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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' OPPOSITION TO DEFENDANT SOUTHERN CALIFORNIA EDISON COMPANY'S MOTION TO DISMISS

Judge: Honorable Cathy Ann Bencivengo

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INTRODUCTION

Southern California Edison's (Edison) motion is based on the same argument as the CPUC's albeit run through a variety of permutations; it should be denied for several reasons. **First,** Edison has and is charging ratepayers for electricity it has not — and is not producing. **Second**, Edison used subterfuge to evade the ratemaking process to impose charges for new steam generators at its San Onofre (SO) nuclear power plant without going through the required rate setting process. **Third**, Edison hatched a scheme in Warsaw, Poland with the former President of Edison parent company/then-CPUC President, to end any investigation into Edison's decision to deploy the failed and defective steam generators without a required license from the Nuclear Regulatory Commission (NRC) and without putting the costs of the steam generators into rates. **Fourth**, Edison excluded all but its hand-selected parties from the discussions to end the investigation.

The case is now under criminal investigation, the former CPUC head Michael Peevey had evidence of the scheme seized at his house under a search warrant based on a finding there was probable cause to believe a felony had been committed.

Plaintiffs have been forced to pay for the damages and costs without just compensation because the CPUC determined to confiscate plaintiffs' property in order to support the CPUC's public purpose of bailing out Edison no matter how serious its wrongdoing. Edison neither sought nor received any finding it acted reasonably; it did not even seek a finding it did *not* act recklessly or even intentionally. There is no merit to the motion and it should be denied. The Court, under these circumstances, has the right and duty to hear the case.

Corruption in public utility commissions is not new, but under the current CPUC in California, it reached new heights in the case of the debacle at San Onofre. The Effect Upon State Powers of Expanded Federal Control of Public Utility Field, 1 MO L. Rev. 245 (1936) This case integrates the difficulty of a utility

recovering costs for a failed nuclear power plant (Public Utility Right to Recover Cost of Nuclear Power Plants 83 A.L.$. 183) with a case of regulatory capture of the utilities commission by an offending utility. See, *City* of *Oakland v. Carpentier* (1859) 13 Cal. 540 (1920) 46 Cal. App. 271,279; Capturing This Watchdog? The Consumer Financial Protection Bureau Keeping the Special Interests Out of Its House, 40 W. St. U. L. Rev. 1; What Can We Learn from the 2010 BP Oil Spill?: Five Important Corporate Law and Life Lessons, 42 McGeorge L. Rev. 809; 43 Sw. L. Rev. 591.

I. STATEMENT OF THE FACTS

On 30 November 2004, Edison Vice President at SO Dwight Nunn admitted facts that put the new steam generators Edison was designing and installing into the category of requiring a license under the rules of the Nuclear Regulatory Commission:

> This will be one of the largest steam generators ever built for the United States and represents a significant increase in size from those that Mitsubishi Heavy Industries has built in the past. It will require Mitsubishi Heavy Industries to evolve a new design beyond that which they currently have available.
> **
> Such design evolutions tend to challenge the capability of existing models and engineering tools used for proven steam generator designs.
> **
> Anti-Vibration Bar design (and installation) is by far one of the most challenging tasks that will face Mitsubishi Heavy Industries and San Onofre; in fact, it is our opinion the single most significant task facing the industry for steam generators of our size today.
> **
> 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). (Severson Ex. 1)

/ / /

Edison Engineer Boguslaw Olech admitted in a January 2012 article Nuclear Engineering International the month the new steam generators at SO failed that "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 U.S. Nuclear Regulatory Commission (USNRC). (Ex. 3)

The Atomic Safety and Licensing Board found the 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. (See Ex. 1 for Edison concerns)

A root cause report prepared by the company Edison hired to build the new steam generators reported, found that Edison recognized that the steam quality in the new steam generators "was high." Design measures to reduce the steam quality were considered but these changes were found to have unacceptable consequences such to insure compliance with 10 CFR 50.59. (Ex. 61)

The former NRC deputy regional administrator over SONGS told the NRC Office of Inspector General that "he believes that SONGS should have requested a license amendment from NRC prior to making the change." He also believes the steam generator design was fundamentally flawed and would not have been approved as designed. (Ex. 54)

