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Date of Issuance 10/2/2017

Decision 17-09-023 September 28, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Improve Public Access to Public
Records Pursuant to the California
Public Records Act.

Rulemaking 14-11-001

**PHASE 2A DECISION ADOPTING GENERAL ORDER 66-D AND
ADMINISTRATIVE PROCESSES FOR SUBMISSION AND RELEASE OF
POTENTIALLY CONFIDENTIAL INFORMATION**

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**PHASE 2A DECISION ADOPTING GENERAL ORDER 66-D AND
ADMINISTRATIVE PROCESSES FOR SUBMISSION AND RELEASE OF
POTENTIALLY CONFIDENTIAL INFORMATION**

Summary

This decision adopts General Order (GO) 66-D and thereby establishes updated processes for (1) regulated entities and the public to submit information to the California Public Utilities Commission (Commission) with a claim of confidentiality,¹ (2) the public to submit requests for information to the Commission per the California Public Records Act (CPRA), (3) the Commission to determine whether a claim of confidentiality associated with the submission of information is lawful, and (4) the Commission to determine whether information, including both information submitted to the Commission and information created by the Commission, shall be disclosed to the public, including but not limited to information that is provided in response to a CPRA request. These processes are summarized in GO 66-D, which is attached as Appendix A to this Decision. Appendix B is a Public Information Appeal Form, which the public may use to challenge a determination of the Public Records Office, Legal Division (Legal Division) to withhold information.

An April 2017 Assigned Commissioner's Ruling² solicited comments and recommendations from parties on a draft proposal for these processes (April 2017 Proposed GO 66-D). Many of the recommendations by parties are adopted. The processes established in GO 66-D aligns the public's right to access

¹ "Information" is defined in GO 66-D to include but is not limited to, any document, record, account, book, or paper regardless of whether it is in an analog or digital format, which is prepared, owned, used, submitted to or retained by the Commission.

² Assigned Commissioner's Amended Scoping Memo and Ruling, April 28, 2017.

government information under the California Constitution and the CPRA, the information submitter's right to confidential protection when afforded by law, and the Commission's need to release information in the course of its activities. GO 66-D supersedes GO 66-C effective January 1, 2018. This decision concludes Phase 2A of this proceeding. An Assigned Commissioner Ruling was issued concurrently with this decision to initiate the next step in Phase 2B of this proceeding. This proceeding remains open to complete Phase 2B.

1. Procedural Background

General Order (GO) 66-C, first adopted in 1974, identifies the records of the Commission as public unless they fall within a list of exemptions. However, the process for the submission of information to the Commission and the release of information by the Commission needs updating and improvement. An Order Instituting Rulemaking (OIR or Rulemaking) was initiated on November 6, 2014, to continue the Commission's process to "increase public access to records furnished to the Commission by the entities we regulate, while ensuring that information truly deserving of confidential status retains that protection."³ The OIR proposes that the Commission adopt a revised GO 66-D to replace the current GO 66-C.

On August 11, 2015, the assigned Commissioner issued a Scoping Memo and Ruling setting forth the issues to be considered, schedule, and other procedural matters for the proceeding.

On August 18, 2016, the Commission issued Decision (D.) 16-08-024 implementing an updated and clarified process for submitting potentially

³ OIR at 1.

confidential information to the Commission.⁴ D.16-08-024 was an interim decision which stated: “the proceeding will remain open to further develop and refine the Commission’s processes relating to potentially confidential documents, and may result in the adoption of a new version of GO-66.”⁵

On December 30, 2016, the assigned Commissioner issued an Amended Scoping Memo and Ruling (Amended Scoping Memo) designating the current phase of the proceeding as Phase 2A wherein the Commission will develop processes for reviewing requests for confidential treatment of documents submitted to the Commission, responses to California Public Records Act (CPRA) requests, and determining whether potentially confidential information will be released to the public. The Amended Scoping Memo also designated Phase 2B as the phase for the Commission to develop lists of information, or “confidential matrices,” for the different industries it regulates that are by default preemptively designated as either confidential or not confidential.⁶

⁴ Pursuant to Pub. Util. Code § 1731, two applications for rehearing of D.16-08-024 were filed on September 26, 2016, by California Cable and Telecommunications Association (CTIA), and jointly by Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Company, Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company, and Winterhaven Telephone Company, (collectively, small LECS), and Consolidated Communications of California Company (Consolidated). The list of companies comprising the “small LECS” consists of the most current list of companies included in this group. On October 11, 2016, Responses to the rehearing applications were filed by California Water Association (CWA), Bayview/Hunters Point Community Legal (Bayview), and The Utility Reform Network (TURN). On May 26, 2017, the Commission issued D.17-06-035, which modified D.16-08-024, and denied rehearing of this decision as modified.

⁵ D.16-08-024 at 5.

⁶ “Confidential Matrices” is defined in GO 66-D as a Commission determination that specific classifications of information are confidential per Section 3.4 of GO 66-D. The determination is made prior to the submission of such information and applies broadly to a classification of information.

On March 3, 2017, comments were filed by the following parties on the Amended Scoping Memo and the draft proposal⁷ attached to the Amended Scoping Memo: California Association of Competitive Telecommunications Companies (CALTEL); TURN; Lyft, Inc. (Lyft); and CWA. Joint comments were also filed on the same day by: Southern California Edison Company, Southern California Gas Company, San Diego Gas & Electric Company, Pacific Gas and Electric Company, and Southwest Gas Corporation (collectively, the Joint Energy Utilities); Consolidated and the small LECS; and Central Valley Gas Storage, L.L.C., Gill Ranch Storage, LLC, Lodi Gas Storage, LLC, and Wild Goose Storage, LLC (collectively, the Independent Storage Providers). Bayview filed comments on May 2, 2017, after its motion to late-file was granted on May 9, 2017.

Reply comments were filed by the following on March 24, 2017: Rasier-CA, LLC (Rasier); The Joint Energy Utilities; CWA; Lyft; TURN; Consolidated Telephone and the small LECS; and AT&T, CTIA, Charter Fiberlink CA-CCO, LLC, Frontier Communications, Sprint, Time Warner Cable Information Services (California) LLC, T-Mobile West LLC and Cellco Partnership, and MCI Communications Services, Inc. (collectively, the Communications Industry Coalition or CIC).

On March 30, 2017, the assigned Commissioner issued a ruling revising the schedule and indicating that opening and reply briefs shall no longer be necessary for Phase 2A. On April 28, 2017, the assigned Commissioner issued another Amended Scoping Memo which included the April 2017 Proposed GO 66-D and solicited comments from parties on the proposal. On May 10, 2017,

⁷ A Draft Proposal was attached to the Amended Scoping Memo discussing the legal framework for this procedure and a proposed process for submitting confidential information to the Commission and handling CPRA requests.

comments to the April 2017 Proposed GO 66-D were filed by the following: Bayview; TURN, CWA, The Joint Energy Utilities; Lyft; Imperial Irrigation District; Rasier; the City of San Bruno (San Bruno); and CIC.⁸ On May 17, 2017, reply comments were filed by the following: Lyft; Bayview; CWA; TURN; Rasier; and San Bruno. On May 25, 2017, the Commission issued D.17-05-035 making small modifications to and denying the rehearing applications filed against D.16-08-024.

2. Phase 1: The Adoption of D.16-08-024

The initial phase of this proceeding, Phase 1, concluded with the Commission's adoption of D.16-08-024. In D.16-08-024, the Commission updated the process for regulated entities and the public to submit information to the Commission with a claim of confidentiality. The updated process was adopted to ensure consistency and expedite Commission review of requests for confidential treatment in response to CPRA requests. The process required a submitting party to provide a signed declaration setting forth the rationale for its request for confidential treatment by the Commission, whether in a formal proceeding or otherwise.

D.16-08-024 also provided guidance for development of a process that the Commission will use in determining whether potentially confidential information can be disclosed, again with the goal of consistent treatment and prompt disclosure of non-confidential information. The decision clarified however, that the specific details and processes for reviewing requests for confidential treatment of information submitted to Commission, responses to

⁸ The list of companies collectively referred to as "CIC" for this filing (May 10, 2017 comment) includes Consolidated and the small LECS.

CPRA requests, and determining whether potentially confidential information will be released to the public, are to be determined either by subsequent order in this proceeding or a successor proceeding, or by adoption of a new GO 66, and will be effective upon adoption of that process by the Commission.⁹

As stated in the background section of this decision, two rehearing applications were filed challenging D.16-08-024, both of which the Commission denied in D.17-05-035 on May 25, 2017. The Commission concluded in D.17-05-035 that good cause has not been established for granting a rehearing.¹⁰ In D.17-05-035, the Commission modified D.16-08-024 to clarify the existing practice of the Legal Division to review legal allegations and to serve as legal advisors for the Commission and state that no new process was created involving assignment of the task for reviewing the requested information to the Legal Division.¹¹

3. Phase 2A: The Adoption of GO 66-D

Consistent with the process for regulated entities and the public to submit information to the Commission adopted in D.16-08-024, the objective of Phase 2A is to establish processes for the Commission to review information submitters' requests for confidential treatment of information submitted to the Commission, the Commission's responses to CPRA requests, and the Commission's determination of whether to release information to the public.

The scope for Phase 2A was designated in the December 30, 2016 Amended Scoping Memo as follows:

⁹ D.16-08-024 at 20-21.

¹⁰ D.17-05-035 at 25.

¹¹ *Id.* at 9.

1. Is the proposed procedure for resolving CPRA requests adequate?
2. Should the Commission provide notice to submitters that their documents are to be disclosed?
3. How should documents already submitted to the Commission be treated?
4. Should there be a modified procedure for requests for confidential treatment of voluminous documents or records?
5. Should the procedure set forth in D.16-08-024 concerning requests for confidential treatment of documents in a formal proceeding be modified?
6. Other related matters.¹²

Subsequently, in order to address questions regarding scope raised in comments by parties, the April 28, 2017 Amended Scoping Memo clarified the scope of the proceeding to include the following:

1. What revisions are necessary to Commission decisions and GOs, including GO 66-C?
2. What should be the process for submission of information to the Commission and associated claims of confidentiality?
3. What should be the process for submission of California Public Records Act requests?
4. What should be the process for release of information by the Commission, including in response to a CPRA request, and in other contexts?¹³

The Commission's adoption of GO 66-D in this Decision concludes Phase 2A.

¹² December 30, 2016 Amended Scoping Memo at 4.

¹³ April 28, 2017 Amended Scoping Memo at 9 to 10.

4. Phase 2B: The Adoption of Confidential Matrices

Phase 2B of this proceeding will focus on the creation of confidentiality matrices for specific industries or types of information. An Assigned Commissioner Ruling outlining the next step for Phase 2B was issued concurrently with the publication of this decision. This proceeding remains open to complete Phase 2B. CIC and the Joint Utilities request that the implementation of GO 66-D be delayed until confidential matrices are adopted, while Bayview stated that such a delay is unnecessary.¹⁴ This decision delays the effective date of implementation of GO 66-D until January 1, 2018, in order to allow Commission staff and parties time to implement the processes contained in GO 66-D.

