

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



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Public Access to Public Records Pursuant to  
the California Public Records Act.

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

**RESPONSE OF THE UTILITY REFORM NETWORK  
TO THE APPLICATIONS FOR REHEARING  
OF THE SMALL LECS/CONSOLIDATED AND CTIA**



Thomas J. Long, Legal Director

THE UTILITY REFORM NETWORK  
785 Market Street, Suite 1400  
San Francisco, CA 94103  
(415) 929-8876 (office)  
(415) 929-1132 (fax)  
[TLong@turn.org](mailto:TLong@turn.org)

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## **I. INTRODUCTION AND SUMMARY**

Pursuant to Commission Rule of Practice and Procedure 16.1(d), The Utility Reform Network (“TURN”) submits this response to applications for rehearing of Decision (“D”) 16-08-24 (“Decision”) submitted by: (1) 13 small local exchange carriers and Consolidated Communications of California Company (“Small LECs/Consolidated”) and CTIA – The Wireless Association (“CTIA”). In order to foster the public’s right of access to governmental information protected by the California Constitution, the Decision takes modest steps to update and clarify the Commission’s process for submitting potentially confidential documents to the Commission and sets forth a process under which submissions that fail to follow certain specific criteria to assert confidentiality may be subject to public disclosure.

Notwithstanding the limited and modest steps taken by the Decision, the applications for rehearing make grandiose claims of egregious violations of “profound public importance.”<sup>1</sup> As discussed in this response, the supposed violations suffered by the rehearing applicants are a fantasy of their own making. The actual Decision bears little resemblance to the over-reaching, statute-abrogating decision described in the applications for rehearing. The Commission should not hesitate to deny the requests for rehearing.

## **II. REHEARING APPLICANTS’ INTERPRETATION OF SECTION 583 IS WITHOUT MERIT**

The rehearing applicants claim that Section 583 requires the Commission to take formal, “individualized, case-by-case” action any time it wishes to disclose information provided by a regulated entity.<sup>2</sup> The Decision fully addresses this argument and properly rejects it.<sup>3</sup> Nothing in

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<sup>1</sup> Small LECs/Consolidated Application for Rehearing (“AFR”), p. 30.

<sup>2</sup> Small LECs/Consolidated AFR, pp. 11-14; CTIA AFR, pp. 7-10.

<sup>3</sup> D.16-08-024, pp. 13-16.

the text of Section 583 mandates that the “order” allowing utility-provided information to be open to public inspection be individualized in nature in all cases. To the contrary, the language of Section 583 is fully consistent with the Commission’s interpretation that it is free to issue orders describing *entire classes of information* that may be “open to public inspection or made public.”

As the Decision (p. 16) explains, the rehearing applicants’ argument would require the Commission to adopt an absurd interpretation of the statute. The logical conclusion of their argument is that formal, individualized action is necessary in each and every instance of disclosure of a utility-provided document -- even documents that the utility has not designated as confidential. For example, if ORA (or any other Commission division) obtained a data request response from a utility that was not labeled confidential, before ORA could share the response with another allied party or any other person, ORA *would need to secure an order of the Commission*. If the data request response were produced outside the context of a docketed case, ORA would need to somehow obtain a decision of the full Commission allowing it to release the non-confidential document. It is unclear how ORA would even go about obtaining such an order. If the data request response were in a docketed proceeding, ORA would, at a minimum, need to file a motion and obtain a ruling of the Assigned Commissioner (or perhaps the full Commission). This is not current Commission practice and would be an absurd requirement that would needlessly consume significant Commission time and resources. Yet this would be the result of the rehearing applicants’ interpretation, under which any blanket decision that allows disclosure of a class of documents would be improper. Rehearing applicants’ reading of Section 583 is not supported by the plain language of the statute and would be a prescription for gridlock

-- directly contrary to Article I, § 3(b) of the California Constitution<sup>4</sup> and the intent of the public records laws to foster, not stifle, access to public records.<sup>5</sup>

### **III. REHEARING APPLICANTS' ALLEGATIONS OF AN UNLAWFUL DELEGATION OF AUTHORITY ARE WITHOUT MERIT**

The rehearing applicants assert that the Decision allows an improper delegation of authority.<sup>6</sup> For the most part, these arguments are based on the incorrect supposition that the Decision would allow Commission staff to make discretionary determinations to release information. A careful review of the situations in which the Decision allows Commission staff to release documents – something the rehearing applicants fail to undertake in their pleadings – shows that the determinations to be made by staff are ministerial in nature.

Specifically, none of the five cases addressed in Section 3.2 of the Decision raise the delegation concerns alleged by the rehearing applicants. Cases 1) and 5) only allow staff to disclose documents that are not marked confidential, a ministerial determination. Case 2) allows disclosure of documents when the submitter only makes a general marking of confidentiality, such as GO-66 and/or Section 583, but fails to indicate a specific substantive basis for confidentiality. Again, this review is ministerial in nature because it only requires staff to verify that the submitter has provided the required information, not whether or not the substantive basis

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<sup>4</sup> §3(b)(2) of the Constitution provides that any statute that limits the right of access shall be narrowly construed.

