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State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

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#2.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 Commission staff, allegations of fact are directed

against Chairman Jaber and Commissioner Michael A. Palecki concerning their communications with staff. Their respective Orders Declining To Recuse From Docket No. 001305-TP are therefore incorporated by reference herein.

Reference is made to p. 16-17 of the Motion and p. 6-7 of the Supplemental Motion. Therein, allegations are made that numerous staff members engaged in ex parte communications, wrongdoing, or had knowledge of wrongdoing and covered it up.

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,[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

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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).

> 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 notes 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

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. 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[3] 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...."

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.[4]

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

[4] Although Rule 28-5.108, the rule cited by the Bay Bank court has been repealed, Section 120.665, Florida Statutes still requires that disqualification motions must be filed prior to agency proceedings, not subsequent to them, as has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

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Both the Motion and Supplemental Motion are procedurally defective, therefore, for lack of timeliness. As such, they are void motions.

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

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

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, staff arrives at the conclusion that Supra's suggestion of recusal is legally insufficient based on the facts Supra alleges.

The origin of Supra's claim that Commission staff should be recused is found in the incident described at length by Chairman Jaber in her Order Declining To Recuse From Docket No. 001305. Therein, Chairman Jaber notes Supra's statement on p. 21 of the Motion that she "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.

The above-described incident demonstrates that Supra's attempt to disqualify the "top tier of the telecommunications portion of the Commission", based on the conclusory arguments stated at p. 16-17 of the motion is not only legally insufficient, but grossly so, since the incident itself was of the harmless, de minimus variety and the circumstances described by Chairman Jaber made no further action at this time entirely appropriate. Supra's argument, if accepted, would lead to the paradox that the less serious the incident, the more drastic the consequences for the agency and the more complete the disruption of the agency's processes. Supra lacks any factual basis for its claims, including the claim at p. 14 of the Motion that "Logue was allowed to continue to supervise other staff subordinates and to participate in the evidentiary hearing in Docket No. 001305-TP."

An example of Supra's unsupported conspiratorial view of Commission actions is afforded by p. 14 of the Motion at ¶10 and n. 11, the import of which is that the Commission's senior management knew in advance that Ms. Logue was going on active military duty before October 9, 2001 and conspired to delay notifying Inspector General Grayson so he would be "unable to interview Logue". Supra's theory that the Commission not only anticipated this particular fall-out of the unprecedented attack on the twin-towers on September 11, 2001, but neatly fit those world-changing events into forwarding some conspiracy against Supra gives new support to the rejection in Bay Bank of wholly conclusory, speculative or tenuous bases for recusal motions. Though the facts alleged are to be taken as true, Supra's unsupported and conclusory beliefs are not facts. This attempt to bootstrap an agency-wide conspiracy from an incident of harmless and de minimus employee error is legally insufficient to support the recusal of Commission staff from Docket No. 001305.

Supra's most recent claims at p. 15-16 of the Supplemental Motion do not survive scrutiny any better. The selective quotations from staff e-mails stating that "we called their hand" and "BellSouth is delighted with this resolution" do not support recusal of any staff. Indeed, Ms. Logue's description of the problems that would have resulted from the delay in scheduling Supra sought, "especially when the 271[5] docket hits", is quite

[5] "271" is a massively complex determination by the PSC of whether an incumbent former monopoly provider of local phone

reasonable support for Chairman Jaber's "solution" to move the date of the prehearing conference forward instead of back. Of course, Chairman Jaber would want to know that BellSouth was "delighted". Schedules are usually lengthened, not shortened, and if BellSouth's counsel were not "delighted", i.e., couldn't do it, the "solution" might not have worked. Supra's attempt to read more into it again fails as "conclusory, tenuous and speculative". Bay Bank.

Finally, Supra's strangely one-sided assumption that its scheduling conflicts had to be accommodated, whereas BellSouth's agreement to the scheduling change was something that staff should not have communicated to Chairman Jaber, reflects a glaring thematic defect in Supra's position as to all of these issues. Every communication between staff and BellSouth is described as "ex parte" and, therefore, "illegal", "wrongdoing" or "misconduct". However, Supra includes, as Attachment B to its Motion, a series of e-mails among various telecommunications staff which respond to an e-mail to staff from Supra. Supra has provided no analysis as to why the staff's contacts with BellSouth are all "ex parte" and "violations", while staff's e-mail contacts with Supra are not.[6]

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service meets FCC criteria to be allowed to compete in long-distance markets.

[6] Supra's point in attaching this series of e-mails is to demonstrate that the "tone" indicates staff's bias against Supra. However, such subjective inferences are not "facts". See, City of Palatka v. Frederick, 174 So. 826, 828 (Fla. 1937) (tone of voice or manner conceived to be indicative of bias or prejudice against the parties in the case are not facts indicating a just cause for disqualification under Section 120.71, Florida Statutes for bias, prejudice or interest).

