

State of California



Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance • • Administration • • Executive/Legal • • Enforcement
(916) 322-5662 322-5660 322-5901 322-6441

May 15, 1984

David W. McMurtry
Law Offices of de la Vergne & McMurtry
901 H Street, Suite 503
Sacramento, CA 95814

Re: Your Request for Advice
Our File No. A-84-081

Dear Mr. McMurtry:

Thank you for your letter regarding the application of Government Code Section 84308^{1/} to the Sacramento Metropolitan Cable Television Commission ("CTC"). You are the General Counsel for CTC which is a joint powers authority created by the County of Sacramento, City of Sacramento, City of Folsom and the City of Galt. CTC is governed by a nine-member Board of Directors; five of the directors are members of the Sacramento County Board of Supervisors, three are members of the Sacramento City Council, and the ninth member is either a Folsom City Councilmember or a Galt City Councilmember. In your letter dated April 4, 1984, you described the duties of CTC as follows:

The Board of Directors acts by a majority vote of its membership. It is vested with the responsibility to administer cable television franchises awarded by each of the parties to the joint exercise of powers agreement. The duties of the Commission and its Board of Directors are prescribed by a cable television ordinance which has been adopted in identical form by each of the parties to the joint exercise of powers agreement. Additional duties are set forth in the cable television franchises which are administered by the Commission.

^{1/} All statutory references are to the Government Code unless otherwise indicated.

David W. McMurtry
May 15, 1984
Page 2

Those duties generally include the monitoring of construction of cable television systems for the Sacramento Metropolitan Area, the monitoring of the operation of the cable television systems, the monitoring of contracts entered into by cable television franchises with community groups to provide various forms of funding and assistance to those groups and the supervision of various other matters relating to the cable television system.

It is contemplated that these duties will involve the Board of Directors in matters affecting not only cable television franchisees, but also in matters affecting a diverse cross-section of persons and organizations in the community.

ISSUES

The three issues you presented for our consideration and our conclusions on these issues are as follows:

1. Issue: Whether the exemption from legislative bodies in Section 84308(d) would apply if the a legislative body themselves were the member of the board of directors of the joint powers authority.

Conclusion: No.

2. Issue: Whether CTC exercise of the rulemaking authority conferred by the Cable Television Ordinance (the "Ordinance") is quasi-judicial within the meaning of Section 84308 and 2 Cal. Adm. Code Section 18438.1.

Conclusion: No.

3. Issue: Whether Section 84308 applies to CTC actions which may be taken under the Ordinance without the necessity of a public hearing at which evidence is taken.

Conclusion: It depends whether the action is quasi-judicial or quasi-legislative.

DISCUSSION

The first issue you posed concerns a possible restructuring of CTC in order to address the concern of the members of the Board of Directors that they might inadvertently violate the

David W. McMurtry
May 15, 1984
Page 3

restrictions of Section 84308 when they decide routine matters under the Ordinance. The suggested restructuring was set forth in your letter as follows:

(a) The Board of Directors would retain its present membership in connection with the performance of all functions which do not involve the undertaking of quasi-judicial actions affecting the franchises or other interested parties.

(b) As to matters requiring quasi-judicial action, (which would be specifically identified by the cable television ordinances), the Board of Directors would consist of three members. One member would be the City Council of the City of Sacramento. The second member would be the Board of Supervisors of the County of Sacramento. The third member would be an elected representative of either the City Council of the City of Folsom or the City Council of the City of Galt. This third member would be entitled to participate in the hearing but would not be entitled to vote. Action taken by the Board of Directors would require majority approval by the members of the Sacramento City Council sitting as a legislative body and majority approval by the Sacramento County Board of Supervisors sitting as a legislative body. Thus, members of the Sacramento City Council and Sacramento Board of Supervisors would vote only as members of those legislative bodies and not as individual members of the Board of Directors of the Commission.

The intended effect of this restructuring of the Board of Directors is to ensure that the members of the Sacramento City Council and Sacramento County Board of Supervisors who would act on quasi-judicial matters in the manner described above would be exempt from the coverage of Section 84308 under the exemption for legislative bodies in subsection (d). You stated in your letter that "[a]ctions would be taken by the members while sitting as members of the Board of Directors of the Commission and accordingly it is my belief that the above exemption is applicable."

