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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

SOUTHERN CALIFORNIA EDISON COMPANY, Plaintiff, v. LORETTA M. LYNCH, HENRY M. DUQUE, JOSIAH L. NEEPER, RICHARD A. BILAS, and CARL W. WOOD, in their official capacities as Commissioners of the California Public Utilities Commission, Defendants.	Case No. 00-12056-RSWL (Mcx) APPLICATION OF THE PEOPLE OF THE STATE OF CALIFORNIA TO SPECIALLY APPEAR RE MOTION FOR PRELIMINARY INJUNCTION; MEMORANDUM IN SUPPORT Date: February 12, 2001 Time: 9:00 a.m. Place: Courtroom 21 Hon. Ronald S.W. Lew

Plaintiff Southern California Edison Company ("SCE") has moved this Court for a preliminary injunction directing the defendants, as the California Public Utilities Commission ("PUC"), to increase significantly electricity rates notwithstanding a statutory rate freeze which the State adopted as part of a comprehensive plan to restructure the electricity industry in

California while protecting consumers from excessive electricity prices during the transition to a competitive market for electricity. The People of the State of California, ex rel. Gray Davis, Governor and Bill Lockyer, Attorney General, hereby apply for leave to make a special appearance in the matter in order to present the views of the People on the motion for preliminary injunction. In short, the People suggest that this Court take no action in the near term that would change the status quo, in order to give the Governor and the Legislature sufficient time to address the various facets of the energy situation, including the uncollected procurement costs which are the basis of this action. Thus, the Court should either deny the motion for preliminary injunction without prejudice or defer ruling on it in order to permit these negotiations to conclude.

As an alternative, the People propose that Court should adopt the following procedure pursuant to Federal Rule of Civil Procedure 65(a)(2):

1. Defer ruling on the motion for preliminary injunction;
2. Consolidate this action with *Pacific Gas & Electric Company v. Lynch* which was recently transferred to the Central District and which raises similar issues;
3. Consolidate the trial on the merits with the preliminary injunction motion in both this action and in *Pacific Gas & Electric Company v. Lynch*; and
4. Set expedited hearings following the completion of any necessary discovery by the parties.

This procedure would delay any possible injunctive relief for a period of time, but as the People make clear in the attached memorandum, such a delay would not prejudice SCE or Pacific Gas & Electric.

As a final alternative, the People request that the Court delay the hearing for several weeks in order that the People may move to intervene in the action and more fully address the issues raised. The People also have a special interest in this litigation, beyond that of the current parties, which justifies this special appear, i.e., a determination by this Court that market rates invoke the filed rate doctrine raises concerns that go far beyond the instant claims before this court. For example, a party might try to use such a ruling in an attempt to thwart enforcement

actions that the People might bring under consumer protection laws.

As a part of this special appearance, the People also wish to inform the Court of a number of events which have occurred which alter the current environment and of other ongoing activities which likely will alter even further that environment. The preliminary injunction should be denied because the State is acting quickly to address the current situation and a grant of the relief SCE seeks would greatly disrupt those efforts. Moreover, the balance of hardship tips strongly toward the people of the State and away from SCE.

This special appearance is expressly not a waiver of sovereign immunity by the State.

For the reasons stated herein and in the attached memorandum, the People of the State of California respectfully request that the Court grant them leave to appear specially on the motion for preliminary injunction.

Dated: February 8, 2001.

Respectfully submitted,

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MEMORANDUM IN SUPPORT OF SPECIAL APPEARANCE

Plaintiff Southern California Edison Company ("SCE") has moved this Court for a preliminary injunction directing the PUC to remove electricity rate caps set by PUC as a part of a comprehensive plan to deregulate electricity rates in California. The People of the State of California, ex rel. Gray Davis, Governor and Bill Lockyer, Attorney General hereby seek to make a special appearance on the motion in order to present the views of the People. The People have a special interest in this litigation, beyond that of the current parties, which justifies this special appearance, i.e., a determination by this Court that market rates invoke the filed rate doctrine raises concerns that go far beyond the instant claims before this court. For example, a party might try to use such a ruling in an attempt to thwart enforcement actions that the People might bring under consumer protection laws. *See* general discussion in *County of Stanislaus v. Pacific Gas And Electric Company*, 114 F.3d 858 (9th Cir. 1997).

