

January 27, 2006

Docket Clerk
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

RE: A.04-12-014/I.05-05-024

Dear Docket Clerk:

Enclosed for filing with the Commission are the original and five copies of the **RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE MOTION AND THE PETITION TO INTERVENE OF JUST TRANSITION COALITION** in the above-referenced proceeding.

We request that a copy of this document be file-stamped and returned for our records. A self-addressed, stamped envelope is enclosed for your convenience.

Your courtesy in this matter is appreciated.

Very truly yours,

Sumner J. Koch

SJK:kar:LAW-#1268076

Enclosures

cc: All Parties of Record
(U 338-E)

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

Application of Southern California Edison Company (U 338-E) for Authority to, Among Other Things, Increase Its Authorized Revenues for Electric Service in 2006, and to Reflect that Increase in Rates.)	Application 04-12-014 (Filed December 21, 2004)
)	
)	
)	
)	
)	
)	
Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Service and Facilities of Southern California Edison Company.)	Investigation 05-05-024 (Filed May 26, 2005)
)	
)	

**RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE
MOTION AND THE PETITION TO INTERVENE OF JUST TRANSITION
COALITION**

MEGAN SCOTT-KAKURES
JAMES M. LEHRER
FRANK A. MCNULTY
SUMNER J. KOCH

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-3253
Facsimile: (626) 302-2050
E-mail: scegrc@sce.com

Dated: **January 27, 2006**

**RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE
MOTION AND THE PETITION TO INTERVENE OF JUST TRANSITION COALITION**

TABLE OF CONTENTS

<u>Section</u>	<u>Title</u>	<u>Page</u>
I.	INTRODUCTION	2
II.	JTC’S MOTION IS GROSSLY UNTIMELY	3
III.	THE CLAIMS MADE BY JTC ARE SUBSTANTIVELY WITHOUT MERIT	5
A.	JTCs’s Ratemaking Proposal For The Emission Allowances Is Contrary To Established Commission Precedent, Which Returns Allowance Proceeds To SCE Customers, And The Coalition Cites No Legal Authority To Support Transferring Allowances or Their Proceeds to Others	5
B.	The Motion’s Claim of Improper SCE Action or Undue SCE Benefit From Cessation of Mohave Operation Is an Attempt to Relitigate Issues Already Adjudicated at the Commission and Decided in SCE’s Favor	7
C.	Suspension of Mohave Operation Has Not Been Driven By SCE or Otherwise Caused by Any Unilateral SCE Decision	8
D.	JTC’s Claims of Mohave Air Violations are Foreclosed by Res Judicata and Lack of Subject Matter Jurisdiction	11
E.	JTC’s Allegations of Mohave Air Emission Violations are Wrong and the Motion Is Incorrect and Misleading on Several Air Quality Issues.....	12
1.	No air quality violations were ever established	12
2.	Mohave has continued to operate in compliance with the Consent Decree and applicable laws.....	13
3.	Mohave has operated with appropriate controls	14
4.	There is no evidence that Mohave has threatened the health of area residents	14
F.	JTC’s Claims of Unfair Compensation under the Coal Mining Leases are Similarly Foreclosed by Collateral Estoppel, Lack of Subject Matter Jurisdiction, and Lack of Standing.....	14
G.	The Tribes’ Compensation under the Coal Leases Has Been Fair and Reasonable	16
IV.	SCE INTENDS THAT MOHAVE RETURN TO SERVICE.....	18

**RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE MOTION
AND THE PETITION TO INTERVENE OF JUST TRANSITION COALITION**

TABLE OF CONTENTS (CONTINUED)

Section		Page
V.	JTC’S MOTION IS HIGHLY IMPROPER AND IMMEDIATE COMMISSION DENIAL OF THE MOTION WITHOUT FURTHER PROCEEDINGS IS APPROPRIATE.....	19
VI.	THE COMMISSION ALSO SHOULD DENY THE PETITION TO INTERVENE	19
VII.	CONCLUSION.....	20

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

Application of Southern California Edison Company (U 338-E) for Authority to, Among Other Things, Increase Its Authorized Revenues for Electric Service in 2006, and to Reflect that Increase in Rates.)	Application 04-12-014 (Filed December 21, 2004)
)	
)	
)	
)	
)	
)	
Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Service and Facilities of Southern California Edison Company.)	Investigation 05-05-024 (Filed May 26, 2005)
)	
)	

**RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE
MOTION AND THE PETITION TO INTERVENE OF JUST TRANSITION
COALITION**

Pursuant to California Public Utilities Commission (Commission) Rule 45(f) and the January 19, 2006, ruling of Administrative Law Judge (ALJ) Carol Brown, Southern California Edison Company (SCE) hereby responds to the *Motion for a "Just Transition" in Response to Closure of the Mohave Generating Station* (Motion) and the *Petition of Just Transition Coalition for Leave to Intervene* (Petition to Intervene) both filed on January 11, 2006, by the Just Transition Coalition (JTC).¹ As SCE shows in this response, JTC's Motion is fatally defective for several important procedural reasons, factually wrong on every front, and would reverse well-established Commission ratemaking policy on emission credits. Completely without

¹ By telephone call with ALJ Fukutome on January 26, 2006, SCE requested and received the ALJ's permission to respond to both the Motion and the Petition to Intervene within this single filing.

substantive merit, the JTC Motion should be denied summarily. JTC's Petition to Intervene states no grounds for intervening in SCE's General Rate Case (GRC) apart from the baseless grounds recited in the Motion, and so should likewise be denied.

