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ATTORNEY GENERAL

88-1

STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

February 1, 1988

Honorable John R. McKernan, Jr.
Governor of Maine
State House Station #1
Augusta, Maine 04333

Dear Governor McKernan:

You have asked to what extent the activities of Mr. Lewis J. Perl as a consultant to parties to various proceedings before the Public Utilities Commission would constitute a legal bar to his participation in pending and future proceedings at the Commission were he to be confirmed by the Legislature as a member of the Commission.1/ For the reasons which follow, it is the Opinion of this Department that, should he assume office, Mr. Perl must disqualify himself from the proceeding currently pending before the Commission with regard to the application of the Central Maine Power Company for a certificate of public convenience and necessity for the purchase of generating capacity and energy from Hydro-Quebec, any subsequent proceedings for the construction of power lines associated with such purchase, and any proceedings concerning the "avoided cost" of Central Maine Power Company cogeneration power purchases until a certificate for the Hydro-Quebec purchase is granted. He must also disqualify himself from the proceeding currently pending before the Commission concerning an examination of the New England Telephone Company's marginal cost methodology. With regard to other proceedings, including

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1/ Your inquiry is specifically directed to Mr. Perl's consulting work for Central Maine Power Company with regard to its proposed purchase of generating capacity and energy from Hydro-Quebec. In the interest of completeness, however, this Department has asked the Public Utilities Commission to advise it of all of Mr. Perl's prior activities before the Commission to enable it to determine their effect, if any, on his participation as a Commission member.

subsequent Central Maine Power Company rate cases (in which the fact of the Hydro-Quebec purchase may be relevant), Mr. Perl would not automatically be disqualified, but should be guided on a case-by-case basis by the general principles of law set forth herein relating to the prejudgment of issues of adjudicative or legislative fact.

In reaching these legal conclusions, this Department does not wish to be misinterpreted as offering any view on the policy judgment to be made by you, as Governor, and the appropriate bodies of the Legislature with regard to Mr. Perl's general suitability for service on the Commission. For example, Mr. Perl's publically stated views about the economic viability of nuclear power plants generally and the desirability of Maine utilities' continual ownership of the Seabrook nuclear power plant may be relevant to your policy determination and that of the Legislature. They are not, however, relevant to the legal determination whether he must disqualify himself from any particular pending or future Commission proceeding. This Opinion confines itself to the narrow question of legal disqualification. It is not meant to encroach upon the issue of Mr. Perl's appointment to the Commission.

I. Facts

The facts, as this Office understands them, regarding Mr. Perl's past activities before the Commission are as follows: From September, 1972 to the present, Mr. Perl has held the position of Senior Vice President of National Economic Research Associates, Inc. (NERA), an economic research organization located in White Plains, New York. During that time, he has been retained by numerous public utilities all over the United States as a consultant on utility regulatory issues and has testified on behalf of these companies before many state utility commissions.2/ Beginning in 1984, these commissions included the Maine Public Utilities Commission, before whom Mr. Perl has filed testimony on behalf of the respective concerned utilities, in the following proceedings:3/

1. PUC Docket No. 84-80 (Maine Public Service Company Rate Case)

2/ He has also written numerous articles and given numerous speeches in the general field of utility regulation.

3/ Needless to say, the views contained in this Opinion are limited to the facts set forth herein. If additional facts concerning Mr. Perl's activities before the Commission should come to light, this Department would be happy to provide additional advice concerning them.

2. PUC Docket No. 84-113 (Investigation of PUC into Ownership by Maine Utilities (Central Maine Power Company, Bangor Hydro-Electric Company and Maine Public Service Company) of Seabrook Nuclear Power Station)

3. PUC Docket No. 84-120 (Central Maine Power Company Rate Case)

4. PUC Docket Nos. 87-40 and 87-268 (Central Maine Power Company Petition for Certificate of Public Convenience and Necessity for Purchases of Generating Capacity and Energy from Hydro-Quebec)[4/]

In addition, Mr. Perl is the author of other studies which have been submitted to the Commission by parties to proceedings before it, but which did not take the form of testimony in those proceedings. These studies include:

1. PUC Docket No. 82-112 (CMP Power Supply Investigation). CMP submitted NERA's report on its capacity planning and load forecasting (dated February 14, 1984). This report was part of Mr. Perl's testimony in PUC Docket No. 84-113 (Seabrook Investigation).

