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10 Attorneys for Intervenor-Defendants Edison Electric Institute, *et al.*

11  
12 IN THE UNITED STATES DISTRICT COURT  
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14  
15 THE WILDERNESS SOCIETY, *et al.*, )  
Plaintiffs, )

16 v. )  
17 )

18 U.S. DEPARTMENT OF THE INTERIOR, )  
*et al.*, )  
Defendants, )

19 and )  
20 )

21 EDISON ELECTRIC INSTITUTE, )  
AMERICAN PUBLIC POWER )  
ASSOCIATION, NATIONAL RURAL )  
22 ELECTRIC COOPERATIVE )  
ASSOCIATION, AMERICAN GAS )  
23 ASSOCIATION, CHAMBER OF )  
COMMERCE OF THE UNITED STATES )  
24 OF AMERICA, and NATIONAL )  
ASSOCIATION OF MANUFACTURERS, )

25 Intervenor-Defendants. )  
26 )

No. 3:09-cv-03048-JW

INTERVENORS-DEFENDANTS’  
STATUS CONFERENCE  
STATEMENT PURSUANT TO THE  
COURT’S ORDER OF MAY 2, 2011  
[Dkt. 52], INCLUDING RESPONSE  
TO THE OTHER PARTIES’ JOINT  
STATUS REPORT [Dkt. 53]

The Honorable James Ware  
U.S. District Chief Judge

1 Intervenor-Defendants Edison Electric Institute, American Public Power Association,  
2 National Rural Electric Cooperative Association, American Gas Association, Chamber of Commerce  
3 of the United States of America, and National Association of Manufacturers (hereinafter  
4 “Intervenors”) file this Status Conference Statement pursuant to the Court’s Order of May 2, 2011  
5 (Dkt. 52) and in response to the Status Report filed today by Plaintiffs and Federal Defendants (Dkt.  
6 53).

7 The Court’s May 2 Order directed the parties to file a Joint Status Conference Statement that  
8 “provides the Court with an update on settlement discussions including whether the parties have  
9 reached an agreement.” Order at 2. The Order also stated that if an agreement had not been reached,  
10 the parties “shall include in their Statement a good faith proposed schedule as to how this case  
11 should proceed.” *Id.* And, of critical importance to Intervenors, the Court directed the principal  
12 parties to “make every effort to include Intervenor-Defendants in further settlement discussions to  
13 the extent that those discussions implicate the interests of Intervenor-Defendants.” *Id.* at 1 n.2.

14 The undersigned counsel conferred with counsel for Plaintiffs and Federal Defendants on  
15 June 9, 2011, concerning the contents of the Court-ordered Joint Statement. However, as happened  
16 with the those parties’ past two joint filings [Dkts. 48, 50], agreement could not be reached, so  
17 Intervenors file this separate statement to address the points identified in the May 2 Order.

18 **Update on Settlement Discussions.** As in our two other filings since the Court granted our  
19 unopposed motion to intervene (Dkts. 49, 51), Intervenors still cannot express a substantive view on  
20 the state of settlement discussions, inasmuch as the other parties have not let us participate in them.  
21 Thus, we have no way of knowing whether the Plaintiffs and Federal Defendants have “achieved  
22 agreement in principle on the substantive points of a proposed settlement,” whether there are only  
23 two remaining issues, or whether those issues are largely “procedural or ancillary to the substance of  
24 the agreement,” as the other parties now report. *See* Joint Status Report at 2. Nor, as strangers to the  
25 settlement discussions, can we possibly join in those parties’ representation that the remaining  
26 “narrow ancillary issues do not implicate the interests identified by Intervenors in their motion to  
27 intervene.” *Id.* at 2. n.1.

1           **Including Intervenors in Settlement Discussions.** Intervenors have not been included in  
2 settlement discussions yet, despite the Court’s May 2 admonition that the Plaintiffs and Federal  
3 Defendants “make *every effort* to include Intervenor-Defendants in further settlement discussions to  
4 the extent that those discussions implicate the interests of Intervenor-Defendants.” Order at 1 n.2  
5 (emphasis added). Those parties justify continuing to exclude Intervenors because, according to  
6 them, the “narrow ancillary issues” that remain unresolved “do not implicate” Intervenors’ interests.  
7 Joint Status Report at 2.

8           But whatever interests those “ancillary” issues do or do not implicate, the Court’s May 2  
9 Order was not so limited when it spoke to Intervenors’ participation in settlement discussions.  
10 Rather, the Court directed the Plaintiffs and Federal Defendants to make “every effort” to include  
11 Intervenors in any “further settlement discussions” that implicated Intervenors’ interests – not to  
12 conduct further discussions and only then, after achieving agreement on substantive issues, to assess  
13 whether the remaining “ancillary” issues warranted Intervenors’ involvement. The Court issued the  
14 May 2 Order in response to the April 28, 2011 request of the Plaintiffs and Federal Defendants to  
15 extend the stay for an additional *150 days* – far more than would have been needed if only two  
16 “narrow ancillary issues” had remained. *See* Dkt. 50 at 1. And Intervenors agreed to a limited  
17 extension of the stay at that time not to give the Plaintiffs and Federal Defendants license to continue  
18 their closed-door negotiating, but to let Intervenors participate and thus advance the goal of reaching  
19 a truly negotiated settlement that would be acceptable to all the litigants.

20           Further, the Status Report filed today is noncommittal about when Intervenors will ever get  
21 to see the proposed settlement. *See* Joint Status Report at 2. Will it be before the proposed  
22 settlement is presented to the Court, so that Intervenors can have a chance to review it and try to  
23 resolve any differences with the other parties? Or will the proposed settlement be a done deal that  
24 Intervenors will see for the first time when the settling parties file their motion asking the Court to  
25 approve it and dismiss the case? The Joint Status Report does not say.

26           This settlement has been nearly 21 months in the making. *See* Dkt. 23 (Sept. 22, 2009) (first  
27 joint motion to stay proceedings). Intervenors are parties to the case. Giving us a reasonable time to  
28

1 review and provide input on the proposed settlement before it is presented to the Court would serve  
2 the interests of fairness and judicial economy, as the Federal Rules of Civil Procedure contemplate.  
3 *See* Fed. R. Civ. P. 1.

4 **Schedule for Further Proceedings.** Intervenors concur in the proposed schedule for  
5 briefing on cross-motions for summary judgment in the Joint Status Report (at 3), if this case were  
6 ever to reach that stage. But further proceedings might involve instead a motion by Plaintiffs and  
7 Federal Defendants to approve a proposed settlement, to which Intervenors might respond and file  
8 objections. To address that scenario and our desire to review a proposed settlement before it is  
9 presented to the Court, Intervenors suggest that we be given 90 days to review the proposed  
10 settlement and try to resolve any differences with the other parties before it is presented to the Court  
11 for approval. At that point, the parties could confer and propose, if necessary, a schedule for  
12 briefing on the settling parties' motion to approve the settlement. That schedule would depend  
13 largely on the extent of our objections; but, given the broad scope of the agency actions challenged  
14 in this lawsuit, Intervenors may well need more than the 14 days and 25 pages allowed by Civil  
15 L.R. 7-3(a) to respond to any motion to approve a settlement and dismiss the case.

Respectfully submitted,

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/s/ J. Michael Klise

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