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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

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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

Summary

Following investigation of the circumstances giving rise to a late-filed notice of ex parte communication by Southern California Edison Company (SCE),[1] I find that SCE, their officers, agents, and/or attorneys have engaged in ten unreported ex parte communications with one or more Commissioners and/or their personal advisors between March 26, 2013 and June 17, 2014. The findings are based on documents and information provided by SCE.

The unreported ex parte communications primarily relate to possible resolution of some cost allocations at issue as a result of the January 31, 2012 shutdown of the San Onofre Nuclear Generating Station (SONGS). SCE's failures to report them (timely or at all), are each a violation of Rule 8.4 of the Commission's Rules of Practice and Procedure (Rules). In this Ruling, I order SCE to file notices of these ex parte communications. Furthermore, I order SCE to show cause why it should not be sanctioned by the Commission for these violations to the maximum extent authorized.

Additionally, SCE is ordered to show cause why it should not also be found to have twice violated Rule 1.1 and be sanctioned for said violations. The proposed Rule 1.1 violations involve statements to the Commission by two SCE

[1] On February 9, 2015, SCE filed notice of ex parte communication which purportedly occurred on or about March 26, 2013.

executives which I find may reasonably be viewed as misleading the Commission.

Furthermore, this Ruling imposes a ban on all parties and interested persons from making any individual ex parte communications, as defined by Rule 8.3(c)(2), regarding this Ruling, including consideration of the Rule 1.1 violations by SCE and whether sanctions should be imposed for all violations of Rules 8.4 and 1.1. This ruling does not affect all-party meetings properly noticed pursuant to Rule 8.3(c)(1) or written ex parte communications where the written materials are timely served pursuant to Rule 8.3(c)(3).

This Ruling also does not affect communications by parties and interested persons with decisionmakers[2] or Commissioners' advisors about other pending matters in these proceedings.

All other pending requests for disclosures by SCE, discovery, or imposition of particular sanctions requested by parties are hereby denied.

1. Background

The Commission issued an Order Instituting Investigation (OII) on October 25, 2012, commencing an investigation into the unexpected shutdown of the San Onofre Nuclear Generating Station (SONGS) units on January 31, 2012. The OII was subsequently consolidated with other SONGS-related cost proceedings. On April 3, 2014, SCE, San Diego Gas & Electric Company (SDG&E), Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), Friends of the Earth, and Coalition of California Utility Employees,

[2] Rule 8.1(b) defines "decisionmakers" as any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge (ALJ), or the Law and Motion Administrative Law Judge. These ex parte prohibitions also apply to communications with Commissioners' personal advisors per Rule 8.2.

(collectively "Settling Parties") filed and served a Joint Motion for Adoption of Settlement Agreement which purported to resolve all issues for the proceedings.

In Decision (D.) 14-11-040, the Commission approved an amended settlement agreement which provided resolution of the disputed cost allocation/rate recovery issues related to the premature SONGS shut down.

The primary catalyst for review of Southern California Edison Company's (SCE) alleged unreported communications was SCE's very late-filed, post-decision disclosure of one or more meetings between former Commission President Michael Peevey and SCE's then- Executive Vice President of External Relations, Stephen Pickett, on or about March 26, 2013. On February 9, 2015, SCE late-filed a notice disclosing the communications between President Peevey and Mr. Pickett at the Warsaw Hotel in Poland (Poland meeting). SCE claimed that President Peevey initiated the meeting for an update on restart efforts at SONGS, and also initiated communication with Mr. Pickett about a "framework for possible resolution" of the SONGS OII.[3]

In the Notice, SCE stated that at the time, it did not believe that an ex parte notice was required pursuant to Rule 8.4, because (1) the status of SCE's efforts to obtain approval from the U.S. Nuclear Regulatory Agency (NRC) to restart Unit 2 was outside the scope of the OII; and (2) the substantive communication on a framework for a possible resolution was "made by President Peevey, not Mr. Pickett." However, SCE eventually decided to late-file the notice because Mr. Pickett had recently provided further information about the meeting, and now stated he "may have crossed into a substantive communication."

[3] Four other SONGS cost proceedings were consolidated with the initial Investigation (I.) 12-10-013 (collectively, SONGS OII).

During the meeting, SCE states a set of possible terms provided by President Peevey was recorded by Mr. Pickett in notes (Notes) concerning how most costs might be allocated in a settlement if SONGS were to permanently shut down. The Notes came to light in April 2015 when they were filed in connection with litigation in federal court initiated by a non-settling party. On April 13, 2015, SCE filed a Supplement to its Late Notice to include a copy of the Notes.

Alliance for Nuclear Responsibility (A4NR) initially filed a motion for investigation and sanctions related to SCE's alleged violation of Rules 8.4 and 1.1 related to the unreported Poland Meeting. In response to the Administrative law Judge's (ALJ) Ruling directing SCE to provide additional information, SCE submitted to the Commission hundreds of pages of supplemental (primarily e-mail) information from SCE regarding the Poland meeting, and communications which also referenced or were themselves communications with decisionmakers, particularly related to the proposed, then modified, settlement adopted in November 2014.[4] After SCE disclosed internal e-mails and documents, A4NR amended its motion on May 6, 2015 to seek sanctions for more than 70 communications which A4NR characterized as unreported and violations of Rule 8.4 and Rule 1.1.

The primary request of A4NR is for the Commission to issue an Order to Show Cause why SCE should not be sanctioned for violations of Rules 8.4 and 1.1. A4NR recommends penalties in excess of $38 million for more than 70 alleged reporting violations.

[4] See, SCE's Response to ALJs' Ruling Directing SCE to Provide Additional Information (April 14, 2015) and ALJ's Ruling Requesting Additional Information (June 26, 2015).

On May 7, 2015, the ORA asked the Commission to impose a ban on all ex parte communications between SCE and Commission decisionmakers, except in written form simultaneously shared with all other parties or in on-the-record proceedings. TURN supports the motion and SCE opposes it.

2. A4NR's Motion For Sanctions, Rulings, and the Amended Motion

2.1. A4NR's Motion For Sanctions Against SCE

On February 10, 2015, A4NR filed a motion seeking investigation of "the extent of sanctions to be ordered" against SCE for violation of Rules 1.1 and 8.4.[5] Article 8 of the Commission's Rules governs communications by parties to proceedings with decisionmakers and their advisors. Rule 8.4 sets forth the Commission's requirements for reporting "ex parte communications," as defined in Rule 8.1 (c). Rule 1.1 is the Commission's ethics rule, and requires persons who appear, testify, or transact business with the Commission "…to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges."

A4NR argued SCE's nearly two-year delay in reporting the March 2013 Poland meeting was prejudicial to A4NR and all other parties who it argued would have been entitled to equal time pursuant to Rule 8.3(c)(2). A4NR claimed additional support for its motion after SCE supplemented its filing to add a copy of the Notes.[6] Mr. Pickett admits the Notes are primarily in his

[5] D.14-11-040 at 141, Ordering Paragraph 7 (The proceedings remained open for consideration and potential prosecution of possible Rule 1.1 violations based on conduct of parties and/or their representatives during the course of these proceedings).

[6] SCE claims it first obtained the notes on April 10, 2015 from a CPUC distribution to the OII Service List, after they were disclosed and filed in a related U.S. District Court Proceeding.

handwriting, and identify both cost categories to be resolved and potential allocations between ratepayers and shareholders if SONGS were not to permanently shut down.[7] Other writing on the Notes appears to be from President Peevey and addresses issues of employee severance costs, and SCE's potential recovery from insurance claims and from Mitsubishi Heavy Industries (MHI), which designed, manufactured, and sold SCE the Replacement Steam Generators (RSGs).[8]

2.2. Supplemental Information From SCE pursuant to ALJ Rulings

The ALJs issued two separate rulings directing SCE to provide additional and clarifying information about communications between SCE executives and Commission decisionmakers related to settlement of the OII, occurring near to or after the date of the Poland meeting.[9] SCE's responsive documents to both ALJ Rulings were timely e-filed and are currently available to the public through the Commission's website, as well as SCE's website.[10]

The first ALJ Ruling, issued on April 14, 2015, directed SCE to produce information and documents, including written communications and documents pertaining to oral communications involving possible settlement of the consolidated OII proceedings that occurred during the period of March 2013 (when the Poland meeting took place) through November 2014 (after adoption of

[7] SCE Response to first ALJ Ruling, Appendix F (Pickett Declaration) at 2 (¶¶11, 13).

