UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

CITIZENS OVERSIGHT, INC. et al., Plaintiffs, vs. CALIFORNIA PUBLIC UTILITIES COMMISSION et al., Defendants.	Case No.: 14-CV-02703-CAB-NLS **[TENTATIVE] ORDER GRANTING MOTIONS TO DISMISS** [Doc. Nos. 11, 12]

This matter is before the Court on the separate motions to dismiss filed by (1) Defendants California Public Utilities Commission ("CPUC"), Michael Peter Florio, and Michael R. Peevey (collectively, the "CPUC Defendants"), and (2) Southern California Edison Company ("SCE"), respectively. For the reasons set forth below, the motions are **GRANTED** and this case is **DISMISSED** for lack of subject matter jurisdiction.

I. Background

This lawsuit arises out of the shutdown of the San Onofre Nuclear Generating Station ("SONGS"). The named plaintiffs are residents of southern California who allegedly have been charged for defective steam generators at SONGS on their monthly utility bills. The complaint purports to assert claims on

behalf of a plaintiff class of 17,400,000 utility customers whose utility bills also included charges for the defective generators. Plaintiffs allege that the inclusion of costs related to SONGS in the utility bills of southern California residents was/is a taking without compensation in violation of the United States Constitution. Although the twenty-eight page complaint purports to seek *billions* of dollars in relief, and the briefing on the instant motions includes hundreds of pages of documents of which the parties want the Court to take judicial notice, the facts and allegations relevant to the Court's decision to dismiss this case for lack of subject matter jurisdiction are few and undisputed.

At all times relevant here, SCE operated SONGS along with San Diego Gas & Electric ("SDG&E"), which is not a defendant here. In 2005, CPUC authorized SCE to replace four steam generators in the two active reactors at SONGS. [Doc. No. 1 at ¶ 46.] The CPUC's 2005 authorization conditionally allowed SCE to charge utility customers for these new generators subject to SCE applying to CPUC to include these costs in utility rates permanently after the installation was complete. [Doc. No. 1 at ¶ 51.] The installation of these generators was completed in one of the reactors in 2010, and in the other in 2011. [Doc. No. 1 at ¶ 50.]

In January 2012, the reactors at SONGS were shut down. After defects were discovered in the steam generators, SCE announced in June 2012 that the shut down would be permanent. [Doc. No. 1 at ¶ 54.] As of this time, SCE had yet to

file an application to have the SONGS costs related to the new steam generators permanently included in customers' utility rates. [Doc. No. 1 at ¶¶ 54, 55.]

In October 2012, the CPUC opened a formal investigation into the outages at SONGS. [Doc. No. 1 at ¶ 80.] The press release announcing the investigation explained that the "investigation will determine whether to remove all costs related to SONGS from the rates of [SCE] and [SDG&E] going forward, and whether to refund SONGS-related costs already collected in rates back to January 1, 2012." [*Id.*] This investigation was divided into phases, took over two years and was not even complete as of the date of this opinion in light of a motion for rehearing that is currently pending. Numerous parties participated during the process, including Ruth Henricks, who is a named plaintiff in this lawsuit, and the Coalition to Decommission San Onofre ("CDSO"), both of whom were represented in the investigation by Plaintiffs' counsel. [Doc. No. 11-4.] Henricks (along with numerous other entities) was formally granted party status in connection with the investigation and Plaintiffs' counsel was on the service list related to the investigation. [Doc. Nos. 11-7, 11-8.] There were weeks of evidentiary hearings and multiple public participation hearings. [Doc. 11-3 at 16-24.] In connection with the evidentiary hearings, the various interested parties, including Henricks, were given the opportunity to, and did in fact, file briefs supporting their positions. [Doc. Nos. 11-4, 11-10.]

On March 20, 2014, SCE, along with several other involved entities (collectively, the "Settling Parties"), served a notice of a settlement conference to be held on March 27, 2014. [Doc. No. 11-3 at 23.] On April 3, 2014, the Settling Parties filed and served a Joint Motion for Adoption of Settlement ("Joint Motion"), stating that the settlement would resolve all issues in the investigation. [Doc. No. 11-3 at 23.] The Administrative Law Judges ("ALJs") presiding over the investigation subsequently required the Settling Parties to provide testimony about the settlement and to post documents supporting the settlement agreement on a website and scheduled an evidentiary hearing and community information hearing. [Doc. No. 11-3 at 23-24.] Numerous entities and individuals, including CDSO and Henricks, filed comments on the proposed settlement. [Doc. No. 11-3 at 24.] Ultimately, on September 5, 2014, the ALJs issued an order asking for certain changes to be made to the settlement to better meet the public interest, and the Settling Parties agreed to these changes. [Doc. No. 11-3 at 25.] Several non-settling parties, again including CDSO and Henricks, filed comments opposing the amended settlement agreement. [*Id.*]

On November 20, 2014, one week *after* Plaintiffs filed this lawsuit, the CPUC approved the settlement. [Doc. No. 11-3.] Henricks and CDSO have since filed a motion for rehearing with the CPUC. [Doc. 11-4] This motion for rehearing is still pending.

