

(APPENDIX D)
BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement)	
Senate Bill No. 1488 (2004 Cal. Stats., CH. 690)	Docket No. 05-06-040
(Sept. 22, 2004)) Relating to Confidentiality of)	
<u>Information</u>)	

PROPOSED MODEL PROTECTIVE ORDER

ANN P. COHN
MICHAEL D. MONTOYA
DEANA WHITE

Attorneys for
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770
Telephone: (626) 302-1936
Facsimile: (626) 302-1935
E-mail: Deana.White@SCE.com

July 31, 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)))))	Docket No. 05-06-040
---	-----------------------	-----------------------------

PROPOSED MODEL PROTECTIVE ORDER

Scope. This Protective Order shall govern access to and the use in this proceeding of Protected Materials, produced by, or on behalf of, any Disclosing Party. This Protective Order does not address the right of employees of the California Public Utilities Commission (“CPUC” or “Commission”) acting in their official capacities (“Commission Staff”) to view protected materials because Commission Staff are entitled to view Protected Materials in accordance with the requirements of Section 583 of the Public Utilities Code and the Commission’s General Order 66-C. Commission Staff will also comply with this Protective Order with regard to Protected Materials provided by entities other than public utilities.¹

Modification. This Protective Order shall remain in effect until it is modified or terminated by the Commission or Assigned Administrative Law Judge (“Assigned ALJ”)² after all affected parties have been given notice and have had a reasonable opportunity to be heard. The parties acknowledge that the amount of Protected Materials, and the identity of the parties submitting such data, may differ from time to time. In light of this situation, the parties agree

¹ Constellation NewEnergy, Inc. (Constellation) objects to the deletion of the following sentence from Paragraph 1: “However, improper disclosure by Commission Staff or Staff Reviewing Representatives of Protected Materials provided by entities other than public utilities constitutes a violation of this Protective Order and is subject to potential penalties under Section 2112 of the Public Utilities Code.” Constellation understands that DRA reads § 2112 as applying only to corporations, but Constellation believes that the section applies to an individual person, as well as persons acting as employees or agents of corporations. Accordingly, Constellation believes the § 2112 language was appropriate.

² PG&E notes that this is inconsistent with the last sentence of this Paragraph which states that parties have the right to seek modifications of the Protective Order from the Assigned ALJ as well as the Commission.

that modifications to this Protective Order may become necessary, and they further agree to work cooperatively to devise and implement such modifications in as timely a manner as possible. Each party governed by this Protective Order has the right to seek changes in it as appropriate from the assigned Assigned ALJ or the Commission.

Definitions

A. The term “Protected Material(s)” means (i) trade secret, market sensitive, or other confidential and/or proprietary information as determined in good faith by the Disclosing Party in accordance with the provisions of D.06-06-066 and subsequent decisions, General Order 66-C, Public Utilities Code Sections 583 and 454.5(g), or any other right of confidentiality provided by law, or (ii) any other materials that are made subject to this Protective Order by the Assigned ALJ, Law and Motion Administrative Law Judge (“Law and Motion ALJ”), Assigned Commissioner, the Commission, or any court or other body having appropriate authority. Protected Materials also includes memoranda, handwritten notes, spreadsheets, computer files and reports, and any other form of information (including information in electronic form) that copies, discloses, or compiles other Protected Materials or from which such materials may be derived. Protected Materials do not include: (i) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court, unless such information or document has been determined to be protected by such agency or court; or (ii) any information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order or any other protective order.

B. The term “redacted” refers to situations in which Protected Materials in a document, whether the document is in paper or electronic form, have been covered, blocked out, or removed. The term “unredacted” refers to situations in which the Protected Materials in a document, whether in paper or electronic form, have not been covered, blocked out, or removed.

C. The term “Disclosing Party” means a party who initially discloses any specified Protected Materials in this proceeding.

D. The term “Market Participant” (“MP”) refers to a party that 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.

E. A Market Participant's Reviewing Representatives are limited to persons designated by the Market Participant who meet the following criteria:

1. Are outside experts, consultants or attorneys;
2. Are not currently 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); and
3. Are not an employee of a market participant.

F. Persons or entities that do not meet the definition of market participant are non-market participants ("NMPs"), and may have access to market sensitive information through their designated Reviewing Representatives. Any NMP Reviewing Representative who is simultaneously representing a Market Participant in other proceedings before the Commission shall disclose such representation to the Disclosing Party. If the Disclosing Party objects to reviewing representative status for such person, the Disclosing Party shall bring the matter before the Presiding Administration Law Judge for resolution within ten (10) days.

