

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program.

Rulemaking 05-12-013
(Filed December 15, 2005)

**ADMINISTRATIVE LAW JUDGE'S RULING
ADOPTING REVISED PROTECTIVE ORDER**

1. Summary

The Revised Protective Order (RPO) attached to this ruling is adopted and shall govern access to, and the use of, certain Protected Materials as defined in the RPO.

2. Background

By ruling dated January 17, 2006, I provided for comments on a draft RPO that was attached to that ruling.¹ By ruling dated January 25, 2006, I provided for replies to the comments. Comments were filed by The Alliance for Retail Energy Markets (AReM), the California Independent System Operator Corporation (CAISO), The Independent Energy Producers Association (IEP), and The Utility Reform Network (TURN). Replies were filed by AReM and TURN. This ruling makes certain revisions to the draft RPO, as discussed below.

¹ The background for the RPO is discussed in detail in the January 17, 2006 ruling.

3. Discussion

Applicability of Public Utilities Code Section 2112. As discussed in the January 17, 2006 ruling, the draft RPO attached to that ruling incorporated several provisions that had been proposed by the Moving Parties in a Joint Motion filed in Rulemaking (R.) 04-04-003 on August 31, 2005. However, the January 17, 2006 ruling did not adopt proposed language in Paragraph 1 of the RPO stating that improper disclosure by Commission Staff or Staff Reviewing Representatives of Protected Materials provided by entities other than public utilities is subject to potential penalties under Section 2112.²

AReM has now provided justification for the proposed language regarding Section 2112. AReM notes that the confidentiality protections afforded to public utilities under Sections 583 and 454.5(g) and General Order 66-C are not applicable to non-utility load-serving entities (LSEs) such as electric service providers (ESPs). According to AReM, Section 2112 provides an enforcement mechanism to uphold the terms of the RPO that may not otherwise be available to protect information submitted by non-utility LSEs. I am persuaded that the proposed reference to Section 2112 conveys an appropriate incentive for recipients of protected materials to act with discretion. The proposed language will be added to the last sentence of Paragraph 1.³

² Section references herein are to the Public Utilities Code unless otherwise noted.

³ This ruling makes no determination with respect to the applicability of Public Resources Code Section 25322(d)(1) as to Staff Reviewing Representatives employed by the California Energy Commission (CEC). It would appear that the salutary effect sought by AReM would derive from that statute as to CEC employees.

Non-Disclosure Certificates. The RPO attached to the January 17, 2006 ruling removed a provision in Paragraph 8 of both the June 24, 2005 Interim Protective Order and the Joint Parties' proposed RPO requiring Staff Reviewing Representatives to execute non-disclosure certificates prior to being granted access to protected materials. The ruling noted that this was done in light of the unnecessary administrative burden associated with processing non-disclosure certificates.

AReM believes execution of a non-disclosure certificate is bound to have a salutary effect on the signatories and that signing such an agreement is significantly more meaningful to an individual than the abstract knowledge that a protective order exists. AReM therefore asks for reconsideration of the non-disclosure certificate requirement.

The addition of the language regarding Section 2112 (see preceding discussion) should have the salutary effect of informing Staff Reviewing Representatives of the importance of treating protected materials with the discretion required by the RPO. I remain unpersuaded that any incremental benefit of requiring non-disclosure certificates outweighs the costs of the administrative burden of requiring such certificates on the part of Staff Reviewing Representatives.

CAISO notes in its comments that the same practical concerns that necessitate exempting Staff Reviewing Representatives from the requirement to execute non-disclosure certificates apply to the CAISO and ISO Reviewing Representatives. CAISO notes that its employees are subject to a strict Code of Conduct. For good cause shown, I will adopt the CAISO's proposed exemption, which appears in the first sentence of Paragraph 8 of the RPO.

Access to and Use of Protected Materials. CAISO states that to fulfill its role in reviewing resource tabulations submitted by LSEs, it will need the same access to data submitted by ESPs that Staff Reviewing Representatives have. For good cause shown, Paragraph 7.a. will be modified to provide ISO Reviewing Representatives with such access.

