

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaints by Southeastern Utilities)
Services, Inc., on behalf of various customers) Docket No.: 030623
against Florida Power and Light Company) Filed: August 23, 2004
concerning thermal demand meter error.)

**MOTION TO DISQUALIFY AND TO REFER MATTER
TO THE DIVISION OF ADMINISTRATIVE HEARINGS**

Dillard's Department Stores, Inc. (Customer), pursuant to section 120.655(1), Florida Statutes, moves to disqualify the Public Service Commission from further consideration of this matter and moves that the matter be referred to the Division of Administrative Hearings for determining the disputed issues of fact and all related matters that arise in this matter. The factual and legal grounds for this Motion are as follows:

1. Customers, including Dillard's, initially brought claims to this Commission in July 2003 that Florida Power and Light ("FPL"), a public utility as defined by § 366.02, Florida Statutes, had overcharged them for electrical service. Customers contend that FPL's thermal demand meters overregistered the demand readings of customers' accounts, resulting in the Customers overpaying FPL for electrical service.

2. FPL has acknowledged that its class of thermal demand meters known as 1-V meters, when tested as a whole, registered an error rate outside of acceptable limits. FPL subsequently removed the 1-V class of meters from service and issued refunds, limited to 12 months, to certain customers. Rule 25-6.103(1) F.A.C. provides in pertinent part that "if it can be shown that the error was due to some cause, the date of which can be fixed, the overcharges shall be computed back to but not beyond such date based upon available records."

3. Customers filed a Petition for Formal Administrative Hearing on December 12, 2003, challenging, in part, the Florida Public Service Commission's Proposed Agency Action that limited Customers refunds to 12 months. Customers contend, as provided for in Rule 25-6.103(1), F.A.C., that the meters in question registered in error from the date of installation at customers' business locations and refunds should not be limited to 12 months, but should reach back in time to the date the faulty meters were originally installed at Customers' location.

4. An Order Establishing Procedure was entered on June 9, 2004 and set a date of September 28, 2004 to conduct an evidentiary hearing pursuant to Florida Statutes 120.569 and 120.57.¹

5. On July 27, 2004, the Florida Ethics Commission found probable cause that four of the five currently serving Public Service Commissioners had violated Florida Statute 350.041(2)(a). Copies of the Orders Finding Probable Cause are attached as Exhibit 1.

6. Within the past 30 days, Customer learned of the entry of Orders Finding Probable Cause and that Florida Power and Light, a party to this docket, was involved such that its conduct was involved in the Ethics Commission's Finding of Probable Cause.

7. Florida Statute 350.041 is entitled Commissioners, standards of conduct. Section 350.041(2)(a) states: "A commissioner may not accept anything from any business entity which, either directly or indirectly, owns or controls any public utility regulated by the commission, from any public utility regulated by the commission, or

¹ Recently, the hearing date was moved to from September 28, 2003 to September 23, 2004 by the Notice of Commission Hearing and Prehearing Conference filed by the PSC on August 19, 2004.

from any business entity, which, either directly or indirectly, is an affiliate or subsidiary of any public utility regulated by the commission.”

8. The Ethics Commission concluded that FPL, among others, was involved in providing items or things of value to the four Commissioners. FPL is the party adverse to the Customers in this case.

9. The finding of probable cause made by the Florida Ethics Commission that four of five commissioners violated statutorily imposed standards of conduct by accepting something from, among others, FPL, raises concern and fear about the Customer’s ability to receive a fair trial. An Affidavit to this effect is attached as Exhibit 2 to this Motion.

10. Accordingly, Customer seek to disqualify the Commission from deciding the matters in dispute between the parties, and have the case heard and determined by an administrative law judge assigned by the Division of Administrative Hearings.

