

BEFORE THE PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA



**FILED**

7-07-16  
04:59 PM

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

OPENING BRIEF OF THE UTILITY REFORM NETWORK  
ADDRESSING WHETHER THE ADOPTED SETTLEMENT  
SATISFIES COMMISSION STANDARDS



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July 7, 2016

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**OPENING BRIEF OF THE UTILITY REFORM NETWORK  
ADDRESSING WHETHER THE ADOPTED SETTLEMENT  
SATISFIES COMMISSION STANDARDS**

Pursuant to the May 9, 2016 Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule (*hereafter* “Joint Ruling”), The Utility Reform Network (TURN) hereby submits this opening brief addressing whether the adopted settlement agreement satisfies Commission standards. The Joint Ruling asks parties to comment on “whether the Settlement Agreement is reasonable in light of the record, consistent with the law, and in the public interest.”<sup>1</sup> Parties are also asked to recommend any further procedural steps that may be warranted. TURN offers perspective on the settlement implementation to date, the standards applicable to contested settlements, the relevance of the *ex parte* violations and sanctions, and options for reopening the proceeding or modifying the allocation of certain costs included in the settlement.

Specifically, TURN believes that the adopted settlement should be set aside due to the pervasive *ex parte* violations involving repeated unreported communications between former President Michael Peevey and executives from Southern California Edison (SCE). If the settlement is set aside, the allocation of costs should be resolved based on the record already developed and briefed in Phases 1 and 2 with the reasonableness of the steam generator replacement project litigated in a new Phase 3.

If the Commission does not set aside the settlement, the following modifications should be considered to satisfy the public interest and protect ratepayers:

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<sup>1</sup> May 9 Joint Ruling, page 5.

- Disallow recovery of 50% or more of \$2.17 billion in base plant to reflect the fact that the premature retirement of the San Onofre Nuclear Generating Station (SONGS) was attributable to imprudence.
- Direct SCE and SDG&E to refund approximately \$150 million related to the Replacement Steam Generators (RSGs) collected in rates prior to February of 2012.
- Permit no rate of return on any base plant eligible for recovery in customer rates, a reduction in ratepayer costs of up to \$100 million.
- Approve an additional \$86.95 million in refunds relating to unreasonable 2012 expenses incurred at SONGS consistent with the Phase 1 Proposed Decision.
- Eliminate the Greenhouse Gas research contribution and direct the \$25 million shareholder contribution to be refunded to ratepayers.

The Commission should also consider additional adjustments proposed by other parties in their opening briefs. These modifications can either be adopted at this time or may require additional briefing. TURN will respond to any other adjustments proposed by parties in the reply brief and stands ready to provide additional legal and factual arguments as directed by any subsequent ruling of the assigned Commissioner or Administrative Law Judge.

## **I. SUMMARY OF SETTLEMENT IMPLEMENTATION TO DATE**

According to the June 2<sup>nd</sup> filings submitted by SCE and San Diego Gas & Electric (SDG&E), the total share of overall cost responsibility for SONGS to be collected in customer rates is less than originally estimated at the time the modified

settlement was approved by the Commission. The settlement adopted in that Decision estimated that customer rates would cover up to \$3.285 billion (or 70%) out of the \$4.733 billion sought by SCE and SDG&E.<sup>2</sup> Since that time, several elements of the settlement have led to a reduction in the ratepayer share including transfers from the nuclear decommissioning trust funds and settlement proceeds from Nuclear Electric Insurance Limited (NEIL) and Mitsubishi Heavy Industries (MHI).

