Decision 08-04-023 April 10, 2008

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Implement Senate Bill No. 1488 (2004 Cal. Stats., Ch. 690 (Sept. 22, 2004)) Relating to Confidentiality of Information.	Rulemaking 05-06-040 (Filed June 30, 2005) (Phase 2)

DECISION ADOPTING MODEL PROTECTIVE ORDER AND NON-DISCLOSURE AGREEMENT, RESOLVING PETITION FOR MODIFICATION AND RATIFYING ADMINISTRATIVE LAW JUDGE RULING

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DECISION ADOPTING MODEL PROTECTIVE ORDER AND NON-DISCLOSURE AGREEMENT, RESOLVING PETITION FOR MODIFICATION, AND RATIFYING ADMINISTRATIVE LAW JUDGE'S RULING

1. Summary

This decision resolves the three issues left open for consideration in Phase 2 of the proceeding, which is focused on confidentiality of information submitted to the Commission. First, we adopt a model protective order and non-disclosure agreement (Model) for all data addressed in the two previous decisions issued in this docket – Decision (D.) 06-06-066 and D.06-12-030. (The Model appears as Appendix A to this decision.) Second, we resolve a Petition for Modification of D.06-06-066 filed on September 7, 2007 by several parties.[1] Third, we ratify certain rulings made by the assigned Administrative Law Judge (ALJ) regarding the procedure for seeking confidentiality of data covered by D.06-06-066. Due to the pendency of an Application for Rehearing of D.06-12-030, this proceeding shall remain open.

The Model is for use with confidential documents governed by this proceeding. Parties to other proceedings, and in industries other than the electric sector, may find the Model useful as well, although we will not obligate them to use it. Parties to the Resource Adequacy (RA), Procurement, Renewables Portfolio Standard (RPS) and offshoot or successor proceedings shall use the Model. These proceedings bear the following docket numbers: Rulemaking

[1] The parties to the petition are Alliance For Retail Energy Markets, Constellation NewEnergy, Inc., APS Energy Services Company, Inc., Commerce Energy, Inc., Praxair Plainfield Inc., Sempra Energy Solutions LLC, Strategic Energy, LLC, 3 Phases Renewables, LLC, And CalpinePowerAmerica-CA, LLC (collectively, AReM).

(R.) 08-01-025, R.05-12-013 and R.04-04-003 (RA); R.06-02-013 (Procurement); and R.06-05-027, R.06-02-012, and R.04-04-026 (RPS).

Several other energy proceedings, including the California Solar Initiative Rulemaking (R.06-03-004), the Demand Response Rulemaking (R.07-01-041), and the Energy Efficiency Rulemaking (R.06-04-010), and their successor proceedings, may use the same documents as those covered by Decision (D.) 06-06-066. Parties to those proceedings using those documents shall also comply with the orders in this proceeding.

2. Background

This proceeding is by and large complete. In April 2007, the assigned ALJ issued a ruling proposing to close the proceeding and asking for parties' response. Several parties commented and asked that the Commission develop a model protective order and non-disclosure agreement tracking the decisions issued in the case. Thereafter, the ALJ ordered the parties to meet and confer in an attempt to stipulate to model documents. The parties engaged in numerous meet and confer efforts, and in July 2007, at the ALJ's request, Southern California Edison Company (SCE) submitted the joint proposal.

The parties were not able to reach agreement on all language in the Model in part because of the pendency of the as-yet unresolved Application for Rehearing of D.06-12-030, and in part for other reasons. The Model SCE submitted reflects each party's view where there are disagreements.

In September 2007, a number of Energy Service Providers (ESPs) filed a petition for modification of D.06-12-030 asking that the Commission modify a "Matrix" of confidential documents attached as Appendix 2 to D.06-06-066. That Matrix identified ESP-provided documents that were and were not entitled to confidentiality protection. The motion's authors, led by AReM, claim the ESP

Matrix is in part inconsistent with another Matrix appended to D.06-06-066, covering Investor-Owned Utility (IOU) documents, and in part incomplete.

Several parties – Pacific Gas and Electric Company (PG&E), SCE, The Utility Reform Network (TURN), Californians for Renewable Energy (CARE) and the Independent Energy Producers (IEPs) – responded to the Petition. PG&E, SCE and TURN proposed changes to the IOU Matrix (a document that differs from the ESP Matrix at issue in the Petition for Modification). The request to modify the IOU Matrix is procedurally improper in comments on another petition, and we therefore deny the request. We address the other comments below. The revised ESP Matrix appears as Appendix B to this decision.

Finally, after we issued D.06-06-066, the assigned ALJ issued a ruling clarifying how and when to use its procedures. We ratify that ruling in this decision.

