BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company and San Diego Gas and Electric Company Associated with the San Onofre Nuclear Generating Station Units 2 and 3	)	I.12-10-013 (Issued November 1, 2012)

ALLIANCE FOR NUCLEAR RESPONSIBILITY'S OPPOSITION TO MOTION OF SOUTHERN CALIFORNIA EDISON COMPANY (U338-E) TO SEAL A PORTION OF THE EVIDENTIARY RECORD

JOHN L. GEESMAN

DICKSON GEESMAN LLP
1999 Harrison Street, Suite 2000
Oakland, CA 94612
Telephone: (510) 899-4670
Facsimile: (510) 899-4671
E-Mail: john@dicksongeesman.com

Attorney for
ALLIANCE FOR NUCLEAR RESPONSIBILITY

Date: January 22, 2013

I. INTRODUCTION

Pursuant to Rule 11.1(e) of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure, the Alliance for Nuclear Responsibility ("A4NR") respectfully submits its opposition to the Motion of Southern California Edison Company ("Edison" or "SCE") to Seal a Portion of the Evidentiary Record ("Motion to Seal" or "Motion"). A4NR's opposition is based on

- Edison's failure to state any provision of law supporting its Motion, as required by the Commission's Rule 11.1(d);[1]
- Edison's failure to meet the burden of proof articulated by the Commission in D.6-06-066;
- Edison's misplaced reliance on ambiguous affidavits from AREVA NP Inc. and Mitsubishi Heavy Industries, Ltd. which do not assert any claimed exemption from disclosure under the California Public Records Act;[2] and
- the indisputable tilt in favor of public access expressed in the California Constitution[3] and the California Public Records Act.[4]

[1] Rule 11.1(d) states: "A motion must concisely state the facts and law supporting the motion and the specific relief or ruling requested."
[2] Cal. Gov't Code § 6250 *et seq.*
[3] Cal. Const., Article 1, § 3(b)(1) states: "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Article 1, § 3(b)(2) states: "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."
[4] Cal. Gov't Code § 6250 states: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

II. DISCUSSION

(1) Despite the requirement of Rule 11.1(d), Edison does not identify any provision of law which would support its Motion to Seal a Portion of the Evidentiary Record.

Rather than provide the legal justification for why the information should be shielded from public access under California law, Edison simply informs the Commission that the documents which it seeks to submit under seal "include portions identified as confidential and proprietary by the creators of those documents, Mitsubishi Heavy Industries, Ltd. (MHI) and AREVA NP Inc. (Areva)."[5] Edison goes on to explain that these documents have previously been provided to the U.S. Nuclear Regulatory Commission ("NRC"), and that prior to that submission they had been reviewed by staff of these two foreign corporations "who identified and marked the confidential and proprietary portions of the documents."[6]

Edison makes no attempt to explain why this is not precisely the type of situation addressed by Cal. Gov't. Code § 6253.3: "A state or local agency may not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter." Nor does Edison argue that these documents are not public records as defined by Cal. Gov't. Code § 6252(e).[7] As the California Supreme Court approvingly noted, quoting from an Assembly Committee Report, "This definition is intended to cover every conceivable kind of record that is involved in the governmental process … Only purely personal information

---

[5] SCE Motion, p. 3.
[6] *Id.*
[7] Cal. Gov't. Code § 6252(e) states: "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics."

unrelated to 'the conduct of the people's business' could be considered exempt from this definition ..."[8]

Instead, Edison asserts that it "is contractually obligated to ***seek*** confidential treatment" (emphasis added) of the information identified as "***proprietary***" (emphasis added) by Areva and MHI, pursuant to contracts with each of those entities.[9] In support of this assertion, Edison offers the Declaration of Russell Harding (its Program Manager for Special Projects, Steam Generator) concerning identical confidentiality provisions of the Master Agreement with Framatome ANP and Mitsubishi Nuclear Energy Services-EMS Conformed Specification SO23-617-01 Rev. 4:

> *The confidentiality provision concerning the actions a receiving party must take when required to produce confidential information in a regulatory proceeding is the same in both contracts. The Provision requires the receiving party to provide written notice* ***so the disclosing party may seek 'a protective order or other appropriate remedy.'*** *The confidentiality provision further provides that '[i]n the event a protective order or other remedy is not obtained ..., [the receiving party] will furnish only that portion of the Confidential Information which is legally required and will exercise its best efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information.'*[10] (emphasis added)

Based on the Harding Declaration, it would appear that SCE is the "receiving party" and that its Motion to Seal is part of its "best efforts to obtain reliable assurance that confidential treatment will be accorded". The two contracts leave pursuit of "a protective order or other appropriate remedy" to the "disclosing party", presumably MHI and Areva. Regardless of who actually brings the Motion, however, the requirement of Rule 11.1(d) to concisely state the law

---

[8] *Commission on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, p 288, fn. 3.
[9] SCE Motion, p. 3.
[10] SCE Motion, Declaration of Russell Harding, unnumbered second page.

supporting the Motion applies. Significantly, Edison's Motion to Seal never states whether Edison believes it could be granted consistent with the California Constitution or the California Public Records Act.

(2) Edison does not even attempt to meet the burden of proof specified by the Commission in D.6-06-066.

Chastened by its own self-awareness ("We are a public agency that regulates public utilities, and most of our business must be conducted in the open."[11]), the Commission provided useful guidance in D.6-06-066 for what it expects from parties seeking to have information designated as confidential:

- "a party seeking confidential treatment … shall bear the burden of proving that its information deserves such treatment." (D.06-06-066 Ordering Paragraph 3)

- "Boilerplate assertions of a need for confidentiality are not appropriate. Rather the producing party must cite the legal basis for confidential protection, along with facts showing the consequences of release." (D.06-06-066 Ordering Paragraph 3)

- "Mere recitation of the conclusory statement that information is a trade secret[12] … is not enough to meet the burden of proving entitlement to confidential treatment." (D.06-06-066 Ordering Paragraph 5)

- "No data that is already publicly available may be characterized or treated as

[11] D.6-06-066, Conclusion of Law 10.

[12] The SCE Motion does not make a "trade secret" claim, using instead the legally less significant "confidential and proprietary" label. Similarly, the Areva and MHI affidavits never state whether either company considers any part of the "confidential and proprietary" information to qualify as a "trade secret".

confidential. Information an IOU has furnished to an affiliated company[13] is publicly available." (D.06-06-066 Ordering Paragraph 7)

Edison's Motion to Seal cannot survive even the most lenient application of the D.6-06-066 requirements. Even under the less formal requirements the Commission has developed to govern advice letter filings, Edison's effort doesn't come close. As specified in General Order 96-B,

> *A person requesting confidential treatment under this General Order bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure. Any request for confidential treatment of information must reference the specific law prohibiting disclosure, the specific statutory privilege that the person believes it holds and could assert against disclosure, the specific privilege the person believes the Commission may and should assert against disclosure, or the specific provision of General Order 66-C (or its successor) or other Commission decision that authorizes a document to be kept confidential.*[14]

Edison's Motion to Seal does none of this. More importantly, it doesn't even go through the motions of trying.

(3) The ambiguous affidavits provided by AREVA NP Inc. and Mitsubishi Heavy Industries, Ltd. fail to assert any claimed exemption from disclosure under the California Public Records Act.

Attached to the Declaration of Russell Holding are four virtually identical affidavits from Areva and three similar affidavits from MHI "attesting to the confidential and proprietary

[13] The extent to which the information has been shared with SCE's parent, Edison International, would render it "publicly available" under the standard specified in D.6-06-066.
[14] GO 96-B, § 9.2 Burden of Establishing Confidentiality.

nature"[15] of the information which Edison seeks to submit under seal. From their terms, the affidavits appear to have been prepared several months ago[16] in conjunction with submittal of the same information to the NRC. Each of the seven affidavits requests withholding from disclosure pursuant to 10 CFR 2.390(a)(4), an NRC regulation exempting from disclosure "Trade secrets and commercial or financial information obtained from a person and privileged or confidential."

