

Decision 06-12-030 December 14, 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)

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ORDER50

**DECISION DEFINING "MARKET PARTICIPANT" AND
"NON-MARKET PARTICIPANT" FOR THE PURPOSES
OF ACCESS TO CONFIDENTIAL DOCUMENTS**

I. Summary

This decision addresses one issue left open for consideration in Decision (D.) 06-06-066: which individuals and entities are “market participants” and which are “non-market participants” for purposes of having access to confidential electric procurement, resource adequacy and renewables portfolio standard (RPS) data under Pub. Util. Code § 454.5(g). We adopt the following definition of “market participant” for purposes of access to “market sensitive” procurement data covered by § 454.5(g) and/or D.06-06-066:

A “market participant” is

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

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

commercial processes, if it can establish a legitimate need for market sensitive information.

We adopt the following definition of “non-market participant”:

Persons or entities that do not meet the definition of market participant are non-market participants, and may have access to market sensitive information. It is proper to require such non-market participants to sign a nondisclosure agreement or to be bound by a protective order prohibiting the disclosure of information to market participants.

II. Background

The term “market participant” is derived from Pub. Util. Code § 454.5(g), which requires the Commission to develop rules to protect certain confidential information:

(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 Advocates¹ *and other consumer groups that are non-market participants* shall be provided access to this information under confidentiality procedures authorized by the commission. (Emphasis added.)

Defining “non-market participants” and its inverse, “market participants” is especially important now, because D.06-06-066 determined “[d]ata that are confidential may be kept from market participants altogether.”² Thus, parties

¹ The Office of Ratepayer Advocates is now the Division of Ratepayer Advocates (DRA).

² D.06-06-066, *mimeo.*, ordering paragraph 9.

who want access to the utility and Energy Service Provider (ESP) procurement, resource adequacy and RPS data covered by D.06-06-066 are eager to establish that they are not market participants.

In D.06-06-066, the Commission asked parties to comment on the definitions of market participant and non-market participant. Southern California Edison Company (Edison), the Independent Energy Producers Association (IEP), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), the California Large Energy Consumers Association (CLECA), The Utility Reform Network (TURN), the California Manufacturers and Technology Association (CMTA), and the Cogeneration Association of California/Energy Producers and Users Coalition (CAC/EPUC) filed opening comments on the issue, and CLECA, SDG&E, Edison, CMTA, Californians for Renewable Energy (CARE), CAC/EPUC, and the California Independent System Operator (CAISO) filed reply comments.

III. Key Disputes

The key disputes among commenters are:

- **Broad vs. narrow definitions.** Whether the term “market participant” should be defined broadly to include many entities, or as narrowly as possible to increase the number of entities with access to confidential documents. Concomitantly, whether the term “non-market participant” should be defined narrowly or broadly.
- **Relevant market.** Which "market" is relevant to the term "market participant?" We address the wholesale and retail purchase and sale of energy/capacity in this decision.
- **Type of staff affected.** Which individuals within a market participant, if any, may have access to documents as **reviewing representatives**, and which may not?
- The role of **consultants and attorneys** who represent both market participants and non-market participants.

- Access by **trade associations**, and the **status of particular associations** who filed comments.

We discuss each of these items in turn below.

IV. Broad vs. Narrow Definitions

A. Parties' Positions

Parties wanting access to confidential data propose that the term “market participant” be defined narrowly, and that “non-market participant” be defined broadly. Conversely, IOUs, who provide most of the data at issue in this proceeding, wish to limit access to their confidential data.

Edison, for example, proposes that the term “market participant” be defined expansively, and include any party – including Edison itself – which transacts or advises others how to transact in the California energy markets. When in doubt, Edison asserts, the Commission should err in favor of finding that an entity is a market participant. Edison reasons that D.06-06-066 provided that “more data than ever be open to market participants,” and that the definition of “market participant” should include all those whose awareness of market-sensitive information could result in raising prices above competitive levels.”³

By contrast, CAC/EPUC state that the Commission should construe the term “market participant” “so as to maximize the number of stakeholders that have access to confidential information, pursuant to reasonable protections.”⁴

³ Edison opening comments at 1.

⁴ CAC/EPUC reply comments at 2. *See also* CMTA opening comments at 2.

B. Discussion

D.06-06-066 contains a materiality requirement. The decision finds that market sensitive information is not all information with a conceivable impact, no matter how small, on the market for electricity. Rather, the decision states,

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.⁵

...

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.⁶

However, we are faced with a different question in this decision: we are defining “market participant,” not determining what is “market sensitive.” The question before us is whether the term “market participant” includes every entity that participates in the market, or whether there should be limitations. Should “market participant” only include players with the potential to use information in a material way? Should we limit the definition of “market participant” to persons and entities who will use “market sensitive” information to harm ratepayers?⁷

⁵ D.06-06-066, *mimeo.*, p. 40.

⁶ *Id.*, ordering paragraph 12.

⁷ As a threshold matter, the fact that “market participant” is not mentioned in § 454.5(g) does not alter our view that we are required to interpret the term and limit access by market participants to market sensitive information. We found in D.06-06-066 that,

The Legislature’s concern about protecting the confidentiality of “market sensitive” information logically includes restrictions on access to data for those who operate in that “market.” Thus, it is appropriate and lawful

Footnote continued on next page

We believe Senate Bill (SB) 1488 requires that we interpret the term “market participant” narrowly, to only include those persons and entities who could use market sensitive information to cause harm to the market or gain an advantage in the market. SB 1488, which we interpreted in D.06-06-066, states that

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.

In D.06-06-066, we stated that we would “start with a presumption that information should be publicly disclosed and that any party seeking confidentiality bears a strong burden of proof.”⁸

It is consistent with the presumption in D.06-06-066 that we define the term “market participant” narrowly. It makes no sense, for example, to include in the definition every person and entity that buys or sells electricity, since this would include virtually everyone, including residential customers. No one argues that residential customers could, if in possession of “market sensitive” information, use it to harm ratepayers or materially impact the market price of electricity.

In our view, it is illogical to define “market participant” to include every entity that buys or sells power at wholesale (or retail), no matter how *de minimis*

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

⁸ *Id.*, p. 2.

its participation. While such an entity clearly “participates” in the market, we do not believe the Legislature intended to protect “market sensitive” information if its recipient could not use it to interrupt normal market forces. Indeed, Edison concedes this point: “‘market participant’” should include all those whose awareness of market-sensitive information *could result in raising prices above competitive levels.*”⁹

Thus, the following criteria, at a minimum, should apply to any determination of who is and is not a market participant. (We add additional criteria later in this decision and summarize all criteria in the ordering paragraphs.)

