



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking to Improve
Public Access to Public Records Pursuant
to the California Public Records Act.

R. 14-11-001

(Filed
November 6, 2014)

**IMPERIAL IRRIGATION DISTRICT'S COMMENTS ON PROPOSED
DECISION RELATING TO ACCESS TO PUBLIC RECORDS**

Michael J. Aguirre, Esq.
maguirre@amslawyers.com
Maria C. Severson, Esq.
mseverson@amslawyers.com
AGUIRRE & SEVERSON, LLP
501 West Broadway, Suite 1050
San Diego, CA 92101
Telephone: (619) 876-5364
Facsimile: (619) 876-5368
Attorneys for Imperial Irrigation District

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I. PROPOSED DECISION MUST BE CHANGED

In September 2004, Senate Bill 1488 was passed aligning records practices of the California Public Utilities Commission (CPUC) with the Public Records Act, in favor of public disclosure and stating that all information furnished by a public utility, or its subsidiary, affiliate or holding company, shall be made public unless a provision of the PRA or the CPUC requires it to be withheld.

The proposed June 28, 2016 decision in this proceeding claims to implement an updated and clarified process for submitting potentially confidential documents to the CPUC based on the process adopted in the prior Decision (D.) 06-06-066. It would be more accurate to say the Proposed Decision continues the CPUC’s 12-year defiance of a law that required the Commission to conform its CPUC document access policies to the Public Records Act.

The proposed rule continues the piecemeal approach the CPUC has adopted over the last 12 years to give apparent, but not actual, compliance with the Public Records Act. On June 29, 2006 -- two years after Senate Bill 1488 was passed into law -- the CPUC issued an “interim” Decision (D. 06-06-066) that continued

policies allowing utilities to withhold from public disclosure documents submitted to the CPUC to support its own decisions. Instead of reading legal authority broadly to expand access to CPUC records, the CPUC practice is to read exemptions broadly to *restrict* access. This practice contradicts the California Constitution. See Art I, Sec 3 (authority shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access)

The CPUC continues to read Pub. Util. Code § 583, which empowers the CPUC to release documents filed by utilities with the CPUC, to say such documents cannot be released. Instead, the CPUC has allowed a provision protecting confidentiality of “market sensitive [procurement] information” to provide blanket secrecy for documents that have no material impact on a procuring party's market price for electricity. 2006 Cal. PUC LEXIS 222, *10-12.

The CPUC Commissioners propose to continue their policies that systematically deny the people’s “right of access to information concerning the conduct of the people's business [at the CPUC].” Cal. State Const. Art I, Sec 3. The meetings at which CPUC decisions are made and the writings of CPUC public officials making them are not “open to public scrutiny”; accordingly, they are in violation of the State Constitution. See, Art I, Sec 3 (b)(1).

II. CPUC HISTORY OF NOT COMPLYING WITH THE PUBLIC RECORDS ACT

The CPUC has a long history of not complying with the California Public Records Act. In 1968, the California Legislature passed and Governor Reagan signed into law the California Public Records Act. Govt. Code §§ 6250 - 6276.48. The Legislature declared that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state. Govt. Code § 6250. A public record was defined to include “any writing containing information relating to the conduct of the public's **business prepared,**

owned, used, or retained by any state or local agency regardless of physical form or characteristics. " Govt. Code § 6252(e).

Under the law, “every person has a right to inspect any public record” with defined exceptions. “Any reasonably segregable portion of a record shall be available for inspection by any person requesting the record after deletion of the portions that are exempted by law.” Govt. Code § 6253(a). “Except with respect to public records exempt from disclosure by express provisions of law [the CPUC], upon a request for a copy of records that reasonably describes an identifiable record or records, shall make the records **promptly available** to any person...” Govt. Code § 6253(b). The CPUC “may, adopt requirements for itself that allow for faster, more efficient, or **greater access to records than prescribed by the minimum standards**” set forth in the Public Records Act. § 6253(e).

When a member of the public requests to inspect a public record or obtain a copy of a public record, the public agency, in order to assist the member of the public make a focused and effective request that reasonably describes an identifiable record or records that reasonably describes an identifiable record or records, is required to assist the member of the public, among other things. Govt. Code § 6253.1(a) The Legislature directed that the CPUC under the Public Records Act “shall establish written guidelines for accessibility of records.” Govt. Code § 6253.4(a). The principle is to help, not hinder, the public access records.

