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Decision 90-11-052 November 21, 1990

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking)
Pursuant to Section 485 of the)
Public Utilities Code to Establish)
Procedures and Safeguards Regarding)
Access to Computer Models.)

ORIGINAL

R. 88-04-030

(Filed April 13, 1988)

**OPINION ADOPTING RULES
REGARDING ACCESS TO COMPUTER MODELS**

I. Summary of Order

This Order adopts rules relating to the use of computer models and data bases for developing exhibits or testimony and the access to such models and data for the purposes of cross-examination or rebuttal.

II. Background

On September 30, 1986, Governor Deukmejian signed into law Assembly Bill (AB) 475 (Moore; Stats. 1985, Ch. 1297). AB 475 requires the Commission to adopt rules relating to access to certain computer models and data bases by the Commission, Commission staff and parties in Commission proceedings.

Following enactment of AB 475, the Division of Ratepayer Advocates (DRA) conducted a series of public workshops to consider a computer access rule. DRA then drafted a proposed rule based upon written and oral comments addressed to the staff.

By Order Instituting Rulemaking (OIR) 88-04-030, the Commission announced its intent to establish procedures and safeguards governing access to and initial verification of computer models. DRA's draft of a computer access rule was attached to the OIR and distributed to all parties in this proceeding. The

proposed rule was also transmitted to the Office of Administrative Law and published in the Administrative Notice Register.

The Commission, upon consideration of all comments, revised and republished the Proposed Rule in Decision (D.) 88-11-058. Comments on the proposed rule, as republished, were received from the California Department of General Services (DGS), the Division of Ratepayer Advocates (DRA), JBS Energy Inc., Pacific Bell, Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E), Sierra Energy and Risk Assessment (SERA), Southern California Edison Company (Edison), Southern California Gas Company (SoCal Gas), Toward Utility Rate Normalization (TURN), and WMA.

Thereafter, in a Ruling dated June 8, 1990, Administrative Law Judge (ALJ) Wheatland revised and republished the proposed rule for further public comment. Comments on the proposed rule set forth in the ALJ's Ruling were received from DRA, Pacific Bell, PG&E, SoCal Gas, GTE California, Inc. (GTEC), Power Technologies Inc. (PTI), and SDG&E.

Discussion

Proposed computer access rules have been under consideration for more than two years. Over this period we have received substantial input from many parties. The comments have been thoughtful and constructive and have significantly assisted us in evolving the rule we adopt today.

We have also had considerable experience during the past two years with computer models utilized in several proceedings. This experience has also helped to shape the rule.

D.88-11-058 and the ALJ Ruling of June 8, 1990, summarize and respond to previous comments regarding the proposed rule. This discussion will address those comments submitted in response to the June 8 Ruling.

DRA

Overall, DRA is supportive of the most recently proposed version of the rules. DRA believes that the rules, with minor modifications, will guarantee sufficient access and insure fairness to ratepayers, utilities, intervening parties and model vendors in Commission proceedings.

We will adopt DRA's suggested modifications to Section 74.2(e). For consistency with the definition of input data in Section 74.2(d), the word "data" will be inserted after "output" in Section 72.4(e).

We will not adopt DRA proposed revision to Section 74.4(f). The terms "input data" and "data base" are not synonymous. Input data is drawn from a data base. Therefore, while a sponsoring party, in providing access, is not required to modify its data base, it may be required to perform a data sort in order to permit a test of the sensitivity of the model pursuant to Section 74.2(j)(4).

DRA also asks that the rule reflect that Commission staff need not sign protective orders to obtain full access to models used by utilities for developing exhibits or testimony in Commission proceedings. We agree with DRA that Public Utilities Code Section 583 is adequate to safeguard information provided by a utility to the Commission staff. It has been our practice in several recent proceedings to exclude DRA from the terms of adopted protective orders.¹ While this policy is not expressly reflected in the rules we adopt, we intend to continue to exempt DRA from the requirement of signing protective orders relating to information subject to the provisions of Section 583.

¹ See for example, "Administrative Law Judge's Ruling Adopting General Protective Order," A.88-12-035, 8-14-89; "Administrative Law Judge's Ruling," A.88-12-047, 9-17-90, Att. A, Paragraph 3e.

Pacific Bell

Pacific Bell endorses many of the recent changes to the rules. Pacific Bell proposed no additional changes to these rules.

PG&E

PG&E believes that the most recent revisions to the rules are a substantial improvement. PG&E proposes a few minor changes in wording which would clarify the proposed rules.

We will adopt PG&E's suggestion to revise Rule 74.3(a)(1), in order to clarify that the sponsoring party shall provide, in testimony or workpapers, "a description" of the source of all input data.

