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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

**RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO THE  
COALITION TO DECOMMISSION SAN ONOFRE'S MOTION FOR REASSIGNMENT**

J. ERIC ISKEN  
WALKER A. MATTHEWS, III  
RUSSELL A. ARCHER  
Southern California Edison Company  
2244 Walnut Grove Avenue  
Post Office Box 800  
Rosemead, CA 91770  
Telephone: (626) 302-6879  
Facsimile: (626) 302-3990  
E-mail: *Walker.Matthews@sce.com*

HENRY WEISSMANN  
Munger, Tolles & Olson LLP  
355 South Grand Avenue, 35th Floor  
Los Angeles, CA 90071  
Telephone: (213) 683-9150  
Facsimile: (213) 683-5150  
E-mail: *Henry.Weissmann@mto.com*

Attorneys for  
SOUTHERN CALIFORNIA EDISON COMPANY

Dated: July 29, 2015

Pursuant to Rule 11.1(e) of the Rules of Practice and Procedure (“Rules”) of the California Public Utilities Commission (“Commission” or “CPUC”), Southern California Edison Company (“SCE”) responds to the Motion for Reassignment (“Reassignment Motion”) filed by the Coalition to Decommission San Onofre (“CDSO”). The Reassignment Motion should be denied.

**I. INTRODUCTION**

CDSO’s Reassignment Motion is based on inaccurate representations regarding the law and the record of this proceeding. The Reassignment Motion erroneously asserts that Administrative Law Judge (“ALJ”) Darling’s communication with SCE’s Russell Worden in December 2012 violated the ex parte rules, and that she cannot evaluate her own conduct. There is no basis to assert that this communication was in any way improper. In addition, the communication is *not* the subject of the pending motion for sanctions filed by the Alliance for Nuclear Responsibility (“A4NR”).<sup>1</sup>

CDSO’s further attacks on Chief ALJ Clopton and Commission President Picker are completely without merit. The Commission’s rules specifically require a motion to reassign a case to be decided by the Chief ALJ, in consultation with the President of the Commission.<sup>2</sup> CDSO’s argument that ALJ Clopton was unable to rule on the motion is based on a mischaracterization of the facts. Likewise, CDSO’s insinuation that President Picker is somehow involved in “collusion and impropriety” is baseless.

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<sup>1</sup> A4NR’s Motion Seeking Investigation of the Extent of Sanctions to be Ordered Against SCE for Violation of Commission Rules 1.1 and 8.4 (filed Feb. 10, 2015); A4NR’s Amended Motion for Sanctions (filed May 6, 2015).

<sup>2</sup> Rule 9.4(e).

Finally, CDSO's recitation of "circumstantial evidence" indicating alleged collusion and impropriety by the Commission is based on a series of mischaracterizations of the record and the history of this proceeding.

## **II. THE MOTION IS PROCEDURALLY IMPROPER**

CDSO's motion is procedurally improper. First, a motion for reassignment of an ALJ for cause must be supported by a declaration,<sup>3</sup> which CDSO failed to submit. Second, with one exception, CDSO's motion is based on information that was available at the time it filed its original motion. The only exception is that CDSO's motion cites press accounts regarding a search warrant served on the Commission. As noted below, this development does not support the Reassignment Motion. The remaining grounds for the Reassignment Motion are not new. The Commission has rejected motions for reconsideration where, as here, they are based on information and arguments that could have been presented with the original motion, characterizing such motions for reconsideration as seeking "the proverbial 'second bite at the apple.'"<sup>4</sup> For these reasons alone, the Reassignment Motion should be denied.

## **III. CDSO MIS-STATES THE APPLICABLE STANDARD**

### **A. CDSO's Discussion of The California Code of Judicial Ethics Is Misleading**

CDSO initially asserts that the CPUC's ALJs, including presumably ALJ Darling and Chief ALJ Clopton, are governed by the California Code of Judicial Ethics. CDSO cites Canon 3B(7), which specifies that a judge shall not initiate, permit or consider ex parte communications. After quoting the exception in Canon 3B(7)(a) for communications with court personnel, CDSO concludes: "[w]e note that there is no provision in this ethics document that

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<sup>3</sup> Rule 9.4(b).

