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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

MARC SPITZER, Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
MIKE GLEASON  
KRISTIN K. MAYES

AZ CORP COMMISSION  
DOCUMENT CONTROL

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IN THE MATTER OF THE APPLICATION OF  
ARIZONA PUBLIC SERVICE COMPANY FOR  
A HEARING TO DETERMINE THE FAIR  
VALUE OF THE UTILITY PROPERTY OF THE  
COMPANY FOR RATEMAKING PURPOSES,  
TO FIX A JUST AND REASONABLE RATE OF  
RETURN THEREON, TO APPROVE RATE  
SCHEDULES DESIGNED TO DEVELOP SUCH  
RETURN, AND FOR APPROVAL OF  
PURCHASED POWER CONTRACT

DOCKET NO. E-01345A-03-0437

Arizona Corporation Commission

DOCKETED

APR 22 2004

DOCKETED BY

RESPONSE OF ARIZONA PUBLIC SERVICE COMPANY TO THE ARIZONA  
COMPETITIVE POWER ALLIANCE'S REQUEST FOR RFP INFORMATION

Pursuant to the Procedural Order issued on April 16, 2004, Arizona Public Service Company ("APS" or "Company") hereby files its Response to the Arizona Competitive Power Alliance's ("ACPA") April 8, 2004 letter ("April Letter") to the Chief Administrative Law Judge ("CALJ") of the Arizona Corporation Commission ("Commission"). In the April Letter, the ACPA seeks production of specific materials included in APS' rebuttal testimony that previously were provided to Commission Staff, and which relate to a Request for Proposals ("RFP") issued by APS in December 2003. As discussed further below, APS does not oppose providing the specific information requested pursuant to its existing rate case protective agreements with the ACPA (and others), so long as the relevant bidders in the RFP, who also are members of the ACPA, consent to such disclosure. APS has been working with the ACPA to attempt to resolve

1 this issue prior to the scheduled procedural conference by obtaining such consents and, if  
2 a resolution is reached, will notify the CALJ.

3 **A. Background.**

4 APS issued the RFP on December 3, 2003. Later that month, the ACPA submitted  
5 a motion requesting that the procedural schedule (and the schedule for the RFP) be revised  
6 so that Staff and intervenor testimony would be filed after bids had been submitted. The  
7 ACPA argued that the RFP should be expanded to include the PWEC generating assets  
8 and the results incorporated into the Company's rate case. After a procedural conference,  
9 the CALJ issued a Procedural Order on January 8, 2004, extending the schedule for  
10 submitting Staff and intervenor testimony until after the bids had been made in the RFP.  
11 As that Procedural Order notes, some parties had asserted that the Commission needed to  
12 know the results of the RFP to evaluate the Company's rate basing proposal (Procedural  
13 Order at 3). Moreover, the Procedural Order specifically reserved any final ruling on the  
14 relevance of the RFP data in this proceeding.

15 Although APS believes that the relevant standard for considering the rate basing of  
16 the PWEC generating assets is a traditional "prudence" and "used and useful" analysis,  
17 APS' rebuttal testimony included an analysis of the RFP results in response to arguments  
18 for a "market" analysis in the direct testimony of Staff and intervenors, including the  
19 ACPA. The provisions in the confidentiality agreements negotiated by the bidders with  
20 APS, however, prevented the Company from releasing to parties other than Commission  
21 Staff the information obtained from bidders in the RFP. Contrary to the ACPA's assertion  
22 in its letter, confidentiality provisions in a RFP bid response are customary, are largely for  
23 the protection of bidders, and encourage the sort of aggressive bidding that benefits  
24 customers. In fact, two members of the ACPA actually insisted on more stringent  
25 confidentiality provisions than APS had proposed in the RFP.

26

1           **B.     The RFP Information.**

2           The ACPA's April Letter seeks several redacted schedules that were submitted  
3 with the Rebuttal Testimony of APS witnesses Steve Wheeler and Ajit Bhatti, as well as  
4 the workpapers supporting those schedules. To date and due to the RFP confidentiality  
5 provisions discussed above, unredacted versions of those schedules have been provided  
6 only to Commission Staff pursuant to a pre-existing protective agreement. APS is willing,  
7 however, to provide the same RFP-related schedules and workpapers that were provided  
8 to Commission Staff to other parties with protective agreements. Thus, APS has asked the  
9 ACPA for the consent of its members to such disclosure—a request that clearly is  
10 reasonable because the bidders are members of the same organization that is seeking the  
11 information.<sup>1</sup>

12           **C.     Need to Protect Competitively-Sensitive Confidential Information.**

13           The consent of the ACPA's members should moot the specific issue raised by the  
14 ACPA's April 8, 2004 letter.<sup>2</sup> It is, however, important for the Commission to adequately  
15 protect procurement-related information so that disclosure, whether pursuant to protective  
16 agreements or otherwise, does not harm APS and its customers. Other utility commissions  
17 recognize that in some cases the desire of all parties to have access to all information is  
18 outweighed by the need to protect highly-sensitive, competitive information relating to  
19 utility procurement from those very entities from which procurement will take place. For  
20 example, the Indiana Utility Regulatory Commission ("IURC") strictly limited certain

21 \_\_\_\_\_  
22 <sup>1</sup>           APS is working with the ACPA to obtain the necessary consents.

