

Decision 06-06-066 June 29, 2006

**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)

(List of Appearances - see Attachment A.)

**INTERIM OPINION IMPLEMENTING SENATE BILL NO. 1488,  
RELATING TO CONFIDENTIALITY OF ELECTRIC PROCUREMENT  
DATA SUBMITTED TO THE COMMISSION**

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**INTERIM OPINION IMPLEMENTING SENATE BILL NO. 1488,  
RELATING TO CONFIDENTIALITY OF ELECTRIC PROCUREMENT  
DATA SUBMITTED TO THE COMMISSION**

**I. Summary**

This decision implements Senate Bill (SB) No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)). SB 1488 requires that we examine our practices regarding confidential information to ensure meaningful public participation in our proceedings and open decision making, while taking account of our obligations under §§ 454.5(g) and 583<sup>1</sup> to protect the confidentiality of certain information.

SB 1488 expresses a preference for open decision making, a policy directive we embrace. However, the bill did not repeal the existing confidentiality provisions that govern our activities. Thus, the challenge we face in our decision today is how to balance the policy goals of public disclosure, full participation and transparency with the statutory provisions allowing and indeed requiring confidential treatment of data in limited instances.

We start with a presumption that information should be publicly disclosed and that any party seeking confidentiality bears a strong burden of proof. Indeed, as discussed below, a party seeking protection of its documents always bears the burden of proof. However, the statutes governing our treatment of confidentiality -- which we note are different from those of our sister energy agency, the California Energy Commission (CEC) -- recognize that in some instances (such as "market sensitive" information relating to electric procurement that passes a materiality

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

standard), confidential treatment of data may not only be allowed, but may be required in order to carry out our statutory and constitutional duties. To ensure the best balancing between the broadest disclosure and the narrowest confidentiality, we have developed two appendices to this decision which provide detailed guidance to parties. We have also specified procedures to be followed when there is a request for confidentiality. This guidance will ensure both more consistency and more public disclosure going forward.

We have also focused specifically on information relating to the Renewable Procurement Standard (RPS) program. California has taken a lead in promoting renewable sources of electricity. They are a critical component of the utilities' procurement activities and resource plans. The Commission has treated as public information in other energy areas that focus on reducing energy demand and environmental harm, such as the energy efficiency and demand response programs. Due to the strong public interest in RPS, we have provided in the attached appendices greater public access to RPS data than other data.

This is the first of two decisions we anticipate in the proceeding. In this first phase, we have examined our approach to confidentiality in the context of electricity procurement by investor-owned utilities (IOUs) and energy service providers (ESPs). The legislative history of SB 1488 indicated that the Legislature was most concerned about confidentiality in this context, so we have addressed this issue first. In the next phase of the proceeding, we will examine our practices more broadly.

In summary, this decision reaches the following conclusions:

- SB 1488 requires rigorous scrutiny of requests for confidentiality but does not prohibit all use of confidential information.
- Greater public access should be provided for procurement documents relating to the RPS program because of the public interest aspects of the program.
- The party producing the data always bears the burden of proof.
- Confidentiality protections are essential to avoid a repetition of electricity market manipulation. The due process and confrontation clauses do not prohibit use of confidential data in Commission proceedings.
- “Market sensitive” information is not the same as “trade secrets.”
- Protections for “market sensitive” information are limited.
  - § 454.5(g) only applies to procurement information.
  - Only information that would have a material impact on a procuring party’s market price for electricity is protected.
- We should distinguish between market participants and non-market participants such as consumer groups in setting confidentiality rules, but defer for further comment a decision on precisely how to define market participants and non-market participants.
- There should be a window of confidentiality (approximately one year backward and three to five years forward) for confidential procurement and related data.
- The substantive confidentiality protections applicable to IOUs and ESPs need not be identical, but the process for establishing entitlement to protection is the same for all entities.

- To provide detailed guidance, we include two appendices – Appendix 1 for documents relating to IOUs’ and Appendix 2 for ESPs documents – explaining our confidentiality rules for these procurement and related records.
- We also establish specific procedures regarding requests for confidential treatment of documents.
- We will commence Phase Two of this proceeding and seek party input on various issues within 30 days.

## **II. SB 1488**

SB 1488 provides, in part, the following:

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 . . . to ensure that the commission’s practices under these laws provide for meaningful public participation and open decision making.

SB 1488 also acknowledges the competing statutory directives in §§ 454.5, 583 and the Public Records Act, and directs us to reconcile them in a way that ensures meaningful public participation and open decision making.

## **III. Procedural History**

The parties submitted extensive comments in response to the Order Instituting Rulemaking (OIR). Administrative Law Judge (ALJ) Thomas held a prehearing conference on September 21, 2005, and Assigned Commissioner Grueneich and ALJ Thomas issued their scoping memo on October 17, 2005. ALJ Thomas held five days of evidentiary hearings on the scope of electric procurement confidentiality from November 28, 2005-December 2, 2005. The parties conducted extensive meet and confer sessions on the contents of the Matrix, and submitted their final

recommendations, in two separate versions of the Matrix (one for IOUs and one for ESPs), on January 13, 2006 and January 19, 2006, respectively. The parties submitted post hearing opening briefs on February 6, 2006 and post hearing reply briefs on February 22, 2006. The matter was submitted on February 22, 2006.

**IV. SB 1488 Requires a Critical Examination of Information Proposed for Confidential Treatment But Does Not Prohibit All Use of Confidential Information**

**A. Parties' Positions on Whether SB 1488 Allows Use of Confidential Information**

**1. IOUs' Position on SB 1488**

The IOUs by and large take the position that SB 1488 has no effect on existing law because it merely requires the Commission to “examine its practices regarding confidential information.” According to the IOUs, the Commission correctly allows them confidential treatment of many types of data, and therefore its practices already ensure meaningful public participation and open decision making. As Pacific Gas and Electric Company (PG&E) observes, “on its face, SB 1488 requires the Commission only to conduct an examination; it leaves the results of the examination and any changes to the Commission’s practices to the discretion of the Commission. The Commission should exercise that discretion free of any influence that may be suggested by the legislative history of SB 1488 as originally proposed.”<sup>2</sup> Thus, according to PG&E, earlier versions of

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<sup>2</sup> PG&E Opening Brief at 7. All citations to a party’s Opening Brief are to the brief that party filed on or about February 6, 2006. All citations to a party’s Reply Brief are to that party’s brief filed on or about February 22, 2006.

SB 1488 that proposed to make all utility information open to the public unless the utility proved need for confidentiality are irrelevant to the current interpretation of the legislation. According to PG&E, the conclusion we should draw from the change in the legislation is that the Legislature decided not to require all utility information to be open to the public.<sup>3</sup>

## **2. Ratepayer Advocates' Position on SB 1488**

The Utility Reform Network (TURN) largely supports the IOUs' position on confidentiality. TURN's witness, Michael Florio, testified that the current process strikes the adequate balance between openness and protection of ratepayers from market manipulation:

Q: (by ALJ Thomas) Do you believe that the Commission can act consistently with Senate Bill 1488, which is the bill that we are trying to implement in this rulemaking, and still maintain as confidential large swath of utility information?

A: Yes. I think it can. SB 1488 doesn't require anything except that the Commission consider its practices. And as initially introduced, it would have required dramatic changes. And, you know, we certainly indicated to the author's office that we thought that was ill advised. And I don't recall which hearings we participated in, to what extent. But we definitely made it our view known that the current process is working and should be largely left alone. And I think the bill, the metamorphoses that the bill went through in the legislation is reflective of that,

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<sup>3</sup> See also Southern California Edison Company (SCE) Opening Brief, Feb. 6, 2006, at 4 ("In the case of SB 1488, it is clear from the plain language of the statute that it does not in any way abrogate existing protections for confidential information.").

that there is no mandate to change 454.5(g) or anything else.

Q: Do you think, as things currently stand, the Commission is furthering open decision making in the way it is allowing utilities to protect their information?

A: Well, it is a balancing act. . . . I think the Commission should avoid redacted decisions to the greatest extent possible. But I think it can rely on confidential information in coming up with public decisions. And it is going to be a balancing act every time one of these very sensitive matters gets litigated.<sup>4</sup>

TURN also notes that the term “open decision making” is generally associated with the provisions of the Bagley-Keene Open Meeting Act (Gov’t Code §§ 11120-11132) that require most meetings of state agencies to be open and public. TURN believes that this Commission should strive to avoid redacted decisions to the maximum extent possible, but as long as the Commission meets in public session when issuing its decisions, Bagley-Keene is not violated.<sup>5</sup>

Similarly, the Division of Ratepayer Advocates (DRA) does not support requiring IOUs to make greater disclosure of electric procurement data, although it recommends further study of the issue:

SB 1488 . . . does not require the Investor-Owned Utilities (IOUs) to produce any information in a different manner from the way they have produced it in the past until the Commission examines its practices and finds a need to do so. Thus, for example, only if the Commission finds that the manner in which the IOUs have produced

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<sup>4</sup> RT Vol. 5, 822:8-823:9. Citations to the Reporter’s Transcript (RT) in this decision show the volume, page:line(s).

<sup>5</sup> TURN Opening Brief at 3.

information to support parties' bid formulation impaired meaningful public participation in the past, will the Commission require some modification of that practice. The record of this proceeding at present does not provide the Commission with the basis for making this finding.<sup>6</sup>

DRA also recognizes that the Commission must protect California consumers from market manipulation, noting that SB 1488's requirement of "meaningful public participation" "must be constrained [as] . . . necessary to protect the IOUs and their ratepayers from unnecessary exposure to market risks."<sup>7</sup>

Moreover, DRA asserts that only businesses engaged in marketing electricity - and not consumers - are seeking further disclosure: "DRA is not aware of any instance where a member of the public other than a market participant complained about the limitations placed on disclosure of utility information. Thus, there appears to be no need for additional transparency to make Commission proceedings clearer to non-marketers."<sup>8</sup>

### **3. ESPs' and Generators' Positions on SB 1488**

On the other end of the spectrum, non-IOUs in the business of selling electricity very much want access to IOU records. These parties claim SB 1488's mandate that the Commission "ensure" open decision making and meaningful public participation requires us to deny most requests for confidentiality. The Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC), for example,

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<sup>6</sup> DRA Opening Brief at 3.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> *Id.*

contend that, “For open decision making to be ensured, all parties must have equal access to all information used as bases for decisions and all parties must have been able to meaningfully participate; if information is to be treated confidentially due to market sensitivity or trade secret status, then equal access to that information by all interested parties through the use of reasonable Protective Orders is necessary.”<sup>9</sup> Under this interpretation, according to CAC/EPUC,

- The majority of electric procurement information must be publicly disclosed;
- Information proven to be market sensitive or trade secret or both must be disclosed to all parties equally under a reasonable protective order; and
- Information that the IOUs categorically refuse to disclose to all parties equally, even pursuant to a reasonable protective order, simply cannot be used in procurement proceedings or to guide procurement decisions.<sup>10</sup>

In CAC/EPUC’s view, use of confidential information also violates their constitutional due process rights and rights to confront witnesses. “At a minimum, meaningful participation means adherence to constitutional requirements of due process and fundamental fairness in terms of parties’ participation in Commission proceedings. This includes

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<sup>9</sup> CAC/EPUC Opening Brief at 3.

<sup>10</sup> *Id.* at 2. *See also* Calpine PowerAmerica and Calpine Corporation (Calpine) Opening Brief at 3 (“all parties in procurement related proceedings before the Commission must have equal access to the same information and data. . .”).

in evidentiary hearing settings the absolute due process rights, such as the right to cross-examination.”<sup>11</sup>

Similarly, the Independent Energy Producers Association (IEP) claims that, “The Legislature was not looking for the Commission to give a nod toward meaningful participation and openness or to go through the motions of procedural reform without significantly altering its practices.”<sup>12</sup> “Proceedings should be open to the public. The public cannot participate, in a meaningful way or otherwise, if it is locked out of the hearings where the record for decision is developed.”<sup>13</sup>

#### **4. AReM/CNE Positions on SB 1488**

The Alliance for Retail Energy Markets (AReM) and Constellation NewEnergy, Inc. (CNE) focus on confidentiality of their own ESP data, rather than on access to IOU data. With regard to their own ESP data, AReM and CNE express views that mirror the IOUs’ positions on IOU data. Thus, AReM/CNE believe SB 1488 does not mandate further openness:

SB 1488 did not alter or modify existing law. Therefore, contrary to what some parties may argue or suggest, SB 1488 is not relevant to the Commission’s determination as to whether any particular information it receives from an LSE [load serving entity] or other entity is protected or should be kept confidential. Rather, the Commission’s charge under SB 1488 is to make sure that,

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<sup>11</sup> CAC/EPUC Opening Brief at 4.

<sup>12</sup> IEP Opening Brief at 5.

