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BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3	I.12-10-013 (Filed October 25, 2012)
And Related Matters.	A.13-01-016 A.13-03-005 A.13-03-013 A.13-03-014

ALLIANCE FOR NUCLEAR RESPONSIBILITY'S OPENING COMMENTS ON PROPOSED DECISION APPROVING SETTLEMENT AGREEMENT AS AMENDED AND RESTATED BY SETTLING PARTIES

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SUMMARY OF RECOMMENDATIONS

The Commission should determine that it cannot make the findings required by Rule 12.1(d) and decline to approve the Amended and Restated Settlement Agreement.

I. INTRODUCTION.

Pursuant to Rule 14.3 of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure, the Alliance for Nuclear Responsibility ("A4NR") respectfully submits its Opening Comments to the "Proposed Decision Approving Settlement Agreement as Amended and Restated by Settling Parties" ("PD") of Administrative Law Judges Melanie M. Darling and Kevin R. Dudney in the Commission's investigation into the extended outages at the San Onofre Nuclear Generating Station ("SONGS"), owned by the Southern California Edison Company ("Edison" or "SCE") and the San Diego Gas and Electric Company ("SDG&E").

As A4NR earlier advised the Commission, "*Terminating its investigation before completing 'review of the full range of post-outage costs'*[1] *would be abdication on a scale unprecedented in Commission history."*[2] Refusing to acknowledge the unprecedented economic significance of the commercial destruction of Southern California's largest electric generation asset, or the resultant threat of grid collapse that preoccupied state government energy agencies for more than two years, the authors of the PD seem exhausted by and bored with I.12-10-013. The PD's headlong rush to this abdication is unexplained – perhaps driven by arbitrary adherence to a deadline imposed by the Settling Parties contrary to the requirements of Rule 12.1(c)[3] – and collides with the evidentiary record, several of the Commission's Rules, and ratepayer protections found in the Cal. Pub. Util. Code.

The PD unfairly chides A4NR (*"The Commission places greater weight than A4NR on the matter of promptly restoring reasonable rates to ratepayers for safe and reliable service."*[4]) and justifies its haste by proclaiming a new-found devotion to *"hundreds of millions of dollars in*

[1] Phase 1 PD (Rev. 1), p. 9, citing OII at p. 8.
[2] A4NR Reply Comments on Proposed Settlement, p. 10.
[3] Rule 12.1(c) provides, *"Settlements should ordinarily not include deadlines for Commission approval; however, in the rare case where delay beyond a certain date would invalidate the basis for the proposal, the timing urgency must be clearly stated and fully justified in the motion."* Settling Parties have yet to serve and file the motion which Rule 12.1(a) requires accompany the amended and restated Settlement Agreement, let alone *"clearly"* state or *"fully"* justify the *"timing urgency"* which enables any single Settling Party to terminate the Settlement Agreement beginning December 23, 2014.
[4] PD, p. 117.

imminent refunds to ratepayers."[5] The depth of the PD's conviction is reinforced with the self-righteous observation, *"A4NR's view does not account for the customer impacts of excessive interim rates and deferred refunds."*[6] But no amount of contrived fervor or new devotion can overcome an evidentiary record that conclusively establishes that there will be no actual *"refunds to ratepayers,"* only an aggregated bookkeeping adjustment applied to SCE's and SDG&E's overspent ERRA accounts. Or that the primary cause of the deficits in the two utilities' ERRA accounts has been the ongoing accumulation of replacement power costs for the inoperable SONGS facility. Or that the primary cause of *"excessive interim rates and deferred refunds"* has been the Commission's refusal for the past 16 months to rule on the June 25, 2013 motion of the Office of Ratepayer Advocates to immediately remove the SONGS revenue requirement from rates in light of the plant's permanent shutdown.[7]

The PD should not expect much ratepayer gratitude for its grossly inadequate response to utility overcollections whose uninterrupted growth the Commission has consistently nurtured throughout this proceeding

II. THE PROCESS RELIED UPON BY THE PD IS LEGALLY UNSOUND AND PREJUDICIAL TO A4NR.

The PD strains to retroactively manipulate the calendar of the rigidly segregated phases of I.12-10-013 in order to address an inescapable violation of Rule 12.1(a)'s limitations on the timing for settlement proposals. As pointed out in A4NR's Opening Comments on the original Proposed Settlement Agreement, and acknowledged by the PD,[8]

> *Rule 12.1 limits the time for settlement proposals to '<u>any time after the first prehearing conference and within 30 days after the last day of hearing.</u>' Broadly bookending the timeframe during which settlement proposals are considered appropriate accomplishes two things: one, it precludes attempts to resolve issues before their broad outlines have been defined at a prehearing conference; two, it ties efforts to resolve issues more closely to the evidence-gathering stage of a proceeding, before Commission*

