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FLORIDA PUBLIC SERVICE COMMISSION ORDERS

*In re: Petition for approval of Commercial/Industrial Service Rider tariff
by Tampa Electric Company, (“CISR” Order),*
Order No. PSC-98-1081-FOF-EI, 98 FPSC 8:153 (Aug. 10, 1998) PASSIM

*In re: Petition to vacate Order No. PSC-01-1003-AS-EI approving, as
modified and clarified, the settlement agreement between Allied Universal
Corp., and Chemical Formulators, Inc., and Tampa Electric Company
and request for additional relief, by Allied Universal Corporation and
Chemical Formulators, Inc., (“Final Order”),*
Order No. PSC-01-1115-FOF-EI, 04 FPSC 11:231 (Nov. 9, 2004) PASSIM

*In re: Complaint by Allied Universal Corp. 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, (“Settlement Order”),*
Order No. PSC-01-1003-AS-EI, 01 FPSC 4:270 (Apr. 24, 2001) PASSIM

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Section 366.07, Florida Statutes 1

FLORIDA RULES OF CIVIL PROCEDURE

Rule 1.540(b), Florida Rules of Civil Procedures 23,40,43

SYMBOLS AND DESIGNATION OF THE PARTIES

1. Appellant Allied Universal Corporation will be referred to as “Allied.”
2. Appellant Chemical Formulators, Inc. will be referred to as “CFI.” Unless CFI is individually referenced, the Appellants will be referred to collectively as “Allied.”
3. Appellee Florida Public Service Commission will be referred to as the “Commission.”
4. Appellee Tampa Electric Company will be referred to as “TECO.”
5. Appellee Odyssey Manufacturing Company will be referred to as “Odyssey.”
6. Empty brackets, [], designate confidential information. Certain passages that are quoted in this Brief include confidential information. The confidential information is not needed to support any argument made in this Brief.
7. All references to the Florida Statutes and the Florida Rules of Civil Procedures are to the 2004 versions.
8. All references to the record below are identified by volume number and page number, as (R. __:___).
9. All references to the Appendix to this Brief are identified by tab number and page number, as (A. ___ at ___).

10. All references to the Appellants' Initial Brief are identified by page number as (B. ____).

STATEMENT OF THE FACTS

A. The Parties and Procedural History

The Appellants, Allied and CFI, are in the bleach manufacturing business. (R. 3:537). CFI operates a bleach manufacturing facility in Tampa. (R. 3:537). Allied is a consultant to CFI. (R. 3:537). The Appellees are Odyssey, TECO and the Commission. Odyssey manufactures and sells bleach in Tampa. (R. 3:537). TECO is a public utility that provides electric service to the Tampa area, and serves Odyssey and CFI. (R. 3:537). The Commission regulates TECO under Chapter 366, Florida Statutes. (R. 3:537). The Commission does not regulate the bleach companies.

This appeal has its genesis in a complaint Allied filed against TECO, before the Commission, on January 20, 2000. In its complaint, Allied claimed that the rates TECO offered Odyssey under its Commercial/Industrial Service Rider (CISR) tariff were discriminatory, and therefore contravened Sections 366.03, 366.06(2) and 366.07, Florida Statutes. (A. 2 at 1). The case was assigned Docket No. 000061-EI and resulted in a Settlement Agreement which was approved in Order PSC-01-1003-AS-EI (“Settlement Order”), on April 24, 2001. The Settlement Order is described in Part C of the Statement of the Facts.

Three and a half years after issuance of the Settlement Order, on January 30, 2004, Allied filed its Petition to Vacate the Settlement Order. (R. 1:7). TECO and

Odyssey moved to dismiss, (R. 94, 150), and the Commission granted Allied leave to amend its Petition. (R.658). On July 2, 2004, Allied filed its Amended Petition to Vacate the Settlement Order. (R. 534). Allied claimed it had standing based on economic injury and injury to its ability to compete in the Tampa bleach market. (R. 3:549-50). TECO and Odyssey again moved to dismiss. This time the Commission dismissed the Amended Petition for lack of standing and failure to state causes of action to vacate the Settlement Order based on the fraud and changed circumstances exceptions to the doctrine of administrative finality, and in reliance upon its long-standing policy to protect and encourage settlements. Order PSC-01-115-FOF-EI (“Final Order”). Allied filed this appeal against the Final Order.

B. Background - Chronology of the Dispute

CFI started manufacturing bleach for the Tampa market in 1995. (R. 3:538). Its Tampa facilities use the Powell process to make bleach. (R. 3:538). Odyssey started negotiations with TECO for a CISR rate in the summer of 1998, when it was looking for a place to open a new cell process bleach manufacturing plant. (R. 3:541). It had no presence in the Tampa market at that time. (R. 3:542). Odyssey and TECO were able to negotiate a mutually acceptable CISR rate and signed a contract service agreement (“CSA”) in October 1998. (R. 3:542).

Allied believed its Powell process plant could not compete with Odyssey's cell process plant. (R. 3:538-9, 542, 550). In April 1999, close to a year after Odyssey and TECO entered negotiations, Allied sought a CISR rate from TECO for use at at proposed cell process plant. (R. 3:542). They could not agree on rates terms or conditions. (R. 3:542). Consequently, on January 20, 2000, Allied filed its complaint against TECO before the Commission in Docket No. 000061-EI. (R. 3:543).

In that Docket Mr. Sidelko, President of Odyssey, provided the prefiled testimony below which pertains to Odyssey's eligibility for a CISR rate.

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.

(R. 3:543-4).

During the litigation, Odyssey's plant became operational. (R. 3:542).

Odyssey had engaged Kvaerner Chemetics ("Chemetics") to build the plant. (R. 3:545). Their contract contained a non-compete provision in which Chemetics agreed not to build another cell process plant in the Tampa area for 10 years. (R. 3:545).

In April 2001, TECO and Allied settled the litigation in Docket 000061-EI. Order No. PSC-01-1003-AS-EI ("Settlement Order"), and the case was withdrawn with prejudice. (A. 2 at 17). TECO and Allied executed a CSA with substantially the same rates, terms and conditions as Odyssey's CSA. (R. 3:545). The main difference between the two CSAs was that Allied agreed its plant would be operational within two years. (R. 3:545). The CSA would expire after two years if the plant were not operational. (R. 3:545).

In November 2001, shortly after settling its dispute at the Commission, Allied sued Odyssey in the 11th Judicial Circuit, In and For Miami-Dade County.

(R. 3:546). One of its claims was that the non-compete clause with Chemetics was illegal. In this proceeding Mr. Sidelko testified that:

- (a) Odyssey would have built its plant in Tampa and taken service from TECO even if TECO had offered Odyssey a rate higher than [].
- (b) At the time Sidelko submitted his affidavit to TECO, he had not identified a specific electric rate that was necessary to make Odyssey's proposed plant economically feasible;
- (c) It was TECO, not Odyssey, that proposed a [] per kwh electric rate;
- (d) The []per kwh rate specified in his affidavit and in his Commission testimony was not important to Mr. Sidelko [In an errata sheet Mr. Sidelko stated that he misunderstood the question and changed hi testimony to say that the important factor was obtaining a CISR rate.]; and
- (e) Odyssey could operate its Tampa plant profitably even if it had an electric rate of [].

