Decision 09-03-046 March 26, 2009

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

ORDER GRANTING LIMITED REHEARING OF DECISION 06-12-030 AND DENYING REHEARING OF DECISION IN ALL OTHER RESPECTS

I. INTRODUCTION

Decision (D). 06-12-030 is the second decision issued in Rulemaking (R.) 05-06-040, concerning implementation of Senate Bill (SB) 1488, and resolves questions posed by D.06-06-066 as modified by D.07-05-032 (Modified D.06-06-066). In D.06-12-030, we defined the terms market participant, non-market participant and reviewing representative. D.06-12-030 further assigned some, but not all, of the parties who submitted comments in R.05-06-040 to the categories of market or non-market participants.

Pursuant to these decisions, we adopted a process that protects the confidentiality of market sensitive information submitted to the Commission in accordance with Public Utilities Code section 454.5, subdivision (g).[1] This process is applicable whether the confidential market sensitive information is

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

sought via a request pursuant to the California Public Records Act (CPRA), or pursuant to discovery in a Commission proceeding. In D.06-12-030, we expanded the process adopted in Modified D.06-06-066, as it pertains to parties in Commission proceedings, to permit a limited discovery process for reviewing representatives of active market participant parties to access confidential market sensitive information, provided such parties agree to abide by the Commission's confidentiality requirements. D.06-12-030 also adopts rules for who may be a reviewing representative. In addition, among other things, D.06-12-030 prohibits simultaneous representation in various Commission proceedings by attorneys, expert witnesses, and/or consultants of parties that are non-market and market participants.

Californians for Renewable Energy (CARE) timely applied for rehearing of D.06-12-030 alleging the decision errs in finding that the California Independent Systems Operator (CAISO), as well as California Manufacturers and Technology Association (CMTA) and California Large Energy Consumers Association (CLECA), are non-market participants. It also challenges D.06-12-030 by alleging that two Ninth Circuit Court of Appeal decisions impact the Federal Energy Regulatory Commission's (FERC) regulation of the bulk power market and affect the CAISO's tariffs. We have reviewed each and every allegation of error raised by CARE and find, as discussed below, that they are without merit. Accordingly, we deny CARE's application for rehearing.

Three associations, Independent Energy Producers Association (IEP), the Cogeneration Association of California (CAC) and the Energy Producers and Users Coalition (EPUC) have also timely filed applications for rehearing of D.06-12-030. IEP filed separately, and CAC and EPUC filed jointly. All three have been determined by D.06-12-030 to be market participants. In their joint application for rehearing of D.06-12-030, CAC and EPUC allege that D.06-12-030 defines market participant so broadly that it is not in compliance with SB 1488, because under the definition adopted, all parties in a Commission

proceeding in which the adopted rules apply cannot meaningfully participate and the adopted rules create a process that does not foster open decision-making. They contend that because of the designation of market participant, they are treated disadvantageously and are denied a process they contend is due. CAC and EPUC also take issue with the rationale provided by D.06-12-030 for their individual designations as a market participants. Additionally, CAC and EPUC claim that D.06-12-030 errs in not defining what constitutes a *de minimis* threshold of participation in the natural gas market and further that there is inadequate evidentiary support for the determination that participation in the natural gas market above a *de minimis* threshold of one megawatt (1 MW) is enough to render EPUC a market participant. Also, CAC and EPUC contend that there is inadequate support for the 1MW *de minimis* threshold adopted for market participants in the electric market. In addition, CAC and EPUC allege D.06-12-030 is internally inconsistent in its treatment of reviewing representatives since it permits some market participants to use them and forbids others from the same process. Moreover, they contend that D.06-12-030 errs in its inconsistent treatment of simultaneous representation by attorneys, as well as expert witnesses and consultants, of market and non-market participants, and that the determination is not supported by the record.

IEP raises similar concerns in its application for rehearing. IEP contends that all parties are entitled to comparable access to information that forms the basis for Commission decisions, including decisions based at least in part on confidential market sensitive information. Like CAC and EPUC, IEP also challenges as arbitrary and capricious, and without adequate evidentiary support, the determination that the 1MW figure adopted from D.06-06-064 for load serving entities with local resource adequacy requirements of less than 1MW establishes a level of participation in the electric market that is truly *de minimis* in nature. IEP also charges that D.06-12-030 mischaracterizes IEP's interest in being a party in various Commission proceedings and takes issue with what it characterizes as an

unsupported inference in D.06-12-030 that IEP participates in Commission proceedings because of improper motives. In addition, IEP argues that even if it did have improper motives—which it claims not to have—such motives should not affect its First Amendment right *as a party* to petition the government, and that by D.06-12-030, it is unlawfully prevented from doing so. IEP further contends that by prohibiting it from using any process available to other parties to access confidential market sensitive information, D.06-12-030 creates an unlawful prior restraint on its First Amendment rights. IEP contends that D.06-12-030 denies it due process and equal protection, which IEP contends are fundamental rights. IEP alleges that the restrictions D.06-12-030 places upon its rights are not narrowly tailored to further a legitimate state interest and, further, because D.06-12-030 violates fundamental rights, IEP alleges the decision must be based on a compelling state interest, which, according to IEP, it is not. Like CAC and EPUC, IEP believes that the reviewing representative exception is illusory, particularly since it is denied to IEP, and IEP alleges that D.06-12-030 is arbitrary and capricious in denying it the reviewing representative option, and also in the decision's treatment of those representing market participants.

The allegations by CAC/EPUC and IEP concern how the rules adopted in this underlying proceeding will affect the proceedings in which they will be applied (generally ratemaking proceedings).[2] Pacific Gas and Electric Company, San Diego Gas and Electric Company and Southern California Edison Company jointly (collectively hereinafter the IOUs) filed an opposition to the applications for rehearing.

We have reviewed each and every allegation raised by CAC/EPUC and by IEP and are of the opinion that there is merit to some of the arguments

[2] The IOUs point out that no one is seeking to prevent the applicants for rehearing from participating in the underlying rulemaking proceeding or any "quasi-legislative" proceedings; however, the focus of the arguments presented by IEP, CAC and EPUC concern their status as intervenor parties in Commission proceedings in which the adopted rules shall apply.

presented by those applicants for rehearing. Accordingly, for the reasons discussed below, we shall grant a limited rehearing of D.06-12-030; however in all other respects the applications for rehearing are denied.