Forty-eight years after the PRA was enacted, the CPUC issued an Order Instituting Rulemaking (OIR) for the PRA in November 2014 in which the CPUC admitted its existing record access order (General Order 66-C) adopted in 1972 “**does not articulate the process and procedure for obtaining Commission records.**” In the OIR, the CPUC admitted General Order 66-C “identifies several exemptions from public disclosure that are inconsistent with the [C]PRA.” In the OIR, the CPUC announced its intent “to address improving the public’s access to

records that are not exempt under the California Public Records Act or other state or federal law.” R.14-11-001, p. 1.

Detailed information shows the CPUC has not complied with the fundamental requirements of the Public Records Act. Instead, the CPUC systematically keeps secret the information relating to the conduct of the public's **business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.**

III. CIRCLE OF SECRECY AT THE CPUC

Recent history of CPUC catastrophes show the CPUC operates in a circle of secret meetings and concealed documents, including (1) the San Bruno explosion that killed eight people; (2) the radioactive leak at San Onofre, the failure of San Onofre steam generators, the decision to kill the CPUC investigation, and the resulting imposition of billions of dollars of costs on utility customers; it took a criminal search warrant to uncover some of the facts, and the governor and CPUC refuse to make public over 120 secret communications; (3) the failure to issue an order instituting investigation into the Aliso massive gas leak and the report claiming the Aliso gas field closure would cause blackouts; and (4) the current attempt to turn over control of the California Independent System Operator (CAISO) to private for-profit interests.

IV. SOME OF THE PRESSURE TO KEEP RECORDS SECRET COMES FROM THE WALL STREET UTILITIES

The stock exchange-traded electric and gas utilities are exercising heavy influence over the CPUC. As Governor Hiram Johnson warned 100 years ago, instead of “regulation of the [utilities], as the framers of the new Constitution fondly hoped, the [utilities have] regulated the State.” The CPUC has a wholesale disregard of the Public Records Act.

The three stock exchange-traded companies -- San Diego Gas & Electric (SDG&E), Southern California Edison (SCE) and Pacific Gas & Electric (PG&E) -- dominate the CPUC with a combined market capitalization of \$66 billion. Over **22 million utility customers paid over \$117 billion** to the three utilities from 2012 to 2015. The utilities, during the same period, paid out over \$7.5 billion in dividends.

A. CPUC OPERATES UNDER WALL STREET

CPUC Commissioner Ferron reported the Wall Street money managers with over \$3 trillion in capital are deeply focused on CPUC policies. It was the “collective judgment” of this group of money managers that now-former CPUC President Peevey had “rehabilitated” California’s image as a “banana republic.” Through “the actions of this Commission over a wide range of cases watched closely by the investment community, California has moved from being a high-risk outlier to being somewhere in the middle of the pack in terms of risk perception.” Peevey was the principal architect of the CPUC policies used to keep secret the records submitted by the companies the money managers had invested in and wished to hide from public view. Commissioner Ferron in September 2012, asked for Wall Street’s research as a quid pro quo for meeting with Morgan Stanley bankers, and in 2013, delivered a threat from money managers who profited under those CPUC policies.

Wall Street players dominate the CPUC according to other evidence. For example, “many research products reach [CPUC President Picker’s] inbox in great profusion daily.” Picker is the author of this proposed decision. A sample of 7,500 communications to and from Wall Street show its utility investor interests provide the operative body of knowledge for CPUC decisions, with information from Wall Street flowing into the CPUC, and inside information flowing out of the CPUC in a number of ways: (1) Commissioners meet in secret in New York and

San Francisco with Wall Street players to discuss pending regulatory matters; (2) Wall Street analysts, investment bankers, and utility investors direct a constant flow of ex parte investment information to CPUC Commissioners regarding matters pending at CPUC; and (3) Wall Street utilities fund free travel to foreign countries for Commissioners to decide issues in secret.

Former CPUC Commissioner Michael Peevey's emails and calendar show Peevey regularly visited key Wall Street players while he served as CPUC President. On March 12, 2012, Credit Suisse Vice President Gavin H. Wolfe wrote that Peevey would be "flying into NY in the afternoon, doing a sellside analyst dinner, then the next morning a big open investor breakfast presentation, and then a run around the city seeing the big CA utility investors." Wolfe continued: "I will likely be with you [Peevey] the entire trip as would Don Eggers, our research analyst. I will call you to discuss and other matters. Best G."

