

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 20-092

ELECTRIC AND GAS UTILITIES

2021-2023 TRIENNIAL ENERGY EFFICIENCY PLAN

Order Denying Motion to Disqualify Commissioner Pradip Chattopadhyay

O R D E R N O. 26,561

January 7, 2022

This order denies the motion of the Office of Consumer Advocate (“OCA”) to disqualify me from participating in the 2021-2023 Triennial Energy Efficiency Plan docket.

I. Procedural History

This docket commenced with the filing of a proposed 2021–2023 Triennial Energy Efficiency Plan on June 5, 2020. The Office of Consumer Advocate (“OCA”) filed a letter of participation on June 8, 2020. At that time, I was an employee of the OCA.

In August of 2021, I began working for the Public Utilities Commission (“Commission”) as a Senior Advisor. I was then appointed to my current position on the Commission on December 8, 2021.

In light of my prior employment with the OCA, I determined that it was prudent to issue a memorandum explaining my rationale for not recusing myself from this Docket. On December 17, 2021, the OCA filed a motion to disqualify me from this Docket. (“OCA Mot.”)

II. Position of the Movant

The OCA identifies three grounds that, it argues, should require my disqualification. First, the OCA notes that, although I was never assigned to work on

this Docket, my job description included tasks such as “direct[ing] all aspects of the representation of residential utility ratepayers on significant adjudicative and rulemaking dockets,” and “assist[ing] the Consumer Advocate in administration of the agency and perform[ing] the duties of the Consumer Advocate in his/her absence, ensuring prompt response on urgent matters.” OCA Mot. at 5. Second, the OCA argues that discussion of ratepayer-funded energy efficiency generally was part of frequent OCA staff meetings, which I attended, OCA Mot. at 5–6 and points out that energy efficiency on a policy and strategic level was a “constant and pervasive subject of discussion among everyone who works at the OCA,” OCA Mot. at 6–7. Finally, the OCA refers to a letter sent to the former Chair of the Commission, during my tenure as Senior Advisor to the Commission, requesting that I be excluded from this Docket’s proceedings.

III. Standard of Review

In conducting adjudicative proceedings, the Commission performs “important judicial duties,” *Parker-Young Co. v. State*, 83 N.H. 551, 556 (1929), and is, therefore considered a quasi-judicial body, *Pub. Serv. Co. of N.H.*, 122 N.H. 1062, 1074 (1982). As a result of the need for neutrality and impartiality in Commission decisions, Commissioners must conduct themselves in accordance with certain ethical standards, including the requirement to disqualify themselves “from proceedings in which [their] impartiality might be reasonably questioned.” RSA 363:12, VII. In addition, as executive branch officials, Commissioners are subject to RSA 21-G:22 prohibiting participation in matters “in which they have a private interest which may directly or indirectly affect or influence the performance of their duties.”

The decision on a pending motion for disqualification rests upon the specific facts of each case, and the burden of establishing a sufficient appearance of partiality

to merit disqualification rests with the moving party; in this case the OCA.

Investigation of Merrimack Station Scrubber Project & Cost Recovery, Order No. 25,342 (Apr. 3, 2012) (citing *Electric Restructuring Proceeding*, 84 NH PUC 413, 417 (1999)). In addition, it is appropriate for me to rule on a motion for my own disqualification. See, e.g., *Electric Restructuring Proceeding*, 84 NH PUC 413, 417 (1999); cf., e.g., *N.H. Admin. Office of the Courts*, 151 N.H. 440 (2004) (justices may decide requests for their own recusal), N.H. Sup. Ct. R. 21A.

In addition, although not controlling, the Commission has, in the past, given due consideration to the Rules of Professional Conduct applicable to the members of the New Hampshire Bar, and the Rules of Judicial Conduct applicable to the judges and justices of New Hampshire's courts. I am neither an attorney nor a judge, but these rules are nevertheless informative. Of particular note, these rules recognize a distinction between prior representation of private persons and prior representation of a government agency. Compare N.H. R. Prof. Conduct. 1.9(a) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.") with N.H. R. Prof. Conduct 1.11(a) ("[A] lawyer who has formerly served as a public officer or employee of the government . . . shall not otherwise represent a client in connection with a matter *in which the lawyer participated personally and substantially* as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.") (emphasis added); see also Sup. Ct. R. 2.11(A)(5)(b) (requiring a disqualification for former government employment only if the judge "participated personally and substantially as a lawyer or public official concerning the proceeding").

