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 TO RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE ALLIANCE FOR NUCLEAR RESPONSIBILITY'S AMENDED MOTION FOR SANCTIONS

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Date: June 1, 2015

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I. INTRODUCTION.

Pursuant to Rule 11.1(f) of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure, the Alliance for Nuclear Responsibility ("A4NR") respectfully submits this reply to the Response filed May 21, 2015 by Southern California Edison Company ("SCE") to A4NR's May 6, 2015 Amended Motion for Sanctions against SCE for violations of Commission Rules 1.1 and 8.4. On May 22, 2015 A4NR by telephonic voicemail sought the permission of Administrative Law Judge ("ALJ") Kevin Dudney to file this Reply on June 1, 2015. On May 26, 2015 ALJ Dudney granted such permission by telephone.

SCE's May 21, 2015 Response constructs an elaborate fantasy environment where the statutory ban on unreported ex parte communications in ratesetting proceedings is ignored, the Commission Rules implementing the statute are rewritten to create hitherto unknown exceptions to enforcement, and high-ranking SCE executives consistently conduct themselves in ontologically improbable ways. SCE's Response does not mention the company's earlier commitment *"to open and fair communications with our regulators to ensure fair decision making in matters involving the public interest,"* which had been splashily proclaimed at the time of SCE's initial Late-Filed Notice of Ex Parte Communication.[1] Also gone from the SCE Response is the earlier assurance, *"To maintain public confidence in the regulatory process, the Company seeks to avoid even the appearance of impropriety in connection with its interactions with the CPUC."*[2] The words *"fair"* or "*fairness"* or *"due process"* do not appear anywhere in the

[1] See A4NR's February 10, 2015 Motion Seeking Investigation of the Extent of Sanctions to be Ordered Against Southern California Edison Company for Violation of Commission Rules 1.1 and 8.4, p. 5., citing SCE February 2, 2015 Policy, Section 1.0.
[2] *Id.,* p. 6, citing SCE February 2, 2015 Policy, Section 1.0.

SCE Response,[3] which treats the ex parte rules as more a burdensome paperwork requirement than a cornerstone of a regulatory level playing field.

II. SCE FORGETS WHY THE EX PARTE RULES EXIST.

The ban on unreported ex parte communications in Commission ratesetting proceedings protects the rights of the parties in such proceedings, and the interest of the Commission in assuring that information it receives is fully vetted for accuracy. As the Commission's legal consultant, Michael Strumwasser, testified to the Little Hoover Commission in March:

> *First, we view ex parte rules as fundamental to the fairness of Commission hearings and decisions. Open-government laws like the Bagley-Keene Open Meeting Act are aimed at ensuring the general public open access to the conduct of government business. Rules regulating ex parte contacts in adversarial proceedings such as formal CPUC ratesetting hearings—like their counterparts governing judicial proceedings—are intended in the first instance to ensure fairness* ***to the parties****. Those parties are entitled to know what their opponents are saying to the decision-makers ... and to have a realistic, meaningful opportunity to respond. To be sure, restricting ex parte communications may (or may not) enhance transparency and improve the public's access to government decisions, but the first job of ex parte rules is to give each party a genuinely equal opportunity to persuade the agency of the merits of the party's position.*[4] (footnotes omitted, emphasis in original)

The State Bar of California has articulated a similar rationale in applying the restrictions on direct or indirect communication on the merits of a contested matter with a judge or judicial officer outside the presence of opposing counsel:

[3] The word *"ethics"* is used once, in a disdainful reference to the trivial penalties SCE claims the Commission has previously imposed for violations of the ex parte rules: *"Commission precedent in sanctioning ex parte violations has ranged from imposing relatively minor fines, or none at all, to requiring training on ethics and the Commission's ex parte rules, to mere admonishments."* SCE Response, p. 28, citing D.14-11-041.

[4] "Statement of Michael J. Strumwasser, Strumwasser and Woocher LLP, Legal Consultant to the California Public Utilities Commission, Before the Little Hoover Commission, Sacramento, California," March 5, 2015, pp. 5 – 6.

Attorneys have a duty to protect the impartiality of the decision-making process. Improper ex parte contacts erode public confidence in the fairness of the administration of justice. This public confidence is "the very cement by which the system holds together." (In re Jonathan S. (1979) 88 Cal.App.3d 468, 471 [151 Cal.Rptr. 810, 812].) Improper ex parte contacts also violate a duty of fairness owed to opposing counsel. They prevent opposing counsel from effectively performing his role as an attorney. (Heavey v. State Bar (1976) 17 Cal.3d 533 [551 P.2d 1238, 131 Cal.Rptr. 406].) The ex parte rule is, in essence, "a rule of fairness meant to insure that all interested sides will be heard on an issue." (Heavey, supra, at p. 559.)[5]

For the SCE Response to labor through 31 pages of strained semiotics and implausible behavioral characterizations to brush aside 72 illicit communications, without even one acknowledgment of the due process safeguards the ex parte communication restrictions are designed to provide, pushes obtuseness to the edge of sociopathy.

III. SCE IGNORES A STATUTORY BAN.

Although perhaps a grudging improvement over its February 25, 2015 Response, which refused to mention Cal. Pub. Util. Code §1701.3(c), the SCE May 21, 2015 Response cannot bring itself to address the significance of the statute's first sentence: *"Ex parte communications are prohibited in ratesetting cases."*[6] The statute identifies three narrowly drawn exceptions to this prohibition:

- *However, oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice.*

[5] State Bar Formal Ethics Opinion No. 1984-78, applying then-Rule 7-108(B) of the Rules of Professional Conduct, which has subsequently been replaced by Rule 5-300.

[6] Cal. Pub. Util. Code §1701.3(c). Instead, SCE's two references to the statute are devoted to disputing whether parties were entitled to equal time meetings after SCE's passive receipt of "*one-way*" communications from Commission decisionmakers. SCE May 21, 2015 Response, pp. 7 – 8.

- *Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day.*

- *If an ex parte meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days ...*[7]

Contemporaneous legislative analyses by the California State Assembly and State Senate staffs reinforce the emphasis of the Legislature on procedural fairness, as made clear by the plain language of the statute. In the words of the final Assembly floor analysis, *"Ex parte communications are prohibited except: oral ex parte communications may be permitted by any commissioner if all interested parties are invited and given three days notice; and written ex parte communications may be permitted if copies of that communication are transmitted on the same day."*[8] As expressed more succinctly by the Senate conference report of that same day, "*In ratesetting cases the PUC may have ex parte contacts provided that all parties have an equal opportunity for contact."*[9]

Faced with the clarity of such placid statutory waters, the SCE Response struggles to concoct an ambiguity from the absence of any definition of the term "*granted"* in Cal. Pub. Util. Code §1701.3(c).[10] Seizing upon the 3-day advance noticing requirement which Commission Rule 8.3(c)(2) imposes on interested persons requesting an individual ex parte meeting, the SCE Response deduces that no equal time opportunity exists where the ex parte communication

[7] Cal. Pub. Util. Code §1701.3(c).
[8] California Bill Analysis, S.B. 960 Assem., 8/28/1996.
[9] California Bill Analysis, S.B. 960 Sen., 8/28/1996.
[10] SCE May 21, 2015 Response, p. 8.

does not originate with such a request.[11] The absence of any assignment of advance noticing responsibilities in Rule 8.3(c)(2) for ex parte communications initiated in violation of Cal. Pub. Util. Code §1701.3(c) is confabulated by SCE as a safe harbor for such meetings from the equal time requirement. By relying on the plain language of the statute, A4NR is accused by the SCE Response of a *"collateral attack on the validity"*[12] of Rule 8.3(c)(2) and "*simply ask*[ing] *that the Commission disregard the rule in favor of the statute."*[13]

A4NR disavows any intent to attack the noticing requirement of Rule 8.3(c)(2) and feels no need to explain why the Commission Rules do not address who should provide advance notice of an unlawful meeting. Nor does A4NR make any request that the Commission disregard the rule, although A4NR suspects even SCE would acknowledge the traditional hierarchy in the American legal system by which statutes prevail over the regulations which implement them. But it should be abundantly clear that the statute and the rule can easily be read to be in harmony with each other.

The fundamental rules of statutory construction are well-established in California, and should be applied to Commission rules as well. In sifting through the contrived conflicts hypothesized in the SCE Response, A4NR recommends the catechism Witken derives from *DeYoung v. San Diego* (1983) 147 C.A.3d 11, 17:

> *(a) Ascertain the intent of the Legislature so as to effectuate the purpose of the law...*
>
> *(b) Give a provision a reasonable and common sense interpretation consistent with the apparent purpose, which will result in wise policy rather than mischief or absurdity...*

[11] *Id.*
[12] *Id.*
[13] *Id.*

(c) Give significance, if possible, to every word or part, and harmonize the parts by considering a particular clause or section in the context of the whole...

(d) Take into account matters such as context, object in view, evils to be remedied, legislation on the same subject, public policy, and contemporaneous construction...