I.

INTRODUCTION

The JTC Motion argues in essence that the funds from SCE's sale of any sulfur dioxide (SO₂) emission allowances (Allowances) attributable to the closure of the Mohave Generating Station (Mohave) should not flow to SCE "shareholders"² and should go instead to some ill-defined group of Hopi and Navajo communities or their designees.³

Even setting aside the Motion's several procedural defects, the Motion is utterly without substantive merit. To begin with, the Allowances are not SCE shareholder assets as JTC mistakenly assumes, but rather SCE customer assets, and JTC's request would directly and seriously impact SCE's customers. Beyond that, JTC's repeated and unexplained assertions that Mohave's suspension has been caused by some "unilateral" SCE "decision" are false.⁴ As JTC member organizations are well aware – indeed, as they have maintained before this Commission -- and as this Commission has already concluded, SCE has not been able to install the pollution control equipment required under the Mohave Consent Decree for plant operations beyond 2005 while critical issues impacting Mohave's post-2005 coal supply, including the water required to slurry and transport the coal to Mohave, remain unresolved. Any implication by JTC that Mohave's shutdown is necessarily permanent is similarly erroneous: SCE and other relevant parties are continuing to work hard in efforts to resume Mohave operation. Likewise, JTC's assertions regarding Mohave air emissions violations, and inadequate compensation to the Hopi Tribe and Navajo Nation under their coal leases, are baseless.

² Motion, pp. 12, 20.

³ *Id.*, pp. 2, 13, 23.

⁴ *Id.*, pp. 1, 9-10, 22.

Apart from being factually wrong on every count, JTC's claims are procedurally barred for several reasons, centering primarily around the fact that issues raised by JTC have already been adjudicated at the Commission or elsewhere; JTC has no standing to represent the entities it purports to be speaking for; and the issues giving rise to Mohave's suspension have been known to JTC members for months and indeed years.

II.

JTC'S MOTION IS GROSSLY UNTIMELY

The issues and circumstances that have given rise to the Mohave's suspended operation have already been the subject of lengthy litigation before the Commission in its Mohave proceeding, A.02-05-046, which began in May of 2002 and closed in late 2004. At least two of JTC's member organizations, Black Mesa Trust and To' Nizhoni Ani, were fully aware of that proceeding, since they were very active parties in it.⁵ Accordingly it may well be that JTC's Motion would be untimely even if it were raised on the first day of this GRC proceeding. In any event, it is certainly untimely now. All of the claims presented in JTC's Motion could have been raised promptly following SCE's GRC update testimony on Mohave of September 26, 2005, or even much earlier.

SCE has stated throughout this proceeding that one possible outcome of the various efforts surrounding Mohave's post-2005 operations could be a permanent shutdown of the plant, although SCE has sought to avoid that outcome. Testimony on this specific point was included in SCE's August 2004 Notice of Intent, its December 2005 application, its May 2005 rebuttal testimony, and the September 2005 update testimony, and in the transcripts of the evidentiary hearings. Throughout this proceeding ample opportunities were given other parties to present their views on Mohave ratemaking. In fact, testimony or briefs on SCE's Mohave proposals

⁵ Black Mesa Trust and To' Nizhoni Ani participated jointly in the proceeding, together with Water and Energy Consulting (WEC). In addition, two other JTC members, Sierra Club and Grand Canyon Trust, as parties in the federal court litigation that resulted in the Mohave Consent Decree, have received formal notice every six months since 2000 regarding the status of the Mohave pollution controls and related issues.

were submitted by the Commission’s Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), and Aglet Consumer Alliance. While SCE did not agree with the positions taken by these other parties, their proposals were at least submitted in accordance with the adopted procedural schedule, giving SCE a timely opportunity to respond and the Commission an opportunity to consider the various positions in rendering its decision.

The parties comprising JTC were certainly aware of ongoing events regarding Mohave in this GRC, as evidenced by the citations to the record evidence in its Motion. Yet the JTC parties chose not to file a protest to SCE’s application, did not engage in discovery, did not submit testimony, did not cross-examine SCE witnesses, and did not file any post-hearing briefs.

The JTC Motion cites to the October 11, 2005, cross-examination testimony of SCE witness Harold Ray, who testified then that SCE had no plans to operate Mohave after December 31, 2005, in violation of the Consent Decree. Even if there were a valid reason for JTC to forego any of the previous opportunities to present its views on Mohave ratemaking (and its motion provides no such reason), at the very latest it should have done so upon receipt of Mr. Ray’s testimony.

JTC variously describes the Assigned Commissioner’s adopted procedural schedule as “expeditious”⁶ or “ambitious,”⁷ implicitly trying to justify its delayed motion. The truth is different. In fact, the Assigned Commissioner’s Scoping Memo characterized as “ambitious” the procedural schedule that had been jointly proposed by SCE, the ORA, TURN, and Aglet.⁸ The Scoping Memo rejected that jointly proposed schedule in favor of one “consistent with the Rate Case Plan.”⁹ The Rate Case Plan’s procedural schedule has been the Commission’s prescribed procedural schedule for processing general rate cases for many years.¹⁰ JTC had ample

⁶ Motion, p. 3.

