ACCEPTED FOR PROCESSING - 2018 July 6 11:06 AM - SCPSC - 2017-370-E - Page 1 of 6

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July 5, 2018

Jocelyn G. Boyd, Esquire
Chief Clerk & Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29210

RE: Request and Petition for Commission Review of Order Nos. 2018-73-H & 2018-79-H, Which Were Entered in the Consolidated Docket for Docket Nos. 2017-207-E, 2017-305-E, & 2017-370-E

Dear Ms. Boyd:

Joint Applicants South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion Energy," or, collectively with SCE&G, "Joint Applicants"), by and through the undersigned counsel and pursuant to S.C. Code Ann. § 58-3-40 (2015) and S.C. Code of Reg. R. 103-854, hereby petition the Public Service Commission of South Carolina (the "Commission") to rehear, reconsider and overrule the decisions giving rise to Order Nos. 2018-73-H & 2018-79-H (collectively, the "Discovery Orders") in the above-captioned matter, which were entered by Hearing Officer David Butler on June 21, 2018, and July 3, 2018, respectively.[1]

To date, ORS has served SCE&G with over 500 separate discovery requests, with multiple subparts, and has produced voluminous amounts of documents to ORS. This petition (the "Petition") involves just one of those requests – ORS Request 5-25 – which reads as follows:

> Please provide all documents provided to the United States Department of Justice, Federal Bureau of Investigation, Securities and Exchange Commission ("SEC"), South Carolina Law Enforcement Division, Office of the Attorney General for the State of South Carolina, and the South Carolina Department of Labor, Licensing and Regulation during 2017 and 2018 as a result of those entities' investigations

[1] ORS directed its motion to compel to both SCE&G and Dominion Energy; however, the request at issue is directed at SCE&G.

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ACCEPTED FOR PROCESSING - 2018 July 6 11:06 AM - SCPSC - 2017-370-E - Page 2 of 6

> into matters arising out of the NND project. Provide the documents in the same format as provided to the entities. SEC filings located on its EDGAR database and documents located on the Public Service Commission of South Carolina's website are excluded from this request.

(ORS Request 5-25.) SCE&G objected to this request on the grounds that it exceeds the scope of permissible discovery under the South Carolina Rules of Civil Procedure and the Commission's own regulations. ORS then filed a motion to compel SCE&G's response to this request on May 23, 2018, which SCE&G timely opposed. On June 21, 2018, Hearing Officer Butler granted that motion and ordered SCE&G to produce all documents responsive to ORS Request 5-25 by July 6, 2018. (*See* Order No. 2018-73-H.) On July 2, 2018, SCE&G requested Hearing Officer Butler's reconsideration of that decision, which was denied on July 3, 2018. (*See* Order No. 2018-73-H.) In that order, Hearing Officer Butler directed SCE&G to produce all documents responsive to ORS Request 5-25 on or before July 6, 2018, two business days later. SCE&G now submits this Petition to: (1) inform the Commission of the unreasonable and impractical deadlines being imposed on SCE&G in this matter; and (2) seek to rehear, reconsider, and overrule Hearing Officer Butler's ruling with respect to ORS Request 5-25.

Impracticability: Hearing Officer Butler has ordered SCE&G to identify, collect, and produce to ORS all documents that are responsive to ORS Request 5-25 within **two** business days of his latest discovery order. Compliance with this directive is simply not possible within the timeframe allotted.

Compliance with this order will entail the production of tens of thousands of documents. Some of these documents have no bearing on the NND Project at all, much less the issues that are subject to ORS's oversight role. Moreover, pursuant to Hearing Officer Butler's directive, SCE&G must review all of those documents to identify and remove those that are not relevant to the NND Project.

Simply stated, identifying, collecting, and producing the documents responsive to Hearing Officer Butler's orders is a substantial undertaking that cannot be completed within two business days – especially during a holiday week. SCE&G would respectfully request a delay of eight days (until July 13, 2018) to comply with Hearing Officer Butler's request, if it is upheld.

