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BEFORE THE WATER TRANSFER PANEL
STATE OF KANSAS

IN THE MATTER OF THE APPLICATION OF THE CITIES OF HAYS, KANSAS AND RUSSELL, KANSAS FOR APPROVAL TO TRANSFER WATER FROM EDWARDS COUNTY PURSUANT TO THE KANSAS WATER TRANSFER ACT	OAH Case No. 23AG0003 AG

INTERVENORS' REPLY TO CITIES' RESPONSE TO MOTION FOR RECUSAL OF CHIEF ENGINEER FROM PARTICIPATION IN HEARING PANEL

I. INTRODUCTION

Contrary to what is directly and implicitly argued by the Cities, whether a decision maker must recuse is governed by the risk of bias or prejudgment, not proof of actual bias. Proof of actual bias is not necessary. "[D]ue process is violated when, under all the circumstances of the case, the "probable risk of actual bias [is] too high to be constitutionally tolerable." *Davenport Pastures, LP v. Morris Cnty. Bd. of Cnty. Comm'rs*, 291 Kan. 132, 46, 238 P.3d 736 (2010) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). Even the appearance of prejudgment mandates recusal. "[J]ustice must satisfy the appearance of justice, and this stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." (internal citation and quotation marks omitted). *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 243, 100 S.Ct. 1610, 64 L.Ed.2d 182 (1980).

The Division of Water Resources, knowing that its administrator is a member and designated chair of the Hearing Panel, has for reasons not apparent assumed an advocacy

role in relation to the Water Transfer Act application under consideration here. DWR's argument is imputable to the Chief Engineer and results in the undeniable appearance of prejudgment and resultant impropriety inconsistent with Water PACK's due process rights. This is not a difficult question. The agency administrator is the executive head of the agency, responsible for its overall operation, including the implementation of policies and decisions. These decisions and policies are commonly the result of the agency's collective work, including analysis, consultation, and deliberation by its staff and sometimes public input. However, since the administrator leads the agency, he or she is ultimately accountable for the agency's actions and decisions.

The principle behind this is rooted in the concepts of accountability and responsibility in public administration. Agency administrators are appointed to their positions to lead the agency in fulfilling its statutory mandates. This includes ensuring that the agency adheres to the law, implements policies effectively, and operates in accordance with the goals set by the legislature or executive authority that oversees the agency. As such, even though many individuals within an agency may contribute to decisions and policy development, the administrator, as the top official, bears the ultimate responsibility for those actions.

II. IN CONTENDING THERE IS NOT EVIDENCE OF THE CHIEF ENGINEER'S PREJUDGMENT OR ACTUAL BIAS THE CITIES MISAPPREHEND THE TEST FOR RECUSAL

The Cities argue repeatedly that there is no evidence that the Chief Engineer has prejudged the question with which the Hearing Panel is tasked. But the question is not proof of actual bias but rather production of evidence suggesting the reasonable possibility of bias. The contention that the Chief Engineer has not offered public

statements suggesting bias is sophistic. He has spoken through the agency he heads. As the Cities incongruously write on page 17 of their response, "Nevertheless, final decisions are made by the Chief Engineer. Mr. Lewis can accept or reject staff recommendations. . . ." And that is the point, precisely. Position statements by the Division of Water Resources necessarily bear the Chief Engineer's imprimatur because "final decisions are made by the Chief Engineer." Consonantly, and as the Cities evidently concede, the decision to urge an outcome before the Hearing Panel was the Chief Engineer's. The decision to weigh in on the merits was an elective choice not in any sense required by the Water Transfer Act or otherwise. Notable is the fact that the agencies with which the other two Panel members are affiliated refrained from taking any position.

III. SCREENING DEVICES DO NOT RECTIFY THE TAINT

The Cities suggest the Chief Engineer has been screened from the decision to recommend approval of the WTA application. "While DWR staff maintained a separation from Mr. Lewis, likely out of an abundance of caution, the separation would only be required if their function as a commenting agency was somehow prosecutorial instead of adjudicatory." *Cities Response at 15.*[1]

The screening representation warrants a question and a comment. First, there is no public evidence to support the assertion and if the Cities have learned of it privately it raises questions regarding the nature and propriety of the communications. Second, under analogous circumstances, the Kansas Supreme Court has consistently refused to permit screening as a method of avoiding disqualification. *Zimmerman v. Mahaska*

[1] The Cities' representation is oblique with no description of the mechanics of the screening effort.

Pepsi-Cola Co., 270 Kan. 810, 821, 19 P.3d 784, 793 (2001) ("[A] majority of courts have rejected screening because of the uncertainty regarding the effectiveness of the screen. . . ."); *Parker v. Volkswagenwerk Aktengesellschaft*, 245 Kan. 580, 589, 781 P.2d 1099, 1106 (1989) (Erection of a "Chinese Wall" ineffective in relation to lawyer conflicts); *Lansing-Delaware Water District v. Oak Lane Park Inc.*, 248 Kan. 563, 574, 808 P.2d 1369, 1377 (1991) ("[S]creening solution . . . rejected by the ABA and most courts addressing the issue.").

