

September 21, 2015

VIA ELECTRONIC MAIL (EDTARIFFUNIT@CPUC.CA.GOV)

Energy Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Comments of the Independent Energy Producers Association on Draft Resolution E-4468

Dear Sir or Madam:

The Independent Energy Producers Association (IEP) respectfully submits its comments on Draft Resolution E-4468 (Draft Resolution), which addresses Advice (AL) 3943-E submitted by Pacific Gas and Electric Company, AL 3943-E submitted by Southern California Edison Company, and AL 2301-E submitted by San Diego Gas & Electric Company on November 10, 2011. The jointly submitted ALs asked the Commission to approve a Model Protective Order (MPO) and Model Nondisclosure Agreement (MNDA) as part of the Commission's implementation of Senate Bill 1488¹ in Rulemaking (R.) 05-06-040 (the Confidentiality Rulemaking).

The Draft Resolution approves the ALs with modifications. In its discussion of the ALs and the proposed MPO and MNDA, the Draft Resolution misreads Decision (D.) 11-07-028 and accordingly arrives at an erroneous conclusion, as discussed later in these comments,

IEP urges the Commission to reject the Draft Resolution and direct the utilities to submit Advice Letters proposed an MPO and MNDA covering only market-sensitive information. Moreover, IEP notes that the time is ripe for a reconsideration of the confidentiality regime the Commission adopted in the Confidentiality Rulemaking, and IEP recommends that the Commission should undertake a renewed examination of its approach to data confidentiality in light of the need for greater transparency in Commission processes and the Commission's move toward an integrated resource planning approach to planning, procurement, and transmission expansions. In these comments, IEP addresses these concerns and identifies specific areas in which the Draft Resolution is inconsistent with existing Commission decisions and determinations.

¹ 2004 Cal. Stats., Ch. 690 (Sept. 22, 2004).

I. The Draft Resolution Is Not Consistent with the Commission's Commitment to Transparency

The Draft Resolution addresses advice letters submitted nearly four years ago, implementing a confidentiality structure that originated in a decision (D.06-06-066) adopted over nine years ago in a proceeding (R.05-06-040) initiated over 10 years ago. The Commission's attitude toward transparency and public access to materials used in its proceedings has changed significantly since this proceeding was started, especially in the last two years.

- President Picker, in his inaugural address as president, referred to the ethical lapses that have come to light and pledged that the Commission would move forward "with openness and transparency."²
- Late last year, the Commission opened a proceeding to revise General Order 66-C and "to Improve Public Access to Public Records Pursuant to the California Public Records Act."³ The order instituting that proceeding summarized the relevant law on public access to documents used at the Commission:

The public has a constitutional right to access most government information.⁴ The California Constitution states that statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.⁵ Rules that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.⁶

(Order Instituting Rulemaking 14-11-001, p. 2, footnotes incorporated below and renumbered.)

- Commissioner Peterman's Scoping Memo and Ruling in the current proceeding on the Renewables Portfolio Standard identified "Revising

² http://www.cpuc.ca.gov/NR/rdonlyres/3C2DB515-AC11-46CF-AE11-608D269C3D52/0/PickerIntro011515_2.pdf

³ R.14-11-001.

⁴ Cal. Const. Article I, § 3(b)(1): "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny." See, e.g., *International Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 328-329.

⁵ Cal. Const., Article 1, § 3(b)(2): "A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." See, e.g., *Sonoma County Employee's Retirement Assn. v. Superior Court (SCERA)* (2011) 198 Cal.App.4th 986, 991-992.

⁶ *Id.*

confidentiality rules applying to the RPS program” as one of the issues to be considered in the proceeding.⁷

In light of the Commission’s growing commitment to transparency and public access to its records, IEP suggests that it may be appropriate for the Commission to revisit the confidentiality provisions adopted in D.06-06-066 and subsequent decisions. As a result of this reconsideration, the Commission may conclude that some of the categories in the “Matrix” attached to D.06-06-066 (which identify categories of market-sensitive information) no longer need to be protected from public access or that the duration of confidentiality protections could be shortened for some of the Matrix categories.⁸ In short, some of the confidentiality protections adopted for procurement proceedings in D.06-06-066 may now seem unnecessary and inappropriate given the Commission’s move toward integrated resource planning, greater openness, and increasing transparency.

