

**BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Consider
Electric Procurement Policy Refinements
Pursuant to the Joint Reliability Plan

R.14-02-001
(Dated February 5, 2014)

**RESPONSE OF PACIFIC GAS AND ELECTRIC
COMPANY (U 39 E) IN OPPOSITION TO THE ALLIANCE
FOR NUCLEAR RESPONSIBILITY'S MOTION TO
COMPEL DISCOVERY**

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Pursuant to Rule 11.3(b) of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, Pacific Gas and Electric Company (PG&E) files this response to the Alliance for Nuclear Responsibility's (A4NR) April 18, 2014, motion to compel discovery from PG&E.

PG&E responded appropriately to A4NR's March 11, 2014, data requests. Therefore, A4NR's motion to compel should be denied.

I. BACKGROUND

This proceeding has three tracks:

- Track 1 – Multi-year resource adequacy;
- Track 2 – Long-term reliability planning assessment;
- Track 3 – Commission policy decision on the California Independent System Operator (CAISO) proposal for a replacement to its Capacity Procurement Mechanisms (CPM) (backstop procurement mechanism).^{1/}

As the Commission notes, this proceeding “is the forum in which we shall execute our commitment to consider proposed modifications to three aspects of California’s electric reliability framework pursuant to the Joint Reliability Plan adopted by the Commission and the

^{1/} R.14-02-001, p. 20.

CAISO board of Governors.^{2/} Toward this end, and to provide further definition for the proceeding, the Commission raises a number of questions relating to each of the three tracks in the “Preliminary Scoping Memo” issued as a part of the rulemaking, and distinguishes between the purposes of this proceeding, on the one hand, and other Commission proceedings such as the Long-Term Procurement Plan (LTTP) proceeding, on the other.^{3/}

Pursuant to the preliminary scoping memo, none of the tracks in this proceeding put the operation of PG&E’s Diablo Canyon Power Plant (DCPP) at issue. A4NR did not take issue with the preliminary scope, filing neither opening nor reply comments on it.

However, on March 11, 2014, as it describes in its motion to compel, A4NR served a data request on PG&E relating specifically to the DCPP and whether PG&E has plans to operate the plant differently in the future. Although the subject of the data request is not relevant to the scope of this proceeding, PG&E responded fully to the data request on April 16, 2014, providing copies of all non-privileged documents it identified responsive to A4NR’s requests for documents, and responding directly and completely to each of A4NR’s requests that called for a narrative answer. PG&E did withhold certain documents that were prepared at the direction of counsel and are privileged and confidential pursuant to the attorney-client and attorney work product privileges.^{4/}

At the April 17, 2014, prehearing conference in this proceeding, A4NR’s counsel approached PG&E’s counsel, suggested that further discussion regarding PG&E’s responses was likely to be fruitless, and indicated that A4NR would be filing a motion to compel further answers, which it did the following day.

^{2/} R.14-02-001, p. 2.

^{3/} R.14-02-001, pp. 7-15.

^{4/} Attached Declaration of William V Manheim.

II. DISCUSSION

A. PG&E's Ability To Present Confidential Information To Members Of The Diablo Canyon Independent Safety Committee Should Be Preserved

A4NR requests that the “Commission should direct PG&E to . . . provide unredacted copies of pages 3, 16, 17 and 18 of the powerpoint provided in response to Question 4.”^{5/} Question 4 seeks production of documents relating to question 2. Question 2 asks whether PG&E participated in a fact-finding session with members of the Diablo Canyon Independent Safety Committee (DCISC) on the topic of the DCPD having to reduce generation output periodically in response to market demands. As PG&E stated in response to A4NR’s question 2, PG&E did participate in such a fact-finding session with members of the DCISC.

In response to question 4, among other documents, PG&E provided a redacted version of a presentation made by a PG&E employee as a part of the DCISC fact-finding session. Most of the presentation was provided to A4NR; three pages and a portion of a fourth were redacted to protect disclosure of privileged portions of the presentation.^{6/}

From the discussion in A4NR’s motion, as well as the demand made of PG&E in the two-minute “meet and confer” session conducted by A4NR’s counsel, it appears that A4NR is seeking the entire powerpoint presentation document with no confidentiality protections. This portion of A4NR’s motion to compel should be denied.^{7/}

The Restated Charter for the Diablo Canyon Independent Safety Committee, approved by the Commission, contains a specific process that authorizes PG&E to provide confidential information to members of the DCISC as part of the committee’s review of Diablo Canyon operations.^{8/} The charter requires the DCISC to treat such information as confidential and not

^{5/} A4NR Motion To Compel, pp. 5-6.

