



FAIR POLITICAL PRACTICES COMMISSION

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July 31, 1998

H. Peter Klein
County Counsel
Mendocino County
501 Low Gap Road, Room 1030
Ukiah, California 95482

**Re: Your Request for Advice
Our File No. I-98-167**

Dear Mr. Klein:

This letter is in response to your request for advice on behalf of Patricia Campbell regarding the provisions of the Political Reform Act (the "Act").¹ Since your request is one for general guidance, we are treating your request as one for informal assistance pursuant to Regulation 18329(c).²

Please keep in mind that the Commission does not act as a finder of fact when issuing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.) Our advice is applicable only to the extent that the facts provided to us are correct, and that all of the material facts have been provided.

QUESTIONS

May Supervisor Campbell participate in discussions and decisions regarding the following:

1. Re-licensing of a PG&E hydroelectric power plant by the FERC?
2. Sale of a PG&E hydroelectric power plant to the County of Mendocino?

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, 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. (Section 83114; and Regulation 18329(c)(3).)

3. Land use proposals for PG&E property?
4. Land use proposals that would affect PG&E's customer base?
5. Contracts for the provision of electrical power to the County of Mendocino?

CONCLUSION

1-5. Supervisor Campbell is prohibited from participating in any decision that will have a reasonably foreseeable, material financial effect on PG&E.

FACTS

Patricia Campbell is a member of the Board of Supervisors (the "board") of Mendocino County, and a Director of the County of Mendocino Water Agency (the "water agency").

Supervisor Campbell is married to a salaried employee of Pacific Gas and Electric Company ("PG&E"). Supervisor Campbell's husband currently holds the position of Customer Field Services Director, for a large area that includes all of Mendocino County.

Supervisor Campbell's community property interest in her husband's salary is in excess of \$10,000 annually. Her husband also participates in a 401K stock ownership plan, which presumably includes PG&E stock.

The board and the water agency will be involved in making decisions in the future which may directly or indirectly involve PG&E.

PG&E owns and operates a hydroelectric power plant (the Potter Valley Project) in Mendocino County. This power plant is in the process of being re-licensed by the Federal Energy Regulatory Commission (FERC). The power plant operates solely by utilizing water diverted from the Eel River to the Russian River Basin. Preliminary studies show an adverse impact of this diversion on Eel River fish life. A proposed condition to re-licensing the plant would result in an annual reduction in diversion of Eel River water to the Russian River basin of about 15 percent, depending on the type of water year. The diversion of Eel River water occurs solely for the purpose of generating electric power at the plant.

Mendocino County and the water agency have intervened in the FERC re-licensing process, to safeguard the continued flow of water to the Russian River Basin, for agricultural and consumptive uses. Supervisor Campbell did not participate in the discussion and decision regarding the motion to intervene, because of uncertainty over whether she would have a disqualifying conflict under the Act.

PG&E has announced its intention to sell the Potter Valley Project. Mendocino County or the water agency could become a purchaser of the Project.

Supervisor Campbell has recused herself from discussions and voting upon a land use appeal for a use permit and variance for a cellular tower on PG&E land. Supervisor Campbell would like guidance with respect to future participation on land use appeals pertaining to PG&E property located within the county.

As PG&E is the major gas and electricity provider in Mendocino County, PG&E is indirectly benefitted every time a land use decision creates an additional market for electricity or gas, through the creation of a subdivision, or through the approval of a commercial or industrial project. Supervisor Campbell would like advice as to whether or not she can vote on land use projects, the indirect effect of which is to increase PG&E's customer base.

Deregulation of the California power industry will result in consumers being able to select from a number of providers, including PG&E. Supervisor Campbell would like advice as to whether or not she can vote on county contracts with power providers, including PG&E.

ANALYSIS

The conflict-of-interest provisions of the Act prohibit a public official from making, participating in making, or in any way attempting to use his or her official position to influence a governmental decision in which the public official knows, or has reason to know, that he or she has a financial interest. (Section 87100.) As a member of the Board of Supervisors of the County of Mendocino, and as a member of the Board of Directors of the County of Mendocino Water Agency, Supervisor Campbell is considered to be a public official. (Section 82048.) As such, she is prohibited from making, participating in making, or using her official position to influence any governmental decision in which she knows, or has reason to know, that she has a financial interest.

Financial Interest

Whether a public official has a financial interest in a decision is governed by Section 87103, which provides, in part, that:

“An official has a financial interest in a decision within the meaning of Section 87100 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, a member of his or her immediate family³, 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.

(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.

According to the facts presented to us in your letter, Supervisor Campbell has two potentially disqualifying economic interests in PG&E.

Investment Interest: Investments held directly or indirectly by an official's spouse are considered investments of the official. (Section 82034; and the *Christiansen* Advice Letter, No. I-87-019.) Thus, if Supervisor Campbell's husband owns PG&E stock that is worth \$1,000 or more, Supervisor Campbell has a potentially disqualifying interest in PG&E, pursuant to Section 87103(a).

Source of Income: Section 82030 provides that the income of an individual also includes any community property interest in the income of a spouse. Consequently, as Supervisor Campbell's community property interest in her husband's income from PG&E exceeds \$250 per year, it is also a potentially disqualifying interest, as described in Section 87103(c).

