

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

Order Instituting Rulemaking to
Implement Senate Bill No. 1488 (2004
Cal. Stats., Ch. 690 (Sept. 22, 2004))
Relating to Confidentiality of Information.

R.05-06-040

**REPLY TO JOINT RESPONSE OF SAN DIEGO GAS & ELECTRIC COMPANY
(U 902-E), PACIFIC GAS AND ELECTRIC COMPANY (U 39-E), SOUTHERN
CALIFORNIA EDISON COMPANY (U 338-E) AND THE UTILITY REFORM
NETWORK TO CALIFORNIA COMMUNITY CHOICE ASSOCIATION PETITION
FOR MODIFICATION OF DECISION D.06-06-066 AS AMENDED BY DECISIONS
D.07-05-032, D.06-12-030, AND D.08-04-023**

Evelyn Kahl
General Counsel
California Community Choice Association
One Concord Center
2300 Clayton Road, Suite 1150
Concord, CA 94521
415.254.5454
regulatory@cal-cca.org

Ann Springgate
Buchalter, A Professional Corporation
55 Second Street
Suite 1700
San Francisco, CA 94105
415.227.0900
aspringgate@buchalter.com

Counsel to the
California Community Choice Association

March 9, 2020

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D.07-05-032, D.06-12-030, AND D.08-04-023**

Pursuant to Rule 16.4 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission or CPUC), the California Community Choice Association (CalCCA)¹ hereby submits this reply to the joint response of San Diego Gas & Electric Company, Pacific Gas and Electric Company, and Southern California Edison Company (Joint Utilities) and to the response of The Utility Reform Network (TURN) to CalCCA's Petition for Modification (Petition) of Decision (D.) 06-06-066 as amended by D.07-05-032, D.06-12-030, and D.08-04-023 (Decision). By email dated February 26, 2020, Administrative Law Judge

¹ California Community Choice Association represents the interests of 19 community choice electricity providers in California: Apple Valley Choice Energy, Clean Power Alliance, Clean Power SF, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, Marin Clean Energy, Monterey Bay Community Power, Peninsula Clean Energy, Pioneer Community Energy, Pico Rivera Innovative Municipal Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Jacinto Power, San Jose Clean Energy, Silicon Valley Clean Energy, Solana Energy Alliance, Sonoma Clean Power, and Valley Clean Energy.

Yacknin authorized the filing of this reply and set the deadline for replies as March 9, 2020.

This reply is timely filed.

I. INTRODUCTION AND EXECUTIVE SUMMARY

The Petition seeks to clarify that sensitive community choice aggregator (CCA) market information will be kept confidential consistent with the Electric Service Provider (ESP) matrix adopted in D.06-06-066.² Until contract price information is publicly disclosed much more rapidly for all Load Serving Entities (LSEs), CCAs must be allowed to participate in the energy market on an equal basis.

The Petition further seeks clarification regarding the interaction between the California Public Records Act³ (PRA or Act) and the confidentiality matrix. TURN agrees with CalCCA that D.06-06-066 “should be modified to identify a specific matrix for CCAs in order to promote consistency across proceedings.”⁴ The Joint Utilities agree in their Response “that there exists a need for clarification of the applicability of the Commission’s procurement confidentiality rules to CCAs.”⁵ While TURN and the Joint Utilities agree that action should be taken regarding confidentiality of CCA data, they disagree with CalCCA’s proposed modifications.

² Petition at 7.

³ CAL. GOV’T CODE §6250 *et seq.*

⁴ Response of The Utility Reform Network to the California Community Choice Association Petition for Modification of Decision 06-06-066 as amended by Decisions 07-05-032, 06-12-030, and 08-04-023, February 20, 2020, (TURN Response) at 1.

⁵ Joint Response of San Diego Gas & Electric Company (U 902-E), Pacific Gas and Electric Company (U 39-E) and Southern California Edison Company (U 338-E) to California Community Choice Association Petition for Modification of Decision 06-06-066 as amended by Decisions 07-05-032, 06-12-030, and 08-04-023, February 20, 2020, (Joint Utilities Response) at 6.