Does the person/entity seeking access to market sensitive information have the potential to materially affect the price paid or received for electricity if in possession of such information? An entity will be considered not to have such potential if:

- a) the person or entity’s participation in the California electricity market is *de minimis* in nature. In the resource adequacy proceeding (R.05-12-013) it was determined in D.06-06-064 § 3.3.2 that the resource adequacy requirement should be rounded to the nearest megawatt (MW), and load serving entities (LSEs) with local resource adequacy requirements less than 1 MW are not required to make a showing. Therefore, a *de minimis* amount of energy would be less than 1 MW of capacity per year, and/or an equivalent of energy; and/or
- b) the person or entity has no ability to dictate the price of electricity it purchases or sells because such price is set by a process over which the person or entity has no control, *i.e.*, where the prices for power put to the grid are completely

⁹ Edison opening comments at 1 (emphasis added).

overseen by the Commission, such as subject to a standard offer contract or tariff price. A person or entity that currently has no ability to dictate the price of electricity it purchases or sells under this section, but that will have such ability within one year because its contract is expiring or other circumstances are changing, does not meet this exception.

V. Relevant Market

A. Wholesale vs. Retail

1. Parties' Positions

Several parties ask the Commission only to include wholesale buyers and sellers of electricity in the definition of “market participant.” For example, IEP states that market participants should only include those who buy, sell or exchange electricity at wholesale.¹⁰

The only real disagreement among the parties on this issue is whether the term “market participant” includes cogenerators (whose business is not primarily generation, but who instead generate electricity for themselves and sell their excess electricity to the grid) or direct access retail customers (who buy large quantities of electricity). We discuss these issues under “Cogenerators” and “Direct Access Customers” below. No one disputes that large wholesale sellers such as merchant generators are market participants.

2. Discussion

The term "market participants" includes a person or entity, or employees of an entity, that engages in the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, or consulting on such matters,

¹⁰ IEP opening comments at 2. *See also* CLECA reply comments at 2.

subject to the limitations set forth elsewhere in this decision. "Market participants" do not include retail purchasers of electricity.¹¹ Market participants may be denied access to confidential data (as set forth in the Matrices to D.06-06-066) altogether.

B. Cogenerators

1. Parties' Positions

Within the wholesale category, there is disagreement as to whether all wholesale sellers are market participants. CMTA, for example, proposes that industrial cogenerators not be deemed market participants. According to CMTA, although cogenerators sell power at wholesale, they do so under long-term standard contracts whose terms they cannot affect. Thus, CMTA contends, even if they had market sensitive information, it would not help them gain a better price for their power, because the price they pay is standardized.

Similarly, CAC/EPUC claim that cogenerators do not have incentives to manipulate the market and thus are not market participants because they are price takers. Under this reasoning, cogenerators should not be deemed market participants if 1) their participation in California's power markets is *de minimis* in nature and by definition unable to materially affect the market price of electricity, 2) cogenerators' principal business is not the generation or sale of electric power, or 3) they sell power to the grid only as a byproduct of the primary reason they installed the generation equipment.¹²

SDG&E disputes CMTA's claims about cogenerators, noting that even if the price term of their contracts is set in stone, cogenerators could use

¹¹ We discuss the status of ESPs in the section entitled "ESP" below.

¹² CAC/EPUC reply comments at 8-9.

market sensitive data to negotiate non-price terms under its standard offer contracts with the utilities. SDG&E also claims that cogenerators do have an incentive to manipulate the market and thus should be characterized as market participants.

2. Discussion

Consistent with our determination to interpret the term “market participant” narrowly, we agree that cogenerators should not be universally prohibited from access to market sensitive data. While some cogenerators participate in the wholesale market, we agree with CAC/EPUC that they often do so at *de minimis* levels, selling small amounts of power left over from their industrial processes. Other cogenerators do not sell any power to the grid, because they consume all the power they generate in their own business.

We do not see how CAC/EPUC’s other criteria should factor into the determination of whether a cogenerator is a market participant. Even if a cogenerator’s primary business is not generation, it may sell enough electricity to have a material impact on the market price. Similarly, even if the sale is simply a byproduct of an industrial product, this fact does not define whether the sale is material.

Instead, we will rely on the following criteria to determine whether a cogenerator is a market participant:

- Does the cogenerator seeking access to market sensitive information have the potential to materially affect the price it receives for electricity if in possession of such information? A cogenerator will be considered not to have such potential if:
 - the person or entity’s participation in the California electricity market is *de minimis* in nature. In the resource adequacy proceeding (R.05-12-013) it was determined in D.06-06-064

§ 3.3.2 that the resource adequacy requirement should be rounded to the nearest megawatt (MW), and load serving entities (LSEs) with local resource adequacy requirements less than 1 MW are not required to make a showing. Therefore, a de minimis amount of energy would be less than 1 MW of capacity per year, and/or an equivalent of energy; and/or

- the person or entity has no ability to dictate the price of electricity it purchases or sells because such price is set by a process over which the person or entity has no control, *i.e.*, where the prices for power put to the grid are completely overseen by the Commission, such as subject to a standard offer contract or tariff price. A person or entity that currently has no ability to dictate the price of electricity it purchases or sells under this section, but that will have such ability within one year because its contract is expiring or other circumstances are changing, does not meet this exception; and/or
- the person or entity is a cogenerator that consumes all the power it generates in its own industrial and commercial processes, if it can establish a legitimate need for market sensitive information.

It may be that an individual cogenerator does not have the ability to materially affect the market price, but that cogenerators acting in concert could affect the price if given access to market sensitive information. Such activity could constitute price fixing in violation of the antitrust laws. While we acknowledge the risk of a large group of small sellers conspiring to fix prices, we do not believe we should set policy on the assumption that this would occur here.

C. Direct Access Customers

1. Parties' Positions

Direct access customers purchase power at retail from ESPs.¹³ They purchase the power for their own use, and not for resale. CLECA and CMTA represent large purchasers of electricity, some of whom take direct access, and others who are bundled utility customers (customers that take service from their utility). They contend that direct access customers are not market participants. CLECA rhetorically questions how DA customers could impact the market price of electricity:

Is the claim that information regarding the prices paid by utilities for power in the *wholesale* market would better inform DA customers' purchases of power from ESPs in the *retail* market? It is unclear why that would be true[;] they are after all different markets. But, even if true how would that information harm the utilities? Is the claim that DA customers' access to information regarding prices paid by utilities would be passed on by such customers to their ESP providers? Why would the customers do that? It certainly would not assist them in their negotiations with the ESP.¹⁴

SDG&E, by contrast, asserts that "DA customers actively participate in the retail market as buyers, and 'could, through access to confidential utility data, gain insights into the utility's future plans that would allow them to make better-informed decisions between bundled and DA service' than 'uninformed

¹³ A list of Commission-authorized ESPs appears on the Commission's website at http://www.cpuc.ca.gov/published/esp_lists/esp_udc2.htm. We discuss the status of ESPs in the "ESP" section below.

