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

RUTH HENRICKS' OPPOSITION TO JOINT MOTION OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E), THE UTILITY REFORM NETWORK, THE OFFICE OF RATEPAYER ADVOCATES, FRIENDS OF THE EARTH, AND THE COALITION OF CALIFORNIA UTILITY EMPLOYEES FOR ADOPTION OF SETTLEMENT AGREEMENT

Michael J. Aguirre, Esq.
maguirre@amslawyers.com
Maria C. Severson, Esq.
mseverson@amslawyers.com
AGUIRRE, MORRIS & SEVERSON LLP
501 W. Broadway Suite 1050
San Diego, CA 92101
Telephone: (619) 876-5364
Facsimile: (619) 876-5368
Attorneys for:
RUTH HENRICKS

April 8, 2014

I. INTRODUCTION

At issue in this case is: Who should pay for 4 failed steam generators installed to replace the 4 existing steam generators at the San Onofre Nuclear Plant (SGRP)? A motion has been filed to approve a secretly negotiated settlement agreement ("Secretly Negotiated Settlement Agreement") resolves the question by placing most of the financial burden for the failed SGRP on the shoulders of ratepayers.

II. THE FACTS

The central issue in this matter has been postponed and not examined -- whether Southern California Edison (SCE) executives acted knowingly, recklessly or negligently in deploying the defective replacement steam generators at San Onofre. Therefore, the predicate factual record needed to determine if the proposed settlement strikes a proper balance in allocating damages caused by the failed SGRP is missing.

This opposition is based upon the following facts and circumstances:

1. On **15 December 2005**, the PUC issued Decision 05-12-040 granting SCE a rate increase to replace the 4 replacement steam generators (SGRP) at San Onofre as requested in A04-02-026. In Decision 0512040 the PUC:

    1.1. Determined the SGRP was cost-effective and allowed as "reasonable" estimate of total SGRP costs of $680,000,000 ($569,000,000 for replacement steam generator installation and $111,000,000 for removal and disposal of the original steam generators)

1.2. If the SGRP cost exceeds $680 million, or the Commission later finds that it has reason to believe the costs may be unreasonable regardless of the amount, the entire SGRP cost shall be subject to a reasonableness review.

1.3. SCE was required to file an Application with the Commission to establish the reasonableness of the SGRP construction costs, six months after San Onofre returned to commercial operations. (D. 05-12-040 Pages 48-49)

2. On **28 December 2005,** SCE filed with the PUC Advice Letter 1951-E stating: Modifies Preliminary Statement, Part YY, Base Revenue Requirement Balancing Account (BRRBA), to reflect the recovery of 20% of SCE's ownership share of the estimated removal and disposal costs for the San Onofre (Units 2 & 3) original steam generators pursuant to Ordering paragraph No. 12 of D.05-12-040. Shows the 1 January 2006 annual revenue requirement of $3.03 million, reflecting SCE's current ownership share in nominal dollars.

3. On **30 November 2006,** SCE filed with the PUC Advice Letter 2067-E stating: Sets forth SCE's 2007 revenue requirement related to 20 percent of SCE's ownership share of the estimated removal and disposal costs for the SONGS 2 & 3 original steam generators pursuant to Ordering Paragraph No. 12 of D.05-12-040. Shows the 1 January 2007 annual revenue requirement of $3.18 million reflecting SCE's current ownership share (75.05 percent), as well as an increase of $.14 million to reflect SCE's proposed ownership share (78.21 percent). If SCE's A.06-03-020 to acquire Anaheim's share of SONGS 2 & 3 is approved for 1 January 2007 the annual revenue requirement will be $3.32 million.

4. On **30 November 2007,** SCE filed with the PUC Advice Letter 2187-E stating: This Advice filing sets forth SCE's 2008 revenue requirement related to 20 percent of SCE's ownership share of the estimated removal and disposal costs for the SONGS 2 & 3 original steam generators pursuant to Ordering Paragraph No. 12 of D.05-12-040. Shows the 1 January 2008 annual revenue requirement of $3.60 million reflecting SCE's current ownership share (78.21 percent)

5. On **24 November 2008,** SCE filed with the PUC Advice Letter 2292-E stating: This Advice filing sets forth SCE's 2009 revenue requirement related to 20 percent of SCE's ownership share of the estimated removal and disposal costs for the SONGS 2 & 3 original steam generators pursuant to Ordering Paragraph No. 12 of D.05-12-040. Shows the 1 January 2009 annual revenue requirement of $3.78 million reflecting SCE's current ownership share (78.21 percent)

6. On **30 June 2009,** SCE filed with the PUC Advice Letter 2355-E stating: To establish two (2) balancing accounts for San Onofre Unit 2 and Unit 3 SGRP in accordance with Ordering Paragraphs 7 and 8 of D.05-12-040. In addition, this advice filing revises the Generation Sub-account of the Base Revenue Requirement Balancing Account (BRRBA).

