BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Southern States Utilities, Inc. Application for Rate Increase and Increase in Service Availability Charges for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Highlands, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 950495-WS
In Re: Investigation into the Appropriate Rate Structure for Southern States Utilities, Inc. for All Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS
In Re: Application for Rate Increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-95-1438-FOF-WS ISSUED: November 27, 1995

The following Commissioners participated in the disposition of this matter:

SUSAN F. CLARK, Chairman
J. TERRY DEASON
JOE GARCIA
JULIA L. JOHNSON

ORDER DECIDING AGAINST THE DISQUALIFICATION OF COMMISSIONER DIANE K. KIESLING IN DOCKETS NOS. 950495-WS, 930880-WS, AND 920199-WS

BY THE COMMISSION:

BACKGROUND

Southern States Utilities, Inc. (SSU or utility) is a Class A utility, which provides water and wastewater service to 152 service areas in 25 counties. On June 28, 1995, SSU filed an application for approval of interim and final water and wastewater rate increases for 141 service areas in 22 counties, pursuant to Sections 367.081 and 367.082, Florida Statutes. The utility also requested an increase in service availability charges, approval of an allowance for funds used during construction and an allowance for funds prudently invested. On August 2, 1995, the utility corrected deficiencies in its minimum filing requirements and that date was established as the official date of filing.

The Office of the Public Counsel (OPC), the Sugarmill Woods Civic Association, Inc. (Sugarmill Woods), the Spring Hill Civic Association, Inc. (Spring Hill), and the Marco Island Civic Association, Inc. (Marco Island), have intervened in this docket. Fifteen customer service hearings are scheduled throughout the state. Technical hearings have been scheduled for January 29-31, and February 1-2, 5, and 7-9, 1996.

On March 7, 1995, Commissioner Diane K. Kiesling appeared before the Florida Senate Commerce Committee and offered testimony on behalf of the Commission on Senate Bill 298, sponsored by Senator Ginny Brown-Waite, District 10. Michael B. Twomey, counsel for petitioners in the aforementioned dockets, followed Commissioner Kiesling before the committee. Senate Bill No. 298 was a bill to be entitled "An act relating to water and wastewater utility rates; amending s. 367.081, F.S.; prohibiting the Florida Public Service Commission from including in a utility customer's rates or charges certain expenses or returns on investments related to certain property ...."

On September 13, 1995, Citrus County, Sugarmill Woods, and Spring Hill (petitioners) filed a Verified Petition to Disqualify or, in the Alternative, to Abstain (petition), together with affidavits. The petitioners moved Commissioner Kiesling to disqualify herself from this docket; from Docket No. 920199-WS, In Re: Application for Rate Increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, Volusia, and Washington Counties by Southern States Utilities, Inc.; Collier County by Marco Shores Utilities (Deltona); Hernando County by Spring Hill Utilities (Deltona); and Volusia County by Deltona Lakes Utilities (Deltona); and from Docket No. 930880-WS, In Re: Investigation into the Appropriate Rate Structure for Southern States Utilities, Inc., for All Regulated Systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Lucie, Volusia, and Washington Counties. Commissioner Kiesling is the Prehearing Officer in Docket No. 950495-WS.

On September 20, 1995, SSU filed a Memorandum in Opposition to Verified Petition to Disqualify or in the Alternative, to Abstain. By Order No. PSC-95-1199-PCO-WS, Order Declining to Withdraw from Proceeding (Order), issued on September 25, 1995, Commissioner Kiesling declined to withdraw from the aforementioned three dockets. Commissioner Kiesling's Order, Order Declining to Withdraw from Proceeding, is attached hereto as Appendix A, and is incorporated herein by reference as we adopt her rationale as well as expand upon it as set forth in the body of this Order.

REVIEW OF COMMISSIONER KIESLING'S ORDER

Rule 25-21.004(1), Florida Administrative Code, provides that:

> A commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or a prejudice for or against any party to the proceeding or a financial interest in the outcome.

Furthermore, Rule 25-21.004(3), Florida Administrative Code, provides that:

> where the commissioner declines to withdraw from the proceeding, a majority vote of a quorum of the full commission, absent the affected commissioner, shall decide the issue of disqualification.

We believe that the rule by its literal terms requires the full Commission's determination of the issue of disqualification without the need for any type of further implementation action, such as a motion for review or reconsideration by the petitioners. In other words, appeal to the full Commission, absent the challenged commissioner, is self-executing. In contrast, Rule 25-22.038, Florida Administrative Code, provides that "[a] party who is adversely affected by [an order of the prehearing officer] may seek reconsideration by the prehearing officer, or review by the Commission panel ... by filing a motion in support ... within ten days of service of the ... order." This rule sets forth the recourse generally available to the parties with respect to orders of the prehearing officer. However, Rule 25-21.004, Florida Administrative Code, is controlling in the specific context of a petition seeking the prehearing officer's disqualification. Therefore, we have found it appropriate that we decide the matter of Commissioner Kiesling's disqualification in Dockets Nos. 920199-WS, 930880-WS, and 950495-WS.

DECISION

As noted earlier, on March 7, 1995, Commissioner Kiesling testified before the Senate Commerce Committee in behalf of the Commission on Senate Bill 298. On September 13, 1995, the petitioners, Citrus County, Sugarmill Woods, and Spring Hill, moved Commissioner Kiesling to disqualify herself from this docket; from Docket No. 920199-WS; and from Docket No. 930880-WS.

The standard for disqualification is set forth in Section 120.71, Florida Statutes. The statute provides that:

> any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

Furthermore, Rule 25-21.004(1), Florida Administrative Code, requires a commissioner's self-disqualification upon a showing of bias, prejudice or financial interest. Moreover by the provisions of Sections 350.041 and 350.05, Florida Statutes, a commissioner is required to carry out her duties in a professional, independent, objective, and nonpartisan manner, and to abide by the standards of conduct of Chapters 112 and 350, Florida Statutes.

Position of Citrus County, Sugarmill Woods, and Spring Hill

Petitioners set forth two grounds for Commissioner Kiesling's disqualification in the aforementioned dockets. First, petitioners alleged that Commissioner Kiesling's testimony before the Commerce Committee on Senate Bill 298 was "impermissible political activity and political comment." Senate Bill 298 contained provisions that would have required the setting of water and wastewater rates on the basis of system-specific plant in service and cost of service. Petitioners further alleged that Commissioner Kiesling supported the position of SSU in opposing the bill, thereby destroying her impartiality on issues of uniform rates.

