DR 96-150: Electric Restructuring Proceeding - PSNH Interim Stranded Cost Charge
DR 96-148: "Best Efforts" Proceeding
DR 96-149: "Light Loading" Proceeding
DR 96-424: Petition of Hannaford Brothers Company
DR 97-059: PSNH Base Rate Proceeding
DR 97-014; DR 98-014; DR 98-197; DR 97-044: PSNH FPPAC
DR 97-167: Petition of OCA Re: Millstone
DR 97-185: PSNH Management Audit
DR 95-247: Bio-Energy Proceeding

Order Denying Motion for Disqualification

O R D E R N O. 23,277

August 6, 1999

This matter comes before me on on the Motion of the Office of Consumer Advocate (OCA) and the Granite State Taxpayers, Inc. (GST) to the Public Utilities Commission (Commission) for my disqualification from hearings or deliberations on certain cases concerning the rates and restructuring of Public Service Company of New Hampshire (PSNH). While the motion is directed to the entire Commission, the case law indicates that such motions should be decided by the subject decisionmaker in the first instance, subject to an appeal to the Supreme Court. See, Douglas v. Douglas, slip op. at 8 (New Hampshire Supreme Court March 10, 1999), citing with approval Taylor-Boren v. Isaac, slip op., 143 N.H. ___ (decided December 30, 1998).

The motion raises the question of whether I have prejudged these cases. As I discuss in more detail below, I affirm that I will be impartial in my review of the cases before

us. My own state of mind, however, does not determine whether I should recuse myself, and the statute and cases do not require a party to show actual bias. Thus, my impartiality in fact does not dispose of the motion. However, the motion fails to show a sufficient appearance of partiality to suggest that I should recuse myself. Accordingly, for the reasons stated below, I deny the motion for disqualification.

At the same time, I will ask my fellow Commissioners to request that the New Hampshire Supreme Court review my decision as soon as possible. If the Commission were to proceed with my participation to decide this case on the merits, and thereafter the Court reversed my decision, the Commission's decision could be voided. Appeal of City of Keene, 141 N.H. 797 (1997); Winslow v. Town of Holderness Planning Board, 125 N.H. 262 (1984); Rollins v. Connor, 74 N.H. 456 (1980). Accordingly, whatever the likelihood of reversal of my decision after completion of the case, the consequences would be extremely serious. All the work of the parties and the Commission in hearings, argument and deliberation would be for naught.

Our transfer of the issue to the Court will give the Court the opportunity to make its decision before the Commission sits for the hearings and deliberations on this case. I will continue to sit pending the Court's decision. In this way, in the event the Court determines my decision today is incorrect,

the Court will be able to rule before my participation would risk influencing the ultimate decision of the Commission, and thus would prevent the possible requirement of rehearing and redeliberation, and the attendant duplication of the parties' efforts in trying these cases.

I. PROCEDURAL HISTORY

On July 9, 1999, the PUC Ethics Board filed a report with the Commission. The Ethics Board was convened by the Chairman of the Commission to investigate bias and interference allegations published first in the Manchester *Union Leader*. The charges arose from a conversation I had on June 11, 1999 with George McCluskey, PUC Director of Restructuring, and then-Staff Attorney Eugene F. "Chip" Sullivan, III. Mr. McCluskey and Mr. Sullivan were staff members assigned to the Interim Stranded Cost (ISC) case.[1]

[1] As noted in the Ethics Board Report, Mr. Sullivan had given notice of his resignation from the Commission staff in April, effective July 8, 1999, and his last working day in the office was June 21, 1999.

The Ethics Board consisted of three members of the PUC staff, assisted by the Chief of the Civil Bureau of the Office of the Attorney General, who was assigned to assist in the investigation.[2] The Board interviewed the participants in the conversation, and reported its findings on July 9, 1999.

The Commission caused a copy of the Report to be sent on July 9, 1999 to all parties to the dockets implicated by the PSNH settlement,[3] and notified parties that they could file any applicable pleadings or comments by June 21, 1999.

