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.	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

STATUS REPORT AND FURTHER RECOMMENDATIONS OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E)

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Pursuant to the December 13, 2016, Joint Ruling and the May 26, 2017, Administrative Law Judge's Ruling,[1] Southern California Edison Company ("SCE") respectfully submits this Status Report and Recommendations. As set forth below, the parties' meet-and-confer efforts, including a lengthy mediation, failed to produce an agreement. Accordingly, SCE makes the following two recommendations, which are explained in more detail in this brief:

(1) **Primary Recommendation:** The California Public Utilities Commission ("CPUC," or "Commission") should promptly issue a decision closing the record of I. 12-10-013 (the "OII"); affirming that the settlement approved in D. 14-11-040 (the "Settlement") is fair, reasonable, and in the public interest; denying the pending petitions for modification ("PFMs") and application for rehearing; and making no further rate adjustments with respect to the San Onofre Nuclear Generating Station ("SONGS").

(2) **Alternative Recommendation:** If the Commission determines that SCE's failure to timely file certain *ex parte* notices had a measurable economic impact on customers, the Commission should grant the PFMs solely for the purpose of ordering a rate adjustment to quantify and remedy that impact. That disallowance should be no more than a small fraction of $365 million, which is the difference between the Present Value Revenue Requirement ("PVRR") of the litigation position of the Office of Ratepayer Advocates ("ORA") and the PVRR of the Settlement.

If the CPUC chooses to disregard the parties' litigation positions, it would then need to consider the actual impact on customers of the closure of SONGS. Based on SCE's updated

[1] Joint Ruling of Assigned Commissioner and Assigned Administrative Law Judge Directing Parties to Provide Additional Recommendations for Further Procedural Action and Substantive Modifications to Decision 14-11-040 ("December 13 Ruling"), at 43 (Dec. 13, 2016); Administrative Law Judge's Ruling Granting Motion of the Meet and Confer Parties to Extend Dates for All-Party Meet and Confers, and Request Additional Information from Utilities, at 6 (May 26, 2017).

economic analysis, customers are better off under the Settlement than they would have been had the replacement steam generators ("RSGs") operated perfectly and SONGS had continued to operate through its license life. As a result, no additional disallowance is warranted.

I. EXECUTIVE SUMMARY

On November 20, 2014, the Commission unanimously (5-0) approved the Settlement as a resolution of all SONGS costs at issue in the OII, finding that the Settlement "reasonably allocates the various cost categories between shareholders and ratepayers and is in the public interest."[2] The Settlement was signed by six parties to the OII representing a broad range of utility, consumer, environmental, and employee interests:[3] SCE; San Diego Gas and Electric Company ("SDG&E" and, together with SCE, the "Utilities"); ORA; The Utility Reform Network ("TURN"); Friends of the Earth ("FOE"); and the Coalition of California Utility Employees ("CUE") (collectively, the "Settling Parties"). Three more parties to the OII expressed support for the Settlement: the California Large Energy Consumers Association; World Business Academy; and the Alliance for Retail Energy Markets and Direct Access Customer Coalition.[4]

The Utilities, TURN, and ORA negotiated the Settlement over a ten-month period that involved fourteen in-person meetings and numerous telephone calls. In the Settling Parties' joint

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[2] Decision Approving Settlement Agreement as Amended and Restated by Settling Parties (D.14-11-040), at 116 (Nov. 20, 2014).

[3] *See, e.g.*, D. 14-11-040 at 4 ("The Settling Parties fairly reflect a diverse array of affected interests in this proceeding.").

[4] D. 14-11-040 at 35 ("CLECA, who became a party in time to weigh in on the Agreement, offers essentially unqualified support, finding it 'reasonable and balanced between ratepayer and shareholder interests' including a reasonable 'bottom line.'"); 36 ("AReM and DACC find the Agreement to be a reasonable resolution of this proceeding and do not oppose its adoption by the Commission."); 38 ("WBA generally supports the Agreement"); 39 ("WBA believes the Agreement will resolve key issues of dispute between parties and bring a 'much needed resolution of the contested claims' when adopted in a final form.").

motion asking the Commission to adopt the Settlement, they stated: "[t]he Utilities, TURN, and ORA—represented by experienced CPUC practitioners—negotiated in good faith, bargained aggressively, and, ultimately, compromised."[5]

The Settlement set forth a comprehensive ratemaking solution for all costs related to the retirement of SONGS. According to the Settling Parties' calculations at the time, the Settlement required SCE and SDG&E to provide refunds and rate reductions of over $1.4 billion (present value) in SONGS costs.[6] The Settlement also required SCE and SDG&E to share certain future recoveries with customers—including a portion of the proceeds from litigation against Mitsubishi Heavy Industries ("MHI") and SCE's nuclear insurer—which could further reduce customers' SONGS costs. On the day the parties announced the Settlement, TURN issued a press release declaring that "$1.4 Billion in Savings is a Good Deal for Customers!"[7]

In fact, the Settlement provided customers with even greater rate relief than the Settling Parties quantified when they asked the Commission to adopt it. After the Commission adopted the Settlement, several events occurred that further reduced customers' obligations for SONGS costs: SCE obtained a recovery from its nuclear insurance carrier; obtained funds from the Nuclear Decommissioning Trust; and took other actions that increased the amount of refunds and rate reductions to **over $2 billion** (present value, 100% share).[8] These events provide even

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[5] Joint Motion of Southern California Edison Company, San Diego Gas & Electric Company, The Utility Reform Network, the Office of Ratepayer Advocates, Friends of the Earth, and the Coalition of California Utility Employees for Adoption of the Settlement Agreement ("Joint Motion"), at 36 (Apr. 3, 2014).

[6] Joint Motion at Attachment 2.

[7] TURN Press Release (March 27, 2014), http://www.turn.org/14-billion-in-savings-is-a-good-deal-for-customers/.

[8] Response of Southern California Edison Company (U 338-E) to Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact

stronger support for the Commission's finding that the Settlement was "reasonable in light of the whole record, consistent with law, and in the public interest."[9]

This conclusion is now being reexamined for one reason: a previously assigned Commissioner (who has since retired from the Commission) and the Administrative Law Judge ("ALJ") issued a ruling in this proceeding on December 13, 2016 (the "December 13 Ruling") finding that undisclosed *ex parte* communications between SCE and CPUC decisionmakers might have "tipped the balance of negotiations in [SCE's] favor," and that modifications to the Settlement could potentially be necessary to "quantify the loss of a stronger negotiating position caused by" the communications.[10] In other words, the only issues now are whether the *ex parte* communications affected the negotiating postures of the parties; if so, whether the derivative result was to alter the economic terms of the Settlement; and, if so, how that effect should be remedied.

In determining whether to impose an additional remedy based on the *ex parte* communications, the Commission should bear in mind that SCE has already paid a substantial penalty—$16.7 million—for violations of Rule 1.1 and Rule 8.4. Moreover, SCE's recommendations in this report should not be viewed as an abdication of responsibility or as evidence of any disregard toward SCE's valued customers. SCE undertook the steam generator replacement project ("SGRP") on behalf of its customers and sought to exercise utmost care in ensuring that the project would be successful. Following the failure of the RSGs due to an unexpected phenomenon and subsequent permanent shutdown of SONGS, SCE agreed to a

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Ban, Consolidating Advice Letters, and Setting Briefing Schedule ("June 2, 2016 Brief"), at 1 (June 2, 2016) (stating that SCE share of rate reductions and refunds is $1.6 billion).

[9] D.14-11-040 at 135.

[10] December 13 Ruling at 33-34 & 37.

settlement that was demonstrably fair and more favorable to SCE's customers than the cost-sharing that would have resulted, according to longstanding CPUC precedent, if the OII were litigated. SCE's recommendations in the instant proceeding are therefore premised in part on the fact that SCE has already paid dearly for the failure of the RSGs and for violations of the Commission's rules. But they are also premised on the fundamental cost recovery principles in the event of a premature plant retirement that have long existed to induce utilities to invest billions of dollars on behalf of their customers and permit them to borrow the necessary capital at favorable interest rates, which in turn lower customer costs.

SCE's primary recommendation is that the Commission should reaffirm the Settlement, deny the PFMs filed by ORA and the Alliance for Nuclear Responsibility ("A4NR"), deny the Application for Rehearing filed by Ruth Henricks ("Henricks") and Citizens Oversight, close the record in the OII, and make no further rate adjustments in respect of SONGS. This outcome is warranted because the Settlement continues to be a demonstrably favorable resolution of the OII for customers, and SCE's late-filed *ex parte* notices do nothing to change that conclusion.

In particular, the March 26, 2013, meeting in Warsaw between Stephen Pickett (then an SCE executive), and Michael Peevey (then President of the Commission) (the "Warsaw meeting"), does not change the fact that the allocation of costs under the Settlement is highly favorable to customers. ORA and TURN, who were the chief non-utility parties who negotiated the Settlement, have touted the benefits of the Settlement even after SCE late-filed its *ex parte* notice regarding Warsaw. For example, TURN stated that the Settlement represented "a

favorable outcome for ratepayers," and ORA admitted that "rescinding the settlement would not necessarily result in a better outcome for ratepayers."[11]

Nor did the Warsaw meeting affect the integrity of the process by which the Settlement was negotiated and approved. It is undisputed that President Peevey and Pickett reached no agreement in Warsaw,[12] and neither participated in the settlement negotiations. The Settlement was the product of an arms'-length negotiation between SCE and SDG&E, on the one hand, and TURN and ORA, on the other. Both before and after SCE reported the Warsaw meeting, TURN and ORA affirmed that they negotiated the Settlement independently and in good faith. In fact, TURN has admitted that it learned about the Warsaw meeting from Peevey just a few days after TURN signed the Settlement,[13] yet TURN continued to support the Settlement and did not make its knowledge about Warsaw public at that time. TURN has acknowledged that, had the Warsaw meeting been disclosed, "it is not clear whether the outcome for ratepayers [in the Settlement] would have been materially different."[14]

TURN and ORA have presented no evidence to support their recent suggestions that the outcome of the settlement negotiations might have been different if SCE had filed a timely *ex parte* notice regarding the Warsaw meeting. For example, neither TURN nor ORA has ever

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[11] Response of The Utility Reform Network to the Amended Petition for Modification of Decision 14-11-040 by Alliance for Nuclear Responsibility ("TURN Response") at 3 (June 24, 2015); Office of Ratepayer Advocates Petition for Modification of D.14-11-040 ("ORA PFM") at 2 (Aug. 11, 2015).

[12] Declaration of Edward F. Randolph in Response to Administrative Law Judge Questions Received by Email on June 1, 2015 at 1-2 (Appendix A to Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering Southern California Edison Company to Show Cause Why It Should Not Also Be Found in Violation of Rule 1.1 and Be Subject to Sanctions for All Rule Violations (Aug. 5, 2015)).

[13] TURN Press Release (Apr. 17, 2015) ("TURN April Press Release"), http://www.turn.org/press-release/turn-statement-on-songs-back-room-deal/

[14] TURN Response at 3.

submitted a declaration stating that a timely *ex parte* notice would have changed its bargaining position at all. Nor have they shown that the Utilities would have accepted TURN or ORA's hypothetical new negotiating tactic.

Nor has any party to the OII presented a logical explanation for how TURN and ORA could have extracted further concessions from the Utilities if SCE had timely filed an *ex parte* notice. TURN and ORA have each publicly stated that they believe that the notes from the Warsaw meeting reflected a *worse* outcome for customers, not a better one.[15] It is therefore impossible to find that public disclosure of Peevey's ideas about settlement would have strengthened TURN's and ORA's hands in the negotiation. Because Peevey's views about settlement would have been viewed by the parties as indicative of a possible outcome of the OII, public disclosure of his ideas would, if anything, have led TURN and ORA to be more concerned about a litigated outcome, which would have put the Utilities in a stronger bargaining position.

