



PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

FILED
10-26-15
02:40 PM

October 26, 2015

Agenda ID #14401
Ratesetting

TO PARTIES OF RECORD IN INVESTIGATION 12-10-013, ET AL.:

This is the proposed decision of ALJ Darling. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's December 3, 2015 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

/s/ AMY YIP-KIKUGAWA for
Karen V. Clopton, Chief
Administrative Law Judge

KVC;jt2

Attachment

Decision PROPOSED DECISION OF ALJ DARLING (Mailed 10/26/2015)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

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

And Related Matters.

Application 13-01-016
Application 13-03-005
Application 13-03-013
Application 13-03-014

DECISION AFFIRMING VIOLATIONS OF RULE 8.4 AND RULE 1.1 AND IMPOSING SANCTIONS ON SOUTHERN CALIFORNIA EDISON COMPANY

Table of Contents

Title	Page
DECISION AFFIRMING VIOLATIONS OF RULE 8.4 AND RULE 1.1 AND IMPOSING SANCTIONS ON SOUTHERN CALIFORNIA EDISON COMPANY	1
Summary	2
1. Background.....	4
1.1. The August 5, 2015 Ruling and Order to Show Cause.....	7
2. Applicable Law	8
3. Standard of Proof.....	9
4. Challenges to the August 5, 2015 Ruling	10
5. Discussion.....	12
5.1. Violations of Rule 8.4.....	13
5.1.1. Rule 8.4 Violations Not Affirmed	23
5.2. Violations of Rule 1.1.....	25
5.2.1. SCE’s Statements and Submission Regarding the Poland Meeting	26
5.2.2. Testimony by SCE’s President Mr. Litzinger	30
6. Penalties and Sanctions.....	33
6.1. Five-Part Test.....	35
6.1.1. What Harm is Caused by the Violation	35
6.1.2. Utility’s Conduct in Preventing, Detecting, Correcting, Disclosing, and Rectifying the Violation.....	38
6.1.3. Commission Precedent.....	40
6.1.4. Amount of Fine or Penalty Will Achieve Objective of Deterrence ..	43
6.1.5. Totality of Circumstances.....	44
6.2. Conclusions re Penalties and Sanctions.....	46
7. Oral Argument.....	49
8. Comments on Proposed Decision	49
9. Assignment of Proceeding	49
Findings of Fact.....	49
Conclusions of Law	53
ORDER	56

Attachment 1 - Notes

DECISION AFFIRMING VIOLATIONS OF RULE 8.4 AND RULE 1.1 AND IMPOSING SANCTIONS ON SOUTHERN CALIFORNIA EDISON COMPANY**Summary**

This decision affirms eight violations of Rule 8.4 of the Commission's Rules of Practice and Procedure (Rules) by Southern California Edison Company (SCE) stemming from failure to report, before or after, ex parte communications which occurred between an SCE executive(s) and a Commissioner. In addition, this decision finds that SCE twice violated Rule 1.1, the Commission's Ethics Rule, as a result of the acts and omissions of SCE and its employees which misled the Commission, showed disrespect for the Commission's Rules, and undermined public confidence in the agency.

To reach the conclusions in this decision, we repeated the discussion and weighing of the evidence and arguments contained in the Administrative Law Judge's Ruling and Order to Show cause (OSC),¹ as modified by information submitted by SCE and other parties in response to the OSC. Due to these rule violations, the decision imposes a total financial penalty on SCE of \$16,740,000. This decision affirms, in part, the Ruling and OSC² which initially found ten violations of Rule 8.4 of the Commission's Rules by SCE.

The single biggest penalty of \$16,520,000 is based on finding that a continuing Rule 1.1 violation was set in motion by Mr. Pickett's grossly negligent failure to accurately and timely report his ex parte communications in Warsaw,

¹ Issued August 5, 2015.

² Amended Administrative Law Judge's Ruling Finding Violations of Rule 8.4, Requiring reporting of Ex Parte Communications, and Ordering SCE 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 (Ruling and OSC) (August 5, 2015).

Poland with former President Peevey. This conduct triggered other misleading acts and omissions by SCE from the date it should have filed the notice of the March 26, 2013 meeting through July 6, 2015, the last date in which SCE repeated Mr. Pickett's misleading statements.³ As described in more detail in Section 6.2, the decision also imposes \$190,000 in fines on SCE for the violations of Rule 8.4 related to unreported ex parte communications, and \$30,000 for the other Rule 1.1 violation related to Mr. Litzinger's false statement about ex parte communications.

In addition, this decision orders SCE to immediately develop a public website tracking of all non-public individual communications which occur after this decision is adopted related to the SONGS OII (and consolidated proceedings) by SCE representatives with Commissioners, and/or their advisors, and/or CPUC decisionmakers (as defined by Rule 8.1(b)). The log, *inter alia*, will identify all participants, the relevant SONGS OII or consolidated proceeding(s), date, length of time, location, whether written materials were used, and an ex parte notice was filed. It is our expectation that this sanction will result in added scrutiny by SCE of its communications with Commissioners, advisors, and decisionmakers, and lead to a change in attitude and culture at SCE in favor of robust disclosure.

³ SCE's response to Ruling and OSC at 20 (It was not misleading to submit Mr. Pickett's declaration, even if it is was not complete).

1. Background

On January 31, 2012, the San Onofre Nuclear Generating Station (SONGS), operated by majority owner Southern California Edison Company (SCE),⁴ experienced a leak of contaminated steam and immediately stopped operations.

On October 25, 2012 the Commission issued an Order Instituting Investigation (OII) into the rates, operations, practices, services and facilities associated with SONGS Units 2 and 3.⁵ The OII was subsequently consolidated with other SONGS cost-related proceedings. The parties litigated early phases, evidence and argument were submitted, but no decision was adopted related to these phases. SCE permanently shut down the facility as of June 7, 2013, leaving questions about the extent of reasonable cost recovery from ratepayers for many different types of outstanding expenses.

On April 3, 2014, SCE, San Diego Gas & Electric Company (SDG&E), Office of Ratepayer Advocates (ORA), The Utility Reform Network (TURN), Friends of the Earth, and Coalition of California Utility Employees, (collectively “Settling Parties”) filed and served a Joint Motion for Adoption of Settlement Agreement which purported to resolve all issues for the consolidated proceedings.

Although not an all-party settlement, the Commission approved an amended settlement agreement in Decision (D.) 14-11-040 which provided resolution of the disputed cost allocation/rate recovery issues related to the Replacement Steam Generators (RSG) and the premature shut down of SONGS.⁶

⁴ SCE owns approximately 78% of SONGS, San Diego Gas & Electric Company (SDG&E) owns approximately 20%; and the City of Riverside owns a small fractional share.

⁵ The OII was issued pursuant to Cal. Pub. Util. Code § 455.5; unless otherwise indicated future references to “Section” or “§” refer to the Pub. Util. Code.

⁶ D.14-11-040 was issued November 20, 2014.

On February 9, 2015, SCE late-filed a Notice of Ex Parte Communication (Late Notice) regarding a meeting that occurred on or about March 26, 2013 between SCE's then-Executive Vice President Stephen Pickett and CPUC's then-President Michael Peevey at an industry conference in Warsaw, Poland (Poland Meeting). In the Late Notice, SCE stated it initially viewed the contact as not an "ex parte communication" between SCE and a Commissioner as defined by § 1701.1(c)(4), and therefore, not reportable. However, SCE stated it eventually decided to late-file the notice based on more information from Mr. Pickett.

SCE claims that former President Peevey initiated a one-sided communication with Mr. Pickett for a possible framework for resolution of the OII, subject to agreement by some parties and the full Commission.⁷ SCE states Mr. Pickett made no response, but admits he took notes (Notes) of President Peevey's comments about some possible cost allocations in a settlement if SONGS were to permanently shut down. SCE states former President Peevey took and kept them.⁸ The Notes came to light in April 2015 when they were submitted in connection with litigation in federal court initiated by a non-settling party.⁹ On April 13, 2015, SCE filed a Supplement to its Late Notice to include a copy of the Notes, which are attached hereto as Attachment 1.

⁷ SCE's Late Notice (February 9, 2015) at 1.

⁸ *Ibid.* (Apparently, the Notes were obtained during a records search at President Peevey's home by the office of California's Attorney General); SCE's Response to ALJ Ruling (April 29, 2015) (SCE's First Response), Appendix F, Pickett Declaration at 1-2 (¶7, ¶11).

⁹ SCE states it first received the Notes from the Commission's Legal Division on April 10, 2015.

Alliance for Nuclear Responsibility (A4NR) filed a motion in February 2015 asking the Commission to investigate the Late Notice and consider sanctions against SCE related to the late-reported Poland Meeting. On April 14, 2015, the Administrative Law Judge (ALJ) issued a Ruling¹⁰ directing SCE to provide all documents pertaining to unreported communications between March 2013 and November 2014, which referenced, or were themselves, communications with decisionmakers, particularly related to the proposed, or amended, settlement agreement approved by the Commission in November 2014.

On April 29, 2015, SCE submitted hundreds of pages of internal and external communications (primarily e-mails and documents related to previously approved settlements for out-of-service generation facilities), and voluntarily expanded the disclosure period from March 2013 back to October 25, 2012, the date the OII commenced.¹¹

With its first set of responsive documents, SCE submitted declarations by Mr. Litzinger¹² and by Mr. Pickett. Mr. Pickett's declaration expands on his memory of the Poland Meeting, his asserted lack of response to President Peevey's comments on settlement, his subsequent internal SCE communications about the meeting, and communications made with President Peevey during "special or other occasions" after the Poland trip.¹³ After SCE disclosed the

¹⁰ ALJs' Ruling Directing SCE to Provide Additional Information Related to Late-filed Notices of Ex Parte Communications (ALJ's first Ruling) (April 14, 2015).

¹¹ SCE's Response to ALJ's first Ruling (April 29, 2015).

¹² Mr. Ron Litzinger was then President of SCE.

¹³ SCE's Response to ALJ's first Ruling, Appendix F, Pickett Declaration at 3 (¶¶13-18).

e-mails and documents, A4NR amended its motion to seek sanctions for more than 70 communications which A4NR characterized as unreported ex parte communications.

On June 26, 2015, the ALJ issued a second ruling requesting SCE to provide supplemental information to clarify its earlier responses. SCE responded on July 3, 2015 and submitted 34 pages of additional e-mails and information.

1.1. The August 5, 2015 Ruling and Order to Show Cause

On August 5, 2015, based on SCE's admissions, the ALJ ruled that SCE committed ten separate violations of Rule 8.4 by failing to report oral and written communications between SCE and CPUC decisionmakers which met the definition of "ex parte communication."¹⁴ In addition, the Ruling and OSC aggregated preliminary evidence from which the Commission might reasonably infer that SCE had violated Rule 1.1 related to acts or omissions by SCE and two of its executives, Mr. Pickett and Mr. Litzinger.

