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 Oct. 25, 2012)
And Related Matters.	Application 13-01-016 Application 13-03-005 Application 13-03-013 Application 13-03-014

MOTION TO RECONSIDER, EXPAND AND PROVIDE FURTHER BASIS OF THE MOTION FOR REASSIGNMENT BY COALITION TO DECOMMISSION SAN ONOFRE

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1 INTRODUCTION

1.1 SUMMARY

On July 2, 2015, the Coalition to Decommission San Onofre (CDSO), a project of Citizens' Oversight, Inc., filed the "July 2 Motion"[1] to, among other things, reassign Administrative Law Judge (ALJ) Melanie Darling, who is currently assigned to the SONGS (San Onofre Nuclear Generating Station) OII (Order Instituting Investigation) I.12-10-013, most specifically regarding the motion for an investigation into sanctions. This motion was denied by Chief Administrative Law Judge Karen V. Clopton in the "July 10 Ruling"[2].

At this time, the CDSO submits this motion to reconsider, expand, and provide further basis for the motion for reassignment. This motion to reconsider is appropriate due to significant new facts that have come to light immediately after the original motion was submitted, and to further refine the rationale for granting the motion to reassign the proceeding to an independent adjudicator outside the CPUC.

1.2 BACKGROUND

1.2.1 PROCEDURAL BACKGROUND

The procedural background was largely provided in the July 2 Motion and will not be repeated here.

1.2.2 THE MOTION

The July 2 Motion included the following three aspects:

1. Reassign the investigation into sanctions to an independent adjudicator outside the CPUC
2. Formally open the investigation regarding sanctions and allow parties to engage in discovery.
3. Compel release of communications starting 2/1/2012 regarding SONGS and/or the SONGS settlement.

1.2.3 THE JULY 10 RULING

Chief ALJ Clopton denied the motion for reassignment with following statement:

> The Coalition asserts that the December 5, 2012, e-mails raise factual questions regarding whether improper ex parte communications involving the judges in the proceeding occurred, and asserts that the investigation into sanctions for SCE's

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1 http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=153016911

2 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M153/K034/153034054.PDF -- "Chief Administrative Law Judge's Ruling Denying Motion For Reassignment"

> possible violations of the ex parte rules creates a conflict of interest for Judge Darling.
>
> The Coalition does not identify any provision of law or order or rule of the Commission that Judge Darling may have violated, and none is apparent. To the extent that the December 4, 2012, communications were ex parte communications as defined by Rule 8.1(c), they are permitted pursuant to Rule 8.3(c) subject to the reporting requirement of Rule 8.4. SCE filed notice of the communication on December 7, 2012.
>
> The Coalition does not identify any self-interest on Judge Darling's part that might be in conflict with her professional interest or the public interest in investigating SCE's possible violations of the ex parte rules, and none is apparent.
>
> Pursuant to Rule 9.4(e) and after consulting with President Picker on this matter, I hereby deny the motion for reassignment.

2 NEW EVIDENCE

On July 6, 2015 we received information about felony search warrants issued and executed on June 5, 2015, and filed with the Superior Court of California, Los Angeles Branch, on June 24, 2015. The search warrants are provided as Exhibit A, and attached to the filing of this motion. There are two warrants, one for each of the following:

1. the offices of the CPUC, and
2. the offices of Southern California Edison, (SCE).

Special Agent Reye Diaz, California Department of Justice, executed the search warrants but was rebuffed with statements that evidence is not currently available.

The search warrants state "that there is probable cause to believe that the property described herein may be found at the locations set forth herein and that it is lawfully seizable pursuant to Penal Code Section 1524"... in that it "was used as the means of committing a felony", "is possessed by a person with the intent to use it as a means of committing a public offense or is possessed by another to whom he or she may have delivered it for the purpose of concealing it or preventing its discovery," and "tends to show that a felony has been committed or that a particular person has committed a felony."

The search warrants were for the following property:

> Any and all records from January 31, 2012 until January 31 2015, involving the San Onofre Nuclear Generating Station (SONGS) closure settlement agreement, the 2013 meeting between Stephen PICKETT and Michael PEEVEY in Poland, communication(s) pertaining to the determination of when and why SONGS would be closed, commitment of monies for research as a result of the closure of SONGS, and communication(s) pertaining to the settlement of the SONGS Order Instituting Investigation (OII).

