

Decision 07-05-032

May 3, 2007

## 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)

**ORDER MODIFYING DECISION (D.) 06-06-066 AND DENYING  
REHEARING OF THE DECISION, AS MODIFIED**

**I. INTRODUCTION**

By this order, we address the applications for rehearing of Decision (D.) 06-06-066, filed jointly by the Cogeneration Association of California and the Energy Producers and Users Coalition (collectively, "CAC/EPUC"), and The Utility Reform Network ("TURN").

D.06-06-066 is an interim decision in Phase I of Rulemaking (R.) 05-06-040, the *Order Instituting Rulemaking to Implement Senate Bill (SB) No. 1488 Relating to Confidentiality of Information*.<sup>1</sup> The Legislature in SB 1488 directed us to examine our practices with respect to the requirements of the

<sup>1</sup> SB 1488, passed in September 2004, provides: "The Public Utilities Commission shall initiate a proceeding to examine its practices under [s]ections 454.5 and 583 of the Public Utilities Code and the California Public Records Act (Chapter 3.5 (commencing with [s]ection 6250) of Division 7 of Title 1 of the Government Code) to ensure that the [C]ommission's practices under these laws provide for meaningful public participation and open decisionmaking." (2004 Cal.Stats., Ch. 690, § 1 (Sept. 22, 2004), emphasis added.)

We note that we recently issued D.06-12-030 in R.05-06-040. Rehearing applications challenging this decision are pending. We note that today's decision in no way disposes of or prejudices those applications for rehearing of D.06-12-030, which this Commission will subsequently be disposing of.

California Public Records Act (“CPRA”) and Public Utilities Code sections 454.5(g) and 583.<sup>2</sup>

Section 583 is one of the foundational statutes concerning the Commission and is a procedural means for utilities to claim confidentiality of information provided to the Commission. Section 454.5 was enacted in 2002, in the aftermath of the 2000-2002 energy crisis and following the collapse of the state’s Power Exchange (“PX”). It requires electric corporations to file their procurement plans with the Commission. The CPRA, enacted in 1968, mandates that all records maintained at public agencies are public records and provides a process to facilitate the public’s access to those records. (Gov. Code § 6250, et seq.) Though records filed with the Commission may be public, the CPRA grants us discretionary authority to exempt numerous records from public disclosure. The Legislature’s directive to us in section 454.5(g) is to ensure the confidentiality of market sensitive information, and is an expression of the public interest in nondisclosure of confidential market sensitive information.

D.06-06-066 clarifies that the burden is on the entity claiming confidentiality of information submitted to the Commission to prove why such information should not be disclosed to the public. Among other things, D.06-06-066 adopts a matrix process that establishes a procedure in accordance with section 454.5(g), for determining whether information is entitled to confidential treatment because it is market sensitive.<sup>3</sup> Under D.06-06-066 market sensitive information that is confidential will remain protected from public disclosure generally for up to three years. D.06-06-066 establishes a process whereby non-market participant intervenors may obtain access to confidential

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<sup>2</sup> All statutory references are to the Public Utilities Code unless otherwise indicated.

<sup>3</sup> In order to be considered to be “market sensitive information” it “must have the potential to materially affect an electricity buyer’s market price for electricity.” (D.06-06-066 at p. 41.) “Information is material if it affects the market price an energy buyer pays for electricity.” (D.06-06-066 at p. 42.)

market sensitive information provided they first enter into a confidentiality agreement and/or submit to a protective order.

Cogeneration Association of California and the Energy Producers and Users Coalition (jointly, “CAC/EPUC”) and The Utility Reform Network (“TURN”) timely filed applications for rehearing of D.06-06-066.