<sup>5</sup> *Williams v. Superior Court* (1993) 5 Cal.4<sup>th</sup> 337, 346 (“Given the strong public policy of the people’s right to information concerning the people’s business (Gov. Code § 6250), and the constitutional mandate to construe statutes limiting the right of access narrowly (Cal. Const., art. I, § 3, subd. (b)(2), all public records are subject to disclosure unless the Legislature has expressly provided to the contrary.”); *Filarsky v. Superior Court* (2002) 28 Cal.4<sup>th</sup> 419, 423 (Legislature enacted the California Public Records Act to further “the fundamental right of every person in this state to have prompt access to information in the possession of public agencies.”)

<sup>6</sup> Small LECS/Consolidated AFR, pp. 16-18; CTIA AFR, pp. 10-12.

properly affords a basis for confidentiality.<sup>7</sup> To the extent Case 3) allows disclosure, it would only be based on expiration of a prescribed time interval, another ministerial determination. Otherwise Case 3), as well as Case 4), do not allow disclosure of information designated confidential at this time, putting off the determination of a process for disclosure to another decision. In sum, none of the disclosures permitted by the Decision implicate a discretionary staff determination, rendering the rehearing applicants' delegation arguments entirely misplaced.

CTIA at least acknowledges that the task that the Decision assigns to staff is to verify that the utility has provided a specific substantive basis for confidentiality and not just GO 66-C or Section 583.<sup>8</sup> But then CTIA misrepresents the review that would be involved in carrying out that task, characterizing it as involving judgment as to whether a particular law requires disclosure or confidentiality and how to apply public interest balancing tests.<sup>9</sup> None of these judgment calls are being delegated to staff. Staff's role is to ascertain whether confidentiality is being claimed and, if so, whether a substantive basis for the claim of confidentiality has been identified, not whether the substantive basis is sufficient to uphold the assertion of confidentiality. Delegation of such ministerial tasks is entirely appropriate and indeed essential to the efficient functioning of a government body such as the Commission and to improving the Commission's ability to timely respond to public record requests.

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<sup>7</sup> In this respect, the Small LECs/Consolidated (p. 17) blatantly mischaracterize the task that has been delegated to the staff. The staff is not charged with "an evaluation of whether a document merits confidential treatment" that requires "an extensive analysis of applicable law," but rather the ministerial assignment of verifying that the submitted has provided a specific substantive basis for confidentiality that does not (as was the utilities' typical approach prior to the Decision) simply cite to GO 66-C or Section 583.

<sup>8</sup> CTIA AFR, p. 11.

<sup>9</sup> *Id.*, pp. 11-12.

#### IV. REHEARING APPLICANTS' ARGUMENTS THAT THE DECISION EXCEEDS THE SCOPE OF THE PROCEEDING ARE WITHOUT MERIT

Small LECs/Consolidated argue that the Decision exceeds the scope of the proceeding by addressing requirements for *submission* of confidential documents to the Commission.<sup>10</sup> The assertion that the Scoping Memo does not include any issues related to submission of documents is patently incorrect. In fact, attached to the Scoping Memo is a Draft Proposal that includes, in Section B, a “Proposed Process for Submission of Confidential Information.” Obviously, the Assigned Commissioner would not have invited comment regarding that Draft Proposal including Section B -- in the Scoping Memo itself -- unless it was within the scope of the proceeding. The Proposed Process for Submission of Confidential Information was clearly related to at least the following issues listed in the “Scope” section of the Scoping Ruling:

1. Are documents submitted to the Commission subject to disclosure unless deemed exempt from disclosure by the PRA or other law? (Emphasis added.)

4. Should the Commission provide notice to submitters that their documents are to be disclosed? (Emphasis added.)

Both issues 1 and 4 specifically relate to submission of documents and the circumstances under which submitted documents may be disclosed, which is precisely the purpose of Section 3.1 of the Decision.

Small LECs/Consolidated make the related argument that the Decision improperly modifies Commission Rule of Practice and Procedure 11.4, without notice and outside the scope of the proceeding.<sup>11</sup> As supposed support for this assertion, they note language in the Decision stating that the “same process shall be followed for submitting documents to the Commission or staff of the Commission in a formal proceeding unless a different process has been established in

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<sup>10</sup> Small LECs/ Consolidated AFR, pp. 24-26.

<sup>11</sup> Small LECs/Consolidated AFR, p. 26

that proceeding.”<sup>12</sup> Once again, Small LECs/Consolidated misread the Decision. Commission Rule 11.4 addresses motions to file documents under seal, *i.e.*, to enter confidential documents into the record of a proceeding. Nothing in the Decision indicates an intent to address requirements for filing documents in the record of a docketed proceeding.<sup>13</sup> Instead, the clear purpose of the above-quoted language is to address documents, other than those that are tendered for filing, that are provided to the Commission in a formal proceeding, such as in response to an industry division request or other data request.

