BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into Implementation of Assembly Bill 970 Regarding Identification of Electric Transmission and Distribution Constraints, Actions to Resolve those Constraints, and Related Matters affecting the Reliability of Electric Supply

Investigation No. 00-11-001

MOTION FOR A PROTECTIVE ORDER AND SHORTENING TIME OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

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Attorneys for the California Independent System Operator

Dated: June 2, 2004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into Implementation of Assembly Bill 970 Regarding Identification of Electric Transmission and Distribution Constraints, Actions to Resolve those Constraints, and Related Matters affecting the Reliability of Electric Supply

Investigation No. 00-11-001

MOTION FOR A PROTECTIVE ORDER AND SHORTENING TIME OF THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR CORPORATION

To: Administrative Law Judge Charlotte F. TerKeurst

This motion is filed in Phase 5 of this proceeding, which relates to the Commission's evaluation of a generic economic methodology developed by the California Independent System Operator ("CAISO") for evaluating transmission projects ("economic methodology"). This motion is made in the interest of facilitating prompt discovery and preparation of testimony, protecting and preserving the rights of the parties and non-parties, and avoiding unnecessary future disputes. Specifically, by this motion, the CAISO seeks the following relief:

1. Pursuant to Rule 74.7 of the Commission's Rules of Practice¹, adoption of a protective order to ensure that "workpaper" information, including CAISO and third-party proprietary databases and algorithms relied on in the economic methodology remain confidential.

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All further references to a "Rule" refer to the Commission's Rules of Practice and Procedure.

- 2. In addition, as part of the ruling on protective order, confirmation that the CAISO may comply with Rule 74.4(d) through two separate means. With respect to the Commission's Energy Division, the CAISO will execute a limited number of requested computer model runs on the CAISO's computer system. With respect to all other intervenors, access to the computer model will be accomplished by making the computer model available from the developer through a limited commercial license directly between the developer's agent and intervenors, as explained further below.
- 3. Pursuant to Rule 45(f), an order shortening time to respond to this motion to allow for a ruling as soon as practicable.

I. A Nondisclosure Agreement Is Necessary to Permit Intervenor Participation

In developing the economic methodology, the CAISO utilized third-party proprietary data. The CAISO obtained the third-party proprietary data pursuant to commercial subscription or licensing agreements that granted the CAISO non-transferable and limited license rights. The data subject to licensing limitations include:

- a. TPS Database data from PacifiCorp this information constitutes the primary basis for the input database employed in PLEXOS, the CAISO's selected market simulation computer model.
- b. Embedded within the TPS Database is proprietary information developed by the Western Electricity Coordinating Council ("WECC"). The WECC data provides information on transmission line ratings, impedance factors, load distribution factors, and other general elements of network topography.

c. WECC Data Module from Henwood Energy Services, Inc. - this data includes synthetic load data for developing normalized load curves to determine load growth in study years.

The CAISO's economic methodology utilizes a "computer model" as that term is defined in Rule 74.2. Under Rule 74.3, any party who submits testimony based in whole, or in part, on a computer model must provide all parties with certain information, including *inter alia*, a complete set of input data used in the sponsoring testimony. The above-referenced data arguably constitutes "input data." Similarly, such data may be considered as constituting a "database" to which parties must be provided access under Rule 74.4(b).

However, under the respective license agreements, the CAISO does not possess the right or ability to disclose the above-referenced data to non-license holders, including the Commission. Rule 74.7 provides that a sponsoring party who objects to or is unable to provide access to any computer model, database, or other information used in a computer model, on the bases that the information is proprietary or subject to a licensing agreement must seek a protective order.²

Although the CAISO does not possess transfer rights, the CAISO has diligently sought consent from the holders of the proprietary information to disclose the data in this proceeding to those intervenors and Commission staff that execute a protective order and non-disclosure certificate. At this time, the CAISO has obtained consent from all licensors to permit disclosure under such procedures. Accordingly, the CAISO proposes to submit the data as workpapers (on CD) in a read-only, password protected format to