CalCCA requested the Decision be modified to make clear that “CCAs will make data available in accordance with the California Public Records Act.”⁶ TURN characterizes CalCCA’s requested modifications as an attempt “to prevent Non-Market Participants (NMPs) from having access, pursuant to a protective order, to confidential material submitted by CCAs in any Commission proceeding.”⁷ The Joint Utilities raise similar concerns.⁸

In addition, the Joint Utilities seek clarification of the specific rules that will be applied to CCAs. They request that the Commission resolve the Petition by:

- Making clear that the Commission’s confidentiality rules and processes apply equally to CCAs;
- Requiring CCAs to use the IOU matrix, not the ESP matrix as a basis for requests for confidential treatment and noting that CCA information not addressed in the applicable matrix is not presumed to be confidential; and
- Directing CCAs to submit future requests for confidential treatment on an individual basis supported by the required particularized showing.

CalCCA’s petition aims not to withhold information from disclosure but simply to achieve the same protections for CCAs as other load-serving entities enjoy. As discussed below, CalCCA has concluded, and continues to maintain, that CCAs are more similarly situated to ESPs than IOUs for purposes of confidentiality under D.06-06-066 and thus the ESP matrix should apply.

Unlike IOUs and ESPs, however, CCAs operate under strict requirements for disclosure of information due to their status as governmental entities and the applicability of the PRA. Specifically, a party requesting information pursuant to the PRA could argue that information

⁶ Petition at Ex. 2-1.

⁷ TURN Response at 1.

⁸ Joint Utilities Response at 10.

CCAs share with parties in Commission proceedings, even pursuant to a non-disclosure agreement (NDA), waives otherwise applicable exemptions from disclosure. Consequently, additional clarifications are necessary.

Thus, CalCCA requests the Commission adopt a CCA matrix identical to the current ESP matrix. CalCCA also proposes CCAs not be subject to an obligation to make information available to intervenors or others designated by the Commission, as such disclosure potentially waives otherwise applicable exemptions under the PRA.

In response to comments, however, CalCCA offers an alternative. Absent a legislative solution modifying the PRA – the only way to address CCAs’ exposure with certainty – the Commission could order CCAs to make information available to intervenors or others designated by the Commission under an NDA. To prevent a waiver under the PRA, the Commission must also conclude the following in its order, as conclusions of law: (1) information disclosed by CCAs pursuant to the Decision must be kept confidential pursuant to an NDA, and (2) disclosure pursuant to the Commission’s order does not constitute a waiver of the exemptions otherwise available to such information under the Act.

II. THE ESP MATRIX CORRECTLY REFLECTS CCAS’ DATA SUBMISSION REQUIREMENTS AND SHOULD BE APPLIED TO CCAS

In their Joint Response, the IOUs argue that the Commission should apply the IOU matrix to CCAs, as opposed to the ESP matrix. The Joint Utilities argue the IOU matrix is nonetheless appropriate for CCAs, noting that “[b]ecause the CCAs are likely to be required to submit procurement information that is covered by the IOU matrix – whether now or in the future – it make sense to direct CCAs to apply the IOU matrix, rather than the ESP matrix, which may not fully cover information provided by CCAs.” However, the IOU matrix categories that differ from the ESP matrix concern items that largely are not relevant to CCAs, including electric

price forecasts, forecasts of revenue requirements and customer rates, and categories of contracts that are simply inapplicable to CCAs (*e.g.*, contracts between utilities and their affiliates, and non-RPS contracts between utilities and non-affiliated third parties). While these data are relevant for rate-regulated utilities, the Commission does not regulate CCA rates, and these data are not relevant to the Resource Adequacy (RA), Renewable Portfolio Standard (RPS) or Integrated Resource Planning (IRP) submissions.

In contrast, the ESP matrix covers a more limited number of categories of information, which are more relevant to CCA submissions to the Commission. For example, the matrix includes contract data that will be submitted to the Commission pursuant to its jurisdiction over RA and RPS compliance. CalCCA respectfully submits that if in the future data submission requirements applicable to CCAs change to more closely resemble those of the IOUs, the matrix can be revisited. Until such time, CalCCA suggests the ESP matrix is appropriate for CCAs, as well.

