STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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July 24, 2024

Nicholaus Norvell
of BEST BEST & KRIEGER LLP
655 West Broadway, 15th Floor
San Diego, California 92101

Re: Your Request for Advice
Our File No. A-24-050

Dear Mr. Norvell:

This letter responds to your request for advice regarding the Political Reform Act ("Act") and Government Code Section 1090, et seq.[1] Please note that we are only providing advice under the Act and Section 1090, not under other general conflict of interest prohibitions such as common law conflict of interest, including the Public Contract Code.

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. Finally, the Commission is not authorized and does not provide advice concerning past conduct. (Section 1097.1(c)(2) and Regulation 18329(b)(6)(A).) Therefore, nothing in this letter should be construed to evaluate any conduct that may have already taken place, and any conclusions contained in this letter apply only to prospective actions.

We are required to forward your request regarding Section 1090 and all pertinent facts relating to the request to the Attorney General's Office and the San Diego County District Attorney's Office, which we have done. (Section 1097.1(c)(3).) We did not receive a written response from either entity. (Section 1097.1(c)(4).) We are also 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." (See Section 1097.1(c)(5).)

QUESTION

Is the Sweetwater Authority Board of Directors ("Authority") disqualified from making decisions regarding the Authority's floating solar installation and participation in the Renewable Energy Self-Generation Bill Credit Transfer ("RES-BCT") tariff program (the "Project") due to Director Castaneda's financial interest in SoCalGas?

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[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 18104 through 18998 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.

CONCLUSION

The Authority may make these decisions under the rule of necessity, subject to the limitations discussed below, which include Director Castaneda's recusal from any participation in the decisions.

FACTS AS PRESENTED BY REQUESTER

The Sweetwater Authority ("Authority") is a joint powers agency that provides water service in south San Diego County. The Authority owns and operates Sweetwater Reservoir ("Reservoir"). The Authority receives electric service from San Diego Gas & Electric Co. ("SDG&E"), which is the main provider of electric services in the San Diego region. SDG&E is wholly owned by Sempra Energy, an energy-based holding company and the parent company of Southern California Gas Company ("SoCalGas"), discussed below.

Director Steve Castaneda has served as a member of the Authority's Governing Board since 2014. In his private capacity, he is employed as an independent contractor providing community outreach consulting services to SoCalGas, which provides gas service in numerous California counties, but not San Diego County. His employment role commenced in 2012. As stated above, SoCalGas, his source of income, is owned by Sempra Energy.

Director Castaneda's consulting services involve working with non-English-speaking, immigrant, refugee, and low-income communities to increase program enrollment in various counties within the state, not including San Diego, an area SoCalGas does not serve. SoCalGas has provided at least $500 of income to Director Castaneda within the previous 12 months and is expected to be a source of income to Director Castaneda for the foreseeable future. Director Castaneda is paid on a performance basis directly linked to the number of customers and households enrolled in programs. He does not receive any other income from SoCalGas, including any bonuses or other incentives based on SoCalGas's performance.

Project for the RES-BCT Program

The Authority is in the process of analyzing the Project, under which the Authority would contract with an energy developer to place a floating solar installation on the surface of the Reservoir. The Authority is pursuing the Project as part of the Renewable Energy Self-Generation Bill Credit Transfer ("RES-BCT") tariff. This tariff was established by the California Public Utilities Commission ("CPUC")[2] to allow local governments and certain other entities to generate energy for their use and to offset the electrical consumption of up to 50 accounts within the Authority's service area.

Under the RES-BCT program, SDG&E provides service to agencies participating in RES-BCT on a first-come, first-served basis until the combined rated generating capacity of participating renewable electrical generation facilities reaches a total of 20.25 MW within SDG&E's service

[2] See Public Utilities Code Section 2380.

territory. Once SDG&E reaches the maximum capacity in operation, the program will be closed to new applications, and any projects on the waitlist will be unable to participate.

Under the RES-BCT program, the Authority would contract with a solar energy developer ("Developer") to install the Project, and SDG&E would install an account meter that measures the amount of electricity withdrawn from and exported to the electric grid. To the extent the Project exports to the grid, the "generation credits" created will be used to benefit up to 50 other SDG&E accounts on property that the Authority owns, operates, or controls. If approved and placed into operation, the Project would save the Authority approximately $550,000 in energy costs per year. Actual savings may vary depending on SDG&E's rate increases for a particular year.