^{6/} Attached Declaration of William V Manheim, pp. 2, 4.

^{7/} In its motion to compel, A4NR provides citations to D.06-06-066 and General Order 96-B relating to submission of confidential information to the Commission. These are not directly applicable to PG&E’s responses to A4NR’s data requests.

^{8/} Restated Charter for the DCISC, p. 6. The restated charter is Attachment 1 to D.07-01-028.

disclose it outside the committee.^{9/} The objective of the confidentiality procedure is to facilitate the exchange of confidential materials.

For the DCISC to carry out its purpose, it is an absolute necessity that the lines of communication between it and PG&E be open and clear. That is not possible unless the confidentiality of information provided to the DCISC is maintained. If, contrary to what is contemplated in the restated charter, all information PG&E provides to the DCISC is made public upon request, as A4NR appears to argue, this would have a very inhibiting effect on PG&E-DCISC communications. If confidential materials provided to the DCISC were subject to disclosure, PG&E would have to withhold confidential information from the DCISC. This would undermine the ability of the DCISC to carry out its purpose.

The Commission should reject the path A4NR is proposing. Entities should not be given access, under the guise of discovery in essentially unrelated Commission proceedings, to the confidential communications between PG&E and the DCISC. The information A4NR is seeking is not even related to A4NR's participation in the proceeding. As indicated by the preliminary scoping memo, none of the three tracks of the proceeding contemplate an evaluation of potential future changes in DCP's operations, and A4NR did not provide any comments on the preliminary scoping memo proposing to bring such issues within the scope of the proceeding.

The Commission should deny the portion of A4NR's motion to compel seeking PG&E to disclose the confidential, redacted portions of the presentation on load-following that PG&E made to members of the DCISC in a fact-finding session. The specific pages of the presentation identified by A4NR in its motion contain privileged information. As explained in more detail in the attached Declaration of William Manheim, the information and material on these pages were prepared at the direction of PG&E's in-house counsel and thus they are protected by the attorney-client and attorney work product privileges. While PG&E has provided the non-

^{9/} Restated Charter for the DCISC, pp. 6-7.

privileged portions of the presentation to A4NR, the privileged portions should not be subject to discovery.^{10/}

B. PG&E Has Already Fully and Adequately Responded To Questions 6 And 10 Of A4NR's March 11, 2014, Data Request, And So The Portion Of A4NR's Motion Which Requests The Commission "To Respond Immediately To A4NR's Questions 6 And 10" Is Moot

Question 6 of A4NR's March 11 data request seeks the production of documents relating to PG&E studies (internal or contracted with other) to study operating either or both units at the DCPD in a load-following mode. As PG&E stated in response to A4NR's question 5, PG&E has performed such studies. A4NR requests that the Commission direct PG&E to respond to question 6.^{11/} But as A4NR acknowledges, PG&E has already responded to this question, stating:

PG&E objects to this question insofar as it seeks the production of confidential or privileged information. PG&E has not identified any non-confidential/non-privileged documents or electronically stored information responsive to this request.^{12/}

Similarly, A4NR question 10 seeks the production of documents relating to any plans PG&E has for future studies of the possible operation of either or both units of the DCPD in a load-following mode. As PG&E stated in response to A4NR's question 9, PG&E does have plans for future studies. A4NR requests that the Commission direct PG&E to respond to question 10.^{13/} But as A4NR acknowledges, PG&E has already responded to this question – there are no documents responsive to the request that are not subject to the attorney-client privilege.^{14/}

^{10/} See *Southern California Gas Company v. CPUC* (1990), 50 C.3d 31, 39 (privilege applies in Commission proceedings).

^{11/} A4NR Motion to Compel, p. 5.

^{12/} A4NR Motion to Compel, p. 2, citing PG&E's response.

^{13/} A4NR Motion to Compel, p. 5.

^{14/} A4NR Motion to Compel, p. 2.

In short, PG&E has already responded to questions 6 and 10 in A4NR's data request by indicating that there are no non-privileged responsive materials. Therefore, A4NR's request that the "Commission should direct PG&E to respond immediately to A4NR's Questions 6 and 10"^{15/} is moot.

