

THE VERMONT DEPARTMENT OF PUBLIC SERVICE'S NEW FOUND POWER UNDER SENATE BILL 130: A CASE OF CONFLICTING INTERESTS

INTRODUCTION

The enactment of Senate Bill 130¹ (hereinafter S. 130) raises questions regarding whether Vermont utilities will receive a fair hearing on various issues that could be presented before the Public Service Board (hereinafter the Board).² The Board is dependent upon the Department of Public Service (hereinafter the Department) for a supply of information which is necessary to its decisions on matters brought before it. Hence, there is a certain nexus between the Department and the Board that should not be overlooked when making a determination concerning Department bias and the possibility of unfair hearings before the Board.

In the past, the Department has acted as a planner, regulator, and advocate of the public interest.³ The Department is charged with the responsibility of supervising, directing, and executing "all laws relating to public service corporations . . ."⁴ As a result of S. 130 the Department's role as a market competitor has been greatly expanded.⁵ Prior to S. 130's enactment, the Department had a more limited role as a retail distributor of electricity.⁶ However, the S. 130 revisions of section 212a make the Department a potentially large scale competitor of Vermont utilities.⁷ There are basic inconsistencies between the Department serving as both executor

1. S. Bill 130, 59th Leg. Sess., 1987 Vt. Laws — [hereinafter S. 130].

2. The Public Service Board has jurisdiction over all public service corporations operating in Vermont. VT. STAT. ANN. tit. 30, § 203 (1986). This includes corporations "engaged in the manufacture, transmission, distribution or sale of . . . electricity directly to the public or to be used ultimately by the public for lighting, heating, or power . . ." *Id.* § 203(1). In addition, the Board has "jurisdiction to hear, determine, render judgment and make orders and decrees in all matters provided for in charters or articles" of any public service corporation that is subject to title 30, chapter 5 of the Vermont statutes. *Id.* § 209. *See also In re New England Tel. & Tel. Co.*, 115 Vt. 494, 66 A.2d 135 (1949); *In re New England Tel. & Tel. Co.*, 135 Vt. 527, 540, 382 A.2d 826, 835-36 (1977).

3. VT. STAT. ANN. tit. 30, § 1 (1986).

4. *Id.* § 2.

5. *See* VT. STAT. ANN. tit. 30, § 212a (Supp. 1987).

6. *See* VT. STAT. ANN. tit. 30, § 212a (1986), *amended by* VT. STAT. ANN. tit. 30, § 212a (Supp. 1987).

7. *See id.*

of "all laws relating to public service corporations"⁸ and being a competitor of such corporations. Considering the Department's new role as a competitor of Vermont utilities, it is difficult to envision the Department carrying out such functions as planning, regulating, and advocacy without some level of bias resulting.

Section I of this note explores the existing relationship between the Department and Board and how this relationship may result in unfair bias. Section II examines a significant United States Supreme Court decision and other cases concerning the combination of investigative and adjudicative functions within administrative agencies. This section also discusses the standards that need to be met in order to demonstrate an administrative agency's bias that may lead to a violation of a party's procedural due process rights. Section III discusses the contradictory roles the Department assumes as a result of S. 130 (*e.g.*, distributor of electricity and advocate of the public interest). In addition, this section examines some of S. 130's pertinent legislative history. This note does not discuss the ethical ramifications of the Department's potential attorney-client conflict of interest.⁹

I. THE EXISTING RELATIONSHIP BETWEEN THE DEPARTMENT AND BOARD

Regardless of the fact that the Department and the Board are independent agencies, under the existing statutory framework there are times when the Board relies on information provided to it by the Department (*e.g.*, section 202(f) energy plan, section 225 rate filings, section 248 certificates of public good). In particular,

8. VT. STAT. ANN. tit. 30, § 2 (1986).

9. Because the Department is charged with the responsibility of representing the public interest in a variety of contexts before the Board, while at the same time operating in the capacity of a utility, questions may legitimately be raised concerning a possible attorney-client conflict of interest. See VT. STAT. ANN. tit. 30, §§ 1, 212a (1986 & Supp. 1987). It is possible that the Department will represent its own distinct interest as a competitor of Vermont's utilities at the same time it attempts to represent the interests of the public. Although it is possible that the Department's interests as a competitor of utilities and advocate of the public's interest may occasionally be consistent and compatible with one another, it is likely that on at least some occasions these interests will conflict. See *infra* text accompanying notes 50-54. Therefore, there is and should be some concern whether the Department can adequately represent the public's interest in the aftermath of S. 130. See generally, *In re New England Tel. & Tel. Co.*, 135 Vt. 527, 540 (1977); Note, *In Re New England Telephone & Telegraph Co.: The Scope of Authority of Counsel for the Public in Utility Rate Cases*, 4 VT. L. REV. 141 (1979); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1986).

