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SUPERIOR COURT OF THE STATE OF CALIFORNIA

12

COUNTY OF IMPERIAL

13

14 IMPERIAL IRRIGATION DISTRICT,

Case No. ECU08934

15 Petitioner,

16 v.

**PETITIONER'S RESPONSE IN
OPPOSITION TO CAISO'S MOTION TO
TRANSFER VENUE**

17 CALIFORNIA INDEPENDENT SYSTEM
18 OPERATOR and DOES 1-20, inclusive,

Date: January 20, 2016

19

Time: 8:30 a.m.

20

21 Respondents.

Dept. 7

22

Judge: Hon. Jeffrey B. Jones

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Complaint filed: October 9, 2015

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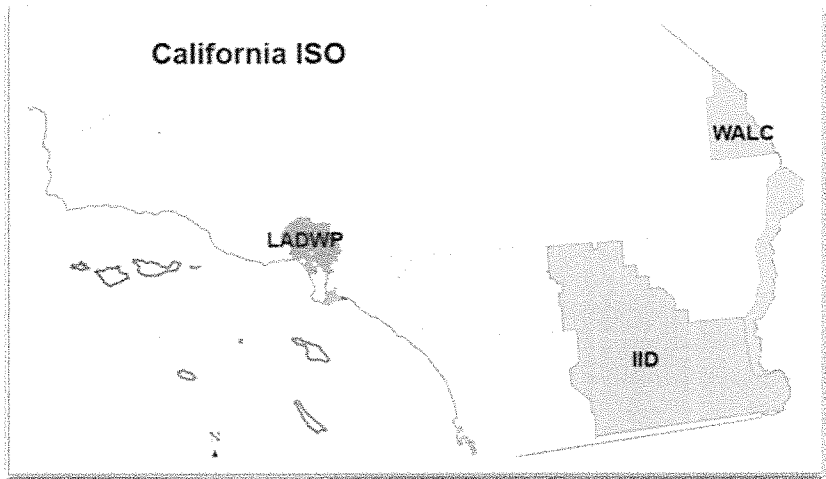
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I. BACKGROUND

Imperial Irrigation District

The Imperial Irrigation District (IID) is a public entity organized in 1911 under the California Irrigation District Law.¹ The people residing within its territory elect a five-member board that governs the IID. The IID, referred to as a “balancing authority,” has the power under law to provide electric service within its 6,483 square mile boundaries. As a balancing authority, IID has the responsibility for integrating resource plans ahead of time, maintaining load interchange and generation balance within the IID territory, and supporting Interconnection frequency in real time.² IID serves electricity to more than 150,000 customers in Imperial County and parts of Riverside and San Diego counties.³ The IID balancing area adjoins the ISO balancing area⁴:



California Independent System Operator (ISO)

The ISO organization controls the state's wholesale transmission grid. California legislature established the California Independent System Operator (ISO). [Cal. Public Utility Code §§ 345, 345.5] to “ensure the reliability of electric service and the health and safety of the public.” The ISO is required to make the most efficient use of available energy resources. Cal. Pub. Util. Code § 345(b)(1). The Governor appoints the five-member ISO governing board. Pub. Util. Code § 337(a).

¹ Codified at Division 11 of the California Water Code.
² http://www.nerc.com/files/glossary_of_terms.pdf
³ <http://www.iid.com/about-iid/an-overview/iid-history>
⁴ http://www.energy.ca.gov/maps/serviceareas/balancing_authority_areas.pdf

1 The ISO must obey the California public records law [Pub. Util. Code § 345.5(c)(4)] and
2 the open meeting law. [Pub. Util. Code § 245(c)(3)]. The ISO produces records under the public
3 record act law electronically. (Exhibit 1, Aguirre Declaration (“decl.”) The public has a
4 constitutional right to witness and obtain the public records related to ISO’s public business:

5 SEC. 3. (a) The people have the right to instruct their representatives, petition
6 government for redress of grievances, and assemble freely to consult for the
7 common good. (b) (1) The people have the right of access to information
8 concerning the conduct of the people's business, and, therefore, the meetings of
9 public bodies and the writings of public officials and agencies shall be open to
10 public scrutiny.