II. Background

In D.06-06-066 (the 2006 Decision), the Commission implemented Senate Bill 1488 relating to the confidentiality of market-sensitive information submitted to the Commission in electric procurement proceedings. The 2006 Decision developed a “Matrix” of categories of market-sensitive information for the investor-owned utilities, and specified the treatment of information falling under each category of the Matrix.

One key aspect of the Matrix was that it simplified the showing required to establish the confidentiality of defined categories of information. For information described in the Matrix, a party need only show that the data met the requirements for a particular category, that the data was not publicly available, and that the data could not be aggregated, redacted, summarized, masked or otherwise protected in a way that allowed partial disclosure. Once that showing was made, the data was automatically entitled to the protection the Matrix provided for that category.⁹ For data not included in the Matrix, a party seeking confidential treatment had the burden of proving that the information deserved confidential treatment, including a citation of the legal basis for the claimed confidentiality protection and the facts showing the consequences of release.¹⁰

Thus, the 2006 Decision drew a clear distinction, with procedural differences, between the market-sensitive information included in the Matrix and other types of confidential information not included in the Matrix.

In D.08-04-023 (the 2008 Decision), however, the Commission appeared to blur that distinction when it approved an MPO and MNDA that provided the same treatment and

⁷ *Scoping Memo and Ruling of Assigned Commissioner* (R.15-02-020), May 22, 2015, p. 6.

⁸ Two Matrices were attached to D.06-06-066, one for investor-owned utilities and one for Energy Service Providers. These comments refer only to the IOU Matrix.

⁹ D.06-06-066, pp. 23-25, 80 (Ordering Paragraph No. 2). The Commission modified D.06-06-066 in D.07-05-032, but not the passages referred to in these comments.

¹⁰ D.06-06-066, p. 81 (Ordering Paragraph No. 3). The MPO the Draft Resolution proposes to approve reverses the burden of proof the Commission established for non-market-sensitive information in the 2006 Decision. Under the proposed MPO, non-market-sensitive information claimed to be “Protected Material” is kept confidential until an Administrative Law Judge, a Commissioner, or the Commission determines that “the document does not contain Protected Materials.” Proposed MPO, § 3.

protections to market-sensitive information (*i.e.*, the data identified in the Matrix and other information the Commission declared to be market-sensitive) and other types of information that had not been found to be market-sensitive. The 2008 Decision did not explain why it was expanding the protections and procedural shortcuts adopted in the 2006 Decision to data that was outside of the Matrix, but its approval of the MPO and MNDA had that effect.

D.11-07-028 (the 2011 Decision) modified an earlier decision on access to market-sensitive information and clarified that the 2008 Decision should be limited to market-sensitive information.¹¹ The 2011 Decision also directed the parties to attempt to arrive at a consensus update to the MPO and MNDA approved in the 2008 Decision.¹²

The parties were unable to reach consensus on the updated MPO and MNDA, and the utilities submitted ALs with a proposed non-consensus MPO and MNDA. IEP protested the ALs because the scope of the proposed MPO and MNDA was not limited to market-sensitive information and thus did not conform to the Commission's instructions in the 2011 Decision.

The Draft Resolution proposes to approve the proposed MPO and MNDA even though they do not conform to the determinations of the 2011 Decision.

III. The Draft Resolution Is Inconsistent with the 2006 Decision and the 2011 Decision

The Draft Resolution approves an MPO and MNDA that expand the scope of confidentiality beyond the "market-sensitive information" that was the focus of the Confidentiality Rulemaking and the 2006 Decision to other categories of information that are not market-sensitive, in direct contradiction to the Commission's determinations. The Commission should correct the legal errors of the Draft Resolution and require modifications to the proposed MPO and MNDA that unambiguously clarify that the only information covered by the MPO and MNDA is the "market-sensitive information" referred to in Public Utilities Code section 454.5(g)¹³ and defined in the 2006 Decision and subsequent decisions.

A. The Model Protective Order and Model Nondisclosure Agreement Should Apply Only to "Market-Sensitive Information"

The Commission's Confidentiality Rulemaking was initiated to carry out Senate Bill 1488, which required the Commission to review its confidentiality practices, including its implementation of section 454.4(g):

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, 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 and other consumer groups that are nonmarket participants shall be provided

¹¹ D.11-07-028, pp. 32-34, 41 (Conclusion of Law No. 9).

