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March 24, 2011

Via Hand-Delivery

Ms. Ann Cole
Florida Public Service Commission
2540 Shumard Oak Boulevard
Betty Easley Conference Center, Room 110
Tallahassee, FL 32399-0850

Re: *In Re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.*, Docket No. 100330-WS

Dear Ms. Cole:

On behalf of Aqua Utilities Florida, Inc. ("AUF"), enclosed for filing are the original and seven (7) copies of AUF's Memorandum in Response to Motion to Disqualify Commissioner Graham.

Please acknowledge receipt by stamping the extra copy of this letter "filed" and returning the copy to me. Thank you for your assistance.

Sincerely,

HOLLAND & KNIGHT LLP

D. Bruce May, Jr.

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cc: Ralph Jaeger, Esq.
Caroline Klancke, Esq.
J.R. Kelly, Esq.
Patricia Christensen, Esq.
David L. Bussey
Kenneth Curtin
Troy Rendell

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water and wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.	Docket No. 100330-WS Filed: March 24, 2011

AQUA UTILITIES FLORIDA, INC.'S MEMORANDUM IN RESPONSE TO MOTION TO DISQUALIFY COMMISSIONER GRAHAM

Aqua Utilities Florida, Inc. ("AUF"), by and through its undersigned counsel and pursuant to Florida Administrative Code Rule 28-106.204, hereby files its memorandum in response to the Motion to Disqualify Commissioner Graham filed in this docket on March 17, 2011 by Mr. David L. Bussey ("Motion"). AUF respectfully submits that the Motion should be denied because the grounds alleged for disqualifying Commissioner Graham are legally insufficient to demonstrate that Commissioner Graham has a bias, prejudice, or interest in this proceeding.

Mr. Bussey's Motion is based upon Section 120.665, Florida Statutes, which provides that an agency head may be disqualified from serving in a proceeding upon proper showing by a party that the agency head has a "bias, prejudice, or interest" in the proceeding. The Motion makes no claim that Commissioner Graham has an "interest"[1] in this rate case, which is now before the Florida Public Service Commission ("PSC"). Instead, the Motion claims that

[1] The type of interest referred to in disqualification statutes is generally a financial or pecuniary interest. *See, City of Tallahassee v. Florida Public Service Commission,* 441 So.2d 620, 624 (Fla. 1983) (a claim that PSC commissioners had "financial" interests in the utility proceeding because their decision might impact their utility bills was insufficient to disqualify); *see also, Peters v. Meeks,* 171 So.2d 562, 563 (Fla. 2nd DCA 1965) ("It does not appear that either circuit judge had any direct or indirect pecuniary interest in the outcome of this cause.").

Commissioner Graham should be disqualified for "bias and prejudice", based solely on three unsworn factual allegations:

1. that Commissioner Graham is the prehearing officer in this proposed agency action rate case, but to date has not attended any of the customer meetings conducted by PSC staff in the case;

2. that on October 26, 2010, Commissioner Graham stated from the bench that it was his goal to "lead you [the PSC] into the path that our friends over at the House and Senate want us to go"; and

3. that on February 15, 2011, Commissioner Graham, while attending a National Association of Regulatory Utility Commissioners ("NARUC") conference at the Renaissance Hotel in Washington D.C., "engaged in ex parte communication" with two representatives of Aqua America, Inc. "for approximately an hour over drinks" in the hotel's public lobby.

When an agency head addresses a motion to disqualify, all factual allegations in the motion should be accepted as true and countervailing evidence is not admissible. *Charlotte County v. IMC-Phosphates Company,* 824 So.2d 298, 300 (Fla. 1st DCA 2002). However, nothing in Florida law requires the agency head to be bound by "mere conjecture and legal conclusions" in a motion to disqualify. *In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.*, 02 F.P.S.C. 6:39, Docket No. 001305-TP, Order No. PSC-02-0772-PCO-TP (June 7, 2002); *Asay v. State*, 769 So. 2d 974, 981 (Fla. 2000) (finding that allegations were "sheer speculation and do not constitute legally sufficient grounds to support a motion for disqualification."); *City of Palatka v. Frederick*, 174 So. 826, 828 (Fla. 1937) (holding that the "words in the affidavit 'hostile manner' and 'heckle' are obviously not statements of fact, as they rest entirely within the so-called opinion of persons who arrived at conclusions"). Indeed, when an agency head deliberates on a motion to disqualify, "[t]he question presented is whether the facts alleged would prompt a reasonably prudent person to fear that they will not obtain a fair and impartial hearing." *Charlotte County, supra*, 824 So.2d at 300 (emphasis added).

