

Decision **PROPOSED DECISION OF COMMISSIONER GRUENEICH**

(Mailed 9/29/2009)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) relating to confidentiality of information.

Rulemaking 05-06-040
(Filed June 30, 2005)

**DECISION MODIFYING DECISIONS 06-12-030 AND 08-04-023 REGARDING
CONDITIONS OF ACCESS TO MARKET SENSITIVE INFORMATION**

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DECISION MODIFYING DECISIONS 06-12-030 AND 08-04-023 REGARDING
CONDITIONS OF ACCESS TO MARKET SENSITIVE INFORMATION

1. Summary

Decision (D.) 06-12-030 adopts a procedure for protecting market sensitive information from disclosure to entities that could use it against the interest of electricity customers by defining “market participants” and imposing more stringent restrictions on their access to the information than those imposed on non-market participants. D.08-04-023 adopts a model protective order and nondisclosure agreement to reflect this procedure.

This decision ~~modifies D.06-12-030 (1) to limit its applicability to proceedings in which market participants’ property rights and/or liabilities are not adjudicated,~~ (2) reaffirms our finding in D.06-12-030 that there is no constitutional right of market participants to access market sensitive information in all Commission proceedings, and clarifies the circumstances under which different rules may apply. This decision also modifies D.06-12-030 (1) to eliminate language suggesting that a 1 megawatt *de minimis* threshold of participation in the natural gas market identifies “market participants,” and ~~(3)~~ (2) to eliminate the redundant prohibition on reviewing representatives from simultaneously representing market participants and non-market participants. This decision also modifies D.08-04-023 to convert the model protective order to a model nondisclosure agreement consistent with Commission rules and practice.

2. Background

Public Utilities Code § 454.5(g)¹ requires the Commission to adopt procedures to ensure the confidentiality of market sensitive information related to electrical corporations' procurement plans, provided that nonmarket participants are provided access to this information. Senate Bill (SB) 1488 requires the Commission to examine its practices under § 454.5(g) to ensure that they provide for meaningful public participation and open decisionmaking. This rulemaking implements SB 1488.

In Decision 06-06-066, we implemented SB 1488 and undertook a comprehensive review of our policies on confidential treatment of utility data. We "started with a presumption that information should be publicly disclosed;" however, we also noted that SB 1488 requires confidential treatment of certain data "in order to carry out our statutory and constitutional duties" to protect ratepayers. After an extensive public process involving five days of evidentiary hearings and multiple rounds of party comments, we concluded that protections for "market sensitive information" would be limited to procurement information that "would have a material impact on a procuring party's market price for electricity" if obtained by a market participant.² We found that the release of

¹ All subsequent references are to the Public Utilities Code unless otherwise specified.

² D.06-06-066, pps. 2-6. D.06-06-066, which was adopted by a unanimous vote of the Commission, includes a 23 page Matrix of utility procurement data which designated which items are "market sensitive" and the length of time that the utilities are permitted to designate such information as confidential. All information designated as "market sensitive" is entitled to confidential treatment for a period of 1 to 5 years, as specified in the Matrix. After that time, the information is deemed to be public. In addition, D.06-06-066 specifies that the party seeking confidential treatment bears the burden of proof to demonstrate that the information is "market sensitive" and that the

Footnote continued on next page

such information “will result in higher, not lower, prices for ratepayers in most situations.”

D.06-12-030, also issued in this rulemaking, defines what is a “market participant” and, essentially, prohibits the disclosure of market sensitive information² to them, with a narrow exception: Market participants may designate representatives (outside experts, consultants or attorneys) who may review market sensitive information so long as those reviewing representatives are not employees of the market participant; are not currently engaged, directly or indirectly, in the purchase, sale or marketing of electrical energy or capacity, natural gas, or power plants; and do not disclose the information to market participants, including those whom they represent.

D.09-03-046 granted limited rehearing of D.06-12-030 to consider ~~the implications of~~whether this procedure ~~on market participants who are parties to Commission proceedings~~satisfies the requirements of due process. Specifically, ~~D.09-03-046~~ raised the following issues:³

1. Is it a violation of due process to prohibit the discovery of market sensitive information by market participants?
2. Does the procedure for disclosure of market sensitive information to reviewing representatives allow for meaningful participation by market participants?

information cannot be aggregated, redacted, summarized, masked or otherwise protected in a manner that allows partial disclosure.

~~² D.06-06-066 (modified by D.08-04-030) identifies certain information as “market sensitive” as that term is used in § 454.5(g).~~

³ This list distills the 14 separate questions articulated in D.09-03-046, but does not limit their scope.

3. Do due process and/or any other constitutional considerations require that all parties have equal discovery rights?
4. Does the Commission have the authority to deny party status to market participants, or limit the scope of their participation, in proceedings where market sensitive information is relevant to the subject matter of the proceeding?
5. Is there a less restrictive means to achieve the public interest in shielding the use of market sensitive information by market participants for purposes other than for the conduct of the proceeding?
6. Does participation in the electric and/or gas market in excess of 1 megawatt (MW) create a material ability to affect market price? If not, what amount of participation in the electric and/or gas market creates such a material ability?
7. Should the Commission reconsider or change its prohibition of access to market sensitive information by attorneys or consultants who simultaneously represent market and nonmarket participants? For example, should a reviewing representative of a nonmarket participants be prohibited from acting as a reviewing representative of a market participant and, if so, for how long?

D.09-03-046 provided for the consideration of related legal issues, not set forth in that order, that might be identified. Based on the April 27, 2009, Administrative Law Judge (ALJ) Ruling setting prehearing conference (PHC),⁴ the May 8, 2009, PHC statements filed by the parties and the discussion at the

⁴ Among other things, the ruling identified potentially related legal issues affecting D.08-04-023, which was also issued in this proceeding and which adopts a model protective order and nondisclosure agreement premised on the definition of “market participant” and the limitations on reviewing representatives that were adopted in D.06-12-030.

May 12, 2009, PHC, the assigned Commissioner identified the following related legal issues to be considered:⁵

8. Does meaningful participation in a Commission proceeding require access to the record of the proceeding, including all evidence introduced by parties?
9. Would the procedure adopted in D.06-12-030 allow for meaningful participation and/or protection of market sensitive information if it was modified to permit access to the record of the proceeding by employees of market participants as reviewing representatives, all else being equal?
10. Would the procedure adopted in D.06-12-030 allow the ability to meaningfully participate and/or protection of market sensitive information if it was modified to permit discovery by employees of market participants as reviewing representatives, all else being equal?
11. Rule 1.4 of the Commission's Rules of Practice and Procedure, as currently written, was enacted in September 2006, only a few months before the Commission issued D.06-12-030. (See also the amendment to Rule 1.4, adopted by Resolution ALJ-224, which is pending review by the Office of Administrative Law.) Rule 1.4 limits party status (which confers the right of discovery under Rule 10.1) to persons who demonstrate a bona fide intention to meaningful participate in a Commission proceeding. Does this limitation mitigate the ability of persons to obtain party status for the purpose of misusing market sensitive information in the record of a Commission proceeding? Does this limitation mitigate the ability of persons to obtain party status for the purpose of obtaining discovery of market sensitive information for the purpose of misusing it?

⁵ Assigned Commissioner's Scoping Memo and Ruling, May 21, 2009.

12. What changes should be made to the model protective order and nondisclosure agreement as a result of this rehearing of D.06-12-030?
13. D.08-04-023 states in its summary that it adopts a model protective order and nondisclosure agreement for all data addressed in D.06-06-066 and D.06-12-030. D.06-06-066 identified “market sensitive” procurement data covered by § 454.5(g), and D.06-12-030 defines market participants who may be denied access to that data. However, the model protective order applies to “Protected Materials,” which it defines to include, in addition to market sensitive procurement data identified in D.06-06-066, “any other materials” determined by the disclosing party to be trade secret, confidential or proprietary under General Order 66-C “or any other right of confidentiality provided by law.” Should the special limitations on market participants’ access to market sensitive procurement data adopted in D.06-12-030 (or as may be reconsidered in this rehearing) extend to these additional materials?
14. D.08-04-023 ratifies the August 22, 2006, ALJ’s ruling clarifying that disputes over access to market sensitive procurement data in discovery or prepared testimony (prior to hearing) in a formal proceeding shall be resolved pursuant to Rule 11.3. Rule 11.3 does not invite motions for protective orders. To the contrary, Rule 11.3 requires parties to discovery disputes to make a good faith effort to reach an agreement, and parties are generally encouraged to only bring motions to compel or limit discovery that address those matters remaining in dispute after such effort. Consistent with Rule 11.3 and the general disfavor of rendering unnecessary rulings, should the model protective order adopted in D.08-04-023 be modified to convert it to a model nondisclosure agreement, without the implied need for the parties to obtain a ruling or protective order by the administrative law judge?
15. Does D.06-12-030 impose unique restrictions on the Independent Energy Producers from those of any other market participant?

16. Do the requirements of D.06-12-030 regarding access to market sensitive information apply to all parties who are market participants, including utilities?

Opening briefs were filed on July 2, 2009, by the Independent Energy Producers Association (IEP); jointly, the Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC); jointly, the Joint Utilities (consisting of Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company) and the Coalition Parties (consisting of the Coalition of California Utility Employees, The Utility Reform Network and the Division of Ratepayer Advocates); and Hydrogen Energy International LLC (HEI).⁶ Reply briefs were filed on July 30, 2009, by IEP, CAC/EPUC, the Joint Utilities and Coalition Parties, and the Western Power Trading Forum (WPTF).

3. Discussion

3.1. ~~Is it a Violation of~~Does Due Process ~~to Prohibit~~Require the Discovery Disclosure of Market Sensitive Information ~~by~~ to Market Participants in All Commission Proceedings?

CAC/EPUC and IEP contend that constitutional due process requires that all parties to a Commission proceeding have sufficient access to market sensitive information to enable meaningful participation, regardless of their status as market participants. The Joint Utilities contend that there are no *constitutional* rights to due process in rate setting proceedings, and that parties' access to market sensitive information in rate setting proceedings is governed by statutory, not constitutional law.⁷ CAC/EPUC, IEP, and the Joint Utilities are

⁶ The July 13, 2009, motion of HEI to become a party is granted.

⁷ The Coalition Parties do not join the Joint Utilities in their analysis of this issue, and do not offer their own analysis or comment on it.

each only partially correct. ~~The United States and California Constitutions prohibit the deprivation of “life, liberty, or property, without due process of law.”~~ As explained in *Matthews v. Eldridge* (1976) 424 U.S. 319, 348-49 (citations omitted):

The essence of due process is the requirement that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to met it.” All that is necessary is that the procedures be tailored, in light of the decision to be made, to “the capacities and circumstances of those who are to be heard,” to insure that they are given a meaningful opportunity to present their case.

~~(U.S. Const., 14th Amend., § 1; Cal. Const., art. 1, § 7(a).) Specifically, parties have a constitutional right to procedural due process in proceedings which threaten deprivation of their vested rights. (Yoshioka v. Superior Court (1997) 58 Cal. App. 4th 972, 982; Bouley v. Long Beach Memorial Center (2005) 127 Cal. App. 4th 601, 609.)~~ Thus, to the extent that a proceeding adjudicates a party's vested ~~property~~ rights ~~or liabilities~~, the party has a constitutional due process right to sufficiently access market sensitive information that is necessary to enable ~~meaningful participation~~ the party to meet it, regardless of ~~its~~ the party's status as a market participant. In other proceedings, however, parties' due process right to access to market sensitive information is governed by statute and common law rules of fairness.