Subsection (d) of 84308 provides in part:

(d) Legislative bodies such as city councils, county boards of supervisors, and the State Legislature while acting as a body or a committee thereof are

David W. McMurtry
May 15, 1984
Page 4

exempted from the coverage of this section. However, this section applies to any member of such a legislative body who serves as a voting member on another quasi-judicial board or commission which considers individual applications for licenses, permits, or entitlements for use....

In view of the purposes of Section 84308 and the Political Reform Act, this exemption for legislative bodies has been narrowly interpreted. By regulation, the Commission has determined that:

(b) A legislative body is "acting as a body or a committee thereof" when:

(1) It acts in its entirety as itself or as the ex officio governing body of any district or other entity; or

(2) Any subgroup of the legislative body composed solely of members of the body sits by designation of the body.

(2 Cal. Adm. Code Section
18438.1(b).)

In addition, in our advice letters, the exemption for legislative bodies has been narrowly confined to the situations where a legislative body such as a city council is exercising its authority to act as a body or members of the council are acting as a committee of that body. Accordingly, we have advised on several occasions that a joint powers authority or special district whose board is comprised entirely of elected officials is not exempt from Section 84308 if those officials are from different legislative bodies. See, e.g., A-83-047 (Los Angeles County Transportation Commission); A-83-114 (Regional Water Quality Control Board); A-83-001 (Santa Monica Mountains Conservancy) (copies enclosed).

You are in agreement that CTC as presently constituted is covered by Section 84308, but you view the proposed restructuring as bringing the Board under the exemption. We fail to see any substantive difference between the present situation and the proposal. It dilutes the voting power of the Sacramento City Councilmembers and the Sacramento County Supervisors on quasi-judicial matters, but it does not change the fact that they are voting as members of the Board of CTC. In the case of

the City Council, it brings all of the councilmembers under Section 84308 since they will all be voting on the matter. In summary, it is our view that your proposal does not exempt the councilmembers and supervisors from Section 84308 since they will still be voting as members of the Board; the proposed changes merely alter the relative voting power of the members. If the Ordinance were amended to provide that certain matters would be referred back to the member legislative bodies for an independent decision, we might come to a different conclusion.

The second issue you raised was whether CTC's exercise of the rulemaking authority conferred by the Ordinance is quasi-judicial within the meaning of Section 84308 and 2 Cal. Adm. Code Section 18438.1. Assuming that you are talking about rules of general applicability (which are similar to regulations), the exercise of rulemaking authority is clearly not quasi-judicial, and Section 84308 does not apply. 2 Cal. Adm. Code Section 18438.1(e) provides that "[a]n action or function is not quasi-judicial if it concerns the adoption or amendment of regulations...." In its Curiel Opinion, the Commission stated:

... Quasi-judicial proceedings generally determine the rights of specific parties, or apply existing law to specific situations. Examples of quasi-judicial proceedings include proceedings to issue or revoke licenses, building permits, zoning variances, conditional use permits, parcel and subdivision maps, or coastal development permits. Other agency functions, because they resemble the law-making functions of the State Legislature, are called "quasi-legislative." Quasi-legislative proceedings involve adoption of rules of general applicability which apply primarily to future situations. Examples of quasi-legislative proceedings include annexations of territory to a city or district, adoption or amendment of zoning ordinances, adoption of regulations, or granting of franchises. Most government agencies at some time perform quasi-judicial functions, and at others quasi-legislative functions.

8 FPFC Opinions 1 at 3-4 (No. 83-003, Sept. 7, 1983) (footnotes omitted, emphasis added)

The third issue you brought to our attention was a general question concerning the applicability of Section 84308 to various actions by the Board which may be taken under the Ordinance without necessity of a hearing at which evidence is

David W. McMurtry
May 15, 1984
Page 6

received. You expressed concern about Commission regulation, 2 Cal. Adm. Code Section 18438.1, and requested clarification of this issue.

