Decision 10-10-016 October 14, 2010

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement the Commission's Procurement Incentive Framework and to Examine the Integration of Greenhouse Gas Emissions Standards into Procurement Policies.	Rulemaking 06-04-009 (Filed April 13, 2006)

DECISION GRANTING IN PART PETITION OF SOUTHERN CALIFORNIA EDISON COMPANY TO MODIFY DECISION 07-01-039

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DECISION GRANTING IN PART PETITION OF SOUTHERN CALIFORNIA EDISON COMPANY TO MODIFY DECISION 07-01-039

1. Summary

This decision grants, in part, the petition of Southern California Edison Company (SCE) to modify Decision 07-01-039 regarding the obligation of Four Corners Generating Station Units 4 and 5 (Four Corners) to comply with the Emissions Performance Standard the decision adopts. While we deny SCE's request for a wholesale exemption for Four Corners, we authorize a partial exemption, limited to capital expenditures incurred prior to 2012 under the current co-tenancy agreements, and therefore, before the greenhouse gas rules issued by the California Air Resources Board pursuant to Assembly Bill (AB) 32 take effect.

Given the important role Four Corners has played and currently plays in SCE's energy supply portfolio, the long-term contractual commitments SCE has made to its co-tenants, and the limited time remaining under the co-tenancy agreements, we find that it is prudent to allow certain capital expenditures incurred prior to January 1, 2012, subject to our review and approval prior to any recovery in rates. For discrete investments of less than $1 million, SCE shall make a showing of reasonableness. For capital expenditures of $1 million or more, SCE's showing shall also establish necessity, based upon consideration of four factors, including prevention of imminent safety hazard and continuation of basic operation through 2016, when SCE's contractual obligations under the co-tenancy agreements terminate. We direct SCE to make all reasonableness showings in its 2012 general rate case.

Because AB 32's new rules will be in effect on January 1, 2012, we cannot treat the period from 2012 through 2016 in the same way and must deny SCE's request to recover in rates any capital expenditures planned for Four Corners Units 4 or 5 in 2012 or later, if those expenditures will increase the life of the powerplant by five years or more. Consequently, we direct SCE to conduct a study on the feasibility of continuing to maintain its interest in Four Corners after the end of 2011 and to report on its study and propose a course of action in its 2012 general rate case. SCE's report must be submitted prior to final determination on rate recovery of any Four Corners-related capital expenditures reviewed in that general rate case. SCE may not extend any of its existing co-tenancy agreements or enter into any new agreements to expand or extend its ownership in Four Corners without first obtaining Commission approval.

Finally, we direct SCE to report in its 2012 general rate case on its remedial activities to ensure that its pleadings are complete, accurate, and fully explain the bases for its positions.

2. Background and Related Procedural History

2.1. Four Corners

Southern California Edison Company (SCE) holds a 48% co-tenancy interest in Units 4 and 5 of Four Corners Generating Station (Four Corners), a coal-fired, baseload electric generation facility located on the Navajo Reservation in northwestern New Mexico. SCE's fifty-year, contractual interest in Four Corners expires in 2016. We refer collectively herein to the various co-tenancy and related operating agreements to which SCE is a signatory as the co-tenancy agreements. SCE has five co-tenants: Arizona Public Service Company (APS), El Paso Electric Company, Public Service Company of New

Mexico, Salt River Project Agricultural Improvement and Power District, and Tucson Gas & Electric Company. APS is the sole owner of Units 1-3.

Unit 4 commenced commercial operation in 1969 and Unit 5, in 1970. Four Corners supplies SCE with approximately 720 megawatts (MW) of power per year. SCE calculates the value to its ratepayers of the potential loss of energy and capacity from Four Corners at approximately $200 million per year.

2.2. Senate Bill 1368

Senate Bill (SB) 1368 (Stats. 2006, ch. 598), enacted in September 2006, directs the Commission, no later than February 1, 2007, to establish an interim greenhouse gas (GHG) emission performance standard (EPS) and to adopt rules to enforce this standard. By Decision (D.) 07-01-039, the Commission timely adopted the EPS and related rules, referred to as the Adopted Interim EPS Rules.[1] D.07-01-039 recognizes that the primary purpose of the EPS required by SB 1368 "is to reduce California's exposure to the compliance costs associated with future GHG emissions (state and federal) and associated future reliability problems in electricity supplies."[2]

As D.07-01-039 observes, SB 1368 specifies much of the design and implementation for the EPS and defines a number of key terms, including two particularly relevant here:

> "Baseload generation" means electricity generation from a powerplant that is designed and intended to provide electricity at an annualized plant capacity factor of at least 60 percent.
>
> ….

[1] *Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard* (2007), D.07-01-039; the Adopted Interim EPS Rules are found at Attachment 7.

[2] D.07-01-039 at 31.

> "Long-term financial commitment" means either a **new ownership investment** in baseload generation or a new or renewed contract with a term of five or more years, which includes procurement of baseload generation."[3]

With reference to these terms, SB 1368 explicitly prohibits the Commission from approving a long-term financial commitment, and any load-serving entity (LSE) such as SCE from entering into one, unless the baseload generation supplied under that long-term financial commitment complies with the EPS. SB 1368 deems compliant with the EPS, and thereby expressly grandfathers, certain combined-cycle natural gas powerplants – those either operating or that hold an Energy Commission final permit to operate, as of June 30, 2007. SB 1368 does not grandfather other types of existing, fossil-fueled powerplants, such as Four Corners. Because SB 1368 does not define "new ownership investment," the Commission had to define this type of long-term financial commitment in D.07-01-039 in order to determine the scope of what D.07-01-039 terms "covered procurements," that is those transactions that trigger a need to demonstrate compliance with the EPS. As part of that task, the Commission had to consider how the EPS should apply to those existing fossil-fueled plants, not grandfathered, that an LSE owns and uses to serve its load, which D.07-01-039 refers to as "retained generation."[4]

D.07-01-039 concludes that powerplants not expressly grandfathered by SB 1368 fall within the scope of covered procurements whenever an LSE makes a

[3] SB 1368, Section 2, codifying Pub. Util. Code § 8340 (subparts (a) and (j), respectively [as quoted here]) (emphasis added). SB 1368 does not define the term "new ownership investment."

