S.Ct. No. _____

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS,
a Non-Profit California Corporation,

Petitioner,

vs.

CALIFORNIA PUBLIC UTILITIES COMMISSION, a State Agency, and
LORETTA LYNCH, CARL W. WOOD, GEOFFREY F. BROWN,
and MICHAEL PEEVEY, in Their Official Capacities as Commissioners
of the Public Utilities Commission, and HENRY DUQUE,
as a Sitting Commissioner of the Public Utilities Commission,

Respondents.

PETITION FOR WRIT OF MANDAMUS;
MEMORANDUM OF POINTS AND AUTHORITIES

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Petitioner the Foundation for Taxpayer and Consumer Rights (FTCR) petitions this Court for a writ of mandamus directed to the Public Utilities Commission of the State of California (PUC). In support, Petitioner allege as follows:

INTRODUCTION

1. In the wake of the disastrous 1996 legislation deregulating the electric-utility industry in California, the California Public Utilities Commission (PUC) has minted a new, wholly illegal form of regulation, outside the public forum, unbounded by state law, transacted in secret, attended by none of the incidents of reasoned decisionmaking that the Legislature and this Court have, over decades, imposed. Either finding itself or inserting itself in federal forums, the PUC makes multi-billion-dollar rate decisions in secret meetings purportedly called to "confer with" its litigation counsel — decisions which violate state law in substance and procedure — and then "consents" to the entry of judgment against it sanctifying those transgressions. The result is a practice that undermines democratic governance, popular sovereignty, and constitutional and regulatory law in California. Unless it is restrained from doing so, the PUC will continue to conspire with regulatees to overrule state laws it disdains.

2. In 1996 the state enacted the electric-utility-deregulation legislation commonly known as "AB 1890" (Stats. 1996, ch. 854 (codified in relevant part at Pub. Util. Code, §§ 330-398.5)), in which the state struck a regulatory bargain with its three electric utilities: Rates would be frozen at then-current levels, well above prevailing costs at the time and even further above projected future costs that were expected to fall well below their 1996 level. If those

expectations were realized, the utilities would not only recover their cost of service but would be able to recover their uneconomic investments — called their "stranded costs." Any stranded costs not recovered by March 31, 2002, were forever lost — the utilities were explicitly "at risk for those costs not recovered during that time period." (Pub. Util. Code, § 368, subd. (a).) In exchange, the utilities agreed to protect their ratepayers from unanticipated cost-increases by maintaining the rate-freeze even if costs rose.

3. In the early years of AB 1890, the utilities did famously well, shoveling billions of dollars in profit to their unregulated parent corporations. Eventually, however, costs did rise, and two utilities, Pacific Gas and Electric Co. (PG&E) and Southern California Edison Co. (SCE), were brought to the brink of insolvency because they no longer had on hand funds sufficient to ride out the cost-spike. PG&E filed for protection under chapter 11 of the Bankruptcy Code on April 6, 2001, and, following the September 14, 2001, adjournment of the Legislature without enacting a bail-out for SCE, that company was poised to filed for bankruptcy as well. Meanwhile, in its bankruptcy case, PG&E had proposed a reorganization plan that would remove the utility's generating assets from PUC jurisdiction and place them under the Federal Energy Regulatory Commission (FERC).

4. The prospect of losing regulatory jurisdiction frightened the PUC. On October 2, 2001, the commission met in secret session, without notice to the public, and voted to enter a stipulation with SCE for entry by a United States district court of an order authorizing SCE to charge rates in violation of AB 1890. The federal court — which had conducted no trial and had reached no ruling on the merits of the underlying lawsuit — entered the order three days later. In consenting to the entry of this order, the PUC did not merely violate the statutory rate-freeze and the California Constitution's prohibition against such action (Cal. Const., art. III, § 3.5) but also — by enacting rate-orders with

no public meeting, no hearing, no notice, no evidence, no findings, and no opportunity for review by this Court — violated the laws governing decisionmaking by the PUC. This petition does not seek this Court's order with respect to that judgment, which is currently on appeal before the U.S. Circuit Court of Appeals for the Ninth Circuit.

5. Meanwhile, the commission is taking action to prevent PG&E from removing any of its assets from PUC jurisdiction. In a series of actions taken, again, with no public hearing, no opportunity for comment, no evidence, and no reasoned decision, the PUC has sought and obtained from the Bankruptcy Court permission to sponsor a PUC reorganization plan for PG&E — a plan that explicitly violates AB 1890. Whether and under what conditions the Bankruptcy Court has the authority, on the motion of a party or its own motion, to preempt a state law regulating utility rates is a disputed question not material to this petition. This petition merely seeks a writ declaring that the PUC may not to propose or consent to such a plan, may not expend state funds in an ultra vires subversion of state law, and may not take or authorize any action with respect to the PG&E bankruptcy without formal action consistent with the laws governing decisionmaking by the PUC.

JURISDICTION

6. FTCR brings this petition pursuant to section 1759 of the Public Utilities Code, which provides that "[t]he writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases prescribed in Section 1085 of the Code of Civil Procedure."

THE PARTIES

7. Petitioner Foundation for Taxpayer and Consumer Rights is a nationally-recognized, California-based, non-profit education and advocacy group organized under section 501(c)(3) of the Internal Revenue Code. FTCR

employs teams of public-interest lawyers, policy experts, strategists, public educators, and grassroots activists to advance and protect the interests of consumers and taxpayers. Founded in 1985, FTCR's day-in, day-out consumer protection and advocacy work embraces a wide variety of issues affecting the daily lives and pocketbooks of millions of Americans. FTCR has, since its inception, been particularly involved in representing the interests of consumers in regulatory matters, especially emphasizing the interests of utility ratepayers in California. FTCR is an SCE ratepayer, and its members include ratepayers of SCE, PG&E, and San Diego Gas & Electric. FTCR and its members all pay the surcharges in their utility bills that substantially fund the PUC's annual budget, as mandated in Public Utilities Code sections 401, 404, and 431.

8. Respondent PUC is an agency of the State of California, created by article XII of the California Constitution. Its jurisdiction includes regulation of private corporations and persons that own, operate, control, or manage lines, plants, or systems for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers.

9. Respondent Loretta Lynch is a duly appointed commissioner of the PUC and is its duly appointed President. Respondents Carl W. Wood, Geoffrey F. Brown, and Michael Peevey are duly appointed Commissioners of the PUC. Respondent Henry Duque claims to be a Commissioner of the PUC, although FTCR contends that he has been disqualified from holding that office due to a violation of article XII, section 7, of the California Constitution and of section 303, subdivision (a), of the Public Utilities Code, which prohibit PUC commissioners from owning stock in companies they regulate. In *People of the State of California ex rel. Foundation for Taxpayer and Consumer Rights v. Duque*, San Francisco Superior Court Case Number 318146, the court on

April 2, 2002, entered a tentative decision that, due to his ownership of stock in Nextel for a period of 15 months while serving as a commissioner, Duque has been excluded from office and prohibited from performing any further duties as a PUC commissioner.

STATEMENT OF FACTS

THE PUC'S FIRST STIPULATED EVASION OF STATE LAW

10. Under AB 1890, retail rates were frozen at levels that initially were higher than the wholesale cost of electricity. Although nothing in the Constitution required the state to protect the utilities' past uneconomic and imprudent investments (see *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 109 S.Ct. 609, 102 L.Ed.2d 646; *Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation* (D.95-12-063), 64 Cal.P.U.C.2d 1, 61-62), the utilities extracted from the Legislature generous treatment of their "stranded costs" — the uneconomic investments they stood to sell at a loss and other costs they might not be able to recover in a competitive market — in exchange for the "rate-freeze" guarantee that they would protect consumers from price increases during the transition to a competitive market. (See Pub. Util. Code, §§ 367 (stranded costs), 368 (rate-freeze).) Specifically, Public Utilities Code section 368 directed the PUC to set rates "at levels equal to the . . . rate schedules as of June 10, 1996," to reduce those levels for residential and small-commercial customers by 10 percent, and to maintain those rates until the utility has fully recovered its stranded costs or until March 31, 2002, whichever comes first. Section 368 explicitly says the utility "shall be at risk for those costs not recovered during that time period." The PUC itself has repeatedly interpreted section 368 to mean that a utility may not recover costs incurred during the rate-freeze after the rate-freeze ends. *See* D.97-10-057, D.97-11-074, D.98-03-059, D.99-05-051, D.99-06-057, D.99-10-057, D.01-01-018, D.01-03-082.

