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Melissa Jones
Executive Director
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EXECUTIVE DIRECTOR

Re: **Appeal of California Energy Commission's Ruling on Southern California Edison Company's Application for Confidentiality -- Electricity Demand Forecast Forms**
Docket No. 09-IEP-1C

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Dear Ms. Jones:

Southern California Edison Company (SCE) received the California Energy Commission's (Energy Commission) letter dated March 27, 2009 (Energy Commission's 2009 Ruling), granting in part and denying in part SCE's Application for Confidentiality for certain information submitted by SCE on the Electricity Demand Forms in the above-referenced docket for the 2009 IEPR. Pursuant to Title 20 of the California Code of Regulations (CCR), Section 2505(a)(3)(B), SCE appeals the Energy Commission's 2009 Ruling denying confidential treatment for the following information on Form 1.2 – Distribution Area Net Electricity for Generation Load:

- Losses for the years 2008 – 2011¹
- Total Distribution System Energy Requirements for the years 2008 – 2011
- Forecast Net of Uncommitted Impacts for the years 2008 – 2011
- Forecast Gross of Uncommitted Impacts for the years 2008 – 2011
- Average Annual Growth Rate (%) 2007-2012

¹ SCE's Application initially sought confidential treatment for Losses for the years 2008 – 2020. SCE agrees to limit its request for confidential treatment for Losses for the years 2008 – 2011.

1. Introduction and Background

In issuing its 2009 Ruling, the Energy Commission stated that the data submitted on this form “does not constitute a trade secret, nor does the public interest in nondisclosure of such data outweigh the public interest in disclosure.” The Energy Commission further stated that its conclusion was supported by “the Energy Commission’s Order Denying Southern California Edison Company’s Appeal of Executive Director Decision Denying Confidentiality, dated April 13, 2005, and, in part, in the subsequent decision in Superior Court upholding that Order” (2005 Ruling). The Energy Commission’s 2009 Ruling is in error, and should be reversed.

For the reasons discussed below, SCE has made a reasonable claim that applicable law authorizes the Energy Commission to keep confidential the information that is the subject of this appeal. Specifically, SCE has demonstrated that the items of information on Form 1.2 for which it seeks confidentiality are trade secrets under Evidence Code § 1060, and has been designated as confidential *as a matter of law* by the California Public Utilities Commission (CPUC) in Confidentiality Matrix approved in Decision (D.) 06-06-066, as modified by D.07-05-032.²

In addition, the Energy Commission’s should not use the 2005 Ruling denying SCE’s appeal in the 2005 IEPR as a basis for denying SCE’s March 2, 2007 application for confidentiality. The California Public Utilities Commission (CPUC) Confidentiality Matrix, which was approved in CPUC Decision No. (D.) 06-06-066 (as modified by D.07-05-032) and is subsequent to the 2005 Ruling, justifies the Energy Commission reversing its 2009 Ruling. Accordingly, SCE’s appeal should be granted.

2. The Applicable Legal Standards

Public Resources Code § 25322(a) and 20 CCR § 2505(a) specifies the information a party must provide to support an application for confidential designation of information it provides to the Energy Commission. In particular, Public Resources Code § 25322(a)(1) provides:

(1) Any person required to present information to the commission pursuant to this section may request that specific information be held in confidence. The commission *shall* grant the request in any of the following circumstances:

(A) The information is exempt from disclosure under the California Public Records Act, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code.

² The Energy Commission actively participated in CPUC Rulemaking (R.) 05-06-040 to implement Senate Bill 1488 relating to confidentiality of information in which D.06-06-066 and D.07-05-032 were issued.

(B) The information satisfies the confidentiality requirements of Article 2 (commencing with Section 2501) of Chapter 7 of Division 2 of Title 20 of the California Code of Regulations, as those regulations existed on January 1, 2002.

(C) On the facts of the particular case, the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.³

Pursuant to CCR 2505(a)(3)(A) “an application *shall* be granted if the applicant makes a reasonable claim that the Public Records Act or other provision of law authorizes the Commission to keep the record confidential.” Applicable provisions of law necessarily include the Evidence Code, which creates a privilege for trade secrets, and *legal* decisions from other regulatory agencies such as the California Public Utilities Commission.⁴

As discussed below, SCE has met this burden and made a reasonable claim that the following categories on Form 1.2 warrant confidential treatment:

- Losses for the years 2008 – 2011
- Total Distribution System Energy Requirements for the years 2008 – 2011
- Forecast Net of Uncommitted Impacts for the years 2008 – 2011
- Forecast Gross of Uncommitted Impacts for the years 2008 – 2011
- Average Annual Growth Rate (%) 2007-2012

Contrary to the Energy Commission’s 2009 Ruling, the information should be protected under Public Resources Code § 25322(a)(1)(A) because it constitutes “trade secret” information under Evidence Code § 1060, and under Public Resources Code § 25322(a)(1)(C) because the CPUC determined in the Confidentiality Matrix that “the public interest served by not disclosing the information clearly outweighs the public interest served by disclosure of the information.”

3. The Information is Non-Public, Confidential Information and is Protected by the Commission.

As explained in SCE’s Application, the data on Form 1.2 for which SCE seeks confidential treatment is not generally known to the public or to others, the information has significant economic value, and it is the subject of reasonable efforts to maintain its secrecy. Market participants could

³ Public Resources Code § 25322(a)(1) (italics added).

