SOUTH CAROLINA PUBLIC SERVICE COMMISSION

HEARING OFFICER DIRECTIVE

DOCKET NO. 2017-370-E, 2017-207-E, and 2017-305-E **ORDER NO. 2018-74-H**

JUNE 25, 2018

David Butler
Hearing Officer

DOCKET DESCRIPTION:
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

Friends of the Earth and Sierra Club, Complainant/Petitioner v. South Carolina Electric & Gas Company, Defendant/Respondent

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:
Motions to Compel Filed by Friends of the Earth/Sierra Club

HEARING EXAMINER ACTION:

Friends of the Earth and Sierra Club ("Friends of the Earth/Sierra Club," or "FOE/SC") have filed their second Motion to Compel Discovery concerning materials from South Carolina Electric & Gas ("SCE&G"), and contend that there are remaining issues to address from its first Motion to Compel. The purpose of this directive is to resolve as many of the remaining discovery issues between these litigants as possible.

10 S.C. Code Ann. Regs. 103-835 states that the South Carolina Rules of Civil Procedure govern all discovery matters not covered in Commission Regulations. Accordingly, Rule 26, SCRCP governs the scope of discovery in Commission proceedings. The Rule states in part: "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action…It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears to be reasonably calculated to lead to the discovery of admissible evidence." Therefore, the standard governing the scope of discovery is very broad.

A major unresolved question with the FOE/SC – SCE&G discovery process has been whether or not FOE/SC should sign a confidentiality agreement to review various materials designated as confidential by SCE&G. SCE&G alleges that the contents of materials deemed confidential by SCE&G and already provided to FOE/SC without execution of a confidentiality agreement have appeared in newspapers, and that such dissemination is harmful to it. FOE/SC, through counsel, has declined to sign a confidentiality agreement and counsel has stated that he believes that he is free to disseminate the material publicly that has already been obtained through the discovery process in the nuclear cases.

Hamm v. PSC, 312 S.C 238, 439 S.E.2d 852 (1994) sets the standard for the Public Service Commission of South Carolina's resolution of discovery disputes involving confidential material, and recognizes Rule 26 SCRCP as the standard that governs discovery before the Commission. The case also recognizes that although Rule 26 SCRCP allows broad pre-trial discovery, that discovery also "allows extensive intrusion into the affairs of both litigants and third parties." The U.S. Supreme Court has recognized that not all material obtained from pre-trial discovery should be available for public dissemination. *Seattle Times v. Rhinehardt, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed. 2d 17 (1984).* The *Hamm* case holds that when the discovery process threatens to become abusive or creates a "particularized harm" to a litigant or third party, the Rules allow a trial judge broad latitude in limiting the scope of discovery. Under the *Hamm* procedure, the party requesting protection from the court or commission must initially show good cause by alleging a "particularized harm" that will result if the challenged discovery is accomplished. Once this "particularized harm" is established, the party seeking the discovery must come forward and show that the information sought "is both

relevant and necessary to the case." According to the case, "when both parties meet their burden of proof, the court must weigh the opposing factors." *Hamm* at 242. In the *Hamm* case, the Court held that both sides involved in the discovery dispute (that is, SCE&G and the Consumer Advocate for the State of South Carolina) had met their respective burdens, and further held that the Commission properly weighed each party's competing interest in the discovery materials, and fashioned a remedy which protected SCE&G's confidential coal purchasing and coal transportation contracts from public disclosure. At the same time, the Commission's decision allowed the Consumer Advocate full access to the information he sought, which was the described contracts.

Likewise, in the present case, it is clear, upon balancing the interests of SCE&G and FOE/SC, that both parties have met their burden, with SCE&G showing a general particularized harm, and Friends of the Earth/Sierra Club showing that the information being sought is relevant and necessary to their case.

With regard to SCE&G's "particularized harm," SCE&G notes in its Response in Opposition to Complainants' Second Motion to Compel Discovery ("the Response") that various internal SCE&G communications about a commercial warehouse audit of the V.C. Summer project, a warehouse audit, and Westinghouse/Chicago Bridge & Iron documents designated as "Proprietary & Confidential" under the Engineering, Procurement and Construction Agreement governing the V.C. Summer Project appeared in a newspaper article after release to Friends of the Earth/Sierra Club. Response at 6. Many such documents had been recognized by prior Commission Orders as containing proprietary and trade secret information, which are exempt from disclosure by the South Carolina Freedom of Information Act. Other similar examples of such publication were cited. Although it is undisputed that Friends of the Earth/Sierra Club may have been entitled to these materials as "relevant and necessary" for litigation purposes, it is reasonable for SCE&G to assert that certain proprietary and trade secret information should be protected from public dissemination, and that such distribution is harmful to SCE&G.

