

Diamond Williams

From: Dave Bussey [dbussey@hotmail.com]
Sent: Wednesday, March 16, 2011 10:52 PM
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Subject: Electronic Filing (Docket 100330-WS)
Attachments: Motion to Disqualify.pdf
Electronic Filing

a. Person responsible for this electronic filing:

Mr. David L. Bussey
4948 Britni Way
Zephyrhills, FL 33541
Phone: (813) 713-9796
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b. Docket No. 100330-WS

In re: Application for increase in water/wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.

c. Document being filed on behalf of:

Mr. David L. Bussey
4948 Britni Way
Zephyrhills, FL 33541

d. There are a total of 7 pages.

e. The document attached for electronic filing is: Motion to Disqualify.pdf

Thank you for your attention and cooperation to this request.

Sincerely,

s/ David L. Bussey
Mr. David L. Bussey
4948 Britni Way
Zephyrhills, FL 33541
Phone: (813) 713-9796
Email: dbussey@hotmail.com

3/17/2011

DOCUMENT NUMBER-DATE
01754 MAR 17 =
FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Application for increase in water/wastewater rates in Alachua, Brevard, DeSoto, Hardee, Highlands, Lake, Lee, Marion, Orange, Palm Beach, Pasco, Polk, Putnam, Seminole, Sumter, Volusia, and Washington Counties by Aqua Utilities Florida, Inc.

DOCKET NO.: 100330-WS

FILED: March 17, 2011

MOTION TO DISQUALIFY COMMISSIONER GRAHAM

Pursuant to section 120.665, Florida Statutes, Mr. David L. Bussey hereby moves to disqualify Commissioner Art Graham from participating as a member of the Florida Public Service Commission in any hearings, deliberations, decision making, or acting in any other capacity (including serving as the prehearing officer) in the above captioned docket. The grounds for this motion are set forth below.

STATEMENT OF FACTS

Commissioner Art Graham is one of five Commissioners appointed to serve on the Florida Public Service Commission (FPSC or Commission), currently serves as Chairman of the FPSC, and is the Prehearing Officer for the Aqua Utilities Florida, Inc. (AUF) rate case in Docket 100330-WS.

The FPSC held numerous customer meetings regarding the proposed rate increase in Docket 100330-WS. The purpose of the FPSC customer meetings were to provide AUF customers with an opportunity to address the Commission regarding the quality of service provided by AUF and for the Commissioners to hear customer comment on the proposed rate increase sought by AUF in Docket 100330-WS. The FPSC held customer meetings in New Port Richey, Florida (10/20/10); Gainesville, Florida (10/21/10); Palatka, Florida (10/22/10); Sebring,

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FPSC-COMMISSION CLERK

Florida (10/27/10); Lakeland, Florida (10/28/10); and Eustis, Florida (10/29/10).¹ Commissioner Graham did not attend any of the FPSC customer meetings in Docket 100330-WS. Commissioner Graham is paid a state salary of approximately \$130,000 per year (plus retirement, vacation, medical, and other benefits) to serve on the Commission.

During the FPSC Agenda Conference held on October 26, 2010, Commissioner Graham publicly proclaimed to the Commission from the bench that it was his intention “to lead you into the path that our friends over in the House and Senate want us to go”. The FPSC is required to perform its regulatory duties independently pursuant to Florida law.

Commissioner Graham attended the National Association of Regulatory Utility Commissioners (NARUC) Conference held February 13-16, 2011, at the Renaissance Hotel in Washington, D.C. On February 15, 2011, Commissioner Graham engaged in ex parte² communication with Aqua America, Inc. (Aqua America) Regional President Christopher Franklin, and Aqua America Regulatory Counsel and Manager of Regulatory Affairs Kimberly Joyce, for approximately an hour over drinks in the Renaissance Hotel lobby. Ms. Joyce is a Party of Record representing Aqua America in Docket 100330-WS. Under Florida law, a commissioner must avoid impropriety in all of his or her activities and must act at all times in a manner that promotes public confidence in the integrity and impartiality of the commission.

The movant, Mr. David L. Bussey, is a residential customer of AUF and is a Party of Record to the AUF rate case currently pending before the Commission in Docket 100330-WS. Mr. Bussey has a reasonable fear and good faith belief that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS on the basis of bias and prejudice.

¹ The FPSC customer meetings were attended by Commission Staff, Commissioner Skop, Public Counsel, AUF representatives and/or AUF counsel, AUF customers, and various elected officials.