The ALJ Ruling included an Order to Show Cause why:

- a) [SCE] should not be held in contempt of the Commission and sanctioned for ten violations of Rule 8.4;
- b) [SCE] should not be found to have violated Rule 1.1 on one or more occasions; and
- c) if Rule 1.1 violations are established, why SCE should not be held in contempt of the Commission and sanctioned.

¹⁴ Amended ALJ's Ruling Finding Violations of Rule 8.4, Requiring Reporting of Ex Parte Communications, and Ordering SCE to Show Cause Why It Should Also Not Be Found in Violation of Rule 1.1 and be Subject to Sanctions for All Rule Violations (ALJ Ruling and OSC) at 35-39.

SCE and other parties were invited to submit a statement on these issues by August 20, 2015. In addition to SCE, other parties who filed a timely statement are A4NR, ORA, and Ruth Henricks.

Due to the procedural posture of the consolidated proceedings, including an adopted decision, the ALJ bypassed issuing a ruling on the OSC and certifying it for an interim decision. Instead, the ALJ prepared a Proposed Decision for final consideration by the whole Commission.

2. Applicable Law

The applicable law consists of § 1701.1(c) and § 1701.3(c), and Rules 8.1(c), 8.3(c) and 8.4 which define ex parte communications, limit and condition ex parte communications in ratesetting proceedings, and establish reporting requirements. Of particular relevance are the elements of an ex parte communication.

Pursuant to § 1701.1(c)(4) and Rule 8.1(c), an "ex parte communication" means:

Rule 8.1... (c) a written communication (including a communication by letter or electronic medium) or oral communication (including a communication by telephone or in person) that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person and a decisionmaker, and
- (3) does not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding.

Communications regarding the schedule, location, or format for hearings, filing dates, identity of parties, and other such nonsubstantive information are procedural inquiries, not ex parte communications.

In addition, we apply Rule 1.1:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

Statutes and precedents related to our consideration of penalties for rule violations are discussed separately in Section 6 below.

3. Standard of Proof

It is well-settled that the applicable standard of proof for violation of a Commission rule is a “preponderance of the evidence,”¹⁵ i.e., the probability of truth, or of evidence that when weighed with that opposed to it, is more convincing with all reasonable inferences to be drawn therefrom.¹⁶ The Commission is permitted to draw reasonable inferences from the record, as well as determine the credibility of witnesses and the weight to be given their testimony.¹⁷

¹⁵ See, e.g., D.15-08-032, 2015 Cal PUC LEXIS 521 (August 27, 2015) at *53; D.15-04-021, 2015 Cal PUC LEXIS 228 (April 9, 2015) at *40; D.11-09-001, 2015 Cal PUC LEXIS 409 (September 8, 2011) at *8; D.00-10-038, 2000 Cal PUC LEXIS 1113 (October 10, 2000) at *9; D.94-11-018, 1994 Cal PUC LEXIS 1090 (57 CPUC2d 176) (November 9, 1994) at *30.

¹⁶ "Preponderance of the evidence" is usually defined in terms of probability of truth, or of evidence that when weighted with that opposed to it, has more convincing force and greater probability of truth with consideration of both direct and circumstantial evidence and all reasonable inferences to be drawn from both kinds of evidence. (Lone Pine Nurseries, Cal/OSHA App. 00-2817, Decision After Reconsideration (Oct. 30, 2001), citing Leslie G. v. Perry & Associates (1996) 43 Cal.App. 4th 472, 483, review denied.)

¹⁷ See, e.g., *Lorimore v. State Personnel Board* (1965) 232 Cal.App.2d 183, 189 (The Court of Appeal affirmed that “if findings [of an administrative agency] are based on inferences

Footnote continued on next page

4. Challenges to the August 5, 2015 Ruling

ORA and A4NR reject most of the ALJ's analysis in the Ruling and OSC which resulted in far fewer violations established than what these parties requested. To some extent, their views reflect a different interpretation of the rules, but their views also show dissatisfaction with the current law and/or the parameters of this OSC.¹⁸ We acknowledge that some party comments helpfully pointed out some unartful language and analysis in the ALJ's Ruling, which has been corrected, clarified, or not affirmed in this decision.

Both parties stay focused on § 1701.3(c) which begins, "Ex parte communications are prohibited in ratesetting cases." "However," the statute continues, some ex parte communications are permitted under certain conditions. We do not read the first sentence alone, but as a guide towards careful application of the identified conditions to the few permitted exceptions.

More as a matter of policy, both parties argue that every communication in which a decisionmaker participates is an ex parte communication, instead of applying the criteria set forth in § 1701.1 and Rule 8.1. Neither party (1) explains why the Legislature intentionally adopted a specific definition which does not include the universe of all sorts of communications, nor (2) offers the Commission a legal basis to ignore the statutory language.

ORA mistakenly claims the Ruling permits utilities to have free access to decisionmakers under the guise of a "one-way" communication. "One-way" (i.e., a decisionmaker speaks to a party about a substantive issue in a formal

reasonably drawn from the record, an administrative order is considered to be supported by substantial evidence in light of the whole record and will not be reversed").

¹⁸ For example, ORA seeks remedies unavailable here (e.g., rescind D.14-11-041, place withdrawn Phase 1 PD on the Commission agenda, etc.).

proceeding and the party purportedly remains silent) does not appear in the statute or rule. However, one requirement for an ex parte communication, pursuant to § 1701.1(c) and Rule 8.1 (c), is that the communication must be “between” the interested person and the decisionmaker. The Ruling and OSC found that “between” requires some form of interaction, and the evidence was that SCE, some practitioners, and at least some Commissioners have shared this view. It is informative that no evidence was submitted to show that parties have historically filed notices of so-called “one-way” communications.

Therefore, we find this interpretation in the Ruling and OSC to be reasonable. The Legislature is able to craft a statute to expand reporting to include solitary statements by a decisionmaker, should it choose to do so, or to modify the reporting to require a more complete summary of the input by all participants.

In the interest of improving transparency, the Ruling clarified that, under the current rules almost any response (other than “I can’t talk about it”) creates a communication between individuals, as “between” is used in § 1701.1 and Rule 8.1. We affirm this view.

Lastly, Ruth Henricks filed an “Objection to the OSC” which combines a restatement of her objections to the adopted decision, and unsupported speculation about alleged improper conduct by ALJ Melanie Darling. Ms. Henricks requests removal of the ALJ for any of several reasons not fully discussed here. We find no merit to these arguments, and further observe that the claims include misrepresentations of facts.¹⁹ Moreover, her allegations

¹⁹ For example, Ms. Henricks invoked an “ethical cloud” over the ALJ and stated, “...[a] Judge of the San Francisco Superior Court found there to be probable cause to believe a felony had

Footnote continued on next page

related to the ALJ's December 2012 procedural communications with SCE's Mr. Worden, and a short set of e-mails to consider whether SCE should file an ex parte notice as to a few statements, fail to note that a timely filing was made disclosing the communications. This latter set of facts has been previously rejected by the Chief ALJ and the Commission President as a basis to re-assign ALJ Darling.²⁰

5. Discussion

We conclude that SCE violated Rule 8.4 eight times during this proceeding by failing to recognize and disclose ex parte communications pursuant to Rule 8.4. The Commission affirms the findings in the Ruling and OSC, based on a preponderance of evidence, because the communications concerned a substantive issue in the SONGS OII, took place between an interested person and a decisionmaker, and did not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding. On the other hand, after careful review of the evidence, explanations, and argument submitted, we do not find sufficient evidence to conclude that unreported ex parte communications occurred on May 29, 2013 or on June 17, 2014. These facts are discussed below in Section 6.1.1.

been committed and that ALJ Darling is in possession of related evidence." She cites "5 June 2015 Search Warrant" but does not attach it or provide information to get it, or disclose the subpoena included many people who worked on SONGS and carries no imputation of misconduct.

²⁰ Chief Administrative Law Judge's Ruling Denying Motion for Reassignment (July 15, 2015) at 2 (The [moving party] does not identify any provision of law or order or rule of the Commission that Judge Darling may have violated, and none is apparent); Ms. Henricks made a previous unsuccessful motion to remove the ALJ for cause, which was denied based on the plain language of Rule 9.4 (see, Chief Administrative law Judge's Ruling Denying Request for Reassignment for Cause (June 26, 2014)).

Furthermore, the Commission concludes that SCE has twice violated Rule 1.1 based on the acts and omissions of SCE and its representatives. Mr. Pickett's failure to accurately describe, or to properly serve notice of the Poland Meeting or reveal the existence of the Notes until they became publicly known by other means, set in motion a series of misleading filings by SCE. As discussed below, we find an additional violation of Rule 1.1 based on the false statement by Mr. Litzinger during his testimony made under oath.

5.1. Violations of Rule 8.4

The Commission has determined that SCE violated Rule 8.4²¹ by not reporting or providing timely notice of the following ex parte communications.

1. March 26, 2013 - At a meeting in Warsaw, Poland, a non-public communication occurred between Mr. Pickett and former President Peevey related to the substantive issue of recovery of the costs of replacement power purchased to cover lost SONGS output, an issue in the SONGS OII. The communication between Mr. Pickett and former President Peevey was not reported until nearly two years later, after a decision had been adopted. SCE acknowledges, as of February 9, 2014, this was a reportable communication. SCE also did not reveal the existence of the Notes until April 2014. Mr. Pickett admits writing the Notes in connection with the ex parte communication, meaning the Notes qualify as written material used during the communication, and subject to ex parte notice and disclosure. SCE neither attempted to serve notice of the ex parte communication nor a copy of the Notes, although written communications must be served on all parties the same day as required by Rule 8.3(c)(3). Although former President Peevey apparently kept the Notes and Mr. Pickett reported that he did not retain a copy, the existence of the Notes used during the communication should have been reported pursuant to Rule 8.4(c).

²¹ See also, § 1701.3.

2. March 27, 2013 – During dinner on the following night at the Poland conference, a non-public communication occurred between Mr. Pickett and former President Peevey about substantive issues associated with potential allocation of some costs to be determined in the SONGS OII. It is reasonable to infer from the evidence, that Mr. Pickett continued communication with former President Peevey, including an internal e-mail he wrote stating he was “working” SONGS at the dinner.²² Mr. Pickett also admitted discussing possible settlement partners with Peevey.²³ Pickett’s later statement that he did not recall discussing SONGS is less reliable than his contemporaneous internal e-mail.

SCE argues it is “implausible” a substantive discussion occurred for several reasons, none of which we find persuasive. SCE provided a declaration from a Mr. Mason,²⁴ who stated the dinner celebrated his wedding anniversary and was organized by former President Peevey. Although Mr. Mason stated he sat next to former President Peevey and did “not recall any discussion about SONGS,” he also admits he was taken by surprise by the noisy dinner which was attended by 15-20 people making speeches and toasts.²⁵ Given the admitted noisy distractions and his friendship with former President Peevey, we give this declaration little weight. Similarly, Mr. Pickett’s credibility is adversely impacted by his inconsistent statements, the Randolph declaration, and by his initial failure to report the actual nature of the March 26 meeting.²⁶

²² SCE Response to second ALJ Ruling at #00282.

