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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: September 1, 2011

To: Members, Ethics Commission

From: John St. Croix, Executive Director
By: Mabel Ng, Deputy Executive Director

Re: Request for waivers from post-employment restrictions

Thomas Long, a former deputy City Attorney, has asked the Ethics Commission to grant him waivers from two post-employment restrictions set forth in San Francisco Campaign and Governmental Conduct Code sections 3.234(a)(1) and (a)(2). For the reasons set forth in Mr. Long's letter, staff recommends that the Commission grant the waivers; however, staff also recommends that the waiver from the one-year ban on communications with the City Attorney's Office be limited to communications on behalf of The Utility Reform Network ("TURN") and not extend to communications for other purposes. Mr. Long will attend the Commission's September 12th meeting in order to address any questions the Commission may have.

Background

Mr. Long plans to become the Legal Director of TURN on September 6, 2011. According to its website, TURN is a non-profit organization whose "legal team saves utility customers millions and advances groundbreaking policies and programs at the California Public Utilities Commission (CPUC) and the State Legislature," whose "consumer advisor helps consumers understand their bills, challenge unjust utility company practices and access information about important money-saving programs," and whose "action team provides accurate and understandable information about critical energy and phone issues, and mobilizes people statewide for change through our campaigns."

Mr. Long states that he seeks waivers in order to enhance his ability to advocate on behalf of residential and small business customers of utility and telecommunications services in his new position at TURN. At the same time, he believes that granting the requests would promote the mutual interests of the City and TURN in their advocacy efforts before the California Public Utilities Commission ("CPUC") on behalf of utility customers. As Deputy City Attorney, Mr. Long occasionally communicated with TURN attorneys on matters that concern both the City and TURN; he mentions that the relationship between TURN and the City is often that of cooperation and coordination because of the mutuality of interests that exists. He adds that TURN "is actively involved" in most of the CPUC cases that he worked on Deputy City Attorney. He

believes that it will serve both the City and TURN if he is able to communicate freely with the City Attorney's Office "regarding the possibility of coordinating or supporting our respective efforts with respect to pending CPUC, court, and legislative matters." Because of the similarity of interests between the City and TURN, Mr. Long believes that there would not be the danger of undue influence or unfair advantage were the Commission to grant the waivers. As shown by the attached email, the City Attorney's Office supports his requests for the waivers.

Relevant Laws

The two post-employment restrictions under section 3.234 at issue here include the permanent restriction on representation in certain matters in subsection 3.234(a)(1), which states:

- (A) Prohibition. No former officer or employee of the City and County, after the termination of his or her service or employment with the City, shall, with the intent to influence, act as agent or attorney, or otherwise represent, any other person (except the City and County) before any court, or before any state, federal, or local agency, or any officer or employee thereof, by making any formal or informal appearance or by making any oral, written, or other communication in connection with a particular matter:
 - (i) in which the City and County is a party or has a direct and substantial interest;
 - (ii) in which the former officer or employee participated personally and substantially as a City officer or employee; and
 - (iii) which involved a specific party or parties at the time of such participation.
- (B) Restriction on assisting others. No former officer or employee of the City and County, after the termination of his or her service or employment with the City, shall aid, advise, counsel, consult or assist another person (except the City and County) in any proceeding in which the officer or employee would be precluded under Subsection (A) from personally appearing.
- (C) Exception for testimony. The prohibitions in Subsections A and B do not prohibit a former officer or employee of the City and County from testifying as a witness, based on the former officer's or employee's personal knowledge, provided that no compensation is received other than the fees regularly provided for by law or regulation of witnesses.

The second post employment restriction at issue here is a one-year ban on communicating with the officer or employee's former department. Subsection 3.234(a)(2) states:

No current or former officer or employee of the City and County, for one year after termination of his or her service or employment with any department, board, commission, office or other unit of the City, shall, with the intent to influence a government decision, communicate orally, in writing, or in any other manner on behalf of any other person (except the City and County) with any officer or employee of the department, board, commission, office or other unit of government, for which the officer or employee served.

