Via Federal Express and email

April 7, 2017

Fred Harris
Angela Hagler
Staff Counsel
Legal Division
CALIFORNIA PUBLIC UTILITIES COMMISSION
505 Van Ness Avenue, Room 5040
San Francisco, CA 94102-3298

RE: Comments to Draft Resolution L-522
Agenda ID #15628

Dear Mr. Harris:


The Comments and the exhibits cited in these Comments are attached herewith.

Very truly yours,

Maria C. Severson, Esq.
I. A MATTER OF PUBLIC INTEREST

The public documents sought under the California Public Records Act and the California Constitution pertain to a matter of public interest. The CPUC is forcing millions of people and families, schools, businesses and local governments to pay more than $3.3 billion over a decade for the San Onofre Nuclear Power plant, even though it generates no electricity for their use. (Exhibit _, Decision Approving Settlement p. 2)

II. THE CPUC Investigation

On 25 October 2012, the CPUC issued a press release announcing it had started a formal investigation to “consider the causes of the outages” at San Onofre. (Exhibit ) The stated purpose of the investigation was to On 1 November 2012, the CPUC assigned the investigation to Commissioner Michel Peter Florio and Administrative Law Judge Melanie M. Darling. The investigation promised to determine what caused the outages and who should pay for the failed steam generators.

A. SCE, ALJ Privately Discuss Root Cause and SCE’s Preference in OII Timing

On 5 December 2012, Administrative Law Judge Melanie Darling exchanged these emails with Russell Worden, a San Onofre owner (Southern California Edison, or SCE) representative:

Message

From: Russell.Worden@sce.com [Russell.Worden@sce.com]
Sent: 12/5/2012 10:02:20 PM
To: Darling, Melanie [melanie.darling@cpuc.ca.gov]
Subject: RE: SONGS 011 - Follow up questions

ALJ Darling:
My plan would then be to file the ex parte notice and limit it to my comments on these few issues.

When you get a moment, I'd be grateful if you could consider my other question -- whether you would like SCE to notice the public hearing to all customers throughout the service territory, or a regional notice to the customers in the southern end of the SCE service territory.

Thanks very much,

Russ

From: "Darling, Melanie" melanie.darling@cpuc.ca.gov
To: "Russell.Worden@sce" <Russell.Worden@sce.com>,
Mr. Worden: I appreciate your scrupulous attention to the rules. To the extent your comments exceeded provision of the procedural status of any SGRP litigation (i.e., an arbitration could commence in CA in 2013) in relation to possible *timing of the OII Phases*, and widely reported information (e.g., SCE & MHI are working together to discover what went wrong), I can see where you could find a comment or two reportable (e.g., no internal root cause analysis has been completed, whether the MHI report provided to NRC was publicly available.)

ALJ Darling

From: Russell.Worden@sce.com [Russell.Worden@sce.com]
Sent: Wednesday, December 05, 2012 1:17 PM
To: Darling, Melanie
Subject: RE: SONGS OII - Follow up questions
Your Honor:
I agree that the bulk of discussion was on the procedural and logistical issues surrounding the public hearing and phasing of the OII.
My recollection is that I made some observations about SC E's interface with MHI, the terms of the arbitration under the contract and SCE's expectations about recovery of damages. And, that SCE had been working closely with MHI at the SONGS site to understand what had gone wrong with the replacement steam generators. I also volunteered my understanding of what root cause analyses had been performed to date, and whether or not MHI considers part of its root cause evaluation to be proprietary because of the FIT III software used to model the steam generator design.
I will follow your direction on this.
Russ

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From: "Darling, Melanie" melanie.darling@cpuc.ca.gov
To: "Russell.Worden@sce.com" <Russell.Worden@sce.com>,
Date: 12/05/2012 12:14 PM
Subject: RE: SONGS OII - Follow up questions

Mr. Worden: I don't recall going beyond procedural matters, including broad concept of *phases of testimony*. Do you refer to my query about the arbitration?
ALJ Darling

From: Russell.Worden@sce.com [Russell.Worden@sce.com]
Sent: Wednesday, December 05, 2012 10:38 AM
To: Darling, Melanie
Subject: SONGS OII - Follow up questions
ALJ Darling:

I have a couple of follow-up items in the wake of our discussion yesterday.
1. Do you want SCE to notify all customers about the upcoming Public Participation Hearing, or just customers in selected zip codes perhaps in the southern region of SCE’s service territory? In the case of the windstorm hearing, we sent a postcard to customers across the region affected by the storm.

2. Upon reflection, I think I have an obligation to file an ex parte notice recounting my end of our conversation yesterday. If you feel differently, please let me know and I won’t file.

3. Jim Walsh, counsel for SDG&E will call you today about his company's role in the hearing.

4. I have been working with Eric Greene about the status of the various root cause analyses, and Commission access to them. As soon as I get clarification internally, I'll forward copies to him. I hope today or before week's end. 

Best Russ
626/ 302-4177

B. Ex Parte That Was Filed Did Not Disclose All They Discussed

On 7 December 2012, a notice of ex parte communication with Administrative Law Judge Darling was filed that provided as follows:

Pursuant to Rule 8.3(c)(2) of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), Southern California Edison (SCE) respectfully submits this notice that an ex parte communication took place on Tuesday, December 4, 2012, between Russell G. Worden, Director, SONGS Strategic Review at Southern California Edison and Administrative Law Judge (ALJ) Melanie Darling. The communication was telephonic, initiated by ALJ Melanie Darling, and Mr. Worden returned her phone call at approximately 11:45 am, with the conversation lasting approximately 15 minutes.

The discussion addressed procedural issues for providing notice for planned public participation hearings for the above-captioned proceeding. Mr. Worden also briefly addressed the following topics: (1) SCE’s current work with Mitsubishi Heavy Industries (MHI) the designer and fabricator of the SONGS Replacement Steam Generators (RSGs); (2) the timing of the RSG capital cost filing pursuant to the Commission’s decision approving new steam generators; and (3) access to SCE documents as well as Nuclear Regulatory Commission documents from the NRC websites. No materials were used during the communication.

The ex parte disclosures failed to reveal the ALJ-SCE writings and emails exchanged, which, in hindsight, call the integrity of the proceedings in question.

C. ALJ Darling Obliges: Investigation Into Cause of Failure Postponed

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On 10 December 2012, (five days after ALJ Darling discussed doing the OII in “phases”), Administrative Law Judge Melanie Darling issued a ruling which postponed the investigation into who caused the plant failure to a later stage:

The Commission intends to approach this inquiry in stages due to the potential wide scope and quantity of information necessary to ensure that ratepayers pay just and reasonable rates, in light of the extended outages at SONGS.

The Commission will initially gather information in the form of testimony from both SCE and SDG&E about the actual expenses each incurred in 2012 related to SONGS.

III. SENATORS DEMAND NRC INVESTIGATION

On 6 February 2013, Senator Barbra Boxer and Congressman Edward Markey wrote the following letter to Allison M. Macfarlane Chairman Nuclear Regulatory Commission:

We, have become aware of new information contained in a 2012 Mitsubishi Heavy Industries (MHI) document entitled "Root Cause Analysis Report for tube wear identified in the Unit 2 and Unit 3 Steam Generators of San Onofre Generating Station" {Report}. We strongly urge the Nuclear Regulatory Commission (NRC) to promptly initiate an investigation concerning the troubling information contained in this Report.

The Report indicates that Southern California Edison (SCE) and Mm were aware of serious problems with the design of San Onofre nuclear power plant's replacement steam generators before they were installed. Further, the Report asserts that SCE and MHI rejected, enhanced safety modifications and avoided triggering a more rigorous license amendment and safety review process.

This is the “MHI report provided to NRC” that ALJ Darling discussed in the secret December 5, 2012 email asking if it “was publicly available.” In the secret December email, the question was asked “whether or not MHI considers part of its root cause evaluation to be proprietary because of the FIT III software used to model the steam generator design.”

A.

A. NRC Issues Notice of Violation

On 20 September 2013 the Nuclear Regulatory Commission (NRC) issued a Notice of Violation based upon the misuse of the FIT III mode:

The Mitsubishi FIT-III thermal-hydraulic computer model (FIT-III) output gap velocities were not appropriately modified for triangular pitch designed steam generators. There were opportunities to identify this error during the design of the
replacement steam generators. Mitsubishi was the vendor selected by Southern California Edison to design and manufacture the replacement steam generators. On numerous occasions during the design process, Southern California Edison personnel questioned the results from and appropriateness of using FIT-III, but ultimately accepted the design as proposed by Mitsubishi.

IV. SECRET CPUC-SCE MEETING IN MARCH 2013

The CPUC San Onofre investigation was on pause when on 26 March 2013, the CPUC president sketched out a framework for ending the investigation altogether in a hotel room in Warsaw, Poland during a secret meeting with SCE management. Other than CPUC President Peevey, CPUC Energy Director Edward Randolph, and SCE management Pickett, no one else was in the room where it happened. The outline of the agreement was recorded on the hotel’s stationary:

1. Pre-RSG investment: recover w/debt-level return through 2022.
2. RSG and post-RSG investment: disallow “retroactively out of rate base” effective 11/1/2012.
3. Replacement power responsibility: customer.
   A. NEER/insurance recovery: to customers.
   5. MHZ recovery: 1st to SCE to the extent of the disallowance, 2nd to customers.
4. Decommissioning costs: remain in rates through time of decommissioning “periodic” (determination in CPUC proceedings as below)
5. O&M:
   a) Already approved O&M amounts through shutdown + 6 months
   b) O&M to determine shutdown O&M through 1/1/2017
6. Environmental offset: see to donate $50 million per year 2014-2022 to ______ an agreed upon EME, climate, or environmental academia research fund, institution, etc.
7. Proceed:
   a) Settlement agreement approved in OII
   b) Closure of OII closed except for shutdown O&M phase
   c) new OII plan for shutdown O&M per 7(a) and 7(b) above
   d) 2/18 O&M for shutdown O&M 2018 and beyond
   e) Use CPUC proceeding for review of decommissioning costs
A. The Post-Warsaw Meeting Activity with Commissioners re Deal Points

When the CPUC president returned to San Francisco following the meeting in Warsaw, Poland, Edward Randolph sent this email to the assigned CPUC Commissioner:

From: Florio, Michel Peter <MichelPeter.Florio@cpuc.ca.gov>
Sent: Sunday, March 31, 2013 9:50 PM
To: Randolph, Edward F.
Subject: RE: Meeting with Peevey Thursday
Categories: Red Category

Yes, I have only a 2:30 meeting that afternoon. Lunch would be fine. THANKS and welcome back! Mike

From: Randolph, Edward F.
Sent: Sunday, March 31, 2013 2:59 PM
To: Florio, Michel Peter
Cc: Gonzalez, Nuria
Subject: Meeting with Peevey Thursday

Commissioner Florio,

Commissioner Peevey asked me to set up a meeting with him for you and me next Thursday after the Commission meeting. (We were both having email problems in Poland so he asked me to set it up when I got back). He suggest lunch or dinner (but I need to be in Sacto late in the day). For now Commissioner Peevey would like to keep this meeting to just the three of us. I am happy to come by and explain the topic in person (or on the phone). Can we make something work for Thursday?

