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January 6, 2015

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Mr. Charles C. Cheezum
32 Canterbury Trail
Charles Town, WV 25414

Re: Ethical Obligations of PSD Board Members

Dear Mr. Cheezum:

I write on behalf of the Board of the Jefferson County Public Service District ("District") in response to the request which you made at the District's December 1, 2014 board meeting regarding the ethical obligations of public service district ("PSD") board members under West Virginia law.

This letter is intended to provide you with an overview of the ethical obligations of PSD board members in light of some issues which have been raised, but it does not definitively address any particular circumstance.

The two Acts of the West Virginia legislation which address the ethical obligations of PSD board members are the PSD Act, W.Va. Code §16-13A-1, *et. seq.* and the Ethics Act, W.Va. Code §6B-1-1 *et. seq.*

THE PSD ACT

The Legislature adopted the PSD Act to have PSDs provide utility service at a reasonable cost to those who would otherwise be unable to obtain such service. W.Va. Code §16-13A-1. PSD board members are required to reside within the approved service territory of the PSD. W.Va. Code §16-13A-3. For PSDs that are actively providing utility service, at least one PSD board member must be a customer of the PSD. Id.

The combination in the PSD Act of the purpose of a PSD being in part to extend utility service, the requirement that board members reside in the PSD's territory, and that one board member be a customer, collectively contemplate that there will be some transactions between individual PSD board members and the PSD which they govern. An individual PSD board member,

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as a resident of the area which the PSD is authorized to serve, may see the residence where he lives included in an extension project. Once service is so extended or if the PSD had previously extended service to his residence, that board member will be a paying customer of the District subject to the ordinary range of interactions between a PSD and its customers, in addition to serving on the Board. Rather than being prohibited, these interactions are expected. The PSD Act provides some parameters on these interactions.

The ethical duties of PSD board members specified in the PSD Act are limited to the following. PSD "[b]oard members shall not be or become pecuniarily interested, directly or indirectly in the proceeds of any contract or service, or in furnishing any supplies or materials to the district, nor shall a former board member be hired by the district in any capacity within a minimum of twelve months after board member's terms has expired or such member has resigned from the district board." W.Va. Code § 16-13A-3. A board member's prohibited pecuniary interests are limited to the proceeds of a contract or service, and employment after service as a board member. This section does not prohibit a board member from voting in favor of a project that will extend service to his residence, subject to limitations in the Ethics Act discussed later in this letter.

There are no reported decisions of the West Virginia Supreme Court specifically addressing the quoted language of the PSD Act, nor have any State Rules been issued elaborating upon the quoted provision. No penalty is specified for violating this particular legal duty, though PSD board members are subject to removal "for consistent violations of any provision" of the PSD Act. W.Va. Code §16-13A-3a.

THE ETHICS COMMISSION

PSD Board members are subject to the Ethics Act. The West Virginia Ethics Commission has extensive authority for administering the Ethics Act, including addressing complaints alleging violations of the Ethics Act, W.Va. Code §6B-2-3a. The Ethics Commission first refers written complaints to a three member probable cause review board. Not until the probable cause review board issues written findings may the Ethics Commission investigate a formal complaint. W.Va. Code §6B-2-3(h). The remedies which the Ethics Commission can implement upon review of a complaint range from dismissing a complaint, imposing sanctions (including fines up to \$5,000 plus cost of investigation) as a result of such complaints, and entering into conciliation agreements with a person who is the subject of an investigation. W.Va. Code §6B-2-4(r-s). A defendant may appeal a decision of the Ethics Commission to the Circuit Court of Kanawha County. Id., (t).

The Ethics Commission issues advisory opinions upon written request regarding particular ethical questions and situations. W.Va. Code §6B-2-3. When a person or body which has requested an advisory opinion and has acted in accord with that opinion, such person or body is

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insulated from sanctions of criminal prosecutions¹ for such conduct, though the Ethics Commission and the Circuit or Supreme Courts are not obligated to adhere to the advisory opinion in a formal complaint.

The Ethics Commission maintains a website explaining its role, and providing broad access to its orders and advisory opinions.

The Ethics Commission has issued 20 series of State Rules including a Series on Private Gain (158 WV CSR Series 6), and Interests in Private Contracts (158 WV CSR Series 8).

