

BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the)
Commission's Own Motion into the Rates,)
Operations, Practices, Services and Facilities)
of Southern California Edison Company)
and San Diego Gas and Electric Company)
Associated with the San Onofre Nuclear)
Generating Station Units 2 and 3)
_____)

I.12-10-013
(Filed October 25, 2012)

_____)
And Related Matters.)
_____)

A.13-01-016
A.13-03-005
A.13-03-013
A.13-03-014

**ALLIANCE FOR NUCLEAR RESPONSIBILITY'S REPLY COMMENTS
OPPOSING THE PROPOSED JOINT SETTLEMENT AGREEMENT AND
THE JOINT MOTION FOR ADOPTION OF THE SETTLEMENT AGREEMENT**

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I. INTRODUCTION.

Pursuant to Rule 12.2 of the California Public Utilities Commission (“Commission” or “CPUC”) Rules of Practice and Procedure, the Alliance for Nuclear Responsibility (“A4NR”) respectfully submits its Reply Comments on the March 27, 2014 *“SONGS OII Settlement Agreement Between Southern California Edison Company, San Diego Gas & Electric Company, the Office of Ratepayer Advocates, and the Utility Reform Network”*¹ (“Proposed Settlement”) and its response to the April 3, 2014 *“Joint Motion of Southern California Edison (U 338-E), San Diego Gas & Electric Company (U 902-E), the Utility Reform Network, the Office of Ratepayer Advocates, Friends of the Earth, and the Coalition of California Utility Employees for Adoption of Settlement Agreement”* (“Joint Motion”).

The sworn testimony provided at the May 14, 2014 evidentiary hearing spotlights the bifurcated challenge confronting the Commission: first, it must fashion a counter-proposal which cleanses the legal defects from the Proposed Settlement if there is to be a sustainable resolution of the limited issues presented in Phase 1 and Phase 2 of I.12-10-013; second, it must determine the appropriate boundaries for refocusing Phase 3 to “encompass review of the full range of post-outage costs”² as earlier promised. Edison’s acknowledged violation of federal design control regulations, triggering a chain of causation which led to the destruction of SONGS operability, leaves the proper measurement of consequential damages (but not liability) still unresolved.

¹ For brevity, these Reply Comments will use “Edison” or “SCE” to refer to Southern California Edison Company; “SDG&E” to refer to San Diego Gas & Electric Company; “ORA” to refer to the Office of Ratepayer Advocates; and “TURN” to refer to the Utility Reform Network.

² Phase 1 PD (Rev. 1), p. 9, citing OII at p. 8.

II. IN A WELCOME CHANGE, EDISON PRESENTS AN HONEST WITNESS.

In contrast to the fumbled charades offered by his company's earlier testimony,³ SCE President Ron Litzinger, the highest-ranking Edison witness yet to testify in I.12-10-013, is refreshingly candid on May 14, 2014 about the case's seminal issue:

But the NRC rules are clear that the licensee is ultimately responsible. We acknowledged that, that we were ultimately responsible and took that and then the – well, we reserved our rights to dispute other matters in the future with regards to the violation.

*All we acknowledged was that the licensee is ultimately responsible, which for most situations at the NRC will be the finding.*⁴

A4NR has little doubt that Edison's Reply Comments will attempt to downplay the significance of what the NRC has characterized as an "escalated enforcement action;"⁵ Edison's choice to not contest the violation; and perhaps even the meaning of the words "ultimately responsible." But the company will not be able to expunge the prominent role regulatory compliance plays in the Commission's decades-old standard of reasonableness:

The reasonable and prudent act is not limited to the optimum act, but includes a spectrum of possible acts consistent with the utility system need, the interest of the

³ Three weeks before the permanent closure of SONGS was announced, current Chief Nuclear Officer Thomas Palmisano was insistent that Unit 2 "has not been damaged" (Transcript, p. 970) and that "To my knowledge, we have not done a cost/benefit of a long-term repair or replacement plan...I would expect I would provide technical information to it...I'm not aware that analysis has been done but I would be, yeah." (Transcript, p. 944) In contrast, Edison International Chairman and CEO Ted Craver's prepared statement announcing the shutdown emphasized the economic analyses that had been performed and the utility's "obligation to serve our customers in a cost-effective manner ... We examined the costs of the alternatives to running SONGS ... In this case, we believe we must be able to represent to our customers; to the public; and to the regulators; that we are pursuing the least cost alternative." Mr. Craver's statement is no longer posted on the Edison web site. See A4NR Opening Phase 1 Brief, pp. 16, 23 – 25, accessible at <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M076/K995/76995810.PDF>

⁴ Mr. Ron Litzinger (SCE), Transcript, pp. 2715 – 2716.