3. Model Protective Order and Non-Disclosure Agreement

3.1. Summary

With this decision, we adopt a Model for use with confidential documents governed by this proceeding. Parties to other proceedings, and in industries other than electric service, may find the Model useful as well, although we will not obligate them to use it. Parties to the RA, Procurement, RPS and offshoot or successor proceedings shall use the Model.[2] Further, because the IOU Matrix and ESP Matrix apply to certain energy-related data regardless of where they are

[2] These proceedings are numbered as follows: R.08-01-025, R.05-12-013, and R.04-04-003 (RA); R.06-02-013 (Procurement); and R.06-05-027, R.06-02-012, and R.04-04-026 (RPS).

used, the Model shall be used in any formal proceeding – or informal context – where such data is furnished to the Commission or third parties.[3]

The parties have spent a good amount of time negotiating the terms of a Model. The parties continue to have disputes about the Model's contents, especially related to portions of D.06-12-030 that are pending rehearing. If the results of the rehearing require change to the Model, the affected parties may seek modification of this decision at that time.

3.2. Changes to Proposed Model

We discuss changes to the proposed Model in the order in which they appear in the proposal.[4]

Paragraph 1. Scope. The proposed Model states that it does not address the right of employees of the Commission acting in their official capacities to view protected materials. The law gives employees this right, and it need not be reiterated in the Model, so we omit the provision.

Paragraph 2. Modification. The proposed Model states that it may not be changed or terminated by the Commission unless "all affected parties have been given notice and have had a reasonable opportunity to be heard." Pub. Util. Code § 1708 requires notice and an opportunity to be heard for rescission, alteration or amendment of Commission orders or decisions. The Model need not restate what is already the law, so we omit this provision.

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[3] For example, several other energy proceedings, including the California Solar Initiative Rulemaking (R.06-03-004), the Demand Response Rulemaking (R.07-01-041), and the Energy Efficiency Rulemaking (R.06-04-010), and their successor proceedings, may use the same documents as those covered by D.06-06-066. Parties to those proceedings using those documents should comply with the orders in this proceeding.

[4] The Model we adopt appears as Appendix A. The parties' proposed Model appears as Appendix D.

Further, ¶ 2 of the Model states that the "amount of Protected Materials … may differ from time to time." The reason for this provision eludes us, and we omit it. We omit a similar provision in ¶ 5 of the proposed Model.

Paragraph 3. Definitions.

Subparagraph A. Protected Materials.

The proposed Model defines "Protected Materials" to include materials determined by the Disclosing Party "in good faith" to be confidential. This "good faith" provision misstates D.06-06-066, which requires various steps to protect confidential information. In most cases, an ALJ must rule on a party's claim to confidentiality, and in all cases a party's representation to the Commission is governed by Rule 1.1, which requires good faith. Thus, we omit this provision as superfluous to what the law already requires.

Further, the definition of "Protected Materials" states that confidential material is information covered under, among other provisions, Pub. Util. Code § 583. However, we made clear in D.06-06-066 that § 583 provides no substantive right to confidentiality, but instead prescribes a process to follow in seeking confidential treatment. We thus omit this reference, and any similar reference to § 583 in the Model.

Finally, the Model states it does not apply to public data "unless determined to be protected." However, D.06-06-066 makes clear that all public data is public for Commission purposes. This provision suggests that some public data may not actually be public, and we omit it as inconsistent with D.06-06-066.

Subparagraph F. Reviewing Representatives.

Paragraph F of ¶ 3 requires a "Reviewing Representative" of a non-market participant (NMP) to disclose situations where they are simultaneously

representing a market participant (MP) in other proceedings. However, D.06-12-030 allows NMPs access to data without the need to designate Reviewing Representatives, so the paragraph is inconsistent with D.06-12-030.

However, D.06-12-030 does provide that "an attorney or consultant that simultaneously represents market participant(s) and non-market participant(s) may not have access to market sensitive data." D.06-12-020, *mimeo.,* ordering paragraph 6. We substitute this language, which imposes an affirmative duty on such individuals to disclose situations in which they have this potential conflict.

Paragraph 4. Designation of Materials. The proposed Model assumes that material designated as Protected Material shall remain so unless "there is a determination … changing the designation and a period of 14 calendar days has elapsed without an appeal or other challenge to the determination…." This provision should provide that an ALJ, or Commissioner, is responsible to change the designation, and we amend it to say so. Further, the 14-day provision is in effect an automatic stay of a ruling that material is not confidential. No such stay exists in Commission practice, and we discourage interlocutory appeals from rulings in all cases. Thus, we omit this provision. If in a particular case a party desiring confidentiality wants a stay pending appeal, it must seek it by motion to the assigned ALJ or Law and Motion ALJ in that case.

Paragraph 5. Redaction of Documents. We omit the reference to "magnitude" of data as being confidential. The reason for this provision is not apparent, as noted above.

