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STATE ETHICS COMMISSION
2020 OCT 16 AM 10:07

STATE ETHICS
COMMISSION

COMPLAINT FORM

FOR COMMISSION USE ONLY:

CASE NUMBER

C 2020-076

COMPLAINANT: State Ethics Commission
ADDRESS: 201 Executive Center Dr, Ste 150
TELEPHONE NUMBER: 803-253-4192
TITLE:

RESPONDENT: Thomas J. Ervin

ADDRESS: [REDACTED]

TELEPHONE NUMBER: [REDACTED]

TITLE: Public Service Commissioner

Set forth in detail specific facts upon which you based your complaint against above-named respondent (only detailed, clear factual allegations will be considered. If additional space is needed, attach supplemental sheets).

Commission staff received information regarding Thomas J. "Tom" Ervin, Commissioner on the SC Public Service Commission (PSC) engaging in ex parte communication potentially in violation of Rule 501, SCACR and Section 58-3-30, S.C. Code Ann., 1976, as amended.

On December 12, 2019, an email was sent from the advocacy group Conservation Voters of SC (CVSC) to Commissioner Ervin that discusses the Public Service Commission's actions that might affect solar development in SC and asks readers to sign a "Ratepayer Letter" that would be provided to the PSC. Commissioner Ervin sent a reply email via his personal email address of tomervin@bellsouth.net on the same day explaining the concerns that the PSC considered and the rationale behind its decision setting avoided cost rates. This communication centered on three matters on the PSC docket. The PSC released orders on these matters on December 19 and December 30, 2019. PSC procedural rules state that all parties have ten days from receipt of the order to petition for a rehearing, signifying that these matters were still in pending status at the time of Commissioner Ervin's email communication with the CVSC.

All investigations, inquiries, hearings, and accompanying documents must remain confidential unless respondent waives the right to confidentiality. If there is a finding of probable cause, the following documents become public record: the complaint, the response (if any) by respondent, and the notice of hearing. If a hearing is to be held, the final order and all exhibits become public record. If no hearing is held following a finding of probable cause, the final disposition of the matter becomes public record. The willful release of confidential information is a misdemeanor, and any person releasing such confidential information, upon conviction, must be fined not more than one thousand dollars (\$1,000) or imprisoned not more than one year. Section 8-13-320(10)(g).

STATE OF SOUTH CAROLINA

COUNTY OF Richland

Personally appeared before me Meghan L. Walker who, first being duly sworn, says that he/she has read and knows the contents of the above complaint and that the allegations contained therein, are true and correct to the best of his/her own knowledge, except for those matters therein based upon information and belief, and as to those he/she believes them to be true.

Sworn to and subscribed before me this
16th day of October, 2020

[REDACTED]

Notary Public for South Carolina

My Commission expires 8-11-2025

[REDACTED]

Complainant Signature

SEC-7 (Revised 8/2019)

REPLY TO: 201 Executive Center Drive, Suite 150, Columbia, South Carolina 29210 (803)253-4192

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STATE OF SOUTH CAROLINA)
COUNTY OF RICHLAND)

IN THE MATTER OF:)
COMPLAINT C2020-076)

State Ethics Commission,)
Complainant,)

Thomas J. Ervin,)
Respondent.)

BEFORE THE STATE ETHICS COMMISSION

RECEIVED

2021 DEC 13 PM 12:50

STATE ETHICS
COMMISSION

CONSENT ORDER

RECEIVED
2021 DEC 16 PM 2:15
STATE ETHICS
COMMISSION

This matter comes before the State Ethics Commission (Commission) by way of a Complaint filed on October 16, 2020. Pursuant to Section 8-13-320(10)(i) of the South Carolina Ethics, Government Accountability, and Campaign Reform Act (Ethics Act), the Complaint against Thomas J. Ervin (Respondent) was considered by the Commission and probable cause was found to warrant an evidentiary hearing on one (1) count of violating Section 58-3-260 of the South Carolina Code of Laws for participating in *ex parte* communication with a person regarding a pending issue before the South Carolina Public Service Commission (PSC). Prior to the call of the case, Respondent agreed to entry of the following:

STATEMENTS OF FACT

1. Respondent has served as a PSC Commissioner since 2018.
2. The Conservation Voters of South Carolina (CVSC) is a non-profit organization whose stated mission is to “make conservation and environmental issues a top priority among South Carolina’s elected leaders, political candidates, and voters.”
3. The PSC is charged with regulating public utilities. As part of this charge, in and around December 2019, three relevant dockets (the Proceedings) were pending with the PSC. At issue in the Proceedings was determination of the method for calculating avoided cost for energy producers known as qualified facilities (CFs), including producers of solar power. CVSC was not a party to the Proceedings.