<sup>13</sup> *Id.* at 6. *See also* Calpine Opening Brief at 4 (“‘meaningful public participation and open decision making’ requires – to the greatest extent possible – equal access to information for all parties.”)

notwithstanding the confidentiality due to certain information under existing law, interested parties have adequate information to participate in the Commission's proceedings in a meaningful manner and the public record contains enough information to explain the Commission's actions. That is all SB 1488 requires or, indeed, allows.<sup>14</sup>

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<sup>14</sup> AReM/CNE Opening Brief at 7.

**B. Discussion – SB 1488 Requires A  
Critical Examination of Information  
Proposed for Confidential  
Treatment But Does Not Prohibit All  
Use of Confidential Information**

**1. Language of SB 1488**

We believe the correct interpretation of SB 1488 lies somewhere between the two extremes set forth above. We do not believe the Legislature intended that we accept without critical analysis utilities' (and other entities') assertions that their data are confidential. It is not enough, for example, that utilities redact large portions of their procurement plans and that we allow those redactions by default. Rather, we must examine different types of data critically, and determine whether utility assertions about confidentiality have merit.

By the same token, we acknowledge that SB 1488 is significantly watered down from its original version. As originally drafted, SB 1488 "would change the presumption to favor public disclosure by providing that all information furnished by a public utility... shall be made public unless a provision of the [Public Records Act] or the CPUC requires it to be withheld."<sup>15</sup> The final version of the statute does not explicitly favor public disclosure. Rather, the guiding principle established by SB 1488 is that the Commission must act carefully before allowing utilities to redact data. We must act as more than a rubber stamp for a party seeking confidentiality.

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<sup>15</sup> PG&E Opening Brief at 8, citing Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1488 (2003-2004 Reg. Sess.) as amended March 30, 2004, p. 2. As discussed later in this decision, we do not agree with PG&E and other IOUs who claim that § 583 places the burden of proof that documents are not confidential on parties seeking disclosure.

Indeed, the statute requires not “universal public participation,” but rather “meaningful public participation.” We find that this language permits some use of confidential data, where there is an overriding statutory requirement of protection. The statute makes clear where those statutory requirements lie by quoting § 454.5(g) and 583. (We discuss these provisions in detail below.) By citing to statutes that restrict public access to records, we find an acknowledgement by the Legislature that in some cases confidential treatment is required by statute.

A similar interpretation applies to SB 1488’s reference to open decision making. We do not interpret this term to preclude any reliance on confidential information, if a statute (such as § 454.5(g)) requires confidentiality, or gives the Commission discretion to keep information confidential. The Legislature easily could have prohibited all use of confidential information if that were its intent. SB 1488 directs the Commission to examine the issue of confidentiality, not to outlaw all protections.

Allowing confidential treatment for records that deserve protection under statute does not “[lock parties] out of the hearings where the record for decision is developed,”<sup>16</sup> as IEP claims. Nothing in this decision prohibits parties from participating in our proceedings. Rather, our decision acknowledges that the Legislature has made provisions for confidential treatment of certain documents, and recognizes that we are not at liberty to ignore those protections. There are ways to deal with confidential information during the course of hearings that do not prohibit participation or remove participants from the hearing room: *e.g.*, reference

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<sup>16</sup> IEP Opening Brief at 6.

on the record to a page/line in a document without identifying its text; description of the information at a high level without revealing details; sealing of exhibits but not the transcript, and other methods. We intend to use these methods when confidentiality is required by statute. While we do not ban all use of closed hearing rooms, such action should occur rarely, and when all of the foregoing alternatives fail.

We also agree with TURN that the Bagley-Keene Open Meeting Act does not preclude us from sealing data that statute otherwise requires be confidential. Bagley-Keene relates primarily to the requirement that we meet in public session when issuing our decisions.

## **2. Prevention of Market Manipulation**

We cannot disregard California's recent history in carrying out our duty to implement SB 1488. Californians are still paying for the energy crisis that commenced in 2000. As the Federal Energy Regulatory Commission (FERC) found in its *Final Report on Price Manipulation in Western Markets*, Docket No. PA02-2-000 (March 26, 2003) (FERC Report), "Over [May-October 2000], electric prices rose to levels often in excess of \$500/MWh [megawatt hour] even though natural gas prices would have supported electric prices of only about \$75/MWh." The FERC concluded that, "Such high bids and clearing prices far exceed the level needed to recover the capacity costs of generation" and that, "the excessively elevated bid prices appear to be solely an attempt to raise prices." By contrast, "in 1998 and 1999 (California's restructuring commenced

operation on April 1, 1998), the California spot market produced average annual wholesale energy prices of \$29 and \$31/MWh, respectively.”<sup>17</sup>

The arguments of parties seeking enhanced access to IOU records are based mostly on the premise that public disclosure will send the correct signals to generators about what generation to construct in the future and make it easier for them to bid on IOU contracts.

Calpine, for example, claims it needs all IOU data in order to determine when and where to build power plants: “making more procurement related information available – particularly information related to supply and demand – will encourage the entry of new, more efficient generation into the market which will increase the overall efficiency of available supply and, in turn, put downward pressure on prices over the long-term.”<sup>18</sup>

IEP focuses on having IOU information in order to bid on utility Requests for Offers/Proposal (RFOs or RFPs) for procurement: “fairness requires that all potential bidders should have a reasonable and fair opportunity to compete with each other and with utility-sponsored projects.” IEP concedes, however, that “a solicitation is not exactly a Commission proceeding. . . .”<sup>19</sup> Similarly, CAC/EPUC claim that, “While SB 1488 may not on its face require public disclosure of information in the

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<sup>17</sup> FERC Report at VI-45 - VI-46 & VI-52. The FERC Report is available on the Internet at <http://files.findlaw.com/news.findlaw.com/hdocs/docs/ferc/wstmrkt32603rptpt2.pdf>.

<sup>18</sup> Calpine Opening Brief at 2.

<sup>19</sup> IEP Opening Brief at 27.

RFP process, greater information dissemination could lead to more cost effective procurement.”

There is no evidence that in enacting SB 1488 the Legislature was concerned with enhancing the competitive posture of generators. While we accept that the release of more information on utility procurement could lead to more efficient investment decisions, we must guard against the release of information that can lead to more opportunities for market manipulation. We seek to strike a balance between the rights of the public to open decision making, particularly with regard to the expenditure of ratepayer money, and the realization of market efficiencies through better information flow on the one hand, and the prevention of market manipulation on the other.

SCE testified that in a market such as the IOU procurement bidding process, one-sided release of information will result in higher, not lower, prices for ratepayers in most situations:

The RFP process is a competitive process where, generally, the IOUs are attempting to purchase the best fit power at the lowest price, and generators are attempting to sell at the highest possible price. This situation is perhaps the clearest real life example of Dr. Plott’s experiments, where the release of data would be one-sided. As Dr. Plott explained,

[T]he behavior of bidders at auction is sensitive to their beliefs about the behavior of other bidders, and those central beliefs are coordinated by the announcement of the R[esidual] N[et] S[hort].<sup>20</sup>

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<sup>20</sup> SCE/Plott Ex. 1 at 17:23-25.

*[L]ower cost bids are increased to near the highest bid when the (RNS) is large. With a large amount to be procured, the bidder knows that bids just below an expected price will be accepted, and so the bidder raises the prices on the low cost units to just below the safe bidding levels. The bidder wants to get as high a price as possible without exposure to the risk of losing the bid to a competitor. Accordingly, the profit margins on the low cost units increase dramatically.<sup>21</sup>*

We believe the most realistic interpretation of SB 1488 must take into account California's recent experience with market manipulation. Ratepayer protection requires us not only to allow meaningful input into our decision making, but also to protect consumers from market manipulation and other harm that can arise if market sensitive information is released across the board.

## **V. Practical Application of SB 1488**

There are at least two ways of implementing our "middle ground" view that we must scrutinize with rigor all confidentiality claims, but that such claims will satisfy statutory requirements for confidentiality in some instances.

### **A. Matrix Approach**

The first method of addressing confidentiality claims involves identification by the Commission of general categories of information and the confidentiality protections to be applied prospectively to those categories. We have attempted, with the parties' assistance, to identify most categories of data that will be called for in the electricity procurement

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<sup>21</sup> *Id.* at 15:6-11 (emphasis added).

area and have outlined those categories in two versions of a Matrix (an IOU Matrix and an ESP Matrix) that accompany this decision as Appendices 1 and 2.

An earlier list of documents and preliminary matrix were appended to the original OIR for this proceeding, but the matrices have been expanded to include new categories and subcategories of records. This Commission's Energy Division made tentative recommendations regarding the confidentiality treatment of the original categories. In numerous meet and confer sessions, several parties responded to the Energy Division's recommendations and added additional recommendations for the categories added to the Matrix. In this decision, we make determinations for how each category in the Matrix should be treated. No data that are already public may be treated as confidential. Data an IOU has furnished to an affiliated company shall be deemed public data.

We delegate to the Assigned Commissioner and Administrative Law Judge authority to make changes to the Matrix as we gain experience with its use.

**B. Approach for Data Not in Matrix**

The Matrix relates to data relevant to electric procurement (and related subjects as identified in the OIR and scoping memo for this proceeding). The scoping memo states that "Phase One will examine confidentiality only in the context of the following proceedings, *and only to the extent the proceedings focus on the utilities' procurement responsibilities.*"

- R.04-04-003, the current electric procurement proceeding;

- R.03-10-003, the community choice aggregation rulemaking;
- R.04-04-025, the avoided cost and QF pricing rulemaking;
- R.04-04-026, the renewables portfolio standard rulemaking;
- R.04-03-017, the distributed generation rulemaking;
- R.01-08-028, the energy efficiency rulemaking;
- I.00-11-001, the transmission planning investigation; and
- R.04-01-026, the transmission assessment process rulemaking.<sup>22</sup>

However, this order and the Matrix apply to data regardless of the proceeding in which it is relevant, including the proceedings listed in this decision, successor proceedings, or proceedings not listed above in which the data are relevant.

We plan to address confidentiality in other contexts in Phase Two of this proceeding. In the interim, current rules will continue to apply. Generally speaking, those rules place the burden of proof on the party seeking confidential treatment. That party must file a motion describing the data at issue, and prove that it should be filed under seal (by showing the information is privileged, protected by a confidentiality statute, covered by General Order (GO) 66-C, or otherwise required to be held confidential (discussed more fully below)).

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<sup>22</sup> *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge*, dated Oct. 17, 2005, at 4-5 (emphasis in original).

### **C. Effect of GO 66-C**

In the 1970s, the Commission adopted GO 66-C, which explains how to obtain records in the Commission's possession.<sup>23</sup> GO 66-C begins by listing the types of documents *not* open to public scrutiny, including "records or information of a confidential nature" furnished to the Commission pursuant to Pub. Util. Code § 583.<sup>24</sup> The general order then lists information falling into this category, including:

b) Reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage.

In the years since GO 66-C was adopted, parties submitting documents in our proceedings have routinely relied on GO 66-C to shield data from public view by invoking the foregoing provision. We stated in the OIR that "In view of SB 1488's concerns about openness, GO 66-C may require revision."<sup>25</sup>

We have not focused on GO 66-C in this phase and are not prepared to address its continuing viability here. However, until we change or repeal it (or opt to leave it intact upon examination) GO 66-C shall continue to apply to data *not* addressed in the Matrix. That is, in the interim, to the extent the Matrix contradicts GO 66-C, the Matrix shall

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<sup>23</sup> GO 66-C and all other Commission General Orders are available on the Commission's website at [http://www.cpuc.ca.gov/static/official+docs/i\\_go.htm](http://www.cpuc.ca.gov/static/official+docs/i_go.htm).

<sup>24</sup> We discuss § 583 in more detail below.

<sup>25</sup> For a further discussion of GO 66-C, we refer parties to our recent decision on the subject, Decision (D.) 05-04-030.

govern. Other portions of GO 66-C not related to electric procurement will remain in place unless and until we change them. Thus, for data not included in the Matrix, a party seeking confidential treatment should continue to file a motion seeking leave from the Commission to retain such material under seal. The filing party shall bear the burden of proving that its information deserves such treatment.

## **VI. Burden of Proof**

### **A. Parties' Positions – Burden of Proof**

SCE asserts that “information provided by an IOU to the Commission is presumed to be confidential and any party seeking an order for publication of such information bears the burden of affirmatively showing that the information should be made public.” SCE concludes that “the burden is on the party seeking disclosure.”<sup>26</sup>

TURN advocates an approach that acknowledges that the party seeking confidentiality always bears the burden of proof, but that also takes into account the existence of the Matrix categories:

[D]ata types determined to be confidential in this docket should presumptively be treated as confidential in future Commission proceedings, but the party claiming confidentiality would bear the burden of demonstrating that the type of information in question was in fact found to be “market sensitive” in this proceeding. Other parties would have the opportunity to dispute that assertion. Establishing such rules of general applicability will help

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<sup>26</sup> SCE Opening Brief at 75. *See also* San Diego Gas & Electric Company (SDG&E) Opening Brief at 19 (“the Commission must protect ‘583 documents’ unless and until it applies a balancing test of public interest in confidentiality against disclosure, determines that the public interest favors disclosure, and issues an order so stating”).

to expedite the many proceedings in which confidentiality issues now arise.

