**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 & Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3. | I.12-10-013<br>(Filed October 25, 2012) |
| And related matters | A.13-01-016<br>A.13-03-005<br>A.13-03-013<br>A.13-03-014 |

# COMPLIANCE FILING OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) CONCERNING MEET AND CONFER SESSIONS AND PROCEDURAL AND SUBSTANTIVE RECOMMENDATIONS

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# COMPLIANCE FILING OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E) CONCERNING MEET AND CONFER SESSIONS AND PROCEDURAL AND SUBSTANTIVE RECOMMENDATIONS

## I. INTRODUCTION

In accordance with the Joint Ruling Directing Parties to Provide Additional Recommendations for Further Procedural Action and Substantive Modifications to Decision ("D.") 14-11-040, issued on December 13, 2016 ("December 13 Joint Ruling"), and the Administrative Law Judge's Ruling Granting Motion Of The Meet And Confer Parties To Extend Dates For All-Party Meet And Confers, And Request Additional Information From Utilities issued on May 26, 2017 ("May 26 Ruling"), San Diego Gas & Electric Company ("SDG&E") submits this compliance filing.

## II. BACKGROUND

In October 2012, in response to the San Onofre Nuclear Generating Station ("SONGS") Units 2 & 3 outage, the Commission issued the SONGS Order Instituting Investigation ("OII" or "OII Order"), which was intended to determine the ultimate recovery of the investment in

SONGS and the costs incurred since the commencement of the outage.[1] For the next two years, Parties conducted discovery, provided written testimony, participated in hearings, and submitted briefs for Phase 1,[2] Phase 1A[3] and Phase 2[4] of the proceeding. SDG&E participated fully in these proceedings. The Commission issued a proposed decision ("PD") for Phases 1 and 1A in November 2013, but did not act on it.[5] No Phase 2 PD was ever published.[6]

Settlement negotiations among some parties occurred throughout the initial OII proceeding. As a result of these settlement negotiations, on April 3, 2014, Southern California Edison Company ("SCE"), SDG&E, The Utility Reform Network ("TURN"), the Office of Ratepayer Advocates ("ORA"), Friends of the Earth ("FOE") and the Coalition of California Utility Employees ("CUE") (collectively, "the Settling Parties") filed and served a Joint Motion for Adoption of Settlement.[7] Subsequent to that motion, Assigned Commissioner Florio and Administrative Law Judges ("ALJs") Dudney and Darling issued a ruling on September 5, 2014,

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1 I.12-10-013, *Order Instituting Investigation Regarding San Onofre Nuclear Generating Station Units 2 and 3* (October 25, 2012); *see also* D.14-11-040 at 12-13 ("The OII identified rate recovery issues including: (1) review of all post 2011 Operations & Maintenance (O&M) costs and capital spending; (2) costs of scheduled RFO and emergent activities; (3) removal of non-useful generation assets from rate base; and (4) various questions around the costs, viability, and prudency of the SGRP approved in D.05-12-040.").

2 Phase 1 addressed the reasonableness of SCE's actions and expenditures following the SONGS outage. *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge Determining the Scope, Schedule, and Need for Hearing in Phase 1 of This Proceeding* (January 28, 2013) ("January 2013 OII Scoping Memo") at 3-4. Hearings were held in May 2013.

3 Phase 1A was subsequently broken out to address the method for calculating the cost of replacement power during 2012 due to the SONGS outage. Email Ruling of ALJ Dudney, re: *SONGS Replacement Power* (May 6, 2013). Hearings were held in August 2013.

4 Phase 2 was designed to address whether any reductions to the utilities' rate base and revenue requirement were warranted or required due to the extended SONGS outages. *Assigned Commissioner's and Administrative Law Judge's Ruling Determining the Phase 2 Scope and Schedule* (July 31, 2013). Hearings were held in October 2013.

5 *D.14-11-040* at 17-18.

6 *Id.* at 18.

7 *Joint Motion of Southern California Edison Company, San Diego Gas & Electric Company, 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* (April 3, 2014).

in which the Settling Parties were asked to modify their settlement agreement ("September 5 Ruling"). Assigned Commissioner Florio and ALJs Dudney and Darling proposed several adjustments to the agreement to increase potential ratepayer benefits, such as increasing the potential proceeds from Mitsubishi Heavy Industries, Ltd. ("MHI") and Nuclear Energy Insurance Limited ("NEIL") recoveries, and providing that any savings from a refinancing of SONGS regulatory assets be shared equally between shareholders and ratepayers, with the ratepayer benefits applied through a lower rate of return or other direct credit.[8] They further requested SCE and SDG&E to provide shareholder funding to the University of California for a multi-year program intended to reduce Greenhouse Gas ("GHG") emissions at California power plants that would replace the lost SONGS generation.[9]

In accord with the September 5 Ruling, the Settling Parties revised the settlement agreement and filed it on September 24, 2014 ("Amended Settlement Agreement"). On November 20, 2014, the Commission unanimously (5-0) found that the Amended Settlement Agreement is "reasonable in light of the whole record, consistent with law, and in the public interest" and approved it.[10]

SCE Late-Filed Ex Parte Communication Notices

On February 9, 2015, SCE filed a late-filed *Notice of Ex Parte Communication*, which described a March 26, 2013 meeting between SCE's then-Executive Vice President of External

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8 *September 5 Ruling* at 6-8.

