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October 23, 2000

HAND DELIVERY

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RECORDS AND REPORTING

Ms. Blanca S. Bayo, Director
Division of Records and Reporting
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, Florida 32399-0850

Re: Docket No. 000061-EI

Dear Ms. Bayo:

Enclosed for filing on behalf of Allied/CFI are the original and fifteen copies of Allied/CFI's Response in Opposition to Tampa Electric Company's Motions to Compel Production of Documents and Responses to Interrogatories.

Please acknowledge this filing by date-stamping and returning the enclosed copy of this letter.

Thank you for your assistance with this filing.

Sincerely,

John R. Ellis

- APP _____
- CAF _____
- CMP _____
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- CTR _____
- ECR 2 _____
- LEG _____
- OPC _____
- PAI _____
- RGO _____
- SEC _____
- SER _____
- OTH _____

JRE/rl
Enclosures
cc: All Counsel
Trib.3

RECEIVED & FILED
FPSC-BUREAU OF RECORDS

DOCUMENT NUMBER-DATE

13519 OCT 23 8

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Allied Universal Corporation and Chemical Formulators, Inc. against Tampa Electric Company for violation of Sections 366.03, 366.06(2) and 366.07, Florida Statutes, with respect to rates offered under Commercial/Industrial Service Rider tariff; petition to examine and inspect confidential information; and request for expedited relief.

Docket No. 000061-EI

Filed: October 23, 2000

ALLIED/CFI'S RESPONSE IN OPPOSITION TO TAMPA ELECTRIC COMPANY'S MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS AND RESPONSES TO INTERROGATORIES

Allied Universal Corporation ("Allied") and its affiliate, Chemical Formulators, Inc. ("CFI"), hereinafter referred to collectively as "Allied/CFI," by and through their undersigned counsel, and pursuant to Rule 28-106.204, Florida Administrative Code, submit the following response in opposition to the motions of Tampa Electric Company ("TECO") to compel production of documents and responses to interrogatories, and state:

1. TECO's Document Requests Nos. 1, 2 and 3, and TECO's Interrogatories Nos. 2(b)-(e), 3, 5, 6, 7, 8 and 9 are not relevant to the subject matter of this proceeding and are not calculated to or likely to lead to the discovery of evidence which would be admissible in this proceeding, because they are directed to the issue of consequential damages to Allied/CFI caused by TECO's violation of Sections 366.03, 366.06 (2), and 366.07, Florida Statutes. The Commission has no jurisdiction to award damages to Allied/CFI. Southern Bell T&T v. Mobile America Corp., Inc. 291 So. 2d 199 (Fla. 1974).

DOCUMENT NUMBER-DATE

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FPSC-RECORDS/REPORTING

2. The derivation of Section 366.03, Florida Statutes, prohibiting public utilities from making or giving any undue or unreasonable preference or advantage to any person or subjecting any person to undue or unreasonable prejudice and disadvantage with respect to the furnishing of electric service, is Chapter 26545 of the Laws of 1951. The derivation of Sections 366.06 and 366.07, Florida Statutes, also is Chapter 26545 of the Laws of 1951.

3. Prior to the enactment of Chapter 26545, Florida courts had jurisdiction of actions alleging undue discrimination with respect to rates for electric service:

The rule of the common law was that utility rates must be reasonable and nondiscriminatory. Section Four, Declaration of Rights, Constitution of Florida, requires that all courts in this State be open so that any person may have a remedy by due course of law for any injury done him in his lands, good, person, or reputation. In our view, Section Four of the Declaration of Rights should be read in connection with Section 30 of Article 16 of the Constitution and if the legislature has not provided a means under the latter provision for one injured to secure redress, then he may seek redress under the common law and the court may determine what is a reasonable rate under the facts shown.

Tampa Electric Co. v. Cooper, 14 So.2d 388, 389 (Fla. 1943).

4. As a result of the enactment of Chapter 26545, the Commission has exclusive jurisdiction of actions to determine the reasonableness of rates for electric service. Richter v. Florida Power Corp., 366 So.2d 798, 799 (Fla. 2d DCA 1979).