On 31 January 2012 Edison operators at SO received secondary plant system radiation alarms, diagnosed a steam generator tube leak and shut down unit 3. Edison saw extensive tube-to-tube wear. The root cause report issued by the company Edison hired to manufacture the steam generators found extensive tube wear in unit 2. (Ex. 61; Root Cause pp. Cover page 6, 30-36, 48-50)

When the new steam generators failed in January 2012, their costs had not been put into rates. Edison had represented to the CPUC that it would submit the new steam generator costs for a reasonableness review, and that the CPUC would

not relinquishing its authority to review the reasonableness of reported costs and construction practices. Specifically, Edison proposed to file an application to establish the reasonableness of the new steam generator project, construction costs "six months after SONGS returns to commercial operations." (Ex. 2)

Instead of filing an application with the CPUC to put the new steam generators in rates, Edison wrote a letter to the CPUC on 13 April 2011 stating that the steam generators had been installed but Edison informed the CPUC of its "current intent" to file the application at the "end of the second quarter 2012" that seeks authority to "permanently include in rates the capital costs incurred in the procurement and installation of replacement steam generators at SONGS." (Ex. 2)

Edison faced a catastrophe of its own making with the unlicensed steam generators failed in January 2012 *before* their costs had been permanently placed into rates. It was at this point that Edison and CPUC officials combined to force Edison customers to pay for Edison's conduct without any review of its reasonableness, and without a finding that SO was used and useful to producing electricity to ratepayers.

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

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

the application required by the original CPUC decision provisionally allowing the project to proceed.

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

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

Notes found in a CPUC President's Office Desk in "Room A" of his La Canada Flintridge home in Los Angeles show the plan to kill the investigation into Edison's decision to deploy the steam generators without a required license was planned a few months after the CPUC announced the investigation in late October 2012. (Exs. 29, 55, 60) The notes reveal a secret meeting was held on 26 March 2013 amongst the CPUC President, Energy Director, and Edison Vice President for

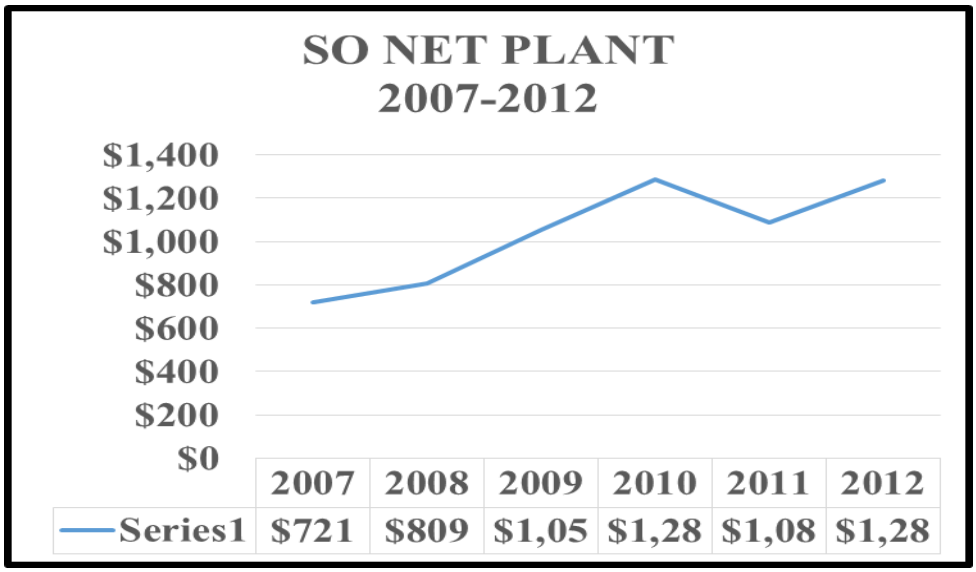
External Affairs at the Hotel Bristol in Warsaw, Poland. While the CPUC and Edison failed to produce the records[1], they were only obtained because they were included in the writings seized under a search warrant executed at the CPUC President's home in in La Canada Flintridge in Los Angeles. (Exs. 33, 55, 60)

