Decision 07-07-044 July 26, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Develop Additional Methods to Implement the California Renewables Portfolio Standard Program.	Rulemaking 06-02-012 (Filed February 16, 2006)

ORDER GRANTING LIMITED REHEARING OF DECISION 07-05-028, MODIFYING DECISION, AND DENYING REHEARING OF DECISION, AS MODIFIED.

I. SUMMARY

The Utility Reform Network (TURN), The Green Power Institute (GPI) and The Union of Concerned Scientists (UCS) timely filed a joint application for rehearing of Decision (D.) 07-05-028 alleging the decision errs because it conflicts with relevant statues and Commission rules, including those established in Rulemaking (R.) 05-06-040 concerning the implementation of Senate Bill (SB) 1488 and D. 06-06-066 as modified by D.07-05-032,[1] and D.06-12-030.

The Alliance for Retail Energy Markets (AReM) filed a response to the application for rehearing. PacifiCorp and Sierra Pacific Power Company (Sierra) filed a joint response. PacifiCorp and Sierra contend that they have been exempted from the requirements of Public Utilities Code[2] section 454.5, including subdivision (g), by D.04-02-044 and D.03-07-011. AReM asserts that the allegations raised in the joint application for rehearing are premature and without merit. AReM essentially argues that D.07-05-028 is a policy decision, rather than legal and thus there is no error, and further

[1] Hereinafter referred to as "modified D.06-06-066."

[2] Hereinafter, all statutory references are to the Public Utilities Code, unless otherwise indicated.

that since no Commission can bind a future Commission, the Commission's decisions have essentially no precedential value so that any earlier Commission decisions are to an extent, irrelevant. Further, AReM contends that ESPs are not subject to section 454.5(g) because they are not electrical corporations.

We have reviewed each and every allegation raised by TURN, UCS and GPI and are of the opinion that there is merit to the arguments presented on the issue of access of non-market participants to confidential information. Accordingly, for the reasons discussed below, we shall grant a limited rehearing of D.07-05-028, and modify the decision as set forth below.

II. BACKGROUND

D.07-05-028 implements subdivision (b) of section 399.14.[3] Evidentiary hearings were held in R.06-02-012. The record in this underlying proceeding also includes the May 2006 evidentiary hearing in R.04-04-026, regarding renewables procurement standards (RPS) using contracts of less than 10 years. Amongst other things, D.07-05-028 requires load-serving entities (LSEs) obligated under the RPS program to enter into long term contracts and/or short term contracts with new facilities for energy deliveries equivalent to at least one-quarter of one percent of that LSE's prior

[3] Section 399.14(b) provides, in relevant parts:

> The [C]ommission may authorize a retail seller to enter into a contract of less than 10 years' duration with an eligible renewable energy resource, subject to the following conditions:
>
> (1) No supplemental energy payments shall be awarded for a contract of less than 10 years' duration. The ineligibility of contracts of less than 10 years' duration for supplemental energy payments pursuant to this paragraph does not constitute an insufficiency in supplemental energy payments ….
>
> (2) The [C]ommission has established, for each retail seller, minimum quantities of eligible renewable energy resources to be procured either through contracts of at least 10 years' duration or from new facilities commencing commercial operations on or after January 1, 2005.

year's retail sales if such LSE intends, for any RPS compliance purpose, to count deliveries from short term contracts with existing RPS-eligible facilities. In addition, D.07-05-028 contains language denying those deemed to be "non-market participants" and Commission staff, access to contracts and other compliance filings under section 399.14 that have been deemed to be confidential material.

III. DISCUSSION

The joint applicants for rehearing, TURN, UCS and GPI, contend that D.07-05-028 denies them relevant information that they are entitled to receive. Specifically, they argue that the rationale for the denial in D.07-05-028 as set forth at pages 28-29 is unlawful because it conflicts with rules established in R.05-06-040 concerning the implementation of SB 1488 and modified D.06-06-066, and D.06-12-030. The language at issue is contained in the text of D.07-05-028 at pages 28-29:

> … TURN asks that non-market participants, in addition to Commission staff, receive copies of contracts and other documentation of compliance with § 399.14(b)(2). For the large utilities, such information (i.e., contracts and other documentation] is already available through participation in procurement review groups (PRGs). We decline to create quasi-PRGs for ESPs, CCAs and small and multi-jurisdictional utilities and will not require documentation to be provided to non-market participants.