The intent of the Commission in the Curriel Opinion, supra, and in 2 Cal. Adm. Code Section 18438.1 was to clarify that an agency is covered by Section 84308 when, and only when, it engages in the type of activities which are traditionally termed "quasi-judicial" by the courts. The Commission did not intend to create a new definition of quasi-judicial actions in 2 Cal. Adm. Code Section 18438.1. Rather categories and examples of quasi-judicial actions are set forth. In choosing examples, we attempted to list only those which were clearly quasi-judicial or clearly quasi-legislative. As you know, the line between quasi-judicial actions and quasi-legislative actions has not always been clearly delineated by the courts. See City of Chula Vista v. Superior Court, 133 Cal. App. 3d 472, 485-488 (1982). With respect to any actions which do not clearly fall in one category or the other, we will determine on a case-by-case basis whether Section 84308 applies using judicial precedent and traditional judicial analysis.

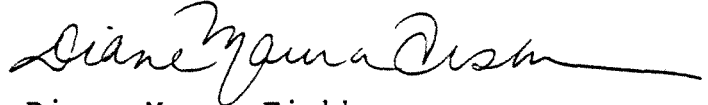
Quasi-judicial proceedings generally determine the rights of specific parties, or apply existing law to specific situations. As you point out in your letter, often a specific law or due process requires an evidentiary hearing in quasi-judicial proceedings. But whether a hearing is required is not always determinative on the question of whether a proceeding is quasi-judicial or quasi-legislative. The question is whether the agency is performing a "judicial" function: is it applying an existing set of standards to a specific factual situation involving specific parties. We realize that the answer to this question is not always clear, and we remain available to assist you on specific CTC decisions.

I would also like to point out that the prohibitions and requirements of Section 84308 apply only with reference to contributions from persons who are the subject of quasi-judicial proceedings or who participate in and have a significant financial interest in the proceedings. I have the impression that the Board feels the coverage of Section 84308 is broader than it actually is. I have enclosed copies of two advice letters (A-83-154 and A-83-015) which I hope will clarify the application of Section 84308 to persons and groups who are not the subject of the Board action, i.e. the franchisee.

David W. McMurtry
May 15, 1984
Page 7

I trust that the foregoing discussion has answered your concerns. If I can be of further assistance or if you would like to discuss this letter, please feel free to contact me at (916) 322-5901.

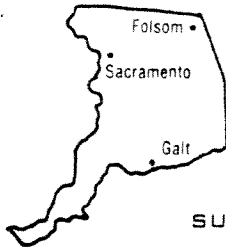
Sincerely,

A handwritten signature in cursive script, reading "Diane Maura Fishburn", with a long horizontal flourish extending to the right.

Diane Maura Fishburn
Counsel, Legal Division

DMF:plh
Enclosures

SACRAMENTO METROPOLITAN



Cable
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Commission
CTC

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SUITE 2500, 700 'H' ST., SACRAMENTO, CA 95814 • (916) 440-6661

ROBERT E. SMITH
EXECUTIVE DIRECTOR

April 04, 1984

Barbara Milman, Division Chief
Legal Division
Fair Political Practices Commission
1100 K Street
P. O. Box 807
Sacramento, California

Re: Request for Written Advice Concerning
Application of Government Code §84308

Dear Ms. Millman:

I am the general counsel for the Sacramento Metropolitan Television Commission ("the Commission"). The Commission is a joint powers authority created under the Joint Exercise of Powers Act (Government Code §§6500 et seq.) by the County of Sacramento, City of Sacramento, City of Folsom and the City of Galt.

The Commission is a separate public entity. As presently constituted, the Commission is governed by a nine-member Board of Directors. Each director is an elected official. Five of the directors are members of the Board of Supervisors of the County of Sacramento. Three of the directors are members of the Sacramento City Council. One director is a member of either the City Council of the City of Folsom or the City Council of the City of Galt.

