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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITIZENS OVERSIGHT, INC., a Delaware non-profit corporation; RUTH HENRICKS, an individual; NICOLE MURRAY RAMIREZ, an individual; NIEL LYNCH, an individual; HUGH MOORE, an individual; DAVID KEELER; an individual; FRANCIS KARL HOLTZMAN, an individual; ROGER JOHNSON, an individual; on behalf of themselves and a class of others similarly situated, Plaintiffs, v. CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R. PEEVEY and MICHEL PETER FLORIO, in their official capacity as Commissioners; SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation; and DOES 1-100, Defendants.	Case No. 14-cv-2703-CAB (NLS) PLAINTIFFS' OPPOSITION TO CALIFORNIA PUBLIC UTILITIES COMMISSION DEFENDANTS' MOTION TO DISMISS Judge: Honorable Cathy Ann Bencivengo

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Plaintiffs,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION; MICHAEL R. PEEVEY and MICHEL PETER FLORIO, in their official capacity as Commissioners; SOUTHERN CALIFORNIA EDISON COMPANY, a California corporation; and DOES 1-100,

Defendants.

Case No. 14-cv-2703-CAB (NLS)

PLAINTIFFS' OPPOSITION TO CALIFORNIA PUBLIC UTILITIES COMMISSION DEFENDANTS' MOTION TO DISMISS

Judge: Honorable Cathy Ann Bencivengo

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INTRODUCTION

In February 2011, Edison turned on its 4 new steam generators at the San Onofre Nuclear Power plant (SO), returning it to full commercial production of electricity. Within a year, in January 2012, Edison turned them off after a tube leak in one of generators triggered a high radiation alarm, bringing SO to its eternal rest. While the electricity generation ended, charges imposed on Edison customers continue unabated. The question presented in this case is: Can Edison customers can be forced to pay up to $5,000,000,000 for SO electricity when the customers receive no electricity in return from the SO?

When the shoe was on the other foot and Edison was forced to provide electricity to customers for which Edison was not paid, it too brought federal question claims in the United District Court, despite of CPUC decisions in the matter. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 804-805 (9th Cir. Cal. 2002) ("*Lynch*"). In *Lynch,* the Ninth Circuit found no jurisdiction barrier to the District Court considering the federal question despite CPUC involvement. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 804-805 (9th Cir. Cal. 2002)

This Court has jurisdiction to hear the case, despite a related state administrative proceeding. Further, a valid takings claim has been alleged. On its face, it cannot be said to be just and reasonable for Edison customers to pay for electricity they are not receiving and when no application to place the matter in rates was ever conducted. The Edison customers have been denied a determination of whether the failed steam generators were used and useful. The matter is ripe: the CPUC decision has become effective 20 days after its issuance (CPUC Rule 15.4), and customers have been paying for electricity they have not received without a hearing putting them in rates.

Plaintiffs should be permitted to proceed with the lawsuit as filed. If required, leave to amend is proper given facts and documents surfaced since the CPUC proceeding and filing of this complaint, or a stay of the proceedings.

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I. BACKGROUND AND CONTEXT

This is not the garden variety rate case brought into federal court by disappointed ratepayers. Plaintiffs are being forced to pay the damages Edison caused with its unreasonable decision to deploy defective steam generators without a required license that permanently knocked out the San Onofre Nuclear Power Plant (SO). (Exs. 2, 3, 54, 41-45) In other words, Edison customers are forced to pay for electricity production when none is being generated. (Exs. 4, 5, 54) This burden was placed on plaintiffs without any finding Edison acted reasonably; without a finding charges are for used and useful purposes. Edison admits as much. (Ex. 56, 58)

The law requires the CPUC to find proposed rates are just and reasonable, and that facilities are used and useful before utility customers can be forced to pay. Evidence during the design phase in 2004 suggests Edison knew of the risks of the massive generators failing but proceeded anyway. (Ex. 1) Edison evaded design review. (Exs. 3, 54) The CPUC and Edison showed neither before the costs of the defunct plant was imposed on Edison customers. (Ex. 54) There was no notice the plan was being made, there was no finding Edison customer bills were just and reasonable nor that SO was used and useful. (Decision; Ex. 29, 55; Severson Decl. ¶ 4) Proceedngs were delayed after private communications to the CPUC by Edison. (Exs. 3-15, 18, 20-22) Edison requested delays (Ex. 18) and the CPUC complied by moving it off the public agenda. (Exs. 19, 23) Relevant information was restricted, no depositions were permitted, parties were excluded from the year-long discussions the CPUC and Edison controlled leading up to the adoption of the plan to end any investigation into the cause of the steam generator failure. (Exs. 26, 53, 58; see also Decision 20 November 2014)

The CPUC ended their own expert's investigation after he issued a blue print for getting at the truth. (Ex. 51) The plan was to have no evidentiary hearing on the plan to end the investigation, then the CPUC and Edison decided to have the

semblance of one that was restricted to 3 hours—not much time to consider a $5,000,000,000 "settlement." (Ex. 48, 58)

The CPUC violated the most fundamental principle of investigative science, the need to act timely and thoroughly. CPUC President Mike Peevey and Commissioner Mike Florio gave Edison the opportunity to sift through evidence and corral witnesses by letting conduct its "investigation" (Ex. 48, Litzinger 14 May 2014 R.T. 2736-2738) before the CPUC's. Peevey and Florio delayed the CPUC Order of Investigation nine months (February 2012 to November 2012). (Exs. 19, 23)

CPUC and Edison skullduggery is understandably suspected when the agency's response to the failure of the $700,000,000 steam generators project after only a year of full operation is a 9 month delay. Rational concerns the CPUC was not protecting Edison customers were aroused upon discovery the CPUC was allowing Edison to charge customers for the new steam generators without filing the application required by the original CPUC decision provisionally allowing the project to proceed.

