

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 )	I.12-10-013
of Southern California Edison Company )	(Filed October 25, 2012)
and San Diego Gas and Electric Company )	
Associated with the San Onofre Nuclear )	
Generating Station Units 2 and 3 )	
)	
)	
)	
)	A.13-01-016
And Related Matters. )	A.13-03-005
)	A.13-03-013
)	A.13-03-014
)	

**ALLIANCE FOR NUCLEAR RESPONSIBILITY'S COMMENTS ON  
ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGES'  
RULING REQUESTING SETTLING PARTIES TO ADOPT  
MODIFICATIONS TO PROPOSED SETTLEMENT AGREEMENT**

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## **I. INTRODUCTION.**

Pursuant to the September 5, 2014 Assigned Commissioner and Administrative Law Judges' Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement ("Ruling"), the Alliance For Nuclear Responsibility ("A4NR") respectfully submits its comments on the proposed modifications. A4NR is a non-settling party and welcomes the Ruling's acknowledgment that the proposed Settlement Agreement contains provisions "*which unfairly disfavor ratepayers, and cannot be overcome by reading the [Settlement] Agreement as a whole.*"<sup>1</sup> The Ruling addresses only a small subset of such defects, however, and offers corrections insufficient to cure even those. Even if the Settling Parties were to accept all of the Ruling's proposed modifications, the Settlement Agreement would still fail to satisfy the three requirements for Commission approval specified in Commission Rule 12.1(d).<sup>2</sup>

## **II. IGNORING THE ELEPHANT IN THE ROOM.**

The Ruling is conspicuously silent about the seminal fact in I.12-10-013: the United States Nuclear Regulatory Commission ("NRC"), exercising its exclusive jurisdiction under the Atomic Energy Act,<sup>3</sup> found Southern California Edison ("SCE" or "Edison") guilty of an "*enhanced enforcement*" regulatory violation for failure to properly supervise the design of the replacement steam generators.<sup>4</sup> In formally responding to the preliminary citation, Edison

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<sup>1</sup> Assigned Commissioner and ALJ's Ruling, p. 2.

<sup>2</sup> Rule 12.1(d) states: "The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest."

<sup>3</sup> 42 USCA §2011 et seq.

<sup>4</sup> 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 frequently addresses Mr. Palmisano as a "Senior Vice President" while his responses consistently identify his title as "Vice President."

said that it

*acknowledges the responsibility imposed upon it ... [and] recognizes that SCE ‘shall retain responsibility for the quality assurance program.’ Therefore, **SCE does not contest its responsibility** under NRC regulations for a violation of Criterion III.<sup>5</sup>* (emphasis added)

Nor did Edison choose to exercise its right to appeal the NRC’s final determination of the significance of the violation. As SCE President Ron Litzinger testified at this Commission’s public hearing on the Settlement Agreement:

*... 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.<sup>6</sup>* (emphasis added)

The Commission has taken official notice of the NRC’s final determination of Edison’s violation.<sup>7</sup> Based on this NRC determination and the confirming testimony of Mr. Litzinger, it is impossible to reconcile Edison’s conduct with the “*reasonable manager*” standard applied by the Commission for decades:

*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 interests of the ratepayers, **and the requirements of government agencies of competent jurisdiction.***<sup>8</sup>

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<sup>5</sup> Letter from SCE Senior Vice President and Chief Nuclear Officer Peter T. Dietrich to NRC Acting Regional Administrator Steven A. Reynolds, October 21, 2013, p. 2, accessible at

<http://pbadupws.nrc.gov/docs/ML1329/ML13296A018.pdf>

<sup>6</sup> Mr. Ron Litzinger (SCE), Transcript, pp. 2715 – 2716.

<sup>7</sup> Administrative Law Judges’ Ruling Taking Official Notice of Documents and Addressing Various Motions, September 11, 2014, p. 4.

<sup>8</sup> 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.”

### **III. CONTINUED OVER-RELIANCE ON THIRD-PARTY RECOVERIES.**

Overlooking the NRC determination of Edison's culpability, or implicitly dismissing its significance, the Ruling's primary redesign of the Settlement Agreement is to generously reallocate to ratepayers third party recovery sums likely to never materialize.<sup>9</sup> There is no reason to assume that the arbitration or insurance claims process will be as forgiving of Edison's admitted "*enhanced enforcement*" regulatory violation as either the Settlement Agreement or the Ruling is. The Ruling wisely balks at the formulae in the Settlement Agreement,<sup>10</sup> but replaces them with will-o'-the-wisp alternatives that are void of any evidentiary grounding. Condemning a Settlement Agreement formula that "*unfairly favors shareholders over ratepayers for their exposure to SGRP-related costs*,"<sup>11</sup> the Ruling instead substitutes a 50/50 split of what it optimistically describes as "*recovery of settlement funds from the MHI [Mitsubishi] arbitration*."<sup>12</sup> In formulating a more equitable shareholder/ratepayer distribution of risks and benefits in the Settlement Agreement as a whole, how should the ratepayers' 50% interest in this speculative fluff be valued, and on what basis?