In addition to being substantively fair, the Settlement is consistent with the "strong public policy of this State that favors settlements and the avoidance of litigation."[16] The Commission has recognized that the "purpose of a settlement is to avoid [the] possibility" of a "costly, time consuming" hearing that "might result in a less favorable outcome for the ratepayers."[17] Indeed, a return to litigation in the OII would be massively expensive for all parties; time-consuming and distracting from the Commission's many other pressing responsibilities; and potentially leading to an outcome that would be worse for customers than the Settlement, given the precedent supporting SCE's litigation position recommending full SONGS cost recovery and a higher rate

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[15] The Utility Reform Network and Office of Ratepayer Advocates, Differences Between Terms Identified on the Note and the Proposed/Final SONGS Settlement ("TURN/ORA Differences") (June 24, 2015), http://www.turn.org/wpcontent/uploads/2015/04/Comparison_final_April17.pdf

[16] D. 98-10-044, 1998 WL 1813290 at *2 (Cal. P.U.C. Oct. 22, 1998).

[17] D. 95-05-043, 1995 WL 461162 (Cal. P.U.C. May 24, 1995).

of return, and the findings of the tribunal in the arbitration brought by the SONGS owners against Mitsubishi, which determined that notwithstanding the failure of the replacement steam generators, MHI's design was reasonable and consistent with industry practice at the time.

If the Commission nevertheless determines that timely disclosure of the Warsaw meeting would have had a measurable impact on the Settlement, then **SCE's alternative recommendation** is that the Commission should reaffirm the Settlement, close the record in the OII, deny the Application for Rehearing, and grant the PFMs solely for the purpose of ordering a disallowance that represents a small fraction of the $365 million difference between the Settlement PVRR and the PVRR of ORA's litigation position.[18]

To the extent the Commission finds that disclosure of the Warsaw meeting would have affected the settlement negotiations, it could find that this remedy would "quantify the loss" to customers, which the December 13 Ruling articulates as the Commission's goal.[19] In other cases, the Commission has imposed rate disallowances as a remedy for *ex parte* and other rule violations.[20] The record shows that the settlement negotiations were bounded by the Utilities' litigation positions on one end, and TURN and ORA's litigation positions on the other end. Because ORA's litigation position called for a larger disallowance than TURN's position, ORA's litigation position set the outer bounds for the settlement negotiation. ORA's litigation position, had it been accepted by the Commission, would have resulted in disallowances that are $365 million greater, PVRR, than those resulting from the Settlement.

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[18] ORA initially calculated a $383 million difference, but this calculation is based on a version of SCE-56 that SCE subsequently corrected. Using the updated version of SCE-56, the difference between ORA's litigation position and the settlement is $365 million.

[19] December 13 Ruling at 37.

[20] *E.g.*, D.14-11-041.

Because the settlement negotiation was an effort to compromise from the parties' respective litigation positions, contemporaneous disclosure of the Warsaw meeting could not possibly have yielded an outcome outside the range bounded by ORA's litigation position. While SCE believes there is no basis to find that the outcome would have been different had the Warsaw meeting been disclosed earlier, the most that TURN and ORA can credibly argue is that the outcome of the negotiations might have shifted slightly toward their position. For the reasons set forth in this brief, the likelihood that the outcome of the Settlement would have shifted is vanishingly small. Accordingly, a disallowance should be no greater than a small fraction of ORA's litigation position. In evaluating the size of this fraction, the Commission should bear in mind the $16.7 million penalty it imposed on SCE, which the Commission calibrated by evaluating the "harm" caused by SCE's conduct "from the perspective of the public interest."[21] While SCE reiterates that no further disallowance should be imposed, if the Commission nevertheless were to impose a disallowance, it should be commensurate with that penalty.

If the Commission were to disregard ORA's litigation position as the outer bound of the settlement negotiation, a new frame of analysis would be needed. Rather than considering how the parties who negotiated the Settlement would have acted had they known about the Warsaw meeting earlier, the question would become: what is a reasonable allocation of the costs of the SONGS shutdown, based on information available now? This evaluation would need to consider the economics of SONGS based on current information. That information shows that any additional disallowance would be unjust and unreasonable, because it would put customers in a better position than they would have been in had the replacement steam generators functioned perfectly and had SONGS continued to operate through 2022.

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[21] Decision Affirming Violations of Rule 8.4 and Rule 1.1 and Imposing Sanctions on Southern California Edison Company (D.15-12-016), at 48, 51 (Dec. 3, 2015).

SCE's updated economic analysis demonstrates that customers are paying less under the Settlement than they would have paid if the RSGs had not failed and SONGS had operated until 2022. These conclusions are validated by the recent decisions (made after the SONGS Settlement) of many other nuclear plant operators to shut down their plants for economic reasons. Of particular importance is PG&E's Diablo Canyon proceeding, in which TURN and A4NR have submitted extensive testimony arguing that the costs of operating Diablo after 2024 exceed the costs PG&E will incur to replace Diablo's output with renewable resources.

Because the purpose of a disallowance is to protect customers from the negative consequences of utility imprudence, the Commission has repeatedly and consistently held that the remedy for an outage that results from utility imprudence is a disallowance of the incremental replacement power costs minus any costs avoided. Accordingly, even if there were imprudence here, which SCE refutes, there is no basis for any additional disallowance given that no actual harm to customers has resulted.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. SCE's Late-Filed *Ex Parte* Notices

On December 18, 2014, Henricks and the Coalition to Decommission San Onofre ("CDSO") filed an Application for Rehearing of the Commission's decision approving the Settlement.[22] CDSO argued that rehearing is necessary because: (1) the Commission made no finding regarding SCE's prudence in connection with the steam generator replacement project; (2) the Commission supposedly acted outside its "fiduciary duty"; and (3) non-settling parties were not given the "opportunity to participate" in the Settlement conference.[23] On January 2,

[22] Ruth Henricks' and the Coalition to Decommission San Onofre's (CDSO) Application for Rehearing Decision D.14-11-040 (20 November, Issued 25 November 2014) (Dec. 18, 2014).

[23] *Id.* at 2, 3, 5.

2015, all of the Settling Parties filed a joint response to the application, asking the Commission to deny it.[24] The Application for Rehearing remains pending before the Commission.

On February 9, 2015, SCE filed a late-filed notice of *ex parte* communication regarding a meeting in Warsaw between Stephen Pickett, then an SCE Executive Vice President, and Michael Peevey, then-president of the CPUC.[25]

On February 9, 2015—the day that SCE filed its late *ex parte* notice—TURN's chief settlement negotiating representative Matthew Freedman told the *San Diego Union Tribune* that he was "very unhappy to hear" about the late-filed *ex parte* notice.[26] Rejecting the notion that the Settlement was guided by Pickett's conversation with Peevey, however, Freedman stated: "nobody forced me to agree to anything. I don't take orders from Peevey's office and I didn't make any deals with him."[27]

In April, 2015, both TURN and ORA made public statements expressing their continued support for the Settlement. TURN issued a press release in which it stated that the Settlement was "far better for customers than the terms described in Peevey's notes."[28] TURN's press release also revealed that TURN had learned about the Warsaw meeting on April 10, 2014—mere days after the Settlement was submitted to the Commission for approval. TURN heard

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[24] Response of Southern California Edison Company (U 338-E), San Diego Gas & Electric Company (U 902-E), The Utility Reform Network, The Office of Ratepayer Advocates, Friends of the Earth, and The Coalition of California Utility Employees to the Application for Rehearing (Jan. 2, 2015).

[25] Southern California Edison Company's (U 338-E) Late-Filed Notice of Ex Parte Communication (Feb. 9, 2015) (hereinafter, "Late-Filed Notice").

[26] San Diego Union Tribune (Feb. 9, 2015), *Meeting Links CPUC Probe to San Onofre*, http://www.sandiegouniontribune.com/news/watchdog/sdut-cpuc-warsaw-hotel-bristol-peevey-edison-2015feb09-htmlstory.html

[27] *Id.*

[28] TURN April Press Release.

about Warsaw from Peevey himself, who referenced his conversation with Pickett and "waved several papers he claimed were notes from that meeting."[29] TURN did not publicly disclose this communication from Peevey about the Warsaw meeting until April, 2015. ORA issued its own press release, in which it criticized SCE's *ex parte* contacts but conceded that "to simply undo the SONGS settlement would not be beneficial to ratepayers," given the enormous "cost savings" that the Settlement provided customers.[30] TURN and ORA also simultaneously released an analysis estimating that the Settlement saved customers somewhere between $780 million and $1.06 billion more than a hypothetical Settlement based on the notes later recovered from the meeting ("Warsaw Notes").[31]

On April 14, 2015, in response to the late-filed *ex parte* notice, ALJs Darling and Dudney ordered SCE to produce all documents pertaining to oral or written communications about possible settlement of the OII between any SCE employee and any CPUC decisionmaker between March 1, 2013 and the end of November 2014.[32] SCE responded to this Ruling on April 29, 2015.[33]

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[29] *Id.*

[30] Press Release, The Office of Ratepayer Advocates, ORA Director Joe Como Response to Conduct by Southern California Edison and Former CPUC President Michael Peevey to Undermine the SONGS Settlement Process (April 17, 2015) ("ORA April Press Release"), http://www.ora.ca.gov/uploadedFiles/Content/Press_Room/2015_Releases/Press%20Release%20ORA%20SONGS%20Statement%20on%20Bristol%20Notes%20FINAL%20version%202.pdf.

[31] TURN/ORA Differences.

[32] Administrative Law Judges' Ruling Directing Southern California Edison Company to Provide Additional Information Related to Late-Filed Notices of *Ex Parte* Communications, at 5 (Apr. 14, 2015).

[33] Southern California Edison Company's (U 338-E) Response to Administrative Law Judges' Ruling (Apr. 29, 2015). On July 3, 2015, SCE responded to a further ALJ ruling requesting clarification. (Southern California Edison Company's (U 338-E) Response to Administrative Law Judges' June 26, 2015, Ruling (July 3, 2015).)

On April 27, 2015, A4NR filed a PFM of the Commission's decision approving the Settlement. The PFM argued that the Warsaw Notes and SCE's late-filed *ex parte* notice constituted "new facts or circumstances" that warranted modification of the decision.[34] A4NR argued that the Warsaw conversation "unfairly deprived A4NR and other parties of the ability to fully participate" in the OII, because A4NR and other parties would have demanded equal time meetings with Peevey, among other hypothetical remedies.[35] A4NR also argued that SCE's actions constituted fraud and deceit, and that alleged collusion between Peevey and Pickett constituted extrinsic fraud.[36] The PFM recommended that the Commission set aside its approval for the Settlement and resume litigation of the OII.[37]

B. Despite Having Supported the Settlement for Months After SCE's *Ex Parte* Notice, TURN and ORA Revoked their Support

On June 24, 2015, TURN made its first public statement revoking its support for the Settlement. In a brief responding to A4NR's PFM, TURN recommended that the Commission "reopen the SONGS investigation to address the public perception that the outcome was a product of intervention by President Michael Peevey."[38] In this brief, TURN stated that it was not aware of the Warsaw meeting at any time "before or during the extended settlement negotiations," and that, had SCE made a proper disclosure, "this information would have had an impact on settlement negotiations although it is not clear whether the outcome for ratepayers

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[34] Alliance for Nuclear Responsibility's Petition for Modification of D.14-11-040 ("A4NR PFM") (Apr. 27, 2015).

[35] *Id.* at 3-6.

[36] *Id.* at 6-7.

[37] *Id.* at 9.

[38] TURN Response at 1.

would have been materially different."[39] While reiterating its view that the Settlement was "a favorable outcome for ratepayers," and that it was not clear how a litigated outcome would compare to the Settlement, TURN supported setting aside the Settlement to "eliminate any lingering perception that private communications between SCE and the Commission served as the basis for the ultimate outcome."[40]

On August 11, 2015, ORA filed its own Petition for Modification of the Commission's decision approving the Settlement, asking the Commission to reopen the OII. In its PFM, ORA admitted that it had initially determined "that rescinding the Settlement would not necessarily result in a better outcome for ratepayers," and that reopening the OII would "give Edison a second chance to get a better outcome for itself."[41] Nonetheless, and without explanation, ORA stated that its new position was that a litigated outcome would better serve customers and the public.[42] ORA recommended that Edison compensate customers at least $648 million, which ORA contended was the difference between the Settlement amount and ORA's initial litigation position.[43] ORA has subsequently adjusted this figure to $383 million, incorporating recovery to customers from SCE's settlement with its nuclear insurer.[44]

C. The Commission Sanctioned SCE for *Ex Parte* Contacts

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[39] *Id.* at 2.

[40] *Id.* at 4-5.

[41] ORA PFM at 2.