On 1 April 2013, this email was sent following up on the deal points reached at the meeting in Warsaw, Poland:

From: stephen e pickett@sce/eix;nsf;stephen.pickett@sce.com;smtp
Here is a typed-up version of my notes from our conversation this morning.

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Elements of a SONGS Deal

1. Recover pre-RSG investment on a "SONGS 1" basis through 2022 (i.e., with a debt level return).

2. Disallow RSG investment entirely ("out of rate base retroactively").

Note: not clear whether the post-leak investment that is not directly related to the RSG's is included (e.g., the new heads, HP turbine, etc.)

3. Customers responsible for all replacement power costs (no disallowance).

4. Any NEIL proceeds go to customers.

5. MHI recovery: to SCE to the extent of any disallowance, then to customers, with some as yet undefined incentive mechanism to encourage SCE to go after MHI to the maximum extent possible for as long as it takes (thinking about the energy crisis settlement as a model).

6. O&M:
   a. Already approved GRC amounts to shutdown plus some reasonable period beyond (+/-6 months)
   b. Ramp down to shutdown level of O&M thereafter.
   c. Use a subsequent phase of the 011 or a separate proceeding to determine the level of ongoing shutdown O&M.
   d. Shutdown O&M to include "reasonable but generous" severance for affected SONGS employees.

7. Environmental offset: SCE to pay $5-10 million per year for the remaining life of SONGS (i.e. through 2022) to an agreed upon GHG, climate, or environmental research fund or academic institution. Structured as a charitable donation.

8. Decommissioning to continue to be collected in rates as before through 2022, with reviews as before in triennial CPUC proceedings.

9. Process:
   a. Settlement agreement approved in 011.
   b. Balance of 011 closed (except possibly a subsequent phase to determine level of ongoing shutdown O&M).
10. Other notes:
   a. Players in deal: Geesman (A4NR), FOE, TURN.
   b. Protecting labor brings TURN along (Carl Wood chair of TURN board).
   c. Privately stated complaints of SDG&E.
   d. Ron Olson involvement per energy crisis.

V. SENATOR BOXER DEMAND DOJ INVESTIGATION

On 28 May 2013, Senator Barbara Boxer of California asked the U.S. Department of Justice “to open a criminal investigation” regarding the replacement steam generators at San Onofre. Senator Boxer Tuesday released a 2004 letter Senator Boxer asserted was "major new evidence of misrepresentation and safety lapses” at San Onofre. A 28 May 2013 email regarding the major new evidence Senator Boxer released on San Onofre provided, in pertinent part:

From: Megan Jordan  
Sent: 05/28/2013 06:33 PM PDT  
To: Russell Swartz, Les Starck  
Cc: Janet Clayton  
Subject: Fw: URL, text for San Onofre story

‘A preliminary review of our records suggests the letters referenced by Senator Boxer were not provided by Edison either to the CPUC itself or to the parties participating in our investigation into the SONGS (San Onofre Nuclear Generating Station) outage,’

VI. WORKINGS TO END INVESTIGATION

On 29 May 2013, the following email exchange took place regarding the meeting in Poland and ending the CPUC San Onofre investigation:

From: michael hoover/sce/eix  
Sent: Wed May 29 2013 19:22:50 PDT  
To: les starck/sce/eix@sce  
CC:  
Subject: Re: SONGS Press Release: SCE Exercised Responsible Oversight for Replacement Steam Generators at the San Onofre Nuclear Plant

In talking with Carol, she indicated that Pickett was well prepared in Poland with specifics, but then nothing has happened. Not making a decision is~ not to move forward. Mike also told me that Pickett is very frustrated ....

From: Les Starck  
Sent: 05/29/2013 07:08 PM PDT  
To: Michael Hoover
Subject: Re: SONGS Press Release: SCE Exercised Responsible Oversight for Replacement Steam Generators at the San Onofre Nuclear Plant

We need to talk with Pickett ASAP to let him know about your discussions with Peevey. Time is running out. I also have no idea if Ron and Ted are even thinking this way.

Sent from my iPhone
On May 29, 2013, at 6:43 PM, "Michael Hoover" <Michael.Hoover@sce.com> wrote:

We have a small window of opportunity to work with parties to implement a shutdown in exchange for getting "bur money back. That-window will close soon and' we will loose a very good opportunity.

VII. WITH PROMISED GOVERNOR SUPPORT FOR SETTLEMENT, INVESTIGATION WILL END

On 6 June 2013, the following email was sent regarding discussions with Governor Brown and San Onofre (SCE) top management:

From: ted craver (Edison Chairman, President, CEO)
Sent: Thu June 6, 2913 20:00 PDT
To: brett white; dick schlosberg; france cardova; jagjeet bindra; luis nogales; peter taylor; ron olson; thomas Sutton (Edison Board of Directors)
CC: Robert Adler
Subject Brown-Feinstein-Peevey phone calls

Wanted to give you a quick report on my phone calls with Govenor Brown, Senator Feinstein and Mike Peevey. They all were quite positive. Governor Brown-about 10 minutes (was in Rancho Mirage with Pres. Obama, Chinese). Appreciated call. Asked some questions about decommissioning and number of employees. He said what we were doing seem right under the circumstances, good to reduce uncertainty, and took a little swipe at NRC bungling the process which was going to cause harm to CA. Fished for whether we were going to blast NRC or Boxer, I said "no, I didn't see any mileage in that. We were taking the high road and focusing on the future and insuring system reliability for our customers." He said he agreed that was best approach. I indicated that I imagined his office would get media calls tomorrow about this and would be looking for his reaction; I indicted that if he was so moved, it would help if he could indicate we had talked and he thought the company was acting responsibly and focused on the right things. He indicated a willingness to do that.

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President Peevey-actually two calls, as the first one was interrupted by the Governor’s call. Constructive, positive. Glad to get this uncertainty over with and focused on their ratemaking OII. Said he was going out with a statement after our investor call; his statement will focus on "urging the parties to meet and see if
they could come up with a settlement to submit to the CPUC" and that he was
going to convene a task force of sorts including the two utilities and various state
agencies to work on insuring reliability. We talked about my call with the
Governor, and I asked him to see if he could get the Governor to say something
supportive about our handling of the situation and looking forward.

On 7 June 2013 the following email exchange took place admitting "the economics of the
plant just don't add up and it's time to get on with life:"

From: les starck/sce/eix;nsf;les.starck@sce.com;smtp
Sent: Fri Jun 07 2013 11:58:13 PDT
To: stephen e pickett/sce/eix@sce
CC:
Subject: Fw: SONGS Conversations At the CPUC
Attachments:

See Mike's note below about his discussions with Florio's chief of staff They're
encouraging us to get "out front" early on sling this with the parties and to do
everything we can to keep this out of the Commission's hands. They've learned
much from the San Bruno effort (i.e. claims that the commission is in the "pockets"
of the utilities) and want to avoid a repeat as much as they can.
Who will have the lead in formulating our strategy for settlement?

From: Michael Hoover/SCE/EIX
To: Catherine Hacket/SCE/EIX@SCE, Laura Genao/SCE/EIX@SCE, Connor J
Flanigan/SCE/EIX@SCE,
Les Starck/SCE/EIX@SCE, Gary Stern/SCE/EIX@SCE, Megan Scott-
Kakures/SCE/EIX@SCE, Russell Worden/SCE/EIX@SCE, Caroline
Choi/SCE/EIX@SCE, Gary Schoonyan/SCE/EIX@SCE,
Date: 06/07/2013 11:51 AM
Subject: SONGS Conversations At the CPUC FOR INTERNAL USE ONLY

I'm sure you-all are thinking along the same lines, but it is really important that we
stay in touch on SONGS and what the various agencies are doing saying, etc. I've
touched base with all of the chiefs of staff at the CPUC - most of the
Commissioners are out but have already talked to Ted - and they all ask the same
question: Is the timing of the decision significant? I tell them that with no decision
looming at the NRC, the economics of the plant just don't add up and it's time
to get on with life - delaying the inevitable hurts our customers, our investors,
and our employees.

Sepideh of Florio's office was fairly forthright. She said we need to move quickly
to address cost recovery and other shutdown issues going forward. We discussed
how to do that in a manner that is inclusive of the parties and avoids the type of
animosity toward the CPUC that has plagued the PG&E San Bruno proceeding.
Ideas to consider are filing a motion for Alternate Dispute Resolution at the CPUC,
outreach to the leaders of the key stakeholder groups involved in the Songs proceeding to initiate discussions quickly. We agreed that it would be best if SCE got out in front in terms of trying to put a process in place that would result in resolution of the issues in a manner that does not rely on protracted hearings etc. Delay only hurts everyone.

We discussed some of the reliability issues as well. Sepideh has been approached by the water board and they have indicated a willingness to make available all of the pumping load for water projects as Demand Response whenever needed and to re-evaluate their OTC policy. We need to work cooperatively with all of these folks.

Thanks
Michael R. Hoover
Director, Regulatory Affairs
(415) 929 – 5541
San Francisco Office

A. Meanwhile, Secret Settlement Related Records Not Produced

On 19 June 2013, the CPUC failed to produce the Warsaw, Poland notes or any other settlement related writings in response to a public records request asking for “all communications between President Peevey and any agent, officer or employee of Southern California Edison regarding the settlement of the proceedings pending before the PUC regarding San Onofre.”