The Ruling identifies a "*primary claim*" against Mitsubishi of "*about \$700 million*" for breach of warranty, observes that it is contested, and logically infers that "*other consequential*

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<sup>9</sup> The Ruling offers no rationale to abandon the common sense of the Phase 1PD in shaping an overall balance: "*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.*" Phase 1 PD, p. 50.

<sup>10</sup> Settling Parties TURN and ORA both admitted to performing no due diligence on the merit of the utility claims against Mitsubishi or the likely recoveries from the replacement power or accidental property damage insurance policies.

<sup>11</sup> Assigned Commissioner and ALJ's Ruling, p. 7.

<sup>12</sup> *Id.*

*damages are likely to be more challenging to recover.*<sup>13</sup> Notably, the Ruling refuses to offer any recognition to the grandiose “*at least \$4 billion*”<sup>14</sup> scale of Edison’s arbitration claim against Mitsubishi. While the Ruling’s proposed 50/50 split may superficially seem an equitable allocation of the uncertainty of recovery, it must be juxtaposed against the windfall O&M, CWIP, and replacement power recoveries which the Settlement Agreement confers immediately upon shareholders with 100% certainty and which the Ruling leaves untouched.

Undeterred by the absence of any record by which to assess the prospect of recovery, the Ruling enhances the ratepayer share of any insurance payment under the “*Outage Policy*” but offers no estimate of a likely amount. The accidental property damage claims – where no proof of loss had yet been filed even by the Commission’s May 14, 2014 evidentiary hearing on the Settlement Agreement – may simply be too vaporous for coherent division. Without explanation, the Ruling simply intones, “*We are not compelled by the public interest to change the allocation.*”<sup>15</sup>

As Joni Mitchell famously explained,

*I've looked at clouds from both sides now  
From up and down, and still somehow  
It's cloud illusions I recall  
I really don't know clouds at all*<sup>16</sup>

#### **IV. UNILATERAL GIFTS: EXCESS O&M, UNEARNED CWIP.**

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<sup>13</sup> *Id.*, p. 6.

<sup>14</sup> EIX Form 8-K, March 27, 2014, p. 2.

<sup>15</sup> *Id.*, p. 7.

<sup>16</sup> Joni Mitchell, *Both Sides, Now*, 1967, accessible at <http://jonimitchell.com/music/song.cfm?id=83>

In stark contrast to its trumpeted redistribution of ethereal recoveries from third parties, the Ruling declines to address the Settlement Agreement's considerably more tangible award of \$785,000,000 in excess O&M for a closed plant<sup>17</sup> and \$584,031,000 for CWIP which never entered service.<sup>18</sup> Ultimately, in reviewing the Settlement Agreement, the Commission will have to reconcile these windfalls with the Phase 1 evidentiary record<sup>19</sup> and the protections against "*unjust or unreasonable*" charges contained in the Public Utilities Code.<sup>20</sup> Severing the historical requirement that O&M and CWIP be restricted to facilities which provide service to customers has a predictable effect, best illustrated by the feeding frenzy in the CWIP accounts. Despite a plant rendered inoperable on February 1, 2012, CWIP had grown by 60% for Edison and 31% for SDG&E as of December 31, 2013 and will continue to accrue until the Effective Date of the Settlement Agreement. Allowing this spectacle to pass unnoticed is the equivalent of expecting health insurance to pay for posthumous surgeries and dental work.

## V. A BOGUS FORMULA FOR REPLACEMENT POWER.

The Ruling is similarly silent on the Settlement Agreement's ultra-loose calculation of replacement power costs. The Order instituting I.12-10-013 prominently emphasizes the need to include foregone sales revenues<sup>21</sup> to accurately compute replacement power costs. Inclusion

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<sup>17</sup> Settlement Agreement, Section 3.43.

<sup>18</sup> This amount is identified as of December 31, 2013, based on Settlement Agreement, Sections 3.40 and 3.41, and SDG&E-22, Attachment A.

