

Dorothy Menasco

From: Butler, John [John.Butler@fpl.com]
Sent: Monday, September 20, 2010 3:45 PM
To: Filings@psc.state.fl.us
Subject: Electronic Filing / Docket 090505-EI / FPL's CORRECTED Notice that its 9/2/10 Verified M/To Disqualify Comm. Skop applies to Dkt 090505
Attachments: 9.20.10 CORRECTED Notice that its 9.2.10 Verified Motion applies to Dkt 090505.pdf

Electronic Filing

a. Person responsible for this electronic filing:

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b. Docket No. 090505-EI

In Re: Review of replacement costs associated with the February 26, 2008 outage on Florida Power & light's electrical system

c. The document is being filed on behalf of Florida Power & Light Company.

d. There are a total of 20 pages (2-page notice, plus 18 pages of appendix and certificate of service).

e. The document attached for electronic filing is Florida Power & Light Company's Corrected Notice that its September 2, 2010 Verified Motion to Disqualify Commissioner Skop Applies to Docket 090505-EI (Corrects Appendix A)

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DOCUMENT NUMBER DATE

07857 SEP 20 0

FPSC-COMM-LIBRARY

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Review of replacement fuel costs)
associated with the February 26, 2008 outage)
on Florida Power & Light's electrical system)

Docket No. 090505-EI

Filed: September 20, 2010

**FLORIDA POWER & LIGHT COMPANY'S CORRECTED NOTICE
THAT ITS SEPTEMBER 2, 2010 VERIFIED MOTION
TO DISQUALIFY COMMISSIONER SKOP
APPLIES TO DOCKET 090505-EI**

Florida Power & Light Company (FPL) hereby gives notice that FPL's September 2, 2010 Verified Motion to Disqualify Commissioner Skop attached hereto as Appendix A (the "Motion") applies to Docket 090505-EI.

1. FPL filed the Motion on September 2, 2010. The Motion asked Commissioner Skop to disqualify himself from "participating as a member of the Public Service Commission (PSC or Commission) in PSC hearings, deliberations, decision-making, or acting in any other capacity, on *all active dockets and matters involving FPL that have not yet been decided by the Commission including, but not limited to, the above-referenced dockets*, as well as any future dockets involving FPL that are opening in calendar year 2010." Motion, at page 2 (emphasis added). Docket No. 090505-EI, among others, was an active docket before this Commission at the time the Motion was filed and hence is clearly covered by the Motion.

2. On September 16, 2010, the Commission issued Order No. PSC-10-0573-PCO-EI ("Order 0573"), in which Commissioner Skop responded to the Motion by declining to recuse himself. The caption to Order 0573 identifies the dockets that are listed by number in the Motion's caption, but not Docket No. 090505-EI. Moreover, Order 0573 appears on the Commission's website for the dockets identified in the caption but not for Docket No. 090505-EI. FPL is not aware of any order issued by the Commission that addresses the Motion with

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respect to Docket No. 090505-EI.

3. FPL is providing this notice to the Commission and the parties in Docket No. 090505-EI to make clear that, as stated on the face of the Motion, it applies to *all* active dockets and matters involving FPL, including Docket No. 090505-EI; that FPL objects to Commissioner Skop's further participation in this docket for the same reasons set forth in the Motion with respect to the specifically enumerated dockets; and that Order 0573 should be entered in this docket as well.

Respectfully submitted,

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By: /s/ John T. Butler
John T. Butler
Florida Bar No. 283479

CERTIFICATE OF SERVICE
Docket No. 090505-EI

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic delivery this 20th day of September, 2010, to the following:

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APPENDIX “A”

