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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.	Investigation 12-10-013 (Filed October 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGES' RULING REQUESTING SETTLING PARTIES TO ADOPT MODIFICATIONS TO PROPOSED SETTLEMENT AGREEMENT

1. Introduction

On April 3, 2014 six parties (Southern California Edison Company (SCE), San Diego Gas and Electric Company, Office of Ratepayer Advocates (also known in this proceeding as Division of Ratepayer Advocates), The Utility Reform Network, Friends of the Earth, and Coalition of California Utility Employees, collectively "Settling Parties") filed and served a Joint Motion for Adoption of Settlement Agreement (Joint Motion). The Joint Motion states that the Settlement Agreement (Agreement) resolves all issues in this proceeding. The Motion further requests, *inter alia*, that the Commission make certain

findings and adopt the Agreement without modification. The Motion and Agreement are contested.

We appreciate the effort of all the parties who have submitted testimony and briefs in Phases 1, 1A, and 2, and participated in the evidentiary hearings to build a detailed and substantial record upon which the Commission may base its decisions. We also recognize the Settling Parties have clearly worked hard and made significant compromises from their individual litigation positions to reach this Agreement. However, in its current form, the Agreement does not meet the Commission's criteria that the proposed settlement be in the public interest.

Although Settling Parties requested the Agreement be adopted without modification, the Commission is bound to review the proposed settlement pursuant to all the requirements of Rule 12.[1] The Agreement has a few terms which unfairly disfavor ratepayers, and cannot be overcome by reading the Agreement as a whole. Moreover, we do not think the terms at issue will achieve the stated goals of the Settling Parties, in light of the Rule 12 requirements.

Therefore, in this ruling, we identify certain changes *(e.g.*, to ratepayer portion of third party recoveries, to address increased emissions, and to improve Commission oversight of the revised rate calculations). These terms in the Agreement must be modified by the Settling Parties before we can recommend that the full Commission approve the settlement.

[1] Rule 12.1 (d) of the Commission's Rules of Practice and Procedure states: "The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest."

2. Modification Process

The Agreement provides a somewhat ambiguous method for the Commission to propose modifications to the Agreement,[2] which we have adapted herein. We have determined that the most efficient approach is to identify necessary modifications for consideration by the Settling Parties, prior to publishing a Proposed Decision on the Joint Motion. Accordingly, this ruling asks the Settling Parties to adopt certain modifications to the Agreement, and confirm our understanding of certain provisions.

Settling Parties shall file and serve comments on the modifications proposed in this ruling within fourteen (14) days after the date of this ruling.[3] Other parties may file and serve comments on the proposed modifications within ten (10) days after the date of this ruling. Specifically, these comments are limited to ten pages and no reply comments will be allowed.

3. Authority to Adopt a Settlement that Closes an Open Investigation

Women's Energy Matters (WEM) and Coalition to Decommission San Onofre (CDSO) argue the settlement of an investigation proceeding cannot ever meet the criteria for Commission approval set forth in Rule 12.1. They assert that (1) the Commission must complete an open investigation, either to be consistent with the law or to conform to the public interest; and (2) a decision to settle an investigation prior to completion of all hearings necessarily cannot be found reasonable in light of the whole record. Some parties also claim that this

[2] ¶ 5.1(e).

[3] This timing is approximately consistent with the procedure contemplated in the Agreement at § 5.1 (e).

specific Agreement's termination of the proceedings violates Rule 12.1. But, for purposes of this Ruling, we only address whether there is a legal bar to the Commission adopting a contested settlement of an investigation, prior to all hearings being held. We conclude there is not.

Pursuant to the our Rules and prior decisions, as described below, the Commission has the authority to resolve an open investigation, just as for other proceedings, by adoption of a settlement, providing the specific proposal meets the Commission's criteria for approval in Rule 12.1.

WEM cites §§ 451, 454, 454.8, 455.5 and 701 as support for the claimed legal duty of the Commission to complete an investigation. However, they do not distinguish any particular language as controlling, nor do they cite to any prior Commission decisions which relied on these sections to bar consideration of a potential settlement. The referenced code sections refer to our ratesetting authority to establish just and reasonable rates, but provide no categorical obstacle to closing an investigation through settlement.

