Decision 15-12-016 December 3, 2015

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

DECISION AFFIRMING VIOLATIONS OF RULE 8.4 AND RULE 1.1 AND IMPOSING SANCTIONS ON SOUTHERN CALIFORNIA EDISON COMPANY

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DECISION AFFIRMING VIOLATIONS OF RULE 8.4 AND RULE 1.1 AND IMPOSING SANCTIONS ON SOUTHERN CALIFORNIA EDISON COMPANY

Summary

This decision affirms eight violations of Rule 8.4 of the Commission's Rules of Practice and Procedure (Rules) by Southern California Edison Company (SCE) stemming from failure to report, before or after, ex parte communications which occurred between an SCE executive(s) and a Commissioner. In addition, this decision finds that SCE twice violated Rule 1.1, the Commission's Ethics Rule, as a result of the acts and omissions of SCE and its employees which misled the Commission, showed disrespect for the Commission's Rules, and undermined public confidence in the agency.

To reach the conclusions in this decision, we repeated the discussion and weighing of the evidence and arguments contained in the Administrative Law Judge's Ruling and Order to Show Cause (OSC),[1] as modified by information submitted by SCE and other parties in response to the OSC. Due to these rule violations, the decision imposes a total financial penalty on SCE of $16,740,000. This decision affirms, in part, the Ruling and OSC[2] which initially found ten violations of Rule 8.4 of the Commission's Rules by SCE.

The single biggest penalty of $16,520,000 is based on finding that a continuing Rule 1.1 violation was set in motion by Mr. Pickett's grossly negligent failure to accurately and timely report his ex parte communications in Warsaw,

[1] Issued August 5, 2015.

[2] Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring reporting of Ex Parte Communications, and Ordering SCE 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 (Ruling and OSC) (August 5, 2015).

Poland with former President Peevey. This conduct triggered other misleading acts and omissions by SCE from the date it should have filed the notice of the March 26, 2013 meeting through July 6, 2015, the last date in which SCE repeated Mr. Pickett's misleading statements.[3] As described in more detail in Section 6.2, the decision also imposes $190,000 in fines on SCE for the violations of Rule 8.4 related to unreported ex parte communications, and $30,000 for the other Rule 1.1 violation related to Mr. Litzinger's false statement about his ex parte communications.

In addition, this decision orders SCE to immediately develop a public website tracking of all non-public individual communications which occur after this decision is adopted related to the SONGS OII (and consolidated proceedings) by SCE representatives with Commissioners, and/or their advisors, and/or CPUC decisionmakers (as defined by Rule 8.1(b)). The log, *inter alia*, will identify all participants, the relevant SONGS OII or consolidated proceeding(s), date, length of time, location, whether written materials were used, and if an ex parte notice was filed.

It is our intention that this sanction will result in added scrutiny by SCE of its communications with Commissioners, advisors, and decisionmakers, and we fully expect that SCE will compel a change in attitude and culture at SCE in favor of robust disclosure.

[3] SCE's response to Ruling and OSC at 20 (It was not misleading to submit Mr. Pickett's declaration, even if it is was not complete).

1. Background

On January 31, 2012, the San Onofre Nuclear Generating Station (SONGS), operated by majority owner Southern California Edison Company (SCE),[4] experienced a leak of contaminated steam and immediately stopped operations.

On October 25, 2012 the Commission issued an Order Instituting Investigation (OII) into the rates, operations, practices, services and facilities associated with SONGS Units 2 and 3.[5] The OII was subsequently consolidated with other SONGS cost-related proceedings. The parties litigated early phases, evidence and argument were submitted, but no decision was adopted related to these phases. SCE permanently shut down the facility as of June 7, 2013, leaving questions about the extent of reasonable cost recovery from ratepayers for many different types of outstanding expenses.

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, (collectively "Settling Parties") filed and served a Joint Motion for Adoption of Settlement Agreement which purported to resolve all issues for the consolidated proceedings. Although not an all-party settlement, the Commission approved an amended settlement agreement in Decision (D.) 14-11-040 which provided resolution of the

[4] SCE owns approximately 78% of SONGS, San Diego Gas & Electric Company (SDG&E) owns approximately 20%; and the City of Riverside owns a small fractional share.

[5] The OII was issued pursuant to Cal. Pub. Util. Code § 455.5; unless otherwise indicated future references to "Section" or "§" refer to the Pub. Util. Code.

disputed cost allocation/rate recovery issues related to the Replacement Steam Generators (RSG) and the premature shutdown of SONGS.[6]

On February 9, 2015, SCE late-filed a Notice of Ex Parte Communication (Late Notice) regarding a meeting that occurred on or about March 26, 2013 between SCE's then-Executive Vice President Stephen Pickett and CPUC's then-President Michael Peevey at an industry conference in Warsaw, Poland (Poland Meeting). In the Late Notice, SCE stated it initially viewed the contact as not an "ex parte communication" between SCE and a Commissioner as defined by § 1701.1(c)(4), and therefore, not reportable. However, SCE stated it eventually decided to late-file the notice based on more information from Mr. Pickett.

SCE claimed that former President Peevey initiated a one-sided communication with Mr. Pickett for a possible framework for resolution of the OII, subject to agreement by some parties and the full Commission.[7] SCE stated Mr. Pickett made no response, but admitted he took notes (Notes) of President Peevey's comments about some possible cost allocations in a settlement if SONGS were to permanently shut down. SCE stated former President Peevey took and kept them.[8] The Notes came to light in April 2015 when they were submitted in connection with litigation in federal court initiated

[6] D.14-11-040 was issued November 20, 2014; at 141, Ordering Paragraph 7 (The proceedings remain open to consider possible Rule 1 violations based on the conduct of parties and/or their representatives….).

[7] SCE's Late Notice (February 9, 2015) at 1.

[8] *Ibid.* (Apparently, the Notes were obtained during a records search at President Peevey's home by the office of California's Attorney General); SCE's Response to ALJ Ruling (April 29, 2015) (SCE's First Response), Appendix F, Pickett Declaration at 1-2 (¶7, ¶11).

by a non-settling party.[9] On April 13, 2015, SCE filed a Supplement to its Late Notice to include a copy of the Notes, which are attached hereto as Attachment 1.

Alliance for Nuclear Responsibility (A4NR) filed a motion in February 2015 asking the Commission to investigate the Late Notice and consider sanctions against SCE related to the late-reported Poland Meeting. On April 14, 2015, the Administrative Law Judge (ALJ) issued a Ruling[10] directing SCE to provide all documents pertaining to unreported communications between March 2013 and November 2014, which referenced, or were themselves, communications with decisionmakers, particularly related to the proposed, or amended, settlement agreement approved by the Commission in November 2014.

On April 29, 2015, SCE submitted hundreds of pages of internal and external communications (primarily e-mails and documents related to previously approved settlements for out-of-service generation facilities), and voluntarily expanded the disclosure period from March 2013 back to October 25, 2012, the date the OII commenced.[11]

With its first set of responsive documents, SCE submitted declarations by Mr. Litzinger[12] and by Mr. Pickett. Mr. Pickett's declaration expands on his memory of the Poland Meeting, his asserted lack of response to President Peevey's comments on settlement, his subsequent internal SCE communications

[9] SCE states it first received the Notes from the Commission's Legal Division on April 10, 2015.

[10] ALJ's Ruling Directing SCE to Provide Additional Information Related to Late-filed Notices of Ex Parte Communications (ALJ's first Ruling) (April 14, 2015).

[11] SCE's Response to ALJ's first Ruling (April 29, 2015).

[12] Mr. Ron Litzinger was then President of SCE.

about the meeting, and communications made with President Peevey during "special or other occasions" after the Poland trip.[13] After SCE disclosed the e-mails and documents, A4NR amended its motion to seek sanctions for more than 70 communications which A4NR characterized as unreported ex parte communications.

On June 26, 2015, the ALJ issued a second ruling requesting SCE to provide supplemental information to clarify its earlier responses.[14] SCE responded on July 3, 2015 and submitted 34 pages of additional e-mails and information.

1.1. The August 5, 2015 Ruling and Order to Show Cause

On August 5, 2015, based on SCE's admissions, the ALJ ruled that SCE committed ten separate violations of Rule 8.4 by failing to report oral and written communications between SCE and CPUC decisionmakers which met the definition of "ex parte communication."[15] In addition, the Ruling and OSC aggregated preliminary evidence from which the Commission might reasonably infer that SCE had violated Rule 1.1 related to acts or omissions by SCE and two of its executives, Mr. Pickett and Mr. Litzinger.

The ALJ Ruling included an Order to Show Cause why:

a) [SCE] should not be held in contempt of the Commission and sanctioned for ten violations of Rule 8.4;

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[13] SCE's Response to ALJ's first Ruling, Appendix F, Pickett Declaration at 3 (¶¶13-18).

[14] ALJ's second Ruling (June 26, 2015).

[15] Amended ALJ's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering SCE to Show Cause Why It Should Also Not Be Found in Violation of Rule 1.1 and be Subject to Sanctions for All Rule Violations (ALJ Ruling and OSC) at 35-39.

b) [SCE] 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.

SCE and other parties were invited to submit a statement on these issues by August 20, 2015. In addition to SCE, other parties who filed a timely statement are A4NR, ORA, and Ruth Henricks.

Due to the procedural posture of the consolidated proceedings, including an adopted decision, the ALJ bypassed issuing a ruling on the OSC and certifying it for an interim decision. Instead, the ALJ prepared a Proposed Decision for final consideration by the whole Commission.

2. Applicable Law

The applicable law consists of § 1701.1(c) and § 1701.3(c), and Rules 8.1(c), 8.3(c) and 8.4 which define ex parte communications, limit and condition ex parte communications in ratesetting proceedings, and establish reporting requirements. Of particular relevance are the elements of an ex parte communication.

Pursuant to § 1701.1(c)(4) and Rule 8.1(c), an "ex parte communication" means:

> Rule 8.1…(c) a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:
>
> (1) concerns any substantive issue in a formal proceeding,
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> (2) takes place between an interested person and a decisionmaker, and
>
> (3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding.

> 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.[16]

In addition, we apply Rule 1.1:

> Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the 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.

Statutes and precedents related to our consideration of penalties for rule violations are discussed separately in Section 6 below.

3. Standard of Proof

It is well-settled that the applicable standard of proof for violation of a Commission rule is a "preponderance of the evidence,"[17] i.e., the probability of truth, or of evidence that when weighed with that opposed to it, is more convincing with all reasonable inferences to be drawn therefrom.[18] The

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[16] "Decisionmaker" means any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge. [Rule 8.1(b)]; Rule 8.2 provides that communications with Commissioners' personal advisors are subject to all of the restrictions on, and reporting requirements applicable to, ex parte communications, except that oral communications in ratesetting proceedings are permitted without the restrictions of Rule 8.3(c)(1) and (2).