Meanwhile, on November 13, 2014, Plaintiffs filed this action. The complaint asserts one cause of action: that including costs for the failed steam generators and for SONGS generally since it stopped producing electricity in January 2012 violates the Takings Clause in the Constitution.

II. Legal Standard

Under Rule 12(b)(1), a complaint must be dismissed if the Court lacks subject matter jurisdiction. Unlike a motion under Rule 12(b)(6), "when considering a motion to dismiss pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings, but may review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988); *see also Thornhill Pub. Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979) ("Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary.").

III. Requests for Judicial Notice

All parties have filed requests for judicial notice of hundreds of pages of documents along with their papers. Pursuant to Federal Rule of Evidence 201(b), "[t]he court may judicially notice a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R.Evid. 201. For their part, Defendants ask the Court to take judicial notice of: (a) public records from the CPUC proceedings related to the SONGS investigation; (b) a press release from the California Governor; and (c) a stipulated judgment from another lawsuit in the Central District of California. Plaintiffs did not object to Defendants request.

As to the first category, public records from the CPUC are properly subject to judicial notice. *PNG Telecomms., Inc. v. Pac-West Telecomm, Inc.*, No. CIV. S-10-1164 FCD/EFB, 2010 WL 3186195, at *3 (E.D. Cal. Aug. 11, 2010) (taking judicial notice of filings and orders from a CPUC proceeding); *Cnty. of Stanislaus v. Pacific Gas & Elec. Co.*, No. CV-F-5866-OWW, 1995 WL 819150, at *8 (E.D. Cal. Dec. 18, 1995) ("[T]he Court may properly take judicial notice of public records of the CPUC. . . .") *aff'd* 114 F.3d 858 (9th Cir. 1997); *City of Vernon v. S. California Gas Co.*, No. CV 92-3435-SVW(CTx), 1994 WL 896057, at *1 (C.D. Cal. Aug. 4, 1994) (taking judicial notice of CPUC orders and papers filed by the parties in CPUC proceedings) *aff'd*, 92 F.3d 1191 (9th Cir. 1996). Accordingly, the Court takes judicial notice of the CPUC records. The request is denied as moot with respect to the press release and stipulated judgment because the Court did not consider them in connection with this opinion.

For their part, Plaintiffs ask the Court to take judicial notice of over sixty documents, the majority of which Plaintiffs assert are communications with the CPUC that they obtained through a public records request. SCE filed an opposition to Plaintiffs' request with respect to many of these documents. Because none of these documents aid the Court in determining whether it has subject matter over Plaintiff's claim, the Court did not consider them in connection with this opinion. Accordingly, Plaintiffs' request for judicial notice is denied as moot.

IV. The Johnson Act

Defendants argue that the Johnson Act, 28 U.S.C. § 1342, divests the Court from exercising jurisdiction over Plaintiffs' claims.[1] According to the Johnson Act:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a State administrative agency or a rate-making body of a State political subdivision, where:
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> (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and,
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> (2) The order does not interfere with interstate commerce; and,
>
> (3) The order has been made after reasonable notice and hearing; and,

[1] Although the CPUC Defendants and SCE each filed a separate motion to dismiss, both motions make largely identical arguments that the Johnson Act applies. Likewise, although Plaintiffs filed separate oppositions to the motions, they did not argue that the Johnson Act applies differently depending on the defendant. Accordingly, there is no need for the Court to address the motions separately.

> (4) A plain, speedy and efficient remedy may be had in the courts of such State.