2. PUC Docket No. 86-112 (Examination of New England Telephone Company Marginal Cost Study Methodology). NET submitted to the PUC a proposed marginal cost methodology and marginal cost study, which it had had prepared for a similar proceeding before the Massachusetts Department of Public Utilities, and in the preparation of which Mr. Perl participated.

3. Mr. Perl is also the author of two studies prepared for non-Maine utilities, dated December 16, 1983 and May 2, 1985, on the effects of local measured service, which were considered by the Public Utilities Commission during its proceedings on the subject in 1984-85.

Finally, this Opinion assumes that if Mr. Perl is confirmed as a member of the Commission, he will sever his connection

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[4/] Mr. Perl's testimony in this proceeding was presented jointly with Mr. John H. Wile, his associate at NERA. Mr. Wile appeared at the public hearing on the testimony to sponsor it and to be subject to cross-examination because Mr. Perl was unable to be present due to another commitment.

completely with NERA.5/

II. Law

Generally, the law relating to the disqualification of members of public boards or agencies from participating in particular agency proceedings6/ derives from the due process clause of the Fourteenth Amendment of the United States Constitution and Article I, Section 6-A of the Maine Constitution. Those provisions insure "the resolution of contested questions [by administrative agencies] by an impartial and disinterested tribunal." Berkshire Employees Ass'n v. NLRB, 121 F.2d 235, 238 (3rd Cir. 1941), quoted with approval in Amos Treat & Co. v. SEC, 307 F.2d 260, 264 (D.C.Cir. 1962). See Ohio Bell Telephone Co. v. Public Utilities Comm'n, 301 U.S. 292, 304-05 (1937) (due process applies to regulatory bodies). New England Telephone & Telegraph Co. v. Public Utilities Comm'n., 448 A.2d 272, 281 (Me. 1982).

Inherent in the concept of due process is the principle that the decision-maker be one who is "capable of judging a particular controversy fairly on the basis of its own circumstances." United States v. Morgan, 313 U.S. 409, 421 (1941). See Gashgai v. Board of Registration in Medicine, 390 A.2d 1080 (Me. 1978). Thus, the decision-maker must be free of legal bias, a requirement imposed on Maine administrative proceedings by Sections 9063(1) and 11007(4)(C)(4) of the Maine Administrative Procedure Act, 5 M.R.S.A. § 8001, et seq. The most obvious form of bias occurs when the adjudicator has a pecuniary interest in the outcome of the dispute. Gibson v. Berryhill, 411 U.S. 564, 479 (1973), relying on Tumey v. Ohio, 273 U.S. 510 (1927). But bias may also be found to be present when the decision-maker is determined to have "prejudged" the case. Cinderella Career & Finishing Schools v. FTC, 425 F.2d 583, 589-92 (D.C.Cir. 1970). Thus, to guard against even the

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5/ This Department has not been advised as to the precise manner in which Mr. Perl will sever his connection. Since it is possible, however, that, in addition to drawing a salary from NERA, Mr. Perl has had an interest in the company itself, the Opinion will assume that that interest will be terminated in such a manner that he will have no financial interest in the future fortunes of the company.

6/ So far as this Department is aware, there is no principle of law prohibiting a prospective member of a public agency from being seated or requiring his removal because of the existence of impediments to his participation in one or more agency proceedings. Thus, while the existence of such impediments may be relevant to you as Governor or to a legislative body making the policy determination whether to nominate or confirm a person for public office, they cannot serve as a basis for the vacation of the seat by a court.

appearance of prejudgment, the courts have consistently invalidated agency decisions in which a member of the agency had participated on behalf of any party prior to his accession to the agency. American General Insurance Co. v. FTC, 589 F.2d 462 (9th Cir. 1979); Amos Treat & Co. v. SEC, supra; Trans World Airlines v. CAB, 254 F.2d 90 (D.C.Cir. 1958); Dr. Bonham's Case, 8 Rep. 114a, 118b (C.P. 1610) (Coke, J.) (". . . one cannot be judge and attorney for any of the parties"). See Canon III (6)(b) of the Code of Ethics of Members of the National Association of Regulatory Utility Commissioners ("A Commissioner should disqualify himself or herself in a proceeding . . . where . . . the Commissioner has served as a lawyer or representative in the matter in controversy . . .").

