State of Florida

Public Service Commission

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TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: June 24, 2004

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Brown, Stern) MCB MKS JDJ
Division of Economic Regulation (Draper) EJD DPW

RE: Docket No. 040086-EI – 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.

AGENDA: 07/06/04 – Regular Agenda – Motions to Dismiss and Motion for Attorney's Fees-Oral Argument Requested

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040086.RCM.DOC

CASE 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

[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; petition to examine and inspect confidential information; and request for expedited relief.

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 2 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.[2] 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 in circuit court in Miami for state antitrust violations and other allegations of interference with business relationships.[3]

In the course of the circuit court proceeding, in December of 2003, Allied conducted a deposition of Odyssey's president, Mr. Sidelko, which contains 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 has filed the present petition in which it asks the Commission to vacate its settlement order, declare the settlement agreement between Allied and TECO unenforceable, terminate the existing CISR contract between Odyssey and TECO, and 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. Allied asserts that it relied on Odyssey's misleading statements to enter into the settlement agreement with TECO, TECO relied on Odyssey's statements in executing the CISR agreement with Odyssey, and the Commission relied on them to approve the settlement agreement and the prudence of TECO's contracts with Odyssey and Allied.

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. Odyssey and TECO have objected to OPC's motion.

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[2] Odyssey was not an original named party to Docket No. 000061-EI, nor a signatory to the settlement agreement the Commission approved, although Odyssey was granted intervenor status in that case. In this case, Allied has specifically named Odyssey as a party in its petition, and requested relief against it. It is therefore not necessary, as Allied has suggested, for Odyssey to intervene in order to participate. Odyssey's substantial interests will be affected by the Commission's decision. Section 120.52 (12)(a), Florida Administrative Code, defines a party to an administrative proceeding as, in pertinent part, "[s]pecifically named persons whose substantial interests are being determined in the proceeding." Rule 28-106.205, Florida Administrative Code, provides that parties ". . . other than the original parties to a pending proceeding . . ." may request intervention (emphasis supplied). Thus an intervention request is not necessary for Odyssey, an original named party to the case whose interests are being determined in the proceeding, to participate.

[3] Case No. 01-27699-CA-25, in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida.

This recommendation addresses the motions to dismiss filed by Odyssey and TECO, and Odyssey's motion for attorney's fees and sanctions. OPC's motion will be addressed during the course of the proceeding after the Commission makes its determination on the motions to dismiss.[4] The Commission has jurisdiction over this matter pursuant to section 366.04, 366.05, and 366.07, Florida Statutes, and pursuant to its inherent authority to enforce and review its own orders.

DISCUSSION OF ISSUES

ISSUE 1: Should the Commission grant the request for oral argument?

RECOMMENDATION: Yes. (Brown, Stern)

STAFF ANALYSIS: Rule 25-22.058, Florida Administrative Code, provides that the Commission may grant oral argument upon the request of any party to a formal proceeding under Section 120.57, Florida Statutes. The rule requires that the oral argument request be made in a separate document that accompanies the pleading on which argument is requested. The rule also requires that the request for oral argument state with specificity why argument would aid the Commission in comprehending and evaluating the issues before it. Odyssey filed a separate request for oral argument in which it stated that the issues raised in Allied's petition and in its motion to dismiss were complex, technical and detailed. Odyssey asserted that oral argument would assist the Commission in the consideration of the issues raised. TECO requested in its motion to dismiss that it be permitted to participate in the oral argument, if the Commission chose to grant it.

Allied's petition to vacate the Commission's order approving the settlement agreement is contentious and complicated and it implicates important Commission policies that encourage settlements and protect the finality and effectiveness of Commission orders. Staff recommends that oral argument on the motions would assist the Commission in resolving these matters. Staff suggests 15 minutes per side for the oral argument.

[4] Several confidentiality requests and OPC's May 24, 2004, Motion for Determination of the Proper Treatment of Deposition Transcript of Mr. Patrick Allman also remain pending. They too will be addressed after the Commission makes its determination on the motions to dismiss. All documents are presently treated as confidential. Also, Mr. Allman's deposition is not part of the evidentiary allegations contained in the four corners of Allied's petition, or incorporated by reference therein, and therefore it will not be considered in this recommendation on the motions to dismiss. See, Flye v. Jeffords, infra. at page11.

ISSUE 2: Should the Commission dismiss Allied's Petition?

RECOMMENDATION: Yes. Allied's petition fails to state a cause of action upon which the Commission can grant relief. The Commission should dismiss the petition with prejudice. (Brown, Stern, Draper)

STAFF ANALYSIS:

Allied's Petition

In its 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).[5] 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. (CISR Order, p. 2) 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. If the Commission found a CSA to be imprudent, the Commission could impute the revenue difference between TECO's regular applicable rate and the CSA rate to TECO.

