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Decision 01-07-032 July 12, 2001

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into the matter of Competitive Access to Customer List Information.	Investigation 90-01-033 (Filed January 24, 1990)

OPINON DENYING PETITION OF CALIFORNIA NARCOTIC OFFICERS' ASSOCIATION TO MODIFY DECISION 90-12-121

In this decision, we deny the petition to modify Decision (D.) 90-12-121 that was filed on August 30, 2000 by the California Narcotic Officers' Association (Narcotic Officers or CNOA). That petition seeks to remove language from D.90-12-121 requiring Pacific Gas and Electric Company (PG&E) to modify its tariffs so that PG&E would not release customer information to law enforcement officers except pursuant to "legal process"; i.e., a warrant or subpoena duces tecum subsequently approved by a judge.[1] For the reasons set forth below, we conclude that the Narcotic Officers have failed to demonstrate good cause for

[1] Under *People v. Blair,* 25 Cal.3d. 640, 651 (1979), it is clear that the production of records pursuant to a subpoena *duces tecum* does not constitute "legal process" without the approval of a judge:

> "The issuance of a subpoena duces tecum pursuant to section 1326 of the Penal Code . . . is purely a ministerial act and does not constitute legal process in the sense that it entitles the person on whose behalf it is issued to obtain access to the records described therein until a judicial determination has been made that the person is legally entitled to receive them."

modifying the tariff language required by D.90-12-121, and so we deny the petition to modify.

Procedural Background

Order Instituting Investigation (OII) 90-01-033 was issued on January 24, 1990. The purpose of the proceeding – which has often been referred to as the "List OII" – was "to consider what customer list information possessed by public utilities in California should be made available to competitors and other utilities and what measures should be taken by the Commission to protect the privacy of customer information." (OII, page 1.) In order to consider these issues, 22 local exchange carriers were made respondents, as well as four energy utilities including PG&E. All of the respondents were directed to submit comments answering 11 broadly-phrased questions. Pursuant to this directive, opening comments were filed on May 14, 1990, and reply comments on July 9, 1990.

D.90-12-121 was issued in response to these comments. The main ruling in the decision was that the energy utilities should be dismissed as respondents, because "the present stated practice at all respondent energy utilities is not to make commercial use of customer information," and because "any possible future demand for information by [cogeneration and demand-side management vendors or alternate gas suppliers] can be better addressed in individual energy proceedings or a later OII specific to the energy utilities." (*Mimeo.* at 10.)

The ruling that the Narcotic Officers want modified was an incidental part of the discussion dismissing the energy utilities. PG&E's comments had indicated that it did not release customer information to third parties without the customer's permission except, inter alia, "to law enforcement agencies, whether or not the request is supported by a subpoena." (*Id.* at 4.) In response to this statement of PG&E's policy, the Commission stated:

> "We also direct respondent PG&E to modify its current practices to be in line with those of the other three energy utilities, so as not to release information except pursuant to legal process, rather than merely upon request of law enforcement agencies whether or not supported by subpoenas." (*Id.* at 11.)

Pursuant to this statement, Ordering Paragraph (OP) 3 of D.90-12-121 directed PG&E to modify its procedures for responding to customer information requests from law enforcement agencies by requiring legal process.

Grounds for the Narcotic Officers' Petition

In their petition to modify D.90-12-121, the principal ground relied on by the Narcotic Officers is that requiring law enforcement officials to use legal process in order to obtain utility customer information is inconsistent with the Crime Victims' Bill of Rights, which was enacted as Proposition 8 in June of 1982.[2] The Narcotic Officers contend that D.90-12-121 has created an "anomaly" in criminal law, because "utility user information is admissible in a criminal prosecution without a warrant, but law enforcement is forbidden to engage in the more preliminary act of investigation in the absence of a warrant." (Petition, p. 3.) The Narcotic Officers contend that the requirement of a subpoena is anomalous for the following reasons:

> "The Crime Victims' Bill of Rights . . . provided that criminal defendants could claim no greater privacy rights than those that exist pursuant to federal constitutional law. Under federal law, there is no recognized right of privacy with respect to utility records,

[2] The provision to which the Narcotic Officers refer is often called the Right To Truth-in-Evidence provision, and is now set forth in Article I, § 28(d) of the California Constitution. Its central provision is that "except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, *relevant evidence shall not be excluded in any criminal proceeding,* including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court." (Emphasis supplied.)