The CAISO, as a non-Commission jurisdictional entity, is not directly subject to Public Utilities Code § 1822 or Rule 74.7. Nevertheless, it is axiomatic that the efficacy of this proceeding requires maximizing Commission and intervenor access to the computer models underlying the CAISO's testimony as a predicate to fostering acceptance and general application of the economic methodology.

intervenors and Commission staff, upon request, subject to execution of a protective order and nondisclosure certificate.³

The CAISO believes that the non-transferable nature of its license rights to the proprietary information identified above constitutes good cause for issuance of a nondisclosure and protective agreement in the form attached. Entry of the attached protective order, therefore, will facilitate Commission and intervenor evaluation of the economic methodology and assist in discovery and the preparation of testimony, without compromising the proprietary or commercially sensitive information. The proposed order is similar to those entered in other Commission proceedings, and its entry will not prejudice the ability of the Presiding Administrative Law Judge to govern admission of evidence at public hearings held in this matter.

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Pursuant to Rule 74.3(b) of the Commission's Rules of Practice and Procedure, information underlying testimony that relies on computer modeling may be submitted as "workpapers." Such workpapers need not be filed with the testimony, but must be available to any party upon request.

Rule 74.4(c) grants the sponsoring party an election regarding how to provide access to data base information. Here, access to the databases by means other than through a non-disclosure agreement is either impossible or less efficient. For instance, the existence of highly sensitive market data on CAISO computers precludes providing parties access to the CAISO's computers themselves to review or manipulate the data base; the number of intervenors and concomitant number of potential "runs" requested by such intervenors would impose an undue burden on CAISO staff and resources; and making the data base available through an external computer service would entail a substantial financial obligation.

The CAISO does not currently seek to obtain permission to file materials under "seal." The testimony, including attached report and appendices, does not disclosure proprietary data. As noted, proprietary materials will be provided as workpapers. To the extent intervenors subsequently attempt to introduce such workpapers as evidence during the hearing process, the CAISO will at that time seek advice from the Presiding Administrative Law Judge regarding protection of workpapers that ultimately become part of the record. The CAISO anticipates that "sealing" the particular workpapers constitutes an appropriate mechanism to protect the confidentiality of the data. The CAISO notes that General Order 66-C governs the scope and procedures for obtaining information and records in the possession of the Commission. Excluded from the definition of "public records" is items rendered confidential under statute. (G.O. 66-C § 1.1.) Government Code § 6254.15 exempts "corporate proprietary information" from the scope of California's public records act statute. Accordingly, sealing confidential exhibits is consistent with, and will facilitate administration of, the Commission's statutory obligations under the California Public Records Act. And in so doing, filing the documents under seal will facilitate that the proprietary materials remain confidential consistent with the expectation of the data owners.

II. A Protective Order Is Necessary to Dictate the Form of Intervenor Access to the Computer Model

Rule 74.4 provides that any party using a computer model as the basis for its testimony shall provide reasonable access to that computer model to all parties who submit a written request and an explanation for why access is necessary to promote the interest of the requesting party in the proceeding. That access may be provided at the election of the sponsoring by either: (1) making requested runs on its own computer; (2) making the model available to the requesting party to run on that party's own computer; or (3) having the requested model run produced for the requesting party by an external computer service.

The CAISO developed the economic methodology using a commercially available analytical software model produced by Drayton Analytics. The software is known as PLEXOS. Similar to the databases discussed above, the CAISO possesses only a limited non-transferable license to use PLEXOS. The scope of the CAISO's license rights precludes its ability to satisfy Rule 74.4 by making the model available to others to run on their computer or providing the model to an external computer service.

