



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 1, 2019

Heather K. Whitham
Arroyo Grande City Attorney
Carmel & Naccasha LLP
1410 Marsh Street
San Luis Obispo, CA 93401

Re: Your Request for Advice
Our File No. A-19-129

Dear Ms. Whitham:

This letter responds to your request for advice on behalf of the Arroyo Grande City Council regarding Government Code Section 1090.¹ Please note that we are only providing advice under Section 1090 and not under any other conflict of interest laws. Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

In regard to our advice on Section 1090, we are required to forward your request and all pertinent facts relating to it to the Office of the Attorney General and the San Luis Obispo County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We are also required to specify whether we have received a written response from either entity: we have not. (Section 1097.1(c)(4).) Finally, we are required to advise you that, for purposes of Section 1090, the following advice "is not admissible in a criminal proceeding against any individual other than the requestor." (Section 1097.1(c)(5).)

QUESTION

Does Section 1090 prohibit the Arroyo Grande City Council from entering into a joint powers agreement with the Monterey Bay Community Power Authority ("MBCPA"), pursuant to which the MBCPA would become City customers' default electricity provider, given that the City's current electricity provider is Pacific Gas & Electric Company ("PG&E") and that the Councilmember George's husband is a PG&E employee?

¹ All statutory references are to the Government Code unless otherwise indicated.

CONCLUSION

No. Section 1090 does not prohibit the City Council from entering into the MBCPA joint powers agreement because the remote interest exception set forth in Section 1091(b)(2) applies so long as Councilmember George abstains from decisions relating to that agreement as required by Section 1091(a).

FACTS AS PRESENTED BY REQUESTER

Public Utilities Code Section 366.2 authorizes a "Community Choice Aggregator" to aggregate the electrical load of interested electricity consumers within its boundaries to reduce transaction costs to consumers, provide consumer protections, and leverage the negotiation of contracts. A Community Choice Aggregator sources electricity, while the investor-owned utility that provides service in the area retains the role of delivering electricity and maintaining infrastructure. Established in March 2017 to be a Community Choice Aggregator, the MBCPA is a joint powers authority which currently provides electricity to the Counties of Monterey, San Benito, and Santa Cruz, as well as 16 incorporated cities within those counties.

The MBCPA recently proposed that the City join its Community Choice Aggregation Program. If the City joins the Program, the MBCPA would become the default electricity provider for the City's electricity consumers, effectively replacing PG&E as the City's current electricity provider. In order to join the Program, the City Council must satisfy certain statutory requirements, including the adoption of an ordinance authorizing participation in the Program as well as a resolution requesting to join the Program and authorizing the City to enter into the joint powers agreement governing the MBCPA.

On June 5, 2019, the Commission issued the *George* Advice Letter, No. A-19-087, advising that the Act prohibited the Arroyo Grande City Councilmember Lan George from taking part in decisions relating to the MBCPA's proposal because those decisions would have a disqualifying effect on the Councilmember's source of income interest in PG&E resulting from her community property share of her husband's income from PG&E. On June 25, 2019, the City Council approved an ordinance authorizing the City's participation in the MBCPA's Community Choice Aggregation Program with the Councilmember abstaining. The City Council may soon consider a resolution requesting to join the Program and authorizing the City to enter into the MBCPA joint powers agreement.

You are the Arroyo Grande City Attorney. You provided the following additional information on July 30, 2019: Councilmember George's husband, Jamian George, has been a PG&E employee for more than 22 years; owns less than three percent PG&E's shares of stock; and is not a director or officer of PG&E; and the Councilmember was appointed to the City Council on January 8, 2019. According to its website, PG&E has approximately 24,000 employees.

ANALYSIS

Section 1090 generally prohibits a public officer or employee from making or participating in the making of a contract in which he or she is financially interested. Section 1090 is concerned with financial interests, other than remote or minimal interests, that prevent public officials from exercising absolute loyalty and undivided allegiance in furthering the best interests of their agencies. (*Stigall v. City of Taft* (1962) Cal.2d 565, 569.) Section 1090 is intended “not only to strike at actual impropriety, but also to strike at the appearance of impropriety.” (*City of Imperial Beach v. Bailey* (1980) 103 Cal.App.3d 191, 197.) A contract that violates Section 1090 is void. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646.)

The California Supreme Court has stated that the purpose of Section 1090 is to make certain that “every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity.” (*Id.* at p. 650.) Eliminating temptation for public officers and employees, obtaining their undivided loyalty, and avoiding the perception of impropriety are important public policy goals in California. (*Id.* at p. 648.) Consequently, Section 1090 applies without regard to whether actual fraud or dishonesty is involved in the contracting process, the contract is fair to the public agency, or the public agency loses money from the contract. (*Id.* at pp. 648-649.)

