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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 Oct. 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

OPENING COMMENT BY THE COALITION TO DECOMMISSION SAN ONOFRE ON THE PROPOSED DECISION OF 10/9/2014

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TABLE OF CONTENTS

Table of Contents

TABLE OF AUTHORITIES

TITLE 20, DIVISION 1. PUBLIC UTILITIES COMMISSION, CHAPTER 1. RULES OF PRACTICE AND PROCEDURE

I. INTRODUCTION

A Proposed Decision[1] has been issued on the merits of the "Amended and Restated" Proposed Settlement on the outage at the San Onofre Nuclear Generating Station (SONGS.) Here, we provide comment on that document.

We believe this settlement must not be approved because it does not fulfill Commission Rule 12.1 which states that a settlement cannot be approved unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest. Most critically, only a partial record has been produced, thereby making it impossible to fully consider the claims of the ratepayers, and thus to approve it is not in the best interests of the public.

II. PRUDENCE NOT ESTABLISHED IN THE RECORD

Throughout the hearings in Phases 1, 1A, and 2, Administrative Law Judge (ALJ) Melanie Darling and ALJ Kevin Dudney were careful to never allow any consideration of prudence or imprudence. Even if there may have been a mention of prudence or imprudence, ALJ Dudney said that all such occurrences would be "given no weight" and therefore effectively not considered in the record.[2]

According to Commission precedent, the burden of proof to determine prudency rests with the utilities. Although we mentioned this in our Comment on the Proposed Settlement[3], the Proposed Decision made no mention that the traditional Commission standard for reasonableness reviews is to presume *imprudence* unless there is a showing by the utility that they acted prudently. The *Helms Pumped Storage Project* and the failure of the *Lost Canyon Crossing* was bitter experience by the Commission, and they stated clearly that it was virtually impossible to operate with a presumption of prudence (underlining added for emphasis):

> In Application 82-02-40, et al., ... The utilities responded by claiming that their rate requests were entitled to a "presumption of prudence" and that other parties bore the burden of establishing imprudence-related rate base disallowances or revenue exclusions. <u>In supporting the Staff, we rejected the notion of a presumption of prudence and held firm to our prior precedents on the issue.</u> See Decision [*28] D.85-06-112, CPUC, slip opinion at 4 (1985).
>
> In the instant case [Helms], these usual rules were not followed. PG&E essentially relied upon a presumption of prudence....

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1 "Proposed Decision Approving Settlement Agreement As Amended And Restated By Settling Parties" – http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M119/K054/119054541.PDF

2 Phase 2 Transcript, page 2544 (underlining added for emphasis)
ALJ DUDNEY: So I'd like to make an observation briefly, which is that prudency concepts pervade a lot of people's testimony. If we're going to try and strike those out line by line, that's going to be a lot of work. <u>Can we just agree that we will give no weight to prudency arguments that are contained in anyone's testimony?</u> – MR. LUTZ: Okay. – MR. WEISSMANN: Yes. – ALJ DUDNEY: All right. Thank you....

3 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M091/K637/91637335.PDF

> In retrospect, we find that, by issuing the OII and then by permitting Staff to suffer the greatest evidentiary burdens, we have unintentionally handicapped our review of the reasonableness of the Helms capital expenditures.[4]

Therefore, it is clear that 1) the question of prudence was not in the record in phases 1, 1A, and 2, and 2) the Commission's "prior precedent on the issue" is to presume *imprudence.*

III. OUR PROPOSAL IS A BETTER SOLUTION

The proposed settlement suggests that it is fair to the ratepayer to forgo the inquiry into the prudence of the steam generator project and accept the proposal to remove the Steam Generator Replacement Project (SGRP) costs from rates as of January 31, 2012, when the plant shut down, and forgo some of the O&M costs. But this does not address the claims of the ratepayer advocates that if found imprudent, then SCE should forgo not just part (about 80%) of the cost of the SGRP, and a bit of the O&M in 2012, but also, as we have contended is proper, consider the plant completely abandoned, with no return on equity and no return on net investment, save salvage value and other third-party recoveries. The only part of the plant which has residual value is the Nuclear Waste Operation (NWO), and we propose that the investors be compensated for this portion alone. Our estimate of the NWO value and CWIP was derived from documents in evidence using three methods which all agree. This is a fair outcome which also creates incentives for the utilities to maximize their efficiency in salvaging and in prosecuting their third-party lawsuits, while leaving the Commission and the ratepayer out of the loop. The proposed settlement does not have these advantages.

The utilities avoided the opportunity of Phase 3 to show they acted prudently. Thus the presumption of imprudence stands.

The details of our proposal is included in our official comments to the proposed settlement[5].

IV. SETTLEMENT PROCESS IS BAD POLICY

We take this opportunity to reflect on what we have discovered in our first intervention in the CPUC proceedings. Anyone looking into the CPUC would, on the surface, see processes and procedures which seem fair, as they use procedures of traditional litigation, careful management of evidence and communications, and a set of rules which are scrupulously observed.

The reality, however, is that there is a second set of procedures that operate out of the bright light of the public process, behind the scenes, guided by extensive private and individual ex parte meetings

4 1985 Cal. PUC LEXIS 781, *; 18 CPUC2d 700 "Application of PACIFIC GAS AND ELECTRIC COMPANY for authority to institute an adjustment procedure for Unit Nos. 1 through 3 at the Helms Pumped Storage Project and to adjust its rates in accordance therewith; Investigation on the Commission's own motion into the construction of the Helms Pumped Storage Project of Pacific Gas and Electric Company D.85-08-102, Application No. 82-04-12 (Filed April 6, 1982; amended April 26, 1983), OII No. I.82-01-01 (Filed January 5, 1982) California Public Utilities Commission" P 10

5 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M091/K637/91637335.PDF

between the utilities and Commissioners and their advisers, culminating in private "negotiations" between the utilities and the most pliable intervenor. A legitimate investigation into the events of the outage, which would allow the industry and the Commission to learn lessons from mistakes, is cast aside for the sake of "cost savings". However, even a 1% improvement the ratepayer position – $33 million – would likely pay for the rest of the proceedings many times over. (See item 34) The resulting settlement is not considered "precedential," and thus all of the conclusions are unavailable as reference for future decisions. Over time, Commission precedent will evolve to benefit the utilities. Any case that may set a precedent they want to avoid, the can pull the application or settle the case, thus avoiding any memory of the principles of the case. All the work to generate a record are potentially lost in this process. When it is going their way, then they finish the case and precedent is set in their favor. Thus, over time, only utility-favoring precedents remain. (See Item #58)

Using court-like litigation to assert regulatory control over the industry assumes that the proper outcome is always some midpoint between two positions, no matter how ridiculous the original position might be, or whether all positions are taken into account.

Given that the Commission likes the idea of settling such cases, it is astonishing that the settlement process itself is largely undefined by the Commission, allowing the utilities to call the shots and ramrod their desired outcome down the throats of comparatively weak intervenor organizations.

Unfortunately, the ALJs continue to illustrate their bias toward the industry when they agree with every single detail of the proposed settlement while ignoring every single idea from opposing parties.

V. DETAILED COMMENTS ON THE PROPOSED DECISION

In TABLE 1, we provide detailed comments to the Proposed Decision in document order.

TABLE 1

1: PD2[6]: "The primary result of the settlement is ratepayer refunds and credits of approximately $1.3 billion." – This is deceptive. The "refunds and credits" are only with respect to the original request by the utilities and not with respect to any "appropriate" refund or credit, and it is not a refund or credit at all, but simply a reduction in their original ridiculous request. Ratepayers are still on the hook for approximately $3.3 billion.
2: "However, instead of the usual authorized rate of return, the settlement reduces shareholders return on SONGS investments to less than three percent." – But this is more than any other abandoned plant, regardless of whether the actions of the utility were considered prudent. We object to PD Finding of Fact 14 as a result. We note that all the work to value the remaining value of the plant in Phase 2 seems to have been completely lost in the settlement process. Again supporting our point in Section IV.
3: PD3: "The effect is ratepayers save approximately $420 million over the ten-year depreciation period." – This savings is completely artificial. The utilities should not get any return on investment

6 PDn is the page number and will not be repeated if the next item is on same page as the prior item.

since this is an abandoned plant. An appropriate statement might be "We give the utilities an additional $350 million[7] over the ten year period more than any other abandoned plant because they were able to work the system better than the other cases."

4: "The Utilities and other parties provided substantial testimony, evidence, and argument during the proceedings to date, including claims by some that SCE bore fault in the design of the RSGs." – Since the proceedings were terminated prematurely, any claims during the proceedings that SCE bore fault were only during argument because there was no testimony or evidence which was allowed on "fault in the design." The compound sentence is a crafty way to imply that there was testimony and evidence on "fault in the design" when there is none.

5: "Although hearings were held for early phases of the OII, no final decisions have been adopted by the Commission in the consolidated proceedings." – There a number of proceedings that were consolidated into Phase 3, which was never even started. Again, this misleading sentence structure that the hearings were sufficient and appropriate, but they were clearly insufficient. Instead of stopping the proceedings inappropriately due to a suggestion in the Motion to Adopt the Settlement, the Phase 1 PD could have easily been completed and the Phase 2 PD could have been easily written by this time by the ALJs and processed by the parties in the proceedings. At least then the proposed conclusions of the ALJs would be available to compare with the proposed settlement. Having the findings from Phase 1A would be useful to determine the value of the Replacement Power. That entire proceeding is disregarded in this settlement. What a waste of time.

6: PD4: "...hearings have not been held on issues related to review of expenses for the Commission-approved SGRP. As part of that cost review in Phase 3, we would have looked at whether SCE acted reasonably as a plant operator, and how the SGRP expenses should be divided between utility customers and utility shareholders." – But that is not all. Phase 3 would have also looked into whether SCE's actions in directing their staff to avoid the License Amendment Process made them liable for the full cost of the failure and the demise of the plant. Again, pro-utility bias. We therefore object to the wording of PD Finding of Fact #24, as it does not go far enough. It should include "disallowance of all investor equity."