In late October 2012, the CPUC finally issued a press release promising to look into whether Edison customers should be relieved from paying anymore for SO, given the failed steam generators rendered the plant inoperative. (Ex. 24) However, on Friday 30 November 2012, Edison Senior Vice President of Regulatory Affairs Les Starck and Edison Director of Regulatory Affairs Mike Hoover met with Sepideh Khosrowjah, Advisor to Commissioner Florio, in Ms. Khosrowjah's CPUC office and suggested the investigation be splintered into "phases." One working day later on Tuesday 4 December 2012, the OII Administrative Law called Edison Director of SO Strategic Review at Edison Russell G. Worden "to discuss the timing of the RSG (replacement or new steam generators) capital cost filing pursuant to the Commission's decision approving new steam generators." (Ex. 26)

Three working days later on Tuesday 10 December 2012, the Administrative Law Judge adopted Edison's Ex Parte request ruling "The Commission intends to approach this inquiry in stages." (Ex. 27, page 1) The Order Instituting the Investigation ("OII") the CPUC adopted does not mention phases or stages. (Ex. 25) The Administrative Law Judge offered no citation to any CPUC decision to do the investigation in stages. (Ex. 27) With the investigation into Edison's decision to deploy the defective steam generators on having been placed on hiatus, CPUC President Mike Peevey acted to end it altogether.

Notes found in a CPUC President's Office Desk in "Room A" of his La Canada Flintridge home in Los Angeles show the plan to kill the investigation into Edison's decision to deploy the steam generators without a required license was planned a few months after the CPUC announced the investigation in late October 2012. (Exs. 29, 55, 60) The notes reveal a secret meeting was held on 26 March 2013 amongst the CPUC President, Energy Director, and Edison Vice President for External Affairs at the Hotel Bristol in Warsaw, Poland. While the CPUC and Edison failed to produce the records[1], they were only obtained because they were included in the writings seized under a search warrant executed at the CPUC President's home in in La Canada Flintridge in Los Angeles. (Exs. 33, 55, 60)

Those notes recorded at the secret meeting in Warsaw, Poland, Edison and CPUC representatives discussed a "framework" for cutting short the investigation which would protect Edison from any exposure that its officials acted unreasonably when they decided to deploy experimental steam generators at SO. (Ex. 29) The first secret meeting in Poland was followed with 58 more instances of secret discussions and meetings amongst CPUC, Edison and an Edison selected ratepayer advocate between May 2013 and March 2014. (Ex. 57)

The plan was hatched in secret, information about how the plan was made was denied, the amounts attributed to the elements in the plan were not set, the

[1] Severson Declaration ¶ 39; Ex. 33)

rationale for making ratepayers pay was not provided (e.g. ratepayers do not pay for part of the defective steam generators but they do pay for the damage they caused). (Severson ¶ 4) The plan has a refund "mechanism" but no actual refunds or reductions in consumer bills. The CPUC excluded all but one ratepayer from the "negotiations"; the CPUC President refused to disclose his involvement in the secret planning (evidence now shows he was). (Ex, 58; see Decision generally) The CPUC terminated its own expert investigation into what caused the steam generators to fail, refusing first to release his report but do so after media pressure. (Exs. 46, 51)

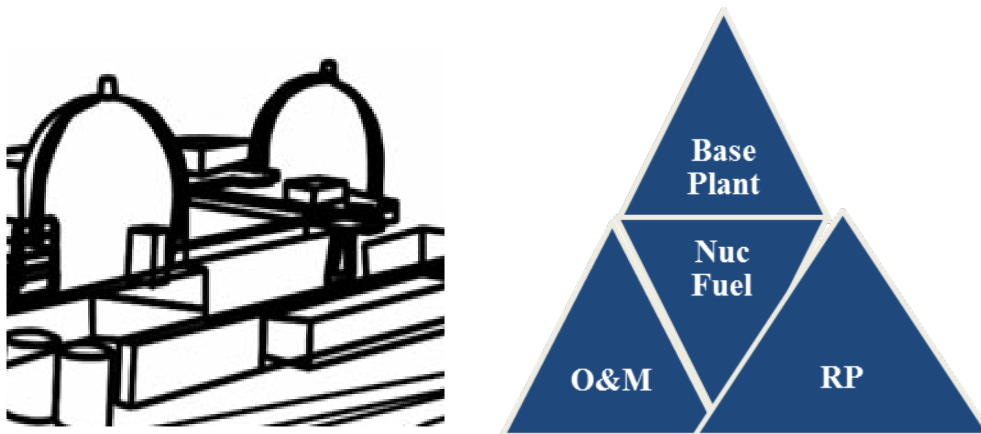
While Edison admitted through 31 December 2013 it had already recovered from its customers $4,135,000,000 in depreciation and amortization for SO (Response to Question 11), under the agreement it will rake in billions more form its customers. Under the agreement Edison receives as regulatory assets amortized over 10 years with a percentage return for: (1) "Base Plant" [4.3(b)]; (2) Nuclear Fuel [4.6(a)]; (3) Material and Supplies (M&S) [4.5]. Edison also receives (4) SO Construction Work in Progress (CWIP) [4.8(a)]; (5) Operations and Maintenance [4,9]; and (6) Replacement Power [4.10]. No specific amounts are attributed to these 6 items. Instead the agreement employs terms like "sufficient to defray" such as "For calendar year 2012, the Utilities will retain rate **revenue sufficient to defray** all recorded Non-O&M Balancing Account Expenses." [4.9(d)] No amounts to be charged were specified none were audited or verified. (Ex. 56)

The agreement is riddled with conditional and ambiguous statements. E.g. To the extent the amounts collected for Capital-Related Revenue Requirements for Base Plant exceed the amounts permitted the amounts shall be refunded per the "refund mechanism." [4.3(b)(ii)] As for materials and supplies (M&S), to the extent the utilities "are able to sell" the M&S they will make refunds through the refund mechanism. [(4.5 (b)] As for nuclear fuel, to the extent Edison sells any portion of its nuclear fuel inventory the amounts will be put through the refund mechanism.

