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THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NOS. 2017-207-E, 2017-305-E, AND 2017-370-E

IN RE:	Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent	)	
IN RE:	Request of the South Carolina Office of Regulatory Staff for Rate Relief to SCE&G Rates Pursuant to S.C. Code Ann. § 58-27-920	)	**EXPEDITED REVIEW** **REPLY BRIEF IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES AND PRODUCTION BY SCE&G AND DOMINION**
IN RE:	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	)	

INTRODUCTION

The response of South Carolina Electric & Gas Company ("SCE&G") and Dominion Energy, Inc. ("Dominion") (collectively "Joint Applicants") to the South Carolina Office of Regulatory Staff's ("ORS's") motion to compel discovery responses only reinforces the need for an expedited review and decision by the Public Service Commission of South Carolina

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("Commission") on ORS's motion. The Joint Applicants devote most of their brief to defending their original objections that necessitated ORS's motion but, most importantly, now stipulate that

> SCE&G has agreed to produce all information that has any reasonable connection to the project [and has] decided to produce documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report (collectively, the "Bechtel Materials").

(Response ("Resp.") at 5, 29.)

While ORS welcomes and appreciates the Joint Applicants' belated decision to produce all information and documents responsive to some of ORS's discovery requests, the Joint Applicants' promise to eventually provide the requested information is insufficient to resolve the issues raised by ORS's motion for several reasons. First, the Joint Applicants still have only selectively produced certain documents they say they will provide. Second, the Joint Applicants have not provided a date certain by which they will produce the information. Given the compressed time frame for these proceedings and the overwhelming importance of the proceedings – in which the Joint Applicants are seeking affirmative relief of billions of dollars in abandonment costs recovery from ratepayers, the prompt disclosure of the requested information and the format in which the information is ultimately produced are every bit as important as the promise and fact of disclosure.

Furthermore, neither ORS (nor the Commission) can be sure whether the Joint Applicants' disclosure of information is complete until the information is actually produced.[1]

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[1] Until its Response brief to ORS's Motion to Compel in these proceedings, SCE&G tried to keep the Bechtel Report secret. ORS first made an inquiry on October 27, 2015, for any information about a possible Bechtel assessment but was told that nothing was available. (*Compare* Resp., Exhibit 40, with Exhibit 9, Bechtel's presentation to SCE&G executives on October 22, 2015.) ORS's initial inquiry was prompted by ORS's NND staff attending the regularly scheduled plan-of-the-day meeting on or about October 15, 2015, during which ORS noted the presence of a Bechtel representative. (The inquiry was not prompted by the examination of legal

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While the Joint Applicants have agreed to produce the requested information, they continue to make unsupported arguments to the effect that certain responsive information is irrelevant to these proceedings or protected by certain other privileges and is thus not discoverable. This response by the Joint Applicants suggests a distinct possibility that this discovery dispute will not be resolved when the Joint Applicants produce "all" documents, information, and a privilege log. This possibility is another factor that reinforces the need for the Commission to make an expedited decision and order the Joint Applicants to promptly produce the information, so that this matter can be resolved within the proposed and necessary schedule for an ultimate decision on the Joint Applicants' requests for affirmative relief from the Commission.

Finally, ORS agrees that the 2009 Master Agreement applies to these proceedings, so there is no reason that the Joint Applicants' production should not occur forthwith. Of course, there also needs to be sufficient time to challenge confidentiality designations and for that determination to occur prior to being required to file testimony.

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invoices, because Bechtel had performed other work at the site for years.) After the October 2015 inquiry, ORS issued an information request to SCE&G asking whether a project consultant had been retained. SCE&G's response did not provide any reference to Bechtel's assessment or any version of the Bechtel Report. In addition, Santee Cooper's notes about the Bechtel Report acknowledge that SCE&G was not forthcoming despite ORS's inquiries. (*See* Attachment 1 to this Reply.) Last, SCE&G's quarterly reports under the BLRA required an update on the project schedule. S.C. Code Ann. § 58-33-277(A). No quarterly report addresses Bechtel's assessment or report. For these reasons, ORS is understandably skeptical that without an expedited decision from this Commission directing SCE&G to produce "all" Bechtel related documents, the Commission, ORS, and the public will never know the "full account" now promised by SCE&G. The Commission and the public deserve to know the whole truth now.

