

**THE STATE OF NEW HAMPSHIRE**  
**before the**  
**PUBLIC UTILITIES COMMISSION**

Docket No. DE 11-250

Public Service Company of New Hampshire

Investigation of Merrimack Station Scrubber Project and Cost Recovery

**OBJECTION OF**  
**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**  
**TO**  
**MOTION FOR DISQUALIFICATION**

Public Service Company of New Hampshire (hereinafter “PSNH” or “the Company”) hereby objects to the Motion for Disqualification filed by Jim and Sandy Dannis (“Dannis”)<sup>1</sup> on March 9, 2012. By that Motion, Dannis moves for the disqualification of Commissioner Michael Harrington “from hearing or otherwise participating in this proceeding.”<sup>2</sup> However, the Motion actually goes well beyond that limited request. A memorandum prepared by Responsible Energy Action LLC<sup>3</sup> (attached as Motion Exhibit 3) which was incorporated in full into the Motion, cites to RSA 363:5, and states that “Mr. Harrington’s massive pension conflict absolutely disqualifies him from serving as PUC commissioner under the clear, unambiguous terms of RSA 363:5. (Emphasis in original.) Thus, the Motion for Disqualification essentially calls for Commissioner Harrington’s removal from the Commission.

---

<sup>1</sup> Although the Dannis pleadings appear to be filed by a layman *pro se*, and despite Mr. Dannis asking for the Commission’s indulgence regarding his pleadings during the March 12, 2012, hearing in this proceeding because he and his wife are “farmers” (Transcript, p. 8) it must be noted that Mr. Dannis is in fact an inactive member of the New Hampshire Bar who graduated from Harvard Law School.

<sup>2</sup> During the March 12, 2012, hearing in this proceeding, Dannis broadened that request to one seeking disqualification of Commissioner Harrington “from sitting as a commissioner on any matter relating to Northeast Utilities or its subsidiaries or affiliates.” (Transcript, pp. 23-24).

<sup>3</sup> Responsible Energy Action LLC’s registered office is 117 McGinty Road, Dalton, New Hampshire, which is the Dannis residence noted on the Dannis Petition for Intervention in this proceeding. Its registered agent and contact person on file with the New Hampshire Secretary of State’s office is Sandy Dannis.

The underlying issue is whether Commissioner Harrington's vested pension benefit from Northeast Utilities constitutes a "pecuniary interest" "in any public utility in this state, or any affiliate thereof" disqualifying him from his appointment to the Commission under RSA 363:5. Based on current legal precedent of the New Hampshire Supreme Court, the answer to that question is, "No."

In support of this Objection, PSNH states:

1. Dannis alleges that Commissioner Harrington possesses a vested right to payment of a sizeable pension from Northeast Utilities ("NU") as a result of the Commissioner's prior employment at the Seabrook Nuclear Generating Station. Commissioner Harrington has publically stated that he is indeed entitled to certain pension payments as a result of that prior period of employment.

2. Dannis states that disqualification of Commissioner Harrington is required because "Mr. Harrington's NU pension constitutes a private interest which may affect or influence his perspectives in hearing and ruling on this proceeding." Motion at para. 1. Dannis cites to RSA 21-G:22, RSA 363:12, IV, and RSA 363:5 as the statutory bases for his Motion.

3. The foundation for all of Dannis' arguments for disqualification is that:

The right to payments from NU's pension plan amount to a private interest held by Commissioner Harrington and decisions made by the Commission will materially affect the ability of NU to meet its pension obligations. It is axiomatic that the private pecuniary interest held by Commissioner [sic] may directly or indirectly influence his perspective on cost recovery for PSNH.

(Motion at para. 8)

4. As Dannis noted in the Motion at para. 6, this very issue was presented to the Executive Council to be considered as part of the review process prior to the Council's confirmation vote on Commissioner Harrington's nomination. The Motion states that the Responsible Energy Action LLC ("REAL") memorandum (Motion Exhibit 3) was provided to the Executive Council on March 6, 2012 – one day before the Council's affirmative vote on

Commissioner Harrington's nomination.<sup>4</sup> Prior to that, Attorney General Delaney provided a memorandum to Executive Councilor Burton dated February 22, 2012, addressing the very issues contained in the Motion. A copy of the Attorney General's memorandum is attached hereto as Attachment 1. In that memorandum, the Attorney General stated, "Mr. Harrington is no longer employed by a public utility in this state, and his Employee Pension Benefit Plan is not based on the financial performance of a public utility. Thus, RSA 363:5 does not apply to him." The Attorney General continued, "[T]he determining factor under RSA 363:5 and the relevant case law is whether the nominee has an ongoing financial interest in, or relationship to, an entity that may appear before the nominee. I find no such interest or relationship based on the facts at hand."

5. Clearly, the Executive Council was well aware of the very issue presented in the Motion when they voted to approve the nomination of Commissioner Harrington. That affirmative vote can only be taken as a demonstration that the Governor and Executive Council determined the information provided by REAL did not reveal any statutory basis that disqualifies Commissioner Harrington from serving as a Public Utilities Commissioner.

6. Having failed to prevail with this issue before the Governor and Executive Council, Dannis now raises the very same issue before the Commission, seeking a different result.

7. Commission precedent regarding motions for disqualification instructs that while a motion may be directed to the entire Commission, the case law indicates that such motions should be decided by the subject decisionmaker in the first instance. Order No. 23,277, Docket No. DR 96-150, *Re Electric Restructuring Proceeding*, 84 NH PUC 413 (1999), citing to *Douglas v. Douglas*, 143 N.H. 419, 427 (1999).<sup>5</sup> Thus, at the hearing on March 12,

---

<sup>4</sup> In that REAL memorandum, Dannis accuses Commissioner Harrington of being "combative, defiant and disrespectful," of "stonewalling," of having "no respect for the confirmation process, the Executive Council or the public," and of having "a character, temperament and value system that is inconsistent with the public trust placed in PUC commissioners." (Motion, Exhibit 3, p. 4).

<sup>5</sup> Pursuant to its authority under RSA 365:20, the Commission transferred the disqualification question in Docket No. DR 96-150 to the New Hampshire Supreme Court. The Court summarily concluded that no substantial question of law was presented and ruled that the denial of the motion for recusal was neither unjust nor unreasonable. *Appeal of NH Public Utilities Commission Re: Public Service Company of New Hampshire*, No. 99-495 (New Hampshire Supreme Court, September 29, 1999). The Court declined to hear a later appeal on the same issue. *Appeal of Granite State Taxpayers, Inc.*, No. 99-616 (New Hampshire Supreme Court, December 30, 1999). *Re PSNH Proposed Restructuring Settlement*, 85 NH PUC 154, 172 (1999).

