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CLERK US DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_ *JR* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

FRANK STANNARD, on behalf of  
himself and all others similarly situated,  
  
Plaintiff,  
  
v.  
  
SOUTHERN CALIFORNIA EDISON  
COMPANY,  
  
Defendant.

CASE NO: 07-CV-0589 W (NLS)  
  
**ORDER DENYING IN-PART  
AND GRANTING IN-PART  
PLAINTIFF'S MOTION FOR  
CLASS CERTIFICATION (DOC.  
NO. 18)**

Pending before the Court is Plaintiff's Motion for Class Certification. The matter is decided on the papers pursuant to Civil Local Rule 7.1(d.1). For the reasons set forth below, the Court **DENIES** the request for class certification under Federal Rule of Civil Procedure 23, but **GRANTS** the request for conditional certification under the Fair Labor Standards Act ("FLSA").

**I. BACKGROUND**

Plaintiff Frank Stannard began his employment as a Technical Specialist for Defendant Southern California Edison Company ("Edison") in approximately June 1980. In 1996, Edison created technical specialist ("TSP") categories, and divided

1 them into four levels. TSP-1s and TSP-2s receive overtime pay. TSP-3s and TSP-4s  
2 are classified as exempt employees and do not receive overtime pay.

3 In 2005, Stannard was elevated from a TSP-2 to a TSP-3. As a TSP-3,  
4 Stannard's compensation consisted of a base salary plus "supplement time", which is  
5 "straight pay for time over 40 hours. . . ." (*Mot.* at 3-4.) Accordingly, although  
6 Stannard consistently worked in excess of eight hours per day and 40 hours per week,  
7 he did not receive overtime pay.

8 In this lawsuit, Stannard challenges Edison's classification of TSP-3s as exempt.  
9 Stannard seeks an order certifying his first cause of action for Failure to Pay Overtime  
10 Wages Pursuant to the FLSA as a Rule 23<sup>1</sup> class or conditional certification under the  
11 FLSA. The proposed group of plaintiffs are:

12 all current and former employees of defendant Southern California  
13 Edison Company who worked at the San Onofre Nuclear Generating  
14 Station (SONGS) and were employed as [TSP-3s] from September 28,  
2003 to the present.

15 (*Not. of Mot.*, p.1.)  
16

17 **II. PLAINTIFF'S RULE 23 CLASS CERTIFICATION MOTION**

18 In his moving papers, Stannard requests class certification under Rule 23. But as  
19 Edison correctly points out, FLSA claims may only be pursued as opt-in collective  
20 actions: "No employee shall be a party plaintiff to any such action unless he gives his  
21 consent in writing to become such a party and such consent is filed in the court in  
22 which such action is brought." 29 U.S.C. § 216(b). Because Stannard only seeks  
23 certification with respect to his FLSA claim, class certification under Rule 23 is  
24 unavailable.

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<sup>1</sup>All reference to "Rule 23" means Federal Rule of Civil Procedure 23.

1 **III. PLAINTIFF'S FLSA CONDITIONAL CERTIFICATION MOTION.**

2 Under the FLSA, an employee may sue his or her employer for alleged statutory  
3 violations on the employee's own behalf and on behalf of "other employees similarly  
4 situated." 29 U.S.C. § 216(b). Interested similarly situated employees must "opt in" to  
5 the lawsuit by filing a written "consent . . . in the court in which the action is brought."  
6 Id. Thus, unlike in a class action under Federal Rule of Civil Procedure 23, only those  
7 individuals who expressly join the collective action are bound by the results.  
8 McElmurry v. U.S. Bank Nat'l. Assn., 495 F.3d 1136, 1139 (9th Cir. 2007).

9 Plaintiff bears the burden of certifying a collective action by demonstrating that  
10 the proposed group of employees are "similarly situated." Pfohl v. Farmers Ins.  
11 Group, 2004 WL 554834, at \*2 (C.D.Cal. March 1, 2004). Although some courts have  
12 used Rule 23's class-action requirements to evaluate the issue, the majority of courts  
13 apply a two-step approach. In the first step, the court decides, "based primarily on the  
14 pleadings and any affidavits submitted by the parties, whether the potential class should  
15 be given notice of the action." Leuthold v. Destination America, Inc. 224 F.R.D. 462,  
16 467 (N.D. Cal. 2004). A lenient standard applies at this phase and generally results in  
17 conditional certification. Gerlach v. Wells Fargo & Co., 2006 WL 824652, \*2  
18 (N.D.Cal. March 28, 2006) (citing Wynn v. National Broadcasting Co., Inc., 234  
19 F.Supp.2d 1067, 1082 (C.D.Cal. 2002)).

20 The second step generally occurs when the opposing party files a motion to  
21 decertify the class after the close of discovery. Kane v. Gage Merchandising Services,  
22 Inc., 138 F.Supp.2d 212, 214 (D. Mass. 2001). At the second stage, the court uses the  
23 complete factual record to determine whether the proposed plaintiffs are "similarly  
24 situated." If they are not, the court may decertify the class and dismiss the opt-in  
25 plaintiffs without prejudice. Id.

26 Here, the parties have primarily relied on the two-step approach for deciding  
27 conditional certification. For this reason, and because that method has been used by  
28 the majority of courts, this Court will also proceed under the two-step analysis.

1 Stannard's basic argument is that TSP-3s are similarly situated because their  
2 primary responsibility is to write procedures for Edison. (*Reply*, p.6.) Edison responds  
3 that Stannard has failed to cite any supporting evidence. (*Opp'n*, at 12.)

4 But Stannard's claim that TSP-3s are similarly situated is supported by Edison's  
5 Job Family Description, attached as Exhibit 2 to Damon Lieu's deposition transcript.<sup>2</sup>  
6 The document lumps all TSP-3s under the same description for "area of  
7 responsibility," "decision making & impact," "education, certifications, and/or  
8 licenses," and "knowledge/experience." (*See Keegan Reply Decl.*, Ex. 2, p.78.) The single  
9 description applicable to all TSP-3s supports an inference at this stage in the analysis  
10 that TSP-3s are similarly situated.

11 In addition, the declarations submitted by Edison also provide some support for  
12 Stannard's claim that TSP-3s are responsible for preparing procedures. Some of the  
13 declarations specifically acknowledge that the TSP-3s draft procedures. (*See Plumlee*  
14 *Decl.*, ¶¶9-11, 14, 19, 24; *Becker Decl.*, ¶¶7-11.) Other declarations, although not  
15 admitting that TSP-3s *write* procedures, demonstrate that TSP-3s are involved in  
16 evaluating procedures. (*See Genschaw Decl.*, ¶6; *Ashbrook Decl.*, ¶5; *Helwig Decl.*, ¶¶5-16.)

17 The Court is mindful of the fact that the declarations also support Edison's  
18 claim that many of the duties and responsibilities of TSP-3s differ, depending on which  
19 division or group the TSP-3 is assigned to. But the declarations do not clarify whether  
20 the duties that differ take up a greater percentage of the TSP-3's work. To the extent  
21 that all TSP-3s are involved in preparing procedures, but that this responsibility does  
22 not account for a significant percentage of their work, Stannard may be hard pressed to  
23 establish that the employees are similarly situated. But at this stage in the analysis, with  
24 the record currently before the Court, such a determination is premature.

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28 <sup>2</sup> Mr. Lieu was designated by Edison as its person most qualified to testify regarding the  
duties and responsibilities of Edison's TSP-3s. (*Keegan Reply Decl.*, p.1.)


1 **IV. CONCLUSION AND ORDER**

2 For the foregoing reasons, the Court **DENIES IN-PART** and **GRANTS IN-**  
3 **PART** Plaintiff's motion (Doc. No. 18), and **ORDERS** as follows:

- 4 • Stannard's request for class certification under Federal Rule of Civil  
5 Procedure 23 is denied.
- 6 • Stannard's request for FLSA conditional certification under 29 U.S.C.  
7 § 216(b) for purpose of sending notice of the action to prospective  
8 plaintiffs is granted.
- 9 • On or before **January 26, 2009**, the parties shall submit proposed forms  
10 of notice to be issued to the prospective plaintiffs. Any objections to the  
11 proposed forms shall be filed on or before **February 5, 2009**, at which  
12 time the matter will be submitted.

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14 **IT IS SO ORDERED.**<sup>3</sup>

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16 **DATE: January 15, 2009**

  
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**HON. THOMAS J. WHELAN**  
United States District Court  
Southern District of California

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28 <sup>3</sup>Because this ruling is not based on any of the testimony to which Edison and Stannard  
object, the Court need not rule on those objections.