These records are to include emails to or from the following individuals:

- Robert Adler -- General Counsel, Edison International (now retired)
- Ted Craver -- Chairman, President, and Chief Executive Officer, Edison International
- Laura Genao -- Director of Regulatory Affairs, SCE
- Michael Hoover -- Senior Director of State Energy Regulation, SCE
- Ron Litzinger -- President, SCE (Now President of Edison Energy)
- R.O. Nichols -- Senior Vice President of Regulatory Affairs, SCE
- Stephen Pickett -- Executive Vice President, External Relations, SCE (now retired)
- Gary Schoonyan -- Director, Strategic Policy Analysis, SCE (now retired)
- Jim Scilacci - Chief Financial Officer, Edison International
- Les Starck -- Senior Vice President Regulatory Policy & Affairs, SCE (now retired)
- Bert Valdman -- Senior Vice President, Strategic Plannign, Edison International (no longer employed)
- Gaddi Vasquez -- Senior Vice President, Government Affairs, Edison International
- Russ Worden -- Director of External Relations, SCE
- Ron Olson, former Board Member, Edison and Edison International
- Michael Peevey (former President of CPUC)
- Michel Florio (Commissioner of CPUC)
- Melanie Darling (ALJ, CPUC)
- Sepideh Khosrowjah (Chief of Staff, Commissioner Florio)
- Paul Clanon ([former] Executive Directory, CPUC)
- Carol Brown (former Chief of Staff to President Peevey)
- Audrey Lee (former Advisor to President Peevey)
- Edward Randolph (Director of Energy [Division], CPUC)

Also specified by the warrant:

> CPUC will identify employees who were involved in the implementation of the greenhouse gas research provisions of the SONGS OII settlement, specifically with respect to CPUC's understandings or intentions with regard to directing funding to UCLA.

3 DISCUSSION

In this section we will further explain, expand, and provide sufficient basis for the Commission to grant our motion for reassignment.

3.1 RULES VIOLATED

Chief ALJ Clopton wrote in the July 10 denial ruling:

> The Coalition does not identify any provision of law or order or rule of the Commission that Judge Darling may have violated, and none is apparent.

However, we did specify that regarding the emails that were provided in Exhibit B of the July 2 Motion that "These emails raise factual questions regarding whether improper ex parte communications involving the ALJs in the proceeding occurred."

Apparently, we have to spell it out explicitly, despite the regular and very public discussion of improper ex parte communications. This is not a topic foreign to very public discourse about the CPUC and the propriety of its actions. We note that the "Report to the California Public Utilities Commission Regarding Ex Parte Communications and Related Practices"[3] was produced by Strumwasser & Woocher LLP dated June 22, 2015 (Strumwasser Report) on this very topic, under contract initiated by the Commission. Actually, the notion that the Commission does not understand the what "improper exparte communications" might mean is far from believable. However, we don't mind acting as if the Commission is unaware of their own rules and the extended discussion about it and provide a greater level of detail, as this will also make the broader implications of our request clear.

According to Govt. Code Section 1701.3(c)

> Ex parte communications are prohibited in ratesetting cases.
>
> However, oral ex parte communications may be permitted at any time by any commissioner if all interested parties are invited and given not less than three days' notice.
>
> Written ex parte communications may be permitted by any party provided that copies of the communication are transmitted to all parties on the same day.
>
> If an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period of time and shall be sent a notice of that authorization at the time that the request is granted. In no event shall that notice be less than three days. [The section about the 14-day quiet period was omitted here.]

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3 http://www.cpuc.ca.gov/NR/rdonlyres/1EE7A892-D7C3-43C7-9163-E60AD859463E/0/StrumwasserReport.PDF

The CPUC Rules of Practice and Procedure, rule 8.3(c) specifically deals with ex parte rules for ratemaking cases:

> (c) In any ratesetting proceeding, ex parte communications are subject to the reporting requirements set forth in Rule 8.4. In addition, the following restrictions apply:
>
> > (1) All-party meetings: Oral ex parte communications are permitted at any time with a Commissioner provided that the Commissioner involved (i) invites all parties to attend the meeting or sets up a conference call in which all parties may participate, and (ii) gives notice of this meeting or call as soon as possible, but no less than three days before the meeting or call.
> >
> > (2) Individual oral communications: If a decisionmaker grants an ex parte communication meeting or call to any interested person individually, all other parties shall be granted an individual meeting of a substantially equal period of time with that decisionmaker. The interested person requesting the initial individual meeting shall notify the parties that its request has been granted, and shall file a certificate of service of this notification, at least three days before the meeting or call.
> >
> > (3) Written ex parte communications are permitted at any time provided that the interested person making the communication serves copies of the communication on all parties on the same day the communication is sent to a decisionmaker.
> >
> > (4) Ratesetting Deliberative Meetings and Ex Parte Prohibitions:
> >
> > > (A) The Commission may prohibit ex parte communications for a period beginning not more than 14 days before the day of the Commission Business Meeting at which the decision in the proceeding is scheduled for Commission action, during which period the Commission may hold a Ratesetting Deliberative Meeting. If the decision is held, the Commission may permit such communications for the first half of the hold period, and may prohibit such communications for the second half of the period, provided that the period of prohibition shall begin not more than 14 days before the day of the Business Meeting to which the decision is held.
> > >
> > > (B) In proceedings in which a Ratesetting Deliberative Meeting has been scheduled, ex parte communications are prohibited from the day of the Ratesetting Deliberative Meeting at which the decision in the proceeding is scheduled to be discussed through the conclusion

> of the Business Meeting at which the decision is scheduled for Commission action.