(e) Give great weight to consistent administrative construction.[14]

IV. SCE IGNORES PROCEDURAL SAFEGUARDS.

A rationale for the Legislature's insistence upon conditioning ex parte communications in Commission ratesetting cases upon the protections written into Cal. Pub. Util. Code 1701.3(c) is easily seen in the 1995 Report of the California Law Revision Commission, which exempted the CPUC from the model Administrative Procedure Act. In the words of UCLA Law School Prof. Michael Asimow, the Law Revision Commission's principal consultant,

> *... Historically, perhaps the most important example is Public Utilities Commission practice. Some commissioners allowed litigants outside the Commission (both utilities and consumers) to communicate with them ex parte, but the nature and content of these written or oral communications were never disclosed. These communications concerned the merits of pending individualized ratemaking cases that were the subject of a trial-type adjudicatory process. In my interviews with PUC staff, I found widespread discomfort, even embarrassment, with the PUC's prior ex parte practice.* [footnote omitted]
>
> *For years the PUC emphatically opposed legislative attempts to impose curbs on its ex parte practice,*[15] *although it occasionally barred such contacts in sensitive cases. However, a new era dawned at the PUC with its adoption of a rule regulating ex parte*

[14] 7 Witkin, Summary 10th (2005) Const. Law, §115, p. 220.

[15] Prof. Asimow's formal comments include a footnote to testimony from an earlier hearing of the Senate Committee on Energy and Public Utilities: *"These hearings contain numerous statements by utility representatives in favor of free ex parte access to commissioners during contested individualized ratemaking cases. For example, a representative of the California Cable Television Association said: 'Now, we had the opportunity for ex parte contacts and we did, in fact, employ them....And the commissioners were very forthcoming in giving us an opportunity to listen because, you know, as a practical matter the commissioners don't read the record....So having the ex parte contact for us meant that at least our concern was heard by the people who are making the decision because they wouldn't normally read the briefs, they wouldn't normally see the record, and so they wouldn't normally hear about what we want them to be concerned about. And frankly, I don't think there's anything wrong with that.' "*

contacts. [footnote omitted] *This rule does not prohibit such contacts, but it requires disclosure of all oral ex parte contacts in ratemaking cases.* [footnote omitted] *The new rule's disclosure obligation should discourage many oral ex parte communications and will place the remaining communications on the record, where they can be rebutted by other parties. While I applaud this sharp break from prior PUC culture, I do not believe that the PUC went far enough; it should have entirely prohibited oral ex parte contacts during individualized ratemaking proceedings.*

***

The commissioners also argue that they are isolated and need ex parte contacts to obtain information about the realities of the industry to help them regulate properly. Of course, no one favors placing commissioners in an ivory tower....Nevertheless, when the commissioners set out to make the rates for a single utility through a structured adjudicatory decision-making process, they should be limited to on-the-record submissions. There is no need for the commissioners to get their information or arguments in a form that does not allow other interested parties to know of these inputs and, if they wish, to rebut them. The process of adjudication is degraded if decision-makers rely on untested submissions and arguments that may well be false, incomplete, irrelevant, or fallacious. Ex parte contacts make a mockery of the hearing process because they provide a conduit for litigants to whisper into the ears of the commissioners arguments that might never survive the crucible of an adversary hearing.[16]

A4NR does not dispute SCE's right, under current law, *"to whisper into the ears of the commissioners arguments that might never survive the crucible of an adversary hearing."* But the Legislature went to great pains, in adopting Cal. Pub. Util. Code §1701.3(c), to confine these whispers to narrowly circumscribed instances and to extend clear protections to other parties when such whispers occur. SCE's May 21, 2015 Response, as was its February 25, 2015 Response, is entirely devoid of any recognition of such protections or the elements of due process which compel them.

V. SCE CARVES GAPING LOOPHOLES INTO THE RULES.

Not content to simply ignore the prohibition on unreported ex parte communications made clear by Cal. Pub. Util. Code §1701.3(c) and Article 8 of the Commission's Rules, SCE's

[16] Administrative Adjudication by State Agencies, 25 Cal. L. Revision Comm'n Reports 55 (1995), pp. 384 – 387.

May 21, 2015 Response invents a creative list of otherwise invisible exceptions to Rule 8.4's disclosure requirements. Under SCE's imaginary rewrite of Rule 8.4, there would be no requirement to file a Notice of Ex Parte Communication where:

- the communication is retroactively characterized by SCE as *"non-substantive."*
- the communication is retroactively characterized by SCE as *"procedural."*
- the communication is conjured to be a "*one-way"* where the SCE non-communicant was in *"listening mode"* or its correlative, *"listen only."*
- the communication involves SONGS *"restart."*
- the communication is between Mr. Craver and Mr. Peevey, regards Mitsubishi, and needs no further explanation to be labeled *"not within scope."*

A. When a communication is "*non-substantive.*"

Of the 71 unreported ex parte communications[17] identified in A4NR's Amended Motion for Sanctions, SCE's Response uses the "*non-substantive"* characterization 45 times.[18] This expansive excuse includes communications where Edison International's General Counsel tells President Peevey that "*SCE was doing its best to navigate a path to be both safe and cost-effective;"*[19] SCE's President phones each Commissioner separately to make them aware of its intent to submit a license amendment request to the NRC, and its Senior Director of State Energy Regulation makes a similar call to Carol Brown;[20] Edison International's CEO sends to President Peevey, and SCE's Senior Vice President of Regulatory Policy & Affairs forwards to