On July 21, 1999, the OCA and GST (together "Moving Parties") requested that the Commission grant the following relief: (a) require that I refrain from any further participation in the PSNH Settlement, in the PSNH rate case, and in the PSNH

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[2] Because the Attorney General represented a party to the litigation, and had signed the MOU, the Bureau Chief erected an "ethics wall" within the Department, consistent with the custom of arrangements with the Attorney General, such that she was not in contact with other members of the office of the Attorney General regarding this matter.

[3] The PSNH Settlement Agreement refers to a proposed settlement filed by PSNH between the Northeast Utilities, PSNH, the Governor, the Governor's Office of Energy and Community Service, the Attorney General, and designated Settlement Staff of the Commission.

By its terms, the PSNH Settlement agreement purports to settle all outstanding issues involved in the PSNH Interim Stranded Cost Case, Docket DR 96-150, and in the pending PSNH Rate Case, Docket DE 97-059, along with pending litigation in the federal court (*Public Service Company of New Hampshire, et al. v. Douglas Patch, et al.*, C.A. 97-97-JD (New Hampshire), 97-121 L (Rhode Island)), as well the other cases noted in the caption.

Interim Stranded Costs dockets, until the Commission has made a final decision on this Motion and all interlocutory appeals are exhausted; (b) declare that I am disqualified from hearing or deliberating in the PSNH Settlement, the PSNH Interim Stranded Costs docket and the PSNH Rate Case; (c) hold a hearing on this motion; and (d) grant such other relief as the Commission deems just and appropriate.

No other party filed opposing or responsive comments within the time frame provided in our Rules. Puc 203.04.

Because there are no disputed issues of fact before me and the Moving Parties have stated their arguments in the motion, there is no need for a hearing on the motion. Also, because I have determined that there is no grounds for my recusal, and because my request for transfer of the question to the Supreme Court will provide an opportunity for resolution of the question of my participation before hearings commence later this year, there is no need to grant the request that I not sit until the determination of the Court on appeal from this ruling.

II. THE MOTION TO DISQUALIFY

The Moving Parties state that I must be disqualified from the three cited PSNH dockets[4] because "the Ethics Report provides a reasonable basis for questioning [my] impartiality," citing RSA 363:12. Motion at 1. The Moving Parties focus attention on my statement in the conversation, as recited in the Ethics Board Report, to the effect that "having adverse testimony filed before the [PSNH settlement] was reviewed could scuttle the deal before it had a chance to be reviewed." Ethics Board Report at 4.

The Moving Parties argue that my statement implies: (a) that I was interested in keeping the settlement from being defeated, (b) that I had a preconceived view of Mr. McCluskey's testimony and its effect on the PSNH settlement, and (c) that I had a substantive concern over whether the settlement with PSNH would survive. Motion at 3. The Moving Parties conclude that it is not possible from the evidence summarized in the Ethics Report to determine whether or not I am actually biased in this matter. However, they state that the evidence provides a reasonable basis for questioning my impartiality. Motion at 4.

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[4] The Moving Parties argue that the three cases (two docketed as of the date of the motion, and one anticipated to be docketed at some point) are interrelated. The Moving Parties are correct. In fact, the MOU states that the settlement, if approved, would dispose of all the above-captioned cases.

The Moving Parties also argue that RSA 363:19 provides a basis for my disqualification. In particular, the Moving Parties state that the facts reported in the Ethics Report indicate that at the time of the conversation I had already formed an opinion regarding both the nature of Mr. McCluskey's testimony, and its effect on the PSNH settlement. They state that as a result it is reasonable to assume that I was not indifferent, as required by RSA 363:19, to the outcome of the PSNH Settlement, the PSNH Interim Stranded Cost docket, and the PSNH Rate Case. Motion at 4-5.

III. STATEMENT OF IMPARTIALITY

While my actual impartiality is not dispositive of the motion, the parties are entitled to my statement on the ultimate question of whether I will approach these cases with the proper attitude of neutrality.

