

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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Case Number: CPF-15-514188

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ORDER

MICHAEL J. AGUIRRE VS. CALIFORNIA PUBLIC UTILITIES COMMISSION ET AL

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Superior Court of California
County of San Francisco

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3 SUPERIOR COURT OF CALIFORNIA
4 COUNTY OF SAN FRANCISCO

FEB 09 2016

5 MICHAEL AGUIRRE

Case No.: CPF-15-514188

CLERK OF THE COURT
BY: *[Signature]*
Deputy Clerk

6 Plaintiff,

7 vs.

8 CALIFORNIA PUBLIC UTILITIES
9 COMMISSION, et al.

ORDER SUSTAINING DEFENDANT'S
DEMURRER IN PART AND OVERRULING
DEFENDANT'S DEMURRER IN PART

10 Defendants.

Date: December 22, 2015
Time: 9:30 a.m.
Dept: 302
Judge: Ernest H. Goldsmith

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13 The Demurrer of Defendant California Public Utilities Commission (CPUC) came on
14 regularly for hearing before the Honorable Judge Ernest Goldsmith on December 22, 2015.

15 Plaintiff Michael Aguirre appeared in pro per and Jonathan Koltz appeared as attorney for
16 Defendant CPUC. This Court, having read and considered the supporting and opposing points
17 and authorities and having heard and considered the arguments of counsel, finds as follows:

18 I.

19 The San Onofre Nuclear Generating Station was closed after it leaked radiation in 2012.
20 The California Public Utilities Commission (CPUC) regulated the plant. Southern California
21 Edison (SCE) and San Diego Gas and Electric Company (SDGE) owned the plant. The costs of
22 the shutdown and loss due to the shutdown exceeded \$4 billion. The CPUC approved SCE
23 assigning \$3.3 billion of these costs to utility ratepayers. This agreement was reached in a hotel
24 room in Warsaw, Poland, at an *ex parte* meeting between former CPUC President Michael
25

1 Peevey (“Peevey”) and former SCE executive Stephen Pickett (“Pickett”). The agreement was
2 outlined on hotel stationary. The CPUC adopted the agreement, stopped investigating the plant’s
3 closure and offered \$25 million to fund environmental research at the University of California.

4 The CPUC then refused to comply with a warrant obtained by the California Office of the
5 Attorney General for records concerning (1) Pickett and Peevey’s meeting in Poland; (2) the
6 agreement to close the San Onofre power plant; (3) the agreement to end the investigation into
7 why the plant closed; (4) the simultaneous agreement to donate research funds; and (5) the
8 agreement to shift \$3.3 billion of SCE and SDEG losses to its ratepayers. (*Ibid.*) According to
9 the Attorney General’s warrant application, probable cause existed to show that the CPUC
10 violated sections 1701.1(c)(4) and 2110 of the Public Utilities Code.¹ (*Ibid.*) The CPUC claims
11 it refused to comply with the warrant because of outstanding federal subpoenas and other records
12 requests. The CPUC did not offer a timeline for complying with the warrant. (*Ibid.*)

13 The Attorney General’s warrant asked for CPUC records that are nearly identical to those
14 records that Plaintiff presently seeks. The CPUC withheld records from the Attorney General
15 and from Plaintiff for nearly identical reasons. Plaintiff contends that the CPUC violated the
16 Public Records Act. (Govt. Code, § 6251 *et seq.*) Plaintiff also contends that the CPUC violated
17 Government Code section 995, by failing to hold a public meeting about whether to hire criminal
18 defense lawyers to defend the CPUC. Plaintiff filed his writ of mandamus with the San
19
20

21 ¹ Public Utilities Code section 1701.1(c)(4) establishes that “ ‘[e]x parte communication,’
22 . . . means any oral or written communication between a decisionmaker and a person with an
23 interest in a matter before the commission . . . that does not occur . . . on the official record of
24 the proceeding on the matter.” Public utilities Code section 2110 establishes that “[e]very public
25 utility . . . who procures, aids, or abets any violation by any public utility of any provision of the
California Constitution . . . or who . . . procures, aids, or abets any public utility in the violation
or noncompliance in a case in which a penalty has not otherwise been provided, is guilty of a
misdemeanor”

1 Francisco Superior Court to provide a public forum afforded by a trial. The CPUC contends that
2 this Court lacks subject matter jurisdiction under Public Utilities Code section 1759.²

3 II.

4 The “failure to exhaust administrative remedies is a proper basis for demurrer.” (*Gupta*
5 *v. Stanford University* (2004) 124 Cal.App.4th 407, 411.) There are exceptions, however, to this
6 requirement. The “[f]ailure to exhaust administrative remedies is excused if it is clear that
7 exhaustion would be futile” because “the party invoking the exception ‘can positively state that
8 the [agency] has declared what its ruling will be on a particular case.’ ” (*Jonathan Neil & Assoc.*
9 *Inc. v. Jones* (2004) 33 Cal.4th 917, 936.)

