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I. INTRODUCTION.

Pursuant to Rule 14.3 of the California Public Utilities Commission (“Commission” or “CPUC”) Rules of Practice and Procedure, the Alliance for Nuclear Responsibility (“A4NR”) respectfully submits its Opening Comments on the Proposed Decision Affirming Violations of Rule 8.4 and Rule 1.1 and Imposing Sanctions on Southern California Edison Company (“SCE”) of Administrative Law Judge (“ALJ”) Melanie M. Darling (“PD”).

Consistent with Rule 14.3(c)’s requirement that comments focus on *“factual, legal or technical errors,”* A4NR’s primary criticism of the PD concerns the factually deficient application of D.98-12-075’s five-part test for assessing sanctions. The PD overlooks recent statements from Edison International Chairman and CEO Ted Craver, as well as the October 20, 2015 tardy disclosure of reportable ex parte communications by Managing Director of State Regulatory Operations Russell Worden that were highly prejudicial to A4NR. Instead, it heralds SCE’s *“new policy”* to restrict off-hours contact with Commissioners as a mitigating factor *“because it indicates SCE understands the problem and is acting to reduce or eliminate it.”*¹ The PD frames its evaluation of SCE President Ron Litzinger’s false and misleading testimony far too narrowly, concluding that it *“does not appear to be intentional, reckless, or grossly negligent”*² but ignoring his knowledge of, and extensive participation in, SCE’s other Rule 1.1 violation.

A4NR’s Opening Comments also identify several lesser errors, but A4NR considers the PD’s basic legal framework to be defensible as a result of the adjustments made to the acknowledged *“unartful language and analysis”*³ in the earlier Ruling and Order to Show Cause (“OSC”). It is the PD’s flawed application of that framework, in calculation of an appropriate penalty, which A4NR’s Opening Comments address.

II. SCE’S RECENT DISCLOSURES UNDERCUT ANY MITIGATION CLAIM.

The PD’s discussion of Factor 2 (“6.1.2. Utility’s Conduct in Preventing, Detecting, Correcting, Disclosing, and Rectifying the Violation”) in the D.98-12-075 five-factor test for

¹ PD, p. 45.

² *Id.*, p. 48.

³ *Id.*, p. 10.

assessing sanctions appropriately pronounces SCE's new internal policies "*of unknown benefit or accessibility.*"⁴

*... as described, it is not clear whether SCE intends to rely on the role of SCE's Legal Department in determining whether the ex parte rules apply to achieve a permanent privilege claim applied to all such records, thus blocking oversight and investigative access by the Commission.*⁵

In the Factor 5 ("6.1.5. Totality of Circumstances") discussion, the PD cites two mitigating factors: (1) SCE's argument that the OSC "*was the first time 'many of the interpretive issues have been explained' ... SCE asks the Commission to recognize that parties' expectations and understanding of the rules have evolved since the communications in question have occurred;*"⁶ and (2) SCE's new policy "*which limits contact with Commissioners to normal business hours or 'at widely-attended events like seminars, recognition ceremonies, or other public events; private dinners are not allowed.'*"⁷ The Commission should not embrace the PD's credulous acceptance of an ignorance plea on Rule (and statute) violations where SCE's multiple legal counsel were directly engaged from the outset,⁸ nor should it find redemption in a "*new policy*" which would expressly enable a reprise of the Pickett-Peevey Warsaw communications because they fortuitously took place at a seminar or during normal business hours.

A. MR. CRAVER'S CONTINUING RECALCITRANCE.

Instead, the Commission should pay heed to the unrepentant attitude which continues to pervade SCE's description of the matter. As Edison International Chairman and CEO Ted Craver stated in prepared remarks for his October 27, 2015 quarterly call with investment analysts:

⁴ *Id.*, p. 40.

⁵ *Id.*

⁶ *Id.*, p. 44.

⁷ *Id.*, p. 45.

⁸ SCE's earlier attempt (SCE Response to OSC, pp. 41 – 42) to deflect attention from the ubiquitous presence of its attorneys in the disputed chain of events is meritless. A4NR does not seek to draw any inference from SCE's assertion of attorney-client privilege, or to gain access to any privileged communications between SCE and its counsel. A4NR's point is that SCE's conduct can be presumed to have been extensively advised by counsel.