TURN objects to the provision of Paragraph 7.a. that would limit Non-Market Participant Party (NMPP) access to ESP RAR compliance filings. TURN proposes that NMPPs be provided access to RAR compliance filings by all LSEs. TURN maintains that questions of whether and how various LSEs comply with the RAR program are of substantial public importance, and that NMPPs such as TURN have a strong interest in being able to assess whether LSEs have in fact complied.

AReM counters that there is no compelling reason why ESPs should be exposed to the risk of harm from public disclosure of the highly sensitive information contained in individual ESP compliance filings. According to AReM, Commission staff, along with California Energy Commission and CAISO staff, is in a position to verify ESP compliance without assistance from TURN.

I recognize that NMPPs such as TURN can provide a valuable role in the review of LSE compliance filings. Nevertheless, as noted in the January 17, 2006 ruling, Decision (D.) 05-10-042 provided for taking a conservative approach to RAR-related confidentiality issues while R.05-06-040, the Commission's generic rulemaking to implement Senate Bill (SB) 1488 (2004 Cal. Stats., Ch. 690) is pending. In order to give effect to the Commission's intent to pursue this interim conservative approach, at this time I will not adopt TURN's proposed broadening of access to ESP compliance filing data. I note that in connection with this conservative approach, the Commission provided that NMPPs should

have access to LSEs' resource tabulations to the same extent, if any, that NMPPs have access to the LSEs' historic and forecast load data. (D.05-10-042, p. 89.) As proposed by Moving Parties including TURN, the RPO provided that NMPP access to load data should be limited to aggregated ESP data. Therefore, consistent with the Commission's decision, pending issuance of a decision in R.05-06-040, at this time NMPPs should have access to aggregated ESP compliance filing data but not individual ESP data.

Applicability of RPO to 2007 RAR Filing Cycle. IEP notes that the Moving Parties developed the RPO with the understanding that it was to remain in effect on an interim basis until issuance of a decision in R.05-06-040. IEP recognizes the need for the RPO to be applicable during the early stages of the 2007 RAR filing cycle, but is concerned that the RPO will remain in effect indefinitely after issuance of a decision in Phase 1 of R.05-06-040 until someone gets around to developing a replacement order. IEP proposes revisions to the language in Paragraph 2 that would provide greater assurance of a timely revision to or re-issuance of the RPO that incorporates the determinations made in the Phase 1 decision. This language is reasonable and will be adopted.

Ratepayer Harm standard. IEP objects to language in Paragraph 3.a. of the RPO attached to the January 17, 2006 ruling providing that significant harm to ratepayers in the event of unrestricted disclosure and use of data is a basis for claiming Protected Materials status. IEP is concerned that this could allow a Disclosing Party to base claims of Protected Materials status on subjective assessments. As TURN correctly points out, however, ratepayer harm should be a primary and foremost consideration. Moreover, as TURN notes, a determination that significant ratepayer harm exists is no more subjective than a

determination that the disclosing Party faces significant harm. IEP's proposed modification will not be adopted.

Clarification of NMPP Definition. The definition set forth in Paragraph 3.g. is modified to clarify that "NMPP" does not include ISO Reviewing Representatives or Staff Reviewing Representatives.

IT IS RULED that:

1. The Revised Protective Order (RPO) (Appendix A) is hereby adopted and shall govern access to and the use of Protected Materials as defined therein.
2. Parties are placed on notice that the terms and conditions of the RPO, after notice and opportunity to be heard, may be subject to further revision to incorporate policies and directives that may be adopted by the Commission in Rulemaking 05-06-040.

Dated February 10, 2006, at San Francisco, California.

/s/ MARK S. WETZELL

Mark S. Wetzell
Administrative Law Judge

APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program.

