BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms.	R.11-02-019 (Filed February 24, 2011)

RESPONSE OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) TO MOTION OF THE UWUA FOR A DIRECTIVE TO PROTECT EMPLOYEES PARTICIPATING DIRECTLY AS WITNESSES OR INDIRECTLY AS SOURCES OF INFORMATION

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Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure of the California Public Utilities Commission (the Commission), Southern California Gas Company (SoCalGas) submits the following Response to the Motion of the UWUA for a Directive to Protect Employees Participating Directly as Witnesses or Indirectly as Sources of Information (Motion for Preliminary Injunction), filed September 22, 2011.[1/]

[1/] Although UWUA attempts to analogize its requested order to a protective order issued by the Commission in A.10-12-005/006, the relief sought is a preliminary injunction that would preclude SoCalGas from taking any "adverse action," whether lawful or not, with respect to any employees that provides information in this Rulemaking. *See* Motion for Preliminary Injunction, Appendix B, Directive to Refrain from Adverse Action. Rule 10.1 of the Commission's Rules of Practice and Procedure limits discovery to matters that are not privileged and preclude discovery of information if the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence. Rule 10.1 of the Commission's Rules of Practice and Procedure also limit discovery to matters that are not privileged. Protective orders are normally adopted by the Commission to govern the exchange of confidential information between parties in a proceeding, and ensure that receiving parties maintain the confidentiality of confidential information. Protective restraining orders may also be issued to prevent abuse (*e.g.* elder abuse, domestic violence, etc.), but only where an affidavit shows proof of *prior* abuse. *See, e.g. Bookout v. Nielsen,* 155 Cal. App. 4th 1131, 1140-1141 (2007). Neither ground is relevant in this matter.

I. INTRODUCTION AND SUMMARY

In its Motion for Preliminary Injunction, the Utility Workers Union of America (UWUA) seeks an order of the Commission precluding SoCalGas from "tak[ing] any adverse action with respect to the employee status or employment at Southern California Gas Company of any person employed by Southern California Gas who appears as a witness on behalf of a party or otherwise furnishes information to the Commission or to any party in any phase of the proceedings in R. 11-02-019, The Gas Safety Rulemaking."[2] UWUA does not seek an order precluding *unlawful* action by SoCalGas, but rather, seeks an order precluding SoCalGas from taking any action to discipline an employee for any conduct whatsoever, simply because that employee has served as a witness or source of information in this proceeding.

Notably, this extraordinary request is not based on any alleged wrongdoing by SoCalGas. Indeed, the UWUA characterizes its motion as "a prophylactic, anticipatory measure,"[3] and admits that its motion "is not responding specifically to overtly offensive actions by [SoCalGas] or asserting at this time any specific adverse acts or threats with respect to any employee or representative by [SoCalGas]."[4] The motion appears to be entirely founded upon the false assumption that SoCalGas "retains the right unilaterally to obstruct the flow of information in this proceeding through threats—subtle or overt—of job-related retaliation."[5] As explained in greater detail below, this assumption that SoCalGas "retains the right" to retaliate against its employees ignores the numerous protections against retaliation afforded to employees under State and Federal law.

UWUA's Motion for a Preliminary Injunction must be denied. "A preliminary injunction is an 'extraordinary and drastic remedy' that should only be granted in limited circumstances,

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2/ UWUA Motion for Preliminary Injunction, Appendix B, Directive to Refrain from Adverse Action.

3/ *Id.*, p. 3.

4/ *Id.*, p. 2.

5/ *Id.*, p. 5. As explained in greater detail below, this assumption that SoCalGas "retains the right" to retaliate against its employees ignores the numerous protections against retaliation afforded to employees under State and Federal law.

and never awarded out of right."[6] In considering motions for preliminary injunctions or temporary restraining orders, the Commission "rel[ies] on standards similar to those usually applied to the consideration of a request for a temporary restraining order in civil court because those standards require sober reflection before granting such a request."[7] That standard is: "1. The moving party must be reasonably likely to prevail on the merits. 2. Such relief must be necessary to avoid irreparable injury. 3. A temporary restraining order must not substantially harm other parties. 4. Such relief must be consistent with the public interest.[8]

"[A]ll four criteria must be met before the Commission will issue a [temporary restraining order] or a preliminary injunction."[9] UWUA's motion fails on all counts.

First, UWUA fails to allege any unlawful or otherwise actionable conduct. Indeed, UWUA affirmatively states that its motion is "prophylactic" in nature and not based on any past or threatened conduct by SoCalGas. Second, UWUA does not, and cannot, allege any irreparable injury without the order. As this Commission has previously explained, adverse employment action is generally not irreparable.[10] In fact, UWUA's motion itself, if granted, may actually cause harm by misleading employees into believing that SoCalGas "retains the right" to retaliate against its employees. This mischaracterization of employment law and SoCalGas policy directly undermines SoCalGas' efforts ensure that its employees know and understand that retaliation against employees is against the law, against company policy, and not tolerated. The more appropriate approach is to direct SoCalGas and UWUA to provide any

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6/ Appendix B, Defendant California Public Utilities Commission's Opposition to Plaintiff's Expedited Motion for Interim Remedies and Economic Relief, p. 4, filed in *Hines v. CPUC*, U.S. District Court, North. Dist., Case No. C-10-2813, February 9, 2011 (quoting *Munaf v. Geren*, 553 U.S. 674, 689 (2008)). *See also*, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) ("It frequently is observed that a preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.") (emphasis in original)

7/ D.98-12-075, 84 CPUC 2d 155, 1998 Cal. PUC LEXIS 1016, pp. *14-*15.

8/ *Id.*, p. *16. *See also*, D.05-04-040, p. 3.

9/ D.94-04-082, 54 CPUC 2d 244, 1994 Cal. PUC LEXIS 339, p. *49.