Reconsideration of the Discovery Orders: Setting aside the unreasonableness of the deadline imposed on SCE&G, SCE&G hereby petitions the Commission to rehear, reconsider, and overrule the Discovery Orders related to ORS Request 5-25. The rehearing, reconsideration, and overruling of these orders is necessary because the Discovery Orders constitute an unprecedented and unwarranted expansion of SCE&G's discovery obligations, which contravenes South Carolina law and the Commission's own regulations. The Discovery Orders concern a single "cloned" discovery request that requires SCE&G to produce to ORS documents (a) whose relevance ORS cannot begin to ascertain (because it is not a party to the underlying investigations therefore has no knowledge of the scope of the document productions its seeks to clone), (b) whose relevance is extremely doubtful (because ORS has already requested through specific discovery requests the documents it believes to be relevant), and (c)

which will be massively duplicative (because, once again, ORS has already requested through specific discovery requests the documents it has reason to believe are relevant).

Indeed, less than a month before entry of the first of the Discovery Orders in this matter, the South Carolina Court of Common Pleas refused to compel SCE&G's response to nearly identical document requests as exceeding the scope of discovery permitted under Rule 26(b)(1). *See Cleckley v. S. Carolina Elec. & Gas Co.*, Case No. 2017-CP-40-04833.[2]

In *Cleckley v. S. Carolina Elec. & Gas Co.*, an SCE&G ratepayer bringing a purported class action arising out of the NND Project sought production of any documents related to the NND Project that SCE&G previously provided to any party—including federal and state agencies—in response to a subpoena. The Court found that such requests were not reasonably tailored to the matters at issue in that litigation, thereby exceeding the scope of permissible discovery:

> [T]he pivotal issue is relevancy. Relevancy is the linchpin of discovery and is, by definition, material that tends to prove or disprove a matter at issue. That material has been produced to third parties weighs neither for nor against production in the instant case. I do not find a clear nexus between the allegations of Plaintiff's Complaint and the plain language of Plaintiff's discovery requests, and the fact that the requested materials have been produced to third parties establishes no such nexus. SCE&G has represented to the Court that it intends to comply with the mandate of Rule 26, SCRCP. Consequently, and because Plaintiff cannot establish a connection between these requests and the issues in this case, Plaintiff's Motion should be denied.

(*See* Ex. 1 at 3.)

Discovery requests like ORS Request 5-25 are often described as "cloned" or "piggybacking" requests because the parties seeking discovery "are attempting to clone the discovery taken by others in unrelated cases and to piggyback on that unrelated discovery." *Wollam v. Wright Med. Grp.*, No. 10-CV-03104-DME-BNB, 2011 WL 1899774, at *1 (D. Colo. May 18, 2011). South Carolina courts are not alone in refusing to enforce such requests. *See, e.g.*, *Racing Optics v. Aevoe Corp.*, No. 2:15-CV-1774-RCJ-VCF, 2016 WL 4059358, at *1 (D. Nev. July 28, 2016) ("'Piggyback' discovery requests are prohibited."); *Wollam*, 2011 WL 1899774, at *1 ("I agree with the many courts that have considered the question and have held that cloned discovery is not necessarily relevant and discoverable."); *Midwest Gas Servs. Inc. v. Ind. Gas Co., Inc.*, No. IP99-0690-C-Y/G, 2000 WL 760700, at *1 (S.D. Ind. Mar. 7, 2000) (refusing to compel production of documents provided to the United States in response to a civil investigative demand absent a showing of relevance to the action at hand); *Chen v. Ampco Sys. Parking*, No. 08-CV-0422-BEN (JMA), 2009 WL 2496729, at *2 (S.D. Cal. Aug. 14, 2009)

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[2] The Honorable John C. Hayes, III – who was specifically selected by the South Carolina Supreme Court to preside over the class actions brought against SCE&G in connection with the NND Project – orally denied the plaintiff's motion to compel on May 22, 2018, but entered the Court's written decision with respect to that motion on June 28, 2018. A true and accurate copy of that June 28 order is attached hereto and incorporated herein as Exhibit 1.

