BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by BellSouth Telecommunications, Inc. for arbitration of certain issues in interconnection agreement with Supra Telecommunications and Information Systems, Inc.	DOCKET NO. 001305-TP ORDER NO. PSC-02-0773-PCO-TP ISSUED: June 7, 2002

ORDER OF CHAIRMAN LILA A. JABER DECLINING RECUSAL FROM DOCKET NO. 001305-TP

BACKGROUND

On April 17, 2002, Supra Telecommunications and Information Systems, Inc. (Supra) filed a Motion To Disqualify And Recuse Commission Staff And Commission Panel From All Further Consideration Of This Docket And To Refer This Docket To The Division Of Administrative Hearings For All Further Proceedings (Motion).

On April 26, 2002, Supra filed a Verified Supplemental Motion To Disqualify And Recuse FPSC From All Further Consideration Of This Docket And To Refer This Docket To The Division Of Administrative Hearings For All Further Proceedings (Supplemental Motion).

Although both the Motion and Supplemental Motion seek the recusal of the entire Commission panel, allegations of fact are directed only toward myself and Commissioner Michael A. Palecki. In responding to those allegations directed against me, I reference p. 21-27 of the Motion and p. 7-9 and p. 15-19 of the Supplemental Motion. Therein, I am said to have received ex parte communications from Commission staff and to have manifested bias in affording Supra a rehearing in Docket No. 001079, as well as by not taking further action as to disciplining a Commission employee. See, Supplemental Motion, p. 15-19.

DISCUSSION

The legal standard for the analysis of motions to disqualify agency heads is found in Bay Bank & Trust Company v. Lewis, 634 So.

2d 672 (1 DCA 1994). Pursuant to Section 120.71,[1] Florida Statutes, such a motion must be filed "within a reasonable period of time prior to the agency proceeding...."[2] Moreover, the agency head, in passing upon the legal sufficiency of the motion, does not decide disputed allegations of fact, but assumes instead that all allegations of fact in the motion are true. However, as noted by the Bay Bank court, citing Seddon v. Harpster, 403 So. 2d 409, 411 (Fla. 1981), Section 120.71 was meant to have a different meaning after a 1983 amendment deleted the phrase "or other causes for which a judge may be recused":

> 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. [e.s.]

634 So. 2d at 679. I also note this Commission's order in In Re: Southern States Utilities, Inc., 1995 Fla. PUC LEXIS 1467, holding that

> The applicable test for legal sufficiency for recusal in any event is enunciated in Havslip 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.

Timeliness

I find at the threshold that Supra's Motion and Supplemental Motion were not timely filed for the purposes of Section 120.71, which requires filing "within a reasonable period of time prior to the agency proceeding". [e.s.] Here, these recusal suggestions were both filed after the hearing in this docket and after the

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[1] Now renumbered as Section 120.665, Florida Statutes.

[2] See also, Section 120.569(2)(a) (affidavit to disqualify ALJ must be filed prior to the taking of evidence at a hearing).

adjudication thereof.[3] Supra cites n. 6 of Bay Bank, 632 So. 2d at 679, for the idea that

> the reference to "within a reasonable time prior to the agency proceeding" in the APA recusal statute should be read as applying only to matters before the hearing officer. Accordingly, this motion for recusal applies to all pending and future motions in this docket and is thus timely with respect to these matters.

Motion, p. 3, ¶6.

However, Supra is incorrect that the discussion in n. 6 is applicable to this case or supports Supra's conclusion. As stated in Bay Bank, 634 So. 2d at 675, the Florida Department of Banking had referred that matter to the Division of Administrative Hearings (DOAH). Accordingly, the Court noted that

> when a matter has been referred to DOAH ... the phrase "with respect to the formal proceeding" should be read as applying only to the matters before the DOAH[4] hearing officer.... [e.s.]

634 So. 2d 679, n. 6.

In this case, where there has been no referral of the matter to DOAH, n. 4 of Bay Bank, 632 So. 2d at 679, is the applicable discussion:

> We note that Rule 28-5.108, Florida Administrative Code, requires that motions for the disqualification of a "presiding officer" be made at least "five days prior to the date scheduled for the final hearing". "Presiding officer" is defined in Rule 28-5.102 to mean an "agency head, or member thereof, who conducts a hearing on behalf of the agency...."

