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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	FILED PUBLIC UTILITIES COMMISSION XXX XX, 2005 SAN FRANCISCO OFFICE RULEMAKING 05-XX-XXX

ORDER INSTITUTING RULEMAKING

I. Summary

This order implements Senate Bill No. 1488 (SB) (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)). SB 1488 requires that we examine our practices regarding confidential information (Pub. Util. Code §§ 454.5(g) and 583, and the Public Records Act, Gov. Code § 6250, *et seq.)* to ensure meaningful public participation in our proceedings and open decisionmaking, while taking account of our obligations under §§ 454.5(g) and 583 to protect the confidentiality of certain information. We invite the parties to suggest ways to promote an appropriate level of openness at the Commission in the spirit of SB 1488 while preserving as confidential information that, if public, could facilitate market manipulation or lead to ratepayer harm. Where parties predict harm from the release of confidential information, we direct them to be as specific as possible about how such harm might arise.

We plan to conduct this proceeding in two phases. Initially, we will examine our confidentiality practices in the context of electricity procurement activity. During the first phase, the respondents will be the three large electric

utilities, Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), and Southern California Edison (SCE), as well as the other respondents in our electric procurement proceeding, Rulemaking (R.) 04-04-003.[1] In the second phase, we will examine other contexts, including our practices under General Order (GO) 66-C. At that time, we may name additional respondents.

II. Statutory Framework

A. Introduction

In the discussion that follows, we first discuss the statutory directive in SB 1488 that the Commission examine its practices under Sections 454.5 and 583 of the Public Utilities Code and the California Public Records Act (PRA) to ensure that we are allowing meaningful public participation and ensuring open decisionmaking. In the PRA, the Legislature declared that, "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov. Code § 6250.

We then discuss and invite input on how to meld these mandates of openness with other statutory requirements protecting the confidentiality of certain types of information. Pub. Util. Code § 454.5(g) requires that we "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 . . . ." Thus, we

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[1] We name Energy Service Providers (ESPs) and Community Choice Aggregators (CCAs) as well as the large electric utilities as respondents because SB 1488 governs, at a minimum, "procurement" data. It thus makes sense to have the same respondents in this proceeding and in the procurement proceeding. We named ESPs and CCAs as respondents in R.04-04-003 in Decision 05-03-013.

seek to define what is meant by "market sensitive information" and to reconcile the need to protect such information with the need to maintain public participation and open decisionmaking.

Pub. Util. Code § 583 states, in relevant part, that "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 . . . ." Thus, § 583 also mandates confidentiality in certain situations.

This OIR then proceeds to a more detailed discussion of each statutory provision, and invites comment as set forth below. We do so keeping in mind the basic tenets of statutory construction. The fundamental task of statutory construction is to determine the intent of the legislators in order to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272; *People v. Peters* (1991) 52 Cal. 3d 894, 898; *White v. Ultramar, Inc.* (1999) 21 Cal. 4th 563, 572; *People v. Murphy* (2001) 25 Cal. 4th 136, 142.) The first step in determining the Legislature's intent is to examine the actual words of the statute, giving them a plain and common sense meaning. (*Mercer v. Dept of Motor Vehicles* (1991) 53 Cal. 3d 753, 763.) The literal meaning of a statute must be in accord with its purpose. (*Lakin v. Watkins Assoc. Industries* (1993) 6 Cal. 4th 644, 658.) Statutes must be harmonized, both internally and with each other, to the extent possible. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.)

When the language of a statute is clear and unambiguous, there is no need for statutory construction. (*People v. Woodhead* (1987) 43 Cal. 3d 1002, 1007-1008.) Where a party claims that the Commission's interpretation of the statute conflicts with the plain language of the statute, it is necessary to review the legislative

history, which should be considered in ascertaining legislative intent. (*California Mfrs. Assn. v. PUC* (1979) 24 Cal. 3d 836, 844; *see also Mildred Lewis v. Karen Eleanor Ryan* (1976) 64 Cal. App. 3d 330, 333-334.)

B. SB 1488

SB 1488 provides 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 decisionmaking.

SB 1488 acknowledges the competing statutory directives in §§ 454.5, 583 and the PRA, and directs us to reconcile them in a way that ensures meaningful public participation and open decisionmaking.