[17] This tally does not include the Pickett-Peevey Warsaw communication, which was reported 681 days after the Rule 8.4 deadline.
[18] SCE May 21, 2015 Response, pp. 15 – 16.
[19] SCE Response to ALJs' Ruling, Appendix C, ¶1.
[20] *Id.,* ¶5.

each other Commissioner, an email describing SCE's efforts to get SONGS back online;[21] SCE's Senior Vice President of Regulatory Policy & Affairs sends each Commissioner written materials pertaining to the design of the SONGS steam generators;[22] Edison International's CEO phones President Peevey to announce SCE's decision to permanently retire SONGS and to indicate that Edison International's General Counsel would oversee settlement negotiations for SCE;[23] SCE's President phones each Commissioner to let them know of the SONGS permanent retirement;[24] SCE's Senior Director of State Energy Regulation has a *"fairly forthright"* phone conversation with Sepideh Khosrowjah in which he agrees *"that it would be best if SCE got out in front in terms of trying to put a process in place that would result in resolution of the issues in a manner that does not rely on protracted hearings etc.;"* [25] and SCE's President phones each of the Commissioners to alert them to SCE's forthcoming full-page ad in the Los Angeles Times expressing its viewpoint on utility recovery of SONGS costs.[26]

While it is conceivable that shareholders would not look askance at *"non-substantive,"* even clerical, tasks being within the job descriptions of SCE's and Edison International's most senior executives, A4NR suspects that successful communication with regulators is an important criterion when executive compensation is determined. Current law allows such ingratiating exchanges, when properly noticed and disclosed. A4NR cannot understand SCE's intense resistance to reporting them.

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[21] *Id.,* ¶6.
[22] *Id*., ¶9.
[23] *Id.,* ¶10. Acknowledgment that Mr. Craver discussed Mr. Adler's role severely undermines the indignation SCE had expressed earlier: *"There is no basis for A4NR's speculation that the Craver-Peevey call also involved a discussion of settlement of the OII, and in fact that topic was not discussed in the call."* SCE February 25, 2015 Response, p. 11.
[24] SCE Response to ALJs' Ruling, Appendix C*,* ¶11.
[25] *Id.,* Appendix D, pp. SCE-CPUC-00000191 -- SCE-CPUC-00000192, and Appendix C, ¶12.
[26] Id., Appendix C, ¶15.

B. When a communication is "*procedural.*"

While not as prolific as *"non-substantive,"* the eight deployments of the *"procedural"* excuse in SCE's May 21, 2015 Response exhibits an even more elastic approach to the English language. SCE's May 21, 2015 Response confesses that "*(t)he dividing line between procedural and substantive communications is not always clear,"*[27] but chooses not to limit itself to Rule 8.1(c)'s safe harbor definition.[28] A hint of SCE's freehanded approach to defining *"procedural"* is captured in the description of a June 26, 2013 communication contained SCE's earlier Response to ALJs' Ruling, before any explanation was provided for non-disclosure:

> *On or about June 26, 2013, Ron Litzinger and Commissioner Florio were in attendance at the oral argument in a proceeding relating to Chino Hills. Following the hearing, Mr. Litzinger provided a brief update on the status of SCE's bargaining efforts with respect to the severance of SONGS employees.*[29]

The SCE May 21, 2015 Response elaborates slightly on this account by now characterizing it as a discussion about possible ways to *"to sequence it* [the OII] *relative to bargaining on severance"*[30] and labeling the communication as unreportable due to its *"procedural"* nature. Except under SCE's madcap theory, discussed below, that the scope of the I.12-10-013 gyrated wildly over time depending upon whether the OII or the Assigned Commissioner's Scoping Memo or comments by the ALJ was definitive at a particular point in time, determining recoverable severance costs were among the substantive issues to be addressed in I.12-10-013.

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[27] SCE May 21, 2015 Response, p. 13.
[28] Rule 8.1(c) states: *"Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications."*
[29] SCE Response to ALJs' Ruling, Appendix C, ¶14.
[30] SCE May 21, 2015 Response, p. 14.

A4NR suggests that each of the disputed eight *"procedural"* explanations for SCE's non-reporting be scrutinized with Rule 8.1(c)'s safe harbor definition in hand.