[8] SCE Supplement to Late-Filed Notice at Ex A-1, A-2.

[9] ALJ Kevin Dudney was reassigned from the OII on June 7, 2015.

[10] http://www3.sce.com/law/cpucproceedings.nsf/vwSearchProceedings?SearchView&Query=I.12-10-013&SearchMax=1000&Key1=1&Key2=25.

the final decision approving a settlement). SCE was also directed to file notices, if required, of any undisclosed ex parte communication identified.

SCE timely filed a Response with supplemental information, including an assertion that none of the communications identified constituted a reportable ex parte communication. The Response included:

- a narrative description of Mr. Pickett's and Mr. Litzinger's "recollections" about the Poland meeting;
- 28 documents, plus attachments, pertaining to communications between SCE and CPUC decisionmakers about potential settlement of the SONGS OII, occurring between March 1, 2013 through November 30, 2014. There are approximately 250 pages of e-mails, letters from local public officials in support of awarding UCLA research funds, and documents from previous Commission-approved settlements (i.e., the closure of SONGS Unit 1 in 1992, and the 2001 "Energy Crisis");[11]
- SCE also provided a summary of 33 communications between SCE and CPUC decisionmakers occurring between October 25, 2012[12] and November 30, 2014, and 22 pages of e-mails, press releases, letters to the editor, and letters from members of the U.S. Congress to federal officials requesting intervention with the Japanese government to bring MHI to the negotiating table;[13]
- a discussion of differences between the cost allocations in the Notes and what was included in the amended settlement adopted by the Commission;

[11] SCE's Response to first ALJ Ruling, Appendix D at #00006 - #00185 [SONGS 1 Settlement in Investigation 89-07-004 et al.; Energy Crisis Settlement Agreement in SCE v. Loreta Lynch, et al., Case 00-12056-RSWL (District Court for the Central District of California)].

[12] SCE's disclosures timed back to October 25, 2012 coincide with the date the SONGS Investigation was initiated, and exceed the disclosure requested by the ALJ Ruling.

[13] SCE's Reply to first ALJ Ruling, Appendix C.

- Declarations by Mr. Pickett and Mr. Ron Litzinger, President of SCE from January 2011 through September 2014;[14] and
- a privilege log describing 52 documents (some are later versions of same document) that are responsive but withheld by SCE based on privilege.[15]

The second ALJ Ruling was issued on June 26, 2015, and directed SCE to provide additional information to explain or clarify some of its responses to the first ruling. In particular, SCE was asked specific questions about content and participation in thirteen communications identified by SCE and which SCE determined that the communication was not reportable for one reason or another. Additionally, the ruling asked SCE to provide additional information to support claims of attorney-client privilege for five responsive communications withheld by SCE and placed on a "privilege log" as exempt from production.

SCE timely responded and produced 43 additional documents, not previously produced because they "do not pertain to oral or written communications about potential settlement of the SONGS OII" or "report, discuss, refer to, or otherwise contain a description of oral or written communications about settlement…." Therefore, SCE claims the documents were not responsive to the first ALJ Ruling.

- Appendix A (70 pages) – 41 documents including a 17-page power point presentation for an April 5, 2013 meeting with Mr. Pickett and President Peevey regarding Los Angeles Basin Reliability issues; and
- Appendix B (8 pages) – Two documents related to the disclosure by U.S. Senator Boxer of two letters from SCE to MHI (dated in

[14] *Id.*, Appendices F and G, respectively.

[15] *Id.* Appendix E.

2004 and 2005) related to the design of the RSGs, and Senator Boxer's allegations that SCE misled the NRC about RSG design changes and the NRC failed to diligently review SCE's disclosures and filings related to the RSGs.

2.3. A4NR's Amended Motion for Sanctions

After review of the supplemental information provided by SCE, A4NR filed an Amended Motion[16] to expand its arguments for sanctions. A4NR contends that almost every identified communication during which an SCE employee and a CPUC decisionmaker or their advisors spoke, is reportable under the Commission's ex parte rules.

A4NR's allegations are based on criticisms of SCE's responses, including claims that SCE misinterprets the reporting rules, did not fully review its records, and doesn't support its claims of privilege. In addition, A4NR asserts that the disclosures support a finding that Mr. Pickett and Litzinger gave false or misleading statements to the Commission.

According to A4NR's analysis, SCE's Response provides the basis to find two violations of Rule 1.1, seventy-two violations of Rule 8.4, and a single violation of Pub. Util. Code § 2114.[17] The resulting penalty, according to A4NR, should be $38.2 million, based on categorizing all violations as "on-going" and applying the maximum penalty allowed.

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[16] A4NR's Amended Motion for Sanctions (May 6, 2015.

[17] Unless otherwise indicated, all future references to "Section" or "§" mean the Public Utilities Code. Section 2114 states in relevant part, "Any public utility on whose behalf any agent or officer thereof who, having taken an oath that he will testify, declare,…truly before the commission, willfully and contrary to such oath states or submits as true, any material matter which he knows to be false,….is guilty of a felony and shall be punished by a fine not to exceed five hundred thousand dollars ($500,000)."

3. Parties' Positions

3.1. SCE's Response to Amended Motion

SCE defends its process for collecting and sifting documents to identify those responsive to the ALJ's Ruling. SCE specifically addresses A4NR's criticism by stating that SCE obtained confirmation from each of the individuals whose documents were collected that they were unaware of any other responsive documents or communications.[18]

Furthermore, SCE states it construed and applied the ex parte rules "in a reasonable manner, in light of the language and intent of the rules, as well as the practice of the parties who regularly appear before the Commission."[19] SCE relies on a plain reading of the Rules which focuses on reporting communications from the regulated entity or party to the decisionmaker, and expressly excludes content from a decisionmaker to the utility or party.

SCE asks the Commission to deny A4NR's Amended Motion on the grounds that none of the communications identified by SCE in the supplemental information are reportable pursuant to the Commission's Rules. SCE's claimed non-reportable categories are as follows:

- Communications from a decisionmaker to a party where the party does not respond in a substantive way;
- "Procedural" communications including schedule, location, format of hearings, as well as other nonsubstantive information;
- Notice of facts not at issue in OII (e.g., SCE announcement on June 7, 2013 that it would permanently shut down the SONGS nuclear facility; and

[18] SCE Response to Amended Motion at 2.

[19] *Id.* at 3.

- Communications related to SONGS or another proceeding but outside the scope of the SONGS OII; this includes substantive information about the status of restart of Unit 2 at the U.S. NRC.

SCE provided a table which identified the basis for exclusion of each communication identified in Appendix C – which identified communications about either the Poland meeting or later reference to settlement of the OII.[20]

3.2. A4NR's Reply

A4NR claims SCE ignores the statutory ban in § 1701.3(c) on unreported ex parte communications and misinterprets the Commission's ex parte rules to create previously unknown exceptions to reporting. A4NR also argues that SCE's interpretations are contrary to public policy that ex parte limits are fundamental to the fairness of Commission hearings and decisions.[21]

According to A4NR, that fundamental fairness is necessary (1) to protect rights of parties to know what their counterparts are saying to decisionmakers; and (2) to assure the Commission's interest in receiving information which is fully vetted for accuracy.

A4NR takes a narrow view of § 1701.3(c) to argue that essentially most communications which include a party and a Commissioner are prohibited unless timely reported to all parties. According to A4NR, the statute was intended to bar all oral ex parte communications unless there is an opportunity for equal contact by all parties regardless of who initiated the conversation.

We examine the parties' positions regarding SCE's different categories of exclusion below.

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[20] *Id.* at 15-16.

[21] A4NR Reply at 2.

3.3. "One-way" Communications

According to SCE, the ex parte rules are clear as to so-called "one-way" communications from a decisionmaker (e.g.,"listening mode" by the party) which are not reportable "consistent with the language of the rule and established practices."[22] SCE claims this interpretation is consistent with Rule 8.4 which requires the interested person's report of his/her communication to include certain basic information about time, date, participants, etc., and a description of the interested person's, but not the decisionmaker's (or advisor's) communication and its content (emphasis added).