CAC/EPUC and IEP cite to numerous court decisions in support of their position that parties have a constitutional right to access market sensitive information in all Commission proceedings. However, all of the decisions to which they cite concern proceedings in which a party's life, liberty or vested rights were adjudicated. (See *California Assn. of Nursing Homes etc., Inc. v. Williams* (1970) 55 Cal.2d 167, concerning a nursing home's challenge to a regulation setting payment rates to be paid to them as providers of health services); *English v. City of Long Beach* (1950) 35 Cal.2d 155, concerning a patrolman's challenge to his dismissal from the police department; *Fost v. Superior Court* (2000) 80 Cal.App.4th 724, concerning a criminal defendant's right to cross-examine a prosecution witness; *Manufactured Home Communities, Inc. v. County of San Luis Obispo* (2008) 167 Cal.App.4th 705, concerning a mobilehome park owner's challenge to a rent review board's refusal to allow him to increase rents; *Morgan v. United States* (1938) 304 U.S. 1, concerning market agencies' challenge to the Secretary of Agriculture's fixing of maximum rates that they

could charge at stockyards; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio* (1937) 301 U.S. 292, concerning the telephone company's right to an opportunity to explain or rebut evidence relied upon by the agency in setting its rates; *Olive Proration etc. Com. v. Agri. etc. Com.* (1941) 17 Cal.2d 204, concerning olive producers' challenge to the agency's refusal to terminate mandatory proration of their production; *Southern California Underground Contractors, Inc. v. City of San Diego* (2003) 108 Cal.App.4th 533, concerning a contractor's challenge to the City's decision to permanently debar him from contracting with the City; *Matthews v. Eldridge* (1976) 424 U.S. 319, concerning the respondent's challenge to the termination of Social Security benefits; *Goldberg v. Kelly* (1970) 397 U.S. 254, concerning a challenge to the termination of welfare benefits; *Hammond Packing Co. v. Arkansas* (1909) 212 U.S. 322, concerning suit by plaintiff State against defendant corporation seeking penalties for alleged violations of the Arkansas Anti-Trust Act; *Garamendi v. Golden Eagle Ins. Co.* (2004) 10 Cal.Rptr.3d 724, concerning homeowner claims against an insurer; *Petersen v. City of Vallejo* (1968) 259 Cal.App.2d 757, concerning plaintiff's claim for damages for wrongful death, damages and loss; *Pratt v. Union Pacific Railroad Co.* (2008) 168 Cal.App.4th 165, concerning plaintiff's termination of employment by defendant; *United States v. Panza* (9th Cir. 1980) 612 F.2d 432, concerning a criminal defendant's obligation to testify under cross-examination; *McCarthy v. Mobile Cranes, Inc.* (1962) 199 Cal. App.2d 500, concerning suit by plaintiff widow for damages for wrongful

death).⁸ This line of decisions stands for the proposition that parties have a constitutional due process right to access evidence regarding the basis for the proposed deprivation of their ~~life, liberty or property~~vested rights. These decisions do not address the question of parties' due process rights in proceedings in which their ~~life, liberty or property~~vested rights

⁸ CAC/EPUC also cites to *Louisiana Ass'n of Indep. Producers & Royalty Owners v. Federal Energy Regulatory Commission* (D.C. Cir. 1992) 958 F.2d 1101, asserting that the decision finds compliance with due process on the grounds that there was full disclosure and ample discovery. CAC/EPUC's characterization of the decision is inaccurate. More accurately, the Court rejected the petitioner's claim that it was denied a meaningful opportunity to be heard on the grounds that there was full disclosure and ample discovery. The Court did not reach the issue of whether, in the event that the petitioner's claim had merit, it would have been a denial of due process: "This is not to say that absent the prior proceedings the Coalition's criticisms of the August hearing would be valid. For example, their request to cross-examine Commission staff on the basis of their market need analysis was plainly improper; parties have no right to inquire into an agency's mental processes." (Id. at fn. 5, citation omitted.)

are *not* adjudicated.⁹

On their part, the Joint Utilities cite to several decisions in support of their contention that there is no constitutional right to due process in a rate setting proceeding. It is not clear if the Joint Utilities use the term “rate setting” to mean proceedings in which a utility’s rates are set or as the similar term “ratesetting” is defined in Rule 1.3(e) of the Commission’s Rules of Practice and Procedure. In either event, this contention overstates the proposition for which these cases stand. *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288 and *Public Utilities Commission of State of California v. United States* (9th Cir. 1966) 356 F.2d 236 do not dismiss the constitutional right to due process by all parties in all proceedings that concern the setting of rates. Rather, they address the more narrow issue of whether ratepayers have constitutional right to a public hearing regarding the setting of rates, and observe that they do not because the setting of rates does not implicate the deprivation of the ratepayers’ property:

Even if they had merit, petitioner’s allegations of lack of notice and opportunity to be heard could not raise constitutional questions *unless proceeding from a deprivation of property claim*. Public utility regulation, historically, has been a function of the legislature; and the prescription of public utility rates by a regulatory commission, as the authorized representative of the legislature, is recognized to be essentially a legislative act. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 589, 65 S. Ct. 829,

⁹ In its reply brief, CAC/EPUC cites to *Marathon Oil v. Environmental Protection Agency* (9th Cir. 1977) 564 F.2d 1253 and *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576 as holding that proceedings involving sharply-disputed facts require strict due process. To the contrary, these cases do not concern the issue of due process rights to access relevant discovery or record information. Rather, they concern the propriety of defendant agencies making determinations based on information not in the record of the proceedings; that issue is not before us here.

89 L. Ed. 1206 (1945). As a ratepayer would have no constitutional right to participate in a legislative procedure setting rates, this right to be heard in a commission proceeding exists at all only as a statutory and not a constitutional right.

(*Public Utilities Commission of State of California v. United States*, 356 F.2d at 241, footnote omitted, emphasis added.)

~~In conclusion,~~ As discussed above, there is no constitutional requirement that market participants have ~~a constitutional due process~~ the right to access market sensitive information in ~~Commission proceedings where their vested property rights or liabilities are adjudicated.~~ Accordingly, we modify D.06-12-030 to limit its restrictions to all Commission proceedings. Rather, “consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action.” (*Cafeteria & Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886, 895.) For example, in complaints or investigations adjudicating a party’s vested rights, that party may have a constitutional due process right to access market sensitive information, regardless of its status as a market participant. Accordingly, we clarify that, in proceedings in which market participants’ vested ~~property rights and/or liabilities are not adjudicated.~~ ~~However, most of the Commission proceedings in which we anticipate market participants—for example~~ are at issue, the ALJ may determine that a deviation from these nondisclosure procedures are necessary to satisfy due process. In contrast, proceedings concerning the utilities’ resource and procurement plans, applications for approval of cost recovery, and the ~~setting~~ approval of prices to be paid to market generators —do not adjudicate market

participants' vested ~~property rights or liabilities~~.¹⁰ With respect to such proceedings, we must ~~consider~~ balance the protection of ratepayers against market participants' right to access market sensitive information pursuant to statute and common law rules of fairness, as discussed below.

3.2. Does the Procedure for disclosure of Market Sensitive Information to Reviewing Representatives' Allow for Meaningful Participation by Market Participants?

SB 1488 provides:

The Public Utilities Commission shall initiate a proceeding to examine its practices under Sections 454.5 and 583 of the Public Utilities Code and the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) to ensure that the commission's practices under these laws provide for meaningful public participation and open decisionmaking.

There is no set meaning that we can find in case law for "meaningful public participation." However, common sense and case law holds that meaningful public participation is an element of fairness:

We conclude that the Board complied with the requirements of the Administrative Procedure Act and because the procedures followed here were sufficient to promote the dual objectives of the act -- meaningful public participation and effective judicial review (*see California Assn. of Nursing Homes etc., Inc. v. Williams* (1970) 4

¹⁰ 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.

Cal.App.3d 800, 810-812 [84 Cal.Rptr. 590] -- we conclude that they were fair as that term is used in *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212 [157 Cal.Rptr. 840, 599 P.2d 31].

(*Western Oil and Gas Association v. Air Resources Board* (1984) 37 Cal.3d 502, 525.)

As with constitutional due process, what constitutes fairness and its component of meaningful public participation in administrative hearings depends on the nature of the proceeding and the person seeking to participate in it:

Statutory administrative procedures have been augmented with common law rules whenever it appeared necessary to promote fair hearings and effective judicial review. In *Fascination, Inc. v. Hoover*, 39 Cal.2d 260 [246 P.2d 656], we construed a statute requiring a licensing agency to “ascertain” facts to require the agency to give notice and hold a hearing. In *English v. City of Long Beach*, 35 Cal.2d 155 [217 P.2d 22, 18 A.L.R.2d 547], we augmented the applicable statutory rules and required the agency involved to afford the accused an opportunity to rebut ex parte evidence before it. In *Brotsky v. State Bar*, 57 Cal.2d 287 [19 Cal.Rptr. 153, 368 P.2d 697, 94 A.L.R.2d 1310], we held that discovery was appropriate in state bar disciplinary proceedings. These cases illustrate Professor Davis’ observation that the law determining the adequacy of administrative hearings “is mostly judge-made law . . .” and “the standards are essentially the same whether judges are giving content to due process, whether they are giving meaning to inexplicit statutory provisions, or whether they are developing a kind of common law.” (Davis, 1 Administrative Law Treatise (1958) § 7.20 at 506.)

(*Shively v. Stewart* (1966) 65 Cal. 2d 475, 479.) Thus, just as ~~due process does not require that market participants have access to~~ the nature of the proceeding will determine whether market participants are entitled to access market sensitive information ~~in proceedings in which their property rights or liabilities are not~~

~~adjudicated, the requirement for meaningful public participation also does not require the release of,~~ it will likewise determine whether market participants have an adequate opportunity to meaningfully participate notwithstanding their restricted access to market sensitive information.

~~Nevertheless, the~~The procedure adopted in D.06-12-030 for disclosure to reviewing representatives provides market participants with access, albeit limited, to market sensitive information. D.06-12-030 generally prohibits the disclosure of market sensitive information to market participants,¹¹ but with a narrow exception: Market participants may designate reviewing representatives who may review market sensitive information. Reviewing representatives may not be employees of the market participant; may not be engaged, directly or indirectly, in the purchase, sale or marketing of electrical energy or capacity, natural gas, or power plants; and may not disclose the information to the market participant or its employees. While this procedure prevents market participants themselves from directly accessing market sensitive information, their qualifying reviewing representatives may access it. In addition, market participants are not deprived of less granular, higher level information in the record of the

¹¹ IEP objects to D.06-12-030's definition of "market participants" and its determination that IEP falls within that class, asserting that D.06-12-030 legally erred by reaching those determinations without notice and opportunity to be heard. IEP raised this assertion in its application for rehearing, and the Commission rejected it. ("We believe that we are well within our jurisdictional authority and expertise to adopt the classifications of market and non-market participant, and also to apply those categories to parties. The applicants for rehearing have not established that our doing so is erroneous." D.09-03-046, p. 11.) This issue is outside the scope of this rehearing.

