

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Common Cause DOCKET NO. 050564-DT
Rulemaking Petition
respecting regulated utility FILED: August 18, 2005
entertainment of
commissioners and staff and
ex parte communications with
commissioner advisors

COMMON CAUSE PETITION TO INITIATE RULEMAKING

Common Cause Florida, pursuant to Rule 28-103.006, F.A.C. and Section 120.54, Florida Statutes, by and through its undersigned counsel, petitions the Florida Public Service Commission (“Commission”) to initiate rulemaking to enhance its rules by restricting social and business entertainment between Commission personnel and regulated utilities and to further restrict communications between regulated utilities and Commissioner advisors, which, communications if made directly to Commissioners, would be statutorily prohibited “ex parte communications.” Common Cause Florida believes such rule revisions would be consistent with the goal of Governor Jeb Bush, stated in his June 2, 2005 letter (attached) to Secretary of Glenda E. Hood transmitting his approval of Senate Bill 1322, but with his concern that provisions of the bill “could lead to regulated utilities (the very entities that are subject to PSC oversight) subsidizing the expenses of PSC commissioners.” Furthermore, Common Cause Florida believes the rule provisions suggested below would also bolster public confidence in the actions of the Commission by addressing several of the concerns and recommendations contained in the Report of the

DOCUMENT NUMBER-DATE

08147 AUG 23 05

FPSC-COMMISSION CLERK

Statewide Grand Jury, Regulating Utilities, January 15, 1992, In The Supreme Court Of The State
Of Florida – Case Number 78,035, Interim Report #1, Interim Report of the Tenth Statewide
Grand Jury Regulating Utilities – Recommendations to Enhance the Integrity of the Process

(attached). In support thereof, Common Cause Florida states as follows:

1. The name and address of the affected agency is:
Florida Public Service Commission
2540 Shumard Oak Boulevard

Tallahassee, Florida 32399-0850
2. The name and address of the petitioner is:
Common Cause Florida
704 West Madison Street
Tallahassee, Florida 32304
3. All pleadings, motions, orders and other documents directed

to the petitioner should be served on:

Walter Dartland
2086 Wildridge Drive
Tallahassee, Florida 32303
Phone: (850) 562-2086
FAX: (850) 562-2086
Email: wdart76@yahoo.com

and
Ben Wilcox
Executive Director
Common Cause Florida
704 West Madison Street
Tallahassee, Florida 32304
Phone: (850) 222-3883
FAX: (850) 222-3906
Email: cmncause@infionline.net

Basis for Requested Rules

4. Within the last two years it has come to light that Commissioners and/or their senior staff have been entertained by regulated utilities or their agents under circumstances where it was admitted, or reasonably clear, that the regulated utilities involved subsidized the events so that the Commissioners and their staff received something of “value” from the regulated utilities. Furthermore, it has come to the public’s attention that on a number of occasions communications from regulated utilities were received by Commissioner advisors, which communications would have been considered statutorily prohibited ex parte communications if they had been received directly by a Commissioner.

5. Senate Bill 1322, signed by Governor Bush and forwarded to Secretary Hood with his stated concerns, appears to specifically allow Commissioners and Commission staff to partake of meals or events at a conference, sponsored in whole or in part by a utility regulated by the Commission, so long as attendance at the meals or events is generally available to all conference participants without payment of any fees in addition to the conference fee. Governor Bush was sufficiently concerned about this section of the bill that he stated in his letter to Secretary Hood:
I believe this provision of the bill does not set the bar high enough for PSC commissioners, who should be held to the highest ethical standards. I strongly encourage the members of the Public Service Commission – who I know share in this belief – to move forward with efforts to amend their code of ethics as necessary to reflect this commitment to the public and ensure that this provision of the bill is not misused.

Common Cause Florida is not aware that the Commission has yet taken action to implement the governor’s request, but believes that the rule provisions proposed below, or similar provisions, will effectively address Governor Bush’s expressed concerns, as well as prohibit meal or event sponsorship by regulated utilities on the

more restricted occasions where attendance is limited to Commissioners and their senior staff and not all conference attendees.

