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Decision 92-04-033 April 8, 1992

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) for Authority to Increase its Authorized Level of Base Rate Revenue Under the Electric Revenue Adjustment Mechanism for Service Rendered Beginning January 1, 1992 and to Reflect this Increase in Rates.	Application 90-12-018 (Filed December 7, 1990)
And Related Matters.	I.89-12-025 (Filed December 18, 1989) I.91-02-079 (Filed February 21, 1991)

FIFTH INTERIM OPINION: PHASE 3 PRELIMINARY MATTERS

1. Summary of Decision

A motion by the Division of Ratepayer Advocates (DRA) to consolidate Phase 3 with three consolidated Energy Cost Adjustment Clause (ECAC) proceedings is denied. The scope of the Phase 3 investigation is clarified to include base rate costs from December 18, 1989 forward, and replacement energy and fuel-related costs from March 3, 1989 forward. A motion by Arizona Public Service Company (APS) requesting confidential treatment of documents is granted, and DRA is not authorized to publicly disclose all of its Phase 3 testimony.

2. Background

Southern California Edison Company (Edison) is a 15.8% owner of the three generating units at Palo Verde Nuclear Generating Station (Palo Verde) in Arizona. Majority owner APS operates the plant.

All three plant units were shut down during the first two weeks of March 1989. Unit 2 was restored to service on or about June 30, 1989, Unit 3 was restored to service on or about February 22, 1990, and Unit 1 was restored to service on or about July 16, 1990. These dates are subject to revision because the appropriate definition of "restored to service" is unresolved.

Investigation (I.) 89-12-025, identified as Phase 3 of Edison's test year 1992 general rate case, is a review of the lengthy outages. I.89-12-025 was instituted on December 18, 1989 and is consolidated with the general rate case. Public Utilities (PU) Code § 455.5(c) requires such investigations when major power plants are out of service for nine months or more. The investigation originally considered outages only at Palo Verde, Units 1 and 3 because Unit 2 was out of service for less than nine months. However, by Administrative Law Judge (ALJ) ruling dated February 3, 1992, issues related to Unit 2 were transferred from three consolidated ECAC proceedings (Application (A.) 89-05-064, A.90-06-001, and A.91-05-050) to Phase 3 of the general rate case.

A Phase 3 prehearing conference was held and completed on December 9, 1991. Preliminary matters discussed included consolidation of base rate and fuel-related rate testimony, scope of the investigation, and confidentiality of documents. This decision resolves those matters.

3. Consolidation of Proceedings

On January 29, 1992, DRA filed a motion to consolidate Phase 3 with the reasonableness phase of the ECAC proceedings. DRA filed a parallel motion in the ECAC proceedings. The motions were filed prior to the February 3 ALJ ruling which transferred replacement power costs from the ECAC proceedings to Phase 3.

DRA is concerned that simply transferring issues from the ECAC proceedings to Phase 3 may not adequately protect ratepayers' interests. According to DRA, there are legal questions regarding the Commission's authority to order refunds for replacement power

costs prior to December 18, 1989, when I.89-12-025 was instituted. DRA's solution to the legal uncertainty is to consolidate the ECAC proceedings with Phase 3.

Edison replied to the DRA motion to consolidate, generally concurring with DRA that Commission review of the instant Palo Verde issues should be done in one proceeding. Edison favors review in Phase 3 and has two other concerns. First, Edison seeks an opportunity to reply to upcoming DRA testimony on Unit 2, which until February 3 was not within the scope of Phase 3. Second, Edison recommends that if consolidation is granted, then determination of penalties and rewards under Edison's Nuclear Unit Incentive Procedure (NUIP) should be left open pending a Phase 3 final decision. NUIP calculations are normally made in ECAC proceedings. DRA believes that NUIP issues should not be deferred, but recognizes that overlap between NUIP awards and Phase 3 issues could be handled by crediting portions of NUIP awards against any replacement power costs found to be unreasonable.

We will deny the DRA motion to consolidate. As we discuss below, there are no legal impediments to review of replacement power costs apart from the ECAC proceedings, and consolidation would serve no other purpose. We will grant Edison an opportunity to respond to DRA testimony on Unit 2. We will reserve final determination of NUIP penalties and rewards pending a Phase 3 decision on reasonableness of the outages. Subsequent NUIP determination should be straightforward because penalties and rewards are calculated by formula. We will determine final NUIP amounts in Phase 3 rather than the ECAC proceedings. Until then, the ECAC proceedings should include calculation of NUIP penalties and rewards as if Palo Verde operations were prudent, subject to revision in Phase 3.