9 *Id.* at 8-10. The ruling also addressed clarification items and enhanced Commission oversight. *Id.* at 11-15.

10 *D.14-11-040* at 21 and Conclusion of Law ("COL") 7 ("The Agreement, as modified, meets the requirements of Rule 12.1(d); it is reasonable in light of the whole record, consistent with law, and in the public interest and should be approved.").

Relations, Stephen Pickett, and then-Commission President Michael Peevey in Warsaw, Poland, while both were attending a conference at the Hotel Bristol ("Hotel Bristol Meeting").[11]

On April 10, 2015, the Commission served a copy of notes written on Hotel Bristol stationary, allegedly written by then-Commission President Peevey and Pickett during the Warsaw Meeting ("Hotel Bristol Notes" or "Notes").[12] The Hotel Bristol Notes appear to outline areas relating to a potential resolution of the OII proceeding. The Hotel Bristol Notes had not been made public until the Commission's production.

On April 27, 2015, as amended on May 26, 2015, The Alliance for Nuclear Responsibility ("A4NR") filed a Petition for Modification of D.14-11-040 ("A4NR Petition") alleging that SCE's involvement in the *ex parte* communications gave SCE an unfair negotiation advantage.[13] The A4NR Petition sought to vacate the Amended Settlement Agreement and return to litigation.[14] The A4NR Petition did not accuse SDG&E of any wrongdoing. A4NR's Petition remains pending.

In June 2015, TURN, one of the Settling Parties, filed its Response to the A4NR Petition ("TURN Response").[15] TURN admitted that it negotiated the settlement in good faith[16] that "the settlement represented a favorable outcome for ratepayers."[17] TURN nevertheless recommended that the Commission rescind its decision approving the Amended Settlement Agreement based

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[11] SCE *Late-filed Notice of Ex Parte Communication*, at 1 (February 9, 2015).

[12] *Email from Harvey Morris at the CPUC re: R.12-10-013, SONGS Settlement - RSG Notes from the Hotel Bristol, Warsaw, Poland* (April 10, 2015).

[13] *A4NR Petition at Appendix A*, ¶ 5 and A4NR's Amendment to the Petition at Appendix A1, ¶¶ 3 and 17 (Declarations of Mr. John Geesman).

[14] *Id.* at Appendix B, page 2, COL 10 (Proposed Wording Changes to D.14-11-010).

[15] *Response of The Utility Reform Network to the Amended Petition for Modification of Decision 14-11-040* by The Alliance for Nuclear Responsibility (June 24, 2015) ("TURN Response to A4NR").

[16] *Id.* at 2.

[17] *Id.* at 3.

on TURN's concern that the Hotel Bristol Meeting created an adverse public perception.[18] TURN did not allege or insinuate any wrongdoing by SDG&E.

In April and July 2015, in response to ALJ Rulings ordering SCE to provide "all documents pertaining to oral and written communications about potential settlement of the SONGS OII between any SCE employee and CPUC decisionmaker," SCE submitted hundreds of pages of documents dating back to October 25, 2012, the date the OII commenced.[19] On August 5, 2015, the ALJ ruled that SCE committed ten violations of the Commission's *ex parte* reporting rules as well as violations of Commission Rule 1.1.[20] This ruling did not find any violations of the Commission's rules by SDG&E.

On August 11, 2015, ORA filed a Petition for Modification of D.14-11-040 ("ORA Petition"), alleging that "Edison's unlawful activities…undermined the SONGS settlement negotiations."[21] ORA asked the Commission to rescind its decision approving the Amended Settlement Agreement and return the proceeding to litigation. The ORA Petition did not allege any wrongdoing by SDG&E. ORA's Petition remains pending before the Commission.

On December 8, 2015, the Commission issued D.15-12-016, which affirmed eight *ex parte* reporting violations by SCE.[22] The Commission found that SCE failed to timely report these eight *ex parte* communications. The Commission also found that SCE had twice violated

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18 *Id.* at 3-4.

19 *Southern California Edison Company's (U 338-E) Response to Administrative Law Judges' Ruling* (April 29, 2015); *Southern California Edison Company's (U 338-E) Response to Administrative Law Judges' June 26, 2015 Ruling* (July 3, 2015); see also D.15-12-016 at 6.

