

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Promote Policy  
and Program Coordination and Integration in  
Electric Utility Resource Planning.

Rulemaking 04-04-003  
(Filed April 1, 2004)

Order Instituting Rulemaking to Promote  
Consistency in Methodology and Input  
Assumptions in Commission Applications of  
Short-run and Long-run Avoided Costs,  
Including Pricing for Qualifying Facilities.

Rulemaking 04-04-025  
(Filed April 22, 2004)

**ADMINISTRATIVE LAW JUDGES' RULING  
ON PROTECTIVE ORDER AND REMAINING DISCOVERY DISPUTES**

Certain discovery disputes, including the terms of a proposed protective order for this proceeding, were heard before Administrative Law Judge Julie Halligan and Administrative Law Judge (Law and Motion) John E. Thorson on January 27, 2005. These issues were raised by (a) the Cogeneration Association of California's and the Energy Producers and Users Coalition's (jointly CAC/EPUC) Motion for Order Compelling Compliance with Federal Law and Production of Complete, Non-Redacted Responses to Data Requests (Dec. 9, 2004); (b) the Independent Energy Producers Association's (IEP's) Motion to Compel Responses to Data Requests (Jan. 4, 2005); (c) the

CAC/EPUC's Draft Protective Order (Jan. 21, 2005); and (d) other parties' responses to and comments on these pleadings.

The pending matters were taken under submission at the conclusion of the January 27th hearing, and the parties concerned about a protective order were ordered to meet and confer in an effort to agree on an appropriate order or, at least, to narrow their differences. The parties filed separate reports on February 4, 2005, indicating partial success in reaching agreement on the terms of a protective order. See Pacific Gas and Electric Company's Proposed Protective Order for Use in Rulemaking 04-04-025 (Feb. 4, 2005); California Cogeneration Council, Comments of the California Cogeneration Council Regarding the Proposed Protective Orders (Feb. 4, 2005).

On March 4, 2005, the California Cogeneration Council (CCC) filed a Motion to Compel Responses to Data Requests. Pursuant to a March 8, 2005, ALJ ruling shortening time for responses to the CCC's Motion, responses were filed on March 10, 2005. In its Motion, the CCC reports that despite frequent meet and confer sessions conducted between January 22, 2005 and the date of the Motion, and the initial belief that it was making progress on both the data requests and Protective Order, the discussions have reached a standstill.

In this ruling, we first address the dispute over the terms of a protective order. We then review and determine the unresolved, contested discovery requests.

### **1. Protective Order**

The debate over the protective order between the utilities and the Qualifying Facilities (QF) generators, which participate in the market, has narrowed to the degree of access QF representatives will have to the utilities' confidential, market-sensitive information. In their most recent proposals, the

utilities agree to allow a limited number of attorneys and experts working for QF parties' to have access to this information—but only if these individuals forego involvement in certain energy marketing activities for three years. The QF representatives oppose this restraint and argue that it would detrimentally impact the careers of these individuals.

The Commission often faces the tension between transparency of information and the potential adverse impacts the release of some information may have on markets and ultimately ratepayers. As recently directed by the state legislature, the Commission will soon open a rulemaking to revisit confidentiality issues. See SB 1488, 2004 Cal. Stat. Ch. 690 (Sept. 22, 2004) (“to ensure that the Commission’s practices . . . provide for meaningful public participation and open decision making”). In its most recent statement on confidentiality in R.04-04-003, the Commission reiterated its “desire to move towards more open and transparent decision making . . . .”<sup>1</sup>

In E-3816, issued May 8, 2003, the Commission “wrestled with whether, and to what degree, to disclose [contract pricing] information submitted to us under seal” (p.2). The Commission observed that:

It is incumbent upon this Commission to keep sensitive information confidential while still making plain to the public at large the bases for Commission decisions. In the final analysis, it is the Commission’s responsibility to make decisions in the light of day, and we give that obligation great weight in determining whether commercial information is of such critical sensitivity as to override broader public concerns. (E-3816, p.2)

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<sup>1</sup> In re Rulemaking to Promote Policy and Program Coordination and Integration in Electric Utility Resource Planning, D.04-12-048 (Dec. 16, 2004).

In E-3816, the Commission also noted that it has broad discretion on disclosure issues pursuant to Public Utilities Code Section 583:

The Commission has broad discretion under Section 583 to disclose information. See, for instance, Southern California Edison Company v. Westinghouse Electric Company, 892 F.2d 778 (1989) in which the United States Court of Appeals for the Ninth District stated (at p. 783):

On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted.<sup>2</sup>

It is, in short, within this Commission's sole discretion to determine whether to release or keep confidential information submitted pursuant to § 583. The current discovery requests come at a time in which the Commission has continued to "shape and define the hybrid power market in California so as to advance the positive benefits of competition and deliver California's energy services according to the priorities of state policy" (D.04-12-048, p.3). Thus, resolution of this discovery dispute must balance both the public interest in transparency and the confidentiality issues while not impeding the development of the hybrid energy market.

Many of the discovery requests at issue concern data related to the utilities' procurement of energy, therefore Public Utilities Code Section 454.5(g) governs the manner in which we address such issues. The code provides that the

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<sup>2</sup> Resolution No. L-290, California Public Utilities Commission, 2000 Cal. PUC LEXIS 1087, June 22, 2000.

Commission “*shall 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 Office of Ratepayer Advocates (ORA) and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission” (emphasis added).

In R.04-04-003, the ALJ issued a protective order that followed FERC protective orders and allowed market participants to have access to confidential materials. However, the Commission remains protective of ratepayers who could be adversely affected if sensitive market information prepared by the utilities became available without restraint to QF marketing personnel.

Accordingly, we have prepared a protective order (Attachment A) that balances the QF parties’ need for certain information to participate meaningfully in this proceeding with the utilities need (and, implicitly, the ratepayers’ need) to prevent certain sensitive market information from being used by the QF parties’ marketing personnel in the preparation of actual bids. While market participating parties will not have access to certain proprietary information and will not have complete access to market sensitive information, non-market participants will have complete access to all information and will be able to provide the Commission with the information and arguments necessary to reach informed decisions on the substantive issues in this proceeding.

We have used the utilities’ proposal as the basis for this protective order, modified in two respects to mitigate the burden on the personnel assisting market participants in the preparation of their case. First, we have reduced the

ban on future work from three to two years. Second, we have limited such future work only if it is reasonably likely to affect California energy markets, either wholesale or retail, in a meaningful way (See Protective Order, Attachment A, at paragraph 7.)

We have also modified the utilities' proposed protective order in paragraph 12 to indicate that the Commission will determine whether Protected Materials are excluded from public inspection when actual requests are made for the information.

## **2. Discovery Requests**

The following section sets forth our rulings on all other pending discovery disputes. In most cases, the parties dispute whether the requested information may be discovered. We have resolved these disputes using, as guidance, the criteria of Code of Civil Procedure section 2017(a) (discovery of "any matter, not privileged, that is relevant to the subject matter involved in the pending action . . . , if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence"). We are also guided by the public interest balance test, as described in the California Public Records Act (CPRA), as generally described here:

Government Code Section 6255. "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

That is, even if no express exemption for particular information within the CPRA applies, and no other law restricts access, Section 6255 allows an agency to

withhold information on an ad hoc basis providing it can show that the public interest is better served by nondisclosure.

The Commission's avoided cost rulemaking stems from the requirements of the Public Utility Regulatory Policy Act of 1978 (PURPA). PURPA requires the Federal Energy Regulatory Commission (FERC) to prescribe and periodically revise rules that "require electric utilities to offer to.... (2) Purchase electric energy from [QFs]." <sup>3</sup> PURPA also requires this Commission to "implement [the FERC QF rules] for each electric utility for which it has ratemaking authority." <sup>4</sup> At issue in this rulemaking is the PURPA mandate that QFs receive payments that are just and reasonable, that do not discriminate against QFs, and that do not exceed the utilities avoided costs. <sup>5</sup>

As the QF parties note, up until 1996, short-run avoided costs (SRAC) were established pursuant to an annual proceeding in which the Commission conducted a detailed examination of the utilities' avoided costs. With electric restructuring, and Assembly Bill 1890, the process for determining SRAC was changed, as set forth in Public Utilities Code Section 390.

In their motions, the QF parties seek production of certain detailed information related to the utilities' avoided costs, including forecasted demand, load, and price data. The QF parties state that, in order to meaningfully participate in the Commission's avoided cost rulemaking, the QF parties must have access to the data necessary to calculate the utilities' avoided costs.

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<sup>3</sup> 16 U.S.C. § 824a-3(a).

