

STATE OF VERMONT
PUBLIC SERVICE BOARD

Amended Joint Petition of Central Vermont Public)
Service Corporation, Danaus Vermont Corp., Gaz Métro)
Limited Partnership, Gaz Métro inc., Northern New)
England Energy Corporation for itself and as agent for)
Gaz Métro Limited Partnership's parents, Green)
Mountain Power Corporation and Vermont Low Income)
Trust for Electricity, Inc. for approval of: (1) the merger)
of Danaus into and with Central Vermont, (2) the) Docket No. 7770
acquisition by Northern New England of the common)
stock of Central Vermont, (3) the amendment to Central)
Vermont's Articles of Association, (4) the merger of)
Central Vermont into and with Green Mountain, and (5))
the acquisition by VLITE of a controlling interest in)
Vermont Electric Power Company, Inc.

**PETITIONERS' OPPOSITION TO
PETITION TO APPOINT INDEPENDENT COUNSEL**

Petitioners¹ oppose the Petition to Appoint Independent Counsel filed by Senator Vincent Illuzzi on behalf of himself and 30 individual ratepayers ("Ratepayers"). In their October 17, 2011 Petition and their October 25, 2011 Reply ("Reply"), the Ratepayers seek appointment of a member of the Vermont bar to represent the public in this case because of (1) the claim that Governor Shumlin supports the proposed merger and (2) the fact that the Commissioner of the Department of Public Service's ("Department") husband works at a law firm that represents GMP. Petition at 7. The Ratepayers' request should be denied. The Governor's general statements in support of the merger are clearly not a basis to appoint independent counsel. Furthermore, there is no appearance of conflict of interest with respect to the Commissioner.

¹ The Petitioners are Central Vermont Public Service Corporation ("CVPS"), Danaus Vermont Corp. Northern New England Energy Corporation (for itself and as agent for Gaz Métro Limited Partnership's parents), Gaz Métro Limited Partnership, Gaz Métro inc., Green Mountain Power Corporation ("GMP") and Vermont Low Income Trust for Electricity, Inc. ("VLITE").

MEMORANDUM OF LAW

I. Background

The Department's public advocacy function as an executive branch department was created more than thirty years ago in order to have a strong, institutional branch of state government that would represent the interests of the state and utility customers in proceedings before the Public Service Board ("Board"). 1979 Vt. Acts (Adj. Sess.) No. 204. The establishment of an institutional public advocate appointed by the Governor addressed major shortcomings in the prior approach of *ad hoc* Board appointment of either a so-called counsel for the public or of one of its staff counsel. *E.g., Petition of Central Vermont Public Service Corp., etc.*, Docket No. 4460 (Vt. Pub. Serv. Bd. Feb. 26, 1981) (counsel for the public); *Petition of Capital City Gas Co., Inc., etc.*, Docket No. 4661 (Vt. Pub. Serv. Bd. Nov. 21, 1980) (staff counsel). Problems with the counsel for the public included the lack of a client to provide guidance on the interests to be represented and positions to be taken and, due to the *ad hoc* nature of appointments, the lack of continuity and institutional knowledge. *See In re New England Tel. & Tel. Co., Inc.*, 135 Vt. 527, 539-40 (1977) (counsel for the public lacks authority to enter into agreements other than procedural in nature due to inability to obtain such authority from the public). Appointment of staff counsel to represent the public in Board proceedings created potential conflict of interest issues with the Board, because the same staff counsel also served, in other cases, as hearing officer and as counsel to the Board in its deliberations, including assistance in writing decisions.

The establishment by the Vermont General Assembly (the "Legislature") of the public advocacy function within the Department addressed these deficiencies by creating an institutional office that had access to the resources required to fulfill its responsibilities, that received guidance and direction ultimately from the Governor, and that eliminated conflicting responsibilities associated with the hearing officer and Board

advisory functions. The Department's public advocacy role has been a constant during the ensuing thirty years of utility regulation.²

The Board is authorized to request the Attorney General or a member of the Vermont bar to represent the public "if it determines that the public interest would be served." 30 V.S.A. § 2(b). *See* 30 V.S.A. § 217 (similar Board authority without reference to public interest standard). Although the applicable standard is broad, the Board has addressed and rejected requests for appointment of public counsel on the grounds identified by the Ratepayers.

II. The Governor's Statements Regarding Petitioners' Proposal Do Not Provide a Basis for Appointment of a Public Advocate.