Paragraph 6. Selection of Reviewing Representatives. This provision requires the party reviewing confidential data to identify "Reviewing Representatives" to the "Division Director," and notes that the Division Director must be involved in meet and confer sessions about the appropriateness of Reviewing Representative

designations. However, D.06-12-030 contains no such requirements, and we omit them.

This paragraph also inappropriately requires an ALJ considering the appropriateness of a Reviewing Representative designation to "consider all relevant facts including whether the proposed Reviewing Representative has a need to know the information…." This provision unnecessarily constrains the ALJ as a decision-maker. Any party opposing a Reviewing Representative's designation should be able to make whatever argument it deems necessary, and the ALJ assigned may resolve the issue according to the arguments raised there.

Finally, and perhaps most importantly, ¶ 6 of the Model unnecessarily constrains a party seeking data in its designation of Reviewing Representatives. Decision 06-12-030 allows a Reviewing Representative that meets certain criteria to have access to confidential data. It does not provide for the review process set forth in ¶ 6. We also note there that an attorney or consultant that simultaneously represents market participant(s) and non-market participant(s) may not have access to market sensitive data, as D.06-12-030 holds. D.06-12-030, *mimeo.,* ordering paragraph 6.

The parties discuss, in Footnote 3 to their proposed Model, what evidence the Reviewing Representative must provide the disclosing party in order to qualify as a Reviewing Representative. We do not require particular documentation, although a resume or *curriculum vitae* is reasonable evidence of a lack of conflicts and should be the default in most cases. Regardless of the mechanism of proof, a Reviewing Representative has a duty to disclose any potential conflict that puts him/her in violation of D.06-12-030.

Paragraph 8. Maintaining Confidentiality of Protected Materials. Paragraph 8 requires a Reviewing Representative to oppose disclosure of another party's

confidential materials if sought in discovery in another proceeding. No such provision appears in D.06-12-030, and we find it unduly binds Reviewing Representatives. However, we retain the provision requiring the Reviewing Representative to immediately notify the disclosing party that a third party seeks the material. The disclosing party may then take any necessary action to protect its data.

Paragraph 12. Access and Use by Governmental Agencies. This paragraph deals with California Energy Commission (CEC) access to records first obtained by the Commission. The parties are concerned that, given the different statutory obligations of the two agencies, material that the Commission protects as confidential may be disclosed by the CEC. While we ordinarily have no power to tell another agency what to do, here, the CEC was a party to this proceeding, and weighed in on the proposed language. Thus, we have agreement from the CEC on some provisions.

The provision in Paragraph 12 generally allows the Commission to release confidential material to the CEC only pursuant to the terms of an "Interagency Confidentiality Agreement" in which the CEC agrees to abide by the Commission-afforded confidentiality protections. The CEC states in footnote 8 of the proposed Model that it supports the language in Paragraph 12:

> 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.

The CEC is concerned, however, about the interplay between Paragraph 12 and paragraph 14, which we discuss in our coverage of that paragraph below and resolve in the CEC's favor.

Paragraph 13. California Public Records Act (CPRA) Requests. This paragraph contains requirements that the Commission notify parties if it receives Public Records Act requests. We delete this provision in its entirety. The Commission will abide by its ordinary practice, consistent with the CPRA, but should not assume any additional burdens, or impose such burdens on third parties who exercise their rights to access information under the CPRA.

Paragraph 14. Derivative Materials. This paragraph creates a rebuttable presumption that any study that incorporates, describes or otherwise employs Protected Materials, or any model that relies on such materials, is also protected. Nothing in D.06-06-066 or D.06-12-030 creates this presumption.

Indeed, both decisions recognize that a party seeking confidential treatment must first attest that it cannot aggregate its data to mask the confidential material. If such aggregation is possible, the data must be disclosed publicly.

In the same way, a model that uses individual data as inputs may create outputs that are aggregated or otherwise mask individualized data. Thus, rather than creating a presumption that model outputs are confidential, if anything D.06-06-066 and D.06-12-030 create the opposite presumption – that aggregate data is not confidential.

While we do not preclude a party from seeking confidentiality for studies or model outputs, we decline to create a rebuttable presumption that such data are confidential, and therefore remove Paragraph 14 from the proposed Model.

We note that Paragraph 14 caused the CEC some concern which qualified its agreement to use an "Interagency Confidentiality Agreement" for data furnished it by the Commission. Now that we remove Paragraph 14 in its entirety, we consider the CEC's concerns to be resolved.