II. DISCUSSION

A. CARE Application for Rehearing

CARE argues that two Ninth Circuit Court of Appeals decisions rendered in December 2006, *Public Utility District No. 1 of Snohomish County Washington v. FERC* ("*PUD v. FERC*") (9th Cir. 2006) 471 F.3d 1053, and *Public Utilities Commission of California v. FERC* ("*PUC v. FERC*") (9th Cir. 2006) 474 F.3d 587, "effectively gutted FERC's decade-old approach to fostering bulk power markets …." (CARE application for rehearing at pp. 1, 4, 6.)[3] CARE's assertions, the bulk of which are indicative of CARE's objection to matters at FERC, rather than D.06-12-030, are based on its interpretation of the two Ninth Circuit Court of Appeal orders, and CARE does not adequately explain how or why they are relevant to D.06-12-030, other than to argue that the CAISO should be considered to be a market participant. CARE cites no legal authority in support of its contention that we erred in making our determination that the CAISO is a non-market participant. Section 1732 requires rehearing applicants to "set forth

[3] Since the filing of CARE's application for rehearing, the United States Supreme Court granted writs of certiorari in each case. Upon review of *PUD v. FERC*, on June 26, 2008, the Supreme Court issued its decision in *Morgan Stanley Capital Group Inc.* v. *Pub. Util. Dist. 1* (2008) 128 S.Ct. 30, 168 L.Ed.2d 807, 2008 US Lexis 9070, 76 USLW 3154 (hereinafter *Morgan Stanley*). *Morgan Stanley* addressed two issues about the scope of the "*Mobile-Sierra"* doctrine: (1) does the *Mobile-Sierra* presumption of justness and reasonableness apply to a contracting party's challenge to a wholesale electricity rate before FERC under section 206 of the Federal Power Act (FPA) where FERC had not previously had the opportunity to review the rate without the presumption; and (2) does the presumption apply equally to challenges to purchasers and sellers. In *Morgan Stanley*, the United States Supreme Court affirmed the Ninth Circuit Court of Appeals' judgment in *PUD v. FERC* on alternate grounds, and the Ninth Circuit Court of Appeals subsequently vacated its opinion in that case on November 3, 2008. On June 27, 2008, the Supreme Court granted certiorari and vacated the judgment in *PUC v. FERC*, and the Ninth Circuit vacated its opinion in that case on December 4, 2008. Both *PUD v. FERC* and *PUC v. FERC* have been remanded to FERC.

specifically the ground or grounds on which the applicant considers the decision or order to be unlawful…." (See also, Commission Rules of Practice and Procedure, rule 16.1(c)[4].) CARE alleges that the finding in D.06-12-030, that the CAISO is a non-market participant, means that both the Commission and California ratepayers have liability for any of the CAISO's actions. It also alleges that it constitutes a violation of section 206, subdivision (a) of the Federal Power Act (FPA). The two Ninth Circuit Court of Appeal cases *PUD v. FERC* and *PUC v. FERC*, that CARE relies on are not a subject of D.06-12-030, nor concern issues before the Commission in the underlying proceeding. Further, CARE's analysis of the two Ninth Circuit Court cases is erroneous under *Morgan Stanley*. In addition, CARE does not explain why D.06-12-030 violates the FPA in its determination that the CAISO is a non-market participant; nor does it explain how its allegation that the CAISO is violating federal laws is properly before this Commission. CARE contends that the CAISO meets the FERC's definition of market participant, and cites the FERC's final rule on rehearing reaffirming and clarifying its basic determinations in Order 2000, in Docket RM99-2-001, issued on February 25, 2000, at pages 22-23:

> … We note that the definition of market participant is not framed in terms of generation ownership, but includes entities that sell or broker electric energy, or that provide ancillary services to the RTO [i.e., Regional Transmission Organization[5]]. Any entity that sells or brokers electric energy, directly or through an affiliate, is a market participant. Also… any entity that provides generation-related ancillary services to the RTO or its customers is also a market participant.

[4] Hereinafter all references to the Commission's Rules of Practice and Procedure shall be to "rule." The rules can be found at Title 20 of the California Code of Regulations.

[5] RTOs are defined in Title 18 of the Code of Federal Regulations section 35.34, subdivision (b)(1). (18 CFR § 35.34(b)(1) and § 35.34(j).) RTOs must be independent of any market participant. The CAISO is an example of a RTO.

By the plain words in the above referenced definition, RTOs are not market participants. Under FERC definitions, the CAISO would *not* be a market participant. The FERC definition of market participants is specifically defined in section 35.34, subdivision (b)(2) of Title 18 of the Code of Federal Regulations:

> 2) Market participant means:
>
> (i) Any entity that, either directly or through an affiliate, sells or brokers electric energy, or provides ancillary services to the Regional Transmission Organization, unless the Commission finds that the entity does not have economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions; and
>
> (ii) Any other entity that the Commission finds has economic or commercial interests that would be significantly affected by the Regional Transmission Organization's actions or decisions.

Thus, CARE's allegation that the CAISO is a market participant under the FERC definition is without merit.

CARE also argues that the CAISO is a market participant under the definition of market participant adopted by D.06-12-030, because it buys and sells more than a *de minimis* amount of energy (which has been defined in D.06-12-030 and Modified D.06-06-060, as capacity in excess of 1 MW per year), and it is 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. CARE further argues that the CAISO has the ability to influence the electric market through its access to confidential information and that as a result, D.06-12-030 violates FERC rules under the Energy Policy Act of 2005 (EPA 2005). We did not adopt, nor are we required to adopt, the FERC definition of market participant or the definition provided in Title 18. CARE cites nothing contrary. CARE has not established

that the CAISO manipulated the market because it had access to confidential information (or for any other reason). The purpose of the rehearing process is to alert the Commission to error, not to create a forum for unfounded allegations. (§ 1732, rule 16.1.)

CARE asserts that the CAISO is a market participant because it represents the interests of market participants and not the interests of non-market participant retail ratepayers, or low-income people of color retail ratepayers. As proof, CARE references the CAISO's website biographical descriptions of its Board of Governors and argues that there is no evidentiary support for our conclusion that the CAISO is a non-for-profit public benefit corporation. The allegation is unfounded. In fact, the CAISO website, upon which CARE relies, plainly states: "…the California ISO performs as the impartial link between power plants and the utilities that provide electricity to 30 million Californians. The California ISO is the not-for-profit public benefit corporation that matches the demand for electricity the instant it is needed with just the right amount of megawatts." CARE has failed to establish that we erred in determining that the CAISO is a not-for profit public benefit corporation. In addition, to the extent that CARE may be intending to allege that footnote 44 of D.06-12-030 raises these issues, its allegation is prohibited by section 1732 and rule 16.1(c). Further, nothing about the statement in footnote 44, "Indeed, the CAISO is more akin to a state agency than it is to a market participant," gives rise to any meritorious claim of error.

CARE reasons that since the CAISO is governed by market participants, retail ratepayers are effectively disenfranchised and claims that "[i]t fundamentally becomes an issue of voting rights once the Commission defines the CAISO as a [non-market participant] since retail ratepayers are effectively disenfranchised from voting on the selection of the Board of Governors …." CARE infers that the CAISO impairs its due process and equal protection rights, as well as rights under Title VI of the Civil Rights Act of 1965, and Government

Code section 65040.12(c), but does not provide specific allegations of error. Section 1732 requires applicants for rehearing to specify the ground or grounds upon which they claim a decision is erroneous. CARE has failed to do so in this instance. We are concerned that CARE is using the rehearing process to allege that the CAISO and FERC are violating its rights not at the Commission, but in other forums, which is an impermissible use of an application for rehearing of a Commission decision. (§ 1732; rule 16.1(c).)

CARE has not established that D.06-12-030 provides for, or is based on, racial, ethnic or other prohibited classifications. CARE has not established that D.06-12-030 subjects anyone to discrimination under any program or activity receiving federal assistance; and, as discussed, CARE has failed to state with specificity the errors it alleges D.06-12-030 contains regarding the Voting Rights Act and Government Code, including failing to allege what provision of the Voting Rights Act it contends is at issue, or why Government Code section 65040.12 is applicable to the underlying proceeding, in violation of section 1732 and rule 16.1(c). CARE has further failed to comply with section 1732 and rule 16.1(c), by not providing any discussion of, or support for, how its due process or equal protection rights are allegedly violated by the challenged decision. CARE failed to adequately articulate its allegation of error and has not demonstrated that the challenged decision's determination that the CAISO is a non-market participant "is an illegal abuse of discretion."

Finally, CARE also challenges the findings in D.06-12-030 that CMTA and CLECA are non-market participants, claiming the findings violate FERC orders and the EPA 2005. However, aside from agreeing with Pacific Gas and Electric Company's (PG&E's) opening comments opining that CMTA and CLECA have members who are market participants or who work with market participants, CARE does not bolster its argument with any legal or evidentiary

support, again in violation of section 1732 and rule 16.1.[6] CARE's application for rehearing is without merit.

B. IEP and CAC/EPUC Applications for Rehearing

IEP and CAC/EPUC challenge D.06-12-030 on various constitutional grounds, including due process and equal protection and IEP also raises First Amendment concerns. The applicants for rehearing argue that each of these constitutional rights has been recognized by the courts as fundamental rights and, therefore, the Commission must establish a compelling interest for its actions. The focus of all arguments by the applicants for rehearing is on their position as parties in the Commission proceedings in which the rules adopted in the underlying rulemaking are to be applied.

1. Due Process and Equal Protection.

IEP and CAC/EPUC challenge what they argue is different treatment afforded to parties in the same proceeding, alleging that the action by the Commission in adopting the different processes, and also denying any process to them, is a denial of their due process and equal protection rights. IEP claims that it would not object if we provided no access to market-sensitive information *provided* that the same prohibition applied to all parties (regardless of whether they are market or non-market participants) and we did not rely on that information as a basis for a decision. However, confidential market sensitive information may be information that we are likely to rely on in reaching a decision in the proceedings affected by the rules we have adopted in this rulemaking proceeding. Further, section 454.5(g) requires us to protect market sensitive

[6] CARE may be inferring that, under the FERC definition, entities such as CMTA and CLECA may be market participants; however, it has not explicitly made that argument. In addition, CARE has not shown that we have either erred or abused our discretion by not applying the FERC definition. CARE has failed to show that we are without discretionary authority to determine the Commission's own definition of market participant. (See e.g., SB 1488, and §§ 454.5(g), 701.)

information and to provide non-market participants who agree to abide by our confidentiality processes with that information.

The first issue we address is the question of whether we may categorize parties as either market or non-market participants. CAC/EPUC complain that the definitions we adopted for market participant and non-market participant apply, not only to the public, but to parties in a variety of Commission proceedings, and that the definitions wrongly focus on an entity's annual participation in the electric market, and in the case of a trade association, activities in Commission proceedings as an 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, and not specifically on whether the entity is a ratepayer or has ratepayer members. In addition, CAC/EPUC take issue with the criteria D.06-12-030 adopts, as well as its implementation, for exempting a party from the definition of market participant. As we discussed thoroughly in the challenged decision, we believe that distinguishing the public, as well as parties in Commission proceedings, as market or non-market participants is necessary for consumer protection purposes and in light of section 454.5(g). We believe that we are well within our jurisdictional authority and expertise to adopt the classifications of market and non-market participant, and also to apply those categories to parties. The applicants for rehearing have not established that our doing so is erroneous. (*Wood v. Public Utilities Com.* (1971) 4 Cal.3d 288, 291-292.)

The applicants for rehearing contend that the categorization in D.06-12-030 has an added effect for parties in Commission proceedings so that parties in the same proceeding who are seeking discovery of/access to confidential market sensitive information are treated differently than other parties based upon a category we may discretionarily assign to them. In their response, the IOUs contend that our focus should be on persons who are "similarly situated." CAC/EPUC allege that the definitions of market and non-market participant

adopted in this docket are used by D.06-12-030 to bar select parties, categorized as market participants in affected Commission proceedings, from access to information made available to other parties, including other MP parties, and thus precludes the select parties from utilizing "critical information on which the Commission bases decisions affecting those parties' interests."[7] Consequently, IEP and CAC/EPUC claim that under D.06-12-030, they cannot fully participate in all the phases of a Commission proceeding to the same extent as other parties. They argue that unlike other parties who have access to and use of confidential information, they are precluded from using the information in the same manner, such as, for example, to cross examine witnesses, present testimony, file comments on the proposed decision, and to apply for rehearing of a decision. Applicants for rehearing reject the notion that they are similarly situated to other parties (including those who are classified as market participants, such as the IOUs), and allege there is no compelling, or even rational, basis for alleged discrimination and denial of process.

Further, applicants for rehearing allege that a rationale for denying them the only process available for access to confidential market sensitive information is erroneously based on alleged incorrect interpretations of SB 1488 and section 454.5(g), in violation of Article 1, section 3 of the state constitution. Pursuant to subdivision (b)(2) of Article I, section 3 of the California Constitution, all statutory, case law or other authority in effect as of November 5, 2004, which would include SB 1488, sections 454.5(g), and 583, as well as 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."

[7] Ordering Paragraph No. 2 of D.06-12-030 declares that a market participant may be denied access to market sensitive procurement data. The applicants for rehearing do not contest a denial of confidential market sensitive information to non-parties.

We reject any notion that protection of confidential market sensitive information is not mandated by subdivision (g) of section 454.5, or that our authority to protect such information is in any way limited by SB 1488. Further, the applicants for rehearing have not established that market participants are entitled to "access" all information just because others may have such information; however, parties in hearings are entitled to use formal discovery to gain access to relevant information. Under our procedural rules, parties in our proceedings are entitled to discovery of relevant information.[8] 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. Over time in this proceeding, and after the filing of the pending applications for rehearing, we developed a model protective order and confidentiality agreement (e.g., D.08-04-023). Consequently, we do not ignore these more recent developments in reviewing the arguments raised by the pending applications for rehearing, and acknowledge the validity of some concerns raised by the applicants for rehearing regarding their ability to meaningfully participate with other active parties in proceedings affected by rules adopted in the underlying proceeding. The applicants for rehearing have argued that protective orders and agreements are a time-tested and sufficient means of protecting confidential market sensitive information and reference the FERC's use of protective orders in

[8] Pursuant to our Rules of Practice and Procedure, rule 10.2, "… any party may obtain discovery from any other party regarding any matter, not privileged, that is relevant to the subject matter involved in the pending proceeding, if the matter either is itself admissible in evidence, or appears reasonably calculated to lead to discovery of admissible evidence, unless the burden, expense, or intrusiveness of that discovery clearly outweighs the likelihood that the information sought will lead to the discovery of admissible evidence." In all circumstances, a party seeking discovery must initially establish the relevance of the information to the pending proceeding, or that the requested information will lead to the production of relevant information.

appropriate cases.[9] Of course, there is a difference between gaining access to government records, such as through the CPRA, and meaningful discovery among parties in a proceeding. In their response, the IOUs correctly note that the overwhelming majority of data submitted by them is now being made publicly available in Commission proceedings; however, they do not adequately address the issues raised by the applicants for rehearing, i.e., whether the "discrete subset of data [that] is restricted" is relevant, and whether select parties not provided with a process to discover such information may meaningfully participate along with other parties who may have access to such information. The IOUs fail to address this difference in their response to the applications for rehearing, and we believe their point that an intervenor may choose to intervene is immaterial, since the constitutional requirements of due process and equal protection are applicable to various categories of Commission proceedings (see e.g., § 1701.1, et seq.), and are not based on the choice one has to become a party, but on the fact that certain constitutional guarantees adhere to various proceedings.[10] (Cal. Const. Art. 12, §

[9] We note that the FERC, in *Mojave Pipeline Company*, 38 FERC P61,249 at 61,842 (1987) in adopting new discovery rules, stated that "[a] claim that information is confidential business information may form the basis for an order denying or limiting discovery …if the documents will give the party seeking discovery an unfair business advantage, the information should be treated confidentially." The FERC further stated that "[i]f it is established that the requested information should be treated confidentially, the ALJ must determine if reasonable protective measures are available to alleviate the harm that could result from disclosure…Since in most instances a protective order can protect against harmful disclosure, a party claiming that confidential material should be withheld entirely will be expected to show that a protective order will not adequately safeguard its interests and that this concern outweighs the need for the material to develop the record….Examples of limitations on di[s]closure that may be included in a protective order include: (1) requiring disclosure of a summary of the relevant information only; (2) limiting the people who can review the material to outside counsel or consultants; (3) prohibiting access to the information by employees who could directly use the information to a competitive advantage …; (4) requiring an independent third party to review the material and summarize the information; and (5) deleting non-essential but sensitive information prior to disclosure." (38 FERC P61,249; 1987 FERC Lexis 2665.)

[10] Pursuant to rule 1.4, a person may become a party to a proceeding by: (1) filing an application, petition, or complaint; (2) filing (i) a protest or response to an application or petition, or (ii) comments in a rulemaking; (3) entering an appearance at a prehearing conference or hearing; or (4) filing a motion to become a party. Subdivision (b) of rule 1.4 requires such a person to fully disclose the persons or entities in whose behalf the filing, appearance or motion is made and the interest of such persons or entities in the proceeding, and to show that the contentions will be reasonably pertinent to the issues already presented. In all cases, the assigned ALJ has discretion, where circumstances warrant, to deny party status or limit the degree to which a party may participate in the proceeding. (Rule 1.4(c).)

2.) The IOUs correctly point out that the data at issue is "highly market-sensitive data" and that misuse of such data could result in harm to California's ratepayers. This is true, and it is why we determined in Modified D.06-06-066 that such information is confidential and subject to our confidentiality process. The ultimate questions before us are whether that information is relevant to the proceedings in which the rules adopted in this rulemaking shall apply and if so, whether all parties, including those categorized as market participants, are constitutionally entitled to discover that relevant information subject to our confidentiality procedures. We believe the applicants for rehearing have established a need for a limited rehearing on these questions.