[17] See, e.g., D.15-08-032, 2015 Cal PUC LEXIS 521 (August 27, 2015) at *53; D.15-04-021, 2015 Cal PUC LEXIS 228 (April 9, 2015) at *40; D.11-09-001, 2015 Cal PUC LEXIS 409 (September 8, 2011) at *8; D.00-10-038, 2000 Cal PUC LEXIS 1113 (October 10, 2000) at *9; D.94-11-018, 1994 Cal PUC LEXIS 1090 (57 CPUC2d 176) (November 9, 1994) at *30.

[18] "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighed with that opposed to it, has more convincing force and greater

Footnote continued on next page

Commission is permitted to draw reasonable inferences from the record, as well as determine the credibility of witnesses and the weight to be given their testimony.[19]

4. Challenges to the August 5, 2015 Ruling

ORA and A4NR reject most of the ALJ's analysis in the Ruling and OSC which resulted in far fewer violations established than what these parties requested. To some extent, their views reflect a different interpretation of the rules, but their views also show dissatisfaction with the current law and/or the parameters of this OSC.[20] We acknowledge that some party comments helpfully pointed out some unartful language and analysis in the ALJ's Ruling, which has been corrected, clarified, or not affirmed in this decision.

Both parties stay focused on § 1701.3(c) which begins, "Ex parte communications are prohibited in ratesetting cases." "However," the statute continues, some ex parte communications are permitted under certain conditions. We do not read the first sentence alone, but as a guide towards careful application of the identified conditions to the few permitted exceptions in order to determine whether compliance or a violation occurred.

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probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (Lone Pine Nurseries, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing Leslie G. v. Perry & Associates (1996) 43 Cal.App. 4th 472, 483, review denied.)

[19] See, e.g., Lorimore v. State Personnel Board (1965) 232 Cal.App.2d 183, 189 (The Court of Appeal affirmed that "if findings [of an administrative agency] are based on inferences reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record and will not be reversed").

[20] For example, ORA seeks remedies unavailable here (e.g., rescind D.14-11-041, place withdrawn Phase 1 PD on the Commission agenda, etc.).

More as a matter of policy, both parties argue that most communications (unless solely regarding the proceeding process) in which a decisionmaker participates is an ex parte communication, instead of applying the criteria set forth in § 1701.1 and Rule 8.1. Neither party (1) explains why the Legislature intentionally adopted a specific definition which does not include all communications, nor (2) offers the Commission a legal basis to ignore the statutory language.

ORA mistakenly claims the Ruling permits utilities to have free access to decisionmakers under the guise of a "one-way" communication. "One-way" (i.e., a decisionmaker speaks to a party about a substantive issue in a formal proceeding and the party purportedly remains silent) does not appear in the statute or rule. However, one requirement for an ex parte communication, pursuant to § 1701.1(c) and Rule 8.1 (c), is that the communication must be "between" the interested person and the decisionmaker. The Ruling and OSC found that "between" requires some form of interaction, and the evidence was that SCE, some practitioners, and at least some Commissioners have shared this view. It is informative that no evidence was submitted to show that parties have historically filed notices of so-called "one-way" communications.

Therefore, we find this interpretation in the Ruling and OSC to be reasonable. We must follow the statutes as the Legislature writes them. The Legislature is able to craft a statute to expand reporting to include solitary statements by a decisionmaker, should it choose to do so, or to modify the reporting to require a more complete summary of the input by all participants.

To improve transparency, the Ruling clarified that under the current rules almost any response (other than "I can't talk about it") creates a communication

between individuals, as "between" is used in § 1701.1 and Rule 8.1. We affirm this view and expect it to result in more complete reporting.

Lastly, Ruth Henricks filed an "Objection to the OSC" which combines a restatement of her objections to the adopted decision, and unsupported speculation about alleged improper conduct by ALJ Melanie Darling. Ms. Henricks requests removal of the ALJ for any of several reasons not fully discussed here. We find no merit to these arguments, and further observe that the claims include misrepresentations of facts.[21] Moreover, her allegations related to the ALJ's December 2012 procedural communications with SCE's Mr. Worden, and a short set of e-mails to consider whether SCE should file an ex parte notice as to a few statements, fail to note that a timely filing was made disclosing the communications. This latter set of facts has been previously rejected by the Chief ALJ and the Commission President as providing a basis in the rules to re-assign ALJ Darling.[22]

5. Discussion

We conclude that SCE violated Rule 8.4 eight times during this proceeding by failing to acknowledge and disclose ex parte communications pursuant to

[21] For example, Ms. Henricks invoked an "ethical cloud" over the ALJ and stated, "…[a] Judge of the San Francisco Superior Court found there to be probable cause to believe a felony had been committed and that ALJ Darling is in possession of related evidence." She cites "5 June 2015 Search Warrant" but does not attach it or provide information to get it, or disclose the subpoena included many people who worked on SONGS and carries no imputation of misconduct.

[22] Chief Administrative Law Judge's Ruling Denying Motion for Reassignment (July 15, 2015) at 2 (The [moving party] does not identify any provision of law or order or rule of the Commission that Judge Darling may have violated, and none is apparent); Ms. Henricks made a previous unsuccessful motion to remove the ALJ for cause, which was denied based on the plain language of Rule 9.4 (see, Chief Administrative law Judge's Ruling Denying Request for Reassignment for Cause (June 26, 2014); see below, Section 7 Other Rulings.

Rule 8.4. The Commission affirms the findings in the Ruling and OSC, based on a preponderance of evidence, because the communications concerned a substantive issue in the SONGS OII, took place between an interested person and a decisionmaker, and did not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding. On the other hand, after careful review of the evidence, explanations, and argument submitted, we do not find sufficient evidence to conclude that unreported ex parte communications occurred on May 29, 2013 or on June 17, 2014. These facts are discussed below in Section 6.1.1.

In Comments on the Proposed Decision, SCE requests some clarifications of the ex parte rules, but the decision is essentially clear. For example, SCE fears uncertainty because the term "substantive issue" is not defined in the statute or rules. However, we affirm herein the finding in the ALJ's Ruling and OSC that, at a minimum, the term refers to issues referenced in one or more scoping rulings issued in a formal proceeding, including broad issues identified for future phases of a proceeding.

Furthermore, the Commission concludes that SCE has twice violated Rule 1.1 based on the acts and omissions of SCE and its representatives. Mr. Pickett's failure to accurately describe, or to properly serve notice of the Poland Meeting or reveal the existence of the Notes until they became publicly known by other means, set in motion a series of misleading filings by SCE. As discussed below, we find an additional violation of Rule 1.1 based on the untrue and misleading statement by Mr. Litzinger during his testimony made under oath.

5.1. Violations of Rule 8.4

Based on admissions (including internal and external emails) by SCE, the Commission has determined that SCE violated Rule 8.4[23] by not reporting or providing timely notice of the following ex parte communications.

1. March 26, 2013 - At a meeting in Warsaw, Poland, a non-public communication occurred between Mr. Pickett and former President Peevey related to the substantive issue of recovery of the costs of replacement power purchased to cover lost SONGS output. The communication between Mr. Pickett and former President Peevey was not reported until nearly two years later, after a decision had been adopted. SCE admitted, as of February 9, 2015, this was a reportable communication. Mr. Pickett also admitted writing Notes during the meeting, although he claimed he wrote down former President Peevey's statements and gave him the Notes at the end of the meeting. SCE also did not reveal the existence of the Notes until April 2015. The Notes were created in connection with the ex parte communication, meaning the Notes qualify as written material used during the communication, and subject to ex parte notice and disclosure. SCE neither attempted to serve notice of the ex parte communication nor a copy of the Notes, although written communications must be served on all parties the same day as required by Rule 8.3(c)(3). Although former President Peevey apparently kept the Notes and Mr. Pickett stated that he did not retain a copy, the existence of the Notes used during the communication should have been reported pursuant to Rule 8.4(c).

2. March 27, 2013 – During dinner on the following night at the Poland conference, a non-public communication occurred between Mr. Pickett and former President Peevey about substantive issues associated with potential allocation of some costs to be determined in the SONGS OII. It is reasonable to infer from the evidence that Mr. Pickett continued communication with former President Peevey, including an internal e-mail he wrote stating he was "working"

[23] See also, § 1701.3.

> SONGS at the dinner.[24] Mr. Pickett also admitted discussing possible settlement partners with Peevey.[25] Pickett's later statement that he did not recall discussing SONGS is less reliable than his contemporaneous internal e-mail.

SCE argues it is "implausible" a substantive discussion occurred for several reasons, none of which we find persuasive. SCE provided a declaration from a Mr. Mason,[26] who stated the dinner celebrated his wedding anniversary and was organized by former President Peevey. Although Mr. Mason stated he sat next to former President Peevey and did "not recall any discussion about SONGS," he also admits he was taken by surprise by the noisy dinner which was attended by 15-20 people making speeches and toasts.[27] Given the admitted noisy distractions and his friendship with former President Peevey, we give this declaration little weight. Similarly, Mr. Pickett's credibility is adversely impacted by his inconsistent statements, the Randolph declaration, and by his initial failure to report the actual nature of the March 26 meeting.[28]

These facts and reasonable inferences support the conclusion that these communications constituted unreported, non-public ex parte communications between Mr. Pickett and former President Peevey about one or more substantive issue in the OII.

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

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

[26] Mr. Mason was the president and CEO of the California Foundation on the Environment and the Economy which sponsored the Poland meeting.

[27] SCE's Response to OSC, Appendix B, Mason Declaration.

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

> 3. May 28, 2013 – Mr. Starck[29] sent one e-mail to all five Commissioners which included an SCE press release containing substantive and argumentative content about the reasonableness of SCE's actions related to the design of the RSGs, a substantive issue in the OII.[30] 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 was likely to be a factor in determining whether SGRP and other costs, including post-shutdown repairs, were reasonable. SCE did not serve the press release on all parties the same day as required by Rule 8.3(c)(3), therefore it should have been reported pursuant to Rule 8.4(c).

SCE argues that forwarding the press release was not a reportable communication because it was "a public action occurring in the context of well-publicized events," and SCE did not have the "intent to influence the outcome of disputed issues in the OII." These arguments are not persuasive. First, neither the language of § 1701 nor Rule 8.4 require proof of intent to establish a violation.[31] In addition, the communication to all Commissioners of SCE's written press statement which addresses substantive SONGS issues is not a "public" event that is visible to the other parties. Furthermore, it is unreasonable to infer that SCE sent the press statement to Commissioners as a sort of "FYI" without comprehending it made arguments about SCE's culpability for the RSG design, and was made without service to other parties.

These facts and reasonable inferences support the conclusion that the e-mail and attachment constitute an unreported, non-public ex parte

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

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

[31] See, e.g., Pacific Gas & Electric Co. v. Public Utilities Com., 237 Cal. App. 4th 812, 853 (as to Rule 1.1).

communication between SCE and the Commissioners on a substantive issue in the OII.