⁵ Letter from NRC Regional Administrator Marc L. Dapas to SCE Senior Vice President and Chief Nuclear Officer Tom Palmisano, December 23, 2013, pp. 1 -- 2, accessible at <http://pbadupws.nrc.gov/docs/ML1335/ML13357A058.pdf> NRC correspondence consistently addresses Mr. Palmisano as a "Senior Vice President" while his responses identify his title as "Vice President."

ratepayers, and the requirements of governmental agencies of competent jurisdiction.⁶ (emphasis added)

Contrary to the illusion fostered by the Joint Motion, that “*the causes of the steam generator damage*”⁷ are a “*main subject of Phase 3*”⁸ whose “*very complex*”⁹ litigation can be avoided only by approving the Proposed Settlement, the NRC’s conclusion is determinative on the issue relevant to ratepayers: Edison is culpable. Or, as Mr. Litzinger admits, “*ultimately responsible.*”¹⁰

III. A MORE PRUDENT APPROACH TO THIRD PARTY RECOVERIES WOULD PAY FOR CORRECTING THE PROPOSED SETTLEMENT’S LEGAL DEFICIENCIES.

In response to A4NR discovery requests, ORA¹¹ and TURN¹² both admit that they have not independently assessed or conducted due diligence on the merits of the SCE/SDG&E claims against Mitsubishi, nor have they requested any documents by which to do so. At the May 14, 2014 evidentiary hearing, they acknowledge that this light-handed approach extends to the NEIL insurance claims as well. ORA says it has not gone beyond “*internally discussing*” the likelihood and likely amount of recoveries under either the replacement power or accidental property damage policies, and cannot quantify any estimates for either type of policy.¹³

⁶ D.05-08-037, p. 11, citing D.90-09-088 as “*based on language in D.87-06-021, and quoted with approval in D.98-09-040.*”

⁷ Joint Motion, p. 38.

⁸ *Id.*

⁹ *Id.*, p. 41.

¹⁰ Mr. Ron Litzinger (SCE), Transcript, pp. 2715 – 2716.

¹¹ ANR-51.

¹² ANR-50.

¹³ Mr. Robert Pochta (ORA), Transcript, pp. 2723 – 2724.

TURN indicates that any recovery under the replacement power policies would not exceed a net present value of \$389 million, but that

As to the probability of occurrence, we did not handicap that or look at that in any detail, nor did we look at the probability of occurrence to handicap the accidental loss policy.¹⁴

The TURN witness acknowledges awareness that no proof of loss has yet been filed under the accidental property loss policies, and says that TURN has not made any estimate of an amount to associate with potential recovery.¹⁵

Notwithstanding the happy-go-lucky quality of their appraisals of potential third party recoveries, both ORA and TURN are resolute in their May 14, 2014 testimony about the fairness of the elaborately tiered distribution formulae. As TURN describes the result,

... therefore, all parties have an interest, have the same interest, which is maximizing the net recovery from either Mitsubishi or from the NEIL insurance policy. Because Edison gets the money. We get some money. It's different, depending on the size of the allowance. But that's the alignment that we were talking about here.¹⁶

In A4NR's experience with financial transactions, a party having an 85% interest in the first \$100 million of net recovery and 66.67% of the next \$800 million simply cannot be said to "have the same interest" as the party whose share never rises above 33.33% until after \$900 million has been recovered. For example, it seems only plausible that the party entitled to 85% of the first \$100 million and 66.67% of the next \$800 million might have more interest in

¹⁴ Mr. William Marcus (TURN), Transcript, p. 2724.

¹⁵ *Id.*, p. 2725.

¹⁶ *Id.*, pp. 2711 -- 2712.

accepting a settlement offer of \$900 million than the party whose share jumps up above 33.33% only after amounts exceed \$900 million.

ORA's justification for preventing Commission review of such settlements is equally obtuse:

So essentially, we feel that the sharing mechanism that's been set forth in the settlement and the incentives are such that utilities are provided the incentive to maximize the amount of settlement and compromise and resolution associated with their claims against NEIL and MHI, and thus by the provision of this settlement, CPUC reviewing the reasonableness of those settlements is not necessary.¹⁷

The casualness with which third party recoveries have been approached by ORA and TURN carries the unmistakable feel of funny money, yet the stated claims exceed \$4.4 billion even before a proof of loss is submitted under the accidental property damage policies. Surely amounts of such size count for something in the grand bargain represented by the Proposed Settlement. The Phase 1 PD articulates a more sensible approach: *"Despite requests that we do so, we decline to speculate here as to future third party recovery or to prematurely apply credits before funds are in hand."¹⁸*

Tallying the conservative valuations identified in A4NR's Opening Comments¹⁹ of the Proposed Settlement's most material legal defects provides a useful context:

¹⁷ Mr. Robert Pocta (ORA), Transcript, p. 2713.