As a result of these credits, SCE's updated estimate shows that approximately \$2.036 billion (or 55% of the total) would be collected from customer rates out of the \$3.693 billion originally requested for recovery by the utility.<sup>3</sup> SDG&E's updated estimate shows that customer rates would cover approximately \$615 million (or 59% of the total) out of the \$1.04 billion originally requested.<sup>4</sup> While it is important to note that the total share of customer responsibility is already below the 70% level estimated in D.14-11-040, this share will decline further if SCE and SDG&E receive any future recoveries from Mitsubishi Heavy Industries through arbitration (50% of which go to ratepayers), realize value from selling approximately \$609 million (\$487 million for SCE, \$122 million for SDG&E) in unused nuclear fuel inventory (95% of which go to ratepayers) to other nuclear plant operators, or realize tax benefits based on losses related to the abandonment of SONGS.<sup>5</sup> At this point in time, it is difficult to assess the likelihood or magnitude of value that may be passed onto ratepayers as the result of these potential future recoveries.

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<sup>2</sup> D.14-11-040, page 33.

<sup>3</sup> SCE response to Joint Ruling, page 13.

<sup>4</sup> SDG&E response to Joint Ruling, page 5 (settlement provided customer contribution of \$746.5 million out of \$1.0399 billion SDG&E request), page 48, Table 8 (\$58.3 million credit from nuclear decommissioning trust, \$76.2 million net proceeds from NEIL/MHI, \$2.8 million in additional costs).

<sup>5</sup> SCE response to Joint Ruling, page 14; SDG&E response to Joint Ruling, pages 23 (table 3), 49 (see footnote 162).

## II. THE COMMISSION SHOULD APPLY MORE SCRUTINY TO SETTLEMENTS NO LONGER SUPPORTED BY ORIGINAL SIGNATORIES

The Joint Ruling offers parties the opportunity to explain whether the adopted settlement should be affirmed, modified or rejected in light of the *ex parte* disclosures and sanctions imposed on SCE.<sup>6</sup> The Joint Ruling points to the “standards for approving settlement agreements” as a basis for justifying any changes to the outcomes adopted in D.14-11-040.<sup>7</sup> Although the circumstances in this case are unique in a number of respects, a review of Commission precedent regarding contested settlements does provide some relevant guidance.

The Commission has traditionally applied far greater scrutiny to contested settlements than to those that have unanimous support from all parties to the proceeding. As explained in D.02-01-041,

In judging the reasonableness of a proposed settlement, we have sometimes inclined to find reasonable a settlement that has the unanimous support of all active parties in the proceeding. In contrast, a contested settlement is not entitled to any greater weight or deference merely by virtue of its label as a settlement; it is merely the joint position of the sponsoring parties, and its reasonableness must be thoroughly demonstrated by the record.<sup>8</sup>

For contested settlements, the Commission is bound to consider “the range of interests represented by the parties to the settlements and any opposition to the settlements”.<sup>9</sup> The Commission has also noted that

one of the factors in measuring public interest is how the range of affected interests in the proceeding react to the settlement -- i.e., whether they

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<sup>6</sup> May 9<sup>th</sup> Joint Ruling, pages 4-5.

<sup>7</sup> May 9<sup>th</sup> Joint Ruling, page 5.

<sup>8</sup> D.02-01-041, page 13.

<sup>9</sup> D.90-08-068 (37 CPUC2d 346, 360)

support or oppose the settlement, and whether their support or opposition is mild or strong.<sup>10</sup>

Since the approval of the original settlement, two key ratepayer groups (TURN and the Office of Ratepayer Advocates) have expressed concerns. The disclosures regarding unreported *ex parte* communications led these two groups to endorse various changes to the settlement outcomes and additional processes to consider sanctions. The fact that any original signatory no longer stands by the settlement justifies a far greater level of scrutiny to be applied by the Commission. What remains of the settlement is therefore little more than a “joint position” by SCE, SDG&E and any other party asserting that the terms offer a reasonable resolution of the contested issues in the proceeding.