Under section 3.234(c), the Commission may waive any of the restrictions in the above two subsections if the Commission determines that granting a waiver would not create the potential for undue influence or unfair advantage. A request for a waiver must be in writing and include

information describing the former position held by the employee; the particular matter for which the waiver is sought; the individual's prior involvement in the matter, if any; and reasons why granting a waiver would not create the potential for undue influence or unfair advantage. Ethics Commission Reg. 3.234-4(a)(1). The Commission may not approve any request for waiver from the permanent or one-year bans unless the Commission makes a finding that granting such a waiver would not create the potential for undue influence or unfair advantage. In making this determination, the Commission may consider: the nature and scope of the communications the individual will have with his or her former department, the subject matter of such communications, the former position held by the employee, the type of inside knowledge that the individual may possess, and any other factors the Commission deems relevant. EC Reg. 3.234-4(a)(5).

Discussion

The Commission has never before considered a request for a waiver from subsection 3.234(a)(1). Staff believes that it is difficult to make a decision whether to grant a waiver without information about the "particular matter" that bars the appearance of or communication by the former employee. Here, we do not have specific information about any "particular matter" that the City "is a party or has a direct and substantial interest." Nonetheless, as Mr. Long notes, because he is an attorney, he is subject to the Rules of Professional Responsibility whereby, among other things, he must obtain a waiver from the City Attorney's Office before he can represent another client, such as TURN, on matters in which he participated as a Deputy City Attorney on behalf of the City. Thus, it appears that granting a waiver from subsection 3.234(a)(1) in this instance would only help to streamline the procedures that Mr. Long must follow were he to appear in a court or agency or communicate on behalf of TURN in a matter in which the City is a party or has a direct and substantial interest. For this reason, and because of the general mutuality of interests between the City and TURN, staff believes that granting a waiver from the restrictions of subsection 3.234(a)(1) would not create the potential for undue influence or unfair advantage.

With respect to a waiver under subsection 3.234(a)(2), staff also agrees that in general, granting the waiver would not create the potential for undue influence or unfair advantage. However, staff recommends that the waiver be limited to Mr. Long's communications on behalf of TURN, and not be extended to communications to influence governmental decisions on behalf of other persons or entities. The one-year post-employment communications ban was enacted to protect the integrity of government decision-making by preventing a public employee from using his influence or knowledge, gained as a public servant, to advance private interests at the expense of the public. While he has demonstrated that his work for TURN would likely be in accord with advancing the City's interests, there has not been a showing that communications on behalf of others would not result in undue influence or unfair advantage.

For the reasons discussed above, staff recommends approval of the request for a waiver from subsection 3.234(a)(1) and approval of a limited waiver from subsection 3.234(a)(2).

From: John St.Croix/ETHICS/SFGOV
To: Mabel Ng/ETHICS/SFGOV@SFGOV

Date: Tuesday, August 30, 2011 04:53PM
Subject: Fw: Tom Long Waiver Request

John St. Croix
Executive Director, San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102-6053

-----Forwarded by John St.Croix/ETHICS/SFGOV on 08/30/2011 04:53PM -----

To: John St.Croix/ETHICS/SFGOV@SFGOV
From: Theresa Mueller/CTYATT
Date: 08/30/2011 04:49PM
Subject: Tom Long Waiver Request

Dear Mr. St. Croix,

I was Tom Long's supervisor while he worked in the City Attorney's Office. The office supports Tom's request for a waiver. Please do not hesitate to ask if I can provide additional information. Thank you.

Theresa L. Mueller
Deputy City Attorney
Office of City Attorney Dennis J. Herrera
City Hall, Room 234
San Francisco, CA 94102
(415) 554-4640 (Tel)
(415) 554-4763 (Fax)
theresa.mueller@sfgov.org

The information in this email is confidential and protected by the attorney/client and/or work product privileges. If you received this email inadvertently, please permanently delete it.