We also adopt PG&E's proposed revisions to Sections 74.4(f), 74.6(a) and 74.7, in order to clarify the references to data or data bases, as such terms are used in these sections.

SoCal Gas

SoCal Gas believes that the rules require that a sponsoring party provide specified information when it submits testimony, whether or not other parties have requested such information. SoCal Gas prefers a rule which provides that computer program information will be supplied only upon request.

We direct SoCal Gas' attention to the final sentence of Section 74.3. This language allows the sponsoring party a choice. The sponsoring party may (1) include the specified information in its testimony and serve the testimony on all parties of record, or (2) include the information in workpapers and serve the workpapers only upon those parties who request this information.

GTEC

Although GTEC finds the proposed rules to be generally fair and reasonable, GTEC suggests certain modifications to further clarify the rule.

Several of the clarifications suggested by GTEC involve discrepancies in Appendix B of the June 8, 1980. These typographical errors have been duly noted and corrected.

On a more substantive note, GTEC asks that Section 74.5(a) be modified. This section requires a party to maintain copies of models or data bases in unmodified form throughout the course of a proceeding, if they continue to provide the basis, in whole or in part, for that party's showing. GTEC suggests that major data bases which are continually being updated should be excluded from the requirement that they be preserved in unmodified form, when the changes have no impact on the results of the model.

We have carefully considered GTEC's suggestion and we conclude that an exemption is not necessary. Under Section 74.5(b), it is permissible to update a major data base without retaining it in unmodified form, as long as the sponsoring party provides timely access to the modified data base to any party who has previously requested access to the original data base.

GTEC requests language which would provide that the sponsoring party's own computer use necessary for daily operation of business shall have priority over any access requests by requesting parties. As stated in the ALJ's Ruling of June 8, given the other provisions of Section 74.4 which allow a party three alternative means of providing access, we see very little chance that a reasonable request for access could unduly interfere with a sponsoring party's daily computer operations. Moreover, should a conflict arise, Section 74.6 allows the sponsoring party to seek appropriate relief.

GTEC also makes a suggestion regarding licensing fees. If a sponsoring party uses a model supplied by a third party vendor and if the vendor requires additional licensing fees for access by requesting parties, GTEC believes that the parties requesting access should be responsible for paying the third party vendor the additional amount. We have addressed the question of compensation in D.88-11-058. This issue is further addressed in the ALJ's Ruling of June 8. Since the rules explicitly allow a sponsoring party to seek protection from unreasonable requests for access, we

see no need to require compensation for access to computer models or data bases used to support evidence in Commission proceedings.

Edison

Edison generally concurs with the Commission's proposed rules and believes that they will assist in the resolution of computer model and data base access issues in the course of regulatory proceedings before the Commission. Edison suggests a few additions and revisions to the rules.

Several of Edison's suggested revisions seem to add redundant language. For example, where Section 74.4(a) requires a requesting party to provide a written request of why it requests access, it is redundant to also reference this requirement in the definition of access in Section 74.2(a).

We will adopt Edison's suggestion to amend Section 74.3(a)(4) to require testimony or workpapers to contain a complete set of output files "relied on to prepare or support the testimony or exhibits." We agree that testimony or workpapers should not contain superfluous output files. It may, however, be a proper data request for a party to request other output files which were generated in the course of preparing the testimony or exhibit.

We will not adopt Edison's suggestion that Rule 74.4(d)(iii) be revised to permit a sponsoring party to make the computer model available through an external computer service, rather than make computer model runs for a requesting party at an external computer service. Nor do we provide for compensation by a requesting party to a sponsoring party for access to a model. As we have previously explained, we simply see no evidence that the manner and scope of access prescribed by this rule will create a burden, financial or otherwise, on sponsoring parties. Moreover, if such a burden should arise, Section 74.6 permits the sponsoring party to seek appropriate relief.

Another suggestion by Edison relates to Section 74.7. Edison asks that we incorporate language, which it characterizes as

"legislative mandates", into Rule 74.7. Edison complains that the rule, as currently drafted, appears to grant the assigned ALJ the discretion to refuse to issue a protective order even in cases in which unwarranted disclosure will result.

The rule does grant the ALJ discretion to rule on requests for confidentiality, as ALJ's have always done. AB 475 did not expand the scope of confidentiality, nor limit the discretion of ALJ's. AB 475, by its terms, "is declarative of existing law." Therefore, we are quite comfortable in allowing ALJ's to continue to exercise reasonable discretion to rule upon requests for confidentiality. We further remind Edison that the most effective way to protect customer-specific records is not to base its testimony upon such records. In cases where a utility has based testimony upon facts which cannot be disclosed, even under the terms of a protective order, the Commission has chosen to strike the testimony rather than compel disclosure.

