

**STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DE 11-250

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE

Investigation of Merrimack Station Scrubber Project and Cost Recovery

Order Denying Motion to Disqualify

ORDER NO. 25,342

April 3, 2012

APPEARANCES: Sarah B. Knowlton, Esq. and Robert A. Bersak, Esq., on behalf of Public Service Company of New Hampshire; N. Jonathan Peress, Esq., on behalf of Conservation Law Foundation; Orr & Reno, P.A. by Douglas L. Patch, Esq., on behalf of TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast, Inc.; Zachary M. Fabish, Esq., on behalf of the Sierra Club; Jim and Sandy Dannis, *pro se*; the Office of Consumer Advocate by Rorie E.P. Hollenberg, Esq., on behalf of residential ratepayers; and Suzanne G. Amidon, Esq. and Matthew Fossum, Esq., on behalf of Commission Staff

I. PROCEDURAL HISTORY

On November 18, 2011, Public Service Company of New Hampshire (PSNH or Company) filed a petition for temporary rates to recover costs associated with the installation of a wet flue gas desulphurization (Scrubber) system at the Merrimack Station located in Bow, New Hampshire. In its petition, PSNH requested that the Commission establish temporary rates pursuant to RSA 378:27 and RSA 125-O:18, for effect January 1, 2012, to allow the Company to begin recovery of costs associated with the Scrubber. PSNH asked that the Commission establish a temporary rate for the recovery of Scrubber costs at 1.18 cents per kilowatt-hour (kWh) or allow the existing energy service rate (8.89 cents per kWh) to remain in effect beyond December 31, 2011 on a “temporary rate” basis until the Commission determined the appropriate recovery of Scrubber costs.

On November 23, 2011, Conservation Law Foundation (CLF) filed an objection to PSNH's petition for the establishment of temporary rates, asserting a number of procedural deficiencies and requesting that, as an alternative to rejecting the filing, parties be allowed to respond to PSNH's request for a rate increase. The Office of the Consumer Advocate (OCA) noted its agreement with CLF in a letter filed November 28, 2011.

On December 1, 2011, the Commission issued an Order of Notice scheduling a prehearing conference for December 13, 2011. On December 7, 2011, TransCanada Power Marketing Ltd. and TransCanada Hydro Northeast Inc. (collectively, TransCanada) filed a petition to intervene in the proceeding. On December 8, 2011, the following parties moved to intervene: Sierra Club, New England Power Generators Association, Inc. (NEPGA), and CLF. On December 12, 2011, the OCA submitted a letter stating that it would participate in the docket on behalf of residential ratepayers consistent with RSA 363:28.

A prehearing conference was held as scheduled on December 13, 2011. On December 15, 2011, Staff filed a report of the technical session that included a proposed procedural schedule for the temporary rate portion of the proceeding. The Commission issued a Secretarial Letter on December 15, 2011, approving the proposed procedural schedule and granting NEPGA, TransCanada, Sierra Club and CLF intervenor status pursuant to RSA 541:32, II. Staff filed the direct testimony of Steven E. Mullen, assistant director of the electric division, on February 24, 2012. On March 9, 2012, Commissioner Robert R. Scott filed a letter recusing himself from participation in this docket.

On March 9, 2012, residential ratepayers Jim Dannis and Sandy Dannis of Dalton (Dannis) filed a motion to intervene out of time, stating that this proceeding will directly affect

their costs for electric energy supplied by PSNH. Dannis stated that allowing the intervention would not impair the orderly and prompt conduct of the proceeding.

Also on March 9, Dannis filed a motion to disqualify Commissioner Michael Harrington from hearing or otherwise participating in the docket. The motion for disqualification was accompanied by the following attachments: Northeast Utilities (NU) 2011 annual 10-K report dated February 24, 2012 to the Securities and Exchange Commission (SEC); NU 2010 10-K report from NU to the SEC dated February 25, 2011; a memorandum dated March 6, 2012 from Responsible Energy Action LLC (REAL) to the Executive Council; and a report prepared by Goldman Sachs Group, Inc. entitled “Markets take their toll on pension funded status.”¹

The hearing on temporary rates was held as scheduled on March 12, 2012. At the hearing, the Commission granted the Dannis late-filed motion to intervene. Before hearing testimony on temporary rates, the Commission took argument on the motion to disqualify Commissioner Harrington and allowed parties until March 19, 2012 to file responses to the Dannis motion. The Commission determined that it would proceed with the hearing on temporary rates as scheduled and reminded the parties that temporary rates are subject to reconciliation. Hearing Transcript of March 12, 2012 (3/12/2012 Tr.) at 45-46.