23 <sup>2</sup>           The only other potential issue at present relates to workpapers (not schedules) in APS witness  
24 Peter Ewen's Rebuttal Testimony. These workpapers do not relate to the RFP data, but involve production  
25 cost modeling analyses that APS has to date provided only to non-market participants pursuant to  
26 protective agreements, due to the potential competitive harm from disclosure of such information to  
market participants. APS has previously addressed discovery requests for similar information by the  
ACPA by providing the information in a way that does not show the underlying details of the model. This  
has proven satisfactory to date, and the Company has proposed handling this more narrow issue the same  
way.

1 market forecasts and “cost and proposed purchase prices” relating to power plants  
2 proposed to be acquired and rate based by PSI Energy. In that case, the IURC limited  
3 disclosure of such information “only to selected members of the Commission Staff.” *See*  
4 December 19, 2002 Decision in Cause No. 42145, 2002 Ind. PUC LEXIS 544, at 24  
5 (excerpt attached as Exhibit A). In California, a generic utility procurement proceeding  
6 involving all the major regulated utilities is ongoing at the California Public Utility  
7 Commission (“CPUC”). In that proceeding, the CPUC has recognized that certain  
8 procurement-related information simply should not be disclosed to market participants but  
9 could be disclosed to non-market participants under protective agreements. *See* Protective  
10 Order re Confidentiality of PG&E Power Procurement Information, May 2003 (attached  
11 as Exhibit B).

12 Recently, all three of the major California electric utilities, including some  
13 affiliated with members of the ACPA, briefed the ongoing need to prevent disclosure of  
14 certain competitively-sensitive information. Each utility, as well as consumer advocate  
15 groups, argued that disclosure of competitive information will harm customers because it  
16 places the utility at a competitive disadvantage and provides the market participant with  
17 information on the utility’s procurement process that it otherwise would not have.  
18 Specifically, the utility affiliate of Sempra (a member of the ACPA), San Diego Gas &  
19 Electric Company, supported the current CPUC procedures for safeguarding confidential  
20 information from market participants and public disclosure, noting that:

21 [D]isclosure of the prices, products and availability terms of power purchase  
22 agreements presented to the [CPUC] as part of an IOU’s procurement-  
23 related application could harm ratepayer interests because, once revealed,  
those terms would likely become a de facto floor for any future agreements.

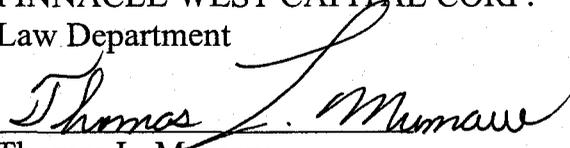
24 Comments of SDG&E re Confidentiality of Information, R.01-10-024, March 1, 2004 at  
25 4. Even under a protective agreement where access to information is limited to certain  
26 parties (such as outside counsel and consultants), the risk of inadvertent disclosure must

1 be considered. Also, the Commission has previously supported the protection of utility  
2 procurement information. For example, in the Track B solicitations last year, the  
3 procedures in the Staff Report, which were adopted by the Commission in Decision No.  
4 65743 (May 14, 2003), recognized that certain competitively-sensitive procurement-  
5 related information was to be provided only to Staff and the Independent Monitor. *See*  
6 Track B Staff Report at 27.

7 In addition to these utility and consumer-focused arguments, the inappropriate  
8 disclosure of bidder information could chill future competitive procurements. Having  
9 fewer participants in competitive procurement may harm customers by limiting supply  
10 alternatives. Accordingly, any production of bidder materials in this proceeding should be  
11 as narrow as possible (and preferably with consent of the bidders). And as these  
12 proceedings continue to unfold, APS urges the CALJ to maintain an appropriate balance  
13 between disclosure of competitively-sensitive information to parties for litigation  
14 purposes and the protection of customer interests relating to the procurement efforts of  
15 public service corporations.

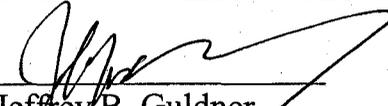
16 RESPECTFULLY SUBMITTED this 22nd day of April 2004.

17 PINNACLE WEST CAPITAL CORP.  
18 Law Department

19   
20 Thomas L. Mumaw  
21 Karilee S. Ramaley

22 and

23 SNELL & WILMER L.L.P.

24   
25 Jeffrey B. Guldner  
26 Kimberly A. Grouse

Attorneys for Arizona Public Service Company

1 ORIGINAL AND 13 COPIES OF THE FOREGOING  
2 filed this 22nd day of April 2004, with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington  
6 PHOENIX, AZ 85007;

7 Copies of the foregoing mailed, faxed or  
8 transmitted electronically this 22nd day of  
9 April 2004 to:

10 All Parties of Record

11 Bud Cobb  
12 Birdie Cobb

13 1505135

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# **ATTACHMENT A**

STATE OF INDIANA

INDIANA UTILITY REGULATORY COMMISSION

JOINT PETITION OF PSI ENERGY, INC. )  
AND CINCAP VII LLC, PURSUANT TO )  
IND. CODE § 8-1-8.5 ET SEQ.: (1) FOR )  
THE ISSUANCE OF CERTIFICATES OF )  
PUBLIC CONVENIENCE AND )  
NECESSITY FOR PSI ENERGY, INC TO )  
PURCHASE GENERATING FACILITIES )  
FOR THE FURNISHING OF ELECTRIC )  
UTILITY SERVICE TO THE PUBLIC; )  
(2) FOR THE APPROVAL OF THE COSTS )  
OF SUCH FACILITIES; AND (3) FOR )  
APPROVAL FOR CINCAP VII TO )  
TRANSFER OWNERSHIP OF GENERATING )  
ASSETS TO PSI ENERGY, INC. )

CAUSE NO. 42145  
APPROVED: 12/19/02

BY THE COMMISSION:  
David E. Ziegner, Commissioner  
Scott R. Storms, Chief Administrative Law Judge

On December 27, 2001, PSI Energy, Inc. ("PSI") and CinCap VII, LLC ("CinCap VII") (collectively "Joint Petitioners" or "Petitioners") filed their Joint Petition with the Indiana and necessity for PSI in connection with the purchase of certain generating facilities pursuant Ind. Code (IC) § 8-1-8.5 et seq., for approval of the costs of such facilities, and for approval CinCap VII to transfer ownership of certain generating facilities to PSI.