CalCCA attaches hereto a revised matrix for application to CCAs that is identical to the current ESP matrix, replacing the proposed matrix attached to the Petition, which inadvertently copied language from an outdated version of the ESP matrix. Thus, CalCCA respectfully requests the attached Exhibit 1 be used in place of Exhibit 1 in the Petition.

III. THE COMMISSION SHOULD RECOGNIZE THE UNIQUE CIRCUMSTANCES CCAS FACE UNDER THE PUBLIC RECORDS ACT

The Joint Utilities and TURN seek to include CCAs within the scope of Ordering Paragraph (OP) 11 of the Decision. That paragraph provides:

Generally, intervenor groups that are non-market participants and other parties that the Commission may so designate may have access to confidential IOU

and/or ESP market sensitive information provided such parties shall comply with Commission directives for protecting the confidentiality of such information.⁹

The Joint Utilities and TURN argue that CalCCA's proposal to refer in this paragraph to CCAs' obligations under the PRA would create a dual process, whereby intervenors and other requesters would obtain information from the IOUs and ESPs via Commission directives, but be required to request information from CCAs under the Act. Therefore, they argue, including the language requested by the CCAs would provide preferential treatment to CCAs.

The Joint Utilities and TURN fail to recognize that CCAs and IOUs/ESPs are not similarly situated in providing information to intervenors. As governmental entities, CCAs are subject to the PRA, and all information disclosed is presumed to be public unless it falls within one or more of the Act's exemptions.¹⁰ Critically, under Section 6254.5 of the Act, if an agency subject to the Act discloses a public record that is otherwise exempt "to a member of the public, this disclosure shall constitute a waiver of the exemptions specified"¹¹ Once waived, the information becomes subject to disclosure to the public pursuant to requests under the Act.

Certain disclosures are deemed by statute not to constitute such waivers. One such exemption applies to disclosures "made to a governmental agency that agrees to treat the disclosed material as confidential."¹² Thus, disclosures made by a CCA to the CPUC generally do not constitute "waivers" of the exemptions to disclosure applicable to such records.

Additionally, an exemption to the Act's waiver provision applies to disclosures "made through other legal proceedings or as otherwise required by law."¹³

⁹ D.06-06-066, as modified by D.07-05-032.

¹⁰ CAL. GOV'T CODE §6253.

¹¹ CAL. GOV'T CODE §6254.5.

¹² CAL. GOV'T CODE §6254.5(e).

¹³ CAL. GOV'T CODE § 6254.5(b).

However, a party requesting information under the Act could argue that disclosures by CCAs under OP 11 to intervenors or others designated by the Commission would not fall under any exemption. Thus, unique to CCAs, disclosure of otherwise confidential information to an intervenor or other party to a Commission proceeding, even under an NDA, could deem such disclosure a waiver of otherwise available exemptions. The result would be inequitable treatment among CCAs and IOUs/ESPs: if a CCA provides information to TURN under an NDA, the information could be deemed publicly available; if an IOU or ESP provided the same information to TURN, it would not.

IV. THE COMMISSION SHOULD ORDER CCAS TO DISCLOSE INFORMATION TO PARTIES SUBJECT TO NON-DISCLOSURE AGREEMENTS OR COMMISSION ORDERS PROTECTING CONFIDENTIALITY, AND CONCLUDE THAT SUCH DISCLOSURE DOES NOT WAIVE OTHER EXEMPTIONS

CalCCA understands TURN's concerns and has considered alternatives to address them while preserving CCA confidentiality. CalCCA suggests alternative language that addresses both the Joint Utilities' and TURN's concerns, and CCAs' legal obligations. As noted above, the Act exempts disclosures "made through other legal proceedings or as otherwise required by law."¹⁴

A legislative fix to the Act would provide absolute certainty that CCA confidentiality would be secured. However, Commission action could provide significant comfort to CCAs and clarity to all interested parties. The Commission could include in the decision resolving this Petition a specific conclusion of law that disclosure under OP 11 does not constitute a waiver of otherwise applicable exemptions available under the Act. The Commission could then amend OP 11 to include a requirement that CCAs disclose information to intervenors and others

¹⁴ CAL. GOV'T CODE §6254.5(b).

designated by the Commission in the same manner and subject to the same conditions as IOUs and ESPs. Although without legislative action there is no guarantee a reviewing court would agree, with these revisions CCAs could rely on the exemption to the waiver provision for disclosures “made through other legal proceedings or as otherwise required by law.” This treatment would ensure equivalent treatment of IOUs, ESPs, and CCAs under the decision to the greatest extent achievable by the Commission.