10/ Union-represented employees at SoCalGas are subject to a collective bargaining agreement, which includes a mandatory and binding arbitration clause. If an arbitrator finds any adverse employment action unjustified, employees are to be made whole under the collective bargaining agreement. *See* Collective Bargaining Agreement, p. 156 ("Where an appeal through the grievance procedure is upheld, the Company agrees to adjust, in accordance with the findings, any employee's status and pay retroactively to the date of the filing of the grievance.")

employees who provide information in this proceeding, and their direct supervisors, with the proposed notice in Appendix A. Such a notice would avoid confusion and provide employees with useful information about how to raise a claim, should they believe retaliation has occurred. Third, if granted, UWUA's motion could substantially harm the interests of other parties by precluding SoCalGas from ensuring that its employees comply with the law, the directives of the Commission and/or company policies. This may be particularly problematic in this proceeding where the Commission is looking to enhance the safety of natural gas infrastructure in California. Fourth, the motion, if granted, would be against public policy. It would be against public policy for the Commission to issue an order precluding SoCalGas from ensuring that its employees comply with the law, the Commission's directives and internal company policies. In order to fulfill its obligation to maintain the safety and reliability of its system, it is essential that SoCalGas retain the ability to discipline its employees or take other appropriate actions to enforce employee compliance with applicable laws, regulations and internal policies.

Finally, the UWUA's motion is an inappropriate attempt to circumvent the Commission's rulemaking process. The Motion for Preliminary Injunction essentially seeks a pre-determination of issues, without the benefit of a factual record, that the Commission has expressly identified as within the scope of this Rulemaking—to wit, "Should the Commission adopt rules to protect utility employees from management retaliation for bringing information to the Commission regarding unreported utility public safety issues? Are such rules necessary or practical?" [11/] All parties must be provided with an opportunity to be heard, and the Commission must establish a factual record, before issuing a decision on these issues (as well as the other issues to be addressed in this proceeding). To pre-determine whether such a rule is needed and to adopt one without the benefit of a factual record and without giving all parties an opportunity to be heard, as proposed by UWUA, would be reversible error, as it would deny the parties to this proceeding (including SoCalGas) of their rights to due process.

[11/] Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms, issued February 25, 2011, pp. 14-15.

II. UWUA's Motion is Unwarranted and Must be Denied

A. UWUA Fails to Demonstrate a Likelihood of Prevailing on the Merits.

In its Motion for Preliminary Injunction, UWUA does not allege any actual or threatened unlawful conduct by SoCalGas.[12] In fact, UWUA admits that its motion is a "prophylactic, anticipatory measure"[13] and that it "is not responding specifically to overtly offensive actions by [SoCalGas] or asserting at this time any specific adverse acts or threats with respect to any employee or representative by [SoCalGas]."[14] In other words, through its motion, UWUA seeks to avoid conduct that has not occurred, is not threatened to occur and is entirely speculative. Because UWUA does not allege any actual or threatened conduct by SoCalGas to justify the issuance of a preliminary injunction, there is no basis for a finding by the Commission that UWUA is likely to prevail on the merits.

B. UWUA's Motion May Actually Cause Harm by Misleading Employees Into Believing that SoCalGas "Retains the Right" to Retaliate Against Employees.

"At a minimum, a plaintiff seeking preliminary injunctive relief must demonstrate that it will be exposed to irreparable harm."[15] "Injunctive relief is inappropriate in an employment case, where back pay is available as a remedy at law, should the plaintiff prevail on her claim."[16] The collective bargaining agreement between UWUA and SoCalGas guarantees that any employee grievant, successful on the merits, will be made whole. The Company already has consented and agreed to a contractually binding make-whole remedy that includes back pay, reinstatement, and other remedies.[17]

12/ Even if the UWUA motion did contain the necessary factual allegations, the motion by UWUA is not supported by any admissible evidence, and therefore, there is no factual record whatsoever upon which the Commission could grant the relief requested. *See* Pub. Util. Code § 1710 ("No documents or records of a public utility or person or corporation which purport to be statements of facts shall be admitted into evidence or shall serve as any basis for the testimony of any witness, unless the documents or records have been certified under penalty of perjury by the person preparing or in charge of preparing them as being true or correct.")

13/ UWUA Motion for Preliminary Injunction, p. 3.

14/ *Id.*, p. 2.

15/ Caribbean Marine Services Co. v. Baldridge, 844 F. 2d 668, 674 (1988).

16/ Appendix B, Defendant California Public Utilities Commission's Opposition to Plaintiff's Expedited Motion for Interim Remedies and Economic Relief, p. 7.

17/ *See, infra,* fn. 9.

UWUA does not assert any irreparable harm. Rather, it claims that its motion "recognizes practical reality and prevents misunderstanding on the part of employees about their rights to present information to their representatives and to the Commission, or potential misunderstandings by managers concerned to prevent open communication or confused about the desirability and importance of employee-provided information in the proceedings and deliberations of the Commission."[18]

The opposite is true. The UWUA motion mischaracterizes the robust body of existing law that protects employees from retaliation by employers, and argues that SoCalGas "retains the right" to retaliate against its employees, asserting that—"free flow of information is impossible if management retains the right unilaterally to obstruct the flow of information in this proceeding through threats—subtle or overt—of job-related retaliation. . . ."[19]

1. UWUA's Motion Ignores State and Federal Laws That Protect Employees

UWUA's assertion that SoCalGas "retains the right" to retaliate against its employees ignores the numerous California and Federal statutes already in place to protect employees from retaliation. For example, the California Whistleblower Act provides that:

> (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
>
> (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.[20]

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[18] Motion for Preliminary Injunction, p. 3.
[19] *Id.*, p. 5.
[20] Cal. Lab. Code § 1102.5 (a)-(b). (emphasis added)

Pursuant to the Whistleblower Act, the California Attorney General must maintain a whistleblower hotline to receive calls from aggrieved persons. All calls received by the Attorney General must be referred to the appropriate government authority for review and investigation.[21] Employers must post a notice regarding "employees' rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline described in Section 1102.7."[22] An employer who violates California's whistleblower protection law is "guilty of a misdemeanor" and an individual is subject to up to one year in jail and a $1,000 fine. Corporations may be fined up to $5,000, plus an additional civil penalty of up to $10,000 per violation.[23] Finally, the law permits employees to recover damages from the employer for any injury resulting from a violation of the statute.[24]

An employee may also file a common law claim for wrongful termination in violation of public policy. An employee need only show (i) a public policy; (ii) an adverse employment action that violates the public policy, such as a termination in retaliation for statutorily protected activity or for refusal to participate in illegal activity;[25] and (iii) damages resulting from the adverse employment action.[26] So called "*Tameny*" claims are broad and permit employees to name any number of public policy claims. The policy must be supported by a statutory or constitutional provision, it must inure to the public interest, it must have been well-established at the time of the discharge, and the policy must be "fundamental" and "substantial."[27] In addition to the statutory protection offered under Labor Code section 1102.5, the California Supreme

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[21] Cal. Lab. Code § 1102.7.

