

July 2, 2015

Ms. Kate Reynolds
Executive Director
Executive Ethics Board
PO Box 40149
Olympia, WA 98504-0149

Dear Ms. Reynolds:

Thank you for inviting me to provide you and the Executive Ethics Board with information to support the Board's consideration of a formal advisory opinion regarding my compliance with the ethics rules on post-state employment. Because such an opinion could help authoritatively address some of the concerns that have been raised, I appreciate the Board's willingness to consider this.

In the several pages that follow, I have provided the specific information you asked for, and have also summarized the analysis that has guided my actions in this matter over the past two years. I hope this is helpful.

A. Information Requested by the Board

1. The contracts at issue

The issues here involve two Department of Commerce grant contracts, one with the Snohomish Public Utility District No. 1 (the PUD) and one with Puget Sound Energy (PSE). The grant contract with the PUD provides up to \$7.3 million to help support a \$16+ million energy storage program. Under the PUD grant, payments are made by Commerce when the PUD achieves certain performance milestones. The start date for that contract is July 8, 2014 and the end date is scheduled for December 31, 2016. The scope of work includes four main elements: the MESA 1 lithium-ion battery system at the Hardeson substation, the MESA-2 UET flow battery system at the Everett substation, controls integration and optimization at the PUD's operations center in Everett, and a use case analysis project. The PUD's subcontractors must be approved by Commerce. 1Energy Systems is an approved subcontractor to the PUD on this grant.

The second grant contract, with PSE, provides up to \$3.8 million to support an energy storage project at the Glacier substation, a project with a total cost of more than \$7.6 million. The start date for this contract is also July 8, 2014 and the end date is also scheduled for December 31, 2016. 1Energy Systems is a subcontractor to PSE under this grant.

2. My job duties at Commerce regarding the contracts and companies

The Department of Commerce operates over 100 programs, employs approximately 300 people, and has an annual capital and operating budget of roughly \$1 billion. Most Commerce programs involve providing grants and loans to public and private entities to have them implement public policy objectives. I served as the Deputy Director of Commerce from August 31, 2009 until September 6, 2013. During my employment at Commerce, I supervised policy development across the agency, including energy policy. I also oversaw the Department's budget, finance, information technology, and accounting functions during my last two years.

As one of the lead economic development officials for the state, I interacted with a wide variety of companies on economic development and energy policy. The energy office, which reported to me, staffed the development of the state energy strategy in 2012, which was led by a 26 member advisory committee, including Kimberly Harris, the CEO of PSE and Steve Klein, the General Manager of the PUD. I also interacted with PSE over a regulatory matter relating to greenhouse gas emissions from one of their natural gas plants and with the PUD in relation to federal permits necessary for their tidal energy project. At an energy conference sponsored by the state energy office in the fall of 2012, I moderated a panel on energy storage that featured Steve Klein from the PUD as well as Tom Melling from 1Energy Systems.

At the beginning of the Inslee administration in February 2013, at the request of the new Commerce Director, Brian Bonlender, I assisted in writing a policy memo with the Governor's executive policy office that ultimately formed the basis for the Clean Energy Fund (CEF). The drafting of the legislative language and lobbying for the CEF was led by the Governor's executive policy office. The Legislature approved the CEF in June of 2013.

In March 2013, Commerce Director Bonlender announced his new management team and that I would be leaving the agency in September. From March 2013 until early September 2013 when I left state service, I functioned as a senior individual contributor. In May 2013, my successor Richard Locke was hired and given oversight responsibility for the state energy office. In my role as an individual contributor, I advised Mr. Locke in his new role, including sharing lessons I had learned from grant programs that the energy office had administered under the federal stimulus program and how those lessons could apply to the Clean Energy Fund.

When I left state service in early September 2013, the selection process that led to the grant contracts at issue had not yet been established. The committee to evaluate the proposals was selected in October 2013 and the proposals were submitted by applicants in December 2013. Commerce and that selection committee made grant decisions in March 2014 and executed contracts with PSE and the PUD in July 2014, more than ten months after I left state service.

3. Role immediately after leaving state service

In late June of 2013, while serving as a senior individual contributor at Commerce, I was approached by Dave Kaplan, the CEO of 1Energy Systems, about joining the company. Among my proposed duties would be to assist 1Energy System's utility customers in applying for CEF grants. I reviewed the state ethics rules and consulted with Sandra Adix, the Assistant Attorney General assigned to Commerce. After consulting with Ms. Adix and reviewing the statute and relevant advisory opinions from the Executive Ethics Board, I concluded that my proposed role at 1Energy was permitted under state law and I accepted the employment offer.

