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 (Issued November 1, 2012)

BRIEF ON LEGAL ISSUES IN SUPPORT OF RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U338-E) AND SAN DIEGO GAS & ELECTRIC COMPANY (U902-E) TO ORDER INSTITUTING INVESTIGATION REGARDING SAN ONOFRE NUCLEAR GENERATING STATION UNITS 2 AND 3

DOUGLAS K. PORTER
WALKER A. MATTHEWS
RUSSELL A. ARCHER
Southern California Edison Company
2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, CA 91770
Telephone: (626) 302-6879
Facsimile: (626) 302-3990
E-mail: Walker.matthews@sce.com

HENRY WEISSMANN
JONATHAN E. ALTMAN
JOHN B. OWENS
LIKA C. MIYAKE
Munger, Tolles & Olson LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9150
Facsimile: (213) 683-5150
E-mail: Henry.Weissmann@mto.com

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

JAMES F. WALSH
STACY VAN GOOR
101 Ash Street, HQ12D
San Diego Gas & Electric Company
San Diego, CA 92101-3017
Telephone: (619) 699-5022
Facsimile: (619) 699-5027
E-mail: jfwalsh@semprautilities.com

Attorneys for
SAN DIEGO GAS & ELECTRIC COMPANY

Dated: February 25, 2013

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF RESPONSES TO COMMISSION QUESTIONS 1

II. DISCUSSION 2

A. Section 455.5 Guides The Procedure For Considering Reductions In Rates In Light Of Out-Of-Service Portions Of SONGS 2

1. The Commission May Only Make Expenses Subject To Refund Starting From November 1, 2012 3

2. The Commission May Not Order Rate Reductions Prior To A Hearing In SCE's Test Year 2015 GRC 3

a. Section 455.5 precludes the removal from rates of the revenue requirement for SONGS prior to SCE's 2015 GRC 3

b. Immediate removal of SONGS revenue requirement from rates is also inconsistent with Section 362 7

B. The Commission Lacks Authority To Order Refund Of Rates Recorded In The SONGS Memorandum Account 8

1. The Commission Lacks Power to Set Rates Retroactively 8

2. The GRC Memorandum Accounts Were Established For A Different Purpose And Do Not Authorize The Commission To Refund SONGS Costs Based On The Outages 10

a. The respective SCE and SDG&EGRC memorandum accounts did not and could not have made SONGS costs subject to refund based on the outages 10

b. Because there was no prior notice that SCE's and SDG&E's rates were subject to refund for the "specified purpose" of examining SONGS costs, setting rates subject to refund prior to November 1, 2012 would be impermissible retroactive ratemaking 14

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Natural Gas Clearinghouse v. F.E.R.C.,
965 F.2d 1066 (D.C. Cir. 1992) 9

Pub. Utils. Comm'n of Cal. v. F.E.R.C.,
988 F.2d 154 (D.C. Cir. 1993) 8

Verizon Cal. Inc. v. Peevey,
2006 WL 1627115 (N.D. Cal. June 13, 2006) 9

STATE CASES

Ponderosa Tel. Co. v. Pub. Utils. Comm'n,
197 Cal. App. 4th 48 (2011) 8

STATE STATUTES

Cal. Pub. Util. Code § 362 ....7, 8

Cal. Pub. Util. Code § 454.8 6

Cal. Pub. Util. Code § 455.5 .... passim

Cal. Pub. Util. Code § 1701.5 13

CPUC DECISIONS AND ORDERS

D. 00-02-046 6

D. 03-05-076 11

D. 03-07-031 9

D. 06-05-016 6

D. 09-03-025 6

D. 12-08-029 13

D. 12-08-038 13

D. 12-11-051 13

TABLE OF AUTHORITIES
(continued)

Page(s)

D. 87-12-067 .... 14, 15, 16

D. 92-12-057 6

D. 95-05-042 6

D. 96-09-100 9

OTHER AUTHORITIES

Assembly Bill 2378 5

Pursuant to the January 28, 2013, Scoping Memo in the Commission's Order Instituting Investigation Regarding San Onofre Nuclear Generating Station (SONGS) Units 2 and 3 ("I.12-10-013" or the "OII"), Southern California Edison Company ("SCE") and San Diego Gas & Electric Company ("SDG&E") respectfully submit this Brief on Legal Issues in response to the Commission's questions as set forth below.

