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Decision 91-12-019 December 4, 1991

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's Own Motion of the Maintenance and Operating Practices, Safety Standards and the Reasonableness of Costs Incurred From the Mohave Coal Plant Accident. Southern California Edison Company (U 338-E), Respondent	ORIGINAL I.86-04-002 (Filed April 2, 1986)

OPINION ON THE REQUEST OF THE DIVISION OF RATEPAYER ADVOCATES TO RELEASE ITS REPORT AND SUPPORTING DOCUMENTS

Southern California Edison Company (SCE) is the operator and majority owner of the Mohave coal plant, located in Clark County, Nevada. The Mohave plant consists of two coal-fired electric generating units, each rated at a maximum capacity of 790 megawatts (MW). In opening this investigation, the Commission reported as follows:

> On June 9, 1985, a tragic accident occurred at the Mohave plant. High pressure steam escaped from a reheat pipe associated with a steam turbine, killing several employees and seriously injuring others. The steam also caused extensive property damage to the control room for both Mohave units, as well as to other portions of the plants.

The Commission opened this investigation on April 2, 1986 out of concern for the safety questions raised by the accident and to both determine SCE's prudence with respect to Mohave and identify costs stemming from the accident.

On May 29, 1991, the Division of Ratepayer Advocates (DRA) distributed to the Assigned Commissioner, Chief Administrative Law Judge, and SCE copies of the following:

1. Report on the Steam Pipe Failure at the Mohave Generating Station on June 9, 1985,

2. The Prepared Testimony of Margaret C. Felts and David Weiss, and

3. Eight volumes of reference documents, some of which were obtained from SCE during the discovery process related to this investigation.

The report was prepared for DRA by an outside consultant. In conjunction with DRA's prepared testimony, it addresses reasonableness issues that might affect rates and presents the Staff's findings concerning the operation and maintenance of the Mohave plant prior to the accident. While prior to evidentiary hearings the Commission is not in a position to assess the merits of DRA's conclusions, the report raises serious concerns related to the safe operation of Mohave and other steam-fired power plants.

DRA filed and served on all previously identified parties a Motion to Disclose its Report, Testimony and Supporting Documents. The utility had asked DRA to have the documents that it produced for DRA's investigation protected from public disclosure pursuant to Public Utilities (PU) Code § 583. In response, DRA has asked the Commission to determine that the report, testimony, and supporting documents should be released to the public.

Responses to DRA's motion were filed by Toward Utility Rate Normalization (TURN), SCE, and three of its partners in ownership of the Mohave plants (Los Angeles Department of Water and Power, Nevada Power Company, and Salt River Project Agricultural Improvement and Power District). SCE and its Mohave partners asked the Commission to delay release of the DRA report, testimony, and documents pending resolution of all civil litigation related to the accident, arguing that release of the documents at this time would prejudice the legal rights of all of the partners. TURN argued that the public has a right to see the study, which was prepared at ratepayers' expense. DRA filed a reply to these responses.

Although it stated in its response to the DRA motion that only some of the documents produced during discovery may have been

otherwise privileged, SCE had not identified any such documents and instead had argued that no portion of the DRA report or the supporting documents should be made public. On September 4, 1991, the assigned Administrative Law Judge (ALJ), Steven Weissman, issued a ruling finding that by opposing DRA's motion in this fashion, SCE had failed to meet its burden of demonstrating that any portion of the report or supporting documents should be protected. He directed SCE to file and serve a Supplemental Response containing the following information:

> "1. A description of each document or portion of the report that the utility seeks to protect. The description must provide enough detail to enable the Commission to specifically identify each document or reference and understand its nature.
>
> "2. For each identified document or portion of the report, a reference to any applicable privilege and a specific explanation as to why it should be protected from disclosure.
>
> "3. For each identified document or portion of the report, a specific explanation as to whether the information has been released to the public in any form and whether the information was requested or supplied as part of discovery in another matter."

In its Supplemental Response, SCE identified three documents that it argued may have been privileged prior to their release to DRA. SCE did not specify any portion of the DRA report as being confidential or subject to privilege. Instead, SCE continued to ask that the entire DRA report and all supporting documents be withheld from public release until the conclusion of pending litigation related to the Mohave accident. DRA filed an additional response, contesting each point raised by SCE.