20 *Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering Southern California Edison Company to Show Cause Why It Should Not Also Be Found in Violation of Rule 1.1 and be Subject to Sanctions for All Rule Violations* (August 5, 2015) ("August 2015 Order to Show Cause") at 2.

21 *Office of Ratepayer Advocates Petition for Modification of D.14-11-040*, at 1 & 3 (August 11, 2015) ("ORA Petition").

22 *D.15-12-016* at COL 6.

the Commission's Rule 1.1. The Commission levied a fine ($16.74 million) on SCE as a sanction for the failure to timely report the communications and related representations to the Commission.[23] The Commission neither found any violations by, nor imposed a fine on, SDG&E.

On May 9, 2016, a joint ruling issued by assigned Commissioner Sandoval and ALJ Bushey "reopen[ed] the record [to] review the [Amended] Settlement Agreement" against the Commission's "standards for approving settlement agreements as set forth in Rule 12.1(d)" in light of the decision imposing the fine on SCE for the *ex-parte* reporting and ethics-rule violations ("May 9 Joint Ruling").[24] That Joint Ruling also directed SCE to file and serve a status report on the implementation of the Amended Settlement Agreement, including updated accounting and ratemaking information, and planned actions for 2016 and beyond. SCE and SDG&E filed responses with the Commission on June 2, 2016 ("June 2 Reports").

The June 2 Reports demonstrate how SDG&E and SCE have each implemented the terms of the approved Amended Settlement Agreement and have performed their respective obligations set forth therein.

On December 13, 2016, Assigned Commissioner Sandoval and Administrative Law Judge Houck issued a joint ruling to instruct the parties to meet and confer ("December 13 Joint Ruling"). In the event that further settlement discussions failed, the ruling ordered parties to file

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[23] *Id.* at COLs 11-14; OP 1.

[24] *Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing Ex Parte Contact Ban, Consolidating Advice Letters, And Setting Briefing Schedule* ("May 9 Ruling") at 5.

and serve a joint status conference statement.[25] The parties were given until April 28, 2017, to reach an agreement on modifications to D.14-11-040. Absent an agreement, according to the December 13 Joint Ruling, the "Commission will carefully consider all of its options in ruling on the pending petitions for modification. These options include, but are not limited to, entertaining additional written testimony, holding evidentiary hearings, and supplemental briefing in this proceeding."[26] The deadline for parties to resolve the case or file the results of the meet and confer sessions was subsequently extended to August 15, 2017,[27] by the May 26 Ruling. In this ruling, ALJ Houck provided that, if the parties have been unable to settle this matter by August 15, 2017, parties could submit separate papers to make procedural and substantive recommendations for how to proceed with the pending petitions to modify Decision 14-11-040.[28]

## III. SUMMARY OF SDG&E'S POSITION

SDG&E has extensively briefed the reasons why the Commission should uphold the Amended Settlement Agreement and dismiss the pending PFMs.[29] SDG&E refers the Commission to those pleadings for the point-by-point legal and factual reasons why the

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[25] *December 13 Joint Ruling* at 40 ("If the parties (or a sub-set of the parties representing a broad range of interests) cannot reach agreement by April 28, 2017, then the parties shall file and serve a summary of their individual positions . . . If parties (or a sub-set of parties representing a broad range of interests) cannot by April 28, 2017, reach an agreement on modifications to D.14-11-040, the Commission will carefully consider all of its options in ruling on the pending petitions for modification ("PFM"). These options include, but are not limited to, entertaining additional written testimony, holding evidentiary hearings, and supplemental briefing in this proceeding.")

[26] *Id*.

[27] *May 26 Ruling* at 3.

[28] *Id.* at 6.

[29] *See Response of San Diego Gas & Electric Company (U 902 E) to A4NR's Amended Petition For Modification* (June 2, 2015); *Supplemental Response of San Diego Gas & Electric Company (U 902 E) to A4NR's Amended Petition For Modification* (June 25, 2015); *Response of San Diego Gas & Electric Company (U 902 E) to The Office Of Ratepayer Advocates' Petition For Modification of D.14-11-040* (September 10, 2015); *Response of San Diego Gas & Electric Company (U 902 E) to Joint Ruling of Assigned Commissioner and Administrative Law Judge Reopening Record, Imposing Ex Parte Contact Ban, Consolidating Advice Letters, and Setting Briefing Schedule* (June 2, 2016); and *Reply Brief of San Diego Gas & Electric Company* (U 902 E) (July 21, 2016).

Commission should affirm D.14-11-040 and close this proceeding. Here, SDG&E offers a high-level explanation of its position for the purpose of providing the Commission with "procedural and substantive recommendations for how to proceed with the pending petitions to modify Decision 14-11-040."

