

State of Florida



Public Service Commission  
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DATE: MAY 30, 2002  
TO: DIRECTOR, DIVISION OF THE COMMISSION CLERK & ADMINISTRATIVE SERVICES (BAYÓ)  
FROM: OFFICE OF THE GENERAL COUNSEL (BELLAK) *RCB*  
RE: DOCKET NO. 001305-TP - PETITION BY BELLSOUTH TELECOMMUNICATIONS, INC. FOR ARBITRATION OF CERTAIN ISSUES IN INTERCONNECTION AGREEMENT WITH SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.  
AGENDA: JUNE 11, 2002 - POST HEARING DECISION - PARTICIPATION IS LIMITED TO COMMISSIONERS AND STAFF  
CRITICAL DATES: NONE  
SPECIAL INSTRUCTIONS: NONE  
FILE NAME AND LOCATION: S:\PSC\GCL\WP\001305.RCM

CASE 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 only toward Chairman Lila A. Jaber and

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Commissioner Michael A. Palecki. Their orders respectively declining to recuse are incorporated herein by reference. In responding to those allegations directed against the Commission panel, reference is made to p. 30-31 of the Motion.

DISCUSSION OF ISSUES

**ISSUE 1:** Are Supra's Motion and Supplemental Motion timely filed pursuant to applicable legal standards for disqualification motions?

**RECOMMENDATION:** No. Supra's Motion and Supplemental Motion are void for lack of timeliness.

**STAFF ANALYSIS:** 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,<sup>1</sup> Florida Statutes, such a motion must be filed "within a reasonable period of time prior to the agency proceeding...."<sup>2</sup> 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. Staff also notes this Commission's order in In Re: Southern States Utilities, Inc., 1995 Fla. PUC LEXIS 1467, holding that

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<sup>1</sup> Now renumbered as Section 120.665, Florida Statutes.

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

DATE: May 30, 2002

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

At the threshold, 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 adjudication thereof.<sup>3</sup> 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<sup>4</sup> hearing officer.... [e.s.]

634 So. 2d 679, n. 6.

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<sup>3</sup> There are Motions for Reconsideration pending in the docket.

<sup>4</sup> Supra's discussion of n. 6 simply deleted the word "DOAH".

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...."

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.<sup>5</sup> Both the Motion and Supplemental Motion are procedurally defective, therefore, for lack of timelines. As such, they are void motions.

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<sup>5</sup> Although Rule 28-5.108, the rule 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.

**ISSUE 2:** Are Supra's Motion and Supplemental Motion legally sufficient to support recusal of the Commission Panel from Docket No. 001305?

**RECOMMENDATION:** No, Supra's Motion and Supplemental Motion are not legally sufficient to support recusal of the Commission panel.

**STAFF ANALYSIS:** Legal Sufficiency - Pursuant to the principles of Bay Bank, staff notes that while it is not to resolve disputed issues of fact and, instead, will assume the truth of the facts alleged, it is not bound by movant's conjectures or legal conclusions. Therefore, the staff arrives at the conclusion that Supra's suggestion of recusal is legally insufficient based on the facts Supra alleges.

Staff relies on the Orders Declining Recusal From Docket No. 001305 of Chairman Jaber and Commissioner Palecki, incorporated herein by reference, for the conclusion that Supra's Motion and Supplemental Motion were legally insufficient to support the recusal of either Chairman Jaber or Commissioner Palecki from Docket No. 001305. The only argument offered by Supra relevant to support recusal of the entire Commission panel is that "an adverse posture exists between Supra and at least two of the three Commissioners assigned to Docket No. 001305-TP". However, none of the authorities cited by Supra<sup>6</sup>, support recusal in this case, where the hearing was held and adjudicated prior to Supra's untimely filing of legally insufficient motions for recusal of two commissioners. Because Supra has alleged merely conclusory, speculative and tenuous circumstances rather than facts relied on to objectively demonstrate the "adverse posture" claimed to exist between itself and the Commission, Supra's post-hearing attempt at

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<sup>6</sup> Ridgewood Properties, Inc. v. Department of Community Affairs, 562 So. 2d 322 (Fla. 1990), cited by Supra, involved a conflict in the roles of an agency head who testified at the hearing and then reviewed his own testimony and found it to be competent, substantial evidence in support of the agency's final order. None of the staff members or Commissioners that are subjects of Supra's motions testified at the hearing in this case. Thus, none had a "Ridgewood" conflict.

DOCKET NO. 001305-TP

DATE: May 30, 2002

forum shopping is only that and nothing more. No cited authority would support that attempt.<sup>7</sup>

**ISSUE 3:** Should this docket remain open?

**RECOMMENDATION:** Yes. The docket should remain open.

RCB

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<sup>7</sup> Supra's reliance on World Transportation, Inc. v. Central Florida Regional Transportation, 641 So. 2d 913 (Fla. 5<sup>th</sup> DCA 1994) is inapposite because Supra's claim that an "adverse posture" exists between it and the Commission is unsupported by objective facts. In that situation, any litigant dissatisfied with the outcome of litigation could forum shop "post-hearing" by filing the kind of conclusory, tenuous and speculative motions Supra has filed here as a pretext to "start over". This is not only defective as to the process, but contrary to the legislative intent that the Commission be the expert agency to adjudicate cases such as Docket No. 001305 in order to achieve a uniform statewide regulation of telecommunications. Section 364.01, Florida Statutes.