5. Summary of Applicable Law

Regulated entities' and the public's submission of information to the Commission, the Commission's consideration of a CPRA request, and the Commission's determination of whether to disclose information implicates California constitutional law; the CPRA (which applies to all state agencies), and a combination of legal requirements in the California Public Utilities Code¹⁵ (which apply only to the Commission). The Commission's evaluation of proposals in this proceeding is made with the following requirements in mind.

The public has a constitutional right to access most government information.¹⁶ The California Constitution states that statutes, court rules, and

¹⁴ CIC Opening Comments at 4; Joint Utilities, Opening Comments at 8-9; Bayview, Reply Comments at 3.

¹⁵ Referred to hereafter as the Public Utilities Code or Pub. Util. Code.

¹⁶ 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." *See, e.g., International* (footnote continued on next page)

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.¹⁷ Rules that limit the right of access must be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest.¹⁸

The CPRA requires that public agency records be open to public inspection unless they are exempt from disclosure under the provisions of the CPRA.¹⁹ "Public records" are broadly defined to include all records "relating to the conduct of the people's business"; only records of a purely personal nature fall outside this definition.²⁰ Since records received by a state regulatory agency from regulated entities relate to the agency's conduct of the people's regulatory

(footnote continued from previous page)

Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court (2007) 42 Cal.4th 319, 328-329.

¹⁷ Cal. Const., Article 1, § 3(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. A statute, court rule, or other authority adopted after the effective date of this subdivision that limits the right of access shall be adopted with findings demonstrating the interest protected by the limitation and the need for protecting that interest." See, e.g., *Sonoma County Employee's Retirement Assn. v. Superior Court (SCERA)* (2011) 198 Cal.App.4th 986, 991-992.

¹⁸ *Id.*

¹⁹ *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370: "The Public Records Act, section 6250 et seq., was enacted in 1968 and provides that 'every person has a right to inspect any public record, except as hereafter provided.' (§ 6253, subd. (a).) We have explained that the act was adopted 'for the explicit purpose of 'increasing freedom of information' by giving the public 'access to information in possession of public agencies.'" (*CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651 [citation omitted])."

²⁰ See, e.g., *Cal. State University v. Superior Court* (2001) 90 Cal.App.4th 810, 825. Note that the Commission has elected to use the term "information" in this proceeding instead of "public record."

business, the CPRA definition of public records includes records received by, as well as generated by, the agency.²¹

Further, 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.”²² 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.²³ The CPRA favors disclosure, and CPRA exemptions must be narrowly construed.²⁴ The fact that a record may fall within a CPRA exemption does not preclude the agency from disclosing the record if the agency believes disclosure is in the public interest. Unless a record is subject to a law prohibiting disclosure,²⁵ CPRA exemptions are permissive, not mandatory; they allow nondisclosure but do not prohibit disclosure.²⁶ The CPRA requires the

²¹ See Cal. Gov’t Code § 6252(e).

²² Cal. Gov’t Code § 6250.

²³ 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.”

²⁴ Cal. Const., Article 1, § 3(b)(2), *supra*. See, e.g., *American Civil Liberties Union of Northern California v. Superior Court* (ACLU) (2011) 202 Cal.App.4th 55, 67; and *SCERA, supra*, 198 Cal.App.4th at 991-992.

²⁵ Various statutes direct the Commission to maintain certain information as confidential. Section 6254(k) provides “[r]ecords, 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.

²⁶ See, e.g., *CBS, Inc. v. Block, supra*, 42 Cal.3d at 652; *ACLU, supra*, 202 Cal. App. 4th at 67-68 fn. 3; Cal. Gov’t Code § 6253(e); *Register Div. of Freedom Newspapers, Inc. v. County of Orange* (1984) 158 Cal.App.3d 893, 905-906; *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; and D.05-04-030 at 8.

Commission to adopt written guidelines for access to agency 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.²⁷ The CPRA requires the Commission to respond to request for information within 10 days unless unusual circumstances require the time to respond to be extended, but an extension should not be for more than 14 days.²⁸

The Commission must reconcile requirements of the California Constitution and the CPRA with other directives provided by the Legislature to the Commission. Pub. Util. Code § 583 reads:

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.

In D.06-06-066, the Commission considered the language of § 583, and concluded that § 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. . . . Section 583 sets forth a process for dealing with

²⁷ Cal. Gov't Code § 6253.4(b): "Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public...."

²⁸ Cal. Gov't Code § 6253(c).

claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection.²⁹

This determination was and is based on case law:

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 determine whether certain information should be disclosed to the public and under what circumstances.³⁰

Accordingly, the Commission determined that in analyzing whether a claim of confidentiality has merit, the Commission does not look to § 583, "because nothing in the statute addresses what types of records should and should not be confidential."³¹ Other laws and regulations – trade secrets jurisprudence, California Evidence Code provisions regarding privileges, confidentiality statutes such as Pub. Util. Code § 454.5(g) – provide the substantive basis for any assertion of confidentiality.³² Section 583 sets forth

²⁹ D.06-06-066 at 27, as modified by D.07-05-032.

³⁰ D.06-06-066 at 28-29, as modified by D.07-05-032.

³¹ *Id.* at 28.

³² *Id.*

a process for dealing with claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protections. In filings in this proceeding some parties such as TURN and Office of Ratepayer Advocates (ORA)³³ supported this legal framework, while other parties expressed concern about the legal framework despite the fact that D.06-06-066 was issued more than 10 years ago. Because the case law has not changed on this issue, there is no need to revisit this interpretation of Pub. Util. Code § 583 today. Similar provisions in the Public Utilities Code apply to household carriers³⁴ and to charter party carrier of passengers.³⁵ The Commission interprets the process requirement of these provisions to be similar to § 583.

The Commission interprets the process requirement of Pub. Util. Code § 583, as described above, to be consistent with the requirement of the CPRA for the Commission to adopt written guidelines for the public's access to Commission records that are consistent with the CPRA and reflect the intention of the Legislature to make agency records accessible to the public.³⁶

³³ TURN, Assigned Commissioner Ruling Comments, dated September 11, 2015, at 2-3; ORA, Assigned Commissioner Ruling Comments, dated September 11, 2015, at 2.

³⁴ Pub. Util. Code § 5228: "Any employee of the commission who divulges any fact or information which comes to his knowledge during the course of the examination of the accounts, records, and memoranda of household goods carriers, except as he is authorized or directed by the commission or by a court of competent jurisdiction or judge thereof, is guilty of a misdemeanor and is punishable by a fine of not more than one thousand dollars (\$1,000) or by imprisonment in the county jail for not more than three (3) months, or both."

³⁵ Pub. Util. Code § 5412.5: "Every officer or person employed by the commission who, except as authorized by the commission or a court, discloses any fact or information from an inspection of the accounts, books, papers, or documents of a charter-party carrier of passengers is guilty of a misdemeanor and is punishable by a fine of not more than one thousand dollars (\$1,000), by imprisonment in the county jail for not more than three months, or by both."

³⁶ Cal. Gov't Code § 6253.4(b): "Guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public...."

The Commission's decisions, including decisions regarding CPRA requests, are subject to judicial review in the state appellate courts per Pub. Util. Code § 1759(a) (*see* also Pub. Util. Code §§ 1756, 1731, and 1732). Specifically, § 1759(a) states:

(a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.

Pursuant to Pub. Util. Code § 1756, an aggrieved party may seek judicial review of a Commission decision through a petition for writ of review. However, no action challenging a Commission decision may be filed absent the filing of an application for rehearing of the Commission decision, pursuant to Pub. Util. Code §§ 1731 and 1732.

Lastly the Commission's interpretation of procedural requirements of the Public Utilities Code is summarized in the Commission's Rules of Practice and Procedure (Commission's Rules), which are subject to approval by the Office of Administrative Law.³⁷ Modification of the Commission's Rules is beyond the scope of this proceeding.³⁸

The Commission attempted to reconcile these legal requirements in GO 66-C, first adopted in 1974 and last updated in 1982. GO 66-C identifies all Commission records as public unless they fall within a short list of exemptions.

³⁷ Pub. Util. Code § 311(h).

³⁸ Draft modifications to the Commission's Rules of Practice and Procedure are currently under consideration in Resolution ALJ 344, which implement statutory amendments pursuant to Senate Bill 215, 2016-2017 Reg. Sess. (CA. 2017).

However, the process to obtain Commission records identified in GO 66-C is not comprehensive and needs to be updated.

In summary, any process proposal in this proceeding must comply with the applicable constitutional, statutory, and administrative law requirements. The combination of these legal requirements (specifically the CPRA and Public Utilities Code) is unique to the Commission and thus analogy to other state agencies' or local governments' processes, which are subject to the CPRA but not subject to the Public Utilities Code, is inapplicable. The processes adopted in GO 66-D reconcile these legal requirements to align the public's right to access government information under the California Constitution and the CPRA, the information submitter's right to confidential protection when afforded by law, and the Commission's need to release information in the course of its activities.

6. Discussion of the April 2017 Proposed GO 66-D

The April 2017 Proposed GO 66-D proposed processes for (1) information submitters to submit information to the Commission with a claim of confidentiality, (2) the public to submit CPRA requests to the Commission, and (3) the Commission to determine whether to release information to the public, including but not limited to, in response to CPRA request. This section notes revisions to the April 2017 Proposed GO 66-D that are in response to comments and are incorporated into GO 66-D.

General Comments

Many parties are supportive of the general framework of the April 2017 Proposed GO 66-D. Imperial Irrigation District (IID) notes "[p]roposed GO 66-D is necessary to allow the Public Records Act to accomplish its lofty policy goals" and also states that the April 2017 Proposed GO 66-D does not violate Pub. Util.

Code § 583 or due process guaranteed in the California Constitution.³⁹ Bayview states the April 2017 Proposed GO 66-D “appears to be a centralized guide for record submitters, records requestors, and the Commission.”⁴⁰

Bayview continues “[b]ecause these stakeholders all have varying levels of sophistication and ability, [April 2017 Proposed GO 66-D] must be modified to be useable by all of them.”⁴¹ Bayview requests that documents referenced in GO 66-D be hyperlinked to provide increased accessibility and transparency.⁴² Because of the large volume of decisions and citations published by the Commission and the Commission’s limited technology resources, the Commission does not currently provide hyperlinks in its decisions. However, to address the policy concern underlying Bayview’s recommendation, Commission documents referenced in GO 66-D are posted on the Commission’s website⁴³ for CPRA requests. Bayview also requests the Commission documents referenced in GO 66-D be available in paper copy for members of the public without internet access. The Commission will work with the Public Advisor of the Commission to make GO 66-D, D.16-08-024, Modified D.06-06-066, the Rules of Practice and Procedure, and any confidential matrices adopted in Phase 2B of this proceeding available in paper format upon request by a member of the public.