On February 15, 2002, March 8, 2002, and April 15, 2002, respectively, the Midwest Independent Power Suppliers Association ("MWIPS"), the PSI-Industrial Group ("PSI-IG"), and Nucor Corporation ("Nucor") filed petitions to intervene in this Cause. Such petitions to intervene were granted by the Commission on February 15, 2002, March 14, 2002 and April 26, 2002, respectively.

On February 15, 2002, the Commission designated Dr. Bradley K. Borum and David R. Johnston of the IURC Electricity Division, and Dr. Douglas J. Gotham of the State Utility Forecasting Group ("SUFUG") as testimonial staff in this Cause ("IURC Testimonial Staff").

Pursuant to notice, and as provided for in 170 IAC 1-1.1-15, a Prehearing Conference was held on February 15, 2002, at 9:30 a.m. in Room E306 of the Indiana Government Center South, Indianapolis, Indiana. On February 27, 2002, a Prehearing Conference Order was issued setting forth the procedural schedule in this Cause.

On March 1, 2002, Joint Petitioners filed a Motion to Amend their Joint Petition, along with an Amended Joint Petition in this Cause. The Presiding Officers granted Petitioners' Motion to Amend their Joint Petition, in a Docket Entry dated March 12, 2002. Also on March 1, 2002, Petitioners filed their case-in-chief testimony and exhibits in support of their Petition along with a Motion for Protection of Confidential and Proprietary Information. Petitioners' Motion for Protection of Confidential and Proprietary Information was accompanied by the sworn affidavits of Judah Rose and Douglas F Esamann. The Motion for Protection was granted by the Presiding Officers, on a preliminary basis, on March 11, 2002.

On June 18, 2002, Petitioners filed supplemental testimony and exhibits. On July 12, 2002, MWIPS filed its testimony and exhibits. On July 17, 2002, the Office of Utility Consumer Counselor ("OUCC") and PSI-IG filed their respective testimony and exhibits. On July 26, 2002,

Stations is consistent with PSI's utility-specific proposal. We further find that the utility-proposal for satisfying the future needs of electricity in PSI's service territory should be approved, but, in conformance with Ind. Code 8-1-8.5-5(d), we find such approval should be construed no more broadly than necessary to support Commission approval of CPCNs for the purchases of the Madison and Henry County plants.

The Commission has engaged the SUFG to prepare periodic forecasts of future electricity requirements for the State of Indiana. The SUFG report presented in this Cause indicates a need for new capacity in Indiana. Further, the SUFG's plan shows that peaking capacity, among other types, needs to be installed to maintain adequate reserves in the State. Dr. Gotham explained that the SUFG determines capacity requirements using a target 15 percent reserve margin for the state as a whole and then assigns these needed resources to the individual utilities in the state. Dr. Gotham also stated that the SUFG projections indicate that PSI needs both peaking and base load capacity, with the need for peaking capacity slightly higher. He also stated that additional capacity above the amounts assigned by SUFG would be expected to be peaking capacity, since it would not be expected to be called upon as often. Importantly, Dr. Gotham also explained that due to differences in forecast methodology and assumptions, one would expect SUFG's projections for PSI to differ from PSI's IRP. [IURC Staff Report No. 3 (Gotham), pp. 1-2.]

Based on the discussion above, and because the Madison and Henry County plants will provide additional peaking capacity dedicated to Indiana retail customers, we find that PSI's purchase of the Madison and Henry County plants, is consistent with the overall plan for electricity requirements prepared by the SUFG.

(5) Reasonableness of the Purchase Prices; Finding on Cost Estimate. The Commission recognizes that the plant purchase prices we are asked to approve were the subject of negotiation between Petitioners, the OUCC, and the IURC Staff. Based on the evidence presented it appears that the plant purchase prices prescribed by the Settlement Agreement are cost-based. Petitioners (and IURC Testimonial Staff) presented evidence that when accurately compared to comparable plant sales, the Settlement Agreement's purchase prices are within a range of reasonableness for facilities of this type. For these reasons, we conclude and find that the purchase prices reflected in the Settlement are reasonable, are part of a "least cost" IRP for PSI, and should be approved for subsequent recovery in PSI's retail electric rates in accordance with the provisions of Ind. Code 8-1-8.5 et seq.

(6) Public Convenience and Necessity. Finally, we consider whether the public convenience and necessity requires approval of PSI's purchase of the Madison and Henry County plants. We previously determined that PSI has a need for capacity; that the type of capacity most needed by the PSI system is peaking capacity; that PSI adequately considered the statutory factors set forth at IC § 8-1-8.5-4; and that PSI's resource planning process was reasonable. Further, we determined that the Madison and Henry County plants represent an economic and reliable option for PSI to utilize in meeting its obligation to provide reliable electric service. In light of those findings, and the evidence presented herein, we find that public convenience and necessity require that PSI be granted certificates to undertake the purchase of the Madison and Henry County plants as described in the Settlement Agreement and in this Order.