[22] Cal. Lab. Code § 1102.8.

[23] Cal. Lab. Code § 1102.5 and § 1103.

[24] Cal. Lab. Code § 1105. An aggrieved employee must file a claim with the California Labor Commissioner within six (6) months of the alleged violation. Cal. Lab. Code § 98.7. In *Campbell v. Regents of the Univ. of Cal.*, 35 Cal. 4th 311, 333-4 (2005), the California Supreme Court held that a litigant seeking damages under section 1102.5 is required to exhaust administrative remedies before the Labor Commissioner prior to bringing suit. The exhaustion of administrative remedies rule is "well established in California jurisprudence." *Campbell.*, p. 321. "'[T]he rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" *Id.*

[25] An "adverse employment action" may include actions other than termination.

[26] Tameny v. Atlantic Richfield Co., 27 Cal. 3d 167 (1980).

[27] *See* Kirby Wilcox, California Employment Law, § 60.04.

Court has held that discrimination against whistleblowing employees is contrary to public policy.[28] Thus, an employee may seek redress by filing a *Tameny* claim using as support the public policy outlined in Labor Code section 1102.5.

The California Occupational Safety and Health Act (Cal/OSHA) prohibits discrimination against employees who make oral or written complaints about workplace safety to either their employer or a governmental agency, or who institute or testify in proceedings under the Act.[29] In *Hentzel v. Singer Co.*, 138 Cal. App. 3d 290 (1982), the court explained that Section 6310 protects employees who complain in good faith about working conditions or practices that they reasonably believe to be unsafe.

An employee claiming a violation of Labor Code Section 6310 may file a complaint with the California Labor Commissioner. The employee must file the complaint within six months of the violation.[30] Potential remedies include rehiring or reinstatement, and reimbursement of lost wages and benefits, with interest and attorneys fees.[31]

Labor Code Section 1101 prevents employers from enforcing any rule or otherwise forbidding or preventing employees from participating in politics. In *Gay Law Students*

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[28] Sanchez v. Unemployment Ins. Appeals Bd., 36 Cal. 3d 575, 588 (1984). *See Colores v. Board of Trustees*, 105 Cal. App. 4th 1293, 1301, n.1 (2003) (Lab. Code § 1102.5 reflects broad public-policy interest in encouraging whistleblowers to report unlawful acts without fearing retaliation).

[29] *See* Cal. Lab. Code § 6310. ("(a) No person shall discharge or in any manner discriminate against any employee because the employee has done any of the following: (1) Made any oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative. (2) Instituted or caused to be instituted any proceeding under or relating to his or her rights or has testified or is about to testify in the proceeding or because of the exercise by the employee on behalf of himself, herself, or others of any rights afforded him or her. (3) Participated in an occupational health and safety committee established pursuant to Section 6401.7. (b) Any employee who is discharged, threatened with discharge, demoted, suspended, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because the employee has made a bona fide oral or written complaint to the division, other governmental agencies having statutory responsibility for or assisting the division with reference to employee safety or health, his or her employer, or his or her representative, of unsafe working conditions, or work practices, in his or her employment or place of employment, or has participated in an employer-employee occupational health and safety committee, shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer. Any employer who willfully refuses to rehire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.")

[30] *See*, *id.*, § 6317.

[31] *Id.*

Association v. Pacific Telephone & Telegraph Co., 24 Cal. 3d 458 (1979), the court found that "political activity" should be read broadly to include litigation, wearing armbands, and associating with others for the advancement of ideas. Alleged violations of Section 1101 are brought in the same manner as claims for alleged violations of California's Whistleblower Protection Act, Section 1102.5.

Several Federal laws also protect employee whistleblowers and may apply to activities related to proceedings before the Commission. The Energy Reorganization Act of 1974 Provision Protecting Employees[32] prohibits employers from discriminating against any employee who notifies his or her employer of an alleged violation of, refuses to engage in any practice made unlawful by, or participates in a proceeding under the Energy Reorganization Act or the Atomic Energy Act of 1954. The National Labor Relations Act[33] protects the rights of employees to engage in self-organization, collective bargaining, and *mutual aid and protection*. The act prohibits adverse employment action (*e.g.*, discipline or discharge) based on union activity or *other concerted activity* relating to the employees' common interests, or the exercise of any rights under the act. The United States Occupational Safety and Health Act Provision Protecting Employees[34] prohibits the discharge or discrimination against any employee because he or she has instituted or testified in any proceedings under the Act or exercised rights afforded by its provisions.

Given the numerous State and Federal provisions in place that expressly prohibit retaliation against employees, UWUA's assertion that SoCalGas "retains the right" to retaliate against employees is false.

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[32] 42 U.S.C. § 5851.
[33] 29 U.S.C. § 158.
[34] 29 U.S.C. § 660(c).

2. The Misinformation Set Forth in UWUA's Motion Should Be Corrected; SoCalGas Seeks To Accurately Inform Employees of their Legal Protections

UWUA's misstatement of existing law undermines SoCalGas' internal efforts to ensure that its employees know and understand that retaliation against employees is against the law, against company policy, and not tolerated. The Company's Code of Business Conduct, provided to all employees, devotes an entire page to "Reporting concerns – without retaliation" and states:

> You have an obligation to ask questions, raise concerns and to speak up if you see something that doesn't seem right so someone can investigate it, and address it quickly and properly. By raising concerns, you protect yourself, your co-workers and the company.[35/]

In order to protect its longstanding policy of encouraging its employees to come forward to report any conduct that is perceived as unethical, unlawful, and/or unsafe, SoCalGas must now act to ensure that employees are not confused or misled by UWUA's mischaracterizations of the law. Accordingly, in Appendix A to this Response, SoCalGas offers a proposed notice to be provided to all employees, and their direct supervisors, who testify or furnish information to the Commission in this proceeding. This proposed notice advises employees and managers of their respective rights and obligations under the law and directs them to appropriate processes for raising good faith claims of retaliation.

C. The Interests of Other Parties and the Public Interest Will Be Harmed if UWUA's Motion is Granted

While the parties may not all agree on the appropriate means of achieving the Commission's safety goals, the parties to this Rulemaking share an interest in developing rules and policies that will promote, rather than undermine, public safety.