For operations and maintenance (O&M) SCE will "refund" through the refund mechanism any excess mounts collected. If the "Utilities recovery any portion of the recorded amounts in Section 4.9(e) (i)-(iii) through the Nuclear Decommissioning Trusts those portions shall also be refunded through the refund mechanism. [4.9(f)]

In March 2014, the California State Auditor found the CPUC, "lacks adequate processes to provide sufficient oversight of utility balancing accounts to protect ratepayers from unfair rate increases." (Ex. 38) In this very case, Edison was required to file its application to put the new steam generator costs into rates six months after SO returned to commercial operation. (Ex. 2) Edison failed to file the needed application to put the steam generator costs into rates before they failed. The CPUC staff allowed Edison to collect rates even after the steam generators failed. (Ex. 2)

A CPUC administrative law judge had ex parte communications with the Edison Vice President at San Onofre and still did not require an application to place the costs into rates. (Exs. 2, 39) When a ratepayer motion to force Edison to file the application was finally granted, the Administrative law judge stayed the proceeding relieving Edison from having to show it acted reasonably. (Exs. 26, 27, 39, 46, 58)



CPUC, Edison Forcing Customers to Pay for Phantom, Inflated Costs

Edison admits it did not seek or receive from the CPUC a determination Edison acted reasonably in deploying the defective steam generators. (Response to Questions 10, 16)) Edison did not retain an independent party to determine if the proposal to end the investigation was fair and just. (Response to Question 25) Edison refused to identify documents showing what, if anything, Edison's senior executives did to address the issue of higher steam quality before the steam generators were installed. (Response to Question 44) Edison refused to admit the truth: that SCE executives decided not to present the RSG design to the NRC under 10 CFR 50.59. (Response to Question 45) When Edison was asked why and who its decision makers who elected not get a license amendment Edison declined to give a direct answer. (Response to Questions 48, 49) Edison refused to identify the Edison decision makers who were aware of the over-heating defect in the steam generators. (Response to Question 17) SCE refused to identify the steps SCE decisions makers went through to protect against risk of the defect in the steam generator. (Response to Question 18) (Ex. 56)

III. SUMMARY OF ARGUMENT

Defendants' motion should be denied for the following reasons.

First, the CPUC's authority is governed, and limited by, the United States Constitution. The Johnson Act does not apply because there was no ratesetting hearing: plaintiffs have paid for the cost of the replacement steam failed generators and energy those generators did not produce after January 2012, even though Edison failed to comply with a 2005 Decision requiring Edison to seek authorization for permanently including in rates the steam generator costs within six months after the plant returned to commercial operation. With both generators returned to commercial operation in February 2011, the application to charge customers was due -- but not filed – no later than August 2011. (Ex. 2)

The failure of the new steam generators in January 31, 2012 put Peevey and Edison in a panic because the costs had not been put permanently into rates. Edison

would have unable to get the costs into rates because the steam generators failed and were not "used and useful" to ratepayers. Ed Randolph (in Warsaw with Peevey for the secret 26 March 2013 meeting with Edison General Counsel Pickett) approved payment for the 2012 steam generator costs in June 2012 after they had failed. (Ex. 29) ALJ Darling had an ex parte with Edison VP Russell G. Worden on 4 December 2012 -- about when Edison was going to file. (Ex. 26) It was not until plaintiff Henricks brought a motion to force Edison to put the costs in rates in Feb 2013 that they were ordered to do so but then ALJ Darling ruled it would be "premature" to hear the matter, despite that Edison was required to do so in August 2012 under the terms of the original December 2005 decision for the new steam generators. (Ex. 27; Ex. 58 p. 4)

The plan to charge plaintiffs was made in secret. Plaintiffs were excluded from the process, not permitted relevant information, and denied a reasonable hearing.

The Eleventh Amendment does not shield the Commissioners from this suit. Commissioners can be sued, especially in cases like the present where they are alleged to have engaged in violations of the federal constitutional protections afforded plaintiffs. *Ex Parte Young,* 209 U.S. 123 (1908); *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989).

The matter is ripe as Plaintiffs were injured when the CPUC allowed Edison to take plaintiffs property without just compensation. The constitutional injury preceded and does not depend upon the actions of the CPUC to approve the proposed settlement. The Decision is final in any event. (CPUC Rule 15.4)

Finally, new documents surfacing as a result of public records act requests, a felony search warrant on Peevey, and "late filings" following media exposure of secret meetings in Poland formulating the settlement terms for the failed "RSG" provide support for a finding of collusion, impropriety by the Commissioner and

key personnel, and jurisdiction of this Court to hear this case. At the least, it provides support for an amended filing under FRCP Rule 15.

