

112 State Street
4th Floor
Montpelier, VT 05620-2701
TEL: 802-828-2358




TTY/TDD (VT: 800-253-0191)
FAX: 802-828-3351
E-mail: Commission.clerk@vermont.gov
Internet: <http://Commission.vermont.gov>

**State of Vermont
Public Utility Commission**

MEMORANDUM

To: Public Utility Commissioners and members of the public

From: Edward McNamara, Chair, Public Utility Commission 

Re: Potential conflicts and recusal

Date: February 9, 2024

I have been appointed as Chair of the Public Utility Commission (“Commission” or “PUC”), with a term running from January 29, 2024, until February 28, 2029. I have drafted this memorandum to identify actual and potential conflicts that could impact my ability to preside over or participate in cases before the Commission. My potential conflicts stem from work that I have previously done before the Commission and the fact that my partner has also done work before the Commission. In this memorandum, I describe the potential conflicts and also list those cases that I am recusing myself from as a result of actual conflicts.

1. Role of the Public Utility Commission

The PUC has multiple functions, including: quasi-judicial (*e.g.*, contested cases), quasi-legislative (*e.g.*, rulemakings), and executive (*e.g.*, ensuring compliance with Renewable Energy Standard requirements). The most comprehensive, albeit dated, description of the PUC can be found in the Vermont Supreme Court’s ruling in *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1 (1941). Each of these functions presents different issues with respect to potential conflicts, as described further below.

2. Potential sources of conflicts

a. Former role at Agency of Natural Resources

From January 2022 to January 2024, I served as General Counsel for the Agency of Natural Resources (“ANR”). In that role I provided legal advice to the Secretary and oversaw the Office of General Counsel, which includes General Counsels for each of the Agency’s Departments and

a Chief of the Enforcement & Litigation Section. In total, the Office of General Counsel has 14 attorneys, with five under the direction of the Enforcement & Litigation Section Chief and five under the direction of the Department of Environmental Conservation General Counsel. The Chief of the Enforcement & Litigation Section and the Agency's Director of Planning directly managed staff that work on PUC matters; consequently, I only became involved in a Commission matter at the Agency if I was drawn into a discussion regarding a specific case.

b. Former role at Department of Public Service

From December 2012 to December 2016, I served as Regional Policy Director for the Department of Public Service ("DPS"). The vast majority of this work entailed issues under the jurisdiction of the Federal Energy Regulatory Commission and does not present a conflict with my current role as Chair of the PUC.

From January 2017 to December 2021, I served as Director of Planning for the DPS, which was a policy-oriented role rather than a legal role. I continued my work on the regional level and from 2017 to 2019 managed the Planning and Energy Resources Division, which included what is now the Planning Division and the Division of Efficiency and Energy Resources, and from 2019 through 2021 managed only the Planning Division and regional issues. In these roles I appeared as a witness before the Commission and directly managed several staff who were witnesses in PUC proceedings.

c. Partner's role at Department of Public Service

My partner, Melissa Bailey, is currently Director of the State Energy Office within the Department of Public Service, as of January 16, 2024. From March 2022 to January 15, 2024, Ms. Bailey served as Director of Efficiency and Energy Resources at the DPS and provided testimony before the PUC. Effective January 16, 2024, Ms. Bailey recused herself from any matters before the Commission.

3. Relevant ethics guidance

The functions of the Chair of the Commission are governed by various, overlapping ethical codes. In preparing this memo, I have reviewed the Vermont Code of Ethics as it pertains to public servants, the Vermont Rules of Professional Conduct because I am a licensed Vermont attorney, the Vermont Code of Judicial Conduct as it may be relevant to the Commission's quasi-judicial function, and the Commission's 2018 Ethics Code.

a. Vermont Code of Ethics (3 V.S.A. § 1203)

In 2021, Vermont passed an Ethics Code for public servants. The most relevant portions are below:

In the public servant's official capacity, the public servant shall avoid any conflict of interest or the appearance of a conflict of interest. The appearance of a conflict shall be

determined from the perspective of a reasonable individual with knowledge of the relevant facts. 3 V.S.A. § 1203(a)(1).

As used in this section, “conflict of interest” means a direct or indirect interest of a public servant or such an interest, known to the public servant, of a member of the public servant’s immediate family or household, or of a business associate, in the outcome of a particular matter pending before the public servant or the public servant’s public body, or that is in conflict with the proper discharge of the public servant’s duties. “Conflict of interest” does not include any interest that is not greater than that of other individuals generally affected by the outcome of a matter. 3 V.S.A. § 1203(a)(3)

b. Vermont Rules of Professional Conduct

I have never formally entered an appearance before the Commission as an attorney; however, as General Counsel for ANR I have consulted with Agency attorneys in a legal capacity on cases before the Commission. Rule 1.9(c) provides:

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known;

or

(2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

c. Vermont’s Code of Judicial Conduct

Vermont’s Code of Judicial Conduct does not apply to the Commission; however, the Commission has occasionally looked to the Code for guidance. Rule 2.4: *External Influences on Judicial Conduct* provides:

(A) A judge shall not be swayed by public clamor or fear of criticism.