CPUC President Picker picked up with the Wall Street players where dethroned President Peevey left off. In May 2014, Peevey asked Bank of America investment banker Gavin Wolfe to help Picker "**to get a read on the investment community view of California regulation.**" Peevey asked Wolfe to set up "a luncheon or other meeting with him and several of your colleagues, not only from BofA, but other investment houses." This was documented in secret writings and meetings, including Picker's Wall Street insider meetings in June 2014 at the secret Bank of America roadshow with more than 20 Wall Street power players.

Wall Street power players also came to San Francisco to hold secret meetings with CPUC officials. On October 31, 2013, CitiBank announced its "2014 annual investors' trip to California" with 15-20 representatives of large institutional investors because CitiBank was "extremely focused on the regulatory environment in the state." CitiBank executives scheduled meetings with Commissioners Peterman, Ferron and Florio (advisers) on January 15, 2014.

Wall Street's Greg Gordon and Commissioner Ferron met on June 18, 2013 on the topics of discussion would include: "[T]he legal framework regarding the CPUC's ability and flexibility to implement fines and penalties."

V. CPUC SECRET BUSINESS IN RESORTS AND FOREIGN LANDS

The CPUC Commissioners and officials regularly conduct official business at resorts in California and foreign lands paid for by utility-funded fronts like the California Foundation for the Environment and Economy (CFEE). Since 2007, they have held 41 "conferences" mostly in California's wine country (Napa and Sonoma) where private accommodations were provided to CPUC Commissioners and utility executives to conduct CPUC business away from public scrutiny. These sessions are held for the ostensible purpose of discussing general issues, but often serve as nothing more than pretexts for collusive decision making.

Additionally, there have been 25 CFEE-sponsored and utility-paid junkets to foreign countries since 2000 for CPUC and other state officials in cities in Europe, Australia and New Zealand, Asia, Africa, South America and Canada.

Wall Street's influence over the CPUC reaches into the governor's office and the appointment of CPUC Commissioners. On January 11, 2011, a Wall Street analyst reported potential new appointees to the CPUC did not align with "constructive regulatory policies." On January 27, 2011, JP Morgan downgraded PG&E from a "buy" to "hold." The action was used to spook the governor. CPUC President Peevey told PG&E executives: "As I suggested before, this info should go to the Governor's office, probably best to Nancy McF. Jerry has to be made aware that actions have consequences and the economy is best off with a stable utility sector." Utility executive Brian Cherry wrote Peevey: "Nancy asks if you have any names you would recommend. You can call her directly if you'd like." "Nancy" was a reference to Nancy McFadden, the PG&E lobbyist the

governor appointed as his executive secretary. In March 2011, Jerry Brown obliged Wall Street and appointed long-time investment banker, Mark Ferron.

VI. CPUC IN SECRET SCHEMES WITH OTHER AGENCIES

The proposed decision fails to address another category of secret documents that need to be released: those that involve CPUC planning with other agencies from which disfavored agencies are excluded. One such example involved the Imperial Irrigation District (IID).

The IID is a public entity organized in 1911 under the California Irrigation District Act (Div. 11 Cal. Water Code). The IID is also a “balancing authority,” with the power under law to provide electric service within its 6,483-square-mile boundaries. IID serves electricity to ratepayers in Imperial County and parts of Riverside and San Diego counties. The IID balancing area adjoins the California Independent Systems Operator (CAISO) balancing area.

Over **8,480** megawatts (MW) of renewable energy have been identified as available for development in Imperial County, according to California’s lead energy agencies. Further, the United States government’s primary laboratory for renewable energy, energy efficiency research, and development -- the National Renewable Energy Laboratory (NREL) -- has identified Imperial County as one of the most favorable regions for solar and geothermal energy in the nation, as shown here on two NREL energy potential maps.

Yet, the CPUC worked with the California Independent Systems Operator (CAISO) in secret to deny IID access to the CAISO transmission lines in order to move renewable energy over to California’s major load areas. These meetings were held at swank locations like the California Club in downtown Los Angeles,

where a July 2013 meeting started with “drinks at six and dinner at 7” with CAISO president Berberich, CPUC President Peevey, and the governor’s staff member.