As the elected representatives of the people of the State, the Governor and the Attorney General are best positioned to represent the public interest here. In short, the People suggest that this Court take no action in the near term that would change the status quo, in order to give the Governor and the Legislature sufficient time to address the energy situation. Thus, the motion for preliminary injunction should be denied without prejudice or any ruling on the motion should be deferred.

In the alternative, the People will propose that the Court, pursuant to Federal Rule of Civil Procedure 65(a)(2) consolidate the trials and the preliminary injunction hearings both in this case and in the companion *Pacific Gas and Electric Company v. Lynch* case and, following the completion of any needed discovery, that all matters be heard on an expedited basis. As a final alternative, the People request that the Court at least delay the hearing for several weeks so that the People can move to intervene and to present fully their views on the motion. As we shall show, the People would bring to the Court's attention new arguments which would go to the core of SCE's likelihood of succeeding on the merits.

In the briefing on SCE's motion, the parties have argued the applicable standard for granting a preliminary injunction, and the People will not repeat those arguments. But the

People do want to emphasize that SCE is seeking a mandatory injunction which will greatly alter the status quo. The Ninth Circuit has been clear that mandatory injunctions are "particularly disfavored" and the courts should be extremely cautious about issuing such injunctions. *Stanley v. University of Southern California*, 13 F.3d 1313, 1319-20 (9th Cir. 1994). When a party is seeking a mandatory injunction, the Court should deny relief "unless the facts and law clearly favor the moving party." *Id.* The facts and law do not clearly favor SCE. More importantly, granting the relief which SCE seeks would be contrary to the public interest because it will interfere with the ongoing efforts of the Governor and the Legislature to resolve the energy crisis now facing California.

I. RECENT EVENTS HAVE CHANGED THE CIRCUMSTANCES SURROUNDING SCE'S MOTION FOR PRELIMINARY INJUNCTION.

A primary basis for SCE's motion for preliminary injunction is that the PUC has not acted to alleviate the financial strain which SCE claims it is experiencing. In effect, SCE argues that the PUC's inaction calls for this Court to act. However, as even SCE now concedes in its reply brief, in the short time since SCE filed its motion, the Governor of California and the California Legislature have acted, and continue to act, to address the electricity supply problems which the State confronts.

On February 1, 2001, the Legislature passed, and the Governor signed into law, Assembly Bill 1 (First Extraordinary Session) ("ABX1 1"). ABX1 1 authorizes the State to enter into the business of providing electricity – in the amount of about $10 billion – by entering into long-term contracts under which the cost of the electricity will be much lower than the present cost on the spot market. In addition, in section 5 of ABX1 1, the Legislature authorized the Department of Water Resources to spend an additional $500 million to purchase electricity on the spot market until the long-term contracts contemplated by ABX1 1 are in place.[1]

Even SCE concedes that ABX1 1 has addressed a considerable part of its preliminary injunction motion. In its reply memorandum SCE states as follows:

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1. SCE submitted a copy of ABX1 1 with its reply memoranda.

> [ABX1 1] . . . makes the State responsible for purchasing electricity on behalf of the retail customers of SCE and Pacific Gas and Electric Company in excess of the utilities' existing generation resources. Because SCE does not now have to buy additional electricity in wholesale markets, the Court need not now order the CPUC to increase SCE's rates to cover future procurement costs on a current basis.

Reply Memorandum in Support of Plaintiff Southern California Edison Company's Motion for Preliminary Injunction ("SCE Reply Mem.") at 1.

Despite the fact that the Governor and the Legislature have acted to deal with SCE's future procurement costs, SCE still demands a preliminary injunction because "[t]he new legislation . . . does *nothing* to enable SCE to recover the wholesale procurement costs that it has incurred to date." *Id.*; emphasis in original. What SCE does not state is that the Governor and the Legislature presently are working to address this very subject, i.e., the wholesale procurement costs SCE has incurred to date. In fact, the State is negotiating with SCE to address the debt that it has incurred because of the increase in energy prices and the movement of capital upstream from the utilities to its parent corporation. In addition, the Legislature is reviewing other options – such as the State's purchase of transmission lines – which may also protect the utility.

