

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Initiation of Show Cause)	DOCKET NO. 880240-TC
Proceedings Against Commercial)	ORDER NO. 22331
Ventures, Inc. for Failure to Comply)	ISSUED: 12-21-89
with Commission Rules.)	

The following Commissioners participated in the disposition of this matter:

MICHAEL McK. WILSON, Chairman
 GERALD L. GUNTER
 JOHN T. HERNDON
 BETTY EASLEY

ORDER DENYING
MOTION FOR RECONSIDERATION

BY THE COMMISSION:

Order No. 21891, issued September 13, 1989, denied Commercial Ventures, Inc.'s (Commercial Ventures) Motion to Disqualify the Hearing Officer for Good Cause. Commercial Ventures' motion, filed after the hearing in this matter, sought to disqualify the Prehearing Officer from addressing the remaining issues in this docket. In our order we stated that the allegations contained in the motion and accompanying affidavit failed to allege facts sufficient to demonstrate that Commercial Ventures would be prejudiced if the Prehearing Officer were to remain on this docket and continue to address post hearing issues.

Commercial Ventures filed its Motion for Reconsideration of Order No. 21891 arguing that disqualification is mandatory and that we were compelled to disqualify the Prehearing Officer upon a showing by Commercial Ventures that it had a well-founded fear it would not receive a fair and impartial hearing. In support of its motion, Commercial Ventures relies upon Section 22i-6.013, Florida Administrative Code, Rule 1.432, Fla. R. Civ. P., and sections 120.71 and 120.57(1), Florida Statutes, stating that "the applicable rules and statutes require the Hearing Officer to disqualify himself after determining the legal sufficiency of the motion and affidavit and therefore the Commission is without the authority to entertain and consider the motion to disqualify the Hearing Officer." Commercial Ventures' argument fails to raise any matters of fact or law which we failed to consider or overlooked when we reached our initial decision. Diamond Cab Co. of Miami v. King, 146 So.2d 889 (Fla. 1962). We find that

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Commercial Ventures' motion sets forth matters which we had previously considered and is an attempt to reargue the case. We have determined that the motion has failed to present the Commission with any new material information upon which we should alter our decision. Pingree v. Quaintance, 394 So.2d 161 (Fla. 1st DCA 1981). Accordingly, the motion seeking reconsideration of Order No. 21891 is hereby denied.

Our decision to deny the original motion to disqualify, as well as the motion seeking reconsideration, is based upon our reading of the applicable rules and statutes pertaining to disqualification of a Hearing Officer or judge as opposed to those pertaining to the disqualification of a commissioner. While Commercial Ventures correctly states the standards for disqualification of a Hearing Officer for the Division of Administrative Hearings (DOAH) or a judge in a civil case, it fails to address the Public Service Commission's own applicable rules pertaining to disqualification of a commissioner, which are controlling in this instance, pursuant to Rule 25-22.035(3), F.A.C. The rules and statutes Commercial Ventures relies upon require that disqualification is mandatory upon a determination of the legal sufficiency of the affidavit in support of the disqualification. However, our applicable rule clearly makes disqualification of a commissioner discretionary. Rule 25-21.004, F.A.C., provides in pertinent part:

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. (Emphasis added)

Our disqualification rule is based, in part, upon the process under which we operate. We appear at hearings or agendas either as a panel of five commissioners or as a panel of two or more commissioners. Acting as the full Commission, there are no "tie" decisions, and in the event this occurs during a Commission panel, our rules provide that, unless the Chairman is a member of the panel, he or she will cast the deciding vote. In either event, the result is essentially the same, no one commissioner acts singularly to determine issues at hearing or agenda. Obviously, our role is significantly different than that of either a judge or a DOAH Hearing Officer, and our applicable rule reflects this difference. It is this difference that we find leads us to support our earlier action and deny reconsideration.

In addition to denying Commercial Ventures' request for reconsideration, we also find that we properly denied the initial motion to disqualify without first having considered Commercial

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Ventures' Notice to Disqualify Hearing Officer and Motion to Remove Such Relief from Agenda. We find the motion portion insufficient on its face, inasmuch as it fails to state the grounds relied upon for the relief sought, pursuant to Rule 25-22.037(2)(b), Florida Administrative Code.

Therefore, based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Commercial Ventures, Inc.'s Motion for Reconsideration and Vacating Order dated September 13, 1989, is hereby denied for the reasons set forth herein. It is further

ORDERED that this docket remain open.

By ORDER of the Florida Public Service Commission, this 21st day of DECEMBER, 1989.

STEVE TRIBBLE, Director
Division of Records and Reporting

(S E A L)

DWS
3553G

by: Kay Flynn
Chief, Bureau of Records

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by section 120.59(4), Florida Statutes (1985), to notify parties of any administrative hearing or judicial review of Commission orders that may be available, as well as the procedures and time limits that apply to such further proceedings. 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 the Commission's final action in this matter may request 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 sewer utility by filing a notice of appeal with the Director, Division of Records and Reporting and filing a copy of the notice of appeal

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and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.