C. When a communication is *"a one-way."*

Far and away, SCE's most creative contribution to evasion of straightforward ex parte reporting requirements is its epistemological explication of the *"one-way"* communication and its doppelgängers, "*listen mode"* and *"listen-only."* In the various SCE submittals, this terminology is most frequently associated with characterizations attributed to Mr. Litzinger (*"Mr. Pickett reported that the communication was **one-way**: President Peevey was talking to Mr. Pickett about a framework for a possible resolution of the SONGS OII;"*[31] *"I pressed Steve as to whether his two previous meeting* [sic] *were **listen only** given we have heard whispers of leaks from the CPUC of significant SCE presence on the issue;"* [32] *"I recall Commissioner Florio stating he agreed Mr. Nichols and I were in **listening mode** and did not say anything substantive regarding SONGS in the May 2 meeting."*[33] *"Commissioner Florio then called me back and said he had spoken with Carol Brown, President Peevey's Chief of Staff, and they had concluded SCE should not file an ex parte notice because the company was in **listening mode**."*[34] (emphases added)), but SCE's May 21, 2015 Response broadens application of the *one-way"* concept to include communications between Mr. Craver and President Peevey, and between Mr. Hoover and President Peevey, where Mr. Litzinger was not involved.[35]

[31] SCE Response to ALJs' Ruling, Appendix G, ¶4.
[32] *Id.*, Appendix D, p. SCE-CPUC-00000186.
[33] *Id.,* Appendix G, ¶10.
[34] *Id.*
[35] SCE May 21, 2015 Response, p. 16.

The SCE May 21, 2015 Response inflates what was already an implausibly binary explanation offered by long-time SCE engineer Litzinger[36] (i.e., the switch is either *"on"* or *"off"*) into a broad umbrella exemption from disclosure. SCE criticizes A4NR's suggestion that this *"one-way"* excuse from reporting requirements implies complete muteness on the part of the SCE communicant as an *"extreme view."* [37] Instead, SCE insists, when its executives respond with palliative phrases like *"I understand"* or *"I'll get back to you"*, no "*substantive"* communication has taken place and consequently no disclosure is required.[38] SCE's expansion of the "*one-way"* communication – always a far-fetched concept because of the high value regulated entities commonly place on private access to decisionmakers – into the borderless fog of its self-serving characterization of *"substantive"* renders Mr. Litzinger's fanciful engineering solution legally unrecognizable. Nothing in Cal. Pub. Util. Code §1701.3(c) or Article 8 of the Commission Rules gives sustenance to SCE's ten uses of the *"one-way"* alibi.

D. When a communication involves *"restart."*

SCE rationalizes that 23 of the 71 unreported ex parte communications[39] identified in A4NR's Amended Motion for Sanctions need not be reported because, among other things, *"communications made in 2013 regarding restart and the shutdown of SONGS were not within*

[36] SCE Response to ALJs' Ruling, Appendix G, ¶1.
[37] SCE May 21, 2015 Response, p. 6. Notwithstanding the ostensibly*"extreme"* hypothetical, SCE approvingly cites the legislative testimony of ALJ Gamson that *"if a Commissioner speaks to a party, but the party doesn't say anything back, that is* ***technically*** *not considered a reportable ex parte contact under the current rules." Id.,* p. 5 (emphasis added). A4NR agrees, and believes that this "*doesn't say anything back"* scenario happens with no greater frequency than February 29, which **technically** occurs once every 1,460 days.
[38] *Id.*
[39] This tally does not include the Pickett-Peevey Warsaw communication, which was reported 681 days after required by the Rule 8.4 deadline.

the scope of the OII ..."[40] Much of SCE's justification for this contorted view of the *"substantive issues"* in I.12-10-013 has been addressed in A4NR's March 9, 2015 Reply.[41] Rather than repeat that discussion, which A4NR expressly incorporated by reference in its Amended Motion for Sanctions,[42] A4NR briefly addresses the new arguments offered about *"restart"* in the SCE May 21, 2015 Response. Where SCE previously failed to acknowledge that the full Commission had established by its Order the scope of I.12-10-013,[43] the SCE May 21, 2015 Response now argues that the Commission's action was irrelevant: *"SCE updates on restart were not within the scope of the preliminary scoping memo, which does not control in any event."*[44]

SCE arrives at the position that *"restart"* was not within the scope of the OII's *"preliminary scoping memo"* by clinging to three semantically slippery protuberances:

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[40] SCE May 21, 2015 Response, p. 8. Without explanation, the SCE May 21, 2015 Response (p. 15) extends the *"restart"* shield to Edison International General Counsel Adler's November 7, 2012 oral communication with President Peevey but, as described at p. 8 herein, also characterizes the communication as *"non-substantive."*

[41] A4NR March 9, 2015 Reply, pp. 2 – 8.

[42] A4NR Amended Motion for Sanctions, p. 3.