¹⁴ CLECA opening comments at 6 (emphasis in original).

customers.’’¹⁵ SDG&E thus concludes that DA customers should be market participants.

TURN does not view as serious the risk SDG&E poses about DA customers gaining insight into utility’s future plans: “A customer’s current status as bundled or DA probably should not be the determining factor in whether that person or entity is classified as a market participant or not.”¹⁶

2. Discussion

The risk that DA customers could use market sensitive information to materially affect the market price for electricity is too attenuated to justify barring such customers from access to market sensitive data. Moreover, as large consumers of electricity, they have a legitimate need to understand the basis for their energy prices.

Thus, DA customers may have access to market sensitive and other confidential data pursuant to the terms of a reasonable protective order. While such customers could potentially use market sensitive information to gain insights that might work to the disadvantage of bundled service customers, we agree with TURN that this possibility is too attenuated to prohibit DA customers access to market sensitive and confidential data.

¹⁵ SDG&E reply comments at 3-4, quoting TURN opening comments at 1-2. Despite the quotations from TURN, TURN concludes that DA customers are not market participants.

¹⁶ TURN opening comments at 2.

VI. "Reviewing Representatives": Access by Staff Within a Market participant

A. Parties' Positions

IEP asserts that even within a market participant, we should focus on the roles and functions of staff to determine who may have access to confidential data. Only staff actually involved in (or who supervise) buying/selling/exchanging electricity should be restricted from access to confidential data. Other staff within the market participant should have access, IEP contends. IEP cites its experience at the Federal Energy Regulatory Commission (FERC), where "reviewing representatives" designated by parties may have access to confidential information even if other employees or representatives of their organizations are not entitled to access. The "reviewing representatives" with access to confidential data would not include persons whose scope of employment involves:

the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting service to any persons whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy.¹⁷

SDG&E argues that IEP's "micro level" approach, which would examine the function of a person within an organization, would cause "numerous, protracted disputes ... as the credentials of each reviewing representative are debated."¹⁸ Even if certain people within a market participant

¹⁷ IEP opening comments at 3. *See also* CMTA opening comments at 2 ("even as to the utilities' competitors, there is no reason to include all personnel from a company within the definition of 'market participant.'").

¹⁸ SDG&E reply comments at 5-6.

do not directly trade in the market, they would “have a strong incentive to gain a competitive advantage for their clients/employers.”¹⁹

B. Discussion

We will allow a narrow exception to our general holding that market participants may not have access to market sensitive data under § 454.5(g). This exception allows market participants to designate representatives (outside experts, consultants or attorneys) as long as such representatives have no involvement in energy marketing and related activities and work in a different firm from, or are ethically screened from, such representatives. This narrow exception will allow some data access to all parties, including market participants, under conditions designed to ensure that market sensitive data are not used to affect energy prices to the detriment of ratepayers.

Market participants may designate as Reviewing Representatives outside experts, consultants or attorneys who meet the following criteria:

1. Reviewing Representatives may not currently be engaged, directly or indirectly, in (a) the purchase, sale, or marketing of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) whose duties include such activities), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (c) consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting).
2. Reviewing Representatives may not be employees of market participants.

¹⁹ *Id.* at 6.

3. Reviewing Representatives shall use market sensitive data only for the purpose of participating in a formal Commission proceeding.
4. Reviewing Representatives shall execute a non-disclosure agreement and be subject to a protective order which precludes the Representatives from disclosing market sensitive information to anyone who is a market participant or who is an employee or an agent of a market participant.

VII. Attorneys and Consultants Who Work for Both Market Participants and Non-Market participants

A. Parties' Positions

Edison is concerned that while an expert may not be a market participant in his/her work for one group, "certain experts can work for a 'trade group' on one matter and then be retained to work for a power seller. In these instances, the persons who obtained the confidential information would have a difficult time not considering it in advising their power-marketer clients."²⁰

Noting that "the California energy legal and consultant business is limited and insular,"²¹ Edison proposes that attorneys and consultants who sign confidentiality agreements and are provided access to confidential information may not work for any entity that engages in the purchase, sale or marketing of power for a period of two years.

CARE also expresses concerns about attorneys and consultants who represent clients with different interests:

CARE agrees with SCE: "How can we be sure that no confidential data obtained by an attorney as a

²⁰ Edison reply comments at 2.

²¹ Edison opening comments at 5.

representative of power customers will be leaked, however inadvertently, to the attorney next door, who represents the other side? Can we be sure that a consultant to power buyers does not later end up working for power sellers and using the confidential data he obtained to further his new clients' interests?"²²

CLECA opposes Edison's two-year employment ban: "This is an express limitation on the attorney's or consultant's business. . . . CLECA's counsel has never encountered such an attempt to intimidate and limit active participation."²³

B. Discussion

We will not impose Edison's two-year employment ban on attorneys and consultants who obtain access to confidential information. We agree with CLECA that this is a serious limitation on professionals' livelihoods.

By the same token, we agree with Edison that the Commission attorney bar and consultant community is fairly small, and that there is a risk of inadvertent disclosure if an attorney or consultant who obtains confidential information while not representing a market participant later commences work as a market participant's representative.

We believe the best practice is to deal with such situations in the terms of the model protective order and nondisclosure agreement we intend to develop in this proceeding. Thus, it is entirely appropriate for the model order to prohibit an attorney, consultant or other representative who receives market sensitive data while not in a market participant position from disclosing such

²² CARE reply comments at 9-10, citing Edison's opening comments at 5-6.

²³ CLECA reply comments at 5.

data to market participants. While a protective order cannot always preclude inadvertent disclosures, we believe it is a better and less draconian solution than one that prohibits professionals from representing clients of their choosing.

Further, any person or entity concerned about disclosure of its market sensitive data disclosed to an attorney, consultant or other representative who has “changed hats” may make a motion seeking a declaration under penalty of perjury from that representative that he/she has not and will not disclose the market sensitive data to the new client. And of course, any violation of a protective order may be brought to the Commission’s attention in a motion for sanctions or fines.

However, simultaneous representation of both groups presents a more serious risk that market sensitive information will be revealed to market participants. Just as it might be a conflict of interest for an attorney or consultant to represent both sides of a dispute in certain circumstances,²⁴ we believe a professional who simultaneously represents both sides of the market participant equation could inadvertently compromise the holder of market sensitive information. With the exception noted below, an attorney or consultant that simultaneously represents market participant(s) and non-market participant(s) may not have access to market sensitive data.

