



FAIR POLITICAL PRACTICES COMMISSION

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October 15, 2003

Robert A. Laurie
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1006 Fourth Street, 8th Floor
Sacramento, CA 95814

**Re: Your Request for Advice
Our File No. A-03-190**

Dear Mr. Laurie:

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

QUESTION

May you be compensated for representation of the developers of the TESLA Power Project in proceedings before the California Energy Commission, despite the fact that you were a member of the commission when TESLA's application for certification was initiated and were assigned as the presiding member of the committee assigned to TESLA's application during the first 6-1/2 months that the application was in process?

CONCLUSION

No. Because you exercised discretion in granting petitions to intervene in the TESLA application for certification proceedings, you took part personally and substantially through decision, as that phrase is used in Govt. Code section 87400(d), and thus "participated" in the proceeding for purposes of the Act. Therefore, you may not be compensated for any representation of TESLA before the CEC, or for any consultation, advice or assistance you may have given TESLA in connection with its application for certification.

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

FACTS

You served as a commissioner for the California Energy Commission ("CEC") from January 1997 to June 2002. The CEC has five commissioners and has jurisdiction over the certification/licensing of thermal power plants (with exceptions).

On October 12, 2001, an application for certification ("AFC") was filed for the TESLA Power Project (AFC 01-AFC-21) by Midway Power LLC. On January 9, 2002, the full commission voted to deem the AFC data adequate. On that day, a two-member committee was assigned to the case; you as presiding member and another commissioner as associate member.

On February 13, 2002, you granted a Petition to Intervene filed by California Unions for Reliable Energy and on February 15, 2002, you granted a Petition to Intervene filed by Robert Sarvey. According to the CEC, which you authorized us to contact for further information, on February 21, 2002, you also granted a Petition to Intervene filed by the San Joaquin Valley Air Pollution Control District. You note that petitions to intervene are granted routinely, without hearing, and are rarely denied.

You conducted an informational hearing and site visit on February 19, 2002, and on or about March 6, 2002, you believe you may have issued a preliminary scheduling order. Subsequently, on April 3, 2002, May 3, 2002, and June 5, 2002, applicant and staff submitted Status Reports 1, 2 and 3, respectively.

On June 24, 2002, you submitted your resignation as a commissioner.

You contend you took no action to render a decision, take and receive evidence or testimony, conduct an investigation, or gain access to confidential information or take any action to influence the outcome of the proceedings.

ANALYSIS

Government Code §§ 87400-87405² prohibit you from representing, for compensation, certain persons³ in proceedings in which you participated as a commissioner of the California Energy Commission after leaving state service.⁴ Section 87401 states:

² All further statutory references are to the Government Code, unless otherwise specified.

³ "Person" is defined in the Act as: "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert." (Section 82047.)

⁴ Section 87406(d)(1) also contains a one-year ban on representation of any person for compensation by a former state administrative official before his or her own agency "if the appearance or communication is made for the purpose of influencing administrative or legislative action or influencing any action proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property." However, because more than 12 months have passed since your resignation from the CEC, section 87406(d)(1) no longer applies to your situation.

“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.”

In addition, section 87402 prohibits former state administrative officials from aiding, advising, counseling, consulting or assisting in representing any person in any proceeding in which section 87401 would prohibit them from appearing.

Section 87400(b) defines “state administrative official” as “every member, officer, employee or consultant of a state administrative agency who as part of his or her official responsibilities engages in any judicial, quasi-judicial or other proceeding in other than a purely clerical, secretarial or ministerial capacity.” “State administrative agency” is defined in section 87400(a) as “every state office, department, division, bureau, board and commission,” excluding the Legislature, the courts, and agencies in the judicial branch of government.

“Judicial, quasi-judicial or other proceeding” is defined in section 87400(c) as follows:

“(c) ‘Judicial, quasi-judicial or other proceeding’ 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.”

Under these definitions, as a former commissioner of the CEC, you are a former state administrative official of a state administrative agency, and because TESLA’s application for certification is an “application . . . involving a specific party . . . in [a] . . .

state administrative agency,” the application qualifies as a “judicial, quasi-judicial or other proceeding” under the Act.

The primary question to be answered is whether, based on your activities before your resignation from the CEC, you “participated” in the proceedings involving TESLA’s application for certification before the CEC.

Pursuant to section 87400(d), “participated” means

“to have taken part personally and substantially through decision, approval, disapproval, formal written recommendation, rendering advice on a substantial basis, investigation or use of confidential information as an officer or employee, but excluding approval, disapproval or rendering of legal advisory opinions to departmental or agency staff which do not involve a specific party or parties.”

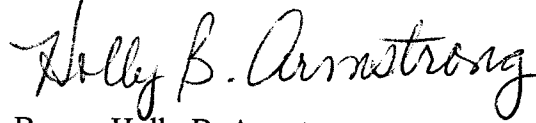
Because you made decisions regarding petitions for intervention, which were discretionary in nature, and other procedural matters, you “participated” in the TESLA proceeding before the CEC. Although you state that denial of petitions for intervention is rare, you acknowledge that it was within your authority to either grant or deny those petitions. By granting the petitions for intervention in the TESLA matter that came before you prior to your resignation, California Unions for Reliable Energy, Robert Sarvey and the San Joaquin Valley Air Pollution Control District each became parties to the proceedings, which could have influenced the proceedings or the final decision in the matter.

We find that your actions with regard to the TESLA application for certification constituted taking part through decision as that phrase is used in section 87400(d). Therefore, you “participated” in the TESLA application for certification and the permanent ban against post-employment representation contained in sections 87401 and 87402 applies to you with regard to the TESLA application for certification, and you may not be compensated for any representation of TESLA before the CEC or for consultation, advice or assistance you may have given TESLA in connection with its application for certification.

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in cursive script that reads "Holly B. Armstrong".

By: Holly B. Armstrong
Staff Counsel, Legal Division

HBA:jg

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