

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 RESPONSES TO ITS AMENDED
PETITION FOR MODIFICATION OF D.14-11-040**

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I. INTRODUCTION.

Pursuant to Rule 16.4(g) 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 other parties’ Responses to its Amended Petition for Modification (“PFM”) of D.14-11-040. On July 1, 2015 Administrative Law Judge (“ALJ”) Melanie M. Darling, by emailed ruling, granted A4NR permission to file this Reply no later than July 7, 2015 with the proviso that the Reply not exceed 15 pages and that it be limited to matters identified in the parties’ Responses.

II. SCE’S RESPONSE IS PREMISED ON SKEWED LOGIC.

Prior to flailing away at a variety of straw man arguments, the SCE Response sets out some dubious general principles:

- **SCE:** *“As far as SCE is aware, the Commission has never set aside a decision approving a settlement at the behest of a non-party to the settlement.”¹ (emphasis in original)*
 - **A4NR Reply:** a party prevented from full participation in I.12-10-013 by a collusive effort between SCE and the CPUC President to pre-empt Commission consideration of prudence has standing to challenge a fraudulently induced settlement now renounced by even the two ratepayer advocacy organizations that co-sponsored it.
- **SCE:** *“Again, as far as SCE is aware, the Commission has never set aside a decision based on an alleged ex parte violation.”² (emphasis in original)*
 - **A4NR Reply:** the extraordinary ex parte violations associated with the Hotel Bristol Notes manifest an extrinsic fraud and fraud-by-concealment, of significant financial magnitude, the discovery of which create a strong expectation that the Commission would have decided D.14-11-040 differently had it been properly informed.
- **SCE:** *“TURN and ORA negotiated the settlement based on their own independent analysis of precedent, the prospects for success, and the benefits of an early resolution.”³*

¹ SCE Response, p. 1.

² *Id.*

³ SCE Response, p. 2.

- **A4NR Reply:** as TURN and ORA have both made clear, this *“independent analysis”* should have been informed by all disclosures from SCE that TURN and ORA were legally entitled to receive.
- **SCE:** *“As the Commission stated in approving the settlement: ‘Every indication is that counsel on each side adequately analyzed the risks and benefits of their clients’ respective positions.’”*⁴
 - **A4NR Reply:** any analysis not informed by the content of the Hotel Bristol Notes was legally deficient and inherently inferior to SCE’s asymmetric knowledge of the terms Peevey had voiced in prodding SCE toward settlement.
- **SCE:** *“President Peevey’s broadly-stated thoughts on how cost responsibility for SONGS might ultimately be sorted out were irrelevant to the settlement negotiations.”*⁵
 - **A4NR Reply:** then why did Mr. Pickett make such a concerted effort to brief his superiors immediately upon return, write up his recollections as *“Elements of a SONGS Deal”*, and direct other SCE personnel to *“take my notes and turn it [sic] into a simple term sheet we could use to help guide the negotiations”*⁶?
- **SCE:** *“The relief A4NR seeks would be unprecedented and would undermine the Commission’s strong policy in favor of the resolution of disputed proceedings through multi-party settlements.”*⁷
 - **A4NR Reply:** the commercial demise of Southern California’s largest electricity generation asset, the criminal investigations of the CPUC, and the search warrant executed at Peevey’s home that led to discovery of the Hotel Bristol Notes are also wholly unprecedented in the Commission’s 104-year history. Nothing would undermine the policy favoring settlements more conclusively than Commission indifference to whether a settlement is procured by fraud. What rational party would ever venture into settlement discussions under such Hobbesian conditions? The

⁴ SCE Response, p. 2.

⁵ SCE Response, p. 2.

⁶ SCE-CPUC-00000005.

⁷ SCE Response, p. 3.

Commission is expected to assure the integrity of any settlement process upon which it relies.

