

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: October 10, 2019

Resolution No.: L-592

R E S O L U T I O N

**RESOLUTION DENYING RUTH HENRICKS’ AUGUST 23, 2019
MOTION FOR DISQUALIFICATION OF COMMISSIONER CLIFFORD
RECHTSCHAFFEN FOR CAUSE IN RULEMAKING 19-07-017**

SUMMARY

This Resolution denies Ruth Henricks’ (Henricks) Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause in Rulemaking (R.) 19-07-017. In essence, Henricks alleges that, because the California Earthquake Authority (CEA) has scheduled a transfer of \$2 billion from the State Treasurer’s Surplus Money Investment Fund (SMIF) to the Wildfire Fund created by AB 1054, there is an inevitable inference that Commissioner Rechtschaffen has improperly communicated to other key decisionmakers that the Wildfire Fund will be approved in R.19-07-017. Henricks also alleges that Commissioner Rechtschaffen has demonstrated bias and/or prejudice by (1) determining there is no need for evidentiary hearings in R.19-07-017 and (2) taking judicial notice of two reports: “Wildfires and Climate Change: California’s Energy Future,” and “Final Report of the Commission on Catastrophic Wildfire Cost and Recovery.”

Finding no evidence of bias or prejudice on the part of Commissioner Rechtschaffen, or even the appearance of it, the Commission denies the Motion for Disqualification.

BACKGROUND

On July 12, 2019, Governor Newsom signed Assembly Bill (AB) 1054 into law. Very generally, AB 1054 creates additional safety oversight and processes for electrical utility infrastructure, recasts recovery of costs from wildfire damages, and authorizes an electrical corporation and ratepayer jointly funded Wildfire Fund to address future-related wildfire liabilities. AB 1054 is prospective only, and does not affect civil liability for past fire damages. AB 1054 directs the Commission to take various actions related to the issuance of bonds to finance future wildfire liabilities. Specifically, Public Utilities Code Section 3289 provides:

- (a) (1) Within 14 days of the effective date of this part, the commission shall initiate a rulemaking proceeding to consider using

its authority pursuant to Section 701 to require each electrical corporation, except a regional electrical corporation that chooses not to participate in any fund pursuant to Chapter 3, to collect a nonbypassable charge from ratepayers of the electrical corporation to support the Wildfire Fund established pursuant to Section 3284, including the payment of any bonds issued pursuant to Division 28 (commencing with Section 80500) of the Water Code, as follows:

(A) For a large electrical corporation, a charge in an amount sufficient to fund the revenue requirement, as established pursuant to Section 80524 of the Water Code.

(B) For a regional electrical corporation, the amount equal to one-half cent per kilowatt-hour (\$0.005/kWh).

(2) If the commission determines that the imposition of the charge described in paragraph (1) is just and reasonable, and that it is appropriate to exercise its authority pursuant to Section 701 to do so, the commission shall direct each electrical corporation to impose and collect that charge commencing in the month immediately following the month in which the final imposition of the revenue requirement with respect to bonds previously issued pursuant to Division 27 (commencing with Section 80000) of the Water Code is made. The charge shall be collected in the same manner as that for the payments made to reimburse the Department of Water Resources pursuant to Division 27 (commencing with Section 80000) of the Water Code.

(b) Notwithstanding any other law, no later than 90 days after the initiation of the rulemaking proceeding, the commission shall adopt a decision regarding the imposition of the charge.

(c) Notwithstanding Section 455.5 or 1708, or any other law, the commission shall not revise, amend, or otherwise modify a decision to impose a charge made pursuant to this section at any time prior to January 1, 2036.

On July 26, 2019, the Commission issued an Order Instituting Rulemaking (OIR) (R.19-07-017), as required by PU Code Section 3289(a)(1), to consider the Commission's authority to require certain investor-owned utilities (IOUs) to impose a non-bypassable charge on their ratepayers to support the newly enacted Wildfire Fund, and whether or not such a nonbypassable charge is just and reasonable. PU Code Section 3289(a)(2)(b) further requires the Commission to adopt a decision in R.19-07-017 no later than 90 days after its initiation.

