



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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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.

And Related Matters.

Investigation 12-10-013
(Filed October 25, 2012)

Application 13-01-016
Application 13-03-005
Application 13-03-013
Application 13-03-014

**BRIEF OF FRIENDS OF THE EARTH
IN SUPPORT OF THE SETTLEMENT AGREEMENT
ADOPTED IN DECISION (D.) 14-11-040**

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Dated: July 7, 2016

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INTRODUCTION

The Joint Ruling of the Assigned Commissioner and the Administrative Law Judge ("Joint Ruling") in this proceeding, dated May 9, 2016, reopened this proceeding in order to review the Settlement Agreement that the Commission adopted on November 25, 2014. This reopening was prompted by late-filed *ex parte* disclosures that occurred after Commission adoption of the Settlement, and a subsequent Commission decision imposing sanctions on the Southern California Edison Company ("SCE") in connection with said *ex parte* disclosures.

The stated purpose of this reopening is, as stated at page 5 of the Joint Ruling, to "review the Settlement Agreement against our standards for reviewing settlement agreements as set forth in Section 12.1(d) of the Commission's Rules." The Joint Ruling directed SCE to file and serve a

Summary of the Settlement Agreement by June 2, 2016, and authorized the parties to the proceeding to file briefs assessing whether the Settlement Agreement meets Commission standards for approving settlement agreements by July 7, 2016. Consistent with this direction, Friends of the Earth ("FOE"), a party to this proceeding and the Settlement Agreement, hereby files its Brief in Support of the Settlement Agreement that the Commission adopted on November 25, 2014.

FOE would note that after the emergency shutdown of the San Onofre Nuclear Generating Station ("SONGS") on January 31, 2012, but prior to the initiation of this proceeding, it had met on a number of occasions with Commission staff, including the staff of then-President Michael Peevey, to urge the Commission to initiate a proceeding to address the issues that were ultimately included in this proceeding. Indeed, it is fair to say that more than any other organization outside the Commission, FOE played the leading role in urging the Commission to initiate this formal investigation

I. THE UNDERLYING FACTS AND THE RATIONALE SUPPORTING THE SETTLEMENT REMAIN UNCHANGED: THE SETTLEMENT PROVIDES SIGNIFICANT BENEFITS TO RATEPAYERS AND IS REASONABLE IN LIGHT OF THE WHOLE RECORD, IS CONSISTENT WITH THE LAW AND IS IN THE PUBLIC INTEREST

The Commission's prior consideration of the proposed Settlement Agreement is the foundation for this reconsideration. We refer the Commission to the April 3, 2014 Joint Motion of the Settling Parties -- including TURN and ORA -- urging its adoption. Pages 36-42 of that Joint Motion, which set forth the bases for Commission approval of the proposed Settlement under Commission Rule 12.1(d), spell out in detail the reasons why said Agreement was reasonable in light of the whole record, was consistent with the law and was in the public

interest. To recall why the Commission found that the Settlement Agreement clearly met -- and still meets -- the criteria of Rule 12.1(d), the key text from those pages 36-42 is set forth in footnote 1 below.¹

¹ **A. The Agreement Is Reasonable In Light Of The Record**

The Settling Parties' testimony and briefing, together with the Agreement and this Joint Motion, contain the information necessary for the Commission to find the Agreement reasonable in light of the record. The Agreement is a product of substantial negotiation efforts on behalf of the Utilities, TURN, and ORA, and the success of those efforts is largely attributable to the magnitude of information and depth of analysis set forth in the record. As the Agreement notes, SCE alone responded to nearly a thousand data requests during the course of this proceeding, and SDG&E similarly responded to numerous data requests. In the seventeen months since this OII was initiated, the Settling Parties have exchanged thousands of pages of prepared testimony on a wide range of issues encompassed by the Agreement. The ALJs held three separate evidentiary hearings, which spanned a total of twelve days, and the Utilities, TURN, and ORA submitted lengthy Opening and Reply briefs following each of these three evidentiary hearings. Likewise, CUE and FOE each submitted multiple briefs regarding critical legal and procedural issues such as the Commission's authority to reduce rates as a result of the non-operation of SONGS and the timing of the Commission's consideration of the Utilities' prudence.

As shown in Part II of this Joint Motion, the negotiated outcomes in the Agreement are within the range of positions and outcomes proposed by the Settling Parties in their prepared testimony and briefing on Phases 1, 1A, and 2. The recoveries and disallowances set forth in the Agreement represent compromises on issues that were thoroughly litigated by the Utilities, TURN, and ORA in these three Phases. Although the record has not been extensively developed with respect to Phase 3 issues, no record on these issues is required for the Commission to find that the Agreement is reasonable and adopt the Agreement in its entirety. In fact, a primary purpose of the Agreement is to avoid the cost, time commitment, and burden that would be required to develop a complete record on the main subject of Phase 3: the causes of the steam generator damage and the reasonableness of the Utilities' costs incurred due to the damage. The Agreement is not dependent on a finding on the causes of the extensive and excessive tube wear in Units 2 and 3, and is likewise silent regarding questions of prudence. To adopt the Agreement, the Commission therefore does not need a detailed record with respect to the technical phenomena that caused the tube wear or the reasonableness of the Utilities' actions leading up to, and responding to, the leak that eventually resulted from this tube wear.