Paragraph 15. Dispute Resolution. Paragraph 15 requires the parties to the Model to resolve disputes by motion. We add a meet and confer requirement so that the parties first attempt to resolve disputes among themselves. We require that all parties to law and motion disputes first meet and confer. In addition, Paragraph 15 states that "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." We remove this paragraph, as it suggests that there may be an automatic appeal within the Commission of law and motion type rulings. In fact, such appeals are strongly discouraged. We also do not need to reserve the right for Commission Staff. Thus, we remove the quoted provision.

With these modifications, we approve the proposed Model.

4. Petition for Modification of D.06-12-030

4.1. Belated Filing of Petition Excused

AReM filed the Petition for Modification beyond the one-year deadline set forth in Commission Rule 16.4. When a petition is late, the petitioner must explain why the petition could not have been presented within one year of the effective date of the decision. (Rule 16.4(d).) We have considered AReM's arguments in this regard, and find the belated filing to be excusable.

AReM alleges that it expected to have a greater opportunity to address the ESP Matrix in Phase 2 of this proceeding, as it was originally scoped. It notes that it deferred preparation of the Petition for Modification on the assumption that the problems ESPs allegedly have encountered in complying with D.06-06-066 would be addressed in Phase 2. Once the assigned ALJ issued a ruling proposing to close the proceeding, AReM contends it first became aware that this opportunity might not arise. Second, AReM contends that it was only

recently informed of the RPS compliance reporting requirements for ESPs (on August 6, 2007). Finally, AReM cites the press of other business as a reason for its delay.

We agree that the first two reasons for the late filing, in combination, allow us to consider the Petition for Modification here. (The press of other business is not a relevant factor.) It is true that as originally scoped, Phase 2 was to include an examination of how the Matrix process was working, and that the ALJ's April 2007 ruling proposing to close the proceeding made the second phase far less likely. Alone, however, this factor would be insufficient since AReM waited from April to September to file its Petition. The second factor – the development in August 2007 of reporting requirements for RPS – is also insufficient on its own, because AReM simply notes that it did not know the reporting requirements "with certainty" until August. This phrasing suggests AReM knew something about the reporting requirements earlier. Further, the Petition is not solely aimed at RPS-related data.

While it is a very close call, we find that the two cited factors in combination justify consideration of the Petition. We agree that the IOU Matrix is more detailed than the ESP Matrix and that this difference is in part because ESPs' reporting requirements were far less well known when we developed the Matrix approach. Thus, we will consider the Petition here.

4.2. Specific Proposed Changes

We address each proposed change to the ESP Matrix, and the reasons given for the change, below. We grant a few changes, but in large part deny AReM's petition.

4.2.1. Resource Adequacy Information

In its RA proceedings, R.08-01-025 and R.05-12-013, the Commission is evaluating the rules for determining whether the IOUs, ESPs and other "load serving entities" (LSEs) have adequate access to electric resources in the foreseeable future. In connection with this goal, the Commission requires all LSEs to make periodic filings that demonstrate the following:

1. The LSE has arranged for supplies to meet 90% of its forecast peak load plus a 15% planning reserve margin for each summer month of the following year.
2. The LSE, on a month-ahead basis, has procured sufficient capacity to meet 100% of its peak load plus the planning reserve margin for each month of the year.
3. The LSE has contracted for capacity to meet its local RA requirements on a year-ahead basis.
4. Recorded (historical) hourly loads and monthly peaks for each year.

AReM states that a fair amount of the data it submits to comply with this requirement should be confidential, including supply data. It is concerned that if power sellers know how much capacity the ESP needs and when and where it needs it, the ESP and its customers will pay more for power than they should due to market manipulation. AReM therefore asks for the following additional confidentiality provisions in the ESP Matrix:

Item	Public/Confidential Treatment	Explanation of Item
II) Resource Adequacy Information		
B) Supply data (both year ahead and month ahead)	Supply data for first three years of forecast period confidential	Year ahead data show that ESP has secured adequate generation capacity to cover 90% of its forecast peak load for next year's summer months or 100% of its annual local RA requirements. Month ahead data show that ESP has secured adequate capacity to cover 100% of its forecast

		load plus a reserve requirement.

We agree that the amount of supply data ESPs file publicly should mirror that of IOUs, as we stated in D.06-06-066: "No type of entity (*e.g.,* IOU or ESP) shall receive greater confidentiality for its data merely because it is such an entity."[5] AReM is also correct that we have protected IOUs' supply forecasts, for limited periods, in order to avoid the same type of market manipulation AReM fears. Thus, we ***grant*** AReM's proposed change, which covers the first three items (which are forecasts) on the list of RA compliance data above.

The fourth category of information above ("Recorded [historical] hourly loads and monthly peaks for each year") is historical in nature. AReM urges us to protect that data because an EPS's actual capacity requirements for the prior year may correspond very closely to their current RA requirements. AReM notes correctly that the equivalent IOU Matrix provision protects equivalent data submitted by the IOUs for one year.[6] We ***grant*** AReM's proposal, as follows, on these grounds.

