

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Florida Power & Light Company's )  
Petition for Authority to Recover Prudently )  
Incurred Storm Restoration Costs Related )  
To the 2004 Storm Season That Exceed )  
The Storm Reserve Balance. )  
\_\_\_\_\_ )

DOCKET NO. 041291-EI  
Filed: January 18, 2005

TWOMEYS' MOTION FOR DISQUALIFICATION OF  
COMMISSIONERS BAEZ, DEASON AND BRADLEY

Thomas P. Twomey and Genevieve E. Twomey (the "Twomeys"), by their undersigned counsel and pursuant to Section 120.665, Florida Statutes, hereby suggests by this Motion disqualification of Commissioners Baez, Deason and Bradley from conducting or participating in quasi-judicial proceedings and from entering any further orders with respect to the above-styled docket. As grounds for this Motion, the Twomeys state:

1. Commissioners Baez, Deason and Bradley are three of the five members of the Commission assigned to adjudicate this docket in which Florida Power & Light Company ("FPL") is seeking to recover \$354 million of monies purported to have been expended in storm damage restoration during 2004. FPL is requesting that it be allowed to begin recovering these monies immediately through a rate increase and prior to any evidentiary hearing at which it is required to prove the monies were expended and, more importantly, before it proves it is legally entitled to recover them from its customers outside its base rates. Commissioners Baez, Deason and Bradley are subject to the provisions of Section 120.665, which provides for the disqualification of an agency head for bias, prejudice, or interest. Specifically, Section 120.665, Florida Statutes, states:

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00537 JAN 18 '05  
FPSC-COMMISSION CLERK

## **120.665 Disqualification of agency personnel.--**

(1) Notwithstanding the provisions of s. 112.3143, 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. If the disqualified individual was appointed, the appointing power may appoint a substitute to serve in the matter from which the individual is disqualified. If the individual is an elected official, the Governor may appoint a substitute to serve in the matter from which the individual is disqualified. However, if a quorum remains after the individual is disqualified, it shall not be necessary to appoint a substitute.<sup>1</sup>

2. An administrative body acts quasi-judicially when it adjudicates private rights of a particular person after a hearing which comports with due process requirements, and makes findings of facts and conclusions of law on the disputed issues. Reviewing courts scrutinize quasi-judicial acts by non-deferential judicial standards. City of Apopka v. Orange County, 299 So.2d 657 (Fla. 4<sup>th</sup> DCA 1974). This case, involving whether to grant FPL \$354 million in surcharge rate increases, especially without a prior evidentiary hearing, is irrefutably quasi-judicial. In cases such as this, an impartial decision-maker is a basic component of minimum due process. Cherry Communications, Inc. v. Deason, 652 So.2d 803, 804-805 (Fla. 1995). An impartial decisionmaker is a basic constituent of minimum due process. Megill v. Board of Regents, 541 F.2d 1073, 1079 (5<sup>th</sup> Cir. 1976).

3. The test for determining the legal sufficiency of a motion for disqualification is whether the facts alleged, which must be taken as true for purposes of the motion, would prompt a reasonably prudent person to fear that he or she will not get a fair and impartial trial.

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1. Inasmuch as this Commission has historically often heard cases in panels of two Commissioners, the availability of a quorum should not be at issue.

Department of Agric. & Consumer Servs. v. Broward County, 810 So.2d 1056 (Fla. 1<sup>st</sup> DCA 2002). Furthermore, it is not a question of how the judge (or Commissioners in this case) actually feels, 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. In other words, the judge or commissioner does not, in fact, have to be biased or prejudiced. Rather, the outcome must turn on the reasonableness of the affiant's belief that the Hearing Officer is prejudiced and the sufficiency of the attested facts supporting the suggestion of prejudice. Mt. Sinai Medical Center v. Brown, 493 So.2d 512 (Fla. 1<sup>st</sup> DCA 1986).

4. In a July 27, 2004 Press Release the Florida Commission on Ethics reported that it had, meeting in Tallahassee on July 22 in closed executive session, found probable cause to believe that:

Braulio Baez, Lila Jaber, Terry Deason and Rudolph Bradley, members of the Florida Public Service Commission, may have violated the Standards of Conduct established for members of the Public Service Commission by accepting gifts from utility companies (sponsorships of meals, coffee breaks and receptions) while attending a 2002 conference held in Miami Beach. No probable cause was found to believe that they violated the State gift law which prohibits the acceptance of a gift valued in excess of \$100 from a lobbyist who lobbies one's agency.

See Pages 1-2, July 27, 2004 Press Release, which is included as Attachment A.

