BEFORE THE
PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider	)	
Electric Procurement Policy Refinements	)	R.14-02-001
Pursuant to the Joint Reliability Plan.	)	(Filed February 5, 2014)
	)	

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

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I. INTRODUCTION.

Pursuant to Rule 11.1(f) of the California Public Utilities Commission ("Commission" or "CPUC") Rules of Practice and Procedure, the Alliance for Nuclear Responsibility ("A4NR") respectfully submits this reply to the Response filed April 28, 2014 by Pacific Gas and Electric Company ("PG&E") to A4NR's earlier Motion to Compel Discovery. On April 29, 2014 A4NR received by email the permission of Administrative Law Judges David Gamson and Colette Kersten to file and serve its reply ten days after the issuance of the Scoping Memo for this proceeding. The R.14-02-001 Scoping Memo was issued on May 20, 2014.

II. A4NR's REQUESTS ARE DIRECTLY RELEVANT TO R.14-02-001.

PG&E's Response to A4NR's Motion raises for the first time the argument that A4NR's inquiry into PG&E's consideration of operating the Diablo Canyon Nuclear Power on a load-following basis *"is not relevant to the scope of this proceeding."*[1] It should be self-evident that transforming 2,240 MW of NP-26 baseload capacity[2] into load-following capacity would have a direct impact on the amount of *"flexible"* capacity required in the CAISO control area. Gaining a better understanding of what is under review by PG&E -- in terms of potential operating characteristics, timeframe for implementation, and realistic likelihood – would seem essential to well-informed Commission decision-making in R.14-02-001. Failure to do so will increase uncertainty in planning assessments, create a large shadow over the flexible capacity market,

[1] PG&E Response, p. 2.
[2] The California Independent System Operator ("CAISO") identifies a 2014 "net qualifying capacity" of 1,122 MW for Diablo Canyon Unit 1 and 1,118 MW for Diablo Canyon Unit 2.

and may inhibit investment in more innovative flexible capacity resources like demand response and storage.

PG&E finds it significant that A4NR did not comment on the R.14-02-001 preliminary scoping memo *"to bring such issues within the scope of the proceeding."*[3] A4NR felt no need to do so because these issues were obviously within the initially identified scope. As elaborated in the May 20, 2014 Scoping Memo, A4NR believes the information which its Motion to Compel seeks is directly relevant to the following aspects of Track 1: Questions 1a, 1b, 2a, 2b, 2c, 2d, 2e, 3a, 3b, 3c, and 3d; and to Track 2 in its entirety.

III. PG&E's ASSERTION OF PRIVILEGE IS OVER-BROAD.

Without offering a privilege log[4] that would identify specific documents and enable a document-by-document determination, PG&E lumps all of them under a new hybrid of the attorney-client and attorney work product privileges: "prepared at the direction of PG&E's in-house counsel;"[5] "prepared under the direction of counsel;"[6] or "prepared at the request of counsel."[7] The Commission is asked to believe that a fundamental change in nuclear operating mode, absolutely unprecedented in the United States, is being evaluated exclusively within the intellectual confines of the PG&E Law Department. A4NR will stipulate that it is not interested

[3] PG&E Response, p. 4.
[4] Regarding *"information requests by our staff or agents"* the Commission requires more than simply a bald assertion of privilege: *"An appropriate showing that the document was prepared, and access to the document was controlled, in a manner consistent with the asserted privilege must support the utility's assertion of the attorney/client privilege. To this end, the utility should maintain a privilege 'log' that, at a minimum, identifies the document and states the date the document was prepared, the person(s) preparing the document, the person(s) receiving the document, the general subject matter (without disclosing the specific contents), and the methods used to store, retrieve, and limit access to the document."* D.04-09-061, p. 48.
[5] PG&E Response, p. 4.
[6] *Id.*, p. 6.
[7] *Id.*

in any PG&E attorney's *"impressions, conclusions, opinions, or legal research or theories"*[8] about operating Diablo Canyon in a load-following mode. But cloaking every assessment of the operational, safety, capital expenditure, maintenance, and economic ramifications of such a mode shift as attorney work product is too farfetched to pass a laugh test. As the Commission has previously made clear,