Item	Public/Confidential Treatment	Explanation of Item
II) Resource Adequacy Information		
C) Recorded hourly loads and monthly peak loads	Public after one year	Recorded load data provided by ESPs for RA compliance

Finally, AReM asks that we protect its monthly customer counts, on the ground that such counts are directly related to and constitute an integral part of an ESP's load forecast. It fails to justify its position in any further detail, to cite a comparable provision in the IOU Matrix, or to show how customer count could

[5] D.06-06-066, Conclusion of Law 23.

[6] D.06-06-066, Appendix 1, p. 21, Item X.C.

drive the price of power an ESP must procure. Thus, we ***deny*** the following modification to the ESP Matrix:

Item	Public/Confidential Treatment	Explanation of Item
II) Resource Adequacy Information		
D) Customer counts by month	Forecast monthly customer counts for first three years if forecast period confidential, actual monthly customer counts public after one year	Monthly customer count data used to evaluate reliability of ESP load forecasts

4.2.2. Demand Forecasting Methodology

AReM asks that the ESP Matrix category for demand forecasting methodology only require ESPs to reveal the methodology in general terms, rather than the specifics of how that methodology is applied. We disagree that there is an inconsistency in the IOU Matrix and ESP Matrix on this point. Both say, in the "Explanation of item column" (*see* IOU Matrix Section V.A and ESP Matrix Section III.A), that the information to be disclosed is general descriptive information regarding the methodology used by LSEs when estimating future electric capacity and energy needs. Thus, the ESP Matrix is already clear and requires no change, and we therefore ***deny*** AReM's Petition in this regard.

4.2.3. Contract Information

AReM contends that ESP contract information should receive greater confidentiality protection than the same information for IOUs, asserting that such information "provides precise information regarding existing and ongoing commercial relationships and could be used to calculate an ESP's total peak demand and corresponding capacity requirement…."[7] AReM asks for the following changes:

Item	Public/Confidential Treatment	Explanation of Item

[7] Petition at 20.

I) RPS Information		
A) RPS contracts	Contract summaries public, including ~~counterparty~~, resource type, ~~location, capacity~~, expected deliveries, delivery point~~, length of contract~~ and online date. Other terms confidential for three years, or until one year following expiration, whichever comes first.	

Item	Public/Confidential Treatment	Explanation of Item
IV) Bilateral Contract Terms and Conditions – Electric		
A) Bilateral contracts	Contract summaries public, including ~~counterparty~~, resource type, ~~location, capacity, expected deliveries, delivery point, length of contract~~ and online date. Other terms confidential for three years, or until one year following expiration, whichever comes first.	Includes contracts of greater and fewer than five years in duration.

We have already protected the contracts themselves, and simply required both IOUs and ESPs to publicly reveal high level summary data about their contracts. AReM has failed to justify that revealing the summary form of detail – counterparty, location, capacity, expected deliveries, delivery point, and length of contract – will cause it harm. We thus ***deny*** AReM's request in this regard, and leave the relevant ESP Matrix as is.

4.2.4. Renewables Portfolio Standard - Compliance Reports

In R.06-05-027 and R.06-02-012,[8] the Commission is engaged in ongoing implementation of the RPS program requirements of Pub. Util. Code § 399.11. That statute generally requires that 20% of total retail sales of electricity in California be from eligible renewable energy resources (*e.g.,* wind, solar, small hydroelectric, geothermal, biomass/biogas and wave power) by December 31, 2010. In meeting this obligation, the IOUs and ESPs must submit

[8] The predecessor proceeding was R.04-04-026.

periodic compliance reports demonstrating their progress toward meeting RPS goals.

AReM asks that its compliance information receive the same confidentiality treatment as we afford the IOUs, as follows (with additions to the current ESP Matrix underlined and deletions in strikethrough text):

Item	Public/Confidential Treatment	Explanation of Item
1) RPS Information		
A) RPS compliance filings required by CPUC, by ESP	~~Public.~~ First three years of forecast retail sales and resource mix data (MWh) confidential, historical retail sales and supply data (MWh) public after one year.	Includes one-time and recurring reporting. Shows current and projected contents of an ESP's RPS portfolio, including sales and resource mix.
B) Annual RPS compliance filings, by ESP	~~Public.~~ First three years of forecast retail sales and resource mix data (MWh) confidential, historical retail sales and supply data public after one year.	Includes Annual Procurement Target (APT) reporting required in Rulemaking 04-04-026 and all other required reports.