CALTEL notes that GO 66-D should reference itself as a “GO” and not a “decision.”⁴⁴ This correction is implemented in GO 66-D. CALTEL also notes

³⁹ IID, Opening Comments at 7-8.

⁴⁰ Bayview, Opening Comments at 2.

⁴¹ *Id.*

⁴² *Id.* at 3.

⁴³ Commission Public Records Act Requests: www.cpuc.ca.gov/record_requests. (Last visited August 14, 2017).

⁴⁴ CALTEL, Opening Comment at 2.

that D.16-08-024 provided information submitters 30 days to comply with new guidelines, which was omitted from the April 2017 Proposed GO 66-D.⁴⁵ GO 66-D is revised to reflect that the rule established in D.16-08-024 went into effect September 25, 2016.⁴⁶

Sec. 1: Definitions and Acronyms

In Section 1, the Commission adopts the recommendations of San Bruno and the IID to expand the definition of “information” to include both information submitted to the Commission and information created by the Commission.⁴⁷

San Bruno is also concerned that the definition of “information” is overly broad. San Bruno states:

[b]y broadly defining ‘information’ and ‘Commission,’ the draft GO potentially makes every document, email, or other writing submitted to the Commission or any of its employees ‘information’ protected by the process in Public Utilities Code section 583.⁴⁸

To mitigate San Bruno’s concern that a party may use administrative process to delay disclosure of information, the Commission modifies Section 3.2 to prohibit unreasonable use of process as a delay tactic. Section 3.2 is revised to require an information submitter, who cites the “public interest balancing test” of Cal. Gov’t Code § 6255(a) (discussed in more detail below), to explain why the *public* interest in withholding information clearly outweighs the *public* interest in

⁴⁵ *Id.* at 2.

⁴⁶ Thirty days from August 25, 2016 is September 24, 2016. CALTEL incorrectly states the date of compliance is September 26, 2016, when it was indeed September 25, 2016.

⁴⁷ City of San Bruno, Opening Comments at 1; IID, Opening Comments at 6.

⁴⁸ City of San Bruno, Reply Comments at 1.

disclosing the information. Moreover, Section 3.2 is revised to state a *private* economic interest is not a substitute for a *public* interest in the context of the “public interest balancing test.” If the information submitter fails to meet the requirement of Section 3.2, then the administrative process in Sections 5 and 6 does not apply. Accordingly, the ability of an information submitter to misuse the “public interest balancing test” as a delay tactic tool should be reduced. However, if the concerns of San Bruno prove to be true, then any party may file a Petition to Modify this decision requesting to amend the process, pursuant to the requirements of the Commission’s Rules of Practice and Procedure.⁴⁹

Section 1 is also revised to reflect the recommendation of Lyft to clarify the definition of “confidential matrix.”⁵⁰

Sec. 2: Statement of Liability For Non-Compliance

Section 2 is revised per the recommendation of Lyft⁵¹ to state non-compliance with GO 66-D “may” (instead of “will”) be referred to the Commission’s General Counsel and/or law enforcement for further actions. Section 2 is intended to provide Commission staff guidance on how to appropriately escalate non-conformance with GO 66-D, but not to create unnecessary mandatory administrative action. Section 2 is also revised to cite additional penalty provisions in the Public Utilities Code, which may apply in instances of non-compliance.

⁴⁹ Rule 16.4 of the Commission’s Rules of Practice and Procedure.

⁵⁰ Lyft, Opening Comments at 2.

⁵¹ *Id.*

Sec. 3: The Submission of Information with a Claim of Confidentiality to the Commission

Sec. 3.1: Applicability

Section 3.1 is revised per the recommendations of CALTEL to reflect the implementation date of D.16-08-024 is September 25, 2016, and that the word “decision” is replaced with “GO.”⁵²

Sec. 3.2: Submission of Information with a Claim of Confidentiality

Section 3.2 has been revised to (1) identify that the burden of proof for a claim of confidentiality lies with the information submitter, (2) clarify how confidential sub-parts of information should be treated, (3) clarify the requirements for information submitters to cite Cal. Gov’t Code §§ 6254(k) and 6255, (4) clarify that § 6254(a) is not a valid exemption for an information submitter to cite, (5) clarify the process to designate a contact person for an organization, (6) clarify non-compliance with Sections 3.2 – 3.4 may result in release of information per Section 5.2. This decision declines to adopt Lyft’s recommendation for the Commission to provide a sample template for declarations, because valid claims of confidentiality will require case-by-case information that we cannot anticipate in advance. Further, we are more concerned that the information submitter set forth a valid basis for confidential treatment than with the format of such submission.

Section 3.2 is revised to explicitly state the information submitter has the burden of proof to establish confidentiality. Lyft recommends “for accuracy’s sake...Section 3.2 should state compliance with...Section 3.2 creates a

⁵² CALTEL, Opening Comments at 9.

‘presumption’ rather than a ‘claim’ of confidentiality.”⁵³ This decision declines to adopt this recommendation, because the term “presumption” typically shifts the burden of production or persuasion to the opposing party and creates a requirement for the opposing party to rebut the presumption.⁵⁴ Such burden-shifting from the information submitter to the information requestor or the Commission does not comport with the CPRA requirements. Section 3.2 is thus revised to explicitly state the information submitter bears the burden to satisfy the requirements of Section 3.2, specifically:

An information submitter bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public. To request confidential treatment of information submitted to the Commission, an information submitter must satisfy...the ...requirements...

Moreover, the burden remains on the information submitter for the duration of the administrative proceeding and does not shift to the information requestor or the Commission at any time.

Many parties recommend that GO 66-D reference specific exemptions of the CPRA. The Commission declines to identify each exemption in GO 66-D, because it would render GO 66-D a lengthy and opaque legal document, and would require that the GO be updated whenever the CPRA is revised. However, GO 66-D does address three specific exemptions to avoid any confusion.

⁵³ Lyft, Opening Comments at 2.

⁵⁴ See California Code of Evidence §§ 600-620. Note per the Commission’s Rule 13.6 the technical rules of evidence do not apply to the Commission’s evidentiary hearings.

Section 3.2 is revised in response to parties'⁵⁵ request for a specific reference to the CPRA "public interest balancing test" of Cal. Gov't Code § 6255. Section 6255 allows a government agency to withhold a record by demonstrating "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." Section 3.2 is revised to require an information submitter who cites the balancing test to provide an analysis of why the *public* interest of withholding information outweighs the *public* interest in disclosing information. Section 3.2 is also revised to note a *private* economic interest is not an adequate substitute for a public interest per § 6255.⁵⁶

Section 3.2 is not revised to make specific reference to specific federal and state statutory requirements as some parties requested. Cal. Gov't Code § 6254(k) explicitly prohibits release of information afforded confidential treatment by federal or state law, thus reference to a specific state or federal law in Section 3.2 is unnecessary. An information submitter may cite § 6254(k), but must cite the specific federal or state law that allows confidential treatment and explain why it applies to the information at hand.

San Bruno raises the question of whether Cal. Gov't Code § 6254(a) can be cited by information submitters.⁵⁷ Section 3.2 is revised to state an information submitter cannot cite Cal Gov't Code § 6254(a). This statutory provision exempts disclosure of preliminary drafts, notes, or interagency or intra-agency

⁵⁵ Bayview, Opening Comments at 2; CIC Opening Comments at 6; CWA Opening Comments at 4; ISP Opening Comments at 2; Lyft, Opening Comments at 2; Rasier Opening Comments at 4.

⁵⁶ Note although a private economic interest is not protected under the public interest balancing test, it may be protected per a specific federal or state statute under § 6254(k).

⁵⁷ San Bruno, Reply Comments at 1-2.

memoranda. Regulated entities and the public may not cite § 6254(a) as a basis for confidentiality, because the deliberative process privilege of the government does not extend to communications with regulated entities or the public.

Contrary to the comments of some parties, the fact that Section 3.2 does not summarize or interpret every exemption to the CPRA does not impact the substantive rights of parties. The “CPRA” is a defined term in GO 66-D, which includes “Section 6250 et seq. of the Government Code,” which incorporates all of the exemptions of Cal. Gov’t Code § 6254 except § 6254(a) since it is inapplicable to public information submitters as explained in the previous paragraph. The incorporation includes § 6254(k) and the “public interest balancing test” of § 6255.

Section 3.2(e) is revised in part, but not fully, to adopt Lyft’s recommendation to require both names and e-mails for the information submitters point of contact.⁵⁸ Section 3.2 allow information submitters to designate up to three contact people for all communications regarding confidential document submission to the Commission.⁵⁹ This recommendation is adopted with the caveat that failure to monitor and respond to Commission communications to the designated e-mail address(es) does not preclude release of information by the Commission. There is also no requirement for the Commission staff to contact each name provided before the disclosure of information. We decline to adopt Lyft’s request for a sample template for an

⁵⁸ Lyft, Opening Comments at 2.

⁵⁹ *Id.* at 2-3.

acceptable declaration, because the Commission is more concerned with the substantive information and not a particular format.⁶⁰

Section 3.2 is not revised to reflect CALTEL's recommendation that "at least in the interim, Section 3.2 of the Proposed GO be revised to reflect the three specific bases for confidential treatments previously identified by CALTEL and discussed in D.16-08-024."⁶¹ The examples used by CALTEL would all be adequate to meet the requirements the Commission adopts today, assuming that the information submitted meets the requirements of those statutes. Cal. Gov't Code § 6254(k) allows information to be withheld per state or federal law and thus those scenarios do not need to be explicitly referenced in Section 3.2.

Sec. 3.3: Submissions in a Formal Proceeding

Section 3.3 is revised to (1) state the requirements of Section 3.2 do not apply in formal proceedings, and (2) to clarify that state advice letter filings are not considered by the Commission to be part of formal proceedings. We decline to adopt the recommendations of Bayview (limit the discretion of Administrative Law Judges) and CIC and Joint Utilities (provide a voluminous record exemption).

⁶⁰ *Id.* at 2.

⁶¹ CALTEL, Opening Comments at 3-4. Identified the following types of documents: "1) competitively-sensitive documents that fall under the trade secrets privilege pursuant to California Evidence Code Section 1061, California Civil Code Section 3426.1 and paragraph (9) of subdivision (a) of Section 499(c) of the California Penal Code, 2) individually-identifiable subscriber information, including information that is protected pursuant to 47 U.S.C. Section 222 and P.U.C. Section 2891, and 3) information regarding the location, function, and relationship between network facilities, including the identity of critical infrastructure protected by 6 U.S.C. Section 133(a)(1)(E)."

