



FAIR POLITICAL PRACTICES COMMISSION

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September 24, 2014

Heather C. McLaughlin
City Attorney
City Hall
250 East L Street
Benicia, CA 94510

Re: Your Request for Advice
Our File No. A-14-170

Dear Ms. McLaughlin:

This letter responds to your request for advice on behalf of Council Member Mark Hughes regarding the conflict of interest provisions of the Political Reform Act (the "Act").¹ This letter is based on the facts presented. The Fair Political Practices Commission does not act as a finder of fact when it renders advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Government Code Section 1090.

QUESTION

May Council Member Hughes participate in and vote on a decision to enter into an agreement to study whether the City of Benicia should join the Marin Clean Energy Program (the "Program") which purchases and/or develops renewable energy that could ultimately reduce revenue to Pacific Gas and Electric Company (PGE), a business in which Council Member Hughes has an interest?

CONCLUSION

Council Member Hughes may participate in the decisions regarding the Program so long as the decision will not have a foreseeable and material financial effect on PGE as discussed below.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

FACTS

On October 7, 2014, the Benicia City Council will consider whether the City should execute an agreement to prepare a study on whether the City should join the Marin Clean Energy Program. The Program is a Community Choice Aggregation Program through which agencies purchase and/or develop renewable energy (electricity) on behalf of residences, businesses, and municipal accounts in member jurisdictions. The Program works in partnership with PGE which will deliver the energy through PGE's transmission and distribution system and continue to provide meter reading, billing, maintenance, and outage response services to customers. You noted that any clean electricity generated may reduce the power sold by PGE.

Council Member Hughes is retired from PGE and currently receives pension benefits under a defined benefit pension plan. You stated that the defined benefit pension plan qualified under Internal Revenue Code Section 401(a). In addition, Council Member Hughes owns PGE stock with a fair market value over \$700,000.

You stated that Benicia is a small town of about 28,000 residents and that based on the Utility Users Tax, PGE's estimated total revenue from Benicia for electricity is about \$2 million dollars. On September 22, 2014, you noted that PGE may incur some expenses under the Program, but that these expenses will be paid by the Program instead of being paid directly by customers. PGE's own expenses should not be impacted.

ANALYSIS

The primary purpose for the conflict-of-interest provisions of the Act is to ensure that “[p]ublic officials, whether elected or appointed, 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 81001(b).) In furtherance of this goal, Section 87100 of the Act prohibits a public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. Determining whether a conflict of interest exists under Section 87100 requires analysis of the questions outlined below.

Steps 1 and 2: Is Council Member Hughes a “public official who will be making, participating in making, or influencing a governmental decision?”

The conflict-of-interest provisions of the Act apply only to “public officials.” (Section 87100.) Section 82048 defines “public official” as every member, officer, employee, or consultant of a state or local government agency. As a member of the City Council, Council Member Hughes is a public official. You are asking whether Council Member Hughes may participate and make decisions affecting the Program.²

² Please note that if a public official's office is listed in Section 87200 (such as city councilmembers) and he or she has a conflict of interest in a decision noticed to be considered at a public meeting, then he or she must: (1) immediately prior to the discussion of the item, verbally identify each type of interest involved in the decision as well as details of the interest, as discussed in Regulation 18702.5(b)(1)(B), on the record of the meeting; (2) recuse

Step 3: What are Council Member Hughes' interests that are possible sources of a conflict of interest pursuant to Section 87103?

Section 87103 provides that a public official has a "financial interest" in a governmental decision "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 family," or on:

- A business entity in which he or she has a direct or indirect investment of \$2,000 or more (Section 87103(a), Regulation 18703.1(a)); or in which he or she is a director, officer, partner, trustee, employee, or holds any position of management (Section 87103(d) Regulation 18703.1(b));
- Real property in which he or she has a direct or indirect interest of \$2,000 or more (Section 87103(b), Regulation 18703.2);
- A source of income, including promised income, which aggregates to \$500 or more within 12 months prior to the decision (Section 87103(c), Regulation 18703.3);
- A source of gifts to him or her if the gifts aggregate to \$440 or more within 12 months prior to the decision (Section 87103(e), Regulation 18703.4);
- The official's personal finances, including those of his or her immediate family -- this is the "personal financial effects" rule (Section 87103, Regulation 18703.5).