[5] *Id.* The PD uses this pie-in-the-sky premise at p. 110 to rationalize the abandonment of Phase 3: *"If we were to continue with Phase 3, ratepayers might fare better or worse than proposed, but a delay of any refunds is certain."*
[6] *Id*.
[7] A4NR's July 10, 2013 response urged that the motion be granted, with minor modifications which included a June 7, 2013 effective date.
[8] PD, p. 64.

decisionmakers have invested substantial resources into digesting the record and briefs in order to draft a Proposed Decision.[9]

As emphatically stated in A4NR's original objections to the proposed settlement,

> *The timing limitations Rule 12.1 places on settlement proposals are closely anchored to its restriction on scope: 'Resolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.'* [10]

Rather than acknowledge the Commission's prior self-congratulation about its unsparing phasing of the proceeding in order to promote efficient administration,[11] the PD is dismissive of A4NR's objection: *"We are not persuaded that the Agreement is so far reaching as to exceed the broad scope of the issues included by the five consolidated proceedings ... the Agreement does not require future ERRA proceedings to do anything other than follow the math of the applied credits."*[12] The PD incredulously explains that the Settlement Agreement technically conforms to Rule 12.1(a) if the draconian phasing is ignored: it was filed after the first prehearing conference in the consolidated proceeding, but before the never-scheduled hearing in the all-important Phase 3, up until now used as a disposal receptacle for issues the Commission considered unsuitable for Phase 1, Phase 1A, or Phase 2. This approach would deprive the time limits of Rule 12.1(a) of any purpose whatsoever. What the PD fails to recognize is the degree to which its conclusion prejudices the parties opposed to the Settlement Agreement, who were never allowed the opportunity to contest any of the issues relegated to Phase 3.

Additionally, the PD's unwillingness to enforce the Rule 12.1(a) time limits as applied to Phase 1, Phase 1A, and Phase 2 inappropriately severs the Settlement Agreement from a fresh evidentiary record. Compounding the inherent attenuation from the record which this approach entails, the PD has invited further discrepancies from the evidentiary record by choosing to plunge forward rather than rule upon A4NR's motion seeking the opportunity to

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[9] A4NR Opening Comments o Proposed Settlement, p. 7.
[10] *Id.,* pp. 7 – 8.
[11] *"Among the benefits of this approach are: (i) the building of a chronological record, (ii) pacing for certain information not yet known, and (iii) consistent decisions in future phases."* Phase 1 PD (Rev. 1), p. 10.
[12] PD, p. 64.

comment upon the Amended and Restated Settlement Agreement.[13] Allowing such comments may have prevented some of the more embarrassing divergences of the PD from the evidentiary record denoted below.

III. THE INTERPRETATION OF §451 IS LEGALLY UNSOUND.

The PD relies upon an inaccurate caricature of A4NR's position in order to bizarrely remove any connection between the Cal. Pub. Util. Code's requirement of *"just and reasonable"* rates and a connection with *"used and useful"* facilities to provide electric service. Incorrectly claiming that A4NR opposes *"rate recovery of any and all post-outage expenses,"*[14] the PD fearfully visualizes *"a ratepayer hatchet"*[15] being applied *"to O&M or other costs and projects at the moment a unit goes offline."*[16] This is fanciful. From the very beginning of I.12-10-013, A4NR has acknowledged that outages are an inescapable aspect of providing electric service and do not automatically violate *"used and useful"* principles.[17]

Much worse than wrongly attributing this exaggerated argument to A4NR, the PD resorts to rewriting Cal. Pub. Util. Code §451 in order to vanquish it. Observing that the words *"used and useful"* do not actually appear in §451 and that they are *"a capital-related concept,"*[18] the PD appears to exempt certain categories of utility costs from any required connection to the utility service being provided. The PD mistakenly identifies ancillary elements

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[13] A4NR Motion Requesting Order to Clarify Review Process for New Proposed Settlement Agreement, September 24, 2014.

[14] PD, p. 73. A4NR's Opening Comments on the Proposed Settlement specifically excluded from disallowance "*bonafide decommissioning costs* [that] *can be recovered from the Nuclear Decommissioning Trusts, or ... base O&M costs* [that] *were incurred prior to February 1, 2012"* (A4NR Opening Comments on Proposed Settlement, p. 39) and embraced the Settlement Agreement's recovery of pre-February 1, 2012 SGRP costs except for the Handy-Whitman adjustment.

[15] PD, p. 73.

[16] *Id.*

[17] *"A4NR does not suggest that every forced outage succumbs to this test through rote application of a zero tolerance standard. The Commission certainly has the discretion to distinguish the ordinary equipment outages experienced by even the most prudently managed of utilities. These are properly charged to customers as a foreseeable cost of utility service. There are other outages, however, which the Commission can determine either persist too long or are caused by utility imprudence, which deprive the affected equipment of its 'used and useful' status. These cannot be charged to customers, and financial responsibility for their correction should best be left to shareholders."* A4NR Opening Brief on Scoping Memo Legal Issues, p. 10.