In its reply brief, IEP raises an additional objection to D.06-12-030's definition of "market participant," asserting that the definition is erroneously founded on D.06-06-066's determination that market sensitive information may be kept from market participants altogether, which was subsequently deleted by D.07-05-032, modifying D.06-06-066. In addition to improperly exceeding the scope of parties' opening briefs and this rehearing, IEP's assertion is without merit. While D.07-05-032 modifies D.06-06-066 to remove its premature discussion of the terms of access to market sensitive information by market participants, it affirmed and modified D.06-06-066 to clarify the need and authority to define "market participants." (See D.07-05-032, Ordering Paragraph 1, sections o, r and u.)

proceeding. ~~Although fairness and meaningful public participation do not require access to market sensitive information by persons in proceedings in which their property rights or liabilities are not adjudicated, our procedure nevertheless provides limited access to market sensitive information by market participants through their reviewing representatives. Given that market participants are not deprived of less granular, higher level information in the record of the proceeding~~ For these reasons, we conclude that the procedure for disclosure to reviewing representatives provides for meaningful public participation.¹²

3.3. Do Due Process and/or Any Other Constitutional Considerations Require That All Parties Have Equal Discovery Rights?

3.3.1. Equal Protection

Market participants do not have an equal protection right to equal discovery as other parties in a Commission proceeding:

The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished.

¹² The Joint Utilities and Coalition Parties assert that the procedure for disclosure to reviewing representatives also satisfies the requirement for meaningful public participation by allowing direct access to market sensitive information by public agencies and non-market participants. Because we find that the procedure provides for meaningful participation by market participants, we do not reach the question of whether meaningful participation by only non-market participants satisfies SB 1488's meaningful public participation requirement.

People v. Spears (1995) 40 Cal.App.4th 1683, 1687. The classification between market participants and non-market participants is logical and grounded in § 454.5(g), and it bears a rational relationship to the legitimate state purpose of ensuring that market sensitive information will not be disclosed to those who could use it against the interest of electricity customers. (See, e.g., *Kirchberg v. Feenstra* (1981) 450 U.S. 455, 460.)

In its opening brief, IEP does not raise an equal protection claim *per se*, but merely argues that the due process requirement of a fair hearing is not met if the Commission bases its decision on information that is not available to all parties. As discussed above, neither constitutional due process nor fairness and meaningful public participation require that all parties have equal access to information in all proceedings.

In its reply brief, IEP objects to the classification between market participants and non-market participants as being based on the erroneous assumption that market participants will routinely disregard ethical and legal obligations not to improperly use market sensitive information for their own competitive advantage. IEP asserts that there is no relationship between the restrictions on access to market sensitive information and the effort to prevent its misuse, and cites to *Blumenthal v. Board of Medical Examiner* (1962) 57 Cal.2d 228 as support for this assertion. IEP's assertion is without basis, and *Blumenthal* does not support it. In *Blumenthal*, the court found that there was no reasonable difference between persons who served a five-year apprenticeship or have been licensed for five years in another state and other persons regardless of their qualifications, for purposes of protecting the public from incompetent and unethical opticians. Here, in contrast, there is a reasonable difference between persons who have the ability to use market sensitive information for their own competitive advantage and other persons who do not, for purposes of protecting the public from the improper use of that information for personal competitive advantage.

3.3.2. Right to Petition

IEP asserts that the restrictions on market participants' access to market sensitive information create an improper and unlawful limitation on their

ability to petition the Commission, as guaranteed by the First Amendment of the United States Constitution and Article I, § 3(a) of the California Constitution. In support of this assertion, IEP cites to *American Civil Liberties Union v. Board of Education* (1961) 55 Cal.2d 167, concerning rights to assemble and of free speech with respect to the application and denial of the use of school property to conduct a meeting; *Thomas v. Collins* (1945) 323 U.S. 516, concerning rights to assemble and of free speech with respect to a labor organizer's solicitation of persons to become union members; and *California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, concerning the right to approach administrative agencies or courts with respect to bringing an action against a competitor. These decisions do not inform the issue before us, as 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.

IEP asserts that the Commission may not impose restrictions on parties' ability to petition the Commission absent a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger," as articulated in *Thomas v. Collins*, 323 U.S. at 530. To the contrary, where, as here, the restrictions do not significantly interfere with the right to petition, the test is whether there is a rational basis for the restriction:

Although a fundamental interest may be involved, both the United States Supreme Court and this court have recognized that not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an incidental effect on exercise of protected rights, strict scrutiny is not applied. (e.g., *Zablocki v. Redhail* (1978) 434 U.S. 374 [54 L. Ed. 2d 618, 98 S. Ct. 673, 681-683] [regulations affecting the right to marry]; *Califano v. Jobst* (1977) 434 U.S. 47 [54 L. Ed. 2d 228, 98 S. Ct. 95, 99] [same]; *Kash Enterprises, Inc. v. City of Los Angeles* (1977)

19 Cal. 3d 294, 303-305 [138 Cal. Rptr. 53, 562 P.2d 1302] [reasonable limitations on placement of newspaper racks]; *Gould v. Grubb* (1975) 14 Cal. 3d 661, 670 [122 Cal. Rptr. 377, 536 P.2d 1337] [rational basis standard applicable to numerous statutes detailing the mechanisms of the right to vote].) It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied. (*Zablocki v. Redhail, supra*, 434 U.S. 374 [54 L. Ed. 2d 618, 98 S. Ct. 673, 681]; *Gould v. Grubb, supra*, 14 Cal. 3d 661, 670.)

(*Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 46.)

IEP asserts that the Commission has failed to articulate a rationale for imposing limitations on market participants' access to market sensitive information. This assertion lacks merit. Market sensitive information is, by definition, information that has the potential to materially affect an electricity buyer's market price for electricity. (D.06-06-066 at 39.) ~~The Commission is legally obligated~~ Because of the sensitive nature of this information, the Legislature's requirement that we protect its confidentiality and our general duty to protect the interests of California ratepayers, these restrictions are needed to ensure that rates are reasonable. To the extent that IEP challenges D.06-06-066 and its designation of market sensitive information, that issue is beyond the scope of this rehearing.

3.4. Does the Commission have the Authority to Deny Party Status to Market Participants, or Limit the Scope of their Participation, in Proceedings Where Market Sensitive Information is Relevant to the Subject Matter of the Proceeding

Rule 1.4 of the Commission's Rules of Practice and Procedure provides that, where circumstances warrant, the Commission may deny party status or limit the degree to which a party may participate in a proceeding. This rule is

intended to limit party status or participation to persons with a legitimate interest and intention to participate in a proceeding and to avoid the inappropriate expansion of the proceeding's scope. However, nothing in Rule 1.4 contemplates that persons may be denied or given only limited party status for purposes of denying them discovery of market sensitive information.

Likewise, with respect to the question of whether Rule 1.4 mitigates against the ability of persons to obtain party status in order to obtain market sensitive information for the purpose of misusing it,¹³ limiting party status to persons with a legitimate basis for seeking party status does not ensure that they will not seek or use market sensitive information for improper purposes.

In any event, it is not necessary to invoke our authority under Rule 1.4 in order to protect against the disclosure of market sensitive information: Rule 10.1 provides that any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence. Market sensitive information is privileged and ~~protected from~~ disclosure of that information is subject to the procedure adopted pursuant to § 454.5(g). The Commission has the authority to ~~deny discovery of~~ determine how market participants may access market sensitive information ~~to market participants who are parties to Commission proceedings in which their property rights or liabilities are not adjudicated~~ consistent with the requirements of due process. Accordingly, we need not reach the question of whether the Commission may deny or limit party status for the purpose of accomplishing the same result.

¹³ This related issue is separately identified as issue 11 in the scoping memo.

3.5. Is There a Less Restrictive Means to Achieve the Public Interest in Shielding the Use of Market Sensitive Information by Market Participants for Purposes Other Than for the Conduct of the Proceeding?¹⁴

Section 454.5(g) requires the Commission to ensure that market sensitive information will not be disclosed, except that non-market participant consumer groups shall have access to it. Thus, the Legislature struck the balance between the public interest in shielding the use of market sensitive information for market purposes and the competing interest in broad public access to government information by limiting disclosure of market sensitive information to non-market consumer groups. SB 1488 directed the Commission to review its procedures to ensure that our practices provide for meaningful public participation and open decisionmaking. Accordingly, we identified what information is market sensitive and to be protected from disclosure to market participants, and established a procedure for allowing limited access to market sensitive information by market participants through qualifying reviewing representatives. Our procedure for disclosure of market sensitive information to reviewing representatives appropriately balances these statutory obligations, and we do not identify any less restrictive means to achieve this result.

IEP asserts that requiring market participants to execute a nondisclosure agreement not to disclose or improperly use the market sensitive information adequately protects against such disclosure or improper use, as such action would be a violation of the agreement, Rule 1.1 and its obligation never to mislead the Commission or its staff, and, in the case of attorneys, the Business

¹⁴ This discussion subsumes and resolves the related issues separately identified as issues 8, 9 and 10 in the Scoping Memo and Ruling and in Part 2, above.

and Professions Code §§ 6068 and 6103 and Rule 5-200 of the Rules of Professional Conduct. However, while Rule 1.1, the Rules of Professional Conduct, and the personal and professional integrity we expect of practitioners certainly deters such action, the risk remains that market participants might improperly use market sensitive information for personal competitive advantage. IEP admits as much when it notes that a reviewing representative "... will face the nearly impossible task of ensuring that the client does not use, even indirectly, any advice he or she gives in the role of reviewing representative in connection with the purchase, sale, or marketing of electrical energy or capacity or natural gas or the bidding on or purchasing of power plants."¹⁵

CAC/EPUC asserts that the Commission's nondisclosure procedure is unduly restrictive because (1) Modesto Irrigation District's experience in publicly disclosing market sensitive information without ratepayer harm demonstrates that it is extremely unlikely that ratepayers would be harmed by the disclosure of market sensitive information, (2) the Commission's regulation of utility procurement provides sufficient ratepayer protection, and (3) a less restrictive nondisclosure procedure will achieve the Commission's goal of safeguarding data from improper use, as evidenced by the less restrictive nondisclosure procedures in other jurisdictions and as required by law.

As an initial matter, we reject CAC/EPUC's assertion that we should relax our nondisclosure procedure because it is unlikely that ratepayers would be harmed by unprotected disclosure of market sensitive information and because ratepayers are adequately protected from any such harm by virtue of the Commission regulation of utility procurement. Even if we concurred with

¹⁵ Reply Brief of Independent Energy Producers Association, p. 9.

CAC/EPUC's assessment - and we do not - we are statutorily required to protect market sensitive information from disclosure to market participants. California has experienced severe consequences of electric market abuse and the limitations of its ability to remedy them. Presumably, in enacting § 454.5(g), the Legislature weighed the severity of those consequences against the risk that market sensitive information might be misused.

In any event, CAC/EPUC's evidence that Modesto Irrigation District has disclosed procurement information similar to market sensitive information and its ratepayers have not been harmed is not proof that such disclosure will not result in ratepayer harm, any more than evidence that a person who left personal identification information on a bus did not suffer from identity theft is proof that leaving personal identification information on a bus will not result in personal financial harm. Finally, in view of the 2000-2001 California electricity crisis, CAC/EPUC's assertion that Commission regulation of utility procurement is sufficient to protect ratepayers from market abuse is not supported by the facts.

We are not persuaded by CAC/EPUC's assertion that the less restrictive nondisclosure procedures of other jurisdictions adequately protect against ratepayer harm. Regardless of whether less restrictive nondisclosure procedures are acceptable to other jurisdictions, the Commission is bound by § 454.5(g) to ensure that market sensitive information will not be disclosed, except to non-market participant consumer groups under confidentiality procedures. In any event, the fact of less restrictive nondisclosure procedures in other jurisdictions is not an adequate basis upon which to determine their appropriateness in the California electricity market or with respect to the market sensitive information at issue in our proceedings.