there are three general ways in which the Board receives and, to some extent, relies on information provided by the Department: first, through data and projections within the twenty year plan;¹⁰ second, by recommendations made by the Department pursuant to various subsections of chapter 5 of title 30;¹¹ and third, through the Department's arguments presented in its role as the advocate of the public interest.¹²

A. *The Department as Planner: Information from the Twenty-Year Plan*

The Department is responsible for the preparation of a twenty-year plan (hereinafter the Plan).¹³ The Plan is intended to serve "as a basis for state electrical energy policy" in Vermont.¹⁴ In several other sections of title 30, the Board is instructed to confer with the Department and refer to the Plan to ensure that companies subject to the statute are in compliance with the Plan.¹⁵ For example, in section 202(f) companies are instructed to submit their business plans for investments to the Department for a consistency determination regarding the twenty-year plan.¹⁶ Although the Board is not bound by the Department's determination, the Board must consider it in reaching a final decision with respect to approving a company's business plans. Considering the Department's new role as a competitor, substantial doubt should exist concerning the Department's objectivity in making determinations and recommendations to the Board.

It is possible the Department may no longer be able to gain access to information necessary to the formation of the Plan.¹⁷ Pursuant to section 202(d) the Director of Regulated Planning may require submission of data from companies subject to the Department's supervision.¹⁸ However, much of this data may no longer be subject to disclosure because of the Department's competitive status.¹⁹ Yet, S. 130 does not purport to state who will become the

10. VT. STAT. ANN. tit. 30, § 202 (1986).

11. *See, e.g., id.* §§ 202(f), 225(b), 248(b)(7) (1986 & Supp. 1987).

12. *See* VT. STAT. ANN. tit. 30, § 1 (1986).

13. *Id.* § 202(b).

14. *Id.*

15. *See supra* note 11 and accompanying text.

16. VT. STAT. ANN. tit. 30, § 202(f) (1986).

17. *See id.* §§ 212e(b) (Supp. 1987).

18. VT. STAT. ANN. tit. 30, § 202(d) (1986).

19. *See id.* § 212e(b) (Supp. 1987); for the language of § 212e(b) see *infra* text accompa-

appropriate party to create and revise the Plan now that the Department is a market competitor.

Having a market competitor—the Department—create and revise the Plan that is the “basis for all electrical energy policy” creates a substantial likelihood for biased policy making and unfair results. Allowing the Department to develop the Plan, now that it is a market participant, is analogous to having Central Vermont Public Service or Green Mountain Power prepare the Plan. Certainly, the Department would object if Central Vermont were preparing or revising the Plan for all market competitors to follow.

B. The Department as Regulator: Investigations and Recommendations

All companies subject to the statute must file proposed rate schedules with the Department.²⁰ The Department is authorized to approve proposed rate schedules.²¹ Although a company can request the Board to change rate schedules, the Department is empowered to “investigate the justness and reasonableness of that change.”²² Moreover, the Department can make recommendations with regard to proposed changes or decide to oppose such changes at a hearing.²³ Department recommendations are likely to influence Board decisions to some degree.

In light of the Department's expanded role as a competitor, it would be improper to have the Department perform the investigatory functions contemplated in section 225 and other subsections of chapter 5 of title 30. In order to effectively conduct such investigations, the Department would need access to the contracts and books of its competitors—Vermont utilities. This would create an intolerable situation for all of the Department's competitors. In fact, the legislature must have foreseen this possible impropriety because S. 130 does provide that the Department's requests for documents can be quashed upon motion to the Board.²⁴

nying note 28; *see also* Petition of Central Vermont, No. 5201, Order of the Pub. Serv. Bd. (May 1, 1987).

20. VT. STAT. ANN. tit. 30, § 225(a) (1986).

21. *Id.* § 225(b).

22. *Id.*

23. The Vermont Supreme Court has recognized the Department's authority to make such recommendations and has implied that the Board relies on them to some extent. *See In re Central Vt. Pub. Serv. Corp.*, 144 Vt. 46, 51, 473 A.2d 1155, 1157 (1985).