On March 19, 2012, PSNH filed an objection to the Dannis motion to disqualify Commissioner Harrington. Also on March 19, 2012, CLF filed a response supporting the Dannis motion.² On March 30, 2012, the Commission’s General Counsel filed an Affidavit concerning Commissioner Harrington’s retirement benefits.

¹ On March 16, 2012, Dannis filed a copy of Note 10A to NU’s 2011 Form 10-K Annual Report. Dannis said that Note 10A was inadvertently omitted from the attachments to the motion for disqualification.

² Additional filings have been made in this docket related to the temporary rate portion of the proceeding; these additional filings can be found at <http://www.puc.nh.gov/Regulatory/Docketbk/2011/11-250.html>.

II. POSITIONS OF THE PARTIES

A. Jim and Sandy Dannis

Mr. and Mrs. Dannis stated that they filed the motion to disqualify Commissioner Harrington from hearing or otherwise participating in the instant proceeding in accordance with RSA 363:12 and RSA 21-G:22. According to the motion, Governor Lynch and the Executive Council confirmed Commissioner Harrington on March 7, 2012, and during the Council's review, it came to light that Commissioner Harrington has a vested right to payment of a "sizeable" pension from Northeast Utilities (NU) based on his 20 year employment at Seabrook Station during a time when it was owned by PSNH, a subsidiary of NU, or by other NU subsidiaries. Dannis Motion to Disqualify (Dannis Motion) at 1. The Dannis motion claims that Commissioner Harrington's NU pension constitutes a private interest which may affect or influence his perspective in hearing and ruling in the instant proceeding.

Mr. Dannis said he and his wife are members of Responsible Energy Action, LLC (REAL), an advocacy group, which prepared a detailed analysis for the Executive Council in connection with Commissioner Harrington's nomination to the Commission.³ Based on that analysis REAL concluded that Commissioner Harrington's right to a pension from NU represents a material conflict of interest and a basis for disqualification. 3/12/12 Tr. at 21. REAL looked at publicly available data on compensation and pension levels and the NU pension plan information on the NU website and estimated that Commissioner Harrington's pension would pay him in the range of \$20,000 to \$70,000 per year.⁴ Dannis testified that REAL also looked at actuarial tables and estimated that, Commissioner Harrington would be entitled to

³ According to its website, <http://responsibleenergyaction.com/> REAL's initial focus has been on preventing a proposed transmission project known as Northern Pass in which NU is a joint developer from being located in Northern New Hampshire. As previously noted, the REAL memorandum was attached to the Dannis motion for disqualification.

⁴ Mr. Dannis said that estimates were used because Commissioner Harrington did not disclose his pension.

receive a projected cumulative amount of between \$400,000 and \$1.75 million in total pension benefits. Dannis claimed that the projected total pension payments are so large as to create an appearance of impartiality, an appearance of conflict, and an actual conflict. *Id.* at 22.

Dannis said that PSNH's petition for temporary rates seeks to add over \$300 million to its rate base. Dannis alleged that \$300 million equals 75 percent of NU's 2011 consolidated net income and, therefore, the outcome of the temporary rate proceeding will affect the financial condition of NU. *Id.* at 29. Dannis said that NU disclosed the instant docket as a "Risk Factor" in its 2011 Annual Form 10-K filed with the U.S. SEC on February 24, 2012. Dannis asserted that NU's Form 10-K also disclosed that NU's economic condition is almost entirely dependent on the earnings it receives from its regulated utility subsidiaries. Dannis Motion at 1-2. Dannis claimed that the risk disclosure in NU's 2011 Form 10-K are similar to disclosures in its 2010 Form 10-K. *Id.* at 3. According to Dannis, the Commission's ruling in the instant proceeding could materially impact NU's ability to pay its own debt obligations. *Id.* After reviewing the reports, Dannis concluded that NU needs earnings from its subsidiaries, such as PSNH, to pay its debt and financial obligations, including NU's pension obligations. Dannis asserted that "[f]or pension holders such as Mr. Harrington, the practical consequence is that his investment experience as a holder of a vested pension depends materially on the credit of Northeast Utilities, just as would the investment of a bondholder." *Id.* at 4.

