

Marguerite McLean

100330-WS

From: Dave Bussey [dbussey@hotmail.com]
Sent: Saturday, April 02, 2011 2:05 PM
To: Filings@psc.state.fl.us
Cc: bruce.may@hklaw.com; kajoyce@aquaamerica.com; CHRISTENSEN.PATTY; kenneth.curtin@arlaw.com; rlloyd1@aol.com; wdco@comcast.net
Subject: Electronic Filing (Docket 100330-WS)
Importance: High
Attachments: Verified 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
Email: dbussey@hotmail.com

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 14 pages.

e. The document attached for electronic filing is: Verified 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

DOCUMENT NUMBER-DATE
02229 APR -4 =
FPSC-COMMISSION CLERK

4/4/2011

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: April 4, 2011

VERIFIED 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. This motion alleges additional facts, provides verification, and includes supporting documentation that was not contained within the original motion. 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

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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, Florida (10/27/10); Lakeland, Florida (10/28/10); and Eustis, Florida (10/29/10).¹ The FAW Notice of Customer Meetings issued by the Commission stated that, “One or more of the Commissioners of the Florida Public Service Commission may attend and participate in this meeting.” (Exhibit 1). Approximately 1,000 AUF customers took their time to attend these meetings and waited hours to express their concerns regarding the proposed rate increase and the quality of service provided by AUF. 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

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).

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.

On March 28, 2011, Commissioner Graham appeared before the Florida Senate Committee on Communications, Energy and Public Utilities for a public hearing regarding his required confirmation by the Senate. Under oath, Commissioner Graham admitted to having the conversation over drinks with the Aqua America executives stating that, “I did not sit there the entire time talking to the Aqua case” during his sworn testimony given to the Senate committee.

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 an objectively 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.

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 Verified 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*

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

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).

While not directly on point, the Florida Supreme Court recently addressed what is required to disqualify a judge within the context of denying the appeal of a criminal death penalty case in *Ault v. State*, 53 So. 3d 175, 204 (Fla. 2010):

In order to present a facially sufficient basis for disqualification, a party must demonstrate a well-grounded fear that he will not receive a fair trial. See *Mansfield v. State*, 911 So. 2d 1160, 1170 (Fla. 2005). A mere subjective fear of bias is legally insufficient. "[R]ather, the fear must be objectively reasonable." *Id.* at 1171 (quoting *Arbelaez v. State*, 898 So. 2d 25, 41 (Fla. 2005)).

Distinguishing from *Ault* under the facts alleged within this motion, the biased conduct, actions, and party admissions of Commissioner Graham clearly provide a well grounded basis for the movant to have an objectively reasonable fear and good faith belief that that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS. Further distinguishing from *Ault*, the standards for disqualifying agency personnel differ from the standards for disqualifying a judge. *Bay Bank & Trust Co. v. Lewis*, 634 So. 2d 672 (Fla. 1st DCA 1994). The rate case pending before the Commission will be conducted as an administrative hearing subject to appellate review by the 1st District Court of Appeal.

Commissioner Graham is not a judge, and has clearly demonstrated through his actions and conduct that he cannot be an impartial decision maker in Docket 100330-WS. Irrespective of which standard for disqualification is applied, the legal standard for disqualification under the facts alleged within this motion has been met and the disqualification of Commissioner Graham is both proper and necessary under State law.

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 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 conduct, actions, and party admissions fail to maintain the appearance of impartiality under the facts alleged within this motion.

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

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 a lengthy conversation over drinks with a Party of Record to the Aqua rate case pending before him in Docket 100330-WS. The party admission of Commissioner Graham acknowledging the conversation occurred coupled with his own words stating that "I did not sit there the entire time talking to the Aqua case" clearly implies that the merits of the Aqua rate case were discussed at some point during the lengthy conversation. Additionally, the fact that the conversation between Commissioner Graham and the Aqua Executives was ex parte is highly prejudicial to the movant because the movant and Aqua ratepayers will never know what was actually said between the decision maker and the adverse party during their lengthy conversation over cocktails. An impartial decision maker would not engage in a lengthy discussion over cocktails with the party that has a pending rate case before the Commission. Accordingly, the biased conduct and party admissions of Commissioner Graham provide a well grounded basis for the movant to have an objectively reasonable fear and good faith belief that that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS on the basis of bias and prejudice.

In striking contrast, Commissioner Graham did not attend any of the FPSC customer meetings held in Docket 100330-WS. Approximately 1,000 AUF customers took their time to attend these meetings and waited hours to express their concerns regarding the proposed rate increase and the quality of service provided by AUF. 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-

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 an objectively 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.

Perception is reality. It is not appropriate for an impartial decision maker to engage in a lengthy ex parte discussion over drinks with the party seeking a rate increase before the decision maker. Members of the Florida Senate clearly recognized this conflict characterizing the conduct and actions of Commissioner Graham as inappropriate and unacceptable for a member of the Florida Public Service Commission during the recent public hearing. Failing to accept responsibility for his actions, Commissioner Graham remains agnostic to the gravity of the situation created by his own conduct. Based upon the above, the biased conduct, actions, and party admissions of Commissioner Graham provide a well grounded basis for the movant to have an objectively reasonable fear and good faith belief that that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS on the basis of bias and prejudice. Accordingly, the disqualification of Commissioner Graham is both proper and necessary under State law.

