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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 Reply 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”). SCE was the only other party to submit Opening Comments.

SCE’s Opening Comments write off the PD’s financial sanction as just another cost of doing business, electing to not contest a fine of \$16,670,000<sup>1</sup> (99.58% of the penalty recommended by the PD) and deepening A4NR’s conviction that the amount recommended by the PD fails to satisfy the deterrence objective of D.98-12-075’s five-factor test.. As the PD states, *“we observe that the primary deterrence value is when financial penalties are sufficiently large that the utility must report them to investors.”*<sup>2</sup> Enabling SCE to report to investors that its penalties for Rule 1.1 violations are on a downward trend over the past seven years, from \$30 million in D.08-09-038 to \$20 million in D.13-09-028 to \$16+ million in this proceeding, cannot conceivably be the message the Commission desires to send.

SCE seeks to justify this light-handed penalty by guilefully distancing the Company from the acts and omissions of Mr. Pickett, its Executive Vice President and former General Counsel, and aggressively exploiting the PD error which truncated the scope of the Commission’s evaluation of Mr. Litzinger’s false and misleading testimony. The former stratagem is to no avail legally under Cal. Pub. Util. Code §2109,<sup>3</sup> and the latter collides head-on with an overwhelming array of evidence. Despite the PD’s admonition against SCE’s instinctive resort to extreme word-parsing in the face of the bright lines of Cal. Pub. Util. code 1701.3(c) and Commission Rules,<sup>4</sup> escalation of the reflex in SCE’s Opening Comments provides some useful

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<sup>1</sup> SCE Opening Comments, Attachment A, Ordering Paragraph 1.

<sup>2</sup> PD, p. 44.

<sup>3</sup> Cal. Pub. Util. Code §2109 provides: *“In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility.”*

<sup>4</sup> PD, p. 39.

examples of “*unartful language*”<sup>5</sup> remaining in the PD that should be tightened to avoid bogus claims of confusion from CPUC litigants in the future.

## II. THROWING MR. PICKETT UNDER THE BUS DOESN'T ABSOLVE SCE OF WRONGDOING.

Almost as a purgative, SCE's Opening Comments go to considerable length to imply (but never directly declare) that the now-retired Mr. Pickett was some combination of ignorant,<sup>6</sup> concealing,<sup>7</sup> misrepresenting,<sup>8</sup> loose cannon,<sup>9</sup> and forgetful<sup>10</sup> executive. How any of this is supposed to diminish SCE's gross negligence in light of Cal. Pub. Util. Code §2109 is left unclear by SCE's Opening Comments, which never mention the statute. As a matter of law, Mr. Pickett's gross negligence = SCE's gross negligence, “*in every case*” for purposes “*relating to penalties.*”<sup>11</sup>

SCE's insinuation that it was victimized by a rogue executive is easily debunked: (1) as acknowledged by Mr. Litzinger, Mr. Pickett's unreported March 26, 2013 meeting with Mr. Peevey in Warsaw was authorized in advance by Mr. Litzinger;<sup>12</sup>(2) on March 27, 2013, the day after the Pickett-Peevey meeting in Warsaw, a thirty minute “*CREE Download*” was electronically calendared for April 1, 2013 between Mr. Pickett and Mr. Craver, Mr. Litzinger, Mr. Adler, and Mr. Scilacci;<sup>13</sup> (3) upon his return from Warsaw, Mr. Pickett immediately debriefed Mr. Craver, Mr. Litzinger, Mr. Adler, and Mr. Scilacci;<sup>14</sup>(4) whether the Pickett-Peevey

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<sup>5</sup> *Id.*, p. 10.

<sup>6</sup> SCE Opening Comments, p. 7: “*It was reasonable to presume that, through his many interactions with the Commission and his previous role as SCE's general counsel, Mr. Pickett had become knowledgeable about the ex parte rules and sensitive to the need to comply with them.*” (internal footnote omitted)

<sup>7</sup> *Id.*, p. 8: “*There is no evidence that anyone at SCE other than Mr. Pickett knew about the notes in 2013.*” *Id.*, p. 9: “*SCE's filings with respect to Mr. Pickett's recollection of the Warsaw meeting followed multiple probing interviews.*”

<sup>8</sup> *Id.*, p. 1, “*It was reasonable for SCE to accept Mr. Pickett's assurances in 2013 that the communication was one-way.*” *Id.*, pp. 9 – 10: “*Mr. Pickett ... voluntarily signed a sworn declaration. Given that he was under no compulsion to do so, it was reasonable for SCE to conclude that the declaration reflected Mr. Pickett's genuine belief and recollection ... he ... had a reputation for being trustworthy and knowledgeable.*”