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Fuel and Purchased Power) Cost Recovery Clause with) Generating Performance) <u>Incentive Factor</u>)	Docket No. 100001-EI
In Re: Energy Conservation Cost) <u>Recovery Clause</u>)	Docket No. 100002-EG
In Re: Environmental Cost) <u>Recovery Clause</u>)	Docket No. 100007-EI
In Re: Nuclear Cost) <u>Recovery Clause</u>)	Docket No. 100009-EI
In Re: Petition for Rate Increase by) <u>Florida Power & Light Company</u>)	Docket No. 080677-EI
In Re: 2009 Depreciation and) Dismantlement Study by) <u>Florida Power & Light Company</u>)	Docket No. 090130-EI
In Re: Investigation of the) Appropriateness of the Affiliate) Product Offerings to Florida Power) & Light customers)	Docket No. 100077-EI
In Re: Petition for Approval of) Demand Side Management Plan) of Florida Power & Light Company)	Docket No. 100155-EG
In Re: Petition to Determine Need for) West County Energy Center Unit 3) Electrical Power Plant, by) <u>Florida Power & Light Company</u>)	Docket No. 080203-EI
In Re: Petition for Determination) of Need for Conversion of Riviera) Plant in Palm Beach County, by) <u>Florida Power & Light Company</u>)	Docket No. 080245-EI
In Re: Petition for Determination of) Need for Conversion of Cape) Canaveral Plant in Brevard County,) <u>By Florida Power & Light Company</u>)	Docket No. 080246-EI

DOCUMENT NUMBER DATE

07406 SEP-20

FPSC-COMMISSION CLERK

In re: Application for Authority to)
Issue and Sell Securities During)
Calendar Year 2010 Pursuant to)
Section 366.04, F.S., and Chapter)
25-8, F.A.C., by Florida Power &)
Light Company)

Docket No. 090494-EI

In re: Petition for Issuance of a)
Storm Recovery Financing Order,)
By Florida Power & Light Company)

Docket No. 060038-EI

Filed: September 2, 2010

VERIFIED MOTION TO DISQUALIFY COMMISSIONER SKOP

Florida Power & Light Company (FPL) moves to disqualify Commissioner Nathan Skop from participating as a member of the Public Service Commission (PSC or Commission) in PSC hearings, deliberations, decision-making, or acting in any other capacity, on all active dockets and matters involving FPL that have not yet been decided by the Commission including, but not limited to, the above-referenced dockets, as well as any future dockets involving FPL that are opened in calendar year 2010. FPL is filing this motion and requests the same relief in each of the above-referenced dockets. The grounds for this motion are set forth below.

Statement of the Facts

Nathan Skop was employed by a subsidiary of FPL's parent company from 2000 until 2002, at which time he was involuntarily terminated as part of a company-wide staff reduction. In 2006, Mr. Skop was appointed to the PSC for a term ending in January 2011. Pursuant to Section 350.031, Florida Statutes, nomination by the Public Service Commission Nominating Council was a prerequisite to his reappointment to the Commission. Commissioner Skop applied for reappointment on June 16, 2010, but on June 30, 2010, the Nominating Council informed

him that it did not intend to interview him. The Nominating Council's decision means that Commissioner Skop's term on the PSC will end as of January 1, 2011.

Within hours after the Nominating Council decision not to interview him for reappointment to the PSC, Commissioner Skop issued a public statement attacking the Nominating Council for allegedly acting on the basis of "money, influence, special interest, and politics" rather than the "most qualified" applicants. Statement by Commissioner Skop posted online, *Herald/Times* political blogs (June 30, 2010). Speaking with various newspapers and TV stations in the wake of the Nominating Council decision, Commissioner Skop proceeded to specifically blame FPL for his lack of success in securing an interview for reappointment:

"It's a sad day for the people of the state of Florida," Skop said in a telephone interview with the News Service of Florida. "It shows the extent to which the Legislature is influenced by the companies that we regulate. Four members of the commission who voted against the (FPL) rate case have lost their job, which clearly smells of retaliation."... "How can that many people have it wrong?," he said. "What was done last time was very brazen. What was done this time was just an abuse of the public trust."

News Service of Florida, June 30, 2010 (parentheses as in original article; emphasis supplied)

Skop said the nominating panel's decision "absolutely" was payback for the five-member commission's unanimous votes earlier this year to reject most of the rate increases sought by Florida Power & Light Co. and Progress Energy Florida. "The people of the state of Florida need to demand accountability from the Legislature or they will continue to be raped by the special interests," Skop said in an interview. "It says, basically, FPL owns state government."... "If this were a list to be most qualified, clearly I would be on the list," Skop said.