<sup>19</sup> For example, the Phase 1 PD questioned the reasonableness of Edison's post-shutdown actions beginning in March of 2012 (Phase 1 PD, pp. 32 – 37) and its Conclusions of Law found unreasonable the recovery of all O&M recorded in 2012 (Phase 1 PD, COL 2 – 6).

<sup>20</sup> Cal Pub. Util. Code §451 specifies: "*Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.*"

<sup>21</sup> This concern is mentioned in four separate paragraphs of the OII, including Ordering Paragraphs 4.d. and 4.g.

of foregone sales revenues is a cornerstone of the methodology adopted by the Phase 1 PD (“*SCE’s argument that foregone sales should not be considered has no merit.*”<sup>22</sup>) after painstakingly developing an evidentiary record. Nevertheless, the Settlement Agreement bluntly excludes foregone sales from the calculation:

*No future adjustments or disallowances to the Utilities’ ERRA accounts shall be made as a result of the non-operation of SONGS. This limitation includes foregone revenues; **there will be no future adjustments or disallowances to the Utilities’ ERRA accounts as a result of foregone sales of SONGS output.***<sup>23</sup> (emphasis added)

Midway through 2014, the shareholder gain from this categorical exclusion was calculated to be in excess of \$438,378,800 and still growing. Edison’s most recent Monthly Compliance Report identifies foregone sales revenue of \$369,327,000 as of July 31, 2014,<sup>24</sup> and SDG&E’s most recent Quarterly Compliance Report identifies foregone sales revenue of \$69,051,800 as of March 31, 2014.<sup>25</sup> Ultimately, in reviewing the Settlement Agreement, the Commission will have to reconcile this strong-arm of ratepayers with the Phase 1A evidentiary record and the protections against “*unjust or unreasonable*” charges in the Public Utilities Code.

## VI. MISCOUNTING THE NEGATIVE CONSEQUENCES.

The Ruling characterizes the increase in CO<sub>2</sub> emissions caused by the shutdown as a “*significant consequence to SONGS ratepayers*”<sup>26</sup> and requests that the Settlement Agreement

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<sup>22</sup> Phase 1 PD, p. 88.

<sup>23</sup> Settlement Agreement, Section 4.10(d).

<sup>24</sup> Edison “Monthly Report in Compliance with I.12-10-013,” September 2, 2014, p. 6.

<sup>25</sup> SDG&E “Quarterly Report in Compliance with Investigation (I.) 12-10-013,” July 1, 2014, p. 3.

<sup>26</sup> Assigned Commissioner and ALJ’s Ruling, p. 9.

be amended to include an RD&D program funded by shareholders for up to \$5 million annually for a period up to five years. While acknowledging the existence of the University of California (“UC”) report cited in A4NR’s earlier comments, the Ruling speaks of “*this adverse, albeit unquantified, consequence*”<sup>27</sup> but neglects to mention that the UC report did in fact quantify the impact as “*the equivalent of putting more than 2 million additional cars on the road, and implies a social cost of emissions of \$331 million per year.*”<sup>28</sup> The Ruling also omits mention of the UC report’s quantification of the jump in wholesale electricity prices caused by the shutdown. As clearly stated in the UC Report:

*We find that the SONGS closure increased the cost of electricity generation in California by about \$369 million during the first twelve months. This is a large change, equivalent to a 15 percent increase in total generation costs, yet it went almost completely unnoticed because of a large offsetting decrease in natural gas prices that occurred in 2012.<sup>29</sup>*

*Over ten years with a 1.6% discount rate this is \$3.4 billion.<sup>30</sup>*

A4NR’s opening and reply comments on the Settlement Agreement emphasize the need to refocus Phase 3 to “*encompass review of the full range of post-outage costs*” as originally promised by the Commission.<sup>31</sup> Rather than repeat the discussion in those comments of the

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<sup>27</sup> *Id.*

<sup>28</sup> 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](http://ei.haas.berkeley.edu/pdf/working_papers/WP248.pdf)

<sup>29</sup> *Id.*, p. 2.

<sup>30</sup> *Id.*, p. 27.

<sup>31</sup> Phase 1 PD, p. 9, citing OII at p. 8. If the Commission ultimately elects to abandon the Phase 3 portion of its investigation, it should explain how its choice is consistent with the requirements of Cal. Pub. Util. Code §463(a): “*For purposes of establishing rates for any electrical or gas corporation, the commission shall disallow expenses reflecting the direct or indirect costs resulting from any unreasonable error or omission relating to the planning, construction, or operation of any portion of the corporation’s plant which cost, or is estimated to have cost, more than fifty million dollars (\$50,000,000), including any expenses resulting from delays caused by any unreasonable error or omission.*” (emphasis added)

limits to the Commission's reparations remedy, and the resultant required action in Superior Court to recover any compensatory damages, A4NR will simply express disappointment with the Ruling's timid consideration of the shutdown's impact on CO<sub>2</sub> emissions and electricity prices. No matter how well-intentioned, responding to a \$700 million yearly injury with a \$5 million annual RD&D program is obscenely disproportionate.