The Commission has exercised its discretion to modify contested settlements to conform to the public interest on numerous occasions. In D.96-01-011 (SCE 1996 General Rate Case), the Commission adopted guidelines which changed the terms of a contested settlement agreement and ordered settling parties to respond to the proposed modifications in order “to balance the ratepayer and shareholder interests.”<sup>11</sup> In D.97-08-055, the Commission adopted a contested settlement known as the “Gas Accord” but only after requiring changes identified by non-settling parties.<sup>12</sup> In D.99-09-070, the Commission adopted a contested settlement regarding SCE’s proposed sharing mechanism for certain other operating revenues upon the inclusion of clarifications introduced by the Commission.<sup>13</sup> Subsequent these decisions, the Commission required modification of contested settlements in D.04-12-015 (Sempra 2004 Cost of Service) and D.06-06-035 (Contra Costa 8).<sup>14</sup> In each of these cases, the

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<sup>10</sup> D.96-01-011, 1996 Cal. PUC LEXIS 23, 38.

<sup>11</sup> D.96-01-011, 1996 Cal. PUC LEXIS 241, \*51.

<sup>12</sup> D.97-08-055, 1997 Cal. PUC LEXIS 763, \*1-2.

<sup>13</sup> D.99-09-070, 2004 Cal. PUC LEXIS 574, Conclusion of Law 11, 1999 Cal. PUC LEXIS 653, \*53-54 (emphasis added).

<sup>14</sup> See D.04-12-015, Conclusion of Law 2 (“The SDG&E settlement is in the public interest,

Commission concluded that the modifications were necessary to satisfy the requirement that the settlement be reasonable in light of the whole record, consistent with law, and in the public interest.

In this proceeding, the Commission has already determined that the original proposed settlement should be modified to incorporate a number of changes sought by the assigned ALJ, the Assigned Commissioner and former President Peevey.<sup>15</sup> Additional changes can now be justified based on legitimate concerns that the previously adopted outcomes are not consistent with the public interest. These changes could range from setting aside the settlement in its entirety to modifying the allocation of costs between ratepayers and shareholders for any number of specific cost categories identified in the proceeding.

### **III. RELEVANCE OF THE EX PARTE VIOLATIONS TO THE SETTLEMENT PROCESS AND OUTCOMES**

The Commission's review of unreported *ex parte* communications in D.15-12-016 highlights the fact that contacts between former President Michael Peevey and SCE executives occurred frequently throughout the course of the proceeding. In the Decision, the Commission noted that the failure to disclose such contacts "meant that other parties lacked the knowledge, however logical, that former President Peevey and some at SCE had begun to consider permanent shutdown and what costs might be allocated by a settlement."<sup>16</sup> TURN agrees that these disclosures detailing extensive communications between SCE and CPUC

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consistent with the law, and should be approved *with two modifications.*" (emphasis added)); D.06-06-035, Conclusion of Law 1 ("The Settlement Agreement, as modified to include a 10-year NBC, meets the requirements of Rule 51.1 of the Commission's Rules of Practice and Procedure, and is adopted by the Commission.")

<sup>15</sup> Assigned Commissioner and Administrative Law Judge Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement, I.12-10-013, September 5, 2014.

<sup>16</sup> D.15-12-016, page 41

decisionmakers before, during and after settlement negotiations are troubling and raise questions about the fairness of the process and the results.

TURN was a good faith participant in the settlement negotiations, and was not aware of the Warsaw note, the private meeting, or any agreement between Mr. Peevey and SCE at any time before or during the extended settlement negotiations that led to the proposed settlement. TURN believes that the timely disclosure of these private communications would have had a material impact on settlement negotiations and outcomes. For example, TURN may have chosen to abandon settlement negotiations and left outstanding issues to be litigated.

At a minimum, these late disclosures create the perception that the settlement process was fundamentally and irreparably tainted and produced outcomes that are manifestly unfair to ratepayers. For TURN, these disclosures undermine the credibility of SCE's representations and the basis for their original motivation to enter into settlement negotiations. In light of these extraordinary circumstances, the Commission must take steps to restore confidence in the legitimacy of its process. TURN outlines a variety of options for moving forward in the following sections.