7. On **16 November 2009,** SCE filed with the PUC Advice Letter 2402-E stating: Sets forth SCE's 2010 revenue requirement related to 20 percent of SCE's ownership share of the estimated removal and disposal costs for the San Onofre Units 2 & 3 original steam generators pursuant to Ordering Paragraph No. 12 of D.05-12-040. Shows the 1 January 1, 2010 annual revenue requirement of $3.84 million.

8. On **10 November 2010,** SCE filed with the PUC Advice Letter 2521-E stating: To implement the 2011 Forecast San Onofre Unit 2 Steam Generator Replacement (SGR) revenue requirement in rate levels on 1 January 2011 in compliance with D.05-12-040. Shows the 2011 Forecast SONGS Unit 2 SGR Revenue requirement of $56.694 million.

9. On **28 February 2011,** SCE reported to its investors in its 2010 SEC 10-K Report that the replacement of the generators was completed by February 2011: "SCE completed the replacement of the steam generators at San Onofre Unit 2 and Unit 3 in April 2010 and February 2011, respectively."

10. **August 2011** was the sixth month after SCE completed the replacement of the SGRP. Decision 05-12-040 required SCE to file an Application with the Commission to establish the reasonableness of the SGRP construction costs six months after

San Onofre returned to commercial operations. (D. 05-12-040 Pages 48-49)

11. On **27 December 2011,** SCE filed Advice Letter with the PUC 2648E stating: To submit revised tariff schedules reflecting the consolidated revenue requirement and other rate changes effective January 1, 2012, as discussed in Advice 2648-E. This advice letter supplements and replaces Advice 2648-E in its entirety. Revised tariff sheets reflecting the revenue requirement and rate changes discussed herein are attached hereto as Attachment A. Shows 2012 revenue requirement for replacement of Units 2 and 3 of $115.239 Million.

12. On **27 December 2011,** SCE filed with the PUC Supplement to Advice 2648-E, SCE stating: "[t]he SONGS Unit 2 steam generator replacement was completed on April 11, 2010" and "the SONGS Unit 3 generators replacement was completed on February 18, 2011." (Advice 2648-E-A, 27 December 2011, Pages 7 and 8)

13. On 10 January 2012, SGRP in Unit 2 were removed from service.

14. On 31 January 2012, SGRP in Unit 3 were removed from service.

15. On **25 October 2012,** the PUC issued Order of Investigation (OII) to "consider the causes of the outages, the utilities' responses, the future of the SONGS units, and the resulting effects on the provision of safe and reliable electric service at just and reasonable rates."

16. On **31 December 2012,** SCE filed Advice Letter 2834-E stating: To consolidate the effect of revenue requirement changes authorized by the CPUC in various decisions in customer rates on January 1, 2013. Shows 2012 revenue requirement for replacement of Units 2 and 3 of $130.766 Million. The total 2013 forecast for Units 2 and 3 of removal and disposal costs of $17.924 million

17. On **28 January 2013,** the assigned ALJ issued a Scoping Ruling assigning to Phase 3 – causes of the SG damage and allocation of responsibility, whether claimed SGRP expenses are reasonable.

18. On **21 February 2013,** the assigned ALJ granted Ruth Henricks' motion seeking an order setting deadline for the SGRP Cost Application, which was set for 15 March 2013.

19. **7 January 2014,** the assigned ALJ denied Ruth Henricks' Motion for an order for discovery relating to the San Onofre Steam generator Anti-Vibration Bar Design team.

20. On **Undisclosed Dates,** TURN, SCE, SDG&E, the Division of Rate Payer Advocates carried out secret settlement negotiations in these proceedings.