5. The Commission on Ethics probable cause findings were based upon factual investigations by its staff investigator and the legal recommendation of the Florida Assistant Attorney General serving as the Advocate for the Florida Commission on Ethics. As reflected in the June 23, 2004 Supplement To Advocate's Amended Recommendation, included as Attachment B:

The 2002 SEARUC conference was an event that was sponsored for the most part by Regulated Industry and attended by Public Service Commissioners and staff from several southern states. The projected budget prepared by PSC staff for the 2002 SEARUC conference vividly illustrates this point. (SROI, Exh. E-1) The projected budget demonstrates that PSC staff expected 220 members from regulated industry to attend the conference while only 80 commission members and staff were expected to attend. (SROI, Exh. E-1) The 220 expected industry participants were charged a conference registration fee of \$425.00 per attendee while the commission members and staff were charged only \$225.00 per attendee. (SROI, Exh. E-1) Stated differently, SEARUC expected to generate \$93,500.00 in revenue from industry participants while generating only \$18,000.00 in revenue from commission and staff attendees. (SROI, Exh. E-1) Not only was a majority of the food and beverage expense paid for by industry, but approximately 80% of the projected revenue for the conference was expected to come from industry. (SROI, Exh. E-1)

Footnote 3 at Pages 2-3, Attachment B.

5. The Supplement To Advocate's Amended Recommendation continued at page 3, saying:

However, any initial understanding that Respondents [referring to the four commissioners] had as to who was sponsoring the food and beverage events at the conference should have been questioned when Respondents attended PSC pre-conference meetings where the industry sponsorship protocol was discussed (SROI Exh. 10), when Respondents were provided with conference materials listing industry sponsors (SROI Exh. C-34), and when Respondents were provided with a reasonable opportunity to observe the tent cards and posters placed at various locations throughout the conference site that advised conference attendees of the sponsorship activities of the regulated industry. (SROI Exh. H)

Respondents attempt to defend against the allegations on the grounds that, to the extent that they may have attended food and beverage events sponsored by industry, they did not eat the food or drink any of the beverages paid for by industry. [footnote omitted] Section 350.041(2)(a), Florida Statutes, however makes it clear that PSC Commissioners are prohibited from "accept[ing] **anything** from any business entity which . . . owns or controls any public utility regulated by the commission. . . ."

(emphasis added) The issue of whether Respondents ate or drank anything at the various events sponsored by regulated industry is a secondary consideration when addressing the conduct that Section 350.041(2)(a) was designed to prevent. The legislative history of Chapter 350 shows that the legislature was attempting to “greatly reduce, if not eliminate, the perception held in some quarters that the regulated industries are receiving an undue advantage through their off-record lobbying of commissioners.” (See letter from House of Representatives, attached hereto as Exh. R-1) The Legislature’s concern with “off-record lobbying of the commissioners by regulated industries” is at least in part expressed in Section 350.041(1), Florida Statutes, wherein the STATEMENT OF INTENT provides “[n]othing shall prohibit [the PSC] standards of conduct from being more restrictive than part III of chapter 112.” By attending the 2002 SEARUC conference, an event that was heavily financed and subsidized by regulated industry, Respondents accepted an invitation by regulated industry and were subjected to the very off-record lobbying efforts contemplated by the authors of Chapter 350. See Exh. R-1; see also, CEO 92-12 (warns against subterfuge which permits utility companies regulated by PSC to indirectly provide gifts, employment or a business activity to PSC Commissioners). Therefore, based upon the evidence before the Commission, I recommend that the Commission find probable cause to believe that each Respondent violated Section 350.041(2)(a), Florida Statutes.

Respectfully submitted this 23<sup>rd</sup> day of June, 2004.

Linzie F. Bogan  
Advocate for the Florida  
Commission on Ethics

6. The Supplemental Report of Investigation states that as early as March, 2000, former PSC Chairman Joe Garcia, according to his assistant, “anticipated that regulated industries would want to sponsor certain portions of the conference. . . .” A provision of the contract with the hotel “was his (Garcia’s) effort to provide regulated industries the opportunity to sponsor portions of the conference without involving PSC commissioners or staff.” Subsequently, after Commissioner Garcia’s departure, Commissioner Baez became SEARUC president and responsible for this Commission’s role as host of the 2002 SEARUC winter

conference. Commissioner Baez's administrative assistant was charged with being the Commission's "contact person" with the Wyndham hotel and reported to the investigator "she 'may have' mentioned to [Commissioner Baez] when sponsorships were obtained." However, she added that she did "recall having attended meetings with [Commissioner Baez] when discussions were held concerning how PSC staff would respond to requests from regulated industries to sponsor events associated with the conference." Page 2 Supplemental Report of Investigation.