- **SCE:** *“... but allowing a non-party to reopen a decision approving a settlement would be especially destabilizing and create significant uncertainty regarding the reliability of Commission decision making.”*⁸
 - **A4NR Reply:** **the Commission looks beyond the parties to a settlement in making the findings required by Rule 12.1(d), so the source of Commission knowledge that such findings were based on fraud should be of less concern than the necessity of correction. Failure to make such correction ‘would be especially destabilizing and create significant uncertainty regarding the reliability of Commission decision making.’**
- **SCE:** *“Regardless of what President Peevey told Mr. Pickett on that date, and regardless of how Mr. Pickett reacted, the settlement remains consistent with law; remains within the range of possible litigation outcomes; remains beneficial to the public in eliminating the delay and uncertainty of further litigation; and remains in the public interest.”*⁹ (emphasis in original)
 - **A4NR Reply:** **with no explanation of how a settlement procured by fraud can be consistent with law or in the public interest, as required by Rule 12.1(d), SCE tells its ratepayers to be happy with their 30% because it could have been less, the smug rejoinder of a miscreant whose only remorse is getting caught.**

III. SCE STUMBLES OVER SEVERAL A4NR KEY POINTS.

A. Collusion between Peevey and Pickett to preempt the OII.

SCE cites the PFM’s assertion that Peevey and Pickett engaged in a collusive effort to scuttle the OII¹⁰ but determines that, since the two reached no final agreement in Warsaw, there was no collusion. A4NR did not allege there was a contract, just a cooperation to preemptively resolve the OII before prudency issues could be addressed, as offered in item

⁸ SCE Response, p. 4.

⁹ SCE Response, p. 6.

¹⁰ *Id.*

9 b) of the Hotel Bristol Notes: *“balance of OII closed except for shutdown O&M phase.”*¹¹ Ironically, Pickett also numbered 9. b. a similar notation in his *“Elements of a SONGS Deal”*: *“Balance of OII closed (except possibly a subsequent phase to determine level of ongoing shutdown O&M.”*¹² SCE’s observation that the OII had already been structured in phases before the Warsaw meeting, or that the I.12-10-013 proceeding continued well after the Warsaw meeting,¹³ in no sense contradicts the evidence that the Peevey-Pickett discussion contemplated a settlement which would close the OII except for determining the amount of shutdown O&M. This is significant because, as SCE’s Response emphasizes, *“The settlement was premised on the Commission not making any finding with regard to SCE’s prudence.”*¹⁴

B. Required disclosure of the Hotel Bristol Notes.

SCE’s Response continues to ignore the core of its disclosure obligation arising from the Peevey-Pickett discussion: the written ex parte communication, and written material used for or during a communication, represented by the Hotel Bristol Notes. Insisting that *“the rules would have required only a report on what Mr. Pickett said, not what President Peevey said,”*¹⁵ SCE fails to recognize that the Hotel Bristol Notes memorialize what Pickett said Peevey said, and were indisputably written material used for or during a communication. The Notes themselves became a written ex parte communication when Pickett handed them to Peevey. As written material used for or during a communication, Rule 8.4(c) required that a copy of the Notes be attached to the Notice of Ex Parte Communication that SCE was required to file within three working days of the Warsaw discussion. As a written ex parte communication, Rule 8.3(c)(3) required that copies of the Hotel Bristol Notes be served on I.12-10-013 parties the same day Pickett handed them to Peevey. Nor did Pickett’s claimed failure to retain a copy of the Notes absolve SCE’s obligation to at least disclose the existence of the Hotel Bristol Notes, as the Late-Filed Notice of Ex Parte Communication eventually did. This would have enabled parties to pursue the Notes through other means, such as the California Public Records Act.

¹¹ Hotel Bristol Notes, p. 2.

¹² SCE-CPUC-00000004.

¹³ SCE Response, p. 7.

¹⁴ SCE Response, p. 13.

¹⁵ SCE Response, p. 9.

SCE's violation of CPUC disclosure requirements deprived the I.12-10-013 parties of their legal rights to timely access to the Hotel Bristol Notes.

