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

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)

**NOTICE OF COMMUNICATIONS INDUSTRY COALITION
IDENTIFYING MATRIX CATEGORIES**

September 22, 2017

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**NOTICE OF COMMUNICATIONS INDUSTRY COALITION
IDENTIFYING MATRIX CATEGORIES¹**

Pursuant to the August 18, 2017 *Assigned Commissioner's Ruling Regarding Phase 2B: Development of Confidential Matrices* ("ACR"), several communication companies and their associations (collectively, the "Communications Industry Coalition," or "CIC")² hereby serve notice of topics that should be included in a telecommunications industry matrix identifying

¹ The ACR also refers to "matrix categories" also as "matrix subjects" and "topics." The CIC believes all three of these refer to the same thing. For sake of consistency, the CIC has chosen to use the phrase "matrix categories."

² The full names and utility numbers of each of the members of the Communications Industry Coalition who join in this notice are as follows: Pacific Bell Telephone Company d/b/a AT&T California (U1001C), and New Cingular Wireless PCS, LLC (U3060C) (collectively, "AT&T"); the California Association of Competitive Telecommunications Companies ("CALTEL"); Charter Fiberlink CA-CCO, LLC (U6878C); Consolidated Communications of California Company (U1015C); California Cable & Telecommunications Association ("CCTA"); Citizens Telecommunications Company of California Inc. d/b/a Frontier Communications of California (U1024C), Frontier California Inc. (U1002C), and Frontier Communications of America, Inc. (U 5429 C) (collectively, "Frontier"); CTIA®, ExteNet Systems (California) LLC; Time Warner Cable Information Services (California), LLC (U6874C); Sprint Communications Company, L.P. (U 5112 C), Sprint Spectrum L.P. (U 3062 C). Nextel of California, Inc. (U 3066 C), and Virgin Mobile USA, L.P. (U 4327 C) (collectively, "Sprint"); T-Mobile West LLC d/b/a T-Mobile (U3056C); Cellco Partnership (U3001C) and MCI metro Access Transmission Services Corp. (U5253C) (collectively, "Verizon"), and The Small LECs: Calaveras Telephone Company (U 1004 C), Cal-Ore Telephone Co. (U 1006 C), Ducor Telephone Company (U 1007 C), Happy Valley Telephone Company (U 1010 C), Hornitos Telephone Company (U 1011 C), Kerman Telephone Co. (U 1012 C), Foresthill Telephone Co. (U 1009 C), The Ponderosa Telephone Co. (U 1014 C), Sierra Telephone Company, Inc. (U 1016 C), The Siskiyou Telephone Company (U 1017 C), Winterhaven Telephone Company (U 1021 C), Volcano Telephone Company (U 1019 C), and Pinnacles Telephone Co. (U 1013 C).

confidential information to be withheld from public disclosure.³ The specific topics and justifications are set forth below.

This notice sets forth the principal categories of confidential information. The specific types of information in each of those categories must remain confidential to avoid harm to customer privacy, employee privacy, public safety, critical infrastructure, consumers, property rights, and competitive markets. Section I of this notice addresses the matrix categories set forth in the ACR, with modifications. Section II contains additional matrix categories that are necessary to ensure protection of confidential information submitted to the Commission.

I. ACR MATRIX CATEGORIES WITH CERTAIN MODIFICATIONS

This section addresses the matrix categories listed in the ACR, and proposes modifications to the first and fourth matrix categories. Additions are represented with underlined text, and deletions are shown with strikethrough text.

A. Personally identifiable information of regulated entity customers protected by Cal. Gov't Code § 6254(c) and confidential subscriber information protected by federal and state privacy laws.

Rationale: The ACR correctly recognizes that confidential subscriber information is protected from public disclosure under the California Public Records Act (“CPRA”)⁴ and is appropriate for inclusion in a matrix. Federal and state law provide extensive protection for personally-identifiable information derived from the customer-carrier relationship, and carriers are prohibited from publicly disclosing this information without customer consent, subject to limited

³ The CIC notes that its proposed matrix is specific to the telecommunications industry, which is characterized by broad and active competition, unlike other industries regulated by the Commission. As such, the CIC matrix components are necessary to preserve a competitive telecommunications marketplace, but are not necessarily transferable or applicable to other regulated industries.

⁴ Cal. Gov't Code § 6250 *et seq.*

exceptions.⁵ These legal restrictions on disclosure are a valid basis for withholding confidential subscriber information under California Government Code Section 6254(k), which provides a CPRA exemption for “records, the disclosure of which is exempted or prohibited pursuant to federal or state law.” The matrix should be clarified to ensure that all information derived from the customer-carrier relationship that is protected under federal and state law is deemed confidential and will be withheld from disclosure.

The ACR also cites Government Code Section 6254(c), which provides an exemption for “personnel, medical, or similar files” where disclosure of those documents “would constitute an unwarranted invasion of personal privacy.” To the extent that the Commission holds “files” meeting this definition involving utility customers, this is an additional ground for exempting the materials from disclosure.

B. Investigations of regulated entities covered by Cal. Gov’t Code § 6254(f).

Rationale: California Government Code Section 6254(f) provides broad protection for “records of complaints to, or investigations conducted by . . . any state or local police agency” or any “investigatory or security files” compiled by such an agency. Where the Commission acts in an investigatory or auditing capacity utilizing its state police powers, this CPRA exemption applies and should be honored.

C. Competitive information covered by Cal. Gov’t Code § 6255(a), which is commonly referred to as the “public interest balancing test.”

Rationale: This is an important exemption relative to the records that the Commission holds from communications providers. Communications providers operate in highly competitive markets that involve numerous players, many of which are not regulated by the Commission. If

⁵ See 47 U.S.C. § 222(a); 47 C.F.R. § 64.2001 *et seq.*; Cal. Pub. Util. Code §§ 2891, 2891.1; Cal. Civ. Code § 1798.85; *see also* Cal. Const. art. I, § 1 (acknowledging constitutional right of privacy under California law).

competitively sensitive information could be obtained through the CPRA process or through a Commission disclosure of confidential information, it could enable unfair competition and materially distort competitive markets. Such harm would ultimately hurt consumers, who depend on properly functioning markets to bring them the best telecommunications services at the most competitive prices. The balancing test can and should be used to prevent the release of information that could skew telecommunications markets to the detriment of consumers.⁶

D. Information regarding the location, function, and relationship between network facilities, including the identity of critical infrastructure protected by 6 U.S.C. § 133(a)(1)(E), and information covered by Cal. Gov't Code § 6254(e).

Rationale: The ACR correctly recognizes that critical infrastructure information requires protection. However, the CIC asserts that this matrix subject must be broadened to ensure the security of networks and protect public safety. Network information deserving of confidentiality protection exceeds the type of information protected from disclosure under Section 6254(e).⁷ Section 6254(k) provides that the following documents do not require disclosure: “[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law. . . .” Information regarding network facilities has been closely protected by the federal government.⁸ Moreover,

⁶ The “balancing test” is neither the sole basis for protecting confidential competitive information, nor is it limited to protecting confidential information. There are other significant provisions of law that also protect competitive information, such as the trade secrets protections incorporated into the CPRA through Government Code Section 6254(k). Similarly, there will be other applications of the balancing test aside from just protecting competitive data, as there are many types of information where the balance will favor non-disclosure.

⁷ Cal. Gov't Code § 6254(e): “Geological and geophysical data, plant production data, and similar information relating to utility systems development, or market or crop reports, that are obtained in confidence from any person.”

⁸ See 6 U.S.C. § 133(a)(1): critical infrastructure information that is voluntarily produced and appropriately marked is protected from public disclosure. See also 6 U.S.C. § 133(a)(1)(E): Sharing with state agencies is permitted only to the extent that those agencies similarly protect critical infrastructure information from disclosure.

the Federal Communications Commission (“FCC”) has specifically found that network information, as set forth in outage reports, are “presumed to be confidential.”⁹ In making this determination, the FCC has cited the “potentially harmful details about particular network vulnerabilities” that could result from disclosure.¹⁰

The Commission itself has recognized the need to protect network information. The additional language in this matrix subject is taken directly from D.16-08-024, in which the Commission stated that “[t]he examples provided . . . would all be adequate to meet the requirements [as an adequate claim for confidentiality]. . . .”¹¹ As another example, the Commission in G.O. 133-D, Section 4(d), specifically provides that: “Major Service Interruption reports [*i.e.*, outage reports] submitted to the Commission pursuant to these rules shall be treated as confidential in accordance with Pub. Util. Code § 583 and General Order 66-C.” There are good reasons for this protection, and the result should be no different under G.O. 66-D—if this type of information is revealed, it could compromise the security of critical network infrastructure, and could put customers at risk. Accordingly, it is appropriate to include network information, as described above, as a matrix subject.

⁹ 47 C.F.R. § 4.2: “Reports filed under this part will be presumed to be confidential. Public access to reports filed under this part may be sought only pursuant to the procedures set forth in 47 CFR § 0.461.” For example, the FCC has found that “outage reports are presumed to be confidential” with concerns about, among others, the release of “potentially harmful details about particular network vulnerabilities.” *Proposed Extension of Part 4 of the Commission’s Rules Regarding Outage Reporting to Interconnected Voice Over Internet Protocol Service Providers and Broadband Internet Service Providers*, Report and Order (“*Proposed Extension of Part 4*”), 27 FCC Rcd. 2650, 2657 ¶13, 2693-94 ¶ 113 (2012). The FCC further asserts that the disclosure of outage reporting information to the public could present an unacceptable risk of more effective terrorist activity, and therefore treats the information that will be provided as confidential, withholding from disclosure to the public in accordance with the Freedom of Information Act. *New Part 4 of the Commission’s Rules Concerning Disruptions to Communications*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 16830, 16834 ¶ 3 (2004).

¹⁰ *Proposed Extension of Part 4*, 27 FCC Rcd. at 2657 ¶13, 2693-94 ¶ 113.

¹¹ D.16-08-024 at 25.

II. ADDITIONAL MATRIX SUBJECTS

A. Financial and business information including but not limited to revenues, expenses and investments.¹²

Rationale: Financial and business information not previously released to the public are protected from disclosure by California Government Code Section 6254(k), which incorporates the trade secrets protections of the California Evidence Code. A “trade secret” as utilized in Evidence Code Sections 1060 and 1061 is defined (by reference to Civil Code Section 3426.1) as a type of information from which an entity “(1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” The Commission has recognized that competitively sensitive information that falls under the trade secrets privilege pursuant to California Evidence Code Section 1060 and California Civil Code Section 3426.1 is confidential and should not be subject to disclosure.¹³

Financial information and business projections (which would include items such as current and projected revenues, expenses, and investments) also meet the two requirements of a “trade secret” as contained in Civil Code Section 3426.1(d). Economic value is derived from protecting this information against disclosure because such information provides a strategic roadmap as to a company’s investments, overhead, costs, margins, assets, liabilities, cash flow,

¹² This is not a reference to information otherwise contained in public filings (e.g., 10-Ks) prepared by publicly traded companies; such information is not considered confidential.

¹³ See, e.g., D.06-06-066 at 46-47 n.58. See also D.07-05-045, in which the Commission granted confidential treatment to the guaranty and financial statements provided by parties seeking approval for a transfer of control because the information contained: “non-public financial documents and the information, if disclosed could place [the] Applicants at an extreme competitive disadvantage.”

and overall financial condition. This information is appropriate for protection under the law and for inclusion in a matrix.

Finally, Government Code Section 6254(n) exempts from disclosure “Statements of personal worth or personal financial data required by a licensing agency and filed by an applicant with the licensing agency to establish his or her personal qualification for the license, certificate, or permit applied for.” Because “person” is defined in Section 6252 as “any natural person, corporation, partnership, limited liability company, firm or association,” the exemptions set forth in Section 6254(n) also apply to companies submitting information to the Commission.

B. Location-specific subscription and deployment data.

Rationale: The Commission and Legislature have consistently treated this type of data as confidential, recognizing that (a) California’s policy is to promote competition for video and broadband services, and (b) maintaining the confidentiality of company-specific video and broadband data helps promote this policy. For example, in the “Competition OII (I.15-11-007),” the ALJ confirmed that “[i]nformation that I have ruled Highly Confidential includes the following: subscriber-related data, at the census block and census tract level, which the carriers report to the FCC and have provided or will provide in this proceeding”¹⁴

Additionally, the Legislature treats this type of data as confidential. Under the Digital Infrastructure and Video Competition Act (“DIVCA”), each franchise holder must submit annual reports on video and broadband availability and subscriptions on a census tract basis, but the Legislature recognized that this data should be confidential.¹⁵ Further, DIVCA required the

¹⁴ See, e.g., I.15-11-007, *Administrative Law Judge’s Ruling on Access to Competitive Carrier Data* at 2.

¹⁵ Cal. Pub. Util. Code § 5960(c).

Commission to report such data to the Legislature on an aggregated basis rather than a company-specific basis.¹⁶

The Commission itself has recognized the importance of keeping company-specific video and broadband data confidential:

Concerning the question of whether the collection of information on speeds and subscribers should be offered special confidentiality protections, we note that § 5960(d) of the California Public Utilities Code [now § 5960(c)] extends the protections of § 583 to all data provided to the Commission annually in the reporting requirements imposed by DIVCA. . . . Since the disclosure of the data concerning a company’s data service offerings and subscribership at the census tract level is competitively sensitive information that, if revealed, would place a company at a serious competitive disadvantage, the information collected pursuant to the annual reporting requirements as to a particular company, qualifies for confidential treatment.¹⁷

The Commission again acknowledged the confidentiality of video and broadband data just a few months ago, when it submitted its most recent DIVCA Report to the Legislature.¹⁸

As discussed above, such build-out and subscribership data should also be protected under the CPRA balancing test. If market participants could use the CPRA process to derive specific information about service capabilities at specific locations and the relative popularity of service offerings among subscribers, this would have a profoundly detrimental impact on the

¹⁶ See former Cal. Pub. Util. Code § 5960(c). In 2015, the Legislature amended DIVCA to eliminate this subsection and redesignate others.

¹⁷ *Order Instituting Rulemaking to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006*, D. 08-07-007 at 22 (July 14, 2008).

¹⁸ DIVCA Video, Broadband and Video Employment Report for the Year Ending December 31, 2015, Appendix F, at 71 (June 8, 2017) (explaining that “[w]hile the [CPUC] extends the confidentiality provisions of PU Code Sec. 583 to data submitted under DIVCA, the CPUC has a special policy for the annual employment reports, [which are] not protected by the general policy of confidentiality.”) (footnotes omitted).

market that would harm consumers. The balancing test exists to prevent this sort of public harm.¹⁹

C. Sensitive employee data including personnel, medical, or similar files, the disclosure of which would constitute an invasion of personal privacy.

Rationale: Sensitive information about utility employees should also be identified as exempt from public disclosure. Personnel data is sensitive and confidential, and is protected from public disclosure by a body of common law and statutory law, thereby justifying an exemption from public release under Section 6254(k). In addition, Government Code Section 6254(c) provides a specific exemption for “personnel, medical, or similar files” where disclosure of those documents “would constitute an unwarranted invasion of personal privacy.”²⁰

This exemption stems from the fundamental privacy protections in the California Constitution. Article I, section 1 of the Constitution confirms that “[a]ll people are by nature free and independent and have inalienable rights,” including “privacy.” California courts have recognized that sensitive information about an employee may be shielded from public disclosure if its disclosure would impair a person’s “inalienable right of privacy” under article I of the California Constitution.²¹ Employers may maintain highly confidential information about their employees, including social security numbers, birthdate, addresses, email addresses, salary, work history information, disability information, and health information.²² Since the public disclosure of this sensitive information in response to a CPRA request would violate individual employee's

¹⁹ See Cal. Gov’t Code § 6255.

²⁰ Cal. Gov’t Code § 6254(c).

²¹ *Britt v. Sup. Ct.* (1978) 20 Cal. 3d 844, 852-64; see also *Alch v. Sup. Ct.* (2008) 165 Cal. App. 4th 1412, 1432 (protecting personnel records as confidential); *Perez v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 678, *disapproved of on other grounds*, *Williams v. Chino Valley Indep. Fire Dist.* (2015) 61 Cal. 4th 97.

²² *Id.*; see also *Americans for Prosperity Found. v. Harris* (C.D. Cal., Oct. 13, 2015, No. CV 14-9448-R) 2015 WL 12859225, at *3 (recognizing a privacy interest in employee compensation).

constitutional privacy rights, the information must be designated as a matrix topic identifying information exempt from disclosure under the CPRA.

D. Contracts between or among utilities²³ affiliates, vendors and/or third parties.

Rationale: Regulated utilities commonly enter into contracts for products and/or services with other parties. Such contractual provisions often reflect extensive negotiation between the parties, touching on a wide variety of proprietary matters such as pricing, deliverable timeframes, new technology deployments, and other confidential issues. Most contracts contain confidentiality provisions that prohibit the disclosure of contract terms without the consent of all parties. Often, the collective understanding that the contract terms will remain confidential is an underlying condition of the negotiation process and the contracts that flow therefrom.

This longstanding and expressed umbrella of confidentiality demonstrates how contracting parties understand and expect their contractual business interactions to remain confidential, and how such confidentiality is a business imperative. Regulated entities, and the entities with which they contract (both regulated and unregulated), require this confidentiality. This is because regulated entities in a competitive industry may be at a competitive disadvantage if their competitors learn the terms under which they obtain products and services. Similarly, vendors of such products and services may be in competition with other vendors, and so disclosure of their contracts with regulated entities may put the vendors at a competitive disadvantage.

²³ This category does not include contracts ordered public under state or federal law, including but not limited to Interconnection Agreements under Section 252 of the Act.

Accordingly, contracts not ordered public under state or federal law such as interconnection agreements or traffic exchange agreements between regulated utilities and other parties (including utility affiliates) should presumptively be considered confidential, and therefore the telecommunications confidentiality matrix should include a category for such contracts. The terms of such contracts typically constitute trade secrets as defined in California Civil Code Section 3426.1, and are therefore protected from disclosure under California Government Code Section 6254(k) (see discussion above). In addition, the disclosure of such contracts would place the contracting parties (including unregulated parties) at a competitive disadvantage, and thus such contracts are also protected under the CPRA balancing test.

E. Strategic marketing/planning information.

Rationale: Both the trade secrets law and the CPRA balancing test provide protection for competitively sensitive information, and this should include documents reflecting strategic business plans and proprietary marketing strategies.²⁴ This information may be provided to the Commission in a variety of contexts, such as merger proceedings, consumer protection proceedings, or ratemaking proceedings. Strategic business information is among the most sensitive information that service providers hold, and may reflect specific strategies about exactly how, where, and to what extent providers intend to compete. This type of information, if publicly released, would pose a strong likelihood of harming competitive markets and thereby harming consumers. Although this information could be subsumed under the “balancing test” category above, the CIC has identified it as a separate matrix category to emphasize the extremely sensitive nature of the category of documents that are entitled to protection from public disclosure.

²⁴ See Cal. Gov’t. Code §§ 6254(k), 6255, Cal. Evid. Code § 1060.

F. Proprietary technical, operational or engineering information.

Rationale: Proprietary technical, operational, or engineering information is confidential pursuant to California trade secret law. As noted above, the general privilege not to disclose trade secrets set forth in Evidence Code Section 1060 is applicable to the PRA pursuant to Government Code section 6254(k). A “trade secret” as utilized in California Evidence Code Section 1060 is defined by reference to Civil Code Section 3426.1 as a type of information from which an entity (1) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. The Commission has recognized that competitively sensitive documents that fall under the trade secrets privilege pursuant to California Evidence Code Section 1060 and California Civil Code Section 3426.1 are confidential and should not be subject to disclosure. Proprietary technical, operational, or engineering information (which would include items such as customer service operations and methods for addressing network failures) meet the two requirements of a “trade secret” as contained in Civil Code Section 3426.1(d). Technical, operational, or engineering information has true economic value, as it sets forth processes which have been created by the carrier (or other entity) for the systems relied upon by the carrier to run their business and which derive value from the fact that they can increase efficiency, improve performance, and reduce costs. Carriers guard this information from public disclosure.

IV. CONCLUSION

The CIC has identified matrix categories that should allow for a focused discussion regarding the types of information that be determined in advance to be confidential. If pursued to its conclusion, this effort to create appropriate matrices should create tremendous efficiencies for

the Commission and service providers, and it should provide important clarity to the public and all parties as to the types of information that are confidential and that therefore should not be publicly disclosed. The CIC looks forward to participating in this effort.

Respectfully submitted,

/s/

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²⁵ Pursuant to Rule 1.8(d), counsel for CIC authorize CCTA to sign and file this notice on behalf of the CIC.