EXHIBIT 1

From: Raymond Marshall <RMarshall@sheppardmullin.com>
Sent: Sunday, June 21, 2015 3:53 PM
To: Maggy Krell; Brett Morris; Reye Diaz; Deborah Halberstadt
Cc: jason.reiger@cpuc.ca.gov; Aguilar, Arocles; Naughton, Pamela; Krystal Bowen
Subject: CPUC Update Status

Counsel,

Per your request, we are writing to provide you an update on our review and production process in response to your office's numerous requests for documents. In doing so, we note the following:

First, as a preliminary matter we feel it important to reiterate our guiding principles for responding to the multiple document requests we have received from you, the U.S. Attorney's Office and tens of Public Record Act Requests. They are simple: (1) review and produce documents as quickly, efficiently and economically as possible; (2) err on the side of transparency and disclosure without unintentionally waiving the CPUC's right to maintain any privileges it is entitled to assert under the law; and (3) communicate and cooperate with all requesting parties in the CPUC's ongoing efforts to timely review and produce documents.

Second, it is important to put into context the CPUC's production to date. As you are aware, following your execution of a search warrant on the CPUC in November 2014, we identified approximately 247,646 documents (of the 1,093,654 that we requested from you from your execution of the search warrant) as potentially privileged. In accordance with our March 13, 2015 email, we made a partial production of the documents (from those which we had previously designated as "potentially privileged") responsive to your 2014 search warrant in May. We will make another production of these materials in late-June/early-July. Unless you direct otherwise, we will then focus efforts on completing that production, begin the review and production of the deleted and recovered files and provide you with a privilege log of all documents currently being withheld on the basis of privilege.

Third, to expedite production we will continue or practice of making "rolling productions", as well as prioritizing for immediate production all documents previously reviewed and produced in response to requests by other parties or already part of the public record. Likewise, we will do a "rolling production" of a privilege log, which we will update as appropriate and called for in connection with future productions by the CPUC.

Fourth, as you are further aware, since the execution of the search warrant, your office has served three subpoenas, and an additional search warrant (served on June 5, 2015) on the CPUC. We are continuing to work diligently on these requests. However, given the large volume of materials sought and the overlapping requested due dates, we are requesting additional guidance from you on your prioritization of these requests. Importantly, we have significant concerns and questions about the breadth and scope of your June 5, 2015 Search Warrant. As we advised Agent Diaz, my former partner, Pam Naughton, will be handling the CPUC's response to the warrant and will contact you directly to discuss the various questions we have about the requests. As it currently stands, the new requests in the June 5 search warrant will delay our review and productions of Grand Jury Subpoenas #1 and #2, as well as the remaining documents that were previously identified as "potentially privileged" from the execution of your 2014 search warrant.

In sum, as stated previously, we are continuing to work diligently to review and produce the materials you are requesting, given limited resources and the concurrent demands of federal subpoenas and Public Records Act requests. However, we would benefit greatly from a dialogue with you about how best to prioritize the requested materials. At that point, we will be in a better position to give you a more detailed timeline regarding our ability to be able to respond to your numerous requests.

Finally, I will be out of the country on vacation the next two weeks, returning to the office July 6. In the interim, Krystal Bowen and Pam McNaughton will be able to address any questions you may have in my absence.

Best regards,

Ray

Attention: This message is sent by a law firm and may contain information that is privileged or confidential. If you received this transmission in error, please notify the sender by reply e-mail and delete the message and any attachments.

EXHIBIT 2

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September 29, 2015

OUR FILE NO. 393011-000001

VIA EMAIL AND US MAIL

Ms. Maggy Krell
Deputy Attorney General
California Department of Justice
Office of the Attorney General
1300 I Street
Sacramento, CA 95814

Re: California Public Utilities Commission

Dear Ms. Krell:

On behalf of the CPUC, we are providing you with updates of the CPUC's production of documents to your office and our plans to complete the productions.

As you know, your office served 2 search warrants and 3 grand jury subpoenas on the CPUC between November 4, 2014 and June 5, 2015. In addition to these demands, the CPUC has received 5 grand jury subpoenas from the United States Attorney's Office. The SONGS search warrant, served by your office, was the last of no less than 10 formal demands for information from two different prosecuting agencies.

The CPUC is a public agency that is integral to the safe, fair and effective operation of California's utilities. Although, as a state agency, it cannot be criminally charged, the CPUC has nevertheless fully cooperated with the ongoing investigations and will continue doing so. However, the excessive demands by the Attorney General and the US Attorney's Office are impinging on the CPUC's already limited resources and threatening its very ability to carry it out its constitutionally mandated duties.

To date, the CPUC has produced well over **a million** documents to the Attorney General. Since January, the CPUC has continue to produce documents nearly every month, on a rolling basis. We have produced documents in response to each and every demand your office has issued. We have completed our production in response to subpoenas 1 and 3.

Now that you have received, and presumably reviewed, the over 1 million documents produced to date and, no doubt, have a better sense of the types of documents requested and how pertinent they may or may not be, it seems an appropriate time to evaluate the remaining document demands to make sure you truly need more documents and, if so, to explain how we intend to go about review and production in the most efficient way possible.

What follows is a summary of the status as to each document demand.

I. Search Warrant Executed In November 2014

In November 2014 state agents seized computers and hardware containing approximately 1.1 million live documents. Because of the likelihood of some of these documents containing privileged

communications, your office provided us with copies of the seized documents in order to filter through agreed upon search terms to identify potentially privileged documents.

It is well settled that privileged documents may be withheld from a government investigation, even if those documents are subject to a search warrant. People v. Sup. Ct., 25 Cal. 4th 703 (2001) (government not entitled to documents protected by the attorney-client privilege and/or work product doctrine that were seized pursuant to a search warrant). Indeed, the Attorney General's Office itself withholds documents subject to subpoenas on the grounds of deliberative process and attorney-client privilege. Notably, Prime Healthcare Serv. v. Harris, No. 5:15-cv-01934-GHK-DTB (C.D. Cal. Sept. 21, 2015); Coleman v. Schwarzenegger, No. C01-1351 THE 2007, WL 4328476 (E.D. Cal. 2007); Coito v. Sup. Ct., 54 Cal. 4th 480 (2012).

The filtering process identified approximately 255,000 documents containing "potentially privileged" terms. The remaining documents (approximately 845,000) were immediately produced back to you. Since then, approximately 131,186 of the "potentially privileged" documents have been produced to you, leaving approximately 10% of the original 1.1 million yet to be reviewed. The nature of this review is time consuming. Unfortunately, there is no way to streamline line this process unless your office allows us to suspend our review and deem the search warrant to have been complied with. Now that you have seen 90% of the documents from this search warrant, please let us know whether you wish us to continue our review or if you are, at this point, satisfied with the production.

If we need to review this last batch of documents, we estimate completion would require approximately an additional 65 working days. Notably, this estimate assumes current staffing levels, including the contract attorneys working 7 days a week, and working only on this search warrant and no other state or federal subpoenas or search warrants, which, of course, is not currently the case. If budgetary constraints force us to limit the number of hours of reviewers, which appears highly likely, then obviously the time to completion is lengthened.

In addition to the active files which we filtered and are currently reviewing, we were able to recover over 321,000 deleted documents from the copies your office provided to us. A good portion of these documents appear to be spam and/or junk email. However, approximately 60% contained privileged search terms. After a preliminary analysis, only 13% of the total deleted documents triggered key terms covering the subject matter addressed in the warrants (e.g., SONGS, utility domain name addresses, etc.). However, given our limited resources, we have not yet begun any review of them and thus have no estimate for completion. The completion date would obviously depend on whether we have to review all 321,000 or only the 13% which contained subject matter key terms.

II. SONGS Search Warrant

Preliminarily, we wish to point out that the SONGS search warrant is vague and has caused confusion among our reviewers. Although not numbered, the search warrant vaguely identifies 5 broad categories for production. It calls for any and all records between January 31, 2012 through January 31, 2015: (1) involving the SONGS OII settlement agreement, (2) the 2013 meeting between Pickett and Peevey in Poland, (3) communications as to when and why the San Onofre facility would be closed, (4) commitment of monies for greenhouse gas research as a result of the SONGS settlement, and (5) communications with parties to the settlement of SONGS OII.

It also specifies 22 custodians (8 of whom are CPUC employees) and requires the CPUC to further identify additional CPUC custodians who were involved in the implementation of the greenhouse gas research provisions and also gather hard copy documents from the identified custodians, which we are in the process of completing.

Section 5 of the search warrant further details what documents should be provided as to three of the demands:(1), (2) and (4):

Introductory Paragraph	Section 5 Further Specifications
(1) SONGS closure settlement agreement	(5)(a): (1)documents constituting or referring to communications with SCE about the OII prior to the execution of the settlement on March 27, 2014 (excluding on-the-record communications such as SCE pleadings filed with the CPUC); and (2) documents constituting communications with TURN or ORA referencing communications from Peevey regarding SONGS or UC in the context of the settlement negotiations up to March 27, 2014
(2) the 2013 meeting between Stephen PICKETT and Michael PEEVEY in Poland	(5)(b): As to documents pertaining to the Poland trip in March 2013, CPUC will produce documents constituting or referring to communications during that trip that relate to SONGS. These documents will include any communications or materials regarding SONGS made: (1) in anticipation of the trip, (2) any documents or communications regarding SONGS that occurred during the trip, and (3) any communications or material regarding SONGS created after the trip ended.
(4) commitment of monies for research as a result of the closure of SONGS	(5)(c): As to the documents regarding funding of research in connection with the SONGS settlement, CPUC will produce documents and all communications that: (1) constitute or refer to communications with SCE or UCLA regarding greenhouse gas research as part of the SONGS drafts of same; (2) refer to SCE's contributing to the UCLA Luskin Institute at UCLA, the University of California, UCLA's Institute of the Environment and Sustainability, or the California Center for Sustainable Communities at UCLA, in connection with the SONGS settlement; and (3) constitute advocacy directed to the CPUC by local governmental agencies in support of greenhouse gas research as part of the settlement.