[43] The OII at pp. 14 – 15 states:

> *"Pursuant to Rule 7.1(c), we include a preliminary Scoping Memo to provide an initial determination of this proceeding's scope, schedule, need for hearing, and other procedural matters. The determination of category may be appealed as described below.*
>
> *"5.1. Issues*
>
> *"The general scope of this OII is to review the effect on safe and reliable service at just and reasonable rates on and after January 1, 2012 of the outages at SONGS Units 2 and 3. The issues include:*
> *1. Whether or not rate adjustments should be made; if so, when they should start, the correct amount, and the correct accounting of these adjustments.*
> *2. The reasonableness and prudency of each utility action and expenditure with respect to the steam generator replacement program and subsequent activities related thereto.*
> *3. The reasonableness and prudency of each utility action and expenditures in securing energy, capacity and other related services to replace the output of SONGS during the outage.*
> *4. The cost-effectiveness of various options for repairing or replacing one or both units of SONGS.*
> *5. Any additional ratemaking issues associated with the above, including the availability of warranty coverage or insurance for any costs related to the SONGS outage.*
> *6. The reasonableness and necessity of each SONGS-related operation and maintenance expense, and capital expenditure made, on and after January 1, 2012 reviewed within the context of the facts and circumstances of the extended outages of Units 2 and 3."*

[44] SCE May 21, 2015 Response, p. 12.

1. *"restart"* cannot fall within the "*reasonableness and prudency of each utility action and expenditure with respect to the steam generator replacement program and subsequent activities related thereto"* because *"restart"* was not an activity related to the steam generator replacement program.[45] **A4NR response: the need for *"restart"* was a direct outgrowth of utility actions and expenditures related to the steam generator replacement program and subsequent activities thereto.**
2. additionally, because of the NRC's involvement with *"restart,"* a report on *"the status of the NRC's consideration of SCE's restart plan is not the same as an evaluation of the 'reasonableness and prudency' of SCE's actions."*[46] **A4NR response: the Commission did not cede review of the reasonableness and prudence of SCE's restart actions to the NRC.**
3. *"restart"* cannot fall within the *"reasonableness and necessity"* of costs incurred after the outages began because, while SONGS costs could have been affected by *"restart,"* such costs are distinct from whether the NRC would concur with SCE's plan.[47] **A4NR Response: whether the NRC concurred with SCE's plan or not did not limit the Commission's authority to review the reasonableness and necessity of SCE's costs.**

The brusque dismissal in SCE's May 21, 2015 Response of A4NR's references to the OII's identification of scope is largely a recitation of the arguments debunked in A4NR's March 9, 2015 Reply. But SCE's belated acknowledgment of the existence of such guidance from the full Commission, its refusal to read the Phase 1 Scoping Memo in a manner consistent with the

[45] *Id.*
[46] *Id.*
[47] *Id.*

preliminary scoping memo contained in the OII,[48] and two comments from its May 21, 2015 Response indicate the dysfunction SCE would cast over the Commission's ex parte disclosure requirements:

- *"(t)he Commission defines those issues* [what communications must be reported] *through a scoping memo and rulings* ***and comments of the ALJs and Assigned Commissioners****."*[49] (emphasis added)
- *"the scoping memo* ***and related comments from the ALJ and Assigned Commissioner*** *determined the scope of the OII."*[50] (emphasis added)

If the legal obligation to report ex parte communications is motivated by concern for fundamental fairness to the parties, and to properly vet "*arguments that might never survive the crucible of an adversary hearing,"* what justifies the casualness of SCE's suggestion for a continuously shape-shifting boundary for that obligation?

E. When a Craver-Peevey communication defies categorization.

The SCE May 21, 2015 Response reserves its most ambiguous characterization, "*not*

[48] SCE's May 21, 2015 Response never acknowledges the breadth of the Phase 1 Scoping Memo, which states at pp. 3 – 4:

> *This Scoping Memorandum establishes Phase 1 in which the Commission will address the following:*
> *1. Nature and effects of the steam generator failures in order to assess the reasonableness of SCE's consequential actions and expenditures (e.g., was it reasonable to remove fuel from unit #3).*
> *2. Whether 2012 SONGS-related expenses recorded in the SONGSMA are reasonable and necessary, including,*
> - *100% of O&M, including segregated safety-related costs;*
> - *100% of cost-savings from personnel reductions and other avoided costs;*
> - *100% of maintenance and refueling outage expenses; and*
> - *100% of capital expenditures.*
>
> *3. A review of the reasonableness and effectiveness of SCE's actions and expenditures for community outreach and emergency preparedness related to the SONGS outages.*
> *4. Other issues as necessary to determine whether SCE should refund any rates preliminarily authorized in the 2012 GRC, in light of the changed facts and circumstances of the unit outages; and if so, when the refunds should occur.*

[49] *Id.,* p. 11.
[50] *Id.*

within scope," for two *"items"* labeled *"Craver-Peevey re MHI."*[51] These ex parte communications were earlier described in particularly inscrutable terms in SCE's Response to ALJs' Ruling:

- *On November 15, 2013, Ted Craver attended a dinner meeting with CPUC President Mike Peevey. During the dinner, Mr. Craver briefly described SCE's efforts to get MHI to the table to discuss a financial settlement with respect to the defective replacement steam generators. Mr. Craver outlined SCE's efforts to secure letters of support from various federal elected officials for MHI to engage on the matter....*[52]

- *On or about February 24, 2014, SCE obtained information from President Peevey's office, who stated that they had heard that settlement talks had resumed and that the Phase 1 proposed decision would likely be held. The individuals involved in the communication cannot be determined at this time.*[53]

SCE's May 21, 2015 Response does not explain why these ex parte communications should be considered *"not within scope"*; or how SCE could learn of the information from President Peevey's office without knowing the identity of the individuals involved; or why this communication is now identified as *"Craver-Peevey re MHI."* A we-don't-report-what-we-don't-want-to-report scofflaw philosophy is impossible to dispel.

VI. SCE IS WRONG ABOUT THE PENALTIES.

SCE's May 21, 2015 Response misconstrues D.14-11-041 in order to take issue with A4NR's recommendation that one of SCE's Rule 8.4 violations – Mr. Pickett's undisclosed March 26, 2013 oral and written communications with President Peevey in Warsaw – be ruled a continuing violation under Cal. Pub. Util. Code §2108 because of the escalating nature of the injury to the other I.12-10-013 parties as the communications remained unreported. As A4NR's Amended Motion for Sanctions points out, each day that the I.12-10-013 parties were

[51] *Id.,* p. 16.
[52] SCE Response to ALJs' Ruling, Appendix C, ¶17.
[53] *Id.,* ¶18.

kept in ignorance of the content of the Hotel Bristol Notes accrued to SCE's strategic advantage, as the Commission's investigation proceeded, settlement negotiations took place, a fraudulently induced agreement was approved, and legal deadlines for rehearing or modification ran. A4NR's Petition for Modification elaborates on the different steps, month by month, it would have taken in I.12-10-013 had it received the information to which it was legally entitled.[54] It is reasonable to assume that other I.12-10-013 parties could assemble comparable lists of their own.

SCE willfully overlooks that D.14-11-041 was premised on Commission findings of 20 violations of Rule 8.3(f): *"Our findings herein only establish that PG&E's January emails violate the prohibition on ex parte contacts related to assignment of administrative law judges."*[55] No discussion of Rule 8.4 appears in D.14-11-041. SCE seizes upon arguments by TURN and ORA that the Rule 8.3(f) violations should be considered continuing violations, which the Commission rejected by reasoning that the violations occurred when the prohibited communications took place (even if their effects were continuing). Rule 8.4, which imposes a continuous reporting requirement rather than a singular ban, is different in its objective. By failing to recognize this distinction,[56] SCE would prevent Cal. Pub. Util. Code §2108 from having any applicability to reporting violations -- even in circumstances like this one where the injury to parties is cumulative. By claiming that the Commission is *"foreclosed by controlling*

[54] A4NR Petition for Modification, pp. 3 – 6.
[55] D.14-11-041, p. 28.
[56] SCE's failure to properly comprehend Rule 8.4 is reinforced by the May 21, 2015 Response's citation (at p. 26, footnote 85) to D.15-04-023 for the principle that "*[I]t is the violation itself that must be ongoing, not its result."* Each day that SCE failed to properly report Mr. Pickett's March 26, 2013 oral and written ex parte communications constituted a separate violation of Rule 8.4 or, in the metaphor used in D.14-11-041, a separate *"assault"* on the rights of the other I.12-10-013 parties.

precedent"[57] from this construction, SCE's May 21, 2015 Response indulges in gross exaggeration.

SCE similarly attempts to airbrush Cal. Pub. Util. Code §2114 from the Commission's arsenal of measures for protecting the integrity of its regulatory process. *"The Commission does not have the authority to impose a penalty under section 2114,"*[58] the SCE May 21, 2015 Response disingenuously argues, because the statute establishes a felony which must be prosecuted as a crime with a right to trial by jury. True enough, but the prerequisite for initiating such a prosecution[59] is an evidentiary finding by the Commission that there has been a violation. The Commission has engaged in this process before.[60]

The more pertinent question regarding Cal. Pub. Util. Code §2114 is whether SCE seriously intends to rely upon a diminished capacity defense: that its well-experienced and highly compensated President should be held to no more than *"a reasonable layperson's understanding of the CPUC's rules"* [61] in the same manner as its well-experienced and highly compensated former General Counsel professed only a "*general understanding of the ex parte rules."* [62]

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[57] SCE May 21, 2015 Response, p. 3.
[58] *Id.,* p. 23, footnote 76.
[59] Cal. Pub. Util. Code §2101 provides: "*The commission shall see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of California.* ***Upon the request of the commission, the Attorney General or the district attorney of the proper county or city and county shall aid in any investigation, hearing, or trial had under the provisions of this part, and shall institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State affecting public utilities and for the punishment of all violations thereof."*** (emphasis added)
[60] See, for example, D.99-06-059 and D.05-06-033.
[61] SCE May 21, 2015 Response, p. 23.
[62] SCE Response to ALJs' Ruling, Appendix F, ¶16.