On June 11, 1999, settlement staff advised the Commissioners that a memorandum of understanding (MOU) would soon be filed, with a definitive settlement agreement to follow in a month's time. The Commission was beginning the process of considering what procedures to follow in entertaining a possible settlement. We did not know the substance of the settlement at this time. It was in this context that I had the conversation described in the Ethics Board report.

I had no opinion on the merits of the particular

settlement. I had no bias in favor of a settlement negotiated by or on behalf of the Governor who nominated me to the Commission. I had no bias in favor of a particular set of terms in a settlement.

Since reading the MOU, I have formed no opinion of the merits of the proposed settlement. I have not yet read the settlement documents filed on August 2, 1999, although I have skimmed some of the voluminous material.

At the time of the conversation in question, I was interested in seeing a settlement be achieved if one was possible. Based on Mr. McCluskey's testimony in earlier phases of this docket or related cases, of which I had been informed, and PSNH's litigation position before the Commission and before the Federal Court, I expected Mr. McCluskey to file testimony[5] generally calling for an Interim Stranded Cost recovery lower than that asked for by PSNH in litigation (to wit, 100%), and possibly lower than the settlement figure, and in that sense "adverse" to PSNH's litigation position, and possibly to its settlement position.

I was concerned that continuing with the litigation during the period between the settling parties filing the MOU and

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[5] I did not expect Mr. McCluskey's testimony to be directed to the proposed settlement itself, nor did I expect Mr. McCluskey to file testimony on the question of whether the Rate Agreement is a contract.

reaching a definitive agreement, including the filing of Mr. McCluskey's testimony before the definitive settlement agreement could be reached, could disrupt the sometimes delicate process of finalizing a settlement on such a complex matter, with such high stakes. I based this hunch on my experience as a litigator, witness and hearings officer in numerous public utility regulatory dockets in other states.

After my conversation with Mr. McCluskey and conversations that day and early the week following with the General Counsel and my fellow Commissioners, I dropped the idea. I was persuaded that the risk of derailing the settlement process was low, and that the risk was high that staying the June 21, 1999 deadline would damage the orderly process of resolving this highly contested litigation. I no longer thought the idea had much validity. In retrospect, the fear I had briefly expressed of the filing of this testimony scuttling the negotiations has not proven to be accurate.

I believed, and believe, that a good settlement is a good thing in an appropriate case. I believe that settlements, particularly in complex multiparty, multimillion dollar litigation involving numerous issues of public policy, can sometimes produce results that are better than results achievable through litigation. This view is consistent with the legislative directive in Chapter 191:1, Section II, Laws of 1998, that there

is a "heightened need to consider negotiated settlements to expedite restructuring," in light of the delays occasioned by federal court orders. Settlement of administrative cases by nonadjudicative processes is also encouraged by R.S.A. 541-A:38.

However, any settlement requires a thorough and complete review by the Commission. Particular care must be taken where a settlement is agreed to by less than the entire cohort of parties, as here. And, in any case, *no* settlement is assured of approval, even if it were agreed to by *all* the parties. No matter who presents a settlement to the Commission, we retain our independent statutory duty to determine whether the public interest is served by the proposal.

I do not know whether the proposed settlement merits Commission approval. As with my colleagues, I will insist that proponents of the settlement plan demonstrate that their suggested disposition of the PSNH matters meets every applicable statutory standard, and that it meets the ultimate test of being in the public good. If the settlement plan does not meet this standard, I will not vote to approve it.

Based on a careful analysis of the evidence concerning my conversation with two staff members on June 11, 1999, I believe that an objective and reasonable person, with full knowledge of the facts, would not conclude otherwise.

IV. ANALYSIS

A. Legal Standard Generally

The Moving Parties correctly note that the standard for disqualification of a commissioner is an objective one, and is the same as the standard for judges. Appeal of Seacoast Anti-Pollution League, 125 N.H. 465, 470-71 (1984); Appeal of Public Serv. Co. of N.H., 122 N.H. 465 1062, 1074-75 (1982). The Court has recognized that under the New Hampshire Constitution, the right to be tried by impartial judges applies to both trial judges and members of administrative boards acting in quasi-judicial capacity. Appeal of Grimm, 141 N.H. 719 (1997).