<sup>4</sup> 18 U.S.C. § 824a-3(f)(1).

<sup>5</sup> 18 CFR 292.304.(a)(1 and 2).

The utilities objected to the QF parties' discovery requests for the most part with a set of standard objections including: (1) the information is trade secret in that it derives independent economic value from not being known to market participants, such as the QF parties; (2) the information is protected from discovery by the California Evidence Code Section 1060; (3) Public Utilities Code Section 454.5(g) prevents disclosure of the information to market participants; (4) CPUC General Order (GO) 66-C prohibits disclosure; and (5), the Administrative Law Judges' Ruling Regarding Confidentiality of Information and Effective Public Participation issued on April 4, 2003 in R.01-10-024 prohibits disclosure. Each of the above objections has at its core, the purpose of preventing the release of information which, using G.O. 66-C as an example, "if revealed, would place the regulated company at an unfair disadvantage."<sup>6</sup> The utilities also assert generally that the requested information is not necessary to the QF parties' participation in this rulemaking.

We grant the QF parties' motions in part, as discussed herein. First, on the issue of whether the information requested is necessary or reasonably likely to lead to the discovery of admissible evidence, we agree with the QF parties that the data sought is clearly subject to disclosure on that basis. We find no requirement that the QF parties are limited to requesting information pertaining to proposals made by the utilities or others in advance of filing testimony. The requested documents must only be reasonable likely to lead to admissible evidence related to the utilities' avoided costs. The QF parties are not prohibited from discovering relevant sources of avoided cost data simply because the

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<sup>6</sup> General Order 66-C § 2.



utilities may recommend that the Commission rely on a different source of data. The test for relevancy is not whether the utilities rely upon a particular source, but rather whether the data source is relevant overall to the Commission's consideration of avoided costs. In this case, the Assigned Commissioner's Ruling and Scoping Memo in R.04-04-025 identified the SRAC issues as follows: "the Scope of Phase 2 of this proceeding should include all SRAC pricing issues, including, but not limited to: 1) whether or not the Commission's current SRAC energy price formula, including existing time-of-delivery and line loss factors, should be replaced, and if so, what changes should be made, and 2) updating the current as-available and as-delivered capacity prices. In addition, as the Commission noted in the OIR, the scope of this phase will include an assessment of whether the formula mandated by Section 390 of the Public Utilities Code allows us to assure just and reasonable rates for the power provided by QFs."<sup>7</sup> We are unpersuaded by the utilities' arguments on this issue.

Next, we turn to the question of whether the information should be disclosed. The utilities argue that Public Utilities Code Section 454.5(g) requires both the utilities and the Commission to keep market sensitive information confidential. Section 454.5(g) provides in pertinent part:

The commission 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, . . . provided that the ORA and other consumer groups that are nonmarket participants shall be provided access to this information under confidentiality procedures authorized by the commission.

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<sup>7</sup> January 4, 2005, ACR and Scoping Memo in R.04-04-025 at 4-5.

The utilities assert that the law does not provide for making market sensitive information available to market participants under any circumstances. The utilities argue that, with reference to the legal maxim of expression unius est exclusion alterius (“the expression of one possibility thereby excludes other possibilities”), the California legislature must be presumed to have intended, by specifically mentioning that the Commission must provide the data to non-market participant parties, that the Commission must exclude market participants from access to such information even under similar confidentiality requirements.

The section sets forth two requirements. First, the Commission must adopt “appropriate procedures” to ensure the confidentiality of market-sensitive information in procurement proceedings. Second, ORA and consumer groups have a guaranteed right to this information (i.e., “shall be provided”), so long as appropriate confidentiality procedures are in place. The Commission may choose to make this market-sensitive information available to parties other than ORA and consumer groups (but is not required to do so), so long as appropriate confidentiality procedures are in place. There is no convincing indication that the legislature intended otherwise. The question for us is whether the disclosure of such information to market participants is consistent with the statutory mandate to ensure its confidentiality.

Under PURPA, a utility’s avoided cost is the cost to either generate or purchase additional power, specifically:

Sec. 292.101 (b)(6) Avoided costs means the incremental costs to an electric utility of electric energy or capacity or both which, but for the purchase from the qualifying facility or qualifying facilities, such utility would generate itself or purchase from another source. (Code of Federal Regulations)

Parties are generally in agreement that the cost of as-available energy and capacity can be determined with publicly available data. However, a complete set of publicly available data is not available with which to determine how much it might cost a utility to generate various increments of electric power. Utilities are concerned that the public availability of such information would allow market participants to more accurately determine when each utility may actually need power, which has been referred to as a utility's RNS or residual net-long (RNL) position. The Commission has previously described a utility's RNS position as "the difference between customer loads and the power already under contract to the utilities or generated from a utility-owned asset" (D.02-09-053, p.1).

Utilities are concerned that, the more market participants know about exactly when a utility has a need for a certain type or amount of power in a certain time period, the more of a price premium power sellers may attempt to extract. As part of the long-term procurement planning process, the utilities have disclosed some, but not all, information on a forecasted basis needed to calculate a utility's need for power. For example, as part of its 2004 Long-Term Procurement Plan Testimony, SCE has provided monthly forecasts of load, but did not publicly provide any forecasted energy or capacity forecasts of its resources with which to meet that load.

Further, with regard to publicly available data, we are aware that while FERC requires public utilities to file Electronic Quarterly Reports (EQRs) "summarizing the contractual terms and conditions in their agreements for all jurisdictional services (including market-based power sales, cost-based power sales, and transmission service) and transaction information for short-term and long-term market based power sales and cost-based power sales during the most

recent calendar quarter” (99 FERC 61,107, p.1). We are not, however, aware of any FERC requirement that the utilities provide similar information on a forecast basis.

Our goal in resolving the remaining discovery disputes is to make available to the parties sufficient data from which utility avoided costs may be derived, without subjecting utility ratepayers to the risk of market manipulation stemming from the misuse of market-sensitive data. In issuing the protective order, Attachment A, we have adopted appropriate procedures concerning access to certain market-sensitive information in the context of an avoided cost proceeding where QFs must have certain market information in order to participate effectively and thereby assist the Commission in its decisionmaking.

**CAC/EPUC Data Request SCE-01 #1:**

CAC/EPUC seeks SCE’s Contract Valuation Tool (CVT) model along with all associated documentation for running the model and support for the inputs used in the model. The CVT model is used to evaluate the most cost-effective periods for SCE to schedule its available contract and generation resources, identifying both optimum running periods and the value of new resources. CVT inputs include each resource’s operating characteristics (minimum and maximum operating power limits, ramp rates, minimum up and down times, start up cost, shut down cost, production cost curve, etc.) and anticipated energy and ancillary services market prices. CAC/EPUC assert that access to SCE’s CVT is directly relevant for determining both SRAC and long run avoided costs.

SCE argues that the CVT is a highly sensitive, trade secret model that would enable competitors to determine with high level of precision SCE’s hourly procurement needs and costs. SCE is particularly concerned that release of the model would allow competitors to ascertain SCE’s RNS position. The RNS

reflects the amount of electricity the utility must procure from the market. The RNS can be calculated by subtracting a utility's resources (including both contractual and utility-owned resources) from hourly system demand. The CVT model and the associated inputs would reveal SCE's RNS position. Familiarity with both the utility's demand component and the supply component would also reveal the utility's RNS position. Knowledge of the utility's RNS position may enable market participants or competitors to manipulate bid prices, or offering amounts, or take other actions resulting in potentially significant harm to the utilities' ratepayers.

As discussed above, the Commission's rules and related policies require that we strike a balance between making information available to other parties in proceeding and protecting a company's proprietary interest. CAC/EPUC's request for release of this information is denied. SCE has appropriately established why the CVT model should remain confidential, as protected proprietary information.

**CAC/EPUC Request SCE-01 Question #2:**

**CAC/EPUC Request PG&E -01 Question #2:**

CAC/EPUC requests copies of the utilities' daily energy plans and the final version of the utilities' daily energy plans for the most recent 12-month period. The plans contain a complete daily dispatch level listing by hour of all the utilities' contractual and physical electricity resources as well as estimates of load and market pricing and natural gas needs. The difference between the resources available and the load estimate is essentially the amount of energy the utility has to buy or sell for each hour.

The utilities maintain that this information could be used in the market to the disadvantage of the utilities and their ratepayers, with market participants

choosing to sell or not sell, or sell at a higher price at times of high demand, thus raising the price. This information should not be subject to disclosure because the risk to the ratepayers of releasing data delineating the utility's RNS positions outweighs the public interest in making this data available to market participants for purposes of the avoided cost rulemaking. CAC/EPUC's request for release of this information is denied.