Associated Press, July 1, 2010 (emphasis supplied)

In the midst of a subsequent hearing on FPL's request for recovery of costs incurred in pursuing new nuclear generation projects,¹ Commissioner Skop again referred on the record to his belief that FPL was responsible for the decision by the Nominating Council not to interview him for reappointment:

I'm a regulator, I do my job, and I've lost my job because I've chosen to do my job. So again, I'm not backing down from FPL in any way. I can back up what I state.

PSC Nuclear Cost Recovery Clause hearing, Aug. 26, 2010, (the transcript of part 1 of day 3 of the hearing is included as Exhibit 1), Tr. 39.²

Commissioner Skop's outbursts followed a year in which his conduct toward FPL in fact-finding hearings has become increasingly more hostile and adversarial. The following example is illustrative of many that occurred over the past year.

Soon after the Commission's January 2010 decision rejecting FPL's rate request almost in its entirety, Commissioner Skop added an item identified only as a "procedural matter" to a regularly scheduled Commission meeting, did not disclose to Commission staff counsel or to FPL the nature of the "procedural matter" to be addressed, and then accused FPL on the record of continuing to collect carrying costs from customers on projects that had been suspended. Without having made any inquiry of FPL prior to his accusation, Commissioner Skop rebuked FPL:

[C]onstructive regulation requires a framework of mutual respect. Unfortunately, as FPL's conduct clearly demonstrates we're not there yet.³

¹ PSC Docket: In re: Nuclear cost recovery clause, Docket No. 100009-EI.

² The context of this comment was that Commissioner Skop made an allegation that FPL did not disclose certain facts to some parties to a stipulation that was proposed in the Nuclear Cost Recovery Clause docket. This allegation was unfounded. Ex. 2, Tr. 5 [Office of Public Counsel Statements]

³ March 2, 2010 PSC Agenda Conference, Item No. 17 (Ex. 3).

FPL, when permitted to speak, advised Commissioner Skop that no such collections were occurring.

Commissioner Skop's level of animosity and bitterness toward FPL reached a zenith during the recent nuclear cost recovery hearing. At the outset of the FPL portion of that hearing, Commissioner Skop engaged in the equivalent of an "opening statement" of issues that he intended to pursue during the hearing.⁴ In that statement, Commissioner Skop accused an FPL witness of "perjury" in a past proceeding *before* the first witness in the current hearing was sworn and *before* any evidence on the matter was heard and admitted into the record.⁵ He also accused FPL of "spin," and "selective disclosure"⁶ and accused FPL's counsel of "misrepresentations."⁷

During that same proceeding, Commissioner Skop engaged in openly adversarial examination of FPL witnesses that in length and hostile tone was well beyond any questioning by other commissioners or intervenors, including the Office of Public Counsel. This was typified by his questioning of FPL vice-president Terry Jones. Commissioner Skop conducted an overtly hostile examination (as opposed to impartial fact-finding) of Mr. Jones for hours. Commissioner Skop's examination of Mr. Jones took the entire afternoon and early evening of a hearing day, during which Commissioner Skop asked approximately 70 questions, many of which were preceded by lengthy statements. A transcript of Commissioner Skop's examination of FPL's vice-president Jones is included as Exhibit 2.

⁴ See Ex. 1, Tr. 9-18 (statement by Commissioner Skop regarding matters that he intended to cover in the hearing).

⁵ Ex. 1, Tr. 11.

⁶ Ex. 1, Tr. 13, 25, 39, 43.

⁷ Ex. 1, Tr. 35.