The Joint Ruling points to an analysis performed by TURN and ORA that found the settlement agreement produced outcomes that reduced costs to customers by between \$780 million and \$1.06 billion compared to the terms outlined in the of the "Peevey-Pickett" note.<sup>17</sup> Although TURN stands by that analysis, the exact contents of the Peevey-Pickett note should not serve as the basis for determining the reasonableness of the settlement because the note does not reflect a reasonable allocation of cost responsibility. The mere fact that the actual modified settlement offered a better outcome for ratepayers does not mean that

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<sup>17</sup> May 9<sup>th</sup> Joint Ruling, page 4.

there was no damage to ratepayer interests caused by unreported *ex parte* contacts.

The note was one of many unreported *ex parte* communications and does not represent the entirety of the private contacts between SCE and former President Peevey. It is not known whether these private communications included any assurances from former President Peevey that SCE and SDG&E shareholders would be protected against extremely adverse outcomes. These extensive private communications may have emboldened SCE and SDG&E to resist more significant concessions in the settlement process. TURN therefore agrees with the Alliance for Nuclear Responsibility's observation that, had SCE filed *ex parte* notices disclosing these communications, "both ORA and TURN would likely have negotiated a better settlement".<sup>18</sup>

Rather than attempting to ascertain the exact impact of these discussions on the outcome of the proceeding (which is likely unknowable), the Commission should move forward to either decide the outcomes based on the litigation positions taken by parties or make specific adjustments to the outcomes adopted in D.14-11-040 to promote the public interest and protect ratepayers.

#### **IV. THE COMMISSION SHOULD SET ASIDE THE SETTLEMENT AND RESOLVE CONTESTED POSITIONS THROUGH LITIGATION BASED ON THE FACTS AND THE LAW**

The most direct way to restore public confidence and ensure a transparent resolution is to fully reopen the proceeding, set aside the settlement, and determine the allocation of SONGS-related costs based exclusively on testimony, evidentiary hearings and briefs. The Commission can and should move

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<sup>18</sup> A4NR Petition for Modification of D.14-11-040, April 27, 2015, page 8.

promptly to resolve contested issues of fact and law in order to bring closure to a proceeding that began almost four years ago.

Much of the evidentiary record has already been developed through Phase 1, Phase 1A and Phase 2. Moreover, the Commission has already issued a proposed decision in Phase 1 and Phase 1A which was scheduled to have been approved at the December 19, 2013 business meeting but instead was repeatedly held from the agenda at the request of former President Peevey.<sup>19</sup> The Phase 1/1A proposed decision is the result of extensive testimony, cross-examination during two rounds of evidentiary hearings, and briefing by all interested parties. The adoption of that proposed decision would resolve the reasonableness of 2012 SONGS costs and the methodology for calculating replacement power costs.

With respect to Phase 2, the Commission can proceed to issue a proposed decision based on the prepared testimony, evidentiary hearings and full briefing already done by active parties. Though the testimony, hearings and briefing in both phases occurred in 2013, the facts and the law have not changed since that time. The existing record provides a sufficient basis to support the adoption of final decisions in these two phases.

While a Phase 2 decision is being prepared, the Commission should initiate Phase 3 and establish a schedule for testimony, hearings, briefing and the issuance of a proposed decision. The purpose of Phase 3 should be to examine the liability of SCE and SDG&E for the defective steam generators including any

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<sup>19</sup> The Phase 1 Proposed Decision of ALJs Darling and Dudney was originally mailed on November 19, 2013. President Peevey placed a hold on the Phase 1 decision to prevent a vote at both the December 19, 2013 and January 15, 2014 meetings. The Proposed Decision was held by "staff" at the February 27, 2014 meeting and by Commissioner Picker at the March 27, 2014 meeting. By the time the settlement was filed in April of 2014, the Phase 1 Proposed Decision had been held on four separate occasions.

additional disallowances for costs included in Phase 1/1A and Phase 2 that are justified as a result of the failure of the steam generator replacement project.

This approach would address the concern that the allocation of costs for the prematurely retired SONGS facility is the product of back-room dealings. Instead, the Commission would be able to rely upon an evidentiary record, applicable legal precedents, and full opportunities for participation by all active parties. TURN believes that this approach would instill confidence in the outcome and allow all parties a chance to offer comprehensive proposals for the resolution of all contested issues.