Therefore, SCE argues, parties are prohibited from disclosing in an ex parte notice either the fact that a decisionmaker made a substantive communication, or the content of the communication. SCE underscores its position by reference to an occasion when Commissioner Florio told SCE that no notice was required for a one-way communication.[23] In sum, SCE's view is that no ex parte notice can be required for a "one-way" communication since neither the topic nor content of a decisionmaker's communication can be legally reported pursuant to § 1701.1(c)(4)(C)(iii) and Rule 8.4(c)[24]; therefore, no actual information useful to other parties can be provided.

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[22] SCE Reply to Amended Motion at 5.

[23] SCE's Response to first ALJ Ruling at 30 (¶24), Appendix at #00022. (On May 7, 2014, SCE's Mr. Litzinger asked Commissioner Florio whether a May 2, 2014 meeting between SCE executives, President Peevey, and Commissioner Florio, wherein they discussed the preferred resource pilot, should be reported as an ex parte communication based on statements by President Peevey about a provision of the proposed SONGS settlement. Commissioner Florio stated he did not think a notice was required for one-way comments by a Commissioner to which the utility did not reply).

[24] Both §1701.1(c)(4)(C)(iii) and Rule 8.4(c) require reporting of a description of the party's or interested person's, but not the decisionmaker's communication and its content.

On the other hand, A4NR observes that neither § 1701.1(c)(4) nor Article 8 of the Commission's Rules expressly contain an exclusion for "one-way" communications. Nonetheless, A4NR seems to concede such communications might not be legally reportable, but only to the extent the SCE individual was nearly silent.[25] In regards to the communications SCE identified as one-way, A4NR construes the supplemental information SCE provided to the Commission as evidence that all, including the Poland meeting, were actually two-way communications and thus reportable.

As a policy matter, A4NR is suspicious of SCE's numerous "one-way" exclusions which it contends have been expanded by SCE into a "broad umbrella of exemption from disclosure."[26] A4NR points to examples where SCE executives respond with phrases like, "I understand," or "I'll get back to you" and SCE determined that no "substantive" communication occurred. A4NR is concerned that SCE's liberal use of this exemption may result in evasion of reporting requirements with the determination of "one-way" solely in the hand of the utility.

SCE contends this analysis is inconsistent with the language of the Rules. Non-substantive responses (e.g., "I understand") mean there was not a communication "between" the party and decisionmaker; the party has not in a "substantive" communication expressed the party's own opinion, and the communication is consequently not reportable since no information was received by a decisionmaker from a party which needs to be vetted by other parties.[27]

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[25] Amended Motion at 7.

[26] A4NR Reply to SCE Response at 11-12.

[27] SCE Response to Amended Motion at 6.

Thus, SCE views this type of communication as neither reportable nor creating due process concerns by other parties.

3.4. Communications Regarding Restart and Shutdown

SCE groups its communications in 2013 related to restart and eventual shutdown of SONGS as not within the scope of the OII and, therefore, neither substantive nor reportable. SCE characterizes the communications as providing information to decisionmakers on the status of SCE's efforts to persuade the NRC to permit restart of Unit 2, and providing notice to Commissioners of the fact of the permanent shutdown of SONGS. SCE views the communications as objective, non-argumentative, and important information to Commissioners who are tasked with broad oversight of critical electric utility infrastructure in the state, including ongoing reliability of electric service.

A4NR disagrees and argues that issues related to the restart of Unit 2 and SCE's eventual decision to permanently shut down SONGS are within the broad scope of issues initially identified in the OII.[28] Therefore, A4NR asserts all communications on these subjects were reportable ex parte communications.

3.4.1. Scope of the Proceeding

The applicable scope of the SONGS OII proceedings by which to measure whether a communication involves a substantive topic is disputed. A4NR favors the "expansive" Preliminary Scoping language of the initial OII, adopted by the full Commission. A4NR identified 23 of the "unreported ex parte

[28] The OII states, in part, "This investigation will consider the causes of the outages, the utilities' responses, the future of the SONGS units, and the resulting effects on the provision of safe and reliable electric service at just and reasonable rates."

communications" as related to restart and shutdown of SONGS, and concludes they are all reportable as issues within the Preliminary Scope.[29]

SCE instead references the more specific Phase 1 Scoping Memo[30] issued in January 2013. SCE's view is that a communication about an issue that "might" become an issue in a later phase, but not delineated in the Phase 1 Scoping Memo, is not reportable because it cannot reasonably be known to be substantive at the time.

At that time of the 2013 Poland meeting, SCE states it concluded that communications about the status of restart were not part of Phase 1 which was to review SCE's 2012 actual recorded costs (deferred from SCE's 2012 General Rate Case) and costs of power purchased in 2012 to replace lost generation from SONGS.[31] More specifically, Phase 1 would examine "the nature and effects of the steam generator failures in order to assess the reasonableness of SCE's consequential actions and expenditures."[32] SCE emphasizes that Mr. Pickett did not discuss the costs of restart or the reasonableness of the costs, only the interaction of SCE and the NRC.

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[29] The Preliminary Scope states, "[t]he general scope of this OII is to review the effect on safe and reliable service at just and reasonable rates on and after January 1, 2012 of the outages at SONGS Units 2 and 3." The specified issues include "the cost effectiveness of various options for repair or replacement of one or both RSGs."

[30] Scoping Memo and Ruling of Assigned Commissioner and ALJ Darling Determining the Scope, Schedule, and Need for Hearing in Phase 1 (First Scoping Memo) (January 28, 2013).

[31] Application (A.) 13-01-016 is the consolidated proceeding which addresses review of 2012 SONGS-related recorded expenses.

[32] The Phase 1 Scoping Memo provided some broad statements about future phases, including that Phase 2 would focus on whether reductions to rate base or revenue requirement were warranted due to the outages pursuant to § 455.5--the basis for launching the OII. Phase 3 was expected to address the cause of damage to the steam generators, and whether the Steam Generator Replacement Project (SGRP) expenses were reasonable, including review of repair or replacement plans.

The Phase 1 Scoping Memo, *inter alia*, stated the OII would be divided into phases, each with its own Scoping Memo, in part because some facts were not yet known and the OII was evolving. The scope for subsequent phases was described broadly, pending commencement of future phases, but generally consistent with the Preliminary Scope in the OII. Nonetheless, SCE claims that the NRC's handling of the restart request is also not expressly within the broader Preliminary Scope in the OII. SCE supports its analysis by reference to statements and rulings by the assigned Commissioner and ALJ that confirmed the Commission would not make determinations on NRC-jurisdictional issues which might affect the Commission's analysis in the SONGS OII.[33]

SCE further explains that it provided the Commission with information about the status of restart and shutdown for reasons unrelated to the OII. For example, the loss of generation from SONGS was substantial and initially of unknown duration. The Commission was working with various agencies and stakeholders on a gubernatorial task force to mitigate related reliability risks.[34] Permanent shutdown was a salient fact related to these reliability concerns, asserts SCE.

3.5. Procedural and "Non-substantive" Questions

A key element of the definition of "ex parte communication" in § 1701.1(c)(4) is that the communication concern "substantive, but not procedural, issues…" A4NR views the "procedural" exclusion as limited to the identified "procedural" examples in Rule 8.1 (c) (i.e., schedule, location, or

[33] SCE Response to A4NR Motion for Sanctions at 6.

[34] *Id.* at 6; SCE's Response to A4NR Amended Motion at 13.

format for hearings, filing dates, identity of parties.) Rule 8.1(c) also identifies "other such nonsubstantive information" as "procedural."[35] When A4NR applies the narrower procedural exclusion, it finds that only four of SCE's eight procedural communications in Appendix C qualify as "procedural."

Alternatively, SCE argues all of its determinations that communications were "procedural," were reasonable and appropriate. Included in "procedural" communications, according to SCE, are those related to the timing and schedule of events, including possible ways "to expedite the OII," "sequence it relative to bargaining on severance," or about the ex parte rules themselves.[36]

The quantity of SCE's use of the term "non-substantive," 45 times, is troubling to A4NR because included are the following communications to CPUC decisionmakers:[37]

- statement by EIX's General Counsel to President Peevey that "SCE was doing its best to navigate a path to be both safe and cost-effective;"
- SCE executives' telephone calls to Commissioners, and President Peevey's Chief of Staff, to inform them SCE will submit a license amendment request to NRC;
- an e-mail from EIX and SCE executives to all Commissioners that included the text of a letter to the editor of the Wall Street Journal asserting an intention to get online by summer;

[35] Rule 8.1(c) adds to the statutory language the following, "Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications."

