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Decision **PROPOSED DECISION OF COMMISSIONER PICKER**
(Mailed 6/28/2016)

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 (Filed November 6, 2014)

DECISION UPDATING COMMISSION PROCESSES RELATING TO POTENTIALLY CONFIDENTIAL DOCUMENTS

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DECISION UPDATING COMMISSION PROCESSES RELATING TO POTENTIALLY CONFIDENTIAL DOCUMENTS

Summary

This decision implements an updated and clarified process for submitting potentially confidential documents to the Commission based on the process adopted in our prior Decision 06-06-066.[1] This process is intended to ensure consistency across industries and to expedite Commission review of requests for confidential treatment in response to California Public Records Act requests.

In addition, this decision provides guidance for the development of the process that the Commission will use in determining whether a potentially confidential document can be disclosed, again with the goal of consistent treatment and prompt disclosure of non-confidential documents. This is an interim decision, and this proceeding remains open for further refinement and improvement of the Commission's processes.

1. Background

This Order Instituting Rulemaking (OIR) was opened to continue our 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." (OIR at 1.) The OIR proposed that the Commission adopt a revised General Order (GO) 66-D to replace the current GO 66-C, and attached a draft of a proposed GO 66-D for the parties to comment on.[2]

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[1] As modified by Decision (D.) 07-05-032.

[2] The OIR noted that GO 66-C is outdated, contains provisions that are inconsistent with the California Public Records Act (CPRA), and "it does not articulate the process and procedure for

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Comments on the OIR, and the proposed GO 66-D, were filed by: Small Business Utility Advocates, Consumer Federation of California, Golden State Water Company, the Commission's Office of Ratepayer Advocates (ORA), City of San Bruno, California Water Association (CWA), Shell Energy North America (U.S.), L.P. (Shell Energy), The Utility Reform Network (TURN), Imperial Irrigation District (IID), Uber Technologies, Inc., California Association of Competitive Telecommunications Companies (CALTEL), City and County of San Francisco (San Francisco), Bayview/Hunters Point Community Legal (Bayview), and Mussey Grade Road Alliance.

The following filed joint or combined comments on the OIR: Joint Utilities (Southern California Edison Company, San Diego Gas & Electric Company, Southern California Gas Company, and Southwest Gas Corporation), Independent Storage Providers (Central Valley Gas Storage, LLC, Lodi Gas Storage, LLC, Wild Goose Storage, LLC, and Gill Ranch Storage, LLC), Communications Industry Coalition (CIC) (AT&T, California Cable And Telecommunications Association, CTIA - The Wireless Association, Frontier Communications, the Small Local Exchange Carriers (LECs), Sprint/Nextel, SureWest Telephone, T-Mobile West LLC, and Verizon).

Reply Comments on the OIR were filed by: Rasier-CA, LLC/Uber Technologies, Inc., Joint Utilities, CWA, Sidecar Technologies, Inc. and Side.CR, LLC, CIC, Small Business Utility Advocates, Bayview, San Francisco, City of San Bruno, Pacific Gas and Electric Company (PG&E), and ORA.

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obtaining Commission records." (OIR at 4.) GO 66-C does in fact articulate a process and procedure for obtaining Commission records, but that process and procedure needs updating and improvement.

A prehearing conference (PHC) was held on March 3, 2015. At the PHC, parties discussed the proposed GO 66-D, its potential interaction with past and present practices of the Commission (including those implemented by D.06-06-066), and the interpretation and application of Public Utilities Code Section 583.

Based on the OIR, comments and reply comments from parties, and the discussion at the PHC, an Assigned Commissioner's Scoping Memo and Ruling (ACR) was issued on August 11, 2015, which refined and revised the scope of the issues to be addressed, and also solicited additional Comments and Reply Comments on an attached "Proposed Process for Handling Public Records Act Requests." (ACR at 3-4.) The ACR specifically directed the parties:

> In addition to the "Proposed Process for Handling Public Records Act Requests" contained in Attachment A, parties shall comment on the legal framework set forth in the draft proposal. If parties dispute the preliminary legal conclusions reached therein, they shall support their contentions with citations to applicable law and precedent. (ACR at 3-4.)

Comments on the ACR were filed by: CWA, CIC, Calpine Corporation, Rasier-CA, LLC, ORA, PacifiCorp, City of San Bruno, Liberty Utilities (CalPeco Electric) LLC, CALTEL, TURN, Independent Storage Providers, PG&E, Joint Utilities, and San Francisco. Reply Comments on the ACR were filed by: Bayview, IID, CWA, Rasier-CA, LLC, TURN, ORA, CIC, and Joint Utilities.

At the request of the parties, a workshop was held to address the possibility of establishing certain types or characteristics of records as being public or confidential. (ACR Scheduling Workshop, dated January 12, 2016.)[3]

2. Procedural and Legal Issues

The scope of this interim decision is limited, and is focused on improving public access to documents in the possession of the Commission and providing guidance for this proceeding going forward. This decision does not adopt an updated version of GO 66, but this 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.

