

THE STATE OF NEW HAMPSHIRE

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**PUBLIC UTILITIES COMMISSION**

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October 21, 2010

Ms. Debra A. Howland  
Executive Director  
New Hampshire Public Utilities Commission  
21 S. Fruit Street, Suite 10  
Concord, NH 03301



Re: DG 10-017 EnergyNorth Natural Gas d/b/a National Grid NH  
Distribution Rate Case

Dear Ms. Howland:

During a meeting with me and the Executive Director on October 1, 2010, the Consumer Advocate, Meredith Hatfield, questioned the propriety of Mr. Robert Wyatt, a utility analyst with the Public Utilities Commission, filing testimony and participating on behalf of Commission Staff in the above captioned docket. Ms. Hatfield's question was based on her understanding that Mr. Wyatt receives a pension from a predecessor company to National Grid.

In consultation with the Attorney General's Office, I reviewed Mr. Wyatt's situation and conclude that his participation in this docket and other dockets is proper. My opinion, which is shared by the Attorney General's Office, is based upon the following facts.

On July 31, 2000, Mr. Wyatt resigned from his position at EnergyNorth, Inc. (EnergyNorth). In July 2000, KeySpan's acquisition of EnergyNorth had been announced, but had not yet been consummated. KeySpan was subsequently acquired by National Grid in 2007. When he resigned, as a result of his past years of service, Mr. Wyatt had a vested pension interest in a defined benefit plan known as the EnergyNorth Retirement Plan for Salaried Employees (Pension Plan).

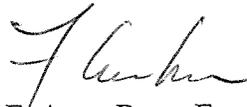
According to documentation provided to Mr. Wyatt, the Pension Plan is in a trust administered by BNY Mellon and is held in trust for the benefit of the plan participants such as Mr. Wyatt. Further, the Pension Plan is insured by the Pension Benefit Guaranty Corporation (PBGC), which is a federal agency. At age 55 Mr. Wyatt began receiving monthly pension payments that will continue at the same set amount regardless of the financial performance of the current successor company, National Grid NH.

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While Mr. Wyatt is not a decision maker at the Commission, his participation in this and other National Grid dockets would be improper if he were deemed to have a conflict of interest. Pursuant to applicable law, in order for a conflict of interest to exist, Mr. Wyatt must have a "private interest which may directly or indirectly affect or influence the performance of [his] duties." RSA 21-G:22. Because National Grid's financial performance does not impact the amount or continuance of Mr. Wyatt's monthly pension payments, he will not gain or lose from the disposition of this or other National Grid dockets. In other words, his private interest concerns the separate Pension Plan trust; not National Grid. Further, he has carefully considered whether his former employment at National Grid's predecessor-in-interest affects his ability to impartially and objectively carry out his responsibilities, and feels strongly that it does not. Consequently, he does not have a conflict of interest that would require his recusal from this or other matters involving National Grid.

This conclusion is consistent with similar circumstances previously reviewed at the Public Utilities Commission and the New Hampshire Supreme Court. *See* Docket DE 03-113, Letter to Mr. Brian Lamy, October 6, 2003, and Advisory Committee on Judicial Ethics, Docket No. 2009-ACJE-04, October 7, 2009. Copies are attached. In the latter example, while recusal was not deemed necessary, the Court nevertheless recommended disclosure to interested parties. Consistent with that recommendation, a copy of this letter should be filed in the above referenced docket.

Very truly yours,



F. Anne Ross, Esq.  
General Counsel

cc: Glenn Perlow, Esq  
Office of Attorney General  
Office of Consumer Advocate  
Service List DG 10-017

Attachments

October 6, 2003

Mr. Brian Lamy  
7 Stonehenge Road  
Bedford, NH 03110

Re: DE 03-113; Public Service Company of New Hampshire  
Investigation Into Service Quality  
in the Town of Bedford

Dear Mr. Lamy:

On September 5, 2003, you submitted a letter requesting that I recuse myself from the above-captioned docket. In your letter, you note that I am a former employee of Public Service Company of New Hampshire and that I am "most likely. . .vested in a retirement plan involving PSNH." You also state that former co-workers of mine "are likely participants" in this docket. Accordingly, you conclude that I am "neither independent in fact or appearance." \_\_\_\_\_

As you point out in your letter, I was an employee of Public Service Company of New Hampshire from 1985 until 1993, information that is publicly disclosed on the Commission's website. This information was also provided to the Governor and Executive Council as part of my nomination, hearing and confirmation process in October of 2001.

It is also accurate that I have a vested interest in a pension as a result of my years as a PSNH employee. The pension interest I have is in a defined benefit program under which I will collect \$600.48 per month at age 65. The pension fund is held in a trust separate from PSNH and its parent company, Northeast Utilities. The trust has a separate taxpayer identification number and the trustee is Mellon Bank. In addition, the pension fund is governed by the Employee Retirement Income Security Act.

RSA 363:19 states that "[n]o commissioner shall sit upon the hearing of any questions which the commissioner is to decide in a judicial capacity who would be disqualified for any cause . . .to act as a juror upon the trial of the same matter in an action of law."

