

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



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Order Instituting Rulemaking to Improve
Public Access to Public Records Pursuant to
the California Public Records Act.

Rulemaking 14-11-001
(Filed November 6, 2014)

**COMMENTS OF THE INDEPENDENT STORAGE PROVIDERS ON
PROPOSED DECISION UPDATING COMMISSION PROCESSES RELATING TO
POTENTIALLY CONFIDENTIAL DOCUMENTS**

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”) Central Valley Gas Storage, L.L.C. (“Central Valley”), Gill Ranch Storage, LLC (“GRS”), Lodi Gas Storage, LLC (“LGS”), and Wild Goose Storage, LLC (“Wild Goose”) (collectively the “Independent Storage Providers” or “ISPs”) comment on the Proposed Decision Updating Commission Processes Relating to Potentially Confidential Documents issued in the above captioned proceeding on June 28, 2016.

I. INTRODUCTION

The Proposed Decision sets forth a process for submitting confidential documents to the Commission and guidelines that the Commission will use for its review and possible release of those documents pursuant to a Public Records Act (or possibly other) request. While the Proposed Decision advises that the process and guidelines are only the beginning of an ongoing proceeding that will “develop and implement specific procedures consistent with these guidelines,” and parties will be provided the “opportunity to present their arguments and positions on the specific procedures to be used,”¹ in the interim the processes and guidelines will be in effect. Accordingly, any interim processes and guidelines must be fashioned in a manner

¹ Proposed Decision, p. 16.

that does not unnecessarily impede the submission of documents to the Commission and that ensures that parties due process rights are met. To that end, the ISPs submit that the Proposed Decision be revised to eliminate (or at minimum modify) the required declaration upon submission of confidential information and to provide with respect to each Public Records Act request, notice and opportunity for appeal.

Similarly, while the ISPs recognize that future opportunities will be provided for parties to propose specific procedures regarding the submission and release of information, the Proposed Decision fails to take into account any of the proposed procedures already submitted on the record, including those of the ISPs. The Proposed Decision should be modified to incorporate the ISP proposal for predeterminations of confidentiality. Doing so will help to achieve the goals set forth in the Proposed Decision of (1) consistency in confidentiality designations; (2) administrative efficiency; and (3) timely processing of Public Records Act requests.

II. THE DECLARATION REQUIREMENT SHOULD BE ELIMINATED OR, AT A MINIMUM, MODIFIED

The Proposed Decision sets forth a process for submission of confidential documents that requires each time a document for which confidentiality is sought is submitted, it must be accompanied by a declaration attesting to the claimed basis for confidentiality that is signed by “an officer of the requesting entity.” This requirement is redundant to Rule 1.1 of the Commission’s Rules of Practice and Procedure and, as such, should be eliminated. If the declaration requirement is retained, however, it must be modified to allow for submission by any duly authorized employee or agent of the submitting party.

The assumed purpose of the proposed declaration is to verify that the basis for claimed confidentiality of a particular document is true based on the declarant’s own knowledge. Commission Rule 1.1, however, already requires that any person who “transacts business with

the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State” and ... “never to mislead the Commission or its staff by an artifice or false statement of fact or law.” In other words, by virtue of Rule 1.1, the submission of a document to the Commission with a confidentiality designation and supporting legal basis is a good faith assertion by the submitting party that the claimed basis for confidentiality is correct to the best of their knowledge.² There is simply no need to add a superfluous declaration requirement.

If the declaration requirement is retained, however, it must be modified in a manner that expands the universe of individuals permitted to sign. An officer of the submitting entity may not have the requisite knowledge to make such declaration. Obtaining knowledge sufficient to make the declaration could markedly delay timely responses to data requests. Similarly, the availability of an officer to review and make any necessary attestation may be limited, further impeding the utility’s ability to timely respond to a Commission data request. Rather than limiting the required declarant to officers, any duly-authorized employee or agent should be allowed to provide the requisite declaration.

