

Documents Filed in Support of Legislature Record
for
Assembly Constitutional Amendment No. 11

California Legislature 2015-2016 Regular Session
Assembly Committee on Utilities and Commerce

VOLUME II

1. CPUC Public Record Act OIR Workshop Report/Evidence (0002 - 0171)
2. Loss of Songs Filings (0172 - 0254)
3. Complexity and Secrecy Paper (0255 - 0322)
4. Haas School Report (0323 - 0390)
5. Petition Requesting Aliso OII (0391 - 0410)
6. Malfeasance Report (0411 -0451)
7. Coastal Commission Complaint (0452-0479)
8. Decision on OII in San Diego Fire Case (0480 – 500)
9. San Diego Federal Complaint and related filings (0501 – 0629)

EXHIBIT 5

ACA 11 - 00391

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

**AMENDED PETITION OF
CONSUMER WATCHDOG,
CITIZENS OVERSIGHT, INC., AND PAUL E. HUNT
FOR AN INVESTIGATION INTO
ALISO CANYON UNDERGROUND STORAGE FACILITY (ACSF)**

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I. INTRODUCTION

On 29 January 2016, Consumer Watchdog, Citizens Oversight, Inc., and Paul E. Hunt petitioned the California Public Utilities Commission (CPUC) requesting, under Art I, Sec 3(a) of the California Constitution, that the CPUC institute an investigation under CPUC Rule 5.1 (Order Instituting Investigation, or “OII”) regarding the causes and parties responsible for the gas leak at the Aliso Canyon Underground Storage Field (ACSF) located at 12801 Tampa Avenue in Los Angeles County.

Almost one month later, on 26 February 2016, CPUC Chief Administrative Law Judge Karen V. Clopton responded to the petition requesting an OII as follows:

The ‘Petition of Consumer Watchdog, Citizens Oversight, Inc., and Paul E. Hunt for an Investigation into Aliso Canyon Underground Storage Facility,’ submitted to the Docket Office on January 29, 2016, cannot be accepted for filing. Pursuant to Rule 5.1 of the Commission's Rules of Practice and Procedure (Rules), ‘The Commission may at any time institute investigations on its own motion ‘The Rules do not otherwise provide any authority or procedures to file a petition for an investigation. However, if you believe there is a violation of law or any order or rule of the Commission, you may wish to consider filing a complaint, pursuant to Article 4 of the Rules.

The CPUC’s refusal to file – even consider – the Petition was improper.

First, the CPUC has previously allowed petitions requesting orders of investigation to be filed. For example, the filing of a petition for an order instituting investigation was permitted in *Petition of CMA for an order of investigation* 1979 Cal. PUC LEXIS 542; 1 CPUC2d 474 (May 22, 1979) Decision No. 90358, Case No. 10740. The petition was denied, but the CPUC allowed it to be filed.

Defendants in another case were permitted to **request an order of investigation** into the rates, terms, and conditions. 1976 Cal. PUC LEXIS 1107, *21-22, 79 CPUC 404. [*October 10, 1972. General (General Telephone Company of California) filed a "Petition to Issue Order Instituting Investigation."*]

The CPUC has also accepted requests of the legislature to issue orders of investigation. Pursuant to the **request** of the Legislature, the Commission instituted Case No. 9804, an **order of investigation** into electric rate structures. 1976 Cal. PUC LEXIS 931, *2, 80 CPUC 723; see also 1977 Cal. PUC LEXIS 809, *2, 82 CPUC 472.

Apart from the CPUC's previous practice of accepting requests for OIIs, Petitioners have a constitutional right to petition the CPUC, an arm of government, to redress their grievances arising out of the Aliso gas catastrophe. The right to petition California governmental authorities for

redress of grievances is guaranteed by Article I, Section III of the California Constitution and embodied in the First Amendment to the United States Constitution. *City of Long Beach v. Bozek*: An Absolute Right to Sue the Government?, 71 Calif. L. Rev. 1258, 1262 The “**California** Constitution declares that "people have the right to . . . **petition government for redress of grievances**. *Robins v. Pruneyard Shopping Center*, (1979) 23 Cal. 3d 899, 907; See, The Vestigial Constitution: The History and Significance of the Right to Petition, 66 Ford L. Rev. 2153 (1998).

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Supreme Court stated that the right to petition encompass "the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive)....”

Petitioners therefore are permitted to ask the CPUC to exercise its authority to issue an order instituting investigation. The CPUC is free to deny the request, but it was error and a violation of Article I, Section 3 of the California Constitution for ALJ Clopton to refuse to allow the petition to be filed with the CPUC. Accordingly, we submit this amended petition and hereby request the CPUC exercise its authority under Rule 5 and issue the subject order instituting investigation.

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II. BACKGROUND

A. “Dismal Safety Record”

As stated in the original petition, Southern California Gas Company (SCG), the public utility regulated by the CPUC that owns and maintains ACSF and is responsible for its wells, jeopardized the public health and safety by operations causing a massive gas leak it was unable to stop for months. The Aliso facility remains, with the threat ongoing. The investigation should consider: the causes of the leak; SCG’s response; the safety of the other wells at ACSF; the future of ACSF; and the resulting effects on just and reasonable rates.

It is the public that has been, and ultimately will be, asked to pay for SCG’s failed operation, just as the public was ordered to do for Southern California Edison’s failed San Onofre nuclear plant. The public must be able to participate in an investigatory proceeding by the CPUC at this time in order to restore public confidence in the CPUC at a moment when its integrity is at an all-time low.

On 9 September 2010, a 30-inch diameter natural gas transmission pipeline owned and operated by Pacific Gas & Electric Company (PG&E) ruptured and caught fire in the City of San Bruno, California. In response, the CPUC on 24 February 2011 issued Rulemaking (R.) 11-02-019, “a

forward-looking effort to establish a new model of natural gas pipeline safety regulation applicable to all California pipelines.”

The September 2010 explosion in San Bruno caused eight deaths and the destruction and damage to more than 35 homes. The San Bruno explosion was part of a pattern of safety lapses of CPUC-regulated utilities.

In October 2007, San Diego Gas & Electric Company’s (SDG&E) electric transmission equipment in San Diego caused fires that took two lives and destroyed or damaged hundreds of homes in San Diego causing damage claims in the amount of \$4 billion.

In January 2012, Southern California Edison’s (SCE) nuclear generators failed, causing the San Onofre nuclear power plant to close permanently, resulting in an increase of carbon-based replacement power equivalent to putting an additional 1.8 million cars on California roads; as a result of this closure, the CPUC required ratepayers to pay an additional \$3.3 billion.

In the aftermath of this dismal record, CPUC President Michael Picker on 14 January 2015 admitted that the CPUC’s “safety oversight was severely lacking.”

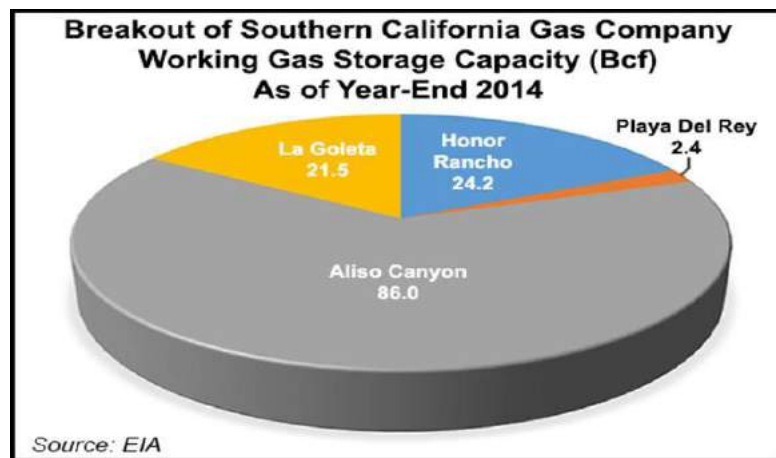
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B. Aliso Expansion Project

In its November 2013 Decision 13-11-023, the CPUC granted \$200.9 million of utility customer funds to SCG to replace obsolete gas turbine compressors in order to expand ACSF's natural gas injection capacity at the Facility. According to the CPUC decision, SGC provides natural gas to approximately six million customers. This service includes operation of four underground natural gas storage facilities to help meet peak hourly, daily, and seasonal demands for all its customers. ACSF is SCG's largest underground natural gas storage field and one of the largest in the United States. The CPUC found the Aliso field contains 84 billion cubic feet (Bcf) of working storage inventory, 1.875 billion cubic feet per day (Bcfd) of withdrawal capacity, and a current end-of-cycle injection capacity¹ of 300 million cubic feet per day (MMcfd).

¹ Injection capacity (or rate) is the complement of the deliverability or withdrawal rate: it is the amount of natural gas that can be injected into a storage facility on a daily basis.



Approximately 45% of SCG's total firm injection capacity is located at the Aliso Field. The three obsolete gas turbine-driven centrifugal compressors provided a majority of Aliso Field's injection capacity, according to the CPUC decision.

Under the CPUC-approved plan, ACSF's natural gas injection capacity will increase from approximately 300 MMcfd (million cubic feet per date) to approximately 450 MMcfd. The new construction at Aliso includes:

- A Central Compressor Station with three new electric-driven, variable-speed compressors and pipelines to connect the station to existing facilities;
- A 12-kilovolt (kV) Plant Power Line to supply the Central Compressor Station with power;
- Office and crew-shift buildings; and
- A guardhouse on a widened segment of the existing entry road into the storage field.

The expansion project was under construction when the leak was disclosed in October 2015.

C. Aliso Gas Leak

Despite the CPUC's representations to the public that safety at the CPUC was a high priority, the initial response to the report of the Aliso gas leak suggests the CPUC staff's actions did not comport with the agency's professed concerns for safety. After a resident reported the gas leak at ACSF, the CPUC investigator closed the case on October 27, 2015:

INFORMAL COMPLAINT

12/23/2015

Complaint No. C201510-674-G

Date Received: 10/27/2015 Date Closed: 10/27/2015

Utility: SCG

Assigned Staff: DURGA SHRESTHA

Utility Type: Gas

USRB Action: Closed

Violation: NA Rule:

Customer Information	
Name: [REDACTED]	Phone: (818) [REDACTED]
Address: [REDACTED]	
City: <u>Porter Ranch</u>	St: <u>CA</u> Zip: <u>91326</u>
E-Mail Address: [REDACTED]@socal.rr.com	

Issue
There was a gas leak in Aliso Canyon Storage on 10/23/2015. Customer is smelling the gas and the leak has not been fixed yet.

Comments
10/27/2015: After getting information from the customer about the incident, I talked to SoCalGas and found out that the incident is not under CPUC's jurisdiction since the leak is upstream side of header valve. SoCalGas informed me that the incident was reported to Division of Oil, Gas, and Geothermal Resources (DOGGR) and DOGGR is investigating the incident. I informed the same to the customer and provided phone numbers for DOGGR.

SCG represents that on 23 October 2015, SCG crews discovered a leak at one of its natural gas storage wells (identified as "Standard Sesnon 25" and referred to as "SS 25") at its Aliso Canyon storage field. SCG has released a document showing inspections revealed no leaks at its SS 25 well since 2011:

09-12-2011	Shut-in Temperature Log	2430	2430	Casing held pressure - no leak
05-29-2012	Shut-in Temperature Log	2572	2572	Casing held pressure – no leak
10-02-2013	Shut-in Temperature Log	2624	2624	Casing held pressure – no leak
10-21-2014	Shut-in Temperature Log	2647	2659	Casing held pressure – no leak

Subsequently, hundreds of residents have reported health problems, including full-body rashes, headaches, vomiting and nosebleeds. Many of those living in and around ACSF have been forced to move to temporary housing as a result of the leak. The leak has caused schools to close and businesses to shut down. Estimates of \$2 billion in damages and costs have been widely reported.

After multiple attempts to plug the leak, a significant concern is trying to avoid a blowout. A blowout, according to state officials, would increase the amount of leaked gas, causing greater environmental damage. If a blowout occurs, highly flammable gas would vent directly up through the well, rather than dissipating. SCG's attempts to stop the leak by pumping slurry into the well may have made the site and wellhead more unstable. Moreover, there are reports that SCG could have eliminated the leaks and further danger to the community by completely drawing down the reserves, but SCG has refused to do so for financial reasons.

Petitioners, on behalf of utility customers, will likely be asked to pay for some, if not all, of the costs of the Aliso gas leak. Given the prolonged and continuing duration of the Aliso natural gas leak, the Governor of the

State of California proclaimed a State of Emergency to exist in Los Angeles County on January 6, 2016. However, the CPUC has initiated only an informal staff-run investigation of this natural gas leak. An “independent,” third-party analysis of the cause of the leak has also been undertaken at the direction of CPUC staff, but its reports are to be provided to the CPUC and not released to the public until after the investigation is deemed complete by the CPUC at an arbitrary date. The CPUC has yet to initiate a formal investigation into the crisis at ACSF in the Porter Ranch community.

III. PETITIONERS

Petitioner Paul E. Hunt is an individual residing in the Porter Ranch Community within one mile of the ACSF and leak, and within the SCG utility ratepayer area. As a direct result of the ACSF leak and facility failure, he has had to leave his residence and relocate for safety reasons.

Petitioner Consumer Watchdog is a California non-profit education and advocacy organization with offices at 2701 Ocean Park Blvd., Suite 112, Santa Monica, CA 90405. It is dedicated to providing an effective voice for consumers on a wide variety of issues, from energy and the environment to privacy, insurance and health care. It has a history of bringing actions to challenge serial environmental polluters and the improper disposal of toxic and radioactive waste, seeking the levy of

maximum fines for violation of California environmental and consumer protection laws; and strenuous advocacy on behalf of the citizens of California whose health and safety is at stake. Consumer Watchdog and its approximately 300,000 supporters in California believe that community health should not come at the expense of corporate wealth. Moreover, Consumer Watchdog has a demonstrated commitment to protecting the right of the public to participate in legal actions and policy-making, a principle of democracy that is enshrined in the California Constitution and numerous statutes governing the conduct of government and private entities.

Petitioner Citizens Oversight, Inc. is a non-profit corporation with primary offices in California. It represents the interests of consumers in administrative and judicial proceedings concerning public utilities matters, and has intervened at the Public Utilities Commission and Nuclear Regulatory Commission regarding the San Onofre Nuclear Plant closure and subsequent waste storage and decommissioning plans.

IV. COMMISSION JURISDICTION

SCG is a public utility company under the CPUC's jurisdiction. The CPUC regulates its rates, operations, practices, programs, and services, plus the reliability, safety, and adequacy of facilities, pursuant to Pub. Util. Code §§ 451, 454, 701, and other statutes. The CPUC executes these

responsibilities in a range of different proceedings, including applications, investigations, rulemakings, and other forums as appropriate.

Under Cal. Pub. Util. § 451, the CPUC is responsible for ensuring safe and reliable service at just and reasonable rates:

All charges demanded or received by any public utility...shall be just and reasonable. Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities...as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

V. A FORMAL, PUBLIC INVESTIGATORY PROCEEDING IS NECESSARY

Gas has been leaking at ACSF since October 2015. As noted above, the CPUC staff has undertaken only an informal inquiry into the causes of the Aliso gas leak. The Division of Oil, Gas and Geothermal Resources (hereafter “DOGGR”), which is overseeing SCG’s efforts to stop the leak, issued emergency orders in November and December 2015 directing SCG to (1) halt gas injections into the storage facility; (2) immediately work on alternatives to stop the leak; and (3) provide testing results, data, daily briefings and a written plan and schedule for sealing the well. DOGG established a panel of experts to provide independent monitoring and technical expertise, and review the SCG data and information reported to DOGGR.

However, the CPUC has failed to comply with California laws and the CPUC's own regulations, which require the CPUC to exercise its authority through formal procedures. These statutory safeguards ensure that the public – particularly the residents who face an imminent threat to their health and safety – are fully apprised of the situation and are able to exercise their due process rights to protect their families and their property.

Instead, the CPUC has made clear it intends to proceed privately, outside the public's view. The CPUC, when describing its scope of CPUC investigation into the well failure at Aliso Canyon, assured SCG it will only “release its official investigation report upon completion of all aspects of the investigation.” The CPUC further made known it “will not release tentative findings of its investigation.” This course of conduct flouts the CPUC's regulatory scheme and mission, described by the CPUC itself as requiring the agency to serve “the public interest by protecting consumers and ensuring the provision of safe, reliable utility service and infrastructure at reasonable rates, with a commitment to environmental enhancement and a healthy California economy.” Accordingly, the public has a right to oversee and participate in the agency's actions.

The CPUC's recent track record of responding to massive utility failures is poor. In the proceedings relating to the San Bruno gas explosion

that killed eight people and destroyed a part of a community, the CPUC was found to engage in secret ex parte communications with PG&E officials to arrange the appointment of an administrative law judge preferred by the utility. In the investigation into Southern California Edison's San Onofre nuclear plant radiation leak and generator failure which required it to shut down, then-CPUC President Peevey and Director of Energy, Edward Randolph, met secretly in Warsaw, Poland with an Edison executive and formulated deal points that resulted in a "settlement" burdening ratepayers with \$3.3 billion in costs for the failed plant.

Until a criminal investigation uncovered, via a Court-issued search warrant, evidence in Peevey's home, the public was unaware of the deal written by his and SCE's own hand. Only after the 2015 publication of the Warsaw settlement notes did SCE admit the secret meeting that had occurred two years prior; Peevey resigned immediately thereafter.

The massive gas leak at SCG's facility has impacted the residents living in and around the facility. It holds the dubious distinction of being California's single largest source of planet-warming pollution. The costs of SCG's gas leak are mounting, with estimates of \$2 billion in damages and costs widely reported.

The CPUC professes to the public it is “committed to transparency in its work to serve the people of California.” Anything short of issuing an Order Instituting Investigation in which the public can participate during – not after – the investigation would make that stated commitment a mere fallacy. The public has a right to participate.

VI. ACTION REQUESTED

For the reasons stated above, utility customers request the following:

- 1. The CPUC issue an Order Instituting an Investigation (OII) relating to (a) the causes of, and persons responsible for, the ACSF gas leak; (b) the actions required to safely terminate the threat to the public health and safety; and (c) measures needed to assure full compensation to members and businesses in the Porter Ranch community for losses they have incurred as a result of the ACSF gas leak.**
- 2. An emergency public meeting of the CPUC Commissioners in Los Angeles within 10 days of this Petition, in order to consider whether to issue the OII and to report on ACSF to Los Angeles officials and the public;**
- 3. Setting a date for a Prehearing Conference in order to place the OII on a fast track for resolution, without unnecessary “phasing”; and**
- 4. The immediate release of all documents and communications to date between SCG (including its executives, staff and vendors), and the CPUC (including Commissioners, and staff) regarding the ACSF gas leak.**

VII. CONCLUSION

The CPUC should issue the requested Order Instituting Investigation to provide utility customers and their advocates an opportunity to participate in the investigation into the causes of the Aliso leak.

VIII. SERVICE LIST

Petitioners respectfully request that the Commission list the
Petitioners' representatives in this matter as follows:

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Petitioners respectfully requests the Commission add Maria Byrnes to the service list for informational purposes only:

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Respectfully Submitted,

Dated: March 4, 2016

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EXHIBIT 6

ACA 11 - 00411

Report of Malfeasance and Institutional Corruption at the California Public Utilities Commission

07 January 2015

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Malfeasance at CPUC Threatens Security of the People of California



**2007 San Diego Fire
Caused by SDG&E Equipment**



**2010 San Bruno Fire Caused by PG&E
Gas Lines**



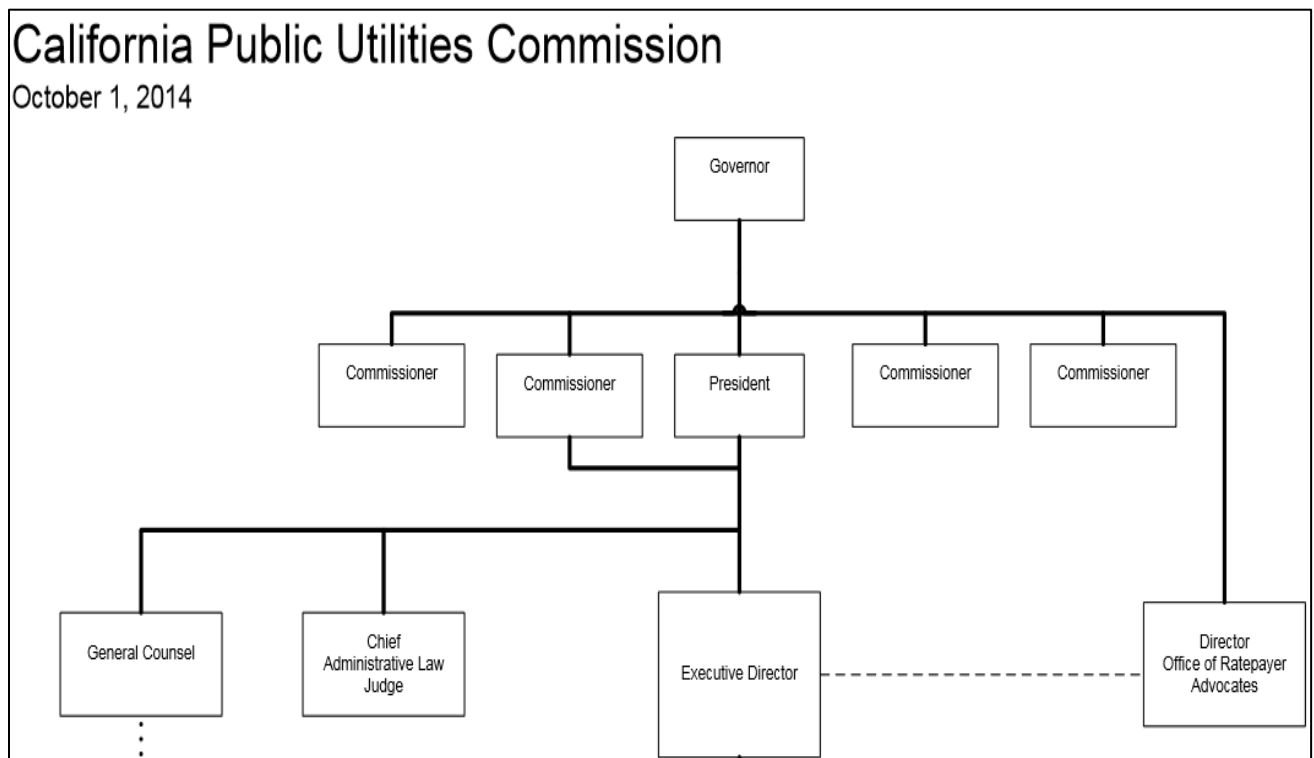
2011 Fukushima nuclear plant



**San Onofre: Disaster Waiting to
Happen**

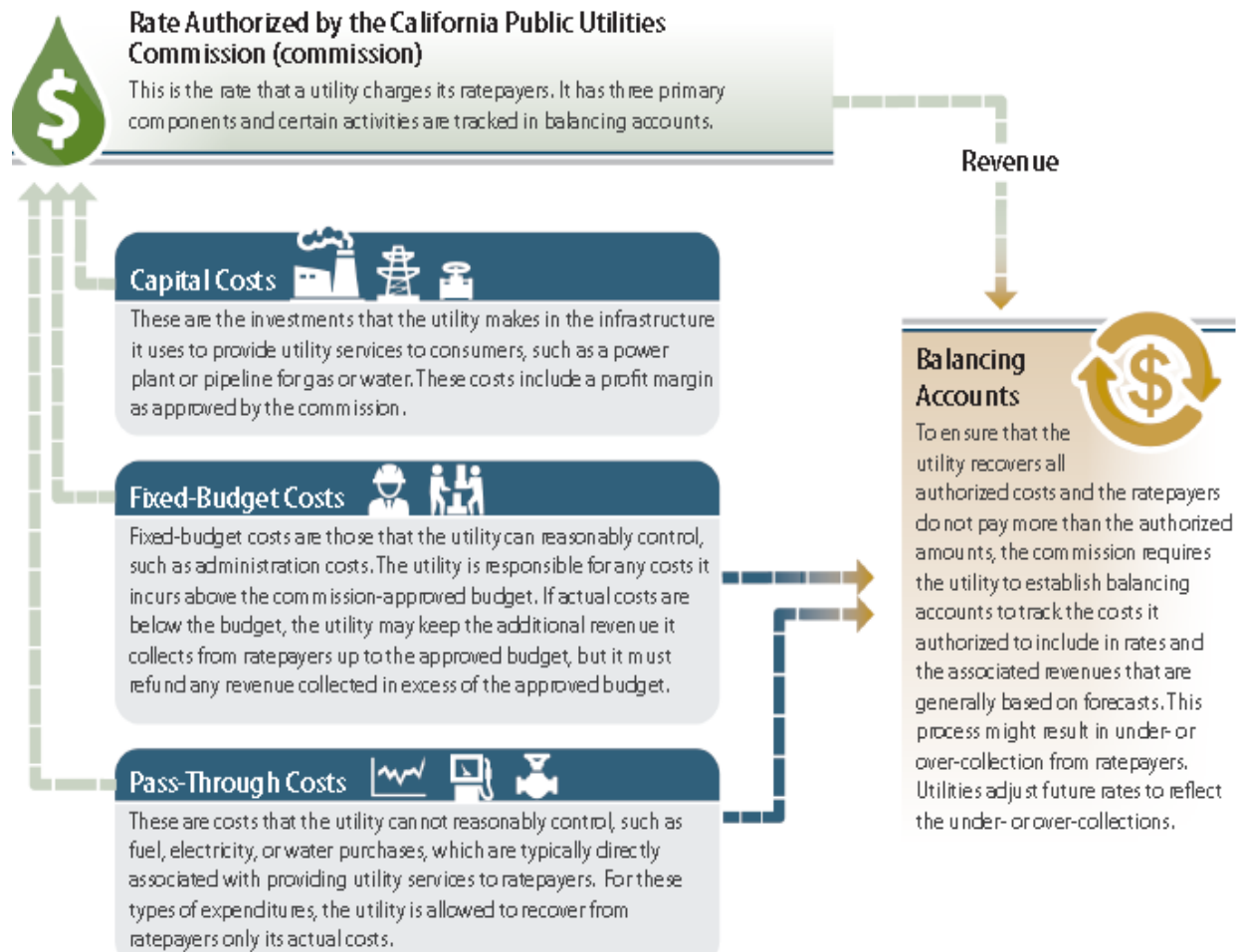
INTRODUCTION

This report is written with the hope of inducing the people of California to action. Malfeasance has spread into the bone marrow of California government. The malfeasance of California's government is illustrated by the corruption at the California Public Utilities Commission (CPUC), which operates under the Governor of the State of California.



The CPUC has 1,000 staff positions and a budget of \$1,332,214,000. Under Public Util. Code § 431, the CPUC annually determines a fee to be paid by “every electrical, gas, telephone, telegraph, water, sewer system, and heat corporation and every other public utility providing service directly to customers or subscribers and subject to the jurisdiction of the Commission to produce a total amount equal to that amount established in the authorized CPUC budget for the same year,

including adjustments for increases in employee compensation and an appropriate reserve to regulate public utilities.¹ The rate structure is explained:

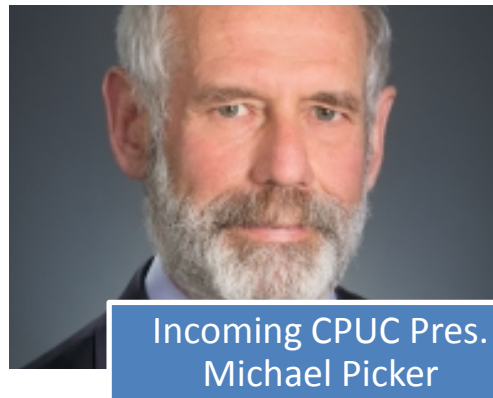
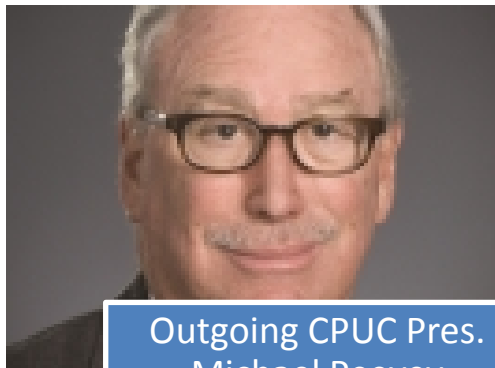


In addition, the CPUC has set up seventy energy programs and several nonprofits, discussed infra.

¹ Less the amount to be paid from special accounts or funds pursuant to Section 402, reimbursements, federal funds, and any other revenues, and the amount of unencumbered funds from the preceding year.

CHANGING OF THE CPUC GUARD

Michael Peevey, President of the CPUC, was forced to step down in the face of a judge-fixing scandal. Another CPUC Commissioner has been exposed by his own emails to have been compromised by the utilities he is charged with regulating. As with Peevey, Michael Picker was a principal in a lobby firm known as Lincoln Crow Strategic Communications from 2001-2009. Governor Brown appointed Picker to the CPUC in January 2014. Picker voted with Peevey on matters before the CPUC approving the collusive San Onofre settlement.



The corruption and malfeasance identified in this report is integral to the ways and means the CPUC has come to operate. The departure of Peevey does not cleanse the bad practices; it may, in fact, create the false impression and diminish the energy behind CPUC reform. Californians spend more than \$47 billion annually for services from industries regulated by the PUC² (\$13,000,000,000 from the investor-owned electricity utilities). The people of California's safety must be maintained and the CPUC must ensure the utilities use customers' funds for their intended purposes. The CPUC must begin again to honor its purpose of protecting the people of California from unreasonable rates. Cal Pub. Util Code § 451.

² 8660 Public Utilities Commission 2014 budget at GG2.

STORM WARNINGS SHOW THE CPUC CANNOT BE TRUSTED TO PROTECT THE PEOPLE OF CALIFORNIA

The safety concerns are heightened in the case of San Onofre where tons of nuclear waste will be stored indefinitely.³ High-level wastes are hazardous to humans and other life forms because of their high radiation levels that are capable of producing fatal doses during short periods of direct exposure.⁴ High level radioactive (or nuclear) waste results from the fuel used by reactors to produce electricity.⁵ Separated High-level waste and spent fuel rods from nuclear power plants must be handled and stored with great care since they contain the highly-radioactive fission products, plus uranium and plutonium.⁶ Nuclear fuel rods are ceramic pellets of uranium oxide (UO₂), about the size of a finger joint, stacked and sealed inside a long metal tube (cladding) about as big around as a Sharpie pen. The space between the pellets and cladding is filled with helium.⁷

ACTION MUST BE TAKEN

The failure of the CPUC to protect ratepayers in the San Diego fire, San Bruno explosion, and San Onofre radiation leak and plant closure are “storm warnings” that the CPUC cannot be counted on to protect the people of California. The people of Okuma, Fukushima, Japan paid dearly for the failures of Japanese

³ <http://www.kpbs.org/news/2014/may/12/del-mar-councilman-testifies-senate-hearing-decomm/>

⁴ <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html>

⁵ <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html>

⁶ <http://www.nrc.gov/reading-rm/doc-collections/fact-sheets/radwaste.html>

⁷ “Spent fuel” refers to fuel used in a commercial nuclear reactor that has been removed because it can no longer economically sustain a nuclear reaction. Burnup refers to the uranium consumed in the nuclear reaction. It is expressed in gigawatt-days per metric ton of uranium (GWd/MTU)—a measure of how long a fuel rod is in the core and the power level it reaches. “High burnup fuel” is in the reactor core for longer than “low burnup fuel.”

regulators when the Tōhoku earthquake and tsunami struck their city, knocked out the Fukushima Daiichi nuclear power plant operated by Tokyo Electric Power Company (TEPCO):



Following the earthquake, a 15-metre tsunami disabled the power supply and cooling of three Fukushima Daiichi reactors, causing the nuclear accident on 11 March 2011. All three cores at the nuclear station largely melted in the first three days. A Japanese commission faulted the government, regulators, and TEPCO for not anticipating and preventing the crisis at the Fukushima Daiichi Nuclear Power Plant.⁸ The destruction of the Fukushima plant resulted in massive radioactive contamination of the Japanese mainland.

In November 2011, the Japanese Science Ministry reported that long-lived radioactive cesium had contaminated 11,580 square miles (30,000 sq km) of the land surface of Japan. Some 4,500 square miles – an area almost the size of

⁸ <http://www.districtenergy.org/blog/2012/07/08/commission-concludes-fukushima-accident-was-manmade/>

Connecticut – was found to have radiation levels that exceeded Japan’s allowable exposure rate.⁹ All of the land within 12 miles (20 km) of the destroyed nuclear power plant, encompassing an area of about 230 square miles (600 sq km), and an additional 80 square miles (200 sq km) located northwest of the plant, were declared too radioactive for human habitation. All persons living in these areas were evacuated and the regions declared permanent “exclusion” zones.¹⁰



Fukushima Before Disaster



Fukushima After Disaster

The people of California cannot ignore the “storm warnings” showing the CPUC has failed its duty to protect ratepayers from unreasonable rates. CPUC imposed rates on ratepayers, but then failed those funds were used to fix pipes, clear brush, obtain reliable steam generators instead of one that have not been used for their intended purposes.

⁹ The exposure rate was 1 mSV (millisievert) per year. About a month after the disaster, on 19 April 2011, Japan chose to drastically increase its official “safe” radiation exposure levels from 1 mSv to 20 mSv per year – 20 times higher than the US exposure limit. This allowed the Japanese government to downplay the dangers of the fallout and avoid evacuation of many badly contaminated areas.

¹⁰ <http://www.psr.org/environment-and-health/environmental-health-policy-institute/responses/costs-and-consequences-of-fukushima.html>

RATEPAYERS CHARGED UNREASONABLE RATES

Customers of utilities the CPUC “regulates” pay amongst the highest rates in the nation and more than their fellow citizens who buy their electricity from publicly owned utilities:



Rates have consistently gone up while electricity consumption has remained constant. Between 2009 and 2013, rates for investor-owned utility customers went up 19.16% between 2009 and 2013. In 2013, the investor-owned utilities charged ratepayers the greater part of \$13,000,000,000; this was up from \$10,373,000 (19.16%).

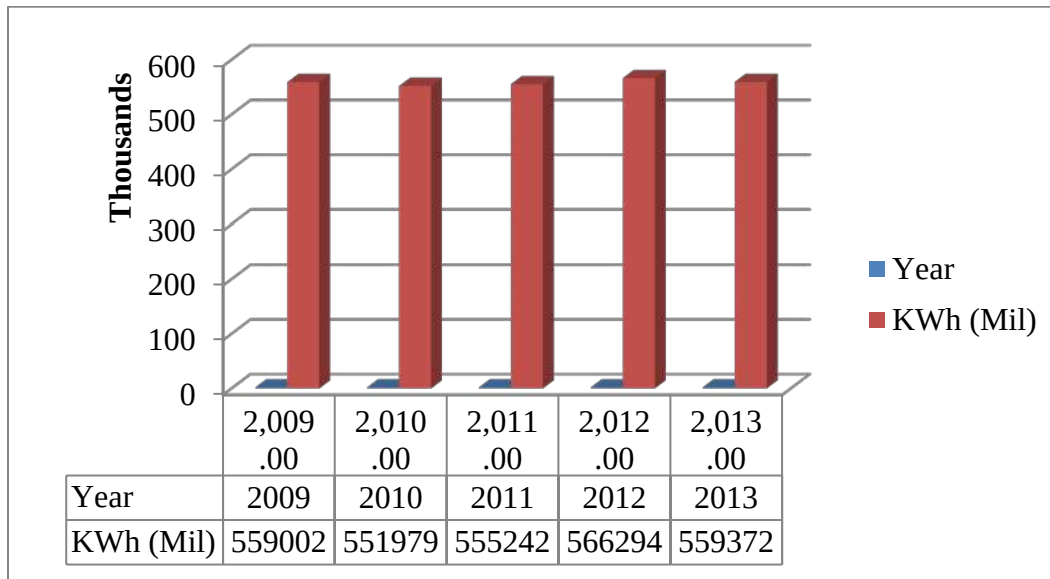
Table II-2
2013 Authorized Electric General Rate Case Revenue Requirements (\$ Million)

	PG&E	SCE	SDG&E
Operations and Maintenance	\$1,947	\$2,272	\$659
Depreciation	\$1,099*	\$1,222	\$274
Return on Rate Base	\$1,246	\$1,465	\$300
Taxes	\$734	\$712	\$207
Attrition **	\$295	\$358	\$40
Total	\$5,321	\$6,029	\$1,481

2009 General Rate Case Revenue Requirements (000)

	PG&E	SCE	SDG&E
Operations and Maintenance	\$1,827,122	\$1,853,119	\$445,646
Depreciation	\$1,019,254	\$1,106,992	\$285,756
Return on Rate Base	\$909,993	\$1,066,918	\$246,799
Taxes	\$617,138	\$819,612	\$176,474
Total	\$4,373,507	\$4,846,641	\$1,154,675

Even as rates utility rates increased by almost 20% for utilities, the consumption of electricity in California remained constant:



This report examines the CPUC’s decision to make ratepayers pay for the San Onfore nuclear power plant after it was permanently knocked out of service by Edison executives’ decision to obtain and deploy defective steam generators. The generators failed after less than 1 year of joint-use. The CPUC authorized Edison to charge customers the greater part of \$5,000,000,000 over the decade for a plant that has not—and will not—produce any more electricity. Worse, the CPUC is supporting Edison’s current plan to leave 1,631 tons—3.6 million pounds—of life-threatening nuclear waste stored on the ocean shore in North County San Diego. This will make San Diego one of the nation’s largest nuclear waste dumps.

The table below illustrates the magnitude of the waste:

THE SAN ONOFRE NUCLEAR WASTE INDEX
Total amount of spent fuel on site : 1631 tons
Amount of spent fuel currently stored in pools: 1099 tons
Amount of spent fuel in dry casks : 430 tons
Number of spent fuel rods generated by 44 years of reactor operations: 926,836
Amount of radioactivity in the spent fuel rods: 484 million curies
Amount of spent fuel to be stored in cooling pools: about 73 percent
Number of times the radioactivity in SONGS's cooling pools exceeds that in 177 waste tanks at the notorious Hanford , Wash., site: nearly 3
Percentage of radioactivity in SONGS' waste that is Cs-137, the most risky form: 43
Number of times the radioactivity in Cs-137 at SONGS exceeds all that released in atmospheric nuclear weapons tests: 6
Number of times it exceeds that released at Chernobyl: 89

Southern California Edison (Edison) was paid money for defective San Onofre steam generators. Later reports will examine the CPUC's conduct in the San Bruno explosion caused by PG&E gas lines. PG&E was paid ratepayer money to fix them, but failed to do so. This is no different than the ratepayer money awarded to SDG&E, despite the SDG&E equipment-caused 2007 San Diego fire. In each case, the CPUC granted rate increases—to buy new steam generators, to fix worn gas pipes, and to clear fire risk brush, but in each case the utilities failed to properly use ratepayer funds for their intended purpose. In each case, the CPUC blocked its own investigations into utility executive wrongdoing.

CPUC MALFEASANCE AT SAN ONOFRE

One clear and unequivocal lesson arises from each of these disasters: the CPUC currently constituted cannot be trusted with the safety or security of the people of California.



In January 2004, a state-set mechanism expired that had allowed Edison to recover about 4 cents per kilowatt hour to pay San Onofre operating costs, including the plant's fuel and fuel financing costs, and incremental capital expenditures. Any money left over was passed on to shareholders. (Nucleonics Week 21 November 2004) In 2004, Edison embarked upon a scheme to obtain ratepayer funds through the CPUC to pay up front for new and more potent steam generators at its San Onofre Nuclear station before they were shown to be “used and useful.”¹¹ Under CPUC President Michael Peevey, the CPUC approved the new steam generator project in December 2005.

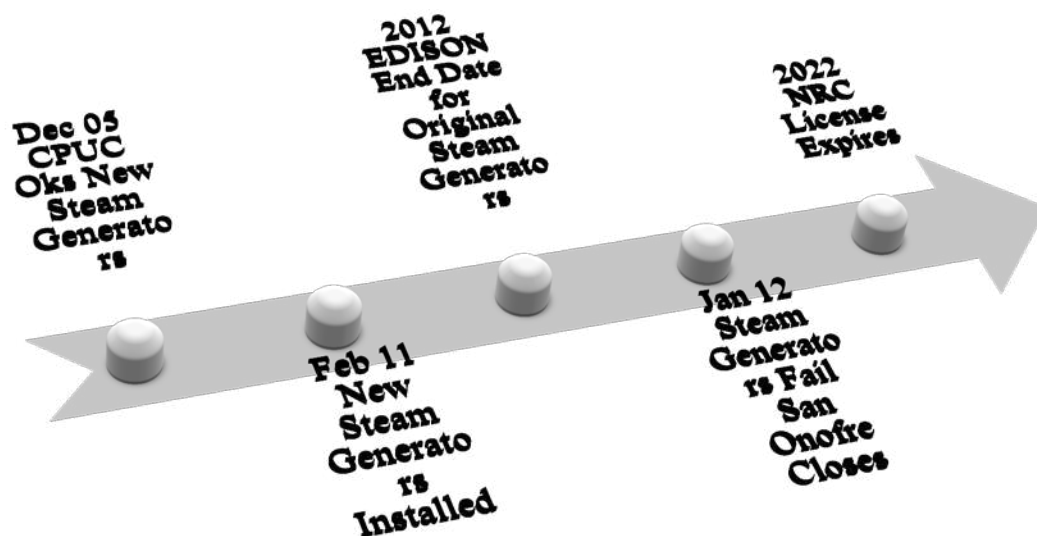
Peevey, a former Edison executive, had an extensive and long-term involvement in San Onofre. It was Peevey who defended Edison when a CPUC staff report recommended Edison “be barred from charging their customers for \$723 million of the cost of units 2 and 3 at the San Onofre nuclear power plant.” In

¹¹ In any decision establishing rates for an electrical or gas corporation reflecting the reasonable and prudent costs of the new construction of any addition to or extension of the corporation’s plant, when the commission has found and determined that the addition or extension is used and useful, the commission shall consider a method for the recovery of these costs which would be constant in real economic terms over the useful life of the facilities, so that ratepayers in a given year will not pay for the benefits received in other years. Cal. Pub. Util. Code § 454.8; 8 Energy L. J. 303 (1987)

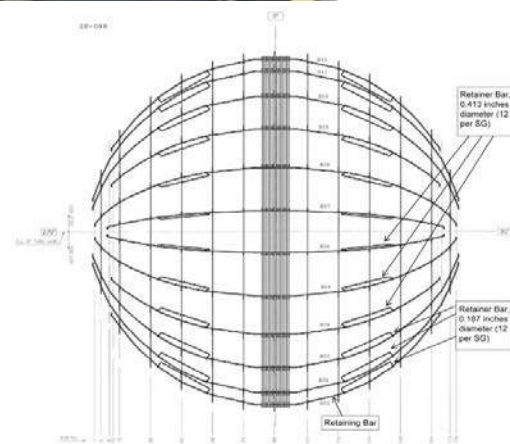
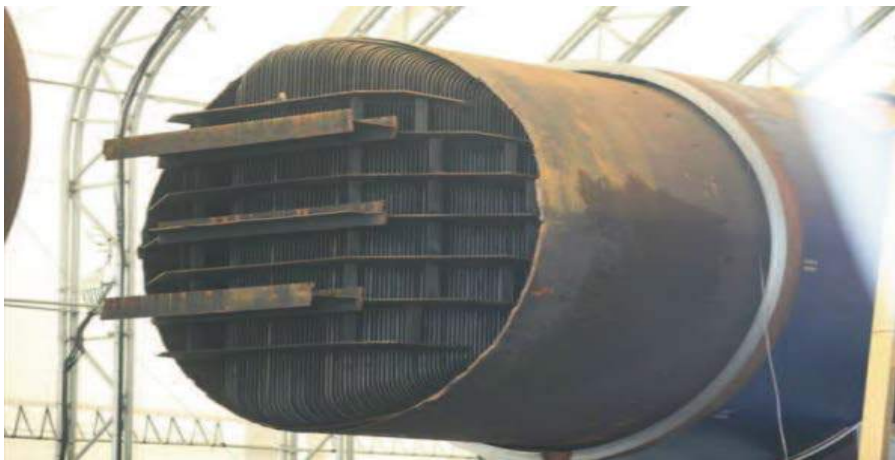
1970, Edison “estimated that the two units would cost \$437 million and be placed in operation in 1975 and 1976. Unit 2 began operation in 1983, and Unit 3 in 1984, at a combined cost of \$4.5 billion (10 times the original estimate), according to a 8 May 1985 Wall Street Journal report. Peevey, then a Senior Vice President at E Edison, defended the San Onofre overcharges:

We knew there was going to be some disallowance but were shocked at the magnitude," said Michael Peevey, senior vice president of Southern Californian Edison. "We believe it is totally unjustified."