AReM explains it needs this protection because 1) RPS and non-RPS data should be treated the same, and 2) there are internal inconsistencies in the ESP Matrix. We disagree that D.06-06-066 requires that we treat RPS and non-RPS data identically (AReM's first point). Indeed, D.06-06-066 held just the opposite, making clear that the Matrices should, and did, afford greater access to RPS data: "Due to the strong public interest in RPS, we have provided in the attached appendices greater public access to RPS data than other data." D.06-06-066, *mimeo.* at 3.

We do agree with AReM that we should fix inconsistencies in the Matrix. To the extent that a forecast for RPS purposes reveals the ESP's total information, for example, it could reveal the ESP's total net short, which we have protected for IOUs. We agree with AReM that we should protect this information. However, we will protect it only if revealing the information for the ESP's RPS compliance would reveal the results for the ESP's entire energy portfolio.

Further, we will not require the ESP to seek confidentiality of regular compliance filings every time it files, but only the first time. Thereafter, it may simply cite a prior ruling or motion when making compliance filings. Thus, we ***grant*** AReM's Petition in part; the relevant portion of the Matrix will read as follows:

Item	Public/Confidential Treatment	Explanation of Item
1) RPS Information		
A) RPS compliance filings required by CPUC, by ESP	~~Public.~~ Public, unless disclosure of first three years of forecast retail sales and resource mix data (MWh) and/or of historical retail sales and supply data (MWh) for prior year would reveal entire net short of ESP. An ESP need not seek confidential treatment of the foregoing information (if not public) every time it makes a compliance filing, but rather need only cite a former ruling/motion when making subsequent compliance filings.	Includes one-time and recurring reporting. Shows current and projected contents of an ESP's RPS portfolio, including sales and resource mix.
B) Annual RPS compliance filings, by ESP	~~Public.~~ Public, unless disclosure of first three years of forecast retail sales and resource mix data (MWh) or of historical retail sales and supply data for prior year would reveal the entire net short of ESP. An ESP need not seek confidential treatment of the foregoing information (if not public) every time it makes a compliance filing, but rather need only cite a former ruling/motion when making subsequent compliance filings.	Includes Annual Procurement Target (APT) reporting required in R.04-04-026 and all other required reports.

4.2.5. Data Not in ESP Matrix

AReM notes that some ESPs may have few customers or contract counterparties and that revealing a customer's identity could reveal customer-specific energy costs and consumption information. It does not ask that we add a provision to the Matrix, but simply that we acknowledge ESPs' right to seek confidentiality "where there is a documented potential for sensitive customer data release." AReM also asks that we make the identity of all contract counterparties confidential.

We ***deny*** AReM's Petition in this regard, but do not preclude an ESP from seeking confidentiality as to the identity of its contract counterparty or customer on a case-by-case basis. Indeed, D.06-06-066 already provides for motions of confidentiality for data *not* contained in the IOU or ESP Matrix, and we do not

see the need to modify the decision in this regard. As in all cases, the party seeking confidentiality bears the burden of proof to show, with particularity, that public release of the data will cause harm, violate trade secret protection, or cause some other ill effect. *See, e.g.,* D.06-06-066, *mimeo.,* Ordering Paragraphs 4-5.

4.2.6 Regular Compliance Filings

As we note above, we allow RPS providers who submit the same compliance reports and filings on a regular basis to only file an initial motion and receive an initial confidentiality ruling. We extend this same rule to all ESP and IOU compliance filings in the proceedings covered by the Matrices. The IOU Matrix change appears as Appendix C to this decision. Where the ESP or IOU makes a compliance filing that is not initially accompanied by a motion – *e.g.*, where the filing is made with the Energy Division – the ESP/IOU need only refer back to the initial showing it made to Energy Division in seeking confidentiality for subsequent filings of the same information.

5. Ratification of Ruling Regarding Compliance With D.06-06-066

During the course of this proceeding, on August 22, 2006, the assigned ALJ issued a ruling clarifying for parties how to comply with the Matrix provisions of D.06-06-066. The clarification appears below. We ratify the contents of the ruling, reproduced below.

Introduction

Parties or persons claiming a right to confidentiality for their data should always be prepared to prove that they meet the requirements of the two versions of a "Matrix" adopted in D.06-06-066. In some cases, listed below, such parties or persons shall prove compliance by way of a formal motion to be decided by an

ALJ. In other cases, also listed below, such parties or persons shall accompany data for which they claim a right to confidential treatment with a declaration under penalty of perjury certifying that they are only claiming confidentiality for data D.06-06-066 recognizes as confidential. In these latter situations, no formal motion is initially required.

Motion Required

A motion is initially required in two situations:

Formal Filing

Situation: A party files a pleading in a formal proceeding, including data of the type addressed in the Matrices to D.06-06-066, and seeks confidential treatment of that data.

A motion for confidential treatment will accompany the data and will comply with new Rule 11.4 of the Commission's Rules of Practice and Procedure (Rules).

