Decision **DRAFT DECISION OF ALJ KOSS (Mailed 6/8/2004)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Amend General Order 77-K.	Rulemaking 03-08-019 (Filed August 21, 2003)

OPINION ADOPTING GENERAL ORDER 77-L AND EXPANDING SCOPE OF RULEMAKING

Summary

By this decision we adopt General Order (GO) 77-L, with revised rules for filing utility employee compensation data. GO 77-L supercedes GO 77-K and contains three substantive revisions:

1. Increases the annual employee compensation levels that trigger reporting under the GO to $125,000 for large utilities (those with at least $1 billion annual revenue) and to $85,000 for all other utilities required to report.
2. Exempts certificated Competitive Local Exchange Carriers (CLECs) and Nondominant Interexchange Carriers (NDIECs) from the provisions of the GO.
3. Allows utilities to file information on employee names as confidential material, subject to Pub. Util. Code § 583, on the condition a redacted version of the report be provided for public inspection.

The joint petition to modify the scope of this rulemaking, filed by Pacific Gas and Electric Company (PG&E) and the Greenlining Institute/Latino Issues

Forum (G/LIF), is granted to the extent of expanding the scope of the rulemaking to include the issues of reporting of utility holding company executive compensation and reporting executive compensation and bonuses awarded but not paid in the reporting year.

Background

GO 77-K requires utilities to annually file certain compensation data for all executive officers. The GO additionally requires the same data be filed for all employees receiving annual compensation above defined amounts, based on the annual operating revenue of the utility. The data include employee names, salaries, expense accounts, contingent fees and reimbursed dues and donations. These data are primarily used in the rate-setting process to ascertain if executive and employee compensation is within prevailing standards and if any cross-subsidization exists where ratepayers are charged with costs unrelated to utility services (see D.96-07-052).

The annual utility operating revenue and employee compensation levels that trigger reporting were last reviewed in 1986 (GO 77-K) and were separated into three tiers:

Tier	Utility Revenue	Employee Compensation
I	$1 billion (minimum)	$75,000
II	$1 million - $1 billion	$60,000
III	$500,000 - $1 million	$40,000

We instituted Rulemaking (R.) 03-08-019 as the result of Petition for Rulemaking (P.) 02-12-039, filed by G/LIF. In its petition, G/LIF suggested several changes be made to GO 77-K, including the reporting of holding company executive compensation, management diversity and philanthropic contributions. After review, we partially granted the G/LIF petition, narrowing the scope of the rulemaking to focus only on whether we should amend GO 77-K in the following three areas. All other aspects of the petition were denied.

1. Amend compensation levels that trigger reporting to the Commission under the GO, and establish an automatic annual change based on the U.S. Department of Commerce Gross Domestic Product Price Index (GDPPI).
2. Exempt CLECs and NDIECs from the provisions of the general order.
3. Determine if information on employee names should be filed as confidential material subject to Pub. Util. Code § 583.

We solicited comments, limited to these issues, from interested parties. Using the timetable proposed in the rulemaking, opening comments were filed on October 7, 2003 and reply comments on October 22, 2003. Sixteen parties filed comments. Each issue is discussed below, with a review of the relevant comments. The PG&E and G/LIF joint petition to modify the rulemaking is discussed in a later section.

Amend Compensation Levels

Reporting Thresholds:

In the rulemaking, we suggested increasing the reporting threshold to $200,000 annual compensation for employees of Tier I utilities (over $1 billion annual revenue). This figure was first proposed by G/LIF in its petition and 14 of the 16 parties commenting on the issue supported an increase to this amount. However, as commented on by G/LIF and the Commission's Office of Ratepayer

Advocates (ORA), the $200,000 amount was to include stock options, pension benefits and other forms of compensation not defined in GO 77-K. ORA instead supports an increase to $100,000 for Tier I utilities and a similar increase (33%) for Tier II and Tier III utilities. ORA advised that it uses this data in its review of formal requests for rate increases by the utilities. PG&E, on the other hand, in its opening comments, originally supported the $200,000 level for Tier I utilities and additionally stated that employee compensation levels should be limited only to "base salary," and not to incentives and other forms of compensation (PG&E later changed its position in a petition to modify the rulemaking). Southwest Gas Corp. (SWG) supports a general $200,000 level for Tier I utilities and a similar increase (166%) for Tier II and Tier III utilities.