This decision does two things: 1) it implements an updated and clarified process for submitting potentially confidential documents to the Commission, and 2) it establishes guidelines for the process that the Commission will use in determining whether a potentially confidential document can be disclosed.[4] This decision addresses documents and information received by the Commission from a utility or other outside entity; it does not address Commission-created documents, such as incident investigation reports or audit reports.

Party statements at the PHC indicated a disparity of practices in how utilities and other entities designate as confidential documents that are submitted

[3] A workshop was held on February 2, 2016, and documents were subsequently circulated amongst the parties. This decision does not rely upon or use information or documents presented at or after the workshop, but that material may become part of the record of this proceeding in the future.

[4] Disclosure of potentially confidential documents in the possession of the Commission is typically the result of a CPRA request, but may occur in other contexts as well.

to the Commission. For example, counsel for T-Mobile and counsel for SureWest and the Small LECs stated that their standard practice is to mark documents as confidential under GO 66-C and Section 583, without specifying the specific basis for confidentiality. (Transcript at 21 and 26.)

By comparison, counsel for CWA stated that the water utilities have not marked or otherwise identified as confidential documents submitted to the Commission, as there "has been an understanding with Commission staff that certain information was highly confidential." Accordingly, even information that was considered confidential "was not rigorously identified as such." (Transcript at 22-23.)

And yet another approach was described by counsel for Shell Energy, who noted that documents relating to electric and gas procurement are submitted under a more detailed protocol established by the Commission in D.06-06-066. (Transcript at 14-15.)

This inconsistency in the way that documents are designated as confidential makes the Commission's review and determination of confidentiality claims more difficult and time consuming, and can result in delays to Commission responses to California Public Records Act (CPRA) requests. Accordingly, this decision implements a more uniform process for all potentially confidential documents submitted to the Commission; while some industry-specific differences will remain, the broad disparities identified at the PHC are eliminated.

In addition, if the Commission receives a request for documents under the CPRA, and determines that responsive documents have been marked as generically confidential, Commission staff often has difficulty in determining the basis for the confidentiality claim, and accordingly will have to contact the

submitting entity to figure out the basis for (and validity of) the claim of confidentiality. This significantly slows down the Commission's responses to CPRA requests. The process implemented by this decision will alleviate this problem, particularly for documents submitted to the Commission in the future.

Parties were asked to comment on the legal framework set forth in the draft proposal attached to the ACR. (ACR at 3; Attachment A to ACR.[5]) Specifically, parties were directed: "If parties dispute the preliminary legal conclusions reached therein, they shall support their contentions with citations to applicable law and precedent." (*Id*. at 3-4.)

For today's decision, one of the key parts of the legal framework set forth in Attachment A to the ACR addressed Section 583 and this Commission's interpretation of that section in D.06-06-066. As Attachment A stated, many of the legal issues raised here were addressed (in the context of energy procurement) in Rulemaking (R.) 05-06-040, which resulted in D.06-06-066 (as modified by D.07-05-032). D.06-06-066 established a new process for submission of potentially confidential documents to the Commission, which has been in place and utilized for energy procurement documents for about 10 years. We agree with Staff's statement in Attachment A that there is "no need to revisit the long-established and unchallenged legal conclusions in D.06-06-066, as modified by D.07-05-032." (ACR Attachment A at A-3.)

In D.06-06-066, the Commission considered the language of Section 583,[6] and concluded that Section 583:

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[5] Attachment A to the ACR is attached as Attachment A to this decision.

[6] Section 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

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> … 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 claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection. (D.06-06-066 at 27, as modified by D.07-05-032).
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> This determination was and is based on case law:
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> 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. (D.06-06-066 at 28-29, as modified by D.07-05-032.)

Accordingly, the Commission determined that in analyzing whether a claim of confidentiality has merit, the Commission does not look to Section 583, "because nothing in the statute addresses what types of records should and should not be confidential." (*Id.* at 28.) Other laws and regulations – trade

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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."

secrets, Evidence Code provisions regarding privileges, confidentiality statutes such as Section 454.5(g), and specific parts of GO 66-C – provide the substantive basis for any assertion of confidentiality. (*Id*. at 28.)

In Attachment A, Staff observed and recommended:

> On its face, R.05-06-040 only dealt with records related to energy procurement. However, the Staff proposes that the Commission's interpretation of Section 583 in R.05-06-040 apply with equal force to all records submitted to the Commission, not just those related to energy procurement. Parties shall address this preliminary conclusion in their comments. (ACR Attachment A at A-6.)

Parties addressed this issue in their comments. (*See* e.g. ACR Comments of San Francisco at 3-4, ACR Comments of PG&E at 1 and 3-4, ACR Comments of ORA at 2-3, ACR Comments of Bayview at 3, ACR Comments of CIC at 9-14, ACR Comments of CWA at 3-6.)