More difficult problems present themselves in the case of a decision-maker who neither has a pecuniary interest in a proceeding, nor has participated in it prior to his assuming decision-making responsibilities. Here, in reviewing claims of prejudgment, the courts have, first of all, adhered to one vital distinction. Analogizing agency adjudicatory and rulemaking activities to actions of the judicial and legislative branches, respectively, the courts have consistently ruled that disqualification for prejudgment will be found much more rarely in rulemaking than in adjudicatory contexts. In the former, the rule in the leading case on the subject, Association of National Advertisers v. FTC, 627 F.2d 1151 (D.C.Cir. 1979), cert. denied 447 U.S. 921 (1980), is that

> . . . a Commissioner should be disqualified only when there has been a clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding. Id. at 1170.

Thus, the Federal Trade Commissioner whose behavior was at issue in that case was not disqualified from participating in a rulemaking proceeding concerning children's advertising even though he had made a speech, written articles and given interviews in which he vigorously expressed the view that children can be harmed by sugared products and are unable to understand advertising.

This is not to say, however, that the possession of strong views relevant to adjudicatory proceedings will necessarily disqualify an agency member. In such cases, a further distinction must be drawn between questions of "adjudicative fact" and those of law or policy. If the agency member's views relate to the latter categories of issue, he is unlikely to be disqualified (absent a showing of close-mindedness of the kind required for disqualification in the rulemaking context). It is only if he is found to have hardened views on issues of fact

"concerning the immediate parties - who did what, where, when, how and with what interest," will he be vulnerable to disqualification for prejudgment. Id. at 1161, quoting with approval 2 K. Davis, Administrative Law Treatise, § 15.03 at 353 (1st ed. 1958). See New England Telephone & Telegraph Co. v. Public Utilities Comm'n., 448 A.2d at 280 ("A preconceived position on law, policy or legislative facts is not a ground for disqualification").

III. Application of Law to Facts

Applying these principles to the facts set forth above concerning Mr. Perl's participation in future Public Utilities Commission proceedings, the first issue to address is whether there is any ground for disqualification for pecuniary interest. Since this Opinion assumes that Mr. Perl will have severed all ties with NERA, this question does not arise.7/

The next question to address is whether Mr. Perl is disqualified from participating in any proceedings pending at the time of his assumption of office. Only two such proceedings present themselves for consideration here: the pending petition of the Central Maine Power Company for a certificate of public convenience and necessity for purchasing additional generating capacity and energy from the Hydro-Quebec Company (PUC Docket No. 87-268), and the New England Telephone examination of marginal cost study methodology (PUC Docket No. 86-112). All of the other proceedings enumerated above to which Mr. Perl has had even a tangential relationship (two electric utility rate cases, the CMP power supply

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7/ A question does arise, however, concerning the operation of 5 M.R.S.A. § 18(2), which prohibits such participation by an agency member if a "person with whom [the member] has been associated as a partner or a fellow shareholder in a professional service corporation pursuant to Title 13, chapter 22 [the Maine Professional Service Corporation Act] during the preceding year" has a "direct and substantial financial interest" in the proceeding. The issue thus arises whether Mr. Perl would be disqualified if NERA were to be involved in some new proceeding during his first year in office. While it is clear that NERA, having been hired by a party to assist in achieving a certain result before the Commission, would, in such circumstances, have the requisite financial interest in the proceedings, it might be argued that the prohibition does not by its terms apply because NERA is not incorporated in Maine. However, since NERA is undoubtedly incorporated under a similar statute of another state, this Department is of the view that it would be covered by the statute, in view of the Legislature's obvious purpose of disqualifying officials for one year from participating in proceedings in which their prior professional associates are involved.

investigation, the Seabrook ownership proceeding and the local measured telephone service proceeding) have long since terminated. Thus, only the Hydro-Quebec case and the NET examination remain for consideration under the rule that, in order to present even the appearance of prejudgment, an agency member may not act as a decision-maker in a proceeding in which he had participated on behalf of a party.

