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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF SAN FRANCISCO

10 MICHAEL J. AGUIRRE,

11 Plaintiff,

12 v.

13 CALIFORNIA PUBLIC UTILITIES
14 COMMISSION, et al.,

15 Defendants.

Case No. CPF-15-514188

PLAINTIFFS' SUPPLEMENTAL BRIEF

Continued Date: January 21, 2016

Time: 9:30 a.m.

Dept.: 302, Hon. Ernest H. Goldsmith

Complaint filed: March 9, 2015

16 **I.**

17 **BACKGROUND FOR CONTEXT OF ARGUMENT**

18 On 31 January 2012 at 4:30 p.m., Southern California Edison (SCE) operators at the San
19 Onofre nuclear power plant (SO) discovered a "Steam Generator Tube Rupture" and
20 "commenced [a] rapid power reduction" of Unit 3. When reactor power was lowered to 35%, the
21 Unit was manually tripped.¹ (Exhibit 1, Severson Declaration ["Decl.]) Replacement steam
22 generators (RSG) at the plant experienced "significant and unexpected steam generator tube wear
23 and the loss of tube integrity" after 11 months of operation. (Exhibit 2, Severson Decl.)

24 On Friday night, 24 January 2013, California Public Utilities Commission (CPUC)
25 President Peevey had dinner with SCE President Ron Litzinger; they discussed SO:²
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27 ¹ The sudden shutting down of a nuclear reactor, usually by rapid insertion of control manually by
28 the reactor operator, is known as a "reactor trip."

² Exhibit 3, Severson Decl.

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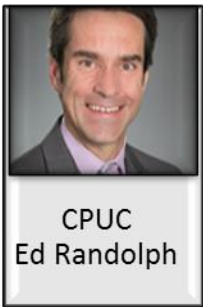


CPUC President
Michael Peevey



SCE President
Ron Litzinger

On 26 March 2013, CPUC officials met with an SCE Executive Vice President at the Bristol Hotel in Warsaw, Poland. (Exhibit 4, Severson Decl.) There, they negotiated an agreement (recorded on the hotel’s stationery) to make utility customers pay over \$3 billion (\$3,000,000) as expected revenue from the plant, had it not closed. (Exhibit 5, Severson Decl.; see also Exhibit 25):



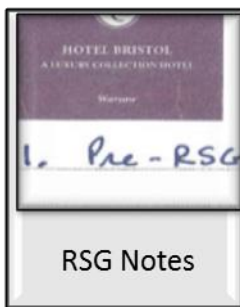
CPUC
Ed Randolph



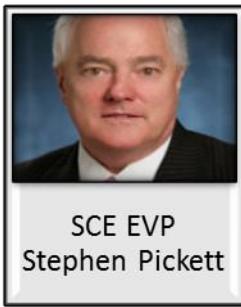
Hotel Bristol
Warsaw,
Poland



CPUC Pres.
Michael
Peevey



RSG Notes



SCE EVP
Stephen Pickett

Upon his return from Poland (31 March 2013), one of the CPUC executives at the Hotel Bristol meeting had the following “red category” email exchange with the CPUC Commissioner in charge of the SO proceeding (Florio) to determine who should pay for the closed SO plant³:

From: Florio, Michel Peter <MichelPeter.Florio@cpuc.ca.gov>
Sent: Sunday, March 31, 2013 9:50 PM
To: Randolph, Edward F.
Subject: RE: Meeting with Peevey Thursday
Categories: Red Category

³ Exhibit 6, Severson Decl.

1 Yes, I have only a 2:30 meeting that afternoon. Lunch would be fine. THANKS and welcome back! Mike

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From: Randolph, Edward F.
Sent: Sunday, March 31, 2013 2:59 PM
To: Florio, Michel Peter
Cc: Gonzalez, Nuria
Subject: Meeting with Peevey Thursday

Commissioner Florio,

Commissioner Peevey asked me to set up a meeting with him for you and me next Thursday after the Commission meeting. (We were both having email problems in Poland so he asked me to set it up when I got back). He suggest lunch or dinner (but I need to be in Sacto late in the day). For now Commisisoner Peevey would like to keep this meeting to just the three of us. I am happy to come by and explain the topic in person (or on the phone).

Can we make something work for Thursday?