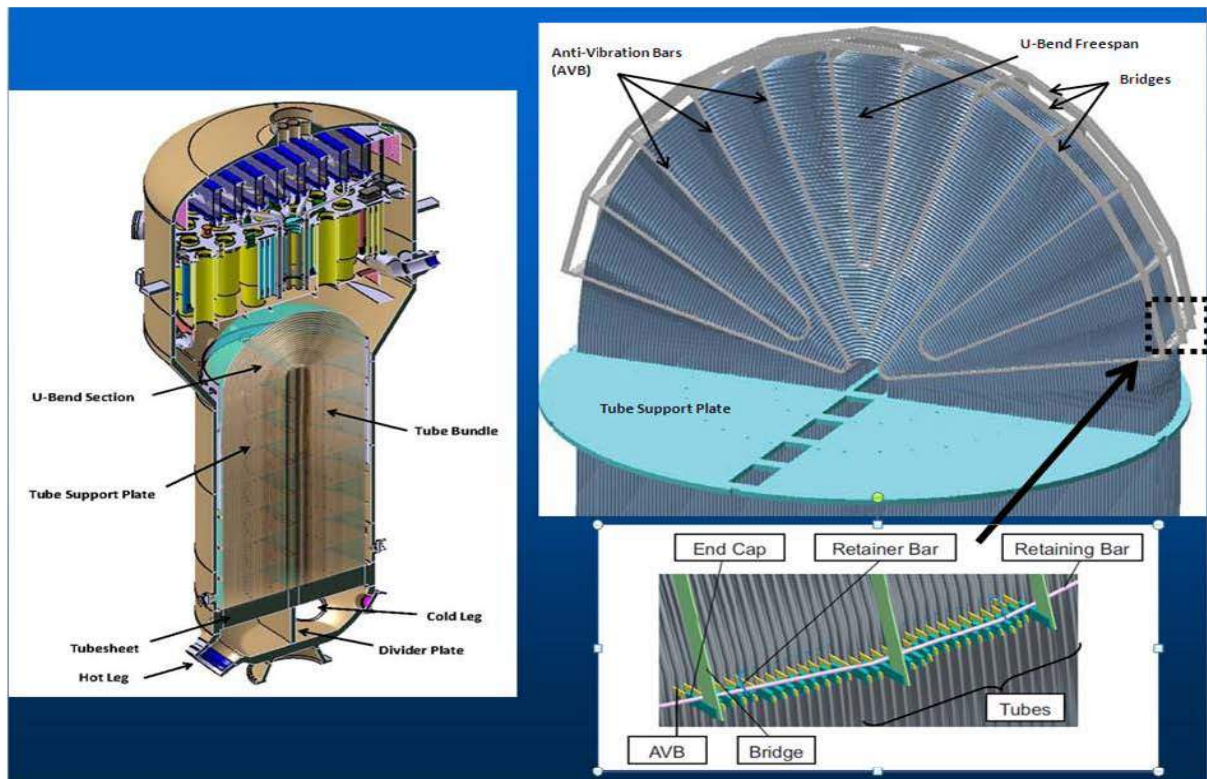
On 7 June 2006, Edison notified the Nuclear Regulatory Commission (NRC) of its intent and timeline to replace Unit 2 and Unit 3 steam generators under 10 CFR 50.59. (NRC Office of Inspector General Report San Onofre p. 7) The new steam generators were supposed to extend San Onofre for another 13 years (2009-2022). EDISON set a 21.4% plugging level as the technical end-of-life of the original steam generators (OSGs). The San Onofre worst-case forecast indicated that the 21.4% plugging level could be reached **as early as 2012**. (20 March 2012 Atomic Power Review, p. 1) The NRC license for San Onofre expires in 2022.



The Edison briefing document given to the NRC indicated there would be no associated “power uprate.” (NRC Office of Inspector General Report San Onofre, p. 7) But the new steam generators (with new turbines) was a power uprate—they produced 48 more megawatts of power —enough to support about 31,000 average-sized homes.¹² The new generators differed in design from the original steam generators: each had 9,727 tubes, which 377 more tubes than the originals, depicted here:

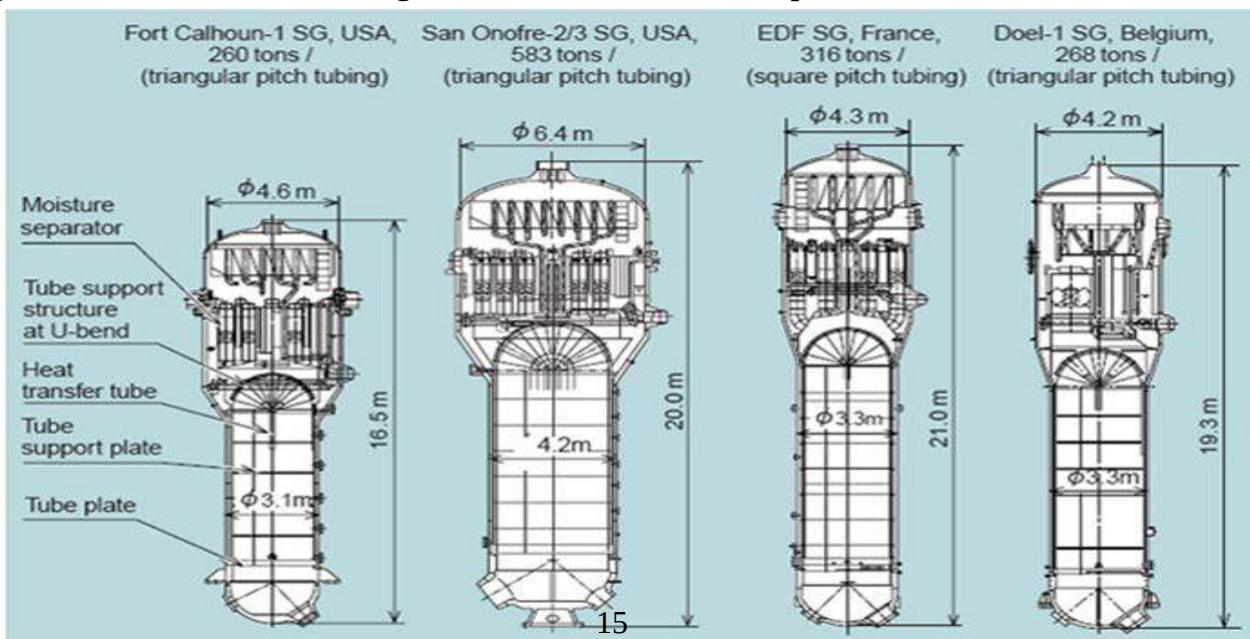


¹² To increase the power output of a reactor, typically more highly-enriched uranium fuel and/or more fresh fuel is used. This enables the reactor to produce more thermal energy and therefore more steam, driving a turbine generator to produce electricity.

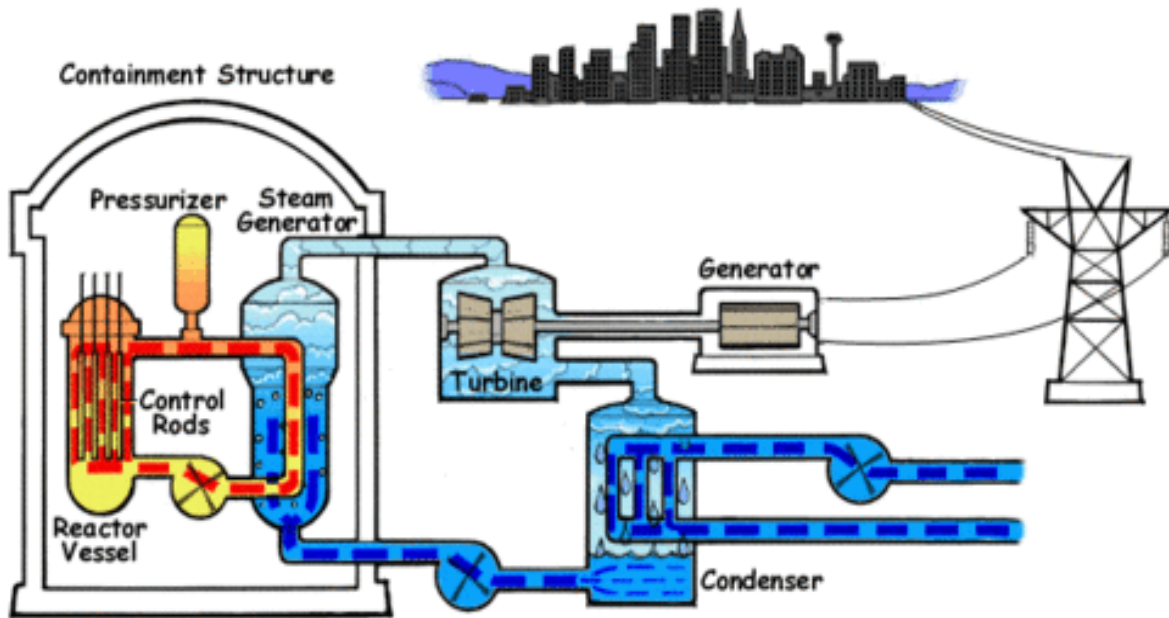


To evade a safety review of Edison's experimental design with an unprecedented tube increase, it eliminated the critical anti-vibration safety bars.

At 65 feet long, 23 feet wide and 621 tons in weight, the new steam generators were twice as big as those in most nuclear plants:



As shown in the following illustration, the steam generators produced steam, which turned turbines that generated electricity, as depicted below:



The two new turbines (costing ratepayers at least \$78,000,000) worked with the new steam generators to produce 48 more megawatts than the original steam generators.¹³ Their installation was aborted when the steam generators failed in January 2012.¹⁴



Neither used nor useful, the aborted turbine installation cost ratepayers \$78 million.

¹³ See testimony by Edison Witness Perez, Transcript pp. 514-515.

¹⁴ ORA Report on the Results of Operation of Edison GRC Test Year 2012.

The new generators were designed and fabricated between 2004 and 2010. An immediate issue was whether Edison would obtain a safety license amendment from the NRC which would provide safeguards against Edison deploying and operating defective steam generators.

Nuclear power reactors are licensed based on a given set of requirements, depending primarily on the type of plant. This set of requirements is called the plant's "licensing basis." A principal licensing basis document is the plant's final safety analysis report (FSAR). The FSAR and the plant's NRC license and associated technical specifications are the principal regulatory documents describing how the plant is designed, constructed, and operated. The FSAR is also a key reference document used by NRC inspectors during both plant construction and operation, and it must be sufficiently detailed to permit the staff to determine whether the plant can be built and operated without undue risk to public health and safety.

**

If any of the criteria in 10 CFR 50.59 are not met (i.e., the change involves modification to the technical specifications or involves one of the eight criteria), the license holder must apply to NRC for a license amendment and obtain NRC's approval before implementing the change. (NRC Office of Inspector General Report San Onofre pp. iii-iv)

Two engineers who worked on the new steam generator project for Edison and its manufacturer, Mitsubishi Heavy Industries (MHI)—Boguslaw Olech and Tomoyuki Inoue—admitted avoidance of NRC approval was a major premise of the RSG project: “At SONGS, the major premise of the steam generator replacement project was that it would be implemented under the 10 CFR 50.59 rule, that is, without prior approval by the US Nuclear Regulatory Commission (USNRC).” (January 2012 NEI, Article p. 2)

The CPUC refused to examine the question of whether Edison crossed over the line and went from avoidance, to evasion, of § 50.59 even before the “AVB Design Team recognized that the design for the SONGS RSGs resulted in higher steam quality (void fraction) than previous designs” but did not implement “changes in design to reduce the void fraction” because the potential changes “could impede the ability to justify the RSG design under the provisions of 10 C.F.R. 50.59.” (MHI Root Cause Report p. 22)

There is substantial evidence supporting the need for a careful investigation into whether Edison officials knowingly violated § 50.59 and were operating the steam generators at San Onofre in violation of the safety law when the replacement steam generators (RSGs) failed.

Former NRC Deputy Regional Administrator Elmo Collins explained that the design, as built, was fundamentally flawed and would not have been approved under any conditions. The new design was unacceptable because of adverse thermal-hydraulic conditions and inadequate upper tube structure support. (NRC Office of Inspector General Report San Onofre p. 24) On 23 December 2013, the NRC found EDISON had failed “to verify the adequacy of the thermal-hydraulic and flow-induced vibration design of the Unit 3 replacement steam generators, which resulted in significant and unexpected steam generator tube wear and loss of tube integrity on Unit 3 Steam Generator after 11 months of operation. (NRC Office of Inspector General Report San Onofre p. 9)

The design of the new steam generators was substantially different than the original. The largest in the industry, the original generators major design shortcoming proved to be tube wear, particularly in the U-bend region, requiring them to be replaced much sooner than stipulated by their design service life. (20 March 2012 Atomic Power Review, p. 1) The new design not only failed to correct

that shortcoming – it added to the likelihood of wear and malfunction by the significant increase in tubes and failure to eliminate vibration of those tubes.

Edison elevated its evasion of submitting the design of the RSGs to the NRC to the highest value, even over safety. (20 March 2012 Atomic Power Review, p. 2) The RSG design requirements and improvements had to be solved so they could be installed under the § 50.59 rule. (20 March 2012 Atomic Power Review, p. 2) This artificial requirement admittedly presented many challenges for the Edison and MHI project teams. (20 March 2012 Atomic Power Review, p. 2)

There were fundamental design changes that warranted taking the new steam generators out of the § 50.59 license exemption. For example, the stay cylinder supporting the tubesheet had to be eliminated. (20 March 2012 Atomic Power Review, p. 2) Removing the stay cylinder allowed for installation of more tubes than there were in the original steam generators. (20 March 2012 Atomic Power Review, p. 2) Thus, the replacement generators had 377 more tubes than the originals. The replacement generators did not have a stay cylinder supporting the tube sheet; they had a broached tube design rather than an “egg crate” tube support. (13 May 2013 US NRC Atomic Safety and Licensing Board pp. 3-4) Moreover, there were substantial changes in the Anti-vibration bars in the U Bend region (AVB), with the single major challenge here was control of the AVB thickness and flatness, and tube-to AVB gap size:

AVB support structure

The term ‘AVB structure’ describes tube supports in the tube bundle U-bend region. The AVB structure had to be designed such that the potential for tube wear due to flow induced vibration was minimized.

Edison officials learned these facts during the new steam generator design phase (2004-2010). Edison executives and engineers conducted meetings with MHI at which technical and production issues associated with the new steam generator design and fabrication were discussed.¹⁵ Edison and MHI held formal and working meetings at SONGS, at MHI facilities in Japan, and at MHI subcontractor facilities. These meetings were held at both the working and executive levels. Technical issues were generally discussed at Design Review Meetings (“DRMs”), Technical Review Meetings, Executive Oversight Meetings, and Anti-Vibration Bar (“AVB”) Meetings. Meeting minutes were generally prepared after these meetings and exchanged between Edison and MHI. Edison had appointed a committee to look into installing new steam generators as early as October 2001. (NRC Office of Inspector General Report San Onofre pp. 6-7)

The Edison key players who worked on San Onofre were engineers and executives, depicted on the following page:

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¹⁵ http://www.songscommunity.com/docs/minutes/White_Paper-Summary_of_Key_Issues_Raised_During_Design_Oversight_Meetings_with_MHI_Final.pdf



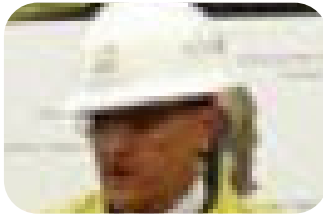
Alan J. Fohrer
Edison CEO



Harold Ray SO
Chief Nuclear
Officer -2006



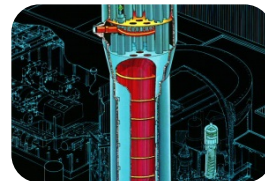
Michael P. Short
SO VP



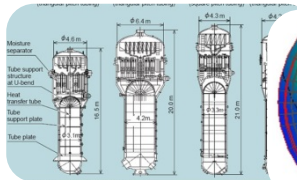
Mike Wharton
Proj Manager



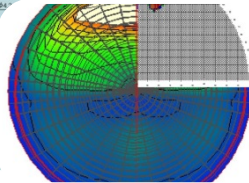
Peter Dietrich SO
Nuke Office



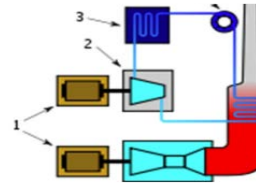
Mehrdad Hojati
SO Design Engineer



Dwight Eugene
Nunn Edison VP



Craig Harberts
RSG Manager



Jonathan McGaw
Edison Nuclear
Engineer



Boguslaw J. Olech
Edison Nuclear
Engineer

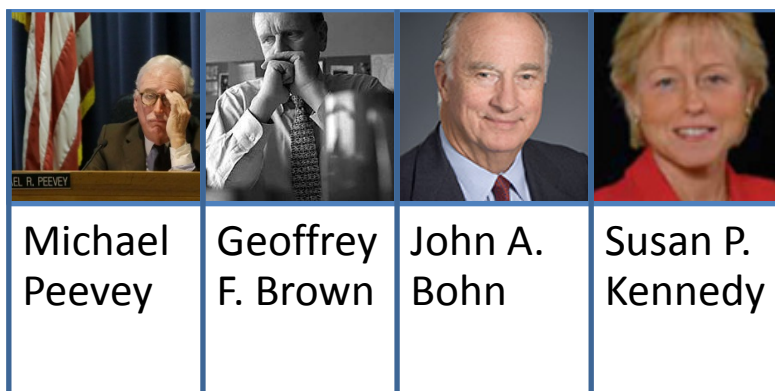
The Anti-Vibration Bar Design Team, recognizing that the design for the SONGS replacement steam generators (RSGs) resulted in higher steam quality (void fraction) than previous designs, considered making changes to the design to reduce the void fraction. But, each of the considered changes had unacceptable consequences and the AVB Design Team agreed not to implement them. Among the difficulties associated with the potential changes was the possibility that making them could impede the ability to justify the new design under 10 C.F.R. § 50.59. Even though “SCE is not expert in steam generator design or fabrication,” it chose not to submit to an NRC license amendment:

The new steam generators were installed in 2010 and 2011. The Unit 2 RSGs were delivered to SONGS in February 2009 and installed during a refueling outage between September 2009 and April 2010. The Unit 3 RSGs were delivered to SONGS in October 2010 and installed during a refueling outage between October 2010 and February 2011. (Root Cause Report p. 8/64)



PUC APPROVES NEW STEAM GENERATORS WITHOUT FINDING THEY ARE “USED AND USEFUL”

The four CPUC Commissioners who approved the new San Onofre steam generators in December 2005 (Decision 5-12-040) were:



Gray Davis appointed Susan P. Kennedy and Peevey to the CPUC in December 2002. Kennedy served on the CPUC from 2003-2006. She was then appointed chief of staff to Governor Schwarzenegger in December 2005. Governor Schwarzenegger appointed Bohn to the CPUC in May 2005. Commissioner Geoff Brown was San Francisco’s long-time elected Public Defender.

The new generators installed were in 2011; they failed within a year, ending any further production of electricity at the plant in January 2012. Edison convinced the CPUC that because the cost of the new steam generators represented 5% of Edison’s rate base, the project was too “large amount to place at risk of cost recovery” on Edison shareholders. Edison claimed “it is essential for SCE to seek, and the Commission to grant, pre-approval of (San Onofre 2 and 3 new generators):

Pre-approval of (San Onofre) 2 & 3 SGRP (steam generator replacement program) means that the Commission finds it reasonable for SCE to replace (San Onofre) 2 & 3 steam generators as described in this Application. While the Commission will retain its full

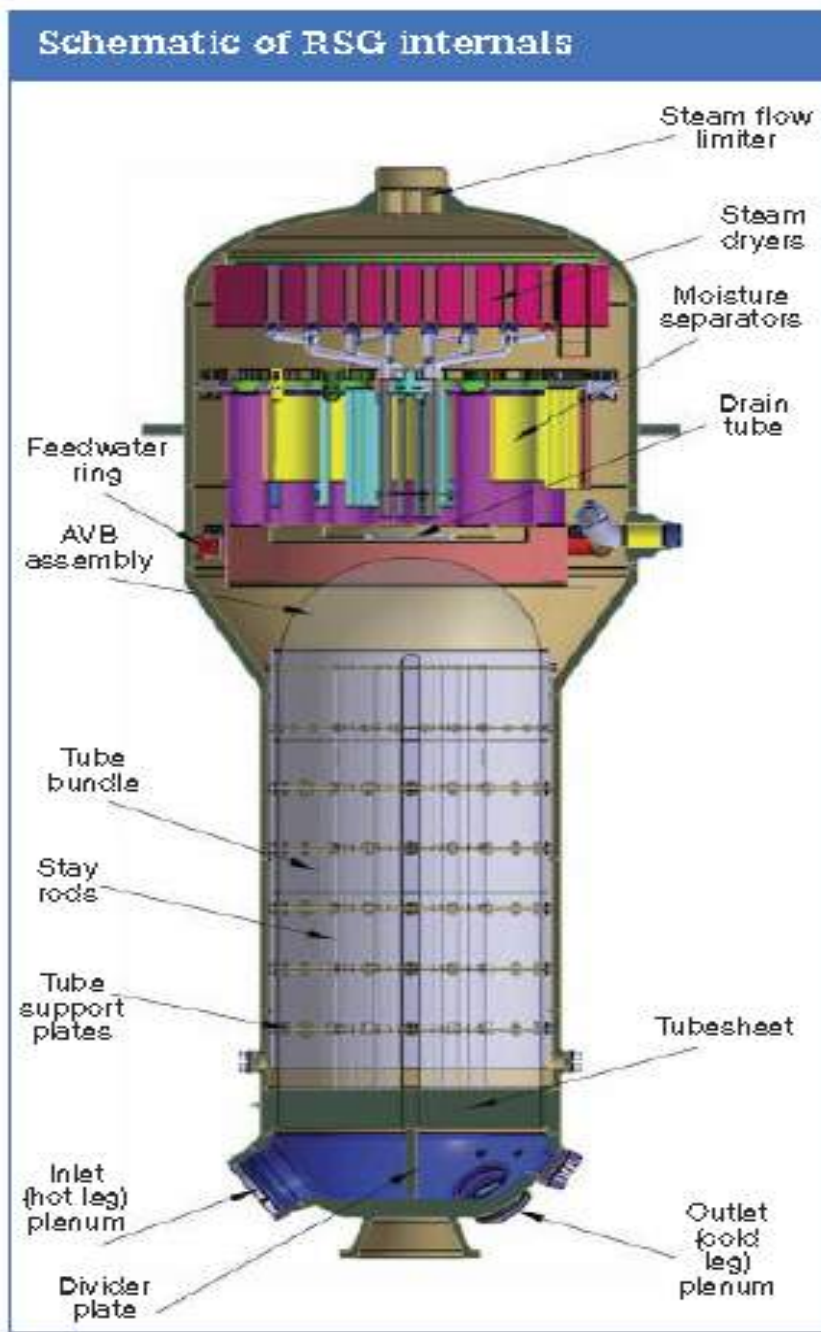
authority, at the completion of SGRP, to review the reasonableness of SCE's construction expenditures and practices, pre-approval means that the Commission may not disallow construction costs, CFC, and Removal and Disposal Costs or their recovery in rates on the ground that SONGS 2 & 3 SGRP was itself unreasonable.

On 31 January 2012 “At 1505 PST, Unit 3 entered Abnormal Operation Instruction S023-13-14 ‘Reactor Coolant Leak’ for a steam generator leak exceeding 5 gallons per day. At 1549 PST, the leak rate was determined to be 82 gallons per day. At 1610 PST, a leak rate greater than 75 gallons per day with an increasing rate of leakage exceeding 30 gallons per hour was established and entry into S023-13-38 ‘Rapid Power Reduction’ was performed. (On 12 June 2013, Edison certified to the NRC that Edison had permanently ceased operations at San Onofre. (12 June 2013 Edison Certification)



The NRC determined there was a “failure to verify the adequacy of the thermal-hydraulic and flow-induced vibration design of the Unit 3 replacement steam generators, which resulted in significant and unexpected steam generator tube wear and the loss of tube integrity on Unit 3 Steam Generator 3EO-88 after only 11 months of operation.”¹⁶

It was determined that all four new generators experienced higher than expected tube wear comprised of: (i) tube to tube wear in the tube free-span sections between the Anti-Vibration-Bars (AVBs) located in the U-bend region; (ii) tube to AVB wear, observed at discrete tube to AVB intersections; (iii) tube to Tube Support Plate (TSP) wear; and (iv) retainer bar to tube wear. (Root Cause Report 6/64)



¹⁶ <http://pbadupws.nrc.gov/docs/ML1335/ML13357A058.pdf>

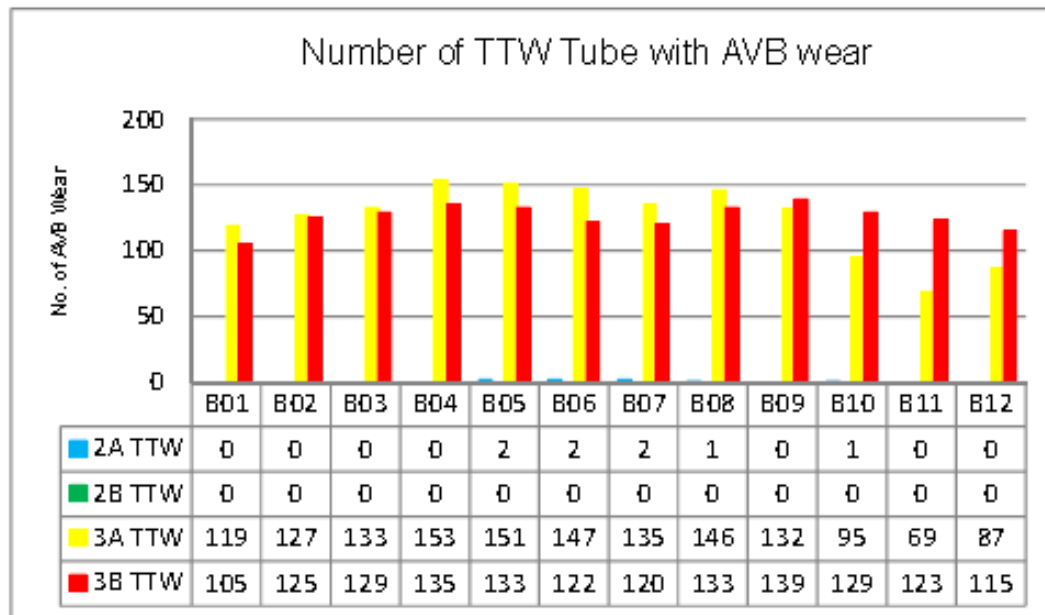
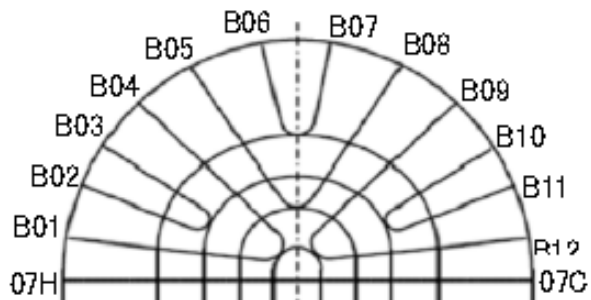
Unit 2 steam generator tubes also experienced high levels of tube degradation: ¹⁷

**SONGS Unit 2 Steam Generators
Wear Depths Summary**

Steam Generator SG2E88 (Through- Wall Wear)	Anti-Vibration Bar	Tube Support Plate	Tube-to- Tube Wear	Retainer Bar	Foreign Object	Total Indications	Tubes with Indications (out of 9727 total per SG)
≥ 50%	0	0	0	1	0	1	1
35 - 49%	2	0	0	1	0	3	3
20 - 34%	86	0	0	0	2	86	74
10 - 19%	705	108	0	0	0	813	406
< 10%	964	117	0	0	0	1081	600
TOTAL	1757	225	0	2	2	1984	734*

Steam Generator SG2E89 (Through- Wall Wear)	Anti-Vibration Bar	Tube Support Plate	Tube-to- Tube Wear	Retainer Bar	Foreign Object	Total Indications	Tubes with Indications (out of 9727 total per SG)
≥ 50%	0	0	0	1	0	1	1
35 - 49%	0	0	0	1	0	1	1
20 - 34%	78	1	0	3	0	82	67
10 - 19%	1014	85	2	0	0	1101	496
< 10%	1499	53	0	0	0	1552	768
TOTAL	2591	139	2	5	0	2737	861*

¹⁷ Root Cause Report Supplemental Technical Evaluation Report 48/68.



The CPUC in November 2014 decided to make ratepayers pay more than \$3,300,000,000 for the inoperative plant including:

- Base Plant –.\$622,000,000
- Nuclear Fuel Investment \$487,000,000.
- Completed Construction Work In Progress (“Completed CWIP”) \$370,000,000.
- Cancelled Construction Work In Progress (“Cancelled CWIP”) \$155,000,000
- Materials & Supplies (M&S) \$99,000,000

CPUC officials worked with Edison to construct a decision that allowed Edison to continue to charge up to \$5 billion for the next decade for San Onofre. The CPUC estimated the financial burden on ratepayers; they will pay \$3,300,000,000.

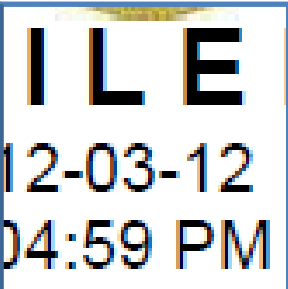
The CPUC claims these charges are for recovery of the **undepreciated net investment in San Onofre “assets”** (e.g., Base Plant). The CPUC is also making ratepayers pay a 2.95% rate of return. (Final Decision p. 3) The CPUC claims ratepayers will be receiving “refunds” and “credits” of \$1,400,000,000. However, the so-called “refunds” are to come through a refund “mechanism” that makes it difficult if not impossible for ratepayers to determine they received an actual benefit.

The CPUC delayed, paused, and then stopped any investigation into whether Edison acted reasonably, and whether the plant remnants are used and useful for ratepayers. The CPUC also killed its own investigation into who and what was responsible for the plant’s failure after the CPUC’s own expert laid out a cogent investigative plan. Our investigation has uncovered the “delay, pause, and stop” plan to relieve Edison of any investigation into its conduct. The CPUC plan did not even permit ratepayers to determine the names of those involved in the decision-making under question.

On 19 December 2005, the CPUC allowed Edison to charge ratepayers for new generators so long as Edison submitted an application to put them in rates six months after San Onofre returned to commercial operation. The plant returned to commercial operation in February 2011, which required EDISON to file its application to put the new generators in rates by August 2011. However, on 13 April 2011, Edison told the CPUC it would not file to put the generator costs in rates until June 2012. No such application was filed.

However, the *timing* of the filing was discussed with CPUC Administrative Law Judge (ALJ) Melanie Darling on 4 December 2012. The CPUC Energy Division staff discussed Edison filing the application before the Prehearing Conference on 8 January 2013 in the Investigation case announced by the CPUC in November 2012. However, Edison declined to file in January 2013.

On 30 November 2012, Edison’s Les Starck and Mike Hoover gave the “pause and delay” plan to Commissioner Florio advisor, Sepideh Khosrowjah. Three days later (3 December 2012), Edison filed with the CPUC its pause and delay plan.

			
15 Dec 05 CPUC Decision says Edison to file to put new generator costs in rates 6 months after Comercial Operations	EDISON Les Starck at 30 Nov 12 Gave Florio (staff) Ex Parte EdisonPause and Delay Plan at CPUC in SF	Sepideh Khosrowjah (Florio) at 30 Nov 12 Received Edison Ex Parte: the Pause and Delay Plan	3 Dec 12 Edison Files Pause and Delay Plan with CPUC

The next day, 4 December 2012, ALJ Melanuie Darling called Edison’s Russell G. Worden (head of the San Onofre Strategic Review Project) to discuss the timing of Edison’s new steam generator cost application.



**4 Dec 2012 ALJ Darling
Phoned EDISON Russell G.
Worden about "timing" of
steam generator cost filing.**



**4 Dec 2012 Russell Worden
Returned call to ALJ Darling
about "timing" of steam
generator cost filing**

Edison waited until 6 December 2012 to file the notice of its Ex Parte (private) 30 November 2012 meeting with Commissioner Florio's office. On 7 December 2012, Edison filed the notice of ALJ Darling's Ex Parte phone call to Edison. On 10 December 2012, ALJ Darling issued a ruling adopting Edison's Pause and Delay Plan.

6 Dec 12: Edison "Late Filed" Notice of 30 Nov 12 Pause and Delay Ex Parte with Florio (staff)	7 Dec 12: Edison Filed Notice of ALJ Darling 4 Dec 12 Ex Parte phone call about the timing of Edison new generator cost filing	10 Dec 12: ALJ Darling issued Ruling adopting Edison Pause and Delay Plan

On 21 February 2013, ALJ Darling denied a motion to set a hearing on whether Edison acted reasonably, stating it would be disorderly and premature. On 1 December 2013, the CPUC's hired expert issued an investigative plan to find who and what caused the generators to fail. On 25 November 2014, the CPUC killed all investigations.



21 Feb 13: ALJ Rules

The Decision did not set a date to put costs in rates, describing it as premature and disruptive to hold hearings now



Eureka (cry of joy upon discovery)
CPUC admitted in 25 Nov 14:

Final Decision not getting to the "cause of the damage" and ruled "No further reasonableness review of (generator) costs is required."

The CPUC and Edison used conflicting numbers and fuzzy math in favor of Edison and against ratepayers. For example, when it came to deciding whether Edison spent more than \$680,000,000 on the new steam generator project (the automatic trigger for a reasonableness review), the CPUC adopted Edison's contention that the replacement steam generators' total cost was \$612.1 million in 2004 dollars. (Decision 14-11-040 p. 29)

In the decision approving the project, the CPUC found the new steam generators were "cost-effective" at \$680,000,000 (\$569,000,000 for the new steam generators and \$111,000,000 for removal and disposal of the old ones). (Decision 05-12-040) Under the settlement agreement, the CPUC found the value of stopping collection for the new steam generators as of 31 January 2012 to be

\$1,000,000 (Decision 14-11-040 p. 2-3) The CPUC found the value of the settlement to ratepayers was \$1,450,000,000 (\$420,000,000 of which was from reducing Edison's rate of return). The CPUC found the primary result of the settlement is ratepayer refunds and credits of approximately \$1.45 billion. (Decision 14-11-040 pp. 2-3)

Ratepayers were given less than three hours to conduct an evidentiary hearing into the proposed settlement on 16 May 2014. At the hearing Peevey was asked but refused to answer whether he was in communication with Edison President Ron Litzinger.

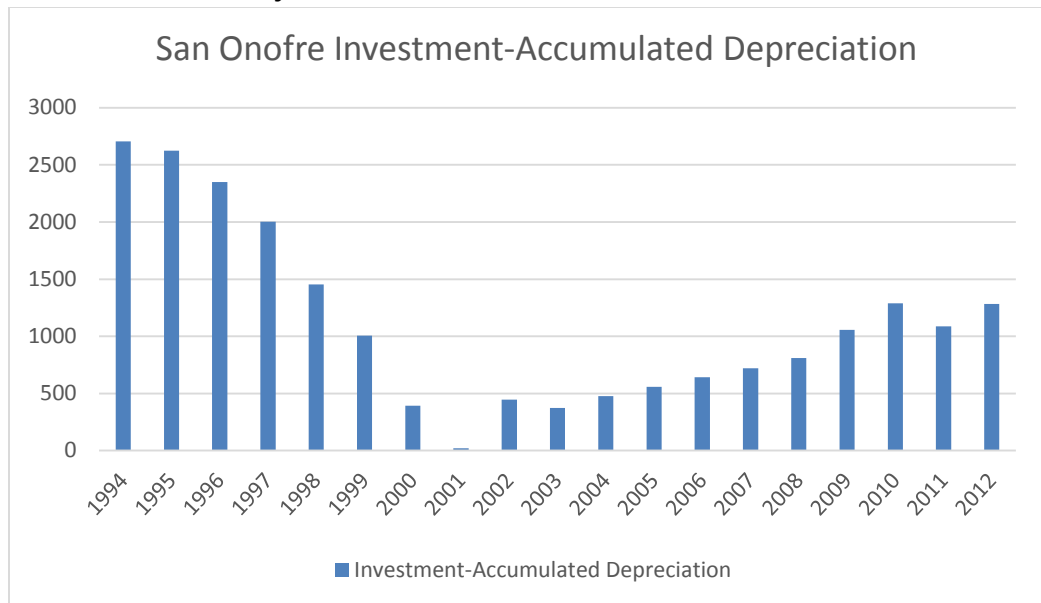
Emails obtained under the Public Records Act show Edison executives to were in regular contact with Peevey—each had the other's personal cell phone and spoke on the weekends. Edison reported San Onofre revenue requirement for 2011-2014 of almost \$2,000,000,000, of which \$361,000,000 was for the new generators even though they were idle:

Year	General Revenue Requirement	New Steam Generator Revenue Requirement	Total	Source
2012	\$498,087,000	\$115,239,000	\$613,326,000	2 Dec 2013 Edison Monthly Report
2013	\$504,253,000	\$130,722,000	\$634,975,000	30 Oct 2014 Edison Monthly Report
2014	\$545,950,800 ¹⁸	\$115,770,000 ¹⁹	\$661,720,800	2 Dec 2014 Edison Monthly Report
Total	\$1,548,290,800	\$361,731,000	\$1,910,021,800	

¹⁸ Estimated based on year to date.

¹⁹ Estimated based on year to date.

EDISON had recovered the costs of Units 2 and 3 from 1996 and had fully recovered its investment by 2003:



PEEVEY FORCED TO RESIGN

CPUC President Michael Peevey was forced off the CPUC when his *quid quo pro* practices at the CPUC were made public by victims of CPUC malfeasance, beginning with the CPUC's efforts to conceal SDG&E's wrongdoing in connection with the catastrophic October 2007 fires in San Diego. Awareness of corruption was heightened by the September 2010 San Bruno gas explosion and the San Onofre nuclear power plant radiation leak in January 2012.

The CPUC is a constitutional office of the State of California (Art. 12) controlled by the Office of Governor. Peevey was appointed to the CPUC in 2002 along with Susan P. Kennedy. He was forced to resign in a CPUC judge-fixing scandal arising out of an effort to cover-up wrongdoing in the San Bruno fire explosion case. The CPUC awarded PG&E \$5,000,000 to repair gas lines running underground through the City of San Bruno. PG&E failed to make the repairs and

in September 2010, a deadly explosion and fire killed eight people and devastated a neighborhood in San Bruno.

PG&E was indicted for obstructing the federal government investigation into PG&E's conduct in failing to fix the gas pipes. After the CPUC staff recommended the CPUC fine PG&E \$2,500,000,000, Peevey obstructed the CPUC review of PG&E's request for additional rates which consumers feared would be used to pay the fine. Embarrassing emails to and from Peevey and his staff showed Peevey helping to fix which judge would hear PG&E's \$6,000,000,000 rate increase application.²⁰ The San Bruno explosion was horrific:



²⁰ <http://www.justice.gov/sites/default/files/usao-ndca/legacy/2014/07/30/PG%26E%20-%20Superseding%20Indictment.pdf>

The San Bruno investigation dragged on for four years until September 2014 when the Commission finally levied a \$1.4 billion fine against PG&E.²¹ The matter remains tied up in litigation.

Under Peevey, the CPUC derailed its investigation into the SDG&E equipment that started two of the 2007 fires in San Diego. (Decision D.10-04-047) CPUC staff determined SDG&E was in violation of General Order 95, Rules 31.1²² and 38²³ at the time of the fires. As in the case of San Bruno, the CPUC under Peevey imposed a fine but bestowed a rate increase large enough to absorb the penalty. (D1112023; Petition 07-11-007) Angry ratepayers were able to stop a CPUC plan to allow SDG&E to recover \$463,000,000 in costs from the fires caused by SDG&E equipment. Over 500,000 people were evacuated; 300,000 acres were charred; and 1,300 buildings were destroyed.



²¹ PG&E is under indictment for the judge-shopping conduct. <http://www.justice.gov/sites/default/files/usao-ndca/legacy/2014/07/30/PG%26E%20-%20Superseding%20Indictment.pdf>

²² Rule 31.1 requires Electrical supply systems shall be designed, constructed, and maintained ... to enable the furnishing of safe, proper, and adequate service.

²³ Establishes Minimum Clearances of Wires from Other Wires.