H. All Reviewing Representatives are required to execute a non-disclosure agreement and are bound by the terms of this Protective Order.

Designation of Materials.

When filing or providing in discovery any documents containing Protected Materials, a party shall physically mark such documents on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as “PROTECTED MATERIALS SUBJECT TO PROTECTIVE ORDER,” or with words of similar import as long as one or more of the terms, “Protected Materials,” “Protective Order,” “Section 583” or “General Order No. 66-C” is included in the designation to indicate that the materials in question are protected.

All materials so designated shall be treated as Protected Materials unless and until (a) the designation is withdrawn pursuant to Paragraph 17 hereof, or (b) there is a determination pursuant to Paragraph 4 hereof changing the designation and a period of 14 calendar days has elapsed without an appeal or other challenge to the determination pending.

All documents containing Protected Materials that are filed with the Commission or served shall be placed in sealed envelopes or otherwise appropriately protected and shall be endorsed to the effect that they are filed or served under seal pursuant to this Protective Order. Such documents shall be served upon Reviewing Representatives and persons employed by or working on behalf of the state governmental agencies referred to in Paragraph 12 hereof who are eligible and have requested to review such materials. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the procedures adopted in this proceeding, (b) by facsimile, or (c) by overnight mail or messenger service. Whenever service of a document containing Protected Materials is made by overnight mail or messenger service, the Assigned ALJ shall be served with such document by hand on the date that service is due.

Redaction of Documents. Whenever a party files, serves or provides in discovery a document that includes Protected Materials (including but not limited to briefs, testimony, exhibits, and responses to data requests), such party shall also prepare a redacted version of such document. The redacted version shall enable persons familiar with this proceeding to determine with reasonable certainty the nature (but not magnitude) of the data that has been redacted and

where the redactions occurred. The redacted version of a document to be filed shall be served on all persons on the service list, and the redacted version of a discovery document shall be served on all persons entitled thereto.

Selection of Reviewing Representatives. Each MP and NMP selecting a Reviewing Representative shall first identify its proposed Reviewing Representative to all other parties and the Division Director and shall provide all parties with a curriculum vitae of each candidate, including a brief description of the candidate's professional experience and past and present professional affiliations for the last 10 years. Any party who objects to a proposed Reviewing Representative shall advise the proposing party in writing within five (5) business days from receipt of such notice, setting forth in detail the reasons therefor. In the event of such objection, the proposing party, the objecting party or parties, and the Division Director shall promptly meet and confer to try to resolve the issue, and if necessary seek a ruling from either the Assigned ALJ or the Law and Motion ALJ. In ruling on the motion, the Assigned ALJ or the Law and Motion ALJ shall consider all relevant facts, including whether the proposed Reviewing Representative has a need to know the information in the Protected Materials to prove or defend against a material element of one or more issues presented in this proceeding, and whether it is reasonable to conclude that the information sought by the Reviewing Representative is essential to a fair resolution of an issue in this proceeding. If a party desires to designate a Reviewing Representative who has previously been approved for that status in a prior Commission proceeding and that person's professional responsibilities have not changed since the prior designation, the party need not repeat the process described above unless the Disclosing Party raises an objection to the person's selection as a Reviewing Representative, in which case the proposing party, the objecting party, and the Division Director shall promptly meet and confer to try to resolve the issue, and if necessary follow the remaining steps set forth above.³

³ CMTA and CLECA object to the inclusion of Paragraph 6 in the Model Protective Order on the following grounds: Paragraph 6 calls for the designated Reviewing Representative ("RR") to present a Curriculum Vitae ("CV") setting forth his or her clients for the past 10 years. If the disclosing party objects to the RR seeing
Continued on the next page

Continued from the previous page

confidential data on the basis of information in the CV it notifies the other party and there is a meet and confer which also includes the Energy Division, followed by a trip to see the ALJ at the CPUC if the matter remains unresolved. CMTA and CLECA object strongly to this process and believe that it was expressly rejected by the Commission in D.06-12-030. At pages 18-21 of that decision, the Commission addresses Edison's proposal that a RR should be banned from working for any market participant for a period of two years. CLECA objected to the proposed two-year employment ban and the Commission agreed with CLECA that is unreasonable and unnecessary. Paragraph 6 creates the potential for an even longer ban on employment by attorneys and consultants as it would require the presentation of a CV with 10 years of employment/consulting history, presumably for review of situations where the individual worked for a market participant and objection on that ground to their ability to see confidential material in the current proceeding. In CMTA/CLECA's view this is not acceptable.

