

BOYD, CHANDLER, FALCONER & MUNSON, LLP
ATTORNEYS AT LAW
SUITE 302
911 WEST EIGHTH AVENUE
ANCHORAGE, ALASKA 99501
TELEPHONE: (907) 272-8401
FACSIMILE: (907) 274-3698
bcf@bcfaklaw.com

MEMORANDUM

TO: Erin Reinders
City Manager

FROM: Brooks W. Chandler
City Attorney



DATE: July 6, 2020

SUBJECT: Geothermal Project Conflict of Interest Ruling

We previously provided rulings on OC shareholders and employees participating in discussion of a potential power purchase agreement for geothermal power between the City and OCCP (a limited liability corporation (“LLC”) in which OC holds a 51% ownership interest). (March 4, 2020 and November 25, 2019 memoranda). The purpose of this memorandum is to provide the city attorney ruling required by UCO 2.88.040(C) as to whether council member Tungul’s employment by Petro Star Inc. d/b/a North Pacific Fuel (“NPF”) is a “substantial financial interest” precluding participation in discussions about a power purchase agreement and voting on whether to approve a power purchase agreement between the City and the LLC. In our opinion the answer is no.

FACTS

According to his most recent APOC disclosure form council member Tungul is employed full time by NPF as its assistant terminal manager at a salary of between \$50,000 and \$100,000 per year. NPF is a trade name of Petro Star Inc. which in turn is a wholly owned subsidiary of Arctic Slope Regional Corporation. Petro Star Inc. does business throughout Alaska.

NPF has¹ sold diesel fuel to the City's electric utility. Those sales could be significantly reduced if the electric utility switches from diesel fuel to geothermal fluid for generation of electricity².

ANALYSIS.

Unalaska's conflict of interest ordinance applies both to City employees and elected officials. UCO 2.88.030(a) prohibits a City Council member from voting on any question in which the Council member "has a substantial financial interest".

A substantial financial interest in the making of "[a] contract" does not include being an employee of the person with whom the contract will be made where the "remuneration of employment will not be directly affected" by the contract. UCO 2.88.020(B)(1). The city is not making a contract with council member Tungul's employer. It is making a contract with a different business. Assuming the same rule applies in this more indirect situation, the issue is whether council member Tungul's pay "will not be directly affected" by any power purchase agreement between the City and OCCP.

Based on a review of summary sales tax information (the details of which are confidential by ordinance) it is clear that sales to the city, while significant, are a relatively small component of NPF's overall revenue generated from fuel sales made in Unalaska. There is little reason to conclude a conversion to geothermal generation of electricity would impact council member Tungul's continued employment or the amount of his salary. He may vote on whether to approve a power purchase agreement between the City of Unalaska and OCCP.

This ruling is specific to discussions of the potential purchase of geothermal power from the LLC including votes on whether to approve a power purchase agreement. This ruling does not mean that a ruling is required or if so what that ruling would be on any other matters coming

¹The City typically solicits bids for the supply of fuel for its generators each year. There is competition in the local fuel business. North Pacific is not always the city's fuel supplier. But for the purposes of this analysis we have assumed North Pacific would always be the low bidder.

²The City's most recent solicitation for diesel fuel indicated the City anticipated purchasing a little more than 3,000,000 gallons of diesel fuel for electric generation purposes. If the geothermal contract is signed generators would only be operated 8 hours per month and total fuel consumption would drop to 103,488 gallons per year. Thus replacing diesel generation with geothermal generation would result in a loss of potential fuel sales of 2,896,512 gallons each year.

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July 6, 2020

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before the city council directly involving North Pacific Fuel or Petro Star, Inc..

If you, or council member Tungul have any questions regarding this ruling please let me know.

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MEMORANDUM

TO: Erin Reinders
City Manager

FROM: Brooks W. Chandler
City Attorney



DATE: March 5, 2020

SUBJECT: Geothermal Project Conflict of Interest Rulings

We previously provided general advice on the above-referenced matter. (See November 22, 2019 memorandum). The background facts and analysis discussed in that memorandum will not be repeated here. In summary we recommended formal disclosures by Mayor Tutiakoff and two council members related to ownership of shares in and payments received from Ouhnalashka Corporation ("OC") whether as an employee or as a corporate director. In our opinion stock ownership and employment constituted a "financial interest" in a potential contract between the City and an LLC 51% of which is owned by OC. Those disclosures have been made and reviewed. The purpose of this memorandum is to provide the city attorney ruling required by UCO 2.88.040(C) as to whether the financial interest is a "substantial financial interest" precluding participation in discussions about a power purchase agreement and voting on whether to approve a power purchase agreement between the City and the LLC.