On 1 April 2013, the SCE official who participated in the Poland meeting (Stephen Pickett) reported to and provided the “Elements of a SONGS Deal” to SCE Chief Executive Officer Ted Craver. (Exhibit 7, Severson Decl.) Three days later, Randolph, Florio and Peevey met on 4 April 2013 at Max's Opera Café in San Francisco, California (Exhibit 6):



CPUC President
Michael Peevey



CPUC
Commissioner
M. Florio



Max's Opera Cafe



CPUC Energy
Director
Ed Randolph

On 4 April 2013, SCE’s Pickett wrote two other SCE officials about his Poland meeting, telling them “we should take my notes and turn it into a simple term sheet.” (Exhibit 8, Severson Decl.) On 29 May 2013, SCE executives exchanged emails reporting on their discussions with then-CPUC President Peevey and his Chief of Staff, Carol Brown: “Carol indicated that Pickett was well prepared in Poland with specifics.” In another, an SCE official warned: “We have a small window of opportunity to work with parties to implement a shutdown in exchange for getting our money back. That -window will close soon and' we will lose a very good opportunity.” (Exhibit 9, Severson)

1 On 6 June 2013, SCE Chief Executive Officer, Ted Craver, sent the following email to his
2 Board of Directors, reporting his conversation with Governor Jerry Brown:

3 Governor Brown-about 10 minutes (was in Rancho Mirage with Pres. Obama,
4 Chinese). Appreciated call. Asked some questions about decommissioning and
5 number of employees. He said what we were doing seem right under the
6 circumstances, good to reduce uncertainty, and took a little swipe at NRC bungling
7 the process which was going to cause harm to CA. Fished for whether we were
8 going to blast NRC or Boxer, I said "no, I didn't see any mileage in that. We were
9 taking the high road and focusing on the future and insuring system reliability for
10 our customers." He said he agreed that was best approach. I indicated that I
11 imagined his office would get media calls tomorrow about this and would be
12 looking for his reaction; I indicted that if he was so moved, it would help if he
13 could indicate we had talked and he thought the company was acting responsibly
14 and focused on the right things. He indicated a willingness to do that. (Exhibit 10,
15 Severson Decl.)

16 Effective 7 June 2013, SCE certified it had "permanently ceased power operation of the
17 San Onofre Nuclear Generating Station, Units 2 and 3." (Exhibit 11, Severson Decl.) On 7 June
18 2013, Peevey advisor Brian Stevens emailed Peevey's Chief of Staff, Carol Brown, and SCE
19 Director of Regulatory Affairs, Laura Genao, copying several SCE executives and CPUC
20 officials (Exhibit 12, Severson Decl.):

21 Hi Laura:

22 Thank you for the information on the check-in today.

23 With the announcement by EIX (SEC parent), can we schedule a meeting to
24 discuss the current status and **next steps**? I request it for early next week. I also
25 request that SCE management involved intimately with this issue be involve at
26 least by phone. There are BK (open meeting law) issues with inviting other offices
27 (I believe my office can invite Florio's office), so the target audience should be ED
28 (Randolph), Legal, CPUC management, my office, and maybe folks from Florio's
Office. I request it be 1-2 hours in duration. I will invite others from the CPUC to
help me propose questions.



Carol Brown



Laura Genao



Brian Stevens

1 On 7 June 2013, an SCE official reported to Stephen Pickett the word from Florio’s office
2 was to “do everything we can to keep this out of the Commission's hands. They've learned much
3 from the San Bruno effort (i.e. claims that the commission is **in the "pockets" of the utilities**)
4 and want to avoid a repeat as much as they can.” (Exhibit 13, Severson Decl.)

5 On 21 September 2013, SCE’s Pickett and CPUC’s Peevey made plans to meet at the
6 “Stafford Hotel in St. James” in London. (Exhibit 14, Severson Decl.)

7 One of the participants in the SO proceedings before the CPUC, The Utility Reform
8 Network (TURN), admitted Peevey told them about the Warsaw meeting: “Mr. Peevey stated that
9 he had met with Stephen Pickett about San Onofre over a year earlier and waved several papers
10 he claimed were notes from that meeting.” (Exhibit 17, Severson Decl.)