In the OIR, the Commission preliminarily determined that hearings would not be necessary in the R.19-07-017 proceeding. The OIR invited comment on an estimated revenue requirement of \$880 million per year for the Wildfire Fund, per Public Utilities Code section 3289. Commissioner Rechtschaffen was necessarily absent and did not participate in the issuance of the OIR. On July 26, 2019 a formal Notice of Assignment was issued assigning Commissioner Rechtschaffen and Administrative Law Judge, Patrick Doherty to R.19-07-017.

On August 14, 2019, Commissioner Rechtschaffen issued an Assigned Commissioner's Scoping Memo and Ruling. In the Scoping Memo, Commissioner Rechtschaffen indicated that the Commission "may" take official notice of two reports: "Wildfires and Climate Change: California's Energy Future," and "Final Report of the Commission on Catastrophic Wildfire Cost and Recovery." The Commission has not yet actually done so. In the Scoping Memo, Commissioner Rechtschaffen also confirmed the OIR's conclusion that evidentiary hearings would not be necessary in R.19-07-017.

On August 23, 2019, Henricks filed the instant Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause, which is the subject of this Draft Resolution. Henricks requests that Commissioner Rechtschaffen be disqualified, pursuant to Commission Rule 9.5, and that ALJ Patrick Doherty instead preside over the proceedings.

NOTICE

Henricks' Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause was publicly filed in R.19-07-017 on August 23, 2019. This Draft Resolution was submitted for public comment on September 6, 2019.

DISCUSSION

STANDARD FOR DETERMINING BIAS OR PREJUDICE

Commission Rule 9.5 of the Commission's Rules of Practice and Procedure (Rule or Rules) allows a party to move to disqualify a Commissioner from a proceeding where it can be demonstrated that the Commissioner has a financial interest in the subject matter or a party to the proceeding or for having bias or prejudice in the proceeding. More specifically, in a Ratesetting proceeding such as R.19-07-017, bias or prejudice may include "(A) Actions taken during the proceeding that demonstrate bias or prejudice" or "(B) Actions taken outside the public record of a proceeding demonstrating any commitment to provide relief to a party." Rule 9.5(a)(1)(A)-(B). Henricks does not allege that Commissioner Rechtschaffen has a financial interest in the subject matter or a party to R.19-07-017.

Rule 9.5(d) requires that “The Executive Director, in consultation with the General Counsel, shall present a recommended resolution for a vote of the Commission.” Rule 9.5(e) prevents a Commissioner who is subject to a motion to disqualify from voting on the Resolution.

As R.19-07-017 is a rulemaking proceeding, the standard for disqualification of a Commissioner is high and requires “a clear and convincing showing” that the decisionmaker “has an unalterably closed mind on matters critical to the disposition of the proceeding.” *Alaska Factory Trawler Assoc. v. Baldrige*, 831 F.2d 1456, 1467 (9th Cir. 1987); see *Association of Nat'l Advertisers, Inc. v. FTC*, 627 F.2d 1151, 1170 (D.C. Cir. 1979).

Furthermore, in the absence of a financial or pecuniary interest on the part of the decision maker (which Henricks has not alleged), the decisionmaker is afforded a presumption of impartiality. *Haas v. County of San Bernardino*, 27 Cal. 4th 1017, 1025 (2002) (citing *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

HENRICKS' ALLEGATIONS LACK MERIT

Henricks alleges that, because the CEA has scheduled a transfer of \$2 billion from the State Treasurer's SMIF to the Wildfire Fund created by AB 1054, there is an “inevitable inference” that Commissioner Rechtschaffen has improperly communicated to other key decisionmakers that the Wildfire Fund will be approved in R.19-07-017.