Accordingly, the CAISO proposes to meet its obligation under Rule 74.4 through two separate mechanisms depending on the identity of the potential model user. First, the CAISO will grant the Commission's Energy Division staff reasonable access to the model on the CAISO's computers. The CAISO does not believe that rigidly defining the terms of the Energy Division's access, i.e., the number of runs, is necessary at this time, but the CAISO would like to reserve all rights pursuant to Rule 74.4(f).

Second, for all other intervenors, Drayton Analytics has agreed to package the version of the PLEXOS software used by the CAISO under special terms.⁶ In particular, Drayton Analytics will provide the PLEXOS software used by the CAISO for the Path 26 study under a 60-day license at a fee of approximately \$3,883. Pinnacle Consulting, LLC, an agent for Drayton Analytics, will distribute the software after execution of a peruse license and receipt of the license fee. Pinnacle Consulting will provide five hours of support for the software and data based on the following terms:

- Phone or e-mail requests will be responded to within 4 hours
- No fee for the first five hours of support
- \$150 per hour thereafter for support up to ten additional hours.

An arrangement where the individual intervenor directly contracts for access to the software is necessary and offers the most efficient mechanism to ensure the orderly administration of this proceeding. The CAISO simply does not have the resources or ability to execute on its own system runs of the computer model that may be requested by intervenors. Modifying the underlying modeling assumptions can take considerable time prior to executing the selected scenario. Given the large number of intervenors in this proceeding, it is simply impossible for the CAISO to accommodate requests for computer runs even from a subgroup of intervenors. This is especially true if the briefing schedule outlined in the January 28, 2004 ruling is to be maintained.

Section 1822(e) of the Public Utilities Code allows the Commission to establish appropriate procedures for determining the level of compensation for a party's access to a computer model. This section contemplates that parties must pay the reasonable costs of

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Of course, any entity remains free to negotiate any form of licensing arrangement with Drayton Analytics.

access to the computer models. As such, intervenors would be required to compensate the CAISO or the IOUs, as the case may be⁷, for the cost of any contract with an external computer service (or even for CAISO staff time if done internally). The CAISO's proposal, therefore, does not have any negative cost implications to intervenors.

Moreover, to the extent the intervenor's contribution is of value to this proceeding, the intervenor may continue to seek compensation under Rule 76.1 et seq.

III. This Briefing Schedule for this Motion Should Be Shortened

Rule 74.7 provides that motions for a protective order are to be filed at the time the testimony is served and permits answers within 15 days of such service. The CAISO believes shortening the response time, however, would facilitate maintaining the anticipated briefing schedule in this proceeding. On January 28, 2004, the Administrative Law Judge issued a ruling anticipating that "direct testimony by all other parties will be due approximately four weeks following submission of the ISO's testimony." The CAISO's opening testimony will constitute a substantial amount of materials that completely describes the economic methodology. Thus, while parties will be able to proceed with drafting their direct testimony, this process is likely to be aided by the expeditious dissemination of the protected materials. Accordingly, the CAISO respectfully requests that answers be due on June 7, 2004, and reply comments, if any, on June 9, 2004.

The CAISO questions the Commission's jurisdiction to direct the CAISO to contract with an external computer service to ensure intervenor access to a computer model.

IV. Conclusion

Based on the foregoing, the CAISO respectfully requests: (1) that the form of Nondisclosure and Protective Agreement, and Nondisclosure Certification, attached hereto be adopted; (2) that the CAISO be deemed to have satisfied the requirements of Rule 74.4 by making the computer model available in the manner set forth above; and (3) that the time for responding to this motion be shortened.

June 2, 2004

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ATTACHMENT

DRAFT

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into Implementation of Assembly Bill 970 Regarding Identification of Electric Transmission and Distribution Constraints, Actions to Resolve those Constraints, and Related Matters Affecting the Reliability of Electric Supply

Investigation 00-11-001

NONDISCLOSURE AND PROTECTIVE AGREEMENT

This Nondisclosure ar	nd Protective Agreement ("Agreement") is effective	this
day of	_, 2004, by and between the	ne California Independent	System
Operator and its counsel of re	ecord, and	("	")
and its counsel of record.			