11. Case law supports the granting of Customers request. The standard for reviewing this motion is whether the facts alleged would prompt a reasonably prudent person to fear that they will not obtain a fair and impartial hearing. Department of Agriculture v. Broward County, 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002); Randolph v. State, 853 So. 2d. 1051, 1064 (Fla. 2003); MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332, 1335 (Fla. 1990); Charlotte County v. IMC-Phosphates Company, 824 So. 2d 298, 300 (Fla. 1st DCA 2002). “It is not a question of how the judge actually fees, but what feeling resides in the movant’s mind and the basis for such feeling. The judge may not pass on the truth of the allegations of fact, and countervailing evidence is not admissible.” Charlotte County, 824 So. 2d at 300.

12. It is difficult to imagine how a reasonably prudent person, including Customer, would NOT have a concern or fear about obtaining a fair trial from the Florida Public Service Commission given these simple facts: 1) The State Ethics Commission, based upon an thorough investigation conducted by an investigator/lawyer with the Florida Attorney General's Office, found probable cause that four of five Florida Public Service Commissioners violated a state statute which sets standards of conduct for Commissioners and the public utilities the Commissioners regulate; 2) among the basis for the Ethics Commission's Finding of Probable Cause was that FPL, a party adverse to Customers in this docket, was involved in actions that lead to the Ethics Commission's finding of Probable Cause.² These facts also give rise to a concern and fear that Customers will be denied their due process rights. It is well settled that "an impartial decision maker is a basic constituent of minimum due process." Cherry Communications, Inc. v. Deason, 652 So. 2d 803, 804 (Fla. 1995).

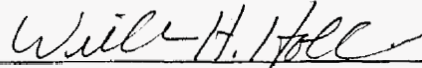
13. Accordingly, for the reasons set forth herein, Customers move that the Florida Public Service Commission be disqualified from considering the dispute between the Customers and FPL and that the matter be referred to the Division of Administrative Hearings for the complete resolution of this matter³. Customer seeks an expedited ruling

² These facts support disqualification under the standard articulated by majority in Charlotte County v. IMC Phosphates Company, Exhibit 4 and the provisions of section 120.665(1). The Ethics Commission found probable cause that four of the five PSC Commissioners violated the state law governing the conduct between PSC Commissioners and the entities they regulate was violated. This finding should suffice for the purposes of concluding that disqualification is in order for the grounds set forth in 120.655(1). Additionally, in the context of judicial disqualification, which is factually similar this case since the Commission was positioned to decide disputed issues of material fact, all facts as alleged in the Petition to Disqualify must be taken as true. Coleman v. State, 866 So.2d 209 (Fla. 4th DCA 2004). The attachments to this motion should leave little doubt as to the facts as spelled out in the motion.

³ Florida Statute 350.125 provides "Any provision of law to the contrary notwithstanding, the commission shall utilize administrative law judges of the Division of Administrative Hearings of the Department of Management Services to conduct hearings of the commission not assigned to members of the commission." Florida Statute 350.01(5) provides that the Commission shall consist of five members and matters may be assigned to two or more commissioners for resolution. Since four of the five current Commissioners are subject to the Ethics Commissions Order of Probable Cause attached as Exhibit 1 hereto, the Division of Administrative Hearings is the appropriate forum in which to resolve the factual disputes and all attendant matters between the Customers and FPL.

on this motion, as case law sets forth that motions to disqualify should be addressed promptly. Anderson v. Glass, 727 So. 2d 1147 (Fla. 5th DCA 1999).

14. Undersigned counsel certifies that this motion is made in good faith and that he has conferred with counsel for FPL and is authorized to represent that FPL opposes this motion.



WILLIAM H. HOLLIMON
Florida Bar No. 104868
JON C. MOYLE, JR.
State Bar No. 727016
MOYLE, FLANIGAN, KATZ, RAYMOND
& SHEEHAN, P.A.
The Perkins House
118 North Gadsden Street
Tallahassee, Florida 32301
(850) 681-3828 (telephone)
(850) 681-8788 (facsimile)

Attorneys for Customers

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to those listed below with an asterisk and the remainder by U.S. Mail without an asterisk this day the 31st day of August, 2004.