In D.14-11-040, the Commission unanimously (5-0) approved the Amended Settlement Agreement. The Commission's decision to approve the Amended Settlement Agreement was based on its thorough review of the agreement's provisions. After completing this thorough review, the Commission concluded that the settlement provisions are "reasonable in light of the whole record."[30] The Commission further concluded that the settlement is fair:

> Taken as a whole, the Amended Agreement also meets the reasonable in light of the whole record standard. The Amended Agreement clearly represents a compromise between the litigation positions of the diverse settling parties and falls within the range of possible outcomes of the consolidated proceedings, if litigated further. Therefore, the Commission concludes that, even if not every provision of the Agreement is the best possible outcome for ratepayers based on the record, that the Agreement as a whole, and the provisions therein, are within the range of possible outcomes based on the record.[31]

The merits of that decision hold true today. Not a single party has demonstrated that the Commission's objective review of the Amended Settlement Agreement was wrong. Not a single party has demonstrated that the Amended Settlement Agreement fails to reflect a compromise solution within the range of litigation positions, as demonstrated in D.14-11-040. Accordingly, the Commission should reaffirm D.14-11-040 and close this proceeding.

The Commission should not take attempts to undo the Amended Settlement Agreement lightly. The parties seeking to modify D.14-11-040 have failed to demonstrate a substantial likelihood that the Commission would have decided the proceeding differently had SCE's

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30 *D.14-11-040* at 7.

31 *Id.* at 109.

contacts been disclosed earlier. ORA and A4NR have had plenty of opportunities to make that case, and have failed to do so. Instead, ORA and TURN -- the key negotiators of the Amended Settlement Agreement for ratepayers -- have recognized that the Amended Settlement Agreement is far more beneficial to ratepayers than the outline contained in the Hotel Bristol Notes. Accordingly, the Commission should dismiss the pending PFMs by ORA and A4NR.

The Commission should also close this proceeding. Parties have generally alleged that the Amended Settlement Agreement would have been negotiated differently, and more favorably to ratepayers, had the Hotel Bristol Notes been timely disclosed. But the parties have proffered no evidence to support those allegations. Absent any evidence in the following areas, the Commission cannot lawfully take the extreme act of modifying the substance of the Amended Settlement Agreement.

First, ORA and TURN have yet to prove that they had no contacts with any Commissioner or Commissioner's advisor regarding possible settlement terms. Such contacts would undercut parties' allegations that TURN and ORA had an information disadvantage in negotiations. Without knowing whether any such contacts exist, the can be no further action by the Commission that is premised on the unsupported allegation that SCE had a negotiating advantage.

Second, parties have alleged that the Amended Settlement Agreement would have been negotiated differently had the Hotel Bristol Notes been immediately disclosed, but ORA and TURN have not even attempted to demonstrate with particularity the issues they would have negotiated differently and the material impact that such position would have had on their negotiating positions.

Because the Commission has no evidence in the foregoing areas, the Commission must affirm D.14-11-040, and close this proceeding. Without evidence, the Commission cannot decide which provisions of the Amended Settlement Agreement to amend, and to the degree to which to amend them. Modifying this agreement is particularly problematic because it already reflects changes to the deal that was negotiated by the Settling Parties. Settling Parties executed the Amended Settlement Agreement precisely for the purpose of providing even greater potential benefits to ratepayers, in accordance with a ruling by Assigned Commissioner Florio and ALJs Dudney and Darling following their review of the original settlement agreement.

In the event the Commission makes further modifications to the Amended Settlement Agreement notwithstanding a lack of evidence upon which to do so, those further modifications must be capped at $383 (or $365) million.[32] $383 million is the amount ORA claims to represent the difference between ORA's litigation positon and the Amended Settlement Agreement. ORA could not have negotiated a settlement that was more favorable to ratepayers than its litigation position. Accordingly, any changes to the Amended Settlement Agreement cannot exceed the value of ORA's litigation position. Any such changes would also have to take into account: (1) how the Amended Settlement Agreement compares to what ratepayers would have paid had SONGS continued to operate through its useful life, and (2) the degree to which ratepayers might have been worse off under a litigated outcome.

Under no circumstance should the Commission consider holding SDG&E shareholders responsible for any incremental contributions to SDG&E ratepayers. Parties have filed extensive papers in this matter, yet not a single party has alleged any wrongdoing by SDG&E. There is no

[32] ORA may have calculated the value incorrectly.

legal basis, therefore, to hold SDG&E shareholders accountable for any modifications that may be made to the Amended Settlement Agreement.

## IV. DISCUSSION

### A. The Commission's Decision Approving the Amended Settlement Agreement Was Objective and Lawful and, Therefore, Should Stand.