RSA 500-A:12,II states that if a "juror is not indifferent, he shall be set aside" in a trial. Subsection I of the statute states that a juror must answer whether he:

- (a) Expects to gain or lose upon the disposition of the case;
- (b) Is related to either party;
- (c) Has advised or assisted either party;
- (d) Has directly or indirectly given his opinion or has formed an opinion;

- (e) Is employed by or employs any party in the case;
- (f) Is prejudiced to any degree regarding the case; or
- (g) Employs any of the counsel appearing in the case in any action then pending in the court.

Putting aside the fact that this docket is an investigation which has not reached the stage of a hearing, I will nevertheless address the substance of your request. Reading the two statutory provisions above together, I would have to recuse myself if I were "not indifferent" to the outcome. In other words, if I expected to gain or lose from the case, which appears to be the implication created by referring to my pension interest, then I should be disqualified.

I do not expect to gain or lose from the disposition of this case. I have a modest interest in a defined benefit program under which I anticipate receiving payments in 15 years. The level of my benefit was set ten years ago and will not change. Moreover, the fund from which I will receive my pension is a trust separate from PSNH. Consequently, my financial interest is in the trust and not in PSNH and the performance of PSNH is unrelated to the level of my pension benefit. As a result, I have no conflict of interest and I am personally indifferent to the outcome of the docket.

With respect to your second point, that individuals I worked with ten years ago are likely to be participants in this docket, my understanding from reading the Company's filing is that I worked with one individual who will be involved in this docket. Having simply worked at the same company as a participant to this proceeding, however, does not mean I am prejudiced to any degree regarding the case. I have no social, family or business relationship to anyone participating in the case. I am indifferent to the outcome on this point as well.

For the reasons set forth above, I will not recuse myself from the docket. I understand your concern that this docket be fairly judged and I take my responsibility in

that regard very seriously. I am hopeful that my description of the relevant facts and law resolves your concerns.

Sincerely,

Thomas B. Getz  
Chairman

TBG/cd\_  
cc: Daniel Mullen, Esquire  
Office of Attorney General  
Office of Consumer Advocate  
Service List – DE 03-113

Mr. Brian Lamy  
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**STATE OF NEW HAMPSHIRE**  
**SUPREME COURT**  
**ADVISORY COMMITTEE ON JUDICIAL ETHICS**

**DOCKET NUMBER:** 2009-ACJE-04

**DATE ISSUED:** October 7, 2009

**QUESTION:**

Does the Code of Judicial Conduct require disqualification of a judge from cases involving attorneys who practice in the judge's former law firm, where the judge will receive future pension benefits as a result of her prior employment with the firm?

**FACTS PRESENTED:**

Justice Carol Ann Conboy was recently sworn in as an associate justice of the supreme court, following seventeen years of service on the superior court. Justice Conboy has previously disqualified herself in all cases involving the law firm where she practiced for thirteen years prior to accepting a full time judicial appointment. As a former employee of the law firm, Justice Conboy will receive pension benefits under a defined benefit plan in the future, on checks issued by the firm. The plan is insured by the Pension Benefit Guaranty Corporation. The amount of the benefit has been determined and will not change, regardless of the law firm's financial condition.

**DISCUSSION AND APPLICATION OF CODE OF CONDUCT:**

The issues raised by this inquiry implicate Canons 2 and 3 of the Code of Judicial Conduct.

Section 2A of the Code provides, "A judge...shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." The commentary to this section states that "[t]he test for appearance of impropriety is whether the conduct would create in the mind of a reasonable disinterested person fully informed of the facts a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired"

Section 3E(1) of the Code states that “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to instances where.” The section goes on to give several specific examples of instances which require disqualification. Although none of the specific examples apply to the facts of this inquiry, the circumstances listed which require disqualification are not exhaustive. The commentary to this section provides the following standard for disqualification: “Under this rule, a judge should disqualify himself or herself whenever the judge’s impartiality might reasonably be questioned by a disinterested person fully informed of the facts, regardless whether any of the specific rules in Section 3E(1) apply.”

The committee believes that a reasonable, disinterested person, fully informed of the facts, would not question Justice Conboy’s impartiality simply because she will receive a monetary benefit from her former law firm which now employs lawyers appearing before her. The pension benefits have already been determined, based on historical information, and are not subject to change regardless of the law firm’s financial condition. Thus, the outcome of any case which Justice Conboy might hear would have no bearing on the defined benefits which she will receive. On the facts of this inquiry, Section 3E(1) of the Code of Judicial Conduct does not require disqualification of the judge in cases involving her former law firm. Applying the same reasoning to Section 2A of the Code of Judicial Conduct, the committee believes that a reasonable, disinterested person, fully informed of the facts of this case, would conclude that Justice Conboy’s ability to carry out her judicial responsibilities with integrity, impartiality and competence is not impaired as a result of these pension benefits.

Further commentary to Section 3E(1) of the Code provides for a separate standard for disclosures of possible conflict, in situations where disqualification may be not required. “A judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.” To warrant disclosure, a judge need only believe that the parties or counsel might consider the information relevant to the issue of disqualification. This comment does not suggest that a reasonableness standard be applied to issues of disclosure. The committee feels that under this lower threshold Justice Conboy should disclose the fact she will receive pension benefits from her former law firm as a result of past employment.