6. While the meal or event issue has at its core the concern the Commissioners will receive statutorily prohibited “value” from a regulated utility, such occasions also necessarily concern consumers because they present the potential, if not realty, for prohibited ex parte communications. Aside from the 2002 SEARUC meal and event sponsorship issues apparently sought to be addressed and permitted by Senate Bill 1322, there was at least one other regulated utility meal sponsorship during the 2002 Miami SEARUC conference that was not available to all conference attendees and which may have involved several Commissioners receiving prohibited “value” from regulated utilities. It is the goal of the proposed rules below to prohibit events and meals of this type as well.

7. Additionally, it has come to light recently that one Commissioner, or his staff, received a memorandum from the telecommunications company Verizon and, further, that the Commissioner subsequently read from that memorandum in a verbatim manner while questioning a Commission staff member’s recommendation that was perceived by Verizon to be detrimental. Whether that Commissioner’s reading of the Verizon text constitutes a statutorily prohibited ex parte communication is currently at issue, but irrespective of whether such regulated utility communications to Commissioner advisors are technically unlawful or not, such communications cause utility customers and the public in general to have reduced confidence in the Commission’s ability to decide its cases impartially. This type situation and a recommended solution was addressed in the 1992 Grand Jury Report as discussed below.

8. Common Cause Florida is of the view that Commissioners spend the vast majority of their time effectively sitting as administrative law judges by deciding cases involving the “substantial interests” of parties appearing before them in Section 120.57(1), Florida Statutes cases. In fact, if the Commission were not to hear these cases themselves, Common Cause Florida is of the understanding that the cases would, of legal necessity, be referred to the Division of Administrative Hearings where they would be heard for purposes of issuing a recommended order by Administrative Law Judges. It is Common Cause Florida’s understanding that Division of Administrative Hearing Administrative Law Judges are obliged to observe the Code of Judicial Conduct and are required to comport themselves in all respects like judges.

9. As suggested above, the failure of Commissioners to conduct themselves more like Administrative Law Judges may cause concern amongst the parties to the Commission’s cases and could lead some to question the impartiality of the decisions rendered. The 1992 Statewide Grand Jury recognized the judge-like character of the Commissioners’ responsibilities, noting in its call for reforms that:

Individuals charged with responsibilities similar to those of a judge must conduct themselves in a manner that exhibits fairness. A judge cannot meet with one party alone to discuss an issue of importance if the judge is the final arbiter of that issue. Judges are required to avoid even the appearance of impropriety. Ex parte communication concerning a regulatory function with a representative of a regulated utility not only appears to be improper, it is improper. Moreover, using a third party to receive the prohibited communication does not remove the taint.

10. As strongly suggested by the Verizon memorandum case, regulated utilities will seek to have their ex parte views communicated to Commissioners at times, even if through the

artifice of a third person. If the Statewide Grand Jury is to be believed, the problem is not a new one. On this point, the 1992 Statewide Grand Jury stated at Page 1 of its Report:

Although the witnesses did not all agree with every recommendation that appears in this report, they all agreed to the one factual finding that led us to write it: regulated utilities with the financial resources to hire the necessary staff often meet alone (ex parte) with individual commissioners, commissioner's aides or PSC staff to discuss regulatory issues.

(Emphasis supplied.)

11. The Statewide Grand Jury went on to observe that the then-current law, Section 350.042 (1), Florida Statutes, did not adequately address the problem and that its amendment was desirable, saying:

This statute does not prohibit aides and other staff from sharing verbatim the content of ex parte communication with each commissioner. The Commission or individual commissioners may from time to time decide at their own discretion to restrict the flow of communication. It is our understanding that some aides to commissioners currently refuse to act as a conduit for ex parte communication. While this is laudable, it is an inadequate and piecemeal approach to the problem. There is nothing to prevent a commissioner's aide or any member of the PSC staff from being used as a conduit for what would otherwise be prohibited communication if he or she chooses to be used in that manner. The only permanent solution is to strengthen the statute and then vigorously enforce it.

