



BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

**FILED**

06-14-10  
04:59 PM

Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Constellation NewEnergy, Inc.; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions For Constellation NewEnergy, Inc. January 2009 Violation of System Resource Adequacy Requirements.

I.10-04-010  
(Filed April 8, 2010)

**REPLY OF CONSTELLATION NEWENERGY, INC. TO THE OPPOSITION OF  
THE CONSUMER PROTECTION AND SAFETY DIVISION**

June 14, 2010

Cynthia Fonner Brady  
Senior Counsel  
Constellation Energy Resources, LLC.  
550 W. Washington Blvd., Suite 300  
Chicago, Illinois 60661  
Telephone: (312) 704-8518  
Facsimile: (312) 795-9286  
Email: [Cynthia.Brady@constellation.com](mailto:Cynthia.Brady@constellation.com)

*On behalf of Constellation NewEnergy, Inc.*

Andrew B. Brown

Ellison Schneider & Harris L.L.P.  
2600 Capitol Avenue, Suite 400  
Sacramento, CA 95816-5905  
Telephone: (916) 447-2166  
Facsimile: (916) 447-3512  
Email: [abb@eslawfirm.com](mailto:abb@eslawfirm.com)

*Attorneys for Constellation NewEnergy, Inc.,*

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion Into the Operations and Practices of Constellation NewEnergy, Inc.; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Impose Fines and Sanctions For Constellation NewEnergy, Inc. January 2009 Violation of System Resource Adequacy Requirements.

I.10-04-010  
(Filed April 8, 2010)

**REPLY OF CONSTELLATION NEWENERGY, INC. TO THE  
OPPOSITION OF THE CONSUMER PROTECTION AND SAFETY DIVISION**

Pursuant to Rule 11.1(f) of the California Public Utilities Commission's ("CPUC" or "Commission") Rules of Practice and Procedure, Constellation NewEnergy, Inc. ("CNE") respectfully submits this reply ("Reply") to the *Opposition of the Consumer and Protection and Safety Division to the Motion of Constellation NewEnergy, Inc. to Modify the Revised Order Instituting Investigation to Remove Confidential Information* filed on June 3, 2010 ("Opposition"). Permission to file this Reply was granted by Administrative Law Judge Yacknin in a June 4, 2010 email.

**I. INTRODUCTION**

The *Motion of Constellation NewEnergy, Inc. to Modify the Revised Order Instituting Investigation to Remove Confidential Information* ("Motion") was filed on May 28, 2010. The Motion asserts that certain information found in the May 21, 2010 revised Order Instituting Investigation ("Revised OII") is protected pursuant to Commission authority as Resource Adequacy ("RA") Supply Data, because CNE identified that data as

eligible for protection under Section II B of the ESP Matrix<sup>1</sup> and complied with the 5-step process to secure three-year protection of that information.<sup>2</sup> CPSD’s Opposition asserts that CNE has misread the applicable confidentiality authorities regarding protection under the ESP Matrix and that the data should not be protected.<sup>3</sup> For the reasons detailed below, CNE’s Motion should be granted as it has identified the correct authorities and has met the burden for gaining protection for its Resource Adequacy (“RA”) supply data described in the ESP Matrix, and because it is CPSD who has not met its burden of proof to overcome the presumption of protection given by the Commission through the ESP Matrix.

## II. ARGUMENT

### A. CNE’s Motion to Remove Confidential Market Sensitive Information is Supported by Commission Precedent and Should be Granted.

In its Opposition, CPSD asserts that, “CNE bases its legal argument on a misreading of Commission decisions....”<sup>4</sup> When arguing that CNE has misread the ESP Matrix, CPSD seems to believe that CNE is seeking to protect “‘high level’ summary data,”<sup>5</sup> when in fact, CNE is seeking to protect its month-ahead RA Supply Data. CPSD mistakenly references the confidentiality protections afforded to *year-ahead* supply data in the ESP Matrix,<sup>6</sup> when the data at issue in this investigation concerns CNE’s January 2009 *month-ahead* compliance submission. The explicit protection afforded by the ESP Matrix,

---

<sup>1</sup> “ESP Matrix” or “Matrix” refers to the “Matrix” referenced by D.06-06-066, as modified by D.08-04-023. The ESP Matrix is now found in Appendix B of D.08-04-023, and is posted at [http://docs.cpuc.ca.gov/word\\_pdf/FINAL\\_DECISION/94610.pdf](http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/94610.pdf).