21. On **20 March 2014,** Russell G. Worden, SCE Director, Case Manager for I. 12-10-013 wrote a letter to the assigned ALJs stating: The purpose of this letter is to inform you that Southern California Edison Company, San Diego Gas & Electric Company, The Utility Reform Network, and the Office of Ratepayer Advocates (the "Parties") will hold a settlement conference for the purpose of discussing terms to resolve the *Order Instituting Investigation Regarding San Onofre Nuclear Generating Station Units 2 and 3*, I.12-10-013, and all proceedings that have been consolidated therewith (including A. 13-01-016, A. 13-03-005, A. 13-03-013, and A. 13-03-014). Pursuant to Rule 12.1(b) of the Commission's Rules of Practice and Procedure, the settlement conference will be held on **March 27, 2014**.

22. On **20 March 2014,** Russell G. Worden, SCE Director, Case Manager for I. 12-10-013 wrote a letter to the assigned ALJs stating: The Parties hereby request that all aspects of this **OII be stayed** pending the conference. Specifically, the Settling Parties request that you refrain from any of the following actions pending the conference: ** Convening a pre-hearing conference or issuing a Scoping Memo on Phase 3 of the OII.

23. On **26 March 2014,** at 8:42 a.m., Ms. Henricks' counsel wrote the assigned ALJ: SCE, acting as agent for TURN, has sent an ex parte communications to you requesting a stay of the proceedings. This application should be denied. If it is going to be made, it should be by noticed motion, based on a written record, with all parties permitted to oppose. There is no legal basis for the Commission or the assigned ALJs to postpone the convening of a pre-hearing conference and the issuing of a Scoping Memo on Phase 3 of the

OII. A timely settlement requires a thorough investigation, not the thwarting of it.

24. On **27 March 2014,** TURN issued a press release stating a settlement had been reached with SCE, and ratepayers would be receiving $1.4 billion in "refunds." ("Secretly Negotiated Settlement Agreement")

25. On **27 March 2014,** SCE filed a Form 8-K with the U.S. Securities & Exchange Commission stating: "SCE estimates that if the settlement were implemented on March 31, 2014, the settlement would have resulted in a refund to ratepayers of **approximately $256 million**. SCE's ERRA **under-collection at December 31, 2013 was approximately $1 billion**."

26. On **27 March 2014 at 12:42 p.m.,** the assigned ALJ wrote Ms. Henricks's counsel: "Mr. Aguirre: This document (the 26 March 2014 letter from Henricks' counsel to ALJ; *see* No. 23, above) is not properly before the Commission or the Administrative Law Judges. There is no provision in the CPUC Rules of Practice and Procedure for an "Ex Parte Request For Stay." If Ms. Henricks seeks to place such a request before the Commission, the proper procedure is to serve and file a Motion, in conformity with Rule 11.1, including a concise statement of the facts and law supporting the motion."

27. **March 2014**: in the days following the announcement the price at which SCE stock trades went up.

28. On **2 April 2014**, SCE executive insiders sold over $18,000,000 of SCE stock.

29. On **3 April 2014,** J. ERIC ISKEN, WALKER A. MATTHEWS, III, and RUSSELL A. ARCHER for SCE; HENRY WEISSMANN, and EMILY B. VIGLIETTA also for SCE, JAMES F. WALSH, and EMMA D. SALUSTRO for SDG&E; MATTHEW FREEDMAN for TURN; GREGORY HEIDEN for Office of Ratepayer Advocates; LAURENCE G. CHASET for FRIENDS OF THE EARTH and JAMIE L. MAULDIN for the COALITION OF CALIFORNIA UTILITY EMPLOYEES filed a motion for the PUC to approve the Secretly Negotiated Settlement Agreement.

III. REASONS WHY THE MOTION FOR ADOPTION OF SETTLEMENT AGREEMENT SHOULD BE DENIED

The Motion for Adoption of Settlement Agreement should be denied because the parties were required to convene at least one conference with notice and **opportunity to participate** provided to all. PUC Rule 12.1 (b). While a session was scheduled to announce the settlement on 27 March 2014, there was no "opportunity to participate." Indeed, the negotiations of the terms of the settlement were conducted in secret. They were not conducted at arm's length.

The Oxford English dictionary defines "*at arm's length"* as far out or away from one as one can reach with the arm, away from close contact or familiarity, at a distance. Secret negotiations amongst those financially interested in the settlement without the involvement of the other ratepayer advocates and with no mediator does not satisfy this definition of "at arm's length." The settlement was reached without a single deposition taken, without the Phase III hearings even being conducted, without the SCE executives involved in deploying the failed SGRP even identified, and while document discovery remained outstanding. TURN and the Division of Ratepayer Advocates did not adequately represent the interests of the ratepayers because they failed to include their fellow ratepayer advocates in the secret negotiations. There was no participation by anyone other than SCE's hand-picked choices to represent ratepayers.