CMTA/CLECA has offered an alternative approach that meets the process endorsed by the Commission in D.06-12-030. This proposed approach would strike Paragraph 6 and substitute language in Paragraph 3.(F) that places the burden on the reviewing representative to disclose the fact that he or she is working for a market participant currently. That is the test set forth in the decision ("simultaneous representation of both groups presents a more serious risk that market sensitive information will be revealed ..." D.06-12-013 at 20.) This Paragraph 3 (F) procedure calls for the RR to disclose any such simultaneous representation and affords the disclosing party the opportunity to object to disclosure on that ground. It is simple, it is consistent with the Commission's direction in D.06-12-030 and it avoids the problems associated with your 10 year employment ban. CMTA/CLECA strongly urge the inclusion of the Paragraph 3 (F) approach.

IEP finds that the revisions proposed by CLECA and CMTA better reflect the provisions of D.06-12-030. However, because IEP contends that D.06-12-030 is legally flawed and has filed an application for rehearing identifying the legal errors of D.06-12-030, IEP cannot support to a Model Protective Order that is based on D.06-12-030.

Similarly to IEP, CAC and EPUC find the provisions proposed by CLECA and CMTA better reflect the provisions of D.06-12-030. CAC and EPUC, with other parties, protested the proposed closure of this proceeding prior to Commission adoption of a model protective order. While CAC and EPUC still believe the Commission should adopt a model protective order, CAC and EPUC have filed an application for rehearing of D.06-12-030, noting its legal flaws and lack of record support for certain findings. CAC and EPUC, therefore, cannot support to a Model Protective Order that is based on D.06-12-030.

The IOUs believe that Paragraph 6 is a reasonable and necessary requirement, and that Paragraph 6 should not be deleted from the Model Protective Order. Nothing in D.06-12-013 provides that Reviewing Representatives may not be asked to submit a CV or resume to parties asked to disclose their market-sensitive, confidential information. This provision merely asks that Reviewing Representatives make their identities and background known so that any relevant professional affiliations will be disclosed at the outset and any disputes or objections may be resolved before confidential information is disclosed, rather than after the fact. The IOUs offered to reduce the applicable length of time from 10 years, but the objecting parties maintained that they do not want to provide any information whatsoever about the experience of their Reviewing Representatives. While the IOUs are willing to agree to a far shorter length of time for such disclosure, the IOUs believe the refusal to provide any form of CV or resume whatsoever is unreasonable given the highly market-sensitive nature of the data at issue, the potential irreparable harm that could result from unauthorized use or disclosure of the information, and the practical difficulties inherent in policing and enforcing the terms of this Protective Order. The objecting parties want the disclosing parties to "trust them" that they will disclose any relevant simultaneous representations under their proposed Paragraph 3(f), and ignore the fact that there may be disputes as to whether a representation is "simultaneous" or whether its scope renders a proposed Reviewing Representative ineligible for Reviewing Representative status under D.06-02-013. The IOUs maintain that disclosing parties and the Commission must be provided with some information about the professional experience and background of a proposed Reviewing Representatives in order to determine whether a proposed Reviewing Representative is in fact eligible for Reviewing Representative Status.

Continued on the next page

Access to Protected Materials and Use of Protected Materials. Subject to the terms of this Protective Order, Reviewing Representatives shall be entitled to access to Protected Materials. All other parties in this proceeding shall not be granted access to Protected Materials, but shall instead be limited to reviewing redacted versions of documents. Reviewing Representatives may make copies of Protected Materials, but such copies become Protected Materials. Reviewing Representatives may make notes of Protected Materials, which shall be treated as Notes of Protected Materials if they disclose the contents of Protected Materials. Protected Materials obtained by a party in this proceeding may also be requested by that party in a subsequent Commission proceeding, subject to the terms of any protective order governing that subsequent proceeding, without constituting a violation of this order.