Even assuming some form of information barrier was implemented, it does not address the essential problem highlighted by Water PACK's motion. Any reasonable observer would presume that an administrative agency would be loath to publicly advocate a position that was not expressly or implicitly representative of the opinion held by agency leadership. Because that is so, regardless of the presence or absence of actual bias, due process cannot countenance the appearance or presumption of prejudgment.

IV. WHETHER THE CHIEF ENGINEER MUST RECUSE IS ENTIRELY UNRELATED TO THE OUTCOME OF THE EVIDENTIARY HEARING BEFORE THE PRESIDING OFFICER

As they are wont to do, the Cities engage in invective when presented with uncomfortable facts. Though Water PACK believes the Presiding Officer's decision was deeply flawed, it is the Hearing Panel that will make the final administrative decision and any participant in that process, Water PACK included, is entitled to a hearing unmarred by concerns of potential bias. To suggest that the motion requesting the Chief Engineer's recusal is motivated by "sour grapes" or constitutes a "Hail Mary" appears to be an attempt to deflect the analysis and obscure the obvious conclusion that recusal is

necessary consistent with established due process norms. The combination of advocacy and adjudicative functions in the same person or persons is incompatible with due process.

V. THE CITIES' ATTEMPTS TO DISTIGUISH THE AUTHORITIES CITED IN SUPPORT OF THE CHIEF ENGINEER'S RECUSAL ARE UNAVAILING

The Cities unpersuasively attempt to distinguish the cases Water PACK has cited in support of its recusal motion without ever effectively addressing the fact that DWR has advocated in writing for approval of the WTA application and the Chief Engineer is responsible for all aspects of the Division's activities and decision making. Saying the authorities are distinguishable without actually demonstrating that they are is unhelpful to the Chief Engineer and to the Panel. A particularly unfortunate example is the Cities' exposition of the decision in *Pork Motel*[2] in which they omit that part of the decision that directly supports Water PACK's position.

> The APA does provide for the separation of judicial functions from prosecuting/investigative functions. The APA says specifically: "An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, *in that or a factually related case,* participate or advise in the decision." 5 U.S.C. § 554(d) (1982), emphasis supplied. The APA separation of functions doctrine requires only that the prosecutor and the adjudicator each be responsible to the agency head by a separate chain of authority.

Id. at 383-384 (Underline emphasis added).

Here there is no separation of functions. The Chief Engineer is the Alpha and Omega. DWR's decisions, and in this case the advocacy, are a necessary product of his authority.

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[2] *Pork Motel, Corp. v. Kansas Dep't of Health & Env't*, 234 Kan. 374, 383–84, 673 P.2d 1126, 1135 (1983).

VI. THE QUESTION EXTANT IS NOT THE CONSTITUTIONALITY OF THE WATER TRANSFER ACT, IT IS, INSTEAD, A QUESTION OF CONSTITUTIONALITY MANDATED DUE PROCESS.

Recusal is required when "a disinterested observer may conclude that (the decisionmaker) has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Ass'n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1158 (D.C. Cir. 1979) (citation omitted); *see, e.g., Cinderella Career and Finishing Schools, Inc.* v. FTC, 425 F.2d 583, 591 (D.C. Cir. 1970).

For purposes of due process, the role of an Article III judge is indistinguishable from the responsibilities of Hearing Panel members. "[I]t is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process. This principle applies to administrative agencies which adjudicate as well as to courts." *Davenport Pastures, supra at* 139 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876, 129 S. Ct. 2252, 2259, 173 L. Ed. 2d 1208 (2009)). The requirements for recusal of federal judges are thus edifying and provide useful guidance for the Chief Engineer:

> (a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

28 U.S.C.A. § 455.

Contrary to the Cities' contention that Water PACK seeks invalidation of the Water Transfer Act on constitutional grounds,[3] the relief requested is limited to recusal. Recusal is not of constitutional dimension. Recusal consistent with recognized Kansas statutory and case law does not render the Act infirm. Analogous is the structure of the United States Supreme Court which has, since the Judiciary Act of 1869,[4] consisted of nine justices. For various reasons, the Court's justices sometimes recuse from participation in a particular case. The result is not a constitutional crisis. The case is then heard by the remaining members. As is true here, there is no statutory provision that prevents consideration of a case because of one or more recusals.

VII. CONCLUSION

The straightforward question presented here is whether an agency head, ultimately responsible for all aspects of the agency's operations and advocacy efforts, must recuse when his agency, in the wake of an evidentiary hearing that is to be reviewed by the agency head, has publicly concluded that one party has the better part of the argument. That decision is not difficult. It borders on risible to argue that it is.

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[3] The word "unconstitutional" appears only once in Water PACK's memorandum and is part of a discussion of constitutional due process. *Water PACK Memorandum at 6.*

[4] Act of April 10, 1869, Ch. 22, 16 Stat. 44.

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Overland Park, Kansas

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