(B) A judge shall not permit family, social, political, financial, or other interests or relationships to influence the judge’s judicial conduct or judgment.

(C) A judge shall not convey or permit others to convey the impression that any person or organization is in a position to influence the judge.

d. Public Utility Commission Ethics Code

The Commission’s 2018 Ethics Code provides in relevant part:

II(B) Employees shall take all reasonable steps to avoid any action or circumstance, whether or not specifically prohibited by this code, that might result in or create the appearance of:

(1) undermining their independence or impartiality of action

(4) giving preferential treatment to any family member or member of the Employee's household;

III(A)(2) Employees shall not take any official action in any particular matter in which they have a Conflict of Interest or the appearance of a Conflict of Interest until the Conflict is resolved.¹

4. Application of the ethics guidance

Conflicts of interest arise in two ways: financial interests and bias. My potential conflicts of interest are not of a financial nature because I do not currently hold, nor have I historically held, any financial interests that would present a conflict with the Commission's work and my prior work experience involved governmental entities as opposed to industry, so that work did not generate any financial interests or ties in conflict with the Commission's work. Any decisions that I participate in as Chair of the Commission will not result in a financial benefit to me or my partner.

My potential conflicts of interest primarily arise in two ways: (1) my prior work on issues that will need to be decided by the Commission, and (2) the potential appearance of impartiality associated with my partner's work before the Commission. To address the first issue, I will recuse myself from any case in which I personally and substantially participated at ANR or DPS.² This includes any cases in which: I appeared as a witness for DPS, I supervised a staff member in their production of witness testimony for DPS, and any Commission case that I substantially discussed with an attorney or staff member while at ANR. In addition, there may be circumstances where, in my role at ANR or DPS, I discussed a matter that may result in a petition being filed with the Commission. In those circumstances I will issue a memorandum in that proceeding identifying any discussions I had and asking parties whether they believe a conflict exists.

With respect to the potential appearance of preferential treatment associated with my partner's work at DPS, I note that Ms. Bailey is no longer participating in any PUC cases, so any potential conflict would arise due to Ms. Bailey's past work at the DPS. This includes those instances where she has appeared as a witness in a PUC case or in situations where Ms. Bailey has directed the testimony of another DPS witness. In addition, I note that matters involving the Energy Efficiency Utilities ("EEU") do not always fit neatly into the distinction between contested cases and other policy matters, thereby making it more difficult to identify where there is a potential or actual conflict. I will recuse myself from any case in which Ms. Bailey appeared as a witness and I will also issue a memorandum in ongoing and new EEU proceedings noting the potential

¹ The Commission Ethics Code defines "Conflict of Interest" in the same way that it is defined in the Vermont Code of Ethics.

² The Commission's Ethics Code provides guidance about work after the Commission that is applicable to my assessment of my previous work experience. See III(B)(1).

for conflict given Ms. Bailey’s prior position and asking parties whether they believe a conflict exists. Further, I note that Ms. Bailey’s employment by a party that appears before the Commission does not itself create a conflict or appearance of a conflict.³

In making the above determinations regarding my potential conflicts, I am deliberately distinguishing between a Commission contested case and other, uncontested proceedings such as a rulemaking. The Vermont Administrative Procedure Act distinguishes between rulemakings and contested cases. Much of the Commission’s work is accomplished through contested cases where it is acting in a quasi-judicial capacity. Pursuant to the Administrative Procedures Act, there are *ex parte* restrictions on communications associated with contested cases. 3 V.S.A. § 813. By contrast, rulemakings are considered quasi-legislative in nature and are concerned with broader policy issues rather than determinations of the merits of each party’s factual and legal analysis, as occurs in contested case proceedings.⁴ The general, prospective applicability of rules eliminate the concerns associated with typical conflicts analysis. For this reason, I am not recusing myself from rulemakings or other uncontested matters.

Finally, I note that the list of cases from which I am recusing myself, below, was developed largely through searches of ePUC. There may be some cases that I had substantially participated in while at the DPS or ANR that did not appear in those searches. To the extent those arise, I will provide notice in that case. In addition, there are Commission proceedings that have produced “follow-on” cases where my recusal may be appropriate for the initial proceeding but the follow-on case may involve matters substantially different than those I participated in during the initial proceeding. In that circumstance I will provide notice of my intent to participate in the follow-on proceeding, if appropriate.