In the ten weeks between my first conversation with Dave Kaplan and the time I left state service, I did not take any action that a reasonable person would conclude was for the benefit of 1Energy. Moreover I did not take any action with the specific purpose of benefiting 1Energy. Indeed, during that time, the scope of my official duties gave me no authority to act on matters that might benefit 1Energy.

After leaving state service, I immediately joined 1Energy Systems as Vice President of Business Development and Public Policy. 1Energy provides design and integration services and software for utilities that want to deploy battery-based energy storage systems. I began representing 1Energy at national conferences on energy storage and working to cultivate utility customers inside and outside of Washington.

Among my responsibilities at 1Energy was helping the PUD prepare its grant application to Commerce for a CEF grant. The PUD itself was the grant applicant and is required to fund over half the cost of the storage project with other PUD resources. 1Energy was identified as a key subcontractor to the PUD on the proposed work program. However, it is worth noting that the PUD did not guarantee 1Energy the work under the grants, and for some of the work 1Energy ultimately had to vigorously compete for the business from the PUD after Commerce had awarded the grant to the PUD.

Regarding the second contract, the PSE grant, I helped develop 1Energy's pricing and proposal materials for PSE to include in their application to Commerce.

Because there would be no role for me in delivering the proposed work under either the PUD or PSE grant proposals, I was not individually listed on either of those proposals.

4. My current role at 1Energy

My job at 1Energy continues to involve leading efforts to develop new business with utilities around the country and advocating for public policy that will support the development of the energy storage industry. I do not have any responsibilities for delivering work under the subcontracts with the PUD or PSE.

5. My reimbursement and compensation structure

At 1Energy, I am paid a base salary and a bonus that is tied to the company's net revenues. The bonus compensation structure excluded a certain threshold of net revenues in my first year based on 1Energy's existing pipeline of business, including projects with the PUD. To the extent that Commerce grants are a source of funding for the utilities' contracts with 1Energy and 1Energy earns net revenue on those contracts and those net revenues influence my bonus (for example are above the minimum threshold), then I may benefit from the contracts at issue.

I also own stock in 1Energy and – in the general sense that 1Energy's performance under those contracts may make the company's stock more valuable – it is possible I may benefit from 1Energy's subcontracts with the utilities that are funded in part by the Commerce grants from the state.

6. Other information that would be important or helpful for the Board to consider

Having carefully thought about these issues before leaving state service and reviewed them since, I would like to share with the Board my analysis of the facts, in view of the relevant law and advisory opinions. I have also attached a time line and a 2013 e-mail to 1Energy CEO David Kaplan and EVP Tom Melling summarizing my conversation with Sandra Adix about my compliance with state ethics rules.

B. Analysis of Ethics Statute

From the beginning, I have believed that a primary purpose of publishing the state's ethics laws and advisory materials is to allow a conscientious state employee to study and understand the ethical constraints and take deliberate steps to comply with them. To this end, I have taken care to read and apply the statutes and guidance.

The question presented here is whether I violated the post-state employment restrictions of RCW 42.52.080 by accepting employment at 1Energy and then providing support to the proposals by the PUD and PSE for Clean Energy Fund grants that were subsequently awarded by Commerce.

1. Negotiation or Administration of State Contracts

The first part of that statute, RCW 42.52.080(1), addresses a situation where, during state employment, a person has worked on negotiation or administration of a contract with the outside employer. It prohibits the person from accepting employment from the employer if all three of the following conditions exist:

- (a) during the two years before leaving state employment, the person worked on behalf of the state agency in negotiating or administering one or more contracts with the outside employer and was in a position to make discretionary decisions affecting such negotiations or such administration;
- (b) the contract or contracts have a total value of more than ten thousand dollars; and
- (c) the duties for the outside employer include fulfilling or implementing the provisions of such a contract or contracts or supervising or controlling the fulfillment or implementation of such contract or contracts.

My analysis was that this section plainly does not apply to the facts of my employment because the contracts in question were not negotiated or administered for more than six months after I left Commerce, the contracts were not directly with 1Energy, and I have had no role in fulfilling the provisions of those contracts.