7. As reflected in the initial Report of Investigation:

(18) **Billing information obtained from the Wyndham indicates that regulated industries the Southern Company, Florida Power, Florida Power and Light/Florida Progress, BellSouth, and AT&T sponsored eight of the ten meals, coffee breaks, and receptions held during the conference. Information concerning these sponsorships is appended as Exhibit A. SEARUC, the records indicate, paid for the two remaining functions. (Emphasis supplied by Twomeys).**

(23) **Information obtained from the hotel indicates that \$36,437.77 in meals, coffee breaks, and receptions were paid for by regulated industries during the conference.**

8. The probable cause determinations by the Florida Commission on Ethics, which appear to be unresolved to date according to that Commission's website, are not insignificant to the Commissioners involved, aside from the concern the charges should, and do, raise in the customers of regulated utilities. Pursuant to Part III, Chapter 112, Florida Statutes, a finding by the Florida Ethics Commission that the named Commissioners were guilty of violating the ethics law for which probable cause has already been found could potentially result in their removal from office and civil penalties.

9. In addition to the probable cause findings by the Florida Commission on Ethics,

the Twomeys are in additional doubt of their ability to receive a fair hearing in this case as a result of the Commission's handling of FPL's earlier request to be allowed to establish a regulatory asset for its storm recovery costs in Docket No. 041057-EI. In that case, the Commission, without any publicly reported request from FPL to do so, with the recommendation of senior staff and with the approval of Chairman Baez, considered FPL's request as an emergency item on the basis that "resolution of this petition will reduce the uncertainty regarding the financial impact of these storms. This may have a positive effect on FPL's cost of capital and thereby, reducing future costs to customers." See Attachment C, 9/9/2004 Request for change to Agenda Conference.

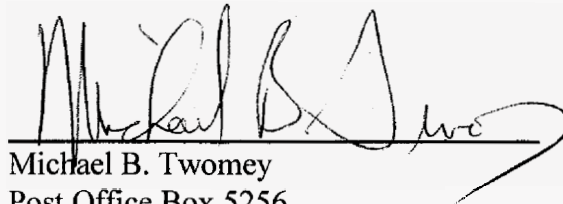
10. Considering the above item as an "emergency item" denied the Twomeys and all FPL customers the 14-day statutory notice required in all but true emergency conditions. The "Wall Street will feel better" rationale for short-circuiting the notice requirement hardly meets the Section 120.525(3), Florida Statutes, emergency meeting exception to full notice where "an agency finds that an immediate danger to the public health, safety, or welfare requires immediate action. . . ." More importantly, the Twomeys are of the belief that the decision to handle FPL's request as an emergency item could not have come without some off-record communications to senior staff and/or Chairman Baez requesting the emergency treatment be given despite the lack of any public request for the same. Such communications in the context of reducing statutory notice, if they occurred, should be considered prohibited ex parte communications.

11. As recited above earlier, the test for determining the legal sufficiency of a motion for disqualification is whether the facts alleged would prompt a reasonably prudent person to fear that he or she will not get a fair and impartial trial. It is not a question of how the judge

actually feels but rather what feeling resides in the affiant's mind and the basis for such feeling. Here, the Twomeys state that the probable cause finding of the Florida Commission on Ethics that the named Commissioners violated Florida's ethics laws by attending a conference financed in large part by regulated industries, specifically including FPL, causes them to fear that they will not get a fair and impartial trial on the issue of FPL's storm damage recovery fund from Commissioners Baez, Deason and Bradley. This fear is reinforced by the unwarranted emergency treatment given FPL by the Commission in Docket 041057-EI.

WHEREFORE, Thomas P. Twomey and Genevieve E. Twomey respectfully suggest that Commissioners Baez, Deason and Bradley recuse themselves from further participation in this docket for the reasons stated above.

Respectfully submitted.

A handwritten signature in black ink, appearing to read "Michael B. Twomey", written over a horizontal line.

Michael B. Twomey  
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Attorney for Twomeys



**CERTIFICATE OF SERVICE**

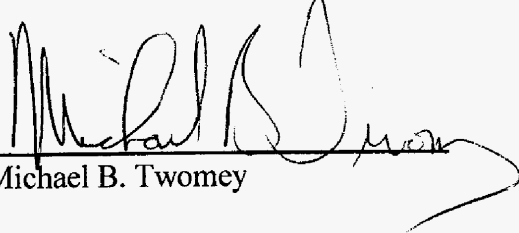
**I HEREBY CERTIFY** that a true and correct copy of this Petition to Intervene has been furnished to the following this 18<sup>th</sup> day of January, 2005, by hand delivery and U.S. Mail:

Wm. Cochran Keating, Esquire  
Florida Public Service Commission  
Division of Legal Services  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

R. Wade Litchfield, Esquire  
Natalie F. Smith, Esquire  
Florida Power & Light Company  
700 Universe Blvd.  
Juno Beach, Florida 33408

Patricia Christensen, Esquire  
Office of Public Counsel  
c/o The Florida Legislature  
111 W. Madison Street, Room 812  
Tallahassee, Florida 32399-1400

McWhirter Law Firm  
Vicki Gordon Kaufman, Esquire  
Timothy J. Perry, Esquire  
117 S. Gadsden Street  
Tallahassee, Florida 32301

  
Michael B. Twomey

Under penalties of perjury, I declare that I have read the foregoing motion and the facts in it are true.

