Decision **PROPOSED DECISION OF ALJ BARNETT** (Mailed 3/20/2003)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) to Review and Recover Transition Cost Balancing Account Entries from July 1, 2000 through June 30, 2001, and Various Generation-Related Memorandum Account Entries.	Application 01-09-004 (Filed September 4, 2001)

Robert B. Keeler and David R. Hinman, Attorneys at Law, for Southern California Edison Company, applicant.
Jason Reiger, Attorney at Law, for Office of Ratepayer Advocates.

OPINION GRANTING RELIEF

I. Summary

This decision permits Southern California Edison Company (SCE) to recover approximately $20,000,000 in costs accruing prior to August 31, 2001, in four accounts. It finds that the release of claims by SCE in the Settlement Agreement between SCE and this Commission did not release the claims which are the subject of this decision.

II. Background

On September 4, 2001, SCE filed its application in this 2001 Annual Transition Cost Proceeding (ATCP) seeking to recover $20,000,000 in its Transition Cost Balancing Account (TCBA) and other generation-related

memorandum accounts. On October 2, 2001, SCE and the Commission entered into a Settlement Agreement in the so-called Federal Filed Rate Doctrine litigation[1] which, among other things, established Settlement Rates and new ratemaking mechanisms, including the Procurement Related Obligations Account (PROACT), that became effective as of September 1, 2001. The Commission approved the PROACT ratemaking structure on January 23, 2002 in Resolution E-3765.[2]

Due to the Commission's implementation of the Settlement Agreement, SCE believed that testimony related to most issues in its September 4, 2001 ATCP filing became moot. Therefore, on February 22, 2002, SCE filed an amended application and revised testimony which it believes is consistent with the terms of the Settlement Agreement. The revised testimony sets forth the operation of three memorandum accounts and the Palo Verde Nuclear Unit Incentive Procedure (NUIP), and requests that the Commission authorize SCE to recover the balances in the three accounts, plus the NUIP reward, as Recoverable Costs in the Settlement Rates Balancing Account (SRBA). Specifically, SCE seeks recovery for amounts associated with the following ratemaking mechanisms:

1. Palo Verde Nuclear Generating Station Nuclear Unit Incentive Procedure (NUIP): $11,669,000;

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[1] See Appendix A, which is the Stipulated Judgment in *Southern California Edison Co. vs. Lynch, et al.*, U.S. Dist Ct., Cent. Dist. Cal., Case No. 00-12056-RSWL (Mcx). The District Court approved the Settlement Agreement in the Stipulated Judgment. The Settlement Agreement is attached to the Judgment.

[2] A copy of Resolution E-3765 is contained in Exhibit 6, beginning at page 67 of the Exhibit.

2. Fuel Oil Inventory Memorandum Account (FOIMA): $5,872,000;
3. Increased Return on Equity on Divestiture Memorandum Account (IROEDMA): $1,567,000; and
4. Short-Term Generation Capacity Memorandum Account (STGCMA): $633,000.

The Office of Ratepayer Advocates (ORA) opposes recovery of the amounts SCE requests. ORA did not conduct a review of the reasonableness of the amounts, but asserts that:

1. Some of the requested amounts are contrary to SCE's tariff language or Commission-approved accounting;
2. Certain amounts requested are not costs;
3. The amounts requested are ineligible for post-December 31, 2001 recovery.

Public hearing was held on July 29, 2002, before Administrative Law Judge (ALJ) Barnett, who raised the issue regarding whether or not the Settlement Agreement had subsumed the costs and incentives SCE has requested to recover in this case, and whether SCE, in the release attached to the Settlement Agreement, waived its right to request recovery of these amounts.

III. A Description of the Accounts at Issue

A. The Palo Verde NUIP provides rewards for the operation of Palo Verde units that perform above an 80 percent average gross capacity factor for a given fuel cycle. NUIP is part of the Palo Verde Incremental Cost Mechanism that provides for costs to be passed through to customers. In Decision (D.) 01-09-041, the Commission authorized SCE to continue the present rate recovery methodology for Palo Verde incremental costs and the NUIP rewards until the

effective date of SCE's 2003 Test Year General Rate Case, or until further order of the Commission.