11 (2) A statute, court rule, or other authority, including those in effect on the
12 effective date of this subdivision, shall be broadly construed if it furthers the
13 people's right of access, and narrowly construed if it limits the right of access. A
14 statute, court rule, or other authority adopted after the effective date of this
15 subdivision that limits the right of access shall be adopted with findings
16 demonstrating the interest protected by the limitation and the need for protecting
17 that interest.

18 The Public Record Law Requests

19 While there is a presumption of public access and a public record requester (like IID here)
20 need not state its “need to know” to justify access [*William v. Superior Court* (1993) 5 Cal 4th
21 337, 346], IID has a vital interest in obtaining the documents sought because of the decisions
22 related to policies affecting IID’s ability to provide safe, reliable, and affordable electricity to the
23 people IID serves. IID possesses numerous emails showing the ISO uses a back-channel process
24 with other regulators and private utilities to make policy decisions that are vital to IID. The ISO
25 excludes the public generally, and IID in particular, from the ISO’s secret decision-making
26 process.

27 **II. FACTS**

28 The Private Forum

While the IID was striving to increase and deliver greater amounts of renewable energy
from the Imperial Valley to where it was needed (Exhibit 2, Aguirre decl.), it discovered the
back-channel government officials and utility executives use to decide what power resources
would be tapped. ISO officials were part of a private forum of utility executives and regulators

1 used to decide the mix of energy sources the state would employ to provide electricity to the
2 people of California. For example, on 27 February 2014, ISO's Kelly Kristen wrote ISO External
3 Affairs Manager Gregory Van Pelt, CPUC Commissioner Michael Picker, CPUC Energy
4 Department head Ed Randolph, ISO Policy VP Karen Edson, and several other CEC and CPUC
5 officials detailing what the group had decided or was considering for decision. (Exhibit 3,
6 Aguirre decl.) Amongst these times were the:

- 7
- 8 • "Earlier completion of LTPP Track IV Proposed Decision"
- 9 • "Renaming and adjusting Carlsbad tasks Transmission Track"
- 10 • "Addition of CEC Fatal Flaw Analysis Completion for Albherhill/Suncrest 500 kv
11 line"
- 12 • "Renaming of the 5/29 "evaluation" of SONGS voltage criteria adjustment to
13 "Quantification" of the benefit" and
- 14 • "Moving the determination of triggers/timeline from the end of March to June 15,
15 2014" and finally
- 16 • "Aiding other tasks to determine if accelerating the generation process is needed and
17 subsequent steps. (Exhibit 3, Aguirre decl.)

18 Loss of San Onofre Nuclear Power Station

19 The operations of this private forum of public officials and utility executives were acutely
20 focused on making sure there was a reliable source of electricity in the areas served by the San
21 Onofre nuclear power plant (SO) before that plant closed on 31 January 2012. (Exhibit 4
22 Aguirre declaration "decl." 1 February 2012 Edison Event Notification to NRC)