Dannis noted that NU's February 24, 2012 10-K filing shows that PSNH's 2011 operating income was \$180.1 million and that PSNH paid \$112.6 million into NU's pension plan, or an amount equal to 63% of PSNH's operating income. The Motion claims that PSNH funded 78% (\$112.6 million) of NU's 2011 pension plan contribution of approximately \$143 million. Dannis asserts that NU's pension plan is "severely underfunded" and argues that: an NU

pension holder has a private interest in PSNH's financial condition. *Id.* at 5. Dannis posits that payment of NU's pension obligations is dependent on continued return on equity and regulated rate base recovery being provided by state utility commissions supervising its regulated utility subsidiaries, and that the decision to be made by the Commission in this docket will materially impact the ability of NU to cover its debts, including its pension obligations to its ex-employees such as Commissioner Harrington. *Id.*

Based on this analysis, Dannis claimed that the right to pension payments held by Commissioner Harrington constitutes a private interest prohibited by RSA 21-G:22, the New Hampshire Executive Branch Code of Ethics. Dannis concluded that because the decisions made by the Commission will materially affect the ability of NU to meet its pension obligations, Commissioner Harrington's vested pension interest may directly or indirectly influence his perspective on cost recovery for PSNH. *Id.* The motion for disqualification also cited RSA 363:12, IV requiring a Commissioner to disqualify himself from proceedings in which his impartiality may reasonably be questioned. The motion noted that Commissioner Ignatius had disqualified herself in another matter under much less obvious circumstances than appear in the case involving Commissioner Harrington. *Id.* at 6.

At hearing, Dannis stated that prior decisions by the Commission's General Counsel and the Attorney General's office suffered from a number of analytical mistakes. 3/12/12 Tr. at 30. First, these prior decisions refer to the fact that pensions are defined benefit plans and "somehow say that this makes it all okay." *Id.* Dannis argued that the pension benefits held by Commissioner Harrington constitute a fixed stream of payments that are no different than a portfolio of bonds, as a credit matter both depend on the ability of the sponsor to make those payments. *Id.* at 30-31.

Second, the opinions rely on the fact that pension plans have some assets set aside in a plan to pay the pensions. According to Dannis that fact is irrelevant because NU's pension plan in his view is "materially and hugely underfunded." *Id.* at 31. Dannis said that because of this pension funding shortfall, the credit of PSNH and NU is involved and the assets in the pension plan should not be a critical factor. *Id.* at 31-32.

Third, the prior opinions rely on the fact that the pension plans have a plan administrator which, according to Dannis, is also irrelevant. *Id.* at 32. Fourth, Dannis stated that it is "flat wrong" for the prior opinions to assert the pension payments are not dependent on credit quality or the performance of the company sponsoring the plan. *Id.* Fifth, Dannis claimed that the opinions cannot rely on the Pension Benefit Guarantee Corporation (PBGC) guarantees unless there is a demonstration that the pension itself, according to its terms, is fully guaranteed by the PBGC. *Id.* at 32-34.

Finally, Dannis distinguished an opinion from a judicial committee⁵ that held that a judge would not be disqualified because she receives a pension from a law firm that appears before her. Dannis said that a law firm is "simply there to provide legal advice. In this case, the pension conflict involves the financial results of companies who are here before the Commission for purposes of regulation." Dannis claimed that the citation to that opinion is "irrelevant." *Id.* at 34.

B. Public Service Company of New Hampshire

PSNH filed an objection to the Dannis motion and attached the following documents to the objection: (1) a memorandum from Attorney General Michael A. Delaney to Executive Councilor Raymond Burton dated February 22, 2012; (2) the October 7, 2009 Opinion of the New Hampshire Supreme Court Advisory Committee on Judicial Ethics regarding the Justice

⁵ The reference is to the New Hampshire Supreme Court's Advisory Committee on Judicial Ethics ruling in Docket Number 2009-ACJE-04 (October 7, 2009) related to the appointment of Justice Carol Ann Conboy to the Supreme Court.

