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ADVISORY OPINION 2019 - 3

The House Legislative Ethics Committee received a request from a Member for an advisory opinion. The Member questioned whether it would have been a violation of the Ethics Act for the Member to participate in an allowable ex parte communication¹ briefing before the Public Service Commission (PSC). The briefing concerned whether Dominion Energy, Inc. should be required to honor its initial offer to provide a \$1,000 rebate to South Carolina Electric and Gas Company customers.² The Member further explained that prior to the scheduled briefing, the Member sent a letter to the PSC informing the Commission that the Member did not wish to be a party to the proceeding and requested that his name be removed from the notice for the hearing which was scheduled for the next day.

Pursuant to House Rule 4.16C.(5), the Committee renders the following advisory opinion.

DISCUSSION

I. Background on the PSC

The PSC "essentially functions as a court for cases involving utilities and other regulated companies. The PSC has broad jurisdiction over matters pertaining to the investor owned electric and gas utility companies, water and wastewater companies, telecommunications companies, motor carriers of household goods, hazardous waste disposal, and taxicabs." <https://psc.sc.gov/about-us-0/history>. As the

¹ Black's Law Dictionary explains an "ex parte communication" as "[o]n one side only; by or for one party; done for, in behalf of, or on the application of, one party only. A judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, and without notice to, or contestation by, any person adversely interested." <https://thelawdictionary.org/ex-parte/>.

² The action before the PSC is In Re: Joint Application and Petition of the South Carolina Electric & Gas Company and Dominion Energy, Inc. for review and approval of a proposed business combination between SCANA Corporation and Dominion Energy, Inc., as may be required and for a prudency determination regarding the abandonment of the V.C. Summer Units 2&3 Project and Associated merger benefits and cost recovery plan, (Dominion Energy) Docket No. 2017-370-E.

PSC notes on its website, “an Allowable Ex Parte Communication Briefing is a communication that is conducted in accordance with S.C. Code Ann. 58-3-260(C)(6). Communications, directly or indirectly, regarding any law or fact, or other matter that is reasonably expected to become an issue in a proceeding may be conducted before the commission, if properly noticed, consistent with the directives of S.C. Code Ann. 58-3-260.” <https://psc.sc.gov/allowable-ex-parte-briefings>.

Moreover, SC Code Ann. Section 8-3-30.(B), provides that the PSC commissioners and commission employees are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules, except as provided in Section 58-3-260, and the State Ethics Commission must enforce and administer those rules pursuant to Section 8-13-320. In addition, commissioners and commission employees must comply with the applicable requirements of Chapter 13 of Title 8, that is the Ethics Act. Thus, in certain circumstances, as delineated in Section 58-3-260(C)(6), an ex parte communication briefing is permitted by the PSC.

The Committee further notes that the Speaker of the SC House of Representatives, James H. “Jay” Lucas, in his official capacity as the Speaker, intervened in the Dominion Energy matter pending before the PSC in February 2018. In his Petition to Intervene, the Speaker explained that he had “the authority to act on behalf of the House of Representatives.” He noted that the House had a substantial interest in the issues to be considered in this proceeding as the House was “currently drafting legislation related to the abandonment by SCE&G of the V.C. Summer Nuclear Units 2 and 3.” Petition to Intervene of James H. “Jay” Lucas, in his official capacity as speaker of the SC House of Representatives. See S.C. Code Ann. § 2-3-110 (The Speaker is designated as the department head and chief administrative officer of the House of Representatives). See also, H. 3744, which would authorize the Speaker to initiate or intervene in any action on behalf of the House as an institution or in his official capacity, whether or not the House is in session.

II. Whether it was permissible for the House Member to participate in the allowable Ex parte Communication

The Rules of Conduct for the Ethics, Government Accountability, and Campaign Reform Act of 1991, (the Ethics Act). Specifically, S.C. Code § 8-13-700(A), provides:

No public official, public member, or public employee may knowingly use his official office, membership, or employment to obtain an economic interest for himself, a family member, an individual with whom he is associated, or a business with which he is associated. This prohibition does not extend to the incidental use of public materials, personnel, or equipment, subject to or available for a public official's, public member's, or public employee's use that does not result in additional public expense.

S.C. Code § 8-13-700(A). (emphasis added). Pursuant to Section 8-13-100(11), economic interest means:

an interest distinct from that of the general public in a purchase, sale, lease, contract, option, or other transaction or arrangement involving property or services in which a public official, public member, or public employee may gain an economic benefit of fifty dollars or more.