7: "On April 2, 2014, six parties..." – Date is incorrect. This occurred on April 3.[8]

8: "The Settling Parties fairly reflect a diverse array of affected interests in this proceeding." – This statement ignores the reality that only TURN and ORA were actively involved in any actual negotiations with the utilities (and how much they were involved is unknown), and the other parties agreed to sign onto the agreement later. None of these parties are located in the service area of the plant, as are the Coalition to Decommission San Onofre and Ruth Henricks. So we disagree that this "fairly reflects" all the interests.

9: "Opposing Parties primarily reject the settlement because the Commission has not completed its investigation into whether SCE shares culpability with Mitsubishi Heavy Industries (Mitsubishi), the designer and manufacturer, for "design errors" in the RSGs." – CDSO believes it would be better to

7 Rough estimate subject to check. The value here is the Return on Equity of just under 3% over ten years.

8 See PD – Finding of Fact 1.

complete the investigation, but we also have suggest that settlement within a set of constraints is appropriate, including all participatory parties. The statement that MHI was the "designer and manufacturer" is not supported by any evidence in the proceeding. The most that can be said is that MHI was a SCE subcontractor. The division of labor between them regarding design is not in the record. The ALJs are attempting to insert information here that is not part of the proceeding, in a way that implies that it is settled fact.
10: Why is there no mention of the Commission's own hired expert, Dr. Budnitz? The contract to hire him is in evidence and this should be mentioned in the decision to be complete, including the reason he was not allowed to complete his investigation. I imagine this is a bit embarrassing to the Commission that they did not follow through with their own investigation.
11: PD5: "...the net difference is estimated to be a reduction to the Utilities of approximately $419 million;" – This statement is based on the absurd notion that the ratepayers should continue to pay for the plant even though it is no longer producing any power at all with the full rate of return. The Commission has never approved such a deal for an abandoned plant. Again, ALJ bias to reward the utilities rather than side with ratepayers.
12: PD6: "Refunds due to ratepayers will be credited to each utility's under-collected Energy Resource Recovery Account balance upon adoption of the settlement by the Commission to reduce otherwise approved rate increases." – This means that ratepayers will see no actual refunds at all because any money supposedly due to ratepayers will be quickly absorbed by the "under-collection." Utilities have no reason to run their operation efficiently because they can always ask for more – and they get it, over and over, through mechanisms like this.
13: "...we are … unpersuaded by the arguments by Opposing Parties" – Not even one argument? This illustrates how the Commission is thoroughly captured by the industry they regulate.
14: PD7: "Southern California Edison Company (SCE) contracted with Mitsubishi Heavy Industries (Mitsubishi) for the design and manufacture of the Replacement Steam Generators (RSG)." See #9.
15: "The Utilities began recovering associated SGRP costs in rates after each unit went online." – But this was only <u>provisional,</u> pending a reasonableness review, a review which was slated for Phase 3 and according to this settlement, will never happen.
16: PD9: "To the extent these purchases have been more costly than the price of the lost power, ratepayers have borne the consequential expense." – Since power from this plant is extremely expensive, this almost never happens (based on the sum of all the costs, it runs about 166% of market rates.) Under the PD, ratepayers are on the hook for a plant that is no longer producing power for another 10 years. This makes the plant historically even less of a bargain than it already was. The PD is absolutely against the best interests of the ratepayer public and in concert with only the wishes of the investor community.
17: PD9: "To the extent these purchases have been more costly than the price of the lost power, ratepayers have borne the consequential expense." – Since power from this plant is extremely expensive, this almost never happens (based on the sum of all the costs, it runs about 166% of market rates.) Under the PD, ratepayers are on the hook for a plant that is no longer producing power for