*First, I want to set the record straight on some misconceptions that are constantly being repeated. Contrary to the many reports, SCE has not engaged in ‘improper talks or communications with regulators’ related to the SONGS OII. The important distinction is that the Judge found that we didn’t report in a timely manner permissible communications with regulators. The communications themselves were not found to be improper or illegal under the ex parte rules as certain parties have repeatedly and wrongly asserted.*⁹ (emphasis in original)

The problem with Mr. Craver’s construction is that, for the “talks or communications” to be lawful under Cal. Pub. Util. Code 1701.3(c) and Rule 8.3, oral communications would have had to have been preceded by not less than three days’ advance notice to the other I.12-10-013 parties. SCE would have had to provide same-day transmittal of copies of all written communications. The OSC and the PD address SCE’s failure to properly report these communications as required by Rule 8.4, and are silent on whether the communications themselves are “improper or illegal” under Rule 8.3. A4NR’s Amended Motion of Sanctions seeks remedies for violation of Rule 8.4, not Rule 8.3. It is A4NR’s still pending Amended Petition for Modification of D.14-11-040 that addresses violations of Rule 8.3. Mr. Craver has gotten ahead of himself.

Mr. Craver also attributed SCE’s failure to report seven of the eight communications cited in the PD to “a direct result of the ambiguity in California’s overly complicated ex parte rules.”¹⁰ In an earlier teleconference with the same financial analysts, the day before SCE’s April 29, 2015 Response to the April 14, 2015 ALJs’ Ruling, Mr. Craver had also played the self-pitying victim card: “In my opinion, Rule 8.4 could certainly stand to be clarified and updated. **We are the ones who bear the reputational and financial risk** of interpretations of, and after the fact judgments regarding, an ambiguous rule.”¹¹ (emphasis added)

For Mr. Craver’s benefit, and for the protection of the rights of the other I.12-10-013 parties and the integrity of the Commission’s regulatory process, the Commission’s final decision on sanctions should re-emphasize the core message of D.14-11-041: “The ex parte

⁹ Accessible at <http://www.edison.com/content/dam/eix/documents/investors/events-presentations/Q3-2015-CEO-CFO-Earnings-Call-Remarks.pdf>

¹⁰ *Id.*

¹¹ Seeking Alpha Transcript, April 28, 2015, p. 2, accessible at <http://seekingalpha.com/article/3113436-edisons-eix-ceo-theodore-craver-on-q1-2015-results-earnings-call-transcript?page=1>

rules are not complicated, and neither are the ethical considerations of due process, transparency and level playing field in government, and the obligation to avoid breaking the law.”¹²

B. MR. WORDEN’S LATE-DISCOVERED VIOLATIONS.

A fresh reminder of the not-yet-mitigated instinct for concealment still harbored at SCE is the extraordinary October 20, 2015 Supplement to SCE’s April 29, 2015 Response to the April 14, 2015 ALJs’ Ruling. In an ambiguous sequence of events reminiscent of SCE’s original February 9, 2015 late-filed Notice of Ex Parte Communication, insisting that *“the communications described in these additional documents are neither inappropriate nor reportable ex parte communications,”* SCE now admits that *“in connection with other, unrelated document reviews, SCE discovered additional data sources and conducted additional quality control with respect to its prior review.”¹³* Among the documents contained in SCE’s October 20, 2015 Supplement are an elaborate four-page typed script, handwritten notes, and emails describing two phone calls between Russell Worden and ALJ Darling that took place on July 8, 2014 and July 10, 2014 related to claims against MHI and NEIL and *“whether SCE itself believed the record on the settlement needed to be reopened.”¹⁴*

The MHI and NEIL claims were subjects of particular importance to A4NR in July 2014, as the crux of its opposition to the Proposed Settlement was based on redirecting SCE and SDG&E claims for the recovery of O&M, CWIP, and replacement power costs to MHI and NEIL rather than to ratepayers¹⁵ At the Commission’s May 14, 2014 evidentiary hearing on the Proposed Settlement, A4NR had questioned the lack of due diligence performed by settling parties ORA

¹² D.14-11-041, p. 20.

¹³ SCE October 20, 2015 Supplement to Response to ALJs’ Ruling, p. 1.

¹⁴ *Id.*, p. 4. MHI and NEIL are acronyms for Mitsubishi Heavy Industries and Nuclear Energy Insurance Limited, respectively.