2012, in this proceeding, the Commission correctly denied the Dannis oral motion seeking to have Commissioner Harrington recused from considering this disqualification issue. Transcript, pp. 22-23. Indeed, it appears that Commissioner Harrington, as the subject of the Motion, should be the one who rules on the Motion in the first instance.

8. Dannis goes into significant detail to describe the NU pension plan. The Motion totals approximately 100 pages in length, and includes as attachments voluminous excerpts from NU filings with the Securities and Exchange Commission and an investment banker report.

9. PSNH asserts that the detailed financial information regarding the NU pension plan is not relevant to deciding the Motion. As noted earlier, Commissioner Harrington has acknowledged that he has a vested right to payment of a pension benefit from the NU retirement plan. Whether his pension right is large or small; or, whether the NU pension fund is over-funded or under-funded, is not information that is necessary to decide this Motion. Dannis acknowledges such in the Motion:

As noted above, RSA 363:5 is a strict statute without any exception for materiality. Having concluded the utility's pension is a present pecuniary interest, there is no need to investigate whether it is big or small or material or immaterial to the holder or any other individual. **Just as Mr. Harrington would be disqualified if he owned a single share of Northeast Utilities common stock, he is disqualified by virtue of owning a Northeast Utilities pension.**

(Motion at Ex. 3, p. 8, emphasis in original).

10. Thus, the underlying issue is whether Commissioner Harrington's vested pension benefit is a "pecuniary interest" "in any public utility in this state, or any affiliate thereof" disqualifying him from his appointment to the Commission under RSA 363:5.<sup>6</sup> Based on current legal precedent of the New Hampshire Supreme Court, the answer to that question is, "No."

---

<sup>6</sup> Dannis seemingly agrees with this analysis: "As regards Mr. Harrington's pension from Northeast Utilities, the only interpretive issue is whether Mr. Harrington's current vested right to the pension makes him 'pecuniarily interested' in Northeast Utilities, an affiliate of a New Hampshire utility." Motion, Exhibit 3, pp. 7-8.

11. The New Hampshire Supreme Court has repeatedly held that “**A *per se* rule of disqualification** due to the probability of unfairness, **‘applies when the trier has pecuniary interests in the outcome...’**” *Plaistow Bank & Trust Co. v. Webster*, 121 N.H. 751, 754 (1981), citing to *State v. Aubert*, 118 N.H. 739, 741, (1978) (emphasis added) ; *see also*, *State v. Fennelly*, 123 N.H. 378, 384 (N.H. 1983); *State v. Martina*, 135 N.H. 111, 120-1 (1991); *Appeal of Grimm*, 141 N.H. 719, 721 (1997); *State v. Bader*, 148 N.H. 265, 270 (2002); *George v. Al Hoyt & Sons, Inc.*, 162 N.H. 123 (2011). A “*per se*” rule is defined by the Merriam-Webster's Dictionary of Law to be “a generalized rule applied without consideration for specific circumstances.” This *per se* rule of disqualification was noted in the *Re Electric Restructuring Proceeding* order. (84 NH PUC at 417).

12. The New Hampshire Supreme Court has on several occasions also addressed the ethical requirements of Public Utilities Commissioners. In *Appeal of Public Service Co. of N.H.*, 122 N.H. 1062, 1073-74 (1982), the Court noted:

[A]s long ago as 1929 this court recognized that the PUC was created by the legislature as a ‘state tribunal, imposing upon it important judicial duties.’ *Parker-Young Co. v. State*, 83 N.H. 551, 556, 145 A. 786, 789 (1929). When it is not acting in a rule-making capacity but in an adjudicative one, see 3 K. DAVIS, *supra* § 14:5, at 24-28, the procedural posture of the PUC is different. ‘If private rights are affected by the board's decision the decision is a judicial one.’ *Petition of Boston & Maine Corp.*, 109 N.H. 324, 327, 251 A.2d 332, 336 (1969) (decision of PUC, closing railroad grade crossing, was judicial).

The legislature reaffirmed that the PUC frequently performs an adjudicative role, when it restructured the PUC in 1979. Speaking on behalf of the Senate committee reporting out House bill 261, Senator Rock observed that the pay of a commissioner was being raised to ‘that equal to the superior court’ because the PUC was a ‘quasi-judicial body.’ N.H.S. JOUR. 1678 (1979); *see id.* at 1225, 1679 (1981). This situation still prevails. *See* RSA 94:1-a (Group T) (Supp.1981); RSA 491-A:1 (Supp.1981). If this agency is to serve a judicial function, it will have to comport itself accordingly. *See, e.g.*, RSA 495:1.

13. This Commission has recognized that in *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 470 (1984), the Court held it is proper to look to the ethical standards applicable to judges to assist in the interpretation of standards applicable to commissioners. *Re New Hampshire Electric Cooperative, Inc.*, 75 NH PUC 731, 734 (1990). “[T]he standard for

disqualification of a commissioner is an objective one, and is the same as the standard for judges.” *Re Electric Restructuring Proceeding*, 84 NH PUC at 417.

14. The New Hampshire Supreme Court has had its own opportunity to determine whether the Code of Judicial Conduct requires 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. The Court's Advisory Committee on Judicial Ethics (Supreme Court Rule 38-A) rendered an opinion on this issue in its Docket Number 2009-ACJE-04 dated October 7, 2009. A copy of that Opinion is attached as Attachment 2.

15. The subject of the Judicial Ethics Opinion is Supreme Court Justice Conboy. Per the opinion, Justice Conboy will receive pension benefits in the future under a defined benefit plan resulting from her former employment at a law firm, on checks issued by the law 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. Based on these facts – which are virtually identical to the facts relating to Commissioner Harrington – the Judicial Ethics Committee determined:

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.

As a result, the Judicial Ethics Committee unanimously held, “The Code does not require disqualification of a judge from cases involving the judge's former law firm simply because the judge will receive future pension benefits from the firm.” The Supreme Court has

accepted the opinion of the Judicial Ethics Committee, and Justice Conboy has not been subject to disqualification *per se* as a result of her pension benefit.