⁷ *Id.*, p. 5.

⁸ *Assigned Commissioner’s Ruling And Scoping Memo Establishing Scope, Schedule, and Procedures For Proceeding*, dated March 15, 2005 (Scoping Memo), p. 4.

⁹ Scoping Memo, p. 5.

¹⁰ The current version of the Rate Case Plan was adopted in 1989 in D.89-01-040. Previous versions of the Rate Case Plan’s schedule, which differ very little from the current version, had been in effect since the 1970s.

opportunities in the adopted procedural schedule to propose Mohave ratemaking alternatives for the Commission's consideration. Its vain attempt to recharacterize the adopted procedural schedule as "ambitious" in an implicit effort to justify the lateness of its Motion provides no justification for its unwarranted delay.

Besides the Motion's untimeliness, the claims raised in the Motion are precluded for other procedural reasons including res judicata, estoppel, lack of jurisdiction, and lack of standing. Because these procedural defects are closely related to the Motion's lack of any substantive merit they are discussed below in Section III of this Response.

III.

THE CLAIMS MADE BY JTC ARE SUBSTANTIVELY WITHOUT MERIT

A. JTCs's Ratemaking Proposal For The Emission Allowances Is Contrary To Established Commission Precedent, Which Returns Allowance Proceeds To SCE Customers, And The Coalition Cites No Legal Authority To Support Transferring Allowances or Their Proceeds to Others

Cutting through twenty-plus pages of half truths and exaggerated rhetoric, the heart of the JTC Motion is that the Commission should direct SCE to transfer to some ill-defined group of Hopi and Navajo communities any future proceeds from sales of Mohave Allowances. JTC wrongly assumes, apparently, that under current ratemaking the sale of such Allowances would flow to SCE shareholders, which JTC alleges would constitute a "windfall."¹¹ In addition to all the other reasons cited herein for rejecting the JTC Motion, its request would have the Commission reverse a decade of ratemaking policy on emission credits at the expense of SCE's *customers*.

Since the mid-1990s, when the issue of the ratemaking treatment of SO₂ Allowances and other tradable emission credits first arose before this Commission, its policy has been to flow the

¹¹ Motion, pp. 9-10, 20.

benefits of such credits to utility ratepayers. The Commission discussed this policy in its 1997 decision on transition costs:

Emission trading credits are used by the utilities to offset certain air pollution emissions under a program established by federal statute. Excess emission trading credits not needed by the utilities can be bought and sold in a secondary market. We have generally found that 100% of the total net value of these credits (less only the sales costs) should be returned to ratepayers. These policies were adopted in D.95-12-051 (for PG&E) and in D.95-04-076 (for SDG&E).

The sale of emissions credits results in a gain from a sale of utility property, rather than from utility overcollection or imprudent conduct. We agree with PG&E's assessment that sales of these assets are similar to sales of utility property, in which the gain on sale accrues to ratepayers.¹²

Consistent with this policy, any net proceeds SCE may realize from selling Mohave Allowances would be credited to the ERRA balancing account, thus offsetting the incremental costs to acquire power for SCE customers to replace the power produced at Mohave. JTC's request would completely overturn this longstanding ratemaking policy, having these Allowances inure instead to the benefit of some unidentified subset of Hopi and Navajo tribal members rather than SCE's customers. It is important to reiterate here that JTC does not act on behalf or for the benefit of the Hopi Tribe or Navajo Nation.

The JTC request would radically alter a decade-old Commission ratemaking policy at the expense of SCE's customers. JTC itself estimates the potential value of the Allowances at \$65 million annually. While JTC's value estimate appears to be faulty and somewhat exaggerated,

¹² D.97-11-074 [*mimeo*], pp. __; 1997 Cal. PUC LEXIS 1093; 76 CPUC2d 627. This rate treatment of SO₂ Allowances and other emission credits is consistent with and reflects the fact that credits are made surplus and available for sale typically through customer-funded action -- installing pollution controls or switching to less-emitting energy sources. The inaccuracy of JTC's "windfall" allegation is further illustrated by the fact that installing pollution controls (SO₂ scrubbers) required by the Consent Decree would also render surplus most of Mohave's Allowance allocation, giving SCE and its customers no Allowance-related motive to prefer shutdown over pollution controls.

the cost impact of such a transfer on SCE's customers would nonetheless be very substantial by any reasonable estimate.¹³

Apart from the baseless allegations of SCE wrongdoing that are discussed and dismissed below, JTC has not cited, and SCE is not aware of, any legal basis for the Commission to transfer customer assets to any other entity. On the contrary, such a transfer would appear to be totally without precedent and beyond the Commission's legal authority.¹⁴

The Commission's existing policy on the ratemaking treatment of the SO₂ Allowances is a sound one and should be retained. JTC's proposal to transfer those credits from SCE's customers to some subset of the Hopi and Navajo, or to anyone else, should be rejected.