Finally, we do not adopt Edison's suggested sunset provision. Parties are free at any time to petition to modify the rules, and the Commission may entertain changes upon its own motion. An arbitrary "sunset" date for a procedural rule is not necessary.

PTI

PTI is a consulting company and a supplier of software to the electric utility industry. PTI believes that the rules as presently drafted exposes its "trade secrets" to potentially serious loss, without adequate protection. PTI states:

"The original version of the rule apparently provided that a requesting party execute a reasonable and nondiscriminatory confidentiality agreement. This would have been a reasonable and acceptable approach.

"In the new version of the rule, the onus is put on the sponsoring party to apply for a protective order. This undoubtedly increases the chance of the loss of confidentiality, since a user of our software must take an

active role to protect our confidential material, rather than the default position of automatic protection under the original rule. In addition, the very short time of 15 days would make it very difficult for PTI to learn or assist in any such action to protect our code.

"We strongly urge that the original version of the rule be restored, so that it can be presumed that confidential material will be protected. The requirement for a sponsoring party to obtain a protective order is an unfair placement of the burden."

While we understand why PTI would prefer "automatic protection" rather than a process whereby a sponsoring party must apply for protection, we find from past experience that PTI's approach is not workable. In A.88-12-035, the Edison-SDG&E merger case, Edison's request that parties be required to execute individually negotiated third-party license agreements was rejected by ALJ Ruling of September 21, 1989. We agree with the rationale of this well-reasoned Ruling:

"Edison's request that parties be required to execute individually negotiated third party license agreements imposes unreasonable restrictions on access by other parties to the SERASYM model. Edison's scenario affords its vendor, not a party to this proceeding, an inappropriate amount of control over the development of the evidentiary record. This is an area properly reserved to the Commission itself."

"[p]ursuant to § 1705, the Commission has a statutory obligation to issue decisions which contain separately stated findings of fact and conclusions of law on all material issues. Among other requirements such findings must be sufficiently complete to afford a rational basis for judicial review, assist the reviewing court, assist the parties to know why the case was lost and to prepare for rehearing, and serve to help the Commission avoid careless or arbitrary action (Greyhound Lines, Inc. v. Public Utilities Com. (1967) 65 Cal. 2d 811,

813). Depending upon the fact at issue, a sealed record may prevent the Commission from discharging this obligation; therefore, the decision to take evidence under seal, and to keep it sealed, must be made with great care. Placing parties under a contractual obligation to a non party vendor to use their best efforts to keep certain matters from becoming part of the open public record does not further this careful process. In addition requiring parties to clear with SERA their use or disclosure of SERASYM information potentially affords Edison's vendor inappropriate control over the formation of the other parties' evidentiary showings."

SDG&E

SDG&E asserts that the proposed rules violate Assembly Bill (AB) 475. According to SDG&E, it has reviewed its previous comments, and it has now determined that:

"even its suggested language...is inadequate to reflect AB 475's explicit protections. The purpose of AB 475 is not to convert all confidential information into public information; it is to afford parties a fair opportunity to participate in hearings and to scrutinize other parties claims."

SDG&E's arguments are simply not correct. The rule we adopt today does not "convert all confidential information into public information." Instead, the rule carefully follows the provisions of Public Utilities Code Section 1822, insofar as that statute requires that "any computer model that is the basis for any testimony or exhibit in a hearing or proceeding before the commission shall be available to, and subject to verification by, the commission and parties to the hearing or proceeding to the extent necessary for cross-examination or rebuttal, subject to applicable rules of evidence...."

Nor does this rule, as SDG&E charges, "put an end to the protection of confidential information" or require "the indiscriminate dissemination of information at the time that

testimony is filed." This rule follows the practices successfully adopted by the Commission in several recent proceedings, including A.88-12-035, the Edison-SDG&E merger case.

Finally, we find that the revisions proposed by SDG&E would not afford other parties a fair opportunity to participate in hearings or scrutinize SDG&E's evidence. These proposals were addressed at length in D.88-11-058 and in the ALJ's Ruling of June 8, 1990 and SDG&E has offered no compelling reason for us to reconsider our prior determination.

Findings of Fact

1. In April 1988, notice was published in the California Administrative Notice Register of Commission consideration of certain amendments to the Commission's Rules of Practice and Procedures. These rules relate to the use of computer models and data bases in the development of testimony and exhibits in Commission proceedings.

