



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

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Order Instituting Investigation on the
Commission's Own Motion into the Rates,
Operations, Practices, Services and Facilities of
Southern California Edison Company and San
Diego Gas and Electric Company Associated
with the San Onofre Nuclear Generating Station
Units 2 and 3.

Investigation 12-10-013
(Filed October 25, 2012)

And Related Matters.

Application 13-01-016
Application 13-03-005
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**RUTH HENRICKS' AND THE COALITION TO DECOMMISSION
SAN ONOFRE'S (CDSO) APPLICATION FOR REHEARING
DECISION D.14-11-040 (20 NOVEMBER 2014, ISSUED 25 NOVEMBER 2014)**

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18 December 2014

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Ms. Henricks and The Coalition to Decommission San Onofre (CDSO) are parties to this proceeding and under Pub. Util. Code § 1731(b)(1). They apply to the California Public Utilities Commission (CPUC) for a rehearing in respect to the matters determined in Decision 14-11-040 ("Decision," effective 20 November 2014, issued 25 November 2014) and specified in this application for rehearing.

INTRODUCTION

SCE and SDG&E are private corporations that own and operate systems for the production, generation and transmission of heat and light to the public. They are "public utilities subject to the control by the Legislature." Cal. Const. Art 12 Sec. 3. The Public

Utilities Commission's duty is to ensure all charges received by any public utility are "just and reasonable." Cal. Public Util. Code § 451.

This application for rehearing of a CPUC Decision 14-11-040 is filed within the permitted time period. In the Decision, the CPUC approved an agreement which makes ratepayers pay for the damage caused by the defective steam generators Southern California Edison (SCE) obtained and deployed at the San Onofre nuclear plant (San Onofre).

The specific grounds on which the application considers the Commission's Decision to be unlawful or erroneous are: (1) The Commission acted without, or in excess of, its powers or jurisdiction; (2) The Commission has not proceeded in the manner required by law; (3) The findings in the decision of the Commission are not supported by substantial evidence in light of the whole record; and (4) The order or decision of the Commission was procured by fraud or was an abuse of discretion.

THE COMMISSION DECISION WAS ERRONEOUS

(1) The Commission Acted Without, Or In Excess Of, Its Powers Or Jurisdiction.

The CPUC acted in excess of its powers when it allowed SCE to charge San Onofre costs in rates after SCE obtained and employed the defective steam generators that knocked the plant out of operation. The CPUC allowed the rates to be charged, but never determined after the plant ceased operations if they were just and reasonable.

Guerrero v. Pacific Gas & Electric Co., (2014) 230 Cal. App. 4th 567, 573. The CPUC acted in excess of its powers when it failed to find and determine San Onofre was "used

and useful” after it stopped producing electricity due to SCE’s defective steam generators. Cal. Pub. Util. Code § 454.8.

In a 2005 decision penned by then-CPUC President Michael Peevey, the CPUC allowed SCE to recover in rates the costs of the four new steam generators at San Onofre *before* finding them to be “used and useful.” (Decision D.05-12-040) This accommodation was made in reliance on SCE’s representation that SCE would “submit the incurred costs for a reasonableness review, and that the Commission would not be relinquishing its authority to review the reasonableness of recorded costs and construction practices:”

Specifically, SCE proposes to file an application to establish the reasonableness of the SGRP construction costs, excluding the costs of removal and disposal of the original steam generators, **six months after SONGS returns to commercial operations**. In addition, SCE proposes to file an application to establish the reasonableness of the costs of removal and disposal of the original steam generators six months after the last removal and disposal costs are incurred. (Decision D.05-12-040 pp. 48-49)

The CPUC acted in excess of its powers when it did not hold SCE to its promise. Instead, the CPUC allowed SCE to dictate to the CPUC when SCE would provide the reasonableness application. The CPUC exceeded its powers when it failed to conduct a review of whether SCE acted reasonably in obtaining and deploying the new steam generators. The CPUC exceeded its powers when it treated the costs of the new steam generators as if they were already in rates.