OC has a 51% ownership interest in an LLC which is proposing to sell geothermal power to the City. OC has 26,900 issued shares of stock. Mayor Tutiakoff owns 70 shares (.26% of the corporation). Council member Robinson owns 75.89 shares (.28% of the corporation). Council member Gregory's immediate family members own a total of 115 shares (.42% of the corporation). This ownership interest of less than one half of one percent is well below the 5% ownership threshold which city code defines as a "substantial financial interest" in a contract with the City. UCO 2.88.020(B)(3)(b). The Mayor and council members are not precluded from participation and voting on a power purchase agreement between the City and the LLC by

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March 5, 2020

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reason of stock ownership in OC.

Mayor Tutiakoff and council member Robinson are members of the OC Board of Directors. Mayor Tutiakoff serves as the chair of the OC Board. Neither the Chair nor Directors are paid by OC. Therefore there is no substantial financial interest in the potential power sales agreement resulting from serving on the OC board or as chairman of the board of directors. The Mayor and council member Robinson are not disqualified from participation and voting on a power purchase agreement between the City and the LLC by reason of their serving as members of the OC board of directors.

Council member Gregory is employed by OC as its lands manager. He is eligible for and has received annual bonus payments in addition to his regular salary. Neither his salary nor bonus payments are directly tied to the success of any particular OC investment, operation or project including the geothermal power project. Therefore by definition his employment by OC does not constitute a substantial financial interest in the geothermal project or potential power purchase agreement between the City and the LLC. UCO 2.88.020(B)(1)(no substantial financial interest unless salary payments “directly affected” by proposed contract).

Similarly, the fact OC pays discretionary dividends from general funds of the corporation does not constitute a disqualifying conflict of interest for either council member or the Mayor. Such dividend payments are not directly tied to the geothermal project. The theoretical possibility dividends could be increased by an unknown amount should the geothermal power project be profitable is not sufficient to establish a “substantial financial interest”.

This ruling is specific to discussions of the potential purchase of geothermal power from the LLC including votes on whether to approve a power purchase agreement. This ruling does not mean that a ruling is required or if so what that ruling would be on any other matters coming before the city council involving OC.

If you, council member Robinson, council member Gregory or Mayor Tutiakoff have any questions regarding this ruling please let me know.

February 10, 2020

To: City Clerk, City of Unalaska

From: Vincent M. Tutiakoff, Sr., Mayor, City of Unalaska

Regarding: Disclosure Statement

To Whom it May Concern:

I'm writing to you and the Council regarding my involvement as a City of Unalaska representative concerning the negotiations of a Power Purchase Agreement between the Ounalashka Corporation/Chena Power, LLC (OCCP) and the City of Unalaska.

I am a Shareholder of the Ounalashka Corporation (OC) and own 70 shares of OC stock representing 26,900 of the outstanding shares of OC stock. I am also a Director on the OC Board and also serve as OC's Chair. I do not receive a bonus as the Chair or Director of OC. The OC Board historically has declared a discretionary quarterly dividend, which I receive as an OC shareholder. I am also a Trustee and Beneficiary of the Ounalashka Settlement Trust, from which I receive quarterly distributions.

Although OC owns a majority of OCCP, I am neither a Director nor Officer of the OCCP.

As for fiduciary duty to the corporation, it is to protect the assets of the shareholders. As to the fiduciary duty to the city, it is as a resident and voter, I will vote for what is good for the city as a whole.

Vincent M. Tutiakoff -2-10-2020



2/10/2020

Declaration of Financial Interest

Marjie,

I am writing this in response to Brooks regarding a potential conflict with the Makushin Geothermal project.

I am a shareholder of The Ounalashka Corporation (OC). I own 75.89 shares of stock.

I also sit on the board of directors of OC.

Ounalashka Corporation is the majority owner of Ounalashka Corporation/Chena Power LLC. (OCCP) of which I do not serve as a director.

OC has 26,900 outstanding shares of stock.

I do not receive any bonuses on the performance of OC.