4. Scope of the Phase 3 Investigation

In a January 22, 1992 ruling following the Phase 3 prehearing conference, the assigned ALJ ordered briefs from the

parties on the scope of replacement power costs to be considered in Phase 3. Specifically, can the Commission approve or disallow replacement power costs from March 1989, when the Palo Verde units were shut down, through December 18, 1989, when I.89-12-025 was instituted, without violating the prohibition against retroactive ratemaking?

DRA declined to discuss this legal point, because if its motion for consolidation was granted the issue would be moot. All fuel-related costs are already subject to refund under the ECAC mechanism.

Edison did respond, arguing that the Commission is empowered to review replacement power costs associated with the Palo Verde outages in Phase 3, and that such deliberations should not be removed to the consolidated ECAC proceedings. Edison points out that PU Code § 455.5(e) explicitly reserves for the Commission the right to review the costs of facilities out of service for less than nine months. That authority supports our existing authority under the ECAC mechanism to review the reasonableness of replacement power costs for Palo Verde, Unit 2.

We find that Phase 3 should consider base rate costs for Palo Verde, Units 1 and 3 from December 18, 1989 through the dates the units were restored to service. DRA does not recommend any disallowance of base rate costs prior to December 18, 1989, apparently conceding that such disallowances would be retroactive ratemaking. Phase 3 should also consider all fuel-related costs--including replacement power costs and adjustments to NUIP penalties and rewards--for all three units from the dates the units went out of service in March 1989 through the dates the units were restored to service. The Commission has the authority to order refunds for fuel-related costs incurred prior to December 18, 1989, under Edison's ECAC mechanism. Phase 3 should cover these issues fully, without any loss of scope by the transfer of issues from the ECAC proceedings. As we have stated in previous decisions, ECAC record

period issues may be considered outside of ECAC reviews if they are expressly removed.[1] Palo Verde replacement power issues have been expressly reserved in the February 3 ALJ ruling in the consolidated ECAC proceedings.

DRA has included in its testimony certain environmental costs associated with the Palo Verde outages. These costs are not recorded in Edison's ECAC balancing account, but they should be considered within the scope of Phase 3. We will not now decide whether disallowances related to environmental costs are either legal or appropriate, but the parties are put on notice that environmental costs may be considered in the Phase 3 hearings.

5. Confidentiality of INPO Documents

The Institute of Nuclear Power Operations (INPO) is a private, voluntary consortium of electric utility companies which operate nuclear power plants in the United States. Its purpose is to promote improved safety and reliability in the operation of commercial nuclear power plants through self-regulation by peer review. INPO produces and circulates among its members reports of inquiries into regular operations and significant safety-related events or experiences occurring at member power plants. Although INPO information is available to utility managers and the Nuclear Regulatory Commission (NRC), the Federal agency responsible for safety matters at nuclear plants, INPO reports are not generally available to the public. APS, the operator of Palo Verde, is a member of INPO.

In this proceeding, APS provided DRA with various INPO reports under the protection of a nondisclosure agreement executed June 21, 1991. On November 1, 1991, DRA served its Phase 3 direct testimony. The testimony includes, among other items: (1) three INPO documents numbered for identification as reference items

1 E.g., Decision (D.) 92496; 4 Cal. PUC 2d 693, 702 (1980).

SEA-20, SEA-21, and SEA-23, (2) direct quotations from those reference items within the narrative testimony, and (3) direct quotations from other INPO documents which are not included as reference items. These portions of the testimony are the subject of the present dispute between DRA and APS. DRA delivered complete copies of its testimony to Edison, APS, INPO, and the assigned ALJ. Other parties received only the nonconfidential testimony, pending the outcome of this dispute.

On January 15, 1992, DRA filed a motion for an ALJ ruling authorizing public disclosure of most of the DRA report. DRA seeks public disclosure of all of its narrative testimony, but would not object to handling the three supporting documents under seal as confidential.

On February 13, 1992, APS filed a motion for a protective order regarding INPO information. APS proposes that the disputed information not be made available to the general public, that testimony and transcripts be handled under seal, and that the confidential documents be returned to APS following completion of Phase 3. Edison responded in support of the APS motion. DRA opposes the motion.