B. The Motion's Claim of Improper SCE Action or Undue SCE Benefit From Cessation of Mohave Operation Is an Attempt to Relitigate Issues Already Adjudicated at the Commission and Decided in SCE's Favor

A basic allegation underlying JTC's Motion – that SCE has somehow “driven”¹⁵ the closure of Mohave or brought it about through a “unilateral” SCE “decision,”¹⁶ and that SCE should be deprived of benefit from that – has already been fully adjudicated. The issues underlying this claim have all been the subject of lengthy litigation before this very Commission, in the two-year-plus Mohave proceeding, A.02-05-046. It is clear beyond dispute that the Commission thoroughly considered, and expressly rejected, the notion that SCE should go forward with installation of the pollution controls required for Mohave operation beyond 2005

¹³ Paradoxically, JTC claims its proposal would have “limited impact, if any, on SCE's ratepayers,” but would avoid what would otherwise be a “windfall” to SCE. Motion, p. 10. Whatever the ultimate amount of the proceeds, JTC does not explain how that transfer could have only a “limited” impact on SCE's customers while at the same time avoiding a “windfall” to SCE.

¹⁴ See *Consumers Lobby Against Monopolies v. Cal. Publ. Util. Comm.*, 25 Cal.3rd 891 (1979) (holding that the Commission lacked authority [prior to enactment of intervenor compensation statute] to award attorneys fees for participation in Commission proceeding). Recognizing that the Commission's authority “has been liberally construed,” the Court also stated that “[a]dditional powers and jurisdiction that the commission exercises, however, ‘must be cognate and germane to the regulation of public utilities...’ [citations omitted].” *Id.* at 905-06. See also Cal. Publ. Code § 740.4(b) (allowing utility rate recovery of reasonable expenses for “economic development programs...to the extent of ratepayer benefit... [emphasis added].”)

¹⁵ Motion, p. 9.

¹⁶ *Id.*, pp. 1, 9-10, 22.

under the Consent Decree, prior to further resolution of the coal and water supply issues and a subsequent Commission decision on the issue.¹⁷ Importantly, the Commission also clearly rejected the suggestion that the failure to achieve resolution of Mohave’s coal and water supply issues has been caused by SCE delay or obstruction.¹⁸ JTC clearly should be foreclosed from relitigating these same issues again, particularly when some of its member organizations were active parties in the Mohave proceeding.

C. Suspension of Mohave Operation Has Not Been Driven By SCE or Otherwise Caused by Any Unilateral SCE Decision

The Motion’s allegation that the suspension of Mohave operation has been brought about by some sort of “unilateral” and discretionary “decision” by SCE to shut down rather than install pollution controls, besides being a rehash of arguments already rejected by the Commission in the Mohave proceeding, is also patently false.¹⁹ First, contrary to the completely unsupported and unexplained assertions in the Motion, Mohave’s suspension has been implemented by SCE as plant operating agent with the full knowledge and concurrence of all three of the other Mohave co-owners, and the action has not been “driven” by SCE.²⁰ Like SCE, none of the co-owners could reasonably and prudently commit to the very large investments required for the pollution controls and other upgrades needed for extended Mohave operations while the plant’s post-2005 water and coal supply remain in question.

Second, the Commission itself reached the same conclusion in its Mohave decision, D.04-12-016, as summarized in its Findings of Fact:

16. Until there is a resolution of the water and coal supply and cost issues, the Commission does not have enough data to determine if the future functioning of Mohave as a coal-

¹⁷ See especially D.04-12-016, Findings of Fact 16-17, Conclusions of Law 3-4; see also Findings of Fact 5-15, 18, and Ordering Paragraph 9.

¹⁸ See especially D.04-12-016, pp. 5-7 and footnote 7.

¹⁹ Motion, pp. 1, 9-10, 22.

²⁰ *Id.*, p. 9. Mohave’s other three co-owners are Salt River Project Agricultural Improvement and Power District (20% co-owner), Nevada Power Company (14%), and Los Angeles Department of Water and Power (10%).

burning facility is in the public interest and that the necessary \$1.1 billion investment will inure to the benefit of the Edison ratepayers.

17. The only determination this Commission can make at this point in time is to authorize Edison to continue funding the C-Aquifer studies, to fund a study of alternatives to Mohave, and to continue to work towards resolution of the water and coal issues so as to keep the “Mohave-open” option viable.²¹

As the Commission went on to conclude in its Conclusions of Law:

3. It is reasonable to defer the Commission’s final decision on the future of Mohave as a coal-fired plant until the Bureau of Reclamation completes the hydro-geological and environmental studies to determine if the C-Aquifer is a viable alternative source of water to slurry the coal from the mine to Mohave.²²

The lengthy search by SCE and other entities for an alternative slurry water source -- now focused on this possibility of using the C-Aquifer, via a completely new well-field and water pipeline -- has already been thoroughly reviewed by the Commission and well-summarized in the Commission’s Mohave decision. Because the question of slurry water availability beyond 2005 lies at the center of the fuel supply issues that have confronted Mohave, the Commission’s summary of this multi-year water search is worth repeating here:

Since Mohave’s inception in 1971, water from the N-Aquifer has been used to slurry the coal the 273 miles from the mine to the Mohave facility. Approximately, 4,400 acre-feet per year of water is extracted from the N-Aquifer for this purpose. The Hopi Tribe opposes the further pumping of the N-Aquifer after 2005, and has taken this position since before Edison filed this application. This opposition is based, in part, on the value the Hopi, and others, place on the special religious and cultural importance of this water source and their concerns about the impact the withdrawal of the water for the slurry purposes has on certain surface springs and washes in the Black Mesa area.