[4] D.07-01-039 at 5.

new ownership investment, defined to include any LSE investment in retained generation that "is intended to extend the life of one or more units of an existing baseload powerplant for five years or more, or results in a new increase in the existing rated capacity of the powerplant. [fn omitted]"[5] D.07-01-039 reasons that this determination is necessary to uphold the integrity of SB 1368 by "… ensur[ing] that there is no 'backsliding' as California transitions to a statewide GHG emissions cap."[6]

In opening comments on the proposed decision that the Commission ultimately adopted as D.07-01-039, SCE had expressed concern that this interpretation might impair its ability to comply with at least some of the co-tenancy agreements, chiefly its obligations to make certain financial investments to maintain Four Corners through the end of the contractual term in 2016. SCE asked the Commission either to clarify that the EPS was inapplicable to contracts governing existing baseload power plants or to create an exemption for LSEs "that co-own existing generating plants with third parties with whom they have contractual obligations to pay for ongoing expenses."[7]

D.07-01-039 does not grant the relief requested but states:

> If SCE anticipates that the EPS will prevent it from complying with its contractual obligations at Four Corners, it should file an application or petition for modification, together with adequate supporting information, documentation, and analysis, and request appropriate relief.[8]

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[5] D.07-01-039 at 5.

[6] D.07-01-039 at 24.

[7] Comments of Southern California Edison Company on the Proposed Decision of President Peevey and ALJ Gottstein, filed January 2, 2007 at 13.

[8] D.07-01-039 at 46.

2.3. Assembly Bill 32

Assembly Bill (AB) 32 (Stats. 2006, ch. 488), also enacted in September 2006 and known as the California Global Warming Solutions Act of 2006, establishes a comprehensive program to achieve quantifiable, cost-effective reductions of GHGs by 2020. Under AB 32, the California Air Resources Board (CARB) is charged to develop measures to achieve this goal. As particularly relevant here, AB 32 provides that CARB's GHG rules and market mechanisms are to take effect and become legally enforceable by January 1, 2012. This date is earlier than 2016, the end of the contractual term of the various Four Corners co-tenancy agreements. While D.07-01-039 takes note of AB 32, it expressly declines to "prejudge or predetermine what approach may be established in the context of our Procurement Incentive Framework [Phase 2 of this docket] or under the statewide GHG emissions limit envisioned under AB 32."[9]

3. SCE's Petition for Modification, Related Filings and September 2, 2008 Proposed Decision

On January 28, 2008, SCE filed the instant petition for modification (petition) of D.07-01-039.[10] The petition acknowledges that SCE's general rate case (GRC) filing for Test Year 2009, Application 07-11-011, includes a request for authority to recover $178,593,000, which represents SCE's share of certain capital expenditures at Four Corners. SCE argues that D.07-01-039 could be construed to prevent SCE from fulfilling its financial obligations as a co-owner of Four Corners and that moreover, "[i]f SCE does not pay its share of such expenditures,

[9] D.07-01-039 at 115.

[10] *Petition for Modification of Decision 07-01-039 of Southern California Edison Company* (Petition). On February 13, 2008, SCE filed an amended petition, which corrects some minor errors but does not modify the substance of the request.

it will not receive power from Four Corners, but will remain liable for unpaid costs.[fn omitted]"[11] SCE also contends that as a minority owner, its "financial obligation with regard to Four Corners is not one over which it has much discretion or choice."[12] Therefore, SCE asks the Commission to revise D.07-01-039 "… to find that financial contributions required under preexisting contractual obligations for generating units owned jointly with third parties are not 'covered procurements' under the EPS."[13] More specifically, SCE proposes that the Commission modify the provision defining what constitutes a new investment in covered procurements (Rule 3(1)(c) of the Adopted Interim EPS Rules) and create the following exemption.

> <u>Except for financial contributions required by existing contractual agreements (effective prior to January 25, 2007),</u> new investments in the LSE's own existing non-Combined-cycle Gas Turbine (CCGT) baseload power plants that are: (1) designed and intended to extend the life of one or more units by five years or more, (2) result in a new increase in the rated capacity of the powerplant, or (3) designed and intended to convert a non-baseload plant to a baseload plant ….[14]

The following parties filed responses: the Division of Ratepayer Advocates (DRA), the Western Power Trading Forum (WPTF), the Independent Energy Producers Association, and jointly, the Natural Resources Defense Council (NRDC), Union of Concerned Scientists, The Utility Reform Network, Environmental Defense Fund, Center for Energy Efficiency and Renewable

[11] Petition at 3.

[12] Petition at 8.

[13] Petition at 5.

[14] Petition at 8-9, as amended [proposed modification underlined].

Technologies and Western Resource Advocates. Although these responses disagree on whether investments in Four Corners should be exempt from the EPS, all agree that SCE's petition seeks too broad a modification. Though SCE's reply does not suggest any language revisions, it reiterates that SCE's singular objective is to obtain an exemption for Four Corners throughout the remainder of the contractual term.

A proposed decision, filed on September 2, 2008, recommended that the Commission deny the petition as overbroad but find that SCE's requested capital expenditures for Four Corners Units 4 and 5 (in SCE's then-pending 2009 GRC) are not subject to the EPS -- and therefore are recoverable -- because they do not fall within D.07-01-039's definition of new ownership investment. D.07-01-039 states that the term is not meant to apply to "every replacement of equipment or addition of pollution control equipment."[15] The proposed decision reasoned, therefore, that the term encompasses "major refurbishments, such as those for repowering an existing powerplant" but not the requested capital expenditures for Units 4 and 5.[16] The proposed decision relied in part on SCE's representation of its contractual liability to its Four Corner's partners to make the expenditures and its limited decisionmaking role, as well as SCE's GRC prepared testimony. While the proposed decision recommended that SCE be authorized to recover the requested capital expenditures, it also recommended that the Commission direct SCE to conduct a study and report within six months on whether SCE should continue to maintain its interest in Four Corners after December 31, 2011.

[15] D.07-01-039 at 52.

[16] Proposed Decision at 7.

4. October 23, 2008 Ruling of Assigned Commissioner and Assigned ALJ

On October 23, 2008, the Assigned Commissioner and the assigned Administrative Law Judge issued a joint ruling to withdraw the September 2, 2008 proposed decision, enter additional documents into the record, require a report by SCE to explain why the information in the additional documents had not been included in the petition, and request comments on three questions.[17] The joint ruling describes what had transpired, as follows.

