

SOUTH CAROLINA PUBLIC SERVICE COMMISSION

HEARING OFFICER DIRECTIVE

DOCKET NOS. [2017-370-E](#), [2017-207-E](#), and [2017-305-E](#) ORDER NO. 2018-141-H

OCTOBER 10, 2018

David Butler
Hearing Officer

DOCKET DESCRIPTION:

Docket No. 2017-370-E – Joint Application and Petition of South Carolina Electric & Gas Company and Dominion Energy, Incorporated for Review and Approval of a Proposed Business Combination between SCANA Corporation and Dominion Energy, Incorporated, as May Be Required, and for a Prudency Determination Regarding the Abandonment of the V.C. Summer Units 2 & 3 Project and Associated Customer Benefits and Cost Recovery Plans

Docket No. 2017-207-E – Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent

Docket No. 2017-305-E – Request of the Office of Regulatory Staff for Rate Relief to South Carolina Electric & Gas Company's Rates Pursuant to S.C. Code Ann. § 58-27-920

MATTER UNDER CONSIDERATION:

Motion of the Office of Regulatory Staff (“ORS”) to Compel Removal of Confidential Designation

HEARING OFFICER ACTION:

SUMMARY OF FILINGS RELATED TO THE MOTION TO COMPEL REMOVAL OF CONFIDENTIAL DESIGNATION

This matter comes before the Hearing Officer on the Motion to Compel Removal of Confidential Designation filed by the Office of Regulatory Staff (“ORS”) with regard to documents produced in discovery from South Carolina Electric & Gas Company (“SCE&G”) that, according to ORS, “do not have a legitimate basis for being marked confidential.” Additionally, ORS moves the Commission for an order that removes the confidential designation from certain documents filed under seal with the Motion in

Exhibits A, B, C, and D. ORS argues that the public and ratepayers, along with the Commission, “deserve the full story of what transpired with the failed nuclear project” and, according to ORS, “that process is severely hindered by SCE&G’s abuse of confidential designations.” ORS states that it is making the present request so that the parties may see, use, and respond to the discovery and depositions in these proceedings without a large number of filings under seal and an unsubstantiated blanket confidential designation by SCE&G, without showing the need and legitimacy of confidentiality in the face of complete abandonment of the project. ORS doubts that there is any way for a public hearing to be conducted if a substantial amount of the evidence is marked confidential. Such information should be available for open use in the proceedings and with this Commission, also according to ORS.

ORS specifically asserts that SCE&G has designated an unreasonable amount of discovery responses as confidential, and used overbroad designations of confidentiality, and that the Company has clearly failed to perform a good faith review of the discovery responses prior to marking them confidential. In addition to the categories of documents that ORS addresses in its motion, ORS has identified certain specific documents provided in the discovery responses that it also believes should be made public. ORS has attached these to its Motion as confidential Exhibits. These are:

1. Confidential Responses Related to the Bechtel Assessment (Exhibit A);
2. Documents Stored in SCE&G’s “ORS New Nuclear Development Data” Electronic Reading Room;
3. Confidential Responses to ORS Utility Rates Request #9 (Exhibit B);
4. Privilege Logs Themselves Marked as Confidential (Exhibit C);
5. ORS Exhibits GCJ-2.2.A, 2.17.A, and 2.20.A Filed Under Seal (Exhibits D and E).

ORS further notes that SCE&G has abandoned the construction of Units 2 and 3, and that SCE&G had requested the approval of the Nuclear Regulatory Commission to withdraw its combined operating licenses for the two units. ORS argues that to the extent the information currently designated by SCE&G as confidential was previously entitled to protection from public disclosure, in light of the decision to abandon construction of the Units, this information should no longer continue to be kept hidden from the public.

The Office of Regulatory Staff points out that the Commission has previously found that it is reasonable to revoke confidential treatment of documents related to the terminated nuclear project as being in the public interest and that revoking the confidential treatment would assist ORS in pursuing rate relief for SCE&G customers. See Order No. 2017-337 in Docket No. 2017-138-E.