In their joint rehearing application, CAC/EPUC contend D.06-06-066 errs: (1) by concluding that section 454.5 mandates a distinction in treatment of market and non-market participants regarding access to confidential market sensitive information; (2) by failing to make any findings of fact or conclusions of law or to cite any record evidence that disclosure of confidential information to market participants has caused or will cause harm to ratepayers; (3) by denying all “stakeholders” affected by a Commission decision access to the information upon which the decision is based; (4) by disregarding and conflicting with the Public Utility Regulatory Policies Act (“PURPA”) of 1978, Title 16 United States Code section 824a-3 and the regulations promulgated there under regarding public inspection of utilities’ avoided costs; and (5) by failing to appropriately balance “meaningful participation” and open decision-making with use of protective procedures for confidential information that provide all “stakeholders” with the ability to meaningfully participate in the decision-making process and result in open decision-making. CAC/EPUC do not challenge the Commission’s use and protection of confidential information. Rather they challenge the absolute prohibition of access to market sensitive information that the Commission will use in reaching a decision in electric procurement proceedings by those deemed to be “market participants,” as well as denial of a process provided to other “stakeholders,” regardless of whether they are parties or a segment of the public.

TURN takes issue with the investor owned utilities (“IOU”) matrix established by D.06-06-066, arguing that sections B and E of Part VII of it are inconsistent and unlawful. TURN contends that these portions of the IOU matrix

are unlawful under section 454.5(g) because they require utilities to make their proposed or executed power purchase agreements public three years after the start of delivery even if delivery under the contract is still occurring. In addition, TURN argues that requiring contract summaries to be made public immediately would provide market participants with a means of determining a utility's net short position and thus create conflict with sections VI, subsections A and B of the matrix which provide that the bundled service net short for capacity and energy will not be publicly disclosed for three years, rendering the decision arbitrary and capricious.

San Diego Gas & Electric Company ("SDG&E") filed a response (in the form of "comments") opposing CAC/EPUC's application. SDG&E also supports TURN's application for rehearing. CAC/EPUC filed a joint response opposing TURN's application.

We have carefully reviewed the arguments raised by TURN and are of the opinion that good cause has not been established for granting rehearing. We have also carefully reviewed the arguments raised by CAC/EPUC and are of the opinion that some of the language in D.06-06-066 may be causing some confusion and by this order we have modified D.06-06-066 accordingly; however, we are of the opinion that good cause has not been established for granting CAC/EPUC's application for rehearing of D.06-06-066 as modified herein. Accordingly, the applications for rehearing of D.06-06-066 as modified by this decision are denied.

## **II. DISCUSSION**

### **A. TURN's Application for Rehearing**

TURN takes issue with two aspects of D.06-06-066: Sections B and E of Part VII of the IOU matrix (Appendix 1 at pages 15-16). TURN contends these two sections are unlawful and inconsistent with the remainder of D.06-06-066 because: (1) they require IOUs to make their proposed or executed power purchase agreements public generally after three years from the start of delivery under a contract, even if deliveries are still occurring, which TURN

contends violates subdivision (g) of section 454.5; and (2) they require contract summaries, including capacity, expected deliveries and length of contract, to be made public immediately, which TURN argues would provide market participants with a means of determining an IOU's net short position, and thus conflicting with Sections VI A and B of the matrix in an arbitrary and capricious manner. Aside from its argument that section 454.5 subdivision (g) would be violated if the agreements are made public three years after the start of delivery, TURN offers no other legal citation in support of its arguments.

TURN admits that subdivision (g) grants the Commission discretion to determine what information is market sensitive, but argues that explicit reference in subdivision (g) to "proposed or executed power purchase agreements" means that those agreements are explicitly within the definition of what is market sensitive. D.06-06-066 defines market sensitive information as that which has the potential to materially affect the market price for electricity. (D.06-06-066 at p. 78 Conclusion of Law No. 12.) D.06-06-066 does not make market sensitive information public. Indeed, where the utilities establish that information they submit is entitled to confidential treatment, D.06-06-66 ensures that it shall be withheld from public disclosure. However, D.06-06-066 also recognizes that market sensitive information is not indefinitely confidential and that generally the reasons for withholding such information from public disclosure are no longer relevant after a few years. D.06-06-066 adopted a flexible approach to this issue and generally most market sensitive information will be withheld from public disclosure for a three to five year period; however, should any particular information remain market sensitive after that time, the burden is on the utility claiming confidentiality to establish that it is indeed information that is still market sensitive and entitled to be treated as such. If the information at issue is no longer market sensitive, because, pursuant to D.06-06-066, it no longer has the potential to materially affect the market price for electricity, then there is no requirement that the Commission maintain its confidentiality. Not only is such information

public, pursuant to the CPRA and the California Constitution, but there is no public policy that would weigh in favor of keeping it confidential. Therefore, TURN's allegation on this issue is without merit.