None of the affidavits attempt to clarify whether the pertinent information is claimed to be a "trade secret" or "commercial or financial information." Nor do they specify any legal privilege which would prevent their disclosure. While "trade secrets" are exempted from disclosure under the California Public Records Act,[17] there is no similar exemption for "commercial or financial information" absent a specific evidentiary privilege barring its disclosure.[18]

Nor does the NRC appear to have determined whether the information covered by the Areva and MHI affidavits actually qualifies as a "trade secret" under 10 CFR 2.390(a)(4). As the NRC's Atomic Safety and Licensing Board carefully makes clear, in granting a joint motion by Edison and Friends of the Earth for a protective order covering the information, "Nothing in this Order shall preclude any person from seeking public disclosure of Protected Information in accordance with NRC regulations. Nothing in this Order shall preclude any person from seeking

[15] SCE Motion, p. 3.
[16] The Areva affidavits were signed on September 5 and October 1, 2012; the MHI affidavits on August 2, September 28 and October 22, 2012.
[17] Cal. Gov't. Code § 6254(k).
[18] *Union Bank of California v. Superior Court* (2005) 130 Cal.App.4th 378, at pp. 388-389, states: "Evidentiary privileges are created by statute, and the courts of this state are not free to create new privileges as a matter of judicial policy but must apply only those privileges created by statute or that otherwise arise out of state or federal constitutional law."

through discovery in any other administrative or judicial proceeding, information protected by this Order."[19]

What the Areva and MHI affidavits actually contain is a series of conclusory statements of corporate preference for confidentiality which fall considerably short of the requirements to qualify as a trade secret under California law.[20] The material attestations in Areva affidavits are:

- *I am familiar with the criteria applied by AREVA NP to determine whether certain AREVA NP information is proprietary. I am familiar with the policies established by AREVA NP to ensure the proper application of these criteria.*

***

- *This Document contains information of a proprietary and confidential nature and is of the type customarily held in confidence by AREVA NP and not made available to the public. Based on my experience, I am aware that other companies regard information of the kind contained in this Document as proprietary and confidential.*

***

- *Use of the information by a competitor would permit the competitor to significantly reduce its expenditures, in time or resources, to design, produce, or market a similar product or service.*

- *The information includes test data or analytical techniques concerning a process, methodology, or component, the application of which results in a competitive advantage for AREVA NP.*[21]

***

[19] NRC Atomic Safety and Licensing Board, *In the Matter of SOUTHERN CALIFORNIA EDISON (San Onofre Nuclear Generating Station, Units 2 and 3),* Docket Nos. 50-361-CAL, 50-362-CAL, December 10, 2012, p. 4.

[20] Cal. Civil Code § 3426.1(d) and Penal Code § 499c (a)(9) both define "trade secret" as "information … that (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy."

[21] SCE Motion, Declaration of Russell Harding, Exhibits A, B, C and D each contain this language on unnumbered pages 1 and 2.

The three MHI affidavits, two of which focus on MHI information contained in Areva documents (Areva is a direct competitor of MHI in the nuclear industry as is fellow Edison SONGS consultant Westinghouse Electric Company LLC[22]), are similarly circular and conclusory. But while the MHI affidavits attest that the information "has in the past been, and will continue to be, held in confidence by MHI" they acknowledge that it has been disclosed to "regulatory bodies, customers and potential customers, and their agents, suppliers, and licensees, and others with a legitimate need for the information."[23] Exactly how this broad dissemination could be characterized as consistent with efforts that are reasonable under the circumstances to maintain secrecy is left unaddressed by the affidavits.