**CAC/EPUC Request – SCE-01 #3:**

CAC/EPUC seek a fully functioning copy of the most current proprietary unit commitment models that determine the hourly dispatch level of all of SCE's physical and contractual generation resources. CAC/EPUC state that the most contentious issue in the annual determination of short-run avoided energy costs in ECAC proceedings was the commitment of a utility's resources, and that it requires the unit commitment models in order to assess the impact of the commitment of SCE's resources on its avoided costs.

SCE objects to this request by stating that the unit commitment models are trade secret, proprietary and extremely market-sensitive. SCE represents that it has not made the model public; and, if the model were made public, the information would provide market participants with hourly information regarding the likely commitment of SCE's resources under various market conditions.

This model determines the likely commitment and dispatch of SCE's resources, identifying SCE's RNS/RNL positions on an hourly basis. SCE has maintained the model as confidential and has shown why the model should remain confidential as protected proprietary information. CAC/EPUC's request for released is denied.

**CAC/EPUC Request SCE-01 #4:**

**CAC/EPUC Request PG&E -01 #3:**

CAC/EPUC request a copy, including all attachments and supporting documents, for the utilities' quarterly Short-Term Procurement Plan Compliance Reports filed to date (SCE Advice Letters 1753, 1774, 1794, 1815, and 1836; PG&E Advice Letters 2299, 2327, 2464, etc.) and any new filings that occur during the course of this rulemaking.

The utilities state that these filings contain detailed quarterly purchase and sale information submitted for review and approval by the Commission. The utilities argue that access to the historical purchase and sale information included in these filings would enable market participants to predict the utilities' RNS/RNL positions. This information is market-sensitive, in that access would provide market participants with the tools to predict the utilities' RNS/RNL positions in the near future. The data should be released only under the approved protective order.

**CAC/EPUC Request SCE-01 #5:**

**CAC/EPUC Request PG&E-01 #4:**

CAC/EPUC requests a copy of the Gas Supply Plans for the State of California Department of Water Resources (DWR) Tolling Agreements filed to date (e.g. SCE advice filings 1701, 1738, 1776, and 1817) and any new filings that occur during the course of this proceeding. CAC/EPUC argue that in order to determine if the current gas price based on the avoided gas being acquired at Malin and transported to Southern California over PG&E's gas transmission lines is still appropriate, parties must review SCE's gas procurement plans, including the location of historical or prospective purchases as well as the associated price.

Unlike in prior ECAC proceedings, the utilities now compete and negotiate directly with other market participants for contracts to acquire or provide gas or energy. These gas supply plans provide information regarding the transaction needs associated with the utilities' portfolio of DWR contracts, including dispatchable resources, for the next five years. This information is market-sensitive, and should be released only under the approved protective order.

**CAC/EPUC Request – SCE-01 #6:**

CAC/EPUC request a copy of the local reliability procurement proposal filed by SCE in Advice Letter 1832. This advice filing contains the parameters under which SCE will solicit up to 600 MW of capacity to ensure local reliability in its service territory in addition to seeking approval of a new contract form. CAC/EPUC maintain that information regarding locational benefits, including losses, is part of the avoided cost determination and therefore this advice filing contains information relevant to SCE's avoided costs.

In response, SCE argues that the confidential appendix of this filing contains the methodology SCE will use to value local area reliability contracts relative to the market. In SCE's opinion, release of this information would allow participants to devise methods to increase profits or increase the likelihood of being selected, at the expense of higher costs to ratepayers.

SCE's general statement regarding the appendix methodology is insufficient to support its request for confidentiality. We will allow SCE to submit additional comments explaining why each component of the local reliability procurement proposal filed in Advice Letter 1832 should remain confidential. SCE should attach copies of the documents sought, along with a motion for confidential treatment, for in camera review.



**CAC/EPUC Request SCE-01 #7:**

**CAC/EPUC Request PG&E-01 #5:**

CAC/EPUC request copies of transition capacity contracts executed by SCE and PG&E. CAC/EPUC explain that as this proceeding will judge the reasonableness of the utilities' avoided cost capacity prices, the utilities' capacity needs and capacity prices are relevant. Following the meet and confer sessions, PG&E and CAC/EPUC determined that the contracts CAC/EPUC sought were authorized in D.03-08-066 and contained in an ERRA filing that CAC/EPUC is seeking under CAC/EPUC Request PG&E-01 #6. CAC/EPUC modified its request to seek a complete, non-redacted copy of PG&E Advice Letter 2427-E. This advice letter contains the procedures under which PG&E was to acquire capacity to meet the needs for summer of 2004.

The utilities represent that market participants could use this capacity contract information to estimate the utilities' market position. In the case of expired contracts, however, the information may be up to three years old and reflects positions and the market conditions at that time. SCE's argument that expired contract information would benefit current participants is speculative. CAC/EPUC's request as modified is granted. Transition capacity contracts currently in effect should be released under the approved protective order. Expired transition capacity contracts shall be released without a protective order.

**CAC/EPUC Request SCE-01# 8:**

**CAC/EPUC Request PG&E-01 #6:**

CAC/EPUC requests complete, non-redacted versions of all documents filed by SCE in eight separate dockets. CAC/EPUC's request is too broad and its need for each of the documents is unsubstantiated. CAC/EPUC's request is denied without prejudice.

**CAC/EPUC Request SCE-01 #9:**

**CAC/EPUC Request PG&E-01 #7:**

CAC/EPUC initially requested a spreadsheet detailing monthly deliveries (kWhs), capacity payment and energy payment made to each QF for the last two years (2002 and 2003), including the QF identification number, contract termination date, and pricing options under which the project is being paid. Following the meet and confer sessions held on January 19-20, 2005, CAC/EPUC modified the request to limit it to kWh and payment data (energy and capacity) aggregated by two categories (thermal and renewable), three pricing provisions within each category (SRAC, fixed energy and LRAC) by month for 2005 and 2006. CAC/EPUC states that this data is necessary to determine the amount of resources needed by SCE in lieu of QF purchases.

The utilities assert that market participants armed with this information may be able to determine the utilities' net short positions. While the information requested is limited to QF purchases, to the extent that one component of the RNS calculation is publicly available, revealing the remaining components of the calculation would allow competitors to determine a utility's RNS position. In addition, the utilities argue that prior protective orders issued in R.01-10-024 protect this information from disclosure.

The utilities must respond, but should narrow their responses to only make available historical information regarding quarterly deliveries from the years 2002 and 2003 in kWhs, aggregated by thermal and renewable QFs and the three pricing provisions (SRAC, fixed energy and LRAC). The utilities are not required to including the QF identification number or contract termination date, unless otherwise required to do so by another entity such as the CEC. As aggregated, the information is no longer market sensitive, therefore,

CAC/EPUC's request is granted as modified, and no protective order is required for release of the data.

**CAC/EPUC Request SCE-02 #1:**

CAC/EPUC requests a complete, non-redacted copy of Advice Letter 1770-E-B, dated December 22, 2004, and all associated workpapers. CAC/EPUC state that AL 1770-E-B contains information related to SCE's capacity needs and the capacity pricing for the period of 2005 through 2014 and is therefore relevant to the determination of the reasonableness of SCE's avoided cost capacity prices.

Both CAC/EPUC's request and SCE's response is insufficient for purposes of determining whether the document should be considered market sensitive, and therefore remain confidential, or should be released. While information related to SCE's capacity needs and pricing in the near future is arguably market-sensitive, the market sensitivity of the utilities' capacity needs and prices further into the future, and certainly as distant as the year 2014 is speculative, at best. At the same time, CAC/EPUC do not provide sufficient detail regarding the information requested and why it is necessary. CAC/EPUC's request is denied, without prejudice, as too broad. In the event CAC/EPUC renew their request, SCE will be required to explain, with particularity, why the data should remain confidential.

**CAC/EPUC Request SCE-02-#2:**

CAC/EPUC requested copies of all data requests received from other parties to this proceeding and SCE's responses, including those attachments and electronic materials, to those data requests. SCE objects as to the ongoing nature of the request. To expedite the discovery process, SCE shall provide copies of all data requests received from other parties, and the responses, provided that the

data requests themselves do not contain information that should be subject to a protective order.

**CAC/EPUC Request PG&E 01 #1:**

CAC/EPUC seeks release of the current version of the utilities' economic dispatch models used to estimate QF generation for contracts with dispatch features, along with documentation for running the model and support for the inputs used in the model.

PG&E represents that the models are currently used for dispatch and procurement planning; and, if the model were made public, the information would provide competitors with the location and amount of PG&E's generation portfolio needs.