There is a *per se* rule of disqualification for New Hampshire judges where the appearance of partiality or impropriety is particularly visible and obvious. MacFarlane v. Smith, 947 F.Supp 572, *aff'd* 129 F.3d 1252 (D.N.H. 1996). *See, e.g.* Appeal of City of Keene, 141 N.H. 797 (1997); Blaisdell v. City of Rochester, 135 N.H. 589 (1992); Winslow v. Holderness Planning Board, 125 N.H. 262 (1984); Plaistow Bank & Trust Co. v. Webster, 121 N.H. 751 (1981). These circumstances include situations where the trier of fact has a pecuniary interest in the outcome, where the trier has become personally involved in criticism from the party before him, or when he has heard evidence in secret at a prior hearing, or when he is related to a

party.[6] The Moving Parties do not allege, and there is no basis to allege, a *per se* grounds for recusal. Rather, the question is whether there is a disqualifying appearance of partiality in this case.

Quoting from J. Shaman, et al, Judicial Conduct and Ethics, § 4.15, at 125-26 (2nd ed. 1995), the Court recently set forth the relevant test when the appearance of partiality is alleged:

> "The test for the appearance of partiality is an objective one, that is, whether an objective, disinterested observer, fully informed of the facts, would entertain significant doubt that justice would be done in the case."

Taylor-Boren v. Isaac, slip op. at 8 (N.H. December 30, 1998).

See also Appeal of Grimm, supra, 141 N.H. at 721, in which the Court held that the petitioner must show an appearance of such bias "that the [factfinder] is unable to hold the balance between vindicating the interests of the [board] and the interests of the [parties]," quoting State v. Fennelly, 123 N.H. 378, 384 (1997). Accord, State v. Linsky, 117 N.H. 866, 882

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[6] A possible conflict of interest has been found not to require disqualification where the connection between the decision-maker and a party is attenuated, and does not fall within the *per se* rule. Appeal of Dell, 140 N.H. 484 (1995); Appeal of Maddox,a/k/a/ Dennis R. Cookish, 133 N.H. 180 (1990); Bricker v. Sceva Speare Memorial Hospital, 114 N.H. 229 (1974).

(1977).[7]

As the Court has noted, determining whether a sufficient appearance of partiality has been shown to merit disqualification rests on the specific facts of each case, and the burden to show such an appearance rests on the party seeking disqualification. Appeal of Grimm, 141 N.H. 719 (1997), Appeal of Hurst, 139 N.H. 702 (1995)(labor compensation appeals board decision reversed and remanded because panel member sat who occasionally used services of attorney representing one party). This rule is sound, among other reasons, because to permit disqualification merely on the assertion that a party believes there to be an appearance of partiality would be to invite judge-shopping. The assertion of an appearance problem must itself be subjected to an objective analysis. Taylor-Boren, *supra*.

B. Findings of Fact

The first task before me is to determine what are the facts germane to the issues presented. In an appearance case, my state of mind is not proof of impartiality. Rather, I look to the facts that would be available to an objective person.

The Moving Parties cite the Ethics Board Report issued

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[7] For an alleged bias to be disqualifying, it must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the factfinder learned from ... participation in the [same proceeding]," Appeal of Grimm, supra, 141 N.H. 719, at 722. Accord, State v. Fennelly, supra, 123 N.H. 378 (1997); State v. Aubert, 118 N.H. 739, 742 (1978).