Thomas P. Twomey  
Thomas P. Twomey

Genevieve E. Twomey  
Genevieve E. Twomey

Joel K. Gustafson  
*Chair*  
John A. Grant, Jr.  
*Vice Chair*  
Peter Antonacci  
Kurt D. Jones  
Carol A. Licko  
John P. Linstroth  
Charles Lydecker  
Richard L. Spears  
Catherine B. Whatley



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## PRESS RELEASE

For Immediate Release  
July 27, 2004

**CONTACT PERSON:**  
Bonnie J. Williams or  
Helen K. Jones  
850/488-7864

May be accessed on the Internet at [www.ethics.state.fl.us](http://www.ethics.state.fl.us)

TALLAHASSEE—July 27, 2004—The Florida Commission on Ethics, meeting in Tallahassee on July 22 in closed executive session, found probable cause to believe that five public officers and a former public employee may have violated a provision of the Code of Ethics, Commission Chairman Joel Gustafson announced today. A finding of probable cause is not a determination that a violation has occurred. Such a determination is made only after a full evidentiary hearing on the charges.

The Commission found probable cause to believe that GREG WEST, former Fire Chief for the Holley-Navarre Fire Department, may have misused his public position by using the Fire Department's credit card to pay for personal hotel room charges and to purchase personal services, products, and clothing. The Commission also found probable cause to

ATTACHMENT A

**PRESS RELEASE**  
**July 27, 2004**

believe that West used the credit card to pay for travel-related expenses at a fire chiefs' conference for him and his wife. Probable cause also was found to believe that West used the credit card for personal expenses for a trip that coincided with his Air Force Reserve duty. The Commission found no probable cause to believe that he misused his position by using the card to purchase food items in the Navarre area.

Probable cause was found to believe that BRAULIO BAEZ, LILA JABER, TERRY DEASON, and RUDOLPH BRADLEY, members of the Florida Public Service Commission, may have violated the Standards of Conduct established for members of the Public Service Commission by accepting gifts from utility companies (sponsorships of meals, coffee breaks and receptions) while attending a 2002 conference held in Miami Beach. No probable cause was found to believe that they violated the State gift law which prohibits the acceptance of a gift valued in excess of \$100 from a lobbyist who lobbies one's agency.

The Commission considered a complaint against ANGELO CASTILLO, member of the Pembroke Pines City Commission, for his failure to provide complete information on his 2003 Form 1, Statement of Financial Interests, when qualifying as a candidate for the Commission seat. Although the Commission determined that the form was technically deficient, it voted to take no further action since Castillo contacted the

**PRESS RELEASE**  
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**City Attorney upon discovering the omission and took prompt action to correct the disclosure forms.**

**The Commission found no probable cause to believe that SUE BEACH SUGGS, Gilchrist County Commissioner, directed her husband to remove speed limit signs from a road on which her son received a speeding ticket in an attempt to affect the enforcement of the speed limit on the road.**

**MARK LOCKLIN, former member of the Santa Rosa County Local Planning Board, was cleared of charges that he violated the voting conflict statute by voting on matters regarding the regulation of billboards while owning a billboard company. Charges that Locklin participated in, and voted on, measures that benefited him or his business associates also were dismissed.**

**The Commission considered a complaint filed against L.E. "LUKE" BROOKER, Clerk of Court of Highlands County. No probable cause was found to believe that Brooker misused his office by giving bonuses, raises, or other financial rewards to employees who signed a "letter of support" during his 2000 election campaign. Brooker also was cleared of charges that he terminated an employee who chose to remain neutral regarding the campaign and that he allowed his office to be used for campaign purposes.**

**PRESS RELEASE**  
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No probable cause was found to believe that **CHARLES McELYEA**, Mayor and City Commissioner of the City of Dania Beach, sold tow truck services to his own agency or had a conflict of interest by entering into a contract with the Broward County Sheriff's Office to tow disabled vehicles within the County. Charges that McElyea voted on an agreement for towing services between the City and the Sheriff's Office also were dismissed.

**ALAN SCHREIBER**, Public Defender of Florida's Seventeenth Judicial Circuit in Broward County, was cleared of charges that he misused public resources when he used his office e-mail to solicit employee contributions sponsoring his daughter's boyfriend on a pro golf tour and to promote a fund-raiser for a judicial candidate.