I. INTRODUCTION AND SUMMARY OF RESPONSES TO COMMISSION QUESTIONS

The Scoping Memo invites briefing on two sets of questions reproduced below, with a summary of SCE's and SDG&E's response included.

Commission Question 1:

a) Whether the Commission has "legal authority to reduce SCE's and SDG&E's electric rates to reflect the value of any portion of the SONGS facility which has been out of service for more than nine months and, further, to exclude from rate recovery any expenses related to that facility";

b) If so, from what date the Commission is authorized to reduce the rates pursuant to Pub. Util. Code § 455.5 ("Section 455.5"); and

c) Whether such an order must be delayed until the utilities' 2015 General Rate Cases ("GRCs").

Under California Public Utilities Code section 455.5, the Commission may place a "subject-to-refund" condition on costs associated with out-of-service portions of SONGS, but only going forward from November 1, 2012, the date on which the OII issued. Section 455.5 permits the Commission to reduce SCE's and SDG&E's rates to reflect the value of any portion of the SONGS facility that has been out of service for more than nine months, but not before SCE's 2015 GRC.

Commission Question 2:

a) Whether the Commission has "legal authority to order SCE and SDG&E to refund rates collected by the utilities upon finding that some 2012 expenses related to post-outage operations at SONGS recorded in the SONGSMA were not reasonable and necessary"; and

b) If so, whether there is "any legal basis to delay such an order."

The Commission does not have authority to order SCE and SDG&E to refund rates recovering revenue requirements recorded in SCE'S GRC Revenue Requirement Memorandum Account ("RRMA") and SDG&E's GRC Memorandum Account ("GRCMA"). The RRMA and GRCMA were established for the specific purpose of allowing the Commission additional time to issue the respective decisions for SCE's and SDG&E's GRCs, and authorizing a rate in the amount of the difference between the rates being collected pursuant to the previous GRC and the 2012 GRC. The establishment of the RRMA and the GRCMA provide no authority for the Commission to retroactively subject rates to refund for non-GRC-related purposes prior to issuance of the OII.

II. DISCUSSION

A. Section 455.5 Guides The Procedure For Considering Reductions In Rates In Light Of Out-Of-Service Portions Of SONGS

Section 455.5 authorizes the Commission to reduce SCE's and SDG&E's rates to reflect the value of any portion of SONGS that has been out of service for more than nine months. § 455.5(a). Per Section 455.5(c), the Commission may make such costs subject to refund beginning from the date of the issuance of the OII, in this case November 1, 2012. Under the plain language of Section 455.5 and Commission precedent implementing that statute, the Commission may not order reductions in rates with respect to the revenue requirement for SONGS before SCE's test year 2015 GRC and, as to SDG&E's internal SONGS costs that do not involve SCE's SONGS costs directly invoiced to SDG&E, before SDG&E's test year 2016 GRC.

Because there is no dispute about the Commission's authority to reduce SCE's and SDG&E's rates, SCE and SDG&E will focus their brief on the Commission's second and third questions: from what date can the Commission make SONGS-outages-related costs subject to refund; and when can the Commission order a reduction in rates?

1. The Commission May Only Make Expenses Subject To Refund Starting From November 1, 2012

Section 455.5(c) states: "The commission's order [instituting investigation] shall require that rates associated with that facility are subject to refund *from the date the order instituting the investigation was issued*." (Emphasis added.) There is no ambiguity about this provision, which is not only clear, but, by the use of the word "shall," is proscriptive. The Commission issued the OII on November 1, 2012. Thus, the Commission may make subject-to-refund only those expenses associated with portions of the SONGS facility out-of-service for more than nine months, and incurred from November 1, 2012, forward.