As explained below, the three unsworn factual allegations in the Motion, when taken individually and collectively, are insufficient to prompt a reasonably prudent person to fear that Commissioner Graham is "biased or prejudiced".

The Allegation That Commissioner Graham Did Not Attend Customer Meetings.

The allegation that Commissioner Graham did not attend customer meetings conducted by PSC staff would not lead a reasonably prudent person to conclude that Commissioner Graham was biased or prejudiced. Under Florida law, a person is presumed to know the applicable law. *See, American Home Assurance Company v. Plaza Materials Corporation American Home Assurance Company*, 908 So.2d 360 (Fla. 2005); *Health Care & Ret. Corp. of Am. v. Dep't of Health & Rehab. Servs.*, 463 So. 2d 1175, 1177 (Fla. 1st DCA 1984) (noting that an applicant for a certificate of need is presumed to know the applicable law); *Reason v. Motorola, Inc.*, 432 So.2d 644, 645 (Fla. 1st DCA 1983); *In re: Will of Martell*, 457 So.2d 1064, 1068 (Fla. 2d DCA 1984) (recognizing that each person is presumed to know the law); *Guemes v. Biscayne Auto Rentals, Inc.*, 414 So.2d 216, 218 (Fla. 3d DCA 1982) (same); *Hart v. Hart*, 377 So. 2d 5152 (Fla. 2d DCA 1979) ("All citizens are presumed to know the law."). Thus, a reasonably prudent person would know that this rate case is being processed as a proposed agency action ("PAA") under Section 367.081(8), Florida Statutes, and that customer meetings held prior to the PSC's PAA vote are conducted by PSC staff and are not regularly attended by PSC commissioners. Consequently, a reasonably prudent person would find nothing unusual in Commissioner Graham not attending a customer meeting conducted by PSC staff at this stage in a PAA proceeding, and certainly nothing that suggests any bias or prejudice on his part.

The Allegation That Commissioner Graham Publicly Stated That His Goal Was To Lead The PSC "Into The Path That Our Friends Over At The House And Senate Want Us To Go".

Commissioner Graham's alleged statement of his intent to have the PSC adhere to laws passed by the Legislature simply restates the fundamental legal principle that the PSC is a creature of statute and has only those powers conferred on it by the Legislature. *City of Cape Coral v. GAC Utilities, Inc. of Florida,* 281 So.2d 493, 495-496 (Fla. 1973); *Southern States Utilities v. Florida Public Serv. Comm'n*, 714 So. 2d 1046, 1051 (Fla. 1st DCA 1998). The Motion makes no claim that the alleged statement was made by Commissioner Graham in relation to this rate case. Moreover, the alleged statement gives no indication whatsoever that Commissioner Graham has prejudged the merits of this case.[2] It would be tenuous and speculative to conclude that this alleged statement would prompt a reasonably prudent person to conclude that Commissioner Graham was biased or prejudiced in this case.

The Allegation That Commissioner Graham "Engaged In Ex Parte Communication".

After alleging that Commissioner Graham attended a NARUC conference and there "engaged in ex parte communication" with Aqua America, Inc.[3] representatives, Mr. Bussey then proceeds to proffer his own legal definition of "ex parte communication" by referring to Black's Law Dictionary. However, the Motion completely overlooks that communications between a PSC commissioner and parties to a proceeding are expressly governed by Section 350.042, Florida Statutes, not by Black's Law Dictionary. As discussed above, parties in administrative proceedings are "presumed to know the applicable law." *Health Care & Ret. Corp. of Am.,*

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[2] *Compare, Charlotte County, supra.,* 824 So. 2d at 300 (the Secretary of the Department of Environmental Protection was properly disqualified when, on the same day that an ALJ issued an order recommending that the Department issue a permit and prior to the agency head ruling on exceptions to that recommended order, the Secretary issued a press release in part stating "We have felt all along that our actions were fully consistent with state law and the Department rules").

