

New York State Ethics Commission

Advisory Opinion No. 95-7: Application of the lifetime prohibition contained in Public Officers Law §73(8) to an employee of the New York State Consumer Protection Board.

INTRODUCTION

The following advisory opinion is issued in response to a request by [], a current employee of the New York State Consumer Protection Board, for an advisory opinion regarding how the lifetime bar contained in Public Officers Law §73(8) may affect his possible subsequent employment with a private sector trade organization.

Pursuant to the authority vested in it by Executive Law §94(15), the State Ethics Commission ("Commission") hereby renders its opinion that [the requesting individual] is not prohibited by Public Officers Law §73(8)(b) from: (1) rendering services with respect to legislation proposing to merge the Cable Commission with the Public Service Commission (PSC) or other State agency, or rendering services regarding proposed regulations to implement such legislation; (2) participating in future proceedings concerning regulation of the cable television industry before the Cable Commission or the PSC or any other successor agency; (3) participating in proceedings involving telephone service provided by individual cable television companies before the PSC; (4) participating in future rate proceedings of incumbent telephone companies; and (5) calling upon his experience in proceedings before State and Federal regulators to give advice or comment upon new transactions and matters, provided that confidential information is not involved. The Commission finds his inquiry as to future rulemaking proceedings to be premature.

BACKGROUND

[The requesting individual] has been employed as a Utility Intervenor Attorney at the New York State Consumer Protection Board ("CPB") since January 1980, except for a one month break in service. The CPB, an independent agency of the Executive Department, is authorized, among other things, to represent the interests of consumers before Federal, State and local administrative agencies, and, in particular, to intervene in proceedings before the Public Service Commission ("PSC").

The CPB has two distinct funding sources, and each of its activities is segregated according to its source. The CPB's Utility Intervention Unit is funded from "special revenues" derived from assessments levied upon the gas, electric, steam, water, and telephone companies regulated by the PSC. Accordingly, the CPB's Utility Intervenor Attorneys are primarily engaged in appearing before the PSC, as well as before Federal regulatory agencies, in proceedings involving utilities.

They also attempt to resolve customer complaints involving utility companies. All other CPB activity is funded from General Fund revenues.⁽¹⁾

During his tenure at the CPB, [the requesting individual] has appeared in many PSC ratemaking and rulemaking proceedings, particularly in those involving the State's largest utility, New York Telephone Company. He has also participated, in various degrees, in the CPB's legislative activities regarding telephone companies. In addition, in 1993, he represented the CPB's Executive Director at the New York Telecommunications Exchange, an *ad hoc* forum of government, industry, academic, and user interests convened by the State Department of Economic Development ("DED") and the PSC to generally discuss telecommunications issues affecting the State.

[The requesting individual] has begun negotiations for an attorney position with [a trade organization] which represents the interests of cable television companies. Although cable television service is not regulated by the PSC,⁽²⁾ a cable company (or its affiliate) may provide telephone service in New York State with the PSC's approval and subject to its regulatory oversight. Further, there have been periodic suggestions to combine into a single agency the State's regulatory oversight of the telephone and cable television industries.⁽³⁾

[The requesting individual] seeks an advisory opinion as to whether possible employment tasks in which he may be engaged on behalf of [the trade organization], should he be employed there, would be barred under the post-employment restrictions of Public Officers Law §73(8).

APPLICABLE LAW

Public Officers Law §73(8)(b) states, in relevant part, that:

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 or she personally participated during the period of his or her service or employment, or which was under his or her active consideration.

This provision, part of what is generally referred to as the "revolving door" provision, sets forth the ground rules for what individuals may do with the knowledge, experience and contacts gained from public service after they terminate their employment with a State agency.⁽⁴⁾ They are prohibited from appearing, practicing, communicating or otherwise rendering services before any State agency, or receiving compensation for such services rendered anywhere, in relation 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 in State service.

DISCUSSION

Question May [the requesting individual], on behalf of [the trade organization], participate in the development of legislation that would transfer the jurisdiction of the Cable Commission to the PSC or some other agency, or in the development of regulations implementing such a transfer?

1.

Over the past several years, there have been periodic suggestions to combine into a single agency the State's regulatory oversight of the telephone and cable television industries.⁽⁵⁾ During his tenure at the CPB, [the requesting individual] has not reviewed any legislative proposals addressing this subject.

However, the subject of such a merger did arise during the course of the New York Telecommunications Exchange ("Exchange") forum attended by [the requesting individual]. The issue presented is whether his participation in the Exchange, as described below, would bar him from rendering services in connection with any legislation proposing to transfer regulatory oversight of the cable television industry to the PSC or some other entity, or in connection with any implementing regulations.

The Exchange was a highly-diverse forum convened in 1993 by DED and PSC to discuss telecommunications issues affecting the State. The CPB's Executive Director ("Executive Director") was one of the approximately 37 individuals drawn from the private and public sectors, as well as from academia, to participate in the Exchange. At the Executive Director's direction, [the requesting individual] represented him at the Exchange's meetings.

The co-sponsoring agencies -- DED and PSC -- divided the Exchange members into various subject-matter-specific "task forces" and asked each task force to consider possible policy suggestions in its assigned area for incorporation into a final report, which DED and PSC would present to the Governor.

The Executive Director was assigned to the "Infrastructure, Technology & Investment" task force. The mission of that task force was to consider the need for a policy to facilitate and encourage the modernization of the State's telecommunications infrastructure.

A different group, the "Regulatory Options" task force, was charged with considering regulatory policies needed to ensure the availability of telecommunications services at reasonable prices and the degree of regulatory oversight that should be exercised over telecommunications providers. The "Regulatory Options" task force offered the suggestion that the regulation of the cable television industry be transferred to the PSC. All task force meetings were open to the public, and [the requesting individual], although not a member of the task force, attended some of its meetings. While [the requesting individual] may have offered his views concerning the way in which the PSC regulates New York Telephone Company, he has no recollection of ever having discussed the merger suggestion at any meetings of the Regulatory Options Task Force or any other task force.

The Task Forces met from January to June of 1993. In the Fall of 1993, DED and PSC prepared and circulated for comment a draft report of the forum which incorporated the policy suggestions of the several task forces. In commenting on the draft in October of 1993, the CPB expressed

reservations as to the suggestion that the PSC regulate the cable television industry. However, DED and PSC retained that suggestion.

Ultimately, a final 67-page report was presented to the entire membership for a general discussion and, finally, an "up-or-down" vote. [The requesting individual] recalls that the report received overwhelming approval; he does not believe a "roll-call" vote was conducted. Although the CPB disagreed with many of the specific suggestions in the report, the agency generally approved of it as a whole, and [the requesting individual] was directed by the Executive Director to cast his vote in support.

Based on these facts, the Commission concludes that [the requesting individual's] participation in the Exchange would not disqualify him from rendering services on [the trade organization's] behalf regarding any future legislative or regulatory proposals to transfer the Cable Commission's authority to the PSC or some other agency. His casting of the Executive Director's vote in support of the overall Exchange report did not constitute his "direct concern and personal participation" or "active consideration" of the merger suggestion, triggering the lifetime bar.

As noted, the Executive Director was not a voting member of the "Regulatory Options" task force. [The requesting individual's] attendance at meetings of the Task Force, without his playing an active role regarding the merger suggestion, clearly did not constitute his personal participation (*see*, [Advisory Opinion No. 90-16](#) ["Mere presence in a room, without any evidence of substantive involvement or participation, is not either direct concern and personal participation or active consideration of a matter in relation to a transaction, case, application or proceeding and does not establish facts which trigger the lifetime bar"]).