Peevey rose up in the utility-lobby sector. Prior to joining the CPUC, Peevey was as an Edison lobbyist. Peevey enjoyed gifts from big utilities. Just after his appointment in 2003, it was disclosed Peevey took a \$2,134 gift from San Francisco Airport, over which the CPUC exercised regulatory authority in the form of free parking at the SF airport.²⁴ In July 2013, NBC news in San Francisco reported Peevey had accepted \$165,000 in free travel from nonprofits and special interests in the prior six years.

Peevey's emails produced in response to a Public Records Act request show he was in regular communication with Edison executives. They met in bars, dined from coast to coast and overseas, and talked on weekends. Peevey "skipped" a Commissioner only meeting to lunch privately with Edison's management. Emails show Peevey gave insight on Edison's public relations response to a Los Angeles Times negative story. Peevey shared VIP tickets for sporting events with Edison's Senior Vice President. Peevey promised his Edison cronies to hold off on proceedings involving Edison.

Peevey, as CPUC President, expanded the lobby function to create extended lobby junkets. For example, a few months after the San Bruno gas explosions caused by natural gas pipes PG&E failed to maintain (even after it had been given ratepayer funds to make needed fixes), Peevey embarked on a 12-day travel-study excursion, with stops in Sevilla and Barcelona, Spain – all sponsored by the California Foundation on the Environment and the Economy (CFEE). Peevey served as a CFEE official before joining the CPUC. Peevey's wife, California Sen. Carol Liu (D-Glendale), was along for the trip. Two other state senators, several members of the state Assembly, CPUC Commissioner Nancy Ryan, and a host of representatives from the energy industry attended too. High-ranking executives of

²⁴ See, California Code of Regulations, Title 2, Sec. 18730.

the State's investor-owned utilities also participated, including Fong Wan, the Senior Vice President of energy procurement for PG&E.²⁵

In 2013 under Peevey's reign, the three major electric utilities spent more than \$6,000,000 (PG&E \$2.2M; Edison \$2.41M, Sempra \$1.33M) to influence the CPUC and legislative policies.²⁶

On 2 May 2013, NBC in San Francisco reported Peevey had ignored the call to answer tough questions by state senators in Sacramento and instead decided to attend a conference at an exclusive Napa resort and a reception at an upscale winery in St. Helena, both of which were captured on hidden camera by the NBC Bay Area Investigative Unit.²⁷

Peevey had served as an Edison executive (SCECorp) from 1984 to 1993, and served as its president for 3 years (1990 to 1993). From 1993 to 1995, he served as a public affairs consultant for Winner & Associates, a public relations firm that works on a variety of political issues and public scandals. (Edison later hired Winner & Associates to deal with fallout from the California energy crisis.) In 1995, Peevey started New Energy Ventures, an energy provider that competed in California's newly deregulated market. He sold New Energy Ventures in 2000.

Peevey started TruePricing, a technology company that built software for large organizations to track and bring down energy costs. At the same time, he served on the boards of directors at Excelergy Corporation, a Massachusetts energy software company, and Electro Rent Corporation, which rents computer equipment. Peevey chairs the boards of directors of the California Emerging Technology Fund and the California Clean Energy Fund; both are nonprofit

²⁵ <http://www.sfbg.com/2011/05/24/secret-life-michael-peevey>

²⁶ <https://www.opensecrets.org/lobby/indusclient.php?id=E08>

²⁷ <http://www.nbcbayarea.com/investigations/LEGALPeeveys-Priority--205838301.html>

collaborations between regulators and energy providers. On December 31, 2002, California Governor Gray Davis reappointed Michael R. Peevey to the CPUC and designated him as President. On the same day, Governor Davis appointed Susan P. Kennedy to serve as a CPUC Commissioner. (SCE 8-K 2003)

On 18 December 2014, the CPUC held its last session with Peevey presiding as President. Peevey orchestrated the meeting so supporters of Peevey's way of doing business at the CPUC took up the public comment period to praise Peevey. Who were these people who came forward to give character testimonials for Peevey? They comprise part of a network of special interests benefiting from the largess Peevey created for special interest groups while at the CPUC.

One group of Peevey defenders came from nonprofits, which the CPUC supports. Susan Wright McPeak, a long-time Bay Area politician, spoke for Peevey. Wright McPeak heads the California Emerging Technology Fund (CETF) established as a non-profit corporation pursuant to orders from the CPUC in approving the mergers of SBC-AT&T and Verizon-MCI in 2005. As a condition of approval of the mergers, AT&T and Verizon were required to contribute to CETF a total of \$60 million over 5 years "for the purpose of achieving ubiquitous access to broadband and advanced services in California, particularly in underserved communities, through the use of emerging technologies by 2010." AT&T will contribute \$9 million per year and Verizon will contribute \$3 million per year. The CPUC also directed that at least \$5 million should be used for telemedicine projects. Peevey served as Chairman of the California Emerging Technology Fund.

Five of the speakers were former CPUC Commissioners who served with, and were supportive of, CPUC favoritism towards utilities and against ratepayers. Another speaker was Gwen Moore, who served in the California Assembly from 1978 to 1994, part of which time Peevey was an Edison executive and lobbyist.

Peevey retired from Edison in 1993. Gwen Moore headed the Assembly Utilities and Commerce Committee. A 12 January 1989 LA Times article reported that Assemblywoman Gwen Moore (D-Los Angeles), whose office was raided in August by the FBI as part of its Capitol sting operation, had been elected majority whip by her fellow Democrats. A source close to Assembly Speaker Willie Brown (D-San Francisco) said the action was to let people know that "we have confidence" in Moore.

PEEVEY Speakers in “GROUP 1”:
CPUC, Former CPUC Officials



Susan P.
Kennedy CPUC
Approved San
Onofre



Timothy Alan
Simon CPUC
Commissioner



Diane M. Grueneich
CPUC Commissioner



Paul Clanon
CPUC Ex.
Director



Dr. Nancy E. Ryan
CPUC
Commissioner



Rachelle Chong
CPUC
Commissioner



Gwen Moore
Cal Assembly
Member



SunneWright
McPeak
(CPUC AT&T)

A second group of Peevey supporters were made up of utility executives, utility investors, and those funded by utilities. One speaker from this group was Dan Adler Managing Director, CalCEF and President, CalCEF Ventures. Peevey served as CalCEF (California Clean Energy Fund) Chairman. CalCEF is a coalition of investors, utility industry players, and former government officials dedicated to advancing clean energy. Mason Wallrich, a former PG&E executive, also spoke from CalCEF.

Two other speakers came from the “Energy Efficiency Center” (EEC) at the University of California, Davis: Executive Director Ben Finkelor and Advisory Board Member Ralph Cavanaugh (also with the Natural Resources Defense Council). Peevey Chairs the EEC. The EEC was established out of the PG&E bankruptcy settlement with \$30 million. The EEC represents that it expects “to deliver market-based financial returns to its investors and positive environmental and economic returns to California, with a focus on PG&E’s service territory.”²⁸

Under Peevey, settlements with regulated utilities were crafted to create non-profit corporations. In July 2013, California legislators debated whether to take away the PUC's authority to create nonprofits with funds from settlements.²⁹

CONCLUSION

Storm warnings require the people of California to act. They must demand fundamental reforms at the CPUC. The new President can either ratify and extend corruption at the CPUC, or break with the past to reinstate the CPUC to its Constitutional mission of providing customers with just and reasonable rates.

The public cannot have confidence the CPUC will protect their interests while Edison establishes one of the largest nuclear waste sites in the world in North County San Diego (3.6 million pounds of nuclear waste).



²⁸ <http://eec.ucdavis.edu/about/sponsors-page/>

²⁹ <http://www.sfgate.com/bayarea/article/Budget-tightens-oversight-on-California-PUC-4646033.php>

EXHIBIT 7

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CLERK-SUPERIOR COURT
SAN DIEGO COUNTY, CA

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11 CITIZENS OVERSIGHT, INC., a
12 California non-profit corporation;
13 PATRICIA BORCHMANN, an individual,

14 Petitioners and Plaintiffs,

15 v.

16 CALIFORNIA COASTAL COMMISSION;
17 SOUTHERN CALIFORNIA EDISON
18 COMPANY, Real Party in Interest; and
19 DOES 1 to 100,

20 Respondents and Defendants.

Case No. 37-2015-00037137-CU-WM-CTL

VERIFIED PETITION FOR WRIT OF
ADMINISTRATIVE MANDATE
(C.C.P. § 1094.5) AND COMPLAINT
FOR DECLARATORY RELIEF

21 Citizens Oversight, Inc. and Patricia Borchmann, Petitioners, hereby petition this Court
22 for a writ of administrative mandamus under California Code of Civil Procedure § 1094.5
23 directed to the California Coastal Commission as follows:

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INTRODUCTION

By this verified petition and complaint, Petitioners and Plaintiffs allege:

1. From 1968 to 31 January 2012, Southern California Edison (Edison) was in the business of generating and selling electricity from its San Onofre nuclear power plant (plant) in San Diego County, California. The plant was designed with three units: Unit 1 operated from 1968 to 1992; Unit 2 from 1983-2012; and Unit 3 from 1984-2012. Unit 1 was decommissioned in 1992.

2. Since 1984, the plant generated an average of 16 million megawatt hours of electricity annually, making it the second largest electric generating facility in California. The plant generated enough electricity to meet the needs of 2.3 million California households -- about 8 percent (8%) of all electricity generated in the State.

3. Since 1992, the plant operated two Units consisting of nuclear Pressurized Water Reactors (PWRs), each rated at 3358 MWt (1180 MWe). Units 2 and 3 were originally equipped with two CE Model 3340 recirculating steam generators. These original steam generators (OSGs) were designed for a 40-year service life.

4. To generate electricity, Edison used uranium oxide fuel in the form of small ceramic pellets that were placed inside metal fuel rods. These rods were grouped into bundles called assemblies. Assemblies at San Onofre were a structured group of fuel rods (long, slender, metal tubes containing pellets of fissionable material which provide fuel for nuclear reactors:

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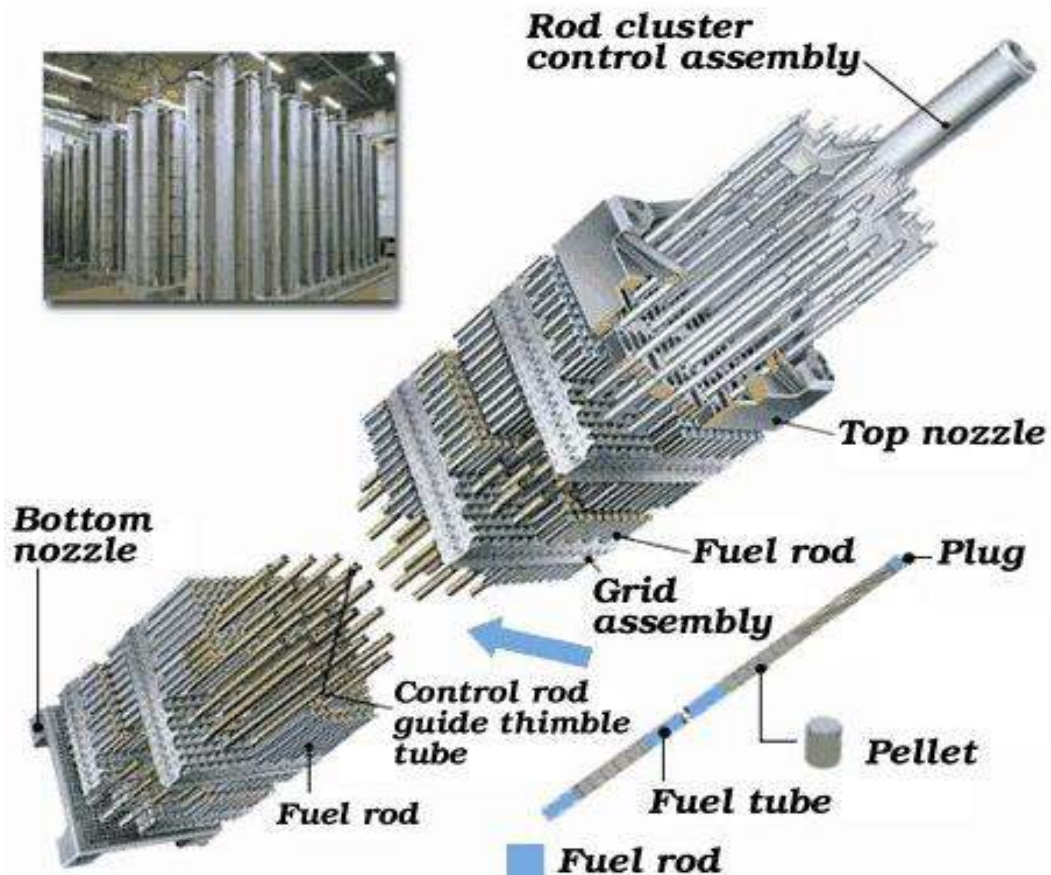
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Figure 3: Schematic view of PWR fuel assembly (Mitsubishi Nuclear Fuel)



5. PWR fuel assemblies like those at San Onofre are comprised of a bottom nozzle into which rods are fixed through the lattice; to finish the whole assembly, it is crowned by a top nozzle. The bottom and top nozzles are heavily constructed as they provide much of the mechanical support for the fuel assembly structure. In the finished assembly, most rod components are fuel rods, but some are guide thimbles, with one or more are likely to be dedicated to instrumentation.

6. An 1100 MWe PWR core may contain 193 fuel assemblies composed of over 50,000 fuel rods and some 18 million fuel pellets. Once loaded, fuel stays in the core for several years depending on the design of the operating cycle:

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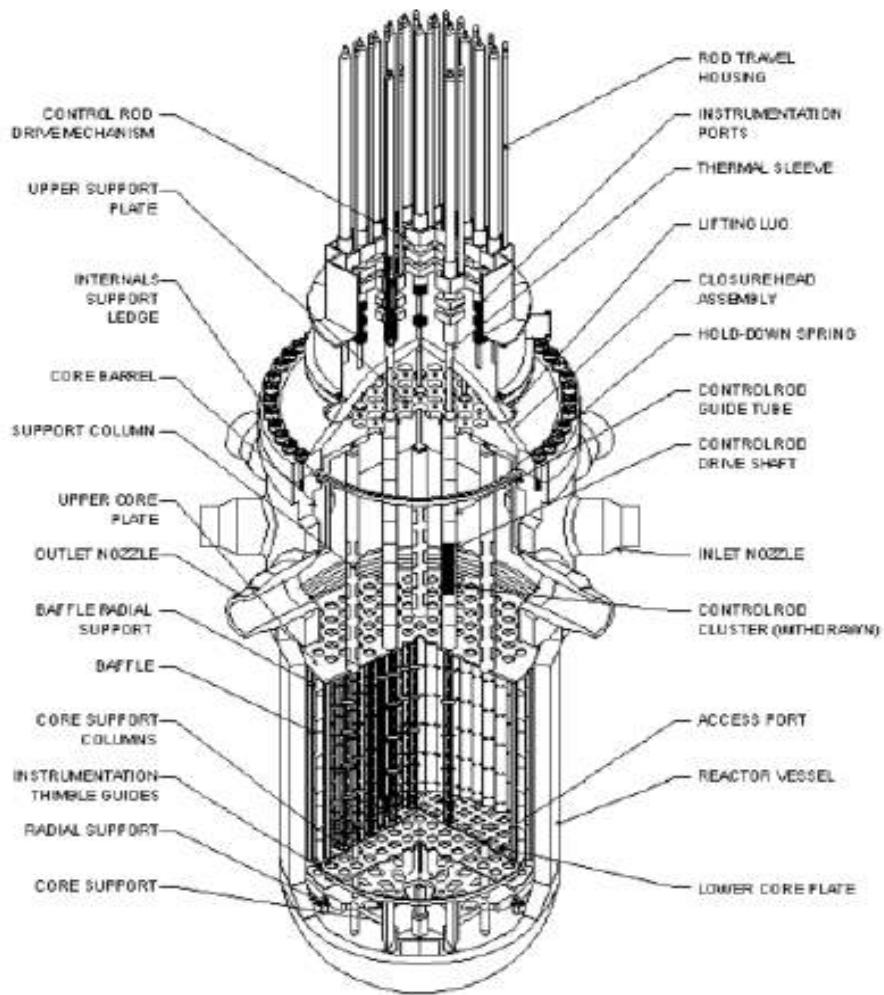


Figure 6 PWR Pressure Vessel Internals

7. Fission, the splitting of uranium atoms in a chain reaction, was used at the plant to produce a tremendous amount of heat.

8. This energy was used to boil water into steam, which drove the turbine generators at the plant to produce electricity:

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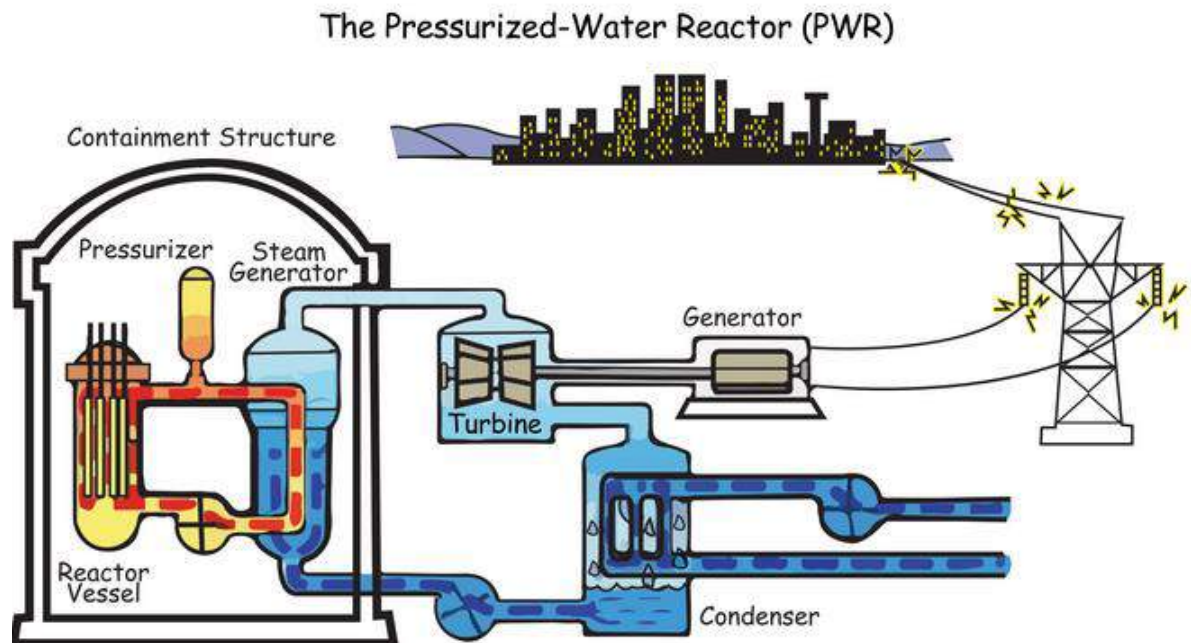
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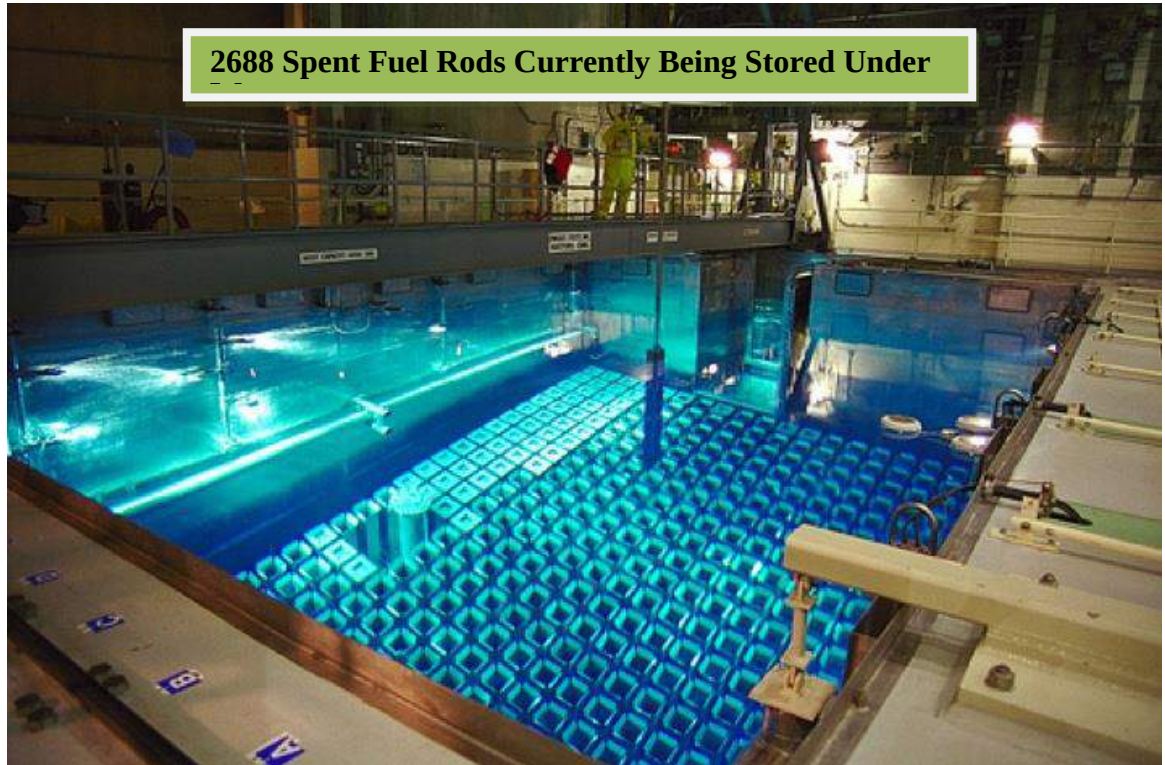
9. During refueling, every 12 to 18 months, some of the fuel - usually one third or one quarter of the core – was removed to storage, while the remainder was rearranged to a location in the core better suited to its remaining level of enrichment.

10. Over time, the nuclear fuel at the plant lost efficiency. Every 18-24 months, Edison shut down the plant to remove and replace about one-third of the fuel, consisting of the oldest assemblies. While the plant was generating electricity, its three (then two) reactors were also producing nuclear spent-fuel waste. The nuclear waste produced at San Onofre looked exactly like the fuel that was loaded into the three reactors – the assemblies of metal rods enclosing stacked-up ceramic pellets. Nuclear fuel spent about three years in the San Onofre reactors to generate heat for electricity.

11. As of October 2014 Edison admitted there were 2,668 in the water pool at San Onofre (approximately 1,100 of them are High Burn -up Fuel). The longer the nuclear fuel remains in the reactor, the higher the burnup. Burnup is a way to measure how much uranium is burned in the reactor. It is the amount of energy produced by the uranium.

12. Following the 18-24 month cycle, Edison installed the newer assemblies and removed some of the spent ones to underwater storage pools:

2688 Spent Fuel Rods Currently Being Stored Under



13. San Onofre was in the midst of its sixteenth refueling cycle when on 31 January 2012, it experienced an event as follows:

"At 1505 PST¹, Unit 3 entered Abnormal Operation Instruction S023-13-14 'Reactor Coolant Leak' for a steam generator leak exceeding 5 gallons per day.

"At 1549 PST, the leak rate was determined to be 82 gallons per day. At 1610 PST, a leak rate greater than 75 gallons per day with an increasing rate of leakage exceeding 30 gallons per hour was established and entry into S023-13-28 'Rapid Power Reduction' was performed.

"At 1630 PST, commenced rapid power reduction per S023-13-28 'Rapid Power Reduction'. At 1731 PST, with reactor power at 35% the Unit was manually tripped. At 1738 PST, Unit 3 entered Emergency Operation Instruction S023-12-4 'Steam Generator Tube Rupture'.

"At 1800 PST the affected steam generator was isolated."

All control rods fully inserted on the trip. Decay heat is being removed thru the main steam bypass valves into the main condenser. Main feedwater is maintaining steam generator level. No relief valves lifted during the manual trip. The plant is in normal shutdown electrical lineup.

Unit 2 is presently in a refueling outage and was not affected by this event.

¹ PST, Pacific Standard Time.

1 The licensee has notified the NRC Resident Inspector. The licensee has issued a press
2 release.

3 14. As a result of the failure of its steam generators after only 11 months of joint
4 operation, the plant was closed permanently on 31 January 2012. When the plant closed, Edison
5 had over 2,668 fuel assemblies in the spent fuel pools for Units 2 and 3. These assemblies must
6 be cooled in the spent fuel pools for five to seven years or more. Edison has removed some of the
7 assemblies from the pools and stored them in dry cask storage. About 800 Unit 2 and 3 fuel
8 assemblies are stored in above-ground dry cask storage at the plant. In addition, there are about
9 400 Unit 1 used nuclear fuel assemblies in dry cask storage on site.

10 15. During decommissioning of Unit 1, the nuclear spent fuel was originally spread
11 between all three units' spent fuel pools. All Unit 1 fuel has now been transferred to dry cask
12 storage (five casks from the Unit 3 pool were loaded between October and December 2003; nine
13 casks from the Unit 1 pool were loaded in May 2004; and three casks from the Unit 2 pool were
14 loaded in June 2005). Transfer of Unit 2 & Unit 3 fuel to dry cask storage began in 2006.

15 **THE PERMIT AND THIS CHALLENGE THERETO**

16 16. Edison applied to the Coastal Commission for a permit to bury close to 3,600,000
17 lbs. of nuclear waste on a San Diego beach, calling the project an "Independent Spent Fuel
18 Storage Installation," or an "ISFSI." The permit was approved on October 6, 2015.

19 17. Unless the permit is revoked, Edison will be permitted to bury at least 75 storage
20 modules filled with the nuclear waste produced by Edison as part of its business operations.
21 There are 2,668 spent fuel assemblies in wet storage pools in buildings in which Edison
22 conducted the business that produced the nuclear waste. The fuel is highly radioactive and will
23 remain so for thousands of years.

24 18. Plaintiffs seek an administrative writ of mandate, or a declaration, directing
25 Respondent and Defendant California Coastal Commission (CC) to set aside its 6 October 2015
26 decision to grant Southern California Edison (Edison) a permit to construct and operate a facility
27 to store nuclear waste produced by Edison as part of its business operations.

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19. Edison's decision to establish an Independent Spent Fuel Storage Installation, or ISFSI, just 100 feet from the shore of a San Diego beach is the worst alternative:

- * The location of the ISFSI is within a few dozen yards of the ocean;

- * It is designed to be built entirely below-grade, but the water table is so high, it can be only partially buried and then a berm added around it;

- * The water table is only inches from the bottom of the ISFSI structure;

- * This area of the coast will likely erode one third of the way to the ISFSI within 35 years, according to estimates in the CC staff report;

- * This is in a tsunami inundation zone;

- * This is on the moving Pacific Plate and is therefore subject to earthquakes;

- * A major freeway (Interstate 5), transporting over 147,000 vehicles per day, runs within the exclusion zone, unlike all other nuclear plants in North America;

- * LOSSAN (LA-San Diego & San Luis Obispo) Rail Corridor; 351 miles, 6 counties, servicing 41 stations, 150 daily passenger trains and the only viable freight rail link to the rest of the nation.

- * 8.4 million people live within a 50-mile evacuation area;

- * The relatively thin canisters (only 5/8 inch thick) are subject to salt-air corrosion and may last only a few decades before cracking due to chlorine-induced stress corrosion cracking (CISCC);

- * Once corrosion starts, transporting the canisters becomes difficult;

- * The canisters are too large to transport economically using conventional rail cars, which are limited to 286,000 pounds net weight, while the canisters plus the transportation overpack can weight well over 400,000 pounds; and

- * The canisters are not compliant with size and weight standards to insure safe and economical transfer to a permanent storage solution.

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1 20. Edison's reckless and knowing conduct in deploying defective steam generators
2 that caused the plant to close brought the need to find an intermediate storage to a head. Edison
3 was repeatedly warned that there were fatal flaws in the design Edison chose for its new steam
4 generators deployed by Edison at the San Onofre plant in 2010 and 2011. The warnings were in
5 Edison emails, action items, minutes, reports, and letters. The new steam generators suffered
6 from very high void fraction and produced steam too hot for the new steam generators to handle.
7 It was these defects that caused the Unit 3 generators to spring a leak. Similar tube wear was then
8 discovered in Unit 2 and the plant was closed, precipitating the need to find an intermediate
9 storage site for the spent fuel.

10 21. In approving the permit to allow 3,600,000 lbs of high level nuclear waste to be
11 buried on the beach 100 feet from the shoreline with no plan for removal, despite storm
12 warnings, and without requiring Edison to show it had exhausted other reasonable alternatives,
13 the Commission (1) proceeded without, or in excess of, jurisdiction; (2) did not provide a fair
14 hearing because of rampant and widespread ex parte communications with Edison; and (3) abused
15 its discretion because the Commission failed to proceed in the manner required by law, which
16 requires the Commission to protect the California Coast lines from such hazardous waste.

17 22. The Commission's decision finding that there are no alternatives is not support by
18 substantial evidence. The whole record and the relevant evidence demonstrates that the
19 Commission's reliance on Edison's statements -- in light of Edison's habitual misrepresentations
20 and reckless conduct in deploying the failed steam generators that closed the plant -- was wholly
21 unjustified. No reasonable person would have granted a permit to store the nuclear waste on the
22 beach 100 feet from the shoreline on this record.

23 23. Edison did not adequately and in good faith attempt to investigate or develop any
24 other alternatives to the coastal site, other than those already in the licensed area.

25 24. The Coastal Commission (CC), in connection with the issuance of the permit,
26 accepted an agreement with Edison under which Edison would pay the CC in excess of
27 \$5,000,000. The CC Commissioners also obtained an unenforceable indemnity agreement from
28 Edison in which Edison agreed to indemnify the CC Commissioners for the intentionally

1 unlawful act of issuing the permit.

2 25. This action is brought pursuant to Code of Civil Procedure sections 1094.5 and
3 1060, and Public Resources Code sections 30801 and 30804. All further statutory references are
4 to the Public Resources Code, unless otherwise indicated.

5 **THE PARTIES**

6 26. Petitioner and Plaintiff Patricia Borchmann is an individual who participated in the
7 permit proceedings.

8 27. Petitioner and Plaintiff Citizens Oversight, Inc, a 501(c)3 corporation with offices
9 in California and members that reside near the San Onofre facility, participated in the permit
10 proceedings.

11 28. Respondent Southern California Edison Company, a California corporation, is a
12 real party in interest and a necessary party as the applicant for the permit that is at issue in this
13 petition.

14 29. Respondent and Defendant California Coastal Commission recently granted a
15 permit to SCE to bury close to 3,600,000 lbs. on the beach in San Diego County. The plaintiffs
16 live in and/or operate out of San Diego and are aggrieved persons with the right to judicial review
17 of the Commission's decision. Pub. Res. Code § 30801.

18 30. Respondent California Coastal Commission (CC) is the state administrative body
19 authorized to enforce the California Coastal Act (Pub. Res. Code §§ 30000, etseq.) consistent
20 with the constitutional rights of private property owners (id. §§ 30001.5(c)).

21 31. The CC Commissioners were appointed by Governors Jerry Brown and Arnold
22 Schwarzenegger, Assembly Speakers John A. Pérez (December 2009), and Toni G. Atkins
23 (March 2014), and President Pro Tempore Kevin de Leon (October 2014) and Darrell Steinberg
24 (November 2008). The following CC Commissioners were appointed to the following terms by
25 the following appointing authorities:

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 **Gov. Arnold Schwarzenegger**

 **Gov Jerry Brown**

 **Wendy Mitchell (12/10)**

 **Martha McClure (5/11)**

 **Senate Pro Tem Darrell Steinberg (2008-2014)**

 **Effie Turnbull-Sanders (1/14)**

 **Mary K. Shallenberger (5/13)**

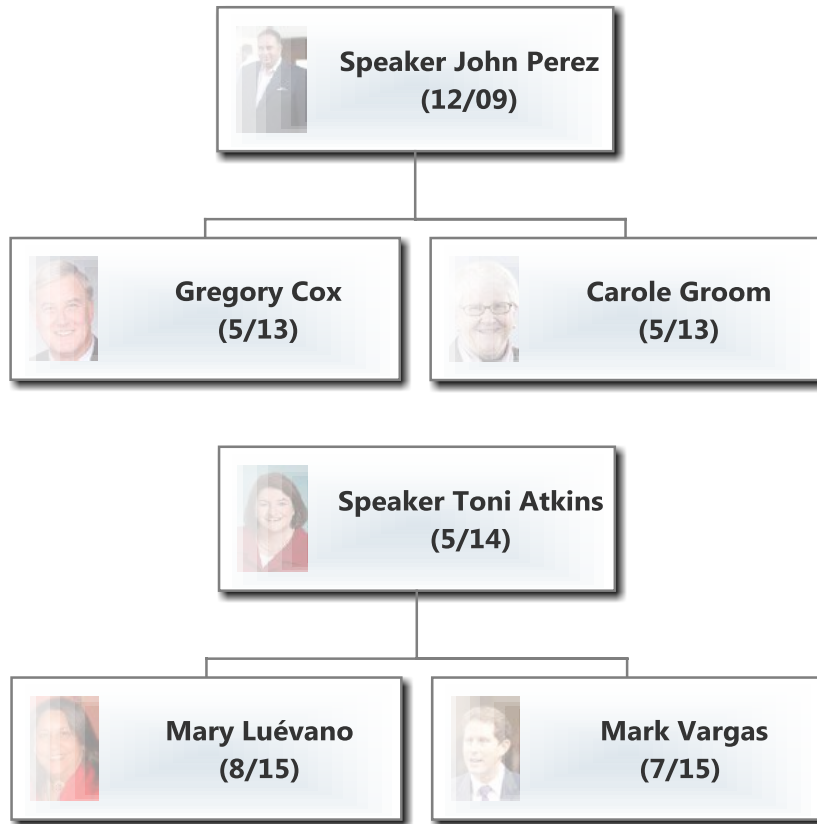
 **Erik Howell (2/14)**

 **Pres Pro Tem Kevin Leon**

 **Roberto Uranga (3/15)**

 **Steve Kinsey (5/15)**

 **Dayna Bochco (5/15)**



32. Does 1 through 50 are persons or entities unknown to the Plaintiffs and Petitioners at this time who may have some interest that may be affected by this action sufficient to render them necessary parties. Plaintiffs will amend this petition to specifically identify each such person or entity as a respondent and/or real party in interest, if and when their identities become known.

VENUE

33. Venue is proper in this Court, because the property that is the subject of this litigation is located in the County of San Diego.

ABANDONMENT OF SAFETY OBLIGATION

34. A Memorandum of Understanding (MOU) has been entered into by a 7-member Interjurisdictional Planning Committee (IPC) which includes the Counties of Orange and San Diego; the Cities of Dana Point, San Juan Capistrano and San Clemente; Camp Pendleton; California, (local jurisdictions) and California State Parks. Under the MOU, local jurisdictions prepare annual budgets identifying specific baseline activities related to radiological emergency planning. Although each of the local jurisdictions are well-intended, none have the infrastructure

1 capability to provide meaningful emergency services in the event of a major nuclear event at San
2 Onofre. These jurisdictions do not have established and understood emergency protocols; they do
3 not have the training in nuclear emergency procedures, and they lack the staff and equipment
4 needed for a radiation emergency event at San Onofre. The Coastal Commission decision to issue
5 the permit for Edison's nuclear waste site at San Onofre leaves Southern California families living
6 under a nuclear Sword of Damocles.

7 **EDISON FAILED TO CONSIDER ALTERNATIVES**

8 35. SCE's current plan is to transfer the fuel assemblies from two spent fuel pools
9 (SFPs) to dry cask storage, creating an on-site ISFSI, or indefinite nuclear waste site, at San
10 Onofre. There are several reasons why the Coastal Commission should not have rushed to grant
11 Edison permission to store its nuclear waste at the location of the decommissioned San Onofre
12 plant on the San Diego coastline:

13 * SCE's Aging Management Program (AMP), required by the NRC and by Special
14 Condition #2 by which the California Coastal Commission permit was granted, is still "in
development"

15 *SCE's AMP, not available at present nor expected to be developed within the next 20
16 years, is needed for monitoring and inspection of the storage casks to ensure the long-term
transportability and eventual removal of the casks ISFSI from the site

17 *SCE's AMP, the utility mechanism for monitoring and maintenance of the spent fuel
18 casks, has not been previously demonstrated nor is it clear when these techniques, tools
and standards would become available for use at San Onofre.

19 *SCE's yet undeveloped AMP is required to provide the monitoring of environmental
20 conditions, i.e. temperature and humidity, the influencing risks of corrosion and
degradation of the casks hence prohibiting SCE's removal the casks as planned in 2051

21 *SCE's undeveloped AMP is also required to provide structural integrity validation of the
22 casks planned for removal by visual observation, surface measurements, and other
inspection techniques related to the physical condition of the casks

23 *SCE's intended but yet undeveloped AMP cannot deliver the combination of the
24 inspections required by the NRC and Special Condition #2 of the California Coastal
Commission's permit, to monitor and maintain the condition of the casks throughout their
25 service life, provide assurance they are performing as designed and allowing the spent fuel
to be safely removed when the DOE provides an interim storage facility or permanent
26 repository

27 * Due to SCE's inability to develop and deliver the required AMP, if the steel fuel storage
casks should degrade becoming unsafe to transport, the proposed ISFSI would be possibly
28 be required for many decades and the temporary permit would consequently transition San
Onofre to a permanent nuclear waste storage site continuing and accelerating increased

1 risk to public safety and the potential to adversely affect marine and visual resources and
2 coastal access

3 * The California Commission own 'Potential for Reasonably Foreseeable Impacts' within
4 the Conclusion of the permit states. "Therefore there is the potential that the proposed
5 ISFSI site will be undermined by shoreline retreat and/or subjected to flooding as a result
6 of sea level rise, storm waves or a tsunami event. Despite the claim of the facility's robust
7 design, these geologic forces would eventually result in a loss of stability and structural
8 integrity, and cause the discharge of debris into the coastal ocean to the detriment of water
9 quality and marine organisms."

10 36. First, dry casks on nuclear reactor sites stored in ISFSI were originally intended as
11 a temporary solution until the Department of Energy (DOE) developed a permanent disposal in a
12 deep geologic repository. However, due to the DOE's failure to establish a permanent nuclear
13 waste repository, on-site storage of nuclear waste on a somewhat permanent basis has become a
14 dangerous default situation, especially when the nuclear reactors are located on the coastline in a
15 high-density population area.

16 37. Second, the original site decision for San Onofre was chosen for the purpose of
17 being within close proximity to population centers, and thus, close to the users of the energy
18 produced. However, the same reasoning does not apply for siting decisions for nuclear waste
19 storage as, in the event of an emergency, there is greater per capita risk in siting the ISFSI near
20 densely populated areas -- a risk that only increases with the length of time nuclear waste remains
21 in the populated area.

22 38. Third, the general public did not agree to indefinite nuclear waste storage at the
23 nuclear plant site when the plant was originally approved and put online.

24 *Although available by the SCE filing date (6-15-2015) the CA Coastal
25 Commission staff permit application review did not include the NRC approved
26 SCE Emergency Planning (EP) exemptions for San Onofre (6-4 and 6-5 2015).
27 These NTC EP exemptions were not disclosed in the public review process nor
28 included in the documentation encompassed by CA Coastal Commission staff in
the permit's application under IV Finding and Declarations, **B. OTHER
AGENCY APPROVALS U.S. Nuclear Regulatory Commission; Federal Pre-
emption.** Those NRC EP approvals were also accompanied by a Federal Pre-
emptive notification to U.S. Department of Homeland Security, Federal
Emergency Management Agency (FEMA), on June 5, 2015, that FEMA is no
longer required to review, monitor and report activities associated with off-site
radiological emergency planning and preparedness as they relate to San Onofre
under the provisions of 44 CFT 350. The NRC further requested FEMA notify
the appropriate state and local governments that off-site radiological emergency
plans and preparedness, as described in 44 CFR 350, are no longer required.

1 *As such, these approved NRC EP exemptions:

- 2 • eliminate the breadth of SCE's obligations to keep the State
- 3 emergency response organizations and the general public informed
- 4 in the event of an emergency;
- 5 • decrease the safeguards to public health and safety in the event of a
- 6 credible and foreseeable accident scenario i.e. cask drop;
- 7 • discontinue the federal requirement for support to State planning
- 8 and monitoring activities resulting in a clear reduction in State's
- 9 emergency plan effectiveness by reducing the ability to effectively
- 10 respond to an emergency;
- 11 • propose notification and interaction procedures with State and
- 12 local agencies are eliminated almost in their entirety, based on the
- 13 erroneous assumption that San Onofre, in its present state with
- 14 spent fuel in the cooling pool, be viewed only as an ISFSI;
- 15 • fail to adequately analyze a number of credible scenarios and
- 16 consider circumstances unique to California's coastal nuclear
- 17 facilities: risks to public health and safety associated with and
- 18 exacerbated by the state's seismicity and risk of tsunami;
- 19 • provide reasonable assurance that the health, safety, common
- 20 defense and security of the public will be endangered.

21 39. Fourth, the highly-concentrated salt air environment at the San Onofre site poses
22 increased degradation risks of chloride-induced stress corrosion cracking (CISCC) due to the close
23 proximity to the ocean and prevailing winds. Furthermore, while the San Onofre nuclear plant
24 needed cold ocean water to condense steam back to water, the ISFSI does not need to be located
25 within close proximity to the ocean. In fact, coastal sites are more likely to result in CISCC as the
26 CISCC process does not begin until the surface temperature of the canisters drops below 85
27 degrees C (185 degrees F). It likely that during the fourteen (14) – to - thirty (30) year cooling
28 period planned by Edison, the canisters will have cooled enough for CISCC to commence and
early cracking could occur.

29 40. In a staff review of the proposal, the Coastal Commission itself stated “it cannot be
30 ignored that the proposed ISFSI location within the NIA lies just over 100 feet from the shoreline,
31 at some of the lowest grade elevations present at the San Onofre site....the site could potentially be
32 exposed to several coastal hazards depending on how long the facility were to remain in place.”

33 41. Most importantly, the Coastal Commission presented the alternative of “shipping
34 the material to an off-site ISFSI to be developed by SCE.” Under this alternative, Edison could
35 apply for a specific license to develop its own ISFSI away from the San Onofre licensed area.

1 However, Edison admitted it did not investigate any alternative locations away from coastal
2 environments due to permitting restrictions. Below are examples of proposed off-site alternatives:

3 **THE PALO VERDE ALTERNATIVE**

4 42. Moving Edison's nuclear waste at San Onofre to Edison's nuclear waste site at
5 Palo Verde is a better alternative than leaving it on San Diego's shoreline. As these pictures show,
6 trucks can move nuclear waste:



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17 43. As this picture below shows, there is a remote area at the Palo Verde nuclear plant
18 (Edison holds 15% ownership) in the desert where nuclear waste is already stored. The Palo
19 Verde Nuclear Generating Station is a nuclear power plant located near Tonopah, Arizona in
20 western Arizona:



1 **FISHEL CALIFORNIA ALTERNATIVE**

2 44. Fishel is located in East San Bernardino County, CA. Fishel has a population of
3 zero (0); the closest improved property, a water pumping plant, is thirteen (13) miles away, and it
4 is located next within close proximity to a railroad line. Railroads have been demonstrated to be
5 one of the safest ways to transport nuclear waste and other hazardous material. Fishel is not a
6 designated wilderness area and is comprised of land mostly owned by the Federal Government.