Both rehearing applicants also contend that the Decision exceeds the scope of the proceeding by allowing the release of utility-submitted documents in accordance with the rules set forth in Section 3.2, even when the information was not the subject of a public records request. Rehearing applicants misread the scope of this proceeding. While improving responses to public record requests is clearly an important element of this docket, the Commission has appropriately framed the purpose of this rulemaking more broadly – in the first paragraph of the OIR launching this proceeding -- as “increasing public access to records furnished to the Commission.”<sup>14</sup> Accordingly, the first issue listed in the Scoping Memo broadly asks when documents submitted to the Commission are “subject to disclosure,” without limiting that inquiry to public records requests.<sup>15</sup> Thus, by allowing disclosure of documents pursuant to Section 3.2 even in the absence of a formal public records request, the Decision is entirely within the broad scope identified by the both the OIR and the Scoping Memo.

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<sup>12</sup> *Id.*, citing D.16-08-024, p.

<sup>13</sup> However, in TURN’s experience, a contested motion to seal under Rule 11.4 typically needs to include at least the information required in Section 3.1 of the Decision in order to be successful.

<sup>14</sup> OIR, p. 1, explaining the purpose of this rulemaking as “build[ing] on a process we started last year to increase public access to records furnished to the Commission by the entities we regulate, while ensuring that information truly deserving of confidential status retains that protection.”

<sup>15</sup> Assigned Commissioner’s Scoping Memo and Ruling, August 11, 2015, p. 2.

**V. REHEARING APPLICANTS' DUE PROCESS ARGUMENTS ARE WITHOUT MERIT**

Rehearing applicants' contend that the Decision deprives utilities of due process by not providing for notice and an opportunity to be heard before utility-submitted information may be disclosed under the Decision.<sup>16</sup> These arguments fail. Rehearing applicants' due process arguments are derivative of their incorrect interpretation of Section 583 and incorrect delegation arguments. As discussed above, there is no statutory right to an individualized, case-by-case determination prior to disclosure, so there is no protected statutory interest under Section 583. In addition, as is also discussed above, the Decision does not authorize staff to exercise discretionary judgment about whether an asserted basis for confidentiality has or lacks legal merit. The determination staff will make is a ministerial verification of whether the utility followed the right steps to claim confidentiality. Rehearing applicants have not pointed to any case or legal principle that requires notice or an opportunity to be heard regarding an agency staff's ministerial determination concerning whether the proper steps have been followed.

**VI. THE DECISION IS BASED ON SOUND POLICY CONSISTENT WITH THE COMMISSION'S OBLIGATIONS UNDER CALIFORNIA PUBLIC RECORDS LAWS**

Small LECs/Consolidated argue that the Decision is arbitrary and capricious because, among other claimed infirmities, the Decision fails to explain how the submission requirements could expedite the Commission's exercise of its statutory duties.<sup>17</sup> Small LECs/Consolidated ignore the Commission's interest and legal obligation, as well as the strong public interest, in reducing the long delays that records requesters often endure when making public records

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<sup>16</sup> Small LECs/Consolidated AFR, pp. 22-24; CTIA AFR, pp. 4-7.

<sup>17</sup> Small LECs/Consolidated AFR, pp. 27-29.

requests. Under Section 6253(c) of the Public Records Act, the Commission is obliged to determine whether requested records may be disclosed within 10 days of receipt of a request, which may be extended only in “unusual circumstances.” As the Decision correctly states (pp. 6-7), one of the problems with the status quo is that staff has no information about the submitter’s claimed substantive basis for an assertion of confidentiality and then has to contact the submitter for that information, which delays the Commission’s ability to provide a timely response. The Decision takes appropriate and limited steps to attempt to alleviate some of the Commission’s well-publicized problems in providing timely responses to public records requests.<sup>18</sup>

## **VII. ORAL ARGUMENT IS UNNECESSARY**

Rehearing applicants have failed to demonstrate why oral argument would assist the Commission in disposing of applications for rehearing that rely on overblown claims bearing little relation to the modest and interim decision the Commission has actually issued. The request for oral argument should be rejected.

## **VIII. CONCLUSION**

For the reasons set forth above, the Commission should deny the applications for rehearing without hesitation.

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<sup>18</sup> See, e.g., “Calif. City Sues CPUC to Publicize Pipeline Explosion Docs”, 2/4/14, found at: <http://www.law360.com/articles/506728/calif-city-sues-cpuc-to-publicize-pipeline-explosion-docs>

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Respectfully submitted,

By: \_\_\_\_\_ /s/ \_\_\_\_\_  
Thomas J. Long

Thomas J. Long, Legal Director  
**THE UTILITY REFORM NETWORK**