The CEC asserts that “any entity claiming that information they submit to a public agency is a trade secret has the burden of proof to establish that fact.”<sup>27</sup> Similarly, IEP asserts that “the party that seeks to deny public access to information has the burden of demonstrating that the particular information falls within one of the recognized exceptions to the general presumption that information should be publicly available.”<sup>28</sup> Green Power Institute (Green Power) also urges the Commission to “[place] the burden of proof of market sensitivity on those who seek confidential status for their submissions, not on those who seek greater public disclosure, and often don’t know what is being kept confidential in the first place.”<sup>29</sup>

### **B. Discussion – Burden of Proof**

The party seeking protection of its documents always bears the burden of proof. We agree with TURN, however, that when a party seeks confidentiality for data listed in the Matrix, its burden should be to prove that the data match the Matrix category. Once it does so, it is entitled to the protection the Matrix provides for that category.

Thus, where an IOU or ESP submits data to the Commission that falls within a category in the appropriate version of the Matrix (which we will refer to collectively unless otherwise noted), it may, if it chooses, mark the data as confidential according to the rules set forth in the Matrix.

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<sup>27</sup> CEC Opening Brief at 26.

<sup>28</sup> IEP Opening Brief at 59.

<sup>29</sup> Green Power Opening Brief at 4.

(Obviously, the submitting party need not mark any data as confidential, and even if the Matrix allows confidential treatment, the submitting party need not treat the data as confidential under any circumstances.) The submitting party must file a motion with any proposed designation of confidentiality, proving:

- 1) That the material it is submitting constitutes a particular type of data listed in the Matrix,
- 2) Which category or categories in the Matrix the data correspond to,
- 3) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data,
- 4) That the information is not already public, and
- 5) That the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure.

For example, if an IOU submits data under seal that it contends reveals that IOU's "Utility Bundled Net Open Position for Energy (MWh) by Customer Class" (IOU Matrix, Appendix 1, item VI(D)), it must be prepared to show that that data actually reveal the residual net open position for energy by customer class, that the data cover the time period for confidential treatment the Matrix allows, that the data are not already public, and that the data cannot be produced in a way that shields the confidential information.

If another party, or the Commission, questions the appropriateness of the confidential designation (by ruling, motion, letter, or other communication), the submitting party bears the burden of proving Items 1-5 above. Once the submitting party meets this burden, the party seeking disclosure of the data (or a change in how it is treated – *e.g.*,

disaggregation of data submitted in aggregated form, relief from the terms of a protective order, or other change) may take several steps. It may rebut the claim that the party meets any or all of 1-5 above. It may assert that despite meeting the criteria in Items 1-5, the data should nonetheless be disclosed. The party seeking access to the data shall bear the burden of proof once the party whose data are at issue meets its burden of proving Items 1-5 above.

**VII. Section 583 Does Not Provide a Substantive Basis for Keeping Data Confidential**

**A. Parties' Positions on Meaning of § 583**

Many parties seeking confidential treatment characterize § 583 as creating a substantive right to such treatment. SCE, for example, states that "Section 583 presumes that data submitted to the Commission would be confidential, except where specifically made public."<sup>30</sup> If another entity seeks access to this data, SCE contends, it must prove that the presumption of confidentiality does not apply. Similarly, SDG&E asserts that the party seeking access to utility records has the burden of proof under § 583.

Occasionally, parties propose a narrow interpretation of § 583. The CEC, for example, proposes limiting the scope of the statute to bookkeeping and accounting records of utility, rather than planning information such as that related to electricity procurement.<sup>31</sup>

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<sup>30</sup> SCE Opening Brief at 16.

<sup>31</sup> CEC Opening Brief at 4-5.

**B. Discussion – Section 583 Does Not Create a Presumption in Favor of Confidential Treatment**

As both courts and this Commission have stated in the past (and as reiterated in the OIR), § 583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules. This is important because several of the parties claim that there is a legal presumption of confidentiality for all data. If this were true, the Commission would be legally obligated to protect whole swaths of information without first considering whether the information meets relevant legal tests for trade secrets, privilege, or other established provisions protecting data from disclosure.

Section 583 sets forth a process for dealing with claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection.<sup>32</sup> Section 583 states:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or

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<sup>32</sup> Because § 583 is a statute regarding process, rather than one that identifies substantive categories of data, we find it unnecessary to address the CEC's claim that the statute protects only bookkeeping and accounting records and not planning documents such as those related to electricity procurement, although we find that interpretation to be strained.

employee of the commission who divulges any such information is guilty of a misdemeanor.

Thus, § 583 sets out the first procedural step for a party claiming confidentiality. That party has the right to submit relevant material under seal when it first submits it to the Commission. However, the material is not entitled to remain confidential forever based on the invocation of § 583. Rather, the affected party must accompany its records with a motion establishing the legal and factual basis for confidential treatment.

As we stated in the OIR, § 583 does not limit our ability to disclose information. As the United States Court of Appeals for the Ninth District noted in *Southern California Edison Company v. Westinghouse Electric Corporation* (9<sup>th</sup> Cir. 1989) 892 F. 2d 778, 783: “Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission’s authority to issue such orders is unrestricted.” Similarly, *In Re Southern California Edison Company* [Mohave Coal Plant Accident], D.91-12-019, 42 CPUC 2d 298, 300 (1991), states that § 583 “assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission” but does not limit our broad discretion to disclose information.<sup>33</sup>

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<sup>33</sup> D.91-12-019 notes: “Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of documents as confidential. To justify an assertion that certain documents cannot be disclosed, the utility must derive its support from other parts of the law.” 42 CPUC 2d at 301. That decision later states: “Further, simply citing Section 583 does not establish the confidentiality of a document. Section 583 does not discuss or

Nothing in § 583 gives utilities a substantive right to confidential treatment for any type of information. Rather, the statute provides a process for handling information a party believes is confidential. We made this point clear in *In Re Southern California Edison Company, supra*: “Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of information as confidential. To justify an assertion that certain documents cannot be disclosed, *the utility must derive its support from other parts of the law.*”<sup>34</sup>

Thus, the mere fact that a party invokes § 583 says nothing about whether a document contains trade secrets, is privileged, or is otherwise entitled to protection. The statute allows a party to submit information about which it has a concern under seal in the first instance, so that its claims about confidentiality may be tested. In determining whether the claims have merit, the Commission does not look to any provision in § 583, because nothing in the statute addresses what types of records should and should not be confidential. Other provisions – the trade secret law, the Evidence Code provisions regarding attorney-client and other privileges, confidentiality statutes such as § 454.5(g), GO 66-C as currently written – provide the substantive theories for asserting confidentiality.

Once the Commission finally determines, based on law other than § 583 itself, that a claim of confidentiality lacks merit (and any appeals are exhausted), the information must be produced.

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define confidentiality, nor establish any privileges. In order to protect documents that would otherwise be released pursuant to Section 583, the utility must find its authority or relevant policy elsewhere.” 42 CPUC 2d at 302-03.

<sup>34</sup> D.91-12-019, 42 CPUC 2d 298, 301 (1991), 1991 Cal PUC LEXIS 902, at \*8 (emphasis added).

**VIII. The Due Process and  
Confrontation Clauses Do Not  
Preclude Use of Confidential Data**

SB 1488 does not create a new due process right to have access to every document on which the Commission relies in rendering its decisions. While it expresses a preference for open decision making, it does not prohibit the use of confidential data in appropriate cases. Nor could it do so, since long-established privileges and protections – such as those for trade secrets and for “market sensitive” information under § 454.5(g) – remain on the books. The due process issues CAC/EPUC raise lack merit in the procurement context.

**A. Parties’ Positions – Due Process  
and Confrontation Claims**

CAC/EPUC claim that SB 1488 gives them a due process right to have copies of all documents a party submits to the Commission: Under this reading of the statute, the Commission may never render a decision based on information that is confidential or that is not available to all parties on the same terms. CAC/EPEC state that all parties must have “equal access to the information relied upon by the Commission in reaching its decisions. . . . [A]ll parties must have the same level of access to the information for there to actually be open decision making. The Commission simply cannot use as a basis for its decisions any information that is not disclosed, be it publicly or pursuant to a reasonable protective order, and sustain an open decision making process.”<sup>35</sup> CAC/EPUC cite a series of fair hearing and criminal cases which address a party’s right to cross examine witnesses, and claim that if they do not have complete

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<sup>35</sup> CAC/EPUC Opening Brief at 4-5.

access to all data before the Commission, their due process rights are violated.<sup>36</sup>

In contrast, SCE asserts that, “The law in California is well established. In the proceedings in which the IOUs submit their market-sensitive information, due process does not require the Commission to hold hearings and it certainly does not require cross-examination of witnesses or formal discovery.” SCE cites the California Supreme Court’s holding in *Wood v. Pub. Utils. Comm’n*, 4 Cal. 3d 288, 292 (1971), for the proposition that, “In adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it and does not, in so doing, adjudicate vested interests or render quasi-judicial decisions which require a public hearing for affected ratepayers.” SCE points out that none of the cases CAC/EPUC cite involve this Commission or another administrative body.<sup>37</sup>

Thus, SCE contends, CAC/EPUC are incorrect in claiming that the Commission would violate due process if it did not allow all parties equal access to records and the right to test those records by cross-examination.

#### **B. Discussion – Due Process and Confrontation Claims**

We reject CAC/EPUC’s assertions that the Commission may never rely on confidential information in reaching its decisions, must afford all parties equal access to all data, and is in violation of the constitutional right to due process and to confront witnesses if it allows parties to designate certain information as confidential.

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<sup>36</sup> See also IEP Opening Brief, at 6-7

<sup>37</sup> SCE Reply Brief, filed Feb. 22, 2006, at 15-16.

Even in a case where due process rights adhere, it is not a violation of due process for an agency to allow certain records to be deemed confidential where there is a statute allowing confidentiality in certain cases. In *Trailer Train Co. v. State Board of Equalization*, 180 Cal. App. 3d 565 (1986), the court found:

The trial court properly ruled that Trailer Train was not denied the right of cross-examination with respect to this witness' testimony. [California Revenue and Tax Code] Section 11655 provides that, subject to limited exceptions not applicable in this action, "all information and records relating to the business affairs of persons required to report to the board pursuant to this part shall be held secret by the board." (§ 11655, subd. (a).) The documents sought to be disclosed come within the meaning of this provision. (§§ 11652-11654.) As such, the Board had an obligation not to disclose the information to Trailer Train; there was no denial of its right to cross-examine the witness. In summation, Trailer Train has not established any of its several due process challenges.<sup>38</sup>

As we discuss elsewhere in this decision, § 454.5(g) allows for confidential treatment of certain utility procurement information. The trade secret statute, Evidence Code 1060, provides other protection. Thus, even if CAC/EPUC were correct that they have due process rights in Commission rulemaking proceedings, such rights do not require that they have access to every record on which the Commission relies in rendering its decisions.

We support openness in decision making and public access to records in Commission proceedings wherever possible. However, we also must allow records protected by statute to be held in confidence.

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<sup>38</sup> *Id.* at 589.

Allowing confidential treatment of such records does not violate any party's due process rights.

**IX. Interpretation of § 454.5(g)  
Protection for “Market Sensitive”  
Procurement Information**

**A. Introduction**

Because Phase One of this proceeding is focused on the confidentiality of procurement data, the parties focus much of their energy on § 454.5(g), which provides:

(g) The commission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination, provided that the Office of Ratepayer Advocates<sup>39</sup> and other consumer groups that are non-market participants shall be provided access to this information under confidentiality procedures authorized by the commission.

In the sections that follow, we describe the various parties' general views on § 454.5(g). We discuss their substantive interpretation of the data, the detailed categories of data for which the IOUs claim confidentiality protection, and the time periods for such protection.

However, the IOU Matrix (Appendix 1) is the best source for determining our item by item determinations on how to treat each type of data. Because the IOUs' confidentiality windows differ based on the type of data, and other parties have different approaches depending on the

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<sup>39</sup> The Office of Ratepayer Advocates is now DRA.

data, it is difficult to summarize their positions briefly here. The parties filed a draft IOU Matrix, setting forth their various positions in more detail in spreadsheet format.<sup>40</sup> This draft included not only the parties' positions, but the preliminary determinations that accompanied the OIR in this proceeding. Appendix 1 and Appendix 2 to this decision contain essentially the same data, but eliminate the parties' varying positions and make a determination on how each category should be treated.