another 10 years. This makes the plant historically even less of a bargain than it already was. The PD is absolutely against the best interests of the ratepayer public and in concert with only the wishes of the investor community.
18: "SCE submitted a plan to NRC in October 2012 to restart the units, neither U2 nor U3 generated electricity again." – The plan to restart the units was at only 70% power and they did not restart because it was not determined to be safe by the NRC. This construct makes it sound like the plan submitted by SCE was close to sound. It was not.
19: PD10: "Some parties contend that if SCE acted imprudently in managing the design of the RSGs, then ratepayers have no responsibility to pay for any costs at SONGS after January 31, 2012 (and perhaps before)." – Not only that, but if SCE acted imprudently, then ratepayers should not foot the bill for the rest of the plant either, because the reason it is not operating is due to the imprudent actions of SCE. Here, the ALJs are improperly minimizing the case the ratepayers have against SCE, illustrating their pro-utility bias and attempting to reduce the exposure of SCE to a minimum rather than defending the position of the ratepayer.
20: "Although responsibility for the problem is disputed..." – The responsibility for the problem is only disputed between SCE and its subcontractor. SCE has ultimate responsibility for its project, not the ratepayer as the ALJs like to promote with this language.
21: PD11: The RSGs include some differences from the design of the original steam generators (OSGs). These differences have sparked questions ..." – These questions are important and should have been processed in Phase 3 of these proceedings, and it is the duty of the CPUC to conduct this investigation *regardless of the outcome of the settlement.* Lawsuits between SCE and their subcontractor is not at issue in this proceeding and should in no way impact the findings of the Commission. Unfortunately, just the opposite is the case, with the CPUC getting into the middle of SCE's business.
22: "SCE and SDG&E state they have submitted claims and proofs of loss to Nuclear Energy Insurance Limited (NEIL)" – These insurance claims should not be part of this proceeding. These are decisions made by SCE, in terms of how much insurance to carry and what to insure.
23: PD12: "flow induced vibration analysis software vibration code were not in accordance with Mitsubishi design requirements." – This is not accurate. The vibration code was not in compliance with NRC requirements, not Mitsubishi design requirements. Specifically, from the actual document[9] (emphasis added): "...design control measures were not established to provide for verifying or checking the adequacy of certain designs. Specifically, on January 28 and April 2, 2008, the licensee's design control measures did not provide for verifying or checking the adequacy of design Documents L5-04GA504 (SO23-617- 1-C157), "Evaluation of Tube Vibration," Revision 3, and L5-04GA521 (SO23-617-1- C683), "Three-Dimensional Thermal and Hydraulic Analysis," Revision 3, developed by Mitsubishi, for the flow-induced vibration and thermal-hydraulic designs. As a result, the licensee did not verify or check the output of the thermal-hydraulic code and input to the vibration code to be in accordance with ASME Section III, Appendix N, "Dynamic Analysis Methods." "

9 Administrative Law Judges' (ALJs') Ruling on Requests for Official Notices (Sept. 11, 2014) at 4.

24: “These Notices have been admitted to the record by ALJ ruling.” – But the comments by the ALJ here have not been admitted to the record and are demonstrably incorrect.

25: “This investigation will consider the causes of the outages” – It is a sad fact that the very first phrase of the declaration by the Commission regarding this proceeding was never even started. The causes of the outages, who was at fault and how such an event can be avoided in the future... none of these noble goals were completed, all implied by that first phrase, and the contractor, Dr. Budnitz, who had started a technical review was abruptly halted.

26: PD12: "all post 2011 Operations & Maintenance (O&M)” – This is incorrect. Phase 1 only considered O&M during 2012. O&M during 2013 was explicitly considered “out of scope” during phase 1, 1A, and 2. See #27 and #29.

27: “The OII identified … (4) various questions around the costs, viability, and prudency of the SGRP approved in D.05-12-040.” – This is a deceptive compound sentence with ambiguous modifiers. Sure the OII may have identified “various questions around” something, but that does not mean it identified anything other than questions regarding the cost, viability and the prudency of the SGRP, as these were always out of scope, and explicitly removed from the record by agreement with the ALJs in charge. So those questions were not answered, and this is a fatal defect of the settlement.

28: PD13: “...SCE and SDG&E each filed applications for reasonableness review of 2012 recorded O&M...” – We agree with this! Phase 1 included reasonableness review only of 2012 O&M, not 2013 O&M. See #25 where it is stated incorrectly.

29: PD14: “the assigned Commissioner and ALJ determined that to promote efficient administration of the OII, it would be divided into several phases, each with its own PHC and Scoping Memo.” – It is clear now, as it was at the time, that the Phase 3 determination of prudence should have been done first. This backwards approach speaks volumes, and indicates that there was collusion between the Commission and the Utilities to avoid the prudency review. Granted, there may be good reasons to split this up into smaller chunks. But once split, the proceedings should not be consolidated in a lump settlement at the whim of the utilities. Each phase should be processed and settled separately. There was never any motion or ruling to unsplit the phases nor any opportunity to comment on that action. This is an example of the loosey-goosey non-control exercised by the Commission over the settlement process.

30: “...for review of 2012 expenses recorded in the SONGS memorandum accounts” – Further proof for #25.

31: PD15: “On May 3, 2013, the ALJs created a sub-phase, Phase 1A, to develop a method for calculating 2012 costs of replacement power.” – This phase was “recombined” with Phase 1 in that PD, but sometimes the ALJs say “we have completed 3 phases” to make it sound like a lot has been done to benefit the position of the utilities that it is appropriate to settle without completing Phase 3. Very ingenious. As mentioned in #5, it is unfortunate that Phase 1A was halted as the results of this phase would be very useful in the calculation of replacement power in any settlement.

32: PD19: “On May 14, 2014, the ALJs conducted the evidentiary hearing, took submission of the supplemental testimony, heard sworn oral testimony from Settling Parties and permitted cross-

examination of the Settling Parties' witnesses by non-settling parties." – No mention is made of the numerous objections to the unbelievably short duration of this important settlement evidentiary hearing. But to cater to the wishes of the utilities, the ALJs scheduled hearings that were far too short for the subject matter to be processed. To be allow at least one counsel to have time to cross-examine, CDSO relinquished our time to counsel for Henricks, and even then, he was cut off by ALJ Darling after an arbitrary time period. Why should this happen? It happens only if the regulatory agency was working as a tool of the industry they regulate.