VIII. ALJ DARLING INTERVENES AGAIN TO HELP SCE RE SETTLEMENT

Ten months later on 3 April 2014, the settlement was filed for approval with the CPUC with no mention of the Warsaw, Meeting. On 24 April 2014, ALJ Darling continued the freeze on the investigation ruling: “it is reasonable to refrain from continuing to work on aspects of the OII which may be resolved as a result of the pending Motion and Agreement. Because utility rates fund Commission, utility, and (in some cases) party activity in our proceedings, it is in the best interests of ratepayers to avoid duplicative or unnecessary activity until the Commission has had an opportunity to consider the proposed settlement.”

IX. CPUC RETAINS OUTSIDE LAWYERS AT BIG PRICES

On 24 November 2014, the CPUC retained the private law firm of Sheppard Mullin to “represent the CPUC in all criminal, civil and administrative proceedings and investigations undertaken by any federal, state or local agency (collectively, the Investigators) involving,
directly and indirectly, any allegations of inappropriate interactions by CPUC personnel with Pacific Gas & Electric, and any other utility. from 2009 - 2014 regarding the CPUC's compliance with its rules, regulations, policies and procedures governing CPUC proceedings, including but not limited to, the assignment of Administrative Law Judges and the processing of various matters before the Commission. (Collectively, the Investigations).”

X. SEARCH WARRANT IS ISSUED INVESTIGATING CPUC AND SCE

On 5 June 2015, a search warrant was issued for the CPUC probable cause to believe the CPUC was in possession of property used as a means of committing a felony. The CPUC search warrant provided:

California Public Utilities Commission
San Francisco Office (Headquarters)
Or Legal Representatives of CPUC
505 Van Ness Avenue
San Francisco, CA 94102
MAY BE SERVED VIA EMAIL or FAX
FOR THE FOLLOWING PROPERTY:
EXHIBIT "A"

Any and all records from January 31, 2012 until January 31, 2015, involving the San Onofre Nuclear Generating Station (SONGS) closure settlement agreement, the 2013 meeting between Stephen PICKETT and Michael PEEVEY in Poland, communication(s) pertaining to the determination of when and why SONGS would be closed, commitment of monies for research as a result of the closure of SONGS, and communication(s) pertaining to the settlement of the SONGS Order Instituting Investigation (OII)

These records are to include:

1. CPUC will search emails to or from the following individuals:
   a. Robert Adler - General Counsel, Edison International (now retired)
   b. Ted Craver - Chairman, President, and Chief Executive Officer, Edison International
   c. Laura Genao - Director, Regulatory Affairs, SCE
   d. Michael Hoover - Senior Director of State Energy Regulation, SCE
   e. Ron Litzinger - President, SCE (now President of Edison Energy)
   f. R.O. Nichols - Senior Vice President for Regulatory Affairs, SCE
g. Stephen Pickett - Executive Vice President, External Relations, SCE (now retired)
h. Gary Schoonan - Director, Strategic Policy Analysis, SCE (now retired)
i. Jim Scilacci - Chief Financial Officer, Edison International
j. Les Starck - Senior Vice President Regulatory Policy & Affairs, SCE (now retired)
k. Bert Valdman - Senior Vice President, Strategic Planning, Edison International (no longer employed)
l. Gaddi Vasquez - Senior Vice President, Government Affairs, Edison International
m. Russ Worden - Director of External Relations, SCE
n. Ron Olson, former Board member, Edison and Edison International
o. Michael Peevey (former President of CPUC)
p. Michel Florio (Commissioner, CPUC)
q. Melanie Darling (ALT, CPUC)
r. Sepideh Khosrowjah (Chief of Staff, Commissioner Florio)
s. Paul Clanon (Executive Director, CPUC)
t. Carol Brown (former Chief of Staff to President Peevey)
u. Audrey Lee (former Advisor to President Peevey)
v. Edward Randolph (Director of Energy, CPUC)

2. CPUC will identify employees who were involved in the implementation of the greenhouse gas research provisions of the SONGS OII settlement, specifically with respect to CPUC's understandings or intentions with regard to directing funding to UCLA. CPUC will propose to the Attorney General's Office additional employees whose email they will collect for this purpose.

3. CPUC will collect and review emails from the above 22 custodians, plus any other custodians identified pursuant to paragraph 2, that are dated from January 31, 2012 through January 31, 2015.

4. Handwritten notes, documents saved to a hard drive or to a network location, and data on smart phones that is not believed to exist in other locations. CPUC will advise the Attorney General's Office of its progress and plan for collection and review of any such documents.

5. With respect to the categories of documents specified in the search warrant, CPUC will search for, review and produce responsive documents as follows:

a. As to documents involving the SONGS settlement, CPUC will produce (1) documents constituting or referring to communications with SCE about the OU prior to execution of the settlement on March 27, 2014 (excluding on-the-record communications such as SCE pleadings filed with the CPUC); and (2) documents constituting communications with TURN or ORA referencing
communications from Peevey regarding SONGS or UC in the context of the settlement negotiations up to March 27, 2014.

b. As to documents pertaining to the Poland trip in March 2013, CPUC will produce documents constituting or referring to communications during that trip that relate to SONGS. These documents will include any communications or materials regarding SONGS made in anticipation of the trip, any documents or communications regarding SONGS that occurred during the trip, and any communications or materials regarding SONGS created after the trip ended.

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XI. CPUC DOES NOT PRODUCE DOCUMENTS REQUESTED

On 9 February 2015, the CPUC was requested to produce under the Public Records Act and Art I, Sec 3 of the California State Constitution: "any and all records showing when any Commissioner or staff of any Commissioner first was informed of the meeting in Poland at which Mr. Peevey discussed a settlement of the OII, as described in the[] late-filed ex parte notice from Southern California Edison.” The only CPUC response was this email:

From: Kotch, Andrew
Subject: CPUC NEWSCLIPS for MONDAY, February 2, 2015
Date: Monday, February 02, 2015 9:03:59 AM
Attachments: image002.png

Included in the Kotch CPUC newsclips was a list of 28 news stories. The last article listed is identified as “San Diego Union-Tribune-AG cites possible felony crime in raid on ex-utility boss.” The CPUC did not produce the article. The Union Tribune did run this article on 30 January 2015:

AG cites possible felony crime in raid on ex-utility boss

By Jeff McDonald

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 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 Cañada 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.

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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.

The CPUC response was to the effect that there are no CPUC writings showing any Commissioner or staff of any Commissioner were informed of the meeting in Poland at which Mr. Peevey discussed a settlement of the OII before the 30 January 2015 Kotch email. Moreover, the CPUC represented in its response to the 9 February 2015 document request that it was not until 16 April 2015 that “the Commission obtained a copy of the notes of the meeting in Poland.” However, Peevey had the original Warsaw notes; indeed, they were found at his home. These documents were not produced. Meanwhile, legal fees climbed (reaching $12.3 million by Spring 2013).

Public agencies like the CPUC “shall make the [public] records promptly available.” Govt. Code § 6253(a). The CPUC has withheld public records from the public for over two years; the request in this case was made 9 January 2015. The writings requested were these:

any and all records of communication, including all emails relating to San Onofre, including the settlement of the Order of Investigation proceedings related to Songs. Please include any and all emails or communications between Michael Picker and the Governor or anyone in the Governor's office related to San Onofre

The CPUC withheld two categories of writings under Govt Code §6254(1) and Govt Code §§6254(k), 6255:

**PICKER**

The CPUC withheld from this production sixty-three (63) records pursuant to the deliberative process and mental process privileges pursuant to Government Code §§6254(k), 6255.
These 63 records are communications between Commissioner Picker and his advisors, top level advisory staff and/or top level state officials that discuss matter (sic) of policy and/or decisions in proceedings before the Commission.

Lastly, the CPUC redacted portions of the text of three (3) records pursuant to the deliberative process and mental process privileges and Government Code §§6254(k), 6255.

BROWN

The CPUC withheld sixty-five (65) records of communications to or from employees of the Governor’s Office pursuant to Government Code §6254(1).

Additionally, the CPUC redacted portions of the text of two (2) records pursuant to Government Code §6254(1) as the redacted text reflected communications to or from employees of the Governor’s Office.

The CPUC first identified the withheld writings on 21 August 2015. The CPUC reiterated its denial of access to the records on 23 December 2015. On 30 December 2016, an appeal was taken to the full Commission. The CPUC staff stalled the hearing on the appeal four months to 27 April 2017.

While the CPUC says disclosure of Picker’s writings “would reveal the Commissioners' deliberative and mental thought processes,” it leaves unanswered the question about what he knew and discussed with SCE, the Governor (a third party), and others. Picker’s withheld writings might show his deliberative process included knowing about what the CPUC president did in Warsaw. The writings might show Picker thought over what happened in Warsaw and decided to go along with the deal struck there. On the other hand, the writings may show Picker made his San Onofre decisions independent of Warsaw. Either way, there is a compelling public interest in understanding how Picker made his San Onofre decisions. Picker decided to make utility customers pay for San Onofre without finishing the OII. This was the very objective of the Warsaw meeting.

A. Picker Tells Assembly Committee His Deliberative Process Without Objection

On 1 April 2015, Picker revealed to the Chair of the Assembly Committee on Utilities and Commerce the deliberative process Picker said he followed in deciding to vote for the San Onofre settlement:

You have asked me to revisit the Commission’s decision last November to approve a settlement on the cost responsibility of the San Onofre Nuclear
Generating Station and its permanent shutdown, and to see if I still have qualms about that decision. **

I have conducted a review into my own decision making process leading to the November 20, 2014 Decision made by the Commission approving the Amended and Restated Settlement Agreement. As a Commissioner, I assessed whether I could reach the same conclusion about the decision based solely on the written record that has been available to all parties. That is the methodology that I used in developing my vote last November. This reliance on an evidentiary record developed through a public process that is open for all to view - transparent - is our primary source of information for formal Commission decisions.

**

The Settlement was first brought to the CPUC by a formal filing on April 3, 2014. After an Assigned Commissioner and ALJs' Ruling issued, an amended Settlement was filed on September 24, 2014. The Settling Parties are: The Utility Reform Network (TURN), The Office of Ratepayer Advocates (ORA), Friends of the Earth, the Coalition of California Utility Employees (CUE), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E). I can confirm that the Assigned Commissioner, the Administrative Law Judges, and the advisory staff of the CPUC were not involved in the settlement negotiations. In the words of the Settling Parties, the Settling Parties themselves negotiated the terms of the Settlement "in a hard-fought process over many months," and the Commission found that the Settling Parties satisfied the procedural requirements for settlements under Commission Rule 12.