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[3] There are Motions for Reconsideration pending in the docket.

[4] Supra's discussion of n. 6 simply deleted the word "DOAH".

Supra's Motion and Supplemental Motion violated the timeliness requirements of Section 120.71. Moreover, this violation is not merely a "technical" problem. It is, after all, Supra itself that noted that

> The applicable test for legal sufficiency for recusal in any event is ... whether the facts alleged would prompt a reasonably prudent person to fear that he could not get a fair and impartial trial. [e.s.]

Motion, p. 10-11.

These principles do not contemplate that a litigant will wait until the trial or hearing is concluded and adjudicated, and, then, if dissatisfied with the result, allege that the unfavorable result must have reflected bias. In short, the policies of the very statutes and cases Supra purports to rely on are at odds with Supra's failure to comply with the requirement for timely filing. [5] I find both the Motion and Supplemental Motion to be procedurally defective, therefore, for lack of timeliness. As such, they are void motions.

Legal Sufficiency

Pursuant to the principles of Bay Bank, I note that while I am not to resolve disputed issues of fact and, instead, will assume the truth of the facts alleged, I am not bound by movant's conjectures or legal conclusions. Therefore, I arrive at the conclusion that Supra's suggestion of recusal is legally insufficient based on the facts Supra alleges.

Based on the analysis in Bay Bank, I am to assume that all allegations of fact in the motion are true. However, Bay Bank also demonstrates that "speculative and tenuous" or "wholly conclusory" allegations of bias "unsupported by any allegations of underlying facts that demonstrate such bias" are insufficient. See, 634 So.

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[5] Although Rule 28-5.108, the rule cited by the Bay Bank court has been repealed, Section 120.665, Florida Statutes still requires disqualification motions to be filed prior to agency proceedings, not subsequent to them, as has Supra.

2d at 676, 679. Indeed, the Court in Bay Bank, at 634 So. 2d 678, described the motion for disqualification filed against the agency head in that case to be

> exceptionally general in the allegations of bias and prejudice: it failed to allege specific facts relied on to objectively establish a sufficient ground for fear of such bias and prejudice. [e.s.]

Thus, there has to be a factual basis relied on to objectively establish a sufficient ground for fear of such bias and prejudice. I find that to be at least as lacking here as it was found to be lacking in Bay Bank.

Supra begins its factual recitation in support of my recusal on p. 21 of the Motion by stating that I "directed an inquiry into Kim Logue's ex parte communications with BellSouth's Director of Regulatory Affairs", also described by Supra as "Logue's misconduct". However, the scope of PSC Inspector General John Grayson's investigation was said to be about "the distribution of the cross-examination questions" by Ms. Logue, who knew about it and what if anything was done. See, Supplemental Motion, Exhibit Y. The characterizations "ex parte" and "misconduct" appear to be Supra's conclusions, rather than facts as determined by Inspector General Grayson.

Next, an "Internal Investigation and Report" issued by Commission Attorney Richard Bellak is described by Supra as addressing "the impact of BellSouth receiving only a single ex parte communication from Logue and the impact of receiving the cross-examination questions on the eve of the evidentiary hearing". However, this report, attached as Exhibit "K" to the Supplemental Motion, says nothing about any ex parte communications. It notes that Ms. Logue, a non-attorney, stated that she provided the cross-examination questions to BellSouth in order to find out which of their witnesses would address which questions, and that she believed she had provided them to Supra as well. The report noted that the proper way to obtain the information sought would have been to inquire as to which witnesses were expert in which area, without providing the questions to anyone. The report concluded that Ms. Logue had in fact erred, but had done so harmlessly since, as it turned out, the questions asked of BellSouth's witnesses by

the staff's attorney at the hearing were, in nearly every instance, different from those e-mailed to BellSouth by Ms. Logue. No findings of "misconduct" or "ex parte" violation were made, just "error". Again, the facts stated in the report attached to the Supplemental Motion by Supra are not the same as Supra's conclusions about them.