Under Section 1090, a member of a public agency’s governing body is conclusively presumed to participate in the making of a contract under the body’s authority, regardless of whether the member actually participates in the making of that contract. (*Id.* at pp. 649-650.) Therefore, Section 1090 prohibits the entire governing body from entering into a contract in which a member of the body is financially interested, even if that member abstains from participating in the making of the contract or fully discloses his or her financial interest in the contract.

Because Section 1090 applies to city councilmembers (*id.* at p. 633), the Councilmember is subject to Section 1090. Decisions relating to the MBCPA joint powers agreement involve that contract. The Councilmember will be deemed to have made or participated in the making of the MBCPA joint powers agreement because, as noted above, a member of a governing body is conclusively presumed to participate in the making of a contract under the body’s authority. The Councilmember has a financial interest in PG&E because the Councilmember’s husband is a PG&E employee, and because an official has an interest in the community and separate property income of his or her spouse (*Nielsen v. Richards* (1925) 75 Cal.App. 680; *Thorpe v. Long Beach Community College Dist.* (2000) 83 Cal.App.4th 655; 83 Cal.App.4th 655; 89 Ops.Cal.Atty.Gen. 69 (2006)). Thus, Section 1090 prohibits the City Council from entering into the MBCPA joint powers agreement unless a remote interest or noninterest exception or the rule of necessity applies.

Remote Interest and Noninterest Exceptions

The Legislature has created various statutory exceptions to Section 1090’s prohibition where the financial interest involved is deemed to be a “noninterest,” as defined in Section 1091.5, or a “remote interest,” as defined in Section 1091. A remote interest or noninterest exception that would apply to the officer if he or she directly held the financial interest at issue, also applies to an officer

whose financial interest results from the officer's community property interest in his or her spouse's income. (See 81 Ops.Cal.Atty.Gen. 169 (1998); 78 Ops.Cal.Atty.Gen. 230 (1995).)

If a noninterest is present, the contract may be made without the officer's abstention, and a noninterest generally does not require disclosure. (*City of Vernon v. Central Basin Mun. Water Dist.* (1999) 69 Cal.App.4th 508, 514-515.) If a remote interest is present, the contract may be made if: (1) the officer discloses the interest in the contract to his or her public agency; (2) that interest is noted in the agency's official records; and (3) the officer abstains from any participation in the making of the contract. (Section 1091(a).)

There is no indication that a noninterest exception applies to the facts presented. Turning to the remote interest exceptions, Section 1091(b)(2) provides that an officer has a remote interest if: (1) the contracting party has 10 or more other employees; (2) the officer was an employee or agent of the contracting party for at least three years prior to the officer initially accepting his or her office; (3) the officer owns less than three percent of the contracting party's shares of stock; (4) the officer is not a director or officer of the contracting party; and (5) the officer did not directly participate in formulating the bid of the contracting party.

The Councilmember's interest in PG&E meets all applicable elements of the remote interest set forth in Section 1091(b)(2). PG&E has approximately 24,000 employees including the Councilmember's husband. The Councilmember was appointed to the City Council on January 8, 2019, and her husband has been employed by PG&E for more than 22 years. The Councilmember's husband owns less than three percent of PG&E's shares of stock, and is not a director or officer of PG&E. Finally, there is no PG&E bid at issue with respect to the City Council's decisions relating to the MBCPA joint powers agreement; PG&E cannot "bid" against the MBCPA to be the City's Community Choice Aggregator because Public Utilities Code Section 331.1 does not authorize PG&E to serve in that capacity.

Extension of a remote interest is appropriate where the officer's interest at issue is no less remote. (*Schons Advice Letter*, No. A-17-129; *Craft Advice Letter*, No. A-14-168.) PG&E is not a directly involved contracting party with respect to the MBCPA joint powers agreement. Furthermore, the Councilmember's only interest in the agreement derives from her interest in PG&E being the City's current electricity provider, and PG&E would retain the role of delivering electricity and maintaining infrastructure even if the City enters into the agreement."

Therefore, for purposes of Section 1090, the remote interest exception of Section 1091(b)(2) applies to the Councilmember's community property interest in her husband's income from PG&E with respect to the MBCPA joint powers agreement.² Accordingly, the City Council may enter into that agreement so long as the Councilmember abstains from decisions relating to that agreement as required by Section 1091(a).

² We do not consider whether the rule of necessity applies to decisions relating to the MBCPA joint powers agreement because we have already determined that the City Council may enter into that agreement pursuant to the remote interest exception of Section 1091(b)(2).

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

Sincerely,

Dave Bainbridge
General Counsel



By: Matthew F. Christy
Counsel, Legal Division

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