> *Smith v. Maryland*, 442 U.S. 753 (1979). Subsequent to Proposition 8 being enacted, *In re Lance W.*, 37 Cal. 3d 873 (1985) and *People v. Rooney*, 175 Cal.App. 3d 634 determined that California peace officers did not need a warrant to obtain names and addresses from utilities, there being no constitutional protection of such information found under federal law." (*Id.* at 5-6.)

The Narcotic Officers continue that the requirement of legal process slows down their everyday work, and prevents them from following up promptly on valuable leads:

> "On a daily basis narcotic officers receive innumerable tips regarding suspected drug activity, characteristically from citizens observing suspicious behavior at a particular address. If utility records can be swiftly accessed, these leads can be winnowed. For example, long-standing residence and stable employment would indicate that illegal activity is less likely; on the other hand, multiple listings – particularly in fictitious names – or a prior criminal record (discovered by submission of the subscriber's name to the criminal justice information system) would indicate that a full investigation may be necessary.
>
> "Sophisticated drug rings set up numerous locations for various uses, including 'stash houses,' 'money houses,' or bogus living quarters. By review of utility records, officers can determine if an individual has initiated service at multiple locations at the same time, identifying possible sites of drug activity and gathering information needed to obtain search warrants. Fast access to records is necessary to facilitate investigation and make maximum use of very limited law enforcement resources. . ." (*Id.* at 4.)

Although they do not mention Pub. Util. Code § 588 specifically, the Narcotic Officers suggest that D.90-12-121 be modified to provide for a procedure similar to the one set forth in that statute, which allows designated investigators and inspectors in child abduction cases to obtain utility customer information without legal process. CNOA urges that using procedures similar to those in § 588, its members should be able to obtain upon written request, but without a

warrant or subpoena, "the full name and address, prior address and place of employment of, and date of service instituted by" a utility customer. (*Id.* at 7-9.)

Responses to the Narcotic Officers' Petition To Modify

Responses to the Narcotic Officers' petition were filed on October 16, 2000 by PG&E, Southern California Edison Company (Edison), San Diego Gas & Electric Company (SDG&E) and Verizon California Inc. (Verizon). With the permission of the assigned Administrative Law Judge (ALJ), the American Civil Liberties Union of Northern California, Inc. (ACLU) filed a response on November 3, 2000, and the Narcotic Officers filed a reply to all of the responses on November 20, 2000. With the exception of PG&E -- which suggests that we hold a hearing to develop new rules governing the release of customer information to law enforcement -- all of the responses strongly oppose the relief sought by the Narcotic Officers.

Edison's objections to changing the existing rules are perhaps the most broad-based. First, Edison argues that the petition should be summarily denied for failure to comply with Rule 47 of the Rules of Practice and Procedure. Rule 47(d) requires that a petition for modification of a decision must ordinarily be filed within one year after the decision's effective date, and that if the petition is filed later than that, an explanation must be offered for why it "could not have been presented" within the one-year period. Edison argues that the Narcotic Officers "completely fail[] to give any reason why [they] waited almost ten years to request modification. " (Edison Response, p. 3.)

Second, Edison argues that the relief sought by the Narcotic Officers is contrary to the trend of legislation and Commission decisions in recent years, both of which require customer permission before utility information on customers can be released to third parties. Edison notes, for example, that Pub. Util. Code § 394.4, which addresses minimum consumer protection standards for

electric service providers, requires that "customer information shall be confidential unless the customer consents in writing. This shall encompass confidentiality of customer specific billing, credit, or usage information."