Second, petitioners alleged that, following the committee hearing, which considered Senate Bill 298, Commissioner Kiesling "loud[ly] and public[ly] reprimand[ed] and threatened" Mr. Twomey, who had also testified on the bill. Petitioners alleged that Commissioner Kiesling was angered by Mr. Twomey's characterization to the committee of her testimony. As a result, Mr. Twomey questioned the ability of his clients (the petitioners herein) to receive a fair and impartial hearing before Commissioner Kiesling on any matter related to either the uniform rate structure or SSU.

Petitioners relied upon Chapter 112, Part III, Code of Ethics for Public Officers and Employees, Florida Statutes, Chapter 350, Florida Statutes, Section 120.71, Florida Statutes, Rule 25-21.004, Florida Administrative Code, as well as canons of the Florida Code of Judicial Conduct (Code), particularly Canon 1, *A Judge Shall Uphold the Integrity and Independence of the Judiciary*; Canon 2, *A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities*; and Canon 3, *A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently*.

Petitioners further relied on the holding in *City of Tallahassee v. FPSC*, 441 So.2d 620 (Fla. 1983), that "[t]he standard to be used in disqualifying an individual serving as an agency head is the same standard used in disqualifying a judge." Moreover, petitioners asserted that "[i]n considering a motion to disqualify[,] the judge is limited to the bare determination of legal sufficiency and may not pass on the truth of the facts alleged," *Bundy v. Rudd*, 366 So.2d 440, 442 (Fla. 1978), and that "the test for legal sufficiency is whether the facts would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial," *Hayslip v. Douglas*, 400 So.2d 553, 556 (Fla. 1st DCA 1982). The court, in *Bundy v. Rudd, supra*, concluded that "[w]hen a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and attempted to refute the charges of partiality, he has then exceeded the proper scope of his inquiry

and on that basis alone established grounds for his disqualification." *Id.* at 442. What is necessary to prevent, the court admonished, is an intolerable adversary atmosphere between the trial judge and the litigant. *Id.*

Concluding that the integrity of the Commission's decisions in the three dockets would be undermined should Commissioner Kiesling participate in them, petitioners requested that she disqualify herself from further proceedings in these dockets, or, should she decline to disqualify herself, that the Commission, absent Commissioner Kiesling, disqualify her pursuant to Section 120.71, Florida Statutes, and Rule 25-21.004, Florida Administrative Code.

Position of Southern States Utilities, Inc.

In its opposition to the petition, SSU characterized the petition as "an abusive litigation tactic employed ... for the purpose of gaining ... advantage." According to SSU, Commissioner Kiesling testified on Senate Bill 298 on behalf of the Commission, and "attempted to present as much information as possible concerning uniform rate structures, offered the Commission's position that the bill would eliminate one of many ratemaking tools historically used by the Commission, and repeatedly emphasized that the Commission is taking no position on the bill."

In addition, SSU maintained that petitioners' grounds for requesting Commissioner Kiesling's disqualification are alleged violations of the Code of Judicial Conduct, and that the Code is not applicable to agency heads. SSU noted that in the revision of the Code effective January 1, 1995, 643 So.2d 1037 (Fla. 1994), *Application of the Code of Judicial Conduct* reads:

> This Code applies to justices of the Supreme Court and judges of the District Courts of Appeal, Circuit Courts, and County Courts.
>
> Anyone, whether or not a lawyer, who performs judicial functions, including but not limited to a magistrate, court commissioner, special master, general master, domestic relations commissioner, child support hearing officer, or judge of compensation claims, shall while performing judicial functions, conform with Canons 1, 2A, and 3, and such other provisions of this Code that might reasonably be applicable depending on the nature of the judicial function performed.

The utility further pointed out that petitioners rely on the superseded statement of the Code effective September 30, 1973, 281 So.2d 21 (Fla. 1973).

Next, SSU asserted that petitioners rely erroneously on *City of Tallahassee v. FPSC, supra*, in advancing as the standard applicable to Commissioner Kiesling, as an agency head, the same standard to be used in disqualifying a judge. SSU offered that the correct, and more stringent, standard to be applied to agency heads is enunciated in *Bay Bank & Trust Co. v. Lewis*, 634 So.2d 672 (Fla. 1st DCA 1994). Construing Section 120.71, Florida Statutes, as last amended, the court stated that:

> The 1983 Florida Legislature deleted the phrase "or other causes for which a judge may be recused" from section 120.71, Florida Statutes, so we must assume that the statute was intended to have a different meaning after its amendment. (citation omitted) Thus, while a moving party may still disqualify an agency head upon a proper showing of "just cause" under section 120.71, the standards for disqualifying an agency head differ from the standards for disqualifying a judge. This change gives recognition to the fact that agency heads have significantly different functions and duties than do judges. Were we to give section 120.71 the same meaning as that given it in City of Tallahassee v. Florida Public Service Commission, the 1983 amendment to section 120.71 would serve no purpose whatsoever.

Id. at 633-34. Petitioners in *Bay Bank & Trust Co. v. Lewis, supra*, failed to establish "just cause" in alleging that the commencement of regulatory proceedings against them was vindictive, and linked to their ceasing campaign support for the comptroller. Similarly, SSU contended, petitioners, in alleging Commissioner Kiesling to be biased in favor of the utility and of uniform rates and to be prejudiced against Mr. Twomey, failed to establish just cause for Commissioner Kiesling's disqualification. SSU characterized Mr. Twomey's testimony before the Commerce Committee as provocative, and Commissioner Kiesling's reaction, therefore, defensible. For support, SSU cited *State ex rel Fuente v. Himes*, 36 So.2d 433 (Fla. 1948) (lawyer cannot deliberately provoke an incident rendering the court disqualified), and *Oates v. State*, 619 So.2d 23 (Fla 4th DCA 1993) (judge justified in publicly stating criminal defendant was being an obstinate jerk).

Order No. PSC-95-1199-PCO-WS

As earlier noted, Commissioner Kiesling, in Order No. PSC-95-1199-PCO-WS, declined to withdraw from the proceeding. She concluded that "[a]pplying applicable standards, the petition is conclusory, untimely and is not legally sufficient to support disqualification." Order at 13. Commissioner Kiesling determined the applicable standards to be Section 120.71, Florida Statutes, as construed in *Bay Bank & Trust Co. v. Lewis, supra*; Rule 25-21.004, Florida Administrative Code; and Sections 350.041(2)(g) and 350.05 Florida Statutes. She noted that, in *Bay Bank & Trust Co. v. Lewis, supra*, the court concluded that the standard for disqualifying an agency head was different from that applicable to a judge in recognition of the differences in their responsibilities. Nonetheless, Commissioner Kiesling stated that she addressed the petition requesting her disqualification in reliance upon the judicial standard, as set forth in *Bundy v. Rudd, supra*. She maintained that she applied "the assertions in the petition to the applicable standards to test whether the petition states a legally sufficient 'just cause' requiring disqualification." Order at 4. She concluded that the petition could "be disposed of based only on the facts alleged in the petition," and that, accordingly, she applied "the more stringent standards." Order at 4, n.4.

