



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE **FILED**

STATE OF CALIFORNIA

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Application of Southern California Edison)
Company (U 338-E) for Approval of Agreements)
to Sell its Interests in Four Corners Generating)
Station.)
_____)

A. 10-11-010
(Filed November 15, 2010)

**RESPONSE OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO
TURN'S MOTION TO ADDRESS CLAIMS OF CONFIDENTIALITY IN SCE DATA
REQUEST RESPONSES**

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Dated: **May 3, 2011**

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

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A. 10-11-010
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**RESPONSE OF SCE (U 338-E) TO TURN’S MOTION TO ADDRESS CLAIMS OF
CONFIDENTIALITY IN SCE DATA REQUEST RESPONSES**

I.

INTRODUCTION

Pursuant to California Public Utilities Commission (CPUC) Rule of Practice and Procedure 11.1(e), Southern California Edison Company (SCE) hereby responds to the April 18, 2011 *Motion to Address Claims of Confidentiality in SCE Data Request Responses* of TURN (Motion).

TURN’s Motion seeks a finding that the “confidential” or “protected” designation should not apply to the SCE Confidential materials that are referenced in TURN’s testimony and attachments. TURN seeks a finding on two categories of SCE Confidential data request responses, citing D.06-06-066 for the proposition that SCE cannot meet its burden of proof for confidentiality, and that as a result the Commission should order public disclosure of this information and the associated documents.¹ Contrary to TURN’s arguments, SCE has met that burden here. The vast majority of the information in SCE’s Application, and supporting

¹ Motion, p. 4.

testimony, workpapers, and discovery responses, is public. The small subset of materials SCE designated as Confidential deserves to remain so under applicable law and public policy.

A. Assumptions Used In Developing SCE’s Transaction Cost Estimate Should Remain Confidential.

The first category of Confidential material at issue is two sets of assumptions SCE included in its cost estimate table for the sale transaction. These assumptions contain information that could harm SCE ratepayers if this information were made public. First, SCE designated as Confidential assumptions related to the hourly rate SCE is paying to its outside lawyers who work on the sale transaction. Second, SCE designated as Confidential assumptions related to the cost of the environmental study for what is commonly referred to as Phase 1 and Phase 2 site assessments. TURN itself noted the correct reason SCE designated the outside counsel rate as Confidential: “the public release of information regarding the number of hours or the hourly rate used to forecast the outside counsel or consultant expenses for this transaction would give other firms access to information that would provide them a competitive advantage when seeking to provide similar services to the utility, and potentially disadvantage ratepayers as a result.”² Publicly disclosing the rate that SCE negotiated with one of its outside law firms could cause tremendous harm to SCE ratepayers.³

TURN’s premise that the hourly rate assumption was an estimate or proxy is false. As SCE explained to TURN during meet-and-confer discussions, the outside counsel hourly rate is an exact, negotiated rate, and is reflected on actual invoices provided by the firm to SCE for work on the Four Corners sale transaction.⁴ TURN is simply incorrect when it claims that “[i]t is not at all clear how the public release of the hourly rate and number of hours used to develop

² Motion, p. 3, footnote 4.

³ Similarly, SCE redacted the number of estimated billed outside counsel hours. Because SCE did not redact its total outside counsel costs, it is necessary to redact both the rate and the number of hours because Rate * Hours = Total Cost.

⁴ SCE will provide these invoices to the Commission *in camera* if requested.

SCE's estimate would in any way jeopardize SCE's ability to negotiate reasonable rates with its vendors."⁵ SCE uses many outside law firms, several of which are direct competitors of each other. If the hourly rate for law firm "A" is made public, then law firm "B" that SCE pays a lower rate to would have advantageous information it could use to negotiate higher rates. This would harm ratepayers by either increasing SCE's outside counsel costs or causing SCE to incur additional costs in finding alternative firms, assuming they would be willing to work at the lower hourly rate.

For similar reasons, the environmental study cost assumptions for the Phase 1 and Phase 2 assessments should remain Confidential. At the time SCE developed its transaction cost estimate, SCE had a Request For Proposal (RFP) out for bid for the Phase 1, Phase 2 and final report work. SCE explained to TURN that the reason these amounts were deemed Confidential was because SCE had not yet received the bids from several environmental consultants interested in this work. TURN even acknowledged that publicly exposing this information would have put SCE at a disadvantage in regards to receiving the most competitive bids from the bidders.⁶ Since this time, SCE awarded the Phase 1, Phase 2 and final report work to one of the bidders and completed the commercial terms of the purchase order. The successful bidder is currently proceeding on the Phase 1 work. This is no reason, though, to now make the Phase 1, Phase 2 and final report estimates public.⁷ The Phase 1 environmental study work will determine the scope and costs of the Phase 2 detailed study work. The Phase 2 work will then determine the extent of the final report. Although SCE selected a bidder in the RFP, the costs of the Phase 2 work and subsequent final report are still negotiable. SCE has the ability in its contractual terms to select a different environmental consultant to perform the Phase 2 work and final report if, for example, the estimated costs presented by the successful bidder for these remaining elements are

⁵ Motion, p. 5.

⁶ Mr. Finkelstein made this comment during a meet-and-confer discussion with SCE.

⁷ The "Other" category in SCE's transaction cost table should also remain Confidential as it was redacted to remove 1) the ability to deduce the amount SCE estimated for the Phase 1, Phase 2 and final report work and 2) any advantage this could create for consultants in bidding on other environmental work.

too high. Making this information public, again, would put SCE (and therefore its ratepayers) at a disadvantage with the successful bidder, as well as other bidders if SCE were to take the Phase 2 and final report work out for bid again.