Thomas J. Long
843 San Carlos Ave.
Albany, California 94706

August 29, 2011

John St. Croix
Executive Director
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

RE: Request for Waivers of Campaign and Governmental Conduct Code Sections 3.234(a)(1) and (a)(2) Related to Employment with The Utility Reform Network (TURN)

Dear Mr. St. Croix:

The purpose of this letter is to respectfully request that the San Francisco Ethics Commission grant me a waiver of two provisions of Section 3.234 of the Campaign and Governmental Conduct Code (“C&GCC”). First, I request a waiver of subsection (a)(1), which bars former City employees from representing a non-City party before a court or administrative agency on a matter in which the employee represented the City. Second, I request a waiver of subsection (a)(2), which bars former employees from communicating with their former City departments with the intent to influence a governmental decision, for a period of one year from the employee’s separation from City employment. As I will explain in more detail below, the reason for these requests is to enhance my ability to advocate on behalf of residential and small business customers of utility and telecommunications services in my new position as Legal Director of The Utility Reform Network (“TURN”), a San Francisco-based non-profit organization. Granting the requested waivers would promote the mutual interests of the City and TURN of coordinating our advocacy efforts before the California Public Utilities Commission (“CPUC”) on behalf of utility consumers. I am informed that the City Attorney’s Office supports these waiver requests.

The Commission should be aware that the rules of professional conduct applicable to attorneys also require me to obtain the informed written consent of the City Attorney’s Office before I may represent TURN in any CPUC matter in which I represented the City. Accordingly, if the Commission grants my waiver requests, I will still need to seek the City Attorney’s Office’s consent for each such matter I wish to work on for TURN.

I request that the Commission take up my waiver requests at its next regularly scheduled meeting on September 12, 2011.

Prior Employment

For the past six and one-half years, until my departure from City service on August 22, 2011, I served as a Deputy City Attorney on the Energy and Telecommunications Team. One of my responsibilities in this position was to represent the interests of the City and its residents and businesses in energy and telecommunications-related regulatory matters before the CPUC. CPUC administrative proceedings and regulations can have a significant effect on the City's interests in two broad ways: (1) by potentially affecting the electricity-related operations of the San Francisco Public Utilities Commission ("SFPUC"), including the Power Enterprise, which provides electricity service to City buildings and facilities, and SFPUC's planned implementation of a Community Choice Aggregation ("CCA") program to provide an alternative source of electricity supply to City residents and businesses; and (2) by affecting the interests of San Francisco's residential and business consumers by regulating the safety, reliability, and rates of the electric and gas services provided by Pacific Gas and Electric Company ("PG&E") and certain rates and policies of telecommunications carriers such as AT&T. Particularly in this latter respect, the City's and TURN's participation in CPUC proceedings pursue the same broad goals of ensuring that utilities and phone companies offer safe, reliable, environmentally-friendly and reasonably priced service.

The most significant ongoing matters in which I represented (or assisted in representing) the City before the CPUC include: two CPUC proceedings arising out of the explosion of Pacific Gas and Electric Company's ("PG&E") gas transmission pipeline in San Bruno (Rulemaking ("R.") 11-02-019 and Investigation (I.) 11-02-016); the proceeding setting PG&E's rates for most of its electric and gas services for the period 2011 through 2013 (Applications 09-12-020 and 10-03-014); the proceeding concerning rules related to CCA (Rulemaking ("R.") 03-10-003); the proceeding concerning rules related to "direct access" suppliers of electricity services (R.07-05-025); a proceeding addressing minimum requirements for basic telephone service (R.09-06-019); and a proceeding fashioning rules for ensuring safety of electric substations (R.10-09-001).

In the course of this work for the City, I (like my colleagues on the Energy and Telecommunications Team) occasionally communicated with TURN attorneys relating to pending matters of mutual interest or concern. In CPUC proceedings, it is quite common for parties with similar interests to discuss potential cooperation and coordination. TURN in particular is a highly respected and effective advocate on utility and telecommunications issues, and its support can be extremely helpful. Likewise, TURN sometimes seeks the support of the City for its positions. For example, in 2010, TURN solicited the City's support for its position opposing CPUC proposed changes that would reduce the requirements for basic telephone service. The City ultimately endorsed TURN's position in Board of Supervisors Resolution 300-10, and the CPUC has since withdrawn the proposal opposed by the City and TURN. As another example of mutual cooperation, TURN has lent its support to pending legislation sponsored by the City (SB 790) that would amend California law relating to CCA.

My work for the City continued my long history of governmental and public interest service on behalf of utility and telecommunications consumers. In the four years prior to joining the City Attorney's Office, I was the Legal and Telecommunications Advisor to one of the CPUC Commissioners. Before that, I served for ten years as TURN's Senior Telecommunications Attorney, leading TURN's advocacy efforts on behalf of California's telecommunications consumers.