The Agreement represents a fair resolution of the Settling Parties' litigation positions described in Part II of this Joint Motion. The extent of the compromise among the Utilities, TURN, and ORA, is illustrated in Attachment 2 to this Joint Motion. Attachment 2 is illustrative of the present value SONGS-related revenue requirement that would have resulted from the litigation positions of SCE, SDG&E, TURN, and ORA as set forth in the record of prior phases of this proceeding. Attachment 2 is also illustrative of the present value SONGS-related revenue requirement that will result if the Commission adopts the Agreement. The present value SONGS-related revenue requirement that will be effectuated if the Commission adopts the Agreement represents a genuine compromise between the litigation positions set forth by the Utilities, on the one hand, and TURN and ORA, on the other hand. By disallowing certain SONGS-related costs and allowing other costs, the Agreement also represents a fair compromise among the litigation positions set forth by the Utilities, FOE, and CUE.

At the most basic level, the Agreement ensures that ratepayers pay for the power they received, but do not pay for the SGRP after the day the outages began. The most significant disallowances in the Agreement—the write-off of \$757.4 million in net investments in the SGRP and the disallowance of \$99 million in SGIR costs above provisionally authorized O&M levels in 2012—are greater than the SONGS-related replacement power costs that the Utilities have incurred from the start of the outages to the date of the permanent shut down of SONGS. On balance, the Agreement thus favors ratepayers and represents a significant concession on the part of the Utilities, who have maintained since the inception of this OII that they are entitled to full recovery of their investments in the SGRP, all SGIR costs in 2012, and replacement power incurred as a result of the outage.

(footnote continued)

B. The Agreement Is Consistent With Law

The terms of the Agreement comply with all applicable statutes and prior Commission decisions, and reasonable interpretations thereof. In agreeing to the terms of the Agreement, the Settling Parties considered relevant statutes and Commission decisions and determined that the Agreement is fully consistent with those statutes and prior Commission decisions. In particular, the Agreement is consistent with Section 455.5 of the California Public Utilities Code (“P.U. Code”). Although Section 455.5 does not require the Commission to remove an out-of-service facility from rates, the statute states that the Commission, when establishing rates, “may eliminate consideration of the value of any portion of any electric . . . facility which, after having been placed in service, remains out of service for nine or more consecutive months, and may disallow any expenses related to that facility.”¹⁶⁴ The Agreement does exactly what Section 455.5 provides for: it eliminates rate recovery of the SGRP, removes the entirety of SONGS from the Utilities’ authorized rate bases, and disallows certain expenses and costs associated with SONGS, including incremental O&M costs that the Utilities incurred in investigating and repairing the tube damage. The Agreement is also consistent with Section 451 of the P.U. Code, which provides that utility rates “shall be just and reasonable.” The reasonableness of the ratemaking proposal set forth in the Agreement is demonstrated in Attachment 2, which illustrates the compromise between the positions set forth by ratepayer advocates and the Utilities.

C. The Agreement Is In The Public Interest

The Commission has determined that a settlement that “commands broad support among participants fairly reflective of the affected interests” and “does not contain terms which contravene statutory provisions or prior Commission decisions” meets the “public interest” criterion.¹⁶⁵ Here, the Settling Parties have joined this motion and have signed the attached Agreement indicating that they believe it represents a reasonable compromise of their respective positions. It is important to note that the Settling Parties include both Utilities (SCE and SDG&E); two of the most prominent ratepayer advocate groups in Commission practice (ORA and TURN); a global network of environmental activists (FOE); and a labor group that represents hundreds of SONGS employees affected by the events giving rise to this OII (CUE). ORA and TURN have been active in the OII since its inception, have propounded numerous data requests on the Utilities, and have actively participated in all of the evidentiary hearings by serving direct testimony, cross-examining SCE’s witnesses, and extensively briefing the issues addressed at each set of evidentiary hearings. CUE and FOE have likewise been active in this proceeding by serving data requests, briefing critical legal issues, and participating at Commission conferences.

The Agreement, if adopted by the Commission, avoids the cost of further litigation and frees up Commission resources for other proceedings. The Agreement frees up the time and resources of other parties as well. If the Agreement were not adopted, and the Commission went forward with Phase 3 of this OII, the Commission and the parties to this OII would be embroiled in an extremely time-consuming and complex litigation process that could potentially take years to complete (and accordingly would delay any potential refunds resulting from those further proceedings). As is demonstrated in public documents such as the NRC’s Augmented Inspection Team Report, the technical phenomena that led to the tube leak are very complex. In light of the complexity of the technical issues and the fact that the relevant facts span ten years, a review of the Utilities’ prudence may require an enormous evidentiary showing. The Utilities and other parties would be required to serve potentially thousands of pages of testimony from myriad witnesses, including several expert witnesses, and evidentiary hearings could be expected to last for an extended period of time. Post-hearing briefs would be voluminous and this briefing schedule would need to span several additional months.