<sup>2</sup> Motion, p. 2.

<sup>3</sup> Opposition, p. 1.

<sup>4</sup> Id.

<sup>5</sup> Id., p. 3.

<sup>6</sup> Id.: “Thus, the Matrix describes ‘supply data’ as reflecting ‘100% of its annual local RA requirements’ or ‘90% of its forecast peak load’ for the coming summer.”

Section II B for month-ahead RA compliance submissions provides that “Month ahead data show[ing] that [an] ESP has secured adequate capacity to cover 100% of its forecast load plus a reserve requirement”—the RA procurement obligation—is confidential for three years.

CNE’s Motion correctly identifies the applicable authorities and the process required to properly protect certain types of data described in the ESP Matrix. When the applicable authorities are reviewed, it becomes apparent that the protections are explicitly provided by the processes adopted in D.06-06-066 and D.08-04-023. According to D.06-06-066, “when a party seeks confidentiality for data listed in the Matrix, its burden should be to prove that the data match the Matrix category.”<sup>7</sup> When data is shown to be of a type covered by the ESP Matrix, and the applicable steps as outlined in D.08-04-023 are taken, then Commission precedent provides a presumption of confidentiality for the period of time set forth in the ESP Matrix. As discussed in its Motion,<sup>8</sup> CNE met its burden for demonstrating that the data for which it asserted confidentiality protection is of a type covered by Section II B of the ESP Matrix and was eligible for the three year protection period applicable for the time of the original RA compliance filing. Moreover, CNE’s Motion also showed that it followed the Commission’s process for asserting confidentiality at the time the submission was made.

CPSD’s Opposition fails to recognize that the applicable authorities *shift the burden of proof* to parties who would seek to disclose data types covered by the ESP

---

<sup>7</sup> D.06-06-066, p. 23.

<sup>8</sup> CNE provided a declaration at the time it submitted the 2009 Year-Ahead data submission on November 21, 2008. The December 1, 2008 Month Ahead RA submission cross-references the November 21, 2008 declaration, as provided for in D.08-04-023’s discussion of so-called “regular compliance filings.” (See CNE’s May 28, 2010 Motion, p. 2.)

Matrix.<sup>9</sup> Instead, CPSD argues that CNE was required to meet the burden for asserting confidentiality for data *not* addressed in the ESP Matrix; an incorrect standard in this case.<sup>10</sup> D.06-06-066 provides that a party seeking disclosure of confidential information must rebut the presumption of confidentiality provided by the Matrix and that party “shall bear the burden of proof” in demonstrating that confidentiality is *not* warranted.<sup>11</sup> CPSD has neither rebutted CNE’s demonstration of confidentiality nor met the burden of proving that disclosure should occur. CPSD makes only a generalized argument that disclosure of the RA supply information at issue will provide transparency of the enforcement process, yet it fails to argue why the Commission’s concern about the potential for manipulation in the RA supply market—which underpins the Commission’s protection of that data—is no longer legitimate.

For the reasons explained in CNE’s Motion, as well as its April 27 Motion in response to Ordering Paragraph No. 2 of the original OII,<sup>12</sup> public release of RA Supply Data results in disclosure to CNE’s competitors and suppliers (aka “market participating parties”) of the details of CNE’s procurement practices and supply requirements. By alleging that CNE’s fears of market manipulation are unfounded,<sup>13</sup> it seems that CPSD does not want to acknowledge the nature of the RA market and the Commission-recognized justification for a presumption of confidentiality under the ESP Matrix. The Commission’s concerns about potential manipulation and harm from loss of competitive

---

<sup>9</sup> See D.06-06-066, p. 25: “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.”

<sup>10</sup> See, *Id.*, p. 53.

<sup>11</sup> *Id.*, Ordering Paragraph No. 8.

<sup>12</sup> See, *Motion of Constellation NewEnergy, Inc. to Redact Portions of CPSD Confidential Report Pursuant to Ordering Paragraph No. 2*, April 27, 2010, (“CNE April 27 Motion”) pp. 1-2.

<sup>13</sup> Opposition, p. 8.

advantage due to disclosure of confidential data remain valid now. Those concerns are acute where RA procurement must be undertaken in relatively short periods of time by all load serving entities without the benefit of a centralized capacity market. As previously described by CNE:

The market for resource adequacy capacity is competitive, and there are a limited number of resources eligible to provide RA capacity. Because there is no standardized product or central clearing market for RA capacity in California, parties experience relatively high transaction costs for developing mutually agreeable forms of contract that will achieve compliance with both the CPUC's RA rules applicable to LSEs and similar California Independent System Operator ("CAISO") Tariff provisions applicable to suppliers. Once parties invest the time and effort to establish a viable commercial format to transact the RA product (including meeting any credit conditions or other internal thresholds), they are more likely to engage in future transactions on a similar basis with that same counterparty. Disclosure of non-public details regarding favored counterparties or RA qualified resources will result in loss of competitive advantage where, as in California, participants in a competitive market are not aware of the specific counterparties, quantities secured or commercial terms over periods of time across different suppliers.<sup>14</sup>

These concerns were considered when the Commission provided a presumption of confidentiality protection for RA Supply data in the ESP Matrix. Disclosure of CNE's procurement obligation or supply details risks harm to CNE and its customers insofar as its improper use by third parties could raise supply prices, or undermine CNE's existing commercial relationships with RA suppliers, thus triggering additional transaction costs or other harms that come from loss of competitive advantage. The potential for such harms is why the Commission protected RA Supply Data for the three year period under the ESP Matrix.

---

<sup>14</sup> CNE April 27 Motion, pp. 1-2.

**B. There Has Been No Disaggregation of CNE’s RA Supply Data, And Extracting Data Elements Should Not Result In Loss of Protection.**

CPSD argues that extracting portions of the RA Supply Data means that the information no longer deserves continued confidentiality.<sup>15</sup> CPSD also argues that CNE’s protected RA Supply Data should become public pursuant to Section IV (C) of the ESP Matrix.<sup>16</sup> As described in CNE’s Motion, CPSD’s arguments create an “end run” around the ESP Matrix protections provided to RA Supply Data. CPSD argues that “when data is stripped of any context which makes it market sensitive, the information in that data is protected.”<sup>17</sup> CPSD’s cited authority does not support the notion that extraction of data elements from a one entity’s year-ahead or month-ahead RA compliance submissions should “strip” that information of its ESP Matrix protections. Additionally, even if such data can be considered “disaggregated” data (which it cannot), such data still warrants confidential protection pursuant to D.06-06-066 unless CPSD meets the shifted burden of proof and demonstrates that the presumption of confidentiality protection is no longer valid.

But CPSD’s “disaggregation” argument is not clear. If, for the sake of argument, CPSD is addressing the concept that protection of otherwise confidential information can be provided by aggregating data from multiple entities (for instance, pooling all ESP RA procurement obligations), that concept does not work in this case. There has been no data aggregation undertaken here—all the information that CPSD wants to make public is RA Supply Data that comes from one source: CNE’s RA compliance forms. No aggregation

---

<sup>15</sup> Opposition, p. 5.

<sup>16</sup> Id.

<sup>17</sup> Id., referencing D.06-06-066 pp. 24-25, available at [http://docs.epuc.ca.gov/WORD\\_PDF/FINAL\\_DECISION/57772.PDF](http://docs.epuc.ca.gov/WORD_PDF/FINAL_DECISION/57772.PDF).

of information from multiple sources was done to provide the kind of protection discussed in relevant authorities. Moreover, the context of this information is not lost—it is clearly CNE’s RA supply data, and it shows from whom supplies were secured, details about contract terms and other information regarding CNE’s procurement practices and efforts.

