

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2015-06**

**Joint Application of Northern Pass Transmission LLC  
and Public Service Company of New Hampshire  
d/b/a Eversource Energy for a Certificate of Site and Facility**

**June 21, 2018**

**ORDER ON MOTION FOR RECUSAL**

This Order denies a motion for recusal filed by the International Brotherhood of Electrical Workers and the Coos County Business and Employers Group (Business Group).

**I. Background**

The evidentiary record closed on December 22, 2017. On February 1, 2018, the Subcommittee concluded deliberations and voted to deny the Application. On February 28, 2018, prior to the Subcommittee issuing its written decision, the Applicant filed a “Motion for Rehearing and Request to Vacate Decision of February 1, 2018, and Resume Incomplete Deliberations.” On March 12, 2018, the Subcommittee held a public meeting on the Applicant’s motion. After deliberating on the motion, the Subcommittee suspended the decision to deny the Application, subject to certain conditions. A written order memorializing the decision was issued the following day. On March 30, 2018, the Subcommittee issued a written Order and Decision Denying the Application for Certificate of Site and Facility.

On April 24, 2018, the Business Group filed a Motion for Recusal seeking the recusal of Subcommittee members Commissioner Kathryn Bailey and Public Member Patricia Weathersby.

Counsel for the Public<sup>1</sup>; Municipal Intervenors Groups 1 South, 2, 3 South and 3 North (Municipalities)<sup>2</sup>; the Society for the Protection of New Hampshire Forests (Forest Society)<sup>3</sup>; and Bethlehem to Plymouth Non-Abutting Property Owners Group of Intervenors all objected.

On May 24, 2018, the Subcommittee deliberated and voted 5-0 to deny the Motion to Recuse as it relates to both Commissioner Bailey and Ms. Weathersby. Commissioner Bailey and Ms. Weathersby abstained.

## **II. Positions of the Parties**

The Business Group claims that Commissioner Bailey and Ms. Weathersby should recuse themselves because they lack the requisite impartiality to continue participating in the proceeding. The Business Group asserts that Commissioner Bailey demonstrated bias during deliberations by considering that the decision of the Subcommittee may be appealed and that it may be beneficial to stop deliberations without creating an unnecessary record. The Business Group asserts that Ms. Weathersby demonstrated her alleged bias during the hearing on March 12, 2018, when stating that her opinion that the Applicant failed to meet its burden of proof remained unchanged and is unlikely to change if the Subcommittee proceeded to consider additional statutory factors.

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<sup>1</sup> The following parties joined the Objection filed by Counsel for the Public: (i) Ashland to Deerfield Non-Abutting Property Owners Group of Intervenors; (ii) Stark to Bethlehem Non-Abutting Property Owners Group of Intervenors; and (iii) Mary Lee.

<sup>2</sup> The following parties joined the Municipalities' Objection: (i) Municipal Group 1 North; (ii) McKenna Purchase Association; (iii) the Grafton County Commissioners; and (iv) Deerfield Abutting Property Owners Group of Intervenors.

<sup>3</sup> The following parties joined the Forest Society's Objection: (i) Bethlehem to Plymouth Abutting Property Owners Group of Intervenors; (ii) Dummer, Stark, Northumberland Abutters Property Owners (overhead section of the Project) Group of Intervenors; (iii) Whitefield to Bethlehem Abutting Property Owners Group of Intervenors; (iv) Clarksville to Stewartstown Property Owners Group of Intervenors; (v) Non-Governmental Organizations Group of Intervenors; and (vi) the Pemigewasset River Local Advisory Committee.

Counsel for the Public argues that the Motion is legally and factually flawed and argues that law relied upon by the Business Group is not applicable to this case. Counsel for the Public points out that cases cited by the Business Group address pre-existing conflict of interests (*Appeal of City of Keene*, 141 N.H. 797 (1997); *Appeal of Cheney*, 130 N.H. 589 (1988)), and extra-judicial statements (*Appeal of Lathrop*, 122 N.H. 262 (1982); *N.H. Milk Dealers' Ass'n v. Milk Control Board*, 107 N.H. 335 (1973)). Commissioner Bailey and Ms. Weathersby made the statements during a deliberative session and while considering the merits of the Applicant's first motion for reconsideration. Counsel for the Public explains that the United States Supreme Court held that judicial officers should recuse themselves if statements made by them in the course of judicial proceedings demonstrate "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 556 (1994). Counsel for the Public argues that neither Commissioner Bailey nor Ms. Weathersby demonstrated bias, antagonism, animus, hostility or anger. Instead, they expressed opinions that the Subcommittee members formed because of participation in this docket. Counsel for the Public concludes that there is no reason for the Subcommittee members to recuse themselves because nothing in the record demonstrates bias or antagonism.

The Municipalities argue that the facts and law do not support the Business Group's position and assert that the statements made by Commissioner Bailey and Ms. Weathersby do not indicate bias. They also argue that law cited by the Business Group is distinguishable from the circumstances of this case.

