



California Fair Political Practices Commission

January 3, 1990

Vincent F. Biondo
City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008-1989

Re: Your Request for Informal Assistance
Our File No. I-89-646

Dear Mr. Biondi:

This is in response to your request for advice regarding your responsibilities as Carlsbad City Attorney under the Political Reform Act (the "Act").¹ Because your request does not involve a specific pending decision, we are treating your request as one for informal assistance pursuant to Regulation 18329(c) (copy enclosed).²

QUESTION

San Diego Gas and Electric Company (hereafter "SDG&E") is considering the construction of an electricity generating plant at one of five locations in their service territory, one of which is at Carlsbad. You own stock in Southern California Edison Company (hereafter "Edison") which has entered into an agreement for a merger with SDG&E. The merger is subject to certain regulatory approvals. Do you have a conflict of interest which prohibits you from participating in decisions regarding the proposed plant?

CONCLUSION

You may participate in decisions regarding the proposed plant, and present the city council's position before the Energy

¹ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, *et seq.* All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Government Code Section 83114; 2 Cal. Code of Regs. Section 18329(c)(3).)

Commission unless the decisions are likely to have a reasonably foreseeable and material financial effect on Edison.

FACTS

The San Diego Gas and Electric Company ("SDG&E") owns and operates a major electrical generating facility, the Encina Power Plant, located in the City of Carlsbad (the "city"). The city has received formal notice that SDG&E has asked the state Energy Commission for approval to construct a new plant at one of five locations, one of which is at Encina. It is your understanding that SDG&E is required to propose five possible sites for the proposed plant in its application to the Energy Commission. The city has land use authority over the site of the proposed plant. You expect that at some point SDG&E must seek a land use permit from the city if the decision is made to construct the plant at Encina. You expect that the city council will take a position regarding the proposed plant and direct you to present that position during the hearings before the Energy Commission on SDG & E's proposed plant. You may also participate in advising management on the options they will present to the city council to aid it in formulating its position with respect to the proposed plant.

You have no financial interest in SDG&E. However, you have an investment in Southern California Edison Company ("Edison"). Edison is traded on the New York Stock Exchange. SDG&E and Edison have entered into an agreement for a merger subject to certain regulatory approvals. An SDG&E spokesman has said there is no connection between the merger and the proposed plant, but that approval of the merger would delay the need for the power plant by approximately three years.

ANALYSIS

Section 87100 prohibits any public official from making, participating in, or using his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest. An official has a financial interest in a decision if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official or a member of his immediate family,³ or on:

- (a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

* * *

³ An official's "immediate family" includes his spouse and dependent children. (Section 82029.)

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

Section 87103(a) and (c).

You are a public official. (Section 82048.) You have an investment interest presumably worth more than \$1,000 in Edison.⁴ (Section 82034.) Accordingly, you are prohibited from participating in any decision which will have a reasonably foreseeable and material financial effect on yourself or on Edison which is distinguishable from the effect on the public generally.⁵ (Section 87103.)

⁴ Edison is not a source of income to you within the meaning of subdivision (c) of Section 87103 since dividends from a company listed on the New York Stock Exchange are excluded from the definition of income. (Section 82030(b)(5).) Accordingly, sale of Edison stock will eliminate Edison as a disqualifying financial interest provided the stock is sold on the stock exchange and you do not know, or have reason to know, the identity of the purchaser. (Section 82030(b)(12).)

⁵ In your letter you mention that you do not believe your participation in decisions regarding the proposed plant should present any problem since you "would be acting at the direction of the city council." However, on page one of your letter you have stated that you "may also participate in advising management on the options which they will present to the City Council as an aid to the Council's decision on what position to take." When participating in advising management you are participating in the making of a governmental decision or attempting to use your position to influence a governmental decision, within the meaning of Section 87100. Subdivision (c) of Regulation 18700 (copy enclosed) states that a public official "participates in the making of a governmental decision" when, acting within the authority of his position, he:

(1) Negotiates, without significant substantive review, with a governmental entity or private person regarding the decision; or

(2) Advises or makes recommendations to the decision-maker, either directly or without significant intervening substantive review, by:

Foreseeability

The effects of a decision are reasonably foreseeable if there is a substantial likelihood that they will occur. To be foreseeable, the effects of a decision must be more than a mere possibility; however certainty is not required. (Downey Cares v. Downey Community Development Com. (1987) 196 Cal. App. 3d 983, 989-991; Witt v. Morrow (1977) 70 Cal. App. 3d 817, 822; In re Thorner (1975) 1 FPPC Ops. 198 (copy enclosed).) The Act seeks to prevent more than actual conflicts of interest, it seeks to prevent even the appearance of a possible conflict of interest. (Witt v. Morrow, supra at 823.)