(R. 3:547).

Sometime after initiating the circuit court litigation Allied realized its plant would not be operational within the two years allowed by the CSA, so Allied sought a time extension from TECO. (R. 3:545). Allied claimed that it was unable to build its plant because of the non-compete clause in Chemetic's and Odyssey's contract, and that this constituted a force majeure under the Settlement Agreement. (R. 3:545). TECO and Allied then tried to negotiate a new CSA but they were unable to agree on a rate. (R. 3:546). In November 2003, a new, specific rate was offered by TECO but Allied found it unacceptable because it was higher than Odyssey's rate, (R. 3:546), which was negotiated five years earlier in 1998, (R.

3:542). Allied's CSA expired in April 2003. (R. 3:546). Allied petitioned to vacate the Settlement Order in January 2004. (R. 1:7).

C. The CISR Order and Tariff

The CISR tariff was approved in Order No. PSC-98-1081-FOF-EI ("CISR Order") on August 10, 1998, and expired on August 10, 2002. The content of the CISR tariff and the CISR Order is substantially the same. The purpose of the CISR tariff was to enable TECO to retain commercial and industrial customers who could show that they had a viable alternative to taking service from TECO, and an intention take the alternative over TECO. The tariff could not be used to shift customers from another Florida utility to TECO. (A. 1 at 3). Thus, in addition to helping TECO retain existing load, the tariff could attract new business or encourage expansion of businesses which might otherwise have relocated out of state.

To be eligible for the CISR tariff, an applicant had to provide the following information to TECO: 1) documentation proving that the applicant had a viable, lower cost alternative to taking service from TECO; and, 2) a sworn statement that but for the application of the CISR tariff, the applicant's load would not be served by TECO. (A.1 at 2). If an applicant could provide this information, then TECO was authorized to enter into rate negotiations. (A. 1 at 2-3).

The tariff contained a floor below which the contract was deemed not cost effective to the general body of ratepayers. (A. 1 at 2-3). The negotiated CISR rate had to exceed the incremental cost of serving the customer, and thus provide some contribution to fixed costs. (A. 1 at 2). Utility costs can be generally divided into incremental and fixed categories. Incremental costs are those which vary directly with the customer's usage. Fixed costs generally correspond to the cost of physical plant or investment in rate base. The premise of the CISR was that revenues received in excess of incremental cost was revenue that benefited the general body of ratepayers by reducing the fixed costs recovered in their rates, since investment in plant would typically not change significantly with the loss or gain of a single customer.

If TECO and the customer agreed on the price, terms and conditions, then they executed a contract service agreement (CSA). (A. 1 at 2-3). The Commission did not require TECO to submit individual CSAs for prior approval. (A. 1 at 3). Rather, the Commission required TECO to report, monthly, the difference between the revenues which would have been received under the standard rate and those actually received under the CISR rate. (A. 1 at 3). The conditions which triggered the Commission's review of each CSA were: 1) a request for a base rate increase; 2) monthly surveillance reports appearing to show that the CSAs were being used to hold down earnings so as to avoid an over earnings investigation; and, 3) a

request from TECO for a prudence review subsequent to the signing of a CSA. (A. 1 at 3). The Commission could initiate a prudence review, on its own motion, at any time. (A. 1 at 3).

The CISR Order ensured that TECO's general body of ratepayers would not subsidize a CISR customer between rate cases. This assurance came from the following paragraph:

The negotiated discount will only apply to base energy and/or base demand charges. The [CISR] customer will pay all otherwise applicable adjustment clauses. To ensure that the other ratepayers are not being harmed through the adjustment clauses, TECO proposes to allocate all revenues received from CISR customers first to all applicable cost recovery clauses at the rate which the [CISR] customer would have been charged in the absence of the CISR. The CISR customer will also pay the otherwise applicable customer charge and an additional \$250 customer charge. The additional customer charge is intended to cover incremental CISR customer-related costs.

(A. 1 at 2).

This language requires that the total revenue received from the customer must be credited first to the cost recovery clauses at the otherwise applicable rate for that customer. (A. 1 at 2). This was done to ensure that any revenue shortfalls could not be passed on to the general body of ratepayers through the annual cost recovery proceedings. (A. 1 at 2). If the negotiated rate incorporated clause charges into a single rate, and over the duration of the CSA the clause costs increased more than TECO estimated they would, then TECO must apply whatever amount is necessary to cover the clause charges. This would come out of the rates

paid by the CISR customer. (A. 1 at 2). The remaining amount would go toward paying the customer's base rate. If the remaining amount was insufficient to cover the base rate, then the loss would come out of TECO's earnings. (A. 1 at 2).

The operation of the CISR Order provides incentive for TECO to ensure that a potential customer is truly at-risk and to ensure that revenues from the CISR customer exceed incremental costs to serve that customer between rate cases. If it is presumed that the CISR customer would have left TECO's system in the absence of a CSA, any revenues in excess of incremental costs would be reflected favorably in its earnings. (A. 1 at 4-5). So TECO has the incentive to negotiate as small a discount as possible while retaining the customer. (A. 1 at 4-5). If, on the other hand, the revenues do not exceed the incremental costs for any reason, since the cost recovery revenues are taken out first, TECO would realize a reduction in earnings. (A. 1 at 4-5). So TECO has an incentive to make sure the load was truly at risk. (A. 1 at 4-5). Likewise, if TECO negotiated a CISR contract with a customer who was not truly at risk, it needlessly left dollars on the table which will also be realized as a reduction in earnings. (A. 1 at 4-5).

D. The Settlement Agreement

The Settlement Agreement was grounded on promises made between TECO and Allied. (A. 2 at 13). Odyssey was not a party to the Agreement. TECO promised to give Allied a CSA with the same rates, terms and conditions as

Odyssey's, so long as Allied's plant would be operational within two years of approval of the Settlement Agreement. (A. 2 at 15). Also, Allied's CSA included a force majeure provision that was not in Odyssey's CSA and which TECO was not permitted to disclose to Odyssey. (A. 2 at 19). Allied agreed that its Complaint would be deemed withdrawn with prejudice (A. 2 at 17), and promised to assert no further challenge to Odyssey's CSA before the Commission, (A. 2 at 15-6), or to the prudence of Allied's and Odyssey's CSAs before the Commission, (A. 2 at 17). Allied also signed a general release which released TECO from any type of liability that could arise related to matters addressed in the Settlement Order. (A. 2 at 18).

In approving the Settlement, the Commission found that Odyssey's and Allied's CSAs provided benefits to TECO's general body of rate payers, and that both CSAs were prudent. (A. 2 at 16-7). To support the findings, the Agreement provided that an evidentiary record be created containing all the testimony and exhibits filed in the docket. (A. 2 at 14). The evidentiary record includes the Rate Impact Measure ("RIM") analysis, a type of cost-benefit analysis, which shows that the rates offered to Allied and Odyssey exceed the incremental cost to serve each, and provide a contribution to fixed costs. (A. 2 at 8). In addition, the Commission required, on its own motion, that all of TECO's discovery responses

be added to the record because that information was also needed to support the findings. (A. 2 at 7). Allied agreed not to contest these findings. (A. 2 at 15, 17).