Henricks provides no evidence in support of her allegation, apart from her speculative inference. The CEA appears to be doing no more than it is duty-bound to do under AB 1054 and newly created Public Utilities Code section 3280 *et. seq.*¹ Specifically, section

¹ PU Code Section 3288 states: “(a) If Section 3291 is operative, the Director of Finance, in consultation with the Treasurer and the administrator, shall determine the amount and timing of moneys needed to support the purposes of this part. The Director of Finance shall request such moneys from the Controller. Upon such request, the Controller shall transfer up to ten billion five hundred million dollars (\$10,500,000,000) to the fund from the Surplus Money Investment Fund and other funds that accrue interest to the General Fund as a cash loan. The loan principal and interest shall be fully repaid as provided in subdivision (b) of Section 80550 of the Water Code.

(b) In the event Section 3292 is operative, the Director of Finance, in consultation with the Treasurer and the administrator, shall determine a schedule to provide ten billion five hundred million dollars (\$10,500,000,000) to the fund and shall provide that schedule to the Controller within 60 days. The Controller shall transfer the moneys from the Surplus Money Investment Fund and other funds that accrue interest to the General Fund pursuant to the schedule provided by the Director of Finance as a loan to support the purposes of this part. The loan from the

3288 calls for the transfer of such funds, and CEA has done nothing more than it has been directed to do by the Legislature. Any inference that the CEA made this transfer in response to some signal from Commissioner Rechtschaffen and not the statutory requirements enacted by the Legislature is simply not supported by the record.

Hendricks also alleges bias due to her contention that the Commission has calculated a pre-determined amount for the revenue requirement for the calculation of the Department of Water Resources (DWR) surcharge in advance of issuing the July 26, 2019 Order Instituting Rulemaking (OIR). However, Hendricks mischaracterizes the OIR. As already stated, the OIR invited comment on the estimated revenue requirement of \$880 million per year for the Wildfire Fund, per Public Utilities Code section 3289. The OIR did nothing more than provide an estimate for comment by the parties.

Next, Hendricks alleges that Commissioner Rechtschaffen has demonstrated bias and/or prejudice by issuing a Scoping Memo determining there is no need for evidentiary hearings in R.19-07-017 and thereby excluding the ALJ from critical decisions in the proceeding. The Commission itself initially determined that evidentiary hearings were likely not necessary in its initial OIR, and Commissioner Rechtschaffen did not even

Surplus Money Investment Fund is intended to provide necessary cash on a short-term basis for claims-paying resources. It is the intent that the loan be repaid as quickly as possible within a fiscal year. The loan shall be repaid by the proceeds of the charges authorized pursuant to subparagraph (A) of paragraph (1) of subdivision (a) of Section 3289 or the proceeds of any bonds as set forth in Division 28 (commencing with Section 80500) of the Water Code.

(c) In the case of subdivision (a) or (b), interest payments on outstanding loan amounts shall be calculated at the greater of the quarter-to-date yield at the one-year constant maturity United States Treasury rate for the calendar quarter concluded directly before the calculation or the Surplus Money Investment Fund rate at the time of the cash transfer. The interest payments shall be paid on a quarterly basis from Wildfire Fund assets following the cash transfer and shall continue until the loan has been fully repaid. The interest payments are interest earnings of the Surplus Money Investment Fund and shall be apportioned pursuant to Sections 16475 and 16480.6 of the Government Code.

(d) Whether Section 3291 or 3292 is operative, an initial transfer to the fund of no less than two billion dollars (\$2,000,000,000) shall be made in the 2019–20 fiscal year.

(e) Prior to a transfer being made from the Surplus Money Investment Fund pursuant to subdivision (a) or (b), the Director of Finance shall determine if the transfer would result in the General Fund's estimated cash and unused borrowable resources declining below three billion dollars (\$3,000,000,000) at any point in time over the succeeding twenty-four month period. If the Director of Finance determines that the transfer would result in estimated cash and unused borrowable resources declining below that level, the transfer of funds from the Surplus Money Investment Fund shall not be made. This subdivision shall not apply to the first two billion dollars (\$2,000,000,000) of transfers made in the 2019–20 fiscal year.