Judges, including Administrative Law Judges, are expected to operate ethically. The "California Code Of Judicial Ethics"[4] defines the expectations of judges in California. This code of ethics has been largely adopted by the California Administrative Procedure Act[5]. We understand that the CPUC does not adopt the CAPA.

The CPUC may argue that judges need not follow any rules of impartiality, ethics, and that the "California Code of Judicial Ethics" and "California Administrators Procedure Act" does not apply. Even if this is true, there is an expectation by the public that any judicial institution will comply with these or similar codes of ethics, and that includes the Administrative Law Judges that work for the CPUC.

Most specifically, we note "CANON 2" entitled "A Judge Shall Avoid Impropriety and the Appearance of Impropriety in All of the Judge's Activities," which includes the following provision:

> A. Promoting Public Confidence
>
> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. A judge shall not make statements, whether public or nonpublic, that commit the judge with respect to cases, controversies, or issues that are likely to come before the courts or that are inconsistent with the impartial performance of the adjudicative duties of judicial office.

We note that the general restrictions on judges need not be proven. Even the "appearance of impropriety" is forbidden. Certainly, it is improper for any judge to rule on a matter where that judge is also part of the case. This is common sense.

Does the CPUC claim that they allow impropriety? Of course not.

This document also specifies the duties of judges with respect to ex parte communications and fairness to the parties (underlining added).

> (7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, full right to be heard according to law. Unless otherwise authorized by law, a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly

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4 http://www.courts.ca.gov/documents/ca_code_judicial_ethics.pdf

5 http://www.documents.dgs.ca.gov/oah/forms/2008/2008%20Administrative%20Procedure%20Act.pdf - § 11475.20. Law governing conduct. Except as otherwise provided in this article, the Code of Judicial Ethics adopted by the Supreme Court pursuant to subdivision (m) of Section 18 of Article VI of the California Constitution for the conduct of judges governs the hearing and nonhearing conduct of an administrative law judge or other presiding officer to which this article applies.

> judicially noticed. This prohibition extends to information available in all media, including electronic. A judge shall not initiate, permit, or consider ex parte communications, that is, any communications to or from the judge outside the presence of the parties concerning a pending or impending proceeding, and shall make reasonable efforts to avoid such communications, except as follows:
>
> (a) Except as stated below, a judge may consult with other judges. A judge shall not engage in discussions about a case with a judge who has previously been disqualified from hearing that matter; likewise, a judge who knows he or she is or would be disqualified from hearing a case shall not discuss that matter with the judge assigned to the case. A judge also shall not engage in discussions with a judge who may participate in appellate review of the matter, nor shall a judge who may participate in appellate review of a matter engage in discussions with the judge presiding over the case.
>
> A judge may consult with court personnel or others authorized by law, so long as the communication relates to that person's duty to aid the judge in carrying out the judge's adjudicative responsibilities.
>
> In any discussion with judges or court personnel, the judge shall make reasonable efforts to avoid receiving factual information that is not part of the record or an evaluation of that factual information. In such consultations, the judge shall not abrogate the responsibility personally to decide the matter.
>
> For purposes of Canon 3B(7)(a), "court personnel" includes bailiffs, court reporters, court externs, research attorneys, courtroom clerks, and other employees of the court, but does not include the lawyers in a proceeding before a judge, persons who are appointed by the court to serve in some capacity in a proceeding, or employees of other governmental entities, such as lawyers, social workers, or representatives of the probation department.

We note that there is no provision in this ethics document that allows private communications with one side of a dispute with the other parties not present. According to this ethics document, judges are supposed to consult only with other judges or court personnel.

The Strumwasser Report said that regarding cases categorized as "rate-making" (which was the case for the SONGS OII I.12-10-013 -- underlining added):

> It is clear that ex parte communications are a frequent, pervasive, and at least sometimes outcome-determinative in CPUC ratesetting cases. In general, these practices have the unavoidable effect of moving actual governmental decision-making out of the public eye. And we found that these practices are fundamentally unfair to the parties, who are not adequately informed by opposing parties' disclosures of what was said ex parte and are sometimes prevented from having ex parte meetings of their own by their adversaries scheduling their meetings at the last-minute. The practice of advisors (who presently take most ex parte meetings) not being required to grant equal-time meetings to all other parties is also unfair—and, in our analysis, not permitted by law. The evidence also supports the claim that present ex parte practices systematically favor the interests of utilities and other well-funded parties. Additionally troubling is the fact that the disclosures do

> not—and, by law, cannot—report what the decisionmaker said. We received disturbing reports of instances where decision-makers sought to assist parties by telling them what to do or say in aid of their cases in communications that were undisclosed in reliance on a claimed loophole in the disclosure rules—a loophole that we have found does not actually exist.

Most specifically, this report found that the practices are "fundamentally unfair to the parties." It is therefore essential that the Commission scrupulously observe these laws and their own rules in this regard to maintain fairness and propriety. It is our opinion that the Commission's rules should be modified to disallow private ex parte meetings. However, our focus at this time is on improper communications that occurred during the OII proceedings, and such is the subject of the motion of the Alliance for Nuclear Responsibility[6], and the subject of our concerns regarding the conflict of interest before ALJ Darling.