SUMMARY OF THE ARGUMENT

The Final Order found that Allied did not have standing, and did not state a cause of action to vacate the Settlement Order. Accordingly, the Commission found that principles of administrative finality and settlement of disputes supported dismissal of the case. The Final Order should be affirmed because the Commission did not abuse its discretion in denying Allied standing, and because Allied did not allege sufficient facts to support its causes of action, even when viewed in the light most favorable to Allied.

The decision on standing should be affirmed because Allied suffered no actual and immediate injuries attributable to the Settlement Order, and because vacating the Settlement Order would not redress its alleged injuries. Under these circumstances Allied has no legitimate claim to standing and the Commission's decision to deny Allied standing should be affirmed.

The Commission's decision to grant the Motions to Dismiss should be affirmed because Allied's factual allegations of fraud and changed circumstances are not relevant to vacating the Settlement Order. Allied has incorrectly assumed that the scope of the Settlement Order includes ongoing compliance with the CISR Order. Allied's factual bases for vacating the Settlement Order pertain to ongoing compliance with the CISR Order or to factors outside of the Commission's jurisdiction. The Commission's determination that the factual allegations pertain

to compliance with the CISR Order should be reviewed under the clearly erroneous standard because the determination is based on interpretation of its own Order. Because the factual allegations were not relevant to the Settlement Order or related to matters beyond the Commission's jurisdiction, they were insufficient to state a cause of action for vacating the Settlement Order.

In addition to the foregoing, the Final Order should be affirmed because over three years has passed since issuance of the Settlement Order, and because the Settlement Order does not have public policy implications that would have changed over time. In fact, the Settlement Order has no precedential value. The doctrine of administrative finality is intended to protect those who rely on final agency action, as the policy supporting settlement agreements is intended to protect those who settle disputes.

STANDARD OF REVIEW

The standard of review for the Commission's denial of standing to Allied is abuse of discretion. AmeriSteel v. Clark et al., 691 So. 2d 473, 478 (Fla. 1997) (affirming that a utility's customer lacked standing to participate in a proceeding to establish the utility's territorial boundary).¹

A motion to dismiss tests whether the petitioner has stated a cause of action on which relief may be granted. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In disposing of the Motion to Dismiss, the Commission was required to accept all of Allied's factual allegations as true and construe them in the light most favorable to Allied. Id. In determining the sufficiency of Allied's Amended Petition, the Commission was required to confine its considerations to the Amended Petition and the documents incorporated therein, and the grounds asserted in the Motions to Dismiss. Flye v. Jeffords, 106 So. 2d 299 (Fla. 1st DCA 1958), overruled on other grounds, 153 So. 2d 759, 765 (Fla. 1st DCA 1963). An

¹ Under this standard, a court should remand or reverse an agency's decision only if the agency's exercise of discretion was:

1. Outside the range of discretion delegated to the agency by law;
2. Inconsistent with agency rule;
3. Inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or
4. Otherwise in violation of a constitutional or statutory provision. (continued on next page)

Section 120.68(7)(e), Florida Statutes. Furthermore, a "court should not substitute its judgment for that of the agency on an issue of discretion." Id.

agency's ruling on a motion to dismiss is a question of law and on appeal it is reviewable under the de novo standard. Royal & Sunallaince v. Lauderdale Marine Center, 877 So. 2d 843, 845 (Fla. 4th DCA 2004).

In this case the relevance of certain factual allegations, such as compliance with the CISR and Settlement Orders, rests on an interpretation of those Orders. The Commission's interpretations of its statutes, rules and orders is reviewed under the "clearly erroneous" standard. Florida Interexchange Carriers Asso. V. Clark, 678 So. 2d 1267, 1268 (Fla. 1996); PW Ventures, Inc. v. Nichols, 533 So. 2d 281 (Fla. 1988); Falk v. Beard, 614 So. 2d 1086 (Fla. 1993).

In its Amended Petition Allied makes factual allegations that the Commission deems irrelevant in light of the CISR Order and Settlement Order. The Commission's determination of the relevance of a fact, when based on interpretation of one of its Orders, should not be overturned unless clearly erroneous. Once all the relevant facts are marshaled, the Court should apply the de novo standard to determine if those relevant facts state a cause of action.

ARGUMENT

I. Allied Lacks Standing to Request That the Settlement Order be Vacated Based on the Fraud and Changed Circumstances Exceptions to the Doctrine of Administrative Finality

For Allied to have a substantial interest in the outcome of this proceeding, it must show that: 1) it had sustained an actual injury at the time it filed its Petition, or that it is in immediate danger of sustaining a direct injury as a result of the challenged action; and 2) that the substantial injury is of a type or nature which the proceeding is designed to protect. Village Park Mobile Home Asso. v. Florida Dep't of Business Regulation, 506 So. 2d 426, 432-433 (Fla. 1st DCA 1987) (*on rehearing*) (citing Agrico Chemical Co. v. Dep't of Environmental Regulation, 406 So. 2d 478 (Fla. 2d DCA 1981)). The test for standing is referred to as the Agrico test. The proceeding at issue is the possible vacating of the Settlement Order.

In its Amended Petition, Allied makes two basic arguments to support its claim to standing – one based on economic harm and the other based on competitive harm. (R. 3:549-51). Allied claims the alleged economic harm is caused by CFI subsidizing Odyssey, in violation of the CISR tariff. (R. 3:549).

Second, Allied argues that its ability to compete against Odyssey in Tampa's bleach market is impaired because Odyssey has a lower electric rate than what Allied has been able to get since its CSA expired. (R. 3:549-550).

A. Allied Lacks Standing Under Agrico

Allied alleges that its economic injury is the subsidization of Odyssey by CFI. (R. 3:549). As further alleged by Allied, the injury is caused by a failure by TECO to implement the CISR tariff or CSA properly. (R. 3:549). By Allied's own admission, however, the injury is not caused by the Settlement Order but by alleged improper implementation of the CISR Order. The Amended Petition states:

A proceeding such as this that focuses on the purpose and intent of the CISR Order, compliance with the CISR Order and Odyssey's eligibility for a discounted rate and the specific discounted rate that it was granted pursuant to the CISR Order, is designed to protect the interests of CFI, a TECO ratepayer, in light of the underlying goal and requirement of the CISR Order to ensure that TECO's general body of ratepayers are not harmed by CSAs reached pursuant to the CISR Order.

(R. 3:549).

A review of the terms of the Settlement Agreement involving the Commission shows that those terms are not causing the alleged injury and that vacating those terms will not redress the injury.