CPUC replacement President Picker also used secret meetings to conduct much of his CPUC business. One such example is documented in an email chain relating to Picker’s opposition to IID gaining access to the California grid for the Imperial County renewables. The email chain started on August 8, 2014 (4:09 p.m.) with CAISO Director of State Government Affairs Mary McDonald writing to Governor Brown’s Deputy Legislative Secretary Martha Guzman-Aceves and related to IID’s efforts to increase transportation of its geothermal, solar and other renewable energy sources through CAISO to energy supply markets.

On August 8, 2014 at 4:22 p.m. -- thirteen minutes after Ms. McDonald sent her email – CAISO Vice President for Policy and Client Services Karen Edson forwarded Ms. McDonald’s email to CPUC Commissioner Picker (previously on the governor’s renewable energy staff) accusing IID General Manager Kelley of making “incorrect representations to the Legislature.” Commissioner Picker sent a reassuring email to ISO policy chief Edson mocking, but not copying, GM Kelley.

Again, the work of this special group was carried out in secret, with SCE (Edison) replacing most of San Onofre’s lost power with electricity based on natural gas. One secret meeting occurred on June 17, 2014 at the home of Air Resources Board Chair Mary Nichols with an email from California Energy Commission (CEC) Chair Weisenmiller notifying participants Mary Nichols, CEC Executive Director Rob Oglesby, CEC Commissioner Janea Scott, CEC Chair Bob Weisenmiller, CAISO President Steve Berberich, CPUC Commissioners Peevey and Picker, and Governor Brown Senior Adviser Rechtschaffen.

VII. CAISO MERGER, PRIVITIZATION OF THE CAISO BOARD

The CPUC, under Commissioner Florio, is pushing hard behind closed doors to privatize governance of CAISO. Another private corporation, PacifiCorp, proposes to take the CAISO private so that energy moguls can control its policies. The California governor appoints the CAISO board under California state law. PacifiCorp proposes the regional board be appointed by those who own or control energy sources sold into the CAISO markets.

Again, much of the planning to implement the proposal to make private the CAISO board is done behind closed doors. For example, secret meetings were organized in Denver for June 21, 2016, following the format of the now-infamous California Club and Warsaw, Poland meetings (where Peevey and SCE executive agreed to kill the San Onofre investigation). The two June 21 meetings were adjuncts to a previously scheduled conference, one at a hotel with California officials from the governor's office, CPUC Commissioners, and CEC head, and a secret dinner meeting in Denver that night "discussing the Regional ISO governance issues."

VIII. THE CPUC MUST CHANGE ITS APPROACH TO THE PUBLIC RECORDS ACT

The CPUC continues to operate its Public Records Act policies on the following erroneous assumptions: (1) Confidentiality protections are essential to avoid a repetition of electricity market manipulation; (2) There should be a window of confidentiality (approximately one year backward and three to five years forward) for confidential procurement and related data.

Secrecy was more the *cause* of manipulated electricity prices than their *cure*. There was no empirical justification for years of protection of procurement and related data. Again, secrecy -- rather than transparency -- creates opportunities to manipulate prices though the wrongful exercise of market power.

Transparency—the real time, public dissemination of trade and quote information—plays a fundamental role in the fairness and efficiency of the secondary markets. Transparency helps to link dispersed markets and improves the price discovery, fairness, competitiveness and attractiveness of U.S. markets. Any justification for procurement secrecy has long past, given the excess capacity in California’s electricity markets. If in doubt, the records should be disclosed.

A. The Proposed Decision Needs to Conform to the Public Records Act

In the proposed decision, the CPUC again writes from the perspective of the person seeking confidentiality, not from that of the people seeking public records used by the CPUC when making its decisions. The proposed decision is not in conformity with the Public Records Act; rather, it does two things: (1) it implements an updated and clarified **process for submitting potentially confidential documents** to the CPUC; and (2) it establishes **guidelines for the process that the Commission will use in determining whether a potentially confidential document can be disclosed**.

However, the proposed decision makes a false distinction between writings submitted to the CPUC and those it creates. The decision should be revised to include the definition of public records in the Public Records Act to include "any writing containing information relating to the conduct of the public's **business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics**. Govt. Code § 6252(e).

