STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:

Proposed Adoption, Amendment, and Repeal of Regulations Governing the Commission's Data Collection System for the Energy Policy Report and Regulations Governing Disclosure of Commission Records

Docket No. 05-DATA-1

COMMENTS OF THE ALLIANCE FOR RETAIL ENERGY MARKETS ON THE COMMISSION'S PROPOSED DATA COLLECTION SYSTEM

I. INTRODUCTION

On October 19, 2005, the California Energy Commission ("CEC" or "Commission") instituted this proceeding to consider changes to regulations governing the Commission's data collection system for energy policy reporting, the Commission's complaint and investigation process, and public disclosure of Commission records.[1] On April 20, 2006, the Commission staff's proposed changes to the regulations were posted on the CEC's website.[2] A workshop to seek public comment on staff's proposed changes is scheduled on May 2, 2006. In the workshop notice, interested parties were encouraged to provide written comments in advance of the workshop.

[1] The data collection regulations addressed in this rulemaking are found at 20 C.C.R. § 1301 et seq. and § 1340 et seq.; the regulations governing the complaint and investigation process are found at 20 C.C.R. § 1230 et seq.; and the regulations governing disclosure of Commission records are found at 20 C.C.R. § 2501 et seq.

[2] Staff Report: Staff-Proposed Changes to the CEC's Regulations on Data Collection and related Matters, CEC-700-2006-004, April 2006.

The Alliance for Retail Energy Markets ("AReM") hereby responds to that request with the following comments on issues of interest with respect to the Commission's regulations governing the collection of energy policy reporting data from electric service providers ("ESPs") and data confidentiality.[3] AReM's comments provide a summary of staff's proposed changes to the regulations, commentary on staff's proposed changes to specific regulations, explanations of how the proposed changes would or could affect ESPs, and recommendations for alternative and additional changes.

II. SUMMARY OF STAFF'S PROPOSED CHANGES TO REGULATIONS GOVERNING THE COLLECTION OF DATA FROM ELECTRIC SERVICE PROVIDERS AND DATA CONFIDENTIALITY

Staff's proposed changes to the regulations governing the CEC's data collection system would, among other things, codify and expand the reporting requirements for ESPs implemented by Commission orders for the 2005 IEPR data collection effort. The staff proposal also includes a new regulation establishing reporting requirements for ESPs and other load-serving entities ("LSEs") that are intended to enable the CEC to assess resource adequacy.

Staff's proposed changes to the CEC's confidentiality rules include a requirement for the Commission to conduct a hearing on an appeal of a confidentiality determination of the Executive Director. In addition, the revised rules address the standard of review for appeals of confidentiality determinations, providing that anytime the Commission addresses a confidentiality claim, it will determine whether the reporting entity had met its burden of proof to establish confidentiality under the Public Records Act ("PRA"). The revised rules further provide

[3] AReM is a California non-profit mutual benefit corporation comprised of electric service providers that serve the majority of the state's direct access load. The comments contained in this filing represent the position of AReM, but not necessarily the view of any affiliates of its members with respect to any specific issue.

that a party making a request under the PRA for access to data that has been deemed confidential must demonstrate the existence of new information or some changed circumstance that is material to the prior confidentiality determination.

III. COMMENTS ON STAFF'S PROPOSED CHANGES

AReM offers its preliminary comments herein on certain of the proposed modifications to the Commission's regulations governing data collection and data confidentiality. AReM reserves the right to file further comments, including comments on items not mentioned herein, in the post-workshop comments that parties are permitted to file on May 8, 2006.

A. Quarterly Fuel and Energy Reports

Regulations governing the content and submission of Quarterly Fuel and Energy Reports are set forth in Title 20 of the California Code of Regulations, Section 1302 et seq. AReM's comments on regulations affecting ESPs are as follows:

1. § 1306. Electric Utility, LSE, and UDC Reports.