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 Petition, p.7.) 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

[5] Order No. PSC-98-1081-FOF-EI, issued August 10, 1998, in Docket No. 980706-EI, In re: 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.

to locate its plant in a different service area where it could obtain a satisfactory rate. In its petition in this docket, Allied quoted the testimony of Mr. Sidelko as follows:

> Q. Were you required to furnish a sworn affidavit to TECO?
>
> 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.
>
> Q. Did Odyssey and TECO reach an agreement?
>
> 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.
>
> 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?
>
> 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 Petition, p. 9.)

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 TECO first offered Allied, however, were higher 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. (Allied Petition, p.10.) 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.[6]

On November 19, 2001, Allied 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 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;
>
> (c) The per kwh rate included in his affidavit and referred to in his testimony was not important to Mr. Sidelko;[7]
>
> **(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; and
>
> **(e)** He did not know if Odyssey's Tampa plant would have been feasible had TECO offered a CISR rate of [confidential number higher than the rate in Mr. Sidelko's affidavit] per megawatt hour, plus taxes.

(Allied Petition, p. 11.) Allied attached portions of Mr. Sidelko's deposition to its petition in this docket to support its allegations of inconsistency. (Allied Petition, Exhibit D.) According to Allied, the statements from Mr. Sidelko 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 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 People's Gas v. Mason, 187 So. 2d 335 (Fla. 1966). Allied also states that because of Odyssey's allegedly false statements and the significant difference between the base rate TECO has recently offered Allied to serve its proposed new plant

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[6] The settlement agreement and the Commission's Settlement order approving it, are referenced, incorporated and attached to Allied's 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 petition. Rule 1.130, Fla. Rules of Civil Procedure; Harry Pepper & Associates v. Lasseter, 247 So. 2d 736 (Fla. 3d DCA 1971).

[7] 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. See, Allied Petition p. 11.

and the Odyssey CSA rate, Allied believes that Odyssey's rate is insufficient to cover TECO's incremental cost, and thus TECO's ratepayers have been harmed.

TECO's Motion to Dismiss

TECO's motion centers upon the settlement agreement between Allied and TECO which was approved by the Commission in the earlier case and which resolved all outstanding claims by Allied against TECO for discriminatory treatment related to TECO's CISR tariff. TECO claims that Allied's new 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 allegation of wrong-doing on TECO's part. 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.

Citing the settlement agreement and the settlement order approving it, which are attached to Allied's 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. . . .
>
> * * *
>
> 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 Motion to Dismiss, pps. 4-5.) 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. . . .
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> * * *
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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 Motion to Dismiss p. 5.) TECO also refers to those portions of the Commission's settlement order that approved the prudence of both Odyssey's and Allied's CSAs and the agreement not to entertain any further challenge to the CSAs. (TECO Motion to Dismiss pps. 6-7.)

TECO argues that the allegations in Allied's 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 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. 11-12.) 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, the doctrine of administrative finality requires dismissal of Allied's Petition with prejudice.

Odyssey's Motion to Dismiss

Contending that Allied's 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 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 petition. Odyssey claims that

Allied's 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 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 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 3 years before this 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 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 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 agreement approving it. Therefore, Odyssey argues, like the principle of res judicata[8], the doctrine of administrative finality would preclude the Commission's reconsideration of those issues. Finally, Odyssey argues that Allied's 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. Like TECO, 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 litigation against TECO regarding the CSAs

[8] A matter already adjudicated.

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 concludes its motion to dismiss by arguing that even if the factual allegations of Allied's petition are taken as true, on their face the statements by Mr. Sidelko are not contradictory. 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. Even if Mr. Sidelko's statements were considered contradictory, Odyssey argues:

> The contradictions are in no manner legally material to Allied/CFI's demands for relief; and even if said statements were determined to be both contradictory and material, they could not support the Commission's granting any of the relief Allied/CFI has demanded due to Allied/CFI's lacking standing, the Commission's lacking jurisdiction, the doctrine of administrative finality, the law of settlements, and other law cited herein.

(Odyssey Motion to Dismiss, p. 40)

Allied's Response

Allied contends that both motions have provided ample argument on the legal and factual substance of Allied's 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 Petition; that is, whether the facts alleged within the four corners of the 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, and demonstrate Allied's standing to assert its claims.

In response to TECO's and Odyssey's argument that the terms of the settlement agreement and the order approving it preclude further litigation on the CSAs, Allied states that this argument misses the point of Allied's 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 Petition is that Odyssey's president, Mr. Sidelko, 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 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 changed circumstances, including fraud, mistake, or misrepresentation, require the modification in the public interest.

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 Petition, taken as true, support modification.

In response to Odyssey's argument that Allied does not have standing to proceed with its 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." (Allied's Response, p. 18.)

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 petition taken as true and construed in the light most favorable to the petitioner, the 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 petition the Commission should confine its consideration to the 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 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). Rule 28-106.201, Florida Administrative Code, provides the requirements for a petition for a formal administrative proceeding involving disputed issues of material fact, and subsection (4) of that rule provides that a petition shall be dismissed if not in substantial compliance with the rule. Subsection (4) also provides that dismissal under the rule shall be without prejudice to file an amended petition at least once, unless it conclusively appears from the face of the petition that the defect cannot be cured.