In addition to those negotiations, the Governor has commandeered SCE and Pacific Gas and Electric Company ("PG&E") contracts with the Power Exchange for the delivery of electricity. The Governor acted by way of two executive orders executed on January 31, 2001, pursuant to his emergency powers granted in section 8572 of the California Emergency Services Act. The Governor's orders direct that the contracts be held subject to the control and coordination of the State of California. True and correct copies of the executive orders are attached hereto as Exhibit 1. The goal of the Governor's actions is to guarantee the delivery of the electricity under the contracts.

Moreover, also subject to negotiation are such issues as whether the two utilities can provide power that they generate at a lower rate, and whether the State can obtain energy from alternative sources at reasonable prices.

The foregoing makes clear that the Governor and the Legislature are actively dealing with

California's energy crisis, including addressing the financial security of SCE. The fact that the Governor and the Legislature have not yet reached on a solution does not mean that they won't. Rather, as the enactment of ABX1 1 demonstrates, the Governor and the Legislature will act. And at a minimum, this Court should stay its hand now so that those negotiations can be concluded.

II. GRANT OF THE PRELIMINARY INJUNCTION WILL BE CONTRARY TO THE PUBLIC INTEREST.

Despite the ongoing activities seeking a resolution of the energy crisis, SCE continues to ask this Court to inject itself into this situation and impose a resolution. The Court should decline because issuance of the injunction will be contrary to the public interest.

As outlined above, the political branches of California's government are actively engaged in this issue, and it is inappropriate for a court to inject itself into those political activities. Indeed, legislation has been enacted which, in effect, protects SCE so that it has withdrawn its request for half of the relief it sought. If the Court issues the preliminary injunction, it will impose a remedy which will jeopardize the ability of the Governor and the Legislature to address the debts incurred by SCE.

The situation which the Governor and the Legislature face is already complex, and granting SCE the relief is seeks now will simply create a new obstacle around which the State must navigate. Thus basic notions of federalism and comity counsel that the Court should stay its hand and not attempt to impose a remedy in a complex situation which the State is now rapidly working to correct. Here, the public interest is served by denying the preliminary injunction without prejudice and allowing the political arms of the State government to address the issues. Should they fail to resolve the problem, SCE can always return to this Court to seek further relief.

Beyond the negative impact on the public interest, there are several other reasons why this Court should decline to grant the preliminary injunction. First, as SCE's reply memorandum makes clear, SCE is asking the Court – on a very limited record – to involve itself in the extremely technical area of setting electricity rates and the amount of time over which SCE's

past procurement costs should be amortized. A court should be very cautious about wading into such matters on a preliminary injunction motion, especially when granting the requested relief will affect millions of Southern Californians. Moreover, SCE effectively is asking this Court to be the final arbiter of the rates which California ratepayers will pay. While SCE's proposed order allows the PUC (in a mere seven days) to attempt to come up with a program to re-pay SCE, should SCE be dissatisfied with the PUC plan, SCE surely will return to this Court asking it to impose a plan more to SCE's liking.

Second, the balance of hardship does not tip toward SCE. SCE's assertion of hardship is that without the preliminary injunction, it may be forced into bankruptcy. In its reply memorandum, SCE points to the recently completed KPMG report as further evidence of its weakened financial condition. However, the fact that SCE's financial condition is weakened does not lead necessarily to its bankruptcy. In fact, as noted above, the Governor and the Legislature presently are working to address SCE's debt problems, and if the Governor and the Legislature are successful, then SCE will not be able to point to any injury at all much less any irreparable injury.

Finally, SCE argues that any injury to the public by way of higher rates for electricity is mitigated because SCE is willing to pay refunds if it ultimately does not prevail. Therefore, pointing to a number of cases, SCE argues that there is no irreparable injury to its ratepayers. There are two answers to SCE. First, TURN has presented evidence that the potential rate increases will cause substantial dislocations which cannot be repaired by a refund. Declaration of Michel Peter Florio in Opposition to Plaintiff's Motion for Preliminary Injunction. Second, the cases on which SCE relies are so different from this case that they have no application here. For example, in *Public Service Company of New Hampshbire v. Patch*, 167 F.3d 15 (1st Cir. 1998), the utility sued to enjoin a deregulation plan from going into effect. On the question of its impending bankruptcy from the deregulation plan, the utility presented "extensive affidavits and then live witnesses." *Id.* at 28. Here, SCE has not presented any evidence in the imminence of its bankruptcy. Rather, SCE is suing after the deregulation plan has been in effect for years and after SCE reaped the benefits of deregulation for most of that time. In addition, the California

situation is distinguishable from that in *Patch* because the relief which SCE seeks would apply a significant shock to California ratepayers and to the California economy at a time of a projected economic slowdown. Thus, *Patch* is simply not applicable here, and the other cases on which SCE relies are similarly distinguishable.

