

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ALJ Division & Legal Division

San Francisco, State of California

Date: December 14, 2006

Resolution ALJ-195

R E S O L U T I O N

RESOLUTION ALJ-195. Resolution Establishing a Process for Resolving Timing, Format, Scope, and Burden Concerns Regarding Commission Staff's Access to Information Outside a Formal Proceeding

On March 2, 2006, we adopted Decision (D.) 06-03-013 announcing a Consumer Protection Initiative designed to empower consumers and prevent fraud in the rapidly changing telecommunications industry. The decision also launched a multilingual Consumer Education Initiative, increased enforcement activities, and expanded the Commission's toll-free hotline for consumer complaints against wireless and other carriers.

Among its various provisions, D.06-03-013 addresses the Commission staff's ability to obtain information from telecommunications carriers and the merits of a process to resolve disputes concerning information requests made outside of a formal proceeding. Ordering Paragraph 6 of the decision requires our General Counsel and Chief Administrative Law Judge (ALJ) to prepare a resolution setting forth an appropriate process for resolving timing, format, scope, and burden issues regarding Commission staff's access to information. The General Counsel and Chief ALJ, in cooperation with our Industry Divisions, have prepared the requested resolution, and we adopt it today. While this resolution is prepared to advance the Consumer Protection Initiative, the principles and procedures we announce are also generally applicable to the other utilities and other entities regulated by the Commission.¹

¹ Individual Commissioners and the Commission's Executive Director and Assistant Executive Directors have specific statutory powers to require information. This resolution does not pertain to information requests made directly by Commissioners. Also, this resolution does not modify the Division of Ratepayer Advocates' separate information-gathering authority.

Background

A major reason for regulation of public utilities is that these entities perform vital services such as the provision of energy, water, and telecommunications services. The availability of information has a crucial role in enabling public regulatory agencies, such as the Commission, to regulate these utilities. The Commission and its staff need information about utilities' ongoing operations to inform policymaking. The Commission and its staff have statutory rights of access to utility information to understand how industry operates, both to ensure that utility operations meet applicable requirements and proposed policies reflect operational realities. The information-gathering activity is a necessary component of the Commission's efforts to secure compliance, either through improvements made by the utility upon notice of non-compliance or through formal proceedings before the Commission or a court. These reasons also apply to other entities regulated in some fashion by the Commission pursuant to law.

For these reasons, staff gathers information for the Commission's various regulatory purposes.

Constitutional and Statutory Basis for Access to Utility Information

The California Public Utilities Code embodies these general considerations and, in particular, provides numerous specific provisions for Commissioners and Commission staff to obtain information from regulated entities and those with whom such entities deal. This authority originates in the state constitutional provision (Art. XII, § 6) allowing the Commission to "fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt" A principal statutory provision is Section 312, authorizing the Commission and each Commissioner to issue summons, subpoenas, warrants of attachment and commitment, and other legal process "in like manner and to the same extent as courts of record." Other related provisions include, but are not limited to, the following:

- Section 309 – Division of Ratepayer Advocates' authority to compel the production or disclosure of any information it deems necessary to perform its duties from any entity regulated by the Commission
- Section 311 – Authority of Commission's officers and administrative law judges to issue subpoenas for the production of documents
- Section 313 – Duty of public utilities to produce books, accounts, papers, or records
- Section 314 – Inspection of books and records of public utilities

- Section 425 – Inspection of business records of any carrier or related business
- Section 581 – Duty of public utilities to provide information to the Commission
- Section 582 – Duty of public utilities to provide certain documents to the Commission
- Section 584 – Duty of public utilities to provide reports, as required by the Commission
- Section 771 – Authority to enter upon premises occupied by public utility

The Commission's authority, and that of its staff, to obtain information from non-regulated persons and entities is also provided by the Public Utilities Code. Such provisions include, but are not limited to, the following:

- Section 314 – Inspection of books and records of subsidiaries, affiliates, and holding corporations of electrical, gas, and telephone corporations
- Section 1794 – Depositions of witnesses residing within or without the state, including production of documents by these persons

While these citations are not exhaustive, these provisions reflect the longstanding, broad, and settled authority granted by the People and Legislature of California to obtain information from public utilities, and those who deal with them, in furtherance of informed public utility regulation.

The Commission's authority, of course, is not without its limits. Inquiries of Commissioners, Commission officers, and its staff must have some rational relationship to public utility regulation. Also, California statutes and the Commission's rules, orders, and decisions provide protections for legitimate confidentiality and privilege claims. (*See, e.g.*, California Public Utilities Code § 583, RULES OF PRACTICE AND PROCEDURE 11.3-11.5, and General Order 66-C.)

