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)

REPLY 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

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Southern California Edison Company ("SCE") and San Diego Gas & Electric Company ("SDG&E") (collectively the "Utilities") respectfully submit this Reply Brief on Legal Issues in response to the Opening Briefs filed by various parties (collectively the "Opposing Parties")[1] on February 25, 2012.

I. INTRODUCTION

The Utilities' opening brief ("Util. Op. Br.") established that Public Utilities Code section 455.5 requires the Commission to make rates associated with the San Onofre Nuclear Generating Station ("SONGS") subject to refund "from the date the order instituting the investigation [to determine whether to reduce the rates] was issued." § 455.5(c).[2] As explained in the opening brief, the Commission cannot make its subject-to-refund order retroactive to January 1, 2012, as this would violate section 455.5 and the rule against retroactive ratemaking.

Section 455.5 also provides that the Commission must consolidate its "hearing on the investigation" with the utilities' next general rate cases.[3] The Commission may not reduce the rates associated with SONGS prior to such hearing. *Id.*

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[1] SCE and SDG&E received opening briefs from the Division of Ratepayer Advocates, The Utility Reform Network, Friends of the Earth and the World Business Academy, Alliance for Nuclear Responsibility, Utility Consumers' Action Network, Coalition of California Utility Employees, the Clean Coalition, Women's Energy Matters, and Ruth Henricks. As stated in the text, these are referred to collectively as the "Opposing Parties."

[2] All statutory citations are to the California Public Utilities Code.

[3] The vast majority of SDG&E's SONGS-related revenue requirement is litigated in SCE's GRCs, and then transferred to SDG&E's base rates through a ministerial process based on SDG&E's ownership percentage in SDG&E's GRCs. Accordingly, and for ease of reference, this brief generally refers to SCE's next GRC (*i.e.*, the 2015 SCE GRC) as the appropriate forum for the consolidated hearing on the investigation. However, a certain subset of SDG&E SONGS-related revenue requirement is not ownership-percentage-derivative of SCE's SONGS-related revenue requirement, but is instead litigated on the merits in SDG&E's GRCs. For that subset of SDG&E SONGS-related costs, the appropriate forum for the consolidated hearing on the investigation is SDG&E's next GRC.

In response to the Utilities' straightforward interpretation of Section 455.5, Opposing Parties argue, among other things, that (1) the Commission's general regulatory authority trumps the specific terms of section 455.5, which govern the timing of the subject-to-refund condition and any rate reductions; (2) the plain language of section 455.5 means the opposite of what it actually says, and allows the Commission to reduce rates at any time, including the day after an outage; and (3) the creation of a GRC memorandum account for reasons having nothing to do with the SONGS outage, and with no notice that costs associated with that outage might be subject to refund, is sufficient to avoid the retroactive ratemaking doctrine.

These arguments, as well as the others offered by the Opposing Parties, are without merit. The California Supreme Court has repeatedly held that general jurisdictional statutes do not grant the Commission power to ignore the specific legislative directives contained in the Public Utilities Code. *Assembly of the State of Cal. v. Public Util. Comm'n*, 12 Cal. 4th 87, 103 (1995). Section 455.5 represents one of those directives. The legislative history shows section 455.5 was enacted principally to insure that the Commission followed a specific schedule in resolving issues connected to a prolonged facility outage. That prescribed schedule requires the Commission to make SONGS rates subject to refund as of the date the OII issued, not ten months *before* the OII issued. The legislative history also makes clear that the intent of the statute is to permit rate reductions only in connection with a utility's next general rate case, not before. Moreover, none of the parties even attempt to address the authorities cited in the Utilities' opening brief, which show that, absent proper notice, the existence of a 2012

GRC memorandum account provides no justification for retroactively making SONGS-related rates subject to refund.

Therefore, the Commission should find (1) that it lacks legal authority to reduce SONGS rates prior to the Utilities' next general rate cases; and (2) that the Commission lacks legal authority to set rates subject to refund in connection with the SONGS outages prior to November 1, 2012.

II. DISCUSSION

A. The Commission May Reduce The Utilities' Rates Based On The SONGS Outage Only In Accordance With Section 455.5's Prescribed Timing

1. The Opposing Parties' Reliance On General Jurisdictional Statutes To Avoid The Specific Timing Requirements Of Section 455.5 Fails As A Matter Of Law

The Utilities do not dispute that the Commission has the legal authority to reduce rates to reflect disallowed costs associated with SONGS. The only question is *when* that legal authority may be exercised. Despite the temporal restrictions in Section 455.5, the Division of Ratepayer Advocates ("DRA"), along with The Utility Reform Network, Friends of the Earth, and the World Business Academy (collectively "TURN"), argue that the Commission may make costs associated with an out-of-service facility subject to refund and remove the facility from rate base "at any time" after an outage, regardless of section 455.5, pursuant to the Commission's broad regulatory authority under sections 451, 463, 454.8, and 701. Opening Brief of TURN ("TURN Op. Br.") at 2; Opening Brief of the Division of Ratepayer Advocates on Legal Issues ("DRA Op. Br.") at 5-6. [4]

[4] The Alliance for Nuclear Responsibility ("A4NR") also invokes Sections 451 and 701 as sources of the Commission's authority to ignore the regulatory framework set forth in Section 455.5 and remove SONGS from rate base immediately. A4NR's Opening Brief ("A4NR Op. Br.") at 9.

For example, TURN contends that "[p]ursuant to §451 . . . , the Commission has repeatedly applied the broad principle that assets no longer deemed 'used and useful' should be removed from rates." TURN Op. Br. at 2.

TURN's argument misses the point. The Legislature enacted section 455.5 specifically to limit the Commission's discretion and delineate the timing of the process in which the Commission must engage with respect to a plant that has been out of service. Consequently, reliance on section 451 or other general jurisdictional statutes to circumvent the detailed timing requirements set forth in section 455.5 contravenes the settled principle that general jurisdictional provisions do not "confer upon the Commission powers contrary to other legislative directives, or to express restrictions placed upon the Commission's authority." *Assembly of the State of Cal. v. Public Util. Comm'n*, 12 Cal. 4th 87, 103 (1995). In *Assembly,* the Supreme Court of California considered a Commission order requiring Pacific Telesis to disgorge certain amounts collected in rates. The order did not require Pacific Telesis to distribute the entire amount directly to its customers. Instead, it allotted the principal and *part* of the interest to current ratepayers, but allocated the balance of the interest "toward school telecommunications infrastructure development and consumer education." *Id.* at 90 (citation omitted).

Petitioners filed a petition for writ of review challenging the validity of the Commission's ruling on the basis that section 453.5, which authorized the Commission to disburse the refund, required that *all* the interest be refunded to ratepayers. *Id.* at 96-97.

The Supreme Court agreed with the petitioners that section 453.3 obligated the Commission to order all interest on the refund disbursed to the ratepayers. In doing so,

the Supreme Court rejected the argument that section 701, which provides that the Commission "may supervise and regulate every public utility in the State and may do all things . . . which are necessary and convenient in the exercise of such power and jurisdiction," bestowed an open-ended grant of authority on the Commission with respect to the use of the interest differential. The Court explained that

> [p]ast decisions of this Court have rejected a construction of section 701 that would confer upon the Commission powers contrary to other legislative directives, or to express restrictions placed upon the Commission's authority by the Public Utilities Code.
>
> In the context of the present case, section 453.5 constitutes one of the express legislative directives and restrictions upon the Commission's regulatory authority . . . .

Assembly, 12 Cal. 4th at 103 (citation omitted); *see Pacific Tel. & Tel. Co. v. Public Util. Comm'n.* 62 Cal. 2d 634, 653 (1965) ("Whatever may be the scope of regulatory power under this section, *it does not authorize disregard by the commission of express legislative directions to it*, or restrictions upon its power found in other provisions of the act or elsewhere in general law" (emphasis added).).

The rule announced in *Assembly* and related cases is an application of the familiar principle that "when two statutes cover the same situation, the more specific statute takes precedence over the more general one. . . . The rationale for this canon is that a general provision should not be applied when doing so would undermine limitations created by a more specific provision." *Coady v. Vaughn*, 251 F.3d 480, 484 (3rd Cir. 2001) (citations omitted).