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.” Such prejudicial comments are readily applicable to all dockets pending before the Commission. 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 upon the facts alleged within this motion, the movant has an objectively 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 Objectively Reasonable Fear

Based upon the facts alleged within this motion, the biased conduct, actions, and party admissions of Commissioner Graham provide a well grounded basis for the movant to have an objectively reasonable fear and good faith belief that that he will not obtain a fair and impartial hearing from Commissioner Graham in Docket 100330-WS. The movant further asserts that the conduct 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 have an objectively reasonable 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 is 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 Verified Motion to Disqualify Commissioner Graham be granted.

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

VERIFICATION

STATE OF FLORIDA

COUNTY OF PASCO

David L. Bussey, 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.

David L. Bussey
Name: David L. Bussey

STATE OF FLORIDA

COUNTY OF PASCO

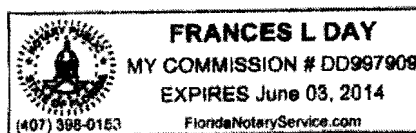
Before me this 2nd day of April, 2011, personally appeared David L. Bussey who is:

Personally Known: OR Produced Identification: _____

Type of Identification Produced: _____

Frances L. Day
Notary Public, State of Florida
Printed Name: FRANCES L. DAY

(SEAL)



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 4th day of April, 2011 to all parties of record as indicated below.

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

<p>Holland & Knight, LLP D. Bruce May, Jr./Gigi Rollini Post Office Drawer 810 Tallahassee, FL 32302-0810 Phone: (850) 224-7000 Fax: (850) 224-8832 Email: bruce.may@hkclaw.com</p> <p>Aqua America, Inc. Kimberley A. Joyce, Esq. 762 West Lancaster Avenue Bryn Mawr, PA 19010 Phone: (610) 645-1077 Fax: (610) 519-0989 Email: kajoyce@aquaamerica.com</p> <p>Aqua Utilities Florida, Inc. 1100 Thomas Ave Leesburg, FL 34748 Phone: (352) 435-4024 Fax: (352) 787-6333 Email: kajoyce@aquaamerica.com</p>	<p>Office of Public Counsel J.R. Kelly/Patricia Christensen c/o The Florida Legislature 111 W. Madison Street, Room 812 Tallahassee, FL 32399-1400 Phone: (850) 488-9330 Email: christensen.patty@leg.state.fl.us</p> <p>Adams and Reese Law Firm Kenneth M. Curtin, Esq. 150 Second Avenue North, Suite 1700 Saint Petersburg, FL 33701 Phone: (727) 502-8261 Fax: (727) 502-8961 Email: kenneth.curtin@arlaw.com</p> <p>Robert Lloyd P.O. Box 63 Captiva, FL 33924 Phone: (239) 395-3771 Fax: (954) 301-5887 Email: rlloyd1@aol.com</p> <p>William Coakley 5934 Lake Osborne Drive Lantana, FL 33461 Phone: (561) 385-8959 Email: wco@comcast.net</p>
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EXHIBIT 1

FAW NOTICE OF CUSTOMER MEETINGS

The FLORIDA PUBLIC SERVICE COMMISSION announces public customer meetings in the following docket to which all persons are invited.

DATE AND TIME: WEDNESDAY, OCTOBER 20, 2010, at 6:00 p.m.

PLACE: West Pasco County, Government Center, County Commission Board Room
7530 Little Road
New Port Richey, Florida

DATE AND TIME: THURSDAY, OCTOBER 21, 2010, at 6:00 p.m.

PLACE: Alachua County Board of Commissioners Board Room (2nd Floor)
12 SE 1st Street.
Gainesville, Florida

DATE AND TIME: FRIDAY, OCTOBER 22, 2010, at 10:00 a.m.

PLACE: St. Johns River Water Management District, Governing Board Room
4049 Reid Street
Palatka, Florida

GENERAL SUBJECT MATTER TO BE CONSIDERED: Docket No. 100330-WS – 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.

The purpose of the meeting is to give customers and other interested persons an opportunity to offer comments regarding the quality of service the utility provides, the proposed rate increase, and to ask questions and comment on other issues. One or more of the Commissioners of the Florida Public Service Commission may attend and participate in this meeting. For questions, contact Commission staff, Katherine Fleming at (850) 413-6199.

EMERGENCY CANCELLATION OF CUSTOMER MEETING

If a named storm or other disaster requires cancellation of the meeting, Commission staff will attempt to give timely direct notice to the parties. Notice of cancellation of the meeting will also be provided on the Commission's website (<http://www.psc.state.fl.us/>) under the Hot Topics link found on the home page. Cancellation can also be confirmed by calling the Office of the General Counsel at (850) 413-6199.

Pursuant to the provisions of the Americans with Disabilities Act, any person requiring special accommodation at this meeting because of a physical impairment is asked to advise the agency at least 48 hours before the meeting by contacting: Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-085 or at (850) 413-6770. If you are hearing or speech impaired, please contact the Agency using the Florida Relay Service, which can be reached at 1-800-955-8771 (TDD) or 1(800)955-8770 (Voice). For more information, you may contact: Florida Public Service Commission, Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850.

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