July 9, 1999, by the Ethics Board of the Public Utilities Commission, as providing the factual basis for their motion. The Ethics Board Report can serve as the factual basis for determining what an objective reasonable person in possession of the facts would reasonably infer concerning my impartiality. In this case, there is no dispute about who said what to whom, and under what circumstances. As the Ethics Board reported, there was "general agreement" among the participants to the conversation in question about what occurred during the conversation. Although there are slight differences between the recital of the conversation in the Report and my own memory of the events, I accept the account of the conversation set forth in the Ethics Board Report. The question becomes what inferences would a reasonable and objective person draw from the conversation.

The Board presented a composite view of the conversation, and reached the following conclusions:

> "There is no evidence to support the allegation that Commissioner Brockway attempted to interfere with or block criticism of the as yet unfiled settlement agreement with PSNH by pressuring or urging Mr. McCluskey not to file testimony on June 21, 1999 with the Commission; and
>
> There is no evidence to support the inference that Commissioner Brockway participated in any negotiations with PSNH and the Governor's staff; and
>
> There is no evidence to support that [sic] Commissioner Brockway attempted to urge or pressure Mr. McCluskey to withhold draft versions of the 1989 rate agreement with PSNH; and

> There is no evidence that Commissioner Brockway discussed with Mr. McCluskey the merits or substance of any issue in the proceedings in which Mr. McCluskey was bifurcated."

Ethics Board Report at 6.

According to the Moving Parties, however, the key inference to be drawn from the Ethics Board Report is that I “was interested in keeping the settlement from being defeated,” and that I “had a substantive concern over whether a settlement with PSNH would survive [the filing of Mr. McCluskey’s testimony].” Motion at 3. The Moving Parties' use of the word "defeat" suggests their view that a reasonable person would believe I wanted the anticipated settlement between PSNH, the Governor and Settlement Staff to be approved by the Commission and to take effect. The Moving Parties' reference to my concern about adverse testimony suggests their view that a reasonable person would believe I thought Mr. McCluskey’s testimony would show the anticipated settlement to be unworthy of support on the merits, and thus that filing of his testimony would give opponents of the settlement a basis to argue for its rejection.

The Ethics Board's recitation of the conversation is not completely immune to varied interpretations, but several facts emerge upon careful reading of the report. The undisputed conversation includes statements that would cause a reasonable person to draw different conclusions than those suggested by the Moving Parties:

> "[Commissioner Brockway] indicated that she hoped to have access to [Mr. McCluskey's] expertise *to analyze the MOU on behalf of the Commissioners*. She further stated that *if the settlement was any good*, having adverse testimony filed before it was reviewed could scuttle the deal before it had a chance to be reviewed....She inquired as to his opinion on the matter, although stating that *until the MOU was filed there was no way to know what impact there would be, if any*."

Ethics Board Report, at 4 (emphasis supplied).

One who is familiar with Commission practice would not reasonably conclude that by suggesting that Mr. McCluskey's bifurcation be lifted and further that he not file testimony on June 21, 1999, as then scheduled, I expected that Mr. McCluskey would never file testimony in the docket regarding the anticipated settlement. Decisional staff[8] may, and do, file testimony. Ethics Board Report at 5. It has been the custom of the Commission that staff present their varied analyses to the Commission through testimony. *Id.*

Also, I conditioned my concern about June 21, 1999 testimony scuttling the settlement on the question of whether the settlement would prove to be "any good." I indicated this could not be known until the MOU was filed.[9] I wanted Mr. McCluskey to

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[8] Staff who are not prevented by the *ex parte* wall from discussing the merits of a case with the Commission, RSA 363:32.

[9] I was unaware of the contents of the anticipated settlement at the time of the conversation with staff members Sullivan and McCluskey. The Moving Parties offer no contrary evidence, and

help the Commission decide if the MOU was "any good," understanding that his opinion would likely be adverse to the PSNH litigation position, if not its settlement position.

On this point, the Ethics Board Report also indicates that I wanted to wait until the MOU was analyzed by Mr. McCluskey before determining the best course for proceeding. While the Moving Parties assume I was referring to approval of the PSNH Settlement (not yet filed at the time of the conversation), I was referring to the deal in its preliminary MOU stage instead. The Ethics Board Report makes clear that Mr. McCluskey was not confused, and understood me to be referring to whether the Commission should have him hold off on filing his testimony at least pending review of the MOU, but not pending review of a final settlement:

> "[Mr. McCluskey] wondered how the Commissioners could grant a stay [of the litigation and testimony filing deadlines] without a complete offer before them ..."

