September 11, 2017

Re: A Vote You Will Forever Regret – Letting Trump Appointees Invalidate CA Energy Laws
Oppose AB 726 and AB 813 (Holden)

California State Senators
State Capitol
Sacramento, CA 94814

Senators,

We have been here before. A rich powerful group of energy barons want to arbitrage electrons to make themselves a killing off California's electricity supply. In the last days of a legislative session, a complicated proposal appears in print to deregulate California's electric supply long sought by some of the smartest people in the legislature. It sounds too good to be true. Some corporate environmental groups and utility friendly unions get on board with a Democratic governor to tout the innovation and the green is spread all around. The deregulation train is unstoppable. Flash forward a few years: Black outs. Enron tapes. Recall. Ask Senator Steve Peace, author of electricity deregulation, or Gray Davis how smart they think it was now.

In this last week of session, Governor Brown is asking you to take the first steps toward a similar bargain with an even more pernicious devil, Donald Trump and other billionaires with power to sell, much of it dirty. The governor is asking you to approve a "Western grid" where coal power from Warren Buffet's dirty plants in Nevada, wind power we have no need for from Phil Anschutz's windmills and other Western electrons are all arbitraged with California's increasingly clean energy.

The biggest reason to object is Californian's ratepayer and environment laws will be subservient to the Federal Energy Regulatory Commission (FERC) controlled by Donald Trump appointees. This proposal puts California's tough laws on the chopping block for Donald Trump's ax.

While the California Independent System Operator (CAISO) has tried disingenuously to minimize the risks to California law (see attached San Diego Union Tribune story), case law, including a recent case decided by the US Supreme Court, is clear. Once states participate in regional electricity sharing authorities state laws, rules and decisions can be nullified by FERC. In April, for example, the Supreme Court ruled in *Hughes v. Talen Energy Marketing* a Maryland law and regional power development was preempted by the Federal Power Act. A Public Records Act request to CAISO produced an analysis by the The Utilities Reform Network (TURN) that details the serious problems with the decision for California. (TURN's memo on the case follows.)

Why would a California legislature resisting Trump's evisceration of our environmental and consumer rights risk giving Trump appointees new power to invalidate California laws and agreements?

There are plenty of other reasons the Western grid proposal is a scam. If the proposal were really good for California it wouldn't materialize in the last week of session when no one has time to focus on the details and problems before voting. This is a last-minute ramrod that will come back to haunt you.

Bottom line: the proposal is about going back to the arbitraging electricity on a free market so that no one can really keep track of the cost or the cleanliness of the energy being sold. Out-of-state billionaires Buffet, Anschutz, and other energy barons want the new market, but Californians don't need their electricity. This is a power play by the billionaire energy barons at the expense of the environment and the ratepayer.

A recent investigation by the LA Times shows we are paying billions too much for our electricity, have far too much electric overcapacity, and rooftop solar and innovations will continue this trend. The Western grid is in part being advanced now under the notion that it could possibly create an export market for California's oversupply of electricity. That's not a viable solution when cheap Buffet-backed coal plants in Nevada are the competition on a free market for California's cleaner energy. Dirty coal will win out in a marketplace based on price.

The proposal is the exact same line that was sold to California's legislature to get it to enact electricity deregulation. In fact, the Western Grid was an idea first introduced and authorized during California's first deregulation legislation. You will literally be re-authorizing the electricity de-regulation law that cost California ratepayers tens of billions of dollars.

Governor Brown won't be around to suffer the consequences when California does. He may be working for Anschutz or Buffet. (Gray Davis's post gubernatorial career includes being a fixer for Occidental Petroleum.) But you will have to live with this vote for your public life. Make no mistake, this vote turns over the key to laws for California ratepayer and environmental protection to Donald Trump.

You may think no one will remember, or this is just a first step with off ramps before the proposal is ratified. Without your vote and your name on this legislation, this deregulation of our electricity supply and abdication of our state laws would not be possible. It's a vote that will live in infamy. We urge you to consider it carefully because it will always be with you.

Feel free to contact me with any questions.

Yours truly,

Jamie Court
Jamie@consumerwatchdog.org

	Results
1.	U-T Watchdog *The San Diego Union Tribune,* December 27, 2016 Tuesday, LOCAL; B; Pg. 1, (1080 words), Jeff McDonald

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The San Diego Union Tribune

December 27, 2016 Tuesday
Final Edition

U-T Watchdog

BYLINE: **Jeff McDonald**

SECTION: LOCAL; B; Pg. 1

LENGTH: 1080 words

A water and power district east of San Diego is suing the University of California over records related to a legal opinion that supports Gov. Jerry Brown's plan to expand the state power grid across the western United States.