[35/] Code of Business Conduct, p. 7.

In order to comply with Section 451[36] and provide safe and reliable natural gas service to its customers, SoCalGas must retain the ability to manage and discipline its employees for conduct that violates the law, the Commission's directives or company policy. Faced with a similar motion for a preliminary injunction that threatened its ability to discipline a single employee, the Commission recently argued this same point:

> Defendant CPUC risks an intangible, irreparable harm: the loss of the ability to maintain order and exercise its supervisory powers over its employees. . . Defendant should not be subject to an injunction forcing it to treat Plaintiff differently from other employees, simply because she has a pending lawsuit against it. An injunction will send a very dangerous, and potentially highly disruptive, message to other employees at the public agency: that employees can be shielded from discipline for inappropriate conduct so long as she first files a lawsuit, however poorly conceived and likely to be later dismissed by a Court. Given the extreme and irreparable harm Defendant would face in loss of ability to enforce the orderly conduct of its employees should the Court grant this injunction, compared to the basic, reparable harm Plaintiff may allegedly suffer in the absence of such relief, the equities soundly balance in favor of denying Plaintiff's request.[37]

The harm described by the Commission in the excerpt above would be greatly multiplied if UWUA's motion were granted. UWUA does not identify any particular employees that would be protected by its proposed order. Rather, it proposes to shield any and all employees that may furnish information to the Commission in this Rulemaking from any disciplinary action whatsoever.

The proposed order would provide complete immunity from any disciplinary action whatsoever to any employee who furnishes information in this proceeding, no matter how severe their misconduct. Thus, for example, an employee who had previously furnished information to the Commission could report to work visibly intoxicated, elect not to show up at work at all,

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[36] Section 451 of the Public Utilities Code requires that "[e]very public utility shall furnish and maintain such adequate, efficient, just and reasonable service, instrumentalities, equipment, and facilities… as are necessary to promote the safety, health, comfort and convenience of its patrons, employees, and the public."

[37] Appendix B, Defendant California Public Utilities Commission's Opposition to Plaintiff's Expedited Motion for Interim Remedies and Economic Relief, p. 8.

abuse a fellow employee, or steal and publicize confidential customer information. No matter how egregious the misconduct, under the terms of UWUA's proposed order, SoCalGas would be precluded from taking any "adverse action" whatsoever against an employee simply because that employee provided information to the Commission in this Rulemaking.[38] That makes no sense, is untenable and could result in harm to SoCalGas, its employees and the public. In order to protect the safety of its employees and the public, it is absolutely essential that SoCalGas maintain the ability to discipline employees who engage in conduct that violates the law, the Commission's directives and/or its internal policies and procedures. Ample protections exist to protect employees who testify or provide information to the Commission—as outlined above and in the proposed notice to employees provided as Appendix A.

The Motion for Preliminary Injunction also expressly seeks to circumvent the Commission's discovery process and deprive SoCalGas of its ability to review its own internal documents to ensure that disclosure of the information contained therein would not, for example, violate the statutory privacy protections afforded to its customers and employees, disclose trade secrets or confidential proprietary information, disclose critical energy infrastructure information that could pose a threat to national security, violate the attorney-client or patient-doctor privilege, etc.[39] UWUA openly seeks a Commission order that would have the effect of authorizing SoCalGas employees to commit theft of documents and disclose such documents to any party, whether or not such theft or disclosure would violate the law or internal policies of SoCalGas. Again, the potential harm to SoCalGas, its customers, its employees and the public from such unfettered employee immunity would be limitless.

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[38] UWUA Motion for Preliminary Injunction, Appendix B, Directive to Refrain from Adverse Action.

[39] *See* UWUA Motion for Preliminary Injunction, p. 5 ("free flow of information is impossible if management retains the right . . . to determine whether information will be furnished in the first place, as well as the form (testimony, cross examination or argument) in which that information will be transmitted.") SoCalGas maintains privileged employee medical records, confidential customer information, and other sensitive data that must be protected and not made public by parties seeking to circumvent the discovery procedures established by the Commission.

D. The Commission Should Not Pre-Determine Issues Identified as Within the Scope of this Rulemaking Without Developing a Factual Record and Providing Parties with an Opportunity to be Heard.

The Motion for Preliminary Injunction essentially seeks a pre-determination of issues, without the benefit of a factual record, that the Commission expressly identified as within the scope of this Rulemaking—"Should the Commission adopt rules to protect utility employees from management retaliation for bringing information to the Commission regarding unreported utility public safety issues? Are such rules necessary or practical?"[40] All parties must be provided with an opportunity to offer admissible evidence, and the Commission must establish a factual record, before issuing a decision on the issues to be addressed in this proceeding. To pre-determine such issues without the benefit of a factual record and without giving all parties an opportunity to be heard, as proposed by UWUA, would be reversible error, as it would deny the parties to this proceeding of their rights to due process. Accordingly, the Commission should deny UWUA's motion as an inappropriate attempt to circumvent the Commission's rulemaking process.

III. CONCLUSION

At SoCalGas, employees are required to report any and all concerns whenever they suspect possible unethical, unsafe or illegal behavior. Employees are also required to report any suspected violations of Company policy. SoCalGas is committed to ensuring that any such concerns, when raised in good faith, are fully investigated and resolved without retaliation.

In order to rectify the potential harm caused by UWUA's misleading motion, SoCalGas urges the Commission to deny UWUA's motion and direct SoCalGas and UWUA to provide all employees who furnish information in this proceeding, and their immediate supervisors, with an

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[40] Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms (R.11-02-019), issued February 25, 2011, pp. 14-15.

accurate notice that advises them of the rights and protections afforded to them under the law. This proposed notice is provided as Appendix A.

Respectfully submitted,

By: _____*/s/ Deana Michelle Ng*_____
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October 7, 2011

Appendix A

NOTICE TO WITNESSES

In conjunction with the California Public Utilities Commission's ("Commission") proceeding entitled, "Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms," Rulemaking 11-02-019, Southern California Gas Company ("Company") and the Utility Workers' Union of America ("UWUA") (collectively, "the Parties"), hereby notify you of the following:

As a witness in this Proceeding, it is critical that you provide truthful and accurate information without fear of retaliation by anyone, including the Parties.

- You cannot and *will not* be retaliated against for your participation in this Proceeding;
- You cannot and *will not* be retaliated against for being a "whistleblower"; and
- You cannot and *will not* be retaliated against for testifying in this Proceeding.