7 **EAST CAMP PENDLETON ALTERNATIVE**

8 45. One potential location evaluated by Edison and the Coastal Commission was the
9 San Onofre "Mesa" location, which is an Edison-operated, non-nuclear auxiliary facility located
10 within Camp Pendleton. The Mesa location has the advantages of being a previously-developed
11 site under Edison ownership, but like San Onofre, it is located on an easement granted by the Navy
12 to be terminated in 2017.

13 **EDISON HAD NO PLAN TO CLEAN UP**
14 **THE WASTE ITS BUSINESS PRODUCED**

15 46. Edison's nuclear power reactors at San Onofre were licensed based on a set of
16 requirements called the plant's "licensing basis." A principal licensing basis document is the
17 plant's final safety analysis report (FSAR). The FSAR and the plant's Nuclear Regulatory
18 Commission (NRC) license and associated technical specifications are the principal regulatory
19 documents describing how the plant is designed, constructed, and operated.

20 47. Because a plant's design and operation are not static, certain changes are necessary
21 over the course of a facility's operating life. Reactor licensees must follow NRC regulations to
22 justify and implement changes in the design basis and licensing basis for their facilities, and are
23 required to document such changes in the FSAR. 10 CFR 50.71(e) requires the FSAR to be
24 periodically **updated**. The objectives of 10 CFR 50.71(e) are to ensure that licensees maintain the
25 information in the Updated FSAR (UFSAR) to reflect the current status of the facility and address
26 new issues as they arise so that the UFSAR can be used as a reference document in safety analysis.

27 48. The NRC has defined the changes that a licensee may make to a licensed facility
28 without prior NRC approval. Pursuant to 10 CFR 50.59(c)(1), without obtaining a license

1 amendment, the holder of a license may: (1) make changes in the facility as described in the FSAR
2 (as updated), or (2) make changes in the procedures as described in the FSAR (as updated), and (3)
3 conduct tests or experiments not described in the FSAR (as updated) only if a change to the
4 technical specifications incorporated in the license is not required, and the change, test or
5 experiment does not meet any of the eight 10 CFR 50.59(c)(2) criteria.

6 49. In 2004, Edison applied to the California Public Utilities Commission (CPUC) for
7 an order permitting Edison to install new steam generators at its San Onofre plant. In December
8 2005, the CPUC decided to allow Edison to proceed with the new steam generators at San Onofre.
9 On 30 November 2004 Edison's Vice President, Dwight Nunn, described the significant design
10 issues and the increased safety threat of the new steam generators in a letter (Nunn Letter). The 30
11 November 2004 Nunn letter provides in pertinent part:



November 30, 2004

Dwight E. Nunn
Vice President

14 Mr. Akira Sawa
15 General Manager
16 Mitsubishi Heavy Industries, LTD
17 Kobe Shipyard & Machinery Works
18 1-1, Wadasaki-Cho 1-Chome
19 Hyogo-Ku
20 Kobe 652-8585
21 Japan

Dear Mr. Sawa:

Subject: Replacement Steam Generators
San Onofre Nuclear Generating Station, Units 2 & 3

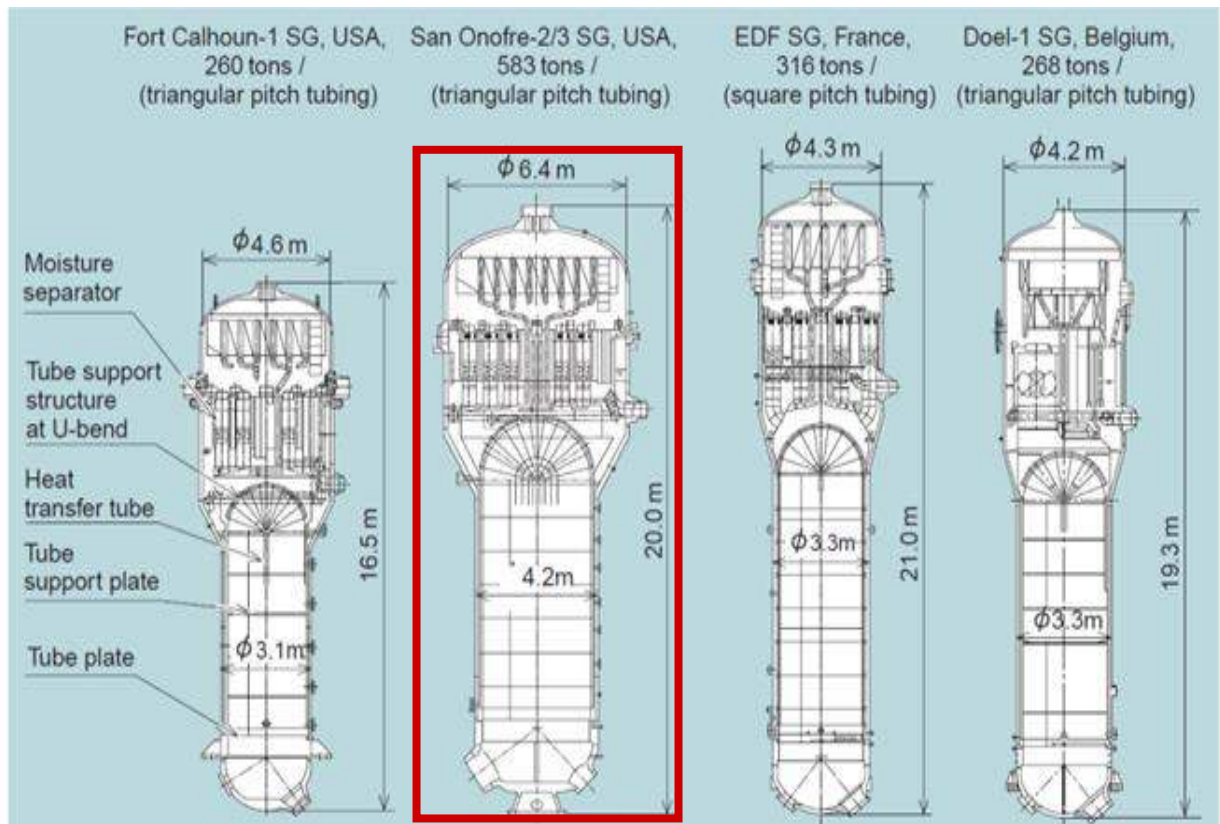
**

22 This will be one of the largest steam generators ever built for the United States and
23 represents a significant increase in size from those that Mitsubishi Heavy Industries has
24 built in the past. It will require Mitsubishi Heavy Industries to evolve a new design beyond
25 that which they currently have available. Such design evolutions require a careful, well
26 thought approach that fully evaluates the risks inherent in creating a new and significantly
27 larger steam generator. Such design evolutions tend to challenge the capability of existing
28 models and engineering tools used for proven steam generator designs. Success in
developing a new and larger steam generator design requires a full understanding of the
risks inherent in this process and putting in place measures to manage these risks.

Based upon these observations, I am concerned that there is the potential that design flaws could be inadvertently introduced into the steam generator design that will lead to unacceptable consequences (e.g., tube wear and eventually tube plugging). This would be a disastrous outcome for both of us and a result each of our companies desire to avoid. In

50. Edison “souped-up” the new steam generators with 9,727 tubes -- 377 more than were in the original generators. In order to make room for the increased tubes, Edison had to remove stabilizing components such as the stay cylinder, supporting the tube sheet, and the “egg crate” tube support.

51. The drawings below illustrate how much bigger the new steam generators were in comparison to any generators previously manufactured by the company Edison hired:



52. After the defective steam generators deployed by Edison at its San Onofre plant failed eleven (11) months into their joint use, the Atomic Safety and Licensing Board found Edison’s new steam generators “differed in design from the original steam generators.” For example, each new steam generator (1) has 9,727 tubes, which is 377 more than are in the original; (2) does not have a stay cylinder supporting the tube sheet; and (3) has a broached tube

design, rather than an “egg crate” tube support.”

53. In order to make room for the 377 new and longer tubes, Edison removed key mechanisms from the stabilizing components of the new steam generators. The following diagrams illustrate the location of the additional 377 tubes, the removed stay cylinder, and the removed egg crate tube support.

Edison’s Overloaded Steam Generators (377 More Tubes than in Original)



54. In order to make room for the 377 tubes, Edison removed the egg crate tube support and stay cylinder parts of the steam generators stabilization system:

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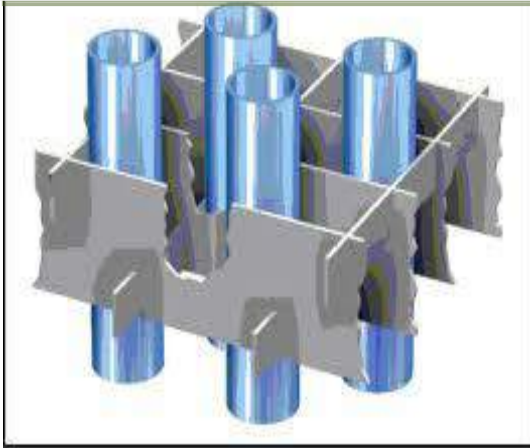
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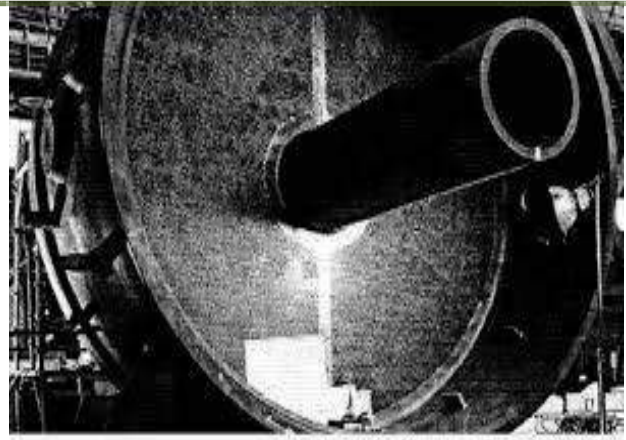
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Edison removed egg crate support



Edison removed massive stay cylinder



55. Section 10 CFR 50.59 stipulates that the FSAR (as updated) is expected to include FSAR changes resulting from evaluations performed pursuant to the regulation (10 CFR 50.59(c)(3)) such as Edison's plan to alter the design of the new steam generators with more tubes and reduced structural protections. Edison was required under this provision and directed to maintain records of changes in the facility (10 CFR 50.59 (d)(1)) and to submit a report containing a brief description of any changes, tests, and experiments made under this regulation, including a summary of the evaluation of each (10 CFR 50.59 (d)(2)). According to 10 CFR 50.59(d)(2), this report must be submitted to NRC at intervals not to exceed 24 months.

56. Because the new design's additional tubes and reduced stabilization increased safety risks, the safety license exemption was not available under 10 CFR 50.59. Edison's changes resulted in more than a minimal increase in the likelihood of the occurrence of a malfunction in the consequences of an accident, and increased the consequences of a malfunction of a structure, system and components (SSC).

57. Edison crossed over the line and went from avoidance, to evasion, of § 50.59 even before the "AVB Design Team recognized that the design for the San Onofre RSGs resulted in higher steam quality (void fraction) than previous designs;" Edison did not implement "changes in design to reduce the void fraction" because the potential changes "could impede the ability to justify the RSG design under the provisions of 10 C.F.R. 50.59."²

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² Mitsubishi Heavy Industries (MHI) Root Cause Report p.22

1 58. Edison's failure to obtain a safety license amendment was not excused by the
2 §50.59 exemption. Edison's Boguslaw Olech, a key engineer who worked for Edison on the
3 design and deployment of the new steam generators, admitted that Edison adopted the policy to
4 evade the safety license amendment under the veil of §50.59. According to Olech, the new steam
5 generators' design requirements and improvements had to be solved so they could be installed
6 under the § 50.59 rule.³

7 59. The former Deputy Regional Administrator of the Nuclear Regulatory
8 Commission, Elmo Collins, admitted that Edison should have requested a license amendment
9 from the NRC prior to deploying the defective steam generators at San Onofre. Collins also
10 admitted "the steam generator design was fundamentally flawed and would not have been
11 approved as designed."

12 60. The CC Commissioners knew Edison had operated its nuclear waste-producing
13 business for over 40 years but failed to develop a plan to locate the Edison nuclear waste to a safe
14 location not on San Diego's coastline. The CC Commissioners knew Edison could not state it
15 could remove its nuclear waste it seeks to bury on the beach by even as late as 2051. The 75
16 modules will be buried below sea level in concrete, making their safe removal infeasible. The CC
17 Commissioners knew Edison had no plan to relocate Edison's nuclear waste from the beach in
18 San Diego.

19 61. It appears that on 7 June 2006, Edison notified the NRC of Edison's plan to install
20 new steam generators at San Onofre. Edison did not inform the NRC that the AVB Design Team
21 had discovered a void fraction problem and Edison had limited correctives to those that would not
22 alert the NRC. Instead, the SCE briefing to the NRC indicated there would be no associated
23 power uprate (i.e. there was to be no increase in San Onofre's maximum power level).

24 62. The briefing document identified the changes as key design "improvements."
25 Edison referred to the limited anti-vibration bar changes as "**improved** anti-vibration bar design."
26 The briefing document also falsely identified that both the original and replacement steam
27 generators were **identical in height**. The briefing informed the NRC that the new steam

28 ³ 20 March 2012 "Steam Generators: Design and details" Atomic Power Review, p. 2

generators were 643.6 tons, which was 23.6 tons heavier than the original, and that the replacement and would have more tubes than the original (9,727 versus 9,350).

63. Edison's PowerPoint for the new steam generator project at San Onofre did not inform the reader as to the negative void problem; it referred to the changes in the steam generators as "improvements."



San Onofre Nuclear Generating Station Units 2 & 3

STEAM GENERATOR REPLACEMENT PROJECT OVERVIEW

June 7, 2006



Some Key Design Improvements



- Larger Surface Area
- Alloy 690 Thermally Treated Tubing
- Improved AVB Design
- Integral Steam Nozzle
- Improved Material for Tube Supports
- Forged Shell



S/G 3A Lower and Middle Shell
S/G 2A Balance Ring, Extension
Ring, & Tubesheet



12



1 **DEFECTIVE STEAM GENERATORS FAIL IN 11 MONTHS**

2 64. Edison deployed the defective steam generators, despite having been warned of
3 their defects. The defective steam generators failed within eleven (11) months, causing the closure
4 of the San Onofre plant.

5 **UNREASONABLE RELIANCE ON SCE**
6 **REPRESENTATIONS NO ALTERNATIVES**

7 65. Edison seeks to bury its nuclear waste on the beach in San Diego as a result of its
8 reckless conduct in deploying four (4) defective steam generators at its nuclear plant at San
9 Onofre. Edison has made a series of false statements to California State officials at the CPUC and
10 to the public that demonstrate that it is unreasonable to rely on Edison's statements regarding San
11 Onofre.

12 **66.** The permit should be revoked until Edison identified and obtains an off-site
13 location for the ISFSI. Edison effort to escape responsibility for storing the nuclear waste its
14 business activities produced raises unacceptable, life-threatening risks for the people living in and
15 around San Onofre. In the event someone else or the federal government does not provide a
16 permanent repository or other offsite interim storage facility emerges, or if the shipment of San
17 Onofre's spent fuel to an off-site location is otherwise delayed, or if the steel fuel storage casks
18 proposed for use in the ISFSI degraded to the point of becoming unsafe to transport, the proposed
19 ISFSI could be required beyond 2051, possibly for many decades. Under this scenario the ISFSI
20 would eventually be exposed to coastal flooding and erosion hazards beyond its design capacity,
21 or else would require protection by replacing or expanding the existing San Onofre shoreline
22 armoring. In either situation, retention of the ISFSI beyond 2051 would have the potential to
23 adversely affect marine and visual resources and coastal access.

24 **UNLAWFUL INDEMNIFICATION**

25 67. In order to induce the CC Commissioners to grant the unlawful permit which the
26 CC members knew to be unlawful, Edison agreed to indemnify the CC Commissioners to
27 indemnify and hold harmless the Commission, its officers, agents, and employees with respect to
28 the Commission's approval of the project against any and all liability.

1 68. The indemnity agreement is void because it violates Cal Civ. Code § 2773
2 prohibition of indemnification agreements for acts known by such person at the time of doing it to
3 be unlawful.

4 **THE ADMINISTRATIVE DECISION**

5 69. The administrative decision in issuing the October 6, 2015 permit was the result of
6 arbitrary or capricious action by the Coastal Commission or an officer of the Coastal Commission
7 acting in his or her capacity.

8 70. Petitioners have no further administrative remedies in that the decision is final
9 upon its issuance.

10 71. Petitioners do not have a plain, speedy or adequate remedy in the law.

11 72. Petitioners seek judicial review because:

- 12 - There has been a prejudicial abuse of discretion in that the Commission has
13 not proceeded in a manner required by law;
14 - The Commission has proceeded in excess of its jurisdiction;
15 - The decision by the Commission to issue the permit is not supported by the
16 record or the findings;
17 - No substantial evidence supports the permit;
18 - Petitioners were denied due process of law in the proceedings.

19 73. Attorney's fees are proper to Petitioners pursuant to California Code of Civil
20 Procedure § 1021.5 and/or Government Code § 800.

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1 WHEREFORE PLAINTIFFS PRAY FOR THE FOLLOWING RELIEF

2 1. For a writ of mandate vacating the order of the California Coastal Commission
3 issuing to Southern California Edison under Application NO. 9-15-0228

4 2. For a declaration that the Permit issued by the California Coastal Commission to
5 Southern California Edison under Application NO. NO. 9-15-0228 was issued in excess of the
6 Coastal Commission authority under law and is declared null and void.

7 3. For attorney's fees according to statute;

8 4. Costs; and

9 5. For all other relief the Court deems proper.

10 AGUIRRE & SEVERSON, LLP

11
12 Dated: November 3, 2015

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14 _____
15 Michael J. Aguirre, Esq.,
16 Attorneys for Petitioners
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1 VERIFICATION

2 I am a petitioner in this proceeding. The facts alleged in the above petition are true of my own
3 knowledge.

4 I declare under penalty of perjury under the laws of the State of California that the foregoing is
5 true and correct.

6 Date: 11/3/2015



Petitioner
Citizen's Oversight, Inc.

9
10 Date: 11-03-15



Petitioner
Patricia Borchmann

EXHIBIT 8

ACA 11 - 0480

Decision 10-04-047 April 22, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own
Motion into the Operations and Practices of
San Diego Gas & Electric Company
Regarding the Utility Facilities linked to the
Witch and Rice Fires of October 2007.

Investigation 08-11-006
(Filed November 6, 2008)

Investigation on the Commission's Own
Motion into the Operations and Practices of
Cox Communications and San Diego Gas &
Electric Company Regarding the Utility
Facilities linked to the Guejito Fire of
October 2007.

Investigation 08-11-007
(Filed November 6, 2008)

**DECISION APPROVING AND ADOPTING THE WITCH/RICE
AND GUEJITO FIRE SETTLEMENTS**

1. Summary

The Consumer Protection and Safety Division and the San Diego Gas & Electric Company and the Consumer Protection and Safety Division, CoxCom Inc., and Cox California Telcom LLC jointly moved for the approval and adoption of their respective Settlement Agreements, which resolve the Commission's Orders Instituting Investigations 08-11-006 and 08-11-007. Under the terms of the Consumer Protection and Safety Division and the San Diego Gas & Electric Company Agreement, San Diego Gas & Electric Company will pay \$14,350,000 to the General Fund of the State of California within 60 days of the issuance of this decision. In accordance with the terms of the Consumer

Protection and Safety Division, CoxCom Inc., and Cox California Telcom LLC Agreement, CoxCom Inc. and Cox California Telcom LLC will pay \$2,000,000 to the General Fund of the State of California within 60 days of the issuance of a final non-appealable decision. San Diego Gas & Electric Company will also reimburse the Consumer Protection and Safety Division up to an additional \$400,000 in order to implement a computer work module to assist the Consumer Protection and Safety Division. San Diego Gas & Electric Company shall remit any unused balance of the \$400,000 to the General Fund of the State of California within 60 days of being directed to do so by the Consumer Protection and Safety Division. Investigations 08-11-006 and 08-11-007 are closed.

2. Background and Procedural History

In late October 2007, several severe fires occurred in the San Diego area. The Rice Fire ignited in Fallbrook, California, and the Witch Fire ignited in southern San Diego County near State Highway 78 and Santa Ysabel. The Guejito Fire started in the San Pasqual area of the county. On November 12, 2008, this Commission issued Order Instituting Investigation (OII or I.) 08-11-006 into "the Operations and Practices of the San Diego Gas & Electric Company Regarding the Utility Facilities linked to the Witch and Rice Fires of October 2007." On the same day, the Commission also issued I.08-11-007 into "the Operations and Practices of Cox Communications and San Diego Gas & Electric Company Regarding the Utility Facilities linked to the Guejito Fire of October 2007."

The Commission stated that it was issuing I.08-11-006 "to determine whether San Diego Gas & Electric Company (SDG&E) violated any provision of the Public Utilities Code, general orders, other rules or requirements in regards to: 1) utility facilities which have been linked to the October 2007 Witch and Rice

Fires; and 2) failing to cooperate with the Consumer Protection and Safety Division (CPSD).” The OII provided notice that a hearing would be held on the matter, and it directed SDG&E to show cause as to why the Commission should not find violations in this proceeding and why the Commission should not impose penalties and/or any other forms of relief, if it found any violations. The OII also directed SDG&E to respond to certain questions and to provide CPSD with certain information.¹

The Commission declared that it was issuing I.08-11-007 “to determine whether Cox Communications (Cox) and/or [SDG&E] violated any provision of the Public Utilities Code, general orders, other rules, or requirements in regards to: 1) utility facilities which have been linked to the October 2007 Guejito Fire; and 2) failure to cooperate with the [CPSD].” The OII provided notice that a hearing would be held on the matter, and directed Cox and SDG&E to show cause as to why the Commission should not find violations in this proceeding, and why the Commission should not impose penalties and/or any other forms of relief, if it found any violations. The OII also directed Cox and SDG&E to respond to certain questions and to provide CPSD with certain information.²

The Guejito and Witch/Rice Fire OIIs’ May 1, 2009 Scoping Memos scheduled evidentiary hearings to begin respectively, on June 29, and July 13, 2009. Before the start of the Guejito Fire OII hearings, CPSD, Cox, and SDG&E requested that the matter be held in abeyance³ so that the parties could

¹ I.08-11-006 at 1.

² I.08-11-007 at 1.

³ The parties requested abeyance until the start of the Witch and Rice hearings on July 13, 2009.

fully develop the settlement agreement in principle that they had reached. At the July 13 Prehearing Conference for both proceedings, CPSD and SDG&E reported that they had also reached a settlement agreement in principle on key terms in the Witch and Rice Fire OII. CPSD, SDG&E, and Cox asked that both proceedings be temporarily held in abeyance while the parties further discussed and set forth the details of the respective agreements.

To monitor the progress of the continuing discussions and finalizing of the agreements, the assigned Administrative Law Judge (ALJ) convened weekly and then bi-weekly status conferences from July 22 through October 9, 2009. On October 21, 2009, CPSD and SDG&E requested the assistance of one of the Commission's Alternative Dispute Resolution (ADR) Neutrals, to help them reach agreement on several remaining issues. CPSD and SDG&E met with an ADR Neutral on October 26, 2009.⁴ On October 30, 2009, CPSD and SDG&E filed a settlement agreement resolving the Witch/Rice and Guejito Fires OIIs as to SDG&E. On the same day, CPSD and Cox also filed a settlement agreement resolving the Guejito Fire OII as to Cox. No comments were filed on the proposed settlement agreements.⁵

⁴ The parties to I.08-11-007 (SDG&E, Cox, and CPSD) and I.08-11-006 (SDG&E and CPSD) held a Settlement Conference on October 28, 2009, with each party waiving the seven-day notice contemplated by Rule 21.1(b). They contend that they set this schedule because they are the only parties in each OII, and they wanted to expedite the public filing of the settlements. See Joint Motion of CPSD and SDG&E at 12 (October 30, 2009).

⁵ On November 5, 2009, the ALJ issued a ruling giving notice that the captions of both proceedings would be used solely for the purpose of addressing the joint motions in I.08-11-006 and I.08-11-007. The Witch/Rice and Guejito proceedings are not consolidated.

3. The Settlement Agreements

Each proposed settlement agreement resolves the issues identified in the respective Assigned Commissioner Rulings and Scoping Memos. Following is a description of the main terms of each of the settlement agreements.

3.1. The CPSD and SDG&E Settlement Agreement⁶

3.1.1. Statement of Apology by SDG&E

SDG&E acknowledges and understands its obligation and duty to respond promptly to Commission requests for access to information and utility employees. SDG&E admits that its efforts fell short of meeting this obligation and duty in connection with CPSD's investigation into the Witch, Rice, and Guejito fires, and apologizes for permitting this to happen. SDG&E agrees that it will conduct additional training in this area.

3.1.2. Admissions Regarding the Accident Reporting Requirements

SDG&E admits that it failed to provide the Commission with a 20-day follow-up letter required by the Accident Reporting Requirements for the Witch, Rice, and Guejito fires. SDG&E agrees that it will conduct additional training in this area.

3.1.3. No Admission Regarding Safety Violations

SDG&E does not admit to any violations of the safety General Order provisions or related statutory requirements.

⁶ The CPSD-SDG&E Settlement Agreement is appended as Attachment I to this decision.

3.1.4. Without Prejudice to Other Parties or Plaintiffs

SDG&E and CPSD state that they enter into the Settlement Agreement, without prejudice to any positions, including positions connected to OII-related evidence that any party may want to introduce, in any other Commission proceeding. They also enter into the Agreement without prejudice to positions that any party, including civil plaintiffs, might take in the civil litigation related to the Witch, Rice, and Guejito fires.

3.1.5. Remedial Measures

- A. SDG&E will conduct additional training regarding vegetation management to ensure familiarity with tree inspection/trimming and vegetation management processes.
- B. SDG&E will also conduct additional training regarding identification and repair of safety hazards, including clearance violations and broken lashing wires.
- C. SDG&E conducted inspections pursuant to the recommendation in the CPSD Report.
- D. SDG&E will conduct Supplemental Quality Assurance/Quality Control inspections for its distribution and transmission systems in the Highest Risk Fire Areas (HRFAs) until the end of 2016.
- E. SDG&E shall adopt, on a going forward basis, design criteria for steel poles and supported facilities in the HRFAs that ensure facilities are designed to withstand the wind load associated with a basic wind speed of 85 miles per hour.
- F. For 69 kilovolt transmission lines, three-dimensional laser scanning surveys focused on ensuring compliant conductor clearances in the HRFAs shall be conducted by SDG&E on a three-year cycle.
- G. SDG&E will develop and implement protocols to improve communication and coordination with

Communications Infrastructure Providers (CIPs)
regarding inspection and maintenance of facilities on
joint use poles.

3.1.6. Settlement Payment

Under the Agreement, SDG&E will pay \$14, 350,000 to the General Fund of the State of California. SDG&E will also reimburse CPSD up to an additional \$400,000 to implement a computer work module designed to assist CPSD in future audits and investigations of utility safety hazards and incidents. SDG&E shall remit any unused balance of the \$400,000 established for that purpose to the General Fund of the State of California within 60 days of being directed to do so by CPSD.

3.2. The CPSD and Cox Settlement Agreement

Under the CPSD-Cox Agreement, Cox agrees to implement additional inspection, maintenance, documentation, and reporting measures, which in certain respects exceed the requirements adopted by the Commission for other CIPs in Decision (D.) 09-08-029 in Phase 1 of Rulemaking (R.) 08-11-005, and to make a settlement payment to the General Fund of the State of California. In general, it agrees to the following terms.

3.2.1. Enhanced Inspection Policies and Practices

Cox shall develop and implement further enhanced inspection policies and practices, in addition to its existing inspections, including additional Patrol Inspections throughout its service territories in California⁷ and annual Detailed Inspections in Extreme and Very High Fire Threat Areas and Southern

⁷ Cox completed its initial Patrol Inspections by October 31, 2009. Under D.09-08-029, in contrast, other CIPs are not required to complete their initial Patrol Inspections in the Extreme and Very High Fire Threat Areas of Southern California until September 30, 2010. (D.09-08-029, mimeo. at 52-53 (Ordering Paragraph 1).)

California, through an independent, dedicated General Order 95/128 inspection program.

3.2.2. Enhanced Maintenance Policies and Practices

Cox shall develop and implement additional enhanced maintenance policies and practices that require corrective actions to remedy safety issues within specific time periods reflecting the relative significance and priority of the condition.

3.2.3. Documentation

Cox shall develop and implement additional documentation, record keeping, and reporting requirements regarding maintenance and inspection activities.

3.2.4. Enhanced Training

Cox shall develop and implement additional, enhanced training for employees and contractors.

3.2.5. Time Period

Cox shall implement the additional enhanced inspection, maintenance, documentation, record keeping, and reporting measures set forth in the Settlement Agreement for a period of seven years, irrespective of whether and the extent to which less stringent measures may be adopted by the Commission for other CIPs in R.08-11-005.⁸

⁸ However, Cox is required to comply with any requirements that the Commission may adopt in R.08-11-005, or in a subsequent proceeding, that are more stringent than the measures required by the Settlement Agreement. See CPSD-Cox Settlement Agreement at § 2.3.

3.2.6. Enhanced Communication and Coordination

Cox shall seek to develop and implement enhanced communication and coordination measures with SDG&E regarding General Order 95 issues on joint use poles.

Cox agrees not to seek recovery of the costs it incurs in implementing the Settlement Agreement through a surcharge on its customer bills.

3.2.7. Cooperation

Cox shall cooperate with CPSD in any further investigation regarding SDG&E's alleged failure to cooperate with CPSD's investigation of the Guejito Fire in I.08-11-007 or a subsequent proceeding.

3.2.8. Settlement Payment

Cox shall make a settlement payment in the amount of \$2,000,000 to the General Fund of the State of California, within 60 days of the issuance of a final non-appealable decision by the Commission approving the Settlement Agreement without material change.

3.2.9. Consistency

Cox shall take no position inconsistent with the express terms of the CPSD-Cox Settlement Agreement in either Phase I or Phase II of R.08-11-005.

Finally, Cox agrees that the Settlement Agreement is without prejudice to the rights of Cox or any other person or party in any other potential or pending civil litigation.

4. The Record

CPSD and SDG&E assert that, after extensive discovery, they submitted prepared written testimony that sets forth a thorough record of the Witch, Rice, and Guejito proceedings. They attached a list of exhibits as an appendix to the CPSD-SDG&E Settlement Agreement.

CPSD's testimony in the proceedings consists of the documents referenced in the appendix of the CPSD-SDG&E Settlement Agreement. With respect to the Witch fire, the CPSD report and testimony alleged that SDG&E is in violation of California Public Utilities Commission (Commission) requirements because it failed to design, construct, and maintain the affected lines and conductors in accordance with General Order 95, and failed to maintain the clearances between conductors also required by General Order 95. With respect to the Rice fire, the CPSD report and testimony alleged failures of SDG&E's vegetation management practices⁹ in violation of General Order 95. With respect to the Guejito fire, CPSD alleged that both SDG&E and Cox failed to maintain proper clearances in violation of Public Utilities Code § 451 and General Order 95. Finally, with respect to all three fires, CPSD also alleged failures to adequately cooperate with its investigations.

The appendix of the CPSD-SDG&E Settlement Agreement also references the documents comprising SDG&E's testimony in the proceedings. Regarding the Witch fire, SDG&E alleged that its facilities and practices were in compliance with General Order 95. Regarding the Rice fire, SDG&E alleged that its vegetation management practices were in compliance with General Order 95 and Public Resources Code § 4293. Regarding the Guejito fire, SDG&E alleged that it maintained proper clearances, consistent with Public Utilities Code § 451 and General Order 95. SDG&E also alleged that it cooperated with CPSD's investigation of all three fires.

⁹ Tree trimming.

In the Agreement, CPSD and SDG&E have stipulated to enter all of their prepared testimony into the record solely to form the basis of factual support for the CPSD-SDG&E Settlement Agreement.

CPSD and Cox assert that they have engaged in extensive discovery, and have both prepared and served lengthy testimony and supporting exhibits in substantiation of their litigation positions. CPSD and Cox have identified this testimony in the appendix to the CPSD-Cox Settlement Agreement, and request that this testimony be included in the proceeding record for the limited purpose of providing a basis for considering whether the CPSD-Cox Settlement satisfies the requirements of Rule 12.1 of the Commission's Rules of Practice and Procedure (Rules).

In order to fully substantiate the extensive records in I.08-11-006 and I.08-11-007, we marked for identification 27 exhibits of testimony and supporting documentation.¹⁰ With today's decision, we receive the 27 exhibits into the formal records of these proceedings.¹¹

5. Discussion of Proposed Settlement Agreements

Pursuant to Rule 12.1 of the Commission's Rules, Commission settlements must be reasonable in light of the record, consistent with the law, and in the public interest.

¹⁰ Attachment III to this decision lists the exhibit numbers, sponsoring parties, descriptions, and the dates the exhibits were identified and included in the formal record.

¹¹ Exhibits 1-WR through 6-WR become part of the formal record of the Witch/Rice Fire Investigation, I.08-11-006, and Exhibits 1-G through 21-G become part of the formal record of the Guejito Fire Investigation, I.08-11-007.

5.1. Reasonableness in Light of the Whole Record

The settling parties represent that the thorough factual record developed in the OIIs provides an ample basis for review and approval of the proposed Settlement Agreements.

In the CPSD-SDG&E Settlement Agreement, SDG&E provided a statement of apology regarding lack of cooperation and has taken on significant remedial measure commitments to address public safety issues raised in the OIIs. SDG&E has also agreed to make a substantial payment of shareholder funds to the General Fund of the State of California. CPSD and SDG&E represent that their Agreement was carefully and extensively negotiated as a package, and they believe that the record or the circumstances of this case individually support each of the items. They maintain that the CPSD-SDG&E Agreement is closely based on the record developed by the parties, and is reasonable because it effectively addresses the specific issues raised by the evidentiary record.

CPSD and Cox contend that the increased inspection and maintenance measures provided for by their proposed accord are consistent with the Commission's goal of enhancing fire safety, and exceed in certain significant respects the requirements mandated of other CIPs under applicable Commission rules. CPSD and Cox submit that their Agreement not only reduces the time, expense, and risk of litigation, but also conserves scarce Commission resources.

We find that both Settlement Agreements resolve the issues in the proceeding in a manner that reflects a reasonable compromise among the litigation positions taken by the settling parties in their testimony. Thus, we conclude that the settlements are reasonable in light of the whole record.

5.2. Consistent with the Law

CPSD and SDG&E assert that their accord resolves the Witch/Rice and Guejito OIIs, and agree that it is consistent with State and Federal law. They are unaware of any conflicts in this regard.

CPSD and SDG&E submit that while the Commission does not have an extensive record of comparable enforcement cases relating to electric utilities, they have looked to previous Commission settlements and decisions for guidance, and noted three applicable decisions.¹² The decisions involved settlement agreements in electric utility investigations with remedial measures undertaken, shareholder payments into the General Fund of the State of California, and vegetation management inspection and compliance protocols. CPSD and SDG&E claimed that to the best of their knowledge, the provisions of the proposed Settlement Agreement are not inconsistent with any orders or requirements in any of these decisions, or any other Commission decisions.

CPSD and Cox also represent that nothing in their Agreement contravenes any statute, Commission decision, or rule.

We concur that the settlement agreements are the product of good faith negotiations, compromise, and do not conflict with State and Federal law. Therefore, we conclude that both settlement agreements are consistent with the law.

5.3. In the Public Interest

CPSD and SDG&E contend that the proposed Settlement Agreement provides significant and direct benefits to SDG&E's customers. The accord requires SDG&E to make payments totaling \$14, 750,000. Additionally, a

¹² D.06-02-003, D.99-07-029, and D.04-04-065.

number of remedial measures will provide going forward benefits in the form of system fire-prevention improvements and additional training to employees and agents in a variety of related areas. SDG&E will also conduct further training regarding the Accident Reporting Requirements. Finally, the settling parties note that SDG&E has issued a statement of apology for falling short in meeting its obligation and duty regarding cooperation with CPSD investigations into the Witch/Rice and Guejito fires.

CPSD and Cox maintain that their Agreement reflects a reasonable compromise between their positions and will avoid the time, expense, and uncertainty of evidentiary hearings and further litigation. It will also facilitate the implementation of additional enhanced inspection, maintenance, documentation, record keeping and reporting by Cox, on a more expedited schedule than would have been possible in the absence of the Settlement Agreement.

We concur with both settling parties' assertion that the proposed agreements provide numerous public interest benefits, and conclude that the proposed settlements are fully in the public interest.

We further concur that these proposed agreements address the alleged violations at issue in the Witch/Rice and Guejito Fire Investigations. Therefore, we approve and adopt both settlement agreements

6. Comments on Proposed Decision

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Section 311(g)(2) of the Public Utilities Code and Rule 14.6 (c)(2) of the Commission's Rules of Practice and Procedure, the otherwise applicable 30-day period for public review and comment is waived.

7. Assignment of Proceeding

Timothy Alan Simon is the assigned Commissioner and Jacqueline A. Reed is the assigned ALJ in this proceeding.

Findings of Fact

1. The settlement agreements resolve all pending issues outlined in the respective assigned Commissioner's Rulings and Scoping Memos that relate to the Witch/ Rice and Guejito Fire OIIs.
2. No party filed in opposition to the proposed settlement agreements.
3. The settlement agreements are the product of good faith negotiations between the parties.
4. Exhibits 1-WR through 6-WR are the testimonies and supporting documents of the Witch/Rice Fire Investigation.
5. Exhibits 1-G through 21-G are the testimonies and supporting documents of the Guejito Fire Investigation.
6. In accordance with the settlement agreement, SDG&E will pay \$14,350,000 to the General Fund of the State of California.
7. Under the settlement agreement, SDG&E will reimburse CPSD up to an additional \$400,000 in order to implement a computer work module, and will remit any unused balance of this sum to the General Fund of the State of California.
8. In accordance with the CPSD-Cox settlement agreement, Cox will pay \$2,000,000 to the General Fund of the State of California.

Conclusions of Law

1. The settlement agreements are reasonable in light of the whole record.
2. The settlement agreements are consistent with the law.

3. The settlement agreements are in the public interest because they provide significant and direct benefits to customers and the overall public.

4. To fully substantiate the extensive records in the Witch/Rice and Guejito Fire Investigations, the testimony and supporting documents should become part of the formal records of these proceedings.

5. The SDG&E-CPSD and Cox-CPSD agreements should be approved and adopted immediately so that the terms and conditions of the agreements can be promptly implemented.

O R D E R

IT IS ORDERED that:

1. The Joint Motion of the Consumer Protection and Safety Division and San Diego Gas & Electric Company for approval and adoption of the Settlement Agreement in Investigation (I.) 08-11-006 and I.08-11-007, appended to this decision as Attachment I, is granted.

2. The Joint Motion of the Consumer Protection and Safety Division and CoxCom, Inc. and Cox California Telcom, LLC for approval and adoption of the Settlement Agreement in Investigation 08-11-007, appended to this decision as Attachment II, is granted.

3. The 27 exhibits identified in Attachment III to this decision as Exhibits 1-WR through 6-WR in Investigation 08-11-006, and Exhibits 1-G through 21-G in Investigation 08-11-007 are received as part of the formal records of the respective proceedings.

4. In accordance with Paragraph 8 of the Consumer Protection and Safety Division and San Diego Gas & Electric Company Settlement Agreement, within

60 days of the issuance of this decision, San Diego Gas & Electric Company shall pay \$14,350,000 to the General Fund of the State of California.

5. Within 10 days of the remittal of payment, San Diego Gas & Electric Company shall provide photocopies of the settlement check to the Consumer Protection and Safety Division.

6. In accordance with Paragraph 8 of the Consumer Protection and Safety Division and San Diego Gas & Electric Company Settlement Agreement, San Diego Gas & Electric Company shall reimburse the Consumer Protection and Safety Division up to an additional \$400,000 in order to implement a computer work module designed to assist the Consumer Protection and Safety Division in future audits and investigations of utility safety hazards and incidents.

7. San Diego Gas & Electric Company shall remit any unused portion of the \$400,000 described in Ordering Paragraph 6 to the General Fund of the State of California within 60 days of being so directed by the Consumer Protection and Safety Division.

8. In accordance with Section 2.5 of the Consumer Protection and Safety Division and CoxCom, Inc. and Cox California Telcom, LLC Settlement Agreement, within 60 days of the issuance of a final non-appealable decision, CoxCom, Inc. and Cox California Telcom, LLC shall make a settlement payment of \$2,000,000 to the General Fund of the State of California

9. Investigation (I.) 08-11-006 and I.08-11-007 are closed.

This order is effective today.

Dated April 22, 2010, at Los Angeles, California.

MICHAEL R. PEEVEY

President

DIAN M. GRUENEICH

JOHN A. BOHN

TIMOTHY ALAN SIMON

NANCY E. RYAN

Commissioners

ATTACHMENTS I thru III

EXHIBIT 9

ACA 11 - 0500

EXHIBIT 9

ACA 11 - 0501

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Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CITIZENS OVERSIGHT, INC., a
Delaware non-profit corporation;
RUTH HENRICKS, an individual;
NICOLE MURRAY RAMIREZ, an
individual; NIEL LYNCH, an
individual; HUGH MOORE, an
individual; DAVID KEELER; an
individual; FRANCIS KARL
HOLTZMAN, an individual; ROGER
JOHNSON, an individual; on behalf
of themselves and a class of others
similarly situated,

Plaintiffs,

v.

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

Defendants.