The Commission determined that **BETTE FARMERIE**, former Building Official for the City of Port Richey, was not required to file a Statement of Financial Interests while serving as the City's Interim Building Official.

The Commission dismissed complaints against the following individuals due to a lack of legal sufficiency: **RANDY BUSCH**, member of the Flagler Beach City Commission; **ALVIN SCHLECTER**, Assistant State Attorney in Florida's First Judicial Circuit; **DENNIS NALES**, Chief Assistant Prosecutor in the Office of the State Attorney; **KEN MASCARA**, St. Lucie County Sheriff; **ALAN BILDZ**, member of the Treasure Island City

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**Commission; WILLIAM GOTTHELF, as President of the Indian Trails Improvement District; TONY MASILOTTI, member of the North Port City Commission; BRUCE PATTERSON, member of the North Bay Village City Commission; PAUL MONTIE, Development Review employee of either Pasco County or New Port Richey; THOMAS O'CONNELL and BILL PORTER, Majors in the Department of Transportation Motor Carrier Compliance Office; JOE BORRAS, Captain in the Department of Transportation Motor Carrier Compliance Office; JACKIE LEONARD-GORMAN, City Planner for the City of Dunnellon; and CHARLES PARKER, MEMBER OF THE Madeira Beach City Commission.**

**The Commission's reviews for legal sufficiency are limited to questions of jurisdiction and determinations as to whether the charges in the complaint are adequate to allege a violation of the Code of Ethics. As no factual investigation precedes the reviews, the Commission's conclusions do not reflect on the accuracy of the allegations made in these complaints.**

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**July 27, 2004**

**Public Session**

In public session on July 22, the Commission considered the Final Order and Public Report issued by the Fifth District Court of Appeal in a case against SAMUEL BENNETT, member of the Pierson Town Council. The Commission complied with the Court Mandate and reversed its April 24, 2003, decision which found that Bennett misused his position to obtain a personal benefit by attempting to change zoning classifications on property that he owned.

The Commission took final action on a complaint against SAL OLIVERI, member of the Hollywood City Commission. A stipulated agreement between Oliveri and the Commission Advocate was approved. The stipulation finds that Oliveri violated the State's gift law by failing to report a trip to Las Vegas which was given to him and his wife.

The Commission rejected a stipulated agreement between THOMAS LYNCH, member of the Palm Beach County School Board, and the Commission Advocate. The proposed stipulation found that Lynch had a prohibited contractual relationship with an architectural firm that is doing business with the School Board and violated the voting conflict statute by voting on measures before the School Board that benefited an engineering firm that was insured by his insurance agency. A \$500 civil



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penalty was recommended in the rejected proposal. The Commission sought renegotiation or a probable cause hearing in the matter.

The Commission approved a joint stipulation between CYNTHIA CHESTNUT, member of the Alachua County Commission, and its Advocate finding that Chestnut violated gifts laws by accepting a ticket to a gala dinner valued at over \$100 from a donor who had lobbied the County Commission. The imposition of a \$750 civil penalty was recommended.

A stipulation between PETER BROBERG, member of the Palm Beach Planning and Zoning Commission, and the Commission Advocate also was approved. The stipulation finds that Broberg failed to file a CE Form 2, Quarterly Client Disclosure, when he appeared before the Palm Beach Town Council on behalf of his clients in December 2002. The Commission recommended the imposition of a \$500 civil penalty.

A probable cause hearing was held involving two complaints filed against GREGORY BROWN, Property Appraiser for Santa Rosa County. No probable cause was found to believe that Brown misused his public position to reinstate the property tax exemption on a church property in order to get one of its trustees to testify against Brown's political opponent. The Commission also found no probable cause to believe that Brown wrongfully removed a friend's residence from tax rolls in 2001 and then under-appraised it in 2002.

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**July 27, 2004**

The Commission considered RALPH TORRES' appeal of the \$4,200 fine (automatic fine of \$50 per day) imposed for late submission of his Executive Branch Lobbyist Expenditure Report. The Commission reduced the fine to \$900, agreeing that an accident resulting in an injury to his hand contributed to Torres' inability to timely file the report.

Contact the Commission Office to obtain rulings on appeals of automatic fines imposed for late submission of financial disclosure reports submitted by public officers and employees listed on the July 22, 2004, agenda.

The Florida Commission on Ethics is an independent nine-member commission formed in 1974 to review complaints filed under the statutory Code of Ethics and to answer questions from public officials about potential conflicts of interest through its issuance of advisory opinions.

If Ethics Commission members believe a violation of the law may have occurred, they may decide to hold a public hearing. If they conclude a violation has been committed, they may recommend civil penalties that include removal from office or employment and fines up to \$10,000.