B. The FOIMA permits SCE to recover the carrying costs and net losses on the sale of its fuel oil inventory.

C. To provide SCE an incentive to voluntarily divest its fossil generation capacity, D.95-12-063 authorized an increase in the return on common equity of up to 10 basis points for each 10 percent of fossil generating capacity that SCE divests. The IROEDMA authorizes SCE to track the differential between the reduced return that applied to SCE's fossil generating plants prior to divestiture and the increased return allowed when they were divested. Recovery of the differential is subject to Commission order.

D. SCE established the STGCMA to track the costs and revenues associated with the lease and operation of the Riverside Canal Generation Station. SCE leased the plant to provide reserve generating capacity to reduce the likelihood of Stage II and Stage III Emergencies: e.g., rotating outages.

IV. The Settlement Agreement

SCE's first amended complaint against the CPUC was filed in February 2001 in federal court (CV-00-12056-RSLW (Mcx). The Stipulated Judgment based on that complaint recites:

> "B. Jurisdiction of the Court
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> > "1. SCE's Complaint alleges that defendants' decisions are unlawful because they prevent SCE from recovering fully its costs, in particular, its costs of procuring electricity and its cost of interstate transmission. SCE's Complaint states causes of action based upon (a) preemption, including preemption under the filed rate doctrine, (b) facial takings, (c) due process, (d) as-applied takings, and (e) commerce clause.
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> * * *

"D. Issues Not Resolved

"6. SCE and the CPUC recognize that SCE has presented substantial federal claims and that the ultimate judicial resolution of these issues is uncertain. SCE and the CPUC agree that the resolution of the case in accordance with this stipulated judgment is desirable to eliminate this uncertainty and to provide an outcome that is in the public interest.

The pertinent provisions of the Settlement Agreement to this ATCP are:

1. In the Recitals of the Parties section:

"B. In the Litigation, SCE has contended, *inter alia*, that Defendants have not permitted SCE to recover in retail rates the full amount of SCE's costs, including its wholesale electric procurement costs, as required by federal law."

2. In the Rate Stabilization and Cost Recovery section:

"Section 2.8. Disposition of TCBA. Balances in SCE's TCBA as of August 31, 2001 shall have no further impact on SCE's retail electric rates, Surplus or Recoverable Costs, except to the extent the CPUC authorizes the recovery after such date of costs previously recorded in the TCBA (e.g., accelerated amortization of SCE's investment in nuclear plants). Recoverable Costs incurred after August 31, 2001, which would otherwise have been recorded in the TCBA, shall be recovered in rates in accordance with further orders of the CPUC, whether or not the CPUC chooses to continue to have such costs recorded in the TCBA."

3. In the Litigation section:

"Section 4.4 Releases of Specified Claims. Promptly upon entry of the Stipulated Judgment, SCE shall deliver to the CPUC executed releases substantially in the form of *Exhibit B* hereto specifically releasing any and all claims and causes of action that SCE has or may have against the State of California and the CPUC that arise from:

"(a) The facts alleged by SCE in the Litigation, including without limitation claims and causes of action based upon the filed rate doctrine, takings, due process and commerce clause violations, except for claims and causes of action based upon this Agreement or as provided in the Stipulated Judgment;"

4. Exhibit B, the Release:

"**Release**

* * *

"A. Except as provided in the Agreement and in the Stipulated Judgment, SCE hereby does forever release and discharge the CPUC, the State of California, and their respective agencies, departments, successors, officials, agents, representatives, and employees, and each of them from any and all claims, debts, liabilities, demands, obligations, promises, acts, agreements, costs, expenses (including but not limited to attorneys' fees), damages, actions, causes of action and claims for relief of whatever kind or nature, under any theory, whether legal, equitable or other, under the law, either common, constitutional, statutory, regulatory, or other, of any jurisdiction, foreign or domestic ("Claims"), that arise from:

"1. The facts pled, or that could have been pled, in Southern California Edison Company, Plaintiff, vs. Loretta M. Lynch et al., presently pending in the United States District Court for the Central District of California, Case No. 00-12056-RSWL(Mcx), including without limitation claims and causes of action based upon the filed rate doctrine, takings, due process and commerce clause violations;

* * *

"B. With respect to the Claims that are the subject of release hereunder, SCE specifically waives all rights and

> benefits afforded by California Civil Code Section 1542 and does so understanding and acknowledging the significance of such specific waiver of such statutory protection, which provides as follows:
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> > "A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM MUST HAVE MATERIALLY AFFECTED HIS SETTLEMENT WITH THE DEBTOR."

* * *

SCE argues that the costs and incentives it has requested in this proceeding do not come within the subject matter of the Settlement Agreement, nor were they waived in the release. As matters governed by state tariffs under the exclusive jurisdiction of this Commission, those costs and incentives could not have been litigated in the federal filed rate doctrine lawsuit.

SCE states that,

> "In sharp distinction to the costs and incentives at issue in this proceeding, the costs in dispute in the Federal Filed Rate Doctrine litigation were all subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission. These were past wholesale procurement costs that SCE contended it had a right under federal law to recover. For example, in the Stipulated Judgment paragraph C (under "General Provisions") describes "Issues Previously Determined by the Court." Issue number 2 states, "SCE alleges that federal law preempts California from preventing SCE from fully recovering in retail rates its wholesale procurement costs, which are subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC). And Issue number 3 states, "SCE has paid wholesale procurement costs established pursuant to tariffs filed by the Independent System Operator and the Power Exchange with FERC, and has been charged additional amounts pursuant to such tariffs that it has not yet paid.
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> "Recital D in the Settlement Agreement speaks of "SCE's past inability to recover its wholesale electricity procurement costs" and of SCE's "having incurred procurement related liabilities and indebtedness totaling approximately $6.355 billion." On page 7 of the Settlement Agreement, Definition (n), "PX Billing Claim," refers to claims against SCE for its failure to pay timely "any amounts due or claimed to be due to the California Power Exchange…or the California Independent System Operator."

In regard to Section 2.8 of the Settlement Agreement which states that "Balances in SCE's TCBA as of August 31, 2001 shall have no further impact on SCE's retail electric rates, Surplus or Recoverable Costs…," SCE asserts that Section 2.8 applies only to costs that had been recorded in SCE's TCBA as of August 31, 2001. None of the costs or incentives at issue had been recorded in the TCBA as of that date because they all required Commission approval before SCE could transfer them to the TCBA. Since the Commission has not yet given

such approval the costs at issue are not included in the category of costs excluded from rates under Section 2.8.

ORA claims that the costs and incentives at issue in this proceeding were waived by the release because these costs could have been alleged in the federal litigation. Further, ORA asserts that regardless of the release, Section 2.8 of the Settlement Agreement shows that costs recorded prior to the cut-off date are clearly not recoverable; costs incurred after the cut-off date are recoverable with further Commission approval. ORA maintains that the settlement does not address expenses incurred before the cut-off date, but recorded after the cut-off date. Two scenarios are possible: (1) SCE's position that the parties to the agreement meant to create a loophole and leave these costs un-addressed, or (2) ORA's position that the parties meant all relevant costs incurred or recorded prior to the cut-off date to be unrecoverable.

Discussion

1. The Release

In our opinion, SCE did not, by entering the Settlement Agreement and release, waive its right to pursue the costs and incentives at issue in this case. The disposition of those costs and incentives are governed by tariffs and decisions of this Commission: the NUIP reward by D.01-09-041; FOIMA by SCE Preliminary Statement, Para. N. 54; IROEDMA by SCE Preliminary Statement, Para. N. 44; and STGCMA by SCE Preliminary Statement, Para. N. 63. In contrast, it is clear that the federal court case was based on federal law and the federal filed rate doctrine.