SONGS has not generated power for more than two years, and this proceeding has already lasted seventeen months. The Agreement provides substantial relief to ratepayers and eliminates the need for an additional year or more of intense litigation that would consume public resources, distract parties from other pressing energy-related issues in California, and distract the Utilities and the Commission from focusing on meeting southern California’s energy needs in the absence of SONGS going forward. The Agreement is therefore decisively in the interest of the public.

(end of footnote)

There have been not any new facts or legal issue raised by any party to the Settlement since that Joint Motion was filed that would call the agreed-on statements and recitations in the text set forth in footnote 1 into any serious question or doubt.

II. THEN-PRESIDENT PEEVEY'S MEETING WITH AN SCE REPRESENTATIVE IN WARSAW HAD NO IMPACT ON THE JUDGMENT OF THE SETTLING PARTIES AT THE TIME THE SETTLEMENT AGREEMENT WAS ADOPTED

There has been much discussion of a meeting between then-Commission President Michael Peevey and SCE 's then-Executive Vice-President in Warsaw, Poland. However, there is no evidence that this meeting had any impact whatsoever on the substance of the negotiations that led to the Settlement Agreement, or on the judgment of the parties that ultimately signed on to that Agreement.

Overlooked in the barrage of comments about the Warsaw meeting is the fundamental policy of the Commission to encourage settlements of the cases before it. The Commission encourages parties to its proceedings to settle cases whenever they can, and, in fact, many of the most important cases that the Commission oversees, including major rate cases, are settled in whole or in significant part. The encouragement of such settlements is good government at its best. It conserves resources and helps enable the Commission to handle its enormous workload in a more timely manner.

The Commission must find such settlements to be "reasonable in light of the whole record, consistent with the law and in the public interest," as it did in this case. In doing so, the Commission has broad latitude in applying these criteria, and the fact that some parties may not agree with a settlement does not, nor should it, invalidate a settlement that the Commission finds to be reasonable.

The information revealed about the Warsaw meeting does not alter *FOE's* informed judgment that the Settlement Agreement was just and reasonable. Moreover, there has been no factual evidence brought forward that indicates that prior knowledge of the terms suggested by then-President Peevey would, or should, have changed the informed judgment of any of the Settling Parties that the Settlement Agreement, as proposed and ultimately adopted by the Commission, was and remains fair and reasonable.

Over the months and months that TURN and ORA negotiated with SCE and SDG&E over the terms of a proposed Settlement, TURN and ORA knew and thoroughly understood what their litigation risks were, and they ultimately negotiated a Settlement Agreement based on their knowing and calculated understanding of those risks. Both TURN and ORA are highly experienced organizations that have been successful for many years in litigation before the CPUC. Indeed, TURN and ORA, more than any other organizations that routinely appear before the Commission, are masters in assessing and critically evaluating their litigation risks and in developing settlements that "are reasonable in light of the whole record."

FOE has carefully reviewed SCE's June 2, 2016 Response to the Joint Ruling and finds nothing in it that is factually or legally incorrect. That document provides a very thorough and accurate characterization of the various elements of the Settlement, as well as an informative discussion of the status of implementation of the various terms of the Settlement. In this latter regard, SCE points out that the actions it has taken since the Settlement was adopted have netted its ratepayers approximately \$500 million in *additional* benefits/savings, above and beyond what the Settling Parties estimated SCE's ratepayers to gain from the Settlement at the time it was signed by the Settling Parties (and subsequently adopted by the Commission). Moreover, depending on the ultimate outcome of SCE's on-going litigation with Mitsubishi Heavy

Industries over the ultimate legal responsibility for the failure of the SONGS replacement steam generators, SCE's ratepayers stand to gain even greater benefits in the future under the Settlement Agreement, as adopted by the Commission. Such major additional benefits, both those already incurred and those that are yet to be realized, are a key reason why it would be harmful to ratepayers for the Commission to overturn the Settlement Agreement and force the parties back to litigation.

CONCLUSION

For all the reasons set forth above, FOE urges the Commission to find that the Settlement Agreement that the Commission adopted in this proceeding on November 25, 2014 was, is and remains reasonable in light of the whole record of the proceeding, is consistent with the law and was, is and remains in the public interest.

The Joint Ruling also requests the parties to provide a separate analysis of the Greenhouse Gas Research and Reduction Program ("GHGRP") portion of the Settlement Agreement. FOE continues to support that portion of the Settlement Agreement and has no comments on it, other than to note that the aggressive program to increase the State's renewable portfolio standard to 50% by 2030, which became law last year pursuant to SB 350, provides compelling further reasons for SCE to move forward aggressively with the GHGRP.

Dated: July 7, 2016

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