Thus, "the Johnson Act precludes federal court jurisdiction over all suits affecting state-approved utility rates, including actions seeking declaratory relief and compensatory damages." *Brooks v. Sulphur Springs Valley Elec. Co-op*, 951 F.2d 1050, 1054 (9th Cir. 1991). "The Act's intent is to channel normal rate litigation into the state courts." *Peoples Nat'l Utility Co. v. City of Houston*, 837 F.2d 1366, 1367 (5th Cir. 1988) (internal quotations omitted).[2] Accordingly, "[i]n construing the Johnson Act, the Court is mindful that '[t]he Act is to be broadly applied to keep challenges to order affecting rates out of the federal courts.'" *ACTS Retirement-Life Cmtys., Inc. v. Town of Columbus*, No. 1:11cv50, 2012 WL 7277033, at *4 (W.D.N.C. Mar. 6, 2012) (quoting *Hanna Mining Co. v. Minn. Power & Light Co.*, 739 F.2d 1368, 1370 (8th Cir. 1984)); *see also Tennyson v. Gas Serv. Co.*, 506 F.2d 1135, 1138 (10th Cir. 1974) ("[B]y its broad wording it is clear that it was intended to keep constitutional challenges to orders affecting rates out of the federal courts lock, stock and barrel. . . .") (internal quotations omitted); *Ambac Assur. Corp. v. Adelanto Pub. Utility Auth.*, 696 F.Supp. 2d 396, 400

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[2] The Ninth Circuit has noted that the dearth of authority on the Johnson Act warrants consideration of the opinions of other circuits. *See US West, Inc. v. Nelson*, 146 F.3d 718, 722 n.2 (9th Cir. 1998) ("Because of the limited number of cases in this circuit dealing with the Johnson Act, we consider cases from other jurisdictions in reaching our decision.").

(S.D.N.Y. 2010) ("Courts have made clear that the Johnson Act is to be construed broadly."); *Stanislaus Food Prods. Co. v. Pub. Utilities Comm'n*, 560 F.Supp. 114, 118 (N.D. Cal. 1982) (noting that the Johnson Act "prompts a general hands-off policy relative to state rate making.") (citation omitted).

A. The Complaint Concerns An "Order Affecting Rates"

"The threshold question in determining whether a case falls within the purview of the Johnson Act is whether there is a challenge to an 'order affecting rates.'" *Ambac Assur. Corp.*, 696 F.Supp. 2d at 400. "However, § 1342 does not require that an order result in a direct rate or tariff modification before it will operate to deprive a federal court of subject-matter jurisdiction. On the contrary, the proscriptive language contained in § 1342 clearly requires only that the challenged order or orders affect rates. It makes no difference that the aspect of the orders of which Plaintiffs complain . . . do not themselves directly involve a "rate" . . ." *Hill v. Kansas Gas Serv. Co.*, 323 F.3d 858, 864 (10th Cir. 2003).

Plaintiffs only half-heartedly contest that this case does not concern an order affecting rates likely because there is little question that this requirement has been satisfied here. Indeed, Plaintiffs are complaining that the inclusion of costs for the defunct reactors at SONGS in their utility rates was unconstitutional. The CPUC conditionally allowed SCE to include these costs in utility bills subject to SCE formally applying for the costs to be included permanently. When the reactors

were permanently shut down prior to SCE filing its formal application, CPUC opened the investigation into "whether to remove all costs related to SONGS from the rates of [SCE] and [SDG&E] going forward and whether to refund SONGS-related costs already collected in rates back to January 1, 2012." [Doc. No. 1 at ¶ 80.] It is the inclusion of these exact costs (post January 2012 SONGS-related costs) in utility bills that the complaint alleges was/is an unconstitutional taking. [*Id.* at ¶¶ 3, 88, 89.] In other words, the allegedly unconstitutional orders in the complaint are the orders that have arisen (or will arise)[3] out of the CPUC investigation concerning whether SONGS costs should have been included in utility rates from January 2012 onward.

The next step in the Johnson Act analysis is to determine whether the four conditions listed in the statute exist. All four of these conditions "must be met for the Johnson Act to deprive federal courts of jurisdiction." *Brooks*, 951 F.2d at 1054. "The burden of showing that the conditions have been met is on the party invoking the Johnson Act." *US West v. Nelson*, 146 F.3d at 722. Thus, Defendants

[3] Defendants make the alternative argument that the complaint is not ripe in part because there has yet to be a final order from CPUC on the post-January 2012 SONGS costs due to a still pending application for rehearing of CPUC's approval of the settlement that Henricks and CDSO filed. Although the Court need not address this specific argument in light of the application of the Johnson Act, it is relevant that in response to the argument, Plaintiffs do not contest that CPUC's approval of the settlement is what they are disputing here, and instead simply argue that the approval order (which was issued a week after the complaint was filed) is actually a final decision. [Doc. No. 17 at 16-17.]

have the burden of establishing that all four Johnson Act conditions are present here.