Like other local governments seeking to participate in the RES-BCT program, the Authority would be required to cover its share of the one-time and ongoing expenses SDG&E incurs to implement and administer the special billing required to implement the RES-BCT program. If participation in the program requires new meters at any Authority properties, the Authority or the Developer would be required to pay SDG&E for metering that meets RES-BCT program requirements. Further, the Authority or the Developer would be responsible for any costs or system upgrades necessary to accommodate the interconnection of the Project to SDG&E's distribution grid.

In response to our follow-up questions, you state that under the RES-BCT tariff, the Authority and all of its customers (ratepayers) are the beneficiaries of the program. The Authority funds the program that SDG&E is offering to local government agencies. The program is designed to allow local governments to overbuild the generation at one location in lieu of building self-generation onsite and then offset usage at other meters through bill credits. SDG&E receives no direct financial profit from the program. It provides any bill credits to the Authority. SDG&E is compensated, as it is in general, through a rate of return methodology in its general rate case by the CPUC. You additionally confirmed that SDG&E is the only utility service provider for the Project under the RES-BCT program and no other entity can apply on the Authority's behalf for this program.

You state that Director Castaneda has never discussed the Project with his employer, SoCalGas, or otherwise discussed the continuation of his position with SoCalGas or any related entity in connection with the Project. You also responded to our additional questions that Director Castaneda would not receive any individual benefit from the RES-BCT tariff program.

As further described below, the potential Project grew out of discussions concerning the installation of aeration/destratification systems for the Reservoir in conjunction with the goal of achieving carbon neutrality for the Authority's operations. The Authority's Governing Board and its Water Quality Committee met on matters relating to the potential Project, commencing on May 23, 2022 and continuing until February 14, 2024. These meetings included the participation of Director Castaneda, with the exception of his recusal from the Governing Board meeting on September 27, 2023, for the agenda item related to the Authority's application with SDG&E. You provided the dates and subjects of these meetings, as follows:

- May 23, 2022: Consideration of Draft FY 2022-23 Budget and Strategic Plan Detailed Work Plan for Review and Comment. The Governing Board's agenda packet included a document that mentioned an Authority objective to "Develop strategies to achieve carbon neutrality -- Explore installation of floating solar panels at Sweetwater Reservoir in conjunction with the installation of the Aeration/Destratification system."

- September 14, 2022: Consideration of Proposal to Update the Water Resources Master Plan. The Governing Board met and voted to Select Hazen and Sawyer as the consultant to update the Water Resources Master Plan, including tasks 1 – 8 of their proposal dated August 23, 2022. The Hazen and Sawyer proposal included work tasks relating to:

> Aeration/Destratification System for Sweetwater Reservoir . . . Two alternative locations for the on-shore components and two alternative diffuser lengths are being evaluated. Hazen is also evaluating the feasibility of a floating solar array in the reservoir to offset power requirements of the aeration system. This evaluation includes review of the Perdue Water Treatment Plant's operations, sizing the array to offset the Plant's power requirements, cost estimating, research on existing floating solar installations, benefit evaluation, payback analysis and preparation of a technical memorandum. The final project deliverables will include design plans, specifications, opinion of probable construction cost, and an updated quagga mussel control plan. Hazen will also assist the Authority with construction support services.

- February 1, 2023: Status Update on the Sweetwater Reservoir Aeration System Project. The Water Quality Committee met on an item, received a staff presentation, and discussed the potential Project in conjunction with the Aeration System project.

- February 8, 2023: Status Update on Sweetwater Reservoir's Aeration System Project. The Governing Board received a staff presentation and discussed the potential Project, including four alternatives for floating solar panels, including the RES-BCT program.

