

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Legal Division

San Francisco, California

Date: April 4, 2013

Resolution No. L-449

RESOLUTION

RESOLUTION AUTHORIZING DISCLOSURE OF RECORDS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION SAFETY AND ENFORCEMENT DIVISION’S INVESTIGATION RELATING TO PACIFIC GAS AND ELECTRIC COMPANY’S GATEWAY GENERATING STATION AMMONIA REFRIGERATION SYSTEM (“CHILLER”) INCIDENT THAT OCCURRED ON JULY 14, 2009, AT 3225 WILBUR AVENUE, ANTIOCH, CALIFORNIA; AND AUTHORIZING DISCLOSURE OF RECORDS OF THE AUDIT RELATING TO GATEWAY GENERATING STATION’S CHILLER, ONCE THE AUDIT IS COMPLETE

BACKGROUND

On February 21, 2013, Stephenie M. Alexander of Haight Brown & Bonesteel LLP, attorney for GEA FES, INC. f/k/a FES SYSTEMS, INC., served on the California Public Utilities Commission (“Commission”) a deposition subpoena for production of business records seeking disclosure of the Commission Safety and Enforcement Division’s records concerning Pacific Gas and Electric Company’s (PG&E) Gateway Generating Station Ammonia Refrigeration System (“Chiller”) incident that occurred on July 14, 2009, at 3225 Wilbur Avenue, Antioch, California 94509. The Commission’s investigation of the incident is complete, and the investigation records are responsive to the subpoena. The Commission’s files of the audit of PG&E Gateway Plant also include records responsive to the subpoena. The Commission staff could not make the records public without the formal approval of the full Commission. The subpoena is treated as an appeal to the full Commission for release of the requested records.

DISCUSSION

The Commission has exercised its discretion under Cal. Pub. Util. Code § 583, and implemented its responsibility under Cal. Gov't. Code § 6253.4(a), by adopting guidelines for public access to Commission's records.¹ These guidelines are embodied in General Order (G.O) 66-C. General Order 66-C § 1.1 provides that Commission records are public, except "as otherwise excluded by this General Order, statute, or other order, decision, or rule". General Order 66-C § 2.2 precludes Commission staff's disclosure of "[r]ecords or information of a confidential nature furnished to or obtained by the Commission...including: (a) [r]ecords of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action". Section 2.2(a) covers both records provided by utilities in the course of a Commission investigation and investigation records generated by Commission staff.

Because G.O. 66-C § 2.2(a) limits Commission staff's ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure, Commission staff denies most initial requests and subpoenas for investigation records.

Although G.O. 66-C § 2.2(a) requires Commission staff to deny most initial requests seeking Commission investigation records and information, and to object to such subpoenas until the Commission has authorized disclosure, § 3.4 of the G.O. permits those denied access to appeal to the Commission for disclosure. Subpoenas implicitly include such an appeal. This resolution constitutes the Commission's response to the subpoena served by Stephenie M. Alexander of Haight Brown & Bonesteel LLP.

The California Code of Civil Procedure ("Cal. Code Civ. Proc.") provides broad discovery rights to those engaged in litigation. Unless limited by an order of the court, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. (Cal. Code Civ. Proc. § 2017(a)).

Cal. Evid. Code § 911 provides that: "Except as otherwise provided by statute: (a) [n]o person has a privilege to refuse to be a witness; (b) [n]o person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing; [and] (c) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing." Thus, as a general rule, where state evidence law applies, a government agency's justification for withholding

¹ Cal. Pub. Util. Code § 583 states in part: "No information furnished to the commission by a public utility...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."

information in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

There is no statute generally prohibiting disclosure of the Commission's incident investigation records. However, certain documents within the investigation file are subject to the official information privilege (Cal. Evid. Code § 1040); the lawyer-client privilege (Cal. Evid. Code § 950 *et seq.*); the attorney work product doctrine (Cal. Code Civ. Proc. § 2018.010); and the Information Practices Act of 1977 ("IPA") (Cal. Civ. Code § 1798, *et seq.*). Records subject to one or more of these privileges will not be disclosed.