The Forest Society argues that administrative officials serving in quasi-judicial capacity are "presumed to be of conscience and capable of reaching a just and fair result." *See Webster v. Town of Candia*, 146 N.H. 430, 441-42 (2001). To rebut the presumption of impartiality,

evidence must show the “existence of bias, the likelihood of bias, or an appearance of such bias that the judge is unable to hold the balance between vindicating the interests of the court and the interests of a party.” *See Appeal of Tapply & Zukatis*, 162 N.H. 285, 296-97 (2011). The Forest Society asserts that statements relied upon by the Business Group do not demonstrate bias. The Subcommittee members stated their positions that were formed because of participation in this docket and their statements do not contain indicia of a “deep-seated favoritism or antagonism that would make fair judgment impossible.” *See Id.*

The Bethlehem to Plymouth Non-Abutting Property Owners Group of Intervenors argues that the Business Group misconstrued the statements made by the Subcommittee members and such statements do not demonstrate any bias.

### **III. Analysis and Findings**

There is a presumption of “regularity and impartiality attending the actions of an administrative agency.” *Appeal of Lathrop*, 122 N.H. 262, 265 (1982). While addressing a standard for disqualification of a Public Utility Commissioner, the New Hampshire Supreme Court found the standard and reasoning used by United States Supreme Court for disqualification of federal judges instructive. *Appeal of Seacoast Anti-Pollution League*, 125 N.H. 465, 470 (1984). The Court held that a Public Utilities Commissioner, similar to a federal administrative law judge, should disqualify herself from any proceeding in which her impartiality might be reasonably questioned. RSA 363:12, VII; *see* 28 U.S.C.A. § 455(a); *Id.* The standard is an objective one. *Appeal of Seacoast Anti-Pollution League*, 125 N.H. at 470-471.

The United States Supreme Court further explained in *Liteky v. United States*, 510 U.S. 540 (1994), that a judge should not be disqualified for bias or prejudice if her knowledge and the opinion expressed (even an exceedingly ill opinion about the parties) were properly and

necessarily acquired in the course of the proceedings. 510 U.S. at 550-51. A judge is expected to form opinions about the credibility of witnesses and the intrinsic merit (or lack of merit) of cases that he hears. *United States v. Caramadre*, 807 F.3d 359, 374 (1st Cir., 2015) (citation omitted). Judicial remarks made during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases: (i) *may* support a bias challenge if they reveal an opinion that is derived from an extrajudicial source; and (ii) *will* support a bias challenge if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *Liteky*, 510 U.S. at 491 (emphasis original). The burden of proving a high degree of favoritism or antagonism is “substantial.” *Yosd v. Mukasey*, 514 F.3d 74, 78 (2008).

To support its position that Commissioner Bailey and Ms. Weathersby should recuse themselves, the Business Group complains about statements made by Commissioner Bailey during deliberations and statements made by Ms. Weathersby during the deliberative hearing on March 12, 2018. Those statements do not, however, support the Business Group’s position.

During deliberations on the Application, Commissioner Bailey stated her opinion about the benefits and drawbacks of continuing deliberations. The statements made by Commissioner Bailey concerned a legitimate consideration as to whether deliberations should continue after the Subcommittee determined the Applicant failed to meet its burden of proof. Commissioner Bailey’s statements showed no indicia of bias, and no antagonism toward the Applicant and/or the Project. The Business Group may disagree with Commissioner Bailey’s position, but that disagreement does not form a basis for Commissioner Bailey’s recusal or disqualification. The request for recusal or disqualification of Commissioner Bailey is completely without merit.


Similarly, during the hearing on March 12, 2018, while deliberating on the Applicant’s first motion for reconsideration, Ms. Weathersby stated that based on the record before her, she


continued to believe that the Applicant failed to meet its burden of proof and it is unlikely that consideration of other statutory requirements will have any bearing on her decision.


Ms. Weathersby based her decision on the record before the Subcommittee. Ms. Weathersby's statement was based on her review of the record and did not express an unfair bias. Statements of deliberative opinions based on the record, regardless of how unfavorable they are toward the Applicant, without more; do not form a basis for recusal. The characterization by the Business Group of Ms. Weathersby's statement is not supported by the record. The motion to recuse Ms. Weathersby is completely without merit.


The Motion for Recusal is denied.

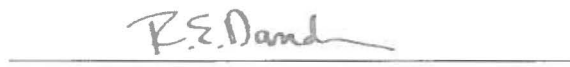
SO ORDERED this twenty-first day of June, 2018.

  
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Martin P. Honigberg, Presiding Officer  
Site Evaluation Committee  
Commissioner and Chair  
Public Utilities Commission

  
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Craig A. Wright, Designee  
Director  
Air Resources Division  
Department of Environmental Services

  
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Christopher S. Way, Designee  
Deputy Director  
Division of Economic Development  
Department of Business and Economic Affairs

  
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William J. Oldenburg, Designee  
Assistant Director of Project Development  
Department of Transportation

  
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Rachel E. Dandeneau, Alternate Public  
Member