In the instant case, section 455.5 is the more specific provision creating the time limitations that govern when the Commission can remove from rates the costs associated

with a facility that has been in a prolonged outage. The Opposing Parties' recourse to sections 451, 701 and other general statutes is therefore unavailing. The question is not whether the Commission has the authority to remove the costs of a utility asset from rates; the Commission has such authority under many statutes. Instead, the question is when and how may the Commission exercise such authority in the specific situation presented by this case (i.e., the prolonged outage of a major generation asset). Neither section 451 nor any of the other statutes the Opposing Parties cite address that timing question; only section 455.5 does. Under governing California law, the authority granted by such general statutes cannot override the Legislature's specific directive with respect to timing set forth in section 455.5. *Assembly,* 12 Cal. 4th at 103.

This rule applies with particular force here given the legislative history of section 455.5, which was passed for the express purpose of restricting the Commission's discretion concerning facility outages, in response to the Commission's Humboldt 3 decision. D.83-05-051, 11 CPUC 2d 532. In Humboldt 3, the utility had shut down a nuclear plant in 1976 for repairs related to a Nuclear Regulatory Commission ("NRC") seismic safety order. The plant was never repaired and closed permanently in 1984. The Commission did not act to remove the plant from rate base or make rates subject to refund for years. *Id.* at 533.

In response, the Legislature passed AB 1823, codified as section 455.5. It was enacted to address "a recurrent problem in traditional public utility regulation -- how to reflect in rates the costs associated with electric plant taken out of service for an extended period of time." Assembly Committee on Utilities and Commerce, AB 2805 (Hauser), Date of Hearing: April 16, 1990, at 1 (attached hereto as Exh. A). As can be seen from

the timing choices made in the statute, section 455.5 was a "compromise that provided a framework for determining *when* an extended plant outage would trigger a review by the PUC . . . ." *Id.* at 2 (emphasis added).

Section 455.5 contains a series of mandatory directives: (1) a utility *shall* notify the Commission when one of its facilities has been out of service for nine consecutive months; (2) in response, the Commission *shall* institute an investigation to determine whether to reduce rates based on the outage; (3) the order instituting the investigation *shall* make the rates associated with the facility subject to refund from the date the OII was issued; and (4) the Commission *shall* consolidate the hearing on the investigation concerning whether and by how much to reduce the rates with the utility's next general rate case.

In short, the Legislature's command is clear, and the Commission must follow it, particularly where the Opposing Parties urge reliance on the same jurisdictional provisions that section 455.5 was enacted to supersede. *Assembly*, 12 Cal. 4th at 103; *Coady,* 251 F.3d at 484.

2. A Number Of The General Statutes On Which The Opposing Parties Rely Are Irrelevant In Any Event

In addition, at least two of the statutes on which the Opposing Parties rely are simply irrelevant. Section 463(a) provides that for purposes of establishing rates, the Commission shall disallow expenses reflecting direct and indirect costs that result from utility imprudence. Although TURN summarily concludes that the "SONGS shutdown is the direct result of errors associated with the planning, construction and operation of faulty replacement steam generators," TURN Op. Br. at 4, the Commission has made no such finding, nor any other finding of imprudence. Likewise, DRA simply assumes

without support that Mitsubishi Heavy Industries ("MHI") was SCE's "agent," that SCE was somehow responsible for all MHI's actions, and that if MHI was imprudent, SCE must have been too. Reply by DRA Responses To The Order Instituting Investigation ("DRA Rep.") at 2; DRA Op. Br. at. 4. The Utilities strongly dispute this characterization of the relationship between SCE and MHI, and DRA's suggestion that any imprudence by MHI is automatically imputed to SCE. *See* D. 99-11-022, 1999 WL 1957791 at * 3 (prudence review "is based on the activity of the utility . . . not that of a manufacturer"). Indeed, one of the purposes of the OII hearings is to determine whether SCE acted prudently in connection with the steam generator replacement project ("SGRP"). Section 463(a) manifestly does not authorize the Commission to reduce rates at any time after an outage without a hearing or a finding of imprudence, and in derogation of section 455.5, nor do the Opposing Parties point to anything hinting that it does.

In addition, TURN, DRA, and The Clean Coalition ("CC') seem to imply that the phrase "indirect costs" in section 463(a) refers to base rates, so that the Commission could disallow base rates upon a finding that the SGRP was imprudent. As noted, there has been no finding of imprudence, and hence section 463(a) cannot justify any rate change at this time. But more fundamentally, this proposed interpretation of section 463(a) is incorrect as a matter of law. Indirect costs generally refer to "those costs that cannot be identified to any one piece of equipment, material, or part of the project, but that were under the control of the project manager. As such, the indirect costs of SONGS 2&3 include the costs of licensing the two units, engineering the project, procuring equipment and materials, managing the construction, starting up the reactors, and

providing the necessary QA/QC." D. 86-10-069, 22 CPUC 2d 124, 1986 WL 215088, at *306. In other words, "indirect costs" as used in section 463(a) means costs *of the project*, not costs of other equipment or personnel. Neither TURN, DRA, nor CC refers to any language in section 463(a) or precedent suggesting "indirect costs" had some other meaning, and consequently none of them offers any justification for transforming section 463(a) into an exemption from the requirements of section 455.5.

Section 454.8 is likewise irrelevant. *See* DRA Op. Br. at 6 (relying on section 454.8). As discussed in the Utilities' opening brief, 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 already existing facility. To the contrary, section 455.5 sets the schedule for ratemaking in the context of an extended facility outage, and the Utilities respectfully submit that the Commission must follow that schedule in the OII.

3. The Plain Language Of Section 455.5 Prohibits The Commission From Reducing Rates Prior To the Utilities' Next GRCs, And Requires The Commission To Set Rates Subject To Refund From The Date The OII Is Issued

a. Section 455.5 does not authorize retroactive ratemaking

Although A4NR and CC recognize the Commission is authorized to remove value from rate base no sooner than "November 1, 2012 if proceeding pursuant to 455.5," A4NR Op. Br. at 17; *see* CC Opening Brief ("CC Op. Br.") at 9 (similar), DRA and TURN argue that Section 455.5 permits the Commission to reduce rates retroactive to the date the outages began. TURN Op. Br. at 7. TURN and DRA base their arguments primarily on dicta in D. 93-05-013, 49 CPUC 2d 218, 1993 WL 767171, where the Commission considered certain outages at the Palo Verde Nuclear Generating Station in

Arizona. Although the outages lasted more than 9 months, they were temporary and Palo Verde had resumed operations at the time the Commission issued D. 93-05-013.

In discussing the general parameters of section 455.5, the Commission stated that in cases where a facility remains permanently out of service (*not* the case in the Palo Verde decision), then "[r]etroactive to the date on which the facility ceased to be used and useful for its dedicated purpose the ratepayers are to be held harmless against all costs. Further, the value of the facility is considered removed from the ratebase as of that date." *Id.* at 5.

Whatever the Commission's precise meaning when stating this dicta, it is apparent the Commission did *not* mean to suggest that section 455.5 granted the Commission authority to engage in retroactive ratemaking by reducing a utility's rates retroactive to the first day of an outage. That would flatly contradict (1) section 455.5, (2) the reasoning of the Commission's prior decision in the same Palo Verde proceeding, (3) DRA's own position in that same proceeding, and (4) the prohibition against retroactive ratemaking.

In its prior Palo Verde opinion, D.92-04-033, 43 CPUC.2d 738, 1992 WL 576036, (attached hereto as Exh. B), the Commission discussed the Palo Verde OII, which the Commission had instituted on December 18, 1989 and properly consolidated as Phase 3 of SCE's 1992 general rate case, pursuant to section 455.5. *Id.* at 2. The Commission explained that on January 29, 1992, DRA filed a motion to consolidate Phase 3 with an ongoing Energy Cost Adjustment Clause ("ECAC") proceeding considering SCE's replacement energy costs related to the Palo Verde outages. *Id.* at 3. The ECAC proceeding provided for a memorandum account making replacement power costs subject

to refund from the first day of the outage. *Id.* at 2-3. (The same is true today of the Energy Resource Recovery Account proceeding.) After DRA filed its motion, the Administrative Law Judge transferred the ECAC replacement energy costs issues to Phase 3. *Id.* at 2. DRA nevertheless pressed its consolidation motion because DRA was concerned that simply transferring the issue from the ECAC proceeding might not adequately protect ratepayers' interests. According to DRA, "there [were] legal questions regarding the Commission's authority to order refunds for replacement power costs [in the OII] *prior to December 18, 1989, when [the OII] was instituted*." *Id.* at 3 (emphasis added).