> *The work product doctrine shelters the mental processes of the attorney, which provides the attorney with a privileged area within which one can analyze and prepare the client's case.* (People v. Collie (1981) 30 Cal. 3d 43, 59.) *In determining whether the work product privilege is involved in a particular discovery request, it is appropriate to look to the purposes of the statute, which are to preserve the right of an attorney to prepare a case for trial, and to prevent an attorney from taking undue advantage of an adversary's industry and efforts.* (Watt Industries v. Superior Court (1981) 115 Cal. App. 3d 802, 804-805.)[9]

Nor can the more elastic attorney-client privilege be stretched far enough to automatically shroud all of the information A4NR has sought:

> *Over time, procedures have been developed by the courts and adopted by this Commission to determine whether a claim of attorney-client privilege can be sustained. Factors to be considered involve whether the communication involved an attorney, whether disclosure of the information to third parties may have broken the chain of privilege or whether treatment of the information constituted a waiver of the privilege. Thus, Pacific's claim that information is covered by the attorney-client privilege does not, by itself, resolve the matter.*[10]

PG&E would have the Commission believe that the operational, safety, capital expenditure, maintenance, and economic ramifications of shifting Diablo Canyon to load-

[8] Pursuant to CCP §2018.030 such a writing is never discoverable.
[9] D.94-08-028, 55 CPUC2d 672,679.
[10] D.04-09-061, p. 8.

following mode simply haven't entered into the company's consideration. Or if they have, they have only done so as elements of *"regulatory and legal strategy."*[11] PG&E's Senior Director and Lead Counsel, Energy Supply, asserts that the materials requested *"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."*[12]

This lawyers uber alles perspective would render virtually any document at PG&E immune from discovery. What activity at PG&E doesn't qualify as related to *"regulatory and legal strategy"*? At a utility whose holding company is headed by an attorney, what analyses cannot be described as prepared at counsel's request *"to assist and inform counsel in the preparation of a legal/regulatory risk assessment"* or directly related to *"carrying out that purpose"*? As Mr. Manheim expansively explains, *"The studies address potential future operating alternatives and strategies that PG&E may consider as it evaluates its regulatory and legal strategy."*[13] What's left?

IV. PG&E INVOKES THE DCISC AS A RED HERRING.

Without accurately describing the confidentiality provisions of the Restated Charter for the Diablo Canyon Independent Safety Committee ("DCISC") approved in D.07-01-028, PG&E's Response nevertheless asserts that the *"charter requires the DCISC to treat such information as confidential and not disclose it outside the Committee."*[14] PG&E goes on to falsely claim that

[11] Declaration of William V. Manheim, attached to PG&E Response.
[12] *Id.*
[13] *Id.*
[14] PG&E Response, pp. 3 – 4.

"A4NR appears to argue" that *"all information PG&E provides to the DCISC [be] made public upon request."*[15] From there, in PG&E's fevered opinion, it is a short step to catastrophe:

> *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 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.*[16]

But even a cursory glance at the DCISC charter reveals a confidentiality standard starkly different from that applied in Commission proceedings, and a process not quite as open-and-shut (in terms of honoring PG&E's unilateral designations) as PG&E's Response describes. As the DCISC's Restated Charter provides,

> *To the extent that PG&E believes that other information sought by the Committee, not regulated by the Atomic Energy Act, constitutes confidential business information, the disclosure of which might injure PG&E in its business, PG&E may so designate that information. Information so designated shall be treated as confidential and not disclosed outside the Committee unless a majority of the Committee challenges the propriety of the claim of confidentiality by vote taken within 30 days of designation. A dispute between the Committee and PG&E on a claim of confidentiality shall promptly be submitted to binding arbitration.*[17]

PG&E's Response makes no indication of whether the company has made the DCISC aware that it has designated as confidential certain portions of its December 12, 2013 PowerPoint presentation.[18] Nor is there any indication that DCISC members have been given the opportunity to challenge *"the propriety of the claim of confidentiality"* as provided for in the

[15] *Id.*, p. 4.
[16] *Id.*
[17] D.07-01-028, Attachment 1.
[18] PG&E Answer 4, "Nuclear Power and California's Evolving Energy Market Increased Need for More Flexible Generation," pp. 3, 16 – 18.