C. Comparison of Peevey framework vs. key settlement provisions.

SCE argues that Peevey's Warsaw comments were not a "*comprehensive settlement outline*"¹⁶ – notwithstanding SCE's original characterization of them as "*a framework for a possible resolution*"¹⁷ -- and that A4NR's contrast of the Peevey framework with the actual settlement is "*futile*."¹⁸ SCE's reliance on Pickett's post-PFM reconstruction of what he now thinks Peevey meant – an exercise in reverse engineering from a declarant SCE originally said "*does not recall exactly what he communicated*"¹⁹ – is less credible than even the flawed textual analysis earlier attempted by ORA and TURN, and the Peevey framework conspicuously remains \$1.2 - 1.3 billion more favorable to ratepayers than the modified settlement agreement approved by the Commission. SCE never addresses the salient issue, however: what use could skilled negotiators make of their legal entitlement to the content of the Hotel Bristol Notes? SCE points to ORA and TURN press releases to suggest that neither considered the information relevant, but overlooks that both parties subsequently rebuked the settlement after the Notes became public.

A simple, and representative, example can be made of the Peevey position in the Hotel Bristol Notes regarding disallowance of all RSG costs. Pickett's post-PFM declaration and his "*Elements of a SONGS Deal*" document remove any doubt that the Warsaw discussion contemplated a total disallowance of the replacement steam generators. The declaration: "*I recall that he [Peevey] made a statement to the effect that the cost of the replacement steam generators ('RSGs') should be written off.*"²⁰ The "*Elements of a SONGS Deal*" document: "*Disallow RSG investment entirely ('out of rate base retroactively').*"²¹ The "*out of rate base retroactively*" phrasing approximates a line that appears in quotation marks in the Hotel Bristol

¹⁶ *Id.*

¹⁷ SCE Late-Filed Notice of Ex Parte Communication, p. 1.

¹⁸ SCE Response, p. 9.

¹⁹ SCE Late-Filed Notice of Ex Parte Communication, p. 1.

²⁰ SCE April 29, 2015 Response, Appendix F, ¶18.

²¹ SCE-CPUC-00000003.

Notes: “retroactively out of rate base.”²² Avoidance of this consequence would eventually bring shareholders an additional \$194 million in the settlement SCE negotiated with its uninformed counter-parties.

Would ORA and TURN have wanted to know of Peevey’s stated position on a \$194 million item? Independent of the Commission’s ex parte rules, Restatement 2d Contracts §161 suggests this nondisclosure may have transformed into a misrepresentation by SCE:

*A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist ... ¶(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.*²³

D. Advantageous knowledge of Peevey framework.

SCE erroneously argues that A4NR’s claim “that SCE ‘used’ what President Peevey said ‘in formulating a settlement strategy’ requires a premise “that SCE actually put President Peevey’s ideas into the settlement.”²⁴ Not so, and A4NR instead has consistently asserted that SCE used its inside knowledge of what Peevey said to negotiate a different and better deal than Peevey had threatened, constrained only by the need to do so before prudence questions were addressed in I.12-10-013. The feeble nature of SCE’s denial is clear from its insistence that contrary evidence from Pickett, Mike Hoover, and Les Starck be discounted because “Mr. Pickett was not involved in the settlement negotiations” and “Neither Mr. Hoover nor Mr. Starck ... were involved in the settlement negotiations or in SCE’s internal deliberations about those negotiations.”²⁵ But Pickett’s post-Warsaw actions spawned an extensive effort and numerous documents to craft a settlement strategy and the May 29, 2013 Hoover-Starck emails²⁶ that SCE would discount unmistakably corroborate that settlement was actively under consideration.

E. Imperative of postponing any prudence inquiry.

SCE also claims to not understand how disclosure of the Warsaw ex parte communications, seven weeks before the Phase 1 evidentiary hearings, could affect the timing

²² Hotel Bristol Notes, p. 1.

²³ See *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal 4th 739, 749 – 750.

²⁴ SCE Response, p. 11.