WHEREAS, certain information or workpapers that may be requested to be produced or disclosed in Phase 5 of Investigation 00-11-001 (the "Proceeding") may constitute trade secrets, proprietary and confidential information, or competitively sensitive documents (the "PROTECTED MATERIALS"); and

WHEREAS, the parties hereto wish to streamline discovery and facilitate preparation of testimony in the Proceeding and avoid unnecessary law and motion practice; and

WHEREAS, the parties hereto believe that this Agreement will facilitate the evaluation of the CAISO's opening testimony, facilitate discovery, protect legitimate proprietary or confidentiality concerns, and preserve the rights of the parties and those third-parties that possess rights in the PROTECTED MATERIALS;

ACCORDINGLY, the parties hereto agree that the following terms and conditions shall govern the use of such workpapers or information provided by the

CAISO (the "Designating Party" or "CAISO") to the other party (the "Receiving Party") in the context of this Proceeding:

- 1. This Agreement shall govern all PROTECTED MATERIALS produced by the Designating Party and shall remain effective until the requirements of paragraph 5 below are satisfied.
- 2. The Designating Party may designate as PROTECTED MATERIALS those items provided through discovery, upon request, or otherwise which are treated by the Designating Party as confidential or proprietary, which are not available to the public, and which, if disclosed freely, would, in the Designating Party's judgment, subject it to risk of competitive disadvantage or other business injury, including liability under a license or subscription agreement with third-parties.
 - 3. For purposes of this Agreement:
- a. The term "PROTECTED MATERIALS" includes (a) material provided by the CAISO in response to discovery requests or in compliance with Rule 74.1, et seq. of the Commission's Rules of Practice and Procedure, and designated by the CAISO as protected, including, but not limited to the TPS Database information, WECC proprietary data, and WECC Data Module from Henwood Energy Services, Inc.; (b) any copy or reproduction of such designated materials; (c) any information contained in or obtained from such designated materials; (d) any other materials which are made subject to this Agreement by the Administrative Law Judge, by the Commission, by any court or other body having appropriate authority, or by agreement of the parties hereto; and (e) notes of PROTECTED MATERIALS.
- b. The term "notes of PROTECTED MATERIALS" means memoranda, handwritten notes, or any other form of information which copies or discloses materials described in the foregoing paragraph.
- c. The term "Reviewing Representative" is a person described in paragraphs 8 and 9.

- d. The term "Commission" means the California Public Utilities

 Commission.
- 4. PROTECTED MATERIALS shall be made available under the terms of this Agreement only to the Reviewing Representatives as provided in paragraphs 8 and 9.
- 5. PROTECTED MATERIALS shall remain available until the date that an order concluding or otherwise terminating this Proceeding is no longer subject to judicial review. Within 30 days after such date, all Reviewing Representatives of the Receiving Party shall return the PROTECTED MATERIALS, including all copies thereof, and notes of PROTECTED MATERIALS to the Designating Party or shall destroy said materials. Within such time period the Receiving Party shall also submit to the Designating Party an affidavit stating that all PROTECTED MATERIALS, copies thereof, and notes of PROTECTED MATERIALS are being returned or have been destroyed by all Reviewing Representatives of the Receiving Party.
- 6. To the extent possible, each page of PROTECTED MATERIALS and each disk containing PROTECTED MATERIALS shall be physically marked "PROTECTED MATERIAL" or "Contains Privileged Information DO NOT RELEASE" by the Designating Party. All PROTECTED MATERIALS shall be maintained by the Receiving Party in a secure manner. Access shall be limited to those Reviewing Representatives specifically authorized pursuant to paragraphs 8 and 9.
- 7. PROTECTED MATERIALS covered by this Agreement shall be treated as confidential by the Receiving Party and by the Reviewing Representative in accordance with the certificate executed pursuant to paragraph 9. PROTECTED MATERIALS shall not be used except as necessary for the conduct of this Proceeding; nor shall they be disclosed in any manner to any person except a Reviewing Representative who is engaged in the conduct of this Proceeding and who needs to know the information in order to carry out that person's responsibilities in this Proceeding.

