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March 17, 2015

Asm. Anthony Rendon
Chair, Assembly Utilities and Commerce Committee
State Capitol, Room 5136
Sacramento, California 95814
916.319.2083 phone

Dear Asm. Rendon:

I want to thank you for the tone and manner in which you conducted the Utilities and Commerce Committee hearing on March 16, 2015. I also appreciated your gracious invitation to meet in your office after the meeting. Although I did not have an opportunity to address the committee during public comment, I am confident that this was an unintentional oversight and this will work out in the end.

Your letter to the CPUC dated March 19, 2015, was outstanding. I can't think of a larger step that could have been appropriately taken at this time. Thank you. I am sure you will receive many phone calls of support for this action.

I would like to request that the committee hear testimony from Citizens' Oversight (which I will represent) and Mike Aguirre (of the law firm Aguirre & Severson LLP). I believe we can shed light on what happened at the CPUC in the San Onofre proceeding and provide an alternative point of view to the testimony you have heard so far. Central to testimony from Citizens Oversight will be proposed changes to improve transparency and the efficiency of the CPUC.

For now, the following are comments on the testimony of Mr. Picker, President of the CPUC, who appeared at the meeting mentioned above. Testimony was transcribed from the video and excepts considered below.

> ASM. DAS WILLIAMS:
> Do you feel like the PUC made the wrong call, and can you illuminate a little bit, why?
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> CPUC PRESIDENT PICKER:
> I'll be honest. I did vote for the-- the eventual proposed decision, the eventual decision that came from the Administrative Law Judges. I sat through a couple of public workshops where and number of parties, including some of the folks here in the room here, and who advocated for something that I thought really wasn't as good as what we finally voted out.

We find it interesting that he only mentioned the public workshops, which were not transcribed into the

record, as opposed to our written testimony. I think it is only fair to recount what occurred, to underline the point that alternative proposals were never seriously considered, nor was there any opportunity to offer any for consideration, except as a reply to the "completed" settlement deal.

On March 27, 2014, after months of secret settlement negotiations involving the utilities (SCE and SDG&E), the Office of Ratepayer Advocates (ORA) and The Utility Reform Network (TURN), the settlement agreement was revealed *fait accompli* at a meeting which supposedly fulfilled the requirements for a "settlement conference." However, the settling parties entertained no other proposals and the agreement had to be approved with no changes whatsoever. No other parties were invited to participate at the settlement negotiations and no other proposals were entertained. Included within the proposed settlement agreement was the suggestion that the Commission's investigation into the matter (the "OII") be called off. Prior to any processing of the settlement agreement, and without any opportunity to discuss the ruling, the ALJ ruled that the OII proceeding should not go forward, thus scuttling Phase 3, which was the most important determination of prudency and the reasonableness review of the Replacement Steam Generator (RSG) project.

Looking back, we see that ALJ Darling had an ex parte contact with Russell Worden (Director, SONGS Strategic Review, SCE) and apparently concocted the phases of the proceeding on December 4, 2012.[1] The Prehearing Conference started with the phases of the proceeding already defined so that the actual investigation and reasonableness review was at the end (Phase 3). I knew that their intention was to never do that phase, otherwise the logical order would be to handle the investigation first, so as to avoid any additional overhead. If they handled it later, the other phases would each have to determine two possible outcomes, one if their actions were prudent, and one if they were imprudent. Handle it first, and you only consider one of those possibilities. So to schedule that at the end meant they did not want to do it at all.

The evidentiary hearings, testimony, briefs and the written record was essentially disregarded to get to the settlement terms formulated in that Warsaw, Poland meeting. Particularly egregious was the "replacement power" terms which were nothing like the result of Phase 1A, which included a set of hearings, briefs, etc. but which were completely disregarded in the settlement.