THE ETHICS ACT

The ethical obligations and prohibitions of public officials, employees, and public bodies are principally set forth in W.Va. Code §6B-2-5. The three subsections of §6B-2-5 which seem most applicable to the Jefferson County PSD are those concerning voting, private gain, and interests in contracts. There are two basic remedies when a situation arises which implicates a violation of one of these sections. Either an official must recuse himself from involvement in deciding or a matter, but if the other members of the body decide to proceed, then the body can move forward even though the course of action involves a financial interest of a member. In other circumstances, the body is prohibited from entering into a contract.

The Ethics Act prohibits public officials and employees from "knowingly and intentionally us[ing] his or her office or the prestige of his or her office for his or her own **private gain** or that of another person". W.Va. Code §6B-2-5(b)(1)(bold added). "The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation does not constitute the use of prestige of office for private gains." Id. The State Rules on private gain address nepotism, using public employees for private gain (such as running errands or performing repair work), removing government property, kickbacks, bribes, and performing private work during public work hours. 158 WV CSR Series. 8.

With respect to **voting**, a public official may not vote on a matter where the public official or an immediate family member, or a business in which the official or an immediate family member has a **financial interest**. W.Va. Code §6B-2-5(j)(1)(A)(bold added). However, a public official may vote where he is "affected as a member of, and to no greater extent than any other member of a profession, occupation, class of persons or class of businesses." W.Va. Code §6B-2-5(j)(2). A "class" consists of "not fewer than five similarly situated persons or businesses." Id.

¹ A public official is potentially subject to criminal misdemeanor prosecution for having a prohibited pecuniary interest in the proceeds of contracts over which the public official has influence under W.Va. Code 61-10-15, however, interests in utilities subject to the PSC's regulation are exempt from such criminal prosecution. §61-10-15(g). The Ethics Commission will issue advisory opinions addressing this section, but it does not enforce this section, other than referring a matter to a county prosecutor for possible investigation and prosecution.

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Public officials and employees and immediate family members and businesses associated with such persons may not "be a party to or have an **interest in the profits or benefits of a contract** which the official or employee may have direct authority to enter into, or over which he or she may have control." W.Va. Code §6B-2-5(d)(1) (bold added). This subsection can prohibit a body from entering into some transactions. This subsection has "prohibited financial interests," which bar the body from some contracts unless an exemption from the Ethics Commission is obtained, and "limited financial interests," in which the body can enter into the contract provided the member with the limited financial interest does not attempt to informally influence deliberations and adheres to the voting rules of the Ethics Act.

The term "profits or benefits of a contract" is not defined in the Ethics Act. The scope of the term profits of a contract by its ordinary usage would be limited to being tied to the proceeds of a contract. The term "benefits of a contract", on first impression, would seem to suggest a broader application. However, looking at its usage in the Ethics Act, the term also appears to be tied to proceeds of a contract. In defining what is a permissible limited financial interest, the Ethics Act provides that a public official "or a member of his or her immediate family or a business with which he or she is associated shall not be considered as having a prohibited financial interest in a public contract when such a person has a limited interest as an owner, shareholder or creditor *of the business which is awarded a public contract.*" W.Va. Code §6B-2-5(d)(2)(italics added). This subsection indicates that the Ethics Act understands the "profit or benefits of a contract" to refer to a contract that is being considered being awarded to public official, or a business in which the public official has an interest, as distinguished from a broader interpretation of "benefit", such as the indirect benefits that result to members of the public from a project providing an increased level of service. This interpretation is further supported by the definition of a limited interest as "an interest which does not exceed one thousand dollars in the *profits or benefits* of the public contract or contracts in a calendar year." If the Legislature had intended for the term benefits to have a broader meaning, it would not have used the phrase in conjunction with a distinct metric, \$1,000 per year. Broader benefits cannot be so definitely measured. The Legislature would have used words to the effect of "indirect benefit" if it had intended a broader application. Elsewhere in the Ethics Act, it uses the phrase "directly or indirectly", demonstrating that the Legislature knew how to express a broader scope when it wanted to do so. The State Rules providing further definition to this provision do not use the term "profits or benefits" but rather "gross revenues in a public contract." 158 WV CSR Series 8. The term "benefits in a contract" may have been used to capture the fact that public contracts are not pure profit to the contractor, but also cover a contractor's cost in providing goods or services. Keep in mind that if the "profits or benefits of a contract" to a member exceed \$1,000 per year this not only prohibits the affected member from voting on the transaction, it prohibits the body from entering into the transaction altogether. Under a broad interpretation of the term "benefits", the PSD would be barred from undertaking any project if the project would "benefit" one of its members by more than \$1,000. This is a nonsensical application that would fundamentally frustrate the purpose and obligations of a public service district -- to extend service, and to repair and replace facilities so as to provide safe, adequate, and continuous service in compliance with applicable regulations.