Rulemaking 05-12-013
(Filed December 15, 2005)

REVISED PROTECTIVE ORDER REGARDING CONFIDENTIALITY OF MARKET SENSITIVE LOAD AND RESOURCE DATA AND INFORMATION

1. Scope

This Revised Protective Order ("Protective Order") shall govern access to and the use of Protected Materials, as hereinafter defined, submitted by any respondent to Rulemaking (R.) 04-04-003 and R.05-12-013 pursuant to any ruling or order of the Assigned Administrative Law Judge ("Assigned ALJ"), the Law and Motion Administrative Law Judge ("Law and Motion ALJ"), the Assigned Commissioner, or the California Public Utilities Commission ("CPUC" or "Commission") that requires such respondents to submit load forecasts, resource tabulations, or other data in furtherance of the Commission's development, establishment, implementation, and operation of a program of Resource Adequacy Requirements. This Protective Order does not address the right of employees of the Commission acting in their official capacities ("Commission Staff") to view Protected Materials to the extent that Commission Staff is entitled to view Protected Materials subject to the provisions of Section 583 of the Public Utilities Code and/or the Commission's General Order 66-C; 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.

2. Modification

This Protective Order shall remain in effect until the Commission issues its decision in Phase 1 of R.05-06-040 and a new protective order that incorporates the determinations of the Commission's Phase 1 decision in R.05-06-040 is adopted by the Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner, or the Commission after all affected parties have been given notice and have had a reasonable opportunity to be heard. Information classified as Protected Materials under this Protective Order that the Commission in its Phase 1 decision rules should be publicly disclosed will thereafter be publicly available.

3. Definitions

a. The term "Protected Material(s)" means (i) trade secret or other confidential and/or proprietary information whose market sensitive nature, as determined in good faith by the Disclosing Party, is such that unrestricted disclosure and use would cause the Disclosing Party or ratepayers significant harm or loss of an opportunity to obtain a competitive advantage, and (ii) any other materials that are made subject to this Protective Order by any Assigned ALJ, 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, any other protective order or Section 583 of the Public Utilities Code.

To the extent that the Commission, the California Energy Commission (CEC), the Federal Energy Regulatory Commission, or any court or agency with jurisdiction determines that data covered by this Protective Order are public information, and such determination is no longer subject to administrative or judicial review, such data shall cease to be Protected Materials.

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 provides any materials specified as Protected Materials in this proceeding.

d. The term “Resource Adequacy Requirements” means the regulatory program governing certain load-serving entities established pursuant to Commission Decision (D.) 04-10-050, D.04-10-035, and D.05-10-042, and being developed and implemented in Commission R.04-04-003 and R.05-12-013.

e. The term “Reviewing Representative” refers to an NMPP Reviewing Representative, a Staff Reviewing Representative, and an ISO Reviewing Representative.

f. The term “Market Participating Party” (“MPP”) refers to a party that is: (i) a person or entity that engages in the purchase, sale or marketing of electrical

energy or capacity or natural gas, or the bidding on or purchasing of power plants, or consulting on such matters; or (ii) a trade association or other organization composed of or representing persons or entities that engage in one or more of such activities.

g. The term “Non-Market Participating Party,” or “NMPP,” refers to a party that is not an MPP as defined in Paragraph 3(f) hereof, nor an ISO Reviewing Representative as defined in Paragraph 3(i) hereof, nor a Staff Reviewing Representative as defined in Paragraph 3(j) hereof.

h. The term “NMPP Reviewing Representative” refers to a person an NMPP selects pursuant to Paragraph 6 hereof who is an employee of the NMPP or an attorney or an expert the NMPP retains for the purpose of preparing for, participating in, or giving advice concerning this proceeding.

i. The term “ISO Reviewing Representative” refers to a person employed and selected pursuant to Paragraph 6 hereof by the California Independent System Operator Corporation (“ISO”), a nonprofit public benefit corporation created pursuant to Article 3, Chapter 2.3 of the Public Utilities Act (Public Utilities Code Sections 345, et seq.).

j. The term “Staff Reviewing Representative” refers to a person who is an employee or contractor of the Commission and, provided that an interagency agreement has been executed pursuant to Paragraph 11.a. hereof, a person who is an employee or contractor of the CEC, or another state governmental agency that is statutorily authorized to obtain access to confidential data held by another state governmental agency, upon execution of a written agreement to treat the data so obtained as confidential as provided in Government Code Section 6254.5(e) and Paragraph 11.a. of this Protective Order.