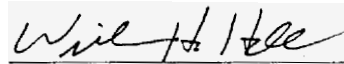
Cochran Keating
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Bill Walker
Florida Power & Light Company
215 South Monroe Street, Suite 810
Tallahassee, FL 32301

*Kenneth A. Hoffman
Rutledge, Ecenia, Purnell & Hoffman
Post Office Box 551
Tallahassee, FL 32302-0551

R. Wade Litchfield
Natalie Smith
Law Department
Florida Power & Light Company
700 Universe Boulevard
Juno Beach, FL 33408-0420

Daniel Joy
785 SunTrust Bank Plaza
1800 Second Street
Sarasota, FL 34236



William H. Hollimon

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

DATE FILED

(JUL 27 2004)

COMMISSION ON ETHICS

In re **BRAULIO BAEZ,**

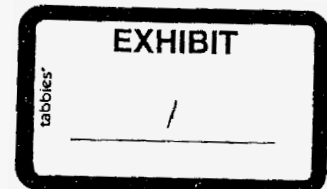
Respondent.

Complaint No. 03-189

ORDER FINDING PROBABLE CAUSE

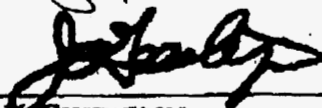
Based on the preliminary investigation of this complaint, the Commission on Ethics accepts the recommendation of the Commission's Advocate and finds that there is probable cause to believe that the Respondent, as a member of the Public Service Commission, violated Section 350.041(2)(a), Florida Statutes, and therefore orders a public hearing as to whether the Respondent violated this provision by accepting anything while attending the Southeastern Association of Regulatory Utility Commissioners conference held in Miami Beach in June 2002 from any business entity which, either directly or indirectly, owns or controls any public utility regulated by the Public Service Commission, from any public utility regulated by the Public Service Commission, or from any business entity which, either directly or indirectly, is an affiliate or subsidiary of any public utility regulated by the Public Service Commission.

However, based on the preliminary investigation and recommendation of the Advocate, the Commission found on June 3, 2004, that there was no probable cause to believe that the Respondent violated Section 112.3148(4), Florida Statutes, by accepting gifts with a value in excess of \$100 from utility companies while attending the June 2002 conference. Accordingly, this allegation is dismissed and will not be at issue at the public hearing.



A formal notice of hearing of the matter on which probable cause has been found will be prepared and sent to the Respondent and to the Advocate. Under Commission Rule 34-5.020, F.A.C., the Commission may resolve a complaint proceeding through a stipulation, settlement or consent order entered into by the Respondent and the Advocate and approved by the Commission. If the Respondent wishes to pursue a settlement of this case, he should contact the Advocate to discuss the terms of a possible settlement.

ORDERED by the State of Florida Commission on Ethics meeting in executive session on Thursday, July 22, 2004.

Date July 27, 2004.


JOEL K. GUSTAFSON
Chair

cc: Mr. Mark Herron, Attorney for Respondent
Mr. Linzie F. Bogan, Commission's Advocate
Mr. Lloyd Brumfield, Complainant

DATE FILED

JUL 27 2004

COMMISSION ON ETHICS

**BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS**

In re **RUDOLPH BRADLEY,**

Respondent.

Complaint No. 03-192

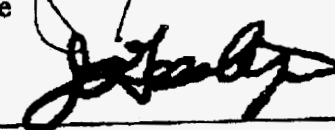
ORDER FINDING PROBABLE CAUSE

Based on the preliminary investigation of this complaint, the Commission on Ethics accepts the recommendation of the Commission's Advocate and finds that there is probable cause to believe that the Respondent, as a member of the Public Service Commission, violated Section 350.041(2)(a), Florida Statutes, and therefore orders a public hearing as to whether the Respondent violated this provision by accepting anything while attending the Southeastern Association of Regulatory Utility Commissioners conference held in Miami Beach in June 2002 from any business entity which, either directly or indirectly, owns or controls any public utility regulated by the Public Service Commission, from any public utility regulated by the Public Service Commission, or from any business entity which, either directly or indirectly, is an affiliate or subsidiary of any public utility regulated by the Public Service Commission.

