Breeden John

From:	Swain Whitfield <swain@whitfieldtransportation.com>
Sent:	Friday, December 5, 2025 3:38 PM
To:	Breeden John; Bryan Triplett; Erica Starnes
Subject:	Legal Opinion regarding my Utility Regulatory Consulting business
Attachments:	HPSCAN_20251205185355488_2025-12-05_185526709.pdf

Breeden, Bryan and Erica,
You all have been fair with me, and I thank you for that. In the spirit of fairness with each of you, and the Members of the PURC Committee, I have decided (Now - Today - in advance of Tuesday) to release a written legal opinion and legal advice that I have received from an attorney here in South Carolina who specializes in Judicial and Ethics matters. I just told Breeden by phone a few minutes ago that I plan to send this over to you today. I did Not think it was fair to each of the 3 of you, or fair to the Members of the Committee to just pull the written opinion out of an envelope on Tuesday, and thereby "surprise" anyone, or to Not be transparent by holding it until executive session. I am aware that this means that this opinion will be made public and be placed in the record. I know that Tuesday will be a long day, and I also believe that giving it to you in advance will keep me from spending your valuable time and the Committee members valuable time on Tuesday explaining it, and I am more than willing to answer any questions that anyone may have regarding it or my work as a Utility Regulatory Consultant over the last 4 years.

*** As an important side note to my attorney's written legal opinion in the above attached 5 pages, my attorney did an examination of every Client that I have ever had (both past and present); however, he only did a "deep dive" on 1 client which is named in the legal opinion, and the rest of my clients are not named. So, for transparency and full disclosure's sake, below is my entire client (past and present -- some of these were mentioned in my Statement of Economic interest form) list that he examined in preparing the legal opinion are as follows:

1. Central States Water Resources (St. Louis, Mo) (Regulated Utility by the SC PSC)
2. Energy Development Partners (Rhode Island) (large scale solar developer) No assets in SC (past or present) and has Not been a client since 2023.
3. Charter Communications (telecommunications company) (The SC PSC has very limited jurisdiction over Charter Communications)
4. Drexel Hamilton, LLC (New York) Investment Bank / Financial and Securitization consultants specializing Utility financing and Utility Securitization). Has not been a client since 2024.
5. Gas South (Atlanta, GA) Natural Gas Company (SC PSC has no jurisdiction over Gas South).
6. Fairfield County (unregulated by the SC PSC) (No longer a client as of September 2025)
7. Field & Stream / Southern Entertainment (Non-Utility client - SC PSC has No jurisdiction).
8. Sun2o (New York) (Large Scale Solar Developer). No Assets in SC at this time.

Thank you and respectfully submitted,
Swain Whitfield
803 354-1476

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October 20, 2025

Via Hand-Delivery
Swain E. Whitfield
124 Palmetto Place Lane
Winnsboro, South Carolina 29180

Re: *Consideration of private employment and potential for future disqualification*

Dear Mr. Whitfield:

This correspondence is being prepared as an expert opinion, out of an abundance of caution and at your sole request, in conjunction with your candidacy for appointment to the Public Service Commission ("Commission"). Although prepared on your behalf as your private legal counsel, this opinion has been prepared in anticipation that you may elect to share the contents thereof in the near future, for the benefit of those involved in your candidate screening, or later for potential benefit during any potential period of ongoing service as a member of the Commission.

This opinion is based upon our multiple communications through various means, each of which were focused on your engagement as an independent, non-attorney regulatory consultant on behalf of multiple entities, only a portion of which are entities that are subject to regulation by the Commission under state law. Those communications were supplemented by provision of written documentation relevant to one specific client identified below, and consisted of the contract defining the nature and extent of your engagement on behalf of that client. You have been very responsive to all requests for information and explanation, which has contributed to the certainty articulated hereinbelow.

In summary, you have sought an opinion regarding whether your consultant work will have any potential limitation or effect upon your candidacy for, or desired future service and membership on, the Commission. For the reasons explained more fully hereinbelow, the summary conclusion, assuming you are appointed to the Commission, is that your consulting work will trigger required disclosures to parties appearing before you on matters heard by the Commission, but only in very limited circumstances (if ever) would you be precluded from presiding over any docketed matter before the Commission.

In support of that conclusion, this opinion will begin with reference to broadly controlling and relevant law and rules, including S.C. Code Title 58, Chapter 3, which establishes and governs the Commission. Section 58-3-30 establishes that commissioners "are bound by the Code of Judicial Conduct, as contained in Rule 501 of the South Carolina Appellate Court Rules." That section also makes applicable S.C. Code Title 8, Chapter 13, which governs all public employees and officials. Both are enforced and administered by the State Ethics Commission. Section 8-13-100(5), together

with (27) trigger applicability of those obligations immediately upon your official candidacy for a position with the Commission. Likewise, Rule 501, SCACR makes applicable all of its provisions and obligations upon the initiation of a candidacy.