The Board of Directors acts by a majority vote of its membership. It is vested with the responsibility to administer cable television franchises awarded by each of the parties to the joint exercise of powers agreement. The duties of the Commission and its Board of Directors are prescribed by a cable television ordinance which has been adopted in identical form by each of the parties to the joint exercise of powers agreement. Additional duties are set forth in the cable television franchises which are administered by the Commission.

Those duties generally include the monitoring of construction of cable television systems for the Sacramento Metropolitan Area, the monitoring of the operation of the cable television systems, the monitoring of contracts entered into by cable television franchises with community groups to provide various forms of funding and assistance to those groups and the supervision of various other matters relating to the cable television system.

It is contemplated that these duties will involve the Board of Directors in matters affecting not only cable television franchisees, but also in matters affecting a diverse cross-section of persons and organizations in the community.

In my opinion, the cable television ordinances and cable television franchises clearly require the Board of Directors to undertake certain quasi-judicial actions in connection with the administration of those franchises. Those actions require a public hearing before the Board of Directors at which evidence must be taken and the Board must make determinations of factual matters affecting the franchise holders under the cable television franchises. I have identified approximately fifteen different functions performed by the Board of Directors which I believe are of a quasi-judicial nature. Although the Commission has been in existence for approximately one year, the initial cable television franchise was only recently awarded by the parties to the agreement. As of this date, the Board of Directors has not been required to exercise any of its quasi-judicial powers although it may soon be required to do so.

At the September 7, 1983 regular meeting of the Board of Directors the applicability of Government Code §84308 to its membership was discussed by legal counsel for the Commission. In view of the relatively large and undefined number of individuals who might be affected by or might support or oppose Commission actions of a quasi-judicial nature, members of the Board of Directors expressed concern that they might inadvertently violate the restrictions of Section 84308 routinely taking such actions. At the conclusion of the discussion the Commission Staff was directed by the Board to evaluate the possibility of reconstituting the Board of Directors as follows:

(a) The Board of Directors would retain its present membership in connection with the performance of all functions which do not involve the undertaking of quasi-judicial actions affecting the franchises or other interested parties.

(b) As to matters requiring quasi-judicial action, (which would be specifically identified by the cable television ordinances), the Board of Directors would consist of three members. One member would be the City Council of the City of Sacramento. The second member would be the Board of Supervisors of the County of Sacramento. The third member would be an elected representative of either the City Council of the City of Folsom or the City Council of the City of Galt. This third member would be entitled to participate in the hearing but would not be entitled to vote. Action taken by the Board of Directors would require majority approval by the members of the Sacramento City Council sitting as a legislative body and majority approval by the Sacramento County Board of Supervisors sitting as a

legislative body. Thus, members of the Sacramento City Council and Sacramento County Board of Supervisors would vote only as members of those legislative bodies and not as individual members of the Board of Directors of the Commission.

I have recently reviewed the above proposal in light of the requirements of Government Code §84308. It is my tentative opinion that the members of the Sacramento City Council and Sacramento County Board of Supervisors who would act on quasi-judicial matters in the manner described above would be exempt from the coverage of §84308 by virtue of the exemption contained in the first sentence of subsection (d) of that section. Actions would be taken by the members while sitting as members of their respective legislative bodies and not as individual voting members of the Board of Directors of the Commission and accordingly it is my belief that the above exemption is applicable. My only doubts concerning this matter are attributable to the administrative regulations relating to Government Code §84308 which were recently adopted by the Fair Political Practices Commission (2 Cal. Adm. Code §18438.1).

Subparagraph (b)(1) of §18438.1 does not appear to recognize the possibility that a legislative body may act in its capacity as a legislative body while serving a member of the board of directors of a joint powers authority whose membership consists of the legislative bodies of two or more public agencies. In view of the ambiguity engendered by the FPPC Regulations pertaining to this matter, I have been requested by the Board of Directors of the Sacramento Metropolitan Cable Commission to seek the advice of the FPPC concerning this matter prior to the time that the governing bodies of the County of Sacramento, City of Sacramento, City of Folsom and City of Galt take action to reconstitute the Board of Directors of the Commission in the manner described above.

The Board has also requested that I seek the advice of the FPPC on two other related matters involving the coverage of Government Code §84308.