Case No. **'14CV2703 CAB NLS**

**COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF***

TABLE OF CONTENTS

NATURE OF THE ACTION	1
NEW STEAM GENERATORS FAILED IN ONE YEAR (39 YEARS TOO SOON)	4
JURISDICTION AND VENUE	6
THE PARTIES	6
PLAINTIFFS	6
CLASS ALLEGATIONS	8
DEFENDANTS	9
PRIVATE PROPERTY TAKEN	10
PLAN TO VIOLATE CUSTOMERS' 5 th AMENDMENT JUST COMPENSATION RIGHTS	15
THE CPUC'S RELATIONSHIP WITH UTILITIES	16
THE PG&E SCANDAL	17
SAN ONOFRE PROCEEDINGS MANUEVERING	20
CLAIMS FOR RELIEF	23
FIRST CLAIM FOR RELIEF	23
(Declaration of Taking Without Just Compensation and Injunction Thereon) Against CPUC, SCE	
PRAYER FOR RELIEF	25

1 Plaintiffs are customers (“customers” or “Customers”) of Southern California
 2 Edison Company (SCE) and San Diego Gas & Electric (SDG&E). They seek an
 3 order declaring the California Public Utilities Commission (CPUC), two of its
 4 controlling commissioners, Michel Florio and Michael Peevey, and SCE are taking
 5 plaintiffs’ property through monthly bills for electricity from the San Onofre
 6 Nuclear Power Plant (San Onofre) without just compensation because SCE has not
 7 distributed electricity from San Onofre to plaintiffs’ homes, businesses, and entities
 8 since January 2012. Plaintiffs seek an injunction requiring the CPUC and SCE to
 9 cause restitution to be made to the 17,400,000 utility customers whose property has
 10 been so taken without just compensation as required under the Fifth Amendment to
 11 the United States Constitution.

12 **NATURE OF THE ACTION**

13
 14 1. The case arises out of a failed project to install four new steam
 15 generators at San Onofre in North County, San Diego. The project failed.

16 2. Plaintiffs invoke the Court’s Article III jurisdiction to stop the CPUC
 17 and SCE from continuing to take the private property of customers without just
 18 compensation in violation of the Fifth Amendment to the United States
 19 Constitution. Since January 2012, the CPUC and SCE have forced SDG&E and
 20 SCE’s 17,400,000 customers to pay more than \$700,000,000 for the failed steam
 21 generator project and \$3,000,000,000 (\$3 billion) or more for the idle power plant.

22 3. By making customers pay for the failed steam generators and shuttered
 23 plant, the CPUC and SCE are taking customers’ private property without just
 24 compensation. Defendants are forcing charges on plaintiffs for the failed steam
 25 generator project and the defunct plant. The billing to Plaintiffs continued, even
 26 after the generators are cold and the plant is closed, and not used or useful. The
 27
 28

1 taking without just compensation started in January 2012, the month the generators
2 died and the plant stopped producing electricity.

3 4. The only way the CPUC could force customers to pay for the failed
4 generators and closed plant would be with a showing under Cal. Pub. Util. Code §
5 451 that SCE acted reasonably in obtaining the generators. SCE and the CPUC did
6 not attempt to make such a showing for good reason: Substantial evidence exists to
7 show SCE did not act reasonably when it obtained and deployed the steam
8 generators. For example, SCE obtained and deployed the new steam generators
9 without a safety license amendment from the Nuclear Regulatory Commission
10 (NRC). Two engineers who worked on the steam generator project, Buguslaw
11 Olech (SCE) and Tomoyuki Inoue of Mitsubishi Heavy Industries (MHI), admitted
12 avoiding of a safety license amendment was an SCE directive.

13 5. SCE adopted a design for the new steam generators that was materially
14 different from the old steam generators. The new design had significant design
15 safety implications. The steam in the newly designed generators ran with a higher
16 void fraction. Void fraction is a measurement of the dryness of steam circulating
17 around the tubes in the steam generator. The higher the void fraction, the lower the
18 damping effect of the moisture in the steam. Damping contributes to preventing
19 tube vibration.

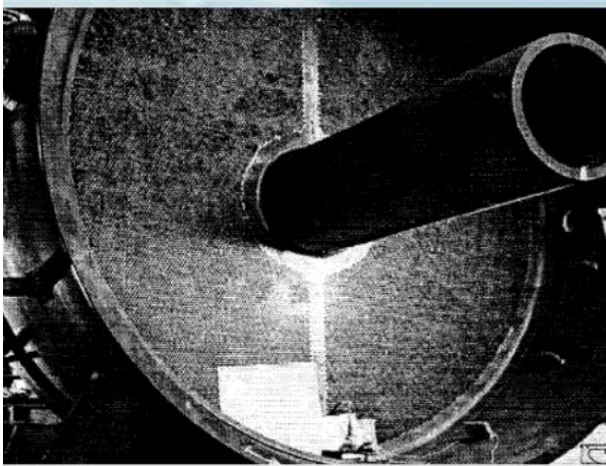
20 6. MHI has admitted that the new steam generators produce higher void
21 fraction. They also admitted that the Anti-Vibration Bar design team eschewed
22 changes to address the problem in order to avoid an NRC review under 15 U.S.C. §
23 50.90. Under the new design, SCE added 4% more center tubes which increased
24 the void fraction in the “U-bend” region of the generators. Hot steam at the U-bend
25 region was a substantial factor in causing the new steam generators to fail.

26 7. In January 2012, the same month the steam generators failed, the two
27 engineers published an article in *Nuclear Engineering International* with a diagram
28

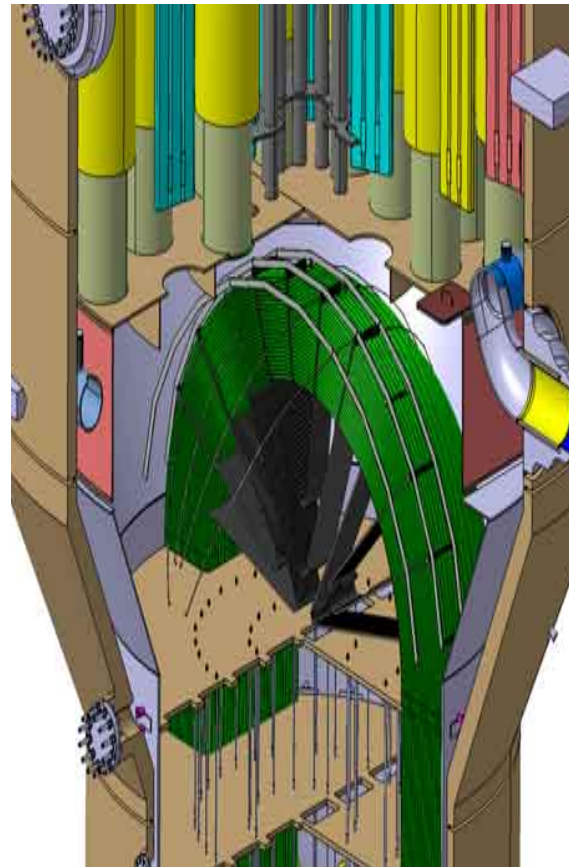
of the new steam generators showing substantial changes from the old steam generators, with significant safety implications. The *sine qua non* criteria for obtaining a safety license permit under 15 U.S.C. § 50.59 are changes affecting safety.

8. The new design adopted for the new steam generators was materially different from the old steam generators. The new version raised serious safety issues which went unresolved, and eventually caused the generators to fail. The stay cylinders were removed, the “egg crate” protection was eliminated, while 4% more tubes at the center the new steam generators were added:

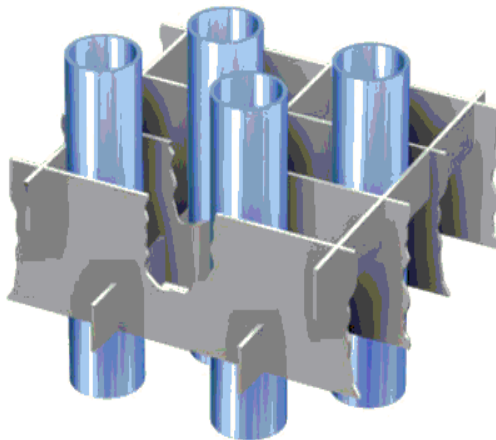
STAY CYLINDERS WERE ELIMINATED



4% MORE TUBES ADDED AT THE CENTER

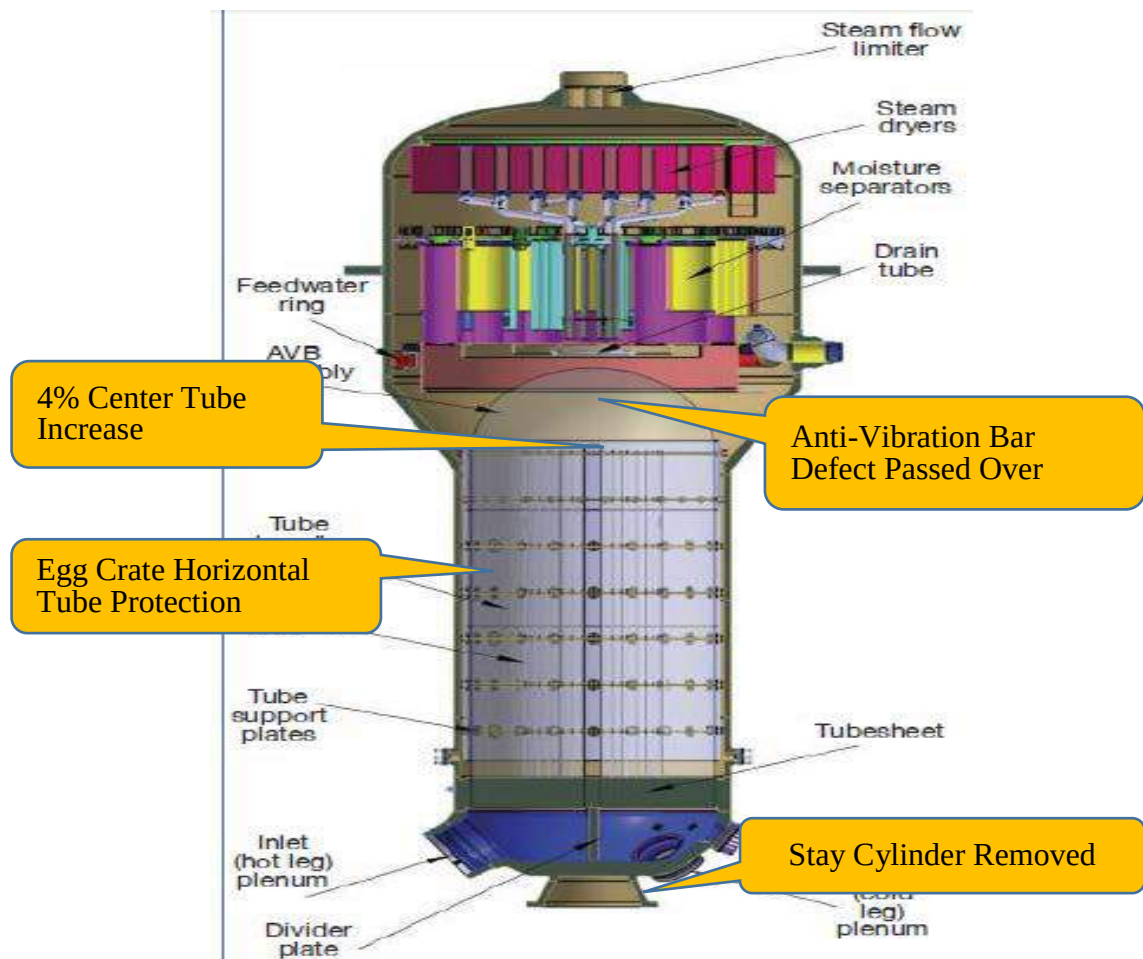


NO EGG CRATE TUBE PROTECTORS WERE INSTALLED



9. The two engineers who worked on the steam generator project, SCE's Olech and MHI's Inoue, provided a diagram of the newly designed steam generators, shown below¹:

**NEW STEAM GENERATORS
FAILED IN ONE YEAR (39 YEARS TOO SOON)**



10. SCE has admitted there were design errors that caused the steam generators to fail, but blamed them on the generators' manufacturer, MHI. An MHI report found that the design errors that crippled the generators and ended the plant were discovered but not removed in order to avoid NRC safety licensing. In short,

¹ The diagram depicted here was provided by SCE and MHI and does not depict all changes made. The heading and captioned comments have been added by Plaintiffs.

1 there was a substantial basis for finding utility customers could not be charged for
2 the generators and the plant because to do so would amount to imposing unjust and
3 unreasonable rates in violation of California Public Util. Code § 451.

4 11. The CPUC, under Commissioners Peevey and Florio, denied
5 customers a hearing on the issue of whether collection of plaintiffs' private property
6 through monthly utility bills should stop because SCE acted unreasonably in
7 obtaining and deploying the defective steam generators rendered useless, along with
8 the plant, in January 2012.

9 12. "It is clear that somewhere along the line [the new steam generators]
10 went from conceptual design to detailed design to fabrication to testing to
11 installation to operation, one or more errors was made,²" according to the CPUC's
12 own expert consultant, Robert J. Budnitz, Ph.D. SCE evaded—and the CPUC
13 refused to follow—the plan Dr. Budnitz provided for getting at the truth. The
14 CPUC obstructed the investigation and did not permit Dr. Budnitz to complete the
15 work plan under his CPUC contract in which he proposed to determine: (1) What
16 error(s) led to the San Onofre SGs tube failure(s)?; (2) At what stage were those
17 errors made?; (3) Who made those errors; (4) What might have been done, and by
18 whom, and at what stage, to have averted those errors?; (5) What arrangements in
19 place elsewhere, technical or administrative or both, that were successful in
20 averting these errors somehow didn't work adequately for the SONGS RSGs?

21 13. Mr. Peevey as CPUC President and Mr. Florio as the Commissioner
22 assigned to the new generator proceedings have worked to thwart any investigation
23 or determination of whether SCE was responsible for the failure and outage. In
24 June 2012 through October 2012, Mr. Florio and Mr. Peevey kept a CPUC review
25 of SCE's of the failed steam generator project off the CPUC public agenda. In
26 January 2013, Peevey and Florio issued CPUC orders stalling a review of the issue
27

28 ² Underline appears in original.

1 to some remote and indeterminate date. In April 2014, Florio and Peevey caused the
 2 CPUC to permanently stay any review into whether SCE or customers should pay
 3 for the defective steam generators.

4 14. In this action, plaintiffs assert their rights under the Fifth Amendment
 5 of the United States to be free of the CPUC's and SCE's taking of the private
 6 property of customers in the form of monthly bills for the costs of the idle
 7 generators and plant. Plaintiffs bring this action on behalf of themselves and the
 8 17,400,000 customers who are similarly situated.

9 **JURISDICTION AND VENUE**

10
 11 15. The Court has jurisdiction over this action pursuant to 28 U.S.C. §§
 12 1331, 1337 and 1343; and 28 U.S.C. §§ 2201 and 2202.

13 16. The parties acknowledge jurisdiction. (*S. Cal. Edison Co. v. Lynch*,
 14 307 F. 3d 794 (9th Cir. 2002). (Exhibit 1)

15 17. Venue is proper in the Southern District of California pursuant to 28
 16 U.S.C. § 1391.

17 **THE PARTIES**

18 **PLAINTIFFS**

19 18. Plaintiff Citizens Oversight, Inc. is a Delaware non-profit corporation.
 20 Defendants SCE and the CPUC have and are taking Citizen Oversight's and its
 21 Southern California members' property without just compensation in the form of
 22 payments on monthly bills to pay for the 4 new defective steam generators at San
 23 Onofre.

24 19. Plaintiff Ruth Henricks is a resident of the City and County of San
 25 Diego, California. Defendants SCE and the CPUC have and are taking Ms.
 26 Henricks' property without just compensation in the form of payments on monthly
 27 bills to pay for the 4 new defective steam generators at San Onofre.
 28

1 20. Plaintiff Nicole Murray Ramirez is a resident of the County of San
2 Diego, State of California. Defendants SCE and the CPUC have and are taking
3 Nicole Murray Ramirez' property without just compensation in the form of
4 payments on monthly bills to pay for the 4 new defective steam generators at San
5 Onofre.

6 21. Plaintiff Niel Lynch is a resident of the County of San Diego, State of
7 California. Defendants SCE and the CPUC have and are taking Mr. Lynch's
8 property without just compensation in the form of payments on monthly bills to pay
9 for the 4 new defective steam generators at San Onofre.

10 22. Plaintiff Hugh Moore is a resident of the City and County of San
11 Diego, California. Defendants SCE and the CPUC have and are taking Mr. Moore's
12 property without just compensation in the form of payments on monthly bills to pay
13 for the 4 new defective steam generators at San Onofre.

14 23. Plaintiff David Keeler is currently a resident of the City Westminster,
15 County of Orange, California and previously a resident of the City of Santee,
16 County of San Diego. Defendants SCE and the CPUC have and are taking Mr.
17 Keeler's property without just compensation in the form of payments on monthly
18 bills to pay for the 4 new defective steam generators at San Onofre.

19 24. Plaintiff Francis Karl (Joe) Holtzman is currently a resident of the City
20 of Mission Viejo, County of Orange, California. Defendants SCE and the CPUC
21 have and are taking Mr. Holtzman's property without just compensation in the form
22 of payments on monthly bills to pay for the 4 new defective steam generators at San
23 Onofre.

24 25. Plaintiff Roger Johnson is currently a resident of the City of San
25 Clemente, County of Orange, California. Defendants SCE and the CPUC have and
26 are taking Mr. Johnson's property without just compensation in the form of
27
28

1 payments on monthly bills to pay for the 4 new defective steam generators at San
2 Onofre.

3 26. Plaintiffs bring this action on behalf of themselves and 17,400,000
4 similarly situated customers whose private property is the subject of CPUC's and
5 SCE's taking without just compensation in the form of bills for the closed plant and
6 failed steam generators rendered useless since January 2012.

7 **CLASS ALLEGATIONS**

8
9 27. Plaintiffs bring this action under Federal Rule of Civil Procedure Rule
10 23, on behalf of all persons or entities who, after January 2012 were charged for the
11 costs of the failed generator project at San Onofre and for the cost of the nuclear
12 plant after it was idled by the failure of the steam generators.

13 28. The requirements of Rule 23(a) are satisfied. There are over
14 17,400,000 customers that are members of the class. The class members are so
15 numerous that joinder of all members is impracticable.

16 29. The class members at this time can only be ascertained from books and
17 records maintained by Defendant SCE or its agents.

18 30. Common questions of law and fact exist as to all class members. These
19 questions predominate over any questions unique to any individual member and
20 include, without limitation:

- 21 • Whether the CPUC and SCE had any legal basis to take class member
- 22 plaintiffs' private property without just compensation in the form of forced
- 23 charges for the useless steam generators and the idled San Onofre plant;
- 24 • Whether the CPUC and SCE appropriated class member plaintiffs' property
- 25 without just compensation in violation of the United States Constitution;
- 26
- 27
- 28

- Whether the CPUC and SCE illegally exacted class member plaintiffs' property by forcing class members to pay for the defective generators and closed plant.

31. Plaintiffs' claims are typical of those of other class members. The CPUC and SCE's actions alleged herein have impacted class members equally because such actions have been directed at obtaining the private property of SCE and SDG&E's customers without just compensation to pay for the discarded steam generators and the inactive power plant at San Onofre. Accordingly, Plaintiffs' claims against the CPUC and SCE are based on the conduct alleged herein and are identical to the claims of other class members.

32. Plaintiffs will fairly and adequately protect the interests of class members. Plaintiffs have a long history of advocating for the utility customers in Southern California.

33. Plaintiffs are committed to prosecuting this action to a final resolution and, in furtherance thereof, have retained experienced and competent class counsel.

34. Plaintiffs seek class certification under Rule 23(b)(3) because as described above, common questions of fact and law predominate over any individual issues and a class action is superior to other methods of adjudicating the controversy.

DEFENDANTS

35. Defendant California Public Utilities Commission (CPUC) is a regulatory agency that is charged under California law with the legal duty of ensuring public utilities, like SCE, charge its customers only just and reasonable electricity rates under Cal Pub Util. Code § 451.

36. Defendant Michael Peevey is a former SCE executive who serves as CPUC President. Mr. Peevey was the CPUC Commissioner who authored the

1 CPUC decision in December 2005 allowing SCE to purchase the 4 new steam
2 generators. He is sued in his official capacity only.

3 37. Defendant Michel Florio serves as a Commissioner of the CPUC.
4 Florio acts as the assigned Commissioner for matters involving the 4 new steam
5 generators and the San Onofre power plant. He is sued in his official capacity only.

6 38. Defendant Southern California Edison Company (SCE) was
7 incorporated in the State of California on 6 July 1909. SCE is located at 2244
8 Walnut Grove Avenue, Rosemead, California. SCE charges ratepayers for the San
9 Onofre Nuclear power station and the 4 new steam generators identified in this
10 operative complaint in the Counties of San Diego, Orange, Los Angeles, Ventura,
11 Mono, Inyo, Tulare, Imperial, Los Angeles, Riverside, and Ventura.

12 39. Interested Party San Diego Gas & Electric (SDGE) is a partial owner
13 of the San Onofre power plant. SDG&E is not named as a party in this action.
14 SDG&E opposed the SCE's plan to buy 4 new steam generators to replace the 4 old
15 steam generators at San Onofre. SDG&E opposed SCE's plan for replacing the old
16 steam generators with 4 new ones because SCE had historically been unable "to
17 reliably forecast its SONGS capital budget." SDG&E noted in January 2000 that
18 SCE forecasted its capital additions for 2004 at \$37 million, whereas actual
19 additions were \$143 million. SCE's first capital additions forecasts for 2005 and
20 2006 were \$50 million and \$80 million respectively. SCE's most recent forecasts
21 are \$114 million for each of these two years.

22 **PRIVATE PROPERTY TAKEN**

23
24 40. After the 4 new steam generators failed and the San Onofre plant was
25 rendered useless in January 2012, the CPUC and SCE made Plaintiffs pay the costs.
26 SCE had not obtained final CPUC authority to put the steam generator costs into
27 rates, as the 2005 Decision allowing SCE to proceed provisionally required.
28

41. Having failed, SCE could not show the steam generators would be used or useful in producing electricity for customers, and therefore, its costs could not be put into rates. Under the direction of Peevey, the CPUC allowed SCE to impose the failed plant and generators' costs on customers without legal authority. The CPUC and SCE, without legal authority, forced customers to pay those costs; in so doing, defendants took the customers' private property without just compensation.

42. Under Commissioner Peevey, the CPUC allowed SCE to increase the amounts charged customers as follows:

Date	Advice Letter	Purpose
12/31/12	2834-E	2013 revenue requirement for replacement of Unit 2 and Unit 3: \$130.766 M
12/31/12	2834-E	2013 forecast for Unit 2 and Unit 3 of removal and disposal costs: \$17.924 M

43. When the plant closed after the generators failed, the CPUC was required to remove the costs of the plant from SCE's rate base and to relieve customers of the burden of paying the costs since the plant was not used or useful in producing electricity for customers. Under the direction of Commissioners Peevey and Florio, the CPUC failed to remove the San Onofre plant from SCE's rate base and to relieve customers of the burden of its costs. Since January 2012, the CPUC and SCE have taken approximately \$1 billion per year of the private property of Southern California ratepayers without just compensation to pay for the idle San Onofre power plant.

44. The CPUC has refused and failed to enforce the December 2005 Decision requirement that SCE file an Application for CPUC authority to put the new steam generator costs in rates. Specifically, in the December 2005 authorizing

1 Decision, SCE was required to file an Application with the CPUC to request
2 authority to put the new steam generator costs in rates in August 2011—**six months**
3 **after the plant was returned to commercial service.**

4 45. The CPUC has never duly authorized the costs of San Onofre's 4 new
5 steam generators to be imposed permanently in plaintiffs' rates, even though the
6 plant costs were required to be taken out of rates after the generator failure in
7 January 2012. Yet, SCE and the CPUC have taken over \$3 billion of customers'
8 private property to pay for the cost of the idle plant in violation of the Fifth
9 Amendment to the United States Constitution.

10 46. Mr. Peevey was also the CPUC commissioner who authored the
11 December 2005 decision allowing SCE to proceed with the new steam generators at
12 San Onofre. Mr. Peevey broke with normal rate-base setting practice and allowed
13 SCE to provisionally place the costs of the steam generators into rates. Normally,
14 new construction like the new steam generator project at San Onofre had to be
15 shown to be "used and useful" in producing electricity before the costs could be put
16 into rates.

17 47. Whether San Onofre's plant construction and new steam generators
18 can be included in the rate base depends on whether it satisfies the "Used and
19 Useful" test. Under this test, only the costs of plants that are actually used and
20 useful to the **utility** in providing service are included in the **rate base**. The Used
21 and Useful test excludes plants that are not yet providing service from the **rate**
22 **base**. It also requires the removal of undepreciated capital costs from the rate base
23 where plants are no longer used due to obsolescence.

24 48. However, the decision Mr. Peevey authored in December 2005
25 allowed SCE to charge plaintiffs for the new steam generators. These charges were
26 conditioned on SCE returning to the CPUC with an application to permanently
27 place the costs in rates:
28

- 1 • SCE may include the revenue requirement for steam generator
2 replacement for each unit in rates on January 1 of the year following
3 commercial operation of each unit. Implementation shall be by advice
4 letter.
- 5 • SCE may include the revenue requirement for removal and disposal of the
6 original steam generators for each unit in rates on January 1 of the year
7 following completion of the removal and disposal of the original steam
8 generators for each unit. Implementation shall be by advice letter.
- 9 • After completion of the SGRP, SCE will be required to file an application
10 for inclusion of the costs thereof permanently in rates, regardless of
11 whether the costs exceed \$680 million. If a reasonableness review is
12 performed, it will be done in connection with the application.

13 49. The Peevey 2005 Decision was written to give the *appearance* that
14 SCE would still be required to demonstrate it acted reasonably in obtaining and
15 deploying the steam generators, and if not, the costs would be disallowed.

16 50. SCE admitted “[t]he SONGS Unit 2 steam generator replacement was
17 completed on April 11, 2010” and “the SONGS Unit 3 generators replacement was
18 completed on February 18, 2011.” SCE reported to its investors in its *2010 SEC*
19 *10-K Report* that the generator replacement was completed by February 2011:

20 **SCE completed the replacement of the steam generators at San**
21 **Onofre Unit 2 and Unit 3 in April 2010 and February 2011,**
22 **respectively.”**

23 51. SCE did not file the application in rates in August 2011, as provided
24 for in the December 2005 Decision authorizing SCE to proceed. Instead, on 13
25 April 2011, SCE sent a letter telling the CPUC Executive Director that SCE would
26 postpone filing until the “second quarter of 2012” its application for authority to
27 permanently include in rates the capital costs incurred in the procurement, the
28 installation costs of the steam generator project, and the related removal and
disposal costs.

52. In its letter to the CPUC Executive Director, SCE acknowledged the
CPUC Decision authorizing SCE to proceed with the steam generator project,

provided upon completion, SEC “shall be required to file an application for inclusion of the SGRP [Steam Generator Replacement Program] costs permanently in rates.” SCE also admitted in its 13 April 2011 letter: “The replacement of the steam generators in Units 2 and 3 at SONGS has now been completed. The units returned to commercial operation in April 11, 2010 and February 18, 2011.”

53. The San Onofre power plant has not been used or useful since January 2012. However, the CPUC has continued to charge plaintiffs for its costs without allowing them to participate in a hearing on whether San Onofre should be removed from rates, and the funds returned to plaintiffs.

54. In June 2012, SCE was required to, but did not, file an application to include in rates the costs of the replacement steam generator project. San Onofre was no longer used or useful because the steam generators failed due to defects, and put San Onofre permanently out of service as of June 2014. As of the filing of this complaint, the CPUC has allowed and duly authorized SCE to charge plaintiffs for the failed steam generator project and the damage it caused.

55. SCE used the Advice Letter procedure to place into rates the costs of the new steam generators, but never obtained CPUC authority to place the steam generators in rates permanently.

56. SCE began charging ratepayers for the steam generators that failed one year into the 40-year life cycle SCE claimed for them:

Date	Advice Letter	Purpose
12/28/05	1951-E	2006 annual revenue requirement of \$3.03 M
11/30/06	2067-E	2007 annual revenue requirement of \$3.18 M
11/30/07	2187-E	2008 annual revenue requirement of \$3.60 M
11/24/08	2292-E	2009 annual revenue requirement of \$3.78 M
11/16/09	2402-E	2010 annual revenue requirement of \$3.84 M
11/10/10	2521-E	2011 Revenue requirement of \$56.694 million
11/22/10	2529-E	2011 \$4.06 M (Removal)
12/27/11	2648-EA	2012 revenue requirement for replacement of Units 2 and 3 of \$115.239 M

**PLAN TO VIOLATE CUSTOMERS’
5th AMENDMENT JUST COMPENSATION RIGHTS**

58. Commissioners Peevey and Florio, working with SCE, developed and executed a plan to allow SCE to take its customers’ private property without just compensation in the form of bills SCE sent directly and indirectly for San Onofre plant and generator costs after January 2012. This taking was in violation of customers’ just compensation rights. Customers had to pay the costs the CPUC and SCE imposed, even though the generators and plant produced no electricity. If the customers did not pay, electricity to their homes and businesses would have been shut off.

59. Under defendants’ plan, SCE was to be relieved of having to show: (1) why the defective replacement steam generators’ costs should be placed permanently in rates; (2) whether SCE acted reasonably in obtaining and deploying the defective steam generators; (3) if it is just and reasonable to impose the damage SCE caused on ratepayers pursuant to Pub. Util. Code § 451; and (4) whether to remove all costs related to the San Onofre plant from SCE and SDG&E’s rates.

60. In order to take customer funds under Pub. Util. Code § 451 for the steam generator project, SCE was required to show it acted reasonably in obtaining and deploying the steam generators. The CPUC did not require SCE to answer this basic question. Florio, Peevey and SCE worked together to create a public appearance that SCE would be required to answer, but in fact, the plan was to allow SCE to evade providing answers. The CPUC and SCE did this because they knew SCE could not make a showing of reasonableness after the steam generators failed. Customers cannot be made to pay because SCE did not provide any answer to the question of whether it acted reasonably in obtaining and deploying the steam generators.

61. In denying ratepayers the opportunity to notice and a reasonable hearing, the CPUC denied the most fundamental precepts of due process rights

1 guaranteed under the U.S. Constitution. The CPUC, under direction of
 2 Commissioners Florio and Peevey, violated 17,400,000 customers' right to just
 3 compensation for the taking of their private property rights.

4 62. Under the direction of Commissioners Peevey and Florio, the CPUC
 5 became intertwined with SCE's goal of avoiding a review of its conduct in
 6 obtaining and deploying the new steam generators. The CPUC failed its fiduciary
 7 duty to protect customers and instead, forced them to give up their private property
 8 to SCE without just compensation.

9 **THE CPUC'S RELATIONSHIP WITH UTILITIES**

10 63. In this case, Commissioners Florio and Peevey used their command
 11 and control to deny any hearing on whether SCE acted reasonably to determine
 12 whether the costs of the failed steam generator project and the resulting closed plant
 13 could be imposed on ratepayers as just and reasonable rates. As alleged, they
 14 postponed putting the issue on the calendar for months, announcing in October
 15 2012 a hearing would be held.

16 64. They again postponed the hearing in January 2013, and blocked the
 17 hearing again in April 2014. No hearing was ever held. In the meantime, the
 18 CPUC through its ORA (Office of Ratepayer Advocate) concocted a plan to forever
 19 end any hearing on the issue by claiming a phantom "refund" agreement had been
 20 reached. SCE admits in public documents the "refund" will have no material effect
 21 on their income.

22 65. Facts were revealed in another major CPUC case that illustrate the
 23 breakdown in the CPUC system and its failure to provide due process to the public.
 24 The plausibility of plaintiffs' claim of collusion between the CPUC Commissioners
 25 Florio and Peevey, and SCE is illustrated by Peevey's and Florio's collusive actions
 26 in another recent case proceeding concurrently with San Onofre. (Exhibit 2)

27 ///
 28

THE PG&E SCANDAL

66. In December 2013, Pacific Gas & Electric (PG&E) filed its 2015 Gas Transmission and Storage rate case asking the CPUC to impose \$1,209, 000,000 in rates to maintain and modernize PG&E's pipelines. PG&E's request to the CPUC to take more money from ratepayers was a sensitive issue.

67. In May 2013, seven (7) months before PG&E's rate increase filing, CPUC staff proposed to order PG&E to pay \$2,250,000,000 in fines for failing to maintain its gas main in San Bruno, California. That failure resulted in a catastrophic explosion on 9 September 2010 that leveled the Bay Area neighborhood and killed eight people:



"The morning after the 2010 explosion in San Bruno, a PG&E utility inspector looks at the gas main that ruptured. (Don Bartletti / Los Angeles Times)"

68. PG&E officials wanted Commissioners Florio, Peevey and their staff to make sure PG&E's preferred Administrative Law Judge (ALJ) was appointed to hear PG&E's GTS rate increase case. On 14 January 2014, PG&E Vice President for Rates and Regulation, Brian K. Cherry, wrote to Peevey's Chief of Staff, "As long as ALJ Wong has the case (which Florio confirms), we are ok with what Mike (Peevey) wants to do on the assignment." Cherry asks Peevey's Chief of Staff,

Carol Brown, “Can you get it done ASAP please?” Cherry, Brown, Peevey and Florio are pictured here:



69. At 8:42 a.m. on 17 January 2014, PG&E Regulatory Manager, Eileen Cotroneo, emailed Brian K. Cherry: “The GTS Case assignment appeared on the daily calendar -Assigned to ALJ Long and Commissioner Peterman. I will issue a note to our team.” PG&E Vice President found this to be disturbing news. Thirty-seven (37) minutes after Ms. Controneo notified Cherry of Long’s appointment, Cherry emailed Peevey’s Chief of Staff Carol Brown: “Is this right? Judge Long? What happened to Wong?” ALJ John Wong is pictured here:



70. At 9:49 a.m., PG&E Cherry writes Peevey's Chief of Staff Brown: "Please, please check. This is a major problem for us. Florio said he would agree to help Peterman if Wong got it." Commissioner Peterman is pictured here:



71. PG&E Cherry then turns to Commissioner Peevey at 9:55 a.m. that same day, January 17, 2014: "This is a problem. Hope Carol can fix it." Then two hours later, Cherry again writes her, "There is a huge world of difference between Long and Wong. I'm not sure we could get someone worse. This is a very important case that is now in jeopardy."

72. A few hours later, Commissioner Florio joins the back-room wheeling and dealing and tells Cherry at 1:18 p.m.: "I'm horrified! He still has not produced a PD for Sempra's Psep/TCAP after much prodding and cajoling—we are considering asking that another ALJ be assigned to finish for him. Plus he may retire any day, and uses that as a threat to deflect any direction. Sepideh spoke to John Wong and he said he's just too overloaded, which we didn't know. John is a true workhorse so it must be true. If I were you I would bump him—you really can't do any worse! Even a brand new ALJ would at least work hard and try—you'll get neither from him ... Keep me posted and I'll do what I can on this end... Peevey referred to his Chief of Staff, Sepideh Khorsrowjah, contacting John Wong. She is pictured here:



Sepideh
Khosrowjah
Chief of Staff for
Florio

73. Ten days later on 27 January 2014, at 3:36 p.m., Peevey Chief of Staff Carol Brown sends a cryptic note with two names: “Wong and Petermen” -- the ALJ and Commissioner PG&E wanted assigned to its GTS case. In fact, *those two were assigned* those roles. Two minutes later at 3:38 p.m., PG&E’s Brian Cherry writes Carol Brown with profuse thanks: “Thank You, Thank You. Thank You.”

74. PGE has self-confessed that its conduct was wrongful. In the San Onofre case, a Public Records request has been made to the CPUC for emails and writings between SCE and the CPUC showing similar conduct, and a similar request to SCE, but both have stonewalled any production. (Exhibit 3)

SAN ONOFRE PROCEEDINGS MANUEVERING

75. SCE used its backdoor access to Commissioners Peevey and Florio to keep the question of whether SCE acted reasonably in connection with obtaining and deploying the new generators at San Onofre for at least five months.

76. On 21 June 2012, the CPUC was set to consider “Item 30,” which provided for the CPUC to look into the outages caused by San Onofre’s failed steam generators.

77. On 19 June 2012, SCE Senior VP for Regulatory Affairs, Lee Starck, sent a secret email to MP1@cpuc.ca.gov (Michael Peevey) with a letter dated 19

June 2012 urging the CPUC to “defer” consideration of the issues. Peevey and Florio honored SCE’s request by taking turns in arranging postponements. The Agenda Changes for the 21 June 2012 CPUC meeting provides “ITEM NO: 30, HELD TO: 8/2/12, HELD BY: Peevey, REASON: Further Review.”

78. On 2 August 2012, the CPUC Agenda listed as “Item 5” whether to investigate what caused SCE’s San Onofre power plant’s closure. The matter was again deferred, this time for Florio. The Agenda Changes for 2 August 2012, Item 5 provided: “ITEM NO: 5, HELD TO: 8/23/12, HELD BY: Florio, REASON: Further Review.”

79. The CPUC agendas for 23 August 2012, 13 September 2012, 27 September 2012, and 11 October 2012, did not have items for the San Onofre closing. The entire time Peevey and Florio were manipulating the CPUC agenda to postpone taking up the question of whether SCE acted reasonably in deploying the steam generators, customers were being charged as if the plant was fully operational. Customers were also charged for replacement power during this period.

80. In late October 2012, the CPUC announced it would look into the San Onofre plant’s closing, with a press release:



California Public Utilities Commission

505 Van Ness Ave., San Francisco

CPUC OPENS FORMAL INVESTIGATION INTO SAN ONOFRE OUTAGES

SAN FRANCISCO, October 25, 2012 - The California Public Utilities Commission (CPUC) today opened a formal investigation into the extended outages of Units 2 and 3 at the San Onofre Nuclear Generating Station (SONGS). The investigation will determine **whether to remove all costs related to SONGS from the rates of Southern California Edison (SCE) and San Diego Gas and Electric (SDG&E) going forward, and whether to refund SONGS-related costs already collected in rates back to January 1, 2012.**

1 81. Florio and Peevey attempted to create the false impression conveyed in
2 the press release that the CPUC was to look into whether SCE acted reasonably in
3 obtaining and deploying the steam generators. A prehearing conference (PHC) was
4 held in San Francisco and presided over by Florio. At the PHC, Florio made
5 definitive statements that a review of whether SCE acted reasonably in obtaining
6 and deploying the steam generators was being postponed. Again, by forcing
7 ratepayers to pay for the steam generators and closed plant, the CPUC was
8 customers of their private property without just compensation.

9 82. On 28 January 2013, under Florio and Peevey's direction, the CPUC
10 issued an order postponing any consideration of whether SCE acted unreasonably
11 to a later, undetermined date. There was no such review or hearing before 24 April
12 2014. On 24 April 2014, again under the direction of Peevey and Florio, an order
13 was issued ending any inquiry into whether SCE acted reasonably in obtaining an
14 deploying the steam generators. Again, during this period, the CPUC continued to
15 make ratepayers pay for the failed plant and generators.

16 83. During the interval the CPUC delays provided, the CPUC (Office of
17 Ratepayer Advocate) and SCE, under the direction of Peevey and Florio, pieced
18 together in secret a Plan to end any review of the reasonableness of SCE's action in
19 obtaining and deploying the steam generators. Rather than returning in excess of
20 \$3 billion (\$3,000,000,000) of customers' private property given to SCE without
21 just compensation, the CPUC proposes to cancel out the debt by giving a credit in
22 SCE's claimed under-collected "Energy Resource Recovery Account" (ERRA).
23 The CPUC and SCE cannot even agree on when, how much and how any such
24 crediting is to occur.

25 84. The proposal is nothing more than window dressing—a contrivance to
26 let SCE off the hook. According to the plan, once SCE is free of any review of its
27 actions in obtaining and deploying the failed generators, "Refunds due to ratepayers
28

will be credited to each utility's under-collected Energy Resource Recovery Account balance." In the CPUC's plan to kill any review of whether SCE acted reasonably in obtaining and deploying the steam generators, refunds are defined to mean a reduction in the amount due for "otherwise approved rate increases" in "future ERRA proceedings."

85. SCE's reports to investors undermine any claim ratepayers will recover \$1.3 billion from SCE: "SCE does not expect implementation of rate recoveries and rate refunds contemplated by the Settlement Agreement will have a material impact on future net income." (27 March 2014 SCE Form 8-K p. 4) The refund "mechanism" is a phantom. It is so small, it is not expected to even have a material impact on SCE's income. The CPUC was charged with a simple fiduciary duty: to find out whether ratepayers were required to pay for the steam generators and the damage they caused.

86. Instead, the CPUC under the direction of Florio and Peevey, denied customers an impartial, unbiased review of the issue. Under the direction of Florio and Peevey, SCE forced its customers to relinquish their private property without just compensation in violation of the Fifth Amendment to the United States Constitution to pay for the idle generators and plants.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF (Declaration of Taking Without Just Compensation and Injunction Thereon)

Against CPUC, SCE

87. Plaintiffs re-allege and incorporate the allegations of all prior paragraphs of the complaint, as though fully set forth herein.

88. Defendants CPUC and SCE have impermissibly infringed upon Plaintiffs' rights to just compensation since January 2012 by forcing SDG&E and SCE's 17,400,000 customers to pay over \$700,000,000 for the failed steam

1 generator project and over \$3 billion for the San Onofre power plant they rendered
2 useless.

3 89. In making customers pay for the failed steam generators and
4 permanently shut plant, the CPUC and SCE are taking customers' private property
5 without just compensation, forcing charges on plaintiffs for the failed steam
6 generator project and the defunct plant, even after the generators are cold and the
7 plant is closed. The taking without just compensation started in January 2012, the
8 month the generators died and the plant stopped producing electricity.

9 90. A case of actual controversy exists regarding Plaintiffs' right to just
10 compensation from Defendants' imposition of rates on Plaintiffs, along with the
11 other facts alleged herein, establish that a substantial controversy exists between the
12 adverse parties of sufficient immediacy and reality as to warrant a declaratory
13 judgment in Plaintiffs' favor.

14 91. Plaintiffs have suffered actual adverse and harmful effects, including
15 but not limited to the illegal taking or exacting plaintiffs' private property to pay for
16 the failed steam generators and the idle nuclear power plant without just
17 compensation, and SCE and the CPUC obtaining from Plaintiffs and the class
18 members over \$3,000,000,000.

19 92. The CPUC and SCE violated fundamental principles of the Due
20 Process, Takings and Equal Protection Clauses of the United States Constitution.

21 93. The CPUC and SCE are required, in taking private property, to adhere
22 to due process of law and to respect the legal rights of affected parties.

23 94. The Government violated the statutory, contractual, and Constitutional
24 rights of Plaintiffs and the Class in taking or illegally exacting over \$3,000,000,000
25 from plaintiffs and the class without just compensation.

26 ///

27 ///

PRAYER FOR RELIEF

WHEREFORE, as relief for the harms alleged herein, Plaintiffs as aggrieved parties respectfully request this Court:

1. Declare that Plaintiffs' private property was taken without just compensation, and that the taking without just compensation started in January 2012, the month the generators died and the plant stopped producing electricity.