2. The Commission May Not Order Rate Reductions Prior To A Hearing In SCE's Test Year 2015 GRC And SDG&E's Test Year 2016 GRC

a. Section 455.5 precludes the removal from rates of the revenue requirement for SONGS prior to SCE's 2015 GRC and SDG&E's Test Year 2016 GRC

Section 455.5 sets forth the process for ratemaking related to extended outages. Under Section 455.5, a rate reduction or refund may occur only after a hearing consolidated with the utility's next GRC. The statute further provides that the utility will continue to collect rates associated with the out-of-service portion of a facility from the date of the issuance of the OII until the GRC decision, but subject to refund.

Section 455.5 directs the Commission, once it receives notice of a nine-month-long outage at a major generating facility, to "institute an investigation to determine

whether to reduce the rates of the corporation to reflect the portion of the electric . . . generation or production facility which is out of service." § 455.5(c). The statute makes clear that, following institution of an OII, the utility continues to collect rates associated with the affected facility, but does so subject to refund:

> The commission's order [instituting investigation] *shall* require that rates associated with that facility *are subject to refund* from the date the order instituting the investigation was issued. The commission *shall consolidate the hearing on the investigation with the next general rate proceeding* instituted for the corporation.

§ 455.5(c) (emphasis added). In other words, the statute directs the Commission to engage in a three-step process: (1) issue an order instituting an investigation, (2) set rates subject to refund, and (3) investigate whether to reduce rates, with such investigation culminating in a hearing consolidated with the utility's next GRC.

This three-step process is confirmed and clarified by the portion of Section 455.5 that directs the Commission to eliminate the value of an out-of-service facility when it establishes rates in the context of deciding the utility's next GRC:

> *In establishing rates* for any [utility], the commission may eliminate consideration of the value of any portion of any [utility] facility which, after having been placed in service, remains out of service for nine or more consecutive months, and may disallow any expenses related to that facility. Upon eliminating consideration of any portion of a facility or disallowing any expenses related thereto under this section, the commission shall *reduce the rates* of the corporation accordingly . . . .

§ 455.5(a) (emphasis added). This provision specifies that the Commission may "reduce the rates" only at the point in time when it is "establishing rates." When read in context with subsection (c), which requires consolidation of the hearing on the OII with the "next" GRC, "establishing rates" clearly refers to the setting of general rates in the GRC.

A rate reduction prior to that point in time is inconsistent with the plain language of, and process set forth in, Section 455.5.

The legislative history of Section 455.5 demonstrates that the statute does not permit an immediate reduction in rates. Section 455.5 was originally enacted in 1986 following its passage as Assembly Bill 2378. The bill, as amended in the Assembly on January 22, 1986, provided that "[i]mmediately upon" notification by the utility that a facility was out of service for nine months, the Commission "shall, after a hearing, determine whether to reduce the rates." ll.25-27. The bill was amended in the Senate on April 17, 1986 to delete that provision and to add what is now subsection (c) of Section 455.5, i.e., the provision requiring the Commission to institute an investigation within 45 days of the utility's notice, to set rates subject to refund, and to consolidate the hearing on the investigation with the utility's next GRC. The analysis of the Senate amendments explains that they

> *permit the utility to collect rates associated with the plant during the investigation* subject to refund, rather than presuming that rates should be lowered. . . . The Senate amendments *preserve the status quo by permitting the utility to continue to collect rates in cash*, subject to eventual refund if the PUC determines that the facility should have been removed from ratebase. There is an ultimate deadline for decision in providing that hearings will be conducted in connection with the corporation's next general ratecase [sic].

Concurrence in Senate Amendments, 1-2 (May 27, 1986) (prepared by Bill Julian for the Assembly Office of Research) (emphasis added).