The federal issues presented to the federal district court are set forth in Paragraph I.C. of the Stipulated Judgment under "Issues Previously Determined by the Court." Those issues include (1) SCE's allegation that federal

law preempts California from preventing SCE from fully recovering in retail rates its wholesale procurement costs, which are subject to the exclusive jurisdiction of the FERC; (2) application of the federal filed rate doctrine to SCE's wholesale procurement costs, and (3) the court's rejection of the Commission's claim that SCE was equitably estopped from invoking the federal filed rate doctrine. In addition, Paragraph I.D. sets forth issues presented to, but not resolved by the court, that were resolved through compromise in the Settlement Agreement. Those issues include (1) whether the "Pike County" exception to the federal filed rate doctrine applied in the case; (2) whether SCE had recovered all of its wholesale procurement costs under the accounting change implemented by D.01-03-082; and (3) whether the Commission's refusal to allow SCE to pass its wholesale procurement costs incurred under federal tariffs through to retail customers constituted a taking of property without just compensation, a violation of due process, or a violation of the Commerce Clause, under the federal constitution.

The release provides for the release of all claims "under any theory" that arise from "the facts pled, or <u>that could have been pled"</u> (emphasis added) in *SCE v. Lynch et al.* (Release, A.1.) The first question to be addressed is whether a cause of action regarding the four accounts disputed in this application "could have been pled" in the federal lawsuit. We believe the answer is "no."

To have properly pled a cause of action for the four disputed claims in the federal litigation SCE would have had to bring itself within the supplemental jurisdiction of the federal court set forth in 28 USCA § 1367(a).

"§ 1367. Supplemental Jurisdiction

> "(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties."

In this event, SCE would have to show that the four claims "are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy…."[3] To invoke the release, ORA would have to show the relationship of the claims in this application to the claims in the federal action. ORA has failed to do so.

In our view, the four claims do not arise from the facts that are part of the same case or controversy on which the federal case rested. The federal complaint raised issues concerning the filed rate doctrine, and did not consider issues regarding state tariffs under this Commission's jurisdiction. The federal complaint alleged wholesale procurement costs were incurred under federal tariffs and FERC jurisdiction. Since the costs and incentives at issue in this proceeding have nothing to do with wholesale procurement costs, they do not relate to the claims SCE alleged, or could have alleged, in the federal litigation. They are not part of the same case or controversy.

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[3] *Wisc. Dept. of Corrections* v. *Schacht* (1998) 524 US 381, 141 L Ed 2d 364, 371; *Patel* v. *Penman* (1996 CA 9th Cir.) 103 F 3d 868,877.

Although the Commission disputed SCE's allegations, there is no doubt that SCE's federal court complaint alleged federal issues involving wholesale procurement costs. The issues in this application are state issues which were not included in the federal lawsuit. But merely because SCE alleged federal issues that were litigated in federal court, does not mean that the release signed by SCE could not release state causes of action or claims based on tariffs or decisions of the Commission.

We note that SCE filed this application on September 4, 2001, and that the Settlement Agreement was executed on October 2, 2001. Obviously, SCE knew of the claims at issue in this application as did ORA and the Commission. This is not the case of an unknown claim unsuspected by the parties when the release was executed. Therefore, ORA cannot benefit from SCE's waiver of Civil Code § 1542. Both parties knew of the claims.

In regard to the scope of the release, we find that it did not embrace the claims of this application. The instant claims did not arise out of the alleged federal claims and we see no connection with those claims. The claims in this application are state claims which came into existence separately from the alleged federal claims. The tenor of the release is specific to SCE's federal court claims and terminates the federal court claims. To broaden the release to cover state claims, known to all parties at the time the release was executed, would be to expand a clear and specific reference to federal court claims into an inchoate provision encompassing any possible claim arising prior to the settlement. Such an expansion would negate the specificity of the release.