[18] PD, p. 73.

of such service (*"instrumentailities, equipment, and facilities"*[19]) as separate products or commodities in themselves, so long as they are *"necessary to promote the safety, health, comfort and convenience of patrons, employees and the public."*[20] Severing the required connection to the utility service being provided is a novel construction of §451's *"just and reasonable"* requirement, and contrary to California law. "*By paying bills for service, utility customers do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company;* ***rather, customers pay for service, not for the property used to render it."*** [21] (emphasis added)

The PD's rewrite of §451, and the resultant liberation of "*just and reasonable"* from a *"used and useful"* requirement, leads down a rabbit hole. Admitting that *"the CWIP values recited in the Agreement cannot be readily validated based on the record of this proceeding,"* the PD elects to limit its review to the *"policy question"* of the proposed *"structure"* of CWIP recoveries.[22] The PD finds it *"not unjust or unreasonable, per se, for the settlement to provide limited rate recovery* ***on*** *CWIP,"* [23] (emphasis added) but completely ignores that the settlement provides unlimited rate recovery **of** CWIP.[24] Acknowledging that the settlement *"treats recorded O&M expenses as if the plant were operational,"*[25] the PD says *"(t)he allocation of these costs somewhat favor the Utilities, but it was reasonable,* ***for some part of 2012****, to attempt to save the assets."*[26] (emphasis added) Allowing that *"(a)t some point this becomes*

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[19] PD, p. 73.
[20] *Id.*
[21] *Ponderosa Telephone Co. v. Public Utilities Com. (2011) 197 Cal.App.4th 48, 57* citing *Board of Commrs. v. N.Y. Tel. Co. (1926) 271 U.S. 23, 31 - 32*.
[22] PD, p. 93. The PD admits at p. 90 that its "*evaluation of the proposed treatment of CWIP is hindered"* by the limited and inconsistent presentation of CWIP costs in the Settlement Agreement.
[23] PD, p. 74.
[24] The PD at p. 92 mistakenly says A4NR's estimate that $584 million of CWIP has never entered service does not identify record support. Page 6 of A4NR's Reply Comments, specifically cited by the PD, contains the following footnote: *"21. This amount is identified as of December 31, 2013, based on Proposed Settlement, Sections 3.40 and 3.41, and SDG&E-22, Attachment A. The amount represents a growth in CWIP of 60% for Edison and 31% for SDG&E since February 1, 2012, with no estimate for what growth in CWIP has continued to accrue since December 31, 2013. SDG&E's May 20, 2014 response to A4NR DR-05 clarified that its CWIP balance at December 31, 2013, was $129.031 million rather than the $239.886 million identified in A4NR's Opening Comments."* Additionally, the PD at p. 74 misstates A4NR's position on CWIP by simply ignoring its support (described at p. 41 of A4NR' Opening Comments on Proposed Settlement Agreement) for recovery of CWIP for bonafide decommissioning projects.
[25] PD, p. 88.
[26] PD, p. 90.

unreasonable or cost-inefficient,"[27] the PD declares reasonable the settlement's disallowance of $99 million in post-outage inspection and repair costs while completely ignoring the retention of $785 million in 2012 and 2013 base O&M.[28]

IV. THE INTERPRETATION OF §463(a) IS LEGALLY UNSOUND.

The PD arbitrarily narrows its application of Cal. Pub. Util. Code §463(a)'s mandatory disallowance of *"expenses reflecting the direct or indirect costs resulting from any unreasonable error or omission"* to apply only to the SGRP. Without explanation, the PD intones (in bracketed language), *"We do not otherwise opine on the applicability of §463(a) to these proceedings, or to all or portions of non-SGRP costs, e.g., Base Plant."*[29] This continues an approach to §463(a) first manifested in this proceeding in the Assigned Commissioner's and Administrative Law Judge's Ruling on Legal Questions Set Forth in Scoping Memo and Ruling, which declined to discuss §463(a) whatsoever despite arguments made by TURN and A4NR. And it may be indicative of a larger attitude of the Commission, which has never rendered a decision applying or construing §463(a).

Unless the Commission has the authority to effectively repeal a properly enacted statute by simply shunning it, §463(a)'s absolute proscription of *"direct or indirect costs resulting from* ***any*** *unreasonable error or omission"* (emphasis added) obviously runs afoul of the PD's preferred approach to evaluating the Nuclear Regulatory Commission's *"escalated enforcement"* Notice of Violation ("NOV"). In rejecting A4NR's argument that the NOV establishes a breach by SCE of the Commission's *"reasonable manager"* standard, the PD is emphatic that the proper analysis should focus upon an extended videotape rather than a single snapshot: *"SCE's knowledge, when making decisions to incur costs between 2005 and 2009, is still unsettled and cannot be overlooked when evaluating the reasonableness of SCE's SGRP-related decisions."*[30]

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[27] PD, p. 89.
[28] Settlement Agreement, Section 3.43. The Settlement Agreement does not identify the amount of this base O&M which was incurred prior to February 1, 2012.
[29] PD, p. 75.
[30] PD, p. 80.