Third, Edison takes sharp issue with the Narcotic Officers' claim that their petition finds support in the Crime Victims' Bill of Rights. Quoting *In re Lance W.*, 37 Cal.3d 873 (1985), a leading decision on Proposition 8, Edison argues that all this provision did was to "eliminate a judicially-created *remedy* for violations of search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled." (37 Cal.3d at 886-887.) But, Edison continues, that change to evidentiary rules does not justify giving permission to law enforcement personnel to conduct free-roving inquiries into the information that utilities must maintain on their customers:

> "[W]hether or not a criminal defendant could preclude the use at trial of evidence obtained without legal process is irrelevant to the question of whether law enforcement can require utilities to produce that information without such process of law. A customer of [Edison] for whom a narcotics officer seeks information may be a criminal suspect but is not yet a criminal defendant. Using [CNOA's] logic and interpretation of the Crime Victims' Bill of Rights would vitiate all protections against unreasonable search and seizure and mean that narcotic officers never need to obtain search warrants or subpoenas for any purpose." (Edison Response, pp. 4-5.)

Finally, Edison notes that the Narcotic Officers are asking the Commission to add language to D.90-12-121 providing that "a law enforcement agency may request and *shall receive* " customer information from utilities, without citing any authority justifying such an order. Edison contends this is a fatal omission, because Edison "is not aware of any authority given to the Commission to assist law enforcement (or any other third party) by ordering utilities to turn over

information when the reason for production has nothing to do with the utility's or the Commission's business." (*Id.* at 5.)

In its response, SDG&E argues that the petition to modify should be denied because the Commission has already rejected, in D.91-10-036, arguments similar to those made by the Narcotic Officers. SDG&E points out that after D.90-12-121 was issued, PG&E sought modification of the decision on the ground that the utility should be permitted to release customer information to law enforcement authorities in the absence of legal process "in emergency situations where public safety is jeopardized." As examples of such emergencies, PG&E cited "unpredictable events such as natural disasters, fires, explosions, criminal activities where the possibility of imminent violence or harm exists, hostage situations, and fugitive situations where a felon might be expected to flee or resist."

The Commission denied PG&E's petition in D.91-10-036, concluding that PG&E had failed to offer any evidence that the subpoena requirement would lead to unacceptable delays in emergencies, and also pointing out that "PG&E does not propose any controls to insure that an emergency condition actually exists or justify why its customer information policy should be different from the standard practice of other California energy utilities." (*Mimeo.* at 3.) In SDG&E's view, the Narcotic Officers' arguments for eliminating the requirement of legal process are similar to those considered in D.91-10-036, and SDG&E faults the Narcotic Officers for failing to mention this decision in their petition. SDG&E also argues that the relief sought in the petition is contrary to the emphasis on

customer privacy protections in recent Commission proceedings such as I.00-02-004.[3] (SDG&E Response, pp. 2-3.)

In its response, Verizon argues that in addition to the Narcotic Officers' failure to comply with Rule 47(d), their long delay in seeking modification of D.90-12-121:

> ". . . casts serious doubt on the very rationale for modification. CNOA states that D.90-12-121 'has constrained law enforcement's ability to investigate criminal activity in a timely manner.' If indeed the problem were as pressing as stated, CNOA would have sought relief sooner. Indeed, the common practice of virtually all California utilities well prior to the issuance of D.90-12-121 has been to release customer information only pursuant to lawful process." (Verizon Response, p. 2.)

Verizon notes that the requirement of legal process before customer information is released to law enforcement has been in place for telecommunications companies since at least 1981, when D.92860 (5 CPUC2d 745) was decided. Further, Verizon points out, insofar as the Narcotic Officers may also be seeking a change in the tariffs of telecommunications companies, such relief would violate Pub. Util. Code § 2891, which prohibits the release without the customer's consent of information such as the customer's credit history and

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[3] In I.00-02-004, which is popularly known as the Telecommunications Customer Bill of Rights proceeding, the Commission's Telecommunications Division has proposed that the following general privacy policy apply across the industry:

> "Consumers have a right of personal privacy, to protection from unauthorized use of their records and personal information, and to reject intrusive communications and technology." (OII, *Mimeo.* at 4.)

