

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

COMMISSION ADVISORY AND
COMPLIANCE DIVISION
Environmental & Energy
Advisory Branch

RESOLUTION M-4781
Date May 22, 1996

R E S O L U T I O N

RESOLUTION M-4781. Executive resolution addressing a Protest by Fund for the Environment of actions by the Department of Health Services acting under the Commission's direction in Decision 93-11-013.

By a Letter filed with the Commission Advisory & Compliance Division on March 5, 1996.

SUMMARY

This resolution responds to an alleged conflict of interest in the Commission's study into the health effects of electric and magnetic fields (EMFs). The Commission Advisory & Compliance Division (CACD) recommends denying the protest and directing the Executive Director to inform the Department of Health Service (DHS) and the protestant of the denial.

BACKGROUND

In 1993 the Commission created a \$5.6 million ratepayer-funded electric and magnetic field (EMF) research and education program, the purpose of which is to determine if EMF exposure from utility facilities pose a significant public health risk (D.93-11-013). The California Department of Health Services (DHS) was selected to manage the program. The Commission also authorized a portion of the funding to be used on stakeholder participation in the program. As a result, the Stakeholders Advisory Committee (SAC) was formed to advise DHS.

DHS has hired outside consultants for various studies and analyses. One project, the School Policy Analysis, was recently awarded to EcoAnalysis, Inc. The project is to outline options for state and local decision-makers to weigh regarding EMF exposures in California's schools and day care centers. The cost of this project is \$700,000.

PROTEST

On March 5, 1996, the Commission Advisory and Compliance Division (CACD) received a protest from Ellen Stern Harris, Executive Director of the Fund for the Environment and a member of the SAC. Harris alleges that EcoAnalysis (and two of its subcontractors) carry significant conflicts of interest.

EcoAnalysis is currently contracted by Southern California Edison for occupational health and safety research projects, including EMF occupational exposure. Harris believes that the integrity of both the project and the EMF program will be compromised by the alleged conflict of interest, and she therefore requests the Commission to void the contract between DHS and EcoAnalysis. D.93-11-013 allows any interested party to inform CACD in writing if the party believes that DHS is not meeting appropriate responsibility or accountability standards, or has concerns about the direction of the research program (p. 40).

DISCUSSION

CACD reviewed the the protest and DHS' response. CACD must recommend a course of action to the Commission (Decision 93-11-013, p. 41). The Commission may replace DHS as program manager if it finds that DHS is unable or proves unwilling to manage the EMF research program (p. 38).

LEGAL OPINION

CACD requested a legal opinion from the Commission's Legal Division (Legal). Legal concluded that the contract did not violate state conflict of issue codes (Political Reform Act) as alleged by Harris, nor did it violate conflict of interest provisions of DHS' Request for Proposal (RFP) for the project. However, Legal discovered that EcoAnalysis and one of its subcontractors (Scott Strauss) may have a conflict of interest which undermines the general requirement that the research be completed independently and without bias pursuant to D.93-11-013. If DHS' EMF research is not likely to be independent and unbiased, then there could be legal error. Because a conclusion on this specific issue is largely fact-driven, Legal deferred to CACD because of its more detailed knowledge of the EMF program, the EcoAnalysis team, and DHS' process of monitoring its contractors.

PROCESS FOR A PROTEST

D.93-11-013 instructs the EMF program manager (DHS) to respond in writing to CACD within 15 days of a protest. DHS' response was dated March 22, 1996. The decision also requires CACD to make a recommendation to the Commission for a final resolution of this issue. Based on our review of the protest, DHS' response, Legal's memo and other relevant information associated with the project and EcoAnalysis, Inc., CACD outlines the following options and recommendation.

OPTIONS:

1. GRANT THE PROTEST

Instruct DHS to void the contract with EcoAnalysis, Inc. and its subcontractors. Legal concluded that the contract does not violate either the Political Reform Act or the RFP, but it may be possible that the research is potentially biased and not independent. By voiding the contract, the Commission ensures that a very high standard for independence is upheld. However, voiding the contract carries long-term and short-term consequences.

The long-term consequence: DHS contends that the other bidders for this project, and future EMF projects, would be eliminated as well if the Commission voided DHS contracts with consultants who have ties with the utilities. DHS argues that the most experienced professionals in the field have worked in part for utilities. DHS argues further that the EcoAnalysis team was scored and selected strictly on the merits of its proposal by an independent (outside of DHS) team of peer reviewers, and is confident that the team will perform the work without bias.

The short-term consequence: Cancellation of the contract would set this particular research project back in schedule, and would likely affect the overall time to complete the EMF program. DHS is planning to prepare an "end-game" document which summarizes all of the projects. A setback in any project will undoubtedly affect the "end-game" summary.