If, on the other hand, simultaneous representation is of market participant and non-market participant clients involved in completely different types of matters, there should be no bar (although there may be ethical

²⁴ See, e.g., *Flatt v. Superior Court (Daniel)*, 9 Cal. 4th 275, 284 (1994), 1994 Cal. LEXIS 6585 (“[I]n all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or ‘automatic’ one”).

implications of such representation that we do not address here). If, for example, an attorney represents a market participant in matters unrelated to procurement, resource adequacy, RPS, or the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, in a forum other than this Commission, and simultaneously represents a non-market participant in cases related to these topics before the Commission, there should be no bar to the attorney's receipt of market sensitive data (pursuant to a non-disclosure agreement and protective order) in the latter matter. In close cases, the balance should militate to bar simultaneous representation because of the risks it poses.

VIII. Trade Associations

A. Parties' Positions

Most parties would allow some trade associations that regularly appear before the Commission access to confidential records, but they differ on how to define eligible associations. At one extreme is IEP, which contends that all trade associations should have access to market sensitive information, even if they are market participants or have market participants as members.

TURN proposes a rebuttable presumption that any organization whose membership consists of more than 20-25% market participants should be viewed as a market participant, and that organizations with membership below this threshold be non-market participants.²⁵

Edison, on the other hand, contends that “a trade organization is the sum of its parts.”²⁶ If the members are market participants, then the trade

²⁵ TURN opening comments at 5.

²⁶ Edison reply comments at 6.

organization should be deemed a market participant. Thus, Edison asserts, CMTA, which includes merchant generators in its membership, is a market participant.

Similarly, SDG&E asserts that “providing sensitive market information to an association representing market participants is the same as providing such information directly to its market participant members. Even if the association does not pass on sensitive information to members directly, the association may well use this information (consciously or unconsciously) to advise members regarding the electricity marketplace.”²⁷

SDG&E rejects TURN’s proposal for a percentage-of-members test as unworkable, noting that many associations do not make their membership public, or change membership constantly.

CMTA disputes that its attorneys and consultants cannot be trusted to abide by the terms of a protective order governing confidential data, citing D.06-06-066’s conclusion on the same subject: “We do not think it right to assume that parties appearing before us cannot be trusted to abide by the terms of such documents [confidentiality agreement or protective order] absent evidence of a prior history of violation.”²⁸ CAC/EPUC also state that the Commission should not assume that information will be mishandled through inadvertence, or unconsciously: “Edison does not cite any concrete example of [such mishandling] happening with CMTA, CLECA, CAC, EPUC or any other trade association.”²⁹

²⁷ SDG&E reply comments at 3.

²⁸ D.06-06-066, *mimeo.*, p. 58.

²⁹ *See also* CLECA reply comments at 4.

Edison counters that it is not asserting that counsel or consultants would deliberately disobey a protective order and mishandle confidential information. Rather, Edison contends, it is difficult to ignore information once one has it, and unconscious use of the information could occur, to the investor owned utilities (IOUs) and ratepayers' detriment. "This is not a question of 'ethics,' as IEP and CMTA would make it out to be. [Edison] trusts that most (but not all) market participants would not deliberately violate a protective order."³⁰ Edison quotes TURN's Michel Florio's testimony at the 2005 hearing: "I can promise not to disclose it, but I can't compartmentalize my brain and say, once I know something, I'll never use that knowledge, because it's just not humanly possible."³¹

B. Discussion

We discuss the status of particular groups in the next section. For groups not discussed there, we believe a test of the type TURN proposes is appropriate. A trade or other representative organization is a market participant if its primary purpose is to represent the interests of market participants. We will apply the following factors to determine whether an organization meets the test:

- The organization's primary focus in proceedings at the Commission is to advocate for persons/entities that purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and/or

³⁰ Edison opening comments at 4.

³¹ *Id.* at 6, citing TURN/Florio Tr. 814:18-21.

- A majority of the organization's members purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and/or
- The organization was formed for the purpose of obtaining market sensitive information; and/or
- The organization is controlled or primarily funded by a person or entity whose primary purpose is to purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations.

Where an organization keeps its membership list secret, the organization will have the burden of proving that it is not a market participant. Where the membership list is available publicly, the party resisting access to its market sensitive data will bear the burden of proving that the organization is a market participant. Further, representatives of trade associations and similar organizations may be required to sign nondisclosure agreements or be bound by protective orders that preclude dissemination of market sensitive information to members who are market participants.

Finally, where we make a determination below that an organization is or is not a market participant, parties shall be bound by those determinations and shall not relitigate them in discovery disputes, unless the makeup of the organization materially changes.

IX. Specific Groups

Because many of the groups eager for access to market sensitive information filed comments specific to their own status, we will address each such organization here. We hope that by identifying and categorizing organizations that commonly appear before the Commission, we will minimize disputes in this area.

A. CMTA

1. Parties' Positions

CMTA contends it is not a market participant because it primarily represents electricity customers. In its comments, CMTA agreed to limit persons entitled to market sensitive information to its attorneys and consultants and a few selected members of its Energy Committee, none of whom are engaged in the generation, transmission or distribution of electricity.³² "Regular" membership in CMTA is reserved for companies engaged in the manufacturing, processing and technology fields, which do not, according to CMTA's Vice President of Government Relations, Dorothy Rothrock, include companies engaged in electricity generation, transmission or distribution. Only "regular" members of CMTA may be members of the Energy Committee.³³

Edison believes "CMTA is a harder case [than CLECA], as many of its constituent companies transact in power markets and many of the persons on its Board of Directors and Executive Committee are affiliated with energy companies."³⁴ By the same token, CMTA's Energy Committee members are not currently employed by companies which transact in the wholesale market. Thus,

³² CMTA opening comments, Appendix, Affidavit of Dorothy Rothrock on Behalf of the [CMTA], at 2.

³³ The current members of the Energy Committee are: The Boeing Company, Georgia-Pacific Corporation, Guardian Industries Corp., Hitachi Global Storage Technologies, Jazz Semiconductor, Inc, Kimberly-Clark Corp., New United Motor Manufacturing, Inc., Northrop Grumman Corp., Oracle, PPG Industries, Inc., Procter & Gamble Co., Raytheon Co., Saint-Gobain Containers, Searles Valley Minerals, Sierra Pine, Ltd., Smurfit-Stone Container Corp., TABC, Inc., and United States Gypsum Co.

³⁴ Edison reply comments at 3.

Edison would not oppose providing market sensitive data to the CMTA Energy Committee pursuant to specified conditions.

TURN states that:

CMTA ... has a very lengthy track record of participation in Commission proceedings as a representative of the interests of its members as consumers of utility services. . . . Thus, TURN believes that an entity such as CMTA that merely lists a few market participants among its membership, but is involved in Commission proceedings for the purpose of representing the interests of its members as utility customers, should not be classified as a market participant.