Moving back to 2014, after the settlement was proposed, comments by the parties were submitted concerning the proposed settlement, and an extremely short (3.5 hour) evidentiary hearing was held on May 14, 2014, where opposing parties each were allowed 20 minutes to develop a record (and we were held to that even though we requested more time.) This was a startlingly short evidentiary hearing given that $3.3 billion was on the line. Citizens' Oversight, DBA the "Coalition to Decommission San Onofre" worked with Attorney Mike Aguirre to combine our time and allow Mr. Aguirre to cross-examine SCE President Ronald Litzinger, who admitted – under oath – that there was nothing in the record to allow the Commission to evaluate the settlement with respect to the claims of ratepayers. The 40 minute cross examination has been reduced to an 18-minute video, which is worth watching, and can be viewed here:

http://www.copswiki.org/Common/M1444

This includes Peevey's outburst when Mr. Aguirre asked him if he had had any inappropriate ex parte communications with SCE, saying "I don't have to answer your goddamned questions. Now Shut up! Shut up!"

Then, on June 16, there was a single public participation hearing in Costa Mesa (and no similar hearing in the San Diego County area). At that hearing, Mr. Aguirre and Ray Lutz of Citizens Oversight were allowed to speak to the Commission and the community about the settlement. Although we requested that we be allowed to make a power point type presentation, we were not allowed to do so, and no documents

1 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M039/K600/39600668.PDF

were allowed to be provided to the Commissioners and ALJs to make our case. In fact, Mr. Aguirre was almost arrested at the door for bringing in his briefcase (See http://www.copswiki.org/Common/M1457). We were never given an opportunity to present any alternative settlement terms except in our comments to the settlement and at this meeting for ten minutes. I imagine we could have engaged in private ex parte communications ourselves, as this appears to the not an exception, but the rule in terms of how business is conducted.

In our comments, we outlined many other cases where utility infrastructure was either retired early, or failed due to mistakes in construction. In no case was there ever any return on equity, while in the San Onofre case, the return in the settlement was approximately 3%, and that was if the utility apparently failed to perform. This is backwards.

So it is likely that Mr. Picker was referring to our proposal, but this proposal was never entertained in any settlement process nor in any official record while the proceeding was occurring (prior to the consideration of the settlement proposed on March 27, 2014.)

Mr. Picker continued:

> I learned one thing that I've learned again since, that this process of settlements may move things along more quickly, but it does not always get to a result that I am thoroughly comfortable with. And so, I'm struggling then, to decide, what do you do when you have this process that moves things along more quickly, and provides some certainty of outcome but where you don't quite feel comfortable about what actually came out.

We agree with this concern. The settlement process is largely under no constraints at all, and thus allows the utilities to control the outcome. We believe this is perhaps the most important single issue to work on and refine at the Commission.

> Now, we got something better than what was originally proposed in the settlement, and eventually everyone came around to support the Commission's decision who participated in those settlement discussions, but, you know, I'm still not sure that we have always made the best decisions. I'm not sure how I would improve them.

The original settlement proposal revealed on March 27, 2014, was refined slightly by the ALJs. These changes seem to be in response to an ex parte telephone call initiated by Mr. Peevey to Alliance for Nuclear Responsibility attorney John Geesman, which was noticed within the required three days by Geesman, and reported that they had discussed the concern for additional greenhouse gas production in the region around the plant and the third-party agreement terms. Somehow, these elements were the ones introduced into the modified settlement agreement which became a part of the Proposed Decision. It is a bit inextricable that these terms were introduced into the settlement unless Peevey had conversations with the ALJs in terms of what the settlement should look like. We hope that when they divulge the emails and information to your committee that this will become clear.

It is simply incorrect that “everyone came around to support the Commission's decision” unless “everyone” is constrain it to include only the parties in the secret settlement meetings, i.e. the utilities, ORA, and TURN. Other parties including Women Energy Matters (WEM), Alliance for Nuclear Responsibility (A4NR), the Coalition to Decommission San Onofre (CDSO) and Ruth Henricks (represented by Aguirre & Severson, LLP) all did not join the settlement. The parties CDSO and Henricks were the only parties to eventually request a rehearing of the matter.