<sup>4</sup> ALJ Ruling Denying AREM's Motion, 2006 WL 192533 (Jan. 23, 2006).

allows private communications with one side of a dispute with the other parties not present. According to this ethics document, judges are supposed to consult only with other judges or court personnel.”<sup>5</sup>

CDSO’s statement is misleading. First, CDSO fails to quote other portions of Canon 3B(7) which create other exceptions. One particularly salient exception permits ex parte communications “when expressly authorized by law to do so.”<sup>6</sup> Under the CPUC’s Rules of Practice and Procedure, communications about procedural matters are permitted,<sup>7</sup> and ex parte communications (as defined) are allowed provided they are reported.<sup>8</sup> As a result, CDSO’s statement that there is “no provision” in the Canons that allows private communications with one side, and that the Canons permit only consultation with other judges and court personnel, is false.

Second, CDSO fails to cite the applicable provisions of the Government Code. While the Government Code provides that certain provisions of the Code of Judicial Ethics apply to ALJs,<sup>9</sup> the code specifically states that Canon 3B(7) does not apply “to the extent it relates to ex parte communications.”<sup>10</sup>

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<sup>5</sup> Reassignment Motion, p. 8.

<sup>6</sup> Canon 3B(7)(c). Another exception permits ex parte communications on “scheduling” issues, provided the judge reasonably believes that no party will gain a procedural or tactical advantage and the judge promptly notifies others. *Id.* 3B(7)(b).

<sup>7</sup> Rule 8.1(c).

<sup>8</sup> *Id.* 8.3(c).

<sup>9</sup> GOV’T CODE § 11475; *see* D.14-11-041, pp. 7-9.

<sup>10</sup> GOV’T CODE § 11475.40(a).

**B. CDSO’s Citation of the Strumwasser Report Is Misplaced**

CDSO also cites the Strumwasser Report,<sup>11</sup> which concludes that ex parte communications in ratesetting cases are “fundamentally unfair.”<sup>12</sup> That report, however, does not purport to make any findings about past compliance with the rules,<sup>13</sup> nor did the Commission delegate to Mr. Strumwasser the authority to adjudicate whether parties have complied with ex parte rules in the past. Moreover, the Strumwasser Report expressly states that it is:

recommending reforms to render illegal certain practices that are lawful today. We have found that, in part because of poor drafting of the governing laws, discussion of ex parte communications sometimes confuses what is illegal and what is legal but ought not to be. We wish it to be clear that just because we recommend a given reform, we are not necessarily saying that current practices are illegal. Rather, in many instances we are saying that the law should be changed to make them illegal.<sup>14</sup>

The Strumwasser Report does not support the motion for sanctions, which is based solely on whether the rules applicable at the time were complied with, not whether those rules should be changed prospectively.

Similarly, the O’Neill Report<sup>15</sup> provides recommendations for prospective changes to the ex parte rules, and as such does not support the imposition of sanctions. The O’Neill Report, however, includes the following important comments:

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<sup>11</sup> Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices (June 22, 2015) (“Strumwasser Report”), *available at* <http://www.cpuc.ca.gov/NR/rdonlyres/1EE7A892-D7C3-43C7-9163-E60AD859463E/0/StrumwasserReport.PDF>.

<sup>12</sup> Reassignment Motion, pp. 8-9 (citing Strumwasser Report, p. 4).

<sup>13</sup> Strumwasser Report, p. 117 (“our mandate was not to assign responsibility for past events”).

<sup>14</sup> Strumwasser Report, p. 116.

<sup>15</sup> Report on Key Findings from CPUC Modernization & Reform Project for Workshop on Government Decision-Making and Open Meetings, Governor’s Office of Planning and Research (June 22, 2015) (“O’Neill Report”), *available at* [http://www.opr.ca.gov/docs/062215\\_Key\\_Findings\\_Mod\\_Reform\\_Project\\_.pdf](http://www.opr.ca.gov/docs/062215_Key_Findings_Mod_Reform_Project_.pdf).