For reasons left unexplained, Edison chooses not to include in its Motion to Seal any updated affidavits from Areva and MHI that would more clearly address the exacting requirements for qualification as trade secrets under California law. In a context where the pertinent information has already been made available to three primary competitors – the two affiants plus Westinghouse – and an indeterminate number of industry consultants, this would require quite a stretch. As submitted, the affidavits leave no doubt about the companies' desire to have the information characterized as "proprietary and confidential" but this is far from sufficient to qualify for any of the exemptions from disclosure contained in the California Public Records Act.

[22] Letter from SCE Senior Vice President Peter T. Dietrich to NRC Region IV Administrator Elmo E. Collins, October 3, 2012, p. 3.
[23] SCE Motion, Declaration of Russell Harding, Exhibits A, B, C and D each contain this language on unnumbered page 1.

(4) Both the California Constitution and the California Public Records Act create a strong presumption in favor of public access to the documents Edison seeks to file under seal.

How should the CPUC respond to a request like Edison's in a legal environment where the Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state"[24]? In A4NR's judgment, the Commission's ruling should be anchored to the California Constitution's requirement that legal authority "shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access."[25] As the Supreme Court has repeatedly explained, the Public Records Act was adopted " for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies.' "[26]

Even if Edison made the argument – which, emphatically, it has not -- that the information covered by its Motion to Seal is protected by some specific exemption to the California Public Records Act, the Commission would not be precluded from disclosing the information if the Commission believes disclosure is in the public interest. Absent a law specifically prohibiting disclosure, the exemptions in the California Public Records Act are permissive, not mandatory; they allow nondisclosure, but they do not prohibit disclosure.[27] As the Commission recognized in D.05-04-030, "Contrary to Applicants' apparent assumption,

---

[24] Cal. Gov't. Code § 6250.
[25] Cal. Const. Article 1, § 3(b)(2).
[26] *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370 citing *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651. "Maximum disclosure of the conduct of governmental operations was to be promoted by the Act." 53 Ops. Cal. Atty. Gen. 136, 143 (1970).
[27] See, e.g., *CBS, Inc. v. Block, supra,* 42 Cal.3d at 652; *American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, at 67-68 fn. 3; *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, at 905-906; *Black Panthers v. Kehoe* (1974) 42 Cal.App.3d 645, at 656.

CPRA exemptions are permissive, rather than mandatory, and an agency may, but is not compelled to, assert the exemptions in a particular circumstance."[28]

In circumstances where no argument has been made that disclosure is legally prohibited, where Edison's entire effort consists of merely asserting a contractual obligation to "exercise its best efforts to obtain reliable assurance that confidential treatment will be accorded"[29] to the unfounded hopes of two foreign corporations, the Commission must deny the Motion to Seal. Doing otherwise would make a mockery of the Constitutional and statutory environment in which the Commission conducts its business, to say nothing of the disdain it would spew on prior Commission guidance.

III. CONCLUSION

A4NR believes there is an overwhelming public interest in "access to information concerning the conduct of the people's business"[30] in order to determine the chain of events which has brought the entire Southern California region to the brink of blackout peril for a second consecutive summer. It should never be forgotten that the origin of this crisis stems from a spectacle of lapsed governmental oversight: despite the combined jurisdictional authority of the CPUC and the NRC, a regulatory "blind spot" failed to prevent $671 million of new equipment from transforming into what may be useless junk. For the reasons stated herein, A4NR urges the Commission to deny Edison's Motion to Seal and reiterates its earlier request that the Assigned Commissioner exercise his authority under Cal. Pub. Util. Code

[28] D.05-04-030, p. 8.
[29] SCE Motion, p. 3.
[30] Cal. Const. Article 1, § 3(b)(1).

§ 583[31] to make public all information obtained during the course of I.12-10-013 except in those instances where such public access is specifically precluded by California law.

Respectfully submitted,

By: /s/ John L. Geesman

JOHN L. GEESMAN
DICKSON GEESMAN LLP

Date: January 22, 2013

Attorney for
ALLIANCE FOR NUCLEAR RESPONSIBILITY

[31] Cal. Pub. Util. Code § 583 states: "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 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."