



California Fair Political Practices Commission

June 17, 1994

Peter M. Greenwald
District Counsel
South Coast Air Quality Management District
21865 E. Copley Drive
Diamond Bar, CA 91765-4182

Re: Your Request for Informal
Assistance
Our File No. I-94-163

Dear Mr. Greenwald:

This is in response to your request for informal assistance concerning the responsibilities of an officer of the South Coast Air Quality Management District ("District") under the provisions of the Political Reform Act (the "Act").¹

Please note that this letter is based on the facts presented to us. The Commission does not act as the finder of fact in providing advice. (In re Oglesby (1975) 1 FPPC Ops. 71.)

QUESTION

Is Ballard a business entity that "does business or plans to do business in the jurisdiction, or has done business within the jurisdiction" of the District within the meaning of Section 82034?

CONCLUSION

Ballard is a business entity that "does business" in the jurisdiction of the District within the meaning of Section 82034.

FACTS

An officer of the South Coast Air Quality Management District, a government agency with regulatory authority over the

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, Sections 18000-18954. All references to regulations are to Title 2, Division 6 of the California Code of Regulations. 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).)

counties of Los Angeles, Orange, San Bernardino, and Riverside, is considering the purchase of stock in Ballard Power Systems, Inc. ("Ballard"). Ballard is a Canadian corporation incorporated under the Canada Business Corporations Act and is located in Vancouver, British Columbia.

The development and commercialization of fuel cells is the principal business of Ballard. A fuel cell is an environmentally clean power generator which converts hydrogen fuel directly, without combustion, into electricity, with pure water and heat as the only by-products. According to a prospectus dated May 28, 1993, issued by the company, Ballard has spent ten years establishing a proprietary fuel cell technology. The prospectus states that Ballard's fuel cells are being developed for transportation applications including buses, commercial fleet vehicles, and automobiles, and for stationary applications including power generation for commercial, industrial or residential uses.

Prior to 1989, Ballard was primarily a contract research and development company. In 1989, it began deriving revenue from the manufacture and sale of advanced lithium batteries and also began selling fuel cells for testing and evaluation. In recent years, Ballard has delivered fuel cells to customers including Daimler-Benz AG, General Motors Corporation, and Mazda Motor Corporation for testing purposes.

According to the prospectus, Ballard believes that the United States will be an important source of development funding which Ballard intends to access through contracts with strategic partners and original equipment manufacturers. The company does not expect to achieve commercial sales of Ballard fuel cells, fuel cell systems and components until at least 1998.

The prospectus notes that the State of California Air Resources Board has adopted stringent regulations relating to vehicle emissions. The regulations require that by 1998, 2 percent of motor vehicle manufacturers' sales must be zero-emission vehicles. This required percentage increases to 10 percent by the year 2003. The prospectus states that this requirement "will initiate a gradual phase in of electric vehicles powered by batteries, fuel cells and hybrids of the two." The prospectus also notes that the South Coast Air Quality Management District targets major emission reductions from locomotives by 2010 and that, at the request of the District, Ballard presented a preliminary conceptual design in November 1992 for a fuel cell powered locomotive. Also described in the prospectus are United States Clean Air Act mandates relating to urban buses. The prospectus states that "urban transit buses represent the earliest and most appropriate entry into the transportation market for Ballard."

You have indicated that Ballard has no manufacturing facility or any ongoing place of business located in the United States.

The following are Ballard's contacts with the area under jurisdiction of the District. In September 1993, Ballard entered into a contract with the District whereby the District, the Canadian federal government, the province of British Columbia, and Ballard co-fund development and demonstration of zero-emission urban transit bus technology. The District's contribution to this contract was \$325,000. The term of this contract extends through July 30, 1994, although District staff may make a recommendation to extend the contract and provide additional funding. In addition, according to the prospectus, the company is negotiating with Transportation Manufacturing Corporation, the largest United States manufacturer of transit buses, to provide a 40-foot transit bus, with the governments of British Columbia and Canada and with the District to provide the funding and with the Southern California Metropolitan Transit Authority and the British Columbia Transit Authority to conduct the testing as evaluating users. You are not aware of any other business contacts which Ballard has, or has had, within this jurisdiction.

ANALYSIS

Section 82034 defines the term "investment" in relevant part as follows:

"Investment" means any financial interest in or security issued by a business entity ... if the business entity ... does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title. No asset shall be deemed an investment unless its fair market value equals or exceeds one thousand dollars (\$1,000). ...

Section 82034 (emphasis added).

You have asked for clarification of the phrase "does business or plans to do business in the jurisdiction" in the above definition of the term "investment" in Section 82034.

The Political Reform Act was adopted by the people of California by initiative in 1974. Significant components of the Act included the disclosure and disqualification requirements of the Act. Section 81001 provides in relevant part:

* * *

(b) Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them

Section 81002 states in relevant part:

* * *

(c) Assets and income of public officials which may be materially affected by their official actions should be disclosed and in appropriate circumstances the officials should be disqualified from acting in order that conflicts of interest may be avoided. ...

Section 81003 essentially provides that the Act should be liberally construed to accomplish its purposes.

In In re Baty (1979) 5 FPPC Ops. 10, the Commission concluded that a public official must disclose his investments of \$1,000 or more in certain corporations. The Commission explained:

... where the entity in which the official has an investment has business contacts with the official's jurisdiction, there is a potential for conflicts of interest arising and substantial justification for disclosure of the official's investment.

In re Baty, supra, at 12 (emphasis added).

The business entities involved were headquartered outside California but had manufacturing or distribution facilities in the state and sold products throughout the state on a regular basis.

In September 1993, Ballard entered into a contract with the District and other parties to co-fund the development and demonstration of zero-emission urban transit bus technology; the District's contribution to this contract was \$325,000. The term of this contract extends through July 30, 1994, but may be extended with additional funding. Presumably, public officials will be making the decisions to approve the extension and funding of this contract with Ballard. The Act's declaration, that public officials should perform their duties in an impartial manner, free from bias caused by their own financial interests, dictates that the term "investment" be construed to include an entity which has business contacts, such as Ballard's existing contract with the District, which may, presumably, be extended by officials of the District.

Black's Law Dictionary (5th Edition, 1979) defines "business," in part, as "employment, occupation, profession, or commercial activity engaged in for gain or livelihood." Although, in Baty the Commission was dealing with business entities that were involved in the manufacturing, distribution and sales of products, it is not necessary that an entity be involved in the manufacturing, distribution and sales of products for the entity

to be deemed to be "doing business"; it is sufficient that the entity is engaged in activity for "gain or livelihood." Presumably, Ballard has entered into the contract with the District with the goal of eventually earning a profit for its shareholders. Under the circumstances described, Ballard is doing business in the jurisdiction within the meaning of Section 82034. Accordingly, an investment of \$1000 or more in Ballard will be deemed to be an investment within the meaning of Section 82034.

I trust this letter has responded to your question. Should you have any other questions regarding this matter, please feel free to contact me at 916/322-5901.

Sincerely,

Steven G. Churchwell
General Counsel



By: Jeevan Ahuja
Counsel, Legal Division

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