¹² D.11-07-028, p. 47 (Ordering Paragraph Nos. 5 & 6).

¹³ All subsequent statutory references are to the California Public Utilities Code.

access to this information under confidentiality procedures authorized by the commission.

The focus of the Confidentiality Rulemaking was identifying market-sensitive information and developing appropriate protections consistent with the Commission's obligations under the California Constitution and the Public Records Act to make its processes and records publicly available.¹⁴

When the ALs were originally submitted to the Commission, IEP objected to the proposed MPO and MNDA because they had the effect of extending the confidentiality provisions adopted in the 2006 Decision, including a streamlined burden of proof, well beyond the "market-sensitive" information that was the focus of the 2006 Decision and section 454.5(g). Specifically, the MPO and MNDA proposed in the ALs would apply the confidentiality protections and streamlined procedures adopted in the 2006 Decision to data that was not market-sensitive and that did not fit within any of the categories of the Matrix adopted in the 2006 Decision.

The Draft Resolution approves the expanded scope of the MPO and MNDA, erroneously concluding that "[t]he definition of material protected by the MPO and MNDA meets the requirements of D.06-06-066, D.08-04-023 and D.11-07-028."¹⁵ The Draft Resolution grounds this conclusion on one sentence of the 2011 Decision:

D.08-04-023 and the terms of the Model Protective Order are appropriately limited to "market sensitive information" that is the focus of § 454.5(g) and this rulemaking; thus it is limited to information that can be identified by the Matrix adopted in D.06-01-066 [*sic*] as modified by D.07-05-032 and subsequent decisions.

(D.11-07-028, p. 33.)

The Draft Resolution quotes this sentence to support its view that "D.11-07-028 makes clear that the definition of materials protected as a result of R.05-06-040 is already contained in D.08-04-023" and its conclusion that "D.11-07-028 did not change the definition of covered materials approved in D.08-04-023, and this Advice Letter is not an appropriate place to challenge that determination."¹⁶

The Draft Resolution misreads the Commission's intent as expressed in the 2011 Decision. Rather than extending the protections and streamlined procedures the 2006 conferred on market-sensitive information to information that is not market-sensitive, a proper reading of the 2011 Decision reveals that the Commission did just the opposite; it limited the scope of the materials appropriately covered by the MPO and MNDA to only the market-sensitive

¹⁴ "We must strike an appropriate balance in interpreting § 454.5(g). We are a public agency that regulates public utilities, and most of our business must be conducted in a public forum. Allowing public access to documents is part and parcel of an open decision making process." D.06-06-066, p. 40 (footnote omitted).

¹⁵ Draft Resolution, p. 12 (Finding No. 9).

¹⁶ Draft Resolution, p. 8.

information that was the focus of the 2006 Decision and the Confidentiality Rulemaking. This intent is made clear in several ways.

1. The Draft Resolution Takes A Critical Sentence Out of Context

The Draft Resolution errs when it concludes that the 2011 Decision did not deal with the issue of the appropriate scope of the MPO or MNDA.¹⁷ As a result, the Draft Resolution's extension of the confidentiality protections and streamlined procedures afforded to market-sensitive information to "trade secret . . . or other confidential and/or proprietary information . . . or any other right of confidentiality provided by law" is directly contrary to the Commission's determination in the 2011 Decision. The materials protected under the MPO and MNDA should be limited to market-sensitive information, as required by section 454.5(g) and implemented by the 2006 Decision and subsequent decisions.

As background, the passage in the 2011 Decision on the MPO approved in the 2008 Decision appears in a section titled, "Should the special limitations on market participants' access to market sensitive procurement data adopted in D.06-12-030 (or as may be considered in this rehearing) extend to additional materials?"¹⁸ Thus, the issue the Commission was considering was whether the confidentiality protections and streamlined procedure developed for market-sensitive information in the 2006 Decision should be extended to information other than the specific categories of information the 2006 Decision identified as market-sensitive and incorporated in the Matrix.