Conclusion: This option will put the protest to rest and is most effective in ensuring the public that the Commission intends to maintain a strict standard of independence for its EMF program. However, by voiding the contract, the Commission essentially sends a signal to DHS that all future contracts with similar consultants are also unacceptable. If DHS is correct in its assessment that the field of non-conflicted qualified professionals is limited, the quality of the program will likely be damaged by the Commission's action.

CACD is swayed by DHS' argument based upon CACD's own experience with selecting contractors to conduct environmental assessments of future utility transmission line projects. Many of the EMF specialists CACD interviewed have or have had business contracts with utilities. CACD automatically disqualifies those contractors with current contracts with the affected California utility. For example, a contractor bidding for work in Pacific Gas & Electric's (PG&E's) territory cannot have current business with PG&E, but can have current business with other utilities. Business with other utilities is weighed against that contractor in the selection process, but does not constitute automatic disqualification from the process.

The problem DHS faces is significantly different in that all utilities are affected because EMF is a common phenomenon in the production, transmission and distribution of electricity. In fact, it could be argued that the entire electric industry, worldwide, is an affected party (which includes other entities besides utilities such as power producers). Given this context, CACD's policy of disqualifying contractors with current utility contracts does not work, and its application in this particular program may result in eliminating all qualified contractors. CACD therefore does not recommend this option.

2. PARTIALLY GRANT THE PROTEST

Void EcoAnalysis's contract, but retain the rest of the team. Because potential conflicts of interest rests with EcoAnalysis, the Commission could instruct DHS to remove them from the contract and find another contractor to replace them. This option would retain the expertise of the subcontractors who have no current contracts with California utilities, and keep the project moving (although some time would certainly be lost due to the reorganization of the team.) It is impossible to predict

how many subcontractors would choose to remain, or may be contractually required to remove themselves if EcoAnalysis is eliminated. This option also assumes that a capable, non-conflicted substitute lead contractor would be found. If no substitute can be found, the result may be the same as Option 1, i.e. essentially voiding the contract.

Conclusion: There are too few benefits to outweigh the potential setbacks with this option.

3. DENY THE PROTEST

Accept DHS' Response to the Protest. This option will enable the project to move forward and retain the expertise of the contractors. CACD believes that it is not appropriate to automatically disqualify a contractor that has current contracts with a California utility in this situation. Based on the discussion in Option 1, CACD believes that the EMF study is unique because it affects all utilities regardless of location, and therefore CACD's automatic disqualification criteria is inapplicable for this situation. D.93-11-013 does not instruct DHS to adopt CACD's method of selecting contractors for the EMF program. The EMF decision is silent on the administrative details for the EMF program, implying that DHS is given leeway on managing the program. The Commission should not dictate to DHS how to evaluate independence in a field (health studies) where the Commission has already accepted DHS to be qualified and capable of managing the EMF study.

CACD believes that there are two important and persuasive additional factors that lend support to its belief that the final research product will be independent and unbiased. First, DHS and SAC (including Harris and Fund for the Environment) have opportunities for input and monitoring EcoAnalysis' work at critical milestones in the research process. Specifically, DHS enables the community representative stakeholders (which includes Harris) to select their own Scientific Advisor(s). These designated individuals (paid by EMF program funds) will help the stakeholders prepare written comments at each methodology milestone of the project, and on the first draft of the final report. The contractor will have to respond in writing to each comment indicating which suggestions were and were not followed, and why.

Second, CACD notes that EcoAnalysis has retained Resources for the Future (Resources) to be its chief technical researcher for the project. No one protests Resources' involvement in the project. Resources is a respected economics think tank in Washington D.C. whose representative has expertise on the EMF issue. CACD believes his inclusion on the team is an indication that a balanced approach to this issue is being taken by DHS. There are also other subcontractors (besides those already mentioned) on the EcoAnalysis team who carry strong qualifications and experience. No one protests their involvement in the project.

Legal noted that while these procedures appear to be reasonable methods for dealing with bias and conflicts of interest, there may be the appearance of a conflict which could undermine the credibility of the School Policy Analysis.

Conclusion: CACD recommends this option as the right choice.

FINDINGS

1. DHS was appointed as project manager for the Commission's EMF health effects study ordered by D.93-11-013.
2. DHS with the advice of a stakeholders advisory committee hired EcoAnalysis, Inc. as a project manager for the School Policy Analysis.
3. Fund for the Environment subsequently protested the hiring, alleging a conflict of interest.
4. There is no valid conflict which would warrant further action by the Commission.

THEREFORE, IT IS ORDERED that:

1. The Protest by Fund for the Environment is denied.
2. The Executive Director shall notify the California Department of Health Services and Fund for the Environment that the protest is denied.

This Resolution is effective today.

I hereby certify that this Resolution was adopted by the Public Utilities Commission at its regular meeting on May 22, 1996. The following Commissioners approved it:

Wesley Franklin

WESLEY M. FRANKLIN
Executive Director

DANIEL Wm. FESSLER
JESSIE J. KNIGHT, Jr.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

President P. Gregory Conlon, being necessarily absent, did not participate.