This definition does not prohibit a public official, public member, or public employee from participating in, voting on, or influencing or attempting to influence an official decision if the only economic interest or reasonably foreseeable benefit that may accrue to the public official, public member, or public employee is incidental to the public official's, public member's, or public employee's position or which accrues to the public official, public member, or public employee as a member of a profession, occupation, or large class to no greater extent than the economic interest or potential benefit could reasonably be foreseen to accrue to all other members of the profession, occupation, or large class.

Section 8-13-100(11). In the instant scenario, the Member, a utility ratepayer, would have a large class exemption as a SCE&G ratepayer. Thus, this exemption would permit him to attempt to influence an official decision, that is the payment of a \$1,000 refund to SCE&G customers.

The bigger concern is that the Member was using his official position as a Member of the House of Representatives (House) to influence the PSC's official decision without the authorization of the House. In The Senate, by and through Leatherman v. McMaster, 821 S.E.2d 908 (2018), in the original jurisdiction of the S.C. Supreme Court, the President Pro Tempore of the Senate requested the Supreme Court to declare invalid the Governor's recess appointment to the office of Chairman of the Board of Directors for the Public Service Authority (Board). The Court noted that whether the President Pro Tempore had the authority to bring this action regarding the Governor's appointment to the Board was an issue that had not been previously addressed but nor was it raised by the parties. The Court stated:

However, the limitations on the power of an individual senator to bring an action in furtherance of Senate business are well-established under federal law. In Reed v. County Commissioners of Delaware County, Pennsylvania, 277 U.S. 376 (1928), the Supreme Court of the United States held that Senators of a special committee created by the United States Senate could not sue without express authorization from the Senate to do so. 277 U.S. at 389; see also Alissa M. Dolan & Todd Garvey, Cong. Research Serv., R42454, Congressional Participation in Article III Courts: Standing to Sue 11 (2014) (stating "an institutional plaintiff has only been successful in establishing" the authority to bring suit "when it has been authorized to seek judicial recourse on behalf of a house of Congress"). Lower federal courts have relied on Reed and the proposition for which it stands to dismiss lawsuits brought by individual members of Congress, and even lawsuits brought by committees of the House or Senate, without express authorization by the House or Senate. See, e.g., In re Beef Indus. Antitrust Litig., 589 F.2d 786, 791 (5th Cir. 1979) (requiring dismissal of appeal without any decision on the merits where the House subcommittee chairmen "failed to obtain a House resolution or any other similar authority before they sought to intervene in the . . . case"); see also United States v. Am. Tel. & Tel. Co., 551 F.2d 384, 391 (D.C. Cir. 1976) (finding the House resolution sufficiently authorized the chairman of a subcommittee to represent the House in the lawsuit); Senate Select Comm. on Presidential Campaign Activities v. Nixon, 498 F.2d 725, 727 (D.C. Cir. 1974) (noting the Senate Select Committee had authorization to sue and enforce subpoenas against the President pursuant to a Senate resolution expressly authorizing the committee to do so); Comm. on Oversight & Gov't Reform v. Holder, 979 F. Supp. 2d 1, 21 (D.D.C. 2013) (finding House committee could initiate an action to enforce subpoena where "the House

of Representatives . . . specifically authorized the initiation of [the] action to enforce the subpoena"); Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 71 (D.D.C. 2008) (concluding the House Committee on the Judiciary could bring civil action where the Committee "ha[d] been expressly authorized by House Resolution to proceed on behalf of the House of Representatives as an institution") (emphasis removed from original). Despite these concerns, we will address the merits of the Senate's challenge to the Governor's recess appointment of Condon. In future actions, however, the Court must examine the President Pro Tempore's threshold authority to bring the action. In any given case, such authority could derive from a majority vote of the members of the Senate as to the individual case, or it could derive from a rule or statute granting the President Pro Tempore such authority without the need for specific authorization by vote.

Id at 910. (emphasis added). See also, Newman v. Richland County Historic Preservation Com'n, 325 S.C. 79, 480 S.E.2d 72 (1997) (Commissioner serving on the Commission did not have standing to bring a declaratory judgement action against his own Commission).

In the instant matter, Committee finds that the Member, in his official capacity, did not have the express authorization from the House to engage in permissible ex parte communication with the PSC on the Dominion Energy matter. The Committee further finds that the Member's subsequent action by sending a letter to the PSC requesting that his name be removed from the notice for the permissible ex parte hearing was the better course of action for handling this matter.

CONCLUSION

In summary, the Committee finds that a Member, in his official capacity, may not participate in a permissible ex parte communication with the PSC when the Member is not officially authorized by the House to engage in such action.

Adopted February 6, 2019.