The Commission denied DRA's consolidation motion, deciding among other things that

> Phase 3 should consider base rate costs for Palo Verde . . . *from December 18, 1989 through the dates the units were restored to service*. DRA does not recommend[] any disallowance of base rates *prior to December 18, 1989, apparently conceding that such disallowances would be retroactive ratemaking*.

Id. at *4 (emphasis added);[5] *see* D.03-07-031, 2003 WL 21705427, at *17 ("the provisions of Section 455.5 do *not* call for a refund unless or until an investigation by the Commission is made. No rate reduction is statutorily mandated, *and the statute does not provide for any rate reduction retroactive beyond the date of the initiation of the Commission's investigation*" (emphasis added)). Commissioner Florio recently acknowledged the same point when he sought to rely on SCE's 2102 GRC Revenue Requirement Memorandum Account rather than section 455.5 as a justification for

[5] The Commission also found that it could consider replacement power costs from the dates the Palo Verde units went out of service pursuant to the Commission's authority to order refunds of such costs "under Edison's ECAC mechanism." D.92-04-033, 1992 WL 576036, at *3.

making SONGS base rates subject to refund from January 1, 2012: "*normally 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).

Moreover, we are not aware of any case in which the Commission made base rates subject to refund prior to the issuance of an OII pursuant to section 455.5, nor any case in which the Commission has attempted to retroactively remove a plant from rate base before the date of the issuance of an OII, and with good reason -- the plain language and legislative history of section 455.5 specifically prohibit such actions.

b. "General rate proceeding" means "general rate case"

TURN also attempts to expand the Commission's authority under section 455.5 through a creative interpretation of the phrase "general rate proceeding" contained in section 455.5(c). TURN argues that because "there is no agreed upon definition of what satisfies the definition of a 'general rate proceeding,'" the Commission can consolidate the OII with any number of proceedings that TURN now characterizes as "general rate proceedings," thereby avoiding section 455.5's requirement of consolidation with the utility's next GRC. TURN Op. Br. at 8, 9.

TURN's argument is without merit. First, on its face, the phrase "next general rate proceeding instituted for the corporation" means what it says -- the next general rate proceeding, or GRC. The Commission uses the terms interchangeably. *See, e.g., In re PacifiCorp*, 2006 WL 1049355, at *Appendix A ("The agreement also provides an opportunity, in the context of this *general rate proceeding ("GRC")*, for the KWUA to make its arguments to the Commission" (emphasis added)); D.07-01-024, 2007 WL

1373784, at *31 ("DRA responds that Class A utilities undergo *a general rate case* plan every three years, pursuant to the general rate case plan, and that D.06-04-037 recognizes *such general rate proceedings* as the appropriate time to amortize under- or over-collections in these accounts" (emphasis added).).

Second, to the extent the phrase general rate proceeding is ambiguous, any such ambiguity is resolved by the legislative history, which makes clear that next general rate proceeding means next general rate case. *See*, *e.g.*, Concurrence in Senate Amendments, AB 2378 (Hauser), As Amended: April 17, 1986 , at 1. (attached hereto as Exh. C) ("[t]his bill as amended would . . . provide that hearings on the investigation be consolidated with the corporation's *next general rate case*" (emphasis added)).

Third, as noted above, in all of its decisions applying section 455.5, the Commission has always interpreted "next general rate proceeding" to refer to the GRC. D. 95-05-042, 1995 WL 461165 (Cal.P.U.C. May 24, 1995), at *1 (Palo Verde); D. 00-02-046, 2000 WL 289723 (Cal.P.U.C. Feb. 17, 2000), at *407-08 (El Dorado); D. 92-12-057, 1992 WL 438010 (Cal.P.U.C. Dec. 16, 1992), at *117-*120 (Geysers 15). That is because the plain language and legislative history demonstrate that it is exactly what "next general rate proceeding" means.

c. Section 455.5 describes a single procedure for addressing an outage

The Utility Consumer Action Network ("UCAN") argues that section 455.5 creates two separate sets of procedures where a facility has suffered a nine-month outage: UCAN claims that section 455.5*(a)* controls ratesetting proceedings, while section 455*(c)* applies to investigations. Brief of UCAN on SONGS Legal Questions ("UCAN Op. Br.") at 4. UCAN suggests that "[b]ecause this is a ratesetting proceeding, Section

455.5(a), not Section 455(c) governs the Commission's authority to remove SONGS from the utilities' rate base." UCAN Op. Br. at 3.

First, UCAN's interpretation is inconsistent with the language of the statute. Although UCAN suggests that section 455.5 mandates two separate procedures, the plain language of subsection (c) requires that the Commission *always* institute an OII when informed that a facility has been out of service for nine months. Subsection (c) also provides that the Commission shall *always* require that rates associated with that facility be subject to refund from the date of the OII, and that the Commission shall *always* consolidate the hearing on the investigation with the next general rate proceeding. Indeed, *"[t]he purpose of the required investigation is for the CPUC to determine if the facility should be removed from ratebase* and if related expenses should be disallowed." Assembly Bill 2805, Assembly Member Hauser, As Amended: April 16, 1990) (attached hereto as Exh. D) (emphasis added). Therefore, there can be no "ratesetting proceeding" envisioned in subsection (a) that is not also a proceeding governed by subsection (c) – which UCAN appears to concede requires a hearing at the next general rate case. The legislative history of section 455.5 makes clear that the Legislature never considered the bifurcated approach that UCAN proposes. In any event, these questions are academic, because the Commission is proceeding under section 455.5(c) by issuing an OII on November 1, 2012.

Nor does section 455.5(e) relieve the Commission of its obligations under subsection (c). DRA argues that because section 455.5(e) provides that nothing in section 455.5 "prohibits the commission from reviewing the effects of any . . . production facility which has been out of service for less than nine months," the statute therefore

"does not limit the Commission's general ratemaking authority." DRA Op. Br. at 2, 8. This is a non-sequitur. Subsection (e) provides that the limitations and time frame that apply when a nine-month outage occurs do not affect the Commission's authority to examine the effects of shorter outages. Far from suggesting that section 455.5 imposes no limits on the Commission's authority, subsection (e) reinforces that once an outage has lasted nine months, the limitations of section 455.5 *do* apply. Moreover, regardless of when the Commission begins to consider the effects of an outage, once the outage has continued for nine months, the Commissions must take the steps described in section 455.5(c). Finally, while subsection (e) preserves the Commission's authority to "review[] the effects" of an outage of less than 9 months, it does not address when the Commission is authorized to remove a facility from rates. That timing issue is comprehensively addressed by section 455.5(c).

In another attempt to disassemble the integrated provisions of section 455.5, the Coalition of California Utility Employees ("CUE") argues that section 455.5(a) governs the timing of removing expenses associated with SONGS from rates, while section 455.5(c) only requires the Commission to consolidate the OII "with the next GRC," but does not speak to the timing of any reduction in rates. Opening Brief of CUE Addressing The Legal Issues Related To The Commission's Authority ("CUE Op. Br.") at 5-6. CUE contends section 455(c)'s requirement that the Commission make rates subject to refund as of the date the OII issues supports CUE's interpretation because "if the Legislature required the Commission to wait until the next GRC to reduce rates, it would have said so explicitly." *Id.* at 6.