If you believe you have been retaliated against for your participation in this Proceeding, including for testifying or providing assistance to the Parties or Commission for purposes of this Proceeding, here are your legal rights:

California Whistleblower Protect Act

California law protects employees who disclose information to a government agency where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation. It is unlawful to retaliate against an employee for providing such information. For more information, call the California Attorney General's Whistleblower Hotline: (800) 952-5225.

Cal-OSHA

You may not be fired or punished in any way for filing a complaint about unsafe or unhealthful working conditions, or exercising any other right given to you by Cal/OSHA law. If you feel that you have been fired or punished for exercising your rights, you may file a complaint about this type of retaliation by contacting the Department of Industrial Relations, Division of Labor Standards Enforcement (State Labor Commissioner) at (866) 924-9757 or the San Francisco office of the U.S. Department of Labor, Occupational Safety and Health Administration at (415) 975-4310.

Grievance and Arbitration

If you are an employee and subject to a collective bargaining agreement, you may file a grievance if you believe you have suffered an adverse employment action without just cause. Please speak to your Union representative for details on the grievance process.

National Labor Relations Board (NLRB)

Employees are guaranteed rights under the National Labor Relations Act to engage in "protected concerted activity." This may include participating in this Proceeding, should such participation be deemed by the NLRB to constitute protected concerted activity. Aggrieved employees may file an unfair labor practice complaint with the NLRB. To learn more go to: www.nlrb.gov.

Civil Lawsuit

Employees may file civil lawsuits alleging violations of California's Whistleblower Protection law or other claims of retaliation, wrongful termination, demotion, or discipline. To file a lawsuit, you should first consult with an attorney.

No employee will be retaliated against for participating in this Proceeding and the Commission takes all claims of retaliation for whistleblowing seriously. Employees are guaranteed the right to provide good faith, honest and accurate information to the Commission without fear of retaliation. The Parties retain all rights to evaluate any statements, claims, and documentation submitted by employees to the Commission and retain all rights to take appropriate action to enforce this Commission's rules or the Parties' rights.

Approved by:

_____

[Commission Signature or Seal]

Appendix B

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CALIFORNIA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DONNA HINES,

Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, *et al.*,

Defendants.

CASE NO.: C-10-2813 EMC

DEFENDANT CALIFORNIA PUBLIC UTILITIES COMMISSION'S OPPOSITION TO PLAINTIFF'S EXPEDITED MOTION FOR INTERIM REMEDIES AND ECONOMIC RELIEF

[Opposition to Motion for Preliminary Injunction]

Judge: Hon. Edward M. Chen
Hearing: None

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I. INTRODUCTION

On January 25, 2011, Plaintiff Donna Hines ("Plaintiff") filed a document titled "Expedited Motion for Interim Remedies and Economic Relief" ("Expedited Motion"). The Court has interpreted this motion as one seeking a preliminary injunction against the Defendant California Public Utilities Commission ("CPUC" or "Defendant"). Plaintiff appears to ask the Court to issue a preliminary injunction against the CPUC to force it to change its employee relations procedures. She further asks the Court to order the transfer of money, on an expedited basis, from a retirement account administered by the California Public Employees' Retirement System ("CalPERS") to her private bank account, and to issue an order regarding alleged conduct not presently before this Court. The Court should deny each of Plaintiff's requests, as Plaintiff has failed to make the necessary showing for entitlement to injunctive relief. The Court should not issue an injunction forcing Defendant to treat Plaintiff with special consideration, compared with her non-litigating colleagues. Plaintiff cannot show she will likely prevail on the merits of a permanent injunction, that she will suffer irreparable harm from potential future disciplinary action, or that the harm she would allegedly suffer outweighs the harm that Defendant would certainly suffer if such an injunction were ordered. Further, Plaintiff cannot show that the public interest would be best served through the requested relief. In addition, this Court should not order the transfer of funds, on an expedited or other basis, from a CalPERS account to Plaintiff's personal bank account because it lacks jurisdiction for such action. Finally, if Plaintiff is requesting leave to amend her complaint a third time, Defendant should have an opportunity to oppose that request before the Court decides the matter.

II. FACTS AND PROCEDURAL HISTORY

On June 28, 2010, Plaintiff filed a complaint with this Court alleging various claims against Defendant CPUC and Dana Appling, now deceased. On August 27, 2010, CPUC filed a motion to dismiss and to strike. On November 8, 2010, this Court issued an order granting CPUC's motion to dismiss and to strike. The Court granted Plaintiff leave to amend her Title VII retaliation claim against CPUC. On November 24, 2010, this Court issued an order granting Plaintiff's motion to amend her complaint to add new defendants, and to substitute in the estate of Ms. Appling. On December 6, 2010, the Court issued an Order requiring Plaintiff to file a Second Amended Complaint

by January 14, 2011, specifying the limitations of that Complaint, and instructing the Plaintiff to serve the parties pursuant to the applicable rules.

Plaintiff filed a Second Amended Complaint on January 14, 2011. In it, Plaintiff appears to allege that the CPUC retaliated against her because she filed a previous lawsuit under Title VII in July 2007. Docket No. 36; *see also Hines v. CPUC*, N.D. Cal. Case No. 07-4145 CW (EMC) (summary judgment granted to Defendant; appeal pending before the U.S. Court of Appeals). She refers to three (3) incidents in which she was disciplined pursuant to CPUC procedures, dating between July and December 2009. Docket No. 36, Exh. I (pages 170-178). In the first instance, she received a "Corrective Action Memo" ("CAM") dated July 27, 2009, in which her managers identified her inadequate work performance and refusal to meet with her supervisor and manager. Docket No. 36, pages 170-172. In this CAM, Plaintiff was invited to meet with her supervisors to discuss her performance and insubordination, and was warned that continued similar conduct could result in disciplinary action. Docket No. 36, page 171.

Plaintiff failed to ameliorate her performance, leading to the September 8, 2009, Notice of Adverse Action ("NOAA"), which indicated Plaintiff would receive a Letter of Reprimand because of her continued inefficiency, insubordination, willful disobedience and other failure of good behavior, pursuant to California Government Code ("Cal. Govt. Code") Section 19572. Docket No. 36, pages 173-175. Plaintiff received the NOAA because she refused to accept work assignments, continued to refuse to meet with her supervisors and attend scheduled meetings, and failed to meet work deadlines. Docket No. 36, page 174. Plaintiff was notified, pursuant to State Personnel Board ("SPB") Rule 52.3, of her right to respond to the NOAA, and of her right to appeal the NOAA to the SPB, pursuant to Cal. Govt. Code Section 19575. Docket No. 36, page 175. Plaintiff failed to respond or file an appeal with the SPB.

