STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 31, 2004

TO PARTIES OF RECORD IN APPLICATION 03-07-032

On December 23, 2003, Decision 03-12-059 was mailed to the parties without the dissent of Commissioner Loretta M. Lynch. The dissent is now available, and is enclosed herewith.

/s/ Angela K. Minkin
ANGELA K. MINKIN
Chief, Administrative Law Judge

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Enclosure

Commissioner Lynch Dissent on Mountainview

I disagree with the majority decision to grant Southern California Edison's request to create a wholly-owned subsidiary of Edison called MVL and to enter into a power purchase agreement with MVL for the purchase of electricity from Mountainview. My alternate decision on this matter would have been a more prudent course for the Commission. My alternate decision would have ordered Edison to file an application for a Certificate of Public Convenience and Necessity (CPCN) to acquire, construct, own, and operate the Mountainview Power Project as a utility-owned generation project. My approach would have committed this Commission to review expeditiously Edison's CPCN application to ensure that Edison could meet its contractual deadlines to purchase the project from Sequoia (or InterGen) and would have enabled the project to be a real state-regulated utility-owned generation facility.

Utility-owned generation will be the foundation of California's recovery from the Energy Crisis of 2000 and 2001 and will ensure that California is never again subjected to the manipulation and gauging rampant during that period. Edison brought this project to the Commission purporting that this project consisted of utility-owned generation. Make no mistake, this scheme is not the same as utility-owned generation. Because Edison the utility will not own the plant, the legal consequence of a subsidiary's ownership transfers regulatory oversight to the federal government. California thereby loses control over the price to be paid for the electricity generated by this plant. While Edison promises to adhere to the ratemaking wishes of this Commission, ultimate authority for review of the project lies with the Federal Energy Regulatory Commission (FERC).

Lest anyone does not remember, FERC is the agency that determined, despite widespread evidence of market manipulation to the contrary, that the long-term contracts that California signed during the Energy Crisis were

reasonable. FERC is the agency that has determined that California is entitled to less than $2 billion of the $9 billion in refunds we have showed are owed – effectively stripping $7 billion from the coffers of California businesses and the wallets and purses of California families. And just recently, despite an all-party settlement carefully crafted for over a year in the El Paso case, FERC, in approving the settlement, felt obliged to change the settlement to its liking. Edison's scheme is constructed specifically to evade state regulation so that FERC will have final review over the price as well as the terms and conditions of this power purchase agreement. Edison has put this Commission in the position of a child sitting on her father's lap in the front seat of the car driving down Main Street, thinking she is steering the car while her father actually controls everything.

Let's be clear: If Edison's convoluted arrangement is approved, FERC will have only two months to review this project. If FERC makes any changes to this agreement those changes will be returned to this Commission with very little time to review them and no choice but to either accept them or let the project die. Ultimately, it will be FERC that sets the terms and conditions, and most importantly, the price of this project.

There are myriad unusual findings and special exemptions required from this Commission to consummate Edison's scheme, as outlined in the majority decision, including exemptions from our affiliate transaction rules and abdication of environmental review under California law. All these "vexing weaknesses," as the majority decision calls them, would have been eliminated by the creation of a real utility-owned project. The majority decision basically pleads with Edison to do the right thing by transferring ownership of the plant to the utility, but leaves the decision up to Edison and then approves the subsidiary scheme that divests this Commission of the ability to ensure just and reasonable

rates. If this Commission is reduced to asking the utility to do the right thing, why are we here? Edison is now creditworthy with all three rating agencies, that is, financially sound. This Commission made a $3 billion commitment to Edison during the Energy Crisis to make them whole and we followed through on that obligation. Wall Street analysts have noted that this agency has followed through on its commitments to the utilities, removed the State from the power buying business and is creating a long-term procurement process with cost recovery assurances secured by statute.