To achieve this result, CalCCA proposes OP 11 be amended to make the CCAs’ obligation explicit:

Generally, intervenor groups that are non-market participants and other parties that the Commission may so designate may have access to confidential IOU, CCA, and/or ESP market sensitive information provided such parties shall comply with Commission directives for protecting the confidentiality of such information. CCAs are required to make confidential market sensitive information available to non-market participants and other parties that the Commission may so designate provided such parties comply with non-disclosure agreements or specific Commission orders protecting the confidentiality of such information.

CalCCA also proposes a new Conclusion of Law be added to the Decision, as follows:

Conclusion of Law 25

Disclosure by CCAs of confidential market sensitive information to intervenors or others designated by the Commission pursuant to this Decision and subject to a non-disclosure agreement or specific Commission order protecting the confidentiality of such information shall be deemed exempt from public disclosure pursuant to Government Code §6254.5(b) and thus shall not constitute a waiver of exemptions otherwise available to the information under the California Public Records Act.

V. CONCLUSION

For the aforementioned reasons, on behalf of its members CalCCA respectfully requests the Commission modify D.06-06-066 as amended by D.07-05-032, D.06-12-030, and D.08-04-

023, to clarify how its provisions interact with the PRA, and to adopt the attached form of “CCA Matrix.”

Respectfully submitted,

/s/ Ann Springgate

Counsel to the
California Community Choice Association

March 9, 2020

EXHIBIT 1
Appendix 2A to D.06-06-066-CCA Matrix

Order Instituting Rulemaking (OIR) 05-06-040¹ Matrix of Allowed Confidential Treatment Community Choice Aggregator (CCA) Data		
Item	Public/Confidential Treatment	Explanation of Item
I) Renewables Portfolio Standard (RPS) Information		
A) RPS compliance filings required by CPUC, by CCA	Public, unless disclosure of first three years of forecast retail sales and resource mix data (MWh) and/or historical retail sales and supply data (MWh) for prior year would reveal entire net short of CCA.	Includes one-time and recurring reporting. Shows current and projected contents of a CCA's RPS portfolios, including sales and resource mix.
B) Annual RPS compliance filings, by CCA	Public, unless disclosure of first three years of forecast retail sales and resource mix data (MWh) or of historical retail sales and supply data would reveal the entire net short of CCA.	Includes Annual Procurement Target (APT) reporting required in Rulemaking 04-04-026 and all other required reports.
C) RPS contracts	Contract summaries public, including counterparty, resource type, location, capacity, expected deliveries, delivery point, length of contract and online date.	

¹ A CCA need not seek confidential treatment every time it makes a compliance filing of a repetitive nature. Instead, on making subsequent compliance filings, the CCA may cite the earlier motion for confidentiality and ruling on said motion.

EXHIBIT 1
Appendix 2A to D.06-06-066-CCA Matrix

Order Instituting Rulemaking (OIR) 05-06-040¹ Matrix of Allowed Confidential Treatment Community Choice Aggregator (CCA) Data		
Item	Public/Confidential Treatment	Explanation of Item
	Other terms confidential for three years ² , or until one year following expiration, whichever comes first.	
II) Resource Adequacy Information		
A) Detailed load forecasts (both year ahead and month ahead)	Front three years of forecast data confidential.	Year ahead data show that CCA has secured adequate generation capacity to cover 90% of its forecast peak load for next year's summer months. Month ahead data show that CCA has secured adequate capacity to cover 100% of its forecast load plus a reserve requirement.
B) Supply data (both year ahead and month ahead)	Supply data for first 3 years of forecast period confidential.	Year ahead data show that CCA has secured adequate generation capacity to cover 90% of its forecast peak load for next year's summer months or 100% of its annual local RA requirements. Month ahead data show that CCA has secured adequate capacity to cover 100% of its forecast load plus a reserve requirement.
C) Recorded hourly loads and monthly peak loads	Public after one year.	Recorded load data provided by CCAs for RA compliance.