Maintaining Confidentiality of Protected Materials. Each Reviewing Representative shall treat Protected Materials as confidential in accordance with this Protective Order and the Non-Disclosure Certificate executed pursuant to Paragraph 7 and 8 hereof. Protected Materials shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) Reviewing Representatives who have executed Non-Disclosure Certificates; (ii) Reviewing Representatives' paralegal employees and administrative personnel, such as clerks, secretaries, and word processors, to the extent necessary to assist the Reviewing Representatives, provided that they shall first ensure that such personnel are familiar with the terms of this Protective Order, and have signed a Non-Disclosure Certificate⁴, (iii) persons employed by or working on behalf of the CEC or other state governmental agencies covered by Paragraph 12. Reviewing Representatives shall adopt suitable measures to maintain the confidentiality of Protected Materials they have obtained pursuant to this Protective Order, and shall treat such Protected Materials in the same manner as they treat their own most highly

Continued from the previous page

⁴ Constellation objects to the requirement that paralegal employees and administrative personnel sign an NDC as burdensome, unnecessary and not consistent with prior Commission practice. The IOUs maintain that this is a reasonable requirement to ensure that paralegal employees and personnel are aware of their obligations under this Protective Order, and to protect against unintentional violation of the Protective Order.

confidential information. Reviewing Representatives shall be liable for any unauthorized disclosure or use by their paralegal employees or administrative staff. In the event any Reviewing Representative is requested or required by applicable laws or regulations, or in the course of administrative or judicial proceedings (in response to oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any of Protected Materials, the Reviewing Representative shall oppose disclosure on the grounds that the requested information has already been designated by the Commission as Protected Materials subject to this Protective Order lawfully issued by the Commission and therefore may not be disclosed. The Reviewing Representative shall also immediately inform the Disclosing Party of the request, and such party may, at its sole discretion and cost, direct any challenge or defense against the disclosure requirement, and the Reviewing Representative shall cooperate in good faith with such party either to oppose the disclosure of the Protected Materials consistent with applicable law, or to obtain confidential treatment of them by the person or entity who wishes to receive them prior to any such disclosure. If there are multiple requests for substantially similar Protected Materials in the same case or proceeding where a Reviewing Representative has been ordered to produce certain specific Protected Materials, the Reviewing Representative may, upon request for substantially similar materials by another person or entity, respond in a manner consistent with that order to those substantially similar requests.

Exception for California Independent System Operator (ISO). Notwithstanding any other provision of this Protective Order, with respect to an ISO Reviewing Representative only, participation in the ISO's operation of the ISO-controlled grid and in its administration of the ISO-administered markets, including, but not limited to, markets for ancillary services, supplemental energy, congestion management, and local area reliability services, shall not be deemed to be a violation of this Protective Order.⁵

⁵ CARE objects to this section while its Application for Rehearing is pending before the Commission. CARE's Application does not challenge the [D.06-12-030 definition of market participant and non-market participant but the applicability of its definition of Non-Market Participant to the ISO as a non-profit corporate entity \(like CARE who](#) Continued on the next page

Non-Disclosure Certificates. A Reviewing Representative shall not inspect, participate in discussions regarding, or otherwise be granted access to, Protected Materials unless and until he or she has first completed and executed a Non-Disclosure Certificate, attached hereto as Appendix A, and delivered the original, signed Non-Disclosure Certificate to the Disclosing Party. The Disclosing Party shall retain the executed Non-Disclosure Certificates pertaining to the Protected Materials it has disclosed and shall promptly provide copies of the Non-Disclosure Certificates to Commission Staff upon request.

Return or Destruction of Protected Materials. Protected Materials shall remain available to Reviewing Representatives until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Protected Material is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Reviewing Representatives shall, within fifteen days of such request, return the Protected Materials (including Notes of Protected Materials) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Protected Materials, and Notes of Protected Material may be retained, if they are maintained in accordance with Paragraph 8. Within such time period each Reviewing Representative, if requested to do so, shall also submit to the Disclosing Party an affidavit stating that, to the best of its knowledge, all Protected Materials and all Notes of Protected Materials have been returned or have been destroyed or will be maintained in accordance with Paragraph 8. To the extent Protected Materials are not returned or destroyed, they shall remain subject to the Protective Order, Section 583 of the California Public Utilities Code and CPUC General Order No. 66-C. In the event that a Reviewing Representative to whom Protected Material are disclosed ceases to be engaged to provide services in this proceeding, then access to such materials by that person shall be

Continued from the previous page

is a bonafide Non-Market Participant representing retail ratepayers) as opposed to ISO which is an entity that buys and sells more than a *de minimus* (1 MW) amount of electricity in the markets that it operates and other markets regulated by the Federal Energy Regulatory Commission which regulates wholesale electricity sales nationwide.]

terminated. Even if no longer engaged in this proceeding, every such person shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate.⁶

Access and Use by Governmental Entities.

(a) In the event the CPUC receives a request from the CEC for a copy of or access to any party's Protected Materials, the procedure for handling such requests shall be as follows. Not less than five (5) days after delivering written notice to the Disclosing Party of the request, the CPUC shall release such Protected Materials to the CEC upon receipt from the CEC of an Interagency Information Request and Confidentiality Agreement ("Interagency Confidentiality Agreement"). Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Protected Materials as confidential in accordance with this Protective Order, (ii) include an explanation of the purpose for the CEC's request, as well as an explanation of how the request relates to furtherance of the CEC's functions, (iii) be signed by a person authorized to bind the CEC contractually, and (iv) expressly state that furnishing of the requested Protected Materials to employees or representatives of the CEC does not, by itself, make such Protected Materials public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC's sole authority (subject to judicial review) to make the determination whether the Protected Materials should remain confidential or be disclosed to the

⁶ SCE objects to adoption of a Model Protection Order without clarification by the Commission as to whether a Reviewing Representative may undertake representation that would render that Reviewing Representative ineligible for Reviewing Representative Status, while a proceeding is pending and that Reviewing Representative is bound by the terms of a protective order. SCE and the other IOUs argued that Reviewing Representatives should be precluded from obtaining such employment for a period of two years, and that argument was rejected in D.06-02-013. D.06-02-013 did not, however, clarify whether a Reviewing Representative may first obtain access to confidential market-sensitive information in a proceeding, and then turnaround the following day and, for example, engage directly in the purchase or sale of electrical energy. SCE asks that the Commission preclude Reviewing Representatives from accepting such employment while bound by the terms of a protective order in a proceeding. Otherwise, the restriction on "simultaneous" representation in D.06-02-013 could easily be circumvented in this manner. If the Commission, declines to impose such a restriction, then the Model Protective Order will need to be modified to provide that: "In the event that a Reviewing Representative to whom Protected Material are disclosed ceases to be eligible for Reviewing Representative status pursuant to Paragraph 3.E., then access to such materials by that person shall be terminated. Even if no longer eligible for Reviewing Representative status, every such person shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate."

public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the CEC.

(b) In the event the CPUC receives a request for a copy of or access to a party's Protected Materials from a state governmental agency other than the CEC that is authorized to enter into a written agreement sufficient to satisfy the requirements for maintaining confidentiality set forth in Government Code Section 6254.5(e), the CPUC may, not less than five (5) days after giving written notice to the Disclosing Party of the request, release such protected material to the requesting governmental agency, upon receiving from the requesting agency an executed Interagency Confidentiality Agreement that contains the same provisions described in Paragraph 10(a) above.

(c) The CEC may use Protected Materials when needed to fulfill its statutory responsibilities or cooperative agreements with the CPUC. Commission confidentiality designations will be maintained by the CEC in making such assessments, and the CEC will not publish any assessment that directly reveals the data or allows the data submitted by an individual load serving entity ("LSE") to be "reverse engineered."

CPRA Requests. If a request is made pursuant to the California Public Records Act ("CPRA"), Government Code sections 6250, *et seq.*, that a party's Protected Materials filed with or otherwise in the possession of the CPUC be produced, the CPUC will notify such party of the CPRA request. The CPUC also will notify the requester that the Protected Materials are public records that have been filed with or submitted to the CPUC accompanied by a claim that they are confidential and/or that there is a public interest served by withholding the records. The CPUC will thereafter proceed to determine, pursuant to applicable law, whether the requested Protected Materials are excluded from public inspection. In the event the CPUC receives a request from a federal government agency or a judicial subpoena for the production of a party's Protected Materials in the CPUC's possession, the CPUC will also notify the Disclosing Party of such request. In the event that a PRA requester brings suit to compel disclosure of a party's Protected

Materials, the CPUC will promptly notify the Disclosing Party of such suit, and Commission Staff and the Disclosing Party shall cooperate in opposing the suit.⁷