TURN and other interveners have a legitimate reason to review our Confidential cost estimate assumptions, which we have provided. However, if these assumptions were made public, SCE's ability to negotiate its outside counsel hourly rates and environmental consultant study costs would be compromised. It is in the best interests of SCE's ratepayers to protect this information to avoid the type of harm described above.

B. Confidential Material Previously Protected In A.07-11-011 Should Remain Confidential.

SCE provided to TURN responses to two DRA data request sets from SCE's 2009 General Rate Case (GRC) that were previously designated Confidential and protected under the Protective Order by the Commission in A.07-11-11 (Protective Order). TURN correctly notes that, "the DRA Data Requests had asked for a *detailed description* of the matter, whether the costs had been included in SCE's 2009 GRC forecast, and when SCE expected the matter would conclude."⁸ The information provided to DRA in the 2009 GRC included information on the specific nature of the legal services provided for several matters. The specific nature of this information has not changed and pursuant to precedent should remain Confidential.

In SCE's Motion for a Protective Order in A.07-11-11 (Protective Motion), SCE had the burden to demonstrate that the information should be protected. SCE met this burden in A.07-11-11. In the Protective Motion, SCE explained that DRA had requested information on "a detailed description of the types of services each firm provided." SCE then explained the substantive rules for asserting confidentiality for this information by stating, "The courts have determined that information on the specific nature of legal services provided is confidential. The court in *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (1992), specifically

⁸ Motion, pp. 5-6 (emphasis added).

stated that the specific nature of legal services provided information that reveal the motive of the client in seeking representation, or litigation strategy is confidential. Therefore, SCE provided the requested information to DRA under Section 583 of the Public Utilities Code and General Order 66(c).” ALJ DeAngelis subsequently approved the Protective Motion and the Commission should continue to keep this information Confidential for the same reasons. *See also* D.02-08-068 (noting that litigation details, analysis, and costs are appropriate subjects of Confidentiality under protective orders).

TURN’s suggestion that the passage of time calls for the “de-designation” of this Confidential material is incorrect. The passage of time does not reclassify the protected material in SCE’s 2009 GRC as public. *Cf.* OIR 05-06-040 (providing for the Confidential treatment of certain types of utility data for three years). In fact, there is nothing in the Protective Order that would change the classification of the material from protected to public, except for a decision by the ALJ, CPUC, or Law and Motion ALJ, as outlined in Sections 10, 13, and 15 of the Protective Order. None of that has happened here.

C. TURN Has Not Demonstrated That The Public Interest In Disclosure Outweighs The Interest Of The Utility in Keeping This Information Confidential.

TURN fails to demonstrate why the information SCE has designated Confidential should be made public. While SCE has the initial burden to show why the information should remain Confidential, this does not excuse TURN from demonstrating how the public interest in disclosure outweighs the interest of keeping this information Confidential. TURN does not even put forth an argument why it is in the public interest to publicly disclose this information. As explained by TURN, SCE provided a redacted transaction cost estimate table that redacts only a few select sensitive items. The vast majority of SCE’s costs estimates and assumptions are publicly disclosed. Of course, TURN, DRA, and other interveners who represent ratepayer interests and who have signed NDAs are free to review *all* of the (non-privileged) information, including the Confidential information, and present their cases to the Commission. TURN is not

limited in making its substantive arguments by keeping this information Confidential, and keeping this information Confidential does not limit the Commission from developing a full and complete record upon which to base its decision in this proceeding. Similarly, the Confidential 2009 DRA data request information that TURN seeks to make public would not assist the Commission in determining the appropriate disposition of the Application.

D.06-06-066, cited by TURN, explains that the process for dealing with claims of confidentiality is set forth in Section 583. Under § 583, the utility may identify information that should not be open to public inspection, and the Commission looks to other substantive areas of law, legal precedent, and policy reasons in determining whether or not the information will remain Confidential. TURN points to no precedent, and identifies no policy reasons, for why the information should be “de-designated.” As discussed above, the Commission already determined that the 2009 DRA data request responses were Confidential in approving the Protective Order in A.07-11-11. That precedential determination remains valid. For SCE’s specific, negotiated outside counsel rate, SCE has demonstrated above why the public disclosure of this information will harm ratepayers. TURN has neither shown any public benefit of the disclosure of this information, nor has demonstrated that its disclosure will not harm ratepayers. The Commission should order the Confidential information to be publicly disclosed only if it makes a determination that the public interest in disclosure outweighs the interest of the utility in keeping the information confidential. *See* D.04-09-061 at p. 112 (in response to information requests from the CPUC, “[u]nder §583, the utility may identify information that should not be open to public inspection, and we will thereafter disclose the information to the public only after we make a determination that the public interest in disclosure outweighs the interest of the utility in keeping the information confidential.”)

CONCLUSION

The appropriate question before the Commission is whether the public interest in disclosure outweighs SCE's and its ratepayers' interest in keeping the information Confidential. As demonstrated above, disclosing the negotiated hourly rate as well as the environmental cost assumption information would be harmful to SCE ratepayers. Also, the detailed description of specific legal services for individual matters should remain Confidential pursuant to the Protective Order and court precedent. The public disclosure sought by TURN will not further the Commission's reasoned deliberations of the Application before it. For all the reasons detailed above and in the interests of SCE ratepayers, TURN's Motion should be denied.

Respectfully submitted,

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Dated: May 3, 2011

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commissioner's Rules of Practice and Procedure, I have this day served a true copy of Response of SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO TURN'S MOTION TO ADDRESS CLAIMS OF CONFIDENTIALITY IN SCE DATA REQUEST RESPONSES on all parties identified in the attached service list(s).

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **3rd day of May, 2011**, at Rosemead, California.

/s/ Henry Romero

Henry Romero
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