**V. IF THE COMMISSION DOES NOT REOPEN THE PROCEEDING TO RESOLVE DISPUTED ISSUES THROUGH FURTHER LITIGATION, IT SHOULD CONSIDER MODIFICATIONS TO THE SETTLED OUTCOMES TO SATISFY THE “PUBLIC INTEREST” STANDARD**

If the Commission decides against the approach outlined in the previous section, it can instead take specific actions to modify the portion of SONGS costs allocated to ratepayers. Such changes are appropriate to ensure that ratepayers receive appropriate relief. In D.15-12-016, the Commission levied \$16.74 million in penalties on SCE and its shareholders for violations of the *ex parte* rules. The entire amount was deposited into the state General Fund where it can be used to support state budget obligations.<sup>20</sup> Since none of these penalty funds went to ratepayers of SCE and SDG&E, the violations resulted in no reduction in the obligations of ratepayers to cover a variety of costs outlined in the settlement.

In the following sections, TURN offers a series of modifications that could be adopted at this time or as the result of additional factual inquiry and legal

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<sup>20</sup> D.15-12-016, Ordering Paragraph 1.

briefing. Most of the proposed modifications are specific to the facts of this proceeding and fully consistent with past precedents. One potential modification would require the Commission to deviate from past precedents and instead adopt a new legal precedent based on the unique circumstances that led to the premature shutdown of SONGS. TURN encourages the Commission to use this opportunity to take a strong position on behalf of ratepayers to hold utilities accountable for egregious mistakes that result in severe economic consequences that were fully avoidable.

**A. Disallow recovery of some or all of \$2.17 billion in base plant to reflect the fact that the premature retirement of SONGS was due to imprudence**

The adopted settlement permits the recovery of all prudently incurred direct capital investment in the base plant excluding the Replacement Steam Generators (RSGs). In prior cases involving prematurely retired generating facilities, the Commission has explained that “the ratepayer typically still pays for all of the plant's direct cost even though the plant did not operate as long as was expected.”<sup>21</sup> TURN recognizes that there are many precedents supporting the recovery of prudently invested capital in a plant that is shut down prematurely. Due to the lack of precedents supporting such a disallowance, TURN did not argue for the disallowance of base plant in Phase 1 or 2 of the OII.<sup>22</sup>

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<sup>21</sup> D.85-08-046, page 22.

<sup>22</sup> Since reasonableness of the RSG project was not within the scope of either Phase 1 or Phase 2, TURN did not offer a position with respect to potential disallowances of base plant costs resulting from a finding of imprudence. The Commission expressly reserved the prudence of the RSG project for a future Phase 3 (which was never initiated). TURN's position in Phase 2 was based solely on past precedents where there had been no finding that imprudence was the cause of the premature retirement. Additional disallowances to base plant would have been raised by TURN in Phase 3.

However, a finding of imprudence relating to the RSGs could justify a departure from these precedents and the adoption of a new approach to allocating responsibility given the circumstances. In this instance, the flawed design of the RSGs constituted the direct and proximate cause of the premature retirement. Had the RSGs not been defective, SONGS would not have retired prematurely and the plant would have continued to operate as expected. There is no dispute on this point.

The defects in the RSGs are due to serious mistakes made by SCE and/or Mitsubishi Heavy Industries. Irrespective of the precise allocation of responsibility between the utility and its contractor, both SCE and SDG&E are responsible for the failure of the project. The obligation to demonstrate reasonableness of the RSG design falls on SCE and SDG&E regardless of whether they delegated the fabrication to an outside contractor.<sup>23</sup> These utilities should be assigned the full consequences of the imprudence regardless of whether they can demonstrate that mistakes were made solely by the contractor they selected to fabricate the RSGs.