However, based on the preliminary investigation and recommendation of the Advocate, the Commission found on June 3, 2004, that there was no probable cause to believe that the Respondent violated Section 112.3148(4), Florida Statutes, by accepting gifts with a value in excess of \$100 from utility companies while attending the June 2002 conference. Accordingly, this allegation is dismissed and will not be at issue at the public hearing.

A formal notice of hearing of the matter on which probable cause has been found will be prepared and sent to the Respondent and to the Advocate. Under Commission Rule 34-5.020, F.A.C., the Commission may resolve a complaint proceeding through a stipulation, settlement or consent order entered into by the Respondent and the Advocate and approved by the Commission. If the Respondent wishes to pursue a settlement of this case, he should contact the Advocate to discuss the terms of a possible settlement.

ORDERED by the State of Florida Commission on Ethics meeting in executive session on Thursday, July 22, 2004.

July 22, 2004
 Date


 JOEL K. GUSTAFSON
 Chair

cc: Mr. Mark Herron, Attorney for Respondent
 Mr. Linzie F. Bogan, Commission's Advocate
 Mr. Lloyd Brumfield, Complainant

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

DATE FILED

JUL 27 2004

COMMISSION ON ETHICS

In re **J. TERRY DEASON,**)

Respondent.)

Complaint No. 03-191

ORDER FINDING PROBABLE CAUSE

Based on the preliminary investigation of this complaint, the Commission on Ethics accepts the recommendation of the Commission's Advocate and finds that there is probable cause to believe that the Respondent, as a member of the Public Service Commission, violated Section 350.041(2)(a), Florida Statutes, and therefore orders a public hearing as to whether the Respondent violated this provision by accepting anything while attending the Southeastern Association of Regulatory Utility Commissioners conference held in Miami Beach in June 2002 from any business entity which, either directly or indirectly, owns or controls any public utility regulated by the Public Service Commission, from any public utility regulated by the Public Service Commission, or from any business entity which, either directly or indirectly, is an affiliate or subsidiary of any public utility regulated by the Public Service Commission.

However, based on the preliminary investigation and recommendation of the Advocate, the Commission found on June 3, 2004, that there was no probable cause to believe that the Respondent violated Section 112.3148(4), Florida Statutes, by accepting gifts with a value in excess of \$100 from utility companies while attending the June 2002 conference. Accordingly, this allegation is dismissed and will not be at issue at the public hearing.

A formal notice of hearing of the matter on which probable cause has been found will be prepared and sent to the Respondent and to the Advocate. Under Commission Rule 34-5.020, F.A.C., the Commission may resolve a complaint proceeding through a stipulation, settlement or consent order entered into by the Respondent and the Advocate and approved by the Commission. If the Respondent wishes to pursue a settlement of this case, he should contact the Advocate to discuss the terms of a possible settlement.

ORDERED by the State of Florida Commission on Ethics meeting in executive session on Thursday, July 22, 2004.

Date

July 22, 2004

JOEL K. GUSTAFSON
Chair

cc: Mr. Mark Herron, Attorney for Respondent
Mr. Linzie F. Bogan, Commission's Advocate
Mr. Lloyd Brumfield, Complainant

BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS

DATE FILED

JUL 27 2004

COMMISSION ON ETHICS

In re **LILA JABER,**

Respondent

Complaint No. 03-190

ORDER FINDING PROBABLE CAUSE

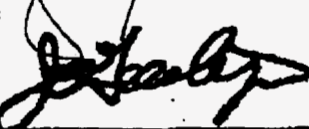
Based on the preliminary investigation of this complaint, the Commission on Ethics accepts the recommendation of the Commission's Advocate and finds that there is probable cause to believe that the Respondent, as a member of the Public Service Commission, violated Section 350.041(2)(a), Florida Statutes, and therefore orders a public hearing as to whether the Respondent violated this provision by accepting anything while attending the Southeastern Association of Regulatory Utility Commissioners conference held in Miami Beach in June 2002 from any business entity which, either directly or indirectly, owns or controls any public utility regulated by the Public Service Commission, from any public utility regulated by the Public Service Commission, or from any business entity which, either directly or indirectly, is an