The purpose of GO 77 is to provide the Commission with data to be used in the rate-setting process to determine if salaries and other compensation received by utility officers and employees is excessive or out of line with prevailing standards. To do this, we need meaningful data that not only includes salaries, but the other forms of compensation now defined in the GO (expense accounts, contingent fees and other moneys). We also recognize that reporting such data at 1986 levels is now out of date and cumbersome.

The reporting levels should be updated and increased, but to a more modest level than initially proposed. An increase to $200,000 is excessive in terms of the need for the data, particularly if stock options and pension benefits are excluded from this sum. No party provided any justification of how the $200,000 figure compares to actual salaries paid or the percent of employees being compensated at or above that amount. We believe a more conservative increase to $125,000, excluding stock options and pension benefits, for Tier I utilities will allow for the necessary comprehensive review of the data and also give us the ability to compare the compensation levels of a greater cross-section of employees.

Additionally, to simplify the reporting categories, Tier II and Tier III utilities will be consolidated into a single tier. The Tier II annual revenue level is now $1 million to $1 billion, while Tier III is $500,000 to $1 million. The consolidation results in a new Tier II of annual operating revenues between $500,000 and $1 billion. The annual employee compensation report trigger for the new Tier II will be $85,000, an approximate average of the former Tier II and Tier III levels ($60,000 and $40,000, respectively) increased by 66%.

A general increase of 66% to the annual employee compensation thresholds is reasonable. This increase ($125,000 for large utilities and $85,000 for others) will be closer in line with 2004 compensation levels and also continue to allow the public and staff access to meaningful data for review of the rate-making process.

Automatic Annual Adjustments:

We solicited comments on whether to establish an automatic annual adjustment to the employee compensation levels, based on the GDPPI (published by the U.S. Department of Commerce, Bureau of Economic Analysis (BEA)). After reviewing the issue and considering the comments received, we now believe any automatic annual adjustment of the reporting levels based on the GDPPI could prove to be too complex and that any computations of increases or decreases using this data could lead to confusing results for parties compiling or using the data. Several parties commented that any automatic increase should be clearly defined and easy to understand. Roseville Telephone (Roseville) commented that the current GDPPI index has no easily identifiable figure to determine increases. The current BEA web-site showing the GDPPI (www.bea.doc.gov) appears to no longer provide these data and explains that some of the information is unavailable. The data that are provided use fractions of percents that can easily be misinterpreted and miscalculated. We understand that an automatic inflation index would lessen the need for future adjustments, but we must maintain a level of control and simplicity on the annual employee compensation levels. In view of these concerns, we will not implement any automatic change to the reporting levels.

Exempting CLECs and NDIECs from GO 77-L

All parties commenting on this issue agree that certificated CLECs and NDIECs should be exempted from the provisions of GO 77-L. As stated in the rulemaking (p. 13) and by all parties, certificated CLECs and NDIECs are not rate-regulated by the Commission, and we do not use GO 77 data filed by them. We now exempt them from GO 77-L.

In Decision (D.) 00-12-030 (gas storage), D.98-09-024 (commercial mobile radio providers) and D.96-07-052 (railroads), we previously exempted certain regulatees from GO 77 for the same reasons (no Commission rate-setting responsibilities). We now add certificated CLECs and NDIECs to the regulatees not covered by the provisions of GO 77-L.

Two parties, Roseville Telephone and the Frontier Companies, commented that, in addition to CLECs and NDIECs, utilities operating under the New Regulatory Framework (NRF) should similarly be exempted from the provisions of GO 77-L. This proposal was previously discussed and rejected in the rulemaking (p. 14), in that compensation data filed by NRF utilities is necessary and used in the regulation of these companies.