[3] Aqua America, Inc. is the parent company of AUF.

supra,, 463 So. 2d at 1177. Thus, a reasonably prudent person would know that under Florida law a PSC commissioner is not barred from talking with utility representatives or parties to a pending proceeding. Rather, a commissioner is prohibited from engaging in ex-parte communications that concern "the merits, threat or offer of reward in any proceeding other than a proceeding under s. 120.54 or s. 120.565, workshops, or internal affairs meetings." Section 350.042(1), Florida Statutes. Furthermore, a reasonably prudent person would know that the Florida Commission on Ethics has opined that Florida law does not prohibit a PSC commissioner from conversing in a social situation with "representatives or employees of intervenors, or even of regulated entities" provided that the commissioner does not discuss the merits of pending proceedings. *Commission on Ethics Opinion* 10-9 (April 21, 2010). The Motion makes no allegation that Commissioner Graham discussed the merits of this or any other pending case with representatives of Aqua America or AUF while he attended the NARUC conference in February 2011. Likewise, there is no allegation that Aqua America or AUF representatives purchased food or beverages for Commissioner Graham or that Commissioner Graham received anything of value from those representatives.

The Florida Supreme Court recently addressed what is required to disqualify a judge based upon allegations of bias in *Ault v. State*, 53 So. 3d 175, 204 (Fla. 2010):

> In order to present a facially sufficient basis for disqualification, a party must demonstrate a well-grounded fear that he will not receive a fair trial. See *Mansfield v. State*, 911 So.2d 1160, 1170 (Fla. 2005). A mere subjective fear of bias is legally insufficient. "[R]ather, the fear must be objectively reasonable." *Id.* at 1171 (quoting *Arbelaez v. State*, 898 So.2d 25, 41 (Fla. 2005)).

The Supreme Court went on to explain that:

> The fact that the judge has made adverse rulings in the past against the defendant, or that the judge has previously heard the evidence, or "allegations that the trial judge had

> formed a fixed opinion of the defendant's guilt, even where it is alleged that the judge discussed his opinion with others," are generally considered legally insufficient reasons to warrant the judge's disqualification.

Id. (quoting *Rivera v. State,* 717 So. 2d 477, 481).

Based on the foregoing, the allegation that Commissioner Graham had conversations with utility representatives in a public hotel lobby during a NARUC conference is insufficient to prompt a reasonably prudent person to fear that he or she would not receive a fair and impartial hearing in this case. The fear of bias and prejudice alleged in the Motion is not "objectively reasonable" and therefore is legally insufficient to warrant disqualification. See *Ault v. State, supra,* 53 So. 3d at 204.

Florida Rule of Judicial Administration 2.330(c)

As a general rule, motions to disqualify filed pursuant to Section 120.665, Florida Statutes, are governed by the same requirements that apply to disqualification of state trial court judges. *Lee Memorial Health System v. State, Agency for Health Care Admin.*, 910 So. 2d 892, 893 (Fla. 1st DCA 2005) (applying state trial court disqualification procedures to an ALJ). Rule 2.330 of the Florida Rules of Judicial Administration governs trial judge disqualification matters. Subsection (c) of Rule 2.330 requires that a motion to disqualify must "be sworn to by the party by signing the motion under oath or by a separate affidavit." Sworn attestation is required to protect the process against reckless factual allegations often employed in judge-shopping and other abusive litigation tactics. *Fischer v. Knuck*, 497 So. 2d 240, 242 (Fla. 1986) (holding that petitioner's subjective fears would not support a motion to disqualify, but instead were "frivolous and appear designed to frustrate the process by which petitioner suffered an adverse ruling"); *The Florida Bar v. Kleinfeld*, 648 So. 2d 698, 701 (Fla. 1994) (holding in the context of false affidavit in support of disqualification that "[w]e can conceive of few offenses a

lawyer may commit more potentially damaging to the legal system than intentionally and falsely impugning the fairness and honesty of a judge for the sole purpose of shopping for a more favorable forum").

The Motion filed by Mr. Bussey was not signed under oath or accompanied by a supporting affidavit. The Motion therefore should be denied as legally insufficient.

Conclusion

Accepting all of the factual allegations as true, nothing in the Motion would prompt a reasonably prudent person to fear that he or she would not receive a fair and impartial hearing in this case. Therefore, the Motion should be denied because the grounds alleged for disqualifying Commissioner Graham are legally insufficient to demonstrate that Commissioner Graham has a bias, prejudice, or interest in this proceeding.

Respectfully submitted this 24th day of March, 2011.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the following this 24th day of March, 2011:

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