[36] SCE's Response to Amended Motion at 14.

[37] A4NR Reply to SCE Response at 9.

- e-mail from SCE executive to all Commissioners about an upcoming press release regarding disclosure by U.S. Senator Boxer of 2004 and 2005 letters to MHI about the RSG design;
- SCE executive telephones all Commissioners to notify them SCE would be publishing a full page ad in the Los Angeles Times newspaper expressing its views on cost recovery after shutdown.
- SCE executives telephone all Commissioners to notify them that SCE has decided to permanently shut down SONGS.

4. Applicable Law

4.1. Elements of an Impermissible Ex Parte Communication

These consolidated proceedings are categorized as ratesetting. Pursuant to Section 1701.1(c)(4) and Rule 8.1(c), an ex parte communication means any written or oral communication between a decisionmaker and a person with an interest in a matter before the Commission regarding a substantive, but not procedural, issue that does not occur in a public hearing, workshop, other public setting, or on the record of the formal proceeding. Further, Section 1701.3(c) and Rule 8.3(c) prohibit ex parte communications in a ratesetting proceeding except subject to certain restrictions and reporting requirements.[38]

The Commission's Rules articulate the statute's applicable restrictions and reporting requirements for ratesetting proceedings.[39] Rule 8.3(c) prescribes different treatment for the three types of ex parte communications:

[38] Rule 8.3(d) provides that in proceedings where it has been determined no hearings are necessary, ex parte communications are permitted without restrictions or reporting.

[39] Rule 8.3 prohibits all ex parte communications in adjudicatory proceedings, and allows all ex parte communications without restriction in quasi-legislative proceedings, neither of which are at issue here.

- All party meetings: oral ex parte meetings allowed with a Commissioner at any time if Commissioner invites all parties to attend, and gives notice three days or more before the meeting;
- Individual oral communications: if a decisionmaker grants an ex parte communication to any individual person, all other parties are granted an individual meeting of a substantially equal period of time with the decisionmaker. The interested person requesting the individual meeting shall notify parties of the scheduled meeting at least three days before the meeting; and
- Written ex parte communications: are permitted anytime provided the interested person making the communication serves copies of the communication on all parties on the same day.

Rule 8.4 provides that ex parte communications subject to reporting requirements "shall be reported by the interested person, regardless of whether the communication was initiated by the interested person." Such notice must be filed and served on all parties within three working days of the communication and include:

- Date, time, and location of the communication, and whether it was oral, written or a combination;
- The identities of each decisionmaker (or Commissioner's advisor) involved, the person initiating the communication, and any persons present during the communication; and
- A description of the interested persons, but not the decisionmaker's (or advisor's) communication and its content, and a copy of any written, audiovisual, or other material used during the communication.

The restrictions regarding advance notice and equal time requirements do not apply to oral communications with Commissioners' advisors

4.2. Purpose of Ex Parte Restrictions at CPUC

The Commission has found that improper ex parte communications by parties and interested persons can taint the regulatory process by improperly influencing an individual Commissioner or by influencing a Commissioner without affording other parties notice and opportunity to do the same.[40]

The Commission adopted formal ex parte rules in 1991 and, at that time, observed the Rules represented "a realistic balancing of competing goals of ensuring that the Commission has adequate information to discharge its decisionmaking obligations and that the due process rights of parties are maintained."[41]

> The rule must be effective in ensuring that no party has unfair access to decisionmakers; only such a rule can promote both the reality and appearance of due process, as well as public confidence in our decisionmaking process. However, in so doing, it must not impede our ability to obtain critical input necessary to fulfill our obligation to act affirmatively in the public interest; our role is not merely to respond passively to the issues presented by parties in our proceedings. The public interest is not served if the Commission is deprived of the knowledge and expertise it needs to function effectively.[42]

In essence, the ex parte rules stand for fairness, and are meant to ensure that all interested sides will be heard on an issue to be decided by the Commission. It extends to communication of "information in which counsel knows or should know the opponents would be interested."[43]

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[40] D.14-11-041 at 8, 2014 Cal. PUC LEXIS 557.

[41] *Re Commission's Rules of Practice and Procedure* (July 31, 1991), 41 CPUC 2d 162, 170.

[42] *Ibid.*

[43] *Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, (1997) 55 Cal. App. 4th 1305, 1317.

The California Court of Appeal has framed the policy of ex parte restrictions as necessary to avoid the use of evidence received outside the record and to preserve "the due process requirement of an unbiased tribunal and the related public interest in avoiding the appearance of bias on the part of public decisionmakers."[44] This policy is reflected in Rule 8.3(k), which states, "The Commission shall render its decision based on the evidence of record. Ex parte communications, and any notice filed pursuant to Rule 8.4 are not a part of the record of the proceeding."

5. Discussion

The Commission's treatment of "ex parte communications" is governed by current statutory authority, implemented through our adopted Rules. Although our Rules and statutes regulate contact between interested persons and decisionmakers, the courts and the Commission have recognized that not all such communications should be barred, nor do all such communications diminish fairness to the process or other parties.

For example, Commissioners need not be cloistered to be unbiased in their decisionmaking. The California Supreme Court has stated that decisionmakers at administrative agencies are accorded a presumption of impartiality.[45] The Commission has further observed that "while courts recognize that parties have a right to an impartial decisionmaker, that does not mean the decisionmaker

[44] D.07-07-020 at 22-23 [citation omitted].
[45] D.09-08-028, mimeo at 51, citing Morongo Band of Mission Indians v. State Water Resources Control Board, 45 Cal. 4th 731 (2009); 2009 Cal. LEXIS 1009, *1146-1147 ("Except where they have a financial interest in the outcome, adjudicators are presumed to be impartial.").

must be uninformed or hold no policy views."[46] Thus, a Commissioner's study tour of a generation facility is not reportable pursuant to Rule 8.4 as long as the utility makes no attempt to discuss substantive matters at issue in open proceedings during the course of the tour and its planning.

Furthermore, the Commission has previously acknowledged that some appropriate communications will occur with industry representatives because the agency is charged with important and constant oversight duties, (e.g., investigation and enforcement, reliability-of-service, cost control, and interagency responsibilities connected with the daily operations of critical infrastructure.)[47] For example, the Commission has found that in the public interest, agency officials may meet with members of the industry, in part to maintain the agency's knowledge of the industry it regulates, and that such informal contacts are necessary to "the process of administration and completely appropriate *so long as they do not frustrate judicial review or raise serious issues of fairness* (emphasis added)."[48]

Therefore, this discussion will distinguish between ordinary and administrative communications from those made to influence the outcome of disputed issues in an open proceeding, i.e., "ex parte communications" as defined by Rule 8.1(c).

A4NR's position that all communications beyond basic logistics for hearings or public events are "ex parte communications" is too broad and belied

[46] D.06-12-042, mimeo, at 20 [citing, Association of Nat. Advertisers, Inc. v. F.T.C., 627 F.2d 1151 (D.C. Cir. 1979).

[47] See, e.g., § 451, General Order 95, etc.

[48] D.06-12-042, mimeo, p. 23. [citations omitted].

by both our rules, § 1701.1 - § 1701.3, and prior Commission decisions. Conversely, SCE's practice of narrowly parsing the rules to exclude matters not explicitly identified in the Phase 1 scoping memo, highlights the parties' differing views about whether the OII or the scoping memo for an open phase of an OII delineate the substantive topics which determine whether a communication concerns a reportable subject. SCE's casual characterization of some communications (e.g., not initiated by SCE, one-way) appears to foster a presumption that some individual communications are more likely to not be reportable.

Whether reporting is required is often a fact-specific inquiry. A suitable practice for SCE (and all parties) is to analyze each oral individual communication first to carefully assess whether the subject matter is at issue in an open proceeding. Rule 8.1(c)(1) refers to any substantive issue "in a formal proceeding." The OII initiated the formal proceeding, and set forth the Preliminary Scope of cost and performance issues related to SONGS that would become the topics of the consolidated proceedings. To the extent a Scoping Memo is issued for a particular phase of a proceeding, it more specifically identifies substantive issues which are also subject to ex parte reporting. However, SCE's claim it may parse issues more likely than not to be part of future hearings or proceeding phases is not persuasive. If one part of a communication made to a decisionmaker or advisor is substantive, and the communication otherwise meets the requirements of an "ex parte communication," then that part must be reported. This applies to both oral and written communications.