A number of parties expressed strong support for the Staff's proposed legal framework. For example, San Francisco states:

> San Francisco agrees with Commission Staff that there is "no need to revisit the long-established and unchallenged legal conclusions in Commission Decision 06-06-066," and that the analysis of Public Utilities Code § 583 in that Decision applies with equal force to "*all* records submitted to the Commission, not just those related to energy procurement." (ACR Comments of San Francisco at 3, quoting Attachment A to ACR, emphasis in original.)

ORA also agrees with the Staff's description of the legal context, including the recommendation that the commission does not need to revisit the legal conclusions of D.06-06-066, including that decision's determination that Section 583 "sets forth a process for dealing with claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection." (ACR Comments of ORA at 2, quoting D.06-06-006 at 27.) ORA acknowledges that D.06-06-006 focused on the confidentiality of electric

procurement information, but, agrees with Staff's proposal that: "this should apply with equal force to all records submitted to the Commission, not just those related to energy procurement (i.e., the rules established in that holding should apply equally to the other regulated industries as well)." (*Id.*)

TURN also agrees with this approach:

> TURN generally agrees with the description in Section A of the Draft Proposal of the legal framework applicable to claims of confidentiality made by submitters of information to the CPUC. In particular, TURN fully endorses the Draft Proposal's interpretation of Section 583 – based on the thorough legal analysis in D.06-06-066, as modified by D.07-05-032 – as a provision that provides no substantive basis for claims of confidentiality. TURN agrees with the Draft Proposal that this interpretation should apply to all records submitted to the Commission. Nothing in the discussion in D.06-06-066 or the authorities relied upon in that discussion suggests that the interpretation of Section 583 should be limited to energy procurement-related information. (ACR Comments of TURN at 2-3.)

Some parties, however, also expressed concern about the legal framework, particularly around questions of whether it would apply prospectively or retroactively.

CWA notes that neither CWA nor any Commission-regulated water utility participated in the proceeding leading to the adoption of the rules set forth in D.06-06-066, and argues that: "Most importantly, any new rules adopted in this proceeding should be given prospective application from the date of a decision in R.14-11-001, […] not from the date of D.06-06-066." (ACR Comments of CWA at 4-5.) Like CWA, CIC argues: "Finally, the retroactive manner in which the Draft Proposal appears to propose to apply D.06-06-066 would violate the due process rights of the many parties in this proceeding that were not parties to R.05-06-040." (ACR Comments of CIC at 11.)

We will not apply the submission requirements adopted today to submissions made before today by parties not subject to the requirements of D.06-06-066. As this proceeding goes forward, the Commission will consider further how to expedite the review of documents submitted prior to the date of this decision, and the extent to which those processes can be consistent with the ones we adopt today.

CIC observes that the staff proposal is vague regarding which aspects of the Commission's interpretation of Section 583 contained in D.06-06-066 would apply here, as significant parts of that decision are specific to electric procurement documents, and appear to be inapplicable outside of that context. (ACR Comments of CIC at 11.) For example, CIC notes that D.06-06-066 requires the filing of a motion, which would not apply to situations outside of a formal proceeding. (*Id.* at 13-14.)

CIC appears to be construing the staff proposal too literally. We are not taking D.06-06-066 in its entirety and applying it to all industries. As Attachment A to the ACR stated, we are applying the interpretation of Section 583 in that decision to all records submitted to the Commission. (ACR Attachment A at A-6.) By doing so, we are confirming the fundamental conclusion that this Commission reached in D.06-06-066 - that Section 583 is not substantive - and using that as the basis for imposing similarly-structured requirements to a broader context. As the Joint Utilities point out, the approach adopted in D.06-06-066 has generally worked well (ACR Comments of Joint Utilities at 7-8.) Accordingly, we are using that existing fundamental structure as a basis for today's decision; we are not just blindly applying it. In addition, the approach we are announcing today is a preliminary one, and we expect it will be further refined as we gain experience.

Attachment A to the ACR also addressed a proposed process for responding to CPRA requests. (ACR Attachment A at A-8 to A-11.) Parties were given the opportunity to comment on this process, and were directed that: "If they believe that the legal authority discussed above compels a different process, or if some other legal authority should control, they shall specifically explain their position, with citations to the controlling authority." (*Id.* at A-8 to A-9.)

A key part of the proposed process is the Commission's delegation of authority to the Commission's Legal Division (under the direction of the Commission's General Counsel[7]) to handle CPRA requests for documents. Under that delegated authority, Legal Division could determine whether records submitted should remain confidential, potentially without further formal action by the full Commission.

Some parties expressly support the delegation of authority to Legal Division. For example, ORA supports the delegation of authority to Legal Division, noting that the Commission has delegated authority to Energy Division to resolve Advice Letters under GO 96-B. (ACR Reply Comments of ORA at 5.) ORA also notes that arguments against delegation based on 583 are groundless, as: "Section 583 neither creates a privilege of nondisclosure for a utility, nor designates any specific types of documents as confidential." (*Id.* at 4, citing to Resolution L-436.) Bayview also supports the delegation of authority to Legal Division as being more efficient and consistent with the California Constitution, as it would improve public access to records. (ACR Comments of Bayview

[7] *See*, Pub. Util. Code § 307.

at 12.) Not all parties addressed this issue; some appear to consider it largely a non-issue. (*See*, e.g. ACR Comments of PG&E.)