Reviewing Representatives may make notes of PROTECTED MATERIALS which notes must be maintained in a secure manner pursuant to paragraph 6.

- 8. A Reviewing Representative is an individual who is:
- (i) An attorney who has made an appearance in this Proceeding for a Receiving Party;
- (ii) Attorneys, paralegals, and other employees associated for purposes of this case with an attorney described in (i);
- (iii) An expert or an employee of an expert retained by Receiving Party for the purpose of advising, preparing for, or testifying in this Proceeding; and
- (iv) An employee of a Receiving Party who has a role in advising, preparing for, or testifying in this Proceeding.
- 9. a. A Reviewing Representative shall not be permitted to inspect, participate in discussions regarding, or otherwise be permitted access to the PROTECTED MATERIALS pursuant to this Agreement unless that Reviewing Representative has first executed, and there has been delivered to the Designating Party, a non-disclosure certificate in the form set forth in Appendix 1.
- b. Attorneys qualified as Reviewing Representatives are responsible for ensuring that persons under their employment, instruction, supervision or control comply with this Agreement.
- 10. Any Reviewing Representative may disclose PROTECTED MATERIALS to any other Reviewing Representative as long as the disclosing Reviewing Representative and the receiving Reviewing Representative have both executed and delivered a non-disclosure certificate to the Designating Party. In the event that any Reviewing Representative to whom the PROTECTED MATERIALS are disclosed ceases to be engaged in these Proceedings, or is employed or retained for a position whereby that person is no longer qualified to be a Reviewing Representative under

paragraph 8, access to PROTECTED MATERIALS by that person shall be terminated and that person must comply with the return/destruction requirements in paragraph 5. However, even if no longer engaged in this Proceeding, every person who has agreed to a non-disclosure certification shall continue to be bound by the provisions of this Agreement and the certification.

- 11. If the Receiving Party intends to submit or use in this Proceeding any PROTECTED MATERIALS such that the submission or use would result in a public disclosure of those PROTECTED MATERIALS, including, without limitation, the presentation of prepared testimony, cross-examination, briefs, comments, protests, or other presentations before the Commission, the attorney for the Receiving Party shall contact the attorney for the Designating Party as soon as possible and not later than 3 business days prior to such use, and counsel shall constructively explore means of identifying the PROTECTED MATERIAL so that the confidentiality thereof may be reasonably protected (including, but not limited to, submission of testimony and briefs under seal and clearing the hearing room during examination, discussion, or argument concerning the PROTECTED MATERIAL), while at the same time enabling an effective presentation. If the Designating Party and the Receiving Party are unable to agree upon a procedure to protect the confidentiality of the PROTECTED MATERIAL, the Receiving Party shall request a ruling from the presiding Administrative Law Judge; the Designating Party reserves the right to oppose the Receiving Party's request. Except as expressly provided for herein, no use can be made of the PROTECTED MATERIAL that would fail to protect its confidentiality without such a ruling from the presiding Administrative Law Judge.
- 12. The presiding Administrative Law Judge retains the discretion to review and evaluate the facts and circumstances involved in any proposed use of PROTECTED MATERIAL in Commission hearings, and the flexibility to respond in whatever manner is most appropriate under the circumstances, including the holding of <u>in camera</u> hearings.