The proposed decision does not provide standards to be followed when a submitter seeks confidential treatment. What the CPUC proposes is the product of pressure from the powerful interests the CPUC is supposed to be regulating, not the power of law as established by the voters in the California State Constitution (Art I, Sec 3) or the Legislature in 1968 in the Public Records Act.

The proposed decision needs to be revised to include standards for those submitting public records who want confidential treatment. Many of these companies already live by such standards when they submit writings to the Securities & Exchange Commission (SEC). However, confidential treatment for documents submitted to the CPUC should be narrower than for those submitted to the SEC. The documents submitted to the CPUC are generally used to impose rates or costs on utility customers. Fundamental due process requires disclosure of documents used to make decisions that utility customers have to pay.

Many of the utilities are also filers with the SEC—such as SDG&E, SCE, and PG&E. Those companies are generally required to disclose a broad range of financial and non-financial information in registration statements, annual reports and other filings. The rules for obtaining confidential treatment incorporate the criteria for non-disclosure set forth in the Freedom of Information Act (FOIA). Like the Public Records Act for state agencies, FOIA requires all federal agencies to make specified information available to the public, including the information required to be filed publicly by SEC rules. FOIA, like the Public Records Act, contains specific exemptions.

The proposed decision should also be revised to require parties seeking confidential treatment from the CPUC to *justify* the request under the specific exemptions of the Public Records Act. The proposed new rule should set forth the specific substantive exemptions for the submitter seeking confidential treatment. It should require the following:

- 1. Confidential treatment cannot be granted if the information is publicly disclosed.***
The application must include an affirmative representation as to the confidentiality of the information it covers.
- 2. Required and/or material information must be disclosed, even if confidential.***

There are some instances in which confidential information cannot be treated as such for basic policy reasons. For example, information about unlawful conduct such as that related to the secret meeting in Warsaw, Poland in the San Onofre case cannot be given confidential treatment. Information related to the crime fraud exception to confidential treatment cannot be given confidential treatment. Information used to impose rates on utility customers cannot be given confidential treatment.

3. *The application should not be overly broad.*

Applicants seeking confidentiality should be selective when identifying the information covered by their application. Frequently, applications are overly broad and attempt to cover information that is not confidential under the Public Records Act. The information covered by an application should include no more text than necessary to prevent competitive harm to the requester. The request for confidentiality should cover only those words and phrases for which confidentiality is necessary and supported by the Public Records Act. The request for confidentiality that covers lengthy portions of agreements will generally be denied. For example, the omission of an entire section is not appropriate without an analysis that specifically addresses: (i) why the disclosure of the existence of the section would be commercially harmful; and (ii) why its disclosure is not necessary for the protection of utility customers and the public

4. *Applicants must set forth their analysis of the exemption.*

The rule should be amended to require that the application include a statement of the grounds for confidential treatment and refer to and analyze the applicable exemption(s) from disclosure under the Public Records Act. An agreement between the parties to keep information confidential does not itself provide adequate justification for confidential treatment. The CPUC's confidential treatment system should be premised on the disclosure requirements of the Public Records Act. The application should avoid conclusory statements and include a sufficient legal analysis, including case law references to seminal cases covering the definition of "confidential" information. The application should also be required to include a factual analysis of the basis for the exemption requested. Where the application relates to different types of information (for example, trade secrets and

financial provisions), the application should address each type separately.

5. *Applicants must specify a particular duration.*

The rule should require that application must request a specific date (year, month and day) for the termination of confidential treatment of the subject information. Further, the application must include an analysis that supports the period requested. This analysis must be specific to the confidential information and to the company and its business. The application should tie the term to specific provisions of, anticipated performance under, or other facts related to, the contract from which the confidential information is omitted.

6. *Applicants must identify clearly the information that is the subject of the application.*

The rule should require applicants to identify clearly the information that is the subject of a request for confidential treatment. To make sure there is a complete record as to which information has been granted confidential treatment, the application should describe each item or category of information omitted pursuant to the confidentiality request.

IX. CONCLUSION

James Madison taught us that knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce, or a tragedy, or perhaps both. If there is any hope of regaining the confidence of the public, the CPUC needs to conduct its business in the open, not in secret. The first step is to revise its decision to further public disclosure, not hinder it.

AGUIRRE & SEVERSON LLP

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By: /s/Maria C. Severson
Michael J. Aguirre
Maria C. Severson