Staff's proposed changes to this section would require electric utilities to provide electric rate information and to submit reports on a quarterly basis rather than annually as the section currently provides. Also, requirements for each class of reporting entity are separated out into subsections, but no substantive changes are proposed for provisions relating to ESPs. AReM has no comment at this time on staff's proposed changes. However, AReM will use this opportunity to comment on the requirement in § 1306(b) that non-utility LSEs, in their quarterly reports, provide monthly sales and customer numbers by customer class at the county level.

AReM questions whether the CEC actually requires such detailed data from ESPs for purposes of integrated energy policy reporting and suggests that monthly sales by customer class

at the utility service territory level should be more than adequate for such purposes. ESPs typically do not keep customer information that is segregated by county, but rather have data systems that are set up on a utility service territory level. Also, information at the utility service territory level is readily available to ESPs, while county level data is not. It would therefore be an expensive proposition for ESPs to restructure their data systems to produce records of customer information at the county level, and AReM must remind the CEC that, unlike utilities, ESPs have no captive customer base to which such costs can be routinely passed. AReM therefore urges the CEC to revise § 1306(b) to provide for the reporting of applicable data by non-utility LSEs at the utility service territory level.

B. Forecast and Assessment of Energy Loads and Resources

Regulations governing the content and submission of reports required as part of the CEC's data collection for the Energy Policy Report (formerly the Integrated Energy Policy Report, or "IEPR") are set forth in Title 20 of the California Code of Regulations, Section 1340 et seq. AReM's comments on staff's proposed changes to regulations affecting ESPs are as follows:

1. § 1345. Demand Forecasts.

Staff's proposed changes to this section include expansion of the requirement to submit 20-year demand forecasts, which currently applies to "electric utilities," to LSEs in general. Other revisions add more specificity about what is required, including identifying hourly loads and departing load assumptions. Presumably, the intended effect of these changes is to codify the requirement for non-utility LSEs to submit long-term demand forecasts and related requirements that were implemented for the last round of IEPR data collection by Commission orders.

Under the expanded § 1345, ESPs would be required to submit demand forecasts covering 20 years, much longer than was required for the 2005 IEPR. AReM notes the highly questionable value of 20-year demand forecasts prepared by ESPs, given that, due to the regulatory uncertainty that currently exists in the state and the suspension of direct access for new accounts, relatively few customers enter into contracts with ESPs that have terms in excess of one year. Therefore, demand forecasts for individual ESPs that attempt to look out 20 years into the future would be highly speculative and could not, for example, reflect with any degree of certainty the impact of reopening the direct access market on a particular ESP.

Given the short contract terms currently prevalent in direct access, ESPs have no certainty of maintaining their contract load in the same manner that utilities enjoy. In fact, with direct access suspended for new customers since September 20, 2001, ESPs are confronted with an essentially static market that cannot grow. As a result, the CEC can look at the California Public Utilities Commission ("CPUC") monthly direct access statistics as being both a reliable source of information as to current direct access load as well as a reliable indictor of aggregate future DA load until such time as direct access is reopened in the state.

AReM therefore recommends that § 1345 be modified to specify a shorter forecast period (e.g., five years) for ESPs. Even a five-year forecast will be rather speculative. However, any individual ESP's forecast beyond that time would not be meaningful for energy policy reporting purposes. AReM further recommends that the revised § 1345 specify that application of the requirement to ESPs is limited to larger ESPs (> 200 MW) as was the case for the previous IEPR data collection.

2. § 1346. Electricity Resource Adequacy.

Section 1346 is a new regulation that would be used to collect information from LSEs to assess resource adequacy by examining the availability of "short-term" contractual supplies. Pursuant to § 1346, each LSE will be required to submit "quantitative documentation of its load forecasts and resource plans, and narrative descriptions of its procurement activities that will enable it to have adequate electricity supplies to serve forecasted loads for the four years following the year that the information is submitted." The report will be due annually on September 30, and shall include (but is not limited to) the following:

(a) monthly energy and peak load forecasts;

(b) generation capacity owned, under the control of, or otherwise available to the LSE to meet monthly peak loads;

(c) estimated monthly capacity savings and adjustments to peak load forecasts that are expected from interruptible load programs, price-sensitive demand response programs, and distributed generation;