In the case of public access to public documents, under the California Public Records Act (CPRA),[4] we may determine on a *case-by-case basis* whether information should be exempted from public disclosure if we find the evidence establishes that the public interest weighs in favor of keeping the data confidential.[5]

[4] Chapter 3.5 (commencing with section 6250) of Division 7 of Title 1 of the Government Code.

[5] The CPRA is not a discovery statute restricted to any particular action or proceeding. Rather, it applies in all circumstances and no underlying proceeding is required; thus, no party status of any sort or relevancy to subject matter in a proceeding is necessary for one seeking disclosure of information submitted to and/or maintained by the state government.

(Govt. Code, § 6255, subd. (a).)[6] The procedure applicable in the case of requests made under the CPRA is not necessarily the same as that applicable for purposes of discovery amongst parties in a Commission proceeding. SB 1488, which is the subject of R.05-06-040, requires the Commission to examine our practices under sections 454.5 and 583 and the CPRA "to ensure that the [C]ommission's practices under these laws provide for meaningful public participation and open decisionmaking." (Stats. 2004, ch. 690, § 1 (Sept. 22, 2004).) Further, Article I of the California Constitution was amended in late 2004 to add section 3 which provides in part: "(1) The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." Generally, information upon which we base our decisions is publicly available. Pursuant to this constitutional provision, all statutory, case law or other authority in effect as of November 5, 2004, which would include the amendments to section 399.14 at issue in D.07-05-028 (as well as SB 1488, sections 454.5(g) and 583, and the CPRA), must be broadly construed in order to "further[] the people's right of access, and narrowly construed if it limits the right of access." In addition, all statutory, case law or other authority adopted thereafter that limits access "shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." (Cal. Const., art. I, § 3, subd. (b)(2).)

There are no provisions in section 399.14(b) requiring withholding of information submitted pursuant to the statute so to the extent that D.07-05-028 results in the denial of discovery to parties the premise does not follow from the statute. To the

[6] The CPRA also provides specific exemptions for statutory privileges, such as, e.g., the official information, attorney-client, or trade secret privileges. "Two exceptions to the general policy of disclosure are set forth in the [CPRA]. Section 6254 lists 19 categories of disclosure-exempt material. These exemptions are permissive, not mandatory. The Act endows the agency with discretionary authority to override the statutory exceptions when a dominating public interest favors disclosure." (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 652.) Therefore, even if there is a statutory confidentiality privilege that may be applicable to information filed with a state agency, such information may still be deemed public if the agency determines the public interest in disclosure outweighs the public interest in keeping the information confidential under the relevant privilege.

extent it is an interpretation of section 399.14, it cannot be supported by the plain language of the statute, does not comply with the requirements of Article I, section 3 of the California Constitution, and does not appear to take into account the discovery rights of parties in Commission proceedings.

Further, the language is not supported by earlier Commission decisions concerning procurement. For example, in *Re Order to Implement the California Renewables Portfolio Standard Program* (2004) ___ Cal.P.U.C.3d ___, slip. op. D.04-07-029,[7] 2004 Cal.PUC Lexis 353, *54, the Commission stated:

> In R.01-10-024, the prior procurement rulemaking, we have consistently sought to provide reasonable access to information to all interested parties. Among other things, we have adopted a series of Protective Orders, which provide interested parties, including market participants under certain conditions, with access to confidential information. [footnote omitted] We intend to continue to provide this same type and degree of access and transparency in the instant rulemaking.

(*Id*. at pp. 38-39.)

