

Decision 09-04-037 April 16, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 Rulemaking 05-06-040 (Sept. 22, 2004)) Relating to Confidentiality of Information.

R.05-06-040
(Filed June 30, 2005)

**ORDER DENYING APPLICATION FOR REHEARING
OF DECISION 08-04-023**

I. INTRODUCTION

Decision (D.) 08-04-023 is the third decision issued in Rulemaking (R.) 05-06-040. D.08-04-023 adopts a “model protective order and non-disclosure agreement” (hereinafter, MPO), and mandates its use in all resource adequacy (RA), resource procurement (procurement), and renewables portfolio standard (RPS) proceedings; and specifically in the following pending proceedings: R.08-01-025, R.05-12-013, R.04-04-003, R.06-02-013, R.06-05-027, R.06-02-012 and R.04-04-026. D.08-04-023 also grants in part, and denies in part, a petition for modification filed by the Alliance For Retail Markets and others (AReM) of D.06-06-066 as modified by D.07-05-032¹, concerning the matrices adopted for electric service providers (ESPs) and investor-owned utilities (IOUs). In addition, D.08-04-023 ratifies rulings made by the presiding ALJ regarding the procedure for seeking confidentiality of certain data.

CALifornians for Renewable Energy, Inc. (CARE) is a party in the underlying proceeding, R.05-04-060, and it filed a timely application for rehearing. AReM filed a timely response to it. CARE alleges that its due process rights have been

¹ D.06-06-066 was the initial decision in R.05-06-040.

violated, and that the Commission abused its discretion by withholding ESP information from the public without statutory authorization to do so. CARE argues that we have no authority to withhold confidential information submitted by wholesale energy providers because they are unregulated entities. Lacking precision, it appears that CARE may have attempted to argue that intervenors in Commission proceedings should be permitted access to the same information that it alleges the Federal Energy Regulatory Commission (FERC) makes available to them. In addition, CARE contends D.08-04-023 is arbitrary and capricious because it conflicts with a litigation position CARE asserts we argued in a FERC proceeding. CARE contends that poor and otherwise unrepresented people of color will be adversely affected by D.08-04-023 if their representatives are not provided access to information concerning wholesale energy transactions.

We have reviewed each and every allegation of error raised by CARE and find, as discussed below, that they are without merit. Accordingly, we deny CARE's application for rehearing.

II. DISCUSSION

CARE states that it represents consumers who purchase retail electric energy from IOUs. (April 1, 2008 comments of CARE on proposed decision at p. 3.) By D.06-12-030 (the second decision in R.05-06-040), we categorized some of the parties participating in the underlying proceeding as market participant (MP) or non-market participant (NMP); however, D.06-12-030 did not specifically categorize CARE. D.06-12-030 defined MP, and determined that entities who do not meet that definition are NMPs. (D.06-12-030 at p. 38.) A MP is one who has "the potential to materially affect the price paid or received for electricity if in possession of" market sensitive information. (D.06-12-030 at p. 9.) One is considered to have the "potential" if one participates in the state's electricity market with more than one megawatt (1 MG) of capacity annually, or the entity "has the ability to dictate the price of electricity it purchases or sells because the price is set by a process over which the ... entity has ... control." (*Id.*) CARE does not allege whether it is, or is not, a NMP. From its self description, it appears likely CARE may be categorized as a NMP.

Public Utilities Code section 1731, which governs applications for rehearing, permits any party to file such an application regarding matters determined in the action or proceeding.² However, the Commission is authorized to grant a rehearing “if in its judgment sufficient reason is made to appear.” (§ 1731(b).) CARE has not described how the challenged decision harms it. CARE complains that intervenors in Commission proceedings should be allowed access to confidential market sensitive information in part, to protect the public from fraudulent energy transactions, and also because provision of material and relevant information to parties in proceedings is necessary for open decision-making. The two earlier decisions in this docket, D.06-12-030 and D.06-06-066, permit NMPs access to all market sensitive information--regardless of whether they make the request under the California Public Records Act (CPRA) or in their capacity as intervenors in a proceeding--provided they agree to abide by our confidentiality process, which consists of the MPO adopted by D.08-04-023.³ Further, even if CARE was categorized as a MP, D.06-12-030 permits some MPs the option of using reviewing representatives in order to access market sensitive information.⁴ CARE has not alleged that it has been denied discovery or access to any information.

To the extent that CARE may be using its application for rehearing of D.08-04-023 to argue that denying intervening parties access to confidential market sensitive information essentially defeats the purpose of Senate Bill (SB) 1488, these issues were relevant to the two earlier decisions in this docket. CARE did not raise these issues in its application for rehearing of D.06-12-030; nor did CARE respond to the applications for

² All statutory references are to the Public Utilities Code unless otherwise indicated.

³ A NMP may obtain access to confidential market sensitive information provided it agrees to comply with our confidentiality process. If CARE were an intervenor MP, a different process than the confidentiality process adopted for NMPs, may be available that permits MPs to use reviewing representatives to obtain access to confidential market sensitive information. (See D.06-12-030.) Although CARE applied for rehearing of D.06-12-030, it never challenged either the categorization criteria (for MP and NMP), or the enhanced process adopted for MPs.

