

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

Order Instituting Rulemaking to Develop an
Electricity Integrated Resource Planning
Framework and to Coordinate and Refine
Long-Term Procurement Planning
Requirements.

Rulemaking 16-02-007
(Filed February 11, 2016)

**COMMENTS OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION ON
JOINT RULING OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW
JUDGE SEEKING COMMENT ON FUTURE CONFIDENTIALITY TREATMENT**

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COMMENTS OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION ON JOINT RULING OF ASSIGNED COMMISSIONER AND ADMINISTRATIVE LAW JUDGE SEEKING COMMENT ON FUTURE CONFIDENTIALITY TREATMENT

Pursuant to the October 5, 2018 *Joint Ruling of Assigned Commissioner and Administrative Law Judge Granting 29 Motions to File Under Seal, Seeking Comment on Future Confidentiality Treatment, and Confirming No Evidentiary Hearings Will Be Held on Individual Integrated Resource Plans* (“Joint Ruling”), the California Community Choice Association (“CalCCA”) respectfully submits the following comments on the questions set forth in the Joint Ruling.

- 1. D.06-06-066, as modified by D.07-05-032, generally governs the Commission’s treatment of confidential procurement related information for the electricity market. Those decisions contain a definition of “market-sensitive” information. Is there anything about that definition that needs to be modified or updated for purposes of the IRP process? Explain your rationale.**

Decision (D.) D.07-05-032 defines “market-sensitive information”:

In order to be considered to be “market sensitive information” it “must have the potential to materially affect an electricity buyer’s market price for electricity.” (D.06-06-066 at 41.) “Information is material if it affects the market price an energy buyer pays for electricity.” (D.06-06-066 at 42.)¹

The phrase “market sensitive information,” as operationalized by the confidentiality matrices contained in D.06-06-066 and its progeny, has been in common use for more than a

¹ D.07-05-032, mimeo at n.3 (citations in original).

decade. Parties have a working understanding of what material will be confidential for Energy Service Providers (“ESPs”) and Investor-Owned Utilities (“IOUs”), notwithstanding periodic disputes on comparatively nuanced points of implementation. Nothing about the IRP process warrants a change at the definitional level.

Accordingly, CalCCA does not recommend changing the definition of “market-sensitive information.”

2. D.06-06-066, as modified by D.07-05-032, contains matrices that apply to IOUs and ESPs. Are there any portions of these matrices that need to be modified or updated? Explain your rationale.

D. 08-04-023 modified in part the matrices that apply to ESPs. Appendix B to D.08-04-023 sets forth the modified ESP matrix to which CalCCA refers in its answer to this question.

CalCCA recognizes that this question, unlike several others in the Joint Ruling, *is not limited to the IRP proceeding*, and approves of the broader framing of this question. To the extent that the California Public Utilities Commission (“Commission”) entertains changes to the matrices, the Commission should apply those changes across all procurement proceedings in which the matrices are employed. Load Serving Entities (“LSEs”) need uniform definitions/rules across *all* procurement-related proceedings. In practice, when proceedings overlap, the least restrictive definition becomes the *de facto* definition across the overlapping proceedings. Thus information cannot be confidential in one proceeding and public in another. Once something is made public, it remains public.

D.08-04-023 recognized the importance of cross-proceeding uniformity:

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

proceeding apply to all uses of the relevant documents, including in ERRA proceedings.²

Accordingly, if the Commission opts to make changes to any aspect of D.06-06-066 and its successors (including D.06-12-030, D.07-05-032, D.08-04-023, D.11-07-028, D.16-08-024, and D.17-09-023), the Commission should explicitly make those changes applicable to all procurement-related dockets and their successor proceedings, including: R.17-09-020 (Resource Adequacy (“RA”)), R.18-07-003 (Renewables Portfolio Standard (“RPS”)), R.16-02-007 (Integrated Resource Planning (“IRP”)), R.13-11-005 (Energy Efficiency (“EE”)), R.12-11-005 (Self-Generation Incentive Program (“SGIP”)), R.14-08-013 (Distribution Resources Plan (“DRP”)), A.18-06-001, A.18-05-003, and A.18-04-004 (Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company Energy Resource Recovery Account Applications (“ERRA”)), and R.17-06-026 (Alternatives to the Power Charge Indifference Adjustment (“PCIA”)).

CalCCA next recommends particular changes the Commission should make to the confidentiality matrices adopted in D.06-06-066 and its successors.

As discussed further in response to question 3 below, if information is treated as confidential for IOUs and ESPs, it should also be treated as confidential for Community Choice Aggregators (“CCAs”). Since CCAs are in different stages of development, they may have different concerns with respect to the confidentiality of certain data and information. But as a baseline, CCAs should receive the same treatment under the matrices and then be afforded the opportunity to decide whether to treat certain additional data and information as confidential.

² D.08-04-023, mimeo at 3 and 25 (citations in original).

As CalCCA and various individual CCAs argued in connection with motions for confidential treatment submitted in this proceeding, load forecast information has already been publicly provided in this proceeding. With such information, IOUs can calculate CCA-specific resource adequacy requirements. IOUs are sellers of resource adequacy to CCAs, which allows them to exploit their place in the resource adequacy market, to the detriment of CCAs. Notably, PG&E sought access to the resource adequacy data of the CCAs while simultaneously arguing to protect its own similar data.³

There should be no dispute that resource adequacy forecasts are confidential. In order to eliminate any possible doubt, the Commission should revise Section II (Resource Adequacy) of Appendix B (ESP Matrix). The “Explanation of Item” column for the “Detailed load forecasts” row should include the description that “Resource adequacy net contracting positions are confidential.” As discussed immediately below, CalCCA requests that the ESP Matrix be applied to CCAs.

3. D.06-06-066, as modified by D.07-05-032, was developed prior to the formation of the majority of the CCAs in the market today. Should the ESP portion of the confidentiality matrices in D.06-06-066, as modified by D.07-05-032, be applied to CCAs? Why or why not?

The ESP portion of the confidentiality matrices in D.06-06-066, as modified by D.07-05-032 and D.08-04-023, should be applied to CCAs.

³ See Motion of Pacific Gas and Electric Company (U 39 E) For Leave To File Confidential Material In Pacific Gas and Electric Company’s (U 39 E) 2018 Integrated Resource Plan (Confidential Version) Under Seal Under Rule 11.4, at A-5 – A-6 (August 17, 2018) (citing to IOU Matrix provisions for confidential treatment for forecast of bundled customer peak load and bundled customer resource adequacy net open position); PG&E Response to Party Motions to Submit Information Under Seal (August 30, 2018) (objecting to CCA Parties request for confidential treatment of resource adequacy capacity information).

“The *process* for dealing with confidential documents should be the same regardless of who claims entitlement to protection.”⁴ For purposes of confidentiality, CCAs are functionally equivalent to ESPs. Both are LSEs engaging in various transactions, and making sundry compliance filings with the Commission. Neither California Public Utilities Code section 583 nor section 454.5(g) directly applies to either ESPs⁵ or to CCAs, yet both possess market sensitive information the confidentiality of which the Commission should — indeed, must — protect.

In D.06-06-066, there was evidently no dispute that ESPs’ market-sensitive information was entitled to confidentiality protections. There should likewise be no argument about whether CCAs are entitled to such protections.

4. D.06-06-066, as modified by D.07-05-032, contains a definition of “non-market participants.” Is there anything about that definition that needs to be modified or updated for purposes of the IRP process? Explain your rationale.

D.06-12-030⁶ defines a “market participant” as:

- 1) A person or entity, or an employee of an entity, that engages in the wholesale purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or bidding on utility procurement solicitations, or consulting on such matters, subject to the limitations in 3) below.
- 2) A trade association or similar organization, or an employee of such organization,
 - a) whose primary focus in proceedings at the Commission is to advocate for persons/entities that purchase, sell or market

⁴ D.06-06-066, mimeo at 52 (emphasis in original).

⁵ D.06-06-066, mimeo at 53.

⁶ D.06-12-030, mimeo at 2-4. To clarify the statement in the question header, “D.06-06-066 does not define the term ‘market participant.’” D.07-05-032, mimeo at 6 (emphasis added). “Market participant” and “non-market participant” are instead defined in D.06-12-030, *Decision Defining “Market Participant” and “Non-Market Participant” for the Purposes of Access to Confidential Documents*. D.07-05-032 does not address those definitions either and the decision states that it “in no way disposes of or prejudices those applications for rehearing of D.06-12-030 ...” D.07-05-032, mimeo at 1, n.1.

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

D.06-12-030⁷ defines non-market participants as:

⁷ D.06-12-030, mimeo at 4.

Persons or entities that do not meet the definition of market participant are non-market participants, and may have access to market sensitive information. It is proper to require such non-market participants to sign a nondisclosure agreement or to be bound by a protective order prohibiting the disclosure of information to market participants.

There is no reason to re-open or re-litigate these definitions, (or others), decided in D.06-12-030. The definition of non-market participant was a central issue addressed by that decision. Nothing has changed since 2006 warranting a revisiting of the definitions.