On the other hand, CIC and the Joint Utilities' vigorously oppose delegation, and take the position that the Commission must review each individual determination via a formal Commission decision. They base this position on an argument that a Commission General Order is not actually an "order," as used in the Public Utilities Code, and specifically that Section 583 "requires the Commission to make individualized, case-by-case determinations as to whether confidential information should be disclosed." (ACR Reply Comments of CIC at 4, citing to ACR Comments of Joint Utilities at 12.)

According to this argument, the Commission cannot delegate authority to Legal Division on a blanket basis, or even on an individual case basis. And since CIC argues that there must be an "individualized, case-by-case" determination of confidentiality, even the Commission could not make a blanket determination that certain documents are not confidential.

Under CIC's approach, if an entity submitting information marked a blank page or a public SEC filing or newspaper article as confidential, it could only be released upon a formal vote of the full Commission. The Commission could not determine in advance that those kinds of documents do not deserve confidential treatment. And it is quite possible that filings marked confidential would actually contain such clearly public records, as CIC also argues that it should be able to claim confidentiality for large documents that may only contain small amounts of confidential material, and that it should not be required to provide a specific basis for any claim of confidentiality at the time it submits documents to the Commission. (ACR Comments of CIC at 21-23.)

In other words, an entity that submitted 10,000 pages of documents could mark all of them as confidential without reviewing each page to determine whether or not it contained confidential information, but the Commission would have to look at each and every page before releasing it. This would make things simpler and easier for utilities and other entities that submit information, but it places all of the burden of reviewing documents on the Commission and its staff. This is neither fair nor efficient, as it relieves the entity claiming confidentiality for stating (or even having) a basis for its claim, places the heaviest burden of determining confidentiality on Commission staff (who did not mark it as confidential and may not know why it should be kept as confidential), and unnecessarily delays the release of public records.

In arguing that a General Order, such as the proposed GO 66-D, is not actually an "order" of the Commission, the Joint Utilities argue that a true "order" requires there to be a case before the Commission, with claims of confidentiality decided upon a factual record. (ACR Comments of Joint Utilties at 12). There are several problems with this argument. First, General Orders are adopted by an order of the Commission in a formal proceeding. (*See*, e.g. D.09-04-005 re GO 96-B; D.94-06-014 re GO 131-D.)[8] So whether or not the General Order itself constitutes an "order," the order adopting the General Order is clearly and indisputably an order of the Commission, just as an order approving a settlement or a tariffed rate is an order of the Commission.

Second, the argument of the Joint Utilities conflicts with Commission precedent. The Public Utilities Code does not define "order," but the

[8] General Orders may also be adopted by a Commission Resolution, rather than a Decision. Resolutions are also formal actions of the Commission. *See*, Pub. Util. Code § 311.5(b).

Commission has. In 2002, the Commission stated that an "order" "means any order of the Commission, including any general order, or other decision of the Commission . . . ." (D.02-02-049, Appx. 1, at 1.) In other words, a General Order is an order.

Applying that same interpretation here is also consistent with the Commission's original understanding of the meaning of Section 583, and the purpose of the Commission's General Orders. Section 583's predecessor, Section 28(d) of the Public Utilities Act, read more or less the same as the current statute.[9] Section 28(d) was enacted in 1911; the legislature amended it in 1915. In 1923, the Commission promulgated the first GO 66.

In that General Order, the Commission set forth the full text of Section 28(d), then proceeded to order that six categories of information "furnished to the Railroad Commission by public utilities should be open to public inspection." The entire General Order is one printed page long, and it is free of discussion of whether that General Order was an order or not. It was just an order that required certain documents to be open to public inspection, and did not require the Commission to issue a separate "order" each time documents in those categories were disclosed. This Commission has treated and continues to treat General Orders as orders of the Commission, not as some lesser vehicle.

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[9] Section 28(d) provided: "No information furnished to the commission by a public utility, except such matters as are specifically required to be open to public inspection by the provisions of this act, 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 officer or employee of the commission who, in violation of the provisions of this subsection, divulges any such information shall be guilty of a misdemeanor." Pub. Util. Act § 28(d). The Act was recodified as the Public Utilities Code and its provisions renumbered in the early '50s.

Applying the Joint Utilities argument to other contexts shows that it is fundamentally absurd. For example, if an order of the Commission approved a settlement in a proceeding, under the Joint Utilities' argument, the utility would not need to comply with the terms of the settlement, and the Commission could not order compliance with the settlement, as the settlement is not really an "order" of the Commission. Applying this same argument to tariffs, that are filed via an advice letter, gives even more absurd results.