However, all of these extraordinary regulatory and statutory assurances and actions are still not enough for Edison. Edison claims to be unsure that a customer base for the project will exist in the future but my alternate decision granted Edison that security for at least ten years. Some of Edison's concerns, even if resolved by the Legislature or this Commission, such as the future of direct access or Community Choice Aggregation, still do not determine the level of use of these non-utility electricity options. If Edison waits until every city and county in its service territory decides whether to pursue Community Aggregation, they may never build any generation within the utility in my lifetime, let along the terms of anyone currently on this Commission. Edison's interests are aligned with ratepayers here – the utility builds new generation, earns a fair rate of return (that is, gets to make a reasonable and guaranteed profit), and California ratepayers, both big and small, businesses and residences, are provided price protection through state oversight as well as reliability – the assurance that power will be there when they reach for the light switch.

The Commission should have ordered Edison to file an application for a CPCN so that Edison the utility could have purchased this project and turned it into a utility-owned facility. Initially, I proposed to grant Edison a CPCN for this project based on the existing record in this proceeding. The legal arguments

raised by parties in this proceeding, most notably the Navajo Nation, convinced me that this was not a legally sound approach. In particular, the CEC siting process to which we had accorded comparable value to our statutory environmental review obligations gives only rudimentary consideration of alternatives to the proposed project. This Commission's CPCN process analyzes a much broader range of feasible alternative projects than the CEC siting process. The CEC process by contrast is focused primarily on whether another site exists upon which to build the exact same project, rather than evaluating alternatives of all different types, including other projects or energy sources. Thus, the most legally sound and prudent course for this project would have been to order the utility to file an application for a CPCN, which we could have reviewed on an expedited basis, supplementing the substantial but incomplete record before us in order to grant a CPCN.

Finally, I am troubled by the rushed nature of this proceeding and the actions of the assigned commissioner to curtail the public process of this proceeding and to restrict public access to essential financial information necessary to effectively participate in this proceeding. Edison filed its application on July 21st of this year. The assigned commissioner did not issue a scooping memo until September 16th, nearly a two month lag. At that time, the assigned office set a schedule to rush the proceeding to a decision within two months, eliminating essential time necessary for interested parties to conduct discovery and thus to actively participate in the proceeding. In addition, this ruling restricted public access to the essential financial information necessary to evaluate Edison's Mountainview proposal. Evidentiary hearings were held in mid-to-late October and concurrent briefs were required a mere two weeks later and a proposed decision was issued a mere 12 days after that. This schedule allowed parties to participate in this proceeding in name only and is not a

reasonable timeline for considering a significant thirty year financial commitment by ratepayers.

Adding to this truncated schedule was the decision to restrict access by parties to the financial terms of this power project. This secretive rush to a decision was described as necessary to secure a fleeting, one-time opportunity. I am skeptical that the majority of this Commission has the will to stand up to any special deals brought before this Commission, especially those that parties contend require expedited review, and I anticipate this is the first of many special and so-called unique deals that this Commission will make in secret and without full public review. In order for this Commission to performs its regulatory duties and to protect the public interest – that is, ratepayers – we need to ensure public access to information and to ensure an open public process with time sufficient to allow considered input from parties other than utilities or others in search of a rubber stamp for their special deal. The costs of the Mountainview facility should have been made public in this proceeding and introduced into the evidentiary record to allow for cross examination and full review by other parties. If Edison's project is as cost effective as they have represented to the parties and the Commission in this deal, Edison should be willing to let that information enter the public record. Secret backroom deals without public scrutiny are neither a short or long-term solution to meeting California's energy needs and will only result in higher costs for ratepayers.

For the above reasons, I dissent.

Dated December 18, 2003, at San Francisco, California.

/s/ Loretta M. Lynch
Loretta M. Lynch
Commissioner

CERTIFICATE OF SERVICE

I certify that I have by mail, and by electronic mail to the parties of which an electronic mail address has been provided; this day served a true copy of the original attached Dissent of Commissioner Lynch on all parties of record for proceedingA.03-07-032 or their attorneys of record.

Dated December 31, 2004, at San Francisco, California.

/s/ Ernesto Melendez

Ernesto Melendez

N O T I C E

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