> 4. June 26, 2013 – The non-public communication between Mr. Litzinger[32] and Commissioner Florio about the substantive issue of employee severance costs is described by SCE as a "brief update on the status of bargaining efforts with respect to the severance of SONGS employees" after announcement of the permanent shutdown of SONGS.[33] The question of SCE's employee compensation commitments and cost recovery of employee severance costs relate to substantive issues in the OII because the reasonableness of these expenses would be considered by the Commission when reviewing 2013 SONGS Operations and Maintenance (O&M) expenses in Phase 3 or later.

In response to the OSC, SCE submitted a new declaration by Mr. Litzinger in which he states (i) they did not discuss any actual costs or cost recovery; (ii) the information was limited to the facts that SCE's negotiations with its labor unions "were ongoing and would be completed within the next few months;" and (iii) Mr. Litzinger thought Commissioner Florio would want to know the timetable for the labor negotiations because he was working on the schedule for the OII.[34] The declaration is unpersuasive. First, the non-public information exchanged between Mr. Litzinger and Commissioner Florio was not relevant to the pending scoping memo for Phase 2.[35] Second, the fact of, and timetable for, negotiations about potentially recoverable and significant employee severance

[32] Mr. Litzinger was SCE's President at the time.

[33] SCE's Response to first ALJ Ruling, Appendix C at 26 (¶14).

[34] SCE's Response to OSC, Appendix A (Litzinger Declaration) at ¶3.

[35] Phase 2 Scoping Memo regarding § 455.5 was issued July 31, 2013; Employee severance costs were expected to be reviewed much later in the OII (a possible Phase 4 based on the Phase 1 Scoping Memo).

costs involved substantive issues to be considered in the OII that should have been disclosed to other parties.

In Comments on the Proposed Decision (PD), SCE claims no substantive communication occurred, based on its misunderstanding of language in the ALJ's Ruling and OSC.[36] SCE contends Mr. Litzinger's communication was limited to the schedule for collective bargaining, which was "procedural," and not a "substantive issue" in the proceeding because it was "not disputed." This is an incorrect interpretation. In the Ruling, "not disputed" was unartfully applied as an antonym for "substantive issue," not to create a discrete standard; note the referenced sentence continues with "i.e., 'ex parte communications' as defined by Rule 8.1(c)."

More significantly, recovery of potential employee severance costs was an identified substantive issue related to the 2012-2014 O&M expenses. This is in clear contrast to procedural information about third-party recoveries outside the formal proceedings. Even if Mr. Litzinger's statements to the Commissioner were limited to the progress or timing of employee severance discussions, the communication concerned SCE's participation in development of an amount to be claimed in the OII. The statements could reasonably be viewed as assurance the process was reasonable, as well as implied support for rate recovery of the eventual negotiated amounts. Therefore, we decline to recharacterize and decline to exclude this unreported communication from the violations determined. These facts and reasonable inferences support the conclusion that this communication constituted an unreported, non-public ex parte

[36] SCE's Opening Comments on PD at 4.

communication between SCE and Commissioner Florio on a substantive issue in the OII.

> 5. September 6, 2013 – During a non-public lunch meeting between former President Peevey, Mr. Litzinger, and "the [SCE] Chino Hills team," a communication about a substantive issue occurred between Mr. Litzinger, Mr. Starck and former President Peevey related to SCE's cost recovery claims for replacement power and capital investment at SONGS. SCE states that former President Peevey told Mr. Litzinger that SCE's 2012 ERRA[37] proceeding regarding replacement power costs would not be resolved until a settlement was adopted in the SONGS OII.[38] In an internal SCE email, Mr. Starck states that (i) Mr. Litzinger responded to former President Peevey, "[I]t would be a combination of disallowances of capital investment and replacement power costs;" and (ii) that Mr. Starck told former President Peevey that delay of the ERRA decision placed SCE in a "difficult financial situation" and SCE was "undercollecting $100 million each month."[39]

SCE submitted Mr. Litzinger's new declaration in support of its claim that his communication took "less than two minutes" and was not substantive. However, Mr. Litzinger essentially admits that he made a similar statement but that it was in an effort to not discuss the topic with former President Peevey.[40] Despite Mr. Litzinger's claim that his reply was just "stating the obvious," when SCE's President contrasted his position with that of former President Peevey on a substantive issue in a non-public meeting, it became a reportable ex parte communication. Mr. Starck's contribution to the ex parte communication was

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[37] SCE's 2013 Energy Resource Recovery Account forecast proceeding, Application (A.) 12-08-001; See, D.13-10-052 (deferring SONGS-related costs).

[38] SCE Response to first ALJ Ruling, at 27 (¶16).

[39] *Id.* Appendix D at #00201.

[40] SCE's Response to OSC, Appendix A (Litzinger Declaration) at ¶14.

argumentative and included an important alleged fact (monthly undercollections) about the substantive issue of SONGS replacement power costs.

In Comments on the PD, SCE re-argues that Mr. Litzinger's "brief remark" was intended only "to deflect the discussion."[41] SCE refers to dicta in the ALJ's Ruling which distinguishes reportable communications by pointing to one of the underlying reasons for reporting—parties want to personally talk to Commissioners about substantive issues to be decided by the Commission. However, this language is merely guidance, the content of the communication is determinative. Neither the law, nor this decision, require proof of intention to influence a decisionmaker in order for the Commission to find a reporting violation. Furthermore, SCE did not address Mr. Starck's statements. Therefore, we decline to recharacterize and decline to exclude this unreported communication from the violations determined.

These facts and reasonable inferences support the conclusion that this meeting included an unreported, non-public ex parte communication between SCE executives and former President Peevey about a substantive issue in the SONGS OII.

> 6. November 15, 2013 - During a non-public dinner meeting between Mr. Craver[42] and former President Peevey, an ex parte communication occurred between them related to SCE's efforts to (i) bring Mitsubishi Heavy Industries (MHI), the RSG vendor, to the negotiating table regarding SCE's warranty claim; and (ii) gain

[41] SCE Opening Comments on PD at 5.

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

> written support from federal officials.[43] SCE's efforts to obtain third party recovery relates to substantive issues in the OII (in contrast to the mere procedural posture of the MHI arbitration). (Mr. Craver also sent a follow-up e-mail to former President Peevey which included copies of three letters from federal officials to either the U.S. Ambassador to Japan or the U.S. Trade Representative seeking the support of the Japanese government for MHI negotiations with SCE.[44]) Some aspects of SCE's claims against MHI are within the Preliminary Scope of "ratemaking issues related to warranty coverage…of SONGS costs."[45] For example, the diligence of SCE's actions to pursue alternate sources of funds to cover shutdown-related costs was relevant to the reasonableness of its actions after shutdown. In addition, funds recovered from MHI would be considered by the Commission to offset cost allocations to ratepayers in the final phase allocating costs.

SCE claims it reasonably concluded no ex parte notice was required because it was not clear that pursuit of third-party recoveries was going to be part of the OII. This is not persuasive. SCE relies on a lack of explicit reference to MHI claims in the Phase 1 and Phase 2 Scoping Memos. However, SCE's analysis is too myopic. Many proceedings are broken into distinct phases due to complexity, availability of evidence, or other considerations. In determining whether a communication involves a "substantive issue," parties may not ignore issues identified, even generally, in an OII, as part of a future phase in the proceeding. Here, the Commission had issued an OII to examine a range of SCE's actions and expenditures connected to failure of the RSGs, primarily to determine cost recovery. The scoping memos issued for the first two phases

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

[44] *Id.* Appendix C at #00016 -#00022.

[45] OII at 15.

focused on other distinct cost issues, but did not eviscerate the overall scope of the OII.

These facts and reasonable inferences support the conclusion that that Mr. Craver's communications constituted an unreported, non-public communication between an SCE executive and former President Peevey on a substantive issue in the OII.

> 7. May 28, 2014 – On or about this date, a non-public ex parte communication occurred between former President Peevey and two SCE executives involving the substantive issue of possible changes to the proposed SONGS settlement. SCE described the communication as initiated by former President Peevey who "was not pleased with SCE's hesitance to contribute economic support" to a particular program at University of California at Los Angeles (UCLA).[46] Further, SCE disclosed an email from that date by Mr. Hoover[47] to Mr. Nichols,[48] which stated in relevant part,
>
> > ….[Peevey] doesn't understand why we will not fund the UC data analysis program. He said Florio is supportive…[Peevey] says he has talked to you and Ron about it and he is frustrated…."[49] [Peevey} wanted me to "pass along that SONGS is on a 'tight schedule' and [Peevey] would hate to see it slip."[50]

SCE argues it is not reasonable to infer from this admission that a communication about a substantive issue occurred between SCE executives and former President Peevey. Instead, SCE links this communication to violation 8

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[46] SCE Response to first ALJ Ruling, Appendix C at 31 (¶26).

[47] Mr. Hoover was then SCE's Director of State Energy Regulations.

[48] Mr. R.O. Nichols was then SCE's Senior Vice President for Regulatory Affairs.

[49] SCE Response to first ALJ Ruling, Appendix D at #00223.

[50] *Ibid.*; see also, Appendix D at #00224 (May 29, 2014 e-mail from Mr. Hoover to Mr. Nichols "…Mike in no way linked SONGS with funding for UCLA….").

below and dismisses them both as simply part of former President Peevey's "campaign to convince SCE to modify the settlement to add a provision for funding greenhouse gas (GHG) research at the University of California. SCE steadfastly refused to engage on this topic with President Peevey"[51]

In contrast to other rebuffs of former President Peevey seen in SCE's internal e-mails, it is reasonable to infer from this language that at least some back-and-forth occurred between former President Peevey and one or more SCE executives. For example, former President Peevey expressed awareness that SCE had decided not to fund the project he requested. It is reasonable to infer that someone from SCE told him -- something different than SCE's representative simply saying he will not discuss it.

These facts and reasonable inferences support the conclusion that an unreported, non-public communication occurred between one or more SCE executives and former President Peevey on the substantive issue of a potential modification to the SONGS OII settlement agreement.

> 8. June 11, 2014 – During a non-public meeting, an ex parte communication occurred between former President Peevey and one or more SCE executives involving the substantive issue of a possible modification to the proposed SONGS settlement agreement. SCE states that former President Peevey called Mr. Hoover to his office, "raised the issue of SCE making a contribution to UC for GHG research," and asked Mr. Hoover to deliver his personal note to Mr. Litzinger[52] along with other letters from local elected officials

[51] SCE's Response to OSC.

[52] Former President Peevey's note read, "Ron –Support for GHG reduction efforts in SoCal from Garcetti, et al."

> urging the Commission to support GHG research.[53] A series of SCE's internal emails on June 11 show that Mr. Hoover conveyed the letters to Mr. Litzinger, along with a message that former President Peevey wanted to "see [Litzinger] right away."[54] In one email to Mr. Nichols, Mr. Hoover states that "he [Peevey] is lowering the ask to $3 million. He talked with Ron last week."[55] Mr. Hoover confirmed that "Ron" refers to Mr. Litzinger.