2. Section 2.8 of the Settlement Agreement

Section 2.8 reads as follow:

> "Balances in SCE's TCBA as of August 31, 2001 shall have no further impact on SCE's retail electric rates, Surplus or Recoverable Costs, except to the extent the CPUC authorizes the recovery after such date of costs previously recorded in the TCBA (e.g., accelerated amortization of SCE's investment in nuclear plants). Recoverable Costs incurred after August 31, 2001, which would otherwise have been recorded in the TCBA, shall be recovered in rates in accordance with further orders of the CPUC, whether or not the CPUC chooses to continue to have such costs recorded in the TCBA."

This section is clear. Under the first sentence, balances that were in SCE's TCBA as of August 31, 2001 are to have no further impact on SCE's rates, unless the Commission authorizes an exception to this clause by approving the recovery after August 31, 2001 of costs that were previously recorded in the TCBA. Under the second sentence, costs that SCE incurs after August 31, 2001, which otherwise would have been recorded in the TCBA, will be recovered in rates as the Commission directs. (The TCBA was eliminated in Resolution E-3765, dated January 23, 2002.)

ORA argues that Section 2.8 intended not only to eliminate balances that were in the TCBA as of August 31, 2001, but also to eliminate all costs SCE had incurred prior to that date, including balances that were in all of SCE's other regulatory accounts. According to ORA, accepting the plain meaning of Section 2.8 "is an irrationally restrictive and tortuously literal reading of one specific sentence taken out of context of the paragraph it falls within, and out of context of the Agreement as a whole." (ORA Opening Brief, p. 5.) Instead, ORA argues that the parties actually intended Section 2.8 to apply to all costs SCE had incurred as of August 31, 2001, not just to costs recorded in the TCBA. ORA claims that costs recorded prior to the cut-off date are clearly not recoverable,

implying that costs recorded in any regulatory account prior to the cut-off date are not recoverable. Obviously, ORA has neglected the modifier "balances in SCE's TCBA." It is only costs that were recorded in the TCBA as of August 31 that were unrecoverable under Section 2.8, not all costs recorded in any regulatory account.

The costs SCE seeks to recover in this case were both incurred and recorded in regulatory accounts prior to August 31, 2001. But they were not recorded in the TCBA. SCE could not transfer those costs from their present accounts to the TCBA without a Commission decision authorizing their recovery. Since that decision is the subject of this proceeding, those costs could not have been recorded in the TCBA as of August 31, 2001.

ORA's argument comes down to an assertion that the August 31 date is meaningless. This argument has no merit. The use of the August 31 cut-off date to exclude from rates only the balance in the TCBA was an essential part of the Settlement. As of the close of the ATCP record period in this case (June 30, 2001), the undercollection in SCE's TCBA was slightly less than $3.46 billion. By August 31, the balance would have decreased somewhat, but would still have been well over $3 billion. Section 2.8 of the Settlement Agreement declared that this August 31, 2001 undercollection in the TCBA would have no further impact on SCE's rates. We acknowledged this fact by eliminating the TCBA and establishing the PROACT. It is "balances in SCE's TCBA as of August 31, 2001, (that) have no further impact…." Balances <u>not</u> in the TCBA as of August 31, 2001, are subject to proceedings such as this. ORA's convoluted argument would render Section 2.8 meaningless.

V. The Accounts

1. The Palo Verde NUIP

The Palo Verde NUIP provides a reward for the efficient operation of the Palo Verde nuclear generators. In D.01-09-041 (A.96-02-056), ORA agreed to the extension of the Palo Verde incremental costs ratemaking mechanism. SCE requests to recover $11,668,994[4] of Palo Verde NUIP rewards. SCE requests that it be authorized to record Palo Verde incremental costs and Commission-approved Palo Verde NUIP rewards in SCE's Native Load Balancing Account, established pursuant to D.02-04-016.[5] Balances in this account are cleared monthly to SCE's SRBA.