⁴ The California Public Records Act exempts from disclosure records protected by federal or state law, including provisions of the Evidence Code relating to privilege. Government Code § 6254(k). Evidence Code § 1060 creates a privilege for trade secrets. A trade secret is broadly defined as “information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

use this information together with other available information to estimate how much energy SCE expects to sell to its customers for each year covered by the forecast. This is a critical component in the calculation of SCE's "residual net short" or "net long" position. Knowledge of SCE's "residual net short" or "net long" position would enable potential suppliers (i.e. third-party generators) to charge SCE higher prices for power when SCE's needs are greatest or to depress the price SCE could obtain when selling excess power. It would put SCE at a competitive disadvantage when purchasing energy or capacity to meet its requirements or when selling excess energy. The effect would be to drive up prices for SCE. SCE's forecast of its annual total distribution system energy requirements has economic value, and disclosure would be detrimental to the interests of SCE.

Contrary to the Energy Commission's 2009 Ruling, this is precisely what makes this information a "trade secret" under Evidence Code, which broadly defines a "trade secret" as "information . . . that: (1) [d]erives independent economic value, actual or *potential*, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) [i]s the subject of efforts that are reasonable under the circumstances to maintain its secrecy."⁵ The undisputable fact is that this information has the potential to be misused by third parties who generally would not otherwise know it. The Energy Commission should therefore recognize it as a trade secret and agree to maintain it as confidential.

The Energy Commission's 2009 Ruling also is inconsistent with the express findings of the CPUC in D.06-06-066, as modified by D.07-05-032. The CPUC's decision followed the submission of "extensive comments," five days of evidentiary hearings, "extensive meet and confer sessions," and post-hearing opening briefs and reply briefs.⁶ The end result of this process was the CPUC's adoption of a Confidentiality Matrix identifying categories of information related to electricity procurement that investor-owned utilities ("IOUs") file with the CPUC and the extent to which the non-public information in each category is treated as confidential.⁷ The CPUC emphasized that it developed the Confidentiality Matrix "[t]o ensure the best balancing between the broadest disclosure and the narrowest confidentiality . . ."⁸ The CPUC further stated that its "[c]onfidentiality protections are essential to avoid a repetition of electricity market manipulation."⁹ Seeking to strike the appropriate balance between the rights of the public to open decision making and the prevention of market manipulation,¹⁰ the CPUC treated non-public information as confidential only "[w]here the data have the potential, if released to market participants, to materially affect a buyer's market price for electricity . . ."¹¹ The Energy Commission was an active participant in these proceedings and is authorized to enforce the Confidentiality Matrix in this proceeding.

In the Confidentiality Matrix, the CPUC expressly concluded in Section V.C that "LSE Total Energy Forecast – Bundled Customer" is confidential.¹² The data on Form 1.2 that SCE requires

⁵ Evidence Code § 1060 (emphasis added).

⁶ D.06-06-066 at pp. 5-6 (Jun. 29, 2006).

⁷ *Id.* at p. 80 (Order 2) and Appendix 1.

⁸ *Id.* at p. 3.

⁹ *Id.* at p. 4.

¹⁰ *Id.* at p. 17. See also *id.* at p. 79 (Conclusion of Law 22).

¹¹ *Id.* at p. 43. See also *id.* at p. 78 (Conclusion of Law 12).

¹² Confidentiality Matrix, Section V.C.

confidential treatment from the Energy Commission can be used to calculate “LSE Total Energy Forecast – Bundled Customer”. The calculation is as follows:

$$\text{Total Bundled Customer Energy Forecast} = \frac{(\text{Total Distribution Energy Requirements-Losses}) * (\text{Sales to Bundled Customers/Total Sales})}{1}$$

Therefore, the same considerations requiring confidential treatment of “LSE Total Energy Forecast – Bundled Customer” demand require confidential treatment of the information on Form 1.2 that can be used to calculate it. This is information that SCE is seeking to protect. As discussed above, the Energy Commission is authorized to rely on the Confidentiality Matrix to maintain consistency between the Energy Commission and CPUC, and to avoid nullifying the CPUC’s lawful determination provided in the Confidentiality Matrix. The Confidentiality Matrix justifies the Energy Commission reversing its 2009 Ruling to protect the limited amount of information that SCE seeks to protect for on Form 1.2.

4. Conclusion

For the foregoing reasons, the Energy Commission should grant this appeal, reverse its initial 2009 Ruling on SCE's Application, and grant confidentiality protection for the following information on Form 1.2 – Distribution Area Net Electricity for Generation Load:

- Losses for the years 2008 – 2011
- Total Distribution System Energy Requirements for the years 2008 – 2011
- Forecast Net of Uncommitted Impacts for the years 2008 – 2011
- Forecast Gross of Uncommitted Impacts for the years 2008 – 2011
- Average Annual Growth Rate (%) 2007-2012

Sincerely,

W. A. Matthews III

Walker A. Matthews III

CERTIFICATION

I certify under penalty of perjury that the factual information contained in this appeal is true, correct, and complete to the best of my knowledge. I also certify that I am authorized to make this certification on behalf of appellant Southern California Edison Company.

Dated: April 10, 2009

Signed: Carl Silsbee

Name: Carl H. Silsbee
Title: Manager of Resource Policy and Economics