5. Thus, the Commission has primary jurisdiction to determine the issue of whether TECO's conduct violated Sections 366.03, 366.06(2), and 366.07, Florida Statutes, and has no jurisdiction to determine the issue of consequential damages to Allied/CFI caused by the violation. See, Sandpiper Homeowner's Ass'n v. Lake Yale, 667 So.2d 921 (Fla. 5th DCA 1996); Hill Top Developers v. Holiday Pines Service Corporation, 478 So.2d 368 (Fla. 2d DCA 1985).

6. For this reason, the relief requested in Allied/CFI's Complaint in this proceeding does not include any request for findings or determinations with respect to any issue of damages. The only claims presented for determination by the Commission concern: (1) the propriety of the rates, terms and conditions offered by TECO to Odyssey Manufacturing Company ("Odyssey") and to Allied/CFI pursuant to TECO's Commercial/Industrial Service Rider ("CISR") tariff; and (2) compliance with the terms of the CISR tariff. The Request for Relief stated in Allied/CFI's Complaint is:

WHEREFORE, Allied and CFI request that the Commission:

- (1) order TECO to disclose the Contract Service Agreement between TECO and Odyssey and all documentation supporting the CISR tariff rates offered by TECO to Odyssey including documentation demonstrating that Odyssey met all requirements and preconditions of the CISR tariff and documentation supporting TECO's determination of its incremental cost to serve Odyssey;
- (2) determine that TECO has given an undue and unreasonable preference and advantage to Odyssey, and has subjected Allied and CFI to an undue and unreasonable prejudice and disadvantage, with respect to the CISR tariff rates offered by TECO to Odyssey and to Allied/CFI;
- (3) determine that TECO has breached its obligation of good faith in the exercise of its discretion in offering the CISR tariff to any customer who complies with the conditions of the tariff;
- (4) order TECO to offer Allied/CFI the same CISR tariff rates offered by TECO to Odyssey;
- (5) suspend the CISR tariff rates offered by TECO to Odyssey until such time as TECO's undue discrimination against Allied and CFI has been sufficiently remedied or mitigated; and
- (6) grant such further relief as the Commission deems appropriate.

7. Specifically, Allied/CFI's Complaint does not request any finding or determination with respect to any issue involving consequential damages or any claim involving the question of

whether TECO's conduct was in violation of any laws other than Sections 366.03, 366.06(2), and 366.007, Florida Statutes, because such issues and claims are beyond the jurisdiction of the Commission.¹

8. Allied/CFI agrees with the presumption underlying TECO's document requests and interrogatories in question, that the measure of damages for TECO's violation of Sections 366.03, 366.06(2), and 366.07, Florida Statutes, is based on the actual damages caused to Allied/CFI in the market for Allied/CFI's and Odyssey's products, rather than on the amount of the overcharge or undercharge in rates multiplied by the amount of consumption. United Gas Corporation v. Shepard Laundries Co., 189 S.W. 2d 485 (Texas Sup. Ct. 1945). Homestead Co. v. Des Moines Electric Co., 248 F. 440 (8th Cir. 1918). However, the issue of damages is beyond the jurisdiction of the Commission, as stated above. If the Commission had jurisdiction to determine the issue of damages then Allied/CFI would be entitled to conduct discovery on this issue against Odyssey, and the Commission would be required to make findings and determinations concerning the relevant market for liquid chlorine bleach and related products. Instead, the Commission's jurisdiction is limited to the claims alleged in Allied/CFI's Complaint and the issues stated in the Draft Prehearing Order: whether TECO's responses to Odyssey's and to Allied/CFI's requests for CISR tariff rates were in violation of TECO's CISR tariff, Order No. PSC-98-1081A-FOF-EI, or Sections 366.03, 366.06(2),