Types of Information Requests

Commission staff requests information from utilities and other respondents for a variety of purposes: to investigate and resolve specific consumer complaints, to gather information that is useful to consumers, to develop factual information with which to evaluate or initiate policy, to ascertain trends or patterns that suggest regulatory shortcomings or impermissible utility activities, or to compile sufficient information to warrant an enforcement proceeding before the Commission or another forum.

For example, representatives in the Consumer Affairs Branch, as part of their work, communicate with utility staff to understand the details of a specific complaint. An industry division analyst may request information on utility outages or service interruptions in an effort to determine whether the requirements of an existing general order are adequate. A staff investigator may request information on customer complaints and a carrier's or utility's response to the complaints. A Division Director or supervisor may not have reviewed the specific information request in these cases; but in all these instances, there is a strong presumption that staff inquiries are in furtherance of regular job responsibilities or a management-authorized program of work. The Commission expects that utilities and carriers will promptly provide information in response to staff inquiries; and, as noted above, information gathered early often can avoid a formal proceeding (for example, where a utility is able to satisfy a staff concern or correct a condition or practice voluntarily).

Specifically in furtherance of the Consumer Protection Initiative that underlies this resolution, we expect all telecommunications carriers to cooperate fully with staff by promptly producing upon staff request all available information on California customer complaints including but not limited to (1) the number of complaints received, (2) the categories of these complaints, (3) the carriers' responses to these complaints, and (4) any operational conditions or practices related to these complaints which affected service quality or coverage. Other carriers and utilities already provide this type of information to the Commission on a regular basis.

While staff has broad authority to request information for regulatory purposes, staff should avoid duplicative requests or unnecessary requests when the desired information is being provided regularly through existing reporting requirements.

Disputes Concerning Information Requests

On occasion, disputes arise between Commission staff and a public utility or another person or entity asked to respond to Commission inquiries (hereinafter referred to as "respondent"). Most disputes are about the timing, format, scope, or burden of an information request. Staff information requests may require a respondent to change its work priorities, and reassign personnel and other resources, in order to provide the requested information by a certain date. Information requests may require a respondent to take additional steps to present data in a different format (*e.g.*, spreadsheet, bound copies) or to deliver it in a specified way (*e.g.*, electronic format). Information requests may provide little information about the reason for the inquiry (indeed, for staff to say too much in some instances will frustrate the inquiry) or seek information that a respondent believes is privileged or confidential. Complying with these information requests may result in unexpected and considerable expenses.

These timing, format, scope, and burden issues will vary depending on the circumstances of a particular inquiry; but the underlying principle is always this: Public utilities and other respondents have the continuing, paramount obligation to respond forthrightly to Commission staff inquiries. In all cases, Commission staff inquiries carry a strong presumption of validity and reasonableness in terms of timing, format, scope, or burden.

Commission staff and a utility or other respondent may have legitimate but different perspectives about the appropriateness of the information request. If the request is in the context of a formal proceeding, our Rules and Resolution ALJ-185 (Alternative Dispute Resolution *or* ADR) set forth existing procedures for resolving such disputes. These methods can include negotiation (“meet and confer” sessions), mediation, or decisions by the assigned ALJ or Law and Motion ALJ.

Disputes concerning staff information requests arising outside formal proceedings have been handled differently over time and by the various industry divisions. Because of the recent Consumer Protection Initiative (focusing on the telecommunications industry), this is an appropriate time for the Commission to more clearly articulate its process for resolving disputes concerning staff information requests made outside formal proceedings. This description is especially warranted because informal staff requests do not often result in Commission orders or decisions that can be used to describe a dispute resolution process.

The following procedures address staff information requests initiated by any Commission Division involved in the implementation of the Consumer Protection Initiative.² These procedures, however, are generally applicable to other utilities and entities regulated by the Commission. In an effort to minimize conflict, time, and transaction costs, this process contemplates that both Commission staff and the public utility or other respondent have rights and obligations throughout the process.

Many disputes over staff information requests involve similar fact patterns, legal issues, or both. The ability of the Commission and its staff to fulfill the agency’s regulatory responsibilities will be impaired if the following procedures are abused and used reflexively to delay the Commission’s rightful acquisition of information.

Dispute Resolution Procedures

The Commission believes that most disputes over staff information requests can be resolved through a graduated process, with many opportunities for structured but

² Thus, references to “Division,” “Division Director,” and related terms in the remainder of this Resolution refer to those Divisions under the supervision of the Executive Director and persons specifically involved in implementing the Consumer Protection Initiative.

informal communications between staff and the utility or other respondent. For this process to be successful, utilities and other respondents with regular dealings with the Commission are responsible for designating employees with sufficient authority to work with Commission staff to resolve these disputes.

Based on this premise of informal dispute resolution, we announce the following basic procedures to be followed in resolving disputes about staff information requests outside formal hearings.