IV. ARGUMENT

A. The CPUC is Governed by the U.S. Constitution

The facts are rare, but blatant. Notes in the possession of the former CPUC President were seized under a 28 January 2015 search warrant issued by the Honorable Linda Colfax, Superior Court Judge for the County of San Francisco, based on probable cause the property sought was used "as the means of committing a felony" or tended "to show that a felony has been committed." (Exhibit 55)

The notes were entitled "RSG Notes on Hotel Bristol Stationery." A report of these facts in the 30 January 2015 edition of the San Diego Union Tribune[2] prompted Edison to disclose a secret meeting had been held on 26 March 2013 at the Hotel Bristol in Warsaw, Poland amongst Edison Vice President for External Affairs Steven Picket, CPUC President Michael Peevey and CPUC Energy Director Edmond Randolph. Edison's Ex Parte report, filed 9 February 2015[3] (nearly two years late) disclosed Peevey had provided "a framework for a possible resolution of the Order Instituting Investigation (OII) that **he** (former President Peevey) would consider acceptable." Edison's report of the secret meeting was filed more than 2 years after it was required. (Ex.) Cal. P.U.C. Rul. Proc. Rule 8.4.

Following the Hotel Bristol meeting, the plan to end the OII was developed by Edison lawyer Henry Weismann, the CPUC's Office of Ratepayer Advocate (ORA) and The Utility Reform Network (TURN) in over 35 secret discussions, communications and meetings with the CPUC's proceedings. (Ex. 57) Edison and the CPUC kept the plan from and the meetings from Plaintiffs Henricks and

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[2] Exhibit 60.

[3] The notice of the meeting was filed nearly 2 years late. CPUC Rules require ex parte communications be disclosed within 3 working days. (CPUC Rule 8.4) Here, the disclosure of the meeting only occurred after a search warrant obtained the secret meeting notes (Ex. 55) and a reporter published that fact. (Ex. 60) Edison's "Late-Filed Notice" was undoubtedly filed reluctantly and only after being caught.

Citizens Oversight. On 27 March 2014, Edison announced the OII was ended by the final version of the plan. (Exs. 44, 45) Under the plan, Edison would not have to show it acted reasonably in deploying the defective steam generators. While the plan was presented falsely to the news media as providing ratepayers a $1.4 billion refund, Edison customers would receive no refund checks, and no specified reduction in their bills. (Exs. 41-43) The supposed benefit was to be an unverified reduction in how much Edison could charge in its ERRA account, which Edison actually reported to increase by $1,250,000,000 between 2014 and 2015. (Ex. 49) A joint motion to approve the plan to end the OII was filed in April 2014. While a year was spent on the plan to end the OII, the CPUC limited the evidentiary hearing to consider the $5,000,000,000 transaction to 3 hours in the afternoon of 14 May 2014. (Ex. 48) Moreover, the administrative law judge issued an order stopping any "work on aspects of the OII which may be resolved" by the secretly made plan to end it. (Ex. 46)

The CPUC's broad authority is limited by the United States Constitution. *PUC Of California v. United States* 355 U.S. 534, 544 (1958) In denying a hearing on the issue of whether the costs incurred for the replacement steam generators and the loss of the plant were reasonable, the CPUC denied the most fundamental precepts of due process rights under the United States Constitution: "governmental action determining the rights or obligations of numerous specified persons is invalid unless the mandates of due process are satisfied." *Due Process and the Administrative State,* 72 Calif. L. Rev. 1044, 1050.

B. Plaintiffs and Their Attorneys Had Neither Notice, Nor an Opportunity to Be Heard

An impartial, unbiased adjudicator is an essential element of procedural due process. U.S. Const., amend. XIV, § 1; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242; *Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *Goldberg v. Kelly* (1970)

397 U.S. 254, 271. Ratepayers repose trust and confidence in their CPUC Commissioners and ALJs to perform their duties. *People ex rel. Harris v. Rizzo* (2013) 214 Cal. App. 4th 921, 950.

Plaintiffs had no notice of the secret process used to make the plan to end the OII. The plan was presented *fait accompli*. The settlement conference was announced ex parte by Edison on 20 March 2014 – just seven days prior to the planned 27 March 2014 meeting with just two of the parties. The ALJ was asked in an unlawful ex parte letter to stay the proceedings. (Ex. 39, 40) The day these few parties were to come together for settlement discussions, they announced a settlement with terms so complex they could not possibly have been negotiated that day. Also evidence of the façade of an all-party settlement negotiation are these facts that occurred on 27 March 2014: (1) Edison filed a 32-page 8-K with the SEC as to the detailed terms and its effect on everything from tax issues to investors (Ex. 45); (2) Edison International's CEO and President, along with counsel and top officials, held a conference call updating investors with the key industry analysts. (Ex. 44); (3) the CPUC ORA and TURN issued press releases with details of the agreement. (Ex. 41, 42).

The agreement was hatched privately without all parties, and without notice and a hearing. Documents seized from Peevey's home revealed notes of a private meeting one year prior between Peevey and Edison where Peevey formulated the terms of a settlement. (Ex. 55) It was not until the media published that finding that Edison filed a public notice about the 26 march 2013 meeting admitting "Peevey initated a communication on a framework for a possible resolution of the [OII]". (Ex. 29, Ex. 60) Meeting after meeting occurred between CPUC Commissioners and Edison relating to San Onofre outside the view of the parties or public. (Exs. 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 18, 20, 21, 22, 29, 30, 31, 32, 35)

Peevey corresponded outside the public view with Edison during this time arranging dinners, drinks and private meetings in London, Warsaw, DC and the

exclusive Los Angeles California Club. (Exs. 8, 28, 29, 35)

Plaintiffs did not agree to it, but are found by its terms. See, Problems for Captive Ratepayers in Nonunanimous Settlement of Public Utility Rate Case 12 Yale L. J on Reg 257 (1995) While claiming notice and hearing were provided and permitted, the CPUC does not reconcile the 24 April 2014 ruling ending from the proceedings any work on whether Edison acted reasonably in deploying the defective steam generators. The CPUC has forgotten the administrative law judge limited the inquiry to "material contested issues of fact." (Ex. 48, R.T. 2753) Also not remembered is the fact Edison repeatedly objected to any questions that broached issues banished to phase III. (Ex. 48, R.T. 2753-2756)