Commission precedent confirms that Section 455.5 does not authorize, and has not been previously invoked to effect, a rate reduction prior to the utility's next GRC. In the Palo Verde, El Dorado, and Geysers 15 OIIs, the Commission consolidated its

investigations with the utility's next GRC. *See* D. 95-05-042, 1995 WL 461165, at *1 (May 24, 1995) (Palo Verde); D. 00-02-046, 2000 WL 289723, at *407-08 (Feb. 17, 2000) (El Dorado); D. 92-12-057, 1992 WL 438010, at *117 (Dec. 16, 1992) (Geysers 15). In none of these proceedings did the Commission reduce the utility's rates pending the outcome of the OII. Instead, in all three cases, the Commission ordered a rate adjustment only in its final decision terminating the OIIs.[1]

In arguing that the Commission may order rate reductions prior to the 2015 GRC, the Division of Ratepayer Advocates ("DRA") does not mention, much less contest, the text of Section 455.5 mandating the consolidation of a Section 455.5 hearing with the next GRC. Instead, DRA points to Public Utilities Code section 454.8—a statute concerning ratemaking in the event of "new construction of any addition to or extension of" a facility to argue that SONGS is not currently "used and useful" and so the Commission must be able to reduce rates immediately. DRA's argument misses the mark. First, Section 454.8 has no application here. By its terms, it applies only to the question of how costs associated with "new construction" should be recovered, not to the Commission's consideration of rates in light of an extended outage at an existing facility. Second, the Legislature enacted a specific process for determining the rate-making implications of extended outages in Section 455.5. Nothing in Section 454.8 or DRA's argument provides any justification for ignoring Section 455.5's express statutory command.

---

[1] The Commission did not immediately reduce rates after the Mohave Generating Station went out of service on December 31, 2005 or after SCE announced in June 2006 that it would not pursue resumed operations. *See* D. 06-05-016, 2006 Cal. PUC LEXIS 189 (May 26, 2005), at *29-*30 (SCE's 2006 GRC, which authorized SCE to recover Mohave costs in rates and record them in a balancing account); D. 09-03-025, 2009 WL 801553 (Mar. 12, 2009), at *18 (SCE's 2009 GRC, which continued rate recovery and balancing account for Mohave).

In sum, a reduction in rates prior to the hearing of the OII issues in SCE's test year 2015 GRC and, as to SDG&E's internal SONGS costs that do not involve SCE's SONGS costs directly invoiced to SDG&E, before SDG&E's test year 2016 GRC would violate Section 455.5 and contravene the Commission's own precedent applying the statute.

b. Immediate removal of SONGS revenue requirement from rates is also inconsistent with Section 362

Section 362 presents another statutory restriction on the removal of the SONGS revenue requirement from rates prior to SCE's next GRC and, as to SDG&E's internal SONGS costs that do not involve SCE's SONGS costs directly invoiced to SDG&E, before SDG&E's test year 2016 GRC. Section 362 requires that in proceedings pursuant to Section 455.5, "the commission shall ensure that facilities needed to maintain the reliability of the electric supply remain available and operational." § 362(a). Traditionally, SONGS has been viewed as a facility needed to maintain the reliability of the California electric supply. Hence, the Commission should not precipitously adopt any measures in the OII that would hamper SCE's efforts to ensure that SONGS is "available and operational."

DRA contends that Section 362 does not apply because SONGS is not currently "available and operational." DRA Reply at 3-4. This argument ignores the plain meaning and import of Section 362. Section 362 does not apply only to facilities that are currently "operational;" it applies "[i]n proceedings pursuant to Section 455.5" to "facilities needed to maintain the reliability of the electric supply." § 362(a). SONGS is just such a facility. Reducing rates associated with the revenue requirement for SONGS prior to an investigation and hearing would effectively deprive SCE of the revenue

needed to support restoration of SONGS to operation, and is at the very least in tension with the Commission's statutory obligations under Section 362 to "ensure that facilities needed to maintain the reliability of the electric supply remain available and operational."

B. The Commission Lacks Authority To Order Refund Of Rates Recorded In SCE's SONGS Memorandum Account And SDG&E's SONGS Outage Memorandum Account

As explained in SCE's Response to the OII, the Commission lacks the legal authority to order SCE and SDG&E to refund rates recovering revenue requirements recorded in SCE's SONGS Memorandum Account and SDG&E's SONGS outage Memorandum Account.[2] Any such order would contravene Commission precedent, violate Section 455.5(c), and constitute impermissible retroactive ratemaking. Accordingly, rates should not be made subject to refund any earlier than November 1, 2012, the date of the OII.