The direct linkage between the RSG fiasco and the premature shutdown represents a unique and direct form of causation that justifies a different allocation of the base plant costs from other prior cases involving premature retirements. Because imprudence in the design of the RSGs was the sole reason why the underlying base plant is rendered no longer used and useful, the Commission could conclude that SCE and SDG&E are not eligible to fully

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<sup>23</sup> Even if SCE and SDG&E could demonstrate, in Phase 3, that the responsibility lies entirely with Mitsubishi, there is no basis to exempt the utilities from the consequences of the defective design. Allowing a utility to avoid responsibility by blaming contractors is not consistent with Commission precedent and should not be permitted under any circumstance. For example, the Commission found in D.04-04-065 (pages 35-42) that SCE should not be permitted to escape liability for failures of its contractor to perform specified work. *See also Snyder v. Southern California Edison Company* (1955) 44 Cal.2d 793.

recover their sunk costs in the facility. The Commission could use this distinction to move beyond past precedents and disallow some or all of the base plant investments from being recovered in customer rates.

According to the June 2<sup>nd</sup> filings submitted by the utilities, the value of base plant (including Construction Work In Progress, Materials and Supplies, and Nuclear Fuel) equals \$1.733 billion for SCE and \$435 million for SDG&E.<sup>24</sup> These costs are included in the regulatory asset to be recovered from customer rates over a 10 year period. TURN recommends the Commission consider disallowing the recovery of some or all of these base plant costs to reflect the unique facts of the SONGS shutdown. The Commission should consider allocating at least 50% of these base plant costs (including canceled CWIP, unsold materials and supplies, and unsold nuclear fuel) to SCE and SDG&E shareholders to reflect their responsibility for the disastrous results of the failed RSG project.

The Commission could either make a finding at this time that a disallowance is warranted or order additional briefing to explore the legal and factual basis for such an outcome and solicit proposals for a fair allocation of base plant costs from all active parties. Such an approach could occur immediately following the consideration of opening and reply briefs.

#### **B. Refund RSG costs collected from ratepayers in 2010 and 2011**

The approved settlement disallows any collection of costs in rates relating to the Replacement Steam Generators (RSGs) after January 31, 2012 thereby prohibiting SCE and SDG&E from charging customers for these defective capital additions after Units 2 and 3 were no longer operating. This disallowance does not require deviation from past precedents because the RSG costs had not yet received

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<sup>24</sup> SCE response to Joint Ruling, pages 14-15; SDG&E response to joint ruling, page 52 (Table 11).

Commission approval to be placed permanently into rates.<sup>25</sup> The applications seeking the inclusion of RSG costs in rates were filed in 2013 and consolidated with the OII.<sup>26</sup>

The settlement does not force SCE or SDG&E to disgorge funds collected in rates prior to January 31, 2012 relating to the RSG project. According to testimony previously submitted in this proceeding, the recorded revenue requirement covering 2006 through 2011 amounts to \$99.85 million (nominal) for SCE.<sup>27</sup> Approximately \$9 million in additional collections occurred in January of 2012.<sup>28</sup> Out of the \$108.85 million collected by SCE, approximately \$22 million are attributable to removal and disposal costs for the legacy steam generators and the remainder is linked to the costs of the new RSGs.<sup>29</sup> Between 2010 and January of 2012, SDG&E was allowed to collect approximately \$32.375 million for the Unit 2 RSG and an additional \$29.85 million for the Unit 3 RSG.<sup>30</sup> Assuming that the removal and disposal costs are not included in these amounts (since they would have been incurred even without the RSGs), the total costs collected from SCE and SDG&E customers for the RSGs prior to February of 2012 are approximately \$150 million.

Pursuant to D.05-12-040 and D.06-11-026, these costs were permitted to be included in rates but subject to refund in the event that a reasonableness review

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<sup>25</sup> D.05-12-040, Ordering Paragraph 11 (“After completion of the SGRP, SCE shall be required to file an application for inclusion of the SGRP costs permanently in rates, regardless of whether costs exceed \$680 million. If a reasonableness review of such costs is performed, it shall be done in connection with the application.”)