⁴ See also, D.09-03-046, granting a limited rehearing of D.06-12-030, in part, on the question of whether all parties in Commission proceedings categorized as MPs may use the reviewing representative process.

rehearing of D.06-06-066, or D.06-12-030, that actually raised these issues.⁵ They are not timely for purposes of D.08-04-023. Allegations of error regarding the categorizations NMP and MP, and the processes adopted and/or denied to some MP parties based on the categorization, should have been made in a timely manner following issuance of D.06-12-030 and/or D.06-06-066, and are now foreclosed by section 1731(b). Because CARE failed to timely articulate its allegations of error regarding the earlier decisions, and failed to allege any harm caused to it by D.08-04-023, there is not good cause to grant a rehearing of D.08-04-023.

Notwithstanding that CARE has failed to establish good cause for granting its application for rehearing, we address the remaining issues raised in its application for rehearing. CARE alleges D.08-04-023 errs in determining that the market sensitive information submitted by “unregulated entities” such as ESPs, shall be kept confidential.⁶ D.08-04-023 did not adopt the ESP matrix, D.06-06-066 did. As noted, D.08-04-023 disposed of a September 2007 petition for modification of D.06-06-066, proposing changes to the ESP matrix. The modification adopted by D.08-04-023 is intended to modify the ESP matrix so that it is comparable to IOU matrix, in order to ensure that information possibly pertaining to an entity’s potential “net short” is protected as confidential and may be withheld from the public. (D.08-04-023 at p. 26 Finding of Fact No. 5.)

CARE’s issues, however, do not concern error in the modification adopted by D.08-04-023; rather it challenges the entire ESP matrix. CARE also challenges the legal and policy rationales for keeping market sensitive information confidential, and the

⁵ CARE alleged in its application for rehearing of D.06-12-030 that the Commission’s designation of the California Independent System Operator (CAISO) as a NMP was erroneous, contending that the CAISO is a MP under the definition adopted by D.06-12-030 and also under the FERC definition of MP. It also challenged that decision’s finding that the California Manufacturers and Technology Association (CMTA) and California Large Energy Consumers Association (CLECA) are NMPs. CARE’s application for rehearing of D.06-12-030 was denied by D.09-03-046.

⁶ An ESP is defined in section 218.3 as “an entity that offers electrical service to customers within the service territory of an electrical corporation...” An ESP is not considered to be an electrical corporation as defined by section 218 (a), but is a retail seller of electricity. (§ 399.12(i)(3).)

Commission's jurisdiction over ESPs. These allegations of error should have been made following issuance of D.06-06-066 and are now untimely. (§ 1731.)

Furthermore, CARE's allegation that we have no authority upon which to treat market sensitive information submitted by ESPs as confidential is without merit. CARE has intervened in this proceeding since August 2006, and it knows, or should have known, that R.05-06-040 specifically applies to ESPs, yet has not previously challenged our authority on this point. (See R.05-06-040 at p. 2 fn 1, p. 17 fn 10, and p. 24.) CARE knows, or should know, from other Commission proceedings it has intervened in, that the Commission has a long line of decisions establishing RPS and RA policies and regulations applicable to the IOUs, as well as ESPs. (See e.g., Pub. Util. Code § 399.12(i)(3); and see D.07-03-015 at p. 2, fns 2-7, concerning R.04-04-003.) CARE's allegation that we have no authority over ESPs constitutes an untimely collateral attack on previous decisions. (§§ 1709, 1731.)

Section 454.5(g) requires the Commission to ensure the confidentiality of market sensitive information. Thus, regardless of whether section 454.5 is applicable to ESPs, not extending the protection to *all* confidential market sensitive information submitted to the Commission in the affected proceedings would defeat the state's purpose in requiring protection of that type of information. We are empowered by section 701 to do all things necessary and convenient in the exercise of our power to supervise and regulate every California public utility, and that power is not expressly limited to actions against public utilities. (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal. App. 4th 1174, 1198, review den. 2004 Cal. LEXIS 8379.) In addition, we are also empowered by General Order (GO) 66-C to protect confidential market sensitive information from public disclosure if the balance favors withholding the information; and even if section 454.5(g) applied only to confidential market sensitive information submitted by IOUs, GO 66-C is not so limited. (GO 66-C, § 2.2.) Also, in the event of a CPRA request for confidential ESP market sensitive information, our balancing test would also include a

review of whether the information may be publicly disclosed or not, pursuant to Government Code sections 6255 and/or 6254(k).⁷

CARE also contends that an ESP's confidential market sensitive information includes wholesale energy transactions, and alleges that ESPs may have engaged in behavior that led to the 2000 Energy Crisis experienced in California. (CARE application for rehearing at p. 3.) However, CARE cites no evidentiary support for its allegation; and ESPs are retail sellers of electricity. (§399.12(i)(3).) CARE argues that the Commission is inconsistent in arguing before the FERC that we are entitled to certain information regarding electric wholesale transactions, while simultaneously withholding confidential market sensitive information submitted by ESPs from some members of the public (e.g., MPs) and presumably in requiring NMPs to abide by a confidentiality process in order to gain access to such information. CARE cites no legal or factual support for its assertion. Arguments the Commission has presented as the representative of California's ratepayers in FERC proceedings regarding questionable wholesale transactions during the 2000 Energy Crisis have nothing to do with the ESP information at issue in the affected proceedings. They are, as D.08-04-023 observed, two separate matters. The allegation is without merit.

III. CONCLUSION

For the reasons discussed above, CARE's application for rehearing of D.08-04-023 is denied.

⁷ To the extent that market sensitive information may include trade secret information, Evidence Code section 1060 may also be a relevant consideration, as possibly may be any privileged information under Evidence Code section 1040.

THEREFORE, IT IS ORDERED that:

1. The application for rehearing of Decision 08-04-023 filed by Californians for Renewable Energy is denied.

This order is effective today.

Dated April 16, 2009, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners