

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: March 18, 1999

Resolution No. L-277

RESOLUTION

**AUTHORIZES DISCLOSURE OF CONFIDENTIAL
RECORDS CONCERNING DIRECT ACCESS
ELECTRIC CUSTOMERS TO THE CALIFORNIA
STATE ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

BACKGROUND

By letter dated December 28, 1998, the California State Energy Resources Conservation and Development Commission (CEC) requests copies of direct access data provided confidentially to the California Public Utilities Commission (Commission) on a monthly basis by regulated electric utilities under Section 583 of the California Public Utilities Code. The CEC's request is accompanied by an agreement to keep the data confidential, signed by the Acting Executive Director of the CEC on December 24, 1998.

Specifically, the CEC requests the following information:

- 1) Monthly data on numbers of direct access customers and estimated sales by service area.
- 2) Monthly data on numbers of direct access customers by ESP and by service area.

The CEC states that:

PG&E, Southern California Edison, and San Diego Gas and Electric Company are providing this information to the Commission and the Commission is treating the data as confidential pursuant to Public Utilities Code §§ 583 and 588.

The CEC declares that it has a need for the monthly direct access data for various activities including: (1) analysis of

direct market share and its impact on future consumption; (2) analysis of the rate of consumer acceptance of renewable electricity products; and (3) monitoring the level of business of energy retailers to ensure that the ERPA [Energy Resources Program Account] surcharge is collected and remitted properly.

The CEC agrees to keep this information confidential in its entirety in accord with Government Code § 6254.5 and Public Resources Code § 25366, disclosing it only to those persons in the CEC's Energy Information and Analysis Division whose work requires them to analyze retail market activity in the restructured electric industry.

The CEC points out that:

The Public Records Act (Government Code § 6250 et seq.) allows a state or local agency to release confidential data to another government agency without violating its own responsibilities to treat the information in a confidential manner if the government agency agrees to maintain the confidential treatment (Government Code § 6254.5). The use of this information is limited to those authorized in writing by the person in charge of the government agency.

Public Resources Code § 25366, which applies expressly to the CEC, states that when confidential information obtained by another agency is pertinent to the responsibilities of the CEC, it shall be available to the CEC and treated by the CEC in a confidential manner.

The CEC's regulations (Tit. 20, Cal. Code Regs, § 2505(b)) allow the Executive Director, on behalf of the CEC, to request and agree to maintain the confidentiality of other agencies' confidential records.

DISCUSSION

The Commission has jurisdiction to determine whether it is in the public interest to disclose to the public or to other governmental agencies confidential information furnished to or obtained by the Commission or its employees in the course of their duties. (See, e.g., *Re Southern California Edison Company* [Decision (D.) 91-12-019] (1991) 42 CPUC 2d 298, 301.)

The CEC has requested certain confidential information furnished to the Commission by utilities and electric services providers (ESPs). The Commission must now determine whether the granting of this request is in the public interest.

Commission Disclosure of Confidential Information

California Public Utilities Code Section 583 states:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

Section 583 prohibits staff disclosure of utility-provided information without formal authorization by the Commission, or by the Commission or a Commissioner in the course of a hearing or proceeding. Section 583 does not limit the Commission's authority to order the release of information provided by utilities, however. Thus, for example, the Commission is free to order that confidential information provided to the Commission by utilities be disclosed to other governmental agencies and/or made public. As Resolution L-258A notes:

It is appropriate for the Commission to exercise this authority, among other reasons, because (i) the Commission, as the regulatory body overseeing these entities, has the expertise to determine the relative sensitivity of different kinds of confidential information; and (ii) the Commission can weigh whether making specific information public will discourage regulated entities from providing similar information to the Commission in the future and thereby make the Commission's regulatory tasks more difficult. (Resolution L-258A at 3.)

In Resolution L-258A, dated October 22, 1997, the Commission exercised its authority to establish a process by which law enforcement organizations can obtain information and

records, not open to public inspection, which are in the possession of the Commission and its employees. Finding that: "[I]aw enforcement requests for records not open to public inspection present unusual problems which warrant a specially tailored process for response" (Finding of Fact 6), the Commission ordered that:

The Executive Director with the advice of the General Counsel, or their respective delegates, are authorized to release to the law enforcement agencies specified below, acting in their official capacity, confidential records as described in Paragraph 2 of General Order 66C as "public records not open to public inspection" upon written request and execution of an agreement with the requesting organization for the receipt of information for use in a confidential manner. In addition to the specific documents requested, the written request shall include an explanation of the purpose for the request and of how the pursuit of the request relates to the law enforcement organization's functions. The confidentiality agreement, signed by a person authorized to contractually bind the requesting law enforcement organization, shall include an express reservation of this Commission's authority to determine whether information kept confidential under GO 66C should be disclosed to the public." (Resolution L-258A at 5 (Ordering Paragraph 1).)¹

While Resolution L-258A applies only to specified law enforcement agencies, it provides a useful model for addressing information requests from other governmental agencies as well.

CEC Request

There are many valid public policy reasons for releasing to the CEC, for use within the scope of its duties, Commission records which are considered to be confidential and which are not open to public inspection. The Commission and the CEC have a strong interest in cooperatively conducting business in which the responsibilities of each agency

2. General Order (GO) 66-C lists a number of categories of public records that are not open to public inspection, and enunciates the procedure by which such records may be obtained. GO 66-C provides that upon written request to the Executive Director of the Commission and a showing of good cause for the disclosure of the records, the Commission may authorize the disclosure of the records. In a manner similar to Section 583, GO 66-C reserves to the Commission the discretion to authorize, or refrain from authorizing, the disclosure to the public of otherwise confidential information.

overlaps and/or complements the work of the other. Given the interrelated responsibilities of the agencies, and their cooperative representation of California's interests, there are many contexts in which it may be useful for each agency to have access to records in the possession of the other agency.

The records requested by the CEC are sought in connection with that agency's responsibilities, including: (1) analysis of direct market share and its impact on future consumption; (2) analysis of the rate of consumer acceptance of renewable electricity products; and (3) monitoring the level of business of energy retailers to ensure that the ERPA surcharge is collected and remitted properly.

Further, provisions of the California Public Resources Code addressing the information needs of the CEC expressly encourage, and indeed mandate, the sharing by other agencies of information pertinent to the CEC's responsibilities, subject to the requirement that confidential information obtained from other agencies must be treated by the CEC in a confidential manner. California Public Resources Code Section 25224 states:

The commission [CEC] and other state agencies shall, to the fullest extent possible, exchange records, reports, material, and other information relating to energy resources and conservation and power facilities siting, or any areas of mutual concern, to the end that unnecessary duplication of effort may be avoided.

California Public Resources Code Section 25366 states:

Any confidential information pertinent to the responsibilities of the commission [CEC] specified in this division which is obtained by another state agency shall be available to the commission and treated in a confidential manner.

And, as noted in D.97-09-124 (petition for writ of review denied), which addresses applications for rehearing of Resolutions L-258 and L-258A, the disclosure of confidential information to other state agencies, such as those responsible for law enforcement, does not constitute disclosure of such information to the public. State, local, and federal agencies are excluded from the definition of "the public" set forth in California Government Code Section 6252.

Nor does disclosure of confidential information to fellow governmental agencies, by itself, waive the Commission's right to assert California Public Records Act (California Government Code Sections 6250 et seq.) exemptions from disclosure of such information to the public. California Government Code Section 6254.5 states the general rule that an agency's disclosure to any member of the public of records which are exempt from

disclosure pursuant to the California Public Records Act waives the right to assert such exemptions. Section 6254.5 (e) explicitly provides, however, that this rule does not apply to disclosures:

Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.
(California Government Code Section 6254.5 (e).)

Resolution L-258A sets forth guidelines for the Commission's of confidential information to specified law enforcement agencies which sign confidentiality agreements. These guidelines require: 1) a written request which shall include an explanation of the purpose for the request and of how pursuit of the request relates to the law enforcement organization's functions; and 2) a confidentiality agreement, signed by a person authorized to contractually bind the requesting law enforcement organization, which includes an express reservation of this Commission's authority to determine whether information kept confidential under GO 66-C should be disclosed to the public. Although not directly applicable to the CEC's request for information, the Resolution L-258A guidelines provide a useful model.

The Interagency Information Request and Confidentiality Agreement (Agreement) signed by the Acting Director of the CEC conforms to most of the requirements set forth in Resolution L-258A. The Agreement is a written request which includes an explanation of the purpose of the request and how the request relates to the requesting organization's function, and is signed by a person (the CEC's Acting Executive Director) who is authorized to contractually bind the requesting organization.³ All that the current CEC Agreement lacks is an express reservation of this Commission's authority to determine whether information kept confidential under GO 66-C should be disclosed to the public. The Agreement does, however, include the following statement: "The CEC agrees to keep this information confidential in its entirety in accord with Government Code § 6254.5 and Public Resources Code § 25366, disclosing it only to those persons in the CEC's Energy Information and Analysis Division whose work requires them to analyze retail market activity in the restructured electricity industry." This statement necessarily implies a reservation to this Commission of the authority to determine whether any confidential information that may be disclosed to the CEC should be disclosed to the public. Thus, as a practical matter, the CEC Agreement appears to meet the guidelines set

3. The CEC's regulations (Title 20, California Code of Regulations, Section 2505(b)) allow the Executive Director, on behalf of the CEC, to request and agree to maintain the confidentiality of other agencies' confidential records.

forth in Resolution L-258A for the disclosure of confidential information to fellow governmental agencies.

The public interest will be served by making the requested records available to the CEC pursuant to the December 24, 1998, Interagency Information Request and Confidentiality Agreement signed by Kent Smith, the Acting Executive Director of the CEC, and subject to the CEC providing a supplemental confidentiality agreement as set forth below.

The Commission's Executive Director, with the advice of the General Counsel, or their respective delegates, will be authorized to release to the CEC, acting in its official capacity, confidential records as described in Paragraph 2 of General Order 66-C as "public records not open to public inspection" upon the execution of the supplemental confidentiality agreement set forth below. The Commission's disclosures to the CEC shall be in accord with the principles of Resolution No. L-258A.

Comments on Draft Resolution

Comments

Draft resolution L-277 was mailed to the parties on the Electric Restructuring Service List February 2, 1999, in accordance with Public Utilities Code Section 311(g) and Rule 77.1 of the Commission's Rules of Practice and Procedure. Comments were filed on February 16, 1999, by the California Manufacturers Association (CMA), Pacific Gas and Electric Company (PG&E), San Diego Gas and Electric Company (SDG&E) and Southern California Edison Company (Edison). Two commenters suggested that draft resolution L-277 be mailed to Electric Service Providers in addition to the parties on the Electric Restructuring Service List. On February 22, 1999, the draft resolution was mailed to parties on the Registered Electric Service Providers and Inactive Electric Service Providers Service lists, with comments being due March 1, 1999. No comments were received as a result of this second mailing.

CMA notes that it has been an active participant before the CEC in its proceeding related to data collection, analysis, and dissemination. CMA states that it has registered concern about CEC proposals that: 1) would duplicate functions performed by other agencies, such as this Commission; 2) exceed the CEC's statutory authority; and 3) jeopardize the confidentiality of customer data. CMA's primary concern is the CEC's lack of adequate measures to ensure the confidentiality of customer data.

CMA questions whether the draft resolution would supercede the CEC's regulations relating to disclosure, which it believes are less protective of confidentiality of customer data than are the Commission's rules. CMA believes that the Commission's rules adequately protect customer data confidentiality, whereas the CEC regulations (Title 20,

Cal. Code Regs., Section 2507) do not. CMA notes that the CEC's regulations allow the release of customer records which have been designated confidential if the information has been aggregated to a lesser extent than the aggregation required by the Commission. CMA asserts that the Commission has a legal obligation to ensure that the CEC does not directly or indirectly disclose confidential information received from the Commission, and asks that we not release direct access customer data to the CEC unless we amend the confidentiality agreement to specifically prevent disclosure under CEC regulation Section 2507.

PG&E comments that ESPs on the list of ESPs registered with the Commission and all other ESPs active in each utility distribution company's (UDC) service territory should be given a formal chance to comment on the draft resolution. PG&E states that it is not clear that the UDCs are, in fact, currently providing the information desired by the CEC (monthly data on numbers of direct access customers and estimated sales by service area, and monthly data on numbers of direct access customers by ESP and by service area) nor how direct access information shall be provided to the Commission in the future. Citing Decision 97-05-040, PG&E notes that the UDCs' current direct access reporting requirement ends on June 30, 1999, and that it understands that the Commission expects to issue a decision in the coming months which will address future direct access reporting. PG&E recommends that the Commission solicit the views of ESPs on the reporting requirements and confidentiality, and, once future reporting requirements are better defined, develop an information sharing agreement, or perhaps, declare the issue moot.

PG&E comments that the draft resolution does not identify how the CEC expects to use the direct access data or the CEC's authority to acquire the data. PG&E notes that a number of ESPs recently filed objections to a CEC request to obtain customer-specific information from ESPs, and encloses the "Comments and Proposal of Enron Corporation, Green Mountain Energy Resources L.L.C., New Energy Ventures, inc., and the California Manufacturers Association on Consumer Information Data Collection," dated February 2, 1999, CEC Docket 97-DC&CR-1. PG&E asserts that this filing suggests that the Commission may want to require CEC to provide additional justification for its request for ESP-related data.

PG&E also comments that the draft resolution and the proposed confidentiality agreement should be consistent in form with other Commission confidentiality agreements. PG&E suggests, for example, that the confidentiality agreement include a requirement that "the agencies' individual employees that are to be given access to the data will sign an acknowledgment form stating that the terms of the Confidentiality Agreement extend to the actions of those employees and clarifying that, in case of breach, the aggrieved party may bring an action against the individual employee."

PG&E further comments that:

[I]t is unclear whether the Confidentiality Agreement broadens who at the CEC would have access to the information beyond the group proposed in the CEC's December 24, 1998 request. While the request states that confidential data will be disclosed only to the CEC's Energy Information and Analysis Division, the proposed "Confidentiality Agreement" appears to open access up to 'persons authorized in writing by the person(s) in charge of the CEC.' Draft Resolution, page 8. Also, neither the December 24, 1998 request nor the proposed 'Confidentiality Agreement' strictly limit the purposes for which the information will be used. Nor do they include any requirement that the CEC aggregate the data in order to protect confidentiality. See e.g., Public Resources Code section 25321. These issues could be clarified in an amended Confidentiality Agreement to be worked out with ESPs and other interested market participants.

SDG&E comments that the draft resolution raises complex legal issues and important public policy issues concerning the release of competitively sensitive information. SDG&E states that the time provide for comments did not give it an opportunity to provide a thorough and considered response.

SDG&E more specifically comments that it has contractual obligations regarding nondisclosure which stem from Commission reviewed and approved contracts with a large number of ESPs. SDG&E states that before it could release confidential information, as defined by its agreements, it would have to provide prompt notice of the disclosure requirement so that it may take whatever action it deems appropriate, including intervention in any proceeding and the seeking of an injunction to prohibit such disclosure. SDG&E states that the draft resolution does not address how notice and intervention could occur in the context of the information sought, and that each Commission registered ESP should be given a chance to comment on the draft resolution. SDG&E also states that the State's utilities "should have the benefit of understanding the concerns of the parties with whom it has entered into contracts, before the terms of the contracts are changed, reconstrued, or applied in new ways. All interested parties should have the benefit of considering whether information specific to a particular ESP should be provided, if at all, directly from the ESP, and not the associated utility."

In addition, SDG&E expresses concern that:

[T]he scope of information which the Commission, and now the CEC, are seeking may be increasing. With the wider dissemination of competitive information, a number of additional issues arise. For example, what additional security measures, if any, will be undertaken to ensure that the

information is not mistakenly released? What remedies are available if information is intentionally or negligently released? What are the appropriate reasons, consistent with the Commission's tremendous efforts to develop competition in the State's electric industry, to release competitive information? What uses will be made of the information once released? Will the scope of information sought for release increase over time? Will the types and number of entities (government and nongovernment) seeking this competitive information increase over time?

Finally, SDG&E states that it "would like all interested parties to consider whether the disclosure of the information, and the ways in which the information will be used, outweigh the competitive or any proprietary interests at stake and any harm that might occur if the information is released."

Edison offers comments on loopholes in the draft confidentiality agreement and provides a four page confidentiality agreement designed to address these loopholes. Edison notes that "the ESPs are not third party beneficiaries, and therefore would not be able to seek to enforce the agreement. In addition, the agreement may be terminated by either party upon 60 days notice; however, there is no provision requiring the CEC to return confidential documents and any copies to the CPUC if the agreement is terminated. The confidentiality agreement should also require that the CEC take reasonable security precautions, and notify the affected ESPs and the CPUC immediately upon discovery of any unauthorized use or disclosure of the documents or information."

On March 3, 1999, the CEC submitted comments replying to the comments filed regarding the draft resolution. The CEC notes that the supplemental confidentiality agreement in the draft resolution clarifies many of the aggregation and confidentiality issues raised by commenters and reserves for the commission its authority over whether the data, or aggregations of the data, can be made public. The CEC states that it has no objection to modifying the confidentiality agreement to include additional reasonable provisions. The CEC notes that each CEC employee must sign a confidentiality agreement with the CEC at the time he or she is appointed, and enclosed a copy of that agreement.

The CEC responds to PG&E's comments regarding the existing sunset of the current direct access filing requirements at the Commission and its suggestion that the CEC's information request be made part of a future proceeding on direct access reporting requirements. The CEC points out that it has requested data which is being collected now and is necessary for the CEC's current work, and that the request should not be delayed by possible future proceedings. The CEC notes that it is likely that the June, 1999 sunset date will be extended, and that the CEC will address future direct access reporting

requirements if additional, necessary data becomes available as a result of those proceedings.

The CEC points out that: "PG&E's questioning of the CEC's authority to acquire the data is not applicable to acquiring data from a sister state agency. Public Resources Code section 25224 directly requires state agencies to exchange records and information. Public Resources Code section 25366 also requires the CEC to treat confidential data obtained from another state agency as confidential."

With regard to CMA's concerns over the CEC's confidentiality regulations (Title 20, Cal. Code Regs. Section 2507 (d)(1)), the CEC notes that:

The data does contain information on estimated customer sales, but by broad categories (i.e., residential, small commercial, large commercial, industrial, and agricultural). Without access to the data, it is impossible to determine if any of the cells of data violate the CEC's, the CPUC's, or even CMA's, confidentiality rules. With data aggregated by such broad categories, it is quite possible that each cell will contain 100 customers, at a minimum. Moreover, Energy Commission regulations allow for stricter rules than the 3/60 rule where appropriate. Section 2507 (3) states that if the Executive Director determines that the application of Section 2507 (d)(1) and (2) are insufficient to protect confidentiality, he may not release the records until the protection of confidentiality is ensured by further aggregation. In any event, this discussion is irrelevant because it is CPUC disclosure rules, not CEC disclosure rules, which will govern the public release of this data.

The Energy Commission agrees that the disclosure of the information requested will not abrogate the CPUC's rules for maintaining confidentiality. Resolution L-277 states that "the Commission reserves its authority under Section 583 of the Public Utilities Code and General Order 66-C to consider and determine whether the records...should be made available for public inspection." The CPUC continues to have authority over the confidentiality of the information and aggregated release of that data will be subject to CPUC rules, not the Energy Commission's 3/60 rule.

Finally, the CEC states that SDG&E's broad concerns may be appropriate for a general proceeding on data collection, but miss the point here, where the CEC is asking for information that is already provided by utilities and for which SDG&E has already satisfied its contractual obligations.

Response to Comments

As noted earlier, we have already responded to the comments of PG&E and SDG&E by mailing the draft resolution to all entities on our Registered Electric Service Providers and Inactive Electric Service Providers service lists on February 22, 1999, for comments by March 1, 1999. We have received no comments in response to this mailing.

We assure CMA that the Interagency Information Request and Confidentiality Agreement signed by the Acting Director of the CEC, and the supplemental confidentiality agreement in the draft resolution require the CEC to refrain from disclosing any information it may obtain from this Commission without consulting with the Commission first. Thus, the CEC cannot release information it receives from us, even in aggregated form, without first consulting with the Commission. While the CEC may have authority under Title 20, Cal. Code Regs, Section 2507 to release certain types of aggregated customer data, this authority is superseded, with regard to the information we may share with the CEC, by the provisions of the confidentiality agreement reserving our right to oversee any further dissemination of the information we provide. CEC's reply comments reflect its agreement with this understanding of our confidentiality agreement.

PG&E correctly notes that future direct access reporting and information disclosure issues will be addressed in future Commission proceedings, and that the views of ESPs, and all other stakeholders, should be solicited during these proceedings. We see no reason to delay acting on the CEC's information request until such proceedings are completed, however. As the CEC notes, it seeks information which is currently available in order to meet its current responsibilities. Access to information which may be available in the future need not be resolved in the context of the CEC's present information request.

We believe that the CEC has provided adequate justification for its request for ESP-related information, and do not see the need to delay acting on the CEC's request until all information gathering issues before the CEC are resolved. Since we reserve the right to determine whether the information we provide the CEC will be disclosed to the public, and do not intend to release authorize the public release of such information unless and until we believe it is in the public interest to do so, we need not be overly concerned that the CEC is still reviewing issues concerning its own collection of data from UDCs and, perhaps, ESPs. The CEC proceeding concerning data collection and dissemination may provide insight for our own proceedings addressing similar issues in the future, but does not control our own decision-making ability.

We acknowledge PG&E's comments that the draft supplemental confidentiality agreement could in some respects be clearer, and will revise the agreement in an endeavor

to provide additional clarity. We believe it is unnecessary to require CEC employees to sign confidentiality agreements referencing the direct access information we may provide the CEC. Indeed, CEC's comments make it clear that its employees are already required to sign a broad confidentiality form which should cover the direct access information it seeks here. We will, however, require any CEC consultants and contractors, and their employees, who may have access to such information to sign forms acknowledging that the terms of the confidentiality agreements extend to those consultants, contractors, and employees. We decline to add a provision stating that, in case of a breach of the agreement, the "aggrieved party" may bring an action against an individual employee.

We do not believe that it is necessary for the supplemental confidentiality agreement to explicitly limit access to the information we may provide to the CEC's Energy Information and Analysis Branch. Although this is the CEC unit noted in the CEC's information request as the intended recipient of the information, and although this unit may in fact be the sole recipient, we see no harm in allowing access to the potentially broader class of "persons authorized in writing by the person(s) in charge of the CEC." We trust that the persons in charge at our sister agency are capable of determining the agency personnel who needs access to the information, and of requiring them to sign forms acknowledging the effect of the confidentiality agreements covering the information. Similarly, we do not think it necessary to limit the purposes for which the information will be used, or to explicitly state that the CEC must aggregate the data to protect confidentiality. Again, we trust our sister agency to determine how to use the information to meet its own regulatory responsibilities, and we trust that our sister agency will not violate the confidentiality agreements by disregarding our explicit reservation of authority to determine whether the information we provide the CEC should be further disclosed to the public. As noted earlier, the CEC must consult with us before releasing any information we provide, even in aggregated form. We decline PG&E's suggestion that we involve ESPs and other market participants in the development of confidentiality agreements between ourselves and our fellow agencies such as the CEC.

We agree with SDG&E that the release of competitively sensitive information raises important legal and public policy issues. We note, however, that the draft resolution does not contemplate making direct access data public at this time. Rather, the draft resolution authorizes the release of certain information to another governmental agency - not the public - subject to confidentiality agreements which reserve our right to determine whether any information we provide to the CEC should be released to the public. We are fully aware that we will need to address SDG&E's more global concerns regarding the public disclosure of direct access customer information, either in the proceeding referred to by PG&E or in response to a public records request by a person outside state government. We do not believe, however, that we need complete our analysis of the entire range of issues associated with such public disclosure before responding to the CEC's current, narrow, information request.

We appreciate Edison's recommendations for closing certain loopholes within the supplemental confidentiality agreement in the draft resolution. We will adopt certain recommendations that we amend the agreement to incorporate a requirement that CEC employees given access to the information we provide acknowledge the existence of the confidentiality agreements and their need to comply with such agreements. We will also add a provision requiring the CEC to take reasonable security precautions to keep confidential the documents and information provided to the CEC, and to inform the Commission of any unauthorized disclosure of information and to cooperate to prevent any further unauthorized disclosures. We decline to add provisions making ESPs third party beneficiaries of the confidentiality agreements, and authorizing the prevailing parties to receive attorneys' fees in actions to enforce rights arising out of or related to the agreements. We will also amend the agreement to require that, if the CEC determines that it is desirable or that it is required to disclose or make available to third parties the contents of records obtained from the Commission, it agrees to not to do so without first notifying the Commission of its intent and reason for the requested disclosure, and that the CEC provide such notice at least 60 days in advance prior to the planned disclosure so that the Commission may, in accord with Public Utilities Code Section 583 and General Order 66-C schedule and publicly notice its consideration whether, in the Commission's view, it is in the public interest to make such records available to the public or a third party. Copies of the CEC's Interagency Information Request and Confidentiality Agreement, the Amended Confidentiality Agreement, and the Acknowledgment Form are attached to this Resolution.

FINDINGS OF FACT

1. The CEC and the Commission each have overlapping and complimentary responsibilities for representing the interests of California and for implementing and enforcing laws governing the use and conservation of energy in California.
2. Given the overlapping and complementary nature of the work performed by each agency, each agency has records which may be of use to the other agency in the implementation of its regulatory and law enforcement responsibilities.
3. The CEC sent to the Commission's Executive Director a written Interagency Information Request and Confidentiality Agreement (Agreement) dated December 24, 1998, requesting disclosure on a confidential basis of information provided to the Commission on a monthly basis by regulated electric utilities, specifically: 1) monthly data on numbers of direct access customers and estimated sales by service area, and 2) monthly data on numbers of direct access customers by Electric Service Provider (ESP) and by service area. The requested information is contained in confidential

records obtained by the Commission on a monthly basis from regulated electric utilities which are not open to public inspection. A copy of the CEC's Agreement is attached hereto.

4. The CEC Agreement declares that the CEC "has a need for the monthly direct access data for various activities including: (1) analysis of direct market share and its impact on future consumption; (2) analysis of the rate of consumer acceptance of renewable electricity products; and (3) monitoring the level of business of energy retailers to ensure that the ERPA surcharge is collected and remitted properly."
5. The CEC Agreement states: "The CEC agrees to keep this information confidential in its entirety in accord with California Government Code § 6254.5 and California Public Resources Code § 25366, disclosing it only to those persons in the CEC's Energy Information and Analysis Division whose work requires them to analyze retail market activity in the restructured electric industry."
6. The CEC Agreement is consistent with the requirements of Resolution L-258A.
7. The information requested by the CEC was provided to this Commission by electric utilities on a confidential basis pursuant to California Public Utilities Code Section 583.
8. The public interest will be served by the Commission's making this information available to the CEC upon the implementation of the CEC's December 24, 1998 Interagency Information Request and Confidentiality Agreement and the execution of the supplemental confidentiality agreement set forth above in the text of this resolution.

CONCLUSIONS OF LAW

1. The Commission is vested with the jurisdiction to determine whether it is in the public interest to disclose to other governmental agencies and/or the public confidential information furnished to or obtained by the Commission or its employees in the course of their duties.
2. The Commission has broad discretion under California Public Utilities Code Section 583 to disclose information. (See, e.g., *Re Southern California Edison Company* [Decision (D.) 91-12-019] (1991) 42 CPUC 2d 298, 301.)
3. Providing confidential records to fellow governmental agency does not, by itself, make those records public. A governmental agency is not the public.
4. The general rule that an agency's disclosure of records which are exempt from disclosure pursuant to the California Public Records Act (California Government

Code Sections 6250 et seq.) waives the right to assert such exemptions does not apply to disclosures:

Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law.
(California Government Code Section 6254.5 (e).)

5. California Public Resources Code Section 25224 states: "The commission [CEC] and other state agencies shall, to the fullest extent possible, exchange records, reports, material, and other information relating to energy resources and conservation and power facilities siting, or any areas of mutual concern, to the end that unnecessary duplication of effort may be avoided."
6. California Public Resources Code Section 25366, which applies expressly to the CEC, states that when confidential information obtained by another agency is pertinent to the responsibilities of the CEC, it shall be available to the CEC and be treated by the CEC in a confidential manner.
7. The CEC's regulations (Title 20, California Code of Regulations, Section 2505(b)) allow the Executive Director of the CEC, on behalf of the CEC, to request and agree to maintain the confidentiality of the confidential records of other agencies.

ORDER

1. The Executive Director with the advice of the General Counsel, or their respective delegates, are authorized to disclose to the California State Energy Resources Conservation and Development Commission (CEC), acting in its official capacity, confidential records as described in Paragraph 2 of General Order 66-C as "public records not open to public inspection," and identified in the CEC's Interagency Information Request and Confidentiality Agreement (Agreement) dated December 24, 1998, as information provided to the Commission on a monthly basis by regulated electric utilities, specifically: 1) monthly data on numbers of direct access customers and estimated sales by service area, and 2) monthly data on numbers of direct access customers by Electric Service Provider (ESP) and by service area, upon the implementation of the CEC Agreement and execution of the supplemental confidentiality agreement set forth above in the text of this resolution.

2. The Commission's disclosures to the CEC shall be in accord with the CEC Agreement, the supplemental confidentiality agreement executed as mandated by this resolution, and the principles set forth in Resolution I-258A.
3. The effective date of this order is today.

I certify that this resolution was adopted by the Public Utilities Commission at its regular meeting of March 18, 1999, and that the following Commissioners approved it.


WESLEY M. FRANKLIN
Executive Director

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

ATTACHMENT 1

**INTERAGENCY INFORMATION REQUEST
AND CONFIDENTIALITY AGREEMENT**

The California Energy Commission (CEC) hereby requests the following information from the California Public Utilities Commission (Commission) provided to the Commission on a monthly basis by regulated electric utilities:

- 1) Monthly data on numbers of direct access customers and estimated sales by service area.
- 2) Monthly data on numbers of direct access customers by ESP and by service area.

PG&E, Southern California Edison, and San Diego Gas and Electric Company are providing this data to the Commission and the Commission is treating the data as confidential pursuant to Public Utilities Code §§ 583 and 588.

The CEC declares that it has a need for the monthly direct access data for various activities including: (1) analysis of direct access market share and its impact on future consumption; (2) analysis of the rate of consumer acceptance of renewable electricity products; and 3) monitoring the level of business of energy retailers to ensure that the ERPA surcharge is collected and remitted properly.

The CEC agrees to keep this information confidential in its entirety in accord with Government Code § 6254.5 and Public Resources Code § 25366, disclosing it only to those persons in the CEC's Energy Information and Analysis Division whose work requires them to analyze retail market activity in the restructured electricity industry.

Applicable Law

The Public Records Act (Government Code § 6250 et seq.) allows a state or local agency to release confidential data to another government agency without violating its own responsibilities to treat the information in a confidential manner if the government agency agrees to maintain the confidential treatment (Government Code § 6254.5). The use of this information is limited to those authorized in writing by the person in charge of the government agency.

Public Resources Code § 25366, which applies expressly to the CEC, states that when confidential information obtained by another agency is pertinent to the responsibilities of the CEC, it shall be available to the CEC and treated by the CEC in a confidential manner.

The CEC's regulations (Tit. 20, Cal. Code Regs. § 2505(b)) allow the Executive Director, on behalf of the CEC, to request and agree to maintain the confidentiality of other agencies' confidential records.