III. THE PROPOSED GUIDELINES FOR RELEASE OF INFORMATION MUST BE MODIFIED TO INCORPORATE BASIC DUE PROCESS RIGHTS

A. Staff Should Provide Utilities With Notice of Requests for Confidential Information and Prior to the Release of Confidential Information.

The proposed guidelines do not contemplate providing a submitter with notice upon a request for, or a determination by staff to release, information submitted to the Commission that has been marked confidential. Given the adverse due process implications of these omissions, the

² The possibility that the Commission may ultimately determine that the designation was inappropriate, or that the public interest in disclosing the information exceeds the public interest in maintaining confidentiality (see CPRA section 6255), alone does not of course suggest that the submission raises a Rule 1.1 violation.

Proposed Decision likely is legally flawed.³ While the ISPs understand that some or all of the review process guidelines set forth in the Proposed Decision may be subject to refinement in the future, the ISPs recommend that the Commission incorporate at this time a requirement that staff notify a submitter (1) whenever a request is made for designated confidential information that a submitter has provided to the Commission,⁴ and (2) upon a staff determination to release designated confidential information provided by a submitter.

Entities regulated by the Commission routinely submit confidential information, including but not limited to customer information, pricing information, physical and cyber security information, and proprietary information, the release of which could substantially harm customers, the market, vendors, utilities, and others. In order to avoid such harm, and to protect the due process rights of entities submitting confidential information to the Commission, the ISPs recommend that the Proposed Decision be revised to require that the Commission provide notice to a submitter any time the Commission receives a request for information that the submitter has designated as confidential. Providing notice of such requests will allow submitters the opportunity to contest disclosure of their confidential information, or to seek a protective order or other appropriate remedy. Similar considerations justify also providing notice to a submitter when staff determines to release information that the submitter has designated confidential.

³ In general, “due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. . . . An orderly proceeding wherein a person is served with notice, actual or constructive, and has an opportunity to be heard and to enforce or protect his rights before a court having power to hear and determine the case.” Black’s Law Dict. (6th ed. 1990) (*citations omitted*).

⁴ As noted in the Proposed Decision, requests for information in the possession of the Commission typically are made pursuant to the California Public Records Act, but they may also occur in other contexts. (Proposed Decision, p. 5, fn. 4.)

Notably, regulations governing other state and federal energy records review processes explicitly require notice to a submitter, both when a request for information designated confidential is received, and when a determination is made to release the requested information. California Air Resources Board (“CARB”) regulations require that CARB contact a submitter if it receives a request for disclosure of data claimed to be confidential, or seeks to disclose that data itself.⁵ CARB regulations further require that CARB provide written notice to the submitter when it determines that information that the submitter claims is confidential is subject to disclosure.⁶ California Energy Commission (“CEC”) regulations require that the CEC provide a submitter with a copy of a request for confidential information, along with a request for written approval and release of the information.⁷ The CEC regulations further imply that submitters are provided with notice of a decision to release a document that the submitter designated confidential. For example, the regulations provide that any party may request reconsideration of a decision to release (or withhold) a document. Additionally, the CEC sets the effective date of a decision providing for disclosure based on consideration of the submitter’s right to seek to prevent its release by seeking reconsideration or appealing a disclosure decision to a court of competent jurisdiction.⁸ Federal Energy Regulatory Commission regulations require that notice and opportunity to comment be given to a submitter when a request is made for Freedom of Information Act (“FOIA”) information or Critical Energy Infrastructure Information (“CEII”) and allows the submitter an opportunity to comment on a proposed FOIA or CEII release.⁹

⁵ 17 CCR § 91022(b).

⁶ 17 CCR § 91022(e)(2).

⁷ 20 CCR § 2506(b)(2)(A).

⁸ 20 CCR § 2506(b)(6) and (7).

⁹ 18 CFR §388.112(d).

Implementation of the ISPs' notice recommendations will protect a submitter's due process rights, and minimize the potential for substantial harm to customers, the market, vendors, utilities, and others, while maintaining a document submitter's burden of demonstrating confidentiality of a document submitted.