[42] *Id.*

[43] *Id.*

[44] Opening Brief of the Office of Ratepayer Advocates ("ORA July 7 Brief"), at 2 (July 7, 2016). *See supra* note 18.

On August 5, 2015, ALJ Darling issued a Ruling finding that SCE had engaged in ten *ex parte* communications that should have been reported under Rule 8.4.[45] ALJ Darling also ordered SCE to show cause why it should not be sanctioned for allegedly violating Rule 1.1 on two counts.[46] On December 3, 2015, the Commission issued a decision affirming eight violations of Rule 8.4, reduced from the ten violations found by ALJ Darling.[47] The Commission also concluded that SCE twice violated Rule 1.1.[48] The Commission imposed a penalty of $16.7 million on SCE for the Rule 8.4 and 1.1 violations.[49]

D. University of California Filed its Own Late *Ex Parte* Notice

On December 15, 2015, The University of California ("UCLA") submitted a late-filed Notice of Ex Parte Communications, describing seven conversations from April to September 2014 between UCLA and Peevey concerning funding for research into greenhouse gas emissions.[50] (A provision for a $25 million contribution to the University of California became part of the Settlement after the Commission *sua sponte* proposed this modification to the original settlement among the parties.) UCLA stated that it did not understand these communications to be reportable until ALJ Darling's Proposed Decision on October 27, 2015.[51] SCE was not involved in the UCLA *ex parte* communications or the filing of UCLA's *ex parte* notice.

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[45] Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering Southern California Edison Company to Show Cause Why It Should Not Also Be Found in Violation of Rule 1.1 and Be Subject to Sanctions for All Rule Violations, at 1, 24 (Aug. 5, 2015).

[46] *Id.* at 2-3.

[47] D.15-12-016.

[48] *Id.* at 36.

[49] *Id.* at 61.

[50] University of California, Los Angeles' Late-Filed Notice of Ex Parte Communications (Dec. 15, 2015).

[51] *Id.* at 2.

E. Assigned Commissioner Sandoval and ALJ Bushey Reopened the Record in the OII

On May 9, 2016, former Commissioner Sandoval and former ALJ Bushey issued a Joint Ruling reopening the record to re-review the Settlement under Rule 12.1(d) "in light of" the Commission's decision fining SCE for "failing to disclose *ex parte* communications relevant to this proceeding."[52] Commissioner Sandoval and ALJ Bushey stated that "a litigated outcome is uncertain" and noted TURN's and ORA's estimate that "the actual Settlement Agreement obtained between $780 million and $1.06 billion more for ratepayers" than what was reflected in the Warsaw notes.[53] Nevertheless, they directed the parties to file briefs addressing whether the Settlement still meets CPUC standards for approving settlements.[54] They also directed SCE to file a brief summarizing the Settlement and providing a status report regarding settlement implementation to date,[55] which SCE filed on June 2, 2016.[56]

In response to the joint ruling, four of the six Settling Parties filed briefs in support of the Settlement. SCE and SDG&E argued that the Warsaw meeting had no impact on the Settlement, which was reasonable and favorable to customers.[57] CUE affirmed that the Settlement remains

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[52] Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing *Ex Parte* Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule, at 1 (May 9, 2016).

[53] *Id.* at 4.

[54] *Id.* at 6.

[55] *Id.*

[56] June 2, 2016 Brief.

[57] Brief of Southern California Edison Company (U 338-E) In Support of the SONGS Settlement Agreement, As Adopted by the Commission in D.14-11-040 ("SCE July 7 Brief"), at 2-6 (July 7, 2016); Initial Brief of San Diego Gas & Electric Company (U 902 E), at 20, 25-27 (July 7, 2016).

reasonable and in the public interest,[58] and FOE argued that "it would be harmful to ratepayers for the Commission to overturn the Settlement Agreement and force the parties back to litigation."[59]

TURN and ORA filed briefs recommending that the Commission rescind or modify the Settlement. ORA recommended that the Commission adopt ORA's original litigation position in full, which would result in an additional refund or rate reduction of $365 million.[60] According to ORA, this number represents the "quantifiable loss attributable to SCE's actions," under ORA's theory that SCE's actions unfairly caused "ORA's withdrawal from its litigation position."[61] TURN recommended that the Commission modify the Settlement to implement positions that it expressly disavowed in the litigation, including a disallowance of Base Plant—a remedy that TURN "did not argue for" in the OII based on its acknowledgement that there is "a lack of precedents supporting such a disallowance."[62] Four non-settling parties also filed briefs opposing the Settlement—Henricks, CDSO, Women's Energy Matters ("WEM"), and A4NR—largely based on the same objections that were asserted, and rejected by the Commission, when the Settling Parties first moved for approval of the Settlement.[63]

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[58] Opening Brief of the Coalition of California Utility Employees on the Settlement Agreement, at 6-7 (July 7, 2016).

[59] Brief of Friends of the Earth in Support of the Settlement Agreement Adopted In Decision (D.) 14-11-040, at 7 (July 7, 2016).

[60] ORA July 7 Brief at 2.

[61] *Id.*

[62] Opening Brief of The Utility Reform Network Addressing Whether the Adopted Settlement Satisfies Commission Standards ("TURN July 7 Brief"), at 11-13 (July 7, 2016).

[63] Ruth Henricks' Response to Joint Ruling Reopening Record: Settlement Agreement Does Not Meet Commission Standards, nor Standards of Due Process, for Approving Settlements, at 27 (July 7, 2016); Women's Energy Matters' Initial Brief in Response to May 9, 2016 Joint Ruling, at 3 (July 7, 2016); The Coalition to Decommission San Onofre's Brief on Reopening the Record on Settlement Agreement, at 5 (July 7, 2016); Alliance for Nuclear Responsibility's Opening

On December 13, 2016, Assigned Commissioner Sandoval and ALJ Houck issued a Joint Ruling directing SCE and SDG&E to meet and confer with other OII parties to determine whether they could jointly propose modifications to D.14-11-040 that would "quantify" the alleged harm to customers caused by SCE's unreported *ex parte* contacts.[64] The Joint Ruling stated that that while "[w]e cannot go back in time and reconstruct the parties' strategic thought process," the OII record needed to be reopened to address whether the Settlement remains reasonable in light of SCE's *ex parte* contacts, and if not, "the Commission must quantify the loss of a stronger negotiating position caused by Edison's unlawful actions balanced with the benefits of the Settlement."[65] Commissioner Sandoval and ALJ Houck stressed that "litigating Phase 3, as if the Agreement had never been adopted, may further harm ratepayers," and that reopening the OII would "create additional costs to ratepayers in time, expense, resources, and uncertainty."[66] The Joint Ruling thus directed that "[a]ny remedy must carefully reflect the impact to ratepayers, as ratepayers cannot be further disadvantaged as a result of Edison's activities."[67] The OII parties were directed to provide a status report on their meet-and-confer efforts by April 28, 2017.[68] If the parties were unable to jointly propose modifications to the Settlement, the Joint Ruling provided that each party should provide procedural and substantive recommendations for how to resolve the pending petitions to modify Decision 14-11-040.[69]

Brief in Response to Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing Ex Parte Contact Ban, Consolidating Advice Letters, and Setting Brief Schedule, at 1-5 (July 7, 2016).

[64] December 13 Ruling at 37, 39-40.

[65] *Id.* at 37.

[66] *Id.* at 35.

[67] *Id.* at 37.

[68] *Id.* at 41.

[69] *Id.* at 43.

F. The Meet and Confer Sessions Did Not Produce a Joint Proposal

The parties engaged in three meet-and-confer sessions which led to the parties engaging retired Judge Layn Phillips and Robert Fairbank to conduct a mediation. The parties participated in four in-person mediation sessions and several additional meetings by telephone. The parties were unable to reach agreement on joint proposed modifications to D.14-11-040. SCE therefore provides these procedural and substantive recommendations for how to move forward.

G. TURN and ORA Declined to Permit Disclosure of the Parties' Original Settlement Communications

The record of the Settlement negotiations is central to the Commission's inquiry into "the impact" of SCE's *ex parte* communications on the outcome of the Settlement.[70] SCE therefore sent a letter to TURN, ORA, and SDG&E requesting that they waive Commission Rule 12.6 as it relates to the parties' settlement communications in 2013-14. SCE asked these Settling Parties to agree that they would not object to the admission of such communications and would consent to SCE's disclosure of such communications, in order to enable the Commission to resolve the pending petitions for modification based on a full record of the relevant information. Although SDG&E has done so, ORA responded that it needed more time to evaluate SCE's request. TURN refused to waive Rule 12.6 unless the Utilities make an extraordinarily broad waiver of all privileged material in the OII, including internal material covered by the attorney-client privilege and the attorney work product doctrine, as well as communications with SDG&E protected by the common interest privilege. Unsurprisingly, TURN did not offer a reciprocal waiver of its own privileged internal communications, work product, or communications with ORA. The imposition of this highly unreasonable condition, which TURN clearly does not expect the Utilities to accept, is tantamount to a refusal to waive Rule 12.6.

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[70] *Id.* at 29.

III. PRIMARY RECOMMENDATION

The Commission should issue a decision denying the petitions for modification, affirming the Settlement, closing the record in the OII, and making no further rate adjustments. This outcome is warranted because: (1) the Settlement is fair, reasonable, and in the public interest; (2) SCE's unreported *ex parte* contacts had no measurable impact on the Settlement; and (3) as compared to litigating the OII, the Settlement protected customers against an outcome that could have resulted in less value to them.

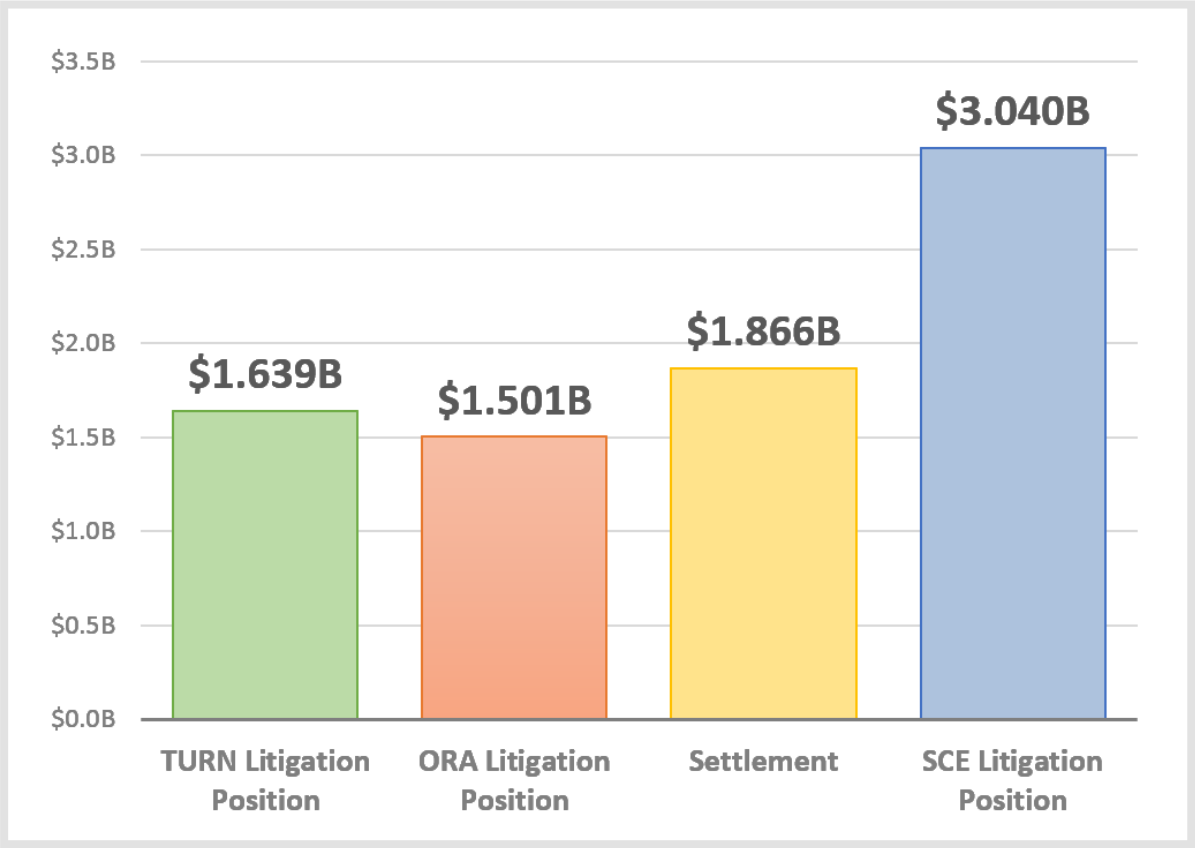
A. The Settlement is Fair, Reasonable, and In the Public Interest

At the heart of the Settlement lies a principled compromise between utility shareholder and customer interests: SCE must write off its entire unrecovered capital investment in the SGRP as of the day after the outages began, as well as its incremental O&M costs to investigate the cause of the leak and possible restart and repair. Customers pay for the replacement power they consumed during the outage and the non-SGRP portion of SCE's investment in SONGS, though over a 10-year amortization period at a greatly reduced rate of return. Finally, the Settlement entitles customers to 95% of SCE's net recoveries from litigation against its nuclear insurer; 50% of the net recoveries from its arbitration against MHI; and 95% of SCE's net recoveries from the sale of nuclear fuel and the materials and supplies inventory.