CUE ignores the actual statutory language. Section 455.5(c) obligates the Commission to institute "an investigation to determine *whether to reduce the rates of the corporation*" (emphasis added) and to consolidate that investigation with the next GRC. This disposes of the argument that section 455.5(c) does not govern the timing of a reduction in rates. Moreover, under CUE's interpretation, section 455.5(a) allows the Commission to remove SONGS expenses from rates on the day SONGS went out of service (which makes no sense since section 455.5(a) does not even apply until nine months after an outage) while simultaneously requiring the Commission to make SONGS rates subject to refund upon the mandatory issuance of the OII. Thus, CUE's construction contemplates that expenses associated with SONGS may be removed from rate base pursuant to section 455.5(a) nine months before those same expenses are made subject to refund under section 455.5(c). CUE's statutory interpretation is incoherent and conflicts with the plain meaning of section 455.5.

d. Section 455.5 and the Public Utilities Code require the Commission to hold a hearing before reducing rates

CC concedes that section 455.5 and the rule against retroactive ratemaking obligate the Commission to make rates subject to refund no earlier than November 1, 2012, CC Op. Br. at 2, 9, but argues the Commission may reduce rates immediately without a hearing pursuant to section 455.5(c). First, section 455.5(c) plainly contemplates a hearing prior to a rate reduction, as it expressly provides that "[t]he commission shall consolidate *the hearing* on the investigation with the next general rate proceeding instituted for the corporation" (emphasis added). Nevertheless, CC somehow reads section 455(c) and the legislative history to make a hearing merely optional. CC Op. Br. at 4-5. Leaving aside the due process issues attendant to reducing rates without a

hearing, *see* A4NR Op. Br. at 18 (due process entitles utility to a hearing), the reason section 455.5 assumes the Commission will hold a hearing before reducing the Utilities' rates is because the Commission *must* hold a hearing before reducing rates, pursuant to section 729. That provision states that "[t]he commission may, *upon a hearing*, investigate a single rate . . . or the entire schedule of rates . . . of any public utility, and may establish new rates" (emphasis added). CC's arguments against a hearing requirement contravene the plain meaning of section 455.5, and are foreclosed by section 729 and due process protections.

e. Section 455.5 contemplates that expenses not directly related to power production but instead required for safe maintenance of the plant will not be subject to refund

In their opening brief, the Utilities explained that section 455.5 permits the Commission to make only those expenses subject to refund that are associated with out-of-service portions of SONGS. (Util. Op. Br. at 3; *see* Response of SCE To Order Instituting Investigation ("SCE Resp.") at 33 (same). Women's Energy Matters ("WEM") argues, however, that the reference in section 455.5 to "any portion of any . . . generation or production facility" is "meant to allow the Commission to continue to allow in rates the cost of units that continue to generate power." WEM Opening Brief On Legal Issues Related To Rate Refunds ("WEM Op. Br.") at 8. WEM also contends that the phrase "[w]hen that portion of the facility is returned to useful service" in section 455.5 (a) means "actually providing service to ratepayers." *Id.* In other words, according to WEM, section 455.5 provides that so long as SONGS is not generating electricity, *no* portion of it is in service, regardless of whether security, safety, maintenance and other portions of the plant continue to operate.

But section 455.5 does not authorize such a draconian result. As CUE correctly observes in its opening brief, the Commission "may not eliminate *all* expenses related to the facility" because section 455.5 contemplates that the Commission "'may eliminate consideration of the value of *any portion*' of the facility and 'may disallow *any* expenses related to that facility.'" CUE Op. Br. at 4 (quoting section 455.5); CC Op. Br. at 9 (same). As CUE puts it, and as explained in SCE's original response to the OII, "[t]he Commission should still allow the utilities continuing recovery of expenses required to keep the facilities safe and ready to come back online if able and needed." CUE Op. Br. at 4; *see* SCE Resp. at 32-34.

WEM bases its opposing argument not on the actual statutory language, but on an Oregon Public Utility Commission Order concerning the Trojan nuclear plant. OPUC Order No. 08-487 (269 P.U.R.4th 1, 2008 WL 4457778; *see* WEM Op. Br. at 9. First, the Trojan plant was in the process of being decommissioned, and the expenses at issue in that case were largely "related to decommissioning, not productive operation of the facility." 2008 WL 4457778, at *63 (citation and quotation marks omitted). In contrast, there has been no decision made to retire and decommission SONGS. SCE has proposed to the NRC that SCE return the plant to service, and SCE requires maintenance, security, and safety operations to maintain the ability to do so. Second, in the *Trojan* decision, the Oregon Public Utility Commission relied on an opinion of the Oregon Court of Appeals interpreting Oregon Revised Statute section 757.355, which provides: "a public utility may not, directly or indirectly . . . collect or receive from any customer rates that include the costs of construction, building, installation or real or personal property not presently

used for providing utility service to the customer." *See* OPUC Order No. 08-487, 2008 WL 4457778, at *62-63.

California has no such statute, and the statute it *does* have clearly states that the Commission "may eliminate consideration of the value *of any portion* of any . . . generation or production facility which . . . remains out of service for nine or more consecutive months." § 455.5(a) (emphasis added). Therefore, the Commission should make subject to refund only the value of those portions of SONGS that are actually out of service.[6]

B. The Retroactive Ratemaking Doctrine Precludes The Commission From Ordering A Refund Of Rates Collected Prior To November 1, 2012 Pursuant To SCE's 2009 GRC and SDG&E's 2008 GRC

As noted, section 455.5 directs the Commission to set rates subject to refund as of the date the Commission issued the OII (November 1, 2012), not before. The Commission's discretion to set an earlier subject-to-refund date is constrained not only by the express command of section 455.5, but also by the retroactive ratemaking doctrine.

In their opening legal brief, the Utilities explained in detail why the Commission lacks legal authority to order the Utilities to refund rates already approved in SCE's 2009 and SDG&E's 2008 general rate cases[7] based merely on the existence of SCE's 2012

[6] Ruth Henricks argues that the Commission has jurisdiction to conduct a reasonableness review of the SGRP, and that all SGRP costs are subject to such a review. The Utilities do not dispute this. SCE Resp. at 22. Henricks repeats her position that the Commission should conduct the reasonableness review in Phase 1. Henricks' position is foreclosed by the Scoping Memo. In addition, the scheduling of the reasonableness review is not relevant to the issues that are the subject of this briefing, as set forth in the Scoping Memo.

[7] D. 09-03-025 (SCE's 2009 GRC decision); D. 08-07-009 (SDG&E's 2008 Test Year GRC decision).

GRC Revenue Requirement Memorandum Account ("RRMA").[8] Because the Commission established the RRMA account for the specific purpose of allowing the Commission additional time to issue the decision in SCE's 2012 general rate case, the creation of the account failed to give the Utilities adequate notice that SONGS-related rates might be subject to refund based on the SONGS outage. Therefore any effort to make those rates subject to refund as of January 1, 2012 -- as opposed to November 1, 2012 -- would constitute impermissible retroactive ratemaking. *See* Util. Op. Br. at 8-17.

Neither DRA nor TURN addresses any of the legal authorities barring the Commission from making SONGS rates subject to refund before November 1, 2012. Instead, TURN states with no support or explanation that "[t]he fact that the Commission explicitly moved consideration of SCE's costs into this investigation should be sufficient to allow resolution on a timely basis." TURN Op. Br. at 6. TURN also notes that SCE did not seek a rehearing of D.12-11-051, the November 2012 GRC decision that purported to make SONGS rates subject to refund from January 1, 2012. *Id.* at 6. The Utilities were not obligated to do so. D.12-11-051 did not order SCE to refund anything, and the Utilities have preserved their rights to challenge any order in this proceeding directing such a refund.

For its part, DRA simply refers to the existence of the RRMA, as though that somehow settles the question. DRA Rep. Br. at 4-5; DRA Op. Br. at 9-10. Again, as explained in the Utilities' opening brief, because the Commission did not give adequate

[8] For ease of reading, we refer to SCE and the RRMA account, but the same principles apply to SDG&E and the GRC Memorandum Account ("GRCMA"). *See* Util. Op. Br. at 8-17. Further for ease of reading, we refer to SCE's 2009 general rate case, but the same principles apply to SDG&E and its 2008 GRC. *See* D.08-07-046 (2008).

notice that the RRMA made SONGS costs related to the 2012 outages subject to refund, the mere creation of the account cannot justify doing so.

A4NR, UCAN and WEM all appear to devote most of their legal arguments in this regard to a question that is not at issue: whether the Utilities are entitled to the rates set in the 2012 GRC retroactive to January 1, 2012, when those rates were not yet final. The Utilities have never claimed such an entitlement. These parties overlook that, before the Commission issued the 2012 GRC decision, SCE was collecting base rates pursuant to its 2009 GRC decision, and SDG&E was collecting rates pursuant to its 2008 GRC decision. Those decisions were closed and established final rates – subject to adjustment only pursuant to the RRMA, which, as noted, contemplated adjustment based solely on the timing and outcomes of the 2012 GRC. Hence, the retroactive ratemaking doctrine prohibits the Commission from ordering a refund of the base rates collected in 2012 pursuant to the closed 2009 GRC for SCE and 2008 GRC for SDG&E.