5.1. Position of APS

APS suggests, but does not directly argue, that any release of disputed information by DRA would breach the nondisclosure agreement between APS and DRA. APS claims that DRA cannot now shirk its obligations to maintain confidentiality.

APS' principal argument for confidentiality is that the INPO documents are protected by a nascent "self-critical analysis privilege" which has recently emerged as a necessary safeguard of public interest. California courts have not yet addressed this privilege in the context of nuclear power plant operations, but courts have upheld the privilege in other circumstances, typically

to protect investigations by medical and academic review committees.[2] APS believes the privilege should apply when three tests are met: (1) the information must result from a self-critical analysis undertaken by or for the party seeking protection, (2) the public must have a strong interest in preserving the free flow of information of the type in dispute, and (3) the flow of information would be curtailed if public discovery were allowed. According to APS, the privilege develops when the public need for disclosure is outweighed by the public need for confidentiality.

APS asserts that INPO investigations meet these criteria, and that public dissemination of confidential INPO documents would cause tangible, irreparable harm to INPO's work at Palo Verde and throughout the nation. APS supports this claim with various documents, none of which has been tested by cross-examination before the Commission: (1) a statement by INPO that disclosure would be counterproductive, would hinder the openness and candor of utilities and individuals responding to INPO investigations, would be misperceived by the public because INPO standards of excellence are higher than minimum legal safety standards, and would in the long run cause a reduction in the margin of safety at the nation's nuclear power plants; (2) testimony by INPO employees before an Arizona Superior Court that INPO's present policy of nondisclosure of reports has improved the flow of valuable information, relative to a prior policy which allowed disclosure; (3) agreements between APS and the Arizona Corporation Commission staff, and between INPO and the NRC staff, which preserve confidentiality of INPO reports;

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2 E.g., Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249 (D.D.C. 1970), affirmed 479 F.2d 920 (D.C. Cir. 1973); and Wiley v. Mills, 195 N.J. Super. 332; 478 A.2d 1273 (1984).

and (4) various other documents. APS also cites a law review article on the self-critical analysis privilege.[3]

5.2. Position of DRA

DRA argues that APS is wrong in characterizing DRA's obligations under the nondisclosure agreement. DRA has specifically reserved the right to pursue disclosure under the terms of the agreement:

> "9. Nothing in this Nondisclosure Agreement shall be construed as precluding DRA from applying to the Commission, upon due notice to Edison, APS and INPO, for relief from this Nondisclosure Agreement on the grounds that continuation of the confidential status of the Confidential Information is no longer necessary or appropriate...."

DRA opposes the notion of a self-critical analysis privilege, noting that the California legislature has, in adopting the California Evidence Code, precluded courts from creating new privileges.[4]

DRA asserts that Commission policy favors public disclosure, and APS has the burden to show why individual documents should not be made public.[5] In review of the public policy balance between confidentiality and disclosure, DRA believes that: (1) disclosure will more likely enhance nuclear plant safety than reduce it, (2) paraphrasing the INPO documents might introduce bias and would reduce the impact of INPO's own words, and (3) the difference in performance standards between INPO's standard of

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3 Note: The Privilege of Self-Critical Analysis, 96 Harv. L. Rev. 1083 (1983).

4 Evidence Code § 911(b); Valley Bank of Nevada v. Superior Court, 15 C.3d 652, 656 (1975).

5 D.88-04-016; 28 Cal. PUC 2d 3, 11 (1988). Also, D.91-12-019, at mimeo. pages 6, 11-12.

excellence and legal safety criteria is irrelevant. DRA argues that APS referrals to information about harm due to disclosure are inappropriate and should be given no weight, because the information is selective and untested by the Commission.

5.3. Discussion

By seeking an order allowing public disclosure of its testimony, DRA has not breached its nondisclosure agreement with APS. DRA is obliged to carry out the terms of the agreement, but the agreement allows the disputed information to be disclosed or used in a hearing if the Commission determines that continuation of confidential status is not necessary or appropriate. This condition is consistent with the Commission's treatment of utility information under PU Code § 583, which authorizes public disclosure of information by the Commission.

The California Legislature has, in adopting Evidence Code § 911, precluded the creation of new privileges. Evidence Code § 911(b) states:

> "Except as otherwise provided by statute: ...
> (b) No person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing."