Commissioner Skop's adversarial conduct toward FPL was also illustrated by his comments in response to objections raised by FPL's counsel (Mr. Anderson) to a request made by Commissioner Skop that FPL's President and Chief Executive Officer, Mr. Olivera, appear to testify in the recent nuclear cost recovery proceeding. Mr. Olivera was not on the witness list for the proceeding. Following a full day in hearing where Progress Energy had presented its witnesses, Commissioner Skop, without notice, requested Mr. Olivera's appearance later that week to testify.⁸ In response to FPL's objections, Commissioner Skop accused FPL's attorney of failure to show him adequate respect and insisted that he would not be "intimidated by FPL":

Mr. Anderson's earlier comments were not well taken. Never in the history of the Commission has a Commissioner been treated with such blatant disrespect by a regulated utility. That being said, I am not intimidated by FPL, and I have absolutely no intention of backing down from my prior reasonable request to have Mr. Olivera appear before this Commission.⁹

A review of the transcript reveals that there was nothing in the responses of Mr. Anderson to justify Commissioner Skop's characterization or the clearly adversarial statement that the commissioner was not "intimidated" by FPL.

Additional examples of Commissioner Skop's adversarial conduct are documented in the transcript.¹⁰ A review of the full transcripts of recent hearings illustrates that Commissioner Skop has reserved his antagonistic behavior for FPL and displayed no similar behavior with respect to the other utility that was before the Commission on its nuclear cost recovery request in the same hearings.

⁸ Commissioner Skop made this request despite serving as the Prehearing Officer assigned to the Nuclear Cost Recovery Clause docket and in that capacity, in addition to handling all prehearing matters, had reviewed and approved all issues to be addressed and witnesses to be presented at the hearing.

⁹ Ex. 1, Tr. 1-2.

¹⁰ Ex. 1.

Argument

The Commissioner's Obligation to Maintain the Reality and Appearance of Impartiality

Members of the PSC perform a judicial function and are bound by the fundamental requirement of all judges to maintain both the reality and the appearance of absolute impartiality in the conduct of their fact-finding duties. In the context of an administrative proceeding, as in any adjudicative proceeding, the right to an impartial decision-maker is a basic component of minimum due process. *Cherry Communications v. Deason*, 652 So. 2d 803 (Fla. 1995) (In the administrative context, "an impartial decision-maker is a basic constituent of due process."); *Ridgewood Properties, Inc. v. Dept. of Community Affairs*, 562 So. 2d 322 (Fla. 1990) ("An impartial decisionmaker is a basic constituent of minimum due process."); *Jones v. Florida Keys Community College*, 984 So. 2d 556 (3d DCA 2008) ("A litigant is entitled to have confidence that the hearing officer before whom he or she appears is acting impartially as a fact-finder."); *Charlotte County v. TMC-Phosphates Company*, 824 So. 2d 298 (Fla. 1st DCA 2002) ("[A]n impartial decision-maker is a basic component of minimum due process in an administrative proceeding."); *World Transportation, Inc. v. Central Florida Regional Transportation*, 641 So. 2d 913 (Fla. 5th DCA 1994).

There are two independent grounds for concluding that the impartiality requirement has not been met: (1) the fact-finding officer must not make public comments that suggest animosity toward a party to proceedings, *See World Transportation, Inc. v. Central Florida Regional Transportation, supra*; *Williams v. Balch*, 897 So. 2d 498 (Fla. 5th DCA 2005); *Coleman v. State*, 866 So. 2d 209 (Fla. 4th DCA 2004); *Novartis Pharmaceuticals Co. v. Carnoto*, 840 So. 2d 410 (Fla. 4th DCA 2003), and (2) the fact-finding officer must not cross the line from neutral arbiter to advocate for or against a party in the conduct of the proceedings. *Barrett v. Barrett*, 851 So. 2d

799 (Fla. 4th DCA 2003); *Cammarata v. Jones*, 763 So. 2d 582 (4th DCA 2000); *Sparks v State*, 740 So. 2d 33 (Fla. 1st DCA 1999).¹¹ Violation of either of these standards is sufficient for disqualification. In this case, Commissioner Skop has violated both components of the impartiality requirement.