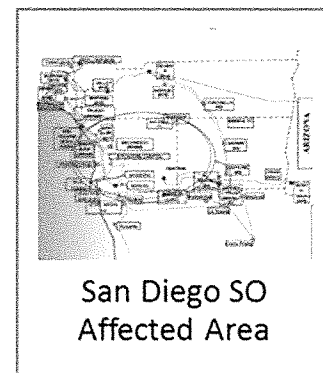
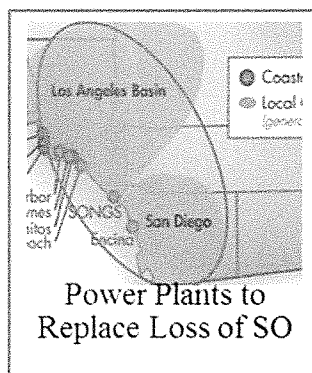
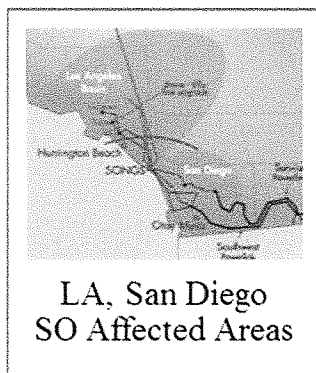
23 The SO generated enough electricity to meet the needs of 2.3 million California
24 households-- about 8 percent of all electricity generated in the state. [Exhibit 5, Aguirre decl.:
25 Market Impacts of a Nuclear Power Plant Closure (Lucas Davis and Catherine Hausman)] SO
26 was a "baseload" plant because it was part of the electricity plants that supplied the minimum
27 amount of electricity that is always in demand. With the exception of refueling outages, SO ran
28 24/7.

By April 2012, CPUC officials were working on SO replacement power under the
assumption SO would be off line through 2012. (Exhibit 6, Aguirre decl.) As of 18 April 2012,
ISO head Steve Berberich assumed SO would be off line and had formulated a replacement

1 power plan to maintain system reliability.⁵ Replacement power for SO came from natural gas
2 generators. (Exhibit 5, page 2, Aguirre decl.) The SO replacement power problem had stabilized
3 when fifteen months after SO closed, Edison permanently abandoned it in June 2013.

4 San Onofre Reliability - February 2012

5 The SO plant, which provided about 8% of California electricity, abruptly quit working on
6 31 January 2012. (Exhibit 5, page 1, Aguirre decl.) Planning and acquiring replacement power
7 was the focus of the formal actions at the CPUC, ISO, and California Energy Commission (CEC).
8 The CEC reported that the “absence of the San Onofre nuclear plant does not create system-wide
9 issues but does create local reliability issues because of transmission constraints that limit imports
10 into the Los Angeles Basin and San Diego areas:”⁶



28 San Onofre Reliability June 2013

During the seventeen months following SO’s closing, the ISO, CPUC and Edison had worked out their plan in secret for replacing the lost power at SO. A 13 October 2012 email from Edison President Litzinger to CPUC President Peevey revealed some of the secret decision-making behind the replacement power plan:

Mike, Thanks for the call yesterday regarding the Huntington Beach Synchronous Condensers. The call was timely as Steve Berberich from CAISO had called me earlier about signing an agreement to backstop AES expenditures for the equipment while a Reliability Must Run (RMR) agreement is negotiated. We certainly share your concern about grid reliability and are willing to consider reasonable measures for Summer 2013 preparedness. I appreciated your sharing with me the (sic) your support and the support of the CPUC, CAISO and the Governor’s Office. **
(Exhibit 9, Aguirre decl.)

⁵ Exhibit 7 Aguirre decl. <http://www.eenews.net/videos/1514>

⁶ Exhibit 8, Aguirre decl., p. 2

1
2 On 12 June 2013, ISO's CEO, Berberich, wrote the regulators and utility
3 executives describing the mission of the "loss of SONGS"⁷ Task Force.

4 The governor has asked for a 90 day report on how reliability will be maintained
5 with the permanent loss of SONGS. In discussions with Mike Peevey, Mike and I
6 agreed that the best approach would be to form a task force from the PUC, CEC,
7 ISO, SCE, SDG&E, SCAQMD and the Water Board to address a number of issues
8 including the following:

9 What mix of resources and assets would best meet reliability needs at the lowest
10 cost and with least regrets for long term system planning? What near term, mid
11 term and long term actions should be taken to replace San Onofre energy and
12 voltage support? What conventional, distributed generation could be contingency
13 permitted and sited? How can we solve the loss yet minimize the amount of
14 replacement power emissions? What OTC plants should be moved on for repower
15 and which ones should be considered for compliance date extensions? How can
16 demand response, energy efficiency and other emerging technologies play a role in
17 in minimizing conventional generation solutions?