11 In an another email, Peevey’s Chief of Staff, Carol Brown, wrote to SCE executive
12 Michael Hoover, acknowledging time is not well spent on Phase I (of the OII), and impliedly
13 admitting her knowledge of the secret settlement the parties had reached. (Exhibit 15, Severson
14 Decl.)

15 On 27 March 2014, SCE announced it had entered into a settlement agreement with
16 TURN, and the Office of Ratepayer Advocates (“ORA”) (Exhibit 16, Severson Decl.)⁴ There is
17 an information black hole between the RSG Notes deal made in March 2013 and the settlement
18 announced a year later in March 2014. Under the settlement, utility customers will pay for the
19 projected future revenue, recovery of investment with interest for the SO plant, even though the
20 plant will produce no electricity.

21 Public Records requests were made to the CPUC to find out how the secret deal in
22 Warsaw worked its way through the CPUC, culminating in the ultimate agreement so harmful to
23 utility customers.

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28 ⁴ Both TURN and ORA have since disavowed the agreement. (Exhibits 17, 18, Severson Decl.)

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**PUBLIC RECORDS ACT,
ARTICLE 1 SECTION 3 REQUEST FOR DOCUMENTS**

On 19 June 2013, two months after the Warsaw meeting, the CPUC acknowledged a PRA request for “all communications between President Peevey and any agent, officer, or employees of Southern California Edison regarding the settlement of the proceedings pending before the PUC regarding San Onofre.” (Exhibit 19, Severson Decl.) The request covered the settlement notes written on the Hotel Bristol stationery. The CPUC did not produce the notes. Two years later, on 23 June 2015, the CPUC stated in response to PRA #1460 (made in March 2015) it had located documents responsive to the request for:

- Emails related to any discussions or understandings held or reached at the Bristol Hotel meeting in Warsaw, Poland amongst Peevey, and Pickett.
- Emails sent or received to Ed Randolph following the March 2013 Warsaw meeting to Florio, Picker or Peevey.
- Emails sent or received by Ed Randolph before the March 2013 Warsaw meeting in or from Florio, Picker or Peevey. (Exhibit 20, Severson Decl.)

However, the CPUC declined to produce or even identify writings it had determined were exempt from production. On 21 August 2015, the CPUC identified *some* of the writings it was withholding on exemptions it claimed under the Public Records Act. The CPUC “redacted portions of the text of five writings, two based on the Governor writings exemptions (Govt Code § 6254(1) and three based on the deliberative process privilege [Govt Code §§6254(k), 6255]. The CPUC withheld sixty-five writings based again on the Governor Communications privilege and 63 based upon the deliberative process privilege. (Exhibit 21, Severson Decl.)

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**LEGISLATIVE DIRECTIVE FOR DETERMINING
WHETHER WRITINGS SHALL BE PRODUCED**

Government Code § 6253(a) (the Public Records Act “PRA”) declares “ ** every person has a right to inspect any public record, except as hereafter provided.” The legislature placed original jurisdiction to hear PRA enforcement cases:

Whenever it is made to appear by verified petition to the **superior court** of the county where the records or some part thereof are situated that certain public records are being improperly withheld from a member of the public, the court shall order the officer or person charged with withholding the records to disclose the public record or show cause why he or she should not do so.

The court shall decide the case after examining the record in camera, if permitted by subdivision (b) of Section 915 of the Evidence Code, papers filed by the parties and any oral argument and additional evidence as the court may allow.

The Legislature-created limited review by the Superior Court to determine whether to release or withhold the writings sought under the PRA are not appealable, but instead, are "immediately reviewable by petition to the appellate court for the issuance of an extraordinary writ." (Id., § 6259, subd. (c), hereafter § 6259(c).) *Powers v. City of Richmond*, 10 Cal. 4th 85, 89 (Cal. 1995)

Voters were emphatic in 2004 when they adopted Article 1 Section 3 of the California State Constitution: “the writings of public officials and agencies shall be open to public scrutiny.” They also directed any “statute or other authority ** shall be broadly construed if it furthers the people’s right of access, and narrowly construed if it limits the right of access. ** Cal Const Art 1, § 3 (b)(2).

In this case, the Court has a legal duty to take possession of what the CPUC has withheld from the public (the 65 claimed Governor writings, the 63 claimed deliberative process writings, and the 5 redacted writings) and then to exercise its independent judgment to determine whether the documents are exempt from disclosure.

