

December 18, 2020

Via Electronic Filing Only

Ms. Kimberley A. Campbell
Chief Clerk
North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, North Carolina 27699-4300

Re: Docket No. E-2, Subs 1103, 1131, 1142, 1153
Docket No. E-7, Subs 819, 1110, 1146, 1152
Remand Proceedings of Appeals from 2018 DEP & DEC Rate Cases
Request for Informed Consent of NCUC Pursuant to RPC Rule 1.11

Dear Ms. Campbell:

I write in response to the North Carolina Utilities Commission's ("Commission") December 17, 2020 Order Requesting Comments on Procedure on Remand ("Remand Order") issued in the above-referenced dockets. At this time, I am not responding in substance to the Remand Order because I have not yet filed a Notice of Appearance in these dockets. For the reasons set forth below, I believe that before I may enter such appearance, I must first obtain the informed consent of the Commission for the reasons set forth below. The purpose of this letter, therefore, is to request such consent and to explain the circumstances surrounding this request for same.

Since July 2020, I have served as regulatory counsel to the Carolina Industrial Group for Fair Utility Rates II ("CIGFUR II"), a party to Docket No. E-2, Subs 1103, 1131, 1142, and 1153. Similarly, during the same time frame, I have served as regulatory counsel to the Carolina Industrial Group for Fair Utility Rates III ("CIGFUR III") (together with CIGFUR II, "CIGFUR").

From November 2017 through February 2019, I worked as a Staff Attorney to the North Carolina Utilities Commission ("NCUC"). During that time, I worked primarily on electric utility matters, including to varying extents, the DEP and DEC rate cases from which the appeals ultimately resulting in the Remand Order were taken. In the DEP rate case, my involvement was minimal and almost exclusively non-substantive. In the DEC rate case, however, my involvement was substantial.

In my opinion, this is exactly the kind of situation contemplated by North Carolina State Bar Rule of Professional Conduct ("RPC") 1.11, which is enclosed hereto for reference. Pursuant to RPC 1.11(a)(2), I am disqualified from representing CIGFUR's interests in the above-referenced proceedings "unless the [Commission] gives its informed consent, confirmed in writing, to the representation." To that end, I respectfully request that the Commission provide me with such consent.

In support of this request, I represent to the Commission and other parties in this docket that I do not believe my prior involvement in the underlying DEP and DEC rate cases while I served on Commission staff will in any way confer an unfair advantage to CIGFUR. Moreover, I have not and would not share confidential information obtained during my time serving on Commission staff with CIGFUR, whether in these dockets or any other dockets in which I have represented parties before the Commission.

In addition, I have conferred with counsel for Duke Energy, and can confirm that Duke Energy does not object to this request. Because of the compressed timetable between now and the current deadline for parties to provide comments in response to the Remand Order – particularly in light of the impending holidays – I have not had an opportunity to confer with any other parties to these proceedings but am providing everyone on the respective Service Lists for these dockets with a copy of this letter by electronic correspondence.

Given the first deadline set in the Remand Order, which is in six (6) business days, I respectfully request a response from the Commission as soon as practicable.

If you have any questions or concerns with this filing, I hope you will contact me directly.

Sincerely,

/s/ Christina D. Cress
Counsel for CIGFUR II and III

cc: Parties of Record

Encl. (1)

CLIENT-LAWYER RELATIONSHIP

Search Rules

RULE 1.11 SPECIAL CONFLICTS OF INTEREST FOR FORMER AND CURRENT GOVERNMENT OFFICERS AND EMPLOYEES

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(1) is subject to Rule 1.9(c); and

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

(b) When a lawyer is disqualified from representation under paragraph (a), no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter unless:

(1) the disqualified lawyer is timely screened from any participation in the matter; and

(2) written notice is promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.

(c) Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows is confidential government information about a person acquired when the lawyer was a public officer or employee, may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person. As used in this Rule, the term "confidential government information" means information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public. A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter.