However, the search warrant does not provide any further guidance as to demands (3) (communication(s) pertaining to the determination of when and why SONGS would be closed) and (5) (communication(s)

pertaining to the settlement of the SONGS OII), which are very broad and vague. Practically anything produced or created for the OII proceeding could be considered to relate as to why SONGS would be closed or the ultimate settlement of the OII itself. Yet, subsection (5)(a) indicates that the CPUC is not required to produce public filings, at least as to the settlement agreement.

To respond to the search warrant, CPUC pulled emails and documents from its servers from the specified CPUC employees, plus other CPUC employees known to be involved with the SONGS OII settlement or greenhouse gas provisions. We also extracted communications to, from, and/or copying the SoCal Edison employees listed in the search warrant. This data was exported into a larger database. There are currently several million documents in this database.

To efficiently and effectively respond to the search warrant, the CPUC compiled SONGS search terms, based on the demands of the search warrant and the detailed requests of section 5, and applied these terms to the emails and other documents of the 22 identified custodians, plus the additional employees identified by the CPUC. This produced several hundred thousand documents which will be reviewed for relevance. We have also applied the agreed upon privileged terms to identify any potentially privileged documents and will review those documents for privilege. We are still in the process of collecting and processing documents from all possible sources. At this point, we do not have an estimate of the total volume, or anticipated completion date.

Finally, as we explained in our last telephone call with you, at least 20,000 of the documents **already produced** to the Attorney General's office in response to the first search warrant and earlier subpoenas triggered SONGS search terms. Moreover, on September 8, 2015, the CPUC produced approximately 19,335 additional documents to the Attorney General's office that referenced SONGS search terms and had been produced in prior productions to federal authorities. Thus, over 40,000 documents have been produced responsive to this search warrant. Since these facts clearly contradict agent Diaz's statement filed with the return of the search warrant, we ask that his affidavit be corrected and refiled with an errata.

III. Second Grand Jury Subpoena

The CPUC has already produced nearly two thousand documents in response to this subpoena. To fully respond to this subpoena, the CPUC has isolated all correspondence among all ALJs during the relevant time period and searched for all documents that trigger the term "assign" or "assignment". These search parameters encompassed over 17,000 documents, which will need to be reviewed for relevance and privilege.

We are open to discussing any suggestions you have as to how we could further prioritize or downsize the review tasks and get truly pertinent documents to you more quickly. We are happy to meet and confer regarding the scope of your requests and our productions.

Please call me with any questions or concerns.

Very truly yours,

DLA Piper LLP (US)

Pamela Naughton
Partner

PN:mev

WEST\261656856.1

EXHIBIT 3

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October 16, 2015

OUR FILE NO. 393011-000001

CONFIDENTIAL

Ms. Maggy Krell, Deputy Attorney General
Ms. Deborah Halberstadt, Deputy Attorney General
Reye Diaz, Special Agent
Office of the Attorney General
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deborah.halberstadt@doj.ca.gov
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Dear All,

As we discussed with Special Agent Diaz and Ms. Halberstadt on Tuesday, October 13, below is a summary of the CPUC's production to date in response to the SONGS search warrant issued on June 5, 2015. Also below is a summary of our proposal to streamline the review and production of (1) the deleted emails recovered from the data seized pursuant to the first search warrant issued in November 2014 and (2) the approximately 100,000 documents that remain to be reviewed in response to this search warrant.

I. Compliance with the SONGS Search Warrant

First, as we informed you during our call and explained in our September 29, 2014 letter, the California Attorney General has a substantial volume of documents responsive to the SONGS search warrant (by our estimate, over 20,000 documents) already in its possession due to the fact that it initially seized a number of computers and hard drives as a result of the November 5, 2014 warrant. The items seized were computers, hard drives, and other devices of certain custodians such as former Commission President Michael Peevey, Michel Florio, Carol Brown, etc. Since your office seized these documents, it obtained everything on them, including any documents relating to SONGS. Per the CPUC's prior agreement with the Attorney General's office, you provided us with copies of everything initially seized and allowed us to review documents that triggered certain terms which may indicate that a document is privileged. Following this agreed upon protocol, we have produced over a million documents back to your office to date (approximately 845,000 which did not trigger any potentially privileged terms and approximately 131,000 which were reviewed for privilege and then produced.)

Using our document review platform tool, we applied relevant SONGS terms to the documents we had already produced back to you as of July 31, 2015 from the first search warrant. Our term search results identified approximately 20,373 documents. So, even before the CPUC made any production to your office specifically in response to the SONGS search warrant, your office already had a substantial volume of responsive documents in your possession. Please note that this search result does NOT include

additional documents the CPUC produced to you in response to the November 5, 2014 search warrant on September 24, 2015. So, it is highly likely you have even more SONGS responsive documents in your possession.

Second, on September 8, 2015, the CPUC produced approximately 19,335 documents to your office in response to the SONGS search warrant. This production consisted of documents that referenced SONGS search terms that had been produced in prior productions to federal authorities.

Third, the CPUC intends to make another production in response to the SONGS search warrant by the end of the month. In order to respond to the SONGS search warrant, CPUC pulled emails and documents from its servers from the specified CPUC employees, plus other CPUC employees known to be involved with the SONGS OII settlement or greenhouse gas provisions. We also extracted communications to, from, and/or copying the SoCal Edison employees listed in the search warrant. This data was exported into a larger database. There are currently several million documents in this database.

To efficiently and effectively respond to the search warrant, the CPUC applied SONGS search terms to the emails and other documents of the 22 identified custodians, plus the additional employees identified by the CPUC. We have also gathered hard copy documents from the identified custodians and will be producing these documents in the next production.

We will continue to produce documents responsive to the SONGS search warrant on a rolling basis, after we have completed our production in response to the November 2014 search warrant, per your instruction.

II. Streamlining Production on the November 5, 2014 Search Warrant

As we discussed on our call, the CPUC has identified approximately 321,000 deleted and recovered emails from the material initially seized pursuant to the November 5, 2014 search warrant. You agreed that the CPUC may limit its review and production of these documents to only those which trigger terms related to the first search warrant and the SONGS search warrant. Our proposed terms are attached as Exhibit A.

Additionally, we estimate that we have approximately 100,000 documents that remain to be reviewed in response to the November 2014 search warrant. It will greatly streamline the process and reduce expenses to filter those 100,000 documents using the terms in Exhibit A. We are open to discussing any additional search terms with you. In the meantime, we will proceed with the filtering process.

Once we finalize the most recent production on SONGS, our priority will be completing our review of the documents responsive to the first search warrant. Once we have completed that review, we will discuss

our next steps for completing production in response to grand jury subpoena #2 and the SONGS search warrant.

Please let us know if you have any questions, concerns or comments regarding the proposed search terms. Thank you.

Very truly yours,

DLA Piper LLP (US)

Pamela Naughton
Partner

Admitted In California Bar

WEST\262193877.1

EXHIBIT A

SONGS*
"San Onofre"
"12-10-013"
"1210013"
Unit2*
"Unit 2"
Poland
Warsaw
"Bristol Hotel"
"greenhouse"
(green* w/3 house)
"ghg"
(fund* w/3 research)
"UC"
"UCLA"
(University w/3 California)
"Luskin"
"IES"
(Institute w/3 Environment w/3 Sustainability)
((Institute w/3 Environment) w/2 Sustainability)
"CCSC"
(California w/3 Center w/3 Sustainable w/3 Communities)
(((California w/3 Center) w/2 Sustainable) w/3 Communities)
"CFEE"
(California w/3 Foundation w/5 Environment w/5 Economy)
(((California w/3 Foundation) w/2 Environment) w/3 Economy)
HECA
Annual w/3 dinner
Cherry
Judge w/3 Long
Judge w/3 Wong
*sce.com
*edisonintl.com
*sdge.com
*pge.com
*Semprautilities.com

EXHIBIT 4

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

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SACRAMENTO, CA 94244-2550

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Facsimile:
E-Mail: Deborah.Halberstadt@doj.ca.gov

December 22, 2015

Ms. Rebecca Roberts
DLA Piper, LLP
401 B Street, Suite 1700
San Diego, California 92101-4297

RE: California Public Utilities Commission

Dear Ms. Roberts:

Thank you for your recent productions of 1) documents responsive to the November 5, 2014 search warrant (CPUC CALAG 02130833-02144600) and 2) the reproduction of documents in response to the June 5, 2015 search warrant (CPUC CALAG 00001781-2122826, though not consecutive). I appreciate your quick turnaround on these items.

In our December 14, 2015 conversation, we also discussed the search terms CPUC is employing to identify responsive documents. As I understood from our conversation, CPUC is currently using Exhibit A to identify documents responsive to the November warrant. Exhibit A includes some terms related to SONGS, and some terms related primarily to the judge-shopping issue with PG&E. In discussing the use of this list of terms further with my office, we have concluded that these limited search terms are insufficient for purposes of response to the November warrant. We respectfully request that you provide all non-privileged documents in response to the November warrant, not just those captured by searching the terms found in Exhibit A. We understand that as of October 16, 2015, you had approximately 103,000 emails left to review for privilege, and on December 21, you produced 13,767 documents. We recognize that this request will require additional time for you to respond, and we will so note in the return to the court.

Furthermore, in our conversation, you explained that the terms found in Exhibit A related to SONGS are the same terms you are using to respond to the June warrant. We respectfully ask you to search for the following additional terms in responding to the June warrant:

Unit3*
"Unit 3"
Bristol
Pincetl
Aguirre

Geesman
Mitsubishi
Japan
TURN
ORA
"$25 million"
"25 million"
"$20 million"
"20 million"

Please do not hesitate to contact me with any questions.