Nevertheless, at this time, and most importantly when the subject of the investigation is the improper use of ex parte communications, it makes no sense to continue the habit of improper ex parte communications or using judges with a conflict of interest.

These are the laws and rules to which our motion applies.

3.2 COMMUNICATIONS IN VIOLATION

The July 2 Motion asserted that factual questions existed regarding the propriety of the communications of ALJ Darling as documented by the May 22, 2015 response to a Public Record Act request (PRA-1365.)[7] These six email documents related to a telephonic meeting between ALJ Darling and SCE Executive Russell Worden on December 4, 2012. These documents of PRA-1365 are provided as Exhibit B of our July 2 Motion.

We believe the fact that this ex parte communication exists and there was confusion about whether it was appropriate or not, including whether it should be reported or not, is sufficient to raise factual questions regarding the whether SCE and ALJ Darling had violated the rules of the Commission in these emails and the telephonic meeting. These questions were raised in the emails between ALJ Darling and SCE representative Worden, as there was some confusion as to whether the elements of the discussion were substantive.

The conflict of interest exists because it is impossible for ALJ Darling to be impartial in a review of her own possible violations of the rules.

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6 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M146/K991/146991349.PDF -- "Alliance For Nuclear Responsibility's Motion Seeking Investigation Of The Extent Of Sanctions To Be Ordered Against Southern California Edison Company For Violation Of Commission Rules 1.1 And 8.4"

7 http://www.copswiki.org/Common/M1597

We notice that the ex parte notice filed on Dec 7, 2012, did not completely describe the communications that occurred, and it seems clear that the conversation dealt with matters of substance rather than just procedural matters, and the emails reveal that the question of what should be reported or could occur without any reporting, was not clear to the participants.

3.3 THE COMMUNICATION WAS A VIOLATION OF EX PARTE RULES

CDSO asserts that the details of the December 4, 2012 communication between ALJ Darling and SCE representative Worden was in violation of the explicit ex parte rules and also were in violation of the spirit of fairness and impartiality we believe every judge should strictly observe.

On December 5, 2012, Worden sent this email reflecting on the substance of their phone conversation[8]:

> I agree that the bulk of discussion was on the procedural and logistical issues surrounding the public hearing and phasing of the OII.
>
> My recollection is that I made some observations about SCE's interface with MHI, the terms of the arbitration under the contract and SCE's expectations about recovery of damages. And, that SCE had been working closely with MHI at the SONGS site to understand what had gone wrong with the replacement steam generators. I also volunteered my understanding of what root cause analyses had been performed to date, and whether or not MHI considers part of its root cause evaluation to be proprietary because of the FIT III software used to model the steam generator design.

The telephone conversation of Dec 4, 2012 was initiated by ALJ Darling and in violation of the California Code of Judicial Ethics, which states clearly that "A judge shall not initiate, permit, or consider ex parte communications."[9] The fact that such ex parte communications were initiated by ALJ Darling and thus in violation of the California Code of Judicial Ethics brings up the question regarding whether such ex parte communications is nevertheless allowed and properly noticed within the rules of the CPUC, and if not allowed, then should it also be subject to sanctions. These are factual questions that are appropriate to consider in the sanctions investigation.

3.3.1 PHASING OF THE OII

The first sentence of this email quoted above refers to the phasing of the OII. This issue was not a procedural issue but instead included questions that were to come before the parties in the prehearing conference. More importantly, the phasing of the OII was the start of the overall plan

8 Included in the July 2 Motion, Exhibit B.

9 Underlining added.

to avoid the actual investigation into the failure of the Replacement Steam Generators (RSGs) and the possible (and we believe likely) responsibility for the failure of the San Onofre plant due to decisions by SCE in their management of the RSG project. The original statement of the OII[10] included the intent to assess "The reasonableness and prudency of each utility action and expenditure with respect to the steam generator replacement program and subsequent activities related thereto."[11] Inexplicably, this extremely important phase of the proceedings was delayed until Phase 3 of the investigation, and then scuttled when the settlement was proposed and then adopted. It appears that this original planning to allow SCE to avoid the reasonableness investigation occurred at this point in the investigation and not only violated ex parte rules, but also rules against collusion, and certainly rules against the appearance of impropriety.

3.3.2 EX PARTE NOT FULLY DISCLOSED

The second paragraph mentions a great many specific issues which arguably drift into the category of substance and therefore impropriety. None of the following things should have been discussed by the ALJ in a private phone call with the company which was being investigated, without being disclosed:

- SCE's interface with MHI
- the terms of the arbitration under the contract
- SCE's expectations about recovery of damages
- Whether SCE had been working closely with MHI at the SONGS site
- what had gone wrong with the replacement steam generators
- what root cause analyses had been performed to date
- whether or not MHI considers part of its root cause evaluation to be proprietary
- if FIT III software used to model the steam generator design.