- June 28, 2023: Consideration to Approve a Term Sheet with Noria Energy for a Floating Solar Project at Sweetwater Reservoir. The Governing Board approved a term sheet with a potential Developer, Noria Energy ("Noria"). Under the term sheet, Noria is providing a demonstration project for the Authority to evaluate whether a floating solar array is feasible at the Reservoir. Under the term sheet, Noria proceeded with the demonstration project at its own risk. If the evaluation is positive and the proposed Project is approved to participate in the RES-BCT program, the Authority and Noria agreed to negotiate in good faith a power purchase agreement or another mechanism for constructing, operating, and

financing the Project. Under the term sheet, Noria has an 18-month exclusive right to pursue the Project with the Authority unless the Authority "buys out" Noria's exclusivity during that period.

- September 27, 2023: Consideration to Direct Staff to Submit an Application to San Diego Gas & Electric for a System Impact and Interconnection Study and Prepare a CEQA Document for the Floating Solar Project. After noting the subject related to SDG&E, Director Castaneda recused himself from consideration of this item due to his relationship with SoCalGas, which is owned by Sempra Energy, the parent company of SDG&E. Director Castaneda disclosed this on the record and left the room for the duration of the item. The Governing Board directed staff to submit an application to SDG&E for a System Impact and Interconnection Study and Execute an Agreement with WSP USA Environment and Infrastructure to prepare an Initial Study and Mitigated Negative Declaration in an amount not to exceed $72,000.

- February 14, 2024: Update of the Floating Solar Project. The Governing Board received an update on the potential Project, including previous and possible future steps and options that the Board may have once CEQA and SDG&E's reviews are complete.

ANALYSIS

Section 1090

Section 1090 generally prohibits public officers, while acting in their official capacities, from making contracts in which they are financially interested. Section 1090 is "concerned with any financial interests, other than perhaps a remote or minimal interest, which would prevent the officials involved from exercising absolute loyalty and undivided allegiance to the best interests of" their respective agencies. (*Stigall v. Taft* (1962) 58 Cal.2d 565, 569.)

Under Section 1090, "the prohibited act is the making of a contract in which the official has a financial interest." (*People v. Honig* (1996) 48 Cal.App.4th 289, 333.) Significantly, Section 1090 reaches beyond the officials who actually execute the contract. Officials who participate in any way in the making of the contract are also covered by Section 1090. The courts have established that "participation in the making of a contract" includes any act involving preliminary discussions, negotiations, compromises, reasoning, planning, drawing of plans and specifications, and solicitation for bids. (*Millbrae Assn. for Residential Survival v. City of Millbrae* (1968) 262 Cal.App.2d 222, 237; see also *Stigall v. Taft*, *supra*, at p.569.) Further, as a general rule, when Section 1090 is applicable to one member of a governing body of a public entity, the prohibition cannot be avoided by having the interested board member abstain; the entire governing body is precluded from entering into the contract. (*Thomson v. Call, supra*, at pp. 647-649; *Stigall v. Taft, supra*, at p. 569; 86 Ops.Cal.Atty.Gen. 138, 139 (2003); 70 Ops.Cal.Atty.Gen. 45, 48 (1987).)

A contract that violates Section 1090 is void, regardless of whether the terms of the contract are fair and equitable to all parties. (*Thomson v. Call* (1985) 38 Cal.3d 633, 646-649.) 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.)

Contracts and Financial Interests

The term "contract" and "financial interest" are broadly interpreted by the courts and the Attorney General in Section 1090 matters. For example, grant agreements are generally considered contracts for purposes of Section 1090. (See, e.g., People v. *Honig*, *supra*, at p. 350; 89 and Ops.Cal.Atty.Gen. 258, 260-262 (2006).) Additionally, the transaction as a whole is examined, and not an "isolated" contract. (*Thomson v. Call*, *supra*, 38 Cal. 3d at pp. 644-645.) Similarly, the California Supreme Court explained what constitutes a financial interest under Section 1090:

> [T]he term "financially interested" in section 1090 cannot be interpreted in a restricted and technical manner. (citation omitted.) The defining characteristic of financial interest is whether it has the potential to divide an official's loyalties and compromise the undivided representation of the public interests the official is charged with protecting. (citation omitted.) Thus, that the interest "might be small or indirect is immaterial so long as it is such as deprives the [people] of his overriding fidelity to [them] and places him in the compromising situation where, in the exercise of his official judgment or discretion, he may be influenced by personal considerations rather than the public good." (citation omitted.)

(*Lexin v. Superior Court* (2010) 47 Cal. 4th 1050, 1075.)