Finally, the current ex parte rules applicable to the CPUC are extremely complex, ambiguous in certain respects, and difficult to fully comply with. . . . This has resulted in such complexity that few utilities or CPUC practitioners can say with complete confidence that they are fully conversant with all of the CPUC's currently applicable ex parte rules.<sup>51</sup>

. . .

<sup>51</sup>In several instances, parties involved in inappropriate ex parte communications that were not properly or timely disclosed, including CPUC Commissioners and utilities that should be as well informed as anyone regarding applicable requirements, claimed not to know that the communications were inappropriate or required disclosure.<sup>16</sup>

These comments not only support reform of the ex parte rules, but also demonstrate that it would be inappropriate to sanction parties for conduct that is alleged not to comply with “extremely complex [and] ambiguous” rules.

#### **IV. CDSO’S ALLEGATION THAT ALJ DARLING CANNOT BE IMPARTIAL IS BASELESS**

CDSO erroneously alleges that ALJ Darling cannot impartially preside over this proceeding, and specifically cannot impartially preside over A4NR’s motion for sanctions. CDSO provides no valid basis for reconsideration of the ruling denying its initial motion for reassignment, which concluded that no violation of any law, order, or rule by ALJ Darling is apparent.<sup>17</sup> The ruling observes that, to the extent the December 4, 2102, communications were ex parte communications as defined in the rules, “they are permitted pursuant to Rule 8.3(c) subject to the reporting requirement of Rule 8.4. SCE filed notice of the communication on December 7, 2012.”<sup>18</sup>

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<sup>16</sup> *Id.* p. 18 & n.51.

<sup>17</sup> Chief Administrative Law Judge’s Ruling Denying Motion for Reassignment (filed July 10, 2015), p. 2.

<sup>18</sup> *Id.*

First, the communication between ALJ Darling and Mr. Worden on December 4, 2012, is not within the scope of A4NR's amended motion for sanctions.<sup>19</sup> While CDSO asserts that the December 4, 2012, communication "logically should be addressed,"<sup>20</sup> there is no motion pending before the Commission that would present that issue. As a result, the premise of CDSO's Reassignment Motion – that ALJ Darling cannot impartially review "her own possible violations of the rules"<sup>21</sup> – is inapplicable and incorrect.

Second, CDSO's allegation that a communication about the phasing of the OII was not procedural is both incorrect and irrelevant. It is incorrect because phasing addresses the "schedule" of the proceeding, which the rules define as procedural.<sup>22</sup> It is irrelevant because discussion of non-procedural matters is permitted, provided they are reported.<sup>23</sup> CDSO's further statement that the decision of the ALJ and Assigned Commission to phase the OII was "the start of the overall plan to avoid the actual investigation"<sup>24</sup> is baseless and irrelevant.

Third, CDSO's assertion that the ex parte notice SCE filed was incomplete is also incorrect and irrelevant. The rules require the notice to include a description of the interested person's communication and its content.<sup>25</sup> The rule does not require a verbatim account. In this case, the notice described the general topics discussed, including SCE's work with MHI. That description complied with the rule, as interpreted and applied by parties who have appeared

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<sup>19</sup> A4NR's Amended Motion for Sanctions.

<sup>20</sup> Reassignment Motion, p. 12.

<sup>21</sup> *Id.* p. 9.

<sup>22</sup> Rule 8.1(c). As of the date the communications occurred, parties had not expressed a view on phasing, and hence it cannot be said that the discussion involved a contested matter.

<sup>23</sup> Chief Administrative Law Judge's Ruling Denying Motion for Reassignment, p. 2.

<sup>24</sup> Reassignment Motion, pp. 10-11.

<sup>25</sup> Rule 8.4(c).

before the Commission, including CDSO itself.<sup>26</sup> In addition, any allegation that SCE's notice was inadequate, while baseless, would not be a basis for removing ALJ Darling from the proceeding; the ALJ has no responsibility for preparing an ex parte notice.