Carol Ann Conboy; (3) an extract from the Summary Plan Description for the NU Retirement Plan; (4) the New Hampshire Air Resource Council decision in *Appeal of New Hampshire Sierra Club et al.* dated February 9, 2010; and (5) a Letter from then Commission Chairman Thomas B. Getz dated October 6, 2003 in Docket No. DE 03-113.

According to PSNH, 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. Dannis Motion at 5.

PSNH said that this very issue was presented to the Executive Council to be considered as part of the review process prior to the Council's vote on Commissioner Harrington's nomination.

PSNH Objection at 2.

PSNH said that REAL provided its memorandum to the Executive Council on March 6, 2012, one day before the Council was scheduled to vote on Commissioner Harrington's nomination, while the Attorney General had addressed the issue of Mr. Harrington's nomination in a February 22, 2012 memorandum to Executive Councilor Burton. *Id.* at 2. In his memorandum, the Attorney General stated, "Mr. Harrington is no longer employed by a public utility in the 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." *Id.* at 3. According to PSNH, the Attorney General said that the determining factor in analyzing an appointment under RSA 363:5 was whether the nominee has "an ongoing financial interest in, or relationship to, an entity that may appear before the nominee" and that the Attorney General found no such interest or relationship in Commissioner Harrington's case. *Id.*

PSNH stated that the Executive Council was well aware of the pension issue presented in the Dannis motion for disqualification when the Council voted on Commissioner Harrington's nomination. According to the Company, the affirmative vote on Commissioner Harrington's nomination can be taken as a demonstration that the Governor and Executive Council determined that the information provided by REAL did not reveal any statutory basis that disqualifies Commissioner Harrington from serving as a Commissioner. PSNH said that, having failed to prevail with the Governor and Council, Dannis raises the same issue before the Commission, seeking a different result. *Id.*

PSNH also argued that motions for disqualification should be decided by the subject decision maker in the first instance. PSNH cited Order No. 23,277 (August 6, 1999) in Docket No. DR 96-150, *Re Electric Restructuring Proceeding, Public Service Co. of N.H.* in support of this contention.⁶ PSNH opined that at the March 12, 2012 hearing, the Commission correctly denied Dannis' oral motion seeking to have Commissioner Harrington recused from considering the disqualification issue. *Id.* at 3-4.

PSNH noted that the Dannis motion goes into significant detail to describe the NU pension plan. PSNH asserted that the detailed financial information regarding the NU pension plan is not relevant to the disposition of the Dannis motion. According to PSNH, "[w]hether his pension right is large or small; or, whether the NU pension fund is over-funded or underfunded, is not information that is necessary to decide this Motion." *Id.* at 4. PSNH stated that the underlying issue is whether Commissioner Harrington's vested pension benefit is a pecuniary interest in any public utility in this state or an affiliate of such a public utility disqualifying him

⁶ Order No. 23,277 (84 NH PUC 413) cited by PSNH is a single Commissioner ruling by which Commissioner Nancy Brockway refused to recuse herself from hearings as requested by a motion filed in the proceeding. Pursuant to its authority under RSA 365:20, the Commission transferred the disqualification question to the Supreme Court, which summarily concluded that no substantial question of law was presented and ruled that the denial of the motion was neither unjust nor unreasonable. *Appeal of NH Public Utilities Commission*, No. 99-495.

for his appointment to the Commission under RSA 363:5, and the correct answer, based the current legal precedent, is no. *Id.*

According to PSNH, 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 a pecuniary interests in the outcome....’” *See, e.g., Plaistow Bank and Trust Co. v. Webster*, 121, N.H. 751,754 (1981) (citation omitted) and *Appeal of Grimm*, 141 N.H. 719,721 (1997). *Id.* at 5. Further, PSNH said that the Supreme Court has addressed the ethical requirements of individuals serving on the Commission on several occasions in consideration of the fact that the Commission services as a quasi-judicial body. The Court has said that if the Commission “is to serve a judicial function, it will have to comport itself accordingly.” *Appeal of Public Service Co. of N.H.* 122 N.H. 1062, 1073-1074 (1982). *Id.* at 5.

PSNH observed that in *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 470 (1984), the Court held that it is proper for the Commission to look to the ethical standards applicable to judges to assist in the interpretation of standards applicable to Commissioners, citing as authority *New Hampshire Electric Cooperative, Inc.*, Order No. 19,988 (November 26, 1990) 75 NH PUC 731,734. PSNH said that the standard for disqualifying a Commissioner is the same standard as that for disqualifying judges. *Id.* at 5-6.