24. VT. STAT. ANN. tit. 30, § 212e(b) (Supp. 1987).

C. *The Conflict Between the Department as Advocate and Competitor*

Under the existing statutory framework the Department is empowered to serve as the advocate of the public interest.²⁵ To that end, the Department is authorized to conduct investigations on behalf of the public interest.²⁶ However, because of the Department's role as a competitor its ability to be an effective public advocate is suspect. Consequently, it can no longer conduct an investigation in an objective manner. Recognizing this fact, the legislature included alternative provisions in S. 130 for representation of the public interest. Senate Bill 130, section 212e(a) provides that "[t]he board shall request the appearance of the attorney general or shall appoint a member of the Vermont bar to represent the interests of the public or the state in any hearings before the board under sections 212a, 212c or 212d"²⁷ Furthermore, the legislature obviously recognized that if the Department was going to be a competitor its investigatory powers would have to be limited. Hence, section 212e(b) provides:

[A]ny request by the department of public service, or subpoena issued by the department of public service for the production and examination of books, records and witnesses, or to furnish information under this title, may, upon motion to the board by the company affected, be quashed upon a finding by the board that the request or subpoena would result in the production of a trade secret or other confidential research, development, or commercial information of the company which would materially disadvantage the company as a competitor to the department in the sale or distribution of electrical energy.²⁸

Some governmental agency should have the authority to investigate and make recommendations concerning the Department in its role as a competitor when it proposes rate schedules or comes before the Board in a section 248 hearing. It can only be inferred that the legislature intended some other party—perhaps the Attorney General's office—to serve this function.²⁹ Certainly, considering the limitations imposed on the Department's ability to gain ac-

25. *Id.* § 1 (1986).

26. *Id.* §§ 205-208.

27. *Id.* § 212e(a) (Supp. 1987).

28. *Id.* § 212e(b).

29. *See id.* § 212e(a).

cess to information, it can no longer make objective recommendations to the Board. Consequently, the Department cannot effectively represent the public interest.

II. ELEMENTS OF BIAS

In *Withrow v. Larkin*,³⁰ the Wisconsin State Examining Board³¹ suspended appellant Larkin's medical license. The Examining Board acted as both an investigator and adjudicator. Larkin claimed that, in acting in this dual capacity, the Examining Board violated his procedural due process rights. The Federal District Court agreed with Larkin stating "for the board to suspend Dr. Larkin's license at its own contested hearing on charges evolving from its own investigation would constitute a denial to him of his rights to procedural due process."³² However, on appeal the United States Supreme Court held that the Examining Board's combination of investigative and adjudicative functions was not a violation of Larkin's due process rights.³³

In the past, arguments contending that administrative proceedings have been unfairly biased because the agency involved acted as both investigator and adjudicator have failed.³⁴ Nevertheless, in *Withrow*, the Supreme Court left the door open for challenges to the constitutional fairness of administrative proceedings based on the claim that the combination of investigative and adjudicative functions unfairly biased the administrative agency's decision. The Court stated:

[A] "fair trial in a fair tribunal is a basic requirement of due process." This applies to administrative agencies which adjudicate as well as to courts. Not only is a biased decision

30. 421 U.S. 35 (1975).

31. *Id.* at 41-42.

32. *Larkin v. Withrow*, 368 F. Supp. 796, 797 (E.D. Wis. 1973), *rev'd*, 421 U.S. 35 (1975).

33. *Withrow v. Larkin*, 421 U.S. at 46.

34. *See, e.g.*, *Marshall v. Jerrico*, 446 U.S. 238 (1980) (strict requirements of neutrality are not the same for administrators as for judges); *Roach v. National Transp. Safety Bd.*, 804 F.2d 1147 (10th Cir. 1986) (due process requires hearing before impartial administrative body and a biased hearing officer deprives a litigant of impartiality); *Anderson v. Dolce*, 653 F. Supp. 1556 (S.D.N.Y. 1987) (whether the impartiality of an adjudicator is grounds for constitutional disqualification is usually a matter for case by case determination); *Barry v. Heckler*, 620 F. Supp. 779 (N.D. Cal. 1985) (due process requirement of impartiality is applied more strictly to administrative adjudicators than to courts because of absence of procedural safeguards normally available in a judicial proceeding).

maker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness." . . . That is not to say that there is nothing to the argument that those who have investigated should not then adjudicate. The issue is substantial, it is not new, and legislators and others concerned with the operations of administrative agencies have given much attention to whether and to what extent distinctive administrative functions should be performed by the same persons. No single answer has been reached. Indeed, the growth, variety, and complexity of the administrative processes have made any one solution highly unlikely.³⁵