18 The ISO will take the lead in getting the task force coordinated and Neil Millar,
19 our head of system planning will be the lead on our end. Please let me know who
20 from your organization will participate in the task force. We anticipate the initial
21 meeting to take place in Folsom at the ISO with subsequent meetings in S.
22 California. Finally, I propose that we have **monthly meetings with Michael
23 Picker of the governor's office and agency and utilities heads** to monitor
24 progress of the task force. As always, I welcome comments and alternative
25 suggestions for moving forward. (Exhibit 10, Aguirre decl.)

26 The ISO understood the IID considered the untapped geothermal in the Imperial Valley to
27 be a like-for-like potential replacement for SO, according to an ISO email: "geothermal from
28 Imperial is just what is needed to replace San Onofre." (Exhibit 11, Aguirre decl., 11 August
2014 email the CPUC's Michael Picker to Karen Edson ISO Vice President, Policy) Imperial
geothermal like SO is a baseload source of energy. Geothermal has an added beneficial feature --
it is renewable.

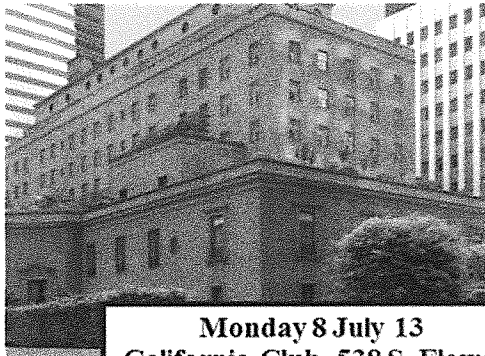
A memorandum written for the 8 July 2013 SO replacement power meeting provided:
"President Peevey has reserved a private room on the 3rd floor of the California Club** Time:

⁷ San Onofre Nuclear Generating Station was commonly called 'SONGS' by Edison.

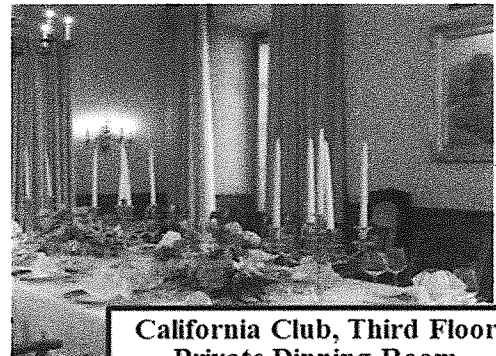
6:00-9:00pm (6:00 Drinks 6:30 pm Dinner)”⁸ The participants in the 8 July 2013 meeting included the following government officials:

					
CALISO President Stephen Berberich	CPUC President Michael Peevey	Chair California Air Resources Board Mary Nichols	Gov Brown Energy Adviser Michael Picker	Chair Cal Energy Commission Robert Weisenmiller	Gov Brown Adviser Jobs, Business Michael E. Rossi

A few weeks later, on 8 July 2013, ISO’s Berberich set up a meeting with an exclusive group of energy regulators to collectively concur on SO replacement power. The meeting was held at the members-only California Club located at 538 S. Flower in downtown Los Angeles in a private dining room on the club’s third floor⁹:



**Monday 8 July 13
California Club 538 S. Flower**



**California Club, Third Floor
Private Dining Room**

The 27 February 2014 email from ISO’s Kristen made it clear the decision-makers and “task force leads” were making these policy decisions in on-going meetings, dinners and phone calls. (Exhibit 3, Aguirre decl.)