<sup>9</sup> *Id.*, p. 8: “*... Mr. Litzinger was 'uneasy' about whether Mr. Pickett would comply with Mr. Litzinger's direction not to engage in settlement discussions with the CPUC.*” (emphasis in original, internal footnote omitted)

<sup>10</sup> *Id.*, p. 10: “*SCE also recognized that Mr. Pickett's declaration was based on his memory, and as memory can be incomplete or faulty, SCE was careful in its statements to the Commission to refer to what Mr. Pickett recalled.*” (emphasis in original, internal footnote omitted)

<sup>11</sup> Cal. Pub. Util. Code §2109.

<sup>12</sup> SCE April 29, 2015 Response to ALJs' Ruling, Appendix E, ¶12. In Mr. Pickett's words, “*SCE management assigned me the task of updating President Peevey ...*” *Id.*, Appendix F, ¶13.

<sup>13</sup> *Id.*, Appendix F, ¶16.

<sup>14</sup> *Id.*, Appendix F, ¶14.

meeting constituted a reportable ex parte communication was specifically discussed in this debriefing;<sup>15</sup>(5) after his debriefing, Mr. Pickett reconstructed the contemporaneous notes he had given to President Peevey in Warsaw and sent his “*Elements of a SONGS Deal*” document to each of the attendees of the debriefing;<sup>16</sup>and (6) the SCE Opening Comments dismissively admit that Mr. Pickett “*began to take a few and short-lived steps to develop a potential settlement framework,*”<sup>17</sup> but ignore the number of SCE staff and counsel among whom the resulting nine documents circulated<sup>18</sup> and the unmistakable parallels between Mr. Pickett’s Warsaw notes and the “*framework*” for the agreement SCE ultimately negotiated.

As mentioned above, however, Cal. Pub. Util. Code §2109 renders the effort in SCE’s Opening Comments to discredit Mr. Pickett entirely gratuitous.

### III. EXONERATING MR. LITZINGER REQUIRES IGNORING HIS TESTIMONY.

SCE’s Opening Comments opportunistically seize upon a blind spot in the PD regarding the breadth of the question to which Mr. Litzinger falsely and misleadingly responded,<sup>19</sup> and take several exaggerated leaps to diminish his wrongdoing. First, SCE imputes to the PD a non-existent “*finding that Mr. Litzinger acted in good faith.*”<sup>20</sup> Second, applying an arbitrary and inaccurate narrowing to the question he was asked under oath, the SCE Opening Comments argue the PD “*(a)t a minimum*” should be revised to “*eliminate any suggestion that the testimony was ‘untrue.’*”<sup>21</sup> Third, SCE suggests that “*untrue*” is properly understood to mean “*inaccurate but not necessarily willfully false*” and “*is sometimes loosely used in the sense of ‘unfaithful.’*”<sup>22</sup> (internal footnotes omitted) Fourth, SCE asserts that because this sense of

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<sup>15</sup> *Id.*, Appendix F, ¶16. The reportability question apparently was left unresolved in the debriefing. According to Mr. Pickett, “*After the April 1 meeting I consulted with SCE’s counsel on the ex parte reporting issue, and no ex parte notice was filed at that time.*” *Id.*

<sup>16</sup> *Id.*, Appendix F, ¶17. According to Mr. Pickett, “*The document was intended to be an internal outline that could serve as a basis for discussing a potential settlement in a deal with consumer and other groups should SCE’s efforts to restart SONGS prove unsuccessful.*” *Id.*

<sup>17</sup> SCE Opening Comment, p. 9.

<sup>18</sup> SCE has asserted legal privilege blocking disclosure of these documents. SCE April 29, 2015 Response, Appendix E, Rpt#1, Rpt#2, Rpt#3, Rpt#4, Rpt#5, Rpt#6, Rpt#7, Rpt#8, and Rpt#9.

<sup>19</sup> “*The PD interprets the question posed to Mr. Litzinger the same way.*” SCE Opening Comments, p. 12.

<sup>20</sup> *Id.*, pp. 13, 14. What initially is described as “*This amounts to a finding that Mr. Litzinger acted in good faith*” (p. 13) transforms into “*The finding of good faith is particularly salient ...*” (p. 13) until it becomes “*notwithstanding the finding that Mr. Litzinger acted in good faith.*” (p. 14)

<sup>21</sup> *Id.*, p. 14.

