



California Fair Political Practices Commission

December 2, 1992

Malcolm M. McCay
101 Ash Street
P. O. Box 1831
San Diego, CA 92112

Re: Your Request for Advice
Our File No. A-92-541

Dear Mr. McCay:

This letter is in response to your request for advice regarding the revolving door provisions of the Political Reform Act (the "Act").¹

QUESTIONS

1. In a settlement conference where several different intervenors are present, may you ask why the California Public Utilities Commission ("CPUC") holds a certain position in the Pacific Gas Transmission Company Order 636 restructuring case? May you discuss the issue with the intent to influence the CPUC's position?
2. In the Pacific Gas Transmission Company Order 636 restructuring case, may you meet separately with the CPUC staff to discuss issues in the proceeding?
3. In a Federal Energy Regulatory Commission ("FERC") proceeding which goes to hearing in Washington, D.C., may you assist in preparing cross examination questions for the CPUC witnesses?
4. In a FERC proceeding such as the Pacific Gas Transmission Company Order 636 restructuring case, may you call a CPUC staff person and inquire about a CPUC position?

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.

5. In a FERC proceeding which goes to hearing, may you file rebuttal testimony to the CPUC position?

CONCLUSIONS

1. During the course of a settlement conference where several different intervenors are present, you may ask why the CPUC holds a certain position in the Pacific Gas Transmission Company Order 636 restructuring case. However, you may not discuss the issue with the intent to influence the CPUC's position.

2. In the Pacific Gas Transmission Company Order 636 restructuring case, you may not meet separately with CPUC staff to discuss issues in the proceeding.

3. In a FERC proceeding which goes to hearing in Washington, D.C., you may assist in preparing cross examination questions for the CPUC witnesses.

4. In a FERC proceeding such as the Pacific Gas Transmission Company Order 636 restructuring case, you may call a CPUC staff person to inquire about a CPUC position. However, you may not discuss the issues with the intent to influence the CPUC's position.

5. In a FERC proceeding which goes to hearing, you may file rebuttal testimony to the CPUC position.

FACTS

Until August, 1992, you were employed by the CPUC as an advisor to Commissioner John B. Ohanian. Your duties while at the CPUC involved reviewing CPUC decisions and orders and making recommendations to Commissioner Ohanian regarding those decisions. On occasion, the CPUC would intervene as a party to a FERC proceeding. One of your duties while at the CPUC was to review the CPUC formal position that it would present to FERC and suggest changes to the CPUC position on FERC proceedings. While at the CPUC, you did not participate in any formal positions involving restructuring proceedings for interstate pipelines, pursuant to FERC Order 636A.

In your current position at San Diego Gas & Electric Company, you will be acting as the lead staff person representing the company in several company restructuring cases pursuant to FERC Order 636. These include restructuring dockets for Pacific Gas Transmission Company, Kern River Transmission Company and Mojave Pipeline Company. These proceedings are in separate dockets from FERC Order 636. San Diego Gas & Electric is one party to the restructuring proceeding, along with several other parties. The CPUC has also intervened as a party in these proceedings. All parties to these proceedings are on equal standing before FERC.

The CPUC has no jurisdiction in this proceeding but is a party to the proceeding. This is a matter under federal jurisdiction. Pursuant to FERC Order 636A, all parties are required to hold meetings and reach agreements on various issues involving the interstate pipelines. Thus, as a part of the FERC proceeding, you will be required to communicate and interact with the CPUC staff because the CPUC is a party to the proceeding.

ANALYSIS

Effective January 1, 1991, the Act provides that legislators, state officeholders and designated employees of administrative agencies are subject to new restrictions on their postemployment activity. For designated employees of state agencies, Section 87406(d)(1) provides in relevant part:

No designated employee of a state administrative agency, any officer, employee, or consultant of a state administrative agency who holds a position which entails the making, or participation in the making, of decisions which may foreseeably have a material effect on any financial interest, and no member of a state administrative agency, for a period of one year after leaving office or employment, shall, for compensation, act as agent or attorney for, or otherwise represent, any other person, by making any formal or informal appearance, or by making any oral or written communication, before any state administrative agency, or officer or employee thereof, for which he or she worked or represented during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative action, or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. For purposes of this paragraph, an appearance before a state administrative agency does not include an appearance in a court of law, before an administrative law judge, or before the Worker's Compensation Appeals Board. The prohibition of this paragraph shall only apply to designated employees employed by a state administrative agency on or after January 7, 1991.

(Emphasis added.)