The lawsuit, filed last week in Alameda County, said university officials refused to turn over documents that three law professors relied on to produce the study. The opinion was commissioned in March by the California Independent System Operator, or **CAISO**, the government nonprofit that manages most of the the grid.

The complaint was brought by the Imperial Irrigation District, a municipal utility that serves about 150,000 people in Imperial County and parts of Riverside and San Diego counties.

Lawyers for the district want a judge to order the university to comply with open-records laws by making the requested documents available for public inspection. According to exhibits attached to the complaint, university officials say they have produced all of the records they are able to release.

Spokeswoman Claire Doan said the institution supports the public's right to access information but must respect and protect employees' right to privacy for such an outside project.

The legal opinion released in August helped **CAISO** promote the plan to expand the state grid into a regional network that would serve up to 14 states, a proposal Brown has pushed as a way to market renewable power across the West.

The irrigation district's lawsuit says the opinion wrongly downplayed legal issues with California's ability to follow through on landmark clean-energy policies like the cap-and-trade program and the rule calling for 50 percent of power consumed in the state to come from renewable sources by 2030.

"The records show how three university lawyers - Ethan Elkind, Dan Farber and Ann Carlson - shaped their legal opinions issued to the California Legislature and the public in such a way as to understate the risk to climate change laws if the California Independent System Operator is expanded to include 14 western states," the complaint says.

Ann Carlson, a professor at the University of California Los Angeles, is listed as lead author of the report. Ethan Elkind of UC Berkeley and UCLA and Daniel Farber of UC Berkeley are listed as consulting professors.

The lawsuit contends that the opinion produced by the scholars was less than independent. It cites a "working outline" **CAISO** supplied to the researchers when they were hired in March that closely resembles the finished report.

"The arguments and language therein reappeared in substantial part in the final legal opinion," the suit says.

According to state officials, expanding the grid to more states would save consumers up to $1.5 billion in coming years. It would also boost the use of renewable power by making solar, wind and other climate-friendly energy sources easier to distribute across state lines.

The initial expansion would merge the California system operator with PacifiCorp, a for-profit utility based in Portland, Ore. that serves 1.8 million customers in six states. The company relies heavily on fossil fuels for power

and says it hopes the grid will lessen that reliance.

The legal opinion at issue in the Imperial Irrigation District lawsuit concludes that expanding the grid to additional states would not affect climate-change programs in California.

"Adding PacifiCorp assets to **CAISO** will not create any new or additional risk of preemption for California's energy and environmental policies," it says. "Nor will it alter the constitutionality of those policies."

The lawsuit against the University of California regents includes pages of exhibits, contending California could lose autonomy on energy policy should the merger go through.

In April, for example, the U.S. Supreme Court limited Maryland's ability to regulate energy in its service area, given that it's part of a multi-state grid. In May, Elkind emailed his co-authors to discuss whether they should pay more attention to the Maryland ruling and a similar case in Minnesota.

"Even a small chance that **CAISO** expansion could call into question California's renewable policies would be hugely detrimental, and so I wonder if we should more explicitly address potential counter-arguments," he wrote. "I'm not suggesting we try to game out the politics in this memo, but perhaps we could acknowledge more of the legal uncertainty."

The final report released in August briefly addressed legal concerns about the Federal Energy Regulatory Commission.

"To the extent that state environmental laws or policies directly intrude upon or seek to establish FERC jurisdictional rates, they would be vulnerable to a preemption challenge on those grounds," the finished opinion states.

CAISO, which is not part of the irrigation district lawsuit, defended the legal opinion's findings and independence.

"This paper evaluates that concern and concludes that having an entity like PacifiCorp join the ISO would not increase federal, i.e. FERC, regulation over the ISO and would not impact the extent to which California may continue to regulate in these areas," the March outline said.

CAISO spokesman Steven Greenlee said the outline was drafted by in-house lawyers and provided to the independent analysts as a courtesy so they would be aware of the agency's position.

"To the extent the professors reached conclusions similar to the ISO, this represents an independent validation of those views," he said.

Advocacy groups watching the proposed expansion are skeptical that federal regulators would permit California to extend its clean-energy policies beyond its borders.