2. On December 9, 1988, the Commission published notice in the California Regulatory Notice Register, 88, No. 50-2, that it had made further changes in the proposed rules. The notice invited further public comment on the proposed rules.

3. Comments on the proposed rules were received from numerous parties, including the Commission staff, utilities, third party providers of software and computer services, and ratepayer organizations.

Conclusions of Law

1. The Commission has provided due notice of, and opportunity to comment on, the rules set forth in Appendix A to this decision.

2. The Commission should amend its Rules of Practice and Procedure by adopting the rules set forth in Appendix A to this decision.

O R D E R

IT IS ORDERED that:

1. Rules 74.1 through 74.7 are adopted, as set forth in Appendix A to this decision.
2. The Executive Director, in coordination with the Administrative Law Judge Division, shall send a certified copy of this order to the Office of Administrative Law in accordance with the provisions of the Government Code.

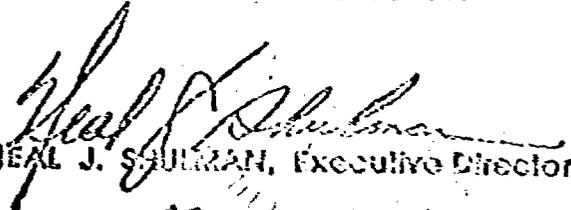
This order is effective today.

Dated November 21, 1990, at San Francisco, California.

G. MITCHELL WILK
President
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

Commissioner Frederick R. Duda,
being necessarily absent, did
not participate.

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY


NEAL J. SHURRAN, Executive Director

APPENDIX A
Page 1

Article 17.1 Access to Computer Models

74.1 (Rule 74.1) - Purpose

The purpose of this article is to establish procedures relating to the use of computer models for developing exhibits or testimony and the access to computer models for cross-examination or rebuttal.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

74.2 (Rule 74.2) - Definitions

When used in this Article, whether in the singular or in the plural, the following terms shall have the following meanings:

- (a) "Access" means the ability of a party to examine, use or verify any other party's computer model or data base that is the basis for the other party's testimony or exhibits to the extent necessary for cross-examination or rebuttal, subject to applicable rules of evidence.
- (b) "Computer model" means a computer program created to simulate or otherwise represent some physical phenomenon or utility function, by using input data and producing output based on those data.
- (c) "Computer program" means a set of instructions which directs a computer to follow a specific processing sequence.
- (d) "Input data" means the data to be processed by the computer in a computer run.
- (e) "Output data" means the data resulting from a computer run.
- (f) "Party" means any person who has filed an appearance in the proceeding, or who has indicated an intention to file an appearance at the first opportunity.
- (g) "Proceeding" means any application, investigation, rulemaking, or complaint before the Commission.

APPENDIX A
Page 2

- (h) "Run" means an execution by a computer of a computer program resulting in output.
- (i) "Sponsoring party" means a party sponsoring testimony or an exhibit that is based in whole or in part on a computer model.
- (j) "Verification" or "verify" means to assess the extent to which a computer model mimics reality, and may include checking or testing:
 - (1) The reliability of the computer equipment used to input the data, process it, and produce output;
 - (2) The manner and accuracy of inputting data into the computer model;
 - (3) The reliability and accuracy of computer model used for processing data; and
 - (4) The sensitivity of the output of the computer model to changes in its input data.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

74.3 (Rule 74.3) - Computer Model Equations, Input, and Documentation

(a) Any party who submits testimony or exhibits in a hearing or proceeding which are based in whole, or in part, on a computer model shall provide to all parties, the following information:

- (1) A description of the source of all input data;
- (2) The complete set of input data (input file) as used in the sponsoring party's computer run(s);
- (3) Documentation sufficient for an experienced professional to understand the basic logical processes linking the input data to the output, including but not limited to a manual which includes:
 - (i) A complete list of variables (input record types), input record formats, and a description of how input files are created and

APPENDIX A
Page 3

data entered as used in the sponsoring party's computer model(s).

- (ii) A complete description of how the model operates and its logic. This description may make use of equations, algorithms, flow charts, or other descriptive techniques.
 - (iii) A description of a diagnostics and output report formats as necessary to understand the model's operation.
- (4) A complete set of output files relied on to prepare or support the testimony or exhibits; and
 - (5) A description of post-processing requirements of the model output.

(b) The information specified in subsection (a) shall be submitted either as part of the testimony or exhibit or included in workpapers. Such workpapers shall be available to any party upon request at the time the testimony or exhibit is first served or filed.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

74.4 (Rule 74.4) - Computer Model and Data Base Access

(a) Each party to a proceeding which intends to seek access to a computer model or data base pursuant to Rule 74.4, when it first requests access, shall serve on the sponsoring party a written explanation of why it requests access to the information and how its request relates to its interest or position in the proceeding.