¹⁵ A4NR Reply Comments Opposing Proposed Settlement, p. 6: *“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’ is to assure that Edison and SDG&E have sufficient skin in the game to stay motivated.”* (internal footnote omitted)

and TURN on the likelihood and potential amounts of payments from MHI and NEIL, and challenged the formulae allocating any such payments between shareholders and ratepayers.¹⁶

The September 5, 2014 Assigned Commissioner and ALJs' Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement ultimately forced a change to the MHI and NEIL formulae. Because the ratepayer share of payments under the NEIL outage policy was increased from 82.5% to 95%, the recently announced \$400 million recovery results in \$50 million more going to ratepayers than would have been the case under the Proposed Settlement.¹⁷ However, with minimal explanation, the 82.5% ratepayer share of any recoveries under the NEIL property damage policy was left intact. As the September 5, 2014 Ruling tersely stated: *"We are not compelled by the public interest to change the allocation."*¹⁸

SCE's October 20, 2015 Supplement attempts to justify failing to file and serve notices of Mr. Worden's July 8 and July 10, 2014 communications with ALJ Darling: *"These exchanges took place after the settlement was signed, and each involves **what SCE believes were procedural** communications that are not ex parte communications subject to reporting."*¹⁹ (emphasis added) The only basis SCE cites for this belief is its claim, *"These communications were not 'made to influence the outcome of disputed issues in an open proceeding,' "*²⁰ a reference to a standard which the PD rightfully rejects for other communications because it conflicts with Cal. Pub. Util. Code §1701 and Rule 8.4.²¹ Notably, SCE's October 20, 2015 Supplement does not attempt to defend non-reporting of Mr. Worden's July 8 and July 10, 2014 communications because they were in response to an ALJ inquiry; or because Mr. Worden wrote *"Notes for Procedural Call With ALJ Darling"* on his advance script for the July 10, 2014 communication; or because the communications fall within Rule 8.1(c)'s exemption from the definition of *"ex parte*

¹⁶ See *Id.*, pp. 3 – 5. As A4NR observed, *"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."* *Id.*, p. 5.

¹⁷ The \$20 million retained by the utilities – an amount in excess of the sanctions recommended by the PD – ostensibly is for the processing of the outage insurance claim.

¹⁸ September 5, 2014 Assigned Commissioner and ALJs' Ruling, p. 7.

¹⁹ SCE October 20, 2015 Supplement to Response to ALJs' Ruling, p. 2.

²⁰ *Id.*

²¹ PD, p. 15.

communication” those “regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information.”

Even measured by the terms of SCE’s self-serving standard, review of the written materials SCE tardily disclosed in its October 20, 2015 Supplement related to Mr. Worden’s July 8 and July 10, 2014 communications²² strips the SCE explanation of credibility. Discussion of the MHI and NEIL issues identified by Mr. Worden unquestionably addressed *“disputed issues in an open proceeding”* as SCE was and is well aware. Conducting such discussions outside the presence of A4NR and the other I.12-10-013 nonsettling parties was a textbook example of the unfairness which flows from one litigant’s preferential access to decisionmakers. The Commission should consider these two newly discovered violations of SCE’s Rule 8.4 reporting requirements, and their exacerbating effect on the continuing Rule 1.1 violation, in determining the appropriate magnitude of penalties.

The Commission should also weigh the belated nature of SCE’s disclosure of the Worden communications in applying Factor 2 and Factor 5 of the D.98-12-075 test. A4NR’s Amended Motion for Sanctions warned of the potential for this very problem in SCE’s purportedly fastidious document search process:

*... why weren’t the individuals identified in Appendix A asked to certify that they knew of no other documents responsive to the April 14, 2015 Administrative Law Judges’ Ruling? A seemingly simple way to button up an otherwise loose end to the extensive search process appears to have been neglected.*²³

SCE assured the Commission there was no such problem, each of the individuals had *“confirmed not only that they knew of no other responsive documents, but also that they knew of no other responsive communications.”*²⁴ How could Mr. Worden’s extensively documented communications have escaped detection? SCE’s October 20, 2015 Supplement offers a meandering litany of excuses for the delay in disclosure: (1) an *“erroneously coded”*²⁵ July 8,

²² SCE October 20, 2015 Supplement to Response to ALJs’ Ruling, Appendix 1, pp. SCE-CPUC-00000331 – SCE-CPUC-00000350.