Beginning in 2001, Edison and the other Mohave co-owners restarted past efforts to develop an alternative water source

²¹ D.04-12-016, Findings of Fact 16-17.

²² *Id.*, Conclusion of Law 3.

to the N-Aquifer for the mine and the coal slurry pipeline. Because of the arid nature of the geography close to the coal mine, as well as the sensitive nature of the water associated with the Grand Canyon, the parties have had a difficult time identifying, much less obtaining, rights to another viable water supply. Some alternatives that were studied included a “pump-back” option involving obtaining Colorado River water from near the Mohave plant site; participation in a multi-purpose water pipeline from Lake Powell; a “mine-only” water pipeline from Lake Powell, possibly combined with relocating the slurry preparation plant further north; relocating the current N-Aquifer well-field to an area northwest of Peabody’s leasehold; obtaining effluent water from Flagstaff or other communities; and obtaining river water from the Marble Canyon area in the lower basin of the Colorado River. After exhausting those possibilities after years of analysis and negotiation, the parties determined that the only potentially viable alternative is the C-Aquifer. This determination was not reached until almost a year after Edison filed this application.²³

Notably, JTC members Black Mesa Trust and To’ Nizhoni Ani were among the parties who argued strenuously in the Mohave proceeding that SCE should not be authorized to go ahead with the pollution controls and other necessary upgrades before further resolution of Mohave’s water and coal issues, if ever.²⁴

In its decision, the Commission authorized only certain identified “critical path” spending as necessary to preserve the option of future Mohave operations. It clearly and expressly did *not* authorize SCE to proceed with installing the pollution controls or other upgrades required for extended post-2005 operation, pending resolution of the water and coal supply issues and a further Commission decision on the pollution controls and upgrades.²⁵ Far from being a unilateral SCE decision, the Mohave suspension is completely in accordance with D.04-12-016.

²³ D.04-12-046, pp. 5-6 (footnotes omitted).

²⁴ These parties’ opposition to further Mohave operations is summarized briefly at D.04-12-046, pp. 40-42.

²⁵ See especially D.04-12-016, Ordering Paragraphs 1, 9.

D. JTC's Claims of Mohave Air Violations are Foreclosed by Res Judicata and Lack of Subject Matter Jurisdiction

JTC's allegations regarding Mohave air quality violations are not only meritless, as explained in detail in Section E below, but are also not properly before this Commission for at least two reasons. First, the Motion presents no allegations of emissions exceedances or other air quality violations that have not already been addressed in and fully resolved by the Consent Decree. The Consent Decree is a final and legally binding judgment that has not only been signed by the parties to the relevant litigation, but also entered by the court of appropriate jurisdiction. Both by its express terms²⁶ and under general legal principles,²⁷ the Consent Decree is a full and final adjudication of the matters litigated in the case, carrying with it the full effect of a court judgment. An attempt to relitigate the air emission claims settled by the Consent Decree is clearly barred by the doctrine of *res judicata*.²⁸ At least as to JTC members Sierra Club and Grand Canyon Trust – both of which were parties to the Consent Decree litigation and are signatories to the Consent Decree itself – the Motion is barred as well as by those two parties' contractual obligations under the Consent Decree.²⁹

Second, even if the Motion does mean to be alleging some new air quality violation not already adjudicated by the Consent Decree, the Commission clearly is not the proper forum in which to hear such allegations. The federal court would be the proper and exclusive venue for any citizen suit alleging violation of either the federal Clean Air Act or Nevada's state implementation plan developed pursuant to the Clean Air Act.³⁰

²⁶ Consent Decree, Section 15, paragraph 37.

²⁷ *See, Sec. & Exch. Comm'n v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984); *United States v. City of Miami*, 664 F.2d 435, 439 (5th Cir. 1981).

²⁸ *Id.*

²⁹ SCE files this response to JTC's Motion without waiver of any rights or remedies that SCE may have with regard to violation of the Consent Decree by the Sierra Club, Grand Canyon Trust, or JTC.

³⁰ *See* 42 U.S.C. §7604 (a); (c) (1).

E. JTC’s Allegations of Mohave Air Emission Violations are Wrong and the Motion Is Incorrect and Misleading on Several Air Quality Issues

As already discussed above in Section D, the Commission clearly is not the proper forum for litigation regarding Mohave’s compliance with its air emission limits. However, because JTC’s Motion makes false allegations of air emission violations by Mohave, and makes incorrect or seriously misleading statements on several related points, SCE responds briefly here to the most important and egregious of the Motion’s misstatements.

1. No air quality violations were ever established

The Motion first claims that the plaintiffs in the Mohave Consent Decree litigation “demonstrated” that the plant violated its pollution limits over 400,000 times between 1993 and 1998.³¹ In fact, no violations at all were ever “demonstrated” or established in any way. Not only have SCE and the other Mohave co-owners denied all of the allegations, but the state of Nevada as the primary regulator of Mohave’s air quality compliance rejected these allegations made by the plaintiffs in the lawsuit. The fact that the Mohave co-owners *and* the plaintiffs mutually agreed to settle all such claims through the Consent Decree is not an admission of any violations. Rather, by mutual agreement the Consent Decree established a schedule by which Mohave would either install additional pollution controls or cease coal-fired operation. SCE and the Mohave co-owners have complied with this schedule. There is no basis whatsoever for any claim that Mohave owes any fines for any violation of air quality requirements, let alone the billions of dollars in fines alleged by the JTC Motion.