33: PD20: "Henricks objected to introductory statements made by ALJ Darling at the evidentiary hearing for the benefit of webcast viewers. The Chief ALJ, in consultation with the President of the Commission, denied the motion based on Rule 9.5 which expressly finds it is not bias for an ALJ to express views on a legal, factual, or policy issue presented in the proceeding." – We object to this treatment. These statements were not presented as the views of the ALJ but as statements of fact, and they were not made just for the purposes of the webcast because they were made part of the official record. ALJ Darling received an objection from counsel for Henricks and instead of just making the correction, stated that she had not said something that she clearly did say, and included as part of the video recording and in the transcript. It would have been easier to just make a quick correction instead of belaboring this silly point just so ALJ Darling can think that she "won."

34: PD20, Footnote 48. "Commissioners Peevey and Florio attended the hearing as observers." – This minimizes their role in the proceeding. As decision-makers of the Commission, they are not just observers, but active participants whenever they are in a meeting of the Commission, even if they do not control the meeting.

35: PD21: "...conserves public and private resources" – It has not been demonstrated that any settlement automatically is better than completing the proceeding in terms of "conserving resources". Since ratepayers pay for the operation of the CPUC and the utilities, if they can benefit only very slightly by completing lengthy proceedings, it can easily outweigh the cost of doing so. In this $3.3 billion settlement, if ratepayers benefited by even 1%, that would be $33 million, and would cover the proceedings many times over. It is quite likely that the ratepayers would benefit by at least 1%. There is no guarantee that SCE would even try to show prudence in Phase 3, and then the Phase 3 proceedings would be short indeed, but still useful to ensure that all issues of the consolidated proceedings in Phase 3 were addressed.

36: PD22 "broad coalition of interests" – See #8. If more parties were involved in the negotiations, this would likely benefit ratepayers, and this pays for the difference.

37: PD29: "they argue, the result is a comprehensive resolution of all major issues" – They actually say, as recounted on PD22 that it resolves "all issues."

38: PD30: "The Agreement is reasonable in light of the whole record, Settling Parties argue, because on "a basic level" ratepayers pay for power they received and don't pay for the SGRP after the outages" – That may sound good to the casual observer, but the pre-outage payment of the SGRP accounted for at least 20% of the cost while getting only about 3.5% of the advertized life. This deal is absolutely unfair to the ratepayer. We did not get 20% of the usage of the SGRP. Again, a hat tilt to the utilities.

39: "The Utilities separately note they have already responded to over a thousand data requests from the parties." – Most of these responses to data requests were denials and that to actually provide the information would be overburdensome and costly without any merit. Data requests by Henricks regarding the AVB design team relative to Phase 3 were never answered even when she asked the Commission to compel.

40: "they claim that potential Phase 3 findings on the causes of tube wear and SCE's prudence in managing the SGRP are unnecessary to find the Agreement is reasonable in light of the whole record." – We certainly disagree with the utility position on this. To find that the agreement is reasonable and fair to ratepayers, the Commission must have, in the record, sufficient information to allow an evaluation of the claims of ratepayers that SCE was indeed imprudent and responsible for the demise of the entire plant. This is a central defect in the proposed decision, and it must not be approved due to the insufficient record.

41: PD31: "In support, they provide an illustrative comparison of the present value of the SONGS revenue requirement for each settling party's litigation position with the results of the proposed Agreement." – They leave out any comparison of the positions of the other parties who did not settle. Why? They decided to choose only a few of the parties to settle with and compare with, rather than all parties that were actively participating, in terms of filing briefs and attending evidentiary hearings. This results in bias toward the utilities.

42: PD32: "...SGRP and SONGS Base Plant are removed from rate base as of February 1, 2012..." – Yes, it is removed in the calculation of rates that utilize the "rate base" but it is <u>still included in the total liability of the ratepayer</u>. Just because it is out of the ratebase calculation does not mean the ratepayer does not have to pay it. This sleight of hand is amazing, unfair and unreasonable.

43: "... just and reasonable because the parties have compromised their positions." – It is quite astonishing that the CPUC has relinquished its regulatory role and instead finds it is most suitable to assume that just because two parties can compromise on something, that then that is also "just and reasonable" to the ratepayer.

44: PD33: "...these parties all participated in the OII prior to the Agreement." – Not true! Of the parties engaged in active negotiation, only TURN and ORA actively participated in terms of submitting briefs and cross-examining witnesses. FOE never attended evidentiary hearings nor submitted briefs. The Coalition of California Utility Employees did not actively participate. Of the parties that did actively participate, a majority – A4NR, WEM, and CDSO are all opposed to the settlement. Henricks did not come to the meetings but her counsel was very active particularly with regard to data requests, and she is opposed. WBA actively participated and did not opposed the settlement.

45: "it avoids the cost of further litigation" – See #34.