Fourth, CDSO's suggestion that the April 14, 2015, ruling was limited to documents from and after March 1, 2013, in order to avoid disclosure of the December 4, 2012, communication between ALJ Darling and Mr. Worden is baseless.<sup>27</sup> There was an obvious reason to set March 1, 2013, as the start-date: it was shortly prior to the Warsaw meeting on March 26, 2013. But documents relating to the December 4, 2012, communication between ALJ Darling and Mr. Worden would not have been responsive to the April 14, 2015, ruling even if the date range had been expanded, because that communication did not relate to settlement of the OII.<sup>28</sup>

Fifth, CDSO's reference to the Attorney General's search warrant is irrelevant. CDSO notes that ALJ Darling is one of the individuals whose email is to be searched.<sup>29</sup> This simply indicates that the Attorney General believes that ALJ Darling may possess information that could be relevant to its investigation; it does not indicate that ALJ Darling engaged in conduct that was in any way improper.

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<sup>26</sup> See Strumwasser Report, p. 99 (describing vagueness of ex parte notices as "an industry practice that intervenors have also adopted"). CDSO filed a Notice of Ex Parte Communication on January 21, 2014, that contains a three-bullet description of a series of 30-minute meetings (along with an attachment consisting of written materials distributed). CDSO cannot now be heard to assert that a summary of the main points discussed in an ex parte communication, such as was contained in SCE's December 7, 2012, notice and CDSO's January 21, 2014, notice, violates Rule 8.4(c).

<sup>27</sup> Reassignment Motion, p. 13.

<sup>28</sup> Administrative Law Judges' Ruling Directing Southern California Edison Company to Provide Additional Information Related to Late-Filed Notices of *Ex Parte* Communications (filed April 14, 2015), p. 5.

<sup>29</sup> Reassignment Motion, p. 13.

V. **CDSO’S ALLEGATION THAT CHIEF ALJ CLOPTON CANNOT BE IMPARTIAL IS BASELESS**

CDSO’s allegation that Chief ALJ Clopton’s ruling denying the motion to reassign should be reconsidered because Chief ALJ Clopton is not impartial is likewise baseless. First, CDSO alleges that Chief ALJ Clopton supervises ALJ Darling, and that Chief ALJ Clopton should have “noticed and stopped” any “improper collusion.”<sup>30</sup> CDSO has not established that any collusion occurred, let alone that Chief ALJ Clopton was or should have been aware of any such alleged collusion. The premise of CDSO’s motion – that the Chief ALJ is not competent to evaluate whether an ALJ should be removed from a proceeding – is contrary to the rules, which expressly designate the Chief ALJ as the person who must issue a ruling addressing a motion to reassign a proceeding.<sup>31</sup>

Similarly without merit is CDSO’s quotation from a news story reporting that Chief ALJ Clopton has retained counsel. As the news report states, Chief ALJ Clopton is a witness in, not a target of, the investigation. Moreover, there is no indication that Chief ALJ Clopton’s role as a potential witness has anything to do with the SONGS OII.

CDSO also erroneously states that Chief ALJ Clopton was “involved in the San Bruno ‘judge shopping’ scandal.”<sup>32</sup> Initially, the issues pertaining to ALJ assignment did not involve San Bruno, but instead involved a separate proceeding.<sup>33</sup> Additionally, there is no evidence that

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<sup>30</sup> *Id.* p. 14.

<sup>31</sup> Rule 9.4(e).

<sup>32</sup> Reassignment Motion, p. 14.

<sup>33</sup> D.14-11-041.

Chief ALJ Clopton was “involved” in that matter. The news report quotes Chief ALJ Clopton as stating that no one within the ALJ division did anything inappropriate.<sup>34</sup>

Finally, CDSO suggests that it was improper for Chief ALJ Clopton to have consulted with President Picker in connection with CDSO’s motion. CDSO overlooks the applicable rule, which states that the Chief ALJ, “in consultation with the President of the Commission,” shall issue a ruling on a motion for reassignment for cause.<sup>35</sup>

## **VI. CDSO’S ALLEGATIONS OF COLLUSION ARE BASELESS**

CDSO alleges that “[c]ircumstantial evidence implies that collusion did occur,” implicitly suggesting that ALJ Darling was involved in such “collusion.”<sup>36</sup> CDSO’s allegations are based on a mischaracterization of the record and are without merit.