WEM also argues it is not in the public interest for the Commission to adopt any settlement that would end an Investigation before completing it. Once the Commission opens an investigation with a declaration that the public interest would be served by an investigation, WEM asserts, without support, the Commission cannot abandon its promise by closing the proceeding prior to all issues being litigated.

Rule 12 authorizes parties to propose settlements to resolve a proceeding, provides that not all parties must join in a settlement, and requires certain parties to be signatories in applications and complaint proceedings. The Rule does not prohibit settlements of proceedings designated as Commission investigations, nor does it identify any required participants. In fact, the Commission has

previously adopted settlements that terminate open investigations, even prior to holding evidentiary hearings, and approved many contested settlements.[4]

CDSO asserts that settlement of an investigation prior to completion of hearings means there is necessarily an insufficient record for the Commission to properly evaluate the settlement.[5] They argue that no record has been generated for certain key issues. However, CDSO offers no support or precedent for this strict view. Instead, the Commission makes a case-by-case determination whether there is a sufficient record to determine if a proposed settlement is reasonable in light of the whole record.

We are not persuaded the Commission's long-standing policy of supporting settlements is limited to settlements reached only after all evidentiary hearings are completed. Not only has the Commission approved numerous settlements prior to completion of all hearings, such a ban would eliminate some of the public benefits achieved by avoiding the costs and risks of litigation, and of conserving public and private resources.

Therefore, we find that the Commission is authorized to consider a proposed settlement of an open investigation, even when not an all-party settlement, and even if not all hearings have been held. Instead, the standard is to review the specific proposal in light of the criteria in Rule 12.1.

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[4] *See, e.g.*, D.14-08-009 (settlement of Investigation prior to hearings); D.13-09-028 (settlement of Investigation before hearings); D.12-04-012 (settlement of Investigation by adoption of a contested settlement);

[5] CDSO Reply Comments at 5.

4. Proposed Modifications

The Commission's task is to review the Agreement as a whole to determine whether it results in fair and reasonable rates and is otherwise consistent with the law, reasonable in light of the whole record, and in the public interest. (Rule 12.1) It is not our intention to single out provisions which could have been resolved in another reasonable way. The Commission supports qualifying settlements. That said, the overall public interest remains an important criteria which we find requires some changes to this proposal. Accordingly, we limit our proposed modifications to subjects integral to the public interest.

4.1. Third-Party Recoveries

The Agreement currently sets formulas in ¶4.11 for how recoveries from Mitsubishi[6] and Nuclear Energy Insurance Limited (NEIL), would be shared between the Utilities and ratepayers. This "SONGS Litigation Balance" would be determined by each utility netting SONGS [San Onofre Nuclear Generating Station] Litigation Costs from the SONGS Litigation Recoveries.[7]

Broadly, the Mitsubishi formula allocates the largest share of smaller awards to the Utilities, with the primary benefit to ratepayers coming only with awards in excess of $900 million. The record indicates the primary claim is for breach of warranty focused on the actual investment in the Steam Generator Replacement Project (SGRP) (about $700 million). This claim is contested by Mitsubishi, and other consequential damages are likely to be more challenging to recover.

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[6] Settlement Agreement at ¶2.20.

[7] ¶4.11(a).

According to the Agreement, the structure favors Utilities until made whole for the refunds to ratepayers of SGRP-related costs. The potential is for ratepayers to trail behind in recovery for pre-2012 SGRP costs, post-outage inspection and repair, cancelled capital projects, etc. This formula unfairly favors shareholders over ratepayers for their exposure to SGRP-related costs. Given the claim by TURN and others that the removal of SGRP costs from rates stands as a "proxy" for a finding of imprudence if Phase 3 were held, the public interest is better served by a 50/50 recovery of settlement funds from the MHI arbitration.

Accordingly, we request a modification to ¶ 4.11 (c)(ii) of the Agreement so that all recoveries from MHI will be shared equally between ratepayers and the Utilities.