Citing a decision from Pennsylvania, WEM urges that "[t]he rule against retroactive ratemaking is merely that past excess profits or failures to earn authorized rate of return by the utility cannot be taken into consideration in setting future rates." WEM Op. Br. at 7. Whatever the law may be in Pennsylvania, the law in California is established by *Ponderosa Telephone Co., v. Public Utilities Commission,* 197 Cal. App. 4th 48, 61 (2011). As the *Ponderosa* court explained, "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." *Id.* In *Ponderosa*, the Commission had established rates for the telephone company based in part on the Commission's estimate of the company's costs. Those costs included interest on certain loans. When some of

the interest was later rebated to the utility, the Commission ordered it disbursed to ratepayers. The utility challenged the Commission's decision, and the Court of Appeal found that when the interest was rebated,

> those proceeds related to a past cost that was factored into the rate established at that time. Accordingly, when the Commission credited the [interest] back to the ratepayers, it was, in effect, adjusting previously established rates to account for the cost savings the [utility] realized on their past loan payments. Because the Commission's decision on the [interest] is based on costs that were incurred in the past and used to establish prior general rates, the [d]ecison violates the rule against retroactive ratemaking.

Id. Put simply, the retroactive ratemaking doctrine does not apply only to the setting of future rates, but bars an order, such as the one contemplated in the OII, that effectively requires a refund of rates set in a prior closed proceeding. Util. Op. Br. at 14-17. Nor, as *Ponderosa* makes clear, does the rule against retroactive ratemaking "appl[y] only in general rate cases," WEM Op. Br. at 4, but instead it bars *any* action in any type of proceeding (including this one) that has the effect of refunding rates set in a prior GRC. 197 Cal. App. 4th at 61.

In sum, the Opposing Parties offer no justifications for the Commission's effort to make rates subject to refund as of January 1, 2012. Because that effort violates the rule against retroactive ratemaking, the Commission should make rates associated with SONGS subject to refund as of November 1, 2012.

Respectfully Submitted,

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Date: March 7, 2013

Exhibit A

Date of Hearing: April 16, 1990

ASSEMBLY COMMITTEE ON UTILITIES AND COMMERCE
Gwen Moore, Chair

AB 2805 (Hauser) - As Amended: April 16, 1990

SUBJECT

Utility plant not in service.

DIGEST

Under existing law, The Public Utilities Commission (PUC) may reduce utility rates to eliminate from rates the costs associated with utility plant that is out of service for more than nine (9) months. A utility is required to notify the PUC when plant has been out of service for more than nine (9) months, so that the PUC may make a determination about whether to reduce rates in this manner. (Public Utilities Code Section 455.5)

This bill provides that out of service periods do not include planned outages of predetermined duration scheduled in advance.

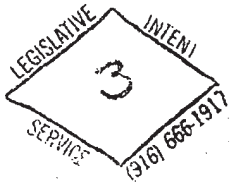
FISCAL EFFECT

None.

BACKGROUND

AB 1823 by the same author (Public Utilities Code Section 455.5), Statutes 1986, Chapter 139) addressed a recurrent problem in traditional public utility regulation -- how to reflect in rates the costs associated with electric plant taken out of service for an extended period of time.

The occasion for that bill also illustrates the problem. The Humboldt Bay Nuclear Power Plant, located in Eureka, was shut down in 1976 for repairs related to seismic safety ordered by the Nuclear Regulatory Commission (NRC). Although the owner, Pacific Gas & Electric Company (PG & E), actively pursued the matter at the NRC, the plant was never actually repaired, and was finally closed permanently in 1984. During the eight years that the plant's fate was under consideration PG & E's ratepayers in effect paid double --- they paid the cost of replacement power, and they paid the capital costs associated with PG & E's ownership of the plant. PG& E had no incentive for decisively resolving the question of the cost effectiveness of repairs, and consumer



- continued -

advocates had no procedural mechanism for raising the issue of the unfairness of the rates at the PUC.

AB 1823 was a compromise that provided a framework for determining when an extended plant outage would trigger a review by the PUC, so that unreasonably long periods of delay would not recur.

COMMENTS

1) AB 1823 was intended to enable the PUC to address the problem of how fairly to spread the economic loss associated with inoperative facilities. The proposed amendment to AB 1823 is not inconsistent with this intent, inasmuch as scheduled maintenance is a period of non-operation that effectively enhances the facility's value and usefulness to the public. It has been regulatory practice to enable the utility to recover costs, including capital costs, during periods of scheduled maintenance, and the proposed amendment assures that this practice will continue.

2) The sponsor is concerned that the provisions of current law may trigger too frequent reasonableness reviews in scenarios which routinely occur with respect to nuclear powerplants and other complex electric generating facilities. Those episodes typically involve a scheduled outage for refueling and/or maintenance, during which time unanticipated or additional tasks are imposed which may extend the scheduled outage beyond the nine month period for triggering a reasonableness review. The sponsor contends that it is unfair to include the scheduled maintenance, which is an ordinary and necessary part of operating the powerplant for the benefit of the public, either for purposes of triggering a reasonableness review or for purposes of reducing rates.

SUPPORT	OPPOSITION
Southern California Edison (sponsor)	None reported to the Committee.

William Julian
445-4246
04/12/90

Exhibit B

43 CPUC 2d 738, 1992 WL 576036 (Cal.P.U.C.)

Re Southern California Edison Company

Decision 92-04-033
Application 90-12-018
Interim Orders 89-12-025, 91-02-079

California Public Utilities Commission

April 8, 1992

ORDER granting motion by Arizona Public Service Company for confidential treatment of a report by the Institute of Nuclear Power Operations during an investigation into extended outages at the Palo Verde nuclear generating units in 1989 and early 1990.

[ABSTRACT OF DECISION. THE FULL CASE TEXT IS OMITTED.]

P.U.R. Headnote and Classification
1. ELECTRICITY
s4 - Operating practices and efficiency - Nuclear plant outages - Investigation.

Ca.P.U.C. 1992
It is appropriate to examine the causes of and responses to extended nuclear plant outages through a separate phase of an owning electric utility's general rate case.
Re Southern California Edison Company

P.U.R. Headnote and Classification
2. EXPENSES
s122 - Electric utility - Replacement power costs - Nuclear plant outages - Investigation.

Ca.P.U.C. 1992
There is no requirement that replacement power costs incurred by an electric utility because of extended nuclear plant outages be addressed only in an energy cost adjustment clause (ECAC) proceeding.
Re Southern California Edison Company

P.U.R. Headnote and Classification
3. EVIDENCE
s33 - Privileged communications - Confidentiality - 'Self-critical analysis privilege' - Rejection - Factors.

Ca.P.U.C. 1992
In looking at possible confidential treatment of documents, the commission rejected the 'self-critical analysis privilege' as a basis for ordering confidentiality, finding that the state's adoption of the California Evidence Code precluded the creation of any new special privileges, and noting that the commission is not bound by any technical rules of evidence anyway.
Re Southern California Edison Company

P.U.R. Headnote and Classification
4. PROCEDURE
s16 - Discovery and inspection - Confidentiality - Nuclear plant outage reports - Factors affecting nondisclosure.

Ca.P.U.C. 1992

In addressing a motion for confidentiality of a report by the Institute of Nuclear Power Operations relative to extended outages at the Palo Verde nuclear generating units in 1989 and early 1990, the commission found that the public interest in nondisclosure outweighed the public interest in disclosure, since no actual accident or breach of safety had occurred and since nondisclosure would facilitate the free flow of information about the outages without involved personnel fearing public embarrassment or peer reprisals.

Re Southern California Edison Company

Before Commissioners: DANIEL Wm. FESSLER President JOHN B. OHANIAN PATRICIA M. ECKERT NORMAN D. SHUMWAY Commissioners

Application 90-12-018 (Filed December 7, 1990)

I.89-12-025 (Filed December 18, 1989)

I.91-02-079 (Filed February 21, 1991)

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Authority to Increase its Authorized Level of Base Rate Revenue Under the Electric Revenue Adjustment Mechanism for Service Rendered Beginning January 1, 1992 and to Reflect this Increase in *Rates. And Related Matters.*

FIFTH INTERIM OPINION: PHASE 3 PRELIMINARY MATTERS

BY THE COMMISSION:

1. Summary of Decision

A motion by the Division of Ratepayer Advocates (DRA) to consolidate Phase 3 with three consolidated Energy Cost Adjustment Clause (ECAC) proceedings is denied. The scope of the Phase 3 investigation is clarified to include base rate costs from December 18, 1989 forward, and replacement energy and fuel-related costs from March 3, 1989 forward. A motion by Arizona Public Service Company (APS) requesting confidential treatment of documents is granted, and DRA is not authorized to publicly disclose all of its Phase 3 testimony.