ORA claims that SCE recorded the Palo Verde NUIP rewards requested in this case in its TCBA prior to August 31, 2001, and that these rewards are therefore not recoverable. In fact, SCE has not recorded the Palo Verde NUIP rewards that it is seeking to recover in this proceeding in any regulatory mechanism. SCE's prior Palo Verde NUIP tariff that was effective through August 31, 2001 provided that SCE must receive Commission approval before any Palo Verde NUIP reward is recorded in any regulatory mechanism. Furthermore, it has been the Commission's practice since the NUIP was

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[4] Palo Verde Unit 1 (Fuel Cycle 9) NUIP reward is $6,576,215, and Palo Verde Unit 2 (Fuel Cycle 9) NUIP reward is $5,092,779.

[5] Pursuant to Resolution E-3765, during the period September 1, 2001 through December 31, 2001, the Commission allowed SCE to recover utility retained generation-related amounts, including Palo Verde NUIP rewards, through the operation of the Settlement Rates Balancing Account (SRBA). Beginning January 1, 2002, the Palo Verde NUIP reward should be included in the Native Load Balancing Account, consistent with D.02-04-016. Balances in this account are then cleared monthly to the SRBA.

established that the Commission must approve any NUIP reward before the reward can be recorded for rate recovery purposes.

ORA has not challenged the amount of the requested reward. We have reviewed the workpapers and find the amount of $11,668,994 to be reasonable. It will be approved.

2. FOIMA Costs

ORA argues that SCE should be denied recovery of four categories of costs recorded in the FOIMA: the portion of delivery costs associated with unmarketable oil sludge at the bottom of some of the fuel oil tanks; a minor amount of costs incurred in mid-January 2001, but not recorded as adjustments until after the January 31 expiration date of the FOIMA; fuel oil carrying costs that the Commission initially denied, but that the California Court of Appeals[6] subsequently directed the Commission to allow SCE to record; and interest recorded after January 31, 2001 on the costs incurred prior to that date. All these costs are legitimate and should be recovered.

Regarding the costs associated with the oily sludge, we provided a description of the purposes of the FOIMA in Resolution E-3649 (which extended the operation of the FOIMA to January 31, 2001): "The purpose of the FOIMA is 1) to record fuel oil inventory carrying costs; and 2) gains and losses on the sale of Edison's fuel oil inventory…." The FOIMA also provides an account for Edison to record its fuel oil related costs until the Commission reaches a final decision on the market valuation of these assets. Oily sludge is a combination of oil, dirt, and water that accumulates over many decades at the bottom of oil

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[6] *SCE* v. *CPUC* (2000) 85 CA[4] 1086.

storage tanks from the normal impurities in the oil as a result of the normal operation of the tanks. As such, costs associated with its disposal are clearly "fuel oil related costs" under the wording of Resolution E-3649.

Regarding the costs that were incurred in mid-January 2001 but not recorded until after the end of that month, SCE says this is simply a matter of normal accounting practice. SCE observes that costs are recorded on a monthly basis, but that does not mean that all costs incurred in January are recorded in January. Some costs incurred may be recorded in a later month when the final vendors' invoices have been received. The January 31, 2001 expiration date of the FOIMA allows SCE to record costs incurred prior to the expiration date after that date in the normal course of accepted accounting practice.

The third category of costs are costs associated with the beginning date of the FOIMA that the Commission initially refused to allow SCE to record. However, the California Court of Appeal subsequently directed the Commission to allow SCE to record them in a decision dated December 29, 2000. SCE recorded these costs in February 2001. It is reasonable that the cost impact of a Court of Appeal decision issued on December 29, 2000 would be calculated and booked one month later. We will authorize SCE to recover this cost – both because the Court of Appeal directed us to allow SCE to record it, and because it was recorded as soon as was reasonably possible under the circumstances.