SCE argues it is unreasonable, and contrary to fact, to infer that a substantive communication occurred between former President Peevey and Mr. Litzinger. Instead, SCE contends that the e-mails reference a continuation of an effort begun during a June 4 telephone call by former President Peevey to discuss with Mr. Litzinger a contribution to UC for GHG research;[56] SCE asserts that Mr. Litzinger then declined to discuss the SONGS settlement.[57] SCE states that when former President Peevey again asked Mr. Litzinger to commit to the GHG project, Mr. Litzinger stated he "was not in a position to" and that the board would have to approve the amount. Former President Peevey then offered to lower the amount requested.

From this evidence, it is reasonable to infer there was a non-public unreported communication between former President Peevey and Mr. Litzinger. The communication addressed the substantive issues of terms and conditions of a possible new program as an addition to the OII settlement. It is more likely

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[53] SCE's Response to first ALJ Ruling, Appendix C at 31 (¶28); see also, Appendix D at #00248 - #00250; Mr. Hoover's e-mails offer no indication that he communicated anything other than he would convey the materials and message to Mr. Litzinger).

[54] *Id.* Appendix D at #00248 - #00250.

[55] *Ibid.* at #00250.

[56] SCE's Response to OSC at 16.

[57] *Ibid.*

true than not that such a discussion occurred between the participants, in part because an SCE e-mail confirms a Peevey-Litzinger meeting on the UCLA GHG proposal, and former President Peevey then promptly made a significant change to the funding terms of his proposed program.[58]

These facts and reasonable inferences support the conclusion that an unreported, non-public communication occurred between one or more SCE executives and former President Peevey on the substantive issue of potential modifications to the settlement agreement.

5.1.1. Rule 8.4 Violations Not Affirmed

Below we explain why we do not affirm violations of Rule 8.4 initially identified in the Ruling and OSC, for the following two instances:

> 1. May 29, 2013 – The ALJ initially found that during a non-public meeting, an ex parte communication occurred between Mr. Hoover and former President Peevey's Chief of Staff, Carol Brown, most likely involving the substantive issue of a possible SONGS settlement.

The non-public communication between Mr. Hoover and Ms. Brown, occurred on the same day as SCE's unreported transmission to Commissioners of SCE's written press statement involving substantive issues in the OII. According to SCE's internal e-mails, after talking with Ms. Brown, Mr. Hoover reported to Mr. Starck that she said Mr. Pickett was "well prepared in Poland with specifics," but complained that "nothing has happened."

However, SCE argues it is unreasonable to conclude a substantive issue was discussed because there is no evidence about the subject matter of the

[58] The public officials' letters may also have been unreported ex parte communications but are not at issue as to SCE.

communication. SCE also submitted a declaration from Mr. Hoover in which he states he does not recall discussing the press release with Ms. Brown or responding to her comments about the Poland meeting.

We acknowledge that Mr. Hoover's sworn declaration, although not conclusive, offers a reasonable alternative inference that the elements of an ex parte communication are not present. Therefore, based on further review, we find there is insufficient evidence to establish that an unreported, ex parte communication occurred between Mr. Hoover and Ms. Brown.

2. June 17, 2014 - The ALJ initially found that during a non-public meeting, an ex parte communication occurred between former President Peevey and Mr. Craver involving the substantive issue of a possible modification to the proposed SONGS settlement agreement.

SCE explained that former President Peevey attended a meeting at SCE that day with a large group of people on a matter unrelated to SONGS.[59] The evidence includes SCE's disclosure of two June 17 e-mails between Mr. Hoover and another employee with the subject line, "Ted just came and got Mike Peevey." In the first, Mr. Hoover wrote, "Interesting…." In the second, the sender replies to Mr. Hoover, "Peevey came back. RO says the mtg was about UCLA." SCE also stated that former President Peevey initiated the meeting with Mr. Craver, "raised the issue of SCE making a voluntary contribution to UC for greenhouse gas (GHG) research," but "Mr. Craver responded that he could not engage in substantive conversation on that topic…"[60]

[59] SCE's Response to ALJs' first Ruling at 12 (Coalition for Environmental Protection, Restoration and Development).

[60] *Id.* at 31 (¶29).

SCE argues it is unreasonable, and contrary to fact, to infer that a substantive communication occurred between former President Peevey and Mr. Craver. According to SCE, Mr. Craver not only declined to discuss the issue, he told former President Peevey that he was acting on advice of counsel. This description also is found in the April 29, 2014 Litzinger Declaration.

Two uncontested facts support an alternative inference: the next day, former President Peevey telephoned, and then met with, Mr. Ron Olson, an attorney and former board member at SCE and EIX, who affirmed that SCE could not engage with a Commissioner about the pending SONGS settlement.[61] It is possible to reasonably infer that SCE's version of events is more likely to be true.

Upon further review of the evidence, and reasonable inferences therefrom, we find there is insufficient evidence to establish that an unreported, non-public communication occurred between Mr. Craver and former President Peevey on a substantive issue.

5.2. Violations of Rule 1.1

SCE was directed to show cause why it had not violated Rule 1.1 in connection with two sets of facts and circumstances described below. Rule 1.1 states, in relevant part, that a party shall "never…mislead the Commission or its staff by an artifice or false statement of fact or law."

The rule does not require a finding of "intention," although intent goes to the weight of the violation.[62] For example, prior Commission decisions have

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[61] *Id.* at 31-32; SCE's Response to second ALJ Ruling at 5.

[62] *Pacific Gas and Electric Company v. CPUC*, 237 Cal. App. 4th 812, 854 (June 16, 2015); 2015 Cal PUC LEXIS 228, at *381 (April 9, 2015).

held that a violation of Rule 1.1 can result from a reckless or grossly negligent act.[63] There is also a line of Commission decisions which hold that situations involving a failure to correctly cite a proposition of law, a lack of candor or withholding of information, and a failure to correctly inform and to correct the mistaken information, are actionable Rule 1 violations.[64]

5.2.1. SCE's Statements and Submission Regarding the Poland Meeting

SCE acknowledges it should have promptly filed a notice of the March 26, 2012 ex parte communication, long before the Commission adopted a decision approving a settlement of the OII. We find that SCE also violated Rule 1.1 because its grossly negligent actions and omissions after the undisclosed ex parte communication resulted in (i) a failure to correct the record; and (ii) false and misleading statements made in other documents subsequently filed with the Commission. On this basis, we find that this is a continuing violation.

In Comments on the PD, SCE argues the decision does not establish "gross negligence," i.e. scant regard or indifference, towards its duty to comply with the Commission's Rules of Practice and Procedure. However, the discussion below sets forth the Commission's basis for this finding: SCE's scant regard for its duty to (1) adequately review and follow-up on Mr. Pickett's unlikely description of his actions in Warsaw, including the existence of written Notes; (2) retain or obtain a copy of the Notes for disclosure; (3) revise rather than repeat Mr. Pickett's mischaracterizations in additional filings with the Commission, even as he offered somewhat different versions of the meeting; and (4) maintain

[63] 2015 Cal PUC LEXIS 228 at *180.

[64] See, e.g., D.93-05-020, D.92-07-084, D.92-07-078, D.90-12-038.

compliance standards to preserve public confidence in the Commission. Furthermore, SCE's argument that it had no duty to obtain or disclose the Notes does not address Rules 8.3 and 8.4 which give rise to the duty.

Notwithstanding early concerns by Mr. Litzinger and Mr. Craver regarding Mr. Pickett's truthfulness,[65] SCE did nothing to probe further about his claimed silence at the meeting, except to ask him again. Indeed, it is difficult to imagine the meeting as described by Mr. Pickett, and believe that this top SCE executive made no comment to the President of the Commission about any of the substantive issues raised. Based on additional evidence, we now conclude this was not the case. Instead, Mr. Pickett privately communicated his opinion about "what a settlement agreement should look like" to a Commissioner while these substantive issues were part of an open proceeding.[66] Moreover, SCE and Mr. Pickett made no effort to retain or serve the Notes, written material used by SCE as part of an ex parte communication, on all parties. Until challenged by public reports of the Poland Meeting and the Notes, SCE overlooked these questions.

When SCE filed the Late Notice in February 2015, it included two of three versions Mr. Pickett and SCE have offered about his actions at the meeting. But, SCE has provided no indication it was troubled by the inconsistencies or had considered looking into whether Mr. Pickett had participated in one or more unreported ex parte communications. SCE's acts and omissions which led to filing of false and misleading statements with the Commission, include:

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[65] SCE's response to first ALJ Ruling, Appendix D at #00186.

[66] Ruling and OSC, Attachment A, Randolph Declaration at 1.

- In April 2013, Mr. Pickett said he did not speak when former President Peevey talked about issues in Warsaw, Poland on March 26 or 27, 2013 related to the costs of a SONGS shutdown [Version 1];
- SCE did not scrutinize Mr. Pickett's description of the communication before determining no reportable ex parte communication occurred;
- SCE failed to retain a copy of the Notes written by Mr. Pickett with former President Peevey near or at the March 26 meeting.[67] (It is undisputed that the Notes include handwriting from both Mr. Pickett and former President Peevey);
- Although Mr. Pickett admits he took notes (Notes) during the communication, no copy of the Notes was disclosed or served on other parties, as required by Rules 8.3(c)(3) and 8.4(c);
- In the Late Notice, SCE only discloses the March 26 communication, and simply reports that former President Peevey kept the Notes and SCE did not have a copy; but SCE does not explain or question Mr. Pickett's failure to retain a copy of the Notes, or to seek a copy to serve on all parties and the Commission;
- SCE did not disclose until April 29, 2015 that Mr. Pickett had created a recollected version of the Notes just a few days after the Poland Meeting;[68]
- In the Late Notice, SCE states Mr. Pickett now "believes that he expressed a brief reaction to at least one of Mr. Peevey's comments." [Version 2];
- In its April 29, 2015 submission, SCE restated that it was only former President Peevey who spoke about a framework for a possible resolution of the SONGS OII;[69]

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[67] The Notes are attached hereto as Attachment 1.

[68] SCE's Response to first ALJ Ruling, Appendix D at #00003.

[69] *Id.* at 2.

- SCE submitted Mr. Pickett's April 28, 2015 declaration in which he continued to assert that former President Peevey did the talking and that he did not react or respond, with one exception: "I briefly expressed disagreement" with a statement by former President Peevey that there should be a disallowance of both replacement power and RSG costs.[70] [Version 3]; and
- Mr. Pickett did not disclose any individual statements he made and maintained the communications regarding shutdown were "in the main, from President Peevey to me."[71]

SCE's and Mr. Pickett's accounts differ with that of Mr. Edward Randolph, Director of the Commission's Energy Division, who attended the March 26, 2013 meeting and whose declaration is attached to the OSC. According to Mr. Randolph, "President Peevey initiated the meeting for the purpose of encouraging SCE to make a decision soon" as to whether it would restart SONGS or permanently shut down.[72] Then "a conversation was initiated" and Mr. Pickett stated "what he thought a settlement agreement would look like in the SONGS OII.…"[73]

SCE argues it was not misleading to present Mr. Pickett's declaration with his recollections of the March 26, 2013 meeting. SCE asserts that Mr. Pickett's recollection may have been "incomplete" or that Mr. Randolph's recollection is "incorrect."[74] In either event, "a difference in recollection is not a basis to find that SCE misled the Commission…absent any evidence of intentional, reckless,

[70] *Id.* at 3.