The case for disclosure as serving the public interest is strong. In secret meetings and communications, an agreement was made to put the damages caused by SCE’s deployment of

1 defective steam generators (they lasted 4% of their represented life span) on utility customers—an
2 amount exceeding \$3,300,000,000. (Exhibits 4-8, 25, Severson Decl.) The CPUC participants
3 acted beyond the powers or legal authority, as explained in part in the affidavit supporting the
4 search warrant directed to the CPUC which states “[T]here is probable cause to believe that
5 evidence showing that PICKETT knowingly engaged in prohibited *ex parte* communications with
6 PEEVEY will be found in personal emails belonging to Stephen PICKETT.” (Exhibit 22,
7 Severson Decl.) The affidavit goes on to explain:

8 *Ex parte* communications are defined in the Public Utilities Code as "any oral or
9 written communication between a decision maker and a person with an interest in
10 a matter before the commission concerning substantive, but not procedural issues,
11 that does not occur in a public hearing, workshop, or other public proceeding, or
12 on the official record of the proceeding on the matter." (Pub. Util. Code
13 §1701.1(c)(4).) *Ex parte* communications are prohibited in adjudicatory cases.
(Pub. Util. Code. § 1701.2.) The SONGS OII⁵ and associated settlement
discussions are considered adjudicatory. Violation of this prohibition is a
misdemeanor. (Public Util. Code § 2110.) **

14 Under California law, "every judicial officer, court commissioner, or referee who
15 commits any act that he or she knows perverts or obstructs justice, is guilty of a
16 public offense punishable by imprisonment in a county jail for not more than one
17 year." (Cal. Penal Code § 96.5). Penal Code section 182 (a) (5) makes it a felony
18 to "commit any act injurious to the public health, to public morals, or to pervert or
obstruct justice, or the due administration of the laws." Conspiracy to commit a
misdemeanor offense can also be charged as a felony, pursuant to Penal Code
Section 182 (a) (1).

19 Further, the nature of the scheme alleged in the operative complaint to impose on
20 utility customers the burden to pay the San Onofre damages was brought to fruition with
21 the involvement of several SCE executives and CPUC officials. The CPUC search
22 warrant identifies the key players likely to be in possession of relevant writings⁶:
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27 ⁵ OII is an abbreviation for the term Order of Investigation. The CPUC issued an OII in the San Onofre steam
generator failure case in November 2012.

28 ⁶ Exhibit 23, Severson Decl.

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CPUC Com.
Michel Florio



CPUC Pres
Michael Peevey



CPUC Energy Dept
Dir. Ed Randolph



Admin. Law Judge
Melonie Darling



Florio Chief of Staff
Sepideh Khosrowjab



CPUC Ex. Dir.
Paul Clanon



Peevey Chief of
Staff Carol Brown



Peevey Adviser
Audrey Lee

SCE, through its CEO Ted Craver, contacted the Governor's office directly as shown in the 6 June 2013 email to the SCE board of directors identified above. (Exhibit 10, Severson Decl.) Also, the CPUC identified 67 San Onofre-related writings between the CPUC and the Governor's office and 66 writings related to Commissioners Picker, a former staff member to the Governor:



CPUC Commissioner
Michael Picker



SCE CEO
Ted Craver



Governor
Jerry Brown

Are these not ex parte communications that should have been disclosed? Are they not meant to be made public?

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**THIS COURT HAS ORIGINAL JURISDICTION
TO ORDER RELEASE OF PUBLIC RECORDS**

The CPUC argues it is exempt from Govt. Code § 6259 which provides: “Whenever it is made to appear ** to the **superior court** ** that certain public records are being improperly withheld ** the court shall order the ** records disclose[d] or [to] show cause why he or she should not do so. ** The court shall decide the case after examining the record in camera.” The CPUC argues Cal Pub. Util. Code § 1759 removed this court’s jurisdiction to decide PRA cases involving the CPUC. However, the legislature record shows otherwise. Under statutory construction rules, the court must determine the intent of the lawmakers was to make the PRA applicable to the CPUC in order to effectuate the purpose of the law, which is to give the public access to public records. *People v. Cruz* (1996)13 Cal. 4th 764, 774-775.