16. The Judicial Ethics Advisory Committee's opinion regarding Justice Conboy's retirement benefits expressly notes, "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." The Pension Benefit Guaranty Corporation ("PBGC") describes itself as follows:

PBGC is a federal agency created by the Employee Retirement Income Security Act of 1974 (ERISA) to protect pension benefits in private-sector defined benefit plans - the kind that typically pay a set monthly amount at retirement. If your plan ends (this is called "plan termination") without sufficient money to pay all benefits, PBGC's insurance program will pay you the benefit provided by your pension plan up to the limits set by law. (Most people receive the full benefit they had earned before the plan terminated.) Our financing comes from insurance premiums paid by companies whose plans we protect, from our investments, from the assets of pension plans that we take over as trustee, and from recoveries from the companies formerly responsible for the plans, but not from taxes. Your plan is insured even if your employer fails to pay the required premiums.

( <http://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc.html> ).

17. The maximum pension benefit guaranteed by PBGC is set by law and adjusted yearly. For 2012, the maximum guaranteeable monthly benefit is \$4,653.41, equating to \$55,840.92 per year. (<http://www.pbgc.gov/prac/whatsnew.html> ).

18. As is the case with Justice Conboy's retirement, Commissioner Harrington's vested pension rights are also protected by the PBGC. The "Summary Plan Description for the Northeast Utilities Service Company Retirement Plan,"<sup>7</sup> which is required by ERISA, states,

Your pension benefits under this Plan are insured by the Pension Benefit Guaranty Corporation (PBGC), a federal insurance agency. If the Plan terminates without the ability to pay all benefits, the PBGC will step in to pay pension benefits up to a maximum amount set by law. In most cases participants receive the pension benefits they would have received under the Plan.

---

<sup>7</sup> The "Summary Plan Description for the Northeast Utilities Service Company Retirement Plan" is available online at <http://www.nuemployees.com/nuemployeescommon/pdfs/pension/retireplan.pdf>.

Summary Plan Description, p. 24. (Extract attached hereto as Attachment 3.)

19. Like Justice Conboy's vested retirement rights, Commissioner Harrington will receive pension benefits in the future under a defined benefit plan resulting from his former employment; 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 plan sponsor's financial condition. *See*, Supreme Court Rule 38-A, (4)(c): "[C]ompliance with an opinion issued to one judge shall not be considered evidence of good faith of another judge unless the underlying facts are substantially the same." In the instant case, the underlying facts are substantially the same.

20. The result of the Judicial Ethics Committee's analysis of Justice Conboy's situation is consistent with several other similar decisions. As noted in the Attorney General's recent memorandum, "Former PUC Commissioner Thomas Getz, for example, served on the PUC while having a vested interest in a PSNH defined benefit ERISA pension from his prior employment with PSNH."<sup>8</sup> Commissioner Harrington's pension benefit is no different.

21. This same issue has been the subject of multiple challenges before the state's Air Resources Council ("ARC"). In *Appeal of NH Sierra Club et al. and Conservation Law Foundation*, Docket Nos. 09-10 ARC and 09-11 ARC, the ARC ruled on February 9, 2010, on a Motion to Disqualify Presiding Officer filed by the Sierra Club (which is also a party in the instant proceeding). A copy of that decision is attached hereto as Attachment 4. In that case, the Sierra Club filed what was its second Motion to Disqualify the Presiding Officer, Mr. Raymond Donald, from hearing that appeal alleging he had a conflict of interest due to his prior employment at Seabrook Station. Like Commissioner Harrington, Mr. Donald is entitled to receive pension benefits from the NU pension plan as a result of his employment at Seabrook Station. The ARC stated, "Mr. Donald collects benefits from an ERISA-governed Employee Pension Benefit Plan administered by an independent third party (Aetna) based on his years of employment at the Seabrook Station. Mr. Donald's retirement benefits

---

<sup>8</sup> Former Chairman Getz denied a request for his recusal based on his vested interest in the NU pension plan resulting from his employment at PSNH. See letter from Chairman Getz to Brian Lamy, October 6, 2003, Docket No. DE 03-113, attached hereto as Attachment 5.

are not affected by the performance of PSNH or Northeast Utilities.” In rejecting the disqualification motion, the ARC held,

[T]he Council finds and concludes that the evidence does not demonstrate that Mr. Donald has a conflict of interest. Mr. Donald was employed at the Seabrook Station for roughly 14 years in the 1980's and 1990's. Mr. Donald was employed by a subsidiary of PSNH. PSNH transferred its ownership interest in the Seabrook Station in 1992. Mr. Donald has had no direct connection with PSNH, with the exception of matters that have come before this Council, for roughly 18 years. Mr. Donald has had no involvement with the Merrimack Station. Most importantly, Mr. Donald has been retired from the Seabrook Station for over a decade and Mr. Donald's retirement benefits from his employment at Seabrook Station are not administered by PSNH and cannot be impacted by PSNH's performance, or the results of this appeal. As such, the evidence does not establish that Mr. Donald has a bias or personal pecuniary interest in this matter that is immediate, definite, and capable of demonstration. Rather, the alleged conflict of interest is remote, uncertain, contingent, and speculative.

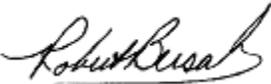
On September 20, 2010, the ARC rejected a third motion to disqualify Presiding Officer Donald that was filed by the Conservation Law Foundation (“CLF”). It is notable that not only is CLF a party in the instant proceeding, but that at the March 12, 2012, hearing in this docket, it admitted to playing a substantial, undisclosed role in drafting the Motion for Disqualification that is the subject of this Objection. (Transcript, pp. 12, 36).

22. The Governor and Executive Council, the Attorney General, the Supreme Court, the Air Resources Council, and this Commission (regarding former Chairman Getz) have all determined on substantially similar facts that a vested interest in a defined benefits retirement plan that is guaranteed by the Pension Benefit Guaranty Corporation does not create a pecuniary interest that mandates disqualification from holding either a judicial position, a quasi-judicial position, or the position of Commissioner on this Commission. If such a pecuniary interest existed as a result of these facts, then, per the many cited holdings of the Supreme Court, Justice Conboy would be subject to *per se* disqualification from cases involving the judge's former law firm. No such disqualification has been deemed necessary or proper by the New Hampshire Supreme Court in the Justice's case. No such disqualification is necessary or proper in the instant case involving Commissioner Harrington.

WHEREFORE, for the reasons set forth above, the Motion for Disqualification filed by Dannis should be denied.

Respectfully submitted this 19th day of March, 2012.

**PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE**

By:   
\_\_\_\_\_

**Robert A. Bersak**  
**Assistant Secretary and Assistant General Counsel**  
**Public Service Company of New Hampshire**  
**780 N. Commercial Street**  
**Manchester, NH 03101-1134**  
**603-634-3355**  
**[Robert.Bersak@PSNH.com](mailto:Robert.Bersak@PSNH.com)**

**Sarah B. Knowlton**  
**Senior Counsel**  
**Public Service Company of New Hampshire**  
**780 N. Commercial Street**  
**Manchester, NH 03101-1134**  
**603-634-2326**  
**[Sarah.Knowlton@PSNH.com](mailto:Sarah.Knowlton@PSNH.com)**

## CERTIFICATE OF SERVICE

I hereby certify that a copy of this Objection has been served electronically on the persons on the Commission's service list in accordance with Puc 203.11 this 19<sup>th</sup> day of March, 2012.

March 19, 2012

  
\_\_\_\_\_

**Attachment 1 – Attorney General Memorandum**

ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

MICHAEL A. DELANEY  
ATTORNEY GENERAL



ANN M. RICE  
DEPUTY ATTORNEY GENERAL

February 22, 2012

Honorable Raymond Burton  
Executive Council  
State House  
Concord, NH 03301

Dear Councilor Burton:

I am writing in response to your inquiry regarding Michael Harrington's nomination to serve as a commissioner on the Public Utilities Commission ("PUC"). Specifically, you have requested that we evaluate whether Mr. Harrington is disqualified from sitting on the PUC because he is eligible to receive a pension from his employment at the Seabrook Station. Based on our understanding of the facts, Mr. Harrington is not disqualified from sitting as a PUC commissioner.

Based on information obtained from Mr. Harrington, as well as from public filings of the Public Service Company of New Hampshire ("PSNH"), we understand the following facts to be true. Michael Harrington worked at Seabrook Station from 1983 to 2004. PSNH owned a portion of Seabrook Station until its bankruptcy. As part of Northeast Utilities' reorganization plan for PSNH, PSNH's ownership in Seabrook Station was transferred to North Atlantic Energy Corporation ("NAEC"), a subsidiary of Northeast Utilities. On June 5, 1992, PSNH became a wholly owned operating subsidiary of Northeast Utilities, and its share of Seabrook Station was transferred to NAEC. NAEC continued to hold that ownership interest until November 1, 2002, when NAEC divested its ownership interest in Seabrook Station to FPL Group, Inc.

As an employee at Seabrook Station, Mr. Harrington is eligible to receive a retirement benefit from an Employee Pension Benefit Plan funded by the joint-owners of Seabrook Station. Mr. Harrington participated in this plan and is entitled to receive such benefits, although he has not yet begun to collect his pension. His pension is a defined benefit plan administered by a third party (Aetna), and his future benefits have been determined and are not subject to change based upon the financial performance of PSNH, Northeast Utilities or FPL Group.

The relevant statute, RSA 363:5, provides: "No person who owns stock in, or is employed by or otherwise pecuniarily interested in any public utility in this state, or any affiliate thereof, shall be appointed upon said [public utility] commission." Mr. Harrington is no longer employed by a public utility in this state, and his Employee

Councilor Raymond Burton

February 22, 2012

Page 2

Pension Benefit Plan is not based on the financial performance of a public utility. Thus, RSA 363:5 does not apply to him.

In closing, it is not unusual in a state such as New Hampshire for nominees to administrative positions to have prior connections to entities that may appear before them in their administrative capacity. Former PUC Commissioner Thomas Getz, for example, served on the PUC while having a vested interest in a PSNH defined benefit ERISA pension from his prior employment with PSNH. Mr. Harrington himself previously served as a PUC Commissioner in 2004. Therefore, the determining factor under RSA 363:5 and the relevant case law is whether the nominee has an ongoing financial interest in, or relationship to, an entity that may appear before the nominee. I find no such interest or relationship based on the facts at hand.

Sincerely,



Michael A. Delaney  
Attorney General

cc: Honorable Raymond J. Wiczorek, Executive Councilor  
Honorable Daniel St. Hilaire, Executive Councilor  
Honorable Christopher T. Sununu, Executive Councilor  
Honorable David K. Wheeler, Executive Councilor  
Jeffrey Meyers, Legal Counsel to Governor Lynch

714539.doc

## **Attachment 2 – Advisory Committee on Judicial Ethics Opinion**

**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.

**ADVISORY OPINION ON THE QUESTION PRESENTED:**

The Code does not require disqualification of a judge from cases involving the judge's former law firm simply because the judge will receive future pension benefits from the firm. The judge should, however, disclose the fact of the pension to litigants involved in cases with the former firm, as this information could be relevant to the issue of disqualification.

The committee notes that disclosure of the identity of the inquiring judge was made with her knowledge and consent.

**THIS ADVISORY OPINION IS ISSUED BY UNANIMOUS CONCURRENCE OF ALL COMMITTEE MEMBERS.**

/s/ David D. King  
David D. King, Member

**CAUTIONARY STATEMENT**

This opinion is advisory only and not binding on the judicial conduct committee, which may, in its discretion, consider compliance with an advisory opinion by the requesting individual as a good faith effort to comply with the Code of Judicial Conduct. Rule 38-A(4)(c).

**Attachment 3 – Extract from  
Summary Plan Description  
for the Northeast Utilities Service Company Retirement Plan**

Summary Plan Description

# *NUSCO Retirement Plan*



Northeast  
Utilities System

# Table of Contents

About the NUSCO Retirement Plan.....	3
Overview .....	4
Plan Basics.....	5
Plan Eligibility, Vesting, Cost, and Funding.....	6
Retirement Eligibility.....	6
Pension Benefit Formula.....	7
Spouse’s Benefit.....	9
Working Past Age 65.....	10
K-Vantage .....	10
Initiating Your Pension Benefit.....	10
Adjustments for Early Benefit Commencement .....	11
Payment Options .....	13
Calculating Optional Forms of Payment .....	14
Reemployment before Your Pension Starting Date.....	16
Reemployment after Your Pension Starting Date.....	17
Death Benefits.....	17
Death Benefits after Your Pension Starting Date .....	19
Employee Contributions to the Plan.....	20
Leaves of Absence and Long-Term Disability.....	20
Merged Plans .....	20
Cost of Living Adjustments .....	21
Benefit Claims Procedures .....	22
Retiree Life Insurance Conversion to Provide Additional Pension Payments.....	23
Assignment of Benefits.....	23
If the Plan is Amended or Terminated.....	23
Insured Benefits .....	24
Tax Treatment of Pension Payments .....	24
Participants Rights and Protections Under ERISA.....	25
Administrative and ERISA Information.....	26
Key Terms.....	27



# About the NUSCO Retirement Plan

This document is the Summary Plan Description (“SPD”) for the Northeast Utilities Service Company Retirement Plan (“the Plan” or the “NUSCO Retirement Plan”) and is designed to provide an overview of the Plan’s key features.