² Black's Law Dictionary defines ex parte as "done or made at the instance and for the benefit of one party only, and without notice to, or argument by, any person adversely interested". Black's Law Dictionary (7th Ed. 1999).

ARGUMENT

The Legal Standard for Determining Motion

Section 120.665, Florida Statutes, provides for the disqualification of agency personnel for bias, prejudice, or interest, when any party to the proceeding shows just cause by a suggestion filed within a reasonable period of time prior to the agency proceeding.³ A Motion to Disqualify Commissioner Graham has been timely filed by a party to the agency proceeding.

In determining the motion to disqualify Commissioner Graham, the facts stated in the motion must be accepted as true and countervailing evidence is not admissible. *Charlotte County v. IMC-Phosphates Company*, 824 So. 2d 298, 300 (Fla. 1st DCA 2002). The standard for determining the 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*, 984 So. 2d 556, 557 (3d DCA 2008).

Commissioner Graham's biased comments and prejudicial conduct clearly meet the legal standard for disqualification under the facts alleged within this motion.

The Obligation to Maintain the Appearance of Impartiality

Commissioner Graham is required to avoid impropriety in all of his activities and must act at all times in a manner that promotes public confidence in the integrity and impartiality of

³ Section 120.665(1), Florida Statutes (2010).

the Commission.⁴ 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. IMC-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). Commissioner Graham's biased comments and prejudicial conduct fail to maintain the appearance of impartiality under the facts alleged within this motion.

Failure to Maintain the Appearance of Impartiality

Commissioner Graham's Conduct

Commissioner Graham is the Prehearing Officer for the AUF rate case currently pending before the Commission in Docket 100330-WS. Commissioner Graham engaged in ex parte communication with Aqua America executives for approximately an hour over drinks in the Renaissance Hotel lobby. In striking contrast, Commissioner Graham did not attend any of the FPSC customer meetings held in Docket 100330-WS. The conduct of Commissioner Graham clearly does not promote public confidence in the integrity and impartiality of the Commission. As Commissioner Graham did not attend any of the FPSC customer meetings in Docket 100330-

⁴ Section 350.041(2)(h), Florida Statutes.

WS, it would be difficult to conclude that his conduct of engaging in ex parte communication over cocktails with Aqua America for nearly an hour during a pending rate case for which he serves as Prehearing Officer would not cause the movant to have a reasonable fear that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS. Through his actions, Commissioner Graham has betrayed the trust and confidence placed in him by Governor Scott and eroded the public trust and confidence in the integrity and impartiality of the Commission. Accordingly, Commissioner Graham must be disqualified.

Commissioner Graham's Comments

The comments that Commissioner Graham made from the bench demonstrate bias against the movant and are egregiously inappropriate. Commissioner Graham publically proclaimed to the Commission that it was his intention "to lead you into the path that our friends over in the House and Senate want us to go." By emphatically pledging allegiance to the Legislature in such a bold manner, Commissioner Graham has crossed the line from being an impartial decision maker to that of a puppet who seems more than willing to do the bidding of the Legislature and regulated utilities at the expense of the Florida ratepayers. Based on the above, the movant has a reasonable fear and good faith belief that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS.

The Movant's Reasonable Fear

The movant has a reasonable fear and good faith belief that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS on the basis of bias and prejudice under the facts alleged within this motion. The movant asserts that the public comments and actions of Commissioner Graham are inappropriate, cross the line, and

substantially depart from that required of an impartial decision maker. Accordingly, the motion is legally sufficient on face and disqualification of Commissioner Graham is both proper and necessary under the legal standard for determining the motion cited above.

CONCLUSION

The evidence presented in this motion clearly demonstrates that a reasonably prudent person in Mr. Bussey's position would fear that he or she would not receive a fair and impartial hearing from Commissioner Graham in Docket 100330-WS. The disqualification of Commissioner Graham from Docket 100330-WS is therefore both proper and necessary under State law.

WHEREFORE, the movant respectfully requests that Commissioner Graham rule upon this motion prior to participating in any hearings, deliberations, decision making, or acting in any other capacity (including serving as the prehearing officer) in the above captioned docket, and further requests that the Motion to Disqualify Commissioner Graham be granted.

s/ David L. Bussey
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Zephyrhills, FL 33541
Phone: (813) 713-9796
Email: dbussey@hotmail.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the following via Electronic Mail this 17th day of March, 2011 to all parties of record as indicated below.

s/ David L. Bussey
Mr. David L. Bussey
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Zephyrhills, FL 33541
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