NORTH CAROLINA BOARD OF ETHICS
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October 26, 2005

Mr. Charles Wakild
Environmental Management Commission
Post Office Box 1666
Raleigh, North Carolina 27602-0629

Re: **Environmental Management Commission**
Former employee's involvement in rulemaking which impacts former employer
AO-05-005

Dear Mr. Wakild:

This preliminary advisory opinion is in response to your October 17 e-mail requesting a formal opinion from the Board of Ethics on any conflict or appearance of conflict aspects of your involvement in rulemaking by the Environmental Management Commission ("EMC" or "the Commission") given your current and former financial relationship with Progress Energy. The full Board of Ethics will address your request at its November 16, 2005, meeting.

The following preliminary advisory opinion is issued by the staff of the Board of Ethics ("BOE" or "the Board") according to the Board's Internal Operating Procedures ("Procedures") and may be relied upon until and unless it is formally modified or rescinded by the full Board. Once the Board formally approves, modifies, or otherwise disposes of the preliminary opinion, all pertinent parties will be so notified.

All advisory opinions, both preliminary and final, are based upon the particular facts presented and issues raised in the specific request for an advisory opinion. As such, the scope of each opinion is limited to the request made and should only serve as a recommendation to the particular parties involved. It may, however, serve as a general guide to other individuals similarly situated.

I understand the basic facts to be as follows. The Environmental Management Commission ("EMC" or "the Commission") was created "to promulgate rules to be followed in the protection, preservation, and enhancement of the water and air resources of the State." North Carolina General Statutes ("N.C.G.S.") §143B-282 (a). Members of the Commission are appointed pursuant to N.C.G.S. §143B-283. By statute, most EMC members are required to have certain backgrounds or fields of expertise. This includes one member "who shall, at the time of appointment, be actively employed by, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control." N.C.G.S. §143B-283 (a) (8). You are the new industrial manufacturing representative on the EMC.

You worked for Progress Energy from May 1997 through January 2005 under an employment agreement. That agreement requires Progress Energy to provide fixed payments for 18 months (February, 2005 through July, 2006) after employment is terminated. Your only obligation in return for these severance payments is that you not compete with Progress Energy or hire its employees during that time. Otherwise, Progress

Energy has no control over your actions or activities. As long as you do not compete with the company, you will receive the payments as scheduled. There is absolutely no connection, either express or implied, between the severance payments and your service on the EMC. Indeed, your employment was terminated in January 2005, and you were not appointed to the EMC until September 2005.

You also own certain Progress Energy stock options which you obtained over the course of your employment. These options generally have been of minimal value. According to the closing stock price on Friday, October 14, these stock options have no value, but obviously that could change either way over time.[1] Because these stock options have no current value, and certainly do not exceed the $10,000 disclosure threshold, there was no obvious place to list them on your Statement of Economic Interest form.[2]

The EMC is considering two separate rules which will apply to Progress Energy and all other similarly-situated companies or facilities. Both rules are necessary because of final rules promulgated by the US Environmental Protection Agency (EPA). In neither situation is Progress Energy the petitioner for rulemaking, and at this point the company has had no formal involvement in the early stages of the rulemaking process.

The first set of rules is called the Clean Air Interstate Rule (CAIR). The EPA has established caps on emissions of certain air pollutants (nitrogen oxides and sulfur dioxide) and an emissions allowance trading program from certain power plant sources. The EMC must adopt rules which are at least as stringent as the EPA rules or else EPA will impose their rules on those sources. The EMC may impose more stringent rules if it determines there is a need. At this point in the rulemaking process, the EMC's Air Quality Committee has recommended that the full EMC hold public hearings on a draft rule which is virtually the same as the EPA rule. These rules would apply to eleven (11) companies or facilities, most notably including Progress Energy and Duke Energy.[3] These 11 companies are *all* of the companies which use fossil-fuel to generate electricity for sale at power plants of a certain size.[4]

While all of the companies will be impacted on some proportional basis, the overwhelming emissions reductions and expenses will come from Progress Energy and Duke Energy. Progress Energy has not provided an estimate of the added cost to comply with the proposed EMC rules, but you acknowledge it will be substantial (tens to hundreds of millions of dollars).[5]

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[1] You stated that the closing price of Progress Energy stock on Friday, October 14 was $41.58 per share.

