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7/14/2011 Item 45a

Decision **ALTERNATE PROPOSED DECISION OF PRESIDENT PEEVEY**  
(Mailed 4/22/2011)

**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)

**DECISION MODIFYING DECISION 06-12-030 REGARDING CONDITIONS OF  
ACCESS TO MARKET SENSITIVE INFORMATION**

## TABLE OF CONTENTS

Title	Page
DECISION MODIFYING DECISION 06-12-030 REGARDING CONDITIONS OF ACCESS TO MARKET SENSITIVE INFORMATION .....	1
1. Summary .....	2
2. Rehearing Background.....	6
3. Background .....	8
4. Discussion .....	11
4.1. Do the procedures adopted in this rulemaking provide all parties with a full and fair opportunity to participate in the affected Commission proceedings? .....	11
4.2. Does the Commission have the authority to deny party status to market participants, or limit the scope of their participation in proceedings where market sensitive information is relevant to the subject matter of the proceeding? .....	15
4.3. Do the confidentiality procedures adopted by the rulemaking provide market participant parties with the opportunity to meaningfully participate in the affected proceedings and provide for open decisionmaking?.....	15
4.4. Do the adopted procedures provide parties in the affected proceedings with requisite constitutional rights? .....	18
4.4.1. Equal Protection .....	18
4.4.2. Right to Petition.....	21
4.5. Is there a less restrictive means to achieve the public interest in shielding the use of market sensitive information by market participants for purposes other than for the conduct of the proceeding? .....	22
4.6. Does participation in the electric and/or gas market in excess of one megawatt create a material ability to affect market price? If not, what amount of participation in the electric and/or gas market creates such a material ability?.....	26
4.6.1. Electricity Market Participation .....	28
4.6.2. Gas Market Participation .....	29
4.7. Should the Commission reconsider or change its prohibition of access to market sensitive information by attorneys or	

## TABLE OF CONTENTS

### (Cont'd)

Title	Page
consultants who simultaneously represent market and non-market participants? .....	32
4.8. Should the special limitations on market participants' access to market sensitive procurement data adopted in D.06-12-030 (or as may be considered in this rehearing) extend to additional materials? .....	32
4.9. Does D.06-12-030 impose unique restrictions on the IEPs from those of any other market participant? .....	34
5. Assignment of Proceeding.....	35
6. Comments on Alternate Proposed Decision.....	35
Findings of Fact .....	37
Conclusions of Law .....	40
ORDER .....	42

**DECISION MODIFYING DECISION 06-12-030 REGARDING CONDITIONS OF ACCESS TO MARKET SENSITIVE INFORMATION****1. Summary**

Decision (D.) 06-12-030 adopted a procedure for protecting market sensitive information from disclosure by defining “market participants” and imposing additional restrictions to ensure the confidentiality of market sensitive information, including the use of reviewing representatives, on market participants’ access to the information than those imposed on non-market participants. D.08-04-023 adopted a Model Protective Order (MPO) as part of the Commission’s confidentiality procedure.

This decision clarifies that all market participant parties can participate in Commission proceedings through the use of reviewing representatives. Further, the Commission’s process, as clarified herein, ensures the protection of market sensitive information, provides for open decision-making, and affords meaningful participation. This decision also modifies D.06-12-030 to clarify that although reviewing representatives may not be employees of a market participant enterprise, market participants may employ outside representatives, such as attorneys, consultants, and experts to serve as reviewing representatives—provided, of course, that these reviewing representatives abide by the Commission’s confidentiality requirements with respect to all confidential market sensitive information. Outside reviewing representatives may be a member or employee of a firm that is also advising clients on energy marketing at wholesale and related services, so long as the firm imposes an ethics wall (of the kind used by law firms to manage conflict-of-interest situations among different clients) between the reviewing representative and its members or

employees who are involved in energy marketing at wholesale and related activity.

In addition, this decision modifies D.06-12-030 to eliminate language suggesting that a 1 megawatt *de minimis* threshold of participation in the natural gas market identifies “market participants;” and to eliminate the redundant prohibition on reviewing representatives from simultaneously representing market participants and non-market participants.

Finally, this decision directs that the parties to this proceeding, using a collaborative process, develop both an updated version of the Model Protective Order approved in D.08-04-023, to reflect the changes adopted here, as well as a new Model Nondisclosure Agreement, which can be used by parties on a bilateral basis where the formality of a Protective Order is not necessary.

## **1.1. Specific Modifications**

### **1.1.1. Reviewing Representative**

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

- Reviewing Representatives may not currently be engaged in (a) a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) engagement in such a transaction), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction), or (c) knowingly providing electricity or gas marketing consulting or advisory services to others in connection with a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas or the bidding on or purchasing of power plants (or the direct

supervision of any employee(s) engagement in such a transaction or consulting).

- Reviewing Representatives may not be an employee of a market participant. If the market participant chooses to retain outside attorneys, consultants, or experts in the same law firm or consulting firm to provide advice in connection with marketing activities, then the attorney, consultant, or expert serving as a Reviewing Representative under our confidentiality rules must be separated by an ethics wall (of the kind used by law firms to manage conflict-of-interest situations among different clients) from those in the firm who are involved in wholesale commercial dealings.
- Reviewing Representatives shall use market sensitive data only for the purpose of participating in an affected Commission proceeding, and Reviewing Representatives are permitted to participate in regulatory proceedings on behalf of market participants.
- Reviewing Representatives shall abide by the terms of these confidentiality rules..

### **1.1.2. EPUC**

The presumption from D. 06-12-030 that EPUC was a market participant is modified so that EPUC is presumed to be a non-market participant when EPUC files in a Commission proceeding solely as a bundled purchaser of power to serve on-site and end-use customers. However, for utility procurement proceedings, especially concerning procurement of combined heat and power (CHP), EPUC will be presumed to be a market participant.

### **1.1.3. Ethics Wall**

In circumstances where a Reviewing Representative is an employee or member of a firm that is also advising clients on energy marketing at wholesale

and related services, the firm is to establish an ethics wall that incorporates the following standards:

- When reviewing or discussing any market sensitive data, the Reviewing Representative and those working with him/her shall employ all reasonable steps to ensure a physical separation from firm personnel who are not authorized Reviewing Representatives;
- The Reviewing Representative shall be responsible for informing all firm personnel about the existence and terms of these confidentiality rules, and in particular the prohibition against sharing market sensitive information with market participants; and
- The Reviewing Representative shall take all reasonable steps necessary to ensure that market sensitive information and files, including electronic files, are not accessible to firm personnel who are not authorized Reviewing Representatives.

#### **1.1.4. Model Protective Order and Nondisclosure Certificate Adopted in D.08-04-023**

As noted above, in D.08-04-023, the Commission adopted a Model Protective Order for use in Commission proceedings covered by this rulemaking. Appended to the Model Protective Order was a Nondisclosure Certificate, which individual Reviewing Representatives would be expected to execute, confirming they understood and agreed to abide by the terms of the Protective Order.

The Model Protective Order adopted in D.08-04-023 now needs to be updated, to reflect the changes in our confidentiality rules approved in this decision. We intend to adopt conforming changes to the Model Protective Order, but wish to allow the parties to this proceeding an opportunity to formulate a consensus version of the document.

In addition, we are persuaded by the comments of several parties, as well as our own experience in various proceedings, that the Commission also should adopt, and encourage the use of, a model “Nondisclosure Agreement” for use by parties on a bilateral basis.

Accordingly, in this decision, we order the parties to convene, on an informal basis, to develop both (1) an updated version of the Model Protective Order, to conform it with the rule changes adopted in this decision, and (2) a model Nondisclosure Agreement for use by parties on a bilateral basis. The parties should attempt to present consensus versions of both documents. The utilities shall jointly file via Advice Letter the consensus versions of both documents, for approval by the Commission by Resolution.

## **2. Rehearing Background**

D.06-12-030 adopted procedures for ensuring the confidentiality of market sensitive information to protect the interest of electricity customers and defined the terms “market participant,” “non-market participant” and “reviewing representative.” In order to secure the confidentiality of market sensitive information (e.g., confidential electric procurement, resource adequacy (RA), and renewables portfolio standard (RPS) data) and provide for open decision-making and meaningful participation, we adopted a discovery process for parties to utilize in certain electric procurement proceedings. This discovery process applies to all parties, whether categorized as market participants or non-market participants, to utilize in Commission electric procurement, RA, and RPS proceedings or concerning 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. This discovery process requires the use of Reviewing Representatives as defined in D.06-12-030.



Applications for rehearing were filed by Independent Energy Producers Association (IEP), and jointly by the Cogeneration Association of California and the Energy Producers and Users Coalition (CAC/EPUC). By D.09-03-046, we granted limited rehearing as set forth in Ordering Paragraph 2(a)-(n). (D.09-03-046 at 26-29.) In addition, in the rehearing order we directed parties to inform the Administrative Law Judge (ALJ) assigned to the rehearing proceeding of any other related legal issues that warrant consideration during the rehearing. (D.09-03-046 at 29 Ordering Paragraph 4.)