Commissioner Kiesling described her testimony on Senate Bill 298 before the Commerce Committee as "demonstrably aimed at the administration of justice in the context of the Commission's economic regulation of water resources." The testimony did not, she asserted, "speak at all to the application or non-application of uniform rates to <u>any</u> specific ratepayers or to litigation concerning any ratepayers." Order at 7. She reasoned that to consider her testimony to be just cause for disqualification would be to preclude commissioners from responding to the invitation of legislators to address matters affecting the regulation of public utilities, a result inimical to the administration of justice. Commissioner Kiesling concluded that "no fact had been adduced demonstrating the testimony to be other than a neutral discussion about the administration of justice." *Id.*

Recognizing the "strained relations" case law in extra-judicial occurrences requiring disqualification, *e.g., McDermott v. Grossman*, 429 So.2d 393 (Fla 3d DCA 1983) and *Town Center of Islamorada, Inc. v. Overby*, 592 So.2d 774 (Fla. 3d DCA 1992), Commissioner Kiesling concluded that her encounter with Mr. Twomey following the committee hearing was distinguishable on the grounds that Mr. Twomey recklessly impugned her integrity in his testimony,

in contravention of Rule 4-8.2, Rules Regulating The Florida Bar. Order at 9. She noted that the supreme court, in *The Florida Bar, in re: Shimek*, 284 So.2d 686 (Fla. 1973), observed that:

> while a lawyer as a citizen has a right to criticize [a judge] publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.

Id. at 688-89. Commissioner Kiesling concluded that her remonstrance cannot give rise to a charge of prejudice, and that it was proper "given [Mr. Twomey's] misconduct." Furthermore, she noted that for a trial judge to display anger and displeasure to a defendant is not to necessarily indicate a prejudice against the defendant if the display is caused by the defendant's conduct. Order at 10-11, quoting *Dempsey v. State*, 415 So.2d 1351 (Fla. 1st DCA 1982). The post-meeting encounter, she concluded, "does not constitute just cause for disqualification on the grounds of bias, prejudice or interest." Order at 8.

Finally, Commissioner Kiesling, in reliance upon Section 120.71, Florida Statutes, requiring that a petition for disqualification be filed within a reasonable time prior to the proceeding, concluded that the petition is untimely in respect to Dockets Nos. 920199-WS and 930880-WS, having been brought subsequent to final hearing. Moreover, she concluded that it is untimely in respect to Docket No. 950495-WS, because it is brought, without justification, at an advanced stage in the proceedings and would have, therefore, a significantly disruptive effect upon the Commission's ratemaking process, endangering the integrity of its outcome.

Applicable Law

First, we believe that the court's holding in *Bay Bank & Trust Co. v. Lewis*, *supra*, correctly construes Section 120.71, Florida Statutes, in setting forth a different disqualification standard applicable to agency heads, than to judges. The 1983 amendment of Section 120.71, Florida Statutes, renders the holding in *City of Tallahassee v. FPSC*, *supra*, inapposite. We note that the holding of *Bundy v. Rudd*, *supra*, still states the law with respect to a motion for the disqualification of a trial judge, *i.e.*, a judge presented with a motion for his disqualification shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification, but shall limit his inquiry to the legal sufficiency of the motion. *See, e.g., Time-Warner Entertainment*

Co., L.P. v. Baker, 647 So.2d 1070 (Fla 5th DCA 1994); *Mitchell v. State*, 642 So.2d 1108 (Fla. 4th DCA 1994); *Dura-Stress, Inc. v. Law*, 634 So.2d (Fla. 5th DCA 1994).

The court in *Bay Bank & Trust Co. v. Lewis, supra*, did not elucidate the difference in standards, and no other court has thus far construed Section 120.71, Florida Statutes, as amended in 1983. However, the court's opinion may be fairly read to affirm the applicability to agency heads of the standard requiring the bare determination of legal sufficiency. The court stated that, "We do not decide disputed issues of fact in such a proceeding, but assume, *as must the agency head*, that all allegations of fact in the motion [for disqualification] are true." (emphasis supplied) *Id.* at 633. Nevertheless, a petitioner seeking the recusal of a commissioner is faced with satisfying a more stringent standard than is one seeking the recusal of a trial judge. The standard applicable to a commissioner contemplates "the fact that agency heads have significantly different functions and duties than do judges." *Id.* at 634. The applicable test for legal sufficiency for recusal in any event is enunciated in *Hayslip v. Douglas, supra, i.e.*, whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial.

Rule 1.432, Florida Rules of Civil Procedure, and Section 38.10, Florida Statutes

Furthermore, petitioners have improperly brought their petition pursuant to Rule 1.432, Florida Rules of Civil Procedure, *Disqualification of Judge*, and Section 38.10, Florida Statutes. Rule 1.432, Florida Rules of Civil Procedure, was repealed effective January 1, 1993, 609 So.2d 465 (Fla. 1992), and replaced by Rule 2.160, Florida Rules of Judicial Administration, *Disqualification of Trial Judges*. In any case, by its terms, its application is limited to county and circuit judges. Similarly, Section 38.10, Florida Statutes, *Disqualification of judge for prejudice; application; affidavits; etc.*, applies only to the judges of this state. Chapter 38, Florida Statutes, appears in Title V, *Judicial Branch*.

Timeliness

Finally, in *Bay Bank & Trust v. Lewis, supra*, the court was unwilling to reach the conclusion that the motion for disqualification was untimely. *Id.* at 678. The court noted that there is no statutory or rule definition of "agency proceeding" for purposes of Section 120.71, Florida Statutes. *Id.* Commissioner Kiesling posits, with respect to Dockets Nos. 920199-WS and 930880-

WS, that for present purposes "agency proceeding" means final hearing. The court in *Bay Bank & Trust v. Lewis, supra*, refused to accept respondents' similar contention that an "agency proceeding" commenced upon the filing of the petition for a Section 120.57, Florida Statutes, evidentiary hearing. *Id.* The motion for disqualification was filed eight and ten months after two petitions for formal hearing were filed. The court instead denied the petition for a writ of prohibition on other grounds.