After the April 2014 Settlement Agreement was submitted to the CPUC, the Assigned Commissioner and Administrative Law Judges in the proceeding issued a ruling ordering written testimony about the Settlement, written comments, an additional evidentiary hearing, and a community meeting. In this time and before the Commission took a final vote on the agreement there were multiple opportunities for public input beyond the settling parties:

• Evidentiary hearings on materially contested factual issues in the April 2014 Settlement (May 14, 2014),

• Community meeting (Costa Mesa, June 16, 2014), • Oral arguments on the proposed decision (October 31, 2014),

• Three rounds of written comments that resulted in 34 sets of comments from parties that became part of the record, and

• Two rounds of comments on the proposed decision proposing approval of the Amended Settlement Agreement.

B. The Decision Statements Deny Any Decision Making Outside the Record

The Commission approved the final decision D.14-11-040 on the modified Settlement Agreement on November 20, 2014.

I work hard at diligence in observing the CPUC's rules, and base my decisions only on what is in the public evidentiary record of the proceeding. The proposed decision on the future and rate recovery of the San Onofre generating facility is one of many hard decisions - with significant impacts to ratepayers,
contending parties, and the environment - that I've had to make as a Commissioner.

**

After having conducted an assessment of my decision making process leading up to the November 2014 vote on the revised San Onofre Settlement, I have concluded that the Commission's decision was based on a settlement process that was appropriate under the Commission's rules and was in the ratepayers' interests, and was supported by the record developed in the proceeding.

The Settlement avoided years of additional uncertainty, offered ratepayers relief from ongoing costs much more immediately than an extended and uncertain litigation, was based on evidence offered in the record that I reviewed, and, when taken as a whole, was a good outcome.

In support of this review, I reviewed the Proposed Decision on Phase 1 Related to 2012 SONGS Related Expenses and Expenditures (November 19, 2013), have re-read my cursory notes taken at a formally noticed public Community Information Meeting held in Costa Mesa on June 16, 2014 (which was helpful to my thinking about an early proposed settlement), the Amended Settlement submitted to the Commission by SCE, SDG&E, TURN, ORA, Friends of the Earth and CUE on September 24, 2014, and also re-read and the Decision Approving Settlement Agreement As Amended and Restated by Settling Parties that frames the Commission's action on November 20, 2014.

The accounting jargon used in this proceeding can make it difficult for the public, on first or second read, to understand clearly the meaning and impact of what is in the amended Settlement that the Commission did adopt last November.

C. The Best Interests are Served by Disclosure in Light of Inconsistencies

Contrast what Picker told the Assembly Committee about how he made up his mind with what the CPUC is now saying about Picker’s decision making. Under the CPUC version, the three redactions and 63 withheld writings cannot be disclosed because they reflect “discussions between Commissioner Picker and his advisors the disclosure of which would reveal the Commissioner's thought process regarding the subject matter of the redacted emails.” According to the CPUC, disclosure would reveal the Commissioners' deliberative and mental thought processes.”

Picker did not tell the Assembly he was withholding information about how he made up his mind about the San Onofre settlement. He told the Assembly he made up his mind solely based on the public record. Yet, he now says his decision also rested on 63 undisclosed and 3 redacted emails. The public interest is best served by getting the evidence consisting of the
redacted and undisclosed emails. Picker says he relied upon the evidentiary hearing, but his email says he did not plan on attending it:

From: Picker, Michael [Michael.Picker@cpuc.ca.gov]
Sent: 5/9/2014 4:37:07 PM
To: Koss, Kenneth L. [kenneth.koss@cpuc.ca.gov]; Banks, Juliane [liuliane.banks@cpuc.ca.gov]
Subject: RE: SONGS (1.12-10-013) Settlement: upcoming evidentiary hearing and all party community meeting

I'll try to drop by the Evidentiary Hearing, but that day is a bit packed up. I'm very interested in the June all party community meeting, and put a place holder on my calendar.
Michael Picker
California Public Utilities Commission
(415) 703-2444

From: Koss, Kenneth L.
Sent: Thursday, May 08, 2014 5:51 PM
To: Picker, Michael
Cc: Hammond, Christine J.; Chaset, Nicolas L.
Subject: FW: SONGS (1.12-10-013) Settlement: upcoming evidentiary hearing and all party community meeting

Michael - see below. We can discuss at tomorrow's staff meeting.

From: Dudney, Kevin
Sent: Thursday, May 08, 2014 4:47 PM
To: Koss, Kenneth L.; Hammond, Christine J.
Cc: Darling, Melanie; Duda, Dorothy
Subject: SONGS (1.12-10-013) Settlement: upcoming evidentiary hearing and all party community meeting

Hello, There are two upcoming events related to the contestee settlement in the SONGS Investigation (1.12-10-013), and Commissioner Picker is welcome to attend either or both, if he wishes. PRA 1386-00 186
1) Evidentiary hearing on the settlement. Wednesday, 5/14, 1:30 pm in the Auditorium.
2) All party community meeting on the settlement. Monday, 6/16, 4:00-7:00 pm, Costa Mesa.
**

If Picker listened to the evidentiary hearing or read the transcript, he would have learned of charges the settlement agreement was the product of collusion:

MR. AGUIRRE: Let me give you my offer of proof. It's our contention that the representation by the Commission that there was going to be an investigation into
the reasonableness of Southern California Edison's deployment of the defective
steam generators was a promise of an investigation with the intent not to perform
it. It is our contention that you, Ms. Darling, Judge Darling, entered a ruling that
put the investigation off into the remote future in order to avoid any such
investigation. It's our position that Mr. Peevey helped to orchestrate this
settlement through Mr. Freedman and others, and it wasn't a settlement
negotiation. It was a meeting to figure out how not to have the reasonableness
investigation. The rulings that you made prohibiting any kind of discovery into the
relevant issues, when the dis-- when the settlement was announced, the
coordinated press releases that falsely stated, from Mr. Florio and Mr. Peevey, that
the parties had settled which was picked up as part of the blitzkrieg in which the
ratepayers were misinformed that they were going to get a $1.4 billion refund was
a collusive, not bona fide basis for this settlement. And we have a right to try to
develop that record, which you are not permitting us to do. And let me just ask
this.
ALJ DARLING: All right.
MR. AGUIRRE: Let me just ask Mr. Peevey a question.
ALJ DARLING: No. You don't have --
MR. AGUIRRE: Mr. Peevey --
ALJ DARLING: -- any questions.
MR. AGUIRRE -- did you have any discussions with any parties?
ALJ DARLING: No.
MR. AGUIRRE: -- about the settlement process while it was taking place, sir? Will
you put that on the record? And same with Mr. Florio. Will you put that on the
record? [14 May 2014 R.T. 2772-2774]

Had he attended the evidentiary hearing on 14 May 2014, Picker would also have
heard the CPUC President refuse to answer whether he had engaged in secret settlement
negotiations:

    MR. AGUIRRE: What about Southern Cal Edison?
COMMISSIONER PEEVEY: Sorry. Edison?
MR. AGUIRRE: Yeah.
COMMISSIONER PEEVEY: 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.

Picker tried to justify to the Assembly his decision to approve the settlement by
discussing its terms. Missing from his analysis is the basis for making utility customers pay for
the damages caused by the failed steam generators deployed at San Ono:re. Here is how Picker
described the terms of the settlement, in pertinent part:

21
Under the terms of the decision, utility costs are about $1.278 billion. Outside of replacement power, ratepayer costs are about $2.767 billion. However, if the utilities are able to sell unused nuclear fuel to licensed buyers, then the ratepayer share will drop further. The decision also includes additional ratepayer benefits. Even though the utilities are responsible of almost 100% of the cost of the failed steam generators, shareholder will receive 50% of any money collected through litigation with Mitsubishi Heavy Industries and a much smaller portion of recoveries from the nuclear risk insurer; the greater part of insurance proceeds will be allocated to ratepayers.

Utility customers pay $3.3 billion, according to the decision Picker voted to approve that adopted the settlement. Picker did not discuss the fact that the benefit to utility customers come from a reduction of the Energy Resource Recovery Account (ERRA). The ERRA contains the fuel and purchased power costs which can be recovered in rates. The costs are forecast for the year ahead. If the actual costs are lower than forecast, then the utility gives money back, and vice versa.\(^1\) The replacement power for what was lost at San Onofre raised the ERRA. The settlement did not provide for a corresponding adjustment. The revenue requirement for the 2012 ERRA was increased $604.0 million from 2011.\(^2\) The ERRA was increased in 2013 $507 million from the 2012 ERRA levels.\(^3\) SCE’s 2014 forecasted ERRA revenue requirement was $1.968 billion greater than the one in 2013.\(^4\)

Picker told the Assembly, utility customers would benefit from the sale of nuclear fuel. What he did not tell them was why utility customers should be charged for nuclear fuel that could not be used in the failed plant. He told the Assembly, that “Even though the utilities are responsible of almost 100% of the cost of the failed steam generators, shareholder will receive 50% of any money collected through litigation with Mitsubishi Heavy Industries [MHI].” Again the utilities so called steam generator payment was a reduction of the blocated ERRA, expanded by mass purchase of replacement power for what was lost at San Onofre.

\(^1\) http://www.cpuc.ca.gov/General.aspx?id=10430
\(^2\) http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/170840.PDF
\(^3\) https://www.sce.com/wps/wcm/connect/c9cd640a-17dc-4b9c-9b6a-e1a300a02622/1208_ERRAApplication.pdf?MOD=AJPERES&CACHEID=c9cd640a-17dc-4b9c-9b6a-e1a300a02622
\(^4\) http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M090/K685/90685759.PDF
Picker also failed to consider whether the utility’s case against MHI had any merit. We now know it did not and in fact the utility has to pay MHI’s legal bills. Picker was wrong in his justification of the settlement. The “Settlement [did not] avoid[] years of additional uncertainty.” The settlement did not “offer[] ratepayers relief from ongoing costs.” The ratepayers will have to pay the arbitration bill likely to exceed $100 million (SCE and MHI combined bills) for “extended litigation” that produced little if any benefit to them. P

Picker falsely told the Assembly the decision to approve the settlement was “based on evidence offered in the record that [he] reviewed.” There was no evidence on the only question that mattered: Who was responsible for the failed steam generators that brought down the plant?