(d) the physical location (control area) of the generation capacity identified in subdivision (b);

(e) energy to which the LSE is entitled to under contract at the time of the LSE's peak load that is not unit-contingent, and the delivery point(s) for such energy;

(f) any terms of deliverability that may limit the dependable capacity of the LSE's generation supplies, including firm transmission rights over interties between control areas at the time of its peak load;

(g) the terms of ownership or dispatchability that limit the deliverability of generation supplies, including call options, non-firm energy, hydrological conditions, and emission limits to serve the LSE's load under monthly peak conditions; and

(h) a detailed description of all adequacy and long-term reliability requirements that control area operators or planning entities have identified as applicable to the LSE, including, but not limited to:

    (1) terms of existing tariffs and agreements that identify the specific nature of resource adequacy requirements that an LSE must satisfy;

(2) planning margins for capacity or energy, or other elements of standardized evaluations of the balance between loads and reserve requirements, and resources, established by the Western Electricity Coordinating Council for resource adequacy purposes; and

(3) any unit commitment and dispatch obligations that generation owned or controlled by the LSE uses to satisfy to requirements imposed by control area operators or other entities operating interconnected electric transmission systems.

Many of these reporting requirements make sense if the intended purpose of the § 1346 is simply to codify the CEC's data collection role in support of the system of resource adequacy requirements established by the California Public Utilities Commission ("CPUC"). It is not clear, however, that this is the CEC's only intent. AReM is generally concerned that the § 1346 imposes resource adequacy demonstration requirements on LSEs that go beyond those established by the CPUC (and are beyond the CEC's authority to impose unilaterally). Of particular concern to AReM is the CEC's apparent intent to assess the resource adequacy and planned procurement activities of individual LSEs for four years out. The requirement to submit four years of resource adequacy data could be viewed as imposing a multi-year resource adequacy demonstration requirement on LSEs or could be misused to rationalize the imposition of such a requirement by the CPUC.

Also, as noted above in AReM's comments on the expanded demand forecasting requirement in § 1345, the CEC needs to be aware of the "junk in, junk out" element associated with seeking to impose multi-year reporting or forecasting obligations on entities whose current operational profiles (and business plans) do not include such long-term characteristics. Put simply, if the data that are input into the CEC's models are highly speculative and not grounded in reasonable and verifiable forecasts, the results that are obtained from these models and published by the CEC will be less than reliable. This risk of unreliability should be avoided by the CEC if at all possible.

It is understandable that in developing reporting requirements, CEC Staff would look first at the reporting obligations for investor-owned utilities ("IOUs") and seek to apply them to other market participants. However, there is a fundamental flaw in this approach. California's investor-owned utilities have been operating for over a century and have multi-million customer bases, franchised service territories, CPUC-approved rates, and the assurance of relative load stability and predictable load growth for many decades to come. By contrast, California's ESPs have, at most, eight years of operating experience, far smaller customer bases with no monopoly service territories, no guaranteed rate recovery, and no assurance of load beyond the terms of the their current contracts with existing direct access-eligible customers.

Given this disparity, reporting requirements that may make a great deal of sense for the IOUs become significantly less than meaningful in the context of ESPs. Obviously, ESPs hope to develop the type of stability of load and certainty of regulatory climate that will allow them to make more meaningful long-term forecasts in the future. However, until that stability is achieved, asking for four-year resource adequacy load forecasts and resource plans from ESPs will not yield reliable information. Moreover, the CEC should be mindful of not imposing on ESPs duplicative, burdensome or superfluous reporting requirements. As noted above, ESPs do not have CPUC-approved rates that permit them to routinely pass through these reporting costs to a captive customer base.

AReM also questions whether the CEC has the power to impose resource adequacy-related reporting requirements on ESPs (and other LSEs) that require the submission of data beyond that required by the CEC to perform its prescribed role in support of the CPUC's resource adequacy program. The statutes cited in the OIR for this proceeding grant no such authority. And the CEC cannot impose resource adequacy requirements on LSEs unilaterally.