Derivative Materials. There shall be a rebuttable presumption that (a) any study that incorporates, describes or otherwise employs Protected Materials in a manner that could reveal all of a part of such materials, or (b) any model that relies upon Protected Materials for algorithms or other computation(s) critical to the functioning of the model, are Protected Materials that are subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this Protective Order. However, models that merely use Protected Materials as inputs and/or outputs will not themselves be considered Protected Materials. There shall also be a rebuttable presumption that where the inputs to studies or models include Protected Materials, or where the outputs of such studies or models reveal such inputs or can be processed to reveal such materials, such inputs and/or outputs shall be considered Protected Materials subject to this Protective Order, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the Disclosing Party. Unless a party, by means of notice and motion, obtains a ruling from the Assigned ALJ or the Law and Motion ALJ holding that the applicable presumption(s) from among the foregoing has been rebutted with respect to the model or study at issue, then any party who devises or propounds a model or study that incorporates, uses or is

⁷ CARE requests insertion of the following language into the Model Protective Order: "An agency has 10 days to decide if copies will be provided. In "unusual" cases (request is "voluminous," seeks records held off-site, OR requires consultation with other agencies), the agency may upon written notice to the requestors give itself an additional 14 days to respond. (§ 6253(c)) These time periods may not be used solely to delay access to the records. (§ 6253(d)) The agency must justify the withholding of any record by demonstrating that the record is exempt or that the public interest in confidentiality outweighs the public interest in disclosure. (§ 6255) Preliminary drafts, notes and memos may be withheld only if: 1) they are "not retained...in the ordinary course of business" and 2) "the public interest in with-holding clearly outweighs the public interest in disclosure." Drafts are not exempted if: 1) staff normally keep copies; or 2) the report or document is final even if a decision is not. (§ 6254(a)) Where a draft contains both facts and recommendations, only the latter may be withheld. The facts *must* be disclosed. *CBE v. CDFCA.*, 171 Cal.App.3d 704 (1985)."

SCE and others object to CARE's requested insertion as beyond the scope of, and not relevant to, the terms of a Model Protective Order.

based upon such materials shall label the model or study “Protected Materials,” and it shall be subject to the terms of this Protective Order.⁸

Dispute Resolution. All disputes that arise under this Protective Order, including but not limited to alleged violations of this Protective Order and disputes concerning whether materials were properly designated as Protected Materials, shall be presented for resolution to the Assigned ALJ or the Law and Motion ALJ. Prior to presenting any such dispute to the applicable ALJ, the parties to the dispute shall use their best efforts to resolve it. The parties and Commission Staff reserve the right to seek additional administrative or judicial remedies after the Assigned ALJ or the Law and Motion ALJ has made a ruling regarding the dispute.

Other Objections to Use or Disclosure. Nothing in this Protective Order shall be construed as limiting the right of a party, the Commission Staff, or a state governmental agency covered by Paragraph 12 from objecting to the use or disclosure of Protected Material on any legal ground, such as relevance or privilege.⁹

⁸ The CEC submitted the following proposed modification Paragraph 12 after the deadline for submitting comments and objections to the Proposed Model Protective Order and did not circulate its proposed modification to the service list for this proceeding. Therefore, none of the interested parties have been provided with an opportunity to discuss or respond to CEC’s proposal:

The CEC is concerned about potential ambiguity regarding the interplay of paragraphs 12 and 14. Paragraph 12 allows the CEC to obtain and use protected information to fulfill its statutory duties, and the CEC in doing so, may not release any studies or papers that either directly reveal the data or allow the data to be calculated. The CEC supports that language.

However, paragraph 14 establishes several rebuttable presumptions regarding studies that incorporates protected materials, and therefore devises approvals to ensure the protected materials are not disclosed. Specifically, CEC is concerned that model outputs that are based on protected material must be treated as protected materials, even where the outputs do not reveal the protected materials. The CEC would like an assurance that in using protected material to fulfill its statutory responsibilities, it does not need to obtain explicit approval from the Disclosing Party or a CPUC ruling to release studies or papers unless protected materials are released or could be ascertained as a result of the release. This could be achieved simply by inserting a single sentence at the end of paragraph 13: “Notwithstanding the foregoing, pursuant to the protection created by the Inter-agency Confidentiality Agreement described in paragraph 11(a), the CEC may release the results of models it devises or uses that incorporate protected materials provided that protected materials will not be disclosed and cannot be ascertained.”