1. The Commission Lacks Power To Set Rates Retroactively

It is axiomatic that "the Commission does not have the power to roll back general rates already approved by it or to order refunds of amounts collected pursuant to such approved rates . . . . In other words, the Commission has the power to fix rates prospectively only." *Ponderosa Tel. Co. v. Pub. Utils. Comm'n*, 197 Cal. App. 4th 48, 61 (2011).

"Predictability is an underlying purpose of . . . the rule against retroactive ratemaking." *Pub. Utils. Comm'n of Cal. v. F.E.R.C.*, 988 F.2d 154, 163 (D.C. Cir. 1993). "'[I]t is not that notice relieves the Commission of the bar on retroactive ratemaking, but that it changes what would be purely retroactive ratemaking into a

[2] Further, the revenue requirement associated with functions that SCE must continue to undertake in the public interest regardless of whether Units 2 and 3 are operating should not be subject to refund. See SCE-1 at 19-28.

functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.'" *Verizon Cal. Inc. v. Peevey*, No. C03-2838, 2006 WL 1627115, at *7 (N.D. Cal. June 13, 2006) (quoting *Natural Gas Clearinghouse v. F.E.R.C.*, 965 F.2d 1066, 1075 (D.C. Cir. 1992)).

In keeping with this principle, the Commission has authority to make rates subject to refund, but "it must do so by beginning the period for which rates are subject to refund *at a future date* and then adjusting rates from the subject to refund date." D. 96-09-100, 68 CPUC 2d 367, 1996 WL 634317, at *3 (Sept. 20, 1996) (emphasis added). In short, the Commission must give prospective notice that rates will be subject to refund.

Similarly, Section 455.5 provides in pertinent part: "[t]he commission's order shall require that rates associated with [the facility at issue] are subject to refund *from the date the order instituting the investigation was issued*." § 455.5(c) (emphasis added). As the Commission has explained: "the provisions of Section 455.5 do not call for a refund unless or *until an investigation by the Commission is made*." D. 03-07-031, 2003 WL 21705427, at *14 (July 10, 2003) (emphasis added).

The Commission's order making SONGS costs subject to refund from January 1, 2012 on its face contravenes Section 455.5 and the controlling precedents. Commissioner Florio recently acknowledged as much, noting that, "[n]ormally we couldn't look back prior to today's opening of the investigation to go back to January of 2012 [to make SONGS costs subject to refund]." CPUC Meeting # 3303, Tr. of Commissioner Discussion Re Item 34, SONGS OII at 2 (Oct. 25, 2012). Nevertheless, the Commissioner expressed his opinion that the rule against retroactive ratemaking does

not apply to the OII "because the general rate case[] for Edison . . . [has] been delayed, [and therefore] all ongoing authorized costs are being tracked in a memorandum account that we can adjust." *Id.*

2. The GRC Memorandum Accounts Were Established For A Different Purpose And Do Not Authorize The Commission To Refund SONGS Costs Based On The Outages

The existing SCE and SDG&E GRC memorandum accounts were established to permit the Commission to adjust rates based on the outcome of SCE's and SDG&E's respective GRCs—not to adjust rates based on the SONGS outages. Accordingly, those memorandum accounts do not permit the Commission to make SONGS costs subject to refund retroactive to January 2012.

The Commission can make a utility's rates subject to refund only for a "specified purpose" beginning on a future date. D. 95-10-018, 61 CPUC 2d 687, 689 (1995). The "specified purpose" of the GRC memorandum accounts was to give the Commission more time to issue the GRC decision. The memorandum accounts provided no notice that the Commission intended to make SONGS costs subject to refund for the "specific purpose" of the Commission's investigation into the SONGS outages. Indeed, the creation of the memorandum accounts could not have given such notice, because the SONGS outages post-dated the creation of the memorandum accounts.

a. The respective SCE and SDG&E GRC memorandum accounts did not and could not have made SONGS costs subject to refund based on the outages

SCE filed its test year 2012 GRC on November 23, 2010. On December 29, 2010, The Utility Reform Network ("TURN") filed a motion asking the Commission to authorize an RRMA to track the change in revenue requirement ultimately adopted in the GRC during the period from January 1, 2012 to the date the Commission adopted a final

decision in the GRC. *See* A. 10-11-015, Assigned Commissioner's Scoping Memo at 4 (Mar. 1, 2011). According to the Scoping Memo, TURN argued that establishing the RRMA early would promote "the essential goal of providing parties sufficient time to perform the necessary review and analysis rather than rushing to meet an artificial goal of issuing a decision in December 201[1]." *Id.* (citations omitted). SCE opposed the motion. *Id.* at 5.