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

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

While Edison admitted through 31 December 2013 it had already recovered from its customers $4,135,000,000 in depreciation and amortization for SO (Response to Question 11), under the agreement it will rake in billions more form its customers. Edison used the defective steam generators to build up its rate base:

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



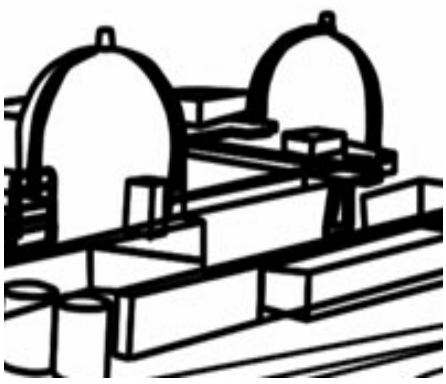
Under the agreement, Edison receives as regulatory assets amortized over 10 years with a percentage return for: (1) "Base Plant" [4.3(b)]; (2) Nuclear Fuel [4.6(a)]; (3) Material and Supplies (M&S) [4.5]. Edison also receives (4) SO Construction Work in Progress (CWIP) [4.8(a)]; (5) Operations and Maintenance [4,9]; and (6) Replacement Power [4.10]. No specific amounts are attributed to these 6 items. Instead the agreement employs terms like "sufficient to defray" such as "For calendar year 2012, the Utilities will retain rate **revenue sufficient to defray** all recorded Non-O&M Balancing Account Expenses." [4.9(d)] No amounts to be charged were specified none were audited or verified. (Ex. 45)

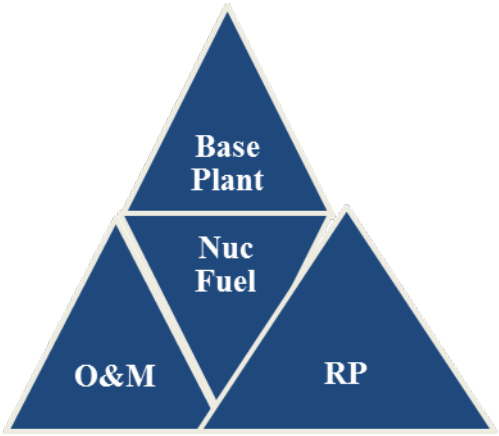
The agreement is riddled with conditional and ambiguous statements. E.g. To the extent the amounts collected for Capital-Related Revenue Requirements for Base Plant exceed the amounts permitted the amounts shall be refunded per the "refund mechanism." [4.3(b)(ii)] As for materials and supplies (M&S),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

the recorded amounts in Section 4.9(e) (i)-(iii) through the Nuclear Decommissioning Trusts those portions shall also be refunded through the refund mechanism. [4.9(f)]