⁹ CARE proposes to delete the words “use or” and “relevance or” from the above sentence and further proposes to add the following paragraph thereafter: Responses to CPRA requests out of time waive responding party’s rights to object Parties participating before the Commission who are subject to the requirements of the California Public Records Act, Government Code § 6250, et seq., must respond to requests for public records within ten calendar days of a request for such records. Any Party who is subject to the CPRA who provides the requesting Party their response to a CPRA request out of time waive responding party’s rights to object to such request. Therefore in the

Continued on the next page

Remedies. Any violation of this Protective Order shall constitute a violation of an order of the CPUC. Notwithstanding the foregoing, the parties and Commission Staff reserve their rights to pursue any legal or equitable remedies that may be available in the event of an actual or anticipated disclosure of Protected Materials.

Withdrawal of Designation. A Disclosing Party may agree at any time to remove the “Protected Materials” designation from any materials of such party if, in its opinion, confidentiality protection is no longer required. In such a case, the Disclosing Party will notify all other parties that the Disclosing Party believes are in possession of such materials of the change of designation.

Continued from the previous page

case of an untimely response to a CPRA request this Protective Order shall be construed as limiting the right of a party, the Commission Staff, or a state governmental agency covered by Paragraphs 10(a), 10(b) and 10(c) from objecting to the use of Protected Material on any legal ground, such as relevance, but this does not apply to the exclusion from the disclosure of any Protected Material based on privilege covered in paragraph 15.

SCE and others believe that the CPRA provisions do not apply to, and are not relevant to, this Model Protective Order and should therefore, not be incorporated into the Model Protective Order.

Interpretation. Titles are for convenience only and may not be used to restrict the scope of this Protective Order.

Entered: _____
Administrative Law Judge

Date: _____

APPENDIX A TO PROPOSED PROTECTIVE ORDER

BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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

NON-DISCLOSURE CERTIFICATE

I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Protective Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses Protected Materials shall not be disclosed to anyone other than in accordance with that Protective Order. I acknowledge that a violation of this certificate constitutes a violation of an order of California Public Utilities Commission.

By: _____
Title: _____ --
Representing: _____
Date: _____ --

APPENDIX B TO PROPOSED PROTECTIVE ORDER

**INTERAGENCY INFORMATION REQUEST AND
CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA PUBLIC
UTILITIES COMMISSION AND THE CALIFORNIA ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

A. INTERAGENCY INFORMATION REQUEST

The California Energy Resources Conservation and Development Commission ("CEC") hereby requests the following information from the California Public Utilities Commission ("Commission") provided to the Commission by [IOU] pursuant to the Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development, issued on October 25, 2001 by the Commission as Rulemaking (R.) 01-10-024:

[List of Information Requested]

[IOU] has provided the above-described data to the Commission and the Commission is treating the data as confidential pursuant to the Public Utilities Code §583.

The CEC declares that it has a need for the above-described data for the following purposes:

1. [to be added]
2. [to be added]
3. [to be added]

The CEC agrees to keep this information confidential in its entirety, disclosing it only to its employees and representatives whose work requires them to review and analyze such data.

APPENDIX B

B. CONFIDENTIALITY AGREEMENT

1. This agreement is limited to records that are not open to public inspection, that are in the possession and control of the Commission, and that are identified above.
2. The Commission shall permit the CEC to review and copy the records identified above that are not open to public inspection ("confidential records"), upon the representation of an authorized representative of the CEC that the confidentiality of such records will be maintained and that they will not be made available for inspection by any other governmental agency, or by the public, except as provided for herein.
3. The CEC agrees that the confidential records identified above shall be released only to persons authorized in writing by the person(s) in charge of the CEC to obtain the confidential records, and that the CEC will inform each of its employees, and any consultants or contractors who have access to the confidential records, that they are subject to the requirements of this confidentiality agreement. The CEC shall have each such consultant or contractor sign the attached "acknowledgment" form obligating the consultant or contractor to comply with this agreement. The CEC further agrees that it will require each such consultant or contractor to inform the consultant's or contractor's employees that they are subject to this Confidentiality Agreement, and to have each such employee with access to the confidential records sign the attached acknowledgement form. Copies of the signed acknowledgment forms will be provided to the Commission upon request.
4. The CEC shall take reasonable security precautions to keep confidential the records provided to the CEC pursuant to this agreement. The CEC shall notify the Commission immediately upon the discovery of any unauthorized use or disclosure of the confidential records or of any other breach of this agreement, and will cooperate in every reasonable way to help the Commission prevent further unauthorized disclosure or use of the confidential records covered by this agreement.

