

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.

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CLEAN COALITION'S OPENING BRIEF ON LEGAL ISSUES

Tam Hunt, J.D.  
Clean Coalition  
2 Palo Alto Square  
3000 El Camino Real, Suite 500  
Palo Alto, CA 94306

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## CLEAN COALITION'S OPENING BRIEF ON LEGAL ISSUES

The Clean Coalition submits this opening brief pursuant to the Administrative Law Judge's ruling from January 28, 2013.

The Clean Coalition is a California-based nonprofit organization whose mission is to accelerate the transition to local energy systems through innovative policies and programs that deliver cost-effective renewable energy, strengthen local economies, foster environmental sustainability, and enhance energy security. To achieve this mission, the Clean Coalition promotes proven best practices, including the vigorous expansion of Wholesale Distributed Generation (WDG) connected to the distribution grid and serving local load. The Clean Coalition drives policy innovation to remove major barriers to the procurement, interconnection, and financing of WDG projects and supports complementary Intelligent Grid (IG) market solutions such as demand response, energy storage, forecasting, and communications. The Clean Coalition is active in numerous proceedings before the California Public Utilities Commission and other state and federal agencies throughout the United States, in addition to work in the design and implementation of WDG and IG programs for local utilities and governments. The Clean Coalition has intervened before the Commission on many areas surrounding including Long Term Procurement Planning (LTPP), Resource Adequacy (RA), Energy Storage (ES) and various Smart Grid proceedings.

In summary, the Clean Coalition urges the Commission to reject SCE's arguments regarding the need for a hearing before reducing rates due to SONGS' unavailability, and to reject the argument that rates can't be reduced until SCE's next General Rate Case. We agree, however, with SCE's general arguments that notice requirements regarding potential reductions in rates for non-operational facilities like SONGS requires that rates be refundable only subsequent to Nov. 1, 2012, the date at which SCE received sufficient notice that rates may be subject to refund. A major exception to this rule applies if SCE's actions are found by the Commission to be unreasonable.

## I. Responses to ALJ Ruling legal questions

The ALJ Ruling requests briefings from parties on two issues:

*1. Does the Commission have legal authority to reduce SCE's and SDG&E's electric rates to reflect the value of any portion of the SONGS facility which has been out of service for more than nine months and, further, to exclude from rate recovery any expenses related to that facility? If so, from what date in 2012 is the Commission authorized to remove value from rate base and exclude 2012 expenses from rate recovery pursuant to Pub. Util. Code § 455.5? Is the Commission required to delay such an order until the utilities' 2015 GRCs?*

### **A. No hearing is required for the Commission to reduce rates for SONGS, and nor must the Commission wait for SCE's General Rate Case to do so**

The plain language of section 455.5 permits the Commission to reduce rates to reflect the non-operation of SONGS prior to SCE's next General Rate Case and without any hearing. There is no need to look to the legislative history, as SCE argues is required (SCE Response to Order Instituting Rulemaking, p. 18, *et seq.*), because the plain language of the statute is clear.

The relevant statutory language is as follows (P. U. Code Section 455.5, see Appendix A for the full text of this section):

(a) In establishing rates for any electrical, gas, heat, or water corporation, the commission may eliminate consideration of the value of any portion of any electric, gas, heat, or water generation or production facility which, after having been placed in service, remains out of service for nine or more consecutive months, and may disallow any expenses related to that facility.

...

(c) Within 45 days of receiving the notification specified in subdivision (b), the commission shall institute an investigation to determine whether to reduce the rates of the corporation to reflect the portion of the electric, gas, heat, or water generation or production facility which is out of service. For purposes of this

subdivision, out-of-service periods shall not include planned outages of predetermined duration scheduled in advance. The commission's order shall require that rates associated with that facility are subject to refund from the date the order instituting the investigation was issued. The commission shall consolidate the hearing on the investigation with the next general rate proceeding instituted for the corporation.