This proposed settlement would not satisfy several of the nine-factors the Supreme Court has established for class action settlements: (1) the reaction of the class to the settlement (here, negative); (2) the stage of the proceedings (here, before the key issues are addressed); (3) the risks of establishing liability (here, liability is likely); (4) the risks of establishing damages (here, damages are clear); (5) the ability of the defendants to withstand a greater judgment (here, substantial); (6) the range of reasonableness of the settlement in light of the best recovery (recovery quantified in SCE 8-K puts recovery on very low side; here, the recovery is neither quantified nor concrete, and includes no rebates); and (7) the range of reasonableness of the settlement in light of all the attendant risks of litigation (here, unreasonable). In federal class actions, the proponents of the settlement bear the burden of proving that these factors weigh in favor of approval, which is missing here. *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 776, 1995 (3d Cir. Pa. 1995).

The Motion for Adoption of Settlement Agreement should be denied because it does not contain a needed statement of the factual and legal considerations adequate to advise the Commission of the scope of the settlement and of the grounds on which adoption is urged. The terms of the settlement are ambiguous, incomprehensible, and the value of the settlement to ratepayers is not substantiated or verified with requisite specificity, in violation of PUC Rule 12.1(a). The proposed contract lacks the same specificity as did the terms

setting the date for a reasonableness review under Decision 05-12-040. The terms are so ambiguous they cannot be enforced because of the difficulty of determining whether a breach has occurred.

The Motion for Adoption of Settlement Agreement should be denied under PUC Rules 12.1(a) because the terms are not limited to the issues in this proceeding, but rather, extend to SCE's ERRA "**under-collection at December 31, 2013 was approximately $1 billion,**" which involve substantive issues that may come before the Commission in other or future proceedings.

The Motion for Adoption of Settlement Agreement should be denied until there is an adequate investigation into whether the settlement is the product of collusion. The settlement was borne from secret negations amongst parties who hope to benefit financially from its terms. No contrarians were admitted to the settlement discussions; the discussions were not conducted under a settlement mediator. The agreement has been presented to the public in a blast of front page headlines falsely claiming ratepayers are to receive $1,400,000,000 in "refunds."

Collusion includes a "secret arrangement between two or more persons, whose interests are apparently conflicting, to make use of the forms and proceedings of law to obtain that which justice would not give them, by deceiving a court." Collusion also includes "a secret combination, conspiracy,

/ / /

or concert of action between two or more persons for fraudulent or deceitful purposes." *Andrade v. Jennings* (1997) 54 Cal. App. 4th 307, 327.

The facts and circumstances of these proceedings, including (1) the delay and avoidance of the central issues, (2) the failure to allow depositions to be taken, (3) the misrepresentation to the public of the terms of the agreement, (4) allowing for a "silent" stay of the proceedings based on a letter from SCE, and (4) the other factors identified in the fact section of this memorandum, all point to the red flags of collusion.

Finally, the Motion for Adoption of Settlement Agreement should not be granted because under PUC Rule 12.1(d), there is not an adequate showing that the proposed settlement is reasonable in light of the whole record, consistent with law, and in the public interest. Unless and until the actions of the SCE officials who deployed the SGRP are examined to determine if they acted knowingly, recklessly, or negligently, there are insufficient grounds to assign the relevant financial burdens.

IV. CONCLUSION

The settlement agreement was arranged in secret, excluding any discordant voices by those with a big financial stake in its consummation. The settlement agreement was falsely represented to the public as providing for $1,400,000,000 in refunds to ratepayers. The terms of the settlement agreement are so incomprehensible and so vast, and its term so long, it defies

enforceability. If the truth has any chance of playing a role in this case, it will be established that the proposed arrangement is nothing more than a contrivance to relieve SCE of hearings into their executives' conduct in deploying the flawed SGRP because it stops the investigation. TURN's complicity has the appearance of being driven by a thirst for intervenor compensation and credit-taking headlines. The motion should be denied.

Respectfully Submitted, Dated: April 8, 2014

By:

/s/ Maria C. Severson, Esq.

Maria C. Severson, Esq.
mseverson@amslawyers.com
Michael J. Aguirre, Esq.
maguirre@amslawyers.com
AGUIRRE, MORRIS & SEVERSON LLP
501 West Broadway Street, Suite 1050
San Diego, CA 92101
Telephone: (619) 876-5364
Facsimile: (619) 876-5368
Attorneys for: Ruth Henricks