IV. Analysis

The OCA's motion fails to meet the burden to establish sufficient appearance of partiality to merit my disqualification.

As to the OCA's first argument, the content of my Supplemental Job Description while I served as Assistant Consumer Advocate does not provide a basis for me to recuse myself. First, contrary to the OCA's assertions, neither passage indicates that I had any involvement whatsoever in the Triennial Energy Efficiency Plan docket while employed by the OCA. The first passage the OCA cites ("direct[] all aspects of the representation of residential utility ratepayers on significant adjudicative and rulemaking dockets...") defines my duties as directing "all aspects" only of some, but not all adjudicative and rulemaking dockets. As acknowledged by the OCA, I was not assigned to this docket in any way. The second passage ("assist[ing] the Consumer Advocate in administration of the agency and perform[ing] the duties of the Consumer Advocate in his/her absence...") would only provide some basis to recuse myself if, in fact, at some point the Consumer Advocate were absent and I performed duties pertinent to this docket in his stead. The OCA has identified no instance of this occurring, and I am similarly aware of none.

More fundamentally, however, in deciding whether to recuse myself from a docket, I must consider the matters that I was actually involved with while employed by the OCA, not the matters that I could hypothetically have been assigned to under my job description, had the Consumer Advocate chosen to assign me to them. To the extent the supplemental job description raises some potential suspicion that I might have been involved in this docket while at the OCA, the OCA's motion has dispelled that suspicion by acknowledging that I was not involved in this docket. A reasonable

person, fully informed of these facts, would not be led to question my impartiality on this docket.

Second, the OCA's reference to broad, general discussions about energy efficiency at both OCA staff meetings and "around the water cooler" does not provide a basis for my recusal. A decision to recuse must be based in facts, not speculation. The OCA's motion does not identify any single specific conversation or communication that I am alleged to have participated in that would lead a reasonable person to question my impartiality in this Docket. Moreover, general discussions on energy efficiency policy must be distinguished from specific, substantive conversations about this docket.

By analogy, as an economist, I have had and overheard innumerable conversations in my professional life on high-level, conceptual matters of economics. Many of these matters are bound to bear on dockets before the Commission in some form. Far from disqualifying me from sitting on the Commission, my background in economics is an asset and part of why I was appointed. See RSA 363:1 ("Of the 3 commissioners...one shall have either background or experience or both in one or more of the following: engineering, *economics*, accounting[,] or finance.") (emphasis added). My economics background would only serve to disqualify me from those specific dockets to which I had lent my economics expertise prior to joining the Commission. Energy efficiency is no different. Conceptual and theoretical discussions of energy efficiency at the OCA during my tenure there do not disqualify me from sitting on this docket.

Third, the OCA's September 2 letter does nothing to alter this analysis and, in fact, bolsters it. The letter provides the OCA's list of dockets that I was actually involved in while employed there. As a Senior Advisor to the PUC, I did not participate

in any docket in which I had personal and substantial involvement while at the OCA. As Commissioner, I intend to recuse myself from any docket in which I had personal and substantial involvement while at the OCA. But the letter itself acknowledges that this docket is not such a docket.

Finally, although not presented as a discrete argument, the OCA's motion makes frequent reference to the high-profile nature of this docket. OCA Mot. at 1-2, 5, 7. I raise this only to note that the "public controversy" and "media attention" referenced by the OCA can have no bearing on my decision here. The ethical standards governing my decision apply equally in high-profile matters and low.

For the foregoing reasons, the OCA's motion to disqualify me from this docket is DENIED.

SO ORDERED, this seventh day of January, 2022.



Pradip Chattopadhyay
Commissioner

Service List - Docket Related

Docket# : 20-092

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