When the Settling Parties presented the Settlement to the Commission for approval, they explained that the fairness of the Settlement can be analyzed by a comparison of the PVRR of the Settlement as compared to the PVRR of the litigation positions of each Settling Party. The PVRR represents the total revenue that would be collected over time, expressed in constant dollars by application of a discount rate. The PVRR of the Settlement is far closer to the PVRR of ORA's and TURN's litigation positions than it is to the PVRR of SCE's litigation position.

Figure 1 below compares the PVRR of the Settlement (as adjusted for NEIL recovery and subsequent developments) to the litigation positions of TURN, ORA and SCE:

Fig. 1



In fact, TURN has characterized the Settlement as essentially adopting TURN's litigation position. TURN's witness in the OII testified that the Settlement "is quite close to our original litigation position and that of ORA."[71] Notably, TURN's litigation position assumed that SCE would be found imprudent in Phase 3 and that the Commission would impose a disallowance for that imprudence—a result that SCE is prepared to contest. The TURN litigation position was thus meant to suggest the proper ratemaking in the event of an imprudence finding. As TURN's

[71] TURN, Marcus, Tr. p. 2679, lines 12-13.

witness explained, the Settlement "essentially adopted our litigation position that there would be no costs for the steam generator after February 1, 2012, which essentially is a proxy for a finding of some type of imprudence."[72]

In other words, the rate relief provided in the Settlement reflects the amount customers could reasonably have expected to achieve if SCE's adversaries had proved imprudence in the OII and the Commission had imposed a disallowance as a result. In its decision adopting the Settlement, the Commission held that it "tend[ed] to agree" with TURN's assessment that the Settlement's provision disallowing SGRP costs was a fair "proxy" for an imprudence finding.[73] That is, the Settlement provided customers with all of the benefits that they could realistically have hoped to achieve if SCE's adversaries had litigated the OII and fully prevailed.

The Settlement's provisions allowing SCE to recover non-SGRP costs are also fair and reasonable. As SCE has explained in multiple prior filings, extensive Commission precedent sets forth the principle that utilities should recover their remaining unamortized investments when power plants close prematurely.[74] In fact, the CPUC has always authorized utilities to recover their remaining investments in plant that was retired before the end of its estimated useful life, even when the premature retirement arguably was the result of imprudent utility conduct.[75] SCE has recited this legal principle in many briefs filed in the OII, yet no other party has ever cited a countervailing precedent. Indeed, TURN has expressly conceded that

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[72] *Id.* at p. 2709, line 9 - p. 2710, line 6.

[73] D. 14-11-040 at 114-115.

[74] SCE July 7 Brief at 4; Reply Brief of Southern California Edison Company (U 338-E) in Support of the SONGS Settlement Agreement, as Adopted by the Commission in D.14-11-040, at 16-17 (July 21, 2016).

[75] *E.g.*, D.11-09-017, 2011 WL 4425407, at *6 (Cal. P.U.C. Sept. 8, 2011) (allowing Golden State Water Company to recover its remaining investment in a facility the utility was forced to retire after receiving repeated water quality violations from the California Department of Public Health); D.92-08-036, 45 CPUC 2d 274, 295 (1992).

Commission precedent supports this recovery.[76] Likewise, TURN has conceded that the Settlement's provisions allowing SCE to earn only a reduced rate of return, over an extended amortization period, are favorable to customers as compared to Commission precedent.[77]

For these reasons and others, the Commission approved the Settlement in this proceeding after an extensive, public process that concluded that the Settlement was just and reasonable for customers, and in the public interest. The Commission specifically found that the Settlement yielded an outcome that was "within the range of possible outcomes" had the case been litigated, and agreed with the Settling Parties' analysis that the Settlement was closer to the litigation position of ORA and TURN than to the litigation position of SCE and SDG&E.[78] The Commission also found that the Settlement allowed customers and the public to avoid the uncertainty, cost, and delay of additional litigation.[79] Those conclusions remain valid today.

B. SCE's Unreported *Ex Parte* Contacts Had No Impact on the Settlement

Nothing about the Warsaw meeting or SCE's late-filed *ex parte* notice affects the reasonableness of the Settlement in any way.

1. Neither TURN nor ORA Demonstrate How They Would Have Negotiated the Settlement Differently

TURN and ORA have never disavowed their statements that the Settlement is beneficial to customers when compared to their litigation positions and the possible outcomes of a fully litigated proceeding. On the contrary, after SCE reported the Warsaw meeting and in response to A4NR's petition for modification, TURN reiterated that the Settlement represented "a favorable

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[76] TURN July 7 Brief at 11 ("TURN recognizes that there are many precedents supporting the recovery of prudently invested capital in a plant that is shut down prematurely.").

[77] TURN, Marcus, Tr., p. 2680, lines 8-17.

[78] D.14-11-040 at 33, 85.

[79] *Id.* at 109.

outcome for ratepayers."[80] ORA also continued to support the Settlement after SCE's late-filed *ex parte*, and admitted that "rescinding the Settlement would not necessarily result in a better outcome for ratepayers."[81] In fact, TURN knew about the Warsaw conversation as early as April 2014, and continued to support the Settlement both leading up to its approval and immediately after the late-filed *ex parte* notice.

No party has ever put any evidence into the record showing how TURN or ORA would have negotiated the Settlement differently had they known about the Warsaw meeting. For example, neither TURN nor ORA has filed a declaration explaining the actions they would have taken if SCE had disclosed the Warsaw meeting at the time of the settlement negotiations. In all of their many pleadings in this proceeding, neither TURN nor ORA has identified any argument it would have made, any term it would have changed, or any concession it would have withdrawn had it known about the Warsaw meeting.

In fact, TURN has never said that knowledge of the Warsaw meeting would have led it to negotiate differently. While TURN asserted that disclosure of the Warsaw meeting "would have had an impact on settlement negotiations,"[82] it did not specify what that impact would have been. Likewise, ORA asserts that the Warsaw meeting "undermined the SONGS settlement negotiations,"[83] but ORA never explains what "undermined" means. Although ORA implies that

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[80] TURN Response at 3.

[81] ORA PFM at 2.

[82] TURN Response at 2.

[83] ORA PFM at 3.

it would not have engaged in settlement negotiations had it known about the Warsaw meeting,[84] ORA does not actually claim it *would* have refused to negotiate.

TURN's Response to A4NR's PFM demonstrates that TURN did not and cannot claim that it would have negotiated a different settlement had it known about the Warsaw meeting. TURN notes that "*A4NR* asserts" that TURN and ORA were "disadvantaged . . . in the Settlement negotiations," and that "*A4NR* argues that . . . both ORA and TURN would likely have negotiated a better settlement" if the Warsaw meeting had been disclosed earlier.[85] But TURN does not say that it agrees with these assertions; TURN says only that it agrees with A4NR that the late-filed *ex parte* notices were "very troubling."[86] In fact, TURN conceded that its "decision to sign the Settlement was based" *not* on any assumptions about what Peevey thought the outcome of the OII should be, but "on its own independently developed litigation positions, a review of the positions put forth by all active parties, and an assessment of potential outcomes based on past Commission decisions . . . ."[87]

ORA's argument that SCE was "likely able to use its knowledge of Peevey's position to steer the Settlement in the direction it wanted"[88] is baseless. TURN and ORA were under no compulsion to agree to any term the Utilities proposed that they did not think was fair and reasonable. At most, the Warsaw meeting gave SCE insight into the CPUC President's views about how the OII might be resolved. Without disclosing those views to TURN and ORA, SCE

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[84] ORA July 7 Brief at 4 ("Had SCE not engaged in undisclosed ex parte communications, ORA would have been in a more informed position to weigh the costs and benefits of such a withdrawal [from its litigation position].").

[85] TURN Response at 1-3 (emphasis added).

[86] *Id.* at 2.

[87] *Id.* at 3.

[88] ORA April Press Release.

could not use them to "steer" the negotiations. Moreover, SCE had no control over what settlement terms TURN and ORA were willing to accept. ORA's and TURN's decisions about the Settlement negotiations were, by their own admission, based on their independent evaluation of CPUC precedent and the record in the OII.[89]

The notion that SCE could have "steer[ed]" the negotiation is also undercut by ORA's and TURN's public analysis of the notes from the Warsaw meeting, in which they claim that the Settlement they negotiated results in cost savings to customers of $780 million to $1.06 billion compared to the Warsaw notes.[90] Had ORA and TURN known that Peevey favored that outcome, ORA and TURN would likely have viewed the risks to customers of continued litigation of the OII as more significant, and as a result ORA and TURN would, if anything, have been even more strongly motivated to settle.

In the absence of evidence, or even logical explanation, of how and why TURN and ORA would have negotiated a different settlement had the Warsaw meeting been known, the Commission cannot find that the late disclosure of the Warsaw meeting had a measurable impact on the Settlement. As the December 13 Ruling states: "We cannot go back in time and reconstruct the parties' strategic thought process."[91] TURN forthrightly admits that "*it is not clear whether the outcome for ratepayers would have been materially different*" had Warsaw

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[89] *See, e.g.*, TURN Press Release (June 11, 2014) ("TURN June Press Release"), http://www.turn.org/press-release/press-backgrounder-songs-settlement-guarantees-savings-and-refunds/ (noting that the Settlement was "unprecedented" and "better for customers than any previous CPUC decisions involving problematic plants").

[90] TURN/ORA Differences.

[91] December 13 Ruling at 33.

been disclosed.[92] This concession precludes any finding that the contemporaneous disclosure of the Warsaw meeting would have had a measurable impact on the Settlement.

2. *A4NR Does Not Demonstrate that the Settlement Would Have Been Different*

Contrary to TURN and ORA, A4NR interprets the notes of the Warsaw meeting to suggest an outcome that A4NR believes would have been more favorable to customers than the Settlement. On this basis, A4NR's PFM speculates that TURN and ORA could have negotiated a better deal had the Warsaw Meeting had been disclosed. A4NR's interpretation of the notes of the Warsaw meeting, however, is not shared by TURN or ORA. Because TURN and ORA viewed the notes as signaling a *less* favorable outcome for customers, A4NR's interpretation is immaterial to the impact of the non-disclosure on the settlement dynamics.

In addition, A4NR's calculations are based on an idiosyncratic interpretation of the notes. For example, A4NR assumes that because CWIP was not mentioned, Peevey intended to disallow such costs.[93] There is no basis for that assumption, as Pickett's follow-up notes demonstrate.[94] A4NR also erroneously assumes that, when Peevey referred to recovery of O&M for 6 months after "shutdown," he meant to limit O&M to 6 months after the start of the outages.[95] Given that the Warsaw meeting occurred in February 2013, more than a year after the outages began, and that the notes contemplate a future shutdown, A4NR's interpretation is

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[92] TURN Response at 2 (emphasis added).

[93] A4NR PFM, Geesman Decl. at 10-11.

[94] SCE's Response to ALJ Ruling (Apr. 29, 2015), Appendix D, p. SCE-CPUC-00000003 ("Note: not clear whether the post-leak investment that is not directly related to the RSG's is included (e.g., the new heads, HP turbine, etc.)").