SDG&E and Edison have entered into an agreement for a merger subject to certain regulatory approvals. The threshold question is whether there is a substantial likelihood that the decision regarding approval of the plant will have an economic effect on

(A) Conducting research or making any investigation which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision; or

(B) Preparing or presenting any report, analysis or opinion, orally or in writing, which requires the exercise of judgment on the part of the official or designated employee and the purpose of which is to influence the decision.

Regulation 18700(c).

In addition, in advising management on the options they will present to the city council as an aid to the council decision on what position to take, you are using your official position to influence a governmental decision within the meaning of Regulation 18700.1 (copy enclosed), and Section 87100. Accordingly, you may not participate in such tasks if the decision is likely to have a reasonably foreseeable and material financial effect, distinguishable from the public generally, on Edison.

When presenting the position of the city council before the Energy Commission, you continue to use your position to influence a governmental decision since you are personally presenting the position and responding to any inquiries the Energy Commission may have. Under such circumstances, you may present the city council's position before the Energy Commission unless the decision will have a reasonably foreseeable and material financial effect on Edison which is distinguishable from the effect on the public generally.

Edison. If the merger process is very preliminary and if there is very little certainty that the two companies will merge, it would be difficult to claim that there is such a substantial likelihood of an economic effect on Edison. On the other hand, if the merger process is further along and there is a greater degree of certainty that the two companies will indeed merge, then there would be a substantial likelihood, that decisions regarding the plant would affect Edison. In this case the Board of Directors and the shareholders of Edison and SDG&E have already approved the merger.⁶ There is no information that suggests that the merger process has hit a regulatory roadblock. Under the circumstances it appears that there is a substantial likelihood that the merger will occur, and, therefore, that the decision will have a reasonably foreseeably economic effect on Edison.

Materiality

Regulation 18702 sets forth the guidelines for determining whether an official's economic interest in a decision is "materially" affected as required by Section 87103. If the official's financial interest is directly involved in the decision, then Regulation 18702.1 (copy enclosed) applies to determine materiality. Thus, for example, if Edison was directly involved in the decision before the city council, the effect of the decision would be deemed material. On the other hand, if the official's financial interest is indirectly affected by the decision, then Regulations 18702.2 to 18702.6 (copies enclosed) would apply to determine whether the effect of the decision is material.

In the circumstances described, Edison will be indirectly affected by the decision regarding the land use permit for the proposed plant. For example, if approval of the merger would delay the need for the power plant by approximately three years because Edison has excess capacity which it can make available to SDG&E, this could result in better utilization of Edison's electricity generating plants and, thus, an increase Edison's gross revenues. Edison is listed on the New York Stock Exchange. The effect of a decision is material as to a business entity listed on the New York Stock Exchange if:

- (1) The decision will result in an increase or decrease to the gross revenues for a fiscal year of \$250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. nonindustrial corporations, in which case the increase or decrease in gross revenues must be \$1,000,000 or more; or

⁶ This information was provided by Mr. Ronald Ball, Assistant City Attorney, in a telephone conversation on Tuesday, December 5.

(2) The decision will result in the business entity incurring or avoiding additional expenses or reducing or eliminating existing expenses for a fiscal year in the amount of \$100,000 or more, except in the case of any business entity listed in Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. nonindustrial corporations, in which case the increase or decrease in expenditures must be \$250,000 or more; or

(3) The decision will result in an increase or decrease in the value of assets or liabilities of \$250,000 or more, except in the case of any business entity listed in the most recently published Fortune Magazine Directory of the 500 largest U.S. industrial corporations or the 500 largest U.S. nonindustrial corporations, in which case the increase or decrease in assets or liabilities must be \$1,000,000 or more.

Regulation 18702.2(a).

Public Generally

Even if the reasonably foreseeable financial effect of a decision is material, disqualification is required only if the effect is distinguishable from the effect on the public generally. (Section 87103.) For the city, the public consists of all residents of the city. Thus, disqualification is required unless the decision will affect Edison in substantially the same manner as it will affect all residents of the city, or a significant segment of the residents of the city. (Regulation 18703, copy enclosed.) In the circumstances described, the effect of the decision on Edison would not be the same as the effect on the public or a significant segment of the public.⁷

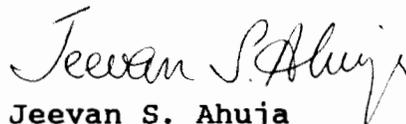
⁷ Copies of In re Owen (1976) 2 FPPC Ops. 77 and In re Legan (1985) 9 FPPC Ops. 1, Commission opinions which explain the application of the concept of public generally, are enclosed for your information.