CDSO alleges that the OII was split into phases to enable a settlement to be drafted before the Commission conducted a prudence review. The decision to phase the OII was within the Commission’s discretion, was done “to promote the efficient administration of this OII,”<sup>37</sup> and was in line with many other proceedings the CPUC has divided into phases. CDSO’s assertion that the reason for the phasing was to give the parties time to reach a settlement so as to avoid a prudence review is baseless. In addition, there would be nothing wrong with structuring a proceeding to enable the parties to reach a settlement before litigation progresses.

CDSO erroneously alleges that the Commission inappropriately issued a press release regarding the proposed settlement that allegedly contained “wording implying that all parties

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<sup>34</sup> Reassignment Motion, p. 14.

<sup>35</sup> Rule 9.4(e).

<sup>36</sup> Reassignment Motion, p. 18.

<sup>37</sup> First Scoping Memo (filed Jan. 28, 2013), p. 3.

were in agreement.”<sup>38</sup> The Commission’s press release was made “in response to the announcement by” the four settling parties that they had reached a settlement. President Peevey and Commissioner Florio are quoted as expressing appreciation that “the parties” had reached a settlement.<sup>39</sup> In context, it is clear that “the parties” refers to the four settling parties, not all of the parties to the OII.

CDSO erroneously alleges that it was improper or irregular to stop the OII based on the settlement before it was approved “rather than [by] a motion by one or more parties.”<sup>40</sup> In fact, the settling parties filed a motion for settlement approval, which included a request that the Commission stay further litigation of the OII pending consideration of the settlement.<sup>41</sup>

CDSO erroneously claims that the “internal investigation” by Dr. Budnitz was stopped “without any rationale other than certainly the utilities would prefer not to be investigated.”<sup>42</sup> There is no evidence that the CPUC “stopped” ongoing work by Dr. Budnitz. The CPUC retained Dr. Budnitz as a technical consultant to assist Energy Division in evaluating evidence to be submitted by the parties regarding the causes of the failure of the replacement steam generators, not to conduct an “internal investigation.”<sup>43</sup> The settlement was reached before Phase 3 commenced and hence before such evidence was submitted by the parties. The settlement does not determine whether SCE’s conduct in connection with the Steam Generator Replacement Project was prudent, and the CPUC found that the settlement was a reasonable

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<sup>38</sup> Reassignment Motion, p. 18.

<sup>39</sup> CPUC Comments on Proposed San Onofre Settlement (Mar. 27, 2014), *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M089/K292/89292171.PDF>.

<sup>40</sup> Reassignment Motion, p. 18.

<sup>41</sup> Joint Motion for Adoption of Settlement Agreement (filed Apr. 3, 2014), p. 43.

<sup>42</sup> Reassignment Motion, p. 18.

<sup>43</sup> D.13-06-013.

compromise of that and related issues.<sup>44</sup> As a result, there was no work for Dr. Budnitz to perform. Indeed, it would have been a waste of ratepayer funds to have directed Dr. Budnitz to conduct additional work in the face of the settlement. There is no basis for CDSO's suggestion that the CPUC's rationale for allegedly stopping Dr. Budnitz from doing more work was that the utilities would prefer not to be investigated.

CDSO erroneously suggests that the Commission acted improperly in accepting a settlement conference in which parties were not allowed to participate meaningfully.<sup>45</sup> As the Commission has found, however, the settling parties complied with the rules, which require only that they convene at least one conference to explain the terms of the proposed settlement.<sup>46</sup> Under long-standing CPUC precedent, the rules do not require the settling parties to engage in further negotiations with other parties.<sup>47</sup> No party has the right to participate in settlement negotiations, either at the settlement conference or otherwise.

CDSO erroneously claims that ALJ Darling's statement that a settlement conference was held was improper because the settling parties' alleged refusal to negotiate at the settlement conference meant that the session did not qualify as a settlement conference.<sup>48</sup> As noted, the settlement conference was conducted in accordance with the rules. In addition, the statement that a settlement conference was held was factually accurate.