The information in the SPD applies to all participants eligible to participate in the Plan and describes the main features of the Plan as of July 1, 2008. If you terminated employment or retired prior to July 1, 2008, your benefits will be determined based upon the terms of the Plan at the time of your retirement or other termination of employment with the Company.

If you have benefits that were accrued while you were an employee of Public Service Company of New Hampshire, Yankee Energy, or Niagara Mohawk prior to merger of their sponsored plans into the Plan, a portion of your benefits may be based on the terms of the pension plan of that company that existed prior to its merger with the Plan.

This document does not cover every provision of the Plan. Many complex topics have been simplified to present a more understandable Plan description. Your rights and benefits under the Plan are governed by the formal Plan document. If there is a discrepancy or inconsistency between this document and the Plan document, the Plan document will govern to the extent permitted by law.

You may obtain a copy of the Plan and related documents by contacting the Northeast Utilities Human Resources Service Center (the “HR Service Center”) at 860-665-5660 or toll-free at 1-800-841-8684. Northeast Utilities Service Company (“NUSCO”) is the sponsor of the Plan and through its Board of Directors reserves the right at any time to change in any way or terminate any benefit under the Plan, to the extent allowed by law and in accordance with bargaining unit contract language.

## Participating Companies

As of July 1, 2008, NUSCO, as the Plan sponsor, and the following Northeast Utilities System companies participate in the Plan:

- NUSCO (the Plan sponsor)

- The Connecticut Light and Power Company
- Public Service Company of New Hampshire
- Western Massachusetts Electric Company
- Yankee Gas Services Company
- Select Energy, Inc.

Collectively, NUSCO and the Participating Companies will be referred to as the “Company.”

Your participation in the Plan will not be affected if you switch employment between or among NUSCO and the participating companies (see exception for *Merged Plans* and *K-Vantage*).

## Information Sources

Active employees, retirees, and survivors interested in more information or in commencing a benefit should contact the **Northeast Utilities Human Resources Service Center** at 860-665-5660 or toll-free at 1-800-841-8684 (800-TDD-TDD4 or 833-8334 for hearing impaired) Monday through Friday, 8 a.m. to 5 p.m., except on certain holidays.

Northeast Utilities  
HR Service Center  
107 Selden Street  
Berlin, CT 06037

For questions regarding a pension benefit check; or to report an address change, a missing payment, or a death; or to request a change in tax withholding or a copy of your Form 1099-R, contact **Aetna** toll-free at 1-800-952-2700 Monday through Friday, 8 a.m. to 5 p.m., except certain holidays.

Aetna, Inc.  
Large Case Pensions  
151 Farmington Avenue  
Hartford, CT 06156

**The Retirement Income Modeler (PREPARE)** is a financial planning modeling tool to help active employees project post-retirement income from various sources such as:

- Your pension benefit from the Plan
- Your benefit from the NUSCO 401k Plan
- Your Social Security benefits, IRAs, other employer plans and annuities.

## Insured Benefits

Your pension benefits under this Plan are insured by the Pension Benefit Guaranty Corporation (PBGC), a federal insurance agency. If the Plan terminates without the ability to pay all benefits, the PBGC will step in to pay pension benefits up to a maximum amount set by law. In most cases participants receive the pension benefits they would have received under the Plan.

Generally, the PBGC guarantee covers: 1) normal and early retirement benefits; 2) disability benefits if you become disabled before the Plan terminates; and 3) certain benefits for your survivors.

The PBGC guarantee generally does not cover:

1. Benefits greater than the maximum guaranteed amount set by law for the year in which the Plan terminates
2. Some or all of benefit increases and new benefits based on Plan provisions that have been in place for fewer than five years at the time the Plan terminates
3. Benefits that are not vested because you have not worked long enough for the company
4. Benefits for which you have not met all of the requirements at the time the Plan terminates
5. Certain early retirement payments (such as supplemental benefits that stop when you become eligible for Social Security) that result in an early retirement monthly benefit greater than your monthly benefit at the Plan's normal retirement age; and
6. Non-pension benefits, such as health insurance, life insurance, certain death benefits, vacation pay, and severance pay

Even if some of your benefits are not guaranteed, you still may receive some of those benefits from the PBGC depending on how much money the Plan has and how much the PBGC collects from employers.

For more information about the PBGC and the benefits it guarantees, ask the Plan Administrator or contact the PBGC's Technical Assistance Division, 1200 K Street N.W., Suite 930, Washington, D.C. 20005-4026 or call 202-326-4000. TTY/TDD users may call the Federal Relay Service toll-free at 1-800-877-8339 and ask to be connected to 202-326-4000.

Additional information about the PBGC's pension insurance program is available through the PBGC's Web site on the Internet at [www.pbgc.gov](http://www.pbgc.gov).

## Tax Treatment of Pension Payments

Generally, pension benefits are taxable as ordinary income for federal income tax purposes. Many states also tax pension benefits. Aetna, the Plan vendor that administers pension payments, will ask

you to complete Form W-4P before your pension starting date to establish the amount that you would like to withhold for federal income taxes from your pension payments.

# Participant Rights and Protections under ERISA

As a participant in the Plan, you have certain rights and protections under the Employee Retirement Income Security Act of 1974 (ERISA). ERISA provides that as a Plan participant, you shall be entitled to:

## Receive Information About Your Plan and Benefits

- Examine, without charge, at the office of the Plan Administrator and at other specified locations, such as worksites and union halls, all documents governing the Plan (including collective bargaining agreements) and a copy of the latest annual report (Form 5500 Series) filed by the Plan with the U.S. Department of Labor and available at the Public Disclosure Room of the Employee Benefits Security Administration.
- Obtain, upon written request to the Plan Administrator, copies of documents governing the operation of the Plan (including collective bargaining agreements) and copies of the latest annual report (Form 5500 Series) and updated summary plan description. The Plan Administrator may require a reasonable charge for copies.
- Receive a summary of the Plan's annual financial report. The Plan Administrator is required by law to furnish each participant with a copy of this summary annual report.
- Obtain a statement telling you whether you have a right to receive a pension at normal retirement age (age 65) and if so, what your benefits would be at normal retirement age if you stop working under the Plan now. If you do not have a right to a pension, the statement will tell you how many more years you have to work to get a right to a pension. This statement must be requested in writing and is not required to be given more than once every twelve months. The Plan must provide the statement free of charge.