If the DRA motion is denied, the Commission would face two fundamental choices. Either the investigation would continue, with all testimony and hearing transcripts kept under seal and all

hearings held behind closed doors; or the investigation would be stayed, pending final resolution of any remaining civil actions related to the accident. SCE and its partners asserted in their pleadings that they are in favor of holding public hearings and treating the DRA report as a public document some time after the civil litigation is completed.[1] At the prehearing conference held October 23, 1991, SCE offered, in the alternative, to have the report made available only to active parties pursuant to a protective order pending completion of civil litigation. Prior to that time, hearings would have to be closed to the public and transcripts would be kept under seal. Depending on the outcome of the pending appeals, the civil litigation could be resolved in several months or several years.

Regardless of safety considerations, a refusal to release the DRA report is inconsistent with Commission practice and unsupported by the facts and by applicable law. In determining whether or not to grant DRA's motion, two fundamental questions must be addressed: (1) Is disclosure of the documents within the Commission's discretion? (2) If so, should the documents be disclosed? The answer to both of these questions is yes.

The Commission's Authority to Disclose the Documents

Under PU Code § 314, the Commission staff has broad power to undertake discovery of utility records. This power is not limited to the discovery of information relevant to any specific proceeding. In exchange, PU Code § 583 assures that the staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is

1 At the time its initial response to the motion was filed, SCE reported that two civil actions were still the subject of appeals. At the Prehearing Conference held October 23, 1991, SCE indicated that only one appeal is now pending.

otherwise ordered by the Commission. Section 583 states as follows:

> "No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except for those matters specifically required to be open to public inspection by this part shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

The Commission has broad discretion under Section 583 to disclose information. See, for instance, Southern California Edison Company v. Westinghouse Electric Corporation, 892 Fed 2d 778 (1989), in which the United States Court of Appeals for the Ninth District stated (at p. 783):

> "On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted."

In General Order 66-C, the Commission delegates to the presiding ALJ the authority to rule on requests for disclosure in specific cases.

Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of documents as confidential. To justify an assertion that certain documents cannot be disclosed, the utility must derive its support from other parts of the law. SCE does not assert that the Commission lacks the discretion to require disclosure of the documents.

Should the Documents be Disclosed?

Normally, DRA discloses its reports and information derived from utility documents without seeking prior Commission approval. When a DRA report is anticipated as part of a formal investigation, application, rulemaking or complaint, the need to disclose that report to the public is presumed. The difference, here, is that SCE specifically requested that reports and documents related to the Mohave accident not be released yet, and DRA has honored that request by filing its motion.

The utility bears the burden to demonstrate why any particular document or related DRA work should be withheld from public disclosure. SCE has not met its burden. SCE requests that the entire content of the report remain confidential. Nonetheless, SCE has not identified a single word in the report as revealing sensitive information or relying on confidential or privileged documents. Since SCE has only identified three of the many documents attached to the report as being potentially confidential or privileged, at most, only a small number of the supporting documents are confidential.

In arguing for continued confidentiality, SCE and its Mohave partners rely on three fundamental arguments. We will address them one at a time.

1. The Potential for Prejudice

SCE reports that, while most civil litigation resulting from the accident has been resolved, one related civil proceeding is currently being reviewed by an appellate court. SCE and its Mohave partners argue that disclosure of the study, testimony, and supporting documents might prejudice the pending civil court appeal and any new trial resulting from a successful appeal. This argument fails for several reasons. First, SCE and its Mohave partners have not established that a single document or conclusion of DRA's report would influence, much less prejudice, their position in civil litigation. Second, SCE and its partners have

not shown that the report and supporting testimony could be used by a civil court on appeal or in a new trial. Finally, it is within the discretion of the trier of fact to decide whether or not certain evidence would be prejudicial. There is no need or basis for this Commission to make such a determination in anticipation that a civil court may decide the issue incorrectly.

In asserting that its interests in civil litigation could be prejudiced by disclosure of the DRA submissions, SCE appears to equate "prejudice" with "influence." In his Declaration, William G. Tucker states, "it is my opinion that public release of this information at this time would prejudice the rights of the Participants either by having a material effect on the pending appeals, or if the judgment is reversed, prejudice their position at trial" (emphasis added).

Section 352 of the California Evidence Code provides the test applied for assessing potential prejudice in California courts. It states, "the court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." The prejudice envisioned, here, is something more than just the tendency to have a material effect, since virtually any relevant evidence can have a material effect on a court case. See, for instance, People v. Yu, 143 Cal.App.3d 358 (1983), which states, at p. 377, that all evidence that tends to prove an assertion made against a defendant:

> "...is prejudicial or damaging to a defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues. In applying section 352,

'prejudicial' is not synonymous with 'damaging.'"