## **VII. TURNING A BLIND EYE TO THE LOOTING OF THE TRUSTS.**

The Ruling attempts to reverse a few of the Settlement Agreement's abusive efforts to preclude Commission oversight. It also seeks clarification of a handful of the multiple drafting ambiguities strategically embedded throughout the Settlement Agreement. Although inexplicably circumscribed, this effort is commendable as far as it goes. But the Ruling makes no attempt to contain an especially corrosive theme, deeply woven into the Settlement Agreement, which will afflict ratepayers for decades to come: treating the Nuclear Decommissioning Trusts as a convenient and unattended purse filled with someone else's money. This poisonous philosophy is candidly admitted in the Settling Parties' Joint Motion seeking approval of the Settlement Agreement:

*The Agreement requires the Utilities to attempt to recover their costs from the Nuclear Decommissioning Trusts, **rather than ratepayers**, whenever possible. To the extent that the Agreement allows rate recovery of costs that the Utilities may be able to recover from the trusts, the Agreement also requires that the Utilities refund any rates collected that duplicate recoveries from the trusts.<sup>32</sup> (emphasis added)*

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<sup>32</sup> Joint Motion, pp. 34 – 35, footnotes omitted.

A4NR's Opening Comments explain the unfunded liability risk of treating trust proceeds like gifts from the Easter bunny, especially with a plant that shut down well ahead of the license expiry assumption upon which its decommissioning trusts were sized.<sup>33</sup> Dissipating trust assets which were collected from past ratepayers as part of the cost of SONGS electricity inevitably transfers the risk of an under-funded decommissioning to future ratepayers who will never receive SONGS electricity. The larcenous quality of this inter-temporal transfer, and Edison's cynical attempt to conceal it with media bluster, is inadvertently exposed by the NRC's September 5, 2014 approval of trust withdrawals.<sup>34</sup>

Notwithstanding Edison's ebullient August 1, 2014 public proclamation that "*San Onofre decommissioning is now fully funded and no further customer contributions are required,*"<sup>35</sup> the NRC determination of funding sufficiency expressly relies on two Edison submittals showing post-shutdown ratepayer contributions of \$323,000,000 between 2013 and 2022 (ten annual installments of \$32.3 million). Apparently, Edison believes it can semantically torture the words "*no further customer contributions*" enough to exempt large future extractions that it considers permanently embedded in customer rates. A4NR recommends that the Commission make its own determination that the trusts are adequately funded before approving any Settlement

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<sup>33</sup> A4NR Opening Comments, pp. 53 – 58.

<sup>34</sup> Letter from NRC Senior Project Manager Thomas Wengert to SCE Vice President and Chief Nuclear Officer Thomas J. Palmisano, September 5, 2014, accessible at <http://pbadupws.nrc.gov/docs/ML1410/ML14101A132.pdf>. The NRC's determination of funding sufficiency and authorization of withdrawals is subject to official notice as an official act of a federal executive agency pursuant to Cal. Evid. Code §452(c) and Commission Rule 13.9.

<sup>35</sup> Press release accessible at <http://www.songscommunity.com/news2014/news080114.asp>. EIX CEO Ted Craver struck the same misleading chord in his July 31, 2014 prepared remarks for a quarterly earnings call with financial analysts: "*The bottom line is that we have \$2.9 billion in present value costs versus \$3.1 billion in present value of the trust funds, which leads us to conclude that San Onofre decommissioning is now **fully funded** and future contributions are not needed.*" (emphasis in original) Prepared statement accessible at <http://www.edison.com/content/dam/eix/documents/investors/events-presentations/Q2-2014-CEO-Earnings-Call-Remarks.pdf>

Agreement affecting them -- especially one promising to maximize withdrawals -- and that all existing Commission oversight authority be expressly recognized and left unaltered by the terms of any such Settlement Agreement.

## **VIII. CONCLUSION.**

A4NR is mindful that step one in the iconic 12-step rehabilitation regimen is recognition of a debilitating problem. The Ruling deserves commendation for that, but its proposed modifications leave the Settlement Agreement's most serious Rule 12.1(d) deficiencies intact.

Respectfully submitted,

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