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

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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

ACTS Retirement-Life Cmtys,
2012 WL 7277033 at *6 1

Brooks v. Sulphur Springs Valley Electric Corp
951 F. 2d. 1050 (9th Cir. 1991) 19

Lively v. Wild Oats Markets, Inc.,
456 F.3d 933 (9th Cir. 2006) 3

Meridian v. Mississippi Valley Gas Co.,
214 F.2d 525 (5th Cir. Miss. 1954) 19, 20, 24

Portland Audubon Society v. Endangered Species Committee,
984 F.2d 1534 (9th Cir. 1993) 25, 26

Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.,
685 F.2d 547 (D.C. Cir. 1982) 27

San Luis & Delta-Mendota Water Auth. v. United States,
672 F.3d 676 (9th Cir. 2012) 3

S. Cal. Edison Co. v. Lynch
307 F.3d 794 (9th Cir. 2002) 15, 17, 18

State ex. Rel. Corbin v. Arizona Corp. Com'n,
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, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*,
1993 UTAH LAW REVIEW 1135, 1197 (1993)....................................25

Re Contacts Between Public Utilities and Former Commissioners,
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 Rule[1] 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)

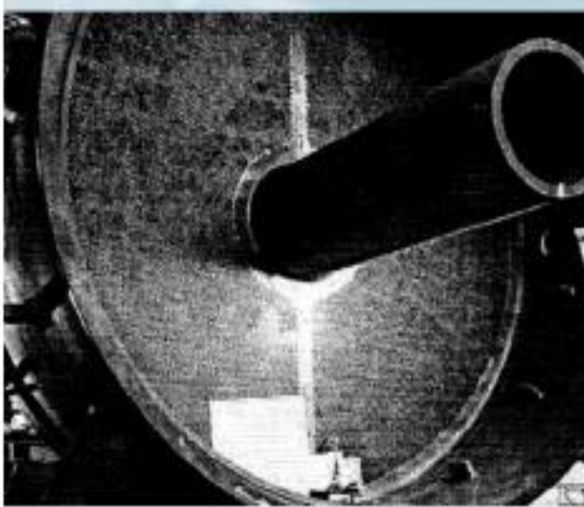
On 21 February 2013, one year after the steam generators failed, SCE was ordered to file an application to determine whether the steam generator costs could be recovered permanently in rates. (ER 1197) However, the CPUC put the application immediately on hold when it ruled examination of the question 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):

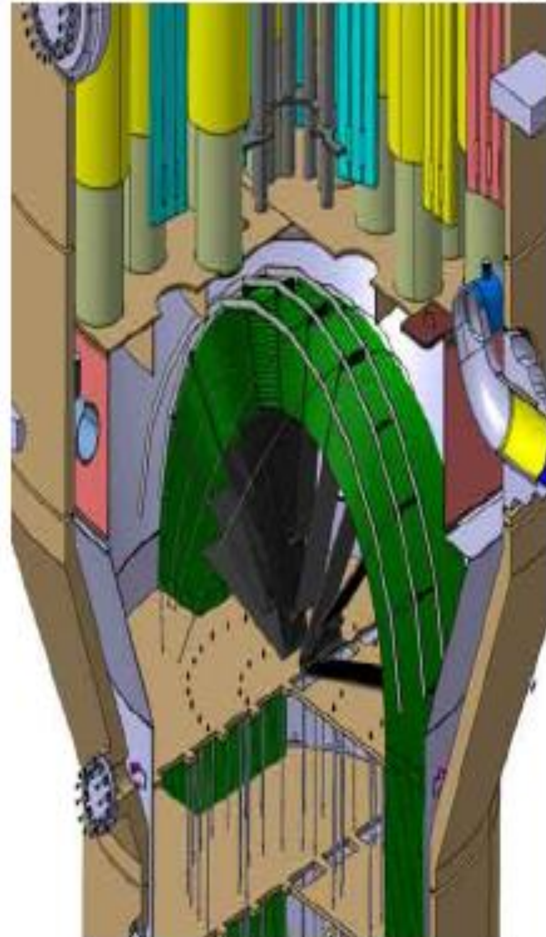
8. The new design adopted for the new steam generators was materially different from the old steam generators. The new version raised serious safety issues which went unresolved, and eventually caused the generators to fail. The stay cylinders were removed, the "egg crate" protection was eliminated, 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 ~~[illegible]~~
3. Replacement power responsibility: customer
4. NEIL/insurance recoveries: to customers
5. MHI recovery: 1st to SCE to the extent of the disallowance 2d to customers — Next page
6. Decommissioning costs: remain in rates through time of decommissioning -- periodic redetermination in CPUC proceedings as before
7. O&M: a) Already approved GRC amounts through shutdown + 6 months
   b) OII to determine shutdown O&M through end of 2017 (i.e., not in GRC)
   c) shutdown O&M 2018 and beyond determined in GRC's
   d) Shutdown O&M to include reasonab severance for SONGS employees — Appr of $50 million

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8. Environmental offset: SCE to donate $5 10 million per year 2014-2022 to ______ {an agreed upon GHG, climate, or environmental academic research fund, institution, etc.}

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

MHI Response

1- First $200 million — 50% custs / 50% SCE
2- Next $200 million — 70% S / 30% cust
3- Any above $400 million up to disallowance — 80% to S / 20% to cu
4- Above disallowance — 25% SCE / 75% custs

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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

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[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 plaint 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 particpated in undiclosed 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. 8326 (1934) (Rep Majority Senate Judicial Committee)

Today the course is not uncommon tor 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. 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 bas 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 ls 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 starching 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 bas 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

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[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 byh 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).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word, Times New Roman, 14-point.

Respectfully submitted,

Dated: September 23, 2015

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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