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The statutory language is generally the most reliable indicator of legislative intent. In this case, the words themselves in their usual and ordinary meaning show the legislature intended to make all of the provisions of the PRA applicable to the CPUC. *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663. The express language of the PRA enacted in 1968 made the CPUC subject to its provisions:

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6253. (a) Public records are open to inspection at all times during the office hours of the **state** ** **agency**

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6252. As used in this chapter: ** (f) "State agency" means every **state** ** **commission** **. (Emphasis added)

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6253.4. (a) ** The following state and local bodies **shall** establish written guidelines for accessibility of records ** **Public Utilities Commission**. (Emphasis added)

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The legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663. The original version of section 1759 curtailing Superior Court jurisdiction over CPUC cases was first adopted in 1911 at ch. 20, 1911 Cal Stat. 13). See, *Pacific Tel. & Tel. Co. v.*

1 *Eshleman* (1913) 166 Cal. 640, 693. The earlier version of section 1759 was in place when the
2 legislature adopted the provisions placing original jurisdiction with the Superior Court to
3 determine whether documents could be withheld. If the legislature wanted to exempt the CPUC
4 from the PRA judicial revisions, it would have provided an exemption or limitation. It did not so
5 provide. The people themselves have directed that when a court is construing a statute or other
6 authority in deciding a PRA case, it “shall be broadly construed if it furthers the people's right of
7 access, and narrowly construed if it limits the right of access. Cal Const Art 1, § 3 (b) (2)

8 Finally, the Court may consider the impact of an interpretation on public policy, for
9 “[w]here uncertainty exists consideration should be given to the consequences that will flow from
10 a particular interpretation.” *Mejia v. Reed* (2003) 31 Cal. 4th 657, 663. The impact on public
11 policy, if the CPUC’s position is adopted, would be to limit the public’s access to public records.
12 This would follow from the fact that the only remedy for those seeking public records would be
13 by way of discretionary writ.

14 Finally, the Supreme Court had established a three-prong test for determining whether
15 section 1759 blocks a Superior Court’s jurisdiction to hear a case:

16 In applying section 1759, we used a three-part test: (1) whether the PUC had the
17 authority to adopt a regulatory policy on whether EMF's are a public health risk and
18 what steps the utilities should take, if any, to minimize the risk; (2) whether the
19 PUC had exercised that authority; and (3) whether the superior court action would
20 hinder or interfere with the PUC's exercise of regulatory authority with respect to
21 EMF's. (Citation omitted) *Hartwell Corp. v. Superior Court* (2002) 27 Cal. 4th
22 256, 266; see, *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal. 4th 1132, 1133.

21 Under the three prong test, the Court must find it has jurisdiction for making the limited
22 determination about whether access should be given to the withheld documents. First, the Court
23 is being called upon to give access to public records so the public can see how the public business
24 was conducted. They are not asking the Court to change what was done. The Court is not being
25 called upon to review any regulatory policy adopted by the CPUC. The CPUC did not exercise
26 any of its regulatory authority in denying the public access to the public records sought. Granting
27 access to public records that would allow the public to witness how the public business was done
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1 would not hinder or interfere with the CPUC's exercise of its regulatory authority. *Hartwell Corp.*
2 *v. Superior Court* (2002) 27 Cal. 4th 256, 260.

3 CPUC ACTS SHOW IT IS GOVERNED BY PRA

4 The CPUC invokes its exemptions rights under the PRA, while at the same time, argues it
5 is not subject to the PRA provisions placing original jurisdiction:

6 In making this production, the CPUC redacted fourteen (14) of the records to
7 protect from disclosure information exempt from disclosure pursuant to the
8 California Public Records Act. Specifically, the CPUC redacted the private cell
9 phone numbers, email addresses, and a private residence street address from
10 eleven (11) records pursuant to the right to privacy and Government Code
11 §§6254(k), 6255. The public has no interest in the disclosure of this information.
12 Therefore, the affected individual's right to privacy outweighs the public's right to
13 disclosure of this information. Additionally, the CPUC redacted portions of the
14 text of two (2) records pursuant to Government Code §6254(1) as the redacted text
15 reflected communications to or from employees of the Governor's Office. Lastly,
16 the CPUC redacted portions of the text of three (3) records pursuant to the
17 deliberative process and mental process privileges and Government Code
18 §§6254(k), 6255. The redacted text reflects discussions between Commissioner
19 Picker and his advisors the disclosure of which would reveal the Commissioner's
20 thought process regarding the subject matter of the redacted emails. As such, the
21 public's interest in disclosure of this information is outweighed by the public's
22 interest in allowing its policy makers to have "frank discussion of legal or policy
23 matters," an interest that would be "inhibited if 'subjected to public scrutiny'" and
24 "greatly hampered if, with respect to such matters, government agencies were
25 'forced '10 operate in a fishbowl'" *Times Mirror Co. v. Sup'.*, *cr.* (1991) 53 Cal.3d
26 1325, 1340. CPUC Assistant General Counsel Laura Gasser made the decision to
27 redact these records.