As explained below, A4NR strongly disputes whether this explication properly frames the Commission's *"reasonable manager"* standard, but it should be beyond dispute that it collides head-on with a statutory tripwire crafted to catch *"**any** unreasonable error or omission."* (emphasis added)

V. THE REWRITE OF RULE 12.1(d)'s 'REASONABLE IN LIGHT OF THE WHOLE RECORD' STANDARD IS LEGALLY UNSOUND AND PREJUDICIAL TO A4NR.

Rather than simply apply the standard articulated in Rule 12.1(d) that the Commission can only approve a settlement which it finds to be *"reasonable in light of the whole record,"* the PD elects to selectively reformulate the requirement in three different combinations of words. As a general rule regarding the *"overall result for ratepayers"*, the PD initially puts forth Reformulated Standard #1, *"within the range of possible outcomes supported by the record as illustrated by the PVRR provided by Settling Parties."*[31] When it comes to approval of the settlement provisions related to O&M and other non-O&M operating expenses, the PD offers Reformulated Standard #2, *"reasonable **and** within the range of possible outcomes based on the record."*[32](emphasis added) Regarding the approval of the settlement provisions related to nuclear fuel inventory, the PD sticks to Reformulated Standard #2,[33] as it does with respect to the settlement provisions for materials and supplies,[34] SGRP costs,[35] and replacement power.[36] But by the time it gets to approval of *"the Agreement as a whole,"* the PD crafts a simpler Reformulated Standard #3: *"within the range of possible outcomes based on the record."*[37]

The hangover from this continuous rewriting of the Rule 12.1(d) standard shows up in Finding of Fact 25, where Reformulated Standard #4 is unleashed: *"within the range of possible outcomes if the consolidated proceedings were to complete Phase 3 addressing the reasonableness of the SGRP expenses."*[38] By the time the PD gets to Conclusion of Law 6,

[31] PD, p. 85.
[32] PD, p. 90.
[33] PD, p. 95.
[34] PD, p. 97.
[35] PD, p. 101.
[36] PD, p. 104.
[37] PD, p. 108.
[38] PD, p. 132, FOF 25.

however, the dizziness has passed and the PD opts for the safe harbor of a conclusory statement purporting to have consistently applied the original standard: *"The Agreement, as modified, meets the requirements of Rule 12.1(d); it is reasonable in light of the whole record, consistent with law, and in the public interest and should be approved."*[39]

But the persistent reframing of the applicable metric robs the Rule 12.1(d) standard of reliable meaning, particularly when it is inflated to *"within the range of possible outcomes"* nonsense. This is a broad-side-of-a-barn measure, and it is difficult to imagine any proposed settlement that would not satisfy it. The PD's unwillingness to consistently apply a record-based reasonableness review to each settlement component, as well as the sum of the parts, without resort to such fog deprives A4NR of any assurance that Rule 12.1(d) remains in effect.

VI. THE TREATMENT OF THE NRC'S 'ESCALATED ENFORCEMENT' NOV IS FACTUALLY INCORRECT AND LEGALLY UNSOUND.

The PD struggles to minimize SCE's violation of NRC design oversight requirements, irrelevantly classifying it as *"a single low to moderate safety violation"*[40] while overlooking the NOV's significance in establishing SCE's position at the head of the chain of causation which destroyed Southern California's primary electric generation asset. Rather than address the NOV's role in expanding SCE's burden of proof, or meeting the regulatory compliance requirement of the Commission's *"reasonable manager"* standard,[41] the PD conflates causation evidence with a straw man argument about imprudence: *"not all violations are equal nor of a severity as to invoke an automatic presumption or conclusion of imprudent management over a five to seven year project."*[42]The PD attempts to shift the focus from a substantive question of who caused the SONGS demise to a procedural inquiry of whether *"the existence of this NOV alone, is legally sufficient to establish SCE's overall imprudent management of the SGRP."*[43]

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[39] PD, p. 133, COL 7. COL 6 similarly relies on the implied rewriting of Rule 12.1(d) in finding the process by which the Commission considered the settlement to be *"consistent with Article 12 of our Rules."*

[40] PD, p. 79.

[41] "*The reasonable and prudent act is not limited to the optimum act, but includes a spectrum of possible acts consistent with the utility system need, the interest of the ratepayers,* ***and the requirements of governmental agencies of competent jurisdiction.***" (emphasis added) D.05-08-037, p. 11, citing D.90-09-088 as *"based on language in D.87-06-021, and quoted with approval in D.98-09-040."*

[42] PD, p. 80.

[43] PD, p. 79.