10 The CPUC contends that their demurrer should be sustained because Plaintiff has failed
11 to exhaust administrative remedies. Viewing the record as a whole, the Court finds that
12 Plaintiff’s failure to exhaust administrative remedies would be futile. (See Code Civ. Pro.
13 § 452.) The CPUC has declared its refusal to provide the requested documents to both the
14 Plaintiff and the California Attorney General. Plaintiff has requested the same type of
15 documents that the CPUC refused to provide to the Attorney General pursuant to a warrant. The
16 CPUC declined to provide a timeline to Plaintiff or the Attorney General. The CPUC offered
17 nearly identical explanations to Plaintiff or the Attorney General for not providing the requested
18 documents.

19 The Court has reviewed extensive correspondence between the CPUC and Plaintiff.
20 There is a clear refusal to provide the requested documents beyond what has been produced. It
21 would be futile to require Plaintiff to invoke CPUC procedures to request that which has been
22 withheld. Accordingly, the Court finds failure to exhaust administrative remedies does not bar
23

24 ² Unless otherwise mentioned all statutory references are to the Public Utilities Code.
25

1 Plaintiff's action brought pursuant to the Public Records Act. The CPUC's demurrer is
2 overruled on this ground.

3 III.

4 At issue before this Court is a demurrer brought by the CPUC, the basis of which is that
5 the superior court does not have primary jurisdiction over claims against the CPUC because
6 section 1759 reserves jurisdiction to the Court of Appeal. A demurrer tests the legal sufficiency
7 of a complaint. (*Grinzi v. San Diego Hospice Corp.* (2004) 120 Cal.App.4th 72, 78.) In a
8 demurrer the Court must accept all material facts pled by a plaintiff as true. (*Serrano v. Priest*
9 (1971) 5 Cal.3d 584, 591.) The allegations made in a demurrer must be liberally construed to
10 promote substantial justice between the parties. (Code Civ. Pro., § 452.)

11 Plaintiff has requested public records from the CPUC. The request has been denied.
12 Plaintiff brings this claim under the Public Records Act, Government Code section 6251 *et seq.*,
13 which provides that Californians have a fundamental right to access public records.
14 (*International Federation of Professional and Technical Engineers, Local 21, AFL-CIO v.*
15 *Superior Court* (2007) 42 Cal.4th 319, 347.) The California Constitution, Article 1, Section
16 3(b)(2) mandates that courts must narrowly construe statutes that limit access to public records.
17 Plaintiff requests CPUC records and documents related to the shifting of \$3.3 billion of utility
18 company losses to the public ratepayers.

19 The basis of the CPUC's demurrer is that PUC section 1759 provides that jurisdiction
20 over claims against the CPUC involving the Commissions official duties lies exclusively with
21 the Court of Appeal and the California Supreme Court.³ To determine the reach of section 1759,
22

23 ³ There are significant exceptions to the application of section 1759. Section 1759 does
24 not bar superior court jurisdiction over claims against entities not subject to CPUC regulation
25 (*Hartwell Corporation v. Superior Court* (2002) 27 Cal.4th 256, 280); claims that a utility has a
easement for a power line (*Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225,

1 the foundational question before this Court is to define what is an official duty. The California
2 Supreme Court has answered that question in *Hartwell Corporation v. Superior Court* (2002) 27
3 Cal.4th 256. The *Hartwell* court held that “when read in context with the entire regulatory
4 scheme, section 1759 must be read to bar superior court jurisdiction that interferes with the
5 CPUC’s performance of its regulatory duties” (*Id.*, at pp. 280-81.) *Hartwell* is consistent
6 with the California Supreme Court’s earlier decision in *Morel v. Railroad Commission of*
7 *California* (1938) 11 Cal.2d 488, which limited the authority of the CPUC to matters that are
8 “cognate and germane” to the regulation of public utilities. (*Id.*, at p. 492.) Accordingly, this
9 Court must interpret “official duties” as stated in section 1759 as regulatory duties.