Material Offered in Evidence

Situation: A party offers material in evidence in a formal proceeding and seeks confidential treatment for data of the type addressed in the Matrices to D.06-06-066.

Consistent with new Rules 11.5, an oral or written motion to seal the evidentiary record will accompany the proffered evidence.

Requirements

Motions filed or made under (A) or (B) above shall, at a minimum, meet the following five requirements in Ordering Paragraph 2 of D.06-06-066:

1. That the material constitutes a particular type of data listed in the Matrix;
2. The category or categories in the Matrix to which the data correspond;
3. That the submitting party is complying with the limitations on confidentiality specified in the Matrix for that type of data;

4. That the information is not already public; and
5. That the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure.

No Motion Initially Required

In the following situations, a party or person seeking confidential treatment need not file a motion, but shall accompany the data for which it claims such treatment with a declaration under penalty of perjury meeting the five requirements in Ordering Paragraph 2 of D.06-06-066.

Prepared Testimony Served But Not Yet Offer in Evidence

Situation: A party serves prepared testimony in a formal proceeding, but before the evidentiary hearing, where the testimony contains data of the type addressed in the Matrices to D.06-06-066. The party has not yet offered the testimony in evidence.

In this situation, the following procedure applies:

1. A declaration under penalty of perjury will accompany the testimony establishing the five factors required by D.06-06-066, Ordering Paragraph 2, but no motion is initially required.
2. If another party or person asks to see the confidential data, the filer and the requesting person shall meet and confer to resolve the dispute informally, consistent with the intent of new Rule 11.3. If they cannot resolve the dispute, the party seeking confidential treatment shall file a motion in compliance with Section II(B) and (C) above.

Discovery/Data Request Responses

Situation: A party or person provides data in response to a data or discovery request in a formal proceeding served by another party or person (other than Commission staff). The party or person providing the data claims confidential treatment under D.06-06-066:

1. A declaration under penalty or perjury will accompany the data establishing the five factors required by D.06-06-066, Ordering Paragraph 2, but no motion is initially required.
2. If another party or person asks to see the confidential data, the submitting party or person and the requesting person shall meet and confer to resolve the dispute informally, consistent with the intent of new Rule 11.3. If they cannot resolve the dispute, the party or person seeking confidential treatment shall file a motion in compliance with Section II (B) and (C) above.

Advice Letter

Situation: A person files an advice letter and seeks confidential treatment for data of the type addressed in the Matrices to D.06-06-066.

In this situation, the following procedure applies:

1. A declaration under penalty of perjury will accompany the filing, establishing the five factors required by D.06-06-066, Ordering Paragraph 2, but no motion is initially required.
2. If another person asks to see the confidential data, the filer and the requesting person shall meet and confer to resolve the dispute informally, consistent with the intent of new Rule 11.3. If they cannot resolve the dispute, the filer and the requesting person shall present the dispute to the director of the Energy Division. The confidentiality claim and dispute will be resolved consistent with the Commission's procedures for addressing confidentiality claims and requests for information in the context of Public Record Act requests. If not before, this interim procedure for advice letters may be modified when the Commission adopts a final version of General Order (GO) 96-B.

Information Provided to Staff Outside of Formal Proceeding

Situation: In response to a Commission staff data request outside of a formal proceeding, a person submits data, for which the submitting person claims confidential treatment under D.06-06-066.

In this situation, the following procedure applies:

1. A declaration under penalty of perjury will accompany the data provided to Commission staff, establishing the five factors required by D.06-06-066, Ordering Paragraph 2, but no motion is initially required.
2. If another party or person asks to see the confidential data, the submitting person and the requesting person shall meet and confer to resolve the dispute informally, consistent with the intent of new Rule 11.3. If they cannot resolve the dispute, the submitting person and the requesting person shall present the dispute to the director of the Energy Division. The confidentiality claim and dispute will be addressed consistent with the Commission's procedures for addressing confidentiality claims and requests' for information in the context of Public Record Act requests.

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6. Comments on Proposed Decision

The proposed decision in this matter was mailed to parties in accordance with § 311 of the Pub. Util. Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. PG&E/SDG&E/SCE (jointly); California Manufacturers and Technology Association and the California Large Energy Consumers Association (CMTA/CLECA) (jointly); IEP; AReM (and the other parties who joined the Petition for Modification); Cogeneration Association of California and The Energy Producers and Users Coalition (CAC/EPUC), and CARE filed comments. AReM filed reply comments.

Several parties criticize the decision for mirroring D.06-12-030, which is on rehearing. However, D.06-12-030 reflects the Commission's current determinations, so this decision appropriately follows its mandates. However, CMTA and CLECA correctly point to modifications to the model protective

order that are necessary to track D.06-12-030. We add the following to paragraph 3.F of the model:

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

CARE claims erroneously the decision contradicts comments the Commission filed in a Federal Energy Regulatory Commission docket.[9] The two writings have nothing to do with one another.