In order to approve the Amended Settlement Agreement, the Commission determined that the agreement satisfies Commission Rule 12.1 and is "reasonable in light of the whole record, consistent with the law, and in the public interest."[33] The Commission reached this conclusion -- on a unanimous (5-0) basis -- after reviewing extensive written briefs and comments by all parties to the proceeding,[34] evaluating testimony submitted at the May 14, 2014 evidentiary hearing by parties in favor of and opposed to the Settlement,[35] and observing extensive public comments regarding the proposed settlement at a community meeting on June 16, 2014.[36] The final decision, D.14-11-040, reflects the Commission's thoughtful and thorough application of the standard under Rule 12.1(d) to evaluate contested settlements. The Commission spent almost 60 pages evaluating the principal terms of the agreement individually and the agreement as a whole.[37]

In particular, the Commission broke the Amended Settlement Agreement down into its major components and observed that the Amended Settlement Agreement reflected a

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33 *D.14-11-040* at 135, COL 7.

34 *Id.* at 22-54.

35 *Id.* at 20.

36 *Id.* at 19-20.

37 *Id*. at 69-129.

compromise position between the parties' litigation positions. Specifically, the Commission included the following chart, indicating the parties' positions in relation to the agreement:[38]

| SCE and SDG&E | All values in $ millions | | | |
|---|---|---|---|---|
| | TURN Litigation | DRA [ORA] Litigation | Settlement | Utilities Litigation |
| PVRR @ 10% | $ 2,692.5 | $ 2,542.9 | $ 3,284.5 | $ 4,732.9 |
| RSG | $ - | $ 100.9 | $ - | $ 917.7 |
| Base Plant | $ 1,127.3 | $ 908.9 | $ 1,319.4 | $ 1,738.5 |
| O&M | $ 900.5 | $ 868.5 | $ 970.6 | $ 1,039.6 |
| Nuclear Fuel | $ 520.0 | $ 519.9 | $ 477.3 | $ 519.9 |
| Replacement Power | $ 144.7 | $ 144.7 | $ 517.2 | $ 517.2 |

As demonstrated by this chart, the agreement reflected a compromise result between the parties' litigation positions, weighing closer to ratepayer interests.

Most importantly, the Commission took into account the "big picture" as to how the agreement allocates benefits and burdens as between ratepayers and shareholders. The Commission stated:

> The primary result of the settlement is ratepayer refunds and credits of approximately $1.45 billion. The Utilities must also stop further collection of the Steam Generator Replacement Project (SGRP) costs in rates, return all SGRP costs collected after January 31, 2012 to ratepayers, and accept a substantially lower return on other prematurely retired SONGS assets.
>
> Ratepayers will still 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.
>
> However, instead of the usual authorized rate of return, the settlement reduces shareholders return on SONGS investments to less than 3%. The effect is

[38] *Id.* at 33.

> ratepayers save approximately $420 million over the ten-year depreciation period.[39]

The Commission also closely considered its precedent regarding how to treat the recovery of costs associated with a plant taken out of service, concluding that prior cases are nuanced and fact-intensive, and that the Amended Settlement Agreement is not out of line with those cases.[40] The Commission found that the whole of the agreement is fair and reasonable and in the public interest. The Commission's decision is indisputably objective and legally sound.

Moreover, the Amended Settlement Agreement already reflects substantive changes to the deal negotiated by the Settling parties that were made to benefit ratepayers. As set forth above, Assigned Commissioner Florio and ALJs Dudney and Darling issued a ruling, the September 5 Ruling, to seek changes to the Settling Parties' proposed settlement agreement. In that ruling, the Assigned Commissioner and ALJs made clear that they had reviewed the substance of the proposed settlement agreement and determined that the settlement would be in the public interest so long as the settlement was modified in certain areas to benefit ratepayers (MHI and NEIL proceeds and enhanced refinancing provisions), and to address GHG emissions. They acknowledged that the Commission's job is not to decide the optimal resolution of each settlement provision, but thought that a few provisions should be changed. The September 5 Ruling reads in pertinent part:

> The Commission's task is to review the Agreement as a whole to determine whether it results in fair and reasonable rates and is otherwise consistent with the law, reasonable in light of the whole record, and in the public interest. (Rule 12.1) It is not our intention to single out provisions which could have been resolved in another reasonable way. The Commission supports qualifying settlements. That said, the overall public interest remains an important criteria [sic] which we find

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[39] *Id.* at 2.

[40] *Id.* at 76-78.

> requires some changes to this proposal. Accordingly, we limit our proposed modifications to subjects integral to the public interest.[41]

The Settling Parties made the suggested changes, resulting in the Amended Settlement Agreement. Thus, there is no basis for the Commission to now conclude that the substantive provisions of the Amended Settlement Agreement fail to satisfy the public interest or are otherwise objectively unfair to ratepayers.

Indeed, no party has demonstrated that, on an objective basis, the Amended Settlement Agreement is unfair, unreasonable, or unlawful. When the Amended Settlement Agreement was filed, various parties challenged it. The Commission rejected those arguments. Because the Amended Settlement Agreement is substantively and legally sound, Commission should affirm D.14-11-040. No further discovery or hearings are needed and the Commission should dismiss the pending A4NR and ORA PFMs and close this proceeding.