16. Request for Confidential Treatment. Petitioners filed a Motion for Protection of Confidential and Proprietary Information, with Affidavits of Messrs. Judah Rose and Douglas F. Esamann, on March 1, 2002. In this Motion, Petitioners demonstrated a need for confidential treatment for data relating to market forecasts of purchased power and natural gas prices, as well as data relating to the costs and proposed purchase prices of the Madison and Henry County Generating Stations. In a March 11, 2002, Docket Entry, the Presiding Officers made a preliminary finding that such information should be subject to confidential procedures. The Affidavits of Messrs. Rose and Esamann indicate that such confidential information has actual and potential independent economic value to competitors, the disclosure of the confidential information could provide competitors with an unfair advantage, and Petitioners and ICF have taken all reasonable steps to protect the confidential information from disclosure. Accordingly, pursuant to IC §§ 5-14-3-4(a)-(4), we find that the data concerning the market forecasts presented in this case, as well as data pertaining to the costs and proposed purchase prices of Madison and Henry County plants, are "trade secrets" and should be afforded confidential treatment. The Commission orders that procedures should be taken so that such information is

appropriately secured and made available only to selected members of the Commission Staff who are under an obligation not to publicly disclose such information.

17. Ultimate Conclusion. In the Finding Paragraphs above, the Commission has determined that the public convenience and necessity support PSI's proposed purchase of the Madison and Henry County plants, that the associated utility specific proposal should be approved, that the purchase of the Madison and Henry County plants is consistent with the utility specific proposal, and that the proposed plant purchase prices as set out in the Settlement Agreement are reasonable. Further, we have found the other provisions of the Settlement Agreement as it relates to this Cause No. 42145 to be reasonable. In light of those findings, Commission finds that the Settlement Agreement as it relates to Cause No. 42145 should be approved in its entirety, that PSI should be issued certificates of public convenience and necessity for the purchase of the Madison and Henry County plants, and that CinCap VII should be authorized to sell the Henry County plant to PSI.

IT IS THEREFORE ORDERED BY THE INDIANA UTILITY REGULATORY COMMISSION that:

1. The Settlement Agreement presented in this Cause is hereby approved by the Commission.
2. Consistent with Ind. Code 8-1-8.5 et seq. and the Settlement Agreement, Petitioner is hereby issued Certificates of Public Convenience and Necessity for the purchase of the Madison Generating Station and the Henry County Generating Station, consistent with the Settlement Agreement and as described herein. This Order constitutes the Certificates.
3. The purchase price formulas set out in the Settlement Agreement for the Madison and Henry County Generating Stations are hereby approved as the estimated costs for the plant purchases and are hereby approved as reasonable.
4. CinCap VII is hereby authorized to transfer the Henry County Generating Station to PSI, consistent with the Settlement Agreement and this Order.
5. PSI shall adopt the commitments made by CinCap VII in Cause No. 41569 relating to air quality; water quality; noise; County comprehensive plan; future abandonment; and emergency planning.
6. Consistent with the Settlement Agreement, in future retail electric rate proceedings PSI shall separate out for ratemaking purposes the costs and revenues associated with 50 megawatts of the Henry County Generating Station that was previously committed to Wabash Valley Power Association, Inc., in Cause No. 41569.
7. Petitioner shall file executed copies of the Asset Purchase Agreements applicable to PSI's purchase of the Madison and Henry County Generating Stations, with the Secretary of this Commission.
8. PSI shall file executed assignments of the plant affiliate agreements to be assigned to PSI as discussed in this Order, with the Secretary of this Commission.
9. Information pertaining to the market price forecasts presented in this case, as well as information pertaining to the costs and the proposed purchase prices for the Madison and Henry County Generating Stations contained in the testimony, exhibits, and workpapers filed in this Cause are found to be confidential and trade secrets and, therefore, exempt from disclosure as public records.
10. This Order shall be effective on and after the date of its approval.

McCARTY, HADLEY AND ZIEGNER CONCUR;  
RIPLEY CONCURRING IN PART AND DISSENTING IN PART;  
APPROVED:

# **ATTACHMENT B**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE  
STATE OF CALIFORNIA**

Order Instituting Rulemaking to Establish	)	
Policies and Cost Recovery Mechanisms for	)	Rulemaking 01-10-024
Generation Procurement and Renewable	)	
Resource Development.	)	
<hr/>		

**PROTECTIVE ORDER REGARDING CONFIDENTIALITY OF PG&E POWER  
PROCUREMENT INFORMATION**

1. This Protective Order shall govern access to and the use of all Protected Materials in this proceeding as hereinafter defined. Notwithstanding any order terminating this docket, this Protective Order shall remain in effect until, after notice and an opportunity to be heard, it is specifically modified or terminated by the Assigned Commissioner, the Assigned Administrative Law Judge (“Assigned ALJ”), the Law and Motion Administrative Law Judge (“Law and Motion ALJ”) or the California Public Utilities Commission (“CPUC” or “Commission”). This Protective Order does not address the right of employees of the Commission acting in their official capacities to view Protected Materials, because Commission employees are entitled to view such Protected Materials in accordance with the requirements of Section 583 of the Public Utilities Code and the Commission’s General Order 66-C.