In the case of the NEIL formula, ratepayers would receive a fixed 82.5% of all recoveries. For the "Outage Policy" that covers replacement power, this percentage is too low because, under the Agreement, ratepayers bear 100% of the costs of replacement power in addition to having paid for the insurance. Therefore, we request that ¶4.11 (c)(i) be modified so that recoveries from the "Outage Policy" would be awarded 95% to ratepayers. We are not compelled by public interest to change the allocation for the Property and Decontamination claims.

4.2. Allocation of Future Refinance Savings

The Agreement currently provides the Utilities with an option to exclude the amortized Base Plant-related assets when measuring each utility's ratemaking capital structure for any purpose.[8] This would not affect the rates of

[8] ¶ 4.4.

return established in ¶4.3 of the Agreement. However, the Utilities may refinance regulatory assets solely with debt, and the capital supporting these assets would not be utilized in determining each utility's ratemaking capital structure or authorized cost of capital for any purpose, including the Agreement.

We are concerned that if the Utilities take the opportunity to refinance SONGS Regulatory Assets per ¶4.4, then any savings would inure only to the benefit of shareholders. Any adjustment would likely be small (*e.g.*, a few million dollars), but it would tilt the delicate balance of interests away from ratepayers.

Therefore, we request the Settling Parties adopt a modification to ¶4.4 which provides that any savings from such a re-financing be shared equally between shareholders and ratepayers, and the ratepayer portion be credited to ratepayers either through a lower rate of return, or other direct credit.

4.3. Shareholder Funds to Reduce Related Greenhouse Gas (GHG) Effects

Alliance for Nuclear Responsibility (A4NR) criticizes the Agreement for failing to recognize and quantify what it calls one of the largest negative consequences arising from the SONGS shutdown: increased electricity prices and carbon dioxide (CO_2) emissions.[9] Because most of the lost production from SONGS was replaced by natural gas generation, A4NR argues it is against the public interest to ignore consequential harmful emissions that impose social and economic cost on ratepayers. A4NR relies on a public report, published through

[9] A4NR OC at 8.

the University of California (UC), which states the SONGS closure increased CO_2 emissions by 9 million metric tons during the first twelve months.[10]

We do not here rely on any assertions or conclusions reached by the researchers who authored the UC Report, which is not in the record. However, we acknowledge the UC Report exists, emission data was collected by the authors, and the general principle that replacement of nuclear power by natural gas-fired power plants will result in more GHG emissions in the service territory.

We are concerned that the Agreement does not address this adverse, albeit unquantified, consequence, particularly given that ratepayers would pay for all replacement power but receive less than 100% of power cost payouts from SONGS insurance. Therefore, we find the public interest would be met by shareholders directing funds to offset this significant consequence to SONGS ratepayers. The Commission may order meaningful remediation to address the public safety concerns raised by the broad social impact of unexpected increases to GHGs. Such an allocation would also further incentivize the Utilities to maximize recovery on the policy claims.

We request the Settling Parties add a provision to the Agreement which will result in a multi-year project, undertaken by the University of California, funded by shareholder dollars, to spur immediate practical, technical development of devices and methodologies to reduce emissions at existing and future California power plants tasked to replace the lost SONGS generation. This is not simply a request for more data or another Report, but for actual

[10] *Id*. at fn 24 (citation to "The Value of Transmission in Electricity Markets: Evidence from a Nuclear Power Plant Closure," (Revised May 2014) by Lucas Davis and Catherine Hausman, produced by the Energy Institute at Haas, a joint venture of the Haas School of Business and the University of California Energy Institute (UC Report) at 27).

remedies that can be applied during the original expected life of SONGS--through 2022.