"There are real risks that regional grid expansion could do substantial harm to California by increasing the potential for federal preemption of cutting-edge state policy initiatives," said Matthew Freedman, an attorney at the Utility Reform Network in San Francisco.

Sierra Club lawyer Travis Ritchie said the benefits would be huge if the expansion is done correctly. It could get rid of dirty power producers like coal and natural gas and promote renewable energy across a dozen or more Western states, he said.

But "regionalization kind of pokes the bear," said Ritchie, referring to federal regulators at the FERC. "If you are expanding those policies to other states, particularly states that don't share the same climate goals, you are inviting legal challenges."

The lawsuit was filed by San Diego attorney Maria Severson.

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COMPANY: CALIFORNIA INDEPENDENT SYSTEMS OPERATOR (57%)

ORGANIZATION: UNIVERSITY OF CALIFORNIA (84%)

PERSON: JERRY BROWN (78%)

CITY: SAN FRANCISCO BAY AREA, CA, USA (94%); SAN DIEGO, CA, USA (93%); RIVERSIDE, CA, USA (79%); LOS ANGELES, CA, USA (79%)

STATE: CALIFORNIA, USA (94%); WEST USA (93%)

COUNTRY: UNITED STATES (94%)

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US SUPREME COURT UPHOLDS PREEMPTION OF MARYLAND RESOURCE PLANNING EFFORTS

Understanding the potential consequences for California

On April 19th, the US Supreme Court issued a decision *Hughes v. Talen Energy Marketing*. The Court affirmed the 4th Circuit and held that Maryland's effort to promote the development of new local generation is preempted under the Federal Power Act. The implications for California are potentially significant.

In 2006, the PJM Regional Transmission Organization developed a centralized capacity market through a settlement joined by all participating states (including Maryland). The settlement specified that states within PJM retained the right to direct, via regulation or legislation, the development of new generating capacity as needed to satisfy local resource needs and bid the capacity into the PJM market as a "price taker" (willing to accept any price set by the market). This settlement provision was critical to gaining state support for the new market and was designed to ensure that states could act if the capacity market failed to produce new local generation at reasonable prices. When Maryland subsequently determined that the PJM capacity market was not successfully encouraging needed new local generation, the state first petitioned FERC to change the capacity market rules to provide 10-year payments to new generation (rather than the 3-year payments for new generation authorized under the rules). When FERC rejected this petition, Maryland initiated processes pursuant to the settlement to provide long-term revenue guarantees as incentives for new local generation.

Under the approach originally adopted by Maryland, the state held an auction for new local generation and picked winning bids on a least-cost basis. The winning generator was required to participate in (and clear) the capacity market, meaning they would effectively bid their capacity as "price takers". The states' load-serving entities would execute 20-year "contracts for differences" allowing the generator to receive a long-term fixed price with Maryland ratepayers responsible for any differences (positive or negative) between the guaranteed contract price and the market clearing price received from the PJM capacity market. In short, the states would get needed local generation built by having the retail customers of the Maryland load-serving entities taking on all of the capacity market risk.

In response to these state initiatives, private generating companies successfully lobbied PJM in 2011 to propose a change to its own tariff to remove the relevant settlement provision that allowed PJM states to direct the development of new local resources that are bid into the capacity market as a "price taker". Over the objections of the states that had originally insisted upon this right in exchange for their support for the settlement, FERC approved the modification and eliminated this right. Private generators subsequently sued Maryland arguing that their actions were preempted under the Federal Power Act.

The Supreme Court's decision in *Hughes* concludes that Maryland's actions were preempted by the Federal Power Act. The decision explains that interstate wholesale rates can be set through auctions run by a grid operator that set prices for day ahead energy, real-time energy, and future capacity. Any effort by states to "intrude on FERC's authority over interstate wholesale rates" (page 13) is subject to preemption under the Federal Power Act. The decision primarily focuses on the specific mechanism used by Maryland to promote in-state generation through the "contract for differences" approach. The

Court distinguishes this arrangement from a traditional bilateral contract between a utility and a generator by noting that the contract for differences specified that the capacity would be sold from the generator into the PJM auction rather than transferred to the utilities outside the auction (as would be the case in a traditional bilateral contract). As a result, the Court found that the Maryland policy was an effort to circumvent the interstate wholesale rate set in the PJM capacity auction. The Court notes that Maryland's goal of encouraging the development of new in-state generation "does not save its program" because "states may not seek to achieve ends, however legitimate, through regulatory means that intrude on FERC's authority over interstate wholesale rates" (pages 12-13).