- A. Recusals for potential conflicts associated with my work at Agency of Natural Resources
- Case No. 23-0880-PET: Petition of Bellevue RNG, LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, to construct and operate a renewable natural gas facility in Berkshire, VT
 - Case No. 22-4900-PET: Petition of New England Power Company for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the relocation of the Vernon #13 Substation and associated rerouting of the A1, B2, D4, and G33 69 kV transmission lines in Vernon, Vermont

³ See, Vermont State Ethics Commission, Advisory Opinion No. 4-2023 at 4.

⁴ See *Beaupre v. Green Mountain Power Corp.*, 172 Vt. 583, 776 A.2d 424 (2001) (“Contested cases are by definition proceedings in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for a hearing. . . . By contrast, rulemaking involves the creation of an agency statement of general applicability which implements, interprets, or prescribes law or policy. Because of the general applicability of a rulemaking proceeding, it can have a broader effect, beyond the named parties.” (citations omitted)); *Appeal of Stratton Corp.*, 157 Vt. 436, 442-43, 600 A.2d 297, 300-01 (1991) (“Due process requirements apply to the procedures that must be used in reaching agency determinations only if they are adjudicative, rather than rulemaking or legislative, in nature. . . . [T]he Court distinguished between an adjudication based on the particular facts concerning specific parties, and a legislative or rulemaking decision, which is made on the basis of general facts, and has a broad, prospective effect. Only the former triggers procedural due process concerns.” (citations omitted)).

- Case No. 22-3085-PET Petition of Green Mountain Power Corporation for a certificate of public good, pursuant to 30 V.S.A. § 248(j), authorizing the rebuild of a 46 kV transmission line from the Taftsville substation to the Windsor substation in Woodstock, Windsor, and Hartland, Vermont
- B. Recusals for potential conflicts associated with my work at the Department of Public Service
- Case No. 21-3707-PET: Petition of Green Mountain Power Corporation for approval of a new Multi-Year Regulation Plan pursuant to 30 V.S.A. Sections 209, 218, and 218d
 - Case No. 19-4464-PET: Petition of Green Mountain Power Corporation for a certificate of public good, pursuant to 30 V.S.A. §248, authorizing the rebuild of the Lowell Substation and the upgrade of the B20 line in Eden, Johnson, and Lowell, Vermont; and Joint Petition of Green Mountain Power, the Village of Morrisville Water and Light Department, and the Village of Johnson Water and Light Department authorizing the upgrade of the B22 line in Johnson and Morristown, Vermont
 - Case No. 19-1774-PET: Petition of ER Jericho Landfill Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the construction and operation of a 1.65 MW solar electric generation facility in Jericho, Vermont
 - Case No. 19-0441-TF: Tariff filing of Green Mountain Power Corporation for net-metering transmission ground-fault overvoltage ("TGFOV") fee and new generation resource rider on bills rendered on or after July 1, 2019
 - Case No. 18-3709-PET: Petition of Davenport Solar, LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 15 MW solar electric generation facility in Brandon, Vermont
 - Case No. 18-2902-PET: Petition of GMP -Essex Solar/Storage LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 4.5 MW solar electric generation facility and 2 MW battery storage facility in Essex, Vermont
 - Case No. 17-5236-PET: Petition of GMP MicroGrid Ferrisburgh LLC for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of up to a 4.99 MW solar electric generation facility and 2 MW battery storage facility to be located off of Greenbush Road in Ferrisburgh, Vermont, and known as the “GMP MicroGrid- Ferrisburgh Project”
 - Case No. 17-5003-PET: Petition of GMP MicroGrid -Milton LLC for a certificate of public good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of up to a 4.99 MW solar electric generation facility and 2 MW battery storage facility to be located off of Mears Road in Milton, Vermont and to be known as the “GMP MicroGrid-Milton Project”
 - Case No. 17-3539-PET: Petition of Saint Albans Solar, LLC for a Certificate of Public Good, pursuant to 30 V.S.A. § 248, authorizing the installation and operation of a 4.9 MW solar electric generation facility off of U.S. Route 7 in the Towns of St. Albans and Georgia, Vermont to be known as the “St. Albans Solar Project”

- Case No. 17-2813-PET: Petition of Green Mountain Power for a Certificate of Public Good pursuant to 30 V.S.A. § 248(j), authorizing the installation and operation of a battery storage system on the GMPSolar Panton Project site located in Panton, Vermont, to be known as the “GMP Panton Battery Storage Project”
- C. Recusals for potential conflicts associated with Ms. Bailey’s work at the Department of Public Service
- Case No. 22-2954-PET: Petition of Department of Public Service to initiate EEU Demand Resources Plan proceeding for the 2024-2026 and 2027-2029 performance periods