In this ruling, the analysis of communications made or referenced by SCE's disclosures focuses on whether a non-public, substantive communication was

made to a decisionmaker relative to a contested subject matter of the consolidated SONGS proceedings. This approach is applied below to review the unreported communications which A4NR alleges are violations of Rule 8.4 and which SCE contends are not reportable.

5.1. "One-way" Communications

The plain language of Rule 8.4, as well as the underlying policy of preventing unilateral influence on a decisionmaker by a party or interested person, supports SCE's view that comments by a decisionmaker are not required to be reported. Such comments, standing alone, do not meet the Commission's definition of "ex parte communication" because they are not "between" a party and a decisionmaker, even if the decisionmaker's comments concern otherwise "substantive" issues. Nor would disclosure serve fairness, because no party's position was offered to influence the decisionmaker outside the awareness of other interested persons. Therefore, disclosure would not serve public policy, nor is it currently required by either § 1701.3(c) or Rule 8.4.

However, the question of whether the response by a party is enough to become an ex parte communication depends on the facts of that party's communication. A4NR rightly observes the potential for mischief and the high value parties place on individual conversations with decisionmakers. To establish whether a communication was "between" a party and a decisionmaker, the query herein is whether the party offered a positive or negative response to a decisionmaker's point of view—constituting communication of the party's position on the decisionmaker's comments.

As with all notices of ex parte communications, what was actually said during a communication is known only to the participants.[49] SCE's contemporaneous internal e-mails were evaluated and weighed to assessing the nature of SCE's response. In some cases, I accorded more weight to the contemporaneous internal emails than a later statement by SCE's participant based on personal recall.

A4NR contends that the "one-way" exception is unchecked and overused by SCE. However, our Rules single out substantive communications made by a party to a decisionmaker as reportable, distinguishable from a non-substantive communication. Additionally, our Rules do not establish that any comment at all by a party, in response to a decisionmaker's statement, equates with attempting to influence the outcome of a pending matter in an open proceeding. Thus, a nominal statement that the party "cannot discuss" the subject raised by a decisionmaker does not constitute a reportable ex parte communication.

Rule 8.4 places the burden on the party, not the decisionmaker, to determine whether an ex parte communication occurred. Rule 1.1 requires parties to comply with all applicable laws and not to mislead the Commission. Therefore, the underlying public policy is best served, if parties report when a representative makes a substantive comment, anything more than a nominal comment, in response to a decisionmaker's statement on a substantive matter at issue in a proceeding.

Although not specifically required by our rules, SCE should consider maintaining a routine contact log for all communications with Commission

[49] Rule 1.1 requires all those who practice before the Commission to never mislead the Commission by false statement of fact or law.

decisionmakers in order to facilitate complete and accurate compliance with reporting of ex parte communications.

5.2. Restart, Shutdown, and Substantive Communications Outside the Scope of the SONGS OII

In practical terms, the seminal question in determining whether an "ex parte communication" has occurred is usually whether the communication concerned a "substantive" issue in a formal proceeding. Neither § 1701.1(c)(4) nor Rule 8.1 define "substantive." Based on the discussion of applicable law in § 4, the appropriate queries for determining whether a "substantive" communication has been made to a decisionmaker are whether (i) it involved an issue to be decided in the proceeding, and (ii) other parties might dispute or contest the communication if known.

Applying the framework described above, a "substantive" communication in these proceedings does not include general statements about SCE doing its "best," SCE's intention to seek restart of the SONGS units, the virtues of seeking a settlement, congratulations on obtaining a settlement, or asking President Peevey to seek the Governor's support for the settlement. In another example, Mr. Hoover contacted all Chiefs of Staff to provide information about what various agencies were doing regarding the SONGS shutdown. He reported internally that their questions were all about the timing of the decision, to which he responded that it was "mostly economics," an obvious and non-substantive statement. There is no indication that substantive topics were discussed.

5.2.1. Restart and Shutdown

SCE frames its description of several communications about "restart" of Unit 2 as an explanation of SCE's efforts to successfully navigate the NRC's process for handling SCE's restart request.[50] In April 2013, the NRC decided to require SCE to submit a license amendment to support the restart request. SCE admits it provided telephone notice of that fact. SCE's internal e-mails support the claim that no substantive issues in the OII were discussed, and SCE did not provide to decisionmakers its written press release about the NRC's action.

The NRC rules determine the NRC process. SCE's actions to comply with the NRC process and the expected timeline of how the NRC would handle SCE's request to restart, including the potential delay of a required a license amendment, are not substantive matters to be decided in the OII. In addition, the extension of the shutdown was important information for the Commission in connection with its interagency efforts on reliability and resource adequacy, and the Commission's statutory duties regarding safety and reliability.

Similarly, communications SCE identified as "notice" of its decision to permanently shut down SONGS on June 7, 2013 relayed an objective fact that SCE would permanently shut down as it could not operate without the NRC authorization to do so.[51] A4NR points to SCE's disclosure that when Mr. Hoover notified Commissioner Florio's Chief of Staff, she urged SCE to "move quickly to address cost recovery and other shutdown issues," discussed how to engage others parties (e.g. Alternative Dispute resolution, initiate settlement talks), and

[50] Such communications were identified as occurring on November 17, 2012, January 14, 2013, March 22, 2013, May 16, 2013, and May 17, 2013.

[51] Telephone calls regarding shutdown were made to Commissioners, advisors, and the ALJs on June 5, 2013 and June 7, 2013.

that "we agreed that it would be best if SCE got out in front…to put a process in place that would result in resolution…."[52] The evidence does not support that the communication was about influencing a decisionmaker about a particular resolution, but instead general non-substantive comments about encouraging a resolution, including starting settlement talks. There is no evidence to support that actual substantive topics were discussed.

A4NR's claim that any reference to restart or shutdown is substantive because it is within the Preliminary Scope of the OII is overbroad. A4NR is correct that the reasonableness of SCE's expenses related to the restart effort and to the permanent shutdown of SONGS would be substantive issues within later phases of the OII. However, the objective facts of NRC delay and SCE's decision of permanent shutdown were both contemporaneously public and not subject to contest by other parties. The Commission might take notice of such facts but the justiciable issue is whether SCE's subsequent actions and expenditures were reasonable in light of these facts. Here, there is no evidence in contemporaneous internal SCE e-mails that the identified communications expanded beyond descriptions of the NRC process and SCE's decision.

On the other hand, SCE overly constrains interpretation of the ex parte rules in its insistence that only the language of the Phase 1 Scoping Memo is relevant to reporting requirements. Many of our proceedings are broken into distinct phases due to complexity, availability of evidence, or other considerations. In determining whether a communication is "substantive," parties may not turn a blind eye to issues identified, even generally in an OII, as

[52] SCE's Response to first ALJ Ruling, Appendix D at #00191 - #00192.

part of a future phase to be determined by the Commission. Here, the Commission had issued an OII to look at a range of SCE's actions and expenditures connected to failure of the RSGs. The Phase 1 Scoping Memo also set broad parameters for subsequent phases, consistent with the Preliminary Scope in the OII.

Notably, SCE was directed in 2012 to begin publicly posting numerous SONGS-related documents and did so, including communications, data requests and responses, links to the NRC, and other relevant documents, some dating back to 2004. SCE was well aware of the types of issues to be determined over time in the OII through multiple phases. Therefore, SCE's claim that the only measure of a "substantive" topic is the Phase 1 scoping Memo is belied by the OII, by the conduct of Phase 1 that required public access on SCE's website of documents relevant to other phases, and by the definition of an ex parte in Rule 8.1(c) as one that "concerns any substantive issue in a formal proceeding."