In doing so, the PD chooses to ignore entirely the admission of SCE's then-president Ron Litzinger at the May 14, 2014 evidentiary hearing on the settlement:

> *But the NRC rules are clear that the licensee is **ultimately responsible**. We acknowledged that, that we were **ultimately responsible** and took that and then the – well, we reserved our rights to dispute other matters in the future with regards to the violation.*
>
> *All we acknowledged was that the licensee is **ultimately responsible**, which for most situations at the NRC will be the finding.*[44] (emphases added)

The PD's dismissive speculation about what a Phase 3 reasonableness review might look like (*"Although we would certainly give the NOV weight, it remains to be seen how much."*[45]) suggests a profound unfamiliarity with just what the NOV contains. *"Absent an NRC finding of seminal or pervasive unreasonable acts, it is highly speculative to assume SCE misconduct would be easily confirmed in Phase 3."*[46] But "*seminal*" **and** *"pervasive"* is precisely what the NRC found:

> *The Mitsubishi FIT-III thermal-hydraulic computer model (FIT-III) output gap velocities were not appropriately modified for triangular pitch designed steam generators. **There were opportunities to identify this error during the design of the replacement steam generators.** Mitsubishi was the vendor selected by Southern California Edison to design and manufacture the replacement steam generators. **On numerous occasions during the design process, Southern California Edison personnel questioned the results from and appropriateness of using FIT-III, but ultimately accepted the design as proposed by Mitsubishi.** Mitsubishi hired consultants with expertise in designing large steam generators, but did not rigorously evaluate all concerns raised by the consultants about use of FIT-III and specific results obtained from that thermal-hydraulic model. As a result, replacement steam generators were installed at San Onofre with a significant design deficiency, resulting in rapid tube wear of a type never before seen in recirculating steam generators.*[47]

[44] Mr. Ron Litzinger (SCE), Transcript, pp. 2715 – 2716. On September 16, 2014, Edison International announced Mr. Litzinger's transfer to a new subsidiary to head up a portfolio of competitive businesses EIX hopes to assemble in emerging sectors of the electric industry.
[45] PD, p. 112.
[46] *Id.*
[47] NRC Confirmatory Action Letter Response Inspection 05000361/2012009 and 05000362/2012009, September 20, 2013, p. 2.

A4NR remains convinced that, as a matter of law, the NOV takes SCE's conduct outside the boundaries of the Commission's *"reasonable manager"* standard. Notwithstanding its disagreement with such a conclusion, the PD retains a duty to accurately describe and properly explore the NOV.

VII. THE TREATMENT OF THE HANDY-WHITMAN INDEX IS FACTUALLY INCORRECT AND LEGALLY UNSOUND.

The PD's sanguine dismissal of the timing limits of Rule 12.1(a) (*"We are not persuaded that the Agreement is so far reaching as to exceed the broad scope of the issues included by the five consolidated proceedings."*[48]) meets its comeuppance with an extra-record stretch to endorse use of the Handy-Whitman index. Contrary to the PD's characterization of Handy-Whitman as *"an appropriate inflation index"*[49] and the assurance that *"(n)o term of the Amended Agreement contravenes ... prior Commission decisions,"*[50] D.05-12-040 expressly deferred selection of a specific index[51] because of a non-existent record[52]and SCE's prepared Handy-Whitman testimony in this proceeding has neither been subject to cross-examination nor even admitted into evidence. The only admitted evidence in the I.12-10-013 record relating to Handy-Whitman is A4NR-23, the minutes of the May 2, 2011 meeting of the San Onofre Board of Review which capture a discussion between SCE and SDG&E executives of a $100 million price swing in SGRP costs depending solely upon the choice of inflation index:

> *Mr. Avery asked what the cost of the project was in today's dollars. Mr. Dietrich explained that if SCE used CPI as an escalation factor the project would be $25M over the $670M target, but if SCE used the Handy-Whitman index, the SGRP would be $75M under the $670M target. Mr. Dietrich said that SCE asked for more specificity from the CPUC on the escalation issue. Mr. Avery responded this was not his recollection, SCE was insistent on being vague during the original filing.*[53]

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[48] PD, p. 71.

[49] PD., p. 130, FOF 12. Without the use of the Handy-Whitman index, the SGRP costs exceed the cap established by D.05-12-040, as adjusted by D.11-05-035. Similarly dependent on Handy-Whitman is the PD's claim at p. 111, *"Absent the shutdown, SCE arguably might have obtained a presumption of reasonableness for the total costs of the SGRP."*

[50] PD., p. 131, FOF 14.

[51] D.05-12-040, OP 13.

[52] D.05-12-040, COL 68.

[53] A4NR-23, p. 3. The original $680 million target was reduced to $670.8 million by D.11-05-035.

With no evidentiary support, the PD nevertheless proclaims, *"The Handy-Whitman Index is an appropriate measure of inflation for utility construction projects, is commonly used for utility projects, and is consistent with our intent in D.05-12-040."*[54] The I.12-10-013 parties have not had the opportunity to examine the components of the Handy-Whitman index, what proportion of its data inputs are obtained from geographic markets that are applicable to SONGS, what use of it is made by other similarly situated utilities, or how applicable it may be to a project like the SGRP during the 2005-12 period in question. One striking point of comparison came from the following exchange in A.12-11-009 (which shared the same Assigned Commissioner as I.12-10-013) with PG&E Senior Vice President and Chief Nuclear Officer Edward Halpin: *Q "...What use does Diablo Canyon make of the Handy-Whitman construction cost index in developing your budgets?" A "I'm not familiar with the Handy-Whitman."*[55]

The only purpose achieved by the PD's Handy-Whitman overreach is to moot A4NR's C.13-02-013 and to gift SCE and SDG&E with $7.231 million, neither of which is appropriate.