¹In particular, the allegations at pages 10-11 of Allied/CFI's Complaint and the facts stated at pages 2 and 12-13 of the Direct Testimony of Robert M. Namoff filed on February 21, 2000 (concerning the TECO employee who negotiated Odyssey's preferential rates and subsequently became an Odyssey employee), are alleged and stated for the sole purpose of making a showing sufficient to overcome the confidentiality terms of the CISR tariff. Allied/CFI has not alleged, and does not seek any finding or determination with respect to, whether such conduct constitutes collusion or is in violation of any law.

and 366.07, Florida Statutes. Neither TECO nor the Commission is required to undertake any extensive analysis of the relevant market for Allied/CFI's and Odyssey's products in order to determine whether Allied/CFI and Odyssey were similarly situated with respect to their requests for service under TECO's CISR tariff, and whether TECO's conduct in its disparate responses to their request was in violation of its tariff, the cited order, and the relevant statutes.

9. Additionally, the information sought by the document requests and interrogatories in question is exactly the kind of trade secret information that all parties and the Commission have agreed is not a proper subject of discovery in this proceeding. Both TECO and Odyssey have repeatedly asserted the need to keep commercially sensitive information concerning Odyssey from being disclosed to Allied/CFI; Allied/CFI has consistently responded that it is not seeking discovery of such information in this proceeding, and has stipulated to Odyssey's prior review of documents before disclosure is made to Allied/CFI in order to alleviate this concern.

10. Order No. PSC-00-1171-CFO-EI, issued June 27, 2000 in this proceeding ("Discovery Order"), granted in part and denied in part Allied/CFI's motions to compel production of documents and answers to interrogatories by TECO. As part of its framework for analysis, the Discovery Order states that the impact of disclosure on TECO's and Odyssey's businesses and the question of whether Allied/CFI can obtain a fair trial without disclosure are of particular relevance in weighing the competing interests of the parties. The Discovery Order acknowledges Allied/CFI's position that it does not seek sensitive commercial information about Odyssey's operation and finances in this proceeding (Discovery Order, at p. 12). In ordering production to Allied/CFI of all documents provided by Odyssey to TECO in connection with Odyssey's request for CISR tariff rates, the Discovery Order provides:

To the extent that the documents to be produced include confidential commercial information on Odyssey, this information must be redacted from production to Allied. Confidential commercial information consists of all aspects of plant size and design, the amount of electricity consumed, any information on the financial status of Odyssey, and any information from which Allied could readily deduce such proprietary information. Allied states it does not want this information, so Allied will not be harmed by redacting it.

If production is withheld, Allied will likely experience direct harm because its ability to prove its case is likely to be impaired...

Production will cause no direct harm to Odyssey because information relevant to its competitive status will be redacted....

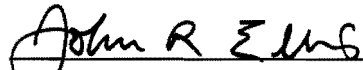
I find that the harm from production is outweighed by the harm from lack of production.

Discovery Order, at p. 18-19.

Here, the information that TECO's discovery requests calls for from Allied/CFI is the same kind of confidential commercial information that was redacted with respect to Odyssey. TECO cannot make any showing that its ability to defend against Allied/CFI's claims in this proceeding will be impaired by the refusal to permit discovery of trade secret information concerning Allied/CFI's market share, pricing, and related commercially sensitive information.

WHEREFORE, for the foregoing reasons, Allied/CFI requests that TECO's motions to compel production of documents and answers to interrogatories be denied.

Respectfully submitted,

A handwritten signature in black ink that reads "John R. Ellis". The signature is written in a cursive style and is positioned above a horizontal line.

KENNETH A. HOFFMAN, ESQ.

JOHN R. ELLIS, ESQ.

Rutledge, Ecenia, Underwood, Purnell &
Hoffman, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Allied/CFI's Response in Opposition to Tampa Electric Company's Motion to Compel Production of Documents and Responses to Interrogatories was furnished by hand delivery(*) and/or U. S. Mail to the following this 23rd day of October, 2000:

Robert V. Elias, Esq.(*)
Marlene Stern, Esq.
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Florida Public Service Commission
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Room 370
Tallahassee, Florida 32399-0850

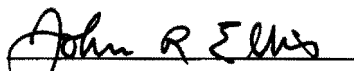
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