Ethics Board Report at 4.

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the Ethics Board so found:

> "At the time of the conversation, the contents of the proposed settlement and the MOU were not known to either Commissioner Brockway or Mr. McCluskey, only that there was to be a proposed settlement."

Ethics Board Report at 6.

The Moving Parties cite my use of the word "scuttle."[10] The facts support my statement that I was referring to the risk that negotiations would be abandoned if adverse testimony were filed after the MOU was signed, but before the "definitive agreement" were executed. Raising the possibility of a stay in order to provide a non-litigious setting for completion of negotiations does not demonstrate bias in favor of the substance of the settlement.

Here I cautioned that the idea of staying the litigation could only be addressed after the Commission, hopefully with the help of Mr. McCluskey, decided whether the MOU warranted such a major change in the procedural schedule the Commission had set out for resolving these cases. In any event, I did not act upon my concern that filing adverse testimony could cause the settling parties to abandon their efforts to reach a settlement.

Mr. McCluskey was clear that he felt no pressure from or direction by me not to file his testimony as scheduled, despite the evidence that I asked him to consider my idea.[11] I

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[10] The Random House Dictionary of the English Language, the Unabridged Edition, defines "scuttle" as follows: "to abandon, withdraw from, or cause to be abandoned or destroyed (as plans, hopes, rumors, etc.)".

[11] The Ethics Board report states that I said I would consider Mr. McCluskey's views if he would consider mine. I have no present

did not broach the subject with him again after the one conversation. PSNH filed the MOU on June 17, 1999, together with a motion seeking a stay of the upcoming June 21 testimony filing deadline until a time after the settling parties had negotiated a definitive settlement agreement. The Commission implicitly denied the motion for a stay by not ruling on it in time to relieve parties of the obligation to file on June 21, 1999. The testimony of Mr. McCluskey and other parties was filed on schedule on June 21, 1999.

It is possible to create a scenario consistent with the objective facts as determined by the Ethics Board that also is consistent with a bias on my part in favor of the PSNH settlement. However, a neutral and objective observer would not draw such inferences. Taylor-Boren, supra, ___ N.H. at ___ (slip op. at 8).

C. Facts in Analogous Cases

As noted by the Moving Parties, the standard for disqualification of a commissioner under RSA 363:12 is an objective one, and is identical to the standard for New Hampshire judges. Appeal of Seacoast Anti-Pollution League, 125 N.H. 465 (1984); and Appeal of Public Serv. Co. of N.H., 122 N.H. 1062 (1982). These two cases provide helpful guidance on the legal

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memory of conditioning my willingness to consider his views, but I did ask him to consider my perspective, and for purposes of this decision, I accept the Board's characterization.

standard to be applied, but neither is factually similar to the instant case. Nor has our Supreme Court been faced, in any other case I have been able to find, with a set of facts substantially similar to those that must be interpreted in this case.

In the Appeal of PSNH case, the Court made several references to the standard of conduct expected of a PUC Commissioner. The Court was not asked to find, and did not find that any of the Commissioners, who had erroneously relied on unrebutted information produced by the Chairman's *ex parte* contact, should therefore be disqualified.

In the SAPL case, however, the Court did determine that a commissioner should have been disqualified. The then-chairman of the Commission had given a lengthy speech to the Portsmouth Chamber of Commerce in which he praised the PSNH-Merrill Lynch plan for avoiding a PSNH bankruptcy and financing the completion of the Seabrook plant. He further praised the new construction manager hired by PSNH. At the time of this speech, the Chairman had already heard one phase of litigation on the proposed financing plan, and knew that PSNH was about to file for permission to proceed with further phases of the plan.