2. The parties acknowledge that in view of the Assigned Commissioner’s Ruling Establishing Category and Providing Scoping Memo issued in this docket on April 2, 2002, this proceeding will be comprised of multiple phases devoted to the review of energy procurement plans and the development of interim procurement cost recovery mechanisms. The parties also acknowledge that the amount of data that is confidential or proprietary, and the identity of the parties submitting such data, may differ from time to time, depending on whether specific procurement plans or broader policy issues are under consideration. In light of this situation, the

parties agree that modifications to this Protective Order may become necessary, and they further agree to work cooperatively with the Assigned ALJ, the Law and Motion ALJ, the Assigned Commissioner or the full Commission, as the case may be, to devise and implement such modifications in as timely a manner as possible.

3. **Definitions** – The terms in this first definitional paragraph shall have a meaning consistent with the ideas set forth in the “Procurement Planning Proposals of the Southern California Edison Company [Edison] In Response to Order Instituting Rulemaking 01-10-024” (Edison Procurement Proposals) submitted in this docket on November 26, 2001. The term “**Procurement Plan**” means the type of plan for purchasing energy and/or capacity set forth in Section II.B. (at pages 39-55) of the Edison Procurement Proposals, whether the reference is to the type of initial Procurement Plan submitted by Edison or an update thereof, or a long term energy procurement plan filed in this proceeding. The term “**Procurement Plan Compliance Submittal**” refers to any one or more of the various types of filings intended to demonstrate the utility’s compliance with an approved Procurement Plan, as described in Section II.C. (at pages 55-58) of the Edison Procurement Proposals. The term “**Notice of Objection**” refers to the pleading that Commission Staff (as defined below) may submit objecting to a Procurement Plan Compliance Submittal or a transaction for which the utility is seeking pre-approval by the Commission, as set forth in Sections II.C.1. and II.D., respectively, of the Edison Procurement Proposals. Nothing in this first definitional paragraph shall be construed as an endorsement of any timeframe proposed in the Edison Procurement Proposals, as these are matters to be determined in interim decisions or a final decision in this docket.

- a) The term “redacted” refers to situations in which confidential or proprietary information in a document, whether the document is in paper or electronic form, has been covered, masked or blocked out. Thus, the “redacted version” of a document is one in which the document is complete except that the confidential or proprietary information contained therein is not visible because it has been covered, masked or blocked out. The term “unreadacted” refers to situations in which confidential or proprietary information in a document, whether in paper or electronic form, has not been covered, masked or blocked out. Thus, the “unreadacted version” of a document is one in which the document is

complete, and the confidential or proprietary information contained therein is visible.

- b) The term "Protected Materials" means the confidential or proprietary information contained in the unredacted version, and not contained in the redacted version, of any of the following: (A) any initial Procurement Plan submitted as a compliance filing by PG&E in this proceeding, and any subsequent revisions thereof; (B) any materials submitted or produced in connection with the review, revision or approval of any initial or revised PG&E Procurement Plan; (C) any Procurement Plan Compliance Submittal that PG&E may submit from time to time to the Commission's Energy Division and/or the Office of Ratepayer Advocates (which Division and Office, whether separately or collectively, are hereinafter referred to as "Commission Staff"); (D) any Notice of Objection prepared and sent by Commission Staff to PG&E in response to a Procurement Plan Compliance Submittal; and (E) any materials submitted or produced in connection with the determination of the reasonableness of any energy procurement transaction which is the subject of any such Notice of Objection. The reviews described in this paragraph are collectively referred to hereinafter as the "PG&E Procurement Plan and Compliance Reviews."
- c) Protected Material shall also include: (A) any information contained in or obtained from the unredacted materials described in the preceding paragraph; (B) any other materials that are made subject to this Protective Order by any assigned ALJ, Law and Motion ALJ, or Assigned Commission, or by the CPUC or any court or other body having appropriate authority; (C) notes of Protected Materials; and (D) copies of Protected Materials. PG&E and Commission Staff, when creating any Protected Materials, shall physically mark such materials on each page (or in the case of non-documentary materials such as computer diskettes, on each item) as "PROTECTED MATERIALS", or with words of similar import as long as one or more of the terms, "Protected Materials," "Section 583" or "General Order No. 66-C" is included in the designation to indicate that the materials in question are Protected Materials.
- d) The term "Notes of Protected Materials" means memoranda, handwritten notes, or any other form of information (including information in electronic form) that copies or discloses materials described in Paragraph 3(b). Except as specifically provided otherwise in this Order, notes of Protected Materials are subject to the same restrictions as are Protected Materials.
- e) Protected Materials shall not include: (A) any information or document contained in the public files of the CPUC or any other state or federal agency, or in any state or federal court, unless such information or document has been determined to be protected by such agency or court; or

(B) information that is public knowledge, or which becomes public knowledge, other than through disclosure in violation of this Protective Order.