46: PD34: "Henricks, alleges there must be "collusion" among the Utilities, Settling Parties, Commissioners, and the ALJs for a settlement to occur at this time which would obviate the need for a Phase 3 inquiry into the RSG design decisions." – That is certainly a misrepresentation of the allegations by Henricks, because this sentence places the emphasis on the settlement. The collusion was to set up the phases so that Phase 3 could be avoided and a settlement determine prior to any chance

that the utilities might have to admit culpability in the demise of the plant.
47: PD40: “A4NR’s premise is that the NRC citation issued to SCE for failure to properly supervise Mitsubishi’s design of the RSGs “places SCE at the head of the chain of causation.” – We agree with this and find it astonishing that the CPUC does not accept the citation by the NRC to indicate what it says – SCE violated the law. This MUST and SHOULD enter into any equation regarding prudence of SCE, even if it is not the sole determinant.
48: PD46: “because SCE should have known U2 would not return to service;” – That is a misrepresentation of our position, we never claimed that SCE can predict the future. We stated that given the U3 failure and that U2 also exhibited unprecedented wear, that a reasonable manager would not have refueled U2 if safety was the top-most concern.
49: PD48: “Henricks did not participate in the hearings or briefing for either Phase 1 or Phase 1A.” – Why was this not noted in the cases of the parties who were supporting the settlement, such as CLECA, AreM/DACC, Joint Parties, FOE, and others? Again, obvious bias.
50: PD49: "Ms. Henricks also (mistakenly) contends the Commission has not allowed discovery about matters expected to be within the scope of Phase 3.” – But in the footnote the PD says the ALJs denied her motion to Compel. Clearly, the utilities did not want to answer those data requests and the ALJs allowed the utilities to have their way. Shame on you, ALJs!
51: PD51: “Given that more than 20 parties intervened in the OII, Settling Parties assert negotiations with every party would have been impracticable, particularly when some parties made clear they did not believe a settlement should occur prior to completion of Phase 3.” – This is an exaggeration as most of the 20 parties were passive participants and would not have wanted to be involved in the negotiations process anyway. CDSO has always stated that settlement IS an option within a set of settlement criteria that the Commission should provide as a framework, and this was stated in our comment to the settlement, including the provision of a Magistrate Judge to lead the negotiations.
52: PD52: “There is no inconsistency with the cited statutes, they argue, because the consolidated proceedings are categorized as 'ratesetting,'” – We note that Phase 3 has no ratesetting components and should be categorized as “adjudicatory”, but of course the utilities would not like that because the ex parte rules are much more strict, so ratesetting it is!
53: “the Agreement does not ask the Commission to make any findings with respect to prudence” – And this is the crux of the problem. Prudence is key to determining whether the settlement is just and reasonable. The fact that the Commission made no findings on this is a shame.
54: PD53: “Settling Parties dismiss as baseless Henricks’ unsupported allegations of utility-Commission “collusion” and financial benefits to organizations participating in the settlement.” – Now that similar collusion is evidenced in the San Bruno case we must take these allegations as much more significant, and for the Commission to blow these off as insignificant is imprudent. Our motion to stay the proceedings until the upheaval at the Commission is settled and the Commission responds to the CPRA request for Commissioner communications, would be a prudent course of action for a reasonable manager of the case. We therefore object to Finding of Fact #22 because the Commission is withholding the CPRA request past the legal deadline for response.

55: “the Commission’s rules and prior decisions encourage cases to be settled” – As stated in our introductory comments, we assert that this is bad policy, at least under the constructs of the current system of settlements at the Commission. See #34. We advise the Commission to draft much better rules and constraints to guide the settlement process.

56: PD54: “the proposed disallowances represent one of the possible outcomes if the Utilities were found to be imprudent in a phase 3, an important indicator of reasonableness” – We disagree, and the range of outcomes has never been carefully stated or weighed by the Commission, and even a 1% change in the outcome for ratepayers is significant.

57: “the Commission’s duty is to ensure that rates are fair.” – The Commission seems to care more about stock prices than utility rates.

58: “SCE also vigorously contests assertions by A4NR and CDSO that it should be presumed imprudent for failing to obtain a license amendment for the RSGs, by approving Mitsubishi’s design, or by not contesting the NRC Notice of Violation. Settling Parties assert these disputed claims have not been litigated in the record, and there is no legal or factual basis to presume in either direction.” – We go further than that. SCE, by Commission precedent as described in the *Helms* case, is considered imprudent unless they make a showing of prudence. This is the Commission's own position on the matter, which is being conveniently ignored by those drafting the PD. We agree that the “disputed claims have not been litigated in the record” and thus the defect in the settlement.

59: “Adoption of the settlement does not bind the Commission in this or other proceeding, it represents a set of compromises among parties with different views on the optimal result in each cost category.” – This is one of the things wrong with the settlement process as it means that the knowledge base represented by Commission precedent is not constructed. If it appears precedent will be created that goes against the long-term interests of the utilities, they decide to settle. If it is going their way, they don't and precedent is created. Thus, over time, the Commission precedents favor utilities, and this is bad policy.

60: “...the Commission does not need to find the Agreement is directly consistent with prior Commission precedents” – That is true, and a good thing because blindly following precedent is sometimes taken as an easy way out. However, we still assert that this case is the outlier and must be denied and modified accordingly. Due to the steady evolution of precedent in favor of the utility position, precedent should be given more weight if it favors the ratepayer position, as it does in this case.