³¹ Motion, p. 16.

2. Mohave has continued to operate in compliance with the Consent Decree and applicable laws

The Motion goes on to allege that “during the last six years since the Consent Decree was signed, the power plant has continued operations in violation of the law....”

³² The statement seems to imply either (i) that following the entry of the Consent Decree in December 1999, the plant was allowed to operate in violation of federal or state law, and/or (ii) that the plant has failed to comply with the Consent Decree’s requirements. Either way, the allegation is false. First, through the Consent Decree, the parties agreed to resolve their dispute without the court making any determination as to whether Mohave's operations constituted a violation of any applicable air quality requirement. After the Consent Decree was entered, the U.S. Environmental Protection Agency (EPA) incorporated the terms of the decree into its visibility program and the State of Nevada incorporated the Consent Decree's terms into Mohave’s air quality permit. Thus, for practical and legal purposes, the Consent Decree's terms have since constituted the relevant requirements and have governed the operation of the plant. In addition, Mohave has fully complied with the Consent Decree since it was entered in 1999. JTC’s claim that the plant has somehow violated the law during that period is completely false.

The Motion also suggests that the Mohave co-owners have somehow violated the Consent Decree by declining to spend more money to date on the pollution controls pending further resolution of Mohave’s water and coal supply issue.³³ Such an implication is completely false. The suspension of coal-fired operation is, clearly and explicitly, an option available to Mohave under the Consent Decree and does not constitute a violation or trigger any penalties.³⁴

³² *Id.*, p. 17.

³³ *Id.* p. 9.

³⁴ Consent Decree, §III Paragraph 4; §VI Paragraph 14.

3. Mohave has operated with appropriate controls

The Motion also claims that Mohave has been operating “without significant pollution controls” since it opened in 1971.³⁵ In fact, Mohave is equipped with an electrostatic precipitator that removes 98% of particulate matter (PM) from its emissions. The Motion also fails to mention that Mohave’s use of relatively low-sulphur coal makes its SO₂ emission rate significantly *lower* than the national average for coal-fired power plants, or that Mohave’s NO_x emissions are also *lower* than the national average.³⁶

4. There is no evidence that Mohave has threatened the health of area residents

The Motion implies that Mohave air emissions have “threatened the health of people who lived near the plant.”³⁷ This conclusion is absolutely unsupported by the data. Air quality data for the Laughlin/Bullhead City area shows that Mohave is a very minor contributor to all pollutant levels in the area except for SO₂, and with respect to SO₂, the local SO₂ levels are 85% or more *below* the National Ambient Air Quality Standards. Of note, the Motion does not even attempt to draw any link between Mohave operation and potential health impacts on the Hopi and Navajo communities, which are located approximately 250 miles or more from the plant.

F. JTC’s Claims of Unfair Compensation under the Coal Mining Leases are Similarly Foreclosed by Collateral Estoppel, Lack of Subject Matter Jurisdiction, and Lack of Standing

As another basis for its request for the Allowance proceeds, JTC argues that the Tribes -- or some indefinite subset of each Tribe -- are entitled to “restitution” based on alleged “unjust

³⁵ Motion, p. 16.

³⁶ Calculated on the basis of emissions per megawatt-hour, using SO₂ and NO_x emissions data from EPA’s Acid Rain Program 2004 Progress Report, available at <http://www.epa.gov/airmarkets/cmprpt/arp04/index.html>, and EIA Form 767.

³⁷ Motion, p. 16.

coal leases” between the Tribes and Peabody Western Coal Company (Peabody) (under which Mohave obtains its coal) and purported historic wrongdoing by Peabody and SCE.³⁸ JTC’s assertions in this area are nothing more than an attempted replay of unfounded allegations already asserted by the Navajo Nation and the Hopi Tribe against the United States, Peabody and SCE in two different lawsuits before the United States Court of Federal Claims and the United States District Court for the District of Columbia. The defendants in those lawsuits deny the claims and are vigorously defending against those claims, except insofar as the litigation has already been dismissed or has been voluntarily stayed by agreement of the parties. JTC’s attempt to obtain Allowance proceeds on behalf of the Hopi and the Navajo Tribes goes well beyond the proper scope of the Commission’s jurisdiction, and could interfere with the resolution of those claims in the federal courts or through settlement by the parties.

Moreover, JTC’s Motion suffers from one especially glaring omission: it neglects to mention that the federal courts, including the United States Supreme Court, have already resolved and rejected the allegations of wrongdoing that JTC’s Motion relies upon. In *United States v. Navajo Nation*, 537 U.S. 488 (2003), the Navajo Nation, like JTC here, alleged that improper conduct by Peabody (with alleged SCE participation) and the U.S. Department of the Interior led to a coal royalty rate purportedly providing less than fair market value for the Navajo’s coal.