2. Background

Southern California Edison Company (Edison) is a 15.8% owner of the three generating units at Palo Verde Nuclear Generating Station (Palo Verde) in Arizona. Majority owner APS operates the plant.

All three plant units were shut down during the first two weeks of March 1989. Unit 2 was restored to service on or about June 30, 1989, Unit 3 was restored to service on or about February 22, 1990, and Unit 1 was restored to service on or about July 16, 1990. These dates are subject to revision because the appropriate definition of 'restored to service' is unresolved.

Investigation (I.) 89-12-025, identified as Phase 3 of Edison's test year 1992 general rate case, is a review of the lengthy outages. I.89-12-025 was instituted on December 18, 1989 and is consolidated with the general rate case. Public Utilities (PU) Code § 455.5(c) requires such investigations when major power plants are out of service for nine months or more. The investigation originally considered outages only at Palo Verde, Units 1 and 3 because Unit 2 was out of service for less than nine months. However, by Administrative Law Judge (ALJ) ruling dated February 3, 1992, issues related to Unit 2 were transferred from three consolidated ECAC proceedings (Application (A.) 89-05-064, A.90-06-001, and A.91-05-050) to Phase 3 of the general rate case.

A Phase 3 prehearing conference was held and completed on December 9, 1991. Preliminary matters discussed included consolidation of base rate and fuel-related rate testimony, scope of the investigation, and confidentiality of documents. This decision resolves those matters.

3. Consolidation of Proceedings

On January 29, 1992, DRA filed a motion to consolidate Phase 3 with the reasonableness phase of the ECAC proceedings. DRA filed a parallel motion in the ECAC proceedings. The motions were filed prior to the February 3 ALJ ruling which transferred replacement power costs from the ECAC proceedings to Phase 3.

DRA is concerned that simply transferring issues from the ECAC proceedings to Phase 3 may not adequately protect ratepayers' interests. According to DRA, there are legal questions regarding the Commission's authority to order refunds for replacement power costs prior to December 18, 1989, when I.89-12-025 was instituted. DRA's solution to the legal uncertainty is to consolidate the ECAC proceedings with Phase 3.

Edison replied to the DRA motion to consolidate, generally concurring with DRA that Commission review of the instant Palo Verde issues should be done in one proceeding. Edison favors review in Phase 3 and has two other concerns. First, Edison seeks an opportunity to reply to upcoming DRA testimony on Unit 2, which until February 3 was not within the scope of Phase 3. Second, Edison recommends that if consolidation is granted, then determination of penalties and rewards under Edison's Nuclear Unit Incentive Procedure (NUIP) should be left open pending a Phase 3 final decision. NUIP calculations are normally made in ECAC proceedings. DRA believes that NUIP issues should not be deferred, but recognizes that overlap between NUIP awards and Phase 3 issues could be handled by crediting portions of NUIP awards against any replacement power costs found to be unreasonable.

We will deny the DRA motion to consolidate. As we discuss below, there are no legal impediments to review of replacement power costs apart from the ECAC proceedings, and consolidation would serve no other purpose. We will grant Edison an opportunity to respond to DRA testimony on Unit 2. We will reserve final determination of NUIP penalties and rewards pending a Phase 3 decision on reasonableness of the outages. Subsequent NUIP determination should be straightforward because penalties and rewards are calculated by formula. We will determine final NUIP amounts in Phase 3 rather than the ECAC proceedings. Until then, the ECAC proceedings should include calculation of NUIP penalties and rewards as if Palo Verde Operations were prudent, subject to revision in Phase 3.

4. Scope of the Phase 3 Investigation

In a January 22, 1992 ruling following the Phase 3 prehearing conference, the assigned ALJ ordered briefs from the parties on the scope of replacement power costs to be considered in Phase 3. Specifically, can the Commission approve or disallow replacement power costs from March 1989, when the Palo Verde units were shut down, through December 18, 1989, when I.89-12-025 was instituted, without violating the prohibition against retroactive ratemaking?

DRA declined to discuss this legal point, because if its motion for consolidation was granted the issue would be moot. All fuel-related costs are already subject to refund under the ECAC mechanism.

Edison did respond, arguing that the Commission is empowered to review replacement power costs associated with the Palo Verde outages in Phase 3, and that such deliberations should not be removed to the consolidated ECAC proceedings. Edison points out that PU Code § 455.5(e) explicitly reserves for the Commission the right to review the costs of facilities out of service for less than nine months. That authority supports our existing authority under the ECAC mechanism to review the reasonableness of replacement power costs for Palo Verde, Unit 2.

We find that Phase 3 should consider base rate costs for Palo Verde, Units 1 and 3 from December 18, 1989 through the dates the units were restored to service. DRA does not recommended any disallowance of base rate costs prior to December 18, 1989, apparently conceding that such disallowances would be retroactive ratemaking. Phase 3 should also consider all fuel-related costs-including replacement power costs and adjustments to NUIP penalties and rewards-for all three units from the dates the units went out of service in March 1989 through the dates the units were restored to service. The Commission has the authority to order refunds for fuel-related costs incurred prior to December 18, 1989, under Edison's ECAC mechanism. Phase 3 should cover these issues fully, without any loss of scope by the transfer of issues from the ECAC proceedings. As we have stated in previous decisions, ECAC record period issues may be considered outside of ECAC reviews if they are expressly removed. [1] Palo Verde replacement power issues have been expressly reserved in the February 3, ALJ ruling in the consolidated ECAC proceedings.

DRA has included in its testimony certain environmental costs associated with the Palo Verde outages. These costs are not recorded in Edison's ECAC balancing account, but they should be considered within the scope of Phase 3. We will not now decide whether disallowances related to environmental costs are either legal or appropriate, but the parties are put on notice that environmental costs may be considered in the Phase 3 hearings.

5. Confidentiality of INPO Documents

The Institute of Nuclear Power Operations (INPO) is a private, voluntary consortium of electric utility companies which operate nuclear power plants in the United States. Its purpose is to promote improved safety and reliability in the operation of commercial nuclear power plants through self-regulation by peer review. INPO produces and circulates among its members reports of inquiries into regular operations and significant safety-related events or experiences occurring at member power plants. Although INPO information is available to utility managers and the Nuclear Regulatory Commission (NRC), the Federal agency responsible for safety matters at nuclear plants, INPO reports are not generally available to the public. APS, the operator of Palo Verde, is a member of INPO.

In this proceeding, APS provided DRA with various INPO reports under the protection of a nondisclosure agreement executed June 21, 1991. On November 1, 1991, DRA served its Phase 3 direct testimony. The testimony includes, among other items: (1) three INPO documents numbered for identification as reference items SEA-20, SEA-21, and SEA-23, (2) direct quotations from those reference items within the narrative testimony, and (3) direct quotations from other INPO documents which are not included as reference items. These portions of the testimony are the subject of the present dispute between DRA and APS. DRA delivered complete copies of its testimony to Edison, APS, INPO, and the assigned ALJ. Other parties received only the nonconfidential testimony, pending the outcome of this dispute.

On January 15, 1992, DRA filed a motion for an ALJ ruling authorizing public disclosure of most of the DRA report. DRA seeks public disclosure of all of its narrative testimony, but would not object to handling the three supporting documents under seal as confidential.

On February 13, 1992, APS filed a motion for a protective order regarding INPO information. APS proposes that the disputed information not be made available to the general public, that testimony and transcripts be handled under seal, and that the confidential documents be returned to APS following completion of Phase 3. Edison responded in support of the APS motion. DRA opposes the motion.

5.1. Position of APS

APS suggests, but does not directly argue, that any release of disputed information by DRA would breach the nondisclosure agreement between APS and DRA. APS claims that DRA cannot now shirk its obligations to maintain confidentiality.

APS' principal argument for confidentiality is that the INPO documents are protected by a nascent 'self-critical analysis privilege' which has recently emerged as a necessary safeguard of public interest. California courts have not yet addressed this privilege in the context of nuclear power plant operations, but courts have upheld the privilege in other circumstances, typically to protect investigations by medical and academic review committees. [2] APS believes the privilege should apply when three tests are met: (1) the information must result from a self-critical analysis undertaken by or for the party seeking protection, (2) the public must have a strong interest in preserving the free flow of information of the type in dispute, and (3) the flow of information would be curtailed if public discovery were allowed. According to APS, the privilege develops when the public need for disclosure is outweighed by the public need for confidentiality.