SCE&G stated in its Response that these categories of documents were originally designated as confidential pursuant to its 2009 Nuclear Facility Master Confidentiality Agreement (“Master Agreement”) with ORS, which SCE&G claims is still in effect. SCE&G claims that it is willing to narrow the scope of its confidentiality designations and

to remove some of them for documents within the specific categories of documents identified in ORS's Motion to Compel to the extent that the documents do not contain information related to trade secrets, competitive information, information that would invade personal privacy, or information which the Company claims is contractually obligated to protect from disclosure. SCE&G has already begun its assessments in this regard, according to its response. Interestingly, SCE&G agrees to remove the confidentiality designations for the specific documents identified above, i.e. those attached to ORS's Motion to Compel in the form of Exhibits. However, SCE&G states that it has to review over 10,000 remaining documents in the named categories, and will need until October 26 to provide ORS with revised confidentiality designations.

In its Reply, ORS asserts that the Master Confidentiality Agreement is not relevant to all information sought in its Motion. ORS notes an unclear nexus between the Master Confidentiality Agreement and the information ORS refers to in its Motion. ORS notes that its Motion specifically requests that the Commission compel SCE&G to remove the cloud of confidentiality from all Bechtel related documents, documents in the ORS New Nuclear Development Data Electronic Reading Room, and to make a determination regarding what responses to ORS AIR 5-25 are confidential and which are not entitled to confidential protection. ORS notes that many documents, including Bechtel reports, already exist in the public sphere and as a result, any privilege that SCE&G claims no longer exists. Furthermore, SCE&G has selectively released certain Bechtel documents, although it previously committed to "produce documents that provide the full account of the Bechtel engagement and assessment..." ORS asserts that the voluntary disclosures waive the attorney-client privilege in the Bechtel situation. Lastly, ORS states that SCE&G's offer to narrow the scope of its confidential designations by October 26 is insufficient, given that this date is a mere three business days before the hearing is set to begin. ORS offers SCE&G the opportunity to provide it with revised confidentiality designations by the alternative date of October 22 instead. ORS, in an aid to SCE&G's proffered additional determinations of confidentiality, attaches Exhibit F to its Reply, in an effort to suggest to SCE&G which additional confidential documents should be declared "public."

It should also be noted that the Hearing Officer has received documents supporting the ORS Motion from various parties, including Central Electric Power Cooperative, Inc. and The Electric Cooperatives of South Carolina Inc., the Solicitor General representing the South Carolina Attorney General, Friends of the Earth and Sierra Club, Tim Dowdey, AARP, and The South Carolina Energy Users Committee.

HEARING OFFICER'S DISCUSSION

After reviewing the exhibits provided by ORS as attachments to its Motion to Compel and its Reply, this Hearing Officer agrees that SCE&G does not have a legitimate basis for designating these documents as confidential. No matter what basis SCE&G had for confidentiality of these documents at the time the documents were so designated, that basis no longer exists. Many of the documents are related to construction issues, which are outdated because of the abandonment of the construction. The Company's willingness to remove the confidentiality designation from the Exhibits attached to the ORS Motion speaks volumes, and should inform the Company's decisions regarding waiver of confidentiality of the remaining documents.

Even if, at the time of determination, SCE&G "carefully" assessed each document to determine whether it contained confidential information as defined by the Master Agreement, such designations are of questionable continuing applicability. SCE&G discusses its use of confidential designation for documents that contained information "that it is contractually obligated to protect." Certainly this is no longer the case, at least as to any such contractual obligations the Company had with Westinghouse. Order No. 2017-337 described the Commission's efforts to determine the position of Westinghouse on the ORS Petition to Revoke Confidential Treatment of the Engineering, Procurement, and Construction ("EPC") Contract, and also to revoke the confidentiality of certain pricing information related to that contract. SCE&G did not object to this Petition, and noted that the true owner of the information was Westinghouse. The Commission then sought to determine Westinghouse's position on the ORS Petition. Despite this effort, Westinghouse later informed ORS that it would take no position. Thus, there was no opposition to the ORS Petition. Accordingly, the Commission revoked all confidential treatment of the EPC Contract, and the pricings, expenditures, and anticipated expenditures for the Units and presented by SCE&G to the Commission. All formerly redacted documents in these categories were required to be filed in unredacted form. Accordingly, SCE&G is no longer contractually obligated to protect information from Westinghouse related to the EPC Contract by Commission Order No. 2017-337.