1. Staff Authority. Commission staff information requests directed to utilities and other respondents must be rationally related to public utility regulation, as vested in the Commission by the state constitution and statutes or delegated to the Commission by federal law or federal agency order. Division Directors and supervisors are responsible for ensuring that staff members who initiate such information requests have an informed understanding of their authority, that information requests are stated succinctly and clearly, and that actual practices conform to these goals. Staff has broad authority to request information for regulatory purposes, but staff should avoid duplicative requests or unnecessary requests when the desired information is being provided regularly through existing reporting requirements.

2. Prompt Initial Review. Utilities and other respondents must review staff information requests promptly and, generally within five business days, contact the staff member with any questions or initial concerns about the timing, scope, format, or burden of the request.

3. Meet and Confer Opportunities. Each Division will develop procedures allowing utilities and other respondents to request a “meet and confer” session with Division staff to attempt to resolve any misunderstanding or disagreement concerning a staff information request. These divisional procedures shall require that a “meet and confer” opportunity is available only when (a) the dispute has not been previously resolved by Commission precedent (including decisions, orders, resolutions, or rulings in formal proceedings) or prior, documented staff dispositions; (b) the requested information is not readily available or routinely collected by the utility or other respondent; and (c) in the case of (b), the utility or other respondent has provided written documentation of the anticipated burden of providing the requested information. Within a reasonable time after the “meet and confer” session or the denial of such a meeting, the Division will inform the objecting utility or other respondent that (a) the information request has not been modified, or (b) the request has been modified, with an explanation of the modification and the time for submission of the information.

4. Review by Division Director. If the utility or other respondent disagrees with the results of the “meet and confer,” the utility or other respondent may request review by

the Division Director. The written request may be sent electronically, by regular mail, or delivered in person. In making the request, the utility or other respondent must document in detail the nature of the dispute, what modifications would be required for the utility or respondent to comply, and whether an oral presentation of the review is requested.

The Division Director has discretion to review the request in the manner he or she deems appropriate. This may include negotiating with the utility or respondent, mediating between staff and the utility or respondent, hearing presentations from both sides before deciding on the information request, or rejecting the request for an oral presentation. Once the Division Director's review is complete, the Division will inform the objecting utility or other respondent that (a) the information request has not been modified, or (b) the request has been modified, with an explanation of the modification and the time for submission of the information.

5. Review by Commission's General Counsel. If the utility or other respondent disagrees with the results of the Division Director's review, the utility or other respondent may request review by the Commission's General Counsel. The Division Director may also request review by the General Counsel. Such review should be requested only in extraordinary circumstances.

The written request for review may be sent electronically, by regular mail, or delivered in person; and a copy must be provided to the Division Director, utility, or respondent, as well as the General Counsel. In making the request, the utility or other respondent must document in detail the severe negative consequences that are reasonably anticipated to result from the information request, the nature of the dispute, what modifications would be required for the utility or respondent to comply, and whether an oral presentation of the review is requested. The General Counsel shall review the request and the General Counsel will decide, in his or her discretion, whether to (a) deny the review without oral presentation; (b) affirm or modify the information request without an oral presentation; or (c) schedule an oral presentation.

The General Counsel has discretion to conduct the review, including any oral presentation, in the manner he or she deems appropriate. The General Counsel will promptly notify the utility or other respondent and Division Director as to his or her decision.

6. Continuing Obligation of Disclosure. As previously discussed, public utilities and other persons or entities subject to Commission inquiries have the continuing, paramount obligation to respond forthrightly to Commission staff inquiries. If a dispute develops about the timing, format, scope and burden of a staff information request, the utility or other respondent has the continuing obligation to suggest, in good

faith, ways to alleviate the specific concern and to respond forthrightly to the unobjectionable portions of the request, thereby narrowly withholding only the information in dispute.

Also, if a utility or other respondent does not respond, or responds insufficiently, to an information request (original or as modified), the Division initiating the request will inform appropriate Commission personnel, and the Commission may proceed as provided by Commission rules, orders, and otherwise as provided by law to enforce the information request.

Comments

The draft resolution of the ALJ Division and Legal Division was mailed in accordance with Section 311 of the Public Utilities Code and Rule 14.2(c) of the Commission's Rules of Practice and Procedure. Comments were received from twelve persons or entities: the Western Power Trading Forum, California Water Association, electric utilities, Exempt Wholesale Generators (EWGs), Sempra Global, railroads, small and medium size Local Exchange Carriers (LECs), wireless carriers, Cox Communications, AT&T California, the Commission's Consumer Protection and Safety Division (CPSD), and the Division of Ratepayer Advocates (DRA).