1. Meaningful Public Participation

The mandate of public participation requires us to allow members of the public and parties in Commission proceedings to have access to documents and information they need to participate meaningfully. SB 1488 does not define "public participation" to exclude certain members or sectors of the public. We thus assume that we must ensure meaningful public participation for all, regardless of the interests a member of the public or party represents. We also assume that one need not be an actual "party" to a Commission proceeding in order to be covered by SB 1488's requirement that we provide for meaningful public participation, but seek comment on this assumption.

Different members or sectors of the public may need various levels of information in order to participate meaningfully. That is, we do not believe SB 1488 requires that all parties in our proceedings must necessarily have equal information. For example, the Office of Ratepayer Advocates (ORA) or other

organizations that do not compete with the utilities we regulate may be entitled to more information than utility competitors, and both still may be able to participate meaningfully in our proceedings. To protect ratepayers, it may be necessary to impose more limits on market participants' access to information than we impose on non-competitors. We believe we may do so consistent with SB 1488.

Similarly, different members of the public or parties may have access to information under different restrictions. For example, while ORA or another consumer group may have unrestricted access to documents, it may be necessary to craft protective orders or other limitations on disclosure for documents produced to utility competitors. Such procedures might include partial sealing of documents; 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, and the like. We urge the parties in this proceeding to think creatively about ways to ensure that others receive information necessary for participation in our proceedings, while protecting that information's confidentiality.

SB 1488's requirement of meaningful public participation does not dictate that every record submitted to the Commission be open to public inspection. The Commission has long had to balance the need for confidentiality with our desire to encourage the public to participate in our proceedings. By the same token, we recognize in SB 1488 the Legislature's mandate that we be vigilant in examining our current process.

We do not, however, have the resources to ensure *in camera* inspection of each document a party redacts or withholds from public scrutiny. We seek to develop requirements that place the initial burden on parties to resolve their confidentiality claims, without involvement by the Commission. Commenters

should propose a process for accomplishing this goal, recognizing resource limitations that make it impossible for us to conduct document-by-document review. For example, in civil litigation, parties alleging privilege must provide a privilege log containing identifying information about withheld documents. We ask the parties to comment on whether such a requirement might help break discovery logjams here.

2. Open Decisionmaking

SB 1488 also requires open decisionmaking. We infer that the Legislature intended that we make decisions based on a record that is appropriately open and accessible. Decisions based on documents replete with redactions and other information not open to the public may run counter to this mandate of openness. Parties claiming the need for confidentiality must also be able to show that their information is not already in the public record at another agency or in another Commission proceeding. It is not reasonable to claim confidentiality at the Commission for information already released publicly in another forum.

The legislative history of SB 1488 evidences concern over both excessive redaction, and claims of confidentiality for records already released elsewhere. In an April 21, 2004 Analysis for the Senate Judiciary Committee,[2] SB 1488's author cited several examples of utility submissions or Commission decisionmaking with which she found fault, as follows:

> *SCE's April 2003 short-term procurement filing*: This filing was submitted pursuant to a statutory requirement and serves as the basis for a CPUC decision to adopt it. Most of its 170 pages

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[2] April 21, 2004 Analysis for Senate Judiciary Committee, available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1488_cfa_20040421_153228_sen_comm.html.

> were redacted in the public version. The CPUC accepted it in this form. You can't make heads or tails of the plan from reading the public version.
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> *PG&E's February 2003 motion to designate large portions of its Energy Resource Recovery Account (ERRA) application confidential:* This application sought confidential treatment of information that was publicly available in PG&E's own General Rate Case from the Department of Water Resources, and in filings made with the Federal Energy Regulatory Commission (FERC).
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> *SCE's 2003 application for approval of the "TrueSolar" project:* This application was kept entirely secret until shortly before it was voted on in the fall. It was made public at that time only because the CPUC Energy Division published a proposed resolution to deny approval which contained all the details except price.

In view of this concern, we seek input on how we can make decisions based on an appropriately open record without releasing information that facilitates third parties' efforts to game the market for electricity or otherwise leads to ratepayer harm.[3] The Commission has entertained several procedures over the years to strike a proper balance, including, as noted above, protective orders, delayed disclosure, data aggregation, selective redaction and the like. We seek input and creativity from the parties. Parties should not assume that our previous methods will suffice going forward.

