



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

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Order Instituting Rulemaking to
Implement Senate Bill No. 1488 (2004
Cal. Stats., Ch. 690 (Sept. 22, 2004))
Relating to Confidentiality of Information

R.05-06-040

**OPENING COMMENTS OF
THE COGENERATION ASSOCIATION OF CALIFORNIA
ON REVISED PROPOSED DECISION**

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Pursuant to Rule 14.3 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Cogeneration Association of California (CAC)¹ submit these opening comments on the Revised Proposed Decision (RPD) issued August 9, 2010.

I. INTRODUCTION

The legislature ordered this Commission to initiate this rulemaking to “*ensure the Commission practices ...[and] provide for meaningful participation and open decision-making.*” The legality of the original decision and the first proposed decision on rehearing presented highly contested and controversial issues. The revised proposed decision issued on August 9, 2010 (RPD) is a step in the right direction but fails to go far enough. Case law reveals that all parties must have access to evidence in Commission proceedings, regardless of whether vested rights are at issue or a proceeding is designated quasi-legislative

¹ CAC represents the combined heat and power and cogeneration operation interests of the following entities: Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company.

or quasi-judicial. Access is required to ensure fairness regardless of case categorization because Commission proceedings involve sharply disputed factual issues. Case law also demonstrates that the provision of market sensitive information through reviewing representatives can appropriately facilitate access while precluding adverse ratepayer impacts, consistent with FERC cases and related holdings of other states. Accordingly, in order for the Commission's procedure to pass constitutional muster, the following changes must be adopted:

- The RPD's legal conclusions must accurately reflect the law applied in California to ensure due process. In addition to considering the existence of vested rights, the Commission is required to consider the intent of SB 1488 to ensure meaningful participation and open decisionmaking.
- The RPD's model nondisclosure agreement (NDA) requires clarification. As currently drafted its ethical wall restrictions are so broad that it will compromise a market participant's ability to retain qualified counsel.

These changes are discussed below. In addition proposed changes to text, conclusions of law and ordering paragraphs are attached as Appendix A.

II. The Commission Is Required To Provide Market Participants Access to Market Sensitive Information in a Quasi-Legislative Proceeding and in the Absence of Vested Rights

The RPD erroneously concludes that market participants do not have a due process right to market-sensitive evidence in a quasi-legislative proceeding or in the absence of vested rights.² The analysis reaching this conclusion fails to harmonize the intent of SB 1488 or applicable case law. Relevant authority demonstrates that access is required to promote fairness. Importantly, ensuring

² RPD, at 14.

fundamental fairness is an essential aspect of due process.³ Reading these factors together indicates that due process does require representatives of market participants to have access to market-sensitive information under appropriate protective orders even in a quasi-legislative proceeding and regardless of vested rights.

The governing statute, SB 1488, clarifies that the procedure used by the Commission must ensure meaningful participation and open decision-making. As noted in the RPD, this proceeding was initiated to implement SB 1488.⁴ SB 1488 unambiguously requires:

“the commission to initiate proceedings to examine its practices with respect to these confidentiality requirements and the California Public Records Act to ensure that these practices provide for meaningful public participation and open decisionmaking.”⁵

Based on this language alone, the Commission’s task is to establish a process through which all parties can meaningfully participate. Restricting access to evidence relied on by a Commission decision precludes participation and bars consideration of market participants’ viewpoints and insights.

The RPD erroneously concludes that less process is due in all quasi-legislative proceedings. California courts require different levels of process in a quasi-legislative proceeding depending on the existence of factual issues. The

³ *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (“the Court must examine a State’s chosen standard to determine whether it satisfies ‘the constitutional minimum of fundamental fairness’”); *H.S. v. N.S.*, 173 Cal.App.4th 1131, 1138 (2009)(“One component of procedural due process is the standard of proof used to support the deprivation. The standard of proof must satisfy ‘the constitutional minimum of fundamental fairness.’”);

⁴ RPD, at 3.