Confidentiality of Employee Names and Compensation

All parties commenting on this issue support some type of confidentiality of employee names, with most recommending the GO 77 reports be subject to Pub.Util.Code § 583 protection. Of primary concern are the problems of identity theft and the need for individual financial information to be kept private. In its comments, PG&E agrees employee names should be confidential and also requests extending this rule to attorneys identified in the GO who are employed by the utilities. In addition to comments, PG&E filed a motion requesting we take official notice of a recent decision of the California First Appellate District in Teamsters Local 856 v. Priceless, LLC (2003) 112 Cal.App.4th 1500, where the court affirmed a preliminary injunction prohibiting the disclosure of salaries linked to the names of individual public employees in certain situations. Though not entirely similar to circumstances in the rulemaking, we take official notice of the above case.

In the rulemaking, we stated that the Commission needs the names of employees to make the compensation information meaningful. Including employee names allows for a more comprehensive review of whether or not an individual is an actual employee of the utility and the role of that employee within the company. Generally, we are attempting to make public as many Commission records and processes as possible, and by informal request, outside parties may now access GO 77 reports. On the other hand, we also recognize the problem of identity theft, privacy concerns and the importance of keeping certain individual financial information confidential.

Classifying the entire GO 77 report under § 583 would not allow a public review of these records by outside parties and is contrary to our policy on open records. As an alternative, G/LIF, SWG, SBC California (SBC) and Southern California Edison (Edison) all suggested an option of allowing a version of the GO 77 report to be filed for public inspection, with employee names redacted. We adopt this option, as it will allow for employee names to be confidential while also providing adequate information to the Commission and its staff for use in the rate-setting process. We will order that utilities may file the GO 77-L report under § 583 on the condition an additional version of the report is provided for public inspection with employee names redacted. The confidentiality of the names of executive officers and attorneys identified in the GO was not included in the scope of the rulemaking and is not subject to this order.

Joint Petition to Modify Rulemaking by PG&E and G/LIF

The petition to modify the rulemaking, filed jointly by PG&E and G/LIF on January 30, 2004, is granted to the extent of expanding its scope. The petition seeks to add the following two requirements to GO 77 executive compensation reports, applicable only to Tier 1 utilities (those over $1 billion annual operating revenue): reporting the total compensation paid to officers and employees of the utility holding company; and reporting compensation and bonuses awarded in the prior reporting period (year), but not yet paid.

The issue of holding company executive compensation was addressed and denied in the rulemaking. The issue of including executive compensation awarded in the prior year, but not yet received, is not within the scope of the rulemaking. Six parties filed timely comments on the petition and all opposed it for these same reasons. We also observed that PG&E's position in the petition to modify conflicts with its opening comments (limit reporting to base salary and exclude incentives and other forms of compensation.)

However, due to recent events and circumstances brought to the Commission's attention by the petition and those in other proceedings relating to the reporting of executive compensation and the role of utility holding companies, it is proper that the subject rulemaking be expanded to include these issues for further consideration.

We anticipate that hearings will not be required and herein solicit comments on whether GO 77 should be further amended by adding the following requirements for Tier 1 utilities (those with annual operating revenues over $1 billion).

1. Reporting the compensation of utility holding company executives.
2. Reporting executive compensation and bonuses awarded in the reporting year, but not yet paid.

The proposed timetable will be:

Opening Comments	45 days after the effective date of this order.
Reply Comments	15 days after Opening comments
Proposed Decision By	November 15, 2004

The assigned ALJ may issue rulings to adjust the timetable as necessary. As required by Rule 6(c)(2) of the Rules of Practice and Procedure (Rules), this rulemaking will continue to be preliminarily determined as quasi-legislative, as defined in Rule 5(d). Any person who objects to the categorization, the need for hearing or to the schedule may file a motion with their objections within 30 days of the effective date of this order. Pursuant to Rules 7(a) and 7(d), ex parte communications are permitted in this proceeding without restrictions or reporting requirements.

Conclusion

As a result of this rulemaking, we are now amending GO 77 in the three areas described in this order. We will also make minor nonsubstantive grammatical changes. A copy of the new GO 77-L is attached to this decision, as Appendix A, showing the revisions (additions and strike-outs) made to GO 77-K.

We will also expand the scope of the rulemaking to solicit further comments from interested parties in the areas of reporting utility holding company executive compensation and the reporting of executive compensation and bonuses paid, but not yet received, for Tier 1 utilities.