The claimed self-critical analysis privilege has not been adopted in California. The only statutes that create privileges similar to the self-critical analysis privilege are limited to the context of the medical professions.[6] However, the Commission is not bound by the technical rules of evidence, as long as the substantial rights of the parties are preserved.[7] In this instance the substantial rights of APS are preserved as long as the Commission balances the need for disclosure against the need for

6 Evidence Code §§ 1156, 1157.

7 Rule 64, Rules of Practice and Procedure.

confidentiality. This balancing test is the same as the test required to endorse the claimed privilege, because the privilege is conditional, not absolute. The cases cited by APS recognize the conditional nature of the self-critical analysis privilege and the need to balance competing interests, especially with nascent rather than established privileges. It is not enough to show exceptional need by one party. That need must be balanced against the needs of other parties and the public.

We decline to endorse the self-critical analysis privilege in this proceeding. However, in analyzing the merits of DRA's claim that continued confidentiality of the INPO information is unnecessary, we will perform the same balancing test that is required by the conditional privilege. Under either approach, the Commission must as the trier of fact assess and weigh the public need for confidentiality against the public need for disclosure. We have reviewed reference items SEA-20, SEA-21, and SEA-23, along with DRA's narrative testimony, in camera in making the necessary judgments.

5.3.1. Factors Supporting Confidentiality

Although the record does not contain quantitative evidence on the subject, it has been strenuously asserted that confidentiality provides an atmosphere critical to the free flow of information about nuclear power plant operations. Disclosure of the INPO reports would hinder the flow of information in two ways. First, it might discourage utilities from pursuing the self-critical analysis that INPO offers, whether for good cause (e.g., fear of unnecessary regulation) or not (e.g., fear of public embarrassment). Second, disclosure might discourage individual respondents from coming forward with useful criticism, due to fear of reprisals or peer disapproval.

We accept that in general the free flow of information can promote plant reliability and safety, which are recognizable

public benefits. Curtailment of information would in the long run hinder the efforts of utilities and of the Commission.

There are parallels between INPO reports and the medical and academic reviews which have been protected in various courts: (1) INPO efforts qualify as self-criticism, (2) the public has a strong interest in the free flow of information, and (3) it is plausible that disclosure would curtail that flow.

The nondisclosure agreements between INPO and the NRC suggest that in some circumstances other agencies have found that confidentiality is in the public interest. Confidential treatment will still allow the Commission to carry out its business.

According to APS and INPO, public disclosure would be misperceived by the public, because INPO's standards are higher than NRC safety standards.

5.3.2. Factors Supporting Disclosure

The strongest factor supporting disclosure is the general public right to inspect all evidence relevant to matters before a government agency. Public policy should encourage self-regulation, but those efforts should be made openly, as is done under government regulation.

Nondisclosure of the INPO reports may reduce public confidence in the nuclear power industry and in the Commission. This investigation is not an inquiry into a specific accident of the type for which confidentiality is sometimes necessary. It is a review of the reasonableness of utility actions. Most of the disputed INPO documents cover regular, periodic reviews, not accidents or safety-related events.

The causality between public disclosure of information and subsequent curtailment of the free flow of similar information is difficult to ascertain. The only support for this connection is contained in statements by INPO and utility employees. Reluctance of individuals to participate in INPO reviews may be exaggerated. Power plant workers certainly have a strong and direct interest in

safety. INPO reports are already widely distributed among plant managers, other utilities, and regulators, which could reduce the fear of reprisals induced by public disclosure.

APS has claimed that the information needed to review the substantive issues in this proceeding is available, perhaps in alternative form, in other public documents. If this is indeed true, then it is less likely that disclosure of direct quotations would impair the future flow of essential information.

The Commission should give little weight to fears of public misperceptions about standards of excellence. The Commission's own standards of prudence need not coincide with either INPO standards or minimum legal standards of performance. The public deserves thorough explanations of utility performance, not paternalistic reassurances that utility actions reviewed behind closed doors are in the public interest.

Finally, Commission policy on nondisclosure should mirror the intentions of Evidence Code § 911, which prohibits the creation of new privileges.

5.4. Conclusion

The concept of public interest can be difficult to define. In the present circumstance, there are no familiar yardsticks to assess long-term public interests or the connection between information flow and confidentiality. The many factors for and against disclosure reflect this difficulty. However, it is the Commission's duty as the trier of fact to balance these factors using our best judgment.