The Ratepayers first claim that counsel is needed due to the Governor's support for the Petitioners' proposal.³ Although the Ratepayers do not identify the statements by the Governor allegedly supporting their claim, in their Reply they cite a news account indicating that the Governor stated on July 11, 2011 that he "strongly supports" the GMP-CV merger, which "will be better for customers." Reply at 4. The full news report included in Attachment A of the Reply, however, makes clear that the comments addressed the relative merits of the Gaz Métro and Fortis proposals, rather than the conclusion that the Gaz Métro proposal should be approved by the Board. The Governor subsequently addressed the issue of Board review and approval of the Gaz Métro proposal in his June 23, 2011 public statement, which stated that the goals for the sale of Vermont utilities are that the transaction is good for ratepayers, that he wants to know that the state's transmission infrastructure will be modernized for community-produced power and that the transaction will lead to greater use of renewables. He further stated the Petitioners' proposal "has value for Vermonters and for job creation," but that the Department would "review this proposal carefully [and] they and the Public Service

² One recognition of the Legislature's view of the importance of the Department's role in utility regulation was the enactment of a law authorizing the Department to represent the interests of the state and ratepayers in a pending action in federal court. 1989 Vt. Acts (Adj. Sess.) No. 42.

³ Finally, the Ratepayers do not claim that GMP's counsel is disqualified from representing GMP due to the familial relationship between a firm lawyer and the Department Commissioner. The affected firm lawyer does not represent GMP in any matters involving the Department or any substantially related matters, and under these circumstances, the disqualification based on personal interest is not imputed to other members of the firm. Vermont Rules of Professional Conduct 1.7, 1.10.

Board will determine the outcome of the regulatory process.” The Governor’s actual statement cannot reasonably be viewed as support for the detailed proposal ultimately submitted to the Board by the Petitioners or as a determination that the Department should not thoroughly evaluate their proposal.

The statement constitutes little more than a description of public policy goals and a preliminary assessment of the proposal. It is little different than other general administration comments responding to initial announcement of a proposal and indicating conceptual support.⁴

In the past, the Board has rejected a request for independent counsel based on a claim that “the Department has not presented an even-handed and balanced case,” finding that the “Department has been doing its job in advocating for the public, as it understands the public interest.” *Petitions of Vermont Electric Power Co., Inc. etc.*, Docket No. 6860 (Vt. Pub. Serv. Bd. Apr. 8, 2004) at 1–2. The Board also rejected an intervention request, that it characterized essentially as “a request that [the movant] be appointed independent public advocate,” based on a claim that “the DPS has hired consultants on the basis of ‘political and personal favors.’” *Investigation into Town of Hardwick Electric Department’s proposed rate design tariff*, Docket No. 5469 (Vt. Pub. Serv. Bd. Oct. 3, 1991) at 2, 4–5. The Board stated that “[i]t would be inappropriate for the Board to appoint an independent public advocate on the basis of such an assertion.” *Id.* at 5.

The Board has also rejected a request for appointment of counsel where, rather than merely expressing a position, the Department stipulated to a proposed rate increase before it was filed for approval with the Board. The Board stated that “the mere fact that the Department, after an independent investigation, has come to an agreement with the company, does not, in and of itself, persuade us that independent counsel must or should be appointed.” *Tariff Filing of Citizens Utilities Co., etc.*, Docket No. 5809 (Vt. Pub. Serv. Bd. Apr. 14, 1995) at 4.⁵

⁴ For instance, in response to a March 11, 2010, announcement of a proposed power contract with Hydro-Quebec, Governor Jim Douglas stated that the agreement “is a good deal for ratepayers and strengthens the state’s economic future.”

⁵ As the Board indicated in another case, “the Department is expected to take and advocate explicit positions upon difficult policy questions[,] [and] it will be more productive for the Board to resolve [disputes about the merits of its choices] by considering the evidence in specific cases, rather than by requiring examinations of the Department’s internal policy deliberations.” *Tariff Filing of Green Mountain Power Corp.*, Docket No. 5532 (Vt. Pub. Serv. Bd. Oct. 22, 1991) at 3.

The Board appointed an independent counsel in a case that was initiated by an agreement between the Department and a utility. *Petition of New England Tel. & Tel. Co., Inc.*, Docket No. 6000 (Vt. Pub. Serv. Bd. May 20, 1998). In particular, the agreement related to a proposed incentive regulation plan for a telecommunications carrier under 30 V.S.A. § 226b, and the procedural context was therefore very similar to review of a Department-utility alternative regulation contract under 30 V.S.A. § 226a, which *requires* appointment of independent counsel. Consequently, the Board found that appointment of independent counsel was consistent with the intent of the Legislature. *Id.* at 3. Unlike that case, however, the Department in this case has not entered into an agreement obligating it to support Board approval of the specific, detailed proposal that the Petitioners have presented.