²³ A4NR Amended Motion for Sanctions, p. 2.

²⁴ SCE Response to Amended Motion for Sanctions, p. 19.

²⁵ SCE October 20, 2015 Supplement, p. 2.

2014 email entitled “Re: SONGS [Counsel discussion re Darling call] from SCE attorney Russell Swartz to Mr. Worden (although with copies to SCE attorneys Henry Weissmann and Robert Adler as well as SCE executives Ron Litzinger and Ron Nichols); (2) storage of “a portion” of Mr. Worden’s emails on a “different server” which meant they “had inadvertently not been collected;”²⁶ and (3) Mr. Worden’s hand-written notes had not been reviewed in connection with the April 29, 2015 Response, apparently because he was not among the “custodians who were found to maintain hard copy records relating to SONGS.”²⁷

SCE’s October 20, 2015 Supplement never attempts to reconcile the unreported Worden communications with the confirmations SCE says it obtained from Mr. Worden, Mr. Litzinger, and Mr. Nichols “not only that they knew of no other responsive documents, but also that they knew of no other responsive communications.” Why not?

III. MR. LITZINGER WAS, AT A MINIMUM, RECKLESS OR GROSSLY NEGLIGENT.

The PD looks past substantial evidence to determine, “We are persuaded that Mr. Litzinger did not intentionally give false testimony before the Commission in his testimony,”²⁸ but it abandons all restraint in adding, “Nor does the evidence imply that he was reckless or grossly negligent.”²⁹ The issue is not Mr. Litzinger’s character, but his conduct. The Commission should consider “the truth, **the whole truth**, and nothing but the truth” aspect of the oath to which Mr. Litzinger was sworn before testifying.³⁰ He was asked about SCE’s ex parte meetings, **not merely those in which he had personally participated**. His partial and false response was misleading regarding **all of such meetings**.

Q Now, while you were having those secret negotiations that some of the settling parties were not invited -- some of the opponents were not invited to participate, you also were having ex parte meetings with members of the Commission, true?

MR. WEISSMANN: I object to the form of the question.

²⁶ *Id.*, p. 3. SCE said it “also conducted further analysis of whether there were similar gaps in the data collected from any of the 12 other custodians ... and did not identify any such gaps.” *Id.*

²⁷ SCE April 29, 2015 Response to ALJs’ Ruling, Appendix A, ¶19.

²⁸ PD, p. 32.

²⁹ *Id.*

³⁰ Transcript, p. 2665, Ins. 10 – 12.

ALJ DARLING: Why don't you just ask the last part, if that's what you want?

MR. AGUIRRE: Q Okay. Go ahead. Answer the last part of that what your Honor said.

WITNESS LITZINGER: A Whether I had ex parte meetings with the commissioners?

Q Was Southern California Edison having ex parte meetings with the commissioners while the secret negotiations were taking place?

A The only ex parte communications I had with commissioners was following the Phase 1 proposed decision. And it was noticed.³¹

Based on Mr. Litzinger's own declaration, there is no dispute that Mr. Litzinger knew of, and authorized in advance, Mr. Pickett's plan to brief then-President Peevey "on the status of SCE's efforts to restart SONGS Unit 2" during the March 2013 trip to Poland.³² There is no dispute that he learned on April 1, 2013 that the Pickett-Peevey interaction in Warsaw had taken up "a framework for a possible resolution of the SONGS Oil;" that he participated in debriefing Mr. Pickett with Mr. Craver, Edison International General Counsel Robert Adler, and Edison International Chief Financial Officer Jim Scilacci; and that Mr. Litzinger felt compelled to tell Mr. Pickett "that he was not authorized to negotiate a settlement for SCE."³³ There is no dispute that Mr. Litzinger again felt compelled in a subsequent April 11, 2013 meeting with Mr. Pickett to reinforce "the message that Mr. Pickett was not authorized to negotiate any SONGS settlement."³⁴ After that meeting, Mr. Litzinger sent an email to Messrs. Craver, Adler, and Scilacci concluding: "I left meeting uneasy. I am pondering another conversation clearly stating that unauthorized engagement would result in dismissal—but common sense would dictate that without saying it ..."³⁵

³¹ Transcript, SCE-Litzinger, p. 2771, lns. 1 – 23.

³² SCE April 29, 2015 Response to ALJs' Ruling, Appendix E, ¶12.