There is no public interest served by keeping secret the deliberative process leading up to thoroughly discredited settlement agreement. What the CPUC would like “to ignore or forget but which must nevertheless be stated, namely, that [utility customers] have sustained a total and unmitigated defeat.” 5

**THE LAW**

Art I, Sec 3 (b)(1) of the California State Constitution the voters adopted in 2004 provides in pertinent part, “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.” The CPUC defies this constitutional mandate, by asserting but not justifying its claim that the redacted and withheld writings are exempt from disclosure under Govt Code § 6254(k) and § 6255.

However, 6254(k) and § 6255 must be “narrowly construed if it limits the right of access.” Cal Const Art I, Sec 3 (b) (2). Relying slanted interpretation of a case decided before the voters adopted Art I, Sec 3 (Times ) , the CPUC reads these code sections to establish an absolute “deliberative process and mental process privileges.”

However, the CPUC is required to “justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter (the Public Records Act) or that on the facts of the particular case the **public interest served by not disclosing the**

5 Paraphrasing Winston Churchill’s remarks after the Munich Agreement.
record clearly outweighs the public interest served by disclosure of the record.” Since the
records sought are not protected by any express provision in the Public Records Act, the CPUC
can withhold the records only if it can show the public interest in not disclosing outweighs the
public interest in disclosing.

Further, determining whether writings are covered by any “deliberative process”
privilege requires a fact-intensive review of the contents of the challenged documents
themselves. City of San Jose v. Superior Court, (2017) 2 Cal. 5th 608, 626.

The deliberative process in this case led to an unfair hearing. The evidentiary hearing
lasted only 3 hours. The question of whether SCE acted reasonably in deploying the steam
generators was not allowed to be addressed at the hearing. The parties were not allowed to
discover the names of those responsible for deploying the steam generators. ALJ Darling also
prohibited the release of the names of witnesses to the alleged unreasonable deployment of the
RSGs at San Onofre and related documents. Instead, some of the parties held secret meetings to
plan how to keep the investigation into the causes of the San Onofre Outages and the
reasonableness of the SCE officials in deploying the RSG there from ever occurring. (See 19
April 2013 Ruling Sealing Names; 7 January 2014 Denying Discovery of RSG Design Issues)

The CPUC grossly misstated the Notice of Violation the NRC issued to SCE. The CPUC
dismissed the NRC as a White finding of low to moderate safety. The CPUC confused the NRC
safety standards with the breach of duty to design the steam generators so they did not fail
causing them to fail and the plant to close. This is what the NRC found:

The Mitsubishi FIT-III thermal-hydraulic computer model (FIT-III) output gap
velocities were not appropriately modified for triangular pitch designed steam
generators. There were opportunities to identify this error during the design of the
replacement steam generators. Mitsubishi was the vendor selected by Southern
California Edison to design and manufacture the replacement steam generators.
On numerous occasions during the design process, Southern California Edison
personnel questioned the results from and appropriateness of using FIT-III, but
ultimately accepted the design as proposed by Mitsubishi. Mitsubishi hired
consultants with expertise in designing large steam generators, but did not
rigorously evaluate all concerns raised by the consultants about use of FIT-III and
specific results obtained from that thermal-hydraulic model. As a result,
replacement steam generators were installed at San Onofre with a significant
design deficiency, resulting in rapid tube wear of a type never before seen in recirculating steam generators. (NRC Notice of Violation Cover Letter p. 2)

**

The inspectors determined that the licensee (SCE) did not ensure that the thermal-hydraulic modeling and flow-induced vibration analysis of the replacement steam generators were adequate with respect to the replacement steam generator design specification. Specifically, the licensee (SCE) failed to ensure that the design calculations appropriately incorporated the methodology from the ASME BPVC, Section III, Appendix N, standard that was adopted by Mitsubishi for the flow-induced vibration analysis.

There were opportunities to identify this error during the early design stage of the replacement steam generators. Licensee (SCE) personnel questioned the analysis results of FIT-III during design review meetings, but ultimately accepted the model results and resultant design. From shortly after the contract was awarded until 2006, there were letters, e-mails, meeting minutes, action item lists, and internal memoranda that suggested concerns with all three of the elements that cause fluid-elastic instability, which is void fraction, gap velocity, and adequacy of anti-vibration bar tube supports. Regarding concerns raised about FIT-III gap velocities, Mitsubishi compared the velocities to other Mitsubishi designed triangular pitch steam generators that also used FIT-III, but did not compare the results to other similar-sized steam generators.

As a result of the failure to verify the adequacy of the thermal-hydraulic and flow induced vibration design, both Unit 3 replacement steam generators experienced fluid-elastic instability in a localized area of the tube bundle leading to rapid, significant, unexpected tube-to-tube wear. The tube degradation progressed to the point of causing a primary-to-secondary leak in Steam Generator 3E0-88 through Tube R106C78. (NOV pp 24-25)

**

Contrary to the above, on January 28, 2008, and April 2, 2008, SCE failed to verify or check the adequacy of Mitsubishi’s developed design Documents L5-04GA504 (SO23-617-1-C157), “Evaluation of Tube Vibration,” Revision 3, and L5-04GA521 (SO23-617-1-C683), “Three-Dimensional Thermal and Hydraulic Analysis,” Revision 3, respectively, for the flow-induced vibration and thermal-hydraulic designs. Specifically, the output of the thermal-hydraulic code and input to the vibration code were not verified or checked to be in accordance with ASME Section III, Appendix N, “Dynamic Analysis Methods.” (NOV p. 27)

“Failure to Verify Adequacy of Thermal-Hydraulic and Flow-Induced Vibration Design for the Unit 3 Replacement Steam Generators.” (NOV p. 28)

The CPUC decision dismissed these findings the NRC made against SCE in the

NOV:

The NRC found that SCE failed to verify the adequacy of Mitsubishi’s design of the RSGs, which resulted in significant and unexpected steam generator tube wear and the loss of tube integrity on Unit 3 Steam.
Generator. The NRC stated the finding is appropriately characterized as White, a finding of low to moderate safety significance. SCE provided explanatory comments, but did not contest the NOV.

**

We disagree ** that the existence of this NOV alone, is legally sufficient to establish SCE's overall imprudent management of the SGMP. Instead, other evidence would be necessary.

While saying more evidence was needed, ALJ Darlings' obstructed the normal evidence fathering process. ALJ Darling prohibited the release of the names of witnesses to the alleged unreasonable deployment of the RSGs at San Onofre. (See 19 April 2013 Ruling Sealing Names; 7 January 2014 Denying Discovery of RSG Design Issues) ALJ Darling ignored the basic rule of discovery:

A [c]entral to the discovery process is the **identification of potential witnesses.** The disclosure of the names and addresses of potential witnesses is a routine and essential part of pretrial discovery. [Citation.] Indeed, our discovery system is founded on the understanding that parties use discovery to obtain names and contact information for possible witnesses as the starting point for further investigations. Crab Addison, Inc. v. Superior Court (2008) 169 Cal. App. 4th 958, 966.

In its decision approving the settlement, the CPUC turned its rulings denying discovery to Ms. Henricks on its head. The CPUC erroneously found “Ms. Henricks also (mistakenly) contends the Commission has not allowed discovery about matters expected to be within the scope of Phase 3.” The CPUC unfairly claimed that “Henricks had almost six weeks to serve pre-hearing discovery related to the proposed Agreement, an opportunity to make these inquiries at the evidentiary hearing, and an ability to bring forth evidence of contested facts.” (November 2014 Decision Approving Settlement p. 50)

The transcript of the 14 May 2014 evidentiary hearing in this matter shows ALJ Darling did not allow any examination of the tube and steam problem with the new generators:

Q: Question before you, sir, is are you familiar with the fact that the AVB Design Team reported to Southern California Edison that the design that was underway for the replacement steam generators was creating greater steam quality in the U-bend region of the generators?

MR. WEISSMANN: Objection, your Honor. This is beyond the scope of this hearing.

ALJ DARLING: Sustained. Move on. (14 May 2014 Transcript p. 2752) 18

26
The records show be disclosed because the evidence supports the inference that the settlement and the decision adopting it were the result of fraud and obstruction of justice. Thus, the evidence is needed to determine if the settlement and the decision approving it was the product of fraud. The evidence is relevant to whether there was a “full and fair” determination of utility customers’ claims to be free of the financial burden of the failed plant. The redacted and withheld writings would be relevant to whether it would be unconscionable to give effect to the settlement agreement. Obtaining the records would support the claim that utility customers have been diligent in discovering the fraud and attacking the settlement adoption decision. See, .  


All withheld writings, except those protected by the absolute work product privilege should be reviewed to determine if they are evidence Picker was engaged in a crime or fraud. There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud. Cal Evid Code § 956

The CPUC gives a strained reading of the *Times Mirror* case, which had two dissents and was decided before the voters adopted Art I, Sec 3. In *Times Mirror*, the court found Govt Code § 6255 established a "catchall" exemption that permits the government agency to withhold a record if it can demonstrate that "on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record." *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1338. Contrary to what the CPUC argues, “Each request for records must be considered on the facts of the particular case" in light of the competing public interests." *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1328; Govt Code § 6255.)

The CPUC has not brought the redacted and withheld Picker writings within the deliberative process doctrine because the CPUC has not provided specific facts showing they reflect “deliberative or policy-making processes on the one hand” as opposed to “purely factual, investigative matters.” *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1341. The Court said the “focus of the inquiry ** is less on the nature of the records sought and more on the effect of the records' release.” *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325,
1342. The key question in every case is "whether the disclosure of materials would expose an agency's decision making process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions." *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1342. Thus, the Picker records that do not reflect the deliberative process he followed in making his San Onofre decision making must be surrendered.