Finally, Public Records Act document requests often come up outside of formal Commission proceedings, and may seek documents that were not part of the record of a formal proceeding. As CIC notes, the "practical reality [is] that utilities often submit responsive documents to data requests outside of a proceeding." (ACR Comments of CIC at 14.) Under the Joint Utilities argument, in this kind of a situation, where there is no case and no factual "record," there could never be an order of the Commission. In other words, Joint Utilities are arguing records must only be released by an order, but in many situations there would not and could not be such an order. Joint Utilities' argument creates a kind of Catch-22, where records can only be released via an "order," but there is no way to get such an "order," making it virtually impossible for records to be released. We decline to adopt this self-serving and tortured interpretation of Section 583.

Bayview presents a more logical approach on both legal and policy grounds:

> Taken as a whole, section 583 does not require a commission order or proceeding to release all information furnished to the commission. Some information, such as non-confidential information, can be released without a Commission order or proceeding. Even if a commission order is required, under *In Re Southern California Edison Company*, D.91-12-019, 42 CPUC 2d 298,

300 (1991), the Commission may delegate its authority to its Legal Division, such as in this proceeding. (ACR Reply Comments of Bayview at 4.)

As Bayview points out, the approach of CIC and the Joint Utilities would unnecessarily delay the Commission's response to Public Records Act requests, and add an unnecessary hurdle for those requesting information. (*Id.*)

ORA correctly concludes that "[I]t is reasonable for the Commission to exercise its discretion by delegating the tasks set forth in proposed GO 66-D" to Legal Division, and that this delegation of authority "[I]s similar to delegations of authority to staff the Commission has made in other contexts." (OIR Reply Comments of ORA at 4.)

3. New Process and Guidelines

Based on the record of the proceeding to date, we adopt the following process for submitting confidential documents to the Commission, and the following guidelines for the process that the Commission will use for its review and possible release of those documents. This should help to further refine and focus this proceeding going forward, as we develop and implement specific procedures consistent with these guidelines. Parties will have the opportunity to present their arguments and positions on the specific procedures to be used, and on the content and language of a revised GO 66.

3.1. Process for Submission of Confidential Documents

The following process shall be used for the submission of potentially confidential documents to the Commission:

1) When submitting documents to the Commission or staff of the Commission (including ORA) outside of a formal proceeding, any documents for which the submitting party seeks confidential treatment must be marked as confidential, the basis for

confidential treatment must be specified, and the request for confidentiality must be accompanied by a declaration signed by an officer of the requesting entity 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.[10]

2) The same process shall be followed for submitting documents to the Commission or staff of the Commission in a formal proceeding unless a different process has been established for that proceeding, except that a motion signed by an attorney may be substituted for the declaration.

3) Documents subject to the requirements of D.06-06-066 may continue to be submitted consistent with the requirements of that decision.[11]

4) If only certain information in a document (e.g. customer names and addresses, contract payment amounts, etc.) is confidential, only that information rather than the entire document should be designated as confidential.

5) This process is effective immediately.

This approach is generally consistent with the approach we took in D.06-06-066 and the recommendations of a number of parties to this proceeding. We acknowledge that this approach may require some additional work on the part of submitting parties, but the additional work should not be excessive or overly time-consuming.

If a party believes that a particular document or piece of information is confidential, presumably they reviewed it in order to make that determination.

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[10] Refinements to this system, such as a checklist or highlighting system, may be considered in a later phase of this proceeding.

[11] Refinements, such as further alignment of the details of the process adopted today and the process adopted in D.06-06-066, and other existing processes (such as that set forth in GO 167) may be considered in a later phase of this proceeding.

And in determining that it was confidential, they necessarily would have to determine why or how it was confidential. Accordingly, the process we adopt today should not require additional analysis and review of documents by submitting entities, although it may require some additional administrative tasks and time, as identifying the specific information and the basis for claiming confidentiality will take more effort than just stamping everything "confidential."[12]

It is preferable for the submitting entity, which has a basis for believing that a document is confidential, to provide that basis to the Commission, as opposed to requiring Commission staff to guess that basis after the fact, or go back to the submitting entity to ask for the basis, which is an inefficient and unnecessary use of staff time and resources. Law, policy and practicality all support requiring that those seeking confidential treatment for documents state clearly why that treatment is appropriate.

3.2. Guidelines for Commission Review Process

The following guidelines apply to the process for the Commission to review and possibly release potentially confidential documents submitted to the Commission:

1) Any documents submitted to the Commission after the effective date of this decision that are not marked confidential may be released by Commission staff, with no formal action by the Commission required.

[12] This Commission has observed instances where an entity appears to have willy-nilly stamped every page of a document "confidential," including blank pages, because some piece of information in that document might be considered confidential. This decision seeks to discourage that practice.

2) Any documents submitted to the Commission on or after 30 days from the effective date of this decision that only have a general marking of confidentiality, such as GO-66 and/or Section 583, but without a specific substantive basis for confidential treatment, may be released by Commission staff, with no formal action by the Commission required. If a submitting party is relying upon GO 66-C as a basis for confidentiality, it must cite to a specific provision in GO 66-C.