Furthermore, at this stage of Docket 950495-WS, the effects of our decision in this matter are independent of the time of the petition's filing. Giving consideration to all of the circumstances of recent months, we do not believe that it follows necessarily that petitioners bypassed earlier opportunities to file a petition seeking Commissioner Kiesling's disqualification. As we have earlier noted, technical hearings are scheduled for January 29-31, and February 1-2, 5, and 7-9, 1996. We will consider SSU's revenue requirements and rates at special Agenda Conferences, April 29, 1996, and May 6, 1996. Moreover, we do not believe that at this time a finding of untimeliness in Docket No. 950495-WS would have sufficient force to trump a finding of bias, prejudice, or interest. The legal sufficiency of the petition seeking Commissioner Kiesling's disqualification can be decided on other grounds, and we have done so.[1]

Testimony by Commissioner

The opinion of the court in *United States v. Morgan*, 313 U.S. 409, 85 L. Ed. 1429 (1940), is an appropriate basis for the Commission's determination of whether petitioners have shown just cause for Commissioner Kiesling's disqualification as to their first grounds. In that case, the Secretary of Agriculture wrote a letter to the New York Times in which he vigorously criticized the decision of the district court to return impounded funds to Kansas City Stockyards market agencies. The impounded funds were those charged by the market agencies in excess of maximum rates set by the Secretary. The market agencies moved to disqualify the Secretary from proceedings reopened by him to fix reasonable rates during the impounding period. The court held:

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[1]Rule 2.160(e), Rules of Judicial Administration, requires that a motion to disqualify "be made within a reasonable time not to exceed 10 days after discovery of the facts constituting the grounds for the motion," and that it "be promptly presented to the court for an immediate ruling." If it is argued that this Rule provides guidance for ruling the petition untimely, we have already noted that the rule is applicable only to county and circuit judges. We believe, accordingly, that the instant petition may not be defeated by the application of this rule.

> That he not merely held but expressed strong views on matters believed by him to have been in issue, did not unfit him for exercising his duty in subsequent proceedings ordered by this Court ... Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

Id. at 421.

In *Re Area Rate Proceeding*, 57 PUR3d 58 (FPC 1965), the Federal Power Commission concluded that it would not be a violation of procedural due process for a judge to sit in on a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. *Id.* at 62. Accordingly, the Commission found that:

> [E]ven if this were an adjudicatory proceeding in which the issue presented was whether the respondents had violated some provision of the law which would require the imposition of sanctions, a commissioner's prior expression of his views on a general question of fact, policy, or law which might be involved in the determination ... would not disqualify him from further participation. Similarly expression of opposition to the respondents' efforts to change the law would not show disqualifying personal bias. *A fortiori*, in a rate-making proceeding like the present one, which Congress has recognized as an essentially legislative function and, as such, part of our rule-making activities, an expression of views on a general question which may be in issue in the proceeding or opposition to amendatory legislation could not be disqualifying.

Id. The Commission further found that:

> In administrative agencies where commissioners are selected for their expertise, or their ability to acquire expertise with experience, it would be most surprising if a commissioner did not develop opinions on the major issues confronting his agency ....

> The public interest would hardly be served if the commission could be silenced on the question of whether its work is necessary and important merely by the regulated industry raising a related question as an issue in a proceeding before the commission. The commission is not merely determining the private rights of litigants but is charged with protecting the overall public interest. It has a duty and obligation to inform the Congress and the general public of its programs and policies ....
>
> There is also a basic difference between an informed mind and a closed one. An opinion is not a prejudice or a prejudgment, at least when held by someone required and accustomed to hold all opinions subject to confirmation or rejection in light of the proof. Ignorance of the problems involved in the regulatory process or lack of views thereon is not the touchstone to effective and impartial exercise of regulatory judgment. The regulatory process assumes that intelligent and fair decisions will be reached by the commissioners because of their familiarity with the special field in which they operate and not despite it.

Id. at 62-63. *See also, Federal Trade Comm'n v. Cement Inst.*, 333 U.S. 683, 702, 92 L.Ed. 1010, 1035, *reh. den.* 334 U.S. 839, 92 L.Ed. 1764 (1947) (mere formation and expression of opinion does not disqualify administrative officer from passing on merits of the case).

In an unpublished opinion, the Colorado Supreme Court held that the fact that a member of the state public utilities commission had issued a statement in an affidavit that ratepayers would be harmed by the transfer of telephone directory publishing assets did not prejudice a subsequent decision by the commission denying authority for the transfer, where there was no showing that the challenged commissioner was incapable of judging the controversy on the merits. *Mountain Tel. & Tel. Co. v. CPUC*, 98 PUR4th 534, 763 P.2d 1020 (1980).

Furthermore, in *Re Arkla, Inc.*, 111 PUR4th 151 (Ark. PSC 1990), the Arkansas Public Service Commission, rejecting allegations of impartiality as insufficient to warrant disqualification of its chairman, held that:

> A decision maker has an obligation not to recuse without valid reasons ... The Commission finds that neither the statements made by the Chairman before the Joint Interim

> committee or his past employment as legal counsel for the Governor warrant his recusal in this matter. A Commissioner has a policy making role as well as a judicial one. A Commissioner's expertise and insight are lost to the collective decision making process if he or she recuses.

Id. at 159.

Finally, Canon 4C of the Code of Judicial Conduct permits a judge to appear at a public hearing before, or otherwise consult with, an executive or legislative body or official on matters concerning the law, the legal system or the administration of justice. Giving effect to the second provision of the *Application of the Code of Judicial Conduct*[2] (quoted in full above), we believe the Code is applicable to agency heads, and may be made to apply to the Commission.

Thus, we find that Commissioner Kiesling's testimony before the Senate Commerce Committee was fully consistent with her obligations to discharge her policy making responsibility. Her testimony was not designed to advance the interests of SSU or to thwart the interests of the petitioners.[3] The thrust of her testimony is captured in the following excerpts:

> Kiesling: We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming.
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> * * *

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[2]The September 30, 1973, version of the Code provided, in *Compliance With the Code of Judicial Conduct*, that:

> Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code.

The phrase, "who is an officer of a judicial system," is not employed in the current version. Nevertheless, both this and the current version of the Code seem meant to apply to agency heads.