[71] *Id.* Appendix F, Pickett Declaration at 3 (¶13).

[72] Ruling and OSC, Appendix A, Randolph Declaration at 1.

[73] *Id.* at 2.

[74] SCE's Response to OSC at 20.

or grossly negligent conduct."[75] We disagree. Although not required to find that Mr. Pickett acted intentionally, recklessly, or with gross negligence in order to find a violation of Rule 1.1, in this instance, we find that SCE's series of acts and omissions constitute gross negligence.

First, the Commission places more weight on Mr. Randolph's statements than Mr. Pickett's because (1) Mr. Pickett's credibility is impacted by his inconsistent statements which have not been appropriately examined or explained by SCE, and (2) Mr. Pickett has an interest in not becoming subject to Commission sanction or action by SCE. Mr. Randolph suffers from no such burdens on his duty to be truthful.

Moreover, the violation of Rule 1.1 is not grounded in a mere difference in recollection. Instead, it is an aggregate of choices made by SCE and its employee, Mr. Pickett, which illustrate a pattern of lax oversight and grossly negligent disregard for the Commission's Rules. The net effect is a series of acts and omissions favoring non-disclosure over disclosure of one-on-one communications with decisionmakers. We are unpersuaded by SCE's bid for justification because it only had Mr. Pickett to interview. There is no indication that SCE made any attempt to contact former President Peevey, or Mr. Randolph, to clarify the content of the communication or get a copy of the Notes. Nor did SCE acknowledge the possibility of a Rule 8.4 violation and follow-up with Mr. Pickett when he promptly began to take internal steps to develop a potential framework for settlement in the event of a permanent shutdown of SONGS.[76]

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[75] *Ibid.*

[76] SCE Response to ALJ's first Ruling, Appendix D at #00005.

In sum, the Commission finds, based on the evidence, and all reasonable inferences to be derived therefrom, that SCE violated Rule 1.1. SCE's employee made false and misleading statements which masked his provision of opinions and comments to a Commissioner about a possible framework for settlement of the SONGS OII that would otherwise have triggered a duty by SCE to file a notice of the ex parte communication. Thereafter, SCE and Mr. Pickett continued making false and misleading statements in the Late Notice and in response to ALJ requests for information. If undiscovered, their actions would have left the Commission with the false impression that SCE did not have an early discussion with former President Peevey about cost recovery through settlement.

5.2.2. Testimony by SCE's President Mr. Litzinger

Based on the information, e-mails, and other documents provided by SCE, the Ruling and OSC identified the possibility that Mr. Litzinger testified falsely at the May 14, 2014 hearing on the proposed SONGS settlement.[77] We find that his testimony is grounds for finding a violation of Rule 1.1 by SCE. In particular, he was asked under oath whether "SCE was having ex parte meetings with the Commissioners" while settlement talks were underway.[78] Mr. Litzinger responded, "The only ex parte communications I had with Commissioners was following the Phase 1 Proposed Decision. And it was noticed."[79]

It is accurate that a series of ex parte communications and meetings between Mr. Litzinger and other SCE representatives and three Commissioners and their advisors occurred on December 4, 2013, and were disclosed by an SCE

[77] Ruling and OSC at 45.

[78] Reporter's Transcript (RT) at 2771.

[79] *Ibid*.

notice filed two days later. On the other hand, Mr. Litzinger's testimony that these were the only ex parte communications he had during the period of settlement negotiations was not true.

In Section 5.1 above, we found that Mr. Litzinger engaged in two unreported ex parte communications between March 2013 and May 14, 2014.[80] Although SCE provided a description of these communications in its April 29, 2015 Response, neither Mr. Litzinger's May 14, 2014 testimony nor his April 29, 2015 declaration disclosed them.[81] SCE states that it did not then, nor does it now, consider these to be ex parte communications (as defined by § 1701.1(c)(4) and Rule 8.1(c)). Thus, SCE contends Mr. Litzinger testified in good faith based on his understanding that he had not participated in any unreported ex parte communications. SCE further asserts that Mr. Litzinger's declaration did not purport to describe all communications he ever had with decisionmakers, and it would be an unreasonable inference for the Commission to draw.

In Comments on the PD, A4NR argues that Mr. Litzinger's testimony was reckless or grossly negligent. A4NR supports its view on the grounds that his testimony was under oath, he failed to respond to the question asked about all SCE communications, and he had advance knowledge that Mr. Pickett would meet former President Peevey during the Warsaw meeting.[82] A4NR infers from the evidence that Mr. Pickett fully briefed Mr. Litzinger about the Warsaw

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[80] One ex parte communication occurred between Mr. Litzinger and Commissioner Florio on June 26, 2013. The other occurred on September 6, 2013 at lunch between Mr. Litzinger, President Peevey, and others.

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

[82] A4NR Opening Comments on the PD at 7-8.

meeting and imputes knowledge to Mr. Litzinger of all the violations found in this decision.

On the other hand, SCE asks the Commission to not find Mr. Litzinger's testimony violated Rule 1.1 because it was merely "mistaken" and "inadvertent."[83] SCE not only disputes A4NR's description of Mr. Litzinger's conduct, SCE underscores that Mr. Litzinger's answer related to his communications only, and if the statement were viewed in context, he also answered the larger question by truthfully stating that SCE frequently has ex parte communications on multiple matters.[84]

SCE disputes that Mr. Litzinger engaged in intentional, reckless or grossly negligent conduct when he testified. SCE further claims that Mr. Litzinger "subjectively believed that the two communications cited were not reportable" and the belief was reasonable given his reliance on legal counsel and the subsequent nuanced application of Rule 8.4 in the Ruling.

We are persuaded by the present evidence that Mr. Litzinger did not intentionally give false testimony before the Commission or in his declaration. Nor does the evidence imply that his conduct was reckless or grossly negligent. Nonetheless, his testimony was untrue and a lack of intent to deceive does not necessarily avoid a Rule 1 violation. The Commission can and has found a Rule 1.1 violation where there has been false statement which misled the Commission.[85]

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[83] SCE Reply Comments on the PD at 3.

[84] *Ibid*.

[85] *Pacific Gas and Electric Company v. CPUC,* 2015 Cal. PUC LEXIS 521 (August 27, 2015) D.15-08-032 at *53, fn. 33.

Here, the Commission was misinformed by Mr. Litzinger's testimony which, if true and accurate, would have exposed two additional ex parte communications he participated in during the time settlement negotiations were underway. Although the undisclosed ex parte communications do not appear to be lengthy or pithy, and involved general references to two terms of a potential settlement, the Commission and the public rely on witnesses being truthful in our proceedings. Thus, Mr. Litzinger's testimony deprived the Commission, and the public, of information about SCE's actions, however limited or informal, to privately communicate its views about possible settlement terms to the Commission's decisionmakers.

Based on the evidence and the reasonable inferences to be drawn, the Commission finds that Mr. Litzinger's testimony included an unintentional false statement which misled the Commission in violation of Rule 1.1.

The Commission takes Rule 1.1 very seriously and requires all participants in our proceedings to testify truthfully and under oath. We especially expect top utility executives to be well-informed about the conduct of the company and its representatives, to model from the top appropriate compliance with Commission Rules, and, if necessary, be able to truthfully say they do not know but will find out.

6. Penalties and Sanctions

In the discussion in Section 5, the Commission finds eight violations of Rule 8.4 by SCE for failing to report ex parte communications, and two violations of Rule 1.1 for misleading the Commission by false statements. Section 2107 provides specific authority to impose monetary penalties for violations of our Rules:

> When any public utility fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, it is subject to a penalty of not less than five hundred dollars ($500), nor more than fifty thousand dollars $50,000 for each offense.

Particularly with respect to ex parte violations, Rule 8.3(j) gives the Commission broader authority to "impose such penalties and sanctions, or make any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest."[86]

Pursuant to § 2109, relating to penalties, "[t]he act, omission or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility." Consequently, this decision imposes penalties and sanctions on SCE for violations committed by its officers, agents, or employees.

In addition, we must determine whether the violations are one-time or continuing. Section 2108 provides, in relevant part, that "every violation of any…rule…of the commission by any corporation or person is a separate and distinct offense, and in the case of a continuing violation, each day's continuance thereof shall be a separate and distinct offense." The Commission has had to interpret what "continuing" means through its decisions.

The Commission has previously found continuing violations where there was an ongoing duty such as maintaining equipment safely. For example, SCE identified several illustrative examples, including (i) failure to clean-up an oil

[86] See also, § 701 (The commission may supervise and regulate every public utility in the State and may do all things….which are necessary and convenient in the exercise of such power and jurisdiction).

spill; (ii) failure to correct conditions that involved unsafe operation of a gas pipeline; and (iii) withholding of required information.[87] SCE distinguishes these situations from the one-time duty in Rule 8.4 to file a notice of ex parte communication. According to SCE, the Commission has never found that a failure to file an ex parte notice is a continuing violation because the violation is complete when the notice is not filed.[88] SCE urges the Commission to reach that conclusion here.

We are persuaded that the violations of Rule 8.4 found herein are not continuing violations. However, we decline to foreclose possible circumstances for which a continuing violation might be appropriate. We also conclude there is no legal barrier to finding a Rule 1.1 violation to be continuing, depending on the circumstances. In Section 5.2.1, we found that the Rule 1.1 violation which arose from the failure to properly report the Poland Meeting, is a continuing violation. The other Rule 1.1 violation concerning Mr. Litzinger's testimony about previous ex parte communications is not continuing.

6.1. Five-Part Test

To determine the appropriate penalties and sanctions for these violations, we apply the Commission's established principles used in assessing sanctions, as set forth in D.98-12-075.

6.1.1. What Harm is Caused by the Violation

The severity of the offense includes considerations about types of harm which can result from a rule violation. We discuss these types of harm below.

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[87] SCE Response to Ruling and OSC at 27 - 29 [citing 16 Cal. 3d at 44; see also D.15-04-023; D.13-12-053].

[88] *Id.* at 29 [See, e.g., D.14-11-041 (aff'd with dicta in D.15-06-035); D.08-01-021].

The Commission typically evaluates an offense based on the degree of economic or physical harm, or the unlawful benefits gained by the utility.[89] Here, ORA quantified the economic harm to ratepayers of all of the violations as $648 million, the difference between the adopted settlement agreement and ORA's original litigation position.[90] However, ORA provides no legal reasoning or support for why its original litigation position should be the measure of harm, or remedial penalty, for SCE's unreported ex parte communications.