Consistent with our ruling with regard to CAC/EPUC Request SCE #01-03, above, CAC/EPUC's request is denied.

**IEP Request PG&E #1:**

**IEP Request SCE #1:**

IEP requests unredacted copies of all data requests received from other parties, the Energy Division, or PG&E's Procurement Review Group and all unredacted responses and data supplied in reply to those data requests in several Commission proceedings. SCE and PG&E object for several reasons, including that the request is overbroad, overly burdensome and seeks confidential, proprietary information.

We agree with the utilities that the request is overly broad. IEP's request is denied.

**IEP Request – PG&E #2:**

**IEP Request SCE #2:**

IEP's request in this case is similar to the request in #1, above, requesting all unredacted copies of all data requests received from other parties, the Energy Division or the utility's Procurement Review Group and all unredacted responses and data supplied in reply to those data requests in several specific advice letter filings. SCE and PG&E's response is identical to the response to #1. IEP's request is denied for the reasons set forth in #1.

**IEP Request – PG&E #3:**

**IEP Request SCE #3:**

IEP requests unredacted copies of all data requests received from other parties, the Energy Division, or the utility's PRG and all responses and data supplied in reply to those data requests in the transition capacity contracts pursuant to D.02-08-071. IEP's request is granted as modified. The utilities shall provide information concerning any transition capacity contracts that have expired. For transition capacity contracts that have not expired, the utilities shall provide the requested information subject to the approved protective order.

**IEP Request – PG&E #4:**

**IEP Request – SCE #4:**

IEP requests unredacted copies of all data requests received from other parties or the Energy Division and all unredacted responses and data supplied in reply to those data requests related to the gas supply plans for the DWR tolling agreements filed to date.

IEP's request is similar to CAC/EPUC Request CAC/EPUC Request SCE-01 #5 and CAC/EPUC Request PG&E-01 #4 in that CAC/EPUC request in that IEP seeks information regarding the gas needs associated with the DWR portfolio, including dispatchable resources, for the next five years. As with the

CAC/EPUC requests, above, this information should be maintained as confidential, and released only under the approved protective order.

**IEP Request – PG&E #5:**

**IEP –SCE – 02 #6:**

IEP requests that PG&E and SCE identify all purchases of electrical energy made from sources other than qualifying facilities during the period January 1, 2002 through the present date, requesting seller name, date of transaction, date and location of energy delivery, the quantity and price of energy delivered.

The utilities object to the information being disclosed out of concern that such disclosure will create a risk that market participants would use the information to ascertain and anticipate the utilities' procurement needs and tailor their own market activities to gain a competitive advantage, i.e., to extract higher prices that are ultimately passed on to ratepayers.

On an hourly or monthly basis, access to this information would provide market participants with the ability to discern the utilities' net short positions to the potential detriment of ratepayers. To reduce the risk of ratepayer harm, we will require the utilities to provide the requested information on an aggregated basis, broken down to identify type of resource, volumes and cost by quarter. The utilities shall release the requested information, in aggregated form as directed herein.

**IEP Request – SCE #5:**

IEP requests unredacted copies of all data requests received from other parties of the Energy Division and all unredacted responses and data supplied in reply to those data requests related to SCE's revised local reliability procurement proposal filed as Advice Letter 1832.

SCE objects to the request for the same reasons listed in IEP Request – SCE #1, above.

As noted above, release of information concerning the utilities' location-specific capacity needs shall be deemed confidential, and released subject to the approved protective order.

**IEP Request – PG&E #6:**

**IEP Request - SCE-02 #7:**

IEP requests information regarding all instances in which Reliability-Must-Run (RMR) units contracted by the California Independent System Operator (CAISO) were instructed to deliver energy to serve load in the utilities' service territory during the period January 1, 2002 through the present date, including the seller name, date of energy delivery, location of energy delivery, quantity (MWh) and the energy price (\$MWh).

PG&E objects to the request as burdensome , stating that PG&E is unable to trace power that it may have purchased as a result of a unit owner delivering energy into the ISO Controlled Grid and selling into the market as a result of an ISO dispatch order. SCE maintains that information provided to SCE for ISO-dispatched RMR units is required to be confidential pursuant to the terms of the RMR-CAISO Pro Forma Must-Run Service Agreements. SCE notes that SCE's 2005 Reliability Services True-Up will be filed at the Federal Energy Regulatory Commission on 12/30/04, and made publicly available on FERC's website.

To the extent any RMR information is required to be publicly released to other agencies, such as the CEC, FERC, or the California Independent System Operator, the same information shall be released in a non-confidential manner in this proceeding.

**IEP Request – PG&E #7:**

**IEP Request -SCE-02 #08:**

IEP requests that PG&E and SCE identify all instances in which generating units or power suppliers under contract with DWR delivered energy to serve customers in PG&E's and SCE service territory during the period January 1, 2002 through the present date, including the seller name, date of delivery, location, quantity and the energy price.

PG&E maintains that the request is overly broad and seeks information that is confidential, proprietary, commercially sensitive, and which is protected under the Administrative Law Judges ruling protecting confidential information in PG&E's ERRA proceeding (A.03-08-004) as well as the protective order adopted in R.01-10-024.

SCE also states that the request is overly broad and burdensome, and exceeding the scope of permissible discovery. SCE also states that SCE is not authorized to release the information because the Commission's Operating Order, dated December 19, 2002, requires SCE to maintain the requested information as confidential.

The information requested is historical delivery information related to the DWR contracts and is not necessarily indicative of future deliveries. However, we are sensitive to the utilities' concerns regarding the potential for the QF parties to use such hourly, location, and price-specific data to calculate the utilities' net short or long positions. The utilities shall make available quarterly information regarding DWR deliveries, including aggregated location, quantity and price data.

**IEP Request-PG&E #8:**

**IEP Request -SCE-02 #9:**



IEP requests copies of any report, presentation or study completed by or for PG&E or SCE in the past two years analyzing wholesale electricity prices in the Western U.S.

The utilities object on the grounds that the request is overly broad, that the documents are protected under California Evidence Code Section 1060, PU Code 583, and Commission GO No. 66-C, and the information is subject to the attorney client privilege.

Both the request and the objections are overly broad. The utilities shall respond to the request by identifying any reports, presentations or studies that meet the requested criteria. Upon receipt of this information, the QF parties may submit a request for specific information, with sufficient justification as to why the requested information is necessary. The utilities may thereafter reassert any claim of confidentiality or privilege.

**IEP Request PG&E #9:**

**IEP-SCE-02 #10:**

IEP requests unredacted copies of all the forecasts of future wholesale electric prices prepared or used by PG&E or SCE since January 1, 2002.

PG&E objects to this request on the grounds that, to the extent the request call for current forecasts, the material has heretofore been protected from disclosure to market participants by the April 4, 2003, ALJ Ruling Regarding Confidentiality of Information and Effective Public Participation Commission Rulemaking, R.01-10-024, the procurement rulemaking preceding R.04-04-003, as well as in the ALJ ruling protecting confidential information in A.03-08-004, PG&E's ERRA filing. PG&E also notes that it does not use forecasts, per se, but relies upon broker quotes . PG&E is not aware whether the brokers would authorize release of their data or under what circumstances.

SCE argues that this request seeks disclosure of trade secrets or other proprietary business information. SCE also notes that, without waiving any confidentiality claims, it has already provided certain forecasted annual price data in response to this request.

Forecast prices, while not revealing the utilities' RNS/RNL positions, may also be market sensitive as they are a factor in determining the expected commitment and dispatch of a utility's resources. For example, to the extent market prices are lower than the cost of dispatching utility resources, the utility is likely to look to the market for resources. Historical forecast information does not present the same concern.

As PG&E and SCE note, however, the forecast information is often proprietary information received from brokers, who are in the business of selling such data to market participants. Although we will not require the utilities to disclose proprietary information received from brokers, it is reasonable to require the utilities to identify the circumstances in which broker information was utilized. The QF parties may then, at their discretion obtain independent access to the same type of information as necessary. Forecasts of future wholesale electric prices prepared by PG&E and SCE prior to the year 2004 shall be disclosed, as these forecasts concern market conditions present over a year ago and any current market sensitivity is speculative.

**IEP Request PG&E#10:**

**IEP Request – SCE-02 #11:**

IEP requests unredacted copies of all the forecasts of future wholesale natural gas prices prepared or used by PG&E/SCE since January 1, 2002.

PG&E and SCE object to this request for the same reasons as discussed in IEP Request PG&E #9/IEP –SCE-02 #10 above.