[3] A Commissioner, during his term of office, may not make any public comment regarding the *merits of any proceeding* under Section 120.57 currently pending before the Commission. FPSC Administrative Procedures Manual, Section 5.01 E. (emphasis supplied)

> Unidentified: So, in other words, unified rates is the commission policy where the commission thinks it's a good policy, and is not their policy where they don't think it's a good policy.
>
> Kiesling: That's right. It's one form of ratemaking that we view as part of our arsenal.

Order at 6. There is nothing to suggest to us that Commissioner Kiesling's testimony should be characterized as having escaped from the boundaries of the administration of justice, as petitioners contend. Accordingly, we find it appropriate to conclude that Commissioner Kiesling's testimony cannot be a legally sufficient basis for her disqualification in the aforementioned dockets.

Confrontational Encounters

As to petitioners' second grounds for disqualification, their fears that they will not receive a fair and impartial hearing before Commissioner Kiesling as a result of her exchange of words with Mr. Twomey following the committee hearing, we do not find sufficient representation in the petition to believe the exchange can be construed as evidence of prejudice to the interests of the petitioners before the Commission. Petitioners do not allege facts that would cause a reasonable person to believe her conduct was prompted by prejudice or that it caused her to harbor a present bias or prejudice.[4]

Petitioners, in their second grounds, allege that Commissioner Kiesling's "public display of anger directed at [petitioners'] attorney directly violated the provisions of Canon [3B(4)]." Canon 3B(4) provides that "[a] judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity." The statements of Mr. Twomey with which Commissioner Kiesling presumably took issue would reasonably appear to strain the Florida Bar's *Rules of*

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[4]In the Commentary to Canon 2A of the Code, it is said that:

> A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

Professional Conduct.[5] We do not find that Commissioner Kiesling's conduct can be interpreted to be a violation of Canon 3B(4) prejudicial to the petitioners' interests, applying the test of *Hayslip v. Douglas, supra*. Accordingly, we find it appropriate to conclude that neither can Commissioner Kiesling's exchange of words with Mr. Twomey following the March 7, 1995, Senate Commerce Committee hearing on Senate Bill 298 be a legally sufficient basis for her disqualification in the aforementioned dockets.

CONCLUSION

Upon consideration, we conclude that Commissioner Kiesling correctly declined to recuse herself from Dockets Nos. 920199-WS, 930880-WS, and 950495-WS, petitioners' having failed in their burden to make a proper showing of just cause, pursuant to Section 120.71, Florida Statutes. We agree with Commissioner Kiesling that the petition is legally insufficient on the basis of the judicial standard enunciated in *Bundy v. Rudd, supra*. Accordingly, we adopt the rationale of Order No. PSC-95-1199-PCO-WS.

Further, we find that Commissioner Kiesling's appearance before the Senate Commerce Committee on March 7, 1995, was consistent with Canon 4C of the Code of Judicial Conduct. She appeared as an authorized spokesperson for the Commission, and her testimony was confined to articulating the Commission's policy regarding uniform rates. In addition, we find that Commissioner Kiesling's confrontation with Mr. Twomey following the committee hearing would not prompt a reasonably prudent person to fear that he could not get a fair and impartial trial and that it was not a prejudicial violation of Canon 3B(4) of the Code. Therefore, sitting in the absence of Commissioner Kiesling, we decide against Commissioner Kiesling's disqualification from further participation in Docket Nos. 920199-WS, 930880-WS, and 950495-WS.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Commissioner Diane K. Kiesling shall not be disqualified from participation in Dockets Nos. 950495-WS, 930880-WS, and 920199-WS. It is further

ORDERED that Order No. PSC-95-1199-PCO-WS is by reference incorporated herein. It is further

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[5]See Rule 4-8.2(a), Rules Regulating the Florida Bar.

ORDERED that Dockets Nos. 930945-WS, 930880-WS, and 920199-WS shall remain open.

By ORDER of the Florida Public Service Commission, this 27th day of November, 1995.

Blanca S. Bayó

BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

CJP

CONCURRING OPINION

Commissioner J. Terry Deason concurs only in the result and writes separately, as follows:

I concur in the result reached only. Because I have reached my decision based solely on the untimeliness of the filing, I do not express any opinion as to the merits of the Petition. Although, I am unsure of the status of the order issued by Commissioner Kiesling, I find the timeliness analysis contained therein to be persuasive and hereby adopt it in this concurrence. Furthermore I would note that the Petition cites to former Rule 1.432, FRCP as binding authority on the Commission in matters of disqualification. While expressing no opinion as to the applicability of this Rule on the Commission's decision making in this matter, I note that the rule was transferred to the Florida Rules of Judicial Administration as Rule 2.160. Subsection (e) of that Rule requires that such pleading shall be filed within 10 days after discovery of the facts constituting the grounds for the motion. This Rule as cited by the Petitioner provides further support for the "reasonable time" analysis contained in Order No. PSC-95-1199-PCO-WS.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.038(2), Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.

APPENDIX A

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Application for rate increase in Brevard, Charlotte/Lee, Citrus, Clay, Duval, Highlands, Lake, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Semionole, Volusia, and Washington Counties by SOUTHERN STATES UTILITIES, INC.; Collier County by MARCO SHORES UTILITIES (Deltona); Hernando County by SPRING HILL UTILITIES (Deltona); and Volusia County by DELTONA LAKES UTILITIES (Deltona).	DOCKET NO. 920199-WS ORDER NO. PSC-95-1199-PCO-WS ISSUED: September 25, 1995
In Re: Investigation into the appropriate rate structure for SOUTHERN STATES UTILITIES, INC. for all regulated systems in Bradford, Brevard, Citrus, Clay, Collier, Duval, Hernando, Highlands, Lake, Lee/Charlotte, Marion, Martin, Nassau, Orange, Osceola, Pasco, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 930880-WS
In Re: Application for rate increase and increase in service availability charges by Southern States Utilities, Inc. for Orange-Osceola Utilities, Inc. in Osceola County, and in Bradford, Brevard, Charlotte, Citrus, Clay, Collier, Duval, Hernando, Highlands, Hillsborough, Lake, Lee, Marion, Martin, Nassau, Orange, Osceola, Pasco, Polk, Putnam, Seminole, St. Johns, St. Lucie, Volusia, and Washington Counties.	DOCKET NO. 950495-WS

ORDER DECLINING TO WITHDRAW FROM PROCEEDING

This cause comes on for consideration on a Verified Petition to Disqualify or, In The Alternative, To Abstain (petition) with accompanying affidavits which was filed on September 13, 1995, by

Citrus County, the Sugar Mill Woods Civic Association, Inc., and the Spring Hill Civic Association, Inc. (Petitioners), in those of the above dockets in which the aforesaid County and Civic Associations are respectively parties. The petition seeks disqualification or abstention from proceeding further in these docketed proceedings based on facts and law alleged to require that result. This petition post-dated by some six weeks the commencement of petitioners' participation in Docket No. 950495-WS and by two and three years, respectively, the commencement of the other two dockets.