On 8 August 2014 (4:09 PM), ISO Director of State Government Affairs, Mary McDonald, wrote Governor Brown’s Deputy Legislative Secretary, Martha Guzman-Aceves, regarding IID’s efforts to increase transportation of its geothermal, solar and other

⁸ Exhibit 12, Aguirre decl. Meeting Calendar for 8 July 2013 SONGS strategy dinner, Memorandum post SONGS Strategy Dinner.)

1 renewable energy sources through the ISO to energy supply markets:

2
3 At this week's Assembly Appropriations Committee hearing on SB 1139 (Hueso),
4 Kevin Kelley the General Manager of Imperial Irrigation District stated that a
5 recent ISO technical addendum finds that 462 MW of export capacity available
6 from IID into the ISO
7 (<http://www.caiso.com/Documents/technicalAddendumImperialCountyDeliverability.pdf>). However, that 462 MW that he referenced is being used to import existing
8 generation from IID into the ISO (Maximum Import Capability, MIC). As
9 explained in the addendum, transmission additions approved in the ISO's 2013-14
10 transmission planning cycle will enable future additional amount of deliverability
11 for the overall Imperial zone of up to 1,000 MW. Based on a review of the CPUC's
12 approved power purchase agreements we have determined that all of the 1,000 MW
13 is expected to be used by generation that is already moving forward as a result of
14 having CPUC approval and are connecting directly to the ISO. (Exhibit 11,
15 Aguirre decl.)

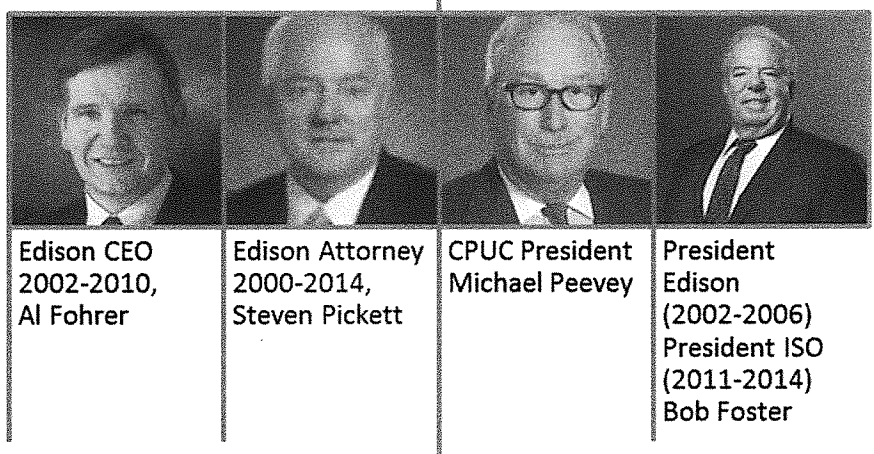
16
17 On 8 August 2014 at 4:22 p.m. -- thirteen minutes after Ms. McDonald sent her email--
18 ISO's Vice President for Policy and Client Services, Karen Edson, forwarded Ms. McDonald's
19 email to CPUC Commissioner Michael Picker (previously on the Governor's renewable energy
20 staff) accusing IID General Manager, Kevin Kelley, of making "incorrect representations to the
21 Legislature." Commissioner Picker sent a reassuring email to ISO policy chief Edson mocking,
22 but not copying, GM Kelley:

23
24 He (GM Kelley) still believes that you guys (the ISO) told him that there was
25 adequate transmission capacity to move 500 MW of geothermal to the coast; and
26 that (not clear that he actually asked the question) geothermal from Imperial is just
27 what is needed to replace San Onofre. I said that Kevin Kelley was wrong about
28 how to reach the Imperial County deliverability and that the physics of the system
made it unlikely that additional remove resources help with reliability on the coast
without another set of transmission improvements that provide delivery (or VARS)
at someplace near San Onofre. He said that he didn't understand what a VAR was,
and then went on to complain about the CPUC leg staff's testimony about
economic impacts. (Exhibit 11, Aguirre decl.)