Upon review of all the pleadings and the documents referenced in Allied's petition, staff recommends that the facts Allied has alleged in the 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 relief. Further, we believe that an amended petition would not cure the fundamental defects of the case. Staff recommends that the Commission should dismiss the petition with prejudice, for the reasons provided below.

Standing

As Odyssey explains in detail in its Motion to Dismiss, the law of standing to participate in a formal administrative proceeding under Florida's Administrative Procedure Act (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 to warrant relief. Allied has not alleged any facts in its petition to show that it has suffered an actual and immediate injury, or that it has suffered any significant injury at all. Staff disagrees with Allied's assertion that Peoples Gas provides the 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, and the case law interpreting it, govern standing in all administrative proceedings. A party to an earlier agreement must still show a substantial interest in the new proceeding pursuant to the requirements of Agrico in order to proceed. While Staff recommends that the Commission could dismiss Allied's petition for lack of standing, the allegations of the petition demonstrate more fundamental flaws that cannot be cured by an amended petition.

The factual allegations

The facts contained in Allied's Petition and described in detail above - specifically the statements by Mr. Sidelko that form the basis of the 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 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. Therefore an alleged inconsistency regarding the plant's economic feasibility would not affect the validity of the Commission's settlement order, and would be insufficient to support a determination that a substantial change in circumstances has occurred as a result of those statements.

Also, the alleged inconsistency does not support the finding that Allied has suffered an injury in fact as a result of the inconsistent statements. If indeed Allied relied on Mr. Sidelko's statements, Allied has not alleged facts to show that it did so to its detriment. The facts alleged in the 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 alleged that it has constructed that plant. It is reasonable to infer that if harm has occurred here, it arises from Allied's failure to comply with the conditions of the settlement agreement that the Commission approved.

Conclusion

Allied has not alleged sufficient facts in its Petition to establish standing to pursue this cause of action; nor has Allied alleged sufficient 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 Petition should be dismissed for failure to state a cause of action upon which the Commission can grant relief. Pursuant to Rule 28-106.201, Florida Administrative Code, it is clear on the face of the Petition that amendment will not cure its defects, and therefore staff recommends that the Petition be dismissed with prejudice.

ISSUE 3: Should the Commission grant Odyssey's Motion for Attorney's Fees and Sanctions?

RECOMMENDATION: No. Odyssey's Motion for Attorney's Fees should be denied. (Brown, Stern)

STAFF ANALYSIS: Odyssey filed its Motion for Sanctions and Attorney's fees pursuant to section 57.105(5), Florida Statutes, Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation, which was amended in 2003 to provide relief in administrative proceedings before an administrative law judge. Section 57.105(5) provides as follows:

> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1) - (4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency. A voluntary dismissal by a nonprevailing party does not divest the administrative law judge of jurisdiction to make the award described in this subsection.

Subsection (1) of the statute provides the standard for determining sanctions and attorney's fees. It provides, in pertinent part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

Odyssey alleges that Allied and its counsel are aware that the claims made in Allied's Petition are unsupported as a matter of fact and law. Odyssey claims that Allied filed its Petition at the Commission for improper purposes; to delay its pending litigation against Odyssey in Miami, to harass Odyssey, and to cause Odyssey undue expense to gain competitive advantage. Allied responds that Odyssey's statements are conclusory and without factual support. Allied asserts that courts have consistently required trial courts to make an explicit finding, on the record, that the losing party did not raise any justiciable issue of law or fact. Courts must

determine that the claim was completely untenable and frivolous, and they must base an award of attorney's fees and costs on competent, substantial record evidence.

Staff recommends that a decision on sanctions is not supportable by the present record. While staff has recommended that Allied's Petition should be dismissed with prejudice for failure to state a cause of action, it is not clear based on the information before the Commission that the Petition is completely frivolous and filed only for an improper purpose. Staff agrees with Allied that Odyssey's request for sanctions and reasonable costs and attorney's fees includes no allegations or evidence of what those sanctions, fees and costs would amount to. The Commission would need more evidence to make an award of this nature. Odyssey's motion should be denied. [9]

[9] Subsection (6) of section 57.105 provides that the remedies therein are supplemental to other sanctions or remedies available under law or court rules. Section 120.569(2) and section 120.595, Florida Statutes, provide fees and sanctions for cases and pleadings filed for an improper purpose, available to the prevailing party at the appropriate time.

ISSUE 4: Should this docket be closed?

RECOMMENDATION: If the Commission dismisses Allied's petition with prejudice, this docket should be closed. If the Commission dismisses Allied's petition with leave to amend, or denies the motions to dismiss, the docket should remain open. (Brown, Stern)

STAFF ANALYSIS: If the Commission dismisses Allied's petition with prejudice, a Final Order will be issued, and the Docket should be closed. If the Commission dismisses Allied's petition with leave to amend, or if the Commission does not dismiss the petition, the docket should remain open for further proceedings.