An RRMA "offset[s] the financial consequences of the difference between the date the Commission adopts its final decision in [the GRC] and the date that the decision would have been expected under the Rate Case Plan." D. 03-05-076, 2003 WL 21294892, at *1 (May 22, 2003). During the period between January 1, 2012, and the date of a final decision in the GRC, "SCE would track in the GRC RRMA the recorded or authorized GRC-related revenue requirements reflected in the various Commission-approved ratemaking mechanisms. When the Commission adopts its [2012] decision . . . SCE would determine the balance (i.e., over-or undercollection) in the GRC RRMA by comparing the authorized GRC revenue requirement to the revenue requirement recorded in the GRC RRMA." *Id.* at *2.

On March 1, 2011, the Commission granted TURN's motion, and established the RRMA. A. 10-11-015, Assigned Commissioner's Scoping Memo at 5-6 (Mar. 1, 2011). The Order creating the RRMA did not purport to make SONGS expenses collected in authorized rates subject to refund based on the SONGS outages, which would not occur for several months.

On June 23, 2011, SCE filed a tariff to implement the RRMA. Preliminary Statement, § N.33, Cal. PUC Sheet 48728-E, Sheet 39. Pursuant to the tariff, SCE

entered its previously authorized GRC-related revenue requirement, and when the Commission authorized a 2012 revenue requirement in the GRC, that amount was compared to the amount recorded to determine the balance that could ultimately be recovered from customers. Consistent with the Order, the tariff was strictly limited to incremental adjustments resulting from the revenue requirement adopted in the GRC. Thus, the SCE RRMA account was confined to tracking the difference between the previously authorized revenue requirement and the ultimate approved 2012 GRC revenue requirement.

On August 23, 2012, the Commission extended the 18-month deadline for reaching a decision in SCE's GRC for 60 days, pursuant to Public Utilities Code Section 1701.5(a). D. 12-08-038, 2012 WL 4320514 (Aug. 23, 2012). The extension order mentioned the SONGS outages, but contained no indication that SONGS costs would be subject to refund as of January 1, 2012 based on the outages. On November 29, 2012, the Commission voted to adopt a decision in SCE's GRC. D. 12-11-051, 2012 WL 6641483 (Nov. 29. 2012). The decision expressly states that "[t]he GRC record does not contain evidence regarding SCE's operating response to the shutdown of the SONGS units." *Id.* at *14.

The Assigned Commissioner and Administrative Law Judge adopted a comparable memorandum account—"GRCMA"—in a Scoping Memo and Ruling ("Ruling") applicable to SDG&E's test year 2012 GRC filed on December 15, 2010. A. 10-12-005, Ruling at 5-7, 17-18 (March. 2, 2011). The Ruling creating the GRCMA did not purport to make SONGS expenses collected in authorized rates subject to refund based on the SONGS outages, which would not occur for several months.

On September 28, 2011, SDG&E filed a tariff to implement its GRCMA, SDG&E Electric Preliminary Statement, Section V, Memorandum Accounts, Cal. PUC Sheet No. 19011-G, which was approved by the Energy Division by letter dated October 28, 2011. The purpose of SDG&E's GRCMA is to record the incremental shortfall or overcollection resulting from the difference between the rates currently in effect and the final rates adopted by the Commission in its decision for Application 10-12-005. Specifically, SDG&E's GRCMA was filed and approved with language in the tariff exclusively calling for entries related to the authorized revenue requirement as decided upon in A. 10-12-005, to the revenue requirement in rates current at the time of the decision in A. 10-12-005, together with interest. Nowhere in the approved tariff is there allowance for changes related to retroactive cost adjustments.