Director Castaneda, as a member of the Authority's Governing Board, is a public official subject to Section 1090's conflict of interest provisions. Under the terms of the RES-BCT program, SDG&E is the electrical utility involved in connecting the Project to the grid, installing metering, and determining and providing infrastructure changes necessary for the Authority in order to facilitate the Project. It is also SDG&E that will provide energy credits on the Authority's utility bills. The Authority will apply and, if accepted for participation, will have the duty to pay SDG&E for its costs. Looking at the transactions as a whole and not isolated agreements that may be involved, the Authority's application and acceptance for participation in the RES-BCT program and its rights and duties with SDG&E are in the nature of a contract.

Here, Director Castaneda has an employment relationship with Sempra Energy's subsidiary and SDG&E's sister company, SoCalGas. At issue is whether he has a prohibitory financial interest in the contractual relationship with Sempra Energy's subsidiary, SDG&E, by virtue of his employment relationship with SoCalGas, particularly where the facts specify that SDG&E "receives no direct financial profit from the program. It provides any bill credits to the Authority. SDG&E is compensated, as it is in general, through a rate of return methodology in its general rate case by the CPUC." Additionally, the facts state that Director Castaneda will receive no benefits related to SDG&E's program.

To begin the analysis, employees have been found to have a financial interest in a contract that involves their employer, even where the contract would not result in a change in income or directly involve the employee, because an employee has an overall interest in the financial success of the firm and continued employment. (84 Ops.Cal.Atty.Gen. 158, 161-162 (2001).) Also, we have previously concluded that the financial ties between a parent company and its wholly-

owned subsidiary render the two entities inseparable under Section 1090. (*Ramirez* Advice Letter, No. A-21-053; *Ramirez* Advice Letter, No. A-22-089.)[3] The concern expressed in *Ramirez* Advice Letter, No. A-22-089 was the "potential influence" on an official by a desire to maintain favorable ongoing relationships between the parent company, their employer, and any subsidiary owned by the parent company. Therefore, Director Castaneda has a financial interest in the Authority's contract decisions related to the Project. He and the Authority's Governing Board are thereby disqualified from participation in these decisions absent an exception.

Remote and Noninterests

There are two categories of interests subject to lesser or no restrictions. Applicable only where the official is a member of a governing body or board, Section 1091 defines a series of "remote" interests. A board member with a "remote" interest may comply with Section 1090 by fully disclosing the interest, it is noted in the entity's official records, and the official abstains from voting on the affected contract or influencing other board members in any way. (Section 1091(a).) So long as these requirements are met, the official is not deemed to have a financial interest in the contract entered into by the board. (*Ibid.*) Applicable regardless of board member status, Section 1091.5 defines a series of "noninterests" that, as a practical matter, do not raise the sorts of conflict of interest problems with which Section 1090 is concerned and thus are statutorily excluded from its purview. While a Section 1091 remote interest requires disclosure and abstention, a Section 1091.5 noninterest generally is no bar to participation in the making of a contract, though in some instances the definition of the noninterest includes specific disclosure requirements.

Based on the facts provided and the current stage in the contracting process, no remote interest or noninterest exception appears applicable. (See Section 1091(c).)

Rule of Necessity

Where the facts presented do not indicate the application of either a remote interest under Section 1091 or a noninterest under Section 1091.5, we examine the rule of necessity to determine if the Authority may make the decision where the board member is disqualified.

The rule of necessity acts to allow a government decision even where it would otherwise be prohibited. The rule applies in two types of situations: where the facts indicate the contract is for "essential" goods or services and no alternative source for the services exists or where the official or the board is the only entity authorized to act. The rule of necessity is applied in limited situations to ensure that essential government functions are performed even where a conflict of interest exists. (*Eldridge v. Sierra View Local Hospital Dist*. (1990) 224 Cal.App.3d 311, 322.)

For example, the Attorney General applied the "essential goods" exception to allow a city to obtain emergency nighttime services from a service station owned by a city council member where the town was isolated, and the council member's station was the only one available in the area. (4

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[3] Note: additionally, under the Act, an official with an employment-related business interest in a business entity also has an interest in a parent or subsidiary of the business entity or an otherwise related business entity. (Regulation 18700.2.) The California Supreme Court has explained that Section 1090 and the Act are in *pari materia*, or "of the same matter," and "to the extent their language permits, we will read section 1090 et seq. and the Political Reform Act as consistent." (*Lexin*, *supra*, at pp.1090-91.)