CAC/EPUC's assertion that a less restrictive nondisclosure procedure is required by law is without merit. As discussed previously, ~~market participants do not have a constitutional due process right to access information in a proceeding in which its property rights or liabilities are not adjudicated, and the adopted nondisclosure procedure satisfies the statutory~~ because of the sensitive nature of this information, the Legislature's requirement of SB 1488 that it provide for meaningful public participation that we protect its confidentiality and our general duty to protect the interests of California ratepayers, these restrictions are needed to ensure that rates are reasonable.

Likewise, ~~the legal precedent that CAC/EPUC cites as favoring~~ CAC/EPUC's assertion that the law governing the disclosure of trade secret information ~~is not controlling in Commission proceedings where~~ requires disclosure of market sensitive information to market participants' ~~property rights or liabilities are not adjudicated~~ in all proceedings is without merit. As CAC/EPUC states, trade secret information is entitled only to a qualified privilege, and is virtually always ordered once the party seeking the information has established that it is relevant and necessary to the party's litigation of the action. (*Centurion Industries, Inc. v. Warren Steurer & Assoc.* (10th Cir. 1981) 665 F.2d 323, 325, citations omitted.) However, a litigant's need for trade secret information extends only as far as it is necessary for that litigant to be a party to the action. Thus, in all of the decisions to which they cite, the discovery at issue was sought by a party with property rights or liabilities adjudicated in the proceeding. (See, e.g., *Coca-Cola Bottling Co. v. Coca-Cola Co.* (1985 D.Del.) 107 F.R.D. 288, concerning a contract dispute; *Upjohn Co. v. Hygieia Biological Lab.* (E.D.Ca. 1992) 151 F.R.D. 355, concerning the misappropriation of trade secrets; *Davis v. General Motors Corp.* (N.D.Ill. 1974) 64 F.R.D. 420, concerning the

misappropriation of trade secrets; *Struthers Scientific & International Corp. v. General Foods Corp.* (1970 D.Del.) 51 F.R.D. 149, concerning the infringement of patent rights and misappropriation of trade secrets; *Centurion Industries, Inc. v. Warren Steurer & Assoc.* (10th Cir. 1981) 665 F.2d 323, concerning patent infringement; *Raymond Handling Concepts Corp. v. Superior Court* (1995) 39 Cal.App.4th 584, concerning a claim for damages for negligence; *Bridgestone/Firestone, Inc. v. Superior Court* (1992) 7 Cal.App.4th 1384, concerning a wrongful death action.) This precedent ~~supports~~ stands for the proposition that the disclosure of market sensitive information to market participants may be appropriate in Commission proceedings where their ~~property~~ vested rights ~~or liabilities~~ are adjudicated, but not otherwise.¹⁶

3.6. Does Participation in the Electric and/or Gas Market in Excess of One Megawatt Create a Material Ability to Affect Market Price? If Not, What Amount of Participation in the Electric and/or Gas Market Creates Such a Material Ability?

D.06-12-030 established a 1 MW threshold of participation in the electricity market for determining whether an entity is a market participant, based on the exemption from local resource adequacy requirements established in D.06-06-064. Specifically, D.06-06-064, which was issued in Rulemaking 05-12-013 regarding the Commission's resource adequacy requirement program, exempts load serving entities from having to procure local resource adequacy requirements of less than 1 MW for a particular area, based on its finding that transactions of less than 1 MW are not commercially reasonable:

¹⁶ In addition, in D.06-06-066, we concluded that "market sensitive" is not coextensive with "trade secret."

We share staff's reluctance to exempt any [load serving entity] from local procurement obligations. On the other hand, the comments of several parties persuasively make the point that transactions of less than 1 MW are not commercially reasonable, at least at this time. Accordingly, we will adopt this proposed exemption for Local [resource adequacy requirements]. (D.06-06-064, p. 32.)

In ordering rehearing on this issue, D.09-03-046 notes that D.06-06-064's determination of the 1 MW exemption threshold was for a different purpose than its intended use in D.06-12-030, i.e., the identification of entities whose participation in the electricity market may materially affect the market price of electricity. Accordingly, D.09-03-046 concluded that parties should have a further opportunity to address the issue of whether this threshold or any other amount establishes *de minimis* participation.

D.09-03-046 also notes concern with D.06-12-030's statement that participation in the natural gas market "above the *de minimis* threshold" renders an entity a market participant without making any finding regarding what constitutes a *de minimis* threshold in the gas market. The Commission therefore extended rehearing to consideration of what constitutes a *de minimis* threshold in the natural gas market.

We address these issues separately below.

3.6.1. Electricity Market Participation

Under the California Independent System Operator's (CAISO) Locational Marginal Pricing market structure, entities can bid supply at any price under the current bid caps; the market generally clears at the highest-priced supply bid to cover the bid-in system load. Therefore, bids as little as one MW, if they are the marginal awarded bid, can set the market clearing price for all suppliers at the relevant price point. Accordingly, we find that a 1 MW *de minimis* threshold reasonably identifies entities whose participation in the electricity market may materially affect the market price of electricity.

IEP and CAC/EPUC assert that, due to the overall size of the California electricity market (historically 71 gigawatts (GW) with a forecasted 63 GW of statewide peak demand), the 1 MW *de minimis* threshold is too low. This

assertion disregards the electricity market structure, as discussed immediately above.

CAC/EPUC observes that the Federal Energy Regulatory Commission (FERC) bases its market-based rate authorizations on a market power test in which an entity's market share of uncommitted capacity must be less than 20% of the market's net uncommitted supply, and proposes that the Commission base the *de minimis* threshold for identifying entities with the ability to materially affect the market price of electricity on the FERC market power tests.

We reject CAC/EPUC's proposal. The FERC market power test identifies entities that have the ability to materially affect the market price of electricity on the basis of their market power. Our purpose here is to identify entities that have the ability to materially affect the market price of electricity on the basis of their access to market sensitive information. The market power test does not inform this inquiry.

3.6.2. Gas Market Participation

D.06-12-030 finds that EPUC is a market participant because (1) it represents the customer generation interests of several major gas and oil companies, (2) collectively, this membership has the potential to materially impact the market price of electricity, and (3) EPUC regularly participates at the Commission jointly with CAC, whose membership, likewise, collectively has the potential to materially impact the market price of electricity. (D.06-12-030, Findings of Fact 5 and 6.) Notwithstanding the narrow scope of these findings of fact, D.06-12-030's discussion of EPUC's status includes the following commentary:

It is true that EPUC's members are large energy consumers, but many of them are also active in the natural gas market. Many categories of data relating to natural gas are deemed confidential in the Matrix accompanying D.06-06-066. Thus, participation in the natural gas market, at least above the *de minimis* threshold, is enough to render an entity a market participant.

(D.06-12-030 at 31.) D.06-12-030 does not adopt a *de minimis* threshold of participation in the natural gas market for purposes of determining market participant status, and D.09-03-046 orders a limited rehearing on this issue "to focus on the question of whether participation based on 1 MW or less of capacity in the [...] gas market establishes *de minimis* participation, and if not, what amount does and why." (D.09-03-046 at 19.) However, because D.06-12-030's determination that EPUC is a market participant does not rely on its activity in the natural gas market, we need not reach this issue. We therefore modify D.06-12-030 to delete this unnecessary commentary.

3.7. Should the Commission Reconsider or Change its Prohibition of Access to Market Sensitive Information by Attorneys or Consultants Who Simultaneously Represent Market and Nonmarket Participants?

Under the current procedure adopted in D.06-12-030, a reviewing representative may not be an employee of a market participant and may not engage in market activities. Thus, the prohibition of access to market sensitive information by attorneys or consultants who simultaneously represent market and non-market participants is unnecessary and redundant. We therefore modify D.06-12-030 to eliminate the prohibition on simultaneous representation

of market and non-market participants.¹⁶¹⁷

3.8. Should the Special Limitations on Market Participants' Access to Market Sensitive Procurement Data Adopted in D.06-12-030 (or as may be considered in this rehearing) Extend to Additional Materials?

D.08-04-023 resolved the remaining issues in this proceeding by adopting a model protective order and nondisclosure agreement for market sensitive information addressed in D.06-06-066. However, the model protective order by its terms applies to “protected materials,” which it defines to include, in addition to market sensitive information identified in D.06-06-066, any other materials determined by the disclosing party to be trade secret, confidential or proprietary under General Order 66-C or any other right of confidentiality provided by law.

The nondisclosure procedure adopted in D.06-12-030 is stringent and imposes severe limitations on parties' ability to access relevant information either in discovery or in the record of a Commission proceeding. We adopted this procedure after balancing our statutory obligation pursuant to § 454.5(g) to shielding the use of “market sensitive information” from disclosure to market participants and the competing interest in broad public access and participation in our proceedings, and after carefully and carefully identifying what specific data is properly classified as “market sensitive” and subject to these special protections. D.08-04-023 and the terms of the model protective order and

¹⁶¹⁷ IEP objects to the prohibition on simultaneous representation on the basis that the distinction between market and non-market participants is not a useful way to determine who should have access to market sensitive information. This issue is beyond the scope of this rehearing.

nondisclosure agreement are appropriately limited to “market sensitive information” that is the focus of § 454.5(g) and this rulemaking. We modify D.08-04-023’s model protective order and nondisclosure agreement to clarify this limitation.

The Joint Utilities and Coalition Parties agree the nondisclosure procedure should be limited to market sensitive information; that is, material that is trade secret, confidential or proprietary, but not market sensitive, should only be subject to the Commission’s standard confidentiality rules and procedures or other right of law. However, the Joint Utilities and Coalition Parties propose that the nondisclosure procedure should extend to all information that market sensitive information, regardless of whether it is specifically identified in D.06-06-066. We agree in principle that all “market sensitive information,” as that term is used in § 454.4 and our decisions in this rulemaking, is subject to this nondisclosure procedure. We clarify, however, that in the event that the Commission or other appropriate authority has not identified particular information as market sensitive, a party’s designation of information as “market sensitive” is not controlling.

Hydrogen Energy International LLC (HEI) proposes that the Commission extend the same protections as those provided by courts for intellectual property, trade secrets, and commercially sensitive information related to new and emerging technologies. Specifically, HEI seeks protection, either in this proceeding or in A.09-04-008, Southern California Edison Company’s application for cost recovery related to HEI’s feasibility study for an integrated gasification and combined cycle facility, for its feasibility study. To the extent that HEI seeks a determination of whether its feasibility study is market sensitive information entitled to the protections of D.06-06-066,

D.06-12-030 and D.08-04-023, that issue is beyond the scope of this rehearing. To the extent that HEI seeks the protections provided by courts for intellectual property, trade secrets, and commercially sensitive information that issue is likewise beyond the scope of this rehearing. To the extent that HEI seeks to extend the protections of D.06-06-066, D.06-12-030 and D.08-04-023 to intellectual property, trade secrets, and commercially sensitive information that is not “market sensitive information,” we reject HEI’s proposal for the reasons discussed above.

3.9. Does D.06-12-030 Impose Unique Restrictions on the Independent Energy Producers from Those of Any Other Market Participant?⁴⁷¹⁸

IEP has repeatedly raised this issue based on its concern that a statement in D.06-12-030 singles out IEP as uniquely barred from obtaining access to market sensitive information through a reviewing representative. Specifically, after finding that IEP is a market participant, D.06-12-030 at 29 states as follows:

Nor are we prepared to give certain “reviewing representatives” within IEP access to market sensitive information, as we discuss in the “Reviewing Representatives” section above.