4. Designation of Materials

a. When filing or providing 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. Each page shall be numbered by "Bates Stamp" or equivalent method.

b. 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 14 hereof changing the designation and a period of 14 calendar days has elapsed without an appeal or other challenge to the determination pending.

c. All documents containing Protected Materials that are filed with or provided to 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, provided 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 11(b) 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 Electronic Service Protocols established for this docket, (b) by facsimile, or (c) by overnight mail or messenger service. Whenever service of a document containing Protected

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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.

5. Redaction of Documents

Whenever a party files 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. These requirements to prepare, serve, and, as applicable, file redacted documents shall not apply to compliance filings, including load forecasts and data and resource tabulations, submitted by respondent load-serving entities pursuant to D.05-10-042 or any decision of the Commission in R.05-10-042, ruling of the Assigned Commissioner or Administrative Law Judge, or directive of the Energy Division Director or his designee.

6. Selection of Reviewing Representatives

Each NMPP shall be entitled to select employees, attorneys, and experts to serve as its NMPP Reviewing Representatives. The ISO shall be entitled to select employees to serve as its ISO Reviewing Representatives. The Commission shall be entitled to select employees and contractors to serve as its Staff Reviewing Representatives. The CEC shall be entitled to select employees and contractors to serve as its Staff Reviewing Representatives. Each party selecting an NMPP Reviewing Representative or an ISO Reviewing Representative shall first identify its proposed Reviewing Representative to all other parties and the Division Director and shall provide all parties with an 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.

7. Access to Protected Materials and Use of Protected Materials

a. Subject to the terms of this Protective Order, Reviewing Representatives shall be entitled to access to Protected Materials provided by public utilities, except that the Disclosing Parties may redact price information from Protected Materials made available to ISO Reviewing Representatives and except that Staff Reviewing Representatives and ISO Reviewing Representatives may have access to Electric Service Provider ("ESP") Protected Materials. Notwithstanding any other provision of this Protective Order, access for parties other than Staff Reviewing Representatives and ISO Reviewing Representatives to information submitted by an ESP shall be limited to a public aggregation of all ESP data to be compiled by the Commission's Energy Division or the staff of the California Energy Commission, and the original Protected Material submissions by ESPs

shall be held in confidence by the Commission, the California Energy Commission, and the ISO.

b. 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 or information aggregated in such a manner as to ensure that no Protected Materials are disclosed or capable of being “reverse engineered” from that aggregated data to create any Protected Materials.

c. Reviewing Representatives shall use Protected Materials solely for purposes of R.04-04-003 and R.05-12-013, and, after these proceedings are closed, for purposes of the Resource Adequacy Requirements program being established and implemented in these proceedings. If a Reviewing Representative's scope of present or future employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, such Reviewing Representative may not use or disclose information contained in any Protected Materials obtained through this proceeding, except while employed by a Reviewing Representative in the task of other than for purposes the of development, establishment, implementation, and operation of a program of Resource Adequacy Requirements.

d. Notwithstanding any other provision of this Paragraph, with respect to an ISO Reviewing Representative only, participation in the ISO's ordinary operation of the ISO controlled grid and in its ordinary administration of the ISO administered markets, including 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.

e. Pursuant to D.05-10-042, Staff of the California Energy Commission may use Protected Materials submitted by LSEs pursuant to resource adequacy compliance filings in assessments of supply-demand balances and in preparation of public documents describing the adequacy of California's electricity system. 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 LSE to be "reverse engineered."

8. Non-Disclosure Certificates

A Reviewing Representative other than a Staff Reviewing Representative or an ISO 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 Attachment 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.