There is no requirement for a hearing, prior to a decision to reduce rates, in subsection (a) or (c). If the Legislature had intended to require a hearing, it surely would have done so. Rather, the end of subsection (c), which is the primary language SCE relies on, simply requires that any hearing that is held be consolidated with the next general rate case. It is clear from the plain meaning of section 455.5 that a hearing is not required for the Commission to act on its authority to “eliminate consideration of the value of any portion” of a generating facility “in establishing rates.” (Subsection (a)). Standard rules of statutory interpretation require that the interpretation exercise end if the plain meaning is clear.<sup>1</sup>

SCE argues that the legislative history of this section supports its assertion that a hearing is required and that such a hearing must not take place until the next GRC, in which case the Commission cannot eliminate consideration of SONGS in SCE’s or SDG&E’s rate-base until the next GRC is resolved (SCE Response to Order Instituting Rulemaking, p. 18). Again, the plain meaning of section 455.5 is clear, which moots any discussion of legislative history. Accordingly, SCE’s arguments should be rejected.

Moreover, even if the Commission does in this case find the legislative history relevant, SCE’s own arguments support the view that a hearing is not required. SCE states (*Id.*,

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<sup>1</sup> "[I]n interpreting a statute a court should always turn to one cardinal canon before all others. . . . [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." And: "[W]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-4 (1992).

emphasis added):

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

The fact that the bill was amended to explicitly remove the requirement for a hearing undermines SCE’s assertions to the contrary. Additionally, an investigation does not require a hearing. The Order Initiating Investigation in this proceeding preliminarily determined that a hearing will be required to resolve disputed issues, but there is no general requirement that an investigation include hearings.

Last, subsection (d), governing when the generating facility at issue may be reinstated as rate-base, states expressly that the Commission (emphasis added) “may adjust the corporation's rates accordingly without a hearing, except that a hearing is required on whether to include, for purposes of establishing rates, any additional plant value added.” This additional evidence shows that the Legislature knew how to require a hearing if it intended to do so. The combined facts that the Legislature: 1) did not expressly require a hearing prior to reducing rates, in subsection (a) or (c); 2) that it actually removed draft language that would have required a hearing, and; 3) that it clearly knew how to include language requiring a hearing elsewhere in the statute, should be considered dispositive by the Commission.

In sum, even if the Commission feels that the legislative history is relevant to the issue at hand, this history weighs heavily in favor of a hearing not being required prior to the Commission’s decision to reduce rates for SONGS.

## **B. SCE's arguments re Section 362 are inapplicable**

SCE also argues that Section 362 also prevents "removal of the SONGS revenue requirement from rates prior to SCE's next GRC." (SCE Response, p. 20). As DRA pointed out in its reply in this proceeding, Section 362 is not applicable to the present proceeding because SONGS is not "available and operational." To the point, SONGS is neither available nor operational, which is why the Commission is considering removing SONGS from the utilities' rate-base.

Section 362 states, in full:

(a) In proceedings pursuant to Section 455.5, 851, or 854, the commission shall ensure that facilities needed to maintain the reliability of the electric supply remain available and operational, consistent with maintaining open competition and avoiding an overconcentration of market power. In order to determine whether the facility needs to remain available and operational, the commission shall utilize standards that are no less stringent than the Western Electricity Coordinating Council and North American Electric Reliability Council standards for planning reserve criteria. (b) The commission shall require that generation facilities located in the state that have been disposed of in proceedings pursuant to Section 851 are operated by the persons or corporations who own or control them in a manner that ensures their availability to maintain the reliability of the electric supply system.

Even if the Commission finds Section 362 applicable to the present context, SCE's argument still lacks merit because Section 455.5(d) provides specific recourse to reinstate facilities into rate-base, if they have previously been removed pursuant to subsection (a). Subsection (d) states (emphasis added):

d) Upon being informed by the corporation that any portion of its electric, gas, heat, or water generation or production facility which was eliminated from consideration by the commission in establishing rates for being out of service for nine or more consecutive months pursuant to subdivision (a) or (b), has been restored to service and has achieved at least 100 continuous hours of operation, the commission may again consider that portion of the facility for purposes of establishing rates, and may adjust the corporation's rates accordingly without a hearing, except that a hearing is required on whether to include, for purposes of

establishing rates, any additional plant value added.

There is nothing to prevent SCE or SDG&E from applying pursuant to subsection (d) to reinstate SONGS into rate-base if the Commission decides first to remove SONGS from rate-base pursuant to subsection (a).

SCE argues that depriving it of the revenue currently authorized for (non-operational) SONGS would prevent it from continuing to work to bring SONGS back online (SCE Response, p. 20). This argument fails because SCE has many other sources of funding to continue this work – and this work should optimally be funded by shareholders, not ratepayers, anyway. There is recent evidence, cited by Senator Feinstein,<sup>2</sup> that SCE may have known about potential problems with the SONGS replacement steam generators prior to installing the new generators. If at all accurate, these reports further support the notion that any additional expenditures for SONGS should be funded by shareholders.