Respondent violated Section 112.314(7), Florida Statutes, by accepting an excess of \$100 from utility companies while attending the June 2002 conference. Accordingly, this allegation is dismissed and will not be at issue at the public hearing.

A formal notice of hearing of the matter on which probable cause has been found will be prepared and sent to the Respondent and to the Advocate. Under Commission Rule 34-5.020, F.A.C., the Commission may resolve a complaint proceeding through a stipulation, settlement or consent order entered into by the Respondent and the Advocate and approved by the Commission. If the Respondent wishes to pursue a settlement of this case, she should contact the Advocate to discuss the terms of a possible settlement.

ORDERED by the State of Florida Commission on Ethics meeting in executive session on Thursday, July 22, 2004.

Date

July 27, 2004


JOEL K. GUSTAFSON
Chair

cc: Mr. Mark Herron, Attorney for Respondent
Mr. Linzie F. Bogan, Commission's Advocate
Mr. Lloyd Brumfield, Complainant

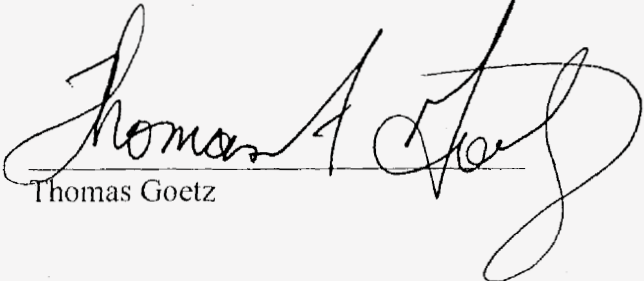
AFFIDAVIT

STATE OF ARKANSAS
COUNTY OF PULASKI

BEFORE ME, this day personally appeared Thomas Goetz, who being duly sworn, deposes and says that the following information is true and correct, and within his personal knowledge:

1. My name is Thomas Goetz. I am over the age of 18 and am of sound mind and am competent to testify to the matters set forth herein. I give the following information of which I have personal knowledge, both freely and truthfully and without any threat of coercion or promise of reward.
2. I am employed by Dillard's. ("Company") and am responsible for, among other things, issues affecting electricity usage and consumption for the Company's Florida stores. I am the person within the Company most familiar with Florida Public Service Commission case number 030623 in which refunds are being sought from Florida Power and Light ("FPL").
3. I recently became aware of four Orders Finding Probable Cause involving four Florida Public Service Commissioners entered by the Florida Ethics Commission. I understand that FPL, among other utilities, was involved in actions that lead the Florida Ethics Commission finding probable cause. I understand that the Orders Finding Probable Cause conclude probable cause exists that the four commissioners violated Florida Statute 350.041(2)(a). I understand that this statute prohibits a public service commissioner from accepting anything from a public utility regulated by the Public Service Commission. I understand that FPL is a public utility regulated by the Florida Public Service Commission.
4. Given the recent actions and findings by the Florida Ethics Commission, concern, apprehension and fear exist about the ability of the Company to receive a fair, unbiased and impartial trial.

FURTHER AFFIANT SAYETH NAUGHT.


Thomas Goetz



STATE OF ARKANSAS
COUNTY OF PULASKI

Sworn to and subscribed before me by Thomas Goetz this 23rd day of August, 2004.

 (he/she is personally known to me, OR
 has produced as identification.

Nancy K. Sparks
NOTARY PUBLIC

(NOTARY STAMP)

Print Name: Nancy K. Sparks