²⁵ *Id.*

²⁶ SCE-CPUC-00000187.

of Commission consideration of prudence issues. SCE overlooks that nearly all of the prepared testimony submitted by non-utility parties was deferred to Phase 3 on May 10, 2013 shortly before commencement of the Phase 1 hearings. This testimony had been prepared as a good faith response to two paragraphs in the Phase 1 Scoping Ruling by Assigned Commissioner Florio and ALJ Darling:

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).

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.²⁷

The Phase 1 Scoping Ruling “(b)roadly stated” an “envisioned” Phase 3 :

Phase 3 – causes of the SG damage and allocation of responsibility, whether claimed SGRP expenses are reasonable, including review of utility-proposed repair and/or replacement cost proposals using cost-effectiveness analysis and other factors;²⁸

Knowledge that the March 26, 2013 Peevey-Pickett discussion had taken place, and that “balance of OII closed except for shutdown O&M phase”²⁹ was recorded in the Hotel Bristol Notes, would have reconfigured the environment in which ALJ Darling’s May 10, 2013 ruling was issued. Even if such awareness did not alter her ruling, SCE’s legally required disclosures would have enabled an informed response to the ruling by parties whose testimony was exiled to a Phase 3 unlikely to ever occur. SCE’s Response is candid about the indispensability to SCE of avoiding Phase 3: “An acceleration of Phase 3 might have accelerated the discussions, but it would not have changed the outcome. The settlement was premised on the Commission not making any finding with regard to SCE’s prudence ...”³⁰ But this candor begs whether the

²⁷ Phase 1 Scoping Ruling, pp. 3 – 4.

²⁸ Phase 1 Scoping Ruling, p. 4.

²⁹ Hotel Bristol Notes, p. 2.

³⁰ SCE Response, p. 13.

“outcome” would have changed had the non-utility parties been allowed to develop an evidentiary record of SCE’s imprudence.

IV. SCE IS WRONG ABOUT EXTRINSIC FRAUD.

SCE mistakenly suggests that because A4NR was a party to I.12-10-013, the Peevey-SCE conduct should be considered intrinsic to the proceeding rather than extrinsic. But Peevey was neither the Assigned Commissioner nor the presiding officer of I.12-10-013, and there was no way that any party to the proceeding could protect itself in the proceeding from his and SCE’s efforts to preempt the OII from outside the proceeding. By failing to disclose Pickett’s March 26, 2013 oral and written ex parte communications with Peevey, SCE eviscerated A4NR’s (and other non-utility parties’) effective participation in I.12-10-013. A long chain of California cases has characterized such conduct, without need of a fiduciary relationship, as extrinsic fraud sufficient to set aside a prior judgment:

- *The main requirement to establish extrinsic fraud is that the unsuccessful party was prevented by his adversary from presenting **all** of his case to the court.... It would seem that the deceit practiced in the instant case was just as effected to prevent the proper presentation of the contest as if the plaintiff had been prevented from being present at the hearing.* Caldwell v. Taylor (1933) 218 C. 471, 479 ³¹ (emphasis in original)
- *Extrinsic fraud is a broad concept that tends to encompass almost any set of extrinsic circumstances depriving a party of a fair adversary hearing.* In re Estate of Beard (1999) 71 Cal.App.4th 753, 773
- *The essence of extrinsic fraud is that a party has been denied by his opponent or otherwise an opportunity to be heard or to fully present a claim or defense.* In re Marriage of Wipson (1980) 113 Cal.App.3d 136, 141

The fraudulent concealment from the court of important facts may also, under certain circumstances, constitute extrinsic fraud entitling a party to relief from a judgment.³² Where the concealment of facts from the trial judge results in an order the judge would not have made had the true facts been disclosed, the concealment constitutes extrinsic fraud on the court.³³

³¹ See also *Stenderup v. Broadway State Bank of Los Angeles* (1933) 219 C. 593, 597, and *Pentz v. Kuppinger* (1973) 31 C.A.3d 590, 596.

³² See *Stenderup v. Broadway State Bank of Los Angeles*, *supra*, and *Saunders v. Saunders* (1958) 157 Cal.App.2d 67, 72.