The PUC's decisions have been upheld by both the California Court of Appeal, First Dist. No. A090780, sum. den. Sept. 26, 2000, and this Court, No. S091687, sum. den. Nov. 21, 2000.

11. This regulatory bargain — the freezing of rates at levels above expected costs to give the utilities the opportunity to recover their uneconomic investments, balanced against the utilities' assumption of the risk of higher-than-expected wholesale costs — served the utilities' interests well in the first years of deregulation. The AB 1890 rates went into effect in 1998, and in the early years those rates allowed the utilities to collect far more than their cost of providing service. However, beginning in approximately June 2000, the rate freeze began to work against their interests, as the wholesale prices that California utilities paid to procure electricity climbed dramatically. SCE and PG&E, the two PUC-jurisdictional utilities that had not yet fully recovered their uneconomic investments, found themselves suddenly paying more for wholesale power than they could recover in frozen retail rates. Regulatory filings by the two utilities conclusively establish that the utilities realized billions of dollars in gains in the early years of deregulation but upstreamed those gains to their unregulated parent companies. As a result of this upstreaming, PG&E and SCE each faced a liquidity crisis when wholesale prices rose. Although PG&E and SCE had each collected enough in the early years of deregulation to cover even the high 2000 charges, those collections were paid out as huge dividends to their parent companies, leaving the utilities without enough capital to pay their ongoing costs.

12. PG&E and SCE had both enthusiastically supported AB 1890 and its rate freeze — which had actually first been proposed by PG&E (see Pub. Util. Code, § 368, subd. (g)), but when wholesale rates rose above the rate-freeze level, the two companies sued the PUC in federal court, claiming that the regulatory bargain they had struck was preempted by operation of the "filed-rate

doctrine," which, the utilities argued, required states to pass through in retail rates all costs incurred at wholesale under tariffs filed with the FERC.[1] The PUC initially resisted these federal-court cases, arguing vigorously that there was no preemption.

13. By the beginning of 2001, with their cash reserves depleted, carrying huge debts for wholesale power purchases, and their parent companies unwilling to return any of the proceeds of the earlier, profitable years of operation under AB 1890, PG&E and SCE ceased purchasing further wholesale power to serve their respective loads. In January 2001, the California Legislature adopted urgency legislation authorizing the state Department of Water Resources (DWR) to purchase wholesale power to serve SCE's and PG&E's customers. (Stats. 2001, 1st Ex. Sess. 2001-2002, ch. 4.)

14. On January 4, 2001, the PUC issued D.01-01-018, granting both PG&E and SCE an emergency one-cent-per-kilowatt-hour rate increase, subject to refund.[2] According to the PUC, the increase was "a temporary surcharge to improve the ability of the applicants to recover the costs of procuring future energy in wholesale markets that they cannot produce themselves to serve their loads." (*Id.* at p. 2.) On March 27, 2001, the PUC confirmed the January 4 rate increase and ordered retail rates raised by an additional three cents per kilowatt-hour. (D.01-03-082[3] at p. 16.) These emergency rate increases were solely for "future electricity procurement costs" (D.01-01-018 at p. 2) and for "future power purchases" (D.01-03-082, ordering ¶ 2), not to reimburse the utilities for

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[1]Southern California Edison v. Lynch et al., U.S. Dist. Ct., C.D. Cal., No. CV-00-12056-RSWL; Pacific Gas & Electric Co. v. Lynch et al., N.D. Cal. Case No. C01-03023.

[2]A true and correct copy of D.01-01-018 is Exhibit 1 to this Petition.

[3]A true and correct copy of D.01-03-082 is Exhibit 2 to this Petition.

past procurement costs. In 2001, power procurement costs declined, so each month hundreds of millions of dollars in surcharge revenue — attributable to the four-cent increase approved by the PUC but not necessary for the utilities to meet their ongoing power procurement obligations — has been accruing in the utilities' coffers. Under AB 1890, the DWR power-purchase legislation (Stats. 2001, 1st Ex. Sess. 2001-2002, ch. 4), and a long line of PUC decisions, the excess has been held by the utilities and must be refunded to ratepayers.

15. While relieved of the duty to continue to purchase wholesale power, SCE and PG&E still carried large debts for past power procurement. Even before the dramatic increase in wholesale costs, the utilities had sought from the PUC the authority to carry forward, beyond the end of the deregulation statute's transition period (which, AB 1890 mandated, ends no later than March 31, 2002) any costs they had incurred during the transition period and not recovered, so that they could apply subsequently-collected rates to pay off those debts. The PUC denied those requests, holding that AB 1890, as part of its regulatory bargain, explicitly put the utilities at risk of not recovering those costs during the transition period and that allowing them to apply rates collected after March 31, 2002 would therefore violate the law. (D.99-10-057[4], followed in D.00-03-058[5].) PG&E sought review from the First District Court of Appeal, which was denied (No. A090780 (Sept. 26, 2000)), and then from this Court, which was also denied (No. S091687 (Nov. 21, 2000)). As wholesale prices rose sharply, SCE and PG&E asked the PUC to reconsider its holding. The commission rejected the utilities' pleas on rehearing as well. (D.02-01-001.)

16. Rebuffed by the PUC, the utilities turned to the Governor and Legislature to provide an escape from their regulatory bargain.

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[4]A true and correct copy of D.99-10-057 is Exhibit 3 to this Petition.

[5]A true and correct copy of D.00-03-058 is Exhibit 4 to this Petition.

17. However, on April 6, 2001, PG&E, announcing that it did not believe state government was willing to bail it out, sought protection from its creditors under chapter 11 of the Bankruptcy Code. (Pacific Gas & Electric Co., N.D. Cal. Case No. 01-30923 DM.) PG&E continues to pursue its preemption case against the PUC.

18. SCE continued to press its case with the Legislature. Several bills were introduced, and one, Assembly Bill No. 82 of the second extraordinary session, cleared the Assembly. However, in the face of strong public opposition to the measure, it died in the Senate on September 14, 2001, the last day of the 2001 session.

19. Shortly after adjournment of the Legislature, SCE and the PUC entered into secret negotiations for a bail-out. On October 2, 2001, they announced that they had secretly negotiated a deal to allow SCE to carry its power-procurement debt beyond the AB 1890 transition period and to collect billions from ratepayers to pay-off its past procurement costs. In order to overcome the obvious legal obstacles, the PUC agreed to implement the settlement in a "stipulated judgment" in SCE's still-pending district-court case against the PUC challenging the rate-freeze.[6] The secret agreement purported to allow SCE to recover "procurement related liabilities" of $6.355 billion incurred between the summer of 2000 and December 31, 2005. The agreement includes commitments by the PUC (1) to extinguish all refund rights to the surcharge revenues that have been accruing in SCE's accounts, (2) to maintain the current excessive rates for at least 28 months, and (3) to allow SCE to use the excess to pay its past procurement debt. In fact, the stipulated judgment is more generous to SCE than the legislative proposals passed by the Assembly but

[6]A true and correct copy of the Stipulated Judgment, and its attached Settlement Agreement, is Exhibit 5 to this Petition.

rejected by the Senate.

20. As part of the stipulated judgment, the "Commission (as distinct from the individual Defendants) join[ed] in and agree[d] to be bound by all of the terms of this stipulated judgment. . . [,] waiv[ing] any defense it may have to the Court's jurisdiction based upon the Eleventh Amendment, or other defense . . . ."

