PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California
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Resolution No.: L-436

R E S O L U T I O N

INTERIM RESOLUTION REGARDING ADOPTION OF NEW REGULATIONS REGARDING PUBLIC ACCESS TO RECORDS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND REQUESTS FOR CONFIDENTIAL TREATMENT OF RECORDS

BACKGROUND

The California Public Utilities Commission (CPUC) is improving public access to records subject to disclosure under the California Public Records Act (CPRA) (Cal. Gov't. Code § 6250 *et seq*.). The CPUC's regulations for public access to CPUC records, set forth in General Order 66-C, are outdated and cumbersome, and often delay rather than facilitate access to records.

The absence of clear and consistent rules for processing records requests, and requests for confidential treatment of records, results in confusion regarding the status of records and information. This Interim Resolution is an element of our ongoing effort to develop such clear and consistent rules, but does not in itself adopt the version of Draft General Order 66-D previously circulated for public comment. Further refinements are necessary before we adopt such far reaching new rules.

By taking a fresh look at policies that currently impede the CPUC's ability to share documents with the public it serves, the CPUC will provide the public with more immediate access to accident reports and records of our investigations. In addition, by updating the CPUC's regulations governing public access to CPUC records, establishing procedures for more uniform processing of records requests and requests for confidential treatment of documents provided to the CPUC, and improving access to records on the CPUC's website, we can substantially streamline public access to records and information.

Improvements to the public records process include:

(1) Instead of permitting a company to identify documents filed with the Commission as confidential, in a manner that requires the

CPUC to take explicit action to release the documents, the CPUC will treat documents as public unless the company can show why the documents are subject to a CPRA exemption or other provision of law prohibiting or limiting disclosure. The CPUC will require parties seeking confidential treatment to submit sufficient information to enable the CPUC to determine whether confidential treatment is permitted and in the public's interest. If the CPUC determines that a document is confidential, the CPUC must be able to demonstrate that the public's interests are served by maintaining the confidentiality of the document.

(2) The CPUC will disclose records of completed safety-related investigations on a routine basis, as opposed to requiring a vote of the Commission or an Administrative Law Judge Ruling, so that the CPUC can speed up its responses to records requests and discovery. The CPUC will create a list of safety-related reports that will automatically be disclosed to the public and posted on the CPUC's internet site, after appropriate redactions, upon the conclusion of the CPUC's investigation of the safety-related incident.

(3) A comprehensive online index will be created that describes the records maintained by the CPUC, and explains whether, and how, they may be located.

(4) An online database will be created that includes requests received by the CPUC to treat documents as confidential and the CPUC's decision on the requests.

(5) The CPUC will create an online safety portal that will augment and house the safety-related records and information the CPUC provides. The portal will describe the CPUC's safety jurisdiction and inspection, investigation, and enforcement activities; and provide access to a wide range of safety-related records received or generated by the CPUC.

By making the changes outlined in this Resolution, we hope to improve the public's access to records that are not exempt under the CPRA, and the CPUC's ability to process records requests and requests for confidential treatment in an efficient, well-reasoned, and consistent manner. The CPUC is a public agency and the public should have the widest possible access to information we possess, consistent with well-established exceptions for information relating to personal privacy of individual residents, short-term market sensitivity, and critical infrastructure.

The planned index of CPUC records and related confidentiality determination database will take time to develop and refine. We will, therefore, make a number of the provisions of our new regulations effective only after certain resources are available, require staff to proceed as promptly as practical, and anticipate that staff may recommend modifications of these regulations as experience dictates.

We recognize that further refinements to our proposed rules are required before these rules are ready for final adoption, and for this reason will hold Draft General Order 66-D in abeyance pending workshops and additional opportunities to comment on our proposed changes.

We will direct staff to begin developing the databases and records management systems necessary for implementation of the procedures outlined in this Interim Resolution.

DISCUSSION

Access to CPUC Records

The California Constitution, the CPRA, and discovery law, require that most government records be available to the public. The CPUC's records access practices must be consistent with these requirements.

The public has a constitutional right to access most government information.[1] Statutes, court rules, and other authority limiting access to information must be broadly construed if they further the people's right of access, and narrowly construed if they limit the right of access.[2]

While mindful of the rights of individuals to privacy, the Legislature has declared that "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."[3] An agency must base a decision to withhold a public record in response to a CPRA request upon the specified exemptions listed in the CPRA, or a showing that, on the facts of a particular case, the public interest in confidentiality clearly outweighs the public interest in disclosure.[4] The CPRA favors

[1] Cal. Const. Article I, § 3(b)(1): "The people have the right of access to information concerning the conduct of the people's business, and, therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny."

[2] Cal. Const., Article I, § 3(b) (2).

[3] Cal. Gov't. Code § 6250: "In enacting this chapter, the Legislature, mindful of the right of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state."

[4] Cal. Gov't. Code § 6255(a): "The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

disclosure, and CPRA exemptions must be narrowly construed.[5] The fact that a record may fall within a CPRA exemption does not preclude the CPUC from disclosing the record if the CPUC believes disclosure is in the public interest. Unless a record is subject to a law prohibiting disclosure, CPRA exemptions are permissive, not mandatory; they allow nondisclosure but do not prohibit disclosure.[6]

The CPRA authorizes the CPUC to adopt regulations, and requires the CPUC to adopt written guidelines for access to CPUC records and requires that such regulations and guidelines be consistent with the CPRA and "reflect the intention of the Legislature to make agency records accessible to the public."[7]
"In compliance with the legislative mandate and policy expressed in" the CPRA, CPUC Resolution L-151 adopted the CPUC's regulations and guidelines for access to CPUC records, in General Order 66-C.

General Order 66-C was intended to improve public access to CPUC records by replacing a regulation that identified roughly 20 broad classes of CPUC records as public, and provided that the remainder were confidential unless the CPUC specifically ordered disclosure, with a regulation that identified all CPUC records as public unless they fell within a short list of exemptions. Adopted in 1974, General Order 66-C is outdated and requires revision. The General Order references provisions of law that have been amended or repealed[8] and CPUC positions that have been renamed,[9] and includes exemptions that are obsolete and/or do not match those in the CPRA.[10] Further, although intended to increase public access to CPUC records, General Order 66-C has instead acted as an impediment to prompt disclosure of CPUC records.

The law makes it easy for utilities to claim confidentiality and often requires the CPUC to take explicit action to release information. Cal. Pub. Util. Code § 583 provides that information furnished to the CPUC by a public utility shall not be made public unless the Code specifically requires the information to be open to public inspection, or the information is made public "by an order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding," and that "Any officer or employee of the commission who divulges any such information is guilty of a

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[5] *See, e.g., American Civil Liberties Union of Northern California v. Superior Court* (ACLU) (2011) 202 Cal. App. 4th 55, 67; and *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325.

[6] *See*, *e.g.*, *ACLU*, *supra*, 202 Cal. App. 4th at 86, fn. 17; Cal. Gov't. Code § 6253(e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656; *Re San Diego Gas & Electric Company* (*SDG&E*) (1993) 49 Cal.P.U.C.2d 241, 242.

[7] Cal. Gov't. Code § 6253.4.

[8] Cal. Pub. Util. Code §§ 1903, 3709.

[9] General Order 66-C §§ 4. and 4.2 refer to the "Secretary" of the Commission, rather than to the "Executive Director," and § 3.3 refer to "Examiners," rather than to "Administrative Law Judges."

[10] Compare General Order 66-C §§ 2.2 – 2.8 to Cal. Gov't. Code §§ 6254(a), (c), (g), (k) and (l).

misdemeanor." [11] [12] Staff concerns that they may be charged with a misdemeanor, pursuant to § 583, if they disclose records furnished by a utility in the absence of a CPUC order specifically authorizing such disclosure, have a definite chilling effect on the public disclosure of CPUC records.

Cal. Pub. Util. Code § 583 neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential." (*Re Southern California Edison Company* (*Edison*) [Decision (D.) 91-12-019] (1991) 42 Cal.P.U.C.2d 298, 301.) As we noted in *Edison*, *supra*:

> The Commission has broad discretion under Section 583 to disclose information. *See*, *e.g.*, *Southern California Edison Company v. Westinghouse Electric Corporation*, 892 Fed. 2d 778 (1989), in which the United States Court of Appeals for the Ninth District stated (*at* p. 783):
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> > On its face, Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted.

Although Cal. Pub. Util. Code § 583 does not limit our ability to disclose records or information, it does assure "that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission." (*Edison*, *supra*, 42 Cal.P.U.C.2d at 300.) By including § 583 as an example of records of a confidential nature, even though it does not actually limit our disclosure of records, General Order 66-C places staff in the position of having to initially deny access to records where it is not clear whether we have required or authorized disclosure. The General Order's use of a short but confusing list of exemptions as a replacement for its predecessor's explicit CPUC order that a long list of broad classes of records be available to the public, coupled with its reference to § 583, has resulted in a substantial decrease in prompt public access to our records.

While General Order 66-C § 3.4 provides that those seeking access to records exempt from disclosure under the General Order can appeal to the full Commission for access to such information, this option is unwieldy and time-consuming. Staff must prepare a draft

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[11] Cal. Pub. Util. Code § 583 states: "No information furnished to the commission by a public utility ... except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor."

[12] Cal. Pub. Util. Code § 5228 similarly makes it a misdemeanor for Commission employees to divulge: "any fact or information which comes to his knowledge during the course of the examination of the accounts, records, or memoranda of household goods carriers, except as he is authorized or directed by the commission or a court of competent jurisdiction or judge thereof."

decision or resolution authorizing or denying disclosure, and, in accord with Cal. Pub. Util. Code § 311(g), circulate the draft decision or resolution for public comment at least 30 days before we take action.

By affirming our intent to disclose records unless they are subject to a CPRA exemption or other provisions of law prohibiting or limiting disclosure, and making clear that Cal. Pub. Util. Code § 583 does not limit the CPUC's authority to disclose information obtained from public utilities and should not be the substantive basis for a utility assertion of confidentiality or request for confidential treatment, we can eliminate the uncertainties associated with the current language of General Order 66-C § 2.2.

Moving on to other issues, we briefly address problems with two of the specific § 2.2 exemptions. First, General Order 66-C § 2.2(a), which indentifies as confidential: "records of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action," often unnecessarily delays disclosure of records of completed safety investigations. There are times when records of our investigations and audits can and should remain confidential, such as where disclosure would interfere with our ability to carry out our regulatory and law enforcement responsibilities in an effective and efficient manner. In most cases, however, the disclosure of records of completed investigations will have no adverse effect on our ability to carry out our responsibilities, and we have, accordingly, issued dozens of resolutions authorizing the release of safety-related investigation records, with appropriate redaction of privileged and personal information.

By authorizing the disclosure of records of completed safety-related investigations on a routine basis, with appropriate redactions, we can speed up our responses to records requests and discovery.[13] PRA exemptions and other legal authority will still permit us to preserve the confidentiality of investigation and audit records where our investigation or audit is not yet complete and in other circumstances where the need for confidentiality clearly outweighs the public interest that would be served by disclosure.

Second, General Order 66-C § 2.2(b), which exempts: "reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage," does not match any specific CPRA exemption. In addition, § 2.2(b) focuses on the perceived impact of disclosure on a regulated company, rather than on how disclosure might benefit or harm the public, and thus creates a potential conflict with CPRA exemptions that require us to balance the *public's* interest in having access to information, against the *public's* interest in not having access to the information.

[13] Disclosure of the records of many other types of completed CPUC investigations would also be unlikely to interfere with our regulatory responsibilities, but we are not yet prepared to provide further guidance as to which other classes of investigation records should be routinely made public upon completion.

Often, the interests of the regulated entity and the public may overlap; disclosure might both place a company at an unfair business disadvantage, and also disrupt the workings of a competitive market, thus reducing competition, increasing utility costs, and ultimately increasing rates paid by utility customers. At other times, confidential treatment may lead to a lack of transparency that impairs the efficient functioning of an energy market, and have the potential to result in increased costs to ratepayers.

To the extent a regulated entity's confidentiality assertion based on §2.2(b) seeks confidential treatment for information that falls within the scope of one or more specific CPRA exemptions and/or Commission privilege against disclosure, we can base our confidentiality determination on the provisions of the CPRA or the applicable privilege without the need for a potentially conflicting CPUC-created exemption. When a CPRA exemption or Commission privilege involves a balancing of interests for and against disclosure, the potential for disclosure to result in increased utility costs that will be borne by ratepayers is a valid consideration.

Modification of General Order 66-C on a section-by-section basis is impractical, given its many provisions that are outdated, legally erroneous, and/or inconsistent with the CPRA. Therefore, this Interim Resolution reflects our intent to repeal General Order 66-C and adopt new regulations designed to permit more efficient access to CPUC records and to preserve fully our ability to maintain the confidentiality of records and information that must or should not be disclosed to the public.

Requests for Confidential Treatment

The absence of clear and consistent rules for processing records requests and requests for confidential treatment outside formal CPUC proceedings results in confusion regarding the public or confidential status of records and information. Our Rules of Practice and Procedure provide guidance to those filing motions for leave to file records under seal, General Order 96-B, General Rules, § 9, provides guidance to those filing advice letters, and General Order 167 provides guidance to Generating Asset Owners. However, we have not provided clear guidance with regard to assertions of confidentiality or requests for confidential treatment made in other contexts.

We believe it will be helpful for us to adopt a procedure through which our staff can efficiently respond to requests for confidential treatment received by the CPUC in contexts not already addressed in our Rules of Practice and Procedure, General Orders, and similar authority. Consistent with the confidentiality provisions of General Order 96-B, General Order 167, and our practice in formal CPUC proceedings, we will highlight the fact that the party requesting confidential treatment bears the burden of demonstrating that such treatment is both authorized and appropriate. We will require parties seeking confidential treatment to submit sufficient information to enable us to determine whether confidential treatment is permitted and in the public's interest.

The CPRA prohibits us from allowing others to make confidentiality determinations regarding records otherwise subject to disclosure under the Act. (Cal. Gov't. Code § 6253.3.) We must make our own independent assessment as to whether records are subject to an exemption in the PRA. If we assert an exemption that requires a balancing of the public's interests for and against disclosure, we must be able to demonstrate that the *public's* interests are served by maintaining the confidentiality of such records. Unless the Cal. Pub. Util. Code itself specifically directed that information be available to the public, or we have issued a decision, order, or ruling addressing the issue, the primary format for authorizing disclosure of records furnished by utilities has generally been a ruling or order by the Commission, an ALJ, or an Assigned Commissioner, during the course of a CPUC hearing or proceeding. This is useful when the disclosure question falls within the scope of a currently open proceeding, but not in other situations.

The other common format for CPUC orders regarding disclosure has been a resolution addressing a specific disclosure matter raised in a records request or subpoena for CPUC records. This resolution process may be cumbersome and time-consuming, but does offer a well-established procedure for the CPUC to respond to requests for review of initial denials of access to CPUC records.

We encourage staff to develop other tools for improving the ease of public access to records that are not subject to CPRA exemptions or other limitations on access, and to bring to our attention disclosure matters that could be effectively and appropriately resolved in a broad CPUC decision, order, or ruling. Such broad determinations can eliminate or reduce the need for repetitive and routine disclosure resolutions.

Information Indexes or Databases

The absence of a central index or database of requests for confidential treatment, and our responses to such requests, contributes to disclosure status uncertainty. There is no simple way for the public, regulated entities, other governmental entities, and the CPUC and its staff, to determine whether we have already resolved an issue in a response to a motion in a formal CPUC proceeding, or in response to an advice letter filing. People cannot easily determine whether we have previously decided that a class of records, or specific records, is available to the public, or that confidential treatment is warranted. If we have authorized confidential treatment for a limited period of time, information regarding the date such treatment expires is often not readily available. Finally, people may not know what types of records have been requested or subpoenaed from the CPUC, and how we have responded. The result may be inconsistent or overlapping confidentiality determinations, and the expenditure of unnecessary time revisiting matters that have already been resolved.

The creation of an index or database that describes the types of records the CPUC maintains and explains where such records are available to the public, or why they are not available, should increase our ability to operate efficiently. A database of information

regarding the status of requests for confidential treatment should similarly increase our ability to operate efficiently. The public, CPUC staff, regulated entities, and others would be able to locate accessible records more easily, and to address confidentiality issues in a more consistent manner.

We direct staff to begin developing such indexes or databases. Once such databases have been established, we may require those seeking confidential treatment to accompany any request for confidential treatment with a declaration attesting that they have reviewed any such indexes or databases and determined either that the records for which they seek confidential treatment fall within a class of records determined to be confidential, or that their request presents issues not already addressed by the CPUC.

The development of these indexes or databases will take time, and will require the thoughtful exploration of many legal, policy, and data processing issues. For these reasons, we will not specify every detail we expect to see in such indexes or databases. We will instead instruct staff to work on these issues and establish such indexes or databases as soon as practical.

We order staff to hold a series of workshops during which stakeholders will discuss issues relating to public access, and confidentiality treatment of, Commission records on an industry by industry basis. We have attached to this Interim Resolution a Workshop Preparation Questionnaire we hope will make such workshops more productive by providing a basis for discussions focused on details rather than abstract principles.[14] We strongly encourage regulated entities to enhance the value of these workshops by submitting Workshop Preparation Questionnaires that solicit input regarding the types of reports and records submitted to the CPUC by such entities, and the specific types of reports or other records they believe must or should remain confidential.

Safety Information Portal

Most records requests and subpoenas for records received by the CPUC have involved some aspect of our safety jurisdiction. The vast majority of our resolutions authorizing disclosure of records are issued in response to those seeking records relating to our investigations of incidents (accidents) involving the facilities and/or operations of electric or gas utilities, railroads, or transit districts.

Most of our resolutions authorizing disclosure are routine. If our investigation has been completed, the resolutions authorize disclosure of the records, after redaction of information subject to a CPUC held privilege against disclosure, and or of information, the disclosure of which would constitute an unwarranted invasion of personal privacy. If

[14] The Workshop Preparation Questionnaire replaces the Request for Confidential Treatment Form attached to previous versions of the Draft Resolution, for the purposes of this Interim Resolution. This does not reflect an intent to eliminate that previous form from consideration.

our investigation has not been completed, our resolutions generally state that disclosure, with appropriate redactions, is authorized once the investigation has been completed.

We see no reason for us to continue with our current practice of addressing such routine requests through resolutions regarding the disclosure of records of our investigations of a specific safety-related incident, and of our routine safety-related inspections or audits. We will, therefore, authorize disclosure of records of routine safety-related incident investigations, inspections, and audits, once those investigations, inspections, or audits, are completed, subject to appropriate redactions. Such redactions may include information subject to a statutory prohibition or CPUC-held privilege against disclosure; personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and information subject to other CPRA exemptions the CPUC finds are applicable and in the public's interest to assert.

There is no statute forbidding disclosure of the records of safety investigations initiated by the CUC, although portions of such records are subject to one or more CPRA exemptions from mandatory disclosure in response to records requests, and to other provisions of law limiting access to such records. Information we will generally refrain from making available to the public includes: maps and schematic diagrams showing the location of specific utility regulator stations, valves, and similar facilities; the numerical element of street addresses included in work papers and other documents associated with the CPUC's investigation and a utility's internal audits; and certain employee information that may not contribute to an understanding of an incident. Disclosure of specific schematic diagrams, location information, and employee information may create a risk of harm to utility facilities, utility employees, and the public, or constitute an unwarranted invasion of personal privacy, without providing significant additional insight into the operations of the utility and the CPUC. (*See*, *e.g.*, Resolution L-430 (February 16, 2012.) Such records, or portions of records, are exempt from disclosure in response to CPRA requests, pursuant to Cal. Gov't. Code §§ 6254(c), 6254(k), or other CPRA exemptions. We may redact additional information as well, to the extent such information is subject to CPRA exemptions that we find it necessary and appropriate to assert.

There are, of course, situations in which an investigation is by no means routine, and/or where there is a concrete and definite prospect of enforcement activity. In such situations, a more individualized resolution of disclosure issues will be necessary. For example, where our staff participates in an National Transportation Safety Board (NTSB) investigation of an accident involving utility facilities or is working with law enforcement agencies or other governmental entities, public disclosure of our incident investigation records, and/or of incident investigation records we receive from such entities, may be prohibited by law, and/or restricted by our need to conduct our investigations efficiently and effectively. Public disclosure of such records would, in some cases, be unlawful.

Various provisions of law, including Cal. Gov't.Code § 6254.5(e), permit us to share information in confidence with other governmental entities, without waiving our ability

to assert CPRA exemptions as a basis for not providing such information in response to records request, where the information is shared pursuant to confidentiality agreements or understandings. Our public disclosure of records subject to such prohibitions and/or confidentiality agreements and understandings, would clearly be against the public's interest because such disclosures may violate the law, and would undermine relationships of trust with other governmental entities, and adversely effect, or eliminate, our ability to work cooperatively and effectively with such agencies. For the above reasons, we will stop short of mandating the disclosure of records associated with all CPUC safety-related investigations.

Regulated entities subject to our safety jurisdiction are often also subject to the jurisdiction of other state or federal agencies. Utilities and other regulated entities may be required to file with such agencies various reports concerning incidents relevant to the jurisdiction of such agencies. In many cases, the utility may be required by law or regulations to provide the CPUC with a copy of such reports or other documents, or may be directed by the CPUC to do so. Often, such documents are considered to be public records, and are available either on the internet site of the other agencies, or in response to Freedom of Information Act requests.

The CPUC is not required to track down records maintained by other agencies or entities in order to provide such records to those who request such records from our agency. Nonetheless, we may choose to make some such information available on our internet site, and/or inform members of the public where they may seek such records.

For example, we receive a number of gas pipeline related reports that gas utilities are required to submit to the Federal Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) that are not considered by that agency to be confidential. Many such reports, or information from such reports, may be available directly from PHMSA. In some cases, however, the California utility information is included in a somewhat difficult to access database providing similar information from the several hundred other pipeline operators subject to PHMSA's safety jurisdiction. By posting copies of most such reports on our internet site, we can improve the public's understanding of California-specific gas safety issues, and limit the need for individual CPUC responses to requests seeking such records.

Our General Order 112-E requires gas utilities to provide us with copies of reports filed with PHMSA, and with additional reports similar but not identical to those required by PHMSA. With minor redactions, such reports can also be provided to the public on our internet site.

The safety-related reports we intend to have CPSD disclose to the public and post on our internet site, after appropriate redactions, include, but are not limited to, the following:

1. Reports of gas incidents required by 49 CFR Part 191 General Order 122.1. Such reports include written incident reports submitted on DOT Form PHMSA F7100.1 and PHMSA F7100.2 in compliance with General Order 112-E § 122.2 (c).

2. Quarterly summary reports summarizing all CPUC reportable and non-reportable gas leak related incidents submitted to the Commission in compliance with General Order 112-E § 122.2(d), subject to the following redactions: the name, telephone number, e-mail address, if any, and the numerical portion of any street address, associated with individuals identified by the submitting gas operator as the "damaging party" associated with an incident. Posting such personal information adds little to the public's understanding of the incident. Such information is exempt from mandatory disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(c).