The more difficult issue is his vote on the final report. However, as noted, the merger suggestion was included among many others in the overall report which was presented by DED and PSC to the entire Exchange membership for a single vote. [The requesting individual's] casting of the Executive Director's vote in favor of the overall report, even though the CPB had opposed many specific recommendations therein, does not necessitate a finding of personal participation. As the Commission previously held in [Advisory Opinion No. 93-13](#), what is decisive to a finding of whether a former employee personally participated in and was directly concerned with or actively considered a transaction is whether the former employee had some official State role in affecting the outcome of the transaction. In that case, the Commission held that while the employee "was certainly interested in the outcome" of the transaction, his interest did not rise to the level of direct concern and personal participation or active consideration necessary to invoke the lifetime bar because his role "was not one of an active participant or a decision maker."

Here, [the requesting individual's] casting of the Executive Director's vote on the overall report did not alter the outcome since the Exchange's membership evidenced overwhelming support of the overall report. In fact, it appears that no roll call was ever taken. Accordingly, the Commission concludes that [the requesting individual] did not "personally participate" in the merger suggestion contained in the final report. He is, therefore, not prohibited by Public Officers Law §73(8)(b) from rendering services with respect to legislation proposing to merge the Cable Commission with the PSC or other State agency, or from rendering services regarding proposed regulations to implement such legislation.

Question 2. If the PSC acquires jurisdiction over the cable television industry, may [the requesting individual] participate in proceedings pertaining to the regulation of that industry?

[The requesting individual] has told the Commission that during the course of his State employment, he never appeared or participated in any proceeding or matter before the Cable Commission. Since he never participated in any proceeding concerning regulation of the cable television industry, there is no lifetime bar to his participating in any future ratemaking, rulemaking, or other matter before the Cable Commission or the PSC or any other successor agency relating to regulation of the cable television industry.

Question 3. May [the requesting individual] participate in proceedings of specific cable television companies before the PSC regarding their provision of telephone service?

[The requesting individual] has told the Commission that he has not participated in any proceedings involving telephone service provided by individual cable television companies, nor has he been involved in the rates or rules governing any such service. Therefore, there is no bar against his rendering services in relation to such matters in the future.

Question 4. May [the requesting individual] participate in future rate proceedings of incumbent telephone companies?

[The requesting individual] submits that a rate case convened to consider the reasonableness of rates of a utility for a specified period is distinct from every other rate case for that utility, as each case is convened to consider the reasonableness of rates for a specific period. The Commission agrees.

The PSC has traditionally set a telephone company's rates to produce sufficient revenue to recover the firm's "revenue requirements"⁽⁶⁾ in a specific, forecasted twelve-month period. If, due to changes in customer demand, operating costs, investor-return requirements or other factors, once-appropriate rates are suspected to be either excessive or inadequate relative to revenue requirements in a future period, the PSC may investigate whether the rates should be changed for the future period. Such investigations may be instituted upon the PSC's own motion, upon a consumer complaint, or upon a request of the utility.

In recent years, the PSC has experimented with alternative regulatory plans to govern utility rates. Under these alternative plans, rates are fixed for several years. Following the conclusion of such a plan, the PSC may investigate what rates would be just and reasonable for the ensuing period.

In both traditional and alternative regulation, successive rate proceedings involve substantially different fact situations: operating costs may decline as a result of technological innovations and efficiencies; finance costs may vary with changes in investor perceptions of risk and the vagaries

of world capital market activity; and customer demand may change, as new products are offered or competition expands. Accordingly, in considering whether to change rates for a specified future period, the PSC must re-estimate every component of a utility's revenue requirements for the new rate period and determine the rate elements and rate structure that will best recover the revised revenue requirements in the new prospective rate period. The Commission therefore concludes that successive utility rate cases should be considered different "cases, proceedings, applications, or transactions" for the purposes of Public Officers Law §73(8)(b), and [the requesting individual] may participate in future rate proceedings of incumbent telephone companies.

Question To what extent may [the requesting individual], in general, participate in future
5. rulemaking proceedings regarding the provision of telephone services?

In addition to setting rates, the PSC establishes and revises its rules and policies on a variety of subjects. According to [the requesting individual], the PSC considers modifying its rules much less often than it considers changing rates, and rule modifications are only considered when factual circumstances, such as evolving technology, new economic or competitive conditions, or different regulatory objectives, warrant such consideration.