²³ SCE Response to first ALJ Ruling, Appendix D at #00186.

²⁴ Mr. Mason was the president and CEO of the California Foundation on the Environment and the Economy which sponsored the Poland meeting.

²⁵ SCE’s Response to OSC, Appendix B, Mason Declaration.

²⁶ See also, Order to Show Cause (issued simultaneously) at Attachment A (Declaration of Edward Randolph).

These facts and reasonable inferences support the conclusion that this communication constituted an unreported, non-public ex parte communication between Mr. Pickett and former President Peevey about a substantive issue in the OII.

3. May 28, 2013 – Mr. Starck²⁷ sent one e-mail to all five Commissioners which included an SCE press release containing substantive and argumentative content about the reasonableness of SCE’s actions related to the design of the RSGs, a substantive issue in the OII.²⁸ Although Phase 3 had not yet begun, the Preliminary Scope in the initial OII and the Phase 1 scoping memo clearly indicated that the prudence of SCE’s actions related to the RSG design was likely to be a factor in determining whether SGRP and other costs, including post-shutdown repairs, were reasonable. SCE did not serve the press release on all parties the same day as required by Rule 8.3(c)(3), therefore it should have been reported pursuant to Rule 8.4(c).

SCE argues that forwarding the press release was not a reportable communication because it was “a public action occurring in the context of well-publicized events,” and SCE did not have the “intent to influence the outcome of disputed issues in the OII.” These arguments are not persuasive. First, neither the language of § 1701 nor Rule 8.4 require proof of intent to establish a violation.²⁹ In addition, the communication to all Commissioners of SCE’s written press statement which addresses substantive SONGS issues is not a “public” event that is visible to the other parties. Furthermore, it is unreasonable to infer that SCE sent the press statement to Commissioners as a

²⁷ Les Starck was SCE’s former Senior Vice President Regulatory Policy & Affairs.

²⁸ SCE Response to first ALJ Ruling, Appendix D at #00188-189.

²⁹ See, e.g., *Pacific Gas & Electric Co. v. Public Utilities Com.*, 237 Cal. App. 4th 812, 853 (as to Rule 1.1).

sort of “FYI” without comprehending it made arguments about SCE’s culpability for the RSG design, and without service to other parties.

These facts and reasonable inferences support the conclusion that the e-mail and attachment constitute an unreported, non-public ex parte communication between SCE and the Commissioners on a substantive issue in the OII.

4. June 26, 2013 – The non-public communication between Mr. Litzinger³⁰ and Commissioner Florio about the substantive issue of employee severance costs is described by SCE as a “brief update on the status of bargaining efforts with respect to the severance of SONGS employees” after announcement of the permanent shutdown of SONGS.³¹ The question of SCE’s employee compensation commitments and cost recovery of employee severance costs relate to substantive issues in the OII because the reasonableness of these expenses would be considered by the Commission when reviewing 2013 SONGS Operations and Maintenance (O&M) expenses in Phase 3 or later.

In response to the OSC, SCE submitted a new declaration by Mr. Litzinger in which he states (i) they did not discuss any actual costs or cost recovery; (ii) the information was limited to the facts that SCE’s negotiations with its labor unions “were ongoing and would be completed within the next few months;” and (iii) Mr. Litzinger thought Commissioner Florio would want to know the timetable for the labor negotiations because he was working on the schedule for the OII.³² The declaration is unpersuasive. First, the non-public information exchanged between Mr. Litzinger and Commissioner Florio was not relevant to

³⁰ Mr. Litzinger was SCE’s President at the time.

³¹ SCE’s Response to first ALJ Ruling, Appendix C at 26 (¶14).

³² SCE’s Response to OSC, Appendix A (Litzinger Declaration) at ¶3.

the pending scoping memo for Phase 2.³³ Second, the fact of, and timetable for, negotiations about potentially recoverable and significant employee severance costs involved substantive issues to be considered in the OII that should have been disclosed to other parties.

These facts and reasonable inferences support the conclusion that this communication constituted an unreported, non-public ex parte communication between SCE and Commissioner Florio on a substantive issue in the OII.

5. September 6, 2013 – During a non-public lunch meeting between former President Peevey, Mr. Litzinger, and “the [SCE] Chino Hills team,” a communication about a substantive issue occurred between Mr. Litzinger, Mr. Starck and former President Peevey related to SCE’s cost recovery claims for replacement power and capital investment at SONGS. SCE states that former President Peevey told Mr. Litzinger that SCE’s 2012 ERRA³⁴ proceeding regarding replacement power costs would not be resolved until a settlement was adopted in the SONGS OII.³⁵ In an internal SCE email, Mr. Starck states that (i) Mr. Litzinger responded to former President Peevey, “[I]t would be a combination of disallowances of capital investment and replacement power costs;” and (ii) that Mr. Starck told former President Peevey that delay of the ERRA decision placed SCE in a “difficult financial situation” and SCE was “undercollecting \$100 million each month.”³⁶

SCE submitted Mr. Litzinger’s new declaration in support of its claim his communication took “less than two minutes” and was not substantive.

³³ Phase 2 Scoping Memo regarding § 455.5 was issued July 31, 2013; Employee severance costs were expected to be reviewed much later in the OII (a possible Phase 4 based on the Phase 1 Scoping Memo).

³⁴ SCE’s 2013 Energy Resource Recovery Account forecast proceeding, Application (A.) 12-08-001; See, D.13-10-052 (deferring SONGS-related costs).

³⁵ SCE Response to first ALJ Ruling, at 27 (¶16).

³⁶ *Id.* Appendix D at #00201.

However, Mr. Litzinger essentially admits that he made a similar statement but that it was in an effort to not discuss the topic with former President Peevey.³⁷ Despite Mr. Litzinger's claim that his reply was just "stating the obvious," when SCE's President contrasted his position with that of former President Peevey on a substantive issue in a non-public meeting, it became a reportable ex parte communication. Mr. Starck's contribution to the ex parte communication was argumentative and included an important fact about the substantive issue of SONGS replacement power costs.

These facts and reasonable inferences support the conclusion that this meeting included an unreported, non-public ex parte communication between SCE executives and former President Peevey about a substantive issue in the SONGS OII.

6. November 15, 2013 - During a non-public dinner meeting between Mr. Craver³⁸ and former President Peevey, an ex parte communication occurred between them related to SCE's efforts to (i) bring Mitsubishi Heavy Industries (MHI), the RSG vendor, to the negotiating table regarding SCE's warranty claim; and (ii) gain written support from federal officials.³⁹ Third party recovery relates to substantive issues in the OII. (Mr. Craver also sent a follow-up email to former President Peevey which included copies of three letters from federal officials to either the U.S. Ambassador to Japan or the U.S. Trade Representative seeking the support of the Japanese government for MHI negotiations with SCE.⁴⁰) Some aspects of SCE's claims against MHI are within the Preliminary Scope of

³⁷ SCE's Response to OSC, Appendix A (Litzinger Declaration) at ¶14.

³⁸ Ted Craver was Chairman, President, and CEO of Edison International, SCE's parent company.

³⁹ SCE's Response to first ALJ Ruling, Appendix C at 27 (¶17).

⁴⁰ *Id.* Appendix C at #00016 -#00022.

“ratemaking issues related to warranty coverage...of SONGS costs.”⁴¹ For example, the diligence of SCE’s actions to pursue alternate sources of funds to cover shutdown-related costs was relevant to the reasonableness of its actions after shutdown. In addition, funds recovered from MHI would be considered by the Commission to offset cost allocations to ratepayers in the final phase allocating costs.

SCE claims it reasonably concluded no ex parte notice was required because it was not clear that pursuit of third-party recoveries was going to be part of the OII. This is not persuasive. SCE relies on a lack of explicit reference to MHI claims in the Phase 1 and Phase 2 Scoping Memos. However, SCE’s analysis is too myopic. Many proceedings are broken into distinct phases due to complexity, availability of evidence, or other considerations. In determining whether a communication involves a “substantive issue,” parties may not ignore issues identified, even generally, in an OII, as part of a future phase in the proceeding. Here, the Commission had issued an OII to examine a range of SCE’s actions and expenditures connected to failure of the RSGs, primarily to determine cost recovery. The scoping memos issued for the first two phases focused on other distinct cost issues, but did not eviscerate the overall scope of the OII.

These facts and reasonable inferences support the conclusion that that Mr. Craver’s communications constituted an unreported, non-public communication between an SCE executive and former President Peevey on a substantive issue in the OII.

7. May 28, 2014 – On or about this date, a non-public ex parte communication occurred between former President Peevey and two

⁴¹ OII at 15.

SCE executives involving the substantive issue of possible changes to the proposed SONGS settlement. SCE described the communication as initiated by former President Peevey who “was not pleased with SCE’s hesitance to contribute economic support” to a particular program at University of California at Los Angeles (UCLA).⁴² Further, SCE disclosed an email from that date by Mr. Hoover⁴³ to Mr. Nichols,⁴⁴ which stated in relevant part,

...[Peevey] doesn’t understand why we will not fund the UC data analysis program. He said Florio is supportive...[Peevey] says he has talked to you and Ron about it and he is frustrated....”⁴⁵ [Peevey] wanted me to “pass along that SONGS is on a ‘tight schedule’ and [Peevey] would hate to see it slip.”⁴⁶

SCE argues it is not reasonable to infer from this admission that a communication about a substantive issue occurred between SCE executives and former President Peevey. Instead, SCE links this communication to violation 8 below and dismisses them both as simply part of former President Peevey’s “campaign to convince SCE to modify the settlement to add a provision for funding greenhouse gas (GHG) research at the University of California. SCE steadfastly refused to engage on this topic with President Peevey”⁴⁷

In contrast to other rebuffs of former President Peevey seen in SCE’s internal e-mails, it is reasonable to infer from this language that at least some

⁴² SCE Response to first ALJ Ruling, Appendix C at 31 (¶26).

⁴³ Mr. Hoover was then SCE’s Director of State Energy Regulations.

⁴⁴ Mr. R.O. Nichols was then SCE’s Senior Vice President for Regulatory Affairs.

⁴⁵ SCE Response to first ALJ Ruling, Appendix D at #00223.

⁴⁶ *Ibid.*; See also, Appendix D at #00224 (May 29, 2014 e-mail from Mr. Hoover to Mr. Nichols “...Mike is in no way linked SONGS with funding for UCLA....”).