CPSD argues that ESP Matrix Section IV C requires disclosure of certain “high level” data, yet fails to explain why Section II B of the ESP Matrix should be rendered inapplicable or trumped by Section IV C.<sup>18</sup> As discussed in CNE’s Motion, asserting that Section IV C requires disclosure of data otherwise protected by the same ESP Matrix defeats the purpose of the Commission’s decision to extend confidential protection to RA Supply Data by the ESP Matrix.<sup>19</sup> For this reason and the reasons described above, CPSD’s arguments and assertions should be rejected as they clearly do not support the inclusion of confidential data in the publicly accessible Revised OII.

CPSD claims that CNE’s Motion does not seek to protect capacity data.<sup>20</sup> This is incorrect. The RA product is a capacity product. The RA Supply data CNE is seeking to protect is its exact RA capacity procurement obligation and sources of capacity applicable for the January 2009 compliance period. CPSD contend that the “when and where” of that obligation is unknown. However, the supply data identifies capacity sources needed by CNE for the month of January 2009, and the resources’ identities will indicate where the capacity is provided. The compliance submission’s RA Supply Data lays out the set of resources procured to satisfy the local and system RA needs determined by the CAISO and

---

<sup>18</sup> Opposition, p. 7.

<sup>19</sup> See Motion, pp. 2-3.

<sup>20</sup> Opposition, p. 4. CPSD states, “[n]one of the data CNE seeks to protect by its motion reveals the ESPs capacity data, or ‘when and where’ that capacity is needed, in such a way that provides sufficient context for any market participant or a member of the public to be able to manipulate the data.”

CPUC. It is precisely this type of data that the Commission has determined warrants confidential protection as RA Supply Date under the ESP Matrix.

CPSD also appears to argue that CNE waived its right to continued protection of the data. CPSD asserts that CNE “did not seek to protect the ‘specific RA MW procurement obligation at the bottom of page 1 and on page 6’ in its first motion to redact,”<sup>21</sup> as if to imply waiver of protection of data otherwise covered by the ESP Matrix. Ordering Paragraph No. 2 of the original OII directed CNE to “identify portions of the [CPSD] report for which CNE requests confidential treatment.”<sup>22</sup> In response to the original OII, CNE filed its April 27 Motion, addressing the confidential information contained in CPSD’s Confidential Investigative Report. The April 27 Motion identified Attachments 1 and 5, *in toto*, which contain CNE’s total RA procurement obligation—the same total procurement obligation number found in the Revised OII.<sup>23</sup> CNE’s Motion addresses its concerns about a continuing disclosure of protected RA Supply Data within the Revised OII. Thus, contrary to CPSD’s assertions that the confidentiality issues raised by CNE’s Motion were an “afterthought,”<sup>24</sup> the RA procurement obligation that is contained in its January 2009 RA compliance submission was previously addressed.

**C. Contrary to CPSD’s Assertions, CNE is Not Attempting To Hide the Compliance Issue that has Precipitated the Investigation.**

According to CPSD, “[i]n order for the Commission’s enforcement process to be effective, the respondent should not be allowed to hide from public view vital non-market

---

<sup>21</sup> Id.

<sup>22</sup> OII(April 13, 2010), Ordering Paragraph No. 2, p. 5.

<sup>23</sup> CNE April 27 Motion, pp. 2-3.

<sup>24</sup> Opposition, p. 4; “If those figures comprised sensitive market data subject to confidentiality protections, CNE would have made them the centerpiece of the first motion rather than an afterthought of its second motion.”

sensitive information surrounding its violation.”<sup>25</sup> CNE agrees that the Commission’s OII should make clear the nature of the alleged violation to both the subject of the proceeding and the public. Contrary to CPSD’s assertions, CNE has no “desire to keep[] its [alleged] violations hidden from public view.”<sup>26</sup> CNE has no objection to disclosing the total alleged megawatt (“MW”) deficiency. What CNE has sought to keep protected is other RA Supply Data that, when used in conjunction with that alleged MW deficiency number, can be used to by market participating parties to determine CNE’s RA procurement obligation, as well as information that details CNE’s specific RA supply sources and its RA procurement methods or practices. Apart from the alleged MW deficiency, the other information CPSD seeks to disclose will not enhance the public’s understanding of CPSD’s allegations or the potential violation. CNE’s specific RA MW procurement obligation, the amount of RA capacity procured by CNE, contract identifiers, and references to contract durations and volumes need not be disclosed to the public for the public to understand whether or not an alleged RA procurement shortfall should be subject to a penalty. This other RA Supply Data is superfluous to the public’s understanding of this enforcement proceeding.