**B. Parties' Positions – Meaning Of  
§ 454.5(g) “Market Sensitive”  
Information**

**1. IOUs' Positions – § 454.5(g) “Market  
Sensitive” Information**

The IOUs generally claim that § 454.5(g) protects as confidential all information with any possible association with procurement, resource adequacy, and the renewables portfolio standard, including forecasts of future prices, demand, costs, and generation needs; historical price and cost information; contracts; the bidding (RFO) process for utility generation contracts. Under this interpretation, the public must be permanently (or for several years) denied access to the vast majority of such information. The IOUs therefore interpret § 454.5(g) expansively.

For example, according to SDG&E's witness, “virtually the entire range of data can be categorized as one of two types of sensitive procurement information: 1) net short data – information that indicates a company's need to buy or sell goods and services, and a feel for the extent

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<sup>40</sup> *Joint Parties' IOU Matrix of Electric Procurement-Related Data in Rulemaking 05-06-040*, filed Jan. 17, 2006.

of that need; and 2) valuation data – information that suggests the value a company places on needed goods and services.”<sup>41</sup>

PG&E presents a long list of information that must be confidential under § 454.5(g), including utility-specific net open (short or long) positions (where there is little disagreement among any of the parties about the need for confidential treatment), but also including load and resource forecasts, generation contracts, gas hedging plans, RFO bid evaluation information, costs of generation, and many other types of data.<sup>42</sup>

SCE defines “market sensitive” information as “information that has not yet been made publicly available, which if made publicly available, would likely influence the decisions of a market participant.”<sup>43</sup> Under this definition, SCE seeks confidential treatment for four categories of data: (a) net short and net long positions; (b) information related to SCE’s willingness to pay for power; (c) contract valuation methods; and (d) non-price contract terms. Virtually every category in the IOU Matrix (Appendix 1 to this decision) fits into one of these categories, according to SCE.

Like IEP (discussed in “Market Participant and CEC Positions - § 454.5(g) ‘Market Sensitive’ Information,” below), SCE asks us to look to other statutory schemes for assistance in defining “market sensitive” information. It cites a rule used by the U.S. Food and Drug Administration (FDA), which prohibits the disclosure of “financially sensitive

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<sup>41</sup> SDG&E Opening Brief at 14.

<sup>42</sup> See PG&E Opening Brief at 3-5.

<sup>43</sup> SCE Opening Brief at 23.

information,” which is “non-public information which could be reasonably expected to influence an investment decision by one having knowledge of the information.”<sup>44</sup> SCE also cites rules used in the United Kingdom and by the Joint Market Practices Forum, which represents entities who trade in derivatives and corporate debt.

The IOUs do not address the limitations or meaning of that portion of § 454.5(g) that applies protection only to an “electric corporation’s proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination...” Nor do they address in detail what the statute means by requiring that the Commission “adopt appropriate procedures to ensure the confidential of [such] market sensitive information.”

Generally speaking, the IOUs seek either permanent confidential protection for their data – with releases under protective order or confidentiality agreement allowable only to non-market participants – or protection in the three-year range. They choose three years because it is the shortest time within which new generation can come online. A shorter confidentiality period, according to these parties, could allow entities receiving the information to use it for ill, and new generation would be unavailable to offset energy price impacts.

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<sup>44</sup> *Id.* at 24, citing “Nondisclosure of Financially Sensitive Information,” Integrity Memorandum G92-1, FDA Office of Device Evaluation Review Staff (March 5, 1992).

**2. Ratepayer Group Positions -  
§ 454.5(g) “Market Sensitive”  
Information**

TURN generally sides with the IOUs and advocates strong confidentiality protections for procurement data: “TURN believes that this Commission is free to adopt a definition of ‘market sensitive’ procurement information that is geared toward protecting the ratepayer interest in the lowest reasonable procurement costs to the maximum extent possible, including barring MPPs from access to such information if its disclosure would provide such market participants with the means to extract higher prices.”<sup>45</sup>

TURN receives all such data under a confidentiality agreement or other order, either because of its membership on the IOUs’ Procurement Review Groups or because of its status as a non-market participant. TURN assures the Commission that it is watching out for the interests of ratepayers and that granting market participants’ pleas for access to IOU procurement data will only cause ratepayer harm. TURN generally favors a window of confidentiality approach that would treat procurement information as “market sensitive” for one year backward and three to five years forward, depending on the specific nature of the information. TURN believes “three years is an approximation of the amount of time required for the entry of new supply into the market.”<sup>46</sup> However, TURN supports proposals to make more renewable resource procurement information public, in light of the strong public interest in such matters.

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<sup>45</sup> TURN Opening Brief at 6.

<sup>46</sup> See *Prepared Rebuttal Testimony of Michael Peter Florio*, Ex. 1201 at 7:15-16.

TURN also recommends that ESP compliance filings regarding RPS and Resource Adequacy (RA) requirements be made available to non-market participants, subject to confidentiality restrictions approved by the Commission.<sup>47</sup>

Green Power “urges the Commission to interpret § 454.5(g) narrowly rather than broadly, making as much utility procurement planning information publicly accessible as possible, while protecting the rights and interests of all parties.”<sup>48</sup> Alone among the parties, Green Power advocates a distinction between cost and price data. It claims that “cost data deserve far more consideration for confidential treatment than quantity data” because biomass generating plant owners treat the data differently. Green Power cites a study of biomass operators who had no objection to releasing information about the quantity of biomass (plant material, vegetation or agricultural waste used as fuel) they used, but strongly objected to disclosing how much they paid for that material.<sup>49</sup>

### **3. Market Participant and CEC Positions – § 454.5(g) “Market Sensitive” Information**

The IOUs’ competitors (except AReM and CNE, which focus only on the confidentiality of ESP data), take a much more limited view of § 454.5(g)’s requirement of a process to ensure confidentiality for “market sensitive” information. They seek either public release of data the IOUs

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<sup>47</sup> TURN Opening Brief at 1.

<sup>48</sup> Green Power Opening Brief at 2, citing its Opening Testimony, Ex. 1001 at 2-3. We admit the study as Ex. 1010, upon Green Power’s motion of June 19, 2006. The ALJ gave parties time to object to the exhibit and no party did so.

<sup>49</sup> Green Power Opening Brief at 6.

claim is confidential or shorter time periods for protection. Where, for example, the IOUs seek a three-year window of protection for forecast information and a one-year window for historical data, competitors seek one- or two-year windows for forecast data and 90 day windows for historical data.

IEP focuses on process issues under § 454.5(g). It believes everyone may have access to market sensitive information so long as a reasonable protective order is in place: “To harmonize the requirements of SB 1488 with those of § 454.5(g), the commission should provide access to all information (including market sensitive information) to all participants who are willing to abide by the terms of a reasonable protective order.”<sup>50</sup> IEP does not believe § 454.5(g) requires that market participants be treated differently from non-market participants (a contention we discuss separately below).

IEP analogizes to securities law under § 10(b) of the Securities Exchange Act of 1934<sup>51</sup> and Securities and Exchange Commission Rule 10b-5.<sup>52</sup> Under those provisions, in order to be deemed to have an impact on the market, information must be material. Materiality is determined by the significance a reasonable investor would place on the (misrepresented) information. By analogy to securities regulation, IEP states that a definition for “market sensitive” data could be based on a materiality standard:

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<sup>50</sup> IEP Opening Brief at 12.

<sup>51</sup> 15 U.S.C. § 78j(b).

<sup>52</sup> 18 C.F.R. § 240.10b-5.

Market sensitive information would be defined as information that is material to a reasonable buyer or seller of power in making decisions regarding the price for, or quantity of, a purchase or sale of electricity. Information that does not affect the price at which an electricity product is bought or sold or the quantity offered for sale or accepted for purchase is not material and thus not market sensitive.<sup>53</sup>

IEP also suggests we look to antitrust law in defining market sensitive information. Under this approach, we would undertake the following analysis to determine whether information is market sensitive: 1) does keeping the information confidential improve or undermine a well-functioning market?; 2) are the effects of disclosure ones that would not ordinarily be experienced in a competitive marketplace?; 3) can the information be used to manipulate the market in the future, even if all competitors have access to the same information?; and 4) are the effects persistent and measurable?<sup>54</sup>

The CEC also advocates great openness. In its view, market sensitive information under § 454.5(g) will always meet the definition of “trade secret” and therefore be entitled to the same protection as trade secrets receive under the California Public Records Act. In other words, the CEC contends, if data does not meet the definition of trade secrets, it is not market sensitive under § 454.5(g).<sup>55</sup>

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<sup>53</sup> IEP Opening Brief at 19.

<sup>54</sup> *Id.* at 19-20.

<sup>55</sup> CEC Opening Brief at 7.

**C. Discussion – Meaning of “Market Sensitive” Information Under § 454.5(g)**

**1. Introduction**

We must strike an appropriate balance in interpreting § 454.5(g). We are a public agency that regulates public utilities, and most of our business must be conducted in a public forum.<sup>56</sup> Allowing public access to documents is part and parcel of an open decision making process.

All parties concede, however, that there must be some limitation on data available to the general public – and, in turn, to market participants. We must not forget the context in which Assembly Bill (AB) 57 (the act that promulgated § 454.5(g)) arose. The statute, signed in 2002, was conceived in the midst of the state energy crisis. The Legislature wished to assist the IOUs’ return to creditworthiness by encouraging them to enter into long term contracts for electricity. The IOUs asserted – and most agreed – that in order to encourage such contracting, the IOUs must be assured in advance of recovery in rates of their contracted energy prices, rather than running the risk that the Commission would disapprove their contracts in after-the-fact, hindsight-driven reasonableness reviews.

While there is no legislative history on the confidentiality provision of § 454.5(g), the provision is part of a larger statute dealing with the IOUs’ return to long-term procurement through a competitive bidding process. As we discuss below, we believe this context, and the language of § 454.5(g) itself, dictate several outcomes.

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<sup>56</sup> Public Records Act, Cal Gov. Code § 6250 et seq., California Constitution, Article 1, § 3(b).

First, the statute covers only procurement plans and related contracts and information. Second, not all procurement plan and related data is market sensitive; a subset of such information meets this definition. Such information must have the potential to materially affect an electricity buyer's market price for electricity. Data that can have no material impact on this price are not "market sensitive." Finally, we must develop procedures to ensure the confidentiality of information meeting the foregoing two requirements.

## **2. Limited to Procurement Information**

Section 454.5(g) is limited in scope to "an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination."

To the extent the IOUs attempt to extend protection for "market sensitive" information to every document that conceivably relates to resource adequacy, the RPS, and their procurement function, they overstate the statute's scope. The information must, at the very least, be contained in procurement plans or power purchase agreements, or relate to these documents.

## **3. Potential to Affect the Market – Materiality Standard**

Section 454.5(g) does not protect every record connected to procurement; it only relates to "market sensitive" information submitted in procurement plans and related documents. Had the Legislature intended all information in procurement plans and related documents to be confidential, it could have said so. The term "market sensitive" must be

limited to information with the potential to affect the market for electricity in some way.

For this reason, we agree with IEP that there must be a materiality standard attached to the term “market sensitive.” Information only has the potential to affect the market if it is material. Immaterial information will have no impact on the market price for energy. We do not intend to import the law regulating securities (§ 10(b) and Rule 10b-5) into our materiality determination, and parties should not use case law interpreting those legal provisions in this context. We do agree, however, that in order to be deemed “market sensitive” in the context of § 454.5(g), information must be material. Information is material if it affects the market price an energy buyer pays for electricity.

The IOUs effectively concede this point by opposing access to procurement information by market participants. They assert that such access will allow such parties to overprice the electricity the IOUs procure, and harm ratepayers through higher prices. Information that does not allow market participants to raise the price of electricity the IOUs procure from them is not, therefore, market sensitive information.

#### **4. Procedures to Ensure the Confidentiality of Market Sensitive Information**

Section 454.5(g) requires the Commission to adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in procurement plans and related submissions. The procedure we adopt here relies on the IOU Matrix in the first instance to identify the data the IOUs may treat as confidential.

Because IOUs must show that information they seek to keep confidential could have a material impact on their market price for electricity, only data in the Matrix that meet this definition may be held in confidence. Several categories in the IOU Matrix do not meet this required showing, as shown in Appendix 1 to this decision. Where we find that the material is not “market sensitive,” we require the data’s public disclosure. Where some but not all related data require confidentiality protection, we specify the relevant data. Where the data have the potential, if released to market participants, to materially affect a buyer’s market price for electricity, we require confidentiality of that data. The most sensitive data may require protection for five years, but cases of such protection in the IOU Matrix are rare. In most cases, we adopt a window of confidentiality for such data that protects it for three years into the future, and one year in the past at most.

We disagree with IEP and others who argue that all data should be available pursuant to a “reasonable protective order.” Data that are confidential may be kept from market participants altogether, although we will always require that the producing party meet its burden of proving that it cannot produce aggregated, partially redacted, summarized or other data that do not reveal the confidential material.