The second matter involves the applicability of §84308 to actions by the presently constituted Board of Directors involving the exercise of rule-making authority vested in the Board under the terms of the Cable Television Ordinance. This rule-making authority is found in §§5.50.508, 5.50.512, 5.50.544 and 5.50.552 of the Cable Television Ordinance. Copies of those sections are enclosed with this letter. It is my opinion that the Board's exercise of the rule-making authority is the exercise of a legislative or quasi-legislative function rather than the exercise of a quasi-judicial function (See Strumsky vs. San Diego Board of Supervisors, (1974) 11 Cal.3d 28, 35, Fn. 2, 112 Cal. Rptr. 805, Stauffer Chemical Company vs. California State Air Resources Board (1982) 128 Cal.App. 3d 789, 180 Cal. Rptr. 550, Santa Ana Tustin Community Hospital vs. Board of Supervisors of Orange County (1982) 127 Cal.App. 3d 644, 179 Cal. Rptr. 620); however, since

this function is not expressly mentioned in Subsection (e) of §18438.1, I have been requested by the Board to solicit your advice as to this matter.

The final matter involves the applicability of §84308 to various actions by the Board of Directors in which may be taken under the Cable Television Ordinance without necessity of a public hearing at which evidence is received. These actions are described in §§5.50.510, 5.50.612, 5.50.614, 5.50.700, 5.50.752 and 5.50.762 of the Cable Television Ordinance. Copies of those sections are enclosed.

In reviewing the recent FPPC Regulations concerning the coverage of §84308, I noted that the definition of quasi-judicial actions or functions in the Regulations seem to include by inference various actions that do not require a hearing at which evidence is received. In particular, Subsection (d)(2)(c) and Subsection (d)(2)(d) seem to engender some ambiguity in reference to this matter.

For example, Subsection (d)(2)(d) states that "... approval of official bonds. . ." is a quasi-judicial function. You will note that the last paragraph of the enclosed §5.50.700 of the Cable Television Ordinance authorizes the Board of Directors of the Commission, acting without a hearing to approve a reduction in the amount of official performance bond required by the Cable Television Ordinance.

I am not aware of any decisional law in California in which a court has held that a governmental action was quasi-judicial when that action was taken without an evidentiary hearing. On the contrary, all decisions of which I am familiar hold that an action is legislative, quasi-legislative or ministerial if it can be lawfully taken without an evidentiary hearing. (No Oil, Inc. vs. City of Los Angeles (1974) 13 Cal.3d 68, 118 Cal.Rptr. 34, Rich vs. State Board of Optometry (1965) 735 C.A.2d 591, 45 Cal. 512, Keeler vs. Superior Court (1956) 46 Cal. 2d 596, 297 P.2d 967).

One option that the legislative bodies of the County of Sacramento, City of Sacramento, City of Folsom and City of Galt may wish to consider in connection with this general subject is the elimination of evidentiary hearings as a condition precedent to the Board of Directors performing certain minor functions delegated to it by the Cable Television Ordinance. These functions involve enforcement of the cable television franchises as a contractual obligation of the franchisee. In my opinion, due process does not require hearings to be held on most of these matters.

It would be most helpful if you could provide us with some insight into and general guidance concerning the intent of the FPPC in promulgating Subsection (d)(2)(c) and (d)(2)(d) of §18438.1. In particular, we are concerned to learn if these Subsections are intended to include within the definition of "quasi-judicial actions" any actions or functions that would be

considered legislative, quasi-legislative or ministerial under the traditional criteria set forth in Subsection (d)(2)(b).

It would be appreciated if you would send a copy of your reply to this letter to me at my office address which is as follows:

Law Offices of de la Vergne & McMurtry
901 H Street, Suite 503
Sacramento, California 95814

If you have any questions concerning this request, please contact me at (916) 441-1978.

Very truly yours,

By David W. McMurtry
DAVID W. McMURTRY
General Legal Counsel for
SACRAMENTO METROPOLITAN
CABLE COMMISSION

DWM:klm

cc: Robert E. Smith
Executive Director