

STATE OF NEW YORK  
DEPARTMENT OF PUBLIC SERVICE

October 29, 2014

TO: NEW YORK STATE BOARD ON ELECTRIC  
GENERATION SITING AND THE ENVIRONMENT

FROM: KATHLEEN H. BURGESS, Secretary  
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SUBJECT: *Ex Parte* Communications, Conflicts of Interest, Project Sunlight

Introduction

All members of the Siting Board, including the two *ad hoc* public members, serve as "state officers" as defined by Section 2 of the Public Officers Law. The purpose of this memorandum is to provide you with guidance concerning the parameters of permissible communications and recommended procedures when communications occur during the phases of an Article 10 proceeding, as dictated by rules applicable to state officers concerning *ex parte* communications, conflicts of interest, and Project Sunlight.

*Ex Parte* Communications

The term "*ex parte*" means "on one side only" and in the context of a tribunal like the Siting Board refers to a potential situation where the Siting Board or its members receive a substantive communication from one party without notice to or the opportunity to contest by any other party that has an interest in the matter. Such *ex parte* communications are prohibited by Section 307(2) of the State Administrative Procedure Act (SAPA) in proceedings where the Siting Board adjudicates the legal rights, duties or privileges of named parties thereto and is required by law to make its determination only on a record and after an opportunity for a hearing. A Siting Board proceeding to determine whether to grant a certificate of environmental compatibility and public need authorizing the construction of a major electric generating facility is such an adjudicatory proceeding.

The filing of an Article 10 application commences the adjudicatory phase of the Siting Board proceeding and the prohibitions on *ex parte* communications commence at that milestone. It should be noted that the pre-application public involvement and preliminary scoping phases of an Article 10 proceeding are not adjudicatory in nature and are not subject to the *ex parte* prohibition. Commencing upon the filing of an Article 10 application, information received outside of the public record is considered *ex parte* and prohibited. Therefore, after an application is filed, members of the Siting Board and their advisors must not communicate with any person, party or party representative about any issue of fact or question of law in the matter. Should a Siting Board member inadvertently receive an *ex parte* communication, the member should notify the Secretary to the Siting Board, who will take whatever steps that can be taken to remedy the situation.

The *ex parte* rules do not prohibit Siting Board members from consulting at any time with "advisory staff" who provide guidance and counsel to Siting Board members. The presiding and associate examiners (administrative law judges) assigned to the proceeding are considered advisory staff, as are most senior staff personnel at the state agencies that provide the permanent

members of the Siting Board. In contrast, “trial staff” is made up of those employees of an agency designated to participate as a party in the proceeding. Those trial staff employees are treated like any other party to the adjudication and the members of the Siting Board are prohibited from communication with them by the *ex parte* rules. Because of the different roles of advisory staff and trial staff and the limitations with respect to *ex parte* communications applicable to trial staff, it is essential that trial staff be separate from the advisory staff and, further, that caution be exercised concerning communications by Siting Board members intended for advisory staff so that such communications are not directed inadvertently to trial staff. The Secretary is available to assist Siting Board members in their communications.

#### Conflicts of Interest

Public Officers Law §74 is the Code of Ethics, which pertains to all State officers and employees. The rule with respect to conflicts of interest, contained in Public Officers Law Section 74(2), is as follows:

No officer or employee of a state agency ... should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.

Following the rule with respect to conflicts of interest, Public Officers Law §74(3) provides standards of conduct that address not only actual but apparent conflicts of interest. Of relevance are the following:

....  
(d) No officer or employee of a state agency . . . should use or attempt to use his official position to secure unwarranted privileges or exemptions for himself or others.

....  
(f) An officer or employee of a state agency . . . should not by his conduct give reasonable basis for the impression that any person can improperly influence him or unduly enjoy his favor in the performance of his official duties, or that he is affected by the kinship, rank, position or influence of any party or person.

....  
(h) An officer or employee of a state agency . . . should endeavor to pursue a course of conduct which will not raise suspicion among the public that he is likely to be engaged in acts that are in violation of his trust.

....

Public Officers Law §74 applies to activities of State officers and employees that have even the appearance of a conflict of interest; an actual conflict is not necessary for a violation of the law.

Considering SAPA §307 and Public Officers Law §74 in tandem, if communications are not prohibited by SAPA during the pre-application stages of the proceeding, Public Officers

Law §74 still requires that consideration must be given to the propriety of having meetings or phone calls with representatives of entities or members of the public involved with the process. A Board member should ensure that his or her conduct does not give a reasonable basis for the impression that any person can improperly influence or unduly enjoy his or her favor in the performance of official duties. A Board member should also ensure that his or her conduct does not raise suspicion among the public that he or she is likely to be engaged in acts that are in violation of the public trust.

Siting Board members should exercise discretion and caution, in light of Public Officers Law §74, when considering communications with individuals and/or representatives of entities or members of the public concerning a potential Article 10 application. There is a risk that a member's conduct could give a basis for the impression that he or she was improperly influenced. Communications with an applicant or other interested parties prior to the filing of an application, while not restricted by the *ex parte* prohibitions, may create an appearance that an applicant or other party may be receiving preferential considerations, may improperly influence a Siting Board member, or that the member is engaged in acts that are in violation of the public trust. Therefore, while such communications are not barred, Siting Board members and their advisors should be mindful that such meetings, prior to the commencement of the adjudicatory phase of the proceeding, may create an appearance of impropriety.

In order to ensure transparency of the Article 10 process and to maintain accountability to the public, it is recommended that when a meeting is requested during the pre-application phase, that the Siting Board members and their advisors delegate the meeting to trial staff so that only trial staff will meet with the individuals or representatives. This would clearly obviate any claim of improper influence. If the Siting Board member or advisor feels that they must attend the proposed meeting, it is recommended that careful consideration should be given to opening the meeting to the public upon advance notice provided by the Secretary.

#### Project Sunlight

Project Sunlight, an important component of the Public Integrity Reform Act of 2011, is an online database that provides the public with an opportunity to see the individuals and entities that are interacting with government decision-makers. For the text of the law, see Chapter 399 Part A, § 4 of the Laws of 2011. Siting Board members should be aware that the provisions of Project Sunlight requires Siting Board members and their advisors to provide a public record of any interaction that is an in-person meeting or a video conference between them and applicants, individuals, advocacy groups, and their representatives related to any Article 10 adjudicatory proceeding. The location and formality of the interaction is irrelevant as to whether it constitutes an appearance, and it is irrelevant who initiates the interaction. There can be numerous appearances related to a single matter. Written communications and telephone conversations do not constitute such an interaction.