Settling Parties should respond with a provision which includes the following basic criteria:

- Edison and SDG&E commit to working with the University of California Energy Institute (or other appropriate existing UC entity engaged in energy technology development) to create a Research, Development, and Demonstration (RD&D) program which results in innovation and deployment of new technologies, methodologies, and/or design modifications to reduce GHG emissions, particularly at current and future generating plants;
- The defined program would operate for up to five years;
- The defined program would be funded by up to $5 million annually (e.g., $4 million from Edison, $1 million from SDG&E) from shareholder funds;
- The Utilities shall host a meeting, within 60 days of an adopted decision with this provision, which includes UC representatives and other interested parties with the goal of crafting a Program Implementation Plan (PIP). The Commission's Energy Division shall provide support in coordinating the meeting;
- The Utilities jointly file, and serve, a PIP via a Tier 2 Advice Letter no later than thirty (30) days after the meeting which describes the process for implementation, a proposed schedule and budget, and expected results, applications, and demonstrations; and
- At a minimum, the Utilities shall file, and serve, an annual report to the Energy Division to apprise the Commission of the program's progress towards beta testing of developed technologies, methodologies, and/or design changes.

4.4. Commission Oversight of Implementation

The current Agreement limits the Commission's oversight for some aspects necessary for implementation. WEM and others have argued the public interest is not served by insufficient Commission oversight of implementation of the proposed settlement. The restrictions cover several areas, including:

- Non-Operations and Maintenance (non-O&M) expenses - ¶ 4.9 provides the Utilities retain 2012-2013 recorded non-O&M expenses, but if they record less than preliminarily authorized amounts, then refund the difference to ratepayers. However, the formula for allocating company-wide expenses is currently based vaguely on a "formula agreeable to all Settling Parties" and not subject to any form of Commission review or disallowance.[11]
- Construction Work In Progress (CWIP) - ¶4.8 provides for utility recovery of all non-SGRP-related CWIP.[12] Not all covered CWIP has been identified in the record. Recovery of the CWIP balances will conform to the amortization schedule and rates of Base Plant, which will change during the amortization period based on each Utility's Authorized Cost of Debt and Preferred Stock.[13] There is currently no requirement the Utilities document revised calculations of the impact on rate recovery after new capital cost rates are authorized, either as to Base Plant or CWIP.
- SONGS Litigation Recoveries from Third Parties - ¶ 4.11 provides the Utilities "complete discretion to settle, compromise, or otherwise resolve claims against NEIL and

[11] ¶ 4.09(k).

[12] ¶ 4.9 (The Utilities would recover CWIP under different terms, depending on whether it is categorized as "Cancelled CWIP" or "Completed CWIP," as defined in ¶2.13.)

[13] ¶ 4.3(d) (The Authorized Cost of Debt and Authorized Cost of Preferred Stock…are floating rates….).

> or Mitsubishi in any manner" according to their own business judgment, and the Commission would have no prior or subsequent review of the recoveries, costs, or net balance subject to shared allocation.[14] Similarly, ¶ 4.11(g)(ii) prohibits Commission review of the Utilities' settlement, or other resolution of Mitsubishi and NEIL litigation, for reasonableness or prudence. Instead, the current Agreement requires the Utilities to notify the Commission of any resolution, but they may preserve "the confidentiality thereof as may be reasonably necessary" for their flexibility to negotiate.[15]

The Utilities' reporting requirements, set forth in ¶ 6.1-¶ 6.2, include a one-time, post-adoption filing of revised tariff sheets "to implement the revenue requirement, accounting procedures, and charges authorized in this Agreement." TURN and ORA are authorized to review the final numbers used in the tariff sheets, notwithstanding any differences from amounts utilized in the General Recitals portion of the Agreement. In addition, the Utilities must file Tier 2 Advice Letters to implement subsequent changes to revenue requirements based on the terms of the Agreement.

We find these current provisions vague, limited and not currently in the public interest. Therefore, we request the Settling Parties modify ¶ 6.1 and ¶ 6.2 to require the Utilities to identify and support the detailed numbers and calculations used to reach the revised revenue requirements requested in the revised tariff sheets and Tier 2 Advice Letters. The modifications should include, but not be limited to, a requirement for a clear description of the agreed-upon formula for allocating company-wide expenses to SONGS and

[14] ¶ 4.11(f).

[15] ¶ 4.11(g)(i).

documenting the calculations revising the reduced return on amortized capital investment based on newly authorized rates.