Other procedures might include Commission guidance on the types of information that is and is not confidential. For example, in response to Decision (D.) 04-01-050/R.01-10-024, we invited input on confidentiality procedures in the

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[3] We ask parties to comment on whether SB 1488's mandates require us to keep information confidential if release would lead to ratepayer harm.

procurement context. ORA and The Utility Reform Network (TURN) suggested that the Commission develop 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] They also suggested various means to aggregate confidential data through use of averages, percentages or annualization of data instead of providing monthly or hourly data.

ORA and TURN also noted that the burden should be on the parties producing the documents to document the harm to them if the data in question is disclosed. The process in the California courts also places the burden on the producing party where "trade secrets" are alleged. 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 demonstrate the disadvantages of alternatives to full disclosure, such as a protective order.[5] We seek comment on whether we should apply the Evidence Code § 1060 framework here.

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[4] *Comments of the Office of Ratepayer Advocates and the Utility Reform Network on Confidentiality Requirements in Resource Planning*, R.01-10-024, filed March 1, 2004. Other parties also provided helpful comments in the R.01-10-024 confidentiality briefing cycle. To the extent their comments at that time are responsive to our inquiries here, they may attach and cite to their previous comments, rather than repeating them.

[5] Weil & Brown, *Civil Procedure Before Trial*, Scope of Discovery, Ch. 8C, at 8C-24–8C-24.1.

C. Public Utilities Code § 454.5(g)

Pub. Util. Code § 454.5(g) states the following:

> (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 and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission.

Because the statute relates to electricity "procurement plans," it is inapplicable in the telecommunications and water areas, and not applicable to energy unless electricity procurement (and perhaps procurement of natural gas as fuel pursuant to electric procurement contracts)[6] is at issue. Thus, the following discussion applies only to electric utilities that have submitted or will submit procurement plans and related documents. Other parties need not respond to the following discussion, but we will require input from the electric utilities themselves.

1. Meaning of Term "Market Sensitive Information"

The key § 454.5(g) language for our purposes is the requirement that we "ensure the confidentiality of any market sensitive information . . . ." We seek to define the term "market sensitive," which we find to be ambiguous and capable

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[6] We ask parties to comment on whether natural gas procurement is covered by SB 1488.

of several interpretations, some broad and others narrow. None of the reports prepared for the legislative committees and the full Legislature define or even discuss the term, so that portion of the legislative history does not aid our determination.

However, other portions of the statute and the Public Utilities Code may aid us in statutory construction. For example, § 454.5(a) focuses on "the date that the electric corporation intends to resume procurement of electricity for its retail customers ...." Is it appropriate, therefore, to apply the statute's requirement that we protect "market sensitive" information only to procurement plans enabling electric utilities to "resume procurement"? Once these utilities resume procurement, will the requirements of § 454.5(g) continue to apply? In the same vein, § 454.5(b)(9)(A) requires the procurement plans to achieve certain long-term goals, including acquisition of 20 percent of the utility's electricity through renewable sources. Does this provision suggest that the protection of "market sensitive" information should continue indefinitely? Are there other provisions in the Public Utilities Code that provide adequate protection for confidential information into the future without the need to construe § 454.5(g) to apply for years to come?

2. Meaning of Term "Procurement"

We also must determine what "procurement" records are covered by § 454.5(g). The statute states that "procurement plans" include, but are not limited to, "proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination . . . ." It is unclear what documents this description covers. For example, our current procurement proceeding, R.04-04-003, is designed to look at utility procurement plans.

However, R.04-04-003 also serves informally as an umbrella proceeding[7] for several other proceedings:

- 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

Does § 454.5(g) apply to all of the listed proceedings, or only documents at issue in R.04-04-003? Is there any legislative history to guide us in defining the universe of "procurement" documents? Is the term limited to procurement plans and data requests/consultant reports directly related to those plans, or does it include all of the inputs into procurement plans?

In Appendix A to this OIR, we list the types of documents about which there have been confidentiality disputes to date in R.04-04-003 and a few of the other proceedings listed above. We also provide the Commission's Energy Division's initial determinations of which documents should be confidential.[8] Parties may address this proposal in comments, as well as answering the following questions: Must we apply § 454.5(g) to all such documents or is the list too broad? Is it more effective for the Commission to define certain specific categories of documents that should and should not be treated as confidential, or

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[7] R.04-04-003, *mimeo.*, p. 9.