2. Declare that Plaintiffs have suffered actual adverse and harmful effects, including but not limited to the illegal taking or exacting plaintiffs' private property to pay for the failed steam generators and the idle nuclear power plant without just compensation.

3. Declare that the CPUC and SCE violated fundamental principles of the Due Process, Takings and Equal Protection Clauses of the United States Constitution.

4. Declare that the Government violated the statutory, contractual, and Constitutional rights of Plaintiffs and the Class in taking or illegally exacting over \$3,000,000,000 from plaintiffs and the class without just compensation.

5. Grant a preliminary and permanent injunction prohibiting Defendants, their affiliates, agents, employees, and attorneys, and any and all other persons in active concert or participation with them, from seeking to collect from Plaintiffs for the failed steam generator project and the defunct plant.

6. Grant an order of restitution to Plaintiffs of property taken without just compensation relating to the failed steam generator project and the defunct plant in an amount no less than \$3,000,000,000, or according to proof at trial, for the unconstitutional taking of Plaintiffs' private property without just compensation;

7. An award attorneys' fees and costs to Plaintiffs to the extent permitted by law; and

///

1 8. That this Court award such other and further relief as it deems proper.
2

3 Respectfully submitted,

4 AGUIRRE & SEVERSON LLP

5
6 Dated: _November 13, 2014

/s/Maria C. Severson

 Maria C. Severson

 Attorneys for Plaintiffs
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EXHIBIT 1

ACA 11 - 0530



As of: November 13, 2014 1:05 PM EST

S. Cal. Edison Co. v. Lynch

United States Court of Appeals for the Ninth Circuit

March 4, 2002, Argued and Submitted, Pasadena, California ; September 23, 2002, Filed

No. 01-56879, No. 01-56993, No. 01-57020

Reporter

307 F.3d 794; 2002 U.S. App. LEXIS 19802; 2002 Cal. Daily Op. Service 9737; 2002 Daily Journal DAR 11033; 54 Fed. R. Serv. 3d (Callaghan) 286

SOUTHERN CALIFORNIA EDISON COMPANY, Plaintiff-Appellee, v. LORETTA M. LYNCH; HENRY M. DUQUE; RICHARD A. BILAS; CARL W. WOOD; GEOFFREY F. BROWN, Commissioners of California Public Utilities Commission, Defendants-Appellees. UTILITY REFORM NETWORK, Defendant-intervenor-Appellant. SOUTHERN CALIFORNIA EDISON COMPANY, Plaintiff-Appellee, RELIANT ENERGY SERVICES, INC.; MIRANT AMERICAS ENERGY MARKETING, LP, Intervenor-Appellants, v. LORETTA M. LYNCH; HENRY M. DUQUE; RICHARD A. BILAS; CARL W. WOOD; GEOFFREY F. BROWN, Defendants. SOUTHERN CALIFORNIA EDISON COMPANY, Plaintiff-Appellee, CALIFORNIA MANUFACTURERS AND TECHNOLOGY ASSN., Intervenor-Appellant, v. LORETTA M. LYNCH; HENRY M. DUQUE; RICHARD A. BILAS; CARL W. WOOD; GEOFFREY F. BROWN, in their official capacities as Commissioner of the California Public Utilities Commission, Defendants-Appellees.

Subsequent History: Later proceeding at S. Cal. Edison Co. v. Lynch, 2002 U.S. App. LEXIS 19796 (9th Cir. Cal., Sept. 23, 2002). Request granted Southern California Edison Co. v. Lynch, 2002 Cal. LEXIS 7961 (Cal., Nov. 20, 2002). Certified question answered by S. Cal. Edison Co. v. Peevey, 2003 Cal. LEXIS 6095 (Cal., Aug. 21, 2003).

Prior History: [**1] Appeal from the United States District Court for the Central District of California. D.C. No. CV-00-12056-RSWL. Ronald S.W. Lew, District Judge, Presiding.

S. Cal. Edison Co. v. Lynch, 2001 U.S. App. LEXIS 24540 (9th Cir. Cal., Oct. 30, 2001)

Disposition: Judgment of the district court affirmed in part and questions based on California state law to the Supreme Court of California certified.

Core Terms

district court, rates, stipulated judgment, state law, settlement, electricity, costs, Intervenor, decisions, regulated, issues, wholesale, parties, state court, requirements, intervene, public utility, Obligations, Procurement, abstention, stranded, retail, administrative agency, proceedings, generation, transition, customers, deprived, internal quotation marks, federal district court

Case Summary**Procedural Posture**

Plaintiff utility sued defendant public utility commissioners for refusing to allow a rate increase. The United States District Court for the Central District of California allowed intervention by defendant-intervenor public interest group, denied intervention by proposed intervenor electricity generators and trade association, and entered a stipulated judgment based on the original parties'

agreement. The group and proposed intervenors appealed.

Overview

The utility claimed the refusal to allow it to increase its rates was preempted by the federal filed-rate doctrine. The circuit court held that the trial court properly denied the proposed intervenors' motions to intervene under *Fed. R. Civ. P. 24*, as the fact that the generators were owed money by an entity affiliated with the utility, and that the trade association had an undifferentiated, generalized interest in the outcome of the suit were insufficient interests in the subject matter of the action to require intervention as a matter of right. None of the substantive arguments based on federal statutory or constitutional law compelled reversal of the approval of the stipulated judgment. However, the circuit court believed that by entering into the stipulation, the commissioners violated *Cal. Pub. Util. Code § 368* (regulating rates); the Bagley-Keene Open Meeting Act, *Cal. Gov't Code §§ 11120-11132.5*; *Cal. Pub. Util. Code § 454(a)* (requiring a public hearing and findings before certain actions); and *Cal. Const. art. III, § 3.5* (banning agencies from refusing to enforce a statute). Therefore, it certified these state law issues to the Supreme Court of California.

Outcome

The district court was affirmed on all claims, except for the challenges founded on California law, which were certified to the California Supreme Court. Further proceedings in the case were stayed pending a response from the supreme court on the request for certification.

LexisNexis® Headnotes

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Motions to Intervene

Civil Procedure > Parties > Intervention > Intervention of Right

HN1 An applicant for intervention in a pending federal action as a matter of right must satisfy four requirements, namely that: (1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest.

Civil Procedure > Parties > Intervention > General Overview

HN2 An applicant for intervention has a "significant protectable interest" in an action if (1) it asserts an interest that is protected under some law, and (2) there is a "relationship" between its legally protected interest and the plaintiff's claims. The relationship requirement is met if the resolution of the plaintiff's claims actually will affect the applicant. The "interest" test is not a clear-cut or bright-line rule, because no specific legal or equitable interest need be established. Instead, the "interest" test directs courts to make a practical, threshold inquiry, and is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Intervention of Right

HN3 A contingent, unsecured claim against a third-party debtor falls far short of the direct, non-contingent, substantial and legally protectable interest required for intervention as a matter of right.

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Intervention of Right

Energy & Utilities Law > Electric Power Industry > General Overview

307 F.3d 794, *794; 2002 U.S. App. LEXIS 19802, **1

Energy & Utilities Law > Electric Power Industry >
State Regulation > General Overview

HN4 An undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention as of right.

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Permissive Intervention

HN5 A court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common. Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention.

Civil Procedure > ... > Justiciability > Standing > General Overview

Civil Procedure > Appeals > General Overview

Civil Procedure > Appeals > Reviewability of Lower Court Decisions > Adverse Determinations

HN6 A nonparty has standing to appeal a district court's decision only in exceptional circumstances. The United States Court of Appeals for the Ninth Circuit has allowed such an appeal only when (1) the appellant, though not a party, participated in the district court proceedings, and (2) the equities of the case weigh in favor of hearing the appeal.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Appellate Jurisdiction > State Court Review

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

HN7 The Rooker-Feldman doctrine is founded on the unremarkable proposition that federal district courts are courts of original, not appellate, jurisdiction. It is based on negative inferences drawn from 28 U.S.C.S. § 1331, which establishes the district court's original jurisdiction, and 28 U.S.C.S. § 1257, which allows Supreme Court review of final judgments or decrees rendered by the highest court of a state in which a decision could be had. Applying these jurisdictional limitations, the Rooker-Feldman doctrine bars direct federal district court appellate review of state court judicial proceedings.

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction > Subject Matter Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN8 The Rooker-Feldman doctrine does not apply to the actions of a state administrative agency. The primary statute from which the Rooker-Feldman doctrine has been drawn - 28 U.S.C.S. § 1257 - does not, by its terms, describe state administrative decisions. More importantly, the Supreme Court has rejected a claim that the Rooker-Feldman doctrine bars federal district court review of adjudicatory decisions of state administrative agencies. The Rooker-Feldman doctrine merely recognizes that 28 U.S.C.S. §

307 F.3d 794, *794; 2002 U.S. App. LEXIS 19802, **1

1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to the Supreme Court, 28 U.S.C.S. § 1257(a). The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency.

Civil Procedure > ... > Jurisdiction > Jurisdictional Sources > General Overview

Civil Procedure > ... > Jurisdiction on Certiorari > Considerations Governing Review > State Court Decisions

HN9 The Rooker-Feldman doctrine does not bar the exercise of federal court jurisdiction when the federal court litigant was not a party to the state court action. Mere participation in a state case as amici does not invoke the Rooker-Feldman bar.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN10 An appellate court reviews whether the requirements for abstention have been met de novo, and the district court's decision whether to abstain for an abuse of discretion.

Administrative Law > Judicial Review > Reviewability > Questions of Law

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

HN11 District courts have an obligation and a duty to decide cases properly before them, and abstention from the exercise of federal jurisdiction is the exception, not the rule. However, under the Burford abstention doctrine, when timely and adequate state court review is available, a federal court sitting in

equity may decline to interfere with the proceedings or orders of state

administrative agencies: (1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

HN12 The United States Court of Appeals for the Ninth Circuit has required certain factors to exist before a district court can abstain under Burford. These are: first, that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

HN13 A state may voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

HN16 Burford abstention is particularly inappropriate when a plaintiff's claim is based on

307 F.3d 794, *794; 2002 U.S. App. LEXIS 19802, **1

preemption, because abstaining under Burford would be an implicit ruling on the merits.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

HN14 The fact that a non-state intervening party preferred another forum is not relevant to satisfying the prerequisites for Burford abstention.

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > Abstention

Governments > Courts > Judicial Comity

HN15 If a state voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the state's own system.

Civil Procedure > Parties > Intervention > General Overview

Civil Procedure > Parties > Intervention > Intervention of Right

Civil Procedure > Settlements > Settlement Agreements > General Overview

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Contracts Law > Types of Contracts > Settlement Agreements

HN17 An intervenor does not have the right to prevent other parties from entering into a settlement agreement. It has never been supposed that one party - whether an original party, a party that was joined later, or an intervenor - could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > General Overview

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN18 District courts have inherent power to control their dockets. Appellate review of such decisions is deferential; an appellate court will reverse a district court's litigation management decisions only if it abused its discretion, or if the procedures deprived the litigant of due process of law within the meaning of the Fifth or Fourteenth Amendments. Due process requires that a party affected by government action be given the opportunity to be heard at a meaningful time and in a meaningful manner.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN19 In analyzing the constitutional sufficiency of notice, a court must consider: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Constitutional Law > Congressional Duties & Powers > Commerce Clause > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

Governments > Federal Government > US Congress

Governments > Legislation > General Overview

Governments > Legislation > Enactment

Transportation Law > Interstate Commerce > Federal Powers

307 F.3d 794, *794; 2002 U.S. App. LEXIS 19802, **1

HN20 To say that nothing in the Commerce Clause justifies federal regulation of even the intrastate operations of public utilities misapprehends the proper role of the courts in assessing the validity of federal legislation promulgated under one of Congress' plenary powers. If Congress has the constitutional authority to enact legislation, then the pre-emption question is whether Congress intended to displace state law in that area, not whether the existence of state law forbade Congress from regulating.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > Settlements > Settlement Agreements > General Overview

Constitutional Law > Congressional Duties & Powers > Reserved Powers

Constitutional Law > The Judiciary > General Overview

Governments > State & Territorial Governments > Legislatures

HN21 The Tenth Amendment cannot be used to bar enforcement of a consensual judgment. A federal district court has the power under U.S. Const. art. III to approve a settlement over a suit alleging federal preemption.

Civil Procedure > Judgments > Entry of Judgments > Consent Decrees

Governments > State & Territorial Governments > Employees & Officials

Transportation Law > Bridges & Roads > Billboards

HN22 State officials cannot enter into a federally-sanctioned consent decree beyond their authority under state law.

Energy & Utilities Law > Electric Power Industry > State Regulation > General Overview

Energy & Utilities Law > Electric Power Industry > State Regulation > Stranded Cost Recovery

Energy & Utilities Law > Utility Companies > Rates > General Overview

Energy & Utilities Law > ... > Rates > Ratemaking Factors > Stranded Costs

HN23 Cal. Pub. Util. Code § 368 directs the California Public Utilities Commission to set rates at levels equal to the rate schedules as of June 10, 1996, to reduce those levels for residential and small-commercial customers by 10 percent, and to maintain those rates until the utility has fully recovered its stranded costs or until March 31, 2002, whichever comes first. Cal. Pub. Util. Code § 368(a). Cal. Pub. Util. Code 368 explicitly states that the utility shall be at risk for those costs not recovered during that time period.

Governments > Legislation > Expiration, Repeal & Suspension

Governments > Legislation > Interpretation

HN24 Repeals by implication are heavily disfavored. A finding of implied repeal must be based on a finding that the legislative body actually formulated the intent to repeal the earlier enactment but somehow failed to carry out that intent.

Administrative Law > Governmental Information > Public Information > General Overview

Energy & Utilities Law > Regulators > Public Utility Commissions > General Overview

HN25 See Cal. Gov't Code § 11126(d)(1).

Administrative Law > Governmental Information > Public Information > General Overview

HN26 See Cal. Gov't Code § 11126(e)(1).

Administrative Law > Governmental Information > Public Information > General Overview

HN27 Cal. Gov't Code § 11126(e) merely allows a state agency to meet in closed session to confer with, or receive advice from, its legal counsel regarding pending litigation - not to take action, and certainly not to issue regulatory orders.

Administrative Law > Governmental Information > Public Information > General Overview

307 F.3d 794, *794; 2002 U.S. App. LEXIS 19802, **1

Energy & Utilities Law > Regulators > Public Utility
Commissions > General Overview

Energy & Utilities Law > Utility Companies > Rates >
General Overview

HN28 See Cal. Pub. Util. Code § 454(a).

Administrative Law > Governmental Information >
Public Information > General Overview

Energy & Utilities Law > Regulators > Public Utility
Commissions > General Overview

Energy & Utilities Law > Utility Companies > Rates >
General Overview

HN29 California case law holds that the California
Public Utilities Commission must hold a hearing
and issue findings before adopting an order that
affects rates.

Administrative Law > Separation of Powers >
Constitutional Controls > General Overview

Civil Procedure > Judgments > Entry of Judgments >
Consent Decrees

Energy & Utilities Law > Regulators > Public Utility
Commissions > General Overview

Governments > Federal Government > Employees &
Officials

HN30 California agencies such as the Public
Utilities Commission are explicitly prohibited by the
California Constitution from agreeing to be enjoined
from enforcing state laws that have not been
declared unconstitutional by an appellate court.

Administrative Law > Separation of Powers >
Constitutional Controls > General Overview

HN31 See Cal. Const. art. III, § 3.5.

Civil Procedure > Preliminary Considerations > Federal
& State Interrelationships > Erie Doctrine

Civil Procedure > Appeals > Appellate Jurisdiction >
Certified Questions

Governments > Courts > Judicial Precedent

HN32 Federal courts are bound by the
pronouncements of the state's highest court on
applicable state law. Where the decisions of
California appellate courts provide no controlling
precedent on applicable issues of state law, the
criteria for certification are satisfied. Cal. Rules of
Court 29.5(a)(3).

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Judges: Before: James R. Browning, Sidney R.
Thomas and Johnnie B. Rawlinson, Circuit Judges.
Opinion by Judge Thomas.

Opinion by: Sidney R. Thomas

Opinion

[*800] THOMAS, Circuit Judge:

In this appeal, we review the district court's order entering a stipulated judgment in an action brought by Southern California Edison Co. ("SoCal Edison"), an electric public utility that provides retail electric service in Southern California, against the Commissioners ("Commissioners") of the California Public Utilities Commission ("the Commission"), which regulates the rates, practices and services of SoCal Edison and other California public utilities. We affirm the judgment of the district court in part and certify questions based on California state law to the Supreme Court of California.

I

The origins of the present controversy began in 1996 with the passage of Assembly Bill 1890 ("AB 1890"), which significantly restructured California's power [*3] industry. Act of September 23, 1996, 1996 Cal. Legis. Serv. 854, *codified in Cal. Pub. Util. Code* §§ 330-398.5. The idea animating AB 1890 was that deregulation would foster competition in electrical generation, which would ultimately provide better service and reduce the price of electricity to consumers. *See generally Cal. Pub. Util. Code* § 330. ¹ Under prior law, the Commission set the retail electricity rates charged by utilities providing service in exclusive service territories. *Id.* at § 330(d). These regulated rates included reimbursement for the cost of constructing power plants and contractual obligations for the provision of electrical service. *Id.* at § 330(q). The goal of AB 1890 was to create a deregulated market in which price would be established by competition and [*801] consumers could select their electrical power supplier.

The [*4] legislature recognized that the transition from a regulated environment to a competitive market had the potential to leave the utilities with unrecoverable, or "stranded" costs. In general terms, stranded costs are those costs an electrical supplier incurs in anticipation of serving customers that later become unrecoverable because the supplier either cannot charge a rate that allows cost recovery or is unable to sell sufficient power. This most typically occurs when there is a shift in utility rate philosophy from a "cost plus rate of return" design to a market-driven rate. *Ass'n of Pub. Agency Customers, Inc. v. Bonneville Power Admin.*, 126 F.3d 1158, 1180 (9th Cir. 1997).

Of course, as we have observed, "the term 'stranded costs' is something of a misnomer, for someone always pays for them." *Id.* Under AB 1890, the Commission was charged with the responsibility of calculating the amount of stranded costs. *Cal. Pub. Util. Code* § 367. The utilities were to recover their allowed stranded costs through individual cost-recovery plans during a transition period when rates were temporarily frozen, under the theory that the utilities would continue to make a profit. [*5] *Id.* at § 368. During this transition period, the utilities were also to dismantle their vertically-integrated operations by selling a large portion of their generation plants, and to sell the output of their remaining generation capacity to a wholesale clearinghouse known as the California Power Exchange Corporation ("CalPx"). *Cal. Power Exchange Corp.*, 245 F.3d at 1114-15. During the transition period, the utilities were required to purchase power from CalPx on behalf of retail customers who had not elected to purchase power elsewhere. *Id.* at 1115. The demise of vertical integration, which was regulated by the state, subjected the utilities' purchases of wholesale power to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), which

¹ The legislation is summarized in *Cal. Power Exchange Corp. v. FERC (In re Cal. Power Exchange Corp.)*, 245 F.3d 1110, 1114-15 (2001).

regulated CalPx as a public utility under the Federal Power Act. 245 F.3d at 1114.

In 2000, wholesale electricity prices skyrocketed, particularly in the CalPx spot markets. SoCal Edison, which was still subject to the retail rate freeze designed to lock in profit, incurred enormous debt because it was unable to pass its wholesale power costs onto its customers. Id. at 1115. [**6] SoCal Edison alleges that it incurred obligations of over \$ 6.5 billion for wholesale electricity in excess of what it recovered in retail sales. A series of power emergencies ensued which threatened the continuous provision of electricity in California. Id. at 1115-16. FERC responded in a series of regulatory actions detailed in *Cal. Power Exchange Corp.* Id. at 1116-19. In 2001, the California legislature and the Commission took a series of steps to alleviate the power crisis, the result of which was to significantly alter the impact of AB 1890. However, SoCal Edison alleges that the legislation failed to improve SoCal Edison's dire financial condition because SoCal Edison was precluded by a Commission decision from recovering costs incurred during the rate freeze period.

As a result, SoCal Edison filed the instant action for injunctive and declaratory relief against the Commissioners. Among other theories, SoCal Edison alleged that the refusal of the Commission to increase its retail rates as SoCal Edison's wholesale rates rose was preempted under the federal filed-rate doctrine, which holds that a state is preempted from preventing the recovery [**7] in retail rates of costs incurred pursuant to FERC tariffs.

After some preliminary decisions by the district court, The Utility Reform Network [**802] ("TURN"), a non-profit organization devoted to protecting the interests of residential and small-commercial consumers of utility services, moved to intervene. The district court initially denied the motion, but eventually granted TURN

permissive intervention. After further proceedings, the case was stayed by agreement of the Commission and SoCal Edison so that the parties could attempt to resolve their disputes. A settlement was negotiated and presented to the district court in the form of a stipulated judgment ("Stipulated Judgment"). Under the terms of the Stipulated Judgment, existing rates were to remain in effect for a two-year period to allow SoCal Edison to recover approximately \$ 3.3 billion of its \$ 6.3 billion loss during the prior rate-freeze period. TURN objected to the entry of the Stipulated Judgment. The district court allowed TURN one day to register its objections, and one day for SoCal Edison and the Commission to respond. After reviewing the objections, the district court approved the Stipulated Judgment. TURN appeals the [**8] entry of the Stipulated Judgment. Three other parties who were denied intervention appeal the district court's denial of their intervention motions.

We affirm the district court on all claims, except for the challenges founded on California state law, which we certify to the California Supreme Court.

II

The district court did not err in denying the motions to intervene filed by Reliant Energy Services ("Reliant"), Mirant Americas Energy Marketing ("Mirant"), and the California Manufacturers and Technology Association ("CMTA") (collectively, "Proposed Intervenors"). Reliant and Mirant are wholesale generators of electricity. The CMTA is a trade association with approximately 800 manufacturing and technology companies owning and operating facilities in California. We review the district court's denial of intervention as of right is reviewed de novo, Waller v. Fin. Corp. of Am. 828 F.2d 579, 582 (9th Cir. 1987), except for district court's determination of timeliness, a decision which we review for abuse of discretion. Cunningham v. David Special Commitment Ctr. 158 F.3d 1035.

1037 (9th Cir. 1998). We review the district court's denial of permissive [**9] intervention for abuse of discretion. Venegas v. Skaggs, 867 F.2d 527, 529 (9th Cir. 1989).

A

The district court properly denied the Proposed Intervenor's motions to intervene as of right, pursuant to Rule 24(a), Federal Rules of Civil Procedure. **HN1** An applicant for intervention in a pending federal action as a matter of right must satisfy four requirements, namely that: "(1) it has a significant protectable interest relating to the property or transaction that is the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent the applicant's interest." United States v. City of Los Angeles, 288 F.3d 391, 397 (9th Cir. 2002) (quoting Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998) (internal quotation marks omitted)).

The district court correctly denied the Proposed Intervenor's motions to intervene as of right because they did not satisfy the first requirement: that they have a significant protectable interest relating to the property or transaction [**10] that is the subject of the action. We recently discussed the analytical framework for this requirement in City of Los Angeles, 288 F.3d at 398:

[*803]

HN2 "An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." Donnelly, 159 F.3d at 409. The relationship requirement is met "if the resolution of the plaintiff's claims actually will affect the applicant." Id. at 410. The "interest" test is not a

clear-cut or bright-line rule, because "no specific legal or equitable interest need be established." [Greene v. United States, 996 F.2d 973, 976 (9th Cir. 1993).] Instead, the "interest" test directs courts to make a "practical, threshold inquiry," id., and "is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process," County of Fresno v. Andrus, 622 F.2d 436, 438 (9th Cir. 1980) (internal quotation marks and citation omitted).

Reliant [**11] and Mirant argue that they have a significant protectable interest in the litigation because SoCal Edison owes them over \$ 260 million arising out of their wholesale electricity transactions which, allegedly due to the Commission's actions, SoCal Edison is unable to repay. The pending litigation would not resolve those claims, and SoCal Edison is in privity with the California Power Exchange Corporation, not with Reliant or Mirant. Thus, Reliant and Mirant are claiming a right to intervene based on **HN3** a contingent, unsecured claim against a third-party debtor. This falls far short of the "direct, non-contingent, substantial and legally protectable" interest required for intervention as a matter of right. Dilks v. Aloha Airlines, 642 F.2d 1155, 1157 (9th Cir. 1981) (citation omitted).

CMTA asserts that, as an association of more than 800 companies in the manufacturing and high-technology sectors, its members are "an integral part of the California economy" who "purchase significant quantities of electricity from SoCal Edison." However, **HN4** "an undifferentiated, generalized interest in the outcome of an ongoing action is too porous a foundation on which to premise intervention [**12] as of right." Public Serv. Co. of N.H. v. Patch, 136 F.3d 197, 205 (1st Cir. 1998); see also Westlands Water Dist. v. U.S., 700 F.2d 561, 563 (9th Cir. 1983) (Environmental Defense Fund's

307 F.3d 794, *803; 2002 U.S. App. LEXIS 19802, **12

interest in water district's water export rights is no different from interest of "substantial portion of the population of northern California" and is thus not "legally protectible" under Rule 24(a). Thus, CMTA does not have the right to intervene in this case under federal law.

B

The district court also did not err in denying Reliant, Mirant, and CMTA permissive intervention. **HN5** "[A] court may grant permissive intervention where the applicant for intervention shows (1) independent grounds for jurisdiction; (2) the motion is timely; and (3) the applicant's claim or defense, and the main action, have a question of law or a question of fact in common." City of Los Angeles, 288 F.3d at 403 (quoting Northwest Forest Res. Council v. Glickman, 82 F.3d 825, 839 (9th Cir. 1996)). "Even if an applicant satisfies those threshold requirements, the district court has discretion to deny permissive intervention." Donnelly, 159 F.3d at 412. [**13]

Here, Proposed Intervenor fail to meet the threshold requirements because no common question of law or fact exists between their claims and the main action. Proposed Intervenor argue that the amount of money that SoCal Edison may collect, and how SoCal Edison uses that money, raises questions of law and fact [*804] common to both the underlying action and any claims Reliant and Mirant have against SoCal Edison and/or the Commission. However, the Proposed Intervenor's concerns as to whether SoCal Edison would repay them are sufficiently different from the issues in the underlying action so as to not meet this factor of the test for permissive intervention. "The intervention rule is ... not intended to allow the creation of whole new

lawsuits by the intervenors." Donnelly, 159 F.3d at 412 (internal quotation marks and citation omitted).

III

Reliant, Mirant, and CMTA argue in the alternative that, even if the district court did not err in denying their motions to intervene, they still have standing to appeal the entry of the Stipulated Judgment. We disagree.

HN6 A nonparty has standing to appeal a district court's decision "only in exceptional circumstances." [**14] Citibank Int'l. v. Collier-Traino, Inc., 809 F.2d 1438, 1441 (9th Cir. 1987). We have allowed such an appeal only when "(1) the appellant, though not a party, participated in the district court proceedings, and (2) the equities of the case weigh in favor of hearing the appeal." Bank of Am. v. M/V Executive, 797 F.2d 772, 774 (9th Cir. 1986). Proposed Intervenor have not met these requirements. Apart from their applications for intervention, the Proposed Intervenor did not participate in the district court proceedings. By contrast, the appellant in Bank of Am. filed papers and presented oral argument to a magistrate judge and the district court on the merits of the case. Id. at 774. Further, there is nothing inequitable about limiting participation in this appeal to submission of amicus briefs. In short, there are no "exceptional circumstances" in this case that justify granting a non-party standing to appeal.

IV

TURN argues that the Rooker-Feldman doctrine² precluded the district court from exercising original jurisdiction. **HN7** The Rooker-Feldman doctrine is founded on "the unremarkable

² The doctrine takes its name from Rooker v. Fid. Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983). Rooker held that federal statutory jurisdiction over direct appeals from state courts lies exclusively in the Supreme Court and is beyond the original jurisdiction of federal district courts. See Rooker, 263 U.S. at 415-16. Feldman held that this jurisdictional bar extends to particular claims that are "inextricably intertwined" with those a state court has already decided. See Feldman, 460 U.S. at 486-87.

proposition that federal district courts are [**15] courts of original, not appellate, jurisdiction." Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1078 (9th Cir. 2000) (en banc). It is based on negative inferences drawn from 28 U.S.C. § 1331, which establishes the district court's original jurisdiction, and 28 U.S.C. § 1257, which allows Supreme Court review of "final judgments or decrees rendered by the highest court of a State in which a decision could be had." *Id.* (internal quotation marks omitted). Applying these jurisdictional limitations, the *Rooker-Feldman* doctrine bars direct federal district court appellate review of state court judicial proceedings. See Worldwide Church of God v. McNair, 805 F.2d 888, 890 (9th Cir. 1986).

[**16] TURN contends that the *Rooker-Feldman* doctrine applies here because SoCal Edison's lawsuit is "inextricably intertwined" [*805] with the actions of the Commission and because the Pacific Gas & Electric Company ("PG&E") sought state judicial review of the Commission's cost-recovery decisions.

HN8 The *Rooker-Feldman* doctrine does not apply to the actions of the Commission because it is a state administrative agency, not a court. The primary statute from which the *Rooker-Feldman* doctrine has been drawn - 28 U.S.C. § 1257 - does not, by its terms, describe state administrative decisions. More importantly, the Supreme Court has recently rejected a claim that the *Rooker-Feldman* doctrine barred federal district court review of adjudicatory decisions of state administrative agencies. As the Court noted:

The Commission also suggests that the *Rooker-Feldman* doctrine precludes a federal district court from exercising jurisdiction over Verizon's claim. See District of Columbia Court of Appeals v.

Feldman, 460 U.S. 462, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 44 S. Ct. 149, 68 L. Ed. 362 (1923). [**17] The *Rooker-Feldman* doctrine merely recognizes that 28 U.S.C. § 1331 is a grant of original jurisdiction, and does not authorize district courts to exercise appellate jurisdiction over state-court judgments, which Congress has reserved to this Court, see 28 U.S.C. § 1257(a). The doctrine has no application to judicial review of executive action, including determinations made by a state administrative agency. Verizon Md. Inc. v. Pub. Serv. Comm'n of Md., 535 U.S. 635, 152 L. Ed. 2d 871, 122 S. Ct. 1753, 1759 n. 3 (2002) (emphasis added).

TURN also claims that a collateral state court judicial challenge to the Commission action filed by PG&E deprives the district court of jurisdiction over this case. This argument is unavailing. **HN9** The *Rooker-Feldman* doctrine does not bar the exercise of federal court jurisdiction when the federal court litigant was not a party to the state court action. Johnson v. De Grandy, 512 U.S. 997, 1006, 129 L. Ed. 2d 775, 114 S. Ct. 2647 (1994). SoCal Edison was not a party to PG&E's state court challenge; thus the *Rooker-Feldman* doctrine did not preclude the federal [**18] district court from exercising jurisdiction in this case. ³ SoCal Edison did file an amicus letter in support of PG&E's petition. However, "mere participation in the state case as amici does not invoke the *Rooker/Feldman* bar." Bennett v. Yoshina, 140 F.3d 1218, 1224 (9th Cir. 1998). Thus, existence of collateral state court proceedings involving a third party did not deprive the district court of original jurisdiction over this action.

V

³ In fact, the district court in PG&E's case rejected the argument that PG&E's state court writ was res judicata of PG&E's federal claims. Pac. Gas & Elec. Co. v. Lynch, 2001 U.S. Dist. LEXIS 5500, No. CV 01-1083 RSWLSHX, 2001 WL 840611, at *8 (C.D. Cal. May 2, 2001).

307 F.3d 794, *805; 2002 U.S. App. LEXIS 19802, **18

TURN argues the district court should have abstained under the "*Burford* doctrine" from exercising jurisdiction over this lawsuit. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-33, 87 L. Ed. 1424, 63 S. Ct. 1098 (1943)). **HN10** We review whether the requirements for abstention have [**19] been met *de novo*, and the district court's decision whether to abstain for an abuse of discretion. *Fireman's Fund Ins. Co. v. Quackenbush*, 87 F.3d 290, 294 (9th Cir. 1996).

HN11 "District courts have an obligation and a duty to decide cases properly before them, and 'abstention from the exercise of federal jurisdiction is the exception, not the rule.'" *City of Tucson v. U.S. West* [*806] *Communications, Inc.*, 284 F.3d 1128, 1132 (2002) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)).

However, under the *Burford* abstention doctrine, when timely and adequate state court review is available, a federal court sitting in equity may decline to interfere with the proceedings or orders of state administrative agencies:

(1) when there are difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar; or (2) where the exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to [**20] a matter of substantial public concern. *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361, 105 L. Ed. 2d 298, 109 S. Ct. 2506 (1989) (internal quotation marks and citation omitted).

HN12 We have required certain factors to exist before a district court can abstain under *Burford*. See *City of Tucson*, 284 F.3d at 1133. These are:

first[,] that the state has chosen to concentrate suits challenging the actions of the agency involved in a particular court; second, that federal issues could not be separated easily from complex state law issues with respect to which state courts might have special competence; and third, that federal review might disrupt state efforts to establish a coherent policy. *Id.* (quoting *United States v. Morros*, 268 F.3d 695, 705 (9th Cir. 2001)).

Here, not only has the state not chosen to concentrate suits challenging the administrative action in a particular court, it has expressly waived any abstention defense to SoCal Edison's action and consented to the Stipulated Judgment. See *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 626, 91 L. Ed. 2d 512, 106 S. Ct. 2718 (1986) [**21] **HN13** ("A State may of course voluntarily submit to federal jurisdiction even though it might have had a tenable claim for abstention."). Thus, the threshold requirements for the exercise of *Burford* abstention by the district court have not been satisfied. ⁴ **HN14** The fact that a non-state intervening party preferred another forum is not relevant to satisfying the prerequisites for *Burford* abstention. Cf. *Southwest Airlines Co. v. Texas Intern. Airlines, Inc.*, 546 F.2d 84, 93 (5th Cir. 1977). **HN15** "If the State voluntarily chooses to submit to a federal forum, principles of comity do not demand that the federal court force the case back into the State's own system." *Ohio Bureau of Employment Servs. v. Hodory*, 431 U.S. 471, 480, 52 L. Ed. 2d 513, 97 S. Ct. 1898 (1977). The district court did not err in declining to abstain in this case.

⁴ We also note that **HN16** "*Burford* abstention is particularly inappropriate when the plaintiff's claim is based on preemption, because abstaining under *Burford* would be an implicit ruling on the merits." *Morros*, 268 F.3d at 705 (quoting *Knudsen Corp. v. Nevada State Dairy Comm'n*, 676 F.2d 374, 377 (9th Cir. 1982)). Here, SoCal Edison alleges that the federal filed-rate doctrine facially preempts any Commission refusal to permit recovery of SoCal Edison's wholesale procurement costs.

307 F.3d 794, *806; 2002 U.S. App. LEXIS 19802, **22

[**22] VI

The district court did not exceed its authority by approving the stipulated settlement between SoCal Edison and the Commission without TURN's consent, a decision which we review *de novo*. Class Plaintiffs v. City of Seattle, 955 F.2d 1268, 1287 (9th Cir. 1992). *HN17* An intervenor [*807] does not have the right to prevent other parties from entering into a settlement agreement. Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO v. City of Cleveland, 478 U.S. 501, 528-29, 92 L. Ed. 2d 405, 106 S. Ct. 3063 (1986). As the Court explained:

it has never been supposed that one party - whether an original party, a party that was joined later, or an intervenor - could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent.

Thus, TURN's consent was not a necessary precursor to the district court's accepting the Stipulated Judgment.

TURN points out that *Firefighters* provides an exception where [**23] "nonconsenting intervenors" have brought "valid claims" that are "properly raised." 478 U.S. at 529. However, as TURN itself admits, the organization "as defendants were not expected to raise claims and [its] members cannot challenge the terms of the settlements in later suits." Instead, what TURN claims to possess is a "legally cognizable interest in protecting the refund rights of its 30,000 rate-paying members, in securing the lower rates that state law guarantees them and the stipulated judgment denies them, and in preventing the rate increases that will inevitably result from this judgment." These interests do not amount to the

kind of "valid claims" the *Firefighters* Court had in mind. Furthermore, TURN's attempt to narrow the scope of the *Firefighters* exception as applying only to plaintiffs, and not defendants such as TURN, is unavailing because the *Firefighters* case clearly references "third parties" in general. See *Firefighters*, 478 U.S. at 529. In sum, TURN's consent was not required for the district court to approve the settlement.

VII

Nor did the district court's approval of the settlement deny TURN due process. TURN argues that [**24] the district court did not afford it sufficient time to submit briefs opposing the proposed settlement.

HN18 District courts have "inherent power" to control their dockets. Ferdik v. Bonzelet, 963 F.2d 1258, 1260 (9th Cir. 1992). Our review of such decisions is deferential; we will reverse a district court's litigation management decisions only if it abused its discretion, *see id.*, or if the procedures deprived the litigant of due process of law within the meaning of the *Fifth* or *Fourteenth Amendments*. See Barona Group of Capitan Grande Band of Mission Indians v. Am. Mgmt. & Amusement, Inc., 824 F.2d 710, 721-22 (9th Cir. 1987), amended by 840 F.2d 1394, 1405-06 (9th Cir. 1988). Due process requires that a party affected by government action be given "the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333, 47 L. Ed. 2d 18, 96 S. Ct. 893 (1976) (internal quotation marks and citation omitted). *HN19* In analyzing the constitutional sufficiency of notice, we must consider:

first, the private interest that will be affected by the official action; second, [**25] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

307 F.3d 794, *807; 2002 U.S. App. LEXIS 19802, **25

interest, including the function involved and the fiscal and administrative burdens [*808] that the additional or substitute procedural requirement would entail. *Id.* at 335.

Although the district court expedited the notice and hearing process in this case, TURN filed an extensive brief raising all of the salient issues. In turn, the district court required TURN's opponents to file their response brief on an expedited schedule, which they did. TURN does not quantify either the probable increased value of alternative procedures, or the risk of an erroneous deprivation of the interest through the procedures used. Indeed, TURN does not contend that it was prevented from presenting its case; its essential complaint is that the district court did not consider adequately the arguments that TURN made. However, that argument goes to the merits, not to procedural due process.

For the same reasons, TURN has not established prejudice. TURN has failed to demonstrate that the district court's scheduling order substantially prejudiced TURN's ability to present its arguments. See *U.S. v. Fitch*, 472 F.2d 548, 549 n. 5 (9th Cir. 1973) (rejecting challenge to contempt judgment based on insufficient notice where "appellants have shown no prejudice."); *Hoffman for and on Behalf of NLRB v. Beer Drivers & Salesmen's Local Union No. 888*, 536 F.2d 1268, 1273 (9th Cir. 1976) (rejecting due process claim based on "insufficient notice of hearing" because "there is no indication that the parties were not fully aware of the issues or were in any way deprived of a full opportunity to explore the issues of fact or be heard on the issues of law").

Given the totality of the circumstances of this case, we cannot say that the expedited briefing schedule deprived TURN of procedural due process.

VIII

Contrary to TURN's assertion, the district court did not violate the *Tenth Amendment* in approving the

Stipulated Judgment. The application of federal preemption, as sought by SoCal Edison in its complaint, would not intrude on the rights reserved under the *Tenth Amendment*. Further, *HN20* "to say that nothing in [**27] the *Commerce Clause* justifies federal regulation of even the intrastate operations of public utilities misapprehends the proper role of the courts in assessing the validity of federal legislation promulgated under one of Congress' plenary powers." *FERC v. Mississippi*, 456 U.S. 742, 753, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982). "If Congress has the constitutional authority to enact legislation, then the pre-emption question is whether Congress intended to displace state law in that area, not whether the existence of state law forbade Congress from regulating." *United States v. Geiger*, 263 F.3d 1034, 1040 (9th Cir. 2001) (citing *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-41, 150 L. Ed. 2d 532, 121 S. Ct. 2404 (2001)).

The district court's approval of the Stipulated Judgment does not mandate state participation in the enforcement of a federal statutory scheme such as in *Printz v. United States*, 521 U.S. 898, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997), nor require a state legislature to adopt federal regulations such as in *New York v. United States*, 505 U.S. 144, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992). [**28] Rather, the judgment simply confirms a settlement of a valid federal preemption claim. *HN21* The *Tenth Amendment* cannot be used to bar enforcement of consensual judgments. *United States v. District of Columbia*, 210 U.S. App. D.C. 87, 654 F.2d 802, 808 (D.C. Cir. 1981). In short, the district court had the power under Article III to approve a settlement over a suit alleging [*809] federal preemption, and did not unconstitutionally commandeer California's regulatory apparatus in doing so.

IX

In sum, none of the substantive arguments based on federal statutory or constitutional law compel

307 F.3d 794, *809; 2002 U.S. App. LEXIS 19802, **28

reversal of the district court's approval of the Stipulated Judgment. There is, however, a serious question of whether the agreement between the Commission and SoCal Edison violated state law, both in substance and in the procedure by which the Commission agreed to it. If so, then the Commission lacked capacity to consent to the Stipulated Judgment, and we would be required to vacate it as void. *HN22* State officials cannot enter into a federally-sanctioned consent decree beyond their authority under state law. See *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (consent decree could [**29] not be interpreted to supplant California Outdoor Advertising Act because state agency would not have had authority to agree to such a decree); *Wash. v. Penwell*, 700 F.2d 570, 573 (9th Cir. 1983) (vacating a consent decree that required the state of Oregon to fund a prisoners' legal services program because the state Attorney General acted beyond his authority and therefore "the consent decree was void to the extent that it exceeded defendants' authority").

A

On a substantive level, there is a serious question as to whether the Stipulated Judgment's rate-making terms violate § 368 of AB 1890. *HN23 California Public Utilities Code § 368* directed the Commission to set rates "at levels equal to the ... rate schedules as of June 10, 1996," to reduce those levels for residential and small-commercial customers by ten percent, and to maintain those rates until the utility has fully recovered its stranded costs or until March 31, 2002, whichever comes first. *Cal. Pub. Util. Code § 368(a)* (emphasis added). *Section 368* explicitly states that the utility "shall be at risk for those costs not recovered during that time period." *Id.*

The Stipulated Judgment appears to violate [**30] § 368 in two respects. First, the settlement expressly maintains the rate-freeze beyond March 31, 2002, in violation of § 368, and the settlement expressly does

so for the purpose of allowing SoCal Edison to recover its past procurement costs. The contested language of the Stipulated Judgment reads as follows:

The Parties hereby agree that during the Recovery Period [SoCal Edison] shall recover in retail electric rates its Procurement Related Obligations recorded in the PROACT [Account for Recovery of Procurement Related Obligations established pursuant to § 2.1(a) of the Agreement]. The Parties acknowledge that they each currently project that the maintenance of Settlement Rates will likely result in sufficient Surplus for [SoCal Edison] to recover substantially all of its unrecovered Procurement Related Obligations prior to the end of 2003. Stipulated Judgment, § 2.2, emphasis added. The agreement defines "Recovery Period" as:

the period commencing September 1, 2001 and ending on the earlier of the date that [SoCal Edison] recovers all Procurement Related Obligations recorded in the PROACT or December 31, 2005. The Recovery Period includes [**31] the Rate Repayment Period. Stipulated Judgment, § 1.1(q), emphasis added. These provisions appear to violate § 368, which clearly limits the utilities to March 31, 2002 and disallows SoCal Edison [**810] from applying collections past this date to prior procurement costs.