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

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

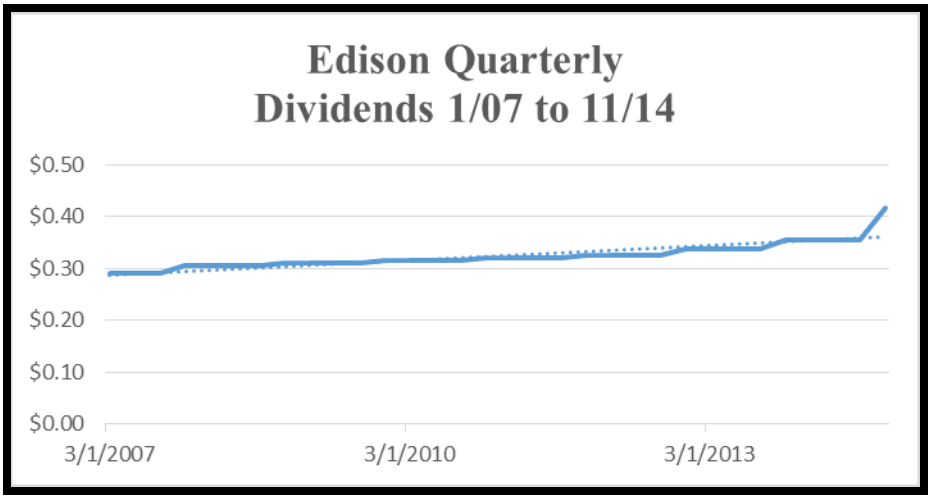




CPUC, Edison Forcing Customers to Pay for Phantom, Inflated Costs

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

Edison and the CPUC's conduct cannot be justified by the hardship found in *Jersey Central Power & Light Co. v. Federal Energy Regulatory Commission* 810 F. 2nd 1168, 1183-1186 (D.D. 1987). Edison investors have been fed courses of uninterrupted dividends over the last 8 years (Ex. 62):



II. ARGUMENT

A. DEFENDANT'S CLAIMS FOR JURISDICTIONAL BARS ARE UNFOUNDED

1. The Johnson Act Does Not Bar Plaintiffs' Challenge to Defendant's Rulings

The Johnson Act was written into law to "channel *normal rate litigation* into the state courts, while leaving the federal courts free in the exercise of their equity powers to grant relief against arbitrary action [in cases like this one]." *Hartford Consumer Activists Ass'n v. Hausman*, 381 F. Supp. 1275 (D. Conn. 1974).

The court had jurisdiction to hear the case because (1) dispute does not involve a matter in which there was a reasonable notice and hearing; and (2) there is no plain, speedy and efficient remedy may be had I the courts of such State. 28 U.S.C.A. §1342 The absence of any of these requirements is fatal to the application of the Act and therefore allows the federal court to maintain jurisdiction. *Gen. Textile Printing & Processing Corp. v. City of Rocky Mount*, 908 F. Supp. 1295, 1300 (E.D.N.C. 1995). The burden of showing that the conditions have been met is on Edison, the party invoking the Johnson Act. *US W., Inc. v. Nelson*, 146 F.3d 718, 722 (9th Cir. 1998). Defendants cannot carry this burden because 1) reasonable notice and hearing was not given prior to the order being made; and 2) a plain, speedy, and efficient remedy may not be had by plaintiffs in California Courts.

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

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

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The CPUC acted arbitrarily in June 2012 when it allowed Edison to make its customers pay for the steam generators after they failed, without Edison showing they were used and useful and that Edison acted reasonably. The CPUC acted arbitrarily when it delayed at Edison's request the start of the OII for nine months, when it divided the OII into stages and phases and postponed the examination of the reasonableness of Edison's conduct to the end, at Edison request. The CPUC acted arbitrarily when CPUC President Peevey met with Edison officials in Warsaw, Poland, while the OII was stalled, and outlined a plan to end the OII altogether.

The CPUC acted arbitrarily when it allowed parties to be excluded from the sessions held to plan the end of the OII between May 2013 and March 2014. The CPUC acted arbitrarily when it limited the "evidentiary" hearing to 3 hours in the afternoon of 14 May 2014. It acted arbitrarily when it limited the examination of witnesses to factual conflicts and prohibited an examination of whether the plan to end the OII was the product of collusion. The CPUC acted arbitrarily when it denied the requests for official notice after the evidentiary record was closed and when it took an official notice of a hearsay letter written by an NRC investigator. The CPUC acted arbitrarily when it found falsely the "primary result of the settlement is ratepayer refunds and credits of approximately $1.45 billion," There are no refunds, as the term is defined in the Oxford English Dictionary (A repayment; the return of money paid). See, Problems for Captive Ratepayers in Nonunanimous Settlement of Public Utility Rate Case, 12 Yale L. J on Reg 257 (1995); Limitation of Lower Federal Court Jurisdiction Over Public Utility Rate Cases 44 Yale L. J. 119, 132.

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(a) Reasonable Notice and Hearing was Not Given to Ratepayers Prior to Allocation of the Costs of the RSGs

California law imposes strict requirements on the type of notice and hearing required for a public utility to legally change its rates. Cal. Pub. Util. Code § 454 provides. Edison was required to file an application, and to furnish to its customers affected by the proposed rate change notice of its application to the CPUC. The notice was required to state the amount of the proposed rate change expressed in both dollar and percentage terms for the entire rate change, as well as for each customer classification, a brief statement of the reasons the change is required or sought, and the mailing, and if available, the email address of the commission to which any customer inquiries may be directed regarding how to participate in, or receive further notices regarding the date, time, or place of, any hearing on the application, and the mailing address of the corporation to which any customer inquiries relative to the proposed rate change may be directed. *Id.*

In order to comply with the reasonable notice and hearing elements of the Johnson Act, there must be compliance with any state laws setting requirements for notice and hearing in rate disputes must be complied. *See Brooks v. Sulphur Springs Valley Elec. Co-op.*, 951 F.2d 1050, 1054 (9th Cir. 1991).

Moreover, the CPUC and SCE failed to comply with the CPUC's own notice and hearing requirements. CPUC Rules of Practice and Procedure state that "Prior to signing any settlement, the settling parties shall convene at least one conference with notice and opportunity to participate provided to all parties for the purpose of discussing settlements in the proceeding. Notice of the date, time, and place shall be served on all parties at least seven (7) days in advance of the conference." CPUC Rules of Prac. and Proc. §12.1.

In denying a hearing on the issue of whether the costs incurred for the replacement steam generators and the loss of the plant were reasonable, the CPUC denied the most fundamental precepts of due process rights under the United States

Constitution: "governmental action determining the rights or obligations of numerous specified persons is invalid unless the mandates of due process are satisfied." *Due Process and the Administrative State*, 72 Calif. L. Rev. 1044, 1050.

An impartial, unbiased adjudicator is an essential element of procedural due process. U.S. Const., amend. XIV, § 1; *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242; *Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *Goldberg v. Kelly* (1970) 397 U.S. 254, 271. Ratepayers repose trust and confidence in their CPUC Commissioners and ALJs to perform their duties. *People ex rel. Harris v. Rizzo* (2013) 214 Cal. App. 4th 921, 950. The facts in the complaint, and the facts learned since the complaint as to secret meetings, improper ex partes, and Commissioner formulated settlement terms in a luxury hotel in Poland (warranting leave to amend, if necessary) create an impermissible look of impropriety and cast doubt on whether an impartial, unbiased adjudicator considered their case. Worse, the San Onofre replacement generators were never put permanently inrates, and the CPUC failed to hold proceedings making Edison do so.

(b) There is No Plain, Speedy and Efficient Remedy in State Court

In California, there is no plain, speedy and efficient remedy in California state court for the review of Edison and the CPUC's violation of the federal constitution. 28 U.S.C. § 1382. See, 39 Hastings L. J. 1147, 1155 (1988) The doors of the Superior Court are closed to plaintiffs, the pathway to state appellate court is blocked by a wall of pure discretion, with the chances of review about the same as a writ of certiorari. When ratepayers have tried to bring their matters to state court, they get denied at the trial court level under Cal. Pub. Util. C. § 1759, and the Court of Appeal fails to review merits of unlawful actions. See *Disenhouse v. Peevey*, 226 Cal. App. 4th 1096, (Cal. App. 4th Dist. 2014) (Court of Appeal denied writ review, Court of Appeal declined to hear matter on merits of violation)

That no "rate" (as that word is commonly used) was set, the absence of a fair notice, opportunity to participate and a hearing, along with the unavailability of

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

2. The *Williamson County* Ripeness Doctrine Does Not Bar Plaintiffs' Claim

Defendant incorrectly asserts, "Plaintiffs' claim of a taking of property without just compensation is not ripe." The CPUC's decision may be considered final, and Plaintiffs have exhausted all available remedies under state law. A takings claim is not ripe until "(1) the state agency imposing the allegedly confiscatory regulation has taken final action against the plaintiff's property and (2) the plaintiff has pursued all available remedies under state law." *US West Commc'ns v. MFS Intelenet, Inc.*, (9th Cir. 1999) 193 F.3d 1112, 1126 (citing *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, (1985) 473 U.S. 172).

Unless otherwise stated in the decision, a decision issued by the CPUC shall become effective 20 days after it is served on the parties. Public Utilities Code § 1705. "An application for rehearing shall not excuse any corporation or person from complying with and obeying any order or decision." PUC § 1735.

In the instant action, the CPUC issued a decision on November 25, 2015, which "should be effective immediately." (See Defendants' exhibits to motion, Decision 14-11-040 November 25, 2014, p. 136). In addition, the efficacy of the CPUC's November 25, 2014 decision is not affected at all by Plaintiffs' filing for a rehearing because "An application for rehearing shall not excuse any corporation or

person from complying with and obeying any order or decision." It remains in effect, and is therefore a final decision. Pub. Util. Code § 1735; CPUC Rule 15.4.

B. PLAINTIFFS STATE A VALID LEGAL CLAIM FOR RELIEF

1. Utility Rates Are Not User Fees, And Utility Rates Give Rise To a Takings Claim

The amounts charged for electricity that Edison is not producing and plaintiffs are not receiving from SO can hardly be called a user fee; it's a non-user fee. In *Sperry* user fee was charged to reimburse the United States Government for expenses incurred in connection with the arbitration of claims of United States claimants against Iran *United States v. Sperry Corp*., 493 U.S. 52, 60 (1989).

Here, the charge is for electricity producing nuclear plant that produces no electricity. Here, there is no reasonable relationship" between the monetary exaction" and the purpose of the exaction which is the receipt of electricity production. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 860 (1996)

2. The Filed Rate Doctrine Does Not Preclude Claims Against Defendant

Again, in order for the filed rate doctrine to apply, a rate must have been fixed. *Cal. ex rel Lockyer v. Dynegy Inc*., 375 F. 3d 831, 853 (9th Cir. 2004) The charges are not imposed under a tariff. Edison did not include a copy of any tariff plaintiffs relied upon in stating their claims. Edison had a duty to file legitimate tariff rates with the CPUC. Edison made a conscious decision to not meet its duty because it failed to file to put the steam generators into rates permanently. (Ex. 2) Edison cannot assert the file rate sword under these circumstances. *Maislin Indus., U.S. v. Primary Steel*, 497 U.S. 116, 126 (1990)

3. Plaintiffs State a Valid Legal Claim in Their Complaint

Edison misunderstands the gist of the claim. Edison, in cooperation with the CPUC, is forcing plaintiffs to pay for the defective steam generators and the damages they caused without going through the rate process, but instead imposing rates based upon a secret planning process from which plaintiffs were excluded.

Edison had a better grip on the theory when Edison brought a lawsuit for providing electricity without getting paid; here, they are getting paid but not providing any electricity to plaintiffs. *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 805 (9th Cir. Cal. 2002)

What was hatched in secret was rammed through in a three-hour afternoon session -- wholly inadequate to consider a $5,000,000,000 transaction. The hearing was just so much window dressing, with President Peevey pretending he had come to learn about the settlement—something he had outlined in secret on 26 March 2013 in Warsaw, Poland with Edison. See, *People v. Olson*, 232 Cal. App. 2d 480, 485 (1965). Peevey said at the 14 May 2014 hearing (Ex. 48):

> COMMISSIONER PEEVEY: The only comment I would make is that **I came here today hoping to be educated**. I walk out of here without that happening. ** It has not illuminated the settlement one iota. ** And I have never talked to Mr. Freedman on this topic during that whole time at all. Period. Mr. Freedman. That's it. Sorry.
>
> MR. AGUIRRE: What about Southern Cal Edison?
> COMMISSIONER PEEVEY: Sorry. Edison?
> MR. AGUIRRE: Yeah.
>
> COMMISSIONER PEEVEY: I'm not here to answer your questions. I'm not here to answer your questions.
>
> ALJ DARLING: Mr. Aguirre.
>
> COMMISSIONER PEEVEY: **I'm not here to answer your goddamn question. Now shut up. Shut up.** (Ex. 48, p. 2781)

Mr. Peevey was really the one who would have been able to educate about the plan to kill the OII. Here is what he did not mention at the evidentiary hearing:

> On or about March 26, 2013, former SCE Executive Vice President of External Relations, Stephen Pickett, met with then-President Michael

> Peevey at the 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 the Energy Division, also was present for some or all of the meeting. The meeting was initiated by Mr. Peevey, ** 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. (Ex. 29)

Edison was asked to confirm that Mr. Peevey did not talk settlement with any of the parties and refused to answer the question, as Mr. Peevey did at the evidentiary hearing. (Ex. 48) Edison citation to *Mobil Oil Corp. V. Fed. Power Com'n* 417 U.S. 283, 314 is surprising since it supplemented the settlement record "with extensive testimony and exhibits *MOBIL v. FPC*, 417 U.S. 283, 313 (1974)

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

key industry analysts. (Ex. 44); (3) the CPUC ORA and TURN issued press releases with details of the agreement. (Ex. 41, 42).

