

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for authority to recover prudently incurred storm restoration costs related to 2004 storm season that exceed storm reserve balance, by Florida Power & Light Company.

DOCKET NO. 041291-EI  
ORDER NO. PSC-05-0061-PCO-EI  
ISSUED: January 18, 2005

ORDER OF COMMISSIONER J. TERRY DEASON DECLINING  
RECUSAL FROM DOCKET NO. 041291-EI

On January 18, 2005, in the above-captioned docket, Thomas P. Twomey and Genevieve E. Twomey (the "Twomeys") filed a motion pursuant to Section 120.665(1), Florida Statutes, to disqualify Commissioners Baez, Deason, and Bradley from conducting or participating in proceedings, and entering any further orders, in this docket.<sup>1</sup>

The Twomeys base their motion on the July 24, 2004, issuance by the Florida Commission on Ethics of orders finding probable cause that three of the five current members of the PSC and one former member violated Section 350.041(2)(a), Florida Statutes, while attending the Southeastern Association of Regulatory Utility Commissioners conference in June 2002.<sup>2</sup> The Ethics Commission ordered a public hearing as to whether the affected Commissioners violated Section 350.041(2)(a) by "accepting anything" from a public utility, or from a direct or indirect affiliate or subsidiary of any public utility, while attending the conference.<sup>3</sup>

Citing an "initial Report of Investigation," the Twomeys assert that conduct by Florida Power & Light Company ("FPL"), among others, was involved in the Commission on Ethics' finding of probable cause. The Twomeys also assert that the Commission, in Docket No. 041057-EI, added an "emergency item" to its September 21, 2004, Agenda Conference, to address an FPL request to establish a regulatory asset for its storm recovery cost, without a publicly reported request from FPL to do so but based on the recommendation of senior Commission staff and with the approval of Chairman Baez. The Twomeys note that FPL, in this

<sup>1</sup> Section 120.665(1), Florida Statutes, provides a scheme under which "any individual serving alone or with others as an agency head" may be disqualified. (Emphasis supplied.) Thus, the Twomeys' motion is being handled as a motion to separately disqualify each of the affected Commissioners. This order addresses the Twomeys' request that I be disqualified.

<sup>2</sup> Attached to the Twomeys' motion are two documents related to the orders finding probable cause: (1) the Florida Commission on Ethics' July 24, 2004, Press Release announcing, among other things, the finding of probable cause; and (2) a June 23, 2004, document entitled Supplement to Advocate's Amended Recommendation, which the Twomeys allege to be the recommendation upon which the Florida Commission on Ethics entered its orders finding probable cause.

<sup>3</sup> The orders found no probable cause to believe that there was a violation of Section 112.3148(4) relating to acceptance of gifts with a value in excess of \$100 from utility companies while attending the conference, and dismissed this allegation.

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docket, is seeking recovery of storm damage restoration costs through a surcharge to its customers. The Twomeys contend that the finding of probable cause and the Commission's addition of the emergency item to its September 21, 2004, Agenda Conference therefore cause them to fear that they will not receive a fair and impartial hearing.

Under Section 120.665(1), Florida Statutes:

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.

Just cause may be demonstrated when the facts alleged would prompt a reasonably prudent person to fear that they will not obtain a fair and impartial hearing. Charlotte County v. IMC-Phosphates Co., 824 So. 2d 298, 300 (Fla. 1<sup>st</sup> DCA 2002), citing Dept. of Agriculture v. Broward Co., 810 So. 2d 1056, 1058 (Fla. 1<sup>st</sup> DCA 2002).

Upon reviewing the Twomeys' motion, I find that the allegations contained therein are not legally sufficient pursuant to Section 120.665, Florida Statutes, to demonstrate a bias, prejudice, or interest in the instant proceeding. The Twomeys' allegations are simply too tenuous and speculative to demonstrate a bias, prejudice, or interest in this proceeding. See Bay Bank & Trust Company, et al. v. Lewis, 634 So. 2d 672 (Fla. 1<sup>st</sup> DCA 1994). The existence of the probable cause determination and the addition of an item to a published agenda, which the Twomeys rely upon as the basis for their motion, are not valid bases for disqualification.

Further, the Twomeys' motion was filed at 9:44 a.m. this morning, within minutes of the start of the Commission's January 18, 2005, Agenda Conference, which was, pursuant to notice, scheduled to commence at 9:30 a.m. As announced to the parties in this docket at the Commission's prior Agenda Conference and as shown in a published Agenda, the Commission is scheduled to consider FPL's request in this docket to implement a storm cost recovery charge subject to refund at today's Agenda Conference. Because the Twomeys' motion was filed after the scheduled start of the Commission's proceedings at today's agenda conference, I find that the motion was not filed within a reasonable period of time prior to proceedings at today's Agenda Conference and, thus, untimely with respect to my vote at today's Agenda Conference.

For these reasons, I decline to recuse myself from this proceeding.

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By ORDER of Commissioner J. Terry Deason this 18th day of January,  
2005



J. TERRY DEASON  
Commissioner

(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 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.