29
30 Again, the work of this special group was carried out in secret; their decisions resulted in
31 Edison replacing most of San Onofre's lost power with electricity-based on natural gas. (Exhibit
32 5, page 2, Aguirre decl.) One example of the closed-door meetings at which the energy regulators
33 conducted business occurred on 17 June 2014 at the home of Air Resources Board Chair, Mary
34 Nichols. (Exhibit 14, Aguirre decl.) An email from CEC Chairman Robert Weisenmiller notified
35 participants the meeting was scheduled for Tuesday, June 17, 2014 3:15 PM-5:00PM at Mary

1 Nichols' residence. (Exhibit 14, Aguirre decl.) Those scheduled to attend the meeting were Air
2 Resources Board Chair Mary Nichols, CEC Executive Director Rob Oglesby, CEC
3 Commissioner Janea Scott, CEC Chair Bob Weisenmiller, ISO President Steve Berberich, CPUC
4 Commissioners Peevey and Picker, and Senior Adviser to Governor Brown, Cliff Rechtschaffen.

5 Other records dated 14 December 2014 show CPUC officials (e.g. Michael Peevey)
6 meeting in secret at the California Club, including long-time Edison CEO Al Fohrer (2002-2010)
7 and Edison Attorney Steven Pickett (Exhibit 15, Aguirre decl.):



15 The foregoing is the tip of the iceberg of the private forum the CEC, CPUC, Governor's
16 office, and ISO have organized to make fundamental policy decisions affecting the people living
17 in the IID territory. The policy decisions go well beyond resource development issues and
18 include a radical plan to merge the ISO into a regional transmission system that would reduce the
19 IID's ability to protect the safe, reliable and reasonably priced electricity, as discussed below.

20 ISO, PacifiCorp Integration

21 By 27 April 2015, ISO began another series of secret communications with agents,
22 officers, and employees of PacifiCorp, a utility corporation operating in six Western states.
23 Emails obtained from the Oregon Public Utility Commission (OPUC) show that on 27 April
24 2015, Jorge Ordonez (an OPUC Economist) wrote PacifiCorp executive Bryce Dalley: "I've been
25 tasked to provide the [O]CPUC chairman with an update about PacificCorp's exploration to
26 become a transmission owner at the CALISO." Dalley responded on 27 April 2015: "I asked the
27 legal team working on this and they indicated that our initial review indicated that we would
28

1 likely need to seek approval to transfer operation of public utility property and the performance of
2 public utility services to the ISO under ORS § 757.480.” (Exhibit 16, Aguirre decl.)

3 These secret discussions about combining the for-profit corporation PacifiCorp with the
4 ISO culminated in the introduction and passage of a midnight amendment and passage to an
5 unrelated bill (SB 350, De Leon) hours before the California legislature went out of 2015 session.
6 (Exhibit 17, Aguirre decl.) The bill (SB 350) was approved by the legislature and sent to the
7 Governor at 11:00 pm on Friday, 9 September 2015. The bill requires ISO to do what it has
8 already decided to do, which is to study the impacts of a regional grid.

9 III. ARGUMENT

10 TRANSFER MOTION SEEKS TO 11 STALL PRODUCTION OF PUBLIC RECORDS

12 The ISO delay tactics fly in the face of the legislative mandate that “[T]he times for
13 responsive pleadings and for hearings in [public record] proceedings shall be set by the judge of
14 the court with the object of securing a decision as to these matters at the earliest possible time.
15 Govt. Code § 6258. ISO has refused to produce a single record of communication or email in
16 response to IID’s public records requests -- a blatant defiance of California public record law.
17 Cal. Pub Util. Code 345.5(c)(6); The ISO employs typical Public Record Act delay tactics.