9. Maintaining Confidentiality of Protected Materials

Each Reviewing Representative shall treat Protected Materials as confidential in accordance with this Protective Order and, as applicable, the Non-Disclosure Certificate executed pursuant to Paragraph 8 hereof. Except as provided in Paragraph 7.e., Protected Materials shall not be used except as necessary for the conduct of this proceeding and for the ongoing operation of the

RAR program being established and implemented in R.04-04-003 and R.05-12-013, and shall not be disclosed in any manner to any person except (i) NMPP Reviewing Representatives; (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 assure that such personnel are familiar with the terms of this Protective Order, (iii) persons employed by or working on behalf of the state governmental agencies covered by Paragraph 11(b), (iv) ISO Reviewing Representatives (with the exception of price information), and (v) Staff Reviewing Representatives. Reviewing Representatives shall adopt suitable measures to maintain the confidentiality of Protected Materials they have obtained pursuant to this Protective Order, including by maintaining such materials in locked file cabinets and implementing password protection for computer files. Reviewing Representatives shall not leave such materials unattended on desks or tables or on computer screens. 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 with such party to the maximum extent practicable 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, notwithstanding such opposition, the Reviewing Representative is ordered by a court of competent jurisdiction to disclose any Protected Materials, such disclosure shall not constitute a violation of this Protective Order. 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.

10. Return or Destruction of Protected Materials

Within thirty (30) days after a Reviewing Representative other than a Staff Reviewing Representative completes or terminates his or her services in this proceeding or within thirty (30) days after this proceeding is concluded and no longer subject to appellate review, whichever occurs first, each Reviewing Representative shall, at his or her option, return to the Disclosing Party or destroy the Protected Materials obtained, produced or maintained pursuant to this Protective Order. Within the same 30-day period, the Reviewing Representatives shall submit to the Disclosing Party an original signed affidavit or declaration under penalty of perjury under the laws of the State of California stating that, to the best of his or her knowledge, all Protected Materials subject to this paragraph have been returned to the Disclosing Party or destroyed. To the

extent any Protected Materials are not returned or destroyed pursuant to this paragraph for any reason, they shall remain subject to this Protective Order, Section 583 of the California Public Utilities Code and/or CPUC General Order No. 66-C as applicable. In the event that a Reviewing Representative to whom Protected Materials are disclosed ceases to be engaged to provide services in this proceeding, then access to such materials by that person shall be terminated. Even if no longer engaged in such reviews, every such person shall continue to be bound by the provisions of this Protective Order and, as applicable, the Non-Disclosure Certificate.

11. Access by Governmental Entities

a. The CPUC shall release Protected Materials to the CEC upon receipt from the CEC of an executed Interagency Confidentiality Agreement (“Interagency Confidentiality Agreement”) identical in form to the agreement set forth in Attachment B hereto. 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) be signed by a person authorized to bind the CEC contractually, and (iii) 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 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 11(a) above, and that is otherwise substantively identical to the draft agreement set forth in Attachment B; i.e., identical as to legal principles but with variations in language that are necessary due to the particular situation of the requesting agency.

12. PRA Requests

If a request is made pursuant to the Public Records Act ("PRA"), Government Code § 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 PRA 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 fall within the exclusions listed in Section 2 of General Order No. 66-C or other specific exclusions provided by the PRA, and/or that there is a public interest served by withholding the records. The CPUC will thereafter proceed to determine, pursuant to General Order No. 66-C, whether the requested Protected Materials are excluded from public inspection. In the event the CPUC receives a request from a federal government agency or via 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.

13. 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 or 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, or this Protective Order. However, models that merely use Protected Materials as inputs 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 or, in the case of the CEC, to extent that the data cannot be "reverse engineered." Unless a party other than the CEC, 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 based upon such materials shall label the model or study "Protected Materials," and it shall be subject to the terms of this Protective Order.

14. Dispute Resolution

All disputes arising 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.

15. 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 Paragraphs 11(a) or 11(b) from objecting to the use or disclosure of Protected Material on any legal ground, such as relevance or privilege.

16. 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.

17. 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.

18. Interpretation

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

Dated February 10, 2006, at San Francisco, California.

/s/ MARK S. WETZELL
Mark S. Wetzell
Administrative Law Judge

ATTACHMENT A TO REVISED PROTECTIVE ORDER

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program.

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NON-DISCLOSURE CERTIFICATE

I, _____, have been asked by _____ to inspect certain materials that have been designated as "Protected Materials" under Paragraph 4 of the Protective Order entered in the above-captioned matter by the Administrative Law Judge by order dated February 10, 2006.