Regarding my fiduciary duty and my belief in how I handle myself when the matter comes up.

When I am at a duly convened meeting of the City of Unalaska my fiduciary duty is to the City of Unalaska as a City Council member. I am one of six Council members

When I am at a duly convened meeting of The Ounalashka Corporation my fiduciary duty is to the shareholders of The Ounalashka Corporation. I am one of nine board members.

Dennis Robinson



TO: Unalaska City Clerk – Marjorie Veeder
FROM: Councilman David M. Gregory
DATE: February 19, 2020
REF: Declaration of Financial Interest

With respect to my involvement with the OC/CP LLC I offer the following.

I am an employee of The Ounalashka Corporation, my title is Lands Manager, I am a salaried employee.

My wife Okalena Patricia Lekanoff Gregory is a shareholder in the Corporation and owns 95 shares of OC Stock out of a total of 26,900 total shares available. She is also a Director on the OC Board.

My Son, James Gregory and my daughter Delores Gregory are both Shareholders who own 10 shares of OC stock each.

I work for the Ounalashka Corporation which is the majority owner of the OC/CP LLC developing the Makushin Geothermal Project.

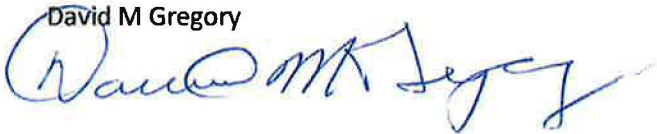
As an employee of the Ounalashka Corporation I am eligible for an annual bonus and have received bonuses in the past from OC.

I regard my fiduciary duty to the City of Unalaska as my number One duty while sitting as a Council Member during Council Meetings. I am one of six members of the Unalaska City Council.

In my role of Lands Manager for OC I am called upon to provide support to the OC/CP LLC in the form of providing maps, Drone Imagery, exhibits and expertise on the use of OC lands.

I am not involved in any final decision making in either the OC/CP project or other OC projects.

David M Gregory




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MEMORANDUM

TO: Erin Reinders
City Manager

FROM: Brooks W. Chandler
City Attorney



DATE: November 25, 2019

SUBJECT: Geothermal Project Conflict of Interest

At Mayor Tutiakoff's request, we have examined whether either his status as a shareholder or his role as chairman of the Ouhnalashka Corporation ("OC") creates a conflict of interest prohibiting his participation in Council consideration of matters pertaining to a geothermal project being pursued by Ounalashka/Chena Power, LLC ("the LLC") including a potential power purchase agreement between the LLC and the City. Based on our understanding of OC's involvement with the LLC, general information about the OC shareholder dividend program, the conflict of interest provisions of the Unalaska Code of Ordinances and relevant Alaska Supreme Court decisions on conflict of interest we have concluded no OC shareholder, employee or board member on the City Council including Mayor Tutiakoff has a disqualifying conflict of interest. However, because city code requires "declaration" of "any" financial interest a declaration should be made by the Mayor and Council members Gregory and Robinson prior to participating in council discussions about the project. This memorandum supplies the reasons for this recommendation.

FACTS.

The Unalaska City Council is being asked to support and will be asked to approve a negotiated contract for the purchase of energy from a geothermal power project ("the Project"). The Project will be developed and owned by the LLC. OC owns 51% of the LLC.

Should the LLC successfully develop the Project some of OC's LLC distributions would

potentially be added to the principal held in an OC fund called the Ounalashka Shareholder's Trust¹ ("OST"). Earnings from OST are distributed to unit holders in the trust. The recently announced 2019 distribution was \$19 per unit. Mayor Tutiakoff and council member Robinson are unit holders as is council member Gregory's wife. Future contributions to the Trust from OC's share of LLC profits are contingent on overall development and operating costs associated with the Project. They can fairly be described as speculative.

Council member Gregory is currently employed by OC at a middle management level. His pay may include an annual bonus based on how well OC performs financially. Council member Robinson is a member of the OC Board of Directors as is the Mayor. Members of the Board are not paid other than stipends for attendance at each board meeting. Board member payments are not tied to OC's annual profit.

There will be two types of anticipated city council action within the next three months: 1) issuing a general letter of support for the Project and; 2) a vote on whether to approve a power purchase agreement.

ANALYSIS.