Accordingly, we shall grant a limited rehearing on the question of whether market participants who are parties in proceedings affected by the rules adopted in this underlying proceeding—and in particular, the applicants for rehearing—may meaningfully participate in such proceedings if they are denied discovery of relevant information, including confidential market sensitive information. Further the question must be addressed whether market participants who are active parties in proceedings affected by the rules adopted in this underlying proceeding may meaningfully participate in such proceedings if they are permitted to use reviewing representatives for purposes of discovery of relevant confidential market sensitive information, provided such reviewing representatives agree to abide by all required confidentiality procedures, such as those adopted in D.08-04-023. We direct the applicants for rehearing and other parties desiring to participate in the limited rehearing to address the question of whether meaningful participation by parties in proceedings affected by the rules adopted by D.06-12-030, regardless of categorization of the parties, mandates a right of access by all parties to all of the information available to other parties in the proceeding, including confidential information subject to protection and withheld from public disclosure, and if so or if not, based on what laws. Comments should include a discussion of the difference between public or other

"access" to information versus discovery of relevant information, and whether that distinction is pertinent to the question of meaningful participation by all parties in which the rules adopted in this proceeding apply, regardless of classification.[11] We further direct the applicants for rehearing and other parties desiring to participate in the limited rehearing to address the question of whether circumstances warrant a denial of party status to entities who may be in a position to misuse confidential market sensitive information, and if so, under what circumstances and pursuant to what laws. In addition, we direct the applicants for rehearing and other parties desiring to participate in the limited rehearing to address the question of whether we may utilize a "limited participation" status for certain parties and if so, what such status entails, including, but not limited to, what constitutes fair and adequate participation and whether that satisfies the requirement of "meaningful participation," as well as any additional requirements such as those pertaining to proceedings which may be affected by the adopted rules and based on what laws.[12] Finally, the applicants for rehearing and other parties desiring to participate in the limited rehearing are directed to address whether a protective order or protective agreement, including the MPO, may adequately safeguard the interests of the party claiming the market sensitive information is confidential, particularly if other parties are permitted some form of access to, or discovery of, that same information in situations where the parties seeking the confidential information may be competitors.

[11] Note that in Application 07-12-021 we denied access to confidential market sensitive information that was deemed to be of limited relevance and had no bearing on the central issue in the proceeding, to a market participant party who was a direct competitor of the applicant. We also determined that the applicant did meet its burden in establishing that competitive harm could occur if the market participant party were to gain access to the market sensitive information. (May 16, 2008 ALJ ruling in *Re Application of Pacific Gas & Electric Company for Authorization to Enter into Long-Term Natural Gas Transportation Arrangements with Ruby Pipeline*., A.07-12-021.)

[12] Comments should include references to and discussion of relevant state and federal laws, including, but not limited to, the Public Utilities Regulatory Policy Act of 1978 (e.g., 16 U.S.C.S. § 2631(a), authorizing any consumer to intervene and participate as a matter of right in electric utility ratemaking proceedings).

2. First Amendment.

In addition, according to IEP, the outcome of D.06-12-030's determination not to permit IEP to access confidential market sensitive information, including via the reviewing representative option, inhibits its First Amendment right to petition the government for redress of a grievance. IEP also alleges that the rules adopted in D.06-12-030 place a prior restraint upon its First Amendment right to petition the government, since it is banned under all circumstances from accessing confidential market sensitive information in proceedings in which it is a party even where such information may be available to other parties through use of a Commission authorized confidentiality process.

IEP also contends the restriction placed on trade associations and their representatives unlawfully interferes with their First Amendment right to petition the Commission in the only forum available to address certain issues. In addition, IEP asserts the rules prohibit it from fully participating in any proceedings where this restriction may be made, and the restriction constitutes an unlawful prior restraint in violation of the First Amendment since it is applicable to all proceedings in which the rules adopted in the underlying proceeding apply, and in which IEP may participate. IEP did not specifically address the question of whether the use of a reviewing representative would raise similar concerns. We note that the rules adopted do not foreclose IEP from participating in the affected proceeding, though we are cognizant that the effect of the restrictions may, depending on the circumstances, inhibit IEP from participating to the full extent that other parties may participate, and find the application for rehearing presents an appropriate opportunity to explore further, the concerns expressed by IEP regarding the questions of prior restraint and its ability to fully participate with other parties in the appropriate forum regarding the proceedings affected by the

adopted rules.[13] Accordingly, we believe a limited rehearing is warranted on the question of whether and if so, how, use of a reviewing representative by IEP and/or other market participant parties, may or may not impede those parties' First Amendments rights; and we direct the applicants for rehearing and other parties desiring to participate in the limited rehearing to address these questions.

3. Criteria for market participant designation.

In CAC's case, D.06-12-030 determines that CAC is a market participant based on its membership, which is comprised of cogenerators. D.06-12-030 concludes that CAC and its members have an ability to materially affect the market price of electricity in part because they participate in the electricity market above the 1 MW threshold. With respect to EPUC, D.06-12-030 notes that its members are comprised of oil and gas companies who may materially affect the market price of electricity because their participation in the natural gas market is above a *de minimis* threshold, and that EPUC generally files its pleadings jointly with CAC. EPUC argues that D.06-12-030 does not contain any findings regarding what constitutes a *de minimis* threshold in the natural gas market. CAC/EPUC argue that the 1 MW figure D.06-12-030 adopts as a threshold for participation which materially affects the electricity market is not based on adequate evidence and is unreasonable, as applied here, since it

[13] The IOUs in their response point to *Fair Political Practices Com. v. Superior Court* (1979) 25 Cal.3d 33, 46, for the proposition that although a right of petition is a fundamental right, depending on the circumstances, a state need not always justify limitations on that right under a strict scrutiny standard. However, while some limitations on lobbying of government officials need only be based on a rational relationship to the government's restriction, the court also found that because "governmental requirements will often constitute a significant interference with the fundamental right to petition, the strict scrutiny doctrine is applicable." (25 Cal.3d at pp. 48-49.) In such cases, "[t]he requirements may be upheld only if the state demonstrates sufficiently important interests and the statute 'is closely tailored to effectuate only those interest….' "Even if the compelling state interest is present, the restriction on First Amendment activities must be drawn with narrow specificity to avoid arbitrary and unnecessary curtailment of the protected freedom. [Citations omitted.]" (*Id.* at p. 49.) Here we are reviewing whether a party is denied use of a process established for access to (and/or discovery of) allegedly relevant but commercially sensitive information, and the question is whether, and if so how, the limitation interferes with the right of an intervenor classified as a market participant to petition the government via its party status.

