



FAIR POLITICAL PRACTICES COMMISSION

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July 16, 1999

Michael R. Woods
Woods & Daube LLP
790 Broadway
Sonoma, California 95476-7011

**Re: Your Request for Advice
Our File No. A-99-182**

Dear Mr. Woods:

This letter is in response to your request for advice on behalf of councilmember Frank Aiello regarding the provisions of the Political Reform Act (the "Act").¹

QUESTION

May councilmember Aiello participate in governmental decisions concerning the Pittsburg District Energy Facility and Enron Capital and Trade, Inc.?

CONCLUSION

Under the Act, councilmember Aiello does not have a potentially disqualifying financial interest in the salary paid to him by the city for his services as a member of the city council. Councilmember Aiello may therefore participate in these decisions, absent some other financial interest not revealed in the factual account supporting this request for advice.

FACTS

In September 1996, the City of Pittsburg (the "city") and its redevelopment agency formed a joint powers authority in order to establish a new municipal utility. The new authority was the Pittsburg Power Company Joint Powers Authority ("PPC"). The city councilmembers also sit as the board of directors of the PPC, and the city attorney serves as general counsel to the PPC. Frank Aiello is a member of the city council.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

On or about July 2, 1997, the PPC's board of directors approved an Alliance and Development Agreement (the "agreement") with Enron Capitol and Trade, Inc. ("ECT.") The agreement provided a structure for ECT to analyze various opportunities which might be available to the PPC as a new municipal utility, in light of California's deregulation of the electric industry. The agreement provided that in the event that PPC and ECT pursued any of a number of particular opportunities, net revenues would be divided between them, with 60 percent going to PPC and 40 percent going to ETC. The formation documents for the PPC allow PPC revenues to be used for various municipal purposes, such as capital improvement projects.

One of the projects contemplated by the agreement was development of a natural gas-fired electric and steam cogeneration plant. ECT evaluated that opportunity, and filed an application for certification with the California Energy Commission ("CEC"). Under the state Public Resources Code, the CEC has the exclusive jurisdiction to permit the establishment of cogeneration power plants in California. It is anticipated that in late July or early August 1999, the CEC will issue a permit for the new cogeneration plant in Pittsburg, called the Pittsburg District Energy Facility ("PDEF").

PPC expects that there will be net revenues from the PDEF which will be divided between PPC and ECT on a 60/40 basis, as provided in the agreement. In early June 1999, ECT agreed that the PPC will receive at least \$1.8 million from the project, assuming that the CEC issues a permit, and PDEF is successfully financed (by a traditional lending institution or private equity investor, for example). PPC and ECT anticipate that there will be additional revenues, 60 percent of which will go to PPC. Any expenditure by PPC is determined in the sole discretion of the PPC board of directors.

ECT is not a source of income to councilmember Aiello. No member of the PPC will receive any compensation from the 60/40 division of net revenues between PPC and ETC. The only income Mr. Aiello receives from the city is his compensation as a councilmember.

ANALYSIS

Section 87100 prohibits public officials from making, participating in making, or using their official position to influence a governmental decision in which they know or have reason to know they have a financial interest. As a member of the city council, councilmember Aiello is a public official subject to the Act's conflict of interest provisions. (Section 82048.)

A public official has a financial interest in a governmental 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, or on a member of the official's immediate family.

There are six kinds of economic interests from which conflicts of interest may arise. They are defined in Section 87103 and Regulations 18703-18703.5 to include:

- An interest in a business entity in which a public official has a direct or indirect investment² of \$1,000 or more. (Section 87103(a), Regulation 18703.1(a).)
- An interest in a business entity in which a public official is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d), Regulation 18703.1(b).)
- An interest in real property in which a public official has a direct or indirect interest of \$1,000 or more. (Section 87103(b), Regulation 18703.2.)
- Any source of income to the public official which aggregates to \$250 or more within 12 months prior to the decision. (Section 87103(c), Regulation 18703.3.)
- Any source of gifts to the public official if the gifts aggregate to \$300³ or more within 12 months prior to the decision. (Section 87103(e), Regulation 18703.4.)
- A public official also has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family, a.k.a. the “personal financial effects” rule. (Section 87103, Regulation 18703.5.)

From the information presented to us, we can see only two possible economic interests; first, in the councilmember’s income from the city as his employer and, second, in his personal expenses, income, assets, or liabilities (or those of his immediate family).

The city is a local governmental agency. (Section 82041.) Salary from a state, federal, or local governmental agency is expressly exempted from the definition of “income” for purposes of the Act. (Section 82030(b)(2).) The salary paid by the city to councilmember Aiello for his services as a city councilmember is therefore not potentially disqualifying “income” within the meaning of the Act’s conflict of interest provisions. (*Bordsen* Advice Letter, No. A-95-347.)

Under the “personal effects” rule, a conflict of interest exists where a decision would foreseeably result in a public official's personal expenses, income, assets, or liabilities (or those of his or her immediate family) increasing or decreasing by \$250 or more, regardless of the source of that increase or decrease. (Section 87103; Regulations 18703.5; 18704.5; 18705.5; *Beardsley* Advice Letter, No. I-99-003; *Daniels* Advice Letter, No. I-98-297.)

² Section 87103 defines an ‘indirect investment’ or interest as any investment or interest owned by the spouse or dependent child of a public official, by an agent on behalf of a public official, or by a business entity or trust in which the official, the official’s agents, spouse, and dependent children own directly, indirectly, or beneficially a 10-percent interest or greater.

³ The gift limit amount is adjusted biennially by the Commission to reflect changes in the Consumer Price Index. As of January 1, 1999, the amount is \$300. (Section 87103(e), Regulation 18940.2.)

The personal effects test does not require disqualification if the decision affects only the salary, per diem, or reimbursement for expenses an official may receive from a local government agency. (Regulation 18705(c)(1); *Cosgrove* Advice Letter, No. A-98-145.) Thus a decision affecting councilmember Aiello's salary will not give rise to a conflict of interest under this rule.

In summary, absent some other financial interest in the anticipated decisions, there is no barrier under the Act to councilmember Aiello's participation in the decisions you have described. The only effects we can envision are effects on his salary and associated payments from the city, which can not give rise to a conflict of interest.

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

Sincerely,

Steven G. Church well
General Counsel



By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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