We also request modifications to these or other provisions to clearly ensure the Commission, through its Energy Division, will have the ability to review documentation of any resolution of third party litigation and the litigation expenses netted from the recoveries, while protecting confidentiality concerns. We believe the revised 50/50 allocation of litigation recovery improves the Utilities' incentives to maximize recovery. However, the Commission stands in the public's shoes to ensure the ratepayer credits are properly calculated and that charged costs are not exorbitant in relation to the recovery obtained. Therefore, the Commission must, at a minimum, review the documentation in order to protect the integrity of the refund calculations.

4.5. Clarification of Existing Provisions in Agreement

A few provisions are possibly subject to more than one interpretation, however, we interpret them in accordance with the overall stated intentions of the Settling Parties when evaluating the Agreement in light of Rule 12.1. In order to ensure our proper understanding of these provisions, we ask Settling Parties to affirm or distinguish our understanding of the following provisions:

- The General Recitals in Article III reflect the views of the Settling Parties as to the underlying facts that provide context for their settlement of the many complex issues in these consolidated proceedings. The Commission is not being asked to confirm that all statements in ¶3.1 through ¶ 3.48 are objectively true [some are in the record, others are not] for use by the parties in another context.
- ¶ 4.10 provides that all replacement power expenses will be subject to normal Energy Resource Recovery Account (ERRA) compliance review, but will not be subject to any

special Commission review or future disallowances due to the non-operation of SONGS.[16]

- ¶ 4.14 applies to 2012 and 2013 expenses recorded in Edison's the SONGS Memorandum Account and SDG&E's SONGS Balancing Account. If a modified Agreement is adopted, Utilities shall file an application for the Commission to conduct a reasonableness review of 2014 expenses recorded in these accounts, whether sought as general rates or as designated decommissioning activities.
- In¶ 4.16, Settling Parties seek Commission adoption of findings on contested facts based on the Utilities' testimony related to Applications (A.) 13-03-005 and A.13-03-014. These applications involve review of the costs of the Steam Generator Replacement Project (SGRP) and use of the appropriate inflation index to convert nominal dollars to $2004 for comparison to D.05-12-040. We have no evidence the chosen index is inappropriate, but the Commission cannot rely on testimony which has not been submitted into the record. There is some support in the record for the total amount of nominal dollars expended,[17] but it is Settling Parties who have agreed to the numbers and the use of the Handy-Whitman index.
- In ¶5.2, the current Agreement states the Settling parties intend that Commission adoption of the Agreement "will be binding on all parties to the OII…." A Commission decision in these consolidated proceedings stands for neither approval of, nor precedent for, any principle or issue as resolved herein. The decision would have the same effects as any other Commission decision in ratesetting proceedings. However, to the extent the

[16] ¶ 4.10(c), (d).

[17] Edison's monthly (San Onofre Nuclear Generating Station Memorandum Account (SONGSMA) reports and related Advice Letters; SDG&E's quarterly San Onofre Nuclear Generating Station Bill Analysis (SONGSBA) reports and Advice Letters.

> Settling Parties seek to bind non-settling parties to promises of Settling Parties (*e.g.* to defend the Agreement), then it exceeds the ordinary effects of a Commission decision that resolves issues in a proceeding.

Based on the foregoing, we request the Settling Parties to make the identified modifications to the Agreement within fourteen days of the date of this Ruling.

IT IS RULED that:

1. Settling Parties shall promptly review this Ruling to determine whether to change or modify the Agreement, as requested, and shall file and serve Comments on the modifications proposed in this ruling within fourteen calendar days after the date of this ruling. The Comments shall state whether all or some of the Settling Parties agree to make the modifications requested in this Ruling.
2. Non-settling Parties may file and serve Comments on the modifications proposed in this ruling within ten calendar days after the date of this ruling.
3. Comments are limited to ten pages and no reply comments will be allowed.

4. If Settling Parties, or some portion thereof, agree to make the requested modifications, then they shall file and serve a copy of the Modified Settlement Agreement within three business days of filing their Comments.

Dated September 5, 2014, at San Francisco, California.

/s/ MICHEL PETER FLORIO
Michel Peter Florio
Commissioner

/s/ MELANIE M. DARLING
Melanie M. Darling
Administrative Law Judge

/s/ KEVIN R. DUDNEY
Kevin R. Dudney
Administrative Law Judge