In the Opinion of this Department, Mr. Perl would be disqualified from participating in both matters. In the Hydro-Quebec proceeding, as indicated above, he was retained by the Central Maine Power Company to present testimony before the Commission as to the advisability of the proposed transaction, which testimony was submitted, on the Company's behalf, at a public hearing. This testimony occurred in the context of a proceeding denominated "preliminary investigation" conducted by the Commission following the filing of a "Notice of Intent" by Central Maine Power Company to file a petition for a certificate of public convenience and necessity, and bearing PUC Docket No. 87-40. The purpose of this proceeding, as set forth in a Commission Order of April 27, 1987, was to obtain the concurrence of the Commission that it was prudent for the company to pursue the purchase of substantial amounts of power for a 29-year period from Hydro-Quebec.

The burden of Mr. Perl's Hydro-Quebec testimony, contained in a document dated March 17, 1987, was that the Company's forecast of long-term energy needs was reasonable and that the Hydro-Quebec purchase was the best means of meeting the demand from a cost-benefit perspective. On June 25, 1987, the Commission issued an order approving further activities in pursuit of the purchase, emphasizing that it was making only a prima facie finding that the purchase was reasonable, but reserving for later decision a final determination, not only of the reasonableness of the transaction, but the ability of the Company to recover its expenses in pursuing it through rates. On July 19, 1987, the Company filed its petition for a certificate of public convenience and necessity, still under PUC Docket No. 87-40. On September 9, 1987, the Commission issued an order concerning petitions to intervene in the proceeding in which it emphasized that issues before it were the need for the power and the reasonableness of the Hydro-Quebec alternative, compared to other sources of power and conservation, the exact issues on which Mr. Perl had presented testimony. On October 30, 1987, the Commission, acting at the suggestion of the parties, terminated the existing certificate proceeding and opened a new proceeding on the Company's refiled petitions for public convenience and necessity, assigning to it PUC docket No. 87-268. This order further incorporated the record in PUC Docket No. 87-40, including Mr. Perl's testimony, into the new proceeding.

The question thus presented is whether Mr. Perl is disqualified, by virtue of his participation in the "preliminary investigation," from deciding the "certificate proceeding." In the Opinion of this Department, he is. First, under the rule disqualifying persons from participating in proceedings in which they have appeared on behalf of a party, Mr. Perl appears to be clearly disqualified because his testimony in Docket No. 87-40 has been incorporated into the record in Docket No. 87-268. Moreover, beyond this, even if the second proceeding could somehow be considered an entirely new one, Mr. Perl would still be disqualified because the subjects of his testimony - the need for additional power and the reasonableness of the Hydro-Quebec option in view of alternative sources of power and conservation -- are issues of adjudicative fact and constitute the basic issues which the Commission must ultimately decide in the case. His expression of opinion on them would thus constitute a "prejudgment" within the meaning of the due process clause, and any decision which the Commission might reach in the matter would be subject to subsequent judicial invalidation.

