

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

Legal Division

San Francisco, California

Date: May 29, 2008

Resolution No. L-364

**RESOLUTION**

**RESOLUTION AUTHORIZING DISCLOSURE OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION CONSUMER PROTECTION AND SAFETY DIVISION'S RECORDS REGARDING INVESTIGATION OF AN AUGUST 21, 2007, ELECTRIC INCIDENT IN THE CITY OF HAWTHORNE, CALIFORNIA**

**BACKGROUND**

Attorneys for Jason Ortiz served on the California Public Utilities Commission ("Commission") a subpoena requesting any and all records regarding Jason Ortiz and an incident on August 22, 2007. The Commission has records regarding Jason Ortiz and an electric incident he was involved in on August 21, 2007, in Hawthorne, California. Commission staff responded to this subpoena by providing a copy of the initial electric incident report filed with the Commission by the Southern California Edison Company ("SCE"), in accord with Commission authorization provided in Resolution L-272. Pursuant to limitations imposed in General Order 66-C, however, staff could not make the remaining investigation records public without the formal approval of the full Commission. This subpoena is treated as an appeal to the full Commission for the release of the requested records pursuant to General Order 66-C § 3.4.

**DISCUSSION**

**General Order 66-C**

The Commission has exercised its discretion under Cal. Pub. Util. Code § 583, and implemented its responsibility under Cal. Gov't. Code § 6253.4(a), by adopting guidelines for public access to Commission records.<sup>1</sup> These guidelines are embodied in General Order 66-C. General Order 66-C § 1.1 provides that

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<sup>1</sup> Cal. Pub. Util. Code § 583 states in part: "No information furnished to the [C]ommission by a public utility...shall be open to public inspection or made public except on order of the [C]ommission, or by the [C]ommission or a commissioner in the course of a hearing or proceeding".

Commission records are public, except “as otherwise excluded by this General Order, statute, or other order, decision, or rule.” General Order 66-C § 2.2 precludes Commission staff’s disclosure of “[r]ecords or information of a confidential nature furnished to or obtained by the Commission...including: (a) [r]ecords of investigations and audits made by the Commission, except to the extent disclosed at a hearing or by formal Commission action.” Section 2.2(a) covers both records provided by regulated entities in the course of a Commission investigation and investigation records generated by our staff.

Because General Order 66-C § 2.2(a) limits staff’s ability to disclose Commission investigation records in the absence of disclosure during a hearing or a Commission order authorizing disclosure, staff denies most initial records requests, subpoenas, and other discovery seeking investigation records. Section 2.2(a) covers investigation information provided to our staff, as Commission-generated records containing this information.

Although General Order 66-C § 2.2(a) requires staff to deny most initial requests seeking Commission investigation records and information, and to object to subpoenas and other discovery efforts until the Commission has authorized disclosure, § 3.4 of the General Order permits those denied access to appeal to the Commission for disclosure. Subpoenas and demands for the production of documents implicitly include such an appeal. This resolution constitutes the Commission’s response to the subpoena served on behalf of defendant, Metro PCS and Yukon, LLC.

### **Discovery Law**

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

Cal. Evid. Code § 911 provides that: “Except as otherwise provided by statute: (a) [n]o person has a privilege to refuse to be a witness; (b) [n]o person has a privilege to refuse to disclose any matter or to refuse to produce any writing, object, or other thing; [and] (c) no person has a privilege that another shall not be a witness or shall not disclose any matter or shall not produce any writing, object or other thing.” Thus, as a general rule, where state evidence law applies, a government agency’s justification for withholding information in response to a subpoena must be based upon a statutory prohibition, privilege, or other protection against disclosure.

There is no statute prohibiting disclosure of the Commission's accident or incident investigation records, although Pub. Util. Code § 315 provides a clear statutory prohibition against the admissibility of such records as evidence in actions for damages arising from such accidents.

The potentially applicable statutory restrictions on disclosure applicable here relate to "official information" obtained in confidence by a public employee in the course of his/her duties that has not been open or officially disclosed to the public. (Cal. Evid. Code § 1040(a)) and "personal information" subject to the Information Practices Act of 1977 ("IPA") (Cal. Civ. Code § 1798, *et seq.*).

### **Official Information Privilege**

Cal. Evid. Code § 1040 provides government agencies with an absolute privilege to refrain from disclosing information obtained in confidence by public employees during the course of their duties and not open, or officially disclosed, to the public prior to the time a claim of privilege is made where disclosure is prohibited by state or federal law, and a conditional privilege to refrain from disclosing such information where the public interest in nondisclosure outweighs the necessity for disclosure in the interest of justice.

Because there is no statute prohibiting disclosure of the Commission's accident investigation records, the absolute official information privilege in Evid. Code § 1040 (b)(1) does not apply.

