OF ELECTRIC AND GAS (DRAPER) *EDJ* *JDJ*

RE: DOCKET NO. 000061-EI - COMPLAINT BY ALLIED UNIVERSAL CORPORATION AND CHEMICAL FORMULATORS, INC. AGAINST TAMPA ELECTRIC COMPANY FOR VIOLATION OF SECTIONS 366.03, 366.06(2) AND 366.07, F.S., WITH RESPECT TO RATES OFFERED UNDER COMMERCIAL/INDUSTRIAL SERVICE RIDER TARIFF; PETITION TO EXAMINE AND INSPECT CONFIDENTIAL INFORMATION; AND REQUEST FOR EXPEDITED RELIEF.

AGENDA: 03/28/00 - REGULAR AGENDA - INTERESTED PERSONS MAY PARTICIPATE

CRITICAL DATES: NONE

SPECIAL INSTRUCTIONS: NONE

FILE NAME AND LOCATION: S:\PSC\LEG\WP\000061.RCM

CASE BACKGROUND

On January 20, 2000, Allied Universal Corporation and Chemical Formulators, Inc. (Allied) filed a formal complaint against Tampa Electric Company (TECO). The complaint alleges that: 1) TECO discriminated against Allied by failing to offer Allied the same rate offered to a competitor under TECO's Commercial Industrial Service Rider (CISR) Tariff; 2) TECO did not properly adhere to the CISR process in its arrangements with Allied's competitor; and 3) a TECO employee colluded with the competitor of Allied in setting rates.

The CISR tariff allows TECO to negotiate a discount on the base energy and base demand charges with commercial/industrial

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customers who can show that they have viable alternatives to taking electric service from TECO (at-risk load).

Allied requested that the docket be expedited to minimize damages from the alleged discriminatory treatment. Accordingly, a hearing was scheduled for April 5, 2000. The Order Establishing Procedure, Order No. PSC-00-0392-PCO-EI, was issued on February 23, 2000. However, after issuance of that order, the procedural schedule was suspended by the prehearing officer, pending the Commission's decision on this recommendation.

Since the opening of this docket, Allied has vigorously pursued discovery of information pertaining to TECO's CISR negotiations and contract service agreement (CSA) with Odyssey Manufacturing Company, a competitor of Allied. TECO has steadfastly objected, claiming the information is confidential.

On February 14, 2000, TECO filed a Request for Approval of Proposed Procedures for a Disposition of This Proceeding Without Disclosing Confidential Information, and Summary Disposition. Through this filing TECO proposed a procedure by which the Commission could confidentially review the necessary information and make a final decision on the Complaint. On February 28, 2000, Allied responded in its Response in Opposition to TECO's Motion for Protective Order, for Suspension of Procedural Schedule, and for Summary Disposition.

This recommendation addresses TECO's Request for Proposed Procedures and Allied's Response in Opposition.

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ISSUE 1: Should the Commission grant TECO's Request for Approval of Proposed Procedures for a Disposition of This Proceeding Without Disclosing Confidential Information?

RECOMMENDATION: No. The Commission should deny TECO's Request because it violates fundamental principles of due process, and denies Allied the rights granted to parties to a formal hearing in Section 120.57(1)(b), Florida Statutes.

STAFF ANALYSIS:

TECO's Request for Proposed Procedures and Motion for Summary Disposition

TECO's proposed procedure is described below.

1. TECO would submit to the Commission and staff comparable packages of information and sworn affidavits reflecting all of the relevant CISR negotiations between TECO and Odyssey, and TECO and Allied. A time line for the two sets of negotiations would also be submitted. All information would be submitted on a confidential basis.
2. The Commission would review the information, without disclosing it to Allied, and hold the procedural schedule in abeyance pending the outcome of the review. The review would be expedited.
3. At the end of the review, the Commission would either grant TECO's Request for Summary Disposition, thereby resolving the case, or deny the Request and allow normal hearing procedures to resume.

In support of its proposal TECO relies on the following provision of its CISR tariff:

The CSA [customer service agreement] shall be considered a confidential document. The pricing levels and procedures described within the CSA, as well as any information supplied by the customer through an energy audit or as a result of negotiations or information requests by the Company and any information developed by the Company in connection therewith, shall be made available for review by the Commission and its staff only and such review shall be made under the confidentiality rules of the Commission.

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This CISR tariff was approved by the Commission in Order No. PSC-98-1241-S-EI. Staff does not believe that the tariff provision obviates the need for a confidentiality determination under Section 366.093, Florida Statutes. A request to determine confidentiality of this information is pending.

TECO claims its proposed procedure will enable the Commission to reach the merits of the complaint, save time, and preserve the confidentiality of CISR related information. Allied attempted to review this information in its Request to Examine and Inspect Confidential Information, submitted with the Complaint, and also through discovery served shortly after the Complaint.

TECO argues that contracts negotiated under the CISR tariff contain highly proprietary information the public disclosure of which would harm the utility, its general body of rate payers, and the CISR customer. TECO further argues that the Commission determined that similar information warranted confidential treatment under Gulf Power's CISR. In Order No. PSC-99-0274-CFO-EI, a ruling on a confidentiality request from Gulf Power, the Commission stated:

This information is regarded as sensitive and confidential by the CISR customer because public disclosure of this information would impact the customer's ability to compete in its "native market." In the event such information is made public, it appears as if future potential CISR customers could avoid the risk of public disclosure of their confidential information by refusing to negotiate with Gulf. This may lead to uneconomic bypass of Gulf's facilities. Therefore the information is entitled to confidential classification under Section 366.093(4), Florida Statutes.