[95] A4NR PFM, Geesman Decl. at 6.

implausible.[96] The flaws in A4NR's interpretations of the Warsaw notes are demonstrated by Peevey's decision to vote for the Settlement. If Peevey had in mind a result that was far more beneficial to customers, as A4NR assumes, he could be expected to have voted against the Settlement or to have requested changes to the Settlement. But while the Assigned Commissioner and ALJs issued a ruling requesting certain changes to the agreement negotiated by the parties, there was no request to change the terms in the way A4NR believes Peevey was contemplating.

Even if A4NR's interpretation of the notes of the Warsaw meeting were correct, there is no basis to assume that SCE would have accepted the extreme outcomes A4NR advocates, or that TURN or ORA would have accepted a settlement that was, from their perspective, worse for customers. The Settlement negotiations yielded a compromise. The Settlement already reflects a major concession by the Utilities to refund or credit approximately $2 billion to customers. A4NR can point to no evidence to suggest that the Utilities would have gone even further.

A4NR also speculates that, had it known about Warsaw, it would have taken different positions in the OII and would have attempted more vigorously to persuade the Commission to accelerate consideration of Phase 3 prudence issues.[97] A4NR has failed to explain how knowledge of the Warsaw meeting would have influenced the Commission to change its decision from the outset of the OII to divide the OII into phases, as there is no relationship between the Warsaw meeting and the timing of Phase 3. The Settlement was premised on the Commission not needing to perform a prudence review, so it is not clear why accelerating Phase 3 would have changed the Settling Parties' willingness to settle.

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[96] *See also* Response of Southern California Edison Company (U 338-E) to the Alliance for Nuclear Responsibility's Petition for Modification of D.14-11-040, at 9-10 & n.4 (June 2, 2015).

[97] A4NR PFM at 4.

Moreover, A4NR's arguments assume that A4NR did not know about the Warsaw meeting or about Peevey's views about a possible resolution of the OII. But A4NR has never actually said that it lacked such knowledge. SCE has pointed out on multiple occasions[98] that in its intervenor compensation request, A4NR included detailed time entries for John Geesman and Rochelle Becker that reveal communications with Peevey and Florio as to which *ex parte* notices have not been filed. Of particular note, Mr. Geesman's time entries reflect a July 26, 2013, conversation with Peevey. The proximity of this communication to SCE's announcement of the permanent shutdown of SONGS, followed by Peevey's public statement calling on the parties to settle the OII, raises a question about whether Peevey told Mr. Geesman about the Warsaw meeting or how he thought the OII should be resolved. SCE has previously called on A4NR to disclose the substance of that communication, but A4NR has not done so.

In addition, nearly a year later, on July 9, 2014, Mr. Geesman spoke with Peevey about the proposed settlement. A4NR filed a notice of an *ex parte* communication regarding that call. The notice reports that Mr. Geesman objected to certain aspects of the Proposed Settlement, including its failure to address greenhouse gas impacts of the permanent shutdown of SONGS.[99] Consistent with CPUC Rule 8.4(c), this notice did not reveal what Peevey said to Mr. Geesman, but the fact that Mr. Geesman discussed greenhouse gas impacts again raises a question about what Peevey told Mr. Geesman about the Warsaw meeting. Because A4NR's claim that it would have opposed the Settlement more effectively had it known about the Warsaw meeting depends on what Peevey communicated to A4NR during these conversations, A4NR's failure to disclose

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[98] Response of Southern California Edison Company (U 338-E) to Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering Southern California Edison Company to Show Cause, at 4-5 (Aug. 20, 2015); Response of Southern California Edison Company (U 338-E) to The Alliance for Nuclear Responsibility's Amended Motion for Sanctions, at 4 & n.5 (May 21, 2015).

[99] Alliance for Nuclear Responsibility's Notice of Ex Parte Communications (July 14, 2014).

those communications is problematic. Unless and until A4NR comprehensively describes its communications with CPUC decisionmakers, and categorically denies that it knew anything about how Peevey thought the OII might be resolved, the Commission should discount A4NR's arguments that it would have litigated differently.

C. Settlement Is a Better Outcome for Customers than Litigating the OII

The Commission has long articulated a "strong public policy" in favor of settlement.[100] The Commission has also recognized that the "purpose of a settlement is to avoid [the] possibility" of a "costly, time consuming" hearing that "might result in a less favorable outcome for the ratepayers."[101] Sending the parties back to litigation in the OII would flatly contradict this purpose, as the Phase 3 hearings would be enormously costly, complex, time-consuming, and risky for customers in that they would likely end up paying more for SONGS than they currently pay under the Settlement.

The Commission has also "articulated a clear policy to decline to exercise its discretion to modify its own decisions where to do so would dishonor a previous settlement agreement."[102] Any reversal of a decision approving a settlement undermines interests of promoting finality. In support of these interests in finality and efficiency, SCE favors an immediate order from the Commission to finally resolve the OII. The OII was initiated in 2012—nearly five years ago—and the parties and the public deserve closure.

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[100] D.93-03-021, 48 CPUC 2d 352, 1993 WL 175321, *33 (1993); D.91-05-029, 40 CPUC 2d 301, 326 (1991).

[101] D.95-05-043, 60 CPUC 2d 1 (1995).

[102] D.99-01-033, 84 CPUC 2d 707 (1999) (citing D.96-05-037, 66 CPUC 2d 280, 282 (1996)).

1. *If this Case Returns to Litigation, the Outcome Could Be Worse for Customers than the Settlement*

In the December Ruling, the Assigned Commissioner and ALJ acknowledged that any new *settlement* in the OII would have to reduce the costs that customers pay for SONGS: "Ratepayers should not be further disadvantaged as a result of Edison's bad acts. . . . The benchmark today for assessing the reasonableness of any proposed settlement is not the parties' former litigation positions; the benchmark today is the Agreement as implemented and quantification of the loss suffered by ratepayers . . . ."[103] But the same is not true for a litigated outcome of the OII, which could result in customers paying more than they currently pay under the Settlement. Indeed, in the same passage of the December Ruling, the Assigned Commissioner and ALJ stated that "[l]itigating Phase 3, as if the Agreement had never been adopted, may further harm ratepayers."[104] The December Ruling did not and could not prejudge the outcome of litigation.

In fact, there is a significant risk that the litigated outcome of Phase 3 would force customers to pay more for SONGS than what is provided for in the Settlement. This is because SCE would not be found imprudent in Phase 3, and therefore the outcome of litigation would be to allow SCE to recover significantly more SONGS costs than the Settlement allows. But even if SCE were deemed imprudent in Phase 3, the resulting disallowance would not be greater than the rate relief customers receive under the Settlement.

(a) SCE Would Not Be Found Imprudent

First, if the OII returns to Phase 3, SCE would not be found imprudent. When it approved the Settlement, the Commission said:

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[103] December 13 Ruling at 35.

[104] *Id*.

> In addition, the public actions by NRC and SCE's public webposting of numerous design review–related documents, have given parties a reasonable opportunity to initiate discovery regarding SCE's SGRP conduct. Yet, 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.[105]

Since the Commission made these statements in November 2014, new information regarding the failure of the replacement steam generators has made it even less likely that SCE would be found imprudent in Phase 3. A particularly salient source of information is the approximately 1200-page decision in the arbitration between the SONGS owners and MHI. After years of arbitration and the work of 60 expert and fact witnesses, the arbitration panel found that MHI delivered defective RSGs and breached its contract with SCE,[106] but nevertheless upheld the contractual limitation on MHI's liability. In reaching this conclusion, the majority opinion made detailed factual findings that demonstrate that neither MHI nor SCE acted imprudently.

Appendix A sets forth a detailed discussion of the arbitration panel's findings. As explained in Appendix A, these factual findings include the following key conclusions, all of which significantly reduce the chance that SCE would be found imprudent if the OII returned to Phase 3: (1) MHI was qualified to design the RSGs; (2) SCE oversaw MHI's design process with a strong and robust quality-control program; (3) despite SCE's thorough oversight, MHI remained ultimately responsible for the RSG design; (4) the RSGs contained a design defect; (5) the root cause of the tube leak was an unprecedented and first-of-a-kind phenomenon that neither SCE, nor MHI, could have predicted; (6) MHI followed industry standards in designing the

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[105] D.14-11-040 at 87-88.

[106] Final Award in ICC Arbitration Case No. 19784/AGR/RD (Redacted Final Award) (Corrected 12 June 2017), Redacting Concurring and Dissenting Opinion, and Redacted Addendum (Public Version) ("Arbitration Award") (June 15, 2017) ¶¶ 2003, 2930.

RSGs; and (7) SCE's decision to shut down SONGS, rather than repair or replace the steam generators, was commercially reasonable.

These findings undermine any suggestion that the Commission would find imprudence in Phase 3 of the OII. After reviewing a mountain of evidence from myriad percipient and expert witnesses, the arbitration panel essentially found that neither MHI nor SCE could have predicted or prevented the steam generators' failure. The panel instead attributed the design defect to an unprecedented and unavoidable phenomenon that took the nuclear industry by surprise.

These findings make it highly unlikely that the Commission would find, in Phase 3, that MHI's conduct was imprudent. The panel found that MHI followed industry standards and MHI did not act unreasonably in the design of the RSG. Even if MHI had acted imprudently, however, MHI's conduct would not be imputed to SCE. CPUC precedent holds that a mistake by a vendor—even an imprudent mistake—does not justify a disallowance unless the utility acted unreasonably in failing to prevent the vendor from committing that mistake.[107] Any argument that a disallowance should be imposed based on MHI's errors, therefore, must establish (1) that MHI's errors were unreasonable, based on information available at the time of its actions, and (2) that the CPUC would overrule its precedents and create a new rule imposing a disallowance on a utility for a mistake by an independent vendor that the utility could not reasonably have been expected to detect. In light of the extensive and detailed analysis from the

[107] D.99-11-022, 1999 WL 1957791, at *3 (Cal. P.U.C. Nov. 4, 1999) (declining to impose disallowance despite manufacturing defect, since the reasonable manager standard is "based on the activity of the utility . . . not that of a manufacturer"); D.82-12-055, 10 CPUC 2d 155, 1982 WL 196701, at *32 (Dec. 13, 1982) (declining to impose disallowance after tube leak at SONGS Unit 1, which is not at issue in this proceeding, because there was "no basis in the record to conclude that Edison acted unreasonably in accepting what proved to be a faulty plant design or in its detection and repair of the steam generator failure").

arbitration panel about MHI's and SCE's prudence, it is unlikely that the Commission would reach either or both conclusions.

The arbitration decision also significantly reduces the chance that SCE would be found imprudent based on its own actions. The panel concluded that SCE acted reasonably in overseeing the design process and ultimately deciding to retire SONGS in the face of a protracted, expensive, and uncertain regulatory path to restart. Given that SCE itself acted prudently in its oversight of MHI, no disallowance would be appropriate.[108]

The Settlement protects customers from the significant risk that they would pay far greater costs if the case had been litigated. If the case were litigated and SCE found prudent, customers would end up paying as much as $2 billion more than under the Settlement. SCE's prior briefs explain that ample Commission precedent supports SCE's litigation position of full cost recovery for SONGS.[109] If SCE's conduct is deemed prudent, SCE would be entitled to recover the costs of the SGRP, and the associated O&M, in full. TURN and ORA have acknowledged that the Settlement was very favorable for customers because a litigated outcome might allow total recovery of the SGRP.[110]

The position certain intervenors took with respect to PG&E's cost recovery for Diablo Canyon supports SCE's position that it is entitled to recover its investments at SONGS in full notwithstanding the early retirement. TURN, ORA, A4NR, and other parties entered into a partial settlement with PG&E addressing, among other issues, the recovery of capital investments in projects that PG&E will cancel due to the decision not to seek a license extension.

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[108] *E.g.*, D.99-11-022, 1999 WL 1957791, at *3 (Cal. P.U.C. Nov. 4, 1999).

[109] D.11-09-017, 2011 WL 4425407 (Cal. P.U.C. Sept. 8, 2011); D.92-08-036, 45 CPUC 2d 274 (1992); D.85-08-046, 18 CPUC 2d 592, 599 (1985). *See also* D. 92-12-057, 1992 WL 438010, at *118 (Cal. P.U.C. Dec. 16, 1992).

[110] ORA PFM at 2; TURN Response at 3.