SCE also cites Section 729 as “requiring the Commission to hold hearings before establishing new rates.” (SCE Response, p. 20). This argument should also be rejected. Section 729 states in full:

The commission may, upon a hearing, investigate a single rate, classification, rule, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof.

Section 729 provides broad authority to the Commission to conduct investigations into utility rates, rules, etc. However, it in no way supersedes the more specific directions in section 455.5, and nor does SCE argue that it does. Rather, SCE cites Section 729 in an

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<sup>2</sup> Los Angeles Times, Feb. 6, 2013: [latimes.com/news/local/la-me-0207-san-onofre-20130207,0,3728522.story](http://latimes.com/news/local/la-me-0207-san-onofre-20130207,0,3728522.story). SCE has rejected Feinstein’s claims: <http://www.latimes.com/la-me-0208-san-onofre-20130208,0,5651841.story?track=latiphoneapp>.

aside, only once. The Commission should ignore Section 729 in determining its authority under Section 455.5 to reduce rates.

### **C. Past rate reduction cases are not binding on the Commission**

SCE argues that the Commission has previously consolidated hearings on rate reductions with the next GRC (SCE response to OII, p. 19), as it argues is required in the present case:

Commission precedent confirms that Section 455.5 does not authorize, and has not been previously invoked to effect, a rate reduction prior to the utility's next GRC. As noted, in the Palo Verde, El Dorado, and Geysers 15 OIIs, the Commission consolidated its investigations with the utility's next GRC. See D. 95-05-042, 1995 WL 461165, at \*1 (Palo Verde); D. 00-02-046, 2000 WL 289723, at \*407-08 (El Dorado); D. 92-12-057, 1992 WL 438010, at \*117 (Geysers 15). In none of these proceedings did the Commission reduce the utility's rates pending the outcome of the OII. Instead, in all three cases, the Commission ordered a rate adjustment only in its final decision terminating the OIIs.

The Commission is not bound by these precedents, and should not emulate this precedent. As discussed above, the plain meaning of the statute and the legislative history strongly weigh in favor of no requirement for a hearing prior to reducing rates, or that the hearing be consolidated with the next GRC. Accordingly, the Commission, in these cases cited by SCE, elected to consolidate hearings with the GRC - but it has never been required to do so by the statute at issue.

*2. Does the Commission have legal authority to order SCE and SDG&E to refund rates collected by the utilities upon finding that some 2012 expenses related to post-outage operations at SONGS recorded in the SONGSMA were not reasonable and necessary? If so, is there any legal basis to delay such an order?*

**A. In the absence of unreasonable error or omission, revenue should be considered refundable only upon commencement of this OII**

SCE argues that the Commission does not have authority for retroactive refunds from Jan. 1, 2012, and has this authority only for funds collected after Nov. 1, 2012. (SCE Response, p. 25). The Clean Coalition agrees with SCE's arguments that refund authority exists only for revenue collected after Nov. 1, 2012, because the "specified purpose" of the GRC memorandum account, required by D.95-10-018 for retroactive refundability, was not applicable to SONGS when the GRC memorandum account was created. Moreover, the intent of the specified purpose rule is to provide notice to the utility that revenue may be subject to refund. SCE argues convincingly in the present case that it was not on sufficient notice that SONGS revenue may be subject to refund until Nov. 1, 2012.

Additional guidance is contained in section 455.5(c), which states, in part: "The commission's order shall require that rates associated with that facility are subject to refund from the date the order instituting the investigation was issued." This language bolsters SCE's case that revenue is refundable only after the OII commenced on Nov. 1, 2012.

SCE also argues against the refund of revenue "associated with functions that SCE must continue to undertake in the public interest regardless of whether Units 2 and 3 are operating..." (SCE Response, p. 25). We agree with this argument also, though we caution the Commission to carefully circumscribe what activities should fall into the "functions that SCE must continue to undertake in the public interest" category.

