

**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.

R.16-02-007
(Filed February 11, 2016)

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

Beth Vaughan
Executive Director
California Community Choice Association
4391 N. Marsh Elder Court
Concord, CA 94521
Telephone: (925) 408-5142
Email: beth@cal-cca.org

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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 reply comments on the Joint Ruling. These reply comments focus on several key topics raised in parties’ opening comments on the questions set forth in the Joint Ruling.

I. INTRODUCTION

CalCCA does not see a need to re-visit and relitigate the entire existing framework for the confidential treatment of market-sensitive procurement information. In its opening comments, CalCCA suggested modest modifications that would appropriately extend the existing confidentiality rules to Community Choice Aggregation programs (“CCAs”)¹ and maintain the overall structure of the rules and procedures that have been developed and been in use over the past decade.

¹ *Comments of the California Community Choice Association on Joint Ruling of Assigned Commissioner and Administrative Law Judge Seeking Comment on Future Confidentiality Treatment* (November 16, 2018) (“CalCCA Comments”).

The existing confidentiality rules address several important factors raised in parties' opening comments. The existing framework recognizes that confidentiality rules must be consistent across California Public Utilities Commission ("Commission") proceedings, in particular procurement-related proceedings. The existing rules and procedures also maintain the flexibility to consider confidentiality requests on a case-by-case basis, taking into account specific facts and circumstances, including the relative market positions of load serving entities ("LSEs") and requirements unique to CCAs as public entities. Finally, the existing confidentiality rules strike the right balance between confidentiality concerns and the need for access to information by allowing the use of standardized non-disclosure agreements ("NDAs").

A. There is No Need to Relitigate the Commission's Existing Confidentiality Rules.

With respect to considering questions concerning confidentiality, the Commission must balance competing concerns of public participation in the Commission's decision-making process and protecting market-sensitive information that, if disclosed, could substantially harm consumers.² The Commission's existing confidentiality rules and procedures, as embodied in Decision (D.) 06-06-066, D.08-04-023 and the accompanying Confidentiality Matrices, adequately balance these concerns in most cases.

Several parties, such as the California Environmental Justice Alliance ("CEJA"), Sierra Club, and Environmental Defense Fund ("EDF") filing jointly and the Natural Resources Defense Council ("NRDC"), advocate for a comprehensive re-examination of the Commission's existing confidentiality rules and procedures.³ These parties point to changes in the electricity market (such as the increase in load being served by CCAs and Electric Service Providers

² See D.06-06-066, as modified by D.07-05-032, mimeo at 17.

³ See *Comments of California Environmental Justice Alliance, Sierra Club, and Environmental Defense Fund on Future Confidentiality Treatment of Confidential Information*, at 13-16 (November 16, 2018) ("CEJA, Sierra Club, and EDF Comments") and *Comments of the Natural Resources Defense Council (NRDC) on 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*, at 2-3 (November 16, 2018) ("NRDC Comments").

(“ESPs”) and legislative changes (such as SB 350 and SB 100 GHG emissions reductions goals) to support this recommendation.⁴ However, these issues, such as the treatment of data pertaining to GHG and air pollutant emissions and disadvantaged communities, can and should be deliberately addressed individually. They do not require an extensive overhaul of the Commission’s existing confidentiality rules and procedures.

CEJA, Sierra Club, and EDF, jointly, and NRDC raise concerns rooted in the need for transparency and public engagement in decision-making on vital issues of energy policy.⁵ CCAs are strongly committed to both transparency and public engagement. In addition to being subject to the Commission’s rules and procedures regarding confidentiality, CCAs are subject to the Public Records Act (“PRA”).⁶ Further, CCA Board meetings are open to the public and CCA activities are subject to the Brown Act and other state laws designed to foster transparency. The laws governing CCAs promote public engagement and open decision-making while allowing CCAs to protect their ratepayers from the harmful economic impacts of public disclosure of confidential, market-sensitive information.

B. The Use of Standardized NDAs Balances Concerns Regarding Confidentiality and Access to Information.

CEJA, Sierra Club, and EDF, jointly, and NRDC also state that the use of NDAs would be inadequate to address their concerns regarding non-disclosure of certain information and would be administratively burdensome.⁷ CalCCA supports easing the administrative burdens associated with executing numerous NDAs. For example, CalCCA proposes standardizing NDAs and ensuring the procedural schedule accommodates any processes related to NDAs, such as meet and confers.⁸ CalCCA also supports aggregating data. However, CalCCA does not believe that there is an adequate alternative to NDAs that appropriately balances allowing non-

⁴ See CEJA, Sierra Club, and EDF Comments, at 13-14; NRDC Comments, at 3.

⁵ See CEJA, Sierra Club, and EDF Comments, at 14; NRDC Comments, at 3.

⁶ CalCCA Comments, at 8.