If it is determined the writings are deliberative process records then “the lingering question nevertheless remains whether the public interest in nondisclosure "clearly outweighs" the public interest in disclosure.” *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1344. Under the facts and circumstances of this case, the answer is no. This is the case *Times Mirror* anticipated “There may be cases where the public interest in certain specific information **is more compelling, the specific request more focused, and the extent of the requested disclosure more limited; then, the court might properly conclude that the public interest in nondisclosure does not clearly outweigh the public interest in disclosure, whatever the incidental impact on the deliberative process.” *Times Mirror Co. v. Superior Court* (1991) 53 Cal. 3d 1325, 1345.

Indeed, the record here demonstrate the records should be produced. As shown in the utility’s response to a data request issued in the OII, SCE admitted no determination was made that SCE acted reasonably when it deployed the steam generators that quit 11 months into their 40-year life span:

*Southern California Edison*

**SONGS OII 1.12-10-013**

**Prepared by:** Walker Matthews  
**Title:** Senior Attorney  
**Dated:** 04/16/2014

16. Please admit that the "extensive proceedings in this OII" you mention in your motion to adopt did not include an examination of whether SCE acted reasonably in connection with deploying the SRGs in the SRGP.

**Response to Question 16:**  
**The extensive proceedings in this OII to date have not included an examination of whether SCE acted reasonably in replacing the steam generators at SONGS Units 2 and 3**
However, Picker told the Assembly, SCE was allowed to recover 50% of any award made in the MHI arbitration because it had “to do with the question of whether they (SCE) fairly and honestly procured equipment that they had good reason to believe would function in the way that it was intended to function and whether having been sold bad technology whether they are required to take all the blame for that.” As shown above, whether SCE “fairly and honestly procured equipment that [SCE] had good reason to believe would function in the way that it was intended to function” was a question the CPUC failed to address.

Picker served as Governor Brown’s Senior Advisor for Renewable Energy from 2009 to 2014. Picker has a history of participating in secret government decision making regarding San Onofre. Picker was part of the Loss of SONGS Task Force which included the CPUC president, and the heads of the California Energy Commission (CEC), the California Independent System Operator (CAISO), and executives from SCE and San Diego Gas & Electric (SDG&E). The following email shows the Loss of SONGS task force was up and running as of 12 June 2012, 4 months before the CPUC convened the OII:

From "Berberich, Steve" SBerberich@caiso.com
To: "Peevey, Michael R.(michael.peevey@cpuc.ca.gov)"
"michael.peevey@cpyc.ca.gov", "Weisenmiller, Robert@Energy
(Robert.Weisenmiller@energy.ca.gov)"
"Robert.Weisenmiller@energy.ca.gov>
"Niggli, Michael" mniggli@semprautilities.com,
Rn.Litzinger@sec.com,
Ron.Litzinger@sec.com",
"Wallerstein Barry (bwallerstein@aqmd.gov)"
"bwallerstein@agmd.gov",
"Felicia Marcus (felicia.marcus@waterboards.ca.gov)"
"felicia.marcus@waterboards.ca.gov",
"Picker, Michael" <Michael.T.Picker@gov.ca.gov>, "Edson, Karen"
KEdsgn@caiso.com
Date 06/12/2013 10:28 AM
Subject Loss of SONGS Task Force

The governor has asked for a 90 day report on how reliability will be maintained with the permanent loss of SONGS. In discussions with Mike Peevey, Mike and I agreed that the best approach would be to form a task force from the PUC, CEC, ISO, SCE, SDG&E, SCAQMD and the Water Board to address a number of issues including the following: What mix of resources and assets would best meet reliability needs at the lowest cost and with least regrets for long term system planning? What near term, midterm and long term actions should be taken to replace San Onofre energy and voltage support? What conventional, distributed generation could be contingency permitted and sited? How can we solve the loss yet minimize the amount of replacement power emissions? What OTC plants should be moved on for repower and which ones should be considered for
compliance date extensions? How can demand response, energy efficiency and other emerging technologies play a role in in minimizing conventional generation solutions? The ISO will take the lead in getting the task force coordinated and Neil Millar, our head of system planning, will be the lead on our end. Please let me know who from your organization will participate in the task force. We anticipate the initial meeting to take place in Folsom at the ISO with subsequent meetings in S. California. Finally, I propose that we have monthly meetings with Michael Picker of the governor's office and agency and utilities heads to monitor progress of the task force. As always, I welcome comments and alternative suggestions for moving forward. Best regards, Steve

On 8 July 2013 Picker participated in a meeting of a subset of the Loss of SONGS task force at the California Club for a Post SONGS Strategy as set forth in this email:

Subject: Post SONGS Strategy Dinner
Location: California Club - 538 S, Flower St, Los Angeles - Private room on 3rd floor
Start: Mon 7/8/2013 6:00-0 PM
End: Mon 7/8/2013 9:00 PM
Show Time as: Tentative
Recurrence: (none)
Meeting Status: Accepted
Organizer: Berberich; Steve
Required Attendees: mp1@cpuc.ca.gov; 'Mary Nichols'; bwallerstein@aqmd.gov; Weisenmiller, Robert@Energy (Robert.Weisenmiller@energy.ca.gov); Michael Picker; 'Marcus Felicia- State Water Resources Control Board (felicia.marcus@waterboards.ca.gov'); 'michaelrossi@gov.ca;ov’

Picker’ sent and received in another area—those relating to whether Imperial Valley geothermal produced electricity could make it onto the CAISO grid::

From: Edson, Karen
To: "Picker, Michael"
Subject: RE: IID deliverability issue
Date: Monday, August 11, 2014 11:57:34 AM
Who is “he?” Hueso? You are correct, of course. Deliverability refers to being deliverable to ISO load. We currently have no incremental deliverability from IID to serve ISO load. San Onofre is irrelevant to the this deliverability question. It would take their DC line for geothermal to mitigate local needs in the San Onofre area. Karen

From: Picker, Michael [mailto:Michael.Picker@cpuc.ca.gov]
Sent: Monday, August 11, 2014 11:10 AM
To: Edson, Karen
Subject: RE: IID deliverability issue
< EXTERNAL email. Evaluate before clicking. >
He still believes that you guys told him that there was adequate transmission capacity to move 500 MW of geothermal to the coast; and that (not clear that he actually asked the question) geothermal from Imperial is just what is needed to replace San Onofre. I said that Kevin Kelley was wrong about how to reach the Imperial County deliverability and that the physics of the system made it unlikely
that additional remove resources help with reliability on the coast without another set of transmission improvements that provide delivery (or VARS) at someplace near San Onofre. He said that the didn’t understand what a VAR was, and then went on to complain about the CPUC leg staff’s testimony about economic impacts.
Commissioner Michael Picker
California Public Utilities Commission
505 Van Ness, Fifth Floor
San Francisco, CA 94102
(415) 703-2444
Michael.Picker@cpuc.ca.gov

From: Edson, Karen [mailto:KEdson@caiso.com]
Sent: Friday, August 08, 2014 4:22 PM
To: Picker, Michael
Subject: IID deliverability issue

Michael,
Below is Mary McDonald’s email to Martha Guzman regarding deliverability from IID. As the email indicates, Kevin Kelley misunderstood the issue we tried to clarify in this document --
http://www.caiso.com/Documents/TechnicalAddendum-ImperialCountyDeliverability.pdf -- and made incorrect representations to the Legislature. Let me know if you have questions. Karen Edson

From: McDonald, Mary
Sent: Friday, August 08, 2014 4:09 PM
To: Martha Guzman-Aceves
Cc: Edson, Karen; Layton, Katie
Subject: FW: SB 1139
Hi Martha,
At this week’s Assembly Appropriations Committee hearing on SB 1139 (Hueso), Kevin Kelley the General Manager of Imperial Irrigation District stated that a recent ISO technical addendum finds that 462 MW of export capacity available from IID into the ISO (http://www.caiso.com/Documents/TechnicalAddendum-ImperialCountyDeliverability.pdf).

However, that 462 MW that he referenced is being used to import existing generation from IID into the ISO (Maximum Import Capability, MIC). As explained in the addendum, transmission additions approved in the ISO’s 2013-14 transmission planning cycle will enable future additional amount of deliverability for the overall Imperial zone of up to 1,000 MW. Based on a review of the CPUC’s approved power purchase agreements we have determined that all of the 1,000 MW is expected to be used by generation that is already moving forward as a result of having CPUC approval and are connecting directly to the ISO. I should also note at the request of the CPUC/CEC we are studying a scenario that would see an increase of 2,500 MW from the IID zone. Finally, also as part of this year’s transmission plan we are also exploring how to achieve additional deliverability from the Imperial zone part of the 2014-15 plan. We are exploring options that
include relatively low cost transmission operation changes, upgrades and re-
repurposing that could potentially provide several hundred MWs of additional
deliverability from the Imperial zone. This afternoon, Karen Edson the ISO’s VP
of Policy and Client Services spoke with Kevin Kelley about his statement in
Assembly Appropriations Committee and they discussed the ISO’s addendum and
he now has a clearer understanding

The following is an excerpt of what Kelley said at the Assembly Appropriations
Committee Hearing: Kevin Kelley: “In past committees, it’s been testified by the
regulators that IID has zero export capacity into the ISO system. I listened to that
repeatedly and so I went to the ISO to correct the record. And I commend to you
this technical addendum which was published to the ISO website last week that
places the current export capacity from IID to the ISO system at 462 MW. That’s
today, and that’s without building any new transmission. The closing thought I’d
like to leave you with is it’s been said that this bill if it were to be enacted does
nothing for the Salton Sea. It’s true this bill is silent on the Salton Sea, but this
bill is looked at as a first step in something like a self-help regiment to the Salton
Sea. It serves our region’s interest, it serves the public’s interest, and the Salton
Sea can’t wait much longer.” Please feel free to contact me with any questions.
Have a great weekend Mary

Other groups Picker discusses policy issues with are institutional investors and
investment analysts, as illustrated in these emails:

From: Peevey, Michael R. [michael.peevey@cpuc.ca.gov]
Sent: 5/6/2014 5:48:37 PM
To: Brown, Carol A. [carol.brown@cpuc.ca.gov]; Picker, Michael
    [Michael.Picker@cpuc.ca.gov]
Subject: RE: Picker to NY
Here is what I suggest for a NY trip:
1. Meet with the rating agencies, Moody's and Standard and Poors. Terrie Prosper
can set up.
2. Meet with Gavin Wolfe, my good friend. He is Managing Director, Bank of
   America Merrill Lynch. His phone: 646-855-3829. I will contact him and tell him
   you (Picker) will be in touch. He can organize a luncheon or other function where
   you can meet several investor types.
3. You may wish to have one of our utilities arrange, through their Investor
   Relations operation, set up a meeting with investors. If so, I suggest asking
   Sempra, not either of the other two (too much before us by each of them).