5.2.2. Notice of Settlement and Written Communications

Another disputed category of communication involves what SCE describes as "notice" in either telephonic or written form. Again the question is whether the "notice" involves an objective, non-justiciable fact or is a subjective interpretation and argument meant to influence. For example, on March 27, 2014, Mr. Litzinger called or left messages for Commissioners to notify them that SCE had signed a settlement agreement with other parties for the SONGS OII and directed them to SCE's publicly filed 8-K for the details.[53] Contemporaneous e-mails support that no specifics of the agreement were provided or discussed

[53] SCE's Response to first ALJ Ruling, Appendix C at 28 (¶19).

with decisionmakers, and general comments of mutual thanks between Mr. Hoover and Commissioners or their advisors are not substantive.[54]

SCE disclosed some communications it described as "notice" of its intention to send a letter. An example of a written but non-reportable communication is SCE's April 5, 2013 notice of a letter to the Wall Street Journal which was forwarded to the Commissioners.[55] The letter's minimal references to SONGS: "SONGS…provides around-the-clock, emission-free electrical power. It is crucial that we bring this plant back online before the next summer heat waves if possible," are general and non-substantive. (The letter primarily addressed California Energy Policy.)[56]

In contrast, as discussed in § 5.4 below, where SCE provided a written press release or letter to decisionmakers which touched on substantive matters which could influence the outcome of an open proceeding, then it must be disclosed pursuant to Rule 8.3(c)(3).

5.2.3. "Substantive" But Outside the Scope of the SONGS OII

SCE and A4NR disagree as to whether communications must be reported which may contain "substantive" information, perhaps relating to broad Commission oversight or other proceedings, but not related to any matter to be decided in the OII.

For example, on May 2, 2014, Mr. Litzinger and Mr. Nichols met with Commissioners Florio and Peevey to provide a "requested update on the

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[54] *Ibid.*

[55] SCE's Response to first ALJ Ruling, Appendix C at 25 (¶6).

[56] *Id.,* Appendix C at #0007 -#0008.

preferred resources pilot," a matter not within the scope of the OII.[57] SCE's description of the meeting also indicates that: (1) Commissioner Peevey said he was pleased with the settlement (and waved the Notes); (2) Mr. Litzinger stated the Mr. Pickett was not authorized to speak for SCE; (3) Commissioner Peevey asked why the settlement did not have a provision to address GHG impacts; and (4) Mr. Litzinger said he would get back to him.[58]

In response to the ALJ's request for additional information, Mr. Litzinger stated he was seeking a 'respectful way to terminate the conversation," and that no "follow-up" occurred, despite several attempts by Commissioner Peevey to engage SCE on the issue.[59] None of these statements constitute an attempt by SCE to influence decisionmakers on open issues in the OII and no contrary inferences arise from the evidence. Therefore, it appears no substantive communication occurred between SCE and either Commissioner, primarily due to SCE's position of non-response.

A4NR also pointed to a meeting on April 5, 2013 attended by Mr. Pickett, Mr. Starck, President Peevey, and others "on "L.A. Basin reliability."[60] SCE stated the meeting included discussion of reliability "in light of the continuing SONGS outage" but did not include discussion of the OII or settlement.[61] SCE's responsive documents are persuasive, including an after-the-fact e-mail and the power point for the meeting, which support SCE's description that the broad

[57] *Id.*, at 29 (¶23).

[58] *Ibid.*

[59] SCE's Response to second ALJ Ruling at 4.

[60] SCE's Response to first ALJ Ruling, Appendix D at #0005; SCE's Response to second ALJ Ruling, Appendix A at #000267 - #00294.

[61] SCE's Response second ALJ Ruling at 6.

topic was a reliability project regarding the continuing outage, preferred resources, and system upgrades.[62]

Rule 8.4(c) requires a report of ex parte communications to include "a description of the interested person's communication and its content." To comply with the requirement that the content of the communication be reported, SCE and other parties may want to disclose more information than simply the topic of a discussion with a decisionmaker. Additionally, decisionmakers may wish to be mindful of whether an accurate notice is filed and served after an individual ex parte communication with a party or interested person, although as noted above, it is the responsibility of the party, not the decisionmaker, to timely file an accurate notice of the communication.

5.3. Procedural and Non-Substantive

"Procedural" inquiries are not limited to schedule, location, format for hearings, filing dates, and identity of parties, as asserted by A4NR. Rule 8.1 clarifies that "procedural inquiries" also include "other such non-substantive information" which are not ex parte communications. A plain reading of the Rule is consistent with the particular type of activities which Commissioners, their advisors, ALJs and others may be required to undertake which necessitate non-substantive communications. Some examples are:

- to answer questions and inform a party about the Commission's rules;
- to participate in discussions with a utility and the Public Advisor to resolve any differences over the wording, format or service of public notices;

[62] SCE's Response to second ALJ Ruling at #00300-#00319.

- to coordinate provision by a utility of specified customer services at a public meeting;
- to identify general topics of a workshop or presentation;
- to discuss community outreach for public meetings;
- to initiate a site visit for parties, decisionmakers and/or Commission staff;
- to identify any obstacles to the current availability of evidence (not what the evidence reveals); and
- to identify other conditions which may impact the timing of the administration of the proceeding (e.g., litigation, permits).

A4NR identified four communications which SCE claimed were "procedural" that it instead asserts are reportable ex parte communications. A4NR's conclusions derive from its narrow interpretation of Rule 8.1 and § 1701.3(c). The referenced communications involve: a discussion of whether the Commission's ex parte rules required reporting of a previous conversation; conversations about the legal reasons why SCE would not respond to Commissioner Peevey's questions about a provision in the proposed settlement agreement; and an inquiry about the possible timing for the release of a Proposed Decision which received a vague answer from an advisor.

Although not explicitly "procedural," they involved legal questions regarding our Rules of Practice and Procedure. None of these discussions meet the criteria for a substantive matter. Therefore, the evidence supports SCE's position that these communications were procedural and not "ex parte communications" subject to reporting.

Additionally, parties are reminded that they may not rely on the opinion of a Commissioner or advisor as to whether an ex parte communication has occurred. For example, the Commission has acknowledged there may be

instances where it might be difficult for parties to discern between a procedural "inquiry" that merely seeks information and a procedural request for Commission action that is substantive in nature. "…[T]o the extent that procedural communications are nonsubstantive, there is no cause to direct them to Commissioners or their advisors; the Commission's administrative law judges are best suited to address them and are trained and experienced in fielding procedural requests and adept at discerning when they rise to the level of ex parte communications that require notice and reporting."[63]

Parties must seek their own counsel and strive to fully and completely comply with all of the Commission's ex parte rules.

5.4. SCE's Violations of Rule 8.4

Upon consideration of the responsive documents, applicable law and arguments made, I find that ten ex parte communications occurred and were not timely reported by SCE:

1. 3/26/13 - Poland meeting: Pickett's statements that Peevey did all the talking about the possibility of settlement of the SONGS OII in a "one-way" meeting are not credible in light of other evidence. In particular, Pickett admits he disagreed with Peevey over treatment of replacement power costs[64] and thus, engaged in a substantive communication with a decisionmaker which was not reported until nearly two years later, after a decision had been adopted.
2. 3/27/13 - Pickett admits he continued communication with Peevey the following night during dinner with others and wrote

[63] Law and Motion Judge's Ruling Imposing Sanctions for Violation of Ex Parte Rules at 20, (A.13-12-012, Application of Pacific Gas and Electric Company Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the period of 2015-2017Rates).

[64] SCE Response to first ALJ Ruling at 6-7, Appendix F (Pickett Declaration) at ¶13.

an internal e-mail that he was "working" SONGS at the dinner.[65] Pickett also admitted discussing possible settlement partners with Peevey.[66] Pickett's later statement that he did not recall discussing SONGS is less reliable than his contemporaneous internal e-mail. Pickett's credibility is adversely impacted by his failure to disclose the true nature of the 3/26/13 meeting.[67] Thus, the evidence weighs in favor of concluding that Pickett communicated with Peevey on substantive issues relating to the potential allocation of some costs to be determined in the proceeding.

3. 5/28/13 - Starck[68] sent an e-mail to all five Commissioners with an SCE press release that provided SCE's response to U.S. Senator Boxer's allegations, made in reliance on two letters from SCE to MHI from 2004 and 2005, that the NRC and SCE made errors related to the design of the RSGs.[69] Although Phase 3 had not yet begun, the Preliminary Scope in the initial OII and the Phase 1 scoping memo clearly indicated that the prudency of SCE's actions related to the RSG design were likely to be a factor in determining whether the SGRP costs, including for post-shutdown repairs, were reasonable. The press release includes substantive and argumentative content about SCE's actions and constitutes a substantive communication regarding matters to be determined in the SONGS OII.