On 13 April 2011, SCE’s Vice-President of Regulatory Operations, Akbar Jazayeri, told the CPUC it was not going to file its application to put the new steam

generator costs in rates until “the second quarter of 2012,” 1.76 years after San Onofre returned to commercial operations (February 2011):



Akbar Jazayeri
Vice President of Regulatory Operations

April 13, 2011

Re: San Onofre Nuclear Generating Station (SONGS), Steam
Generator Replacement Project (SGRP) – Recovery of
Costs Application

Dear Mr. Clanon:

Southern California Edison Company (SCE) hereby informs the Commission of its current intent to file a single application, at the end of the second quarter of 2012, that seeks authority: 1) to permanently include in rates the capital costs incurred in the procurement and installation of replacement steam generators at SONGS; and, 2) to permanently include in rates the cost of removal and disposal of the original steam generators.

**

The replacement of the steam generators in Units 2 and 3 at SONGS has now been completed. The units returned to commercial operation in April 11, 2010 and February 18, 2011

On 21 February 2013, the CPUC exceeded its powers when it ruled the CPUC “did not specify any particular date for the filing.” (21 February 2013 Ruling) The CPUC exceeded its powers when it ignored its own record and failed to even mention: (1) SCE’s commitment to file the application “six months” after San Onofre returned to commercial operation in February 2011 (Decision D.05-12-040 pp. 48-49); (2) SCE’s letter setting the date “at the end of the second quarter 2012” (21 February 2013 Ruling); and instead, relied on something outside the record to postpone the application date to 15 March 2014,

three years and one month after San Onofre had returned to commercial operation. (21 February 2013 Ruling)

The CPUC acted outside its fiduciary duty to find out whether ratepayers should pay for the damages caused by the defective replacement steam generators. *People ex rel. Harris v. Rizzo* (2013) 214 Cal. App. 4th 921, 950.

The CPUC acted outside its powers because it did not properly comply with PUC Rule 12.1(d), and failed to properly require an adequate showing that the proposed settlement is reasonable in light of the whole record, consistent with law, and in the public interest. The CPUC acted outside its powers because it failed to examine the actions of the SCE and its officials who deployed the new steam generators to determine if they acted knowingly, recklessly, or negligently.

(2) The Commission Has Not Proceeded In The Manner Required By Law.

The CPUC did not proceed in a manner required by law when it failed to consider that only SCE's hand-picked choices to represent ratepayers were permitted to attend settlement discussions. The CPUC did not proceed in a manner required by law in approving the agreement when the settling parties did not convene at least one conference with notice and opportunity to participate provided to all. CPUC Rules of Practice and Procedure Rule 12.1(b). The non-settling parties were never given the "opportunity to participate" in the required settlement conference. The negotiations of the terms of the settlement were conducted in secret; they were not conducted at arm's length.

The CPUC did not proceed in a manner required by law because the version of the agreement approved was not the version submitted to opponents for comments.

The CPUC did not proceed in a manner required by law because the writing it approved was not sufficiently certain to make the precise acts which are to be done clearly ascertainable. The writing lacks the required definiteness and certainty. *Goehring v. Stockton Morris Plan Co.* (1949) 93 Cal.App.2d 417, 420-421. The writing is not complete and certain as shown by the hundreds of pages of advice letters SCE has filed in a futile effort to provide the needed certainty. *Gould v. Callan* (1954) 127 Cal. App. 2d 1, 4.

The CPUC did not proceed in a manner required by law when it limited the scope of the evidentiary hearing on a \$5 billion proposed settlement to just three (3) hours, which was fundamentally too short to properly examine whether there was a sufficient basis under the law to adopt the agreement.

The CPUC did not proceed in a manner required by law when it failed to consider why steam generators costing hundreds of millions of dollars engineered to last forty years failed in two years without someone's negligence. The CPUC did not proceed in a manner required by law when the CPUC refused to consider the legal principle of *res ipsa loquitur*.¹

¹ In Latin, the phrase *res ipsa loquitur* means "the thing speaks for itself." The most widely accepted interpretations of *res ipsa loquitur* include (1) that it creates a permissible inference of negligence for a jury in situations where a plaintiff can only show that an injurious event occurred. *The Law of Falling Objects: Byrne v. Boadle and the Birth of Res Ipsa Loquitur*, 59 *Stan. L. Rev.* 1065, 1066.