As referenced above, your current gainful employment consists of engagement as an independent, non-attorney regulatory consultant on behalf of multiple entities. Some of those clients are regulated entities subject to the jurisdiction of the Commission under state law. Consistent with S.C. Code § 8-13-755, you have reported that your provision of such services to regulated entities did not commence until after the expiration of the one year waiting period following conclusion of your public service as a member of the Commission.

As noted above, relevant state law and the Code of Judicial Conduct are immediately applicable in many respects by virtue of your candidacy for the Commission, especially as relates to being engaged in broadly unlawful activity, or having membership in organizations that practice invidious discrimination, etc. However, many restrictions are specific measures related to preventing or avoiding misuse of office, and as such are only possible to violate once an individual assumes an office. Accordingly, and in your context at present as intended formal candidate, immediate applicability of state law and conduct rules does not require any immediate or without-exception termination of any current consulting relationships you may have.

Nevertheless, your employment does have potential future effect in the form of potentially necessary disclosures and/or recusals should any former client be directly or indirectly involved in a matter that comes before the Commission for consideration by operation of Canon 3 of the Code of Judicial Conduct. That canon provides generally that "A judge shall perform the duties of judicial office impartially and diligently." Canon 3(E) specifically addresses Disqualification obligations, and relevant excerpts therefrom provide as follows:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding…

In that regard, you have explained that some of your work has been done for regulated entities, although none of your current clients have any matters currently on the docket of the Commission. As such, even if those entities later were associated with docketed matters that arose after termination of your consulting relationship, the nature and scope of your prior work would be very unlikely to have resulted in you obtaining "personal knowledge of disputed evidentiary facts" that would be relevant in that future matter.

Next considered is Canon 3(E)(1)(c), which would disqualify any judge that "served as a lawyer *in the matter in controversy*" (emphasis added). But by that language, the judge would <u>not</u> be disqualified merely for having been a lawyer for a party more broadly or historically. The restriction is applied on a per matter basis, not per-relationship more broadly. Although you are not a lawyer, a

consulting relationship should be considered equivalent for present consideration purposes. But even applying this provision, mere existence of prior employment alone on your part is not evidence sufficient to create grounds for recusal on the basis of alleged "personal bias or prejudice" with respect to all of your prior contractual relationships.

Further, the South Carolian Supreme Court has noted that appellate courts "accord great weight to the trial judge's assurance of his own impartiality." *Davis v. Parkview Apartments*, 409 S.C. 266, 762 S.E.2d 535, 545 (2014). And that Court has noted that "It is not sufficient for a party seeking disqualification to simply allege bias; the party must show some evidence of bias or prejudice." *Patel v. Patel*, 359 S.C. 515, 524, 599 S.E.2d 114 (2004). Instead, the alleged bias or prejudice must "result in a decision based on information other than what the judge learned from his or her participation in the case as a judge" to be substantiated. *State v. Jackson*, 353 S.C. 625, 629, 578 S.E.2d 744 (Ct.App.2003). Again, because your prior work would be very unlikely to result in you obtaining "personal knowledge of disputed evidentiary facts," you would be free to participate in future proceedings, even for parties that were previously clients, without a basis for requiring your recusal.

Canon 3(E)(1)(c) also provides that disqualification should be done when "the judge knows that he… has an economic interest in the subject matter in controversy or in a party to the proceeding." "Economic interest" is defined within the rules as denoting "ownership of a more than de minimis legal or equitable interest, or a relationship as officer, director, advisor or other active participant in the affairs of a party." (emphasis added). There will be no such instance on account of your prior consulting work for two reasons. First, your consulting contract establishes your pay on a flat fee basis, rather than contingent on any outcome. Secondly, the contract allows for termination of the engagement immediately without cause by either party. As such, your termination of engagement will be immediate and permanent, making you no longer an "active participant" within an entity, and leaving no residual economic interest tied to that entity for purposes of payment owed to you.

"Disqualification issues are necessarily decided on the facts of each case." *Patel* at 525. In discussions regarding potential docket matters related to your prior consulting that may come before the Commission in the future, you have indicated an intention of handling such matters as you did during your prior service with the Commission. To wit, erring on the side of making full and expansive factual disclosure to the parties, even when disqualification would not be required or intended. This is consistent with the commentary to Canon 3(E), which states:

> A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification.