4. 5/29/13 - Hoover's[70] communication with Peevey's Chief of Staff, Carol Brown: In connection with SCE's e-mail of the press release, Hoover talked to Brown and reported to Starck that she told him Pickett was "well prepared in Poland with specifics,"

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[65] SCE Response to second ALJ Ruling at #00282.

[66] SCE Response to first ALJ Ruling, Appendix D at #00186.

[67] See also, Order to Show Cause (issued simultaneously) at Attachment A (Declaration of Edward Randolph),

[68] Les Starck was SCE's former Senior Vice President Regulatory Policy & Affairs.

[69] SCE Response to first ALJ Ruling, Appendix D at #00188-189.

[70] Michael Hoover was SCE's Senior Director of State Energy Regulation.

but complained that "nothing has happened."[71] It is not credible that this is a non-substantive "one-way" discussion. The press release which prompted the communication was substantive, the topic upon which Pickett was "well-prepared" is much more likely to be possible settlement terms because the status report on the restart request was mostly limited to NRC's regulatory process, i.e., not "specifics" or something that SCE could make "happen."

5. 6/26/13 – Litzinger gave Florio a "brief" update on the status of bargaining efforts regarding employee severance after announcement of the permanent shutdown of SONGS.[72] The question of SCE's employee compensation commitments and cost recovery of employee severance costs were substantive topics because their reasonableness would be considered by the Commission when reviewing 2013 SONGS Operations and Maintenance expenses.

6. 9/6/13 - Lunch meeting with Peevey, Litzinger and "the Chino Hills team" during which they discussed, inter alia, delaying any decision on SCE's 2012 ERRA proceeding regarding replacement power costs until a settlement was adopted in the SONGS OII.[73] Starck's internal e-mail to Pickett states that Litzinger offered his view in opposition to Peevey's approach by which SCE would get either replacement power costs or its capital investment but not both.[74] Litzinger and Peevey engaged in a substantive discussion of possible outcomes of SCE's cost recovery claims for replacement power and capital investment at SONGS. Notably, at least one person at SCE advised Starck to check with Hoover about whether to report the "potential ex parte communication," to which Hoover replied that Starck "should not put this in his

[71] SCE Response to first ALJ Ruling, Appendix D at #00187.

[72] *Id.*, Appendix C at 26 (¶14).

[73] *Id.*, at 27 (¶16).

[74] *Id.*, Appendix D at #00201.

notes."[75] These latter e-mails also suggest that some SCE personnel were not committed to full disclosure of ex parte communications.

7. 11/15/13 Craver[76] had a dinner meeting with Peevey where he discussed efforts to bring MHI to the negotiating table regarding SCE's warranty claim, and efforts to gain written support from federal officials.[77] Some aspects of SCE's litigation of its claims against MHI is within the Preliminary Scope of "ratemaking issues related to warranty coverage…of SONGS costs. The diligence of SCE's actions to pursue alternate sources of funds to cover shutdown-related costs were relevant to the reasonableness of its actions after shutdown and funds recovered from MHI would be considered by the Commission to offset cost allocations to ratepayers in a later phase. Therefore, the communication was substantive because it concerned matters to be determined in the OII and of interest to other parties.

8. 5/28/14 –Hoover met with Peevey who said he "talked to you and Ron about [the GHG provision] and was not pleased that SCE was hesitant to contribute funds to the Center For Sustainable Communities at UCLA as part of the SONGS settlement."[78] Peevey asked Hoover to tell SCE he would hate to see the tight schedule for the settlement slip, but no evidence that Hoover responded substantively.[79] SCE's disclosures and the e-mail support that an unreported communication occurred between Litzinger and Peevey in which the substantive issue of a possible settlement provision to address GHG impacts was discussed. However, the evidence does not support that the communication between Hoover and Peevey was substantive.

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[75] *Id.*, at #00203.

[76] Ted Craver was Chairman, president, and CEO of Edison International, SCE's parent company.

[77] SCE's Response to first ALJ Ruling, Appendix C at 27 (¶17).

[78] *Id.*, Appendix C at 31 (¶26).

[79] *Ibid.*; Appendix D at #00223.

9. 6/11/14 – Peevey called Hoover to his office to discuss the GHG issue, asked Hoover to deliver his letter to Litzinger which had several letters attached.[80] The letters were written to the Commission by several public officials urging the Commission to support GHG research.[81] Hoover transmitted the materials to Litzinger.[82] The evidence is that "Peevey talked with Ron last week" and then lowered the requested annual research amount to $3 million. It is more credible that such a discussion was two-way because a significant change occurred in the parameters of a disputed issue related to the settlement of the OII. The public officials' letters may also have been unreported ex parte communications but are not at issue as to SCE.
10. 6/17/14 - Peevey met with Craver about the GHG issue but Craver states he responded that he could not engage with Peevey on that topic.[83] Although characterized by SCE as "one-way," the evidence indicates that it was more likely two-way and substantive. The e-mail states, "Ted just came and got Peevey" and the meeting was "about UCLA."[84] This is a substantive topic to be determined in the OII and other parties might seek to contest the issue.

5.4.1. Compliance and Sanction

SCE shall promptly late-file and serve notices of the unreported ex parte communications identified in § 5.4 as required by Rule 8.4. Furthermore, in order to discourage such violations in connection with this Ruling, I exercise my authority under Rule 9.1 to hereby ban all parties from making individual ex parte communications as described in Rule 8.3(c)(2) about this Ruling,

[80] *Id.* at 31 (¶28).

[81] *Id.*, Appendix D at #00225 to #00237.

[82] *Id.* at #00248 - #00250.

[83] *Id.* Appendix C at 31 (¶29).

[84] Id., Appendix D at #00252.

including whether SCE violated Rules 8.4 and 1.1, and what sanctions may be appropriate for the Commission to impose. This ruling does not affect or prohibit all-party meetings properly noticed pursuant to Rule 8.3(c)(1) or written ex parte communications where the written materials are timely served pursuant to Rule 8.3(c)(3). Furthermore, this Ruling does not apply to other pending actions in the OII (i.e. Application for Rehearing, Petition to Modify Decision), nor to other non-OII proceedings in which some aspect of SONGS may be at issue (e.g. nuclear decommissioning).

In addition, SCE is hereby ordered to show cause why it should not be held in contempt[85] and subject to penalty for the ten violations of Rules 8.4 determined in Section 5.4 of this Ruling. Such sanctions may include, but are not limited to, monetary penalties, required ex parte training for SCE's executives, credits to ratepayers, and supplemental recordkeeping requirements regarding some or all communications between SCE's employees, agents, and counsel and CPUC decisionmakers.

When the Commission determines there has been a violation of Rule 8.3 or 8.4, it "may impose penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the record and to protect the public interest."[86] Also, specific penalty authority is provided by § 2107 which states that any public utility "which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement

[85] § 2113 (Every public utility, corporation, or person which fails to comply with any part of any order, decision, rule, regulation…of the commission…is in contempt of the commission, and is punishable by the commission for contempt in the same manner and to the same extent as contempt is punished by courts of record)

[86] Rule 8.3(j).

of the commission" may be subject to a penalty of no less than $500 and no more than $50,000 for each offense.

In addition, in a recent Court of Appeals decision in *Pacific Gas and Electric Company v. Public Utilities Commission,* First Appellate District, Division Two, Case No. A142127, at pp. 44 – 45 (Slip op.) (June 16, 2015) the Court made clear that a showing of intent is not required for a finding of a violation under § 2107. Furthermore, under § 2108, any such violation "is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense."

Recently, in the Commission's *Decision on Fines and Remedies To Be Imposed On Pacific Gas And Electric Company For Specific Violations In Connection With The Operation And Practices Of Its Natural Gas Transmission System Pipelines,*[87] the Commission addressed its broad authority to fashion remedies:

> We agree that the California Constitution, along with Pub. Util. Code § 701, confer broad authority on the Commission to regulate public utilities, in particular the fashioning of remedies in addition to those specifically set forth in the Public Utilities Code.[88]

The Commission also discussed its ratemaking authority under § 728 and Section XII, Article 6 of the California Constitution as additional authority to impose other remedies. [89]

A4NR recommends the March 26, 2013 ex parte communication be treated as a continuing violation from the three-day notice period following the

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[87] D. 15-04-024, April 9, 2015 at p. 26,

[88] (See, *Southern California Edison Co. v. Peevey*, (2003) 31 Cal. 4th 781, 792, citing *Assembly v. Public Utilities Commission* (1995) 12 Cal. 4th 87, 103.)"