DCISC Restated Charter. Based upon the obvious differences in standards applied, it would seem beyond dispute that a document could be considered confidential for DCISC purposes yet receive different treatment by the Commission. The Commission should not be bamboozled into out-sourcing to the DCISC its own determination of whether the PowerPoint presentation pages at issue in A4NR Question 4 are properly privileged in a Commission proceeding.

V. PG&E FOISTS A PHONY LAST STANDARD.

Reduced to a belated relevance argument unworthy of consideration, sprinkling lawyer dust over every conceivable yet still unidentified document, threatening the future viability of the DCISC – it should come as no surprise that PG&E's final attempt at maintaining the secrecy of its Diablo Canyon load-following evaluations should be a real whopper: "*Disclosure of PG&E's confidential and privileged business strategies could result in PG&E being de-positioned in the energy markets.*"[19]

A4NR has searched Commission decisions, English-language dictionaries, and multiple internet sites in a fruitless attempt to understand the meaning of *"de-positioned".* It certainly seems alien to the criteria articulated by the Commission in D.6-06-066 or General Order 96-B[20] for confidentiality determinations. It does not appear to bear any relationship to the mechanism for providing PG&E shareholders a return on investment. No nexus with the economic interests of PG&E's customers is – or can logically be – asserted.

[19] PG&E Response, p. 6.
[20] These guidelines are discussed in A4NR's Motion to Compel Discovery, pp. 4 – 5.

The lack of candor in PG&E's information management policies has earned the recent attention of both the Commission[21] and the United States Department of Justice.[22] Nothing in PG&E's Response suggests any change in attitude, and the apprehension over a transparency-induced *"de-positioning"* is overwrought. If anything, the company's ignominious *"position"* appears robustly intact.

VI. A4NR NARROWS ITS MOTION.

Because PG&E's Response grudgingly provides the relief sought (a simple "yes" or "no" answer) by A4NR regarding questions 7 and 11,[23] A4NR hereby withdraws them from its Motion to Compel Discovery.

VII. CONCLUSION.

For the reasons stated in A4NR's Motion to Compel Discovery and reinforced in this Reply, the Commission should direct PG&E to respond immediately to A4NR's Questions 6 and 10, and provide unredacted copies of pages 3, 16, 17 and 18 of the PowerPoint provided in response to Question 4. Pursuant to Rule 11.3, a proposed ruling which deletes reference to Questions 7 and 11 is attached.

Respectfully submitted,

[21] D.13-12-053 fined PG&E $14,350,000 for violations of Rule 1.1.
[22] *USA vs. Pacific Gas and Electric Company*, Case No. 3:14-cr-00175, was filed in U.S. District Court, California Northern District, on April 1, 2014.
[23] PG&E Response, p. 7.

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[PROPOSED] RULING GRANTING THE MOTION TO COMPEL OF THE ALLIANCE FOR NUCLEAR RESPONSIBILITY

Pursuant to Rule 11.3 of the Commission's Rules of Practice and Procedure, the Alliance for Nuclear Responsibility (A4NR) filed and served a Motion to Compel Discovery of the information identified in its Data Requests 4, 6, and 10 concerning Pacific Gas and Electric Company's consideration of operating the Diablo Canyon Nuclear Power Plant in a load-following mode.

IT IS HEREBY RULED that:

A4NR's Motion to Compel is granted.

DATE: BY: _____

Administrative Law Judge