The ex parte notice filed by SCE on December 7 included the following paragraphs:

> Pursuant to Rule 8.3(c)(2) of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission), Southern California Edison (SCE) respectfully submits this notice that an ex parte communication took place on Tuesday, December 4, 2012, between Russell G. Worden, Director, SONGS Strategic Review at Southern California Edison and Administrative Law Judge (ALJ) Melanie Darling. The communication was telephonic, initiated by ALJ

10 http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M032/K192/32192692.pdf

11 *Ibid.*

> Melanie Darling, and Mr. Worden returned her phone call at approximately 11:45 am, with the conversation lasting approximately 15 minutes.
>
> The discussion addressed procedural issues for providing notice for planned public participation hearings for the above-captioned proceeding. Mr. Worden also briefly addressed the following topics: (1) SCE's current work with Mitsubishi Heavy Industries (MHI) the designer and fabricator of the SONGS Replacement Steam Generators (RSGs); (2) the timing of the RSG capital cost filing pursuant to the Commission's decision approving new steam generators; and (3) access to SCE documents as well as Nuclear Regulatory Commission documents from the NRC websites. No materials were used during the communication.

It is very obvious that all of the items enumerated in the email from Worden on Dec 5 were not reflected in the subsequent exparte disclosure. To be specific, the following elements were discussed but not disclosed:

- the terms of the arbitration under the contract
- SCE's expectations about recovery of damages
- what had gone wrong with the replacement steam generators
- what root cause analyses had been performed to date
- whether or not MHI considers part of its root cause evaluation to be proprietary
- if FIT III software used to model the steam generator design.

This then is a violation of CPUC exparte rules regarding full notification, and as such, it should be included in the investigation regarding sanctions.

3.3.3 SHOULD BE PART OF SANCTIONS INVESTIGATION

Thus, this is a communication which logically should be addressed in the investigation for sanctions "For Violation Of Commission Rules 1.1 And 8.4" due to the motion[12] by the Alliance for Nuclear Responsibility.

3.3.4 THE CONFLICT OF INTEREST

For ALJ Darling to be investigating her own potential violation of CPUC rules and judicial ethics is a conflict of interest. When there is potential a conflict of interest, even if unproven, the judge should recuse herself from the proceeding. Thus, we request that the Commission reassign this case to an independent adjudicator.

12 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M146/K991/146991349.PDF

3.4 DISCOVERY LIMITED, CONDUCTED ONLY BY ALJS

On April 14, 2015, Administrative Law Judges Melanie Darling and Kevin Dudney submitted the "April 14 Ruling"[13] directing SCE to produce information regarding written and oral communications involving possible settlement of the OII, starting on March 1, 2013. We can notice that the questionable communications between Darling and Worden that occurred on Dec 4, 2012 and were referred to in the emails on Dec 5, 2012 and then documented in the ex parte notice on Dec 7, 2012, was not included in the April 14 Ruling because the date range started March 1, 2013, well after the Darling/Worden exchange of December 4.

This illustrates the same conflict of interest. ALJ Darling should not be assigned to a case where she was also an actor and participant. It may be the case that the date of March 1, 2013 was chosen by ALJ Darling to avoid disclosure of the Dec 4-5, 2012 ex parte communications, and perhaps other communications between ALJ Darling and Worden and others, which occurred or may have occurred prior to the March 1, 2013 document request starting date of the April 14 Ruling.

The logical starting date for discovery would be January 31, 2012, the start of the failure of the San Onofre Nuclear plant, which is the date chosen by the search warrants described in paragraph 2 above.

For this reason alone, our motion for reassignment should be granted.

3.5 PROBABLE CAUSE DUE TO FELONY SEARCH WARRANTS

The search warrants issued by the Superior Court, Los Angeles branch, attached to this motion as Exhibit A, are described in paragraph 2, above. They include ALJ Darling in the list of individuals believed to have evidence in the form of emails and communications.

Therefore, for this reason alone, to avoid any notion of impropriety and to maintain impartiality, it is appropriate for this case to be reassigned to a different judge, and we will further assert that it should be assigned to an independent adjudicator, due to the large number of other persons listed in the search warrant.

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13 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M151/K170/151170170.PDF -- "Administrative Law Judges' Ruling Directing Southern California Edison Company To Provide Additional Information Related To Late-Filed Notices Of Ex Parte Communciations."

3.6 CHIEF ALJ CLOPTON HAS A CONFLICT OF INTEREST

3.6.1 CHIEF ALJ CLOPTON CANNOT BE IMPARTIAL ABOUT AN ALJ SHE SUPERVISES

Chief Administrative Law Judge Karen V. Clopton denied July 2 Motion. She is the supervisor of ALJ Darling. If ALJ Darling engaged in improper collusion with SCE regarding any element of the proceeding or settlement, this should have been noticed and stopped by Clopton. Thus, Chief ALJ Clopton has a conflict of interest, and cannot be impartial regarding an employee that reports to her in the department that she manages. Such managers tend to defend the rank and file workers under their supervision. Thus, to avoid impropriety and the appearance of impropriety, the ruling on this motion should be performed by an independent adjudicator.