The decision claims that "our holding is limited" and asserts that the decision does not "address the permissibility of various other measures States might employ to encourage development of new or clean generation, including tax incentives, land grants, direct subsidies, construction of state-owned generation facilities, or re-regulation of the energy sector." (page 15) The Court also states "nothing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation through measures 'untethered to a generator's wholesale market participation.' So long as a State does not condition payment of funds on capacity clearing the auction, the State's program would not suffer from the fatal defect that renders Maryland's program unacceptable" (page 15).

While some instant analysis has characterized the decision as having a limited impact on states' rights, a leading commenter on Supreme Court decisions (SCOTUSblog) observes that the decision "reinforced the authority of the federal government's energy regulators in the ongoing national-state competition to manage the markets for electricity."[1] Any analysis of the potential impacts on California and other states must consider the following relevant issues:

(1) States have a poor record defending against preemption challenges brought under the Federal Power Act (FPA) in federal courts. The Court's holding continues a near-perfect string of losses by states seeking to preserve their authority. There is no specific reason to hope that future challenges brought against state resource planning efforts will fail simply because the facts are somewhat different than those presented in the Maryland case.

(2) Maryland and New Jersey originally agreed to the PJM capacity market through a settlement that guaranteed these states a right to direct the development of local resources that could bid into the capacity market as a "price taker". Several years later, this provision was eliminated by FERC in response to a PJM proposal. The lesson is that conditions originally obtained by states in exchange for their support for a regional market can be eliminated after the market is operating even if the states protest these changes. Any deal to retain specific states' rights is neither durable nor enforceable once jurisdiction is transferred to FERC.

(3) The Court did not hold that other types of state resource planning initiatives are protected against preemption in a regional market. The decision ONLY addresses the limited issue of the mechanism adopted by Maryland. There is no basis to conclude that any other state program to promote local

[1] http://www.scotusblog.com/2016/04/opinion-analysis-u-s-energy-regulators-authority-grows/

resources would necessarily survive a similar challenge.

(4) The decision references measures available to states that are extraordinarily limited (tax incentives, land grants, direct subsidies, state-owned generation). None of these are comparable to the kind of resource planning and direct contracting requirements used in California. The decision also references "re-regulation" but that would seem to suggest the highly improbable situation where FERC-regulated wholesale markets are eliminated and utilities are fully vertically integrated. Missing from this list are renewable portfolio standards, preferred resource carve-outs, utility procurement requirements, and distribution-level incentives to generation selling into wholesale markets. None of California's policy tools to move towards a low carbon grid appear on the Court's safe harbor list.

(5) The Decision points to a variety of "competitive wholesale auctions" that could justify preemption. These include "a 'same-day auction' for immediate delivery of electricity to LSEs facing a sudden spike in demand; a 'next-day auction' to satisfy LSEs' anticipated near-term demand; and a 'capacity auction' to ensure the availability of an adequate supply of power at some point far in the future" (page 3). The CAISO already runs two of these three types of "wholesale auctions" in the form of day ahead and real-time energy markets. Any state policies that direct load-serving entities to procure resources and have a direct effect on prices in these markets could be subject to challenge.

(6) Although no centralized capacity market currently exists for California, the California Independent System Operator (CAISO) has historically favored this type of centralized auction to both promote new generation and compensate existing units. Prior efforts by CAISO have failed due to stiff opposition from the CPUC and other California stakeholders. If CAISO regional expansion occurs, there is a serious risk that the new ISO will propose (and FERC will approve) a region-wide capacity market in the coming years. Even if California obtains an assurance from CAISO that no capacity market will be created in the future, the experience with PJM demonstrates that any conditions obtained by a state (even in a settlement) can be eliminated at a later date.

(7) If a regional capacity market is established in the future, it is not clear that new preferred and renewable resources located in California could bid into such a market as "price takers" due to FERC's preference for Minimum Offer Price Rules (MOPRs) designed to prevent this type of bidding behavior. Under a MOPR, new clean generation under contract to California utilities could fail to clear a regional capacity market. This outcome could lead to additional and unnecessary expenditures on dirty fossil plants that do clear the capacity auction, resulting in an oversupply of resources and higher costs to California customers.