With respect to parties in Commission proceedings, there is no question that we have adopted rules in R.05-06-040 that specifically permit parties that have been designated by the Commission to be "non-market participants" discovery of all confidential market sensitive information provided such parties agree to abide by the Commission's confidentiality process which, by modified D.06-06-066, and D.06-12-030 may be a non-disclosure agreement and/or protective order. In addition, modified D.06-06-066 adopts, among other things, matrices that establish what information may be entitled to confidential treatment and places the burden of proof on the entity claiming confidentiality. (Modified D.06-06-066, at pp. 2, 79 Ordering Paragraph No. 2, and Appendices A and B.) Appendix A of modified D.06-06-066 contains the matrix for Investor-Owned Utilities (IOUs) and Appendix B is the matrix for Energy Service

[7] R.04-04-026.

Providers (ESPs). Modified D.06-06-06, and D.06-12-030 contemplate use of a protective order or other confidentiality agreement for parties seeking discovery of information that falls within the definitions set forth in the matrices. Regarding information that may be confidential and not market sensitive and/or not included in a matrix, Ordering Paragraph No. 3 of modified D.06-06-066 provides:

> For data not included in the matrix, a party seeking confidential treatment shall continue to file a motion pursuant to Law and Motion Resolution ALJ-164 or any successor [r]ule seeking leave from the Commission to retain such material under seal. The filing party shall bear the burden of proving that its information deserves such treatment. Boilerplate assertions of a need for confidentiality are not appropriate. Rather the producing party must cite the legal basis for confidential protection, along with facts showing the consequences of release. It must also show that aggregation, redaction, or other similar methods are inadequate to protect the data.

Although D.07-05-028 does not specify the particulars of the information sought by TURN, it refers to contracts and other documentation of compliance with section 399.14(b)(2). Presumably the contracts and some if not all of the other documents at issue are market sensitive and/or will be claimed to be confidential. In any event, under the rules established in D.05-06-040 as articulated in modified D.06-06-066, the burden is on the party arguing information is entitled to be withheld from the public and entitled to confidential treatment to prove the public interest favors confidential treatment. (Modified D.06-06-066, *supra*, at p. 76 Conclusions of Law Nos. 5-7, p.78 Conclusion of Law No. 24, and pp. 79-82 Ordering Paragraphs Nos. 1-13; accord Govt. Code § 6255.) These rules apply in all Commission proceedings. With respect to subdivisions (a) and (c) of section 399.14, modified D.06-06-066 provides in Conclusions of Law Nos. 19 and 20 at page 77:

> 19. Section 399.14(a)(2)(A) provides confidentiality for the results of a competitive solicitation only until the solicitation is complete. This is a very narrow confidentiality

> requirement that does not change our general conclusion that most RPS information should be public.
>
> 20. Section 399.14(c)(3)(B), which provides certain confidentiality protection to ESP end-user retail customer contracts, which confidentiality is provided in the Matrices, has no bearing on our general conclusion in this decision that to the maximum extent possible RPS data should be public.

Modified D.06-06-066, and D.06-12-030 generally follow the standard process applied in various legal proceedings and venues, including at the Commission, for discovery of confidential relevant information by requiring the parties to agree to maintain the confidentiality of the information via use of a protective order and/or confidentiality agreement.

If parties in procurement proceedings already have relevant information (because e.g., they are participants in PRGs, etc.) then there may be no need for such parties to obtain duplicate copies of the same information and a discovery request for duplicate information may be considered to be burdensome and oppressive to the responding party, unless, of course, such parties are forbidden by a protective agreement order from using it in another proceeding. However, not all parties, including some of those parties that have been determined to be non-market participants, necessarily have means other than discovery in proceedings in which they are parties, to material and relevant information that may be confidential; therefore, the assumption in D.07-05-028 is flawed. Further, TURN states that it was not seeking the creation of "quasi-PRGs" for ESP, CCAs and small and multi-jurisdictional utilities, but rather was asserting its discovery rights under the various laws and rules set forth above.