The terms that would be affected if the order is vacated are: 1) the Commission's findings that the CSAs are prudent in ¶ 4 of the agreement; 2) the requirement in ¶ 7. a. that the Commission not entertain further challenges to the CSA; and, 3) the release of TECO from the requirement to submit monthly surveillance reports in ¶ 7. b. None of these provisions could cause the alleged

injury. A CSA may be prudent but if it is not administered in accordance with the CISR Order, that may cause injury. Allied explains that TECO's alleged failure to comply with the CISR Order is causing the injury, not the finding of prudence. (R. 549). Thus the prudence finding is not the immediate cause of the injury, nor could it be based on Allied's factual allegations.

If the Settlement Order is vacated then the prudence finding would be vacated, but it would not automatically be replaced with a finding that the CSA is imprudent. Furthermore, Odyssey's CSA would still be in effect because the CISR Order does not require TECO to seek a prudence finding for its CSAs. The alleged injury would still continue. With respect to ¶ 7. a., that provision would no longer be binding on the Commission. With respect to ¶ 7. b., TECO would have to start submitting monthly surveillance reports for Odyssey's CSA. These are the immediate effects of vacating the Settlement Order and none of them would redress the injury. For these reasons, Allied's claim that CFI is subsidizing Odyssey does not support standing.

Allied's second alleged injury is competitive harm. (R. 3:549-50). Allied claims it cannot compete in the Tampa bleach market because it does not have the same rate as Odyssey. (R. 3:550). This injury is not actual and immediate. It is purely speculative because Allied has no cell process plant in Tampa. (R. 3:538-9, 550). Even if Allied did get the same rate, it would still have to build a cell

process plant. Furthermore, Allied had the same rate as Odyssey for two years and did not even start to build a plant, so there is no reason to believe that lack of an identical rate now is the direct cause of the competitive harm.

In addition, Allied's alleged competitive injury was not caused by the Settlement Order. The Settlement Order resulted in Allied's securing a CSA, and a finding that the CSA was prudent. Before the issuance of the Settlement Order, Allied had no CSA. Far from injuring Allied, the Settlement Order helped Allied to compete against Odyssey. Approval of the Settlement Agreement by the Commission did not create the risk or cause the injury.

Vacating the Settlement Order would not redress the injury because Odyssey's CSA would still be in effect and Allied would still not have the same rate as Odyssey. For these reasons Allied's alleged competitive injury does not support its standing to vacate the Settlement Order.

B. Allied Lacks Standing Under Peoples Gas System v. Mason

Allied argues that Peoples Gas System v. Mason, 187 So. 2d 335 (Fla. 1996), grants a party to a settlement agreement, and any interested person, standing to challenge the agreement without satisfying the requirements of Sections 120.569 and 120.57, Florida Statutes. (R. 550; B. 32). The Commission disagrees for three reasons. First, Sections 120.569 and 120.57 supersede Peoples because they were enacted in 1974, some eight years after Peoples was decided. Second, the issue of

standing was not before the Court in Peoples, so the case should not be accepted as binding authority on the matter.

Finally, if we accept Allied's interpretation of the case, there would be no requirement for the person filing the claim to allege an injury to himself or herself in order to have standing to challenge an order approving a settlement agreement. A person would only have to allege that there were changed circumstances and that modification would benefit the public. The notion that a person must have suffered some injury in order to file a complaint is ubiquitous throughout the law and has its roots in the U.S. Constitution. It is unlikely that a court would have created such an exception to the principles of standing without acknowledgement of it in the opinion, and in a case where standing was not at issue.

C. Allied Lacks a Statutory Basis for Standing, Unlike the Public Counsel

The Commission acknowledged the intervention of the Office of Public Counsel ("OPC") in this case. (R. 2:208). Allied claims that if OPC has standing then Allied should too. This is incorrect. OPC's standing is conferred by Section 350.0611, Florida Statutes. Allied has no such statutory claim to standing.

II. Allied Does Not State a Cause of Action for Vacation of the Settlement Order Under the Fraud or Changed Circumstances Exceptions to the Doctrine of Administrative Finality

A. The Doctrine Of Administrative Finality

The doctrine of administrative finality prevents agencies from modifying their orders once they become final. The doctrine advances the need of the public and parties to rely on final agency action. In certain, limited circumstances, however, agencies may revisit final orders. These limited circumstances, referred to as exceptions to the doctrine of administrative finality, allow modification of final orders based on fraud and changed circumstances. Reedy Creek Utilities Co. v. Florida Public Service Commission, 418 So. 2d 249, 253-4 (Fla. 1982).

In evaluating claims that arise under the doctrine, courts consider several issues relevant to this appeal. Those issues are: 1) whether individuals who relied on the initial order would be harmed by the modification; Reedy Creek at 254, Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 339 (Fla. 1966), Sunshine Utilities v. Florida Public Service Commission, 577 So. 2d 663, 664 n.3 (Fla. 1st DCA 1991); 2) whether too much time elapsed between issuance of the initial order and the modification, Peoples at 339, Austin Tupler Trucking, Inc. v. Hawkins, 377 So. 2d 679, 681 (Fla. 1979), Reedy Creek at 253; and 3) whether the modification actually rights the wrong, or resolves the problem created in the initial order, Reedy Creek at 253, Sunshine Utilities at 664-5. These factors are discussed below.

The doctrine of administrative finality is intended to protect persons who rely on final agency action. When final agency action is modified courts will

consider whether there has been reliance on that final agency action. In approving a modification to final agency action, the Reedy Creek court stated:

An underlying purpose of the doctrine of administrative finality is to protect those who rely on a judgment or ruling. We find that Reedy Creek did not change its position during the lapse of time between the [initial and modifying] orders, and suffered no prejudice as a consequence.

Reedy Creek at 254; see also Sunshine Utilities at 664, n.3 (finding the fact that the utility had not changed its position in reliance on the final agency action was material to its affirming a modification of the final agency action); Peoples at 339 (explaining that a modification to final agency action is acceptable provided the parties are not harmed by the modification).

There is a timing component to the doctrine of administrative finality which prevents orders from being modified if an unreasonable amount of time has passed. In Peoples, the Commission issued an order, in 1960, delineating the territory to be served by two utilities, Peoples and City gas. Sometime thereafter City Gas built distribution facilities into Peoples' territory, and Peoples filed a complaint for specific performance in a court of equity. While that complaint was being litigated the Commission, in 1965, ordered City Gas to show cause why the Commission should not withdraw or revise its order delineating the territories. An administrative hearing ensued and culminated with the Commission revising the territorial delineation on grounds that it did not have authority to issue the initial

order. On appeal, despite the jurisdictional issue raised by the litigation, the Court framed the core issue as “whether the commission may, some four and one-half years after entry of an order approving a service area agreement, modify the order on the ground that it initially lacked the power to enter such an order.” Peoples at 338.

As can be seen by the framing of the issue, the Court in Peoples considered the time elapsed after issuance of an order an important factor. In addressing the issue, the Court stated: “[W]e experience no qualms in holding that in entering the order under review the commission went far beyond any power it has to modify an order. . . . As noted above, it was entered more than four years after the entry of the order which it purported to modify.” Peoples at 339; see also Reedy Creek at 253 (“*Peoples Gas System* and *Austin Tupler* dealt with orders amended four years and two years, respectively, after their inception and ‘administrative finality’ had attached. The instant case deals with a period of two and a half months.”)