[The requesting individual] argues that if a significant period of time has elapsed since the PSC last adopted or revised a given rule, a new proceeding to consider modifying that rule should be deemed a different transaction for purposes of the lifetime bar. Under this argument, successive rulemaking proceedings governing the same subject but separated by a significant period of time would be considered different transactions for the purposes of Public Officers Law §73(8)(b).

The Commission is unwilling to make such a broad determination at this time. If an individual personally participated in the establishment of a particular rule while in State service, the mere passage of time would not necessarily be sufficient to allow the individual to personally participate in proposed modifications to the very same rule without violating the lifetime bar. On the other hand, if a rule were amended several times, an individual's rendition of services on proposed further modifications to the then current version of the rule might not be deemed to be work on the same "transaction." The question would be whether the rule had so changed as to make it a different transaction. The Commission has previously stated that the determination of whether the lifetime bar applies is one which must be made on a case-by-case basis (*see*, Advisory Opinion No. 90-22). Therefore, the Commission considers this question not yet ripe for review.

Question May [the requesting individual], in the context of new transactions and matters,
6. discuss and comment upon proceedings in which he previously participated as a State employee?

In any new position, [the requesting individual] may call upon his experience in proceedings before State and Federal regulators to give advice or comment upon new transactions and matters, provided that confidential information is not involved.

As the Commission stated in [Advisory Opinion No. 91-2](#), a former State employee may utilize his or her knowledge of past policies and procedures to provide advice on new transactions. Thus, Public Officers Law §73(8)(b) does not restrict the use of his knowledge regarding past proceedings in providing advice on any new transactions, provided that the knowledge used is that of general knowledge and not of any "insider information" which would not otherwise be available.⁽⁷⁾

CONCLUSION

The Commission concludes that [the requesting individual] is not prohibited by Public Officers Law §73(8)(b) from: (1) rendering services with respect to legislation proposing to merge the Cable Commission with the PSC or other State agency, or rendering services regarding proposed regulations to implement such legislation; (2) participating in future proceedings concerning regulation of the cable television industry before the Cable Commission or the PSC or any other successor agency; (3) participating in proceedings involving telephone service provided by individual cable television companies before the PSC; (4) participating in future rate proceedings of incumbent telephone companies; and (5) calling upon his experience in proceedings before State and Federal regulators to give advice or comment upon new transactions and matters, provided that confidential information is not involved. The Commission finds his inquiry as to future rulemaking proceedings to be premature.

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

Angelo A. Costanza

Robert E. Eggenschiller

Donald A. Odell, Members

Dated: March 7, 1995

Endnotes

1. The salaries of several CPB employees are funded from both sources and, in recent years, the Legislature has required the CPB to report the distribution of each such employee's actual time between utility and non-utility activities. Utility Intervenor Attorneys, however, are solely fully funded from "special revenues".

2. Pursuant to a scheme of distributed regulatory authority established by Congress, cable television service is regulated by the Federal Communications Commission, the New York State Commission On Cable Television, and local municipalities (*see generally*, 47 USC §521, *et seq.*).

3. The Commission notes that the 1995 Executive Budget, which has been presented to the Legislature as of the Commission's consideration of this opinion, recommends the merger of the Cable Television Commission within the PSC, effective April 1, 1995.

4. There is also a two year bar which is absolute with respect to appearing, practicing or receiving compensation for services rendered before a State agency that employed a former employee. [The requesting individual] has indicated that he will not appear or practice before the CPB or render services on a matter before the CPB. Thus, he is not seeking an opinion with regard to the two year bar.

5. As previously noted, the 1995 Executive Budget recommends the merger of the Cable Commission within the PSC.

6. A firm's revenue requirements consist of all prudently incurred operating expenses, an allowance for depreciation, and a fair return to debt and equity holders on capital investment used to provide utility service during the defined forecasted twelve-month period.

7. We do not address in this opinion the extent to which attorney-client privilege under the Code of Professional Responsibility might affect [the requesting individual] and prohibit his involvement in some of these activities. Those ethical judgments are properly addressed to the Committee on Professional Ethics of the New York State Bar Association.