Sincerely,

DEBORAH R. HALBERSTADT
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

DRH:

LA2014118251

KAMALA D. HARRIS
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Senior Assistant Attorney General
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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

IN RE JUNE 5, 2015 SEARCH WARRANT NO. 70763 ISSUED TO CALIFORNIA PUBLIC UTILITIES COMMISSION	Case No. SW 70763 **DOJ'S OPPOSITION TO CPUC'S MOTION FOR RETURN OF PROPERTY** Date: June 23, 2016 Time: 1:00 p.m. Dept: 56 **FILED UNDER SEAL**

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TO THE HONORABLE JUDGE OF THE SUPERIOR COURT OF LOS ANGELES, AND TO THE CPUC AND ITS ATTORNEYS OF RECORD:

The Attorney General, representing the People of the State of California, hereby opposes the California Public Utilities Commission's Motion for Return of Property, and respectfully requests the Court order compliance with the search warrants issued by this Court on June 5, 2015, and March 9, 2016.

PROCEDURAL AND FACTUAL BACKGROUND

On June 5, 2015, the Department of Justice (DOJ) served a search warrant (the June warrant) on the California Public Utilities Commission (CPUC) seeking documents relevant to a pending criminal investigation regarding the shutdown of San Onofre Nuclear Generating Station (SONGS). The warrant was signed by the Honorable David V. Herriford of the Los Angeles Superior Court after presentation by DOJ Special Agent Reye Diaz. CPUC was immediately served with the warrant. CPUC claimed that the materials sought were protected by the attorney client and deliberative process privileges. CPUC proposed a screening process whereby they would review evidence for privilege, and submit screened evidence to DOJ on a rolling basis.

CPUC partially complied with the warrant, submitting some responsive records to DOJ in September and December 2015. After being ordered to do so by the Court on April 27, 2016, the CPUC finally provided a partial privilege log to DOJ, detailing which records are being withheld due to privilege claims. However, the privilege log indicates that CPUC has withheld an enormous swath of evidence highly relevant to DOJ's investigation. CPUC has failed to complete the production, failed to adequately substantiate its privilege claims, and instead attempts to challenge the warrant. CPUC initially claimed that an incorrect statement invalidated the June 5, 2015 warrant. DOJ submits that the June 5, 2015 search warrant is legally sufficient despite the misstatement and, therefore, that CPUC is obligated to comply. Nonetheless, DOJ submitted a new search warrant for the same items to the Court, excising the misstatement. On March 9, 2016, the Honorable David V. Herriford signed the new warrant and CPUC was served. Still, CPUC indicated it would not comply with either warrant, instead filing a Motion to Quash – which this Court denied – and then the instant Motion to Return Property. DOJ maintains that

both warrants were supported by adequate probable cause, and opposes CPUC's Motion for Return of Property. Instead, DOJ respectfully requests that this court order CPUC to comply.

ARGUMENT

CPUC's Motion to Return Property relies on Penal Code section 1540. In order to prevail under this statute, CPUC must prove that either no probable cause existed for the warrant, or that the property seized was not that described in the warrant. If a magistrate makes either of these findings, the property must be restored. (See *People v. Butler* (1966) 64 Cal.2d 842.) The "Legislature's purpose in enacting sections [1539 and 1540] was not to regulate the procedure for objecting to the introduction of evidence in criminal trials but to afford the person from whom property was wrongfully seized an expeditious remedy for its recovery." (*Id.* at p. 821 (citing *Aday v. Superior Court* (1961) 55 Cal.2d 789, 800).) Moreover, sections 1539 and 1540 "would not preclude an officer from testifying to what he saw in the course of a search under an invalid warrant or from using information obtained in such a search to secure other evidence." (See *People v. Butler* (1966) 64 Cal.2d 842 (citing *People v. Berger*, *supra*, 44 Cal.2d 459, 462, 282 P.2d 509; *People v. Roberts* (1956) 47 Cal.2d 374, 378-379, 303 P.2d 721).)

Here, the CPUC has failed to show that the property it turned over was not described in the warrant, or that the warrant lacks probable cause. CPUC makes several claims without factual or legal basis. The People will address those that fit within the legal framework of a Motion to Return Property.[1]

A. THE DEPARTMENT OF JUSTICE'S SEARCH WARRANTS ARE NOT FACIALLY DEFECTIVE

CPUC first attempts to claim the warrant is "defective," taking issue with the production process. The clear language of the warrant commands the affiant to seize "any and all records from January 31, 2012 until January 31, 2015, involving San Onofre Nuclear generating Station (SONGS) closure settlement agreement, the 2013 meeting between Stephen Pickett and Michael Peevey in Poland, communication(s) pertaining to the determination of when and why SONGS

[1] CPUC's claims about DOJ's motives for using search warrants are unprofessional, unsupported, and untrue.

would be closed, commitment of monies for research as a result of the closure of SONGS, and communication(s) pertaining to the settlement of the SONGS Order Instituting Investigation (OII)." The warrant goes on to identify with particularity what records to include by listing specific email accounts, individuals, and communications at issue. The evidence described in the warrant is directly related to the affidavit. The property taken was provided by the CPUC as a direct response to this warrant. CPUC can hardly claim that the "property seized" was "not described" in the warrant, as required to prevail on a Motion to Return Property pursuant to section 1540.

Rather than attack the description in the warrant itself, CPUC appears, for the first time since the execution of this warrant over a year ago, to quibble with the method of collecting evidence. This is not a ground for return of property under section 1540. In any event, as laid out in the Declaration of Reye Diaz and accompanying exhibits filed in support of the People's Motion to Compel[2], the CPUC not only agreed to this collection method, but insisted on it. In November 2014, DOJ agents went to CPUC headquarters, with a warrant in hand, seized several hardware items, and downloaded data from CPUC's servers. CPUC attorneys immediately claimed privilege, and insisted that DOJ wait to search any evidence until CPUC had an opportunity to screen for privilege. CPUC promised to provide DOJ with evidence responsive to the warrant, and to do so on a rolling basis as the material was reviewed for privilege. CPUC promised to produce evidence in a timely manner and to provide a privilege log. CPUC also requested that any future warrants be executed in this fashion. Rather than disrupt the important work of a public agency, DOJ agreed to this method, believing at that time that CPUC would comply in good-faith and cooperate with the criminal investigation. DOJ submitted to this process for serving its June 5, 2015 and March 9, 2016 warrants. Faced with continual delays, DOJ sought to alleviate the CPUC's workload by offering to perform its own internal taint review, by suggesting and drafting a confidentiality agreement which would have preserved CPUC's privilege claims, or by assigning a special master. CPUC rejected all of these proposals

[2] The People have not reattached these exhibits to avoid unnecessarily burdening the Court with duplicative documents.

and re-committed to finishing the production. Rather than following through, CPUC now challenges the very process it insisted on. The process does not render DOJ's warrants defective. The warrants meet legal requirements and as described below, are supported by probable cause.

B. THE DEPARTMENT OF JUSTICE'S SEARCH WARRANTS ARE SUPPORTED BY PROBABLE CAUSE

1. The Probable Cause Requirement

Probable cause exists for a search warrant when there is "a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239; see also *id.* at p. 243 ["probable cause requires only a ... substantial chance"]; *Texas v. Brown* (1983) 460 U.S. 730, 742 [Probable cause is a "particularized suspicion"]; *Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564 [Probable cause is "facts that would lead a man of ordinary caution ... to entertain a strong suspicion that the object of the search is in the particular place to be searched."].) A magistrate reviewing a search warrant affidavit is tasked with making "a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information," the probable cause requirement is met. (*Illinois v. Gates, supra,* 462 U.S. at pp. 238-239.) The search warrant affiant must provide the magistrate, by way of affidavit, with the factual information he or she knows and his or her opinion as a law enforcement officer. Because an affidavit offered in support of the search warrant is normally drafted by nonlawyers in the midst and haste of a criminal investigation, technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. (*U.S. v. Ventresca* (1965) 380 U.S. 102, 108; *People v. Ulloa* (2002) 101 Cal.App.4th 1000, 1006 .)

2. The Court's Standard of Review

Great deference is shown to the issuing magistrate in challenges to a search warrant. (See *U.S. v. Grant* (9th Cir. 2012) 682 F.3d 827, 832.) Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. (*Jones v. United States, supra*, 362 U.S., at p. 270, 80 S.Ct., at p. 735.)

Therefore, a reviewing court should resolve doubtful or marginal cases in favor of upholding the warrant. (*Caligari v. Superior Court* (1979) 98 Cal.App.3d 725, 729-730.)

3. The Warrant Affidavits Articulate Probable Cause to Believe Peevey and Pickett Conspired to Have Unreported Ex Parte Communications in Violation of Penal Code section 182(a)(1)

Throughout the search warrant affidavits at issue, facts are presented that, in their totality, constitute probable cause that Michael Peevey (Peevey) and Stephen Pickett (Pickett) conspired to have unlawful ex parte communications. In ratesetting matters, the Public Utilities Code prohibits ex parte communications, which it defines as communications between a decisionmaker and a person with an interest in a matter before the commission concerning substantive issues. (Pub. Util. Code, § 1701.3, subd. (c).) However, a commissioner may permit oral ex parte communications "if all interested parties are invited and given not less than three days' notice." (*Ibid.*) Additionally, CPUC Rules, Rule 8.4, requires that, regardless of whether the ex parte communication was initiated by the interested person or the decisionmaker, the communication is reported by the interested person within three working days.

CPUC, in its Motion, manufactures its own set of rules governing ex parte communications that is neither found in nor consistent with the Public Utilities Code or the implementing regulations. Neither authority provides that there are four variations of the ex parte rule governing ratesetting proceeding nor is that a reasonable interpretation of the various provisions when they are read in conjunction with one another. Rather, Rule 8.3(c) says that, "In any ratesetting proceeding, ex parte communications are subject to the reporting requirements set forth in Rule 8.4. In addition, the following restrictions apply… ." Rule 8.3 then goes on to provide that with individual oral communications, "the interested person requesting the initial individual meeting shall notify the parties that its request has granted, and shall file a certificate of service of this notification, at least three days before the meeting or call." The plain language of Rule 8.3 – namely, its use of the phrase "In addition" – indicates that Rule 8.3 *and* 8.4 apply together, not individually in different situations as CPUC suggests. Furthermore, there is no mention in Rule 8.3 or 8.4 of separate requirements for pre-planned and spontaneous ex parte communications, or that Rule 8.3 applies to one and Rule 8.4 to the other. Rather, it seems that

only pre-planned ex parte communications are permitted since that is the only way that the requirements of both rules can be met. The plain language of Pub. Util. Code 1701.3(c) supports this reading of the Rule. Therefore, Pickett and Peevey's ex parte communications were unlawful.