CDSO erroneously asserts that the ALJs "attempted to fabricate a record" by taking judicial notice of numerous documents "desired by the utilities" while refusing to take judicial

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<sup>44</sup> D.14-11-040, p. 109.

<sup>45</sup> *Id.* pp. 61-62.

<sup>46</sup> *Id.* pp. 61-64.

<sup>47</sup> *Id.*

<sup>48</sup> Reassignment Motion, p. 18.

notice of other documents requested by “parties representing ratepayer interest.”<sup>49</sup> The utilities did not request that the CPUC take official notice of the documents in question. The ALJs, on their own initiative, chose to exercise their discretion to take official notice of certain actions taken by the Nuclear Regulatory Commission (“NRC”).<sup>50</sup> The primary purpose of taking official notice of these documents was to address the arguments of certain parties who objected to the settlement that the NRC’s findings established that SCE acted imprudently in connection with the Steam Generator Replacement Project.<sup>51</sup> The ALJs denied the requests for official notice of other documents, finding that they did not meet the criteria for official notice and/or were otherwise offered in a procedural improper manner.<sup>52</sup> These rulings provide no evidence of impropriety.

CDSO erroneously claims that the time scheduled for the evidentiary hearing and for the final oral argument on the proposed settlement were inadequate.<sup>53</sup> The duration of these hearings was within the CPUC’s discretion. The time allowed for the evidentiary hearing was appropriate given its scope, which was limited to addressing the meaning of the proposed settlement agreement. The purpose of the hearing was not to address SCE’s prudence with respect to the Steam Generator Replacement Project, which was one of the issues settled. There is no record to indicate that parties wished to ask additional relevant questions.<sup>54</sup> Similarly, there is no record that parties were prevented from presenting additional, relevant oral argument.

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<sup>49</sup> *Id.*

<sup>50</sup> Administrative Law Judges’ Ruling Taking Official Notice of Documents and Addressing Various Motions (filed Sept. 11, 2014) (“Sept. 11 Ruling”), p. 3.

<sup>51</sup> *Id.* p. 4; *see also* D.14-11-040, pp. 79-81.

<sup>52</sup> Sept. 11 Ruling, pp. 6-7, 9-11.

<sup>53</sup> Reassignment Motion, p. 19.

<sup>54</sup> D.14-11-040, pp. 67-68.

CDSO erroneously claims that it was improper to allow the settling parties to present the Amended Settlement Agreement for approval without filing a new motion for settlement approval. There was no need, however, to file a new motion for settlement approval because all parties were given an opportunity to comment on the changes to the settlement requested by the September 5, 2014, ruling,<sup>55</sup> and the Amended Settlement Agreement implemented that ruling. Moreover, the rules require only one motion for settlement approval; there is no requirement to file a new motion if the proposed settlement is revised.<sup>56</sup>

## VII. CONCLUSION

CDSO's Reassignment Motion should be denied.

Date: July 29, 2015

Respectfully Submitted,

J. ERIC ISKEN  
WALKER A. MATTHEWS, III  
RUSSELL A. ARCHER  
HENRY WEISSMANN

*/s/ Henry Weissmann*

By: Henry Weissmann

Attorneys for  
SOUTHERN CALIFORNIA EDISON COMPANY

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<sup>55</sup> Assigned Commissioner and Administrative Law Judges' Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement (filed Sept. 5, 2014), p. 15.

<sup>56</sup> Rule 12.1(a). *See also* D.14-05-001, 2014 WL 1931958 (May 1, 2014) (rejecting the settlement as filed but adopting it as modified without requiring a new motion to adopt settlement); *Matter of Appl. of So. Cal. Edison Co.*, D.95-05-042, 59 CPUC 2d 779, 1995 WL 461165 (May 24, 1995) (adopting settlement agreement as modified, only requiring SCE and DRA to jointly file a notice of acceptance, not a new motion to adopt settlement); *In re Pac. Bell*, D.93-06-032, 49 CPUC 2d 486 1993 WL 766927 (June 3, 1993) (adopting settlement as modified by order, requiring parties to submit written comments accepting the modified settlement agreement, but not a new motion to adopt settlement).