BEFORE THE  
STATE OF FLORIDA  
COMMISSION ON ETHICS

COMMISSION ON ETHICS  
DATE RECEIVED  
JUN 23 2004

In re: **Braulio Baez,**

**Respondent.**

**Complaint No. 03-189**

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**SUPPLEMENT TO ADVOCATE'S AMENDED RECOMMENDATION**

On June 3, 2004 the Commission on Ethics directed that additional investigation should be undertaken in this matter.<sup>1</sup> The Supplemental Report of Investigation was released on June 18, 2004. The undersigned Advocate's Amended Recommendation of May 4, 2004 is incorporated by reference as if fully set-forth herein.

**ANALYSIS**

In 2001, PSC staff member Linda Buchan was named staff coordinator for the 2002 SEARUC conference. (ROI 6) Ms. Buchan advised that once she started planning the conference she began receiving telephone inquiries from regulated industry members who wanted to sponsor certain portions of the conference. (ROI 8) Because other states that participate in SEARUC have always included regulated industry in their conferences, industry representatives were aware of the opportunity to sponsor meals, coffee breaks and receptions at the 2002 conference. (ROI 8)

It was the goal of PSC staff to ensure that SEARUC did not lose money on the 2002 conference (ROI 9) In order to accomplish this goal, PSC staff reviewed the cost and attendance records from prior SEARUC conferences in order to set the registration fees for the 2002 conference.

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<sup>1</sup>Respondents Jaber, Deason, Bradely and Baez are all represented by Attorney Mark Herron. Mr. Herron has advised that each Respondent has agreed to have their respective cases consolidated at this phase of the proceedings.

ATTACHMENT B

(SROI 12) According to PSC staff member Rhonda Hicks, the 2002 registration fees were set prior to any sponsorship being secured from regulated industry. (SROI 12) Ms. Hicks also asserts that registration fees were set at amounts that the planning team believed were sufficient to cover the entire cost of the conference without considering the sponsorship of any conference events by regulated industries. (SROI 12) However, in an effort to ensure that SEARUC did not lose money on the 2002 conference, and after it was learned that the majority of the food and beverage events were being sponsored by regulated industries, PSC staff made no attempt to reduce the registration fee in an amount commensurate with the level of sponsorship secured from regulated industries. Furthermore, it appears as though PSC staff had knowledge of the extent of sponsorship from regulated industry prior to the April 2002 mailing of the registration materials to possible convention attendees.<sup>2</sup> By failing to reduce the registration fees commensurate with the level of sponsorship received from regulated industries, and charging convention attendees for food and beverage events that were paid for by regulated industries<sup>3</sup>, PSC staff, at least at the pre-registration phase of the

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<sup>2</sup>Ms. Kathleen Stewart, administrative assistant to Respondent Baez, advised that she has no specific recollection as to when the industry sponsorships were obtained. (SROI 9) However, Ms. Stewart also advised that she was contacted by the hotel each time a regulated industry member agreed to sponsor a meal, coffee break or reception. (ROI 15) Furthermore, Respondent Baez was contacted on February 18, 2002 by Progress Telecom about sponsoring an event at the SEARUC conference (SROI, Exh. I-1, 2) Additionally, the April 25, 2002 projected budget for the conference that was prepared by PSC staff shows only \$20,000.00 in expected food and beverage expenses (SROI Exh. E-1) while the convention hotel contract guarantees a minimum food and beverage expense of \$50,160.00. (SROI Exh. A-12) The most likely reason why the projected budget shows an amount for food and beverage that is \$30,000.00 less than the guaranteed minimum is because PSC staff new that regulated industries were covering approximately \$30,000.00 of the food and beverage expense for the conference.

<sup>3</sup>The 2002 SEARUC conference was an event that was sponsored for the most part by Regulated Industry and attended by Public Service Commissioners and staff from several southern states. The projected budget prepared by PSC staff for the 2002 SEARUC conference vividly illustrates this point. (SROI, Exh. E-1) The projected budget demonstrates that PSC staff expected 220 members from regulated industry to attend the conference while only 80

conference, may have caused registrants to initially conclude that their registration fees were paying for events that actually were paid for by industry. However, any initial understanding that Respondents had as to who was sponsoring the food and beverage events at the conference should have been questioned when Respondents attended PSC pre-conference meetings where the industry sponsorship protocol was discussed (SROI 10), when Respondents were provided with conference materials listing industry sponsors (SROI Exh. C-34), and when Respondents were provided with a reasonable opportunity to observe the tent cards and posters placed at various locations throughout the conference site that advised conference attendees of the sponsorship activities of the regulated industry. (SROI Exh. H)