pertains to D.06-06-064 which determined that load serving entities with local resource adequacy requirements of less than 1MW need not comply with filing requirements. D.06-06-064 determined that a level of participation in the electric market of less than 1MW is truly *de minimis* in nature. However, CAC/EPUC allege use of the load serving capacity cut-off, for calculating what constitutes a level of participation that materially effects the electric market, is arbitrary and capricious because D.06-06-064 did not base its determination for adopting the cut-off for the same purpose in which we have utilized it herein.

Whether an entity has *de minimis* participation, and what constitutes material participation for purposes of classification as a market participant, are technical questions well within our special expertise and broad authority to determine. However, applicants for rehearing raise a valid point; and, we believe, that a further opportunity for the parties to address the issue and to provide supplemental evidentiary support is called for on the question of what level of participation in the gas and/or electric markets constitutes material participation, and what can be categorized as *de minimis* for purposes of determining whether an entity is a market participant. In light of this opportunity, we want to make it clear that we reject any notion that we are without authority to reach a final determination of what level of participation establishes material participation in these markets. We also underscore our duty and commitment 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. Thus, our purpose in ordering a limited rehearing is to focus on the question of whether participation based on 1 MW or less of capacity in the electric and/or gas market establishes *de minimis* participation, and if not, what amount does and why. We direct the applicants for rehearing and other parties desiring to participate in the limited rehearing to address this issue.

4. Criteria for reviewing representatives and whether trade associations may use reviewing representatives.

IEP, CAC and EPUC are trade associations who are also market participants. (D.06-12-030 at pp. 28-32.) In reviewing IEP's classification, we stated that we were not "prepared to give certain 'reviewing representatives' within IEP access to market sensitive information…." (*Id*. at p. 29.) Noting that all of CAC's members are cogenerators we stated "[a] large number of cogenerators, or an organization representing them, has a far clearer potential to materially impact the market price of electricity." (*Id*., at p. 30.) In discussing EPUC's classification we noted that although its members consist of large energy consumers, many of them are active in the natural gas market. Further, we noted that EPUC regularly participates jointly in Commission proceedings with CAC and that "if we find that one of two associations is a market participant, the finding will apply to both EPUC and CAC as long as they continue to participate jointly in Commission proceedings." (*Id*. at pp. 31-32.)[14]

CAC/EPUC contend that the criteria we adopted of who may be a reviewing representative of a market participant are unreasonably narrow and contrary to the reviewing representative requirements adopted by the FERC, which, among other things, permit trade associations to use reviewing representatives and also permit employees of market participants to act as reviewing representatives provided they comply with the FERC's confidentiality procedures. CAC/EPUC also argue that although Conclusion of Law No. 6 of D.06-12-030 permits market participants to use reviewing representatives to gain access to confidential market sensitive information it is contradicted by Conclusion of Law No 7 which excludes trade associations such as CAC and

[14] We also stated; "[A]n association representing cogenerators or 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. Collectively, CAC's and EPUC's memberships may well have the ability to materially affect the market price of electricity." *(Id*. at p. 32.)

EPUC from obtaining access.[15] Further, CAC/EPUC contend that there is inadequate evidentiary support for the restriction applicable to trade associations regarding access to confidential market sensitive information, and that the restriction is unreasonably and unnecessarily limiting and discriminatory of those labeled market participants, and not based on substantial evidence.

Notwithstanding Conclusion of Law No. 7, Ordering Paragraph No. 5 permits market participants to use reviewing representatives, provided they meet four criteria.[16] Pursuant to those criteria: reviewing representatives may not be an employee of any market participant, nor may they supervise an employee of a market participant who is engaged in the purchase, sale or marketing of electrical energy or capacity or natural gas, bids on or purchase power plants, or consults with or advise others in connection with any such activities. Two additional criteria require reviewing representatives to use market sensitive information only for the purpose of participating in a formal Commission proceeding, and they must execute a non-disclosure agreement and be subject to a protective order.

It is clear from Ordering Paragraph No. 1 that our definition of a market participant may include a trade association. It is also clear that market participants may use reviewing representatives in order to gain access to confidential market sensitive information provided the reviewing representatives comply with the four criteria. None of our ordering paragraphs prohibit a trade association from using reviewing representatives, although we agree that Conclusion of Law No. 7 may be interpreted to

[15] Conclusion of Law No. 7 provides that in determining whether a trade association may have access to market sensitive information, we should examine whether: (1) the organization's primary focus in Commission proceedings is as an 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; and/or (2) a majority of the organization's members purchase, sell or market energy or capacity at wholesale; bid on, own, or purchase power plants; or bid on utility procurement solicitations; and/or (3) the organization was formed for the purpose of obtaining market sensitive information; and/or (4) the organization is controlled or primarily funded by a person/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.

[16] Ordering Paragraph No. 5 does not mention trade associations but concerns entities what are classified as market participants.

prohibit a trade association that is a market participant from utilizing a reviewing representative. Thus, it is possible that a trade association market participant that satisfies the requirements for reviewing representative may otherwise be denied access to confidential market sensitive information, even if such entity is an active party in a Commission proceeding. This question is similar to the issue discussed in our section 1 above. Accordingly, we grant a limited rehearing on this issue. This will provide the parties with a further opportunity to address the issue, and to provide supplemental evidentiary support for their positions, regarding trade association parties who are classified as market participants and who seek to use reviewing representatives for purposes of discovery in proceedings which are affected by the rules adopted in the underlying rulemaking. We direct the applicants for rehearing and other parties desiring to participate in the limited rehearing to address the question of whether meaningful participation by parties in proceedings affected by the rules adopted by D.06-12-030, regardless of categorization of the parties, mandates a right of discovery which includes access by all parties who agree to abide by our confidentiality processes, including those consisting of trade associations classified as market participants, to *all* of the information available to other parties in the proceeding, and if so or if not, based on what laws (the issue of whether relevant information necessarily includes all information accessed by non-market participants should also be addressed).