In further analysis of the standard for disqualification of judges, PSNH reviewed the recent decision of the Court’s Advisory Committee (Advisory Committee) on Judicial Ethics regarding the appointment of Justice Conboy to the Supreme Court (Attachment 2 to its Objection). *Id.* at 6. This decision addressed whether the Code of Judicial Conduct (Code) 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. As a result of its review, the Advisory Committee unanimously held that 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.” *Id.* at 6.

PSNH emphasized that the Advisory Committee took note of the fact that the pension benefits in question were insured by the PBGC. To provide an explanation of the PBGC, PSNH included in its Objection an excerpt from the PBGC website which stated that the PBGC is a federal agency that was created to protect pension benefits in private-sector defined benefit plans. *Id.* at 7. The website explained that if a plan ends 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” *Id.* Referring to the PBGC website, PSNH said that the maximum pension benefit guaranteed by PBGC is set by law and adjusted yearly. For 2012, the maximum guaranteed annual benefit is \$55,840.92. *Id.* PSNH noted that Commissioner Harrington’s vested pension rights are also protected by the PBGC.

Per the Advisory Committee opinion, Justice Conboy will receive pension benefits in the future under a defined benefit plan resulting from her prior employment at the firm; the plan is insured by the PBGC; and the amount of the benefits has been determined and will not change regardless of the law firm’s financial condition. PSNH said that these facts are virtually identical to the facts relating to Commissioner Harrington in the instant situation, and that the same conclusion should be applied to Commissioner Harrington’s ability to participate in this proceeding. *Id.* at 8

PSNH said that the Advisory Committee’s analysis of Justice Conboy’s situation is consistent with that referred to by the Attorney General in his memorandum where it was noted

that “[F]ormer 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.” *Id.*

Further, PSNH said that the same issue was addressed by the New Hampshire Air Resource Council (ARC) in the disposition of a motion to disqualify the ARC presiding officer, Raymond Donald, from hearing an appeal related to PSNH. The motion claimed that Mr. Donald had a conflict of interest due to his prior employment at Seabrook Station and his receipt of retirement benefits based on that prior employment. *Id.* In its decision on the motion to disqualify, the ARC found that Mr. Donald’s benefits are not affected by the performance of PSNH or NU, and that Mr. Donald has had no direct connection with PSNH for the past 18 years with the exception of matters that were considered by the ARC. *Id.* at 9. PSNH said that the ARC rejected a third motion to disqualify Mr. Donald on September 20, 2010. *Id.*

In conclusion, PSNH argued that Governor and Executive Council, the Attorney General, the Supreme Court, the ARC and this Commission (regarding former Chairman Getz) have all determined on substantially similar facts that a vested interest in a defined benefit plan that is guaranteed by the PBGC does not create a pecuniary interest that mandates the disqualification from holding either a judicial position or a quasi-judicial position. PSNH said that no such disqualification of Commissioner Harrington in the instant docket is necessary or proper, and requested that the Commission deny the motion for disqualification. *Id.* at 9-10.

C. CLF

At hearing, CLF argued that RSA 363:12, VII requires a Commissioner to “disqualify himself from proceedings in which his impartiality might be reasonably questioned.” *Id.* at 35. CLF stated its belief that PSNH and ratepayers require an “enduring decision” that the parties

can be assured was made with the appropriate statutory standards and with the integrity that is required of all governing officials. For those reasons, CLF stated that it supported the Motion.⁷

In its March 19, 2012 filing, CLF further argued that RSA 363:12, VII has been interpreted by the New Hampshire Supreme Court as establishing an “objective reasonable person standard,” citing *Appeal of Seacoast Anti-Pollution League*, 125 NH 465, 470 (1984). CLF opined that the Dannis motion for disqualification provides sufficient facts upon which Commissioner Harrington’s impartiality might reasonably be called into question. CLF Response at 1.

CLF stated that the Supreme Court has applied a standard of impartiality to judges and to members of boards and commissions acting in a quasi-judicial capacity. *Winslow v. Holderness Planning Board*, 125 N.H. 262, 269 (1984). CLF said that the applicable standard is, if an official has a direct interest in the outcome of a proceeding, a conflict of interest exists. *Id.* at 2. According to CLF, the Dannis motion recites sufficient information linking Commissioner Harrington’s right to a pension through NU to the outcome of this proceeding because NU’s pension obligations are “severely underfunded” and the decision to be made by the Commission in this docket will “materially impact the ability of NU to cover its debts.” *Id.* at 2.

