BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for increase in rates by Florida Power & Light Company.	DOCKET NO. 080677-EI ORDER NO. PSC-09-0626-PCO-EI ISSUED: September 16, 2009

ORDER DECLINING RECUSAL OF
COMMISSIONER KATRINA J. MCMURRIAN

On September 14, 2009, Mr. Richard Unger filed a Motion for Disqualification of Commissioner McMurrian (Motion), suggesting my disqualification in this docket. Mr. Unger (Movant) was granted intervention in this docket on August 21, 2009, by Order No. PSC-09-0572-PCO-EI. It is my task to review this Motion for legal sufficiency. See Bay Bank & Trust Company, et. al. v. Lewis, 634 So. 2d 672 (Fla. 1st DCA 1994). Under that authority, Movant must allege

> specific facts relied on to objectively establish a sufficient ground for fear of . . . bias and prejudice.

Id. at 678. In comparison to the disqualification of a judge, the Court held that

> the standards for disqualifying an agency head differ from the standards for disqualifying a judge . . . . agency heads have significantly different functions and duties than do judges.

Id. at 679. Moreover, the grounds for disqualifying an agency head are not legally sufficient if they are tenuous and speculative.[1]

Movant first cites as authority Section 120.665, Florida Statutes, which states, in pertinent part:

> . . . 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. [e.s.]

Motion, p. 1.

[1] In Bay Bank, petitioners alleged that after the Bank's principal did not contribute to Lewis' 1990 reelection campaign, the bank was subjected to regulatory complaints from the Florida Department of Banking and Finance. Petitioners then sought Lewis' disqualification from their case challenging the complaints. The Court held that "Petitioners have failed to show any connection between their cessation of campaign support and the Department's commencement of regulatory proceedings against them other than a temporal circumstance which, without more, is simply too tenuous and speculative to require disqualification of the agency head."

In this instance, the above-styled rate hearing proceeding commenced August 24, 2009. The Motion was filed September 14, 2009. Plainly, the Motion is legally insufficient for having been filed after the commencement of the proceeding rather than prior to it, as the statute cited by Movant himself requires.

Citing Cherry Communications, Inc. v. Deason, 652 So. 2d 803, 804-805 (Fla. 1995), Movant then alleges:

> This case, involving whether to grant FPL $1.3 billion in rate increases, is irrefutably quasi-judicial.

However, rate cases are quasi-legislative, rather than quasi-judicial proceedings.[2] Nonetheless, I do not find that Movant's error in characterizing this rate-setting proceeding as quasi-judicial affects the legal sufficiency of the Motion.

Movant next cites two cases in which the test for legal sufficiency of a disqualification motion is set out:

> whether the facts, as alleged, which must be taken as true for purposes of the motion, would prompt a reasonably prudent person to fear that he or she will not get a fair and impartial trial.[3]
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> . . .
>
> the reasonableness of the affiant's belief that the Hearing Officer is prejudiced and the sufficiency of the attested facts supporting the suggestion of prejudice.[4]

Movant also cites Section 350.041(2)(h), Florida Statutes, which states,

> a commissioner must avoid impropriety in all his or her activities and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the Commission.

On pp. 3-5 of the Motion, Movant alleges as factual support for the Motion my participation in a Standard and Poors Conference panel that focused on "credit related issues that affect the power industry."

Movant further alleges that there were no consumer advocates listed as presenters or panelists and that the conference was described as attended primarily by utilities, bankers and investors, as indicated by the invitation appended to the Motion as Attachment A. Movant

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[2] Florida Motor Lines, Inc. v. Railroad Comm'rs., 100 Fla. 538, 547 (Fla. 1930); Cherry Communications, which involved a license revocation, was a quasi-judicial proceeding.
[3] Department of Agric. and Consumer Servs. v. Broward County, 810 So. 2d 1056 (Fla. 1 DCA 2002).
[4] Mt. Sinai Medical Center v. Brown, 493 So 2d 512 (Fla. 1 DCA 1986).

further alleges that utility CEOs were listed as presenters and that I was invited to a dinner for the presenters and panelists, including Paul Cutler, Treasurer, FPL Group.

Movant notes that the FPL rate case commenced in November 2008, the invitation to the Standard and Poors Conference was received in January 2009, and that the President and CEO of FPL filed testimony on March 18, 2009 in the rate case stating that FPL needs a rate increase for reasons related to "uncertain and volatile capital markets." Movant alleges that the topics at the conference and the basis of FPL's $1.3 billion rate increase are "clearly related," and that based on the topics presented, the dinner I attended, which included the FPL Group Treasurer, and the fact that I did not notify parties of my participation in the conference, Movant fears he will not get a fair and impartial trial on the issues before me as a member of the Commission panel.