⁴⁷ SCE’s Response to OSC.

back-and-forth occurred between former President Peevey and one or more SCE executives. For example, former President Peevey expressed awareness that SCE had decided not to fund the project he requested. It is reasonable to infer that someone from SCE told him---something different than SCE's representative simply saying he will not discuss it.

These facts and reasonable inferences support the conclusion that an unreported, non-public communication occurred between one or more SCE executives and former President Peevey on the substantive issue of a potential modification to the SONGS OII settlement agreement.

8. June 11, 2014 - During a non-public meeting, an ex parte communication occurred between former President Peevey and one or more SCE executives involving the substantive issue of a possible modification to the proposed SONGS settlement agreement. SCE states that former President Peevey called Mr. Hoover to his office, "raised the issue of SCE making a contribution to UC for GHG research," and asked Mr. Hoover to deliver his personal note to Mr. Litzinger⁴⁸ along with other letters from local elected officials urging the Commission to support GHG research.⁴⁹ A series of SCE's internal emails on June 11 show that Mr. Hoover conveyed the letters to Mr. Litzinger, along with a message that former President Peevey wanted to "see [Litzinger] right away."⁵⁰ In one email to Mr. Nichols, Mr. Hoover states that "he [Peevey] is lowering the ask to \$3 million. He talked with Ron last week."⁵¹ Mr. Hoover confirmed that "Ron" refers to Mr. Litzinger.

⁴⁸ Former President Peevey's note read, "Ron -Support for GHG reduction efforts in SoCal from Garcetti, et al."

⁴⁹ SCE's Response to first ALJ Ruling, Appendix C at 31 (¶28); see also, Appendix D at #00248 - #00250; Mr. Hoover's e-mails offer no indication that he communicated anything other than he would convey the materials and message to Mr. Litzinger).

⁵⁰ *Id.* Appendix D at #00248 - #00250.

⁵¹ *Ibid.* at #00250.

SCE argues it is unreasonable, and contrary to fact, to infer that a substantive communication occurred between former President Peevey and Mr. Litzinger. Instead, SCE contends that the e-mails reference a continuation of an effort begun during a June 4 telephone call by former President Peevey to discuss with Mr. Litzinger a contribution to UC for GHG research;⁵² SCE asserts that Mr. Litzinger then declined to discuss the SONGS settlement.⁵³ SCE states that when former President Peevey again asked Mr. Litzinger to commit to the GHG project, Mr. Litzinger stated he “was not in a position to” and that the board would have to approve the amount. Former President Peevey then offered to lower the amount requested.

From this evidence, it is reasonable to infer there was a non-public unreported communication between former President Peevey and Mr. Litzinger. The communication addressed the substantive issues of terms and conditions of a possible new program as an addition to the OII settlement. It is more likely true than not that such a discussion occurred between the participants, in part because an SCE e-mail confirms a Peevey-Litzinger meeting on the UCLA GHG proposal, and former President Peevey then promptly made a significant change to the funding terms of his proposed program.⁵⁴

These facts and reasonable inferences support the conclusion that an unreported, non-public communication occurred between one or more SCE

⁵² SCE’s Response to OSC at 16.

⁵³ *Ibid.*

⁵⁴ The public officials’ letters may also have been unreported ex parte communications but are not at issue as to SCE.

executives and former President Peevey on the substantive issue of potential modifications to the settlement agreement.

5.1.1. Rule 8.4 Violations Not Affirmed

Below we explain why we do not affirm violations of Rule 8.4 initially identified in the Ruling and OSC, for the following two instances:

1. May 29, 2013 – The ALJ initially found that during a non-public meeting, an ex parte communication occurred between Mr. Hoover and former President Peevey’s Chief of Staff, Carol Brown, most likely involving the substantive issue of a possible SONGS settlement.

The non-public communication between Mr. Hoover and Ms. Brown, occurred on the same day as SCE’s unreported transmission to Commissioners of SCE’s written press statement involving substantive issues in the OII. According to SCE’s internal e-mails, after talking with Ms. Brown, Mr. Hoover reported to Mr. Starck that she said Mr. Pickett was “well prepared in Poland with specifics,” but complained that “nothing has happened.”

However, SCE argues it is unreasonable to conclude a substantive issue was discussed because there is no evidence about the subject matter of the communication. SCE also submitted a declaration from Mr. Hoover in which he states he does not recall discussing the press release with Ms. Brown or responding to her comments about the Poland meeting.

We acknowledge that Mr. Hoover’s sworn declaration, although not conclusive, offers a reasonable alternative inference that the elements of an ex parte communication are not present. Therefore, based on further review, we find there is insufficient evidence to establish that an unreported, ex parte communication occurred between Mr. Hoover and Ms. Brown.

2. June 17, 2014 - The ALJ initially found that during a non-public meeting, an ex parte communication occurred between

former President Peevey and Mr. Craver involving the substantive issue of a possible modification to the proposed SONGS settlement agreement.

SCE explained that former President Peevey attended a meeting at SCE that day with a large group of people on a matter unrelated to SONGS.⁵⁵ The evidence includes SCE's disclosure of two June 17 e-mails between Mr. Hoover and another employee with the subject line, "Ted just came and got Mike Peevey." In the first, Mr. Hoover wrote, "Interesting....." In the second, the sender replies to Mr. Hoover, "Peevey came back. RO says the mtg was about UCLA." SCE also stated that former President Peevey initiated the meeting with Mr. Craver, "raised the issue of SCE making a voluntary contribution to UC for greenhouse gas (GHG) research," but "Mr. Craver responded that he could not engage in substantive conversation on that topic..."⁵⁶

SCE argues it is unreasonable, and contrary to fact, to infer that a substantive communication occurred between former President Peevey and Mr. Craver. According to SCE, Mr. Craver not only declined to discuss the issue, he told former President Peevey that he was acting on advice of counsel. This description also is found in the April 29, 2014 Litzinger Declaration.

Two uncontested facts support an alternative inference: the next day, former President Peevey telephoned, and then met with, Mr. Ron Olson, an attorney and former board member at SCE and EIX, who affirmed that SCE could not engage with a Commissioner about the pending SONGS settlement.⁵⁷

⁵⁵ SCE's Response to ALJs' first Ruling at 12 (Coalition for Environmental Protection, Restoration and Development).

⁵⁶ *Id.* at 31 (¶29).

⁵⁷ *Id.* at 31-32; SCE's Response to second ALJ Ruling at 5.

It is possible to reasonably infer that SCE's version of events is more likely to be true.

Upon further review of the evidence, and reasonable inferences therefrom, we find there is insufficient evidence to establish that an unreported, non-public communication occurred between Mr. Craver and former President Peevey on a substantive issue.

5.2. Violations of Rule 1.1

SCE was directed to show cause why it had not violated Rule 1.1 in connection with two sets of facts and circumstances described below. Rule 1.1 states, in relevant part, that a party shall "never...mislead the Commission or its staff by an artifice or false statement of fact or law."

The rule does not require a finding of "intention," although intent goes to the weight of the violation.⁵⁸ For example, prior Commission decisions have held that a violation of Rule 1.1 can result from a reckless or grossly negligent act.⁵⁹ There is also a line of Commission decisions which hold that situations involving a failure to correctly cite a proposition of law, a lack of candor or withholding of information, and a failure to correctly inform and to correct the mistaken information, are actionable Rule 1 violations.⁶⁰

⁵⁸ 237 Cal. App. 4th 812, 854 (June 16, 2015); 2015 Cal PUC LEXIS 228, at *381 (April 9, 2015)

⁵⁹ 2015 Cal PUC LEXIS 228 at *180.

⁶⁰ See, e.g., D.93-05-020, D.92-07-084, D.92-07-078, D.90-12-038.

5.2.1. SCE's Statements and Submission Regarding the Poland Meeting

SCE acknowledges it should have promptly filed a notice of the March 26, 2012 ex parte communication, long before the Commission adopted a decision approving a settlement of the OII. We find that SCE also violated Rule 1.1 because its grossly negligent actions and omissions after the undisclosed ex parte communication resulted in (i) a failure to correct the record; and (ii) false and misleading statements made in other documents subsequently filed with the Commission. On this basis, we find that this is a continuing violation.

Notwithstanding early concerns by Mr. Litzinger and Mr. Craver regarding Mr. Pickett's truthfulness,⁶¹ SCE did nothing to probe further about his claimed silence at the meeting, except to ask him again. Indeed, it is difficult to imagine the meeting as described by Mr. Pickett, and believe that this top SCE executive made no comment to the President of the Commission about any of the substantive issues raised. Based on additional evidence, we now conclude this was not the case. Instead, Mr. Pickett privately communicated his opinion about "what a settlement agreement should look like" to a Commissioner while these substantive issues were part of an open proceeding.⁶² Moreover, SCE and Mr. Pickett made no effort to retain or serve the Notes, written material used by SCE as part of an ex parte communication, on all parties. Until challenged by public reports of the Poland Meeting and the Notes, SCE overlooked these questions.

⁶¹ SCE's response to first ALJ Ruling, Appendix D at #00186.

⁶² Ruling and OSC, Attachment A, Randolph Declaration at 1.

When SCE filed the Late Notice in February 2015, it included two of three versions Mr. Pickett and SCE have offered about his actions at the meeting. But, SCE has provided no indication it was troubled by the inconsistencies or had considered looking into whether Mr. Pickett had participated in one or more unreported ex parte communications. SCE's acts and omissions which led to filing of false and misleading statements with the Commission, include:

- In April 2013, Mr. Pickett said he did not speak when former President Peevey talked about issues in Warsaw, Poland on March 26 or 27, 2013 related to the costs of a SONGS shutdown [Version 1];
- SCE did not scrutinize Mr. Pickett's description of the communication before determining no reportable ex parte communication occurred;
- SCE failed to retain a copy of the Notes written by Mr. Pickett with former President Peevey near or at the March 26 meeting.⁶³ (It is undisputed that the Notes include handwriting from both Mr. Pickett and former President Peevey);
- Although Mr. Pickett admits he took notes (Notes) during the communication, no copy of the Notes was disclosed or served on other parties, as required by Rules 8.3(c)(3) and 8.4(c);
- In the Late Notice, SCE only discloses the March 26 communication, and simply reports that former President Peevey kept the Notes and SCE did not have a copy; but SCE does not explain or question Mr. Pickett's failure to retain a copy of the Notes, or to seek a copy to serve on all parties and the Commission;

⁶³ The Notes are attached hereto as Attachment 1.