Furthermore, notes TECO, Allied and Odyssey insisted on entering into binding nondisclosure agreements with TECO before starting CISR negotiations. Staff notes that order quoted above granted confidentiality to Gulf Power's earnings surveillance report which showed revenue shortfall due to CSAs over a given time period.

Allied is willing to enter a binding nondisclosure agreement with TECO regarding information on the Odyssey CISR negotiations. TECO claims Odyssey will not be protected by such an agreement because Allied and Odyssey compete in the same market. Furthermore, if Allied is allowed access to the information,

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potential CISR customers may decide that bypassing TECO poses less economic risk than negotiating with TECO.

Allied's Objection to Proposed Procedures

Allied argues that TECO's proposed procedure violates principles of due process codified in Section 120.57(1)(b), Florida Statutes, and it would prevent Allied from acting as a litigant and from conducting discovery. Section 120.57(1)(b), Florida Statutes, grants all parties to formal administrative hearings the opportunity to present evidence and argument on all issues, and to conduct cross-examination. Allied maintains there is no precedent to support the legitimacy of TECO's proposal and notes that TECO cites no precedents.

Allied argues that implementing TECO's proposal would allow Allied's complaint to "be dismissed on a secret showing made by TECO to the Commission." Allied cites numerous cases to support the proposition that "[t]he prohibition of secret agreements by public utilities favoring one commercial or industrial customer among similarly situated competitors is generally considered the driving force behind the movement for regulation of public utilities." See Homestead v. Des Moines Electric Co., 248 F. 439 (8th Cir. 1918); Bromer v. Florida Power & Light Co., 45 So. 2d 658 (Fla. 1950); Main Valley Realty Co. V. Blackstone Valley Gas & Electric. Co., 59 RI 29, 193 A. 879 (1937); American Aniline Products v. City of Lock Haven, 288 Pa. 420, 135 A. 726 (1927); Barringer v. Louisville Gas & Electric Co., 196 Ky. 268, 244 SW 690, (1922); Western Union Tel. Co. V. Call Pub. Co., 198 U.S. 92, 21 S. Ct. 561, 45 L. Ed. 765 (1900). Allied maintains that private agreements between utilities and commercial or industrial customers should not be shielded from scrutiny by private litigants.

Both Allied and TECO believe that the Commission's rationale for confidentiality of CISR related information is to deter bypass of the utility by potential customers who would be harmed by public disclosure of such information. However, Allied contends that the process lacks adequate safeguards against undue discrimination. Allied asserts that, to date, TECO's conduct under its CISR tariff is so egregious that suspension or cancellation of the tariff should be considered until adequate safeguards against undue discrimination are established. Allied further contends that the speculative harm to TECO of potential, future bypass is outweighed by the need to prevent undue discrimination.

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Allied claims that there is nothing exceptional about the kinds of confidential information involved in this proceeding, and that the Commission's standard procedures for handling proprietary information are appropriate for use in this case. Allied notes, for example, that it has already submitted, via direct testimony, the same types of information it requested TECO to produce concerning Odyssey. Allied's direct testimony was submitted with a request for confidential treatment. The information redacted from the nonconfidential copy are the rates, terms and conditions of TECO's and Georgia Power's proposals, proposals from engineering companies for construction of Allied's new plant, and certain information on Allied's financial projections of estimated return on investment in its new plant at various rates for electric service. In addition, Allied requested confidentiality for correspondence and other documents related to CISR tariff negotiations with TECO and Georgia Power.

Allied is willing to enter into a protective order under Rule 25-22.006, Florida Administrative Code, which would: 1) limit the distribution of proprietary, confidential, business information to the parties, witnesses, the Commission and Commission staff; and, 2) limit the use of such information to litigation, and provide for the return to TECO of all such information upon the conclusion of all litigation involving claims arising from the CISR tariff negotiations.

Allied concedes that a limited subset of Odyssey's CISR related information may not be appropriate for disclosure to Allied. This subset of information would include the types of items Allied redacted from its own direct testimony. Allied proposes that this type of confidential information could be produced by TECO to the Commission, for *in camera* review, to decide if the information should be made available to Allied. Allied maintains however, that certain information should not be deemed confidential and should be produced immediately. Such information includes the terms and conditions of TECO's offer(s) of CISR rates to Odyssey, TECO's analysis of its incremental cost to serve Allied and Odyssey, and documentation pertaining to Odyssey's satisfaction of all the requirements and preconditions of the CISR tariff.

Staff Analysis

TECO's proposed procedure should be denied because it denies Allied's rights under Section 120.57(1)(b), Florida Statutes. This section pertains to hearings involving disputed issues of material fact and provides:

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All parties shall have an opportunity to respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence...

Under TECO's proposal, Allied would be precluded from responding, presenting argument and cross-examining witnesses if the Commission decided to rule in TECO's favor. Therefore, the Commission would violate the requirements of the Florida Statutes if it granted TECO's proposal.

In addition, TECO's proposal is unfair in that a summary decision can only be made in TECO's favor, not Allied's. Under TECO's proposal, if the Commission reviewed all the information and determined that Allied was correct, it could not summarily rule in favor of Allied, but would have to conduct a hearing.

For the above reasons, staff recommends that TECO's request be denied.

ISSUE 2: Should this docket be closed?

RECOMMENDATION: No. This docket should not be closed.

STAFF ANALYSIS: This docket should remain open pending completion of the hearing.