The settling parties agreed "that PG&E should recover its direct costs incurred during the time that the project was reasonably and prudently undertaken . . . the Agreement reflects the policy of the Commission in past decisions that, in general, the costs of prudent and reasonably incurred cancelled project costs should be shared by customers and shareholders."[111] As a result, the settling parties agreed that PG&E could recover in full all direct costs associated with capital projects recorded up to the date PG&E publicly announced it would suspend license renewal efforts at Diablo Canyon, and 25% of any costs recorded after that date. This position by the intervenor parties supports SCE's argument that it is entitled, under ample Commission precedent, to recover all prudent capital costs related to SONGS.

In addition, if the case returns to litigation, SCE has argued (and would argue again) for recovery of investment over a shorter period of time, and at a higher rate of return, than authorized by the Settlement. This position is supported by strong CPUC precedent.[112] SCE has also argued (and would argue again) that SONGS assets should remain in rate base until SONGS was permanently shut down, and additional assets remaining in service to support regulatory and safety obligations should remain in rate base until fully depreciated. The Settlement nullifies the potential that any of the Utilities' well-founded legal positions would prevail in litigation, which would result in further customer costs.

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[111] Joint Motion of Pacific Gas and Electric Co. (U 39 E), et al. for Adoption of Settlement Agreement Regarding License Renewal Project and Cancelled Project Cost Recovery at Diablo Canyon, at 12-13, 14 (May 23, 2017); *see also* Opening Brief of the Office of Ratepayer Advocates, A. 16-08-006, at 32 (Aug. 11, 2016) ("Subject to the Employee Retention Program adjustment recommended by ORA, ORA does not oppose PG&E's cost recovery mechanism proposal."). The Joint Motion asserted that costs of cancelled projects are "shared" in the sense that customers pay for the investment costs but not AFUDC. SCE does not agree with this contention, as the Commission has often approved recovery of CWIP with AFUDC for capital projects that were cancelled as a result of an early shutdown of a plant. *See, e.g.*, D.13-11-005, 2013 WL 6327714, at *38 (Cal. P.U.C. Nov. 14, 2013).

[112] D.92-08-036, 45 CPUC 2d 274 (1992); D.11-09-017, 2011 WL 4425407, *6-7 (Cal. P.U.C. Sept. 8, 2011).

(b) The Disallowances Imposed by the Settlement Are the Most Likely Outcome Even if SCE Were Found Imprudent

Even if SCE were found imprudent, a disallowance of SGRP costs from the date the outages began, as provided for in the Settlement, is the most probable remedy. As set forth above, the CPUC has always authorized utilities to recover their remaining investments in plant that was retired before the end of its estimated useful life, even when the premature retirement arguably was the result of imprudent utility conduct. Even in the event of an imprudence finding, therefore, the Commission would be unlikely to impose a disallowance of capital investments that had nothing to do with the RSGs.[113]

The Settlement's disallowance of RSG costs starting on the day after the outage began is the most financially advantageous realistic litigation result for customers. At TURN's key witness Marcus explained, the Settlement "essentially adopted our litigation position that there would be no costs for the steam generators after February 1, 2012, which essentially is a proxy for a finding of some type of imprudence."[114] In its decision approving the Settlement, the Commission stated that it "tend[s] to agree" with Marcus's statement and that "there is little indication" that a more extreme disallowance would be warranted.[115] TURN and ORA have both acknowledged that even if SCE had been found imprudent, it should be allowed to recover its non-SGRP investment. A disallowance of other SONGS investments beyond the RSGs would have been, in the Commission's words, an "extreme action."[116]

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[113] D.85-08-102, 18 CPUC 2d 700 (1985) (disallowing only actual costs incurred as a result of defect at the Helms plant, while allowing recovery for the balance of the Helms plant costs).

[114] TURN, Marcus, Tr. p. 2709, line 9 - p. 2710, line 6.

[115] D.14-11-040 at 114-15.

[116] *Id.* at 114-15.

2. *Litigating Phase 3 Would Be Costly, Complex, and Time-Consuming*

Phase 3 would potentially extend for years and would undoubtedly be costly for all parties. In Phases 1 and 2 alone, the OII involved thousands of pages of testimony, dozens of briefs, three evidentiary hearings spanning twelve days, and several dozen witnesses. Phases 1 and 2 spanned seventeen months, from the scoping ruling until the Proposed Settlement. The Commission cited this history as a reason why the Settlement was in the public interest, accepting the Settling Parties' prediction that Phase 3 would be "long and complex," "quite consuming of time and resources,"[117] and not in the public interest, given that customers "foot the bill" for regulatory litigation.[118]

The Commission was right to anticipate that Phase 3 will be far more complex and intensive than Phases 1 and 2. The MHI arbitration illustrates this fact. The review of the causes of the RSG failures involved extensive technical evidence, as demonstrated by the approximately 1200-page arbitration decision. The arbitration hearings spanned six weeks and included 2,323 exhibits and 60 witnesses. The tribunal took nearly a year to issue its decision, which included a dissent from one member who interpreted the evidence differently (and more favorably to SCE).

IV. ALTERNATIVE RECOMMENDATION

If the Commission determines that contemporaneous disclosure of the Warsaw meeting would have had a measurable impact on the Settlement, the Commission should affirm the Settlement and impose a disallowance that is commensurate with the penalty the Commission imposed on SCE related to the Warsaw meeting—$16.7 million. Any disallowance should be a small fraction of the $365 million difference between the Settlement PVRR and the PVRR of ORA's litigation position. To the extent the Commission finds that disclosure of the Warsaw

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[117] *Id.* at 109-114.

[118] *Id.* at 115.

meeting would have affected the settlement negotiations, it could find that this remedy would align with the Commission's stated goal in reopening the record of the OII: to "quantify the loss" to customers caused by SCE's failure to report its *ex parte* contacts.[119]

Precedent supports the Commission's authority to impose a disallowance as a remedy for *ex parte* and other rule violations. Because the purpose of the remedy is to make customers whole, however, in no event can the Commission impose a disallowance that is greater than a small fraction of ORA's litigation position, which ORA and TURN concede set the outer bounds of the Settlement negotiations.[120] Any disallowance in excess of a small fraction of $365 million would be an unjustified and excessive penalty against the Utilities.

A. When Utility Conduct Has a Measurable Economic Impact on Customers, a Disallowance May Be the Appropriate Remedy

Section 451 of the Public Utilities Code requires that utility rates be "just and reasonable,"[121] and the Commission has the authority to "fashion . . . equitable remedies," such as disallowances, when utility conduct results in unreasonable rates.[122] If the Commission determines (contrary to SCE's position) that the Settlement rates are unreasonable as a result of the late-filed *ex parte* notices, the Commission has the inherent authority to disallow that portion of rates that the Commission has deemed unreasonable.

In D.14-11-041, the Commission found that PG&E had violated the *ex parte* rules and imposed both a penalty and a disallowance as a remedy.[123] In this ratesetting proceeding, the

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[119] December 13 Ruling at 33-34 & 37.

[120] Joint Motion at 8 (arguing that the Settlement was a reasonable compromise between the parties' competing litigation positions).

[121] P.U. Code section 451.

[122] D. 15-04-024, 2015 WL 1687684, at *19 (Cal. P.U.C. Apr. 9, 2015)

[123] Decision Modifying Law and Motion Judge's Ruling Imposing Sanctions for Violation of Ex Parte Rules (D. 14-11-041) (Nov. 20, 2014).

Commission found that PG&E engaged in prohibited *ex parte* communications regarding the selection of the ALJ. The Commission imposed a penalty of $1,050,000 for these *ex parte* violations.[124] In addition, the Commission held that PG&E's conduct caused "significant ratepayer harm resulting from the delay caused by the necessity to re-assign a new administrative law judge to this case."[125] As a result, the Commission ordered PG&E to pay a "ratemaking remedy" calculated as the portion of revenues that were collected from customers during the delay in the proceedings caused by PG&E's actions.[126] In other words, the Commission quantified the impact of PG&E's *ex parte* communications on customers in the proceeding and ordered that PG&E refund customers this exact amount.

When PG&E challenged the disallowance, arguing that the Commission could not order a monetary sanction beyond the $1,050,000 penalty, the Commission reiterated its authority to order such a disallowance as a "reparation" for PG&E's conduct.[127] The Commission held that "[i]t is directly within our regulatory authority . . . to determine ratemaking remedies when actions of the company create ratepayer impacts that are unjust and unreasonable."[128] In rejecting PG&E's application for rehearing, the Commission further held that CPUC Rule 8.3(j) gives the Commission authority to order monetary disallowances for *ex parte* violations.[129]

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[124] *Id.* at 3.

[125] *Id.*

[126] *Id.* at 3, 16.

[127] *Id.* at 16, 31.

[128] *Id.* at 26.

[129] Order Denying Rehearing of Decision (D.) 14-11-041 (D.15-06-035), at 12 (June 17, 2015). *See also* D.08-09-038 (p. 141), 2008 WL 4448990 (Cal. P.U.C. Sept. 18, 2008) (after finding that SCE had improperly manipulated its Performance Based Ratemaking results, the Commission quantified the impact of that wrongdoing on customers and ordered a rate disallowance of that amount).

According to the December 13 Ruling in this proceeding, the Commission now faces a similar issue as it faced with PG&E: although it has already issued a substantial penalty, the Commission will consider further whether SCE's actions had "other consequences that impact ratepayers."[130] If it finds such impacts—again, SCE believes that the record does not support such a finding—the proper remedy for any such impact would be a disallowance of the amount by which the Settlement rates were increased due to the late disclosure of the Warsaw meeting.

B. Any Disallowance Should Be, at Most, a Small Fraction of $365 Million

As the Commission stated in the PG&E case, "the goal of any ratemaking adjustment is to *offset any negative financial consequence* that [the utility's] ratepayers would otherwise experience" due to the utility's actions."[131] Under this principle, if the Commission finds that SCE's failure to file a timely *ex parte* notice resulted in a measurable change in the Settlement, the Commission could impose a disallowance that quantifies that impact. The Commission should then reaffirm its finding that the Settlement is otherwise reasonable, lawful, and in the public interest.

The December 13 Ruling signals that this is the approach the Commission contemplates. The ruling directs the parties to "carefully consider whether and to what extent any modifications to D.14-11-040 could allow further ratepayer benefits as an offset for any tipping of the balance in the Utilities' favor that resulted from the unreported ex parte communications."[132] The calculation of such an impact would "capture" any "disadvantages suffered by ratepayers as a result of Edison's actions."[133]

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[130] December 13 Ruling at 30.

[131] D.15-06-35 at 11 (emphasis added).

[132] December 13 Ruling at 39.

[133] *Id.* at 33 & 37.

It is axiomatic that the amount of a disallowance must be supported by the record.[134] Because TURN and ORA have not waived Rule 12.6 with respect to the settlement communications that led to the Settlement in 2014, however, the *only* record evidence that could be used to quantify a disallowance is the Settling Parties' Joint Motion for Approval of the Settlement Agreement and press releases from ORA and TURN. These documents make clear that the Settlement was based on a compromise between the Utilities' litigation positions regarding cost recovery, on the one hand, and TURN and ORA's litigation position regarding cost recovery, on the other hand. The Settling Parties' Joint Motion for Approval argued that the Settlement was fair because it was "within the range of positions and outcomes proposed by the Settling Parties in" the OII.[135] TURN's press release following the Settlement said the same thing,[136] as did its press release following SCE's late-filed *ex parte* notice.[137]

According to these public statements by the Settling Parties, the Settlement was based on a compromise from the Settling Parties' litigation positions, and the negotiations could not have resulted in a settlement that provided more benefits to customers than the litigation positions of TURN and ORA regarding cost recovery. Because the litigation positions of TURN and ORA represented their settlement demand, SCE would never have agreed to a settlement that was *even more* punitive to its investors than TURN's and ORA's demands. Because ORA's litigation position was more aggressive than TURN's (i.e, called for larger disallowances than TURN recommended), ORA's litigation position necessarily was the outer bound of the Settlement

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[134] *E.g.,* D.94-11-075, 57 CPUC 2d 525 (Nov. 22, 1994).

[135] Joint Motion at 37.

[136] TURN June Press Release.