- SCE did not disclose until April 29, 2015 that Mr. Pickett had created a recollected version of the Notes just a few days after the Poland Meeting;⁶⁴
- In the Late Notice, SCE states Mr. Pickett now “believes that he expressed a brief reaction to at least one of Mr. Peevey’s comments.” [Version 2];
- In its April 29, 2015 submission, SCE restated that it was only former President Peevey who spoke about a framework for a possible resolution of the SONGS OII;⁶⁵
- SCE submitted Mr. Pickett’s April 28, 2015 declaration in which he continued to assert that former President Peevey did the talking and that he did not react or respond, with one exception: “I briefly expressed disagreement” with a statement by former President Peevey that there should be a disallowance of both replacement power and RSG costs.⁶⁶ [Version 3]; and
- Mr. Pickett did not disclose any individual statements he made and maintained the communications regarding shutdown were “in the main, from President Peevey to me.”⁶⁷

SCE’s and Mr. Pickett’s accounts differ with that of Mr. Edward Randolph, Director of the Commission’s Energy Division, who attended the March 26, 2013 meeting and whose declaration is attached to the OSC. According to Mr. Randolph, “President Peevey initiated the meeting for the purpose of encouraging SCE to make a decision soon” as to whether it would restart SONGS or permanently shut down.⁶⁸ Then “a conversation was initiated” and

⁶⁴ SCE’s Response to first ALJ Ruling, Appendix D at #00003.

⁶⁵ *Id.* at 2.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* Appendix F, Pickett Declaration at 3 (¶13).

⁶⁸ Ruling and OSC, Appendix A, Randolph Declaration at 1.

Mr. Pickett stated “what he thought a settlement agreement would look like in the SONGS OIL...”⁶⁹

SCE argues it was not misleading to present Mr. Pickett’s declaration with his recollections of the March 26, 2013 meeting. SCE asserts that Mr. Pickett’s recollection may have been “incomplete” or that Mr. Randolph’s recollection is “incorrect.”⁷⁰ In either event, “a difference in recollection is not a basis to find that SCE misled the Commission....absent any evidence of intentional, reckless, or grossly negligent conduct.”⁷¹ We disagree. Although not required to find that Mr. Pickett acted intentionally, recklessly, or with gross negligence in order to find a violation of Rule 1.1, in this instance, we find that SCE’s series of acts and omissions constitute gross negligence.

First, the Commission places more weight on Mr. Randolph’s statements than Mr. Pickett’s because (1) Mr. Pickett’s credibility is impacted by his inconsistent statements which have not been appropriately examined or explained by SCE, and (2) Mr. Pickett has an interest in not becoming subject to Commission sanction or action by SCE. Mr. Randolph suffers from no such burdens on his duty to be truthful.

Moreover, the violation of Rule 1.1 is not grounded in a mere difference in recollection. Instead, it is an aggregate of choices made by SCE and its employee, Mr. Pickett, which illustrate a pattern of lax oversight and grossly negligent disregard for the Commission’s Rules. The net effect is a series of acts and omissions favoring non-disclosure over disclosure of one-on-one

⁶⁹ *Id.* at 2.

⁷⁰ SCE’s Response to OSC at 20.

⁷¹ *Ibid.*

communications with decisionmakers. We are unpersuaded by SCE's bid for justification because it only had Mr. Pickett to interview. There is no indication that SCE made any attempt to contact former President Peevey, or Mr. Randolph, to clarify the content of the communication or get a copy of the Notes. Nor did SCE acknowledge the possibility of a Rule 8.4 violation and follow-up with Mr. Pickett when he promptly began to take internal steps to develop a potential framework for settlement in the event of a permanent shutdown of SONGS.⁷²

In sum, the Commission finds, based on the evidence, and all reasonable inferences to be derived therefrom, that SCE violated Rule 1.1. SCE's employee made false and misleading statements which masked his provision of opinions and comments to a Commissioner about a possible framework for settlement of the SONGS OII that would otherwise have triggered a duty by SCE to file a notice of the ex parte communication. Thereafter, SCE and Mr. Pickett continued making false and misleading statements in the Late Notice and in response to ALJ requests for information. If undiscovered, their actions would have left the Commission with the false impression that SCE did not have an early discussion with former President Peevey about cost recovery through settlement.

5.2.2. Testimony by SCE's President Mr. Litzinger

Based on the information, e-mails, and other documents provided by SCE, the Ruling and OSC identified the possibility that Mr. Litzinger testified falsely at the May 14, 2014 hearing on the proposed SONGS settlement.⁷³ We find that his testimony is grounds for finding a violation of Rule 1.1 by SCE. In particular, he

⁷² SCE Response to ALJ's first Ruling, Appendix D at #00005.

⁷³ Ruling and OSC at 45.

was asked under oath whether “SCE was having ex parte meetings with the Commissioners” while settlement talks were underway.⁷⁴ Mr. Litzinger responded, “The only ex parte communications I had with Commissioners was following the Phase 1 Proposed Decision. And it was noticed.”⁷⁵

It is accurate that a series of ex parte communications and meetings between Mr. Litzinger and other SCE representatives and three Commissioners and their advisors occurred on December 4, 2013, and were disclosed by an SCE notice filed two days later. On the other hand, Mr. Litzinger’s testimony that these were the only ex parte communications he had during the period of settlement negotiations was not true.

In Section 5.1 above, we found that Mr. Litzinger engaged in two unreported ex parte communications between March 2013 and May 14, 2014.⁷⁶ Although SCE provided a description of these communications in its April 29, 2015 Response, neither Mr. Litzinger’s May 14, 2014 testimony nor his April 29, 2015 declaration disclosed them.⁷⁷ SCE states that it did not then, nor does it now, consider these to be ex parte communications (as defined by § 1701.1(c)(4) and Rule 8.1(c)). Thus, SCE contends Mr. Litzinger testified in good faith based on his understanding that he had not participated in any unreported ex parte communications. SCE further asserts that Mr. Litzinger’s declaration did not

⁷⁴ Reporter’s Transcript (RT) at 2771.

⁷⁵ *Ibid.*

⁷⁶ One ex parte communication occurred between Mr. Litzinger and Commissioner Florio on June 26, 2013. The other occurred on September 6, 2013 at lunch between Mr. Litzinger, President Peevey, and others.

⁷⁷ SCE’s response to first ALJ Ruling, Appendix G at 2-3 (¶¶8-11).

purport to describe all communications he ever had with decisionmakers, and it would be an unreasonable inference for the Commission to draw.

SCE denies that Mr. Litzinger engaged in intentional, reckless or grossly negligent conduct when he testified. SCE further claims that Mr. Litzinger “subjectively believed that the two communications cited were not reportable” and the belief was reasonable given his reliance on legal counsel and the subsequent nuanced application of Rule 8.4 in the Ruling.

We are persuaded that Mr. Litzinger did not intentionally give false testimony before the Commission or in his declaration. Nor does the evidence imply that he was reckless or grossly negligent. Nonetheless, his testimony was untrue and a lack of intent to deceive does not necessarily avoid a Rule 1 violation. The Commission can and has found a Rule 1.1 violation where there has been false statement which misled the commission.⁷⁸

Here, the Commission was misinformed by Mr. Litzinger’s testimony which, if true and accurate, would have exposed two additional ex parte communications he participated in during the time settlement negotiations were underway. Although the undisclosed ex parte communications do not appear to be lengthy or pithy, and involved general references to two terms of a potential settlement, the Commission and the public rely on witnesses being truthful in our proceedings. Thus, Mr. Litzinger’s testimony deprived the Commission, and the public, of information about SCE’s actions, however limited or informal, to privately communicate its views about two or three possible settlement terms to the Commission’s decisionmakers.

⁷⁸ 2015 Cal. PUC LEXIS 521 (August 27, 2015) D.15-08-032 at *53, fn. 33.

Based on the evidence and the reasonable inferences to be drawn, the Commission finds that Mr. Litzinger's testimony included a false statement which misled the Commission in violation of Rule 1.1.

The Commission takes Rule 1.1 very seriously and requires all participants in our proceedings to testify truthfully and under oath. We especially expect top utility executives to be well-informed about the conduct of the company and its representatives, to model from the top appropriate compliance with Commission Rules, and, if necessary, be able to truthfully say they do not know but will find out.

6. Penalties and Sanctions

In the discussion in Section 5, the Commission finds eight violations of Rule 8.4 by SCE for failing to report ex parte communications, and two violations of Rule 1.1 for misleading the Commission by false statements. Section 2107 provides specific authority to impose monetary penalties for violations of our Rules:

When any public utility fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in a case in which a penalty has not otherwise been provided, it is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars \$50,000 for each offense.

Particularly with respect to ex parte violations, Rule 8.3(j) gives the Commission broader authority to "impose such penalties and sanctions, or make

any other order, as it deems appropriate to ensure the integrity of the formal record and to protect the public interest.”⁷⁹

Pursuant to § 2109, relating to penalties, “[t]he act, omission or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility.” Consequently, this decision imposes penalties and sanctions on SCE for violations committed by its officers, agents, or employees.

In addition, we must determine whether the violations are one-time or continuing. Section 2108 provides, in relevant part, that “every violation of any...rule...of the commission by any corporation or person is a separate and distinct offense, and in the case of a continuing violation, each day’s continuance thereof shall be a separate and distinct offense.” The Commission has had to interpret what “continuing” means through its decisions.

The Commission has previously found continuing violations where there was an ongoing duty such as maintaining equipment safely. For example, SCE identified several illustrative examples, including (i) failure to clean-up an oil spill; (ii) failure to correct conditions that involved unsafe operation of a gas pipeline; and (iii) withholding of required information.⁸⁰ SCE distinguishes these situations from the one-time duty in Rule 8.4 to file a notice of ex parte communication. According to SCE, the Commission has never found that a failure to file an ex parte notice is a continuing violation because the violation is

⁷⁹ See also, § 701 (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).

⁸⁰ SCE Response to Ruling and OSC at 27 - 29 [citing 16 Cal. 3d at 44; see also D.15-04-023; D.13-12-053].

complete when the notice is not filed.⁸¹ SCE urges the Commission to reach that conclusion here.

We are persuaded that the violations of Rule 8.4 found herein, are not continuing violations. However, we decline to foreclose possible circumstances for which a continuing violation might be appropriate. We also conclude there is no legal barrier to finding a Rule 1.1 violation to be continuing, depending on the circumstances. In Section 5.2.1, we found that the Rule 1.1 violation which arose from the failure to properly report the Poland Meeting, is a continuing violation. The other Rule 1.1 violation concerning Mr. Litzinger's testimony about previous ex parte communications is not continuing.

6.1. Five-Part Test

To determine the appropriate penalties and sanctions for these violations, we apply the Commission's established principles used in assessing sanctions, as set forth in D.98-12-075.

6.1.1. What Harm is Caused by the Violation

The severity of the offense includes considerations about types of harm which can result from a rule violation. We discuss these types of harm below.

The Commission typically evaluates an offense based on the degree of economic or physical harm, or the unlawful benefits gained by the utility.⁸² Here, ORA quantified the economic harm to ratepayers of all violations as \$648 million, the difference between the adopted settlement agreement and

⁸¹ *Id.* at 29 [See, e.g., D.14-11-041 (aff'd with dicta in D.15-06-035); D.08-01-021].

⁸² 84 CPUC2d 155, D.98-12-075 at *54.