B. Submitters of Information Designated as Confidential Should be Provided the Opportunity to Challenge a Determination to Release Such Information

The Proposed Decision presently does not afford a third party requesting information or a submitter of information designated as confidential an opportunity to challenge a staff decision authorizing the release or withholding of information. As with the omission of notice provisions, the lack of an appeal process likely constitutes legal error. Consistent with the ISPs' comments above regarding the need for notice, the ISPs recommend that the Proposed Decision be revised to allow either a submitter or a requester the opportunity to challenge or appeal a staff determination to release or withhold a document. A right to appeal is a basic procedural safeguard, and essential to an equitable, efficient, and reliable administrative process.

Entities that provide confidential information to the Commission do so with the reasonable expectation that the information will be maintained as confidential. If information that has been designated confidential is erroneously released, it would put the submitter and potentially the submitter's customers at risk of significant commercial and other harm, pose risks to the functioning of the market, impair vendors' ability to work with Commission-regulated entities and compete with each other, and potentially harm others. Erroneous withholding of information similarly could adversely affect customers, markets, vendors, utilities, and others. The scope and magnitude of the potential harm that could result from the erroneous release or withholding of information are substantial.

An appeal process is a known, common procedural mechanism for guarding against such harm. CARB regulations state that CARB will provide written notice to the person claiming confidentiality when it has determined that information is subject to disclosure, that it proposes to disclose the information, and that the information will be released 21 days after receipt of the notice by the person claiming confidentiality, unless CARB is restrained from doing so by a court of competent jurisdiction.¹⁰ CEC regulations provide that any party may request that the full Commission reconsider the Chief Counsel’s decision regarding the release or withholding of information that is designated confidential.¹¹ Further, the effective date of any decision that information should be disclosed is to be set in a manner “consistent with maintaining the opportunity of the person originally submitting the information to prevent its release by requesting reconsideration or appealing the decision to a court of competent jurisdiction.”¹² At the federal level, FOIA affords submitters of confidential information the opportunity to appeal adverse agency FOIA decisions through “reverse” FOIA” actions.¹³

The guidelines in the Proposed Decision for staff review of confidentiality matters should be revised to include a process for a document submitter or requester to challenge or appeal a determination by staff that a document should be released or withheld.

¹⁰ 17 CCR § 91022(e)(2).

¹¹ 20 CCR § 2506(b)(6).

¹² 20 CCR § 2506(b)(7).

¹³ The Court of Appeals for the District of Columbia Circuit has defined a “reverse” FOIA action as one in which the “submitter of information – usually a corporation or other business entity” that has supplied an agency with “data on its policies, operations or products – seeks to prevent the agency that collected the information from revealing it to a third party in response to the latter’s FOIA request.” *CNA Fin. Corp. v. Donovan*, 830 F. 2d 1132, 1133, n. 1 (D.C. Cir. 1987).

IV. PREDETERMINATIONS OF CONFIDENTIALITY WILL HELP ACHIEVE COMMISSION'S GOALS

The Proposed Decision, while evidencing the intent to (1) reduce the burden on Commission Staff with respect to the processing of Public Records Act requests, (2) achieve administrative efficiency, and (3) ensure consistency in the marking of documents, fails to address means sufficient to achieve such goals. While the ISPs recognize that the processes and guidelines set forth in the Proposed Decision are interim nature and will evolve, there are procedures that can be implemented now which will help to achieve the goals enumerated in the Proposed Decision.