APPENDIX B

5. The Commission reserves its authority under Section 583 of the California Public Utilities Code and General Order 66-C to consider and determine whether the records identified above should be made available for public inspection. The CEC agrees that its Executive Director will not exercise his authority under California Code of Regulations, title 20, section 2507(e), and will not release any confidential records or other documents designated as confidential by the CPUC in R.01-10-024 unless explicitly authorized by the CPUC.
6. In the event the CEC determines for any reason that it is required, or that it would be desirable, to disclose or make available the contents of the confidential records identified above to other governmental agencies or to the public, the CEC agrees not to do so without first notifying the Commission of its intent and the reason for the requested disclosure. The CEC further agrees that such notice shall be given be no less than 20 days prior to the planned disclosure in order that the Commission, the Assigned Commissioner for R.01-10-024, the Assigned Administrative Law Judge (ALJ) for that proceeding or the Law and Motion ALJ, as the case may be, can give adequate consideration, in accordance with Section 583 of the Pubic Utilities Code and the Commission's General Order 66-C, to the issue of whether it is in the public interest to make such records available to other governmental agencies or to the public. The CEC agrees to abide by the determination of the Commission, the Assigned Commissioner or the applicable ALJ on this issue, but may appeal such determination pursuant to the CPUC's Rules of Practice and Procedure.
7. With respect to the use of data by the CEC contained in the confidential records subject to this agreement ("confidential data"), it shall be a rebuttable presumption that (i) any study that incorporates, describes or otherwise employs such confidential data in a manner that could reveal all or part of the confidential data, or (ii) any model that relies upon such confidential data for algorithms or other computation(s) critical to the functioning of the model, shall also be considered a confidential record subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this agreement. However, models that merely use confidential data as inputs will not themselves be considered such confidential records. It shall also be a rebuttable presumption that where the inputs

APPENDIX B

to studies or models include confidential data, or where the outputs of such studies or models reveal the inputs or can be processed to reveal the confidential data, such inputs and/or outputs shall be considered confidential records subject to this agreement, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the party producing the confidential records. Any disputes concerning the appropriate scope of redaction or aggregation that the CEC and the party producing the confidential records cannot resolve shall be presented for resolution to the Assigned ALJ for R.01-10-024 or to the Law and Motion ALJ.

8. This agreement shall continue in effect unless or until either of the undersigned parties determines that the agreement should be terminated. Unless otherwise provided for by the written agreement of both the CEC and the Commission, unilateral termination of this agreement shall be effected no sooner than 30 days from the date that either party provides notice, in writing, of its intent to terminate this agreement. All obligations created by this agreement during its term shall survive termination of the agreement.
9. This agreement shall not be modified except by a written agreement dated subsequent to the date of this agreement and signed by authorized representatives of both parties. None of the provisions of this agreement shall be deemed to have been waived by any act or acquiescence on the part of either party, its agents, or employees, but only by an instrument in writing signed by an authorized representative of the party. No waiver of any provisions of this agreement shall constitute a waiver of any other provisions(s) or of the same provision on another occasion.
10. If any provision of this agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

Name _____

Position at the CEC: _____

Dated: _____

General Counsel
California Public Utilities
Commission

Dated: _____

APPENDIX B

**ACKNOWLEDGEMENT AND ACCEPTANCE OF THE REQUIREMENTS OF
THE CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA STATE ENERGY
RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION (CEC) AND THE CALIFORNIA PUBLIC UTILITIES
COMMISSION FOR CEC CONSULTANTS AND CONTRACTORS**

The Undersigned acknowledges that he/she/it has received copies of the Interagency Information Request and Confidentiality Agreement Between the California Public Utilities Commission (CPUC) and the California Energy Resources Conservation and Development Commission (CEC) dated _____ (Interagency Confidentiality Agreement), Public Utilities Code Section 583 and CPUC General Order 66-C. The undersigned acknowledges that he/she/it will be subject to the requirements of the Interagency Confidentiality Agreement, and agrees to be bound by the requirements set forth therein.

Signed: _____

Name _____

Title: _____

Organization: _____

Dated: _____

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of PROPOSED MODEL PROTECTIVE ORDER on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this 31ST day of July, 2007, at Rosemead, California.

/s/

Raquel Ippoliti
Case Analyst
SOUTHERN CALIFORNIA EDISON COMPANY

2244 Walnut Grove Avenue
Post Office Box 800
Rosemead, California 91770

(END OF APPENDIX D)