[89] Ibid., pp. 27 - 28.

communication until February 9, 2015 when SCE first late-filed its notice. If so, the maximum penalty, based on § 2107, is calculated as 681 days at $50,000 per day as a continuing violation, for a total penalty of $34,050,000. If the other nine violations for failure to report the other ex parte communications are treated as single violations, as suggested by A4NR, SCE would be subject to a maximum of $50,000 each, equal to $450,000. In the alternative, if each is viewed as continuing a violation, the amount would increase by $50,000 for each day after the three day reporting period until April 29, 2015 when the communications were disclosed.

6. Rule 1.1 Violations

Rule 1.1 requires "any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission…agrees to comply with the laws of this state, to maintain respect due to the Commission, members of the Commission and its Administrative law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law." Violation of this rule can result in sanctions.

Not all Rule violations are necessarily violations of Rule 1.1. However, where a party, through its officers, agents, and/or attorneys makes false statements or misleads the Commission, then a violation of Rule 1.1 occurs. I have identified two possible Rule 1.1 violations below.

6.1. Declaration of Edward Randolph

Attached hereto as Appendix A, is a declaration by the Commission's Director of Energy Division, Edward Randolph, which describes his observations of the March 26, 2013 Poland meeting, which he attended. Mr. Randolph's declaration contradicts some of Mr. Pickett's statements and instead declares that

Mr. Pickett communicated his opinion to President Peevey of "what he thought a settlement agreement would look like in the SONGS OII."[90]

6.2. Stephen Pickett

On February 9, 2015, SCE late-filed a notice of an ex parte communication which occurred on March 26, 2013 between Mr. Pickett and President Peevey. In the notice, SCE explained that based on Mr. Pickett's first description, SCE considered the meeting to be (1) not reportable as to non-substantive restart efforts; and (2) not reportable as to possible terms for resolution of the OII because only President Peevey spoke. However, SCE states that based on further information recently received from Mr. Pickett, that he (Pickett) may have engaged in a substantive communication by expressing reaction to one of President Peevey's statements. SCE supplemented the notice on April 10, 2015 to add a copy of the Notes taken by Mr. Pickett at the meeting.[91]

In Mr. Pickett's April 29, 2015 declaration, he again stated that President Peevey did the talking about resolving cost allocation issues in the event of a permanent shutdown of SONGS. Mr. Pickett stated he believed he "very briefly expressed disagreement" over one proposal that costs of both the RSGs and replacement power should be disallowed.[92] I found in § 5.4 above that this communication qualified as ex parte because it attempted to influence a decisionmaker about a pending issue.

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[90] SCE's Response to the first ALJ Ruling, Appendix A at 2.

[91] SCE explained that it had just received a copy of the Notes from the Commission in connection with outside litigation.

[92] SCE's Response to first ALJ Ruling at 3 (¶13).

In his declaration, Mr. Pickett also stated that he had dinner with President Peevey the following night and that President Peevey "may have mentioned SONGS," but Pickett did "not recall anything of substance."[93] However, this statement is contradicted by an internal e-mail by Mr. Pickett in which he states he was "working SONGS" with President Peevey at the dinner.

Mr. Pickett's two statements to the Commission can reasonably be viewed as misleading and possible violations of Rule 1.1.

In addition, two other matters are troubling and impact SCE's and Mr. Pickett's credibility. In an April 11, 2013 e-mail, Mr. Litzinger described his meeting that day with Mr. Pickett, and that Mr. Pickett stated President Peevey felt strongly about including a particular party in any future settlement discussions. Yet, there is no indication in SCE's responses to ALJ Rulings that Mr. Pickett had any other contact with President Peevey between March 27, 2013 and April 11, 2013 in which the topic might have been discussed.

Lastly, Mr. Pickett has described a dinner with President Peevey on April 16, 2013 as "social." However, according to an e-mail, Mr. Pickett scheduled a meeting with a senior SCE attorney immediately after the dinner. This is suggestive that substantive topics were covered which necessitated review by SCE's counsel. In any event, no notices of ex parte communications were filed regarding these latter two probable substantive communications.

6.3. Ron Litzinger

A4NR alleges that Mr. Litzinger testified falsely at the May 14, 2014 hearing on the proposed settlement.[94] In particular, he was asked under oath

[93] *Id.* (¶15).
[94] Amended Motion at 19-20.

whether "SCE was having ex parte meetings with the Commissioners" while settlement talks were underway.[95] Mr. Litzinger responded, "The only ex parte communications I had with Commissioners was following the Phase 1 Proposed Decision." SCE argues that Mr. Litzinger was faced with confusing questions, but truthfully responded as to his understanding that none of the communications now at issue in this proceeding constituted ex parte communications under the Commission's Rules.

As described in § 5.4 above, I found that Mr. Litzinger engaged in two unreported ex parte communications between March 2013 and May 14, 2014. On June 26, 2013, Mr. Litzinger engaged in a substantive communication with Commissioner Florio on the status of bargaining efforts regarding employee severance after announcement of the permanent shutdown of SONGS. Mr. Litzinger was also present at a lunch on September 6, 2013 with President Peevey and others in which they expressed views on the substantive topic of how the costs of replacement power and capital investment should be allocated.

Neither Mr. Litzinger's May 14, 2015 testimony nor his Declaration disclose either of these two communications.[96] Moreover, in this Ruling I have identified seven ex parte communications, as defined by our Rules, to have occurred between SCE and decisionmakers during the time at issue.

It is reasonable to view Mr. Litzinger's testimony on May 14, 2014 and his April 29, 2015 Declaration as containing incorrect statements which misled the Commission in violation of Rule 1.1.

[95] Reporter's transcript at 2771.

[96] SCE's response to first ALJ Ruling, Appendix G at 2-3 (¶¶8-11).

Based on the foregoing, SCE is hereby ordered to show cause why (i) it should not be found to have violated Rule 1.1; and (ii) be held in contempt and punished for its violations of Rule 1.1.

6.4. Compliance and Sanctions

SCE is ordered to show cause why it should not be found to have violated Rule 1.1 on one or more occasions; and if Rule 1.1 violations are established, why SCE should not be held in contempt of the Commission and sanctioned.

As discussed in §5.4.1, the Commission has authority to impose appropriate orders and sanctions for violation of its rules, including imposing a penalty of no less than $500 and no more than $50,000 for each offense.

IT IS RULED that:

1. Southern California Edison Company (SCE) is ordered to show cause why:
   a) it should not be held in contempt of the Commission and sanctioned for ten violations of Rule 8.4;
   b) it should not be found to have violated Rule 1.1 on one or more occasions; and
   c) if Rule 1.1 violations are established, why SCE should not be held in contempt of the Commission and sanctioned.
2. SCE and any other party to the consolidated San Onofre Nuclear Generating Station (SONGS) Order Instituting Investigation (OII) proceedings, may file a written response to this order to show cause, with supporting declarations, by no later than August 20, 2015. Any showing by SCE must take into consideration SCE's past violations of the ex parte rules.
3. SCE may request a hearing regarding their showing of cause no later than August 20, 2015. All parties to the OII are prohibited from making individual ex parte communications as described in Rule 8.3(c)(2) about this Ruling,

including whether SCE violated Rules 8.4 and 1.1, and what sanctions may be appropriate for the Commission to impose. This Ruling does not impose any bans on all-party meetings or written communications which are properly reported pursuant to the requirements of Rule 8.4. This Ruling does not apply to other pending actions in the OII (e.g., Petition to Modify Decision), nor to other non-OII proceedings in which some aspect of SONGS may be at issue (e.g. nuclear decommissioning).

4. SCE shall file and serve notice of the ten ex parte communications identified in Section 5.4 of this Ruling no later than August 20, 2015.

Dated August 5, 2015, at San Francisco, California.

/s/ MELANIE M. DARLING
Melanie M. Darling
Administrative Law Judge