## Prudent Actions by Plan Fiduciaries

In addition to creating rights for Plan participants, ERISA imposes duties upon the people who are responsible for the operation of the employee benefit plan. The people who operate your Plan,

called "fiduciaries" of the Plan, have a duty to do so prudently and in the interest of you and other Plan participants and beneficiaries. No one, including your employer, your union, or any other person, may fire you or otherwise discriminate against you in any way to prevent you from obtaining a pension benefit or exercising your rights under ERISA.

## Enforce Your Rights

- If your claim for a pension benefit is denied or ignored, in whole or in part, you have a right to know why this was done, to obtain copies of documents relating to the decision without charge, and to appeal any denial, all within certain time schedules.
- Under ERISA, there are steps you can take to enforce the above rights. For instance, if you request a copy of Plan documents or the latest summary annual report from the Plan and do not receive them within 30 days, you may file suit in a federal court. In such a case, the court may require the Administrator-Benefits to provide the materials and pay you up to \$110 a day until you receive the materials, unless the materials were not sent because of reasons beyond the control of the Administrator.
- If you have a claim and an appeal for benefits, which are denied or ignored in whole or in part, you may file suit in a state or federal court. In addition, if you disagree with the Plan's decision or lack thereof concerning the qualified status of a domestic relations order, you may file suit in federal court. If it should happen that Plan fiduciaries misuse the Plan's money, or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in a federal court. The court will decide who should pay court costs and legal fees. If you are successful, the court may order the person you have sued to pay these costs and fees. If you lose, the court may order you to pay these costs and fees, for example, if it finds your claim is frivolous.

### Assistance with Your Questions

If you have questions about your benefit under the Plan, contact the HR Service Center at 860-665-5660 or toll-free at 1-800-841-8684. If you have questions about this statement or about your rights under ERISA, or if you need assistance in obtaining documents from the Plan Administrator, you should contact the nearest office of the Employee Benefits Security Administration, U.S. Department of Labor, listed in your telephone directory or the

Division of Technical Assistance and Inquiries, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue N.W., Washington, D.C. 20210. You may also obtain certain publications about your rights and responsibilities under ERISA by calling the publications hotline of the Employee Benefits Security Administration.

## Administrative and ERISA Information

### Plan Sponsor

#### Mailing

Northeast Utilities Service Company  
P.O. Box 270  
Hartford, Connecticut 06141-0270

#### Location

Northeast Utilities Service Company  
107 Selden Street  
Berlin, Connecticut 06037

### Employer Identification Number

06-0810627

### Plan Administrator

Vice President - Human Resources

#### Address of Plan Administrator

P.O. Box 270  
Hartford, Connecticut 06141-0270

### Plan Number

001

### Plan Year

Calendar year

### Agent for Service of Legal Process

Secretary of Northeast Utilities Service Company

#### Mailing

Northeast Utilities Service Company  
P.O. Box 270  
Hartford, Connecticut 06141-0270

#### Location

Northeast Utilities Service Company  
107 Selden Street  
Berlin, Connecticut 06037

Service of legal process may also be made upon the Plan Trustee or the Plan Administrator

### Plan Type

Defined benefit pension plan

### Type of Administration

Self-administered

### Source of Financing of Benefits

Contributions go to an irrevocable trust

### Trustee

Mellon Bank, N.A.  
One Mellon Bank Center  
Pittsburgh, Pennsylvania 15258

**Attachment 4 – ARC decision in**  
***Appeal of NH Sierra Club et al. and Conservation Law Foundation,***  
**Docket Nos. 09-10 ARC and 09-11 ARC**  
**February 9, 2010**



The State of New Hampshire  
DEPARTMENT OF ENVIRONMENTAL SERVICES



*Air Resources Council*

PO Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095  
Appeals Clerk Telephone (603) 271-6072 - TDD Access: Relay NH 1-800-735-2964  
DES Website: [www.des.nh.gov](http://www.des.nh.gov) - Council Website: <http://www.des.nh.gov/councils/>

February 9, 2010

**Via E-mail and Regular Mail**

Arthur B. Cunningham, Esq.  
P.O. Box 511  
Hopkinton, NH 03229

**Via E-mail and Regular Mail**

Melissa A. Hoffer, Esq.  
Conservation Law Foundation  
27 North Main Street  
Concord, NH 03301

**Via E-mail and Regular Mail**

Evan J. Mulholland, Assistant Attorney General  
Office of Attorney General  
Environmental Protection Bureau  
33 Capitol Street  
Concord, NH 03301

**Via E-mail and Regular Mail**

Barry Needleman, Esq.  
Gregory Smith, Esq.  
McLane, Graf, Raulerson & Middleton  
Professional Association  
11 South Main Street, Suite 500  
Concord, NH 03301

Re: Docket No. 09-10 ARC – New Hampshire Sierra Club, et al.  
Docket No. 09-11 ARC – Conservation Law Foundation

Dear Attorneys Cunningham, Hoffer, Mulholland, Needleman, and Smith:

Enclosed you will find the NH Air Resources Council's Decision and Order relative to the above-captioned appeal.

If you have any questions, please contact me at (603) 271-6072 or by e-mail at [amy.samson@des.nh.gov](mailto:amy.samson@des.nh.gov).

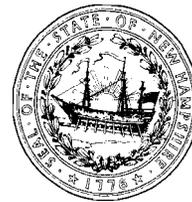
Sincerely,

  
Almormida (Amy) Samson, Appeals Clerk  
NH Air Resources Council

- cc: NH Air Resources Council  
Linda Landis; Robert A. Bersak; John M. MacDonald; Laurel L. Brown; and Richard R. Roy, PSNH  
Town of Bow
- ec: Thomas S. Burack, Commissioner, DES  
Robert R. Scott, Director, DES Air Resources Division  
Craig Wright, Assistant Director, DES Air Resources Division  
Pamela G. Monroe, Compliance Bureau Administrator, DES Air Resources Division  
Barbara Hoffman, Enforcement Section Supervisor, DES Air Resources Division  
K. Allen Brooks, NH DOJ  
Anthony I. Blenkinsop, NH DOJ  
Ida McDonnell, USEPA, Region I  
DES Public Information Officer



The State of New Hampshire  
**DEPARTMENT OF ENVIRONMENTAL SERVICES**  
*Air Resources Council*



PO Box 95, 29 Hazen Drive, Concord, New Hampshire 03302-0095  
Appeals Clerk Telephone (603) 271-6072 - TDD Access: Relay NH 1-800-735-2964  
DES Website: [www.des.nh.gov](http://www.des.nh.gov) - Council Website: <http://www.des.nh.gov/councils/>

**STATE OF NEW HAMPSHIRE**

**AIR RESOURCES COUNCIL**

**Decision & Order**

**On Pending Motions**

**Docket Nos. 09-10 ARC and 09-11 ARC**

Appeal of NH Sierra Club et al and Conservation Law Foundation  
In Re: March 9, 2009 Temporary Permit TP-0008 PSNH Merrimack Station

**Background:**

On January 25, 2010, the Air Resources Council met in Room 110 of the Department of Environmental Services on the above-referenced matter. Raymond Donald served as the Presiding Officer.<sup>1</sup> The purpose of the meeting was for the Council to decide the various pending motions set forth below.