The CPUC did not proceed in a manner required by law when the CPUC concluded that SCE could, by filing its paperwork ipso facto make out a prima facie case of reasonableness. The CPUC did not proceed in a manner required by law when it failed to require SCE to show why it was not at fault. CPUC Rules of Practice and Procedure Rule 12.1(d). The CPUC did not proceed in a manner required by law when the CPUC let SCE recover rates for San Onofre without SCE showing its negligent acts did not cause the forced closure of San Onofre. *Natural Soda Products Co. v. Los Angeles* (1943) 23 Cal. 2d 193, 201.²

The CPUC did not proceed in a manner required by law when it took official notice of the truth of **hearsay** statements in Nuclear Regulatory Commission (NRC) staff reports and letters and relied upon them as a substitute for taking evidence in this proceeding for factual support of the CPUC decision. The CPUC did not proceed in a manner required by law when it failed to take official notice of the Atomic Safety and Licensing Board Panel (ASLBP) 13 May 2013 decision that NRC actions taken in connection with San Onofre “constitutes a de facto license amendment proceeding.” (13 May 2013 LBP-13-07)

The CPUC did not proceed in a manner required by law when it failed to consider whether SCE had engaged in per se negligence in obtaining and deploying the new steam generators at San Onofre. The CPUC did not proceed in a manner required by law when

² In negligence cases, the measure of damages is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. Cal. Civ. Code § 3333. So too here, the costs should be borne by SCE and not ratepayers.

it failed to allow the issue of whether an NRC safety license amendment was required for SCE's modifications, additions, removals, or design changes in obtaining and deploying the new steam generators. The CPUC did not proceed in a manner required by law when it did not allow the issue to be raised whether the new steam generators resulted in more than a minimal increase in the likelihood of (1) a safety malfunction; (2) an accident; or (3) the consequences of malfunction important to safety. 10 CFR 50.59 (1-iv)

The CPUC did not proceed in a manner required by law when it dismissed its own expert, Dr. Robert Budnitz, and the plan he outlined for determining the if SCE was the cause of the failure of the defective steam generators. The CPUC did not proceed in a manner required by law when the CPUC blocked Dr. Budnitz from finding answers to critical questions: (1) What error(s) led to the tube failure(s)? (2) At what stage were those errors made? (3) Who made those errors? (4) What might have been done, and by whom, and at what stage, to have averted those errors? (5) What arrangements in place elsewhere, technical or administrative or both, that were successful in averting thee errors somehow didn't work adequately for the SONGS RSGs? (Dr. Robert Budnitz' 1 December 2013 Report, p. 4).

The CPUC did not proceed in a manner required by law when the CPUC relieved SCE from its legal duty to show: (1) why the defective replacement steam generators' costs should be placed permanently in rates; (2) whether SCE acted reasonably in obtaining and deploying the defective steam generators so that it is just and reasonable to impose the damage it caused on ratepayers, pursuant to Pub. Util. Code § 451; and (3)

whether to remove all costs related to the San Onofre plant from SCE and SDG&E's rates.

The CPUC did not proceed in a manner required by law when it approved the agreement, even though it did not consider (1) the reaction of the ratepayers 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). See, *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 776, (3d Cir. Pa. 1995).

(3) The Findings In The Decision Of The Commission Are Not Supported By Substantial Evidence In Light Of The Whole Record.

The CPUC finding that the primary result of the settlement is ratepayer refunds and credits of approximately \$1.45 billion is not supported by substantial evidence in the record. (Decision D.14-11-040, p. 2) The CPUC claim that ratepayers will pay approximately \$3.3 billion in costs over ten years (2012-2022), including costs of power the Utilities purchased for its customers after the outage, and recovery of the undepreciated net investment in SONGS assets (e.g., Base Plant), excluding the failed SGRP, is not supported by substantial evidence in the record. (Decision D.14-11-040, p.