- f) The term "Non-Disclosure Certificate" shall mean the certificate annexed hereto as Appendix A by which persons who have been granted access to the Protected Materials of PG&E shall, as a condition of such access, certify their understanding that such access is provided pursuant to the terms and restrictions of this Protective Order, and that such persons have read such Protective Order and agree to be bound by it. All Non-Disclosure Certificates shall be sent to and retained by PG&E.
- g) The term Non-Market Participating Party ("NMPP") Reviewing Representative shall mean a person who is:
- 1) An employee of: (A) a state governmental agency other than the California Energy Commission (CEC) that (i) is not a Market Participating Party as defined in Paragraph 3(h)(1) hereof, and (ii) is statutorily authorized to obtain access to confidential data held by another state governmental agency upon execution of a written agreement to treat the data so obtained as confidential, as provided in Government Code Section 6254.5(e); or (b) any other consumer or customer group that PG&E and the Director of the Commission's Energy Division or his designee ("Division Director") agree has a bona fide interest in participating on behalf of end-use customers in Procurement Plan and Compliance Reviews regarding PG&E, and which group is not a Market Participating Party as defined in paragraph 3(h)(1); or
  - 2) An attorney, paralegal, expert or employee of an expert retained by an NMPP for the purpose of advising, preparing for or participating in Procurement Plan and Compliance Reviews regarding PG&E.
  - 3) NMPPs shall identify their proposed Reviewing Representatives to PG&E and Division Director and provide a curriculum vitae of the candidate, including a brief description of the candidate's professional experience and past and present professional affiliations for the last 10 years. PG&E and Division Director shall advise the proposing party in writing within three (3) business days from receipt of the notice if either or both of them object to the proposed Reviewing Representative, setting forth in detail the reasons therefor. In the event of such objection, the proposing party, PG&E and Division Director shall promptly meet and confer to try to resolve the issue, and if necessary seek a ruling from either the assigned ALJ or the Law and Motion ALJ. In addition to determining whether the proposed Reviewing Representative has a

need to know, the ALJ in ruling on the issue will evaluate whether the candidate is engaged in the purchase, sale or marketing of energy or capacity (or the direct supervision of any employee(s) whose duties include such activities), or the bidding on or purchasing of power plans or consulting on such matters (or the direct supervision of any employee(s) whose duties include such bidding, purchasing or consulting). Absent unusual circumstances as determined by the ALJ, a candidate who falls within the criteria set forth in the preceding sentence will ordinarily be deemed ineligible to serve as an NMPP Reviewing Representative;

- h) The term Market Participating Party (“MPP”) Reviewing Representative shall mean a person who is:
  - 1) An employee of a private, municipal, state or federal entity that engages in the purchase, sale or marketing of energy or capacity, or the bidding on or purchasing of power plants, or consulting on such matters, or an employee of a trade association comprised of such entities that engage in one or more of such activities; or
  - 2) An attorney, paralegal, expert or employee of an expert retained by an MPP for the purpose of advising, preparing for participating in Procurement Plan and Compliance Reviews regarding PG&E.
  
- i) The term “ISO Reviewing Representative” shall mean a person who is employed by the California Independent System Operator, a nonprofit public benefit corporation created pursuant to Article 3, Chapter 2.3 of the Public Utilities Act (Public Utilities Code Sections 345, *et seq.*). The ISO shall identify its proposed Reviewing Representative to PG&E and Division Director and provide a curriculum vitae of the candidate, including a brief description of the candidate’s professional experience and past and present professional affiliations for the last 10 years. In addition, the ISO shall provide for each proposed ISO Reviewing Representative a copy of the ISO’s Employees Code of Conduct signed by the proposed ISO Reviewing Representative. PG&E and Division Director shall advise the ISO in writing within three (3) business days from receipt of the notice if either or both of them object to the proposed Reviewing Representative, setting forth in detail the reasons therefor. In the event of such objection, the ISO, PG&E and Division Director shall promptly meet and confer to try to resolve the issue, and if necessary seek a ruling from either the assigned ALJ or the Law and Motion ALJ. In addition to determining whether the proposed Reviewing Representative has a need to know, the ALJ in ruling on the issue will evaluate whether the candidate is engaged in the purchase, sale or marketing of energy or capacity (or the direct supervision of any employee(s) whose duties include such activities), or the bidding on or purchasing of power plants or consulting on such matters (or the direct supervision of any employee(s) whose duties include such bidding, purchasing or consulting). Absent unusual circumstances as determined by the ALJ, a candidate who falls within the criteria set forth in the preceding

sentence will ordinarily be deemed ineligible to serve as an ISO Reviewing Representative; provided however that for purposes of this protective order, the ordinary operation by the ISO of ISO Controlled Grid and the ordinary administration by the ISO of the ISO administered markets, including markets for Ancillary Services, Supplemental Energy, Congestion Management, and Local Area Reliability Services, shall not be deemed to be the purchase, sale or marketing of energy or capacity.

4. Access of NMPP Reviewing Representatives to Protected Materials shall be granted only pursuant to the terms of this Protective Order. Access of ISO Reviewing Representatives to Protected Materials shall be granted, but only pursuant to the terms of this Protective Order and PG&E may redact price information from materials made available to an ISO Reviewing Representative. Participants in this proceeding who are designated as MPP Reviewing Representatives shall not be granted access to Protected Material, but shall instead be limited to reviewing redacted versions of documents that contain Protected Material.

5. Whenever PG&E submits a document in this proceeding that includes data PG&E contends is confidential or proprietary, PG&E shall also prepare a redacted version of such document. The redacted version shall be sufficiently detailed in organization so that persons familiar with this proceeding (including MPP Reviewing Representatives) can determine with reasonable certainty the nature (but not magnitude) of the data that has been redacted. The redacted version of any document required by this paragraph shall be served on all persons on the service list (or, in the case of discovery, on all persons entitled to the discovery responses) who are not entitled to obtain access to Protected Material hereunder. All disputes regarding redacted versions of documents shall be submitted for resolution to the CPUC in accordance with Paragraph 13 of this Protective Order.