On August 23, 2012, the Commission extended the 18-month deadline for reaching a decision in SDG&E's GRC to November 1, 2012. D. 12-08-029, 2012 WL 4320512 (Aug. 23, 2012). This deadline has subsequently been extended. None of these decisions mentioned the SONGS outages. A proposed decision in SDG&E's GRC has not yet been circulated.

In short, at no time prior to the issuance of the OII on November 1, 2012 did the Commission give notice that SONGS costs and expenses might be subject to refund based on the 2012 outages. Instead, the creation of SCE's RRMA and SDG&E's GRMCA contemplated that the Commission would adjust the rates SCE collected in 2012 only to the extent the Commission's final 2012 GRC decision changed SCE's base rates, and to the extent the Commission's final test year 2012 GRC decision changes SDG&E's base rates based on GRC record evidence.

b. Because there was no prior notice that SCE's and SDG&E's rates were subject to refund for the "specified purpose" of examining SONGS costs, setting rates subject to refund prior to November 1, 2012 would be impermissible retroactive ratemaking

The rule against retroactive ratemaking bars the Commission from declaring rates broadly subject to refund and then later making specific costs retroactively subject to refund based on events occurring after the original pronouncement.

D. 87-12-067, 27 CPUC 2d 1 (1987) ("*PacBell*") is instructive in this regard. In *PacBell*, the utility filed its rate case for 1986 on January 22, 1985. In March 1985, the Commission issued an OII and consolidated its investigation with the rate case. *Id.* at 12. The Commission bifurcated the proceedings, with Phase 1 considering results of operations, and Phase 2 addressing rate design. *Id.*

On January 10, 1986, the Commission issued the Phase 1 interim opinion, which it subsequently modified in response to Pacific Bell's application for rehearing. In the Phase 1 decision, the Commission highlighted several issues for further investigation in Phase 2, indicating that "Pacific Bell's intrastate rates and charges would be collected subject to refund back to March 5, 1986." *Id.* at 25.

Pacific Bell objected, arguing that the rule against retroactive ratemaking required that ratemaking adjustments such as those in question in Phase 2 could be applied only to revenues collected or expenses incurred *after* the decision specifying the rate adjustments. "At bottom, Pacific Bell maintain[ed] that the Commission [could not] avoid the rule against retroactive ratemaking by simply labeling Pacific Bell's rates subject to refund." *Id.* at 142.

The Commission rejected Pacific Bell's argument, observing that its

> 'subject to refund' designation was narrowly tailored, not open-ended. The Commission does not engage in impermissible retroactive ratemaking where it first makes a utility's rates subject to refund *for a specified purpose* and thereafter determines the amount to be adjusted by going back to the date of the 'subject to refund' order.

Id. at 142-43 (emphasis added). The Commission noted that "the rates previously approved in [the] interim order were rates subject to refund to account *for the issues specifically reserved for Phase 2*." *Id.* at 143 (listing the specific issues for which the rates were made subject to refund) (emphasis added). As the Commission put it, because its "'subject to refund' proviso . . . was a carefully tailored reservation, keyed to precise issues to be developed in Phase 2 of this proceeding . . . [the Commission's] 'subject to refund' order does not constitute impermissible retroactive ratemaking." *Id.*

In stark contrast, the order creating the SCE RRMA and ruling creating the SDG&E GRCMA say *nothing* about the SONGS outages and identify *no* specific issue for which any rates, much less the SONGS revenue requirement as it might be affected by outages that could not then be anticipated, are made subject to refund. The creation of the SCE RRMA and SDG&E GRCMA put SCE and SDG&E on notice *only* that the Commission would adjust SCE's and SDG&E's rates from January 1, 2012, based on the final GRC decisions. When the Commission issued the GRC decision applicable to SCE on November 29, 2012, that condition was fulfilled, and rates were adjusted from January 1, 2012 to reflect that decision, based on the record developed in that proceeding. In fact, the decision in SCE's GRC finds on the record before it that the revenue requirement for SONGS should be increased, based on a projection of costs of operating SONGS without regard to the outage, which are outside the record of the GRC. The final decision applicable to SDG&E's 2012 test year GRC has not yet issued.