Court judgments are subject to finality requirements similar to those for final agency action. Rule 1.540(b), Florida Rules of Civil Procedure, allows a court to modify a judgment in a variety of scenarios including when the judgment is based on fraud. The Rule further states that a motion to modify a judgment must be made within a year. The Court in Peoples considered the doctrine of administrative finality and Rule 1.540 to be the “same rule.” Peoples at 339.

Inherent in the doctrine of administrative finality is the requirement that the modified order rights the wrong in the initial order. For example, in Reedy Creek, shortly after the Commission approved a refund to Reedy Creek Utilities, it realized the refund was calculated incorrectly and issued a modification stating the correct refund amount. The Court found that the modification was justified as an exception to the doctrine because it was in the public interest, and stated: “[w]hen the commission determined that it had erred to the detriment of the using public, it had the inherent power and the statutory duty to amend its order to protect the customer.” Reedy Creek at 253. The modified order undid the harm created by the initial order. See also Sunshine Utilities at 664-5 (affirming modification of an order in which the rate base was calculated incorrectly when the modification corrected the error); Richter v. Florida Power Corp., 366 So. 2d 798, 800 (Fla. 2d DCA 1979) (finding that the Commission had authority to modify fuel adjustment costs when the initial order adjusting those costs was based on illegally inflated fuel costs).

B. Allied Does Not State a Cause of Action Under the Fraud Exception to the Doctrine of Administrative Finality

The statement of ultimate facts in Allied’s Amended Petition alleges fraud in paragraphs 48 and 49. (R. 3:555-6). The statements of Odyssey’s President, Mr. Sidelko, are Allied’s primary basis for its claim of fraud. With respect to the allegations, Paragraph 49 states:

...Allied submits that TECO was falsely or fraudulently induced to enter into a CSA with Odyssey at a rate of [] per kilowatt hour and that Allied/CFI was falsely or fraudulently induced to dismiss its Complaint in Docket No.000061-EI and enter into the Settlement AgreementAllied/CFI respectfully submits that the false, misleading and/or fraudulent sworn statements of Odyssey's President, Mr. Sidelko, demonstrate and justify a determination by the Commission that TECO, Allied/CFI and the Commission were misled by the false, misleading and/or sworn statements of Odyssey's President, Mr. Sidelko.

(R. 556).

Allied's allegations reflect its misunderstanding of the CISR Order. The explanation of the CISR Order, below, shows that neither the Commission nor TECO was fraudulently induced into approving the Settlement Agreement.

As required by the CISR Order, Odyssey had to provide two pieces of information in order to qualify for a CISR rate. Those two items were: 1) documentation proving that the applicant had a viable, lower cost alternative to taking service from TECO; and 2) a sworn statement that but for the application of the CISR tariff, the applicant's load would not be served by TECO. (A. 1 at 2).

By entering into the Settlement Agreement Allied explicitly agreed that Odyssey's CSA was prudent, (A. 2 at 15, 17), and therefore implicitly agreed that Odyssey satisfied both the eligibility requirements of the CISR tariff. Now, in its amended petition, Allied does not challenge the fact that the applicant had a viable lower cost alternative. Allied only challenges the integrity of the sworn statement, in this case an affidavit.

Specifically, Allied questions paragraph 4 of the affidavit which states:

If Odyssey is unable to obtain a rate of [] cents per kilowatt hour or less from Tampa Electric Company, Odyssey will have no alternative but to locate its manufacturing facility in a different electric service area to obtain such a rate.

(R. 3:561).

By challenging the affidavit, Allied challenges Odyssey's eligibility for a CISR rate, not the rate, terms and conditions of the CSA. However, as is apparent from Allied's Amended Petition, Allied placed undue importance on the specific rate in the affidavit. (R. 3:543-4, 547, 555-6). The rate in the affidavit was important only insofar as it was lower than TECO's standard rate. The affidavit clearly showed Odyssey's intent to locate elsewhere if it did not get a rate below the standard rate. The affidavit would have complied with the CISR tariff if it stated no rate at all, because documentation of a viable lower cost alternative is what proves that the customer can get a lower rate. Thus, the allegations do not negate the fact that Mr. Sidelko's affidavit satisfied the second eligibility criterion for a CISR rate.

The Commission's interpretation of the CISR Order should not be overturned unless clearly erroneous, and the Commission determined that the importance that Allied places on the rate stated in the affidavit is not warranted by the CISR Order. (A. 3 at 12-3). The allegations are immaterial with respect to Odyssey's eligibility for a CISR tariff. Because they are immaterial, the

Commission rightly concluded that Allied did not state a cause of action for fraudulent inducement.

In paragraph 37 of its amended petition Allied claims that Mr. Sidelko contradicted his affidavit and Commission testimony by stating, under oath, in the civil case that:

- (a) Odyssey would have built its plant in Tampa and taken service from TECO even if TECO had offered Odyssey a rate higher than [].
- (b) At the time Sidelko submitted his affidavit to TECO, he had not identified a specific electric rate that was necessary to make Odyssey's proposed plant economically feasible;
- (c) It was TECO, not Odyssey, that proposed a [] per kwh electric rate;
- (d) The []per kwh rate specified in his affidavit and in his Commission testimony was not important to Mr. Sidelko; and
- (e) Odyssey could operate its Tampa plant profitably even if it had an electric rate of [].

(R. 3:547).

These alleged contradictions do not impugn the legitimacy of Odyssey's CSA or TECO's implementation of the CISR tariff. Per the CISR Order, the Commission's concern is whether the negotiated rate covers TECO's incremental costs to serve Odyssey plus a contribution to fixed costs. (A. 1 at 4). How the negotiated rate compared to the rate in the affidavit is immaterial to determining whether the negotiated rate satisfied the incremental and fixed cost requirements of the CISR tariff.

Allied's subparagraph (a) is immaterial to compliance with the CISR tariff. As was stated above, the importance of the rate in the affidavit was that it was lower than TECO's standard rate. If TECO accepted the rate in the affidavit, and the rate covered the incremental costs plus a contribution to fixed costs, that is all that matters. It does not matter that TECO could have gotten a higher rate. The CISR Order did not require TECO to determine the rate at which the bleach plant became unprofitable and offer a slightly lower rate. The CISR tariff did not even require TECO to negotiate the highest rate it possibly could, although the CISR order provides an incentive for TECO to do so.

Subparagraph (b) is also immaterial. The feasibility of Odyssey's plant was not relevant to determining whether Odyssey was eligible for a CISR rate or if its CSA covered incremental costs and a contribution to fixed costs. If Odyssey did not know what was required for its plant to turn a profit, that would be Odyssey's problem alone. The Commission did not need this information to determine if TECO's actions were prudent. Even though Odyssey said it needed a specific rate to make the plant feasible, the important fact regarding the rate was that Odyssey needed a rate lower than TECO's standard rate. This alleged contradiction does not justify a determination by the Commission that the Commission was misled by Odyssey's testimony.