Not only does the Public Utilities Code prohibit ex parte communications unless the proper notice is given, and the proper reporting requirements complied with, but it criminalizes them. Specifically, Public Utilities Code section 2110 provides that "[e]very public utility officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the California Constitution or of this part . . . is guilty of a misdemeanor. . . . (Pub. Util. Code, § 2110.)[3] Penal Code section 182(a)(1) makes it a crime to conspire to commit any other crime, including a violation of Public Utilities Code section 2110.

The facts contained in the search warrant affidavits present substantial evidence that Peevey and Picket violated Penal Code section 182(a)(1) by conspiring to have an ex parte communication that Pickett would not report, in violation of Public Utilities Code section 2110. Specifically, the warrant affidavit explains that while the SONGS proceedings were ongoing before the CPUC, Pickett and Peevey met regarding the proceeding while at a hotel in Warsaw, Poland.[4] During this meeting, Peevey and Pickett discussed prospective settlement terms related to the closure of SONGS, including rate payer costs, which is most certainly an issue of "substance." The ex parte communication was witnessed by a Ed Randolph, the current Director of Energy of the CPUC, who corroborated the substantive nature of the conversation and

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[3] Pursuant to Public Utilities Code section 2110, an individual can only be found guilty of a misdemeanor violation of the Public Utilities Code if a penalty has not otherwise been provided. However, this does not preclude Peevey and Pickett charged with, or found guilty of, conspiring to commit a violation of Public Utilities Code section 2110, as the conspiracy charge is an entirely different crime with wholly distinguishable elements. A conspiracy to violate Public Utilities Code section 2110 requires that Peevey and Picket agreed to engage in ex parte communications and committed some overt act toward that end. As discussed in this section, there is a factual basis for a violation of Penal Code section 182(a)(1) and probable cause to believe a violation of that section was committed.

[4] All references in this section to the facts included in the search warrant are from pages six through nine of the affidavit.

confirmed that the nature of the communication was such that it needed be reported. Upon returning home, Pickett provided Southern California Edison (SCE) management with notes based on his recollection of the meeting. Peevey recorded notes from the meeting on hotel stationery which he brought home with him. These notes were recovered during the service of a search warrant at Peevey's house on January 27, 2015. The notes prepared by Pickett and Peevey are nearly identical. The warrant affidavit goes on to explain that SCE did not disclose that the ex parte communications took place, or provide any type of notice regarding their occurrence, until after Peevey's notes were discovered and the fact that the meeting took place was publicly disclosed by the San Diego Union-Tribune. SCE attempted to justify this conduct by indicating that Pickett only remembered that he may have crossed the line by engaging in a substantive conversation, rather than just listening to Mr. Peevey deliver a monologue, after the public disclosure. Mr. Randolph's statement indicating that, to him, the communication would clearly need to be reported yields even greater suspicion regarding the decision not to report the communication.

Peevey also did not give notice of or report the communication. Though CPUC argues that, because it was not CPUC's responsibility to report the communication, Peevey could not have violated the law, this is incorrect. While it is true that the utility is responsible for reporting the communication, and not Peevey or the CPUC, this does not impact both parties' probable culpability in agreeing to have prohibited ex parte communications that would remain unreported and acting on that agreement as members of a conspiracy. Multiple courts have held that an individual can be subject to prosecution for conspiring to commit a crime even when he or she could not be criminally liable for the underlying crime. (See *People v. Lee* (2006) 136 Cal.App.4th 522, 529 (citing *People v. Buffum* (1953) 40 Cal.2d 709, 722, overruled on other grounds in *People v. Morante* (1999) 20 Cal.4th 403; see also *People v. Roberts* (1983) 139 Cal.App.3d 290, 293; *People v. Biane* (2013) 58 Cal.4th 381 [holding that the offeror of a bribe may be charged, along with recipient of the bribe, with conspiring to receive the bribe].)

It is uncontested that Peevey and Pickett met in Poland, discussed the substance of the SONGS proceeding during that meeting, and failed to disclose the meeting as required. These

facts are all detailed in the search warrant affidavit. It is also clear that Peevey took, and kept, a single page of handwritten notes and Pickett, upon being asked about the meeting, suddenly had a limited recollection of what transpired. These facts, too, are laid out in the search warrant affidavit. Together, these facts most certainly give rise to a "particularized suspicion" that Pickett and Peevey conspired to have unlawful ex parte communications. As such, the affidavit establishes sufficient probable cause for a magistrate to find that further evidence of this crime and surrounding circumstances would likely be found at the CPUC.

4. The Warrant Affidavits Articulate Probable Cause to Believe Peevey and Pickett Conspired to Obstruct Justice in Violation of Penal Code section 182(a)(5)

There is probable cause to believe Peevey and Pickett, in their agreement to have unnoticed and unreported ex parte communications, also conspired to obstruct justice in violation of Penal Code section 182(a)(5). An individual violates this section if he or she is one of two or more people who conspire to commit any act injurious to the public health, or public morals, or to pervert or obstruct justice, or the due administration of the laws. (Pen. Code, § 182(a)(5).) An act that perverts or obstructs justice or the due administration of the laws is not limited to the crimes listed in the Penal Code. *(People v. Redd* (2014) 228 Cal.App.4th 449, 462; see *Davis v. Superior Court* (1959) 175 Cal.App.2d 8.) Rather, this conduct includes "malfeasance and nonfeasance by an officer in connection with the administration of his public duties, and also anything done by a person in hindering or obstructing an officer in the performance of his official obligations." (*Lorenson v. Superior Court of Los Angeles County* (1950) 35 Cal.2d 49, 59.)

The search warrant affidavit lays out facts sufficient to yield particularized suspicion that Peevey and Pickett conspired to obstruct justice by agreeing to have ex parte communications without providing notice or reporting that the communications took place. As detailed in the warrant, at the time of the ex parte communication at issue, Peevey was an officer with official obligations: he was the President of the CPUC. In this role, his duties included assuring that CPUC achieved its stated mission of "serv[ing] the public interest by protecting consumers and ensuring the provision of safe, reliable utility service and infrastructure at reasonable rates. . . ." (*CPUC Website*, http://www.cpuc.ca.gov/general.aspx?id=1034 (as of April 11, 2016).) and acted

consistent with its "commit[ment] to transparency in its work to serve the people of California." (*CPUC Website*, http://www.cpuc.ca.gov/transparency/ (as of April 11, 2016.) Presumably, Peevey's duties as President also included following the provision of the Public Utilities Code – the statutory authority intended to govern his agency - and facilitating others doing so as well. Nonetheless, while ostensibly open and fair ratesetting proceedings were pending before the CPUC in Sacramento, California, Peevey and Pickett were engaged in ex parte communications half-way across the globe, without any notice to or input from ratepayers' settlement parties.

The evidence points to the fact that Peevey and Pickett agreed to have the unreported ex parte communication in Poland in an effort to influence the outcome of the SONGS proceeding, which was pending before a different CPUC Commissioner, and provide each of them respective benefits. During the meeting, Peevey attempted to influence the outcome of the SONGS ratesetting proceeding by discussing the terms of a potential settlement with Pickett "off the record." By participating in the ex parte communications, Pickett was able to help SCE achieve an optimal outcome in the SONGS negotiations.[5] A ratepayers' settlement party, upon learning of the ex parte communications, issued a statement concluding that Peevey's handwritten hotel notes appear to have been the framework for the final settlement and that, because Pickett had obtained knowledge regarding Peevey's position, it was likely that SCE was able to steer the settlement accordingly to achieve the favorable outcome. This attorney also indicated that it appeared that SCE managed to improve its position by at least $919 million, and arguably $1.522 billion, as a result of the ex parte communications. Additionally, Peevey insisted that any settlement include a 25 million dollar commitment to UCLA. As detailed in the search warrant affidavit, the original SONGS settlement, which was filed on April 4, 2014, did not include this term. Peevey made several back door attempts, including the initiation of multiple private communications with other SCE employees and conversations with the Commissioner presiding over the proceeding, to demand that the UCLA term would be included in the settlement. Finally, on September 5, 2014, the assigned Commissioner rejected the parties' proposed settlement. The

[5] All references in this section to the facts included in the search warrant are from pages ten through fifteen of the affidavit.

UCLA term was ultimately added and on November 25, 2014, a SONGS settlement was approved.

These facts lead to a particularized suspicion that Peevey and Pickett conspired to obstruct justice by agreeing to have unreported ex parte communications that would influence the outcome of the SONGS proceeding. By having the unreported ex parte communications, Peevey and Pickett were able to circumvent the statutes and regulations intended to assure the fairness and transparency of ratesetting proceedings and just outcomes for rate payers, thereby obstructing the just resolution of the SONGS proceedings. They undermined the sanctity of the proceeding before the CPUC, as well as CPUC's commitment to transparency, and put the rate payers CPUC is intended to protect in a disadvantaged position. The conspiracy fundamentally compromised the rights of other parties who were not included in the ex parte communications. CPUC itself has recognized the magnitude of this potential harm by recently reopening the tainted settlement proceedings. Peevey and Pickett's agreement to have unreported ex parte communications demonstrated malfeasance in Peevey's administration of his public duties, and constitutes a violation of Penal Code section 182(a)(5). This is laid out in the search warrant affidavit which, in its presentation of the facts supporting a violation of Penal Code section 182(a)(5), provides probable cause to believe the crime was committed and further evidence would be found at the CPUC.

C. THE SONGS WARRANT IS A VALID SEARCH WARRANT SUPPORTED BY PROBABLE CAUSE; THEREFORE, THE COURT SHOULD ORDER CPUC TO COMPLY WITH THE WARRANT

CPUC has avoided complying with DOJ's search warrants for many months. Most recently, CPUC has ignored not only DOJ's warrant, but also this Court's order that it provide a privilege log by May 25, 2016. CPUC has provided only a partial privilege log and, even in the incomplete log provided, attempted to avoid compliance with DOJ's warrant by asserting an inapplicable privilege.

