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OPINION COMMITTEE

July 9, 2002

CERTIFIED MAIL

The Honorable John Cornyn
Attorney General
209 W. 14th Street
Austin, Texas 78711-2548

RQ-0575-JC
FILE # ML-42698-02
I.D. # 42698

Dear General Cornyn:

Pursuant to Texas Government Code §402.042(7), I seek your opinion about an apparent conflict on the qualification for membership to the Public Utility Commission of Texas as it relates to ownership of stock.

In particular, Sec. 12.053 of the Public Utility Regulatory Act sets the qualification for eligibility. Sec. 12.053(b), in particular, states:

- (b) A person is not eligible for appointment as a commissioner if the person:
 - (1) at any time during the two years preceding appointment:
 - (A) personally served as an officer, director, owner, employee, partner, or legal representative of a public utility, affiliate, or direct competitor of a public utility; or
 - (B) owned or controlled, directly or indirectly, stocks or bonds of any class with a value of \$10,000 or more in a public utility, affiliate, or direct competitor of a public utility; or
 - (2) is not qualified to serve under Section 12.151, 12.152, or 12.153.

Pursuant to Sec. 12.053(b)(2) a person is also not eligible if he/she or his/her spouse is not qualified under Sec. 12.152. Sec.12.152(a)(2)(B)(i) and (ii) reads as follows:

- (a) A person is not eligible for appointment as a commissioner or executive director of the commission if:
 - (2) the person or the person's spouse:
 - (B) directly or indirectly owns or controls more than a 10 percent interest or a pecuniary interest with a value exceeding \$10,000 in:
 - (i) a business entity or other organization that is regulated by or receives funds from the commission; or
 - (ii) a utility competitor, utility supplier, or other entity affected by a commission decision in a manner other than by the setting of rates for that class of customer.

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This prohibition can be cured if the person divests himself/herself or his/her spouse of this ownership or control before beginning service. Sec. 12.152(b) reads as follows:

- (b) A person otherwise ineligible because of Subsection (a)(2)(B) may be appointed to the commission and serve as a commissioner or may be employed as executive director if the person:
 - (1) notifies the attorney general and commission that the person is ineligible because of Subsection (a)(2)(B); and
 - (2) divests the person or the person's spouse of the ownership or control:
 - (A) before beginning service or employment; or
 - (B) if the person is already serving or employed, within a reasonable time.

ISSUE

Both Sec. 12.053(b)(1)(B) and Sec. 12.152(a)(2)(B) impose a prohibition of \$10,000 in stock of an appropriate effected entity. The former is absolute within a two year period of time and apparently cannot be cured. The latter can be cured. And therein lies the apparent inconsistency and conflict.

As a matter of policy, it would appear that a conflict should be permitted to be cured by eliminating the conflict prior to governmental service. Once one extricates him/herself from the financial conflict, there is no conflict. The cure embraced in Sec. 12.152(b) is appropriate and makes sense. (It is interesting to note that Sec. 12.152 extends the conflict to a spouse while Sec. 12.053 applies only to the appointee.)

What is problematic in reading the cure to apply to Sec. 12.053 is the use of the disjunctive "or" in Sec. 12.053(b)(1)(B). It would seem to read that the cure permitted to satisfy the prohibition in Sec. 12.053(b)(2) would not apply to the absolute prohibition of Sec. 12.053(b)(1)(B).

Ultimately, I must assume the legislature did not intend this conflict on such a simple, straight-forward matter. I therefore put to you the following questions:

1. Can an appointee to the Public Utility Commission of Texas who owns or controls, directly or indirectly, stocks or bonds with the value of \$10,000 or more, at any time during the two years preceding appointment, cure that conflict and therefore be eligible for service if that person notifies the attorney general and commission that the person is ineligible because of this conflict, and divests him/herself of the ownership or control of the stock either before the beginning of service or employment or within a reasonable period of time?

Letter to General Cornyn
July 9, 2002
page 3

2. Put a different way, does the cure provision on eligibility in Sec. 12.152(b) apply to the conflict provision of Sec.12.053(b)(1)?

I look forward to hearing from you. If you have any questions, please let me know.

With kind regards,



Steven D. Wolens

SDW/cb