ORA's original litigation position.⁸³ However, ORA provides no legal reasoning or support for why its original litigation position should be the measure of harm, or remedial penalty, for SCE's unreported ex parte communications.

The Commission has also held that violations which do not involve harm to consumers but instead harm the regulatory process by disregarding statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity. A4NR views SCE's violations as severely harming the integrity of the regulatory process because they reduce or eliminate any impression the proceeding was transparent.⁸⁴

SCE disputes that its failure to report the Poland meeting significantly harmed consumers or the process, "beyond the inherent harm in any rule violation." According to SCE, there is no evidence that the March 26, 2013 communication in Poland adversely affected the settlement, and there is no evidence the meeting influenced the Commission's consideration of the settlement. Similarly, SCE asserts that none of the other alleged unreported communications resulted in more than minimal harm to the regulatory process.

A4NR also raises a due process form of criticism alleging that SCE's decision to not timely report its ex parte communications, especially those by Mr. Pickett in Poland, "prevented other parties from effectively participating in what they believed to be a level playing field."⁸⁵ A4NR's description of missed "effective participation" is vague. Some of the identified issues had been

⁸³ ORA's Response to Ruling and OSC at 13.

⁸⁴ A4NR's Response to Ruling and OSC at 13.

⁸⁵ *Ibid.*

discussed generally in the proceeding and were already known to parties.⁸⁶ Nonetheless, Rule 8.4 provides for “equal time” access by other parties, if SCE was able to obtain individual one-on-one time with a Commissioner without opportunity for others to participate. Other parties did not have that option.

We consider any ex parte violation to be harmful to our agency and its process. In the current context, the disclosure of many little comments which sometimes touched on a substantive issue seems nominal to SCE. But this view undervalues the importance of transparency and disclosure of those individual contacts with decisionmakers at the Commission.

SCE’s violations, particularly not reporting the Poland meeting, meant that other parties lacked the knowledge, however logical, that former President Peevey and some at SCE had begun to consider permanent shutdown and what costs might be covered by a settlement. Additionally, all parties other than SCE were in the dark about former President Peevey’s repeated attempts to obtain SCE’s support (inside or outside the settlement) for a variously described data center or GHG research program at UCLA. Notably, there was little comment from parties about the competitive final GHG research, development, and deployment program included in the amended settlement agreement.

We do not need to determine the impact of the violations, if any, on the settlement negotiations or the final decision adopted in the SONGS proceedings because these issues are part of pending Petitions for Modification.

⁸⁶ For example, the view that SCE should recover replacement power or capital but not both, and growing undercollections for replacement power, were publicly discussed at the Phase 2 Pre-hearing conference in July 2013; RT at 96-97, 129.

More harm to the public attaches to the Rule 1.1 violations. In both instances, SCE representatives misled the Commission, the public, and other parties. We cannot emphasize enough how important it is that witnesses are truthful and accurate when providing information to the Commission, especially under oath. Otherwise, due process and fairness evaporate and the agency's authority and decisions are undermined.

Based on the foregoing, the Commission finds that the Rule violations resulting from SCE's actions and omissions in these proceedings have severely harmed the public's confidence in the Commission, and the integrity of the regulatory process.

6.1.2. Utility's Conduct in Preventing, Detecting, Correcting, Disclosing, and Rectifying the Violation

This factor recognizes the important role of a utility's conduct in preventing the violation, detecting the violation, and disclosing and rectifying the violation.⁸⁷ SCE argues that it has acted reasonably in this matter by (i) checking on Mr. Pickett's description of the Poland meeting; (ii) cooperating with the ALJ's requests for information; (iii) voluntarily expanding the scope of documents produced; and (iv) strengthening its internal procedures, including providing training on Commission's requirements, promoting increased awareness, incorporating more layers of review, and adopting recordkeeping requirements.⁸⁸

⁸⁷ 84 CPUC 2d 155, D.98-12-075 at *56.

⁸⁸ SCE's Response to Ruling and OSC at 1-2.

SCE maintains that it took reasonable steps to verify Mr. Pickett's first description of the Poland Meeting by asking him a second time in April 2013, and again in 2015, whether former President Peevey did all the talking. However, we find this is not much effort. SCE also omits that it undertook the 2015 inquiry after information about the meeting became public. At that point, Mr. Pickett revised his statement, and SCE decided to file the Late Notice. SCE reiterates its belief that the other identified ex parte communications are not reportable, but states it voluntarily disclosed them and the disclosures exceeded the requirements of the ALJ's first Ruling seeking information and documents.

SCE's approach to reporting should have been more robust and favored reporting over non-reporting when it engaged in what it saw as ambiguous communications and matters of first impression. Instead, SCE's primary response to this inquiry and OSC has been to parse the identified communications as "brief" or not "rising to the level" of a reportable substantive communication. SCE should return to § 1701.3(c) which first states, "Ex parte communications are prohibited in ratesetting cases" and to the exceptions which follow. SCE---and all interested persons---should be carefully reading the exceptions and conditions to such prohibited communications in order to conform with the overall intent of transparency advanced by the ex parte statutes and Commission Rules.

SCE does not address its conduct relative to the Rule 1.1 violations. We observe that if SCE had undertaken an effective inquiry before or after Mr. Pickett's Poland Meeting, SCE would not have found itself repeating Mr. Pickett's incorrect statements. SCE offered no comment here about Mr. Litzinger's false testimony, which it also could have prevented. SCE claims that at the time of his testimony, SCE had no knowledge that the violations

identified in this decision were reportable ex parte communications. However, SCE's submissions confirm that he and other SCE executives were often in informal contact with Commissioners, particularly former President Peevey. Mr. Litzinger, as SCE's President, should have been aware that such contacts were occurring and at times becoming ex parte communications between SCE and a Commissioner about substantive issues in a proceeding. Instead his reaction was to make a firm, but false statement when he lacked all the facts.

We acknowledge SCE's eventual disclosures and its initiative in adopting new policies to promote compliance with the Commission's ex parte rules. However, as described, it is not clear whether SCE intends to rely on the role of SCE's Legal Department in determining whether the ex parte rules apply to achieve a permanent privilege claim applied to all such records, thus blocking oversight and investigative access by the Commission. Thus, SCE's proposal is of unknown benefit or accessibility.

6.1.3. Commission Precedent

Commission precedent in imposing sanctions for ex parte violations has ranged from relatively minor fines, or none at all, to requiring training on ethics and the Commission's ex parte rules. In D.14-11-041, the Commission described several relevant examples which are presented below:

- In a ratesetting proceeding in which the utility failed to report its ex parte communications with each of the Commissioners' energy advisors, the ALJ required the utility to file notice of its ex parte communications and to retain an independent firm, at its shareholders' expense, to conduct four training sessions on

Rule 1.1 and Article 8 of the Rules of Practice and Procedure, and no penalty was imposed.⁸⁹

- In a ratesetting proceeding in which Pacific Gas and Electric Company (PG&E) met with two Commissioners and their advisors without providing the requisite three-day advance notice of the grant of the individual meetings with the Commissioners or post-meeting notices of the ex parte communications, PG&E was required to develop and institute a control system which reflects best practices for compliance with the ex parte rules, and no penalty was imposed.⁹⁰
- Where two utilities in an adjudicatory proceeding violated the ban against ex parte communications by participating in two separate ex parte meetings, each with two Commissioners' advisors, the Commission fined them each \$20,000 per meeting.⁹¹
- In an adjudicatory proceeding in which a party sent a written ex parte communication to all Commissioners (and concurrently served it on all parties), the ALJ chastised the party and no penalty was imposed.⁹²
- The highest fine ever was imposed on PG&E for engaging in prohibited communications about ALJ assignment in violation of Rule 8.3. The Commission imposed a \$1,050,000 penalty.⁹³

SCE asks the Commission to bear in mind that the largest penalty the Commission has ever imposed for a violation of an ex parte rule was that \$1.05 million penalty recently imposed on PG&E. SCE argues that it would be

⁸⁹ February 16, 2012, Joint Assigned Commissioner and ALJ's Ruling, A.08-05-022 et al.

⁹⁰ D.08-01-021.

⁹¹ D.07-07-020 as modified by D.08-06-023.

⁹² May 3, 2002, Administrative Law Judge's Ruling, I.00-11-052.

⁹³ D.14-11-041.

unfair to impose a higher fine on SCE for late reporting of permitted ex parte communications.

On the other hand, A4NR and ORA have expressed significant outrage over the possibilities of deal making occurring during unreported ex parte communications. Although the actual content of the communications, to the extent known, is neither detailed nor reflective of agreement, these parties are committed to imposition of the statutory maximum penalties for each and every rule violation.

The Commission has tended to impose higher financial penalties in connection with violations of Rule 1.1, particularly for continuing violations:

- In a rulemaking involving natural gas safety, the Commission fined PG&E \$14,350,000 for not promptly correcting a material misstatement of fact in a pleading filed with the Commission and by mischaracterizing the correction submitted for filing as a routine and non-substantive correction.⁹⁴
- In an investigation, the Commission fined a transportation agency \$210,500 for violating Rule 1.1 when it disobeyed the subpoena duces tecum by not producing the unredacted copies of the requested records.⁹⁵
- Pursuant to a settlement, the Commission approved the Applicant's payment of a penalty of \$ 10,000 for making a misrepresentation on a Commission form in violation of Rule 1.1 by failing to disclose a previous sanction by the Ohio Public Utilities Commission for failure to file a detariffing application.⁹⁶

⁹⁴ D.13-12-053 at 1 (Order Instituting Rulemaking to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms, R.11-02-019).

⁹⁵ D.15-08-032 *55, 2015 Cal. PUC LEXIS 521, I.13-09-012.

⁹⁶ D.09-11-010; 2009 Cal. PUC LEXIS 587 *3.

6.1.4. Amount of Fine or Penalty Will Achieve Objective of Deterrence

Based on the provisions of § 2107, the maximum fine for the eight ex parte violations and one non-continuing Rule 1.1 violation (Litzinger's false statement) is \$450,000, or \$50,000 per violation. We have concluded that the Poland Meeting Rule 1.1 violation launched a continuing violation, therefore, the penalty will be calculated for the period of March 29, 2013, the date by when SCE should have filed its ex parte notice, through July 3, 2015, the last date in which SCE repeated the erroneous statements of Mr. Pickett. The total is 826 days. If we apply the maximum fine of \$50,000 per day for 826 days, the aggregate maximum penalty fine would be \$41.3 million. Altogether, SCE's maximum exposure pursuant to § 2107 is a combined total financial penalty of \$41,750,000.

SCE argues that application of the maximum fine would be inappropriate notwithstanding its significant financial resources, because such a fine would be disproportionate to the harm caused, the utility's conduct, and precedent. According to SCE, financial resources are used by the Commission "as a means of calibrating deterrence and avoiding the assessment of an excessive fine."⁹⁷ SCE argues that its conduct did not risk "severe consequences" so that deterrence is a less significant factor.