D.06-12-030 does not uniquely bar IEP from obtaining access to market sensitive information through a reviewing representative. To the contrary, as discussed in the referenced “Reviewing Representatives” section, reviewing representatives may not be employees of market participants. This criterion

⁴⁷¹⁸ This discussion subsumes and resolves the related issue, separately identified in the scoping memo, of whether the requirements of D.06-12-030 regarding access to market sensitive information by market participants apply to all persons who are market participants, including utilities.

applies to all reviewing representatives, whether they are reviewing representatives for IEP or for any other market participants. D.06-12-030 provides that employees of market participants, whether IEP's or an investor-owned utility's or an electric service provider's, may not serve as reviewing representatives. D.06-12-030's observation, in its discussion of IEP's status as a market participant, that this provision applies to IEP does not reasonably suggest that IEP's right to reviewing representatives is different from that of other market participants.

3.10. Should the Model Protective Order Adopted in D.08-04-023 Be Modified to Convert it to a Model Nondisclosure Agreement, Without the Implied Need for the Parties to Obtain a Ruling or Protective Order by the Administrative Law Judge?

Although D.08-04-023 adopts a model protective order, it also ratifies the August 22, 2006, administrative law judge's ruling clarifying that disputes over access to market sensitive information in a formal proceeding shall be resolved pursuant to Rule 11.3 of the Commission's Rules of Practice and Procedure. Rule 11.3 does not invite motions for protective orders. Rather, Rule 11.3 requires parties to discovery disputes to make a good faith effort to reach an agreement, and parties are generally encouraged to limit motions to compel or limit discovery to the specific issues in dispute, consistent with our disfavor of rendering unnecessary rulings. Converting the model protective order to a model nondisclosure agreement is consistent with our practice and procedure. In addition, converting the model protective order to a model nondisclosure agreement will facilitate more efficient and timely agreements among the parties sharing market sensitive information, as it does not require motions to be filed, the allowance of time for oppositions to be filed, and the issuance of a formal ruling. Accordingly, we modify D.08-04-023 to convert the model protective

order to a model nondisclosure agreement between, and limited to matters affecting the rights and responsibilities of, the disclosing and receiving parties.

IEP suggests that a formal protective order or ruling may be necessary to enforce the terms of the nondisclosure agreement in the event of a breach, as a violation of an order or ruling is a violation of Rule 1.1 and §§ 2107 and 2108. As IEP suggests, it may be appropriate in some circumstances to obtain this additional level of insurance against disclosure, and we do not foreclose parties from seeking it; in those circumstances, a ruling can easily incorporate the model nondisclosure agreement or other agreement of the parties. However, we do not anticipate the need for such formal ruling in proceedings where only non-market participants seek access to market sensitive information. We therefore decline to adopt a model protective order.

IEP also suggests the potential need for a ruling or order of some kind to set the rules for handling market sensitive information once the proceeding moves beyond discovery. This suggestion, while helpful, implicates the broader procedural issue of how to handle confidential information of any type in any Commission proceeding, and is beyond the scope of this rehearing.

3.11. What Changes Should be Made to the Model Nondisclosure Agreement as a Result of this Rehearing of D.06-12-030?

Consistent with the discussion earlier in this decision, we modify the model protective order in Appendix A to D.08-04-023 to (1) convert it and all references within it to a model nondisclosure agreement, (2) convert all references to “protected materials” to “market sensitive information,” and (3) eliminate the prohibition on simultaneous representation of a market and non-market participant by an attorney or consultant.

Consistent with these changes, we also delete Paragraph 12 of the model protective order. Sections (a) and (b) of Paragraph 12 set forth requirements for how the Commission will handle requests for market sensitive information from other state governmental agencies. As this Commission will not be a party to the model nondisclosure agreement, it makes no sense to include this language in it. Furthermore, it is inappropriate for the Commission to impose limitations on itself in this manner. As we stated in rejecting proposed language imposing notification requirements on the Commission in the event of Public Records Act requests,

“The Commission will abide by its ordinary practice, consistent with the [California Public Records Act (CPRA)], but should not assume any additional burdens, or impose such burdens on third parties who exercise their rights to access information under the CPRA.” (D.08-04-023, pp. 9-10.)

We also modify Section (c) of Paragraph 12 to reflect its limited applicability. Specifically, Section (c) governs use of market sensitive information by the California Energy Commission (CEC). As such, its applicability is limited to nondisclosure agreements between the CEC and a disclosing party.¹⁸¹⁹

The Joint Utilities and Coalition Parties recommend that we modify paragraph E.2 of the model nondisclosure agreement to delete the phrase “directly or indirectly” from the description of prohibited activity by outside experts, consultants and attorneys who may serve as reviewing representatives, in order to put to rest IEP’s concern that the prohibition on “indirectly” engaging

¹⁸¹⁹ Although this Commission does not ordinarily tell another agency what to do, in this instance the CEC agreed to abide to the terms of this provision. (D.08-04-023 at 9.)

in prohibited marketing activities could be construed so broadly as to make impossible for market participants to obtain reviewing representatives. No party opposed this recommendation in their briefs, although EPUC/CAC and the California Manufacturers & Technology Association (CMTA) recommend that only the word “indirectly,” but not the word “directly,” be deleted; EPUC/CAC does not provide a reason for recommendation, while CMTA merely asserts that the word “indirectly” (but not “directly”) is ambiguous. We conclude that both words are vague and ambiguous, and we delete the entire phrase.

The Joint Utilities and Coalition Parties recommend that we further modify the model nondisclosure agreement to insert oversight and enforcement provisions that would enable the Commission to audit and monitor the activities of parties that have been provided with access to market sensitive information. This recommendation is outside the scope of issues in this rehearing.

4. Assignment of Proceeding

Commissioner Dian Grueneich is the assigned commissioner, and ALJ Hallie Yacknin is the assigned administrative law judge, to the proceeding.

5. Comments on Proposed Decision

The proposed decision of Commissioner Grueneich in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed on October 19, 2009, by IEP, CAC/EPUC, the Joint Utilities, The Utility Reform Network (TURN), the Division of Ratepayer Advocates (DRA), and CMTA, and reply comments were filed on October 26, 2009, by IEP, CAC/EPUC, PG&E, SCE, SDG&E, TURN, and CMTA. The Joint Utilities, TURN, and CMTA recommend certain changes that will clarify the decision, modify the model nondisclosure agreement consistent

with the discussion in the decision, and better reflect the evidentiary record of the underlying proceeding, and we incorporate them.

In their reply comments, CMTA and CAC/EPUC recommend for the first time that model nondisclosure agreement be changed to expand eligibility for reviewing representative status to persons who engage in retail marketing activities. This ~~recommendations~~recommendation is untimely, as the time for recommending changes to the substance of the model nondisclosure agreement was in pre-decisional briefs, and is beyond the scope of comments on the proposed decision as it does not raise legal error.

With one exception, the remainder of IEP's and EPUC/CAC's comments merely reargue positions previously taken in briefs, which have been adequately addressed by the proposed decision and require no further changes.

EPUC/CAC asserts that the adopted procedure for maintaining the confidentiality of market sensitive information is barred by 18 C.F.R. §292.302(b), ~~which provides~~. That regulation provides that each regulated electric utility "shall provide to its State regulatory authority, and shall maintain for public inspection" the following data

- (1) The estimated avoided cost on the electric utility's system, solely with respect to the energy component, for various levels of purchases from qualifying facilities. Such levels of purchases shall be stated in blocks of not more than 100 MW for systems with peak demand of 1,000 MW or more, and in blocks equivalent to not more than 10% of the system peak demand for systems of less than 1,000 MW. The avoided costs shall be stated on a cents per kilowatt-hour basis, during daily and seasonal peak and off-peak periods, by year, for the current calendar year and each of the next five years;
- (2) The electric utility's plan for the addition of capacity by amount and type, for purchases of firm energy and

capacity, and for capacity retirements for each year during the succeeding 10 years; and

- (3) The estimated capacity costs at completion of the planned capacity additions and planned capacity firm purchases, on the basis of dollars per kilowatt, and the associated energy costs of each unit, expressed in cents per kilowatt hour. These costs shall be expressed in terms of individual generating units and of individual planned firm purchases.

As FERC has explained, it entrusts State regulatory authorities with the responsibility to compile the necessary cost data required under this regulation for the purpose of calculating avoided cost rates, and does not require disclosure of that that could compromise the integrity and confidentiality of the regulated utilities' ongoing procurement processes. (*Tennessee Power Co.*, 77 FERC ¶ 61,125, 61,484-485 (1996).) Pursuant to 18 C.F.R. § 292.302(d), state regulatory authorities are allowed to impose different data requirements if, after notice and opportunity for public comment, it determines that avoided costs can be derived from such data. This Commission has adopted the use of alternative data for calculating avoided cost and, in so doing, specifically determined EPUC/CAC's claims that this violated 18 C.F.R. § 292.302 to be without merit. (See D.08-07-048, pp. 1-12; D.09-01-039. p. 5.) EPUC/CAC's claim that the proposed decision violates 18 C.F.R. § 292.302 merely rehashes arguments that the Commission has previously addressed and rejected.

Findings of Fact

1. Evidence that Modesto Irrigation District has disclosed procurement information similar to market sensitive information and its ratepayers have not been harmed is not proof that such disclosure will not result in ratepayer harm in all instances.

2. Commission regulation of utility procurement has not proven sufficient to protect ratepayers from market abuse.

3. Prohibitions against violations of Rule 1.1 and the Rules of Professional Conduct are not sufficient to prevent the improper use of market sensitive information for personal competitive advantage.

4. Under the CAISO Locational Marginal Pricing market structure, entities can bid supply at any price under the current bid caps; the market generally clears at the highest-priced supply bid to cover the bid-in system load. Therefore, bids as little as 1 MW, if they are the marginal awarded bid, can set the market clearing price for all suppliers at the relevant price point.

5. The purpose of a market power test is to determine whether an entity has the ability to materially affect the market price of electricity on the basis of its market power. It does not determine whether an entity has the ability to materially affect the market price of electricity on the basis of its access to market sensitive information.

6. Unlike a protective order, a nondisclosure agreement does not require parties to file a motion and the issuance of a formal ruling in order for it to take effect.

Conclusions of Law

1. HEI's motion to become party should be granted.

~~2. Market participants have a constitutional due process right to access otherwise discoverable market sensitive information in Commission proceedings where their vested property rights or liabilities are adjudicated.~~

2. ~~3.~~ Parties do not have a constitutional due process right to access market sensitive information in Commission proceedings where their vested ~~property rights or liabilities~~ **property** rights are not being adjudicated.

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.

5. ~~4. Meaningful~~ The nondisclosure agreement adopted in D.06-12-030 allows for meaningful public participation ~~does not require access to market sensitive information~~ in Commission proceedings in which a party's ~~property~~ vested rights ~~or liabilities~~ are not adjudicated.

6. ~~5.~~ The classification between market participants and non-market participants is logical and grounded in § 454.5(g), and it bears a rational relationship to the legitimate state purpose of ensuring that market sensitive information will not be disclosed to those who could use it against the interest of electricity customers.

7. ~~6.~~ 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.

8. ~~7.~~ The procedure adopted in D.06-12-030, as modified herein, is the least restrictive means to achieve the Commission's competing statutory obligations to protect against the misuse of market sensitive information by market participants and to ensure meaningful public participation in its proceedings.

9. ~~8.~~ The fact of less restrictive nondisclosure procedures in other jurisdictions is not an adequate basis upon which to determine their appropriateness in the California electricity market or with respect to the market sensitive information at issue in our proceedings.

10. ~~9. Market participants' need for~~ The disclosure of trade secret ~~or market sensitive~~ information ~~does not overcome the qualified trade secret privilege in Commission~~ to market participants may be required in proceedings ~~in~~ which ~~where~~ their ~~property~~ vested rights ~~or liabilities~~ are ~~not~~ adjudicated, but not otherwise.