[2] While it is unclear whether or where stock options should be listed on Public Officials' Statements of Economic Interest, in particular situations where they could be relevant to a complete conflict evaluation, they could be listed under question number 16 (the general "catch-all" question).

[3] The others are Butler-Warner Generation Plant, Dwane Colier Battle Cogeneration, Dynergy – Rockingham Power, Elizabethtown Power, Lumberton Power, NC Electric Membership Corporation, Primary Energy, Rosemary Power Station, and Westmoreland LG&E Partners. By far the greatest impact of the rules will fall on the biggest generators: Progress Energy and Duke Energy.

[4] As I understand it, the rules apply to *any* stationary fossil-fuel fired boiler or combustion turbine serving a generator with capacity of more than 25 megawatts of power which generates electricity for sale.

[5] Both Progress Energy and Duke Energy are already required to substantially reduce emissions of nitrogen oxides and sulfur dioxide from their North Carolina plants under the NC Clean Smokestacks Act of 2002. Progress Energy has estimated its cost of compliance under that provision at over $800 million (through 2012). This will bring Progress Energy near compliance with the EPA's CAIR and will substantially reduce

The second rule being considered by the EMC is a mercury emissions reduction rule. EPA promulgated rules which establish emission caps and an emissions trading program on mercury from the same sources applicable to the CAIR. Mercury is removed from certain power plant exhaust gasses by the same emissions control technologies which remove nitrogen oxides and sulfur dioxide as well as other, mercury specific, technologies. Therefore mercury emissions in North Carolina will be reduced as a result of NC's Clean Smokestacks Act, and may be reduced further by the CAIR, and may be reduced even further by EMC's adoption of the EPA's mercury rule.

At this point in the EMC's rulemaking process, the Air Quality Committee is considering a mercury emissions reduction rule which would be more stringent than the EPA's rule (and therefore acceptable to EPA), but no specific rule language has as yet been developed. Again, at this point Progress Energy has neither petitioned for this rule nor been involved in the rulemaking process. The potential more stringent requirements being debated include having some mercury emission control technology on all applicable power plants and/or not allowing applicable power plants the option of purchasing emission allowances in the federal trading program. Progress Energy has not developed specific cost estimates to comply with these proposed rules (beyond Clean Smokestacks), but under the most stringent conditions being discussed, tens to perhaps hundreds of million dollars in additional costs would be incurred.[6]

If I am mistaken about any of the foregoing facts, or if there is additional relevant information needed for a complete understanding of the issues involved, please let me know at once.

This is one of the more difficult questions the Board has had to deal with in quite some time. Because of the numerous interconnected rules which must be applied to a unique set of facts, the basic conflict of interest question is deceptively complex. However, heavily relying upon several recent advisory opinions dealing with the same public body, and the clear legislative intent to have representation on the Commission by an active employee or recent retiree from an industrial manufacturing facility, I believe that you are *not* prohibited from participating in the above-mentioned rulemaking proceedings. My reasoning is as follows.

In its landmark Coastal Resources Commission ("CRC") decision in 1999, the Board of Ethics for the first time interpreted the ethics Order to include the traditional conflict of interest analytical dichotomy of legislative/quasi-legislative decisions and judicial/quasi-judicial decisions. AO-99-014 (July 7, 1999), pp. 3-4. The Board stated,

> [B]ecause an unbiased, impartial decision-maker is essential to due process, in the context of **quasi-judicial proceedings** a Public Official's impartiality might reasonably be questioned as a result of both financial conflicts of interest and impermissible legal bias. According to the North Carolina Supreme Court, this type of bias may include preconceptions about facts, policy, or law; a person, group, or object; or a personal interest in the outcome of some determination. These determinations will need to be made on a fact-specific, case-by-case basis.

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its mercury emissions (60%-70%). The proposed EMC rules potentially may increase compliance costs up to several hundred million dollars (through about 2020).

[6] Even though you acknowledge that the rules under consideration could impact Progress Energy "in substantial dollar amounts," you do not believe these costs will have a significant impact on the company in terms of its stock price, annual earnings, dividend payout, or debt level. *See* discussion below.

> In **quasi-legislative matters** (like most rulemaking) Public Officials have more, but not unfettered, leeway in the degree of participation allowed. They should not participate in quasi-legislative matters involving their own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others. Moreover, they should recuse themselves when their impartiality might reasonably be questioned due to their personal relationship with a participant in the proceeding.