Comments were submitted in response to the proposals of the Telecommunications Division on April 17, 2000, and reply comments on June 2, 2000. Public participation hearings regarding the proposals were held at 13 locations around California between June 15 and September 18, 2000. A proposed decision is being drafted.

calling patterns, except under circumstances including "information provided to a law enforcement agency in response to lawful process." (Verizon Response, pp. 2-3.)

The ACLU's response enlarges upon Edison's arguments about why the Victims' Bill of Rights does not support the relief sought by the CNOA. The ACLU points out that the protections against unreasonable searches and seizures inherent in the privacy clause of the California Constitution (Article I, § 13) are broader than their counterparts in the Fourth Amendment to the federal Constitution, and argues that:

> ". . . the California Supreme Court [has] established that people do not relinquish the privacy of personal information by opening accounts with companies that furnish basic financial, residential and communication services. Thus, banks, public utilities, and credit card companies may not release customer information to law enforcement authorities in absence of valid, judicially-supervised, legal process." (ACLU Response, p. 1.)

After quoting *Lance W.*'s holding that Proposition 8 merely eliminated the *remedy* of excluding trial evidence obtained in violation of state constitutional search standards, the ACLU continues:

> "Thus, if a public utility were to release customer information to law enforcement officials acting without a warrant, the information would not be excluded from a subsequent criminal trial, but the disclosure would constitute a clear violation of the California Constitution. (*Id.* at 3.)

Unlike the other parties who filed responses, PG&E does not flatly oppose the type of relief sought by the Narcotic Officers. Although the company opposes the specific language changes proposed in CNOA's petition, PG&E – after noting its own unsuccessful petition for modification that resulted in D.91-10-036 – argues that it is time for the Commission to reexamine the question

of when law enforcement agencies should be provided with customer information in the absence of legal process:

> "PG&E is sympathetic to the concerns raised by CNOA in regard to the difficulties facing law enforcement agencies and recognizes that there are situations where a limited exception to the subpoena requirement may be warranted. However, PG&E takes its role in protecting the confidential information of its customers very seriously. PG&E does not think it is appropriate, based solely on the Petition filed by the CNOA, to overturn the long standing policy established in Decision 90-12-121 to 'require release of information to law enforcement agencies only pursuant to legal process.' While the concerns of law enforcement certainly deserve a fair hearing, the interests of customers in maintaining the privacy of the confidential information they provide to utilities should receive careful consideration by the Commission prior to modifying the current process." (PG&E Response, pp. 1-2; footnote omitted.)

PG&E continues that any new rules adopted by the Commission should be applied uniformly to all utilities, and should include very specific requirements as to (1) what information can be released, (2) what form the request for information should take, and (3) to whom within the utilities such requests should be submitted. (*Id.* at 3-4.)

Discussion

After careful consideration of the parties' arguments, we agree with Edison, SDG&E, Verizon and the ACLU that the Narcotic Officers have not made an adequate case for modifying D.90-12-121. As Verizon points out, it has been the policy of this Commission for two decades that telecommunications utilities should not release customer credit information or calling records to law

enforcement agencies without a warrant or subpoena[4], and this requirement is now reflected in several statutes applicable to both telecommunications and energy utilities.

When D.90-12-121 was issued in 1990 (nearly a decade after D.92860), all of the energy utilities except PG&E required a warrant or subpoena as a precondition to releasing customer information. As the Narcotic Officers concede, D.90-12-121 merely required PG&E to bring its practices into conformance with these other utilities. Until now, no law enforcement agency or group has complained to the Commission that this basic procedural requirement imposes an undue burden on its activities.[5]

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[4] In our 1981 ruling, D.92860, which formally imposed the requirement of a search warrant or judicially-approved subpoena as a precondition to the release by telephone companies of credit information or calling records, we said:

> "As a matter of policy and practice almost all telephone companies in the state release calling records and credit information only in response to legal process. We think the telephone companies' present practices are reasonable but that the practices should be published as a tariff rule to give them sanction and to protect consumers from any slackening in the standards. Representatives of practically all state and local law enforcement agencies who testified at the hearing indicated that securing a search warrant as a condition to obtaining such information did not present a problem to their agencies." (5 CPUC2d at 762; footnote omitted.)