For the same reasons stated above concerning forecasts of future electric prices, we will not require the utilities to disclosure proprietary information received from brokers. Forecasts of future wholesale natural gas prices prepared by PG&E and SCE prior to the year 2004 shall be disclosed, as these forecasts concern market conditions present at that time and any current market sensitivity is speculative.

### **CCC Data Requests**

The CCC and the utilities have communicated repeatedly since the initial CCC Data Requests were submitted on December 13, 2004. Based on the Motion to Compel Responses to Data Requests filed on March 4, 2005, the number of documents and information in dispute appears to have been reduced to six outstanding requests. In response to the CCC's requests, the utilities have each asserted essentially the same set of objections that were presented in response to the CAC/EPUC and IEP Motions.

### **CCC Data Request 01-02**

CCC requests that the utilities provide their current forecast of hourly system demand for the period 2006 to 2010, including: (1) the most recent 8760 hour retail demand forecasts for each year in the period from 2006 through 2010 (in MWh, by hour), (2) the assumed levels of energy efficiency programs, direct access loads, customer migration to community choice aggregation programs, and load loss to distributed generation or municipalization. CCC also requested that the utilities indicate whether the forecast provided is from the R.04-04-003 procurement plan filing.

CCC states that it is developing and may propose an Incremental Energy Rate (IER) established using the Commission's adopted, pre-restructuring, methodology for determining the IER using production cost modeling, and that

CCC needs certain detailed data concerning the utilities' systems that enable it to do so. CCC states that it is willing to accept historical hourly load data for the past two years, as well as monthly forecasts for the years 2006-2010. CCC notes that SCE provided historical data for 2002 and 2003, but will only provide monthly demand forecasts with a protective order, and will not provide any monthly forecasts for supply. PG&E provided historical data for 2003 and will produce 2004 historical data, but refuses to provide forecast data. SDG&E will produce historical data and will produce monthly forecasts with a protective order.

The information requested is highly market sensitive because, if combined with sufficient load information, it will enable recipients to determine the utilities' net short and net long positions. As such, any hourly or monthly information shall be deemed confidential, and shall be released only under the approved protective order, unless the information has been released publicly in another forum, such as at the CEC. The utilities shall provide quarterly demand forecasts without a protective order.

**CCC Data Request 01-04/02-02**

CCC is requesting monthly procurement costs for 2002, 2003 and 2004, identified by resource and contract type. CCC notes that the utilities have asserted in prior procurement proceedings that current SRAC energy prices exceed their avoided costs. CCC states that it needs historical monthly data on the utilities' procurement costs in order to determine whether and by how much, if at all, the utilities avoided costs are lower than current SRAC prices.

PG&E provided monthly data, but did not break down the data by resource type and contract. SDG&E only provided SONGS 2002-2003 costs, and SCE did not provide any information. The CCC argues that without this data, it

cannot determine the monthly costs of each utility's marginal purchases, which provide an indication of its avoided costs.

The CCC is willing to accept monthly UMFOR reports and quarterly procurement transaction compliance filings for 2003 and 2004, monthly power purchase volumes and costs for on- and off-peak periods for 2003 and 2004, and monthly excess power sales into the wholesale market for 2003 and 2004.

This request is similar to the CAC/EPUC's requests SCE-01 #4 and PG&E - 01 #3. Monthly information on procurement costs, resource and contract type is highly market sensitive, even on a historical basis, as it is an indicator of the utilities' net short and net long positions on a monthly basis. And, as discussed above, access to quarterly procurement transaction compliance filings would enable market participants to determine the utilities' long and short positions. The utilities confidentially claim for hourly information is sustained. This information should be considered confidential, and released only under the approved protective order.

The utilities shall make publicly available historical procurement cost data aggregated on a quarterly basis.

**CCC Data Requests 01-05/02-03:**

In its first data request, the CCC requested the utility forecast for 2005 and 2006 of monthly URG costs and MWh produced, broken down by resource type (hydro, coal, nuclear, QF gas, QF renewable, IOU gas-fired, and other). For purchased power separate DWR contracts long-term and short-term purchases. CCC also requested the monthly forecasted sales of power (MWhs) and sales revenues for 2005. CCC requested that the utilities indicate whether these forecasts are consistent with the utilities' ERRA forecast.

In the second data request, the CCC indicated that it was willing to accept data for 2005, only so long as it is provided in monthly on- and off-peak units. The CCC requested the utilities' most recent forecast for 2005 of monthly, on and off-peak purchased power volumes,(MWhs) and costs (\$), separately broken down into DWR contracts, QF gas, QF renewable, RPS renewable, long-term bilateral contracts with other utilities, and other wholesale market purchases. CCC also requested the monthly on- and off-peak forecasted sales and revenues for excess power sold into the wholesale market in 2005. SCE refused to produce any monthly forecasts, and will only produce quarterly forecasts, without on- and off-peak data.

The utilities shall provide quarterly forecasts of URG costs and MWH produced.

**CCC Data Request 01-07**

CCC requested the utilities' natural gas price forecasts for 2006-2010, indicating whether the forecast is consistent with the procurement plan filing in R.04-04-003. CCC states that SDG&E fully complied with data request 7, providing a long-term gas forecast at many market centers in the West. PG&E provided annual forecasts for 2008 onward from its long-term procurement plan, but failed to provide any data for the years 2006 or 2007. SCE did not provide any data. CCC will accept annual forecasts rather than monthly forecasts for the years 2006 through 2010.

The utilities shall provide annual forecasts of natural gas market prices for the years 2006-2010.

**CCC Data Request 01-08**

CCC requests the utilities' electric market price forecasts for the years 2006-2010, and an indication of whether the forecasts are consistent with their

procurement plan filing. CCC states that because PG&E has asserted in prior proceeding that its short-run avoided costs are represented by published electric wholesale market prices, it has a right to understand the utilities' future expectations for these prices. CCC states that while PG&E and SDG&E have provided annual forecasts for 2008 onward from their long-term procurement plans, neither has provided data for 2006 and 2007. CCC is willing to accept annual forecasts rather than monthly forecasts for the years 2006-2010.

The utilities shall provide annual forecasts of electric gas market prices for the years 2006-2010.

**CCC Data Request 01-10**

CCC requests the utilities monthly forecast of QF generation from 2006 through 2010, in MWhs. CCC explains that this information is necessary because standard production cost models require input data on every generating unit operating or expected to operate in the region over the forecast period. The CCC notes that data on QF generation is especially important given the Commission's past practice of setting the SRAC IER based on comparisons between two production cost runs, with QFs in the model and without QFs. This comparison requires knowledge of the amount of QF generation over the forecast period. SCE refuses to provide the requested data and will only produce quarterly forecasts with a protective order. PG&E committed to producing 2003 GRC information, which includes monthly QF forecasts through 2005, but will not produce any information for the years 2006-2010. SDG&E is willing to produce its FERC Form 714, which includes annual forecasts, but refuses to produce monthly forecasts.

The CCC is willing to accept monthly aggregated forecast data on QF generation for 2006-2010, disaggregated only by gas-fired and renewable QFs.

The utilities shall make available quarterly aggregated forecast data on QF generation for 2006-2010, disaggregated by gas-fired and renewable QFs subject to the approved protective order.

### 3. Procedural Schedule

The filing dates for opening and rebuttal testimony in Phase 2 of this proceeding were indefinitely postponed by ruling pending resolution of the discovery requests addressed herein. In light of today's ruling on discovery, the revised schedule is as follows:

July 6, 2005	Concurrent Opening Testimony
July 27, 2005	Concurrent Rebuttal Testimony
August 15, 2005 to be continued day to day through September 2, 2005, as necessary	Evidentiary Hearing
Date to be set at Evidentiary Hearing	Concurrent initial briefs filed
Approximately October 14, 2005 (date to be set at Evidentiary Hearing)	Concurrent reply briefs filed.

Therefore, **IT IS RULED** as follows:

1. The protective order set forth as Attachment A shall issue.
2. Pending discovery disputes are determined as set forth above.



3. The schedule for this Phase 2 of this proceeding is set forth above.

Dated May 9, 2005, at San Francisco, California.