2. Discussion

We find that CMTA is not a market participant. If we apply each test in the “Trade Associations” discussion above, CMTA meets no criterion for market participation:

- Its primary focus in proceedings at the Commission is not to advocate for persons/entities that sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations.
- A majority of the organization’s members do not sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations.
- The organization was not formed for the purpose of obtaining market sensitive information.
- The organization is not controlled or primarily funded by a person or entity whose primary purpose is to purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations.

By the same token, as is true with all organizations, CMTA may not share data covered by the confidentiality protections of D.06-06-066 with any

market participant (as defined in this decision), including market participants among its members.

We also find that disclosure to CMTA's Energy Committee is permissible, as long as the Energy Committee continues to exclude members who are market participants, and Energy Committee members agree not to share market sensitive information with market participants.

B. CLECA

1. Parties' Positions

CLECA contends it is not a market participant because it represents electricity consumers, who "need to know the basis for utility rate requests" CLECA is comprised of roughly 20 large industrial electrical customers of PG&E and Edison, with an aggregate demand of approximately 525 megawatts (MW), and annual consumption of approximately 3,125 gigawatt hours (GWh). Some are DA customers and others take utility bundled service.³⁵

Edison agrees that CLECA is a "consumer group that is a non-market participant"³⁶ because it advocates for its clients as customers and not as wholesale market participants. However, Edison is concerned that certain of CLECA's members are cogenerators. Edison does not want entities that could sell power in the future to have access to market sensitive information.

TURN believes CLECA is not a market participant because it "has a very lengthy track record of participation in Commission proceedings as a representative of the interests of its members *as consumers* of utility services."³⁷

³⁵ CLECA opening comments at 3.

³⁶ Edison reply comments at 2.

³⁷ TURN opening comments at 4 (emphasis in original).

2. Discussion

For the same reasons we discuss for CMTA, we find that CLECA is not a market participant. CLECA may not share data covered by the confidentiality protections of D.06-06-066 with any market participant (as defined in this decision), including market participants among its members.

C. IEP

1. Parties' Positions

IEP focuses more on the conditions under which market participants should have access to market sensitive data than on contending that it is not itself a market participant. D.06-06-066 has already determined that market participants may be denied access outright to market sensitive data, and we do not revisit that determination here.

TURN asserts that IEP is a market participant because it is primarily focused in the interests of its members as producers of electricity. Edison is resolute that IEP must be a market participant. Although IEP claims that its members are also retail consumers of electricity, its website describes it as a “trade association representing both the interests of developers and operators of independent energy facilities and independent power marketers.... IEP’s primary goals are to safeguard the interests of operating independent energy projects.”³⁸

2. Discussion

We find that IEP is a market participant. Its principal purpose, by its own admission, is to represent entities operating in the wholesale power market.

³⁸ Edison reply comments at 5.

IEP itself proposed a definition of market participant that includes the wholesale market.³⁹

We do not believe that IEP's purpose as a representative of generators and power marketers is transformed because its members also purchase electricity. Nor are we prepared to give certain "reviewing representatives" within IEP access to market sensitive information, as we discuss in the "Reviewing Representatives" section above. Finally, we have already held that market participants may be denied access to market sensitive information outright. Thus, we reject IEP's assertion that it is sufficient protection for its staff - who we find are market participants - to sign nondisclosure agreements or be bound by protective orders. We find that there is too much risk that market sensitive information would be disclosed - at least unintentionally - to allow IEP access to such information.

D. CAC

1. Parties' Positions

CAC represents the power generation, power marketing and cogeneration operation interests of the following entities: Coalinga Cogeneration Company, Mid-Set Cogeneration Company, Kern River Cogeneration Company, Sycamore Cogeneration Company, Sargent Canyon Cogeneration Company, Salinas River Cogeneration Company, Midway Sunset Cogeneration Company and Watson Cogeneration Company.

Both CAC and EPUC focus on their *members'* status, rather than on whether CAC or EPUC themselves are market participants. They contend that their members are not market participants because they 1) are not in the

³⁹ IEP opening comments at 2.

exclusive business of generating electric power for sale to the grid, but only sell excess power as a byproduct of their industrial processes; 2) make only *de minimis* sales of power to the grid, and 3) are price takers and may therefore only obtain a price for power that is set or approved by the Commission.

2. Discussion

CAC's members are all cogenerators. In the section entitled "Cogenerators," above, we explain that individual cogenerators may or may not be market participants depending on their ability to affect the market price of electricity. Thus, not all cogenerators are market participants under the definition we adopt here.

A large number of cogenerators, or an organization representing them, has a far clearer potential to materially impact the market price of electricity. CAC concedes that it "represents the power generation, power marketing and cogeneration operation interests" of a number of entities. Its sole purpose is to advocate for those interests. We find that CAC as an organization meets the first two tests set forth in the "Trade Associations" section, above, and therefore is a market participant.

E. EPUC

1. Parties' Positions

EPUC characterizes itself as an ad hoc group representing the electric end use and customer generation interests of the following oil and gas companies: Aera Energy LLC, BP America Inc. (including Atlantic Richfield Company), Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Power and Gas Services Inc, Shell Oil Products US, THUMS Long Beach Company, Occidental Elk Hills, Inc., and Valero Refining Company-California. As noted

above, EPUC concentrates in comments on its members' status, and not on its own.

Edison contends EPUC is a market participant because its members are oil and gas companies, and EPUC advocates for its members as power producers, not consumers.

TURN finds the determination of whether EPUC is a market participant to be a close call. "TURN's preliminary view is that EPUC *does* represent market participant interests, but the Commission could presumably reach a different conclusion after a thorough examination of the facts."⁴⁰ TURN also views the extremely close association between EPUC and CAC, which typically are represented by members of the same law firm in Commission proceedings, as a reason to view EPUC as a market participant.⁴¹

2. Discussion

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

Moreover, EPUC regularly (and perhaps exclusively) participates at the Commission jointly with CAC, which represents cogenerators. As we discuss in the section entitled "Cogenerators" above, some cogenerators are market participants. Because neither EPUC nor CAC address whether they individually are market participants, we must assume that they will continue to act jointly.

⁴⁰ TURN opening comments at 5.

⁴¹ TURN is resolute that CAC is a market participant.

Thus, if we find that one of the two associations is a market participant, the finding will apply to both EPUC and CAC as long as they continue to participate jointly in Commission proceedings. We find CAC is a market participant above, and it follows that EPUC is a market participant as well.

Moreover, an association representing cogenerators or oil and gas companies as a whole may have more ability to materially affect the market price of electricity than an individual company acting alone. Collectively, CAC's and EPUC's memberships may well have the ability to materially affect the market price of electricity. Considering all of the circumstances we find that EPUC is a market participant.