From: Peevey, Michael R. [michael.peevey@cpuc.ca.gov]
Sent: 5/6/2014 5:51:59 PM
To: Gavin H. Wolfe (gavin.wolfe@baml.com) [gavin.wolfe@baml.com]
Subject: Visit to NY

My newest fellow Commissioner, Michael Picker, is planning a trip to NY to get
a read on the investment community views of California regulation, etc. I have
given him your name and he will be in touch. Please extend him every courtesy,
including, I suggest, setting up a luncheon or other meeting with him and several
of your colleagues, not only from BofA, but other investment houses. Thanking you in advance.

From: Wolfe, Gavin - GCIB NY [gavin.wolfe@baml.com]
Sent: 5/7/2014 8:14:38 PM
To: 'Juliane.banks@cpuc.ca.gov' [Juliane.banks@cpuc.ca.gov]; Levine, Suzanne L [suzanne.levine@bankofamerica.com]
Subject: Re: Meeting w/Comr. Michael Picker

Julianne
I am glad to meet with the new commissioner and will work around his schedule when he is in town, but President Peevey thought it might make more sense to have Mike meet with the broader research and investor community. As such, I have reached out to Suzanne Levine who oversees conversations with Brian Chin, BAM L's Utilities Industry research analyst. She can have Brian reach out to you directly to organize a Wall Street Research and Investor luncheon. I will call you later to organize a breakfast or lunch meeting with me alone, but a broader luncheon where Mike can speak to a larger group is a much better venue for his getting Mike up to speed on investors concerns, etc. Does that make sense?

Thanks. Gavin
Gavin H. Wolfe
Managing Director, Investment Banking
Bank of America Merrill Lynch
(646) 855-3829
(646) 822-5697 (fax)
gavin.wolfe@baml.com

From: Banks, Juliane [Juliane.banks@cpuc.ca.gov]
Sent: 5/23/2014 9:36:05 PM
To: Chin, Brian - RSCH AMRS [brian.chin@baml.com]
Subject: RE: Juliane - I thought I had sent this earlier, but I wanted to send it again just to make sure. Re: BAML NYC meetings Cmr Picker
Attachments: image001.jpg; image002.gif

Hi Brian,
Thank you for your patience. Comr. Picker has chosen the last option, the "full day of lx1 meetings+ intimate group meeting." He also would like to schedule the meeting on Monday, June 23rd. Can you give me an idea of the meeting time frame? He already has a breakfast meeting planned that day at 8:30am, so I want to make sure it won't conflict with the start time of your meeting.

From: Banks, Juliane [Juliane.banks@cpuc.ca.gov]
Sent: 6/11/2014 8:32:22 PM
To: Wolfe, Gavin - GCIB NY [gavin.wolfe@baml.com]
Subject: RE: Meeting w/Comr. Michael Picker

Hi Gavin,
My apologies for not sending this note yesterday-I intended on emailing you after I phoned your office and was informed that you were in a meeting. Comr. Picker will be staying at the 70 Park Avenue Hotel. In regards to the lunch on the 23rd, my understanding is that lunch will be brought in; however, the agenda is still being put together, so nothing has been finalized yet. It's also my
understanding that John Apgar has taken over for Brian Chin and is now the contact person.

From: Wolfe, Gavin - GCIB NY [gavin.wolfe@baml.com]
Sent: 6/11/2014 8:47:07 PM
To: Juliane 'Banks, Juliane' [juliane.banks@cpuc.ca.gov]
Subject: RE: Meeting w/Comr. Michael Picker
Thanks for the note. Why don't we meet on the 24th for breakfast at the Pershing Square Cafe located at 90 East 42nd Street at Park Avenue. It's a short walk north on Park Avenue towards Grand Central and its located directly under the bridge and across from the Park Avenue entrance to Grand Central. You can't miss it. I will meet him there and we can enjoy a good breakfast and catch up. Thanks, Gavin

Gavin H. Wolfe
Managing Director, Investment Banking
Bank of America Merrill Lynch
Merrill Lynch, Pierce, Fenner & Smith Inc.
One Bryant Park, 22nd Floor, NY, NY 10036
Office: (646) 855-3829 I Fax: (646) 822-5697

From: kristie.marciniak@ubs.com [mailto:kristie.marciniak@ubs.com]
Sent: Friday, June 20, 2014 12:02 PM
To: Banks, Juliane; Surina.Diddi@ubs.com
Cc: Julien.Dumoulin-Smith@ubs.com; lauren.crawford@ubs.com
Subject: Commissioner Picker - meetings with UBS on Tuesday
Hi Juliane, just wanted to give you a quick update to the meeting schedule. Please see below. As soon as we have the last two meetings confirmed I will send thru an update. Could you let me know if Commissioner Picker will make his own way to the UBS offices on Tuesday morning or if I need to get a car to pick him up prior and bring him to the first meeting? Otherwise, I will arrange a sedan for Michael and Julien to attend the 1 pm meeting onwards. What would be the final drop off location for Michael? Please let me know if you have any questions.
Kind regards
Kristie

Tuesday, June 24, 2014
New York (NY)
10:00 AM -11:00 AM - Group Meeting
UBS, 9th Floor - Boardroom A, 1285 Avenue of the Americas, New York, NY, 10019, Phone: +1 212 713 3970
Investors:
Capital Research Global Investors (P), USA - Karen Choi, Adam Ward
Carlson Capital (P), USA - Andrew Gay
Cramer Rosenthal McGlynn Inc (P), USA - Tom Debourcy
Davidson Kempner Partners (P), USA - Kunal Shah
ECOFIN Ltd (P), UK - Ian Synnott
Electron Capital Management LLC (P), USA - Neil Choi
First Eagle Investment Management (P), USA - George Ross
JPMorgan Asset Management (P), USA - Nisha Chhabra
Kensico Capital Management (P), New York - Papa Chakravarthy
Levin Capital Strategies LLC (P), USA - Brendan Naive
Luminus Management LLC (P), USA - Michael Goldenberg
Macquarie Funds Management (P), AUS - Barry Klein
Nippon Life Insurance Group (P), Japan - Kiyoko Shinozaka
Surveyor Capital (P), USA - Jonathan Yee
The Carlyle Group - Ward Young
Weiss (George) & Associates (P), USA - Jeff Chrzanowski

11:30 AM - 12:30 PM - 1:1 Meeting - Capital Research Global Investors - Adam Ward
UBS, 9th Floor - CMR 4, 1285 Avenue of the Americas, 53rd Floor, New York, NY, 10019, Phone: +1 213-615-4211 Notes: Lunch provided
12:30 PM - Collect from UBS offices and transfer as directed
TBR Global
Driver: +1 Type: Sedan
Conf: Signboard: CPUC

Meet at 51st street side of offices
1:00 PM - 2:00 PM - 1:1 Meeting - SIR Capital Management LP - Kevin Fallon
620 Eighth Avenue, 22nd Floor, New York, NY, NY, 10018, Phone: +1 212 993 7104
2:30 PM - 3:30 PM - 1:1 Meeting
4:00 PM - 5:00 PM - 1:1 Meeting

Kristie M Marciniak
UBS Investment Bank
Director - Event Marketing, Corporate Roadshows
1285 Avenue of the Americas
New York, NY 10019

From: Julien.Dumoulin-Smith@ubs.com [Julien.Dumoulin-Smith@ubs.com]
Sent: 8/11/2014 6:23:01 PM
To: Michael.Picker@cpuc.ca.gov
Subject: RE: Michael- were on our way to your offices, but short on time
Absolutely, I always appreciate your insight; refreshing change from a lot of folks we meet with. It's been described that your cut from a different cloth from other CPUC folks .. I tend to agree.

Julien Dumoulin-Smith
Executive Director
us Electric Utilities & IPPs Group
UBS Investment Research
1285 Ave. of the Americas, New York, NY 10019

From: Picker, Michael [mailto:Michael.Picker@cpuc.ca.gov]
Sent: Monday, August 11, 2014 2:16 PM
To: Dumoulin-Smith, Julien
Subject: RE: Michael- were on our way to your offices, but short on time ..
Did it do what you needed?

Commissioner Michael Picker  
California Public Utilities Commission  
505 Van Ness, Fifth Floor  
San Francisco, CA 94102  
(415) 703-2444  
Michael.Picker@cpuc.ca.gov

-----original Message-----
From: Julien.Dumoulin-Smith@ubs.com  
Sent: Monday, August 11, 2014 11:13 AM  
To: Picker, Michael  
subject: RE: Michael- were on our way to your offices, but short on time  
..Thanks again for taking the time  
-Julien  
Julien Dumoulin-smith  
Executive Director  
s Electric Utilities & IPPs Group  
UBS Investment Research  
1285 Ave. of the Americas, New York, NY 10019

-----original Message-----
From: Picker, Michael [mailto:Michael.Picker@cpuc.ca.gov]  
sent: Monday, August 11, 2014 11:57 AM  
To: Dumoulin-smith, Julien  
subject: RE: Michael- were on our way to your offices, but short on time ..  
okay.
Commissioner Michael Picker  
California Public Utilities Commission  
Michael.Picker@cpuc.ca.gov

-----original Message-----
From: Julien.Dumoulin-Smith@ubs.com  
Sent: Monday, August 11, 2014 8:57 AM  
To: Picker, Michael  
subject: Michael- were on our way to your offices, but short on time ..  
Any interest in meeting us in the lobby of your building a few minutes after 9?  
cheers, Julien  
Julien Dumoulin-Smith  
Executive Director  
Electric Utilities and IPPs Group  
UBS Investment Research  
New York, NY 10019
These serial actions by Picker in favor of the utilities, while denying the public the records, violates the Public Records Act and due process.

B. Ex Parte Communications Are Not Protected: They are Not Part of Deliberative Process

The CPUC is “constitutionally constructed to protect the public from the consequences of monopoly in public service industries” People ex rel. Public Utilities Com. v. Fresno (1967) 254 Cal. App. 2d 76, 80. The CPUC has a legal duty to provide “a fair hearing to any party whose constitutional rights may be affected by a proposed order.” California Motor Transport Co. v. Railroad Com. of California (111930 Cal. 2d 184, 188.

