

New York State Ethics Commission

Advisory Opinion No. 95-11:	Analysis of the lifetime bar of Public Officers Law §73(8) with respect to a proceeding.
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INTRODUCTION

The following advisory opinion is issued in response to an inquiry from [], an Energy Policy Analyst for the New York State Energy Office ("Energy"), as to whether the lifetime bar restrictions of Public Officers Law §73(8) would prohibit him from participating in the future in a Public Service Commission ("PSC") Proceeding on behalf of a private employer. He has participated in certain aspects of this Proceeding as a State employee.

Pursuant to the authority vested in it by the Executive Law §94(15), the New York State Ethics Commission ("Commission") hereby renders its opinion that [the requesting individual] is prohibited from representing a private entity with regard to a proceeding in which he personally participated while in State service.

BACKGROUND

[The requesting individual] is currently employed by Energy within its []. As an Energy Policy Analyst, he, among other things, provides staff support to the agency for proceedings before the PSC. He has not been designated as a policymaker by his agency.

On March 19, 1993, the PSC commenced Case No. 93-M-0229 (Proceeding on Motion of the Commission to Address Competitive Opportunities Available to Customers of Electric and Gas Service and to Develop Criteria for Utility Response ["Proceeding"]). The Proceeding was instituted "to address a number of issues related to competition in the energy marketplace."⁽¹⁾ The Proceeding is being conducted in several distinct "phases," each of which will culminate in one or more specific actions by the PSC. While a "phased" PSC proceeding is not typical, it is utilized on occasion when a myriad of complex issues must be addressed in an independent and systematic manner. This Proceeding, unlike many others conducted by the PSC, is broad in scope and involves a wide array of parties, including electric utilities, independent power producers, several State and federal agencies, consultants and law firms.

Phase I of the Proceeding examined the use of "flexible rates" by electric utilities. A PSC working group solicited comments from utilities and other interested parties regarding this issue and developed a staff report and recommendations. The report was disseminated for written comment, and an on-the-record forum was held to directly address questions and concerns of the parties. On July 11, 1994, the PSC issued Opinion No. 94-15, adopting general guidelines for the "sale of electricity at flexible rates to customers with competitive opportunities." The Opinion also discussed options related to the scope of Phase II of the Proceeding.

On August 9, 1994, the PSC instituted Phase II. The overall objective of this Phase is to "identify regulatory and ratemaking practices that will assist in the transition to a more competitive electric industry designed to increase efficiency in the provision of electricity while maintaining safety, environmental, affordability, and service quality goals."⁽²⁾ To achieve these goals, the PSC directed that the parties convene to collaboratively develop comprehensive principles that might guide the transition. Four one-day conferences were held to discuss the proposed principles submitted by interested parties (i.e., both intervenors in the Proceeding and other organizations). Each meeting was attended by approximately 80 individuals representing more than 40 parties to the Proceeding. The proposed principles, as developed by this working group, were presented to the PSC on November 9, 1994.

On November 30, 1994, the PSC formally opened Case No. 94-E-0952 (In the Matter of Competitive Opportunities Regarding Electric Service) and closed Proceeding Case No. 93-M-0229, incorporating its record into the new case. The PSC stated:

Although this case [93-M-0229] was originally instituted to investigate competitive opportunities for both electric and gas service, a separate proceeding was subsequently commenced to address questions raised by restructuring the natural gas industry.⁽³⁾ For administrative purposes and to avoid misleading any parties, the name and number identifying this proceeding is changed to reflect the fact that it now is limited to electric service."⁽⁴⁾

The PSC revised the November 9th principles and issued them for comment on December 22, 1994. The due date for comments was February 1, 1995. However, several parties to the Proceeding argued that because the proposed principles "diverge very significantly from those submitted . . . following the collaborative process" an extension of the deadline was necessary. In response, the PSC extended the comment period to March 17, 1995.⁽⁵⁾ A conference was scheduled for March 2, 1995 to discuss the process and the schedule for addressing issues related to wholesale and retail competition and any other matters relevant to the Proceeding.⁽⁶⁾ The Commission has been informed by the PSC that it is likely the Proceeding will extend into 1995 and beyond.

The Energy Office is one of 60 active parties to this Proceeding. During Phase I, [the requesting individual] was one of several staff members assisting Energy's Counsel's Office in preparing written comments for submission to the PSC and in preparing an oral presentation to the Administrative Law Judge ("ALJ"). During the first part of Phase II, [the requesting individual], along with other Energy staff members, attended the all-day sessions established by the ALJ to develop consensus on the guiding principles. [The requesting individual] indicates that his role has been to "convey policy objectives established through the legislatively enacted State Energy Planning process and not as a policy decision maker for [the] agency."⁽⁷⁾

[The requesting individual] is currently considering accepting employment at [], a corporation that develops and operates independent power projects worldwide. [The corporation] is interested in establishing an office in Albany and would like to hire [the requesting individual] to "represent the company at the State, local government and community level, monitor events which will affect the company and participate to the extent necessary in proceedings affecting [the corporation]." [The requesting individual] understands that [the corporation] has not been an

active party to the Proceeding identified above, but has followed its progress through a trade association, the Independent Power Producers of New York, of which [the corporation] is a member.⁽⁸⁾ [The requesting individual] understands that as [the corporation]'s representative, he would be prohibited from appearing, practicing or receiving compensation for services rendered before the State Energy Office for a period of two years.⁽⁹⁾ His inquiry concerns whether he would be prohibited by the lifetime bar from involvement in the Proceeding on behalf of [the corporation].