Unalaska's conflict of interest ordinance applies both to City employees and elected officials. UCO 2.88.030(a) prohibits a City Council member from voting on any question in which the Council member "has a substantial financial interest".

A substantial financial interest in the making of "[a] contract" does not include being an employee of the person with whom the contract will be made where the "remuneration of employment will not be directly affected" by the contract. UCO 2.88.020(B)(1). Accordingly, a Council member who is an OC employee will have a substantial financial interest in the negotiated purchase of electricity from the LLC only if their OC salary is "directly affected" by the amount of profit OC will realize from the LLC. Any profit is likely years in the future. It is unlikely a bonus based on corporate income will be immediately impacted by a contract for the sale of power from the Project.

Owning shares in a company contracting with the City only constitutes a "substantial financial interest" when the council member owns more than 5% of the outstanding shares.

¹ Contributions to OST principal are generated from six other OC subsidiaries whose primary historical business has been real estate development and leasing (Aleutian Development Co, Dutch Harbor Aggregate, Dutch Harbor Development, FDOC, Inc., Little Brazil Corp. , Uknadax Corporation and OC Communications, Inc.). The amount of such contributions is not fixed in stone but is dependent on profitability from year to year.

UCO 2.88.020(B)(3)(b). Since OC only owns 51% of the LLC a council member would need to own more than 10% of the outstanding OC shares in order to have more than a 5% interest in the LLC. It is extremely unlikely OC share ownership constitutes a “substantial financial interest” in any contract between the City and the LLC². However, as discussed below, all three city officials should declare a financial interest.

The conflict of interest ordinance anticipates a two step process. The first step is for the council member to “make known”; “any financial interest” the Council member has in a contract or matter being voted on. UCO 2.88.040(a). The second step is a determination by the city attorney regarding whether the council member may vote or participate³ in the matter. UCO 2.88.040(c). Thus, the ordinance anticipates the city attorney making the determination regarding whether a declared financial interest is a “substantial” financial interest “direct or indirect”.

The requirement of a “declaration” of a “substantial” financial interest is required by state law. AS 29.20.010. State law does not mandate declarations of “any” financial interest, but the City is free to have stricter conflict of interest requirement than the minimum requirements established by state law. Unalaska has chosen to do so. Any financial interest in a City Council action must be declared. This also extends to any financial interest the spouse of a City Council member has in a matter being considered by the City Council.

In our opinion, City Council members who are OC employees, and who have in the past received annual bonus payments based in part on OC’s annual income or profit, have some financial interest in the purchase of electricity by the City from the LLC. Similarly, elected officials who are OC shareholders have “some” financial interest in the commercial success of the LLC.

For these reasons, OC employees or shareholders who are elected officials should declare the fact they are OC employees or shareholders, and also identify how frequently they have received bonus payments from OC based on OC’s financial performance (OC employee), the

² It is our understanding that the “standard” number of OC shares held by those eligible to be OC shareholders is 100 shares. Shares can be acquired through inheritance or gift. Per the original articles of incorporation OC is authorized to issue up to 100,000 shares. We do not know if OC limits the total number of shares that may be held by any one eligible shareholder. As a practical matter it is virtually impossible for one individual to accumulate an ownership interest of 10% in OC.

³ Participation includes a broader range of activities than voting. Participation would include discussions related to the proposed contract and the Project that occur at City Council meetings.

number of OC shares they own and the total number of issued OC shares (shareholders). This disclosure can be made orally at a public meeting or in writing directed to the City Clerk. Once the declarations have been made we can finalize the opinion required by UCO 2.88.040(C).

There is another issue related to the conflict of interest question. This involves the legal concept of fiduciary duty. Council members owe a fiduciary duty to Unalaska residents. OC board members owe a fiduciary duty to OC shareholders. In some instances what is in the best interest of OC shareholders (such as the LLC receiving a high price for electricity sold to the City) will not be in the best interest of city residents (who are customers of the city's electric utility). This is not addressed by city code provisions or Title 29. It is a matter for individual consideration of each official as to what is "right". Presumably the contract will be negotiated at arm's length and will result in an agreement being recommended for approval by city staff. Nevertheless, OC board members who also serve the public as elected officials will need to think long and hard as to whether there is a conflict in their fiduciary duties which requires them to request to be excused from voting on an LLC-City contract for purchase of energy from the Project.

If you, the Mayor or the City Council have any questions about this topic, please let me know.