3.6.2 HAS ENGAGED HER OWN DEFENSE ATTORNEY

As reported in the May 29, 2015, Union Tribune[14], Chief ALJ Clopton has hired her own defense attorney.

> The latest contract is with San Francisco attorney Anthony Brass, who told The San Diego Union-Tribune he is representing Karen Clopton, the commission's chief administrative law judge. Brass said his client is a cooperating witness, not a target of the investigations.
>
> "She's also an authority on the inner workings of the CPUC, and that's guidance that the state and federal investigators need," Brass said.
>
> Clopton was the official who signed the order in late March removing Commissioner Michel Florio from the proceeding involving the premature shutdown of the failed San Onofre nuclear power plant north of Oceanside in January 2012.

As a possible defendant or even as a cooperating witness, it is inappropriate for that person to also be the judge.

3.6.3 HAS A HISTORY OF AN "APPEARANCE OF IMPROPRIETY" IN JUDGE-SHOPPING SCANDAL

Chief ALJ Clopton was also involved in the San Bruno "judge shopping" scandal. The San Francisco Chronicle reported[15] that:

> Karen Clopton, the agency's acting general counsel, was the chief administrative law judge when Wong was assigned to the PG&E rate case. She spoke at the meeting and sought to "disabuse anyone of the notion that anyone within in the administrative law judge division did anything inappropriate."

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14 http://www.sandiegouniontribune.com/news/2015/may/29/cpuc-attorney-2

15 http://www.sfgate.com/crime/article/Officials-demand-criminal-probe-of-PG-amp-E-s-5767564.php

But since the scandal occurred "under her watch," it is an appearance of impropriety.

3.6.4 DISCUSSED HER RULING ON THE MOTION FOR REASSIGNMENT WITH CPUC PRESIDENT PICKER

Chief ALJ Clopton, in the July 10 Ruling on the motion for reassignment said

> Pursuant to Rule 9.4(e) and after consulting with President Picker on this matter, I hereby deny the motion for reassignment.

This statement make one wonder what was so difficult about the ruling, such that CPUC President Picker had to be consulted. President Picker is not the assigned Commissioner on this case, which is Commissioner Sandoval. If any Commissioner was consulted, it should have been Commissioner Sandoval, and if she was not consulted but President Picker was, then it makes you wonder why not. Has President Picker taken over her role as the assigned commissioner in this proceeding?

Perhaps more importantly, did President Picker intervene in the decision-making process regarding the motion for reassignment? Did he demand that ALJ Darling be kept at the helm no matter what?

One possibility is that Chief ALJ Clopton was concerned about the real or apparent impropriety and conflict of interest described above, with respect to both ALJ Darling and herself, and wanted to "run it by" President Picker. Knowing that the CDSO is a relative beginner in the proceedings at the CPUC and is not represented by a high-priced legal firm, they may have thought that it was worth a try to just deny it and see if we would give up, while still knowing that any person would agree with the notion that ALJ Darling cannot investigate violation she may be involved in or even may seem to be involved in.

But there is an even more troubling possibility. We know that on March 19, 2015, the Assembly Committee on Utilities and Commerce, chaired by Assemblymember Anthony Rendon, sent President Picker a letter[16] stating that communications regarding the San Onofre OII and settlement should be turned over to both the CPUC and the Assembly Committee on Utilities and Commerce (underlining added):

> As you know, the Public Utilities Code empowers the commission to compel a regulated utility to produce any document that the commission believes is material to the regulating of the utility. This authority was recently exercised by the commission in regard to the Pacific Gas and Electric Company. The CPUC should

16 http://www.copswiki.org/Common/M1565 or http://www.copswiki.org/w/pub/Common/M1565/3_19_15_Letter_to_President_Picker_from_Asm_Rendon.pdf

> utilize this authority and compel the Edison Company and Southern California Edison to turn over to the commission all internal and external emails relative to the SONGS, the investigation of the steam generators at SONGS, and the potential settlement or eventual settlement of the SONGS decommissioning with the CPUC.
>
> Moreover, once the commission is in control of these documents I request that the commission provide them to the Assembly Utilities and Commerce Committee without delay. President Picker, it is my solemn belief that your efforts to reform the commission and restore the public's trust cannot be completed until the dark clouds of the SONGS settlement and the specter of process manipulation by your predecessor are fully and completely removed. Anything short of total transparency will be viewed by public, this committee, and history as a complete failure to meet the duties of the commission.

President Picker responded with an extensive letter which largely provided the rationale for the approval of the settlement. Toward the end, he addresses the request for communications, but first mentions the motion for sanctions (underlining added):

> ...a formal motion seeking sanctions against SCE for Rule 1.1 violations (improper communications with decision-makers), was filed in February by the Alliance for Nuclear Responsibility. In this context, it is important to note that the Commission has not yet ruled on the motion. I expect Assigned Commissioner Sandoval and the Administrative Law Judges will conduct a thorough analysis of the above motion requesting sanctions.