On September 20, 1995, Southern States Utilities, Inc. (Utility), filed a Memorandum In Opposition To Verified Petition To Disqualify, Or In The Alternative, To Abstain (opposition). The Utility's opposition alleged that the petition failed to state factual and legal grounds for disqualification.

Petitioners set out the facts relied on most succinctly at pages 8-11 of the petition. Therein, reference is made to a March 7, 1995 meeting of the Commerce Committee of the Florida Senate in which Senate Bill 298 was heard. Senate Bill 298 is described as legislation which would have prohibited "uniform rates." Testifying in support of the bill were its sponsor, Senator Ginny Brown-Waite, Jim Desjardin, a member of the utility committee of a petitioner association, and Michael B. Twomey, petitioners' attorney. The petition also references my presence at the meeting and testimony about SB 298, with specific reference to my concern about "the elimination of uniform rates as a 'tool' [the commission] could use." Petition p. 9. The petition further describes an incident following the consideration of SB 298 in which I am said to have "loudly, and publicly" accused petitioner attorney Michael B. Twomey of calling me a "liar" during his committee testimony on SB 298 and threatening to "get him" with every legal means at my disposal if the alleged behavior occurred again. The recitation by petitioner of the facts concludes with summaries of the affidavits of Mr. Desjardin, Mr. Twomey and Senator Brown-Waite. These affidavits are said to verify that, based on my testimony re: SB 298 and the post-meeting incident described above, petitioners have a well-founded belief that, absent my disqualification, they will be unable to obtain fair and impartial adjudication in the dockets at issue, all of which concern the application of uniform rates to those they represent.

DISCUSSION

Applicable Standards

Between pages 2 and 7 of the petition, petitioners set out extensive citations of legal authority in support of their theory that disqualification is required. However, as noted by the Utility, significant portions of the authority relied on by petitioners have been repealed or superseded. Repealed provisions include Rule 1.432, Florida Rules of Civil Procedure,[1] and the Canons of the prior Code of Judicial Conduct.[2] Moreover, petitioners' conclusion that "[t]he standard to be used in disqualifying an individual serving as an agency head is the same as the standard used in disqualifying a judge. . ." is no longer correct. The case that conclusion relied on, City of Tallahassee v. Florida Public Service Commission, 441 So.2d 620 (Fla. 1983), has been superseded by Bay Bank & Trust Company v. Lewis, 634 So.2d 672 (Fla. 1st DCA 1994). Therein, the Court stated:

> The 1983 Florida Legislature deleted the phrase "or other causes for which a judge may be recused" from section 120.71, Florida Statutes, so we must assume that the statute was intended to have a different meaning after its amendment [citation omitted]. Thus, while a moving party may still disqualify an agency head upon a proper showing of "just cause" under section 120.71, the standards for disqualifying an agency head differ from the standards for disqualifying a judge. This change gives recognition to the fact that agency heads have significantly different functions and duties than do judges. Were we to give section 120.71 the same meaning as that given it in City of Tallahassee v. Florida Public Service Commission, the 1983 amendment to section 120.71 would serve no purpose whatsoever.

Bay Bank, supra, at 678-9.

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[1]See, The Florida Bar Re: Amendment to Rules of Judicial Administration, 609 So.2d 465 (Fla. 1992).

[2]See, In re: Code of Judicial Conduct, 643 So.2d 1037 (Fla. 1994).

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Thus, the standards that are directly applicable to this matter include Section 120.71, Florida Statutes, as construed by the Court in Bay Bank, and Rule 25-21.004, Florida Administrative Code, promulgated by the Commission. Section 120.71, Florida Statutes, states in pertinent part that:

> (1) . . . any individual serving alone or with others as an agency head may be disqualified from serving in an agency proceeding for bias, prejudice, or interest when any party to the agency proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.

Rule 25-21.004, in turn states, in pertinent part:

> (1) A commissioner may be disqualified from hearing or deciding any matter where it can be shown that the commissioner has a bias or a prejudice for or against any party to the proceeding or a financial interest in its outcome.
>
> (3) A petition for disqualification of a commissioner shall state the grounds for disqualification and shall allege facts supportive of those grounds.

Other statutes which bear on these matters include Section 350.041(2)(g) and Section 350.05, Florida Statutes, which speak to the professional conduct of commissioners and the independent, objective and non-partisan manner in which they are to perform their duties. The rest of the authority cited by petitioner, whether repealed or superseded, is not directly applicable or controlling.

Accordingly, the limitation of a judge to the bare determination of legal sufficiency in considering a disqualification motion,[3] and the prohibition against his passing on the truth of the facts alleged are not controlling either, in light of Bay Bank, in an agency head's consideration of a

[3] See, e.g., Bundy v. Rudd, 366 So.2d 440 (Fla. 1978).

disqualification motion.[4] With all of the foregoing in mind, I will apply the assertions in the petition to the applicable standards to test whether the petition states a legally sufficient "just cause" requiring disqualification.

Remarks at the March 7, 1995, Senate Commerce Committee Meeting

Based on the petition and accompanying affidavits, I conclude that my testimony at the committee meeting does not constitute just cause for disqualification. There is not a single fact presented relevant to the actual testimony I presented which demonstrates it to be beyond the "discussion of the administration of justice" explicitly permitted by the very judicial canon, formerly Canon 4(B) of the Code of Judicial Conduct, relied upon by petitioners. That canon, even though relevant to the stricter standard applicable to judges, allows those judges, and therefore, a fortiori, an agency head:

> [T]o appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and [to] otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.[5]

As to whether my testimony was limited to discussing the administration of justice, the petition offers no facts whatsoever, but only a legal conclusion unsupported by facts:

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[4]Because this motion can be disposed of based only on the facts alleged in the petition, the more stringent standards are applied herein.

[5]The repealed canon is quoted herein because petitioners rely on it. However, it should be noted that the revised canon, although somewhat changed, retains the ability of agency heads to discuss with legislative bodies matters on the law, the legal system or the administration of justice. See, Canon 4(C), Code of Judicial Conduct.

> She was clearly engaging in consulting with a legislative body, but on matters that clearly could not be characterized as "only concerning the administration of justice."

Petition, p. 11.