[5] In the comments on the proposed decision that it submitted on June 28, 2001, CNOA takes issue with the statement that "until now, no law enforcement agency or group has complained" that the requirements of D.90-12-121 impose an undue burden on law enforcement activities. To the contrary, CNOA argues, the Los Angeles District Attorney, the California Peace Officers' Association, the California Police Chiefs' Association and the California State Sheriffs' Association have "at various times over the years, . . . either singly or in concert . . . sought legislative remedy to [D.] 90-12-121." (CNOA Comments, p. 3.)

Even if the attempts to overturn the requirements of D.90-12-121 through legislation have been as numerous as claimed, CNOA's argument is beside the point for several reasons. First, as noted in the text, PG&E is the only party who until now has sought to obtain modification from this Commission of D.90-12-121. Second, CNOA did not discuss any of the legislative initiatives by law enforcement groups in its petition to modify D.90-12-121, or in the reply that

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The principal justification that the Narcotic Officers have presented for modifying the requirement of legal process for PG&E -- a justification that, if accepted, would logically seem to apply to the activities of all other utilities[6] -- is that this requirement is inconsistent with Proposition 8, the Crime Victims' Bill of Rights, the relevant portion of which is now set forth in Article I, § 28(d) of the California Constitution.

The language of Article I, § 28(d) is straightforward. It provides in full:

> "Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, sections 352, 782, or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

As the U.S. Supreme Court noted in *California v. Greenwood*, 486 U.S. 35, 44 (1988), the practical effect of Proposition 8 has been to "eliminat[e] the exclusionary rule for evidence seized in violation of state but not federal law." However, Proposition 8 does not *authorize* such seizures. As the California Supreme Court noted in *In re Lance W.*, "what would have been an unlawful search or seizure in this state before the passage of [Proposition 8] would be

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it submitted on November 20, 2000. Third, CNOA has not provided any details in its comments about any of these legislative initiatives.

[6] Indeed, in the reply that it filed in support of its petition on November 20, 2000, CNOA states that it agrees the modifications it is seeking to D.90-12-121 should not be limited to PG&E. Rather, CNOA requests that the decision "be modified in such a way as to require all energy utilities to provide the requested user information without the necessity of legal process." (CNOA Reply, p. 6.)

unlawful today, and this is so even if it would pass muster under the federal Constitution." (37 Cal.3d at 886.)

While our District Courts of Appeal have consistently applied Proposition 8 to uphold the admission of trial evidence seized in violation of state constitutional standards (as long as federal standards under the Fourth Amendment are satisfied)[7], these courts have been reluctant to rely upon Proposition 8 in non-criminal contexts. For example, in *Gordon v. Superior Court*, 55 Cal.App. 4th 1556 (1997), an attorney whose checkbooks and other financial records had been seized pursuant to a warrant obtained by the Department of Insurance requested that the records be sealed, pursuant to a procedure authorized in § 1524(c) of the Penal Code.[8] When the attorney learned several months later that -- unbeknownst to him -- the records had been unsealed, he filed a motion seeking return of the records and a declaration that the unsealing had been improper.

The trial court denied relief, but the Second District Court of Appeal found that § 1524(c) had not been complied with and issued a preemptory writ of mandate. After noting that only one of the 326 checks and stubs seized pursuant to the warrant was payable to someone named in the warrant, the Court of

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[7] For a concise discussion of how Proposition 8 has affected California law, *see* Kelso & Bass, *The Victims' Bill of Rights: Where Did It Come From and How Much Did It Do?*, 23 PACIFIC L.J. 843 (1992) and Kelso & Bass, *Significant Cases Interpreting Proposition 8*, 23 PACIFIC L.J. 1287 (1992). Briefer discussions of the impact of Proposition 8 on California law can be found in I Witkin, CALIFORNIA EVIDENCE 4th Ed., "Introduction" §§ 7-9; IV Witkin & Epstein, CALIFORNIA CRIMINAL LAW 3d Ed., "Illegally Obtained Evidence" § 13.