Second, the settlement also appears to violate § 368's rate-freeze guarantee that protects consumers from price increases during the transition to a competitive market. The Stipulated Judgment allows the SoCal Edison to "pocket" for itself the above-rate-freeze-level rates that the Commission adopted in 2001 solely in order to pay the state for wholesale power the California Department of Water Resources was procuring for the utilities. As a result, under the Stipulated Judgment, the

307 F.3d 794, *810; 2002 U.S. App. LEXIS 19802, **31

SoCal Edison will collect a "surcharge" rate that is above the rates in effect on June 10, 1996, in violation of § 368.

The testimony of the Commission President Loretta Lynch, in response to the California Legislature's query as to why the Commission did not agree to the SoCal Edison-Commission settlement months earlier, supports this conclusion. She explained as follows:

MS. LYNCH: Well, actually the Commission is [**32] prevented under state law under 1890 from allowing that recovery, and what we did with the [SoCal Edison] settlement was essentially agree to a settlement that federal law trumped state law, but the Commission on its own could not trump state law. The Commission must follow state law.

We are not dissuaded by SoCal Edison's and the Commission's argument that, whatever restrictions § 368 may once have imposed on the Commission, subsequent legislative changes and Commission decisions have restored the Commission's traditional authority to permit utilities to recover their costs - specifically, those costs associated with its utility retained generation, which includes its nuclear power plants and contracts involving Qualifying Facilities - even after the AB 1890 rate freeze. Most notably, the Appellees cite Assembly Bill 6X ("AB 6X"), which in 2001 amended or deleted three provisions of AB 1890, which had previously provided for the transition from regulated status to unregulated status for utility generation.

However, AB 6X as well as Assembly Bill 1X ("AB 1X") were not intended to relieve the utilities of their regulatory bargain but rather to protect the state from further [**33] damage due to the utilities' imminent inability to meet their utility obligation of providing power to their customers. The Appellees' interpretation of AB

1X and AB 6X is contradicted by the fact that the legislature retained *Cal. Pub. Util. Code* §§ 367, 368(a), and *HN24* repeals by implication are "heavily disfavored." See, e.g., *NLRB v. Kolkka*, 170 F.3d 937, 941 (9th Cir. 1999). A finding of implied repeal must be based on a finding that the legislative body actually formulated the intent to repeal the earlier enactment but somehow failed to carry out that intent. *Kenai Peninsula Borough v. State of Alaska*, 612 F.2d 1210, 1214 (9th Cir. 1980) ("There can be no implied repeal unless the intention of the legislative body to repeal is clear."). The legislative history here demonstrates no such intent. Moreover, there is nothing in the 2001 legislation that is inconsistent with the rate-freeze or with holding the utilities to the risk of not fully recovering stranded costs. Finally, both the Commission and SoCal Edison recognized, when AB 1X and AB 6X were enacted, that these acts left the utilities responsible for unrecovered stranded costs. Thus, on a substantive [**34] level, the Stipulated Judgment appears to violate state law.

B

On a procedural level, there is a serious question as to whether the Stipulated Judgment violates state laws, specifically those requiring open government and reasoned [**811] decisions reached upon an evidentiary record. It appears that the Commission adopted the agreement with SoCal Edison in violation of both the Bagley-Keene Open Meeting Act ("Bagley-Keene Act"), *Cal. Gov't Code* §§ 11120-11132.5, and § 454 of the Public Utilities Code.

First, the Stipulated Judgment seems to violate the Bagley-Keene Act because the parties approved it in a secret meeting. *Section 11126(d)(1)*, in particular, requires that *HN25* "notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open and public." *Cal. Gov't*

Code § 11126(d)(1) (emphasis added). The Stipulated Judgment, which extinguished ratepayers' refund rights, precluded a reduction in rates that were otherwise subject to reduction, and granted SoCal Edison significant concessions for years to come, changes rates such that the open meeting requirement of § 11126(d)(1) [**35] is triggered.

SoCal Edison and the Commission argue that the Stipulated Judgment does not change existing rates. Rather, in their view, the agreement obligates the Commission to allow SoCal Edison to charge *existing* rates. But the provision of the agreement to which SoCal Edison cites merely defines the phrase "settlement rates" without saying anything about what the Commission is obligated to do. See Settlement Agreement, § 1.1(w).

The Commission has claimed that it could settle the litigation in a "closed session" pursuant to section 11126(e)(1) of the Government Code, which provides that:

HN26 nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation. Cal. Gov't Code § 11126(e)(1) (emphasis added). However, § 11126(e) *HN27* merely allows the agency to meet in closed session "to confer with, or receive advice from, its legal counsel regarding pending litigation" - not to take [**36] action, and certainly not to issue regulatory orders. *Id.*

Second, the Commission appears to have violated Public Utilities Code § 454 with its decision to extinguish ratepayer refund rights and to lock in higher rates, without a public hearing and without findings. Section 454 provides that:

HN28 except as provided in Section 455 [which deals with rate schedules not resulting in a rate increase], no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, *except upon a showing before the commission and a finding by the commission that the new rate is justified.* Cal. Pub. Util. Code § 454(a) (emphasis added). *HN29* California case law also holds that the Commission must hold a hearing and issue findings before adopting an order that affects rates. See Cal. Mfrs. Ass'n v. Pub. Utils. Comm'n, 24 Cal. 3d 251, 595 P.2d 98, 102, 155 Cal. Rptr. 664 (Cal. 1979) (annulling the Commission rate-increase decisions for absence of supporting findings and evidence).

SoCal Edison and the Commission argued below that § 454 did not apply because the Commission was not changing rates but rather [**37] agreeing not to change rates. The Appellees make a similar argument on appeal; they maintain that § 454 applies only when a utility seeks to "increase" rates, not when a utility keeps existing rates in place, as they claim the Stipulated Judgment provides for.

[*812] However, this argument conforms neither to the text nor to the order or its result. First, as a textual matter, the SoCal Edison-Commission agreement does far more than just agree not to reduce rates. Under the Stipulated Judgment the Commission agrees not to penalize SoCal Edison for failing to meet the Commission's capital-structure requirements, not to "unreasonably withhold" consent to SoCal Edison's payment of dividends to shareholders, to allow SoCal Edison up to \$ 900 million per year in rates for capital additions, to approve SoCal Edison compromising certain claims against wholesale-power sellers, and to announce that SoCal Edison may recover past costs that would not be recoverable under the TURN Accounting

307 F.3d 794, *812; 2002 U.S. App. LEXIS 19802, **37

Proposal adopted by the Commission. Each of these constitutes a "change" in SoCal Edison's rate.

Second, as an economic matter the agreement will result in huge changes in the rates SoCal Edison customers will [**38] pay. Before the entry of the Stipulated Judgment, any over-collection in rates was subject to refund under the Commission Decision 01-03-082. After the entry of the Judgment, it is not. TURN estimates that the SoCal Edison-Commission deal adds \$ 3.3 billion to ratepayers' electric costs.

C

As we have noted, as a matter of federal law, state officials cannot enter into a federally-sanctioned consent decree beyond their authority under state law. In addition, *HN30* California agencies such as the Commission are explicitly prohibited by the state constitution from agreeing to be enjoined from enforcing state laws that have not been declared unconstitutional by an appellate court. Article III, section 3.5, of the California Constitution provides that:

HN31 an administrative agency, including an administrative agency created by the Constitution ... has no power ... (c) to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations. CAL. CONST. art. III, [**39] § 3.5. In assenting to the judgment here, the Commission ("an administrative agency created by the Constitution," *see* CAL. CONST. art. XII) was refusing to enforce

both the substantive limits on the utilities' transition cost recovery and the procedures required of the Commission when making rate orders. By stipulating to the judgment, the Commission agreed not only to exempt SoCal Edison from AB 1890 but also to be enjoined from enforcing AB 1890. Thus, assuming our interpretation of California state law is correct, the Stipulated Judgment must be vacated as void.

D

However, ours is not the final word on California state law. *HN32* Federal courts are bound by the pronouncements of the state's highest court on applicable state law. *Davis v. Metro Productions, Inc.*, 885 F.2d 515, 524 (9th Cir. 1989). However, the decisions of California appellate courts provide no controlling precedent on these issues of state law; thus, this case satisfies the criteria for certification. *See* Cal. Rules of Court 29.5(a)(3). Resolution of the state law issues involved in this litigation will have a substantial effect on California law and the citizens of California. Accordingly, [**40] principles of comity suggest that those decisions should be made by California courts. Thus, by separate order accompanying this decision, we certify these issues of state law to the Supreme Court of California and respectfully [*813] request the Court to accept certification.

X

We affirm the judgment of the district court in all respects, except for the state law claims identified in section IX. We respectfully certify those issues to the Supreme Court of California. We stay further proceedings in this case pending a response from the Supreme Court of California on the request for certification.

AFFIRMED IN PART; CERTIFIED IN PART.

EXHIBIT 2

ACA 11 - 0550

From: Brown, Carol A.

Sent: 1/13/2014 3:06:18 PM

To: Cherry, Brian K (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=BKC7)

Cc:

Bcc:

Subject: RE: GTS

He told me if Wong was the judge it would not matter who the assigned commissioner was - he is just overwhelmed with big cases and does not want this one

-----Original Message-----

From: Cherry, Brian K [mailto:BKC7@pge.com]

Sent: Monday, January 13, 2014 2:49 PM

To: Brown, Carol A.

Subject: Re: GTS

Can you wait ? Florio said he would take it if Wong was ALJ.

Sent from my iPad

On Jan 13, 2014, at 2:35 PM, "Brown, Carol A." <carol.brown@cpuc.ca.gov<mailto:carol.brown@cpuc.ca.gov>> wrote:

Hello: it looks like it will be assigned to Peterman - Florio is way too busy and wants to mentor Peterman through the process. Peevey is OK with it - but wanted you to know the assignment is based on Florio's request (he does have SB and SONGS)

PG&E is committed to protecting our customers' privacy.

To learn more, please visit <http://www.pge.com/about/company/privacy/customer/>

From: Brown, Carol A.

Sent: 1/15/2014 8:18:12 AM

To: Cherry, Brian K (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=BKC7)

Cc:

Bcc:

Subject: RE:

It's in the works

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"

Date: 01/14/2014 5:26 PM (GMT-08:00)

To: "Brown, Carol A."

Subject:

As long as ALJ Wong has the case (which Florio confirms), we are ok with what Mike wants to do on the assignment. Can you get it done ASAP please ?.

PG&E is committed to protecting our customers' privacy.

To learn more, please visit <http://www.pge.com/about/company/privacy/customer/>

From: Cherry, Brian K
Sent: 1/17/2014 3:52:07 PM
To: Brown, Carol A. (carol.brown@cpuc.ca.gov)
Cc:
Bcc:
Subject: RE: GT& S Case Assigned

Thanks.....

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Friday, January 17, 2014 3:52 PM
To: Cherry, Brian K
Subject: RE: GT& S Case Assigned

Take a deep breath - I am working on it

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/17/2014 11:49 AM (GMT-06:00)
To: "Brown, Carol A."
Subject: RE: GT& S Case Assigned

Please, please check. This is a major problem for us. Florio said he would agree to help Peterman if Wong got it.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Friday, January 17, 2014 9:48 AM
To: Cherry, Brian K
Subject: RE: GT& S Case Assigned

I can see if anything can be done

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/17/2014 11:38 AM (GMT-06:00)
To: "Brown, Carol A."
Subject: RE: GT& S Case Assigned

There is a huge world of difference between Long and Wong. I'm not sure we could get someone worse. This is a very important case that is now in jeopardy.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Friday, January 17, 2014 9:33 AM
To: Cherry, Brian K
Subject: RE: GT& S Case Assigned

I was told it would be Wong
We don't control judge assignments.
Think carefully before you bounce him -you could get some one worse.

ACA 11 - 0553

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/17/2014 11:19 AM (GMT-06:00)
To: "Brown, Carol A."
Subject: RE: GT& S Case Assigned

We will bounce him and I don't want to do that.

-----Original Message-----

From: Cherry, Brian K
Sent: Friday, January 17, 2014 9:17 AM
To: Brown, Carol A. (carol.brown@cpuc.ca.gov)
Subject: FW: GT& S Case Assigned

Is this right ? Judge Long ? What happened to Wong ?

> On Jan 17, 2014, at 8:42 AM, "Cotroneo, Eileen" <EFM2@pge.com> wrote:

>

> The GTS case assignment appeared on the daily calendar - assigned to ALJ Long and Commissioner Peterman. I will issue a note to our team.

>

> Eileen

>

> Eileen Cotroneo

> (415)973-2751 Office

> (415)260-0555 Mobile

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From: Cherry, Brian K
Sent: 1/17/2014 9:55:00 AM
To: Michael R. Peevey (michael.peevey@cpuc.ca.gov) (michael.peevey@cpuc.ca.gov)
Cc:
Bcc:
Subject: FW: GT& S Case Assigned

This is a problem. Hope Carol can fix it.

From: Cherry, Brian K
Sent: Friday, January 17, 2014 9:49 AM
To: 'Brown, Carol A.'
Subject: RE: GT& S Case Assigned

Please, please check. This is a major problem for us. Florio said he would agree to help Peterman if Wong got it.

From: Brown, Carol A. [<mailto:carol.brown@cpuc.ca.gov>]
Sent: Friday, January 17, 2014 9:48 AM
To: Cherry, Brian K
Subject: RE: GT& S Case Assigned

I can see if anything can be done

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/17/2014 11:38 AM (GMT-06:00)
To: "Brown, Carol A."
Subject: RE: GT& S Case Assigned

There is a huge world of difference between Long and Wong. I'm not sure we could get someone worse. This is a very important case that is now in jeopardy.

From: Brown, Carol A. [<mailto:carol.brown@cpuc.ca.gov>]
Sent: Friday, January 17, 2014 9:33 AM
To: Cherry, Brian K
Subject: RE: GT& S Case Assigned

I was told it would be Wong
We don't control judge assignments.
Think carefully before you bounce him -you could get some one worse.

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/17/2014 11:19 AM (GMT-06:00)
To: "Brown, Carol A."
Subject: RE: GT& S Case Assigned

We will bounce him and I don't want to do that.

-----Original Message-----
From: Cherry, Brian K

ACA 11 - 0555

Sent: Friday, January 17, 2014 9:17 AM
To: Brown, Carol A. (carol.brown@cpuc.ca.gov)
Subject: FW: GT& S Case Assigned

Is this right ? Judge Long ? What happened to Wong ?

> On Jan 17, 2014, at 8:42 AM, "Cotroneo, Eileen" <EFM2@pge.com> wrote:
>
> The GTS case assignment appeared on the daily calendar - assigned to ALJ Long and Commissioner Peterman. I will issue a note to our team.
>
> Eileen
>
> Eileen Cotroneo
> (415)973-2751 Office
> (415)260-0555 Mobile

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From: Cherry, Brian K
Sent: 1/17/2014 1:35:31 PM
To: Florio, Michel Peter (MichelPeter.Florio@cpuc.ca.gov)
Cc:
Bcc:
Subject: RE: GT& S Case Assigned
We could get Bushey...

From: Florio, Michel Peter [mailto:MichelPeter.Florio@cpuc.ca.gov]
Sent: Friday, January 17, 2014 1:18 PM
To: Cherry, Brian K
Subject: RE: GT& S Case Assigned

I'm horrified! He still has not produced a PD for Semptra's PSEP/TCAP after much prodding and cajoling-- we are considering asking that another ALJ be assigned to finish for him. Plus he may retire any day, and uses that as a threat to deflect any direction. Sepideh spoke to John Wong and he said he's just too overloaded, which we didn't know. John is a true workhorse so it must be true. If I were you I would bump him-- you really can't do any worse! Even a brand new ALJ would at least work hard and try -- you'll get neither from him... Keep me posted and I'll do what I can on this end.....

Sent from my Verizon Wireless 4G LTE Smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/17/2014 9:26 AM (GMT-08:00)
To: "Florio, Michel Peter"
Subject: FW: GT& S Case Assigned

If I don't bounce him, I will need an alternate.

> On Jan 17, 2014, at 8:42 AM, "Cotroneo, Eileen" <EFM2@pge.com> wrote:
>
> The GTS case assignment appeared on the daily calendar - assigned to ALJ Long and Commissioner Peterman. I will issue a note to our team.
>
> Eileen
>
> Eileen Cotroneo
> (415)973-2751 Office
> (415)260-0555 Mobile

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From: Brown, Carol A.
Sent: 1/22/2014 2:18:06 PM
To: Cherry, Brian K (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=BKC7)
Cc:
Bcc:
Subject: RE: Re:

Wong was never promised by Judge Clopton – and she is in charge of the judges!

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 2:17 PM
To: Brown, Carol A.
Subject: RE: RE:

No. It just isn't what was understood.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 1:53 PM
To: Cherry, Brian K
Subject: RE: RE:

What can I say? Would you rather have Long?

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 1:47 PM
To: Brown, Carol A.
Subject: RE: RE:

Let's just say she has a history of being very hard on us. You may recall the Billing Oll where we got screwed royally...

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 1:40 PM
To: Cherry, Brian K
Subject: RE: RE:

I can't control everything! Wong is overbooked and Julie knows what she is doing and is not too busy – she just finished burning up vacation -

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 1:38 PM
To: Brown, Carol A.
Subject: RE: RE:

Julie Halligan ?

Thanks for helping Carol, but I think Tom is going to have a harder time on HECA internally as a result of not getting Wong.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 1:35 PM
To: Cherry, Brian K
Cc: Florio, Michel Peter; Khosrowjah, Sepideh
Subject: RE: RE:

The judge division kindly re-visited its assignment and the matter will now be under the guidance of Judge Julie Halligan who is excited about the assignment and it will allow her to use her vast gas pipeline experience! This notice has not been issued – so do not

ACA 11-0558

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 9:29 AM
To: Brown, Carol A.
Subject: RE: RE:

Please. Thanks. We are nearing the 10 day pre-emptory limit.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 5:43 AM
To: Cherry, Brian K
Subject: RE:

I will check

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/21/2014 4:58 PM (GMT-08:00)
To: "Brown, Carol A."
Subject:

Any progress ?

Brian K. Cherry
PG&E Company
VP, Regulatory Relations
77 Beale Street
San Francisco, CA. 94105
(415) 973-4977

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From: Florio, Michel Peter

Sent: 1/22/2014 5:44:18 PM

To: Cherry, Brian K (/O=PG&E/OU=CORPORATE/CN=RECIPIENTS/CN=BKC7)

Cc:

Bcc:

Subject: RE: Letter from House Energy & Commerce Democratic Women to NARUC

The only one that I know for sure is Core Aggregation Pipeline capacity, which is my case. But there must be others. John is a workhorse and would never shirk an interesting assignment.

From: Cherry, Brian K [mailto:BKC7@pge.com]

Sent: Wednesday, January 22, 2014 5:24 PM

To: Florio, Michel Peter

Subject: RE: Letter from House Energy & Commerce Democratic Women to NARUC

Yes indeed. Do you know what cases Wong is working on that is keeping him so busy ?

From: Florio, Michel Peter [mailto:MichelPeter.Florio@cpuc.ca.gov]

Sent: Wednesday, January 22, 2014 5:23 PM

To: Cherry, Brian K

Subject: RE: Letter from House Energy & Commerce Democratic Women to NARUC

Really helps to have female officers, eh? My how the world has changed

From: Cherry, Brian K [mailto:BKC7@pge.com]

Sent: Wednesday, January 22, 2014 9:41 AM

To: Florio, Michel Peter

Subject: FW: Letter from House Energy & Commerce Democratic Women to NARUC

Thought you might enjoy this.

From: Lavinson, Melissa A

Sent: Saturday, January 18, 2014 6:06 AM

To: Williams, Geisha; Burt, Helen; Austin, Karen

Cc: Pruett, Greg S; Bottorff, Thomas E; Cherry, Brian K; Malnight, Steven; Foster, Christopher

Subject: Letter from House Energy & Commerce Democratic Women to NARUC

Geisha, Helen and Karen,

Discussion of letter from Members of Congress to NARUC dated January 17, 2014 redacted, unrelated to ex parte issue.

Referenced attachment provided.

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From: Cherry, Brian K
Sent: 1/22/2014 5:28:35 PM
To: Brown, Carol A. (carol.brown@cpuc.ca.gov)
Cc:
Bcc:
Subject: RE: Re:

No. Hobson's choice.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 1:53 PM
To: Cherry, Brian K
Subject: RE: RE:

What can I say? Would you rather have Long?

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 1:47 PM
To: Brown, Carol A.
Subject: RE: RE:

Let's just say she has a history of being very hard on us. You may recall the Billing Oll where we got screwed royally...

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 1:40 PM
To: Cherry, Brian K
Subject: RE: RE:

I can't control everything! Wong is overbooked and Julie knows what she is doing and is not too busy -- she just finished burning up vacation -

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 1:38 PM
To: Brown, Carol A.
Subject: RE: RE:

Julie Halligan ?

Thanks for helping Carol, but I think Tom is going to have a harder time on HECA internally as a result of not getting Wong.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 1:35 PM
To: Cherry, Brian K
Cc: Florio, Michel Peter; Khosrowjah, Sepideh
Subject: RE: RE:

The judge division kindly re-visited its assignment and the matter will now be under the guidance of Judge Julie Halligan who is excited about the assignment and it will allow her to use her vast gas pipeline experience! This notice has not been issued -- so do not broadcast too broadly!

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Wednesday, January 22, 2014 9:29 AM
To: Brown, Carol A.
Subject: RE: RE:

ACA 11 - 0562

Please. Thanks. We are hearing the 10 day pre-employment limit.

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Wednesday, January 22, 2014 5:43 AM
To: Cherry, Brian K
Subject: RE:

I will check

Sent from my Verizon Wireless 4G LTE smartphone

----- Original message -----

From: "Cherry, Brian K"
Date: 01/21/2014 4:58 PM (GMT-08:00)
To: "Brown, Carol A."
Subject:

Any progress ?

Brian K. Cherry
PG&E Company
VP, Regulatory Relations
77 Beale Street
San Francisco, CA. 94105
(415) 973-4977

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From: Cherry, Brian K
Sent: 1/24/2014 2:54:13 PM
To: Brown, Carol A. (carol.brown@cpuc.ca.gov)
Cc:
Bcc:
Subject: RE:
You will own me if you do. ;-)

From: Brown, Carol A. [mailto:carol.brown@cpuc.ca.gov]
Sent: Friday, January 24, 2014 2:53 PM
To: Cherry, Brian K
Subject: RE:

Working on it – I hope all the mess is worth it

From: Cherry, Brian K [mailto:BKC7@pge.com]
Sent: Friday, January 24, 2014 2:25 PM
To: Brown, Carol A.
Subject:

Any news on the reassignment ?

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From: Cherry, Brian K
Sent: 1/27/2014 3:38:14 PM
To: Brown, Carol A. (carol.brown@cpuc.ca.gov)
Cc:
Bcc:
Subject: RE: OK

Thank you. Thank you. Thank you.

Brian K. Cherry
PG&E Company
VP, Regulatory Relations
77 Beale Street
San Francisco, CA. 94105
(415) 973-4977

On Jan 27, 2014, at 3:36 PM, "Brown, Carol A." <carol.brown@cpuc.ca.gov> wrote:

Wong and peterman

From: Cherry, Brian K
 Sent: 1/29/2014 6:59:35 PM
 To: Florio, Michel Peter (MichelPeter.Florio@cpuc.ca.gov)
 Cc:
 Bcc:
 Subject: RE: CPUC-FPSS Subscription: 'PG&E GT&S'

Yes. Now you can help Carla in a way that works with a seasoned ALJ.

Sent from my iPad

On Jan 29, 2014, at 6:52 PM, "Florio, Michel Peter" <MichelPeter.Florio@cpuc.ca.gov> wrote:

I trust you're happier now?? Not sure how this came about, but John is the best . . .

From: fpss-no-reply@cpuc.ca.gov [mailto:fpss-no-reply@cpuc.ca.gov]
Sent: Wednesday, January 29, 2014 5:52 PM
To: Florio, Michel Peter
Subject: CPUC-FPSS Subscription: 'PG&E GT&S'

Below are the documents you have subscribed to using the California Public Utilities Commission Subscription Service. Details of this subscription are listed below the document links.

Proceeding #	Document Type	Title	Links	Publish Date/Tim
A1312012	Notice	Notice filed by CALJ/CLOPTON/CPUC on 01/29/2014 Conf# 71591 (Certificate Of Service)	PDF (229 KB)	1/29/2014 12:03:21 PM
A1312012	Notice	Notice filed by CALJ/CLOPTON/CPUC on 01/29/2014 Conf# 71591	PDF (103 KB)	1/29/2014 12:03:20 PM

Subscription Details:

Subscription Name: PG&E GT&S
 Subscription Type: Specific Proceeding
 Proceeding Number: A1312012
 Delivery Frequency: Daily
 Email Address: mfl@cpuc.ca.gov

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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric
Company Proposing Cost of Service and Rates
for Gas Transmission and Storage Services for
the Period 2015-2017

(U 39 G)

Application 13-12-012
(Filed December 19, 2013)

And Related Matter.

Investigation 14-06-016

**PACIFIC GAS AND ELECTRIC COMPANY'S NOTICE OF
IMPROPER EX PARTE COMMUNICATIONS**

MARTIN S. SCHENKER
COOLEY LLP
101 California Street
5th Floor
San Francisco, CA 94111-5800
Phone: (415) 693-2154
Fax: (415) 693-2222
E-Mail: mschenker@cooley.com

Dated: September 15, 2014

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Pacific Gas and Electric
Company Proposing Cost of Service and Rates
for Gas Transmission and Storage Services for
the Period 2015-2017

(U 39 G)

Application 13-12-012
(Filed December 19, 2013)

And Related Matter.

Investigation 14-06-016

**PACIFIC GAS AND ELECTRIC COMPANY'S NOTICE
OF IMPROPER EX PARTE COMMUNICATIONS**

Pacific Gas and Electric Company ("PG&E") hereby provides notification that PG&E has become aware of ex parte communications between PG&E and Commission personnel concerning this proceeding. PG&E believes that these communications violated the Commission's Rules of Practice and Procedure governing ex parte communications.

The written communications at issue are dated from January 9, 2014 to January 29, 2014. The subject matter of the communications is the assignment of this proceeding to particular Administrative Law Judges and Commissioners. Written ex parte communications on this subject matter of which PG&E is currently aware are included in Attachment A of this notice. PG&E believes that oral ex parte communications concerning the same topic occurred during this same time period.

PG&E cautions that its evaluation of the facts and circumstances surrounding these communications is ongoing. PG&E will provide notice in the event additional ex parte communications are identified.

The undersigned is counsel in this proceeding only for purposes of representing PG&E on issues related to these ex parte communications.

Respectfully Submitted,

MARTIN S. SCHENKER

By: /s/ Martin S. Schenker
MARTIN S. SCHENKER

Cooley LLP
101 California Street
5th Floor
San Francisco, CA 94111-5800
Phone: (415) 693-2154
Fax: (415) 693-2222
E-Mail: mschenker@cooley.com

Dated: September 15, 2014

Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

ATTACHMENT A

From: Cherry, Brian K

Sent: 1/9/2014 10:25:43 AM

To: Brown, Carol A. (carol.brown@cpuc.ca.gov) (carol.brown@cpuc.ca.gov)

Cc:

Bcc:

Subject: FW: GT&S Rate Case

Just wondering....

From: Horner, Trina

Sent: Thursday, January 09, 2014 10:25 AM

To: Cherry, Brian K

Subject: RE: GT&S Rate Case

No. have you heard anything?

From: Cherry, Brian K

Sent: Thursday, January 09, 2014 9:42 AM

To: Horner, Trina

Subject: GT&S Rate Case

No GT&S Assigned Commissioner and ALJ yet ?

From: Cherry, Brian K

Sent: 1/13/2014 2:48:56 PM

To: Brown, Carol A. (carol.brown@cpuc.ca.gov)

Cc:

Bcc:

Subject: RE: GTS

That will be a problem.

Sent from my iPad

On Jan 13, 2014, at 2:35 PM, "Brown, Carol A." <carol.brown@cpuc.ca.gov> wrote:

Hello: it looks like it will be assigned to Peterman – Florio is way too busy and wants to mentor Peterman through the process. Peevey is OK with it – but wanted you to know the assignment is based on Florio's request (he does have SB and SONGS)

EXHIBIT 3

ACA 11 - 0573

Mia Severson

From: Mia Severson <mseverson@amslawyers.com>
Sent: Wednesday, September 17, 2014 8:05 AM
To: 'news@cpuc.ca.gov'; 'public.advisor@cpuc.ca.gov'
Cc: 'mseverson@amslawyers.com'
Subject: CPUC - Public records request re Peevey, Florio and SCE

Greetings,

This is a request for records pursuant to the California Public Records Act for the following records:

- All documents showing communications between Commissioner Peevey or his staff and anyone employed with, or representing Southern California Edison or its lawyers, including emails, letters, faxes, phone messages, texts for the period of 2005 through present
- All documents showing communications between Carol and anyone employed with or representing Southern California Edison or its lawyers, including emails, letters, faxes, phone messages, texts for the period of 2005 through present
- All documents showing communications between Commissioner Florio or his staff and anyone employed with or representing Southern California Edison or its lawyers, including emails, letters, faxes, phone messages, texts

Maria "Mia" Severson, Esq.
Aguirre & Severson LLP
501 West Broadway, Ste. 1050
San Diego, CA 92101
Tel. 619.876.5364
Fax 619.876-5368
Cell 858-602-8155

Mia Severson

From: Alviar, Janet <janet.alviar@cpuc.ca.gov>
Sent: Wednesday, October 08, 2014 10:42 AM
To: 'Mia Severson'
Cc: Reiger, J. Jason; Koltz, Jonathan; Reynolds, John; 'Mike Aguirre'
Subject: RE: Response to your Public Records Request re (PRA #1262) Peevey, Florio and SCE Communications

Thank you for your email regarding status of when you can expect the requested documents regarding the above matter. At this date we do not have a specific date by which time we estimate to have a full response. However, I assure you we take our responsibilities under the Public Records Act seriously and are diligently working on gathering and reviewing the relevant records. We will provide a response to you as soon as we are able. We will also work to provide rolling partial responses to you as soon as they become available, if you should so desire.

Sincerely,

Janet V. Alviar

From: Mia Severson [<mailto:mseverson@amslawyers.com>]
Sent: Tuesday, October 07, 2014 6:12 PM
To: Alviar, Janet
Cc: Reiger, J. Jason; Koltz, Jonathan; Reynolds, John; 'Mike Aguirre'; mseverson@amslawyers.com
Subject: RE: Response to your Public Records Request re (PRA #1262) Peevey, Florio and SCE Communications

Greetings,

It has been two weeks since the letter responding to my Public Records Act request.

Can you please advise of (1) the status of the provision of the records, i.e., how many have been gathered, etc., and (2) when I can expect the requested documents?

Thank you.

Maria "Mia" Severson, Esq.
Aguirre & Severson LLP
501 West Broadway, Ste. 1050
San Diego, CA 92101
Tel. 619.876.5364
Fax 619.876-5368
Cell 858-602-8155

From: Alviar, Janet [<mailto:janet.alviar@cpuc.ca.gov>]
Sent: Tuesday, September 23, 2014 4:14 PM
To: 'mseverson@amslawyers.com'
Cc: Reiger, J. Jason; Koltz, Jonathan; Reynolds, John
Subject: Response to your Public Records Request re (PRA #1262) Peevey, Florio and SCE Communications

Good Afternoon Ms. Severson:

Attached please find our response letter to your public records request re above matter. If problems occur in opening attachment, please let me know.

Thank you,

Janet V. Alviar
Legal Analyst

STATE OF CALIFORNIA

EDMUND G. BROWN, JR. Governor

PUBLIC UTILITIES COMMISSION
LEGAL DIVISION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298
ID 94-3031353



September 23, 2014

VIA ELECTRONIC MAIL

Maria "Mia" Severson, Esq.
Aguirre & Severson LLP
mseverson@amslawyers.com

Re: **Public Records Request**
CPUC Reference No.: PRA #01262

Dear Ms. Severson:

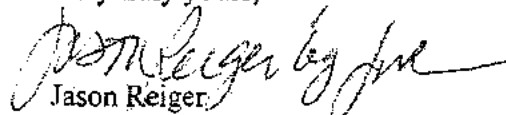
You ask the California Public Utilities Commission (Commission) to provide you a copy of the following:

- any and all communications between the Commissioner Peevey or his staff and everyone employed with, or representing Southern California Edison or its lawyers, including emails, letters, faxes, phone messages, texts for the period of 2005 through present
- All documents showing communications between Carol and anyone employed with or representing Southern California Edison or its lawyers, including emails, letters, faxes, phone messages, texts for the period of 2005 through present
- All documents showing communications between Commissioner Florio or his staff and anyone employed with or representing Southern California Edison or its lawyers, including emails, letters, faxes, phone messages, texts

The Commission's staff has already begun the process of searching for records responsive to your request; however, it will take a considerable amount of Commission staff time to properly comply with your request. Pursuant to Cal. Gov't Code § 6253, *et seq.*, I'm informing you that the Commission staff will need additional time in order to properly respond to your request.

Please refer to PRA #01262 in all of your communications with the Commission regarding the above-referenced matter.

Very truly yours,


Jason Reiger
Staff Counsel

ACA 11 - 0577

Mia Severson

From: Mia Severson <mseverson@amslawyers.com>
Sent: Monday, November 03, 2014 9:08 AM
To: 'Alviar, Janet'
Subject: CPUC - Status of Response to Records Request (PRA #1262)

Thank you for the response to PRA #1298.

Can you let me know the date on which I can expect the Response to my Public Records Request re (PRA #1262) Peevey, Florio and SCE Communications sent to the CPUC in September?
Thank you.

Maria "Mia" Severson, Esq.
Aguirre & Severson LLP
501 West Broadway, Ste. 1050
San Diego, CA 92101
Tel. 619.876.5364
Fax 619.876-5368
Cell 858-602-8155

No. 15-55762

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITIZENS OVERSIGHT, INC., a
Delaware non-profit corporation, et al.,
Plaintiffs-Appellants

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.,
Defendants-Appellees

On Appeal From the United States District Court
For the Southern District of California

Case No. 3:14-cv-02703-CAB (NLS)
The Honorable Cynthia A. Bashant, Judge

APPELLANTS' OPENING BRIEF

Michael J. Aguirre, Esq., CSB 060402
Maria C. Severson, Esq., CSB 173967
AGUIRRE & SEVERSON LLP
501 West Broadway, Suite 1050
San Diego, CA 92101
Telephone: (619) 876-5364
Facsimile: (619) 876-5368
Attorneys for Plaintiffs/Appellants

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Citizens Oversight, Inc., states that it is a Delaware non-profit corporation. It has no parent company, and no publicly held company holds more than ten percent of its stock.

TABLE OF CONTENTS

STATEMENT OF JURISDICTION.....	1
RULING UNDER REVIEW	1
STATEMENT OF THE ISSUES PRESENTED.....	1
STANDARD OF REVIEW	3
STATEMENT OF THE CASE.....	4
I. FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW	4
II. RELEVANT PROCEDURAL HISTORY	15
SUMMARY OF ARGUMENT	17
I. INTRODUCTION	17
II. CPUC NOTICE AND HEARING REQUIREMENTS	18
III. UTILITY CUSTOMERS WERE ENTITLED TO REAL NOTICE AND HEARING	19
IV. DISTRICT COURT MUST MAKE INDEPENDENT DECISION	24
V. ORDER REQUIRING UTILITY CUSTOMERS TO PAY \$3.3 BILLION WAS MADE WITHOUT REASONABLE NOTICE AND HEARING	24
CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<i>ACTS Retirement-Life Cmtys</i> , 2012 WL 7277033 at *6	1
<i>Brooks v. Sulphur Springs Valley Electric Corp</i> 951 F. 2d. 1050 (9th Cir. 1991)	19
<i>Lively v. Wild Oats Markets, Inc.</i> , 456 F.3d 933 (9th Cir. 2006)	3
<i>Meridian v. Mississippi Valley Gas Co.</i> , 214 F.2d 525 (5th Cir. Miss. 1954)	19, 20, 24
<i>Portland Audubon Society v. Endangered Species Committee</i> , 984 F.2d 1534 (9th Cir. 1993)	25, 26
<i>Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.</i> , 685 F.2d 547 (D.C. Cir. 1982).....	27
<i>San Luis & Delta-Mendota Water Auth. v. United States</i> , 672 F.3d 676 (9th Cir. 2012)	3
<i>S. Cal. Edison Co. v. Lynch</i> 307 F.3d 794 (9 th Cir. 2002)	15, 17, 18
<i>State ex. Rel. Corbin v. Arizona Corp. Com’n</i> , 143 Ariz. 219 (1984).....	26

Statutes

California Public Utilities Code	
§ 451	2, 18
§ 454.8	18
California Public Utilities Commission Rules of Practice and Procedure	
Rule 8.4.....	8, 18
Rule 12.1.....	3

5 U.S.C. § 551(14)	25
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
28 U.S.C. § 1337	1
28 U.S.C. § 1342	3
28 U.S.C. § 1342 (3)	1
28 U.S.C. § 1343	1
28 U.S.C. § 2107	1
28 U.S.C. § 2201	1
28 U.S.C. § 2202	1
California State Constitution, Article 1 § 3	27

Other Authorities

78 Cong. (1934)	20
C. Wolfram, MODERN LEGAL ETHICS, § 11.3.....	25
John Allen, <i>Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis</i> , 1993 UTAH LAW REVIEW 1135, 1197 (1993).....	25
<i>Re Contacts Between Public Utilities and Former Commissioners</i> , 82 P.U.R.4th 559, 1987 WL 257598 (Minn. P.U.C. 1987).....	27

STATEMENT OF JURISDICTION

The district court had jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1337 and 1343; and 28 U.S.C. §§ 2201 and 2202. Final judgment disposing of all claims was entered for defendants on April 16, 2015 and Appellants timely filed the notice of appeal on May 16, 2015 within the time provided by 28 U.S.C. § 2107(a).

This court has jurisdiction to hear this alleged violation of the United States Constitution under 28 U.S.C. § 1291.

RULING UNDER REVIEW

The ruling under review is the question of whether the District Court under the Johnson Act [28 U.S.C. 1342 (3)] has to make an independent decision that the California Public Utilities Commission (CPUC) order making utility customers pay \$3,300,000,000 for the closed San Onofre electricity plant when it produces no electricity was issued after reasonable notice and hearing. In other words, does the district court have to determine whether the CPUC satisfied the notice and hearing requirements mandated by California state law. See, *ACTS Retirement-Life Cmtys*, 2012 WL 7277033 at *6 (quoting *Tennyson*, 506 F.2d at 1141).

STATEMENT OF THE ISSUES PRESENTED

This is an appeal from a final judgment in a case alleging property was taken without just compensation to pay for four failed steam generators at the now

mothballed San Onofre Nuclear Generating Station in northern San Diego County, California. (ER 50 judgment; ER 51-68 order granting motion to dismiss; ER 1445 complaint) Plaintiffs, a California non-profit organization and other concerned citizens, brought legal action on behalf of themselves and 17,400,000 Southern California utility customers whose property was taken without just compensation when the California Public Utilities Commission (CPUC) and Southern California Edison (SCE) forced its customers to pay more than \$700,000,000 for the failed Replacement Steam Generator (RSG) project and \$3,000,000,000 (\$3 billion) or more for the idle plant once it failed. (ER 1445-1446; 1450-1453)

The only way the CPUC could force customers to pay for the failed generators and closed plant would be with a showing under Cal. Pub. Util. Code § 451 that SCE acted reasonably in obtaining the generators. SCE and the CPUC did not attempt because substantial evidence exists to show SCE did not act reasonably when it obtained and deployed the steam generators. (ER 1446) SCE obtained and deployed the new steam generators without a safety license amendment from the Nuclear Regulatory Commission (NRC). Two engineers who worked on the steam generator project admitted avoiding of a safety license amendment was an SCE directive. (ER 1446)

The district court erroneously found the Johnson Act, 28 U.S.C. § 1342, divested the court from exercising jurisdiction over Plaintiffs' claims. (ER 017) The district court's error in granting Defendants' motions to dismiss present the following issues:

1. Did the Court below err when it found the only notice or hearing requirement was a CPUC Rule¹ requiring a conference with seven days notice prior to signing a settlement satisfied the Johnson Act?
2. Did the District Court err when it decided Plaintiffs are precluded from contesting whether Defendants complied with state mandated notice and hearing procedures when the CPUC issued an order requiring utility customers to pay the \$3,300,000,000 under the Johnson Act?

STANDARD OF REVIEW

The district court's interpretation and construction of a federal statute are questions of law reviewed de novo. See *San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 699 (9th Cir. 2012); *Lively v. Wild Oats Markets, Inc.*, 456 F.3d 933, 938 (9th Cir. 2006).