Future Employment with TURN

On September 6, 2011, I will assume the position of Legal Director for TURN.¹ My responsibilities as Legal Director will include supervising TURN's eight other staff attorneys and advocates and handling my own caseload of primarily energy-related matters. TURN is actively involved in most of the CPUC cases I listed above in which I represented the City as a Deputy City Attorney. I will be more valuable to TURN and the consumers it represents, including San Francisco consumers, if I can take advantage of my expertise by supervising other attorneys or directly participating in these matters. In addition, I believe it will serve the mutual interest of the City and TURN if I am able to communicate freely with members of the Energy and Telecommunications Team of the City Attorney's Office regarding the possibility of coordinating or supporting our respective efforts with respect to pending CPUC, court, and legislative matters.

Why the Waivers Are Appropriate

The Ethics Commission may grant waivers from subsections (a)(1) and (a)(2) of C&GCC Section 3.234 in instances where granting the waiver would not create the potential for undue influence or unfair advantage. C&GCC 3.234(c). Neither waiver would create such a potential.

Subsection (a)(1). As previously noted, in utility and telecommunications matters, both the City and TURN represent the interests of residential and business consumers – the City representing the interests of San Francisco's consumers and TURN the interests of consumers throughout the state, including San Francisco. Given this broad similarity of interest, the City's interests would not be harmed by granting a waiver under subsection (a)(1). To the contrary, permitting me to take full advantage of my experience and expertise would make me a more effective advocate on behalf of utility consumers, including San Francisco consumers. In addition, my deep understanding of SFPUC's current and planned electricity operations would allow me to help TURN develop well-informed positions in CPUC proceedings that may affect the City's interests.

Moreover, because I am a lawyer subject to the rules of professional conduct, a waiver of subsection (a)(1) would still leave an important restriction on my ability to represent TURN with

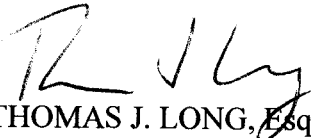
¹ TURN's primary sources of funding are: attorneys' fees awarded by the CPUC under California Public Utilities Code Sections 1801 – 1812, when TURN makes a substantial contribution to a CPUC decision; member contributions; and grants from foundations.

respect to matters on which I represented the City. Applicable rules of professional conduct also bar me from representing another client on matters I participated in on behalf of the City, unless I obtain a waiver – separate and distinct from the waivers I seek here -- from the City. *See* California Rule of Professional Conduct 3-310. Such waiver requests are directed to the City Attorney's Office, which is particularly well-equipped to examine the circumstances of the waiver request and determine whether the City's interests would be adversely affected in any way by granting the waiver. For example, in the event of a possibility that TURN's positions may not be fully consistent with those of the City in a particular proceeding, the City Attorney's Office would be able to make a well-informed determination of whether it would benefit or hinder the City's interest to grant a waiver. It is my understanding that the City Attorney, the Office's Managing Attorney and the Ethics Team all would review such a request before the Office decides whether to grant it. Thus, if this Commission grants me a waiver under subsection (a)(1), I will still be required to seek a waiver from the City Attorney's Office for each matter that I worked on for the City that I wish to participate in as a TURN attorney. This additional waiver requirement furnishes another safeguard against any potential for undue influence or unfair advantage.

Subsection (a)(2). A waiver of subsection (a)(2) would allow me to communicate with the City Attorney's Office about potential matters in which it may be mutually advantageous for TURN and the City to coordinate efforts. Because I was not a Team Leader in the City Attorney's Office, none of the attorneys I would communicate with would be former subordinates. As noted above, the City Attorney's Office often communicates with other parties, including TURN, regarding potential cooperation and mutual support for positions in proceedings before the CPUC. In addition, since TURN, like the City, advocates for the public interest, my communications with the City would not harm the interests of the City Attorney's Office or the City generally. Under these circumstances, the concerns underlying the one-year ban do not apply.

Thank you for your consideration of this letter. If you have any questions regarding this matter, you may reach me by e-mail at tomjlong@sbcglobal.net or by phone at (510) 866-4313.

Very truly yours,


THOMAS J. LONG, Esq.

CC: Dennis J. Herrera, City Attorney
Mark Toney, Executive Director, TURN