C. PG&E Should Not Be Obligated To Disclose Privileged Information Relating To Studies Of Operating Either Or Both Units At The Diablo Canyon Power Plant In A Load-Following Mode

Although A4NR does not clearly ask for such relief in its motion to compel, the Commission should not order PG&E to disclose the privileged studies and plans for future studies that are responsive to questions 6 and 10.

The materials that PG&E designated confidential/privileged were prepared under the direction of counsel and therefore are covered by the attorney client privilege. The studies address potential future operating alternatives and strategies that PG&E may consider as it evaluates its regulatory and legal strategy with respect to DCP. The materials were prepared at the request of counsel to assist and inform counsel in the preparation of a legal/regulatory risk assessment for DCP.^{16/}

Entities, such as A4NR, should not be able to gain access to these confidential and privileged internal evaluations in the guise of discovery in Commission proceedings. Allowing A4NR and others this access would violate the attorney client and attorney work product privileges, which are fully applicable in Commission proceedings,^{17/} and undermine the regulatory process. Disclosure of PG&E's confidential and privileged business strategies could also result in PG&E being de-positioned in the energy markets.

^{15/} A4NR Motion to Compel, p. 5.

^{16/} Attached Declaration of William V Manheim, pp. 3-4.

^{17/} *Southern California Gas Company v. CPUC* (1990), 50 C.3d 31, 39.

To the extent A4NR is seeking it, the Commission should deny A4NR’s motion to compel production of the confidential/privileged studies and plans for future studies that are responsive to questions 6 and 10.

D. PG&E Appropriately Responded To A4NR’s Requests Regarding PG&E’s Communications With The Commission And The California Independent System Operator Regarding Operating DCPD In A Load-Following Mode

Question 7 of A4NR’s March 11, 2014, data request asks, “Has PG&E communicated with the California Independent System Operator about the possible operations of either or both units at Diablo Canyon in a load-following mode?” Question 11 asks, “Has PG&E communicated with the staff of the California Public Utilities Commission about the possible operation of either or both units at Diablo Canyon in a load-following mode?” In its motion to compel, A4NR requests that the Commission compel PG&E to answer “yes” or “no” to questions 7 and 11. This portion of A4NR’s motion to compel should be denied.

To develop its answers to questions 7 and 11, PG&E conducted a reasonable investigation. PG&E did not identify any conversations with the California Independent System Operator or the Commission during the course of its investigation that would be responsive to the request—this is a “no” answer to A4NR’s request. PG&E believes that its responses to A4NR questions 7 and 11 were adequate.

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III. CONCLUSION

For the foregoing reasons, PG&E respectfully requests that the Commission deny A4NR's motion to compel.

Respectfully Submitted,

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MARK R. HUFFMAN

By: */s/ Mark R. Huffman*
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Attorneys for
PACIFIC GAS AND ELECTRIC COMPANY

Dated: April 28, 2014

DECLARATION OF WILLIAM V. MANHEIM IN SUPPORT OF PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE IN OPPOSITION TO THE ALLIANCE FOR NUCLEAR RESPONSIBILITY'S MOTION TO COMPEL DISCOVERY

I, William V. Manheim, declare:

1. I am employed by Pacific Gas and Electric Company (PG&E) and have been an employee since 1987. I am an attorney for PG&E, and my current title is Senior Director and Lead Counsel, Energy Supply. My responsibilities include providing legal advice and support to PG&E's Energy Supply business, which includes the Diablo Canyon Power Plant (DCPP).

2. The information redacted from the powerpoint presentation document provided to the Alliance for Nuclear Responsibility (A4NR) in response to question 4 of its March 11, 2014, data request reflects material that is privileged and confidential pursuant to the attorney-client and attorney work product privileges.

3. The materials that PG&E designated confidential/privileged in response to questions 6 and 10 of A4NR's March 11, 2014, data request reflect material that is privileged and confidential pursuant to the attorney-client and attorney work product privileges.

4. The information in the materials redacted from the powerpoint presentation document provided in response to question 2 of A4NR's March 11, 2014, data request, and the materials designated confidential/privileged in response to questions 6 and 10 of the data request, either were prepared at my request to assist and inform counsel in the preparation of a legal/regulatory risk assessment for DCPP, or relate directly to carrying out that purpose. The studies address potential future operating alternatives and strategies that PG&E may consider as it evaluates its regulatory and legal strategy with respect to DCPP. These documents have not been disclosed to the public.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on April 28, 2014, at San Francisco, California

/s/ William V. Manheim
William V. Manheim
Pacific Gas and Electric Company