**Findings and Conclusions:**

**A. NH Sierra Club Motion to Disqualify R. Donald (10/19/09). PSNH Objection (10/22/09); NH Sierra Club Reply (10/23/09); PSNH Response (10/29/09).**

The NH Sierra Club has filed a second motion to disqualify Raymond Donald from presiding over and sitting on these appeals. In the Motion to Disqualify, NH Sierra Club argues that Mr. Donald should be disqualified for hearing this appeal as he has a conflict of interest due to his prior employment at the Seabrook Station. PSNH has filed responses to said motion setting forth Mr. Donald's employment history at the Seabrook Station. Mr. Donald recused himself from consideration

---

<sup>1</sup> Presiding Officer Donald recused himself from consideration of the Motion to Disqualify.

of the motion, and provided a verbal statement to the Council concerning his past employment at the Seabrook Station and retirement benefits he receives from his employment.

The evidence before the Council demonstrates that Mr. Donald was employed at the Seabrook Station from 1986 to January 1, 2000. From 1986 to 1992, New Hampshire Yankee, a division of PSNH, managed Seabrook Station. In 1992, due to bankruptcy reorganization, PSNH transferred its ownership interest in Seabrook Station to subsidiaries of Northeast Utilities. From 1992 until his retirement, Mr. Donald continued at Seabrook Station under the employ of Northeast Utilities. Mr. Donald has been retired from the Seabrook Station for over ten years. Mr. Donald collects benefits from an ERISA-governed Employee Pension Benefit Plan administered by an independent third party (Aetna) based on his years of employment at the Seabrook Station. Mr. Donald's retirement benefits are not affected by the performance of PSNH or Northeast Utilities. Mr. Donald disclosed his connection to the Seabrook Station on his RSA 15-A disclosure forms on file with the New Hampshire Secretary of State.

“Administrative officials who serve in an adjudicatory capacity are presumed to be of conscious and capable of reaching a just and fair result.” Petition of Grimm, 138 N.H. 42, 52 (1993). “The burden is upon the party alleging bias to present sufficient evidence to rebut the presumption [of impartiality]. To disqualify an administrative official, the party should file a motion for recusal supported by a sufficient affidavit of personal bias or other disqualification.” Petition of Grimm, 138 N.H. 42, 52 (1993). There is no right to individual voir dire of board members regarding possible bias or prejudice. See Id. “The general rule of law, and the law in New Hampshire, [is] that ‘there is a conflict of interest when a public officer votes on a matter in which he has a direct personal and pecuniary interest.’” Atherton v. Concord, 109 N.H. 164, 165 (1968) (citations omitted). “However, the rule is also well established that, to disqualify, the personal pecuniary interest of the official must be immediate, definite, and capable of demonstration; not remote, uncertain, contingent, and speculative, that is, such ‘that men of ordinary intelligence would not be influenced by it.’” Id.

Based on the foregoing, the Council finds and concludes that the evidence does not demonstrate that Mr. Donald has a conflict of interest. Mr. Donald was employed at the Seabrook Station for roughly 14 years in the 1980's and 1990's. Mr. Donald was employed by a subsidiary of

PSNH. PSNH transferred its ownership interest in the Seabrook Station in 1992. Mr. Donald has had no direct connection with PSNH, with the exception of matters that have come before this Council, for roughly 18 years. Mr. Donald has had no involvement with the Merrimack Station. Most importantly, Mr. Donald has been retired from the Seabrook Station for over a decade and Mr. Donald's retirement benefits from his employment at Seabrook Station are not administered by PSNH and cannot be impacted by PSNH's performance, or the results of this appeal. As such, the evidence does not establish that Mr. Donald has a bias or personal pecuniary interest in this matter that is immediate, definite, and capable of demonstration. Rather, the alleged conflict of interest is remote, uncertain, contingent, and speculative.

For the foregoing reasons the Motion to Disqualify Presiding Officer is **DENIED (R. Donald recused)**.

**B. PSNH Objection to NH Sierra Club Witness List and Motion to Strike Witnesses (10/5/09).**

The Council finds and concludes that PSNH's motion seeks to strike three broad categories of witnesses disclosed by the NH Sierra Club: 1) witnesses that were not identified by name; 2) witnesses that were identified by name, but whose testimony is not relevant to the appeal; and 3) witnesses who are employees of PSNH. By way of background, following the August 17, 2009 Prehearing Conference, the Presiding Officer issued a notice and pre-hearing conference order that included the following provision:

the Presiding Officer ruled that on or before **September 28, 2009** the New Hampshire Sierra Club and the Conservation Law Foundation shall file witness lists setting forth the name of each witness expected to testify at the hearing, as well as a description of the expected testimony of each witness. On or before **October 9, 2009** PSNH and DES shall file witness lists setting forth the name of each witness expected to testify at the hearing, as well as a description of the expected testimony of each witness. The witness lists submitted shall be detailed enough to give the parties and the Council an understanding of all subject matters on which each witness will testify and a reasonable expectation as to what each witness will testify to.

On or about September 28, 2009, the NH Sierra Club filed a witness list. Thereafter, on October 5, 2009, PSNH filed its motion to strike, taking issue with some of the witnesses disclosed. No objection was filed.

Regarding the first category of witnesses addressed in PSNH's motion, the Council finds and concludes that the pre-hearing conference order and the Council rules required the parties to this appeal to identify witnesses by name. Fairness requires each side to place the other on notice of the identity of witnesses that will testify. Witnesses that were not disclosed/identified by name in accordance with the pre-hearing conference order should, therefore, be precluded from testifying at the hearing on this matter.