² Where this Matrix allows confidential treatment for a period of time, that period shall begin on the first date a CCA submits the data to the Commission.

EXHIBIT 1
Appendix 2A to D.06-06-066-CCA Matrix

Order Instituting Rulemaking (OIR) 05-06-040¹ Matrix of Allowed Confidential Treatment Community Choice Aggregator (CCA) Data		
Item	Public/Confidential Treatment	Explanation of Item
D) Customer counts by month	Public.	Monthly customer count data used to evaluate reliability of CCA load forecasts.
III) Load Forecast Information and Data – Electric		
A) Load Serving Entity (LSE) demand forecasting methodology	Public.	General descriptive information regarding the methodology used by LSEs when estimating future expected electric capacity and energy needs.
B) LSE Total Peak Load Forecast - (MW)	Front three years of forecast data confidential.	Each LSE's own forecast of its bundled customer peak load. CCAs file annual and monthly data in CEC IEPR Forms 1.3 (annual sectoral peak demand forecasts) and 1 (monthly peak demand for total CCA peak load).
C) LSE Total Energy Forecast – (MWh)	Front three years of forecast data confidential.	CCAs file annual and monthly data in CEC IEPR Forms 1.3 (annual sectoral energy forecasts) and 2 (monthly energy forecast on a total CCA load basis).
D) Total Peak Demand Load Forecast - IOU Planning Area (MW)	Annual and Quarterly data: Public. Monthly and Daily data: Front three years of forecast data confidential	CCAs file annual and monthly data in CEC IEPR Forms 1.3 (annual forecasts) and 2 (monthly forecasts). When CCA data aggregated with that of other LSEs, can create planning area forecast.
E) Detailed load forecasts filed in spring for upcoming year, by CCA	Upcoming year forecast confidential; public once data is one year old.	
IV) Bilateral Contract Terms and Conditions – Electric		

EXHIBIT 1
Appendix 2A to D.06-06-066-CCA Matrix

Order Instituting Rulemaking (OIR) 05-06-040¹ Matrix of Allowed Confidential Treatment Community Choice Aggregator (CCA) Data		
Item	Public/Confidential Treatment	Explanation of Item
A) Contracts and power purchase agreements between CCAs and IOUs (except RPS)	<p>Contract summaries public, including counterparty, resource type, location, capacity, expected deliveries, delivery point, length of contract and online date.</p> <p>Other terms confidential for three years from date contract states deliveries to begin; or until one year following expiration, whichever comes first.</p>	Specific contracts between the IOU and CCA to deliver power to IOUs. The contract information includes the capacity, energy, timing, and pricing terms of the contracts.
B) Expired Power Purchase Agreements (PPAs)	<p>Contract summaries public, including counterparty, resource type, location, capacity, expected deliveries, delivery point, length of contract and online date.</p> <p>Other terms confidential for three years from date contract states deliveries to begin; or until one year following expiration, whichever comes first.</p>	Terminated CCA-IOU Power Purchase Agreements under which power is no longer delivered.
C) Bilateral contracts	<p>Contract summaries public, including counterparty, resource type, location, capacity, expected deliveries, delivery point, length of contract and online date.</p>	Includes contracts of greater and fewer than 5 years in duration.

EXHIBIT 1
Appendix 2A to D.06-06-066-CCA Matrix

Order Instituting Rulemaking (OIR) 05-06-040¹ Matrix of Allowed Confidential Treatment Community Choice Aggregator (CCA) Data		
Item	Public/Confidential Treatment	Explanation of Item
	Other terms confidential for three years from date contract states deliveries to begin; or until one year following expiration, whichever comes first.	
V.) Recorded (Historical) Data and Information - Electric		
D) Market purchases of energy and capacity	Public after data are one year old.	