6. Within thirty (30) days after (a) the issuance of a Commission resolution regarding an PG&E Procurement Plan, or (b) the date on which an PG&E Procurement Plan Compliance Review becomes final and no longer subject to judicial review, an NMPP Reviewing Representative and ISO Reviewing Representative shall, if requested to do so in writing by PG&E, return or destroy the Protected Materials. Within the same 30-day time

period, the NMPP Reviewing Representative and ISO Reviewing Representative shall also submit to PG&E and Commission Staff an affidavit stating that, to the best of the NMPP Reviewing Representative's or the ISO's Reviewing Representative's knowledge, as applicable, all Protected Materials subject to the request have been returned or destroyed. Notwithstanding the two preceding sentences, the NMPP Reviewing Representative and the ISO Reviewing Representative may retain Notes of Protected Materials and copies of filings, official transcripts and exhibits, if any, prepared in the course of the NMPP Reviewing Representative's or the ISO Reviewing Representative's, as applicable, review of the Protected Materials, provided that such retained materials are maintained in accordance with Paragraphs 9 and 12 below. In the event the CEC receives a request that Protected Materials should be returned or destroyed, but the CEC Executive Director determines that the CEC needs to retain some or all of these Protected Materials to carry out its statutorily-mandated tasks, the CEC may retain the Protected Materials, and the CEC Executive Director shall furnish PG&E and Commission Staff with a letter setting forth the CEC's reasons for retaining the Protected Materials, as well as a list enumerating with reasonable particularity the Protected Materials so retained. To the extent Protected Materials are not returned or destroyed pursuant to this paragraph, they shall remain subject to this Protective Order, Section 583 of the California Public Utilities Code and CPUC General Order No. 66-C.

7. (a) In the event that the CPUC receives a request for a copy of or access to any Protected Material from the CEC, the procedure for handling such requests shall be as follows. The CPUC, after giving written notice to PG&E of the request for the Protected Material, shall release such Protected Material to the CEC upon receipt from the CEC of an Interagency Information Request and Confidentiality Agreement (Interagency Confidentiality Agreement) identical in form to the agreement set forth in Appendix B hereto. Such Interagency Confidentiality Agreement shall (i) provide that the CEC will treat the requested Protected Material as confidential in accordance with this Protective Order, (ii) include an explanation of the purpose for the CEC's request, as well as an explanation of how the request relates to

furtherance of the CEC's functions, (iii) be signed by a person authorized to bind the CEC contractually, and (iv) expressly state that furnishing of the requested Protected Material to employees or representatives of the CEC does not, by itself, make such Protected Material public. In addition, the Interagency Confidentiality Agreement shall include an express acknowledgment of the CPUC's sole authority (subject to judicial review) to make the determination whether the Protected Materials should remain confidential or be disclosed to the public, notwithstanding any provision to the contrary in the statutes or regulations applicable to the CEC.

(b) In the event the CPUC receives a request for a copy of or access to Protected Material from a state governmental agency other than the CEC that is authorized to enter into a written agreement sufficient to satisfy the requirements for maintaining confidentiality set forth in Government Code Section 6254.5(e), the CPUC may, after giving written notice to PG&E of the request, release such Protected Material to the requesting governmental agency, upon receiving from the requesting agency an executed Interagency Confidentiality Agreement that contains the same provisions described in Paragraph 7(a) above, and that is otherwise substantively identical to the draft agreement set forth in Appendix B; *i.e.*, identical as to legal principles but with variations in language that are necessary due to the particular situation of the requesting agency.

8. If a request is made pursuant to the Public Records Act (PRA), Government Code §6250, *et seq.*, that the Protected Materials filed with or otherwise in the possession of the CPUC be produced, the CPUC will notify PG&E of the PRA request and will notify the requester that the Protected Materials are public records that fall within the exclusions listed in Section 2 of General Order No. 66(c), and/or that there is a public interest served by withholding the records. *See* paragraphs 2.2 and 3.3 of General Order No. 66-C. In the event the CPUC receives a request from a federal government agency or via a judicial subpoena for the production of Protected Materials in the CPUC's possession, the CPUC will also notify PG&E of such request. In the event that a PRA requester brings suit to compel disclosure of Protected Materials, the CPUC

will promptly notify PG&E of such suit, and Commission Staff and PG&E shall cooperate in opposing the suit.

9. Protected Materials shall be treated as confidential by each NMPP Reviewing Representative and by each ISO Reviewing Representative in accordance with the certificate executed pursuant to Paragraphs 3(f) and 11 hereof. Protected Materials shall not be used except as necessary for the conduct of this proceeding, and shall not be disclosed in any manner to any person except (i) other NMPP Reviewing Representatives who are engaged in this proceeding and need to know the information in order to carry out their responsibilities, (ii) persons employed by or working on behalf of the CEC or other state governmental agencies covered by Paragraphs 7(a) and 7(b) and (iii) the ISO Reviewing Representatives (with the exception of price information). In the event that a NMPP not covered by Paragraphs 7(a) and 7(b) or the ISO is requested or required by applicable laws or regulations, or in the course of administrative or judicial proceedings (in response to oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand or similar process) to disclose any confidential information, the NMPP or the ISO agrees to oppose disclosure on the grounds that the requested information has already been designated by the Commission as Protected Materials subject to this Protective Order lawfully issued by the Commission and therefore may not be disclosed. The ISO or NMPP shall also immediately inform the utility of the request, and the utility may, at its sole discretion and cost, direct any challenge or defense against the disclosure requirement, and the NMPP or ISO shall cooperate with the utility to the maximum extent practicable to either oppose the disclosure of the Protected Materials consistent with applicable law, or obtain confidential treatment of Protected Materials by the entity that wishes to receive the Protected Materials prior to any such disclosure. If there are multiple requests for substantially similar Protected Materials in the same case or proceeding where the NMPP or ISO has been ordered to produce certain specific Protected Materials, the ISO or NMPP may, upon request for substantially similar Protected Materials by a similarly situated party, respond in a manner consistent with that order to those substantially similar requests for those Protected Materials.