The fourth category of FOIMA costs is simply interest on the other amounts recorded in the account at that time. The FOIMA tariff specifically provided for the accrual of interest. ORA has not challenged the reasonableness of the requested costs. We have reviewed the workpapers and find reasonable the debit balance of $5.872 million. It will be allowed.

3. The Divestiture Memorandum Account

The purpose of the Increased Return on Equity on Divestiture Memorandum Account (IROEDMA) is to track the incentive return on common equity and income taxes associated wit the divestiture of SCE's fossil generation. To provide SCE an incentive to voluntarily divest its fossil generation capacity, D.95-12-063 authorized an increase in the rate of return of common equity of up to 10 basis points for each 10 percent of fossil generating capacity that SCE divests. The increased rate of return on common equity on remaining fossil generation rate base recorded in the IROEDMA ended on January 18, 2001.

SCE is seeking recovery of $1.607 million recorded in the IROEDMA as of January 18, 2001, including interest through the 2001 ATCP record period. SCE has requested cost recovery of amounts recorded in the IROEDMA prior to July 1, 2000, in SCE's last two ATCP applications (A.99-09-013 and A.00-09-014). SCE requests that these amounts be transferred to the SRBA as Recoverable Costs. SCE also proposes that this account be eliminated after such transfer since it will no longer be used.

ORA has not challenged the amount of the request. We have reviewed the workpapers and find the amount of $1.607 million to be reasonable. It will be approved.

4. STGCMA Costs

ORA says that SCE should not recover amounts recorded in its STGCMA ($633,000) because, (1) these costs are unrecoverable under the Settlement Agreement because they are pre-August 31, 2001 TCBA-related costs, (2) SCE failed to set the STGCMA account to zero effective January 1, 2001, and (3) SCE should have filed to recover the pre-December 31, 2000 STGCMA costs in

an earlier proceeding under the language of the tariff, so they would have been recorded in the TCBA before August 31, 2001.

ORA's first argument fails because those costs were not recorded in the TCBA as of August 31, 2001, and thus are not excluded from rates under Section 2.8 of the Agreement. ORA's second argument fails because the STGCMA tariff specifically allows SCE to seek recovery from its customers of any debit balance recorded in the account as of December 31, 2000. Since there was a debit balance in the account as of that date, SCE is seeking to recover that balance in this proceeding as expressly authorized by the tariff. We are not persuaded by ORA's third argument, that SCE should have filed to recover pre-December 31, 2000 costs in an earlier proceeding. SCE filed the original application for this 2001 ATCP in September 2001, as required by Commission decisions that govern the timing of the annual ATCP filings. The record period for this case is July 1, 2000 through June 30, 2001. This record period closed just two months prior to the filing date. The STGCMA debit balance SCE seeks to recover is for costs incurred during the record period that pertains to this case, or between July 1 and December 31, 2000, pursuant to the terms of the tariff. The record period for the 2000 ATCP (the only "earlier proceeding" ORA could be referring to) was July 1, 1999 through June 30, 2000, which was prior to the time the costs requested in this proceeding were incurred. There was no "earlier proceeding" in which SCE could have requested recovery of these costs. ORA has not challenged the amount of the request. We have reviewed the workpapers and find the amount of $633,000 to be reasonable. It will be approved.

VI. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(d) and Rule 77.1 of the Rules of Practice and Procedure.

ORA and The Utility Reform Network (TURN) filed comments to the proposed decision and SCE filed reply comments. Much of ORA's comments merely reargue positions it took in its brief and will be disregarded. (Rule 77.3.)

