

BEFORE THE  
PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric )  
Company for Approval of Ratepayer Funding to ) Application No. 10-01-014  
Perform Additional Seismic Studies )  
Recommended by the California Energy )  
Commission. )  
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(U 39 E) )

**ALLIANCE FOR NUCLEAR RESPONSIBILITY'S  
OPPOSITION TO  
PACIFIC GAS AND ELECTRIC COMPANY'S  
MOTION FOR PROTECTIVE ORDER**

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Date: March 15, 2012

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## **I. Background.**

The Alliance for Nuclear Responsibility (A4NR) opposes PG&E's request for a Protective Order to govern the use of confidential material provided by PG&E to the Independent Peer Review Panel (IPRP) because it is overbroad and yet to be justified. Nothing in PG&E's motion establishes a current need for such a measure. PG&E's proposed Order usurps Commission authority by delegating to PG&E the unilateral determination of which information is to be characterized in the future as confidential. Rather than proceed on the case-by-case approach embedded in the California Public Records Act<sup>1</sup> and Section 583 of the Public Utilities Code – where the CPUC is responsible for determining what information is justifiably withheld from the public – PG&E seeks to pull the IPRP down a dark rabbit hole by establishing in advance that the utility will be the sole judge of what is public and what is not.

Regarding the vendor bids for PG&E's seismic studies – the purported trigger for PG&E's motion – A4NR has made clear to PG&E that it does not object to nondisclosure agreements being a pre-condition to their provision.<sup>2</sup> In fact, on its own initiative PG&E suggested on March 9, 2012 this very mechanism to A4NR as a means by which A4NR could obtain the materials<sup>3</sup>, and A4NR has indicated its willingness to sign such an agreement. Upon learning that PG&E had filed its Motion for Protective Order the same day<sup>4</sup>, and will withhold the vendor bids from the IPRP pending resolution of the motion, A4NR urged PG&E to make the

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<sup>1</sup> California Government Code §§ 6250 – 6276.48.

<sup>2</sup> E-Mail communication from John Geesman to Jennifer Post, March 12, 2012.

<sup>3</sup> E-Mail communication from Jennifer Post to John Geesman, March 9, 2012.

<sup>4</sup> That this was the last business day before the anniversary of the Fukushima nuclear accident could not have been lost on the ironists at PG&E headquarters.

information immediately available to the IPRP pursuant to the same approach it had proposed to A4NR.<sup>5</sup>

PG&E's Motion for Protective Order should be seen in the context of the bread-and-water information diet the utility has imposed on the IPRP since its creation by the Commission in D.10-08-003. A palpable frustration flows from the pages of the two written reports filed by the IPRP to date<sup>6</sup>, and the wrangling over the bid materials for PG&E's seismic studies suggests why. The RFPs and vendor bids for PG&E's seismic studies were requested by IPRP members at their January 23, 2012 and February 6, 2012 meetings. As disclosed in PG&E's motion, the RFPs were not provided to the IPRP until March 2, 2012 and the vendor bids continue to be withheld.<sup>7</sup>

Ignoring the fact that the California Public Records Act and Public Utilities Code Section 583 have both applied to the IPRP since its 2010 creation, PG&E has found a new pretext for its starvation strategy: "... in light of the Commission's recent determination that the Bagley-Keene Open Meetings Act<sup>8</sup> applies to IPRP activities, a Protective Order is required ..."<sup>9</sup> Is it plausible to believe that the menu will improve after the lights go off?

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<sup>5</sup> E-Mail communication from John Geesman to Jennifer Post, March 12, 2012.

<sup>6</sup> IPRP Report No. 1, September 30, 2010 and IPRP Report No. 2, September 7, 2011.

<sup>7</sup> PG&E Motion at 1.

<sup>8</sup> California Government Code §§ 11120 – 11132. Section 11120 contains the following policy statement: *"The people of this state do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created."*

<sup>9</sup> PG&E Motion at 2.

## **II. PG&E has not met its burden to show that a Protective Order is needed.**

As cited approvingly in PG&E's motion<sup>10</sup>, the CPUC has previously tried to define in advance certain categories of electricity procurement information entitled to confidential treatment<sup>11</sup> in D. 06-06-066 and, in the related D-08-04-023, created a Model Protective Order.

A brief review of the Conclusions of Law in D.06-06-066 reveals why advance designations of confidentiality are such a challenge for the Commission: "4. The Bagley-Keene Open Meeting Act does not preclude us from sealing data that statute otherwise requires be confidential." "7. Section 583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules." "8. The due process and confrontation clauses do not preclude use of confidential data." "9. Even in a case where due process rights adhere, it is not a violation of due process for an agency to allow certain records to be deemed confidential where there is a statute allowing confidentiality in certain cases." "10. We must strike an appropriate balance ... We are a public agency that regulates public utilities, and most of our business must be conducted in the open."

Recognizing the clear potential for abuse in such designations, the Commission imposed strict requirements:

- "The submitting party must file a motion ... proving ... (t)hat the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure." (D.06-06-066 Ordering Paragraph 2)

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<sup>10</sup> PG&E Motion at 2.

<sup>11</sup> California Public Utilities Code § 454(g), enacted in the wake of the 2000-2001 electricity market crisis, directs the Commission to "adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan ..."

- “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 ... 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 confidential. Information an IOU has furnished to an affiliated company is publicly available.” (D.06-06-066 Ordering Paragraph 7)
- “Intervenor groups that are non-market participants shall not be precluded from access to any ... data as long as they agree to a protective order or confidentiality agreement where there is a need to protect the data.” (D.06-06-066 Ordering Paragraph 11)

How would PG&E’s Motion for Protective Order fare under the D.06-06-066 standard?

There has been no showing that the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure. Indeed, PG&E’s assertion that the vendor bid proposals “contain the same type of information”<sup>12</sup> which D.06-06-066 recognized as entitled to confidential treatment (“specifically, the identity of the bidders and pricing information”) calls out for redaction as the preferred remedy. It would be hard to consider statements that “(t)he bidder responses to the RFPs contain confidential and proprietary information”<sup>13</sup> as more than boilerplate.

PG&E makes no effort to cite the legal basis for confidential protection, or any facts showing the consequences of release. PG&E does assert that the information is “not available

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<sup>12</sup> PG&E Motion at 2.

<sup>13</sup> PG&E Motion at 1.

to the public in any other venue”<sup>14</sup> but makes no representation as to whether it has been shared with its holding company, the apparent standard set by D.06-06-066.

The phrase “trade secrets” does not appear in PG&E’s Motion, but the proposed Protective Order proclaims in advance that certain of the information “requested to be produced or disclosed ... has been identified as trade secrets.”<sup>15</sup> Describing this in D.06-06-066 terms as “(m)ere recitation of the conclusory statement that information is a trade secret” hardly does justice to the backhanded nature of PG&E’s prospective use of the term. In fact, California Civil Code Section 3426.1(d) and Penal Code Section 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.”

If PG&E is claiming that the vendor bid proposals contain “trade secrets”, then some showing should be made as to the nature of the information and what the bidders actually did to maintain the secrecy of such information -- or what credible assurances PG&E, as a regulated utility, provided to them that such secrecy would or could be maintained. Assertions in PG&E’s Motion about “technical information designated by vendors as proprietary and confidential”<sup>16</sup> are not sufficient to satisfy the statutory test for “trade secrets”.

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<sup>14</sup> PG&E Motion at 3.

<sup>15</sup> PG&E proposed Protective Order at 1.

<sup>16</sup> PG&E Motion at 2.

Finally, the D.06-06-066 assurance that “intervenor groups that are non-market participants shall not be precluded from access ... to data”<sup>17</sup> is, at best, incoherently reflected in PG&E’s proposed Protective Order. Paragraph 5 might be read – especially in light of PG&E’s aforementioned offer to A4NR – as vaguely permissive, allowing disclosure to “a person who is engaged in the conduct of the IPRP independent review and comment ... and who needs to know the information to carry out that person’s responsibilities.”<sup>18</sup> But Paragraph 6 confines disclosure “only to the members of the IPRP and any staff, consultants or experts retained to assist the IPRP ...”<sup>19</sup> The general tenor of PG&E’s Motion and proposed Protective Order argues for the more restrictive interpretation.

Not only has PG&E fallen considerably short in meeting the burdens identified in the ostensibly “model” procedures of D.06-06-066, it is impossible to say that it even tried.

### **III. PG&E’s Motion ignores the protections of existing law.**

Remarkably, PG&E’s Motion for Protective Order is devoid of any mention of Public Utilities Code Section 583. This is an odd omission of the cornerstone of the CPUC’s information disclosure policies, especially one which – according to a recent survey by the San Francisco Chronicle<sup>20</sup> – confers powers of confidentiality that are only enjoyed by utility regulatory commissions in six other states. Other than matters specifically required by statute to be open to public inspection, Section 583 requires an order by the Commission or a Commissioner in the course of a hearing or proceeding before information furnished by a utility

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<sup>17</sup> D.06-06-066 Ordering Paragraph 11.

<sup>18</sup> PG&E proposed Protective Order at 2.

<sup>19</sup> PG&E proposed Protective Order at 2.

<sup>20</sup> “Law allows state PUC to keep utilities data secret”, San Francisco Chronicle, November 27, 2011.

can be made public or open to public inspection. The language of Section 583 makes its severity self-evident: “Any present or former officer or employee of the (C)ommission who divulges any such information is guilty of a misdemeanor.”

Consequently, in order for the vendor bid proposals – or any other allegedly “confidential” information from PG&E -- to become public, it must first be designated as such by the Commission or a Commissioner in the course of a hearing or proceeding. Perhaps even more pertinent, depending upon the factual circumstances of the vendor bid proposals, Section (2.8) of CPUC General Order No. 66-C excludes from public inspection “(i)nfornation obtained in confidence from other than a business regulated by this Commission where the disclosure would be against the public interest.”

Of course, Section 583 does not exempt the CPUC from the California Public Records Act. Rather, it governs the manner of its implementation. The Commission is subject to the same statutory preference for disclosure: “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.”<sup>21</sup> And it is subject to the Public Records Act’s many exemptions specified in Sections 6254 through 6254.29 of the California Government Code, including the linkage of Section 6254(k) and California Evidence Code Section 1060 to protect trade secrets. The CPUC is also subject to the catch-all provision of Government Code Section 6255(a), which allows withholding when “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”

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<sup>21</sup> California Government Code § 6250.



While the Bagley-Keene Act, specifically Section 11125.1 of the Government Code, deprives an agency of Section 6255(a)'s "balancing test" flexibility once the subject information has been provided to a majority of members of a state body, this loss of last-minute dexterity should be of no concern to the CPUC. Why? Section 11125.1(a) makes clear "this section shall not include any writing exempt from public disclosure under ... Section 583 of the Public Utilities Code."

PG&E indirectly acknowledges the significance of Section 583 by brief mention in Paragraph 4 of its proposed Protective Order. One of the two physical or electronic marks PG&E proposes for each page of confidential material is "Confidential Pursuant to Section 583 of the Public Utilities Code".<sup>22</sup>

#### **IV. Conclusion.**

PG&E's Motion for Protective Order lacks merit. It seeks to prospectively establish a disclosure regime in A.10-01-014 where all confidentiality determinations are made by the utility rather than the Commission. It fails to even attempt to satisfy the requirements articulated in D.06-06-066 for the Commission's Model Protective Order. It ignores the existing latticework of statutory protections for legitimately confidential information. It further delays the transmittal of important information to the IPRP. It should be denied.

Respectfully submitted,

By: /s/ John L. Geesman

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<sup>22</sup> PG&E proposed Protective Order at 2.

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