The Board has appointed independent counsel when (1) a conflict appears to exist between the Department's role as a public advocate and its role pursuant to a separate statutory requirement, or (2) when the Department is not able to commit the resources to adequately review and present a case. *Petition of Vermont Electric Power Company, Inc. etc.*, Docket No. 6860 (Vt. Pub. Serv. Bd. Apr. 8, 2004) at 2. Those Department role-based conflicts, however, do not apply to this case, where the Department is acting in its capacity of representative of the public interest.⁶

⁶ The Ratepayers do not, and cannot, allege a Department conflict of interest based on conflicting Department responsibilities, such as may arise where the Department requests Board approval of Department sale of power or a Department contract with a utility concerning alternative regulation. 3 V.S.A. § 165; 30 V.S.A. § 212e(a); 30 V.S.A. § 226a(c). *See e.g., Petition of Vermont Department of Public Service, etc.*, Docket No. 5248 (Vt. Pub. Serv. Bd. Feb. 26, 1988) at 5 (review of Department sales proposal); *Investigation of Proposed Second Vermont Telecommunications Agreement, etc.*, Docket No. 5540 (Vt. Pub. Serv. Bd. Oct. 23, 1991) at 3 (review of alternative regulation contract entered into with Department).

The Board has rejected appointment of counsel based on this function-based conflict in broader contexts. The Board denied a request for appointment of counsel, for instance, based on a claim that the Department's review of a utility's power purchase proposal would conflict with its role as a potential seller of electricity. *Petition of Green Mountain Power Corp., etc.*, Docket No. 5296 (Vt. Pub. Serv. Bd. Dec. 6, 1988). The Board rejected the claim that appointment was required because the Department might view the proposed utility sale from the utility's perspective or, conversely, might unjustifiably oppose the proposal if undermined similar power sales opportunities for the Department. *Id.* at 5-7.

The Ratepayers also do not claim that the Department has insufficient resources to adequately represent the public, which the Board has stated is another possible basis for appointment of counsel. *See Tariff Filing of Citizens Utilities Co., etc.*, Docket No. 5809 (Vt. Pub. Serv. Bd. Apr. 14, 1995) at 4 (Board stated that it would consider appointment of independent counsel "where the Department does not have or cannot commit to the resources to adequately review and present a case"); *Central Vermont Public Service Corporation's request to increase its rates, etc.*, Docket No. 5132 (Vt. Pub. Serv. Bd. July 10, 1986) at 4-7

Board precedent makes clear that general conceptual statements provide no basis for appointing an independent counsel, and the Ratepayers' request on this ground must be rejected.

III. There Is No Appearance of a Conflict of Interest With Respect to the Commissioner.

The Ratepayers also claim that an independent counsel should be appointed because the Department Commissioner has an appearance of a conflict of interest resulting from her husband's employment by a law firm that represents GMP. Petition at 7. The Ratepayers do not, however, provide any basis for their claim, whether based on the statutory Code of Ethics applicable to Vermont employees or on applicable precedent.⁷

The Executive Code of Ethics⁸ provides that the Commissioner shall not be "financially interested, directly or indirectly in any private entity or private interest that is subject to the supervision of ... her ... department." Code of Ethics, Executive Order 09-11, § III(A)(1). The Commissioner does not directly or indirectly own any interest in GMP, and the Ratepayers make no allegation that the Commissioner directly or indirectly owns any interest in CVPS.⁹

The Executive Code of Ethics also provides that the Commissioner "shall not take any action in a particular matter in which ... she has either a conflict of interest or the appearance of a conflict of interest." § III(A)(2). A conflict of interest is defined as "a significant interest[] of an appointee or such an interest ... of a member of his or her

(Board criticism of Department request for schedule extension where it committed inadequate resources to the case and did request appearance by the Attorney General).

⁷ As a basis for their argument, the Ratepayers incorrectly claim (without reference to statutes or caselaw) that the "Department is not the commissioner's client; the Public is." Reply at 7. Yet the statutes make clear that, that in cases requiring hearings before the Board, "the department, through the director for public advocacy shall represent the interests of the people of the state." 30 V.S.A. § 2(b) (emphasis added). Although the Department represents the public's interests before the Board, it does not have an attorney-client relationship with the public.⁷ Instead the Commissioner is appointed by the Governor and serves at the pleasure of the Governor. 30 V.S.A. §1(a), (b).