Section 3.3 is not revised to reflect Bayview's recommendation that the ability of an Administrative Law Judge to set rules for submission of confidential information be eliminated.⁶² Rule 9.1 of the Commission's Rules reads:

The Administrative Law Judge may...rule upon all objections or motions which do not involve final determination of proceedings; receive offers of proof; hear argument...The Administrative Law Judge may take such other action as may be necessary and appropriate to the discharge of his duties, consistent with the statutory or other authorities under which the Commission functions and with the rules and policies of the Commission.

Amendment of the Commission's Rules requires approval of the Office of Administrative Law and is not in the scope of this proceeding. Further, Pub. Util. Code §§ 311(b) and (c) give authority to Administrative Law Judges on matters of evidence. Section 3.3 thus must provide the Administrative Law Judge discretion per Rule 9.1 of the Commission's Rules.

Section 3.3 is not revised per CIC and Joint Utilities' recommendation to establish procedures for submission of especially voluminous or complex records in a formal proceeding.⁶³ This issue has previously been addressed in this proceeding, and no reason has been presented to revisit this question.

Sec. 3.4: Preemptive Determination of Confidentiality in a Decision

Section 3.4 is revised to (1) delete the reference to the rules of D.06-06-066 applying to future matrices (however, other than the specific matrix adopted in that decision, the requirements of Modified D.06-06-066 remain in place unless expressly contradicted by decisions in that proceeding), (2) state how a

⁶² Bayview, Opening Comments at 5.

⁶³ CIC, Opening Comments at 3; Joint Utilities, Opening Comments at 2.

determination in a confidential matrix can be challenged, and (3) clarify language in Section 3.4(b)(ii). Concurrent with this decision, an Assigned Commissioner Ruling was issued addressing confidential matrices.

We adopt Lyft's recommendation for Section 3.4(a) to be clarified that once information has been submitted in compliance with the process adopted here and a confidential matrix, it will not be released per a CPRA request absent an Order of the Commission.⁶⁴ Section 3.4 is also revised to state the process to challenge the Commission's *general* determination of confidentiality for a class of information in a confidential matrix is by filing an Application for Rehearing or Petition to Modify the decision adopting the confidentiality matrix. Section 3.4 is also revised to state the process to challenge the Commission's *specific* determination of confidentiality for particular information that the information submitter claims is protected by a confidential matrix is established in Section 5.

Section 3.4 is revised to reflect part of Lyft's recommendation that Section 3.4(b) be modified to incorporate a clarification that confidential matrices may be challenged by an Application for Rehearing, but also by seeking judicial review. As noted above, Section 3.4 is revised to clarify the two scenarios in which the Commission's determination may be challenged, or the sake of brevity the applicable process rules contained in the Public Utilities Code and Rules of Practice and Procedure are not summarized.

Section 3.4 is revised per Lyft and CIC's recommendation to strike the statement that confidential matrices will follow the rules established in the Modified D.06-06-066.⁶⁵ However, other than the specific matrix adopted in that

⁶⁴ Lyft, Opening Comments at 3.

⁶⁵ Lyft, Opening Comments at 4; CIC, Opening Comments at 4.

decision, the requirements of Modified D.06-06-066 remain in place unless expressly contradicted by decisions in that proceeding. Phase 2B of this proceeding will adopt rules for specific confidential matrices.

Section 3.4 is revised per TURN's request to clarify Section 3.4(b) by stating that "any determination to treat certain information as confidential is limited to the particular information required to be submitted in that decision and does not constitute a decision of more general applicability made pursuant to Subpart 3.4(a)." ⁶⁶

Sec. 3.5: Confidential Treatment Unavailable for Public Information

Section 3.5 is revised in response to CIC and Lyft's recommendation to eliminate the requirement to notify the Commission the information has become public,⁶⁷ by amending the requirement to apply to when the information submitter has knowledge that the information is public. For example, if an information submitter provides information to another government agency, or otherwise makes it public without a claim of confidentiality, then the information submitter has knowledge that the information is public. If the information is discussed in a news report and the information submitter is made aware of it or is already aware of it, then the information submitter has knowledge that the information is public. This revision eliminates Lyft's concern that it may be held accountable if a driver unilaterally shares confidential information without informing Lyft.

Sec. 4: California Public Records Act Requests

⁶⁶ TURN, Opening Comments at 3-4.

⁶⁷ CIC, Opening Comments at 5-6; Lyft, Opening Comments at 4 and 5.

Sec. 4.1: Submission of California Public Record Act Requests

Section 4.1 is revised per CIC's recommendation to use more precise language.⁶⁸ Section 4.1 is also revised per CIC's recommendation to state a request for release of information by the Commission, outside of a formal proceeding,⁶⁹ is treated as a CPRA request regardless of how it is titled. Section 4.1 is also requested per Bayview's recommendation⁷⁰ that a CPRA request can be made in person to the Commission's Public Records Office, Legal Division. Section 4.1 is not revised per Bayview's requests that "the public should be educated on how to use the Commission's website to look up available records,"⁷¹ because the Public Advisor Office of the Commission is already a resource available to any person interested in making a CPRA request.

Section 4.1 is revised per TURN's recommendation to state that CPRA requests can be made by e-mail to a Commission staff, but declines to create a CPRA specific e-mail address.

Sec. 4.2: Fees for Copies

Bayview also requests fees for copies be waived by the Commission.⁷² Bayview's point is well taken. Information requestors may request fees to be waived when submitting a request.

Sec. 4.3: Review of Requests

Section 4.3 has not been revised.

⁶⁸ CIC, Opening Comments at 6.

⁶⁹ This provision does not apply to data request of Commission staff in formal proceedings.

⁷⁰ Bayview, Opening Comments at 5.

⁷¹ *Id.* at 6.

⁷² Bayview, Opening Comments at 6.

Sect. 4.4: Exemptions to the CPRA

Section 4.4 has been revised to clarify the title and to eliminate the reference to “applicable privilege.” Section 4.4 has not been revised to identify every exemption to the CPRA as requested by some parties, but Section 4.4 is revised to explicitly state that exemptions are contained in Cal. Gov’t Code §§ 6254⁷³ and 6255.⁷⁴ Bayview requests that “the exemptions to the CPRA referred to in section 4.4 should be attached to Appendix A and hyperlinked so that a records requestor can understand which records may not be open for inspection.”⁷⁵ As noted earlier the Commission is unable to provide hyperlinks in Commission decisions, so this recommendation is not adopted. The Joint Utilities also requests “attorney work product rules” be added to the list of exemptions without explaining how any attorney work product rules would apply to information provided to the Commission by a third party.⁷⁶ This decision declines to add attorney work product rules as a ground to withhold information.

Sec. 5: Guidelines for the Commission’s Release of Information to the Public

Sec. 5.1: Scope

Section 5.1 is clarified to state “this section defines when information submitted to the Commission *and information created by the Commission* may be

⁷³ Revisions to Section 3.2 clarify how information submitters can comply with § 6254.

⁷⁴ Cal. Gov’t Code § 6254(k) specifically incorporates “[r]ecords, 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.” There is thus no compelling reason to identify specific statutes in GO 66-D.

⁷⁵ Bayview, Opening Comments at 6.

⁷⁶ Joint Utilities, Opening Comments at 2.

released to the public, including in response to CPRA requests” (revised language in italics).

Sec. 5.2: Release of Information with No Claim of Confidentiality

As noted earlier, Sections 3.2 and 4.4 have been revised regarding the “balancing test” of § 6255(a), thus CWA’s concern that Section 5.2 fails to allow the Commission to use the “balancing test” is unfounded with these revisions.⁷⁷

Sec. 5.3: Release of Information with Claims of Confidentiality

Section 5.3 is revised to state “[i]f the Commission withholds the information created by the Commission per an exemption of the CPRA, then Section 5.5 of this GO will govern the release of information.” This revision incorporates information created by the Commission, in addition to information submitted to the Commission.

Sec. 5.4: Information with a Claim of Confidentiality Submitted Prior to the Effective Date of this GO

Sec. 5.4(a): Information Submitted per the Requirements of Modified D.06-06-066

Section 5.4 has not been revised.

Sec. 5.4(b): Information Submitted Prior to August 25, 2016; not per the Requirements of Modified D.06-06-066

Per the recommendations of CALTEL this section is revised to reflect the implementation date of D.16-08-024 is September 25, 2016, and that the word “decision” is replaced with “GO.”⁷⁸

⁷⁷ CWA, Opening Comments at 4.

⁷⁸ CALTEL Opening Comments, at 9.

Sec. 5.4(c): Information Submitted Between August 25, 2016 and December 31, 2017, not per the requirements of Modified D.06-06-066

Per the recommendations of CALTEL this section is revised to reflect the implementation date of D.16-08-024 is September 25, 2016, and that the word “decision” is replaced with “GO.”⁷⁹

Sec. 5.5: Information Submitted on or After the Effective Date of this Decision with a Claim of Confidentiality

Sec. 5.5(a): Release of Information Submitted After January 1, 2018 With a Claim of Confidentiality

Per the recommendations of CALTEL this section is revised to replace the word “decision” with “GO.”⁸⁰ Lyft’s recommendation⁸¹ to delete reference to Section 3.4 is not adopted. The confidentiality of information submitted per Section 3.4 may still be challenged by a Public Information Appeal Form.

Sec. 5.5(b): Commission Review of CPRA Request Where Lawful Claim of Confidentiality

Some parties asserted that the five-day window for information submitters to respond the Commission’s Legal Division is insufficient in the scenario identified in Section 5.5(b).⁸² Section 5.5(b) is revised to extend the amount of time from five days to ten days an information requestor has to submit a Public Information Appeal Form to challenge the determination of Legal Division.

⁷⁹ *Id.*

⁸⁰ CALTEL Opening Comments at 10.

⁸¹ Lyft, Opening Comments at 8.

⁸² TURN, Opening Comments at 4-5; Bayview, Reply Comments at 6.

Section 5.5(b) is also revised to state that information requestors *may* state the reasons why the information may be released in a Public Information Appeal Form; however, the form does not require the information requestor to state a reason. But as a practical matter, if an information requestor has a specific legal argument for why the information should be released, it would be helpful to the Commission staff if it was included.

**Sec. 5.5(c): Commission Review of Request
Where Unlawful Claim of Confidentiality**

San Bruno raises concerns regarding the length of time an administrative appeal process will require. San Bruno's argument that the proposed administrative appeal process causes undue delay in the release of information is persuasive. In the interest of eliminating any unnecessary delay, Section 5.5(c) has been revised to amend how an information submitter may challenge Legal Division's determination that information submitted to the Commission, and claimed to be confidential consistent with Section 3.2 or a confidential matrix in Section 3.4, is not confidential. The April 2017 Proposed GO 66-D called for the information submitter to complete a Public Information Appeal Form, which would then be incorporated into a draft resolution consistent with Section 6.