So again, why was not Commissioner Sandoval consulted by Chief ALJ Clopton instead of going directly to President Picker, since President Picker says here that it was his intention that Commissiner Sandoval and the ALJs would handle it?

Getting back to the request for documents, toward the bottom of his April 1, 2015 reply, Picker signals his willingness to comply with the request from the legislature, within the limits posed by confidentiality restrictions and logistics of getting the work done, but we must note that Picker did not say he would actually do it, just that he appreciated the willingness of the legislature to "work with us" on it, and to create a "coordinated strategy" (underlining added):

> We appreciate your willingness to work with us on your request that the Commission compel Southern California Edison to turn over all internal and external emails relative to San Onofre, the investigation of the steam generators at San Onofre, and the potential settlement or eventual settlement of the San Onofre decommissioning with the CPUC. As you know, California Public Utilities Code Section 583(5) sets restrictions on public release of documents provided by the utilities to the Commission which affect our ability to collect and share documents with the Assembly. There may also be other statutory confidentiality restrictions and privileges that apply under the California Public Records Act and other statutes and rules. All of these legal restrictions can create delays when dealing with a request to produce confidential documents. With that in mind, we would like to work with you and the Committee to develop a coordinated strategy, including a schedule, for the production of Edison San Onofre-related emails.

As of this writing, we have been told that nothing has been provided, nor has Picker said that the would comply.

Asm. Rendon sent a follow-up letter to President Picker on May 19, 2015[17], with this section of importance to this discussion:

> As the CPUC provides a response to my March 19th request, I hope that it will be more expansive [than the April 29, 2015 SCE response to the CPUC ruling where only 28 documents were returned]. Ideally, it will include emails on the personal accounts of CPUC employees. Also, CPUC staff most closely linked in press accounts with the SONGS settlement should be included in the document search, such as former Executive Director Paul Clanon, Frank Lindh (fomer Chief Counsel to the CPUC until March 2014), Ed Randolph (Director, Energy Division), and Marzia Zafar (Director, Policy and Planning Division).

Picker's office responded on June 9, 2015[18], with the entire body of the letter being:

> Thank you for your May 19, 2015 letter. I remain committed to working with you and the Committee on the issues you've raised. I will personally convey your concerns about SCE's release of internal and external emails related to SONGS, the investigation of the steam generators at SONGS, and the potential or eventual settlement of the SONGS decommissioning with the CPUC to the assigned Administrative Law Judges and Commissioner Catherine Sandoval, the assigned Commissioner in this case.

President Picker implied in that his entire responsibility in the matter was to convey the message to the assigned Commissioner Sandoval and ALJ Darling, essentially ducking the responsibility to decide whether and when to produce the requested San Onofre documents, so that any failure could be blamed on subordinates. Again, there is no promise of compliance here.

Under the hypothesis that collusion and impropriety did and continues to persist at the CPUC, the result would be precisely what we see today. No production of any documents as requested by the legislature, and the same ALJ in charge of the case so that production could be limited as much as possible and be able to say “I've got your back” to the President of the Commission. Thus, this leads to the appearance of impropriety, even though we cannot prove said hypothesis is true at this time. This, in itself, is enough to warrant granting the motion for reassignment.

Thus, these events also underline the need for the investigation into sanctions be moved to an independent adjudicator and not handled within the CPUC itself. It is always the case that self-reflection is a very difficult task to perform, and it is really improper to ask any judge to do so.

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17 http://www.copswiki.org/w/pub/Common/M1565/05.19.15_Rendon_letter_to_Picker_re_ex_parte_communications.pdf

18 http://www.copswiki.org/w/pub/Common/M1565/06.09.15_Picker_response_to_Rendon.pdf

3.7 CIRCUMSTANTIAL EVIDENCE SUPPORTING GRANTING THE MOTION

Circumstantial evidence implies that collusion did occur, even if the actual communications have not yet been produced by the Commission. Such circumstantial evidence includes:

- Splitting the proceeding into a number of phases with the actual investigation into the failure scheduled to occur last, so a settlement could be drafted prior to any record being created regarding prudence of the actions of SCE regarding the replacement steam generator (RSG) project.
- The fact that the Commission published a press release about the settlement, the fact that it represented a "rebate" to ratepayers, apparently planned prior to the actual announcement of the proposed settlement, with wording implying that all parties were in agreement.
- Stopping the OII proceedings I.12-10-013 et al based on a suggestion within the settlement agreement, prior to the actual acceptance of that agreement, rather than a motion by one or more parties to move to a settlement phase.
- Stopping the internal investigation by Dr. Budnitz, hired by the Commission to provide an expert's opinion on whether SCE acted imprudently in their execution of the RSG project, without any rationale other than certainly the utilities would prefer not to be investigated.
- Acceptance of a process which did not include a settlement conference where all parties were allowed to participate. Instead, a meeting was held where the already-drafted settlement was announced *fait accompli*, with no real opportunity for the parties to participate in any meaningful way, other than to ask questions about what had already been done. No alternative proposals were entertained.
- Making a statement in the Evidentiary hearing by ALJ Darling that at settlement conference had been held when in fact a settlement conference was announced but whether it was held was not in evidence and was disputed, and still is.
- After SCE President Ron Litzinger admitted in the evidentiary hearing that there was nothing in the record that would allow the Commission to evaluate the claims of the parties representing ratepayers that SCE was responsible for not just the loss of the SGRP, but the demise of the entire plant, the ALJs in the proceeding attempted to fabricate a record by taking judicial notice of numerous documents desired by the utilities to be in the record, while simultaneously denying notice of other documents requested to be judicially noticed by parties representing ratepayer interests.