Categorization of Proceeding

In the rulemaking, this proceeding was preliminarily categorized as quasi-legislative and we preliminarily determined that hearings were unnecessary. Based on the record, we conclude that the proceeding is properly categorized and that a public hearing is unnecessary.

Comments on Draft Decision

The draft decision of the administrative law judge (ALJ) in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Public Utilities Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on _____________, and reply comments were filed on ______________.

Assignment of the Proceeding

Carl Wood is the assigned Commissioner and Kenneth L. Koss is the assigned ALJ in this proceeding.

Findings of Fact

1. General Order 77-K requires utilities to annually report compensation data for certain employees, based on the operating revenue of the utility and the compensation level of the employee.

2. The data filed in the GO 77 reports are open to the public and include employee names, salaries, expense accounts, contingent fees and reimbursed dues and donations.

3. The Commission uses GO 77 data in its process for setting utility rates.

4. The last review and update of GO 77 was made in 1986, with the adoption of GO 77-K.

5. Rulemaking 03-08-019 was opened to review whether amendments to GO 77-K should be made in three areas: annual compensation levels that trigger reporting to the Commission and establishing an automatic annual change to these levels; exempting certificated CLECs and NDIECs from the GO; and reporting information on employee names as confidential material, subject to Pub. Util. Code § 583.

6. The annual compensation levels that trigger reporting should be updated and increased.

7. An increase in the reporting level to $200,000 for utilities with over $1 billion regulated annual revenue is excessive in terms of the need for the data.

8. An increase in reporting levels to $125,000 for utilities with over $1 billion regulated annual revenue and $85,000 for other utilities is reasonable.

9. We must maintain a level of control and simplicity in the compensation reporting levels and establishing an automatic annual adjustment based on the GDPPI could prove to be too complex and lead to confusing results.

10. CLEC's and NDIEC's are not rate regulated by this Commission and should be exempted from the provisions of GO 77.

11. Compensation data filed by utilities operating under the NRF framework is used and is necessary in the regulation of these companies and the proposal to exempt these companies from GO 77 was rejected in the rulemaking.

12. While attempting to make public as many records and processes as possible, we recognize the problem of identity theft, privacy concerns and the importance of keeping certain individual financial information confidential.

13. The petition to modify the rulemaking filed by G/LIF and PG&E addresses new issues and facts regarding holding company executive compensation.

14. The petition to modify the rulemaking filed by G/LIF and PG&E addresses new issues and facts regarding executive compensation awarded but not yet received.

Conclusions of Law

1. GO 77-L should be adopted and will supersede GO 77-K.

2. Annual employee compensation thresholds that trigger reporting, under GO 77-L, should be increased to $125,000 for utilities with annual operating revenues of $1 billion or more, and to $85,000 for utilities with revenues between $500,000 and 1 billion.

3. An automatic annual change to the employee compensation levels should not be authorized because a reliable and simple source for such change was not identified

4. Certificated CLECs and NDIECs should be exempted from the provisions of GO 77-L.

5. Utilities should have the option of reporting information on individual employee names, pursuant to GO 77-L, as confidential material, subject to Pub.Util.Code § 583. Utilities choosing this option should file an additional copy of the report for public inspection, with employee names redacted.

6. Other nonsubstantive grammatical changes should be made to the GO.

7. The petition to modify subject rulemaking, jointly filed by PG&E and G/LIF on January 30, 2004, should be granted to the extent of expanding its scope.

8. Today's order should be made effective immediately.

ORDER

IT IS ORDERED that:

1. General Order (GO) 77-L is adopted, effective today, and supersedes GO 77-K. A copy of GO 77-L, showing tracked changes made to GO 77-K, is attached as Appendix A to this order.

2. Certificated Competitive Local Exchange Carriers and Nondominant Interexchange Carriers are exempted from the provisions of GO 77-L.

3. Utilities may report information, required by GO 77-L, on individual employee names as confidential material, subject to Pub. Util. Code § 583, conditioned on providing a copy of the entire report for public inspection, with employee names redacted.

4. The Petition to Modify Rulemaking 03-08-019, jointly filed by Pacific Gas and Electric Company and the Greenlining Institute/Latino Issues Forum, is granted to the extent of expanding the scope of the rulemaking, as described herein.

This order is effective today.

Dated ____________________________, at San Francisco, California.