In rejecting the Navajo Nation’s claims, the Supreme Court held not only that the United States did nothing improper in the conduct with Peabody that was at issue, and breached no trust or other fiduciary duties to the Navajo Nation, but also that the coal royalty rate in question (12.5% of Peabody’s gross realization) was reasonable and consistent with the customary royalty rate for coal leases on federal and Native American lands.³⁹ Moreover – and likewise totally unmentioned by JTC -- on remand from the Supreme Court, the Court of Federal Claims has

³⁸ *Id.*, pp. 8-9, 14-15, 18-20.

³⁹ *See Navajo Nation*, 537 U.S. 488.

now confirmed its rejection of the Navajo Nation’s claims and dismissed the Navajo’s complaint against the United States.⁴⁰

SCE believes that the Navajo Nation’s and Hopi Tribe’s pending lawsuits against SCE and Peabody based on the leases are foreclosed by the courts’ clear rejection of the same allegations asserted against the United States. JTC should be precluded from relitigating those claims here under the doctrine of collateral estoppel. Even assuming, however, that the Tribes’ claims survive the Supreme Court’s decision, the federal courts and not the Commission are the proper fora to adjudicate any claims for restitution by the Tribes based on coal mining leases.

Even setting aside collateral estoppel and lack of jurisdiction, JTC does not claim to be authorized to represent either of the Tribes, or any of the Hopi villages or Navajo chapters that JTC alludes to, and JTC is patently without standing to pursue claims on their behalf.⁴¹ Regarding the individual tribal villages and chapters, further, JTC does not even attempt to explain why or under what authority the Commission (or SCE in the first instance) could sidestep the coal leases between Peabody and the respective central government of each Tribe to provide “restitution” under the coal leases to anyone other than a lease party. The villages and chapters lack any independent claim for restitution under the coal leases and, in any event, are collaterally estopped from pursuing such claims based on the judgment of the Supreme Court.

G. The Tribes’ Compensation under the Coal Leases Has Been Fair and Reasonable

Not only is JTC improperly attempting to replay federal court litigation before the Commission, as discussed above, but JTC’s claim of a “long history of economic exploitation of the Hopi and Navajo through unjust coal leases” is meritless.⁴² When negotiated in the 1960s, the Peabody coal leases with the Tribes provided more than fair compensation to the Tribes. At the time, federal law required only “a royalty of not less than 10 cents per ton” for coal leases on

⁴⁰ See Navajo Nation v. United States, 68 Fed. Cl. 805 (2005).

⁴¹ See e.g., Blumhorst v. Jewish Family Services of Los Angeles, 126 Cal. App. 4th 993, 1001 (2005); O’Flaherty v. Belgum, 115 Cal. App. 4th 1044, 1094 (2004).

⁴² Motion, p. 20.

Indian lands.⁴³ Measured against the regulatory 10-cents-per-ton royalty minimum for Indian lands and the royalties then paid for coal mined on Federal lands, the royalty rates in the original leases were more than fair and reasonable.

Despite contending that there is a “long history” of paying the Tribes purportedly “unjust compensation” for their coal, JTC then fails to discuss the history of the leases, including the substantial increases in compensation negotiated by the Tribes through coal lease amendments in 1987 and 1998-99. Through these amendments, Peabody substantially increased compensation to the Tribes for their coal resources by, among other things, increasing the coal royalty rate, increasing water royalties, establishing and funding Hopi and Navajo scholarships, and making bonus payments. For example, although federal law still required a royalty rate of only 10 cents per ton in 1987,⁴⁴ the 1987 coal lease amendments substantially increased the royalty rates to 12.5% of gross realization. The Supreme Court has held that this 12.5% royalty rate “well exceeded the regulatory floor,” “was the rate the United States itself customarily received from leases to mine coal on federal lands” and was “the customary rate for coal leases on Indian lands.”⁴⁵

JTC also contends that “the Navajo and Hopi tribes waived their rights to levy severance and possessory taxes in the lease.”⁴⁶ JTC’s claim here is fabrication. The Navajo Nation has implemented both possessory and severance taxes on Peabody’s coal mining operations related to Mohave, and Peabody has paid millions of dollars in taxes to the Navajo Nation – the cost of which has been largely passed through to Mohave and shouldered by SCE customers. Although JTC correctly indicates that the Hopi Tribe has never directly received tax revenues from Peabody’s mining operations, this fact simply reflects decisions made by the Hopi Tribal Council, which has repeatedly declined to enact any tax ordinances on the reservation.

⁴³ See 25 C.F.R. § 171.15(c) (1958); 22 Fed. Reg. 10588 (Dec. 24, 1957).

⁴⁴ 25 C.F.R. § 211.15(c) (1987).

⁴⁵ See Navajo Nation, 537 U.S. at 510-11.

⁴⁶ Motion, p. 18.

IV.

SCE INTENDS THAT MOHAVE RETURN TO SERVICE

The Motion is correct in indicating that Mohave suspended operations on December 31, 2005, in accordance with the Consent Decree, because the pollution controls required under the Consent Decree have not yet been installed. The Motion pointedly fails to mention, however, that SCE and the other Mohave co-owners have not yet been able to reasonably commit to the large investments required for the pollution controls, because of critical issues impacting Mohave's post-2005 supply of coal and, especially, slurry water. Most if not all of JTC's member organizations know full well of this water availability issue, and indeed two of them, Black Mesa Trust and To' Nizhoni Ani, were heavily involved in the Commission's own Mohave proceeding in which this issue received tremendous attention.