The Commission has also held that violations which do not involve harm to consumers but instead harm the regulatory process by disregarding statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity. A4NR views all SCE's violations as severely harming the integrity of the regulatory process because they reduce or eliminate any impression the proceeding was transparent.[91]

SCE disputes that its failure to report the Poland meeting significantly harmed consumers or the process, "beyond the inherent harm in any rule violation." According to SCE, there is no evidence that the March 26, 2013 communication in Poland affected the settlement, and there is no evidence the meeting influenced the Commission's consideration of the settlement. Similarly, SCE asserts that none of the other alleged unreported communications resulted in more than minimal harm to the regulatory process.

A4NR also raises a due process form of criticism alleging that SCE's decision to not timely report its ex parte communications, especially those by

[89] 84 CPUC2d 155, D.98-12-075 at *54.

[90] ORA's Response to Ruling and OSC at 13.

[91] A4NR's Response to Ruling and OSC at 13.

Mr. Pickett in Poland, "prevented other parties from effectively participating in what they believed to be a level playing field."[92] However, A4NR's description of missed "effective participation" is vague.

During the proceedings, A4NR was an active party and reported engaging in ex parte meetings with Commissioners and/or staff. A4NR consistently sought litigation of SCE's culpability for the RSG design selection, and rejected rate recovery for any post-outage SONGS-related expenses, including seeking removal of all SONGS assets from rate base and zero return on investment (positions inconsistent with settlement.)[93] In addition, some of the identified substantive issues in the unreported ex parte communications had also been discussed generally in the proceeding and were already known to parties.[94] Nonetheless, Rule 8.4 provides for "equal time" access by other parties, if SCE was able to obtain individual one-on-one time with a Commissioner without opportunity for others to participate. Other parties did not have that option.

We consider any ex parte violation to be harmful to our agency and its process. In the current context, the disclosure of many little comments which sometimes touched on a substantive issue seems nominal to SCE. But this view undervalues the importance of transparency and disclosure of those individual contacts with decisionmakers at the Commission.

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[92] *Ibid*.

[93] D.14-11-040 at 40.

[94] For example, the view that SCE should recover replacement power or capital but not both, and growing undercollections for replacement power, were publicly discussed at the Phase 2 Prehearing conference in July 2013; RT at 96-97, 129.

SCE's violations, particularly not reporting the Poland meeting, meant that other parties lacked the knowledge, however logical, that former President Peevey and some at SCE had begun to consider permanent shutdown and what costs might be allocated by a settlement. Additionally, all parties other than SCE were in the dark about former President Peevey's repeated attempts to obtain SCE's support (inside or outside the settlement) for a variously described data center or GHG research program at UCLA. Notably, there was little comment from parties about the competitive final GHG research, development, and deployment program included in the amended settlement agreement.[95]

We do not need to determine the impact of the Rule 8.4 violations, if any, on the settlement negotiations or the final decision adopted in the SONGS proceedings because these issues have been raised in pending Petitions for Modification. Furthermore, harm to the public also attaches to the Rule 1.1 violations. In both instances, SCE representatives misled the Commission, the public, and other parties. We cannot emphasize enough how important it is that witnesses are truthful and accurate when providing information to the Commission, especially under oath. Otherwise, due process and fairness evaporate and the agency's authority and decisions are undermined.

Based on the foregoing, the Commission finds that the Rule violations resulting from SCE's actions and omissions in these proceedings have severely harmed the public's confidence in the Commission, and the integrity of the regulatory process.

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[95] D.14-11-040 at 40 (A4NR expressed "disappointment" with the "timid consideration of the shutdown's impact on CO2 emissions and electricity Prices." [citation omitted]).

6.1.2. Utility's Conduct in Preventing, Detecting, Correcting, Disclosing, and Rectifying the Violation

This factor recognizes the important role of a utility's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the violation.[96] SCE argues that it has acted reasonably in this matter by (i) checking on Mr. Pickett's description of the Poland meeting; (ii) cooperating with the ALJ's requests for information; (iii) voluntarily expanding the scope of documents produced; and (iv) strengthening its internal procedures, including providing training on Commission's requirements, promoting increased awareness, incorporating more layers of review, and adopting recordkeeping requirements.[97]

SCE maintains that it took reasonable steps to verify Mr. Pickett's first description of the Poland Meeting by asking him a second time in April 2013, and again in 2015, whether former President Peevey did all the talking. However, we find this is not much effort. SCE also omits that it undertook the 2015 inquiry after information about the meeting became public. At that point, Mr. Pickett revised his statement, and SCE decided to file the Late Notice. SCE reiterates its belief that the other identified ex parte communications are not reportable, but states it voluntarily disclosed them and the disclosures exceeded the requirements of the ALJ's first Ruling seeking information and documents.

SCE's approach to reporting should have been more robust and favored reporting over non-reporting when it engaged in what it saw as ambiguous

[96] 84 CPUC 2d 155, D.98-12-075 at *56.

[97] SCE's Response to Ruling and OSC at 1-2.

communications and matters of first impression. Instead, SCE's primary response to this inquiry and OSC has been to parse the identified communications as "brief" or not "rising to the level" of a reportable substantive communication. SCE should return to § 1701.3(c) which first states, "Ex parte communications are prohibited in ratesetting cases" and to the exceptions which follow. SCE -- and all interested persons -- should be carefully reading the exceptions and conditions to such prohibited communications in order to conform with the overall intent of transparency advanced by the ex parte statutes and Commission Rules.

SCE does not address its conduct relative to the Rule 1.1 violations except to state it was reasonable to accept Mr. Pickett's statements. We observe that if SCE had undertaken an effective inquiry before or after Mr. Pickett's Poland Meeting, SCE would not have found itself repeating Mr. Pickett's incorrect statements. SCE offered no comment here about Mr. Litzinger's false testimony, which it also could have prevented. SCE claims that at the time of his testimony, SCE had no knowledge that the violations identified in this decision were reportable ex parte communications. However, SCE's submissions confirm that he and other SCE executives were often in informal contact with Commissioners, particularly former President Peevey. Mr. Litzinger, as SCE's President, should have been aware that such contacts were occurring and at times becoming ex parte communications between SCE and a Commissioner about substantive issues in a proceeding. Instead his reaction was to make a firm, but false statement when he lacked all the facts.

We acknowledge SCE's eventual disclosures and its initiative in adopting new policies to promote compliance with the Commission's ex parte rules. However, as described, it is not clear whether SCE intends to rely on the role of

SCE's Legal Department in determining whether the ex parte rules apply to achieve a permanent privilege claim applied to all such records, thus blocking oversight and investigative access by the Commission. Thus, SCE's proposal is of unknown benefit or accessibility.

6.1.3. Commission Precedent

Commission precedent in imposing sanctions for ex parte violations has ranged from relatively minor fines, or none at all, to requiring training on ethics and the Commissions ex parte rules. In D.14-11-041, the Commission described several relevant examples which are presented below:

- In a ratesetting proceeding in which the utility failed to report its ex parte communications with each of the Commissioners' energy advisors, the ALJ required the utility to file notice of its ex parte communications and to retain an independent firm, at its shareholders' expense, to conduct four training sessions on Rule 1.1 and Article 8 of the Rules of Practice and Procedure, and no penalty was imposed.[98]
- In a ratesetting proceeding in which Pacific Gas and Electric Company (PG&E) met with two Commissioners and their advisors without providing the requisite three-day advance notice of the grant of the individual meetings with the Commissioners or post-meeting notices of the ex parte communications, PG&E was required to develop and institute a control system which reflects best practices for compliance with the ex parte rules, and no penalty was imposed.[99]
- Where two utilities in an adjudicatory proceeding violated the ban against ex parte communications by participating in two

[98] February 16, 2012, Joint Assigned Commissioner and ALJ's Ruling, A.08-05-022 et al.

[99] D.08-01-021.

separate ex parte meetings, each with two Commissioners' advisors, the Commission fined them each $20,000 per meeting.[100]

- In an adjudicatory proceeding in which a party sent a written ex parte communication to all Commissioners (and concurrently served it on all parties), the ALJ chastised the party and no penalty was imposed.[101]
- The highest fine ever was imposed on PG&E for engaging in prohibited communications about ALJ assignment in violation of Rule 8.3. The Commission imposed a $1,050,000 penalty.[102]

SCE asks the Commission to bear in mind that the largest penalty the Commission has ever imposed for a violation of an ex parte rule was that $1.05 million penalty recently imposed on PG&E. SCE argues that it would be unfair to impose a higher fine on SCE for late reporting of permitted ex parte communications.

On the other hand, A4NR and ORA have expressed significant outrage over the possibilities of deal-making occurring during unreported ex parte communications. Although the actual content of the communications, to the extent known, is neither detailed nor reflective of agreement, these parties are committed to imposition of the statutory maximum penalties for each and every rule violation.

The Commission has tended to impose higher financial penalties in connection with violations of Rule 1.1, particularly for continuing violations:

- In a rulemaking involving natural gas safety, the Commission fined PG&E $14,350,000 for not promptly correcting a material

[100] D.07-07-020 as modified by D.08-06-023.

[101] May 3, 2002, Administrative Law Judge's Ruling, I.00-11-052.

[102] D.14-11-041.

misstatement of fact in a pleading filed with the Commission and by mischaracterizing the correction submitted for filing as a routine and non-substantive correction.[103]

- In an investigation, the Commission fined a transportation agency $210,500 for violating Rule 1.1 when it disobeyed the subpoena duces tecum by not producing the unredacted copies of the requested records.[104]
- Pursuant to a settlement, the Commission approved the Applicant's payment of a penalty of $ 10,000 for making a misrepresentation on a Commission form in violation of Rule 1.1 by failing to disclose a previous sanction by the Ohio Public Utilities Commission for failure to file a detariffing application.[105]

6.1.4. Amount of Fine or Penalty Will Achieve Objective of Deterrence

Based on the provisions of § 2107, the maximum fine for the eight ex parte violations and one non-continuing Rule 1.1 violation (Litzinger's false statement) is $450,000, or $50,000 per violation. We have concluded that the Poland Meeting Rule 1.1 violation launched a continuing violation, therefore, the penalty will be calculated for the period of March 29, 2013, the date by when SCE should have filed its ex parte notice, through July 3, 2015, the last date in which SCE repeated the erroneous statements of Mr. Pickett. The total is 826 days. If we apply the maximum fine of $50,000 per day for 826 days, the aggregate maximum penalty fine would be $41.3 million. Altogether, SCE's maximum exposure pursuant to § 2107 is a combined total financial penalty of $41,750,000.

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[103] D.13-12-053 at 1 (Order Instituting Rulemaking to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms, R.11-02-019).

[104] D.15-08-032 *55, 2015 Cal. PUC LEXIS 521, I.13-09-012.

[105] D.09-11-010; 2009 Cal. PUC LEXIS 587 *3.

SCE argues that application of the maximum fine would be inappropriate notwithstanding its significant financial resources, because such a fine would be disproportionate to the harm caused, the utility's conduct, and precedent. According to SCE, financial resources are used by the Commission "as a means of calibrating deterrence and avoiding the assessment of an excessive fine."[106] SCE argues that its conduct did not risk "severe consequences" so that deterrence is a less significant factor.