³³ *Harada v. Fitzpatrick* (1939) 33 Cal.App.2d 453, 459.

Because A4NR is unaware of the extent of any knowledge of the Peevey-Pickett discussion ALJ Darling may have had when she made her May 10, 2013 ruling, A4NR has not argued that SCE's nondisclosure constitutes a fraud on the court. A4NR leaves to the Commission's determination whether the factual prerequisites for such an argument exist.

SCE's formulaic dismissal of A4NR's extrinsic fraud argument does not reflect California law. As the California Supreme Court has observed:

*No abstract formula exists for determining whether a particular case involves extrinsic, rather than intrinsic, fraud. 'It is necessary to examine the facts in the light of the policy that a party who failed to assemble all his evidence at the trial should not be privileged to relitigate a case, as well as the policy permitting a party to seek relief from a judgment entered in a proceeding in which he was deprived of a fair opportunity fully to present his case.'*³⁴

It cannot be argued that A4NR failed to assemble its evidence and is simply trying to relitigate its case. Rather, SCE's failure to comply with its disclosure obligations deprived A4NR (and each of the other I.12-10-013 non-utility parties) of a fair opportunity fully to present its case.

In light of the primacy of balancing two competing policies, the distinction drawn by SCE between extrinsic and intrinsic fraud may be more superficial than substantive. Restatement 2d Judgments abandons the distinction between extrinsic and intrinsic fraud, stressing its uncertainty and the lack of consistency in its application:

*[W]hen the evidence of fraud is weak, or when it appears that the victim should have anticipated the possibility of fabrication or concealment, the decisions often invoke the proposition that relief may not be granted on the basis of 'intrinsic' fraud. It is also clear that there is discord in the underlying judicial attitudes toward relief on the basis of fraud, some courts being more responsive than others. Allowing for all these factors, if the cases are read with close attention to their facts, the critical considerations usually are whether the claim of fraud is well substantiated and not merely asserted at large and whether in the original action the victim had pursued reasonable precautions against deception.*³⁵

V. SCE MISUNDERSTANDS THE SIGNIFICANCE OF ITS FRAUD-BY-CONCEALMENT.

Rather than address the argument A4NR made in its PFM regarding SCE's fraud-by-concealment, SCE resorts to attacking straw men. A4NR never suggested that SCE's fraud

³⁴ *In re Marriage of Modnick* (1983) 33 Cal.3d 897, 905, citing *Jorgensen v. Jorgensen* (1948) 32 Cal.2d 13, 19.

³⁵ Rest.2d, Judgments §70, Comment c. See also 12 Pacific L. J. 1013 urging abolition of distinction.

against its negotiating counter-parties was extrinsic to the proceeding, nor did it assert a contractual remedy of its own since A4NR was not a party to the settlement agreement. Instead, the PFM explained that SCE's nondisclosure of Pickett's oral and written ex parte communications satisfied the elements of an actionable fraud-by-concealment. A4NR argued that a settlement agreement procured by fraudulent concealment cannot be considered either consistent with law or in the public interest, and that discovery of such fraudulent concealment vitiates the Commission's Rule 12.1(d) finding in D.14-11-040.

Without explanation, SCE attempts to shrink its disclosure obligation to exclude the Hotel Bristol Notes: *"The only fact that SCE was even arguably under a duty to disclose [to ORA and TURN] was Mr. Pickett's reaction to President Peevey's comments."*³⁶ SCE's Response never addresses why the Notes weren't required to be disclosed by both Rule 8.3(c)(3) and Rule 8.4. In its defense of how SCE dealt with its settlement counter-parties, the SCE Response elects not to mention the Notes -- except perhaps by inference, in the biggest whopper of them all: *"President Peevey's comments were not even relevant to the settlement negotiations and certainly not material."*³⁷

VI. EIGHT INDICATIONS PEEVEY'S COMMENTS WERE RELEVANT AND MATERIAL.

Contradicting SCE's denial, the pivotal role played by Peevey's comments is demonstrated by the following:

1) The day after the March 26, 2013 Peevey-Pickett conversation, Ronald Litzinger's executive assistant, Lyneece James Johnson, calendars a *"CFEE Download"* for 0:200 April 1, 2013 in Ted Craver's office for Pickett, Litzinger, Craver, Jim Scilacci, and Ronald Adler;³⁸

2) On March 27, 2013, the day after the Peevey-Pickett conversation about settlement, Pickett is seated next to Peevey at a group dinner. Pickett's post-PFM declaration states,

³⁶ SCE Response, p. 16. The June 22, 2015 report to the Commission from Strumwasser & Woocher LLP reaches a different conclusion at p. 138 as to when disclosure is required: *"Furthermore, the Commission's rules do not limit the reporting obligation to 'reportable communications' but rather to all ex parte communications. Rule 8.4 says that '[e]x parte communications' that are subject to these reporting requirements shall be reported by the interested person, regardless of whether the communication was initiated by the interested person. Notice of ex parte communications shall be filed within three working days of the communication.'* (Emphasis added.) So, at a minimum, a notice disclosing the meeting but reporting nothing that was said would be in order."

³⁷ *Id.*

³⁸ SCE-CPUC-00000001.

*I believe President Peevey may have mentioned SONGS during the dinner, but I do not recall anything of substance relating to the SONGS OII being discussed. To the best of my recollection, settlement of the OII was not mentioned.*³⁹

SCE's July 3, 2015 Response to ALJs' Ruling of June 26, 2015 provides additional detail from Pickett's multiple contemporaneous blackberry messages during the March 27, 2013 dinner⁴⁰ to two SCE colleagues in the United States: Polly L. Gault, Executive Vice President of Public Affairs at Edison International, and Elizabeth Matthias, a Senior Attorney at SCE. Although some of the exchanges are fully or partially redacted as non-responsive to the ALJs' Ruling, the Pickett messages which SCE has provided include:

- From Pickett to Gault at 11:06 p.m. Warsaw time:

Subject: Re: Sent the wrong attachment earlier. Here's the agenda. Sorry.

I agree. You should stop sending me annoying e mails. So there. I expect to never hear from you again. So there. From Poland sitting next to Peevey, God help me. So there. Yes, I am moderately intoxicated. Thank God !

- From Pickett to Matthias at 11:26 p.m. Warsaw time:

Subject: Re: Heaven Help Us!

Redacted-NonResponsive *Sitting next to Peevey taking in the last formal evening of the trip* **Redacted-NonResponsive**

- From Pickett to Gault at 11:28 p.m. Warsaw time:

Subject: Re: Sent the wrong attachment earlier. Here's the agenda. Sorry.

Hung out, visited friends, went to Stonehenge. Now sitting next to Peevey at dinner in Warsaw working Chino Hills and SONGS. Deserve combat pay. Will get nothing. Moderately pissed off And you?

3) The April 1, 2013 "CFEE Download" discusses settlement of the SONGS OII, based on Pickett's declaration⁴¹ and his transmittal email ("*Here is a typed-up version of my notes from*

³⁹ SCE April 29, 2015 Response, Appendix F, ¶15.

⁴⁰ SCE's July 3, 2015 Response also includes an email from Pickett to Polly Gault referring to a dinner the preceding day, sent at 12:03 a.m. Warsaw time on March 27, 2013: "Greetings from Poland, where I just had dinner with Peevey. **Redacted-NonResponsive**" SCE-CPUC-00000283

⁴¹ SCE April 29, 2015 Response, Appendix F, ¶16.

our conversation this morning.”⁴²) of his “Elements of a SONGS Deal” document to Craver, Adler, Scilacci, and Litzinger.