### B. The Commission Should Dismiss the Pending PFMs Because They Are Legally Unsupportable.

ORA and A4NR have filed PFMs seeking to undo the Amended Settlement Agreement. A party that petitions the Commission to modify a decision must demonstrate that there is a "*strong expectation*" that the Commission "would have made a different decision."[42] The possibility of a different decision is insufficient. Neither party has even purported to demonstrate that the Commission would likely have come to a different result had SCE disclosed its contacts earlier. Indeed, neither party shows that the Amended Settlement Agreement's terms: (1) do not reflect a reasonable compromise between litigation positions, (2) were irreconcilable with Commission precedent, or (3) otherwise could not have been deemed reasonable and in the

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41 *September 5 Ruling* at 6.

42 *D.99-05-013, 1999 Cal. PUC LEXIS 346* at *26, *citing* D.97-04-049; *see also A4NR Petition*, *citing D.99-05-013*.

public interest, all as decided by the Commission. The parties have therefore failed to meet their burden to show a strong expectation that the Commission would have come to a different resolution of the proceeding.

ORA

Indeed, ORA has effectively admitted the opposite. ORA has stated:

> [ORA initially determined] that rescinding the settlement would not necessarily result in a better outcome for ratepayers of the myriad issues surrounding SONGS shutdown. Furthermore, ORA did not want to provide Edison with the opportunity to simply relitigate its issues after the disclosure that Edison had tainted the settlement process. This would essentially give Edison a second chance to get a better outcome for itself, a prospect that ORA did not believe that Edison deserved.[43]

ORA thus concedes that it initially declined to withdraw its support from the Amended Settlement Agreement because it believed that the agreement could be more advantageous to ratepayers than a litigated result. ORA has recognized, therefore, the value of the Amended Settlement Agreement over litigation. ORA cannot show, therefore, a strong expectation that the Commission would have come to a different result -- one that would have been more advantageous to ratepayers -- had the SCE contacts been disclosed sooner.

Instead, ORA argues that SCE should be punished more than the Commission fined SCE. Specifically, ORA argues that SCE should pay an additional $648 million to ratepayers, consistent with ORA's litigation position.[44] ORA has since updated that number to $383 million.[45] It is not hard to understand why ORA would want to achieve its litigation position. However, ORA can hardly show a "*strong expectation*" that the Commission "would have made

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[43] *ORA PFM* at 2.

[44] *Id.* Notably, ORA suggests that SCE fund this amount. SDG&E would object to any contribution from SDG&E to cover amounts that are intended to punish SCE.

[45] *Opening Brief of the Office of Ratepayer Advocates*, filed July 7, 2016, at 3.

a different decision" to adopt ORA's litigation position when ORA admits at the same time that it feared walking away from the Amended Settlement Agreement because it determined that a litigated case could result in a less favorable outcome to ratepayers. To the extent ORA disapproves of the penalty that the Commission assessed against SCE in its August 5 Order to Show Cause, ORA is free to exhaust its administrative remedies with respect to that decision.

A4NR

A4NR also fails to show that the Commission's decision adopting the Amended Settlement Agreement would have been decided differently had the SCE contacts been disclosed earlier. Accordingly, neither ORA nor A4NR articulate a legal basis for upsetting the Amended Settlement Agreement.

A4NR relies on fraud theories, hypothetical actions it might have otherwise taken in the case, and speculation about how other parties might have negotiated differently. A4NR, of course, was not a Settling Party. A4NR is unable to demonstrate how anything it might have done differently would have resulted in the Commission finding the Settlement to be unreasonable, unlawful, or not in the public interest.

A4NR relies on its own analysis to argue that the Amended Settlement Agreement is more favorable to SCE than the outline contained in Commissioner Peevey's notes. The suggestion is that the Settling Parties would have negotiated a better deal for ratepayers had they known about the outline by Commissioner Peevey. A4NR may believe that the Peevey outline was more favorable to ratepayers, but that does not make it so and cannot establish that the Commission would have decided the case differently had that outline been disclosed earlier. A4NR's "comparison" between the Peevey outline and the Amended Settlement Agreement is vastly different than the analyses performed by ORA and TURN, key Settling Parties. Parties to

the Amended Settlement Agreement do not agree that the Amended Settlement Agreement is less favorable to ratepayers. Indeed, the Settling Parties -- TURN and ORA in particular -- believe the opposite. A "comparative analysis" prepared by ORA and TURN shows that the Amended Settlement Agreement saved ratepayers an estimated range between $780 million and nearly $1.059 billion over the outline in the Hotel Bristol Notes.[46] Thus, A4NR's post-hoc speculation about how the Settling Parties might have negotiated the Amended Settlement Agreement are premised on assumptions not shared by the parties actually involved in the negotiations.