> After the PD [proposed decision] mailed, Energy Division staff requested and received full copies of the [certain Four Corners co-tenancy agreements] between SCE and its co-owners . . . as well as additional information on the capital expenditures listed in A.07-11-011. Upon review of this additional information, we have discovered several discrepancies that cause us to question whether the Petition should have been more comprehensive in its explanation of SCE's rights and obligations under its Agreements and whether this additional information would have led us to reach a different outcome than recommended in the PD.[18]

The joint ruling observes that some of the agreements contain provisions for unanimous consent for approval of capital expenditures, particularly those over $5 million. Furthermore, while some of the capital expenditure approvals

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[17] The new evidence, attached to the joint ruling, consists of: (1) the Four Corners Project Co-Tenancy Agreement, Including Amendment No. 6; (2) the Four Corners Project Operating Agreement, Including Amendment No. 12 and Letter Agreement Dated December 29, 1969; (3) the Four Corners Units 4 & 5 Capital Improvements, Design and Construction Agreement; (4) email correspondence between Energy Division staff and SCE concerning follow-up questions on the capital expenditures and the Agreements; and (5) a list of the Four Corners Co-Owner-Approved Projects as of October 10, 2008.

[18] Assigned Commissioner and Administrative Law Judge's Ruling Entering Additional Information into the Record and Seeking Comments (Joint Ruling) at 3.

were made after D.07-01-039 issued, at the time SCE filed its petition, only a portion of the approximately $178.6 million in capital expenditures had been approved under the various co-tenancy agreements. In light of the new information, the joint ruling requests comments on three questions, which we paraphrase as follows:

- Does the new information require a change in the proposed decision's conclusion that the capital expenditures at Four Corners do not fall under D.07-01-039's definition of new ownership investment?
- Should SCE be allowed to recover any of the requested capital expenditures for Four Corners?
- Are evidentiary hearings necessary and if they are, what issues must be addressed through hearings?

In response to the joint ruling's request for an explanation of the perceived omissions in its original petition, SCE filed a report on November 6, 2008. Thereafter, parties filed comments on the three questions set out above; specifically, DRA, NRDC, SCE and WPTF filed comments on November 24, 2008 and reply comments on December 15, 2008.

5. Discussion

5.1. Overview: Import of the New Information

How, if at all, should the information that the joint ruling adds to the record affect an assessment of whether the capital expenditures at Four Corners do or do not fall under D.07-01-039's definition of new ownership investment? This question goes to the heart of whether the rationale set out in the September 2, 2008 proposed decision must be revised. We conclude that the new information requires revisions.

SCE contends that the new information does not affect what it characterizes as the September 2, 2008 proposed decision's correct determination

that SCE should be authorized to recover all of the approximately $178.6 in capital costs. SCE recognizes that the new information disturbs to some extent that proposed decision's reliance on SCE's contractual obligation to make the capital expenditures. But SCE argues the Commission could have authorized cost recovery solely as a policy matter – and should do so now. SCE presents its policy argument thus: (1) the Commission may exempt Four Corners from the Adopted Interim EPS Rules by finding that none of the capital expenditures are new ownership investment, as that term should be understood, given that all of the expenditures have some reliability purpose; and (2) if the capital expenditures are not new ownership investment, whether or not they are contractually required becomes immaterial. SCE's comments urge the Commission to reach this policy conclusion and to defer determination of the reasonableness and necessity of each of the specific capital expenditures to the 2009 GRC. (At the time SCE filed its comments, the 2009 GRC was still pending).

DRA, NRDC, and WPTF all disagree with SCE. First, they do not share SCE's policy perspective. Unlike SCE, they believe that determining whether the Four Corner's capital expenditures are new ownership investment turns on factual assessments. Their comments set forth several rationales and recommended procedures, some of them overlapping, but they all argue that the Commission needs additional information in order to determine whether the capital expenditures do or do not constitute new ownership investment – and that the new information, together with the existing record, is insufficient to make that determination.

DRA, for example, argues that the SCE must provide more information about the approval process for past capital expenditures, in order to establish the degree to which it has exercised discretion over previous approvals. WPTF

contends that the critical information still missing is the long-term viability of Four Corners. DRA and WPTF both agree that SCE should be prohibited from recovering capital expenditures that SCE approved after the Commission adopted D.07-01-039 and prior to the granting of any exemption.

NRDC begins by recognizing that the Four Corners joint ownership contract allows parties to avoid new investments upon change of law and that D.07-01-039 requires LSEs to avoid new ownership investment. NRDC then argues that while SCE must act in good faith with respect to its partners, it also must prove (and has not) that the capital expenditures exclude investments that will extend the life of Units 4 or 5 by five years or more. NRDC argues that SCE still needs to show three things: a more complete description of the nature of the requested expenditures; a comparison of current investments with past ones, to establish that those now pending are not intended to extend plant life beyond five years; and "an analysis of the full costs of continued ownership given the current end-date for the ownership contract and the soon-to-be-instituted GHG emissions limit in California under AB 32."[19]

Thus, while SCE and the other parties have very different views of the import of the new information, none of them contends that the Commission may adopt the September 2, 2008 proposed decision without change.

[19] Comments of the Natural Resources Defense Council on the Additional Information on Southern California Edison Company's Ownership Interest in the Four corners Generating Plant and Applicability of the Greenhouse Gas Emissions Performance Standard (NRDC Comments) at 4.

5.2. Framework for Determining Recovery of Capital Expenditures at Four Corners

Do the capital expenditures at issue fall within D.07-01-039's definition of new ownership investment and if so, should we modify that definition? Close review of the existing record, including the parties' comments, leads us to conclude that this question has both policy and factual elements. Today's decision resolves the policy aspects and refers the factual determinations to SCE's 2012 general rate case , since the existing record, including the new information, does not permit us to answer the factual questions fully.

We begin by examining SCE's argument that recovery of all of the Four Corners capital expenditures may be authorized as a policy matter, if we simply find that none of them constitutes new ownership investment. SCE's petition also states:

> Although D.07-01-039 does not clearly define the concept of life extension, the most reasonable interpretation is that investments trigger the EPS only if they are designed to and intended to extend the life of Four Corners beyond 2016, which is the terminal year of the Four Corners agreements.[20]

This is the basis for SCE's claim that none of the capital expenditures should be deemed to be new ownership investment. It also is at the core of SCE's contention that we should ask "… not how long any installed equipment included within any particular capital project might be expected to last, but rather whether the project is needed to enable Four Corners to continue reliably

[20] Comments of Southern California Edison Company on Assigned Commissioner and Administrative Law Judge's Ruling Entering Additional Information into the Record and Seeking Comments (SCE Comments on Joint Ruling), filed November 24, 2008 at 4.

operating until 2016."[21] SCE points to the prepared testimony (and related workpapers) for its 2009 GRC as well as to a matrix attached to its comments that identifies each capital project for which SCE seeks cost recovery, describes the reason for the project, and summarizes SCE's basis for claiming the project should not be subject to the EPS. For example, the first capital project on the matrix is "HP Turbine & Controls Repl, U 5," which "Replaces & Upgrades Deteriorated Turbine components to sustain plant Reliability for remaining duration of existing contracts governing plant ownership."[22] Under the matrix column titled "Basis for EPS Non-Applicability," SCE states:

> (1) This project is not designed or intended to extend the life of one or more generating units beyond the remaining duration of existing contracts governing plant ownership. (2) This project does not increase the generator nameplate capacity of the plant/ Project restores and improves Unit MW gross output to approx. 815 MW from prior approx. 795 MW (generators nameplate rating is 818 MW). (3) The plant is already a base load plant. [23]

SCE uses very similar, generalized language to describe the "Basis for EPS Non-Applicability" for each project. The matrix lists over 150 separate projects, some 30 of which were identified after the 2009 GRC filing. While SCE stresses the link to reliability, it concedes that some capital expenditures may have dual purposes – not only maintenance, but ensuring that "Four Corners retains some residual value" should SCE subsequently divest its interest.[24]

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[21] SCE Comments on Joint Ruling at 4.