3) Documents submitted to the Commission as confidential pursuant to the requirements of D.06-06-006 after the effective date of that decision, and that are in compliance with the requirements of that decision, will only be released after the applicable time period set forth in D.06-06-006, or pursuant to a process to be determined in this proceeding or a successor proceeding, consistent with these guidelines. After the expiration of the applicable time period, or if the submission does not comply with the requirements of D.06-06-006, documents may be released by Commission staff, with no formal action by the Commission required.

4) Documents submitted to the Commission prior to the effective date of this decision that only have a general marking of confidentiality, such as GO-66 and/or Section 583, but without a specific substantive basis for confidential treatment, will only be released subject to a process to be determined in this proceeding or a successor proceeding, consistent with these guidelines.

5) Documents submitted to the Commission prior to the effective date of this decision that are not marked confidential may be released by Commission staff, with no formal action by the Commission required. If Commission staff have reason to believe that such documents may contain confidential information, staff should follow the process to be determined in this proceeding or a successor proceeding, consistent with these guidelines.

6) These provisions are adopted to provide guidance for more detailed processes to be implemented either by subsequent order in this proceeding or a successor proceeding, or by adoption of a

new GO 66, and become effective upon adoption of that process by this Commission.

3.3. Going Forward

The basic idea underlying these guidelines is that the process that the Commission and its staff uses for reviewing documents should be as consistent as possible across industries, and for both previously submitted documents and documents submitted in the future. For this to happen, we need to ensure that similar submission practices are followed by all industries; this is somewhat challenging, given the past differences in practices across industries and the fact that we are not imposing the submission requirements retroactively.

This is an interim and preliminary decision establishing an approach and providing guidance for going forward; the details and processes to effectively and efficiently implement this decision will be refined in later stages of this proceeding, consistent with the general approach we adopt today.

4. Comments on Proposed Decision

The proposed decision of Commissioner Picker in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure.

Comments on the proposed decision were filed by CALTEL, IID, Independent Storage Providers, CWA, CIC (not including AT&T), AT&T, Joint Utilities (not including Southern California Edison), and Rasier-CA. Southern California Edison (SCE) and PG&E jointly filed comments. Reply comments were

filed by Bayview, CIC (including AT&T), Joint Utilities (not including SCE), TURN, CWA, Rasier-CA, and City of San Bruno.[13]

A number of parties recommended modification of the proposed decision's requirement that requests for confidential treatment of information: "must be accompanied by a declaration signed by an officer of the requesting entity." For example, the Independent Storage Providers argue that the decision should "expand the universe of individuals permitted to sign," rather than requiring the signature of an officer:

> An officer of the submitting entity may not have the requisite knowledge to make such declaration. Obtaining knowledge sufficient to make the declaration could markedly delay timely responses to data requests. Similarly, the availability of an officer to review and make any necessary attestation may be limited, further impeding the utility's ability to timely respond to a Commission data request. Rather than limiting the required declarant to officers, any duly-authorized employee or agent should be allowed to provide the requisite declaration. (Independent Storage Providers Comments on Proposed Decision at 3.)

Similar arguments were made in by Rasier-CA, CIC, PG&E/SCE and the Joint Utilities. This is a valid point, and the proposed decision has been modified accordingly. The responsible officer may delegate authority for signing the

[13] In addition to CIC's previously-listed members, CIC's Comments and Reply Comments also listed Charter Fiberlink CA-CCO LLC and Time Warner Cable Information Services (California) LLC, which are not parties to this proceeding. A motion for party status was filed by Charter Fiberlink and Time Warner on August 2, 2016, that is currently pending. The sale of Verizon California to Frontier caused some confusion regarding the party status of Verizon and Frontier. Frontier California (U 1002 C) is a party, but other entities with the Frontier name are not. Verizon California is no longer a party; Cellco Partnership (U 3001 C) and MCI Communications Services, Inc. (U 5378 C) (collectively "Verizon") filed a motion for party status on August 2, 2016, that is currently pending.

declaration to an employee or agent (including counsel). The declaration must identify the officer that delegated authority to the signing employee or agent, as well as identifying the signing employee or agent. In such cases of delegated authority, both the individual signing the declaration and the officer delegating authority to that person are subject to the requirements of Rule 1.1 of the Commission's Rules of Practice and Procedure.

The proposed decision leaves to future decisions the adoption of a specific process that the Commission would use in reviewing and possibly releasing potentially confidential documents. A number of parties expressed concern about the details of this process being left largely unresolved. Joint Utilities stated this concern:

> Although cognizant that the Commission may address this issue later in R.14-11-001, [fn. omitted] the Responding Utilities submit that, at the very least, parties should be given notice and opportunity to be heard before the Commission or its Staff releases information that a submitting party has identified as confidential. (Joint Utilities Comments on Proposed Decision at 3.)