The Court also made it clear that there is a presumption of honesty and integrity in favor of those serving as regulators and adjudicators.³⁶ Furthermore, "the burden of establishing a disqualifying interest rests on the party making the assertion."³⁷

Due process depends upon a specific and practical inquiry into the decision-making tasks of the Department and Board and a factual analysis of how a challenged procedure could render their decision-making process unfair. Accordingly, where it can be demonstrated that a decision maker—the Department or Board—is "actually biased," or that circumstances exist that make "the risk of bias too great," the proceeding may be deemed "constitutionally unacceptable."³⁸

In *Wolkenstein v. Reville*,³⁹ the appellants, a public employees' union, challenged the constitutionality of New York's Taylor Law which prohibits strikes by civil servants.⁴⁰ Among other claims, the appellants charged that the Chief Executive Officer of

35. *Withrow v. Larkin*, 421 U.S. at 47, 51 (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)) (citations omitted).

36. *Withrow v. Larkin*, 421 U.S. at 47.

37. *Wolkenstein v. Reville*, 694 F.2d 35, 42 (2d Cir. 1982).

38. See *New York State Inspection, Sec. and Law Enforcement Employees v. New York State Pub. Employees Relation Bd.*, 629 F. Supp. 33, 39-40 (N.D.N.Y. 1984). Although the Vermont Supreme Court has accorded great deference to Board decisions, it has stated that ensuring that certain constitutional bounds are not overstepped is within its review power. See *In re Green Mountain Power*, 142 Vt. 373, 380, 455 A.2d 823, 825-26 (1983).

39. 694 F.2d 35 (2d Cir. 1982).

40. Under the Taylor Law, the Chief Executive Officer (C.E.O.) of a governmental agency whose employees are involved in a strike is authorized to investigate and determine whether an illegal strike has taken place. Employees who are notified by the C.E.O. that they have been found to have participated in an illegal strike have the opportunity to object to the C.E.O. finding. See N.Y. CIV. SERV. LAW § 210 (McKinney Supp. 1987); see also *Wolkenstein v. Reville*, 694 F.2d at 36-38.

the agency involved in the labor dispute had acted as both prosecutor and judge. Therefore, the appellants contended that the Chief Executive Officer was biased and his decisions violated the appellants' due process rights. The court held that the decisions of the Chief Executive Officer did not suffer from unfair bias.⁴¹ Notwithstanding this holding, the court enumerated three separate ways of disqualifying an administrator or administrative agency: one, by demonstrating institutional bias; two, through a disqualifying pecuniary interest; or three, by actual personal prejudice.⁴²

Both *Withrow* and *Wolkenstein* were cases where administrative adjudicators had combined investigative and adjudicative functions. The plaintiffs in both instances claimed that they had been denied their due process rights as a result of the combination of these functions. However, the United States Supreme Court in *Withrow* and the Second Circuit Court of Appeals in *Wolkenstein* disagreed with the plaintiffs, and held that they had received fair hearings.⁴³ While both cases present circumstances that are factually distinguishable from the Department's role in the Vermont utility industry, the standards of *Withrow* and *Wolkenstein* should be applicable in a challenge of the Department's continued function as an investigator, planner, and public advocate in the industry. Although the Supreme Court has limited challenges to an administrative agency's actions as both an investigator and adjudicator, it has not foreclosed consideration of these challenges.⁴⁴ Because the Department is in the unique position of acting as both a market competitor and regulator of the same market, the question of unfair administrative bias should be raised.

Although the Board and Department are independent of one another, at times the adjudicative and regulatory function of the Board is interrelated with the investigatory and planning function of the Department.⁴⁵ Thus, there is a nexus between the Board's adjudicatory function and the Department's investigative, planning, and public advocacy role. Under ordinary circumstances this would not show any potential for bias; however, because of the Department's expanded role as a competitor of Vermont's utilities under S. 130, the interrelationship between the Department and

41. *Wolkenstein v. Reville*, 694 F.2d at 41.

42. *Id.* at 41-42.

43. *Withrow v. Larkin*, 421 U.S. 35, 55 (1975); *Wolkenstein v. Reville*, 694 F.2d at 41.

44. See *supra* text accompanying note 13.

45. See *supra* text accompanying notes 13-29.

Board may be tainted and a sufficient basis for contending unfair bias may arise.