[22] SCE Comments on Joint Ruling, Attachment A at 1.

[23] *Ibid*.

[24] Amended Petition at 3-4.

It is true that D.07-01-039 distinguishes between major refurbishments, such as repowerings, which it identifies as new ownership investment, and much more limited equipment replacements, which it excludes. As D.07-01-039 explains, the Commission was "… looking for the best and most workable approach to identifying changes in an existing powerplant that would increase the expected level of GHG emissions from the facility over the long-term." [25] Nothing in D.07-01-039 suggests a desire to reduce reliability by requiring the repair of all old parts, rather than replacement. But clearly, the overall objective of establishing the EPS in D.07-01-039 is to focus on

> . . . new long-term financial commitments to electrical generating resources that will have major impacts on GHG emissions for many years to come. This enables us to prevent major LSE procurement 'backsliding' that will make future GHG reductions more difficult.[26]

D.07-01-039's summary amplifies upon the need to prevent backsliding, as follows:

> If LSEs enter into long-term commitments with high-GHG emitting baseload plants during this transition, California ratepayers will be exposed to the high cost of retrofits (or potentially the need to purchase expensive offsets) under future emission control regulations. They will also be exposed to potential supply disruptions when these high-emitting facilities are taken off line for retrofits, or retired early, in order to comply with future regulations.[27]

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[25] D.07-01-039 at 52.

[26] D.07-01-039 at 35.

[27] D.07-01-039 at 3.

Redefining new ownership investment for Four Corners as broadly as SCE requests is problematic because it turns a blind eye to D.07-01-039's express admonition against backsliding. January 1, 2012, the date that CARB's AB 32 GHG rules will take effect, is fast-approaching. Among other things, questions about the costs for SCE and SCE's ratepayers of the continued operation of Four Corners Units 4 and 5, whether beyond 2012 or beyond 2016, remain unanswered. While we cannot conclude on the present record that approving SCE's request for a wholesale exemption for Four Corners would be sound, a narrower policy exemption, limited to costs authorized under the co-tenancy agreements prior to 2012, does not raise the same concerns. Most critically, expenditures made before CARB's GHG emissions take effect in 2012 will not risk running afoul of the 2012 rules.

Therefore, we find it prudent to allow Four Corners Units 4 and 5 an exemption from the Adopted Interim EPS Rules for capital expenditures prior to January 1, 2012, given the important role the plant has played and currently plays in SCE's energy supply portfolio, the long-term contractual commitments SCE has made to its co-tenants under the current co-tenancy agreements, and the limited time remaining under the those agreements. Accordingly, subject to a showing of reasonableness as further specified below, capital expenditures for Four Corners incurred prior to 2012 should be recoverable in rates. However, rather than distinguishing whether the expenditures are less than or more than $5 million and relying upon an industry standards life assessment examination for the latter group, as the proposed decision recommends, we adopt the more objective, more workable and, in many respects, more rigorous framework proposed in the NRDC/SCE joint comments. For discrete investments of less than $1 million, a reasonableness showing should be sufficient for determination

of rate recovery. For capital expenditures of $1 million or more, SCE's reasonableness showing also should establish necessity. This necessity showing should identify whether the expenditure likely will extend the life of Units 4 or 5 beyond five years, ten years, or some additional five-year increment. If life extension by one or more five-year increments is likely, the showing should explain the precise nature and purpose of physical modification(s) and why the expenditure is necessary nonetheless, given the impact on life extension.

SCE's showing on necessity and our consideration of it should examine four factors:

- whether the investment is necessary to prevent the risk of an imminent safety hazard or comply with state or federal environmental standards;
- whether the investment is necessary to continue basic operation of Unit 4 or Unit 5 within the period of SCE's existing contractual obligations;
- whether, in considering the cost and benefits and the prohibition on long-term investment at Four Corners, the investment is necessary within the period of SCE's existing contractual obligations and;
- the cumulative impact of all Four Corners capital expenditures for which SCE seeks recovery in its 2012 GRC.

This framework for review and potential rate recovery relies upon several additional principles and elements, some of which are implied above:

- SCE should include its showing on the reasonableness of all capital expenditures incurred prior to January 1, 2012 in its 2012 GRC.
- The framework should apply to SCE's previously requested Four Corners expenditures and any other as yet unapproved Four Corners expenditures incurred prior to January 1, 2012, so long as the total investment before 2012 does not exceed the previously requested amount of $178,593,000.

- Should any unanticipated, unforeseen or catastrophic event require SCE to incur expenses beyond $178,593,000, SCE should file a separate application for recovery of such expenses which establishes necessity, as that term is used within the framework.

We conclude that we cannot treat the period from 2012 through 2016 in the same way, since this four-year period occurs after CARB's AB 32 rules take effect. Accordingly, we should deny SCE's request to recover in rates any capital costs planned for Four Corners Units 4 or 5 in 2012 or later, if the related capital projects will increase the life of the powerplant by five years or more. While we recognize that SCE has certain legal obligations to its co-tenants, SCE does not appear to lack all recourse to modify those obligations in order to avoid conflict with AB 32. Further, as NRDC and other parties point out, as yet we have no record on the comparative costs to SCE and its ratepayers of SCE's various, potential options going forward (retrofit and continued operation, divestment, etc.).

Consequently, SCE should conduct a study on the feasibility of continuing to maintain its interest in Four Corners after the end of 2011. This study should include consideration of the following:

1. Estimated costs of future investments in Four Corners if SCE maintains its interest in the powerplant, including estimated costs to bring Four Corners into compliance with the EPS.
2. Costs of GHG allowances or other GHG compliance costs beginning January 1, 2012, and thereafter, if SCE maintains its interest in Four Corners.
3. Cost impacts of selling SCE's interest in Four Corners either by December 31, 2011, or in 2016, when the present co-tenancy agreements terminate.