21. There can be no doubt that the settlement results in a violation of the statutory rate-freeze. The SCE-PUC agreement violates Public Utilities Code section 368 in at least two respects. First, the settlement expressly maintains the rate-freeze beyond March 31, 2002, and expressly does so for the purpose of allowing SCE to recover its past procurement costs — the costs the statute says and the PUC has, until this agreement, insisted could trigger the risk of less-than-full recovery of uneconomic costs. And second, the settlement violates section 368's rate-freeze guarantee that protects consumers from price increases during the transition to a competitive market.

22. That the PUC knowingly and intentionally employed the stratagem of a federal order to sanction its violation of state law was conceded by PUC President Loretta Lynch. One week after adoption of the settlement, in testimony on behalf of the PUC before the Assembly Energy Cost and Availability Committee, Respondent Lynch was asked by a legislator why the PUC could not have bailed SCE out months earlier. She explained that *the settlement violated AB 1890* and could not have been ordered by the commission without using the federal court to "trump" state law that it would otherwise have to obey:[7]

> "MS. LYNCH: Well, actually the Commission is prevented under state law under [AB] 1890 from allowing that recovery, and what

[7]A true and correct transcript of the pertinent portions of the October 9, 2001, proceedings before the Assembly Cost and Availability Committee is Exhibit 6 to this Petition.

> we did with the Edison settlement was essentially agree to a settlement that federal law trumped state law, but the Commission on its own could not trump state law. The Commission must follow state law." (Exh. 6, p. 45.)

23. Respondent Lynch's comments confirmed the obvious violation of AB 1890, which was also clear from regulatory decisions the PUC issued through 2001. In January 2002 the PUC, attempting to defend its stipulated judgment in the Ninth Circuit Court of Appeals, reversed its interpretation of the law and adopted a new, litigation position, claiming that the rate-freeze had been repealed by implication — an interpretation that the PUC itself had previously rejected, in part on the ground that repeals-by-implication are disfavored.[8] This new construction is plainly contrary to law and is significant only for its demonstration of the extent to which the PUC has abandoned any pretense of principle and has simply become a litigant seeking to defend its position in court by any means.

24. Even though its settlement with SCE locked in high rates, extinguished ratepayers' refund rights, and committed the PUC to various concessions in future SCE rates, the PUC adopted the settlement without holding a single public hearing, without taking any evidence, without making any findings, and without giving the public any opportunity to be heard. Rather, the PUC maintains (see Exh. 7, p. 22) that it was authorized to adopt the decision, including the sweeping rate-order, in a closed session under the "confer with counsel" exception to the requirement of open-meetings. (Gov. Code, § 11126, subd. (e).) And despite the fact that the rate order adopted on October 2, 2001, causes rates to be substantially higher than they would be in the absence of the

[8]A true and correct copy of the Brief of Appellees Commissioners of the California Public Utilities Commission is Exhibit 7 to this Petition. The PUC's litigation position with respect to this new construction of AB 1890 appears at pages 14-21 of the exhibit.

rate order, the PUC inexplicably maintains (see Exh. 7, p. 23) that it does not constitute a change in rates and does not require findings pursuant to Public Utilities Code section 454.

25. To place its action beyond the reach of this Court and any other state court, the PUC and SCE agreed to request an ex parte hearing before the district court, at which time SCE demanded immediate adoption of the order, claiming adverse financial consequences from any delay. Acceding to that claim, the district court gave non-settling parties only one day to file an opposition and then entered the stipulated judgment three days after it was announced, leaving no time to seek state-court protection.

THE DANGER OF FUTURE EVASIONS OF STATE LAW

26. The PUC maintains that it may effect any order it wishes, irrespective of the strictures of state law, by agreeing to be "ordered" by a federal court to do what state law prohibits or not to do what state law compels. Until prohibited from doing so, the PUC will make such agreements with any utility or other party with which the PUC is engaged in federal litigation or, if no case is pending, will simply arrange with that party for one of them to file such a case against the other. Under the PUC's reading of its powers, the opportunities to "trump" state laws not to its liking are unlimited.

27. The PUC has now announced its intention to repeat its consent-to-preemption ploy with respect to the rates of PG&E. On February 13, 2002, the PUC tendered to the Bankruptcy Court a "term sheet" outlining the key terms of a PUC-sponsored reorganization plan.[9] That filing invites the Bankruptcy Court, at the PUC's urging, to order the PUC to maintain PG&E's current rates

[9]A true and correct copy of the PUC's submission is Exhibit 8 to this Petition.

beyond their statutory expiration and to allow PG&E to employ the above-rate-freeze-level rates to pay off past power-procurement bills, in violation of Public Utilities Code section 368. Petitioner is informed and believes that on April 15, 2002, the PUC intends to release its detailed reorganization plan, implementing its scheme to abrogate the AB 1890 rate-freeze.

28. Under the PUC's plan, the commission would consent to orders of the Bankruptcy Court, which has narrowly read its power to preempt state rate-regulation,[10] abrogating AB 1890 in the manner proposed by the PUC. Because the plan would violate state law, the PUC's consent would be ultra vires. However, once its consent is given and the Bankruptcy Court acts upon it, it will be too late for this Court to restrain the PUC from purporting to consent to the violation of state law.

29. Petitioner is informed and believes that the PUC has retained outside counsel and experts to prepare its reorganization plan and that the PUC is using funds collected in taxes from Petitioner to pay them.

30. The PUC submission to the Bankruptcy Court was not adopted or approved during a public meeting and was not supported by any findings or evidentiary record. FTCR is informed and believes that the PUC will continue to take action in and with respect to the bankruptcy case, including formal consent to its terms overriding AB 1890, without conducting any public proceedings, without establishing any evidentiary record, and without adopting findings based on that record, all in violation of the law.

31. The PUC's abandonment of AB 1890 — and, with it, of the state's consumers — was expressly motivated by a desire to protect its bureaucratic jurisdiction. In public statements, including its filings in support of the

[10]A true and correct copy of the Bankruptcy Court's February 7, 2002, order rejecting PG&E's plan on the ground that it exceeds the court's preemption powers, is Exhibit 9 to this Petition.

stipulated judgment in SCE's case, the PUC made it clear that it viewed with alarm PG&E's proposed bankruptcy reorganization plan because it would reduce the PUC's jurisdiction over the company's operations. In its briefing in the SCE case before the Ninth Circuit, the PUC was frank that it had entered a settlement with SCE to avoid the kind of bankruptcy reorganization plan PG&E was proposing, which threatened the PUC because it would transfer jurisdiction over PG&E power plants from the PUC to the FERC. (See Exh. 7, pp. 3, 13, 27.)

32. The PUC will, unless restrained, continue to take regulatory actions in closed session, claiming, under the authority to "confer with" and to "receive advice from" its counsel, the right to adopt orders and to take actions with vast impact on rates, with no public hearing, no evidence, no findings, and no public comment.

33. FTCR has no plain, speedy, and adequate remedy available to it to secure the relief sought here.

34. There are no administrative remedies to exhaust and, if there were, exhaustion would be futile.

FIRST CAUSE OF ACTION

TO RESTRAIN ULTRA VIRES ACTS IN VIOLATION OF CALIFORNIA CONSTITUTION, ARTICLE III, SECTION 3.5

35. FTCR hereby realleges and incorporates the allegations of paragraphs 1 through 34, above.

36. Article III, section 3.5, of the California Constitution provides in pertinent part:

> "An administrative agency, including an administrative agency created by the Constitution . . . has no power . . . (c) to declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a

determination that the enforcement of such statute is prohibited by federal law or federal regulations."

37. The PUC is an administrative agency created by the Constitution.

38. The PUC has indicated its intention to propose and to consent to a reorganization plan in the PG&E bankruptcy that would have the effect of preventing the PUC from enforcing state statutes that have not been determined by an appellate court to be preempted by federal law. In voluntarily consenting to be so restrained, the PUC is refusing to enforce the statute that it invites the Bankruptcy Court to prevent it from enforcing.

39. In so doing, the PUC is threatening to act ultra vires, in excess of its powers, and in violation of article III, section 3.5, of the California Constitution.