[137] TURN April Press Release.

negotiation. As set forth in ORA's PFM, the PVRR of ORA's litigation position is approximately $365 million greater than the Settlement.[138]

For the reasons set forth in this brief, SCE believes that a timely *ex parte* notice regarding the Warsaw meeting would not have changed the outcome of the settlement negotiations. If the Commission were to find otherwise, however, the Commission should determine the extent to which a timely *ex parte* notice would have moved the needle toward ORA's litigation position, and impose a corresponding disallowance. In choosing this disallowance, the Commission should bear in mind the $16.7 million penalty it imposed on SCE, which it selected based on its evaluation of the "harm" caused by SCE's conduct "from the perspective of the public interest."[139] Any quantification of the effects of Warsaw on the Settlement should be commensurate with the Commission's prior evaluation of harm and should be no more than a small fraction of ORA's litigation position.

V. UPDATED ECONOMIC ANALYSIS LIMITS ANY DISALLOWANCE

For the reasons previously explained, the Commission should find that the nondisclosure of the Warsaw meeting did not have a measurable economic impact on the Settlement, or in the alternative that any such impact was limited to a small fraction of $365 million. If, however, the Commission were to look beyond the ORA litigation position as bounding the negotiation, it would be redirecting the inquiry from what the Settling Parties knew at the time they negotiated the Settlement to what is known today. In that event, the Commission must consider the economics of operating SONGS compared to relying on market purchases.

A. Where Imprudence Is Found, The Remedy Should Leave Customers Indifferent

[138] ORA July 7 Brief at 2. *See supra* note 18.

[139] D.15-12-016 at 48, 51.

Absent the Settlement, in a litigated proceeding, the Commission's tasks would include (1) determining whether the failure of the replacement steam generators and subsequent closure of SONGS was due to imprudent actions by SCE, and if so, (2) adopting a remedy that protects customers from the consequences of utility imprudence. As noted, SCE did not act imprudently, so no disallowance would be warranted. But if the Commission were to find otherwise and proceed to the second step, it would adopt a remedy that puts customers in the same position than they would have been absent such imprudence—no better and no worse.

In many cases, the Commission has adopted this principle. In a decision involving extended outages at the Palo Verde nuclear plant, the Commission held:

> The proper rate making treatment of a facility which remains out of service permanently is simple. Retroactive to the date on which the facility ceased to be used and useful for its dedicated purpose the ratepayers are *to be held harmless* against all costs.[140]

This quotation has been cited with approval by many of SCE's adversaries in the OII, including ORA,[141] TURN,[142] and A4NR.[143] The principle that customers should be "held harmless" requires a comparison of the costs the customers incur with the plant shutdown permanently to the costs they would have incurred had the plant continued to operate.

The Commission has frequently applied this principle in the context of plant outages resulting from utility imprudence, where the Commission has ruled that the proper remedy is a

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[140] D.93-05-013, 49 CPUC 2d 218 (Cal. P.U.C. May 7, 1993) (emphasis added).

[141] Opening Brief of the Division of Ratepayer Advocates on Legal Issues Set Forth in the Scoping Memo and Ruling of the Assigned Commissioner and Administrative Law Judge, at 7 (Feb. 25, 2013).

[142] Opening Brief of the Utility Reform Network, Friends of the Earth and the World Business Academy on Legal Issues Associated with Removing San Onofre Nuclear Generating Station Costs from Rates, at 7 (Feb. 25, 2013).

[143] Alliance for Nuclear Responsibility's Opening Brief on Phase 2 Issues, at 5-6 (Nov. 22, 2013).

disallowance of replacement power costs, offset by any avoided costs.[144] For example, in nuclear plant outages, the Commission has offset avoided fuel costs against the replacement power costs in computing the disallowance.[145] Similarly, the Commission offset the value of held-back water in a hydroelectric facility during an outage against the cost of replacement power in computing a disallowance.[146]

B. Customers Have Not Been Harmed by the SONGS Shutdown

Appendix B describes SCE's updated economic analysis, which compares the going-forward cost of operating SONGS (assuming the RSGs had never failed) to the cost of replacing SONGS' output with market power. This analysis demonstrates that customers were not harmed by the SONGS shutdown. In fact, the going-forward costs of operating SONGS from the shutdown date through 2022, when the NRC operating license was set to expire, are now forecast to be slightly higher than the cost of power from the market. Taking into account the amounts credited to customers under the Settlement, offset by the additional costs due to the outages from their start until the shutdown, **customers will pay $761 million less under the Settlement than**

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[144] *See* D.12-13-014, 2012 Cal. PUC LEXIS 121, *9 (Cal. P.U.C. 2012) (approving a settlement related to a SONGS Unit 2 outage that provided for a disallowance for replacement energy, adjusted by avoided costs on two additional outage days); D.10-07-049, 2010 Cal. PUC LEXIS 305, *42 (Cal. P.U.C. 2010) (approving ORA's proposed disallowance of replacement power in a Palo Verde Unit 3 outage, which assumed that "[r]eplacement cost would be mitigated by actual avoided costs during the outage," but, for various reasons, refusing to adopt ORA's overall methodology and calculations for future proceedings); *see also* D.94-03-039, 53 CPUC 2d 362 (1994) (disallowing replacement power costs resulting from certain outages at Palo Verde and SONGS 1 that resulted from unreasonable mistakes); D.11-10-002, 2011 WL 5010518 (Cal. P.U.C. Oct. 6, 2011) (disallowing replacement power costs after outages at SONGS 2 and Mammoth Pool Unit 2).

[145] *See* D.95-11-063, 62 CPUC 2d 505 (1995) (imposing a disallowance equal to "the cost of replacement power *above the cost of nuclear generation had there been no negligent operations*" (emphasis added)); D.95-05-042, 59 CPUC 2d 779 (1995) (approving settlement of Palo Verde OII, and noting that replacement power costs "exceed nuclear fuel costs"); D.94-11-075, 57 CPUC 2d 525 (Nov. 22, 1994).

[146] D.16-04-006, 2016 WL 1447337, at *13, 17 (Cal. P.U.C. Apr. 7, 2016).

they would have paid had the RSGs not failed and SONGS continued to operate through the NRC license term (to 2022). As a result, any further disallowance would be an unjustified and unlawful windfall to customers.

As explained in Appendix B, SCE performed a similar economic analysis in 2012 and 2013. At that time, however, the going-forward costs of SONGS (if it could be restarted) were projected to be materially lower than forecasted market prices. SCE reasonably pursued restart based on this analysis, and opted to shut down SONGS only when it became clear that any restart of SONGS would be significantly delayed.

But the energy market has changed significantly since 2013. In the past four years, wholesale power prices have been, and are projected to continue to be, far lower than forecast at the time of the SONGS shutdown. The validity of these updated forecasts is confirmed by the actions of other nuclear plant owners throughout the country, who are shuttering their plants because they are more costly to operate than the market.[147] On August 14, 2017, the *Los Angeles Times* quoted Rochelle Becker from A4NR as saying that "nuclear is pretty much dead in this country" due to "the price of natural gas and the availability of renewable and new sources that are continuing to hit the market."[148]

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[147] *See, e.g.*, LA Times (Apr. 17, 2017) *As the Industry Struggles, is it Time to Recognize the Nuclear Show's Over?,* http://www.latimes.com/business/la-fi-nuclear-woes-20170417-story.html; Wall Street Journal (Jan. 9, 2017) *Nuclear Plants Fall Victim to Economic Pressures*, https://www.wsj.com/articles/nuclear-plants-fall-victim-to-economic-pressures-1483957802 ("Utilities are closing U.S. nuclear-power plants at a rapid clip as they face competition from cheaper sources of electricity and political pressure from critics.").

[148] LA Times (Aug. 14, 2017), *Soaring Costs and Cheap Natural Gas Deal More Setbacks to the Nuclear Power Industry*, http://www.latimes.com/business/la-fi-nuclear-energy-setbacks-20170807-story.html.

For example, PG&E has announced that it will shut down its nuclear power plant, Diablo Canyon, at the end of its NRC license in 2025 due to economic and other factors.[149] TURN, ORA, and A4NR all supported the closure of Diablo Canyon, and made statements in that proceeding that support SCE's conclusion that SONGS would not have been economic. TURN stated that "the long-term costs of owning and operating Diablo Canyon are excessive . . . TURN's economic analysis demonstrates that ratepayers would benefit from retiring Diablo Canyon and satisfying customer need with incremental renewable resources."[150] TURN submitted an extensive economic analysis from its expert, which estimates the going-forward costs of operating Diablo Canyon. If the same methodology were applied to SONGS, the estimated costs of continued SONGS operation would be considerably higher than SCE estimated, leading to the conclusion that continuing operation of SONGS after the RSG project is even more uneconomic than SCE has estimated. A4NR similarly stated that the costs of operating Diablo are "extremely high relative to the utility's other energy-supply assets,"[151] and urged Diablo's closure at the earliest possible date.[152] A4NR's position in Diablo is consistent with some of its early statements in the SONGS OII, such as "the economics of existing nuclear plants face some daunting cost trends going forward."[153]

In short, customers were not harmed by the premature retirement of SONGS. Under the Settlement, they are paying significantly lower rates than they would have paid if the RSGs had

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[149] Application of Pacific Gas and Electric Company (U 39 E) for Approval of the Retirement of Diablo Canyon Power Plant, Implementation of the Joint Proposal, and Recovery of Associated Costs through Proposed Ratemaking Mechanisms, at 5-6 (Aug. 11, 2016).

[150] Opening Brief of The Utility Reform Network, A.16-08-006, at 2 (May 26, 2017).

[151] Testimony of Rochelle Becker & John Geesman, at 3 (Jan. 27, 2017)

[152] Opening Brief of the Alliance for Nuclear Responsibility, A.16-08-006, at 4 (May 26, 2017).

[153] Prepared Direct Testimony of Rochelle Becker, Executive Director, Alliance for Nuclear Responsibility, at 6 (Mar. 29, 2013).

operated perfectly. There is thus no basis for any additional adjustment—much less an adjustment that exceeds a small fraction of $365 million. Application of the principle that customers should be "held harmless"[154] leads directly to the Settlement, and no further disallowance. As the Commission has acknowledged, it "must resist the temptation to alter results of a good faith negotiation process unless the public will be harmed by the agreement."[155]

VI. CONCLUSION

The Commission should adopt SCE's primary recommendation and affirm the Settlement without change. In the alternative, the Commission should affirm the Settlement and order a rate adjustment of no more than a fraction of the difference between SCE's and ORA's pre-Settlement litigation positions. In either event, the Commission should close the record and terminate the OII, including denying the pending application for rehearing.

Date: August 15, 2017

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[154] D.93-05-013.

[155] D.93-03-021, 48 CPUC 2d 352 (1993).

APPENDIX A

SUMMARY OF KEY FINDINGS IN ARBITRATION AWARD

(1) <u>MHI was qualified to design the RSGs.</u>

Initially, the majority opinion noted that MHI was one of a select group of American Society of Mechanical Engineers N-Stamp holders worldwide, signifying that it was qualified to design and build boiler and pressure vessels for nuclear jobs.[156] In fact, MHI had "decades of experience in the nuclear steam generator industry," including over 50 years of experience designing and constructing replacement steam generators and other components.[157]

(2) <u>SCE oversaw MHI's design process with a strong and robust quality-control program.</u>

Despite MHI's extensive experience, however, SCE insisted on "performing detailed, intrusive evaluations" of MHI's design work to ensure that MHI was "fully evaluat[ing] the risks" inherent in the RSG design.[158] This included: assigning SCE staff to MHI's facilities in Japan; reviewing MHI's design specifications and parameters at oversight meetings; and using SCE personnel and consultants to review and comment on MHI's design documents, action items, and reports.[159] As the majority opinion acknowledged, the NRC has determined that SCE used a "very strong" quality assurance program to oversee Mitsubishi's design.[160]

(3) <u>Despite SCE's thorough oversight, MHI remained ultimately responsible for the RSG design.</u>

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[156] Arbitration Award ¶ 211.

[157] *Id.* ¶ 226-227.

[158] *Id.* ¶ 228-29.

[159] *Id.* ¶¶ 230 & 254-255.

[160] *Id.* ¶ 469.