A4NR states it has "no illusions" that any fine will achieve a deterrent effect. In D.14-11-041, the Commission acknowledged the limited deterrence value of our penalties when applied to a company such as SCE.⁹⁸ As the Commission previously remarked when it declined to impose a penalty for

⁹⁷ SCE's Response to Ruling and OSC at 39.

⁹⁸ D.14-11-041 at 13

PG&E's prior ex parte violation, "In terms of financial resources, PG&E is an extremely large company... even imposing the maximum penalty" would have little likelihood of a discernable financial impact.⁹⁹ Instead, we observe that the primary deterrence value is when financial penalties are sufficiently large that the utility must report them to investors

6.1.5. Totality of Circumstances

The Commission has held that a fine should be tailored to the unique facts, or totality of circumstances of each case. When making this assessment, the Commission considers facts that tend to mitigate or exacerbate the degree of wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.¹⁰⁰

SCE argues for a modest penalty due to several mitigating factors:

- The Ruling was new information - the Ruling and OSC was the first time "many of the interpretive issues have been explained." SCE continues to believe that only the March 26, 2013 Poland meeting constitutes a reportable ex parte communication. Since the Commission has determined otherwise, SCE asks the Commission to recognize that parties' expectations and understanding of the rules have evolved since the communications in question have occurred. Thus, SCE asserts it would be unfair to apply this new understanding retroactively.

We acknowledge this as a mitigating factor, particularly in relation to the Rule 1.1 violation from Mr. Litzinger's testimony. However, in each of the Rule 8.4 violations, there was evidence and inference to support that, perhaps briefly, an ex parte communication occurred. The utility also has a duty to

⁹⁹ D.08-01-021 at 14.

¹⁰⁰ D.15-08-032 at 43.

comply with the Commission's Rules. Therefore, if faced with uncertainty or ambiguity, SCE should have sought guidance or favored disclosure instead of parsing exceptions.

- Informality - The overall impression from the internal and external emails produced, is that SCE has lax oversight of its executives who are permitted, if not encouraged, to meet with Commissioners at "social" occasions, industry activities, and other non-office settings. The executives then engage in conversations that may briefly touch on substantive issues in a formal proceeding, but do not report them on the grounds they are short, or not substantive enough.

We treat this as an exacerbating factor due to the continuing risk that SCE has become too informal, too casual about what is permissible, permissible if reported, and what is wholly prohibited.

- SCE's new policy - SCE has adopted a new policy which limits contact with Commissioners to normal business hours or "at widely-attended events like seminars, recognition ceremonies, or other public events; private dinners are not allowed."¹⁰¹

We treat this as a mitigating factor because it indicates SCE understands the problem and is acting to reduce or eliminate it.

- Everybody else does it - SCE requests restraint in adopting sanctions given the quantity of ex parte and Rule 1.1 violations SCE alleges have been committed by other parties, "including those clamoring most loudly for SCE to be punished."¹⁰² SCE provided numerous examples.¹⁰³

¹⁰¹ SCE's response to Ruling and OSC at 35.

¹⁰² SCE's Response to Ruling and OSC at 40.

¹⁰³ *Id.* at 40-42.

It is tempting to treat this as a mitigating factor because it is true that this has been a boisterous, contentious, and complex proceeding in which several parties accused each other of misconduct. However, SCE is a large company with many resources and a long history with the Commission. We expect it to be able to fulfill its own regulatory duties and not look for excuse in the bad acts of others. Therefore, we consider this neither mitigating nor exacerbating

6.2. Conclusions re Penalties and Sanctions

The facts and circumstances of this proceeding require that we impose financial penalties for the eight Rule 8.4 violations and two Rule 1.1 violations.

SCE has a duty to comply with our rules, and the burden is on the utility to determine its legal obligations and fulfill them. However, SCE's argument that it could hardly be expected to know whether these communications fit the definition of ex parte communications prior to issuance of the Ruling and OSC, is not entirely without weight given the apparent confusion among the parties.

It is remarkable that parties advanced such differing views of the decades-old language defining an ex parte communication. SCE's submissions exposed a range of previously unknown, rather informal, communications between SCE executives and Commissioners, advisors, and other decisionmakers in which a substantive issue may have received briefly passing comments between them. Nonetheless, if the other elements are present, this is a reportable ex parte communication.

In any event, SCE's arguments are inapplicable to the late and inaccurate Late Notice regarding the March 26, 2013 Poland meeting which is the most egregious violation, and which led to SCE repeating the false characterization of this now-admitted ex parte communication. Thus we identify no mitigating factors for this violation. A lower penalty is suitable for the other seven

violations due to mitigating factors, including some previously unresolved ambiguities about the rules. However, the violations are still significant because these particular communications turned out to be “two-way” between SCE and one or more Commissioner on a substantive issue related to the SONGS OIL.

Therefore, we calculate the fines for Rule 8.4 violations as follows:

- March 26, 2012 - \$50,000
- All others - $\$20,000 \times 7 = \$140,000$

We calculate the fines for the two Rule 1.1 violations as follows:

We found that SCE’s and Mr. Pickett’s series of grossly negligent actions and omissions resulting in false and misleading statements made to the Commission is continuing violation. We begin the calculation on March 29, 2013, the date by which SCE should have filed its ex parte notice of the March 26 meeting and disclosed the Notes, and end the calculation on July 3, 2015, the latest date in which SCE continued to repeat Mr. Pickett’s erroneous version of the Poland Meeting. Actions and omissions which mislead the Commission, and continue for a period of time to mislead the Commission, should result in significant penalties. We assess \$20,000 per day for this continuing violation based on the history of this proceeding as set forth above. The financial penalty is $\$20,000 \times 826 \text{ days} = \$16,520,000$.

The second Rule 1.1 violation is the false testimony by Mr. Litzinger which is also subject to mitigating factors. A reasonable inference from the evidence is that he did not mislead the Commission by intention, recklessness, or gross negligence. It is also reasonable to infer that he believed he was responding accurately, and was relying on advice of his counsel. However, as discussed above, these facts do not excuse that he testified falsely under oath and misled the Commission, the public and other parties. Making a false statement to the

Commission, especially under oath, favors the maximum penalty. However, we apply a lesser amount in recognition that Mr. Litzinger's false testimony does not appear to be intentional, reckless, or grossly negligent. Therefore, we impose a substantial penalty of \$30,000 for this violation.

The grand aggregated total financial penalty for SCE is \$16,740,000.

It is the Commission's intent to highlight to SCE and all parties that we are committed to achieving full compliance with our governing laws and rules. Anything less damages the agency's regulatory mission and undermines the public's confidence in due process, fair hearings, and just and reasonable rates.

In addition to financial penalties, we consider the steps SCE has taken to improve tracking and recordkeeping of communications between SCE employees, agents, and representatives and Commission decisionmakers and advisors to Commissioners. As noted previously, we are concerned that this vital information will not be accessible to the public, parties, and the Commission.

Therefore, effective the date this decision is issued, in connection with the SONGS OII (and its consolidated proceedings) SCE shall begin collecting information on all non-public individual communications where both SCE and one or more Commissioners, and/or their advisors, and/or CPUC decisionmakers (per Rule 8.1(b)) are present. SCE shall immediately develop an internal tracking system which results in a public log which shall include the identity of all participants, general subject matter, the relevant SONGS OII or consolidated proceeding(s), meeting date, length of time, location, whether written materials were used, an ex parte notice was filed, and if not, then an explanation. SCE shall make the log available to the public, preferably by posting it on the website and keeping it current throughout the remainder of the

SONGS OII and consolidated proceedings, unless superseded by future Commission action.

No later than March 1, 2016, SCE shall file a Tier 1 Advice Letter with the Executive Director which describes the implementation of the tracking, features of the log, accessibility to the public, and the internal mechanisms to ensure accuracy.

7. Oral Argument

Pursuant to Rule 13.13, in a ratesetting proceeding, a party may request a final oral argument before the Commission. A party may request oral argument on this Proposed Decision by filing and serving a request no later than November 5, 2015.

8. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

9. Assignment of Proceeding

Catherine J.K. Sandoval is the assigned Commissioner and Melanie M. Darling is the assigned ALJ and Presiding Officer in these proceedings.

Findings of Fact

1. On October 25, 2012, the Commission issued an OII into the rates, operations, practices, services and facilities associated with SONGS Units 2 and 3. The OII was subsequently consolidated with other SONGS cost-related proceedings.

2. On April 3, 2014, SCE, SDG&E, ORA, TURN, Friends of the Earth, and Coalition of California Utility Employees, (collectively “Settling Parties”) filed and served a Joint Motion for Adoption of Settlement Agreement which purported to resolve all issues for the consolidated proceedings.

3. The Commission approved an amended, but not all-party, settlement agreement in D.14-11-040 which provided resolution of the disputed cost allocation/rate recovery issues related to the RSGs and the premature shut down of SONGS.

4. On February 9, 2015, SCE late-filed a Notice of Ex Parte Communication (Late Notice) regarding a meeting that occurred on or about March 26, 2013 between SCE’s then-Executive Vice President Stephen Pickett and CPUC’s then-President Michael Peevey at an industry conference in Warsaw, Poland. The Notice disclosed that there may have been a communication between them about a possible framework for resolution of the SONGS OII.

5. Pursuant to two ALJ Rulings requesting information and documents about the Poland Meeting, and other communications between SCE and Commissioners, SCE provided hundreds of pages of information, explanation, declarations, e-mails, and referenced settlement documents from previous shutdowns of generation facilities (e.g., SONGS 1).

6. On August 5, 2015, based on SCE’s admissions, the ALJ issued a Ruling and OSC finding that SCE committed ten violations of Rule 8.4 by failing to report oral and written communications between SCE and CPUC decisionmakers which met the definition of “ex parte communication.”

7. The Ruling and OSC also aggregated preliminary evidence from which the Commission might reasonably infer that SCE had violated Rule 1.1.

8. We affirm that eight undisclosed communications took place between one or more SCE executive and one or more Commissioner concerning one or more substantive issues in the SONGS OII which did not occur in a public hearing, workshop, or other public forum noticed by ruling or order in the OII, or in the record of the OII. These undisclosed communications occurred on the following dates:

- a. March 26, 2013
- b. March 27, 2013
- c. May 28, 2013
- d. June 26, 2013
- e. September 6, 2013
- f. November 15, 2013
- g. May 28, 2014
- h. June 11, 2014.

9. Mr. Pickett failed to report the March 26, 2013 Poland Meeting, a communication between himself and President Peevey from which emerged a written list of possible allocations of major costs necessary to any settlement of the SONGS OII in the event of a permanent shutdown.