Again, the *Hamm* case pointed out the Commission's ability to "fashion a remedy" protecting both interests. The *Hamm* Court did not limit the Commission to use of a confidentiality agreement as the remedy, but found only that this

remedy protected the interests of the competing parties in the particular case before the Court. 439 S.E. 2d at 242.

For this reason, I am establishing, by means of this directive, an alternate remedy which I believe will protect both interests in this case. However, as explained below, I am proposing that the Commission establish the precise terms of the remedy after the submission of proposed Orders by the Parties to these Dockets. I hold that Friends of the Earth/Sierra Club will not be required to sign a confidentiality agreement in order to receive confidential materials for use in the litigation of these Dockets. However, *Hamm* and other case law supports the principle that FOE/SC should not have unfettered discretion to provide this material to outside parties or entities, given the particularized harm demonstrated by SCE&G. See also *Seattle Times v. Rhinehart*, supra. Accordingly, I am requesting that parties in these Dockets that desire to do so provide proposed protective orders to the Commission by the close of business on **Friday, June 29, 2018** that accomplish the goals of protection of the confidential information, and providing access to the opposing party, without requiring that the opposing party, Friends of the Earth/Sierra Club (or other parties that may wish to operate under such a protective order), sign a confidentiality agreement in order to access the confidential documents. The Commission's Order, when issued, would set out the parameters of the provision of confidential material to Friends of the Earth/ Sierra Club (or other parties) and limit their use of the material to the litigation of these Dockets.

Although the parties may submit proposed Orders with whatever relevant content they deem appropriate, the proposed Orders should address, at a minimum, the following topics with regard to the parameters of provision of the confidential information to Friends of the Earth/Sierra Club:

1) Definitions of Operative Terms

2) Scope of Confidential Materials

3) Duration of Agreement and Disposition of Materials at End of Litigation

4) Access to and Use of Protected Material

5) Protected Material Subpoenaed or Ordered Produced in Other Litigation

6) A Non-Party's Protected Material Sought to be Produced in this Litigation

7) Unauthorized Disclosure of Protected Material

8) Inadvertent Production of Privileged or Otherwise Protected Material

9) Methods for Challenging Confidentiality Designations

10) Production of a Privilege Log by SCE&G for all Matters Considered Privileged by SCE&G and Procedure for Resolution When Claims of Privilege are Disputed.

The parties are encouraged to attempt to agree on a joint proposed protective order for submittal to the Commission. If the parties need additional time past the deadline as stated below to prepare a joint proposed protective order, a request for said extra time would be given major consideration.

After the entry of the Commission Order on the provision of confidential materials, should Friends of the Earth/Sierra Club discover particular documents that they believe do not meet the "particularized harm to the Company" description, Friends of the Earth/Sierra Club may file a motion with the Commission describing the document and why they believe the document should be available for review by all members of the public. The procedure to be used in such a circumstance will be described in the Commission's Order, but the parties may also submit proposed language for such a procedure in their proposed orders.

Once the Commission issues its Order, SCE&G and Friends of the Earth/Sierra Club shall make a good faith effort to narrow the scope of Friends of the Earth/Sierra Club's Third Interrogatories, Document Production Requests, and Request for Entry ("the Third discovery request"), since SCE&G had interposed additional objections to FOE/SC's discovery requests. Any remaining disputes may be submitted to this Hearing Officer, but I would request that the two parties exert their best efforts to resolve their issues, in light of the Commission's Order. These two parties shall also determine what further documents from Friends of the Earth/Sierra Club's prior discovery requests might be affected by the Commission's Order, and what further documents from these requests might be provided by SCE&G to FOE/SC under the terms of that Order.

Addressing a specific portion of the Third discovery request, Friends of the Earth/Sierra Club request that the Commission order SCE&G "to permit them and their agents, at times and in a manner to be agreed upon, to enter the subject facility for purposes of inspection, measuring, surveying, photographing, testing, or sampling as authorized by discovery rules," a request which was previously objected to by the Company. This request is denied. Commission Regulation 103-835 states that the South Carolina Rules of Civil Procedure ("SCRCP") govern all discovery matters not covered in Commission Regulations. There is no provision in the Commission Regulations that refers to entering property, therefore, the SCRCP must be consulted for relevant authority. According to the relevant provision governing such requests, which is contained in Rule 34 (b) SCRCP, "the request shall set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity." The request by Friends of the Earth/Sierra Club lacks any of this required specific information, and must therefore be denied. A general request which merely quotes the language of the Rule such as that seen here is not sufficient to invoke the Rule.

Based on the considerations as described above, both the First and Second Motions to Compel by Friends of the Earth/Sierra Club against SCE&G are granted in part and denied in part as explained in the text above. Again, parties wishing to submit proposed orders on the parameters of the handling of the confidential material between Friends of the Earth/Sierra Club and SCE&G should file said orders with the Commission by the close of business on **June 29, 2018**, and serve copies on the other parties to the case.

This concludes the Hearing Officer's Directive on this matter.