The deliberative process privilege, which CPUC asserts as the reason for not turning over most of the documents listed in its privilege log, is governed by Government Code section 6250 et seq. and is part of the California Public Records Act. Government Code section 6260 states:

> The provisions of this chapter shall not be deemed in any manner to affect the status of judicial records as it existed immediately prior to the effective date of this section, nor to affect the rights of litigants, including parties to administrative proceedings, under the laws of discovery of this state, nor to limit or impair any rights of discovery in a criminal case.

(Gov. Code, § 6260.)

In addition, the California Court of Appeal has explained that because the Evidence Code does not refer to the deliberative process privilege, it is not free to expand the scope of the privilege to protect documents unrelated to an administrative decision that is currently subject to judicial review. (*RLI Ins. Co. Group v. Superior Court* (1996) 51 Cal.App.4th 415, 437-438 (citing *In re California Public Utilities Com'n* (9th Cir. 1989) 892 F.2d 778, 781-82).) The statutory language of Government Code section 6260, along with the case law related to the application of the deliberative process privilege, makes it clear that the privilege cannot be expanded to apply to criminal proceedings.

Similarly, Evidence Code section 1040 outlines a privilege for "official information" in limited circumstances when it is "in the public interest," however, CPUC has failed to properly assert that privilege or explain how it could be applicable. "[B]efore the privilege can be exercised, the public entity claiming that privilege must show the necessity for preserving the confidentiality of the information and that it outweighs the necessity of disclosure." (*Gill v. Manuel* (9th Cir. 1973) 488 F.2d 799, 803.) CPUC has not and cannot meet this burden. The essence of DOJ's investigation is an inquiry into CPUC's process, lack of transparency, and potential conspiracy to violate its own rules and obstruct justice. Withholding key information to hamper a criminal investigation thwarts the goal of the statute and is clearly not within the "public interest." Moreover, sharing information with another state agency would not have forfeited CPUC's claims under the Public Records Act. (*County of Los Angeles v. Union of American Physicians and Dentists* (2005) 130 Cal.App.4th 1099.) Because the documents listed in CPUC's privilege log claimed to be protected by the deliberative process privilege are in fact not privileged at all, the Court should order CPUC to produce the documents to DOJ.

CONCLUSION

DOJ's March and June search warrants are both supported by probable cause. The affidavits supporting each warrant present facts that generate a particularized suspicion that Peevey and Pickett unlawfully conspired to have ex parte communications. Therefore, the Court should deny CPUC's Motion to Return Property and order CPUC to comply with the search warrants.

Dated: June 16, 2016

Respectfully Submitted,

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Attorney General of California
JAMES ROOT
Senior Assistant Attorney General
MAGGY KRELL
Supervising Deputy Attorney General

AMANDA G. PLISNER
Deputy Attorney General

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **CPUC/PG&E**
No.:

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 16, 2016, I served the attached **DOJ'S OPPOSITION TO CPUC'S MOTION FOR RETURN OF PROPERTY, Filed Under Seal** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 16, 2016, at Los Angeles, California.

M. Moore
Declarant

M. Moore
Signature

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Attorneys for Movant
California Public Utilities Commission

SUPERIOR COURT OF CALIFORNIA

COUNTY OF LOS ANGELES

In re June 5, 2015 Search Warrant issued to California Public Utilities Commission	CASE NO. SW-70763 **CPUC NOTICE OF MOTION AND MOTION FOR RETURN OF SEIZED PROPERTY; MEMORANDUM OF POINTS AND AUTHORITIES** Date: June 23, 2016 Time: 1:30 p.m. Place: Department 56 Judge: Hon. William C. Ryan **FILED UNDER SEAL PURSUANT TO COURT ORDER MARCH 24, 2016**

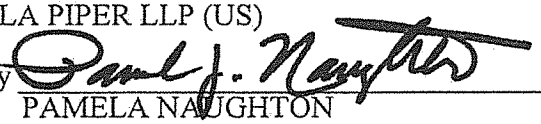
PLEASE TAKE NOTICE that on June 23, 2016 at 1:30 p.m. or as soon thereafter as counsel may be heard, the California Public Utilities Commission ("the CPUC" or "the Commission") will move the Court for an order finding the search warrants directed at CPUC proceedings centering on the failure of the San Onofre Nuclear Generating Station ("SONGS") issued on June 5, 2015 and March 9, 2016 ("SONGS Search Warrants") invalid and lacking probable cause, and to restore the property back to the CPUC pursuant to California Penal Code sections 1539 and 1540. The search warrants are defective because, rather than ordering a peace officer to seize specified items, they require a third party, the CPUC, to investigate, search for relevant documents, identify witnesses, and produce thousands of documents over an unlimited period of time, well beyond the 10-day limit for search warrants. The search warrants also lack probable cause.

The first SONGS search warrant, issued on June 5, 2015, contained materially false statements claiming that the CPUC proceedings were adjudicatory in nature and thus *ex parte* communications were prohibited. The Attorney General attempted to circumvent this problem by obtaining a second SONGS search warrant, based on a revised affidavit, issued on March 9, 2016, which allegedly excised the "misstatements" from the prior one. However, the new affidavit is even weaker than the prior one because it does not allege that the *ex parte* communications violated any rule, much less a criminal statute. Since there is no alleged criminal violation, there can be no basis for a misdemeanor or for a felony conspiracy. There is also no probable cause for an obstruction of justice charge when the alleged conduct was lawful and certainly did not amount to criminal activity. The Attorney General's efforts to criminally investigate conduct that is administratively lawful raises substantial due process concerns. Since the affidavits point to no rule, order, statute, investigation, or other proceeding that was allegedly violated or obstructed, there exists no probable cause to support a search warrant.

This motion will be based on this notice of motion and supporting memorandum of points and authorities, all the papers and records on file in this action including but not limited the prior papers filed in support of its February 17, 2016 motion to view the affidavit *in camera* and April 4, 2016 motion to quash, and on such oral and documentary evidence as may be presented at any hearing on this motion.

Dated: June 9, 2016

DLA PIPER LLP (US)

By 

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California Public Utilities Commission

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I.

MEMORANDUM OF POINTS AND AUTHORITIES

A. Background[1]

In 2012, SONGS experienced leaks of contaminated steam. The facility was temporarily shut down and the CPUC filed an Order Instituting Investigation ("SONGS OII"), which was categorized as a ratesetting proceeding. Under this categorization, *ex parte* discussions were **permitted** (subject to requirements for notice, equal time, and timely reporting by the party).

On March 26, 2013 at an energy conference in Warsaw, Poland, Stephen Pickett ("Pickett"), an executive of Southern California Edison ("SCE"), majority owner of SONGS, had a drink at the hotel bar with CPUC President/Commissioner Peevey ("Peevey") and the Director of CPUC's Energy Division, Ed Randolph ("Randolph"). Peevey was **not** the Assigned Commissioner for the SONGS OII. Noting that replacement energy costs were getting very expensive, President Peevey asked Pickett whether SCE intended to permanently shut down SONGS, and if so, when. Pickett acknowledged that closure was being considered and then went on to describe the various categories of costs associated with the shutdown which would need to be addressed in any settlement of the SONGS OII. Notes of this conversation were later recorded on a sheet of hotel stationery, although reports differ on who actually wrote which notes. (*See* Ex. 1 ("Warsaw Notes"); Ex. 2 ("Randolph Declaration").) Pickett failed to report this *ex parte* conference within the three-day period required under the rules. The obligation to report an *ex parte* conversation rests with the party. The Commissioner is under no obligation to report. Rule 8.4 of the CPUC Rules of Practice and Procedure ("Rule" or "Rules").

SONGS was permanently shut down in June 2013 and SCE and minority owner SDG&E negotiated a complex settlement agreement of the SONGS OII with ratepayer advocate groups and other interested parties. The settlement agreement was approved by the Commission on November 25, 2014. In early February 2015, the Warsaw discussion was reported in the media. On February 9, 2015, SCE filed a notice of the *ex parte* communication regarding the Warsaw

[1] The background of this case is discussed in detail in the CPUC's initial motion to view the affidavit issued in support of the original SONGS search warrant, filed on February 17, 2016 and incorporated herein.

meeting.

On June 5, 2015, CPUC counsel was given the first SONGS search warrant. The supporting affidavit for this search warrant was filed under seal. The SONGS search warrant, which is very broad and vague, requires the CPUC, not the executing officer, to identify possible witnesses, search for, select, review, and produce documents concerning records from 2012-2015 involving the SONGS settlement agreement, the 2013 Poland meeting, the determination of when and why SONGS would be closed, commitment of monies for research as a result of the closure of SONGS, and communications pertaining to the settlement of the SONGS OII.

In December 2015, the San Diego Union Tribune published an affidavit written by Agent Diaz in support of a similar search warrant for Pickett's personal emails. This affidavit contained material misstatements that SONGS OII was adjudicatory, not ratesetting, and that *ex parte* communications were prohibited under the CPUC's Rules.

Upon learning of these material misstatements, the CPUC filed a motion for *in camera* review of the affidavit supporting the original SONGS search warrant. The court granted the motion. As expected, the original SONGS affidavit contained those false statements.

Meanwhile, before the Court heard the CPUC's motion for *in camera* review, the Attorney General obtained a second SONGS search warrant on March 9, 2016 based on a revised affidavit that excised the misstatements. The search warrant and affidavit are virtually identical except for the removal of the misstatements, although now the affidavit does not provide any legal authority for its assertion that the communications between Peevey and Pickett are illegal. It reads:

> **B. Public Utilities Code Prohibitions on Ex Part Communications:**[2]
>
> Ex parte communications are defined in the Public Utilities Code as "any oral or written communication between a decision maker and a person with an interest in a matter before the commission concerning substantive, but not procedural issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding on the matter." (Pub. Util. Code § 1701.1(c)(4)).

[2] The CPUC was not given a copy of the affidavits in support of either SONGS search warrant, so they are not attached hereto.