Regarding the second category of witnesses addressed in PSNH's motion, the Council finds and concludes that witnesses that have been identified by name, with a description of proffered testimony, should not be stricken at this juncture. Such witnesses may be called at the hearing on this matter to provide testimony that is relevant to the issues on appeal and not unnecessarily repetitive. However, the Council reserves its right to control the conduct of any hearing and to limit witness testimony offered by any party that is irrelevant or unnecessarily repetitive.

Regarding the third category of witnesses addressed in PSNH's motion, the Council finds and concludes that the NH Sierra Club is free to identify such witnesses on its witness list and the Council will not strike such witnesses from its list. However, the burden to secure such witnesses' attendance at a hearing lies with the NH Sierra Club.

For the foregoing reasons, the Council **GRANTS** the Motion to Strike witnesses that were not identified by name and **DENIES** the Motion to Strike as to other listed witnesses.

**C. NH Sierra Club Motion to Compel 3rd Request for Documents (10/23/09). PSNH Objection (11/2/09).**

The NH Sierra Club has filed a Motion to Compel a 3<sup>rd</sup> Request for Documents from PSNH. PSNH has objected. The Council finds and concludes that it is the moving party's responsibility and burden to set forth in its Motion to Compel the reasons why PSNH should be compelled to provide the information requested. See Env-AC 204.15, Env-AC 205.03. This includes articulating with specificity why the information sought is relevant to the matter at hand and reasonably limited in scope

to the matter on appeal, and why the requesting party will be materially prejudiced if the material is not provided. *Id.* Upon a review of the Motion to Compel the Council finds that the motion fails to articulate such reasons, but rather simply demands that items be produced. Conversely, PSNH argues its objection that much of the information requested is irrelevant, publicly available and/or confidential and privileged. Furthermore, under Council rules, document requests should not be granted if they are excessively burdensome. Given the failure of the NH Sierra Club to articulate relevancy in its Motion to Compel, the Council does not conclude that the information requested is directly related to the matter at hand such that the requesting party will be materially prejudiced in the case by the lack of the requested information.

For the foregoing reasons, the Motion to Compel the 3<sup>rd</sup> Request for Documents is **DENIED**.

**D. PSNH Motion to Dismiss Issue C on Appeal (12/23/09):**

Via Order dated October 29, 2009, the Council dismissed from this appeal what had been referred to as “Issue D.” Issue D concerned “whether the MK2 turbine modifications should have undergone new source review.” Concluding that DES had not taken final action on this issue, the Council determined that it did not have jurisdiction to consider that issue in this appeal.

PSNH has now filed a motion to dismiss Issue C, which is, “whether DES considered the proper baseline years in issuing the permit in question.” PSNH argues that that the “proper baseline years” issue relates to the MK2 turbine modification issue that the Council has already dismissed. As such, PSNH argues that Issue C should also be dismissed.

While neither the NH Sierra Club nor the CLF have filed objections to this motion, based on its own review of the relevant pleadings the Council is unable to definitively ascertain at this juncture whether the Appellants claim that improper baseline years were used in DES’ consideration of the MK2 turbine modification, or in issuing the temporary permit on March 9, 2009 as related to the other two issues on appeal. While the Council agrees that if Issue C is only related to the MK2 turbine modification (i.e. Issue D), it is not an appropriate issue for this appeal, based on the potential connection of Issue C to the other issues on appeal it finds and concludes that it is not able to dismiss Issue C at this point. As such, the Council will allow Issue C to proceed to hearing where testimony and evidence can clarify the specific nature of the issue raised.

For the foregoing reasons the Motion to Dismiss Issue C is **DENIED**.

**E. PSNH Motion to Dismiss NH Sierra Club for Lack of Standing (12/23/09). NH Sierra Club's Objection (12/28/09); PSNH Reply to Objection (1/6/10).**

PSNH has filed a Motion to Dismiss for Lack of Standing arguing that contrary to its representations in its appeal, the NH Sierra Club is not a duly organized non-profit in the State of New Hampshire. NH Sierra Club counters that it is a duly organized chapter of the national Sierra Club, which is a duly organized non-profit registered in the State of New Hampshire. The NH Sierra Club argues that as a local chapter its members have authorized this appeal.<sup>2</sup>

The Council finds and concludes that it previously ruled that the NH Sierra Club had standing to pursue this appeal based on the standing of at least one of its members. While the Council expects accuracy in representations concerning standing in any notice of appeal filed with the Council, the Council finds and concludes that such standing exists in this case whether NH Sierra Club is an independent non-profit, or a duly organized state chapter of a national non-profit registered in New Hampshire.<sup>3</sup>

For the foregoing reasons the Motions to Dismiss NH Sierra Club for Lack of Standing is **DENIED**.

**So Ordered by the Council.**

by:  February 9, 2010  
Almorinda Samson, Appeals Clerk

<sup>2</sup> No party has addressed whether any approval of the national Sierra Club was necessary for the New Hampshire chapter to file this appeal, nor whether such approval, if necessary, was provided.

<sup>3</sup> The Council offers no opinion on whether such local chapters should be registered with the New Hampshire Secretary of State's Office or the Charitable Trust division of the New Hampshire Attorney General's Office.

**Attachment 5 – Letter from PUC Chairman Getz**

**NHPUC Docket No. DE 03-113**

**October 6, 2003**

STATE OF NEW HAMPSHIRE



CHAIRMAN  
Thomas B. Getz

COMMISSIONERS  
Susan S. Geiger  
Nancy Brockway

EXECUTIVE DIRECTOR  
AND SECRETARY  
Debra A. Howland

**PUBLIC UTILITIES COMMISSION**

8 Old Suncook Road  
Concord, N.H. 03301-7319

TDD Access: Relay NH  
1-800-735-2964

Tel. (603) 271-2431

FAX No. 271-3878

Website:  
[www.puc.state.nh.us](http://www.puc.state.nh.us)

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.

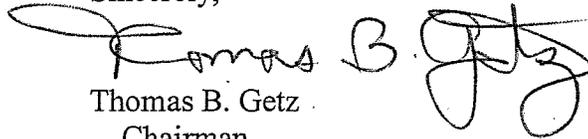
I do not expect to gain or lose from the disposition of this case. I have a modest interest in a defined benefit program under which I anticipate receiving payments in 15 years. The level of my benefit was set ten years ago and will not change. Moreover, the fund from which I will receive my pension 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.

Mr. Brian Lamy  
October 6, 2003  
Page 3

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