In addition to the sentence quoted above, the Draft Resolution finds support in the paragraph immediately following this sentence. In that paragraph, the Commission addresses a specific proposal to extend the confidentiality procedure "to all market sensitive information, regardless of whether it is specifically identified in D.06-06-066 as modified." The Commission agreed "in principle" that "all 'market sensitive information,' as that term is used in § 454.5 and our decisions in this rulemaking, is subject to confidential treatment." However, the Commission went on to caution that "in the event that the Commission or other appropriate authority has not identified particular information as market sensitive, a party's designation of information as 'market sensitive' is not controlling."¹⁹

Even if this paragraph is read in a way most favorable to the Draft Resolution's interpretation, however, in no way does the Commission suggest that the confidentiality protections should extend to material that has not been identified as market-sensitive by the Commission or "other appropriate authority." The Commission was careful to distinguish between the market-sensitive information referred to in section 454.5(g) and other types of information that parties might claim as confidential. This paragraph offers no support for the Draft Resolution's conclusion that confidentiality protections of the MPO and MNDA should extend beyond the market-sensitive information that is the focus of section 454.5(g), the Confidentiality Rulemaking, and the 2006 Decision.

¹⁷ Draft Resolution, p. 6.

¹⁸ D.11-07-028, p. 32.

¹⁹ D.11-07-028, p. 33. Note that this treatment echoes the treatment the 2006 Decision provided for non-market-sensitive information not included in the Matrix. D.06-06-066, p. 81 (Ordering Paragraph No. 3).

The Draft Resolution's interpretation is also contradicted by the last paragraph of this section of the 2011 Decision. In that paragraph, the Commission addresses HEI's proposal to extend the confidentiality protections to "intellectual property, trade secrets, and commercially sensitive information related to new and emerging technologies." The Commission rejected that request, saying, "To the extent that HEI seeks to extend the protections of D.06-06-066 as modified by D.07-05-023, D.06-12-030, and D.08-04-023 to intellectual property, trade secrets, and commercially sensitive information that is not 'market sensitive information,' we reject HEI's proposal for the reasons discussed above."²⁰ There would be no reason for the Commission to reject HEI's proposal to extend the confidentiality protections and procedural shortcuts provided to market-sensitive information by the 2006 Decision to trade secrets if, as the Draft Resolution concludes, the Commission intended to adopt an MPO that specifically includes trade secrets in its defined Protected Materials.

2. The Draft Resolution Misinterprets Conclusion of Law No. 9

Conclusion of Law No. 9 of the 2011 Decision is unambiguous: "D.08-04-023 should be limited to market sensitive information that is the focus of § 454.5 and this rulemaking."

The Draft Resolution fails to adequately explain how it can reconcile Conclusion of Law No. 9 with its assertion that the 2011 Decision did not address the types of documents to be covered by an MPO or MNDA. The Draft Resolution tries to explain away this provision²¹ by relying on its reading of the Commission's discussion of whether to include material other than market-sensitive information within the scope of the confidentiality protections, discussed above. The Draft Resolution merely asserts that according to its interpretation, that discussion "makes clear that the conclusion in D.08-04-023 was *correct*."²² Moreover, the Draft Resolution does not explain how it can logically read this Conclusion to mean the opposite of what it says. According to the Draft Resolution, the statement that "D.08-04-023 should be limited to market sensitive information" should somehow be read to mean that D.08-04-023 should be expanded to cover information that is not market-sensitive, as provided in the language of the MPO and MNDA that the Draft Resolution proposes to approve. The Draft Resolution does not, and cannot, reconcile this contradiction.

Conclusion of Law No. 9 is unambiguous; the 2008 Decision and the MPO and MNDA attached to that decision should be "limited to market sensitive information."

IV. The Proposed Model Protective Order Contradicts the Commission's Determinations

The expanded definition of covered materials contained in the MPO and MNDA proposed by the ALs, which the Draft Resolution approves, in several respects directly contradicts the Commission's original determination in the 2006 Decision regarding the proper scope of the protections and streamlined procedure provided to market-sensitive information.

²⁰ D.11-07-028, p. 34.

²¹ The Draft Resolution erroneously refers to the provision as "ordering paragraph 9." Draft Resolution, p. 9.

²² Draft Resolution, p. 9 (emphasis in original).