3. Annual reports required by 49 CFR Part 191 [see §§ 191.11 and 191.17] and General Order 112-E § 123.1.

4. Safety-related condition reports required by 49 CFR Part 191 [§§ 191.1, 191.7, 191.23 and 191.25] and General Order 112-E § 124.1

5. Proposed installation reports required by 49 CFR Part 191 [§191.11] and/or General Order 112-E § 125.1, after redaction of detailed facility location information, including numerical portions of street addresses, maps, drawings, or schematic diagrams.

6. Strength testing failure reports required by 49 CFR Part 191, and General Order 112-E § 125.2.

7. Change in maximum allowable operating pressure reports required by General Order 112-E.

8. Reports of gas leaks or interruptions submitted on standard reporting form, "Report of Gas Leak or Interruption," CPUC File. No. 420 (General Order 112-E Appendix B), with the redaction of the same types of personal information redacted with respect to quarterly summary reports, and the detailed facility information redacted with respect to proposed installation reports.

9. General Order 88 applications submitted to the CPUC by railroads proposing changes to rail crossings, and related records, subject to appropriate redaction of data compiled or collected to identify and

evaluate rail-highway crossing safety hazards and develop plans for federally funded safety improvements, pursuant to 23 U.S.C. § 130 (a federal program for funding the elimination of hazards and the installation of protective devices at railway-highway crossings). 23 U.S.C. § 409 provides that such information is not subject to discovery, and may not be used as evidence or for other purposes in crossing accident litigation. Such information is also exempt from disclosure pursuant to Cal. Gov't. Code § 6254(k).

10. Gas incident reports required by General Order 112-E § 122.2.

11. Mobile home park annual reports, inspection reports, and citation records, related to the CPUC's enforcement of federal pipeline safety standards for mobile home park operators, pursuant to Cal. Pub. Util. Code § 4352 *et seq*.

12. Propane operator annual reports, inspection reports, and citation records related to the CPUC's enforcement of federal pipeline safety standards for propane operators, pursuant to Cal. Pub. Util. Code § 4451 *et seq*.

We will direct our Staff to create an informative safety information portal on our internet site, where information and records regarding our safety jurisdiction, and our implementation of our safety responsibilities, will be readily accessible to the public.

We consider the changes outlined in this Resolution, and in our Draft General Order 66-D, to reflect a work in progress, rather than a final product. We anticipate that these changes will, when fully implemented, greatly improve our ability to provide prompt public access to CPUC records that are not subject to CPRA exemptions or privileges that limit mandatory disclosure of CPUC records, or are where we determine that nondisclosure is both legally justified and in the public's interest. As noted earlier, we are deferring adoption of Draft General Order 66-D until we hold workshops, receive comments, and further refine our proposed new rules.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the CPUC's Legal Division in this matter was mailed to the parties in interest on March 20, 2012, in accordance with Cal. Pub. Util. Code § 311(g). Comments were filed on April 25, 2012 by the California Water Association (CWA), Calpine, the City and County of San Francisco (CCSF), the Cogeneration Association of California (CAC), the Communications Industry Coalition (CIC), the Division of Ratepayer Advocates (DRA), the Independent Energy Producers Association (IEP), Pacific Gas and Electric and Southern California Edison (PG&E/SCE), and San Diego Gas and Electric Company and Southern California Gas Company (SDG&E/SCG).

CWA

CWA comments that: 1) generic problems with the draft resolution and proposed G.O. 66-D justify limiting immediate implementation to gas safety matters, with broader implementation awaiting more thorough consideration in a rulemaking or workshop process; 2) documents submitted prior to the adoption of the new General Order should remain subject to the rules and procedures of G.O.66-C and § 583, and the utility concerned should be given timely notice of any request or intention to release such documents to the public or a third party and a fair opportunity to oppose such release; 3) confidential commercial or financial information should continue to be accorded confidential treatment similar to that provided in G.O. 66-C; 4) parties seeking confidential treatment should not be required to attest to having reviewed an index or database of confidential treatment requests until CPUC staff has made such an index or database available and the CPUC has found it to be adequate; 5) types of information recognized as confidential in the context of safety investigation should be protected in other contexts as well (*e.g.* information subject to a statutory prohibition or CPUC-held privilege against disclosure, personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and information subject to other CPRA exemptions the CPUC finds applicable and in the public's interest to assert); 6) documents submitted to DRA under a claim of confidentiality in the context of a formal CPUC proceeding should be treated as confidential absent a ruling to the contrary by the Presiding Officer or the CPUC, in order to avoid a new layer of complexity to formal proceedings by requiring confidentiality review of proposed applications accompanied by volumes of testimony and other supporting data submitted two months before GRC application is filed; and responses to data requests from DRA and other staff during the course of the proceeding; 7) the new General Order should require CPUC staff to act within a specified reasonable period of time on any request for confidential treatment and to honor such requests until the internal review and appeal process has been completed, since, absent specific time limits for responses to requests for confidential treatment, such requests are likely to languish until a records request is received, at which point staff may give short shrift to confidentiality claims.; and 8) the proposed limits on the duration of confidentiality are ambiguous and absurdly short; CWA proposes clarifying language and that the two-year default limit specified in the proposed G.O. be extended to five years.

CALPINE

Calpine comments that the Draft Resolution and proposed G.O. 66-D should be revised to: 1) require CPUC staff to timely respond to all requests for confidential treatment, since, if such staff determinations are delayed until a records request or subpoena is received, the specified time periods for responses to records requests or subpoenas may unfairly prejudice an entity's ability to seek review of a staff determination that confidential treatment is unwarranted.; 2) prohibit public disclosure of information that is subject to a request for CPUC review unless and until the CPUC affirms the staff

determination that confidential treatment is unwarranted, even where the staff determines that confidential treatment is unwarranted because a statute, CPUC decision, order, or ruling requires the that the information be open to the public, since there may be legitimate reasons for disagreement regarding whether a particular document falls within such a class of information or records, and permitting access while a review is pending eviscerates the purpose for such a review; and 3) prohibit the disclosure of information provided to staff as part of G.O.167 audits and investigations until the Generating Asset Owner (GAO) has a chance to review and comment on the draft audit report and make recommendations regarding confidentiality, and the CPUC issues a resolution approving staff's report and authorizing disclosure, in accord with current practice regarding G.O.167 audit reports.

CCSF

CCSF comments that: 1) the Draft Resolution and proposed General Order, with their provisions for indexes to help the public locate information, and for streamlined access to CPUC safety investigation records, go a long way toward bringing the CPUC into compliance with the CPRA principles, and replace a system in which those seeking records had to overcome a presumption of confidentiality with one that properly assumes records the agency receives or generates are public unless the person seeking confidentiality meets the burden of proving the records are subject to a CPRA exemption or other basis for nondisclosure; 2) the CPUC should modify the proposed General Order to make clear that it takes precedence over conflicting prior CPUC decisions, orders, and rulings, so that the currently proposed option of referencing prior CPUC decisions, orders, and rulings as a basis for confidential treatment does not result in a continuation of problems associated with such past decision's orders, and rulings; 3) the CPUC should apply the Draft Resolution and proposed General Order retroactively to provide public access to the public records previously filed under seal on the basis of a claim the filer would be subject to an unfair business disadvantage, since the CPRA does not exempt such records as a class, but instead only exempts trade secret information, information regarding utility system development, and similar more limited types of information; 4) the CPUC's provision of an option to appeal staff records request responses to the CPUC may be inconsistent with the CPRA provision for prompt judicial review of agency responses to records requests (Cal.Gov't. Code §§ 6258, 6259), since, presumably, any court review of the CPUC's resolution would have to be by a writ to the court of appeal or Supreme Court pursuant to Public Utilities Code § 1759,[15] the CPUC should consider providing for staff determinations with no right of appeal to the Commission, so that "an aggrieved party could file a writ in the superior court challenging the Commission's determination as to whether or not the document is a public record subject to disclosure"[16]; and 5) the CPUC should expand the list of safety records to be routinely

[15] CCSF Comments, p. 7.

[16] CCSF Comments, p. 8.

disclosed to include "records of audits of gas operators' regional divisions; Operation, Maintenance and Emergency Plans; and Integrity Management Programs," and "All other safety-related incident investigations, inspections, and audits," and correspondence related to each of these safety-related investigations and audits," "once those investigations, inspections, or audits are completed"[17]; 6) the CPUC should allow any person to file reply comments to the comments filed April 25, 2012.

CAC

CAC comments that: 1) The California Constitution, CPRA, and other laws and regulations promoting public access "compel the Commission to support greater disclosure and transparency of the records of public utilities over redaction and secrecy; and the CPRA sets the foundational premise that confidential treatment of information is to be the narrow exception to the broader rule of full public access to information;." 2) the Draft Resolution and proposed General Order complies with these legal mandates, and, with the revision proposed by CAC, should be adopted; 3) the CPUC should expand the automatic disclosure of energy procurement information, including Renewal Portfolio Standard (RPS) and non-RPS Power Purchase Agreements (PPAs), once the three-year period for confidential treatment of such PPAs set forth in the matrixes adopted in D.06-06-066 expires; 4) the CPUC should also automatically disclose, or ensure public awareness of the expiration of the confidential period, for the following energy procurement information, once period for confidential treatment of such PPAs set forth in the matrixes adopted in D.06-06-066 expires: Solicitation information for utility Requests for Offers (RFOs) and corresponding work papers and documents; all specific quantitative analyses involving scoring evaluations participating bids; all winning bid information from the RFOs, including levelized and/or escalated bid prices, transmission cost upgrade adders, wheeling charges, congestion costs, delivery characteristics, portfolio fit, 'dump energy' quantities and costs.

CIC

CIC Comments that: 1) the creation of a safety portal might be worth considering in a limited Draft Resolution; 2) G.O. 66-C is working well; 3) the Draft Resolution has: (a) identified no specific problems related to confidential documents and information communications providers submit to the CPUC; (b) would harm the CPUC's ability to conduct business in the communications arena, and would create significant uncertainties and potential competitive harm to communications providers; (c) misinterprets Article 1, § 3 of the California Constitution, by stating that the (3)(b) provision favoring public access to CPUC records applies to records utilities provide to the CPUC, as well as to records the agency generates; (d) misconstrues and misapplies § 583, in stating that the CPUC has authority to issue broad rules determining what classes of records are confidential; (e) unlawfully delegates to staff functions reserved exclusively to the CPUC

[17] CCSF Comments, p. 9.

in § 583; and (f) should not be adopted because it could conflict with pending legislation which could significantly modify the law governing confidentiality of company information coming into the custody of the CPUC (Senate Bill (S.B.) 1000 (Yee) and Assembly Bill (A.B. 1541 (Dickinson)).

DRA

DRA comments that: 1) DRA supports the CPUC's fresh look at policies that impede the agency's ability to share documents with the public it serves; 2) DRA recommends that Draft Resolution be adopted, after being modified to clarify that: (a) the requesting party who owns or controls the confidential information bears the burden of demonstrating the basis and need for confidential treatment – not parties who request or use such information - who should be ably simply to reference the initial request for confidential treatment when they request that such information be filed under seal; (b) confidentiality of employee-specific training and certification records should be determined on a case by case basis, with the public's interest in full disclosure being balanced against any employee privacy interest, since the Draft Resolution does not explain how disclosure of such information poses a risk of harm or invasion of privacy, and employee training information may be relevant to incident investigations; (c) an online database and other tools for improving the ease of public access to records should be developed with stakeholder input and participation; and (d) a centralized database and form for requesting confidential treatment will ensure consistency and uniform application of the new regulations; 3) the CPUC should identify minimum requirements for the information databases discussed in the Draft Resolution; these should include, at a minimum: a) an index of requests for confidential treatment, with a hyperlink to the actual request; a hyperlink to all protests; c) the purpose of the information provided (*e.g.*, for a formal proceeding, compliance report, response to CPUC staff request); and d) an explanation of the disposition of each request; and 6) the CPUC should create a centralized Docket Card type system for Advice Letters, which are currently maintained separately by each CPUC Division.

IEP

IEP comments that: 1) the principles stated in Draft Resolution L-436 are laudable: "'The CPUC is a public agency and the public should have the widest possible access to information we possess ….,'" and "'The public has a constitutional right to access most government information,'" and "'The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning eth conduct of the people's business ….'"[18]; 2) the Draft Resolution will not automatically result in widest possible public access because it does not address separate restrictions on access to energy procurement information imposed by D.06-06-066, as modified by D.07-05-032, which provide that to extent the

[18] IEP Comments, p. 1, quoting Draft Resolution, pp. 2, 3, and 6, respectively.

Matrix [of confidentiality rules for procurement data] contradicts GO 66-C, the Matrix shall govern until the Commission changes or repeals G.O. 66-C.[19]; 3) the Draft Resolution's silence regarding its interaction with matrix and other confidentiality provisions of D.06-06-066 and its progeny "means that much of the information in procurement proceedings will remain out of the public's reach."[20]; 4) refinements to the energy procurement matrix should be considered because: (a) although D.06-06-066 warns against over-assertions of the need for confidentiality, there is practically no enforcement of this limitation on confidentiality claims, and thus no consequences; (b) parties with access to information not available to the public have no incentive to complain, while those without access have no way to assess legitimacy of confidentiality assertions since they do not have access to the information kept from the public; (c) information subject to confidential treatment for a limited period of time under a procurement information matrix should be automatically made available to the public and/or posted on the CPUC's internet site when the confidentiality period expires; and 5) the CPUC should establish procedures for Public Records Office review of claims for confidentiality for materials falling under both General Order 66 and the procurement Matrix; enhance the online index so that as confidentiality protections expire, the documents become accessible of the CPC's internet site; and ensure that confidentiality provisions do not deprive generation developers of information about where future generation will be needed and the types of operational characteristics required for system reliability and safety.

PG&E/SCE

PG&E/SCE comment that: 1) they support the CPUC's effort to streamline access to CPUC records, provide for consistent processing of records requests and requests for confidential treatment, and update outdated General Order 66-C; 2) the CPUC cannot adopt rules providing that broad classes of information furnished by utilities are available to the public; Cal. Pub. Util. Code § 583 bars disclosure of any information furnished by a utility, whether or not confidential treatment is requested, in the absence of an order of the Commission, or the Commission or a Commissioner in a hearing or proceeding, unless a provision of the Cal. Pub. Util. Code expressly requires that certain such information be available to the public; and, although Cal. Pub. Util. Code § 701 gives the CPUC authority to do all things necessary and convenient in the exercise of its jurisdiction, this broad authority does not allow the CPUC to act contrary to express provisions of Cal. Pub. Util. Code § 583; 3) the CPUC could comply with the requirements of § 583 and further its intent to act in a manner consistent with the spirit of the CPRA -which favors public access to agency records – by having the Public Records Office (PRO) created by the Draft Resolution prepare a PRO Resolution for each Commission meeting that would provide the status of each request for confidential

[19] IEP Comments, pp. 1-2, quoting D.07-05-032, Appendix A, pp. 22-23.

[20] IEP Comments, p. 2.

treatment received by the CPUC during a given period, and otherwise authorize disclosure of public utility information submitted to the CPUC during that period, with this PRO Resolution being similar to "the ALJ Resolution on Preliminary Categorization and hearing Determinations for Recently Filed Formal Applications that currently appears as a regular item on the CPUC's business meeting agendas;"[21] and 4) PG&E/SCE support the creation of a safety portal and the CPUC's recognition of the importance of protecting information that could pose national security risks, and request that staff be directed to work with utilities to ensure appropriate redactions. PG&E/SCE provided a redlined version of Draft Resolution L-436 and its accompanying documents.

SDG&E/SCG

SDG&E/SCG comment that: 1) they support the CPUC's goal of improving public access to records subject to disclosure under the CPRA and developing clear and consistent rules for processing records requests and requests for the confidential treatment of records, 2) they concur that General Order 66-C is outdated and cumbersome, but believe Draft General Order 66-D requires modifications to correctly balance the public right of access to CPUC records with the public in protecting the confidentiality of certain data; 3) the CPUC should first address safety records, and then address other issues through a second phase consisting of workshops "which would provide a valuable forum for all interested parties and Staff to analyze the possible consequences of releasing sensitive information, discuss what particular types of documents deserve confidential treatment, and determine how confidentiality requests and public disclosure should be handled. A similar process resulted in D.06-06-066, which governs the confidential treatment and public disclosure of electric procurement-related documents, and provides a helpful matrix to guide confidentiality determinations."[22]; 4) as an alternative, they support the procedural process proposed by PG&E/SCE; 5) they concur that the list of utility-generated safety-related reports listed in the Draft Resolution may be publicly disclosed, after appropriate redactions, without fear of releasing confidential and sensitive information, and suggest that the utilities and staff should discuss expanding this list in workshops, if appropriate; 6) utility-generated safety-related records should only be disclosed once the documents are considered final and complete by the author (whether the CPUC, a utility, or third party); 7) final and complete reports should not be publicly disclosed until privileged, sensitive or personal information has been redacted, and the authors of any safety-related reports should be given the opportunity, prior to submission, to redact any such privileged, sensitive or personal information, 8) G.O. 66-D should be modified to ensure confidential utility information is adequately protected; particularly, information of the types of commercially sensitive information currently protected by G.O. 66-C; 9) G.O. 66-D's confidentiality request review can be made less administratively burdensome by specifying "well established exceptions" to public disclosure which would include: (a)

[21] PG&E/SCE Comments, p. 4.

[22] SDG&E/SCG Comments, p. 3.

commercially sensitive and proprietary business information; b) customer information, the disclosure of which could intrude on customers privacy, or place them at unfair business disadvantage; (c) private individual information, the disclosure of which could intrude on individual privacy rights; and d) critical energy infrastructure and system security information, the disclosure of which could pose a danger to public safety; 8) the Draft Resolution's proposed process to determine confidentiality should be modified, since: a) publicly releasing documents based on a staff denial of a request for confidential treatment violates Cal. Pub. Util. Code § 583; (b) permitting staff to determine whether confidential treatment is appropriate may inappropriately delegate CPUC authority; c) requests for confidential treatment based on a submitter's assertion of a privilege should not be publicly posted, and submitters of such requests should only be required to provide general information regarding the records subject to the privilege assertion, and not the documents themselves; (d) utilities should be able to assert a privilege against self-incrimination as a basis for a request that the CPUC withhold such incriminating information from the public; (e) whistleblowers and individuals should not be exempted from the requirement that they provide the information required of others who seek confidential treatment; (f) all requests for records, and for confidential treatment, should be in writing; (g) several of the forms accompanying the Draft Resolution are confusing; (h) documents should not be disclosed while any review of an initial determination denying confidential treatment is pending; and (i) documents submitted to DRA as confidential during a proceedings should be treated as confidential absent a ruling to the contrary by a presiding officer or the CPUC; 9) records disclosure rules should be amended to provide utilities with notice and an opportunity to object, prior to disclosure of utility records, and with notice of any inadvertent disclosures of confidential information; and that 10) records submitted to the Commission prior to the adoption of G.O. 66-D should not be subject to its provisions. SDG&E/SCG provided a list of specific types of records they are particularly concerned about, and a redlined version of Draft Resolution L-436 and the accompanying documents.

RESPONSE TO COMMENTS

We found the comments received regarding Draft Resolution L-436 very useful and informative.

In response to comments recommending hold workshops on issues raised in the Draft resolution, staff held a workshop on June 19, 2012, and indicated that additional workshops would be scheduled in the future. Although we initially scheduled two days of workshops, at the end of the first day the majority of attendees expressed the belief that a second day of workshops attended by all stakeholders might not be productive at this time. We hope the workshop made clear the CPUC's intent to proceed with its reform of its records management processes on a careful and thoughtful basis, and that we did not plan on immediately making public all utility records of a confidential nature.

Commenters raise several fundamental legal issues, practical procedural concerns, and a variety of industry specific concerns. CIC and PG&E/SCE expressed the belief that the CPUC does not have the legal authority to make decisions authorizing disclosure of classes of information furnished by utilities.

Several commenters asserted that the Commission cannot, or should not, apply proposed General Order 66-D information submitted to the Commission prior to its adoption; while one commenter, CCSF, recommended that the CPUC apply the Draft Resolution and proposed General Order to records in the CPUC's possession, and override CPUC orders in CPUC proceedings that granted confidential treatment for records on the basis that disclosure would subject the submitter to an unfair business disadvantage, on the ground that the CPRA included no such exemption.

Some commenters state that the CPUC should modify its records disclosure procedures to give utilities notice of records requests and subpoenas seeking information they provided to the CPUC, an opportunity to object to disclosure, and an opportunity to appeal any determination rejecting their objections to disclosure, prior to any such disclosure.

Several commenters cite with approval the D.06-06-066 matrixes establishing classes of energy procurement records are open to the public, and classes which are confidential for up to three years, as an approach the CPUC may wish to pursue in developing the public and confidential indexes, databases, or guidelines proposed in Draft Resolution L-436. Two commenters, CAC and IEP, suggest that the D.06-06-066 matrixes be refined, and that certain classes of procurement records should be automatically disclosed once the period for confidential treatment expires.

A number of commenters expressed concern that the proposed requirements for justifying confidential treatment are complicated, and could impede the free flow of information between utilities and staff during formal CPUC proceedings, and in response to data requests, and thus result in frequent litigation regarding disclosure or in less information being made readily available to the CPUC, and DRA expressed the opinion that only the initial utility or other person or entity seeking confidential treatment should bear the burden of proving the existence of a legal basis and reason for confidentiality, and that DRA and other parties with access to such information who may wish to introduce such information under seal in a proceeding should be able to simply reference the utility's confidentiality claim, and not independently duplicate the entire process of justifying confidential treatment. We modified Draft Resolution L-436 to provide this option.

CCSF comments that the CPUC's procedures allowing for appeals to the CPUC of initial denials of access to CPUC records may result in CPUC decisions subject to Cal. Pub. Util. Code § 1759, and that this limitation on review may be contrary to the provisions of the CPRA providing that the exclusive opportunity for review of agency determinations regarding access to records is through a superior court; CCSF recommended the CPUC

delegate disclosure decisions to staff, with no internal right of appeal, so that aggrieved parties could go directly to superior court for a review of such determinations.

Other commenters suggested we incorporate into proposed G.O. 66-D disclosure limitations similar to those in G.O. 66-C for records, the disclosure of which would place the party at an unfair business disadvantage, reveal proprietary business information; and raised a wide variety of other issues and concerns as well.

PG&E/SCE's comments were particularly useful in suggesting a new procedural approach that could help us centralize our information regarding requests for confidential treatment received by the CPUC, and also provide routine CPUC orders authorizing disclosure of information furnished by utilities with no request for confidential treatment. The vehicle proposed by PG&E/SCE is a standing PRO Resolution that would be presented for the CPUC's consideration at each business meeting. PG&E/SCE suggest that such PRO Resolutions identify requests for confidential treatment received during a given period, and any disposition thereof, without unnecessarily addressing each request in depth, and expressly authorize disclosure of all other information received from utilities during that period.

We have modified Draft General Order 66-D to include a PRO resolution process. We will explore in workshops or through comments whether there may be ways to expand on this basic concept to address other issues of concern the commenters and the CPUC. For example, one commenter recommended that the CPUC post records requests on its internet site, as well as the requests for confidential treatment it proposes to disclose. And several commenters want the CPUC to adopt procedures requiring notice and an opportunity to object to any records request or subpoena. Practical considerations such as staffing constraints, the CPRA requirement that the CPUC respond to written records requests within ten days (absent specific circumstances allowing and additional fourteen days), and the Cal. Code of Civ. Pro. timelines for responses to subpoenas, preclude the adoption of the extensive pre-disclosure notification process some recommend.

We agree with commenters who point to the public/confidential matrixes developed in D.06-06-066 and its progeny as a useful example of an approach that could enable us to streamline both public access to CPUC records the commission determines must and/or should be public, and streamline the process of handling requests for confidential treatment as well, since the development of matrix categories designating a specific classes of information has the potential to foster common understandings regarding what information is, or is not, available to the public. At the same time, we note the concerns expressed about our staff's ability to determine whether a request for confidential treatment seeks confidential treatment for information determined to be confidential, and thus should be accepted, or seeks confidential treatment for information within a class determined to be public, and thus should be rejected.

Our recognition of the potential for different interpretations of laws, regulations and decisions requiring information to be public, or to be confidential, leads us to the conclusion that we should be as careful and detail-oriented as possible when developing new disclosure/confidentiality matrixes, so that we can to the greatest extent practical reduce uncertainties on all sides regarding whether specific types of information submitted to, or generated by, the CPUC will be made available to the public.

Once such detailed matrixes are established, and our procedures for handling requests for confidential treatment refined after additional workshops and comments, we would anticipate a lessening of fears regarding the probability that the we will inappropriately disclose truly confidential information, where there is lawful basis and public interest in refraining from making the information available to the public.

To make any new matrixes more clear and useful, we may choose to include within the matrixes themselves references to the legal authority for confidential treatment, or for disclosure. We may further our goal of clarifying what information is, or is not, public by requiring the cover page of reports filed routinely with the CPUC to include a statement as to the public, or confidential, nature of the document, much as the cover page of the Fair Political Practices Commission Statement of Economic Interest Report ("Form 700") expressly states that "This is a Public Document." Such an approach would lessen the possibility that CPUC staff could err regarding disclosure.

Before moving on to discuss the scheduling of additional workshops regarding new procedures handling requests for confidential treatment, and new industry by industry, or subject by subject, matrixes of public and confidential information, we feel the need to provide some initial thoughts regarding comments stating that we have no legal authority to issue broad decisions that would make various classes of information furnished by utilities available to the public without additional case by case orders authorizing disclosure, and that we cannot delegate to our staff even the simplest responsibility for determining whether or not a request for confidential treatment seeks such treatment for information required by law, or by prior CPUC decision or order, to be public.

We disagree with those who contend that Cal. Pub. Util. Code § 583 bars the CPUC from issuing decisions authorizing disclosure of multiple classes of records. Nothing in § 583 states that the CPUC is precluded from issuing decisions regarding disclosure of information furnished by utilities on a class-wide basis, rather than a case by case basis. We decline to read such a limitation into the law.

The CPUC has long considered the issuance of a single order authorizing disclosure of multiple classes of information furnished by utilities to be consistent with Cal. Pub. Util. Code § 583, and relied on its staff to provide access to records subject to disclosure under the guidelines established by the CPUC.

In 1923, the CPUC approved G.O. 66, which, after quoting former Cal. Pub. Util. Code § 28(d)[23], a statutory predecessor to § 583 with almost identical language, ordered that:

"the following information furnished to the Commission by public utilities shall be open to public inspection:

1. Complaints and information furnished in connection therewith.
2. Applications and information furnished in connection therewith, unless at the time of filing the same the applicant specifically requests that such information or designated portions of thereof be not open to public inspection, whereupon the commission will take such action on such requests as it may deem expedient.
3. The annual reports of utilities.
4. All tariffs and rate schedules of public utilities.
5. All maps, profiles, station plats, drawings and inventories furnished by public utilities.
6. All information furnished in compliance with the general orders or resolutions of the commission, unless at the time of filing the same the public utility specifically requests that such information or designated portions thereof be not open to public inspection, whereupon the Commission will take such action as it may deem expedient.

Subsequent amendments to G.O. 66 expanded the list of classes of information furnished by utilities or generated by the CPUC that were available to the public. G.O. 66-B, adopted in 1967, lists the following 21 classes of records as open to public inspection:

1. Annual reports and General Orders of the Commission.
2. Uniform systems of accounts.
3. Annual Reports filed by public utilities, including reports to stockholders and individual system reports of multi-system utilities.

[23] G.O. 66 quoted former Cal. Pub. Util. Code § 28(d) as follows:

"*No information furnished to the Commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this act, shall be open to public inspection or made public except on order* of the Commission, or by the commission or a Commissioner in the course of a hearing or proceeding. Any officer or employee of the commission who, in violation of the provisions of this subjection, divulges any such information shall be guilty of a misdemeanor," (Emphasis in original.)

4. All pleadings, briefs, exhibits, and transcripts in formal proceedings.
5. Material filed in compliance with Commission decisions.
6. All reports (except accident reports) filed with the Commission pursuant to any of the Commission's General orders, unless at the time of filing request is made in writing that any part thereof be not open to public inspection and the commission has so ordered.
7. Tariff schedules, including 'advice letters' and service area maps contained such tariff schedules.
8. Resolutions and minutes of the Commission.
9. Contracts filed by utilities for services at other than filed rates, and filings of rate deviations.
10. Filed contacts between utilities.
11. Material or reports which have been declared by Commission action to be open to public inspection.
12. Grade crossing data:

    Name of street and location and number of crossing.

    Number and description of tracks at crossing.

    Description of existing crossing protection and date installed.

    Accident experience at crossing, i.e., date and number of persons killed or injured only.
13. Special tariff docket applications filed pursuant to General Order No.109.
14. Powers of attorney and concurrences applicable in connection with transportation tariffs.
15. Copies of Interstate Commerce Commission filings, pleadings and copies of reports, orders, and certificates filed pursuant to the Interstate Commerce act.
16. Annual Reports relating to hospital service filed by common carriers by rail pursuant to Labor Code Sec. 5208.
17. All applications for the issuance or transfer of permits or licenses filed under the Highway Carriers' Act, City Carriers' Act, Household Goods Carriers' Act, For-Hire Vessel Act, Motor Transportation Brokers' Act, and Passenger Charter Party Carriers' Act, and all permits, license, authorizations and notices in connection therewith.

18. Certificates of insurance pertaining to bodily injury and property damage insurance, including notices of cancellation and reinstatement, bodily injury and property damage liability bonds.
19. Certificates of cargo insurance, notices of cancellation and notices of reinstatement.
20. C.O.D. bonds, required by General Order No 84-F, including notices of cancellations and notices of reinstatement.
21. Subhaul lease bonds, required by General Order No. 102-B, including notices of cancellation and notices of reinstatement.

Copies of any of the above-described records could be obtained upon request to the Commission's Secretary, and the records could also be inspected by any person at the Commission's offices in San Francisco or Los Angeles at any time during its regular business hours.

General Orders 66 through 66-B governed disclosure of Commission records from 1923 until 1974, when General Order 66-B was replaced by General Order 66-C, which was intended to provide even greater public access to Commission records in a manner consistent with the language and intent of the CPRA. We are aware of no challenges to the Commission's legal authority to adopt General Orders 66 through 66-C on the grounds that § 583 required an individual Commission or Commissioner order regarding disclosure of each document furnished by a utility, and did not permit the Commission to issue a decision or adopt a rule designating multiple classes of records containing information furnished to the Commission by public utilities as open to public inspection.

Nor are we aware of challenges to the explicit and implicit delegation to staff set forth in the several iterations of General Order 66. When members of the public request copies of records from the Commission's Secretary (a title replaced by "Executive Director"), or come to inspect public records at the CPUC's offices, staff is expected to, and does, determine whether requested records fall within a class of records designated as public by the Commission. A separate order authorizing disclosure of records designated as public is not required.

As noted in Resolution M-4801 and D.02-02-049, General Order 96-B, and the more recent Safety Citation Resolution Res. ALJ-274, the CPUC has confidence in its authority to delegate to staff responsibility to carry out its General Orders and other directives, as long as it provides sufficient guidance.

COMMENTS ON REVISED DRAFT RESOLUTION L-436

We modified initial Draft General Order 66-D in minor respects in response to the initial comments, with the understanding that further amendments would be made following

workshops. Revised Draft Resolution L-436 was circulated for comments on July 13, 2012. Comments were received from: CAC, CALTEL, CWA, CIC, Clean Coalition, DRA, PG&E, SDG&E/Sempra, SCE, and TURN.

CAC

CAC comments that the Commission should adopt Revised Draft General Order 66-D and should: 1) require additional automatic, regular, disclosures pursuant to D.06-06-066, etc.; 2) consider automatically updating procurement contract matrices on a quarterly or semi-annual basis. CAC also comments that: 1) under the dictates of D.06-06-066, data that is publicly available is not confidential; "confidential" procurement information is "market sensitive" for a maximum of three years, after which its must be released; 2) implementation of the limitations on redactions and the clear subsequent disclosure requirements in D.06-06-066 *et seq*., would improve public access to and transparency of utility procurement data; 3) the procurement contract databases already maintained by staff should be automatically disclosed on a quarterly or semi-annual basis; and 4) regular automatic disclosure should be required for additional categories of data in the matrix with limitations for confidential treatment to either one year or three years.

CAC further comments that it is appropriate to hold workshops on energy-related records and other records, in a series of discrete workshops; and that additions to the energy procurement matrix should be considered to limit mistaken redaction of information that is publicly available from other sources, such as "new and clean" heat rate information for generating facilities that are publicly available in permit applications, and actual operating heat rates that are reported annually on FERC Form 1s. CAC provides examples of such over-redaction.

CALTEL

CALTEL comments that: 1) although the CPUC has historically not received many CPRA requests for telecommunications records, the process proposed by the Draft Resolution will encourage carriers to use the CPRA to attempt to obtain financial and market share data and other confidential trade secrets of their competitors; 2) it is unlawful for the CPUC to disclose information subject to a CPRA exemption; 3) trade secrets are privileged and exempt from disclosure under the CPRA; 4) attorney work product exemptions cannot be overridden; 5) General Order 66-D should not be applied retroactively; 6) the Revised Draft Resolution does not adequately protect submitting parties' confidentiality interests; 7) Rule 2.2.3.2 should be modified to require notice and an opportunity to be heard and seek judicial relief when a company's confidential information is subject to subpoena or other discovery; 8) parties should have an opportunity to withdraw documents or file an appeal following denial of confidentiality; 9) General Order 66-C should remain in effect on an interim basis; 10) additional workshops should be held before Commission procedures are modified; 11) the CPUC

should develop an interim plan for maintaining the confidentiality of confidential information extracted by staff from confidential documents; and 12) the CPUC should develop specific templates for commonly recurring documents which contain information considered confidential by CALTEL members and develop specific forms for this reporting which protect legitimate confidentiality interests.

CIC

CIC comments that: 1) the Revised Draft Resolution continues to misconstrue § 583; 2) erroneously concludes that General Order 66-C is illegal because the "undue business disadvantage" exemption is not included in the CPRA; 3) the CIC supports the Commission's intent to proceed in as careful and detailed a manner so it can to the greatest extent possible reduce uncertainties on all sides regarding whether specific types of information submitted to, or generated by, the Commission, are confidential"; 4) the process of establishing clear and consistent new rules should be completed before the new General Order becomes effective in order to eliminate the unnecessary and harmful uncertainties the Draft Resolution seeks to avoid; 5) safety-related records should be addressed as a priority; 6) the Draft Resolution errs in finding General Order 66-C illegal; 7) the CPUC has the authority under §§ 583 and 701 to observe a business disadvantage exemption; 8) the Draft Resolution creates a complex and confusing process for confidentiality requests, thereby exposing providers to competitive harm; 9) the approach in the revised Draft Resolution does not survive a cost benefit analysis, since, among other things, few CPRA requests seek telecommunications provider records that implicate confidential materials or claims of confidentiality; - a more practical approach would be to contact providers once a CPRA request is received for a particular document; 10) the revised Draft Resolution improperly delegates confidentiality decisions to staff without adequate guidance; 11) the CPUC should not revise General Order 66-C until after it has conducted workshops; 12) the CIC supports the iterative workshop process outlined in the revised Draft resolution and urges the CPUC to complete the process before adopting a new General Order; and 13) if the CPUC decides to revise its confidentiality rules at this time, it should only adopt modifications regarding safety-related documents.

CWA

CWA comments that: 1) the Revised Draft Resolution includes significant improvements, such as the provision for a standing resolution at each CPUC business meeting that will (a) list all pending requests for confidential treatment of documents, and b) declare other recently received documents not accorded confidential status as public documents available for disclosure; 2) the revised Draft Resolution does not address CWA's concerns about transitional issues, formal proceedings, and confidential commercial information: e.g., it does not distinguish between information provided to, or created by, the CPUC, or ensure that proprietary information in confidential documents provided to

the CPUC in the course of routine oversight and reporting would receive the same level of protection that such information would receive if filed in a formal proceedings where non-disclosure agreements or protective orders are available; 3) documents submitted prior to the adoption of new General Order should remain subject to the procedures set by General Order 66-C, and well-justified expectations that commercial and financial information will be held in confidence absent a specific contrary determination by the CPUC or a Commissioner in the course of proceeding; 4) the revised Draft Resolution fails to respond to CWA's request for continuing protection for confidential commercial or market sensitive information; 5) the revised Draft Resolution does not respond to CWA's concerns about the burdens and delays the new approach to confidentiality may impose on complex CPUC proceedings: such proceedings involve large volumes of data and tight procedural schedules; with the majority of discovery disputes between DRA and utilities being resolved with no ALJ or CPUC involvement. If every workpaper or response to a DRA data request is treated as public, claims of confidentiality must be respected until a presiding officer, or the CPUC, has assessed the claim. The revised General order should provide that all documents submitted to DRA under a claim of confidentiality, in a formal proceeding, be treated as confidential absent a presiding officer or Commission ruling to the contrary; alternatively, an preferably, consideration of confidentiality issues regarding documents submitted in formal proceedings could be deferred until a request for such records is received from someone not subject to a non-disclosure agreement or protective order; 6) in order to continue with what has been a constructive process toward developing an appropriate General Order 66-D, the CPUC should pursue the workshops indicated in the Revised Resolution before adopting a new General Order.

Clean Coalition

The Clean Coalition comments that: 1) it strongly supports a presumption of transparency and non-confidentiality in all CPUC matters; 2) the Critical Infrastructure Information Act should not be interpreted to deem information confidential by default; 3) information released by other public agencies should be deemed as non-confidential until a coordinated policy change is adopted among such agencies; 4) specific information relating to energy procurement should be addressed in more detail, providing transparency with respect to well-functioning markets; 5) development and incorporation of specific criteria matrices should be discusses and possibly incorporated into the resolution; 6) while it is important to protect legitimately confidential information, the costs of denying public parties must be weighed against the need for, and benefits of, confidentiality; 7) where restrictions are warranted, the impact of such restrictions should be mitigated through anonymization and aggregation to allow public access to as much information as possible.

DRA

DRA comments that:1) the utilities' concerns that complex requirements impede the free flow of information is not persuasive since the new General Order is intended to streamline confidentiality requests; 2) the burden for establishing confidential treatment should remain with the party who propounds the information; 3) the proposal for a standing resolution at each CPUC meeting has merit and should be explored further; 4) development of the D.06-06-066 energy procurement matrixes and other industry specific matrices should occur in a formal rulemaking to preserve parties rights to due process; and 5) timeframes for staff to develop indexes and databases should be more clearly defined and include an ordering paragraph for the development of an advice letter "Docket Card" type database.

PG&E

PG&E comments that: 1) PG&E supports the Commission's plan to convene further workshops to discuss both procedural and substantive issues pertaining to disclosure of confidential information, and looks forward to participating actively in the workshops; 2) in the meantime, the CPUC should hold the Draft Resolution in abeyance, since both the Draft Resolution and associated General Order still raise issues of concern that would benefit from further discussion and revision; 3) the legality of delegation may be closely linked to the level of detailed guidance that the Commission provides to staff, and details should be worked out in workshops before the Draft Resolution or General Order is adopted; 4) the matrixes of D.06-06-066 were the result of extensive and detailed discussions and argument by the parties to that proceeding, and PG&E strongly opposes any efforts to re-visit that decision in workshops associated with this Draft Resolution; and 5) there has been some confusion among the participants about accessing the original and Revised Draft Resolution, as well as other participants' comments, and, while PG&E is not opposed to continuing with this informal resolution process, PG&E urges the CPUC to make sure that all parties are served with documents, including other parties' comments, in a timely manner.

SDG&E/Sempra

SDG&E/SoCalGas comments that: 1) the Revised Draft General Order 66-D must be amended to protect confidential utility information and "well-established" exceptions to public disclosure; 2) the proposed Public Records Office (PRO) resolution process is promising, and comports to California law, but requires further refinement in workshops; a) subdelegation law requires agency ratification of discretionary staff acts; b) the Commission recognized that staff cannot be subdelegated tasks requiring discretion and judgment; and c) the proposed PRO resolution process appears to adhere to California subdelegation law by because staff's discretionary acts must be ratified but the full Commission before becoming final; 3) the Revised Draft Resolution must be amended to

include specific procedural protections; 4) the General Order should not be applied retroactively; 5) notice of unauthorized disclosures should be provided; 6) whistleblowers and individuals should have to justify confidential treatment; 7) Commission decisions constitute state law for the purposes of the CPRA, and thus can be used to protect Commission records from disclosure; and 8) workshops should focus on areas where matrixes do not currently exist.

SCE

SCE reiterates and incorporates its comments on the initial draft of Resolution L-436, and additionally comments that the CPUC should make clear that it will not revisit the D.06-06-066 matrixes in the proposed workshops. SCE notes that the proceeding that resulted in those matrixes was a complex and extensive rulemaking that involved approximately 130 entities listed on the service list, over 260 filings, and 16 decisions. SCE notes that this proceeding took six years, and was finally closed in May, 2011. SCE does not believe there are any related or pressing energy procurement issues that must be addressed in the workshops that have not already been addressed in R.05-06-040, and that if parties have concern with the matrixes or issues from the Rulemaking, they should file a petition for modification in that Rulemaking

TURN

TURN comments that: 1) a determination that material is exempt from disclosure under the CPRA should not preclude parties in subsequent proceedings from seeking a determination that the document in question does not warrant confidential treatment; and that 2) further exploration of the issues raised in the Draft Resolution and the development of confidentiality matrices should be conducted in a rulemaking.

RESPONSE TO COMMENTS ON REVISED DRAFT RESOLUTION L-436

The initial round of comments, and the subsequent round of comments regarding the RDR reflect a number of common issues raised by multiple commenters, but also include issued discussed by only single commenters. We will address the common issues first:

Cal. Pub. Util. Code § 583

A number of commenters believe that Cal. Pub. Util. Code § 583 bars the CPUC from issuing decisions that authorize disclosure of broad classes of records. Some believe § 583 requires the CPUC to issue decisions authorizing disclosure of records furnished to the CPUC by a utility or affiliate on a case by case basis.

As we noted in our response to the initial round on comments on Draft Resolution L-436, we believe that CPUC decisions authorizing disclosure of broad classes of records is both legal and appropriate.

Section 583 states.

> No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

Section 583 does not include any language requiring that CPUC disclosure decisions be made on a case by case basis, or prohibiting the CPUC from issuing decisions that designate broad classes of records as being available to the public. We decline to read into the statute limitations that do not exist.

If regulated entities had a problem with CPUC decisions authorizing automatic public access to broad classes of records furnished to the CPUC by utilities, or generated by the CPUC, one might have expected them to raise their concerns sometime between 1923, when General Order 66 was adopted, and 1974, when General Order 66-B was replaced by General Order 66-C.

We also believe that the assertion that Cal. Pub. Util Code § 583 bars CPUC decisions authorizing disclosure of broad classes of records is inconsistent with other assertions by a number of commenters that the energy procurement matrixes of confidential and public procurement related records provides a useful model for future Commission confidentiality determinations. These matrix provisions identify classes of investor owned utility and electric service provider procurement related records that are open to the public, and classes of records that are confidential for periods up to three years. The matrixes were adopted in order to streamline determinations regarding the public or confidential status of procurement elated records provided to or maintained by the CPUC, thus reducing the need for case by case determinations.

Finally, we note that D.06-06-066, the decision establishing the matrixes lauded by many commenters, clearly explains the limits of § 583 as a barrier to disclosure.

> As both courts and this Commission have stated in the past (and as reiterated in the OIR), § 583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements

> for such treatment created by other statutes and rules. This is important because several of the parties claim that there is a legal presumption of confidentiality for all data. If this were true, the Commission would be legally obligated to protect whole swaths of information without first considering whether the information meets relevant legal tests for trade secrets, privilege, or other established provisions protecting data from disclosure. (D.06-06-066, as modified by D.07-05-032, at 27.)
>
> As we stated in the OIR, § 583 does not limit our ability to disclose information. As the United States Court of Appeals for the Ninth District noted in *Southern California Edison Company v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F. 2d 778, 783: "Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission's authority to issue such orders is unrestricted." Similarly, In *Re Southern California Edison Company* [Mohave Coal Plant Accident], D.91-12-019, 42 CPUC 2d 298, 300 (1991), states that § 583 "assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission" but does not limit our broad discretion to disclose information. [24] (D.06-06-066, as modified by D.07-05-032, at 28.)

Delegation

Several commenters assert that the Commission cannot lawfully delegate to staff the power to determine whether particular records furnished to the CPUC by a utility or affiliate fall within a class of records the CPUC has determined to available to the public. Others modified similar assertions made in the initial round of comments by conceding the CPUC may have the authority to delegate such responsibility to staff as long as it provides adequate guidance, and/or, as long as it provides for a thorough appeal of any such determinations, and/or ratifies staff actions at a later date.

In response to similar assertions in the initial round of comments, we noted that Staff made such determinations, without evident challenge or problems, throughout the decades when General Orders 66 through 66-B were in effect. When staff received

[24] [Fn. 33 in D.06-06-066.] "D.91-12-019 notes: "Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of documents as confidential. To justify an assertion that certain documents cannot be disclosed, the utility must derive its support from other parts of the law." 42 CPUC 2d at 301. That decision later states: "Further, simply citing Section 583 does not establish the confidentiality of a document. Section 583 does not discuss or define confidentiality, nor establish any privileges. In order to protect documents that would otherwise be released pursuant to Section 583, the utility must find its authority or relevant policy elsewhere." 42 CPUC 2d at 302-03."

requests for records that fell within any of the many broad classes of records identified as public in General Order 66-B, for example, staff did not request or require specific CPUC authorization before making the requested records available. In essence, the Commission's adoption in 1923 of a regulation intended to serve as authorization under § 583 for public access to several broad classes of Commission records served as an implicit CPUC delegation to staff of authority, and responsibility, for implementing that regulation be making the publicly available records available to the public.

Our Draft Resolution L-436 proposal to create new matrixes of public and confidential documents reflects our belief in the utility of some of the basic concepts embodied in our prior decades old General Orders 66 through 66-B. CPUC decisions that authorize automatic public access to broad classes of records, clearly identify classes of records not automatically open to the public, and give staff the responsibility of actually making those classes of records available to the public, should reduce our decisional workload and improve public access to our records, without in any way negating our responsibility to determine in the first place whether records furnished by utilities or affiliates are open to the public.

Our confidence in Commission staff's ability to make confidentiality determinations is reflected in General Orders 66 through 66-B, with their inherent assumption that staff could be trusted to provide the public with records in classes we identified as open to the public, and to withhold other records unless we specifically authorized disclosure. It is also reflected in our adoption of the energy procurement matrixes we, and several commenters, believe provides useful model for future disclosure determinations. Not only do we assume that staff will make records that fell within a matrix class designated as public available to the public, we trust that staff can determine when confidentiality periods expire.

Our confidence is also reflected in our decision adopting the energy procurement matrixes. Ordering Paragraph 16 of D.06-06-066, as modified by D.07-05-032, states: "We delegate to the Assigned Commissioner and ALJ authority to make changes to the Matrix as we gain experience with its use." In addition, we responded to utility requests that we give them time to disclose information designated as public as follows:

> Information that is public anywhere shall be public everywhere. Nothing in this decision allows any party to withheld information, or parts of information, already revealed, or required to be revealed, elsewhere. The IOUs also ask us to give them a period of time to release information this decision requires be public. We do not believe such a rule is required. Information that is required to be public shall be released in the ordinary course just as any public information is released. (D.06-06-066, as modified by D.07-05-032, at 73.)

As CAC notes, staff automatically posts on our internet site certain RPS PPA records when the three year confidentiality period for such records expires. This practice is consistent with the D.06-06-066 statement that: "Information that is required to be public shall be released in the ordinary course just as any public information is released." We are aware of no controversy regarding this practice, although we note CAC's request that we expand this approach to non-RPS PPA records as well.

We agree with commenters who express the opinion that the appropriateness of a delegation of authority to staff depends on the guidance we provide. We must provide fundamental policy decisions, and provide sufficient guidance to render staff's actions essentially "ministerial," as that term is interpreted in Resolution M-4801, D.02-02-049, and General Order 96-B, General Rules, § 9. This is a road we have travelled before, in a somewhat similar context, when we needed to establish a process through which Industry Division staff could reject or suspend advice letters, in accord with guidance we provided, in order to permit us to reject or suspend inappropriate advice letters that would otherwise become effective by default after 30 days, pursuant to Cal. Pub. Util. Code § 455.5. It was necessary for us to delegate such authority to staff, rather than issue a CPUC decision every time rejection or suspension proved necessary, since Cal. Pub. Util. Code § 311(g) requires that most draft decisions be circulated for public comment at least 30 days before the CPUC could take action regarding the draft decisions. It would have been impossible for us to meet both statutory deadlines: a 30-day default effective date, and a 30-day public comment period. We would have had to be prepared to reject or suspend advice letters before we received them.

We adopted delegation guidelines in Resolution M-4801; in D.02-02-049 we amended the guidelines and rejected an application for rehearing; when D.02-02-049 was appealed on the grounds we had unlawfully delegated authority to staff, the writ of review was denied. Our advice letter delegation guidelines were eventually incorporated in General Order 96-B, General Rules, § 9; which in § 15 also delegates to Industry Division staff authority to address and resolve issues regarding confidentiality.

CPRA Exemptions

CALTEL contends that the CPUC does not have authority to release information subject to a CPRA exemption. CALTEL states that: 1) Cal. Gov't. Code § 6253.3, which states that "A state or local agency mat not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to this chapter," cannot be read to support the ability of the CPUC to override statutory CPRA exemptions; 2) Cal. Gov't. Code § 6253(e) deals only with the manner and speed with which agencies are required to make documents subject to disclosure under the CPRA available, it does not authorize agencies to override CPRA exemptions; Cal. Gov't. Code § 6253(a) provides that public records are open to public inspection during an agency's office hours and that every person has a right to inspect any public records, except as hereafter provided, and that "Any reasonably segregable portion of a record shall be available for inspection by

any person requesting the record **after deletion of the portions that are exempted by law**." (emphasis added by CALTEL); 3) Cal. Gov't. Code § 6253(b) specifies that: "Except with respect to public records exempt from disclosure by express provisions of law, each state or local agency, upon a request … shall make the records promptly available…."; 4) Cal. Gov't. Code § 6253(c) gives agencies 10 days to respond to CPA requests, with a possible extension of up to an additional 14 days upon the existence of specified circumstances, but does give any agency authority to override CPRA exemptions; 5) Cal. Gov't. Code § 6253(e), which states that "Except a otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for faster, more efficient, or greater access to records than prescribed by the minimum standards set forth I this chapter," only gives agencies the right to find way to respond more rapidity and efficiently to CPRA request; it is not designed to permit agencies to override CPRA exemptions, since "Documents subject to CPRA exemptions are "otherwise prohibited by law" from disclosure; 6) *Black Panther Party v. Kehoe*, (1974) 42 Cal.App.3d 645, cited in the draft resolution, provides no support for the CPUC's reasoning, since that decision turned on whether an agency that disclosed information to one requester could selectively refrain from disclosing the same information to another party; Cal. Gov't. Code § 6254 specifically creates a right of agencies to open their own administrative files to public inspection, **except where another separate exemption from disclosure applies**, but there is "nothing in the decision which permits an agency to create new exemptions not provided by statute, nor to release any documents to which another statutory exemption applies" 7) *Re San Diego Gas and Electric Company* (1993) 49 Cal.P.U.C. 2d 241, the last authority cited by the CPUC for "its extraordinary assertion of Commission authority to ignore statutory exemptions from disclosure under the CPRA," is a decision of the CPUC itself, which cannot bestow upon itself administratively the authority to ignore exemptions created by statute."[25]

CALTEL is simply wrong. If an agency proposes to disclose records where disclosure is prohibited by law, a challenge to the agency's proposed disclosure may be appropriate. Agencies should not disclose records where disclosure is prohibited by law. If, however, an agency's decision to disclose is based on its interpretation of a CPRA exemption that is not based on a law prohibiting disclosure, the agency's action is discretionary.

The recent case of *Marken v. Santa Monica-Malibu Unified School District* (2012) 202 Cal. App.4th 1250 (*rev. denied*, 2012 Cal LEXIS 4200 (Cal., May 9, 2012), provides a timely confirmation of the CPUC's interpretation of the CPRA. Plaintiff sought a writ of mandate barring a school district from disclosing to the public certain records regarding its investigation of the plaintiff teacher's behavior toward students. The investigation records exonerated plaintiff from most of the charges leading to the investigation, but not from all charges. Plaintiff contended that the agency's decision to disclose an investigation report and letter of reprimand was not authorized under the CPRA because

[25] CALTEL comments at pp. 3-7.

the complaint was neither substantial nor well founded, and that the intended disclosure of his confidential personnel files would violate his rights of privacy protected by the Cal. Const., Cal. Gov't. Code, and Cal. Educ. Code. The Court disagreed:

> While "mindful of the right of individuals to privacy" (§ 6250), the Legislature has declared "access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." (Ibid.) Thus, the CPRA generally provides "every person has a right to inspect any public record …" (§ 6253, subd. (a)), "[e]xcept with respect to public records exempt from disclosure by express provisions of law … ." (§ 6253, subd. (b).) Section 6254, in turn, lists 29 categories of documents exempt from the requirement of public disclosure, many of which are designed to protect individual privacy, including, "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." (§ 6254, subd. (c); see also § 6254, subd. (k) [exempting "[r]ecords, the disclosure of which is exempted or prohibited pursuant to federal or state law"].) Section 6255, subdivision (a), also permits a public agency to withhold other records if it can demonstrate "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (202 Cal. App.4th at 1261-1262, *footnotes omitted*.)

> These statutory exemptions from mandatory disclosure under the CPRA must be narrowly construed. Cal. Const., art. I, § 3, subd. (b)(2) ["[a] statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access"]; *see Sonoma County Employees' Retirement Assn. v. Superior Court*, *supra*, 198 Cal.App.4th at p. 992.) Moreover, the exemptions from disclosure provided by section 6254 are permissive, not mandatory: They allow nondisclosure but do not prohibit disclosure. (*CBS, Inc. v. Block*, supra, 42 Cal.3d at p. 652; *Register Div. of Freedom Newspapers*, *Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905 [205 Cal. Rptr. 92]; *Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 656 [117 Cal. Rptr. 106]; *see* 68 *Ops.Cal.Atty.Gen*. 73 (1985).) Indeed, the penultimate sentence of section 6254 provides, "Nothing in this section prevents any agency from opening its records concerning the administration of the agency to public inspection, unless disclosure is otherwise prohibited by law." (*See also* § 6253, subd. (e) ["[e]xcept as otherwise prohibited by law, a state or local agency may adopt requirements for itself that allow for

> faster, more efficient, or greater access to records than prescribed by the minimum standards set forth in this chapter"].) (202 Cal. App.4th at 1262.)

The *Marken* court found that while an agency may have no discretion to disclose certain classes of information, where disclosure is expressly prohibited by law, agency officials cannot be compelled to exercise discretion in a particular manner. "As discussed, the exemptions from disclosure provided by section 6254 are permissive, not mandatory." (202 Cal. App.4th at 1266, fn. 12.) The exemptions in the CPRA protect only against required disclosure, not permissive disclosure. A party seeking to enjoin an agency's disclosure must establish that such a disclosure is 'otherwise prohibited by law.' (202 Cal. App.4th at 1266.)

Contrary to the evident belief of some commenters, the CPRA applies to records provided to, as well as records generated by, an agency. Cal. Gov't. Code § 6252(e) provides that: "'Public records' includes any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." Records received by the CPUC from entities it regulates relate to the conduct of the agency's business of regulating those entities.

Deferral of Confidentiality Determinations

Comments regarding initial Draft Resolution L-436 complained that Draft General Order 66-D § 3.1.2 permitted the CPUC to defer making confidentiality determinations regarding requests for confidential treatment, and suggest that the General order be amended to require timely determinations regarding every request for confidential treatment. Section 3.1.2. read, in part, as follows:

> This General Order does not require CPUC divisions to respond to requests for confidential treatment in every situation, or to respond within a specified time period. However, the receipt by the CPUC of a records request, subpoena for records, or other discovery request, will trigger a need for the CPUC to respond to the records request or discovery process within the time periods applicable to such requests or discovery. For this reason, our divisions are encouraged to review and respond to requests for confidential treatment as soon as practical.

When responding to the initial round of comments on Draft Resolution L-436, and amending § 3.1.2 to include the standing PRO resolution proposed by PG&E/SCE, we deleted the deferred determination option included in the original Draft Resolution.

In commenting on the Revised Draft Resolution, CWA commented that, at least with respect to confidential records provided to DRA during the course of a formal proceeding, it would more administratively efficient to provide that all such records

remain confidential unless disclosure is authorized by a presiding officer or the CPUC during the proceeding, without the need for individual requests for confidential treatment for each data request response or other record. CWA suggests "deferring the consideration of confidentiality issues with respect to documents submitted in the context of formal proceedings until a request for such documents is received from someone not subject to a non-disclosure agreement or a protective order in the subject proceeding. Absent such a request, Commission and parties' resources need not be expended on detailed and potentially contentious confidentiality reviews." [26] CIC suggested something similar.

We see merits to both approaches: determinations regarding every request for confidential treatment, in order to provide consistency and certainty, and deferral of determinations regarding confidential records routinely provided to DRA and/or others during formal proceedings, in order to avoid interfering with already tight procedural schedules, and wasting parties' and CPUC resources on numerous and burdensome filings that may result in contentious confidentiality reviews. In our ideal world, the development of carefully thought out public and confidential records matrices, and the implementation of streamlined procedures for requesting confidential treatment for records that fall within a class designated by the CPUC as confidential, would reduce by 90% any confusion regard what is, and is not, available to the public. In the real world, this is an issue about which reasonable minds can differ. This will be an issue for discussion during the procedural workshop we will direct staff to schedule.

Application of General Order 66-D to records previously filed with the CPUC

Several commenters express concern regarding the possible application of General Order 66-D provisions to records submitted to the CPUC before the new proposed General Order becomes effective. Commenting on the initial Draft Resolution, CCSF specifically requested the we apply the new disclosure principles to previously filed records, especially those where confidential treatment was accorded on the basis of claims that disclosure would place a company at an unfair business disadvantage, and others requested that we clarify the relationship between the proposed General Order and previous CPUC confidentiality determinations that may be at odds with new policies. There was concern that the proposed General Order would permit acceptance of new requests for confidential treatment on the basis of old CPUC decisions or rulings that may be contrary to the new policies.

We appreciate these comments because they highlight our need to be more precise in establishing rules for requesting confidential treatment and in explaining the intended relationship between the proposed General Order, previously filed records, and previously issued rulings and decisions. We note that we faced a somewhat similar issue in R.05-06-040, when we adopted the energy procurement public and confidential

[26] CWA Comments, p. 4.

information matrices. Prior to that Rulemaking, requests for confidential treatment for sensitive information in Power Purchase Agreements (PPAs) were processed in Energy Division Resolutions regarding the Advice Letter filings seeking approval of the PPAs. Different Resolutions granted different degrees of confidential treatment, for various periods of time.

In adopting the new matrices, the CPUC dealt with the potential inconsistency between new matrix confidentiality rules and past CPUC confidentiality determinations regarding records now subject to the matrices by declaring that the new matrixes were controlling, and superseded certain past conflicting PPA confidentiality determinations. This simplification created a great deal more certainty regarding whether or not specific PPAs could be disclosed, by standardizing the period for confidential treatment. Previously, when a request for a PPA was received, staff was required visit the file room and review the specific Advice Letter and resolution to determine whether disclosure was appropriate or not. Under the new system, staff can, and does, automatically post on our internet site Renewal Portfolio Standard (RPS) PPAs once the matrix confidentiality period expires.

On the other hand, we do not think it would be wise for us to implement the proposed General Order, once adopted, in a manner that rides roughshod over specific confidentiality determinations already made in formal proceedings, or in resolutions regarding advice letters, since this would both interfere with well-established expectations and create the potential for contentions that we were modifying our own prior decisions without appropriate due process. In R.05-06-040, parties with PPAs affected by the standardization of confidential treatment had ample opportunity to express their views before the CPUC consciously and thoughtfully changed the rules.

However, regulated entities have filed many records accompanied by requests for confidential treatment in contexts other than formal proceedings or advice letter proceeding; contexts in which the CPUC neither granted or rejected the assertion of confidentiality or request for confidential treatment. In cases where there has been no CPUC confidential determination, due process concerns regarding inappropriate changes of prior decisions are lessened, although those who submitted the records and asserted the need for confidential treatment may certainly have expected the records to be treated as confidential indefinitely.

In those situations, a nuanced approach may be necessary. We are aware that, in a number of situations, regulated entities routinely assert confidentiality for records not truly entitled to confidential treatment. If a regulated entity identifies a document it files with the CPUC as confidential, yet the filing is in response to a statute or order that provides that the document be available to the public, the fact that the entity may desire or expect confidential treatment does not suggest that we should defer to such prior, though sometimes ill-founded, expectations.

Regulated entities routinely label such documents as confidential pursuant to Cal. Pub. Util. Code § 583 and General Order 66-C, using these references as a shorthand way of expressing their desire for confidential treatment. Often such shorthand references are unaccompanied by further explanation.

Even where such references are perfectly appropriate, the applicability of § 583 and/or General Order 66-C does not create a vested right in confidentiality, or prevent the CPUC from authorizing disclosure in appropriate circumstances. As we note in numerous resolutions authorizing disclosure of CPUC investigation records, neither the statute nor the general Order present a substantive barrier disclosure: both offer the CPUC the opportunity to determine that records subject to those provisions shall be disclosed. Filing something "subject to § 583 and General Order 66-C" requires the regulated entity to accept all elements of these provisions; *e.g.*, both the initial expectation of confidentiality in many situations, and the possibility that the CPUC may decide to authorize disclosure. An expectation that we are bound by a regulated entity's identification of a document as subject to § 583 and General Order 66-C is not objectively reasonable, given the actual language of the statute and General Order.

We hope the above discussion provides some assurance that we do not intend to make public every document previously filed with the CPUC that may not be subject to confidential treatment under new matrices or policies. At the same time, we hope it demonstrates our understanding that the relationship between new rules and old records is not wholly susceptible to an easy one size fits all approach. We anticipate that our planned workshops will result in thoughtful consideration of these issues.

"Well-established Exceptions"

Several commenters recommend that we amend the Revised Draft Resolution and General Order to incorporate protections for market-sensitive, commercially-sensitive, and proprietary information similar to the potential protection currently provided by the General Order 66-C exemption for information, which if disclosed would place the company at an unfair competitive disadvantage.

We have no basic quarrel with the concept that much such information is well entitled to such protection, and that, in competitive markets, the public may be harmed if the disclosure of sensitive information places a company at an unfair competitive disadvantage, which in turn detrimentally affects the functioning of the market, thus reducing competition, and ultimately perhaps resulting in higher costs for utility ratepayers.

On the other hand, we also understand that over-assertion of relatively vague exemptions for "information that would place a company at a competitive disadvantage," or information that is "market sensitive," can similarly have adverse impacts on the public. If the amount of relevant information available to the public is so reduced that the public

cannot truly understand the actions of regulated entities or the CPUC itself, the public may rightly lack confidence that their best interests are being served.

CAC and IEP allude to this issue indirectly when asking the CPUC to ensure that generators have access to sufficient information regarding locations where additional energy is needed, and the operational characteristics necessary for an assessment of options for seeking to provide such energy. Public access to more information, even if some might argue its commercial sensitivity, may result in more effective competition by those who can use the additional information to more thoughtfully tailor proposed generation projects, which may increase real competition and improve the functioning of a competitive market, and, in turn, ultimately benefit ratepayers and other members of the public by creating the potential for lower rates or less wasteful project developments.

CAC and others also noted that while D.06-06-066 created matrixes that made specified market sensitive information confidential, it limits the duration of such confidential treatment. We note that a subsequent decision in that same proceeding, D.07-05-032, states that:

> D.06-06-066 also recognizes that market sensitive information is not indefinitely confidential and that generally the reasons for withholding such information from public disclosure are no longer relevant after a few years. D.06-06-066 adopted a flexible approach to this issue and generally most market sensitive information will be withheld from public disclosure for a three to five year period; however, should any particular information remain market sensitive after that time, the burden is on the utility claiming confidentiality to establish that it is indeed information that is still market sensitive and entitled to be treated as such. If the information at issue is no longer market sensitive, because, pursuant to D.06-06-066, it no longer has the potential to materially affect the market price for electricity, then there is no requirement that the Commission maintain its confidentiality. Not only is such information public, pursuant to the CPRA and the California Constitution, but there is no public policy that would weigh in favor of keeping it confidential. (D.07-05-032, at 5-6.)

While we decline at this time to amend proposed General Order 66-D to include specific General Order 66-C language we found vague and troubling, we reiterate our intentions to engage in carefully and thoughtful consideration of the market sensitive and proprietary information concerns of many commenters, during the planned workshops, and through our provision of other opportunities to be heard. We are confident that the CPRA and other provisions of law offer sufficient options for protecting information that truly requires confidential treatment, even without the use of the specific language in General Order 66-C § 2.2(b).

We strongly encourage regulated entities to utilize the Workshop Preparation Questionnaire attached to this Resolution as an initial vehicle for explaining specific concerns regarding records routinely provided to the CPUC, so that we will have the benefits of their detailed thoughts as we engage in the planned workshops and industry specific matrix development process.

Records subject to privileges held by a regulated entity submitting records to the Commission.

A number of commenters assert that the CPUC has no authority to disclose records which regulated entities assert include information subject to privileges asserted by the submitting entity, or to adopt a rule that notes that disclosure to the CPUC may result in a waiver of the asserted privileges. Privileges cited include the trade secret privilege, the attorney client privilege, the attorney work product doctrine, and the privilege against self incrimination.

We note that trade secret privilege is one of the most commonly asserted privileges, and is asserted to protect a wide range of information commonly submitted in formal Commission proceedings. The assertion of this privilege often accompanies assertions that such information is also subject to the GO 66-C § .2 (b) exemption for information which, if disclosed, would place a business at an unfair business disadvantage.

We have no quarrel with those who say we can or should not disclose information subject to the trade secret privilege. The privilege is set forth in Cal. Evid. Code § 1060. When we receive a subpoena or other discovery request seeking records that include trade secrets, we can cite Cal. Evid. Code § 1060 as a basis for nondisclosure. Similarly, when we receive a records request seeking records that include trade secrets, we can cite Cal. Gov't. Code § 6254(k) , which exempts from mandatory disclosure in response to records requests: "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

The existence of a trade secret privilege does not, however, mean that we must accept without question an assertion of the privilege. There are certain statutory elements that must be met before information can be considered to fall within the definition of a trade secret, and we are entitled to ask regulated entities to substantiate any claims of privilege.

Our reference to the potential waiver of a privilege through the submission of privileged information was not a reflection of any intent to disregard applicable and properly asserted privileges. Instead, it reflected our understanding that California statutes and case law identify a number of contexts in which the provision of privileged information results in the waiver of a privilege. Cal. Evid. Code. § 952, defines "confidential

communications," for the purposes of the attorney- client privilege, as follows: "confidential communication between client and lawyer" means information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted …" If such communications are disclosed in other situations, the privilege may be waived. Similarly, if a party places such communications at issue in a proceeding by raising an "advice of counsel" defense, the privilege may be waived.

If a regulated entity wants to provide privileged information to the CPUC, it should substantiate its right to assert the privilege prior to providing the information, and, where appropriate discuss options for protecting that material. Generally, the CPUC should be able to assess the existence and applicability of the privilege without reviewing the privileged records.

Those asserting privileges should not assume the CPUC needs or wants the privileged information in order to perform its regulatory responsibilities. A privilege against disclosure, such as the attorney-client privilege, gives the holder the right to refrain from providing the privileged information to the CPUC. The privilege does not give the holder the right to require that we accept the privileged information and agree to keep it secret.

Since the acceptance of a privilege claim and an agreement to keep such information from the public might detract from the CPUC's ability to conduct open and transparent proceedings, the agency may instead choose to rely on other public, sources of information. This is a choice for the CPUC to make, not the person asserting a privilege.

We note that both General Order 95-A and General Order 128, which address safety issues associated with overhead, and underground electric lines, require utilities to have procedures for investigating safety incidents, and state that those rules are not intended to "extend, waive, or limit, and assertion of privileges." (General Order 95-A, Rule 17; General Order 128, Rule 18.) These General Orders take a neutral position regarding privileged information associated with a utility's investigation of incidents involving its facilities; recognizing that such privilege may exist, indicating that the rules are not intended to waive such privileges, and also indicating an intent that the rules not to be viewed as an extension of such privileges.

If the CPUC does agree to accept and protect privileged information, it can, in appropriate circumstances, protect such information through its independent assertion of the official information privilege in Cal. Evid. Code § 1040. This privileges applies to information obtained in confidence by agency employees, and not previously disclosed to the public, where either disclosure if prohibited by federal or state statute, or there is need for confidentiality that outweighs the necessity for disclosure in the interest of justice.

Pre-Disclosure Notice

A number of commenter ask that we them with notice and an opportunity to object to disclosure every time we receive a records request or subpoena seeking disclosure of records they provided to the CPUC. While we are willing to explore the possibility that we could provide some degree of notice by posting records requests and subpoenas on our internet site, it is not practical for us to provide individual notice in every case; nor is it necessary or desirable. When we receive records request and subpoenas, we determine whether we have responsive records, and whether such records are available to the public, or, in the case of subpoenas, the subpoenaing party. If the records are subject to a statute prohibiting disclosure, a CPUC asserted privilege or CPRA exemption against disclosure, or a CPUC decision, order, or ruling prohibiting or limiting disclosure, we do not provide the requested records.

Given our responsibility to respond to CPRA requests within ten days, absent unusual circumstances, and to subpoenas within the time periods set forth in the Cal. Code of Civ. Pro., there is generally no time to locate the records, send notices, wait for replies, respond to such replies, and still get the records out the door in a timely fashion. In the Rulemaking resulting in the energy procurement matrixes, we rejected a similar request, by deleting a provision of a proposed model protective order. D.08-04-023 states:

> Paragraph 13. California Public Records Act (CPRA) Requests. This paragraph contains requirements that the Commission notify parties if it receives Public Records Act requests. We delete this provision in its entirety. The Commission will abide by its ordinary practice, consistent with the CPRA, but should not assume any additional burdens, or impose such burdens on third parties who exercise their rights to access information under the CPRA. (D.08-04-023 at 10.)

D.08-04-023 discussed various situations in which a person seeks access to information designated as confidential in a party's response to a data request, designated as confidential in a separate proceeding, and so on. The Decision provides that in many such situations, the requester, and the party that designated information as confidential, should meet and confer to seek to resolve issues regarding access to such information. This approach may be practical in a number of contexts, and we are willing to explore suggestions as to who such a process could be implemented in certain well-defined contexts in which a grant of confidential treatment is based primarily upon a regulated entity's claim that disclosure would reveal proprietary or commercially-sensitive information and thus place the entity at an unfair business disadvantage, rather than a more universal confidential determination that disclosure was prohibited by law, or by a CPUC asserted exemption or privilege not based on such a relatively subjective need for confidential treatment.

D.08-04-023 highlights a potential practical problem with this approach: the burden placed on the requester. Any member of the public can make a CPRA request, orally, or in writing. No special language or format is required, and requests are received in person, by phone, by fax, by mail, by electronic mail, and so on. The level of contact information provided by requesters varies, and we have no authority to require requesters to engage in any type of meet and confer process, although we can certainly offer the option of doing so. The procedural workshop we direct staff to schedule will provide a forum for further discussion of these issues.

D.06-06-066 Matrix Revisions

Several commenters recommend that the Commission implement existing energy procurement confidentiality matrixes by automatically disclosing records subject to limited term confidential treatment under the matrixes, once the period for confidential treatment exoires (CAC, IEP). Several comment that the matrixes should be revised to make additional records more accessible to the public.

Other commenters note that the D.06-06-066 matrixes were adopted after a lengthy proceeding that began in 2005 and ended in 2011, involved many parties, hundreds of documents, and 16 Commission decisions, and recommend that the CPUC not revisit those particular matrixes as part of its effort to make Commission records more accessible. SCE suggests that if parties wish to revisit those matrixes, they should file a petition for modification, or an application for rehearing.

We note that, to some extent, the CPUC already makes certain records subject to confidential treatment under the matrixes automatically available to the public once the period for confidential treatment expires. For example, the RPS Project Status Update Table on the commission's internet site provides access to RPS PPA once the three year confidentiality period expires. The CPUC is unable to provide precisely this same level of automatic disclosure with regard to non RPS PPA because of differences in the types of records associated with non-RPS PPA projects. We will direct staff to consider other contexts in which automatic disclosure of records once matrix confidentiality periods expire is practical.

While we understand that some parties want access to more records concerning energy procurement, we also understand SCE and PG&E's position that we should not at this time revisit the D.06-06-066 matrixes at this time, but should instead concentrate on areas where no matrixes currently exist.

We agree that our interests may be better served by considering the development of matrixes in areas where none exist before considering changes to the existing matrixes as a part of the L-436 process. If a party would like more automatic access to energy procurement records not currently covered by the existing matrixes, or access to additional information not covered by the matrixes, they can discuss such issues in the

energy-related workshop we intend to schedule. However, we will not re-open the D.06-06-066 matrixes for consideration in the workshop.

Future Workshops

We are accepting the recommendation of a number of commenters who suggested we hold workshops, or initial a formal Rulemaking, to more thoroughly explore procedural and substantive issues raised by Draft Resolution L-436. We found our initial workshop fruitful, and expect future workshops will also be productive.

We plan to hold at least 1 additional workshop on procedural issues to discuss potential further revisions to the proposed General Order 66-D in detail and circulate that revised version for a final round of comments and replies. We also plan to hold at least 3 other workshops to address confidentiality and disclosure issues on a subject matter, or industry specific, basis.

We desire and intend to move forward as promptly as practical, and to make our workshops as efficient and productive as possible. We believe this can best be accomplished if both our staff, and other stakeholders, engage in appropriate preparation for such workshops. In our opinion, our effort to develop additional matrixes identifying public, and confidential, information may proceed faster if we encourage the following workshop preparation:

1) We will require Staff to provide the public, and potential workshop attendees, with what might be considered a small resource library of statutes, regulations, Commission decisions, resolutions and other reference material that can be used to provide a common source of information for people to consider when making recommendations regarding what should be included in specific matrix categories. We believe this may help stakeholders avoid the much less useful situation in which various sides argue for or against confidential treatment based on broad philosophies, or generic and ill defined categories, rather than on the basis of specific and explicit statutory language, and/or tightly focused policy discussion.

   For example, Pub. Util. Code § 7912 requires that: utilities of a certain size to file annual reports that include a specified and detailed list of information regarding the number of customers the utility serves in California, the number of utility employees who reside in California, and other details, and requires the CPUC to post that information on the internet within a reasonable period of time. This type of explicit statutory language should, we would expect, limit the range of arguments that could be advanced for or against the

disclosure of information subject to that section of the Cal. Pub. Util. Code.

2) Utilities and other stakeholders should consider using the Workshop Preparation Questionnaire attached to the initial Draft Resolution L-436 as a potentially useful template for describing confidentiality concerns associated with the specific types of reports and records the stakeholders commonly submits to the CPUC on a routine basis, or provides in response to data requests, *etc*. The more detailed the lists of documents or specific types of information the utility is most concerned about being available to the public, the more likely it is that a carefully crafted matrix could accommodate truly legitimate confidentiality concerns, without hampering required public access to information on the basis for speculative or generic fears and concerns

We will order Staff to schedule the following workshops, with the procedural workshop to be scheduled as soon as practical:

1) Procedural Issues workshop: Possible topics include, but are not limited to, the following: 1) communications flow between utilities and DRA prior to, and during the course of, CPUC proceedings; 2) utility responses to information requests, records, request, and data requests from CPUC staff; and the CPUC's responses to records requests, discovery, and data requests seeking access to records of such utility responses; 3) CPUC responses to records requests, discovery, and data requests seeking information subject to a utility request for confidential treatment that has been granted by the CPUC, or remains pending; with the possibility of distinguishing between requests for confidential treatment that are based on statutory prohibitions or similar explicit limitations on disclosure, and those that are based on a more company specific assertion of a basis for confidential treatment (*e.g*., assertions that information is subject to a utility's trade secret privilege, that disclosure would interfere with the functioning of a competitive marketplace (and thus potentially increase utility expenses, and costs borne by ratepayers), with the possibility of trying to provide utilities making such more individualized assertions more individualized opportunities to defend such assertions in CPUC or judicial proceedings; 4) Public Records Office Resolution refinements; and 5) modification of the proposed Division initial processing of requests for confidential treatment.

2) Safety-related records: Possible topics include, but are not limited to, the following: 1) routine disclosure of safety-related reports utilities are required to provide to other state or federal agencies pursuant to laws and regulations of those agencies, where the reports are made available to the public by such agencies, where a copy of such reports is also provided to the CPUC [we already post some such reports, and will be expanding this practice]; 2) routine disclosure of safety-related reports utilities routinely provide to the CPUC in response to laws governing the CPUC, or CPUC decision, order, or rulings; (*e.g.*, G.O. 165 Rports; G.O. 112-E Reports, *etc.*); the need, or absence of need, to redact any information from reports provided to such reports before they become available to the public; 3) routine disclosure of records of completed CPUC safety-related audits or inspections; after any necessary and appropriate redactions, and potentially, after the provision of an opportunity for the utility to review draft audit findings, and respond to such findings and recommend appropriate redactions, subject to the CPUC's independent determination regarding the appropriateness of any such redactions) ; and the need, if any, for redactions of specified information is such records; 4) routine disclosure of records of completed CPUC safety-related investigations, after any necessary and appropriate redactions, and potentially, after the provision of an opportunity for the utility to review draft investigation findings, and respond to such findings and recommend appropriate redactions, subject to the Commission's independent determination regarding the appropriateness of any such redactions) ; and the need, if any, for redactions of specified information in such records; 5) routine disclosure of the subset of a safety-related investigation file that includes information regarding routine inspections and audits that would routinely be disclosed in the absence of the safety-related investigation; 6) the disclosure/confidential treatment policies that should apply to records of transit agency incident investigations audited or otherwise reviewed by the CPUC; 7) the applicability, if any, of the provisions, or principles, in Cal. Gov't. Code § 6254(f) to CPUC safety-related investigation records; 8) whether disclosure of utility employee safety training certifications and similar records is useful or essential to an understanding of a safety-related incident; 9) the level of detail of information regarding utility facilities that must or should be disclosed in order to provide the public with adequate information regarding the location and potential safety of utility facilities; 10) the level of detail of information regarding utility facilities that can and should be withheld from the public because it is unavailable from other sources and might provide evil-doers

knowledge they could use to destroy or disrupt utility facilities and operations; and 12) the best way to craft disclosure matrixes or policies to ensure that any such matrixes do not prevent the disclosure of detailed information regarding existing or proposed utility facilities that is routinely made public as part of a formal CPUC proceeding, an environmental review conducted by the CPUC or an environmental contractor of the CPUC or by another governmental agency, an application or similar informal (*e.g*. G.O. 88) proceeding through which permission is sought for grade crossing safety modifications; when such level of detail might in other contexts be considered unwise to make public.

3) Communications provider records: Possible topics include, but are not limited to, the following: 1) records relating to user fees paid by communications companies; 2) records associated with 3) records associated with programs subsidized by the public, or by communications provider customers (applications, service area or quality of service maps, *etc*.) 4) CASF records; 5) tariff archives maintained by utilities, but not the CPUC, whether still in use by virtue of incorporation into service agreements that have may have replaced standard tariff offerings, or obsolete, but still requested from the Commission by members of the public; 6) service quality records; 7) wiretap event reports, if any, filed pursuant to General Order 104; 8) annual reports; 9) information in Federal Communications Commission (FCC) Form 477 Reports filed by communications providers, with identification of the types of information in such reports for which assert the need for confidentiality, pursuant to FFC regulations, and of the types of information in such reports for which no confidential claim is typically asserted.

4) Energy-related records: Possible topics include, but are not limited to, the following: 1) issues related to disclosure of records included in D.06-06-066 matrixes [*e.g*., automatic disclosure/posting where confidentiality period expires, options for refining matrixes (through action authorized in D.06-06-066 and its progeny, or otherwise; enforcement/ implantation issues raised by commenters, *etc*.]; 2) RPS Project Status Table Database, non-RPS Project database, reasons for differences in current automatic positing practices; 3) disclosure of additional resource adequacy information; disclosure of location of corporate solar and other renewable projects subsidized by ratepayers or the public, to allow the public, and/or prospective solar installation customers, to see what types of

facilities they help subsidize, or might consider purchasing; 4) building energy usage information need for building energy efficiency rating information required to be provided to potential purchasers; 5) advice letter records, including dates associated with receipt, protest period, protest, service of protests, responses to protests, modification of the advice letter, etc; and 6) definition of "market sensitive information," and similar terms, in contexts other than procurement records subject to existing matrixes, *etc.*

FINDINGS OF FACT

1. The CPUC's guidelines for access to public records, set forth in General Order 66-C, include many provisions that are inconsistent with the provisions of the California Public Records Act (CPRA) (Cal. Gov't. Code § 6250 *et seq*.) and other laws governing the disclosure of records and information, and the appearance of CPUC staff in response to subpoenas.

2. The public interest would be served by the CPUC's adoption of regulations regarding the disclosure of CPUC records that were consistent with current law and with the public records disclosure policies set forth in Article 1, § 3 of the California Constitution, and the CPRA.

3. The creation of a publicly-accessible index or database of CPUC records that identifies the classes of records maintained by the CPUC, and the status of their accessibility to the public, or a subset of the public, would be in the public interest.

4. The creation of industry-specific matrices that list specific classes of documents and information that will be accessible to the public, and specific classes of documents and information that will receive confidential treatment for specified periods of time, would be in the public interest. These matrices will guide submitters and reviewers of requests for confidential treatment, as do the matrices developed through D.06-06-066.

5. The development of a publicly-accessible database of requests for confidential treatment of records or information provided to the CPUC, and the CPUC's responses to such requests, would be in the public interest. Such requests are received in motions for leave to file records under seal, proposed non-disclosure agreements, responses to data requests, advice letter filings applications that request that portions of the application filing be kept confidential, and other contexts. Such a database would permit CPUC staff, regulated entities, other governmental entities, and members of the public, to more readily determine whether records or information was available to the public, or was subject to a CPRA exemption, a privilege, or any other legal authority prohibiting or restricting disclosure.

6. The CPUC's disclosure of records, or portions of records, that include information that, if disclosed, could jeopardize the safety of regulated entity facilities and operations, is not in the public interest; to the extent such records or information is subject to a CPRA exemption, CPUC-held privilege, or other provision of law or regulation limiting disclosure.

7. While CPUC investigations of safety-related incidents remain open, the public disclosure of the CPUC's investigation records could compromise the CPUC's investigation.

8. Given the CPUC's need to conduct its investigation effectively and efficiently, the public interest in non-disclosure of the complete files of active investigation records clearly outweighs the necessity for public disclosure.

9. In many circumstances, routine CPUC inspection and audit records, records of the physical layout and crossing protection installed at a rail crossing, and similar records that may be obtained and analyzed in a safety incident investigation, but not be generated as a part of the investigation, could be disclosed while the investigation remained open without compromising the ability of the CPUC or other governmental entities to complete the investigation effectively and efficiently.

10. Records requests, and subpoenas seeking open investigation records and/or the appearance of Commission safety staff, received during an open safety-related investigation may seriously interfere with the CPUC's ability to complete the investigation effectively and efficiently.

11. Once a CPUC investigation of a safety-related incident is complete, the investigation is complete, the public interest will generally favor disclosure with the exception of: information subject to a statute prohibiting disclosure; personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and information subject to a Commission-held privilege or limitation on disclosure.

12. While a CPUC safety inspection or audit of the facilities and/or operations of a regulated entity is open, the public disclosure of the CPUC's entire inspection or audit records could compromise the Commission's ability to complete the inspection or audit effectively and efficiently.

13. Once the CPUC has completed a safety inspection or audit of the facilities or operations of a regulated entity, the public interest will generally favor disclosure of the completed inspection or audit records, with the exception of: information subject to a statute prohibiting or limiting disclosure; personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy; and information subject to a Commission-held privilege or limitation on disclosure, and

detailed information regarding utility facilities, systems, and operations which, if disclosed, could create a risk of harm to utility facilities, utility employees, and the public, to the extent such information is subject to one or more CPRA exemptions.

14. While CPUC investigations of matters involving a concrete and definite prospect of law enforcement action, by the CPUC or another governmental entity, remain open, the public disclosure of the CPUC's investigation records could compromise the CPUC's investigation.

15. Once a CPUC investigation of matters involving a concrete and definite prospect of law enforcement action, by the CPUC or another governmental entity, is completed, the necessity for confidentiality may be reduced. If the investigation results in law enforcement action, by the CPUC or another governmental entity, disclosure of the CPUC's investigation records, or portions of such records, may be necessary for the resolution of the law enforcement action. However, there may be a necessity for confidential treatment of such completed law enforcement related investigations, or portions of records, even after the investigation is completed. Disclosure may compromise the effectiveness or integrity of the investigation or a related investigation, may compromise confidential sources of information, or raise other concerns. A uniform decision regarding the disclosure of such investigations records once the investigation is closed would be inappropriate.

16. The public interest will generally favor the disclosure of safety-related reports filed in compliance with federal laws and regulations, to the extent such records are not designated as confidential and subject to a federal restriction on disclosure to the public.

17. The public interest will generally favor the disclosure of safety-related reports filed in compliance with state laws and regulations, to the extent such records, or portions of such records, are not designated as confidential and subject to a CPRA exemption, privilege, or other limitation on disclosure to the public.

CONCLUSIONS OF LAW

1. The California Constitution favors disclosure of governmental records by, among other things, stating that the people have the right of access to information concerning the conduct of the peoples' business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny. The California Constitution also requires that statutes, court rules, and other authority favoring disclosure be broadly construed, and that statutes, court rules, and other authority limiting disclosure be construed narrowly; and that any new statutes, court rules, or other authority limiting disclosure be supported by findings determining the interest served by keeping information from the public and the need to protect that interest. Cal. Const. Article I, §§ 3(b) (1) and (2).

2. The general policy of the CPRA, Cal. Gov't. Code § 6250, *et seq*., favors disclosure of records: "In enacting this chapter, the Legislature, mindful of the rights of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state." Cal. Gov't. Code § 6250.

3. The CPUC is a "state agency" as defined in Cal. Gov't. Code § 6252(f), and is therefore subject to the CPRA.

4. The CPUC cannot allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to the CPRA. Cal. Gov't. Code § 6253.3.

5. The CPRA "does not allow limitations on access to a public record based upon the purpose for which the record is being requested, if the record is otherwise subject to disclosure." Cal. Gov't. Code § 6257.5

6. Justification for withholding a public record in response to a CPRA request must be based on specific exemptions in the CPRA or upon a showing that, on the facts of a particular case, the public interest in nondisclosure clearly outweighs the public interest in disclosure. Cal. Gov't. Code § 6255.

7. Cal. Gov't. Code § 6254(a) exempts from disclosure, in response to records requests, "Preliminary drafts, notes, or interagency or intra-agency memoranda that are not retained by the public agency in the ordinary course of business, if the public interest in withholding the records clearly outweighs the public interest in disclosure."

8. Cal. Gov't. Code § 6254(b) exempts from disclosure, in response to records requests, "Records pertaining to pending litigation to which the public agency is a party, or claims made pursuant to Division 3.6 (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled."

9. Cal. Gov't. Code § 6254(c) exempts from disclosure, in response to records requests, "Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.'

10. Cal. Gov't. Code § 6254(e) exempts from mandatory disclosure, in response to records requests, "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."

11. Cal. Gov't. Code § 6254(f) exempts from mandatory disclosure, in response to records requests, "Records of complaints to, or investigations conducted by, or records of intelligence information or security procedures of, the office of the

Attorney General and the Department of Justice, and any state or local police agency, or any investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes." If the records concern an incident involving personal injury or property damage or loss as result of an incident caused by arson, fire, explosion, larceny, or vandalism, or other specified events, state and local law enforcement agencies are, in most cases, required to disclose a substantial amount of information from the incident files to victims of the incident and other specified individuals and entities.

12. The Cal. Gov't. Code § 6254(f) exemption for record of complaints to, or investigations conducted by, any state or local agency for licensing purposes does not apply when a request for inspection of such records is made by a district attorney. Cal. Gov't. Code § 6262.

13. There is no statute forbidding disclosure of the records of safety investigations initiated by the CPUC, although portions of such records are subject to one or more CPRA exemptions from mandatory disclosure in response to records requests, and to other provisions of law limiting access to such records.

14. Cal. Gov't. Code § 6254(g) exempts from mandatory disclosure, in response to records requests, "Test questions, scoring keys, and other examination data used to administer a licensing examination, examination for employment, or academic examination."

15. Cal. Gov't. Code § 6254(k) exempts from disclosure, in response to records requests, "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

16. Cal. Gov't. Code § 6254(l) exempts from disclosure, in response to records requests, "Correspondence of and to the Governor or employees of the Governor's office or in the custody of or maintained by the Governor's Legal Affairs Secretary."

17. Cal. Gov't. Code § 6254(n) exempts from disclosure, in response to records requests, "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."

18. Cal. Gov't. Code § 6254(r) exempts from disclosure, in response to records requests, "Records of Native American graves, cemeteries, and sacred places and records of Native American places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code maintained by, or in the possession of, the Native American Heritage Commission, another state agency, or a local agency."

19. Cal. Gov't. Code § 6254(aa) exempts from disclosure documents prepared by or for a state agency that assesses its vulnerability to terrorist attack or other criminal acts intended to disrupt the public agency's operations and that is for distribution or consideration in a closed session.

20. Cal. Gov't. Code § 6254(ab) exempts from disclosure "critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the California Emergency Management Agency for use by that office, including the identity of the person who or entity that voluntarily submitted the information."

21. Cal. Gov't. Code § 6254.5 provides that a state or local agency's disclosure of public records subject to a CPRA exemption does not result in a waiver of the agency's right to assert CPRA exemptions in response to records requests where the disclosure is: (a) Made pursuant to the Information Practices Act (Cal. Civ. Code § 1798 *et seq*.; (b) Made through legal proceedings or as otherwise required by law; (c) within the scope of disclosure of a statute which limits disclosure of specified writings to certain purposes; or (e) "Made to any governmental agency which agrees to treat the disclosed material as confidential. Only persons authorized in writing by the person in charge of the agency shall be permitted to obtain the information. Any information obtained by the agency shall only be used for purposes which are consistent with existing law."

22. Cal. Gov't. Code § 6254.9(a) provides that computer software developed by a state or local agency is not itself a public record under the CPRA.

23. Cal. Gov't. Code § 6254.23 provides that nothing in the CPRA or any other provision of law "shall require the disclosure of a risk assessment or railroad infrastructure protection program filed with Public Utilities Commission, the Director of Homeland Security, and the Office of Emergency Services pursuant to Article 7.3 (commencing with Section 7665) of Chapter 1 of Division 4 of the Public Utilities Code."

24. Cal. Gov't. Code § 6260 provides that the provisions of the CPRA shall not be deemed in any manner to affect the rights of litigants, including parties to administrative proceedings, under the California laws of discovery, nor to limit or impair any rights of discovery in a criminal case. Thus, CPUC responses to discovery may not base objections to disclosure on the existence of one or more applicable CPRA exemptions.

25. The CPUC must allow the inspection or copying of any public record or class of public records not exempted by the CPRA, when requested by a district attorney. Cal. Gov't. Code § 6263.

26. If a district attorney petitions a court of competent jurisdiction to require the CPUC to allow him or her to inspect or receive a copy of a public records or class of records not exempted under the CPRA, after the agency fails or refuses to allow inspect or make copies in a timely manner, the court may order the CPUC to permit inspection or copying unless the public interest or good cause in withholding such records clearly outweighs the public interest in disclosure. Cal. Gov't. Code § 6264.

27. Disclosure of records to a district attorney under the provisions of the CPRA does not change the status of the records under any other provision of law. Cal. Gov't. Code § 6265.

28. Cal. Gov't. Code § 11125.1(a) provides that, notwithstanding Cal. Gov't. Code § 6255 or any other provisions of law, agendas of public meetings and other writings, when distributed to all, or a majority of all, of the members of a state body such as the Commission in connection with a matter subject to discussion or consideration at a public meeting of the body, are disclosable public records under the CPRA, and shall be made available upon request without delay. This section does not include any writing exempt from public disclosure under Cal. Gov't. Code §§ 6253.5, 6254, or 6254.7, Cal. Pub. Util. Code § 583.

29. Confidential communications between Commissioners or CPUC staff, and CPUC lawyers, that are subject to the lawyer-client privilege set forth in Cal. Evid. Code § 950 *et seq*., are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

30. Information acquired in confidence by a public employee in the course of his or her duty and not open, or officially disclosed to the public, may be subject to the official information privilege set forth in Cal. Evid. Code § 1040. Records, or portions of records, that include information subject to the CPUC's official information privilege are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

31. Cal. Evid. Code § 1040(b)(1) provides state agencies an absolute privilege to refuse to disclose official information, and to prevent another from disclosing official information, if disclosure is forbidden by an act of the Congress of the United States or a California statute. Records, or portions of records, that include information subject to the Commission's Cal. Evid. Code § 1040(b) (1) official information privilege are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

32. Cal. Evid. Code § 1040(b)(2) provides state agencies a privilege to refuse to disclose official information, and to prevent another from disclosing official information, if disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the

necessity for disclosure in the interest of justice. In determining whether disclosure is against the public interest, the interest of the CPUC as a party in the outcome of the proceeding may not be considered. Records, or portions of records, that include information subject to the CPUC's Cal. Evid. Code § 1040(b) (2) official information privilege are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

33. Cal. Evid. Code § 1041 provides that a public entity such as the CPUC has a privilege to refuse to disclose the identity of a person who has furnished information in confidence to a law enforcement officer, a representative of an administrative agency charged with the administration or enforcement of the law alleged to be violated, purporting to disclose a violation of a law of the United States or of this state or of a public entity in this state, and to prevent another [other than the informant], if: 1) disclosure is forbidden by an act of the Congress of the United States or a statute of this state; or 2) disclosure of the identity of the informer is against the public interest because there is a necessity for preserving the confidentiality of his or her identity that outweighs the necessity for disclosure in the interest of justice. In determining whether disclosure is against the public interest, the interest of the CPUC as a party in the outcome of the proceeding may not be considered. Records, or portions of records, identifying such informers, are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

34. Cal. Evid. Code §§ 1060 and 1061(a)(1) provide that the owner of a trade secret, as defined in Cal. Civil Code § 3426.1(d) or Penal Code § 499c, may assert a privilege to refuse to disclose the trade secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. Cal. Civil. Code § 3426.1(d) defines "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process that: (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." Records, or portions of records, that include information subject to the trade secret privilege are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

35. Cal. Evid. Code §§ 1115 et seq. provide that communications, negotiations, or settlement discussions by and between participants in the course of a mediation or mediation consultation are confidential, and writings prepared for, or in the course of or pursuant to , a mediation, or mediation consultation, and evidence of things said, or admissions made, for the purpose of, in the course of, or pursuant to, a mediation or mediation consultation are not admissible or discoverable, except as otherwise provided in Cal. Evid. Code Chapter 5. Records and information subject

to the Cal. Evid. Code limitations on the admissibility and discovery of mediation records and information are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k). See also, Rule 12.6 of the CPUC's Rules of Practice and Procedure.

36. Writings that reflect an attorney's impressions, conclusions, opinions, or legal research or theories are not discoverable under any circumstances. Cal. Code Civ. Pro. § 2018.030(a) Such writings are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

37. The work product of an attorney, other than a writing described in Cal. Code Civ. Pro. § 2018.030(a), is not discoverable unless a court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense, or will result in an injustice. Such work product is exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k).

38. Cal. Pub. Contracts Code § 10304 provides that bids for public contracts are confidential until the public opening and reading of the bids takes place.

39. Cal. Pub. Contracts Code § 10305 provides that after bids for public contracts are opened, they are available for public inspection.

40. Cal. Pub. Util. Code § 583 does not limit the CPUC's ability to order disclosure of records.

41. Cal. Pub. Util. Code § 583 authorizes the CPUC to make broad, as well as narrow, decisions regarding disclosure of records.

42. Cal. Pub. Util. Code § 583 notes that the Cal. Pub. Util. Code specifically requires certain matters to be open to public inspection. Section 583 provides that other information furnished by a public utility, subsidiary or affiliate of a public utility, or corporation which holds a controlling interest in a public utility, concerning such matters, may not be open to the public or made public without a CPUC order, or action by the CPUC or a Commissioner in the course of a hearing or proceeding.

43. Cal. Pub. Util. Code § 315 does not limit the CPUC's disclosure of accident reports filed with the CPUC, or orders and recommendations issued by the CPUC.

44. Cal. Pub. Util. Code § 315 prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property."

45. Cal. Pub. Util. Code § 324 authorizes the Executive Director to release to the Director of the California Department of Industrial Relations any information concerning an person, corporation, or other entity under the CPUC's jurisdiction and control, relevant to the enforcement of California workers' compensation laws.

46. Cal. Pub. Util. Code § 353.15(a) requires that customers that install distributed energy resources with a capacity greater that 10 kilowatts must report to the CPUC, on an annual basis, as recorded on a monthly basis: the heat rate for the resource; 2) the total kilowatt hours produced in the peak and off-peak periods as established by the ISO, and 3) emissions data for the resources, as required by the California Air Resources Board or the appropriate air quality management district; and § 353.15(b) requires the CPUC to release that information in a manner that does not identify the user of the distributed energy resource.

47. Cal. Pub. Util. Code § 392.1(a) requires the CPUC to compile and regularly update the following information regarding energy service providers (ESPS): names and contact numbers of registered providers, information to assist consumers in making service choices, and the number of customer complaints against specific providers in relation to the number of customers served by those providers and the disposition of those complaints. Registered entities must file with the CPUC information describing the terms and conditions of any standard service plan made available to residential and small commercial customers. The CPUC is required to maintain and make generally available a list of entities offering electrical services operating in California. This list must include all registered providers and those providers not required to be registered who request to be included in the list. The CPUC is required to make this information available at no charge, upon request.

48. The CPUC has authority under Cal. Pub. Util. Code §§ 583 and 701 to adopt broadly applicable regulations regarding disclosure of records or information in the custody of the Commission that provide that the CPUC's records are public, with limited exceptions for disclosure is prohibited by law or the records are otherwise subject to specified exemptions from mandatory disclosure.

49. The CPUC has authority under Cal. Pub. Util. Code §§ 583 and 701 to issue case specific decisions, orders, or rulings regarding the disclosure of records or information in the custody of the CPUC.

50. Cal. Pub. Util. Code § 5228 provides that any CPUC employee who divulges any fact or information which comes to his or her knowledge during the course on the examination of the accounts, records, and memoranda of household goods carriers, except as ordered or directed by the Commission or by a court of competent jurisdiction is guilty of a misdemeanor. Cal. Pub. Util. Code § 5228 does not limit the CPUC's authority to order disclosure of household goods carrier records, and there is no CPRA exemption specific to agency records regarding household goods carriers. The CPRA does include a number of exemptions for portions of the CPUC's records regarding household goods carriers that include confidential personal information and other information subject to legal prohibitions or limitation. The CPUC could order its employees to provide access to its records regarding household goods carriers, with the exception of portions of those records subject to an appropriate CPRA exemption, without compromising its ability to maintain the confidentiality of portions of its records than can and should remain confidential.

51. Cal. Pub. Util. Code § 7912(a) requires public utilities employing more than 750 total employees to annually report: 1) the number of customers the utility serves in California; 2) the percentage of the utility's total domestic customer base that resides in California; 3) the number of California residents employed by the utility, 4) the percentage of he utility's total domestic workforce that resides in California, 5) the capital investment in the utility's tangible and intangible plant with a service life of more than one year, in California during the yearly reporting period, and 6) the number of California residents employed by independent contractors and consultants hired by the utility, when the utility obtained such information from the consultant or contractors, is not contractually prohibited from disclosing the information to the public. Cal. Pub. Util. Code § 7912(b) requires the CPUC to report this information to specified legislative committees, and to make the information available to the public on its internet site.

52. Cal. Gov't. Code § 6260 states that the provisions of the CPRA shall not be deemed in any manner to affect the rights of litigants, including parties to administrative proceedings, under the laws of this state, nor to limit or impair any rights of discovery in criminal cases. Therefore, CPUC responses to discovery must be based on legal authority other than the CPRA.

53. The existence of an applicable CPRA exemption is not in itself a basis for a CPUC objection to discovery; objections must be based on the Commission's assertion of an applicable Commission-held privilege, or other legal authority relevant to discovery. Cal. Gov't. Code § 6260.

54. A number of CPRA exemptions apply to records and information that are subject to privileges or other legal authority relevant to discovery. *E.g.*, Cal. Gov't. Code §§ 6254(k); 6254.23. Thus, records or information subject to CPRA exemptions may

also be subject to privileges or other legal authority that may be asserted in response to discovery.

55. 23 United States Code (U.S.C.) § 409 states that, notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of railway-highway crossings, pursuant to 23 U.S.C. § 130 or for the purpose of developing and highway safety construction improvement project which may be implemented using federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data. CPUC records, or portions of records, that reference safety enhancement of railway-highway crossings pursuant to 23 U.S.C. § 130 [commonly, "Section 130"], are subject to a federal statutory limitation on discovery, and thus are exempt from disclosure in response to records requests, pursuant to Cal. Gov't. Code § 6254(k), and nondiscoverable, pursuant to Cal. Evid. Code §§ 911 and 1040(b) (1).

ORDER

1. Draft General Order 66-D, set forth in Attachment 1 to this Resolution, is held in abeyance pending further refinement, after workshops, of new procedures regarding access to CPUC records and regarding the processing of requests for confidential treatment of information submitted to the CPUC.

2. CPUC staff shall prepare and periodically update Guidelines for Access to Commission Records that provide the public with information regarding the inspection and copying of CPUC records, including information regarding fees that may be imposed for copies of CPUC records. These guidelines shall be posted on the CPUC's internet site, and in public locations at CPUC offices open to the public, and shall be made available, without charge, to anyone upon request. These guidelines shall include reference to, and, when provided in an electronic format, links to, General Order 66-D (when adopted), which will also be posted on the CPUC's internet site, and in public locations at CPUC offices open to the public, and made available to anyone, without charge, upon request.

   An initial set of guidelines is set forth in Attachment 2 to this Resolution.
   An initial Fact Sheet describing these regulations and guidelines is set forth in Attachment 3 to this Resolution.

3. CPUC staff shall develop a publicly accessible index of information regarding the broad classes of records maintained by the CPUC that includes, at a minimum, the following information: 1) a description of the records; 2) information regarding the public accessibility of each class of records, with an explanation of where and how

the records may be accessed; 3) if a class of records is not available to the public, the index or database shall explain the legal basis for withholding the records from the public [*e.g.*, CPRA exemption, CPUC- held privilege, *etc*.]; and 4) if a class of records is conditionally available to a subset of the public, a description of any conditions that must be met before the records may be accessed. The internet site of the California Energy Commission provides a useful example of such an index

4. CPUC staff shall develop a publicly accessible index or database of information regarding requests for confidential treatment of records or information provided to the CPUC, whether the request for confidentiality is in the form of a motion to file under seal, or in any other format, as soon as practical. Staff shall engage interested stakeholders, and allow parties to contribute to the development of such resources, by creating working groups and filing comments or suggestions. The index or database shall, at a minimum, include the following: a) an index of all requests for confidential treatment, with a hyperlink to the actual request; b) a hyperlink to all protests submitted; c) an explanation of the purpose of the information provided (*e.g.*, for a formal proceeding, advice letter filing, compliance report, or response to CPUC staff request); d) the CPUC's disposition of each request.

5. CPUC staff shall develop a publicly accessible "Docket Card" system for tracking advice letter filings and associated documents, in a manner similar to the existing Docket Card system for tracking documents filed or issued in formal Commission proceedings. The advice letter tracking system shall provide a centralized database that will permit tracking of advice letters, protests, responses, associated correspondence, and CPUC actions regarding advice letters, regardless of the industry division with which they were filed.

5. CPUC staff shall report on workshops regarding the development of new procedures for processing records requests and requests for confidential treatment, and the development of industry specific matrices regarding public, and confidential records, and recommend any procedures and matrices deemed appropriate. Staff shall, as part of this process, consider whether the CPUC's Rules of Practice and Procedure, any other applicable procedural guidelines, or General Orders that require reports or include references to the public or confidential status of records, should be amended to improve our implementation of the policies set forth in this Resolution and Draft General Order.

6. CPUC staff shall develop a safety information portal for the CPUC's internet site, on which staff will post descriptions of the Commission's safety jurisdiction and its safety inspection and enforcement activities. Staff shall develop a publicly accessible index or database of safety related records and information in the custody of the CPUC that will, to the maximum extent practical, provide links to safety-related records, or portions of records, that are not subject to a CPRA exemption

asserted by the CPUC, subject to a CPUC-held privilege against disclosure, or subject to other mandatory prohibitions or restrictions on disclosure.

7. CPUC staff shall hold workshops regarding the following topic, as described earlier in this Draft Resolution: 1) procedures; 2) safety-related records; 3) communications-related records; 4) energy-related records. Staff may choose to hold additional workshops to obtain further input regarding the procedural and substantive changes discussed in Draft Resolution L-436 and proposed General Order 66-D. The first workshop, regarding procedural issues, shall be scheduled as soon as practical, so that we may consider additional modifications to the Draft General Order based on ideas discussed in the workshops.

8. Utilities and other entities that routinely submit records to the CPUC are strongly encouraged to provide detailed information regarding the types of records they routinely submit to the Commission, and to use the Workshop Preparation Questionnaire attached to Resolution L-436 as a standardized tool for explaining in detail the types of information they wish withheld from the public, the legal basis for such withholding, and the rationale for the requested confidential treatment. Such information may be incorporated in draft matrixes of information that should, or should not, be disclosed to the public, which will be discussed during the workshops CPUC staff will convene. We encourage parties to submit Workshop Preparation Questionnaires as soon as practical, so that staff may take responses into account when developing reports outlining issues for discussion during workshops.

9. Staff shall post on the CPUC internet site a library of documents relevant to public access to, and confidential treatment of, CPUC records, to serve as a resource during workshops and the development of industry specific matrices regarding public, and confidential records.

10. Prior to each workshop, staff shall post on the CPUC internet site a report outlining issues for discussion during the workshop. Such reports need not be comprehensive, but should reflect staff experience and, where practical, propose lists of classes of records or information it believes are required to be public, or required to be confidential, based on staff experience, Workshop Preparation Questionnaires submitted to the CPUC, and comments received regarding the questionnaires.

9. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of October 11 2012 ~~August 23, 2012~~, and that the following Commissioners approved it:

PAUL CLANON
Executive Director

ATTACHMENT 1

GENERAL ORDER 66-D, HELD IN ABEYANCE PENDING FURTHER REFINEMENTS

REGULATIONS REGARDING PUBLIC ACCESS TO RECORDS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND REQUESTS FOR CONFIDENTIAL TREATMENT OF RECORDS

INTRODUCTION

These regulations provide guidance regarding: 1) access to Commission records; 2) requests for confidential treatment; 3) confidentiality determinations; and 4) discovery seeking Commission records and/or the appearance of Commission employees.

1. Access to Commission Records

1.1 California Public Records Act

1.1.1 Commission Policy

1.1.1.1 The California Public Utilities Commission (CPUC) is committed to full, fair, and prompt compliance with the California Public Records Act. These regulations are designed and intended to facilitate access to public records pursuant to the California Public Records Act (CPRA). For detailed statutory language, please consult Cal. Gov't. Code § 6250 *et seq*.

1.1.1.2 In the event that any portion of these regulations are deemed in conflict with any law or regulation, such law or regulation shall prevail.

1.1.1.3 The CPUC will not limit access to a public record based upon the purpose for which the record is requested, if the record is otherwise subject to disclosure to the public. (Cal. Gov't. Code § 6257.5.)

1.1.1.4 The CPUC may limit access to CPUC records on the basis of the status of the requester or the purpose for which the record is requested, if the record is exempt from disclosure to the public, but conditional disclosure to other governmental agencies, individuals, or subsets of the public is authorized by law, and the conditions necessary for such conditional disclosures have been met. (*See*, *e.g*., Cal. Gov't. Code §§ 6254.5, 6260, 6265; Cal. Civil Code § 1798 e*t seq*.)

1.1.1.5 The CPUC shall not allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to the California Public Records Act. (Cal. Gov't. Code § 6253.3.)

1.1.1.6 Public records, as defined in Cal. Gov't. Code § 6252(e), in the physical custody of the CPUC shall be made available for inspection and copying in accord with the following provisions.

1.2 Requests for Inspection of Public Records

1.2.1 Subject to reasonable notice, any person may inspect public records in the custody of the CPUC during normal business hours. Physical inspection of such records shall be permitted at locations within the Offices of the CPUC in San Francisco, California, or Los Angeles, California, as determined by the Executive Director, or his or her designee. Special arrangement must be made in advance for the inspection of voluminous records.

1.2.2 Inspection of public records maintained by the CPUC shall be permitted only in the presence of Commission staff, except as the Executive Director or the Executive Director's designee otherwise determine.

1.2.3 Persons inspecting public records shall not destroy, mutilate, deface, or alter any such records or remove any such record or records from the location designated for inspection. The records shall be physically returned in the same condition and order as received, upon either the completion of the inspection or the request of CPUC staff presiding during the inspection.

1.2.4 Functions of the CPUC shall not be suspended to permit, and public records shall not be made available for, inspection during periods in which such records are reasonably required in the performance of the duties and responsibilities of the CPUC.

1.2.5 The CPUC may refrain from providing an opportunity to inspect any records, or portions of records, that are exempt from disclosure under the CPRA. (Cal. Gov't. Code § 6255.)

1.3 Requests for Copies of Public Records

1.3.1 Upon receipt of a request for copies pursuant to the CPRA, and payment of the fees set by the CPUC pursuant to Cal. Pub. Util. Code § 1903 to cover direct copy costs, or the applicable statutory fee, the CPUC shall promptly provide the requested records, to the extent they are not exempt from disclosure under the CPRA. An initial fee schedule, which may be periodically updated by the Executive Director or his or her designee, shall be included in the CPUC's guidelines for access to records.

1.3.2 Requests for copies of public records pursuant to the CPRA must reasonably describe an identifiable record or records. Requests should be specific, focused, and sufficiently describe the requested records so that they can be identified, located, and retrieved by CPUC staff.

1.3.3 Where a request is specific or focused, and the records are not listed in a public index of CPUC records, CPUC staff will attempt to assist the requester to identify records and information responsive to the request, or to the purpose of the request, if stated; describe the physical location of such records, and the technology in which they are maintained; and provide suggestions for obtaining access to the records or information, where such records are not subject to an exemption listed in the CPRA.

1.3.4 Requests sent through the postal service should be directed to: Public Records Office, CPUC, 505 Van Ness Ave., San Francisco, CA 94102. Requests sent by electronic mail should be directed to: public records office@cpuc.ca.gov. Requesters may contact the Public Records Office by calling: (415) 703-2015.

1.3.5 When a request requires a delay in response due to the need to search for, retrieve, review, or redact records and cannot be accommodated with immediate inspection or copying, the CPUC shall have ten calendar days from the receipt of the request by the Public Records Office to determine whether the request seeks copies of disclosable public records in the possession of the CPUC. The CPUC shall promptly notify the requesting party of the determination. If the request is denied, in whole or in part, the response will set forth the basis for the denial and identify the person responsible for the denial.

In unusual circumstances, as specified in Cal. Gov't. Code § 6253(c), the CPUC may extend the time in which the requesting party is to be notified of the determination. Notice of the extension shall be in writing, setting forth the reasons for the extension and the date on which a determination is expected. The extension shall not exceed fourteen additional calendar days.

1.3.6 A response to a written request pursuant to the CPRA denying the request, in whole or in part, shall be in writing.

1.3.7 The CPUC may refrain from providing copies of any records, or portions of records, that are exempt from disclosure under the CPRA. The CPUC shall justify withholding any record, or portion of a record, by demonstrating that the record in question is exempt under express provisions of the CPRA, or that, on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest in disclosure. (Cal. Gov't. Code § 6255.) Any reasonably segregable portion of a record shall be provided to the requesting party

after removal of the information in the record that is exempt from disclosure by law.

1.3.8 The CPUC is not required to compile data, gather information, perform research, or otherwise create a record that does not exist or that is not maintained by the CPUC in the normal course of business.

1.3.9 Requests for copies pursuant to a CPRA request will be forwarded to the division or divisions within the CPUC that generate, file, and/or maintain such documents. Commission responses to copy requests shall not require CPUC staff to suspend normal operations in order to comply with a request. Responses to requests for copies of voluminous records may need to be processed over a reasonable period of time in order to permit staff to carry out their normal regulatory responsibilities.

1.3.10 The CPUC may respond to requests for copies of records by referring the requester to the location on the Commission's internet site where such records may be located and copied. Where the CPUC does not have or maintain the requested records, the CPUC may refer the requester to the internet site of another governmental agency responsible for maintaining such records.

1.4 Appeals of Denials of Access to Records

1.4.1 Formal Commission Proceeding, Advice Letter Filings, and other contexts in which the Commission has established a specific procedure

If the CPUC has established a formal requirements for processing requests for information, motions to compel the production of records, or for requiring parties to make information available upon request, as is the case for formal CPUC proceedings, advice letter proceedings, and similar matters, the procedures already established will continue to apply unless specifically modified. For example, parties in formal CPUC proceedings may appeal decisions or rulings denying access to records or information in accord with the CPUC's Rules of Practice and Procedure.

1.4.2 Other Contexts

If a request for records is denied, in whole or in part, in a context other than an open formal CPUC proceeding, advice letter proceeding, or similar matter subject to specific CPUC requirements for processing requests for information, the person seeking the records may request CPUC review of the denial of access. Requests for CPUC review of initial denials of access to records shall be filed with the CPUC's Public Records Office, and shall set forth specifically the grounds on which the requester considers the denial of access to be unlawful or erroneous.

The Public Records Office will prepare and place on the CPUC's meeting agenda a proposed resolution addressing the request for review of an initial denial of access to records, and serve it on: the requester; and, to the extent practical, any regulated entity that provided the CPUC with records to which access was denied. The resolution may be served on other persons where appropriate. Cal. Pub. Util. Code § 311(g) requires that most proposed resolutions be circulated for public comment at least 30 days before the CPUC takes action on the proposed resolution at one of its regularly scheduled business meetings.

Individuals or entities whose records are subject to a request for review of an initial denial of access to records are encouraged to consider informally resolving issues regarding the accessibility of such records or information, and to enter into confidentiality or nondisclosure agreements where appropriate.

The Public Records Office may refer requests for review of initial denials of access to CPUC records to a presiding officer in any formal proceeding in which the records to which access is sought have been filed or admitted into the evidentiary record under seal.

1.4.3 Applications for Rehearing and Petitions for Modification

CPUC resolutions addressing the disclosure of CPUC records are a form of decision subject to applications for rehearing and petitions for modification in accord with the CPUC's Rules of Practice and Procedure.

1.4.4 Actions

Any action filed with a court pursuant to Cal. Gov't. Code § 6258 to compel the disclosure of records must be served on the CPUC, and should be directed to the attention of the General Counsel, California Public Utilities Commission, 505 Van Ness Ave., San Francisco, CA 94102.

1.5 Guidelines

The Public Records Office will prepare and, as necessary, update, guidelines for access to CPUC records. A copy of those guidelines, and these regulations, shall be posted in a public location in the CPUC's San Francisco, Los Angeles, and Sacramento Offices. A copy shall be made available at no charge to any person upon request.

1.6 Fees for Copying Public Records

1.6.1 Cal. Pub. Util. Code § 1903 requires the CPUC to set the fees to be charged for the making and furnishing of copies, including certified copies, of papers,

records, and documents of the CPUC. The fees shall as nearly as practicable reflect the costs of furnishing the materials and providing the service.

1.6.2 Upon a request for a copy of records, other than records the CPUC has determined to be exempt from disclosure under the CPRA, and payment of the fees set by the CPUC, or any other statutory fee, the CPUC shall promptly provide the requested copies.

1.6.3 Pursuant to Cal. Pub. Util. Code § 1903, the Executive Director or his or her designee shall set, and periodically update, the fees for providing copies of CPUC records, in a manner that, to the extent practicable, enables the CPUC to recover the costs of furnishing the materials and providing the services associated with the provision of such copies. Fees for transcripts shall take into account the provisions of contract with bargaining units that include Commission reporters.

2. Requests for Confidential Treatment

2.1 Definitions

2.1.1 Request for Confidential Treatment

For the purposes of this General Order, "request for confidential treatment" means any assertion of confidentiality, or request for confidential treatment, in any format, made by any individual or entity, within or outside the scope of any formal CPUC proceeding. The term includes, but is not limited to, the following: motions for leave to file records under seal, advice letter filings asserting confidentiality or requesting confidential treatment; and responses to data requests or information requests that include assertions of confidentiality or requests for confidential treatment.

2.1.2 Responses to Requests for Confidential Treatment

For the purposes of this General Order, "response to a request for confidential treatment" means any CPUC response to any assertion of confidentiality or request for confidential treatment, made, in any format, within or outside the scope of any formal CPUC proceeding.

2.2 Basic Principles Regarding Request for Confidential Treatment

2.2.1 Burden of Establishing Basis For Confidential Treatment

2.2.1.1 Individuals or Entities other than Employees of the CPUC

Any person, other than a person filing an informal complaint with the CPUC, a CPUC employee, or a governmental entity, filing or submitting records or information to the CPUC, either within or outside the scope of formal CPUC proceedings, who desires that those records or information or portions of those records or information, be kept confidential by the CPUC, and not disclosed to the public in response to records requests or discovery, bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure.

.Any request for confidential treatment of information must reference the specific law prohibiting disclosure, the specific statutory privilege that the person believes it holds and could assert against disclosure, the specific privilege the person believes the CPUC may and should assert against disclosure, or the specific provision of any General Order or other CPUC decision, order, or ruling that authorizes a document to be kept confidential.

2.2.1.2 CPUC Employees

CPUC employees are not required to request confidential treatment pursuant to this General Order, and thus do not as a general rule bear the burden of establishing a basis for confidential treatment.

CPUC employees who participate as representatives of a unit of the CPUC participating as a party in a CPUC proceeding, or in a similar representative capacity, bear the burden of establishing a basis for confidential treatment of any records subject to a motion for leave to file under seal, or other request for confidential treatment, in accord with the CPUC's Rules of Practice and Procedure. If, however, the motion is based on the CPUC's receipt of records subject to a request for confidential treatment made by a party to a Commission proceeding that was granted in accord with the provisions of this General Order, the CPUC employee may meet the burden through reference to, and attachment of, the request for confidential treatment, and evidence the request was granted.

2.2.1.3 Other Governmental Entities

Other governmental entities are not required to request confidential treatment pursuant to this General Order, and thus do not as a general rule bear the burden of establishing a basis for confidential treatment in accord with its provisions.

A governmental entity that participates as a party in a CPUC proceeding may bear the burden of establishing a basis for confidential treatment of any records subject to a motion for leave to file under seal, or other request for confidential treatment, in accord with the CPUC's Rules of Practice and Procedure.

A governmental entity subject to the CPUC's jurisdiction may be asked to justify any assertion that records or information provided to the CPUC must or should remain confidential, so that the CPUC may reach an independent determination regarding public disclosure of such records or information, as required by Cal. Gov't. Code § 6253.3.

2.2.1.4 Secondary Users in Commission Proceedings

If a party receives access to records for which confidential treatment was requested, and granted, pursuant to this General Order, and wishes to file the records under seal in a Commission proceeding, the party may identify the records as being subject to the granted request for confidential treatment, without independently bearing the burden of proving the need for confidential treatment, and attach the initial request for confidential treatment and evidence that it was granted.

2.2.2 Limitations on Requests for Confidential Treatment

2.2.2.1 Records or Information for Which Confidential Treatment may be Requested

Confidential treatment may be requested only for the kinds of records or information for which treatment is authorized by federal or state statute; by federal or state regulation; by prior CPUC General Order, decision, order, or ruling; or by the provisions of this General Order.

Confidential treatment may not be requested for records or information subject to a CPUC General Order, decision, order, or ruling, designating a class of records or information, and/or specific records or information, as being accessible to the public or otherwise subject to disclosure, once any applicable period for appealing the General Order, decision, order, or ruling has expired. Requests for confidential treatment of such records or information shall be rejected, in the absence of evidence that the relevant provisions of the General Order, decision, order, or ruling, are inconsistent with current laws, regulations, and CPUC policies regarding access to such records or information.

Once the CPUC has established a comprehensive index of CPUC records and a database of requests for confidential treatment and responses to such requests, persons requesting confidential treatment will be required to accompany the request with a declaration attesting that the requester has reviewed any publicly accessible index or database, and determined, to the best of the person's knowledge, that no CPUC General Order, decision, order, or ruling requires or authorizes public access to such records or information, or otherwise prohibits or limits requests for confidential treatment of such information.

If the entity requesting confidential treatment is a public utility, the public utility should not cite Cal. Pub. Util. Code § 583 as a sole basis for the CPUC's nondisclosure of information since, as noted in D.91-12-019, § 583 does not create for a utility any privilege that may be asserted against the CPUC's disclosure of information or designate any specific types of documents as confidential.

2.2.2.2 Privilege Assertions

Any person asserting a privilege against disclosure has the burden of establishing that the privilege applies to the records or information in the context in which the privilege is asserted or confidential treatment is requested. A person asserting a privilege has the right to claim an absolute statutory privilege, such as the attorney-client privilege, for information requested. If such a privilege applies, the person may not be required to provide such information to the CPUC. However, the person must specify the statutory privilege applicable to particular information and explain how the information meets each element or criteria necessary for the assertion of the privilege. Any person may also assert a claim of privilege for documents or information provided to the CPUC on a confidential basis, such as the trade secret privilege. In such cases, the person must assert the specific privilege(s) it believes the person and/or the CPUC holds and why the document, or portion of document, should be withheld from public disclosure.

If a privilege holder's provision of privileged records to the CPUC might result in a waiver of the privilege, such as may be the case with regard to records subject to the lawyer-client privilege set forth in Cal. Evid. Code § 950 *et seq*., the privilege holder shall, before providing such records, either: 1. explain why the provision of the privileged records would not result in a waiver of the privilege, in accord with statutes and case law regarding waiver; or 2. demonstrate to the CPUC's satisfaction that the records would, if provided to the CPUC, fall within the Cal. Evid. Code § 1040 (a) definition of "official information," and be subject to the CPUC's assertion of absolute official information privilege in Cal. Evid. Code § 1040(b)(1) for information subject to a federal or state law prohibiting disclosure; or the conditional official information privilege in Cal. Evid. Code § 1040(b)(2), which may be asserted by the CPUC where there is a need for confidential treatment that outweighs the necessity for disclosure in the interests of

justice, with certain exceptions. The privilege holder must explain how the public's interests would be served by the CPUC's assertion of the CPUC-held privilege.

2.2.2.3 Confidentiality Claims Requiring a Balancing of Interests

If a confidentiality request is based on a privilege or exemption requiring a balancing of interests for and against disclosure, rather than on a statutory prohibition against disclosure or a privilege held by the individual or entity, the person requesting confidential treatment must demonstrate why the public interest in an open process is clearly outweighed by the need to keep the material confidential.

When balancing of public interests for and against disclosure, the CPUC will take in account the following: 1) the balancing of interests for and against disclosure may shift over time; 2) the interests of the public in accessing information, or in having information withheld, may in some circumstances coincide, and in some circumstances differ, from the interests of the individual or entity providing the records or information to the CPUC; 3) privacy interests are important, but not absolute, and at times must be balanced against the necessity for the public to understand adequately the actions of the CPUC and the entities it regulates (*See, e.*g*., Hill v. National Collegiate Athletic Association,* (1994) 7 Cal.4th 1).

2.2.3 Limitations on Confidential Treatment

2.2.3.1 Independent CPUC Determinations

The CPUC cannot allow another party to control the disclosure of information that is otherwise subject to disclosure pursuant to the CPRA. Cal. Gov't. Code § 6253.3. The fact that records may fall within a CPRA exemption does not preclude the CPUC from disclosing the records.

Except with respect to records subject to a law prohibiting disclosure, CPRA exemptions are discretionary, rather than mandatory, and the CPUC is free to refrain from asserting such exemptions when it finds that disclosure is appropriate. *See* Cal. Gov't. Code § 6253(e); *Black Panthers v. Kehoe* (1974) 42 Cal. App. 3d 645, 656; *see also*, *Re San Diego Gas & Electric Company* (SDG&E) (1993) 49 Cal.P.U.C.2d 241, 242.

For the above reasons, the fact that a person may demonstrate that the records for which confidential treatment is requested may fall within the scope of a CPRA exemption the CPUC could choose to assert is no guarantee that the CPUC will determine that the assertion of the exemption is in the public's interest.

The same is true with regard to CPUC-held privileges that may be asserted in response to records requests and/or discovery.

2.2.3.2 Records Requests vs. Discovery

Cal. Gov't. Code § 6260 provides that the provisions of the CPRA shall not be deemed in any manner to affect the rights of litigants, including parties to administrative proceedings, under the California laws of discovery, nor to limit or impair any rights of discovery in a criminal case. Thus, CPUC responses to discovery may not base objections to disclosure on the existence of one or more applicable CPRA exemptions. Similarly, discovery objections in formal CPUC proceedings should not be based on the existence of applicable CPRA exemptions.

A confidentiality determination that finds that records, or portions of records, are subject to one or more CPRA exemptions will not insulate such records from disclosure in response to a subpoena or other discovery procedure, unless the determination finds that the records are also subject to a CPUC-held privilege or other prohibition or limitation on disclosure in response to subpoenas or other discovery.

If a confidentiality determination finds that the records are also subject to a CPUC-held privilege or other prohibition or limitation on disclosure in response to subpoenas or other discovery, the determination will generally find that the records are also exempt from mandatory disclosure in response to records requests, pursuant to the Cal. Gov't. Code § 6254(k) exemption for: "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

2.2.3.3 Disclosure to Governmental Entities

If the CPUC provides any information to another governmental agency (whether in response to a request, subpoena, or on the CPUC's own initiative), the CPUC will ensure that the information is accompanied with a copy of any request for confidential treatment that has been submitted pursuant to this General Order. Where appropriate, the CPUC may enter into a confidentiality agreement with the other governmental agency.

When the CPUC obtains information indicating a possible violation of any federal, state, or local law, the CPUC may provide that information to the appropriate governmental agency.

Requests for confidential treatment will not prevent the CPUC from providing that information to other governmental agencies.

2.2.3.4 Duration of Confidential Treatment

A request for confidential treatment, whether or not specifically acted upon by the CPUC, expires on the earliest of the following dates: (a) at the end of the period specified by the individual or entity pursuant to the request for confidential treatment; (b) at the end of a period specified in a specific CPUC ruling or decision (Confidentiality Determination); or (c) in the event no expiration date is specified either in the request or determination, then two years after the request for confidential treatment was first submitted to the CPUC. To reassert a request for confidential treatment, the person must again satisfy the requirements for confidential treatment before the end of the confidentiality period. Staff may disclose information provided under a claim of confidentiality or request for confidential treatment if the CPUC has authorized disclosure of that information, or class of information.

2.2.3.5 Communication with Persons Requesting Confidential Treatment

In a number of circumstances, the CPUC may need to contact a person who has requested confidential treatment, and/or who has provided the CPUC with records subject to a CPUC confidentiality determination; may wish to provide others the opportunity to contact the person to discuss issues relating to the accessibility or confidentiality of such records, or may wish to inform the person that the records are being sought through a records request, subpoena for records, or other procedure.

If the person requesting confidential treatment does not provide the CPUC with consistently current contact information, the CPUC may be unable to engage in such necessary or desirable communication. This may, as a practical matter, affect the person's ability to defend their position regarding the need for confidential treatment before the CPUC or in other forums.

Any CPUC index or database of requests for confidential treatment, and CPUC responses thereto, shall include current contact information for each person requesting confidential treatment.

2.2.4 Minimum Requirements for Requesting Confidential Treatment

A person desiring confidential treatment of information provided to the CPUC shall, in any document requesting confidential treatment, at a minimum:

2.2.4.1 Specifically indicate the information the person wishes to be kept confidential, clearly identifying each page, or portion of a page, for which confidential treatment is requested.

2.2.4.2 Identify the length of time the person believes the information should be kept confidential and provide a detailed justification for the proposed length of time, or identify the length of time a CPUC decision addressing the information authorizes the information to be kept confidential. The business sensitivity of information generally declines over time and the balancing of interests for and against disclosure may change accordingly.

2.2.4.3 Identify any specific provision of state or federal law the person believes prohibits disclosure of the information for which it seeks confidential treatment and explain in detail the applicability of the law to that information.

2.2.4.4 Identify any specific state or federal regulation, or CPUC General Order, Rule of Practice and Procedure, decision, order, or ruling, the person believes prohibits or limits disclosure of the information for which it seeks confidential treatment, and explain in detail the applicability of the law to that information.

2.2.4.5 Identify any specific privilege, if any, the person believes it holds and may assert to prevent disclosure of information, and explain in detail the applicability of that law to the information for which confidential treatment is requested. The person must explain how the information meets each element or criteria necessary for the assertion of the privilege. For example, if a person asserts that information is subject to a trade secret privilege (Cal. Evid. Code § 1060 *et seq.*), the person must explain how the information fits the definition of a trade secret. The person must explain how the information provides the privilege holder with economic value by virtue of its not being generally known to the public and what steps the person has taken to maintain the secrecy of the information.

2.2.4.6 Identify any specific privilege the person believes the CPUC holds and may assert to prevent disclosure of information and explain in detail the applicability of that privilege to the information for which confidential treatment is requested.

If the privilege involves a balancing of public interests for and against disclosure, such as the conditional official information privilege in Cal. Evid. Code § 1040(b)(2), the person must demonstrate that the information falls within the definition of official information, and that there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice.

2.2.4.7 State whether the person would object if the information were disclosed in an aggregated format.

2.2.4.8 State whether and how the person keeps the information confidential and whether the information has ever been disclosed to a person other than an employee of the individual or entity.

2.2.4.8 Provide, and update, contact information sufficient to allow the CPUC to:

1. Contact the person to provide a copy of any subpoena or other discovery procedure in which a party to a proceeding seeks records or information subject to a request for confidential treatment based on an assertion that the person requesting confidential treatment holds and asserts a privilege against disclosure.

2. Inform any person seeking access to records or information subject to a pending request for confidential treatment, or a confidentiality determination granting such treatment, how they can contact the person requesting, or granted, confidential treatment, to determine whether access may be obtained, subject to a nondisclosure agreement, or in some other fashion.

3. Contact the person to provide information regarding of any CPUC confidentiality determination affecting the status of the records or information for which confidential treatment was requested and/or obtained.

2.2.4.9 Submit the request for confidential treatment in a document separate from the document(s) that include the information for which confidential treatment is requested. Requests for confidential treatment received from entities regulated by the CPUC are open to the public.

2.2.4.10 If the CPUC has authorized confidential treatment for a specific class of records or information, and designated a procedure for identifying such records or information in a clear an uniform manner, requests for confidential treatment of individual documents falling within such a class of records or information may be made in accord with such procedures.

3. Procedure for Requesting Confidential Treatment

3.1 Context of Request

3.1.1 Formal CPUC Proceeding, Advice Letter Filings, and other contexts in which the CPUC has established a specific procedure

If the CPUC has established a formal procedure for requests for confidential treatment, and responses to such requests, as is the case for formal CPUC proceedings, advice letter proceedings, generating asset owner filings, and energy procurement documents subject to the public access and confidentiality matrices established in D.06-06-066 and its progeny for records that may include market sensitive information, the procedures already established will continue to apply unless specifically modified.

For example, in formal CPUC proceedings, the CPUC's Rules of Practice and Procedure will continue to govern motions to file records under seal, motions to seal the evidentiary record, and motions to compel the production of documents. Similarly, General Order 96-B will continue to govern requests for confidential treatment of records associated with advice letter filings, and objections to such requests.

We will supplement those procedures in one respect. The division of the CPUC that receives and/or responds to any request for confidential treatment shall maintain a file of such requests and responses, and provide a copy each to the Public Records Office for inclusion in public databases, and for use in the preparation of Public Records Office Resolutions.

3.1.2 Other Contexts

A person requesting confidential treatment in a context other than a formal CPUC proceeding, advice letter filing, or other contexts in which the CPUC has established a specific procedure shall submit the request for confidential treatment in a document that includes the information set forth in § 2.2.4 of this General Order. The requester may use one of the model forms in Appendix C of this General Order.

A CPUC division that receives a request for confidential treatment from a regulated entity in a context in which the CPUC has not established a specific procedure shall respond to such requests as follows:

1. Review the request to determine whether it seeks confidential treatment for a class of records or information that the CPUC has determined to be confidential.

Commission divisions implementing specific CPUC programs are familiar with CPUC decisions that affect those programs, and specific confidential treatment provisions in those decisions. The comparison of a request for confidential treatment to the provisions of a CPUC decision that identify specific program-related classes of records or information as confidential is a ministerial task. The indexes and databases discussed elsewhere in this General Order should make this process easy and routine, in most cases.

2. If a CPUC division cannot determine with certainty that the record or information falls within a class of records or information that the CPUC has determined to be confidential, the division shall consult with the Public Records Office and other appropriate authority.

   The division, and/or the Public Records Office, may ask the person seeking confidential treatment to provide additional information regarding the request for confidential treatment, in order to obtain sufficient information to permit the CPUC to determine independently whether confidential treatment is permitted by law, and warranted.

3. If the division, in consultation with the Public Records Office, finds that the record or information does not fall within a class of records or information that the CPUC has determined to be confidential, the division, or the Public Records Office, will, in an initial response to the request for confidential treatment, notify the person requesting confidential treatment of this determination. The division shall also notify the Public Records Office of this determination, for further action as appropriate.

The grounds for a determination that the record or information does not fall within a class of records or information that the CPUC has determined to be confidential include, but are not limited to, the following:

1. A provision of the Cal. Pub. Util. Code or other law expressly requires such records or information to be public;

2. The CPUC has issued a General Order, decision, order, or ruling determining that the class of records or information is open to the public;

3. A CPUC decision, assigned Commissioner decision or ruling, ALJ decision or ruling; or similar CPUC determination, mandates disclosure of the records or information for which confidential treatment is requested.

4. Initial CPUC responses providing notice that records or information for which confidential treatment is requested do not fall within a class of records or information that the CPUC has determined to be confidential shall inform the person requesting confidential treatment that they may, within 10 days, file a request for review of the denial of confidential treatment. Confidential treatment will continue until the time for filing a request for review has expired, or the request for review has been resolved by the CPUC, with certain exceptions.

If the notice that confidential treatment is not warranted is based on the existence of a statute specifically mandating that the records or information be open to the public, or a CPUC decision, order, or ruling mandating that the records or information be open to the public, the notice will include a reference to the statute, decision, order, or ruling, and inform the person requesting confidential treatment that they should contact to Public Records Office with any questions regarding the appropriateness of the initial determination.

Requests for CPUC review of initial notices that confidential treatment is unwarranted shall be filed with the CPUC's Public Records Office, and shall set forth specifically the grounds on which the requester considers the notice that confidential treatment is unwarranted to be unlawful or erroneous.

Requests for CPUC review of initial notices that confidential treatment is unwarranted, and any protests regarding the granting of confidential treatment, will be addressed in the Public Records Office Resolutions prepared for each Commission business meeting in accord with Section 3.3 of this General Order.

Cal. Pub. Util. Code § 311(g) requires that most proposed CPUC resolutions be circulated for public comment at least 30 days before the CPUC takes action on the proposed resolution at one of its regularly scheduled business meetings.

Regulated entities that who receive notice that confidential treatment is unwarranted are encouraged to consider informally resolving issues regarding the accessibility of such records or information.

Initial notices that confidential treatment is unwarranted are not final CPUC decisions. The request for review procedure noted above may result in a final CPUC decision.