2. Post-Employment Compensation

The second part of the law, RCW 42.52.080(2), restricts a person from receiving certain post-employment compensation. The terms of that section are very precise:

“No person who has served as a state officer or state employee may, within a period of two years following the termination of state employment, have a direct or indirect beneficial interest **in a contract or grant that was expressly authorized or funded by** specific legislative or **executive action in which the former state officer or state employee participated.**”
RCW 42.52.080(2) (emphasis added.)

A plain reading of this statute supports my position for two reasons.

(a) *The statute applies only to “expressly authorized or funded” contracts and grants, not to general policy work.*

To have violated RCW 42.52.080(2), I must have participated in “executive action” that “authorized or funded” the “contract or grant.” Under RCW 42.52.010(6), “[c]ontract’ or ‘grant’ means an agreement between two or more persons that creates an obligation to do or not to do a **particular thing.**” (emphasis added) Thus, the statute applies to participation in the authorization or funding of contracts or grants “to do particular thing[s],” not to participation in general policy work or initiatives.

Furthermore, use of the words “**expressly** authorized or funded by **specific** ... executive action” demonstrates this section is intentionally limited to situations involving authorization or funding of a particular contract or grant. It is clear that the contracts and grants in question here were not expressly authorized or funded until more than ten months after I left state service.

Although some may argue for ignoring the statute’s specific words in favor of a much broader interpretation of this section, doing so would have the profound effect of precluding every senior Department of Commerce employee from being employed by any actual or potential grant recipient or

subcontractor. In my case, if the words “expressly” and “specific” were discarded, one could then argue that all CEF grants are being funded by executive actions in which I participated by drafting the policy memo on options for the Clean Energy Fund. Beyond that, since I had oversight of all of Commerce’s budget, finance, and contract administration, this interpretation would then support an argument that I participated in executive actions that proposed funding for every one of the Commerce budget items, totaling \$1 billion per year and including the Public Works Trust Fund, the Housing Trust Fund, and scores of other programs for local governments, non-profits, and businesses. Such a loose reading would then block my employment with every local government in the state, the entire affordable housing sector, economic development agencies, and a host of non-profits, not to mention all of the companies and agencies that subcontract to or benefit from these many grants from Commerce. The statute does not say this and that result cannot have been its intent.

(b) The statute does not apply to subcontractors.

RCW 42.52.080(2) applies to contracts or grants made by the Department of Commerce with specific entities. It should not be interpreted to apply to subcontractors, or subcontractors of subcontractors, etc. If that were the case, taking post-government employment would be a perilous task, researching whether an employer, through some tenuous multi-tiered subcontractor relationship, might create an indirect beneficial interest. To be effective, ethic laws must promote reasonable reliability and transparency, without endless uncertainty.

3. Attempt to Influence

The third and fourth sections of RCW 42.52.080 address the potential for employment offers that might improperly influence the conduct of public officials in their state duties. RCW 42.52.080(3) prohibits a state employee from accepting an offer of employment:

“...if the officer or employee **knows or has reason to believe that the offer of employment or compensation was intended**, in whole or in part, directly or indirectly, to influence the officer or employee or as compensation or reward for the performance or nonperformance of a duty by the officer or employee during the course of state employment.”

Similarly, RCW 42.52.080(4) prohibits a state employee from accepting an offer of employment:

“...if **the circumstances would lead a reasonable person to believe** the offer has been made, or compensation given, for the purpose of influencing the performance or nonperformance of duties by the officer or employee during the course of state employment.”

In other words, these sections apply when either the *employee knows* that an outside job offer is meant to influence performance of his official duties or when circumstances would lead a *reasonable person* to that belief.

Because there was a ten-week period between late June 2013 when I was approached by 1Energy regarding employment and September 6, 2013 when I left state service, this provision must be considered. There are, however, no facts to indicate that I violated these provisions. The offer of employment at 1Energy from Dave Kaplan was never related to any official action I could take in the ten weeks after its communication nor was it offered as a direct “reward” for my involvement in the CEF policy memo drafting. By the time the initial offer of employment was made, oversight for the state energy office, which had responsibility for the CEF, *had already been turned over to my successor Rick Locke*. I had no direct reports during that time period and functioned only as an advisor to Locke to orient him to his new duties. I shared lessons learned from the prior clean energy grant programs and

advised on timelines to achieve program objectives, but I left before any of the key decisions were made about the form of the grant application, who would serve on the selection committee, how the committee would score the grant proposals, and most importantly, the actual reviewing and scoring of the proposals.