Similar concerns were expressed in the comments of other parties, including the Independent Storage Providers, CALTEL, PG&E/SCE, and CIC. We acknowledge those concerns, but prefer to implement our process in a unified, rather than piecemeal, manner. Parties will have the opportunity to address this issue and related implementation details later in this proceeding.

AT&T argues that the requirement that it identify the basis for its claims of confidentiality "creates a substantial, completely unnecessary burden," and that: "This will require that with every single submission, a party will have to also submit a legal brief, as well as factual declarations." (AT&T Comments on Proposed Decision at 3-4.) AT&T overstates the matter.

D.06-06-066 imposed similar requirements to those adopted today, that have been acknowledged to work well, without creating the heavy burdens claimed by AT&T. TURN and City of San Bruno point out in reply comments that the process set forth in the proposed decision for requesting confidential treatment of material is not particularly burdensome. City of San Bruno notes that the Federal Communications Commission (FCC) requires significant detail to be provided in support of a request for confidential treatment. (City of San Bruno Reply Comments on Proposed Decision at 1-2.) This Commission's GO 96-B (in sections 9.2 and 9.3) also incorporates similar provisions for requesting confidential treatment for material submitted to the Commission with an advice letter.[14] The process adopted today is consistent with prior practices of both this Commission and other agencies, and is not unduly burdensome. Claims to the contrary are without merit.

Several parties note that certain types of records and information, such as those that are unusually complex or voluminous, may present difficulties in identifying and marking confidential information, and accordingly there may need to be exceptions to the confidentiality designation rules set forth in the proposed decision. (*See*, e.g. Joint Utilities Reply Comments on Proposed Decision at 2, citing to Comments of SCE/PG&E.)

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[14] Section 9.2 of GO 96-B reads:

A person requesting confidential treatment under this General Order bears the burden of proving why any particular document, or portion of a document, must or should be withheld from public disclosure. Any request for confidential treatment of information must reference the specific law prohibiting disclosure, the specific statutory privilege that the person believes it holds and could assert against disclosure, the specific privilege the person believes the Commission may and should assert against disclosure, or the specific provision of General Order 66-C (or its successor) or other Commission decision that authorizes a document to be kept confidential.

This would be an appropriate refinement to consider in this proceeding going forward. In the meantime, to the extent that such records or information are being presented in response to a Commission data request, the submitting entity can request additional time to comply with the request.

CALTEL, with the support of Rasier-CA, requests clarification of what constitutes an appropriate basis for designating documents as confidential; CALTEL provides three examples of what it believes would be a valid basis:

> 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, [fn. omitted]
>
> 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).” (CALTEL Comments on Proposed Decision at 2-3)

The examples provided by CALTEL would all be adequate to meet the requirements we adopt today, assuming that the information submitted meets the requirements of those statutes. Those statutes (and other similar statutes or regulations) provide an adequate description for Commission staff to understand the basis for the claim of confidentiality.

CWA, alone among all parties, argues:

> CWA strongly recommends that the PD be revised so that documents submitted, prior to the effective date of the decision, without any confidentiality marking at all, would be subject to the same rules for documents submitted, prior to the effective date of the decision, with only a general marking of confidentiality. (CWA Comments on Proposed Decision at 4.)

TURN responded to this argument:

> CWA claims that Case 5), which allows staff to release documents submitted prior to the effective date of the decision *that were not marked confidential*, somehow constitutes an improper delegation of a discretionary decision to staff. The premise for CWA's argument is that it was reasonable for a regulated entity to expect confidential treatment for a document even when the entity did not mark the document as confidential. It was not. The PD reasonably presumes that an entity that truly desired confidential treatment for a document would go to the minimal trouble of so indicating. An entity that failed to provide any notice of an expectation of confidentiality can appropriately be deemed to have waived any right to seek confidential treatment. (TURN Reply Comments on Proposed Decision at 2, emphasis in original.)

Whether or not CWA's members have in fact waived the right to seek confidential treatment, the fact that they have apparently regularly provided confidential information to the Commission with no marking or designation or other indication that the material is confidential shows at best an indifference to, or at worst a total disregard for, the protection of confidential information. For them to now argue that the Commission must treat all documents it has received from every utility as if they are confidential because the water utilities could not be bothered to mark their own documents as confidential shows a deficit of good judgment. We decline to make CWA's requested change to the proposed decision.[15]

[15] CWA members may wish to inform the relevant Commission staff of precisely what information they have submitted to the Commission actually is confidential.

Joint Utilities (without SCE), repeat their argument that: "Section 583 requires the Commission to take an individualized, formal action each time it wishes to publicly disclose records or information submitted to the Commission by the utilities," and that the Commission cannot release records via a General Order. (Joint Utilities Comments on Proposed Decision at 11.) CIC also repeats the same argument. (CIC Comments on Proposed Decision at 10.) City of San Bruno and TURN oppose this argument; as TURN says: "This reading of Section 583 is a prescription for gridlock and directly contrary to Article I, § 3(b) of the California Constitution and the intent of the public records laws to foster, not stifle, access to public records." (TURN Reply Comments on Proposed Decision at 5.) We agree. The argument of Joint Utilities and CIC is nonsensical, and is inconsistent with long-standing Commission precedent. The proposed decision has been modified to provide a more detailed explanation why a General Order of the Commission is in fact an order of the Commission.