Ex parte communications are defined in the Public Utilities Code as "any oral or written communication between a decision maker and a person with an interest in a matter before the commission concerning substantive ** issues, that does not occur in a public hearing, workshop, or other public proceeding, or on the official record of the proceeding or the matter." (Pub. Util. Code §1701.1(c)(4).)

The CPUC’s Order Instituting Investigation of San Onofre directed that “Communications with decision makers and advisors in this rulemaking are governed by Article 8 of the Rules of Practice and Procedure. (Rule 8.1, et seq.) Specifically, Rule 8.3(c) states that ex parte communications in ratesetting proceedings are subject to the restrictions stated in Rule 8.3, and the reporting requirements set forth in Rule 8.4.” (OII) Rule 8.3(c)(2) provides in pertinent part:

(2) Individual oral communications: If a decision maker grants an ex parte communication meeting or call to any interested person individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decision maker. The interested person requesting the initial individual meeting shall notify the parties that its request has been granted, and shall file a certificate of service of this notification, at least three days before the meeting or call.

(3) Written ex parte communications are permitted at any time provided that the interested person making the communication serves copies of the communication on all parties on the same day the communication is sent to a decision maker.

Interested parties who engage in ex parte communications held under Rule 8.3 are required under Rule 8.4 to report such communications to the CPUC and parties “within three
working days of the communication.” Ex parte communications are also expressly prohibited in adjudicatory cases. Pub. Util. Code § 1701.2. Violation of this prohibition is a misdemeanor. Pub. Util. Code § 2110.

The CPUC is a state agency “not under [the Governor's] direct executive authority.” Brown v. Chiang (2011) 198 Cal. App. 4th 1203, 1221. In connection with San Onofre, why then did the “CPUC redact[] portions of the text of two (2) records pursuant to Government Code §6254(1) as the redacted text reflected communications to or from employees of the Governor's Office”? And why did the “CPUC withheld sixty-five (65) records of communications to or from employees of the Governor's Office pursuant to Government Code §6254(1)”?

Rather than work within the CPUC proceedings, SCE went directly to the Governor’s office when San Onofre failed—and the Governor’s office obliged. SCE avoided any effort to hold it accountable for the defective steam generator and the closed plant throughout 2012. It did this by elevating the concern about safety above one about SCE’s accountability. On 6 June 2013 -- in the wake of Senator Boxer’s call for a criminal investigation -- SCE went directly to Governor Brown, as indicated in this email:

Sent: Thu June 6, 2013 20:00 PDT
To: brett white; dick schlosberg; france cardova; jagjeet bindra; luiz nogales; peter taylor; ron olson; thomas Sutton (Edison Board of Directors)
CC: Robert Adler
Subject Brown-Feinstein-Peevey phone calls

Wanted to give you a quick report on my phone calls with Governor Brown, Senator Feinstein and Mike Peevey. They all were quite positive. Governor Brown-about 10 minutes (was in Rancho Mirage with Pres. Obama, Chinese). Appreciated call. Asked some questions about decommissioning and number of employees. He said what we were doing seem right under the circumstances, good to reduce uncertainty, and took a little swipe at NRC bungling the process which was going to cause harm to CA. Fished for whether we were going to blast NRC or Boxer, I said "no, I didn't see any mileage in that. We were taking the high road and focusing on the future and insuring system reliability for our customers." He said he agreed that was best approach. I indicated that I imagined his office would get media calls tomorrow about this and would be looking for his reaction; I indcited that if he was so moved, it would help if he could indicate we had talked and he thought the company was acting
responsibly and focused on the right things. He indicated a willingness to do that. **

On 7 June 2013, Governor Brown’s office joined the reliability cause with the following press release, as shown in these emails:

6-7-2013
SACRAMENTO – Governor Edmund G. Brown Jr. today issued the following statement regarding Southern California Edison’s decision to permanently shut down the San Onofre Nuclear Generating Station.

"Since San Onofre nuclear power plant went offline last year, energy utilities and the state have worked to provide Southern California with reliable electric power year round. At my direction, California’s top energy experts will continue developing a long-term plan that ensures there is reliability for decades to come. As we move into the hot summer months, we can all do our part by continuing to conserve."

From "Berberich, Steve" SBerberich@caiso.com
To: "Peevey, Michael R. (michael.peevey@cpuc.ca.gov)"
<michael.L.peevey@epyca.gov>, 'Weisenmiller, Robert@Energy
(Robert.Weisenmiller@energy.ca.gov)
"Niggli, Michael"
<nmaggli@semprautilities.com>, RN.L.Litzinger@sce.com
<Ron.L.Litzinger@sce.com>, 'Wallerstein Barry (bwallerstein@aqmd.gov)"
<bwallerstein@aqmd.gov>, "Felicia Marcus
(felicia.marcus@waterboards.ca.gov)" <felicia.marcus@waterboards.ca.gov>,
Cc "Picker, Michael" <Michael_picker@ca.gov.gov>, f"Edson, Karen"
KEEdsgn@caiso.com
Date 06/12/2013 10:28 AM
Subject Loss of SONGS Task Force

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

What mix of resources and assets would best meet reliability needs at the lowest cost and with least regrets for long term system planning? What near term, mid term and long term actions should be taken to replace San Onofre energy and voltage support? What conventional, distributed generation could be contingency permitted and sited? How can we solve the loss yet minimize the amount of replacement power emissions? What OTC plants should be moved on for repower and which ones should be considered for compliance date extensions? How can demand response, energy efficiency and other emerging technologies play a role in in minimizing conventional generation solutions? The ISO will take the lead in getting the task force coordinated and Neil Millar, our head of system planning,
will be the lead on our end. Please let me know who from your organization will participate in the task force. We anticipate the initial meeting to take place in Folsom at the ISO with subsequent meetings in S. California. Finally, I propose that we have *monthly meetings with Michael Picker* of the governor’s office and agency and utilities heads to monitor progress of the task force. As always, I welcome comments and alternative suggestions for moving forward. **Best regards,**

Steve

With the Governor’s office collapsing the utilities and regulators into San Onofre hodgepodge in which the Governor’s staff members (like Picker) were active participants, can it be said that the Governor’s Correspondence Exemption applies? The answer is “No”, especially if the records have been shared with private utilities.


Moreover, under the *Times Mirror* case, ex parte communications with CPUC decision makers and staff involving matters not under the Governor’s direct executive control do not constitute correspondence as defined is Govt. Code Section 6254(l). As the *Times Mirror* court noted, “Prior to 1975, the [Public Records] Act exempted from disclosure *all* records ‘[i]n the custody of or maintained by the Governor or employees of the Governor's office employed directly in his office . . . .’” (Stats. 1970, ch. 1295, § 1.5, p. 2397.) In 1975, this exemption was amended to limit the exemption to *correspondence of or to* the Governor and his staff. (Stats. 1975, ch. 1246, § 3, p. 3209.) "Where changes have been introduced to a statute by amendment it must be assumed the changes have a purpose . . . ." *Louisiana-Pacific Corp. v. Humboldt Bay Mun. Water Dist.* (1982) 137 Cal.App.3d 152, 159. What *Times Mirror* said about the Governor in that case could also be said here:

The Governor's suggested definition of correspondence as "written communications" is so broad as to encompass nearly every document generated by the Governor's office, effectively reinstating the original exemption and rendering the 1975 amendment a nullity. *Times Mirror Co. v. Superior Court,* (1991) 53 Cal. 3d 1325, 1336-1337.
To the extent the records to and from the Governor’s office show obstruction of justice, they are not exempt from disclosure. Under California law, "every judicial officer, court commissioner, or referee who commits any act that he or she knows perverts or obstructs justice, is guilty of a public offense punishable by imprisonment in a county jail for not more than one year." (Cal. Penal Code § 96.5). Penal Code section 182(a)(5) makes it a felony to "commit any act injurious to the public health, to public morals, or to pervert or obstruct justice, or the due administration of the laws." Conspiracy to commit a misdemeanor offense can also be charged as a felony, pursuant to Penal Code Section 182(a)(1).

Moreover, to the extent there were ex parte communications about the pending San Onofre OII, those would have been prohibited and would not be exempt from disclosure. To determine otherwise would be an unconstitutional deprivation of the due process rights of utility customers before the CPUC in the San Onofre OII proceeding. 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 arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion.”)

Improper ex parte communications have been referred to as fraud by courts 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).

Did the Governor’s staff participate in discussions about how the OII should be settled? Did they discuss the Warsaw, Poland meeting? Did they have discussions with the CPUC President or utility officials about a deal to exchange a San Onofre shut down for a financial recovery in rates? Did the Governor’s staff discuss the *ex parte* meeting in Warsaw and the “framework” of the settlement arrived at there? If such *ex parte* discussions took place makes 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.
XII. CONCLUSION

The CPUC, by continuing to withhold the records, denies not only Mr. Aguirre his rights under the Public Records Act, but also, the ratepayers' and public's due process rights because they have not had the benefit of them in participation in the CPUC proceedings. They should be released immediately as the benefits to the public by their disclosure outweigh any benefit to keeping them secret.
CERTIFICATE OF SERVICE

I hereby certify that I have this day served the original and two copies of

“MICHAEL J. AGUIRRE'S COMMENTS RE RESOLUTION AFFIRMING STAFF’S WITHHOLDING AND REDACTION OF REQUESTED RECORDS PURSUANT TO THE PUBLIC RECORDS ACT DENYING MICHAEL J. AGUIRRE'S APPEAL OF STAFF’S ACTION IN RESPONSE TO PRA #16-258; AND REQUEST FOR HEARING AND ORAL ARGUMENT” and EXHIBITS THERETO to the parties shown below via Federal Express and email:

Fred Harris
Angela Hagler
Staff Counsel
Legal Division
California Public Utilities Commission
505 Van Ness Avenue, Room 5040
San Francisco, CA 94102-3298
Telephone: (415) 703-1557
E-mail: fnh@cpuc.ca.gov and ah4@cpuc.ca.gov

Dated April 7, 2017, at San Diego, California.

[Signature]
Maria E. Byrneš