[8] We do not now adopt the Energy Division's initial determinations, and they do not bind the Commission if it determines another approach is warranted.

is a less specific process more prudent? If § 454.5(g) is construed to require protection of procurement plans well into the future, a more general approach may make most sense. If we are too specific about the types of documents deserving protection, our decision may not be a living document with applicability over time. If, on the other hand, it is appropriate to construe §454.5(g) to apply for a limited period, a more specific approach may be feasible. We invite comment on both approaches.

3. Procedures Developed Thus Far - Procurement

The Commission has already taken several steps to protect market sensitive information submitted with the utilities' procurement plans. We initiated R.01-10-024 to establish policies and cost recovery mechanisms for generation procurement and renewable resource development. Parties raised initial concerns about protecting confidential information in January 2002, culminating in the issuance of an *Administrative Law Judge (ALJ) Ruling Re Revised Protective Order* on May 1, 2002. That protective order remained in place throughout 2002.

In early 2003, however, the ALJ reopened the issue in response to concerns that certain market participants (parties who could use utility information in their market activities) and other entities did not have adequate access to information under the existing protective order. In one dispute, SCE and PG&E denied the California Independent System Operator (ISO), a party to R.01-10-024, access to confidential data. SCE and PG&E claimed the ISO was technically a market participant, could cause competitive harm to the utilities and their ratepayers, and could not guarantee the protection of confidential information from third parties.

After oral and written arguments were presented by interested parties, including TURN on behalf of residential customers, an ALJ ruling issued on April 4, 2003, modifying the protective order to allow the ISO the same access to the confidential information that ORA, TURN, and other consumer groups had. The April 4 ruling directed the ISO to identify an ISO Reviewing Representative for the proceeding, and directed each non-market participant, including the ISO, to treat protected materials as confidential vis-à-vis third parties.

Thereafter, on October 7, 2003, San Diego Gas & Electric Company (SDG&E) filed a motion to amend the April 4, 2003, protective order to request that it encompass all confidential, proprietary, and otherwise commercially sensitive and/or trade secret information provided to SDG&E by parties submitting bids in response to the Request for Proposals (RFP) for grid reliability capacity the utility issued on May 16, 2003. Numerous market participants responded to SDG&E's motion expressing concern that there was a lack of transparency in the implementation by the IOUs of procurement policies, and arguing that further additions to the protective order would prevent market participants from fully participating in the proceeding.

Seeking more access to data, while sensitive to the importance of shielding from public review information that is legitimately commercially sensitive, the market participants presented the Commission with suggested guidelines for amending the protective order to allow more access to information. Briefly, the market participants suggested that the Commission determine what types of information should be deemed propriety, confidential, and trade secret, and then allow parties access to this information under the revised protective order.

On December 1, 2003, the ALJ issued a ruling amending the protective order in part, but also denying SDG&E's request to deem confidential bid information that the bidders themselves did not identify as confidential; the

December 1, 2003, ruling did allow bid information that was confidential to remain confidential. However, recognizing the market participants' continuing claims, the ALJ solicited comment on a further modification to the protective order to incorporate a provision allowing outside attorneys and/or consultants to a market participant who do not perform competitive duties for or on behalf of their client, and who execute a non-disclosure certificate, to have access to protected materials relevant to the SDG&E RFP. The ALJ directed the parties to draft a revised protective order that paralleled language from an amended protective order adopted by a Federal Energy Regulatory Commission (FERC) judge in FERC Docket Nos. EL02-60-003 and EL02-62-003.

On January 14, 2004, following the receipt of comments on the FERC model, the ALJ issued a ruling adopting an amended protective order that was substantially consistent with the FERC orders and that allowed the market participants access to protected materials following the FERC guidelines. The ALJ indicated that the adoption of this protective order would put the market participants on an "effectively equal footing with the non-market parties that are participating in this review."[9]

Thus, we have already taken many steps to protect market sensitive information in accord with § 454.5(g)'s requirements. Our task here is to determine whether these steps have been adequate or whether we must take additional steps in view of SB 1488. Clearly, the Legislature was concerned with the lack of openness in the procurement proceeding when it passed SB 1488. We seek to determine whether there is more we should or must do consistent with

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[9] *Administrative Law Judge's Ruling Adopting Amended Protective Order and Severing an Issue for Hearing*, dated January 14, 2004, p.4.

the new legislation. We also ask the parties to identify the problems, if any, with the process we have already developed in the procurement proceedings to protect confidential documents, especially our initial determination to create a distinction between market participants and non-market participants. Are there also differences among market participants that warrant different treatment depending on whether the participant is a large IOU or a competitive Energy Service Provider? Is public participation and open decisionmaking possible if there is asymmetric access to these market participants' information?