[8] Under Penal Code § 1524(c), when a warrant is issued for records that are in the possession of a lawyer, physician, psychotherapist or clergyman, and that professional is not suspected of criminal activity related to the records, the warrant must be served in the presence of a special master. If the professional served with the warrant states that the records seized should not be

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Appeal rejected the argument that Proposition 8 served to excuse non-compliance with § 1524(c), and directed the trial court to rule on the attorney's privilege and other claims:

> "The District Attorney contends the checks are not privileged. He says 'no harm, no foul,' and relies on *United States v. Miller* (1976) 425 U.S. 435 . . . , where the court held there was no reasonable expectation of privacy in checks that were voluntarily conveyed to a bank in the ordinary course of business . . . The District Attorney concedes there is California law to the contrary . . . , but insists that [under Proposition 8,] federal constitutional standards must now be applied . . . Implicit in the District Attorney's argument is the assumption that we are dealing with a criminal case. He is mistaken.
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> "With the possible exception of Charles Smith . . ., Gordon's clients were not targeted by the criminal investigation that resulted in the issuance of the warrant for the search of Gordon's office. Insofar as we know (and insofar as it is relevant to this proceeding), there are no criminal charges pending against Gordon or his clients. The fact that Gordon's records were seized as part of a criminal investigation of others does not mean Gordon can be treated as a criminal. Indeed, the special master provisions of subdivision (c) of section 1524 apply only where the attorney is 'not reasonably suspected' of any criminal activity. Accordingly, Proposition 8 has nothing to do with the price of tomatoes . . . The only issues here are the attorney-client privilege and the clients' rights of privacy." (55 Cal. App. 4th at 1556; citations and footnote omitted.)

While the utility customers on whom the Narcotic Officers want information do not have privilege claims like those in *Gordon*, they do enjoy privacy rights based on Article I, § 13 of the California Constitution. The California Supreme Court has held, for example, that telephone customers reasonably expect that the numbers they call from their homes are private, and

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disclosed, the special master is obliged to seal the records and take them to court for a hearing on any claims of privilege or other grounds that the professional may assert.

will be used by the telephone company only for billing purposes. Thus, when a record of these telephone numbers is provided to law enforcement agencies without legal process, the customers' privacy rights under Article I, § 13 are violated. *People v. Blair*, 25 Cal.3d 640, 653-54 (1979). Similarly, the Court has held that persons with unlisted telephone numbers have a reasonable expectation that their names and addresses will remain confidential, and that when this information is disclosed to law enforcement personnel without a warrant, the customers' rights under Article I, § 13 are violated. *People v. Chapman*, 36 Cal.3d 98, 108 (1984).[9] While the Narcotic Officers are correct that Proposition 8 now makes customer information obtained in violation of these decisions admissible in criminal trials[10], the holdings in *Blair* and *Chapman* counsel that, like the court in *Gordon*, we should be reluctant to rely on Proposition 8 outside the context of a criminal trial, especially when the proposed conduct would clearly contravene decisions of our Supreme Court.[11]

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[9] In its June 28, 2001 comments on the proposed decision, CNOA seeks to distinguish the *Blair* and *Chapman* rulings on the ground that the information CNOA seeks—the date utility service was instituted, as well as the customer's address, prior address, and place of employment—is of a "minimalist nature," and far less sensitive than the information at issue in *Blair* and *Chapman*. (CNOA Comments, p. 2.)

We continue to find this argument unpersuasive. While some utility customers might not expect their current address to remain private, we think most customers would consider the other information CNOA seeks to be private, and not subject to disclosure except pursuant to legal process.