> DAS WILLIAMS:

The question I have, or the input that I have is, we want you to fight harder for the ratepayer when cases like this come done, where if people mess up, there should be some consequences for that, they can't take all of the burden, but that we need you to stick up for us, and we need you to tell us what is going on, and frankly, one sentence in – here's your annual report, and it's nearly an inch thick. And there is only one sentence on the matter which is the loss of 10% of the energy in the state and a $3.3 billion hit to the ratepayers. I, you know. We want to hear more.

PICKER:
I can talk to you a little bit more about this. I'll tell you that I am trying to really take my role as a decision maker in a very legalistic process seriously. And part of that process is to ensure that we actually make decisions based on testimony and documentation that is actually in the written record. And unless it is in the written record, we can't rely on it for making our decisions. When I read the record, this was the best decision I thought I could make. I am troubled because I think that there are possibly things that are not in the record that were not brought forward by parties.

Since the CPUC split the OII into four phases, the most important to evaluate the settlement would have been Phase 3, which was to consider the prudency and reasonableness of SCE's decisions, but it was never even started. This was certainly understood by the Commission as we had made this point on a number of occasions, including during Oral Argument where each party had 10 minutes to speak. Those things were not in the record because all reference to prudency was disallowed during phases 1 and 2.

What is absolutely IN the record are admissions that the record is incomplete. So his statement that "I think there are possibly things that are not in the record" is not accurate. He knows there are things not in the record, he knows what those things are, and he knows why.

So this is, clearly, a way that the utilities and the Commission can "game the system" by architecting that damning evidence would enter the record in a phase never encountered when a settlement is accepted too soon in the process.

Maybe they came up in the settlement discussions which were closed to us. Maybe they were voiced by people who were not parties to the proceeding and were not entered in the record. But like a judge in a law case, I can only make my decisions based on those things that are actually brought to us and presented to us in the record.

What Mr. Picker is skipping here is that the fact that the record was incomplete WAS in the record. The fact that the record contained nothing to support clear evaluation of the settlement was agreed to by SCE President Ronald Litzinger when he testified under oath during the evidentiary hearing on the settlement and stated that nothing was in the record to allow the Commission to evaluate the settlement with respect to the claims of ratepayers.

1:53

ASM. ANTHONY RENDON (CHAIR)
I wanted to return to the issue of SONGS, the San Onofre Nuclear Generating [Station]. During the 1980s PUCs in Montana, Missouri, California, disallowed costs from being added to the ratebase because of mismanagement of construction projects.

We described similar cases handled by the CPUC, all of which did not grant any ROI to investors even if the early retirement was due to regulatory or legal changes which were no fault of the utility. 0%. In this settlement, they got 3%, and it is clear that it was the fault of the utility and their subcontractor, and not due to regulatory change, changes in the law or other factors out of the control of the utility.

> Yet here, at SONGS, the decision was that 2/3 of the costs related to SONGS would be passed on to ratepayers instead of shareholders.

This is a common misperception. The total "costs related to SONGS" is something that was disputed by the parties, and $4.7 billion was the number which SCE maintains is fair to them. We feel the number should be more like $500 million for replacement power, thus about $2.8 billion less than the $3.3 billion number they eventually agreed to. The difference is mainly that in our proposal, we allowed SCE to pursue their subcontractor for 100% of whatever they could get and we would stay out of it, and they could salvage the plant, and get 100% of that. The deal would be settled and over, rather than going on for another ten years and requiring constant oversight. With deals like this, no wonder the CPUC has so much work and the utilities they regulate have the sky high rates.

You may remember that other testimony at the hearing on March 16, ORA mentioned that the utilities constantly would ask for more than they would eventually receive. So the $4.7 billion is simply their sky-high initial request, reduced to what they actually expected in the Warsaw, Poland meeting. So the ratepayer essentially pays 100% of the cost. Investment principal was returned to investors and they even made about 3% on their money... a pretty good return these days for risk-free investments.