TURN also alleges that requiring public contract summaries is unlawful in the case of non-renewable procurement standard program (non-RPS) contracts. TURN contends that D.06-06-066 is arbitrary and capricious because this approach may fail to carry out, via the matrix, the Commission's policy decision that RPS contracts should be subject to greater access than non-RPS contracts. In addition, TURN argues that making the contract summaries public also undermines the finding in Sections VI A and B of the matrix that the Utility Bundled Net Open position for capacity and energy remain confidential for three years. TURN speculates that the information could possibly lead to a determination of an IOU's net short and thus undermine the purpose of keeping other information confidential for a period of three years. These are policy arguments, as TURN concedes, and TURN has not demonstrated a legal inconsistency in D.06-06-066 rendering the decision arbitrary and capricious. Its argument is based mostly on speculation and is without merit.

**B. CAC/EPUC Joint Application for Rehearing**

CAC/EPUC allege that D.06-06-066 deprives them of due process essentially because the decision provides that confidential data may be kept from market participants altogether. D.06-06-066 does not define the term "market participant," and to that extent, CAC/EPUC's arguments are, at the very least, not ripe. However, we have considered each and every of CAC/EPUC's allegations and believe that some of the language used in D.06-06-066 may be confusing, and warrant clarification.

CAC/EPUC also allege that D.06-06-066 may violate portions of the Public Utility Regulatory Policies Act (PURPA) of 1978, Title 16 United States Code section 824a-3 and the regulations promulgated there under regarding public inspection of utilities' avoided costs. We disagree. With the modification we are

making by this order, CAC/EPUC's issue has been addressed and we find it has no merit.

### III. CONCLUSION

As set forth in Ordering Paragraph No. 1 below, D.06-06-066 is modified. A conformed copy of D.06-06-066, as modified herein, is attached as Appendix A. For the reasons specified herein, the applications for rehearing filed by TURN and CAC/EPUC of D.06-06-066, as modified herein, are denied.

**THEREFORE, IT IS ORDERED** that:

1. Decision 06-06-066 is modified as follows:
  - a. The following discussion is added at the end of the Section II.B on page 5:

“We note that as a matter of law, and consistent with SB 1488, the Commission continues to have broad discretion to determine whether confidential information submitted by regulated public utilities and other entities to the Commission should be shared with other parties. In exercising this discretion, the Commission will determine whether the public interest in keeping confidential materials confidential outweighs the public interest in making them public. Further, the Commission has the discretion to determine what procedures might be needed to ensure the confidentiality of market sensitive information. (See generally, Pub. Util. Code, §§454.5, subd. (g), 583 & 701.) For example, Public Utilities Code section 454.5(g) provides:

‘The [C]ommission 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 the approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant

reports, or any combination, provided that the Office of Ratepayer Advocates and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the Commission.’

Although it expressly provides for access by the Office of Ratepayers (now, the Division of Ratepayer Advocates) and consumer groups that are non-market participants, neither this statute nor any other statutory provisions limits the Commission’s authority to protect market sensitive information or make a distinction between non-market participants and market participants.

We note that the test for non-disclosure to the public includes whether “the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (See e.g., Gov. Code, §6255, subd. (a).) Further, the Commission’s broad statutory authority permits it to do all things, whether specifically designated in law or “in addition thereto”, that are “necessary and convenient” in the protection of ratepayers. (Pub.Util. Code, §701.)”

- b. The first sentence of the third full paragraph on page 31 is modified to read as follows:

“As we discuss above, we have the authority to determine which information is entitled to be treated confidential, and to determine what procedures to use to maintain the confidentiality of the market sensitive information. In addition, §454.5(g) allows for confidential treatment of certain utility procurement information.”

- c. The following second sentence of the third full paragraph on page 31 is deleted:

“Thus, even if CAC/CPUC were correct that they have due process rights in Commission rulemaking proceedings, such rights do not require that they have access to every record on which the Commission relies in rendering its decisions.”