SCE should include a report on its study and propose a course of action in its 2012 GRC prior to any final determination on rate recovery for all investment in Four Corners reviewed in the GRC. The study should be used in SCE's showing on and the Commission's determination of necessity, particularly whether, in considering the cost and benefits and the prohibition on long-term investment at Four Corners, the investment is necessary within the period of SCE's existing contractual obligations.

Further, SCE should not extend any of its existing co-tenancy agreements or enter into any new agreements to expand or extend its ownership in Four Corners without first obtaining Commission approval. SCE should explain how any such request is consistent with D.07-01-039.

Granting this narrow policy exemption is consistent with SB 1368. First, as noted elsewhere in today's decision, while SB 1368 defines a number of terms, it does not define the key term at issue here: "new ownership investment." Accordingly, this Commission has discretion to define it in a way that is consistent with SB 1368's policy objectives, even if that involves defining it somewhat differently than we did in D.07-01-039. Because the exemption we are granting here is limited in scope and duration and because we are requiring SCE to undertake a study on the feasibility of continuing its interest in Four Corners after the end of 2011, we conclude that this exemption should not expose California to avoidable GHG compliance costs or future reliability problems. Furthermore, in light of SCE's existing investment in Four Corners, we conclude that the additional investment that may occur as a result of this exemption does not represent "backsliding".

We believe this guidance, as expressed in the Ordering Paragraphs of today's decision, sufficiently modifies D.07-01-039 to provide clarity regarding

the scope of the partial exemption for Four Corners. There is no need to revise the generically applicable Adopted Interim EPS Rules to include this narrow, partial exemption for Four Corners.

5.3. Content of SCE's Petition

As noted above, the October 23, 2008 joint ruling requires SCE to explain why the new information was not made a part of its petition. The joint ruling also requires SCE to respond to concerns that the petition as filed is misleading and to address whether the Commission should open an investigation into whether SCE's actions and omissions violated Rule 1.1 of the Commission's Rules of Practice and Procedure.[28] SCE's comprehensive response, which includes a report SCE commissioned from outside counsel, concludes that the totality of circumstances do not rise to the level of a violation of Rule 1.1.[29]

SCE's response concedes that the petition could have been clearer and states that the petition "does not meet the high standards for thoroughness and clarity that SCE sets for itself in our submissions to this Commission."[30] SCE adds:

> … the Petition could have been more precise and complete in developing and explaining our position … we do recognize our

[28] The joint ruling refers to Rule 1, which predated Rule 1.1; the language of the two does not differ in any material way.

[29] Response of Southern California Edison Company to Assigned Commissioner and Administrative Law Judge's Ruling Entering Additional Information Into the Record and Seeking Comments, including Appendix A, Report of Munger, Tolles & Olson LLP Regarding Review of Southern California Edison Company's January 28, 2008 Petition for Modification and Related Submissions in R.06-04-009 (SCE Response/MTO Report), filed November 6, 2008.

[30] SCE Response/MTO Report at 2.

> obligation to be clear and complete in our submittals to the Commission. SCE will take remedial action in light of the MTO finding to ensure that our pleadings are complete, accurate, and fully explain the bases for our positions. We sincerely apologize for the time and effort spent by the Commission to review SCE's Four Corners contractual obligations, and the concerns arising from that review with respect to the Petition.[31]

On balance, we concur with the assessment of SCE and its outside counsel. We find that assessment to be quite candid in a number of instances – for example, the MTO report, which identifies several problematic statements in the petition and reviews them against legal authority on the nature of a "misleading" statement, acknowledges that several are a close call. Given all of the circumstances here, including SCE's public apology, its recognition of the need for remedial action, and its agreement to undertake such action, we conclude we will not pursue a formal investigation. However, SCE should report on its remedial activities in its forthcoming GRC filing. Among other things, SCE may wish to consult with San Diego Gas & Electric Company (SDG&E), which is preparing a professional responsibility class emphasizing Rule 1.1 as part of a settlement agreement the Commission approved in D.09-07-018.[32] The settlement agreement was negotiated to resolve allegations, which SDG&E denied, that SDG&E had committed a Rule 1.1 violation in connection with the Sunrise Powerlink transmission project. Under the terms of the settlement agreement, the professional responsibility class will use a third-party facilitator and will be offered in San Francisco to SDG&E personnel, Commission staff, and outside

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

[32] See Decision Approving Phase 3 Settlement of the Consumer Protection and Safety Division (2009), D.09-07-018, Attachment 1.

parties; it also will be offered internally at SDG&E. SCE may wish to explore whether the course could be provided internally at SCE, as well.

5.4. Timeliness of SCE's Petition

Rule 16.4(d) of the Commission's Rules of Practice and Procedure requires that a petition for modification be filed and served within one year of the effective date of the decision proposed to be modified. If more than one year has elapsed, the petition must also explain why the petition could not have been presented within one year of the effective date of the decision. If the Commission determines that the late submission has not been justified, it may on that ground issue a summary denial of the petition.

SCE's filed its petition several days beyond the one-year anniversary of D.07-01-039's effective date. SCE's amended petition explains that SCE incorrectly identified the effective date as January 29, 2007 (the date the decision was mailed), rather than January 25, 2007 (the date the decision was filed). As SCE has explained its error and states that is has remedied the defect in its tracking system and because the late filing has caused no harm, the petition is properly filed.

6. Comments on Proposed Decision

The proposed decision of the Commissioner 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. Comments were filed on June 16, 2010, by DRA, NRDC, and SCE, and reply comments were filed on June 21, 2010, by each of those parties. On August 31, 2010, NRDC and SCE filed a joint motion for leave to file joint, additional comments. By ruling on September 2, 2010, the ALJ granted the motion, directed that the joint, additional comments be filed, and authorized

other parties to file additional comments on or before September 20, 2010. No other party filed additional comments.

The NRDC/SCE joint comments supersede the two parties' prior, individual comments and resolve the significant differences between them. The joint comments suggest three revisions to the proposed decision: (1) modification of the framework for review and recovery of the approximately $178.6 million in capital expenditures at Four Corners at issue; (2) a deferral until later in the GRC for submission of SCE's report on its feasibility study regarding future ownership options; and, (3) clarification regarding the Commission's pre-approval of any modifications to the current co-tenancy agreements. We find that these proposals have merit and revise the proposed decision accordingly, though in the interests of improved clarity we do not adopt, verbatim, all of the language NRDC and SCE propose.