The revised affidavit only defines what an *ex parte* communication is; it does not cite any authority indicating that such communications were prohibited, much less criminal. Thereafter, the CPUC filed its initial motion to quash the search warrants for lack of probable cause. On May 20, 2016, this Court ruled that the CPUC does not have standing to quash the search warrants under Penal Code section 1538.5 but can seek relief under sections 1539 and 1540.

B. The CPUC Has Standing To Challenge The Legality Of The Search Warrant And Seek Return Of Property

As the Court indicated in its May 20, 2016 order, and the Attorney General concedes, the CPUC, a third party which cannot be criminally charged, may nevertheless challenge the legality of the search warrants and seek return of its property pursuant to Penal Code sections 1539 and 1540. (May 20, 2016 Ord. at pp. 4-5; AG Opp. To Mot. to Quash at p. 3, n.1.) Sections 1539 and 1540 of the Penal Code provide that "where the grounds for issuance of the warrant are controverted, a hearing shall be held and, if it is found that there is no probable cause for believing the grounds on which the warrant was issued, that the magistrate must restore the property from whom it was taken." *People v. Keener*, 55 Cal. 2d 714, 720 (1961) (reviewing challenge to search warrant for lack of probable cause, even though it did not specifically seek return of property, was broad enough to include grounds for relief under sections 1539 and 1540), *overruled on other grounds by People v. Butler*, 64 Cal. 2d. 842 (1966); Cal. Penal Code §§ 1539(a), 1540; *see also People v. Sup. Ct. (Mem. Med. Center)*, 234 Cal. App. 3d 363 (1991) (in special proceeding for issuance of search warrant for hospital records concerning investigation into doctor's criminal negligence, third party hospital was allowed to oppose issuance of the search warrant invoking evidence code section 1157);[3] *People v. Gale*, 9 Cal. App. 3d 788, 793 (1973) (motion for return of property or to suppress evidence is essentially an *in rem* proceeding against the evidence itself and moving party's standing is based on sufficient interest in the property.) "Legislature's purpose in enacting those sections was not to regulate the procedure for

[3] This is the proper citation for the case described by CPUC counsel at the April 18, 2016 hearing concerning third party standing to challenge search warrants. CPUC counsel mistakenly cited *People v. Sup. Ct.*, 56 Cal. App. 3d 374 (1976) at oral argument, which was distinguished in the Court's May 20, 2015 ruling. In *People v. Sup. Ct. (Mem. Med. Center)*, 234 Cal. App. 3d 363 (1991), the third party hospital was allowed to oppose the issuance of a search warrant on evidentiary grounds during a special proceeding, before the search warrant issued.

objecting to the introduction of evidence in criminal trials but to afford the person from whom the property was wrongfully seized an expeditious remedy for its recovery." *Butler*, 64 Cal. 2d at 845. In this case, the CPUC has already produced 59,546 documents and seeks their return.

C. **The Search Warrants Are Defective**

Even though the Attorney General had already executed a broad search warrant at the San Francisco headquarters of the CPUC in November 2014, and had convened a grand jury which issued 3 subpoenas to the CPUC for documents, the Attorney General strategically chose to seek the SONGS documents via search warrants issued out of Los Angeles, rather than by grand jury subpoena. Perhaps the Attorney General chose the search warrant mode because the warrant and its returns would be publically available to the press[4], which grand jury subpoenas are not. Perhaps it was because the CPUC would have no opportunity to quash a search warrant – but would have had standing to quash and challenge a subpoena prior to any production. The law is clear that that third parties have standing to challenge and/or move to quash defective **subpoenas**. *See, e.g., People v. Superior Court (Barrett)*, 80 Cal. App. 4th 1305, 1320 (2000) (holding that a third party who is subpoenaed by defendant in a criminal matter "of course, could move to quash the subpoena and would have the opportunity, through its legal representative, to lodge objections"); *Alford v. Superior Court*, 29 Cal. 4th 1033, 1045 (2003) (recognizing that a custodian of records may object to disclosure of information sought pursuant to a subpoena under Penal Code section 1326, requiring the party seeking the information to make a "plausible justification or a good cause showing of need therefor").[5]

Despite choosing to act via search warrants, the Attorney General has nevertheless treated

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[4] Indeed, at least one reporter in San Diego somehow knew to search Los Angeles County court records for the search warrant and returns.

[5] Federal courts have criticized government authorities who use search warrants as a means to circumvent a third party's right to object to a grand jury subpoena. *See U.S. v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1131-32 (9th Cir. 2008) ("Documents held in the possession of third parties are appropriately obtained through use of grand jury subpoena, not search warrant. The record is quite clear that the government used the vehicle of a search warrant only because it thought its grand jury subpoenas might be contested. As the DOJ Guidelines recognize, that is an inappropriate use of a search warrant."); *Stanford Daily v. Zurcher*, 353 F. Supp. 124 (N.D. Cal. 1972) ("A subpoena duces tecum ... is much less intrusive than a search warrant: the police do not go rummaging through one's home, office, or desk if armed with only a subpoena. And, perhaps equally important, there is no opportunity to challenge the search warrant, whereas one can always move to quash the subpoena before producing the sought-after materials.")

the search warrants as de facto *subpoenas duces tecum* or interrogatories, by requiring the CPUC to determine what is relevant, search emails, investigate and identify possible witnesses, and then review and produce tens of thousands of emails on a rolling basis over the course of several months. The search warrant states that: **"CPUC will search emails ... CPUC will identify employees, ... CPUC will propose to the Attorney General additional employees ... CPUC will collect and review email ..."** (*see* SONGS search warrant). The orders are not proper search warrants; they do not command a peace office to seize pertinent items, but instead require a third party to search, investigate, identify, and produce electronic and paper documents. They are in essence subpoenas issued, not by a grand jury, but by a court. *Cf.* Cal. Penal Code § 1528(a).

Nevertheless, the Court has deemed these orders to be search warrants and held, that as a non-defendant, CPUC has no standing to move to quash them. If these orders are truly search warrants, then they are defective since they order the custodian to identify witnesses and produce evidence; they do not instruct an agent to seize evidence. A search warrant must identify the specific items to be seized and must be executed within 10 days of its issuance. Cal. Penal Code § 1534(a). These "search warrants" are ill-defined and, apparently, limitless in time. Due to these incurable defects, the search warrants must be vacated and the documents returned.

D. The New Affidavit Does Not Allege Facts Establishing Probable Cause To Believe A Crime Has Been Committed

Property should be returned when there exists no probable cause to support the issuance of the search warrant. Cal. Penal Code §§ 1539, 1540. There are two probable cause prerequisites for the issuance of a search warrant. The first is the "commission element," that is, probable cause to believe a crime has been committed and, second, the "nexus" element, that is, a factual showing that evidence related to the suspected criminal activity probably will be found at the location to be searched at the time of the search and not some other time. *U.S. v. Zayas-Diaz*, 95 F.3d 105, 111 (1st Cir. 1996); *U.S. v. Grubbs*, 547 U.S. 90, 95 (2006); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

The lack of probable cause and particularity is especially prominent as to the March 2016 SONGS search warrant, which was issued after the January 2016 enactment of the Electronic Communications Privacy Act, Penal Code § 1546, *et seq.* It specifies that the warrant must state with particularity the information to be seized, the target individuals or accounts, the applications or services covered, and the types of information sought. The search warrants at issue here are not particularized nor specific and leave it to the third party custodian to try to discern what is relevant to the investigation.

Both affidavits allege that there is probable cause for the search warrant for 2 reasons: (1) Peevey and Pickett knowingly engaged and conspired to engage in prohibited *ex parte* **communications** and (2) Peevey utilized his position to influence SCE to commit greenhouse gas research monies to UCLA as part of the settlement negotiations:

> 1. There is probable cause to believe Stephen Pickett, former Executive President of External Relations at SCE and Michael Peevey, former President of CPUC, knowingly engaged in and conspired to engage in **prohibited ex parte communications** regarding the closure of a nuclear facility to the advantage of SCE and to the disadvantage of other interested parties. And there is probable cause to believe the evidence showing that Pickett knowingly engaged in **prohibited ex parte communications** will be found.
>
> 2. There is probable cause to believe Peevey utilized his position to influence SCE's commitment of millions of dollars to UCLA to fund the research program and there is probable cause to believe such evidence documenting the commitment of research money to UCLA or University of California as part of settlement negotiations associated with closure of the nuclear facility will be found.

The affidavits conclude:

> Based on the above evidence and facts, there is probable cause to believe that PICKETT knowingly engaged and conspired to **engage in a reportable ex parte communication** with PEEVEY in POLAND to the overall advantage of SCE..."
>
> The facts indicate that PEEVEY conspired to obstruct justice by **illegally engaging in ex parte communications**, concealed ex parte communications and inappropriately interfered with the settlement process on behalf of the California Center for Sustainable Communities at UCLA's Luskin Institute.
>
> PEEVEY executed this plan through back channel communications and exertion of pressure, **in violation of CPUC ex parte rules**, and in obstruction of the due administration of laws.

Unlike the first affidavit, which at least (wrongly) claimed that the alleged *ex parte* communications violated CPUC Rules and constituted a misdemeanor under Public Utilities Code section 2110, the new affidavit simply alleges and concludes that the *ex parte* communications were "prohibited" and "illegal" without citing any rule, law, or regulations prohibiting them. The applicable portion of the "Legal Framework" section (discussed above), which was the only section the Attorney General revised, only defines what an *ex parte* communication is; it does not cite any authority indicating that such communications were prohibited, much less criminal. There cannot be probable cause to justify a search warrant when the affidavit completely fails to identify what rule the alleged conduct violated, much less a basis for why this constitutes a crime.

E. *Ex Parte* Communications Are Permitted In Ratesetting Cases

The affidavit also fails to acknowledge that California Public Utilities Code 1701.3(c) and CPUC Rules of Practice and Procedure **permit** *ex parte* communications in ratesetting cases such as the SONGS proceedings, with certain notice requirements to other parties, and that it is the sole responsibility of the **party**, **not** the CPUC decision maker such as a Commissioner, to file and serve notice of the *ex parte* communication.