Several parties ask for further changes to the Matrix, or reargue the changes already made. These requests are either procedurally improper because requested in comments, or constitute inappropriate reargument.

One party requests that we clarify that the Matrix process and the model protective order applies to ERRA proceedings. We believe we have made this clear but restate that the decisions in this proceeding apply to all uses of the relevant documents, including in ERRA proceedings.

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[9] FERC Docket EL02-71-004 (filed March 28, 2008).

7. Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Sarah R. Thomas is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. A model nondisclosure agreement and protective order (Model) will streamline the process of designating confidential materials.

2. The parties met and conferred and developed a proposed Model that, with modification, is appropriate for use in all cases where confidentiality is claimed for matter covered by this proceeding.

3. The amount of supply data ESPs file publicly should mirror that of IOUs, as we stated in D.06-06-066; "No type of entity (*e.g.,* IOU or ESP) shall receive greater confidentiality for its data merely because it is such an entity."

4. We have protected IOUs' supply forecasts, for limited periods, in order to avoid market manipulation.

5. To the extent that a forecast for RPS purposes reveals the ESPs' total information, and thus, the ESP's total net short, it is reasonable to protect it.

6. The ALJ's August 22, 2006 clarifying ruling on how to comply with Matrix provisions of D.06-06-066 is reasonable.

Conclusions of Law

1. The Model, attached to this decision as Appendix A, should be adopted for use with confidential documents governed by this proceeding.

2. While untimely, we may consider AReM's Petition for Modification in the narrow circumstances presented here.

3. We should grant AReM's Petition in part and deny it in part.

4. We should ratify the ALJ's Ruling applying D.06-06-066.

O R D E R

IT IS ORDERED that:

1. With this decision, we adopt a model protective order and non-disclosure agreement (Model), attached to this decision as Appendix A, for use with confidential documents governed by this proceeding. Parties to other proceedings, and in industries other than the electric sector, may find the Model useful as well, although we will not obligate them to use it. Parties to the Resource Adequacy (RA), Procurement, Renewables Portfolio Standard (RPS) and offshoot or successor proceedings shall use the Model. These proceedings bear the following docket numbers: Rulemaking (R.) 08-01-025, R.05-12-013 and R.04-04-003 (RA); R.06-02-013 (Procurement); and R.06-05-027, R.06-02-012, and R.04-04-026 (RPS).

2. Several other energy proceedings, including the California Solar Initiative Rulemaking (R.06-03-004), the Demand Response Rulemaking (R.07-01-041), and the Energy Efficiency Rulemaking (R.06-04-010), and their successor proceedings, may use the same documents as those covered by Decision (D.) 06-06-066. Parties to those proceedings using those documents shall comply with the orders in this proceeding.

3. Because the Investor-Owned Utility (IOU) Matrix and Energy Service Provider (ESP) Matrix appended to D.06-06-066 and discussed in this decision apply to certain energy-related data regardless of where they are used, the Model shall be used in any formal proceeding - or informal context - where such data is furnished to the Commission or third parties.

4. We modify the ESP Matrix appended to D.06-06-066 as set forth in this decision. A new version of the ESP Matrix appears as Appendix B to this decision. It shall apply in all cases to which this decision applies.

5. We modify the IOU Matrix appended to D.06-06-066 on our own motion as set forth in this decision. A new version of the changed page of the IOU Matrix appears as Appendix C to this decision. It shall apply in all cases to which this decision applies.

6. We deny as procedurally improper any request to modify the IOU Matrix appended to D.06-06-066, but we do amend that Matrix to allow IOUs who seek and receive confidential treatment for a regular compliance filing to simply cite the prior ruling or motion when making subsequent compliance filings of the same type.

7. This decision does not prejudge or otherwise affect pending applications for rehearing in this proceeding.

8. We ratify the assigned Administrative Law Judge's August 22, 2006 ruling regarding how and when to comply with the matrices appended to D.06-06-066.

9. An ESP or IOU need not seek confidentiality of regular compliance filings every time it files, but only the first time. The ESP or IOU may simply cite a prior ruling or motion when making subsequent compliance filings. Where the ESP or IOU makes a compliance filing that is not initially accompanied by a motion – *e.g.*, where the filing is made with the Energy Division – the ESP/IOU need only refer back to the initial showing it made to Energy Division in seeking confidentiality for subsequent filings of the same information.

This order is effective today.

Dated April 10, 2008, at San Francisco, California.

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

Commissioners

APPENDIX A R0506040 Grueneich

APPENDIX B R0506040 Grueneich

APPENDIX C R0506040 Grueneich

APPENDIX D R0506040 Grueneich