ACCEPTED FOR PROCESSING - 2018 July 6 11:06 AM - SCPSC - 2017-370-E - Page 3 of 6

(holding that the defendant "appropriately object[ed] to Plaintiff's 'attempt to piggyback on the discovery conducted in the state cases without a sufficient showing of relevance'"); *Moore v. Morgan Stanley & Co., Inc.*, No. 07 C 5606, 2008 WL 4681942, at *5 (N.D. Ill. May 30, 2008) ("[J]ust because the information was produced in another lawsuit . . . does not mean that it should be produced in this lawsuit."); *Oklahoma v. Tyson Foods, Inc.*, No. 05-CV-329-TCK-SAJ, 2006 WL 2862216, at *1-2 (N.D. Okla. 2006) (denying a motion to compel the production of documents made available "in a similar poultry waste pollution lawsuit previously brought in this Court" absent a showing of more than "surface similarities" between the cases); *Payne v. Howard*, 75 F.R.D. 465, 469 (D.D.C. 1977) (stating that "[w]hether pleadings in one suit are 'reasonably calculated' to lead to admissible evidence in another suit is far from clear" and that such a determination requires consideration of "the nature of the claims, the time when the critical events in each case took place, and the precise involvement of the parties, among other considerations").

As the *Cleckley* Court found, cloned or piggybacking document requests are not enforceable absent proof of a nexus between the allegations in the case at hand and the documents produced in the other action(s) from which they are being sought. (*See* Ex. 1 at 3.) The reasoning for this is simple. A cloned discovery request seeks not only documents that are relevant to the subject matter involved in the pending action, but also all documents that were produced in—and thus relevant to—a separate legal action. It is unlikely that two separate legal actions are completely coterminous. In fact, it is a virtual certainty that comparing two legal actions—even two actions involving identical parties—will reveal at least some factual and legal issues that are uniquely raised in one action, but not the other. Thus, information and documents regarding these unique issues would be discoverable in one of those actions, but not the other. There is no legal basis for such an unwarranted expansion of a party's discovery obligations, especially where, as here, ORS has failed to make any showing of a nexus between the documents requested in ORS Request 5-25 and the allegations at issue in this case.

As has been publicly disclosed, the criminal and regulatory investigations from which ORS is now seeking documents are sweeping in scope, and, in some instances, they relate to matters that have little or no connection to any issues concerning the NND Project that fall within the purview of ORS and are therefore, not relevant. For instance, the SEC has sought documents that relate to information provided to investors in quarterly earnings calls. ORS does not even attempt to describe how documents produced in these unrelated investigations are connected to the issues before the Commission in this matter. SCE&G should also not be compelled to produce documents in response to ORS Request 5-25 for the following reasons:

1. ORS is not a party to the investigations from which it seeks cloned discovery, and thus has no basis for representing that the documents produced in those matters are, in fact, relevant to the issues in this proceeding. Neither ORS nor this Commission have any information about the document request that the FBI, the SEC or other parties have made in these investigations. Accordingly, neither ORS nor the Commission have any base to evaluate relevance much less to affirm that the material produced in these investigation are relevant to ORS's issues in this proceeding. ORS is fishing in the dark, which is not permitted under South Carolina law or this Commission's regulations.

ACCEPTED FOR PROCESSING - 2018 July 6 11:06 AM - SCPSC - 2017-370-E - Page 4 of 6

2. ORS has propounded, and SCE&G has answered, more than 500 discovery requests, which means that, presumably, ORS has asked for those documents that ORS believes to be relevant. Accordingly, the cloned request necessarily seeks documents which ORS did not think was sufficiently relevant to justify ORS taking time to draft its own questions requesting them.

3. Because ORS has already requested and received the documents that it believes to be relevant, the cloned request inevitably will require SCE&G to unnecessarily duplicate the production of tens of thousands of documents which ORS has already requested and received. This is abusive discovery, and is precisely why cloned discovery is impermissible.

Conclusion: For the reasons set forth herein, and for the reasons set forth in Joint Applicants' "Response to Motion to Compel Discovery Responses and Production by SCE&G and Dominion Energy," Joint Applicants respectfully request that the Commission reconsider that portion of the Discovery Orders requiring SCE&G to provide a full and complete response to ORS Request 5-25, and determine that that request exceeds the scope of permissible discovery under South Carolina law. Joint Applicants also request a stay of such production of documents responsive to ORS Request 5-25 until the Commission issues an order on this Request.

Respectfully submitted,

/s/ Belton T. Zeigler

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ACCEPTED FOR PROCESSING - 2018 July 6 11:06 AM - SCPSC - 2017-370-E - Page 5 of 6

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ACCEPTED FOR PROCESSING - 2018 July 6 11:06 AM - SCPSC - 2017-370-E - Page 6 of 6