**X. Section 454.5(g) Distinguishes Between Market Participants and Non-market Participants**

Several parties claim that § 454.5(g) does not permit the Commission or other parties to provide different access to data depending on whether they compete in the market for electricity. We find these assertions to lack merit. Section 454.5(g) states that, “the Office of Ratepayer Advocates

(DRA) and other consumer groups that are non-market participants shall be provided access to [procurement] information under confidentiality procedures authorized by the Commission.” The statute makes no such allowance for market participants who compete with electric utilities. We discuss this issue in the following paragraphs.

**A. Parties’ Positions – Non-market vs. Market Participants Under § 454.5(g)**

IEP makes the claim most directly that § 454.5(g) provides no distinction for confidentiality purposes between non-market and market participants. IEP asserts that the language providing DRA and other consumer groups who are non-market participants access to confidential documents

- does *not* exclude market participants from those parties who are “provided access to this information under confidentiality procedures authorized by the commission,”
- does *not* require the Commission to withhold market sensitive information from market participants (however defined); and
- does *not* restrict the Commission’s discretion to develop “appropriate” procedures to address confidentiality or its discretion to employ those procedures to provide participants in procurement proceedings or other members of the public (in addition to DRA and consumer groups) with the same access to confidential materials that the entities listed in the statute will receive.

On the other side of the equation, PG&E claims that, “[b]y referring to ‘non-market participants,’ the Commission expressly excluded ‘market participants,’ who are the only possible opposite class.” PG&E goes on to assert that, “If the Legislature had intended to give market participants

access to market sensitive information ‘under confidentiality procedures authorized by the commission,’ the Legislature would have said so. Because the Legislature has not empowered the Commission to grant access to market participants even under ‘authorized’ confidentiality procedures, the Commission cannot give market participants such access.”<sup>57</sup>

California Manufacturers and Technology Association (CMTA) claims it has been treated erroneously as a market participant in the past, even though it is a trade association. It notes that SCE has claimed that organizations such as CMTA should be considered market participants because their membership includes entities such as Duke Energy, Calpine Corporation, Constellation Energy and similar generator companies. We defer this specific issue for further briefing.

**B. Discussion – Non-market vs. Market Participants Under § 454.5(g)**

The reference in § 454.5(g) granting access to DRA and other consumer groups who are non-market participants is evidence of a legislative intent to distinguish between non-market participants and market participants. We agree with PG&E that the Legislature could have easily said that market participants should have the same access to data as non-market participants if that had been its intent. Moreover, § 454.5(g)’s key purpose is to address protection for “market sensitive” information, and it makes sense in that context that the Legislature would be sensitive to the risks utilities face if participants in that market have access to their data. The Legislature’s concern about protecting the confidentiality of

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<sup>57</sup> PG&E Opening Brief at 11.

“market sensitive” information logically includes restrictions on access to data for those who operate in that “market.”

Thus, it is appropriate and lawful under § 454.5(g) to make distinctions between non-market participants and market participants in determining whether to grant access to confidential data. We cannot anticipate in advance every distinction we might draw, and thus do not adopt a specific process here. Nor do we agree with PG&E that market participants may never have access to “market sensitive” information. There may be instances, for example, where it is appropriate to release such information in aggregate, redacted, or masked form.

Our decision here finds that § 454.5(g) does not preclude the Commission (or parties) from making distinctions between non-market and market participants in granting or denying access to “market sensitive” data. We will determine a more precise definition of the two terms upon receipt of additional briefing, as noted in the ordering paragraphs below.

**XI. “Market Sensitive” Information Is Different From “Trade Secrets”**

Several parties assert that we should interpret § 454.5(g) coextensively with Evidence Code § 1060’s protection for trade secrets.<sup>58</sup> We find no merit to this assertion. While there may be instances in which information meets both statutory bases for confidentiality protection, neither the language of § 454.5(g) nor its legislative history provides support for interpreting the two statutes coextensively. Trade secret law

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<sup>58</sup> The California Public Records Act creates an exception to the general requirement that government records be open by providing protection for trade secrets. Cal. Gov’t Code §§ 6254(k), 6254.7(d).

and § 454.5(g) provide independent bases for protecting confidential information, and SB 1488 does not give us leave to ignore these statutory provisions.

**A. Parties' Positions – Market Sensitive Information vs. Trade Secrets**

CAC/EPUC claims that “Caselaw on trade secret and market-sensitive information suggests that the ultimate treatment of these categories of information is the same.”<sup>59</sup> Similarly, “Other than the distinctions described above, SCE believes that most confidential data is both trade secret and market sensitive.”<sup>60</sup> While PG&E asserts that “[t]here is no formal distinction between ‘trade-secret’ and ‘market sensitive,’” it goes on to identify a distinction:

As a rule of thumb however, PG&E considers “trade secret” to include information and data that it creates and used in the course of its business practices, such as its load forecasting methodologies and forecasts, projections of unit operations, new resource procurement, and resource need. Additional types of information that PG&E considers trade secret would include contract terms designed to meet specific PG&E requirements. Market sensitive information would include most if not all trade secret information, and would also include information that is not developed by the utility but may have commercial value.<sup>61</sup>

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<sup>59</sup> CAC/EPUC Opening Brief at 22.

<sup>60</sup> SCE Opening Brief at 26.

<sup>61</sup> PG&E Opening Brief at 16.

In perhaps the narrowest view, the CEC asserts that the only protection for data identified in the Matrix is trade secret protection: “The CEC believes that ‘market sensitive information’ will always meet the definition of trade secret.”<sup>62</sup>

In contrast, “TURN submits that the trade secret concept is clearly narrower in scope [than ‘market sensitive’ information], having been defined and limited by years of judicial interpretation. The definition of ‘market sensitive’ does not enjoy the same history, and thus this Commission is free to interpret the term as appropriate to its proceedings.”<sup>63</sup>

**B. Discussion – Market Sensitive Information is Not the Same as Trade Secret Information**

The OIR asked the parties to address trade secrets vis-à-vis market sensitive information because trade secret law is well developed and therefore provides a possible *process* for handling market sensitive information:

According to Evidence Code § 1060, the owner of a trade secret has a privilege against disclosure so long as allowance of the privilege “will not tend to conceal fraud or otherwise work an injustice.” The party claiming the privilege must establish that the information is a trade secret and that the party is its owner. Thereafter, the party seeking discovery must show that the information is “relevant and necessary to proof of . . . a material element of a cause of action” and essential to resolution of the case. Then the party claiming privilege must

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<sup>62</sup> CEC Opening Brief at 7.

<sup>63</sup> TURN Opening Brief at 6.

demonstrate the disadvantages of alternatives to full disclosure, such as a protective order.<sup>64</sup> We seek comment on whether we should apply the Evidence Code § 1060 framework here.<sup>65</sup>

We acknowledge that the request for comment on this point may have led the parties to believe we were seeking input on the substantive similarities between trade secrets and “market sensitive” information, when it was the process and relative burdens of proof on which we sought input.

We find no use in straining to read the two statutes as covering the same substantive information. There is no evidence from the statutory language that they are the same. While it might be neater to have one confidentiality statute rather than two, we cannot change the law.

Under Evidence Code § 1060, the Uniform Trade Secrets Act, trade secrets consist of

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that:  
(1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Market sensitive information, by contrast, is not defined in § 454.5(g), and the legislative history contains no helpful information, but the statute gives us no reason to believe that by “market sensitive,” the Legislature meant

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<sup>64</sup> Weil & Brown, *Civil Procedure Before Trial*, Scope of Discovery, Ch. 8C, at 8C-24 to 8C-24.1.

<sup>65</sup> OIR, *mimeo.* at 8.

“trade secret.” If the Legislature had so intended, it could have said so expressly.

Even if the statutes cover different substantive information, the *process* for analyzing trade secrets is helpful to determining how to protect “market sensitive” information. As we discuss more fully in the section entitled “Practical Application of SB 1488,” above, the party seeking to assert that it possesses a trade secret or market sensitive information bears the initial burden of proving that its information meets the requirements for protecting such information.

Mere recitation of the conclusory statement that information is a trade secret, or is market sensitive procurement information, is not enough to meet this burden. Rather, for information listed in the Matrix (Appendices 1 and 2), the producing party always bears the initial burden of proof that the information is entitled to protection. For data not in the Matrix, the producing party also bears the burden of proof, without the benefit of the Matrix determinations.

## **XII. The Confidentiality Rules Applicable to IOUs and ESPs Need Not Be Identical**

The parties are divided on whether we should devise identical rules for IOUs and ESPs when it comes to confidentiality. Some would require identical treatment, others acknowledge that the confidentiality statutes do not all refer to IOUs and ESPs together but nonetheless find it practical to treat the two groups the same, and still others contend ESPs should be given more protection than IOUs because they allegedly face greater competitive pressures. We find that the confidentiality rules applicable to IOUs and ESPs (or other IOU competitors) need not be identical.

**A. Parties' Positions on Whether IOUs and ESPs Should Be Treated Identically**

AReM and the CEC recommend that the Commission avoid adopting rules that would require an identical result for ESPs and the IOUs and take into account that the two types of entities operate differently in the energy market. In addition to advocating at least for equal treatment of IOUs and ESPs, AReM goes further and seeks greater protection for ESP data in some instances:

ESP data should in some instances be given a higher degree of protection or should not be requested from regulatory bodies at all. ESPs do not seek cost recovery from the Commission, because ESPs recover their costs through negotiated contracts with customers. IOUs, however, present complicated cases before the Commission wherein they request recovery of costs associated with their utility function. That process requires disclosure so that the Commission and the public can satisfy themselves that the request is just and reasonable as a matter of fulfilling their regulatory role. ESPs, however, are submitting information to satisfy a legislative requirement to fulfill RA and RPS requirements, for which the Commission is the body charged with verifying and enforcing compliance.<sup>66</sup>

AReM concedes that ESPs are not covered by § 583 or § 454.5(g), but ask us to apply their protections to ESPs anyway. "Previously the Commission has directed its staff to treat confidential ESP information *as if* Section 583 applied."<sup>67</sup> Acknowledging the difficulties in our making the misdemeanor provision in § 583 applicable to non-public-utilities, AReM

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<sup>66</sup> AReM Opening Brief at 22.

<sup>67</sup> *Id.* at 11.

instead suggests that we “expressly [notify] staff that they are subject to the provisions of Section 2112 with regard to their handling of confidential ESP data through the use of protective orders and the requirement to execute associated non-disclosure agreements.”<sup>68</sup>

The CEC agrees generally with AReM that if any entities deserve greater protection than the other, it is ESPs over IOUs. “Thus, release of identical information may have harmful economic consequences for ESPs, but not for utilities.”<sup>69</sup>

TURN takes the middle road:

Since PU Code Sections 454.5(g) and 583 are not applicable to ESPs, arguably those entities are not entitled to same protections as public utility electrical corporations. However, given the policy arguments in favor of affording ESPs some degree of confidential treatment, TURN believes that the Commission would be justified in providing ESPs with the same types of protections afforded to the utilities. It would appear to turn the statutory scheme on its head, however, to afford ESPs greater protections than electric corporations. . . .<sup>70</sup>

**B. Discussion – The Confidentiality Rules Applicable to IOUs and ESPs Need Not Be Identical**

**1. Process For Claiming Confidentiality Should be the Same for All Entities**

The *process* for dealing with confidential documents should be the same regardless of who claims entitlement to protection. The burden of showing that information meets one of the various statutory protections

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<sup>68</sup> *Id.* at 12.

<sup>69</sup> CEC Opening Brief at 11.

<sup>70</sup> TURN Opening Brief at 5.

shall always be on the holder of the data. That party shall always have to make a particularized showing that its data meet the statutory definition, and may not ever simply label the data with the statutory language and rest. The party seeking the information will then have some opportunity to respond, but never bears the initial burden of proof. This general process should apply whether the producing party is an IOU, an ESP, a future Community Choice Aggregator, or any other entity.

A party seeking confidentiality – regardless of its regulatory status – must always bear the burden of showing legal entitlement to confidentiality. No such party may successfully claim its data is confidential without a particularized showing. When the data appear in the Matrix (Appendices 1 or 2), the party seeking confidential treatment must show that the data match the categories in the Matrix, are not public, and cannot be aggregated or masked, as discussed elsewhere in this decision. When the data are not in the Matrix, the party must show entitlement to protection under the trade secret law, the Evidence Code provisions regarding attorney-client and other privileges, confidentiality statutes such as § 454.5(g), GO 66-C as currently written, or other provision of law.