participate in that initial determination and Order because he was necessarily absent. The fact that Commissioner Rechtschaffen subsequently confirmed the Commission's initial determination that evidentiary hearings are not necessary in R.19-07-017 is not an indication of prejudice or bias. Not all proceedings at the Commission require evidentiary hearings, and Rule 7.3 gives the Assigned Commissioner discretion in determining whether evidentiary hearings are necessary.² Moreover, a number of questions raised in Henricks' Motion for Disqualification as examples of potential factual inquiry are in fact, legal questions, such as "Whether utility customers have a legal duty to provide for 'California's electrical corporations' to be 'financially viable' or 'financially healthy?'" or "Whether utility customers have any legal duty to 'support the financial stability of California's electrical corporations?'" Questions such as these, and other policy determinations raised by Henricks, do not require evidentiary hearings.

In addition, the Scoping Memo invites Opening and Reply comments from parties on all of the issues raised in Henricks' Motion, and the Memo also notices the deadline for filing motions for oral argument in the R.19-07-017 proceeding. There is ample opportunity for the parties to be heard and no indication of prejudice or bias.

Finally, Henricks alleges bias or prejudice based on the Scoping Memo's "taking" judicial notice of two reports: "Wildfires and Climate Change: California's Energy Future," and "Final Report of the Commission on Catastrophic Wildfire Cost and Recovery." Henricks devotes substantial discussion in the Motion on why it would be legal error to take judicial notice of the reports, and she disputes a number of the reports' conclusions. However, as noted, Commissioner Rechtschaffen has only stated that he "may" take official notice of the two reports; he has not yet done so. But even if official notice were taken of the documents, that would not constitute evidence of bias or prejudice that would warrant disqualification.

In sum, Henricks' Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause does not present credible evidence, let alone clear and convincing evidence, that Commissioner Rechtschaffen "has an unalterably closed mind on matters critical to the disposition of the proceeding." *Alaska Factory Trawler Asso. v. Baldrige*, 831 F.2d 1456, 1467 (9th Cir. 1987). The Motion should therefore be denied.

COMMENTS ON DRAFT RESOLUTION

² 7.3. (Rule 7.3) Scoping Memos.

The assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed. In an adjudicatory or ratesetting proceeding in which there is evidentiary hearing, the scoping memo shall also designate the presiding officer. In a proceeding initiated by application or order instituting rulemaking, the scoping memo shall also determine the category and need for hearing.

The Draft Resolution was mailed to the parties on September 6, 2019, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on _____. Reply comments were filed on _____.

FINDINGS OF FACT

1. The Commission received a Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause by Ruth Henricks on August 23, 2019.
2. In the motion, Ruth Henricks alleges bias because the Commission allegedly set a pre-determined revenue requirement for the DWR surcharge in advance of issuing the OIR, because Commissioner Rechtschaffen denied her an evidentiary hearing, because Commissioner Rechtschaffen allegedly excluded the ALJ from critical decisions and because Commissioner Rechtschaffen allegedly took official notice of the Strike Force and Wildfire Commission Reports.
3. Ruth Henricks' Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause lacks merit.
4. Ruth Hendricks has not established facts to establish that Commissioner Clifford Rechtschaffen "has an unalterably closed mind on matters critical to the disposition of the proceeding."
5. Ruth Henricks has not established a financial or pecuniary interest on the part of Commissioner Clifford Rechtschaffen.

CONCLUSIONS OF LAW

1. In the absence of a financial or pecuniary interest on the part of the decision maker, the decisionmaker is afforded a presumption of impartiality.
2. Ruth Henricks has failed to establish by "clear and convincing evidence" that Commissioner Rechtschaffen "has an unalterably closed mind on matters critical to the disposition of the proceeding."

ORDER

1. Ruth Henricks' Motion for Disqualification of Commissioner Clifford Rechtschaffen for Cause in R.19-07-017 is denied.
2. The effective date of this order is today.

I certify that the foregoing Resolution was adopted by the California Public Utilities Commission of the State of California at its regular meeting of October 10, 2019, and the following Commissioners approved favorably thereon:

ALICE STEBBINS
Executive Director