³³ *Id.*, ¶14.

³⁴ *Id.*, ¶15.

³⁵ *Id.*, Appendix D, p. SCE-CPUC-00000186. Mr. Litzinger's April 11, 2013 email stated, "I met Steve face to face this morning and reinforced that there can be no discussions with the CPUC on settlement that is not sanctioned by us. There will only be one spokesperson appointed by us. I noted we are in listen mode only—Steve has yet another 'social dinner' with President Peevey this weekend??"

"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. He said he did not engage. He said the CPUC leaks like a sieve ..."

Reflecting the SCE senior executive culture, Mr. Litzinger's conduct both pre- and post-testimony showed lack of concern for what constitutes a reportable ex parte communication under Rule 8.4, and disregard for the consequences of crossing that line (perhaps because he perceived them to be so small). Knowledge of each of the unreported ex parte communications identified in the PD which took place before his May 14, 2014 sworn testimony should be imputed to Mr. Litzinger as President of SCE, and there is no evidence he was unfamiliar with any of them. A useful benchmark for the Commission to use in evaluating Mr. Litzinger's false and misleading testimony is the Judicial Council of California Civil Jury Instructions explaining gross negligence and recklessness:

425. 'Gross Negligence' Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others. A person can be grossly negligent by acting or by failing to act.

3113. 'Recklessness' Explained

[[Name of individual defendant]/[Name of employer defendant]'s employee] acted with 'recklessness' if [he/she] knew it was highly probable that [his/her] conduct would cause harm and [he/she] knowingly disregarded this risk. 'Recklessness' is more than just the failure to use reasonable care.³⁶

Based on the evidence, the threshold for establishing that Mr. Litzinger knowingly disregarded the risk of harm caused by false testimony is lower than the threshold for establishing that he intentionally provided false testimony. And the threshold for establishing that Mr. Litzinger demonstrated a lack of any care, or an extreme departure from what a reasonably careful person would do to prevent such harm, is lower still. Because of what he knew about SCE's unreported ex parte communications (including his own), the circumstantial evidence overwhelmingly supports an inference that when Mr. Litzinger testified falsely, he did

³⁶ Accessible at http://www.courts.ca.gov/partners/documents/caci_2015_edition.pdf

so with recklessness or gross negligence. His misconduct exacerbates both Rule 1.1 violations described in the PD.

IV. THE PD MISCALCULATES THE HARM SCE'S CONDUCT CAUSED.

The PD downplays as “vague” A4NR’s “due process form of criticism”³⁷ that SCE’s decision to not timely report its ex parte communications prevented the other I.12-10-013 parties from **effectively participating** on what they believed to be a level playing field. The PD errs in overlooking the extensive explanation in A4NR’s Amended Petition for Modification of D.14-11-040 of the use it would have made of the unreported information:

Mr. Pickett’s failure to comply with the procedural requirements of Commission Rule 8.3(c) and the reporting requirements of Commission Rule 8.4 deprived all of the parties to I.12-10-013, except SCE, of any knowledge concerning:

- *that the meeting between Mr. Pickett and Mr. Peevey took place;*
- *what Mr. Pickett said to Mr. Peevey;*
- *that Mr. Pickett and Mr. Peevey had engaged in a back-and-forth discussion as evidenced by what SCE now admits are Mr. Peevey’s annotations on Mr. Pickett’s memorialization of the discussion; and*
- *that Mr. Pickett had made a written communication by providing the Notes to Mr. Peevey.*

SCE’s exclusive knowledge of the oral and written communications in the collateral Peevey-Pickett meeting unfairly deprived A4NR and other parties of the ability to fully participate in I.12-10-013. Had SCE made the required disclosures of Mr. Pickett’s ex parte communications, it is reasonable to assume that:

1. *A4NR and other parties would have exercised their rights to meetings with Mr. Peevey of substantially equal time; and*
2. *A4NR and other parties would have requested copies of the Notes from Mr. Peevey, or filed requests under the California Public Records Act, to obtain them.*

Speaking only for itself, had A4NR received timely notice of Mr. Pickett’s March 26, 2013 oral and written ex parte communications to Mr. Peevey, including a copy of the Notes, it would have:

- *late-filed a response endorsing the March 11, 2013 motion by Friends of the Earth (“FOE”) and the World Business Academy to accelerate consideration of certain*

³⁷ PD, p. 36.