Disclosure of information CNE seeks to protect will, however, compromise market sensitive information by making it available to market participating parties that do not otherwise have access to this information, thus subjecting CNE and its customers to potential increased costs, as specifically recognized by the Commission when providing

---

<sup>25</sup> Id., p. 2.

<sup>26</sup> Id., p. 1.

for protection of RA Supply Data in D.08-04-023.<sup>27</sup> Therefore, CNE's interest to preserve confidential market sensitive information far outweighs CPSD's interest in disclosing the information for the public interest, as no public interest will be served by such a disclosure.

**D. The Commission Acted Appropriately by Revising the OII.**

CPSD argues that “the OII was already released by the Commission and thus redacting it now will have little value.”<sup>28</sup> This argument is inconsistent with the Commission's goals for protecting certain types of market-sensitive data. CNE appreciates the efforts to remediate the disclosure of protected information. Contrary to CPSD's argument, an inadvertent disclosure, once discovered, should not be left uncorrected. While it is likely that some third parties may have seen the data, correction now will preclude other, future discoveries of the data by third parties that—absent the unintended disclosure—would not have access to the information. Accordingly, CNE respectfully requests that its Motion be granted to end an ongoing disclosure of information that should be protected pursuant to the EPS Matrix.

**III. CONCLUSION**

For the reasons set forth above, CNE respectfully requests that the Commission grant its Motion and remove from the Revised OII its RA Supply Data subject to protection under the ESP Matrix. CNE complied with the confidentiality processes and met its burden to show the data was RA Supply data of a type contemplated in the ESP Matrix as well as other process requirements from D.08-04-023 at the time that information was provided to the Commission. Once CNE met its burden, the burden shifts

---

<sup>27</sup> See, D.08-04-023, Section 4.2.1 at pages 13-15, discussing adoption of protection for RA supply data, available at [http://docs.cpuc.ca.gov/WORD\\_PDF/FINAL\\_DECISION/94606.PDF](http://docs.cpuc.ca.gov/WORD_PDF/FINAL_DECISION/94606.PDF).

<sup>28</sup> Opposition, p. 8.

to CPSD to overcome the Commission's presumption that data covered by the ESP Matrix should be confidential. CPSD has not met that burden. Accordingly, CNE's motion should be granted.

Dated: June 14, 2010

Respectfully submitted,



Cynthia Fonner Brady  
Senior Counsel  
Constellation Energy Resources, LLC  
550 W. Washington Blvd., Suite 300  
Chicago, Illinois 60661  
Telephone: (312) 704-8518  
Facsimile: (312) 502-6151

Andrew B. Brown  
Ellison Schneider & Harris L.L.P.  
2600 Capitol Avenue, Suite 400  
Sacramento, CA 95816-5905  
Telephone: (916) 447-2166  
Facsimile: (916) 447-3512  
Email: [abb@eslawfirm.com](mailto:abb@eslawfirm.com)

*On behalf of Constellation NewEnergy, Inc.*

*Attorneys for Constellation NewEnergy, Inc.*

## Certificate of Service

I hereby certify that I have this day served a copy of “Reply of Constellation NewEnergy, Inc. to the Opposition of the Consumer Protection and Safety Division” on all known parties to I.10-04-010 by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without a valid e-mail address were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on June 14, 2010 at Sacramento, California

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Eric Janssen

I.10-04-010  
Service List  
June 14, 2010

sha@cpuc.ca.gov  
abb@eslawfirm.com  
cynthia.brady@constellation.com  
case.admin@sce.com  
william.v.walsh@sce.com  
liddell@energyattorney.com  
cem@newsdata.com  
mary.lynch@constellation.com  
hsy@cpuc.ca.gov  
jrg@cpuc.ca.gov  
jf2@cpuc.ca.gov  
ljw@cpuc.ca.gov  
phs@cpuc.ca.gov  
rwc@cpuc.ca.gov