Following the issuance of D.06-12-030, but before we granted rehearing of that decision, we issued D.08-04-023 wherein we adopted a MPO and NDA as part of our confidentiality process for market sensitive information pursuant to Public Utilities Code Section 454.5(g), which requires the Commission to adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted to it.<sup>1</sup>

After issuance of the D.09-03-046, the assigned ALJ issued a ruling, on April 27, 2009, setting forth a preliminary scope of the issues on rehearing, setting a prehearing conference (PHC) for May 8, 2009, and inviting parties to file PHC statements. Following the PHC and incorporating the PHC statements and comments provided at the PHC, the assigned Commissioner issued a Scoping Memorandum and Ruling (ACR) on May 21, 2009, identifying additional issues for consideration during the rehearing.

In this rehearing phase of the rulemaking, the Commission developed the record through notice and comment. The comments came in the form of

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<sup>1</sup> All subsequent references are to the Public Utilities Code unless otherwise specified.

“opening briefs” and “closing briefs.” (See May 21, 2009 ACR, at 5-6, stating that “[p]arties may present . . . factual information in their briefs.”) No party requested evidentiary hearings.

### **3. Background**

Section 454.5(g) requires the Commission to adopt procedures to ensure the confidentiality of market sensitive information related to electrical corporations’ procurement plans.<sup>2</sup> Senate Bill (SB) 1488 requires the Commission to examine its practices under §§ 454.5(g), 583, and the California Public Records Act (CPRA), to ensure that they provide for meaningful public participation and open decisionmaking.<sup>3</sup> This rulemaking implements SB 1488.

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<sup>2</sup> Section 454.5(g) provides: “The [C]ommission shall adopt appropriate procedures to ensure the confidentiality of any market sensitive information submitted in an electrical corporation's proposed procurement plan or resulting from or related to its approved procurement plan, including, but not limited to, proposed or executed power purchase agreements, data request responses, or consultant reports, or any combination, provided that the ...[Division] of Ratepayer Advocates and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the [C]ommission.”

<sup>3</sup> Section 583 provides: “No information furnished to the [C]ommission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the [C]ommission, or by the [C]ommission or a [C]ommissioner in the course of a hearing or proceeding. Any present or former officer or employee of the [C]ommission who divulges any such information is guilty of a misdemeanor.”

The CPRA is set forth in Government Code Section 6250 et seq. Among other things, Government Code Section 6253 requires the Commission to make available to the public, records, that are not otherwise exempted, when requested.

D.06-12-030 sought to develop a process that would permit parties in affected Commission proceedings to discover market sensitive information<sup>4</sup> while protecting its confidentiality. This was to be achieved by use of Reviewing Representatives, as reflected in the Model Protective Order ultimately adopted by D.08-04-023. As a means of protecting confidential market sensitive information and thus, protecting the California electric market and ultimately California's ratepayers, D.06-12-030 permitted a party categorized as market participant to use a Reviewing Representative, subject to certain conditions, as set forth in Ordering Paragraph 5 of D.06-12-030.<sup>5</sup> The criteria adopted by D.06-12-030 prohibited a Reviewing Representative of a market participant from being an employee of the market participant:

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

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<sup>4</sup> D.06-06-066 (modified by D.07-05-032) adopted a process for determination of whether information is entitled to confidential treatment as "market sensitive" for purposes of § 454.5(g).

<sup>5</sup> However, among other things, the applicants for rehearing of D.06-12-030 argued that they were not permitted to avail themselves of the reviewing representative process adopted in the challenged decision.

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

(D.06-12-030 at 49-50 Ordering Paragraph 5.)

The applications for rehearing filed by IEP and CAC/EPUC challenged whether the procedures set forth above provided sufficient access to Commission proceedings by all parties limited to using reviewing representatives.

D.09-03-046 provided parties with an opportunity to revisit the restrictions established for reviewing representatives to determine if there was a less restrictive methodology for protecting the confidentiality of market sensitive information.

In the rehearing proceeding, opening briefs were filed on July 2, 2009, by IEP; jointly by CAC/EPUC; jointly by the Joint Utilities (consisting of Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company), and the “Coalition Parties” (consisting of the Coalition of California Utility Employees, The Utility Reform Network and the Division of Ratepayer Advocates); and Hydrogen Energy International LLC

(HEI).<sup>6</sup> Reply briefs were filed on July 30, 2009 by IEP, CAC/EPUC, the Joint Utilities and Coalition Parties; and the Western Power Trading Forum.

#### **4. Discussion**

##### **4.1. Do the procedures adopted in this rulemaking provide all parties with a full and fair opportunity to participate in the affected Commission proceedings?**

Parties in Commission hearings are entitled to discover confidential market sensitive information in accordance with our Rules of Practice and Procedure. (See Commission Rules of Practice and Procedure, Rule 10.1, et seq.)<sup>7</sup> CAC/EPUC and IEP contend that due process in a Commission hearing requires that all parties to a Commission proceeding have sufficient access to market sensitive information to enable meaningful participation, regardless of their status as market participants. The Joint Utilities contend that there are no constitutional rights to due process in rate setting proceedings, and that parties' access to market sensitive information is governed by statutory, not constitutional law.<sup>8</sup> The point here is not whether the Commission needs to provide for due process in ratesetting proceedings; we have previously stated: "...constitutional requirements of due process and equal protection are applicable to various categories of Commission proceedings [citation omitted], and are not based on the choice one has to become a party, but on the fact that

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<sup>6</sup> The July 13, 2009 motion of HEI to become a party is granted.

<sup>7</sup> Hereinafter, all references to the Commission's Rules of Practice and Procedure are to hereinafter "rule."

<sup>8</sup> The Coalition Parties do not join the Joint Utilities in their analysis of this issue, and do not offer their own analysis or comment on it.

certain constitutional guarantees adhere to various proceedings. [Citations omitted.]” (D.09-03-046 at 14.) The point here is whether the procedures we adopted in this rulemaking and that are to be applied in the affected proceedings provide all parties with due process.

We do not find that the cases cited by IEP and those relied on by CAC/EPUC support their position that employees of the market participant enterprise -- as distinct from a market participant party's outside counsel and outside consultants and experts -- must be given access to confidential market sensitive information, under the general rules we have adopted and are clarifying here, in order to satisfy the requirements of due process. On the contrary, we believe the general rules we have adopted and are clarifying here, achieve a fair and reasonable balance between two sets of competing considerations, namely, the right to participate meaningfully in Commission proceedings versus the need to protect sensitive, confidential information from being exploited to the disadvantage of utility customers.

It is important to emphasize that these are rules of general applicability. If, in the course of a particular proceeding before the Commission, a market participant party believes that its employees must be given access, on a confidential basis, to sensitive and confidential information, and that its right of full participation somehow will be unduly constrained by the general rule limiting access to outside counsel, consultants and experts, then such a party can file a motion with the decision-maker and seek an exemption from the general rule.

The focus of this decision on rehearing is whether the procedures that we have adopted for gaining access to confidential market sensitive information allow market participant parties a full and fair opportunity to participate in Commission proceedings.<sup>9</sup> We believe that the procedures we have adopted, with the clarifications we make herein to D.06-12-030, achieve this goal and, therefore, that the due process rights of market participant parties are ensured.

In this decision, we modify D.06-12-030 to expand the qualifications to be a Reviewing Representative so that any market participant party may hire non-employee attorneys, consultants and experts to act as its Reviewing Representatives. Of course, any such Reviewing Representative will be obligated to satisfy the four part criteria, as modified herein, and must agree to abide by the Commission's confidentiality rules. In addition, a Reviewing Representative retained by a market participant party will not be permitted to provide commercial advice to the market participant enterprise. If the market participant chooses to retain other attorneys, consultants or experts in the same law firm or consulting firm to provide advice in connection with market activities, then the attorney, consultant or expert serving as a Reviewing Representative under our confidentiality rules must be separated by an ethics wall from those in the firm who are involved in commercial dealings. We note that the Model Protective Order adopted in D.08-04-023 now will need to be

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<sup>9</sup> IEP comments that "[p]arties are not required to have 'equal information,' an impossible requirement, but the Commission should strive to ensure that all parties ... have equal access to ... information that underlies the Commission's decision...." (July 2, 2009 IEP Opening Comments at 29.)

updated, to conform with the changes made in this decision for Reviewing Representatives.