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The voting procedures of subsection (j), including the permission to vote for a public official with a financial interest so long as the financial interest is similar to those of a class of five or more, apply when a public official "has an interest in the profits or benefits of a contract." W.Va. Code § 6B-5-2(d)(3). Consequently, even if the broad interpretation of "interest in the profits or benefits of a contract is used", so long as a PSD board member's interest is not advanced more than the other members of a class of five or more, the PSD board member can vote on the matter.

ADVISORY OPINIONS OF THE ETHICS COMMISSION

In its advisory opinions, the Ethics Commission often refers to multiple subsections of §6B-2-5 because they often overlap. What is alleged to be use of public office for private gain might also involve the benefits of a contract, and there may be a vote of a body where the issue of a financial interest is in question that pertains to private gain or the proceeds of a contract.

The West Virginia Ethics Commission has issued a number of advisory opinions which provide some greater guidance in applying the statutory standards just discussed.

The Ethics Commission advised a City Council member who was also employed part-time by the same City's police department that he could **vote** on municipal budget and employee matters when the matters involved five or more employees, but this Council member would need to recuse himself if discussions of individual line items in a budget or other items involved five or fewer employees. Advisory Opinion ("A.O.") 2014-14. The Ethics Commission stated that this City Council member could advocate for general pay increases for municipal employees or police department employees, or to dedicate a larger percentage of municipal funds to the police department, so long as the item under discussion involved five or more employees.

A Conservation District was advised that it could not construct a \$50,000 pilot project using public funds on a board member's property. The pilot project required a contract between the property owner and the Conservation District. The pilot project would not be constructed on any other property. The Ethics Commission found that the landowner would be a **beneficiary of the contract** and have a financial interest in the project. A.O. 2010-20.

Town Council members who are currently or were formerly employed by a county board of education do not have a **financial interest** in a proposed real estate transfer between the Town and the board of education, and may vote on such transfer, and such vote does not constitute using office for private gain. A.O. 2013-47. The Ethics Commission found that the Ethics Act "does not prohibit a public official from voting on a matter in which his or her public employer has a financial interest."

The Ethics Commission advised that members of the Municipal Home Rule Selection Board, some of whom were elected officers, employees, and contractors of municipalities applying for Home Rule authority, that such members could **vote** on applications from the

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municipalities which they served, since the municipalities were not businesses in which the members could have a financial interest. A. O. 2014-02.


Similarly, in Advisory Opinion No. 2014-05, the Ethics Commission concluded that a County Board of Education could purchase a scoreboard from a non-profit booster club where one of the County board of education members was also an unpaid officer of the booster club. Further the County Board of Education member was permitted to vote on the proposal.

With respect to **business partners**, a County Commission was considering a proposal from a business partner of a County Commissioner to lease a county owned marina, A.O. 2013-13. The County Commissioner involved was a partner with the proposed marina contractor only in a business totally unrelated to the marina. The Ethics Commission advised under the more stringent criminal misdemeanor provision, W.Va. Code §61-10-15 (which is inapplicable to transactions involving PSC regulated utilities) that the County Commission could not award the lease to the County Commissioner's business partner (unless a hardship waiver was obtained from the Ethics Commission) and the County Commissioner could not participate in deliberations on his partner's application.

The Ethics Commission advised a Mayor who also worked part time in a private direct sales position that he was not obligated to recuse himself when a **former customer** appeared before City Council, but that he must recuse himself from deliberations and voting when a current customer appears before the Council. A.O. 2012-07.

The District hopes that this letter is informative to you.

Very truly yours,


James V. Kelsh

JVK/dlm
cc: Jefferson County Commission