COMMONWEALTH OF KENTUCKY

EXECUTIVE BRANCH ETHICS COMMISSION

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Executive Branch Ethics Commission
ADVISORY OPINION 09-23
September 18, 2009

RE:

1. May a commissioner of the Public Service Commission ("PSC") serve on the board of directors of a local hospital if the hospital receives electricity from a regulated electric utility pursuant to a special contract tariff, if the commissioner abstains from any and all matters involving the PSC's review of that contract?

2. May a commissioner of the PSC serve on the board of directors of the same local hospital if a regulated electric utility has made significant contributions to a separate entity, a non-profit foundation, that the commissioner previously led and that supports the hospital?

DECISION:

1. Yes.
2. Yes.

This opinion is issued in response to your August 6, 2009 request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the September 18, 2009 meeting of the Commission and the following opinion is issued.

You provide the relevant facts as follows:

You were appointed as one of three PSC commissioners on July 15, 2009. The PSC is the state agency charged under KRS Chapter 278 with regulating the intrastate rates and services of over 1500 utility companies throughout the state of Kentucky. The mission of the PSC is to foster the provision of safe and reliable utility service at a reasonable price to customers while providing for the financial stability of those utilities by setting fair and just rates, and supporting their operational competence by overseeing regulated activities. The PSC performs its regulatory functions through written orders following procedures outlined in KRS Chapter 278 and administrative regulations. PSC commissioners are primarily responsible for reviewing and deciding utility rate cases filed with the PSC, promulgating utility regulations, and developing utility policy. The commissioners work with PSC staff to conduct investigations, hold hearings

and public meetings, and review testimony, exhibits and briefs filed by utilities and other parties that appear before the PSC.

Immediately prior to your appointment as Commissioner of the PSC, you were the Executive Director of the Kings Daughters Health Foundation, Inc. ("Foundation"), a Kentucky non-profit corporation. The purpose of the Foundation is to improve the health and quality of life in the northeastern Kentucky community. The Health Foundation extends healthcare services to the community, promotes comprehensive health awareness through education, and provides scholarships for students entering healthcare-related fields. In 2009, a utility regulated by the PSC, Kentucky Power Company ("Kentucky Power") contributed $50,000.00 to the Foundation to help cover the costs of a mobile mammography unit.

You have been asked to serve on the Board of Directors of the Ashland Hospital Corporation d/b/a Kings Daughters Medical Center ("KDMC"), an entity supported by the Foundation. Service on the Board is strictly voluntary with no compensation. KDMC has a special contract tariff for utility service in place with Kentucky Power due to its unique and specialized load and reliability requirements as a major medical facility. The contract was filed as a tariff with the PSC and approved on March 21, 2009.

KRS 11A.005 provides:

> 1) It is the public policy of this Commonwealth that a public servant shall work for the benefit of the people of the Commonwealth. The principles of ethical behavior contained in this chapter recognize that public office is a public trust and that the proper operation of democratic government requires that:
>
> (a) A public servant be independent and impartial;
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> (b) Government policy and decisions be made through the established processes of government;
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> (c) A public servant not use public office to obtain private benefits; and
>
> (d) The public has confidence in the integrity of its government and public servants.
>
> (2) The principles of ethical behavior for public servants shall recognize that:
>
> (a) Those who hold positions of public trust, and members of their families, also have certain business and financial interests;

(b) Those in government service are often involved in policy decisions that pose a potential conflict with some personal financial interest; and

(c) Standards of ethical conduct for the executive branch of state government are needed to determine those conflicts of interest which are substantial and material

or which, by the nature of the conflict of interest, tend to bring public servants into disrepute.

KRS 11A.020 (1)- (3) provides:

(1) No public servant, by himself or through others, shall knowingly:

(a) Use or attempt to use his influence in any matter which involves a substantial conflict between his personal or private interest and his duties in the public interest;

(b) Use or attempt to use any means to influence a public agency in derogation of the state at large;

(c) Use his official position or office to obtain financial gain for himself or any members of the public servant's family; or

(d) Use or attempt to use his official position to secure or create privileges, exemptions, advantages, or treatment for himself or others in derogation of the public interest at large.

(2) If a public servant appears before a state agency, he shall avoid all conduct which might in any way lead members of the general public to conclude that he is using his official position to further his professional or private interest.

(3) When a public servant abstains from action on an official decision in which he has or may have a personal or private interest, he shall disclose that fact in writing to his superior, who shall cause the decision on these matters to be made by an impartial third party.

KRS 11A.030 provides:

In determining whether to abstain from action on an official decision because of a possible conflict of interest, a public servant should consider the following guidelines:

> (1) Whether a substantial threat to his independence of judgment has been created by his personal or private interest;
>
> (2) The effect of his participation on public confidence in the integrity of the executive branch;
>
> (3) Whether his participation is likely to have any significant effect on the disposition of the matter;
>
> (4) The need for his particular contribution, such as special knowledge of the subject matter, to the effective functioning of the executive branch; or
>
> (5) Whether the official decision will affect him in a manner differently from the public or will affect him as a member of a business, profession, occupation, or group to no greater extent generally than other members of such business, profession, occupation, or group. A public servant may request an advisory opinion from the Executive Branch Ethics Commission in accordance with the commission's rules of procedure.

First, you ask whether you may serve on the board of directors of KDMC. The hospital receives utility service from Kentucky Power, a utility regulated by the PSC, pursuant to a special contract tariff that was approved by the PSC prior to your appointment as commissioner. You have stated your intention to abstain from any and all matters involving the PSC's review of the special contract tariff.

The Commission advised in Advisory Opinion 00-43 that a state officer may serve on the board of a non-profit corporation, as long as the state officer has no involvement with matters related to the non-profit corporation as part of his official duty and abstains from such matters in writing. Similarly, in Advisory Opinion 04-3, the Commission advised that a state officer may serve on a board or commission, provided that he or she abstains from official action with respect to that particular entity.

It is the opinion of the Commission, therefore, that you may serve on the Board of Directors for KDMC. However, in compliance with KRS 11A.020(3), you should state in writing your intention to abstain from participating in all matters coming before the PSC that pertain to KDMC. In particular, in order to avoid a conflict of interest, you should abstain from discussing or voting on any matter that involves the special contract tariff between Kentucky Power and KDMC, or on any other matter that would affect KDMC differently than any other similarly situated customer of Kentucky Power.

Second, you ask whether you may serve on the Board of Directors for KDMC in light of the fact that Kentucky Power made recent significant contributions to the Foundation, your former employer. The Foundation and KDMC are separate non-profit entities, but the Foundation supports KDMC.

The Commission does not believe that the monetary donation by Kentucky Power to the Foundation creates a conflict of interest that prohibits you from serving on the Board of Directors for KDMC. However, the substantial monetary donation by Kentucky Power, a regulated entity, to your former employer does create a potential conflict of interest for you as a commissioner of the PSC. Therefore, in addition to matters pertaining directly to KDMC as discussed above, the Commission believes that in order to avoid any real or perceived conflicts of interest, you should also abstain for a reasonable period of time from any matters directly involving Kentucky Power. For such abstention, you should follow the guidance laid out in KRS 11A.030 and the requirements set forth in KRS 11A.020(3). Based on the advice in Advisory Opinion 08-20, the Commission believes that six months may be a reasonable period of time for you to abstain from any matter directly involving Kentucky Power. Further, should it be necessary for you to abstain from any matters directly involving Kentucky Power during your first six months at the PSC, you must continue to abstain from those same matters as long as they remain pending.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

Gwen R. Pinson

By Chair: Gwen R. Pinson