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¹ CPUC Rule of Practice and Procedure 12.1

STATEMENT OF THE CASE

I. FACTS RELEVANT TO ISSUES SUBMITTED FOR REVIEW

The pertinent facts underling the district court ruling under review are these. SCE is charging utility customers for the costs of the San Onofre Nuclear electricity plant (San Onofre), even though it has produced no electricity since January 2012. (ER 1445-1446) In December 2005, the CPUC allowed SCE to install four replacement steam generators at the San Onofre Nuclear power plant “followed by a reasonableness review of the project costs after completion.” (ER 1188, 39-42)

SCE was required to file an application with the CPUC for permission to put the replacement steam generator costs permanently in rates. (ER 455-456 ¶ 44) The application to put the steam generator costs permanently in rates was to be filed six months after the steam generators were installed and San Onofre was returned to commercial service. (ER 1456) San Onofre was returned to commercial service when the last steam generator was installed in February 2011. (ER 391) A date six months later would have required the application to have been filed by August 2011. (ER 1455-1456 ¶ 44) However, in April 2011, SCE informed the CPUC “of its current intent to file a single application, at the end of the **second quarter of 2012** (June 2012) that seeks authority: 1) to **permanently**

include in rates the capital costs incurred in the procurement an installation of replacement steam generators at [San Onofre].” (ER 391)

While SCE pushed off the date to apply for authority to put the steam generator costs permanently in rates, it collected them in rates on a provisional basis. (ER 459-460) On 27 December 2011, SCE sent an advice letter to the CPUC requesting to put \$115, 239, 000 of the steam generators’ costs in 2012 rates on an “interim basis (subject to refund).” (ER 458-460) While the project was underway but not completed, the CPUC had permitted SCE to provisionally collect in rates the steam generator costs “commencing on January 1 of the year subsequent to the date that installation of the new replacement steam generators is completed and they are placed in commercial operation.” (ER 459)

In December 2011, SCE employed this procedure for obtaining interim rates ten months after all four steam generators were installed and San Onofre had been returned to commercial service in February 2011. (ER 1457 ¶50, 391) All four steam generators failed by January 2012 (ER 1188-1189, 1454 ¶40), closing the plant (ER 1182, 821), and costing over \$3,300,000,000 (ER 1183). However, in June 2012, the CPUC allowed SCE to collect the 2012 rates \$115,000,000 of steam generator costs -- even though they had failed and the plant had closed. (ER 457) SCE evaded the hearing to determine if the steam generator costs should be

permanently in rates (ER 772-773) in deploying the four steam generators that together, lasted less than one year. (ER 1457 ¶ 50, 1183)

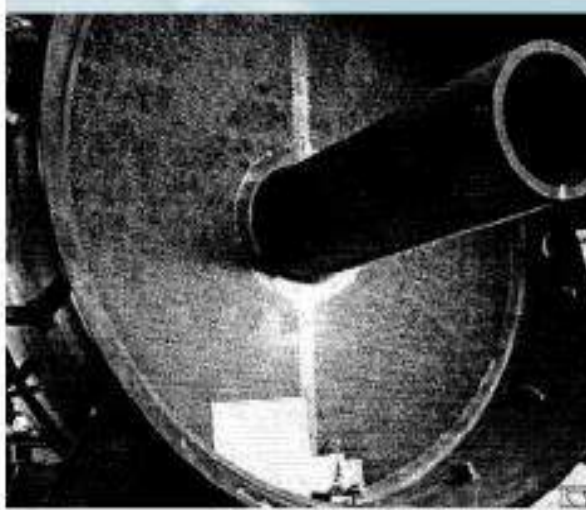
On 21 February 2013, one year after the steam generators failed, SCE was ordered to file an application to determine whether the steam generator costs could be recovered permanently in rates. (ER 1197) However, the CPUC put the application immediately on hold when it ruled examination of the question of whether SCE had acted reasonably was then “premature.” (ER 799)

The questions to be answered in the aborted investigation and reasonableness review were: (1) What error(s) led to the tube failure(s); (2) Who made those errors? (ER 717) SCE admits there were design errors that caused the steam generators to fail, but blamed them on the generator’s manufacturer. (ER 1448 ¶ 10) There was substantial evidence the errors were due to SCE’s decision to build “one of the largest steam generators ever built for the United States” (ER 386) that represented a “significant increase in the size from those” the SCE manufacturer had built and required it to “evolve a new design.” (ER 386)

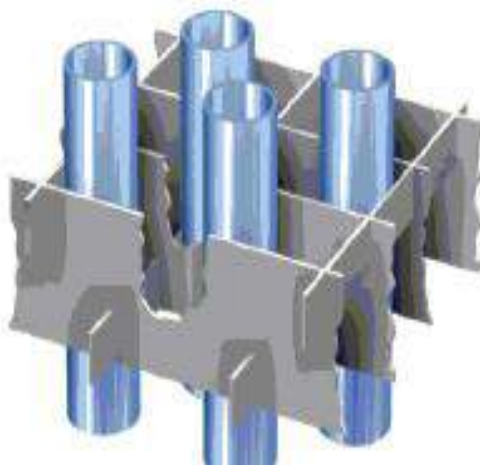
As early as 30 November 2004, SCE knew about the potential that “design flaws” could cause “disastrous outcome.” (ER 388) In order to make room for 377 more tubes, SCE removed stabilizing components in the steam generators (ER 1447 ¶ 8):

8. The new design adopted for the new steam generators was materially different from the old steam generators. The new version raised serious safety issues which went unresolved, and eventually caused the generators to fail. The stay cylinders were removed, the “egg crate” protection was eliminated, while 4% more tubes at the center the new steam generators were added:

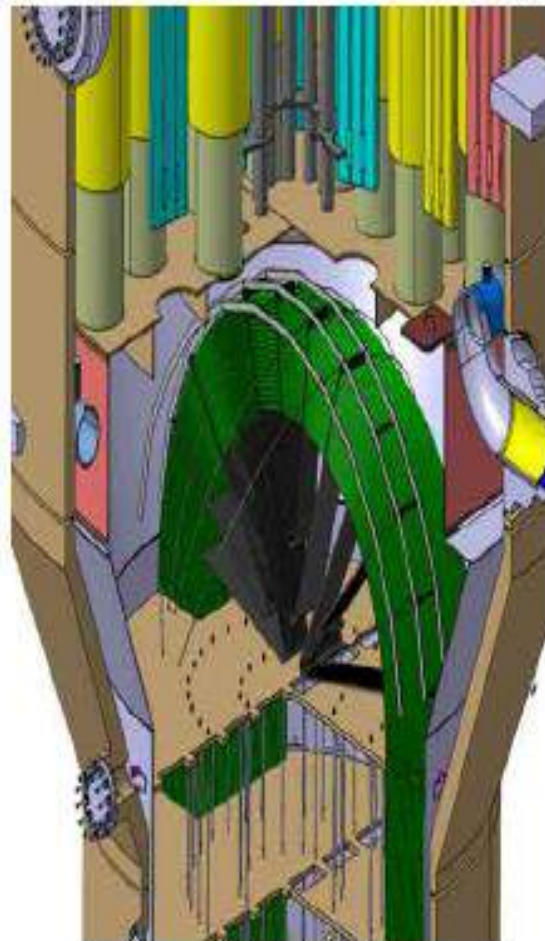
STAY CYLINDERS WERE ELIMINATED



NO EGG CRATE TUBE PROTECTORS WERE INSTALLED



4% MORE TUBES ADDED AT THE CENTER



The Atomic Safety and Licensing Board found SCE's new steam generators "differed in design from the original steam generators." For example, each new steam generator (1) has 9,727 tubes, which is 377 more than are in the original; (2) does not have a stay cylinder supporting the tube sheet; and (3) has a broached tube design rather than an "egg crate" tube support. (ER 288) The steam generator's manufacturer reported the design errors that crippled the generators that closed the plant were discovered, but not removed, so SCE could avoid having to request a safety license amendment from the Nuclear Regulatory Commission (NRC). (ER 1448 ¶ 10)

The CPUC then stalled the investigation and reasonableness review of San Onofre's shut down from January to November 2012. (ER 798) On 1 November 2012, the California Public Utility Commission (CPUC) issued an Order of Investigation (OII) to determine whether to order the "immediate removal ** of all costs related to the San Onofre Nuclear power station from utility rates." (ER 509-510) The category of the proceeding was determined to be rate setting. (ER 524) Communications with decision makers and advisors were thus subject to the restrictions of CPUC Rule 8.4 (ER 530) requiring notice of ex parte communications to be filed within three working days of the communication. (ER 360)

However, on 7 December 2012, after her ex parte communications (ER 37-49) with the SCE official in charge of San Onofre, the assigned Administrative Law Judge postponed indefinitely the investigation into whether SCE acted reasonably. (ER 042) This initial postponement was confirmed in January 2013. (ER 541, 1466 ¶ 82)

On 25 November 2014, without conducting either the reasonableness review or the investigation, the CPUC ordered utility customers to pay the \$3,300,000,000 in costs caused by the failed generators. (ER 1183, 1446 ¶ 4) The framework of the order that required utility customers to pay those costs was formed at a secret meeting in Warsaw, Poland on March 26, 2013 by then-CPUC President Michael Peevey and SCE Executive Vice President of External Relations, Stephen Pickett. (ER 118-119, 551-552)

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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 ~~effective 2/1/2012~~

3. Replacement power responsibility: customer

4. NEIL/insurance recoveries: to customers

*Wart
prze* [5. MAI recovery: 1st to, see to the extent of the disallowance
2^d to customers

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) O&M 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 5063 employees - *Approx of \$50 million*

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8. Environmental offset: SCE to donate \$5¹⁰ million per year 2019-2022 to _____ {an agreed upon GHG, climate, or environmental academic research fund, institution, etc.}

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

MHI Recovery

- 1- First \$200 million → 50% cost, 50% SCE
- 2- Next \$200 million → 70% cost, 30% SCE
- 3- Any above \$400 million up to shutdown → 80% cost, 20% SCE
- 4- Above shutdown → 25% cost, 75% SCE

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The notes about the replacement steam generator settlement (known as the “RSG notes”)² recording the settlement order’s framework were found and seized from CPUC President Michael Peevey’s home office desk by a California state criminal investigator executing a search warrant. (ER 758, 766) The RSG notes were made on the Bristol Hotel stationery where Peevey and Pickett had met in Warsaw, Poland in March 2013. The search warrant property receipt recorded the receipt of: “RSG Notes on Hotel Bristol stationery.”³ The San Diego Union Tribune reported the State Attorney General investigator had seized the RSG notes at Peevey’s house on 30 January 2015:⁴

**AG cites possible felony crime in raid on ex-utility boss
Warrant indicates notes involving San Onofre may
have been among items seized**

**By Jeff McDonald (/staff/jeff-mcdonald/), 12:05 p.m.,
Jan. 30, 2015**

State agents seized bank statements, computers, miscellaneous files and a host of other materials from the Los Angeles area home of former California Public Utilities Commission President Michael Peevey this week, indicating a public-corruption case is growing more serious.

According to the search warrant and an inventory of materials seized by Attorney General’s office

² RSG refers to the defective four “Replacement Steam Generators” installed in 2010 and 2011 at the San Onofre nuclear power plant that failed, causing the plant to permanently close.

³ ER 073-074

⁴ ER 816

investigators, Peevey is suspected of committing at least one felony offense.

The 13-page document, obtained by U-T Watchdog on Friday, shows state agents executed a search warrant Tuesday at the La Canada Flintridge home Peevey shares with his wife, state Sen. Carol Liu.

“It is further ordered that affiant be allowed to share information with federal and state and criminal and civil law enforcement authorities who are also investigating this matter,” the records state.

The records show agents took an iMac computer, a MacBook Pro, three Dell computers, a thumb drive and six day planners.

They also seized “RSG notes on Hotel Bristol stationery,” which may be a reference to replacement steam generators – the fatally flawed project that led to the premature decommissioning of the San Onofre nuclear power plant on San Diego County’s north coast.

Also, they took a roster of utilities commission employees as of Dec. 2, 2014, which Peevey had at his home for some reason as he neared departure from his post.

Ratepayers in San Diego County and Southern California are covering \$3.3 billion out of \$4.7 billion in shutdown costs as a result of faulty steam generators that leaked in 2012 and prompted the plant to close for good in 2013.

On 9 February 2016, nine days after the Union Tribune reported criminal investigators under a search warrant had seized the RSG notes from the CPUC

President, and 683 days after SCE was supposed to report such ex parte communications, SCE admitted Pickett had met with Peevey in Warsaw:⁵

**SOUTHERN CALIFORNIA EDISON COMPANY'S
(U 338-E)
LATE-FILED NOTICE OF EX PARTE
COMMUNICATION**

Southern California Edison (SCE) respectfully submits this late-filed Notice of Ex Parte Communication. On or about March 26, 2013, former SCE Executive Vice President of External Relations, Stephen Pickett, met with then-President Michael Peevey at this Bristol Hotel in Warsaw, Poland in connection with an industry event. To the best of Mr. Pickett's recollection, the meeting lasted approximately 30 minutes. Mr. Pickett recalls that Ed Randolph, Director of Energy Division, also was present for some or all of the meeting.

The meeting was initiated by Mr. Peevey, who had requested an update on the status of SCE's efforts to restart San Onofre Nuclear Generating Station (SONGS) Unit 2. Mr. Pickett provided the requested update. Thereafter, in the course of the meeting, Mr. Peevey initiated a communication on a framework for a possible resolution of the Order Instituting Investigation (OII) that he would consider acceptable but would nonetheless require agreement among at least some of the parties to the OII and presentation to and approval of such agreement by the full Commission. Mr. Pickett believes that he expressed a brief reaction to at least one of Mr. Peevey's comments. Mr. Pickett took notes during the meeting, which Mr. Peevey kept; SCE does not have a copy of those notes.

⁵ ER 551-552

The secret meeting in Warsaw was followed up with a score of secret meetings amongst CPUC officials, SCE executives, and two ratepayer advocates. (ER 75-77) At these meetings, the participants learned of the Warsaw meeting and the deal struck there. The CPUC and SCE initiated a media blitzkrieg to foist the deal on utility customers representing it as a \$1.4 billion refund to utility customers, when in fact, it was a \$3.3 billion charge. There were a series of other ex parte conferences between SCE and CPUC decision makers, and then in March 2014, the “settlement” was announced.

On 14 May 2014, a hearing on the settlement agreeent was held. However, the ex parte Warsaw, Poland meeting was not disclosed. A second search warrant was issued in connection with this hearing. The CPUC Administrative Law Judge who participated in undisclosed ex parte communications remains on the case to which utility customers have objected, blocking them from receiving a fair notice and hearing. (ER 37-47)

II. RELEVANT PROCEDURAL HISTORY

Plaintiffs filed their complaint alleging an unlawful taking under the Fifth Amendment to the United States Constitution on November 13, 2014. (ER 1443-1470) Attached as an Exhibit to the complaint was the case *S. Cal. Edison Co. v Lynch*, 307 F.3d 794 (9th Cir. 2002) – a case filed by Defendant/Respondent here, Southern California Edison (SCE), in district court alleging a Fifth Amendment

taking by the California Public Utilities Commission when the CPUC refused to allow it to increase its rates it charged customers. (ER 1471-1490) Also attached to the complaint were emails and ex parte communications between the CPUC and the utility SCE (ER 1491-1513), and public records requests seeking to obtain such information. (ER 1514-1519)

Defendant SCE filed a motion to dismiss Plaintiffs' complaint that alleged a Fifth Amendment taking by the California Public Utilities Commission when the CPUC to increase the rates it charged customers for the failed steam generators without having provided reasonable notice and hearing. (ER 1116-1142; ER 1013-1016)

The CPUC also filed a motion to dismiss the complaint the case challenging jurisdiction under the Johnson Act. (ER 1143-1173; ER 1174-1442)

Plaintiffs opposed both motions, alleging the secret meetings in Warsaw and elsewhere, and meeting in disregard of the ex parte rules, did not provide reasonable notice and hearing. (ER 0281-1012) Defendants filed their reply brief. (ER 118-280)

Before the district court heard the case but after Plaintiffs' responsive briefing, Plaintiffs filed the recently released "RSG" Hotel Bristol Notes with the Court. (ER 103-107) Defendant SCE filed a Response (ER 081-083), and Plaintiffs filed a reply. (ER 069-080)

The court heard argument (ER 019-035) and issued an order confirming its tentative ruling. (ER 085-102; ER 051-068) Judgment was entered (ER 050) and the matter appealed. (ER 048-049)

SUMMARY OF ARGUMENT

The United States District Court was not deprived of jurisdiction under the Johnson Act to hear utility customers' constitutional claim because there was not a fair or reasonable notice and hearing.

ARGUMENT

I. INTRODUCTION

Utility customers should not be ordered on the threat of losing their electricity service to pay over \$3,300,000,000 for the defunct San Onofre Power Plant (which produces no electricity) without a fair notice and hearing. When the shoe was on the other foot and SCE was providing electricity to utility customers, for which SCE was not paid, SCE had no difficulty recognizing that such an outcome violated the U.S. Constitution. *S. Cal. Edison Co. v. Lynch* 307 F.3d 794 (9th Cir. 2002) ("Lynch")

From *Lynch* we learned that "District courts have an obligation and a duty to decide cases properly before them." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 805 (9th Cir. Cal. 2002) We also learned that in both cases, the one here seeking relief from rates for electricity charged not produced, and the other in which rates

were sought for electricity produced and not paid for, the CPUC was on SCE's side and against the utility customers who the CPUC is supposed to protect. In fact, in *Lynch*, the CPUC "expressly waived any abstention defense to SoCal Edison's action and consented to the Stipulated Judgment." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 806 (9th Cir. Cal. 2002)

In *Lynch*, the Ninth Circuit instructed that "Due process requires that a party affected by government action be given "the opportunity to be heard at a meaningful time and in a meaningful manner." *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 807 (9th Cir. Cal. 2002)

II. CPUC NOTICE AND HEARING REQUIREMENTS

The utility customers were entitled to a hearing on whether SCE acted reasonably in deploying the defective steam generators before ordering utility customers to pay the \$3,300,000,000 in costs SCE caused. Cal Pub Util Code § 451. An order imposing the San Onofre costs on utility customers required notice and a hearing on the question of whether the defunct plant was used and useful. Pub Util Code 454.8.

The utility customers were entitled to the protection afforded them under the CPUC ex parte rules, which required ex parte communications with CPUC decision makers, like those that occurred at Warsaw, Poland, be reported in three days. CPUC Rule 8.4.

None of these protections were present here.

III. UTILITY CUSTOMERS WERE ENTITLED TO REAL NOTICE AND HEARING

Before they could be ordered to pay the costs caused by the failed steam generators, customers were entitled to: “a real notice and [to be] afford[ed] a real hearing.” *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. Miss. 1954) Thus, the Johnson Act’s limit on a district court’s jurisdiction applies only when the parties “had an adequate opportunity to litigate.” *Brooks v. Sulphur Springs Valley Electric Corp* 951 F. 2d. 1050, 1055 (9th Cir. 1991)

The language of the statute is plain; it applies only when the “order has been made after reasonable notice and hearing.”⁶ The language of the Johnson Act is so plain, the legislative history is so consonant with the language, the mischief it was designed to reach and the remedy determined upon and afforded by it is so clear as to make further discussion, and the citation of authorities in support of these views unnecessary. *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. Miss. 1954) Holding the notice and hearing essential in judicial proceedings would not seem to be indispensable' “if accepted and followed as to the promise of the Johnson Act for notice and hearing, would keep it to the ear while it breaks it to the

⁶ 28 U.S.C. 1342

hope.”⁷ *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. Miss. 1954)

The legislative history makes clear the target of the (Hiram) Johnson Act was the utilities’ abusive practice of delaying Commission orders issued after fair notice and hearing by filing federal court cases:

The Johnson bill contains but one substantive proposition, and that is to divest the district courts of the United States of jurisdiction in public-utility rate cases of an intrastate character where-and I call attention particularly to these features of the bill--**a fair hearing after notice** has been had before the State public utility commission and where an adequate remedy for any wrong is provided in the courts of law and equity of that State. 78 Cong. 8338 (statement Rep. Tarver)

The question involves the resort of **the utility companies** to our Federal courts with the consequent delays and the expense and the alleged abuses to which such resort has given rise. 78 Cong. Rec 8322 (1934) (statement of Rep. O’Connor)

Is it not a fact that in many instances these **utility corporations**, when they cannot obtain all they desire from the utility commissions, jump into the Federal courts and go even as far as to demand and secure a receivership for corporations that should not be forced into receivership or bankruptcy, as has been done in several of the cities of the United States? 78 Cong. Rec 8323 (1934) (statement of Rep. Sabath)

After the telephone company finally lost the case they were directed to refund the money to the patrons, but they were not able to refund \$600,000 because in this long interval of time a sufficient number of patrons to be entitled to that sum of money had moved away, had died, or had become otherwise inaccessible, and, so far as the record discloses, the \$600,000 was converted into the treasury of the

⁷ Macbeth Act 5 Scene 8 They tricked me with their word games, raising my hopes and then destroying them. (in plain English)

telephone company, money to which it was not entitled, but which it was enabled to secure through this Federal court procedure. 78 Cong. Rec. 8338 (1934) (statement of Mr. Traver)

If **the utility** chooses to bring such action in the lower Federal courts, such courts are authorized by Federal law to try the case de novo and to substitute their judgment, both on the facts and the law, for the judgment of the State commissions. 78 Cong. Rec. 8324 (1934) (statement of Rep. Mapes)

The evidence at these hearings tended to establish that, under the present procedure in the Federal courts, grave abuses have arisen in some cases where **utility corporations** have sought injunctive relief from orders by State boards or commissions fixing rates. 78 Cong. Rec. 8326 (1934) (Reptr Majority Senate Judiciary Committee)

Citizens complaining of rates alleged to be excessive have sometimes been unable, because of limited funds, properly to present their case a second time in the United States court after having already presented it once fully before the board or commission, with the result, so it is claimed, that efforts to secure relief from extortionate rates have had to be abandoned. The mere threat by the **utility company** that it would seek an injunction in a United States court, involving the prospect or great additional expense and delay, has sometimes been sufficient to force a compromise unfavorable to the public interest. 78 Cong. Rec. 8326 (1934) (Rep Majority Senate Judicial Committee)

Today the course is not uncommon for a public utility whose rates have been fixed by a State utility regulatory body to proceed, if it desires, within the State court, obtain its injunction, try its case up to a certain point, and then, with the power that is given it under the diversity of the citizenship clause, take its case into the Federal district court as well, and there interminably delay the matter. 78 Cong. Rec. 8335 (1934) (statement Senator Johnson)

For instance, take the case of this sort: The largest utility corporation in the State of California is what is called the "**PG.& E.**", that is, the Pacific Gas & Electric Co. Recently there has been a trial before our railroad commission, a railroad commission of which Californians are very proud, and which has done a remarkably excellent work and in

its early stages a work under very great difficulty. There has been a trial there of the rates that have been fixed. The trial has lasted between 1 and 2 years I think. Upon both sides there has been an immense amount of testimony taken before the Railroad Commission of the State of California. On the testimony taken, the expert witnesses, money has been expended to a very, very large extent, both by the State and, legitimately, by the **utility**. The case finally is determined. The railroad commission decides what rates believes to be just. Not content with the remedy that is accorded by the State court; not content with their act, its ultimate appeal to the Supreme Court of the United States, the utility goes into the Federal district court, and the three-Judge District court, when its next term meets, grants an injunction against the acts of the railroad commission, appoints a master and this is the course, in general, of this sort of procedure. 78 Cong. 8335 (1934) (statement Senator Johnson)

But the then Governor of New York State found that they are just what I found when I was Governor of the State of California, and just what every other man has found that holds a public position in a State and tries to render and perform his duty unto the people of the State, rather than unto its corporations. And the Governor of New York found that situation confronting him, and in no uncertain tones he expressed himself. It was in 1930 that he said, in a message to the legislature:

The recent decision of the Federal Court in the Southern District of New York, permitting the New York Telephone Co drastically to raise its telephone rates, brings to the fore in a striking way the whole question of interference by the United States court with the regulatory powers of our Public Service Commission. • • •

It means that hearings and trials which rightfully should be held before our Public Service Commission or before State courts are, by a scratch of the pen, transferred to special master appointed by the Federal court. The State regulatory body • • • • is laughed at **by the utility** seeking refuge with a special master, who is unequipped by experience and training, as well as by staff and assistants, to pursue that searching inquiry into the claims of the property which the consuming public is entitled to demand. The special master becomes

the rate maker; the Public Service Commission becomes a mere legal fantasy. This power of the Federal court must be abrogated.

This is the language of the President when he was Governor of New York and he expresses very much better than most of us can express, exactly how the Iron has entered the soul of every man who, within his State, endeavors, with that State power, to give the remedy and relief to its people **from extortionate, outrageous, and shameful rates charged by a public utility**. He expresses it so well that I am very glad to adopt his language; and I wish It were possible for me to express myself with equal facility on this occasion. 78 Cong. 8336 (1934) (statement Sen. Johnson)

Everyone knows if there is anything wrong with the Johnson bill no one is to blame save the utilities themselves. They have brought this upon themselves by abusing their opportunity to invoke the jurisdiction of the Federal courts, invoking that jurisdiction not for the primary purpose of redressing a wrong or obtaining justice but primarily for the purpose of obtaining delay. 78 Cong. 8336 (1934) (statement Rep. McGugin)

When a public-service commission hears a case after notice and renders a fair decision, is that not due process of law. It is to the citizen who has to abide by it. Why should not the power company and the gas company or the telephone company abide by the same decision? 78 Cong. 8339 (statement of Rep. Tarver)

The people of the United States, it seems to me, will realize that this great octopus-this greedy monopoly, living on the pennies which are contributed by God's poor, stealing out of the school children's hands the pennies given to them by their parents, going into every home, into every little town, and taking their toll from the toil and sweat of millions of our people in order that they may debauch the very people they rob-presents a picture that ought to cause every man to raise his voice in condemnation of such an unholy, such a wicked, such an indefensible thing. 78 Cong. 8342 (statement Rep. Carpenter)

The miscarriage of justice in those cases were notorious. The companies were playing a game of fast and loose with both the State and the United States courts. When this was brought to my attention,

I introduced in the House the bill H.R. 73, a companion bill to that of Senator Johnson. 78 Cong. 8350 (1934) (statement Rep Martin)

A regulatory commission in your State decides to lower a rate that is being charged by some utility. What takes place? ** Then they will take you into the Federal court and do it all over again. You have to put in new evidence, because it is a trial de novo. 78 Cong. 8350 (1934) (statement Rep. McKeown)

IV. DISTRICT COURT MUST MAKE INDEPENDENT DECISION

The federal court must make an independent decision regarding the order requiring utility customers to pay over \$3,000,000,000 for the failed San Onofre plant that “has been made after reasonable notice and hearing.” *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. Miss. 1954) It is for the “court whose jurisdiction is invoked to determine whether reasonable notice and hearing, as provided in the [Johnson] Act, were afforded [not] for the defendant to determine this for itself and for the plaintiff to be bound by that determination.” *Id.*

Allowing the state agency under review to make the decision “would nullify the purpose of Congress to channel normal rate litigation into the State Courts while leaving Federal Courts free in the exercise of their equity powers to relieve against arbitrary action.” *Id.*

V. ORDER REQUIRING UTILITY CUSTOMERS TO PAY \$3.3 BILLION WAS MADE WITHOUT REASONABLE NOTICE AND HEARING

Ex parte communication is defined under the Federal Administrative Procedure Act as “an oral or written communication not on the public record with

respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.” Administrative Procedure Act, 5 U.S.C. § 551(14)⁸ Black’s Law Dictionary defines “ex parte” as “on one side only; by or for one party; done for, in behalf of, or on the application of, one party only.”

One of the primary purposes of restrictions on ex parte contacts with decision-makers is to prevent a party from gaining an unfair advantage in a contested matter. See, *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1543 (9th Cir. 1993) By not being subject to the adversarial process, ex parte contacts violate the right to a fair hearing. C. Wolfram, MODERN LEGAL ETHICS, § 11.3 (“Such contacts violate the right of every party to a fair hearing, a corollary of which is the right to hear all evidence and argument offered by an adversary. The violation is particularly acute because the calculated secretiveness of such communications strongly suggests their inaccuracy.”); See, John Allen, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH LAW REVIEW 1135, 1197 (1993) (“Unchallenged evidence or

⁸ See, D. Behles & S. Weissman 1 Ex Parte Requirements at the California Public Utility Commission: A Comparative Analysis and Recommended Changes. http://cdn.ca9.uscourts.gov/datastore/uploads/guides/appellate_jurisdiction_outline/Appellate%20Jurisdiction%20Outline%202012%20update_rev.pdf (utility customers draw heavily on the work product of this article)

arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion.”)

Improper ex parte communications have been referred to as fraud by the court, because they interfere with the decision-makers ability to make a fair decision. See, e.g., *State ex. Rel. Corbin v. Arizona Corp. Com’n*, 143 Ariz. 219 (1984). As one court summarized: “a party’s right to due process is violated when the agency decision-maker improperly allows ex parte communications from one of the parties to the controversy.” *State ex. Rel. Corbin v. Arizona Corp. Com’n*, 143 Ariz. 219 (1984)

Allowing ex parte contacts can essentially nullify the public’s right to attend and participate in agency decisions. As the Ninth Circuit observed:

The public’s right to attend all Committee meetings, participate in all Committee hearings, and have access to all Committee records would be effectively nullified if the Committee were permitted to base its decisions on the private conversations and secret talking points and arguments to which the public and the participating parties have no access. *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1542 (9th Cir. 1993) (citing *United States Lines, Inc. v. Federal Maritime Comm’n*, 584 F.2d 519, 539 (D.C. Cir. 1978).

The ex parte meeting in Warsaw, where, according to SCE’s admission the “framework” of the settlement was discussed, was one in which the public did not attend and participate. This settlement, according to the Ninth Circuit, effectively

nullifies the public's right to attend. The Warsaw settlement framework is the exact type of secret talking points criticized by the Ninth Circuit.

The D.C. Circuit has further stated that ex parte contacts make a “mockery of justice:”

We think it is a mockery of justice to even suggest that judges or other decision-makers may be properly approached on the merits of a case during the pendency of an adjudication. Administrative and judicial adjudication are viable only so long as the integrity of the decision making process remains inviolate. There would be no way to protect the sanctity of the adjudicatory process if we were to condone direct attempts to influence decision-makers through ex parte contacts. *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 570 (D.C. Cir. 1982).

In addition to issues of general fairness and possible taint of the decision, ex parte contacts can also damage the “integrity of the decision making process itself, and the public's perception of the process.” *Re Contacts Between Public Utilities and Former Commissioners*, 82 P.U.R.4th 559, 1987 WL 257598 (Minn. P.U.C. 1987). Such ex parte discussions also offend the Bagley-Keene open meeting law and the California State Constitution's Article 1 § 3 which provides:

The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

On the record before this Court and the District Court below, the CPUC order requiring utility customers to pay SCE \$3.3 billion cannot be said, as a

matter of law, to have provided plaintiffs reasonable notice and hearing. Accordingly, the Johnson Act requirements are not met and the matter should be reversed and remanded.

CONCLUSION

The order requiring utility customers to pay over \$3,300,000,000 was issued without fair notice or hearing, and therefore all the conditions of the Johnson Act are not met. The order below should be reversed, and the case remanded to the district court for further proceedings and discovery.

Respectfully submitted,

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Dated: September 23, 2015

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,108 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Respectfully submitted,

Dated: September 23, 2015

/s/Michael J. Aguirre
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Court Rule 28-2.61, Appellants advise they are not aware of any related cases pending in the United States District Court for the Ninth Circuit.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing APPELLANTS' OPENING BRIEF and APPELLANTS' EXCERPT OF RECORD with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 23, 2015.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Michael J. Aguirre
MICHAEL J. AGUIRRE

No. 15-55762

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CITIZENS OVERSIGHT, INC., a
Delaware non-profit corporation, et al.,
Plaintiffs-Appellants

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION, et al.,
Defendants-Appellees

On Appeal From the United States District Court
For the Southern District of California

Case No. 3:14-cv-02703-CAB (NLS)
The Honorable Cathy Ann Bencivengo, Judge

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	THE STEAM GENERATOR REPLACEMENT PROJECT	3
III.	THERE WAS NO NOTICE OR HEARING OF SCE’S EX PARTE COMMUNICATIONS WITH THE JUDGE	4
IV.	THERE WAS NO NOTICE OR HEARING OF SCE’S OTHER EX PARTE COMMUNICATIONS.....	8
V.	THE DISTRICT COURT DID NOT DECIDE IF THERE WAS REASONABLE NOTICE AND HEARING	9
VI.	CONCLUSION.....	10

TABLE OF AUTHORITIES

CASES

<i>Brooks v. Sulphur Springs Valley Electric Corp.</i> (1991) 951 F. 2d. 1050	9
<i>Meridian v. Mississippi Valley Gas Co.</i> (5th Cir. Miss. 1954) 214 F.2d 525	9
<i>Morrison v. Nat'l Austl. Bank Ltd.</i> (2010) 561 U.S. 247.....	9

AUTHORITIES

28 U.S.C. § 1342	1
28 U.S.C. § 1342(3)	1

I. INTRODUCTION

The Johnson Act (28 U.S.C. § 1342) provides that the district courts shall not enjoin, restrain the operation of or compliance with any **order affecting rates** chargeable by a public utility made by a State administrative agency where the order has been made after “reasonable notice and hearing.” 28 U.S.C. § 1342(3).

Under the extraordinary facts of this case, officials of a California State administrative agency made the format of the “order affecting rates” in a private hotel room in Warsaw, Poland, and in follow-up secret communications with no notice or hearing given to ratepayers to participate in the ex parte proceedings. (Supplemental Excerpt of Record “SER” 006-025) The flawed order of the California Public Utility Commission required the utility customers on whose behalf this case is brought to pay over \$3.3 billion in rates. (ER Vol V 1183)

Additional writings have been made public by SCE and a criminal investigation into the ex parte meetings amongst and between California Public Utilities Commission (CPUC) and Southern California Edison (SCE) officials and executives; these are relevant to this appeal and have been known to appellees CPUC and SCE. (SER 1-26, SER 102). A supplemented excerpt of record is filed with this reply brief to include these later-released documents and additional writings documenting the ex parte communications. The ongoing releases of damaging documentation of pervasive, secret meetings have had no effect on the

CPUC decision makers when it comes to the flawed order under which utility customers are required to pay billions without having received notice or a hearing; the order remains in effect.

The only question before this Court is whether a district court must determine independently whether a State administrative agency issued the order after reasonable notice and hearing as those terms are used in the Johnson Act.

On 31 January 2012, eleven months after they were installed, SCE San Onofre nuclear power plant's steam generators failed, ending its production of electricity. (ER Vol IV 821) The CPUC had given SCE conditional access to utility customer funds to pay for the new generator project, subject to the requirement that after completion, SCE 'file an application for inclusion of the costs permanently in rates.' (ER Vol III 390-392) The determination of whether there would be a reasonableness review of the project was to occur when SCE filed its application if costs exceeded \$680 million. (ER Vol III 390-392; VI 1187)

SCE did not file the required application to put the new steam generator costs permanently in rates before its generators failed in January 2012. (ER Vol III 390-392) The costs of the failed project exceeded \$3.3 billion (ER Vol V 1183), raising the prospect that SCE and not ratepayers would pay for the damages if SCE could not show it acted reasonably. (ER Vol III 390-392) SCE carried out a scheme in which the CPUC was complicit in making ratepayers pay for SCE's

failed equipment, even though SCE neither sought nor obtained a finding it acted reasonably in deploying the defective steam generators that failed a mere eleven months after they were started. (ER IV 772-773)

In October 2012, the CPUC opened, and parties in this case joined in, a proceeding to investigate the causes San Onofre plant closure. (ER Vol I 6; VI 1193; VII 1465; SER 32) Early on, the CPUC recognized the “big question remains what was the root cause of the original leak.” (SER 29) Those proceedings required any ex parte communications between SCE executives and CPUC commissioners or judges to be reported. (ER VII 1465; SER 33)

SCE executives and CPUC officials met and spoke in secret to design and implement a plan to make utility customers pay over \$3.3 billion for the failed San Onofre nuclear power plant. (ER Vol II, 73-74; SER 1-26) The SCE executives and CPUC officials combined forces to deprive utility customers reasonable notice and hearing (ER Vol II, 73-74; SER 1-26) on the question of whether SCE (and not ratepayers) should pay for the closed plant because SCE executives were on notice of the generators’ defects before it chose to deploying them at San Onofre. (ER Vol IV 819-831; SER 1-25)

II. THE STEAM GENERATOR REPLACEMENT PROJECT

There was substantial evidence SCE was on notice of the defects in the steam generators before deploying them (SER 29 45-71; Vol IV 819-831) but did

not disclose those defects to the Nuclear Regulatory Commission's (NRC). (SER 73-100) The NRC former Region IV Deputy Regional Administrator admitted San Onofre should have requested a license amendment from NRC prior to making the change. The former NRC Administrator admitted the steam generator design was fundamentally flawed, and would not have been approved as designed, had it been submitted. (ER Vol IV 755)

III. THERE WAS NO NOTICE OR HEARING OF SCE'S EX PARTE COMMUNICATIONS WITH THE JUDGE

The CPUC opened its investigation into the causes of the steam generator failure at San Onofre on 25 October 2012 only after a substantial delay that followed SCE's request for a postponement. (ER III 463-471; Vol VI 9) With no notice or hearing, just weeks after the CPUC issued the San Onofre Order Initiating Investigation ("OII"), the assigned administrative law judge (ALJ) started ex parte communications with the SCE's San Onofre Vice President. (ER I 42-46; SER 40-43)

On 4 and 5 December 2012, the ALJ and SCE's Vice President discussed in secret: (1) dividing the investigation into "phases" (SER 40-43); (2) whether the manufacturer of the steam generators' "root cause" report would be made public (SER 40-43); and (3) limiting the disclosure of what the ALJ and SCE Vice President discussed. (SER 40-43) SCE filed an ex parte report but did not include

in its disclosure the discussion about (1) the “root cause” report; (2) phasing the investigation; or (3) what to public report about their discussion. (SER 37-38)

Five days after the ALJ’s secret “phasing” discussion with SCE’s San Onofre Vice President, the ALJ on 10 December 2012 issued an order *sua sponte* announcing the CPUC had decided to conduct the proceeding in stages. (SER 147) The ALJ wrote: "The Commission intends to approach this inquiry in stages **. The Commission will initially gather information ** about the actual expenses each incurred in 2012 related to SONGS” (SER 146-147) The inquiry never returned to its original purpose, which was to investigate to determine the cause of San Onofre’s closing. (ER Vol VI 1291-1296) On 24 April 2014, the ALJ extended the stay of the investigation into who was responsible for deploying the steam generators at San Onofre. (ER IV 678-679)

After the ALJ put the investigation on ice, the CPUC President and the CPUC Director of Energy traveled with SCE’s long-time general counsel Executive Vice President Stephen Pickett to Warsaw, Poland. There in the privacy of the Bristol Hotel, they wrote up a settlement deal. (Vol II 73-74; SER 1-26) The written terms were not uncovered until a January 2015 search of the CPUC President’s home office under a criminal search warrant revealed the hotel stationary on which the terms were written. (ER IV 758-771; SER 1-26) For those terms, there was no notice of hearing.

There was no notice or hearing for other April 2014 ex parte communications between the ALJ and SCE's Vice President. (SER 106-124) On 21 April 2014, the ALJ contacted the SCE Vice President to tell him SCE was relieved of having to send notices to customers to be charged under the settlement agreement. (SER 106) On 10 June 2014, the ALJ called the SCE Vice President regarding what written materials would be given to utility customers at a meeting to discuss the San Onofre proceedings. The Vice President's handwritten notes refer to "Matt not asking to add to evidence." (SER 107) On SCE's Vice President's handwritten notes, there is a line drawn to the word "Freedman." Matt Freedman represented The Utility Reform Network (TURN) in the OII Proceedings. (ER Vol II 196-202)

On 8 July 2014, the ALJ called the SCE Vice President stating the ALJ had heard from one of the Commissioner's offices that one of the utilities said the record of settlement needed to be reopened. (SER 104, 113) The SCE Vice President wrote: "Does SCE think the record needs to be reopened?" The response noted, "emphatically no." (SER 113) The SCE Vice President told the ALJ that SCE did not want the record reopened. (SER 104) SCE's Vice President wrote: "Settlement PD" (PD is an abbreviation used to refer to the CPUC's Proposed Decision) "working through. Talk to Eric Greene?"

The ex parte discussions between the assigned ALJ and SCE's Vice President returned to the evidence showing SCE's notice of defects in the steam generators before deploying them. (SER 40-42) During their December 2012 ex parte discussions, the two had talked about the Mitsubishi Heavy Industries (MHI) "root cause" report (SER 40-42) which noted that SCE was made aware of defects in the steam generators, but had limited correctives to those that would not impede SCE installing the new generators without an NRC license amendment. (SER 59)

On 8 July 2014, SCE's Vice President noted discussions with the ALJ about "disclaimers" regarding "Joint Design and AVB"¹ and "minutes of video conf." (SER 114) The notes also stated "While building and installing the RSG's MHI provided docs to SCE in the normal course of business." It was during the design stage SCE was alleged to have learned of the steam generator defects. (SER 45-39) This evidence (in non-redacted form) is the type utility customers sought to present to show SCE was on notice of the defects before the generators were deployed, if provided notice and hearing in the proceeding to determine whether SCE, and not utility customers, should pay for the failed plant.

The SCE Vice President also prepared notes of ex parte communications with the ALJ for other SCE executives. (SER 120-124)

¹ "AVB" refers to antivibration bars – a critical feature designed to prevent tube-to-tube contact caused by steam vibration. This was an element that was compromised in the design features that caused the tube wear and leak, and ultimately the mothballing of the San Onofre Nuclear Plant. (SER 67-69)

IV. THERE WAS NO NOTICE OR HEARING OF SCE'S OTHER EX PARTE COMMUNICATIONS

Utility customers were not given reasonable notice or hearing of other ex parte communications between SCE and CPUC executives and officials. On 1 April 2013, the SCE Executive Vice President who met in Warsaw with CPUC officials reduced the agreement to written notes. (SER 130-132) Those notes of the deal hammered out in Warsaw were used as a framework and a guide. (SER 133) SCE executives spoke about the Warsaw pact with the CPUC President's Chief of Staff on 29 May 2013. (SER 124) SCE executives described the terms of the secret deal: "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 loose [sic] a very good opportunity." The discussions included talks about SCE letters showing SCE was on notice of the defects before the steam generators were deployed. (SER 61-67, 135-136, 139)

Another ex parte conversation took place on 7 September 2013 between SCE executives and the CPUC president. One email stated: "You should talk to Mike H. about the potential ex parte implication of today's conversation. (SER 140-141)

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**V. THE DISTRICT COURT DID NOT DECIDE IF
THERE WAS REASONABLE NOTICE AND HEARING**

The sole question before this Court is whether it is for the “court whose jurisdiction is invoked to determine whether reasonable notice and hearing, as provided in the [Johnson] Act was afforded.” *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. Miss. 1954) The district court erred when it ruled the decision about whether proper notice and hearing was afforded utility customers was properly made by the CPUC -- the entity alleged to have denied the hearing and notice. The district court did not address the due process implications of the undisclosed Warsaw, Poland agreement and the follow-on ex parte discussions implanting its terms. The district court deferred to the CPUC determination. The “reasonable notice and hearing” prong of the Johnson Act required the district court to independently, as a matter of law, determine if it had subject matter jurisdiction. The Johnson Act was not satisfied.

The Supreme Court has instructed, “[S]ubject-matter jurisdiction ** refers to a tribunal's power to hear a case.” (Citation Omitted) *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010) The determination of whether that power exists should be uniquely made by the court itself. *Meridian v. Mississippi Valley Gas Co.*, 214 F.2d 525, 526 (5th Cir. Miss. 1954); See, *Brooks v. Sulphur Springs Valley Electric Corp.*, 951 F. 2d. 1050, 1055 (9th Cir. 1991)

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VI. CONCLUSION

The district court should be directed to determine independently whether reasonable notice and hearing was given before the order requiring utility customers to pay over \$3.3 billion was issued. This is the rare exception case that requires federal court intervention.

Respectfully submitted,

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Dated: January 22, 2016

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Respectfully submitted,

Dated: January 22, 2016

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