Respondents attempt to defend against the allegations on the grounds that, to the extent that they may have attended food and beverage events sponsored by industry, they did not eat the food or drink any of the beverages paid for by industry.<sup>4</sup> Section 350.041(2)(a), Florida Statutes, however,

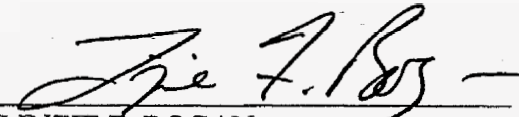
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commission members and staff were expected to attend. (SROI, Exh. E-1) The 220 expected industry participants were charged a conference registration fee of \$425.00 per attendee while the commission members and staff were charged only \$225.00 per attendee. (SROI, Exh. E-1) Stated differently, SEARUC expected to generate \$93,500.00 in revenue from industry participants while generating only \$18,000.00 in revenue from commission and staff attendees. (SROI, Exh. E-1) Not only was a majority of the food and beverage expense paid for by industry, but approximately 80% of the projected revenue for the conference was expected to come from industry. (SROI, Exh. E-1)

<sup>4</sup>Respondent Bradley advised that he “most likely did not eat at the President’s reception because he ate dinner at the overflow hotel where he stayed during the conference.” He further advised that he did not eat at any of the breakfasts or partake in anything provided at the breaks because he is “not a big coffee drinker and [he] prefers a particular soft drink that is not generally served.” (Bradley SROI, Exh. G-2 ¶ 7) Respondent Deason denied attending or partaking of any of the food and beverage events other than the SEARUC sponsored dinner and dance on June 4, 2002. (Deason SROI, Exh. G2 ¶ 9) While Respondent Baez admits to attending “most, if not all of the conference functions,” he advised that he most likely did not eat or drink anything “because of his duties as host.” (Baez SROI, Exh. G-2 ¶ 10) Respondent Jaber admits to attending the lunch program on June 3, 2002 and the dinner and dance on June 4, 2002 and denied participating in the other food and beverage events. (Jaber SROI, Exh. G-3 ¶¶ 14,15)

makes it clear that PSC Commissioners are prohibited from “accept[ing] anything from any business entity which . . . owns or controls any public utility regulated by the commission. . . .” (emphasis added) The issue of whether Respondents ate or drank anything at the various events sponsored by regulated industry is a secondary consideration when addressing the conduct that Section 350.041(2)(a) was designed to prevent. The legislative history of Chapter 350 shows that the legislature was attempting to “greatly reduce, if not eliminate, the perception held in some quarters that the regulated industries are receiving an undue advantage through their off-record lobbying of the commissioners.” (See letter from House of Representatives, attached hereto as Exh. R-1) The Legislature’s concern with “off-record lobbying of the commissioners by regulated industries” is at least in part expressed in Section 350.041(1), Florida Statutes, wherein the STATEMENT OF INTENT provides “[n]othing shall prohibit [the PSC] standards of conduct from being more restrictive than part III of chapter 112.” By attending the 2002 SEARUC conference, an event that was heavily financed and subsidized by regulated industry, Respondents accepted an invitation by regulated industry and were subjected to the very off-record lobbying efforts contemplated by the authors of Chapter 350. See Exh. R-1; see also, CEO 92-12 (warns against subterfuge which permits utility companies regulated by PSC to indirectly provide gifts, employment or a business activity to PSC Commissioners). Therefore, based upon the evidence before the Commission, I recommend that the Commission find probable cause to believe that each Respondent violated Section 350.041(2)(a), Florida Statutes.

Respectfully submitted this 23<sup>rd</sup> day of June, 2004.

  
\_\_\_\_\_  
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on Ethics  
Florida Bar No. 143693  
Office of the Attorney General  
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# Florida House of Representatives

Tom Gustafson, Speaker

Committee on Science, Industry & Technology

Jack N. Tobin  
Chairman

Lars A. Hafner  
Vice Chairman

March 5, 1990

Professor Pat Dore  
College of Law  
Florida State University  
Tallahassee, FL 32306

Dear Professor Dore:

As I indicated to you in our earlier discussions, the intent of the committee staff was to recommend changes to Chapter 350, Florida Statutes, that would have the effect of greatly reducing, if not eliminating, the perception held in some quarters that the regulated industries are receiving an undue advantage through their off-record lobbying of the commissioners. Early in the process, Representative Drage made the point that while current law prohibits ex parte communications in pending proceedings, such communications should also be prohibited in impending cases where a party intends to file an action but is merely seeking to "test the waters" before formally filing. The debate on this issue has revealed an understandable level of confusion about the purposes of the Administrative Procedure Act among some of the non-lawyer members of the committee. While clearly desiring to protect the interests of parties, there is a legitimate concern on the part of most, if not all, members that the valid purposes of the regulatory process not be unnecessarily impeded. Specifically, there is some concern that the commission be able to accomplish its quasi-legislative function, while still fairly fulfilling its quasi-judicial function. I had hoped that your expertise in this area could shed some light on what the PSC can and cannot do under the Administrative Procedure Act and why.