61: PD59: “...SCE states it sought and obtained all necessary license amendments for the SGRP, as described in publicly available documents.” – But they also had, as a major premise of the SGRP, the desire to avoid a license amendment and NRC approval. They ended up changing the Steam Generator design significantly, and as a result, needed the License Amendment. The Citation by the NRC made this very clear. (See #46)

62: PD60: “CDSO provided no support for it allegation that SCE rejected design changes to avoid license amendment requirements.” – This would have come out in the Phase 3 proceedings, were they completed. We had no way to submit any evidence in the proceeding of this type due to scope

restrictions.
63: “We find the processes by which the Settling Parties developed the Agreement, submitted it to the Commission, and the Commission considered it, are consistent with Article 12 of our Rules, as well as principles of due process.” – The fact that the record is not sufficiently complete means that the claims of the ratepayers cannot be considered by the Commission, and this is a violation of due process.
64: PD62: “Rule 12.1 permits settlements which do not include all parties.” – But the settlement negotiations should provide participation for all parties that wish to participate. See 43.
65: PD63: “There is no evidence that CDSO or Henricks ever initiated any settlement discussions with the Utilities or other parties, or otherwise indicated interest in resolution without full litigation.” – Incorrect! CDSO clearly defined a set up settlement criteria and suggested the use of a Magistrate Judge to oversee settlement negotiations. When settlement negotiations were underway, all parties should have been contacted. Just because it would be “difficult” does not mean it should not be done.
66: PD66: “inappropriate to a non-sworn person.” – The Commissioners are always sworn in, from the moment they accept the position, so this is a ridiculous statement.
67: “...non-settling parties were afforded an opportunity to present evidence or testimony on material contested issues of fact if it was served on all parties five (5) days prior to the hearing. No evidence or testimony was submitted prior to the hearing.” – Extensive evidence was submitted but rejected due to sophomoric details, such as no table of contents or numbered pages, or perhaps slightly late. This evidentiary hearing was quickly arranged and scheduled. To disallow evidence because it did not comply with arbitrary format or timing was an indication that there was no sincere effort on the part of the Commission to solicit any reasonable or effective participation by the non-settling parties.
68: PD67: “...non-settling parties attempted to expand the scope to include a wide range of questions about the underlying facts and circumstances in the record.” – The content of the record IS a contested issue of fact. This is not an expansion of the scope at all. If the record does not include enough information to allow for an adequate evaluation of the merits of the ratepayers case against the utilities, then it does not have a “complete record” sufficient for the conclusion of the case.
69: “The Commission has previously described the purpose is not to conduct a “mini-hearing” on the issues in the proceeding.” – Of course it is, particularly if huge parts of the proceeding were never even started. Here in this PD there is a constant drumbeat of why we did not get any Phase 3 evidence in the record, but at the same time claim that opponents were stepping out of line each time it was attempted.
70: PD68: “Henricks failed to establish any basis for the claims and questions, in addition to posing them in the wrong forum.” – There is no law against asking the Commissioner's questions in meetings with all parties present, and they can answer them if they desire, and should if they can.
71: PD75: “Section 463(a) requires the Commission to establish the utility incurred costs as a result of an unreasonable error or omission relating to the planning, construction, or operation of any portion of the SGRP. Despite the persistent allegations of the non-settling parties, the record does not establish that SCE made an “unreasonable error or omission” that resulted in certain expenses.” – We agree that the record does not contain this specifically because Phase 3 was never even started, and the other phases rule that out of scope. Unfortunately, the Commission did not establish this either way as they

actively avoided their duty, and for this reason, the settlement is hopelessly defective and must be denied.

72: PD77: "In contrast to these proceedings, the Commission concluded in *Helms* that PG&E failed to perform at the appropriate standard of performance, based on findings of unreasonable acts," – Yes, and that is why these proceedings are defective. The Commission is concluding nothing about whether SCE "failed to perform at the appropriate standard of performance" and there is nothing in the record about "findings of unreasonable acts," except for the citation and notice of violation from the NRC, which was accepted without any objection by SCE. (See 46).

73: PD79: "We disagree with A4NR that the existence of this NOV alone, is legally sufficient to establish SCE's overall imprudent management of the SGRP." – Even if this is true, it does provide support the conclusion that SCE was imprudent in their management of the SGRP. With this in mind, if the Commission approves the settlement without properly conducting an inquiry into their possible imprudence, then it is not fulfilling its duty to the public.

74: PD80: "However, not all violations are equal nor of a severity as to invoke an automatic presumption or conclusion of imprudent management over a five to seven year project." – Of course not. Nothing is automatic. But this notice of violation should at least cast some doubt on the propriety of the conduct by SCE sufficient to cause the Commission to fully investigate it.

75: PD82: "Agreement was reached after the parties...litigated three phases of the OII" – This is an exaggeration. Only 1 phase of the proceedings completed to the PD. No PD was prepared for Phase 2. Phase 1A was rolled into Phase 1.

76: "not every party who engaged in negotiations signed the Agreement" – Only TURN and ORA were actively engaged in the negotiations, and they both signed the agreement. Of the active parties in the proceeding (prepared briefs, attended evidentiary hearings, etc.) a majority oppose the settlement. See 43.