Inquiry into the propriety of Edison's conduct was denied because Edison did not seek and did not receive a finding it acted reasonably, nor that the charges approved by the CPUC for the steam generators were just and reasonable nor used and useful. (Ex. 58; see Decision)

Moreover, plaintiffs were foreclosed from pursing and developing their offer of proof, then seen as blasphemy and now gospel in light of the search warrant uncovered Warsaw notes of a secret deal to kill the OII. While the CPUC argues there was no evidence of collusion it again forgets the administrative law judge ruled evidence of collusion out-of-bounds at the evidentiary hearing. (Ex. 48, R.T. 2774) The CPUC also overlooks the fact that the administrative law judge ruled out evidence properly brought before the CPUC by way of "official" notice. (Ex. 53) The CPUC did not recognize the NRC report regarding San Onofre, but it did take official notice of a letter from a NRC investigator. (Ex. 53, Ex. 54)

1. <u>The Settlement Continues to Contain Unlawful Terms</u>

The changes made to the settlement were limited to ratepayer share of any litigation or insurance recovery. The changes made to the original agreement left in place the primary offending provisions. Edison customers are required to pay for steam generator costs and the damages they caused without Edison showing the

costs were reasonable, or that the steam generators and SO was used and useful. No evidentiary hearing was held on the changes made by Commissioner Florio. Edison admitted there was nothing in the record where Edison explained its evaluation of the strength of the case against Edison. (Ex. 48, R.T. 2745) Edison admitted there was nothing before the CPUC to establish the sufficiency of the settling parties investigation into the extent to which Edison was responsible for the new steam generator design errors. (Ex. 48, R.T. 2747)

2. The Application for Rehearing Does Not Remove this Court's Jurisdiction

This court has jurisdiction because Edison customers have been forced to pay money for electricity it did not receive from a plant whose equipment was never put in the rates. (Edison failed to file its application, as discussed *supra.*) Further, the November 25, 2014 decision issued by the CPUC became effective 20 days after it is served on the parties. Public Utilities Code § 1705. "An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision." Public Utilities Code § 1735. In the instant action, the CPUC issued a decision on November 25, 2015, which "should be effective immediately." (Defendants' Exhibit, Decision 14-11-040 November 25, 2014, p. 136).

C. This Case of Arbitrary Action Is Permitted Under The Johnson Act

As a preliminary matter, there was no rate setting here: Edison never applied to put in rates the charges for the replacement steam generators when it was required to do so by August 2011. It admits as much. (Ex. 2)

In adopting the Johnson Act, Congress intended to channel normal rate litigation into the State Courts, "while leaving Federal Courts free in the exercise of their equity powers to relieve against arbitrary action such as the [one before the] district judge." *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. 1954)

The CPUC acted arbitrarily in June 2012 when it allowed Edison to make its customers pay for the steam generators after they failed without showing they were

used and useful and that Edison acted reasonably. The CPUC acted arbitrarily when it delayed at Edison's request the start of the OII for nine months, when it divided the OII into stages and phases and postponed the examination of the reasonableness of Edison's conduct to the end, at Edison request. The CPUC acted arbitrarily when CPUC President Peevey met with Edison officials in Warsaw, Poland, while the OII was stalled, and outlined a plan to end the OII altogether. It acted arbitrarily when it allowed parties to be excluded from the sessions held to plan the end of the OII between May 2013 and March 2014. The CPUC acted arbitrarily when it limited the "evidentiary" hearing to 3 hours in the afternoon of 14 May 2014.

The CPUC further acted arbitrarily when it limited the examination of witnesses to factual conflicts and prohibited an examination of whether the plan to end the OII was the product of collusion. The CPUC acted arbitrarily when it denied the requests for official notice after the evidentiary record was closed and when it took an official notice of a hearsay letter written by an NRC investigator. The CPUC acted arbitrarily when it found falsely the "primary result of the settlement is ratepayer refunds and credits of approximately $1.45 billion," There are no refunds, as the term is defined in the Oxford English Dictionary (A repayment; the return of money paid). See, Problems for Captive Ratepayers in Nonunanimous Settlement of Public Utility Rate Case, 12 Yale L. J on Reg 257 (1995)

Moreover, even under the Johnson Act, there is no plain, speedy and efficient remedy that may be had in the state court. 28 U.S.C. § 1382. Plaintiff Henricks filed a Petition for Rehearing, which has sat idle. When ratepayers have tried to bring their matters to state court, they get denied at the trial court level under Cal. Pub. Util. C. § 1759, and the Court of Appeal fails to review merits of CPUC unlawful actions. See *Disenhouse v. Peevey*, 226 Cal. App. 4th 1096, (Cal. App. 4th Dist. 2014) (trial court declined to hear matter, Court of Appeal denied writ

1 review, Court of Appeal did not rule on substance of alleged violation of open
2 meeting law)

3 The absence of any of these requirements is fatal to the application of the Act
4 and therefore allows the federal court to maintain jurisdiction. *Gen. Textile Printing*
5 *& Processing Corp. v. City of Rocky Mount*, 908 F. Supp. 1295, 1300 (E.D.N.C.
6 1995). The burden of showing that the conditions have been met is on the party
7 invoking the Johnson Act. *US W., Inc. v. Nelson*, 146 F.3d 718, 722 (9th Cir. 1998).
8 Defendants cannot carry this burden because 1) reasonable notice and hearing was
9 not given prior to the order being made; and 2) a plain, speedy, and efficient
10 remedy may not be had by plaintiffs in California Courts.