With regard to the examination of the NET marginal cost study methodology, PUC Docket No. 86-112, we reach the same conclusion. Here, although Mr. Perl has not personally participated in the Maine Commission proceeding, he did participate in preparing testimony in a similar proceeding before the Massachusetts Commission, which testimony has been conveyed to the Maine Commission by NET. Thus, Mr. Perl can fairly be determined to have indirectly participated in the Maine proceeding and must disqualify himself from deciding it.8/

This leaves the question as to whether any of Mr. Perl's activities before the Commission would lead to his disqualification in any Commission proceedings not currently pending. Here, it is not possible for this Opinion to be definitive, since the exact nature of such proceedings is as yet unknown. Nonetheless, the following observations may be made. First, with regard to future proceedings in which the accomplishment of the Hydro-Quebec power purchase is at issue, the advisability of Mr. Perl's participation is doubtful. For example, as the Commission has emphasized in its orders, the "certificate proceeding" does not include the question of the approval for the construction of the necessary transmission

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8/ This is particularly true since this Department is advised that the Maine Commission is waiting for the Massachusetts decision to be made before reaching its own determintion. Thus, even if the degree of Mr. Perl's involvement in the Maine proceeding were judged to be insufficient to warrant disqualification per se, the views which he expressed to the Massachusetts Commission would constitute a prejudgment in fact of factual issues to be determined by the Maine Commission.

lines in Maine, a certificate for which is required by 35-A M.R.S.A. § 3132. Although Mr. Perl has not expressed any opinion on the need for such lines, he could reasonably be assumed to favor their construction in view of his endorsement of the entire project. Thus, a strong element of prejudgment might well appear to be present were he to participate in a transmission line certificate proceeding.

Next, the question of Hydro-Quebec purchase might also arise in the context of proceedings which the Commission has for some time been conducting to determine the cost which public utilities must pay to so-called cogenerators from whom they are required by law to purchase power.9/ In such "avoided cost" proceedings, the Commission may determine, and indeed has determined, that the cost should be based on a hypothetical price paid by the Company for Hydro-Quebec power.10/ As long, however, as the issue of whether the Hydro-Quebec purchase is to be approved is pending before the Commission, a Commissioner who favors the purchase would have a strong interest in continuing to use it as the "proxy" for the determination the hypothetical cost of alternative power to Central Maine Power. Thus, in view of Mr. Perl's testimony regarding the advisability of the Hydro-Quebec purchase, this Department is of the Opinion that he must disqualify himself from all future "avoided cost" proceedings in which such a purchase may be relevant until such time as the certificate authorizing it is granted.

Next, the Hydro-Quebec purchase will be of significance in future Central Maine Power rate cases, in which the Commission will have to determine the extent to which its costs, both before and after its approval, may be passed on to consumers through rates. Here, in the view of this Department, Mr. Perl's participation would not be legally barred by his testimony in the "certificate proceeding." In contradistinction to the transmission line or "avoided cost" cases, the issue of whether the Hydro-Quebec project will be accomplished is not present in a future rate; it would be a fact. Thus, Mr. Perl's public statements favoring the project should not affect his judgment on the merits of such ratemaking

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9/ Chapter 36 of the Commission's Rules requires that such determinations be made on an annual basis for each major utility in the State.

10/ In late 1986, the Commission made such an assumption in a proceeding to establish the rate to be paid by Central Maine Power to Boise-Cascade Corp., a cogenerator. Prior to this time, the Commission had assumed a hypothetical coal-fired power plant as the "proxy."

determinations since they are not relevant to those issues.11/

Finally, with regard to other proceedings not involving the Hydro-Quebec project, there is little advice this Department can offer other than to reiterate the general principles set forth above that Mr. Perl should be careful not to participate in rulings on adjudicative facts where he may have given testimony before the Commission or otherwise expressed views on such facts. He must be sure, with regard to other issues, that he does not have the "closed mind" described in Association of National Advertisers v. FTC, supra.

I hope this answers your question. Please feel free to reinquire of this Department if further clarification is needed, or if any additional questions regarding Mr. Perl's past activities and future Commission proceedings arise.

Sincerely,

JAMES E. TIERNEY
Attorney General

JET/ec

cc: Senate President Charles A. Pray
House Speaker John L. Martin
Sen. John M. Kerry
Rep. Harry L. Vose
Chairmen, Joint Standing Committee on Utilities
Mr. Lewis J. Perl

11/ It is, of course, possible that any issue concerning Hydro-Quebec might arise in a rate case that would change this conclusion. As with other matters, Mr. Perl's ability to participate would have to be assessed on a case-by-case basis.