In evaluating the legal sufficiency of these assertions, I note that the invitation to the conference states:

> We, of course, would avoid discussion [at the conference] of any specific filings that may be outstanding at the time.

Motion, Attachment A.

There is no claim by Movant that I, or anyone at the conference, discussed the FPL rate case. I further note the following authorities that are pertinent to this matter:

Section 350.041(2)(a), Florida Statutes, (Commissioners; Standards of Conduct) states:

> . . . A commissioner may attend conferences and associated meals . . . . Additionally, while attending a conference, a commissioner may attend . . . meals . . . that are not sponsored, in whole or in part, by any representative of any public utility regulated by the commission and that are limited to . . . speakers if the commissioner is a . . . speaker at the conference.

Standard and Poors, the sponsor of the conference and the dinner, is not a utility regulated by the Commission and, in fact, is not a utility at all. Accordingly, the statute authorizes the activities complained of in the Motion.

Section 350.042, Florida Statutes, (Ex Parte Communications) states in pertinent part:

> (3) This section [prohibiting ex parte communications] shall not apply to oral communications or discussions in scheduled and noticed open public meetings of educational programs . . .

Ethics Commission Opinion CEO 92-12 states, with particular relevance to Movant's citation of Section 350.041, Florida Statutes,

> There is no indication that by serving on the Advisory Council [of EPRI] . . . the Commissioner has contravened the provisions contained in Section 350.041, Florida Statutes [concerning standards of commissioner conduct]. From the information you have provided there is no indication that the EPRI either directly or indirectly owns any public utility regulated by the PSC or is an affiliate or subsidiary of any utility regulated by the PSC. Rather, the EPRI is an independent, nonprofit corporation supported by approximately 600 U.S. utilities, including investor-owned companies operating in Florida. We do not view this situation as a subterfuge which permits utility companies regulated by the PSC to indirectly provide gifts, employment, or a business activity to PSC commissioners.

In light of the foregoing, the basis for concern articulated by Movant seems to be, not the conduct alleged, which is, after all, explicitly permitted by the statutes, but the temporal circumstance that the general economic conditions discussed at these conferences might have, and have had, specific invocation by witnesses at the hearing in FPL's rate case. But that would be true of all general discussions of current economic conditions related to public utilities and their customers. Based on Movant's apprehensions, a utility could move to disqualify a Commissioner from a rate case for attending a conference of consumer advocates because the general discussion there of the present-day economic challenges faced by consumers, in the absence of any participation by speakers from the industry, would create fear that the utility would not get a fair trial of the issues before that Commissioner as a member of the Commission panel.

I find that Movant's theory creates a paradox: PSC Commissioners are expected to be the State's expert panel in dealing with extraordinarily complex technical, economic and societal issues, but because no information is purely objective, Commissioners have to be guarded from information relevant to these subjects. I find this claim to be even more tenuous and speculative than Bay Bank's principals' fear that their cessation of political support for the agency head of the Department of Banking and Finance explained their subsequent regulatory difficulties and established a basis for disqualifying the agency head from proceedings concerning those regulatory matters.

Moreover, the theory has implications beyond educational conferences. The media, both broadcast and print, continuously feature discussions about the general effects of economic conditions on businesses and consumers. Even if I recused myself based on my participation at the Standard and Poors Conference, or the EPRI advisory group[5] also complained of in the Motion at p. 5, I would still be the recipient of an unending flow of information concerning these issues, none of which can be realistically expected to be perfectly objective. Accordingly, I believe that the paradox presented by the Motion is better resolved with more information, rather than less, so long as my conduct comports, as it does here, within the limits provided in the Florida Statutes.

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[5] My response to the allegations in the Motion concerning the EPRI conference essentially duplicates the foregoing. Attendance at such events is authorized by the Florida Statutes.

Accordingly, based on the foregoing, I find the Motion to be legally insufficient to be a basis for my disqualification from this docket. Procedurally, the Motion is legally insufficient for being late-filed under the requirements of Section 120.665, Florida Statutes. Substantively, the Motion is legally insufficient for basing a fear of bias on the speculative and tenuous temporal circumstance that my participation in educational conferences took place prior to the Commission's commencement of a utility rate case hearing, which is the Commission's most normal and expected activity at any time. Therefore, I hereby decline the suggestion to recuse.

By ORDER of Commissioner Katrina J. McMurrian, as Prehearing Officer, this 16th day of September, 2009.

Katrina J. McMurrian

KATRINA J. McMURRIAN
Commissioner and Prehearing Officer

(SEAL)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), 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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

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 25-22.0376, Florida Administrative Code; or (2) 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 Office of Commission Clerk, in the form prescribed by Rule 25-22.0376, 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.