

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaints by Ocean Properties, Ltd.,
J.C. Penney Corp., Target Stores, Inc., and
Dillard's Department Stores, Inc. against
Florida Power & Light Company concerning
thermal demand meter error.

DOCKET NO. 030623-EI
ORDER NO. PSC-04-0862-PCO-EI
ISSUED: September 3, 2004

ORDER OF COMMISSIONER J. TERRY DEASON DECLINING
RECUSAL FROM DOCKET NO. 030623-EI

On August 31, 2004, in the above-captioned docket, Dillard's Department Stores, Inc. ("Dillard's"), one of four customers whose complaints are being addressed in this docket, filed a motion pursuant to Section 120.665(1), Florida Statutes, to disqualify the Public Service Commission ("PSC") from further consideration of this matter and to refer this matter to the Division of Administrative Hearings for determining the disputed issues of fact and all related matters arising from this docket.¹

Dillard's bases its motion on the issuance by the Florida Ethics Commission on July 27, 2004 of orders finding probable cause that four of the five current members of the PSC violated Section 350.041(2)(a), Florida Statutes, while attending the Southeastern Association of Regulatory Utility Commissioners conference in June 2002.² 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.³

Dillard's asserts that conduct by Florida Power & Light Company ("FPL"), among others, was involved in the Ethics Commission's finding of probable cause. Dillard's notes that FPL is the party adverse to Dillard's in this docket and that the finding of probable cause therefore raises concern and fear about Dillard's ability to receive a fair trial.

Under Section 120.665(1), Florida Statutes:

¹ Although Dillard's motion seeks disqualification of the "Public Service Commission" from these proceedings, 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, Dillard's motion is being handled as a motion to separately disqualify each of the affected Commissioners. This order addresses Dillard's request that I be disqualified.

² A copy of these orders was attached to Dillard's motion.

³ 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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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. 1st DCA 2002), citing Dept. of Agriculture v. Broward Co., 810 So. 2d 1056, 1058 (Fla. 1st DCA 2002).

Upon reviewing Dillard's 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. Dillard's 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. 1st DCA 1994). The existence of the probable cause determination relied on as the basis for Dillard's motion, without more, is not a valid basis for disqualification.

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

By ORDER of Commissioner J. Terry Deason this 3rd day of September,
2004


J. TERRY DEASON
Commissioner

(S E A L)

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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.