40. Unless restrained by this Court, the PUC will sponsor and consent to a reorganization plan in the PG&E bankruptcy that will have the effect of preventing the PUC from enforcing state statutes, under circumstances where no appellate court will have made a determination that the state statutes at issue are unconstitutional or otherwise cannot be enforced.

41. The PUC will, as it has in the past, take such action in a manner that denies any aggrieved party the opportunity to seek judicial review of the action in state court once the action has been taken. Therefore prospective judicial action is necessary to prevent such ultra vires actions in excess of the PUC's jurisdiction and in violation of state law.

SECOND CAUSE OF ACTION

TO RESTRAIN UNLAWFUL EXPENDITURE OF STATE FUNDS

42. FTCR hereby realleges and incorporates the allegations of paragraphs 1 through 41, above.

43. In the absence of this Court's writ, Respondents will continue to waste taxpayer funds in their effort to propose and to consent to a reorganization

plan in the PG&E bankruptcy that violates state law, including but not limited to the hiring of outside counsel and consultants to prepare and seek adoption of that plan, in violation of article III, section 3.5 of the California Constitution.

44. In the absence of this Court's writ, Petitioner will suffer irreparable harm for which it has no plain, speedy, or adequate remedy available in the ordinary course of law.

THIRD CAUSE OF ACTION

TO RESTRAIN VIOLATIONS OF THE BAGLEY-KEENE OPEN MEETING ACT

45. FTCR hereby realleges and incorporates the allegations of paragraphs 1 through 44, above.

46. The Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.) establishes the policy of the State of California to be as follows:

> "It is the public policy of this state that public agencies exist to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed.
>
> "In enacting this article the Legislature finds and declares that it is the intent of the law that actions of state agencies be taken openly and that their deliberation be conducted openly." (Gov. Code, § 11120.)

47. Government Code section 11123, subdivision (a), provides:

> "All meetings of a state body shall be open and public and all persons shall be permitted to attend any meeting of a state body except as otherwise provided in this article."

48. Government Code section 11126 creates specified limited exceptions to the requirement of the Bagley-Keene Open Meeting Act that state agencies take action only in open meetings. Government Code section 11126, subdivision (d)(1), provides:

> "Notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open and public."

49. Notwithstanding the foregoing provisions of law, the PUC has in the past met in closed session to adopt decisions and orders that have the effect of:

i. Preventing the PUC from issuing future orders that would, but for the action taken in closed session, cause rates to be reduced.

ii. Extinguishing ratepayers' rights to refunds to which they would otherwise be entitled.

iii. Preventing the PUC from taking enforcement actions that would, in the ordinary course, cause rates to be reduced or refunded.

iv. Requiring the PUC to allow specified costs to be included in future rates.

50. In taking such action, the PUC claims that it has not "changed" rates. The PUC argues that when it abrogates statutory refunds, maintains rates at levels that are required to be reduced, and authorizes a utility to collect in rates amounts the utility is expressly prohibited by statute from collecting, the PUC has not "changed" the utility's rates. That claim is false and is based on an incorrect interpretation of the word "changed" in Government Code section 11126, subdivision (b)(1). The actions described above do cause the "rates of entities under the commission's jurisdiction [to be] changed" within the meaning of Government Code section 11126, subdivision (d)(1), and the PUC taking such action in closed session violates Government Code section 11126, subdivision (d)(1).

51. Respondents have repeatedly acted, and threaten to continue to so act, to authorize filings in the PG&E bankruptcy proceeding without taking any action in a public meeting in accordance with the requirements of the Bagley-Keene Open Meeting Act.

52. Subdivision (e)(1) of Government Code section 11126 provides:

> "Nothing in this article shall be construed to prevent a state body, based on the advice of its legal counsel, from holding a closed session to confer with, or receive advice from, its legal counsel regarding pending litigation when discussion in open session concerning those matters would prejudice the position of the state body in the litigation."

53. Purportedly on the basis of Government Code section 11126, subdivision (e)(1), the PUC has met in closed session not merely "to confer with, or receive advice from, its legal counsel regarding pending litigation," but to take regulatory action. That exceeds the PUC's authority under section 11126, subdivision (e)(1), which authorizes agencies only to receive information in closed session regarding pending litigation, not to take action, and certainly not to adopt regulatory orders.

54. In taking the actions alleged in paragraphs 49 through 53, the PUC has proceeded contrary to law and has acted in excess of its jurisdiction.

55. Unless restrained by this Court, the PUC will again take actions in closed session that have the effects alleged in paragraphs 49 through 53, above.

56. The PUC will, as it has in the past, take such action in a manner that denies any aggrieved party the opportunity to seek judicial review of the action in state court once the action has been taken. Therefore prospective judicial action is necessary to prevent such ultra vires actions contrary to law and in excess of the PUC's jurisdiction.

FOURTH CAUSE OF ACTION

TO RESTRAIN VIOLATIONS OF PUBLIC UTILITIES CODE SECTION 454

57. FTCR hereby realleges and incorporates the allegations of paragraphs 1 through 56, above.

58. Public Utilities Code section 454, subdivision (a), provides in

pertinent part:

> "Except as provided in Section 455, no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified."

59. Notwithstanding the foregoing provisions of law, the PUC has in the past taken actions that have the following effects without taking evidence and without making findings that the resulting rate is justified:

i. Preventing the PUC from issuing future orders that would, but for the action taken without evidence or findings, cause rates to be reduced.

ii. Extinguishing ratepayers' rights to refunds to which they would otherwise be entitled.

iii. Preventing the PUC from taking enforcement actions that would, in the ordinary course, cause rates to be reduced or refunded.

iv. Requiring the PUC to allow specified costs to be included in future rates.

The PUC has taken such action on claim that it does not "change any rate or so alter any classification, contract, practice, or rule as to result in any new rate." That claim is false. The actions described above do "change" the rates charged, do "alter . . . any rate or . . . classification, contract, practice, or rule as to result in any new rate" within the meaning of Public Utilities Code section 454, and taking such action without making findings, upon substantial record evidence, "that the new rate is justified" violates Public Utilities Code section 454.

60. In so doing, the PUC has proceeded contrary to law and has acted in excess of its jurisdiction.

61. Unless restrained by this Court, the PUC will again take actions that have the effects enumerated in paragraph 59, above, without making the necessary findings.

62. The PUC will, as it has in the past, take such action in a manner that denies any aggrieved party the opportunity to seek judicial review of the action in state court once the action has been taken. Therefore prospective judicial action is necessary to prevent such ultra vires actions contrary to law and in excess of the PUC's jurisdiction.

PRAYER FOR RELIEF

WHEREFORE FTCR prays that this Court issue its alternative and peremptory writs of mandamus as follows:

A. Declaring that the PUC lacks the authority to agree not to enforce any state law that has not been determined by an appellate court to be invalid, unconstitutional, or unenforceable, and declaring that the PUC acts ultra vires when it purports to do so.

B. Declaring that the PUC's expenditure of taxpayer funds to propose or consent to a PG&E bankruptcy reorganization plan that violates AB 1890 and article III, section 3.5, of the California Constitution is improper, wasteful, and illegal under Code of Civil Procedure section 526a and enjoining any further expenditures of taxpayer funds for this or similar purposes.

C. Prohibiting and restraining the PUC from taking any action in closed session that has any of the following effects:

i. Preventing the PUC from issuing future orders that would, but for the action taken in closed session, cause rates to be reduced.

ii. Extinguishing ratepayers' rights to refunds to which they would otherwise be entitled.

iii. Preventing the PUC from taking enforcement actions that would, in the ordinary course, cause rates to be reduced or refunded.

iv. Requiring the PUC to allow specified costs to be included in future rates.

D. Prohibiting and restraining the PUC from taking any action, beyond receiving information from counsel, in any closed session conducted pursuant to the provisions of Government Code section 11126, subdivision (e)(1).