While other states have become market competitors in various industries, none have sought to regulate the market while simultaneously participating in it.⁴⁶ Certainly the Board is not a market competitor. Nevertheless, under the standards for bias stated in *Wolkenstein*, there is some question of whether an institutional bias exists between the Department and Board due to the nature of their relationship under the current statutory framework. Moreover, when the Department acts as a market competitor it has a strong pecuniary interest that may affect its relationship with the Board.⁴⁷ However, demonstrating actual prejudice by the Board would be a difficult, if not impossible, task.

III. THE DEPARTMENT CANNOT EASILY SWITCH ROLES: THE "TWO HATS THEORY"

The Department's role, prior to the enactment of S. 130, of providing the Board with information through the Plan, making determinations and recommendations on various matters, and being an advocate of the public interest must be viewed differently in light of its expanded role as a market competitor.

Undoubtedly, proponents of S. 130 will argue that no conflict or bias will arise in the Department's role as a planner, regulator, and advocate as a result of its expanded role as a competitor. For example, during the Senate Finance Committee hearings on S. 130, Michael Marks, a former Department Public Advocate stated:

It has been implied that somehow the State's participation in

46. See generally *Reeves v. Stake*, 447 U.S. 429 (1980) (South Dakota's state-owned cement mill); see also Anson & Schenkan, *Federalism, The Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71 (1981).

47. For example, the Department enters a take or pay contract with a power producer. The contract contains a price floor. During the term of the Department's contract, power becomes available to a public service company at a rate substantially lower than the floor price of the Department's contract. When hearings are instituted before the Board, the Department's pecuniary interest is triggered, particularly if the public service company's contract would displace the Department's more expensive power. Moreover, as a competitor of Vermont's utilities, the Department would find itself in the position of wanting to sell its power out of state. Yet under S. 130, the Department would have to demonstrate that the sale would be "reasonably incidental to and in furtherance of the needs of the state of Vermont." VT. STAT. ANN. tit. 30, § 211 (Supp. 1987). In this event, the Department's pecuniary interest would clash with its role as a regulator and advocate, thereby, dramatically increasing the likelihood of bias.

this business should somehow be rejected because it would create a conflict of interest. Well, I don't think a conflict of interest is created by an agency having overlapping roles. *I think it is created by somebody having conflicting motivations.* Now the State of Vermont when it acts as a regulator for the sale of power, has the same interests that it has when it arranges for the purchase and sale of power which means you have to deliver the lowest cost price to consumers. It's as simply [sic] as that and until somebody identifies the motivation that supposedly creates the conflict, I don't see the overlapping of roles as creating any conflict and historically we have a record dating back to 1957 which shows that the overlapping of roles does not create such a conflict.⁴⁸

However, there are conflicting motivations which will arise when a regulator of a business becomes an active competitor in that same business.

The argument offered by those in favor of the state's expanded competitive role is that the state will have the same motives as a competitor as it formerly had as a regulator—simply arranging purchases and sales of power at low cost.⁴⁹ However, this

48. *Proposed Revisions in Title 30: Hearings on S. 130 Before Vermont Senate Finance Comm.*, 59th Leg. Sess. 29 (Feb. 26, 1987) (statement of Michael Marks, former Department of Public Service Public Advocate) (emphasis added) [hereinafter *Hearings*]. *But see id.* at 17 (March 24, 1987) (statement of Tom Wies, General Counsel for the Public Service Board). "There is certainly no question that the Department is an influential participant in proceedings and its views are argued in great weight and yes, I think you can't deny that there is that potential problem for a conflict of interest." *Id.* Mr. Wies went on to state that if the Board had "supervisory power" over the Department similar to the power it has over utilities, "the possibilities for abuse are limited." *Id.*

49. *See id.*; *see also Hearings, supra* note 48, at 34 (March 5, 1987) (statement of George Sterzinger, National Consumer Law Center):

In my mind, whether there is a question of conflict of interest comes down to whether in this legislation, there is something which changes the State's participation, the overall regulation in a way which will irreparably harm present regulations so that the function of the regulations, protection of consumers, can't be carried out. I don't see that. . . . *I don't see the goals, i.e. provision of power at the least or those cause [sic] possible changing at all.*

Id. (emphasis added). *But see id.* at 7 (statement of Charles Ross, former Chairman of the Public Service Board, former member of the Federal Power Commission and International Joint Commission):