³ “Immediate family” means the spouse and dependent children. (Section 82029.)

Due to having these economic interests in PG&E, Supervisor Campbell is required to disqualify herself from any decision of the board, or the water agency, which could have a reasonably foreseeable material financial effect on PG&E, that is distinguishable from the effect on the public generally.

Foreseeability

Whether the financial consequences of a decision are reasonably foreseeable at the time a governmental decision is made depends on the facts of each particular case. An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. If an effect is only a mere possibility, however, it is not reasonably foreseeable. (*Downey Cares v. Downey Development Com.* (1987) 196 Cal.App.3d 983, 989-991; *Witt v. Morrow* (1977) 70 Cal.App.3d 817, 822; and *In re Thorner* (1975) 1 FPPC Ops. 198.)

According to the facts presented in your letter, it is clearly foreseeable that decisions concerning the re-licensing of a PG&E hydroelectric power plant, the sale of a PG&E hydroelectric power plant to the County of Mendocino, land use proposals for PG&E property, land use proposals that would affect PG&E's customer base, and contracts for the provision of electrical power to the County of Mendocino will have a financial effect on PG&E. Consequently, Supervisor Campbell may not participate in any of these decisions if PG&E will be materially affected by them.

Materiality

The Commission has adopted differing guidelines to determine whether the effect of a decision is material, depending on the specific circumstances of each decision.

In pertinent part, Regulation 18702.1(a) provides that the effect of a decision is deemed material on a business entity directly involved in a decision before the official's agency, unless the decision will have no financial effect on the business entity, where any of the following apply:

1. A business entity has been a source of income to the public official.
(Regulation 18702.1(a)(1).)
2. The official:
 - a. has a direct or indirect investment of \$1,000 or more in a business entity

covered by Regulation 18702.2(c) - (g);

b. has a direct or indirect investment of \$10,000 or more in a business entity covered by Regulation 18702.2(a) or (b) (*Johns Advice Letter*, No. A-92-567); or

c. is an officer, director, partner, trustee, employee, or holds any position of management in a business entity.

Based on the facts presented in your letter, PG&E is a source of income to Supervisor Campbell. Thus, irrespective of whether some other provision of Section 87103 applies, Supervisor Campbell has an economic interest in any decision by the board or the water agency that involves PG&E.

To determine whether a board or water agency decision is deemed material on PG&E, the initial inquiry is whether PG&E is directly involved in a decision before the board or the agency.

Under the provisions of Regulation 18702.1(b), PG&E is directly involved in a decision before the board or the water agency if PG&E, or its agent:

“(1) Initiates the proceeding in which the decision will be made, by filing an application, claim, appeal, or similar request or

(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official’s agency.

(3) A person or business entity is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial, or revocation of any license, permit, or other entitlement to, or contract with, the subject person or business entity.”

If PG&E is not directly involved in a decision before the board or the water agency, then its involvement is only indirect.

As set forth in Regulation 18702.1(a)(1), Supervisor Campbell must disqualify herself from participating in any decision by the board or the water agency that directly involves PG&E, if the decision will have some financial effect on PG&E.

For a decision by the board or the water agency that only indirectly affects PG&E, Supervisor Campbell is not required to disqualify herself, unless the effect of the decision is material, as described in Regulation 18702.2.

PG&E is a business entity that is listed on the New York Stock Exchange. As such, under Regulation 18702.2(a), the effect of a decision which indirectly affects PG&E is only material 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 1,000 largest U.S. corporations, in which case the increase or decrease in gross revenues must be \$1,000,000 or more; or

(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 the most recently published Fortune Magazine Directory of the 1,000 largest U.S. 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 1,000 largest U.S. corporations, in which case the increase or decrease in assets or liabilities must be \$1,000,000 or more.”

We do not have sufficient facts about the specific decisions involving PG&E, that will have to be made by either the board or the water agency, in order to analyze whether the effect of any particular decision on PG&E will be direct or indirect. Without having sufficient facts to make that determination, we also are unable to determine whether the effect of any particular decision on PG&E will be material. Thus, we can only provide you with this general guidance for determining whether Supervisor Campbell must disqualify herself from participating in a decision by the board or the water agency, because the decision will have a reasonably foreseeable, material financial effect on PG&E.

Public Generally

As an additional point, you should keep in mind that even when an official's economic interest may be materially affected by a decision, the official may still participate in the decision if the effect on the official's financial interest is not distinguishable from the effect on the public generally. For the "public generally" exception to apply to a decision, the decision must affect the official's interest in substantially the same manner as it would affect a significant segment of

the public. (Regulation 18703.) Regulation 18703(a)(1)(B) defines the term "significant segment," as it relates to an economic interest in a business entity, as: "fifty percent of all businesses in the jurisdiction or the district the official represents, so long as the segment is composed of persons other than a single industry, trade, or profession." There is, however, a special rule regarding the application of this exception to decisions by a water, irrigation, or similar district, the concern assessments, taxes, fees, charges, rates, or similar decisions. That rule is contained in Regulation 18703(b)(3).

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel



By: Steven Benito Russo
Staff Counsel, Legal Division

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