E. Prohibiting and restraining the PUC from taking any action that has any of the following effects without taking evidence and making findings on that evidence that the resulting rate is reasonable:

i. Preventing the PUC from issuing future orders that would, but for the action taken without receiving evidence and without making findings, cause rates to be reduced.

ii. Extinguishing ratepayers' rights to refunds to which they would otherwise be entitled.

iii. Preventing the PUC from taking enforcement actions that would, in the ordinary course, cause rates to be reduced or refunded.

iv. Requiring the PUC to allow specified costs to be included in future rates.

F. Granting FTCR such other and further relief as the Court deems just and proper.

Dated: April 11, 2002

STRUMWASSER & WOOCHER LLP
Michael J. Strumwasser
Fredric D. Woocher
Johanna R. Shargel
Daniel J. Sharfstein

By _____
Michael J. Strumwasser

Attorneys for Petitioner Foundation for Taxpayer and Consumer Rights

VERIFICATION

I, Harvey Rosenfield, declare:

I am President and founder of the Foundation for Taxpayer and Consumer Rights. I am also an attorney at law admitted to practice before this Court. I am authorized to make this verification for the Foundation for Taxpayer and Consumer Rights.

I have read the foregoing Petition for Writ of Mandamus and know the contents thereof. Said contents are known to me to be true except those matters alleged on information and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 11th day of April, 2002, at Santa Monica, California.

_____

Harvey Rosenfield

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

California law is carefully constructed to limit the authority of administrative agencies. In 1978 the voters strengthened those limits by amending the California Constitution to add section 3.5 to article III:

> "An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> "(a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> "(b) To declare a statute unconstitutional;
>
> "(c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations."

Nevertheless, the California Public Utilities Commission (PUC) — "an administrative agency created by the Constitution" (see Cal. Const., art. XII) — claims that it may "trump" state laws by voluntarily agreeing to have a federal-court order entered against it to enjoin its enforcement of, or even compliance with, state laws that have not been determined by any appellate court to be unconstitutional or in disaccord with any federal laws.

The PUC's position obviously conflicts with the California Constitution, and such actions are plainly ultra vires and unconstitutional. However, the PUC believes it may so act with impunity because each such agreement to a judgment or order blocking a state law, once it is entered by the federal court, becomes unreviewable in state court. And, to ensure that result, the PUC has resorted to procedures calculated to minimize public notice and opportunity to seek review in state court before the action is implemented — procedures that themselves

violate state law by effecting vast economic consequences with no due process, no public participation, and no judicial review.

Thus, the PUC takes the position that it may decide to consent to a preemptive order in a closed meeting, with no public notice. The commission bases its position on a perverse expansion of the "confer-with-counsel" exception to the open-government requirements of the Bagley-Keene Open Meeting Act (Gov. Code, § 11126, subd. (e)). The PUC claims that it may not only confer with its attorneys in closed session but also may adopt orders that effect vast regulatory consequences, a position at odds with the letter and the spirit of the act. The commission takes the further position that the Bagley-Keene Act's prohibition against the PUC changing a rate in a closed session does not apply to orders that block rate-decreases that would otherwise take effect, that grant a utility rate concessions that will require higher rates, and that extinguish ratepayer refund rights. This position, too, violates both the letter and the spirit of the law.

These powers that the PUC arrogates to itself are not just unconstitutional but anti-constitutional. In exercising its claimed absolute administrative powers, the commission usurps the authority of the other two branches of state government and revokes the rights of voters to direct-democracy. The commission manipulates federal process to prevent this Court and the Courts of Appeal from reviewing the PUC's actions. And by procuring a federal order to its liking, the PUC not only effectively strikes down duly enacted state laws, it prevents the Legislature from enacting corrective laws. Furthermore, in so doing, the PUC consciously and deliberately thwarts the ability of the People to exercise their right of initiative to control governmental abuse.

Because the PUC carefully orchestrates this usurpation in a manner that prevents retrospective state-court review, the PUC's practice and policy must

be reviewed and restrained in advance, by this Court's writ.

I. The PUC Is Violating the California Constitution by Consenting to Judgments That Prevent It from Enforcing State Law.

A. No State Agency May Stipulate to a Judgment or Order That Has the Effect of Preventing the Agency from Enforcing a State Law.

In assenting to federal judgments against enforcement of AB 1890, the PUC was refusing to enforce both the substantive limits on the utilities' stranded-cost recovery and the procedures required of the PUC when making rate orders. By stipulating to a federal-court judgment in the Southern California Edison Co. (SCE) case, the PUC agreed not only to exempt SCE from AB 1890 but to be *enjoined from enforcing* AB 1890. That is an extreme example of an "administrative agency . . . refus[ing] to enforce a statute" (Cal. Const., art. III, § 3.5, subd. (c)).

The commission now proposes to neutralize AB 1890 for Pacific Gas and Electric Co. (PG&E). The PUC is proposing to the Bankruptcy Court presiding over PG&E's chapter 11 case a reorganization plan that explicitly violates AB 1890. Under the Bankruptcy Code, the PUC's "approval" of the utility's rates is required before the reorganization plan can be confirmed. (11 U.S.C. § 1129.) It is the PUC's intent, in sponsoring its reorganization plan for PG&E, to provide such approval to rates that the PUC could not otherwise approve because, as the PUC itself has repeatedly found, they would violate Public Utilities Code sections 368 and 369.

The PUC's arrogation to itself of the power to consent, on behalf of the State of California, to the invalidation of state laws is precisely the kind of rogue administrative action article III, section 3.5, was enacted to interdict. For

much of last year, the utilities implored the Legislature and the Governor to amend the Public Utilities Code to relieve them of the consequences of their legislative bargain. The Assembly responded favorably to SCE's entreaties (albeit less generously than the PUC ultimately did) by passing bail-out legislation (Assem. Bill No. 82 (2001-2002 2d Extraord. Sess.)), against which FTCR testified and marshaled an outpouring of public opposition. The bail-out bill failed to pass the State Senate. So when the Legislature adjourned, the PUC simply decided to override that result, to alter the law to conform its own, new vision of the public interest, and then to join with SCE to enlist the district court in the coup. And the commission now stands poised to rewrite the law for PG&E by consenting to the abrogation of AB 1890. The PUC is not merely presuming to overrule the Legislature by subverting the law the Legislature has enacted; the PUC is also defying the Legislature by enacting an Edison bail-out that the Legislature, just days earlier, considered and rejected. Had the voters even imagined in 1978 that California officials would attempt that kind of statutory subversion, they surely would have believed they were preventing such betrayal by enacting article III, section 3.5.

B. The Orders to Which the PUC Is Consenting Conflict with, and Block Enforcement of, AB 1890.

There is no question that the terms of the PUC's reorganization plan for PG&E, like its settlement with SCE, violates AB 1890. AB 1890 enacted Public Utilities Code section 368, directing the PUC to set rates "at levels equal to the . . . rate schedules as of June 10, 1996," to reduce those levels for residential and small-commercial customers by 10 percent, and to maintain those rates until the utility has fully recovered its stranded costs or until March 31, 2002, whichever comes first. Section 368 explicitly says the utility "shall be at risk for those costs not recovered during that time period." The

PUC itself has repeatedly interpreted section 368 to mean that a utility may not carry over costs incurred during the rate-freeze into the post-rate-freeze period. (See D.97-10-057, D.97-11-074, D.98-03-059, D.99-05-051, D.99-06-057, D.99-10-057, D.01-01-018, D.01-03-082.)

The commission's proposed PG&E reorganization plan, like the SCE-PUC agreement, violates section 368 in two respects. First, it expressly maintains the rate-freeze beyond March 31, 2002, and expressly does so for the purpose of allowing the utility to recover its past procurement costs — the costs the statute says the utility is at risk of not fully recovering. And second, the plan violates section 368's rate-freeze guarantee that protects consumers from price increases during the transition to a competitive market.

On the first illegality, section 368 clearly limits the utilities to March 31, 2002, to recover their power-procurement and other costs incurred during the rate-freeze, plus their "stranded costs," and explicitly says the utility "shall be at risk for those costs not recovered during that time period." Yet the PUC seeks now to maintain those rates well beyond that date and explicitly to allow PG&E to apply those collections to the past procurement costs.