10. It shall be a rebuttable presumption that (i) any study that incorporates, describes or otherwise employs Protected Material in a manner that could reveal all or a part of the Protected Material, or (ii) any model that relies upon Protected Material for algorithms or other computation(s) critical to the functioning of the model, shall also be considered Protected Material that is subject to Section 583 of the Public Utilities Code, the Commission's General Order 66-C, and this Protective Order. However, models that merely use Protected Material as inputs will not themselves be considered Protective Material. It shall also be a rebuttable presumption that where the inputs to studies or models include Protected Material, or where the outputs of such studies or models reveal such inputs or can be processed to reveal the Protected Material, such inputs and/or outputs shall be considered Protected Material subject to this Protective Order, unless such inputs and/or outputs have been redacted or aggregated to the satisfaction of the party producing the Protected Material. Unless a party, by means of notice and motion, obtains a ruling from the Assigned ALJ or the Law and Motion ALJ holding that the applicable presumption(s) from among the foregoing has been rebutted with respect to the model or study at issue, then any party who devises or propounds a model or study that incorporates, uses or is based upon Protected Material shall label the model or study "Protected Material," and it shall be subject to the terms of this Protective Order.

11. No NMPP Reviewing Representative or ISO Reviewing Representative shall be permitted to inspect, participate in discussions regarding, or otherwise be granted access to Protected Materials pursuant to this Protective Order unless such NMPP Reviewing Representative or ISO Reviewing Representative has first executed a Non-Disclosure Certificate and delivered it to PG&E. PG&E shall provide copies of executed Non-Disclosure Certificates to Commission Staff. Attorneys qualified as NMPP Reviewing Representatives or as ISO Reviewing Representatives shall ensure that persons under their supervision or control comply with this Protective Order.

12. In the event that an NMPP Reviewing Representative to whom Protected materials are disclosed ceases to be engaged in Procurement Plan and Compliance Reviews

concerning PG&E, or is employed or retained for a position whose employer is not qualified to be an NMPP under Paragraph 3(g)(1), then access to Protected Materials by that person shall be terminated. Even if no longer engaged in such reviews, every such person shall continue to be bound by the provisions of this Protective Order and the Non-Disclosure Certificate.

13. All disputes arising under this Protective Order shall be presented for resolution to the Assigned ALJ or the Law and Motion ALJ. Prior to presenting any such dispute to the applicable ALJ, the parties to the dispute shall use their best efforts to resolve it. Neither PG&E nor the Commission Staff waives its right to seek additional administrative or judicial remedies after the Assigned ALJ or the Law and Motion ALJ has made a ruling regarding the dispute.

14. All documents containing Protected Materials that are filed with the Commission or served shall be placed in sealed envelopes or otherwise appropriately protected and shall be endorsed to the effect that they are filed or served under seal pursuant to this Protective Order. Such documents shall be marked with the words "**PROTECTED MATERIALS**" or one of the other, similar terms set forth in paragraph 3(c) hereof, and shall be served upon all NMPP Reviewing Representatives and persons employed by or working on behalf of the state governmental agencies referred to in Paragraphs 7(a) and 7(b) who are eligible to see the Protected Materials. Service upon the persons specified in the foregoing sentence may either be (a) by electronic mail in accordance with the Electronic Service Protocols set forth in Appendix A to the Order Instituting Rulemaking in this docket, (b) by facsimile, or (c) by overnight mail or messenger service. In the event the serving party chooses to serve the foregoing persons entitled to see Protective Materials by overnight mail or messenger service, the serving party shall give all parties 24 hours' electronic notice of its intention to do so. Any affected party who objects on account of delay to being served with the document(s) at issue by overnight mail or messenger service shall promptly notify the serving party of such objection, and in such a case the serving party shall arrange to have the document(s) containing the Protected Material hand-delivered on the date service is due to the party so objecting. Whenever service of a document containing

Protected Material is made by overnight mail or messenger service, the Assigned ALJ shall be served with such document by hand on the date that service is due.

15. Nothing in this Protective Order shall be construed as limiting the right of PG&E, Commission Staff, a NMPP or a state governmental agency covered by Paragraph 7(a) or 7(b) from objecting to the use of Protected Material on any legal ground, such as a relevance or privilege.

16. All Protected Materials filed with judicial or administrative bodies other than the Commission, whether in support of or as part of a motion, brief or other document or pleading, shall be filed and served in sealed envelopes or other appropriate containers bearing prominent markings indicating that the contents include Protected Materials that are subject to this Protective Order.

17. Neither PG&E nor the Commission Staff waives its right to pursue any other legal or equitable remedy that may be available in the event of actual or anticipated disclosure of Protected Materials.

18. PG&E and Commission Staff may agree at any time to remove the "Protected Material" designation from any material if, in their mutual opinion, its confidentiality is no longer required. In such a case, PG&E will notify all parties that PG&E believes are in possession of such materials of the change of designation.

Dated May \_\_, 2003, at San Francisco, California.

/s/ A. KIRK McKENZIE

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A. Kirk McKenzie  
Administrative Law Judge