III. RULE 65(a)(2) PROVIDES THE COURT WITH AN EXPEDITIOUS MEANS TO RESOLVE THIS MATTER.

As an alternative to the Court ruling on the motion for preliminary injunction, the People suggest that Federal Rule of Civil Procedure 65(a)(2) provides a means of resolving both this matter, and *Pacific Gas and Electric Company v. Lynch*, in which PG&E raises similar issues and seeks similar relief, and which recently was transferred from the Northern District to the Central District. The People propose the following:

1. Defer ruling on the motion for preliminary injunction;
2. Consolidate this action with *Pacific Gas & Electric Company v. Lynch*;
3. Consolidate the trial on the merits with the preliminary injunction motion in both this action and in *Pacific Gas & Electric Company v. Lynch*; and
4. Set expedited hearings following the completion of any necessary discovery by the parties.

This procedure would delay any possible injunctive relief for a period of time, but as the People have made clear herein, such a delay would not prejudice SCE.

The Advisory Committee Notes on Rule 65(a)(2) also indicate some of the benefits of this procedure. For example, the repetition of evidence is avoided, and if during the presentation of the evidence, a party establishes that a preliminary injunction is justified, "it may be issued during the course of the consolidated proceedings." The Advisory Committee Notes also state that "to consolidate the proceedings will tend to expedite the final disposition of the action." The People believe that this proposal here will expedite the final disposition of these actions.

IV. THE COURT SHOULD DELAY RULING TO PERMIT THE PEOPLE TO MOVE TO INTERVENE AND TO RESPOND FULLY TO SCE's MOTION.

In the event that the Court decides not to deny SCE's motion for a preliminary injunction,

the People respectfully request that the hearing be continued for several weeks to allow the People to formally move to intervene and more fully present their views on the issues raised in SCE's motion. As noted herein, the People have a strong interest which is not represented by the parties. Moreover, in addition to presenting its perspective on some of the arguments that have been raised, the People would bring to the Court's attention a number of potentially dispositive arguments which have not been presented.

Among the new arguments that the People would raise are two that go to the core of SCE's likelihood of success on the merits. First, all of SCE's claims are barred by res judicata. In both its complaint and in its reply brief, SCE asserts that its alleged harm stems from decisions of the PUC. (SCE Reply Mem. at 11; Complaint, ¶¶ 18, 19, 27, 34, 38, 41,44 and 47.) Those decisions are final. As such, SCE is barred from raising claims which were before the PUC, as well as claims, such as its filed rate doctrine and takings claims, which "could have been raised." *Western Radio Servs. Co. v. Glickman*, 123 F.3d 1189, 1192 (9th Cir. 1997); *also see Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991) (res judicata applies to final decisions of administrative bodies.)

Second, the People would show how, even if its claims were not barred, SCE has failed to meet a threshold requirement for establishing a taking under the Fifth Amendment of the United States Constitution, to wit, its burden of proving that AB 1890's deregulation program thwarted its reasonable investment-backed expectations. *See, e.g., Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999) ("For any regulatory takings claim to succeed, the claimant must show that the government's regulatory restraint interfered with his investment-backed expectations in a manner that requires the government to compensate him.") The People would show that, in supporting the AB 1890 deregulation program, SCE was aware that it would face risks – and so stated in public documents. SCE made a business decision that the potential benefits of deregulation justified its exposure to market forces. The marketplace has arguably thwarted SCE's hopes, but the Fifth Amendment is not designed to protect parties from the marketplace.

V. CONCLUSION

For the foregoing reasons, the People of the State of California, ex rel. Gray Davis, Governor and Bill Lockyer, Attorney General, respectfully request that the Court grant this application for a special appearance on this matter of great public importance.

Dated: February 8, 2001.

Respectfully submitted,

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