Given the Chairman's substantive comments in his public speech, SAPL and others moved for the Chairman to recuse himself from hearing these further phases of the plan. The Chairman denied the motion, stating that he was impartial, and would approach each new docket with an open mind. *See, e.g.*, Order No. 17,127, and Order No. 17,162, 1984 N.H. P.U.C. Reports 438. The Court reversed, holding that the Chairman's public speech provided:

> "...a factual basis for reasonably questioning [the Chairman's] impartiality in exercising his statutorily mandated duty, as a member of the PUC, to determine whether the proposed financing, which implements phase II of the Merrill Lynch plan, is in the public good.

125 N.H. at 471.

The Court reaffirmed that the test is an objective, not subjective test. The Court then noted the many specific facts at issue in the financing case about which the Chairman had publicly stated his opinion in the speech:

> "By making a speech containing his commendation of PSNH's efforts to avoid bankruptcy and complete Unit I and by referring to the Merrill Lynch package as appearing to be in the best interest of New Hampshire, at a time when he was well aware that he would be deciding future financing requests which PSNH has characterized as crucial to the success of the 'bail-out' plan, [the Chairman] allowed his impartiality on the matter pending before the commission to be questioned."

Id.

The Court held that the Chairman should have disqualified himself pursuant to RSA 363:12, VII, because his impartiality might reasonably be questioned in the circumstances. Id., at 472. The Court then vacated the order approving the financing, and remanded it to the Commission for redetermination, because in the absence of the Chairman's vote, there was no majority as required under 363:16.

The Court's lengthy discussion of the factual assertions made in the Chairman's pre-litigation speech underscores that it was the Chairman's apparent and publicly-

announced pre-determination of the specific facts of the financing that disqualified him from sitting on the case. In the instant case, I did not publicly announce an opinion about the merits of the proposed settlement. I did not privately state an opinion about the merits of the proposed settlement. The objective facts support my subjective statement that I had (and have) no opinion about the merits of the proposed settlement. The SAPL precedent thus does not counsel that disqualification is appropriate on these facts.

The Moving Parties cite Snow's Case for the proposition that "[p]erceptions may become reality," and that even a single isolated error by a judge can constitute a violation of the canons of ethics, justifying sanctions. The general language from Snow's Case provides a further reminder that judges, and commissioners, must take pains not to act in such a way that reasonable people would get the impression, however false, that the decision-maker will not render justice impartially. However, the specific facts of Snow's Case are not apt in the instant case, and the analogy to Snow's Case does not counsel my disqualification from these dockets.

Judge Snow was found to have tried to "fix" a traffic ticket for his brother. The Court, in rejecting the judge's plea to be excused for having committed an "impulsive" and "ill-advised" action, cited facts showing no significant doubt that

the judge had tried to use the influence of his office to achieve a personal gain for a family member, and at the least had not acted to prevent the officer from exercising favoritism in favor of the judge's family member. Failure to sanction the judge in this situation would lead to an appearance that justice would not be done in cases involving the judge's family. These facts have no relevance to the situation before us today.

The Moving Parties cite to no other cases supporting their conclusion that my conversation with Mr. McCluskey and attorney Sullivan requires disqualification.

In the end, I base my decision on my application of the objective reasonable person standard to the facts as presented by the Ethics Board, and conclude there is no appearance of partiality in the inferences that may be reasonably be drawn from those facts. Accordingly, I decline to recuse myself based on RSA 363:12.

D. Juror Standard

With respect to the argument under RSA 363:19, the Moving Parties aver that the facts determined by the Ethics Board support two inferences of prejudgment that would disqualify me from sitting as a juror on these cases: an opinion about the contents of Mr. McCluskey's testimony, and an opinion about the effect of Mr. McCluskey's testimony on the settlement. Motion at 4. These allegations come close to stating facts accurately, but

they do not support a motion to disqualify.