<sup>26</sup> A.13-03-005 (SCE) and A.13-03-014 (SDG&E).

<sup>27</sup> SCE testimony in Response to February 21, 2013 ruling (Ex. SCE-5), March 15, 2013, page 6)

<sup>28</sup> This figure is a one month prorated share of the \$110.19 million in recorded revenues collected in all of 2012 by SCE.

<sup>29</sup> SCE testimony in Response to February 21, 2013 ruling (Ex. SCE-5), March 15, 2013, pages 4, 6.

<sup>30</sup> SDG&E Advice Letter 2156-E (approved by CPUC on April 24, 2010); SDG&E Advice Letter 2243-E (approved by CPUC on May 9, 2011).

is performed.<sup>31</sup> Because the RSGs were defective, the Commission could modify the settlement to require additional refunds equal to the entire amounts collected by SCE and SDG&E prior to February 1, 2012.

These refunds are justified to prevent ratepayers from being billed for incremental costs associated with the RSGs. Had the RSGs not been purchased and installed, SONGS would likely have operated with its original steam generators until at least January of 2012.<sup>32</sup> Therefore, the Commission can conclude that all RSG costs are incremental to what would have been expended if the project had never proceeded. Moreover, had the OII proceeded to Phase 3, it is likely that TURN and/or other intervenors would have argued for the complete refund of these additional RSG costs previously collected from ratepayers.<sup>33</sup>

### **C. Elimination of any return on debt or preferred stock for base plant**

The adopted settlement provides for the recovery of base plant (not including the RSGs) over 10 years including a full rate of return on debt, 50% of the authorized return for preferred stock, and no return on shareholder equity. This approach results in a current overall rate of return of 2.62% for SCE and 2.35% for SDG&E.<sup>34</sup> While this level of return is far below what was sought by either

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<sup>31</sup> D.05-12-040, Ordering Paragraphs 9 and 10.

<sup>32</sup> The Commission previously found that the original Unit 2 and 3 steam generators would likely have allowed the plant to continue operating until at least 2012 (D.05-12-040, page 30).

<sup>33</sup> While TURN offered a preliminary suggestion in Phase 2 that the collection of RSG costs end as of February 1, 2012, the issue was not within the scope of that Phase of the OII and TURN reserved the right to modify and expand this recommendation in Phase 3. Moreover, it is likely that other intervenors would have recommended a full disallowance in Phase 3 including costs incurred prior to February of 2012.

<sup>34</sup> SCE response to Joint Ruling, page 8. SDG&E Advice Letter 2672-E, page 4.

utility, it represented a compromise relative to the litigation positions taken by TURN and ORA.<sup>35</sup>

In Phase 2 of the proceeding, TURN explained that the Commission's historic approach for prematurely retired plant is to deny any return on debt or equity and permit recovery of the unamortized capital over an accelerated period.<sup>36</sup> For example, in the case of PG&E's Geysers, the Commission relied upon "our longstanding regulatory principle that shareholders should earn a return only on used and useful plant."<sup>37</sup> Although the settlement provides for a far longer period of amortization (10 years) than has typically been allowed in previous situations involving prematurely retired facilities (4-6 years), it is fully reasonable for the Commission to permit no rate of return on any base plant allowed for recovery without modifying the 10 year amortization period.<sup>38</sup> The same zero return treatment should be applied to nuclear fuel, which is permitted to earn a return based on commercial paper rates under the adopted settlement.

This change should result in a reduction of approximately \$100 million (NPV) for SCE and SDG&E ratepayers, assuming that there is no change to the amount of base plant eligible for recovery. If the amount of base plant eligible for rate recovery is reduced (as TURN proposes), then the savings associated with this recommendation would decline proportionate to the changes in the treatment of base plant.<sup>39</sup>

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<sup>35</sup> TURN had recommended no return on equity or debt with amortization occurring over the remaining license life (approximately 10 years).

<sup>36</sup> TURN opening brief on Phase 2 issues, November 22, 2013, pages 8-15, *citing* D.85-08-046, D.92-12-057, D.12-11-051, D.85-12-108.