For the foregoing reasons, the Commission has no legal basis upon which to grant the ORA or A4NR PFM.

### C. The Commission Should Close this Proceeding Because It Has No Evidence to Hold It Open.

Notwithstanding the absence of evidentiary support in the ORA and A4NR PFMs and other party briefings, parties have alleged that SCE's undisclosed *ex parte* communications adversely affected the Settling Parties negotiations of the Amended Settlement Agreement. SDG&E has already explained in detail in its reply brief, filed on July 21, 2016 in this proceeding, how each allegation proffered by the parties is specious. SDG&E will refer to its brief rather than repeat those points here, except to point out that these allegations defy logic. ORA and TURN -- the principal negotiators on behalf of ratepayers -- have publicly

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[46] Press Release, ORA, *ORA Director Joe Como Response to Conduct by Southern California Edison and Former CPUC President Michael Peevey to Undermine the SONGS Settlement Process, April 17, 2015* ("April 2015 ORA Press Release") (contained in the record of this proceeding as Attachment 3 to A4NR's PFM and cited in the ORA Response to Ex Parte Ruling at 13, fn. 23). *See also*, *THE UTILITY REFORM NETWORK OFFICE OF RATEPAYER ADVOCATES*: *Differences between terms identified on the note and the proposed/final SONGS settlement* (contained in the record of this proceeding as an attachment to SDG&E's Response to ORA's Petition, filed September 10, 2015).

acknowledged that the Amended Settlement Agreement is vastly more favorable to ratepayers than the outline contained in the Hotel Bristol Notes. As set forth above, ORA and TURN have estimated relative ratepayer benefits in the range of $780 million to nearly $1.059 billion. Had these parties been aware of the Hotel Bristol Notes earlier, therefore, they would have perceived them as less valuable to ratepayers than what ORA and TURN sought to achieve through negotiations. Thus, it makes no sense to assume that the Hotel Bristol Notes would have been helpful to ORA and TURN.

Looking forward, it is critical for the Commission to parse the evidence from speculation. In the December 13 Joint Ruling, the Assigned Commissioner and Presiding ALJ seem to accept the notion that settlement negotiations were compromised in some way. Citing to TURN and ORA briefing materials, the joint ruling states:

> …Edison tipped the balance of negotiations in its favor and in the favor of its shareholders. The information gained by Edison during these unreported *ex parte* communications provided the Utilities an unfair advantage. The advantage Edison gained by the information asymmetry included direct insight into what at least one decision-maker would accept as a settlement, and the fact that this decision maker preferred parties settle rather than litigate. This information could have provided additional leverage to ratepayer advocates in the negotiation process resulting in additional benefits to ratepayers. [Footnotes omitted].[47]

This quote completely ignores that the original settlement agreement was amended in favor of ratepayers following a review of the agreement by Commissioner Florio and ALJs Dudney and Darling, in the September 5 Ruling. Moreover, it would be unlawful for any Commissioner or ALJ to prejudge issues before they are fully considered by the Commission with an evidentiary record,[48] so it is fair to assume that the language was not meant to signal any findings by the Commission. The Commission cannot undo a settlement -- particularly one that

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[47] *December 13 Joint Ruling* at 33-34.

[48] *See*, *e.g.*, *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049, 1055 (9th Cir. May 2005).

has already afforded ratepayers substantial benefits -- based on mere speculation and a prejudgment that negotiations were compromised in some way.

To this end, the Commission should close this proceeding because ORA and TURN have failed to proffer evidence in three critical areas. First, ORA and TURN have failed to show that SCE did in fact have an information advantage in negotiations. Second, ORA and TURN have failed to identify with specificity the provisions they would have successfully negotiated differently had the SCE contacts been disclosed earlier.

### 1. Issue No. 1: ORA and TURN Have Not Shown that Their Knowledge and Bargaining Power Were Adversely Affected by the Hotel Bristol Notes.

Parties have alleged and assumed that SCE had special knowledge due to its contacts with Commissioner Peevey and, as a result, SCE had some advantage in settlement negotiations. But what if ORA or TURN had access to information from a Commissioner or Commissioner's advisor regarding the OII? To date, there has been no opportunity to discover what information was available to other parties. Absent any evidence, there can be no assumption that the "playing field" was unlevel. The Commission cannot make any modifications to the Amended Settlement Agreement based on unsupported allegations that the Hotel Bristol Notes provided SCE with a negotiating advantage.

### 2. Issue No. 2: ORA and TURN Have Failed to Identify the Specific Provisions of the Amended Settlement Agreement that Would Have Been Negotiated Differently.

In the unlikely event the Commission finds that the untimely disclosure of SCE's *ex parte* contacts adversely affected settlement negotiations (and it should not find these things), the Commission must recognize that TURN and ORA have made no effort to identify with specificity the provisions in the Amended Settlement Agreement that would have been negotiated differently, and how they otherwise would have been resolved. Only the Settling

Parties' views on this point are relevant because they were the only parties involved in the negotiations.

