

Memorandum

To: ISO Board of Governors

From: Roger Collanton VP, General Counsel and Chief Compliance Officer

Date: December 10, 2015

Re: **Decision on Appeal Process under the ISO's Records Availability Policy**

This memorandum requires Board action.

EXECUTIVE SUMMARY

The ISO maintains a Records Availability Policy ("Policy") that applies to requests by the general public for access to ISO records. The Policy, which is approved by the ISO Board of Governors ("Board"), describes the process a party must follow when requesting access to ISO records, sets forth guidelines for proper requests, and identifies categories of information that are considered confidential and thus not subject to production. The Policy also provides that if ISO staff denies a request for access to records under the Policy, the party may appeal that decision to the Board within 30 days of the denial. Beyond the filing requirements, the Policy does not specify the details of the process that the Board will follow in considering the appeal.

ISO Management believes that memorializing a standard process to be followed in connection with an appeal to the Board related to requests for access to ISO records will be beneficial to parties seeking an appeal of ISO staff decisions and provide a clear framework for the Board and management for handling any such appeals. Accordingly, Management proposes that the Board consider and approve procedures for appeals under the Policy, set forth in the document entitled *Standard Procedures for Appeal of Records Request Determinations*, included as Attachment A.

Moved, that the ISO Board of Governors approves the Standard Procedures for Appeal of Records Request Determinations, as attached to the memorandum dated December 10, 2015.

DISCUSSION AND ANALYSIS

The ISO has maintained an official, Board-approved policy regarding public access to corporate records since inception in 1998. The current version of the policy – "Records

Availability Policy, Version 4.3” – has been in effect since April 30, 2015 and is maintained on the ISO’s public website¹ and is included as Attachment B for reference. The Policy, cannot be substantively revised without Board approval, and it complies with open records requirements established for the ISO in section 345.5 of the California Public Utilities Code. Specifically, section 345.5(4) provides that the ISO shall maintain a records availability policy consistent “with the general policies of the California Public Records Act” and “no less consistent with the California Public Records Act than” the Board-approved policy that was in effect immediately prior to the enactment of Section 345.5 in 2002. Consistent with that obligation, the ISO has maintained a Records Availability Policy since that time that is substantively similar to the version in effect in 2002.

The Policy sets forth the process for requesting access to ISO records, the roles and responsibilities of ISO staff, the Board, and the requester, and the general substantive standards that ISO staff are to apply in considering a records request. In addition to vesting the Board with ultimate responsibility for determining which types and categories of records shall be subject to public disclosure, the Policy provides that the Board shall be responsible for deciding any appeals to denied requests for access to corporate records.

The Policy sets forth the initial steps that a requesting party must take to appeal a staff determination denying a records request, specifically requiring a party to submit a notice of appeal with the ISO Corporate Secretary within thirty calendar days of the denial. The Policy further provides that the determination of the Board shall be final and binding. The Policy does not, however, identify the process the Board will follow after receiving notification of an appeal.

In light of its overall past experience, the ISO has not identified a need to formally document the specific process the Board follows in connection with such an appeal. Although the ISO has received hundreds of records requests since the inception of its Policy in 1998, to date there has been only one appeal to the Board. In that instance, the requesting party appealed ISO staff’s decision to deny access to a document that was confidential. The requesting party submitted written briefing in support of its position, and was provided an opportunity to appear before the Board in connection with the Board’s consideration of the matter. The appeal proceeded on an orderly basis that afforded the requesting party a full opportunity to present its position to the Board.

The ISO has a strong history of working with parties requesting access to corporate records to help them obtain the records they are seeking. However, under the very rare circumstance where disputes over the application of the Policy cannot be resolved by staff, and a party appeals to the Board, there should be a defined process for conducting the appeal, particularly if the record requests are more involved or

¹ The Records Availability Policy is publicly available at the following website address: <http://www.caiso.com/rules/Pages/LegalPoliciesNotices/Default.aspx>.

voluminous, so that the requesting party and the Board have guidance on how to handle the appeal and what to expect out of the process.

Recent events have highlighted the need for an appeals process. A party that has brought suit against the ISO in federal court regarding the ISO's calculation of maximum import capability values, has in recent months, propounded numerous requests for records on the ISO. While the ISO has produced thousands of pages of public documents in response to certain of the requests, there were other requests that were so vague and overly broad as to potentially encompass vast volumes of documents. While the ISO staff attempted to work with the party to focus and narrow the requests, the party chose to file a lawsuit in state court seeking to compel production instead of working with staff or filing an appeal with the Board. The ISO believes that the lawsuit is improper and should be dismissed on various grounds, including that the proper forum for resolving this matter is through an appeal to the ISO Board as required by the Policy.

The experience with this party led Management to conclude that a defined process for appeals under the Policy would benefit the ISO, the Board and any party submitting an appeal. Management drafted a process for the Board's consideration, the attached document entitled, *Standard Procedures for Appeal of Records Request Determinations* ("Procedures"), setting out standard procedures the Board will follow in considering such an appeal.

These procedures first set forth the process for initiating an appeal. Specifically, once the requesting party has made its appeal within the 30-day window required under the Policy, a Case Manager, designated by the Board, will review the notice to determine whether it is timely and complies with the Procedures' requirements. If not, the appellant will be so notified and given an opportunity to cure any defects.

The Case Manager will then issue a briefing schedule to the appellant. The Procedures establish a standard schedule for typical requests: (1) appellant to submit its initial briefing within 15 business days, (2) ISO staff to submit its response within 15 business days after appellant's submission, and (3) appellant to file a reply brief within five business days after the ISO's response. The Procedures allow the Board to modify the standard timelines based on considerations such as the complexity or scope of the issues or other considerations, and also address other matters, such as formatting the briefs and how the briefs should be served on the other party.

The Procedures provide that if either the appellant or ISO staff believe an oral argument is warranted, they should inform the Board of this position in their written submission. The Board will then, at its discretion and based on input from the parties, determine whether to have oral argument and, if so, establish the timing, duration and any other specifics, such as whether the parties will appear in person or by teleconference. After briefing and any argument is concluded, the Board will issue a written decision that explains its basis for upholding or denying the appeal. Any proceeding by the Board under this process will be conducted consistent with the ISO's Open Meeting Policy.

The Procedures establish a clear, timely and well-documented process for the full and fair consideration of an appeal under the Policy, consistent with past practice and with the more general process established in the Policy. Management anticipates that these Procedures, if accepted by the Board, will be posted on the ISO's website on the same page where the Policy is currently located, providing the public with easy access to the process.

CONCLUSION

Management recommends that the Board approve the proposed *Standard Procedures for Appeal of Records Request Determinations* to document the process to be followed by the parties and the Board where an appeal has been made under the ISO's Records Availability Policy.