VIII. THE TREATMENT OF REPLACEMENT POWER IS FACTUALLY INCORRECT.

The PD's discussion of Replacement Power combines an apparent unawareness of what the Settlement Agreement actually contains with an incoherent prescription for the conduct of future ERRA proceedings. No single aspect of the Settlement Agreement is more directly contradicted by the evidentiary record than the overt elimination of foregone sales revenues from the Replacement Power calculation. Avoidance of just such an omission was a prominent concern of the OII, mentioned in four separate paragraphs, including OP 4.d. and OP 4.g.,[56] and by March 31, 2014 the economic effect of such an omission had aggregated to more than $414.536 million.[57]

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[54] PD, p. 100.
[55] A.12-11-009, Mr. Ed Halpin (PG&E), Transcript, p. 3149.
[56] OII OP 4.d. and OP 4.g., p. 23. Other references are found at p. 13.
[57] A4NR Opening Comments on Proposed Settlement, p. 31. This amount only included SDG&E's foregone sales revenues ($65.529 million) through December 31, 2013. The most recent utility compliance reports filed in I.12-10-013 raise this amount above $447 million -- $377.349 million for SCE through August 31, 2014 and $69.8493 million for SDG&E through June 30, 2014.

The PD acknowledges that the estimates from SCE-56 on which it relies exclude foregone sales,[58] but derives comfort from *"post-settlement testimony"* in which *"SCE indicates that the Settlement intends Foregone Energy Sales and Capacity Payments to be allowed by the Settlement as components of replacement power."*[59] The PD goes on to state that including utility estimates for the foregone amounts – with the disclaimer *"(which the Utilities did not propose to include)"* despite the PD's earlier description of SCE-54 – *"move the total estimates closer to what would have been calculated based on TURN and DRA's preferred methods."*[60] What does all this mean? Are foregone sales included or not? Notwithstanding SCE-54, Section 4.10(d) of the Amended and Restated Settlement Agreement retains the exact wording that it did in the original Proposed Settlement:

> *No future adjustments or disallowances to the Utilities' ERRA accounts shall be made as a result of the non-operation of SONGS.* ***This limitation includes foregone revenues; there will be no future adjustments or disallowances to the Utilities' ERRA accounts as a result of foregone sales of SONGS output..***[61] (emphasis added)

Unhesitantly, the PD confronts this obvious contradiction with absolute gibberish:

> *In adopting ¶4.10 of the Amended Agreement, we note that we approve neither a specific method for calculating replacement power costs nor any specific costs to be recovered from ratepayers. Instead, our adoption of ¶4.10 is merely an agreement that we will not disallow any costs on the basis that they are SONGS replacement power costs.* [62] (emphasis in original)

The limited usefulness of this strategic ambiguity becomes apparent in the PD's approach to whether direct access customers should be charged for replacement power costs through the Power Charge Indifference Adjustment ("PCIA"). *"There are many different types of costs included within the category of replacement power costs,"*[63] the PD intones, and Ordering Paragraph 3.c. provides that direct access customers shall be charged for replacement power costs *"only to the extent that the particular replacement power charge was procured on*

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[58] PD, p. 102.
[59] PD, p. 103, citing SCE-54 at Question 19. According to the latest I.12-10-013 compliance reports, capacity payments would add $47.0393 million to the $447 million foregone sales estimate described in footnote 57.
[60] PD, p. 103.
[61] Settlement Agreement, Section 4.10(d). As the Phase 1 PD memorably summarized the record developed in Phase 1A, *"SCE's argument that foregone sales should not be considered has no merit."* Phase 1 PD (Rev. 1), p. 75.
[62] PD, p. 104.
[63] PD, p. 128.

behalf of system (as opposed to bundled) customers."[64] But that doesn't really comport with the PD's earlier assurance that *"the Agreement does not require future ERRA proceedings to do anything other than follow the math of the applied credits."*[65] Or Conclusion of Law 18's assurance, *"This decision does not constitute approval of, or precedent regarding, any principle or issue in the consolidated proceedings or other proceedings pursuant to Rule 12.5 ..."*[66] Or Ordering Paragraph 1's assertion that the Amended and Restated Settlement resolves all issues except community outreach and education. [67]