We find without merit ORA's argument that the December 31, 2001 deadline for recovering generation-related stranded costs in Section 367(a) of AB 1890 precludes our granting recovery of the costs at issue here. It ignores D.02-11-026 where we held that the surcharge revenues imposed by D.01-03-082 may be applied to return each utility to financial health. (D.02-11-026, Finding of Fact 5, pp. 18-19.) In D.02-11-026, we reviewed ABX1-6, which modified, among other statutes, § 330(l)(2) and § 377, and we held that we retained jurisdiction to determine what generation costs utilities may recover in rates. (Id. at 14.) Nothing in AB 1890 as originally enacted limits the costs which may be recoverable under cost-of-service ratemaking. ABX1-6 specifically reauthorizes the Commission to regulate rates for the utilities' generation related costs. (D.02-11-026 at 16.) It is clear to us that December 31, 2001 is not a deadline to recover the costs at issue here, which were incurred under CPUC tariffs prior to August 31, 2001.

TURN argues that the Proposed Decision discusses the wholesale procurement cost issue of the federal settlement as if all parties agreed the wholesale procurement costs were the federal issue. TURN points out that in the federal case the Commission took the position that the costs were generation related. For this ATCP it is not necessary to determine procurement versus

generation; what is clear is that SCE's pleadings in the federal case alleged the costs were procurement costs. This opinion has been modified to reflect that SCE alleged the costs were procurement.

VII. Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Robert Barnett is assigned ALJ in this proceeding.

Findings of Fact

1. The issues regarding costs presented in federal court were based upon SCE's allegations of federal issues involving wholesale procurement costs. The issues in this application are state issues which were not included in the federal lawsuit.

2. To have properly pled a cause of action for the four disputed accounts in the federal litigation SCE would have had to bring itself within the supplemental jurisdiction of the federal court set forth in 28 USCA § 1367(a).

3. The four disputed accounts in this proceeding do not arise from the facts that are part of the same case or controversy on which the federal case rested.

4. The costs SCE seeks to recover in this case were both incurred and recorded prior to August 31, 2001. They were not recorded in the TCBA. They were recorded in other regulatory accounts. SCE could not transfer those costs from their present accounts to the TCBA without a Commission decision authorizing their recovery. Since that decision is the subject of this proceeding, those costs could not have been recorded in the TCBA as of August 31, 2001.

5. The release in the Settlement Agreement did not embrace the claims in this application. The claims in this application did not arise out of SCE's alleged federal claims and are not connected with those claims. The claims in this

application are state claims which came into existence separately from the alleged federal claims. The release is specific to the alleged federal claims and terminates those claims.

6. Section 2.8 of the Settlement Agreement excludes from rates only the balances in the TCBA as of August 31, 2001.

7. SCE has not recorded the Palo Verde NUIP rewards that it is seeking to recover in this proceeding in any regulatory mechanism. SCE's tariff that was effective through August 31, 2001, provided that SCE must receive Commission approval before any Palo Verde NUIP reward is recorded in any regulatory mechanism. The requested reward of $11,668,994 is reasonable.

8. All costs recorded in SCE's FOIMA during the record period ($5.872 million) are reasonable.

9. The costs of $1.607 million recorded in the IROEDMA are reasonable.

10. The costs of $633,000 recorded in the STGCMA are reasonable.

Conclusions of Law

1. The Settlement Agreement did not release SCE's claims which are the subject of this application.

2. The amounts SCE has recorded in various accounts for its NUIP reward, its FOIMA, its IROEDMA, and its STGCMA are allowed, and are authorized to be recorded in SCE's Settlement Rates Balancing Account.

O R D E R

IT IS ORDERED that:

1. Southern California Edison Company (SCE) shall record in its Settlement Rates Balancing Account the amounts as of June 30, 2001 that were recorded in

its Fuel Oil Inventory Memorandum Account, its Increased Return on Equity on Divestiture Memorandum Account, its Short-Term Generation Capacity Memorandum Account, and its Palo Verde Nuclear Unit Incentive Procedure reward.

2. Within 10 days after complying with Paragraph 1 of this order, SCE shall file an advice letter which will be effective upon approval of the Energy Division.

3. This proceeding is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX A

STIPULATED JUDGMENT

Appendix A to A0109004 - Stipulated Judgment