As noted above, DRA did not comment on the NRDC/SCE joint comments. While DRA's initial and reply comments reflect agreement with portions of the proposed decision, DRA reiterates that SCE should not be permitted to recover any capital expenditures made during the period between the resolution of this petition and January 1, 2012, and that we should open an investigation to examine further why SCE's petition, as initially filed, was not more complete. DRA's comments do not establish legal or factual error and we make no changes in response to its comments.

Finally, to improve consistency, clarity, and to correct typographical errors and omissions, we make other, nonsubstantive revisions throughout the proposed decision.

7. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner. On September 21, 2009, this proceeding was reassigned to ALJ Jean Vieth.

Findings of Fact

1. SCE owns a 48% co-tenancy interest in Four Corners through 2016 and its rights and obligations with respect to Four Corners are stated in various agreements referred to collectively herein as the co-tenancy agreements.

2. SCE requested authorization to recover $178,593,000, its share of capital expenditures at Four Corners, as part of its general rate case for test year 2009 (A.07-11-011); that proceeding is now closed.

3. Four Corners makes up approximately 720 MW of SCE's resource portfolio.

4. In addition to currently applicable measures under SB 1368, CARB regulations pertaining to GHG emission limits and emission reductions measures will be operative on January 1, 2012.

5. Determining whether the capital expenditures for Four Corners fall within D.07-01-039's definition of new ownership investment has both policy and factual elements.

6. Given the important role Four Corners Units 4 and 5 have played and currently play in SCE's energy supply portfolio, the long-term contractual commitments SCE has made to its co-tenants under the co-tenancy agreements, and the limited time remaining under the those agreements, it is prudent to allow SCE to recover certain necessary capital expenditures at Four Corners incurred prior to January 1, 2012. This finding applies to SCE's previously requested Four Corners expenditures and any other as yet unapproved Four Corners expenditures incurred prior to January 1, 2012, so long as the total

investment before 2012 does not exceed the previously requested amount of $178,593,000. Any actual recovery should be subject to Commission review and approval as further specified in Findings 7 and 8. Should any unanticipated, unforeseen or catastrophic event require SCE to incur expenses beyond $178,593,000, SCE should file a separate application for recovery of such expenses consistent with the requirements of Findings 7 and 8.

7. Recovery in rates is subject to a showing of reasonableness. For discrete investments of less than $1 million, this showing should be sufficient. For capital expenditures of $1 million or more, the reasonableness showing also should establish necessity, as further specified in Finding 8. If a capital expenditure of $1 million or more likely will extend the life of Unit 4 or Unit 5 beyond five years or some additional, five-year increment, SCE also should explain the precise nature and purpose of the physical modification(s) and why the capital expenditure is necessary.

8. SCE's necessity showing pursuant to Finding 7 should address the following issues which the Commission will consider to reach a determination on necessity:

(a) whether the investment is necessary to prevent the risk of an imminent safety hazard or comply with state or federal environmental standards;

(b) whether the investment is necessary to continue basic operation of Unit 4 or Unit 5 within the period of SCE's existing contractual obligations;

(c) whether, in considering the cost and benefits and the prohibition on long-term investment at Four Corners, the investment is necessary within the period of SCE's existing contractual obligations and;

(d) the cumulative impact of all Four Corners capital expenditures examined in the 2012 general rate case.

9. SCE has certain legal obligations to its co-tenants but does not appear to lack all recourse to modify those obligations in order to avoid conflict with California law.

10. SCE should conduct a study on the feasibility of continuing to maintain its interest in Four Corners after the end of 2011 and should report on its study and propose a course of action prior to any final determination in the 2012 general rate case on rate recovery for investment at Four Corners described in Finding 6. The study should be used in SCE's showing on and the Commission's determination of the issue listed in Finding 8(c).

11. Since the financial risks have yet to be determined, SCE should not extend any of its existing co-tenancy agreements or enter into any new agreements to expand or extend its ownership interest in Four Corners without first obtaining Commission approval. SCE should explain how any such request is consistent with D.07-01-039.

12. The totality of the circumstances, including SCE's public apology, its recognition of the need for remedial action, and its agreement to undertake such action, support our determination not to open a formal investigation into whether errors and omissions in SCE's petition reach the level of a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure.

13. In the general rate case for test year 2012 that it will file in 2010, SCE should report on the remedial activities undertaken to ensure that its pleadings are complete, accurate, and fully explain the bases for its positions.

Conclusions of Law

1. After January 1, 2012, SCE's ratepayers would be exposed to potential financial risks to bring Four Corners into compliance with the pollution control requirements established by CARB pursuant to AB 32; therefore, approving a

wholesale EPS exemption for Four Corners would be unsound, as would approving an EPS exemption for capital expenditures made after January 1, 2012.

2. The Commission has discretion to modify the definition of new ownership investment and with the modification made herein, the framework for review and potential recovery of capital expenditures incurred for Four Corners prior to January 1, 2012, is consistent with SB 1368 and D.07-01-039.

3. Any recovery in rates of capital expenditures for Four Corners incurred prior to January 1, 2012, should be subject to review for reasonableness, as further detailed in the Ordering Paragraphs.

4. SCE's test year 2009 general rate case (A.07-11-011) is closed and should not be reopened to review the reasonableness of the capital expenditures for Four Corners.

5. A fair reading of relevant legal authority supports our determination not to open a formal investigation into whether errors and omissions in SCE's petition reached the level of a violation of Rule 1.1 of the Commission's Rules of Practice and Procedure.

6. SCE has met the requirements of Rule 16.4(d), regarding the timeframe for filing a petition for modification; the petition is properly filed.