TURN and AReM raise an important point – that neither § 583 nor § 454.5(g) directly apply to ESPs. Section 583 is limited to information furnished to the Commission by a “public utility.” Section 454.5(g) only relates to “electrical corporations” who submit procurement plans. No one asserts that ESPs are public utilities, and AReM asserts that they are not electrical corporations either.<sup>71</sup> While there may be instances in which the

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<sup>71</sup> AReM/CNE Opening Brief at 10 n.11 & 11 n.12.

latter point is incorrect, we will assume for the sake of argument here that the ESPs before us meet neither the § 583 nor the § 454.5(g) definition. While we cannot write ESPs into either statute,<sup>72</sup> and therefore decline to treat ESPs as if they were covered by statute, we also believe it is within our discretion to require that all parties that come before us follow the same procedure in seeking confidentiality designations for their documents.

We disagree with AReM, however, that we should notify Commission staff that they must execute non-disclosure agreements and agree to be bound by § 2112 when receiving ESP data. It is inappropriate to require Commission staff - including DRA - to enter into private contractual agreements with the entities we regulate or that otherwise come before us.

As for § 2112, which creates a misdemeanor and penalties for violation, among other things, of Commission orders, we do not need to instruct staff to obey the law. The statutory requirements in § 2112 exist regardless of what we tell staff, and it would be cumbersome to issue instructions to staff every time they receive confidential information.

## **2. Substantive Confidentiality Determinations Will Depend on Producing Party's Market Position**

We agree with AReM, however, that there may be differences between parties that justify different *substantive* treatment of data. We do not necessarily agree with AReM's assertion that ESPs as a group deserve

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<sup>72</sup> Section 583, for example, makes it a crime for Commission staff to disclose information furnished by public utilities that the Commission has deemed confidential. We cannot apply this criminal provision to data from non-public utilities because we do not have the authority to create new crimes.

greater protection than IOUs in all instances. Thus, our finding that we need not treat all entities identically should not be construed to suggest that we think ESPs in all situations deserve more protection for their data than IOUs. There may well be instances, for example, where ratepayer harm from release of IOU data could be far greater than if equivalent data from an ESP were released, given just the size differences of the two types of entities. There should be room for differently-situated entities to make different claims about which of their data are and are not confidential, and parties opposing such claims to do the same. As the CEC states, “whether a particular piece of information derives economic value from not being generally known to the public or other persons may depend on the market position of the owner of the information.”<sup>73</sup>

We cannot anticipate in advance every situation in which such differences might arise, but we are also reluctant to create a rule requiring that every entity’s documents must receive identical confidentiality treatment. One business may be able to argue that its customer list is not publicly known. Another may not be able to make such a showing, since its customers are well publicized. We would find a rule requiring identical treatment of all contracts too constraining. The merits of a claim that data are confidential will always depend on the context, and we must have the flexibility to make decisions based on specific facts rather than developing across-the-board rules.

This is why it is especially important that parties seeking confidential treatment bear the burden of proving entitlement to such treatment. Without evidence from such parties about the nature of the

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<sup>73</sup> CEC Opening Brief at 11.

data and the harm that would result from release, we cannot adequately assess confidentiality claims.

### **XIII. Access to ESP Data**

The ESPs note that neither § 583 nor § 454.5(g) apply to them, but urge us to use the same or similar rules for them as those we apply to IOUs. We discuss this issue below.

#### **A. Parties' Positions – Access to ESP Data by Non-market Participants**

AReM/CNE contend that TURN and Green Power should not have access to their electricity procurement data. They assert that the Commission can assess ESP data without these parties' help, and claim they only need – and perhaps will obtain better information from – aggregated information:

While TURN may be accustomed to looking over staff's shoulder in matters involving the public utilities that the Commission regulates, there simply is no need for TURN or any other private party to play a similar role in connection with staff's verification of ESPs' compliance with the RAR.<sup>74</sup>

AReM makes similar statements about Green Power:

The Green Power Institute ("GPI") and other parties have expressed concern about their ability to monitor ESPs' compliance with the RPS and their progress toward the state's renewable procurement goals without having access to some ESP data. In reality, however, aggregated ESP information would be more useful for such purposes, given that ESPs *as a group* serve less than 10%

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<sup>74</sup> AReM/CNE Opening Brief at 38.

of the state's total load and each ESP only serves a fraction of that 10% of load.<sup>75</sup>

TURN opposes any limitation on its ability to have access to ESP data submitted in the RPS or RA contexts:

[It] would be especially egregious to bar [Non-market Participating Parties] NMPPs from reviewing relevant ESP data subject to the terms of a nondisclosure agreement, given that such entities are explicitly granted access to utility confidential data by statute. For purposes of this proceeding, TURN maintains that ESP compliance filings pursuant to Resource Adequacy (RA) and the Renewables Portfolio Standard (RPS) requirement should be available to NMPPs who agree to be bound by a reasonable protective order.<sup>76</sup>

**B. Discussion – Access to ESP Data by Non-market Participants**

The work of intervenor groups such as TURN and Green Power is invaluable to the Commission. The intervenor compensation statutes and rules acknowledge the importance of such groups to the Commission's decision making process by providing for compensation to them if they make substantial contributions to our decisions. We do not view the work they do as "looking over our shoulders"; rather, it is an integral part of the work we do. Our many intervenor compensation awards to TURN, Green Power and other similar consumer, environmental, community and non-profit groups over the years constitute an acknowledgement of the key role these groups play in contributing to our process.

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<sup>75</sup> *Id.* at 39 (emphasis in original).

<sup>76</sup> TURN Opening Brief at 5.

We therefore reject AReM/CNEs' premise that Commission-only or government-agency-only analysis of ESP (or other) data is better than examination by government plus outside non-market groups. Part of what gives our processes legitimacy is participation from outside groups in our decision making process. With their participation, we consider diverse viewpoints, examine concerns, and develop a fuller record in support of our decisions.

We do not agree that giving non-market participants access to aggregate data is always a full substitute for access to unredacted, detailed information. While there may be ratepayer harm concerns about giving market participants access to the detail (as discussed elsewhere in this decision), there is no basis to restrict non-market participants to receiving only aggregated or redacted information.

Further, AReM points to no instances in which TURN or Green Power (or other non-market participants) abused or neglected data they received in the context of our RA or RPS proceedings. It is common in litigation and in many other contexts for parties to receive information pursuant to a confidentiality agreement or protective order. We do not think it right to assume that parties appearing before us cannot be trusted to abide by the terms of such documents absent evidence of a prior history of violation.

Nor do we view having a point of view about policy as being the same as being a market participant. TURN, Green Power, and other intervenor groups clearly take strong policy positions in our proceeding. That is the point of their participation in many instances. However, taking a position is not the same as being a competitor in the market for electricity or other goods or services. The Legislature acknowledged in enacting

§ 454.5(g) that there may be differences between market participants and non-market participants, and we find the difference to be important.

Where a party (or its membership) does not actually trade or conduct business in the market to which the data at issue pertain, it is not a market participant.

Thus, TURN and Green Power shall not be precluded from access to any ESP (or, for that matter, IOU) data as long as they agree to a protective order or confidentiality agreement where there is a need to protect the data. We reject AReM's request to the contrary.

#### **XIV. RPS Data**

We have provided in the Matrix for somewhat greater public access to RPS data than other data, due to the strong public interest in the RPS program.<sup>77</sup>

The RPS program, required by Pub. Util. Code §§ 399.11 through 399.16, requires the Commission to establish a program whereby the utilities must purchase a specified minimum percentage of electricity generated by renewable energy resources. The utilities must increase their total procurement of eligible renewable energy resources by at least one percent per year so that twenty percent of their retail sales are procured from eligible renewable energy resources by December 31, 2010.

Renewable energy resources include wind power, biomass, geothermal energy, solar power and biodiesel.

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<sup>77</sup> See, e.g., D.05-07-039, *mimeo.*, p. 3 (declining to decide long term RPS solicitation plans without having all IOU data publicly available: "Because of the public importance of RPS planning issues, we are reluctant to issue a decision on RPS long-term planning without discussing all relevant information.").

For many reasons – including climate change, air quality, price and supply constraints – California has chosen to lead the way in promoting renewable sources of electricity. As the IOUs in their draft matrix note, the Commission has treated as public information in other energy areas that focus on reducing energy demand and environmental harm, such as the energy efficiency and demand response programs. Consistency with our other programs, and the lack of a specific statute governing RPS data (except as discussed below) warrant greater openness for RPS data.

**A. Section 399.14(a)(2)(A)**

Section 399.14(a)(2)(A) prohibits a utility from sharing the results of a competitive solicitation for renewable resources until the Commission has established the market price referent that will determine whether winning bids from the solicitation qualify for Supplemental Energy Payments (SEPs). SEPs are payments, administered by the CEC, that are intended to cover some or all (at CEC’s discretion) of the difference between the market price referent and the (higher) price of RPS contracts that are approved. Thus, the protection in § 399.14(a)(2)(A) is temporary.

The Commission adopted a methodology for determining the market price referent in D.05-12-042. We noted in that decision that § 399.14(a)(2)(A) requires only that we make determinations of market prices after the closing date of a competitive solicitation. Thus, § 399.14(a)(2)(A) provides confidentiality for the results of a competitive solicitation only until the solicitation is complete. This is a very narrow confidentiality requirement that does not change our general conclusion

that most RPS information should be public. It does not affect any of the categories in the ESP Matrix (Appendix 2).<sup>78</sup>

**B. Section 399.12(c)(3)(B)**

Section 399.12(c)(3)(B) states that “nothing in this subdivision [which defines ‘retail seller’ for purposes of the RPS] may require an electric service provider to disclose the terms of the contract [between the ESP and the retail customer] to the commission.” The ESP Matrix reflects this confidentiality provision, which is a narrow one. The parties are primarily concerned in this proceeding with data flowing between IOUs and ESPs, and not with end-user retail customer contracts. Thus, this provision has no bearing on our general conclusion in this decision regarding RPS data.<sup>79</sup>

**C. Details of Compliance**

We do not agree with AReM/CNE that information regarding *whether* ESPs are complying with RAR or RPS requirements is sufficient information to release publicly.<sup>80</sup> Information about *how* ESPs are complying – their resource mix, the adequacy of their projections, whether they are meeting RPS targets – should also be subject to public disclosure.

**XV. Matrix Treatment of Data Types–  
IOU Data**

The following sections of this decision address the specific categories of data relevant to the “procurement umbrella” proceedings we ruled to be within the scope of Phase One of this proceeding. We discuss each category, and explain how each type of data should be treated for

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<sup>78</sup> See IEP Opening Brief at 14.

<sup>79</sup> IEP discusses this provision in its Opening Brief at 13-14.

<sup>80</sup> See AReM/CNE Opening Comments at 54.

confidentiality purposes. The three large IOUs whom we named as respondents in this proceeding (PG&E, SDG&E and SCE) shall follow these rules when submitting any data in the Matrix in any proceeding.

In Appendix A to the original OIR, we listed the types of documents that IOUs might produce in the context of procurement (and related proceedings) and the Energy Division made initial determinations of how the data should be treated. The parties moved and added categories, with leave of the ALJ, to make the Matrix more comprehensive. To avoid confusion, we will work now from the new versions of the IOU Matrix and ESP Matrix.

The IOU Matrix contains 13 categories of data, as follows:

1. Natural Gas Information
2. Cost Forecast Data - Electric
3. Forecast of Revenue Requirements and Customer Rates - Electric
4. Resource Planning Information - Electric
5. Load Forecast Information and Data - Electric
6. Net Open Position - Electric
7. Bilateral Contract Terms and Conditions - Electric
8. Competitive Solicitation (Bidding) Information - Electric
9. Strategic Procurement Information - Electric
10. Recorded (Historical) Data and Information - Electric
11. Monthly Procurement Cost (Energy Resource Recovery Account [ERRA] Filings)
12. Monthly Portfolio Risk Assessment
13. Energy Division Monthly Data Request (AB 57)

### **A. Highlights of IOU Matrix**

We do not discuss each category of data contained in the IOU Matrix here. We have attempted to adopt the parties' approach to confidentiality.<sup>81</sup> We find, however, that in several instances, some or all of the IOUs have proposed confidential treatment of an excessive amount of data. For detailed information, parties shall refer to the IOU Matrix (Appendix 1).

Our approach to IOU data is the following:

- Historical data should be public after 1 year;
- Residual net open (short or long) information should be confidential for 3 years;
- Near term forecast information (daily, monthly information) should receive greater protection than longer term forecasts;
- RPS information should be public to a greater extent than non-RPS data (except the price term in contracts, which may be confidential);
- Individual contracts for energy or capacity should be confidential for 3 years from the date the contract states that energy deliveries begin, except contracts between IOUs and their own affiliates, which should be public;
- Contract summaries should be public;
- Bid/RFO information in the IOU procurement context should be partially public and partially confidential, depending on the specificity of the data;

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<sup>81</sup> See *Joint Parties' IOU Matrix of Electric Procurement-Related Data Rulemaking 05-06-040*, filed Jan. 17, 2006.

- A window of confidentiality approach that protects future looking information more than historical information should be used;
- Information that is public in one forum/proceeding shall be public everywhere; and
- Information shall be treated the same in all proceedings in which it is furnished to the Commission, including proceedings not yet commenced.