4) In the days immediately following the April 1 meeting, Pickett formulates a settlement strategy. He sends an email with the identified subject “Next steps” to Megan Scott-Kakures and Russell Worden. This Thursday, April 4, 2013 email refers to “the settlement framework we discussed yesterday” and identifies tasks to be performed.⁴³ “First, we should take my notes and turn it into a simple term sheet we could use to help guide the negotiations.”⁴⁴ And a prompt turnaround appears important: “Ron is going to want to pull a subset of the INMG together sometime next week to discuss this, so if we could have something on paper by Tuesday or so it would be great.”⁴⁵

5) At least nine documents are created in the aftermath of Mr. Pickett’s requests over the next eight days,⁴⁶ but SCE has asserted legal privilege to block access to each .

6) Litzinger’s April 11, 2013 email to Craver, Scilacci, and Adler indicates his frustration with Pickett’s role but voices no qualms about SCE’s apparent decision to “entertain President Peevey’s ideas.”⁴⁷ As Litzinger explains,

*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??*⁴⁸

7) The May 29, 2013 email exchange between Hoover and Starck,⁴⁹ concerning Hoover’s discussions with Peevey and Carol Brown, centers on settlement:

- Hoover to Starck: *We have a small window of opportunity to work with parties to implement a shutdown in exchange for getting our money back. That window will close soon and we will lose a very good opportunity.*

⁴² SCE-CPUC-00000002.

⁴³ SCE-CPUC-00000005.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 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.

⁴⁷ Litzinger’s post-PFM declaration states, “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, ¶14.

⁴⁸ SCE-CPUC-00000186.

⁴⁹ SCE-CPUC-00000187.

- Starck to Hoover: *We need to talk to Pickett ASAP to let him know about your discussions with Peevey. Time is running out. I also have no idea if Ron and Ted are even thinking this way.*
- Hoover to Starck: *In talking with Carol, she indicated that Pickett was well prepared in Poland with specifics, but then nothing has happened. Not making a decision is a decision not to move forward. Mike also told me that Pickett is very frustrated....*(ellipses in original)

8) Notwithstanding the SCE Response’s discounting of Hoover’s perspective,⁵⁰ his September 6, 2013 email to Laura Genao regarding that day’s Peevey-Litzinger lunch discussion reveals a clear understanding of the Peevey leverage on settlement: *“Mike is also playing with him. He’s saying if its [sic] left up to them it will be harsh....”*⁵¹(ellipses in original)

VII. SDG&E’S RESPONSE COMPOUNDS THE WE-STOLE-IT-FAIR-AND-SQUARE MEME.

The SDG&E Response regurgitates SCE’s arguments, but torques them one full turn toward hyperbolic extreme. *“First, Commissioner Peevey could not speak for the entire Commission,”*⁵² SDG&E intones, with the same conviction that one might use in saying that President Putin cannot speak for the entire Duma. One need not have attended the controversial February 12, 2015 Peevey tribute dinner to recognize the dominant role he played at the Commission during his 12-year presidency. As one of only three Commission presidents to ever wield the authority of Cal. Pub. Util. Code §305, Peevey never once found himself in the minority of any significant decision at the Commission. He is widely considered to have been one of the most influential members in its 104-year history.

SDG&E descends further into make-believe by arguing that SCE gained no advantage from its exclusive knowledge of the Peevey’s Warsaw comments *“because the substantive Hotel Bristol Notes topics were already in the public domain.”*⁵³ In this fantasy world, what mattered was not the substantive positions that Peevey articulated to Pickett in trying to induce settlement, but merely the topics he covered: *“The substantive topics identified in the Hotel Bristol Notes had already been identified as relevant to the SONGS outage or were topics that*

⁵⁰ SCE Response, p. 11.

⁵¹ SCE-CPUC-00000203.

⁵² SDG&E Response, p. 12.