We will address the further questions raised by the applicants for rehearing concerning our criteria for reviewing representatives below in the next section concerning simultaneous representation by attorneys and others acting as reviewing representatives.

5. Simultaneous representation.

Ordering Paragraph No. 6 applies equally to licensed attorneys and non-attorneys, including those employed by or otherwise under the direction of, licensed attorneys, and prohibits all of them, in their capacity as representatives, from viewing, utilizing or otherwise accessing market sensitive information if they are simultaneously representing market and non-market participants in proceedings concerning procurement, resource adequacy, RPS, or the wholesale purchase, sale or marketing of energy or

capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations. (D.06-12-030 at p. 53.) Consequently, D.06-12-030 prohibits attorneys and consultants engaged in simultaneous representation of market and non-market participants in the aforementioned Commission proceedings from acting as reviewing representatives. (D.06-12-030 at pp. 45-46.) (However, simultaneous representations of clients that are classified as market and non-market participants but are parties in other proceedings than those aforementioned, or in other forums, are not bared by D.06-12-030.)

The applicants for rehearing challenge the simultaneous representation prohibition rule adopted by D.06-12-030 as unnecessarily burdensome, improperly interfering with business interests, and unlawfully discriminatory. CAC/EPUC also argue that the prohibition in D.06-12-030 against duly licensed attorneys, in addition to consultants who would otherwise be permitted (but for the simultaneous representation rule) to represent market participants, provided they meet the requirements of reviewing representatives and are not otherwise in violation of relevant rules (such as e.g., the Rules of Professional Conduct of the State of California which apply to licensed attorneys), has no evidentiary support and is arbitrary and capricious.

Parties in Commission proceedings are not required to be represented by licensed attorneys. Thus not all of the representatives of parties participating in Commission proceedings are licensed attorneys, subject to the Rules of Processional Conduct and the relevant provisions of the Business and Professions Code.[17] For

[17] For example, licensed attorneys are forbidden from advising clients to violate any valid law, rule or ruling of any tribunal. (Rules Prof. Conduct, rule 3-210.) Further, licensed attorneys may not represent interests adverse to a client without providing written disclosure to the client that the attorney has a relationship with an adverse interest in the same matter, or the attorney knows or should know that s/he had had a relationship with a party or witness in the same matter and the previous relationship would substantially affect the attorney's representation, or the attorney has had a relationship with another person or entity that would be affected substantially by resolution of the matter, or the attorney has had an interest in the subject matter of the representation. (*Id.*, rule 3-310.) In the case of potential simultaneous representation, an attorney shall not, without the written consent of each client, accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or accept or

(footnote continued on next page)

example, pursuant to Business and Professions Code section 6068(e), attorneys are required to "… maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." Of course, those consultants and others hired by and acting under the direction of a licensed attorney are employees and/or agents of the attorney, and under the Rules of Professional Conduct of the State of California, that attorney has a duty to supervise their work. (Rules Prof. Conduct, rule 3-110.) Failure of the attorney to supervise such non-attorneys consultants, experts or other employees or agents may be a failure to act competently and is subject to discipline by the California State Bar. (*Id*.; see also, *Trousil* v. *State Bar* (1985) 38 Cal.3d 337, 342; *Palomo* v. *State Bar* (1984) 36 Cal.3d 785, 795 .) "The ethical prohibition against acceptance of adverse employment involving prior confidential information includes potential as well as actual use of such previously acquired information. [Citations omitted.]" (*Woods* v. *Superior Court* (1983) 149 Cal.App.3d 931, 934.)

In addition, of course, every person or entity that conducts business before this Commission, regardless of whether they are licensed as an attorney or not, is required to act ethically. (Commission Rules of Practice and Procedure, rule 1.) Further, anyone who "fails to comply with any part of any order, decision, rule, regulation, direction, demand, or requirement of the [C]ommission or any [C]ommissioner…may be in contempt of the Commission…," and is punishable by the [C]ommission for contempt in the same manner and to the same extent as contempt is punished by courts of record." (Pub. Util. Code § 2113.)[18] Finally, we note that in the case of licensed attorneys, the Rules of Professional Conduct forbid attorneys, "… without the informed written consent

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continue representation of more than one client in a matter in which the interests of the clients actually conflict; or represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter. (*Id*., rule 3-310(c)(1)-(3).)

[18] Of course, other remedies and punishments are also available for failure to comply with a Commission order, etc. In addition to contempt, monetary penalties, as well as punishment as a misdemeanor are available enforcement tools. (§§ 2107, 2110 (utilities), and §§2111, 2112 (non-utilities).)

of the client or former client," from "accept[ing] employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment." (See also, Bus. & Prof. Code § 6068(e)(1).) If adequate disclosure is precluded, then informed written consent is similarly precluded in all such cases.

In reviewing the issues set forth in the rehearing applications filed by IEP and CAC/EPUC, we are of the opinion that a limited rehearing is warranted on this issue to develop a fuller record regarding the following: (1) why some market participants should not have access to market sensitive information (for purpose of discovery or participating in the procurement proceeding), if others will have access through a reviewing representative and by entering into a protective order; (2) whether other means may be used, aside from total prohibition, to address the Commission's concern for inadvertent disclosure, and if so, what are they (comments should include recent developments in this proceeding such as the adoption of the MPO); (3) whether the Commission should reconsider and/or change (and if so why and how), its prohibition of simultaneous representation by an attorney or consultant of non-market and market participants in Commission proceedings that involve procurement, resource adequacy, RPS, the wholesale purchase, sale or marketing of energy or capacity, the bidding on or purchasing of power plants, or bidding on utility procurement solicitations; and (4) whether a representative of a non-market participant that has access to confidential market sensitive information should be prohibited from acting as a reviewing representing of a market participant in any Commission proceeding and if so, for how long?[19]

The granting of this limited rehearing does not change our responsibilities under section 454.5(g), which mandates that we ensure the confidentiality of market