With respect to subparagraph (c), it is unclear whether Allied is referring to the rate in the affidavit or the rate in the CSA. In either case, the prudence of the CSA remains intact. If we assume that TECO told Odyssey to enter the specific rate in paragraph 4 of Odyssey's affidavit, that does not change the fact that Odyssey satisfied the eligibility requirements for receiving a CISR rate. While it would be irregular for TECO to tell Odyssey what to say in its affidavit, this is not relevant to Odyssey's eligibility for a CISR rate.

If Allied is claiming that TECO proposed the specific rate to Odyssey once the parties entered in CSA negotiations, this again is immaterial. One would expect offers and counter offers from both parties to a negotiation. As long as the rate agreed on covered TECO's incremental costs to serve Odyssey plus a contribution to fixed costs to serve, the rate was prudent. A determination of who proposed the rate is unnecessary because it is irrelevant. This alleged contradiction does not justify a determination that the Commission was misled by Odyssey's testimony.

Subparagraph (d) is immaterial. If Odyssey claims that the rate in its affidavit or CSA is not "important", then one could question Odyssey's business sense. The statement about "importance" did not cause the Commission to question the facts that Odyssey had a viable lower cost alternative to taking service from TECO, it swore it would get service elsewhere if it didn't get a rate below the

standard rate, and that the CSA covered TECO's incremental costs to serve Odyssey plus a contribution to fixed costs. Because Odyssey's statement does not cast doubt on these facts, there is no reason to doubt the prudence of Odyssey's CSA. Furthermore, Odyssey submitted an errata sheet revising this statement and asserting that it misunderstood the question. (R. 602). This alleged contradiction does not justify a determination that the Commission was misled by Odyssey's testimony.

Like subparagraphs (a)-(d), subparagraph (e) is also immaterial. TECO was not obligated to determine the rate at which construction of the plant became infeasible and charge slightly less than that. The CISR tariff provided the incentive for TECO to try to determine and negotiate such a rate, because that would maximize TECO's earnings, but there was no requirement for this. The only requirement was that the rate cover the incremental costs and contribute to fixed charges, so that the rate would create revenues that exceeded costs over the term of the CSA. This alleged contradiction does not justify a determination that the Commission was misled by Odyssey's testimony.

In summary, none of the fraud allegations show that the Commission was misled with respect to any material fact. The materiality of the facts is based on the Commission's interpretation of the CISR Order and should not be overturned unless clearly erroneous. Because all of the allegations were immaterial with

respect to Odyssey's eligibility for a CISR rate and TECO's negotiations, the Commission concluded that Allied did not state a cause of action for vacating the Settlement Order based on fraud.

C. Allied Does Not State a Cause of Action Under the Changed Circumstances Exception to the Doctrine of Administrative Finality

1. The Alleged Changed Circumstances do not Justify Vacating the Settlement Order

Allied claims that the Settlement Order should be vacated based on the changed circumstances exception to the doctrine of administrative finality. (R. 3:556-7). The changed circumstances, alleged in paragraphs 50, 51 and 52 of the Amended Petition, are: a) Odyssey's refusal to release Chemetics from the non-compete clause; b) TECO's refusal to extend Allied's CSA; c) TECO's improper implementation of the CISR order with respect to fuel charges; d) increased cost of fuel since execution of the CSA, and TECO's failure to conduct an analysis to determine if its revenue exceeds its costs to serve Odyssey under the CSA; e) failure of TECO to negotiate as high a rate as possible with Odyssey; and, f) TECO's recent offer of a CISR rate to Allied that is higher than the rate offered Odyssey in 1998. (R. 3:557).

In addressing these allegations two topics repeatedly arise. Those topics will be fully addressed here so that they do not have to be repeatedly explained for each individual allegation.

First, Allied apparently believes that the scope of the Settlement Order is the same as the scope of the CISR Order. It is not. The CISR Order covers all aspects of tariff implementation including, but not limited to, eligibility for a CISR rate, design of a CISR rate, administration of CSAs, safeguards for ratepayers, and the penalty for violating the tariff. The Settlement Order deals with prudence of the CSAs, which includes eligibility and rate design. The Settlement Order also governs conduct between TECO and Allied that is not regulated by the CISR tariff. In short, the Settlement Order focuses on initiation of service under the tariff while the CISR Order deals with all aspects of tariff implementation, which does include initiation of service. When a changed circumstance falls outside the scope of the Settlement Order, it cannot be used as a ground to vacate the Order.

A CSA can be both prudent and administered improperly. Allied's argument implies that improper administration of any aspect of the CISR tariff casts doubt on the prudence of Odyssey's CSA. This is not true because the CISR tariff covers many topics beside prudence and they are not all necessarily related to prudence.

Whether the allegations are relevant to the Settlement Order or the CISR Order is a matter of interpretation of those Orders. The Commission's determination that the allegations are not relevant to the Settlement Order should

be given great deference, and should not be overturned unless it is clearly erroneous.

The second recurring topic is the proper manner in which to address the alleged ongoing violations of the CISR Order. As stated in the Final Order, this is the type of issue that can be addressed in the Commission's annual, ongoing, fuel proceedings. (A. 3 at 13). If properly raised in the fuel proceedings then TECO's accounting with respect to the CSA could be audited. If TECO is found to be violating the CISR Order then costs could be imputed to TECO and the ratepayers made whole. These actions could be accomplished whether the Settlement Order is vacated or not, because the Settlement Order has no effect on administration of the CSAs. It should be noted that the Commission cannot require Odyssey to refund money to TECO, relief Allied requested, because the Commission does not regulate Odyssey.

a. Odyssey's Refusal to Timely Release Chemetics From the Non-Compete Clause

The Commission accepts as true that Odyssey's release of Chemetics from the non-compete clause was made too late to benefit Allied. However, the non-compete clause had no bearing on the Commission's decision to approve the Settlement Agreement between TECO and Allied. It was not relevant to any of the eligibility or rate setting criteria in the CISR Order. It's relevance to the criteria in the CISR Order is a matter that depends on the interpretation of the CISR Order,

and the Commission's interpretation of the CISR Order is entitled to great deference. While the Commission accepts the allegation as true, it is simply irrelevant.

The changed circumstances cases that have come before the Commission involved changes in circumstances that materially affected the Commission's decisions and involved factors that were within the Commission's jurisdiction to evaluate. Examples include, rate base calculations, Sunshine Utilities at 664, a regulated utility's construction of distribution lines into another regulated utility's territory, Peoples at 337, dormancy of a transportation certificate, Austin Tupler at 680, changes in factors considered in the setting of telecommunications interconnection charges, McCaw Communications at 1178, and the Commission's approval of a refund which it later found to be insufficient, Reedy Creek at 252.