On December 3, 2009, Plaintiff received a second NOAA because of her continued inefficiency, insubordination, willful disobedience and other failure of good behavior, pursuant to Cal. Govt. Code Section 19572. Plaintiff continued to refuse to meet work deadlines or to comply with her supervisors' directions. Docket No. 36, pages 177-178. Plaintiff received a one-week suspension without pay as a result of this NOAA. Docket No. 36, page 176. As with the September 2009 NOAA,

Plaintiff was notified, pursuant to SPB Rule 52.3, of her right to respond to the NOAA, and of her right to appeal the NOAA to the SPB, pursuant to Cal. Govt. Code Section 19575. Docket No. 36, page 178. Plaintiff failed to respond or file an appeal with the SPB.

On May 26, 2010, Plaintiff received a "Courtesy Reminder" from her supervisor that she had not shown improvement in the areas detailed in the December 2009 NOAA. Plaintiff received NOAAs on August 19, 2010 and December 14, 2010. Docket No. 38, pages 10-16, 23-31. The Second Amended Complaint is silent as to the May 2010 Courtesy Reminder and the 2010 NOAAs. *See* Docket No. 36; Docket No. 38 at 5:15-17. Both the August 2010 and December 2010 NOAAs charged Plaintiff with inefficiency, inexcusable neglect of duty, insubordination, willful disobedience, and other failure of good behavior, pursuant to Cal. Govt. Code Section 19572, based on her continued refusal to meet with supervisors and colleagues, continued failure to meet the requirements of her job classification, and continued failure to meet deadlines. Docket No. 38, pages 10-16, 23-31. Plaintiff received a two-week suspension without pay in the August 2010 NOAA. Docket No. 38, page 23. Plaintiff received a one-month suspension without pay in the December 2010 NOAA. Docket No. 38, page 10. As with the earlier NOAAs, Plaintiff was notified, pursuant to SPB Rule 52.3, of her right to respond to the NOAA, and of her right to appeal each NOAA to the SPB, pursuant to Cal. Govt. Code Section 19575. Docket No. 38, pages 14-16, 29-31. As with her previous NOAAs, Plaintiff failed to respond or file an appeal with the SPB.

On Thursday, January 20, 2011 at 6:15 p.m., Plaintiff sent an e-mail message to CPUC Executive Director Paul Clanon, asserting that the CPUC committed "acts of involuntary termination of the employment relationship" and requesting that the CPUC stipulate to transfer funds administered by CalPERS to her custody and private retirement account. Plaintiff requested a response from Mr. Clanon by close of business Friday, January 21, 2011. Docket No. 38, page 17. However, neither the Executive Director, Paul Clanon, nor anyone else at the CPUC has the authority to stipulate to the transfer of funds from a CalPERS account to an employee's private account. The CPUC has no jurisdiction over the disposition of retirement funds; such inquiries must be directed to CalPERS. Declaration of Grant Lee ("Lee Decl."), ¶ 2. In fact, the Refund Election Form that Plaintiff sent Mr. Clanon has no space for the state employer's signature and clearly does not contemplate any

involvement by the employing entity at all. Rather, the form asks for the employee to elect to receive a distribution or rollover of retirement funds directly through CalPERS, without any reference to the employer. Docket No. 38 at pages 18-19.

Plaintiff remains an employee of Defendant CPUC and has therefore not been terminated. Lee Decl., ¶ 4. Plaintiff was suspended pursuant to established disciplinary proceedings from December 22, 2010 to January 20, 2011, and returned to work on January 21, 2011. *Id.; see* Docket No. 38, pages 10-16; 23-31. Plaintiff filed her Expedited Motion on Monday, January 24, 2011. On January 26, 2011, the Court issued an order construing Plaintiff's Expedited Motion to be a motion for preliminary injunction, and set a briefing schedule for Defendant's response, due February 9, 2011.

III. ARGUMENT

A. Plaintiff Does Not Merit Injunctive Relief.

A preliminary injunction is an "extraordinary and drastic remedy" that should only be granted in limited circumstances, and never awarded out of right. *Munaf v. Geren*, 553 U.S. 674, 689 (2008); *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374 (2008). A plaintiff seeking preliminary injunction must establish that: 1) she will likely succeed on the merits of the underlying suit; 2) she will likely suffer irreparable harm in the absence of preliminary relief; 3) the harm to the plaintiff of the motion not being granted outweighs harm to the defendant caused by the proposed injunction; and 4) the injunction is in the public interest. *Winter*, 129 S.Ct. at 374; *Sierra Forest Legacy v. Rey*, 577 F.3d 1015, 1021 (9th Cir. 2009). The purpose of a preliminary injunction is to preserve the *status quo* and prevent loss of rights that cannot be regained through traditional legal remedies. *Partida v. Union Pacific R.R. Co.*, 221 F.R.D. 623, 625 (C.D. Cal. 2004), *citing Sierra On-Line Inc. v. Phoenix Software, Inc.*, 793 F.2d 1415, 1422 (9th Cir. 1984).

There are two types of injunctions: a mandatory injunction, which requires the subject party to take some action, and a prohibitory injunction, which orders that party to refrain from doing something. *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 485, 116 S.Ct. 1251, 1254 (1996). Mandatory injunctions are particularly disfavored in that they disturb the *status quo* by forcing the nonmoving party to act, and should not be granted absent a showing of likely extreme or very serious harm that cannot be compensated in damages. *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH*

& *Co.*, 571 F.3d 873, 879 (9th Cir. 2009); *Stanley v. University of Southern California*, 13 F.3d 1313, 1320 (9th Cir. 1994), *citing Anderson v. U.S.*, 612 F.2d 1112, 1114 (9th Cir. 1979).