- Phase 3 issues to a parallel track with Phase 1, countering the opposition responses filed by SCE and the Division of Ratepayer Advocates (“DRA”);*
- *filed a Motion for Reconsideration of ALJ Melanie Darling’s May 10, 2013 emailed ‘brief version’ ruling on two SCE motions to defer or strike testimony, in which all of A4NR’s prepared testimony and nearly all of the prepared testimony submitted by other non-utility parties was ‘excluded from Phase 1.’ Properly informed of Mr. Pickett’s ex parte communications, A4NR would have sought reconsideration of ALJ Darling’s ruling from the Assigned Commissioner, if necessary – and, if necessary, the full Commission;*
 - *endorsed the recommendation in DRA’s June 25, 2013 Motion to Amend the Scoping Memo, instead of opposing DRA’s suggested amendment of the Scoping Memo while embracing DRA’s request to immediately remove the SONGS revenue requirement from rates;*
 - *attended the March 27, 2014 “settlement conference” required by Rule 12.1(b) and pointed out that, in negotiating with the Office of Ratepayer Advocates (“ORA”) and The Utility Reform Network (“TURN”), SCE had managed to improve its position by \$1.419 – 1.438 billion from the position attributed to Mr. Peevey in the Notes;*
 - *documented in its May 7, 2014 Opening Comments Opposing the Proposed Joint Settlement Agreement (and reiterated in its May 22, 2014 Reply Comments) that, in negotiating with ORA and TURN, SCE had managed to improve its position by \$1.419 – 1.438 billion from the position attributed to Mr. Peevey in the Notes;*
 - *cross-examined the witnesses from SCE, ORA, and TURN at the May 14, 2014 evidentiary hearing on how their claim that the Proposed Joint Settlement Agreement reflected ‘a hard-fought process over many months’ could be reconciled with a result \$1.419 – 1.438 billion inferior to that articulated by Mr. Peevey in the Notes;*
 - *identified in its September 15, 2014 Comments on the Assigned Commissioner and Administrative Law Judges’ Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement that, despite the improvements represented by the requested modifications, the result remained \$1.239 – 1.309 billion inferior to the position articulated by Mr. Peevey in the Notes.*
 - *argued in its October 29, 2014 Opening Comments on the Proposed Decision approving the Amended and Restated Settlement Agreement (and reiterated in its November 3, 2014 Reply Comments) as well as in its October 31, 2014 oral argument to the full Commission that – notwithstanding the ‘hard-fought process’ and the requested modifications to correct ‘provisions which unfairly disfavor ratepayers’ – the Commission was being asked to approve an outcome \$1.239 – 1.309 billion worse for ratepayers than the position articulated by Mr. Peevey in the Notes.*
 - *filed an application for rehearing of D.14-11-040 pursuant to Rule 16.1(c) alerting the Commission to the legal error of approving a settlement that had been procured by*

*fraud, and preserving A4NR's appellate rights to allege a violation of Cal. Pub. Util. Code §1757(a)(5).*³⁸ (internal footnotes omitted)

A4NR agrees with the PD that whether the Commission should modify D.14-11-040 is a different issue than the magnitude of sanctions to impose on SCE for violations of Rules 1.1 and 8.4.³⁹ But the Commission should not avert its eyes from the corrosive impact SCE's violations have had on I.12-10-013. A multi-billion dollar settlement of an extremely controversial proceeding has been formally renounced by the only parties, both considerably experienced Commission litigants, with whom SCE and SDG&E negotiated the agreement. Impairment of such a highly valued mechanism for dispute resolution threatens the ability of the caseload-intensive Commission to function effectively. SCE's debasement of the Commission's investigation into the premature closure of SONGS 2&3 can easily be described in the same terms used by D.13-12-053: *"profoundly disheartening in that it reflects a lack of candor and appreciation of the public interest and the regulatory process."*⁴⁰ The Commission should apply D.13-12-053's maximum penalty template in levying fines against SCE for Rule 1.1 violations.

The PD rightfully *"finds that the Rule violations resulting from SCE's actions and omissions in these proceedings have severely harmed the public's confidence in the Commission, and the integrity of the regulatory process."*⁴¹ Inexplicably, the PD assigns SCE only a \$20,000 per day fine to the Rule 1.1 violation attributable to *"SCE's and Mr. Pickett's series of grossly negligent actions and omissions."*⁴² The PD is bereft of any rationale for not imposing the maximum penalty of \$50,000 per day for this Rule 1.1 continuing violation.