11. ~~10.~~ A 1 MW *de minimis* threshold reasonably identifies entities whose participation in the electricity market may materially affect the market price of electricity.

12. ~~11.~~ D.06-12-030's determination that EPUC is a market participant does not rely on its ability to impact the market price of electricity by virtue of its participation in the natural gas market.

13. ~~12.~~ The prohibition of access to market sensitive information by attorneys or consultants who simultaneously represent market and non-market participants is unnecessary and redundant, because their representation of a market participant, either solely or simultaneously with their representation of a non-market participant, disqualifies them as reviewing representatives.

14. ~~13.~~ D.08-04-023 and the terms of the model nondisclosure agreement adopted therein should be limited to market sensitive information that is the focus of § 454.5(g) and this rulemaking.

15. ~~14.~~ D.06-12-030 provides that employees of market participants, whether the market participant is a trade association, an investor-owned utility, or an electric service provider, may not serve as reviewing representatives.

16. ~~15.~~ The adoption of a model protective order is inconsistent with our practice and procedure for limiting adjudication of motions to compel or limit discovery to specific discovery matters in dispute.

ORDER

IT IS ORDERED that:

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

a. ~~The last sentence of the first paragraph of the decision is modified to read as follows:~~

~~“We adopt the following definition of “market participant” for purposes of access to “market sensitive” procurement data covered by § 454.5(g) and/or D.06-06-066 by parties to Commission proceedings in which their property rights and/or liabilities are not being adjudicated.”~~ The phrase “directly or indirectly” is deleted from bullet number 1 in part IV.B entitled “Discussion.”

eb. The following first paragraph in part IX.E.2 entitled “Discussion” is deleted:

“It is true that EPUC’s members are large energy consumers, but many of them are also active in the natural gas market. Many categories of data relating to natural gas are deemed confidential in the Matrix accompanying D.06-06-066. Thus, participation in the natural gas market, at least above the *de minimis* threshold, is enough to render an entity a market participant.”

c. The first word in the first sentence of the subsequent paragraph (“Moreover”) is deleted, modifying the sentence to read as follows:

“EPUC regularly (and perhaps exclusively) participates at the Commission jointly with CAC, which represents cogenerators.”

d. The first sentence of the subsequent paragraph is modified to read as follows:

“Moreover, an association representing cogenerators or customer generation interests of oil and gas companies as a whole may have more ability to materially affect the market price of electricity than an individual company acting alone.”

- e. Part VII (“Attorneys and Consultants Who Work for Both Market Participants and Non-Market participants”) is deleted in its entirety.
 - f. Part XII.F (“Attorneys/Consultants”) is deleted in its entirety.
 - g. Conclusion of Law no. 5 is deleted in its entirety.
 - h. The phrase “directly or indirectly” is deleted from the first bullet in Ordering Paragraph no. 5.
 - i. Ordering Paragraph no. 6 is deleted in its entirety.
2. Decision 08-04-023 is modified as follows:
- a. “Decision Adopting Model Non-Disclosure Agreement, Resolving Petition for Modification and Ratifying Administrative Law Judge Ruling.”
 - b. The phrase “model protective order and” is deleted from the first paragraph of the decision.
 - c. The phrase “model protective order and” is deleted from the Heading 3.
 - d. The phrase “Protected Materials” is replaced with the phrase “Market Sensitive Information” in the sub-heading “Subparagraph A. Protected Materials” and in the first sentences in each of the first two paragraphs under that sub-heading.
 - e. The discussion beginning with and under the sub-heading “Subparagraph F. Reviewing Representatives,” contained in part 3.2 (“Changes to Proposed Model”), is deleted in its entirety.
 - f. The phrase “Protected Materials” is replaced with the phrase “Market Sensitive Information” in the first sentence under the sub-heading “*Paragraph 4. Designation of Materials.*”
 - g. The phrase “Protected Materials” is replaced with the phrase “Market Sensitive Information” in the sub-heading “*Paragraph 8. Designation of Protected Materials.*”

- h. The discussion under the sub-heading “*Paragraph 12. Access and Use by Government Agencies*” is modified to read as follows:

“This paragraph deals with California Energy Commission (CEC) access to records first obtained by the Commission. The parties are concerned that, given the different statutory obligations of the two agencies, the CEC may disclose Market Sensitive Information. While we ordinarily have no power to tell another agency what to do, here, the CEC was a party to this proceeding, and weighed in on the proposed language. The CEC states in footnote 8 of the proposed Model that it supports the language in Paragraph 12:

“Paragraph 12 allows the CEC to obtain and use protected information to fulfill its statutory duties, and the CEC in doing so may not release any studies or papers that either directly reveal the data or allow the data to be calculated. The CEC supports that language.””

“Thus, we have agreement from the CEC on some provisions regarding its use and restrictions on the disclosure of Market Sensitive Information. We will therefore retain this provision (subject to the discussion below), with the caveat that it applies only to nondisclosure agreements to which the CEC is a party.

“The CEC is also concerned about the interplay between Paragraph 12 and Paragraph 14, which we discuss in our coverage of that paragraph below and resolve in the CEC’s favor.

“The proposed Model Nondisclosure Agreement also imposes procedures and obligations on this Commission that are intended to govern our release of Market Sensitive Information to the CEC. As this Commission will not be a party to the model nondisclosure agreement, it makes no sense to include this language in it. Furthermore, it is inappropriate for the Commission to impose limitations on itself in this manner. We therefore eliminate this language.”

- j. The phrase “and protective order” is deleted from Finding of Fact no. 1.
 - k. The phrase “protective order and” is deleted from Ordering Paragraph no. 1.
 - l. Appendix A is replaced in its entirety with Appendix A to this decision.
3. Hydrogen Energy International LLC’s July 13, 2009, motion to become a party is granted.
4. Rulemaking 05-06-040 ~~remains open~~ is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Administrative Law Judge (“Law and Motion ALJ”), Assigned Commissioner, the Commission, or any court or other body having appropriate authority. Market Sensitive Information also includes memoranda, handwritten notes, spreadsheets, computer files and reports, and any other form of information (including information in electronic form) that copies, discloses, or compiles other Market Sensitive Information or from which such materials may be derived (except that any derivative materials must be separately shown to be Market Sensitive Information). Market Sensitive Information does not include: (i) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court; or (ii) any information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Nondisclosure Agreement or any other nondisclosure agreement or protective order.

B. The term “redacted” refers to situations in which Market Sensitive Information in a document, whether the document is in paper or electronic form, has been covered, blocked out, or removed. The term “unredacted” refers to situations in which the Market Sensitive Information in a document, whether in paper or electronic form, has not been covered, blocked out, or removed.

C. The term “Disclosing Party” means a party who initially discloses any specified Market Sensitive Information in this proceeding.

D. The term “Market Participant” (“MP”) refers to a party that is:

- 1) A person or entity, or an employee of an entity, that engages in the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, or consulting on such matters, subject to the limitations in 3) below.
- 2) A trade association or similar organization, or an employee of such organization,
 - a) whose primary focus in proceedings at the Commission is to advocate for persons/entities that purchase, sell or market

- energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations; or
- b) a majority of whose members purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations; or
 - c) formed for the purpose of obtaining market sensitive information; or
 - d) controlled or primarily funded by a person or entity whose primary purpose is to purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations.
- 3) A person or entity that meets the criteria of 1) above is nonetheless not a market participant for purpose of access to market sensitive data unless the person/entity seeking access to market sensitive information has the potential to materially affect the price paid or received for electricity if in possession of such information. An entity will be considered not to have such potential if:
- a) the person or entity's participation in the California electricity market is *de minimis* in nature. In the resource adequacy proceeding (R.05-12-013) it was determined in D.06-06-064 § 3.3.2 that the resource adequacy requirement should be rounded to the nearest megawatt (MW), and load serving entities (LSEs) with local resource adequacy requirements less than 1 MW are not required to make a showing. Therefore, a *de minimis* amount of energy would be less than 1 MW of capacity per year, and/or an equivalent of energy; and/or
 - b) the person or entity has no ability to dictate the price of electricity it purchases or sells because such price is set by a process over which the person or entity has no control, *i.e.*, where the prices for power put to the grid are completely overseen by the Commission, such as subject to a standard offer contract or tariff price. A person or entity that currently has no ability to dictate the price of electricity it purchases or sells under this section, but that will have such ability within one year because its contract is expiring or other circumstances are changing, does not meet this exception; and/or
 - c) the person or entity is a cogenerator that consumes all the power it generates in its own industrial and commercial processes, if it can establish a legitimate need for market sensitive information.

E. A Market Participant's Reviewing Representatives are limited to persons designated by the Market Participant who 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 not an employee of a market participant.

F. Persons or entities that do not meet the definition of market participant are non-market participants ("NMPs"), and may have access to market sensitive information through their designated Reviewing Representatives.

H. All Reviewing Representatives are required to execute a non-disclosure agreement and are bound by the terms of this Nondisclosure Agreement.

4. Designation of Market Sensitive Information.

When filing or providing in discovery any documents containing Market Sensitive Information, a party shall physically mark such documents on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as " MARKET SENSITIVE INFORMATION SUBJECT TO NONDISCLOSURE AGREEMENT," or with words of similar import as long as one or more of the terms, "Market Sensitive Information" or "Nondisclosure Agreement" is included in the designation to indicate that the materials in question are protected.

All materials so designated shall be treated as Market Sensitive Information unless and until (a) the designation is withdrawn pursuant to Paragraph 16 hereof, or (b) an ALJ, Commissioner or other Commission representative makes a determination pursuant to Paragraph 4 hereof changing the designation.

All documents containing Market Sensitive Information that are tendered for filing with the Commission shall be placed in sealed envelopes or otherwise appropriately protected and shall be tendered with a motion to file the document under seal pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure. All documents containing Market Sensitive Information that are served on parties shall be placed in sealed envelopes or otherwise appropriately protected and shall be endorsed to the effect that they are served under seal pursuant to this Nondisclosure Agreement. Such documents shall be served upon Reviewing Representatives, persons employed by or working on behalf of the Commission, and persons employed by or working on behalf of the California Energy Commission or other state governmental agency that has executed an Interagency Confidentiality Agreement as referred to in Paragraph 12 hereof and has requested to review such materials. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the procedures adopted in this proceeding, (b) by facsimile, or (c) by overnight mail or messenger service. Whenever service of a document containing Market Sensitive Information is made by overnight mail or messenger service, the Assigned ALJ shall be served with such document by hand on the date that service is due.

5. Redaction of Documents. Whenever a party files, serves or provides in discovery a document that includes Market Sensitive Information (including but not limited to briefs, testimony, exhibits, and responses to data requests), such party shall also prepare a redacted version of such document. The redacted version shall enable persons familiar with this proceeding to determine with reasonable certainty the nature of the data that has been redacted and where the redactions occurred. The redacted version of a document to be filed shall be served on all persons on the service list, and the redacted version of a discovery document shall be served on all persons entitled thereto.

6. Selection of Reviewing Representatives. Each MP and NMP selecting a Reviewing Representative shall first identify its proposed Reviewing Representative to the Disclosing Party. Any designated Reviewing Representative has a duty to disclose to the Disclosing Party any potential conflict that puts him/her in violation of Decision 06-12-030. A resume or curriculum vitae is reasonable disclosure of such potential conflicts, and should be the default evidence provided in most cases.