5. Thinking about the ability of non-market participants (however defined) to review confidential information in IRPs, would it be feasible and recommended for the Commission to develop a standard non-disclosure agreement that all LSEs must use to allow non-market participant access to the confidential portions of their IRPs? Are there other criteria you would recommend for certain types of organizations that should be deemed eligible to review confidential data or information beyond non-market participants, such as only if they are formal parties in an IRP rulemaking, etc.?

Having a standard non-disclosure agreement (“NDA”) for mandatory use across all procurement proceedings would be sensible. The Commission already has a model NDA for optional use in “the RA, Procurement, RPS and offshoot or successor proceedings.”⁸ The Commission should extend use of the model and mandate its use in all procurement-related proceedings, including the RA, RPS, IRP, EE, SGIP, DRP, ERRRA, and PCIA proceedings specified *supra* at 3. Adopting this approach will simplify matters for parties because proceedings frequently overlap.

Approaching the question about a NDA from the standpoint of market participants seeking access to utility information, CalCCA would appreciate the streamlining that a standard NDA would offer. In fact, we would go further and urge the commission to adopt a standard

⁸ D.08-04-023, mimeo at 4.

NDA for use across the spectrum of procurement proceedings, just as it has standardized definitions across those proceedings.

That said, when CalCCA approaches the question about the NDA from the standpoint of CCAs as LSEs, CCAs have a unique concern. CCAs are subject to the Public Records Act (“PRA”).⁹

Public agencies like CCAs may withhold “trade secrets” under the PRA. California Gov’t. Code section 6254(k) does not require disclosure of “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege.” California Evidence Code section 1060 protects the disclosure of trade secrets. Public agencies “shall justify withholding any record by demonstrating that . . . on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”¹⁰ Given that the use of the NDA would be to actually ensure additional transparency and accountability by allowing disclosure of the confidential information to non-market participants rather than keeping confidential information completely inaccessible to all non-governmental third parties, the use of a NDA should ensure ongoing confidentiality of the information for clear public policy reasons.

The CCA community aims for as much transparency as possible and thus would be willing to provide confidential information to non-market participants under a NDA at this time. However, should a CCA be forced under the PRA at a future date to make public confidential

⁹ Cal. Gov’t. Code § 6250 *et seq.*

¹⁰ Cal. Gov’t. Code § 6255(a).

information because of its disclosure of the confidential information to non-market participants under a NDA, CCAs would have to revisit their position on this point.

6. Are there other mechanisms you would recommend to facilitate intervenor review of confidential information in future IRP proceedings? For example, requiring parties to meet and confer about non-disclosure agreements in advance of IRP filing deadlines, etc.?

CalCCA has no recommendations for additional review processes beyond those currently available. If the Commission does direct any new informal discovery/review processes, the Commission will need to accommodate such processes in future IRP procedural schedules.

7. Are there other process recommendations you would recommend to facilitate timely and thorough review of all IRP filings, including information deemed confidential?

In D.08-04-023, the Commission allowed “RPS providers who submit the same compliance reports and filings on a regular basis to only file an initial motion and receive an initial confidentiality ruling.”¹¹ The Commission proceeded to:

extend this same rule to all ESP and IOU compliance filings in the proceedings covered by the Matrices. [] Where the ESP or IOU makes a compliance filing that is not initially accompanied by a motion – e.g., where the filing is made with the Energy Division – the ESP/IOU need only refer back to the initial showing it made to Energy Division in seeking confidentiality for subsequent filings of the same information.¹²

The Commission should also extend to CCAs the same provisions applicable to ESPs and IOUs for regular compliance filings.¹³ “The process for dealing with confidential documents should be the same regardless of who claims entitlement to protection.”¹⁴ CalCCA requests that the Commission simply modify Ordering Paragraph 9 to include “CCA” in addition to ESP and IOU, as follows:

¹¹ D.08-04-023, mimeo at 20.

¹² *Id.*

¹³ *See* D.08-04-023, mimeo at 28 (Ordering Paragraph 9).

¹⁴ D.06-06-066, mimeo at 25.

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

8. Are there any other changes that you would recommend to the Commission’s confidentiality treatment of any data related to the IRP process? Please explain in detail.

As discussed above, if the Commission opts to make changes to any aspect of D.06-06-066 and its successors (including D.06-12-030, D.07-05-032, D.08-04-023, D.11-07-028, D.16-08-024, and D.17-09-023), the Commission should make those changes applicable to all procurement-related dockets, including the RA, RPS, IRP, EE, SGIP, DRP, ERRRA, and PCIA proceedings specified *supra* at 3.

Most importantly, the Commission should place CCAs on a level footing with IOUs and ESPs with respect to confidentiality.

Respectfully submitted,

/s/

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