Section 5.5(c) is revised to provide that Legal Division will prepare a draft resolution and serve it on the information submitter instead of providing for an additional step for the information submitter to file a Public Information Appeal Form. If Legal Division determines that information claimed to be confidential should be disclosed, the administrative process should be as minimal as possible to expedite the disclosure of non-confidential information (as opposed to where Legal Division believes that information is appropriately marked confidential). The revised Section 5.5(c) provides notice to the information submitter, quickly

moves the dispute between the information submitter and the Legal Division to the public agenda of the Commission, allows for public comment on the draft resolution, and provides for a vote by the Commission on whether to release the information.

In the April 2017 Amended Scoping Memo and Ruling, the Assigned Commissioner stated “document submitters and requestors should be provided equal process” and “proposed reciprocity of an appeals process for the information submitter and requestor in instances when the Legal Division disagrees with an assertion of confidentiality.”⁸³ Sections 5.5(b) and the revised 5.5(c) are substantively reciprocal, because in each instance the party challenging Legal Division’s determination is provided notice and opportunity to be heard before the Commission. The different process is justified, because in the instances when Legal Division makes the determination that information should be public, as opposed to being withheld per a CPRA exemption, then the administrative process should be as minimal as possible to allow information to become public.

Sec. 6: Administrative Appeal

General Comments – San Bruno

San Bruno identified concerns with an administrative appeal process, including whether the CPRA allows state entities, such as the CPUC, to create an administrative appeal process for CPRA requests and the scope of the administrative appeal process. San Bruno also raises a question of the standard of review applied by the California Supreme Court or Court of Appeals when

⁸³ Amended Scoping Memo and Ruling, April 28, 2017 at 19-20.

reviewing a writ petition challenging a Commission decision regarding a CPRA request.

San Bruno's thesis is that the Commission does not have legal authority to create an administrative process for the full Commission to review Legal Division's determination of whether information should be withheld or disclosed to the public. The CPRA identifies the CPUC as "one of the agencies authorized to 'establish written guidelines for accessibility of records'."⁸⁴ The CPRA states the "guidelines and regulations adopted pursuant to this section shall be consistent with all other sections of this chapter and shall reflect the intention of the Legislature to make the records accessible to the public."⁸⁵ In addition, Article I, Section 3(b)(1) of the California Constitution, which was created by Proposition 59, provides the public a constitutional right to access government records. Given this legal framework, San Bruno asserts "Proposition 59 did not authorize the CPUC, or any other public agency to delay access to public records by creating an appeal process."⁸⁶

To comply with both the general directives contained in the CPRA and the specific directive contained in Pub. Util. Code § 583, an administrative appeal process was proposed in Section 6 of the April 2017 Proposed GO 66-D. An administrative appeal process provides notice and opportunity to be heard by the full Commission when parties dispute the determination of Legal Division. Elevating the dispute to the full Commission is within the statutory confines of the CPRA to "reflect the intention of the Legislature to make the records

⁸⁴ Cal. Gov't Code § 6253.4(b).

⁸⁵ Cal. Gov't Code § 6253.4(b).

⁸⁶ City of San Bruno, Opening Comments at 2. Proposition 59, enshrined in the California Constitution as Article I, Section 3(b)(1), which provides the public a constitutional right to access government records.

accessible to the public” and is necessary to satisfy the Legislature’s specific directive to ensure that records are not disclosed improperly per Pub. Util. Code § 583. However, to mitigate San Bruno’s concern, we revise Section 5.3(c) as discussed above to expedite the process when Legal Division’s determination is that information should be released.

San Bruno also states they are “not aware of any public entity that provides an appeals process; the only statutorily authorized remedy is to file a writ in court.”⁸⁷ As a preliminary matter, other state agencies are not required to reconcile the CPRA with the Public Utilities Code, and other state agencies’ employees are not subject to misdemeanor liability for improper release of information. Second, the Commission is not alone in providing a full panel review. The California Energy Commission (CEC) allows anybody to make administrative challenge determinations of confidentiality in the context of CPRA. The CEC’s guidelines specifically state:

Energy Commission regulations allow you to request that the full Commission review the Chief Counsel’s decision on the ‘stamped’ record. This request must be made within 14 days of the denial of your request...The Commission will either agree with the decision of Chief Counsel and withhold the record, or the Commission will disagree and allow for the record to be disclosed.⁸⁸

The Commission is thus not alone in providing a full panel review of staff legal determinations regarding confidentiality.

⁸⁷ City of San Bruno, Opening Comments at 2.

⁸⁸ See the California Energy Commission “Public Records Act FAQs,” www.energy.ca.gov/public_adviser/public_records_act_faq.html. (Last visited August 14, 2017).

The types of information subject to the administrative appeal process is also of concern to San Bruno. San Bruno asserts that there “is no legal basis for an appeals process that would apply to non-Section 583 documents.”⁸⁹ As noted above the Commission has legal authority to create guidelines for the release of information. To avoid any unnecessary process, we limit full review of the Commission to a limited sub-set of information submitted consistent with this decision. If an information submitter fails to claim confidentiality or claims confidentiality but does not comply with Sections 3.2 or 3.4, then the full panel review does not apply and information is released per Section 5.2.

San Bruno is also concerned that the administrative appeal process does not have a temporal limit. If agencies are allowed to create administrative appeal processes, then San Bruno asserts “public entities across the state could thwart the Constitution and the PRA merely by subjecting requestors to a potentially endless appeals process that is completely within the control of its governing body.”⁹⁰ To the contrary, Section 6 is not an “endless appeals process,” it merely allows the determination of Legal Division to be considered by the full Commission before information is released.

Lastly, if the Commission withholds information, San Bruno is concerned that if an information requestor decides to challenge that determination the information requestor:

must now overcome two additional obstacles: filing an action in the appellate court or supreme court (Public Utilities Code section 1759), which are often distant, expensive, and unfamiliar forums, and then being subject to the deferential

⁸⁹ City of San Bruno, Opening Comments at 2.

⁹⁰ City of San Bruno, Opening Comments at 2.

standard of review accorded to all decisions of an administrative agency.

In regards to Appellate Court or Supreme Court review, which is required by Pub. Util. Code § 1759, San Bruno states it is not aware of a CPRA case that has been litigated in the first instance in an Appellate or Supreme Court. Contrary to San Bruno's assertion, the County of Fresno was able to receive judicial review under Pub. Util. Code § 1759 in *County of Fresno v. Public Utilities Commission*, California Court of Appeal, First Appellate District, Division Five, Case No. A138273. Pub. Util. Code § 1759(a) states "No court of this state, except the Supreme Court and the court of appeal, to the extent specific in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission..." The Supreme Court or court of appeal may sit as the court in the first instance if it were to grant a writ of mandamus under Pub. Util. Code § 1759(b).

San Bruno also asserts that during judicial review that an information requestor's challenge to a Commission decision regarding a CPRA request will be subject to a deferential standard of review accorded to all decisions of an administrative agency, rather than independent judgment. Regardless of which standard of review is applied during judicial review, the courts will look to the record in making its determination. San Bruno's concern is thus misplaced.

General Comments - Other Parties

Section 6 is revised to describe the process. The term "administrative appeal" used in the April 2017 Proposed GO 66-D has been replaced with "resolution" which accurately describes the proposed process. We also clarify

Section 6 by referring to “draft resolution” instead of “resolution.”⁹¹ Lyft also requests that we explicitly state parties can file an application for rehearing and a motion to stay enforcement of the order pending a rehearing. Rule 16 of the Commission’s Practice and Procedure govern the application for rehearing process. Rule 16.2 identifies how a person or entity may become eligible to file an Application for Rehearing. Rule 16.2 states for “purposes of filing an application for rehearing of a resolution, ‘parties’ include...any person who has served written comments on a draft or alternate resolution pursuant to Rule 14.5.” Accordingly, to file an Application for Rehearing, a person or entity must file written comments on the resolution at issue. Parties to this proceeding should note that Rule 16.2(c) states “a person may not become a party by filing an application for rehearing or a response to an application for rehearing.” Because these rules are articulated in the Commission’s Rules of Practice and Procedure, we decline to repeat them in Section 6. Parties may file a motion to stay enforcement of the order pending a rehearing and we will address the motions on a case-by-case basis.

Lyft also requests GO 66-D be clarified to state that a “party may exercise its right to appeal the Commission’s determination in a court of competent jurisdiction or seek any other legal or equitable relief allowed under applicable law.”⁹² Such a general restatement of law is unnecessary and thus is not incorporated into this decision. Lyft also requests that “in the event the Commission issues a decision on rehearing ordering the release of information, the effective date of the decision will be 10 business days following issuance of

⁹¹ Lyft, Opening Comment at 8.

⁹² Lyft, Opening Comments at. 8.

the decision, in order to provide the affected Information Submitter or other affected party a reasonable opportunity to seek further legal recourse in the courts.”⁹³ The Commission does not have legal authority to bind the effective date of future Commission decisions, thus this recommendation is declined.

Public Information Appeal Form

The Public Information Appeal Form identifies which information is mandatory or optional. Information Requestors have no legal requirement to provide a justification for their request, but may if they choose to do so. The formatting of the form is intentionally simple to avoid confusion. Per Bayview’s recommendation that the “CPRA request and appeal forms must be readily accessible to all members of the public,”⁹⁴ the Commission’s Public Advisor Office will make a paper copy available upon request. Similarly Bayview provided proposed features of a Public Information Form, which were largely incorporated into the forms.⁹⁵

Sec. 6: Resolution

Comments addressing the resolution are discussed above. Section 6 has been condensed.

7. Comments on Proposed Decision

The proposed decision of Commissioner Picker in this matter was mailed to the parties in accordance with § 311 of the Pub. Util. Code, and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed on September 7, 2017, by Calpine Corporation,

⁹³ *Id.*

⁹⁴ Bayview, Opening Comments at 4.

⁹⁵ *Id.* at 7-8.

CIC, CWA, Imperial Irrigation District, Joint Energy Utilities, and Rasier. Reply comments were filed on September 12, 2017, by CWA, Joint Energy Utilities, Lyft, Rasier, and TURN.

Parties' comments are addressed in the sequence each arises in GO 66-D.

Sec. 3: The Submission of Information with a Claim of Confidentiality to the Commission

Sec. 3.2: Submission of Information with a Claim of Confidentiality

CIC and Lyft request the portion of Section 3.2(b) addressing the public interest balancing test (Cal. Gov. Code § 6255(a)) be revised to apply more broadly.⁹⁶ TURN opposes this revision.⁹⁷ CIC asserts that *private* economic injury – the release of closely-held business strategy to competitors – may result in a *public* harm – presumably an increase in rates for the public. Thus CIC asserts private economic interest should be considered when the Commission applies the public interest balancing test. This example raised by CIC demonstrates a distinction necessary for the Commission to cite the public interest balancing test to withhold information. A carrier requests for the Commission to maintain information confidentiality may cite the *public* harm, an increase in rates for example, and may also cite the *private* economic injury as a basis for the public balancing test to apply. However a claim of confidentiality relying on the public interest balancing test, which only cites a private economic interest is not a sufficient basis for the Commission to withhold information.