O R D E R

IT IS ORDERED that:

1. Decision 07-01-039 is modified to allow certain necessary capital expenditures for the period prior to January 1, 2012, for Units 4 and 5 of the Four Corners Generating Station (Four Corners) such that Southern California Edison Company (SCE) may recover a yet to be determined portion of the $178,593,000 capital expenditures and any other Four Corners capital

expenditures incurred prior to January 1, 2012, but not previously approved by the California Public Utilities Commission (Commission), so long as the total, pre-2012 investment does not exceed $178,593,000. Any actual recovery shall be subject to Commission review and approval pursuant to subparts (a) through (c) of this Ordering Paragraph. Should any unanticipated, unforeseen, or catastrophic event cause SCE to incur expenses beyond $178,593,000, SCE shall file a separate application for recovery of such expenses, consistent with subparts (a) through (c) of this Ordering Paragraph. All investment at Four Corners incurred prior to January 1, 2012, is subject to the following qualifications:

a. Recovery in rates is subject to a showing of reasonableness in the general rate case for test year 2012 that SCE is required to file in 2010;

b. For each capital expenditure of $1 million or more, SCE's reasonableness showing must establish necessity, consistent with this subpart and subpart (c), below. SCE's necessity showing must identify whether the capital expenditure likely will extend the life of Unit 4 or Unit 5 beyond five years or some additional five-year increment and if such life extension is likely, the showing also must explain the precise nature and purpose of the physical modification(s) and why the capital expenditure is necessary nonetheless; and

c. SCE's showing on necessity must address the following four factors, which the Commission will consider in determining rate recovery: (i) whether the investment is necessary to prevent the risk of an imminent safety hazard or comply with state or federal environmental standards; (ii) whether the investment is necessary to continue basic operation of Unit 4 or Unit 5 within the period of SCE's existing contractual obligations; (iii) whether, in considering the cost and benefits and the prohibition on long-term investment at Four Corners, the investment is necessary within the period of SCE's existing contractual obligations and; (iv) the cumulative impact of all Four Corners capital expenditures examined in the 2012 general rate case.

2. Recovery in rates of capital expenditures for Units 4 and 5 of the Four Corners Generating Station forecasted to be incurred beginning January 1, 2012 and thereafter is denied.

3. Southern California Edison Company (SCE) must conduct a study on the feasibility of continuing to maintain its interest in Four Corners Generating Station (Four Corners) after December 31, 2011 and must include a report on its study and a proposed course of action. SCE must submit the study in its 2012 general rate case prior to a final determination on rate recovery for any investment at Four Corners described in Ordering Paragraph 1. SCE may submit the study as part of its necessity showing. The study must include consideration of the following:

a. Estimates of the costs of future investments in Four Corners if SCE were to maintain its interest in Four Corners, including estimates of the costs to bring Four Corners into compliance with the Emission Performance Standard;

b. Costs of greenhouse gas allowances or other greenhouse gas compliance costs beginning January 1, 2012, and thereafter, if SCE were to maintain its interest in Four Corners; and

c. Cost impacts of selling SCE's interest in Four Corners either by December 31, 2011, or in 2016 (the end of the current co-tenancy agreements).

4. Southern California Edison Company (SCE) must not extend any of its existing co-tenancy agreements or enter into any new agreements to expand or extend its ownership in Four Corners without first obtaining approval from this Commission. In making any request for such approval, SCE shall explain how its request is consistent with Decision 07-01-039.

5. Southern California Edison Company must report, in the general rate case for test year 2012 that it will file in 2010, on its remedial activities to ensure that its pleadings are complete, accurate, and fully explain the bases for its positions.

6. The petition to modify Decision 07-01-039 filed by Southern California Edison on January 28, 2008, as subsequently amended, is granted to the extent consistent with this Order and is otherwise denied.

7. Rulemaking 06-04-009 is closed.

This order is effective today.

Dated October 14, 2010, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
TIMOTHY ALAN SIMON
NANCY E. RYAN
Commissioners

I reserve the right to file a concurrence.

/s/ TIMOTHY ALAN SIMON
Commissioner

I reserve the right to file a concurrence.

/s/ DIAN M. GRUENEICH
Commissioner

I reserve the right to file a concurrence.

/s/ NANCY E. RYAN
Commissioner

I will file a dissent.

/s/ JOHN A. BOHN
Commissioner

Concurrence of Commissioner Timothy Alan Simon
October 14, 2010 Commission Business Meeting
Item 37, Agenda ID #9734

As we taper our long term financial commitments with coal-fired generation in accordance with SB 1368, it makes sense that we clarify the rules for the reasonableness of projects associated with any remaining tenancy or co-tenancy agreements for such facilities. I fully support this Proposed Decision as it sets boundaries around the types of projects Edison may recover in rates so as to avoid extending the life of Four Corners by five years or more once the Assembly Bill 32 (Pavley/Nuñez) rules are in effect.[1]

Senate Bill 1368

In an effort to maintain the bright line established by the Emissions Performance Standard, set forth in Senate Bill 1368 (Perata), this Proposed Decision appropriately limits Southern California Edison's requested rate recovery for its ownership of Four Corners generating Units 4 and 5. It is important that we define "new ownership investment" as narrowly as possible in order to prevent the sort of regressive procurement practices that would run afoul of the EPS requirements contemplated in D.07-01-039, thereby derailing progress toward our GHG emissions reduction goals. By making recoverable investments subject to feasibility studies, this decision implements this definition in a manner that prevents unnecessary and avoidable GHG compliance costs for our ratepayers.

The framework provided in this decision for determining the reasonableness and necessity of discrete investments of more than $1 million in SCE's 2012 General Rate Case puts the appropriate regulatory boundaries around their remaining financial interest in Four Corners. Furthermore, I support the four factors delineated by the decision in measuring the "necessity" of such projects, and in particular, whether investments are needed to ensure reliable plant operation and to prevent safety and environmental hazards.[2]

Finally, it is important to note that the transition to a future in which California eliminates financial interests in generation that exceed the 1100 pounds per Megawatt

[1] Decision Granting in Part Petition of Southern California Edison Company to Modify Decision 07-01-039, (D.10-10-016), at 5.

[2] *Id* at 18.

hour threshold required by SB 1368 must be swift but balanced. When we consider that certain municipal contracts with coal generation will remain in play even as we implement our AB 32 rules, we must be patient and mindful of the costs of this transition to our ratepayers. Thus, we must exercise discretion as we make new investments in cleaner fossil and renewable resources, in addition to our eventual implementation of a 100% auction for GHG emissions allowances. This requires us to achieve the delicate balance of prudency and expediency while complying with our ambitious environmental mandates.

Embracing Forward-looking Technologies to Address Carbon Emissions

Looking forward, carbon sequestration and storage and other crucial clean technologies loom large as critical solutions that we must emphasize in California's post-coal existence. Natural gas and shale exploration, with full environmental review, will continue to sustain us as clean solutions in the green energy economy, and we will need to continue drilling and producing these natural advantages as a path to increased energy independence.

However, we also should continue to make wise investments in the technologies that can help us to leverage cleaner forms of all fossil fuels rather than abandon them unnecessarily. In addition, given that California has negligible coal resources, and those that remain are being retrofitted for cleaner uses. Thus, eliminating coal generation would have no immediate impact on California resource development. However, emerging carbon sequestration and storage technologies could have positive impacts for California ratepayers in the future, and therefore should not be summarily dismissed. This decision highlights the need to expedite research and investment in such technologies.