7. Access to Market Sensitive Information and Use of Market Sensitive Information. Subject to the terms of this Nondisclosure Agreement, Reviewing Representatives shall be entitled to access to Market Sensitive Information. All other parties in this proceeding shall not be granted access to Market Sensitive Information, but shall instead be limited to reviewing redacted versions of documents. Reviewing Representatives may make copies of Market Sensitive Information, but such copies become Market Sensitive Information. Reviewing Representatives may make notes of Market Sensitive Information, which shall be treated as Notes of Market Sensitive Information if they disclose the contents of Market Sensitive Information. Market Sensitive Information obtained by a party in this proceeding may also be requested by that party in a subsequent Commission proceeding, subject to the terms of any nondisclosure agreement or protective order governing that subsequent proceeding, without constituting a violation of this Nondisclosure Agreement.

8. Maintaining Confidentiality of Market Sensitive Information. Each Reviewing Representative shall treat Market Sensitive Information as confidential in accordance with this Nondisclosure Agreement and the Non-Disclosure Certificate executed pursuant to Paragraph 7 and 8 hereof. Market Sensitive Information shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) Reviewing Representatives who have executed Non-Disclosure Certificates; (ii) Reviewing Representatives' paralegal employees and administrative personnel, such as clerks, secretaries, and word

processors, to the extent necessary to assist the Reviewing Representatives, provided that they shall first ensure that such personnel are familiar with the terms of this Nondisclosure Agreement, and have signed a Non-Disclosure Certificate, (iii) persons employed by or working on behalf of the Commission, and (iv) persons employed by or working on behalf of the CEC or other state governmental agency that has executed an Interagency Confidentiality Agreement as referred to in Paragraph 12. Reviewing Representatives shall adopt suitable measures to maintain the confidentiality of Market Sensitive Information they have obtained pursuant to this Nondisclosure Agreement, and shall treat such Market Sensitive Information in the same manner as they treat their own most highly confidential information. Reviewing Representatives shall be liable for any unauthorized disclosure or use by their paralegal employees or administrative staff. In the event any Reviewing Representative is requested or required by applicable laws or regulations, or in the course of administrative or judicial proceedings (in response to oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any of Market Sensitive Information, they shall immediately inform the Disclosing Party of the request, and the Disclosing Party may, at its sole discretion and cost, direct any challenge or defense against the disclosure requirement, and the Reviewing Representative shall cooperate in good faith with such party either to oppose the disclosure of the Market Sensitive Information consistent with applicable law, or to obtain confidential treatment of them by the person or entity who wishes to receive them prior to any such disclosure. If there are multiple requests for substantially similar Market Sensitive Information in the same case or proceeding where a Reviewing Representative has been ordered to produce certain specific Market Sensitive Information, the Reviewing Representative may, upon request for substantially similar materials by another person or entity, respond in a manner consistent with that order to those substantially similar requests.

9. Exception for California Independent System Operator (ISO). Notwithstanding any other provision of this Nondisclosure Agreement, with respect to an ISO Reviewing

Representative only, participation in the ISO's operation of the ISO-controlled grid and in its administration of the ISO-administered markets, including, but not limited to, markets for ancillary services, supplemental energy, congestion management, and local area reliability services, shall not be deemed to be a violation of this Nondisclosure Agreement.

10. Non-Disclosure Certificates. A Reviewing Representative shall not inspect, participate in discussions regarding, or otherwise be granted access to, Market Sensitive Information unless and until he or she has first completed and executed a Non-Disclosure Certificate, attached hereto as Appendix A, and delivered the original, signed Non-Disclosure Certificate to the Disclosing Party. The Disclosing Party shall retain the executed Non-Disclosure Certificates pertaining to the Market Sensitive Information it has disclosed and shall promptly provide copies of the Non-Disclosure Certificates to Commission Staff upon request.

11. Return or Destruction of Market Sensitive Information. Market Sensitive Information shall remain available to Reviewing Representatives until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Market Sensitive Information is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Reviewing Representatives shall, within fifteen days of such request, return the Market Sensitive Information (including Notes of Market Sensitive Information) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Market Sensitive Information, and Notes of Market Sensitive Information may be retained, if they are maintained in accordance with Paragraph 8. Within such time period each Reviewing Representative, if requested to do so, shall also submit to the Disclosing Party an affidavit stating that, to the best of its knowledge, all Market Sensitive Information and all Notes of Market Sensitive Information have been returned or have been destroyed or will be maintained in accordance with Paragraph 8. To the extent Market Sensitive

Information is not returned or destroyed, it shall remain subject to the Nondisclosure Agreement. In the event that a Reviewing Representative to whom Market Sensitive Information is disclosed ceases to be engaged to provide services in this proceeding, then access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every such person shall continue to be bound by the provisions of this Nondisclosure Agreement and the Non-Disclosure Certificate.

12. Access and Use by Governmental Entities.

(a) In the event the CEC or other state governmental agency requests Market Sensitive Information from a Disclosing Party, the procedure for handling such requests shall be as follows. Not less than five (5) days after delivering written notice to the Disclosing Party of the request, the Disclosing Party shall advise the requesting agency to execute an Interagency Information Request and Confidentiality Agreement (“Interagency Confidentiality Agreement”) with the CPUC. Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Market Sensitive Information as confidential in accordance with this Nondisclosure Agreement, (ii) include an explanation of the purpose for the agency’s request, as well as an explanation of how the request relates to furtherance of the agency’s functions, (iii) be signed by a person authorized to bind the agency contractually, and (iv) expressly state that furnishing of the requested Market Sensitive Information to employees or representatives of the agency does not, by itself, make such Market Sensitive Information public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC’s sole authority (subject to judicial review) to make the determination whether the Market Sensitive Information should remain confidential or be disclosed to the public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the agency.

(b) Upon execution of an Interagency Confidentiality Agreement with the CPUC and providing it to the Disclosing Party, the CEC or other state governmental agency may obtain Market Sensitive Information from Disclosing Parties and use it when needed to fulfill its

statutory responsibilities or cooperative agreements with the CPUC. Commission confidentiality designations will be maintained by the CEC in making such assessments, and the CEC will not publish any assessment that directly reveals the data or allows the data submitted by an individual load serving entity (“LSE”) to be “reverse engineered.”

13. Dispute Resolution. All disputes that arise under this Nondisclosure Agreement, including but not limited to alleged violations of this Nondisclosure Agreement and disputes concerning whether materials were properly designated as Market Sensitive Information shall first meet and confer in an attempt to resolve such disputes. If the meet and confer process is unsuccessful, the involved parties may present the dispute for resolution to the Assigned ALJ or the Law and Motion ALJ.

14. Other Objections to Use or Disclosure. Nothing in this Nondisclosure Agreement shall be construed as limiting the right of a party, the Commission Staff, or a state governmental agency covered by Paragraph 12 from objecting to the use or disclosure of Market Sensitive Information on any legal ground, such as relevance or privilege.

15. Remedies. Any violation of this Nondisclosure Agreement shall constitute a violation of an order of the CPUC. Notwithstanding the foregoing, the parties reserve their rights to pursue any legal or equitable remedies that may be available in the event of an actual or anticipated disclosure of Market Sensitive Information.

16. Withdrawal of Designation. A Disclosing Party may agree at any time to remove the “Market Sensitive Information” designation from any materials of such party if, in its opinion, confidentiality protection is no longer required. In such a case, the Disclosing Party will notify all other parties that the Disclosing Party believes are in possession of such materials of the change of designation.

17. Interpretation. Titles are for convenience only and may not be used to restrict the scope of this Nondisclosure Agreement.

REQUESTING PARTY

By: _____
Title: _____
Representing: _____
Date: _____

DISCLOSING PARTY

By: _____
Title: _____
Representing: _____
Date: _____

ATTACHMENT TO MODEL NONDISCLOSURE AGREEMENT

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

| | | |
|---|---|-----------------------------|
| Order Instituting Rulemaking to Implement |) | |
| Senate Bill No. 1488 (2004 Cal. Stats., CH. |) | Docket No. 05-06-040 |
| 690 (Sept. 22, 2004)) Relating to |) | |
| <u>Confidentiality of Information</u> |) | |

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Market Sensitive Information is provided to me pursuant to the terms and restrictions of the Nondisclosure Agreement between [REQUESTING PARTY] and [DISCLOSING PARTY] in this proceeding, that I have been given a copy of and have read the Nondisclosure Agreement, and that I agree to be bound by it. I understand that the contents of the Market Sensitive Information, any notes or other memoranda, or any other form of information that copies or discloses Nondisclosure Agreement shall not be disclosed to anyone other than in accordance with that Nondisclosure Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of California Public Utilities Commission.

By: _____
Title: _____
Representing: _____
Date: _____

Signed: _____

Name _____

Title: _____

Organization: _____

Dated: _____

(END OF APPENDIX A)

Administrative Law Judge (“Law and Motion ALJ”), Assigned Commissioner, the Commission, or any court or other body having appropriate authority. Market Sensitive Information also includes memoranda, handwritten notes, spreadsheets, computer files and reports, and any other form of information (including information in electronic form) that copies, discloses, or compiles other Market Sensitive Information or from which such materials may be derived (except that any derivative materials must be separately shown to be Market Sensitive Information). Market Sensitive Information does not include: (i) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court; or (ii) any information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Nondisclosure Agreement or any other nondisclosure agreement or protective order.

B. The term “redacted” refers to situations in which Market Sensitive Information in a document, whether the document is in paper or electronic form, has been covered, blocked out, or removed. The term “unredacted” refers to situations in which the Market Sensitive Information in a document, whether in paper or electronic form, has not been covered, blocked out, or removed.

C. The term “Disclosing Party” means a party who initially discloses any specified Market Sensitive Information in this proceeding.

D. The term “Market Participant” (“MP”) refers to a party that is:

- 1) A person or entity, or an employee of an entity, that engages in the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, or consulting on such matters, subject to the limitations in 3) below.
- 2) A trade association or similar organization, or an employee of such organization,
 - a) whose primary focus in proceedings at the Commission is to advocate for persons/entities that purchase, sell or market

- energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations; or
- b) a majority of whose members purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations; or
 - c) formed for the purpose of obtaining market sensitive information; or
 - d) controlled or primarily funded by a person or entity whose primary purpose is to purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations.
- 3) A person or entity that meets the criteria of 1) above is nonetheless not a market participant for purpose of access to market sensitive data unless the person/entity seeking access to market sensitive information has the potential to materially affect the price paid or received for electricity if in possession of such information. An entity will be considered not to have such potential if:
- a) the person or entity's participation in the California electricity market is *de minimis* in nature. In the resource adequacy proceeding (R.05-12-013) it was determined in D.06-06-064 § 3.3.2 that the resource adequacy requirement should be rounded to the nearest megawatt (MW), and load serving entities (LSEs) with local resource adequacy requirements less than 1 MW are not required to make a showing. Therefore, a *de minimis* amount of energy would be less than 1 MW of capacity per year, and/or an equivalent of energy; and/or
 - b) the person or entity has no ability to dictate the price of electricity it purchases or sells because such price is set by a process over which the person or entity has no control, *i.e.*, where the prices for power put to the grid are completely overseen by the Commission, such as subject to a standard offer contract or tariff price. A person or entity that currently has no ability to dictate the price of electricity it purchases or sells under this section, but that will have such ability within one year because its contract is expiring or other circumstances are changing, does not meet this exception; and/or
 - c) the person or entity is a cogenerator that consumes all the power it generates in its own industrial and commercial processes, if it can establish a legitimate need for market sensitive information.

E. A Market Participant's Reviewing Representatives are limited to persons designated by the Market Participant who 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 not an employee of a market participant.