JTC's Motion also fails to mention that SCE and other relevant entities -- the other Mohave co-owners, the Hopi Tribe and the Navajo Nation, Peabody and others -- have been engaged in prolonged and intensive efforts to resolve the Mohave water and coal issues so as to allow the Mohave pollution controls to go forward. The Motion further fails to note that intensive efforts are still continuing among them now. SCE has summarized these ongoing efforts every month in the Mohave monthly status reports that SCE serves on the Commission Energy Division and on the service list for the Mohave proceeding, A.02-05-046, which is now a subdocket within R.04-04-003.⁴⁷ The implications by JTC that Mohave's suspension is necessarily permanent, and that it has been intended and driven by SCE, are false.

⁴⁷ See D. 04-12-016, Ordering Paragraph 4.

V.

JTC'S MOTION IS HIGHLY IMPROPER AND IMMEDIATE COMMISSION DENIAL OF THE MOTION WITHOUT FURTHER PROCEEDINGS IS APPROPRIATE

The Commission should deny JTC's Motion summarily, without embarking on any of the six-month procedure proposed by JTC.⁴⁸ The Motion is so replete with mischaracterization and omission of important facts that are or should be known to JTC that the bringing of the Motion, especially at this point, may be reasonably viewed as an attempt to misuse Commission process. Such misuse should not be countenanced by the Commission. In any case, the Motion is too procedurally improper and too substantively baseless to merit the time and attention on the part of the Commission, SCE or other potential parties.

If the Commission should nevertheless conclude that a prehearing conference on the subject is warranted, SCE respectfully urges that it be held no later than February 8, 2006.

VI.

THE COMMISSION ALSO SHOULD DENY THE PETITION TO INTERVENE

JTC's Petition to Intervene offers no reasons for JTC to intervene in SCE's GRC other than the groundless reasons that are recited in the Motion and dismissed above, and it likewise should be denied by the Commission. Like JTC's Motion, the Petition to Intervene in this 2006 GRC is, above all, untimely -- by a matter of months, at least -- and it rests on a supposition that JTC is representing entities for which it actually has no authority to speak. Based as it is on completely erroneous factual assumptions and allegations, the Petition to Intervene also fails to state any valid interest of JTC in the GRC. For all these reasons, summary denial of the Petition to Intervene is appropriate.

⁴⁸ Motion, p. 21.

VII.

CONCLUSION

Even if it were procedurally appropriate for this Motion to be brought at this time, and brought before the Commission, and brought by JTC, the Motion is completely without substantive merit. The Motion's factual errors begin at the most fundamental level, with its apparent assumption that the proceeds from SCE Allowances would flow to SCE's shareholders. In fact it is already established that for ratemaking purposes SCE's Allowances are effectively treated as customer assets, not shareholder assets, and accordingly the net proceeds from SCE Allowance sales flow as a credit to SCE's customers. Despite JTC's baseless assertion to the contrary, JTC's plan for diverting these proceeds would very directly and seriously harm SCE customers.

Moreover, there is simply no valid grounds for the Commission to divert any Allowance proceeds from SCE's customers (or shareholders, if that were even relevant) to the communities that JTC purports to be speaking for, or to anyone else. The Motion's allegations of Mohave air emission violations are without any basis, as is the allegation of unfair compensation for coal and water. And as JTC is well aware, the Motion's allegation that the suspension of Mohave operation has been brought about by some sort of "unilateral" and discretionary "decision" by SCE to shut down rather than install pollution controls is also false.⁴⁹ As JTC member organizations are intimately aware, the suspension of Mohave operations has been necessitated by surrounding circumstances, above all by the unresolved issues impacting Mohave's post-2005 supply of slurry water and coal. As also known to JTC members, SCE actions with respect to the suspension of Mohave operation have been fully consistent with and in accordance with this Commission's decision on Mohave, D.04-12-016.

⁴⁹ *Id.*, pp. 1, 10, 22.

The Commission should deny JTC's Motion summarily, without embarking on the six-month procedure proposed by JTC.⁵⁰ The Motion is not only highly improper procedurally, and substantively baseless, but it also rests on mischaracterization and omission of important facts that are or should be known to

⁵⁰ *Id.*, p. 21.

JTC, and it should not be allowed to divert the time and attention of the Commission, SCE, or other parties.

Respectfully submitted,

MEGAN SCOTT-KAKURES
JAMES M. LEHRER
FRANK A. MCNULTY
SUMNER J. KOCH

By: Sumner J. Koch

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-3253
Facsimile: (626) 302-2050
E-mail: scegrc@sce.com

January 27, 2006

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE MOTION AND THE PETITION TO INTERVENE OF JUST TRANSITION COALITION on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

- Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.
- Placing the copies in sealed envelopes and causing such envelopes to be delivered by hand or by overnight courier to the offices of the Commission or other addressee(s).
- Placing copies in properly addressed sealed envelopes and depositing such copies in the United States mail with first-class postage prepaid to all parties.
- Directing Prographics to place the copies in properly addressed sealed envelopes and to deposit such envelopes in the United States mail with first-class postage prepaid to all parties.

Executed this **27th day of January, 2006**, at Rosemead, California.

Myrna Martinez
Project Analyst
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770