Proceedings before the CPUC are governed by sections of the California Public Utilities Code and the CPUC Rules of Practice and Procedure. Cal. Pub. Util. Code § 1701(a). In ratesetting proceedings, like the SONGS OII, the Utilities Code and the CPUC Rules of Practice and Procedure contemplate 4 scenarios for *ex parte* communications (*See* Ex. 3):

> 1. **All party meetings**: pre-planned meetings between all parties to the proceeding and a Commissioner.
>
> 2. **Individual oral communications**: If a party ahead of time requests a meeting with a decision maker, the other parties should be granted meetings of equal time and notice.
>
> 3. **Written ex parte communications**: permitted at any time so long as the interested party serves copies on all parties.
>
> 4. **Unscheduled meetings/ communications**: These communications must be reported within 3 days of the communication.[6]

[6] CPUC Rule 8.4 provides:

Ex parte communications that are subject to these reporting requirements shall be reported by the interested person, regardless of **whether the communication was initiated by the interested person**. Notice of *ex parte*

The alleged Pickett/Peevey communication falls into scenario 4 identified above: it was an **unplanned** communication in a hotel bar that **Pickett** should have reported within 3 days under CPUC Rule 8.4. There was nothing unlawful about this permitted conversation and certainly nothing criminal. *Ex parte* communications in CPUC ratesetting proceedings are commonplace. In fact, there were at least 72 reported *ex parte* communications between the Commissioners and various parties to the SONGS settlement, all of which were proper. The information contained in these *ex parte* notices is basic, *e.g.*, who initiated the conversation, when it took place, and what the party (notably not what the decision maker) discussed. Ratepayer advocates had equal access to, and, in fact, more *ex parte* communications with Commissioners and their staff. As an example, see Ex. 4 filed by John Geesman, the advocate quoted by Agent Diaz in the affidavit in support of the search warrants. Notably, Mr. Geesman did not disclose what the Commissioner said during the *ex parte* communication.

It is, therefore, a legal impossibility that the communications between Peevey and Pickett were a crime because the communications were permitted when they took place. *People v. Jerome*, 160 Cal. App. 3d 1087, 1094 (1984) ("It follows that if the statute only prohibited certain conduct, it is legally impossible to violate it by engaging in different conduct.")

The Attorney General's other theory – recently presented and not articulated in the supporting affidavit – is that Peevey and Pickett conspired not to report the *ex parte* communication after it occurred. This is a *post hoc* argument and should not be considered for purposes of whether the submitted affidavit was sufficient to establish probable cause. Probable cause for a search warrant must be delineated within the four corners of the supporting affidavit. *People v. Clark*, 230 Cal. App. 4th 490, 497 (2014) ("[I]n reviewing the sufficiency of the facts

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communications shall be filed **within three working days of the communication**. The notice may address multiple *ex parte* communications in the same proceeding, provided that notice of each communication identified therein is timely. The notice shall include the following information:

(a) The date, time, and location of the communication, and whether it was oral, written, or a combination;

(b) The identities of each decision maker (or Commissioner's personal advisor) involved, the person initiating the communication, and any persons present during such communication;

(c) A description of the interested person's, **but not the decision maker's** (or Commissioner's personal advisor's), communication and its content, to which description shall be attached a copy of any written, audiovisual, or other material used for or during the communication.

upon which the magistrate or judge based his or her probable cause determination, we consider only the facts that appear within "'the four corners of the warrant affidavit.'"). Furthermore, there is not a shred of evidence cited in the affidavit that suggests the two conspired not to report the communication. In fact, the evidence suggests the opposite. Ed Randolph, a witness to the Pickett/ Peevey communication, testified that he assumed Pickett would report the conversation. (Ex. 2.) The affidavit states that after the settlement was reached between the settling parties, Peevey waived the Warsaw notes around at a meeting at the CPUC and openly stated that he had discussed the matter with Pickett. (Diaz Affidavit at ¶ 6(B)). None of these facts support the theory that Peevey and Pickett conspired to keep the communication secret.[7]

Notably, the Attorney General **did not present a shred of new evidence** in the affidavit in support of the March 9, 2016 search warrant even though: (1) 8 months have passed since the original SONGS search warrant issued; (2) the CPUC alone has produced over 1.1 million documents to the Attorney General; and (3) the Attorney General has obviously obtained hundreds of thousands if not millions of other documents as well as testimony through other grand jury witnesses, search warrants and subpoenas. If the Attorney General's office had any other evidence or theory to support its criminal investigation, it follows that it would have said so in the new affidavit. It did not.

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[7] Although it appears that the Attorney General has abandoned its theory that the *ex parte* communication constitutes a misdemeanor under California Public Utilities Code section 2110 since this provision is not mentioned anywhere in the new affidavit, it should be noted that Section 2110 is only triggered if the CPUC itself does not take action. Cal. Pub. Util. Code §2110.[7] Section 2110 provides:

> Every **public utility and every officer, agent, or employee of any public utility**, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the California Constitution or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in the violation or noncompliance in a case **in which a penalty has not otherwise been provided**, is guilty of a misdemeanor and is punishable by a fine not exceeding five thousand dollars ($5,000), or by imprisonment in a county jail not exceeding one year, or by both fine and imprisonment. (Emphasis added.)

Since the CPUC Rules expressly provide that the CPUC will issue sanctions or impose penalties if its *ex parte* rules are violated (*See* CPUC Rule 8.3(j)), and in fact fined SCE over $16.7 million for its failure to report, there is no basis for a misdemeanor charge under Section 2110.

F. **There Is No Basis For Conspiracy When The Underlying Conduct Was Lawful**

The Diaz Affidavit asserts that Peevey and Pickett allegedly "conspired to engage in a reportable *ex parte* communication." Assuming for the sake of argument they did agree to engage in a reportable communication, this is **not illegal** and cannot form the basis for a criminal conspiracy charge. Criminal conspiracies require at least a criminal objective, even if all the specific actions taken to implement that criminal objective are otherwise not criminal. *Fleming v. Sup. Ct.*, 191 Cal. App. 4th 73, 101 (2010). If the underlying conduct was lawful, there can be no criminal objective to support a criminal conspiracy. "**It is fundamental that no one can be held criminally liable for conspiracy to do acts that are perfectly lawful and to which there is no criminal objective**." *Fleming*, 191 Cal. App. 4th at 101; *People v. Jurado*, 38 Cal. 4th 72, 123 (2006) ("the crime of conspiracy requires dual specific intents: a specific intent to agree to commit the target offense, and a specific intent to commit that offense."). "To be guilty of conspiracy, in other words, parties must have agreed to commit an act that is itself illegal – parties cannot be found guilty of conspiring to commit an act that is not itself against the law." *United States v. Vaghela*, 169 F.3d 729, 732 (11th Cir. 1999).

G. **There Is No Probable Cause For Obstruction Of Justice**

The only other alleged criminal basis for the search warrant is "obstruction of justice" under Cal. Penal Code section 182(a)(5), which makes it a felony "to commit any act injurious to public health, to public morals, or to pervert or obstruct justice, or the due administration of laws." The affidavit alleges there is probable cause to believe that Peevey obstructed justice by (1) engaging in prohibited *ex parte* communications with Pickett concerning the possible SONGS settlement terms; and (2) pressuring SCE to include a commitment of $25 million to fund greenhouse gas research **after** the settlement had been fully negotiated and agreed to by all parties. The extra money for the greenhouse gas research was contributed by SCE and its shareholders, **not** by ratepayers. Since none of this alleged conduct violated any rule or law, administrative, civil or criminal, it cannot serve as a basis for an obstruction of justice charge.

A party cannot conspire to, or pervert or obstruct justice, or the due administration of laws absent evidence that the acts would have been a crime under Title 7 of the Penal Code or common

law or that the defendant's duties included enforcement of law. *People v. Redd*, 228 Cal. App. 4th 449 (2014). The California Supreme Court in *Lorenson v. Superior Court*, 35 Cal. 2d 49 (1950) defined "obstruction of justice" by looking to common law and Title 7 of the Penal Code, which addresses offenses such as bribery, escapes, perjury, and falsifying evidence. *See Lorenson*, 35 Cal. 2d at 60 (upholding conviction of police officer who conspired with other officers and criminal organization to assault and rob a victim and then hide evidence of their collaboration concluding "[a] conspiracy with or among public officials not to perform their official duty **to enforce criminal laws** is an obstruction of justice and an indictable offense at common law .") (Emphasis added).

While conduct that perverts or obstructs justice is not necessarily limited to crimes listed in title 7 of the Penal Code (and not all listed crimes in title 7 necessarily pervert or obstruct justice), courts are clear that Section 182(a)(5) is limited and does not include every conceivably unlawful act. Indeed, because Section 182(a)(5) is a vaguely worded statute, it must be narrowly construed to avoid running afoul of the Due Process Clause. *Redd*, 228 Cal. App. 4th at 463 (if section 182(a)(5) is not to 'run afoul of the Due Process Clause because it fails to give adequate notice to those who would be law-abiding, to advise defendants of the nature of the offense with which they are charged, or to guide courts in trying those accused' [citation], it must be given content by cases.' . . . [it] 'is not limitless but contracted.'") (citing *Davis v. Sup. Ct.*, 175 Cal. App. 2d 8, 16 (1959)).

People v. Redd and *Fleming vs. Sup. Ct.* are insightful cases. In *Redd*, the Court of Appeals reversed a conviction under section 182(a)(5) against a prison cook for smuggling cell phones and tobacco into prison. The court held that the act of smuggling tobacco into prison, while not lawful, was not a crime under title 7 of the Penal Code or common law and that the Attorney General failed to explain how the act of conspiring to bring tobacco into state prison constituted perversion or obstruction of justice or the due administration of laws:

> It is not enough to show that the object of the conspiracy was not lawful. We note that the Attorney General does not claim, for example that [the defendant] was a public official and smuggling tobacco to an inmate was a failure to perform his official duty to **enforce criminal laws**. [Citing *Lorenson*]. Nor does the Attorney General point to any evidence in the

> record showing that [the defendant's] duties as a correctional supervising cook included enforcement of the law.