F. IOUs

1. Parties' Positions

IEP seeks to bar an IOU's employees who buy power from access to data generated by that same IOU's employees who sell power. According to IEP, when an IOU sells power into the wholesale market, it acts in competition with other generators, and the IOU as buyer should not have access to greater information about IOU wholesale sales than other generators have.

Edison agrees that the "company as a whole" is a market participant, and that it is permissible to prevent Edison employees from access to market sensitive data generated by PG&E or SDG&E. However, Edison asserts, the Commission should not bar any Edison employee from access to data relevant to Edison's wholesale energy sales. "Those who buy power and those who sell it are the same people, working in the same department. It would be extremely difficult for the company to properly provide power for its bundled

service customers if those individuals were segmented and unable to speak to each other.”⁴²

⁴² Edison reply comments at 8.

2. Discussion

The three major IOUs – Edison, SDG&E and PG&E – are market participants, as Edison concedes. As for sharing of information between utility employees, we do not prohibit such sharing by this decision. On the other hand, the IOUs are bound by other Commission decisions, such as those adopting the affiliate transaction rules. Thus, for example, where an IOU's affiliate sells or trades electricity in the wholesale market, our affiliate transaction rules bar exchange of information between the IOU and the affiliate on terms more favorable than the information-sharing arrangement available to non-IOU and non-IOU-affiliate third parties.

G. CAISO

1. Parties' Positions

CAISO states that no one mentioned CAISO when discussing the appropriate scope of the definition of market participants. CAISO concludes that this silence likely reflects general acceptance that the CAISO is not a market participant. Because the CAISO procures energy, capacity and other reliability-related service on behalf of its control area, it is concerned that some of the proposed definitions of market participant might inadvertently include CAISO.

CARE contends (in reply comments filed concurrently with CAISO's reply comments) that CAISO is a market participant. CARE cites evidence the CPUC submitted to the FERC in 2003:

Another example of the potential for collective action as part of an industry organization is shown in a group of letters sent by various parties and organizations in June 2000 in an effort to forestall implementation of reduced price caps then under consideration by the ISO board of directors. Notable among these documents are

letters sent on or about June 27, 2000, to Jan Smutny-Jones in his role as Chairman of the Board of Directors of the ISO, and a letter to Governor Davis of California co-signed by Jan Smutny-Jones in his contemporaneous role as Executive Director of the [IEP].⁴³

CARE contends that because Smutny-Jones held dual roles, there is no certainty that CAISO will not share information with market participants in the future.

2. Discussion

We do not find that the evidence CARE cites renders the CAISO a market participant. The CAISO is a not-for-profit public benefit corporation that ensures the reliability of the electric grid in California. While it enters the market for out of market calls, it engages in these activities to ensure system reliability, not for its own economic gain. It operates the real-time market and is establishing a day-ahead market. In this capacity, it acts as neutral arbiter, not as a participant at all. Its incentive is to keep the lights on and the grid stable, not to drive up (or down) the price of electricity out of a desire to enhance profits for itself.⁴⁴

CAISO did not weigh in on the appropriateness of having its staff sign nondisclosure agreements or submit to protective orders. CAISO has done so in the past (*see* Ruling of Administrative Law Judge (ALJ) Mark Wetzell, December 20, 2004, in Rulemaking 04-04-003,

⁴³ CARE reply comments at 9 (citation omitted).

⁴⁴ Indeed, the CAISO is more akin to a state agency than it is to a market participant.

http://www.cpuc.ca.gov/word_pdf/RULINGS/42395.doc) and we assume it would agree not to disclose market sensitive information to market participants.

H. ESPs

ESPs sell electricity to large retail customers and also buy electricity at wholesale. No party (including an ESP representative in this proceeding, the Alliance for Retail Energy Markets [AReM]) expressed an opinion on the status of ESPs. Participation in the wholesale market for energy and capacity, at least above the 1 MW *de minimis* threshold, is enough to render an entity a market participant.

I. AReM

Similar to ESPs, no party expressed an opinion on the status of AReM. We find that AReM is a market participant because its principal purpose is to represent entities operating in the wholesale power market.

X. Definition – Market participant

In summary, a market participant is:

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

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

because its contract is expiring or other circumstances are changing, does not meet this exception; and/or

- c) the person or entity is a cogenerator that consumes all the power it generates in its own industrial and commercial processes, if it can establish a legitimate need for market sensitive information.

XI. Definition – Non-Market participant

Persons or entities that do not meet the definition of market participant are non-market participants, and may have access to market sensitive information. It is proper to require such non-market participants to sign a nondisclosure agreement or to be bound by a protective order prohibiting the disclosure of information to market participants.

However, as we explained in D.06-06-066, in no case shall Commission staff, or any Commission Division or Office, be required to sign a nondisclosure agreement or be bound by a protective order: “It is inappropriate to require Commission staff – including [the Division of Ratepayer Advocates] – to enter into private contractual agreements with the entities we regulate or that otherwise come before us.”⁴⁵

XII. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with § 311 of the Pub. Util. Code and Rule 14.2(a) of the Commission’s Rules of Practice and Procedure. Comments were filed by TURN, CLECA, CARE, CAISO, City and County of San Francisco (CCSF), IEP, CAC/EPUC, PG&E, SDG&E, AReM, and Edison, and reply comments were filed

⁴⁵ D.06-06-066, *mimeo.*, p. 52.

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by CARE, AReM, PG&E, CAC/EPUC and Edison. The comments are in the following areas, and we respond as follows:

A. Legal Issues

IEP claims the proposed decision is discriminatory, and violates due process, the federal Public Utility Regulatory Policies Act of 1978 (PURPA), and related FERC practice with regard to confidentiality. It also claims the decision does not link the recent energy crisis to the release of market sensitive information. These arguments repeat asserts made in comments on the proposed decision leading to D.06-06-066 and by other parties on rehearing of D.06-06-066. Thus, we will not respond to them at length here.

1. Discrimination

IEP's claim is that unless all parties have equal access to information, there is unlawful discrimination. This is an issue dealt with amply - and rejected - in D.06-06-066, and we will not repeat ourselves here. Section 454.5(g) creates a distinction between market participants and non-market participants, so IEP's real quarrel is with state law.

2. Due Process

D.06-06-066 also deals at length with the claim that differential access to information denies parties without access their due process rights. We do not repeat those arguments here. As discussed above, the information at issue here is a subset of the universe of utility data in the record for any given proceeding. None of the commenters explain why lack of access to a utility's net short position, or to every piece of data used in a Commission proceeding, constitutes a denial of due process.