CLF argues that the facts disclosed by NU in its 2011 Form 10-K “strongly suggest” that PSNH makes an annual expense accrual to fund the underfunded balance of pensions attributable to PSNH employment, including the pension of Commissioner Harrington. Further, CLF claimed that a portion of NU’s pension obligations incurred through its regulated subsidiaries such as PSNH “are recoverable through rates charged to customers.” *Id.* at 3. CLF asserted that “Commissioner Harrington’s pension plan constitutes compensation by NU which, based on the

⁷ CLF also acknowledged that it “did materially assist Mr. Dannis in preparing this motion.” 3/12/12 Tr. at 36.

information in the Motion, appears to be reliant to some extent on the continued funding of the pension plan by PSNH. Under such circumstances, according to CLF, Commissioner Harrington has a financial interest and a connection with a party in interest which provides a reasonable basis for a reasonable person to question Commissioner Harrington's impartiality." *Id.*

CLF said that although it believes Commissioner Harrington will render an objective decision in this proceeding, his objectivity is not the test. CLF stated that facts exist for a reasonable person to question Commissioner Harrington's impartiality, and that a determination which is rendered with the improper participation of an administrative official is deemed void as a matter of law, *citing Appeal of City of Keene*, 141 N.H. 797, 802 (1997). *Id.* at 4. CLF asserted that the inclusion in PSNH's rate base of \$422 million associated with the Scrubber was of sufficient magnitude to warrant an enduring decision, and requested that the Commission grant the Dannis motion for disqualification. *Id.*

D. Sierra Club

Sierra Club stated that it did not necessarily support the motion, but supported the seriousness of the motion and the importance of investigating it to protect the integrity of the process. 3/12/12 Tr. at 37.

E. TransCanada

TransCanada took no position on the Motion for Disqualification. *Id.* at 16.

F. NEPGA

NEPGA took no position on the Motion for Disqualification.

G. Office of Consumer Advocate

The OCA stated that it agreed with the comments of CLF at hearing. *Id.* at 37.

H. Commission Staff

Staff took no position on the Dannis motion for Disqualification.

III. COMMISSION ANALYSIS

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

In deciding the pending motion for disqualification, we note that our determination rests upon the specific facts of each case, and that the burden of establishing a sufficient appearance of partiality to merit disqualification rests with the moving party; in this case Dannis. *Electric Restructuring Proceeding*, 84 NH PUC 413, 417 (1999) citing *Appeal of Grimm*, 141 N.H. 719 (1997) and *Appeal of Hurst*, 139 N.H. 702 (1995). Further, there is nothing inappropriate in Commissioner Harrington’s participation in this decision on a motion for his disqualification. See *Electric Restructuring Proceeding*, 84 NH PUC 413, 417 (1999), *Public Service Company of New Hampshire*, 69 NH PUC 391 and 438 (1984); and *New Hampshire Administrative Office of the Courts*, 151 N.H. 440 (2004) (justices may decide requests for their own recusal.)

Turning to the facts in this case, we note that Commissioner Harrington holds a fully vested pension interest in a defined benefit plan sponsored by Northeast Utilities (NU) of which

PSNH is a subsidiary. The pension plan assets are held in trust pursuant to the Employee Retirement Income Security Act of 1974 (ERISA). The estimated pension amount payable to Commissioner Harrington upon reaching the age of 65 is either (1) \$1,905 per month after age 65; or (2) a combination of \$3,507 per month from age 65-66 and \$1,724 per month after age 66; depending upon the pay-out option chosen. *See* Affidavit of Attorney Ross, General Counsel. The Pension Benefit Guarantee Corporation (PBGC), an agency of the United States government, insures payments of Commissioner Harrington's pension up to monthly and annual maximums. The maximum pension benefit guaranteed by PBGC is set by law and is adjusted yearly. For 2012, the maximum monthly benefit is \$4,653.41, equating to \$55,840.92 per year. *See* PSNH Objection at 5.