⁵ SB 1488.

courts' holdings require less process for proceedings with this categorization because they assume the primary focus will be policy considerations. California courts justify less due process in quasi-legislative proceedings because courts presume that the veracity of evidence and witnesses is not at issue.⁶ As noted in Marathon Oil, the assumption is that the “agency determinations . . . depend less on the resolution of factual disputes and more on the drawing of policy.” Where quasi-legislative proceedings involve sharply contested factual issues the standards of access are different. California courts favor providing access to the information or witnesses or both to promote fairness based upon the nature of contested factual issues.⁷

Where a quasi-legislative proceeding involves disputed factual issues, California courts require access to the underlying evidence. In fact in proceedings involving disputed facts, California courts determine the degree of process due by focusing on the nature of the proceeding, not its categorization.⁸ For example, in Rivera, the California Appeals Court found that fairness cannot be ensured if a hearing record in a quasi-legislative proceeding is not based on facts available to the public:

⁶ See Rivera v. Division of Industrial Welfare, 265 Cal.App.2d 576, 588 (1968) (implicit in decisions sanctioning quasi-legislative proceedings limiting process is “a distinction between two kinds of evidence: one which is not generally available to the public, thus depending upon confrontation as a precondition of rebuttal; the other, generally available data and argument which can be countered without advance confrontation.”)

⁷ Marathon Oil v. Environmental Protection Agency, 564 F.2d 1253, 1261 (1977) (“In summary, the crucial question is not whether particular talismanic language was used but whether the proceedings under review fall within that category of quasi-judicial proceedings deserving of special protections. The focus of the inquiry should be on the nature of the administrative determination before us.”); Manuf. Home Communities v. County of San Luis Obispo, 167 Cal.App.4th 705, 711 (2008)(citing Goldberg v. Kelly, 397 U.S. 254, 269 (1970)) (“almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”)

⁸ See *supra* n.8.

*[w]hen the evidentiary material consists of private facts rather than public conditions or of a special investigation conducted for the purpose of the particular determination and is not generally available to the public during the hearing the hearing process, its incorporation in the hearing record may be an indispensable condition of fairness.*⁹

Similarly, several California courts have “*sanction[ed] quasi-legislative proceedings*” that have excluded cross-examination, precluded access to information underlying compilations of data or statistics, or that support findings relied on by an agency.¹⁰ In *Embry*, the Court of Appeals concluded the underlying Agricultural Code section did not require the Director of Agriculture to make specific findings in a quasi-legislative hearing setting the minimum retail prices for milk.¹¹ The Court also found, however, that “*in the interest of fairness and ascertaining the relevant facts,*” the regulatory agency below should have allowed cross-examination of all witnesses.¹² In *Marathon Oil*, the Ninth Circuit found that formal adjudicatory hearings were required to preclude a “*disservice to the administrative process.*”¹³ In short, these cases reveal that fundamental fairness is considered when assessing what degree of access to evidence is required.¹⁴ The RPD’s due process analysis erroneously overlooks these cases.

⁹ *Rivera*, 265 Cal.App.2d at 589 (where the Industrial Welfare Commission’s investigation was based on facts that were generally available to the public, the failure to incorporate the materials into the record did not violate minimum procedural requirements).

¹⁰ *See id.*

¹¹ *Embry Foods, Inc. v. Paul*, 230 Cal.App.2d 687 (1964)

¹² *Embry Foods, Inc.*, 230 Cal.App.2d at 703.

¹³ *Marathon Oil*, 564 F.2d at 1264.