(d) Except as law may otherwise expressly permit, a lawyer currently serving as a public officer or employee:

(1) is subject to Rules 1.7 and 1.9; and

(2) shall not:

(A) participate in a matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, confirmed in writing; or

(B) negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially, except that a lawyer serving as a law clerk to a judge, other adjudicative officer or arbitrator may negotiate for private employment as permitted by Rule 1.12(b) and subject to the conditions stated in Rule 1.12(b).

(e) As used in this Rule, the term "matter" includes:

(1) any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties, and

(2) any other matter covered by the conflict of interest rules of the appropriate government agency.

Comment

[1] A lawyer who has served or is currently serving as a public officer or employee is personally subject to the Rules of Professional Conduct, including the prohibition against concurrent conflicts of interest stated in Rule 1.7. In addition, such a lawyer may be subject to statutes and government regulations regarding conflicts of interest. Such statutes and regulations may circumscribe the extent to which the government agency may give consent under this Rule. See Rule 1.0(f) for the definition of informed consent.

[2] Paragraphs (a)(1), (a)(2) and (d)(1) restate the obligations of an individual lawyer who has served or is currently serving as an officer or employee of the government toward a former government or private client. Rule 1.10, however, is not applicable to the conflicts of interest addressed by this Rule. Rather, paragraph (b) sets forth a special imputation rule for former government lawyers that provides for screening and notice. Because of the special problems raised by imputation within a government agency, paragraph (d) does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or employees, although ordinarily it will be prudent to screen such lawyers.

[3] Paragraphs (a)(2) and (d)(2) impose additional obligations on a lawyer who has served or is currently serving as an officer or employee of the government. They apply in situations where a lawyer is not adverse to a former client and are designed to prevent a lawyer from exploiting public office for the advantage of another client. For example, a lawyer who has pursued a claim on behalf of the government may not pursue the same claim on behalf of a later private client after the lawyer has left government service, except when authorized to do so by the government agency under paragraph (a). Similarly, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, except when authorized to do so by paragraph (d). As with paragraphs (a)(1) and (d)(1), Rule 1.10 is not applicable to the conflicts of interest addressed by these paragraphs.

[4] This Rule represents a balancing of interests. On the one hand, where the successive clients are a government agency and another client, public or private, the risk exists that power or discretion vested in that agency might be used for the special benefit of the other client. A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government. Also, unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service. On the other hand, the rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards. The provisions for screening and waiver in paragraph (b) are necessary to prevent the disqualification rule from imposing too severe a deterrent against entering public service. The limitation of disqualification in paragraphs (a)(2) and (d)(2) to matters involving a specific party or parties, rather than extending disqualification to all substantive issues on which the lawyer worked, serves a similar function.

[5] When a lawyer has been employed by one government agency and then moves to a second government agency, it may be appropriate to treat that second agency as another client for purposes of this Rule, as when a lawyer is employed by a city and subsequently is employed by a federal agency. However, because the conflict of interest is governed by paragraph (d), the latter agency is not required to screen the lawyer as paragraph (b) requires a law firm to do. The question of whether two government agencies should be regarded as the same or different clients for conflict of interest purposes is beyond the scope of these Rules. See Rule 1.13 Comment [9].

[6] Paragraphs (b) and (c) contemplate a screening arrangement. See Rule 1.0(l) (requirements for screening procedures). These paragraphs do not prohibit a lawyer from receiving a salary or partnership share established by prior independent agreement nor do they specifically prohibit the receipt of a part of the fee from the screened matter. However, Rule 8.4(c) prohibits the screened lawyer from participating in the fee if such participation was impliedly or explicitly offered as an inducement to the lawyer to become associated with the firm.

[7] Notice, including a description of the screened lawyer's prior representation and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent. When disclosure is likely significantly to injure the client, a reasonable delay may be justified.

[8] Paragraph (c) operates only when the lawyer in question has knowledge of the information, which means actual knowledge; it does not operate with respect to information that merely could be imputed to the lawyer.

[9] Paragraphs (a) and (d) do not prohibit a lawyer from jointly representing a private party and a government agency when doing so is permitted by Rule 1.7 and is not otherwise prohibited by law.

History Note: Statutory Authority G.S. 84-23

Adopted by the Supreme Court: July 24, 1997

Amendments Approved by the Supreme Court: March 1, 2003; October 6, 2004