With regard to the second illegality, section 368 explicitly and unambiguously commands that the rates the utilities collect remain frozen through the transition period:

> "These rate levels for each customer class, rate schedule, contract, or tariff option shall remain in effect until the earlier of March 31, 2002, or the date on which the commission-authorized costs for utility generation-related assets and obligations have been fully recovered."

The PUC has repeatedly held that SCE and PG&E have not yet fully recovered their costs for utility generation-related assets and obligations. (See, e.g., Exh. 2, at pp. 19-24.) Yet the commission would now authorize the utilities to keep the above-rate-freeze-level rates that the PUC had strictly limited to pay

for wholesale power (see D.01-03-082, conclusion of law 9 (PUC authorized by 2001 legislation to raise rates to recover DWR power-purchase costs "despite the fact that the AB 1890 rate controls remain in effect")) and instead allow the utilities to pocket those higher rates themselves.

All of the foregoing has been clear from the explicit wording of AB 1890 and was clear to the PUC. Indeed, one week after its adoption of the SCE settlement, PUC President Loretta Lynch testified before the Legislature on behalf of the commission and, in response to a legislator's question, confirmed that the SCE settlement violated AB 1890 and could not have been ordered by the commission without using the federal court to "trump" state law that it would otherwise have to obey:

> "MS. LYNCH: Well, actually the Commission is prevented under state law under [AB] 1890 from allowing that recovery, and what we did with the Edison settlement was essentially agree to a settlement that federal law trumped state law, but the Commission on its own could not trump state law. The Commission must follow state law." (Exh. 6, p. 45.)

This testimony was entirely consistent with an unbroken five-year string of PUC adjudicatory decisions declaring that the utilities may not recover any unrecovered transition-period costs beyond the end of the transition period, no later than March 31, 2002. (D.97-10-057, finding 12 & ordering ¶ 1; D.99-10-057 at 13-14; see also D.00-03-058 at 18-26.)

However, earlier this year the PUC, in an effort to defend the SCE settlement before the Ninth Circuit, adopted a new, litigation position, reversing itself and declaring that legislation adopted *a year earlier* had, contrary to the clear understanding of the PUC and everyone else, repealed by implication Public Utilities Code section 368's rate-freeze and its ban on recovering costs after March 31 2002. (Exh. 7, at pp. 14-21.) The legislation upon which the PUC's utterly specious fabrication was constructed was adopted in January

2001, when the utilities could no longer afford to purchase wholesale power for their customers. The Legislature enacted Assembly Bill Number 1 of the first extraordinary session (Stats. 2001, 1st Ex. Sess. 2001-2002, ch. 4) ("AB 1x")), authorizing the state Department of Water Resources (DWR) to procure the power for those customers. The Legislature then adopted Assembly Bill Number 6 of the first extraordinary session (Stats. 2001, ch. 2) ("AB 6x"), prohibiting the utilities from making matters any worse by selling any of their remaining power plants. Neither AB 1x nor AB 6x amends Public Utilities Code section 368, and neither the language nor the legislative history of either bill suggests any intent to repeal operation of the rate-freeze. Thus, the PUC is necessarily arguing that AB 1x or AB 6x (the commission is not explicit on which) repealed by implication section 368, that the Legislature intended to repeal the most controversial piece of legislation enacted in at least a decade and to give the utilities a multi-billion-dollar bail-out, but simply forgot to put it in the codes.

In March 2001, two months after enactment of AB 1x and AB 6x, the PUC itself rightly rejected the very same argument it subsequently made to the Ninth Circuit:

> "[T]o find existing AB 1890 statutes inconsistent with AB1X, . . . , would be to repeal by implication. . . .
>
> "The legislation enacted in January and February 2001 addresses electricity market conditions and utility financial distress that AB 1890 neither anticipated nor provided for. These new laws respond to the current emergency and provide enhanced authority for this Commission to set retail rates for electric power to provide for the recovery of revenues expended by CDWR for power purchases that it makes, despite the fact that the AB 1890 rate controls remain in effect." (D.01-03-082 at 21, 52; *see also* D.01-03-073 at 12; D.01-07-028 at 4; D.01-07-029 at 7.)

The PUC could scarcely have stated more clearly that nothing in the 2001 legislation alters or is inconsistent with the stranded cost recovery and rate freeze provisions of AB 1890.

The fact that the PUC's new construction was "adopted" in judicial litigation vividly illustrates the corrosive effect of the commission's procedures here. The prior interpretation was adopted in adjudicatory decisions, after full public notice and extensive briefing and argument by scores of parties before the commission, and was reflected in a reasoned analysis. On January 11, 2002, the PUC swept away those holdings in a lawyers' brief with no notice, no hearings, no participation of the parties who contributed to the prior decision — and no acknowledgment that it was reversing its prior position. That the PUC did not, in filing its brief, feel itself bound by intellectual honesty, duty to the parties before it, or the dignity of its adjudicatory rulings is a sad self-commentary.

The Court may well wonder why the PUC suddenly reversed its interpretation of state law and abandoned its defense of the rate-freeze. The PUC answers the question in the same brief in which it announces the policy pirouette: The commission was suddenly frightened into its new position by the bankruptcy reorganization plan proposed by PG&E, which would remove most of that utility's assets from PUC jurisdiction. (Exh. 7, at p. 3.) That plan represented "the backdrop to the Commission's decision to approve its settlement with SCE." (*Ibid.*) The PUC approved the SCE settlement as the preferable "alternative" to a PG&E-style bankruptcy plan that would move a portion of its regulatory authority to the FERC. (*Id.*, p. 27.) In short, this is simply a bureaucracy defending its turf. As long as it had nothing to lose, the PUC was a vigorous defender of AB 1890 and the rate-freeze. When it found that vigorous defense could lead to a trimming of its jurisdiction, it decided to defend its turf with ratepayers' money and adjusted its interpretation of

California law to serve that purpose.

All of which merely confirms that any scheme that allows the utilities to collect more than rate-freeze-level rates during the statutory period, and any scheme that allows the utilities to use post-March 31, 2002, rates to pay-off prior obligations, is contrary to the Legislature's express command in AB 1890 and remains contrary to law. The PUC's proposed PG&E reorganization plan, like its SCE settlement, is just such a scheme. The PUC does not have the authority to ask, nor to consent to, a federal court entering an order abrogating AB 1890.

II. The PUC May Not Expend Taxpayer Funds to Subvert State Law.

Having already sunk millions of tax dollars into its aggressive attempt in the SCE case to avail itself of federal jurisdiction in order to "trump" state substantive and procedural law, in violation of article III, section 3.5, of the California Constitution, the PUC is now spending millions more in developing and proposing a PG&E bankruptcy reorganization plan that mirrors the terms of the SCE settlement and contains the same substantive and procedural illegalities. This waste of taxpayer funds must be enjoined.

Code of Civil Procedure section 526a allows taxpayers to sue to "restrain[] and prevent[] any illegal expenditure of, waste of, or injury to" the public fisc. Although the terms of section 526a apply only to local governments, California courts have extended the statute "to all state and local agencies and officials." (*Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240; see also *Ahlgren v. Carr* (1962) 209 Cal.App.2d 248, 252-54.) In the present case, the PUC is currently in the process of spending millions of taxpayer dollars to pay outside counsel and consultants to prepare and seek adoption of a PG&E bankruptcy

reorganization plan that violates state law. Petitioner, who pays utility surcharges that fund the PUC, and whose members likewise pay those charges, has standing to enjoin such plainly illegal expenditures of funds by the PUC.

Every tax dollar the PUC spends on its PG&E bankruptcy plan is a dollar devoted to violating article III, section 3.5, of the California Constitution. Under the terms of this constitutional prohibition, state administrative agencies cannot adopt litigating positions that declare statutes unenforceable. In *Native American Heritage Comm'n v. Board of Trustees of the California State University* (1996) 51 Cal.App.4th 675, the California State University proposed to build a mini-mall on a sacred Native American site without obtaining the statutorily required review of the Native American Heritage Commission (NAHC). The state university attempted to defend its failure by arguing that the statutes authorizing the NAHC's review violated the Establishment Clause of the U.S. Constitution. The Court held that, as a state agency, the university could not raise such a defense because article III, section 3.5, prohibited it from failing to enforce the state law that had not been declared invalid by an appellate court.