- 13. Nothing in this Agreement shall be construed as precluding any party from objecting to the use of PROTECTED MATERIALS on any legal grounds.
- 14. Nothing in this Agreement shall preclude any party from requesting the presiding Administrative Law Judge, the Commission or any other body having appropriate authority to find that this Agreement should not apply to all or any part of any materials previously designated as PROTECTED MATERIALS pursuant to this Agreement.
- 15. The presiding Administrative Law Judge shall resolve any disputes arising under this Agreement. Prior to presenting any dispute under this Agreement to the presiding Administrative Law Judge, the parties to the dispute shall use their best efforts to resolve it. Any objection to the designation of PROTECTED MATERIALS or motion to compel, and any response to the objection or motion to compel shall be filed in writing with the Administrative Law Judge, and shall be delivered to the opposing party's counsel(s) of record within 24 hours of filing unless otherwise ordered by the presiding Administrative Law Judge. In any challenge to the designation of materials as PROTECTED MATERIALS, the burden of proof shall be on the Designating Party.
- 16. To the extent that PROTECTED MATERIALS are discussed, analyzed or otherwise the subject of consideration during any conference or other session held in connection with the Proceeding, only authorized representatives for the Receiving Party and the Designating Party may be present for such sessions.
- 17. The Receiving Party agrees that any release or attempted release of the PROTECTED MATERIALS or use of such materials other than as contemplated by this Agreement by a Receiving Party may cause Designating Party irreparable injury which could not be adequately compensated through pecuniary damages. Accordingly, the parties agree that any breach or threatened breach of this Agreement may be enjoined.
- 18. This Agreement shall be governed and construed according to the laws of the State of California.

- 19. This Agreement sets forth the complete understanding of the parties hereto with respect to the subject matter hereof as of the date first above set forth and supersedes any prior understandings, discussions, or course of conduct (oral and written). Any modification or waiver of the provisions hereof must be written, executed by both parties, and shall not be implied by any usage of trade or course of conduct.
- 20. Nothing in this Agreement shall be deemed to preclude any party from independently seeking through discovery in any other administrative or judicial proceeding information or materials produced in this Proceeding under this Agreement.
- 21. This Agreement may be executed in separate counterparts by each party, each of which shall be fully effective as to the party executing it.

IN WITNESS WHEREOF, the undersigned parties have executed this Agreement as of the date entered below.

Dated:	Ву:	Grant A. Rosenblum Attorney for: THE CALIFORNIA INDEPENDENT SYSTEM OPERATOR
Dated:	Ву:	Attorney for:

APPENDIX 1

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation into Implementation of Assembly Bill 970 Regarding Identification of Electric Transmission and Distribution Constraints, Actions to Resolve those Constraints, and Related Matters affecting the Reliability of Electric Supply

Investigation 00-11-001

NONDISCLOSURE CERTIFICATE

I certify my understanding that access to PROTECTED MATERIALS is provided to me pursuant to the terms and restrictions of the Nondisclosure and Protective Agreement ("Agreement"), concerning the above-captioned proceeding. I have been given a copy of and have read that Agreement and agree to be bound by it. I understand that the contents of the PROTECTED MATERIALS, any notes or other memoranda or any other form of information which copy or disclose PROTECTED MATERIALS shall not be disclosed to anyone other than in accordance with the Agreement and shall be used only for the purpose of the above-captioned proceeding before the California Public Utilities Commission. I agree that my obligation to honor the confidentiality of the PROTECTED MATERIALS shall continue after the issuance of the final, non-appealable order disposing of the merits of Phase 5 of Investigation 00-11-001 as set forth in the Agreement. I acknowledge that a violation of this certificate constitutes a violation of an order of the Commission.

Printed Name	·	······	
Гitle:			
Representing:			
Address:			

PROOF OF SERVICE

I hereby certify that on June 2, 2004 I served, by electronic and U.S. mail, a Motion for a Protective Order and Shortening Time of the California Independent System in Docket # I. 00-11-001.

DATED at Folsom, California on June 2, 2004.

Charity N. Wilson

An Employee of the California
Independent System Operator

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