The majority opinion found that SCE "made clear" to MHI that SCE's heightened supervision of the design process did not relieve MHI of its ultimate responsibility for the design of the RSGs.[161] To the contrary, these findings demonstrate that SCE reasonably relied on MHI's assurances that its design of the RSGs was safe and reliable. In particular, SCE reasonably relied on MHI's assurances regarding the estimated thermal-hydraulic conditions within the RSGs. SCE repeatedly challenged MHI to justify its calculations of the thermal-hydraulic conditions, including void fraction (a measure of the dryness of steam) and velocity of fluids.[162] MHI investigated these issues and concluded, by multiple paths of analysis, that the design was safe and would provide adequate tube support to mitigate any vibration.[163]

(4) <u>The RSGs contained a design defect.</u>

Despite MHI's assurances, MHI delivered defective RSGs. The majority opinion concluded that MHI's design was defective because it did not have adequate tube support to mitigate the vibration and tube wear caused by adverse thermal-hydraulic conditions.[164] As a result of this defect, MHI was contractually obligated to repair or replace the steam generators with "due diligence and dispatch," and to pay the costs of such efforts.[165] Acknowledging that SCE's own investigation and efforts to resolve the issues with the RSGs were "excellent,"[166] the

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[161] *Id.* ¶ 231.

[162] *Id.* ¶¶ 289, 290, 292, 306.

[163] *Id.* ¶¶ 305-06, 1396.

[164] *Id.* ¶ 1290-91.

[165] *Id.* ¶ 1291.

[166] *Id.* ¶ 557.

arbitration panel concluded that MHI breached its warranty obligations by failing to reimburse SCE for its costs incurred inspecting and attempting to restore the RSGs to service.[167]

Although the panel agreed with the SONGS owners that MHI's defective design caused the RSGs to fail, the panel awarded significantly less damages than the SONGS owners sought. This is primarily the result of a contractual limitation on liability that capped damages at $137 million, plus interest. This limitation on liability was customary in the industry. The SONGS owners argued that the limitation on liability was unenforceable for various reasons, primarily that the contract's limited remedy failed of its essential purpose.[168] The majority opinion rejected these arguments and concluded that any remedy for breach of contract was capped by the limitation on liability. The majority opinion's reasoning was based in part on its finding that MHI's design of the RSGs was reasonable and consistent with industry standards.

(5) <u>The root cause of the tube leak was an unprecedented and first-of-a-kind phenomenon that neither SCE, nor MHI, could have predicted.</u>

Crucially, the majority opinion found that the tube leak was caused by an unprecedented, first-of-a-kind phenomenon: in-plane fluid elastic instability, or in-plane "FEI."[169] According to the panel, all other forms of tube wear that the RSGs experienced were similar to the normal tube wear at other nuclear plants and did not materially reduce the expected life of the RSGs.[170] The

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[167] *Id.* ¶¶ 1688-1689.

[168] *Id.* ¶ 828

[169] *Id.* ¶¶ 1430, 1468-69, 1475.

[170] *Id.* ¶¶1485, 1548.

panel found that neither MHI nor SCE could have, or did, predict that the RSGs would suffer from in-plane FEI.[171]

(6) <u>MHI followed industry standards in designing the RSGs.</u>

The panel found that MHI's failure to analyze in-plane FEI during the design process was reasonable and consistent with industry practice. This was based on the conclusion that MHI's design controlled for a related thermal-hydraulic phenomenon—out-of-plane FEI—and that the nuclear industry then believed that controlling for out-of-plane FEI would address in-plane FEI.[172] The panel further held that the in-plane FEI resulted from a design philosophy, known as the "zero gap" philosophy, which was also industry standard at the time.[173]

The panel rejected the argument that MHI's computer software for modeling thermal-hydraulic conditions—the "FIT-III" software—was to blame for the design defect. Although the panel acknowledged that MHI's FIT-III code included embedded errors, the majority found that the errors did not cause the RSG failures.[174] The majority reasoned that, *even if* MHI had known about the error in its computer code, it either would not have changed the design or would have added tube supports (in the form of anti-vibration bars), which would not alone have prevented the tube leak.[175] This finding was based in part on the panel's skepticism that the thermal-hydraulic condition that FIT-III was designed to estimate—void fraction—was significantly worse at SONGS than at other comparable nuclear plants.[176] The panel found that the void

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[171] *Id.* ¶¶ 1430.

[172] *Id.* ¶¶ 1430, 1468-69, 1475.

[173] *Id.* ¶¶ 2062, 2155.

[174] *Id.* ¶¶ 2681-82.

[175] *Id.* ¶¶ 554, 1142, 1250, 1428, 1439.

[176] *Id.* ¶ 1250.

fraction at SONGS "does exceed that of other plants, [but only] by less than 1%."[177] It was therefore "not evident" to the panel that an accurate FIT-III calculation would have "led to a difference in design."[178]

(7) <u>SCE's decision to shut down SONGS, rather than repair or replace the steam generators, was commercially reasonable.</u>

Finally, the panel held that SCE reasonably decided to shut down SONGS rather than continue to attempt to repair or replace the defective RSGs. After the steam generator failure, MHI proposed plans to repair or replace the RSGs.[179] In the arbitration, the SONGS owners argued that SCE had serious and reasonable concerns regarding the efficacy, safety, and licensability of MHI's proposed repair. SCE had further concerns that the repair, even if it prevented in-plane FEI, left unchanged the underlying thermal-hydraulic conditions and therefore could have led to other problems. This concern had been supported by AREVA, another leading steam generator designer, which independently reviewed MHI's proposed repair.[180] SCE's concern that the NRC review process would be lengthy and uncertain was validated by Ellis Merschoff, a former high-ranking NRC official and prominent industry consultant.[181] SCE also concluded that the time required to design and install new steam generators rendered the "replace" option commercially infeasible.

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[177] *Id.*

[178] *Id.*

[179] *Id.* ¶1790.

[180] *Id.* ¶ 2268.

[181] *Id.* ¶¶ 542, 2268.

The arbitration panel found that, based on technical evidence developed after the shutdown, MHI's proposed repair to the RSGs might have worked.[182] As a matter of contract law, the panel concluded that MHI's proposed repair satisfied its warranty obligations. However, the panel found that SCE acted reasonably in deciding to shut down SONGS rather than continue to pursue the repair, given the lengthy timeline and the regulatory risk associated with MHI's proposal. As the panel noted, MHI's proposed repair would have taken two to three years to implement, including 12 months for the NRC to review the repair,[183] followed by a public hearing that would have added another 17 to 33 months to the approval process.[184] Likewise, the panel affirmed that SCE acted reasonably in not pursuing the "replace" option that MHI proposed, which might have taken five or more years.[185] As the panel acknowledged, the costs of pursuing a multi-year repair or replacement greatly exceeded any benefits of resumed SONGS operation.[186] As a matter of contract interpretation, however, the panel found that SCE—not MHI—bore the commercial risks associated with these delays.[187]

The majority opinion also refutes several imprudence theories that OII parties have asserted against SCE. For example, the panel noted that the contract specified that SCE "intended" to replace the steam generators under 10 CFR 50.59 (without a formal license amendment) and therefore "requested" that the RSGs be as close as possible to the original steam generators in form, fit, and function.[188] The panel found that these specifications were industry

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[182] *Id.* ¶ 1915.

[183] *Id.* ¶ 1977.

[184] *Id.* ¶¶ 1965-66, 1969, 1978, 1985.

[185] *Id.* ¶¶ 1982, 2314.

[186] *Id.* ¶¶ 1982, 1985.

[187] *Id.* ¶ 2406.

[188] Id. ¶¶ 212, 215.

standard.[189] In the course of the design process, MHI told SCE that design changes were unnecessary to reduce predicted thermal-hydraulic conditions and would not have a material impact.[190] There is no evidence that SCE rejected a proposed design change for any reason other than that MHI said it was unnecessary and unhelpful, and specifically no evidence that SCE rejected any design change because of a concern that it would not meet the 10 C.F.R. § 50.59 criteria.[191] There is also no evidence that a license amendment would have resulted in changes that would have prevented in-plane FEI.[192]

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[189] *Id.* ¶¶ 181-82, 186.

[190] *Id.* ¶ 306.

[191] *Id.* ¶¶ 181-82, 186, 1930, 2235, 2285.

[192] *Id.* ¶¶ 181, 1930.

APPENDIX B

UPDATED ECONOMIC ANALYSIS

SCE's Original SONGS Economic Analysis

In 2012-13, SCE analyzed the going-forward costs of SONGS, assuming it could be restarted, as compared to the costs of shutting down SONGS.[193] This analysis showed that the going-forward costs of SONGS were projected to be materially lower than forecasted market prices. Based in part on these projections, SCE pursued restart. The anticipated benefits of restart, however, would be dissipated by delay in restart, as SCE would continue to incur costs pending restart and the plant would have less time to operate until the expiration of its NRC operating license. Accordingly, SCE's analysis showed that the going-forward costs of operating SONGS were lower than the costs of relying on the market, but only if SONGS could be restarted by early 2014. Following a decision of the Atomic Safety Licensing Board in May 2013 regarding the need for a license amendment to restart the less damaged of the SONGS units, SCE concluded that the likelihood that it would be permitted to restart in 2013 appeared small. As a result, SCE concluded that the least-cost alternative at that time was a permanent shutdown of SONGS.[194] The arbitration panel agreed that SCE's shutdown decision was commercially reasonable.[195]

SCE's Updated SONGS Economic Analysis

SCE has updated the economic analysis it performed at the time it decided to shut down

[193] June 2, 2016 Brief at 4.

[194] SCE's analyzes and reasoning were set forth in a paper titled "SCE's Decision to Retire San Onofre Units 2 & 3: Economic Considerations," which was published on November 13, 2013. The paper is available at http://www.songscommunity.com/docs/Economic_Considerations_WhitePaper_Final.pdf

[195] Arbitration Award ¶¶ 1984-85.

SONGS in mid-2013. In the intervening four years, wholesale power prices have been far lower than forecast at the time of the SONGS shutdown, and those low prices are projected to continue. As a result, the costs of replacing SONGS with purchases of power from the market are significantly lower than forecast in 2013. For example, the average price forecasts SCE uses for natural gas, power prices, GHG prices, and resource adequacy prices have declined by 35-40%. As a result, the lost value of SONGS output, as reflected in forecast market prices through 2022, has decreased by more than $3.2 billion since the 2013 forecasts. SCE also refined the projected going-forward cost of operating SONGS, which increased the estimate slightly (~3%). Taken together, these updates indicate that, from the date of the SONGS shutdown to the end of the NRC license, the going-forward costs of SONGS (had the RSGs operated as expected) are approximately $33 million more than the value of lost SONGS output as measured by forecast market prices.[196] In other words, customers would have paid more, in O&M and incremental capital, to operate SONGS from mid-2013 through 2022 than the market value of that power.

To complete the economic analysis, SCE also analyzed the additional costs and benefits associated with SONGS and the Settlement from the date of the leak (January 31, 2012) to the date of the shutdown (June 6, 2013). The following table summarizes these impacts:

[196] These value of lost SONGS output includes both replacement power purchases as well as foregone opportunities to sell excess SONGS output.

Customer Impacts of Loss of SONGS and Existing Settlement (SCE Only, $ in millions)

Value ($ in M)	SCE
Lost Value of SONGS (SCE Share)	$(33)
Replacement Power (Feb '12 – June '13)	$389
Foregone Sales	$251
Transmission Fixes	$163
Less: 2013 O&M Underspend (Jan-May)	($18)
Less: NEIL	($293)
Less: Write-off RSG	($696)
Less: Reduced Return on Base Plant	($524)
Total	**($761)**

Shutdown of SONGS is forecast to save customers $761 million compared to operating SONGS at 100% power.

On the one hand, due to the outage, customers were required to pay for replacement power during this period, did not receive the benefit of the revenues SCE would have earned from selling excess SONGS output, and also were required to pay for transmission system modifications to address the loss of SONGS. These items added about $770 million in costs. On the other hand, under the Settlement, SCE's customers received a credit for the NEIL recovery of $293 million which largely offset those replacement power costs, plus a credit of $18 million for reductions in 2013 O&M expenses. The Settlement also relieves customers of the obligation to pay for the RSGs from the date of the outage ($696 million, including foregone return) and the incremental O&M incurred in 2012 to respond to the outage ($99 million). Finally, under the Settlement, customers pay a much lower rate of return on other SONGS investments than they

would have paid had SONGS operated; the net reduction in rates resulting from this reduced return is $761 million. Netting these amounts, customers are paying $761 million less under the Settlement than they would have paid had SONGS operated through early 2022, based on updated data.