In the present case, the PUC's proposed reorganization plan is quite literally a consent to federal preemption of AB 1890, Public Utilities Code section 454, and the Bagley Keene Open Meetings Act. The purpose of article III, section 3.5, would be utterly subverted if the PUC could invite the Bankruptcy Court to supercede a valid state law, and the PUC's actions create a precedent that deeply threatens the ability of the Legislature and citizens of California to set any boundaries with which an administrative agency might disagree.

III. The PUC May Not Take Regulatory Action in a Closed Meeting Called Solely to Confer with Its Counsel Regarding Pending Litigation.

The PUC's October 2, 2001, decision was adopted entirely in secret, in blatant violation of the Bagley-Keene Open Meeting Act (Gov. Code, §§ 11120-11132.5). However, the PUC claims that it may adopt rate orders in a secret meeting called, under Government Code section 11126, subdivisions (e)(1) and (e)(2)(A), to confer with counsel about pending litigation. (See Exh. 7, at p. 22 ("the Commission was explicitly authorized to discuss with its attorneys the proposed settlement in a 'closed session,' which is not open to the public.").) This represents a longstanding, chronic violation of the Bagley-Keene Open Meeting Act, under which the PUC regularly conducts in closed session business that the law requires it to conduct in public.

The PUC's theory is refuted by the letter of the statute. Government Code section 11126, subdivision (e), merely allows the agency to meet in closed session "to confer with, or receive advice from, its legal counsel regarding pending litigation" — not to take action, and certainly not to issue regulatory orders. Pointedly missing from that subsection is the authority to take formal action. Other subsections of the same section authorize *action* at closed sessions. (E.g., Gov. Code, § 11126, subds. (a)(1) ("appointment, employment, . . . dismissal of a public employee"), (c)(1) ("prepare, approve, grade, or administer examinations"), (c)(7)(A) ("give instructions to its negotiator regarding the price and terms of payment").) The omission of authority to take action under subdivision (e)(1) plainly was purposeful.

If there were any doubt that the words of subdivision (e) were intended to be narrowly read, the doubt would be dispelled by consulting the express purpose of the Bagley-Keene Open Meeting Act.

"It is the public policy of this state that public agencies exist

> to aid in the conduct of the people's business and the proceedings of public agencies be conducted openly so that the public may remain informed. . . .
>
> "The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created." (Gov. Code, § 11120.)

To achieve this purpose, the Open Meeting Act defines "action taken" in the broadest possible terms, to mean

> "a collective decision made by the members of a state body, a collective commitment or promise by the members of the state body to make a positive or negative decision or an actual vote by the members of a state body when sitting as a body or entity upon a motion, proposal, resolution, order or similar action." (Gov. Code, § 11122.)

Significantly, in 1987 the Legislature reigned in agencies' use of closed meetings with their attorneys by amending section 11126 to narrow the scope of the confer-with-counsel exception to the act. The 1987 amendment declared that, for purposes of the Bagley-Keene Open Meeting Act, "all expressions of the lawyer-client privilege other than those provided in this subdivision are hereby abrogated" and that subdivision (e) "is the exclusive expression of the lawyer-client privilege for purposes of conducting closed session meetings pursuant to this article." (Gov. Code, § 11126, subd. (e)(2), as amended by Stats. 1987, ch. 1320, § 2.) The Legislature recognized that the confer-with-counsel exception had the potential, if broadly construed, to be a Trojan Horse that would allow renegade agencies to transact some of the people's most important business in secret. The Legislature therefore expressly conveyed its intent to construe subdivision (e), and its right to meet with attorneys on pending litigation, narrowly. That intent cannot be reconciled with the PUC's reading,

that it may, while meeting in closed session with its lawyers, adopt sweeping multi-billion-dollar rate orders.

The act draws a clear distinction between taking action and conferring or receiving advice. What the PUC does in secretly adopting its PG&E reorganization plan, like its October 2, 2001, approval of the SCE settlement, unquestionably is an "action taken" by the commission. Subdivision (e) of Government Code section 11126 omits authority to take action in a closed meeting to "confer with, or receive advice from," its lawyers. The PUC's continued use of such closed meetings to adopt regulatory orders is an ongoing violation of the Bagley-Keene Open Meetings Act that must be arrested by this Court.

IV. The PUC's Interpretation of What Constitutes a "Change" in Rates Is Contrary to Law, Resulting in the Commission Taking Action in Unlawful Closed Meetings and Issuing Orders Without Evidence and Without Findings.

By claiming, in the authority to confer with counsel, the right to issue sweeping regulatory orders, the PUC has fundamentally altered the way the most basic decisions about utility policy and rates are made, stripping the public of all access to its decisions and exempting itself from the requirements of a reasoned decision on an evidentiary record. This fast-and-loose regulatory regime the commission has concocted is contrary to law.

Even were the PUC entitled to take action in a closed session called to confer with counsel, or to act under any other exception to the open-meeting requirements, the Legislature has made it clear that it may not adopt orders that change rates in a closed meeting:

> "Notwithstanding any other provision of law, any meeting of the Public Utilities Commission at which the rates of entities under the commission's jurisdiction are changed shall be open

and public." (Gov. Code, § 11126, subd. (d)(1).)

Furthermore, any order that imposes an increase in rates may issue only "upon a showing before the commission and a finding by the commission that such increase is justified." (Pub. Util. Code, § 454.) That is not, however, how the PUC is issuing multi-billion-dollar decisions. As its PG&E reorganization plan and its adoption of the SCE settlement both demonstrate, when the PUC retreats into one of its closed sessions ostensibly to confer with counsel, the orders that emerge are based on no evidentiary record and are accompanied by no evidentiary findings.*

In the case of its SCE consent, and in the incipient PG&E case, the PUC purports to evade these requirements by arguing that its orders effect no "change[]" (Gov. Code, § 11126, subd. (d)) and no "increase" (Pub. Util. Code, § 454) in rates. The PUC's argument is that it is merely agreeing not to lower rates, not increasing rates. The PUC makes this argument because the four-cents-per-kilowatt-hour emergency rate increases it adopted in 2001 resulted in rates that are now far above the cost of power in a wholesale power that has returned to a semblance of moderation. But the orders at issue here hardly preserve a status quo. Without the PUC's reorganization plan for PG&E and settlement with SCE, ratepayers are entitled to billions in refunds and, because AB 1890 excludes the costs of past power procurement from post-March 31,

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*In the SCE case, the settlement agreement contains recitations the PUC negotiated with the utility. FTCR trusts it is clear such bargained stipulations are not "findings" within the meaning of Public Utilities Code section 454. Furthermore, this Court has been clear that the commission does not discharge the requirement of findings without explicitly tying each finding to the record evidence that supports it. (E.g., *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251, 258-59; *Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811, 812-13; *California Motor Transport Co. v. Public Utilities Com.* (1963) 59 Cal.2d 270, 273.) With no record and no evidence, the PUC is incapable of issuing anything this Court would recognize as a "finding."

2002, rates, utility bills would, by law, have to fall. But by virtue of the PG&E reorganization plan, like the SCE settlement, those refund rights are extinguished, and rates are authorized in excess of statutory limits.

Were there any residual doubt that these are not decisions that can be made in secret, one need merely consult the express policy of the Bagley-Keene Open Meeting Act: that "proceedings of public agencies be conducted openly," "that actions of state agencies be taken openly and that their deliberation be conducted openly," that the people "do not give their public servants the right to decide what is good for the people to know and what is not good for them to know," that they "insist on remaining informed so that they may retain control over the instruments they have created." (Gov. Code, § 11120.) There can be no doubt that the Legislature that wrote this statute would have wanted a collective decision, a commitment, and a promise by the PUC that forces SCE ratepayers to pay $3.3 billion more than they would have paid absent the action, that extinguishes ratepayers' refund rights, that locks in high rates for years, and that makes numerous other regulatory concessions worth hundreds of millions of dollars to be made in public. An interpretation of Government Code section 11126, subdivision (d)(1), that makes a meeting at which such action is taken not a "meeting . . . at which the rates . . . are changed" cannot be squared with the patent legislative intent.