APS asserts that INPO investigations meet these criteria, and that public dissemination of confidential INPO documents would cause tangible, irreparable harm to INPO's work at Palo Verde and throughout the nation. APS supports this claim with various documents, none of which has been tested by cross-examination before the Commission: (1) a statement by INPO that disclosure would be counterproductive, would hinder the openness and candor of utilities and individuals responding to INPO investigations, would be misperceived by the public because INPO standards of excellence are higher than minimum legal safety standards, and would in the long run cause a reduction in the margin of safety at the nation's nuclear power plants; (2) testimony by INPO employees before an Arizona Superior Court that INPO's present policy of nondisclosure of reports has improved the flow of valuable information, relative to a prior policy which allowed disclosure; (3) agreements between APS and the Arizona Corporation Commission staff, and between INPO and the NRC staff, which preserved confidentiality of INPO reports; and (4) various other documents. APS also cites a law review article on the self-critical analysis privilege. [3]

5.2. Position of DRA

DRA argues that APS is wrong in characterizing DRA's obligations under the nondisclosure agreement. DRA has specifically reserved the right to pursue disclosure under the terms of the agreement:

'9. Nothing in this Nondisclosure Agreement shall be construed as precluding DRA from applying to the Commission, upon due notice to Edison, APS and INPO, for relief from this Nondisclosure Agreement on the grounds that continuation of the confidential status of the Confidential Information is no longer necessary or appropriate '

DRA opposes the notion of a self-critical analysis privilege, noting that the California legislature has, in adopting the California Evidence Code, precluded courts from creating new privileges. [4]

DRA asserts that Commission policy favors public disclosure, and APS has the burden to show why individual documents should not be made public. [5] In review of the public policy balance between confidentiality and disclosure, DRA believes that: (1) disclosure will more likely enhance nuclear plant safety than reduce it, (2) paraphrasing the INPO documents might introduce bias and would reduce the impact of INPO's own words, and (3) the difference in performance standards between INPO's standard of excellence and legal safety criteria is irrelevant. DRA argues that APS referrals to information about harm due to disclosure are inappropriate and should be given no weight, because the information is selective and untested by the Commission.

5.3. Discussion

By seeking an order allowing public disclosure of its testimony, DRA has not breached its nondisclosure agreement with APS. DRA is obliged to carry out the terms of the agreement, but the agreement allows the disputed information to be disclosed or used in a hearing if the Commission determines that continuation of confidential status is not necessary or appropriate. This condition is consistent with the Commission's treatment of utility information under PU Code § 583, which authorizes public disclosure of information by the Commission.

The California Legislature has, in adopting Evidence Code § 911, precluded the creation of new privileges. Evidence Code § 911(b) states:

'Except as otherwise provided by statute: (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing.'

The claimed self-critical analysis privilege has not been adopted in California. The only statutes that create privileges similar to the self-critical analysis privilege are limited to the context of the medical professions. [6] However, the Commission is not bound by the technical rules of evidence, as long as the substantial rights of the parties are preserved. [7] In this instance the substantial rights of APS are preserved as long as the Commission balances the need for disclosure against the need for confidentiality. This balancing test is the same as the test required to endorse the claimed privilege, because the privilege is conditional, not absolute. The case cited by APS recognize the conditional nature of the self-critical analysis privilege and the need to balance competing interests, especially with nascent rather than established privileges. It is not enough to show exceptional need by one party. That need must be balanced against the needs of other parties and the public.

We decline to endorse the self-critical analysis privilege in this proceeding. However, in analyzing the merits of DRA's claim that continued confidentiality of the INPO information is unnecessary, we will perform the same balancing test that is required by the conditional privilege. Under either approach, the Commission must as the trier of fact assess and weigh the public need for confidentiality against the public need for disclosure. We have reviewed reference items SEA-20, SEA-21, and SEA-23, along with DRA's narrative testimony, *in camera* in making the necessary judgments.

5.3.1. Factors Supporting Confidentiality

Although the record does not contain quantitative evidence on the subject, it has been strenuously asserted that confidentiality provides an atmosphere critical to the free flow of information about nuclear power plant operations. Disclosure of the INPO reports would hinder the flow of information in two ways. First, it might discourage utilities from pursuing the self-critical analysis that INPO offers, whether for good cause (e.g., fear of unnecessary regulation) or not (e.g., fear of public embarrassment). Second, disclosure might discourage individual respondents from coming forward with useful criticism, due to fear of reprisals or peer disapproval.

We accept that in general the free flow of information can promote plant reliability and safety, which are recognizable public benefits. Curtailment of information would in the long run hinder the efforts of utilities and of the Commission.

There are parallels between INPO reports and the medical and academic reviews which have been protected in various courts: (1) INPO efforts qualify as self-criticism, (2) the public has a strong interest in the free flow of information, and (3) it is plausible that disclosure would curtail that flow.

The nondisclosure agreements between INPO and the NRC suggest that in some circumstances other agencies have found that confidentiality is in the public interest. Confidential treatment will still allow the Commission to carry out its business.

According to APS and INPO, public disclosure would be misperceived by the public, because INPO's standards are higher than NRC safety standards.

5.3.2. Factors Supporting Disclosure

The strongest factor supporting disclosure is the general public right to inspect all evidence relevant to matters before a government agency. Public policy should encourage self-regulation, but those efforts should be made openly, as is done under government regulation.

Nondisclosure of the INPO reports may reduce public confidence in the nuclear power industry and in the Commission. This investigation is not an inquiry into a specific accident of the type for which confidentiality is sometimes necessary. It is a review of the reasonableness of utility actions. Most of the disputed INPO documents cover regular, periodic reviews, not accidents or safety-related events.

The causality between public disclosure of information and subsequent curtailment of the free flow of similar information is difficult to ascertain. The only support for this connection is contained in statements by INPO and utility employees. Reluctance of individuals to participate in INPO reviews may be exaggerated. Power plant workers certainly have a strong and direct interest in safety. INPO reports are already widely distributed among plant managers, other utilities, and regulators, which could reduce the fear of reprisals induced by public disclosure.

APS has claimed that the information needed to review the substantive issues in this proceeding is available, perhaps in alternative form, in other public documents. If this is indeed true, then it is less likely that disclosure of direct quotations would impair the future flow of essential information.

The Commission should give little weight to fears of public misperceptions about standards of excellence. The Commission's own standards of prudence need not coincide with either INPO standards or minimum legal standards of performance. The public deserves through explanations of utility performance, not paternalistic reassurances that utility actions reviewed behind closed doors are in the public interest.

Finally, Commission policy on nondisclosure should mirror the intentions of Evidence Code § 911, which prohibits the creation of new privileges.

5.4. Conclusion

The concept of public interest can be difficult to define. In the present circumstance, there are not familiar yardsticks to assess long-term public interests or the connection between information flow and confidentiality. The many factors for and against disclosure reflect this difficulty. However, it is the Commission's duty as the trier of fact to balance these factors using our best judgment.

We find that the factors supporting confidential treatment of the INPO documents outweigh the factors supporting public disclosure. In particular, the benefits of keeping INPO reports confidential exceed the need for open review of nuclear issues especially in the case of a review which is not safety related. We will deny DRA's motion for disclosure of its narrative testimony. We will grant the APS motion for protection of the INPO documents.

Findings of Fact

1. On January 29, 1992, DRA filed a motion to consolidate Phase 3 with reasonableness reviews in three consolidated ECAC proceedings, A.89-05-064, A.90-06-001, and A.91-05-050.

2. Edison believes that Palo Verde reasonableness issues should be reviewed in Phase 3.

3. Reasonableness issues for Palo Verde, Units 1, 2, and 3 should be reviewed in Phase 3.

4. NUIP penalties and rewards should be reviewed in the consolidated ECAC proceedings, subject to revision in Phase 3.

5. The Phase 3 review should consider base rate costs for Palo Verde, Units 1 and 3 from December 18, 1989 through the dates the units were restored to service and fuel-related costs for all three units from the dates the units went out of service in March 1989 through the dates the units were restored to service.

