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September 9, 2011**

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

Legal Division

San Francisco, California

Date: September 8, 2011

Resolution No. L-419

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION'S INVESTIGATIVE RECORDS CONCERNING RAILROAD INCIDENTS INVOLVING THE CONEJO AVENUE CROSSING, DOT 0284421, IN FRESNO COUNTY, CALIFORNIA BETWEEN 2000 AND THE PRESENT.**

**BACKGROUND**

On July 19, 2011, Shawn Tillis of Winner & McKenna, LLP served a subpoena on the California Public Utilities Commission ("Commission") seeking disclosure of the Commission's Consumer Protection and Safety Division investigation records concerning railway incidents and other investigative records involving the Conejo Avenue Crossing, DOT 0284421, in Fresno County, California between 2000 and the present. The Commission's staff could not make the investigation records public without the formal approval of the full Commission. Shawn Tillis' subpoena is treated as an appeal to the full Commission for the release of the requested records pursuant to Commission General Order 66-C § 3.4.

**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 records.<sup>1</sup> These guidelines are embodied in General Order 66-C. G. O. 66-C § 1.1 provides that Commission's 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

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<sup>1</sup> 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".

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 request and subpoenas for investigation records. Section 2.2(a) covers information provided by Burlington Northern Sante Fe Corporation (“BNSF”) employees to Commission staff in the course of Commission staff’s investigation, as well as Commission-generated records containing this information.

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 Shawn Tillis.

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

There is no statute prohibiting disclosure of the Commission’s incident investigation records. The potentially applicable statutory restrictions on disclosure applicable here relate to “official information” obtained in confidence by a public employee in the course of his/her duties that has not been open or officially disclosed to the public. (Cal. Evid. Code § 1040(a)) and “personal information” subject to the Information Practices Act of 1977 (“IPA”) (Cal. Civ. Code § 1798, *et seq.*).

The Commission investigation records concerning the incidents are complete; 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 attorney-client or other privilege.

### **OFFICIAL INFORMATION**

The records include information from BNSF. Because there is no statute prohibiting disclosure of the Commission's incident investigation records, the official information privilege governing information obtained in confidence by public employees during the course of their duties and not open, or officially disclosed, to the public is not absolute, and the Commission has discretion whether to exercise the privilege. (Cal. Evid. Code § 1040(b)). The Commission has ordered disclosure of records and information concerning completed incident investigations on numerous occasions. The Commission has found that such disclosure will not interfere with the Commission's investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the incident.<sup>2</sup>

Viewing the current subpoena for records within the context of these laws and policies, we note that Commission staff has completed its investigation of this incident and closed the incident administratively. Thus, disclosure of investigation records will not interfere with Commission staff's ability to complete its incident investigation responsibilities.

### **PERSONAL INFORMATION**

The IPA restricts the maintenance and dissemination of "personal information" maintained in the records of a state agency, and prohibits disclosure of "personal information in a manner that would link the information to the individual to whom it pertains", except in specified circumstance. (Cal. Civ. Code § 1798.24). The IPA defines "personal information" as:

any information that is maintained by an agency that identifies or describes an individual, including but not limited to, his or her name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history. It includes statements made by, or attributed to, the individual. (Cal. Civ. Code § 1798.3(a)).

The primary "personal information" in the records subpoenaed here consists of references to the individuals (insert requester's name) represents, (insert utility name) employees, and Commission staff. Most of this information is not restricted from disclosure because: (1) it is otherwise public; (2) it does not link the individual with other "personal information" in the records; or (3) by service of this resolution, the Commission made a

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<sup>2</sup> See, e.g. Commission Resolution L-240 *Re San Diego Gas & Electric Company*, rehearing denied in D.93-05-020 (1993), 49 CPUC 2d 241.

reasonable attempt to provide notice that “personal information” will be disclosed. (*See* Cal. Civ. Code § 1798.24(k)).

### **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 Legal Division in this matter was mailed to the parties in interest on August 8, 2011, in accordance with Cal. Pub. Util. Code § 311(g). No comments were received.

### **FINDINGS OF FACT**

1. The Commission was served a subpoena on July 19, 2011, by Shawn Tillis of Winner & McKenna, LLP which seeks disclosure of the investigation records concerning railway incidents and other investigative records involving the Conejo Avenue Crossing, DOT 0284421, in Fresno County, California between 2000 and the present.
2. Access to the records in the Commission’s investigation file was denied in the absence of a Commission order authorizing disclosure.
3. The Commission investigation records concerning the incidents are complete; 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 attorney-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. G.O. 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The public interest in disclosure of records concerning the incidents involving the Conejo Avenue Crossing, DOT 0284421, in Fresno County, California does not outweigh the necessity for disclosure in the interest of justice.
4. The subpoenaed records include "personal information" protected by the IPA. (Cal. Civ. Code § 1798.24(k)).
5. The service of this resolution provides notice that the records include "personal information" related to BNSF employees, and constitutes a reasonable attempt to provide notice pursuant to Cal. Civ. Code § 1798.24(k).
6. The names of Commission staff, other government employees and employees of BNSF are not "personal information" restricted from disclosure by the IPA if the information is otherwise public information or does not link the individual to any other "personal information" pertaining to that individual in the records.
7. The subpoenaed investigation files do not include documents subject to the Commission lawyer-client, attorney work product, or similar privileges regarding the Commission's deliberations concerning the investigation of incidents involving the Conejo Avenue Crossing, DOT 0284421, in Fresno County, California between 2000 and the present.
8. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
9. 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's investigation records concerning railway incidents and other investigative records involving the Conejo Avenue Crossing, DOT 0284421, in Fresno County, California between 2000 and the present, 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 attorney-client or other privilege.
2. 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 September 8, 2011, and that the following Commissioners approved it:

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PAUL CLANON  
Executive Director

MICHAEL R. PEEVEY  
President  
TIMOTHY ALAN SIMON  
MICHEL PETER FLORIO  
CATHERINE J.K. SANDOVAL  
MARK J. FERRON  
Commissioners