IID filed 29 pages of comments on the proposed decision; the limit under the Commission's Rules of Practice and Procedure is 15 pages, except for unusually large cases (such as general rate cases) where the limit is 25 pages. IID did not request permission to file comments longer than allowed by the Commission's Rules. Nevertheless, we will accept and consider IID comments on the proposed decision, with an admonishment that in the future IID's pleadings must comply with the Commission's Rules of Practice and Procedure.

The majority of IID's Comments do not actually address the proposed decision, but range through descriptions of former Commissioner Ferron's meetings with the investment community in 2012 and 2013, a list of California Foundation for the Environment and Economy (CFEE) conferences back to 2007,

and photos of the California Club, Mary Nichols, and Robert Weisenmiller, among other things.

IID does eventually, however, make some concrete suggestions that relate to the proposed decision. IID argues that parties requesting confidential treatment from the Commission provide a detailed justification for that request. Specifically, some of IID's recommendation for what the Commission processes should require include: 1) Confidential treatment cannot be granted if the information is publicly disclosed. The application must include an affirmative representation as to the confidentiality of the information it covers; 2) Some information may need to be disclosed, even if it is confidential. For example, information about unlawful conduct may not be given confidential treatment; 3) The application must not be overly broad. Applicants seeking confidentiality should be selective when identifying the information covered by their application; 4) Applicants must set forth their analysis of the applicable exemption from disclosure; 5) Applicants must specify a particular duration for confidential treatment; The applicant should request a specific date (year, month and day) for the termination of confidential treatment of the subject information. Further, the application should include an analysis that supports the period requested; and 6) Applicants must identify clearly the information that is the subject of the application. (IID Comments on Proposed Decision at 26-28.)

Some aspects of IID's suggestions are already incorporated in the processes adopted in this decision, but bear reiteration. We agree with IID that if information has been publicly disclosed elsewhere, it is not appropriate to request confidential treatment from the Commission, and that the designation of confidential material should be clear, specific and not overly broad. Other of IID's suggestions would be appropriate to consider as potential additional

implementation details or interpretations in future stages of this proceeding as we continue to refine our processes.

5. 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 potentially confidential documents submitted to the Commission are marked or otherwise designated as confidential.

2. Non-confidential portions of documents containing confidential information and non-confidential documents submitted to the Commission are frequently marked as confidential.

3. Documents submitted to the Commission are commonly marked as generically confidential, with no explanation of the basis for the claim of confidentiality.

4. The current practices for submitting potentially confidential documents to the Commission have placed unnecessary burdens on Commission staff and have delayed Commission responses to Public Records Act requests.

5. Implementing a consistent process for the marking of potentially confidential documents submitted to the Commission would improve the ability of the Commission to respond in a timely manner to Public Records Act requests.

6. Requiring that potentially confidential documents submitted to the Commission specify the basis for confidential treatment would improve the ability of the Commission to respond in a timely manner to Public Records Act requests.

7. The Commission's internal processes for review of potentially confidential documents have not been clearly and publicly described.

8. The Commission can most effectively review potentially confidential documents by delegating the review of the individual documents to the Commission's 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 Public Records Act requests.

Conclusions of Law

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

2. All potentially confidential documents submitted to the Commission should specify the basis upon which confidentiality is claimed.

3. Commission review of potentially confidential documents submitted to the Commission should be delegated to the Commission's Legal Division.

4. The processes adopted by this decision are consistent with Public Utilities Code Section 583 and D.06-06-066.

O R D E R

IT IS ORDERED that:

1. The following process shall be used for the submission of potentially confidential documents to the Commission:

   a) When submitting documents to the Commission or staff of the Commission (including ORA) outside of a formal proceeding,

any documents for which the submitting party seeks confidential treatment must be marked as confidential, the basis for confidential treatment must be specified, and the request for confidentiality must be accompanied by a declaration signed by an officer of the requesting entity 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.

b) The same process shall be followed for submitting documents to the Commission or staff of the Commission in a formal proceeding unless a different process has been established for that proceeding, except that a motion signed by an attorney may be substituted for the declaration.

c) Documents subject to the requirements of D.06-06-066 may continue to be submitted consistent with the requirements of that decision.

d) If only certain information in a document (e.g. customer names and addresses, contract payment amounts, etc.) is confidential, only that information rather than the entire document should be designated as confidential.

e) This process is effective immediately.

2. Authority for reviewing requests for confidential treatment of documents is delegated to the Commission's Legal Division.

3. Rulemaking 14-11-001 remains open.

This order is effective today.

Dated _____, at San Francisco, California.