/s/ JULIE HALLIGAN

Julie Halligan  
Assigned Administrative  
Law Judge

/s/ JOHN E. THORSON

John E. Thorson  
Administrative Law Judge  
(Law and Motion)

**ATTACHMENT A**

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Promote	)	
Consistency in Methodology and Input	)	
Assumptions in Commission	)	
Applications of Short-Run and Long-run	)	Rulemaking 04-04-025
Avoided Costs, Including Pricing for	)	
Qualifying Facilities.	)	
	)	

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**PROTECTIVE ORDER REGARDING CONFIDENTIALITY  
OF MARKET SENSITIVE DATA AND INFORMATION**

1. **Scope.** This Protective Order shall govern access to and the use in this proceeding of Protected Materials, as hereinafter defined. The parties to this proceeding (the "parties," or individually a "party") acknowledge that in view of the Assigned Commissioner's Ruling and Scoping Memo issued in this docket on January 4, 2005, this proceeding will be comprised of multiple phases devoted to the review and consideration of the E3 avoided cost methodology, short-run avoided cost ("SRAC") QF pricing, and long-run avoided cost forecasts and calculations. This Protective Order does not address the right of employees of the California Public Utilities Commission ("CPUC" or "Commission") acting in their official capacities ("Commission Staff") to view protected materials because Commission Staff is entitled to view Protected Materials in accordance with the requirements of Section 583 of the Public Utilities Code and the Commission's General Order 66-C.

2. **Modification.** This Protective Order shall remain in effect until it is modified or terminated by the Commission after all affected parties have been given notice and have had a reasonable opportunity to be heard. The parties acknowledge that the amount of Protected Materials, and the identity of the parties submitting such data, may differ from time to time. In light of this situation, the parties agree that modifications to this Protective Order may become necessary, and they further agree to work cooperatively to devise and implement such modifications in as timely a manner as possible.

3. **Definitions**

a. The term "Protected Material(s)" means (i) trade secret or other confidential and/or proprietary information whose market sensitive nature, as determined in good faith by the Disclosing Party, is such that unrestricted disclosure and use would cause the Disclosing Party significant harm, and (ii) any other materials that are made subject to this Protective Order by any assigned Administrative Law Judge ("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. Protected Materials also includes memoranda, handwritten notes, spreadsheets, computer files and reports, and any other form of information (including information in electronic form) that copies, discloses, or compiles other Protected Materials or from which such materials may be derived. Protected Materials do not include: (i) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court, unless such information or document has been determined to be protected by such agency or court; or (ii) any information that is public knowledge, or which

becomes public knowledge, other than through disclosure in violation of this Protective Order or any other protective order.

b. The term “redacted” refers to situations in which Protected Materials in a document, whether the document is in paper or electronic form, have been covered, blocked out, or removed. The term “unredacted” refers to situations in which the Protected Materials in a document, whether in paper or electronic form, have not been covered, blocked out, or removed.

c. The term “Disclosing Party” means a party who initially discloses any specified Protected Materials in this proceeding.

d. The term “Market Participating Party” (“MPP”) refers to a party that is: (i) a person or entity that engages in the purchase, sale or marketing of electrical energy or capacity or natural gas, or the bidding on or purchasing of power plants, or consulting on such matters; or (ii) a trade association or other organization composed of or representing persons or entities that engage in one or more of such activities.

e. The term “MPP Reviewing Representative” refers to an outside attorney or an outside expert retained by an MPP and selected pursuant to Paragraph 6 hereof for the purpose of preparing for, participating in, or giving advice concerning this proceeding.

f. The term “Non-Market Participating Party,” or “NMPP,” refers to a party that (i) is a state governmental agency other than the California Energy Commission (“CEC”), is not an MPP as defined in Paragraph 3(f) hereof, and is statutorily authorized to obtain access to confidential data held by another state governmental agency upon execution of a written agreement to treat the data so obtained as confidential, as provided in Government Code Section 6254.5(e); or (ii) any other consumer or customer group that the Disclosing Parties and the

Director of the Commission's Energy Division or his designee ("Division Director") agree have a bona fide interest in participating on behalf of end-use customers in this proceeding, and which group is not an MPP.

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

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

#### **4. Designation of Materials.**

a. When filing or providing in discovery any documents containing Protected Materials, a party shall physically mark such documents on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as "PROTECTED MATERIALS SUBJECT TO PROTECTIVE ORDER", or with words of similar import as long as one or more of the terms, "Protected Materials," "Protective Order," "Section 583" or "General Order No. 66-C" is included in the designation to indicate that the materials in question are protected.

b. All materials so designated shall be treated as Protected Materials unless and until (a) the designation is withdrawn pursuant to Paragraph 17 hereof, or (b) there is a determination pursuant to Paragraph 14 hereof changing

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

c. All documents containing Protected Materials that are filed with the Commission or served shall be placed in sealed envelopes or otherwise appropriately protected and shall be endorsed to the effect that they are filed or served under seal pursuant to this Protective Order. Such documents shall be served upon Reviewing Representatives and persons employed by or working on behalf of the state governmental agencies referred to in Paragraphs 11(a) and 11(b) hereof who are eligible and have requested to review such materials. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the Electronic Service Protocols set forth in Appendix A to the Order Instituting Rulemaking in this docket, (b) by facsimile, or (c) by overnight mail or messenger service. Whenever service of a document containing Protected Materials is made by overnight mail or messenger service, the Assigned ALJ shall be served with such document by hand on the date that service is due.

5. **Redaction of Documents.** Whenever a party files or provides in discovery a document that includes Protected Materials (including but not limited to briefs, testimony, exhibits, and responses to data requests), such party shall also prepare a redacted version of such document. The redacted version shall enable persons familiar with this proceeding to determine with reasonable certainty the nature (but not magnitude) of the data that has been redacted and where the redactions occurred. The redacted version of a document to be filed shall be served on all persons on the service list, and the redacted version of a discovery document shall be served on all persons entitled thereto.

6. **Selection of Reviewing Representatives.** Each MPP shall be entitled to select up to two outside attorneys and three outside experts to serve as its MPP Reviewing Representatives. Each NMPP shall be entitled to select employees, attorneys, and experts to serve as its NMPP Reviewing Representatives. The ISO shall be entitled to select employees to serve as its ISO Reviewing Representatives. Each party selecting an MPP Reviewing Representative, an NMPP Reviewing Representative, or an ISO Reviewing Representative shall first identify its proposed Reviewing Representative to all other parties and the Division Director and shall provide all parties with a curriculum vitae of each candidate, including a brief description of the candidate's professional experience and past and present professional affiliations for the last 10 years. Any party who objects to a proposed Reviewing Representative shall advise the proposing party in writing within five (5) business days from receipt of such notice, setting forth in detail the reasons there for. In the event of such objection, the proposing party, the objecting party or parties, and the Division Director shall promptly meet and confer to try to resolve the issue, and if necessary seek a ruling from either the Assigned ALJ or the Law and Motion ALJ. In ruling on the motion, the Assigned ALJ or the Law and Motion ALJ shall consider all relevant facts, including whether the proposed Reviewing Representative has a need to know the information in the Protected Materials to prove or defend against a material element of one or more issues presented in this proceeding, and whether it is reasonable to conclude that the information sought by the Reviewing Representative is essential to a fair resolution of an issue in this proceeding.

**7. Access to Protected Materials and Use of Protected Materials.**

a. Subject to the terms of this Protective Order, Reviewing Representatives shall be entitled to access to Protected Materials, except that the Disclosing Parties may redact price information from Protected Materials made available to ISO Reviewing Representatives.

All other parties in this proceeding shall not be granted access to Protected Materials, but shall instead be limited to reviewing redacted versions of documents.

Reviewing Representatives shall use Protected Materials solely for purposes of this proceeding. In addition, for a period of two (2) years from the date a Disclosing Party provides Protected Materials to a Reviewing Representative, such Reviewing Representative shall not engage, 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 or power plans (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), if such activities (as described in subparagraphs (a) through (c) are reasonably likely to affect California energy markets in more than a de minimis way.

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



energy, congestion management, and local area reliability services, shall not be deemed to be a violation of this Protective Order.

8. **Non-Disclosure Certificates.** A Reviewing Representative shall not inspect, participate in discussions regarding, or otherwise be granted access to, Protected Materials unless and until he or she has first completed and executed a Non-Disclosure Certificate, attached hereto as 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 Protected Materials it has disclosed and shall promptly provide copies of the Non-Disclosure Certificates to Commission Staff upon request.