From these facts, it did not appear to me, nor do I think a reasonable person could conclude, that the offer to work for 1Energy was meant to influence my work at Commerce. I trust that the facts will lead the Board to the same conclusion.

4. Assisting With Transactions

Finally, section RCW 42.52.080(5) prohibits a former state employee from assisting another person “...in any transaction involving the state in which the former state officer or state employee at any time participated during state employment.”

The scope of this section is limited by the detailed statutory definition of “transaction involving the state” found in RCW 42.52.010 (21). The phrase is meant to include “a proceeding, application, submission, request for a ruling or other determination, contract, claim, case, or other similar matter” in which the state is a party or has an interest. The question in this section is whether any of my actions during state employment related to the Clean Energy Fund constituted participation in a “proceeding, application, submission, request for a ruling or determination, contract, claim, case, or other similar matter” that would be the subject of state action.

First, although “proceeding” is not defined in this statute, Merriam-Webster defines the term as “the process of appearing before a court of law so a decision can be made about an argument or claim: a legal action.” This definition makes sense in the context of RCW 42.52 as the state wants to avoid state employees representing the state and then going to work for the state’s adversary in a legal action. It does not apply to my situation.

Second, at the time I left Commerce there was no “application” or “submission” from either the PUD or PSE in the possession of Commerce. The CEF applications were not submitted until three months after I left state service. Similarly, there was no “contract” until ten months after I left state service.

It is also informative to note that “transaction involving the state” expressly does not include the “[p]reparation, consideration, or enactment of legislation, including appropriation of moneys in a budget . . .” RCW 42.52.010 (21)(b). In this instance, I was involved in policy work that supported the preparation of legislation and I had broad budget responsibility at Commerce when the CEF was proposed and these activities are explicitly excluded as “transactions involving the state”.

5. Conclusion

Advisory Opinion 01-01, states that “[g]enerally, the post-state employment provisions are transactional in nature and prohibit former state employee[s] and their employers from improperly benefiting from grant or contracting decisions made while state employees.”

The key fact in establishing my adherence to RCW 42.52.080 is that the “grant or contracting decisions” were made more than half a year after I left state service. I had no participation as a state employee in writing the request for proposals, choosing the selection committee, setting the evaluation criteria, scoring the proposals, or making the final grant decisions.

C. "Appearance of Conflict?"

This review of my actions in view of the state ethics laws convinces me that I have honored the letter and the intent of the law. However, some may ask if I created an "appearance" of conflict by leaving my role as a senior Commerce official and then joining a company where my duties included assisting that company's customers apply for grants from the agency I had recently left. In a different set of circumstances, the Ethics Board in Advisory Opinion 00-07 discouraged an employee from leaving state service and immediately becoming a contractor for the same work because it created an "appearance of conflict" even though it was not expressly prohibited by RCW 42.52.080. While my circumstances are very different, the broader issue of whether my actions created an appearance of conflict deserve comment.

First, I firmly believe the state's interests are served when someone in my former role at Commerce leaves to work on behalf of one of the thousands of organizations that contract with Commerce. I might, for instance, have become a finance director of a city that applied for and won a Public Works Trust Fund grant to repair a leaking sewage system. I might have joined a non-profit housing association that won a Housing Trust Fund grant to build low-income housing. I might have gone to work for a port district that won grants to advance local economic development. Commerce has many worthy policy goals and operates many competitive grant processes to advance them including the CEF. In my case, I chose to enter the clean energy field after leaving state service and part of my job has been to support the applications of in-state utilities for the CEF. In any of these examples of potential post-Commerce employment, the key test for the appearance of a conflict is whether Commerce ran fair and open competitions for their grant funds that elicit the best possible proposals, judged on their merits.

Here, every indication is that the competition for the CEF grants was fair and open and that my prior relationship with Commerce could not and did not "stack the deck" for one applicant or change the evaluation and scoring of the proposals. Indeed, the selection committee was comprised almost entirely of individuals who did not work at Commerce and who did not know me. I was not even listed in the proposal since it is not my job to deliver projects once under contract. Moreover, 1Energy was not the prime applicant for the grant funds, the utilities were. It was their staff who led the proposal preparation and negotiated the contracts with Commerce. Ultimately, it was utilities who developed and championed these projects and paid for more than half the project costs with their own resources.