<sup>37</sup> D.92-12-057, 1992 Cal. PUC LEXIS 971, \*83, \*84

<sup>38</sup> For a more complete review of the relevant precedents, see TURN Phase 2 opening brief, pages 8-15; TURN Phase 2 reply brief, pages 13-14.

<sup>39</sup> If the Commission decides to reduce the recoverable base plant by 50% then the savings associated by this recommendation could decline by a similar amount.

**D. Approve an additional \$86.95 million in refunds that would have been ordered under the Phase 1 Proposed Decision**

The Phase 1 Proposed Decision (issued November 19, 2013) addressed 2012 SONGS-related expenses and expenditures.<sup>40</sup> The original PD would have ordered refunds of \$94 million while the revised PD would have reduced the refunds to \$86.95 million.<sup>41</sup> These refunds are based on a finding that SCE incurred excessive and unreasonable capital and expense costs at SONGS in 2012 after the plant was taken offline. Although the Phase 1 PD was on the Commission's agenda beginning in December of 2013, it was repeatedly held by President Peevey.<sup>42</sup>

Even if the Commission does not reopen the proceeding and adopt outcomes based on litigation positions, the Commission could decide to enforce the refunds proposed in the Phase 1 PD. This outcome would be reasonable given the clear and direct involvement by former President Peevey in preventing the PD from being considered at several successive Commission business meetings. Had Mr. Peevey not actively intervened to stop the Commission from considering the Phase 1 PD, these refunds would likely have been approved at the end of 2013 and been additional to any terms included in a settlement. It is therefore appropriate for the Commission to include the refunds indicated in the Phase 1 PD in the package of remedies ultimately adopted.

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<sup>40</sup> Proposed Decision of ALJs Darling and Dudney on Phase 1 Regarding 2012 SONGS-related Expenses and Expenditures, I.12-10-013, Mailed November 19, 2013.

<sup>41</sup> The change appears in Rev. 1 of the PD.

<sup>42</sup> The specifics of these holds are described in Section IV.

**E. Eliminate the GHG research contribution and refund these amounts to ratepayers**

The adopted settlement agreement directs SCE and SDG&E to contribute \$25 million of shareholder funds to support Greenhouse Gas (GHG) research at the University of California.<sup>43</sup> This requirement was not included in the original settlement agreement but instead was added based on direction provided by an Assigned Commissioner and Administrative Law Judge ruling issued on September 5, 2014.<sup>44</sup> Recent disclosures suggest that this contribution was a primary goal of former CPUC President Peevey and demonstrate that he personally intervened with SCE executives in an effort to include such a commitment as part of any final outcome.<sup>45</sup>

Given the fact that this contribution is intimately tied to violations of the *ex parte* rules, the public interest would be served by eliminating the provision. However, since shareholders are the source of the contribution, simply deleting the requirement would unjustly enrich SCE and SDG&E shareholders and effectively reward the *ex parte* violations. Instead, TURN recommends that the full amount of the shareholder contribution (\$25 million) be credited to ratepayers. This outcome would send the right signal and provide a modest but meaningful reduction in the obligation of customers to pay for the costs of the SONGS shutdown.

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<sup>43</sup> Amended Settlement Agreement §4.16(a).

<sup>44</sup> Assigned Commissioner and Administrative Law Judge Ruling Requesting Settling Parties to Adopt Modifications to Proposed Settlement Agreement, I.12-10-013, September 5, 2014.

<sup>45</sup> D.15-12-016, pages 23-26, 41.

## VI. CONCLUSION

For the reasons outlined in the preceding sections, TURN urges the Commission to reopen the proceeding and resolve the outstanding legal and factual disputes through the issuance of proposed decisions based on litigation positions offered by parties. If the Commission does not wish to proceed in this manner, it should instead consider a series of adjustments to the adopted settlement that will protect ratepayers and promote the public interest.

Respectfully submitted,

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Dated: July 7, 2016