The major comments (some of which were made by more than one person or entity) and our responses are as follows:

1. The resolution should be limited to telecommunications carriers or, at least should be clear about the entities it does cover. While this resolution responds to a directive set forth in the telecommunications Consumer Protection Initiative, we believe it benefits all persons and entities dealing with the Commission, as well as the Commission itself, to have routinized procedures for resolving disputes concerning staff information requests – even if existing practices have worked well in some areas (which we are confident will continue). We direct each of our Industry Divisions to implement the general principles and procedures we outline in this resolution, but we allow Industry Division Directors to adapt these general provisions to the unique circumstances of the particular industry. We have amended the resolution to indicate that these principles and procedures are generally applicable to other utilities and entities regulated by the Commission.
2. The resolution exceeds the Commission's authority over certain entities that are not regulated as traditional utilities or, at least, ignores preemptive federal law. The Commission's information-gathering authority cannot be simply characterized and does depend on whether the recipient of the request is a public utility or regulated carrier, another entity regulated specially by the Commission (*e.g.*, billing agents), entities affiliated with public utilities, or third persons. The procedure we outline in the resolution requires that Division Directors and supervisors be responsible for proper use of information-gathering authority, and legitimate disagreements about the Commission's authority, and the impact of federal law, may be addressed in the "meet and confer" process we establish.
3. The scope of the information requests contemplated by the resolution ("rationally related to public utility regulation") is too broad, in the view of some, and too narrow in the view of others. Similar comments argued that the resolution's "strong presumption

of validity” afforded staff information requests is unwarranted. The resolution describes the many purposes for which information is gathered outside formal proceedings, ranging from information to help understand industry trends to information to prepare for enforcement proceedings. The statutes, upon which our information-gathering authority is based, impose few limits on the type of information that may be requested. While we have slightly altered the text to recognize our ability to obtain information from other entities, we believe that the “rationally related” standard appropriately circumscribes staff inquiries.

4. The resolution should clarify its application to DRA’s information-gathering authority. The resolution does not prescribe principles or procedures for DRA or in any way expand or contract that division’s information-gathering authority. As acknowledged by footnote 1, DRA has its own statutory authority for information gathering.
5. Staff information requests should not be used to implement an ongoing reporting requirement when the Commission itself has not done so. We agree. The resolution creates a process for resolving legitimate disputes concerning staff information requests. It does not authorize new, ongoing requirements where not warranted.
6. The initial period for respondents to review an information request and communication with Commission about any concerns (two days) is too short. We agree with the comments. We have extended the initial review period to five business days.
7. No provision is made to protect claims to the confidential information of non-utility entities. Utilities and affiliates of public utilities obtain confidentiality protection under Public Utilities Code section 583 and General Order 66-C. Other persons or entities submitting information to Commission benefit from the confidentiality protections afforded under the Public Records Act, California Government Code section 6254.
8. The specific information items on page 4 of the resolution are inappropriate for a resolution setting forth generalized principles and procedures. One comment was that the itemization of certain telecommunications information (*e.g.*, number of complaints, categories, responses, and related conditions and practices) that should be promptly provided to staff is inappropriate for this resolution. The resolution seeks to routinize information-gathering procedures and assist in the prompt resolution of these disputes. Because we are especially interested in the implementation of a new telecommunications policy, the prompt receipt of this type of information will aid our monitoring of the policy and reduce the number of disputes over information which is necessary for our regulatory purposes in this industry.

9. The meet and confer requirement should not be conditioned but should be available to resolve all disputes. The resolution indicates that “meet and confer” opportunities are not available unless Commission precedent has not previously resolved the dispute or the respondent has documented that the requested information is not readily available or routinely collected. We believe that a threshold is necessary to prevent these procedures from being used to unnecessarily delay legitimate staff information requests.

10. A Division Director’s involvement in information-gathering dispute resolution potentially violates due process. A concern was registered that the procedures allow an interested Division Director, whose staff initiated the information request, to resolve a disagreement over the request. So long as privilege and confidentiality claims are respected, information requests (which are often quite preliminary) do not deprive the respondent of a property interest, entitlement, or other protectable interest that would require resolution by an impartial decisionmaker.

11. Final resolution of a dispute concerning a staff information request should be by an administrative law judge, with possible appeal to the Commission, and not by the General Counsel. We seek to avoid transforming informal staff information requests into formal proceedings before administrative law judges with appeals to the Commission. Also, the final resolution of these disputes by the General Counsel, who (unlike other Division Directors) is under the supervision of the President and Commission, affords disputants the independent review sought by many of the commenters. We are confident that most disputes over information requests can be resolved by people talking to one another, and we have set forth a procedural setting in which they may do so.

12. The resolution should clarify the status of disputed information requests while the dispute-resolution process is underway. When a recipient of a staff information request disputes in good faith the timing, format, scope, or burden of a request, the respondent still has the obligation to provide the requested information not in contention – thereby narrowly withholding only the information in dispute.

IT IS SO RESOLVED.

This resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held on _____, the following Commissioners voting favorably thereon:

STEVE LARSON
Executive Director