The Commission has been compelled in recent years to impose sizable fines on SCE for statutory and Rule violations: \$30,000,000 in D.08-09-038 (*"Not only did SCE take no action to prevent a violation, but there is convincing evidence that its management encouraged the violations."*⁴³); and, as recommended by CPUC Safety and Enforcement Division staff in a

³⁸ A4NR Amended Petition for Modification of D.14-11-040, pp. 3 – 6.

³⁹ The PD at p.37 mistakenly attributes equal time provisions to Rule 8.4. Those are in Rule 8.3, violations of which are addressed in A4NR's Amended Petition for Modification.

⁴⁰ D.13-12-053, p. 19, cited in *Pacific Gas and Electric Company v. Public Utilities Commission* (2015) 237 Cal.App.4th 812, 836.

⁴¹ PD, p. 38.

⁴² *Id.*, p. 47.

⁴³ D.08-09-038, p. 103.

settlement with SCE, \$20,000,000 in D.13-09-028 (“*It appears that the Rule 1.1 violations bordered on deliberate wrongdoing.*”⁴⁴).

The Commission should assess an aggregated penalty in this proceeding that is proportionate to the harm done. Adjusting the \$16,740,000 amount recommended by the PD to reflect (1) the maximum \$50,000 (rather than \$30,000) fine applied to Mr. Litzinger’s grossly negligent or reckless violation of Rule 1.1; and (2) the maximum \$50,000 (rather than \$20,000) daily fine applied to the continuing Rule 1.1 violation attributable to SCE’s and Mr. Pickett’s grossly negligent actions and omissions would add \$24,800,000 -- for a total financial penalty of \$41,540,000.

As the Commission explained in D.08-09-038:

*Applying those [People ex rel. Lockyer v. R.J. Reynolds Tobacco Co. (2005) 37 Cal. 4th 707] principles to SCE, we find that SCE was culpable. Some managers encouraged the falsification and manipulation of data and others were in a position to know of the problem but failed to investigate thoroughly. The relationship between the harm and the penalty is: harm \$80.7 million, penalty \$30 million, an extremely favorable relationship when the penalty could have been \$102 million. SCE’s ability to pay is clear. In 2006, it had revenue of \$10.3 billion and net income after taxes of \$827 million. Our fine is less than 4% of net income, and 0.3% of revenue. We expect this penalty to be a deterrent to SCE and to other utilities...*⁴⁵

SCE’s operating revenue for 2014 was \$13.4 billion and net income after taxes was \$1.6 billion. The \$41,540,000 fine recommended by A4NR would be 2.6% of net income, and 0.3% of revenue.

V. SMALLER ERRORS DESERVING CORRECTION.

A4NR identifies these minor errors in the PD which, in the interest of accuracy, should be corrected before a final decision is adopted by the Commission:

- **page 10:** the PD mistakenly attributes to A4NR “*views [that] show dissatisfaction with the current law*” and “*argue that every communication in which a decisionmaker participates is an ex parte communication.*”⁴⁶ Actually, A4NR’s Amended Motion for

⁴⁴ D.13-09-028, p. 38.

⁴⁵ D.08-09-038, p. 107.

⁴⁶ PD, p. 10.

Sanctions identified multiple SCE communications that were on procedural subjects and therefore not ex parte communications,⁴⁷ and A4NR has consistently accepted that not every communication with decisionmakers is reportable under the Commission's Rules.⁴⁸ A4NR played no role in, and took no position on, the Legislature's 2015 efforts to revise the statutes governing ex parte communications at the Commission. A4NR's concerns focus on the adequate enforcement of **existing** law.

- **page 13:** the PD describes the March 26, 2013 Pickett-Peevey communication too narrowly as *"related to the substantive issue of recovery of the costs of replacement power purchased to cover lost SONGS output."*⁴⁹ This characterization should be expanded to match either of the more accurate descriptions in Finding of Fact 4 (*"a possible framework for resolution of the SONGS OII"*⁵⁰) or Finding of Fact 9 (*"possible allocations of major costs necessary to any settlement of the SONGS OII in the event of a permanent shutdown"*⁵¹).
- **page 32:** the PD's discussion of Mr. Litzinger's undisclosed ex parte communications inconsistently refers to *"two terms of a potential settlement"* and *"two or three possible settlement terms"* in two adjoining sentences.⁵²
- **page 46:** the PD's imprecise language in urging SCE to *"not look for excuse in the bad acts of others"*⁵³ should be clarified to state *"not look for excuse in the bad acts **it alleges** of others"*. The Commission should take care to maintain a judicious detachment from SCE's clumsy efforts at diversionary innuendo.