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DISCUSSION

A. SCE&G's Agreement to Produce "All Information" Related to the Project Does Not Make ORS's Motion Moot.

Contrary to the Joint Applicants' assertion, (Resp. at 5), SCE&G's decision to produce all information related to the Project and the full account of the Bechtel engagement, assessment, and Report does not make ORS's motion moot. Rather, for several reasons, the issues raised in ORS's Motion to Compel remain very much a live controversy needing an expedited decision and order compelling full and complete production.

First, it is unclear exactly what the Joint Applicants have agreed to produce. On one hand, the Joint Applicants proffer that SCE&G has "decided to produce documents that provide the full account of the Bechtel engagement and assessment, including the communications related to the engagement of Bechtel and the ensuing Bechtel Report." (Resp. at 5.) Yet, on the other hand, the Joint Applicants state that SCE&G will not "waive attorney-client privilege or work-product protection for documents related to Bechtel that SCE&G may have an independent basis for withholding based on a claim of privilege." (Resp. at 5 n.5)

The Joint Applicants provide no further details regarding any other "independent basis" for withholding documents, nor do they identify the documents "related to Bechtel" to which such an alleged independent basis for withholding would apply. This leaves ORS (and the Commission) in the untenable position of having to wait and see what the Joint Applicants eventually produce under its promises. In light of this uncertainty, the question whether the Joint Applicants have met their discovery obligations with regard to production of the Bechtel Materials cannot be determined until the Joint Applicants actually produce the documents and a privilege log for any withheld documents.

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The continued uncertainty about the Joint Applicants' understanding of their agreement to produce documents highlights the second reason that ORS's motion is not moot: Even now – weeks after ORS filed its motion to compel – the Joint Applicants have yet to identify a date by which they will produce the responsive documents and a privilege log. This failure cannot be an oversight – ORS's motion prominently and specifically requested that the Commission order production to occur within 15 days of an expedited decision on this motion.

Furthermore, the importance of the timing of the Joint Applicants' document production cannot be overstated. The expedited nature of these proceedings and the voluminous and technically dense nature of the documents that should and are likely to be produced both mandate an expedited production of documents. Now that the Joint Applicants have finally acknowledged that all the information and a full account should be produced, it would be unfortunate if their prior objections and delay in production results in a production that is so tardy as to render the actual information unusable in these proceedings.[2] Thus, there is a continued need for the Commission to order the Joint Applicants to produce the materials – both the responsive documents and the promised privilege log – within 15 days.

Finally, the same factors that make the timing of the Joint Applicants' production of documents critical – the expedited nature of these proceedings and the dense and voluminous nature of the information – also make the format of the production critical as well. Even if the Joint Applicants are ordered to and produced the requested information within 15 days, that

[2] In a June 12 letter to the Commission, the Joint Applicants requested that the Commission require ORS to present testimony on July 12 in Docket 2017-305-E. This scheduling request suggests that the Joint Applicants are employing a strategy to "run out the clock" with respect to its belated promise to now provide all information and a full account of the Bechtel Report. This tactic should not be permitted by the Commission because it would undermine the use of the forthcoming document production in these proceedings, and granting the Joint Applicants' scheduling request would certainly have that effect.

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would still leave a narrow window of time for ORS to review the information prior to any anticipated date for ORS to file its direct testimony in these proceedings. The format of the production will make a vital difference in the speed with which ORS will be able to process and review the information. A production of documents in "native format" (i.e., the original electronic format of the information) with image and text "load files," which could quickly be uploaded into a document review platform, and the associated metadata will allow ORS to more efficiently and effectively review the information. For example, production in this format allows "de-duplication" of information so that ORS would not be spending needless time reviewing numerous copies of the same information.

B. ORS's Discovery Requests Seek Information That is Clearly Relevant and Highly Probative of the Issues to be Decided In these Proceedings.

In addition to its recent decision to eventually produce the Bechtel Materials, SCE&G also states that it has "agreed to produce all information that has any reasonable connection to the project." (Resp. at 29.) Although belated, SCE&G's decision is entirely appropriate in light of the broad discovery rules and authority of ORS to represent the public interest in these proceedings. *See* S.C. Code Ann. § 58-4-10. As with the Bechtel Materials, though, the Joint Applicants fail to provide any indication of when this production of documents will occur.

Moreover, the Joint Applicants' continued insistence that ORS's discovery requests seek information that is irrelevant to these proceedings is simply incorrect and also creates concern on ORS's part that the forthcoming production of documents will be inadequate.[3] (Resp. at 2.) Rule 26 of the South Carolina Rules of Civil Procedure establishes a "broad" scope of discovery in civil actions in South Carolina, as "[p]arties may obtain discovery regarding any matter, not

[3] Several statutes allow ORS to access books and records. See S.C. Code Ann. §§ 58-4-50, 58-4-55, 58-27-160, 58-27-1570, 58-27-1580, and 58-33-277.

privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party." Rule 26(b)(1), SCRCP; *see also Oncology & Hematology Assocs. Of S.C., LLC v. S.C. Dep't of Health & Envtl. Control*, 387 S.C. 380, 387; 692 S.E. 2d 920, 924 (2010) ("We are keenly aware that the scope of discovery is broad."). Thus, "[i]n South Carolina the scope of discovery is very broad and 'an objection on relevance grounds is likely to limit only the most excessive discovery request.'" *Samples v. Mitchell*, 329 S.C. 105, 110, 495 S.E.2d 213, 215 (Ct. App. 1997) (quoting J. Flanagan, *South Carolina Civil Procedure* 216 (2d ed. 1996)). Additionally, "where the court is uncertain as to whether or not an unprivileged document, whose production is resisted solely on grounds of irrelevancy, is relevant to the subject matter involved, production should be ordered." *Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1188 (D.S.C. 1974).

Set against this generous standard for all cases, the information sought by ORS in this case is unquestionably relevant to these proceedings. A central issue – if not the central issue – in these proceedings is whether SCE&G's failure to anticipate, avoid or minimize costs incurred or associated with the Project "was imprudent considering the information available at the time that the utility could have acted to avoid or minimize the costs." S.C. Code Ann. § 58-33-280(K). Any information relating to what SCE&G knew about the problems at the Project and when it knew about such problems is clearly relevant and highly probative to these proceedings because SCE&G's knowledge has a direct bearing on the prudency of its failure to minimize or avoid costs. ORS's discovery requests go directly to this issue—and SCE&G's full disclosure is not only necessary for this relevant evidence, it is also required by statute. *See* S.C. Code Ann. §§ 58-27-1570, 58-27-1580.

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For example, while the Joint Applicants go to great lengths in their response brief to discredit the Bechtel Report, they nevertheless acknowledge that the purpose of the Bechtel engagement was to "evaluat[e] the current status and forecasted completion date of the Project." (Resp. at 4.) Thus SCE&G cannot reasonably dispute that documents related to Bechtel's engagement bear on SCE&G's knowledge regarding the status of the Project. SCE&G's knowledge of the costs, management, and schedule of the Project is critical to these proceedings because it sheds light on the prudency of SCE&G's failure to anticipate, avoid or minimize costs. The Joint Applicants are certainly free to argue on the merits in these proceedings that the Bechtel Report is biased and should not be used to assess the prudency of SCE&G's decisions, but such arguments go merely to the weight of the evidence and have no bearing on whether the information is relevant or discoverable.

Likewise, documents provided by the Joint Applicants to federal and state agencies that are conducting investigations into matters arising out of the Project in the past two years (Request 5-25) are also relevant to the merits of these proceedings. The Joint Applicants claim that ORS's requests for such documents are objectionable because the investigations are "sweeping in scope, and they relate to matters that have a more limited connection to the Project." (Resp. at 29.) This argument carries no weight here, however. ORS only seeks information from investigations arising out of the Project. Thus, to the extent that there are governmental investigations that do not arise out of the Project and have only a "limited connection" to it, such information is not being sought by ORS.

Moreover, the fact that such investigations are "sweeping in scope" does not make the information arising out of them any less relevant to these proceedings. The issues in this matter are "sweeping in scope." As previously noted, the prudency determination the Commission must

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make requires an understanding of all the facts of which SCE&G was aware regarding the problems at the Project as well as the timing of SCE&G's awareness of such facts. All the governmental investigations regarding the problems at the Project are likely sources of information regarding the prudency of SCE&G's decisions and thus relevant and reasonably calculated to lead to the discovery of admissible evidence.