¹⁴ Footnote 10 of the RPD mistakenly contends that *Marathon Oil* and *Rivera* address issues not before this Commission because they focus on agency determinations based on evidence not in the record. These cases clarify the extent to which due process requires market participants to have access to evidence in CPUC proceedings in order to ensure due process and promote fairness. They emphasize that meaningful participation, through access to evidence and witnesses, is necessary to allow a fair evaluation of the evidence or different perspectives on the evidence. In contrast, precluding the participation of market participants in a proceeding effectively keeps that

Case law also reveals that California courts require access to information in cases not involving vested rights. The RPD notes that where vested rights are not at issue, the Commission “*must balance the protection of ratepayers against market participants’ right to access market sensitive information pursuant to statute and common law rules of fairness.*”¹⁵ The prior discussion reveals that SB 1488 and common law rules of fairness require access to information to ensure fairness. In fact, despite the absence of a vested right, where factual issues exist, courts have provided or demanded the type of process due in an adjudicatory proceeding:

- *Fed. Power Comm’n v. Natural Gas Pipelines*:¹⁶ Court required a “*fair hearing*” in a quasi-legislative rate setting proceeding
- *People v. Western Air Lines, Inc.*:¹⁷ Due process in quasi-legislative CPUC rate setting proceeding required “*adequate notice and opportunity to be heard before a valid order [could] be made.*”
- *Ohio Bell Telephone Co. v. Pub. Util. Comm’n of Ohio*:¹⁸ Reliance on secret information in a rate setting proceeding was held not to be a “*fair hearing essential to due process.*” Instead the court considered it “*a condemnation without trial.*”

Accordingly, Commission proceedings involving utility resource and procurement plans, applications for cost recovery, and the approval of prices to be paid to market generators require the degree of process required to ensure due process and fairness. This requires representatives of market participants to have full

perspective and evidence out of the case. *Marathon Oil* and *Rivera* reveal that this type of exclusion will not satisfy due process and common law concepts of fairness.

¹⁵ RPD, at 14.

¹⁶ 315 U.S. 575, 586 (1942).

¹⁷ *People v. Western*, 42 Ca.2d 621, 632 (1954).

¹⁸ *Ohio Bell Telephone Co. v. Pub. Util. Comm’n of Ohio*, 301 U.S. 292, 300 (1937).

access to all evidence relied upon in a proceeding, subject to reasonable nondisclosure agreement.

III. RPD's Recommended Use of Reviewing Representative Can Strike Appropriate Balance between Due Process and Adverse Impact to Ratepayers As Long As Ethical Wall Restrictions Are Limited

The RPD's recommendation to use a potentially uninformed and unknowledgeable reviewing representative to facilitate market participant access to commercially sensitive information will not adequately promote fairness and ensure due process. The RPD suggests that a reviewing representative provides an appropriate balance between the interests in market participants' due process rights and ratepayer interests. However, as noted in the comments of EPUC, the current terminology relating to the ethical wall is too broad to allow meaningful participation and open decisionmaking as required by SB 1488. As currently provided in the draft model NDA, a qualifying market participant's reviewing representative must meet the following criteria:

1. *Are outside experts, consultants or attorneys;*
2. *Are not currently engaged in (a) the purchase, sale, or marketing of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) whose duties include such activities), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (c) consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting); and*
3. *Are separated by an ethical wall from those employees who are engaged in (a) the purchase, sale, or marketing of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) whose duties include such activities), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (c) consulting with or advising others*

in connection with any activity set forth in subdivisions (a) or (b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting).

Based on this language, a market participant is disabled from finding a qualified, informed reviewing representative versed in California energy issues. Moreover, imposition of a non-disclosure agreement for the reviewing representative that departs from standards used by FERC and several states¹⁹ and undermines the supposed balance sought by the Commission. For these reasons, for the RPD's recommendations to pass established constitutional standards, the clarifications and limitations recommended by EPUC in its comments must be adopted.

III. CONCLUSION

For the foregoing reasons, the Commission should change its legal conclusions and adopt the refinements proposed by EPUC to the RPD's model NDA.

Respectfully submitted,



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¹⁹ See Opening Brief on Rehearing of Cogeneration Association of California and the Energy Producers and Users Coalition, dated July 2, 2009, at 19-28.