The problem is not addressed entirely by prohibiting aides and other staff from being used as direct conduits to commissioners. Even if they do not directly share ex parte communication received from regulated utilities, it may be included in recommendations made by staff to the commission.

* * *

This direct, unfettered and frequently undocumented one-to-one access to the PSC occurs despite the fact that commissioners are supposed to be neutral "judges" or decision-makers who reach their regulatory decisions only after hearing from all interested parties and weighing the evidence presented by each of them. Aside from the regulated utilities, the interested parties most affected by the decisions made by the commissioners and their staff are the citizens who use and pay for water, sewer, electricity and telephone service. The amount

paid for those regulated services is ultimately determined by the five members of the Public Service Commission.

(Emphasis supplied.) The law has not been amended since the rendition of the 1992 report to correct all the observed problems.

12. In constructing its proposed solutions to the problems, the Statewide Grand Jury recognized the importance of the Office of Public Counsel in both representing utility customers and playing a role in the proposed solution. The Grand Jury observed:

D. Insufficient communication with Office of Public Counsel

The government entity charged with the responsibility of representing the interests of individual utility customers is the Office of Public Counsel. That office does not have the staff or the sources equal to one major utility, much less the myriad of regulated utilities that may have daily access to commissioners, their aides and other PSC staff.

There is no systematic mechanism whereby the Office of Public Counsel is given the opportunity to be aware of and respond to the information provided during private communications between the regulator and regulated utilities. We believe that the creation of such a mechanism should be required and made a part of the provisions of Chapter 350 of the Florida Statutes.

(Emphasis supplied.)

13. While the 1992 Statewide Grand Jury recommended correcting the ex parte communications problems through statutory reform, Common Cause Florida sees no restriction on the Commission's ability to restrict the objectionable practices through rule adoption. Accordingly, Common Cause Florida would propose that the Commission adopt the recommendations of the Statewide Grand Jury, which are outlined below with the suggested text of the rule underlined.

14. In its legislative recommendations, the Statewide Grand Jury gave the following

preface:

Due to the specific nature of our first recommendation, we have divided it into two subsections. The "general rule" subsection is a general requirement that could readily be incorporated into Chapter 350 of the Florida Statutes. The "procedure" subsection applies to all communication between representatives of the PSC and regulated utilities. The following recommendations are being submitted because we believe, if implemented, they will help ensure that the interests of the people of the State of Florida are represented in a fair and equitable manner before the Public Service Commission.

A. Communications between regulated utilities and representatives of the PSC

1. General Rule

Any communication between a regulated utility and any representative of the Public Service Commission concerning any regulatory function should be open and advance notification should be given to the Office of Public Counsel, with the following exceptions: (1) written correspondence; (2) communication related to a documented emergency; and (3) communication related to a brief, unscheduled follow-up to a previously scheduled meeting or previously scheduled telephone conference call.

With regard to written correspondence, a copy of all such correspondence must be provided to Public Counsel at the same time it is provided to the PSC. A written summary of communication related to a documented emergency, and communication related to a brief, unscheduled follow-up to a previously scheduled meeting or previously scheduled conference call should be provided to Public Counsel within ten working days after the communication.

These same requirements regarding open communication and advance notification should also apply to any similar communication between the Office of Public Counsel and the PSC concerning any regulatory function directly concerning a regulated utility.

2. Procedure

a. With the exception of documented emergencies that cannot be scheduled in advance, Public Counsel should be notified in writing at least five working days prior to meetings and/or conference calls between any representative of the PSC and any representative of a utility. Public Counsel should have the option of participating in said communication for the purpose of questioning and/or directly responding to the communication.

b. Written correspondence between a utility and any representative of the PSC should be provided to Public Counsel at the same time it is provided to the PSC representative.

c. The substance of emergency meetings and conference calls should be documented in written memoranda provided to Public Counsel no later than ten working days following the meeting or conference call.

d. The five-day notice requirement should not apply to Public Service Commission staff, or utility staff required to initiate or receive brief, unscheduled communication, such as additional information that may be needed after the completion of an audit.