4. Prior to the initiation of the Proceedings, Respondent's personal email address was added to the CVSC subscriber list, which included over 19,000 email addresses.
5. On December 9, 2019, the PSC issued an Order (Order) in one of the matters included in the Proceedings. According to procedural rules governing the Proceedings, parties had ten (10) days to seek reconsideration of the PSC's Order.
6. On the morning of December 13, 2019, CVSC sent an email blast to its subscribers:

Just a few weeks ago, I emailed you about a "doomsday scenario" for South Carolina's large-scale solar development in the wake of the Public Service Commission's latest vote.

Thank you to those who took action and contacted your elected officials – your voice was heard and we are making progress! Legislators are getting involved, but we need your help to keep the pressure on. We're asking citizens to sign on to a "Ratepayer Letter" in support of solar energy, which will be delivered to the PSC on Dec. 20th.

[Sign on here](#)

In case you missed it?

In their November vote, the PSC slashed the payments that utilities make to large-scale solar producers by 33% and they limited contracts to 10 years, despite evidence that 15-20 year contracts are critical for solar development to occur. The combination of low solar payments and short contracts essentially will stagnate solar development in South Carolina for the next two years.

In response to your public outcry, legislators from around the state are speaking out! Check out these editorials demanding accountability:

Sen. Tom Davis - Post and Courier

Rep. Shannon Erickson - Island Packet

Rep. Bobby Cox - Greenville News

Rep. Max Hyde - Spartanburg Herald

What's Next?

The Commission issued their final order for the Dominion case earlier this week and we're keeping an eye out for Duke's final order on or around December 27th. If parties request

reconsideration or rehearing in the Dominion case, we expect the Commission to make that determination on January 3, 2020.

What Can You Do?

Sign our Ratepayer Letter to the Public Service Commission.

We are gathering signatures from ratepayers across the state for a letter in support of clean energy in South Carolina. We'll submit this letter to the PSC, making sure they hear our voice, before their final ruling to make sure they hear our voice.

Add your name to the Ratepayer letter by December 19th by clicking here! >>
<https://p2a.co/2fykNO>

The coming weeks will be packed with action - so stay tuned for more updates.

7. On the night of December 13, 2019, Respondent responded to the CVSC email:

Rebecca:

Decades ago, PURPA was passed by Congress to give small scale renewable providers with access to the market. This federal legislation requires monopoly utilities to accept "must take" solar and other renewables and so the small providers have a level playing field with access to the marketplace.

The PSC didn't "slash rates". We are required by law to determine "avoided cost rates" based upon actual utility costs which are driven by market conditions like the cost of natural gas which is currently trading at the lowest prices since 1999. Solar energy will continue to be an important part of the state's energy portfolio. Technological breakthroughs in battery storage have the potential to make solar an even more valuable investment in meeting our future energy needs. Battery storage will empower solar to meet peak demands for electricity on cold winter evenings when the sun isn't shining. Solar plus storage will be the next development that provides renewable energy with a strong footprint. Storage is a game changer because it increases the market value of solar.

The PSC is required by law to adopt "avoided cost rates" which are fair, just and reasonable to the ratepayers, the small solar developers and the utilities. This is a difficult balancing act which requires insuring that all parties and intervenors are treated fairly given the facts presented at the hearing. Unintended consequences like overpayment risks pose significant negative financial impacts on low and moderate income customers in our state. Like several other states, North Carolina recently reduced the length of their power purchase agreements from 15 years to 5 years noting how difficult it is to predict how future conditions might change. For example, if natural gas prices go back up in ten years, avoided cost rates will also increase. So it's in the solar developers best interest as well as the ratepayers best interest to reset avoided cost rates periodically rather than be locked into lower rates for longer terms.

"Large solar developers" aren't affected by the recent PSC Order since they are not covered by PURPA.

We appreciate CVSC's passionate support for clean energy and hope you will accept these observations as being supportive of your mission. South Carolina deserves a clean energy future.

Best wishes,
Tom

8. On December 18, 2019, CVSC notified the PSC's Executive Director Jocelyn Boyd of Respondent's email.
9. On December 27, 2019, Boyd emailed the parties of record advising them to submit in writing "any concerns or comments on the record including asking [Respondent] to recuse from participating in any motions for reconsideration or rehearing" by January 2, 2020. Boyd subsequently received two letters in support of Respondent's recusal and one letter opposed to Respondent's recusal.
10. On January 3, 2020, Respondent recused himself from further participation in the Proceedings.