4. Proposed Procedures Going Forward - Procurement

We must seek to construe § 454.5(g) in a manner that is consistent with the public participation and open decisionmaking requirements of SB 1488. Blanket claims of a need for confidentiality will no longer suffice if we are to satisfy SB 1488's concerns. Nor can we ignore § 454.5(g)'s mandate to ensure the confidentiality of market sensitive information. Rather, we must attempt to strike an appropriate balance, Thus, we will require that parties asserting confidentiality be as specific as possible about the harm that they contend will result from publication of various types of procurement information.

We are most interested in knowing which data categories contained in various procurement documents are the most sensitive and the most likely to cause ratepayer harm if released verbatim. In response to this OIR, the electric utilities shall, and other parties may, comment on the preliminary Energy Division confidentiality recommendations contained in Appendix A to this OIR. If they disagree with those recommendations, they should do so on a category by category basis. For all of the categories, even the most sensitive, the utilities should specify timeframes or other parameters for the Commission to use to protect them. For example, certain procurement documents may be sensitive if

they reveal hourly or daily information, but may lose their sensitivity if they cover longer timeframes.

Therefore, at the very least, we will require the utilities in their comments to comment on the Energy Division's recommended matrix of data categories contained in Appendix A.[10] They should accompany each data category with the following information:

Type of documents	**Short description of document type**	**Market sensitive – need for confidentiality (Y/N)?**	**Timeframe for maintaining confidential**	**Specify ratepayer harm if released sooner than specified timeframe**	**Procedure(s) other than sealing that will protect documents**

In completing this matrix, each electric utility should list the category, using the list in Appendix A. (If the list contains duplicates, the utilities may combine categories, but should state they are doing so. Utilities may also add data categories to the list.) Each utility should then give a brief description of the data category. It should next state whether the data is "market sensitive" and also confidential.

Importantly, each utility should explain how long the data category should remain confidential, or identify the timeframe (*e.g.*, hourly, daily) of information that requires protection. Equally important, the utilities should explain with specificity the ratepayer harm that may result from release of the information. It will not help us for parties to provide only general allegations about ratepayer

[10] The ESPs and CCAs also named in Phase 1 of this proceeding as respondents may participate in the development of this matrix, but we do not require them to do so at this time. We may so require at a future date.

harm. Rather, utilities should describe how one might use the data to unfairly affect electricity market prices or cause other harm.

Finally, for each category of confidential information, the utilities should identify how we might allow other parties access to the information in summary, aggregate, percentage-based, or partially redacted form, or via delayed release. That is, they should balance the harm they allege with procedures designed to maximize open decisionmaking. They should provide alternatives to full redaction or sealing for each type of data.

A matrix of this type will be most useful if the parties work on it together. Thus, we ask the parties to meet and confer before providing us the matrix in an attempt to develop one document rather than several different versions. At the very least, the three large electric utilities (PG&E, SCE, and SDG&E) and ORA should participate in the meet and confer session.

We also believe the matrix should be designed to last beyond our current procurement proceedings, to the extent parties contend § 454.5(g) binds us into the future. Thus, the data categories listed in Appendix A should be broad enough to cover procurement activities generally, rather than being limited to the types of information we are analyzing in our current procurement proceeding. We believe Appendix A is sufficiently broad to include data categories that might be at issue in future procurement proceedings, but we wish the parties' analysis of this conclusion.

D. Public Records Act

SB 1488 also requires us to ensure that our practices under the state Public Records Act (PRA) provide for meaningful public participation and open decisionmaking. In the PRA, Cal. Gov. Code § 6250 *et seq.*, "the Legislature, mindful of the right of individuals to privacy, finds and declares that access to

information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[11]

There is a large body of law construing the PRA, and this OIR is not the place for a full discussion of PRA precedent. The general policy of the PRA favors disclosure, and a decision to withhold public records must be based on the specific exemptions listed in the PRA, or on a determination that the public interest in confidentiality clearly outweighs the public interest in disclosure. (Cal. Gov. Code § 6255; *see, e.g., American Civil Liberties Foundation v. Deukmejian* (1982) 32 Cal. 3d 44*; San Gabriel Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 71-72; and *Re San Diego Gas and Electric Company*, D.93-05-020, 49 Cal. PUC 2d 241 (1993).)