19 Moreover, the CPUC withheld from this production one hundred twenty four (124)
20 records in total The CPUC withheld sixty-five (65) records of communications to
21 or from employees of the Governor's Office pursuant to Government Code
22 §6254(1).

22 Additionally. the CPUC withheld from this production sixty-three (63) records
23 pursuant to the deliberative process and mental process privileges pursuant to
24 Government Code §§6254(k), 6255. These 63 records are communications
25 between Commissioner Picker and his advisors, top level advisory staff and/or top
26 level state officials that discuss matter of policy and/or decisions in proceedings
27 before the Commission. As such, their disclosure would reveal the Commissioners'
28 deliberative and mental thought processes. Consequently. the public's interest in
disclosure of this information is outweighed by the public's interest in allowing
such decisions to be made uninhibited by public scrutiny. CPUC Assistant General
Counsel Laura Gasser made the decision to withhold these records.

1 Neither of the two exemptions set forth by the CPUC seem to apply to justify withholding
2 the records. In a 1 April 2015 CPUC letter to the Assembly Committee on Utilities & Commerce
3 Chairperson, President Picker revealed the deliberative process he claims he followed in
4 connection with San Onofre:

5 I have conducted a review into my own decision making process leading to the
6 November 20, 2014 Decision made by the Commission approving the Amended
7 and Restated Settlement Agreement. As a Commissioner, I assessed whether I
8 could reach the same conclusion about the decision based solely on the written
9 record that has been available to all parties. That is the methodology that I used in
developing my vote last November. This reliance on an evidentiary record
developed through a public process that is open for all to view - transparent - is
our primary source of information for formal Commission decisions. (See Exhibit
24, Severson Decl.)

10 Mr. Picker did not mention he relied on any private writings. (Exhibit 24, Severson Decl.)
11 Moreover, the deliberative process privilege does not protect facts from disclosure. In this case,
12 an ex parte meeting between the CPUC President (Michael Peevey) and a SCE Executive Vice
13 President (Steve Pickett) at the Bristol Hotel in Warsaw, Poland scarred the decision making
14 process. Handwritten notes made at the Warsaw meeting (Exhibit 3, Severson Decl.) show the
15 format of the agreement requiring utility customers to pay for a majority of the costs of the San
16 Onofre shutdown.

17 Under these circumstances, the public has a profound and practical interest in reviewing
18 the records relating to the public business decisions the CPUC made related to San Onofre. In a
19 democratic society, the public is entitled to know how [the CPUC and the Governor] perform
20 [their] duties. *Times Mirror Co. v. Superior Court*, 53 Cal. 3d 1325, 1344 (Cal. 1991).

21 CONCLUSION

22 James Madison taught us that knowledge will forever govern ignorance, and a people who
23 mean to be their own governors must arm themselves with the power knowledge gives. A
24 popular government without popular information or the means of acquiring it is but a prologue to
25 a farce, or a tragedy, or perhaps both. The CPUC cannot lawfully stop a review of whether it is
26 legitimately withholding documents from the public by misconstruing a provision of law that
27 assigned review of the CPUC's regulatory decisions to the appellate court. Giving to the public
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1 what they are entitled to under the State Constitution does not implicate section 1759. As our
2 Constitution states, “The people have the right of access to information concerning the conduct of
3 the people's business, and, therefore, ** the writings of public officials and agencies shall be open
4 to public scrutiny.” Cal State Const. Art 1, Sect 3.

5
6 AGUIRRE & SEVERSON LLP

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8 Dated: December 27, 2015

9 By: /s/Maria C. Severson
10 Maria C. Severson
11 Attorneys for Plaintiff Michael Aguirre
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