1. 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, is derivative of or otherwise discloses such Protected Materials shall not be disclosed to anyone other than in accordance with the Protective Order.

2. I understand that my review of Protected Materials is solely for the purpose of participating in the above-captioned matter and establishing and implementing the RAR program adopted in the proceeding, and that any other use or disclosure of such materials by me is a violation of the Protective Order.

3. I hereby agree that if the scope of my present or future employment includes the marketing of energy, the direct supervision of any employee or employees whose duties include the marketing of energy, the provision of consulting services to any person whose duties include the marketing of energy, or the direct supervision of any employee or employees whose duties include the marketing of energy, I will not use or disclose information contained in any

Protected Materials obtained through this proceeding, except while employed by a Reviewing Representative in the task of other than for purposes of the development, establishment, implementation, and operation of a program of Resource Adequacy Requirements.

I acknowledge that using or disclosing information contained in any Protected Materials in violation of the preceding paragraph constitutes a violation of the Protective Order. Notwithstanding any other provision of this paragraph, with respect to an ISO Reviewing Representative only, participation in the ISO's ordinary operation of the ISO-controlled grid and in its ordinary administration of the ISO administered markets, including markets for ancillary services, supplemental energy, congestion management, and local area reliability services, shall not be deemed to be a violation of this paragraph or the Protective Order.

4. I hereby agree to submit to the jurisdiction of the California Public Utilities Commission ("CPUC") for the enforcement of the undertakings I have made hereby and I waive any objection to venue laid with the Commission for enforcement of the order.

5. I acknowledge that any violation of the Protective Order shall constitute a violation of an order of the CPUC and that the parties to this proceeding 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, including misdemeanor violation under Public Utilities Code § 2112.

Dated: _____

BY: _____

TITLE: _____

REPRESENTING: _____

ATTACHMENT B TO REVISED PROTECTIVE ORDER

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Refinements to and Further Development of the Commission's Resource Adequacy Requirements Program.

Rulemaking 05-12-013
(Filed December 15, 2005)

CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

A. PURPOSE

In connection with the development, establishment, and implementation of a program of Resource Adequacy Requirements in this proceeding, The California Energy Resources Conservation and Development Commission ("CEC") will review, analyze, compile, and adjust load forecasts and data and qualifying resource data submitted to the California Public Utilities Commission ("Commission") by load-serving entities (LSEs) pursuant to order of the Assigned Administrative Law Judge, the Assigned Commissioner, or the Commission. The CEC agrees to keep this information confidential in its entirety, disclosing it only to its employees and contractors whose work requires them to review and analyze such data.

B. CONFIDENTIALITY AGREEMENT

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.

The Commission shall permit the CEC to review and copy the records identified above that are not open to public inspection ("protected materials," or, hereinafter, "confidential records"), upon the representation of the Executive

Director 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.

The CEC agrees that the confidential records identified above shall be released only to persons who are authorized in writing by the Executive Director of the CEC to obtain the confidential records and, to the extent applicable, who have executed a nondisclosure certificate in accordance with the Protective Order making reference hereto, and that the CEC will ensure that each of its employees and contractors who have access to the confidential records is informed that they are subject to the requirements of this confidentiality agreement.

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.

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.04-04-003 and R.05-12-013 unless explicitly authorized by the CPUC or ordered by a court of competent jurisdiction.

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 no less than 20 days prior to the planned disclosure in order that the Commission, the Assigned Commissioner for R.04-04-003 and R.05-12-013, the Assigned Administrative Law Judge (ALJ) for those proceedings or the Law and Motion ALJ, as the case may be, can give adequate consideration, in accordance with Section 583 of the Public 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.

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 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 extent that the data cannot be "reverse engineered". 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.04-04-003 and R.05-12-013 or to the Law and Motion ALJ.

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.

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 provision(s) or of the same provision on another occasion.

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 _____

Name _____

Executive Director, California
Energy Commission

General Counsel, California
Public Utilities Commission

Dated: _____

Dated: _____

(END OF APPENDIX A)