This is the first time, in my experience, that I have heard of a proposal that the State should engage in the power supply and sale of power for the purpose of making a profit. It is wrong and will result to the disadvantage of the power consumer. To have the Public Service Department operate as an operating utility in buying and selling power and at the same time appearing before the Public Service Board to contest the actions of the private and municipally owned utilities appalls me. I confess I have not seen the exact

motive may not remain the same because the Department now finds itself in a competitive situation which is quite different from the situation it was formerly in of merely regulating. In light of S. 130, the Department now has an interest in the success of its business arrangements and ventures. Its success to some degree will be measured against its ability to compete effectively with other market competitors. Therefore, it is reasonable to assume that the Department may attempt to effect the market in ways that are advantageous to its business position, and conversely not always favorable to its competitors. Although at times the Department's competition in the market may be beneficial to those it serves, at other times the Department's activities may not be beneficial to all Vermont consumers of electricity. In essence, there will be two distinct motives driving the Department as a competitor and regulator: one, to compete successfully and two, to ensure that all Vermont residents are provided with low cost power. Unfortunately, these two distinct motives will not always lead to the same result. Furthermore, under "a realistic appraisal of psychological tendencies and human weakness"⁵⁰ it is possible that the efforts of the Department to be a successful competitor would bias its decisions as a regulator.

In his comments before the Senate Finance Committee, Mr. Marks stated that the overlapping roles of the Department do not create any conflict.⁵¹ He went on to state that there is "a record dating back to 1957 which shows that overlapping of roles does not create such a conflict."⁵² Nonetheless, this statement is inaccurate and misleading. In 1979, the Vermont Legislature recognized that the overlapping functions of the Department and Board created a clear conflict and thus required their division. In comments before the Senate Finance Committee concerning the division of the Department from the Board, Senator Scott, the bill's sponsor, made statements which seem particularly relevant in light of the recent changes in the Department's role:

Now one of the reasons why I think that it is essential to split duties and it is essential not to have it go through their [sic]

language of the final bill before this Committee but here I am going to some extent by the newspaper accounts. . . . How the Executive Department can expect to have credibility is beyond me.

Id.

50. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

51. *Hearings*, *supra* note 48, at 29 (statement of Michael Marks).

52. *Id.*

and then appeal to the board is one in the same. If you have a staff under the public service board, secretary, engineer, accountant, so on and they are also the staff for the public service department, there is no way humanly possible that they can take a position based on the knowledge of the department which is contrary to the public service board when they are employed by the public service board also. It is just not reasonable to assume that they are going to be able to switch that easily. *We are all human beings; we are subject to inter-relationships with one another, so I feel, one, we essentially have to have two staffs so you don't put the staff in the same conflict of interest situation as we now put the public service board in.*⁵³

Similarly, it is unrealistic to expect the Department on one hand to make objective decisions with regard to its role as planner, regulator, and advocate; and on the other hand, make decisions as a market competitor. In *Withrow*, the United States Supreme Court stated that "a realistic appraisal of psychological tendencies and human weakness" is appropriate when assessing the fairness of an adjudicator or regulator.⁵⁴ Thus, given the Department's inconsistent and contradictory roles as planner, regulator, or advocate on the one hand, and, market competitor on the other, it is reasonable to conclude that the Department will be biased in its decision-making. As a result, the Board may be provided with information that would unfairly affect its decisions. If the Department continues to operate as it has under the statutory framework, that existed prior to S. 130, then a substantial likelihood of institutional bias will exist. Therefore, if the Department wishes to become a full fledged competitor, it must cease to operate as it has in the past.

CONCLUSION

Under S. 130 the Department's expanded role as a market competitor is incompatible with its previous role as a planner, regulator, and advocate. The Department's role as a competitor adds the element of bias to all of its decisions. Furthermore, there is a substantial likelihood that its status as a competitor of Vermont

53. *Debate on Splitting the Department of Public Service From the Public Service Board: Hearings on S. 40 Before Senate Finance Comm.*, 51st Leg. Sess. 14 (Jan. 19, 1979) (statement of Senator Scott) (emphasis added).

54. *Withrow v. Larkin*, 421 U.S. at 47.

utilities could adversely affect its relationship with the Board—a relationship which includes formal determinations and recommendations concerning the Department's competitors. If the Department is allowed to continue to conduct itself as it has under the statutory framework which preceded S. 130, it is possible in certain instances Vermont utilities would be subject to unfair hearings before the Board. Consequently, Vermont's rate payers may suffer.

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