#### **B. Quantity Data vs. Cost Data**

We do not agree with Green Power that quantity data is always less sensitive than cost data. Green Power cites a study in its brief that tends to establish that biomass plant operators are willing to disclose how much biomass material they purchase, but not the price they pay. There may well be differences between power plants fueled by biomass and other generation. While we do not establish a hard and fast rule distinguishing cost and quantity data, any party may make this argument in seeking protection for (or disclosure) individual types of data listed in the Matrix.

#### **XVI. Matrix Treatment of Data Types – ESP Data**

In preparing their version of the Matrix (ESP Matrix – Appendix 2), the ESPs used the categories the IOUs had used in their version. However, many of the categories in the IOU Matrix are currently irrelevant to ESPs. Thus, we have modified the ESP Matrix the parties submitted<sup>82</sup> to suit the current ESP participation in meeting the state's needs for electricity. Most of their participation falls in the area of RPS and RA.

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<sup>82</sup> *Revised ESP (Retail Provider) Matrix*, filed Feb. 2, 2006.

Once again, we do not discuss each category in the ESP Matrix here; parties should refer to the Matrix for specific requirements. Our general approach to ESP data confidentiality is the following:

- RPS information should be public (except the price term in contracts, which may be confidential);
- Bid/RFO information in the IOU procurement context should be partially public and partially confidential, depending on the specificity of the data; and
- A window of confidentiality approach that protects future looking information more than historical information should be used.

## **XVII. Phase Two**

With this decision, we also commence Phase Two of this proceeding by posing a series of questions. Respondents shall, and other parties may, file and serve comments responsive to these questions within 30 days of Commission adoption of this decision.

### **A. Consequences For Excessive Confidentiality Designations**

We intend for parties to treat confidentiality designations with care. They must think about whether they are simply asking for confidentiality as a rubber stamp, or whether evidence truly needs protection. Thus, the requirement that parties show that their data meet the criteria we establish here must have teeth. If there are no consequences of overstating the need for confidentiality, we suspect parties will simply err on the side of asking that too many documents be held under seal.

In order to ensure that parties make an honest effort to prove that documents meet the various legal definitions for confidentiality (e.g., for

trade secrets or “market sensitive” information), we will no longer allow parties to submit data under seal accompanied by boilerplate motions for leave to file under seal that do not address the specific documents at issue.

We seek comment on whether it is appropriate for us to adopt the following requirements:

1. A motion that simply asserts, without explanation, that the data contain trade secrets or “market sensitive” information will be denied as incomplete.
2. A party whose motion has been denied for violation of item 1 that refiles the motion in substantively the same form may be subject to penalties pursuant to § 2107 at the discretion of the Assigned Commissioner, Assigned ALJ or Law and Motion ALJ.
3. A party seeking confidentiality treatment shall provide in its motion, in text or table form, the following information:
  - a. Legal basis for asserting confidentiality (*e.g.*, § 454.5(g), trade secret, privilege);
  - b. If covered by the IOU or ESP Matrix in R.05-06-040, the category/ies into which the data fall, with an explanation of how the data match the category/ies in the Matrix;
  - c. Discussion of why the data should be kept under seal;
  - d. Identification of appropriate procedures short of submitting entire documents under seal or in redacted form, such as partial sealing of documents; partial redaction; aggregation of data to mask individualized, sensitive information; delayed information release (after documents are no longer market sensitive); restriction on personnel with access to documents; use of averages, percentages or annualization of data instead of monthly or hourly data; and issuance of

guidelines for parties to follow in producing redacted information (*e.g.*, leaving headings in documents; limiting redactions to figures only; and leaving sufficient information in documents to give other parties notice of what has been redacted).

4. Parties may not assume that their motions have been granted if the Assigned Commissioner, Assigned ALJ or Law and Motion ALJ do not act on them. The onus shall be on parties to follow up with the Assigned Commissioner, ALJ or Law and Motion ALJ to seek a ruling, if one is not issued within 60 days of filing of the motion.

#### **B. Model Protective Order**

The OIR initiating this proceeding asked parties to weigh in on whether the Commission should adopt a model protective order or nondisclosure agreement for use in future confidentiality disputes. The ALJ also required the parties to meet and confer in an attempt to reach consensus on the terms of such a model protective order. In their reply briefs after the hearing of this case, the parties explained that they had been unable to reach agreement on a form of order.

The parties proposed several different possible models. First, TURN supported the protective order and nondisclosure agreement attached hereto as Appendix 4, which related only to non-market participating parties' access to utility information via discovery prior to the adoption a formal protective order in a proceeding. CAC/EPUC supported the TURN model.

Second, the IOUs proposed a model based on an ALJ ruling issued May 9, 2005 in R.04-04-003/R.04-04-025, attached hereto as Appendix 5, and available on the Internet at

[http://www.cpuc.ca.gov/word\\_pdf/RULINGS/46194.doc](http://www.cpuc.ca.gov/word_pdf/RULINGS/46194.doc). TURN proposed a variation of this model in its reply comments.

Third, CMTA supported a model Protective Order used by the FERC, attached hereto as Appendix 6, and available on the Internet at <http://www.ferc.gov/legal/admin-lit/model-protective-order.pdf>. As an alternative to the TURN model, which CAC/EPUC supported, CAC/EPUC proposed that the Commission use the FERC model.

Given the parties' disagreements about the terms of the model protective order, we are not prepared to select a model at this time. We prefer that the parties meet and confer again in light of the decisions we make here, and determine whether they can narrow the choices, or at least agree on parts of a model protective order for our further consideration.

Therefore, as part of Phase Two of this proceeding, within 60 days of this decision, the parties shall 1) meet and confer at least once on the three model protective orders and nondisclosure agreements cited above (and any other model they prefer), and 2) submit the results of their meet and confer session to the assigned ALJ. The parties shall agree upon portions of a model protective order and nondisclosure agreement if they cannot agree upon a complete model. One party to the meet and confer session shall take responsibility for filing and serving the version(s) that are the results of the meet and confer session(s). The assigned ALJ may give the parties additional procedural direction as needed. We delegate to the ALJ responsibility for approving a model protective order.

### **XVIII. Comments on the Proposed Decision**

The proposed decision of Commissioner Grueneich in this matter was mailed to the parties in accordance with Section 311(d) of the Public

Utilities Code and Rule 77.1 of the Rules of Practice and Procedure. The parties filed comments on June 19, 2006<sup>83</sup> and reply comments on June 26, 2006.<sup>84</sup> The consumer groups (DRA, TURN and Green Power) generally support the proposed decision with very minor changes.

In no particular order, we have made the following changes/clarifications to the proposed decision based on comments:

1. *Market participants vs. non-market participants*

CMTA, CLECA, IEP, and CAC/EPUC all raise issues related to the definition of “market participants.” We lack an adequate record on this issue. While CMTA addressed it during the proceedings, other parties did not explain the definition of market participants, how they differ from non-market participants, and what groups belong in each category. The parties shall submit comments of no more than 15 pages on this issue in 30 days from issuance of this decision. We are committed to promptly issuing a decision on this issue. In the interim, we remove the discussion finding that CMTA is a market participant.

2. *Protective Orders*

TURN asks for more time for the parties to meet and confer on the terms of a model protective order, and CMTA asks that we allow another draft protective order to be considered as a model. We will modify the timing to 60 days (from 30), and allow any model protective order, and not just those issued with the proposed decision, to serve as a basis for

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<sup>83</sup> AReM/CNE, CAC/EPUC, CARE, CEC, California Large Energy Consumers Association (CLECA), CMTA, DRA, Green Power, IEP, PG&E, SCE, SDG&E and TURN filed opening comments.

<sup>84</sup> AReM/CNE, CAC/EPUC, Calpine, IEP, PG&E, SCE, SDG&E and TURN filed reply comments.

discussion. We expect the parties to agree on all non-controversial terms of a model protective order during the meet and confer session, and to attempt to reach agreement on the controversial terms. Parties shall assume that the protective order must be consistent with this decision. We delegate to the assigned ALJ the authority to approve the model protective order.

### 3. *Other Utilities*

CEC asserts that other utilities (e.g., Modesto Irrigation District and PacifiCorp) release more information than we require be released here, and do so without harm. We do not find these utilities analogous to the large IOUs at issue here. As SCE pointed out in its post-hearing brief:

The experiences of Modesto, however, are not applicable to the IOUs because Modesto operates under a different type of procurement market and under a different regulatory environment. Moreover, it should be noted that the basis of Modesto's argument is solely related to resource and procurement forecasts. Modesto believes supplier information (i.e. the specifics of individual contracts) and pricing information should be kept confidential.

One of the most important distinctions between Modesto and the IOUs is size. Modesto is a small utility that "provides electric service to over 106,000 customers with a combined peak load of approximately 632 Megawatts." SCE, on the other hand, is one of the largest investor owned electric utilities, serving more than 13 million people. Therefore, the release of Modesto's forecast information to market participants does not have nearly the same impact on the energy market as the release of SCE's confidential information would . . . .<sup>85</sup>

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<sup>85</sup> SCE Reply Brief at 59.

PG&E made similar observations about the PacifiCorp example:

PG&E must rely on the market to fill its net open position to a much greater extent than is the case for PacifiCorp: PacifiCorp's utility-owned generation produces 72 percent of its energy needs. . . . PG&E by contrast is able to supply only 43 percent of its energy requirements using its utility-retained generation. In addition, PG&E serves a substantial portion of its load using energy from QFs and from the contracts the Commission allocated to it from DWR. With the QF contracts, PG&E must hedge the natural gas price risk inherent in the SRAC energy price; with the DWR contracts, some are dispatchable and also subject to natural gas price risk. PacifiCorp does not have a direct analogue to this form of natural gas price risk.<sup>86</sup>

#### 4. *ESP information*

AReM/CNE and the CEC are concerned that we are affording their data less protection than IOU data. We do not intend in this decision to protect one type of data more/less than another type. We do not rule out greater protection for ESPs (or IOUs) in certain situations. The Commission's intent is not to provide ESPs less protection than IOUs, but simply to allow some case-by-case flexibility. That said, to the extent we are releasing more information on RPS than general procurement, and ESPs have RPS data and no § 454.5 procurement data, it may be said that they are releasing more data for RPS. However, this is not due to their status as ESPs; rather, it is because we believe there is great public interest in whether California utilities are meeting targets for procurement of renewable energy. IOUs will have to produce RPS information on the same terms as ESPs.

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<sup>86</sup> PG&E Opening Brief at 36 (citation omitted).

5. *DRA*

We make clear that DRA staff shall have the same access to data as other Commission staff, which has always been our intent.

*6. Materiality standard under § 454.5(g)*

We agree with TURN that the proposed decision should be modified to state that if a procuring party can show that public release of its data will affect the price paid by that utility for electricity (even if the market price paid by all buyers is not affected), such information is “market sensitive” and protected under § 454.5(g). The proposed decision required a showing of impact on the market price, not the individual price paid by the utility. We agree that ratepayers are harmed from unreasonable price impacts to the utility serving those ratepayers, and that the change therefore is warranted.

*7. Closed hearing*

The proposed decision prohibits closed hearings. TURN and IEP point out they are used, albeit rarely. We will retain a general rule that no closed hearings are allowed, unless the party seeking such a hearing can prove that there is no other way to protect the confidential information (through circumspection or abbreviation in testimony, sealed exhibits, reference to a document without revealing confidential contents, etc.). We expect closed hearings to be extremely rare.

*8. Public information*

Information that is public anywhere shall be public everywhere. Nothing in this decision allows any party to withhold information, or parts of information, already revealed, or required to be revealed, elsewhere. The IOUs also ask us to give them a period of time to release information this decision requires be public. We do not believe such a rule is required. Information that is required to be public shall be released in the ordinary course just as any public information is released. The information in the Matrix deserves no special “public” status. By the same token, just

because we deem certain information “public” does not mean a party must produce it immediately if it does not yet exist. If information does not exist when requested, a response to that effect is appropriate, just as it would be in any other situation.

In no circumstance do we allow permanent confidential treatment of data. All data we find confidential must be released within a window of time, usually 3 years.

#### 9. CEC/CPUC

The CEC expresses concern that the proposed decision moves the CEC and the CPUC apart in their approach to public information. It is not our intent with this decision to create distance from the CEC. As we stated in R.06-02-013, “we will also consider the [CEC’s] 2005 Integrated Energy Policy Report (IEPR) for procurement-related recommendations during this and related rulemakings.”<sup>87</sup>

By the same token, we cannot ignore the fact that § 454.5(g) binds us and not the CEC. We cannot, therefore, take the identical approach to data as the CEC. The CEC is not required by statute to protect IOUs’ “market sensitive” information. This distinction – created by statute – is not one we can ignore.