SCE's RRMA nor SDG&E's GRCMA did and could have put SCE and SDG&E respectively on notice that SONGS costs were subject to refund based on the SONGS outages, which did not occur until months later. SCE's RRMA and SDG&E's GRCMA were not a "carefully tailored reservation, keyed to precise issues," *id.*, but rather a generic catch-all technique for protecting both SCE and SDG&E and their respective customers from the financial consequences of a delay in the respective GRC decisions.

DRA's argument to the contrary ignores entirely the "specified purpose" for SCE's RRMA and SDG&E's GRCMA. Instead, DRA contends without support that the creation of the RRMA "preserves the Commission's discretion" to order the refund of rates generally, and therefore (apparently) of rates associated with expenses incurred on account of the SONGS outages. Indeed, DRA's own discussion of the RRMA—acknowledging that the RRMA was authorized "to recover the difference between existing rates and *rates ultimately adopted*," DRA Reply at 5—demonstrates that DRA's understanding that the "specified purpose" of the RRMA was to permit the adjustment of rates to account for rates ultimately adopted in the delayed 2012 GRC decision, not to account for any other adjustment that the Commission might later wish to make. Effectively, DRA argues that the establishment of the RRMA gave the Commission "discretion" to adjust rates based on whatever issue might later arise, regardless of whether it was part of the "specified purpose" for the RRMA in the first place.[3] Such an

[3] DRA cites D. 09-06-027, Conclusion of Law 84, in support of its argument, but this decision only reflects Commission precedent confirming that the Commission makes rates "subject to refund" for specific purposes, and only for those purposes. In D. 09-06-027, the Commission made a part of San Gabriel Valley Water Company's ("San Gabriel") revenue requirement subject to refund in connection with the very specific purpose of reviewing rates in connection with the Sandhill water treatment facility and another entity's contractual obligation and ability "to deliver sufficient water to the afterbay for Sandhill to operate at its full 29 mgd capacity and the capability of Sandhill to treat 29 mgd of Lytle Creek water, if sufficient water is available."

outcome would eviscerate the predictability and notice guarantees that, as explained above, separate prospective from retroactive ratemaking.

Under Section 455.5(c), the governing case law, and the Commission's precedents, SONGS costs should be made subject to refund as of the date the OII was issued, and not on January 1, 2012. At the very least, SONGS costs should be subject to refund *no earlier* than January 31, 2012 for Unit 3 so that the Commission's order excludes base operating and maintenance expenses for the month of January when Unit 3 was operating; and March 5, 2012 for Unit 2, so that expenses for the planned Unit 2 refueling outage are excluded.[4]

2009 WL 1893536 (June 18, 2009), at *51. Nothing in this decision indicates that the Commission could or would order San Gabriel make rates subject to refund for any but this specific reason.

[4] SCE and SDG&E do not dispute that the revenue requirement associated with the SGRP is subject to refund because D. 05-12-040 (the SGRP Final Decision) expressly made such costs subject to refund, and that costs associated with electricity purchased from the market in response to the SONGS outages are subject to refund from the date of the commencement of the unplanned outages (January 31, 2012 for Unit 3 and March 5, 2012 for Unit 2). 2005 WL 3540902 (Dec. 15, 2005).

Respectfully Submitted,

DOUGLAS K. PORTER
WALKER A. MATTHEWS
RUSSELL A. ARCHER
HENRY WEISSMANN
JONATHAN E. ALTMAN
JOHN B. OWENS
LIKA C. MIYAKE

/s/ Walker A. Matthews
By: Walker A. Matthews

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-6879
Facsimile: (626) 302-3990
E-mail: Walker.matthews@sce.com

JAMES F. WALSH
STACY VAN GOOR

/s/ James F. Walsh
By: James F. Walsh

Attorneys for
SAN DIEGO GAS & ELECTRIC COMPANY

101 Ash Street, HQ12D
San Diego Gas & Electric Company
San Diego, CA. 92101-3017
Telephone: (619) 699-5022
Facsimile: (619) 699-5027
E-mail: jfwalsh@semprautilities.com

Date: February 25, 2013