However, only a single word of my testimony is cited by petitioners, the word "tool," cited at page 9 of the petition. The sentence of testimony containing that word appears at page 15 of the transcript:[6]

> We would urge you not to take away one tool in our tool chest that allows us as economic regulators to deal with the significant water problems that are coming. [emphasis supplied]

This testimony is demonstrably aimed at the administration of justice in the context of the Commission's economic regulation of water resources. It does not speak at all to the application or non-application of uniform rates to any specific ratepayers or to litigation concerning any ratepayers, including petitioners. Moreover, the listener reaction reflected an understanding of the limited scope of the testimony:

> **Unidentified Speaker:** So, in other words, unified rates is the commission policy where the commission thinks it's a good policy, and is not their policy where they don't think it's a good policy.
>
> **Commissioner Kiesling:** That's right. It's one form of ratemaking that we view as part of our arsenal.

Transcript, p. 25.

The fact that petitioners took it differently and had the feeling or perception that the testimony was directed toward supporting the imposition of uniform rates on them is of no moment. That feeling or perception is not a "fact." See, e.g., City of

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[6]Petitioners quotation should have referenced the tape or a transcript of the Committee Meeting, a copy of which is attached.

Palatka v. Frederick, 174 So. 826, 828 (Fla. 1937). If there was anything about petitioners' cases that was impermissibly addressed in the testimony it should have been cited as constituting a fact in support of just cause for disqualification. Conversely, where only the single word "tool" was cited, and the context of the testimony containing that word did not concern the imposition of uniform rates on any specific ratepayers, let alone petitioners, or litigation involving petitioners, no fact has been adduced demonstrating the testimony to be other than a neutral discussion about the administration of justice. The testimony cited above specifically allowed for the possibility that a given application of uniform rates might be found to be "bad," a determination which was in the Court's jurisdiction as to petitioners, not the Commission's. Moreover, concern that the testimony was presented "forcefully" assumes that discussions which are forceful cannot be limited to the administration of justice. These assumptions and conclusions are arrived at:

> . . . from a tone of voice or a manner which [is] conceived to be indicative of bias or prejudice against the parties in the case.

As such, they are not facts indicating a just cause for disqualification under Section 120.71, Florida Statutes, for bias, prejudice or interest. City of Palatka, supra. To conclude otherwise would result in a ban on the ability of commissioners to respond to the invitations of legislators to address such matters.[7] That result would be inimical to the administration of justice which is the very subject of the judicial conduct canon petitioners claim to rely on.

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[7]Petitioner's claim that the testimony was "unsolicited" is unsupported because Senator Brown-Waite's affidavit is based on a lack of knowledge and is therefore legally insufficient:

> I had not solicited Commissioner Kiesling's attendance or comments at the Committee meeting and am not aware that any other Senator invited her to speak on the bill. [emphasis supplied]

See, e.g., Gieseke v. Grossman, 418 So.2d 1055, 57 (Fla. 4th DCA 1982).

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The Post-Meeting Encounter

There are numerous cases in which extra-judicial occurrences involving judges and attorneys have resulted in disqualification of the judge.[8] For example, a judge's tirade about a lawyer's failure to support that judge for other judicial positions was held to merit disqualification in McDermott v. Grossman, 429 So.2d 393 (Fla. 3rd DCA 1983). Again in Town Center of Islamorada, Inc. v. Overby, 592 So.2d 774 (Fla. 3rd DCA 1992), an extrajudicial dispute which began at a bar luncheon at which an attorney offended the judge by announcing his intent to sue the judges of that circuit warranted disqualification.

However, upon careful reflection, I conclude that even under the more stringent standard applicable to judges, the so-called "strained relations" cases are distinguishable from this matter. As a result, I further conclude that the post-meeting encounter does not constitute just cause for disqualification on the grounds of bias, prejudice or interest. Section 120.71, Fla. Stat.; Rule 25-21.004, Fla. Admin. Code.

The difference between this case and those just cited is that there is nothing wrong with an attorney choosing not to support a judge for a different judicial position. Therefore, being on the receiving end of a tirade about it may cause legitimate concern that the judge is prejudiced. Likewise, suing the judges in the circuit is not improper, and the fact that a judge was offended by it may reflect prejudice against the attorney for his having sued the judge and the judge's colleagues.

In contrast, an attorney that makes a statement that he knows to be false or with reckless disregard as to its truth or falsity "concerning the . . . integrity of a judge . . ." violates Rule 4-8.2 of the Florida Bar's Code of Attorney Conduct. This is true whether or not the statements are made extra-judicially. See, The Florida Bar v. Stokes, 186 So.2d 499 (Fla. 1966) (disparaging and unfair comments about a local judge made by attorney during radio program which judge had no opportunity to rebut required that attorney make a public apology).

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[8]Even though the disqualification of judges is arguably not a standard which must be met, Bay Bank, supra, consideration of that more stringent standard adds by that stringency to the confidence with which these issues are addressed here pursuant to Section 120.71 and Rule 25-21.004.

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The Florida Supreme Court expounded at length on the issue of recklessly impugning the integrity of judges in In re: Shimek, 284 So.2d 686 (Fla. 1973). In that case, the attorney filed a memorandum in federal court which claimed that:

> The state trial judge avoided the performance of his sworn duty. . . . A product of [the prosecutorial] system who works close with Sheriffs and who must depend on political support and re-election to the bench is not going to do justice.

The District Court judge concluded that this language was:

> A scurrilous attack upon members of the state judiciary, completely unwarranted by the record before it.

284 So.2d 686.

The Florida Supreme Court then noted the following:

> Nothing is more sacred to man and particularly, to a member of the judiciary, than his integrity. Once the integrity of a judge is in doubt, the efficacy of his decisions are (sic) likely to be questioned. . . . While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.

284 So.2d 688-9.

Several statements of Mr. Twomey, at page 31, lines 23-25 and page 32, lines 1-20, recklessly impugned my integrity. For example, on page 32 of the transcript beginning at line 19, Mr. Twomey states:

> The $150 is a scare tactic, it's dishonest, it's not true. You shouldn't be sucked in by this.

This hardly comports with either the requirements of Rule 4-8.2 or Shimek. The point is not that an attorney may not disagree, but that the disagreement could have been accomplished without violating these precepts, just as my testimony was accomplished without personally abusing anyone else.

As stated by the Court in Shimek:

> Judges are subject to fair criticism. The attorney is bound to use restraint. His statements must be prudent, not rash, irresponsible, and without foundation.