The Joint Applicants' claim that such "cloned" discovery requests for information from other investigations is unduly burdensome is also unavailing. ORS is requesting access to documents that SCE&G has already gathered and produced. The incremental effort required of SCE&G to produce these documents to ORS would be minimal in the context of the importance of matters at issue in these proceedings and the limited time for discovery, review, analysis, and presentation of the evidence and issues to the Commission. In any event, the Joint Applicants cannot base their refusal to produce documents on a mere conclusory assertion of burden, without further explanation.

C. The Joint Applicants' Blanket Designation of Categories of Documents as Confidential is Improper and Should be Rejected by the Commission.

The Joint Applicants defend their refusal to respond to numerous discovery requests on the ground that the requests seek confidential and sensitive information. (Resp. at 34-37.) In doing so, the Joint Applicants complain that ORS has not provided adequate assurance that it agrees that the Master Confidentiality Agreement for Base Load Review Act Proceedings and Nuclear Construction (the "Master Agreement"), which ORS and SCE&G executed in 2009 and having been operating under since, applies to these proceedings. There is no legal or factual basis for the Joint Applicants' position. The Joint Applicants have just been asking for more secrecy, which is not acceptable under the circumstances of abandonment and their request for the inclusion of billions of dollars in abandonment costs in future rates for decades. Most

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importantly, ORS is not required to agree to any confidentiality under its broad authority to demand and receive information and documents to fulfill its statutory duties to protect the public interest—and it does not waive its right to refuse any confidentiality agreement in this or any other proceeding or case.[4]

However, to remove any doubt and to move forward now, ORS agrees that the Master Agreement is still in effect and applies to information produced in these proceedings provided that the Joint Applicants will promptly produce the requested information they have now promised to provide. SCE&G's prompt disclosure of the information is critical because the Master Agreement specifically contemplates an opportunity for ORS to review any information designated as confidential and to challenge such designation. This opportunity is rendered illusory if the Joint Applicants continue to delay in producing information. The application of the Master Agreement to information produced in these proceedings undercuts the Joint Applicants' claimed basis for failing to produce the requested information, and the information should be produced forthwith.[5]

Beyond that, the Joint Applicants' blanket designation of all documents produced as being confidential is inconsistent with the rules and regulations. "Where the materials to be produced include a mix of protectable and non-protectable documents, the initial determination

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[4] While ORS reserves its rights with respects to challenge the confidentiality of documents, the Joint Applicants' suggestion that ORS has not respected the confidentiality of documents in the past is unfounded. (Resp. at p. 36.) Notably, the Joint Applicants do not identify any instances of ORS failing to comply with the Master Agreement. Rather, they simply complain that these proceedings are receiving significant public attention. Such complaints are misguided because the legitimacy of the public interest in these proceedings is beyond question, and any attention by the public to the matter is fully warranted.

[5] Of course, by acknowledging the applicability here of the Master Agreement, ORS does not necessarily concede that any information designated by SCE&G as confidential "is, in fact, proprietary, commercially and/or competitively sensitive or confidential or in the nature of a trade secret."

as to what is and is not 'confidential' should be made by the producing party, which must review its documents and make a good-faith determination as to which of them meet the standards of Rule 26(c)(1)(G)." *United States v. Mount Sinai Hosp.*, 185 F. Supp. 3d 383, 396 (S.D.N.Y. 2016) (internal quotation marks omitted). The producing party "may not simply designate its entire production [as] confidential[, but rather] may only designate documents within its production as confidential after making a good faith determination that there is a legitimate basis for a confidentiality designation." *Id.* (internal quotation marks omitted); *see also* Rule 26(c)(7), SCRCP (applying the same standard as Rule 26(c)(1)(G), Fed. R. Civ. Proc.).