Though her motion is not entirely clear, it appears that Plaintiff is asking the Court to order Defendant CPUC to change its disciplinary procedures and give her special treatment by enjoining it from considering future disciplinary proceedings against her. The *status quo*, as it stands now, is that Defendant, as Plaintiff's employer, has the right and duty to maintain order among its staff members. This includes the ability to discipline all of its employees through Corrective Action Memos or Notices of Adverse Action, should an individual's conduct warrant such action. Decl. of Grant Lee, ¶ 3. To order the Defendant to change its procedures and treat Plaintiff differently from its other employees would force Defendant to take an affirmative action, and would thus be considered a mandatory injunction.

In *Stanley v. University of Southern California*, the plaintiff, a female basketball coach, rejected her employer's offers to renew her employment contract, and brought a suit alleging, *inter alia*, sex discrimination based on wage disparities between herself and the male coach of the men's basketball team. 13 F.3d at 1317-19. The plaintiff sought a preliminary injunction to restore her to her position (which lay vacant at the time), at a higher salary, pending resolution of her suit. The Court found that the plaintiff sought a mandatory, rather than prohibitory, injunction, because it would change the *status quo*, even though it would have simply required the University to put the plaintiff back to the job she held, and at a salary it had proposed in contract negotiations. *Id.* at 1320.

As in *Stanley*, Plaintiff's request for injunctive relief is of a mandatory, not prohibitory, nature. Though she claims the injunction would preserve the *status quo*, in reality, the current situation where Defendant has the power to maintain order among all its employees would be changed if the Court enjoined it from considering appropriate discipline against Plaintiff in the future. As mandatory injunctions are particularly disfavored, the Court should not grant Plaintiff's motion. *Marlyn Nutraceuticals*, 571 F.3d at 879. As detailed below, Plaintiff does not show she would suffer extreme or very serious harm, nor that the injury she fears is irreparable.

In the alternative, even if this were a prohibitory, rather than mandatory injunction, it should be denied. As detailed below, Plaintiff simply cannot meet the traditional standards necessary for a

(prohibitory) preliminary injunction, as there is little likelihood of success on the merits, Plaintiff faces no likely irreparable harm, the balance of equities tips in Defendant's favor, and the public interest is not served by the issuance of an injunction.

1. Plaintiff Is Not Likely to Prevail on the Merits.

Plaintiff asserts a Title VII retaliation claim against Defendant CPUC. Docket No. 36 at 31:12-13. For a successful claim of retaliation under Title VII, a plaintiff must show that she engaged in protected activity under Title VII, that her employer subjected her to an adverse employment action, and that a causal link exists between the protected activity and the adverse action. *Thomas v. City of Beaverton*, 379 F.3d 802, 811 (9th Cir. 2004) (outlining the standards for a *prima facie* case of retaliation under Title VII).

The Court granted Defendant's motion to dismiss Plaintiff's original complaint, because Plaintiff failed to establish a nexus between any alleged protected activity under Title VII, and alleged adverse action. Docket No. 24 at 11:13-15, fn.1. Plaintiff's Second Amended Complaint does not cure the defects of the first; therefore, she is not likely to prevail on the merits of a Title VII claim against Defendant CPUC.[1] As in the first complaint, Plaintiff fails in the Second Amended Complaint to establish any link between alleged protected activity and any alleged adverse employment action. Plaintiff filed her first lawsuit alleging Title VII claims in July 2007. She first received disciplinary action two years later, in July 2009. In the Court's own words, "[T]his two-year lapse in time, without any other evidence of causation, makes Ms. Hines' retaliation claim facially implausible." Docket No. 24 at 11:13-15. The Court noted that Plaintiff's allegation that she suffered retaliation for refusing to endorse reports is not a ground for relief under Title VII, which protects against, *e.g.*, "discrimination based on race and retaliation against an employee for making a charge or otherwise participating in a Title VII proceeding. Ms. Hines' refusal to endorse the DRA reports had nothing to do with discrimination prohibited by Title VII or a Title VII proceeding." *Id.*, fn. 1 (citation omitted).

Rather than allege that she has engaged in Title VII-protected activity, and that she suffered

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[1] Defendant will address this in further detail in a separate Motion to Dismiss.

adverse employment actions because of that activity, Plaintiff's Second Amended Complaint offers myriad allegations that she suffered retaliation "for failing to testify under oath (i.e., "sponsor") testimony" containing information with which Plaintiff apparently disagreed. Docket No. 36 at 30:4-16. As this Court has already noted, Plaintiff's Title VII claim requires a showing of protected activity and retaliation therefor. As Plaintiff has not cured the defects of the original Complaint with respect to Title VII, she is not likely to be successful on the merits. Therefore, the Court should not grant her injunctive relief.[2]

2. Plaintiff Is Not Threatened with Irreparable Harm.

"[M]onetary injury is not normally considered irreparable." *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980). Injunctive relief is inappropriate in an employment case, where back pay is available as a remedy at law, should the plaintiff prevail on her claim. *Sampson v. Murray*, 415 U.S. 61, 89-90, 94 S.Ct. 937, 952-53 (1974) ("It seems clear that the temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury"); *Stanley*, 13 F.3d at 1320 (noting that injunctive relief is inappropriate in the employment context where back pay and even reinstatement would be available if the plaintiff were ultimately successful on the merits of the discrimination action); *see also Shegog v. Board of Ed. of City of Chicago*, 194 F.3d 836, 839 (7th Cir. 1999) (temporary deprivation of employment does not inflict an irreparable injury, and therefore does not justify a preliminary injunction).

Plaintiff has failed to show that she is at risk of any immediate or irreparable injury. In her own words, Plaintiff fears that she will suffer economic injury if she receives additional suspensions or other loss of income based on continued refusal to comply with her work requirements. Docket No. 38 at 4:18-19, 26-27. Though she labels the suspensions without pay "an irreparable economic injury" warranting injunctive relief, the U.S. Supreme Court noted that economic injury, even the loss of income, "does not usually constitute irreparable injury." *Sampson*, 145 U.S. at 89-90; *see* Docket

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[2] Plaintiff includes in her Motion allegations about two NOAAs she received in August and December 2010, but which are absent from the Second amended Complaint filed on January 14, 2011. Even if, *arguendo*, they could properly be considered without being included in a complaint before the Court, Plaintiff fails to offer facts to show any connection between these NOAAs (based on the same type of conduct that occurred in July 2009) and any protected activity under Title VII.

No. 38 at 4:18-19. Similarly, any damage to reputation that Plaintiff asserts (though which is unsupported by fact or case law in her motion) is also not considered irreparable injury meriting injunctive relief. *Id.* Therefore, Plaintiff offers no compelling argument to warrant the extraordinary issuance of injunctive relief.