- d. The first sentence on page 32 is modified to read as follows:

“Allowing confidential treatment of such records in our proceedings does not violate any party’s due process rights.”

- e. The following first sentence of the first full paragraph on page 40 shall be deleted:

“We must strike an appropriate balance in interpreting § 454.5(g).”

- f. In the second full paragraph on page 40, the following is deleted:

“We must not forget the context in which Assembly Bill (SB) 57 (the act that promulgated § 454.5(g)) arose. The statute, signed in 2002, was conceived in the midst of the state energy crisis.”

The deleted language shall be replaced by the following:

“Section 454.5(g) was enacted in 2002, in response to the state energy crisis.”

- g. The following second sentence in the third full paragraph on page 40 is deleted:

“As we discuss below, we believe this context, and the language of § 454.5(g) itself, dictate several outcomes.”

- h. The first full paragraph on page 41 is modified to read as follows:

“First, the statute covers specifically procurement plans and related contracts and information. Section 454.5(g) requires the Commission to adopt appropriate procedures to ensure the confidentiality of any market sensitive information, as determined by this Commission, submitted in an electrical corporation’s proposed procurement plan or resulting from or related to its approved procurement plan. It also requires the Commission to provide access to such information to its staff and “other consumer groups that are nonmarket participants ... under confidentiality procedures authorized by the [C]ommission.” Pursuant to § 454.5(g) market sensitive information includes, but is not limited to: “proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination ....” Second, not all procurement plan and related data is market sensitive; a subset of such information meets this definition. Such information must have the potential to materially affect an electricity buyer’s market price for electricity. Data that can have no material impact on this price are not “market sensitive.” Finally, we must develop procedures to ensure the confidentiality of information meeting the foregoing requirements.”

- i. The following last sentence of the second full paragraph on page 42 is deleted:

“Information that does not allow market participants to raise the price of electricity the IOUs procure from them is not, therefore, market sensitive information.”

- j. On page 43, the following second full paragraph in its entirety, is deleted:

“We disagree with IEP and others who argue that all data should be available pursuant to a ‘reasonable protective order.’ Data that are

confidential may be kept from market participants altogether, although we will always require that the producing party meet its burden of proving that it cannot produce aggregated, partially redacted, summarized or other data that do not reveal the confidential material.”

This deleted language is replaced by the following:

“As discussed below, we note that we will fully address the market participant issue in a subsequent decision.”

- k. The following second sentence of the third full paragraph on page 43 is deleted:

“We find these assertions to lack merit.”

- l. The title for Section X. on page 23 is modified to read as follows: “**Access to Market Sensitive Information**”

- m. The following paragraph carried over from page 43 to page 44 under Section X is deleted:

“Several parties claim that § 454.5(g) does not permit the Commission or other parties to provide different access to data depending on whether they compete in the market for electricity. We find these assertions to lack merit. Section 454.5(g) states that, “the Office of Ratepayer Advocates (DRA) and other consumer groups that are non-market participants shall be provided access to [procurement] information under confidentiality procedures authorized by the Commission.” The statute makes no such allowance for market participants who compete with electric utilities. We discuss this issue in the following paragraphs.”

- n. The title: “**B. Discussion—Non-market vs. Market Participants Under § 454.5(g)**” on page 45 is deleted and replaced with “**B. Discussion—Access to Market Sensitive Information.**”
- o. The following language beginning in the second full paragraph on page 45 and continuing to page 46 is deleted:

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

And the following language is added in its place, beginning at page 45:

“Section 454.5(g) specifically requires the Commission to provide access to confidential market sensitive information submitted in electric procurement plan/or resulting from or related to an approved procurement plan to our staff and also to non-market participant consumer groups who agree to subject themselves to our confidentiality procedures. As discussed herein, by this decision we believe various procedures for ensuring confidentiality of market sensitive information may include provision of such information under a protective order or confidentiality agreement, and in some instances,

release of such information to the public in general, in aggregate, redacted or masked form.

Our confidentiality process must take into account the 2000-2002 energy crisis in California, and the fact that the Legislature recognizes a need to protect the confidential nature of market sensitive information and has mandated us to ensure such information remains confidential. We will define, by a separate decision, the terms “market participant,” and “non-market participant,” as well as any related terms, e.g. “reviewing representatives.” Thus, we will determine a more precise definition of the terms upon receipt of additional briefing, as noted in the ordering paragraphs below.”