The division of the CPUC that receives and/or responds to any request for confidential treatment shall maintain a file of such requests and response, and provide the Public Records Office with copies of each request and response. These requests for confidential treatment and the CPUC's responses to such requests will be included in any public database of such records developed by the CPUC.

Initial responses to requests for confidential treatment may be based on the model forms in the Appendix to this General Order.

3.1.3 Special Circumstances

Other governmental agencies, whistleblowers, and individuals, making requests for confidential treatment are not required to provide the information required in this General Order. However, such requesters will be asked to provide information that would permit to make a reasoned decision regarding the confidentiality request, if the legal basis for the request is not immediately clear, or in other appropriate circumstances.

Confidentiality or nondisclosure agreements between the CPUC and another governmental entity, entered into in accord with Cal. Gov't. Code § 6254.5(e) or other authority, shall generally be signed by the Executive Director or General Counsel.

Such requests for confidential treatment, and any response thereto, shall be forwarded to the CPUC's Public Records Office, for inclusion, where appropriate, in any index or database of requests for confidential treatment.[27]

3.2 Informal Resolution

Individuals or entities whose records are subject to a request for review of an initial denial of access to records are invited to consider informally resolving issues regarding the accessibility of such records or information, and to enter into confidentiality or nondisclosure agreements where appropriate.

[27] In certain contexts, the public disclosure of a request for confidential treatment, and the CPUC's response to the request, may be restricted by law, and/or against the public's interest. The CPUC reserves its right to refrain from disclosing such records in response to records requests or discovery, and to refrain from including such records in any publicly accessible index or database of such requests for confidential treatment, where the records are subject to one or more CPRA exemptions from mandatory disclosure, one or more CPUC-held privileges against disclosure, or similar legal authority.

3.3 Public Records Office Resolutions

The Public Records Office will prepare and place on the agenda of each CPUC business meeting agenda a proposed Public Records Office Resolution that identifies each request for confidential treatment received during a given period, and the status of the request. The Public Records Office Resolution will authorize public access to all information provided by utilities to the Commission during the period covered by the Public Records Office Resolution where confidential treatment was not requested, or where a request for confidential treatment was denied. The Public Records Office Resolution will ratify Staff determinations regarding requests for confidential treatment, as appropriate. The Public Records Office Resolution may also serve as a vehicle to place requests for confidential treatment, and any protests of such treatment, directly before the Commission for appropriate action.

3.3 General Counsel Review

The General Counsel, and/or his or her designee, may, in response to a request for assistance from the Commission, a Commissioner, an ALJ, a Commission Division, or other Commission staff, provide advice and make recommendations regarding the application of the CPRA, discovery law, or other authority to matters involving the disclosure of CPUC records and/or the assertion of CPRA exemptions, Commission-held privileges, or other authority requiring or limiting public access to CPUC records.

If the CPUC, a Commissioner, a Commission Division, or other appropriate Commission staff determines that confidential treatment is not warranted, and has been unable to resolve the dispute with the individual or entity seeking confidential treatment on an informal basis, the General Counsel or designee has the option of providing an additional forum for the informal resolution of the disclosure dispute.

3.4 Review and Appeal Records

A copy of all CPUC responses to appeals of any request for review, or appeal, of a CPUC decision, order, ruling, or initial determination that confidential treatment is not warranted, shall be provided to the Public Records Office for inclusion in any index or database regarding requests for confidential treatment and the CPUC's responses to such requests.

4. DISCOVERY

4.1 Records

Subpoenas for CPUC records should be served on a representative of the Public Records Office, or other CPUC employee authorized to accept service of process. Such employees include: the Executive Director, Assistant Executive Directors, General Counsel, Assistant General Counsel, and representatives of the Public Records Office.

Copy fees will be charged in accord with the provisions of Cal. Evid. Code § 1563.

4.2 Appearances

Subpoenas seeking the appearance of a specific CPUC employee must be served on the employee or his or immediate supervisor, in accord with the requirements of Cal. Gov't. Code § 68097.1. Subpoenas seeking the appearance of the "person most knowledgeable" should be served on a representative of the Public Records Office, or other CPUC employee authorized to accept service of process.

Witness fees must be paid in accord with the provisions of Cal. Gov't. Code § 68097.2, on or before the date of the appearance.

4.3 Original Records

Availability of original records is necessary for the conduct of the CPUC's duties. Cal. Evid. Code §§ 1560 *et seq*. provide for the admissibility into evidence of true copies of records such as are maintained by the CPUC. The personal appearance of the Custodian of Records is not required.

4.4 Appearance of the Custodian of Records

A subpoena demanding original CPUC records or personal appearance of the Custodian of Records is an unwarranted interference with the CPUC in the performance of its duties and may be resisted. (Cal. Pub. Util. Code § 1759.)

The Executive Director is the CPUC's Custodian of Records. The Custodian of Records may designate a member of the CPUC staff responsible for the direct supervision of the records in question to appear in his or her stead as the Custodian of Records subject to the subpoena, where necessary and appropriate.

Workshop Preparation Questionnnaire

REQUEST FOR CONFIDENTIAL TREATMENT OF A CLASS OF RECORDS

Name: _____ Today's Date: _____

Address: _____

Telephone No: _____ Email: _____

Description of the class of records for which confidential treatment is requested: _____

_____

_____

Identification of the context in which the records are submitted to the CPUC:

1. In response to a statute requiring the filing of a periodic report (e.g., annual, monthly), specifically: _____

2. In response to a statute requiring the filing of other types of records, specifically: _____

2. In response to a regulation requiring the filing of a periodic report, specifically: _____

2. In response to a regulation requiring the filing of other types of records, specifically: _____

3. In response to a Commission General Order requiring the filing of a periodic report, specifically: _____

5. In response to a Commission General Order requiring the filing of a record upon the occurrence of an event, specifically: _____

4. In response to a Commission Rule of Practice and Procedure, specifically: _____

5. In response to a routine class of CPUC data requests, specifically: _____

6 Other context, specifically: _____

Specific portions of reports or records, for which confidential treatment is requested: _____

_____

Time period for which confidential treatment is requested: _____

Justification for time period: _____

_____

Basis for confidential treatment: _____

_____

_____

Federal or state statute prohibits disclosure (cite): _____

Commission Decision, Order, or Ruling prohibits or limits disclosure (cite): _____

_____

_____

Records are exempt from mandatory disclosure in response to California Public Records Act (CPRA) (Cal. Gov't. Code § 6250 *et seq*.), pursuant to one or more CPRA exemptions (cite)[28]**:** _____

_____

_____

_____

[28] If citing Cal. Gov't. Code § 6254(k); 6254(ab); or 6255, see additional requirements on page 2.

Records are subject to a Commission-held privilege or similar limitation on mandatory disclosure in response to subpoena for records or other discovery procedure (cite): _____

_____

_____

Requester would object if information were disclosed in an aggregated format: (check one) ☐ Yes ☐ No

Requester has made the records available to the public prior to the date of this request. (check one) ☐ Yes ☐ No

_____ _____

Name Date

Additional requirements that may apply:

1. If the exemption cited is Cal. Gov't. Code § 6254(k), the requester MUST identify federal or state law prohibiting or limiting disclosure; privilege or similar limitation on disclosure that the Commission holds and may assert; or other basis for a Commission's assertion of the Cal. Gov't. Code § 6254(k) exemption. Cal. Gov't. Code § 6254(k) is not an independent exemption; it requires an underlying statutory prohibition, a privilege, or similar basis for confidentiality.

2. If privilege cited as a basis for the Commission's potential assertion of the Cal. Gov't. Code § 6254(k) exemption is the Cal. Evid. Code § 1040 official information privilege, the requester MUST demonstrate that: (1) the information for which confidential treatment is requested falls within the Cal. Evid. Code § 1040(a) definition of official information: and (2) either: (a) The information is subject to a federal or state statute prohibiting disclosure; or (b) that the necessity for confidentiality outweighs the necessity for disclosure in the interests of justice. If the (2)(b) option is chosen, the requester should describe how the public's interest in NOT having the information publicly available clearly outweighs the public interest that would be served by having the information available.

3. If privilege cited as a basis for the Commission's potential assertion of the Cal. Gov't. Code § 6254(k) exemption is a privilege the requester believes it holds and may assert to bar or limit disclosure, the requester should fill out the worksheet on page 3 of this request for confidential treatment.

4. If the exemption cited is Cal. Gov't. Code § 6254(ab), the requester must attest that the class of infrastructure information is routinely voluntarily submitted to the California Office of Homeland Security for use by that office.

5. If the exemption cited is Cal. Gov't. Code § 6255, the requester MUST describe how the public's interest in NOT having the information publicly available clearly outweighs the public interest that would be served by having the information available.

FORM 2 RCT-G

RCT-G NO.____
[For CPUC Use Only]

REQUEST FOR CONFIDENTIAL TREATMENT OF RECORDS (GOVERNMENTAL ENTITY)

Name: _____ Today's Date: _____

Address: _____

Telephone No: _____ Email: _____

Description of the records for which confidential treatment is requested: _____

_____

_____

Time period for which confidential treatment is requested: _____

Basis for confidential treatment: _____

_____

_____

Federal or state statute prohibits disclosure (cite): _____

_____

Other: _____

Records are subject to a non-disclosure agreement, confidentiality agreement, or memorandum of understanding entered into by requester and the Commission on _____

A copy of the non-disclosure agreement or similar document is attached: (check one) ☐ Yes ☐ No

The requester would be willing to provide the Commission with the records described above, provided that the Commission executed an appropriate nondisclosure agreement.

NOTE: Governmental entities may share information subject to one or more California Public Records Act exemptions with other governmental entities, pursuant to confidentiality agreements, without waiving their right to assert exemptions in response to public records requests. (Cal. Gov't. Code § 6254.5(e)).

Other provision of the Cal. Gov't. Code, and other applicable law, may permit other forms of records sharing between governmental entities as well.

_____ _____
Name Date

_____
Position

FORM 3 .1 RCT Initial Response – Incomplete

RCT NO.____
[For CPUC Use Only]

RESPONSE TO REQUEST FOR CONFIDENTIAL TREATMENT

REQUEST FOR CONFIDENTIAL TREATMENT IS INCOMPLETE

Incomplete Request:_____Today's Date: _____

The Commission received your Request for Confidential Treatment on _____

Your Request was incomplete. Please provide the following information:

_____

_____

The submitted records will be treated as confidential for 10 days. If you do not return a completed application by _____, the records or information will not be treated as confidential, unless the Commission determines that such treatment is warranted.

_____ _____
Name Date

_____
Position

RCT FORM 3.2. (Initial Response – (Request for Additional Information)

RCT NO.____
[For CPUC Use Only]

RESPONSE TO REQUEST FOR CONFIDENTIAL TREATMENT OF DOCUMENT

ADDITIONAL INFORMATION REQUESTED

Request for Additional Information: _____Today's Date: _____

The Commission received your Request for Confidential Treatment on _____

We are unable to fully evaluate your application on the basis of the information you provided.

Please provide the following information: _____

_____

_____

The submitted records will be treated as confidential for 20 days. If you do not provide the additional information we request by _____, the records or information will not be treated as confidential, unless the Commission independently determines that such treatment is warranted.

_____ _____

Name Date

_____

Position

RCT FORM 3. 3 Initial Response (Confidential Treatment Appears Warranted)

RCT NO.____
[For CPUC Use Only]

RESPONSE TO REQUEST FOR CONFIDENTIAL TREATMENT OF RECORDS

CONFIDENTIAL TREATMENT APPEARS WARRANTED

Today's Date: _____

We reviewed your request for Confidential Treatment on _____ _____.

The records appear to meet the criteria for confidential treatment for the following reasons:

☐ The records are exempt from mandatory disclosure in response to a California Public Records Act (CPRA) pursuant to one or more CPRA exemptions. Specifically: _____

_____

_____

☐ The records are exempt from mandatory disclosure in response to a discovery, pursuant to one or more Commission privileges. Specifically: _____

_____

_____

The records will be treated as confidential until: _____

Records subject to an initial response determining that the records for which confidential treatment is requested meet the criteria for confidential treatment denying a request for confidential treatment will not be disclosed except as ordered by a Commission decision or resolution; an assigned Commissioner or Administrative Law Judge ruling; or a court of competent jurisdiction.

_____ _____
Name Date

_____
Position

FORM 3.4 RCT Initial Response – Denial – Mandatory Public Access)

RCT NO.____
[For CPUC Use Only]

RESPONSE TO REQUEST FOR CONFIDENTIAL TREATMENT OF DOCUMENT

DENIAL – PUBLIC ACCESS IS MANDATORY

Initial Denial: _____ Today's Date: _____

We reviewed your request for Confidential Treatment on _____

The records of information do not appear to meet the criteria for confidential treatment for the following reasons:

☐ Disclosure is required by law: Specifically: _____

_____

_____

☐ Disclosure is required by a Commission, Decision, Order, or Ruling, Specifically: _____

_____

_____

If you disagree, you may request a review of this initial determination within 10 days. Request for review shall be submitted to the Commission's Public Records Office, at: _____.

The Commission' Public Records Office will prepare and circulate for public comment a draft resolution for the Commission's consideration at one of its regularly scheduled business meetings. In most situations, the Commission will not disclose records subject to a pending request for review of an initial denial of a request for confidential treatment. However, since the records clearly fall within a class of records that are required to be public pursuant to a federal or state statute, or a Commission decision, order, or ruling, the filing of a request for review will not limit or delay disclosure.

_____ _____

Name Date

_____

Position

RCT FORM 3.5. Initial Response (Denial – Other)

RCT NO.____
[For CPUC Use Only]

Today's Date: _____

RESPONSE TO REQUEST FOR CONFIDENTIAL TREATMENT OF DOCUMENT

DENIAL – OTHER

We received your request for Confidential Treatment on: _____. Your request does not appear to meet the criteria for Confidential Treatment.

Specifically, you assert the records or information are subject to _____

_____

_____

_____

However, _____

_____

_____

If you disagree, you may request a review of this application within 10 days. Request shall be submitted to the Commission Public Records office. The Commission' Public Records Office will prepare and circulate for public comment a draft resolution for the Commission's consideration at one of its regularly scheduled business meetings. Records subject to an and initial response denying a request for confidential treatment will not be disclosed while request for review is pending, except as ordered by a Commission decision or resolution; an assigned Commissioner or Administrative Law Judge ruling; or a court of competent jurisdiction.

_____ _____

Name Date

_____

Position

ATTACHMENT 2

Guidelines for Accessing Public Records

Californians have a right under the state Public Records Act and the California Constitution to access public information maintained by all state agencies, including the California Public Utilities Commission. The following are guidelines for accessing public records at the California Public Utilities Commission (CPUC). For more information, please see Cal. Gov't. Code § 6250 *et seq*; and CPUC General Order 66-D, and **Frequently Asked Questions** about accessing public records maintained by the CPUC.

- **Direct Your Request to the Public Records Office.** The CPUC's Public Records Office is responsible for facilitating responses to all public records requests. If you direct your request to the Public Records Coordinator, it makes it easier for us to track and process your request resulting in a prompt response. Contact the Public Records Coordinator by mail or facsimile at:

  California Public Utilities Commission Public Records Office
  Legal Division
  505 Van Ness Ave.
  San Francisco, CA 94102
  Phone: (415) 703-2015
  Facsimile: (415) 703-2262

  public.records@cpuc.ca.gov

- **Written Requests Encouraged.** The CPUC encourages, but does not require, requests for records to be made in writing unless the request involves records maintained by the CPUC for the purpose of immediate public inspection. Examples of these types of records include Statements of Economic Interest, and these guidelines. Denials of any written requests will always be provided in writing. When requests are made orally, the CPUC may confirm the request in writing to ensure we have correctly understood your request and to expedite your request.
- **Records Defined.** "Records" include any writing owned, used or maintained by the CPUC in the conduct of its official business. Writings include information recorded or stored on paper, computers, email, or audio or visual tapes.
- **Identifying Records.** In order to help the CPUC provide records promptly, requesters should provide specific information about the records they seek including names of facilities and addresses. When a record cannot be identified by name, the requester should attempt to be as specific as possible in describing the record, based on its content. When a request is not sufficiently specific, CPUC staff will help the requester to identify the information, describe how the records are maintained and their physical location, and provide suggestions on how to overcome any practical barriers to disclosure.
- **Inspection of Public Records.** Public records maintained by the CPUC are available for inspection during regular business hours, 8:30 a.m. until 4:30 p.m., Monday through Friday, excluding state holidays. Members of the public are not required to give notice in order to inspect public records at CPUC offices during normal working hours. However if the request requires the retrieval, review or redaction of records, a mutually agreeable time should be established for inspection of the records. In order to prevent records from being lost, damaged or destroyed during an inspection, CPUC employees may determine the location of, and may monitor, the inspection. Requests for Statements of Economic Interests, Public Records Guidelines, and CPUC publications usually can be provided quickly. Requests for other records may take more time because the records must be located and reviewed for any possible trade secret information. Please also note that numerous CPUC databases, fact sheets / FAQs, and other information resources are available at our website,

- **Processing Requests for Copies of Records.** When a copy of a record is requested, and the record cannot be produced immediately, the CPUC will determine within 10 days after receipt of the request, whether to comply with the request, and shall promptly inform the requester of its decision and the reasons for the decision. The initial 10-day period may be extended for up to an additional 14 days if the CPUC needs to:

  a. Communicate with field offices.
  b. Inspect voluminous records.
  c. Consult with other divisions or agencies.
  d. Construct a computer program or report to extract data.

  Whenever possible, the CPUC will provide records at the time the determination is made to disclose them. If immediate disclosure is not possible, the CPUC will provide an estimated date when the records will be available, and will provide the records within a reasonable period of time.

- **Copying Fees.** The CPUC must, pursuant to Cal. Pub. Util. Code § 1903, set fees to be charged for making and furnishing copies, including certified copies, of papers, records, and documents of the CPUC, which will, as nearly as practicable, reflect the costs of furnishing the materials and providing the service. The cost of duplication includes the pro rata expense of the duplicating equipment and the staff (salary/benefits) required to make a copy of the record. The cost of duplication does not include CPUC staff time in researching and retrieving the records. When the CPUC must compile electronic data, or extract information from an electronic record, to satisfy a request, the CPUC may require the requester to bear the full costs, not just the direct cost of duplication. The fees set by the CPUC are: 1)$.10 per page for standard copies; 2) $1.00 per page for color copies; 3) actual costs for reproducing oversize documents and documents requiring special processing; 4) actual postage charges; and 5) actual costs, if any, for retrieval and return of records held off-site in archives(currently, $7.00 per box). Reasonable clerical charges may be imposed if making copies requires special processing; *e.g.*, extensive or complex records or data compilation, programming, or certification. Such charges will be billed at a rate of $24 per hour per person, or $6 per quarter hour. Fees for transcripts will reflect costs incorporated within reporter compensation provisions of relevant employee bargaining unit agreements.
- **Exemptions.** The CPUC will provide access to all public records upon request unless the law provides an exemption from mandatory disclosure. Examples of records exempt from mandatory disclosure under the California Public Records Act include: certain personnel records, investigation records, drafts, confidential legal advice, trade secrets, records prepared in connection with litigation, and information that may be kept confidential pursuant to other state or federal statutes.[29] In most circumstances, if the CPUC removes or redacts exempt information from the record, it will disclose the remainder of the record.
- **Identification of Requesters.** CPUC personnel will not require that persons requesting to inspect records provide identification, or the reasons for wanting to inspect records. However, if records are to be picked up or mailed to a requester, relevant identifying information must be provided. Persons wishing to enter the CPUC building must comply with security protocols, including providing identification to security personnel.
- **Statement of Economic Interest.** These forms can be provided by contacting the Public Records Office at (415) 703-2015 during CPUC regular business hours, 8:30 a.m. to 4:30 p.m.

[29] A list of CPRA exemptions that may commonly apply to Commission records, or portions of records, may be found in the Appendix to these guidelines.

Guidelines Appendix

CPRA Exemptions

1. Records will be made available for inspection or copying unless the records are exempt from disclosure. Any reasonably segregable portion of a record shall be provided to any requesting party after the removal of the information in the record that is exempt from disclosure by law.

2. The following types of records, which are commonly found in files maintained by the Commission, may be withheld from public disclosure in accordance with the provisions of the Government Code.[30]

• Preliminary drafts, notes, or interagency or intra-agency memoranda not retained by the Commission in the ordinary course of business, if the public interest in withholding the records clearly outweighs the public interest in disclosure. [Government Code § 6254(a)].

• Records pertaining to pending litigation to which the Commission is a party, or claims made pursuant to Division 3.6 of the Government Code (commencing with Section 810), until the pending litigation or claim has been finally adjudicated or otherwise settled. [Government Code § 6254(b)].

• Records that are exempt or prohibited from disclosure by state or federal law. Such records may include, but are not limited to, the following: confidential attorney-client correspondence; notes and other work product prepared by legal counsel; materials constituting trade secrets of licentiates or applicants or contained in contract proposals; personal information, such as date of birth, social security number, and criminal history; and records that may be subject to other legal privilege (*e.g.*, medical records prepared by a physician). [Government Code § 6254(k)].

• Records pertaining to personnel matters including, but not limited to, employee records, background checks, medical evaluations, psychological evaluations, *etc*. [Government Code § 6254(c)]. However, nothing in this section limits the Commission from providing such information to the employee to whom it pertains, to someone else with the written consent of the employee representative of the employee, or in response to appropriate discovery, to the extent no other provision of law limits such disclosure.

• Test questions, scoring keys, and other examination data used to administer a licensing examination, examinations for employment, or academic examination. [Government Code § 6254(g)].

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[30] This list does not include all CPRA exemptions. The complete text of the CPRA may be accessed through the following links:

• Correspondence with the Governor's Office. [Government Code § 6254 (l)].

• Records of informal complaints received by the Commission, to the extent such records include the name, home address, telephone number, e-mail address, utility account number, bank account number, social security number, or similar information, of any person, or family member of any person, filing such an informal complaint, and the disclosure of which may constitute an unwarranted invasion of personal privacy. [Government Code § 6254(c)]. However, nothing in this section shall prevent a person who filed such an informal complaint from requesting and receiving informal complaint records pertaining to the individual, from authorizing or the Commission to provide such records to someone else, or from making such information public by filing a formal complaint.

• Records of investigations conducted by the Commission, which are compiled for the purposes of law enforcement or licensing purposes, are not subject to mandatory public disclosure, except as set forth in Government Code § 6254 (f). However, nothing in this section shall require records reflecting the analysis or conclusions of an investigator to be disclosed. [Government Code § 6254(f)].

• Circulation records maintained by the California State Archives for the purpose of identifying parties that viewed archival materials. [Government Code § 6254(j)].

• Documents prepared by or for the Commission that assess its vulnerability to terrorist attack or other criminal acts intended to disrupt the Agency's operations and that is for distribution or consideration in a closed session. [Government Code § 6254(aa)].

• Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the California Office of Homeland Security for use by that office, including the identity of the person who or entity that voluntarily submitted the information. [Government Code § 6254(ab)