The petitioners' own characterization of the post-meeting encounter confirms that these concerns, rather than any substantive issue involving the clients or their cases, were the subject of the encounter:

> Commissioner Kiesling berated Mike Twomey for calling her a "liar" and publicly threatened to "get him" with "every legal means at her disposal" if the alleged behavior occurred again. [emphasis supplied]

Unlike the "strained relations" cases, petitioners cannot deduce prejudice from this encounter because, given the attorney's misconduct, it would be proper for the remonstrance and warning to be given at the hearing, should the same conduct occur there. In contrast, it obviously would not be any more proper for the judge in McDermott to lambaste the attorney at the hearing for his failure to support her for other judicial positions than it was to do so extra-judicially.

Finally, as to this issue, showing anger and displeasure has not been found to be a just cause for disqualification if caused by the misbehavior of the defendant himself, let alone that of his attorney:

> For a trial judge to indicate anger and displeasure in a direct criminal contempt proceeding in which the defendant was found guilty does not in and of itself indicate that the trial judge is prejudiced against the defendant. The record in this case reflects that if the trial judge was angry and displeased, it was caused by the defendant's

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> conduct. Further, there is nothing in the record to reflect any prejudice of the trial judge during the . . . later proceedings. .

Dempsey v. State, 415 So.2d 1351 (Fla. 1st DCA 1982). Similarly, in Oates v. State, 619 So.2d 23 (Fla. 4th DCA 1993), rev. denied, 629 So.2d 134 (Fla. 1993), the court found that the judge's remark calling defendant an "obstinate jerk" did not require disqualification where defendant persisted in engaging in argumentative exchanges with the judge. The same is true of this case as well.

Timeliness

Section 120.71, Florida Statutes, requires that a petition be filed within a reasonable time prior to the proceeding. There are no rules or case law defining "prior to the proceeding." Rule 25-5.108 of the Model Rules requires a petition to be filed 5 days prior to final hearing. The final proceeding in Docket No. 920199-WS was held November 6 through 11, 1992, prior to my appointment to the Commission. A decision on remand was made on September 12, 1995, before the filing of the subject petition. The subsequent decision of the Commission on August 12, 1995, was not a separate or new proceeding, and the decision scheduled for September 26, 1995, is merely the conclusion of the deliberations from September 12, 1995. Therefore, the petition as applied to Docket No. 920199-WS is untimely as it was filed after the final hearing. Even if it were not untimely, petitioners have clearly waived their right to seek recusal in this case by filing after the subsequent Agenda Conference decision.[9]

The final hearing in Docket No. 930880-WS was held on April 14, 1994. The case is currently pending on appeal. On August 29, 1995, the Commission requested the appellate court to relinquish jurisdiction in order to allow the Commission to re-open the record for the purpose of conforming the Commission's decision on appeal to the appellate court's opinion in Commission Docket No. 920199-WS. If jurisdiction is relinquished, the Commission will not conduct a new proceeding. The full Commission will merely be

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[9]On September 12, 1995, at the beginning of argument at the Agenda Conference, attorney for the petitioners did state that he would be filing a petition for recusal. He did not make an oral motion for recusal or seek a continuance based on his imminent motion. Commissioner Kiesling made no comments on the motion.

taking limited evidence to amplify the trial record. Therefore, the petition is untimely having been filed after the final hearing, inappropriate to the extent the appellate court has jurisdiction over the case, and unfounded as to any future amplification of the record.

In the third case in which petitioners seek recusal, Docket No. 950945-WS, the final hearing has not occurred. However, petitioners knew that this Commissioner was assigned as prehearing officer as early as July 24, 1995, when counsel for petitioners filed a request for full commission review of Procedural Order PSC-95-08290-PCO-WS. Also at that time, counsel for petitioners knew or should have known the dates set for numerous customer service hearings, as well as those for agenda conferences on such matters as the setting of interim rates. Counsel for petitioners has requested other commissioners to order Commissioner Kiesling recused at two of the public hearings held on September 14, and September 20, 1995, where no decisions are made by the Commission, where counsel for petitioners did not allege any further bias or prejudice has occurred, and where those hearings were scheduled prior to the filing of the petition. In fact, it was the scheduling of these hearings to which petitioners objected in their July 24, 1995 motion for full commission review of that procedural order.

The nature of the operation of the Commission constituted with five members is significantly different from the operation of the circuit or county courts and even different from the operation of the Division of Administrative Hearings where such courts have a pool of judges or hearing officers from which to draw. Unlike the recusal of a Commissioner, the recusal of one judge among a pool of judges may be accomplished without a significant danger of permitting the intended or unintended manipulation of the decision-making process.[10] It is disruptive of the orderly process of the Commission, particularly when proceeding to hearing with all five commissioners in their quasi-legislative role of rate making,[11] to fail to bring the matter of recusal to the attention of the Commission at the earliest practical moment.

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[10]In City of Palatka, supra, at 827-828, the Florida Supreme Court held that it would have been improper for the judge to disqualify himself based on a legally insufficient pleading. This decision has higher significance in view of my responsibilities as a part of this collective agency head. Bay Bank, supra.

[11]United Telephone Co. v. Mayo, 345 So.2d 648 (Fla. 1977), at 654 (the fixing of rates is not a judicial function).

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Further, petitioners are customer intervenors to this rate proceeding. Counsel for petitioners knew or should have known that the full commission would be assigned to hear Docket No. 950495-WS. Therefore, counsel for petitioners knew or should have known prior to representing his clients that this commissioner would be hearing this case. In Town Center of Islamarada v. Overby, supra, the court held that ordinarily a party may not bring an attorney into a case after it has been assigned to a judge and then move to disqualify on the grounds of bias against the attorney. So here, where Rule 25-22.039, Florida Administrative Code, provides that an intervenor takes the case as he finds it, where counsel for petitioners knew of his belief of bias prior to representing petitioners in this cause, and where counsel had an opportunity to raise this issue at least upon their first filings in this case, petitioners have waived their right to seek recusal.

CONCLUSION

As discussed above, the standards relied on by petitioners are inapposite. Applying applicable standards, the petition is conclusory, untimely and is not legally sufficient to support disqualification. Based on the foregoing, I hereby decline to withdraw from the proceeding.

By ORDER of Commissioner Diane K. Kiesling, as Prehearing Officer, this 25th day of September, 1995.

/s/ Diane K. Kiesling
DIANE K. KIESLING, Commissioner and Prehearing Officer

This is a facsimile copy. A signed copy of the order may be obtained by calling 1-904-413-6770.

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.59(4), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Further review of this interlocutory order shall be pursuant to Rule 25-21.004, Florida Administrative Code.