Whether due process issues arise in situations where market sensitive information is relevant to an adjudicatory or ratesetting proceeding (rather than a quasi-legislative proceeding such as this proceeding) may be addressed in connection with CAC/EPUC's application for rehearing of

D.06-06-066. If the Commission addresses the issue on rehearing, we will follow any decision rendered there.

3. PURPA and Implementing FERC Regulations

According to IEP, PURPA's implementing regulations make certain utility cost information publicly accessible. Edison rebutted this assertion at length in *Southern California Edison Company's Response to Application for Rehearing of Decision 06-06-066 Filed by the Cogeneration Association of California and the Energy Producers and Users Coalition*, filed on August 21, 2006 in this proceeding (Edison Rehearing Response). In brief, the FERC regulations implementing PURPA only require that certain cost data – "generic cost data" – be made available; do not require disclosure of data that would violate the confidentiality of a competitive solicitation process or planning and cost data; and allow states discretion to modify federal data requirements.⁴⁶

4. Energy Crisis

As Edison notes, the proposed decision does no claim that disclosure of confidential data led to the recent energy crisis, but that disclosure of data could affect prices. Edison cites the testimony of its expert, Dr. Charles Plott, in Phase One of this proceeding, cited in D.06-06-066, as evidence that disclosure of confidential information to market participants could lead to higher electricity crisis. "The Commission is rightly trying to prevent a future crisis by limiting access to market-sensitive data."⁴⁷

⁴⁶ See generally Edison Rehearing Response at 9-10.

⁴⁷ Edison reply comments on proposed decision at 3.

B. Reviewing Representative of MP

Several parties challenge the proposed decision's denial of access to market sensitive information for reviewing representatives who work for market participants, but do not actively engage in trading, buying or selling of electricity. We discuss this issue fully in the decision, and do not alter our conclusion on the matter.

C. Exception to Market Participant Definition

TURN criticizes aspects of our exception to the general definition of market participant, which provides:

- 3) A person or entity that meets the criteria of 1) above is nonetheless not a market participant for purpose of access to market sensitive data unless the person/entity seeking access to market sensitive information has the potential to materially affect the price paid or received for electricity if in possession of such information. An entity will be considered not to have such potential if:
 - a) the person or entity's participation in the California electricity market is *de minimis* in nature. In the resource adequacy proceeding (R.05-12-013) it was determined in D.06-06-064 § 3.3.2 that the resource adequacy requirement should be rounded to the nearest megawatt (MW), and load serving entities (LSEs) with local resource adequacy requirements less than 1 MW are not required to make a showing. Therefore, a *de minimis* amount of energy would be less than 1 MW of capacity per year, and/or an equivalent of energy; and/or
 - b) the person or entity has no ability to dictate the price of electricity it purchases or sells because such price is set by a process over which the person or entity has no control; and/or
 - c) person or entity is a cogenerator that consumes all the power it generates in its own industrial and commercial processes.

TURN claims that the language in b) would allow entities whose contracts will expire in the near future to gain access to market sensitive information now and use it to impact the price they pay for electricity once the price is no longer constrained by the contract. We modify section b) to accommodate this concern, as we agree with TURN's concern. We also clarify that this exception applies where there is a fixed contract price or tariff, as CAC/EPUC urged in their original comments proposing this exception.⁴⁸

Edison is concerned with subsection c) because a cogenerator may consume all its power today, but begin selling into the grid in the future. We agree, but it would be impossible to police such behavior. Rather, we modify the decision to indicate that such a cogenerator must be able to prove a need for such information. It is unlikely cogenerators that consume all their own power need information about an IOU's net short or other related information.⁴⁹

D. Whether We Can Decide Status in a Quasi Legislative Proceeding

IEP alleges that we are not allowed to decide the market participant/non-participant status of individual groups in a quasi-legislative proceeding such as this one. It asserts it had no notice or opportunity to be heard

⁴⁸ CAC/EPUC comments at 6-7.

⁴⁹ See generally SDG&E reply comments on proposed decision, at 3 ("[I]f a seller's role in the market truly is *de minimis*, then he/she should have no use for confidential utility data").

that its status would be adjudicated here. Edison responds that it is "difficult to believe" that IEP had no notice that its status as a market participant would be adjudicated in this proceeding.

IEP's assertion that it had no notice and opportunity to be heard has no merit. D.06-06-066 itself stated that, "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."⁵⁰ Similarly, the scoping memo for Phase Two of this proceeding stated that, "We plan to address outside of Phase Two the question of *who is and is not a market participant* under the electric procurement statute."⁵¹

Moreover, all parties with a stake in the matter addressed their own status, as well as that of other groups, in comments. While IEP focused more on its clients' access to information than its own, the definitions it urged were also relevant to a determination of how to characterize IEP itself. IEP thus has had ample notice and opportunity to be heard, both in its opening and reply comments that led to the proposed decision, and in comments on that decision.

E. Specific Groups

We lack a record to adjudicate the status of groups that have not participated in this proceeding. Thus, we do not decide whether the Silicon Valley Leadership Group, the California Cogeneration Council, or the City and County of San Francisco are market participants as there is no current record

⁵⁰ D.06-06-066, ordering paragraph 15.

⁵¹ *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge (Phase 2)*, filed Sept. 21, 2006, *mimeo.*, at p. 5.

regarding those groups. Parties wishing to determine the status of any group not in this decision may refer to the general market participant definition.

Other groups identified in the proposed decision challenged the determinations of their status. We do not alter those determinations, but do add language where the comments render it necessary.

F. Attorneys/Consultants

The proposed decision allows attorneys and consultants to "change hats" by representing non-market participants in one period, gaining access to market sensitive information, and later representing non-market participants, provided a protective order is place. TURN asks for clarification of the decision when an attorney or consultant simultaneously represents market participants and non-market participants. We agree with TURN that simultaneous representation of both groups presents a more serious risk that market sensitive information will be revealed to market participants. Just as it might be a conflict of interest for an attorney or consultant to represent both sides of a dispute in certain circumstances,⁵² we believe a professional who simultaneously represents both sides of the market participant equation could inadvertently compromise the holder of market sensitive information. We adopt TURN's recommended change and hold that an attorney or consultant that simultaneously represents market participant(s) and non-market participant(s) may not have access to market sensitive data.

⁵² See, e.g., *Flatt v. Superior Court (Daniel)*, 9 Cal. 4th 275, 284 (1994), 1994 Cal. LEXIS 6585 ("[I]n all but a few instances, the rule of disqualification in simultaneous representation cases is a *per se* or 'automatic' one").

If, on the other hand, simultaneous representation is of market participant and non-market participant clients involved in completely different types of matters, there should be no bar (although there may be ethical implications of such representation that we do not address here). If, for example, an attorney represents a market participant in matters unrelated to procurement, resource adequacy, RPS, or the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, in a forum other than this Commission, and simultaneously represents a non-market participant in cases related to these topics before the Commission, there should be no bar to the attorney's receipt of market sensitive data (pursuant to a non-disclosure agreement and protective order) in the latter matter. In close cases, the balance should militate to bar simultaneous representation because of the risks it poses.