¹⁸ Phase 1 PD (Rev. 1), p. 50.

¹⁹ A4NR Opening Comments Opposing Proposed Settlement, pp. 42 – 43.

(1)	Excess O&M for a closed facility:	\$ 785,000,000 ²⁰
(2)	CWIP which never entered service:	584,031,000 ²¹
(3)	Replacement Power costs:	<u>1,461,686,000²²</u>
	TOTAL	\$ 2,850,717,000

The peculiar symmetry between such unlawful windfalls bestowed by the Proposed Settlement upon Edison and SDG&E, and the speculative residual offered the ratepayers from iffy recoveries from Mitsubishi and NEIL, suggests an apt solution: reverse the arrangement. Rather than misappropriate these purloined amounts from defenseless ratepayers, let Edison and SDG&E keep a commensurate sum from any third party recoveries. The best incentive for “maximizing the net recovery from either Mitsubishi or from the NEIL insurance policy”²³ is to assure that Edison and SDG&E have sufficient skin in the game to stay motivated. And the “judicial economy”²⁴ heralded by TURN, as well as minimization of the “not necessary”²⁵ Commission reasonableness reviews feared by ORA, can be achieved by confining Commission scrutiny (and ratepayer sharing formulae) to recoveries above the otherwise disallowed amounts.

IV. CROWING ROOSTERS DO NOT CREATE THE DAWN.

²⁰ This amount is identified in Proposed Settlement, Section 3.43.

²¹ This amount is identified as of December 31, 2013, based on Proposed Settlement, Sections 3.40 and 3.41, and SDG&E-22, Attachment A. The amount represents a growth in CWIP of 60% for Edison and 31% for SDG&E since February 1, 2012, with no estimate for what growth in CWIP has continued to accrue since December 31, 2013. SDG&E’s May 20, 2014 response to A4NR DR-05 clarified that its CWIP balance at December 31, 2013, was \$129.031 million rather than the \$239.886 million identified in A4NR’s Opening Comments.

²² Edison’s amount is reported as of March 31, 2014, SDG&E’s amount is as of December 31, 2013, and neither includes foregone Resource Adequacy value as would be required by the Phase 1 PD.

²³ Mr. William Marcus (TURN), Transcript, p. 2711.

²⁴ *Id.*, p. 2718.

²⁵ Mr. Robert Pocta (ORA), Transcript, p. 2713.

Although never mentioned in the Joint Motion or the Proposed Settlement, the May 14, 2014 testimony reveals that both ORA and TURN attach considerable negotiating significance to a claimed avoidance of litigation time lag in removing the inoperable SONGS from rates. As ORA explains,

*A review of many past cases reveals there's typically a lag between the time in which a generating facility ceases commercial operation when the utilities continue to earn full return on investment and the date when the facility is removed from ratebase by the Commission and the utilities no longer earn a full return.*²⁶

Or, in TURN's words,

*... if we were in a protracted period of litigation, these refunds might not show up and rates might be going up for reasons unrelated to SONGS without the benefit of the refunds, and the rates for SONGS might even be higher. So, okay.*²⁷

Well, yes.

Although A4NR does not believe the criteria specified by Rule 12.1(d) place much weight on how ORA and TURN evaluate their own negotiating prowess, it is impossible to regard this purported time lag triumph as anything but hyperbole. In adopting the Order Instituting Investigation which launched I.12-10-013, the Commission carefully eliminated the threat of any such "lag."²⁸ In fact, this specific protection was explained on the record by Commissioner Florio at the Commission meeting at which the OII was adopted, and later was fruitlessly challenged by Edison and SDG&E early in Phase 1:

²⁶ Mr. Robert Pocta (ORA), Transcript, p. 2675.

²⁷ Mr. William Marcus (TURN), Transcript, p. 2680.

²⁸ OII Ordering Paragraph 3 states: "All revenues collected in recovery of costs on and after January 1, 2012 related to San Onofre Generating Station Units 2 and 3 are subject to refund. All Steam Generator Replacement Program costs, and rates collected in recovery of those costs, are subject to reasonableness review and refund."

The Commission's order making SONGS costs subject to refund from January 1, 2012 on its face contravenes Section 455.5 and the controlling precedents. Commissioner Florio recently acknowledged as much, noting that, '[n]ormally we couldn't look back prior to today's opening of the investigation to go back to January of 2012 [to make SONGS costs subject to refund].' CPUC Meeting # 3303, Tr. Of Commissioner Discussion Re Item 34, SONGS OII at 2 (Oct. 25, 2012). Nevertheless, the Commissioner expressed his opinion that the rule against retroactive ratemaking does not apply to the OII 'because the general rate case [] for Edison . . . [has] been delayed, [and therefore] all ongoing authorized costs are being tracked in a memorandum account that we can adjust.' *Id.*²⁹

The confidentiality provisions of Rule 12.6 impede discovery of just what ORA and TURN chose to compromise in order to vanquish this imaginary time lag, but A4NR hopes it was not much. Hypothetically, perhaps they are concerned about the Commission backsliding from the commitment expressed in the OII. While respectful of the perspective ORA and TURN have gained as fixtures in CPUC proceedings over some four decades, A4NR takes comfort in a less jaundiced view of the current cast of Commissioners.

V. THE PROPOSED SETTLEMENT OFFERS NO BASIS FOR THE COMMISSION TO ABANDON THE DAMAGES PORTION OF ITS INVESTIGATION.

A4NR's Opening Comments and the financial tally outlined on p. 6 above provide a straightforward regimen by which the Commission can drain the legal abscesses from the Proposed Settlement and begin a healing process. But it would be serious error to consider such correction as resolution of more than Phase 1 and Phase 2 of I.12-10-013. True, there is no reason to expend further investigatory resources in Phase 3 on questions of utility prudence

²⁹ SCE and SDG&E Joint Opening Brief on Legal Issues, February 25, 2013, pp. 9 – 10. The utilities' argument about retroactive ratemaking was expressly rejected in the April 30, 2013 Assigned Commissioner's and Administrative Law Judge's Ruling on Legal Issues.

– not because the Proposed Settlement directs that the subject be ignored,³⁰ but because the NRC’s final determination of an enhanced enforcement regulatory violation renders the issue moot for Commission purposes. The Commission’s task in Phase 3 is to fashion appropriate remedies for the consequences which California has suffered as a result of Edison’s design control failures. As noted in A4NR’s Opening Comments, these remedies may require enlistment of the Commission’s enforcement staff³¹ and/or initiation of civil actions in Superior Court.³²

After A4NR’s Opening Comments raised the issue of consequential damages, it should come as no surprise that SCE President Ron Litzinger’s May 14, 2014 testimony would construe what had previously been called a “*comprehensive agreement on all major issues*”³³ as narrowly circumscribed as possible:

*In exchange for writing off the investment in the steam generators from the start of the outage and for removing the remaining investments from rate base on that date, the settlement would permit utilities to recover the amounts they have spent to purchase power for our customers in the market to replace the lost output at SONGS.*³⁴

Even the lowliest employee at Edison knows, however, that if not for the shutdown, Edison would not be consigning its customers to a decade of market purchases to replace the lost output at SONGS. Most of Edison’s customers need no help to understand that the SONGS debacle is a CO₂ version of the Exxon Valdez and Deepwater Horizon negligence-caused

³⁰ “The Agreement is not dependent on a finding on the causes of the extensive and excessive tube wear in Units 2 and 3, and is likewise silent regarding questions of prudence.” Joint Motion, p. 38.

³¹ A4NR Opening Comments, pp. 12 – 14.

³² *Id.*, pp. 12 – 14, 59.

³³ Joint Motion, p. 36.

³⁴ Mr. Ron Litzinger (SCE), Transcript, p. 2669.

pollution spills. A number of them probably have come to the same conclusion as Working Paper 248 of the Energy Institute at Haas, a joint venture of the University of California's ("UC") Haas School of Business and the UC Energy Institute, that the plant closure caused a significant rise in the wholesale price of electricity and exacerbated exercise of market power in Southern California.³⁵ These are all easily foreseen and readily calculable results of Edison's failure to adhere to the Commission's "reasonable manager" standard. None of them is addressed in the Proposed Settlement.

Although seldom a comfortable position, the Commission sits at the apex of California's regulatory culture. Its traditions and precedents, not to mention aspirations, are anchored in a morality of noticing. The Proposed Settlement would command the Commission to avert its eyes, to pretend not to see the unfulfilled portions of the I.12-10-013 agenda. Terminating its investigation before completing "*review of the full range of post-outage costs*"³⁶ would be abdication on a scale unprecedented in Commission history. Such prospect is unworthy of serious consideration.

VI. CONCLUSION.

For the reasons explained in A4NR's Opening Comments, and reinforced herein, the Proposed Settlement is neither reasonable in light of the whole record, consistent with law, or in the public interest. A4NR urges the Commission to deny the Joint Motion, reject the

³⁵ Lucas Davis and Catherine Hausman, "*The Value of Transmission in Electricity Markets: Evidence from a Nuclear Power Plant Closure*," Energy Institute at Haas, March 2014, accessible at http://ei.haas.berkeley.edu/pdf/working_papers/WP248.pdf

³⁶ Phase 1 PD (Rev. 1), p. 9, citing OII at p. 8.

Proposed Settlement as drafted, and formulate an appropriate counter-proposal pursuant to Rule 12.4.

Respectfully submitted,

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