11 **D. The Eleventh Amendment Permits This Action**

12 1. The CPUC and Its Commissioners Can Be Sued

13 A "democracy is effective only if the people have faith in those who govern, and
14 that faith is bound to be shattered when high officials and their appointees engage
15 in activities which arouse suspicions of malfeasance and corruption." (*United States*
16 *v. Miss. Valley Generating Co.*, 364 U.S. 520, 562 [1961]). The plaintiffs invoke
17 their federal constitutional protections in federal court to ward off arbitrary acts of
18 malfeasance and corruption led by the former CPUC President. They seek the
19 return of their money from Edison not the State of California. They want to stop
20 Edison from taking more of plaintiffs' funds. Thus, the funds sought are those
21 Edison wrongfully took from and plan to continue to take from plaintiffs over
22 which the CPUC exercises control. No state funds are sought in the complaint.
23 The exercise of control by the CPUC over funds collected from Edison customers
24 does not convert those funds to public funds. Cal Pub. Util. Code § 453.5 (Refunds
25 belong to current and former utility customers, not the State of California)

26 In one sense, allowing the CPUC to use state regulatory power to transfer
27 wealth from Edison customers to Edison to pay for what could be intentional or
28 reckless or at least imprudent deployment of the effective steam generators could be

1 construed as an exercise of the taxing power of the state. However, Edison is not
2 authorized under California law to impose taxes. See, Privatization, Policy
3 Paralysis, and the Poor, 96 Calif. L. Rev. 393, 405. The 11th Amendment is not
4 implicated in this case. See, Leaving the Chisholm Trail: The Eleventh
5 Amendment and the Background Principle of Strict Construction 50 Wm & Mary
6 L. Rev. 1579, 1691 (This case poses no threat to California of "annihilation as an
7 independent sovereign.")
8 For 12 years, former CPUC President Peevey headed the CPUC. Commissioner
9 Florio had practice before the CPUC since 1978. As is demonstrated from the
10 emails attached to the operative complaint, both of these commissioners exercised
11 control over the CPUC. The CPUC recognizes that the Commissioners can be
12 sued, especially in cases like the present where they are alleged to have engaged in
13 violations of the federal constitutional protections afforded plaintiffs. *Ex Parte*
14 *Young,* 209 U.S. 123 (1908); *Presbyterian Church (U.S.A.) v. United States*, 870
15 F.2d 518, 525 (9th Cir. 1989)
16 **E. The Court Need Not Abstain; It Should Resolve the Dispute**
17 District courts have an obligation and a duty to decide cases properly before
18 them, and 'abstention from the exercise of federal jurisdiction is the exception, not
19 the rule. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 805 (9th Cir. Cal. 2002);
20 *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 283 (2005) The
21 plaintiffs were and are being force to pay Edison for losses Edison purportedly
22 incurred when its executives decided to deploy defective steam generators at SO.
23 They have no timely and adequate state court review. As set forth above the state
24 court review is neither timely nor adequate. Plaintiffs seek only to vindicate their
25 federal rights under the United States Constitution to stop their property from being
26 taken for public use. There are no "difficult questions of state law bearing on
27 policy problems of substantial public import whose importance transcends the
28 result in the case then at bar." The exercise of federal review of the question in a

1 case and in similar cases would [not] be disruptive of state efforts to establish a
2 coherent policy with respect to a matter of substantial public concern." *S. Cal.*
3 *Edison Co. v. Lynch*, 307 F.3d 794, 806 (9th Cir. Cal. 2002); *Flagging the*
4 *Obligation: Federal Courts' Abstention in Favor of State Rehabilitation and*
5 *Liquidation Proceedings*, 28 Tort & Ins. L.J. 837 (1992-1993); *Making Younger*
6 *Civil: The Consequences of Federal Court Deference to State Court Proceedings A*
7 *Response to Professor Stravitz,* 58 Ford. L. Rev. 173 (1989)

8 Plaintiffs seek aid of the court to require CPUC officials and Edison to
9 conform to the United States Constitution and stop taking plaintiffs property for
10 public use without compensation. The CPUC argument that this case is about state
11 law is incorrect and misunderstands the relief sought.

12

13 **F. The Claims Are Ripe**

Plaintiffs were injured when the CPUC allowed Edison to take plaintiffs
14 property without just compensation. The constitutional injury preceded and does
15 not depend upon the actions of the CPUC to approve the proposed settlement.
16 Ratepayers have and continue to suffer constitutional injuries they seek to redress in
17 this case. The constitutional declaratory judgment action is ripe because it is based
18 on facts alleged, under all the circumstances that show that there is a substantial
19 controversy, between parties having adverse legal interests, of sufficient immediacy
20 and reality to warrant the issuance of a declaratory judgment. The issues presented
21 are definite and concrete, not hypothetical or abstract. *Educ. Credit Mgmt. Corp. v.*
22 *Coleman (In re Coleman),* 560 F.3d 1000, 1004-1005 (9th Cir.2009)

23 The CPUC's suggestion that the CPUC may alter the underlying decision is
24 speculation. There is nothing before the CPUC or coming from the CPUC that
25 suggests anything other than more of the same abuse of power and rights of the
26 people it supposed to be protecting.