B. Constitutional Claim

The first requirement for application of the Johnson Act is that jurisdiction is based solely on solely on diversity or a constitutional violation. 28 U.S.C. § 1342(1). There is no dispute that jurisdiction here is premised solely on Plaintiff's claim that inclusion of SONGS costs in utility bills violates the Constitution. Plaintiffs do not argue otherwise in their opposition. Accordingly, this element is satisfied.

C. No Interstate Commerce

The Johnson Act divests the Court of jurisdiction only if the order does not affect interstate commerce. 28 U.S.C. § 1342(2). There can be no dispute that the orders in question here involve only the utility rates of California customers, and in any event, such orders usually do not affect interstate commerce. *See US West*, 146 F.3d at 724. Plaintiffs again do not argue otherwise. Accordingly, this element is satisfied as well.

D. Reasonable Notice and Hearing

The third element for application of the Johnson Act is that the order affecting rates be made after a reasonable notice and hearing. 28 U.S.C. § 1342(3). However, "the Johnson Act requires no formal notice or hearing and imposes no

standard of its own. It requires only that the rate-making body satisfy any notice or hearing requirements mandated by state law. 'The Johnson Act does not engraft its own undefined standards of notice and hearing upon the rate making bodies of the several states. . . .'" *ACTS Retirement-Life Cmtys*, 2012 WL 7277033 at *6 (quoting *Tennyson*, 506 F.2d at 1141).

Here, the only notice or hearing requirement cited by Plaintiffs is a CPUC Rule requiring a conference with seven days notice prior to signing a settlement. *See* CPUC Rule of Practice and Procedure 12.1. Although their two opposition briefs are not entirely consistent, Plaintiffs appear to argue that this rule was not followed, and that the notice and hearing requirements of the Johnson Act were not satisfied, for two reasons: (1) because there was never a hearing concerning whether inclusion of costs for the defective steam generators was reasonable [Doc. No. 17 at 14-15]; and (2) because Plaintiffs were not notified of the negotiations that led to the proposed settlement. [Doc. No. 16 at 16-18].

Plaintiff Henricks and the CDSO made similar arguments concerning due process and notice to CPUC, as reflected in the order approving the settlement agreement. [Doc. No. 11-3 at 65-89.] CPUC rejected these arguments, holding that "the processes by which the Settling Parties developed the Agreement, submitted it to the Commission, and the Commission considered it, are consistent with Article 12 of our Rules, as well as principles of due process." [Doc. No. 11-3

at 65.] The CPUC also stated that it "is unpersuaded that no conforming settlement conference was held and concludes that there is no basis to reject [the motion to adopt the settlement] on that ground." [Doc. 11-3 at 68.] Thus, CPUC concluded that the settlement "is consistent with the law and precedent, and . . . does not contravene any statute or Commission decision or rule." [*Id.* at 89.] These CPUC findings "preclude[] relitigation of the issue of compliance with the requirements of notice and hearing under [California] law." *Brooks*, 951 F.2d at 1054 (9th Cir. 1991) (holding that the Arizona Corporation Commission's finding that an electricity "service availability charge" was "lawfully approved and authorized by the Commission," is preclusive on the issue of compliance with the notice and hearing requirement of the Johnson Act). Accordingly, because Plaintiffs are precluded from contesting whether Defendants complied with state mandated notice and hearing procedures when approving the settlement, the third condition for application of the Johnson Act is satisfied. *Id.*

E. Plain, Speedy and Efficient State Remedy

The fourth condition for application of the Johnson Act is that a "plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1342(4). "In order to qualify as 'plain, speedy, and efficient,' the state remedy need only meet certain minimum procedural requirements." *Brooks*, 951 F.2d at 1055 (citing *Rosewell v. LaSalle Nat'l Bank*, 450 U.S. 503, 512-14 (1981)).

"Succinctly put, the state remedy is 'plain' as long as the remedy is not uncertain or unclear from the outset; 'speedy' if it does not entail a significantly greater delay than a corresponding federal procedure; and 'efficient' if the pursuit of it does not generate ineffectual activity or unnecessary expenditures of time or energy." *US West v. Nelson*, 146 F.3d at 724-25. The Johnson Act's "plain object is to prevent federal courts from intervening in the state rate-making process even though the matter might be repugnant to the Federal Constitution, unless the remedy in state courts is inadequate." *Tennyson*, 506 F.2d at 1141.

Section 1756(a) of the California Public Utilities Code expressly provides for judicial review of CPUC decisions:

> Within 30 days after the commission issues its decision denying the application for a rehearing, or, if the application was granted, then within 30 days after the commission issues its decision on rehearing, or at least 120 days after the application is granted if no decision on rehearing has been issued, any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. If the writ issues, it shall be made returnable at a time and place specified by court order and shall direct the commission to certify its record in the case to the court within the time specified.