- ALJs and Commissioners Florio and Peevey orchestrated a ridiculously short evidentiary hearing, consisting of only 3.5 hours to discuss a lengthy and complex settlement agreement proposing that the ratepayers cover a $3.3 billion tab for the abandoned nuclear plant, cutting off representatives for opposing parties before they could adequately address the record, further exemplified by Peevey's statement that the hearing did not explain the settlement “one iota.”
- Commissioner Peevey declined to answer the question by counsel for Ruth Henricks, about whether he had any inappropriate exparte communication with his former employer, SCE, during the investigation, to which he responded by telling the attorney to shut up and cursing rather than just saying “no.” However, now we know that former CPUC President Peevey did have numerous inappropriate ex parte meetings with SCE, most notably the March 26, 2013 meeting in Warsaw Poland where the infamous “RSG Notes on Hotel Bristol Stationery” was created, the outline of the settlement business points which were eventually reflected in the settlement agreement.
- Oral arguments were scheduled with a vastly insufficient ten minutes allowed for each party opposing the settlement agreement to address the 139-page Revised Proposed Decision.
- Allowing the settling parties to revise the settlement agreement without then requiring a motion to adopt the new settlement agreement, thereby avoiding comments and an evidentiary hearing on the new proposed agreement.

4.0 THE MOTION

4.1 THE INVESTIGATION INTO SANCTIONS SHOULD BE ASSIGNED TO AN INDEPENDENT ADJUDICATOR

The Coalition to Decommission San Onofre hereby moves that ALJ Melanie Darling should be removed, for cause, from the investigation into sanctions due to the conflict of interest this presents, supported by the numerous citations of law and examples of impropriety, real or apparent, provided above. The Commission should assign this aspect of the proceeding to an adjudicator outside the CPUC. An application should be filed with California Supreme court to designate an independent adjudicator with no ties to the CPUC and this case, or through some other mechanism to result in the accomplishment of this assignment to avoid the obvious conflict of interest if an ALJ who works for the CPUC is assigned.

4.2 ALLOW PARTIES TO ENGAGE IN DISCOVERY

Although the motion to investigate possible sanctions has been made and the ALJ's have made two discovery requests of SCE for information related to possible sanctions, the motion to investigate has not been granted and other parties are not allowed to engage in discovery.

Therefore, the Coalition to Decommission San Onofre moves that the investigation into sanctions be formally opened, and parties allowed to engage in discovery. including data requests and depositions.

We request that this motion be ruled on by the new independent adjudicator.

4.3 COMPEL RELEASE OF COMMUNICATIONS STARTING 2/1/2012

The requests for communications from the utilities by the ALJs in the April 14 Ruling started with documents dated March 1, 2013 and later. The Coalition to Decommission San Onofre moves that the Commission compel the disclosure of all communications starting on January 31, 2012, the day of the emergency shutdown of the San Onofre Nuclear Plant. The disclosure of communications should extend to Former President Peevey, President Picker, and Commissioner Florio.

Communications with President Picker are important because he was a member of the Governor's task force on the San Onofre Shutdown, as documented in meetings that go back at least as early as April 2012. Thus for completeness and full disclosure, the entirety of his communications regarding the San Onofre Shutdown and eventual settlement should be disclosed.

This request reflects the demands made by the search warrants. To the extent allowed by law, those documents should be made public.

Again, this motion should be ruled on by an independent adjudicator, not an ALJ that works for the CPUC and is beholden to their interests.

5. CONCLUSION

The California Public Utilities Commission has suffered a loss of credibility in the recent months and years over this case and the settlement, tainted by improper ex parte communications and back-room settlement negotiations. We have already filed a timely request for rehearing of the settlement. It appears that the Commission is just planning to ignore that request and instead allow modification of the decision based on various Petitions for Modification. We reject this notion and maintain that the proper disposition of the case is to grant our rehearing request,

particularly in light of the recent statement by TURN that the settlement should be abandoned and the case litigated instead.[19]

However, the question of sanctions and the related investigation into sanctions is a separate and distinct issue, and is not contingent on the approval of the rehearing request, nor the progress of any petitions for modification.

Therefore we make the motions as described above and request timely and explicit ruling.

Respectfully submitted.

---/S/---

Raymond Lutz
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DATE: July 14, 2015

19 http://turn.org/press-room/press-releases/item/865-edison-secret-meetings-with-peevey-tainted-settlement-process.html

EXHIBIT A - SEARCH WARRANTS

Please find this exhibit as an attachment to the filing.