You were a designated employee of the CPUC in a position that your agency had determined involved the making or participation in making of decisions which may affect financial interests. Pursuant to Section 87406(d)(1), you may not appear before or communicate with the CPUC, or any subdivision thereof, for the

purpose of influencing "administrative action"² or any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. The prohibition extends for one year after leaving state office or employment. The prohibition does not prevent you from communicating with the Legislature or with other state agencies.

It does not appear from your facts that you propose to become involved in actions or proceedings involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Thus, we focus our analysis on your efforts to influence administrative action.

Communications with administrative agencies which are not for the purpose of influencing "administrative action" are not restricted. For example, we have advised that informational meetings between a representative of a nonprofit corporation and state agency officials to determine the agency's viewpoint, and to introduce the corporation to the officials were not influencing an "administrative action." (Bagatelos Advice Letter, No. I-91-202.)³ On the other hand, if at the meeting the corporate representative suggested or requested that the agency consider drafting rules or regulations, the activity would constitute attempting to influence an "administrative action."

Thus, under the revolving door provisions of the new ethics bill, requesting information from the CPUC concerning anything that is a matter of public record, such as existing laws, regulations or policies, is not influencing "administrative action" and is not a restricted communication.

In addition, using your expertise to advise your employer on matters related to the Pacific Gas Transmission Company Order 636 restructuring case, participating in FERC hearings and questioning CPUC staff during the course of the hearings or drafting proposals on behalf of your employer which would be submitted to the CPUC or to FERC would not be a prohibited "appearance" or "communication" under Section 87406. Conversely, you may not communicate with

² "Administrative action" is defined in Section 82002 and Regulation 18202. It means the proposal, drafting, development, consideration, adoption, amendment or repeal of rules and regulations and other quasi-legislative action proposed by a state agency. "Influencing legislative and administrative action" is defined in Section 82032. It means promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including the provision or use of information, statistics, studies or analyses.

³ The term "influencing administrative action" historically has been interpreted in the lobbying contest.

CPUC staff for the purpose of influencing CPUC's position in the proceedings. (Albino Advice Letter, No. A-92-470.) These restrictions apply for a period of one year after leaving your employment with the CPUC. (Section 87406(d).)

The traditional revolving door provisions of the Act, discussed below, may impose additional restrictions on your activities. (Sections 87401 and 87402.)

Traditional Revolving Door Provisions

The Act also places certain lifetime restrictions on postgovernmental employment activities. Sections 87401 and 87402 provide:

No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial, quasi-judicial or other proceeding if both of the following apply:

(a) The State of California is a party or has a direct and substantial interest.

(b) The proceeding is one in which the former state administrative official participated.

Section 87401.

No former state administrative official, after the termination of his or her employment or term of office shall for compensation aid, advise, counsel, consult or assist in representing any other person (except the State of California) in any proceeding in which the official would be prohibited from appearing under Section 87401.

Section 87402.

Pursuant to Sections 87401 and 87402, you may not appear before or communicate with the CPUC, or any subdivision thereof, with the intent to influence a judicial, quasi-judicial or other

proceeding⁴ where the proceeding is one in which you participated and in which the state is a party or has a direct and substantial interest. In addition, Section 87402 prohibits you from aiding, advising, counseling, consulting or assisting any other person in the proceeding.

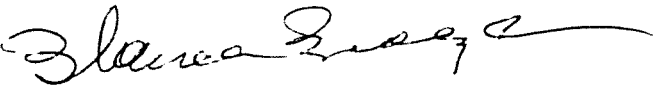
For purposes of Sections 87401 and 87402, you are considered to have "participated" in a proceeding during your tenure at the CPUC if you took part in the proceeding "personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information." (Section 87400(d).) Moreover, you are presumed to have been substantially involved in all the proceedings in which those employees who were supervised by you as part of your official duties, were personally and substantially involved. (Brown Advice Letter, No. A-91-033.) In other words, for purposes of the Act, if you had a supervisory position directly responsible for an employee's activities, you "participated" in the proceeding. (Blonien Advice Letter, No. A-89-034.)

You have not provided us with sufficient information to make this determination. However, if you determine that you participated in the same restructuring case while employed with the CPUC, the lifetime prohibition would apply and you would be required to abstain from participating in all aspects of the proceedings.

We trust this letter adequately responds to your inquiry. Should you have any further questions regarding this matter, do not hesitate to call me at (916) 322-5901.

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Blanca M. Breeze
Counsel, Legal Division

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⁴ "Judicial, quasi-judicial or other proceeding" is defined in Section 87400(c). It means any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency, including but not limited to any proceeding governed by Chapter 5 (commencing with Section 11500) of Division 3 of Title 2 of the Government Code.