AReM's concern in this regard goes not only to the four-year reporting requirement in § 1346, but also goes to the requirement to provide "narrative descriptions of procurement activities." This requirement is akin to the statutory requirement for IOUs to submit procurement plans to the CPUC for review and approval, and, as the CEC is well aware, the CPUC does not regulate the procurement planning of ESPs and the CEC itself has no such authority.

For the above reasons, AReM recommends that § 1346 be revised to limit the data to be provided to that required for the CEC to perform its prescribed role in support of the CPUC's resource adequacy program. Specifically, the resource adequacy forecast period should be limited to the year following the year the information is submitted. In addition, the requirement to submit "resource plans" and "narrative descriptions of its procurement activities that will enable it to have adequate electricity supplies to serve forecasted loads" should be deleted.

3. § 1347. Resource Plans.

Staff's proposed changes to this section include expansion of the requirement in to submit 20-year resource plans, which currently applies to "electric utilities," to LSEs in general. Other revisions would require more detailed information about electricity supply and costs, the criteria used to develop resource plans, and would move the transmission information into a new section (§ 1349). Presumably, the intended effect of these changes is primarily to codify the requirement for non-utility LSEs to submit resource plans and related requirements that were implemented for the last round of IEPR data collection by commission order.

Under the expanded § 1347, ESPs would be required to submit resource plans covering 20 years, rather than 10-year plans as was required for the last round of data collection for the IEPR. Once again, AReM would point out to the CEC the questionable value of 20-year resource plans prepared by ESPs and therefore recommend that § 1347 be modified to specify a

shorter planning period (e.g., 10 years) for ESPs. As with § 1345 above, AReM also recommends that the revised § 1347 specify that application of the requirement to ESPs is limited to larger ESPs (> 200 MW) as was the case for the previous IEPR data collection.

4. § 1350. Exemptions.

This section currently provides a potential exemption for small utilities from certain reporting requirements (the exemption is potential in that is must be requested). The proposed revisions to this section would exempt smaller LSEs (< 100 MW) from complying with the "full" reporting requirements set forth in § 1345 (demand forecasts), § 1347 (resource plans), and § 1348 (pricing and financial information).[4] The revised section further provides that in response to an exemption request, the Commission may: (a) exempt other LSEs; and (b) establish abbreviated reporting requirements for exempted LSEs. The intended effect of these changes is to codify the exemption for smaller LSEs from reporting requirements as was done in the last round data collection for the IEPR. While AReM appreciates this, two aspects of the proposed revised § 1350 are concerning.

First, the threshold for an exemption would be lowed from 200 MW to 100 MW. AReM questions whether the benefit of any additional data that would be collected by lowering the threshold would outweigh the burden to affected LSEs. As previously noted, ESPs do not have captive customers from which to recovery regulatory compliance costs, and the costs of complying with the extensive reporting requirements associated with the CEC's energy policy reporting are not insubstantial for even the largest ESPs. AReM therefore recommends that the threshold for an exemption under § 1350 be set at 200 MW.

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[4] The staff's comment explains that availability of exemption is qualified "in light of [the CEC's] mandate to assess resource adequacy."

Second, because the revised § 1350 only provides for an exemption from the "full" requirements in the specified reporting sections and does not specify exactly which requirements a requesting LSE will be exempted from, the CEC essentially retains the discretion to reject an exemption request (e.g., by only exempting the LSE from some minor requirement). However, assuming that AReM's recommended changes to the applicable regulations described above are adopted, AReM does not object to this aspect of the expanded exemption.

C. Data Confidentiality

Regulations concerning the disclosure of CEC records are set forth in Title 20 of the California Code of Regulations, Section 2501 et seq. Proposed changes to those regulations that potentially affect ESPs and AReM comments thereon are as follows:

1. § 2505. Designation of Confidential Records.

Under § 2505 as revised by staff in its proposal, confidentiality would be granted automatically for any data that is the same or similar to data that either the CEC's Executive Director or the Commission has previously determined should be kept confidential.[5] [§ 2505(a)(4)] Under the current version of § 2505, the automatic designation applies only to data that the full Commission has deemed to be confidential. The practical effect of this change is to eliminate the need for ESPs to make future PRA showings for those types of data that were deemed to be confidential during the last round of data collection for the 2005 IEPR. AReM supports this change to the CEC's data collection regulations.