Council Member Hughes is retired from PGE and currently receives pension benefits under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a). As you note Section 82030(b)(1) states that income does not include "[p]ayments received under a defined benefit pension plan qualified under Internal Revenue Code Section 401(a)" within the definition of income.

In addition, Council Member Hughes owns PGE stock with a fair market value over \$700,000. This is a potentially disqualifying interest in PGE pursuant to Section 87103(a).

Step 4: Are Council Member Hughes' interests directly or indirectly involved in the governmental decision?

Under the provisions of Regulation 18702.1(b), PGE is directly involved in a decision before the city council if PGE, or its agent:

himself or herself; and (3) leave the room for the duration of the discussion and/or vote on the item. For closed sessions, consent calendars, absences and speaking as a member of the public regarding personal interests, special rules found in Regulation 18702.5, subdivisions (c) and (d) apply. (Section 87105.)

“(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.”

PGE did not initiate the proceeding in question, and while PGE may be a participant in the Program, they are not a “named party” in the City’s decision to do the study or whether to join the Program. If PGE is not directly involved in the decision, then its involvement is indirect. (Regulation 18704.)

Steps 5 and 6: What is the applicable materiality standard and is it reasonably foreseeable that the standard will be met?

The Commission has adopted differing guidelines to determine whether the effect of a decision is material, depending on the specific circumstances of each decision. PGE is a Fortune 500 company and is traded on the New York Stock Exchange. Regulation 18705.1(c) provides that if more than one of the materiality standards in Regulation 18705.1 is applicable, as here, we apply the highest materiality thresholds.

As such, under Regulation 18705.1(c)(1), the effect of a decision which indirectly affects PGE is only material if:

“If the business entity is listed in the Fortune 500 or, if not listed in the Fortune 500, has revenues that are no less than the revenues of the business entity that ranks 500th in the Fortune 500 list, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that:

“(A) The governmental decision will result in an increase or decrease in the business entity’s gross revenues for a fiscal year of \$10,000,000 or more; or

“(B) The governmental 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 \$2,500,000 or more; or

“(C) The governmental decision will result in an increase or decrease in the value of the business entity’s assets or liabilities of \$10,000,000 or more.”

Regulation 18706(b) defined "foreseeability" as follows:

"Economic Interest Not Explicitly Involved in Decision: A financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable."

As noted above, in order for a financial effect to be material on PGE, the decision must increase or decrease in PGE's gross revenues for a fiscal year of \$10,000,000 or more, impact its expenses for a fiscal year in the amount of \$2,500,000 or more, or result in an increase or decrease in the value of PGE's assets or liabilities of \$10,000,000 or more. Since you stated that PGE's estimated total revenue from Benicia for electricity is about \$2 million dollars, it is not foreseeable that that the \$10,000,000 threshold for materiality will be met. In addition, you stated that expenses incurred by PGE under the Program will be paid by the Program, thus PGE's own expenses should not be impacted. Based on your facts, the decisions will not have a foreseeable material financial effect on PGE, the business in which Council Member Hughes has an investment.

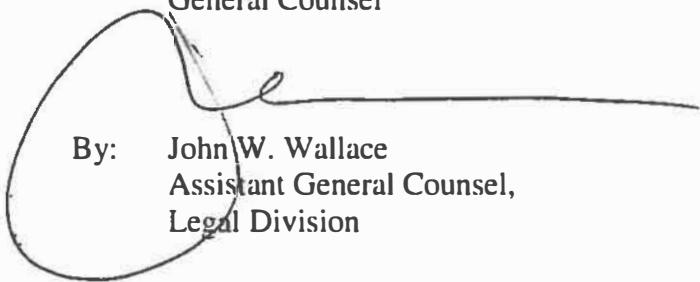
Steps 7 & 8. The "public generally" and "legally required participation" exceptions.

Even if a material financial effect on a public official's economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official's interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). Since we have concluded that Council Member Hughes does not have a conflict of interest we do not further discuss the exceptions to the disqualification rule.

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

Sincerely,

Zackery P. Morazzini
General Counsel

By:  John W. Wallace
Assistant General Counsel,
Legal Division

JWW:jgl