Our rationale for permitting market participant parties to access market sensitive information via Reviewing Representatives is to ensure confidentiality of market sensitive information to protect the California ratepayer.<sup>10</sup> “By definition, market sensitive information has commercial value to the utilities and market participants, including those who seek to maximize profits in negotiating energy supply contracts with utilities. Such information can be used to cause harm to or gain an advantage in the market.” (July 2, 2009 Opening Brief of the Joint Utilities and Coalition Parties at 2.)<sup>11</sup> We agree with the Joint Utilities and Coalition Parties in their opening brief, that we cannot protect the confidentiality of market sensitive information by allowing market participant parties to retain Reviewing Representatives who themselves actually engage in wholesale marketing activities or commercial negotiations with the utilities, because it is precisely those people who are in a position to make use of the protected information. This does not present a due process issue, as no party will be

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<sup>10</sup> “Our concern is protecting ratepayers by balancing the mandate that we ensure the confidentiality of market sensitive information with the due process rights of parties in Commission proceedings. California ratepayers were victims of an Energy Crisis not too long ago and we must do all we can to ensure that we protect them from any repeat experience.” (D.09-03-046 at 13.) “... [O]ur duty and commitment [is] to protecting the interests of ratepayers and ensuring that Californians are not subject to experiencing abuses similar to those visited upon the State during the 2000-01 Energy Crisis.” (D.09-03-046 at 19.)

<sup>11</sup> See also, e.g., July 2, 2009 Opening Brief of HEI at 10-11; and July 30, 2009 Joint Closing Brief of Joint Utilities and Coalition Parties, Attachment 1: Charles R. Plott’s Research on the Disclosure of Buyer Information to Sellers (February 22, 2004) at 2-5.



deprived of the opportunity to participate in Commission proceedings, provided it abides by our confidentiality rules.

**4.2. Does the Commission have the authority to deny party status to market participants, or limit the scope of their participation in proceedings where market sensitive information is relevant to the subject matter of the proceeding?**

Rule 1.4 provides that, where circumstances warrant, the Commission may deny party status or limit the degree to which a party may participate in a proceeding. This rule is intended to limit party status or participation to persons with a legitimate interest and intention to participate in a proceeding and to avoid the inappropriate expansion of the proceeding's scope. However, nothing in Rule 1.4 contemplates that persons may be denied or given only limited party status for purposes of denying them discovery of market sensitive information.

It is not necessary to invoke our authority under Rule 1.4 in order to ensure the confidentiality of market sensitive information: Rule 10.1 provides that any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the proceeding or reasonably calculated to lead to the discovery of admissible evidence.

The Legislature has required the Commission to adopt procedures to protect the confidentiality of market sensitive information, which we have done. (§ 454.5(g).) Accordingly, we need not reach the question of whether the Commission may deny or limit party status for the purpose of accomplishing the same result.

**4.3. Do the confidentiality procedures adopted by the rulemaking provide market participant parties with the opportunity to meaningfully**

**participate in the affected proceedings and  
provide for open decisionmaking?**

The purpose of this rulemaking is set forth in SB 1488, which provides:

The Public Utilities Commission shall initiate a proceeding to examine its practices under Sections 454.5 and 583 of the Public Utilities Code and the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) to ensure that the [C]ommission's practices under these laws provide for meaningful public participation and open decisionmaking.

There is no set meaning that we can find in case law for “meaningful public participation” in the affected ratesetting (i.e., quasi-legislative) proceedings. However, common sense and case law holds that meaningful public participation is an element of fairness.<sup>12</sup>

Under the confidentiality rules we are adopting in this proceeding, Reviewing Representatives of market participant parties in electric procurement proceedings will be given the same opportunity for access to confidential market sensitive information through discovery as other parties pursuant to Article 10 of our Rules of Practice and Procedure. To be sure, they will be required to abide by our confidentiality rules, just as they are obligated to abide by all of our rules. We do not agree that this implicates in any way the due process of market

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<sup>12</sup> See e.g., *Railroad Com. of California v. Pacific Gas and Electric Co.* (1938) 302 U.S. 393-394; *Western Oil and Gas Association v. Air Resources Board* (1984) 37 Cal.3d 502, 528; *Los Angeles v. Public Utilities Com.* (1975) 15 Cal.3d 680, 698; *Strumsky v. San Diego County Employees Ret. Assn.* (1974) 11 Cal.3d 28, 35; *San Francisco v. Superior Court* (1951) 38 Cal.2d 156, 162-163; *Franchise Tax Board v. Superior Court* (1950) 36 Cal.2d 538, 549; *Rivera v. Division of Industrial Welfare* (1968) 256 Cal.Ap.2d 576, 586-587.

participant parties, nor prevents them from meaningful participation in the affected proceedings.<sup>13</sup>

Because of the critical nature of the market sensitive information, the Legislature's requirement that we protect its confidentiality, and our general duty (both statutory and constitutional) to protect the interests of California's ratepayers, we have previously decided that Reviewing Representatives may not be employees of the market participant; they may not be engaged in the purchase, sale or marketing at wholesale of electrical energy or capacity, natural gas, or power plants;<sup>14</sup> and may not disclose the information to the market participant or its employees.<sup>15</sup> While this procedure prevents employees of market participant enterprises from directly accessing market sensitive information (and thus protects the confidentiality of that information as required by the Legislature and the interests of California's ratepayers), their qualifying Reviewing Representatives will be able to access it for the specific purposes of a proceeding. In addition, market participant parties are not deprived of

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<sup>13</sup> By this decision we are modifying D.06-12-030 to delete language that may have been construed to exclude certain market participant parties from use of reviewing representatives.

<sup>14</sup> This decision shall also modify D.06-12-030 to delete the words "directly or indirectly," with respect to engagement in the purchase, sale or marketing of electrical energy or capacity, natural gas, or power plants, from the criteria for whom may act as a reviewing representative, as well as the clarifications discussed in Section 4.1 *supra*.

<sup>15</sup> We emphasize that market participants cannot employ the same individual to simultaneously act as reviewing representatives (with access to market sensitive information) in regulatory proceedings before this Commission, and as participant in wholesale commercial transactions. The Commission cannot tolerate this regime because the danger is just too great that the commercial negotiations will be skewed against the interests of the ratepayers this Commission has a duty to protect.

discovery of relevant material information that is not market sensitive and hence not covered by our confidentiality rules.

Fairness and meaningful public participation do not require unfettered access to market sensitive information by all market participants. Our procedures achieve the appropriate balance by providing access to market sensitive information by the qualified Reviewing Representatives of market participant parties. Given that all parties, including market participants, will enjoy access to all relevant material information in the record of the proceeding, in accord with Article 10 of our procedural rules, we conclude that the procedures we have adopted for disclosure to Reviewing Representatives in the affected proceedings provide for meaningful public participation and open decisionmaking.

**4.4. Do the adopted procedures provide parties in the affected proceedings with requisite constitutional rights?**

We granted rehearing of D.06-12-030 in part to consider implications concerning equal protection and the right to petition that were raised by the applications for rehearing of D.06-12-030 with respect to the Reviewing Representative process.

**4.4.1. Equal Protection**

As we discussed above, by this decision we shall modify D.06-12-030 to clarify that all market participant parties who utilize Reviewing Representatives will enjoy the same discovery rights as other parties in an affected Commission proceeding, including access to confidential market sensitive information through a Reviewing Representative, provided that they agree to abide by our

confidentiality rules. Accordingly, no “equal protection” issue is presented. As the courts have explained:

The equality guaranteed by the equal protection clauses of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated. The Legislature may make reasonable classifications of persons and other activities, provided the classifications are based upon some legitimate object to be accomplished.

(*People v. Spears* (1995) 40 Cal.App.4th 1683, 1687.)

We have previously addressed our rationale for categorization of market participant and non-market participant parties in the electric procurement and related proceedings. The categorization is grounded in § 454.5(g). The process bears a rational relationship to the legitimate state purpose of ensuring that market sensitive information remains confidential and to protect it from disclosure to those who may have a reason and the means use it against the interest of electricity customers. (See e.g., *Kirchberg v. Feenstra* (1981) 450 U.S. 455, 460.)

In its opening brief, IEP does not raise an equal protection claim *per se*, but merely argues that the due process requirement of a fair hearing is not met if the Commission bases its decision on information that is not available to all parties. As discussed above, we modify D.06-12-030 to clarify that all market participant parties may use Reviewing Representatives, provided they agree to abide by our confidentiality requirements in order to access confidential market sensitive information for purposes of discovery in a proceeding. Thus, through our procedures, all parties will have equal access to information in all affected proceedings.

In its reply brief, IEP objects to the categorization between market participants and non-market participants as being based on the erroneous assumption that market participants will routinely disregard ethical and legal obligations not to improperly use market sensitive information for their own competitive advantage. We did not grant a rehearing on the question of the categorization of parties<sup>16</sup> whether market or non-market. As both D.06-12-030 and D.09-03-046 set forth, we are authorized to adopt such categories and we are obligated to do so by our duty to protect the confidentiality of market sensitive information and simultaneously provide access of it to non-market participants as required by § 454.5(g).

IEP asserts that there is no relationship between the restrictions on access to market sensitive information and the effort to prevent its misuse, and cites *Blumenthal v. Board of Medical Examiner* (1962) 57 Cal.2d 228, a case on qualifications for opticians, as support for this assertion. IEP's claim is both without basis, and not supported by *Blumenthal*. In *Blumenthal*, the court found that for purposes of protecting the public from incompetent and unethical opticians, there was no reasonable difference between persons who served a five-year apprenticeship or have been licensed for five years in another state and other persons regardless of their qualifications.