AO-99-014, pp. 5-6. A "participant" was defined to include "an organization or group which has petitioned for rulemaking or has some specific, unique, and substantial interest, financial or otherwise, in the rulemaking." *Id.* at p. 5. The final result was a "sliding scale" for disqualification from public decision-making, depending upon what type of action the public body is engaging in. Quasi-judicial decisions trigger a higher standard, meaning a Public Official can be disqualified more easily. Quasi-legislative decisions, like rulemaking, are much more forgiving of "bias" in the form of a general preference or inclination. *Id.* at p. 3. This analytical framework has been applied in numerous cases since 1999.[7]

In late 2000, the EMC asked a series of questions dealing with conflict of interest and the appearance of conflict in the context of a member's service on the EMC and concurrent employment by an environmental education and advocacy organization. AO-00-007-B (October 9, 2000). Distinguishing the case from the CRC opinion, the Board noted,

> This case involves a significant, and perhaps even extreme, financial interest in the form of not only an employer-employee relationship but also a relatively unique and near-symbiotic relationship between employee, employer, and employer-members. There is direct involvement here between the employee/Public Official and at least some of his employer's members. This case involves much more than a situation where someone "draws a paycheck" from an entity involved in the public decision-making process. *In that respect, it may help define the limits of allowable participation in quasi-legislative rulemaking.*

AO-00-007-B, p. 4 (emphasis added).

The Board concluded that the EMC member could not participate in contested cases involving either his employer or it members.[8] Nor could he participate in rulemaking when either his employer or its members was the petitioner for that particular rulemaking. The member could, however, participate in rulemaking proceedings when either his employer or its members merely commented on proposed rules.

In 2003, the same EMC member's employment relationship changed from that of an employee to an independent contractor providing services on a project-by-project basis. The scope of his other duties also changed. This prompted the EMC, through counsel, to ask whether the standards and restrictions set out in AO-00-007-B noted above were altered in any way by the change in employment status. In AO-03-001 (July 18, 2003), the Board found that they were. The Board determined that the EMC member should *generally* be allowed to participate in both contested cases and rulemaking proceedings when a *mere* member of his contract-employer is a participant. *Id.* at p. 3. He was still prohibited from participating in any

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[7] In fact, it was expressly incorporated into Governor Easley's Executive Order Number One in January 2001. *See* section 7 (b) (2) of the Order.

[8] Because contested cases are quasi-judicial in nature, legal impartiality is required, and Public Officials must also avoid "legal bias." What constitutes legal bias is a question of law for the Commission and its counsel.

contested cases involving his contract employer or in a rulemaking proceeding when his contract employer was the petitioner. *Id.*

Therefore, despite what the Board had described as "a significant, and perhaps even extreme, financial interest," the EMC member was allowed to participate in rulemaking except where his employer or former employer is the *petitioner*. He was, however, required to observe a general "cooling off" period for a reasonable length of time. *Id.* at p. 4.

The question here is to what extent you can participate in classic quasi-legislative rulemaking. According to the CRC opinion, you "should not participate in quasi-legislative matters involving [your] own specific, substantial, and readily identifiable financial interests, except where the financial interest is shared equally by others." Read literally, this is a fairly straightforward question. I do not believe that the proposed rulemaking will impact your specific, substantial, and readily identifiable financial interest. The only arguable personal financial interest would be the potential impact on your stock options. While they are currently worthless, that could change in the future depending upon the fluctuations of Progress Energy's stock value. Nevertheless, I believe they are not substantial and in fact fall under the *de minimis* exception of section 7 (a) (c) of the Rules of Conduct for Public Officials:

> [The Conflict of Interest] provision shall not apply to financial and other benefits … that are so remote, tenuous, insignificant, or speculative that a reasonable person would conclude under the circumstances that the Public Official's ability to protect the public interest and perform his or her official duties would not be compromised.

EO One, Section 7. Particularly considering your belief that the rules under consideration would not significantly impact Progress Energy's stock price, annual earnings, dividend payout, or debt level, I do not believe that a reasonable Public Official would allow such stock options to factor into their public decision-making in this context.[9] If you feel that they would, you have an obligation to take appropriate action to protect the public interest.