The Supreme Court has recognized that making disclosures is evidence of compliance with ethical obligations, not indicia of a basis for disqualification. *See Davis v. Parkview Apartments*, 409 S.C. 266, 287, 762 S.E.2d 535 (2014) ("If anything, the judge's decision to disclose these relationships during the course of the litigation demonstrates his sensitivity to assuaging any concerns about his

impartiality."); *Simpson v. Simpson*, 377 S.C. 519, 522, 660 S.E.2d 274, 276 (Ct.App.2008) (disclosing information at the beginning of the hearing "do not show any bias or prejudice but instead show her sensitivity to any apprehension each side might have in her ability to make a fair and impartial ruling in the case")

Having considered your consulting work broadly, you have also specifically asked that I consider your work on behalf of Fairfield County ("Fairfield"). I note that your consulting contract with them is consistent with the non-contingent, immediately terminable terms as discussed above, but includes additional relevant provisions. Those includes an introductory recital that describes the scope of consultation services, which are being provided regarding "any and all potential impacts... for the foreseeable and long-term future" upon Fairfield County that might result from potential restart of construction of two nuclear generating plants within that county. Specifically referenced is that you will provide advice as to future tax revenues."

The consultation was thus sought and obtained by Fairfield County in anticipation of potential activity within county borders that would be fully regulated by the Commission. However, the exclusive focus was on Fairfield County (an unregulated entity) and its planned response to regulated activity of others, not any sort of activity directly regulated by the Commission. That is true firstly because Fairfield County will never be an applicant in connection with any future matter that may come before the Commission. Secondly, the consultation was not premised upon or related to analysis of a particular potential entity that may later become an applicant before the Commission. The consultation was solely focused on the tax and broader "impact" on Fairfield County as to such a resumed construction by any regulated entity.

As such, the consultation was specifically <u>not</u> inclusive of issues that would fall within the purview of the Commission, such as: approval of a particular applicant for such a construction project, management or financing thereof, potential effect upon supply of energy or the rate at which such energy would be available on the market, appropriateness of such a project within the state or county therein, etc. To the contrary, the focus was primarily upon tax issues, a matter that the Commission does not decide, nor could it resolve via any award of monetary judgments or the like, and instead would have to be decided via other available means, including direct negotiation with any entity that was successful in constructing such a facility within the county, or via order from a state court with appropriate jurisdiction.

Finally, you made clear in the consulting contract that you were strictly an advisor for Fairfield County, not agent acting on their behalf when the contract stated that the parties "expressly stipulate and acknowledge that Consultant is to only provide advice and not state or denote to other interested parties, agencies, and internal and external experts regarding the Project that Consultant represents or can bind the County in any manner." Accordingly, your advisory role has exclusively consisted of internally focused advice shared only with Fairfield County, leaving the county to then take such action directly on its own initiative through third parties such as lawyers. As such, your work, from its topical focus, nature of output, and the exclusive recipient, was never of the sort that would or

could ever be brought before the Commission for consideration or adjudication in any respect under South Carolina law.

Additionally, you have shared a confirmation email between yourself and Fairfield County dated September 3, 2025, which confirms your mutual and amicable agreement to terminate your contract for services to Fairfield County as of September 15, 2025, as the county had reached the point where they needed to direct their limited resources towards obtaining services of a kind that you do not provide (i.e. attorney and lobbyists services). Consistent with the mutual intentions articulated in that email, you have confirmed that you did cease providing any manner of services to Fairfield County on September 15, 2025.

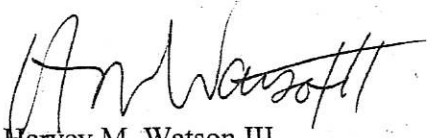
In conclusion, assuming you are given the honor of appointment to the Public Service Commission, it is my opinion that your consulting work will trigger required disclosures to parties appearing before you on matters heard by the Commission if they involve a former client. However, only in very limited circumstances (if ever) would you be precluded from presiding over any docketed matter before the Commission. Those limited circumstances would not include any potential nuclear project within Fairfield County, even though your work with Fairfield County was prompted by the county's anticipation of unrelated third parties eventually coming before the Commission in the future while seeking approval for such a project.

The conclusions set forth above are based on an understanding of the facts you have shared during our discussions as applied to relevant South Carolina law and rules, bolstered by my experience practicing in the field of ethics and professional responsibility. That experience includes representation of respondents appearing before the State Ethics Commission and Office of Disciplinary Counsel for the last fifteen years, during which time I have had the privilege to serve as Chairman of the SC Bar's Ethics Advisory Committee. I am currently Chairman of the SC Bar's Professional Responsibility Committee. My law partner is also Desa Ballard, also contributed to these conclusions as a result of our having discussed the facts, circumstances, and legal conclusions.

As you know, my opinion is not a binding opinion from the judiciary or any regulatory agency, nor does not have the effect of law. It is, however, a carefully considered and researched opinion about which I have great confidence, and am glad to share with you for your benefit, both in connection with your intended candidacy in the near future, as well as a resource that may be considered during any potential later period of service as a member of the Commission.

With warm personal regards, I am,

Sincerely yours,



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