Here, in contrast, there is a reasonable difference between persons in the independent energy markets who have the ability and business/financial incentives to use market sensitive information for their own competitive advantage and other persons who do not.

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<sup>16</sup> See D.09-03-046 at 11.

**4.4.2. Right to Petition**

IEP asserts that restrictions in D.06-12-030 on market participants' access to market sensitive information created an improper and unlawful limitation on its ability to petition the Commission, as guaranteed by the First Amendment of the United States Constitution and Article I, § 3(a) of the California Constitution. IEP relies on *American Civil Liberties Union v. Board of Education* (1961) 55 Cal.2d 167, concerning rights to assemble and of free speech with respect to the application and denial of the use of school property to conduct a meeting; *Thomas v. Collins* (1945) 323 U.S. 516, concerning rights to assemble and of free speech with respect to a labor organizer's solicitation of persons to become union members; and *California Motor Transport Co. v. Trucking Unlimited* (1972) 404 U.S. 508, concerning the right to approach administrative agencies or courts with respect to bringing an action against a competitor.

IEP asserts that the Commission may not impose restrictions on parties' ability to petition the Commission absent a "clear public interest, threatened not doubtfully or remotely, but by clear and present danger," as articulated in *Thomas v. Collins, supra*, 323 U.S. at 530.

The flaw in IEP's argument is that we have not restricted market participant parties from participating in the affected proceedings, because they may do so through use of our Reviewing Representative procedure, as clarified herein. Further, the eligibility criteria we have established for Reviewing Representatives do not impede the right to petition; the test is whether there is a rational basis for the restriction:

Although a fundamental interest may be involved, both the United States Supreme Court and this court have recognized that not every limitation or incidental burden on a fundamental right is subject to the strict scrutiny standard. When the regulation merely has an

incidental effect on exercise of protected rights, strict scrutiny is not applied. [Citations.] It is only when there exists a real and appreciable impact on, or a significant interference with the exercise of the fundamental right that the strict scrutiny doctrine will be applied. [Citations.]

*(Fair Political Practices Com. v. Superior Court (1979) 25 Cal.3d 33, 46.)*

IEP asserts that the Commission has failed to articulate a rationale for imposing limitations on market participants' access to market sensitive information. This assertion lacks merit. Market sensitive information is, by definition, information that has the potential to materially affect an electricity buyer's market price for electricity. (D.06-06-066 at 39.) The Commission is legally obligated to ensure that rates are just and reasonable. (See e.g., Cal. Const. Art. 12, § 6; Pub. Util. Code, §§ 451, 454, 728.) To the extent that IEP challenges D.06-06-066 as modified and its designation of market sensitive information, that issue is beyond the scope of this rehearing, and such challenge is foreclosed by § 1731.

**4.5. Is there a less restrictive means to achieve the public interest in shielding the use of market sensitive information by market participants for purposes other than for the conduct of the proceeding?<sup>17</sup>**

SB 1488 directed the Commission to review our procedures under §§ 454.5 and 583, as well as the CPRA to ensure that our practices provide for meaningful participation and open decisionmaking. Accordingly, we identified what information is market sensitive and subject to confidential treatment, and

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<sup>17</sup> This discussion subsumes and resolves the related issues separately identified as issues 8, 9 and 10 in the Scoping Memo and Ruling referenced in Part 2, above.



established procedures that protects the confidentiality of such information, including, the use of qualified Reviewing Representatives in procurement and related proceedings. We further believe that the confidentiality requirements and procedures we have adopted are within our authority<sup>18</sup> as well as within the bounds of what other administrative agencies have adopted for protecting relevant confidential information subject to discovery. The process we have adopted is the least restrictive means to achieve the public interest in protecting the confidentiality of market sensitive information.

IEP asserts, however, that the Reviewing Representative requirement is an unnecessary and duplicative restriction on market participants because a nondisclosure agreement requiring market participants not to disclose or improperly use the market sensitive information, would achieve the desired result. IEP further asserts that such requirement would adequately protect against such disclosure or improper use because doing so would be a violation of that agreement, as well as a violation of our Rule 1.1<sup>19</sup> which requires any person appearing before the Commission not to mislead the Commission or its staff; in addition to, in the case of attorneys, the Business and Professions Code §§ 6068 and 6103 and Rule 5-200 of the Rules of Professional Conduct which impose additional professional obligations and sanctions for violations. We agree that

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<sup>18</sup> See e.g., Cal. Const. Art. 12, § 2; Pub. Util. Code § 701.

<sup>19</sup> Rule 1.1 provides: “Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.”

Rule 1.1, and the personal and professional integrity we expect of practitioners certainly should deter such action, as perhaps do various penalty provisions in the Public Utilities Code.

However, although those rules may be applicable, none of them are absolutely specific to our mandate from the Legislature to ensure the confidentiality of market sensitive information, while providing for open decisionmaking and meaningful public participation. (§ 454.5(g); SB 1488.) The reality is that unfettered access by market participants to confidential market sensitive information does not ensure such information's confidentiality, for the reasons both articulated in the comments filed in this proceeding and as we have discussed herein and in earlier decisions in this rulemaking. The risk that market participants might improperly use market sensitive information for personal competitive advantage, is alluded to by IEP when it notes that a Reviewing Representative "... will face the nearly impossible task of ensuring that the client does not use, even indirectly, any advice he or she gives in the role of reviewing representative in connection with the purchase, sale, or marketing of electrical energy or capacity or natural gas or the bidding on or purchasing of power plants."<sup>20</sup> IEP's observation underscores our rationale of why Reviewing Representatives cannot be employees of market participants and must not actually engage in wholesale marketing activities or in commercial negotiations.

CAC/EPUC assert that the Commission's nondisclosure procedure is unduly restrictive because: (1) Modesto Irrigation District's experience in publicly disclosing market sensitive information without ratepayer harm

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<sup>20</sup> Reply Brief of IEP, at 9.

demonstrates that it is extremely unlikely that ratepayers would be harmed by the disclosure of market sensitive information, (2) the Commission's regulation of utility procurement provides sufficient ratepayer protection, and (3) a less restrictive nondisclosure procedure will achieve the Commission's goal of safeguarding data from improper use, as evidenced by the less restrictive nondisclosure procedures in other jurisdictions and as required by law.

As an initial matter, we reject CAC/EPUC's assertion that we should relax our confidentiality procedures because it is unlikely that ratepayers would be harmed by unprotected disclosure of market sensitive information and because ratepayers are adequately protected from any such harm by virtue of the Commission regulation of utility procurement. Even if we concurred with CAC/EPUC's assessment – and we do not – we are statutorily required to ensure the confidentiality of market sensitive information. California experienced severe consequences of electric market abuse and the limitations of its ability to remedy them. Presumably, in enacting § 454.5(g), the Legislature weighed the severity of those consequences against the risk that market sensitive information might be misused.

In addition, CAC/EPUC's evidence that Modesto Irrigation District has disclosed procurement information similar to market sensitive information and its ratepayers were not harmed in that instance is not proof that similar disclosure here will not result in ratepayer harm. In view of the 2000-2001 California Electricity Crisis and § 454.5(g), CAC/EPUC's assertion that relaxation of our confidentiality procedures in Commission utility procurement proceedings is in order because without them we are sufficiently able to protect ratepayers from market abuse is not supported by the facts, recent history or the law.

Finally, we are not persuaded by CAC/EPUC's assertion that less restrictive nondisclosure procedures of other jurisdictions adequately protect against ratepayer harm in California. The fact that less restrictive nondisclosure procedures are acceptable to other jurisdictions is not dispositive, nor relevant to the Commission's obligations under § 454.5(g).

CAC/EPUC's assertion that a less restrictive nondisclosure procedure is required by law is without merit. As discussed previously, market participant parties through use of our Reviewing Representative procedures will have access to the same discovery as non-market participant parties, provided they agree to abide by our procedures. We do not think it necessary to discuss in detail the legal precedent that CAC/EPUC cites as favoring disclosure of trade secret information because we have addressed the question of trade secret information in previous decisions in this proceeding and not all confidential market sensitive information is necessarily trade secret.

Further, because the clarifications we make herein to D.06-12-030 address all of the interrelated issues raised in this rehearing and provide all parties with the opportunity to meaningfully participate in the affected proceedings (including e.g., discovery pursuant to our rules, the ability to submit and cross-examine evidence and challenge our action), it is unnecessary to repeat each and every argument raised during the rehearing.

**4.6. Does participation in the electric and/or gas market in excess of one megawatt create a material ability to affect market price? If not, what amount of participation in the electric and/or gas market creates such a material ability?**

D.06-12-030 established a 1 megawatt (MW) threshold of participation in the electricity market for determining whether an entity is a market participant,

based on the exemption from local resource adequacy requirements established in D.06-06-064. Specifically, D.06-06-064, which was issued in Rulemaking 05-12-013 regarding the Commission's resource adequacy requirement program, exempts load serving entities from having to procure local resource adequacy requirements of less than 1 MW for a particular area, based on its finding that transactions of less than 1 MW are not commercially reasonable:

We share staff's reluctance to exempt any [load serving entity] from local procurement obligations. On the other hand, the comments of several parties persuasively make the point that transactions of less than 1 MW are not commercially reasonable, at least at this time. Accordingly, we will adopt this proposed exemption for Local [resource adequacy requirements]. (D.06-06-064 at 32.)

In ordering rehearing on this issue, D.09-03-046 noted that D.06-06-064's determination of the 1 MW exemption threshold was for a different purpose than its intended use in D.06-12-030, i.e., the identification of entities whose participation in the electricity market may materially affect the market price of electricity. Accordingly, D.09-03-046 concluded that parties should have a further opportunity to address the issue of whether this threshold or any other amount establishes *de minimis* participation.

D.09-03-046 also noted concern with D.06-12-030's statement that participation in the natural gas market "above the *de minimis* threshold" renders an entity a market participant without making any finding regarding what constitutes a *de minimis* threshold in the gas market. The Commission therefore extended rehearing to consideration of what constitutes a *de minimis* threshold in the natural gas market.

We address these issues separately below.

#### 4.6.1. Electricity Market Participation

Under the California Independent System Operator's (CAISO) Locational Marginal Pricing market structure, entities can bid supply at any price under the current bid caps; the market generally clears at the highest-priced supply bid to cover the bid-in system load. Therefore, bids as little as 1 MW, if they are the marginal awarded bid, can set the market clearing price for all suppliers at the relevant price point. Accordingly, we find that a 1 MW *de minimis* threshold reasonably identifies entities whose participation in the electricity market may materially affect the market price of electricity.

IEP and CAC/EPUC assert that, due to the overall size of the California electricity market (historically 71 gigawatts (GW) with a forecasted 63 GW of statewide peak demand), the 1 MW *de minimis* threshold is too low. This assertion disregards the electricity market structure, as discussed immediately above.

CAC/EPUC observes that the Federal Energy Regulatory Commission (FERC) bases its market-based rate authorizations on a market power test in which an entity's market share of uncommitted capacity must be less than 20% of the market's net uncommitted supply, and proposes that the Commission base the *de minimis* threshold for identifying entities with the ability to materially affect the market price of electricity on the FERC market power tests.

We reject CAC/EPUC's proposal. The FERC market power test identifies entities that have the ability to materially affect the market price of electricity on the basis of their market power. Our purpose here is to identify entities that have the ability to materially affect the market price of electricity on the basis of their access to market sensitive information. The market power test does not inform this inquiry.

Therefore, we find no compelling argument or authority to change our determination in D.06-12-030 that a 1 MW threshold reasonably identifies entities whose participation in the electricity market may materially affect the market price of electricity and therefore their designation as a market participant remains.

#### **4.6.2. Gas Market Participation**

D.06-12-030 found that EPUC is a market participant because: (1) it represents the customer generation interests of several major gas and oil companies, (2) collectively, this membership has the potential to materially impact the market price of electricity, and (3) EPUC regularly participates at the Commission jointly with CAC, whose membership, likewise, collectively has the potential to materially impact the market price of electricity. (D.06-12-03 at 48, Findings of Fact 5 and 6.) After reviewing the comments submitted in this rehearing, we are no longer convinced that this finding was supported by the record and we modify it. EPUC states that it is primarily an end-use consumer group whose member companies purchase a large amount of bundled power from both PG&E and SCE.<sup>21</sup> EPUC member companies maintain combined heat-and-power operations mainly to serve on-site end-use loads. In addition, EPUC argues, and the record before the Commission supports it, that EPUC and CAC are different and EPUC regularly appears before the Commission without CAC.

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<sup>21</sup> We note that on their respective FERC Form 566 for 2010, SCE and PG&E have identified several EPUC members as being among their 20 largest retail purchasers. Pursuant to Rule 13.9, we take official notice of the FERC Form 566 filing.

The Commission has determined that entities such as the California Large Electric Consumers Association (CLECA), the California Manufacturers and Technology Association (CMTA) and the California Farm Bureau are “non-market participants.” Just like EPUC, these other entities “directly or indirectly purchase electricity or natural gas.” However, in EPUC’s case, it is also true that some of its member companies are also energy sellers in wholesale electricity and natural gas markets. We do not find record support for treating EPUC, when it buys bundled power from a California regulated utility to serve on-site end-use loads, differently than CLECA, CMTA, or the California Farm Bureau, for purposes of participation in our proceedings. Therefore, we will modify our presumption from D.06-12-030 that EPUC should always be treated as a market participant party, to the presumption that when EPUC files solely as a bundled purchaser of power to serve on-site and end-use customers, that the presumption is that EPUC is not a market participant. For example, for a general rate case or rate design window proceeding, the presumption is that EPUC is not a market participant.

However, when EPUC participates in a proceeding where EPUC’s position is as a market participant, such as a utility procurement proceeding, especially one for procurement of combined heat and power (CHP) EPUC will be categorized as a market participant.

Further, in instances when EPUC – or any other non-market participant – files jointly with a market participant in an affected Commission proceeding, the non-market participant, as well as the market participant parties must comply fully with the Commission’s confidentiality procedures, including executing a Nondisclosure Certificate in accordance with a Protective Order that prohibits disclosure of market sensitive information to those who are employees of market



participant enterprises. In accordance with our procedures for ensuring the confidentiality of market sensitive information, only authorized Reviewing Representatives of the market participant party may have access to market sensitive information. Accordingly, language in D.06-12-030 will be changed to reflect this modification to the presumption concerning EPUC as a market participant.

D.06-12-030's discussion of EPUC's status also includes the following commentary:

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

(D.06-12-030 at 31.)

D.06-12-030 does not adopt a *de minimus* threshold of participation in the natural gas market for purposes of determining market participation status, and D.09-03-046 orders a limited rehearing on this issue. The rehearing order was "to focus on the question of whether participation based on 1 MW or less of capacity in the [...] gas market establishes *de minimus* participation, and if not, what amount does and why." (D.09-03-046 at 19.) However, because we are modifying D.06-12-030's presumption that EPUC is a market participant, we need not reach this issue. We therefore, modify D.06-12-030 to delete this unnecessary commentary and reference to EPUC.

In modifying our prior characterization of EPUC as a market participant, we are in no way tempering our directive that all disclosure of market sensitive information must be pursuant to the confidentiality procedures and processes

we have adopted in the underlying proceeding. Our goal is to warrant that no participant to a Commission proceeding, be they a consultant or a lawyer, no matter what category of participant they represent, be they a market or a non-market participant, can both have access to an investor owned utility's confidential information and simultaneously knowingly advise a third party on a wholesale power transaction with that utility. These rules are intended to ensure both the protection of confidential information and parties' ability to meaningfully participate in our proceedings.

**4.7. Should the Commission reconsider or change its prohibition of access to market sensitive information by attorneys or consultants who simultaneously represent market and non-market participants?**

Under the current procedure adopted in D.06-12-030, and as expanded by this decision, a Reviewing Representative may not be an employee of a market participant and may not engage in wholesale market activities. Thus, the prohibition of access to market sensitive information by attorneys, consultants or experts who simultaneously represent market and non-market participants is unnecessary for purposes of protecting against the disclosure of market sensitive information to an individual who engages in market activities. We therefore, modify D.06-12-030 to eliminate the prohibition on simultaneous representation of market and non-market participants.

**4.8. Should the special limitations on market participants' access to market sensitive procurement data adopted in D.06-12-030 (or as may be considered in this rehearing) extend to additional materials?**

D.08-04-023 resolved the remaining issues in this proceeding by adopting Model Protective Order for market sensitive information addressed in

D.06-06-066 as modified by D.07-05-032. Included as an addendum to the Model Protective Order was a Nondisclosure Certificate, to be executed by individual Reviewing Representatives, confirming that they understood and agreed to abide by the terms of the Protective Order.

We adopted the Model Protective Order after balancing our statutory obligation pursuant to § 454.5(g) to ensure the confidentiality of “market sensitive information,” and the competing interest in broad public access to public information and meaningful participation in our proceedings, and after carefully identifying what specific data is properly classified as “market sensitive” and subject to these special protections. D.08-04-023 and the terms of the Model Protective Order are appropriately limited to “market sensitive information” that is the focus of § 454.5(g) and this rulemaking; thus it is limited to information that can be identified by the Matrix adopted in D.06-01-066 as modified by D.07-05-032 and subsequent decisions.

The Joint Utilities and Coalition Parties propose that the confidentiality procedure should extend to all information that is market sensitive information, regardless of whether it is specifically identified in D.06-06-066 as modified. We agree in principle that all “market sensitive information,” as that term is used in § 454.5 and our decisions in this rulemaking, is subject to confidential treatment. We clarify, however, that in the event that the Commission or other appropriate authority has not identified particular information as market sensitive, a party’s designation of information as “market sensitive” is not controlling.