APPLICABLE LAW

The lifetime bar found in Public Officers Law §73(8)(b) limits certain post-employment activities by former State employees. It states:

No person who has served as a state officer or employee shall after the termination of such service or employment appear, practice, communicate or otherwise render services before any state agency or receive compensation for any such services rendered by such former officer or employee on behalf of any person, firm, corporation or other entity in relation to any case, proceeding, application or transaction with respect to which such person was directly concerned and in which he personally participated during the period of his service or employment, or which was under his or her active consideration.

This subdivision permanently prohibits former State employees from appearing, practicing, communicating or otherwise rendering services before any State agency or receiving compensation at any time with respect to any case, proceeding, application or transaction involving a matter in which they were directly concerned and personally participated or which was under their active consideration while employed by the State.

DISCUSSION

It is clear the PSC Proceeding discussed herein constitutes a "proceeding" within the meaning of the lifetime bar. And, there is little doubt that [the requesting individual] was directly concerned with and personally participated in the Proceeding. As an Energy Policy Analyst, he prepared materials for use by his agency in Phase I and worked with the active parties in developing the guidelines submitted to the PSC as part of Phase II. His work included attendance at lengthy, substantive meetings on behalf of his agency.

The first question before the Commission is whether the PSC Order dated November 30, 1994 that formally opened Case No. 94-E-0952 and closed Case No. 93-M-0229 resulted in the creation of two separate proceedings for purposes of the lifetime bar. The Commission concludes it did not. The PSC has indicated that this action was taken "[f]or administrative purposes" and to correctly identify the Proceeding as pertaining to electric service only rather than gas and electric services. Moreover, the record of the first Proceeding was incorporated into the second, thereby demonstrating a clear unity of purpose and relevance between these proceedings.

The next question is whether a proceeding of this nature -- that is, one that has been divided into several distinct phases and will take a year or more to conclude -- can be defined as a series of

separate and distinct *transactions* for purposes of the lifetime bar. Here, again, the Commission must respond in the negative.

The statute makes clear that the lifetime bar prohibits former employees from rendering services in relation to any "case, proceeding, application or transaction" with respect to which they were directly concerned or personally participated during their State service. Rules of statutory construction require that the Commission apply the most "natural and obvious" interpretation of this language in an effort to "carry out, if possible, the intention of the Legislature."⁽¹⁰⁾ To define a "proceeding" as consisting of several transactions would disregard the plain meaning of the term.⁽¹¹⁾ The use of the disjunctive in the statute makes clear that a proceeding is not to be divided into separate phases or transactions.

CONCLUSION

[The requesting individual] is prohibited from representing a private entity with regard to a proceeding in which he personally participated while in State service.

This opinion, until and unless amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All Concur:

Joseph M. Bress, Chair

Barbara A. Black

Angelo A. Costanza

Robert E. Eggenschiller

Donald A. Odell, Members

Dated: April 25, 1995

Endnotes

1. Opinion and Order Regarding Flexible Rates - PSC Opinion No. 94-15 (July 11, 1994).
2. PSC Order Instituting Phase II of Proceeding (August 9, 1994).
3. Case No. 93-G-0932 - Proceeding on the Motion of the Commission to Address Issues Associated with the Restructuring of Emerging Competitive Natural Gas Market. Order instituting Proceeding (issued October 28, 1993).

4. PSC Order Deciding Petitions For Rehearing and Clarification. Issued and effective November 30, 1994.

5. Case No. 94-E-0952 - In the Matter of Competitive Opportunities regarding Electric Service - Notice Extending the Deadline for Comment (January 24, 1995).

6. Case No. 94-E-0952 - In the Matter of Competitive Opportunities Regarding Electric Service - Notice of Conference (January 24, 1995).

7. Request letter dated November 29, 1994.

8. This trade association represents the interests of non-utility owned electric generators in New York State.

9. If the State Energy Office is abolished in Fiscal Year 1995-6, it is unclear whether any other State agency will assume some or all of Energy's statutory responsibilities. It is possible that [the requesting individual] could be precluded by the two year bar from appearing before a State agency other than Energy. *See*, for example, [Advisory Opinion No. 93-11](#) in which the Commission determined that for purposes of the two year bar, the Office of Alcoholism and Substance Abuse Services is the former agency of employees of the Division of Alcoholism and Alcohol Abuse and the Division of Substance Abuse Services. These agencies were consolidated by the Legislature in 1992 (Chapter 223 of the Laws of 1992).

10. Statute §94.

11. The term proceeding is defined as "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgement . . . The proceedings of a suit embrace *all* matters that occur in its progress judicially." Blacks Law Dictionary 5th Ed. 1979.