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

Peevey corresponded outside the public view with Edison during this time arranging dinners, drinks and private meetings in London, Warsaw, DC and the exclusive Los Angeles California Club. (Exs. 8, 28, 29, 35

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

Inquiry into the propriety of Edison's conduct was denied because Edison did not seek and did not receive a finding it acted reasonably, nor that the charges approved by the CPUC for the steam generators were just and reasonable nor used and useful. (Ex. 58) Moreover, plaintiffs were foreclosed from pursing and developing their offer of proof, then seen as blasphemy and now gospel in light of

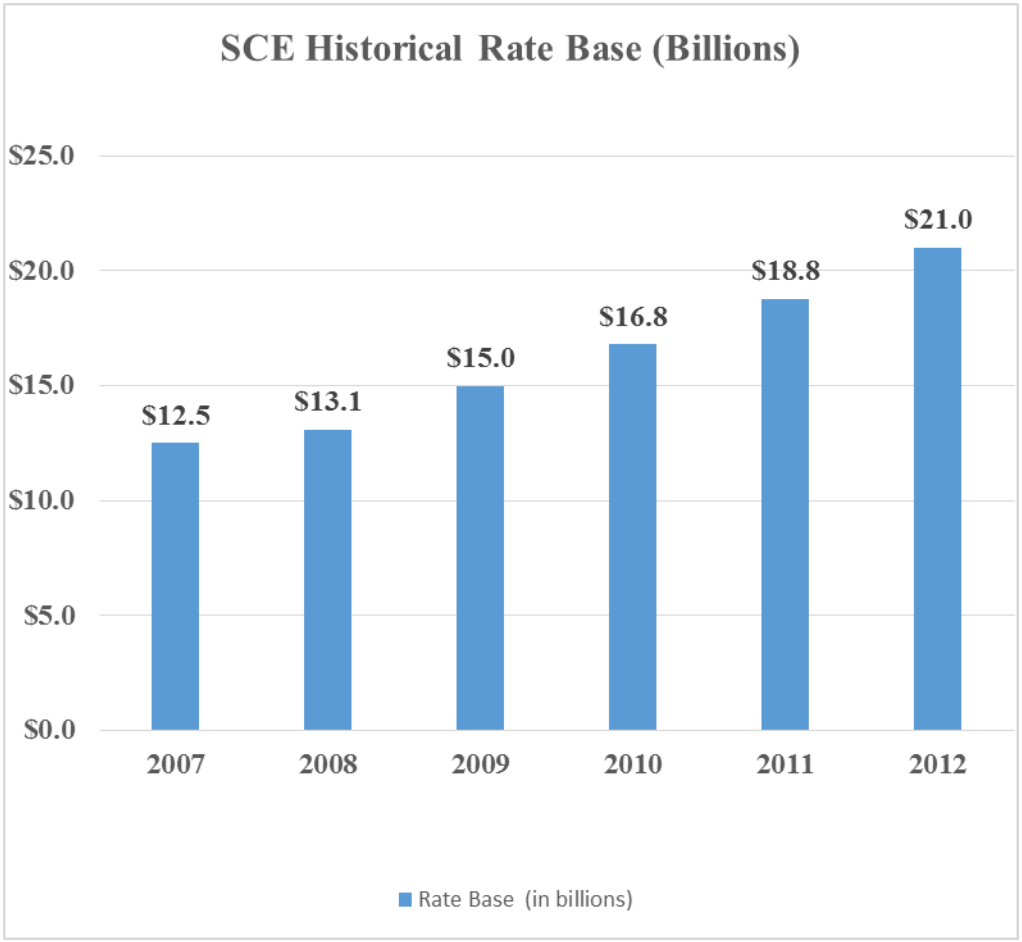
the search warrant uncovered Warsaw notes of a secret deal to kill the OII. While the CPUC argues there was no evidence of collusion it again forgets the administrative law judge ruled evidence of collusion out-of-bounds at the evidentiary hearing. (Ex. 48, R.T. 2774) The CPUC also overlooks the fact that the administrative law judge ruled out evidence properly brought before the CPUC by way of "official" notice. (Ex. 53) The CPUC did not recognize the NRC report regarding SO, but it did take official notice of a letter from a NRC investigator. (Ex. 53, Ex. 54) The record here stands in stark contrast with that of *Mobil Oil Corp. V. Fed. Power Comm'n.*