HEI proposes that the Commission extend the same protections as those provided by courts for intellectual property, trade secrets, and commercially sensitive information related to new and emerging technologies. Specifically, HEI seeks protection, either in this proceeding or in Application 09-04-008,

regarding SCE's application for cost recovery related to HEI's feasibility study for an integrated gasification and combined cycle facility. To the extent that HEI seeks a determination of whether its feasibility study is market sensitive information entitled to the protections of D.06-06-066 as modified by D.07-05-032, D.06-12-030 and D.08-04-023, that issue is beyond the scope of this rehearing. To the extent that HEI seeks the protections provided by courts for intellectual property, trade secrets, and commercially sensitive information, that issue is likewise beyond the scope of this rehearing. To the extent that HEI seeks to extend the protections of D.06-06-066 as modified by D.07-05-032, D.06-12-030, and D.08-04-023 to intellectual property, trade secrets, and commercially sensitive information that is not "market sensitive information," we reject HEI's proposal for the reasons discussed above.

**4.9. Does D.06-12-030 impose unique restrictions on the IEPs from those of any other market participant?**

IEP has repeatedly raised this issue based on its concern that a statement in D.06-12-030 singled out IEP as uniquely barred from obtaining access to market sensitive information through a Reviewing Representative. Specifically, after finding that IEP was a market participant, D.06-12-030 at page 29 provided: "Nor are we prepared to give certain 'reviewing representatives' within IEP access to market sensitive information, as we discuss in the 'Reviewing Representatives' section above."

We reiterate what we stated on page 17 of D.09-03-046, which granted rehearing of D.06-12-030: "We note that the rules adopted [in this proceeding] do not foreclose IEP from participating in the affected proceeding[s]...." To the extent that language in D.06-12-030 could be interpreted to uniquely bar IEP

from obtaining access to market sensitive information through a Reviewing Representative, we shall, by this order, delete it. Although there are necessary restrictions on who may act as a Reviewing Representative, e.g., Reviewing Representatives may not be employees of market participants, all market participant parties may use Reviewing Representatives in accordance with our procedures. This criterion applies to all parties, whether they are market participants or non-market participants. D.06-12-030 provided that employees of market participants, whether IEP's, or an investor-owned utility's, or an electric service provider's, may not serve as Reviewing Representatives. IEP's right to use Reviewing Representatives shall be no different from that of other party. We shall modify D.06-12-030 to delete the above quoted language from that decision.

## **5. Assignment of Proceeding**

Commissioner Dian M. Grueneich was the assigned Commissioner, and the proceeding is now re-assigned to Commissioner Michael R. Peevey. Hallie Yacknin is the assigned judge to the proceeding.

## **6. Comments on Alternate Proposed Decision**

The alternate proposed decision of Commissioner Peevey was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were permitted under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on May 12, 2011 by Californians for Renewable Energy, Inc. (CARE), IEP, EPUC, TURN, CAC and the Joint Utilities (PG&E, SCE and SDG&E), and reply comments were filed on May 17, 2011 by IEP, EPUC, CAC and the Joint Utilities.

A number of parties, IEP, EPUC and CAC in particular, requested clarifications to the restrictions on reviewing representatives so that there would not be any misinterpretation, and so the modifications the APD is making to

D.06-12-030 expand the rights of parties for meaningful participation in Commission proceedings and make it possible for market participants to retain qualified Reviewing Representatives. We did adopt many of the recommendations for the Reviewing Representatives and those changes have been incorporated into this decision.

The Joint Utilities request clarifications they argue will ensure the protection of market-sensitive information. Specifically, the Joint Utilities request that EPUC be categorized as a market participant in all circumstances, rather than presuming it is not when it acts solely as a bundled purchaser of power to serve on-site and end-use utilities. After considering the arguments of the Joint Utilities and the reply of EPUC, we state that the presumption will remain that if EPUC is acting solely as a bundled purchaser of power to serve on-site and end-use customers it is not appearing as a market participant. This will be the case when EPUC appears in a general rate case or a rate design window proceeding. However, when EPUC appears in a utility procurement proceeding, including a proceeding for procurement of CHP, EPUC will be presumed to be a market-participant. Any party may challenge EPUC's categorization on a case-by-case basis. If the categorization of EPUC, or any other participant, as a market/non-market participant causes time-consuming and distracting litigation, this subject may be re-visited. It goes without repeating that EPUC must maintain an impermeable ethical wall to ensure that there is no leakage of sensitive material from EPUC as a non-market participant to EPUC as a market participant.

In addition, the Joint Utilities argue that an entire firm should be disqualified where any member of the firm consults with or advises market participants about energy marketing or related activities. While we appreciate

the concern the Joint Utilities express for the protection of market-sensitive information, we are persuaded that the limiting language we proffer for Reviewing Representatives will protect the ratepayers. Reviewing Representatives will be required to execute a Nondisclosure Certificate in accordance with the Model Protective Order adopted in D.08-04-023 before they have access to market-sensitive information and we do not share the Joint Utilities' fear that the Reviewing Representatives will freely violate a Protective Order. As IEP cogently argues, the practitioners who have established reputations before this Commission for multiple decades will honor Commission orders as well as their contractual and ethical obligations, or they will lose the trust and confidence they worked so hard to build.

We are persuaded, however, that some of the suggestions advanced by the Joint Utilities for establishing standards for an effective ethical wall have merit and we have incorporated some of those suggestions into this decision.

### **Findings of Fact**

1. The confidential nature of the information, the Legislature's mandate that this Commission ensure its confidentiality, the potential for economic misuse of market sensitive information by market participants and consequential adverse effects on ratepayers justifies the use of Reviewing Representatives, and the procedures adopted in D.06-12-030, as clarified herein.

2. Evidence that Modesto Irrigation District has disclosed procurement information similar to market sensitive information and its ratepayers have not been harmed is not proof that such disclosure will not result in ratepayer harm in all instances.

3. Under the CAISO Locational Marginal Pricing market structure, entities can bid supply at any price under the current bid caps; the market generally

clears at the highest-priced supply bid to cover the bid-in system load.

Therefore, bids as little as 1 MW, if they are the marginal awarded bid, can set the market clearing price for all suppliers at the relevant price point.

4. Because bids as little as 1 MW, if they are the marginal awarded bid, can set market clearing price for all supplies at the relevant price point, that constitutes a *de minimis* threshold for participation in the electricity market which may materially affect the market price of electricity.

5. The purpose of a market power test is to determine whether an entity has the ability to materially affect the market price of electricity on the basis of its market power. The test is not useful in determining whether an entity has the ability to materially affect the market price of electricity on the basis of its access to market sensitive information.

6. The modifications made to D.06-12-030 are minor and will provide the same protection to the confidential market sensitive information in the affected proceedings.

7. The prohibition of access to market sensitive information by attorneys, consultants or experts who simultaneously represent market and non-market participants is unnecessary and redundant. The intent of the limits on market participant Reviewing Representative is to prohibit the simultaneous engagement in wholesale power contract negotiations with a utility while accessing that utility's confidential procurement data.

8. When EPUC files in a Commission proceeding solely as a bundled purchaser of power to serve on-site and end-use customer load, EPUC is presumed to be a non-market participant. This presumption would be true for general rate cases and rate design window applications. When EPUC participates in a procurement proceeding as a market participant it is presumed



to be a market participant. The presumption is subject to challenge on a case-by-case basis.

9. Under the California Independent System Operator's (CAISO) Locational Marginal Pricing market structure, entities can bid supply at any price under the current bid caps; the market generally clears at the highest-priced supply bid to cover the bid-in system load. Therefore, bids as little as 1 MW, if they are the marginal awarded bid, can set the market clearing price for all suppliers at the relevant price point.

10. In no case shall the designation of information as market sensitive information, pursuant to D.06-06-066 as modified by D.07-05-032 and subsequent decisions, exceed three years.

11. D.08-04-023 adopted a Model Protective Order for use with confidential market sensitive information. Parties to the Resource Adequacy , Procurement, Renewables Portfolio Standard, and offshoot or successor proceedings are required to abide by the confidentiality protections in the Model Protective Order. Parties to other proceedings, and in industries other than the electric sector, may find the Model Protective Order useful, although they are not obligated to use it. There have been no previous decisions or orders modifying D.08-04-023.

12. Modifications made by this decision to D.06-12-030 necessitate conforming changes to the Model Protective Order adopted by D.08-04-023.

13. The Commission also encourages the use of bilateral Nondisclosure Agreements between parties, as an alternative to a Protective Order. To that end, the Commission will direct the parties to develop a Model Nondisclosure Agreement, along with an updated version of the Model Protective Order.

**Conclusions of Law**

1. HEI's motion to become party should be granted.
2. The confidentiality procedures we have adopted herein and in the underlying rulemaking, including modifications to D.06-06-066 as modified by D.07-05-032, D.06-12-030, and D.08-04-023, provide all parties in the affected proceedings with due process.
3. The confidentiality procedures adopted in D.06-12-030, as clarified herein, provide for meaningful public participation and open decisionmaking, consistent with SB 1488, in all proceedings in which the rules adopted in this rulemaking apply.
4. The categorization of market participants and non-market participants is necessitated by the Legislature's mandate that we protect confidential market sensitive information. Thus, in order to protect electric customers, we are mandated to ensure confidentiality of that information from those engaged in market activities or commercial negotiations.
5. Our rules, as clarified herein, provide all parties in the affected Commission proceedings with a process to access the same information, and so there is no prospect that these rules will restrict any party's right to petition the Commission.
6. The confidentiality procedures adopted in D.06-12-030, as modified herein, particularly regarding clarifying the restrictions on Reviewing Representatives, are the least restrictive means to achieve the Commission's competing statutory obligations to ensure the confidentiality of market sensitive information by protecting against the possible misuse of that information by market participants and to ensure meaningful public participation and open decisionmaking in the affected proceedings.