We agree with the CEC, however, that the California Constitution and the Public Records Act are at the foundation of our obligations as a public agency. We have tried to strike an appropriate balance between a statute that requires protection of “market sensitive” information, and our general obligation of openness.

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<sup>87</sup> R.06-02-013, *mimeo.*, at 3.

10. *Burden of Proof*

The CEC asserts that the Matrix approach does not require parties to prove that their data are confidential. It is true for data in the Matrix, what the producing party must prove is different than for data not in the Matrix. This is because we are satisfied from the record that certain data must be protected under § 454.5(g). In all cases, however, the producing party must prove that its data deserve confidentiality protection. Further, in no case may a producing party obtain permanent confidential treatment for any data in the Matrix.

11. *Matrix*

Parties make several comments about the ESP and IOU Matrices. Our responses, and changes, are in the following general areas:

- a. We retain the 3 year requirement for contract release (ESPs and IOUs), but have the 3-year period begin at the point the contract states energy deliveries will begin. Some long-term contracts last for 20 years. We do not believe it is appropriate to shield information from the public for such an extended period.
- b. We disagree with the IOUs that their own contracts with affiliates should not be public. As TURN notes, “[s]uch agreements are subject to heightened public interest because of the potential for self-dealing, which merits a policy of “sunshine” for such transactions.”<sup>88</sup>
- c. We agree that Resource Adequacy (planning) information should be protected in the same way as other procurement information. Section 454.5(g) protects planning and procurement information

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<sup>88</sup> *Id.*

alike so long as the planning information is “submitted in an electrical corporation’s proposed procurement plan or [results] from or [is] related to its approved procurement plan. . . .” This definition is not limited only to contracts.

### **XIX. Assignment of Proceeding**

Dian M. Grueneich is the Assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

### **Findings of Fact**

1. California’s electricity markets recently experienced market manipulation.
2. In a market such as the IOU procurement bidding process, one-sided release of information will result in higher, not lower, prices for ratepayers in most situations.
3. AB 57 (the act that promulgated § 454.5(g)), signed in 2002, was conceived in the midst of the state energy crisis.
4. There is no legislative history on the confidentiality provision of § 454.5(g).
5. Section 454.5(g) covers only procurement plans and related contracts and information, including planning information.
6. Information that does not allow market participants to raise the price of electricity an IOU procures is not market sensitive information.
7. The statutory requirements in § 2112 exist regardless of what we tell staff, and it would be cumbersome to issue instructions to staff every time they receive confidential information.
8. The work of intervenor groups who make substantial contributions to our decisions is invaluable to the Commission.

9. Giving non-market participants access to aggregate data is not always a full substitute for access to unredacted, detailed information.

10. Having a point of view about policy is not the same as being a market participant.

11. Quantity data is not always less sensitive (and therefore less deserving of confidentiality protection) than cost data.

### **Conclusions of Law**

1. SB 1488 does not prohibit all use of confidential information.

2. The language “meaningful public participation” in SB 1488 permits some use of confidential data, where there is an overriding statutory requirement of protection.

3. The language “open decision making” in SB 1488 does not preclude any reliance on confidential information, if a statute (such as § 454.5(g)) requires confidentiality, or gives the Commission discretion to keep information confidential.

4. The Bagley-Keene Open Meeting Act does not preclude us from sealing data that statute otherwise requires be confidential.

5. The party seeking protection of its documents always bears the burden of proof.

6. When a party seeks protection for data already contained in the Matrix, its burden should be to prove that the data match the Matrix category, that the information is not already public and that it cannot produce the data in masked or aggregated form. Once it does so, it is entitled to the protection the Matrix provides for that category.

7. Section 583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules.

8. The due process and confrontation clauses do not preclude use of confidential data.

9. Even in a case where due process rights adhere, it is not a violation of due process for an agency to allow certain records to be deemed confidential where there is a statute allowing confidentiality in certain cases.

10. We must strike an appropriate balance in interpreting § 454.5(g). We are a public agency that regulates public utilities, and most of our business must be conducted in the open.

11. Section 454.5(g) does not protect every record connected to procurement; it only relates to “market sensitive” information submitted in procurement plans and related documents.

12. Not all procurement plan and related data are market sensitive under § 454.5(g); a subset of such information meets this definition. Such information must have the potential to materially affect the market price for electricity.

13. It is appropriate and lawful under § 454.5(g) to make distinctions between non-market participants and market participants in determining whether to grant access to confidential data.

14. Market sensitive information under § 454.5(g) is different from trade secrets under Evidence Code § 1060.

15. The confidentiality rules applicable to IOUs and ESPs need not be identical.

16. Neither § 583 nor § 454.5(g) directly apply to ESPs.

17. It is inappropriate to require Commission staff, including DRA, to enter into private contractual agreements with the entities we regulate or that otherwise come before us.

18. The merits of a claim that data are confidential will always depend on the context, and we must have the flexibility to make decisions based on specific facts rather than developing across-the-board rules.

19. Section 399.14(a)(2)(A) provides confidentiality for the results of a competitive solicitation only until the solicitation is complete. This is a very narrow confidentiality requirement that does not change our general conclusion that most RPS information should be public.

20. Section 399.12(c)(3)(B), which provides certain confidentiality protection to ESP end-user retail customer contracts, which confidentiality is provided in the Matrices, has no bearing on our general conclusion in this decision that to the maximum extent possible RPS data should be public.

21. Data about how (and not just whether) ESPs are complying with requirements applicable to them should be publicly filed.

22. It is reasonable to adopt the IOU Matrix and ESP Matrix. We balance the need for open decision making and meaningful public participation with the legitimate needs of parties that come before us for confidential treatment of their data as allowed by law.

23. There may be differences between parties that justify different *substantive* treatment of data. No type of entity (*e.g.*, IOU or ESP) shall receive greater confidentiality for its data merely because it is such an entity.

## INTERIM ORDER

**IT IS ORDERED** that:

1. Where we find that data are market sensitive pursuant to Pub. Util. Code § 454.5(g) or otherwise entitled to confidentiality protection, in most cases, we adopt a window of confidentiality for Investor-Owned Utility (IOU) and Energy Service Provider (ESP) data that protects it for three years into the future, and one year in the past.

2. We adopt the confidentiality conclusions set forth in the IOU Matrix and ESP Matrix attached hereto as Appendices 1 and 2 (collectively Matrix, unless otherwise stated). Where a party seeks confidentiality protection for data contained in the Matrix, its burden shall be to prove that the data match the Matrix category. Once it does so, it is entitled to the protection the Matrix provides for that category. The submitting party must file a motion in accordance with Law and Motion Resolution ALJ-164 or any successor Rule, accompanied with any proposed designation of confidentiality, proving:

- 1.) That the material it is submitting constitutes a particular type of data listed in the Matrix,
- 2.) Which category or categories in the Matrix the data correspond to,
- 3.) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data,
- 4.) That the information is not already public, and
- 5.) That the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure.

3. For data not included in the Matrix, a party seeking confidential treatment shall continue to file a motion pursuant to Law and Motion Resolution ALJ-164 or any successor Rule seeking leave from the Commission to retain such material under seal. The filing party shall bear the burden of proving that its information deserves such treatment. Boilerplate assertions of a need for confidentiality are not appropriate. Rather, the producing party must cite the legal basis for confidential protection, along with facts showing the consequences of release. It must also show that aggregation, redaction, or other similar methods are inadequate to protect the data.

4. Unless and until we change or repeal General Order (GO) 66-C (or opt to leave it intact upon examination), it shall continue to apply to data *not* addressed in the Matrix. In the interim, to the extent the Matrix contradicts GO 66-C, the Matrix shall govern. Other portions of GO 66-C not related to electric procurement (and similar topics) will remain in place unless and until we change them.

5. Mere recitation of the conclusory statement that information is a trade secret, or is market sensitive procurement information, is not enough to meet the burden of proving entitlement to confidential treatment.

6. The submitting party need not mark any data as confidential, and even if the Matrix allows confidential treatment, the submitting party need not treat the data as confidential under any circumstances.

7. No data that is already publicly available may be characterized or treated as confidential. Information an IOU has furnished to an affiliated company is publicly available.

8. If another party, or the Commission, questions the appropriateness of the confidential designation (by ruling, motion, letter, or other

communication), the submitting party bears the burden of proving (1) that the material it is submitting actually constitutes a particular type of data listed in the Matrix; (2) which category or categories in the Matrix the data correspond to, (3) that it is complying with the limitations on confidentiality specified in the Matrix for that type of data, (4) that the information is not already public, and (5) that the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure. Once the submitting party meets this burden, the party seeking disclosure of the data (or a change in how it is treated - *e.g.*, disaggregation of data submitted in aggregated form, relief from the terms of a protective order, or other change) may take several steps. It may rebut the claim that the party meets any or all of 1-5 above. It may assert that despite meeting the criteria in Items 1-5, the data should nonetheless be disclosed. The party seeking access to the data shall bear the burden of proof once the party whose data are at issue meets its burden of proving Items 1-5 above.

9. Data that are confidential may be kept from market participants altogether. In all cases, the producing party shall meet its burden of proving that it cannot produce aggregated, partially redacted, summarized or other data that do not reveal the confidential material, and that a protective order is inadequate to protect its data.

10. The process for dealing with confidential documents shall be the same regardless of who claims entitlement to protection. The burden of showing that information meets one of the various statutory protections shall always be on the holder of the data. That party shall always have to make a particularized showing that its data meet the statutory definition, and may not ever simply label the data with the statutory language and

rest. The party seeking the information will then have some opportunity to respond, but never bears the initial burden of proof. This general process should apply whether the producing party is an IOU, an ESP, a future Community Choice Aggregator, or any other entity.

11. Intervenor groups that are non-market participants shall not be precluded from access to any ESP or IOU data as long as they agree to a protective order or confidentiality agreement where there is a need to protect the data.

12. This order and the Matrix apply to data regardless of the proceeding in which they are relevant, including the proceedings listed in this decision, successor proceedings, or proceedings not listed in this decision in which the data are relevant.

13. With this decision, we commence Phase Two of this proceeding. Respondents shall, and other parties may, file and serve comment on whether it is appropriate for us to develop the following requirements within 30 days of Commission adoption of this decision:

- 1.) A motion that simply asserts, without explanation, that the data contain trade secrets or “market sensitive” information will be denied as incomplete.
- 2.) A party whose motion has been denied for violation of item 1 that refiles the motion in substantively the same form may be subject to penalties pursuant to § 2107 at the discretion of the Assigned Commissioner, Assigned Administrative Law Judge (ALJ) or Law and Motion ALJ.
- 3.) A party seeking confidentiality treatment shall provide in its motion, in text or table form, the following information:

- a. Legal basis for asserting confidentiality (*e.g.*, § 454.5(g), trade secret, privilege);
  - b. If covered by the IOU or ESP Matrix in R.05-06-040, the category/ies into which the data fall, with an explanation of how the data match the category/ies in the Matrix.;
  - c. Discussion of why the data should be kept under seal;
  - d. Identification of appropriate procedures short of submitting entire documents under seal or in redacted form, such as partial sealing of documents; partial redaction; aggregation of data to mask individualized, sensitive information; delayed information release (after documents are no longer market sensitive); restriction on personnel with access to documents; use of averages, percentages or annualization of data instead of monthly or hourly data; and issuance of guidelines for parties to follow in producing redacted information (*e.g.*, leaving headings in documents; limiting redactions to figures only; and leaving sufficient information in documents to give other parties notice of what has been redacted).
- 4.) Parties may not assume that their motions have been granted if the Assigned Commissioner, Assigned ALJ or Law and Motion ALJ do not act on them. The onus shall be on parties to follow up with the Assigned Commissioner, ALJ or Law and Motion ALJ to seek a ruling, if one is not issued within 60 days of filing of the motion.

14. Within 60 days of Commission adoption of this decision, the parties shall (1) meet and confer at least once on the three model protective orders attached as Appendices 4, 5 and 6 to this decision, or any other model, and (2) submit the results of their meet and confer session to the assigned ALJ.

The parties shall agree upon portions of a model protective order and nondisclosure agreement if they cannot agree upon a complete model. One party to the meet and confer session shall take responsibility for filing and serving the version(s) that are the results of the meet and confer session(s). The assigned ALJ may give the parties additional procedural direction as needed. We delegate to the assigned ALJ authority to approve a model protective order for use in this and other proceedings.

15. Parties may submit comments addressing the definition of market participants, how they differ from non-market participants, and what types of groups belong in each category. The comments shall be no more than 15 pages and should be filed and serviced within 30 days of issuance of this decision. We delegate to the Assigned Commissioner and ALJ authority to make changes to the Matrix as we gain experience with its use.

This order is effective today.

Dated June 29, 2006, at San Francisco, California.

MICHAEL R. PEEVEY  
President  
GEOFFREY F. BROWN  
DIAN M. GRUENEICH  
JOHN A. BOHN  
RACHELLE B. CHONG  
Commissioners