IX. THE DESCRIPTION OF THE SETTLEMENT MODIFICATIONS IS FACTUALLY INCORRECT.

The PD's description of what was gained from the amendments to the Settlement Agreement required by the September 5, 2014 Assigned Commissioner and Administrative Law Judges' Ruling is an exercise in hallucination and after-the-fact acquiescence. The PD describes the modification regarding third party recoveries *"from a three tiered lop-sided formula favoring investors"* as *"a substantial improvement."*[68] TURN's legal counsel, Matthew Freedman, was considerably more circumspect in his comment to the Los Angeles Times: *"It's the same bottom line."*[69] Notwithstanding the PD's grandiose genuflecting, *"We appreciate the efforts of the Settling Parties to consider and accept the requested changes which significantly improve the public's interest in this settlement,"*[70] the Settlement Agreement's most prominent endorser declines to embellish: *"It's the same bottom line."*[71]

The PD basks in the afterglow of the September 5, 2014 Ruling, but appears not to notice that its edict that litigation costs be "*not excessive in relation to recovery*"[72] was softened in the Amended and Restated Settlement Agreement to the significantly looser *"not exorbitant*

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[64] PD, p. 136, OP 3.c.
[65] PD, p. 71.
[66] PD, p. 134, COL 18.
[67] PD, p. 135, OP 1.
[68] PD, p. 105. The PD at p. 124 radically misstates A4NR's position regarding ratepayers sharing in third party recoveries , clearly stated at p. 6 of its Reply Comments on Proposed Settlement.
[69] http://www.latimes.com/business/la-fi-puc-san-onofre-20141010-story.html
[70] PD, p. 108.
[71] http://www.latimes.com/business/la-fi-puc-san-onofre-20141010-story.html
[72] PD, p. 122.

in relation to the recovery obtained;"[73] or that the allocation of SCE's company-wide expenses to SONGS will not be subject to any reasonableness review, just a check-the-math validation;[74] or that there will be no required documentation of new capital cost rates for Base Plant;[75] or that the Settling Parties chose to completely ignore the September 5, 2014 Ruling's concerns regarding Settlement Agreement Sections 6.1 and 6.2.[76] The PD promises that this last issue *"is discussed in more detail in §9.5.2,"*[77] but there is no §9.5.2 in either the PD or the Settlement Agreement. Similarly, the PD claims that A4NR's oversight concerns regarding the convoluted fuel inventory sales incentives are mitigated by a non-existent Section 9.5[78]

In light of the above, FOF 20's self-congratulatory assurance that *"(t)he Amended Agreement ensures reasonable Commission oversight and review"*[79] seems to have been written on a different planet; COL 3 fails to provide the necessary carve-out for OP 1; OP 2 ignores the aforementioned confusion regarding replacement power; the retention of Commission *"review and validate the calculations"* authority in OP 3.e. fails to address the formula for allocating SCE's company-wide expenses to SONGS, and unmistakably does not amend the Settlement Agreement. Additionally, the PD's prideful claim of compelling the *"establishment of a mechanism to prompt decrease in GHG during expected life of SONGS and more"*[80] is a self-abasing venture into the theatre of the absurd.

X. THE EVALUATION OF THE SETTLEMENT 'TAKEN AS A WHOLE' IS LEGALLY UNSOUND.

The PD's cavalier finding that the individual, but largely unquantified, components of the Settlement Agreement satisfy Rule 12.1(d)'s tripartite test renders final appraisal of the settlement *"taken as a whole"* anticlimactic. While criticizing A4NR and other parties opposing the settlement for cherry-picking individual pieces and *"mere second guessing the compromises*

[73] Settlement Agreement, Sections 4.11.(g) (ii) and 4.11(i).
[74] PD, p. 122.
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] PD, p. 95. The PD at p. 96 also mistakenly claims A4NR opposes the 5% utility incentive for M&S sales, notwithstanding the contrary declaration in its Phase 2 Opening Brief, p. 26.
[79] PD, p 131, FOF 20.
[80] PD, p. 128.

made by the Settling Parties,"[81] the PD is resolutely oblivious to the fact that this *"mere second guessing"* is precisely the task which Rule 12.1(d) assigns the Commission. Much worse, the PD fails to recognize that its inability or unwillingness to insist upon a rigorous quantification of the settlement's individual components neglects a necessary prerequisite to determining whether the *"compromises made by the Settling Parties"* satisfy the three requirements of Rule 12.1(d) or not. For example, the PD's preening that *"all collection of SGRP-costs would stop and SGRP costs collected in rates after the shutdown would largely be refunded to ratepayers, including the vast majority of post-outage RSG inspection and repair costs"*[82] simply ignores that these amounts are financially dwarfed by inappropriate recoveries of post-outage O&M, CWIP that never entered service, and replacement power costs that do not include foregone sales revenues. In a rational universe, the PD's repeated hectoring that *"(r)atepayers foot the bill for regulatory litigation"*[83] would demand quantification in order to properly evaluate the merit of abandoning further investment in I.12-10-013.

One does not have to be an accomplished cherry-picker to know that valuation of the entire fruit bowl requires some calibrated insight into which pieces are rancid.

XI. CONCLUSION.

Rule 14.3's page limits have forced A4NR to focus upon a subset of the most debilitating of the PD's defects, but enough to establish that the Settlement Agreement cannot be approved under Rule 12.1 and must be rejected.