7. . A 1 MW *de minimis* of energy threshold reasonably identifies entities whose participation in the electricity market may materially affect the market price of electricity.

8. There is no basis to determine what constitutes *de minimis* participation in the natural gas market, warranting modification of D.06-12-030.

9. D.08-04-023 should be limited to market sensitive information that is the focus of § 454.5(g) and this rulemaking.

10. D.06-12-030 provides that employees of market participants, whether the market participant is a trade association, an investor-owned utility, or an electric service provider, may not serve as Reviewing Representatives.

11. Members or employees of a consulting or legal firm whose clients include market participants should be permitted to serve as Reviewing Representatives to other market participants, so long as the Reviewing Representatives are separated by an ethics wall from members and employees of the firm who are engaged in knowingly providing electricity or gas marketing consulting or advisory services to others in connection with the purchase, sale or marketing at wholesale of electric energy or capacity or natural gas.

12. A market participant's Reviewing Representatives shall not participate in (a) a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) whose duties include such activities), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) whose duties include such activities), or (c) knowingly consulting with or advising others in connection with any activity set forth in subdivisions (a) or (b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting).

13. A Reviewing Representative of a market participant may not be an employee of a market participant, except, if in the course of a particular proceeding before the Commission, a market participant party believes that its employees must be given access, on a confidential basis, to market sensitive information, and that its right of full participation somehow will be unduly constrained by the general rule limiting access to outside counsel, consultants and experts, then such a party can file a motion with the decision-maker and seek an exemption from the general rule

14. The prohibition of access to market sensitive information by attorneys or consultants who simultaneously represent market and non-market participants is unnecessary for purposes of protecting against the disclosure of market sensitive information to an individual who engages in market activities, because a Reviewing Representative may not engage in wholesale market activities.

15. Until a new Model Protective Order is approved by the Commission, the terms of the Model Protective Order adopted by D.08-04-023, for use with market sensitive information, as defined by the process adopted in D.06-06-066 as modified by D.07-05-032 and subsequent decisions, in proceedings including Resource Adequacy , Procurement, Renewables Portfolio Standard, and offshoot or successor proceedings shall comply with this decision.

## **O R D E R**

### **IT IS ORDERED** that:

1. Paragraph 2 of Section VI.B. of Decision 06-12-030, at pages 17-18, is deleted, and replaced with the following:

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

- Reviewing Representatives may not currently be engaged in (a) a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) engagement in such a transaction), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction), or (c) knowingly providing electricity or gas marketing consulting or advisory services to others in connection with a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas or the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction or consulting).
- Reviewing Representatives may not be an employee of a market participant. If the market participant chooses to retain outside attorneys, consultants, or experts in the same law firm or consulting firm to provide advice in connection with marketing activities, then the attorney, consultant, or expert serving as a reviewing representative under our confidentiality rules must be separated by an ethics wall (of the kind used by law firms to manage conflict-of-interest situations among different clients) from those in the firm who are involved in wholesale commercial dealings.
- Reviewing Representatives shall use market sensitive data only for the purpose of participating in an affected Commission proceeding, and Reviewing Representatives are permitted to participate in regulatory proceedings on behalf of market participants.
- Reviewing Representatives shall abide by these confidentiality rules.

2. Decision 06-12-030 is further modified as follows:

- a. The third sentence in the third paragraph on page 31 in Section IX.E.2 entitled “Discussion” is deleted so the paragraph is modified as follows:

“It is true that EPUC’s members are large energy consumers, but many of them are also active in the natural gas market. Many categories of data relating to natural gas are deemed confidential in the Matrix accompanying D.06-06-066.”

- b. The first word in the first sentence of the subsequent paragraph (“Moreover”) on page 31 is deleted and the final three sentences of the paragraph are deleted, and the modified paragraph is as follows:

“EPUC, represents the interests of bundled purchasers of power to serve on-site and end-use customers, and is not presumed to be a market participant.”

- c. The first full paragraph on page 32 is modified as follows:

“Moreover, an association representing cogenerators or customer generation interests of oil and gas companies as a whole may have more ability to materially affect the market price of electricity than an individual company acting alone.”

- d. Section VII (“Attorneys and Consultants Who Work for Both Market Participants and Non-Market participants”) beginning on page 18, is deleted in its entirety.

- e. Section XII.F (“Attorneys/Consultants”) beginning on page 45, is deleted in its entirety.

- f. Conclusion of Law 5 is deleted in its entirety.

- g. Conclusion of Law 6 is modified to delete subsections (b) and (c) and add in their place:

“and, b) an association representing cogeneration or customer cogeneration interests of oil and gas companies as

a whole may have more ability to materially affect the market price of electricity than an individual company acting alone.”

- h. Ordering Paragraph 5 is deleted in its entirety, and replaced as follows:

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

- Reviewing Representatives may not currently be engaged in (a) a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) engagement in such a transaction), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction), or (c) knowingly providing electricity or gas marketing consulting or advisory services to others in connection with a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas or the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction or consulting).
- Reviewing Representatives may not be an employee of a market participant. If the market participant chooses to retain outside attorneys, consultants, or experts in the same law firm or consulting firm to provide advice in connection with marketing activities, then the attorney, consultant, or expert serving as a reviewing representative under our confidentiality rules must be separated by an ethics wall (of the kind used by law firms to manage conflict-of-interest situations among different clients) from those in the firm who are involved in wholesale commercial dealings.

- Reviewing Representatives shall use market sensitive data only for the purpose of participating in an affected Commission proceeding, and Reviewing Representatives are permitted to participate in regulatory proceedings on behalf of market participants.
  - Reviewing Representatives shall execute the nondisclosure agreement adopted in this proceeding, and shall be at all times in compliance its provisions.
- i. Ordering Paragraph 6 of Decision 06-12-030 is deleted in its entirety.
3. Hydrogen Energy International LLC's July 13, 2009, motion to become a party is granted.
4. In circumstances where a Reviewing Representative is an employee or member of a firm that is also advising clients on energy marketing at wholesale and related services, the firm is to establish an ethics wall that incorporates the following standards:
- When reviewing or discussing any market sensitive data, the Reviewing Representative and those working with him/her shall employ all reasonable steps to ensure a physical separation from firm personnel who are not authorized Reviewing Representatives;
  - The Reviewing Representative shall be responsible for informing all firm personnel about the existence and terms of the Commission's confidentiality rules, and in particular the prohibition against sharing market sensitive information with market participants; and
  - The Reviewing Representative shall take all reasonable steps necessary to ensure that market sensitive information and files, including electronic files, are not accessible to firm personnel who are not authorized Reviewing Representatives.



5. The Model Protective Order adopted by Decision 08-04-023 should be amended to conform with the modifications adopted by this decision.

6. The parties shall convene a collaborative process designed to achieve consensus versions of an updated version of the Model Protective Order, as well as a Model Nondisclosure Agreement for use with confidential documents governed by this proceeding. The utilities thereafter shall submit these documents via joint Advice Letter for Commission approval by Resolution.

7. This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

**APPENDIX A**

**BEFORE THE PUBLIC UTILITIES COMMISSION**

**OF THE STATE OF CALIFORNIA**

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

**Docket No. 05-06-040**

**MODEL NONDISCLOSURE AGREEMENT**

**REGARDING MARKET SENSITIVE INFORMATION**

1. Scope. This Nondisclosure Agreement shall govern access to and the use in this proceeding of Market Sensitive Information produced by, or on behalf of, any Disclosing Party.

2. Modification. This Nondisclosure Agreement shall remain in effect until it is modified or terminated by agreement of the parties or by order of the Commission or Assigned Administrative Law Judge (“Assigned ALJ”). The parties acknowledge that the identity of the parties submitting Market Sensitive Information may differ from time to time. In light of this situation, the parties agree that modifications to this Nondisclosure Agreement may become necessary, and they further agree to work cooperatively to devise and implement such modifications in as timely a manner as possible. Each party governed by this Nondisclosure Agreement has the right to seek changes in it as appropriate from the Assigned ALJ or the Commission.

3. Definitions

A. The term “Market Sensitive Information” means market sensitive information as determined by the Disclosing Party in accordance with the provisions of D.06-06-066 and subsequent decisions, or (ii) any other materials that are made subject to this Nondisclosure

Agreement by agreement of the parties or by order of the Assigned ALJ, Law and Motion Administrative Law Judge (“Law and Motion ALJ”), Assigned Commissioner, the Commission, or any court or other body having appropriate authority. Market Sensitive Information 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 Market Sensitive Information or from which such materials may be derived (except that any derivative materials must be separately shown to be Market Sensitive Information). Market Sensitive Information does 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; or (ii) any information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Nondisclosure Agreement or any other nondisclosure agreement or protective order.