9. **Maintaining Confidentiality of Protected Materials.** Each Reviewing Representative shall treat Protected Materials as confidential in accordance with this Protective Order and the Non-Disclosure Certificate executed pursuant to Paragraphs 8 hereof. Protected Materials 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) MPP Reviewing Representatives and NMPP Reviewing Representatives; (ii) Reviewing Representatives' paralegal employees and administrative personnel, such as clerks, secretaries, and word processors, to the extent necessary to assist the Reviewing Representatives, provided that they shall first assure that such personnel are familiar with the terms of this Protective Order, (iii) persons employed by or working on behalf of the CEC or other state governmental agencies covered by Paragraphs 11(a) and 11(b), and (iv) ISO Reviewing Representatives (with the exception of price information). Reviewing Representatives shall adopt suitable measures to maintain the confidentiality of Protected Materials they have obtained pursuant to this Protective Order, including by maintaining such materials in locked file cabinets and

implementing password protection for computer files. Reviewing Representatives shall not leave such materials unattended on desks or tables or on computer screens. Reviewing Representatives shall be liable for any unauthorized disclosure or use by their paralegal employees or administrative staff. In the event any Reviewing Representative is requested or required by applicable laws or regulations, or in the course of administrative or judicial proceedings (in response to oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any of Protected Materials, the Reviewing Representative shall oppose disclosure on the grounds that the requested information has already been designated by the Commission as Protected Materials subject to this Protective Order lawfully issued by the Commission and therefore may not be disclosed. The Reviewing Representative shall also immediately inform the Disclosing Party of the request, and such party may, at its sole discretion and cost, direct any challenge or defense against the disclosure requirement, and the Reviewing Representative shall cooperate with such party to the maximum extent practicable either to oppose the disclosure of the Protected Materials consistent with applicable law, or to obtain confidential treatment of them by the person or entity who wishes to receive them prior to any such disclosure. If there are multiple requests for substantially similar Protected Materials in the same case or proceeding where a Reviewing Representative has been ordered to produce certain specific Protected Materials, the Reviewing Representative may, upon request for substantially similar materials by another person or entity, respond in a manner consistent with that order to those substantially similar requests.

10. **Return or Destruction of Protected Materials.** Within thirty (30) days after a Reviewing Representative completes or terminates his or her services in this proceeding or within thirty (30) days after this proceeding is concluded and no longer subject to appellate review, whichever occurs first, each Reviewing Representative shall, at his or her option, return to the Disclosing Party or destroy the Protected Materials obtained, produced or maintained pursuant to this Protective Order. Within the same 30-day period, the Reviewing Representatives shall submit to the Disclosing Party an original signed affidavit or declaration under penalty of perjury under the laws of the State of California stating that, to the best of his or her knowledge, all Protected Materials subject to this paragraph have been returned to the Disclosing Party or destroyed. To the extent any Protected Materials are not returned or destroyed pursuant to this paragraph for any reason, they shall remain subject to this Protective Order, Section 583 of the California Public Utilities Code and CPUC General Order No. 66-C. In the event that a Reviewing Representative to whom Protected Materials are disclosed ceases to be engaged to provide services in this proceeding, then access to such materials by that person shall be terminated. Even if no longer engaged in such reviews, every such person shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate.

11. **Access by Governmental Entities.**

a. In the event the CPUC receives a request from the CEC for a copy of or access to any party's Protected Materials, the procedure for handling such requests shall be as follows. Not less than five (5) days after delivering written notice to the Disclosing Party of the request, the CPUC shall release such Protected Materials to the CEC upon receipt from the CEC of an Interagency Information Request and Confidentiality Agreement ("Interagency

Confidentiality Agreement”) identical in form to the agreement set forth in Appendix B hereto. Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Protected Materials as confidential in accordance with this Protective Order, (ii) include an explanation of the purpose for the CEC’s request, as well as an explanation of how the request relates to furtherance of the CEC’s functions, (iii) be signed by a person authorized to bind the CEC contractually, and (iv) expressly state that furnishing of the requested Protected Materials to employees or representatives of the CEC does not, by itself, make such Protected Materials public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC’s sole authority (subject to judicial review) to make the determination whether the Protected Materials should remain confidential or be disclosed to the public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the CEC.

b. In the event the CPUC receives a request for a copy of or access to a party’s Protected Materials from a state governmental agency other than the CEC that is authorized to enter into a written agreement sufficient to satisfy the requirements for maintaining confidentiality set forth in Government Code Section 6254.5(e), the CPUC may, not less than five (5) days after giving written notice to the Disclosing Party of the request, release such protected material to the requesting governmental agency, upon receiving from the requesting agency an executed Interagency Confidentiality Agreement that contains the same provisions described in Paragraph 11(a) above, and that is otherwise substantively identical to the draft agreement set forth in Appendix B; i.e., identical as to legal principles but with variations in language that are necessary due to the particular situation of the requesting agency.

12. **PRA Requests.** If a request is made pursuant to the Public Records Act (“PRA”), Government Code §6250, et seq., that a party’s Protected Materials filed with or otherwise in the possession of the CPUC be produced, the CPUC will notify such party of the PRA request. The CPUC also will notify the requester that the Protected Materials are public records that have been filed with or submitted to the CPUC accompanied by a claim that they fall within the exclusions listed in Section 2 of General Order No. 66(c), and/or that there is a public interest served by withholding the records. The CPUC will thereafter proceed to determine, pursuant to General Order No. 66-C, whether the requested Protected Materials are excluded from public inspection. In the event the CPUC receives a request from a federal government agency or via a judicial subpoena for the production of a party’s Protected Materials in the CPUC’s possession, the CPUC will also notify the Disclosing Party of such request. In the event that a PRA requester brings suit to compel disclosure of a party’s Protected Materials, the CPUC will promptly notify the Disclosing Party of such suit, and Commission Staff and the Disclosing Party shall cooperate in opposing the suit.

13. **Derivative Materials.** There shall be a rebuttable presumption that (a) any study that incorporates, describes or otherwise employs Protected Materials in a manner that could reveal all of a part of such materials, or (b) any model that relies upon Protected Materials for algorithms or other computation(s) critical to the functioning of the model, are Protected Materials that are subject to Section 583 of the Public Utilities Code, the Commission’s General Order 66-C, and this Protective Order. However, models that merely use Protected Materials as inputs will not themselves be considered Protected Materials. There shall also be a rebuttable presumption that where the inputs to studies or models include Protected Materials, or where the outputs of such studies or models reveal such inputs or can be processed to reveal such materials, such inputs and/or outputs shall be considered Protected Materials subject to

this Protective Order, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the Disclosing Party. Unless a party, by means of notice and motion, obtains a ruling from the Assigned ALJ or the Law and Motion ALJ holding that the applicable presumption(s) from among the foregoing has been rebutted with respect to the model or study at issue, then any party who devises or propounds a model or study that incorporates, uses or is based upon such materials shall label the model or study “Protected Materials,” and it shall be subject to the terms of this Protective Order.

14. **Dispute Resolution.** All disputes arising under this Protective Order, including but not limited to alleged violations of this Protective Order and disputes concerning whether materials were properly designated as Protected Materials, shall be presented for resolution to the Assigned ALJ or the Law and Motion ALJ. Prior to presenting any such dispute to the applicable ALJ, the parties to the dispute shall use their best efforts to resolve it. The parties and Commission Staff reserve the right to seek additional administrative or judicial remedies after the Assigned ALJ or the Law and Motion ALJ has made a ruling regarding the dispute.

15. **Other Objections to Use or Disclosure.** Nothing in this Protective Order shall be construed as limiting the right of a party, the Commission Staff, or a state governmental agency covered by Paragraphs 11(a) or 11(b) from objecting to the use or disclosure of Protected Material on any legal ground, such as relevance or privilege.

16. **Remedies.** Any violation of this Protective Order shall constitute a violation of an order of the CPUC. Notwithstanding the foregoing, the parties and Commission Staff reserve their rights to pursue any legal or equitable remedies that may be available in the event of an actual or anticipated disclosure of Protected Materials.

17. **Withdrawal of Designation.** A Disclosing Party may agree at any time to remove the “Protected Materials” designation from any materials of such party if, in its

opinion, confidentiality protection is no longer required. In such a case, the Disclosing Party will notify all other parties that the Disclosing Party believes are in possession of such materials of the change of designation.

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

ADOPTED PER RULING OF ADMINISTRATIVE LAW JUDGE

/s/ JULIE HALLIGAN

Julie Halligan  
Assigned Administrative  
Law Judge

/s/ JOHN E. THORSON

John E. Thorson  
Administrative Law Judge  
(Law and Motion)

Dated: May 9, 2005

**APPENDIX A**  
**BEFORE THE**  
**PUBLIC UTILITIES COMMISSION**  
**OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-run and Long-run Avoided Costs, Including Pricing for Qualifying Facilities.

Rulemaking 04-04-025  
(Filed April 22, 2004)

**NON-DISCLOSURE CERTIFICATE**

I, \_\_\_\_\_, have been asked by \_\_\_\_\_ to inspect certain materials that have been designated as “Protected Materials” under Paragraph 4 of the Protective Order entered in the above-captioned matter by the Administrative Law Judge \_\_\_\_\_ by order dated \_\_\_\_\_.