⁷ See CEJA, Sierra Club, and EDF Comments, at 27-29; NRDC Comments, at 7-8.

⁸ See CalCCA Comments, at 7-9.

market participants access to market-sensitive information and protecting consumers from market manipulation and other harm that can arise from the release of such information.⁹

C. The Commission’s Existing Confidentiality Rules Provide Consistency Across Commission Proceedings.

NRDC also suggests specific confidentiality rules for the IRP proceeding.¹⁰ Any rules regarding confidentiality must be consistent across Commission proceedings, in particular procurement-related proceedings.¹¹ Having one set of rules for one proceeding and another set of rules for other proceedings is unworkable and unrealistic. This is particularly true of LSEs’ IRP filings, which rely heavily on data that is also relevant to the Commission’s Resource Adequacy and Renewables Portfolio Standard proceedings. Once information is made public in one proceeding, it can no longer be treated as confidential for purposes of other proceedings. Therefore, the Commission must ensure that its confidentiality rules are consistent across intersecting proceedings.

D. The Commission’s Existing Confidentiality Rules Provide Flexibility to Consider Facts and Circumstances Specific to Individual LSEs.

CalCCA emphasizes the need for consistent confidentiality rules across Commission proceedings, as well as consistent treatment of LSEs under those rules.¹² However, the rules require a degree of flexibility in order to address the specific circumstances of individual LSEs, such as the relative market positions of LSEs and requirements unique to CCAs as public entities.

In its comments, NRDC suggests that the Commission set standards for each class of LSE - IOU, CCA, and ESP - based on the IRP filings of San Diego Gas & Electric, Marin Clean

⁹ As discussed in CalCCA’s opening comments, CCAs are in a unique position with respect to NDAs because CCAs are subject to the PRA. CCAs support transparency and are generally willing to provide confidential information to non-market participants under a NDA, subject to the requirements of the PRA. *See* CalCCA Comments, at 8-9.

¹⁰ *See* NRDC Comments, at 3-6.

¹¹ *See* CalCCA Comments, at 2-3.

¹² *Id.*, at 3.

Energy, and American Powernet, respectively.¹³ CalCCA disagrees that the IRP filing of one LSE within each class of LSEs is or should be representative of the entire class. CCAs are in different stages of development and what may be market-sensitive information for one CCA may not be market-sensitive information for another CCA.¹⁴ For example, if a CCA is fully procured, its procurement information may not be as sensitive as that of a newer CCA that is ramping up procurement on behalf of its customers. In the latter case, disclosing certain procurement information, such as open contracting positions, would put the CCA at a distinct competitive disadvantage and could subject its ratepayers to market manipulation. The Commission's existing confidentiality rules, with the modifications proposed by CalCCA in its opening comments, can maintain consistent treatment of LSEs and provide the flexibility necessary to address the specific circumstances of individual LSEs.

The Commission has already found that it is appropriate to consider the specific facts and circumstances surrounding an individual LSE's request for confidential treatment. For example, public entities like CCAs may be required to publicly disclose certain records under the PRA.¹⁵ In D.06-06-066, the Commission expressly stated that "that there may be differences between parties that justify different *substantive* treatment of data."¹⁶ According to that Decision:

There should be room for differently-situated entities to make different claims about which of their data are and are not confidential, and parties opposing such claims to do the same. As the CEC states, "whether a particular piece of information derives economic value from not being generally known to the public or other persons may depend on the market position of the owner of the information."

We cannot anticipate in advance every situation in which such differences might arise, but we are also reluctant to create a rule requiring that every entity's documents must receive identical confidentiality treatment. One business may be able to argue that its customer list is not publicly known. Another may not be able to make such a showing, since its customers are well publicized. We would find a rule requiring identical treatment of all contracts too constraining. **The merits of a claim that data are**

¹³ See NRDC Comments, at 6.

¹⁴ See CalCCA Comments, at 3.

¹⁵ See *id.*, at 8.

¹⁶ D.06-06-066, as modified by D.07-05-032, mimeo at 54 (emphasis in original).

confidential will always depend on the context, and we must have the flexibility to make decisions based on specific facts rather than developing across-the-board rules.¹⁷

Thus, the Commission should retain the flexibility provided by the Commission's existing confidentiality rules to address the specific circumstances of individual LSEs, including their relative market positions and requirements unique to CCAs as public entities.

II. CONCLUSION

CalCCA appreciates the opportunity to provide these comments and looks forward to working with the Commission and other stakeholders on these questions.

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Respectfully submitted,

/s/

Beth Vaughan
Executive Director
California Community Choice Association
4391 N. Marsh Elder Court
Concord, CA 94521
Telephone: (925) 408-5142
Email: beth@cal-cca.org

¹⁷ *Id.*, at 55 (emphasis added).