G. Procedural Issues

We add, at IEP's suggestion, additional findings and conclusions. We make other, minor changes as suggested by the commenters. Where we do not make a suggested change, we reject that proposed change.⁵³

XIII. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Sarah R. Thomas is the assigned ALJ in this proceeding.

Findings of Fact

1. In the resource adequacy proceeding (R.05-12-013) it was determined in D.06-06-064 § 3.3.2 that the resource adequacy requirement should be rounded to

⁵³ AReM's comments regarding ESP-ESP data exchanges, and its access to IOU data, are beyond the scope of this decision.

the nearest MW, and LSEs with local resource adequacy requirements less than 1 MW are not required to make a showing. Therefore, a *de minimis* amount of energy would be less than 1 MW of capacity per year, and/or an equivalent of energy.

2. CMTA, including its Energy Committee, is not a market participant because a) its primary focus in proceedings at the Commission is not to advocate for persons/entities that sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations, b) a majority of its members do not sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and c) the Energy Committee excludes members who are market participants, and Energy Committee members will agree not to share market sensitive information with market participants.

3. CLECA is not a market participant because a) its primary focus in proceedings at the Commission is not to advocate for persons/entities that sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and b) a majority of its members do not sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations.

4. IEP is a market participant. It is a trade association representing both the interests of developers and operators of independent energy facilities and independent power marketers, whose primary goals are to safeguard the interests of operating independent energy projects. As such, a) its primary focus in proceedings at the Commission is to advocate for persons/entities that sell or market energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and b) a majority of its members sell or market

energy or capacity; bid on, own, or purchase power plants; or bid on utility procurement solicitations.

5. CAC is a market participant because a) it represents the power generation, power marketing and cogeneration operation interests, and b) a large number of cogenerators, or an organization representing them, has a far clearer potential to materially impact the market price of electricity than a cogenerator with a *de minimis* contribution to the market acting alone.

6. EPUC is a market participant because a) it represents the customer generation interests of Aera Energy LLC, BP America Inc. (including Atlantic Richfield Company), Chevron U.S.A. Inc., ConocoPhillips Company, ExxonMobil Power and Gas Services Inc, Shell Oil Products US, THUMS Long Beach Company, Occidental Elk Hills, Inc., and Valero Refining Company-California, b) a large number of generators, or an organization representing them, has a far clearer potential to materially impact the market price of electricity than a cogenerator with a *de minimis* contribution to the market acting alone, and c) EPUC regularly participates at the Commission jointly with CAC.

7. IOUs are market participants.

8. CAISO is not a market participant because it is a not-for-profit public benefit corporation that ensures the reliability of the electric grid in California. While it enters the market for out of market calls, it engages in these activities to ensure system reliability, not for its own economic gain. It operates the real-time market and is establishing a day-ahead market. In this capacity, it acts as neutral arbiter, not as a participant at all. Its incentive is to keep the lights on and the grid stable, not to drive up (or down) the price of electricity out of a desire to enhance profits for itself.

9. ESPs are market participants if they operate above the *de minimis* threshold.

10. AReM is a market participant because its principal purpose is to represent entities operating in the wholesale power market.

Conclusions of Law

1. SB 1488 requires that we interpret the term “market participant” narrowly, to only include those persons and entities who could use market sensitive information to cause harm to the market or gain an unfair market advantage.

2. "Market participants" do not include retail purchasers of electricity.

3. Cogenerators should not be universally prohibited from access to market sensitive data. If they do not have the potential to materially affect the price paid or received for electricity if in possession of such information, they are not market participants under § 454.5(g).

4. DA electricity customers are not market participants for purposes of § 454.5(g).

5. We should not bar attorneys or consultants working for a market participant from later working for a non-market participant. Simultaneous representation of market and non-market participants on procurement, resource adequacy, RPS, or the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations will act as a bar to access to market sensitive data.

6. Market participants may designate "Reviewing Representatives" to gain access to market sensitive information, if such representatives meet the four criteria in this decision.

7. In determining whether a trade association may have access to market sensitive information, we should examine whether

- The organization's primary focus in proceedings at the Commission is to advocate for persons/entities that purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and/or
- A majority of the organization's members purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations, and/or
- The organization was formed for the purpose of obtaining market sensitive information, and/or
- The organization is controlled or primarily funded by a person or entity whose primary purpose is to purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations.

O R D E R

IT IS ORDERED that:

1. We adopt the following definition of "market participant" for purposes of access to "market sensitive" procurement data covered by Pub. Util. Code § 454.5(g) and/or Decision (D.) 06-06-066:

A "market participant" is

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

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

such as subject to a standard offer contract or tariff price. A person or entity that currently has no ability to dictate the price of electricity it purchases or sells under this section, but that will have such ability within one year because its contract is expiring or other circumstances are changing, does not meet this exception; and/or

- c) the person or entity is a cogenerator that consumes all the power it generates in its own industrial and commercial processes, if it can establish a legitimate need for market sensitive information.

2. A market participant (as that term is defined in this decision) may be denied access to “market sensitive” procurement data covered by Pub. Util. Code § 454.5(g) and/or D.06-06-066.

3. We adopt the following definition of “non-market participant” for purposes of access to “market sensitive” procurement data covered by § 454.5(g) and/or D.06-06-066:

Persons or entities that do not meet the definition of market participant are non-market participants, and may have access to market sensitive information. It is proper to require such non-market participants to sign a nondisclosure agreement or to be bound by a protective order prohibiting the disclosure of information to market participants.

4. All persons or entities, except Commission staff, who receive market sensitive information, may be required to execute a non-disclosure agreement and/or be bound by a protective order against disclosure of such information.

5. Reviewing Representatives of market participants may have access to market sensitive data if they meet the following four criteria:

- Reviewing Representatives may not currently be engaged, directly or indirectly, in (a) the purchase, sale, or marketing of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) whose duties include such

activities), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (c) consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting).

- Reviewing Representatives may not be employees of market participants.
- Reviewing Representatives shall use market sensitive data only for the purpose of participating in a formal Commission proceeding.
- Reviewing Representatives shall execute a non-disclosure agreement and be subject to a protective order which precludes the Representatives from disclosing market sensitive information to anyone who is a market participant or who is an employee or an agent of a market participant.

6. Attorneys or consultants that simultaneously represent market and non-market participants on procurement, resource adequacy, RPS, or the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations may not have access to market sensitive data.

This order is effective today.

Dated December 14, 2006, at San Francisco, California

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