APPENDIX A

Proposed Changes to Text

Footnote 11: In its reply brief, CAC/EPUC asserts that Application (A.) 08-11-001, wherein Southern California Edison Company seeks retroactive downward adjustments to qualifying facility pricing retroactively to April 1, 2004, requires strict due process protections because it involves highly contentious facts and will impact past and present rights and liabilities of the parties. ~~While we do not make any determination in this proceeding as to whether strict due process protections apply to market participants in A.08-11-001, we note that the contentiousness of facts and presence of an impact on parties' rights are not determinative of the issue.~~

Proposed Conclusions of Law

2. Parties do ~~not~~ have a constitutional due process right to access market sensitive information in Commission proceedings where their vested rights are not being adjudicated. given SB 1488 and common law rules of fairness.

3. Market participants ~~may~~ have a constitutional due process right to access market sensitive information in Commission proceedings where their vested rights are adjudicated.

4. The Commission has the authority to determine how market participants may access market sensitive information consistent with the requirements of due process, SB 1488 and common law rules of fairness.

5. The nondisclosure agreement adopted in D.06-12-030, and as clarified in this decision, allows for meaningful public participation in Commission proceedings ~~in which a party's vested rights are not adjudicated.~~

* * *

7. Unequal access to information does ~~not~~ restrict a person's right to assemble, to speak freely either in or outside of a Commission proceeding, or to bring an action to the Commission.

* * *

14. The prohibition of access to market sensitive information by attorneys or consultants who simultaneously represent market and non-market participants is unnecessary for purposes of protecting against the

disclosure of market sensitive information to an individual who engages in market activities, because a reviewing representative may not engage in market activities or provide advice on market activities to persons engaged in market activities.

Proposed Ordering Paragraph

1. D.06-12-030 is modified as follows:

a. The phrase “directly or indirectly” is deleted from bullet number 1 in part IV VI.B entitled “Discussion” is revised to read as follows:

Reviewing Representatives may not be currently engaged, ~~directly or indirectly,~~ in (a) a transaction at wholesale for the purchase, sale, or marketing of electrical energy or capacity ~~or natural gas~~ (or the direct supervision of any employee(s) whose duties include such activities), (b) a transaction at wholesale for the ~~purchase,~~ sale, or marketing of natural gas for electric generation use in central station or utility power plants, (c) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (de) consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) ~~(or (c))~~ above (or the direct supervision of any employee(s) whose duties include such activities or consulting).

b. Bullet number 2 in part VI.B entitled “Discussion” is revised to read as follows:

“Reviewing Representatives who are employees of market participants must be separated by an ethical wall from those employees who are engaged in the above energy marketing and related activities detailed in bullet number 1.”

* * *

h. The phrase “directly or indirectly” is deleted from the first bullet in Ordering Paragraph no. 5 is modified to read as follows:

Are not currently engaged, ~~directly or indirectly,~~ in (a) a transaction at wholesale for the purchase, sale, or marketing of electrical energy or capacity ~~or natural gas~~ (or the direct supervision of any employee(s) whose duties include such activities), (b) a transaction at wholesale for the ~~purchase,~~ sale, or marketing of natural gas for

electric generation use in central station or utility power plants, (c)
the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (de) consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) (or (c)) above (or the direct supervision of any employee(s) whose duties include such activities or consulting)

CERTIFICATE OF SERVICE

I, Amie Burkholder, hereby certify that I have on this date caused the foregoing document, Opening Comments of the Cogeneration Association of California on Revised Proposed Decision to be served on all known parties by electronic mail, to each party named in the official service list obtained from the Commission's website, attached hereto, and pursuant to the Commission's Rules of Practice and Procedure.

Dated August 30, 2010, at San Francisco, California.

A handwritten signature in cursive script that reads "Amie Burkholder".

Amie Burkholder

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