3. The Equities Do Not Balance in Favor of Granting an Injunction.

In considering whether to grant injunctive relief, courts are charged with balancing the claims of injury against the effects of the proposed injunction on each of the parties. *Amoco Production Co. v. Village of Gambell, AK*, 480 U.S. 531, 542, 107 S.Ct. 1396 (1987). The only harm that Plaintiff may suffer if she continues to refuse to fulfill her job duties is that she may receive additional disciplinary actions which could include, *inter alia*, removal from work and a concomitant loss of income. These harms are inherently reparable and not properly the subject of injunctive relief. Sec. III.A.2, *supra*.

Conversely, Defendant CPUC risks an intangible, irreparable harm: the loss of its ability to maintain order and exercise its proper supervisory powers over its employees. Defendant has not been found to have violated Plaintiff's Title VII rights, and Plaintiff offers no facts showing that such a violation is likely to happen in the future. Therefore, Defendant should not be subject to an injunction forcing it to treat Plaintiff differently from other employees, simply because she has a pending lawsuit against it. An injunction would send a very dangerous, and potentially highly disruptive, message to other employees at this public agency: that an employee can be shielded from discipline for inappropriate conduct as long as she first files a lawsuit, however poorly conceived and likely to be later dismissed by the Court. Given the extreme (and irreparable) harm Defendant would face in loss of ability to enforce the orderly conduct of its employees should the Court grant this injunction, compared to the basic, reparable harm Plaintiff may allegedly suffer in the absence of such relief, the equities soundly balance in favor of denying Plaintiff's request.

4. The Public Interest Is Not Served by Granting an Injunction.

Courts should pay particular attention to the public consequences of using this extraordinary remedy. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798 (1982). The public's interests in this case track closely to those of the public employer, Defendant CPUC. The people of

the state of California have an interest in the smooth functioning of such an important regulatory agency as the CPUC. *See, e.g.*, Docket No. 38 at 6:22-23. One aspect of an effective public agency is the strength of its staff working on behalf of the public. The *status quo* now is that the CPUC has the power to discipline employees like Plaintiff who refuse to fulfill their professional obligations, so that it can maintain order and maximize the benefits the employees bring to their constituents. Plaintiff offers no cogent argument that the public would be served by forcing this state agency to change its established disciplinary procedures because she disagrees with the terms of her discipline, particularly where she has consistently failed to respond to and pursue appeals options available to her, and where the sum total of her "evidence" of wrongdoing or potential future wrongdoing is her own subjective and self-serving opinion. In fact, there is no public benefit to such an injunction, and it should be denied.

B. The Court Lacks Jurisdiction to Order Transfer of Funds.

A motion must state with particularity the grounds for seeking an order, and upon which relief should be granted. Federal Rule of Civil Procedure ("Fed. R. Civ. Proc.") 7(b)(1)(B). Plaintiff fails to offer any legal basis upon which this Court may order the transfer of retirement funds administered by CalPERS to Plaintiff's private bank account.[3] These funds are not the subject of any lawsuit before the Court. The CPUC also has no power over the disposition of retirement funds. Neither the Executive Director, Paul Clanon, nor anyone else at the CPUC has the authority to stipulate to the transfer of funds from a CalPERS account to an employee's private account. Rather, CalPERS is the entity in charge of such matters. Indeed, the form to which Plaintiff asked the CPUC to "stipulate" does not even contemplate a signature by any CPUC personnel or other employer involvement. CalPERS is not subject to the Court's jurisdiction in this matter. Plaintiff's argument that she has been "effectively converted" to an hourly employee is baseless and irrelevant to matters properly before the Court. She cites no legal grounds for her request for "interim economic relief." The Court

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[3] Plaintiff appears to assert that she has been terminated from her employment. Docket No. 38 at 4:23-26. However, she remains an employee of Defendant CPUC. Lee Decl., ¶ 4.

is not a means by which she may seek cash advances of retirement funds, CalPERS or from any other sources. Therefore, the Court should deny Plaintiff's request to "effectuate" the transfer of funds.

C. Plaintiff Must Seek Leave to Further Amend the Complaint.

A party may amend its pleadings once as a matter of course within twenty-one (21) days after service. Fed. R. Civ. Proc. 15(a)(1). After this initial amendment, a party may amend only with the opposing party's written consent or the court's leave. Fed. R. Civ. Proc. 15(a)(2). Plaintiff has already made an initial amendment, and has been granted leave to amend her original complaint through the Second Amended Complaint, filed pursuant to court order on January 14, 2011. Docket No. 36. Though it is unclear from Plaintiff's motion, it appears that she may be seeking the Court's leave to further amend her complaint to include incidents that occurred before the deadline for filing her Second Amended Complaint. (She mentions two suspensions dating from August and December 2010, respectively; the Second Amended Complaint was not filed until January 14, 2011.) Should Plaintiff seek leave to include these incidents in her Second Amended Complaint, she should be required to file a regularly noticed motion for leave to amend, and Defendant afforded an opportunity to oppose that motion.

IV. CONCLUSION

For the reasons stated above, Defendant CPUC the Court should deny each of the requests in Plaintiff's Expedited Motion.

Dated: February 9, 2011

RUIZ & SPEROW, LLP

By: Heather R Coffman
Heather R. Coffman
Attorneys for Defendant
CALIFORNIA PUBLIC UTILITIES COMMISSION

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF CALIFORNIA

DONNA HINES,

Plaintiff,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.,

Defendant

/

Case Number: C10-2813 EMC

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify:

that I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2000 Powell Street, Suite 1655, Emeryville, California 94608; on February 9, 2011, I enclosed one duplicate of

1) *Defendant California Public Utilities Commission's Opposition to Plaintiff's Expedited Motion for Interim Remedies and Economic Relief*; and

2) *Declaration of Grant Lee in Support of Defendant's Opposition to Plaintiff's Expedited Motion for Interim Remedies and Economic Relief*

and deposited it into a Federal Express envelope provided by the overnight delivery carrier and addressed to the person at the address hereafter. I placed the envelope for collection and next business day delivery in a regularly utilized drop box of the Federal Express carrier as set forth hereafter:

Donna Hines
268 Bush Street, #3204
San Francisco, CA 94104

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 9, 2011, at Emeryville, California.

Gretchen Trupiano

Gretchen Trupiano