2) The CPUC claims that the settlement reduces shareholders' return on SONGS investments to less than 3%. **The effect is ratepayers save approximately \$420 million** over the ten-year depreciation period: this is not supported by substantial evidence. (Decision D.14-11-040, p. 2)

The CPUC claim that refunds due to ratepayers will be credited to each utility's under-collected Energy Resource Recovery Account (ERRA) balance upon adoption of the settlement by the Commission to reduce otherwise approved rate increases was not supported by substantial evidence in the record.

The finding there was approximately \$1 billion of SCE's non-SGRP investment in SONGS (San Onofre) that was to be removed from rate base and recovered at a reduced rate of return was not supported by substantial evidence in the record. The claimed reduction of interest to the Utilities of approximately \$419 million was not supported by substantial evidence in the record. The cost of the power purchased was not supported by substantial evidence in the record. The implied fact that SCE is bona fide pursuing claims against Mitsubishi is not supported by substantial evidence in the record.

There is not substantial evidence in the record to support a 70% - to - 30% split between ratepayers and investors as right, fair and just. There is not substantial evidence in the record to support a finding that SCE's conduct in deploying the defective steam generators that caused a permanent outage of the San Onofre power plant warrant the corporations—SCE and SDG&E—receiving a total of \$3,298,600,000 (or 70% of the \$4,708,200,000 they sought). There is no substantial evidence that supports this division

of benefits and burdens (*The Utility Reform Network v. See Public Utilities Com.* (2014) 223 Cal. App. 4th 945, 959).

(4) The Order Or Decision Of The Commission Was Procured By Fraud Or Was An Abuse Of Discretion.

The Decision was procured by abuse of discretion based upon: (1) failing to allow any meaningful investigation into whether SCE was responsible for obtaining and deploying the defective steam generators; (2) blocking any evidentiary hearing into whether SCE acted unreasonably; (3) blocking any investigation into the value of benefits to ratepayers under the agreement; (4) misleading ratepayers to believe that an investigation would be conducted into who and what caused the new steam generators to fail; (5) issuing press releases suggesting that the parties were supporting the agreement; (6) carrying out SCE's directive to postpone the OII proceedings for 4 months; (7) postponing the investigation into who and what caused the steam generators to fail into the indefinite future; (8) participating through the Office of Ratepayer Advocate in secret settlement discussions from which parties were excluded; (9) promoting the settlement value far in excess of its actual value to ratepayers; (10) limiting the evidentiary hearing on the settlement to 3 hours; (11) placing matters in the record falsely e.g. there was a settlement conference for all parties as required under Rule 12; (12) limiting cross examination by not permitting proper cross-examination questioning; and (13) the other matters identified above. *Deveny v. Entropin, Inc.* (2006) 139 Cal. App. 4th 408, 428. See, *Consumer Defense Group v. Rental Housing Industry Members*, (2006) 137 Cal. App. 4th 1185, 1186; *Walk Haydel & Assocs. v. Coastal Power Prod. Co.*, 934 F. 4 Supp.

209, 211, (E.D. La. 1996); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1300 (4th Cir. N.C. 1978); *In re GMC Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 776 (3d Cir. Pa. 1995); *Commercial Union Ins. Co. v. Ford Motor Co.*, 640 F.2d 210, 211, 1981 U.S. App. LEXIS 20155, 1 (9th Cir. Cal. 1981) *Chevron Corp. v. Donziger*, 2014 U.S. Dist. LEXIS 28253, 1 (S.D.N.Y. 2014); *Dacotah Mktg. & Research, L.L.C. v. Versatility, Inc.*, 21 F. Supp. 2d 570, 572; (E.D. Va. 1998); *Greshko v. County of Los Angeles* (1987) 194 Cal. App. 3d 822, 836; *Continental Cas. Co. v. Westerfield*, 961 F. Supp. 1502, 1503 (D.N.M. 1997); 49 UCLA L. Rev. 991, 993.

CONCLUSION

For the foregoing reasons, the moving parties to the application request rehearing of the Decision D.14-11-040.

Respectfully Submitted,

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