Respectfully submitted,

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[81] PD, p. 106.
[82] PD, p. 111.
[83] PD, p. 114. Similarly, the PD's *"(w)e tend to agree"* endorsement that the settlement's disallowances are a *"proxy"* for a finding of unreasonable actions by SCE in Phase 3 begs the question of whether the *"proxy"* has been properly valued. Ratepayers are entitled to expect the Commission to bring a modicum of quantitative rigor to this determination.

APPENDIX

REVISED FINDINGS OF FACT

12. Total cost of SGRP was $612.1 million in 2004 dollars (100% share) as calculated by SCE, using ~~an appropriate~~ the Handy-Whitman inflation index to deflate these costs to 2004 dollars. There is no evidence in the record to justify use of the Handy-Whitman inflation index.

13. ~~All~~ Not all issues in this proceeding are encompassed by, and resolved in, the Amended Agreement and decision.

14. ~~No term~~ Several terms of the Amended Agreement ~~contravenes~~ contravene statutory provisions or prior Commission decisions.

15. The Amended Agreement fails to ~~conveys~~ convey to the Commission sufficient information to permit it to discharge its future regulatory obligations with respect to the parties and their interests.

~~16. If the Commission held hearings on Phase 3 issues, there is a wide range of possible evidentiary outcomes.~~

~~18. The Amended Agreement resolves the issues related to costs of the shutdown at SONGS in a way that protects public safety.~~

~~20.~~ 16. The Amended Agreement fails to ~~ensures~~ ensure reasonable Commission oversight and review of documentary support for utility changes to revenue requirement, including for ratepayer share of third party recoveries.

~~21.~~ 17. Although not all provisions ~~favor~~ disfavor ratepayers, the Amended Agreement ~~reasonably~~ unreasonably allocates the various cost categories between shareholders and ratepayers.

~~23. If the Utilities were to prevail on their claims that their actions in relation to incurring SGRP-related costs were reasonable, and rate recovery did not constitute a violation of §451, then one conceivable outcome is that the Commission would order rate recovery of all SGRP investment.~~

~~24. If the parties opposed to the Agreement were to prevail on their claims that SCE was at fault, or shared fault with Mitsubishi, for the failure of the RSGs, then a conceivable outcome is the disallowance of some or all SGRP investment, and as well as disallowance of some post-outage costs.~~

~~25. The provisions of the Amended Agreement are within the range of possible outcomes if the consolidated proceedings were to complete Phase 3 addressing the reasonableness of SGRP expenses.~~

~~26. Adoption of the Amended Agreement renders to Proposed Decision in Phase 1 and 1A moot.~~

REVISED CONCLUSIONS OF LAW

~~3. The Agreement and decision resolve and settle all disputed issues among the parties concerning the issues in the consolidated proceedings.~~

~~4.~~ 3. The decision reasonably requires the utilities to each file an application with the Commission to obtain a reasonableness review of SONGS-related 2014 expenses.

~~5.~~ 4. It is reasonable and in the public interest for the Utilities' shareholders to fund development of a program with the University of California, or a UC-affiliated entity, to identify and apply new technology, methods, and/or processes to current and future generation plants that now or in the future will serve customers in Southern California previously served by SONGS.

~~6.~~ 5. The processes by which the Settling Parties developed the Agreement, submitted it to the Commission, and the Commission considered it, are not consistent with Article 12 of our Rules, ~~as well as~~ nor principles of due process.

~~7.~~ 6. The Agreement, as modified, ~~meets~~ does not meet the requirements of Rule 12.1(d); it is not reasonable in light of the whole record, or consistent with law, ~~and~~ or in the public interest, and ~~should~~ cannot be approved.

~~8. The Commission has made no findings about whether SCE was unreasonable or imprudent during the period of time between submitting its application for approval of the SGRP and the Effective Date of the decision.~~

~~9. The Notice of Violation issued to SCE is not, in and of itself, determinative of the company's overall prudence when managing the project to replace the steam generators (SGRP).~~

~~10. No further reasonableness review of SGRP costs is required, and each Utility may retain all revenues for the SGRP prior to February 1, 2012.~~

~~11. No further reasonableness review of the 2012 costs recorded in SCE's SONGSMA and SDG&E's SONGSBA is required.~~

~~15. Modifications to the Agreement that provide closer Commission scrutiny of the Utilities' post-decision final revenue requirement calculations are in the public interest.~~

~~16. Modifications to the Agreement which increased the portion of third party recoveries to be allocated to ratepayers is in the public interest.~~

~~17. It is reasonable to withdraw the proposed decision for Phases 1 and 1A.~~

~~19.~~ 7. This decision should be effective immediately to provide certainty to the parties~~, permit the utilities to effectuate the terms of the Amended Agreement promptly~~ and to ensure the timely resolution of this investigation and consolidated proceedings.

~~20. Investigation 10-02-003 and consolidated proceedings should remain open so the Commission may undertake consideration of Rule 1.1 violations which appear to have occurred during the course of these proceedings.~~