Moreover, Supra's subjective inferences are legally insufficient to recuse staff based on the content of the e-mail: Thus, the bureau chief advised the attorney that the senior manager "believes we should dismiss the complaint..." The attorney replied, "Interesting. I thought she didn't want to see it dismissed. Well, Supra may have an argument for dismissing, we can discuss that Tuesday." [e.s.] In other words, Supra's position needed to be reviewed and considered.

Moreover, Supra's approach to this problem affecting all of its allegations is to studiously ignore it. Thus, at p. 12-13 of the Supplemental Motion, Supra states

> With respect to the merits of Supra's Motion, Florida Statute §350.042(1) states in pertinent part as follows: [e.s.]

Supra then quotes the first sentence of Section 350.042(1), but omits the last sentence thereof, the only sentence that is really pertinent to Supra's allegations:

> The provisions of this subsection shall not apply to commission staff. [e.s.]

Thus, Supra's allegations are not only legally insufficient as conclusory, speculative, and tenuous, but legally incorrect and unsupported on their face. Actually, the ex parte provisions govern communications from persons outside the Commission to Commissioners and from Commissioners to persons outside the Commission. Yet, Supra's Motion and Supplemental Motion describe contacts (real and imagined) between staff and BellSouth as well as between Commissioners and staff as ex parte, wrongdoing and misconduct without any legal predicate for doing so based on Section 350.042.

Rule 25-22.033, in contrast, does apply to staff. However, Supra's misinterpretation of Section 350.042 causes it to misinterpret Rule 25-22.033 as well. First, Supra omits the initial paragraph of the rule, which states:

> The intent of this rule is not to hinder in any way the exchange of information, but to provide all parties to adjudicatory proceedings notification of and the opportunity to participate in certain communications. [e.s.]

The complexities inherent in actually achieving those goals means that the rule is "technical" and to be closely "read". Thus, it turns out that the rule governs "communications between Commission employees and parties to docketed proceedings," but does not "affect communications regarding discovery requests, procedure or other matters not concerned with the merits of a case". Rule 25-22.033(1).

That subsection identifies what is governed, but not how it is governed. Subsection (2) requires notice of "written communications", but subsection (3) does not require notice of one-to-one telephone calls, only "conference calls" involving "three or more persons".

At page 13-14 of the Supplemental Memorandum, Supra asserts that e-mails between Kim Logue and Nancy Sims about BellSouth's claims violated Rule 25-22.033(2). The rule, however, does not define whether e-mails are "written communications" or "one-to-one telephone conversations". Whether they violated the rule would depend on how they are defined. Staff's practice, pending that definition, is to treat them as one-to-one telephone conversations, since they function that way. That is why Supra's e-mails to the staff were not violations of the rule either. Moreover, it would also have to be determined whether the Logue/Sims e-mails merely clarified discovery requests, which are exempt even under subsection (2) of the rule.

Just as much complexity attends the operation of subsection (5) of the rule, which prohibits Commission employees from "directly or indirectly" relaying communications from parties or other persons which would "otherwise be a prohibited ex parte communication under Section 350.042, Florida Statutes". To Supra, which ignores the provision in Section 350.042(1) exempting staff from ex parte restrictions, the interpretation of subsection (5) of the rule is perfectly circular. Since Supra assumes that every contact between staff and BellSouth (but, illogically, not staff and Supra) is "ex parte" and a "violation", if a Commissioner seeks information from staff and Supra can magically impute to the Commissioner the "knowledge" that staff would seek the information from BellSouth rather than by other means, then staff has violated subsection(5). See, Supplemental Motion, p. 14-15. Again, this ignores the non-debatable and explicit exclusion of staff from ex parte restrictions in Section 350.042(1). What subsection (5) means in actual practice is that staff should not allow itself to be used by parties as conduits for ex parte communications initiated by parties that are intended for Commissioners, and to recognize that if it happens. This would not be a factor in requests to parties for information which are initiated by staff, as were the communications at issue in Supra's Motion and Supplemental Motion. Though Supra may disagree with the policies embodied in the statute and rule, the familiar precepts of statutory interpretation require that every provision be accorded

a harmonious interpretation and that no provision be ignored.[7] Staff's interpretation accommodating both Section 350.042(1) and Rule 25-22.033 does that, while Supra's interpretation ignores the last sentence of Section 350.042(1) as inconvenient to its arguments. That is, therefore, an incorrect reading. Moreover, the statute would control over the rule even if there were a conflict between then.[8] Supra's reading is infirm on that ground also.

ISSUE 3: Should this docket remain open?

RECOMMENDATION: Yes. The docket should remain open.

RCB

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[7] See, Atlantic Coast Line R.R. v. Boyd, 102 So. 2d 709, 712 (Fla. 1958).

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