> So I was curious as to the extent to which – and I think this points to the decision-making processes and the way that decisions are made at the PUC. Given that there was a precedent for disallowing construction – disallowing costs related to mismanagement, how did the PUC arrive at this decision relevant to SONGS?
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> PICKER:
> As best I can restructure – reconstruct it from my reading of the record, essentially there was a long discussion within the Commission as to how you actually figure out what really should be charged to the ratebase and what should not be charged to the ratebase, and so what the Commission did is hire some experts and did some research, and tried to assign the date at which it was most reasonable to assume that you couldn't make the nuclear generating station work.

What does it mean to have a "discussion within the Commission"? Does that mean the Commissioners would meet do their own private investigations and meet together to discuss this without any involvement by any other parties? This whole paragraph is very much a concern, because it implies that a great deal of work is being done behind the scenes, while the public process is just for show.

To our knowledge, there was only one expert hired by the Commission, Dr. Budnitz, who commented on whether the same failure mode would be possible at the Diablo Canyon Nuclear Power Plant (Diablo).

> And so, some of the infrastructure that was in place before then was just assumed to be part of the ratebase. At the point it became very clear that you could not um make the system functional, everything beyond that went to the cost of the utility.

You can argue this statement is true only with respect to certain O&M costs during 2012. All other categories of costs were not handled this way. Most importantly, the net asset value of the plant was to be paid by ratepayers plus about 3% return.

> So these are very big, costly infrastructure, and I don't know what the best way is to figure out how much that you disallow, and how much you allow. That is eventually the process that we settled on. And then it became just a matter of trying to do the accounting to figure out what fell after that date, and what came before that date.

That really isn't the process settled on by the proceedings. COPS disagrees that this should be the process that should be used to figure this out, because it does not consider whether SCE acted prudently and reasonably in their execution of the RSG project. If they did not execute this reasonably – and we do have evidence that they scuttled changes to the steam generators because it would trigger a license amendment at the NRC – then the utility should shoulder the full cost of the RSG project, not just the portion after it stopped working, and should also have to shoulder the demise of the plant.

We take a reasonable position that we will not attempt to fine or punish SCE for their mistakes, but we suggest that the ratepayer not cover their investment position and instead, it should be covered by their own litigation with MHI and their insurance coverage with NEIL (Nuclear Electric Insurance Ltd).

We suggest that you take a look at our opening comment brief to the proposed settlement: http://www.copswiki.org/Common/M1430 which also includes a summary of similar plants and how they were handled in the past by the CPUC. This was entered into the proceeding only as comment to the proposed settlement, and the ALJ argued that it was invalid in the Proposed Decision, but we were unable to substantiate our position through the use of expert witnesses or other testimony, because Phase 3 was never even started.

> RENDON:
> Okay. Also relating to, and again this pertains to a lot of the issues we talked about with regard to transparency, but also with respect to your decision-making process. It's come to the surface that in late March [of 2013] your predecessor held detailed discussions with Southern California Edison's Chief Legal Counsel, in Warsaw, Poland, regarding the outline of a potential settlement on SONGS. This was during the period when the Commission had made an active investigation into the SONGS matter, and more than two months before the [secret] settlement process started with the Commission. Among the ethical concerns raised by these meetings was that Southern California Edison knew ahead of time what your predecessor wanted to see in the settlement. Then SCE could easily manipulate the record to achieve the terms they prenegotiated with the President. To what extent does this now infamous meeting in Warsaw potentially undermine, taint, or inappropriately predetermine the outcome of the SONGS settlement.
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> PICKER:
> I don't think I can really answer that question in full, I think in part some of the issues that two different uh investigative agencies are looking at, the State AG and the Federal Dept of Justice, and I partly stood aside from trying to reconstruct that so that I might not know things that um, that other people can't read in the newspaper. I can't be accused of disclosing to anyone potential defendants things that might help them to avoid prosecution. So, I'm just going to have to depend on them to tell us whether there was mis-doing. I can't really form effective judgments on things that I read in the newspaper because I don't know exactly what the newspapers have and what they don't have. I'm going to leave that to the justice system.