⁹⁶ CIC, Opening Comments at 2; Lyft, Reply Comments, at 4.

⁹⁷ TURN, Reply Comments at 2 TURN correctly cites *State Bd. Of Equalization v. Superior Court*, 10 Cal. App. 4th 1177, 1191 (1992), for the premise that the public interest, instead of private interest, is the material facts in a public interest balancing test analysis.

CIC requests Section 3.2(c) be revised to remove the requirement to cite a “legal authority” as opposed to a “basis” for confidentiality, which is the language in D.16-08-024.⁹⁸ The distinction between “legal authority” and “basis” is without difference. In either instance, the information submitter must cite a provision of the CPRA in order for the Commission to provide confidential treatment. Despite the lack of a material difference, this revision is adopted to avoid any unnecessary confusion amongst parties who have been complying with D.16-08-024 for the past year. CIC also requests Section 3.2 be modified to avoid an inadvertent mandate to release information.⁹⁹ This revision is adopted.

CIC requests Section 3.5 be revised to avoid a burden being placed on information submitters by the requirement to maintain the confidential status of information and to alert the Commission when information is no longer confidential.¹⁰⁰ TURN opposes this request.¹⁰¹ Section 3.5 requires an information submitter who claims confidential treatment to take reasonable steps to maintain the confidential status of information. This requirement is necessary to ensure that the Commission is not unnecessarily maintaining information confidentially. CIC’s proposed revision is not adopted.

Some parties request an exception to the requirements of Section 3.2 for voluminous records.¹⁰² This request has been raised in previous proposals in this proceeding and has not been adopted. There is no reason raised by parties to

⁹⁸ CIC, Opening Comments at 3.

⁹⁹ *Id.* at 4.

¹⁰⁰ *Id.* at 7.

¹⁰¹ TURN Reply Comments, at 3.

¹⁰² Joint Utilities, Opening Comments, at 2; CIC, Opening Comments, at 5; Lyft, Reply Comments, at 2; Rasier, Reply Comments, at 1.

revisit this issue again. If information contained in voluminous documents are appropriate for confidential matrices, the concern of parties may be addressed per Section 3.4(a) (to be developed in Phase 2B of this proceeding). Moreover Section 3.4(b) provides for the Commission to make preemptive determinations of confidentiality in future decision requesting submission of documents.

Sec. 3.3: Submissions in a Formal Proceeding

This section is revised with a non-substantive revision to remove ambiguity.

Sec. 3.4: Preemptive Determination of Confidentiality in a Decision

Some parties request GO 66 D be revised to reference other General Orders of the Commission, which make determinations of confidentiality.¹⁰³ This revision is adopted in part. This section is revised to state that a determination of confidentiality in another General Order will be treated as a preemptive determination of confidentiality and the processes of Sections 5 and 6 will apply.

Sec. 4: California Public Records Act Requests

Sec. 4.1: Submission of California Public Record Act Requests

Some parties requests GO 66 D be revised to require Legal Division to notify an information submitter at the time a CPRA request is made for the information submitter's information.¹⁰⁴ These parties assert that this revision would allow information submitters to anticipate the possibility of a draft resolution in response to a CPRA request and adequately prepare their arguments. Such a revision is unnecessary. Per GO 66 D an information

¹⁰³ Calpine, Opening Comment at 3; CWA, Opening Comments at 8; Lyft, Reply Comments at 2.

¹⁰⁴ CWA, Opening Comments at 3; Lyft, Reply Comments at 1; Rasier, Reply Comments at 3.

submitter may assert their argument for confidential treatment in three instances: 1) an information submitter must assert the basis of confidential treatment at the time of submission to the Commission, 2) when the Legal Division serves a draft resolution in response to a CPRA request, an information submitter receives a second opportunity to assert the basis for confidentiality, and 3) if the Commission adopts a resolution, which releases information, an information submitter may file an application for rehearing asserting legal error. Many parties in this proceeding assert these three opportunities for information submitters to assert their legal argument may unnecessarily delay the release of information.¹⁰⁵ Thus the concern that GO 66 D does not allow information submitters sufficient opportunity to assert arguments is without merit.

Sect. 4.4: Exemptions to the CPRA

Parties request the exclusions¹⁰⁶ identified in GO 66-C continue to apply during the interim period while confidential matrices are developed.¹⁰⁷ This proposal is opposed by TURN.¹⁰⁸ GO 66 D modifies the process used for information to be submitted and released by the Commission. The legal basis for the Commission to provide confidential treatment to information submitted to the Commission rest in the CPRA, state and federal law, and applicable privileges, not in GO 66 C. Thus the request to have GO 66 C to continue to apply while confidential matrices are developed is unnecessary.

¹⁰⁵ See comments of IID, San Bruno, and Bayview in this proceeding.

¹⁰⁶ Note while GO 66 C references “exclusions,” GO 66 D references “exemptions.”

¹⁰⁷ Joint Utilities, Opening Comments at 12; CWA, Reply Comments at 3.

¹⁰⁸ TURN, Reply Comments at 1.

CIC requests GO 66 D to be revised to explicitly state that documents may be withheld per the “unfair business disadvantage.”¹⁰⁹ This proposal is supported by CWA and opposed by TURN.¹¹⁰ Contrary to CIC’s statement that the Commission is nullifying decades of Commission precedent, as noted above, GO 66 D does not alter legal authority for the Commission to withhold information. CIC cites a statutory provision, Pub. Util. Code § 285(e)(3), to withhold information in a specific instance and asserts it should apply more broadly. The CPRA, specifically Cal. Gov. Code § 6254(k), provides the Commission may withhold information if the disclosure of information is prohibited by federal or state law. An information submitter thus may cite a federal or state statutory provision which prohibits the disclosure of information and if the cited provision is indeed applicable, the Commission will not disclose the information per § 6254(k). An information submitter may also argue the public interest in withholding information outweighs the public interest in disclosing information per Cal. Gov. Code § 6255(a) (the public interest balancing test), but as noted in Section 3.2 this assertion must identify the public interest and not rely solely on private economic injury. CIC’s concern is thus unfounded.

Some parties request GO 66 D be modified to address how information provided by another state agency with markings of confidentiality should be addressed.¹¹¹ This concern is addressed by the official information privilege in Cal. Evidence Code § 1040 which is incorporated in the context of CPRA by Cal. Gov. Code Section § 6254(k). Per this privilege, the Commission may

¹⁰⁹ CIC, Opening Comments at 11.

¹¹⁰ CWA, Reply Comments at 3; TURN, Reply Comments at 1.

¹¹¹ Calpine, Opening Comment at 2-3; Lyft, Reply Comments at 3; Rasier, Reply Comments at 2.

withhold information provided to it by another agency, which has been identified as confidential. The Commission may also address confidentiality with other agencies in memorandums of understanding or non-disclosure agreements.

Sec. 5: Guidelines for the Commission's Release of Information to the Public

Sec. 5.5(b): Commission Review of CPRA Request Where Lawful Claim of Confidentiality

Some parties requested the ten day requirement of Section 5.4(b) to be extended to allow compliance with Section 3.2.¹¹² Although ten days should be sufficient time in most situations, to allow sufficient time for information submitters to comply, Section 5.4(b) is revised to state that the information submitter may request an extension of time of an additional ten days. Thus the sum total days for an information submitter to respond should not exceed twenty days.

CWA and Lyft request the titles of Sections 5.5(b) and (c) be amended to avoid a presumption that Legal Division's determinations are correct.¹¹³ The proposed revisions are incorporated.

Sec. 5.5(c): Commission Review of Request Where Unlawful Claim of Confidentiality

Some parties request Section 5.5(c) be revised with a specific time frame for comments on a Resolution.¹¹⁴ Per Rule 14.5 of the Commission's Rules of Practice and Procedure, "any person may comment on a draft or alternate draft

¹¹² Joint Utilities, Opening Comments at 8-10.

¹¹³ CWA, Opening Comments at 4; Lyft, Reply Comments, at 2..

¹¹⁴ Joint Utilities, Opening Comments at 10-11.

resolution by serving...comments on the Commission by no later than ten days before the Commission meeting..." As noted earlier, the Commission's Rules of Practice and Procedure must be approved by the Office of Administrative Law. Amending the time to comment on a draft resolution is beyond the scope of this rulemaking. The parties' request to revise Section 5.5(c) is not adopted.

Sec. 6: Resolution

Some parties request a time certain for a draft resolution to be placed on a Commission agenda in response to a challenge of a determination of confidentiality per Sections 5.5(b) and (d).¹¹⁵ The recommendation is not incorporated, but parties are able to inquire to the Public Records Office regarding the status of a resolution.

Multiple parties commented on how the resolution process interplays with the application for rehearing process: IID requests the rehearing process be eliminated for decisions addressing CPRA requests and CWA requests Section 6 be revised to be more informative regarding the application for rehearing process.¹¹⁶ Further clarification regarding applications for rehearing is warranted and a revision has been incorporated as explained below.

Sections 1731 and 1732 of the Pub. Util. Code sets forth the requirement for an application for rehearing before a party may seek judicial review. This is a statutory requirement and may not be waived by the Commission. Section 6 has been revised to mention this statutory requirement. In the alternative to eliminating the application for rehearing process, IID requests the Commission

¹¹⁵ IID, Opening Comments at 5.

¹¹⁶ IID, Opening Comments at 7; CWA, Replying Comments at 4. Sen. Jerry Hill also e-mailed a letter to the service list addressing this issue. Sen. Hill is not a party to the proceeding, but emphasized points raised in the record by parties in the proceeding.

adopt a specific timeframe for the rehearing process. The time necessary for the Commission's deliberation of an application for rehearing for a CPRA decision is dependent on many factors, including the complexity of the application, the number of legal issues raised, and the scope of the relevant CPRA request (CPRA request range from a request for a single document to a request for thousands of documents), as well as staff resources. Accordingly the review and disposition of applications of rehearing may take different amounts of time, and thus, it is not appropriate to identify a specific timeframe.

CIC requests Section 6 to be revised to clarify that information subject a resolution not be released during the pendency of the resolution.¹¹⁷ To provide clarity to the resolution process, this revision is adopted.

CWA requests Section 6 be revised so an information submitter may challenge a Commission decision directing the release of information before the information is released to the public.¹¹⁸ TURN opposes this request.¹¹⁹ As noted by TURN, an information submitter may submit motions to prevent the release of information if the Commission adopts a decision to release records.

The Joint Utilities and Rasier request the time period to comment on a draft resolution be established as 15 days.¹²⁰ As noted above, the rules pertaining to resolutions are contained in the Commission's Rules of Practice and Procedure and the amendment of the rules are thus beyond the legal authority of this proceeding.

¹¹⁷ CIC, Opening Comments at 10.

¹¹⁸ CWA, Opening Comments at 6.