In the 1970s, the Commission adopted General Order (GO) 66-C, which explains how to obtain records in the Commission's possession. (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.) In the second phase

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[11] Recent amendments to the California Constitution reinforce the public's right of access to government information, and condition our ability to establish new limits on disclosure. Article 1, § 3(b) now provides in pertinent part that:

(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.

(2) A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings that demonstrating the interest protected by the limitation and the need for protecting that interest.

of this proceeding, we will seek to determine whether GO 66-C conforms to SB 1488's goals.

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.[12] The general order then lists information falling into this category, including

> a) Records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.
>
> [and]
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> 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 view of SB 1488's concerns about openness, GO 66-C may require revision.[13] Under SB 1488, a party asserting confidentiality may now have to show with greater particularity how release of the information will cause it – or ratepayers – harm. Consistent with the Evidence Code § 1060 trade secret process we describe above, the party claiming confidentiality may also have to demonstrate why we cannot use alternative procedures such as aggregation of information, partial data masking, delayed release of documents, and other methods as alternatives to outright filing under seal.

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[12] We discuss § 583 in more detail below.

[13] For a further discussion of GO 66-C, we refer parties to our recent decision on the subject, D.05-04-030.

In the second phase of this proceeding, we intend to seek comment on whether GO 66-C requires amendment in light of the passage of SB 1488. We do not plan to limit the second phase to the electricity procurement context, and when we initiate that phase we may name additional parties as respondents, including parties in the gas, telecommunications and water industries.

E. Public Utilities Code § 583

The Legislature also requires that in implementing SB 1488 we examine our practices under Pub. Util. Code § 583. Section 583 is the statute the Commission and parties to Commission proceedings have long relied upon to justify holding records confidential. It provides the following:

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

As introduced, SB 1488 would simply have amended § 583 to provide for more openness.[14] However, the Legislature ultimately passed legislation that did not amend § 583 but instead required that we examine our practices under § 583,

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[14] *Compare* Analysis prepared for Senate Energy, Utilities and Communications Committee, March 23, 2004, available online at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1488_cfa_20040319_122113_sen_comm.html *with* Assembly Amendment of June 9, 2004, available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1451-1500/sb_1488_bill_20040609_amended_asm.html.

§ 454.5, and the PRA with a view toward ensuring meaningful public participation and open decisionmaking.

We do not believe § 583 allows document holders simply to stamp documents as confidential in order to transfer the burden to those seeking discovery to disprove the need for confidentiality. Rather, under § 583, parties must in the first instance justify their need for confidentiality. General, sweeping assertions of ratepayer or business harm will not suffice.

Section 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* (9th 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, *Re Southern California Edison Company* [Mohave Coal Plant Accident], D.91-12-019 (1991) 42 CPUC2d 298, 300, 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.[15]

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[15] 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 CPUC2d at p.301.) That decision later states: "Further, simply citing Section 583 does not establish the confidentiality of a document. Section 583 does not discuss or 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 CPUC2d at pp. 302-303.)

III. Category of Proceeding

The Commission's Rules of Practice and Procedure require that an order instituting rulemaking preliminarily determine the category of the proceeding and the need for hearing.[16] As a preliminary matter, we determine that this proceeding is quasi-legislative. We reserve the right to hold hearings in this proceeding after we receive comments. Hearings might include input on what information is "market sensitive" and the harm that would result from such information's release. If we determine hearings are not necessary, we will reverse our determination that hearings may be required.

As provided in Rule 6(c)(2), any person who objects to the preliminary categorization of this rulemaking as "quasi-legislative" or to the preliminary hearing determination, shall file and serve its objections within ten days of the mailing date of this decision. These comments or objections shall be served on the temporary service list whose web links appear in Appendix B to this order. After the first Prehearing Conference (PHC) in this matter, the assigned Commissioner will issue a Scoping Memo making a final category determination; this final determination is subject to appeal as specified in Rule 6.4.

IV. Schedule

The preliminary schedule is set forth below. We delegate to the Assigned Commissioner and the ALJ the authority to set other dates in the proceeding.

Comments on procurement issues due (see Questions in Appendix C)	30 days after OIR mailed

[16] Rule 6(c)(2).

Reply Comments on procurement issues due	30 days after Comments due

This proceeding will conform to the statutory case management deadline for quasi-legislative matters set forth in Pub. Util. Code § 1701.5.