CONCLUSIONS OF LAW

Based upon the Statements of Fact, the Commission concludes, as a matter of law:

1. At all times relevant, Respondent was a "public official" pursuant to S.C. Code Ann. § 8-13-100(27). Therefore, the Commission has personal and subject matter jurisdiction.
2. Section 58-3-30(B) of the South Carolina Code of Laws provides:

The [PSC] commissioners and commission employees are bound by the Code of Judicial Conduct as contained in Rule 501 of the South Carolina Appellate Court Rules, except as provided in Section 58-3-260, and the State Ethics Commission must enforce and administer those rules pursuant to Section 8-13-320. In addition, commissioners and commission employees must comply with the applicable requirements of Chapter 13 of Title 8.

3. Section 58-3-260 of the South Carolina Code of Laws provides, in relevant part:

(B) Except as otherwise provided herein or unless required for the disposition of ex parte matters specifically authorized by law, a commissioner, hearing officer, or commission employee shall not communicate, directly or indirectly, regarding any issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any person without notice and opportunity for all parties to participate in the communication, nor shall any person communicate, directly or indirectly, regarding any issue that is an issue in any proceeding or can reasonably be expected to become an issue in any proceeding with any commissioner, hearing officer, or commission employee without notice and opportunity for all parties to participate in the communication.

(J) Any commissioner, hearing officer, commission employee, or person who willfully violates the provisions of this section is guilty of a misdemeanor and, upon conviction, must be fined not more than two hundred fifty dollars or imprisoned for not more than six months. If a commissioner willfully communicates with any party or person or if any person or party willfully communicates with a commissioner regarding any fact, law, or other matter that is or can reasonably be expected to become an issue in a proceeding less than ten business days prior to the scheduled hearing on the merits, during the hearing or after the hearing but prior to the issuance of a final order, including an order on rehearing, in a proceeding where such facts, law, or other matter is or can reasonably be expected to become an issue, the commissioner shall be removed from office . . . For purposes of this section: (1) “wilful” means an act done voluntarily and intentionally with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done, that is to say with bad purpose either to disobey or disregard the law, and (2) a violation of the provisions of this section must be proved by clear and convincing evidence before a commissioner, hearing officer, or commission employee can be removed from office or terminated from employment..

4. Section 58-3-260(A) of the South Carolina Code of Law provides, in relevant part:
 - (1) “Proceeding” means a contested case, generic proceeding, or other matter to be adjudicated, decided, or arbitrated by the commission.
 - (2) “Person” means a party to a proceeding pending before the commission, a member of the Office of Regulatory Staff, a representative of a party to a proceeding pending before the commission, individuals, corporations, partnerships, limited liability companies, elected officials of state government, and other public and elected officials.
5. Section 8-13-320(10)(l) of the South Carolina Code of Laws allows the Commission to require a public official found in violation of the Act “to pay a civil penalty of not more than two thousand dollars for each violation.”
6. Section 8-13-130 of the South Carolina Code of Laws allows the Commission to “levy an enforcement or administrative fee on a person who is in violation” of the Act.
7. Section 8-13-780 of the South Carolina Code of Law provides, in relevant part:
 - (A) The provisions of this section are in addition to all other civil and administrative remedies against public officials, public members, or public employees which are provided by law.
 - (B) In addition to existing remedies for breach of the ethical standards of this chapter or regulations promulgated hereunder, the State Ethics Commission may impose an oral or

written warning or reprimand.

DISCUSSION

The Commission found probable cause to charge Respondent with one (1) violation of S.C. Code Ann. § 58-3-260(B) for sending the aforementioned December 13, 2019 email. Although the Commission believes the December 13, 2019 email constituted *ex parte* communication per S.C. Code Ann. § 58-3-260(B), the Commission found no evidence that Respondent intentionally violated the prohibition against *ex parte* communication as set forth in S.C. Code Ann. § 58-3-260(J).

Through this Consent Order, Respondent acknowledges he violated Section 58-3-260(B) when he sent the December 13, 2019 email. In mitigation, Respondent believed his email was merely a restatement of the Order that was issued earlier that day. Respondent states the CVSC was not a party to the Proceedings, but that he recused himself out of an abundance of caution to ensure no party was prejudiced. Respondent states it was not his intent to violate S.C. Code Ann. § 58-3-260.

DISPOSITION

1. The Commission hereby finds Respondent in violation of S.C. Code Ann. § 58-3-260(B).
2. The Commission hereby adopts the Statements of Fact, Conclusions of Law, Discussion, and Disposition as agreed upon by the Respondent.

THEREFORE, the Commission hereby issues an oral warning to the Respondent pursuant to S.C. Code Ann. § 8-13-780(B), but imposes no monetary fines or penalties.

AND IT IS SO ORDERED THIS 15 DAY OF December 2021.

STATE ETHICS COMMISSION

CHILDS CANTEY THRASHER, CHAIR

THOMAS J. ERVIN
RESPONDENT