Dated: 12/24/98



KENT SMITH, Acting
Executive Director

ATTACHMENT 2

CONFIDENTIALITY AGREEMENT

1. The intent of this agreement is to implement the provisions of Resolution L-277, which was adopted by the Commission on March 18, 1999, with respect to the records specified below.
2. This agreement is limited to records, not open to public inspection, that are in the possession or control of the California Public Utilities Commission (Commission) and are identified in the California State Energy Resources Conservation and Development Commission's (CEC) Interagency Information Request and Confidentiality Agreement request dated December 24, 1998, as information provided to the Commission on a monthly basis by regulated electric utilities, specifically:
 - 1) Monthly data on numbers of direct access customers and estimated sales by service area;
 - 2) Monthly data on numbers of direct access customers by Electric Service Provider (ESP) and by service area.
3. A copy of Commission Resolution L-277 has been provided to and reviewed by the signatories to this agreement. In accordance with Resolution L-277, and with the principles of Resolution L-258A:
 - A. The Commission shall permit the CEC to review and copy the records, not open to public inspection, identified in Paragraph 2 above, upon the representation of an authorized representative of the CEC that the confidentiality of the records will be maintained and that they will not be made available for inspection by any other governmental agency, or by the public, except as provided for herein.
 - B. The CEC shall agree that the information shall be released only to persons authorized in writing by the person(s) in charge of the agency to obtain the confidential information, and that it shall inform each of its employees, and any consultants and contractors who have access to the records or information contained therein that they are subject to the requirements of this confidentiality agreement, and shall have each such consultant and contractor sign the attached "acknowledgment" form obligating them to comply with this agreement. The CEC further agrees that it will make sure any such consultants

and contractors inform their employees that they are subject to this confidentiality agreement and have each of their employees who has access to the confidential records sign the attached acknowledgment form. Copies of the signed acknowledgment forms will be provided to the Commission upon request.

- C. The CEC shall take reasonable security precautions to keep confidential the records provided to the CEC under this agreement. The CEC shall notify the Commission immediately upon the discovery of any unauthorized use or disclosure of the records or information contained therein, or any other breach of this agreement, and will cooperate in every reasonable way to help the Commission prevent further unauthorized disclosure or use of the records or information contained therein.
4. The Commission reserves its authority under Section 583 of the California Public Utilities Code and General Order 66-C to consider and determine whether the records identified in Paragraph 2 above should be made available for public inspection.
5. Should the CEC, for any reason, determine that it desires or that it is required to disclose or make available to other governmental agencies and/or the public the contents of the records identified in paragraph 2 above, the CEC agrees not to do so without first notifying the Commission of its intent and the reason for the requested disclosure. The CEC further agrees that such notice will be no less than 60 days prior to the planned disclosure in order that the Commission can, in accordance with Section 583 of the Public Utilities Code and the Commission's General Order 66-C, schedule and publicly notice its consideration of whether, in the Commission's view, it is in the public interest to make such records available to other governmental agencies and/or the public. The CEC will abide by the Commission's determination, but may appeal pursuant to our Rules of Practice and Procedure.
6. This agreement shall continue unless or until either party to this agreement determines that the agreement should be terminated. Unless otherwise provided for by the written agreement of both the CEC and the Commission, unilateral termination of this agreement shall be effected no sooner than 60 days from the date that either party provides notice, in writing, of its intent to terminate this agreement. All obligations created by this agreement during its term shall survive termination of the agreement.
7. This agreement shall not be modified except by a written agreement dated subsequent to the date of this agreement and signed by authorized representatives of both parties. None of the provisions of this agreement shall be deemed to have been waived by any act or acquiescence on the part of either party, its agents, or employees, but only by an

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instrument in writing signed by an authorized representative of the party. No waiver of any provisions of this agreement shall constitute a waiver of any other provision(s) or of the same provision on another occasion.

8. If any provision of this agreement shall be held by a court of competent jurisdiction to be illegal, invalid or unenforceable, the remaining provisions shall remain in full force and effect.

Name _____
Position _____

Peter Arth, Jr.,
General Counsel
California Public Utilities Commission

Dated: _____

Dated: _____

ATTACHMENT 3

March 18, 1999

**Acknowledgment and Acceptance of Requirements of the Confidentiality Agreement
Between the California State Energy Resources Conservation and Development
Commission (CEC) and the California Public Utilities Commission For CEC
Consultants and Contractors**

The Undersigned acknowledges that it/he/she has received copies of the California Energy Resources Conservation and Development Commission's (CEC) Interagency Information request and Confidentiality Agreement dated December 24, 1998, the Confidentiality Agreement between the California Public Utilities Commission (Commission) and the CEC dated _____, Public Utilities Code Section 583 and Commission Resolution L-277. The undersigned acknowledges that it/he/she will be subject to the requirements of the Confidentiality Agreement. The undersigned agrees to be bound by the requirements set forth therein.

Signed: _____

Name _____

Title: _____

Organization: _____

Dated: _____