General Order (GO) 66-C. The Draft Resolution's definition of "Protected Materials" as presented in the proposed MPO and MNDA contradicts the explicit determinations of the 2006 Decision. On the relation between the treatment of market-sensitive information addressed in the Confidentiality Rulemaking and information that is protected from public disclosure under GO 66-C, the 2006 Decision was clear:

[U]ntil we change or repeal it (or opt to leave it intact upon examination) GO 66-C shall continue to apply to data *not* addressed in the Matrix. That is, in the interim, to the extent the Matrix contradicts GO 66-C, the Matrix shall govern. Other portions of GO 66-C not related to electric procurement will remain in place unless and until we change them. Thus, for data not included in the Matrix, a party seeking confidential treatment should continue to file a motion seeking leave from the Commission to retain such material under seal. The filing party shall bear the burden of proving that its information deserves such treatment.

(D.06-06-066, pp. 21-22 (emphasis in original).) The proposed MPO and MNDA contradict the 2006 Decision by:

- extending the treatment provided to market-sensitive information to **all** information claimed to fall under GO 66-C, regardless of whether or not it is market-sensitive, as determined by the Commission. (As the quote above suggests, information protected under GO 66-C that the Commission determines is market-sensitive is eligible for the protections adopted in the 2006 Decision.)
- blurring the distinction the Commission drew in the passage quoted above between information included in the Matrix attached to the 2006 Decision and information claimed to be confidential under GO 66-C.

Trade Secrets: The Draft Resolution contradicts the 2006 Decision when it expands confidential treatment under the MPO and MNDA to trade secrets. The 2006 Decision announced in a heading that "'Market Sensitive' Information Is Different From 'Trade Secrets.'" The Commission then explained:

Several parties assert that we should interpret § 454.5(g) coextensively with Evidence Code § 1060's protection for trade secrets. We find no merit to this assertion. While there may be instances in which information meets both statutory bases for confidentiality protection, neither the language of § 454.5(g) nor its legislative history provides support for interpreting the two statutes coextensively. Trade secret law and § 454.5(g) provide

independent bases for protecting confidential information, and SB 1488 does not give us leave to ignore these statutory provisions.²³

The Draft Resolution would approve an MPO and MNDA that obliterate the distinction the Commission drew in the 2006 Decision by including trade secrets within the definition of “Protected Materials” and providing trade secrets with exactly the same treatment as market-sensitive information. The Commission clearly respected the different statutes governing trade secrets and market-sensitive information:

We find no use in straining to read the two statutes as covering the same substantive information. There is no evidence from the statutory language that they are the same. While it might be neater to have one confidentiality statute rather than two, we cannot change the law.²⁴

Overall, the Draft Resolution nullifies the effort the Commission undertook in the 2006 Decision to identify the market-sensitive information that was appropriately protected from disclosure under section 454.5(g). If the protections adopted in the 2006 Decision and subsequent decisions apply to whatever “other confidential and/or proprietary information,” as the Draft Resolution proposes, what was the point of undergoing a lengthy proceeding to identify market-sensitive information and to develop appropriate procedures to protect market-sensitive information?

IV. Conclusion

Information that the Commission has not identified as market-sensitive should not be granted the protections and streamlined procedure provided in the 2006 Decision and should not be covered by the MPO and MNDA. The Draft Resolution, in spite of Commission decisions and determinations to the contrary, would expand the coverage of the proposed MPO and MNDA to data that is not market-sensitive.

Accordingly, IEP respectfully urges the Commission to consider the following courses of action:

First, IEP respectfully urges the Commission to consider whether it is time to revisit the confidentiality provisions and the Matrix of the 2006 Decision in light of the Commission’s recent commitment to a more open and transparent process.

Second, if the Commission at this point chooses to act on the utilities’ four-year old advice letters, IEP respectfully urges the Commission to reject the ALs and to direct the utilities to resubmit a proposed MPO and MNDA that are consistent with the Commission’s decisions and determinations and cover only market-sensitive information.

Third, if the Commission at this point chooses to approve the utilities’ four-year old advice letters, the Draft Resolution should be modified to state clearly and consistently that the scope of the MPO and MNDA is limited to information that the Commission has identified,

²³ D.06-06-066, pp. 46-47, footnote omitted.

²⁴ D.06-06-066, p. 49.

in the Matrix attached to the 2006 Decision or otherwise, as market-sensitive information. The Draft Resolution should also require the MPO and MNDA attached to the ALs to be revised to limit the scope of the MPO and MNDA to market-sensitive information.

Very truly yours,

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