The Commission has no jurisdiction over a non-compete clause between two companies it does not regulate. A change in the status of the non-compete clause cannot be used to vacate an order that never took account of the clause in the first place. Furthermore, vacating the Commission's findings in the Settlement Order would not right the alleged wrong that Allied suffered because of the non-compete clause. Allied is litigating or has litigated that issue in circuit court, which is the proper venue.

b. TECO's Refusal to Extend Allied's CSA

Allied's CSA provided that if Allied's plant was not operational within two years, Allied would no longer be served under the negotiated rate. (A. 2 at 15). Allied agreed to this provision. The Commission was aware of the provision when it found the CSA prudent, and did not find that the CSA's expiration would be detrimental to TECO's general body of ratepayers. It was not the Commission's place to decide whether the two year condition would be detrimental to Allied.

Expiration of the CSA after two years is not logically a changed circumstance. It was a known contingency. None of the cases cited on changed circumstances involve modifying an order based on a change that was a known contingency.

Allied also claims that expiration of the CSA was the result of a force majeure, that the CSA should have been extended under the force majeure clause, and that TECO's failure to do so was arbitrary and capricious. As the Commission said in the Final Order, these allegations support a claim to enforce the Settlement Order, not vacate it. (A. 3 at 14).

Finally, vacating the Settlement Order because Allied's CSA expired would not resolve Allied's problem. Vacation would not reinstate Allied's old CSA, would not provide Allied a new CSA, and it would not undo Odyssey's CSA. In other words, vacating the Order would not cure the problem created by the changed circumstance.

In short, the expiration of Allied's CSA is not a changed circumstance justifying vacation of the Settlement Order because the change was anticipated and because vacating the order would not directly correct any harm created by the changed circumstance.

c. Improper Implementation of the CISR Order With Respect to Odyssey's Fuel Charges

The CISR Order allows the fuel charge to be assessed as a separate charge or to be incorporated into a single rate based on projected fuel costs over the duration of the CSA. (A. 1 at 2). This aspect of rate design would be designated in the CSA.

Allied claims that "TECO's post-settlement implementation/interpretation of Odyssey's CISR rate" is improper with respect to Odyssey's fuel charges. (R. 3:557). Improper implementation of the CISR Order with respect to handling of fuel charges is not relevant to the Settlement Order. (A. 3 at 13). This aspect of tariff implementation lies within the scope of the CISR tariff and outside the scope of the Settlement Order. As explained in the Final Order, this alleged violation is the type of issue that could be raised in the annual fuel clause proceeding. (A. 3 at 13).

d. Increased Costs of Fuel

The Commission accepts as true that fuel costs have increased and that this is a change in circumstances since the issuance of the Settlement Order. However, an increase in fuel costs is not a changed circumstance that affects the validity of the Settlement Order or alters the effects of the Order. Before TECO entered into a CSA with Odyssey it was required to do a cost-benefit analysis to determine if the revenues generated at the negotiated rate would cover the costs. (A. 2 at 8).

The analyses required TECO to project numerous factors, including fuel costs, over the duration of the CSA. (A. 1 at 4). It is possible that TECO's projections underestimated the increase in cost of fuel over time, but that does not mean that the analyses failed to comply with the CISR Order or were deficient in any other way. The Settlement Order shows the analyses were conducted. (A. 2 at 8). If TECO is taking a loss on Odyssey's CSA, the loss comes out of its earnings. (A. 1 at 2, 5). If Allied believes the loss is passed on to ratepayers then vacating the Settlement Order would not fix the problem. This type of issue can be raised in the annual fuel proceedings.

It is possible that Allied alleges that an unexpected rise in fuel costs occurred since signing of the CSA and the rise warrants new analyses. Its allegation is unclear and it may not be challenging the initial analyses but asserting that new analyses are required in light of the cost increase. The CISR Order does not require new analyses. The analyses are done up front, and the CISR Order

provides an incentive for TECO to make conservative projections. (A. 1 at 4-5). If the revenues from the CSA fail to recover the costs to serve the customer over the long term, then the loss comes out of TECO's earnings. (A. 1 at 5). Passing the loss on to the ratepayers would violate the CISR tariff and this alleged violation could be addressed in the annual fuel proceedings. The increased cost of fuel is beyond the scope of the Settlement Order and vacating the Order would not resolve the problem.

e. TECO's Failure To Negotiate as High a Rate as Possible With Odyssey

Allied contends that the CISR Order imposes an obligation on TECO to negotiate the highest rate possible with potential CISR customers, and that TECO did not comply with this requirement. The CISR Order imposes no such requirement on TECO. This is not a factual matter which the Commission must accept. It is a matter of interpretation of a Commission order and the Commission's interpretation should not be overturned unless clearly erroneous.

A CISR rate is structured so that keeping or attracting an at-risk customer provides a benefit to all of TECO's ratepayers. (A. 1 at 4). It provides a benefit to all of TECO's ratepayers because the customer is required to make a contribution to TECO's fixed costs. (A. 1 at 4). The fixed costs stay the same whether the CISR customer stays or leaves. (A. 1 at 4-5). So, if the customer stays and makes some contribution to fixed costs, then that benefits the ratepayers, whether or not

TECO could have received a higher rate. TECO has an incentive to get as high a rate as possible in order to increase its earnings, but it must balance that against the risk of losing the customer. The CISR Order leaves the balancing to TECO, but includes safeguards to protect the ratepayers.

In addition, there is no way to determine what the highest possible negotiated rate would be. The at-risk customer must show that it has an offer for lower cost electricity, (A. 1 at 2), but it cannot be assumed that customer will refuse service at a rate between the lower cost alternative and the standard rate. There may be reasons the customer would rather locate in Tampa than elsewhere as long as it can get some discount on the rate. Furthermore, a requirement to negotiate the highest rate possible could not be enforced because that rate might never be known with certainty, and because it is up to TECO to determine its own risks and benefits of attracting or keeping an at-risk customer.

f. Discrepancy Between the CISR Rates Offered to Allied in 2003 and to Odyssey in 1998

The Commission accepts as true that TECO offered Allied a higher CISR rate in 2003 than what it offered Odyssey in 1998. The Commission also accepts as true Allied's allegation that Odyssey's rate no longer covers TECO's cost to serve Odyssey. None of this necessarily implicates TECO in any wrongdoing. If fuel costs have risen dramatically, as Allied claims, then TECO may have to offer Allied a higher rate. In addition, the CISR Order anticipates that TECO may

experience a loss on a CSA, and requires that TECO make up any loss out of its earnings. (A. 1 at 4-5). If it passes the loss onto the ratepayers, it is violating the CISR tariff, and this is the type of concern that could properly be raised in the annual fuel proceedings, not in a petition to vacate.

2. Too Much Time Has Elapsed to Vacate the Settlement Order

The time that has elapsed since issuance of the Settlement Order bars vacating it. The Amended Petition was filed on July 2, 2004, (R. 3:534), over three years after issuance of the Settlement Order on April 24, 2001, (A. 2 at 1). At the time of filing this brief four years will have elapsed since the issuance of the initial order, and the case will still not be over. TECO has conducted its affairs for over three years based on the finality of the Settlement Order. To disturb the Settlement Order now defeats the purpose of the doctrine which is to provide the parties a decision on which they may rely.