(8) The Court's suggestion that states may encourage new or clean generation through measures "untethered to a generator's wholesale market participation" may be difficult to accomplish in practice. All generation built in California (except for resources located in the service territories of non-CAISO member utilities, such as SMUD, IID and LADWP) participates in wholesale energy markets and receives compensation based on the day ahead and/or real-time prices. California's preferred resource policies guarantee fixed prices (paid by retail customers) to resources that sell their output into FERC-regulated markets and act as "price takers". As a result, there may be few meaningful differences between the mechanisms prohibited in _Hughes_ and those favored by California to promote

clean, local generation.

(9) The risks of federal court challenges to California policy are likely to increase if the CAISO expands to become a regional transmission operator (like PJM). Once freed from obligations to act consistent with California law, CAISO would be emboldened to develop new regional energy and capacity markets regardless of objections raised by California political leaders and state regulators. This evolution would increase the likelihood of conflicts between FERC-regulated wholesale markets and California policy measures. Claims could be raised in federal court or at FERC by private parties (as was the case in _Hughes_) claiming that the innovative policies favored by California are distorting wholesale markets and disadvantaging fossil fuel generation.

Although it is impossible to predict the outcome of future litigation, the trend towards greater reliance on FERC-authorized regional markets significantly increases the risk that California will find itself in the crosshairs and potentially on the losing end of a preemption challenge. Policymakers concerned about this possibility should carefully consider whether the expansion of FERC-regulated wholesale markets will ultimately serve California's goal of being an international leader on clean energy and climate policy.

The Mercury News

Commentary: How governor's regional electricity grid plan is flawed

Gov. Jerry Brown's regional electricity grid plan takes away California's ability to control its own power. (File Photo)

By Michael J. Aguirre |

PUBLISHED: May 23, 2017 at 9:30 am | UPDATED: May 23, 2017 at 9:49 am

Gov. Jerry Brown's regionalization plan would transfer control of California's electric grid to a board selected by private electric industry corporations.

The plan would take away the right of the people of California to elect the appointing authority — the governor of the state of California. Under the plan, out-of-state companies in the new system would then be free to move their large carbon-based electricity, such as coal and natural gas over the regional grid.

The plan would shift renewable energy generation away from California, and give to out-of-state renewable energy generators market power over renewable energy needed by California to meet its Renewable Energy Portfolio mandate. In 1996, California made the mistake of putting an electricity deregulation system in place that transferred control over electricity generation needed in California. Electricity prices soared from $8 billion in 1999 to $20 billion in 2000. Proponents would have us repeat the same mistake made under the electricity deregulation — transferring control over electricity generation outside of California.

Under the plan the jurisdiction of the California System Operator, the entity that manages California's electric grid, would be extended to parts of Montana, Nebraska, New Mexico, South Dakota, Texas, Wyoming, and all of Arizona, Colorado, Idaho, Nevada, Oregon, Utah, and Washington. Recent judicial decisions have made it clear California would lose authority to impose its renewable energy and climate change laws in the expanded grid.

California Energy Commission studies show California does not need to expand its electric grid into other states to achieve California's renewable energy goals. The studies proponents rely on to argue regionalization would create jobs and save money are flawed. The reasoning is tenuous. The jobs are supposed to come from consumer spending increased from savings utilities get from regionalization and pass on to their customers. It is highly unlikely that utilities would ever pass on any savings to their customers.

Moreover, many more reliable jobs will be created if California builds its own renewable resources in California. Proponents also argue that it would be better to have one rather than multiple grids. However, distributed energy resources (DER) are the key to building a modern renewable energy system. We need more decentralization not less. Communities in the future will plan their energy systems as part of their land use, which is done by cities and counties.

Decentralization of energy grid planning will increase electric reliability and reduce costs. Together with DER, decentralization will allow communities to engage in more local energy cooperatives like community choice aggregation. It will also reduce the size of the over-sized utility monopolies that make Californians pay amongst the highest electricity rates in the country.

Regionalization should be the coming together of states committed to reducing greenhouse gas emissions (GHG) to make a unified effort to achieve shared GHG reduction goals. Two of the states proposed to be included in the plan are suing the federal government to kill former President Obama's Clean Power Plan. Let us not squander the billions of dollars California utility customers have spent to build the state's renewable energy portfolio. California legislators and their staff have worked too hard to now surrender control of California's energy future to private owners of the nation's energy resources.

Michael J. Aguirre is a former city attorney of San Diego. He has led the effort to defeat the regionalization plan. He wrote this article for The Mercury News..