¹¹⁹ TURN, Reply Comments at 3.

¹²⁰ Rasier, Opening Comments at 2.

8. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Rafael L. Lirag is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. There is inconsistency in how information submitters mark or otherwise designates potentially confidential information submitted to the Commission.
2. Information submitters mark information as confidential that contains both confidential and non-confidential information.
3. Information submitted to the Commission is commonly marked as generically confidential, with no explanation of the substantive legal basis for the claim of confidentiality.
4. The current practices for submitting potentially confidential information to the Commission have placed unnecessary burdens on Commission staff and have delayed Commission responses to CPRA requests.
5. Implementing a consistent process for the marking of potentially confidential information submitted to the Commission would improve the ability of the Commission to respond in a timely manner to CPRA requests.
6. Requiring that information submitters claiming confidential treatment for information submitted to the Commission specify the basis for confidential treatment would improve the ability of the Commission to respond in a timely manner to CPRA requests.
7. It is appropriate for the Commission's internal processes for review of potentially confidential information to be clearly and publicly described.
8. The Commission can most effectively review potentially confidential information by assigning the task of review of the individual information to the Commission's Public Records Office, Legal Division.

9. Requiring the Commission to approve by formal vote the release of each document that is claimed to be confidential would be extremely time consuming and inefficient, and would result in delays in the Commission responding to CPRA requests.

10. The Commission can most effectively perform its duties and functions if consistent processes for disclosing information to the public, including pursuant to CPRA requests, are identified.

Conclusions of Law

1. The Commission should implement a consistent process for the marking of potentially confidential information submitted to the Commission.

2. All potentially confidential information submitted to the Commission should specify the basis upon which confidentiality is claimed consistent with the protocols established in GO 66-D, which is attached as Appendix A to this Decision.

3. Commission review of potentially confidential information submitted to the Commission should be assigned to the Commission's Public Records Office, Legal Division.

4. The processes adopted by this decision are consistent with the CPRA, Pub. Util. Code § 583, D.06-06-066 as modified by D.07-05-032, and D.16-08-024.

5. The release of all potentially confidential information by the Commission should be consistent with the protocols established in GO 66-D, which is attached as Appendix A to this Decision.

ORDER

IT IS ORDERED that:

1. The process identified in General Order 66-D, which is attached as Appendix A to this Decision, shall be used for the submission of potentially confidential information to the Commission, the submission of California Public Record Act (CPRA) requests to the Commission, and the release of information by the Commission, including pursuant to CPRA request and in other contexts.
2. The process established in General Order 66-D shall be implemented and supersede General Order 66-C on January 1, 2018.
3. The Commission's Public Records Office, Legal Division is assigned the task for reviewing requests for confidential treatment of information.
4. Rulemaking 14-11-001 remains open.

This order is effective today.

Dated September 28, 2017, at Chula Vista, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners

APPENDIX A

APPENDIX A

GENERAL ORDER NO. 66-D (Supersedes General Order No. 66-C)

PROCEDURES FOR (1) SUBMISSION OF INFORMATION TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION WITH CLAIMS OF CONFIDENTIALITY, (2) SUBMISSION OF REQUEST PER THE CALIFORNIA PUBLIC RECORDS ACT, AND (3) THE RELEASE OF ANY INFORMATION BY THE COMMISSION, INCLUDING PURSUANT TO THE CALIFORNIA PUBLIC RECORDS ACT

Adopted _____; Effective _____. Decision _____.

1. Definitions and Acronyms

- (1.1) **“Commission”** includes the Commission; each commissioner; any person employed by the Commission; which includes the Office of Ratepayer Advocates, Safety and Enforcement Division, and Office of Safety Advocate.
- (1.2) **“Confidential Matrices”** is a term describing a Commission determination that specific classifications of information are confidential per Section 3.4 of this GO. The determination is made prior to the submission of such information and applies broadly to a classification of information.
- (1.3) **“CPRA”** is an acronym for California Public Records Act (Section 6250 et seq. of the Government Code).
- (1.4) **“GO”** is an acronym for General Order.
- (1.5) **“Information”** includes but is not limited to, any document, record, account, book, or paper regardless of whether it is in an analog or digital format, which is prepared, owned, used, submitted to or retained by the Commission.
- (1.6) **“Information Submitter”** includes any person or entity submitting information to the Commission.
- (1.7) **“Information Requestor”** includes any person or entity requesting information from the Commission per the CPRA.

- (1.8) **“Modified D.06-06-066”** is a citation to Decision 06-06-066, as modified by D.07-05-032, which addresses confidentiality in the context of energy procurement information.
- (1.9) **“Public Records Office”** is the portion of the Commission Legal Division assigned to process claims of confidentiality and responses to CPRA requests.

2. Statement of Liability For Non-Compliance

- (2.1) Compliance with all Commission Orders is subject to Public Utilities Code Sections 702 and the penalty provisions in the Public Utilities Code including but not limited to, Sections 2107, 2107.5, 2108 2110, 2111, 2112, 2113, and 2114 and Rule 1.1 of the Commission’s Rules. Non-compliance by a person, corporation, and/or organization with this GO may be referred to the Commission’s General Counsel and/or law enforcement for further action.

3. The Submission of Information with a Claim of Confidentiality to the Commission

- (3.1) **Applicability:** This section applies to information submitted to the Commission on or after January 1, 2018. Information submitted between September 25, 2016, and December 31, 2017, is governed by D.16-08-024. Where D.16-08-024 references future decisions in R.14-11-001, this GO shall apply. Information submitted prior to September 25, 2016, is subject to GO 66-C or its predecessors.
- (3.2) **Submission of Information with a Claim of Confidentiality:** An information submitter bears the burden of proving the reasons why the Commission shall withhold any information, or any portion thereof, from the public. To request confidential treatment of information submitted to the Commission, an information submitter must satisfy all of the following requirements:
 - a) If confidential treatment is sought for any portion of information, the information submitter must designate each page, section, or field, or any portion thereof, as confidential. If only a certain portion of information is claimed to be confidential, than only that portion rather than the entire submission should be designated as confidential.

- b) Specify the basis for the Commission to provide confidential treatment with specific citation to an applicable provision of the CPRA.

A citation or general marking of confidentiality, such as "GO-66" and/or "Public Utilities Code Section 583" without additional justification of confidentiality does not satisfy the information submitter's burden to establish a basis for confidential treatment by the Commission.

If the information submitter cites Government Code Section 6255(a) (commonly known as the public interest balancing test) as the legal authority for the Commission to withhold the document from public release, then the information submitter must demonstrate with granular specificity on the facts of the particular information why the *public* interest served by not disclosing the record clearly outweighs the *public* interest served by disclosure of the record. A *private* economic interest is an inadequate interest to claim in lieu of a *public* interest. Accordingly, information submitters that cite Section 6255(a) as the basis for the Commission to withhold the document and rest the claim of confidentiality solely on a *private* economic interest will not satisfy the requirements of this Section. To invoke the administrative processes described in Sections 5 and 6, the information submitter must satisfy the requirements of this Section.

If the information submitter cites Government Code Section 6254(k) (which allows information to be withheld when disclosure of it is prohibited by federal or state law), it must also cite the applicable statutory provision and explain why the specific statutory provision applies to the particular information.

An information submitter may not cite Government Code Section 6254(a) as the legal authority to establish a basis for confidential treatment by the Commission, because Section

6254(a) does not apply to any communication between the Commission and a member of the public.

- c) Provide a declaration in support of the legal authority cited in Section 3.2(b) of this GO signed by an officer of the information submitter or by an employee or agent designated by an officer. The officer delegating signing authority to an employee or agent must be identified in the declaration.
- d) Provide a name and email address of the person for the Commission to contact regarding the potential release of information by the Commission per Section 5 of this GO. An information submitter may designate as many as three people by name and email address for all document submissions to the Commission. Failure of the information submitter to monitor and respond to Commission communications to the designated email address(es) does not preclude release of information per Section 5 of this GO. There is no requirement for the Commission staff to contact each name provided. To change the designated email address and contact name, an information submitter shall send a letter to:

Public Records Office, Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

There are limited circumstances when the requirements of this Section do not apply. First, information subject to the requirements of Modified D.06-06-066 is exempted from the requirements of this Section and may continue to be submitted consistent with the requirements of that decision. Second, valid submission of information per Section 3.3 (submission in a formal proceeding) and Section 3.4 (submission consistent with a determination of confidentiality in a decision) of this GO is exempted from the requirements of this Section.

If an information submitter satisfies the requirements in this Section, then the Commission will evaluate the legal authority for the Commission to withhold the document from the public per the

process established in Sections 5 and 6 of this GO. Unless information is submitted in accordance with Section 3.2-3.4, information submitted in non-compliance with this Section, may be released to the public per Section 5.2.

(3.3) Submissions in a Formal Proceeding: The requirements of Section 3.2 of this GO do not apply in when a party in a formal proceeding files information in the docket. To obtain confidential treatment of information to be filed in the docket of a formal proceeding, the information submitter must file a motion pursuant to Rule 11.4 of the Commission's Rules, or comply with a process established by the Administrative Law Judge for that specific proceeding. Please note that advice letters are not part of formal proceedings and thus confidentiality for information in advice letters shall be governed by the process in Section 3.2 or 3.4.

(3.4) Preemptive Determination of Confidentiality in a Decision:

- a) The Commission may adopt confidential matrices which preemptively designate certain information as confidential or public in a decision. Information submitted to the Commission per this Section shall clearly designate the relevant decision adopting the applicable confidential determination. If the information is appropriately identified as being preemptively determined to be confidential, the Commission will not release information in response to a CPRA, unless by order of the Commission. The Commission's *general* determination that a classification of information in a confidential matrix is confidential may only be challenged by filing an Application for Rehearing or a Petition to Modify of the Commission decision adopting the confidential matrix. The Commission's *specific* determination of whether particular information qualifies for confidential treatment per a confidential matrix adopted by the Commission may be challenged per Sections 5.5 and 6.
- b) In addition, in any proceeding in which the Commission issues a decision requiring the submission of information, the Commission may make a determination of whether the

information required by the decision will be treated as public or confidential. In such an instance the Commission will:

- i. Identify the type of information to be submitted, and
- ii. Provide an analysis of the legal authority for the Commission to provide confidential treatment to the specific information.

Information submitted to the Commission per this Section should clearly designate the relevant decision containing the confidential determination. Any party may challenge the confidentiality determination of the decision by filing an Application for Rehearing or Petition to Modify. The determination of confidentiality in a decision governs the release of the information to the public, including in response to a CPRA request. Any determination to treat certain information as confidential is limited to the particular information required to be submitted in that decision and does not constitute a decision of more general applicability made pursuant to Section 3.4(a).

If the Commission has made a determination in another General Order regarding confidentiality, an information submitter may cite that General Order. In such instances the process in Sections 5.5 and 6 will apply.