As I have stated, I was not indifferent to whether the settling parties would have the opportunity to conclude their negotiations and produce a definitive agreement. I thought Mr. McCluskey's testimony[12] would likely argue for Interim Stranded Costs lower than the PSNH litigation position (100% recovery), and perhaps lower than that of the MOU, although I could not be sure of this as I did not know the contents of the MOU, and did not know what Mr. McCluskey was planning to say in his testimony. I was and am, however, 'indifferent' to the ultimate success of the settlement to win approval.

The requirement of juror, and hence Commissioner, indifference, is found in RSA 500-A:12, II: "If it appears that any juror is not indifferent, he shall be set aside on that trial." The case law is clear that a juror need not enter the jury box with no thoughts or attitudes about the case at all. State v. Weir, 138 N.H. 671, 676 (1994). The underlying test is factual: can the trier of fact set aside any preconceptions, and decide the case based on the evidence adduced in the trial and the instructions of the law? State v. Weir, *supra,* State v. Wellman, 128 N.H. 340, 349 (1986)(applying Part I, article 35 of

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[12] Anticipation as to McCluskey's testimony is something I could hardly have avoided from my familiarity with the docket and its history - obtained in course of the litigation.

Constitution to jurors as well as judges). *See also* State v. Sawtelle, 66 N.H. 488 (1891)(erudite and lengthy discussion of origin of predecessor to current juror statute in common law, distinguishing *per se* challenges from ones requiring specific proof of bias, and history of juries, showing evolution away from original requirement of a jury panel containing persons familiar with parties and subject matter).

Based on the above analysis, I conclude that the Moving Parties have not demonstrated that a reasonable person would interpret the facts as showing lack of indifference within the meaning of RSA 363:19 and RSA 500-A:12, II.

E. *Ex Parte* Contact

Although the Moving Parties do not make the argument, I have considered whether the fact that I engaged in an improper *ex parte* contact with a bifurcated staff member requires my recusal. I conclude that it does not. The cases indicate that an *ex parte* contact, without more, does not require the disqualification of a decision-maker.

The issue of *ex parte* contacts has come up in the context of appeals on due process grounds. *E.g.* Appeal of Courville, 139 N.H. 119 (1994); Atlantic Connections, Ltd., 135 N.H. 510 (1992); Appeal of PSNH, *supra*, 122 N.H. at 1074-75. In none of those cases did the Court suggest that the decisionmaker who had engaged in the improper *ex parte* contact recuse himself.

The statutes governing the conduct of Commissioners prohibit *ex parte* contacts, but do not make them a ground for recusal without more.[13] RSA 363:34, RSA 541-A:36, RSA 363:12, III, VII.

In the *ex parte* contact in question here, no issue of substance was communicated between me and the staff person who was bifurcated. I expressed no attitude on the merits of any

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[13] Similarly, in the Code of Judicial Conduct, prohibited *ex parte* violations, Canon 3(A)(4), are not listed among the examples of conduct giving rise to the appearance of impropriety, except in the case of a judge's personal knowledge of disputed evidentiary facts. Canon 3(C)(1)(a).

parties' position. The due process rights of parties seeking to rely on the filing of Mr. McCluskey's testimony have been and will be respected. I joined with my fellow Commissioners in allowing the deadline for his and others' testimony to pass without granting PSNH's motion for a stay of that testimony, and the testimony did get filed. The idea of lifting Mr. McCluskey's bifurcation has been dropped. The parties have had an opportunity to argue for continuing the litigation, and will have a further opportunity at our upcoming prehearing conference August 10, 1999. Thus, no harm has been caused to any party by my ill-advised conversation with staff members McCluskey and Sullivan. Appeal of Courville, *supra.*

Based on the foregoing, it is hereby

ORDERED, that the motion of Granite State Taxpayers, Inc. and Office of Consumer Advocate seeking my disqualification from certain of the above-captioned dockets be, and hereby is, **DENIED**.

By order of Commissioner Brockway this sixth day of August, 1999.

Nancy Brockway
Commissioner

Attested by:

Kimberly Nolin Smith
Assistant Secretary