

THE STATE OF NEW HAMPSHIRE
BEFORE THE PUBLIC UTILITIES COMMISSION

Docket No. DE 11-250

PUBLIC SERVICE OF NEW HAMPSHIRE

Investigation of Scrubber Costs and Recovery

CONSERVATION LAW FOUNDATION'S RESPONSE TO
MOTION FOR DISQUALIFICATION

The Conservation Law Foundation (“CLF”) hereby responds in support of the Motion For Disqualification (the “Motion”) filed on March 9, 2012 by ratepayer Jim and Sandy Dannis. In support of this Response, CLF states the following:

1. The Dannis’s Motion for Disqualification seeks to disqualify Commissioner Harrington pursuant to RSA 21-G:22 due to his apparent entitlement to a pension from Northeast Utilities (“NU”) which the Motion asserts “constitutes a private interest which may affect or influence his perspectives in hearing and ruling on this proceeding.” Motion at page 1. In addition, the Motion cites, as a basis for disqualification, RSA 363:12, VII which requires a Public Utilities Commission Commissioner to “disqualify himself from proceedings in which his impartiality might be reasonably questioned.”

2. RSA 363:12,VII has been interpreted by the New Hampshire Supreme Court as “establishing an objective reasonable person standard.” *Appeal of Seacoast Anti Pollution League*, 125 N.H. 465, 470 (1984). At a minimum, the Motion provides sufficient facts upon which Commissioner Harrington’s impartiality might reasonable be questioned by a *reasonable* person.

3. In addition, the New Hampshire State Constitution mandates that judges be “as impartial as the lot of humanity will admit.” N.H. Const. pt I, art. 35. New Hampshire Supreme

Court precedent applies this mandate to members of boards and commissioners acting in a quasi-judicial capacity. *Winslow v. Holderness Planning Board*, 125 N.H. 262, 267 (1984). “A conflict of interest exists if an official has a direct interest in the outcome of a proceeding, . . . or any ‘connection with the parties in interest, as would be likely, improperly, to influence [his or her] judgment.’” *Appeal of City of Keene*, 141 N.H. 797, 801 (1997) (quoting *N.H. Milk Dealers’ Ass’n v. Milk Control Bd.*, 107 N.H. 335, 338 (1966)). “Whether a direct interest or connection requires disqualification depends upon the particular circumstances of the case.” *Id.* (quoting *Appeal of Hurst*, 139 N.H. 702, 704 (1995)).

3. According to the Motion: NU subsidiary Public Service Company of New Hampshire (“PSNH”) owned Seabrook Station a portion of the time during which Mr. Harrington was employed and his right to a pension was vested; NU relies on dividends/earnings from its regulated subsidiaries like PSNH to fund its pension obligations; of the \$180.1 million in PSNH operating income flowing to NU’s earnings in 2011, \$112.6 million was paid into NU’s pension plan; NU’s pension obligations are severely underfunded; and, the decision to be made by the Commission in the instant docket will materially impact the ability of NU to cover its debts.

4. According to Note 10A to NU’s Consolidated Financial Statements in its 2011 10-K, the NU Pension Plan “covers nonbargaining unit employees (and bargaining unit employees, as negotiated) of NU, including CL&P, PSNH, and WMECO, hired before 2006 (or as negotiated, for bargaining unit employees).” Note 10A further clarifies that NU’s pension accounting goes down to the regulated subsidiary level, or in this instance to PSNH, stating,

Charges for the Regulated companies are recorded as Regulatory Assets and included as deferred benefit costs as these benefits expense amounts have been and continue to be recoverable in cost-of-service, regulated rates. Regulatory accounting was also applied to

the portions of the NUSCO costs that support the Regulated companies, as these amounts are also recoverable through rates charged to customers.

These disclosures and the 2011 contribution by PSNH to NU's pension plan strongly suggest that PSNH makes an annual expense accrual to fund, on an annual basis, the underfunded balance of pensions attributable to PSNH employment, including by Mr. Harrington. In addition, the portion of NU's pension obligations incurred through its regulated subsidiaries like PSNH "are recoverable through rates charged to customers."

5. In effect, Mr. Harrington's pension payable by NU amounts to a loan repayable pursuant to a contract. A pension plan is not a gift, but a contract entered into by the employer unilaterally or through negotiation with the employees' representative. See, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978); *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949); 29 U.S.C. § 186(c)(5). According to the Motion (at page 4), NU "maintains the right to suspend, terminate, or completely discontinue contributions under the Plan." In this instance, Commissioner Harrington's pension plan constitutes compensation by NU which, based on the information in the Motion, appears to be reliant to some extent on the continued funding of the pension plan by PSNH. Under such circumstances, Commissioner Harrington has a financial interest and a connection with a party in interest which provides a reasonable basis for a reasonable person to question Commissioner Harrington's impartiality.

6. In *Appeal of Seacoast* at 470, the Court construed the objective-reasonable person standard broadly, citing the First Circuit: "Such a standard allows recusal when objective appearances provide a factual basis to doubt impartiality, even though the judge himself may subjectively be confident of his ability to be evenhanded." Quoting, *Home Placement Service*,

Inc. v. Providence Journal Co., 739 F.2d 671 at 674 (1st Cir.1984) (quoting *Blizard v. Frechette*, 601 F.2d 1217, 1220 (1st Cir.1979)). *See also United States v. Kelley*, 712 F.2d 884, 890 (1st Cir.1983); *In re United States*, 666 F.2d 690, 695 (1st Cir.1981); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir.1981), *cert. denied*, 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148 (1982); *United States v. Mirkin*, 649 F.2d 78, 81 (1st Cir.1981); *United States v. Parrilla Bonilla*, 626 F.2d 177, 179 (1st Cir.1980).

7. Although CLF believes that Commissioner Harrington will render an objective decision in this proceeding, his objectivity is not the test. If facts exist for a reasonable person to question his impartiality, then disqualification under RSA 363:12, VII is warranted. *Appeal of Seacoast* at 471. The facts set forth in the Motion provide a reasonable basis for a reasonable person to question Commissioner Harrington's impartiality. A determination which is rendered with the improper participation of an administrative official is deemed void as a matter of law. *Appeal of City of Keene* at 802 (ruling that where commission rendered decision with member who should have recused himself, decision was void). In a matter of this magnitude, entailing inclusion in the rate base of PSNH's \$422 million scrubber project, it is critical for the Commission to render an enduring decision which can be relied upon by the parties.

WHEREFORE, CLF respectfully requests that the Commission:

A. Grant the Motion For Disqualification dated March 9, 2012 filed by Jim and Sandy Dannis; and

B. Grant such further relief as it deems appropriate.

Respectfully submitted,

CONSERVATION LAW FOUNDATION

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Dated: March 19, 2012

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of March 2012, a copy of the foregoing Response to Motion for Disqualification was sent electronically or by First Class Mail to the service list.



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