SCE&G also discusses using a confidential designation on documents containing information that could harm SCE&G's position in future negotiations with contractors or suppliers. The question must be asked: "What future negotiations with contractors or suppliers?" The nuclear project has been abandoned. There will be no need for future negotiations with contractors or suppliers related to the V.C. Summer Project. In fact, even the very language from the Master Agreement that the Company quotes on page 4 of its Reply states that the confidentiality agreement applies only to: "documents that could provide commercial leverage to contractors or suppliers *to the project* if disclosed." (emphasis added) In other words, since the project has been abandoned, this category of confidentiality is no longer applicable.

Further, SCE&G continues to modify its position with regard to documents related to the Bechtel Report, and its responses continue to be “troubling.” At one time, as pointed out by ORS, SCE&G stated that it would “produce documents that provide the full account of the Bechtel engagement and assessment.” SCE&G then failed to do so when given an opportunity. This Hearing Officer was of the belief that, after issuance of an Order compelling SCE&G to provide the Bechtel materials to ORS, which avoided imposing sanctions, SCE&G had lived up to its original pledge to “produce documents that provide the full account of the Bechtel engagement and assessment.” It is apparent that SCE&G continues to hinder access to a number of the Bechtel documents either in confidential form or in public form. It is time for SCE&G to live up to its pledge. SCE&G shall disgorge all documents related to the Bechtel Report to the parties in public form as soon as possible, but no later than October 22, 2018.

Since SCE&G has already agreed that the materials contained in Exhibits A, B, C, D, and E attached to the ORS Motion to Compel may be declared “public,” such material is hereby declared to be public information. Further, Exhibit F, which is attached to the ORS Reply to SCE&G’s Response is also declared to be public information, since that information appears to be related to what was provided in the original Exhibits attached to the ORS Motion to Compel, which SCE&G agreed to make “public.”

Further, to the extent waiver has been granted above, the documents contained in the ORS New Nuclear Development Data Electronic Reading Room are also hereby declared to be public information. This information may have been confidential when the new units were under construction, but there is no reason why this information spanning the course of the project should be kept confidential, due to the fact that construction of the V.C. Summer Units has been halted and will not resume. As with all of this information being declared “public,” ratepayers and the Commission should be afforded the benefit of full access to this material. If there are specific documents that the Company believes continue to be subject to a legitimate claim of confidentiality, the burden is on SCE&G to specifically identify those documents in any further relief it might seek from this ruling regarding the removal of the confidentiality designation.

With regard to the determination of what documents in response to ORS AIR 5-25 are confidential and what documents are not confidential, the Hearing Officer will be glad to aid the parties in such a determination if given access to the materials. I am aware that these materials are related to governmental investigations related to the V.C. Summer Project, but, to my knowledge, I have not been approached with this request prior to the language that appears in the ORS Reply to the SCE&G Response.

Finally, with regard to SCE&G’s need to review another 10,000 documents for confidentiality by October 26, with ORS requesting an alternative deadline of October 22, this Hearing Officer does not understand why these documents have not already been reviewed for confidentiality, considering the posture of this case, the fact that the hearing on these matters is fast approaching, and the existence of the large number of attorneys and

personnel available to SCE&G for this and other purposes. In light of the ORS proposal, I hereby set on or before the close of business on October 22, 2018, for completion of the document review for confidentiality purposes.

CONCLUSION

Clearly, it is just, reasonable, and in the public interest that the ORS Motion be granted, and it is, therefore, granted. The confidential designation shall be therefore removed from all Exhibits to the original Motion which were filed under seal, Exhibit F filed under seal with the ORS Reply, all Bechtel Report-related documents, the identified categories of documents in the NND e-Room, as well as SCE&G's privilege log. Further, SCE&G shall identify specific documents and portions of depositions with legitimate claims of confidentiality, and release the remainder of the 10,000 documents as public information on or before the close of business on October 22, 2018, or earlier if possible. SCE&G shall update ORS weekly of any documents from which the confidentiality designation is removed. The public's right to view all documents without legitimate claims of confidentiality is paramount. Streamlining the Commission's hearing process is also of great benefit to all parties in this case, and to the Commission.

This ends the Hearing Officer's Directive.