The proposed changes to § 2505 would also require the Commission to hold a hearing whenever an applicant appeals a negative determination of the Executive Director. [§

[5] To receive protection, the reporting entity need only certify that the relevant data are covered by a previous confidentiality determination.

2505(a)(3)] Currently, § 2505 merely provides that the Commission has four weeks to issue a decision on an appeal, i.e., a hearing is not required. AReM supports this change, as it is more protective of LSEs' due process rights.

2. § 2506. Petition for Inspection or Copying of Confidential Records.

The proposed changes to this section would require that any request to inspect or copy records that have been deemed confidential by the full Commission after a hearing shall include a statement under penalty of perjury that since the time of that decision, new information has become available or changed circumstances have occurred that "materially affected the previous determination." [§ 2506(a)] AReM supports this change and also recommends that, consistent with § 2505, the showing requirement for a party seeking access to confidential records apply to confidentiality determinations of the Executive Director, and not just to those of the Commission.

The proposed changes further provide that the Commission shall conduct a hearing any time a party appeals a decision on a request for release of confidential information. [§ 2506(b)(5)] Currently, § 2506(b)(5) simply provides that the Commission shall issue its decision on appeal within four weeks, with no hearing requirement. AReM also supports this change, as it protects the due process rights of LSEs. AReM recommends, however, that the right of appeal should only lie with a reporting entity whose data is to be disclosed, not the party seeking disclosure. Otherwise, ESPs and other LSEs could essentially be forced repeatedly to re-litigate prior confidentiality determinations by frivolous or unsubstantiated claims of changed circumstances.

3. § 2507. Disclosure of Confidential Records.

The core provisions of this section concern the public release of confidential data after the data have been aggregated, and further specify the minimum level of required aggregation. Under staff's proposed changes, as interpreted by AReM, ESP data would be aggregated at the following levels (or higher) before release:

- Monthly sales, monthly customer numbers, and monthly revenues:
  - For an individual ESP: Aggregated at the statewide level by major customer sector. [§ 2507(e)(1)(A)(1)]
  - For all ESPs: Aggregated (a) at the county level by residential and non-residential groups and (b) at the service territory, planning area or statewide level by major customer sector. [§ 2507(e)(1)(A)(3)]
  - For all LSEs (sales data): Aggregated at the county level by the economic industry groupings used by the California Employment Development Department in its September 2005 Current Employment Statistics survey county reports. [§ 2507(e)(1)(A)(7)]
- Commodity energy price data: Aggregated for all LSEs by customer sector. [§ 2507(e)(1)(B)]
- Other data: Masked or aggregated "to the point necessary to protect confidentiality." [§ 2507(e)(2)]

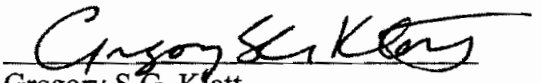
AReM seeks clarification of the intended treatment of the monthly sales data of individual ESPs, as it is not clear from the description in § 2507(e)(1)(A)(1) whether the aggregation would be with the data of other LSEs or ESPs, or would simply be the ESP's data, which would be reported at the statewide level. In either case, AReM opposes the proposed level of aggregation, as it would result in the public disclosure of trade secret information that is protected under the PRA and other provisions of California law. To protect such information, no disaggregated data of individual ESPs should be released; instead, ESP data should be aggregated for all ESPs at the IOU service territory level. Also, AReM strongly opposes the

release of ESP data at a level of disaggregation that is lower than that adopted for the same or similar data by the CPUC in the previous decisions and/or its Confidentiality OIR (R.05-06-040).

III. CONCLUSION

For the foregoing reasons, AReM urges the Commission to adopt the alternative and additional changes to the regulations governing the CEC's collection of data from ESPs and data confidentiality. AReM thanks the Commission for its consideration of these comments.

Respectfully submitted,



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