⁵³ SDG&E Response, p. 9.

would likely be handled in already-established Commission proceedings.”⁵⁴ This is akin to believing that an insider trading securities based on illicit early access to a quarterly earnings report gains no advantage because everyone knows quarterly earnings reports are important. Inadvertently reinforcing A4NR’s point about the superior ratepayer benefit of Peevey’s Warsaw framework compared to the actual settlement, SDG&E argues, “no party, having done legal research on early plant retirement, should have been surprised by the cost treatments Commissioner Peevey allegedly outlined in the Hotel Bristol Notes.”⁵⁵

SDG&E’s Response administers an unintentional coup de grâce to the settlement by singling out decommissioning costs: “the suggested treatment of other types of costs outlined in the Hotel Bristol Notes, particularly ‘decommissioning costs’, should not be surprising for any party familiar with the Commission’s established series of decommissioning proceedings.”⁵⁶ But ORA’s and TURN’s earlier claim to have negotiated a settlement superior to the Hotel Bristol Notes derived “approximately \$434 million”⁵⁷ of a purported of a \$780 million to \$1.059 billion benefit from windfall “refunds”⁵⁸ from the Nuclear Decommissioning Trusts. Viewing withdrawals from the Trusts as “refunds” for ratepayers is like raiding your children’s college fund for a “free” vacation. With the Trusts currently sized on the basis of hyper-optimistic assumptions about how quickly the federal government will remove spent fuel from the SONGS site,⁵⁹ heralding withdrawals as “refunds” increases the likelihood that additional contributions will be required from future ratepayers who never received electricity from SONGS. Agreeing with SDG&E that the Hotel Bristol Notes indicate the intent to maintain the current CPUC review process for decommissioning costs, A4NR’s comparison of the Notes with the settlement attributed no savings to withdrawals from the Nuclear Decommissioning Trusts.

VIII. TURN’S INELUCTIBLE RESPONSE; WEM’S BROADER APPROACH TO THE EVIDENCE.

Discovery of the Hotel Bristol Notes made renunciation of the SONGS settlement by SCE’s negotiating counter-parties, ORA and TURN, as inevitable as tomorrow’s sunrise. ORA

⁵⁴ SDG&E Response, p. 12.

⁵⁵ SDG&E Response, p. 13.

⁵⁶ SDG&E Response, p. 13.

⁵⁷ A4NR PFM, Appendix A, Attachment 2, p. 3.

⁵⁸ *Id.*

⁵⁹ See discussion in D.14-12-082, p. 22.

opted to do this by press release, recommending, *“at a minimum, Edison be sanctioned and required to return to ratepayers an additional \$648 million.”*⁶⁰ (emphasis in original) TURN recanted more formally, filing a Response which endorses the PFM. Both parties deserve acknowledgment for their forthrightness.

Women’s Energy Matters (“WEM”) filed a Response which *“agrees that D.1411040 must be rejected”*⁶¹ and applies a broader interpretation to SCE’s disclosures, especially the SCE April 29, 2015 Response, than does the PFM. A4NR appreciates the support.

IX. SCE’s AND SDG&E’s SUPPLEMENTAL RESPONSES DEFY CREDULITY.

Both SCE’s and SDG&E’s Supplemental Responses focus on vilifying TURN. SCE observes that TURN had continued to support the settlement after learning, post-execution, of the Warsaw meeting,⁶² but ignores the much more significant and prolonged concealment of the Hotel Bristol Notes. SDG&E disdains *“(h)indsight knowledge that the Decision or Settlement is unpopular with some, or that a former Commission representative’s conduct has not reflected well on the Commission.”*⁶³ A4NR agrees that the Commission’s evaluation of the PFM must be confined to legal principles of fairness, but SCE’s sanctimony (*“The foundation for public confidence in the legitimacy of the Commission’s decisions is that those decisions are based in an independent, record-driven process.”*⁶⁴) cannot erase the stain on D.14-11-040 caused by the company’s own ex parte misconduct.

Respectfully submitted,

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ALLIANCE FOR NUCLEAR RESPONSIBILITY

⁶⁰ A4NR PFM, Appendix A, Attachment 3, unnumbered p. 2.

⁶¹ WEM Response, p. 4.

⁶² SCE Supplemental Response, p. 5.

⁶³ SDG&E Supplemental Response, p. 4.

⁶⁴ SCE Supplemental Response, pp. 7 – 8.