AReM's response that D.07-05-028 is a policy decision and that Commission decisions have no precedential value is without merit. Regardless of whether the Commission announces policy in a decision, action by the Commission through a decision is a legal act. The point of an application for rehearing is to point out

legal errors, which is what the joint applicants for rehearing have done. (§ 1732, Commission Rules of Practice and Procedure, rule 16.1(c)[8] .) In addition, the question is not whether a Commission can bind future Commissions, rather, the Commission is required, among other things, to issue decisions in a lawful manner that comply with the state and federal constitutions, are supported by substantial record evidence, and that contain findings and conclusions. ESPs are subject to modified D.06-06-066 and D.06-12-030 and AReM may not use a response to an application for rehearing to initially and/or collaterally challenge the decisions issued in R.05-06-040. (See §§ 1709, 1731.)

PacifiCorp and Sierra's argument that they have been exempted from the requirements of section 454.5(g) is not relevant since section 454.5 is not the only statute or rule at issue concerning disclosure and/or discovery of confidential information. By D.04-02-044 and D.03-07-011 the Commission exempted Sierra and PacifiCorp, respectively, from the requirements of section 454.5 pursuant to the exemption set forth in section 454.5(i) since both public utilities serve less than 500,000 customers in California. The various provisions of law regarding discovery are not effected by either utility's filing exemption to the provisions of section 454.5.

Finally, in all cases, Commission staff is entitled to fully access all information at the time it is submitted to the Commission and it is inappropriate to require Commission staff to enter into non-disclosure agreements concerning such information. (Modified D.06-06-066 at pp. 53-54, 70, 77 Conclusion of Law No. 17.)[9] Thus, we are concerned that D.07-05-028 does not accurately describe the Commission's staff's right of access to documents submitted to the Commission.

[8] Code of Regs., tit. 20, §16.1, subd. (c).

[9] "We disagree with AReM, however, that we should notify Commission staff that they must execute non-disclosure agreements and agree to be bound by § 2112 when receiving ESP data. *It is inappropriate to require Commission staff—including DRA—to enter into private contractual agreements with entities we regulate or that otherwise come before us*." (Modified D.06-06-066 at pp. 53-54, emphasis added.)

For these reasons we believe good cause exists for granting a limited rehearing of D.07-05-028. We will modify D.07-05-028 to cure the error, and deny rehearing of D.07-05-028, as modified.

IV. CONCLUSION

We have reviewed each and every allegation of error raised by the joint applicants for rehearing and are of the opinion that there is merit to their allegation that D.07-05-028 errs because it conflicts with relevant statues and Commission rules including those established in R. 05-06-040. Accordingly, we grant limited rehearing of D.07-05-028 in order to modify the decision to correct the error in the manner set forth in the ordering paragraphs below.

For the foregoing reasons we grant a limited rehearing of D.07-05-028.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing of D.07-05-028 is granted.
2. D.07-05-028 is modified as follows:

a. The following language on pages 28-29, after the sentence "Finally, TURN asks that non-market participants, in addition to Commission staff, receive copies of contracts and other documentation of compliance with § 399.14(b)(2)" is deleted in its entirety:

> "…For the large utilities, such information is already available through participation in procurement review groups (PRGs). We decline to create quasi-PRGs for ESPs, CCAs, and small and multi-jurisdictional utilities and will not require documentation to be provided to non-market participants."

And the following language is added in its place:

> "Non-market participants are entitled under Public Utilities Code section 454.5(g) to access confidential market sensitive information submitted to the Commission in a procurement plan or resulting from or related to the Commission's approval of a procurement plan provided such entities agree to abide by the Commission's confidentiality procedures at all times. Further, it is standard practice at the

Commission, for parties seeking discovery of confidential relevant information to be required to maintain the confidentiality of the information via use of a protective order and/or confidentiality agreement. Pursuant to D.06-06-066 as modified by D.07-05-032 in R.05-06-040, parties that are deemed to be non-market participants are entitled to discovery of confidential market sensitive information provided they agree to abide by the Commission's confidentiality procedures. The Commission's staff at all times has the right of access to documents submitted to the Commission and no confidentiality order or agreement is required for Commission staff. (D.06-06-066 as modified by D.07-05-032 at pp. 53-54.)

3. Rehearing of D.07-05-028, as modified, is hereby denied.

This order is effective today.

Dated July 26, 2007, at San Francisco, California.

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