V. Respondents

We name as respondents in this proceeding the three major electric IOUs: PG&E, SDG&E, and SCE, as well as the ESPs listed in Appendix D to this proceeding, and any other ESP or CCA that is registered to serve retail customers within the service territory of one or more of the three respondent investor-owned utilities. These respondents shall file comments in response to the questions listed in Appendix C to this OIR, except that the ESPs and CCAs may, but are not required to comment on the specifics of the "matrix" we discuss elsewhere in this decision. All other parties may file comments. We may add respondents when we commence the second phase of this proceeding, related to GO 66-C.

VI. Parties and Service List

Interested persons will have 20 days from the date of mailing to submit a request to be added to the service list for this proceeding. Since our order names PG&E, SDG&E, and SCE respondents to this rulemaking, by virtue of that fact, they will appear on the official service list.

We will also serve this order on those who are on the service lists for the following proceedings:

- R.04-04-003, the procurement rulemaking;
- 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;
- R.04-01-026, the transmission assessment process rulemaking;
- R.04-01-025, the natural gas supply rulemaking; and
- All ESPs listed in Appendix D to this OIR.

Within 20 days of the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in this rulemaking should send a request to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California, 94102 (or ALJ_Process@cpuc.ca.gov) asking that his or her name be placed on the official service list for this proceeding. The service list will be posted on the Commission's website, www.cpuc.ca.gov, prior to the time comments are filed pursuant to Ordering Paragraph **7.**

Any party interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor in Los Angeles at (213) 649-4782 or in San Francisco at (415) 703-7074, (866) 836-7875 (TTY – toll free) or (415) 703-5282 (TTY), or send an e-mail to public.advisor@cpuc.ca.gov.

The Commission has recently adopted rules for the electronic service of documents related to its proceedings, Commission Rule 2.3.1, available on our website at http://www.cpuc.ca.gov/PUBLISHED/RULES_PRAC_PROC/44887.htm. All parties shall comply with the requirements of the new rule.

VII. Ex Parte Communications

Per Rule 7(d) of the Commission's Rules of Practice and Procedure, *ex parte* communications are allowed without restriction or reporting requirement in any quasi-legislative proceeding. Therefore, there are no such restrictions or reporting requirements applied to this proceeding.

Therefore, **IT IS ORDERED** that:

1. The Commission hereby institutes this rulemaking on its own motion to implement the provisions of Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) relating to the confidentiality of information submitted to this Commission.

2. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E), and each Energy Service Provider (ESP) and Community Choice Aggregator (CCA) that is, or becomes, registered to serve retail customers within the service territory of one or more of the three respondent investor-owned utilities, are Respondents in Phase 1 of this proceeding. We may add additional respondents in Phase 2.

3. The Executive Director shall cause this Order Instituting Rulemaking (OIR) to be served on Respondents, the California Energy Commission, and parties to the following existing Commission proceedings: R.04-04-003, R.03-10-003, R.04-04-025, R.04-04-026, R.04-03-017, R.01-08-028, I.00-11-001, R.04-01-026, and R.04-01-025, and the ESPs listed in Appendix D to this OIR. Further, until this proceeding is closed by order of the Commission, the Executive Director shall cause a copy of the OIR and this Order to be served on each newly registered ESP and CCA.

4. Within 20 days from the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in this

rulemaking shall send a request to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California, 94102 (or ALJ_Process@cpuc.ca.gov) asking that his or her name be placed on the official service list for this proceeding.

5. All parties shall abide by the Commission's new electronic service rules contained in Rule 2.3.1 of the Commission's Rules of Practice and Procedure.

6. We preliminarily determine the category of this rulemaking to be "quasi-legislative" and find that hearings are necessary. Parties objecting to these determinations shall file and serve comments or objections on the categorization of this proceeding and need for hearings within ten days of the mailing date of this decision. These comments or objections shall be served on the temporary service list whose web links appear in Appendix B.

7. PG&E, SCE, and SDG&E shall, and other parties may, file opening comments on the procurement related issues identified in Appendix C to the OIR no later than 30 days after mailing of this OIR. Respondents and other parties may file reply comments no later than 30 days after opening comments are due.

8. We delegate to the Assigned Commissioner and Administrative Law Judge the authority to set the schedule for this proceeding.

This order is effective today.

Dated _____, 2005, at San Francisco, California.