I dwell on these initial factual allegations of Supra for a reason. I cannot resolve disputed allegations of fact here, but Supra's conclusions that every contact between staff and BellSouth is an "ex parte" violation is not a "fact". It is merely Supra's conclusion and one that is inconsistent with the governing statutes and rules. Moreover, "ex parte" constraints do not apply to staff, as a matter of law. See, Section 350.042(1), Florida Statutes. The further problem with Supra's blending of this employee's error with a casual assumption of misconduct and bias, is that it deprives the employee of the presumption of innocence.

As noted in Exhibit Y, attached by Supra itself to its Supplemental Motion, an investigation was commenced on October 25, 2001, by Inspector General Grayson into staff employee Logue's provision of cross-examination questions to BellSouth. In other words, the investigation was for the purpose of finding out whether the mistake was accompanied by the kind of motivation that would have turned a simple error or blunder by an employee into a serious offense motivated by interest, bias or the like. See, generally Administrative Procedures Manual, Ch. 5. If an employee were found to have simply blundered, the remedy would be more training and an admonition to consult other staff before acting. At the other end of the spectrum, if proof were found of an improper motive or character defect, the employee's entire professional career could be jeopardized or destroyed.

Inspector General Grayson's memorandum, attached as Exhibit Y to the Supplemental Motion, is unmistakably clear:

> Effective October 10, 2001, Ms. Logue reported for active duty in the US Air Force.

In other words, the events of September 11, 2001 removed this employee entirely from the PSC sphere. She is now unavailable to do anything therein whether well or badly, however motivated. She

could attend the hearing in Docket No. 001305 as an audience member because the hearing was a public event. Her attendance is not a legally sufficient allegation supporting recusal.

Inspector General Grayson's memo continued saying:

> [Ms. Logue's] absence and the inability to interview her has rendered my investigation incomplete.

Again, this could not be more clear. The employee is, for legitimate reasons, on leave. She has rights attendant to her being an employee on leave to serve on active duty in the military. See, Administrative Procedures Manual, Ch. 4.08-21. She has the right to a presumption of innocence and cannot be deprived of the right to confront whatever evidence of purposeful wrongdoing may eventually be discovered, if indeed any such evidence is found.

The above is the clear import of report documents Supra itself attached to its Motion and Supplemental Motion. Equally in accord with this position are my remarks at the agenda conference complained about by Supra and found on p. 8 of the Supplemental Motion. Pursuant to those remarks, I exercised discretion to afford rehearing in Docket No. 001097.[6] The remarks contain no admission by the Commission as to anything beyond a training failure in alerting the employee as to the inappropriateness of her activity in this incident. They are not, therefore, legally sufficient to support recusal. Moreover, based on the reports cited by Supra itself and attached by Supra to its motions, no further action as to this matter is, for the time being, appropriate. A lack of further disciplinary action, as complained of by Supra, is legally insufficient to support recusal.

If any of the facts alleged by Supra in these pleadings form facts relied on to objectively establish a sufficient ground for fear of Commission bias or prejudice against Supra, I have been unable to discern them from Supra's Motion and Supplemental Motion.

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[6] The parties declined the Commission's offer of rehearing when they jointly voluntarily dismissed Docket No. 001097 on March 26, 2002. Docket No. 001097 was the docket in which Ms. Logue's error occurred.

If they exist, they are far too speculative and tenuous to be legally sufficient to support my recusal. Moreover, they are not only wholly conclusory, but assign a presumption of guilt as to matters in which the investigation is suspended by necessity and, therefore, incomplete.

In view of the above, it is

ORDERED by Chairman Lila A. Jaber that the Motion and Supplemental Motion of Supra Telecommunications and Information Systems, Inc. as further described in the body of this Order are denied as untimely. It is further

ORDERED that the said Motion and Supplemental Motion are denied as legally insufficient to support my recusal from Docket No. 001305.

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer, this 7th Day of June, 2002.

LILA A. JABER
Commissioner and Prehearing Officer

(S E A L)

RCB

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, 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 the Commission Clerk and Administrative Services, 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.