The prohibition on a blanket designation of confidentiality is particularly salient here due to the significant time that has passed since the creation of many documents related to the project. Under the terms of the Master Agreement, SCE&G must be able to show that information is both commercially valuable and non-public *at the time of production* in order to designate it as confidential information. Thus, information that may have been confidential when the information was created does not automatically retain that status in perpetuity. If such previously confidential information has been disclosed, then the documents containing the information are no longer confidential under the terms of the Master Agreement. *See also Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 415 (M.D.N.C. 1991) ("In determining whether the material is confidential, the Court must look at the nature of the information, the measures taken to protect its secrecy, and the extent of knowledge of the information by both outsiders and insiders."). Likewise, SCE&G's abandonment of the Project is a substantial change in circumstances

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warranting closer scrutiny and more skepticism on the confidentiality of information and documents prior to the abandonment.[6]

CONCLUSION

For the forgoing reasons, ORS respectfully requests an expedited decision and order compelling the Joint Applicants to respond in full within fifteen (15) days of the Commission's order to all outstanding discovery requests by ORS, including the complete production to the ORS offices of all documents responsive to the requests in "native format" that includes image load files for electronic document review and text files with the associated metadata, along with a privilege log for any documents withheld on that basis and without further delay or objection.

[Signature block on following page]

[6] Aside from the Master Agreement and another agreement executed with Westinghouse in 2014, ORS is not a party to any other confidentiality agreement. The 2009 Master Agreement has been used by ORS and SCE&G for nine years and in connection with all BLRA proceedings since 2009. In 2009 and during the nuclear construction, ORS recognized that proceedings and ORS duties under the BLRA are unlike others. During construction, ORS did not contest the assertion of protection for trade secrets and intellectual property. ORS also did not contest the assertion that procurement and bidding related to the construction should be confidential. However, now that construction has been abandoned, the need for the protection has ceased as this Commission recognized in requiring disclosure of the Engineering, Procurement, and Construction contract for the nuclear project. Commission Order No. 2017-337 in Docket No. 2017-138-E. While ORS has serious concerns about being further burdened by any confidentiality agreement, at this point – given the already compressed schedule for a hearing and decision – ORS will agree that the Master Agreement applies to these proceedings. Nonetheless, any designation of confidentiality should be accurate, up to date, and not overbroad.

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Respectfully submitted,

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BECHTEL REPORT ACTION PLAN

SCE&G CONCERNS

1. **What disclosure to make to ORS**—Marion Cherry is aware of internal SCE&G emails and verbal communications revealing that ORS is aware that a project assessment was being done, and recent inquiries have from ORS to SCE&G checking on status of assessment report. On 02/10/16, Mike Baxley asked Al Bynum how SCE&G legal intended to handle this disclosure and received the answer that Al did not know, would have to check on this, and would be back in touch.
2. **What bond disclosures are required**—This same concern applies to Santee Cooper, disclosures should be similar.
3. **What mitigation effort is required to defend potential shareholder suit**—Now that SCE&G is specifically aware of problems raised in report, failure to act may result in O&D liability.

SANTEE COOPER PROPOSAL FOR USE OF REPORT

1. We will continue to cooperate, within the law, with SCE&G's efforts to avoid disclosure on the condition that SCE&G will agree to use the document as a template for project administration changes to be jointly decided, but must include:
   (a) The hiring of an EPC nuclear construction-experienced owners' engineer with authority to manage the project, Bechtel is not excluded from consideration;
   (b) An internal SCE&G project management change that will increase managerial staff and be led by a nuclear construction-experienced individual who is a direct report to Kevin Marsh whose sole responsibility is managing this construction project;
   (c) The Bechtel Report will be reviewed jointly by SCE&G and Santee Cooper leadership, section by section, together with Bechtel analysts, to determine specifically what administrative and operations changes will be made going forward with the project, effective immediately; and,
   (d) Each change will include an objective metric to determine compliance and success.

SANTEE COOPER ACTION STEPS

1. First step, determine from Al Bynum what ORS disclosures are contemplated, this will substantially drive all other disclosures.
2. No later than February 19 schedule a meeting of attorneys in Columbia, with George Wenick present, to develop a proposal for disclosures and distribution of the Report document, this meeting to produce a recommendation for meeting scheduled in Step 3 below.
3. No later than February 26, schedule an all day meeting in Columbia with business and legal teams and Bechtel analysts to review the report section by section to produce a plan for operations and administration for the project. This meeting will also consider the proposed disclosure plan prepared by the legal teams.
4. Prior to February 26 meeting, to avoid surprise, Lonnie will telephone Kevin with specifics of Santee Cooper's position with respect to management changes at project.