F. Persons or entities that do not meet the definition of market participant are non-market participants ("NMPs"), and may have access to market sensitive information through their designated Reviewing Representatives.

H. All Reviewing Representatives are required to execute a non-disclosure agreement and are bound by the terms of this Nondisclosure Agreement.

4. Designation of Market Sensitive Information.

When filing or providing in discovery any documents containing Market Sensitive Information, a party shall physically mark such documents on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as " MARKET SENSITIVE INFORMATION SUBJECT TO NONDISCLOSURE AGREEMENT," or with words of similar import as long as one or more of the terms, "Market Sensitive Information" or "Nondisclosure Agreement" is included in the designation to indicate that the materials in question are protected.

All materials so designated shall be treated as Market Sensitive Information unless and until (a) the designation is withdrawn pursuant to Paragraph 16 hereof, or (b) an ALJ, Commissioner or other Commission representative makes a determination pursuant to Paragraph 4 hereof changing the designation.

All documents containing Market Sensitive Information that are tendered for filing with the Commission shall be placed in sealed envelopes or otherwise appropriately protected and shall be tendered with a motion to file the document under seal pursuant to Rule 11.4 of the Commission's Rules of Practice and Procedure. All documents containing Market Sensitive Information that are served on parties shall be placed in sealed envelopes or otherwise appropriately protected and shall be endorsed to the effect that they are served under seal pursuant to this Nondisclosure Agreement. Such documents shall be served upon Reviewing Representatives, persons employed by or working on behalf of the Commission, and persons employed by or working on behalf of the California Energy Commission or other state governmental agency that has executed an Interagency Confidentiality Agreement as referred to in Paragraph 12 hereof and has requested to review such materials. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the procedures adopted in this proceeding, (b) by facsimile, or (c) by overnight mail or messenger service. Whenever service of a document containing Market Sensitive Information is made by overnight mail or messenger service, the Assigned ALJ shall be served with such document by hand on the date that service is due.

5. Redaction of Documents. Whenever a party files, serves or provides in discovery a document that includes Market Sensitive Information (including but not limited to briefs, testimony, exhibits, and responses to data requests), such party shall also prepare a redacted version of such document. The redacted version shall enable persons familiar with this proceeding to determine with reasonable certainty the nature of the data that has been redacted and where the redactions occurred. The redacted version of a document to be filed shall be served on all persons on the service list, and the redacted version of a discovery document shall be served on all persons entitled thereto.

6. Selection of Reviewing Representatives. Each MP and NMP selecting a Reviewing Representative shall first identify its proposed Reviewing Representative to the Disclosing Party. Any designated Reviewing Representative has a duty to disclose to the Disclosing Party any potential conflict that puts him/her in violation of Decision 06-12-030. A resume or curriculum vitae is reasonable disclosure of such potential conflicts, and should be the default evidence provided in most cases.

7. Access to Market Sensitive Information and Use of Market Sensitive Information. Subject to the terms of this Nondisclosure Agreement, Reviewing Representatives shall be entitled to access to Market Sensitive Information. All other parties in this proceeding shall not be granted access to Market Sensitive Information, but shall instead be limited to reviewing redacted versions of documents. Reviewing Representatives may make copies of Market Sensitive Information, but such copies become Market Sensitive Information. Reviewing Representatives may make notes of Market Sensitive Information, which shall be treated as Notes of Market Sensitive Information if they disclose the contents of Market Sensitive Information. Market Sensitive Information obtained by a party in this proceeding may also be requested by that party in a subsequent Commission proceeding, subject to the terms of any nondisclosure agreement or protective order governing that subsequent proceeding, without constituting a violation of this Nondisclosure Agreement.

8. Maintaining Confidentiality of Market Sensitive Information. Each Reviewing Representative shall treat Market Sensitive Information as confidential in accordance with this Nondisclosure Agreement and the Non-Disclosure Certificate executed pursuant to Paragraph 7 and 8 hereof. Market Sensitive Information shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) Reviewing Representatives who have executed Non-Disclosure Certificates; (ii) Reviewing Representatives' paralegal employees and administrative personnel, such as clerks, secretaries,

and word processors, to the extent necessary to assist the Reviewing Representatives, provided that they shall first ensure that such personnel are familiar with the terms of this Nondisclosure Agreement, and have signed a Non-Disclosure Certificate, (iii) persons employed by or working on behalf of the Commission, and (iv) persons employed by or working on behalf of the CEC or other state governmental agency that has executed an Interagency Confidentiality Agreement as referred to in Paragraph 12. Reviewing Representatives shall adopt suitable measures to maintain the confidentiality of Market Sensitive Information they have obtained pursuant to this Nondisclosure Agreement, and shall treat such Market Sensitive Information in the same manner as they treat their own most highly confidential information. Reviewing Representatives shall be liable for any unauthorized disclosure or use by their paralegal employees or administrative staff. In the event any Reviewing Representative is requested or required by applicable laws or regulations, or in the course of administrative or judicial proceedings (in response to oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any of Market Sensitive Information, they shall immediately inform the Disclosing Party of the request, and the Disclosing Party may, at its sole discretion and cost, direct any challenge or defense against the disclosure requirement, and the Reviewing Representative shall cooperate in good faith with such party either to oppose the disclosure of the Market Sensitive Information consistent with applicable law, or to obtain confidential treatment of them by the person or entity who wishes to receive them prior to any such disclosure. If there are multiple requests for substantially similar Market Sensitive Information in the same case or proceeding where a Reviewing Representative has been ordered to produce certain specific Market Sensitive Information, the Reviewing Representative may, upon request for substantially similar materials by another person or entity, respond in a manner consistent with that order to those substantially similar requests.

9. Exception for California Independent System Operator (ISO). Notwithstanding any other provision of this Nondisclosure Agreement, with respect to an ISO Reviewing

Representative only, participation in the ISO's operation of the ISO-controlled grid and in its administration of the ISO-administered markets, including, but not limited to, markets for ancillary services, supplemental energy, congestion management, and local area reliability services, shall not be deemed to be a violation of this Nondisclosure Agreement.

10. Non-Disclosure Certificates. A Reviewing Representative shall not inspect, participate in discussions regarding, or otherwise be granted access to, Market Sensitive Information unless and until he or she has first completed and executed a Non-Disclosure Certificate, attached hereto as Appendix A, and delivered the original, signed Non-Disclosure Certificate to the Disclosing Party. The Disclosing Party shall retain the executed Non-Disclosure Certificates pertaining to the it has disclosed and shall promptly provide copies of the Non-Disclosure Certificates to Commission Staff upon request.

11. Return or Destruction of Market Sensitive Information. Market Sensitive Information shall remain available to Reviewing Representatives until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Market Sensitive Information is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Reviewing Representatives shall, within fifteen days of such request, return the Market Sensitive Information (including Notes of Market Sensitive Information) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Market Sensitive Information, and Notes of Market Sensitive Information may be retained, if they are maintained in accordance with Paragraph 8. Within such time period each Reviewing Representative, if requested to do so, shall also submit to the Disclosing Party an affidavit stating that, to the best of its knowledge, all Market Sensitive Information and all Notes of Market Sensitive Information have been returned or have been destroyed or will be maintained in accordance with Paragraph 8. To the extent Market Sensitive

Information is not returned or destroyed, it shall remain subject to the Nondisclosure Agreement. In the event that a Reviewing Representative to whom Market Sensitive Information is disclosed ceases to be engaged to provide services in this proceeding, then access to such materials by that person shall be terminated. Even if no longer engaged in this proceeding, every such person shall continue to be bound by the provisions of this Nondisclosure Agreement and the Non-Disclosure Certificate.

12. Access and Use by Governmental Entities.

(a) In the event the CEC or other state governmental agency requests Market Sensitive Information from a Disclosing Party, the procedure for handling such requests shall be as follows. Not less than five (5) days after delivering written notice to the Disclosing Party of the request, the Disclosing Party shall advise the requesting agency to execute an Interagency Information Request and Confidentiality Agreement (“Interagency Confidentiality Agreement”) with the CPUC. Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Market Sensitive Information as confidential in accordance with this Nondisclosure Agreement, (ii) include an explanation of the purpose for the agency’s request, as well as an explanation of how the request relates to furtherance of the agency’s functions, (iii) be signed by a person authorized to bind the agency contractually, and (iv) expressly state that furnishing of the requested Market Sensitive Information to employees or representatives of the agency does not, by itself, make such Market Sensitive Information public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC’s sole authority (subject to judicial review) to make the determination whether the Market Sensitive Information should remain confidential or be disclosed to the public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the agency.

(b) Upon execution of an Interagency Confidentiality Agreement with the CPUC and providing it to the Disclosing Party, the CEC or other state governmental agency may obtain Market Sensitive Information from Disclosing Parties and use it when needed to fulfill its

statutory responsibilities or cooperative agreements with the CPUC. Commission confidentiality designations will be maintained by the CEC in making such assessments, and the CEC will not publish any assessment that directly reveals the data or allows the data submitted by an individual load serving entity (“LSE”) to be “reverse engineered.”

13. Dispute Resolution. All disputes that arise under this Nondisclosure Agreement, including but not limited to alleged violations of this Nondisclosure Agreement and disputes concerning whether materials were properly designated as Market Sensitive Information, shall first meet and confer in an attempt to resolve such disputes. If the meet and confer process is unsuccessful, the involved parties may present the dispute for resolution to the Assigned ALJ or the Law and Motion ALJ.

14 Other Objections to Use or Disclosure. Nothing in this Nondisclosure Agreement shall be construed as limiting the right of a party, the Commission Staff, or a state governmental agency covered by Paragraph 12 from objecting to the use or disclosure of Market Sensitive Information on any legal ground, such as relevance or privilege.

15. Remedies. Any violation of this Nondisclosure Agreement shall constitute a violation of an order of the CPUC. Notwithstanding the foregoing, the parties reserve their rights to pursue any legal or equitable remedies that may be available in the event of an actual or anticipated disclosure of Market Sensitive Information.

16. Withdrawal of Designation. A Disclosing Party may agree at any time to remove the “Market Sensitive Information” designation from any materials of such party if, in its opinion, confidentiality protection is no longer required. In such a case, the Disclosing Party will notify all other parties that the Disclosing Party believes are in possession of such materials of the change of designation.

17. Interpretation. Titles are for convenience only and may not be used to restrict the scope of this Nondisclosure Agreement.

REQUESTING PARTY

By: _____

Title: _____

Representing: _____

Date: _____

Entered: _____

Administrative Law Judge

Date: _____

ATTACHMENT TO MODEL NONDISCLOSURE AGREEMENT

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

| | | |
|---|---|-----------------------------|
| Order Instituting Rulemaking to Implement |) | |
| Senate Bill No. 1488 (2004 Cal. Stats., CH. |) | Docket No. 05-06-040 |
| 690 (Sept. 22, 2004)) Relating to |) | |
| <u>Confidentiality of Information</u> |) | |

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Market Sensitive Information is provided to me pursuant to the terms and restrictions of the Nondisclosure Agreement between [REQUESTING PARTY] and [DISCLOSING PARTY] in this proceeding, that I have been given a copy of and have read the Nondisclosure Agreement, and that I agree to be bound by it. I understand that the contents of the Market Sensitive Information, any notes or other memoranda, or any other form of information that copies or discloses Nondisclosure Agreement shall not be disclosed to anyone other than in accordance with that Nondisclosure Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of California Public Utilities Commission.

By: _____
Title: _____
Representing: _____
Date: _____

Signed: _____

Name _____

Title: _____

Organization: _____

Dated: _____

(END OF APPENDIX B)

Document comparison by Workshare Professional on Thursday, February 18, 2010
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