The conditional official information privilege in Evid. Code § 1040 (b)(2) requires that we carefully balance interests for and against disclosure of information meeting the definition of official information. We have on numerous occasions authorized disclosure of most records of completed accident/incident investigations to the public in accord with the disclosure-favoring provisions of the California Constitution, Public Records Act, discovery laws, and similar guidance, with the belief that such disclosure serves the public's interest. We have generally found that such disclosure will not interfere with the Commission's investigations, and may lead to discovery of admissible evidence and aid in the resolution of litigation regarding the incident.<sup>2</sup>

In certain situations we refrain from disclosing investigation records, such as where an investigation is still underway, where we are working with other governmental entities with overlapping regulatory or enforcement responsibilities, and/or where documents in an investigation file are subject to the lawyer-client, trade secret, or other privilege or restriction on disclosure. We will continue to

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

exercise our judgment in determining whether the balancing of interests for and against disclosure favors nondisclosure of particular records or information

### **Information Practices Act**

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

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

The “personal information” in the records located in response to this subpoena consists of information regarding Mr. Ortiz and the names of utility and Commission employees who provided information to or on behalf of the Commission. We do not consider the identity of employees of utilities who sign documents submitted to the Commission during the performance of their work responsibilities, or the names of Commission employees who investigate or process incident information, to be the type of personal information the IPA is intended to protect. In any event, service of notice regarding this draft resolution provides reasonable notice that such “personal information” may be disclosed. (*See* Cal. Civ. Code § 1798.24(k)).

### **Public Utilities Code § 315**

Pub. Util. Code § 315 states in relevant part that: “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

We have made clear in numerous Commission decisions and resolutions addressing accident and incident investigation records disclosure issues that Pub. Util. Code § 315 prohibits their admissibility as evidence in actions for damages, although it does not bar disclosure of accident reports and investigation records.

**Summary**

Reviewing the subpoena within the context of the above discussion of applicable laws and policies, we find that disclosure of the records in the Commission's possession that are responsive to this subpoena will not interfere with Commission staff's ability to perform its safety responsibilities. We authorize staff to disclose investigation reports and related records not already provided in response to the subpoena to the degree that we generally disclose such records through formal action. We do not authorize disclosure of records or information subject to the Commission's lawyer-client or work product privileges, and/or other information subject to the official information privilege.

**COMMENTS ON DRAFT RESOLUTION**

The Draft Resolution of the Commission's Legal Division in this matter was mailed to the parties in interest on April 29, 2008, in accordance with Cal. Pub. Util. Code § 311(g). No comments or reply comments were filed regarding this resolution.

**FINDINGS OF FACT**

1. Attorneys for defendant, Metro PCS and Yukon, LLC served on the Commission a subpoena seeking any and all records regarding Jason Ortiz and an incident on August 22, 2007 in Hawthorne, California. March 12, 2008 was the initial date specified for compliance with the subpoena.
2. Commission staff responded to the subpoena by providing a copy of the initial electric incident report filed by SCE, in accord with Resolution L-272. Commission staff noted that the remaining responsive Commission records could not be disclosed without formal action by the Commission, and that the subpoena would be brought before the Commission for formal action, probably on May 29, 2008.
3. The Commission's investigation of the August 21, 2007 electric incident involving Jason Ortiz is complete and, therefore, the disclosure of these reports would not compromise any Commission investigation.
4. At this time, the public interest favors disclosure of the requested Commission investigation records.
5. The public interest does not favor disclosure of records subject to the lawyer-client privilege, attorney work production protection, or official information privilege, that are not generally disclosed by the Commission.

**CONCLUSIONS OF LAW**

1. Where state evidence laws apply, a government agency's justification for withholding a public record in response to a subpoena or other discovery procedure must generally be based upon statutory prohibition, privilege, or other protection against disclosure. (Cal. Evid. Code § 911).
2. The Commission has, through General Order 66-C § 2.2(a), limited Commission staff disclosure of investigation records and information in the absence of formal action by the Commission or disclosure during the course of a Commission proceeding. General Order 66-C does not limit the Commission's ability to order disclosure of records and information.
3. The public interest in nondisclosure of the records sought in the subpoena does not outweigh the necessity for disclosure in the interest of justice, to the extent the subpoena seeks records that are not subject to the Commission's lawyer-client privilege, attorney work product protection, or official information privilege as asserted regarding investigation records.
4. The subpoenaed records include little "personal information" as defined in the Information Practices Act. (Cal. Civ. Code § 1798 et seq.).
5. The service of this draft resolution provides notice that portions of the documents responsive to the subpoena that contain personal information may be disclosed through the Commission's compliance with the subpoena, and constitutes a reasonable attempt to provide notice in accord with Cal. Civ. Code § 1798.24(k).
6. The Commission should not authorize disclosure of records or information subject to the Commission's lawyer-client, attorney work product, or similar privileges.
7. Cal. Pub. Util. Code § 583 does not limit the Commission's ability to order disclosure of records.
8. Cal. Pub. Util. Code § 315 prohibits the introduction of accident reports filed with the Commission, or orders and recommendations issued by the Commission, "as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property."

**ORDER**

1. Commission staff is authorized to disclose Commission records concerning investigations of an August 21, 2007 electric incident involving Jason Ortiz, in Hawthorne, California, with the exception of any personal information, the disclosure of which would constitute an unwarranted invasion of personal privacy, or any information which is subject to the Commission attorney-client or other privilege.
  
2. The effective date of this order is today.

I certify that this Resolution was adopted by the California Public Utilities Commission at its regular meeting of May 29, 2008, and that the following Commissioners approved it:

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PAUL CLANON  
Executive Director