In order to be disallowed as prejudicial, evidence must have little relevance to the issues at hand while being of a type that would draw the jury's or judge's attention away from evidence that is relevant. Not only have SCE and its partners failed to demonstrate that the DRA submissions are of this nature, they have not even made an assertion to this effect.

Even if the DRA submissions could unduly influence a court of law, an assumption of which we are not persuaded, SCE and its partners have not demonstrated how they would come before a court. Appellate review must be based on the record before the trial court. The DRA submissions are not in the trial court record, and therefore could not affect pending appeals. DRA argues that even if the lower court decisions are remanded for new evidentiary trials, its report could not be admitted in those proceedings. This is because the DRA report includes the results of an accident investigation, and Public Utilities Code Section 315 prohibits the use of at least some such reports in civil court. Section 315 requires that the Commission investigate the cause of all accidents occurring within the state on public utility property. It goes on to state that "neither the order nor recommendation of the commission shall be admitted in evidence in any action for damages based on or arising out of such loss of life, or injury to person or property...." Perhaps most significantly, SCE has failed to show why the Commission should hold up the disclosure of its staff's study out of concern for the sanctity of the record in another jurisdiction. Normally, it is the trier of fact who rules on the admissibility of evidence. If the remaining civil action is remanded for a new trial and if the DRA report would be unduly prejudicial, SCE and its partners can ask to have it stricken in the trial court. There is no reason for

the Commission to take that decision out of the hands of a trial judge.

2. The Significance of Section 583

In support of its position, SCE emphasizes that it submitted all data and documents to DRA subject to a Section 583 claim of confidentiality. However, every document and all other information received by the Commission staff from a utility is subject to Section 583. That section requires no triggering event (in the form of a utility requesting protection or affixing a stamp impression citing Section 583 on documents produced). It also does not expressly provide for utility waiver. It simply says that Staff may release utility materials only in the context of a Commission proceeding. Thus, SCE's invocation of Section 583 does not change a thing.

Further, simply citing Section 583 does not establish the confidentiality of a document. Section 583 does not discuss or define confidentiality, nor establish any privileges. In order to protect documents that would otherwise be released pursuant to Section 583, the utility must find its authority or relevant policy elsewhere.

In his September 4, 1991 ruling, the ALJ directed SCE to specifically identify portions of the report or supporting documents that are subject to a claim of privilege or are otherwise confidential. In response, SCE asserted the attorney-client and attorney work-product privileges for three documents relied upon by DRA. As SCE suggests in its Supplemental Response, any privileges that may have existed were probably waived when the documents were provided to DRA. The existence of privileged communication only becomes of interest, here, in deciding whether some documents should now be protected because SCE willingly provided documents to DRA that could have been withheld.

Despite the ALJ's direction that SCE provide detailed information about the status of the documents and the reasons that

they need be protected, SCE has provided only the most general information. On their faces, none of the three documents show signs of having been intended to be privileged communications. While all three are addressed to Mr. Bury, who is identified as Vice President and General Counsel, none are stamped or otherwise identified as privileged or as work-product. It is not readily apparent that any of the three documents refer internally to litigation or litigation strategy.

Despite being directed to do so, SCE has not fully listed the recipients of the documents other than DRA. For instance, one report is identified as having been prepared for Howard Allen. However, Mr. Allen is not listed by SCE as having received the document. This omission is not explained. The impression remains that SCE may not have provided the names of internal or other recipients of the documents. This information is critical to determining whether or not any otherwise existing privilege might have been waived.

In addition, although the ALJ asked SCE questions designed to elicit the full history of the documents at issue, SCE has not provided all of the information as directed. Among other things, he directed SCE to indicate whether a particular document had ever been requested through discovery in another matter. SCE did not answer this question. The ALJ asked SCE to explain why a document should be protected. This provided SCE with an opportunity to explain how any of the three identified documents should be found to comprise privileged communication. For example, SCE could have said that a particular document was compiled at the request of the General Counsel as part of its preparation for litigation. SCE elected, instead, to simply say that the documents were privileged and that the privilege would be lost if the documents were released. SCE has failed to meet its burden of establishing any of the documents as privileged.

The applicable standard is succinctly stated in Re Sierra Pacific Power Company, 28 PUC 2d 3 at p. 11 (1988), as cited by DRA:

> "The Commission intends to continue the policy of openness...and will expect the utility to fully meet its burden of proving that the material is in fact confidential and that the public interest in an open process is outweighed by the need to keep the material confidential."

SCE has not met its burden.