As you will note in the attached e-mail to my then-prospective employers at 1Energy, I closed with a sentence that it was important that I remain sensitive to appearances with Commerce and my former staff. To that end, I eschewed any contact with Commerce staff during the first three months after joining 1Energy. I would occasionally see them at events and avoided talking about the PUD's or PSE's proposals. I have done my best to navigate the transition from public service to the private sector and hope the Executive Ethics Board will conclude that I have honored the letter as well as the spirit of the law.

Sincerely,



Daniel Malarkey

April 2009	Rogers Weed named Director of Commerce (then Community, Trade, and Economic Development) by Gov. Gregoire.
August 31, 2009	Daniel Malarkey joins Commerce as Deputy Director
March 2010	Malarkey assigned oversight of policy including state energy office
August 29, 2011	In addition to policy, Malarkey given oversight of agency budgeting, finance and administration including IT.
2013	
Jan	Brian Bonlender named new Commerce Director; Weed leaves Commerce
Feb	Malarkey drafts policy memo on clean energy options for capital budget informed by earlier policy work done by the state energy office.
Mar	Bonlender and Malarkey agree he will help hire replacement & leave Commerce by Sept 2013. New management team announced and Malarkey becomes individual contributor.
May 21	Rick Locke hired to replace Malarkey.
Jun	Clean Energy Fund of \$40 million is included in the Legislatures of capital budget for 2013-15; includes \$15M for smart grid grants
Late June	1Energy CEO David Kaplan contacts Malarkey about joining company
July 9 2013	Malarkey has conversation with Commerce AAG Sandra Adix regarding compliance with RCW 42.52 if Malarkey joins 1Energy.
July 10, 2013	E-mail to Kaplan and Melling re compliance with RCW 42.52 and employment at 1Energy Systems
July 19, 2013	Malarkey and 1Energy sign employment agreement and set start date in September.
July	Weed joins 1Energy's Board of Advisors
August	Malarkey takes medical leave from Commerce during portions of August and treats lower back problems
Sept 6, 2013	Malarkey ends state service
Sept	Malarkey starts at 1Energy
Oct	Commerce selects expert review panel for Clean Energy Fund grants
Dec	SNOPUD and PSE submit proposals to Commerce. 1Energy included in both proposals. Avista and Energy Northwest submit proposals that don't include 1Energy.
2014	
Mar	Commerce makes grant awards contingent on reaching grant contract terms. Weed joins 1Energy fulltime
Jul	Commerce announces awards and signs contracts with SNOPUD, Avista, and PSE. Energy Northwest does not win a grant.
Oct	1Energy enters into contract with PUD for projects proposed under CEF
Jan	MESA 1a energy storage systems energized

Attachment 2: 2013 Email

Compliance with RCW 42.52 Ethics in Public Service



Inbox x



Daniel Malarkey <daniel.j.malarkey@gmail.com>

7/10/13 ☆



to David, Tom ▾

Dave and Tom-

I spoke yesterday with **Sandra Adix**, the Assistant Attorney General who represents the Department of Commerce, regarding my joining 1Energy and compliance with RCW 42.52.080 on employment after public service.

She did not think that my joining 1Energy would present a compliance problem for the following reasons:

1. 1Energy would not be the applicant for the Clean Energy Fund grant, Snohomish PUD and potentially other utilities would be the applicant. 1Energy would be a vendor to the utility and no more than half of the total project cost would be paid by the state grant. She thought that any beneficial interest of mine in the contract was so attenuated by these facts as to not present a problem. Moreover,...
2. The capital budget proviso for the Clean Energy Fund establishes that the grant selection must be done by a group of qualified experts who would be selected well after I leave state service. It is would be hard to argue I had undue influence over the key decision-making process.
3. The Ethics Board has issued advisory opinions that allowed post-state employment in several instances where the connection to a state grant or contract was more direct than in my potential situation with 1Energy. Opinions 98-11, 00-07, and 01-01 at http://www.ethics.wa.gov/ADVISORIES/Advisory_Opinions_07.htm appear to bolster the position that my employment at 1Energy would not represent a violation of state ethics laws.

Sandra made clear that she can only provide legal advice to the Department, not me as a former employee, nor 1Energy. However, in this instance, the Department does have an interest in not having a former employee violate the state ethics law.

I do not think it necessary or advisable at this point to request a formal opinion from the Ethics Board.

So I'd consider this issue checked off the list and that we can turn to the other open issues in my offer of employment. Should we reach an agreement, I will nonetheless need to be sensitive to appearances and the spirit of the ethics law in any of my interactions with Commerce staff.

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