Ops.Cal.Atty.Gen. 264, 264 (1944).) The Attorney General cautioned, however, that "routine and foreseeable services must be obtained from an unconflicted source." (*Ibid*.) Similarly, the Attorney General applied the exception to a healthcare district in a remote area when contracting to advertise its services on a local radio station that employed a district member where the radio station was the only source that would deliver the necessary information in an efficient, cost-effective, and timely manner. (88 Ops.Cal.Atty.Gen. 106 (2005).) The Attorney General also applied the rule where a city councilmember was the only certified drug tester in the immediate area and time was of the essence in performing the test on city employees involved in a traffic accident. (91 Cal. Op. Atty. Gen.8 (2008).) What these situations have in common is the exigency of the circumstances such that delaying action to contract with a non-conflicted source would be to the detriment of the public.

The Attorney General applied the "performance of essential duties" exception to allow a Superintendent of Education to enter into a memorandum of understanding with school employees, despite the fact that he was married to a permanent civil service school employee.(65 Ops.Cal.Atty.Gen. 305 (1982); see also 69 Ops.Cal.Atty.Gen. 102 (1986) [rule of necessity allowed a school board to enter into a memorandum of understanding with a teachers' association even when a board member is married to a tenured teacher].) Similarly, a community college board could negotiate with its faculty for salary and benefits even though a board member is a retired faculty member whose health benefits are tied to current faculty benefits. (89 Ops.Cal.Atty.Gen. 217 (2006).) Also, a city council member with an interest in a local franchise was permitted to dispose of his interest where the council was required to approve such disposition. (76 Ops.Cal.Atty.Gen. 118, 123-125 (1993).)

The rule of necessity is applicable to these facts. The Authority's essential government duties include obtaining cost-efficient electrical service while addressing the Authority's aeration/destratification systems for the Reservoir and meeting its carbon-neutral goals. The Authority is the only entity that may apply for the program on the Authority's behalf. We note that no comparable alternative to the RES-BCT program and SDG&E's involvement exists, as the program would allow a single location to generate and transfer "generation credits" to benefit up to 50 other SDG&E accounts on property that the Authority owns, operates, or controls. Also, participation in the program is not a "routine and foreseeable service," as this is a unique, limited, statutory program. Therefore, the rule of necessity is applicable and allows the Authority to make the Project decisions. The Attorney General has concluded that the "effect of the rule of necessity is to permit the board with an interested member to make a contract, even though the interested board member must disqualify himself or herself from participating in its making."[4] We note that our advice is relevant to the Authority and Director Castaneda's future conduct only. We do not provide advice on conduct that has already occurred, including as to the application of the rule of necessity to any prior actions.

The Act

Under the Act's conflict of interest prohibitions, a public official is prohibited from making, participating in making, or otherwise using their official position to influence a governmental decision in which the official has a financial interest. (Section 87100.) An official has a financial

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[4] *Conflicts of Interest*, 2010, California Attorney General's Office, *supra*, "Practical Effect of Utilizing the Rule of Necessity," p. 78.)

interest in a decision, within the meaning of the Act, if it is reasonably foreseeable that the decision will have a material financial effect on one or more of the official's interests identified in Section 87103. Director Castaneda has already taken part in Authority meetings concerning the Project, and the Commission does not provide advice regarding past conduct. (Regulation 18329(b)(8)(A).) Thus, we express no opinion as to whether it was reasonably foreseeable Director Castaneda's prior involvement in Authority meetings concerning the project may have a material financial effect on his employer and, consequently, whether Director Castaneda was disqualified from taking part in those meetings. However, given our conclusion above, Director Castaneda must disqualify himself from any participation or attempts to influence all future decisions concerning the Project. This will satisfy the prospective requirements of both the Act and Section 1090.

If you have other questions on this matter, please contact me at KHarrison@fppc.ca.gov.

Sincerely,

Dave Bainbridge
General Counsel

L. Karen Harrison

By: L. Karen Harrison
Senior Counsel, Legal Division

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