The Commission investigation of PG&E Gateway Generating Station Chiller incident that occurred on July 14, 2009, has been completed; therefore, the public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

The file of the audit instituted by the Commission pursuant to G.O. 167, with regards to PG&E Gateway Plant also includes records responsive to the subpoena. This audit is still open; therefore, the disclosure of the Commission's audit records would compromise the audit. Once the audit is complete, the public interest will favor disclosure of the requested audit records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.

TESTIMONY OF COMMISSION STAFF

We strongly discourage litigants from seeking the testimony of Commission staff regarding incident investigations. The provision of such testimony at depositions or trials often greatly interferes with Commission staff's vital work conducting safety inspections and incident investigations, and thus with the Commission's efficient implementation of its regulatory responsibilities, since Commission staff must adjust normal workload to accommodate the often changing schedule of a subpoenaed appearance. Further, litigants frequently inappropriately seek Commission staff testimony regarding legal issues and Commission policy determinations beyond the scope of their knowledge or authority.

COMMENTS ON DRAFT RESOLUTION

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on March 5, 2013, in accordance with Cal. Pub. Util. Code § 311(g). No comments were received.

FINDINGS OF FACT

1. The Commission was served a subpoena on February 21, 2013, by Stephenie M. Alexander of Haight Brown & Bonesteel LLP, attorney for GEA FES, INC. f/k/a FES SYSTEMS, INC., seeking disclosure of the Commission Safety and Enforcement Division's records concerning the investigation of a July 14, 2009 incident involving PG&E's Gateway Generating Station Ammonia Refrigeration System ("Chiller") in Antioch, California.
2. The file of the Commission's G.O. 167 audit of PG&E's Gateway Plant also includes records responsive to the subpoena.
3. Access to the records in the Commission's investigation and audit files was denied in the absence of a Commission order authorizing disclosure with the exception of the Commission's final investigation report, the disclosure of which is authorized by Resolution L-436.
4. The Commission investigation of the PG&E Gateway Generating Station Chiller incident of July 14, 2009, has been completed; therefore, the public interest favors disclosure of the requested Commission's investigation records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.
5. The Commission audit of the PG&E Gateway Plant is still open; therefore, the disclosure of the Commission audit records would compromise the Commission's audit.
6. At this time, the public interest does not favor disclosure of the requested Commission's audit records.
7. Given the Commission's need to conduct its audit effectively and efficiently, the public interest in non-disclosure of active audit records outweighs the necessity for public disclosure at this time.
8. Once the audit is complete, the public interest will favor disclosure of the audit records, with the exception of any personal information, the disclosure of which

would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission lawyer-client or other privilege.

CONCLUSIONS OF LAW

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon statutory prohibition, privilege, or other protection against disclosure. (Cal. Evid. Code § 911).
2. The Commission has, through G.O. 66-C § 2.2(a), limited Commission staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. General Order 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The Commission has, in Resolution L-436, authorized disclosure of Commission-generated reports of completed Commission safety investigations and audits.
4. The public interest in nondisclosure of records concerning the July 14, 2009 incident in Antioch, California does not outweigh the necessity for disclosure in the interest of justice, with the exception of documents subject to one or more Commission privileges against disclosure.
5. The subpoenaed records include "personal information" protected by the IPA. (Cal. Civ. Code § 1798.24(k)).
6. The subpoenaed investigation files include documents subject to the Commission lawyer-client, attorney work product, or similar privileges regarding the Commission's deliberations concerning the investigation of the July 14, 2009 PG&E Gateway Generating Station Chiller incident at 3225 Wilbur Avenue, Antioch, California. Such privileged records shall not be disclosed in response to the deposition/subpoena.
7. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
8. 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".

ORDER

1. The request for disclosure of the Commission records concerning the investigation of a July 14, 2009 incident involving Pacific Gas and Electric Company's Gateway Generating Station Ammonia Refrigeration System ("Chiller") in Antioch, California is granted, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.
2. The request for disclosure of the Commission records concerning its audit of Pacific Gas and Electric Company's Gateway Plant, is granted, once the audit is complete, at which time the Commission staff will release the requested records, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission's lawyer-client or other privilege.
3. 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 April 4, 2013, and that the following Commissioners approved it:

PAUL CLANON
Executive Director