27 After putting the central purpose of the OII to find out whether Edison acted
28

unreasonably in deploying the steam generators on hold on 10 December 2012, the CPUC held 5 days of hearings (13-17 May 2013) on what it called phase 1. (Ex. 48; Final Decision p. 17) In contrast, a 3-hour hearing to consider the entire $5,000,000,000 transaction ended the OII. (Ex. 46, p. 3) More stalling after the secret 26 march 2013 Warsaw, Poland meeting was used with an invented Phase 1A, with hearings held on 5-6 August 2013. Phase 2 hearings were held on 7-11 October 2013. A proposed decision for Phase 1 was issued on 19 November 2013 (Final Decision p. 17) and none was issued for Phase 2. (Final Decision p. 18)

While the CPUC was steering the OII away from its intended purpose of examining how and why the steam generators failed, it was receiving expert advice about how the investigation should be conducted from renowned nuclear expert Dr. Robert Budnitz:

> What error(s) led to the tube failure(s)? or At what stage were those errors made? or Who made those errors? or What might have been done, and by whom, and at what stage, to have averted those errors?" or "What arrangements in place elsewhere, technical or administrative or both, that were successful in averting these errors somehow didn't work adequately for the SONGS RSGs?" Each of these is a much bigger question, one that I am developing insights into but on which my opinion(s) will only crystallize later as I dig into more information.

While the CPUC distracted with phases and phases on phases the real proceedings to end the OII went on in secret:

No.	Date	Description	Time
1	**3/26/2013**	**Peevey provides "framework for a possible resolution of the OII" was made by Mr. Peevey to Mr. Pickett**	
2	5/3/2013	Discussion with SCE (Henry Weissman[4]) re: TURN data responses	0.5
3	5/31/2013	Discussion with Henry Weissman (SCE) re: possible settlement, summary of conversation for TURN attorneys and consultants	0.5

[4] Actual spelling is Henry "*Weissmann.*"

No.	Date	Description	Time
4	6/19/2013	Settlement meeting with SCE (Henry Weissman) in person to discuss issues	1.5
5	7/1/2013	Meeting with SCE (Henry Weissman) to discuss settlement issues	1.5
6	7/3/2013	Discussion with SCE (Henry Weissman) and development of issue matrix	0.75
7	7/17/2013	Meeting with SCE (Henry Weissman) to discuss settlement	1.5
8	8/14/2013	Preparation for settlement meeting with SCE, settlement meeting with SCE (Henry Weissman) at TURN's office	2
9	8/23/2013	Discussions with SCE (Henry Weisman), DRA (Scott Logan) and SDG&E (Lee Schevrin) re settlement	0.5
10	10/11/2013	Ex-parte meeting (by phone) with Sepideh Khosrowjah (Commissioner Florio)	0.25
11	10/11/2013	Preparation for and attendance at, settlement meeting with DRA, SCE, SDG&E	2.75
12	10/20/2013	Review of SCE settlement revenue requirement model update, correspondence, with SCE and Bill Marcus re: modeling issues.	0.75
13	11/1/2013	Preparation for, and attendance at, settlement meeting with ORA, SCE and SDG&E	2.5
14	11/7/2013	Review of SCE/SDG&E settlement offer, attendance at settlement meeting with SCE/SDG&E/ORA	2.5
15	11/13/2013	Call with ORA to discuss settlement status, call with SCE to discuss settlement status	1.0
16	1/10/2014	Ex-parte discussion with Sepideh Khosrowjah re: SONGS phase 1 PD	0.25
17	1/13/2014	Ex-parte meeting with Commissioner Florio	0.5
18	1/27/2014	Settlement meeting (in person) with SDG&E	0.5
19	1/28/2014	Discussion with Joe Como (ORA) re: SONGS settlement, drafting of settlement communications to ORA staff and SCE/SDG&E	0.5
20	2/4/2014	Drafting settlement communications to SCE/SDG&E	0.5
21	2/5/2014	Conversation with SCE (Henry Weissman) re: settlement issues	0.5

No.	Date	Description	Time
22	2/7/2014	Communications with SCE re: settlements issues	0.25
23	2/26/2014	Communication with SCE re: settlement issues	0.25
24	2/27/2014	Review and preparation of TURN/ORA settlement offer; distribution to SCE/SDG&E	1
25	2/28/2014	Settlement call with SCE, SDG&E and ORA	0.75
26	3/3/2014	Settlement meeting (in-person) with SCE, SDG&E and ORA; Post-meeting debrie with ORA	1.5
27	3/6/2014	Settlement meeting (in-person) with SCE, SDG&E and ORA	1.5
28	3/10/2014	Review/analysis of SCE/SDG&E settlement offer, settlement communications with SCE/SDG&E re: next meetings; communication with ORA re: settlement issues	0.5
29	3/11/2014	Settlement meeting (by phone) with SCE, SDG&E and ORA	1.25
30	3/13/2014	Preparation for, and attendance at, settlement meeting (in person) with SCE, SDG&E and ORA	2.5
31	3/18/2014	Settlement meting (in person) with SCE, SDG&E and ORA re: settlements documents	1.5
32	3/19/2014	Settlements meeting (by phone) with SCE, SDG&E and ORA	0.75
33	3/20/2014	Settlement meeting (by phone) with SCE, SDG&E and ORA	1.0
34	3/21/2014	Settlement meeting (by phone) with SCE, SDG&E and ORA	1.0
35	3/24/2014	Review of latest settlement draft, exchange of emails with settling parties, meeting (by phone) with SCE, SDG&E and ORA to discuss latest revisions to settlement	2.5
36	3/26/2014	Settlement call with SCE, SDG&E and ORA	1.5
37	3/26/2014	Review of revised settlement documents, settlement summary, PVRR calculations, phone calls/emails with SDG&E re: PVRR issues; 2012 O&M costs; phone calls with SCE and ORA to discuss various settlement issues	5.5
		Total	35.75

On 24 April 2014, the administrative law judge issued a ruling staying the entire proceeding: "Work on the Phase 2 PD is incomplete, the ALJs did not contemplate scheduling a pre-hearing conference regarding Phase 3 prior to issuance of the Phase 2 PD, and the Phase 1 PD is currently on hold." (Ex. 46, p. 6) Under the written plan to end the OII, the phase 1 and 1A proposed decisions are withdrawn. Phase 1, 1A, and 2 were nothing more than means the CPUC used to avoid the OII's real purpose to get to the bottom of who and what caused the steam generators to fail.