Our File No. A-89-646
Page 7

I trust this letter has provided you with the guidance you requested. If you have any questions regarding this matter, please call me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel


Jeevan S. Ahuja
Counsel, Legal Division

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Enclosure

FPPC

Nov 14 7 44 AM '89

VINCENT F. BIONDO, JR.
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November 9, 1989

Fair Political Practices Commission
P. O. Box 807
Sacramento, CA 95804

RE: ENCINA ADDITION OF 463 MEGAWATT COMBINED CYCLE POWER PLANT

This letter is to ask for a written opinion as to whether or not I may participate as City Attorney in my official capacity and as directed by the City Council in response to a proposal by the San Diego Gas and Electric Company to construct a 463 megawatt combined cycle power plant as an addition to its existing Encina Power Plant in Carlsbad, California notwithstanding the fact that I own stock in the Southern California Edison Company.

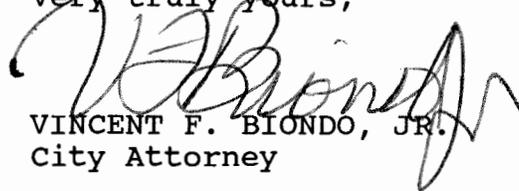
The San Diego Gas and Electric Company ("SDG&E") owns and operates a major electrical generating facility, the Encina Power Plant, located in Carlsbad, California. We have received formal notice that SDG&E has asked the Energy Commission for approval to construct a new combined cycle 463 megawatt generating plant on one of five locations in their service territory, one of which is at Encina. I anticipate the proposal will be controversial and that my City Council will take a position and direct this office accordingly. I may also participate in advising management on the options which they will present to the City Council as an aid to the Council's decision on what position to take. The proposed power plant will cost in excess of several hundreds of millions of dollars and would probably be a matter of some significance even to a company the size of SDG&E. If the City takes a position in opposition and we prevail and an alternative site results, it is not clear what affect that will have on the company's finances.

I have no financial interest in SDG&E, however, I do have an investment in the Southern California Edison Company and receive dividend income from them in excess of the conflict of interest thresholds. Although at this point, the companies are separate and I do not have any information indicating that a decision against the power plant in Carlsbad could have a material financial effect

on Southern California Edison, I am aware that the two companies have entered into an agreement for a merger subject to certain regulatory approvals. Because of my investment in Southern California Edison I have not been participating in any way in matters relating to the proposed SDG&E-Southern California Edison merger. The only information I have received about the connection of the merger to the proposed power plant expansion is a press report of a statement from an SDG&E spokesman that there is no connection. That is, that SDG&E has an independent need to provide more power for its own service territory. The spokesman stated that the company needs the plant expansion whether or not the merger is approved. However, it is acknowledged by the spokesman that approval of the merger would delay the need for the power plant by approximately three years. Based on my knowledge of the utility industry in general and SDG&E in particular, it is not possible to say whether or not the SDG&E spokesman's statements are true.

If the City Council takes a position in opposition to the power plant expansion they will want me to represent them before the Energy Commission, the Public Utilities Commission and as otherwise required. I also will probably be involved in the local land use approval process which SDG&E must satisfy before securing City approval for the expansion. It would be a hardship for the City if I were disqualified since the City would probably have to retain outside counsel at significant additional expense if I am unable to participate. In my view, the possible effects on Southern Cal Edison by the SDG&E power plant are remote and speculative and should not present a problem. In any case, I would be acting at the direction of the City Council. Although I don't think there is a problem, I need a written opinion from the Commission since, if the City and SDG&E do become involved in an adversarial situation, it is possible the company may attempt to make an issue of it.

Very truly yours,



VINCENT F. BIONDO, JR.
City Attorney

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California Fair Political Practices Commission

November 17, 1989

Vincent F. Biondo
City Attorney
1200 Carlsbad Village Drive
Carlsbad, CA 92008-1989

Re: Letter No. 89-646

Dear Mr. Biondo:

Your letter requesting advice under the Political Reform Act was received on November 14, 1989 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Jeevan Ahuja an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

A handwritten signature in cursive script that reads "Kathryn E. Donovan".

Kathryn E. Donovan
General Counsel

KED:plh