A4NR states it has "no illusions" that any fine will achieve a deterrent effect. In D.14-11-041, the Commission acknowledged the limited deterrence value of our penalties when applied to a company such as SCE.[107] As the Commission previously remarked when it declined to impose a penalty for PG&E's prior ex parte violation, "In terms of financial resources, PG&E is an extremely large company… even imposing the maximum penalty" would have little likelihood of a discernable financial impact.[108] Instead, we observe that the primary deterrence value is when financial penalties are sufficiently large that the utility must report them to investors.

6.1.5. Totality of Circumstances

The Commission has held that a fine should be tailored to the unique facts, or totality of circumstances of each case. When making this assessment, the Commission considers facts that tend to mitigate or exacerbate the degree of

[106] SCE's Response to Ruling and OSC at 39.

[107] D.14-11-041 at 13

[108] D.08-01-021 at 14.

wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.[109]

SCE argues for a modest penalty due to several mitigating factors:

- The Ruling was new information - the Ruling and OSC was the first time "many of the interpretive issues have been explained." SCE continues to believe that only the March 26, 2013 Poland meeting constitutes a reportable ex parte communication. Since the Commission has determined otherwise, SCE asks the Commission to recognize that parties' expectations and understanding of the rules have evolved since the communications in question have occurred. Thus, SCE asserts it would be unfair to apply this new understanding retroactively.

We acknowledge this as a mitigating factor, particularly in relation to the Rule 1.1 violation from Mr. Litzinger's testimony. However, in each of the Rule 8.4 violations, there was evidence and inference to support that, perhaps briefly, an ex parte communication occurred. The utility also has a duty to comply with the Commission's Rules. Therefore, if faced with uncertainty or ambiguity, SCE should have sought guidance or favored disclosure instead of parsing exceptions.

- Informality - The overall impression from the internal and external emails produced, is that SCE has lax oversight of its executives who are permitted, if not encouraged, to meet with Commissioners at "social" occasions, industry activities, and other non-office settings. The executives then engage in conversations that may briefly touch on substantive issues in a formal proceeding, but do not report them on the grounds they are short, or not substantive enough.

[109] D.15-08-032 at 43.

We treat this as an exacerbating factor due to the continuing risk that SCE has become too informal, too casual about what is permissible, permissible if reported, and what is wholly prohibited.

- SCE's new policy – SCE has adopted a new policy which limits contact with Commissioners to normal business hours or "at widely-attended events like seminars, recognition ceremonies, or other public events; private dinners are not allowed."[110]

We treat this as a mitigating factor because it indicates SCE understands the problem and is acting to reduce or eliminate it.

- Everybody else does it - SCE requests restraint in adopting sanctions given the quantity of ex parte and Rule 1.1 violations SCE alleges have been committed by other parties, "including those clamoring most loudly for SCE to be punished."[111] SCE provided numerous examples.[112]

It is tempting to treat this as a mitigating factor because it is true that this has been a boisterous, contentious, and complex proceeding in which several parties accused each other of misconduct. However, SCE is a large company with many resources and a long history with the Commission. We expect it to be able to fulfill its own regulatory duties and not look for excuse in the alleged bad acts of others. Therefore, we consider this neither mitigating nor exacerbating.

6.2. Conclusions re Penalties and Sanctions

Based on the discussion above, the facts and circumstances of this proceeding require that we impose financial penalties for the eight Rule 8.4 violations and two Rule 1.1 violations.

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[110] SCE's response to Ruling and OSC at 35.

[111] SCE's Response to Ruling and OSC at 40.

[112] *Id.* at 40-42.

SCE has a duty to comply with our rules, and the burden is on the utility to determine its legal obligations and fulfill them. However, SCE's argument that it could hardly be expected to know whether these communications fit the definition of ex parte communications prior to issuance of the Ruling and OSC, is not entirely without weight given the apparent confusion among the parties.

It is remarkable that parties advanced such differing views of the decades-old language defining an ex parte communication. SCE's submissions exposed a range of previously unknown, rather informal, communications between SCE executives and Commissioners, advisors, and other decisionmakers in which a substantive issue may have received briefly passing comments between them Nonetheless, if the other elements are present, this is a reportable ex parte communication.

In any event, SCE's arguments are inapplicable to the late and inaccurate Late Notice regarding the March 26, 2013 Poland meeting which is the most egregious violation, and which led to SCE repeating the false characterization of this now-admitted ex parte communication. Thus we identify no mitigating factors for this violation. A lower penalty is suitable for the other seven violations due to mitigating factors, including SCE's new policy limiting after-hours social occasions between SCE executives and Commissioners. However, the violations are still significant because these particular communications were established as "two-way" between SCE and one or more Commissioners on a substantive issue related to the SONGS OII.

Therefore, we calculate the fines for Rule 8.4 violations as follows:

- March 26, 2013 - $50,000
- All others - $20,000 x 7 = $140,000

We calculate the fines for the two Rule 1.1 violations as follows:

We found that SCE's and Mr. Pickett's series of grossly negligent actions and omissions resulting in false and misleading statements made to the Commission is a continuing violation. We begin the calculation on March 29, 2013, the date by which SCE should have filed its ex parte notice of the March 26 meeting and disclosed the Notes, and end the calculation on July 3, 2015, the latest date in which SCE continued to repeat Mr. Pickett's erroneous version of the Poland Meeting. Actions and omissions which mislead the Commission, and continue for a period of time to mislead the Commission, should result in significant penalties. We assess $20,000 per day for this continuing violation based on the history of this proceeding as set forth above. The financial penalty is $20,000 x 826 days = $16,520,000.

The second Rule 1.1 violation is the false testimony by Mr. Litzinger which is also subject to mitigating factors. A reasonable inference from the evidence is that he did not mislead the Commission by intention, recklessness, or gross negligence. It is also reasonable to infer that he believed he was responding accurately, and was relying on advice of his counsel. However, as discussed above, these facts do not excuse that he gave untrue testimony under oath and misled the Commission, the public and other parties. Making a false statement to the Commission, especially under oath, favors the maximum penalty. However, we apply a lesser amount in recognition that Mr. Litzinger's false testimony does not appear to be intentional, reckless, or grossly negligent, but at a minimum it was unreasonably uninformed and unreflective. Therefore, we impose a substantial penalty of $30,000 for this violation.

The grand aggregated total financial penalty for SCE and its shareholders is $16,740,000.

In Comments on the PD, both SCE and A4NR asked the Commission to alter the proposed penalties, albeit in different directions. However, the decision reaches a reasonable conclusion based on the facts in evidence, the criteria established by D.98-12-078, and is consistent with Commission precedent. SCE's request was based on unaccepted arguments to reduce the number of violations. A4NR's requests for the maximum penalties are based on its unaccepted arguments, and reference to two decisions which are factually distinguishable.[113] Consequently, we decline to make any adjustments to the proposed penalties.

It is the Commission's intent to highlight to SCE and all parties that we are committed to achieving full compliance with our governing laws and rules. Anything less damages the agency's regulatory mission and undermines the public's confidence in due process, fair hearings, and just and reasonable rates.

In addition to financial penalties, we consider the steps SCE has taken to improve tracking and recordkeeping of communications between SCE employees, agents, and representatives and Commission decisionmakers and advisors to Commissioners. As noted previously, we are concerned that this vital information will not be accessible to the public, parties, and the Commission.

Therefore, effective the date this decision is issued, in connection with the SONGS OII (and its consolidated proceedings) SCE shall begin collecting information on all non-public individual communications where both SCE and

[113] For example, D.08-09-038, wherein the Commission adopted a $30 million penalty, was in response to finding that SCE employees and management had manipulated and submitted false data which was used to determine certain rewards for a period of seven years. The penalty amount was the equivalent of $12,000/day for the continuing violation, lower than the $20,000 per day imposed in this decision.

one or more Commissioners, and/or their advisors, and/or CPUC decisionmakers (per Rule 8.1(b)) are present. SCE shall immediately develop an internal tracking system which results in a public log which shall include the identity of all participants, general subject matter, the relevant SONGS OII or consolidated proceeding(s), meeting date, length of time, location, whether written materials were used, if an ex parte notice was filed, and if not, then an explanation. SCE shall make the log available to the public, preferably by posting it on the website and keeping it current throughout the remainder of the SONGS OII and consolidated proceedings, unless superseded by future Commission action.

No later than March 1, 2016, SCE shall file a Tier 1 Advice Letter with the Executive Director which describes the implementation of the tracking, features of the log, accessibility to the public, and the internal mechanisms to ensure accuracy.

7. Other Rulings

On November 24, 2015, Chief ALJ Karen V. Clopton issued a Ruling that denied Coalition to Decommission San Onofre's (Coalition) July 14, 2015, and October 21, 2015 motions to reassign ALJ Melanie Darling and to recuse Chief Judge Clopton from ruling on these matters. These motions follow the Coalition's July 2, 2015, motion to reassign Judge Darling and Chief Judge Clopton's July 10, 2015, ruling denying that motion. The Commission affirms these rulings.

8. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

SCE and A4NR timely submitted Opening Comments on November 16, 2015 and Reply Comments on November 20 and 23, respectively.

Some nominal changes have been made to correct the text for errors, format, clarity, or style. The parties' comments have been carefully considered and resulted in no substantive changes. Significant comments have been addressed within the appropriate section of the decision. Comments made but not addressed were determined to be unpersuasive or re-argument of previous positions. Lastly, we decline as premature SCE's request to prospectively address discovery or any aspect of future phases of these proceedings.

9. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Melanie M. Darling is the assigned ALJ and Presiding Officer in these proceedings.

Findings of Fact

1. On October 25, 2012, the Commission issued an OII into the rates, operations, practices, services and facilities associated with SONGS Units 2 and 3. The OII was subsequently consolidated with other SONGS cost-related proceedings.

2. On April 3, 2014, SCE, SDG&E, ORA, TURN, Friends of the Earth, and Coalition of California Utility Employees, (collectively "Settling Parties") filed and served a Joint Motion for Adoption of Settlement Agreement which purported to resolve all issues for the consolidated proceedings.

3. The Commission approved an amended, but not all-party, settlement agreement in D.14-11-040 which provided resolution of the disputed cost allocation/rate recovery issues related to the RSGs and the premature shutdown of SONGS.

4. On February 9, 2015, SCE late-filed a Notice of Ex Parte Communication (Late Notice) regarding a meeting that occurred on or about March 26, 2013 between SCE's then-Executive Vice President Stephen Pickett and CPUC's then-President Michael Peevey at an industry conference in Warsaw, Poland. The Notice disclosed that there may have been a communication between them about a possible framework for resolution of the SONGS OII.

5. Pursuant to two ALJ Rulings requesting information and documents about the Poland Meeting, and other communications between SCE and Commissioners, SCE provided hundreds of pages of information, explanation, declarations, e-mails, and referenced settlement documents from previous shutdowns of generation facilities (e.g., SONGS 1).

6. On August 5, 2015, based on SCE's admissions, the ALJ issued a Ruling and OSC finding that SCE committed ten violations of Rule 8.4 by failing to report oral and written communications between SCE and CPUC decisionmakers which met the definition of "ex parte communication."