An artful dodge by Mr. Picker, who should have said: “If it is determined that this settlement was

inappropriately predetermined at the meeting in Warsaw, Poland, then I believe the process intended by the Rules of Practice and Procedure at the Commission were cast aside and the deal between Peevey and Pickett was artificially approved, and therefore, the settlement should be reversed and a the proceedings that were halted, renewed and then brought to an appropriate end.

> I do know that as somebody who actually voted on that, the only thing that I had to make a decision on was the record. And so, it looked to me like it was built out of discussion and public testimony, everybody else had that same record, and uh, and that's about all I can really offer you.

Again, the record includes proof that it is incomplete. And knowing that, I can understand why anyone would have a hard time voting for it and feeling comfortable.

> 1:58
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> RENDON:
> 'kay. With respect to these meetings, Southern California Edison has refused to release internal emails related to meetings with your predecessor. Will the PUC compel Southern California Edison to release those email, and when will the PUC be releasing its emails?
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> PICKER:
> I don't think we've been asked to in a formal way. I will be honest with you that we will hit the same roadblock that we do under any document that we have to review for public disclosure, we will have to submit it to our P.U.C. 583 screening before we get to the public records act. There are specific things that relate to potential legal confidential documents that we can't disclose. There are also trade secrets and third-party information. Until we have a request and until our attorneys start to grind it through, I can't really give you an answer. I will say that if we do get the request, then that is probably going to be added to the list of 220 other Public Records Act requests. Generally, when you get a public records act request, my experience of having worked around it, frequently people will ask for everything in the world, you try to get them to be more specific, if they ask for everything in the world, it takes a long time to give it to them, and frankly they are unhappy because they get everything and they can't find things they actually want to see. So, in all fairness, people are probably going to have to be patient because we are all working very hard around the clock to grind through those other 220 public records act requests. We are not allows under the public records act request to set priorities. We just grind through them.

Attorney Michael Aguirre did submit a CPRA request for these records. Additionally, John Geesman, representing A4NR, made a formal request in the form of a motion[2] to sanction SCE for the improper ex parte communication and make all the emails public. This is about as formal as you can get and goes beyond the typical CPRA request. But it does NOT require that the Commission grant the motion, unfortunately. (We hope that your letter will be respected by the Commission and get results).

> RENDON:
> I believe you said earlier there are something like 220 public records act requests right now.

2 http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M146/K991/146991349.PDF

I think most of my colleagues are aware of the potential litigation between Southern California Edison and Mitsubishi. And the settlement negotiated or approved by the CPUC allowed Southern California Edison to keep 50% of any funds recovered from this litigation with Mitsubishi. Why should Edison be able to recover anything for its investments in SONGS relevant to the Replacement Steam Generators

PICKER
I think it has to do with the question of whether they fairly and honestly procured equipment that they had good reason to believe would function in the way it was intended to function and whether being sold a bad technology whether they are required to take all the blame for that.

Again, since Phase 3 of the OII was never even started, there is nothing on the record to support any conclusion to "the question of whether they fairly and honestly procured equipment that they had good reason to believe would function in the way that it was intended to function..."

But we believe that since SCE was in ultimate control of the project, the effective execution of this project is their responsibility, and the ratepayer should not have to get in between SCE and their subcontractor (MHI) or to cover the exposure of SCE in the process. Thus, it is our position that this should be turned around. Instead of the ratepayer covering the value of the plant, and then getting some of the proceeds of the litigation between SCE and their subcontractor, the ratepayer should not cover their position up front, and allow SCE to recover 100% of what they can in their litigation with their subcontractor and their insurance company.

One of our proposals is to disclose pending CPRA requests on their website so it is possible to see where anyone is in the queue.

I hope this information is helpful to your committee.

Sincerely,

Raymond Lutz
National Coordinator, Citizens' Oversight Projects