**B. If the OII leads to the conclusion that SCE committed unreasonable error or omission, funds may be refundable prior to commencement of this OII**

A major exception to the general rule described in the previous section arises if this OII uncovers evidence that SCE acted unreasonably in incurring the outages. In such a case, there is clear legal precedent for refundability of rates prior to Nov. 1, 2012. Specifically, P. U. Code section 463(a) provides (emphasis added):

For purposes of establishing rates for any electrical or gas corporation, the commission shall disallow expenses reflecting the direct or indirect costs resulting from any unreasonable error or omission relating to the planning, construction, or operation of any portion of the corporation's plant which cost, or is estimated to have cost, more than fifty million dollars (\$50,000,000), including any expenses resulting from delays caused by any unreasonable error or omission. Nothing in this section prohibits a finding by the commission of other unreasonable or imprudent expenses. This subdivision is a clarification of the existing authority of the commission, is not intended to limit or restrict any power or authority of the commission conferred by any other provision of law, and applies to all matters pending before the commission. This section does not prohibit the commission from establishing rates for an electrical or gas corporation on a basis other than an allowed rate of return on undepreciated capital costs.

This section requires that the Commission “not include in rates any expenses “resulting from any unreasonable error or omission...” Accordingly, if this OII does result in such findings, the Commission is required to exclude this revenue from rates. The reasonableness of SCE’s actions in relation to SONGS will be examined in a number of phases already scoped in this proceeding.

**II. Conclusion**

The Clean Coalition urges the Commission to reject SCE’s arguments regarding the need to wait until the next GRC or that a hearing is required before reducing rate-base due to the unavailability of SONGS. We agree, however, with SCE’s arguments that

such revenue can only be retroactively refunded to ratepayers after sufficient notice is provided to the utility, and such notice was not provided in this case until Nov. 1, 2012. A major exception to this rule applies if SCE's actions are found by the Commission to be unreasonable.

Respectfully submitted,

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Tam Hunt

Attorney for the  
Clean Coalition  
2 Palo Alto Square  
3000 El Camino Real, Suite 500  
Palo Alto, CA 94306  
[805-214-6150](tel:805-214-6150)

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## Appendix A: Full text of Public Utilities Code section 455.5

**455.5.** (a) In establishing rates for any electrical, gas, heat, or water corporation, the commission may eliminate consideration of the value of any portion of any electric, gas, heat, or water generation or production facility which, after having been placed in service, remains out of service for nine or more consecutive months, and may disallow any expenses related to that facility. Upon eliminating consideration of any portion of a facility or disallowing any expenses related thereto under this section, the commission shall reduce the rates of the corporation accordingly and shall, for accounting purposes, record the value of that portion of the facility in a deferred debit account and shall treat this amount similar to the treatment of the allowance for funds used during construction. When that portion of the facility is returned to useful service, as provided in subdivision (c), the corporation may apply to the commission for the inclusion of its value and expenses related to its operation for purposes of the establishment of the corporation's rates.

(b) Every electrical, gas, heat, and water corporation shall periodically, as required by the commission, report to the commission on the status of any portion of any electric, gas, heat, or water generation or production facility which is out of service and shall immediately notify the commission when any portion of the facility has been out of service for nine consecutive months.

(c) Within 45 days of receiving the notification specified in subdivision (b), the commission shall institute an investigation to determine whether to reduce the rates of the corporation to reflect the portion of the electric, gas, heat, or water generation or production facility which is out of service. For purposes of this subdivision, out-of-service periods shall not include planned outages of predetermined duration scheduled in advance. The commission's order shall require that rates associated with that facility are subject to refund from the date the order instituting the investigation was issued. The commission shall consolidate the hearing on the investigation with the next general rate proceeding instituted for the corporation.

(d) Upon being informed by the corporation that any portion of its electric, gas, heat, or water generation or production facility which was eliminated from consideration by the commission in establishing rates for being out of service for nine or more consecutive months pursuant to subdivision (a) or (b), has been restored to service and has achieved at least 100 continuous hours of operation, the commission may again consider that portion of the facility for purposes of establishing rates, and may adjust the corporation's rates accordingly without a hearing, except that a hearing is required on whether to include, for purposes of establishing rates, any additional plant value added.

(e) Nothing in this section prohibits the commission from reviewing the effects of any electric, gas, heat, or water generation or production facility which has been out of service for less than nine consecutive months or planned outages of predetermined duration scheduled in advance.

(f) For purposes of this section, an electric, gas, heat, or water generation or production facility includes only such a facility that the commission determines to be a major

facility of the corporation, and does not include any facility determined by the commission to constitute a plant held for future use.