6. The Commission has reviewed reference items SEA-20, SEA-21, and SEA-23, along with DRA's narrative testimony, *in camera* in assessing the need for confidentiality of the documents.

7. In order to resolve the APS and DRA motions on confidential treatment of INPO documents, the Commission should balance the public need for confidentiality against the public need for disclosure.

8. There are factors which support confidentiality and factors which support public disclosure, as discussed in this decision.

9. The benefits of confidentiality of INPO reports exceed the need for open review of nuclear power issues.

10. The factors supporting continued confidentiality of the disputed INPO information outweigh the factors supporting public disclosure.

Conclusions of Law

1. Edison should have an opportunity to serve testimony on Palo Verde, Unit 2 issues in Phase 3.

2. DRA's January 29, 1992 motion to consolidate should be denied.

3. In the consolidated ECAC proceedings, Palo Verde issues have been expressly reserved for consideration in Phase 3.

4. The Commission has the authority to order refunds for costs related to outages commencing at Palo Verde, Units 1, 2, and 3 in March 1989 because the costs have been recorded in memorandum accounts pursuant to I.89-12-025 and Edison's ECAC tariff.

5. DRA has not breached its June 21, 1991 nondisclosure agreement with APS.

6. No absolute self-critical analysis privilege exists.

7. The substantial rights of APS are preserved as long as the Commission balances the need for disclosure against the need for confidentiality.

8. DRA should not be authorized to publicly disclose its Phase 3 testimony in its entirety.

9. The APS motion for a protective order regarding INPO information should be granted.

FIFTH INTERIM ORDER

***IT IS ORDERED* that:**

1. The January 29, 1992 motion of the Division of Ratepayer Advocates (DRA) to consolidate hearings in Phase 3 of this proceeding with three consolidated Energy Cost Adjustment Clause proceedings (Application (A.) 89-05-064, A.90-06-001, and A.91-05-050) is denied.

2. The assigned Administrative Law Judge shall afford Southern California Edison Company (Edison) the opportunity to serve testimony in Phase 3 of this proceeding on the reasonableness of operations at Palo Verde Nuclear Generating Station, Unit 2.

3. Penalties and rewards ordered in A.89-05-064, A.90-06-001, and A.91-05-050 under Edison's Nuclear Unit Incentive Procedure are subject to revision in Phase 3 of this proceeding.

4. Proposed disallowances relating to the environmental costs of replacement power generation during the outages considered in Phase 3 of this proceeding may be considered in Phase 3 hearings.

5. The DRA motion filed January 15, 1992 for authorization to publicly disclose most of its report in Phase 3 of this proceeding is denied.

6. DRA is not authorized to publicly disclose its Phase 3 testimony in this proceeding in its entirety.

7. The Arizona Public Service Company motion filed February 13, 1992 for a protective order regarding Institute of Nuclear Power Operations information is granted, however, the assigned ALJ shall make the appropriate procedural arrangements, consistent with the motion, to ensure the confidentiality of documents requested.

8. The Executive Director shall cause copies of this decision to be served on all parties in the reasonableness phase of consolidated A.89-05-064, A.90-06-001, and A.91-05-050.

This order becomes effective 30 days from today.

Dated April 8, 1992, at San Francisco, California.

FOOTNOTES

Footnotes

1 E.g., Decision (D.) 92496; 4 Cal. PUC 2d 693, 702 (1980).

2 E.g., *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *affirmed* 479 F.2d 920 (D.C. Cir. 1973); and *Wiley v. Mills*, 195 N.J. Super. 332; 478 A.2d 1273 (1984).

3 *Note: The Privilege of Self-Critical Analysis*, 96 Harv. L. Rev. 1083 (1983).

4 Evidence Code § 911(b); *Valley Bank of Nevada v. Superior Court*, 15 C.3d 652, 656 (1975).

5 D.88-04-016; 28 Cal. PUC 2d 3, 11 (1988). Also, D.91-12-019, at mimeo. pages 6, 11-12.

6 Evidence Code § § 1156, 1157.

7 Rule 64, Rules of Practice and Procedure.

Exhibit C

CONCURRENCE IN SENATE AMENDMENTS

AB 2378 (Hauser) - As Amended: April 17, 1986

ASSEMBLY VOTE 72-0 (January 29, 1986) (Consent Calendar) SENATE VOTE 30-0 (May 23, 1986)

Original Committee Reference: U. & C.

DIGEST

Under current law, rates for utility service must be reasonable. This requirement has been interpreted by the Public Utilities Commission and the courts to mean that in most cases utility property must be "used and useful" in providing service (in "ratebase") in order to be the basis for a rate paid in cash.

This bill as amended would apply to electric, gas, heat and water corporations.

This bill as amended would:

1) require a utility to report to the PUC the status of a "major facility" (as determined by the PUC) out of service for more than nine consecutive months.

2) require the PUC to order that rates associated with the facility be collected subject to refund, while the PUC conducts an investigation to determine whether the rates should be reduced to reflect the plant out of service. This investigation is to be commenced within 45 days.

3) provide that hearings on the investigation be consolidated with the corporation's next general rate case.

The Senate amendments 1) exclude "plant held for future use" from being considered as plant "out of service"; 2) provide the PUC with more administrative flexibility regarding the PUC response time to a plant out of service; and 3) limit the application of the bill by changing the term "any electric, gas, or water generation or production facility", to "major" ...facility," as determined by the PUC; 4) permit the utility to collect rates associated with the plant during the investigation subject to refund, rather than presuming that rates should be lowered.

FISCAL EFFECT

Minor absorbable costs to PUC to conduct periodic proceedings.

- continued -

COMMENTS

1) This bill is intended to address a recurrent utility ratemaking problem: the rate treatment accorded utility property which is taken out of service for extended periods of time, but not permanently retired. Under traditional principles, utility property which is not used and useful in providing service to customers cannot be the basis for a rate paid in cash by customers. This bill would establish a procedure for considering how to apply this principle for plant out of service.

2) The author's intention is to provide a procedure for avoiding the extended delay that occurred in his district with the Humboldt Bay Unit 3 plant. A small nuclear powerplant was taken out of service while the owner (PG & E) decided whether to reconstruct it to meet more realistic seismic loads, or close it down. For a number of years, the PUC permitted PG & E to collect depreciation and return (profit) on the investment in the facility in cash, despite the fact that it was not used to provide service to customers, and was ultimately retired. Ratepayers thus paid twice for their power, once for the actual cost of the power they consumed, and once for the costs of the powerplant that was supposed to provide them with service, but in fact was not operating.

3) The Senate amendments give the PUC added administrative flexibility, in scheduling the hearings on its investigation. 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.

Bill Julian
445-4246
5/27/86:auc

Exhibit D

MAY 18 1990

ASSEMBLY BILL 2805
(As Amended April 16, 1990)

Assembly Member Hauser

This bill would amend provisions in Section 455.5 of the Public Utilities Code which requires the California Public Utilities Commission ("CPUC") to institute an investigation whenever a facility has been "out of service" for nine consecutive months. The purpose of the required investigation is for the CPUC to determine if the facility should be removed from ratebase and if related expenses should be disallowed.

The bill would not prohibit such an investigation by the CPUC, but it would clarify the term "out of service" so that an investigation would not be mandated when a facility is experiencing a planned outage scheduled in advance and of predetermined duration. A temporary facility shutdown under these circumstances was not understood to be within the intent of the original legislation which established PUC Section 455.5 requirements.

The Southern California Edison Company supports AB 2805 for the following reasons:

1. The requirement for a CPUC investigation whenever a facility has been shutdown for nine consecutive months, regardless of the reason, places an unwarranted, and unintended, burden on the utility and on the CPUC. Planned outages scheduled in advance and of predetermined duration should be excluded from the nine-month duration.

2. The costs associated with extended facility shutdown periods, whether or not they exceed nine consecutive months in duration, already are subject to CPUC reasonableness review. Where incentive programs have been established concerning capacity factors, as for example in the case of nuclear plants, the utility is already placed at risk as a result of extended shutdown periods.

3. A facility which is undergoing a planned outage of predetermined duration and is undergoing active work to complete required maintenance, modification, or refueling has not been placed "out of service," as would be the case if no such work were being performed. The shutdown should be conducted in whatever manner is most efficient and effective, and should not be arbitrarily limited to less than nine months. (Multiple, shorter outages may be less cost-effective than fewer, longer duration outages, for example).

DGM:db
5/15/90