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-02-0772-PCO-TP ISSUED: June 7, 2002

ORDER OF COMMISSIONER MICHAEL A. PALECKI 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 Chairman Lila A. Jaber. In responding to those allegations directed against me, I reference p. 27-30 of the Motion and p. 4-6 and p. 14-15 of the Supplemental Motion. Therein, I am said to have instigated and received a series of ex parte communications which violated both Section 366.042(1), (4), Florida Statutes and Rule 25-22.033(5), Florida Administrative Code. See, Supplemental Motion, p. 14.

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

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

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. We 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

---

[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...."

---

[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 as analyzed in Bay Bank. 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, I am not bound by movant's mere conjectures or legal conclusions. Assuming the truth of the facts alleged, I arrive at the conclusion that Supra's suggestion of recusal is legally insufficient.

Supra itself identifies Harold McLean as Commission General Counsel, Beth Keating as Legal, Bureau Chief, Telecommunications and Katrina Tew as my aide. See, Motion, p. 27. These are the three Commission employees with whom I am said by Supra to have conducted ex parte communications in violation of Section 350.042(1), (4); Florida Statutes. I will, therefore, address the

---

[5] Though Rule 28-5.108 cited by the Bay Bank court, has been repealed, Section 120.665 still requires disqualification motions to be filed prior to agency proceedings, not subsequent to them, as has Supra.

question of whether these facts are legally sufficient to support Supra's Motion and Supplemental Motion to disqualify me.

Section 350.042(1), Florida Statutes states:

> A commissioner should accord to every person who is legally interested in a proceeding, or the person's lawyer, full right to be heard according to law, and, except as authorized by law, shall neither initiate nor consider ex parte communications concerning 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. No individual shall discuss ex parte with a commissioner the merits of any issue that he or she knows will be filed with the commission within 90 days. The provisions of this subsection shall not apply to commission staff. [e.s.]

The facts alleged by Supra identify all three participants in the forwarding of information to me as Commission staff. Therefore, as a matter of law, those communications could not be ex parte communications in violation of 350.042(1) and as a matter of law, could not trigger the process for handling ex parte communications set out in Section 350.042(4). Supra cannot rewrite the statute to suit its taste as to how the legislation "should" read, even it if believes its version would be "better." Pointedly, the alleged facts are legally insufficient to support Supra's Motion and Supplemental Motion for my recusal based on any violation of Section 350.042.[6]

---

[6] Section 120.569(2)(e) requires attorneys to make a reasonable inquiry to assure no improper purpose to harass or unnecessarily delay is present before signing a pleading. The sanction for failure to comply may include an award of attorney's fees and expenses to the other party. Given the text of Section 350.042(1) as plainly stated, all of Supra's references to staff's allegedly ex parte communications raise the issue of whether Supra complied with the requirements of Section 120.569(2)(e) and conducted any "reasonable inquiry."

Moreover, though I will, to some extent, leave to the Commission's response to Supra's Motion and Supplemental Motion to recuse staff the question of whether staff violated Rule 25-22.033(5), F.A.C., Supra's alleged facts, taken as true, as opposed to its conjectures and legal conclusions, are legally insufficient to support my recusal on that basis. Rule 25-22.033, F.A.C., must be read consistently with Section 350.042, Florida Statutes. In a conflict between the rule and statute, the statute would control.[7] However, in my understanding of them, there is no conflict.

There is no allegation by Supra that the staff members I communicated with are other than non-testifying, advisory staff. Moreover, there are no allegations by Supra that BellSouth initiated a communication with me or staff or that I initiated a communication with BellSouth. Contact with staff as Supra has alleged does not constitute an ex parte communication under statute or rule.

Though Supra conjectures on p. 29 of the Motion that the e-mails involved were "obviously relevant and significant to the Commission's decision-making process," it is allegations of fact that I must assume as true, not conjectures. There is no allegation of fact reflecting any support for this conjecture other than the mere pendency of an agency decision conference, the very kind of circumstances held to be too tenuous and speculative in Bay Bank (no underlying facts justifying allegation that agency head was biased against petitioners' bank after petitioners withdrew political support).

Instead, Supra is left with reading sinister meanings into such ordinary e-mail message language as "Sounds good. I'm here the rest of the day. Feel free to call or drop in whenever. Thanks again!" See, Supplemental Motion, p. 5.

The facts alleged, as opposed to conjecture about them, are that my staff asked for and received from other staff information relevant to what non-testifying advisory staff thought the approximate lay of the land was in the conflict between the parties

---

[7] See, Gretz v. Florida Unemployment Appeals Commission, 572 So. 2d 1384, 1387 (Fla. 1991).

as to how much money each claimed was owed by the other. Supra's own allegations are that "[a certain sum] had been awarded during prior arbitrations." [e.s.] Moreover, staff indicated only that BellSouth "claimed" it was owed [a different sum],[8] not that staff endorsed the claim. Supra agreed that BellSouth had billed for that amount. See, Supplemental Motion, p. 5-6. These staff activities are allowed under Section 366.042, Florida Statutes and Rule 25-22.033(5), Florida Administrative Code. No legally sufficient facts are alleged by Supra supporting my recusal for violation of either provision.

Based on the above, it is

ORDERED by Commissioner Michael A. Palecki that Supra Telecommunications and Information System, Inc.'s Motion and Supplemental Motion 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 this docket.

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

Michael A. Palecki

MICHAEL A. PALECKI
Commissioner and Prehearing Officer

(S E A L)

RCB

[8]These amounts are the subject of requests for confidential classification, which are still pending reconsideration.

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.