Nor will your decisions on any proposed rules impact your severance payments under your former employment contract. Those payments are for a set amount for a set period of time, and your only obligation to Progress Energy is not to compete with it. Thus Progress Energy has no discretion in making the payments and no control over your actions, in the context of EMC rulemaking or otherwise.

However, based on longstanding Board of Ethics precedent, we must look beyond your personal financial interest to Progress Energy's as well. The Board has stated numerous times that the interests of employers and employees are generally equated for conflict of interest analysis. AO-04-001B, p.4, fn.2; *see also* AO-05-002 (Hearing Aid Dealers & Fitters Board); AO-01-004 (Parks & Recreation Authority); AO-01-001 (State Building Commission). As stated in a recent opinion,

> The reasonable assumption is that one's primary loyalty lies with his or her employer in this situation, either from a general sense of loyalty, a fear of retaliation, or expectation of reward.

AO-01-001, p. 5; AO-04-001B, fn.2, p.4.[10]

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[9] See footnote 13 below and related text.

[10] This also applies to a contract employment arrangement, such as consulting. *See* AO-03-001, discussed above (independent contractor providing services on a project-by-project basis could not participate in

Even though you are receiving severance payments under a former employment agreement, I do not believe you are an actual or implied Progress Energy "employee" at this time. As mentioned above, as long as you do not compete with Progress Energy, the company has no discretion in the amount or timing of your severance payments. They cannot be decreased or suspended without violating the contract. Thus, the key component of an employer-employee relationship is missing in this situation – control. Moreover, while you *may* have some general "sense of loyalty,"[11] you have no reasonable fear of retaliation or expectation of reward from Progress Energy at this time.

The fact that you are no longer a Progress Energy employee does not end the relevant inquiry, however. The Board of Ethics has previously found that covered "personal interests" can include, under appropriate circumstances, a **former** association or relationship with a participant in a covered proceeding:

> Determining factors would include the nature of the former association or relationship, the length of time separating it from the current public position or function, and of course the type of proceeding being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative).

AO-02-002 (Board of Massage & Bodywork Therapy), p. 2 (a Public Official/school owner should not be involved in a disciplinary proceeding against a former student); *see also* AO-00-008 (a former mayor of a municipality was not precluded from participating in a contested case proceeding because of his association with the city 19 years ago); AO-98-014 (the same former mayor could participate in rulemaking involving his former city/employer after 17 years).

Here, the nature of the former association or relationship is that of employer and employee, just as it was in the two EMC opinions discussed above (AO-00-007B and AO-03-001). As previously noted, despite what the Board had described as "a significant, and perhaps even extreme, financial interest," the EMC member was *allowed* to participate in rulemaking except where his employer or former employer is the *petitioner*. Since the employment relationship was ongoing when the Public Official was allowed to participate in most rulemaking proceedings in AO-00-007B, the most significant factor must be the *type of proceeding* being engaged in by the public body (that is, quasi-judicial vs. quasi-legislative). Even in contemporaneous employment situations (like Mr. Besse in AO-00-007B), Public Officials appear to have tremendous leeway to participate in rulemaking proceedings absent a specific, unique, substantial, and readily identifiable financial interest that is not shared equally by others.

In addition to the above conclusions and as part of both the CRC and the former association analysis, Progress Energy is not a "participant" in the rulemaking proceedings unless they have "some specific, unique, and substantial interest in the proceeding." EO One, section 7 (b) (2), definition of "participant."[12] This is one of the most significant factors in this case. In absolute terms, Progress Energy's cost to comply with the

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either contested cases involving his employer or in rulemaking proceedings when his employer was the petitioner).

[11] It is equally likely the opposite is true. You could just as easily harbor hostility toward Progress Energy for terminating your employment. There is no evidence or indication, however, that you tend toward either extreme.

[12] Progress Energy did not petition the EMC for these rule changes, and at this point there has not even been the opportunity to comment on them.

proposed EMC CAIR rule certainly appears to be "substantial." Indeed, it is hard to imagine a "reasonable person" concluding that tens and perhaps even hundreds of millions of dollars is not "significant," even to a Fortune 500 company.[13] However, Progress Energy has approximately $9 billion in annual revenues, and $100 million is but 1.11% of that $9 billion. Viewed in context, even hundreds of millions of dollars might not be "significant" in this case, but I do not believe the Board needs to make that ultimate determination here.