Ultimately, SCE is focusing its arguments not on individual documents that are confidential or privileged but on the overall impact of the report on the appeals court. In asking to have the report withheld, SCE is making an argument that has nothing to do with Section 583. That portion of the code governs the release of information received from utilities. If the utility made a convincing argument that specific information derived from the utility through discovery and relied upon by DRA must remain confidential and then identified a statement or reference in the accompanying report that must be withheld in order to protect the confidentiality of the information, then a case could be made for redacting or sealing a portion of the report. However, although the ALJ directed it to do so, SCE did not identify a single reference or statement within the report as reflecting confidential information.

In effect, SCE is arguing that the DRA report and testimony are confidential and must be protected. No support in fact or law has been provided for such a claim. On the contrary, there are at least three reasons that it is in the public interest to disclose the DRA submissions and proceed with the Commission's investigation as soon as possible.

First, the public has the right to expect that government will function in the open. The need for openness is underscored when serious safety concerns are raised. The utility would have to

make an extremely compelling argument to block this public process. SCE has not done so here. Second, if the investigation is further delayed, full consideration of relevant information may become more difficult. It is better to take evidence while recollections are still relatively fresh and the testimony of percipient witnesses is more easily obtained. Third, the accident and DRA's study raise issues that could affect the continued safe operation of Mohave and other utility facilities. We must proceed expeditiously in case a full airing of safety questions can add to the likelihood that similar accidents can be avoided. The safety concerns alone might be sufficient to merit release of the DRA report, even if SCE persuasively showed that DRA had promised to further delay the release of the report. Finally, the survivors of some of those who died in the Mohave accident and some of those who continue to cope with injuries sustained at the time have asked through correspondence that the Commission help them cope with a tragic chapter in their lives by disclosing the report and continuing to move the investigation to completion.

3. DRA's Assurance of Confidentiality

SCE argues that in filing the motion to disclose prior to the completion of all civil litigation related to the accident, DRA has abrogated an earlier agreement. Thus, it would be unfair to allow DRA to disclose these materials if it had promised it would not.

DRA denies that it made any promise to withhold its report until the completion of all litigation, and SCE never directly claims that DRA made such an explicit promise. DRA acknowledges, however, that during the discovery process, it assured SCE that it, DRA, would comply with Section 583. SCE, in contrast, asserts that when it responded to DRA's discovery requests, it understood that release would be delayed. The evidence SCE offered to support this understanding is a sentence in a 1985 letter written by then-staff counsel Mary McKenzie: "Any

privileged materials may be supplied to the staff in confidence under Section 583 of the Public Utilities Code."

Neither DRA nor the Commission has required SCE to release privileged information. If SCE has provided privileged materials to DRA in this matter, it has done so of its own volition. However, if DRA's assurances constituted an implied promise not to release privileged documents while civil litigation is pending, we must determine whether this Commission will honor DRA's promise.

Normally, DRA makes no specific promises in exchange for discovery of utility information, and nothing requires DRA to do so. In this instance, it is not altogether clear that DRA made any such promise, implicitly or explicitly. One reading of DRA's assurance is that SCE's privileged materials (as is true of non-privileged materials) will receive the protections provided in Section 583. Since Section 583 states that information discovered from a utility by the Commission staff can only be disclosed in the course of a hearing or proceeding, or as the result of an order of the Commission or a Commissioner's ruling, by filing its motion, DRA operated in a manner consistent with an assurance of Section 583 protection.

An alternative interpretation of DRA's statement is that, by using the words "in confidence," it promised to regard any privileged materials SCE provided to DRA as confidential. This would suggest that any materials for which SCE asserted a privilege would be subject to some degree of protection greater than that afforded by Section 583. With the passage of time adding to the ambiguity of DRA's assurance, we may never know exactly what type of protection DRA had in mind. To be as fair as possible to SCE, we will assume that DRA had promised to treat any privileged material as confidential.

We are not obliged by Section 583, nor by any other statute, to preclude the release of utility information simply

because DRA may have promised not to do so. However, Section 583 creates responsibilities and privileges that apply to both DRA and the Commissioners. Where DRA has assured a utility that the confidentiality of information will be protected, we should be prepared to require that DRA adhere to that promise.

In this instance, however, DRA's assurances go only to the protection of privileged material. As discussed elsewhere, SCE has only identified three documents relied on by DRA as being potentially privileged and has not adequately supported its claim of privilege. In addition, SCE has not identified any portion of DRA's testimony or the study prepared by its consultant as disclosing privileged information.