⁸ Unlike members of the Board, who are subject to the Code of Judicial Conduct, the Commissioner is subject to the Executive Code of Conduct. Executive Order No. 09-11, Preamble. Additionally and although the Commissioner is a lawyer, her role as Commissioner is not as an attorney representing a client. As a result, the conflict-of-interest provisions of the Rules of Professional Conduct do not apply. *See* Rules of Prof. Resp. Preamble and Scope ¶¶ 3 and 17, Rule 1.7.

⁹ The other Petitioners are not subject to the supervision of the Department.

immediate family ... in the outcome of any particular matter pending before the appointee,” and an appearance of a conflict of interest “means the impression that a reasonable person might have, after full disclosure of the facts, that an appointee’s judgment might be significantly influenced by outside interests.” *Id.* § I(A), (B).

The Ratepayers claim that the Commissioner fails to meet these standards because a family member is managing partner of a law firm representing several Petitioners and therefore the Commissioner, through the family member, has “a direct interest in the outcome of the litigation.” Reply at 4. The Ratepayers claim, for instance, that the law firm will benefit from business provided by the merged company and that the Commissioner stands to profit from this arrangement. Such alleged secondary benefits are not only entirely speculative, but also unsubstantiated and remote. Reply at 5.

The applicable precedent relating to government employee ethical standards makes clear, however, that the standards are not violated where, as here, a government employee’s family member is a lawyer whose firm represents an entity regulated by the government employee’s agency. For instance, in Advisory Opinion 07-35, the Kentucky Executive Branch Ethics Commission (“Kentucky Ethics Commission”) considered whether a Kentucky Public Service Commissioner’s husband’s employment at a law firm that represented several utility companies before the Kentucky Public Service Commission constituted a conflict of interest or the appearance of one. Kentucky Executive Branch Ethics Commission Advisory Opinion 07-35 (Dec. 14, 2007) (attached as Exhibit 1). The Commissioner’s husband did not himself practice utility law nor represent the firm’s utility companies before the Commission. *Id.* at 3. Moreover, the husband’s law firm received compensation for the work it performed for the utilities on an hourly basis, and not a contingency basis,¹⁰ and screened him from any involvement in Commission matters. *Id.* at 1–2, 3. Therefore, the Ethics Commission concluded that

¹⁰ In this regard, the compensation for the firm’s representation of the Petitioners is on an hourly basis, rather than a contingent fee or other basis affected by the outcome of the proceeding. There is no conflict of interest where the firm of a government lawyer’s spouse represents an entity that is subject to litigation involving the governmental department that employs the government lawyer. *United States v. Tierney*, 947 F.2d 854 (8th Cir. 1991); *In re TPI International Airways, Inc. v. United States Trustee*, 1998 WL 34064504, *6 (Bankr. S.D. Ga.). The Ratepayers’ request is also not premised on 30 V.S.A. § 4, which prohibits the Commissioner from (1) being employed by, (2) managing, (3) having an ownership interest in, (4) having an official relationship with, (5) rendering professional service for or performing a business contract with (directly or through a partner or agent) (6) in any way being connected with the operation of, or (7) directly or indirectly receiving a commission, present or reward from a regulated utility.

“the potential for conflict that exists is far removed and is not substantial.” *Id.* at 4. The Connecticut Office of State Ethics reached a similar conclusion in Advisory Opinion No. 2004-11, *Application of Code of Ethics for Public Officials to Commissioner of the Public Utility Control Authority When Law Firm of Commissioner’s Husband Files an Appearance Before the Authority* (attached as Exhibit 2). The same conclusion is warranted in this case, especially where the Commissioner is not even serving as a Public Service Board member.¹¹

Instead of relying on precedent relating to government employees, the Ratepayers rely on other, inapplicable standards. For instance, they claim, without any citation or other support, that the Commissioner’s role “is akin to the traditional role of private counsel,” and that “[l]egal ethics would require disqualification of the commissioner.” Reply at 5, 7.¹² This claim should be rejected for several reasons.

First, the Commissioner does not act as counsel representing the Department. Instead, the Commissioner is the head of the Department, and its legal representation is provided by the public advocate. 30 V.S.A. §§ 1, 2(b). Second, it is questionable whether the conflicts provisions of the Rules of Professional Responsibility (“Rules”) apply to government employees who are lawyers but perform only non-legal functions. The conflicts provisions apply to “representation” of “clients,” whereas the Commissioner does not engage in this function. *E.g.*, Rules 1.7, 1.11; *see* Rule 1.11 Comment (4) (references to “successive representation,” the “lawyer’s professional functions on behalf of the government”). Third, even if the Rules did apply to government employees acting in a non-legal capacity, there is no basis for a claimed conflict. Conflicts based on current representation under Rule 1.7 are not imputed to other lawyers in the firm if the conflict is based on personal interest and there is not a significant risk of materially limiting representation by the remaining members of the firm. Rule 1.10(a). Rule 1.11(d)(1) applies Rule 1.7 to a lawyer serving as a government