7. The Ruling and OSC also aggregated preliminary evidence from which the Commission might reasonably infer that SCE had violated Rule 1.1.

8. We affirm that eight undisclosed communications took place between one or more SCE executives and one or more Commissioners concerning one or more substantive issues in the SONGS OII which did not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the OII, or in the record of the OII. These undisclosed communications occurred on the following dates:

a. March 26, 2013
b. March 27, 2013
c. May 28, 2013
d. June 26, 2013
e. September 6, 2013
f. November 15, 2013
g. May 28, 2014
h. June 11. 2014.

9. Mr. Pickett failed to report the March 26, 2013 Poland Meeting, a communication between himself and President Peevey from which emerged a written list of possible allocations of major costs necessary to any settlement of the SONGS OII in the event of a permanent shutdown.

10. SCE failed to exercise due diligence to investigate Mr. Pickett's unlikely initial version of the meeting -- or his evolving versions of the meeting -- each recalling additional information about his conversation with President Peevey. SCE also did not attempt to retain and disclose the written document used in connection with the ex parte communication, nor did it disclose that Mr. Pickett had re-created his recollection of the document for SCE just a few days later.

11. Mr. Pickett's three versions of the March 26, 2013 communication with President Peevey are contradicted by credible evidence in the form of the Declaration of Edward Randolph in which Mr. Randolph stated that Mr. Pickett expressed his opinion to President Peevey about what he thought a settlement agreement might look like.

12. SCE repeated Mr. Pickett's false or misleading statements to the Commission in the Late Notice, in Mr. Pickett's declaration, and in response to ALJ requests for information through July 3, 2015.

13. On May 14, 2015, Mr. Litzinger made a false statement to the Commission while testifying under oath. There is no evidence from which to infer that his statement was intentionally untrue, or that he was reckless or grossly negligent.

14. The Commission was misled by Mr. Litzinger's false statement.

15. The rule violations resulting from SCE's acts and omissions in these proceedings have severely harmed the public's confidence.

16. We make no determination of the impact, if any, of the identified rule violations on the settlement negotiations or the Commission's adoption of D.14-11-040.

17. Although SCE has taken some internal steps to improve compliance with our ex parte rules in the future, the company's approach should have been more robust and favored reporting over non-reporting when it engaged in what it saw as ambiguous communications and matters of first impression.

18. Commission precedent in imposing sanctions for ex parte violations has ranged from relatively minor fines, or none at all, to requiring training.

19. We treat as an exacerbating factor that SCE permitted, if not encouraged, its executives to meet with Commissioners at non-business settings where they engaged in conversations that briefly touched on a substantive issue, but did not report them on the grounds they were too brief or not substantive "enough."

20. It is reasonable to impose a financial penalty of $50,000 for the violation of Rule 8.4 related to the March 26, 2013 ex parte communication.

21. It is reasonable to impose a financial penalty of $20,000 for each of the seven other violations of Rule 8.4 identified in Finding of Fact 8.

22. It is reasonable to impose a financial penalty of $30,000 for violation of Rule 1.1 related to Mr. Litzinger's false statement, albeit unintentional, which misled the Commission.

23. It is reasonable to calculate the term of SCE's continuing violation of Rule 1.1 related to the series of events beginning with imposingf a financial penalty of $20,000 per day for a period of 826 days. The calculation begins on March 29, 2013, the date by which SCE should have filed its ex parte notice of the March 26 meeting and Notes, and ends on July 3, 2015, the latest date in which SCE continued to repeat one of Mr. Pickett's erroneous versions of the Poland Meeting.

24. In order to promote transparency of non-public individual oral and written communications (§ 1701.1(c)(4)) regarding the SONGS OII and consolidated proceedings which may be discussed between or in the presence of both SCE and Commissioners, and/or their advisors, and/or CPUC decisionmakers (as defined in Rule 8.1(b)) it is reasonable that SCE should immediately begin collecting the information and promptly create an internal tracking system to capture the existence of such communications for inclusion in a log available for public review.

25. On July 10, 2015, Chief Administrative Law Judge Karen V. Clopton issued a Ruling which denied a July 2, 2015 motion by Coalition to Decommission San Onofre's (Coalition) to reassign ALJ Melanie Darling. On November 24, 2015, Chief Judge Clopton issued a Ruling that denied the Coalition's July 14, 2015, and October 21, 2015 motions to reassign Judge Darling and to recuse Chief Judge Clopton from ruling on these matters.

Conclusions of Law

1. For purposes of the Commission's Rules, an "ex parte communication" is one that meets the requirements of § 1701.1(c) and Rule 8.1(c), including that the communication must be "between" a decisionmaker and an interested person.

2. Solitary statements by a Commissioner or Commissioner's advisor are not disclosed, pursuant to Rule 8.4(c), but almost any response by a party about a substantive issue, other than "I cannot talk about it," is sufficient to create a communication "between" the party and the Commissioner or advisor.

3. A "substantive issue" refers, at a minimum, to issues referenced in one or more scoping rulings issued in a formal proceeding, including broad issues identified for future phases of a proceeding.

4. Section 1701.3(c)'s prohibition of ex parte communications in ratesetting cases is not absolute, and is instead modified by the language which follows in this subsection which permits some such communications with timely notice and similar opportunities provided to other parties.

5. The applicable standard of proof for violation of a Commission rule is a preponderance of evidence.

6. SCE engaged in unreported ex parte communications between one or more SCE executives and one or more Commissioners in violation of Rule 8.4, on the following dates:

a. March 26, 2013
b. March 27, 2013
c. May 28, 2013
d. June 26, 2013
e. September 6, 2013
f. November 15, 2013
g. May 28, 2014
h. June 11, 2014

7. SCE violated Rule 1.1 as a result of a series of grossly negligent acts and omissions in disregard of the Commission's ex parte Rules. SCE's limited inquiry into the true nature of the Poland Meeting, and unfulfilled duty to

provide copies of written communications, are just two of the acts or omissions that resulted in SCE continuing to repeat Mr. Pickett's misleading statements to the Commission. This violation is a continuing violation.

8. SCE violated Rule 1.1 as a result of the false statement made by Mr. Litzinger under oath.

9. Pursuant to § 2109, the acts, omissions, or failure of any officer, agent, or employee of SCE, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of SCE.

10. These violations of Rule 8.4, regarding failure to disclose an ex parte communication, are not continuing violations.

11. The facts and totality of circumstances require that we impose financial penalties for the eight Rule 8.4 violations and two Rule 1.1 violations.

12. Pursuant to § 2107, we impose on SCE a financial penalty of $190,000 for violations of Rule 8.4: $50,000 for the most harmful violation on March 26, 2013, and 7 x $20,000 = $140,000 for the other seven violations.

13. Pursuant to § 2107, we impose on SCE a financial penalty of $30,000 for its Rule 1.1 violation for a false statement made under oath which misled the Commission.

14. Pursuant to § 2107, we impose on SCE a financial penalty of $20,000 per day for the 826 days of the continuing violation arising from SCE's acts and omissions related to Mr. Pickett's meeting with Commissioner Peevey through the time when SCE ceased repeating his evolving and misleading versions of the communication. The total penalty is calculated as $20,000 x 826 = $16,520,000.

15. Pursuant to § 701 and Rule 8.3(j), in order to ensure the integrity of the record and to protect the public interest, SCE shall begin collecting information about all non-public individual communications occurring after the date the

decision is issued, regarding the SONGS OII and consolidated proceedings for which both SCE and one or more Commissioners, and/or their advisors, and/or CPUC decisionmakers (as defined in Rule 8.1(b)) are present. SCE shall promptly develop an internal tracking system to make certain information available to the public through a communications log, preferably by posting it on the SCE website and keeping it current. The information shall include the identity of all participants, general subject matter, the related SONGS OII proceeding(s), meeting date, length of time, location, whether written materials were used, if ex parte notice was filed, and if not, then an explanation. SCE shall report to the Commission on the creation and implementation of this system.

16. It is reasonable for the Commission to affirm the Rulings issued by Chief Administrative Law Judge Karen V. Clopton on July 10, 2015 and November 24, 2015 which denied motions by the Coalition to Decommission San Onofre to reassign ALJ Darling, and in the latter Ruling, to also recuse Chief Judge Clopton.

O R D E R

IT IS ORDERED that:

1. Southern California Electric Company must pay a penalty of $16,740,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. The face of the check or money order should read "For deposit to the General Fund per [Decision 15-12-016]." The penalty is not subject to rate recovery.

2. In addition to the financial penalties, Southern California Edison Company (SCE) shall develop and implement an internal tracking system to prospectively capture and make public the existence of non-public individual oral and written communications regarding the San Onofre Nuclear Generating Station Order Instituting Investigation (SONGS OII) and consolidated proceedings.

a) Effective the date this decision is issued, in connection with the SONGS OII (and its consolidated proceedings), SCE shall begin collecting information for the public about all non-public individual communications where both SCE and one or more Commissioners, and/or their advisors, and/or CPUC decisionmakers (per Rule 8.1(b)) are present.

b) SCE shall promptly develop an internal tracking system, dating from the date this decision is issued, which results in a public log that must include the identity of all participants, general subject matter, the relevant SONGS OII or consolidated proceeding(s), meeting date, length of time, location, whether written materials were used, if an ex parte notice was filed, and if not, then an explanation.

c) In no case shall the log disclose the content of a communication by a decisionmaker or a Commissioner's personal advisor as prohibited by Rule 8.4(c).

d) Southern California Edison shall post the communications log with the identified information on its website. SCE shall keep the log current throughout the remainder of the SONGS OII and consolidated proceedings, unless superseded by future Commission action or order.

e) No later than March 1, 2016, Southern California Edison shall file a Tier 1 Advice Letter with Commission, through its Executive Director, which describes the features of the system, the public accessibility, and the internal mechanisms to ensure accuracy.

3. The sanctions and remedies ordered in this decision are in response only to the disclosures by Southern California Electric Company that resulted from this inquiry into rule violations. This enforcement portion of the proceeding

identified in Ordering Paragraph 7 of Decision 14-11-040 is closed. This decision does not prospectively address procedural or other matters subject to future action by the Commission in these proceedings.

4. The Rulings issued by Chief Administrative Law Judge Karen V. Clopton on July 10, 2015 and November 24, 2015 are affirmed.

5. Investigation 12-10-013 and consolidated proceedings (Applications 13-01-016, 13-03-005, 13-03-013, and 13-03-014) remain open for the pending application for rehearing and petitions for modification of Decision 14-11-040.

This order is effective today.

Dated December 3, 2015, at San Francisco, California.

MICHAEL PICKER
President
CATHERINE J.K. SANDOVAL
CARLA J. PETERMAN
LIANE M. RANDOLPH
Commissioners

I abstain.
/s/ MICHEL PETER FLORIO

I reserve the right to file a concurrence.
/s/ CATHERINE J.K. SANDOVAL