The Ninth Circuit has held that statutes setting forth similar schemes for challenging ratemaking orders in Washington and Arizona satisfy the Johnson Act. *See US West v. Nelson*, 146 F.3d at 725-26; *Brooks*, 951 F.2d at 1055-56. Nevertheless, Plaintiff ignores this binding precedent and instead cites to

Disenhouse v. Peevey, 226 Cal. App. 4th 1096 (Cal. Ct. App. 2014), as evidence that no plain, speedy and efficient remedy exists. *Disenhouse* is entirely irrelevant. In *Disenhouse*, the California *Superior* Court determined that it lacked subject matter jurisdiction to enjoin a CPUC meeting, and the Court of Appeal declined a writ of mandate. Here, Plaintiffs have not even tried to avail themselves of the state courts for review of their claim, and thus cannot know that state courts do not offer a plain, speedy and efficient remedy.[4] In fact, a cursory search yields numerous California Court of Appeal opinions concerning writs seeking review of CPUC orders. *See, e.g., Utility Reform Network v. CPUC*, 223 Cal. App. 4th 945 (Cal. Ct. App. 2014); *San Pablo Bay Pipeline Co. LLC v. CPUC*, 221 Cal. App. 4th 1436 (Cal. Ct. App. 2013). Indeed, the California Court of Appeal stated that "a court ordinarily has no discretion to deny a timely-filed petition for writ of review if it appears that the petition may be meritorious." *S. California Edison Co. v. CPUC*, 140 Cal. App. 4th 1085, 1096 (Cal. Ct. App. 2006); *see also Commc'ns Telesystems Int'l v. CPUC*, 196 F.3d 1011, 1019 (9th Cir. 1999) ("[T]he California Supreme Court has no discretion to refuse to consider petitions for review of

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[4] *See generally Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 15 (1987) ("[W]hen a litigant has not attempted to present his federal claims in related state-court proceedings, a federal court should assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.")

CPUC decisions."). Accordingly, the fourth condition for application of the Johnson Act is satisfied.[5]

V. Leave to Amend

Plaintiffs request leave to amend the complaint. Rule 15(a)(2) of the Federal Rules of Civil Procedure states that leave to amend should be freely given "when justice so requires." Thus, a "district court should grant leave to amend . . . unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (*en banc*) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995)). Leave to amend should be granted with "extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). However, "[d]ismissal without leave to amend is proper if it is clear that the complaint could not be saved by amendment." *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1051 (9th Cir. 2008); *California ex rel. California Dept. of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004) ("[D]enial of leave to amend is appropriate if the amendment would be futile.") (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

Here, the Court finds that amendment would be futile. In support of their request for leave to amend, Plaintiffs argue that they could allege additional facts

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[5] Having reached this conclusion, the Court declines to address Defendants' other arguments for dismissal.

to support their claims of collusion among Defendants and the CPUC commissioners. These allegations, however, go to the merits of Plaintiffs' claim about the constitutionality of the settlement and inclusion of SONGS costs in utility rates, and do not save the complaint from the Johnson Act. There is nothing Plaintiffs could allege that would create a triable issue of fact as to whether this action affects a rate order, whether reasonable notice and a hearing was provided prior to the order, or whether the California courts could provide a plain, speedy, and efficient remedy. Accordingly, leave to amend is denied. *See, e.g., US West v. Nelson*, 146 F.3d at 726 (affirming denial of leave to amend complaint that was dismissed pursuant to Johnson Act).

VI. Conclusion

For the foregoing reasons, the Court finds that the Johnson Act divests this Court of subject matter jurisdiction over Plaintiffs' claim. Accordingly, it is hereby **ORDERED** that Defendants' motions to dismiss [Doc. Nos. 11, 12] are **GRANTED**, and the complaint is **DISMISSED WITH PREJUDICE** to re-filing in federal court for lack of subject matter jurisdiction. If Plaintiffs wish to proceed with their claims in a judicial forum they are free to do so using the procedures established under California state law for judicial review by the California state courts. *See generally US West v. Tristani*, 182 F.3d 1202, 1211 (10th Cir. 1999) (affirming dismissal with prejudice, noting that the plaintiff was "free to pursue its

claims in state court, as the Johnson Act intended" and that "intervention of a federal court is not necessary for the protection of federal rights.").

It is **SO ORDERED**.