10. SCE failed to exercise due diligence to investigate Mr. Pickett's unlikely initial version of the meeting-- or his evolving versions of the meeting -- each recalling additional information about his conversation with President Peevey. SCE also did not attempt to retain and disclose the written document used in connection with the ex parte communication, nor did it disclose that Mr. Pickett had re-created his recollection of the document for SCE just a few days later.

11. Mr. Pickett's three versions of the March 26, 2013 communication with President Peevey are contradicted by credible evidence in the form of the Declaration of Edward Randolph in which Mr. Randolph stated that Mr. Pickett

expressed his opinion to President Peevey about what he thought a settlement agreement might look like.

12. SCE repeated Mr. Pickett's false or misleading statements to the Commission in the Late Notice, in Mr. Pickett's declaration, and in response to ALJ requests for information through July 3, 2015.

13. On May 14, 2015, Mr. Litzinger made a false statement to the Commission while testifying under oath. There is no evidence from which to infer that his statement was intentionally false, or that he was reckless or grossly negligent.

14. The Commission was misled by Mr. Litzinger's false statement.

15. The rule violations resulting from SCE's acts and omissions in these proceedings have severely harmed the public's confidence

16. We make no determination of the impact, if any, of the identified rule violations on the settlement negotiations or the Commission's adoption of D.14-11-040.

17. Although SCE has taken some internal steps to improve compliance with our ex parte rules in the future, the company's approach should have been more robust and favored reporting over non-reporting when it engaged in what it saw as ambiguous communications and matters of first impression.

18. Commission precedent in imposing sanctions for ex parte violations has ranged from relatively minor fines, or none at all, to requiring training.

19. We treat as an exacerbating factor that SCE permitted, if not encouraged, its executives to meet with Commissioners at non-business settings where they engaged in conversations that briefly touched on a substantive issue, but did not report them on the grounds they were too brief or not substantive "enough."

20. It is reasonable to impose a financial penalty of \$50,000 for the violation of Rule 8.4 related to the March 26, 2013 ex parte communication.

21. It is reasonable to impose a financial penalty of \$20,000 for each of the seven other violations of Rule 8.4 identified in Finding of Fact 8.

22. It is reasonable to impose a financial penalty of \$30,000 for violation of Rule 1.1 related to Mr. Litzinger's false statement, albeit unintentional, which misled the Commission.

23. It is reasonable to calculate the term of SCE's continuing violation of Rule 1.1 related to the series of event beginning with impose a financial penalty of \$20,000 per day for a period of 826 days. The calculation begins on March 29, 2013, the date by which SCE should have filed its ex parte notice of the March 26 meeting and Notes, and ends on July 3, 2015, the latest date in which SCE continued to repeat one of Mr. Pickett's erroneous versions of the Poland Meeting.

24. In order to establish transparency for all non-public individual oral and written communications (§ 1701.1(c)(4)) regarding the SONGS OII and consolidated proceedings which may have been discussed between or in the presence of both SCE and Commissioners, and/or their advisors, and/or CPUC decisionmakers (as defined in Rule 8.1(b)) it is reasonable that SCE should create an internal tracking system to capture the existence of such communications for inclusion in a log available for public review.

Conclusions of Law

1. For purposes of the Commission's Rules, an "ex parte communication" is one that meets the requirements of § 1701.1(c) and Rule 8.1(c), including that the communication must be "between" a decisionmaker and an interested person.

2. Solitary statements by a Commissioner or Commissioner's advisor are not disclosed, pursuant to Rule 8.4(c), but almost any response by a party other than

“I cannot talk about it” is sufficient to create a communication “between” the party and the Commissioner or advisor.

3. Section 1701.3(c)'s prohibition of ex parte communications in ratesetting cases is not absolute, and is instead modified by the language which follows in this subsection which permits some such communications with timely notice and similar opportunities provided to other parties.

4. The applicable standard of proof for violation of a Commission rule is a preponderance of evidence.

5. SCE engaged in unreported ex parte communications between one or more SCE executives and one or more Commissioners in violation of Rule 8.4, on the following dates:

- a. March 26, 2013
- b. March 27, 2013
- c. May 28, 2013
- d. June 26, 2013
- e. September 6, 2013
- f. November 15, 2013
- g. May 28, 2014
- h. June 11, 2014.

6. SCE violated Rule 1.1 as a result of a series of grossly negligent acts and omissions in disregard of the Commission's ex parte Rules. SCE's lack of inquiry into the true nature of the Poland Meeting, or duty to provide copies of written communications, are just two of the acts or omissions that resulted in SCE continuing to repeat Mr. Pickett's misleading statements to the Commission. This violation is a continuing violation.

7. SCE violated Rule 1.1 as a result of the false statement made by Mr. Litzinger under oath.

8. Pursuant to § 2109, the acts, omissions, or failure of any officer, agent, or employee of SCE, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of SCE.

9. These violations of Rule 8.4, regarding failure to disclose an ex parte communication, are not continuing violations.

10. The facts and totality of circumstances require that we impose financial penalties for the eight Rule 8.4 violations and two Rule 1.1 violations.

11. Pursuant to § 2107, we impose on SCE a financial penalty of \$190,000 for violations of Rule 8.4: \$50,000 for the most harmful violation on March 26, 2013 violation, and $7 \times \$20,000 = \$140,000$ for the other seven violations.

12. Pursuant to § 2107, we impose on SCE a financial penalty of \$30,000 for its Rule 1.1 violation for a false statement made under oath which misled the Commission.

13. Pursuant to § 2107, we impose on SCE a financial penalty of \$20,000 per day for the 826 days of the continuing violation arising from SCE's acts and omissions related to Mr. Pickett's meeting with Commissioner Peevey through the time when SCE ceased repeated his evolving and misleading versions of the communication. The total penalty is calculated as $\$20,000 \times 826 = \$16,520,000$.

14. Pursuant to § 701 and Rule 8.3(j), in order to ensure the integrity of the record and to protect the public interest, SCE shall begin collecting information about all non-public individual communications occurring after the date the decision is issued, regarding the SONGS OII and consolidated proceedings for which both SCE and one or more Commissioners, and/or their advisors, and/or CPUC decisionmakers (as defined in Rule 8.1(b)) are present. SCE shall promptly develop an internal tracking system to make certain information available to the public through a communications log, preferably by posting it on

the SCE website and keeping it current. The information shall include the identity of all participants, general subject matter, the related SONGS OII proceeding(s), meeting date, length of time, location, whether written materials were used, if ex parte notice was filed, and if not, then an explanation. SCE shall report to the Commission on the implementation of this system.

O R D E R

IT IS ORDERED that:

1. Southern California Electric Company must pay a penalty of \$16,740,000 by check or money order payable to the California Public Utilities Commission and mailed or delivered to the Commission's Fiscal Office at 505 Van Ness Avenue, Room 3000, San Francisco, CA 94102, within 30 days of the effective date of this order. The face of the check or money order should read "For deposit to the General Fund per [Decision XX-XX-XXX]".
2. In addition to the financial penalties, Southern California Edison Company (SCE) shall develop and implement an internal tracking system to prospectively capture and make public the existence of non-public individual oral and written communications regarding the San Onofre Nuclear Generating Station Order Instituting Investigation (SONGS OII) and consolidated proceedings.
 - a) Effective the date this decision is issued, in connection with the SONGS OII (and its consolidated proceedings), SCE shall begin collecting information for the public about all non-public individual communications where both SCE and one or more Commissioners, and/or their advisors, and/or CPUC decisionmakers (per Rule 8.1(b)) are present.
 - b) SCE shall promptly develop an internal tracking system, dating from the date this decision is issued, which results in a public log

that must include the identify of all participants, general subject matter, the relevant SONGS OII or consolidated proceeding(s), meeting date, length of time, location, whether written materials were used, if an ex parte notice was filed, and if not, then an explanation.

- c) In no case shall the log disclose the content of a communication by a decisionmaker or a Commissioner's personal advisor as prohibited by Rule 8.4(c).
- d) Southern California Edison shall post the communications log with the identified information on its website. SCE shall keep the log current throughout the remainder of the SONGS OII and consolidated proceedings, unless superseded by future Commission action or order.
- e) No later than March 1, 2016, Southern California Edison shall file a Tier 1 Advice Letter with Commission, through its Executive Director, which describes the features of the system, the public accessibility, and the internal mechanisms to ensure accuracy.

3. The sanctions and remedies ordered in this decision are in response only to the disclosures by Southern California Electric Company that resulted from this inquiry into rule violations. Nothing in this decision precludes further discovery by parties in connection with the pending petitions for modification of Decision 14-11-040, nor does it preclude future Commission action related to any other violations that may be subsequently discovered.

4. This decision is effective today.

5. Investigation 12-10-013 and consolidated proceedings (Applications 13-01-016, 13-03-005, 13-03-013, and 13-03-014) remain open for the pending application for rehearing and petitions for modification of Decision 14-11-040.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT 1



1. Pre-RSG investment: recover w/ debt-level return through 2022.
2. RSG and post-RSG investment: disallow "retroactively out of rate base" effective 2/1/2012 ~~2/1/2012~~
3. Replacement power responsibility: customer
4. NEIL/insurance recoveries: to customers
5. MHI recovery: 1st to see to the extent of the disallowance
2^d to customers
6. Decommissioning costs: remain in rates through time of decommissioning -- periodic redetermination in CPUC proceedings as before
7. O&M:
 - a) Already approved GRC amounts through shutdown + 6 months
 - b) OII to determine shutdown O&M through end of 2017 (i.e., not in GRC)
 - c) shutdown O&M 2018 and beyond determined in GRC's
 - d) Shutdown O&M to include reasonable severance for SONGS employees - A pool of \$50 million

Next page

+48 22 55 11 000 telephone / telefony
+48 22 625 25 77 facsimile / fax

KRAKOWSKIE PRZEDMIEŚCIE 42/44
00-325 WARSZAWA, POLAND

luxurycollection.com/bristolwarsaw



8. Environmental offset: SCE to donate \$¹⁰5.0 million per year 2014-2022 to _____ [as agreed upon GHG, climate, or environmental academic research fund, institution, etc.]

9. Process
- a) settlement agreement approved in OII
 - b) balance of OII closed except for shutdown O&M phase
 - c) new OII phase for shutdown O&M per 7(b) and 7(d) above
 - d) 2018 GRC for shutdown O&M 2018 and beyond
 - e) Usual CPUC proceedings for review of decommissioning costs

MHI Recovery

- 1 - First \$200 million — 50% credit
- 2 - Next \$200 million — 50% SCE, 70% S, 30% credit
- 3 - Any above \$400 million up to disallowance — 80% to S, 20% to a
- 4 - Above disallowance — 25% SCE, 75% credit

+48 22 55 11 000 telephone / telefon
 +48 22 625 25 77 fax / faks
 KRAKOWSKIE PRZEDMIEŚCIE 42/44
 00-325 WARSZAWA, POLAND
 luxurycollection.com/bristolwarsaw