In this case, I do not believe Progress Energy's interest is "unique" – not shared equally by others. I believe that it *is* shared equally by the entire affected group and is therefore not unique as contemplated by the applicable conflict standards.

The proposed and contemplated rules will apply to 11 companies or facilities. These 11 constitute *all* of the similarly-situated companies or facilities – those that use fossil-fuel to generate electricity for sale at plants of a threshold size. Thus the rules apply to the entire relevant segment of the regulated community, much like a tax, even if the impacted community is relatively small.[14] I therefore believe that this is precisely the type of decision-making situation contemplated by the CRC exception and section 7 (b) (2) of the Order, and Progress Energy's interest *is* shared equally by others and therefore not unique.

In addition, while not dispositive, I believe that the rather unique statutory requirements of your position on the EMC is a significant factor in favor of your participation absent a clear and convincing case of some specific, unique, and substantial financial interest in the rulemaking. As mentioned above, you fill the industrial manufacturing representative position. According to the statutory requirement, you must be "*actively employed by*, or recently retired from, an industrial manufacturing facility and knowledgeable in the field of industrial air and water pollution control." N.C.G.S. §143B-283 (a) (8) (emphasis added). As noted, the General Assembly intentionally built a significant potential for conflict into the requirements for this position, and even allowed for the possibility that the member could simultaneously serve on the Commission and work for an industrial manufacturing facility that would surely be impacted by the Commission's work. Of the 13 designated positions in §143B-283 (a), this is the *only one* that allows for active employment while serving.

The Board of Ethics addressed a similar situation in AO-01-001 involving a designated representative on the State Building Commission. While the Board found that "at a minimum, it would create a significant appearance of conflict of interest for a Commissioner to vote on a request from his or her employer" (a quasi-judicial decision), Executive Order One did not prevent the designated representative from continuing to do his or her job and participate in preparing the very applications for approval which would ultimately be presented to the Commission:

> Where possible, statutes, rules, and executive orders should be read consistent with one another and in a manner to give effect to the goals of each. As noted, section 143-135.25 (c) (7) requires that "[a]n employee of the university system **currently involved in the capital facilities development process**" serve on the Commission (emphasis added). The same statute creates the Commission "to develop procedures to direct and guide the State's **capital facilities development and management program**…" Section 143-135.25 (a) (emphasis added). The General Assembly obviously intended to draw upon the knowledge, experience, and perspective of not only a

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[13] Progress Energy is actually a "Fortune 250" diversified energy company with $9 billion in annual revenues and nearly $26 billion in assets.

[14] The likelihood of a small impacted group increases dramatically in the context of regulated public monopolies, like utility companies. There are simply not that many companies that occupy the field.

> University system employee but also one working in the very field being served by the Commission. To deny the University representative the very work experience called upon in the statute would not make sense.

AO-01-001, p. 5.

I believe the same holds true in the present case. While not an ethical "free pass," the relatively rare and quite specific statutory requirements of your position must be given significant weight, particularly in the context of quasi-legislative rulemaking.[15]

Therefore, for the reasons set forth above, you may take part in the referenced rulemaking.

As stated in the referenced EMC decisions, you should disclose relevant potential conflicts at appropriate times. This goes for like all similarly-situated Commissioners. Moreover, you are always free to remove yourself from *any* decision-making process if you feel that personal, financial, or professional interests or associations could improperly influence your objectivity in a given situation. The Order states the minimum that must be done, not the maximum which can be done.

Finally, your request and thorough and forthright disclosure of the relevant facts shows a high degree of sensitivity to the ethical ramifications, both real and perceived, of your public service. We commend you for this approach and appreciate your cooperation in this matter.

I hope this preliminary opinion adequately addresses the specific questions raised in your request. As you know, the Board of Ethics' next meeting where this and other pending advisory opinions will be discussed has been scheduled for Wednesday, November 16, 2005, at approximately 10:00 a.m. A meeting notice and tentative agenda will be provided separately. Again, you may rely upon this preliminary opinion until it is formally modified or rescinded by the full Board. If you have any questions in the meantime, please do not hesitate to give me a call.

Sincerely,
Perry Y. Newson
Executive Director

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[15] Again, while it neither allows nor excuses otherwise prohibited conflicts of interest in public decision-making, the industrial manufacturing position is one of 19 votes on the Commission and represents one of many voices the legislature wants heard, particularly in rulemaking.