Edison misunderstands the constitutional argument. The taking was done without setting rates, outside the rate setting process. Edison did not put the steam generator costs into rates. No case has authorized decisions to charge utility customers for the mistakes of utility executives worked out in secret meetings in foreign countries and in secret meetings from which almost all of the other parties are excluded. The fact a false media campaign in support of the settlement was carried out with the cooperation of Commissioners Florio and Peevey does not strengthen Edison's case. (Exs. 41-43) It is not just the rates are unreasonable; San Onofre plant is not useful, the charges were the product of suspect collusion, with storm warnings and red flags in sufficient number to warrant a throughout airing by the CPUC before approval. (Ex. 58, Ex. 2) Edison and the CPUC created the problem by taking a year to work out a complicated agreement with little discernable benefit to ratepayers, which was then foisted upon plaintiffs. (Ex. 29, 57) See, Problems for Captive Ratepayers in Nonunanimous Settlement of Public Utility Rate Case, 12 Yale L. J on Reg 257 (1995)

Plaintiffs do not quarrel with the proposition that the "mandate of Hope is clear: the end result of a rate order must be just and reasonable. In determining the reasonableness of utility rates courts must weigh the affected investor and consumer interests." *Taking Clause Analysis of Utility Ratemaking Decisions Measuring*

Hope's Investor Interest Fact 58 Ford L. Rev. 427, 446.

While the ends can justify the means in a rate setting case because the rate set must clear the just and reasonable hurdle before implementation, it does not mean rates can be set arbitrarily in secret sessions from which parties are excluded. Edison does not have a right to confiscate plaintiffs' property to keep the always upward march of the Edison rate base (Ex, 45: attachment therto)



IV. PLAINTIFFS SHOULD BE GRANTED LEAVE TO AMEND

Generally, Fed. R. Civ. P. 15 advises the court that "leave shall be freely given when justice so requires." This policy is "to be applied with extreme liberality." *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001)(quoting *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th

Cir. 1990)). Dismissal with prejudice and without leave to amend is not appropriate unless it is clear on de novo review that the complaint could not be saved by amendment. *Chang v. Chen*, 80 F.3d 1293, 1296 (9th Cir. 1996).

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

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

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

V. CONCLUSION

Under former CPUC President Peevey, the public purpose mission of the CPUC was altered from one protecting ratepayers from unreasonable and unjust rates, to one guaranteeing the “utilities’ financial health, while achieving the lowest

possible rates." Edison and the CPUC are forcing some Edison customers alone to bear the public burden of maintaining Edison's financial health by relieving Edison of the financial consequences of deploying the unlicensed defective steam generators that knocked the plant out of commission, when Edison had failed to put the costs of the steam generators permanently in rates. In other words, plaintiffs are being forced by Edison and the CPUC to alone bear the public burden which, in all fairness and justice, should be borne by the public as a whole -- including Edison investors. *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012).

There is one fundamental reality in this case: Edison customers are being charged for the costs of a nuclear electricity production plant that produces no electricity. While the public should indeed pay for what it gets and it should also get what it pays for, this is not happening. 8 Energy L. J. 303, 335 (1987) Here, Edison in complicity with the CPUC, is robbing Edison customers under "legal authority." *Id.*

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

AGUIRRE & SEVERSON, LLP

Dated: February 25, 2015

/s/Maria C. Severson
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