While the Court in Peoples identifies the doctrine of administrative finality and Rule 1.540, Florida Rules of Civil Procedure, as the “same rule”, it cautions against “too doctrinaire” an application of the time limit in Rule 1.540 in administrative proceedings because of differences between agencies and courts. Peoples at 339. The reasons given by the Court are not applicable here because this case is not typical of those coming before the Commission.

First, the Court explains that agencies may routinely initiate proceedings, unlike courts. The Commission, however, did not initiate this proceeding or the underlying case in which the Settlement Agreement was approved. Both proceedings were initiated by an unregulated entity, which is rare. Furthermore, the Commission does not have continuing regulatory authority over Odyssey and Allied. These companies have only appeared before the Commission in this proceeding and the one underlying it.

Second, the Court notes that court cases usually determine the rights of parties based on fixed principles of law which are relatively static, while agencies usually decide issues based on an evolving public interest. This case turns on a motion to dismiss which implicates fixed principles of law more so than public policy.

Compare the instant case with McCaw Communications of Florida, Inc. v. Clark, 679 So. 2d 1177 (Fla. 1996), which involved parties over which the Commission had continuing jurisdiction and involved a public policy issue. In a 1988 order, the Commission made its first attempt to regulate mobile service providers (MSPs). The Commission set the MSPs' interconnection charges so they fluctuated with access charges paid by inter-exchange carriers (IXCs).

In 1995 the Commission revisited the issue. A hearing was held and evidence showed that "the mobile communications industry was undergoing

significant change and that IXC access charges were being influenced by factors unrelated to mobile interconnection.” McCaw at 1178. The Commission issued an order “severing the link between MSP and IXC charges.” Id.

The order was appealed, in part on grounds that it violated the doctrine of administrative finality. The Court held that the doctrine of administrative finality did not bar modification of the 1988 order for the following reasons:

The setting of interconnection rates is not a one-time adjudication of rights but rather a process that must take into account a multiplicity of factors affecting the telecommunications industry and its customers. Administrative finality was not meant to preclude the Commission from revisiting its 1988 order. The record reflects a plethora of changed circumstances that justify the Commission’s decision.

Id. at 1179.

McCaw is an example of the type of administrative case that Peoples was concerned with when it warned against too doctrinaire an application of the one year time limit. Peoples said the time limits in Rule 1.540 should not be applied too rigidly in a case like McCaw, and the McCaw Court did not apply that time limit rigidly, modifying the charges seven years after they were initially set.

The instant case is not at all like McCaw. The issues under review are standing and dismissal with prejudice, legal issues that are not uniquely related to the Commission’s policy concerns and are decided more on fixed principles of law than policy. Furthermore, TECO’s CISR tariff expired two years ago, Odyssey and Allied were the only customers to execute CSAs, the Settlement Order has no

precedential value, and two of parties are unregulated entities. The only policy concern raised by this case is that favoring settlement of disputes. That policy dictates that the Settlement Order remain in place.

This is a case in which the concerns for the parties' ability to rely on the finality of a decision should be weighed more heavily than the need to adapt a Commission policy to changing circumstances. For these reason's relying on the stricter time limits, such as provided in Rule 1.540 would be appropriate. The Settlement Order should not be vacated because too much time has passed.

3. Allied's Allegations on TECO's Administration of Its Fuel Adjustment Clause Do Not State a Cause of Action for Vacating the Settlement Order

In Part IIIB of its brief, Allied alleges that it stated a cause of action requiring the Commission to investigate whether Odyssey's payment of fuel charges complies with the CISR Order (B. 28-29). The manner in which TECO has administered its fuel cost recovery clause has no relevance to the Settlement Order. Allied is erroneously attempting to rely upon a CSA administration issue as a basis for attacking the Settlement Order. This alleged cause of action should be dismissed because it pertains to on-going administration of the CSA, an issue that is beyond the scope of the Settlement Order. Furthermore, any alleged irregularities in payment of fuel costs are properly addressed in the Commission's ongoing, annual fuel proceedings.

4. Summary of Changed Circumstances Argument

The changed circumstances alleged by Allied do not state a cause of action for vacating the Settlement Order. The circumstances are outside the Commission's jurisdiction, beyond the scope of the Settlement Order, or based on an erroneous interpretation of of the CISR Order. Furthermore, the annual fuel proceedings are the proper place to address the changed circumstances that are within the Commission's purview. Finally, the Settlement Order should not be vacated because too much time has elapsed since its issuance, the issues raised do not identify a need to change public policy, and the Commission does not have continuing jurisdiction over the bleach companies.

III. The Settlement Order Should not be Vacated Because the Legal System Favors Negotiated Settlements

The legal system favors settlement of disputes by negotiation rather than litigation. South Florida Hospital and Healthcare Asso. v. Jaber, 887 So. 2d 1210, 1212 (Fla. 2004); Utilities Commission of New Smyrna Beach v. Florida Public Service Commission, 469 So. 2d 731, 732 (Fla. 1985). In South Florida Hospital, the Court affirmed a Commission Order that approved a settlement which one of the parties refused to sign. The party appealed claiming its due process rights were violated. On appeal, the Court held that the Commission "acted in accordance with Florida Law and its own policies and procedures in approving the negotiated settlement without conducting a hearing." South Florida Hospital at 1212; see also

New Smyrna Beach at 732 (“The legal system favors the settlement of disputes by mutual agreement of the contending parties.”).

Based in part on this principle, the Commission dismissed the Amended Petition. (A. 3 at 14). At this point, Allied has received all the benefits it bargained for under the settlement. The benefits to TECO included findings that the CSAs were prudent and that Allied would not raise any challenges against the CSAs before the Commission. To vacate the Settlement Order would deny TECO its benefits. Such action would not serve the policy of promoting settlement – it would discourage settlement. For this reason, the Final Order should be affirmed.

CONCLUSION

The Commission's orders come to this court with a presumption that they were made within the scope of the Commission's jurisdiction and powers and that they are reasonable and just. Gulf Coast Electric Coop. v. Johnson, 727 So. 2d 259 (Fla. 1999). An appellant carries a heavy the burden to prove error. Id. Allied failed to meet its burden. The Court should affirm the Commission's Final Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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I HEREBY CERTIFY that the font type used in this brief is Times New Roman 14 point.

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SUPPLEMENTAL APPENDICES

In re: Petition for approval of Commercial/Industrial Service Rider tariff by Tampa Electric Company, (“CISR” Order), Order No. PSC-98-1081-FOF-EI, 98 FPSC 8:153 (Aug. 10, 1998), and CISR TariffAppendix 1

In re: Petition to vacate Order No. PSC-01-1003-AS-EI approving, as modified and clarified, the settlement agreement between Allied Universal Corp., and Chemical Formulators, Inc. , and Tampa Electric Company and request for additional relief, by Allied Universal Corporation and Chemical Formulators, Inc,(“Final Order”) Order No. PSC-01-1115-FOF-EI, 04 FPSC 11:231 (Nov. 9, 2004) Appendix 2

In re: Complaint by Allied Universal Corp. 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, (“Settlement Order”), Order No. PSC-01-1003-AS-EI, 01 FPSC 4:270 (Apr. 24, 2001).....Appendix 3