1. I hereby certify my understanding that access to Protected Materials is provided to me pursuant to the terms and restrictions of the Protective Order in this proceeding, that I have been given a copy of and have read the Order, and that I agree to be bound by it. I understand that the contents of the Protected Materials, any notes or other memoranda, or any other form of information that copies or discloses such materials shall not be disclosed to anyone other than in accordance with the Protective Order.



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

3. I hereby agree that for a period of two (2) years from the last date on which a Disclosing Party, as defined in the Protective Order, provides me with Protected Materials, I will not engage, directly or indirectly, in any of the following activities:

(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 3(a) or 3(b) above (or the direct supervision of any employee(s) whose duties include such activities or consulting).

I acknowledge that engaging in any of the above activities within the two (2) year period following the last date on which a Disclosing Party, as defined in the Protective Order, provides me with Protected Materials constitutes a violation of the Protective Order. Notwithstanding any other provision of this paragraph, with respect to an ISO Reviewing Representative only, participation in the ISO's ordinary operation of the ISO-controlled grid and in its ordinary administration of the ISO administered markets, including markets for ancillary services, supplemental energy, congestion management, and local area reliability services, shall not be deemed to be a violation of this paragraph or the Protective Order.

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

5. I acknowledge that any violation of the Protective Order shall constitute a violation of an order of the CPUC and that the parties to this proceeding and Commission Staff reserve their rights to pursue any legal or equitable remedies that may be available in the event of an actual or anticipated disclosure of Protected Materials.

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

**BY:** \_\_\_\_\_

**TITLE:** \_\_\_\_\_

**REPRESENTING:**\_\_\_\_\_

## **APPENDIX B**

### **INTERAGENCY INFORMATION REQUEST AND CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE CALIFORNIA ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION**

#### **A. INTERAGENCY INFORMATION REQUEST**

The California Energy Resources Conservation and Development Commission (“CEC”) hereby requests the following information from the California Public Utilities Commission (“Commission”) provided to the Commission by [IOU] pursuant to the Order Instituting Rulemaking to Promote Consistency in Methodology and Input Assumptions in Commission Applications of Short-Run and Long-run Avoided Costs, Including Pricing for Qualifying Facilities, issued on April 22, 2004 by the Commission as Rulemaking (R.) 04-04-025:

[List of Information Requested]

[IOU] has provided the above-described data to the Commission and the Commission is treating the data as confidential pursuant to the Public Utilities Code §583.

The CEC declares that it has a need for the above-described data for the following purposes:

1. [to be added]
2. [to be added]
3. [to be added]

The CEC agrees to keep this information confidential in its entirety, disclosing it only to its employees and representatives whose work requires them to review and analyze such data.

B. CONFIDENTIALITY AGREEMENT

1. This agreement is limited to records that are not open to public inspection, that are in the possession and control of the Commission, and that are identified above.
2. The Commission shall permit the CEC to review and copy the records identified above that are not open to public inspection (“confidential records”), upon the representation of an authorized representative of the CEC that the confidentiality of such records will be maintained and that they will not be made available for inspection by any other governmental agency, or by the public, except as provided for herein.
3. The CEC agrees that the confidential records identified above shall be released only to persons authorized in writing by the person(s) in charge of the CEC to obtain the confidential records, and that the CEC will inform each of its employees, and any consultants or contractors who have access to the confidential records, that they are subject to the requirements of this confidentiality agreement. The CEC shall have each such consultant or contractor sign the attached “acknowledgment” form obligating the consultant or contractor to comply with this agreement. The CEC further agrees that it will require each such consultant or contractor to inform the consultant’s or contractor’s employees that they are subject to this Confidentiality Agreement, and to have each such employee with access to the confidential records sign the attached acknowledgement form. Copies of the signed acknowledgment forms will be provided to the Commission upon request.
4. The CEC shall take reasonable security precautions to keep confidential the records provided to the CEC pursuant to this agreement. The CEC shall notify the Commission immediately upon the discovery of any unauthorized use or disclosure of the confidential records or of any other breach of this agreement, and will cooperate in every reasonable way to help the Commission prevent further unauthorized disclosure or use of the confidential records covered by this agreement.

5. The Commission reserves its authority under Section 583 of the California Public Utilities Code and General Order 66-C to consider and determine whether the records identified above should be made available for public inspection. The CEC agrees that its Executive Director will not exercise his authority under California Code of Regulations, title 20, section 2507(e), and will not release any confidential records or other documents designated as confidential by the CPUC in R.04-04-025 unless explicitly authorized by the CPUC.
6. In the event the CEC determines for any reason that it is required, or that it would be desirable, to disclose or make available the contents of the confidential records identified above to other governmental agencies or to the public, the CEC agrees not to do so without first notifying the Commission of its intent and the reason for the requested disclosure. The CEC further agrees that such notice shall be given no less than 20 days prior to the planned disclosure in order that the Commission, the Assigned Commissioner for R.04-04-025, the Assigned Administrative Law Judge (ALJ) for that proceeding or the Law and Motion ALJ, as the case may be, can give adequate consideration, in accordance with Section 583 of the Public Utilities Code and the Commission's General order 66-C, to the issue of whether it is in the public interest to make such records available to other governmental agencies or to the public. The CEC agrees to abide by the determination of the Commission, the Assigned Commissioner or the applicable ALJ on this issue, but may appeal such determination pursuant to the CPUC's Rules of Practice and Procedure.
7. With respect to the use of data by the CEC contained in the confidential records subject to this agreement ("confidential data"), it shall be a rebuttable presumption that (i) any study that incorporates, describes or otherwise employs such confidential data in a manner that could reveal all or part of the confidential data, or (ii) any model that relies upon such confidential data for algorithms or other computation(s) critical to the functioning of the model, shall also be considered a confidential record subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this agreement. However, models that merely use confidential data as inputs will not themselves be considered such

confidential records. It shall also be a rebuttable presumption that where the inputs to studies or models include confidential data, or where the outputs of such studies or models reveal the inputs or can be processed to reveal the confidential data, such inputs and/or outputs shall be considered confidential records subject to this agreement, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the party producing the confidential records. Any disputes concerning the appropriate scope of redaction or aggregation that the CEC and the party producing the confidential records cannot resolve shall be presented for resolution to the Assigned ALJ for R.04-04-025 or to the Law and Motion ALJ.

8. This Agreement shall continue in effect unless or until either of the undersigned parties determines that the agreement should be terminated. Unless otherwise provided for by the written agreement of both the CEC and the Commission, unilateral termination of this agreement shall be effected no sooner than 30 days from the date that either party provides notice, in writing, of its intent to terminate this agreement. All obligations created by this agreement during its term shall survive termination of the agreement.
9. This agreement shall not be modified except by a written agreement dated subsequent to the date of this agreement and signed by authorized representatives of both parties. None of the provisions of this agreement shall be deemed to have been waived by any act or acquiescence on the part of either party, its agents, or employees, but only by an instrument in writing signed by an authorized representative of the party. No waiver of any provisions of this agreement shall constitute a waiver of any other provision(s) or of the same provision on another occasion.
10. If any provision of this agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

Name\_\_\_\_\_

Position at the CEC:\_\_\_\_\_

General Counsel, California  
Public Utilities Commission

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

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

ACKNOWLEDGEMENT AND ACCEPTANCE OF THE REQUIREMENTS OF  
THE CONFIDENTIALITY AGREEMENT BETWEEN THE CALIFORNIA STATE  
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION (CEC) AND THE CALIFORNIA PUBLIC UTILITIES  
COMMISSION FOR CEC CONSULTANTS AND CONTRACTORS

The Undersigned acknowledges that he/she/it has received copies of the Interagency Information Request and Confidentiality Agreement between the California Public Utilities Commission (CPUC) and the California Energy Resources Conservation and Development Commission (CEC) dated \_\_\_\_\_ (Interagency Confidentiality Agreement), Public Utilities Code Section 583 and CPUC General Order 66-C. The undersigned acknowledges that he/she/it will be subject to the requirements of the Interagency Confidentiality Agreement, and agrees to be bound by the requirements set forth therein.

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

Name: \_\_\_\_\_

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

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

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



**CERTIFICATE OF SERVICE**

I certify that I have this day served the attached Administrative Law Judges' Ruling on Protective Order and Remaining Discovery Disputes on all parties of record in this proceeding or their attorneys of record by U.S. mail and by electronic mail to those who have provided electronic mail addresses.

Dated May 9, 2005, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.