18 The ISO argues IID’s requests are too broad, and IID is using the public records law to
19 obtain discovery for its antitrust case. However, public record law “does not allow limitations on
20 access to a public record based upon the purpose for which the record is being requested, if the
21 record is otherwise subject to disclosure.” Govt Code § 6257.5. ISO refuses to release the
22 requested writings unless IID signs a confidentiality agreement. ISO also delayed production by
23 providing filler documents consisting of duplicate copies from the ISO website. (Exhibit 1,
24 Aguirre decl.)

25 Having retarded progress towards producing the public records sought for more than 6
26 months, ISO further obstructs and hinders production with its transfer motion filed by its retained,
27 outside counsel. ISO’s rhetoric and arbitrary and capricious acts betrays its dismissiveness
28

1 towards its obligation to produce public records under California’s statutory and constitutional
2 public record law. Under California Public Utility Code 345.5(c)(6), ISO is required to comply
3 with “policies of the California Public Records Act. The cardinal provision of the Public Records
4 Act is Government Code § 6253(a), which provides “[E]very person has a right to inspect any
5 public record, except as hereafter provided.” The California State Constitution goes further:
6 “[T]he right of access to information concerning the conduct of the people's business, and,
7 therefore, ** the writings of public officials and agencies shall be open to public scrutiny.” Cal.
8 Const. Art I, Sec 3.

9 **THIS COURT DETERMINES WHETHER ISO
10 COMPLIED WITH PUBLIC RECORD LAW**

11 Under Government Code § 6258, any person may “institute proceedings for
12 injunctive or declarative relief or writ of mandate in any court of competent jurisdiction to
13 enforce his or her right to inspect or to receive a copy of any public record or class of
14 public records under this chapter.” The Public Records Act placed with the Superior
15 Court the legal authority to decide whether public records are withheld improperly. Govt.
16 Code § 6259. The court shall decide the case after examining the withheld records in
17 camera and any oral argument and additional evidence as the court may allow. Govt Code
18 § 6259, subd. (c); *Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 89.

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

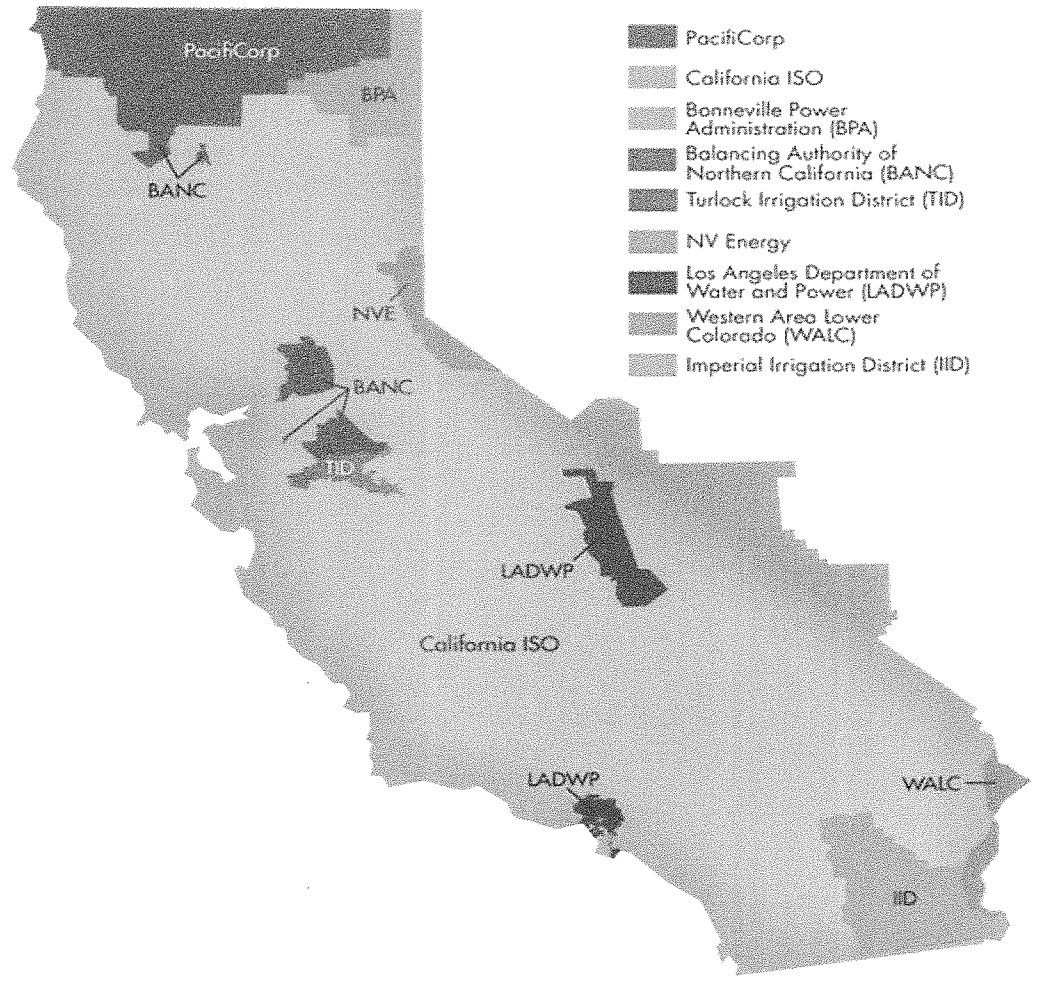
24 The Public Records Act allows the Superior Court to hear public record cases if
25 some part of the records sought are situated. Govt Code § 6259. The ISO is situated
26 throughout the State of California, including Imperial County, as illustrated here:

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Moreover, the records sought are in computer format. The ISO produced records so far to IID's legal counsel in San Diego in computer format. (Exhibit 1, Aguirre decl.) Gone are the days of letters sent and existing solely in hard copy format, such that documents need to be dusted off and boxed for production. Now, documents are electronically produced on CD or other electronic format.

Moreover, part of the records sought were made in Imperial County. The subject matter of the records is entirely related to IID, which is headquartered in Imperial County. ISO's duty to provide the records is owed to the IID, and they are required to be produced to IID.

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**THIS COURT DECIDES IF ISO'S
WITHHOLDING OF WRITINGS PROPER**

The records sought are those made in connection with the private forum communications where ISO and the CPUC decided important policy questions outside of the public's view. Such communications do not fit within those exempted under the Public Records Act See, Govt. Code §§ 6250-6276.48. ISO has identified no record from the secret communications that should be "kept confidential in order to achieve the ISO's mandated role in ensuring efficient use and reliable operation of the electric transmission grid." The right to decide what is, and is not, a public record is not vested with the ISO, but with the California Superior Court under California public record law. *Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 89.

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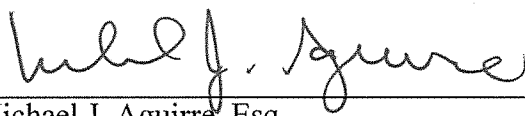
THIS CASE IS OF VAST IMPORTANCE

The ISO organization that controls the state's wholesale transmission grid conducts important parts of its public business outside public view in secret meetings at exclusive members-only clubs and personal residences of state officials. The decisions made have limited the development of renewal resources in Imperial County and resulted in vast harm to the People of California. IID has requested the writings that fully document ISO's deviant actions. The records sought are under ISO's possession, custody and control, and ISO is situated throughout the state. The ISO has already produced limited records to IID lawyers in computer format – not through a bulky postal delivery. The motion to transfer is a delay tactic employed after ISO has already delayed production for over six months. The motion should be denied.

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AGUIRRE & SEVERSON, LLP

Dated: January 5, 2016



Michael J. Aguirre, Esq.
Attorneys for Petitioner