VII. SCE UPENDS PRESIDENT PICKER'S ASSURANCES.

A flood of unreported SCE ex parte communications has come to light since President Picker's widely circulated April 1, 2015 letter to Assemblymember Rendon. As made clear in A4NR's Amended Motion for Sanctions, the Commission ordered SCE to produce only a subset of documents relating to unreported ex parte communications concerning the subject matter of I.12-10-013[63] and it is reasonable to infer that additional unreported ex parte communications would have been discovered had the full scope of A4NR's February 10, 2015 request been granted. Even with this limited production of documents, SCE has reduced President Picker's self-described methodology (*"As a Commissioner, I assessed whether I could reach the same conclusion about the decision based solely on the written record that has been available to all parties."*[64]) to the incomplete assessment of an iceberg from the surface of the water.

By offering even a partial glimpse of what had been submerged, SCE's disclosures – to borrow a verb from one SCE email – "*disembowel*"[65] President Picker's assurances to Assemblymember Rendon about the transparency of Commission proceedings: *"When we at the CPUC say transparent, we mean, generally, that everyone can see the same full record of evidence provided by our staff and the formally recognized parties to our quasi-judicial proceedings ..."*[66]

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[63] A4NR Amended Motion for Sanctions, p. 1, footnote 3. The April 14, 2015 ALJs' Ruling ordered documents pertaining to communications "*about potential settlement of the SONGS OII"* between March 1, 2013 and November 31, 2014 [sic], whereas A4NR's February 10, 2015 Motion sought similar documents "*since the January 31, 2012 SONGS tube leak concerning the subject matter of the I.12-10-013 investigation." Id.,* citing April 14, 2015 ALJs' Ruling, p. 5, ¶1, and A4NR February 10, 2015 Motion, p. 9, respectively.

[64] April 1, 2015 letter from CPUC President Michael Picker to Assemblymember Anthony Rendon, Chair, Assembly Committee on Utilities and Commerce, p. 1.

[65] SCE Response to ALJs' Ruling, Appendix D, p. SCE-CPUC-00000187.

[66] April 1, 2015 letter from CPUC President Michael Picker to Assemblymember Anthony Rendon, Chair, Assembly Committee on Utilities and Commerce, p. 1, footnote 1.

The SCE revelations splash a certain poignancy onto President Picker's remarks:

> *I work hard at diligence in observing the CPUC's rules, and base my decisions only on what is in the public evidentiary record of the proceeding....I regularly ask myself, is there anything that I've missed? Is there anything that I didn't understand? Did the Assigned Commissioner or the Administrative Law Judges ask the correct questions in order to get all pertinent testimony from the parties to the proceeding, and thus to build the record? Like other judicial and quasi-judicial bodies, we make the best decisions possible based on the best information that is available after strenuous efforts to obtain that evidence.*[67]

While the Commission should consider A4NR's Amended Motion for Sanctions independently from A4NR's Petition for Modification, SCE's forced disclosures establish that SCE's conduct in I.12-10-013 bore little resemblance to that contemplated by California statutes or Commission Rules. Whether the Commission ultimately elects to modify D.14-11-040 or not, it will not begin to restore public confidence in its decisionmaking until it demands that all parties ***"****work hard at diligence in observing the CPUC's rules."*

VIII. CONCLUSION.

A4NR respectfully requests a ruling from the Commission to direct SCE to appear in the Commission Courtroom, State Office Building, 505 Van Ness Avenue, San Francisco, California, on _____, 2015 and show cause why it should not be held in contempt of the Commission and sanctioned for violating Rules 1.1 and 8.4. and Cal. Pub. Util. Code §2114. Such sanctions may include monetary penalties, restrictions on future ex parte communications, and other appropriate sanctions as may be identified at the hearing.[68]

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[67] *Id.,* p. 3.

[68] A4NR considers the information provided in SCE's May 21, 2015 Response to be sufficient to moot the other relief requested in Section IX of its Amended Motion for Sanctions.

Respectfully submitted,

By: /s/ John L. Geesman

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Date: June 1, 2015

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ALLIANCE FOR NUCLEAR RESPONSIBILITY