Over the course of almost six months, SCE has sought to suppress the release of DRA's report and testimony. These actions have used considerable resources, of both the utility staff and of our staff. In all of this concerted activity, SCE has yet to demonstrate why any specific documents are privileged. In its Supplemental Response to DRA's motion (filed September 19, 1991), SCE requested that "the CES report in its entirety" and three documents attached to the report be withheld from public release. The only justification SCE offered for its request that the CES report be withheld was "[n]o specific privilege." Plainly, SCE has asserted no privilege for the CES report, as indeed, it cannot since the report was prepared by a consultant for DRA. And, while SCE could identify portions of the CES report which are based upon materials it believes to be privileged, it has not done so.

For each of the three documents attached to the CES report, SCE offered the following justification: "Attorney - client, Attorney Work Product - disclosure would remove privilege and document could be used in the Mohave civil litigation." Since SCE provided these documents to DRA during discovery, it is not clear why SCE now considers these documents to have been privileged when they were handed over to DRA. Despite

the ALJ ruling seeking clarification of this point, SCE still has not explained why it believes these three documents are privileged. A refusal of this type to provide information very specifically requested by an ALJ gives every appearance of being a willful effort to delay the ultimate outcome. If the appearance is accurate, we do not look kindly on this tactic.

SCE has had every opportunity to substantiate its claim of privilege for the three documents in question, as well as for portions of the CES report derived from those documents. SCE has failed to meet its burden of demonstrating the basis for the claim of privilege. Thus, even applying an interpretation of the McKenzie letter most favorable to SCE, the utility has not established that any information contained in DRA's report, testimony or supporting documents is of the type that DRA might have promised to protect from disclosure. Under these circumstances, we see no reason to withhold from public disclosure the CES report, its attachments, and the DRA testimony. Accordingly, we will authorize DRA to release publicly the report, attachments, and testimony.

At the Prehearing Conference held on October 23, 1991, DRA reported that it plans to distribute additional prepared testimony no later than February 28, 1992 and requested guidance as to whether it must specifically request permission to release that testimony as well. If SCE has specific concerns related to the release of any information it has provided or will provide to DRA, it must express those concerns well in advance of February 28, 1992. DRA and SCE must try to resolve any such concerns prior to February 28, 1992. In the absence of specific objections, as long as DRA only releases information received through discovery from SCE in conjunction with prepared testimony, DRA need not seek permission prior to releasing its additional testimony.

Findings of Fact

1. DRA has moved for permission to release its Report on the Steam Pipe Failure at the Mohave Generation Station on June 9, 1985, and related documents.

2. SCE and its Mohave partners oppose release of the report and supporting documents while civil litigation related to the Mohave accident is still pending.

3. This report addresses reasonableness issues that might affect rates and presents the Staff's findings concerning the operation and maintenance of the Mohave plant prior to the accident.

4. The report raises serious concerns related to the operation and maintenance of Mohave and other steam-fired power plants.

5. Although it stated in its response to the DRA motion that only some of the documents produced during discovery may have been otherwise privileged, SCE had not identified any such documents and instead had argued that no portion of the DRA report or the supporting documents should be made public.

6. In its Supplemental Response, SCE identified three documents that it argued may have been privileged prior to their release to DRA.

7. SCE failed to meet its burden of demonstrating that any portion of the report or supporting documents should be protected.

8. SCE has not demonstrated that any of the identified documents are or ever were subject to a privilege.

9. SCE has not specified any portion of the DRA report as being confidential or subject to privilege.

10. If we were to delay the proceeding, we might delay making findings that could affect the health and safety of utility workers.

11. If we proceed under seal, we shield from public view information that might affect the safe operation of any number of power plants controlled by SCE and others.

12. DRA by its motion is operating in a manner consistent with its assurances of Section 583 protection.

13. We must proceed expeditiously in case a full airing of safety questions can add to the likelihood that similar accidents can be avoided.

14. SCE has not presented compelling reasons for this Commission to withhold the release of the report and supporting documents in light of the public's right to expect government to function in the open.

Conclusions of Law

1. Refusal to release the DRA report is inconsistent with Commission practice and unsupported by the facts and by applicable law.

2. DRA's motion should be granted.

O R D E R

IT IS ORDERED that:

1. The Motion of Division of Ratepayer Advocates is granted.

2. DRA may release its report, testimony, and supporting documents on the effective date of this order.

This order is effective in 21 days.

Dated December 4, 1991, at San Francisco, California.

PATRICIA M. ECKERT
President
JOHN B. OHANIAN
DANIEL Wm. FESSLER
NORMAN D. SHUMWAY
Commissioners

I CERTIFY THAT THIS DECISION WAS APPROVED BY THE ABOVE COMMISSIONERS TODAY

NEAL J. SHULMAN, Executive Director