If only a small amount of follow-up information is required, as opposed to an actual audit, monitoring session or formal face-to-face meeting, a written memorandum explaining the purpose, date and content of the communication should be prepared and a copy provided to Public Counsel within five working days of the date of the communication. The PSC staff member initiating and/or receiving the above communication should be responsible for preparing the written memorandum and forwarding it to Public Counsel.

e. Public Counsel should have the option of preparing a written response to any of the above communication within ten working days of receiving it. The written response should become part of the written record to be considered prior to the time the Commission makes any decision concerning any rulemaking or ratemaking issue in any way related to the communication.

f. Some communication such as trade secrets or other proprietary information provided by regulated utilities may legitimately be confidential. Material claimed to be confidential should be made available to Public Counsel, prior to a ruling as to its confidentiality, if a nondisclosure agreement is executed.

15. To address Governor Bush's and the public's concerns regarding Commissioners and their staff's meals or entertainment being subsidized by regulated utilities to any degree, Common Cause Florida would request that the Commission adopt the following underlined language in the appropriate section of its current rules dealing with ethical behavior:

Commissioners and Commission staff shall not:

A. Partake of meals or participate in entertainment activities that are subsidized in any fashion by a regulated utility, their competitors or other parties to

Commission cases; or

B. Partake of meals with the officers or agents of regulated utilities in which there is a joint bill paid for by the regulated utility and Commissioners are merely billed for their "pro rata share." Rather, Commissioners and staff dining with regulated utility personnel shall request separate bills and ensure that they are billed for everything they consume;

Commissioners and Commission staff shall:

A. Report on the docket file of each case involving a regulated utility when they have dined or otherwise participated in entertainment functions with regulated utility personnel. They shall report the following particulars:

(1) The Commissioners and Commission staff involved;

(2) The regulated utility, competitive company or other party to a Commission proceeding and the personnel of those utilities or parties involved;

(3) The date, activity and location of the activity being reported;

(4) The cost of participation at the event or meal to each Commissioner or Commission staff member involved.

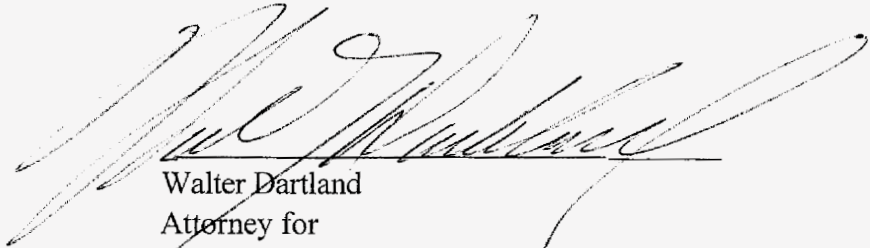
THE PUBLIC INTEREST

16. If the above requested rule provisions are adopted and observed, customers of regulated utilities and parties to the Commission's dockets, specifically, and the public, in general, will have greater confidence that Commissioners and their staff and not receiving the substance of ex parte, or one-sided, communications and, consequentially, will have greater confidence that the cases are being decided impartially.

WHEREFORE, Petitioner Common Cause Florida respectfully requests that the
Commission:

- (1) Hold a rulemaking hearing, if the Commission deems a hearing appropriate and necessary to consider the rule adoptions requested; and
- (2) Adopt the proposed rules contained within the body of this pleading.

RESPECTFULLY submitted this 18th day August, 2005.



Walter Dartland
Attorney for
Common Cause Florida
2086 Wildridge Drive
Tallahassee, Florida 32303
Phone: (850) 562-2086
FAX: (850) 562-2086
Email: wdart76@yahoo.com