The CPUC did not accurately state the theory of collusion advanced. We now know that there were over 35 secret discussions, meetings and communications following the Warsaw meeting amongst Peevey, Randolph, and Pickett. We know the CPUC's Office of Ratepayer Advocate was an active member of the secret meetings. We know the secret meetings were kept from the 8 other parties to the OII. Peevey, having already expressed himself on what it would take to end the OII to one of the parties without having done so to the other side, was not an impartial public officer. *Clark v. City of Hermosa Beach (1996)* 48 Cal. App. 4th 1152, 1173. The parties have a right, and Peevey had a duty, to put his conflict on the record.

The CPUC also misconstrues plaintiffs' argument regarding evidence of collusion. Plaintiffs argued to the CPUC there were storm warnings that collusion was present, red flags--putting the parties on "inquiry notice" that an investigation, discovery, and an evidentiary hearing were needed to determine if the Plan to kill the investigation was the product of collusion rather than good faith negotiation. (Ex. 48, Ex. 58 p. 9) *Deveny v. Entropin, Inc.*,(2006) 139 Cal. App. 4th 408, 428. See, *Consumer Defense Group v. Rental Housing Industry Members*, (2006) 137 *Cal. App. 4th 1185, 1186; Chevron Corp. v. Donziger*, 2014 U.S. Dist. LEXIS 28253, 1 (S.D.N.Y. 2014); 49 UCLA L. Rev. 991, 993.

/ / /

1 Finally, the failure to develop a proper record in cases such as these has been
2 criticized in similar cases. In *Jersey Central Power & Light Co. v. Federal Energy*
3 *Regulatory Commission* 810 F. 2nd 1168, 1183-1186 (D.D. 1987) Judge Bork's 5-to-
4 4 majority opinion, written pursuant to en banc review, concluded the FERC
5 committed error when it failed to build a proper record, a deficiency found in this
6 case. Here, the effort to cite to the record failed because it ignored that Edison did
7 not even attempt to obtain a reasonableness finding. See, 12 Yale J. on Reg 257,
8 285 (1995)

9 **V. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND**

10 Generally, Fed. R. Civ. P. 15 advises the court that "leave shall be freely
11 given when justice so requires." This policy is "to be applied with extreme
12 liberality." *Owens v. Kaiser Found. Health Plan, Inc.,* 244 F.3d 708, 712 (9th Cir.
13 2001)(quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th
14 Cir. 1990)). Dismissal with prejudice and without leave to amend is not
15 appropriate unless it is clear on de novo review that the complaint could not be
16 saved by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

17 A district court's failure to consider the relevant factors and articulate why
18 dismissal should be with prejudice instead of without prejudice may constitute an
19 abuse of discretion. *Eminence Capital, LLC v. Aspeon, Inc.,* 316 F.3d 1048, 1052
20 (9th Cir. 2003). Plaintiffs proffer that if remanded, they could add facts developed
21 in their analysis and investigation to cure insufficiencies, if any are found to exist,
22 and to add specificity if any found lacking.

23 The documents attached to the Declaration of Maria C. Severson, filed
24 herewith, represent an offer of proof as to new additional facts plaintiffs could
25 allege in support of their claims, substantively and jurisdictionally. The proceedings
26 at the CPUC did not include a request to put the generators in rates; that was to
27 happen in August 2011 (within six months of the steam generators being fully
28 operational) but never occurred. (Ex. 2) When the CPUC ALJ ordered it be done,

1 the utility and the two parties concocted a deal to close the investigation.
2 The proceedings on the rates never took place. Since then, a search warrant
3 served on CPUC President Peevey produced records relating to secret meetings
4 where Peevey and Edison inked out deal terms. Public filings, records forced public
5 by way of public records act requests and media investigation have revealed facts
6 that show collusion and impropriety at the highest level of the Commission relating
7 to the settlement. Accordingly, the policy of liberal amendment requires plaintiffs
8 to be given an opportunity to set forth these facts. *Owens v. Kaiser Found. Health*
9 *Plan, Inc.,* 244 F.3d 708, 712 (9th Cir. 2001).

10 **VI. CONCLUSION**

11 Under former CPUC President Peevey, the public purpose mission of the
12 CPUC was altered from one protecting ratepayers from unreasonable and unjust
13 rates, to one guaranteeing the "utilities' financial health, while achieving the lowest
14 possible rates." Edison and the CPUC are forcing some Edison customers alone to
15 bear the public burden of maintaining Edison's financial health by relieving Edison
16 of the financial consequences of deploying the unlicensed defective steam
17 generators that knocked the plant out of commission, when Edison had failed to put
18 the costs of the steam generators permanently in rates. In other words, plaintiffs are
19 being forced by Edison and the CPUC to alone bear the public burden which, in all
20 fairness and justice, should be borne by the public as a whole -- including Edison
21 investors. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012).
22 There is one fundamental reality in this case: Edison customers are being
23 charged for the costs of a nuclear electricity production plant that produces no
24 electricity. While the public should indeed pay for what it gets and it should also
25 get what it pays for, this is not happening. 8 Energy L. J. 303, 335 (1987) Here,
26 Edison in complicity with the CPUC, is robbing Edison customers under "legal
27 authority." *Id.*
28 / / /

If the Court is inclined to dismiss as not ripe, it should stay the matter. If it is inclined to dismiss for perceived deficiencies, Plaintiffs respectfully request leave to amend.

AGUIRRE & SEVERSON, LLP

Dated: February 25, 2015

/s/Maria C. Severson
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