77: PD84: "implication that parties were precluded from undertaking discovery on Phase 3 issues is misleading" – This is false. Henricks requested the identities of the SCE employees who were invovled in the Anti-Vibration Bar (AVB) design team so these individuals could be potentially called as witnesses. That information was denied by SCE, and the ALJs did not compel.

78: PD86: "The NRC Notices to Mitsubishi and SCE reveal a regulatory view that both companies erred in some way during the design development for the RSGs." – We agree with this statement and assert that the Commission must not approve the settlement without performing due diligence to investigate this fact.

79: PD87: "The Commission has previously held that termination of an investigation prior to completion of all hearings, in and of itself, does not prevent adoption of a settlement which otherwise complies with Rule 12." – Certainly, "in an of itself". But with the "regulatory view that the companies erred" as mentioned in 77, it is not conceivable that the Commission can terminate the investigation and avoid the duty to perform due diligence.

80: "Opposing Parties offered nothing----only speculation and unsupported allegations--- to brace claims that egregious acts by the Utilities, and specific executives, would be uncovered by a Phase 3

record." – On the contrary, many times we offered to enter such information into the record but the utilities objected to that due to the scope of the proceedings in the other phases, and their objections were sustained in every instance. For example, in Phase 2, we attempted to enter a document from the NRC into the record (Phase 2 Transcript, page 2641)

> MR. WEISSMANN: We do have an objection to 23, your Honor. This is the NRC's letter to SCE of September of this year. This raises multiple issues that are within the scope of Phase 3, but not properly within the scope of Phase 2. There's a number of technical and other issues that we'll have to go into in greater depth. And so we would object to the introduction of CDSO-23 into the record of Phase 2.
>
> ALJ DARLING: I tend to agree with Mr. Weissmann's analysis. I don't see how this relates.
>
> MS. SULLIVAN: Well, the reason why we introduced it and we referenced it in the cross-examination was in respect to the NRC identifying the failure of the Steam Generator Replacement Project as unprecedented. That was the reason for introducing the NRC as a recognized regulatory body.
>
> ALJ DARLING: How does that impact the decision in a Phase 2 which would remove non used and useful assets from rate base?
>
> MS. SULLIVAN: It impacts its accounter to Edison's testimony that it would be unprecedented for this Commission to disallow anything. This is the identification by the NRC that this is an unprecedented situation.
>
> MR. WEISSMANN: Well, the issue of precedent has different dimensions. I believe the NRC's comment was relative to the technical causes of the failure, which is the subject we'll be discussing in Phase 3. Our contention about precedent was about precedent relative to cost recovery, which is quite a different matter.
>
> ALJ DARLING: Right. I think that's the case, that this is -- this letter goes to issues that are, A, as yet unresolved by the NRC. They've issued a preliminary set of findings. There's opportunities in their proceedings for responses. They don't have a final. So that's the primary reason that I think it may not be admissible. The secondary reason is that I don't see that it would impact or influence the Commission's decision over analyzing what assets are used and useful. So I'm going to sustain that objection.

So this statement in the PD on page 87 referenced here is factually incorrect. Opponents "offered" many items of evidence, and they were all excluded.

81: "They did not contend a Phase 3 record would establish different recorded expenses or revenues collected from ratepayers." – That is beside the point. Recorded expenses and revenues is not the topic of Phase 3, and you know it. We do contend that a Phase 3 will result in a vastly different outcome to these proceedings that will benefit ratepayers far exceeding any cost to do so.

82: "CDSO would restrict recovery to its own definition of "NWO-related costs" and estimates this value at $92 million. However, there is little record basis for this number or to adopt it as a cap on recovery." – That number is derived based on the percentage of the plant still used and useful for the NWO, which was checked by three different methods, based on evidence in the record. The proposal by CDSO must be viewed in its entirety because the utilities would make out about the same but we propose that the fate of the companies be placed in their hands rather than be protected by the ratepayer.

83: ORDER, 3(d), "...amounts used by the Utilities to implement the revenue requirement, accounting procedures, and charges authorized by the Amended and Restated Settlement Agreement." – CDSO objects to the ORDER, 3(d). We believe this information described in this provision should be released

for public review, including any interested parties, such as CDSO. We understand that the Advice Letters mentioned in 3(a) and (b) are already provided to the public but if not, we object accordingly.

VI. CONCLUSION

Unfortunately, the Utilities apparently can call the shots here, and the Commission bends to its every wish, including marching to the rules established by the Proposed Settlement. The Commission has become not an industry watchdog, but a passive and compliant lap-dog. However, we do hold out hope that our comments will make a difference and perhaps turn this around.

With these comments it should be clear that this OII cannot be settled at this point without generating at least some evidence in Phase 3 or completing Dr. Budnitz's research and reporting, so that the Commission can evaluate the claims of ratepayers. However, we do continue to assert that the Commission should audit and revamp the settlement rules and procedures because they are much too lax and they allow the utilities to call the shots without even one suggestion from opposing parties being embraced.

Respectfully submitted.

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