(b) In addition to the documentation required by Rule 74.3, each party using a computer model or data base which is the basis, in whole or in part, for its testimony or exhibits in a proceeding shall provide reasonable access to, and explanation of, that computer model or data base to all parties complying with Rule 74.4(a). Immediately upon service of any testimony or exhibit, any computer model or data base that is used for the testimony or exhibit shall be reasonably accessible to the Commission staff and other parties complying with Rule 74.4(a).

(c) If a party requests access to a data base, the sponsoring party may, at its election, either (i) provide such access on its own computer, (ii) perform any data sorts requested

APPENDIX A
Page 4

by the requesting party, (iii) make the data base available to the requesting party to run on the requesting party's own computer, or (iv) make the data base available through an external computer service.

(d) If a party requests access to a computer model, the sponsoring party, may at its election, either (i) make the requested runs on its own computer, (ii) make the model available to the requesting party to run on that party's own computer, or (iii) have the requested model run produced for the requesting party by an external computer service.

(e) Requests for access pursuant to subsections (c) and (d) shall be limited to a reasonable number of runs as agreed to by sponsoring and requesting parties. If the parties are unable to agree, the sponsoring party may seek relief pursuant to Rule 74.6 before providing such access.

(f) The sponsoring party, in providing access pursuant to subsections (c) and (d), is not required to modify its computer model or data base in order to accommodate a request, or to install its model on the requesting party's computer, or to provide detailed training on how to operate the model beyond provision of written documentation. The sponsoring party is not required to provide a remote terminal or other direct physical link to its computer for use by the requesting party. The sponsoring party may take reasonable precautions to preclude access to other software or data not applicable to the specific model or data base being used.

(g) Within five business days of receipt of a request from a requesting party pursuant to this Rule, the sponsoring party shall indicate whether the request is clear and complete and shall provide the requesting party a written estimate of the date of completion of the response. If the requesting party deems the time estimate unacceptable, it may make a motion for expedited response pursuant to Rule 74.6.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

74.5 (Rule 74.5) - Model and Data Modifications

(a) Except as provided in subsection (b), a party shall be required to maintain copies of computer models and data bases in unmodified form throughout the length of a proceeding if they continue to provide the basis, in whole or in part, for that party's showing. For purposes of this article, the length of a proceeding shall be considered to extend 90 days after the date of

APPENDIX A
Page 5

issuance of the Commission's last order or decision in the proceeding, including any order or decision on applications for rehearing filed in accordance with Rule 85 of the Commission's Rules of Practice and Procedure.

(b) Where a party's computer model provides the basis, in whole or in part, for its showing in a proceeding, and notwithstanding subsection (a), such party may thereafter modify the computer model or the data, and may introduce the results so produced in the proceeding, on the condition that such party has provided timely access to the modified model or data to any requesting party who has previously requested access to the original model or data. Each party who relies on the modified model or data shall provide the modification to all parties at least 10 calendar days prior to its use in the proceeding.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

74.6 (Rule 74.6) - Relief of Parties

(a) Any party may make a motion seeking relief concerning a dispute regarding access to computer models or data bases under the Commission's current practices governing discovery disputes. Such motion shall be made in writing, shall be served upon all parties to the proceeding, and shall state clearly and concisely the grounds and authority for the requested relief. The grounds and extent of available relief are the same as those that excuse or limit the obligation to respond to other types of discovery requests. The motion shall be accompanied by a declaration stating facts showing a reasonable and good faith attempt at an informal resolution of each presented by the motion.

(b) Responses to a motion under Rule 74.6(a) shall be filed and served within 15 days of the date the motion was served.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

74.7 (Rule 74.7) - Confidential and Proprietary Information

Each sponsoring party who objects to providing access to any computer model, data base, or other information which is used in a computer model pursuant to this article, on the grounds that the requested material is confidential, proprietary, or subject to

APPENDIX A
Page 6

a licensing agreement, shall file a motion for a protective order. The motion shall be filed concurrently with the service of the testimony or exhibit which is based in whole, or in part, upon the matters to be protected. Any party may file and serve an answer to the motion for a protective order within 15 days after such motion was served. The assigned administrative law judge, for good cause shown, may make any ruling to protect confidential, proprietary or licensed information from unwarranted disclosure.

NOTE: Authority cited: Section 1822(d), Public Utilities Code.
Reference: Sections 1821-1822, Public Utilities Code.

(END OF APPENDIX A)