After providing for extensive briefings to date, the Commission has no evidentiary basis upon which to modify the Amended Settlement Agreement. The Commission must be careful not to undo a settlement agreement based on unsupported allegations.

### D. The Commission Should Not Revise the Amended Settlement Agreement, but if It Does, Changes Are Capped By ORA's Litigation Position.

The Commission has no evidence to support modifications to the Amended Settlement Agreement. Importantly, that agreement was already amended in order to secure Commission approval. The Settling Parties' original settlement agreement was reviewed by Assigned Commissioner Florio and ALJs Dudney and Darling, which resulted in a ruling that encouraged the Settling Parties to amend their agreement to enhance the potential ratepayer benefits. Commissioner Florio and ALJs Dudney and Darling sought specific changes to the agreement so that the whole of the settlement agreement would be in the public interest.[49] The Settling Parties agreed to those changes, which gave rise to the Amended Settlement Agreement. Thus, the Amended Settlement Agreement does not simply reflect the deal that the Settling Parties negotiated; it reflects objective input from a Commissioner and two ALJs. That deal, as revised, was approved by the Commission unanimously (5-0).

If the Commission now decides to second-guess its decision approving the Amended Settlement Agreement, any modification to the Amended Settlement Agreement must be subject to a cap based on ORA's admissions in this proceeding. ORA has argued that its litigation position would have resulted in an additional $383 million of ratepayer benefits. ORA may have

[49] *See September 5 Ruling* at 6.

calculated this number incorrectly such that the actual difference between ORA's litigation positon and the Amended Settlement Agreement is actually $365 million.

TURN has not compared its litigation position to the Amended Settlement Agreement in this way, but TURN's litigation position was closer to the litigation positions of SDG&E and SCE than it was to ORA's litigation position.[50] Given that settlements are generally compromises between litigation positions, the Commission should establish ORA's litigation positon as the ceiling for any further ratepayer benefits (either $385 or $365 million, whichever is correct). Such a bookend is necessary to prevent a patently absurd result, contrary to public policy and the public interest.

### E. In Evaluating Whether to Modify the Amended Settlement Agreement, Parties Must Be Free to Show that Surcharges to Ratepayers Are Warranted.

Notwithstanding the lack of evidence here to support modifying the Amended Settlement Agreement, if the Commission considers modifying the Amended Settlement Agreement in a material way, the Commission must consider that a litigated result to this case may be less favorable to ratepayers than the Amended Settlement Agreement. First, the Commission would have to compare the ratepayer benefits in the Amended Settlement Agreement to a scenario in which SONGS continued to operate through its useful life. Second, the Commission would have to consider the potential for litigation to result in a less favorable result to ratepayers than the Amended Settlement Agreement.

Either or both of these scenarios could demonstrate that surcharges to ratepayers are warranted in the event that the Amended Settlement Agreement is undone.

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[50] *See* chart in *D.14-11-040* at 33.

### F. SDG&E Cannot Be Responsible for any Further Shareholder Contributions.

No party has alleged that SDG&E had anything to do with the Hotel Bristol Notes or other SCE contacts with Commissioner Peevey. Accordingly, the Commission should establish from the outset that SDG&E will bear no financial responsibility beyond its existing obligations as set forth in the Amended Settlement Agreement.

### G. Procedural Step: The Commission Should Issue a Decision Closing this Proceeding.

The issues have been extensively briefed by the parties. The Commission has all it needs to dismiss the PFMs of ORA and A4NR, and to close this matter with no material modification to the Amended Settlement Agreement.[51] If the Commission modifies the Amended Settlement Agreement in a material way, however, the Commission may then have to establish further litigation proceedings.

## V. CONCLUSION

The Commission's decision to approve the Amended Settlement Agreement was based on an objective review of the provisions in that agreement. The Commission should uphold its decision and close this proceeding. The Commission must recognize that no evidence exists to show that the Amended Settlement Agreement was substantively affected by SCE's *ex parte* contacts. The Commission should not and legally cannot undo the Amended Settlement Agreement based on mere speculation and specious allegations. Moreover, any modifications could not exceed ORA's litigation position, which represents an outcome that never would have been achieved through settlement negotiations. In evaluating any material modifications within

[51] SDG&E does not consider the GHG Research program as material to the Amended Settlement Agreement. If that provision is stricken by the Commission, the rest of the Amended Settlement Agreement would continue intact. Because the GHG Program was specifically requested by a Commission ruling, SDG&E leaves it to the Commission's discretion to determine whether to allow that provision to remain in place.

that cap, the Commission must consider the evidence indicating that ratepayers are better served by the Amended Settlement Agreement than litigation.

Respectfully submitted,

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