Redd, 228 Cal. App. 4th at 464. So, even though the act of smuggling tobacco into a prison was not lawful, it did not amount to obstruction of justice.

In *Fleming v. Sup. Ct.*, a superintendent was charged with misusing public funds and conspiracy to obstruct justice per Penal Code section 182(a)(5) for compiling lists of individuals who were circulating petitions to recall school district board members. The Court concluded that because the superintendent was within his lawful authority as superintendent to research the nature of the discontent and unrest within the district, his conduct was not criminal and could not serve as a basis for a conspiracy to obstruct justice charge, regardless of his political motive for gathering the information. The Court held:

> [T]he conspiracy allegations under Penal Code section 182, subdivision (a)(5) fails because [the defendant] and his assistant superintendent agreed to do nothing more than acts which (1) they had a legal right do in the first place, (2) they had no criminal objective in doing, and (3) do not come anywhere near to obstructing justice or the due administration of law in the first place. . . .
>
> The district attorney's office has presented no evidence whatsoever that the lists were used in any political campaign, or that they were used to intimidate anybody, or that any child in the District was in any way affected by those lists or their preparation. Their compilation was *not criminal.*

Id. at 105. *See also United States v. Goyal*, 629 F.3d 912, 922 (9th Cir. 2010) (conc. Opn. Of Kozinski, J.) ("This case has consumed an inordinate amount of taxpayer resources, and has no doubt devastated the defendant's personal and professional life . . . . This is just one of a string of recent cases in which courts have found that federal prosecutors overreached by trying to stretch criminal law beyond its proper bounds. [Citations Omitted.] This is not the way criminal law is supposed to work. Civil law often covers conduct that falls in gray area of arguable legality. But criminal law should clearly separate conduct that is criminal from conduct that is legal.").

The same concerns arise here. The affidavit fails to cite any authority which even suggests the alleged *ex parte* communications themselves violated any rule, much less a criminal one. The affidavit alleges that Peevey "inappropriately interfered with the settlement process."

(Diaz Affidavit IV Summary.) Lots of conduct that might be "inappropriate" is certainly **not criminal**. There is also nothing unlawful about a Commissioner, who is appointed by the Governor to a policy position to lead and run the Commission, engaging in settlement discussions. No section of the *ex parte* rules or the settlement rules in the Public Utilities Code or the CPUC Rules of Practice and Procedure prohibit *ex parte* communications with a Commissioner about settlements. Neither does a Commissioner's participation in an *ex parte* discussion regarding settlement dictate his recusal from voting on any proposed settlement. *See Decision Adopting Settlements On Marginal Cost, Revenue Allocation, and Rate Design,* No. 09-08-028 (August 20, 2009) at pp. 50-51; *Morongo Band of Mission Indians v. State Water Resources Control Bd.*, 45 Cal. 4th 731, 737 (2009); *Assoc. of Nat. Advertisers, Inc. v. Fed. Trade Comm'n*, 627 F.2d 1151, 1170 (D.C. Cir. 1979). Indeed, even in civil court proceedings, judges engage in settlement discussions all the time. Are they obstructing justice?

It should also be noted that the affidavit fails to reveal the truth: that the utilities, SCE and SDG&E negotiated an arms-length settlement with the settling parties, which was reached on March 27, 2014. *See Joint Motion of SCE, SDG&E, TURN, ORA, Friends of the Earth and Coalition of California Utility Employees for Adoption of Settlement Agreement*, Investigation No. 12-10-013 (April 3, 2014). The rate to be paid by ratepayers had already been determined by the settling parties and was not changed. The affidavit does not allege anywhere that Peevey, interfered with the settlement negotiations among the parties. Rather, the Attorney General's complaint is that after the settlement agreement was reached, Peevey further pressured the utilities to contribute an additional $25 million of shareholder funds towards funding existing greenhouse gas emission research prior to the Commission's approval of the settlement agreement. *See Proposed Decision Approving Settlement Agreement As Amended and Restated by Settling Parties*, Investigation No. 12-10-013 (October 9, 2014). All of the settling parties agreed to this term, which was a cost **the utilities**, *e.g.*, SCE and SDG&E, **not the ratepayers** absorbed. This provision was to fund greenhouse gas emission research since these harmful emissions would increase due to the shutdown of the nuclear power plant and the increased reliance on electric power plants. This alleged conduct reflected the policy judgment of then-

Commissioner Peevey, which was ultimately supported by all of the CPUC Commissioners in their unanimous vote finding that the amendment requiring SCE and SDG&E to pay for the research was in the public interest. *See Decision Approving Settlement Agreement As Amended and Restated by Settling Parties* No.14-11-040 (November 20, 2014). CPUC Rule 13.1(d) ("The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with the law, and in the public interest.")

The Attorney General does not allege that then-Commissioner Peevey's communications about the greenhouse gas research were an illegal quid pro quo and cites no law or rules that prohibit a Commissioner from suggesting amendments to a settlement to ensure that it serves the public interest. The alleged conduct simply does not amount to criminal obstruction of justice. *Cf.*, *Lorenson*, 35 Cal. 2d at 59-60 (affirming obstruction of justice conviction of police officers who robbed and assaulted victim and destroyed evidence as it constituted interference with a criminal proceeding); *People v. Martin*, 135 Cal. App. 3d 710 (1982) (affirming obstruction of justice charge against criminal judge who had docket sheets falsified, declared prior DWIs unconstitutional, and falsely credited defendants with time served, when they in fact had not served the time).

wrong cite

It should also be noted that the "administ

United States v. Metcalf

435 F. 2d 754

obstructed was a CPUC administrative proceedir

holding that the "obstruction" of an administrati

3d

obstruction of justice charge. Quite the contrary

754, 756 (9th Cir. 1970) (federal obstruction of

proceedings).[8]

The Attorney General argues that the Warsaw discussion put SCE in an advantageous position in settlement negotiations because SCE learned what Peevey's position and estimates

[8] The Ninth Circuit in *Meltcalf* held that, **although the statute refers to the broad range of "administration of justice," it only prohibits specific types of impending acts and "[T]hus, not only must the broad term administration of justice be limited to pending judicial proceedings**, but also the manner in which the statute may be violated would only seem to be limited to **intimidating** actions. **This conclusion would appear necessarily to follow from the proposition that Section 1503, since it is a criminal statute, must be, and should be, construed narrowly so that it can be upheld against the charges of vagueness**." *Meltcaf*, 435 F.2d at 757.

were regarding some settlement terms. However, had SCE reported the meeting right after it occurred, as required by the rules, it would not have been required to disclose what **Peevey** said at the meeting, only what **Pickett** said. Thus, even if the rules had been scrupulously followed, the other parties would not have known what Peevey said. Therefore, compliance or non-compliance with the reporting requirements was not material to the settlement. The Attorney General claims the ratepayer parties were disadvantaged, but fails to state how. They, too, had *ex parte* meetings with Commissioners and they did not, and were not obliged to, report what the Commissioner said. (*See, e.g.* Ex. 4.) Moreover, according to ratepayer advocate parties, ORA and TURN, the final settlement was far more favorable to ratepayers and the numbers far different from the terms outlined in the Warsaw notes. (*See, e.g.*, Exh. 5.)

The legislature has invested the CPUC with the power to enforce laws affecting public utilities. *Southern Cal. Edison Co. v. Peevey*, 31 Cal. 4th 781, 800 (2003). The CPUC has already sanctioned SCE for failing to report (but not engaging in) the *ex parte* communications with Peevey. There are petitions for modifications and rehearing pending as well as a proceeding assessing the settlement. Indeed, how incongruous would it be if a prosecutor could unilaterally conclude, using a heightened criminal standard of proof, that a conversation obstructed justice, when the very body conducting the proceeding itself concluded, using a **lesser** civil standard of proof, that the conversation did not impede or affect its administration of justice?

II.

CONCLUSION

For the reasons discussed above, the CPUC requests that the Court find the search warrants are not supported by probable cause and the property of the CPUC be returned.

Dated: June 9, 2016

DLA PIPER LLP (US)

By _____

PAMELA NAUGHTON
REBECCA ROBERTS
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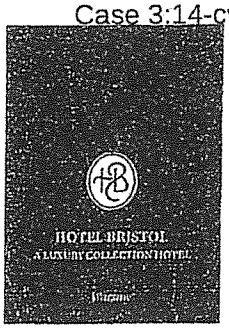
California Public Utilities Commission



1. Pre-RSG investment: recover w/ debt-level return through 2022.
2. RSG and post-RSG investment: disallow "retroactively out of rate base" effective 2/1/2012
3. Replacement power responsibility: customer
4. NEIL/insurance recoveries: to customers
5. MHI recovery: 1st to SCE to the extent of the disallowance
   2d to customers

Next page

6. Decommissioning costs: remain in rates through time of decommissioning -- periodic redetermination in CPUC proceedings as before
7. O&M: a) Already approved GRC amounts through shutdown + 6 months
   b) OII to determine shutdown O&M through end of 2017 (i.e., not in GRC)
   c) shutdown O&M 2018 and beyond determined in GRC's
   d) Shutdown O&M to include reasonable severance for SONGS employees - ~$50 million

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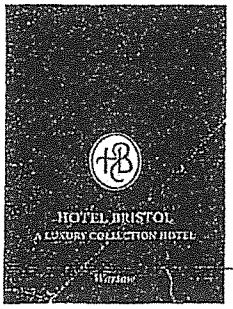

8. Environmental offset: SCE to donate $10 million per year 2014-2022 to _____ {an agreed upon GHG, climate, or environmental academic research fund, institution, etc.}

9. Process a) settlement agreement approved in OII
b) balance of OII closed except for shutdown O&M phase
c) new OII phase for shutdown O&M per 7(b) and 7(d) above
d) 2018 GRC for shutdown O&M 2018 and beyond
e) Usual CPUC proceedings for review of decommissioning costs

MHI Reserve

1- First $200 million — 50% costs
50% SCE
2- Next $200 million — 70% s
30% cost
3- Any above $400 million — 80% to s.
up to disallowance — 20% to c
4- Above disallowance — 25% SCE
75% costs

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