## Current Law

1. Isn't it correct that most Florida agencies have both quasi-judicial and quasi-legislative functions?
2. Isn't it true that proceedings held pursuant to Section 120.57, Florida Statutes, involve decisions "in which the substantial interests of a party are determined by an agency," and are, therefore, quasi-judicial in nature?

EXHIBIT

R-1

Professor Pat Dore  
March 5, 1990  
Page Two

3. Isn't it true that the Section 120.66, Florida Statutes, prohibition against ex parte communications in pending cases is specifically made applicable only to the quasi-judicial proceedings; i.e., Section 120.57, Florida Statutes, proceedings involving the substantial interests of a party?

4. Isn't it true that an agency, including the PSC, may carry out its legislative function through Section 120.54, Florida Statutes, rulemaking proceedings?

5. Isn't it true that an agency may receive ex parte communications during a Section 120.54, Florida Statutes, rulemaking proceeding because such proceedings have been specifically excluded from the Section 120.66 prohibition against ex parte communications?

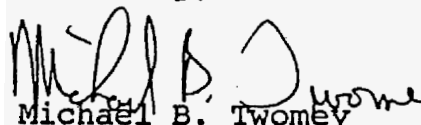
6. Isn't it true that under current law, policy may be developed within a quasi-judicial proceeding (Section 120.57, Florida Statutes) so long as it is done on the record?

7. Doesn't it follow then that if an agency desires to make policy and desires the ability to do so under circumstances that would allow off-the-record, ex parte communications, it must make that policy within the confines of a Section 120.54, Florida Statutes, rulemaking proceeding? and

8. If the prohibitions against ex parte communications in proceedings that determine the substantial interests of a party are designed to protect against either the appearance or the actuality that one party has gained an unfair advantage with the trier of fact, do you see any justification for allowing such communications prior to the formal filing of a petition when a party knows that it will file?

Thank you again for your willingness to assist the committee in this important area. If you have any questions regarding the above questions, please contact me.

Sincerely,

  
Michael B. Twomey  
Staff Attorney

MBT/ldt



REQUEST FOR CHANGE TO AGENDA CONFERENCE  
HAND DELIVER

ORIGINAL

Date of Request: 9/9/2004 Date of Agenda Conference: 9/21/2004 Item No. \_\_\_\_\_

Docket No.: 041057-EI Brief Title: FPL's request for a regulatory asset

Requested by:  Staff  Other \_\_\_\_\_ (Name)

Please attach a copy of the written documentation filed (IF OTHER)

STAFF's Recommendation to Executive Suite (IF OTHER)  Approve Request  Deny Request

**ACTION REQUESTED [see APM 2.11]**

- Defer Item to Agenda Scheduled Date: \_\_\_\_\_
- Change Order of Item or Take Up at Time Certain
- Withdraw Item (not expected to return to Agenda)
- Late Filed Recommendation (must be filed no later than 3:00 p.m. on the date approved for late filing) A copy of the front page of the recommendation must be provided to CCA by 12 noon on the regular filing date for use as a place-holder during agenda preparation.
- Add Item to Published Agenda [see Section 120.525(2), F.S.] - Issue an ADDENDUM and give Legal NOTICE
- Add Emergency Item to Published Agenda [see Section 120.525 (3), F.S.] - Issue an ADDENDUM and Give Fair NOTICE

Concise explanation, justification or comments (attach additional sheet if necessary):

Resolution of this petition will reduce the uncertainty regarding the financial impact of these storms. This may have a positive effect on FPL's cost of capital and thereby, reducing future costs to consumers.

Signature (Technical Staff): \_\_\_\_\_

Initials (Division Director or Designee): 1gx

Signature (Legal Staff): \_\_\_\_\_

Initials (General Counsel or Designee): RV

**EXECUTIVE DIRECTOR:**

Recommendation to the Chairman's Office

Approve Request  Deny Request

Initials: MMB

Date: 9/16/04

Comments:

*Recommendation will be filed by 10:00 a.m. on 9/17/04.*

**CHAIRMAN'S OFFICE:**

Approve Request  Deny Request

Initials: [Signature]

Date: 9/16/04

Executive Suite will send the original to the Division of Commission Clerk & Administrative Services and return copy to the requesting staff after the Chairman's Office takes action on this request. Requesting staff should distribute copies to the Division Directors (OPR & OCR) and Attorney assigned to the docket.

DOCUMENT NUMBER-DATE

ATTACHMENT C