Specifically, the ISPs suggest that the Commission institute a process wherein an entity regularly submitting documents of the same type on a regular basis (*e.g.*, customer contracts submitted monthly) can request a determination that would establish on a going-forward basis whether such document type (or relevant portions thereof) will be treated as confidential by the Commission and not released pursuant to a Public Records Act request.¹⁴ Such request for a confidentiality determination could be made in manner similar to an advice filing, and thereby provide opportunity for public comment. The determination of the “advice filing” could be made by Commission staff, provided that there was an opportunity to appeal that determination to the Commission. Establishing a process that results in a predetermination of the confidential nature of a type of document will help the Commission achieve several of the goals set forth in the Proposed Decision:

¹⁴ The ISPs set forth a similar proposal in comments submitted earlier in this proceeding. Therein the ISPs recommended that the Commission identify certain classes of documents deserving of blanket confidential treatment and non-disclosure treatment. See Comments of the Independent Storage Provider on Draft Proposal - OIR on Public Records Act – R.14-11-001 (September 15, 2015), p. 11

Timely Processing:¹⁵ By providing predeterminations of confidentiality for certain documents that are regularly submitted to the Commission (or relevant portions thereof), the Commission will be providing authority that can be relied on and cited to in future submissions. Such determinations of confidentiality can be vetted in a measured manner and not subject to the time pressures involved when the Commission receives a Public Records Act request.

Consistency:¹⁶ Having rulings on specific types of documents (or relevant portions thereof) will enhance the consistency of Public Records Act determinations. Further, from a submitter's perspective, being able to request a ruling instead of having to wait for a determination on a request for release will avoid the uncertainty that arises where the submitter is routinely submitting data that it believes should and will be protected from public disclosure yet does not find out that the staff disagrees until perhaps years (and numerous submissions) later.

Administrative Efficiency: Under this proposed process, the "heaviest burden" will not fall on Commission staff;¹⁷ the submitter will have to make its case for protection from public disclosure. Future submissions that fit within the parameters described in the request will be subject to the outcome of the process and the analysis will not have to be performed with respect to and in the context of individual requests. Such a process could yield "economies of scale" for all involved.

Thorough Legal Analysis: A process that is focused on a certain type of submission, *e.g.*, an annual report, and that is initiated by request of the submitter, will be more focused than a process that relies on a legal analysis that has to be performed or updated with respect to a variety of types of data in any given submission. This should lead to a more focused and complete legal case being made by the party requesting an advance determination.

¹⁵ In the context of submissions with a general claim of confidentiality, the Proposed Decision describes how: "Commission staff often has difficulty in determining the basis for the confidentiality claim, and accordingly will have to contact the submitting entity to figure out the basis for (and validity of) the claim of confidentiality. This significantly slows down the Commission's responses to Public Records Act requests." Proposed Decision, pp. 6-7.

¹⁶ For instance, the Proposed Decision states: This inconsistency in the way that documents are designated as confidential makes the Commission's review and determination of confidentiality claims more difficult and time consuming, and can result in delays to Commission responses to Public Records Act requests." Proposed Decision, p. 6.

¹⁷ In addressing the filing of voluminous documents with all pages stamped confidential, the Proposed Decision asserts that "[T]his is neither fair nor efficient, as it relieves the entity claiming confidentiality for stating (or even having) a basis for its claim, places the heaviest burden of determining confidentiality on Commission staff (who did not mark it as confidential and may not know why it should be kept as confidential), and unnecessarily delays the release of public records." Proposed Decision, p. 14.

While the ISPs believe that the current record of this proceeding supports Commission adoption of the above proposal for predetermining the confidentiality of documents (or parts thereof), if the Commission determines that it should not be adopted at this time, then, at minimum the Proposed Decision should be modified to acknowledge the proposal and specifically set if for consideration at future workshops.

V. CONCLUSION

For the above stated reasons, the ISPs request that the Proposed Decision be modified to:

- (1) Eliminate (or at minimum modify) the required declaration upon submission of confidential information;
- (2) Provide notice to a submitting party when (a) a Public Records Act request is made for the party's documents, and (b) upon a determination by Staff of whether to release such documents;
- (3) Provide opportunity for appeal from a Staff determination regarding release of a document(s); and
- (4) Adopt the ISP proposed process for a predetermination of confidentiality of types of documents, or, at minimum, specifically set if or consideration at future workshops.

Respectfully submitted this July 18, 2016 at San Francisco, California.

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¹⁸ In accordance with Rule 1.8(d), Wild Goose's representative is authorized to sign these Comments on behalf of the ISPs.