[19] Because we are granting a limited rehearing on issues concerning the denial of access of market sensitive information by certain market participants, we do not further address the First Amendment and other constitutional issues raised in the IEP and CAC/EPUC applications for rehearing.

sensitive information. We believe the record establishes that there is ample reason for categorizing entities as market or non-market participants, and for requiring parties who are market participants to use reviewing representatives and abide by our confidentiality procedures if they want access to confidential market sensitive information, provided they can establish that the information they seek is relevant to the proceeding, per our discovery rules. We have the authority to establish necessary procedures to insure confidentiality if it is warranted and established in the record of a proceeding. Further, as discussed in D.06-12-030, and earlier in Modified D.06-06-066, our objectives include protecting the State of California from market manipulation and from experiencing another Energy Crisis like the one of 2000-2001, as well as ensuring the confidentiality of market sensitive information, while facilitating the directives of SB 1488.

III. CONCLUSION

For the reasons discussed above, CARE's application for rehearing of D.06-12-030 is denied. However, in response to IEP's rehearing application and CAC/EPUC's joint rehearing application, a limited rehearing on issues discussed above and set forth in Ordering Paragraph No. 2 herein shall be granted; in all other respects, the applications for rehearing are denied.

THEREFORE, **IT IS ORDERED** that:

1. A limited rehearing of D.06-12-030 is granted in response to the applications for rehearing filed by Independent Energy Producers Association and jointly by Cogeneration Association of California and Energy Producers and Users Coalition.

2. The limited rehearing of D.06-12-030 herein ordered shall concern:

    a. Whether all parties, including those categorized as market participants, are constitutionally entitled to discover confidential market sensitive information if it is relevant to the proceedings in which the rules adopted in this rulemaking shall apply, subject to our confidentiality procedures.

    b. Whether market participants who are parties in proceedings affected by the rules adopted in this underlying proceeding—and in particular, the applicants for rehearing—may

meaningfully participate in such proceedings if they are denied discovery of relevant information.

c. Whether market participants who are active parties in proceedings affected by the rules adopted in this underlying proceeding may meaningfully participate in such proceedings if they are permitted to use reviewing representatives for purposes of discovery of relevant confidential market sensitive information, provided such reviewing representatives agree to abide by all required confidentiality procedures, such as those adopted in D.08-04-023.

d. Whether meaningful participation by parties in proceedings affected by the rules adopted by D.06-12-030, regardless of categorization of the parties, mandates a right of access by all parties to all of the information available to other parties in the proceeding, and if so or if not, based on what laws; comments should include a discussion of the difference between mere "access" to information versus discovery of relevant information, and whether that distinction is pertinent to the question of meaningful participation by all parties in which the rules adopted in this proceeding apply, regardless of classification.

e. Whether circumstances warrant a denial of party status for entities who may be in a position to misuse confidential market sensitive information, and if so, under what circumstances and pursuant to what laws.

f. Whether the Commission may utilize a "limited participation" status for certain parties and if so, what such status entails, including but not limited to what constitutes fair and adequate participation and whether that satisfies the requirement of "meaningful participation," as well as any additional requirements, such as those pertaining to proceedings which may be affected by the adopted rules, and based on what law(s).

g. Whether a protective order or protective agreement may adequately safeguard the interests of the party claiming the market sensitive information is confidential particularly if other parties are permitted some form of access to or discovery of that same information in situations where the parties seeking the confidential information may be

competitors; comments should include relevant laws, rules, regulations and relevant Commission and/or court decisions.

h. Whether and if so, how, use of a reviewing representative by IEP and/or other market participant parties in proceedings affected by the rules adopted in this proceeding may or may not impede those parties' First Amendments rights in said proceedings; and whether such an impediment, if it exists, is permissible and if so under what standards.

i. Whether participation in the electricity and/or gas market(s) in excess of one megawatt constitutes a material ability to affect market price and if not, what amount does and what amount constitutes a *de minimis* participation level and why?

j. Whether meaningful participation by parties in proceedings affected by the rules adopted by D.06-12-030, regardless of categorization of the parties, mandates a right of discovery which includes access by all parties, including those consisting of trade associations classified as market participants, to all of the relevant information available to other parties in the proceeding, and if so or if not, based on what laws.

k. Whether some market participants should not have access to relevant market sensitive information (for purpose of discovery or participating in a proceeding in which the rules adopted in the underlying proceeding apply), while other parties may have access through a reviewing representative and by entering into a protective order, and if so based on what laws.

l. Whether other means may be used, aside from total prohibition of access by select parties, to address the Commission's concern for inadvertent disclosure, and if so, what are they (comments should include relevant laws as well as recent developments in this proceeding such as the adoption of the MPO).

m. Whether prohibition of simultaneous representation by an attorney or consultant of non-market and market participants should apply in all Commission proceedings that involve procurement, resource adequacy, RPS, the wholesale purchase, sale or marketing of energy or capacity, the bidding on or purchasing of power plants, or bidding on

utility procurement solicitations, and if so or if not, why and when.

n. Whether a representative of a non-market participant that has access to confidential market sensitive information should be prohibited from acting as a reviewing representing of a market participant in any Commission proceeding and if so, which proceedings, why, and for how long.

3. The Executive Director shall serve upon the parties in R.05-06-040 a copy of this order.

4. An ALJ shall hold a prehearing conference setting forth the schedule for the limited rehearing. To the extent there are related legal issues not set forth in this order, that warrant consideration during the limited rehearing, the parties should inform the ALJ assigned to the rehearing what those issues are specifically, so that the schedule may incorporate an opportunity to file briefs on those legal issues, as necessary.

5. Pending the outcome of the limited rehearing, the ordering paragraphs of D.06-12-030 shall remain in effect.

6. The application for rehearing of D.06-12-030 filed by Californians for Renewable Energy is denied.

7. Except as set forth in Ordering Paragraph Nos. 1 and 2, the applications for rehearing filed by Independent Energy Producers Association and jointly by Cogeneration Association of California and Energy Producers and Users Coalition, are denied in all other respects.

This order is effective today.

Dated March 26, 2009, at San Francisco, California.

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