The Commissioner's Failure to Meet His Obligation to Maintain the Reality and Appearance of Impartiality

The Commissioner's Public Comments — It is egregiously inappropriate for a quasi-judicial officer sitting in an adjudicative hearing involving the substantial rights of a party to make public statements that he has unjustly been denied reappointment because of the actions of the very party whose rights are being decided. It is difficult to imagine scenarios that more clearly convey a mindset that would make it difficult at best for Commissioner Skop to maintain impartiality.

The Commissioner's Adversarial Conduct During Hearings — The PSC performs both investigatory and quasi-judicial functions. Nevertheless, the dual roles of the Commission do not relieve individual commissioners from their obligation to maintain impartiality in the performance of their adjudicative duties. *Charlotte County v. IMC-Phosphates Co.*, *supra*. Commissioners have the authority to question witnesses during the course of a proceeding and to comment on the evidence during deliberations. However, when a commissioner crosses the line from neutral arbiter to zealous advocate for or against a party, he becomes subject to disqualification. Commissioner Skop's delivery of a speech equivalent to an opposing counsel's "opening statement", his adversarial cross-examination of FPL witnesses, his antagonistic remarks regarding FPL's counsel during hearings, and his statement in the midst of hearing that

¹¹ The standard of objectivity and impartiality for PSC Commissioners has been adopted by the Legislature through statutory standards of conduct and the oath of office. Sections 350.04(2)(g), (h) and 350.05, Florida Statutes.

he is not "intimidated" by FPL and that he has "no intention of backing down" illustrates that the Commissioner has crossed the line from impartial arbiter to zealous adversary and that his personal animosity toward FPL has risen to such a level that he utterly fails to maintain even an appearance of impartiality.

The Legal Standard for Determination of Motion

In determining a motion to disqualify a quasi-judicial officer, the facts stated in the motion must be accepted as true. *Charlotte County v. IMC-Phosphates Company*, 824 So. 2d 298 (Fla. 1st DCA 2002). The standard for determining a motion to disqualify is an objective one, having nothing to do with the commissioner's own belief as to impartiality:

The question presented 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). It is not a question of how the judge actually feels, but what feeling resides in the movant's mind and the basis for such feeling. *Id.*

Charlotte County v. IMC-Phosphates Company at 824 So. 2d 300; *Jones v. Florida Keys Community College*, *supra*.

Commissioner Skop's hostile accusations, both during hearings and in public statements to news media, that FPL was responsible for his failure to be reappointed to the PSC, and his aggressive adversarial behavior toward FPL during hearings, certainly meet that standard.

Conclusion

The evidence presented in this Motion clearly demonstrates that a reasonably prudent person in FPL's position would fear that he or she would not receive a fair and impartial hearing from Commissioner Skop. Disqualification therefore is both proper and necessary under State law.

Wherefore, FPL respectfully requests: (a) that Commissioner Skop rule on this Motion prior to participating in PSC hearings, deliberations, decision-making, or acting in any other capacity, on all active dockets and matters involving FPL that have not yet been decided by the Commission including, but not limited to, the above-referenced dockets; and (b) that this Motion to Disqualify Commissioner Skop be granted.

VERIFICATION

STATE OF FLORIDA

COUNTY OF PALM BEACH

Eric Silagy, as a representative of Florida Power & Light Company, being first duly sworn, deposes and says that the information provided within this document is true and correct to the best of his/her knowledge, information and belief.



Name: Eric E. Silagy
Position: Senior Vice President

STATE OF FLORIDA

COUNTY OF PALM BEACH

Before me this second day of September, 2010, personally appeared Eric Silagy, who is personally known to me.




Notary Public, State of Florida
Printed Name: Valerie A. Haasko

(SEAL)



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TAL 451,562,369v2 9-1-10

CERTIFICATE OF SERVICE

**Docket Nos. 100001-EI, 100002-EG, 100007-EI, 100009-EI, 080677-EI, 090130-EI,
100077-EI, 100155-EG, 080203-EI, 080245-EI, 080246-EI, 090494-EI, 060038-EI**

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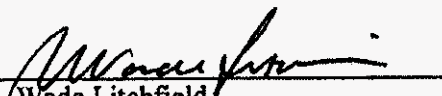
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