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

C. The term “Disclosing Party” means a party who initially discloses any specified Market Sensitive Information in this proceeding.

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

- 1) A person or entity, or an employee of an entity, that engages in the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, or consulting on such matters, subject to the limitations in 3) below.
- 2) A trade association or similar organization, or an employee of such organization,

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

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

- Reviewing Representatives may not currently be engaged in (a) a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas (or the direct supervision of any employee(s) engagement in such a transaction), (b) the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction), or (c) knowingly providing electricity or gas marketing consulting or advisory services to others in connection with a transaction for the purchase, sale, or marketing at wholesale of electrical energy or capacity or natural gas or the bidding on or purchasing of power plants (or the direct supervision of any employee(s) engagement in such a transaction or consulting).
- Reviewing Representatives may not be an employee of a market participant. If the market participant chooses to retain outside attorneys, consultants, or experts in the same law firm or consulting firm to provide advice in connection with marketing activities, then the attorney, consultant, or expert serving as a Reviewing Representative under our confidentiality rules must be separated by an ethics wall (of the kind used by law firms to manage conflict-of-interest situations among different clients) from those in the firm who are involved in wholesale commercial dealings.
- Reviewing Representatives shall use market sensitive data only for the purpose of participating in an affected Commission proceeding, and Reviewing Representatives are permitted to participate in regulatory proceedings on behalf of market participants.
- Reviewing Representatives shall execute the NDA adopted in this proceeding, and shall be at all times in compliance its provisions.

F. Persons or entities that do not meet the definition of market participant are non-market participants ("NMPs"), and may have access to market sensitive information through their designated Reviewing Representatives.

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

#### 4. Designation of Market Sensitive Information.

When filing or providing in discovery any documents containing Market Sensitive Information, 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 “ MARKET SENSITIVE INFORMATION SUBJECT TO NONDISCLOSURE AGREEMENT,” or with words of similar import as long as one or more of the terms, “Market Sensitive Information” or “Nondisclosure Agreement” is included in the designation to indicate that the materials in question are protected.

All materials so designated shall be treated as Market Sensitive Information unless and until (a) the designation is withdrawn pursuant to Paragraph 16 hereof, or (b) an ALJ, Commissioner or other Commission representative makes a determination pursuant to Paragraph 4 hereof changing the designation.

All documents containing Market Sensitive Information that are tendered for filing with the Commission shall be placed in sealed envelopes or otherwise appropriately protected and shall be tendered with a motion to file the document under seal pursuant to Rule 11.4 of the Commission’s Rules of Practice and Procedure. All documents containing Market Sensitive Information that are served on parties shall be placed in sealed envelopes or otherwise appropriately protected and shall be endorsed to the effect that they are served under seal pursuant to this Nondisclosure Agreement. Such documents shall be served upon Reviewing Representatives, and persons employed by or working on behalf of the Commission. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the procedures adopted in this proceeding, (b) by facsimile, or (c) by overnight mail or messenger service. Whenever service of a document containing Market Sensitive Information 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, serves or provides in discovery a document that includes Market Sensitive Information (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 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.

6. Selection of Reviewing Representatives. Each MP and NMP selecting a Reviewing Representative shall first identify its proposed Reviewing Representative to the Disclosing Party. Any designated Reviewing Representative has a duty to disclose to the Disclosing Party any potential conflict that puts him/her in violation of Decision 06-12-030. A resume or curriculum vitae is reasonable disclosure of such potential conflicts, and should be the default evidence provided in most cases.

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

8. Maintaining Confidentiality of Market Sensitive Information. Each Reviewing Representative shall treat Market Sensitive Information as confidential in accordance with this Nondisclosure Agreement and the Non-Disclosure Certificate executed pursuant to Paragraph 7 and 8 hereof. Market Sensitive Information shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) Reviewing Representatives who have executed Non-Disclosure Certificates; (ii) Reviewing Representatives' paralegal employees and administrative personnel, such as clerks, secretaries, and word processors, to the extent necessary to assist the Reviewing Representatives, provided that they shall first ensure that such personnel are familiar with the terms of this Nondisclosure Agreement, and have signed a Non-Disclosure Certificate, and (iii) persons employed by or working on behalf of the Commission. Reviewing Representatives shall adopt suitable measures to maintain the confidentiality of Market Sensitive Information they have obtained pursuant to this Nondisclosure Agreement, and shall treat such Market Sensitive Information in the same manner as they treat their own most highly confidential information. Reviewing Representatives shall be liable for any unauthorized disclosure or use by their paralegal employees or administrative staff. In the event any Reviewing Representative is requested or required by applicable laws or regulations, or in the course of administrative or judicial proceedings (in response to oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any of Market Sensitive Information, they shall immediately inform the Disclosing Party of the request, and the Disclosing Party may, at its sole discretion and cost, direct any challenge or defense against the disclosure requirement, and the Reviewing Representative shall cooperate in good faith with such party either to oppose the disclosure of the Market Sensitive Information consistent with applicable law, or to obtain confidential treatment of them by the person or entity who wishes to receive them prior to any such disclosure. If there are multiple requests for substantially similar Market Sensitive Information in the same case or proceeding where a Reviewing Representative has been ordered



to produce certain specific Market Sensitive Information, 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.

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

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

(a) 11. Return or Destruction of Market Sensitive Information. Market Sensitive Information shall remain available to Reviewing Representatives until the later of the date that an order terminating this proceeding becomes no longer subject to judicial review, or the date that any other Commission proceeding relating to the Market Sensitive Information is concluded and no longer subject to judicial review. If requested to do so in writing after that date, the Reviewing Representatives shall, within fifteen days of such request, return the Market Sensitive Information (including Notes of Market Sensitive Information) to the Participant that produced them, or shall destroy the materials, except that copies of filings, official transcripts and exhibits in this proceeding that contain Market Sensitive Information, and Notes of Market Sensitive

Information may be retained, if they are maintained in accordance with Paragraph 8. Within such time period each Reviewing Representative, if requested to do so, shall also submit to the Disclosing Party an affidavit stating that, to the best of its knowledge, all Market Sensitive Information and all Notes of Market Sensitive Information have been returned or have been destroyed or will be maintained in accordance with Paragraph 8. To the extent Market Sensitive Information is not returned or destroyed, it shall remain subject to the Nondisclosure Agreement. In the event that a Reviewing Representative to whom Market Sensitive Information is 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 this proceeding, every such person shall continue to be bound by the provisions of this Nondisclosure Agreement and the Non-Disclosure Certificate.

12. Dispute Resolution. All disputes that arise under this Nondisclosure Agreement, including but not limited to alleged violations of this Nondisclosure Agreement and disputes concerning whether materials were properly designated as Market Sensitive Information shall first meet and confer in an attempt to resolve such disputes. If the meet and confer process is unsuccessful, the involved parties may present the dispute for resolution to the Assigned ALJ or the Law and Motion ALJ.

13. Other Objections to Use or Disclosure. Nothing in this Nondisclosure Agreement shall be construed as limiting the right of a party, the Commission Staff, or a state governmental agency covered by Paragraph 12 from objecting to the use or disclosure of Market Sensitive Information on any legal ground, such as relevance or privilege.

14. Remedies. Any violation of this Nondisclosure Agreement shall constitute a violation of an order of the CPUC. Notwithstanding the foregoing, the parties reserve their rights to pursue any legal or equitable remedies that may be available in the event of an actual or anticipated disclosure of Market Sensitive Information.

15. Withdrawal of Designation. A Disclosing Party may agree at any time to remove the “Market Sensitive Information” 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.

16. Interpretation. Titles are for convenience only and may not be used to restrict the scope of this Nondisclosure Agreement.

**REQUESTING PARTY**

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date: \_\_\_\_\_

**DISCLOSING PARTY**

By: \_\_\_\_\_  
Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date: \_\_\_\_\_

\_\_\_\_\_

**ATTACHMENT TO MODEL NONDISCLOSURE AGREEMENT****BEFORE THE PUBLIC UTILITIES COMMISSION****OF THE STATE OF CALIFORNIA**

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

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**NON-DISCLOSURE CERTIFICATE**

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

By: \_\_\_\_\_

Title: \_\_\_\_\_

Representing: \_\_\_\_\_

Date: \_\_\_\_\_

Signed: \_\_\_\_\_

Name \_\_\_\_\_

Title: \_\_\_\_\_

Organization: \_\_\_\_\_

Dated: \_\_\_\_\_

**(END OF APPENDIX A)**

**APPENDIX B**

Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date \_\_\_\_\_

Title: \_\_\_\_\_  
Representing: \_\_\_\_\_  
Date: \_\_\_\_\_

Entered: \_\_\_\_\_

Administrative Law Judge

Date: \_\_\_\_\_

(END OF