10 The CPUC asks this Court to sustain the CPUC’s demurrer based on *Disenhouse v.*
11 *Peevey* (2014) 226 Cal.App.4th 1096, and *Pegastaff v. Pacific Gas and Electric Company* (2015)
12 236 Cal.App.4th 374, 377.) The Court in *Disenhouse* held that the superior court lacked
13 jurisdiction to hear whether the CPUC violated the state’s open meeting law. (*Disenhouse,*
14 *supra*, at p. 1099.) In that case, a person was excluded from a CPUC Commissioner’s meeting.
15 The Court did not discuss the meaning of “official duties” under section 1759. The instant case
16 is not about public meetings, it is about the Public Records Act. Similarly, the Court in *Pegastaff*
17 held that the superior court lacked jurisdiction to decide whether the CPUC discriminated against
18 a contractor by allowing a utility to prefer minority and disabled veteran-owned businesses in the
19 public utility sector. (*Pegastaff, supra*, at p. 390.) *Pegastaff* is in agreement that the CPUC’s
20 jurisdiction only extends to regulatory matters. (*Id.*, at p. 1315, citing *Hartwell, supra*, 27
21 Cal.4th at p. 281.) A policy to prefer minority contractors in the public utilities sector can well

22 231); and consumer fraud claims (*People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132,
23 1138). Superior courts may also hear claims against a utility company for injuries from stray
24 voltage. (*Seacrist v. Southern California Edison Company* (Cal. Ct. App., Jan. 27, 2016) 16 Cal.
25 Daily Op. Serv. 1100; see also *Wilson v. Southern California Edison Company* (2015) 234
Cal.App.4th 123, 151.)

1 be said to arise under a regulatory duty. The instant case arises under entirely different factual
2 and statutory grounds than *Disenhouse* and *Pegastaff* which do not contradict this Court's
3 finding that official duties are defined as regulatory duties.

4 The CPUC takes the extraordinary position that the passing of utility company losses to
5 ratepayers is simply an ordinary rate setting matter and therefore regulatory. This Court
6 disagrees. The instant case is factually and legally distinguishable from a regulatory matter.
7 First, there is a violation of the Public Records Act by withholding public records. Second, there
8 is undisputed evidence consisting of documents seized by a search warrant from former CPUC
9 President Peevey, including a memorandum memorializing an ex parte agreement between
10 Peevey and SCE shifting \$3.3 billion of utility company losses to ratepayers which has
11 implicated violations of Sections 1701.1(c)(1) and 2110, the latter being a criminal statute. To
12 consider this merely an ordinary rate setting regulatory matter would do violence to the right of
13 citizens in a democracy to know the actions taken by their public officials, the reasons for them,
14 and the circumstances under which they were taken.

15 This Court is mandated to interpret official duties as set forth in section 1759 as
16 regulatory duties. Accordingly, this Court finds that withholding recordings involving allegedly
17 illegal secret ex parte deals between CPUC officials and utility companies in violation of the
18 Public Records Act is not a regulatory function of the CPUC. Also, this Court finds it is not
19 reasonable to believe that the Legislature intended that section 1759 should be invoked to
20 insulate CPUC officials accused of illegal acts from public scrutiny in a trial court. Plaintiff may
21 seek relief at a trial in the superior court. Defendant CPUC's demurrer to Plaintiff's claim under
22 the Public Records Act is overruled. This finding is limited to a Public Records Act request to
23 the CPUC for records about non-regulatory actions.

1 IV.

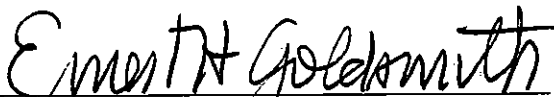
2 Lastly, Plaintiff contends that the CPUC violated Government Code section 995.8
3 “because it is providing a criminal defense to unidentified current and former CPUC
4 agents . . . without determining in a duly noticed public meeting that providing such a defense in
5 a criminal matter would be in the best interests of the public entity” (Plaintiff’s Petition for
6 Writ of Mandamus, p. 10.)⁴ Plaintiff seeks a declaration from this Court that the CPUC must
7 disclose for whom it is providing a criminal defense in a public meeting. No portion of
8 Government Code section 995 requires a public meeting. It is not up to the Courts “to add
9 elements to a statutorily defined crime. That task is best left to the Legislature.” (*People v. Reed*
10 (2000) 78 Cal.App.4th 274, 284.) This Court sustains without leave to amend Defendant
11 CPUC’s Demurrer to Plaintiff’s claim under Government Code section 995.8.

12 V.

13 Defendant CPUC’s Demurrer to Plaintiff Aguirre’s claim under Government Code
14 section 995.8 is sustained without leave to amend. Defendant CPUC’s Demurrer to Plaintiff
15 Aguirre’s claim under the Public Records Act is overruled.

16
17 IT IS SO ORDERED.

18 DATED: February 8, 2016

19 
20 ERNEST H. GOLDSMITH
21 Judge of the Superior Court

22
23 ⁴ “[A] public entity may provide for the defense of a criminal action or proceeding . . . if:
24 (a) The criminal action or proceeding is brought on account of . . . the public entity; and (b) The
25 public entity determines that such defense would be in the best interests of the public entity”
(Govt. Code § 995.)