We find that the factors supporting confidential treatment of the INPO documents outweigh the factors supporting public disclosure. In particular, the benefits of keeping INPO reports confidential exceed the need for open review of nuclear issues especially in the case of a review which is not safety related. We will deny DRA's motion for disclosure of its narrative

testimony. We will grant the APS motion for protection of the INPO documents.

Findings of Fact

1. On January 29, 1992, DRA filed a motion to consolidate Phase 3 with reasonableness reviews in three consolidated ECAC proceedings, A.89-05-064, A.90-06-001, and A.91-05-050.

2. Edison believes that Palo Verde reasonableness issues should be reviewed in Phase 3.

3. Reasonableness issues for Palo Verde, Units 1, 2, and 3 should be reviewed in Phase 3.

4. NUIP penalties and rewards should be reviewed in the consolidated ECAC proceedings, subject to revision in Phase 3.

5. The Phase 3 review should consider base rate costs for Palo Verde, Units 1 and 3 from December 18, 1989 through the dates the units were restored to service and fuel-related costs for all three units from the dates the units went out of service in March 1989 through the dates the units were restored to service.

6. The Commission has reviewed reference items SEA-20, SEA-21, and SEA-23, along with DRA's narrative testimony, in camera in assessing the need for confidentiality of the documents.

7. In order to resolve the APS and DRA motions on confidential treatment of INPO documents, the Commission should balance the public need for confidentiality against the public need for disclosure.

8. There are factors which support confidentiality and factors which support public disclosure, as discussed in this decision.

9. The benefits of confidentiality of INPO reports exceed the need for open review of nuclear power issues.

10. The factors supporting continued confidentiality of the disputed INPO information outweigh the factors supporting public disclosure.

Conclusions of Law

1. Edison should have an opportunity to serve testimony on Palo Verde, Unit 2 issues in Phase 3.

2. DRA's January 29, 1992 motion to consolidate should be denied.

3. In the consolidated ECAC proceedings, Palo Verde issues have been expressly reserved for consideration in Phase 3.

4. The Commission has the authority to order refunds for costs related to outages commencing at Palo Verde, Units 1, 2, and 3 in March 1989 because the costs have been recorded in memorandum accounts pursuant to I.89-12-025 and Edison's ECAC tariff.

5. DRA has not breached its June 21, 1991 nondisclosure agreement with APS.

6. No absolute self-critical analysis privilege exists.

7. The substantial rights of APS are preserved as long as the Commission balances the need for disclosure against the need for confidentiality.

8. DRA should not be authorized to publicly disclose its Phase 3 testimony in its entirety.

9. The APS motion for a protective order regarding INPO information should be granted.

FIFTH INTERIM ORDER

IT IS ORDERED that:

1. The January 29, 1992 motion of the Division of Ratepayer Advocates (DRA) to consolidate hearings in Phase 3 of this proceeding with three consolidated Energy Cost Adjustment Clause proceedings (Application (A.) 89-05-064, A.90-06-001, and A.91-05-050) is denied.

2. The assigned Administrative Law Judge shall afford Southern California Edison Company (Edison) the opportunity to

serve testimony in Phase 3 of this proceeding on the reasonableness of operations at Palo Verde Nuclear Generating Station, Unit 2.

3. Penalties and rewards ordered in A.89-05-064, A.90-06-001, and A.91-05-050 under Edison's Nuclear Unit Incentive Procedure are subject to revision in Phase 3 of this proceeding.

4. Proposed disallowances relating to the environmental costs of replacement power generation during the outages considered in Phase 3 of this proceeding may be considered in Phase 3 hearings.

5. The DRA motion filed January 15, 1992 for authorization to publicly disclose most of its report in Phase 3 of this proceeding is denied.

6. DRA is not authorized to publicly disclose its Phase 3 testimony in this proceeding in its entirety.

7. The Arizona Public Service Company motion filed February 13, 1992 for a protective order regarding Institute of Nuclear Power Operations information is granted, however, the assigned ALJ shall make the appropriate procedural arrangements, consistent with the motion, to ensure the confidentiality of documents requested.

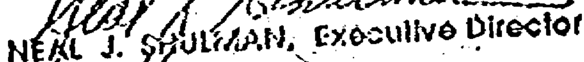
8. The Executive Director shall cause copies of this decision to be served on all parties in the reasonableness phase of consolidated A.89-05-064, A.90-06-001, and A.91-05-050.

This order becomes effective 30 days from today.

Dated April 8, 1992, at San Francisco, California.

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

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



NEAL J. SHULMAN, Executive Director