- p. On page 46, the following should be deleted from the first full paragraph:

“Thus, it is appropriate and lawful under § 454.5(g) to make distinctions between non-market participants and market participants in determining whether to grant access to confidential data. We cannot anticipate in advance every distinction we might draw, and thus do not adopt a specific process here. Nor do we agree with PG&E that market participants may never have access to ‘market sensitive’ information. There may be instances, for example, where it is appropriate to release such information in aggregate, redact, or masked form. Our decision here finds that § 454.5(g) does not preclude the Commission (or parties) from making distinctions between non-market and market participants in granting or denying access to ‘market sensitive’ data. We will determine a more precise definition of the two terms upon receipt of additional briefing, as noted in the ordering paragraphs below.”

- q. The fourth sentence in the fourth full paragraph beginning on page 58 and ending on page 59 is deleted:

“The Legislature acknowledged in enacting § 454.5(g) that there may be differences between market participants and non-market participants, and we find the difference to be important.”

- r. The language in Finding of Fact No. 9 on page 77 is deleted, and replaced with the following language:

“Section 454.5(g) requires the Commission to ensure the confidentiality of market sensitive information and also to provide access to confidential market sensitive information submitted in an electric procurement plan and/or resulting from or related to an approved procurement plan to our staff and also to non-market participant consumer groups who agree to subject themselves to our confidentiality procedures.”

- s. Finding of Fact No. 12 should be added to page 78, which shall read as follows:

“12. The Commission has authority to determine the reasonable period wherein confidential market sensitive information submitted to it remains confidential. Market sensitive information that is confidential is entitled to protection during a window of confidentiality that may extend for up to three years into the future in most cases and one year in the past.”

- t. The language in Conclusion of Law No. 11 on page 78 is deleted, and replaced by the following:

“Section 454.5(g) does not require the Commission to ensure the confidentiality of every record connected to procurement; it only relates to confidential ‘market sensitive’ information submitted in procurement plans and related documents.”

- u. Conclusion of Law No. 13 on page 78 is deleted and the following language added in its place to read as follows:

“13. The Commission has the authority to make a distinction between non-market participants and market participants, and to prescribe the terms of access.”

- v. Conclusion of Law No. 24 is added on page 79, and shall read as follows:

“24. The Commission is required by § 454.5(g) to ensure the confidentiality of market sensitive information. Once an entity has satisfied its burden of proving that information it has submitted to the Commission is entitled to be withheld from public disclosure and that such information satisfies the relevant requirements of the IOU or ESP matrices adopted by this decision, the public interest in disclosure of such information is outweighed by the public interest in protecting the confidentiality of such information for the time period in which it is confidential. This requirement does not affect the Commission’s discretionary authority to determine whether disclosure of such information may be warranted in a case-by-case basis and/or for purposes of discovery subject to appropriate confidentiality procedures.”

- w. The first sentence in Ordering Paragraph No. 9 on page 82 is deleted in its entirety, and the remainder of the ordering paragraph is rewritten as follows:

"In all cases, the producing party shall meet its burden of proving that it cannot produce aggregated, partially redacted, summarized or other data that does not reveal the confidential material. In those instances where a producing party believes that a protective order is inadequate to protect its

data, it must substantiate its claim with a particularized showing."

- x. Ordering Paragraph No. 11 on page 83 is deleted and the following language is added in its place to read as follows:

"11. Generally, intervenor groups that are non-market participants and other parties that the Commission may so designate may have access to confidential IOU and/or ESP market sensitive information provided such parties shall comply with Commission directives for protecting the confidentiality of such information."

- y. Ordering Paragraph Nos. 12-15 on pages 83 to 85 shall be renumbered as Ordering Paragraph Nos. 13-16 respectively.

- z. The following is added as new Ordering Paragraph No. 12 on page 83:

"12. The issue of market participants' access to confidential information will be fully addressed in a subsequent decision."

2. Rehearing of D.06-06-066, as modified, is hereby denied.

This order is effective today.

Dated May 3, 2007, San Francisco, California.

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