EXHIBIT 2
Proposed Modifications to D.06-06-066 as amended

D.06-06-066
Conclusions of Law

15. The confidentiality rules applicable to IOUs, ~~and~~ ESPs and CCAs need not be identical.
22. It is reasonable to adopt the IOU Matrix, ~~and~~ ESP Matrix, and CCA Matrix. We balance the need for open decision making and meaningful public participation with the legitimate needs of parties that come before us for confidential treatment of their data as allowed by law.
23. There may be differences between parties that justify different *substantive* treatment of data. No type of entity (*e.g.*, IOU, ~~or~~ ESP, or CCA) shall receive greater confidentiality for its data merely because it is such an entity.
25. Disclosure by CCAs of confidential market sensitive information to intervenors or others designated by the Commission pursuant to this Decision and subject to a non-disclosure agreement or specific Commission order protecting the confidentiality of such information shall be deemed exempt from public disclosure pursuant to Government Code §6254.5(b) and thus shall not constitute a waiver of exemptions otherwise available to the information under the California Public Records Act.

Ordering Paragraphs

1. Where we find that data are market sensitive pursuant to Pub. Util. Code §454.5(g) or otherwise entitled to confidentiality protection, in most cases, we adopt a window of confidentiality for Investor-Owned Utility (IOU), Community Choice Aggregator (CCA), and Energy Service Provider (ESP) data that protects it for three years into the future, and one year in the past.

2. We adopt the confidentiality conclusions set forth in the IOU Matrix, ~~and~~ ESP Matrix and CCA Matrix attached hereto as Appendices 1, 2, and 2A (collectively Matrix, unless otherwise stated). Where a party seeks confidentiality protection for data contained in the Matrix, its burden shall be to prove that the data match the Matrix category. Once it does so, it is entitled to the protection the Matrix provides for that category. The submitting party must file a motion in accordance with Law and Motion Resolution ALJ-164 or any successor Rule, accompanied with any proposed designation of confidentiality, proving:

- 1.) That the material it is submitting constitutes a particular type of data listed in the Matrix,
- 2.) Which category or categories in the Matrix the data correspond to,
- 3.) That it is complying with the limitations on confidentiality specified in the Matrix for that type of data,
- 4.) That the information is not already public, and
- 5.) That the data cannot be aggregated, redacted, summarized, masked or otherwise protected in a way that allows partial disclosure.

11. Generally, intervenor groups that are non-market participants and other parties that the Commission may so designate may have access to confidential IOU, CCA, and/or ESP market sensitive information provided such parties shall comply with Commission directives for protecting the confidentiality of such information. CCAs are required to make confidential market sensitive information available to non-market participants and other parties that the Commission may so designate provided such parties comply with non-

disclosure agreements or specific Commission orders protecting the confidentiality of such information.

13. With this decision, we commence Phase Two of this proceeding. Respondents shall, and other parties may, file and serve comment on whether it is appropriate for us to develop the following requirements within 30 days of Commission adoption of this decision:

- 1.) A motion that simply asserts, without explanation, that the data contain trade secrets or “market sensitive” information will be denied as incomplete.
- 2.) A party whose motion has been denied for violation of item 1 that refiles the motion in substantively the same form may be subject to penalties pursuant to §2107 at the discretion of the Assigned Commissioner, Assigned Administrative Law Judge (ALJ) or Law and Motion ALJ.
- 3.) A party seeking confidentiality treatment shall provide in its motion, in text or table form, the following information:
 - a. Legal basis for asserting confidentiality (*e.g.*, §454.5(g), trade secret, privilege);
 - b. If covered by the IOU, ~~or~~ ESP, or CCA Matrix in R.05-06-040, the category/ies into which the data fall, with an explanation of how the data match the category/ies in the Matrix.;
 - c. Discussion of why the data should be kept under seal;
 - d. Identification of appropriate procedures short of submitting entire documents under seal or in redacted form, such as partial sealing of documents; partial redaction; aggregation of data to mask individualized, sensitive information; delayed information release (after documents are no longer market sensitive); restriction on personnel with access to documents; use of averages, percentages or annualization of data

instead of monthly or hourly data; and issuance of guidelines for parties to follow in producing redacted information (*e.g.*, leaving headings in documents; limiting redactions to figures only; and leaving sufficient information in documents to give other parties notice of what has been redacted).

- 4.) Parties may not assume that their motions have been granted if the Assigned Commissioner, Assigned ALJ or Law and Motion ALJ do not act on them. The onus shall be on parties to follow up with the Assigned Commissioner, ALJ or Law and Motion ALJ to seek a ruling, if one is not issued within 60 days of filing of the motion.