The PUC has done exactly what the Bagley-Keene Open Meeting Act prohibits: It has taken regulatory action in closed session that necessarily and inevitably raises rates and revokes ratepayers' refund rights.

V. This Court's Writ of Mandamus Is Urgently Required to Close a PUC-Fabricated Loophole in Administrative Law Through Which the Commission Threatens to Drive Billions of Dollars in Rate-Decisions.

A. Mandamus Is the Prescribed Means for Judicial Review of Actions of the PUC.

The appropriate remedy to prevent PUC actions contrary to law is mandamus. Under Public Utilities Code section 1759, subdivision (b), "[t]he writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure." That section provides that

> "[a] writ of mandate may be issued by any court, except a municipal court, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins, as a duty resulting from an office, trust, or station . . . ." (Code Civ. Proc., § 1085, subd. (a).)

This petition meets all of the requirements for issuance of mandamus relief.

The two requirements essential to issuance of a writ of mandate under Code of Civil Procedure section 1085 are that:

> "(1) the respondent has a clear, present, and usually ministerial duty to act; and (2) the petitioner has a clear, present, and beneficial right to performance of that duty." (*Unnamed Physician v. Board of Trustees of Saint Agnes Medical Center* (2001) 93 Cal.App.4th 607, 618.)

The PUC has a clear, present, and nondiscretionary duty to abide by article III, section 3.5, of the California Constitution. It also has a clear, present, and ministerial duty to conduct its business in public, not to make regulatory decisions in closed session, and to support any order changing rates with findings supported by record evidence.

These duties create a public right, and FTCR and its members are citizens "interested in having the laws executed and the dut[ies] in question enforced"; Petitioner is therefore entitled to mandamus "to procure the enforcement" of those duties. (*Green v. Obledo* (1981) 29 Cal.3d 126, 144; *California Homeless & Housing Coalition v. Anderson* (1985) 31 Cal.App.4th 450, 457.)

The courts recognize this constitutes sufficient beneficial right to qualify for mandamus in order to "promote[] the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right." (*Green v. Obledo*, *supra*, 29 Cal.3d at p. 144; *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100.)

Furthermore, the PUC's expenditure of taxpayer funds for the purpose of securing the federal preemption of AB 1890 in the PG&E bankruptcy is illegal. Under Code of Civil Procedure section 526a, Petitioner is entitled to an order restraining and preventing those expenditures.

There is no question that mandate is available not only to correct unlawful past action but to restrain threatened wrongful future action. "[M]andate does now clearly lie to compel performance of future acts where it is clear that public officers do not intend to comply with their obligation when the time for performance arrives." (*Knoll v. Davidson* (1974) 12 Cal.3d 335, 343, fn. 6.) "By parity of reasoning, prohibitory mandate would lie to *restrain* a public officer who has indicated he or she will attempt to enforce an invalid law when the time arrives to do so . . . ." (*Planned Parenthood Affiliates of California v. Van de Kamp* (1986) 181 Cal.App.3d 245, 264 (emphasis in original).)

Finally, there is no other adequate remedy for Petitioner. Under Public Utilities Code section 1759, the writ of mandamus to the Supreme Court or the Court of Appeal is the only available remedy to prevent the PUC from illegally acting in excess of its authority. (See, e.g., *Brian T. v. Pacific Bell* (1989) 210 Cal.App.3d 894, 900-901 (finding no superior-court jurisdiction to enter injunctions requiring the PUC to modify previous decisions because "[s]uch a challenge to the legality or adequacy of [PUC] orders lies only by writ of mandamus to the Supreme Court under Public Utilities Code section 1759").) Mandamus is therefore an entirely appropriate remedy for the PUC's illegal

strategies for avoiding entirely valid but inconvenient state laws.

B. Absent Immediate Action by This Court, the PUC Will Continue to Make Multi-Billion-Dollar Decisions That Are Contrary to Law but That the PUC Places Beyond the Reach of This Court's Review.

In its aggressive defense of its past actions, the PUC has made it clear that it believes it has found a refuge from pesky procedural strictures and statutes it finds to be an obstacle to its bureaucratic objectives. Until it is judicially restrained from doing so, the PUC will take full advantage of the loopholes it claims to have found.

FTCR does not claim that the PUC will wholly abandon public hearings and routinely trump regulatory laws. But, as the SCE and PG&E cases demonstrate, it will do so precisely when the protection of state law is most urgent. Consider, for example, its confer-with-counsel exception to the open-meeting requirement. Virtually every regulatory issue before the PUC is "before . . . an administrative body exercising its adjudicatory authority" (Gov. Code, § 11126, subd. (e)(2)(A)), and it can always be said of the most sharply contested issues that "there is a significant exposure to litigation against the state body" (*id.*, subd. (e)(2)(B)(i)). Whenever the PUC faces a hard decision, whenever it must take an unpopular action, whenever its action is most vulnerable to public disapproval and legal challenge — in short, whenever the temptation to slink into the shadows and avoid public attention is greatest — the commissioners will, under their reading of the Bagley-Keene Open Meeting Act, have available to them the expedient of a closed session called to confer with counsel but used to issue far-reaching regulatory orders.

This is a trying, contentious time for utility regulation. Pursuing their own vision of sound public policy, the commissioners of the PUC challenged DWR's power-purchasing program, blocked the sale of bonds to finance the

power purchases, conferred upon one electric utility an exemption from AB 1890 and propose to confer a like exemption on another. The time has come to reimpose upon an increasingly imperial PUC the limits the California Constitution and statutes prescribe.

C. Beyond the Devastating Effects of the PUC's Actions on Rates and Ratemaking, Those Actions Mark a Path for Any and Every Other California Administrative Agency Seeking Liberation from State Laws with Which it Disagrees.

The very public liberties the PUC has taken with state laws have created precedents that threaten not merely public-utility regulation in California but administrative law across the state. The fact that the PUC met in closed session and, under the guise of conferring with its counsel, rewrote the statutes it administers will not be lost on other multi-member tribunals. Many of those tribunals — particularly those upon which the Legislature may have imposed strict regulatory requirements after finding their regulatory performance wanting — will take careful notice of the fact that the PUC could collaborate with its regulatee to neutralize state laws that regulator and regulatee agreed were too harsh.

This Court has repeatedly taught that "an administrative agency has only such authority as has been conferred on it." (E.g., *Ass'n for Retarded Citizens — California v. Dept. of Dev. Services* (1985) 38 Cal.3d 384, 391-392; *Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103; *United States F. & G. Co. v. Superior Court* (1931) 214 Cal. 468, 471, 6 P.2d 243.) If the PUC is allowed to continue to act as it has come to act, it will be teaching its fellow administrative officials that an agency has as much authority as it may seize. That is not a lesson agencies ought to be learning.

CONCLUSION

The commissioners of the PUC are public officials, upon whom the State of California has conferred vast quasi-judicial and quasi-legislative powers, and whom the state has directed to exercise those powers deliberately and respectfully. Yet in their most important regulatory decisions in years, the commissioners have acted less like public officials than like commodity traders, wheeling and dealing in secret, knowingly acting against the law but betting the law cannot reach them, switching litigation positions from case to case in a post-hoc effort to rationalize their actions. The immediate result is that 9 million California households and businesses will pay at least $10 billion more in rates than state law allows, with the PUC having never even adopted a decision explaining why they must shoulder that burden.

The long-term result of the PUC being allowed to continue this practice is that the commission, and every other state tribunal, will be able to nullify the constitutional proscription against their declaring statutes unconstitutional and will be able to evade the carefully-constructed system of reasoned decisionmaking and of due-process rights of the public to participate in the making of state policy.

Petitioner respectfully urges the Court to put an end to these practices and to restore the rule of law governing the PUC.

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Respectfully submitted,

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