<sup>22</sup> *Id.*

unfaithful “*carries a connotation of culpability,*” it is “*contrary to the PD’s express findings*”<sup>23</sup> although no such findings are cited (and none exist). Fifth, SCE urges the Commission to use “*mistaken*” rather than “*untrue*” to “*avoid leaving Mr. Litzinger vulnerable to an unfounded and misleading characterization of his testimony.*”<sup>24</sup>

As Mr. Litzinger’s role in the debriefing of Mr. Pickett establishes, however, Mr. Litzinger knew of the Pickett-Peevey Warsaw meeting when he testified. He authorized it in advance. Despite his professed opposition to pursuing settlement in April 2013,<sup>25</sup> Mr. Litzinger reported to Messrs. Craver, Adler, and Scilacci that he had quizzed Mr. Pickett on strategy on April 11, 2013:

*I used that as an opportunity to seek out the answer to our question on ‘TURN without DRA’. Steve said that can be done, but would likely result in a ‘protested settlement’ with a hearing—DRA of course filing the protest. He would recommend considering inviting DRA in later in the process. I took it all under advisement.*<sup>26</sup>

The only possible inference from the evidence is that Mr. Litzinger had been a knowledgeable participant in the conduct underlying SCE’s continuing Rule 1.1 violation when he gave his false and misleading testimony. Evaluation of Mr. Litzinger’s truthfulness should be based on his response to the full scope of the question he was asked at the May 14, 2014 evidentiary hearing, not an arbitrary shrinkage that only addresses his personal ex parte meetings.

#### **IV. SCE’S ETHICAL COMPASS CONTINUES TO POINT SOUTH.**

SCE’s Opening Comments reveal the distance the Company must still travel to walk the talk of the “*New Policy*” bundled with the same February 9, 2015 press release announcing its late-filed notice of Mr. Pickett’s ex parte communications in Warsaw. Where the “*New Policy*” commits “*to open and fair communications with our regulators to ensure fair decision making in matters involving the public interest,*”<sup>27</sup> the SCE Opening Comments warn that “*Filing a notice when not required imposes a substantial and unnecessary burden on Commissioners to give*

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> “*I believed that it was damaging and counterproductive to entertain President Peevey’s ideas while SCE was pursuing restart.*” SCE April 29, 2015 Response, Appendix G, ¶4.

<sup>26</sup> *Id.*, Appendix D, p. SCE-CPUC-00000186.

<sup>27</sup> SCE February 2, 2015 Policy, Section 1.0.

*equal time meetings to other parties.*”<sup>28</sup> The earlier press release proclaimed “*the company’s policy to avoid ‘close calls’ when it comes to compliance*”<sup>29</sup> but the SCE Opening Comments caution against “*over-reporting of innocuous and non-substantive contacts with decision makers.*”<sup>30</sup>

As it has since its late-filed notice, SCE seeks refuge in what it describes as “*accepted practices*”,<sup>31</sup> heedless of their irreconcilability with the plain language of applicable statutes and Commission Rules. SCE’s disregard for the written standards of conduct governing I.12-10-013 exemplifies “*such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results*” — exactly how SCE’s Opening Comments define “*gross negligence*”.<sup>32</sup>

The PD largely resists SCE’s shadowy justifications of an “*accepted practices*” standard, but makes an unsupported observation about “*apparent confusion among the parties. [¶] It is remarkable that parties advanced such differing views of the decades-old language defining an ex parte communication.*”<sup>33</sup> Given the scofflaw attitude toward compliance, and ongoing resort to semantic water-boarding, manifest in SCE’s Opening Comments, there is nothing remarkable about “*such differing views*”. The comment should be removed from the PD, as should the word “*almost*” in the PD’s interpretation of Cal. Pub. Util. Code §1701.1 and Rule 8.1.<sup>34</sup>

Respectfully submitted,

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<sup>28</sup> SCE Opening Comments, p. 6.

<sup>29</sup> February 10, 2015 A4NR Motion Seeking Investigation of Sanctions, Exhibit B.

<sup>30</sup> SCE Opening Comments, p. 1.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*, p. 6, citing

<sup>33</sup> PD, p. 46.

<sup>34</sup> *Id.*, p. 11. See Judicial Council of California Criminal Jury Instruction No. 101: “*If someone asks you about the case, tell him or her that you cannot discuss it. If that person keeps talking to you about the case, you must end the conversation.*”