¹¹ There would be no basis for appointment of independent counsel even under the requirements applicable to judges. *See Jenkins v. Arkansas Power & Light Co.*, 140 F.3d 1161 (8th Cir. 1998) (disqualification not required where judge's son had become a new associate at defendant's law firm); *Datagate, Inc v. Hewlett-Packard Co.*, 941 F.2d 864 (9th Cir. 1991) (disqualification not required where judge's son was an employee of one of the parties).

¹² The Ratepayers also claim that the “situation is virtually the same if the CEO of a petitioner were a family member of the Commissioner.” Reply at 5. They offer no support for this novel proposition.

employee, and is intended to assure that current “conflicts should not be imputed to lawyers associated with a government agency.” Rule 1.11, Reporter’s Notes – 2009 Amendment, § 11. Cases from other jurisdictions support this conclusion, by finding that there is no basis for disqualification. There is no conflict of interest where the firm of a government lawyer’s spouse represents an entity that is subject to litigation involving the governmental department that employs the government lawyer. *United States v. Tierney*, 947 F.2d 854 (8th Cir. 1991); *In re TPI International Airways, Inc. v. United States Trustee*, 1998 WL 34064504, *6 (Bankr. S.D. Ga.).

Similarly, the Ratepayers claim that the Commissioner “stands in a fiduciary relationship,” and imply that the Commissioner was not acting in a manner consistent with undivided loyalty to the public. Reply at 9. The case law they cite, however, is inapposite.¹³

Accordingly, although there is no doubt that the Commissioner owes undivided loyalty to the Department, the Ratepayers have not demonstrated how the Commissioner’s actions have been anything other than consistent with this obligation. There is no basis for a conclusion that the Commissioner’s actions in her capacity as Commissioner with respect to the matters to be litigated in this docket conflict with the applicable provisions of the Executive Code of Ethics or otherwise somehow provide any basis for appointing an independent counsel.

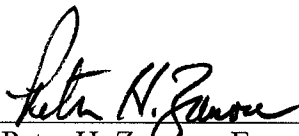
For all of the above reasons, the Ratepayers’ request should be denied.

¹³ *In re Boardman* involved an assistant judge who used his judicial office to reject an offer to purchase property so that a non-profit on whose board he sat could make the purchase. *In re Boardman*, 2009 VT 42, ¶¶ 1-8. *Tuscan v. Smith*, 130 Me. 36 (1931), relates to city officials negotiating contracts in which they were financially interested. *People v. Brown*, 356 Ill. App.3d 1096 (2005), held that a city official was conflicted from serving as both district park commissioner and a city alderman because the park district and municipality had adverse interests. *Opinion of Justices*, 330 A.2d 912, 913-15 (Me. 1975) involved a putative state commissioner of finance who sat on the board of a bank that he would be charged with regulating, and *Anderson v. Zoning Commission of Norwalk*, 157 Conn. 285 (1968) actually upheld the trial court’s ruling that two local zoning commissioners faced no conflict. Finally, *Ross v. Wilson*, 308 N.Y. 605 (1955) dealt with whether a state official had breached his fiduciary duty by selling county property without properly soliciting bids, and has been overruled to the extent it relied upon a “purely arbitrary” standard of review.

Dated at Burlington Vermont, this 26th day of October 2011.

CENTRAL VERMONT PUBLIC SERVICE CORPORATION, NORTHERN NEW ENGLAND ENERGY CORPORATION, for itself and as agent for Gaz Métro Limited Partnership's parents, GAZ MÉTRO LIMITED PARTNERSHIP, GAZ MÉTRO INC., DANAUS VERMONT CORP., GREEN MOUNTAIN POWER CORPORATION and VERMONT LOW INCOME TRUST FOR ELECTRICITY, INC.

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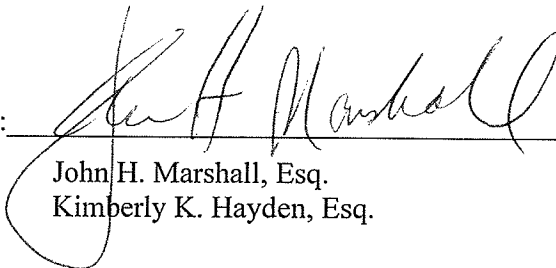
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