I appreciate the manner in which this decision resolves some of the challenging issues around the implementation of SB 1368, and look forward to the opportunities that lie ahead in a carbon constrained world.

Dated October 19, 2010, at San Francisco, California.

/s/ TIMOTHY ALAN SIMON
TIMOTHY ALAN SIMON
Commissioner

R.06-04-009
D.10-10-016

Concurrence of Commissioner Grueneich

October 14, 2010 Business Meeting, Agenda ID #9734, Item 37

I support the decision because it provides adequate safeguards to ensure that SCE's past and future investments in the four corners power plant comply with senate bill 1368, the greenhouse gas emissions performance standard for baseload generation. Of particular importance is our commitment to review the cumulative impact of all of SCE's investments in determining whether the spirit and the letter of the law has been met, and the requirement that SCE conduct a feasibility study on continuing its ownership interest in four corners.

However, I disagree strongly with the decision not to open an investigation into a potential rule 1.1 violation by SCE. That rule – which is titled "ethics" - requires any person appearing before this commission to never "mislead the commission or its staff by an artifice or false statement of fact or law."

In its petition for modification, SCE made representations regarding the scope of its contractual liability and the nature of its decision-making role under the four corners operating agreement. However, SCE failed to submit the agreement with its petition, even though rule 16.4 requires petitioners to support any factual allegation with specific citations to the record in the proceeding or matters that may be officially noticed.

Upon request of my office, SCE was required to submit the agreements for review. The so-called "new information" lead to the withdrawal of the original decision in this case and the preparation of a new decision based on the "new information".

Let me emphasize that the "new information" SCE submitted was <u>not</u> new; it was information that SCE had in its possession when it prepared and filed its petition for modification, a petition that its attorneys verified. This information showed that SCE had

the right to request modification of the operating agreement to reflect changes in California law, including SB 1368, even though SCE claimed in its petition that it had little "discretion or choice" over its financial obligations under the operating agreement. On the facts before us – literally a change in the original proposed decision to a new proposed decision - SCE's statements and omissions were material to the outcome of this case.

Despite these facts, the proposed decision declines to open an investigation because SCE has apologized, submitted its own consultant's report on SCE's actions in this case, and promised to train its employees better. The decision does not even slap SCE on the wrist; instead it praises SCE for hastily conducting its own investigation which concluded that the petition was not misleading.

However, the facts lead to the conclusion that the commission was mislead, since the result was a new decision.

The obligation of the regulated utilities to be truthful is critical to this commission's ability to effectively oversee and regulate the actions of the utilities. In many, many areas of regulation, this commission relies on the self-reporting of the utilities and accords a great deal of discretion to the utilities to comply with our rules. This type of oversight is effective only if we can rely on the utilities to be truthful. And we guarantee truthfulness by sending strong, clear, consistent messages that any form of misrepresentation will not be tolerated.

In this case we have statements that, in SCE's own words, led to "misunderstandings and confusion as to the fundamental bases of the requested relief" and which were material to the outcome of the case. Yet we decline to exercise our jurisdiction to investigate and impose sanctions as appropriate.

I disagree with this course of action.

/s/ DIAN M. GRUENEICH
Dian M. Grueneich
Commissioner

DISSENT OF COMMISSIONER BOHN ON D.10-10-016

In this decision, the Commission has approved Southern California Edison's (SCE) request to exempt certain expenditures made for the Four Corners coal plant from the statutory prohibition on cost recovery for investments made in relatively highly polluting facilities enacted in AB 1368 and contained in P.U. Code section 8340. AB 1368 specifically precludes this Commission from authorizing recovery of long term financial commitments in baseload power plants that are more polluting than a combined cycle facility. In D.07-01-39, we adopted our rules for implementing AB 1368, indicating that capital investments that extend the life of existing power plants by five or more years are considered new long term investments and are not recoverable under AB 1368. There is no exemption in AB 1368 to grandfather in existing coal plants such as Four Corners.

Despite this prohibition, SCE made continued investments in Four Corners. SCE's testimony in its last general rate case indicates that many of these capital additions were to continue operation of Four Corners beyond 5 years, to at least 2016, the end date of its contractual agreements with its co-owners, and fall outside of the allowance the Commission established in D.07-01-039. SCE stated to the Commission that it had no other option given its contractual agreements with the other co-owners of the facility. In fact, as addressed in this proceeding, SCE's statements were factually incorrect. SCE was not required by existing contractual terms to make these investments. Thus we have had to revisit this issue as to whether these costs can be approved by the Commission.

However, before I address the cost recovery issues, I first must state my concerns with SCE's having provided the Commission with incorrect information regarding their contractual obligations for Four Corners. It is not disputed that SCE did in fact provide the Commission with inaccurate, self-serving information that misled the Commission about the nature of SCE's commitments to fund improvements to the Four Corners plant. I cannot agree with the decision that there is no need for consideration of potential sanctions against SCE for failing to comply with the Commission's rules simply because the correct facts ultimately came to light and SCE belatedly admitted that it had provided misleading information to the Commission.

Returning to the issue of SCE's recovery of over $170 million in new investment in Four Corners, AB 1368 was clear regarding what sorts of long term investments are allowed and which are not. P.U.Code Section 8341(b) (1) states:

The commission shall not approve a long-term financial commitment by an electrical corporation unless any baseload generation supplied under the long-term financial commitment complies with the greenhouse gases emission performance standard established by the commission pursuant to subdivision (d)

It is not disputed that Four Corners provides baseload generation that does not comply with the established greenhouse gas emission performance standard, nor that SCE's over $170 million in expenditures were in part for continuing the long-term operation of the facility, through 2016 and beyond. While I appreciate the conclusion in this decision that the Four Corners plant plays an important role in supplying relatively low cost energy and capacity to SCE's customers, I cannot agree with the decision that this constitutes a basis for non-compliance with the law prohibiting recovery of these investments. If the legislature had wanted to allow continued investment in existing coal plants, it could have exempted them from the prohibitions in AB 1368. It did not. I am simply not convinced that the newly proposed conditions upon which we would allow recovery of these investments are consistent with the law. AB 1368 did not condition the prohibition on long-term investments in this way, nor did it provide the Commission with authorization to create exemptions from AB 1368's requirements.

I appreciate that the decision crafts these new conditions such that they will likely only apply to Four Corners and not create a large loophole allowing continued investment in other highly polluting facilities. However, I believe that underscores the fact that in this decision we are not so much rationally interpreting AB 1368 as we are attempting to create an exemption for Four Corners where none exists in the law.

Dated October 14, 2010 in San Francisco, CA .

/s/ JOHN A. BOHN
John A. Bohn
Commissioner