VI. CONCLUSION.

A4NR believes the evidence discussed in the PD, especially when Mr. Litzinger's false and misleading testimony under oath is properly framed, strongly compels a larger penalty than

⁴⁷ A4NR Amended Motion for Sanctions, pp. 7, 9.

⁴⁸ Indeed, as SCE has noted, A4NR has participated in several such communications in this proceeding.

⁴⁹ PD, p. 13.

⁵⁰ *Id.*, p. 50, FOF 4.

⁵¹ *Id.*, p. 51, FOF 9.

⁵² *Id.*, p. 32.

⁵³ *Id.*, p. 46.

\$16,740,000. This need is made clearer by Mr. Craver's public comments and the belated disclosure of Mr. Worden's July 8 and 10, 2014 unreported communications. Based upon the severity of the Rule 1.1 violations, and Commission precedent in previously unsuccessful attempts to deter SCE misconduct, A4NR recommends a revised sanction of \$41,540,000. A4NR proposes supportive changes to the PD's findings of fact and conclusions of law in the attached appendix.

A4NR's August 10, 2015 Response to the OSC requested oral argument, well in advance of the November 5, 2015 deadline for such requests specified in the PD.⁵⁴

Respectfully submitted,

By: /s/ John L. Geesman

JOHN L. GEESMAN
DICKSON GEESMAN LLP

Date: November 16, 2015

Attorney for
ALLIANCE FOR NUCLEAR RESPONSIBILITY

⁵⁴ A4NR Response to OSC, p. 12.

APPENDIX

A4NR's Proposed Changes to the PD's FOFs and COL's

Findings of Fact:

12. SCE repeated Mr. Pickett's false ~~or~~ and misleading statements to the Commission in the Late Notice, in Mr. Pickett's declaration, and in response to ALJ requests for information through July 3, 2015.

13. On May 14, 2015, Mr. Litzinger made a false and misleading statement to the Commission while testifying under oath. ~~There is no~~ The circumstantial evidence ~~from which to infer~~ strongly supports an inference that ~~his statement was intentionally false, or he was either~~ reckless or grossly negligent in making his statement.

22. It is reasonable to impose a financial penalty of ~~\$30,000~~ 50,000 for violation of Rule 1.1 related to Mr. Litzinger's false and misleading statement, ~~albeit unintentional,~~ which was either reckless or grossly negligent and misled the Commission.

23. It is reasonable to calculate the term of SCE's continuing violation of Rule 1.1 related to the series of events ~~beginning with~~ and to impose a financial penalty of ~~\$20,000~~ 50,000 per day for a period of 826 days. The calculation begins on March 29, 2013, the date by which SCE should have filed its ex parte notice of the March 26 meeting and Notes, and ends on July 3, 2015, the latest date ~~in~~ on which SCE continued to repeat one of Mr. Pickett's erroneous versions of the Poland Meeting.

Conclusions of Law:

7. SCE violated Rule 1.1 as a result of the false and misleading statement made, with either recklessness or gross negligence, by Mr. Litzinger under oath.

12. Pursuant to §2107, we impose on SCE a financial penalty of ~~\$30,000~~ 50,000 for its Rule 1.1 violation for a false and misleading statement made under oath which misled the Commission.

13. Pursuant to §2107, we impose on SCE a financial penalty of ~~\$20,000~~ 50,000 per day for the 826 days of the continuing violation arising from SCE's acts and omissions related to Mr. Pickett's meeting with Commissioner Peevey through the time when SCE ceased ~~repeated~~ repeating his evolving and misleading versions of the communication. The total penalty is calculated as ~~\$20,000~~ 50,000 x 826 = \$41,300,000.

ORDERING PARAGRAPHS:

1. Southern California ~~Electric~~ Edison Company must pay a penalty of ~~\$16,740,000~~ 41,540,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102 within 30 days of the effective date of this order. The face of the check or money order should read "For deposit to the General Fund per [Decision XX-XX-XXX]".