Dannis moves to disqualify Commissioner Harrington pursuant to RSA 21-G:22 and RSA 363:12, VII. Dannis argues that, [t]he right to payments from NU's pension plan amounts to a private interest held by Commissioner Harrington and that decisions made by the Commission will materially affect the ability of NU to meet its pension obligations. In support of the Dannis motion CLF claims that, "[a]t a minimum, the Motion provides sufficient facts upon which Commission Harrington's impartiality might reasonable [sic] be questioned by a *reasonable* person." CLF Motion at 1, *citing Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 470 (1984).

Although Dannis acknowledges that the cases dealing with defined benefit pension interests have not found that such pensions created a pecuniary interest sufficient to disqualify a trier of fact from sitting in proceedings involving the pension provider, Dannis takes the position

that the analysis in those cases is flawed⁸. The flaw, according to Dannis, is that the Courts and the Commission have not considered whether, notwithstanding the existing obligation to pay a defined benefit which does not change, the decisions made by the tribunal, in this case the Commission, might render the plan sponsor incapable of meeting its obligation to pay the defined benefits obligations. Dannis posits that adverse decisions by the Commission regarding PSNH might render PSNH, and ultimately NU, incapable of adequately funding the NU pension plan. According to Dannis an under-funded pension plan might change the benefits actually paid to Commissioner Harrington in the future, notwithstanding the fixed nature of the pension benefits.

As noted above, the full benefit of Commissioner Harrington's pension is guaranteed by the PBGC. There is no reason, therefore, to speculate on the potential short-falls by PSNH or NU in their pension contributions. As a result, in accordance with our prior decisions as well as Court precedent, we find that under any foreseeable set of circumstances, the Commission's decisions in this docket will not affect the amount, or payment, of Commissioner Harrington's NU pension payments. Commissioner Harrington has no pecuniary interest in the outcome of the matters in this docket.

With regard to CLF's arguments that the test should be whether Commissioner Harrington's impartiality might reasonably be questioned, we note that case law on the objective standard makes clear that:

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. *Electric Restructuring Proceeding*, Order No. 23,277, 84 NH PUC 413, 417 (August 6, 1999) citing *Taylor-Boren v. Isaac*, 143 N.H. 261, 268 (1999).

⁸ Dannis oral argument at hearing refers to the Attorney General's February 22, 2012 letter to Councilor Burton and the Judicial Advisory Committee ruling regarding the appointment of Justice Conboy to the Supreme Court Docket Number 2009-ACJE-04 (October 7, 2009).

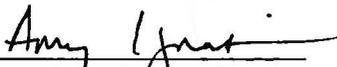
A fully informed observer would know of the level of Commissioner Harrington's pension benefits and the existence of the full PBGC guarantee. Given that information, together with Commissioner Harrington's assertion, *see* Concurrence below, that he severed his employment with an NU subsidiary ten years ago and is not biased or prejudiced toward or against PSNH or NU, a reasonable person would not question Commissioner Harrington's impartiality.

Having found that Commissioner Harrington has no pecuniary interest in the outcome of this docket, and based upon his assertions that he has no bias or prejudice toward or against PSNH or NU, we do not find that a conflict of interest exists under RSA 21-G:22.

Based upon the foregoing, it is hereby

ORDERED, that the Motion by Dannis for disqualification of Commissioner Harrington is DENIED.

By order of the Public Utilities Commission of New Hampshire this third day of April, 2012.

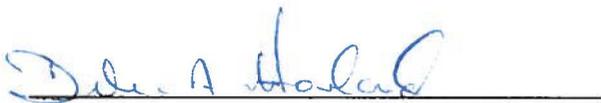


Amy L. Ignatius
Chairman



Michael D. Harrington
Commissioner

Attested by:



Debra A. Howland
Executive Director

CONCURRENCE BY COMMISSIONER HARRINGTON

I severed my employment relationship with an affiliate of NU ten years ago, and have no bias or prejudice against or in favor of NU or PSNH. I will consider the facts and arguments in

this docket fairly and impartially and have not prejudged any result or outcome in this case.

In order to support the record for this decision I authorized the NU pension administrator to release my private pension details to the Commission's General Counsel and those details are contained in her affidavit filed in this docket. My pension benefits are fully insured by the PBGC and my decisions in this docket will not influence the amount of or payment of my pension. As a result, I have no pecuniary interest in NU or PSNH. Accordingly, I will not recuse myself from this docket.



Michael D. Harrington
Commissioner