- (3.5) Confidential Treatment Unavailable for Public Information:** A request for the Commission to provide confidential treatment of information per Sections 3.2 - 3.4 of this GO, which is already public, will not be granted. An information submitter requesting confidential treatment must make reasonable steps to maintain the information confidentiality and in the event an information submitter becomes aware that the information is public, the information submitter must so inform the Commission in a timely manner.

4. California Public Records Act Requests

- (4.1) Submission of California Public Record Act Requests:** A CPRA request for information from the Commission can be made in four ways. First, CPRA requests can be submitted to the Public Records Office, Legal Division, by using the electronic Public Records Request Form available at publicrecords.cpuc.ca.gov/. Second, a request can be submitted by U.S. mail by mailing a request to:

Public Records Office, Legal Division
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

- Third, a request can be submitted by email or phone to a Commission employee. And lastly, a request may be submitted in person to the Public Records Office. Before submitting a request, please check to see if the information is available from the Commission's website, <https://publicrecords.cpuc.ca.gov/requests>. The Commission will process a CPRA request per this GO regardless of how it is titled.
- (4.2) Fees for Copies:** Fees may be assessed consistent with the CPRA. Checks for payment should be made payable to the Public Utilities Commission of the State of California. Information requestors may request fees to be waived when submitting a request.
- (4.3) Review of CPRA Requests:** Requests will be reviewed and processed by the Public Records Office per Sections 5 and 6 of this GO. The Office will promptly notify the person making the request of the determination of whether the information is disclosable, in accordance with Government Code Section 6253 of the CPRA. If information is withheld, the provisions of Sections 5 and 6 of this GO shall apply.
- (4.4) Exemptions to Disclosure Per the CPRA:** Information in possession of the Commission is available for public inspection unless deemed to be exempt by the Commission from inspection pursuant to the exemptions in the CPRA (Government Code Sections 6250, et seq., except Section 6254(a) which does not apply to information submitted by regulated entities and the public).

5. Guidelines for the Commission's Release of Information to the Public

(5.1) Scope: This section defines when information submitted to the Commission and information created by the Commission may be released to the public, including in response to CPRA requests.

In instances when the Commission receives a subpoena, it will review claims of confidentiality consistent with lawful claims of privileges and applicable law.

(5.2) Release of Information with No Claim of Confidentiality:

Information submitted to the Commission with no claim of confidentiality at all may be released to the public without further action by the Commission, unless the Commission withholds the information per an exemption of the CPRA. This provision applies regardless of the date the information was submitted to the Commission. Information created by the Commission may be released to the public without further action by the Commission, unless the Commission withholds the information per an exemption of the CPRA.

(5.3) Release of Information with Claims of Confidentiality: The determination of rules applicable for the release of information submitted to the Commission with a claim of confidentiality will be based on the date of submission to the Commission. Section 5.4 of this GO governs the release of information with a claim of confidentiality submitted prior to January 1, 2018. Section 5.5 of this GO governs the release of information with a claim of confidentiality submitted on or after January 1, 2018.

If the Commission withholds the information created by the Commission per an exemption of the CPRA, then Section 5.5 of this GO will govern the release of information.

(5.4) Information with a Claim of Confidentiality Submitted Prior to the Effective Date of this GO

a) **Information Submitted per the Requirements of Modified D.06-06-066:** This section applies when the Commission seeks to release information submitted to the Commission as confidential pursuant to the requirements of Modified D.06-06-066 after the effective date of that decision, and that are in compliance with

the requirements of that decision. Such information will only be released, including in response to CPRA requests, after the applicable time period set forth in Modified D.06-06-066. After the expiration of the applicable time period, or if the submission does not comply with the requirements of Modified D.06-06-066, such information may be released by Commission staff.

- b) **Information Submitted Prior to September 25, 2016; not per the Requirements of Modified D.06-06-066:**¹²¹ This section applies when the Commission seeks to release information submitted prior to September 25, 2016, including in a response to a CPRA request, and the document submitter simply marked the information confidential, or invoked Section 583 or General Order 66-C, without more information to substantiate the claim of confidentiality.

If the Commission has received a CPRA request for such information, Legal Division will contact the information submitter and provide them ten days to meet the requirements of Section 3.2 of this GO. An information submitter may request an extension of time of an additional ten days.

If the Commission seeks to release such information in any context other than a CPRA request, Legal Division will contact the information submitter and provide them ten days to meet the requirements of Section 3.2 of this GO. In this instance, the ten days may be extended by Legal Division to fifteen days, if the information submitter requests an extension.

Rule 1.15 of the Commission's Rules governs calculation of time.

- c) **Information submitted between September 25, 2016 and December 31, 2017, not per the requirements of Modified D.06-06-066:** This section applies when the Commission seeks to release information, including in response to a CPRA request,

¹²¹ This section resolves Section 3.2(4) of D.16-08-024, which stated such documents "will only be released subject to a process to be determined in this proceeding or a successor proceeding, consistent with these guidelines."

submitted to the Commission between September 25, 2015, the date established in D.16-08-024 for the implementation of the D.16-08-024 rules, and December 31, 2017, which was not submitted per the requirements of Modified D.06-06-066. Section 3.2 of D.16-08-024 governs the release of such information.

If the information submitter has satisfied the requirements of Section 3.1 of D.16-08-024, and the Commission receives a CPRA request for such a document, then the provisions of Sections 5.5 and 6 of this GO will apply.

If the information submitter fails to satisfy the requirements of Section 3.1 of D.16-08-024, and the Commission receives a CPRA request for such information, then the information may be released.

(5.5) Information Submitted on or after January 1, 2018, with a Claim of Confidentiality and Information Created by the Commission

- a) **Release of Information Submitted on or After January 1, 2018, With a Claim of Confidentiality:** This section applies if an information submitter has satisfied Section 3.2 of this GO, or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO. Before releasing information in response to a CPRA request, or in any other context, Legal Division will determine whether the information submitter has established a lawful basis of confidentiality. If Legal Division finds *the information submitter did establish a lawful basis of confidentiality*, then Legal Division will not release the information, and will proceed as described in Section 5.5(b) of this GO. If Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, Legal Division will proceed as described in Section 5.5(c) of this GO.
- b) **Commission Review of CPRA Request Where a Confidentiality Claim Has Been Found Lawful:** If an information submitter has met the requirements of Section 3.2 of this GO or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO, and Legal Division finds *the information submitter did establish a lawful basis of confidentiality*, then Legal Division will inform the CPRA

requestor and not release the information. In these cases, Legal Division will comply with the CPRA by providing the requestor with enough detail about the withheld information so that the requestor broadly understands what is being withheld and why, without disclosing confidential information. If a CPRA request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Information Appeal Form within ten days of receiving notice that a CPRA request has been denied in whole or in part per Section 6. The Public Information Appeal Form may state the reasons why the information should be released. Information requesters are encouraged to provide reasons why information should be released. Rule 1.15 of the Commission's Rules governs calculation of time.

If an information requestor submits a Public Information Appeal Form, Legal Division will prepare a draft resolution per the requirements of Section 6.

- c) **Commission Review of Request Where a Confidentiality Claim Has Been Found Unlawful:** If an information submitter has met the requirements of Section 3.2 of this GO or if the information submitter has met the requirements of a confidentiality matrix established per Section 3.4 of this GO, but Legal Division finds *the information submitter has failed to establish a lawful basis of confidentiality*, then Legal Division will submit a draft resolution per Section 6. In these cases, the information submitter receives notice of the resolution and may comment on the draft resolution per Rule 14.5 no later than ten days before the Commission meeting when the draft resolution is first scheduled for consideration. Rule 1.15 of the Commission's Rules governs calculation of time.
- d) **Information Created by the Commission:** If the Commission receives a CPRA request for information created by the Commission, and the Legal Division finds a lawful basis to withhold the information created by the Commission, then Legal Division will inform the CPRA requestor and not release the information. In these cases, Legal Division will comply with the CPRA by providing the requestor with enough detail about the

withheld information so that the requestor broadly understands what is being withheld and why, without disclosing confidential information. If a CPRA request is denied in whole or in part, the requestor may appeal to the Commission for reconsideration by submitting a Public Information Appeal Form within ten days of receiving notice that a CPRA request has been denied in whole or in part per Section 6. The Public Information Appeal Form may state the reasons why the information should be released.

Information requesters are encouraged to provide reasons why information should be released. Rule 1.15 of the Commission's Rules governs calculation of time. If an information requestor submits a Public Information Appeal Form, Legal Division will prepare a draft resolution per the requirements of Section 6.

6. Resolutions

(6.1) Resolutions: If the Public Records Office, Legal Division, prepares a draft resolution granting or denying, in whole or in part, the CPRA request per Section 5.5(b), (c), or (d), then:

- a) The Commission will serve the draft resolution on both the information submitter and information requestor (except for the scenario identified in Section 5.5(d) where there is not an information submitter, because the Commission created the information).
- b) The Commission will release the draft resolution for public review and comment pursuant to Pub. Util. Code § 311(g) and Rule 14.5 of the Commission's Rules.
- c) The Commission shall not release such information pending the adoption of the resolution provided for in this section.

(6.2) Applications for Rehearing: To challenge a Commission resolution which disposes of the appeal of staff action, a party may file an Application for Rehearing pursuant to Pub. Util. Code § 1731 and Rule 16.1 of the Commission's Rules of Practice and Procedure. Per Pub. Util. Code § 1732, the Application for Rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision to be unlawful and no corporation or person shall in any court urge or rely on any ground not so set forth in the application.

(END OF APPENDIX A)

R.14-11-001 COM/MP6/vm2/ek4

APPENDIX B

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Public Information Appeal Form **See CPUC General Order 66-D for additional information**

If you have requested information from the California Public Utilities Commission (CPUC), and the CPUC staff have informed you that the information responsive to the request will be withheld in whole or in part, you may challenge the CPUC's determination to withhold by completing this form.

Please complete the following information and submit it the Commission by one of the following: (1) mail to Public Records Office, Legal Division, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102; or (2) email to the Commission's staff who informed you about withholding the information, (3) in person at the Front Desk of the Commission's Legal Division at 505 Van Ness Avenue.

Once the Public Information Appeal Form is received, the Commission will place a draft resolution on a future agenda for the Commission to reconsider the determination to withhold information. You may comment on that draft resolution.

Required Information

PRA Request #: _____

Name and Contact Information (please provide an address, email, or phone number):

Date You Received Denial of Request: _____

Date of Submission of this Appeal Form: _____

This appeal form must be submitted within ten days of receiving a denial of request. If the tenth day falls on a weekend or holiday, the appeal is due the proceeding business day.

Optional Information

You may attach an Appendix to this form not exceeding five pages if you would like to provide information supporting your request. Under the California Public Records Act, you are not required to provide a reason or justification to support your request, but may do so in order to assist the Commission to better understand your request.

(END OF APPENDIX B)