[10] In *People v. Rooney*, 175 Cal.App.3d 634, 648 (1985), in ordering a complaint for bookmaking to be reinstated, the Second District Court of Appeal held that under Proposition 8, information on telephone customers obtained in violation of *Chapman* was nonetheless admissible.

[11] There is apparently some anecdotal evidence that Proposition 8 has led to more expansive police conduct. *See* Brown, *Proposition 8: Origins and Impact-A Public Defender's Perspective*, 23 PACIFIC L.J. 881, 894-95 (1992) (discussing Christopher Commission report on Los Angeles City Police practices at the time of the Rodney King arrest).

Our reluctance to rely upon Proposition 8 as grounds for modifying D.90-12-121 is increased by the fact that in recent years, statutes protecting the confidentiality of various types of utility customer information have been enacted by the Legislature. The most extensive restrictions are contained in Pub. Util. Code § 2891, subsection (a) of which provides that "no telephone or telegraph corporation shall make available to any other person or corporation, without first obtaining the residential subscriber's [written] consent," information including personal calling patterns, credit or financial information, services the subscriber purchases, and demographic information from which individual identifying characteristics have not been removed. Subsection (d)(6) does contain an exception to this prohibition for information requested by law enforcement agencies, but the exception states that the information must be provided "in response to lawful process."

Confidentiality legislation also applies to electricity customers. For example, as part of the electric restructuring legislation passed in 1997, Pub. Util. Code § 394.4(a) directed the Commission to adopt a minimum standard for the confidentiality of customer information obtained by electric service providers. The standard provides that "customer information shall be confidential unless the customer consents in writing. This shall encompass confidentiality of customer specific billing, credit, or usage information."[12] And while Pub. Util. Code § 588, enacted in 1994, empowers inspectors and investigators in child abduction cases to obtain specified utility customer information without a warrant or subpoena in cases where the inspector or investigator has a "reasonable, good faith belief that the utility customer information is needed to

[12] The Commission adopted rules implementing the minimum standards of § 394.4(a) in Ordering Paragraph 1 of D.97-10-031.

assist the inspector or investigator in the location or recovery of [the] minor child or abductor," the statute provides that only specifically-designated inspectors or investigators may seek this information, requires the inspector or investigator to submit an affidavit of probable cause supporting the request to the utility, and requires the utility to retain such affidavits for at least one year.[13]

In addition to the strong policy favoring customer privacy that is reflected in these statutes, we agree with Edison and Verizon that CNOA has not adequately explained why it waited nearly a decade after the issuance of D.90-12-121 to seek modification of the decision. While CNOA stresses that no law enforcement agency was a party to the List OII or was made aware of

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[13] As noted in the text, even though CNOA does not specifically mention Pub. Util. Code § 588, its petition proposes to modify D.90-12-121 by adding language that in many respects would track the provisions of § 588. (Petition to Modify, pp. 7-9.) On February 19, 2001, the California Attorney General sent a letter to President Lynch and the other Commissioners endorsing this idea.

We have decided for several reasons that the invitation to replace our current customer privacy policies with a modified version of § 588 should be declined. First, § 588 carved out an exception to our current policies only in cases dealing with "kidnapping, abduction, concealment, detention, or retention" of a minor child. Such cases usually present emergency situations, as evidenced by the requirement in § 588(b)(6) that the affidavit of probable cause must "contain a statement of exigent circumstances, explaining why the inspector or investigator could not seek and obtain a search warrant . . . or other court process for the production of the information sought." The Narcotic Officers, in contrast, want authority to obtain customer information without legal process for their everyday work, and do not propose to state in the declaration supporting the request why it is infeasible to obtain a warrant or other legal process.

Second, the bill that added § 588 to the Pub. Util. Code, AB 2333 (Stats. 1994, Ch. 112), also added § 2112.5, which makes willful violations of § 588 a misdemeanor punishable by a penalty of between $500 and $2000 per offense. This indicates to us not only that the Legislature intended to carve out a very limited exception to our existing privacy policies, but included penalty provisions to ensure that the procedural safeguards included in § 588 were strictly complied with. CNOA is not proposing to follow the same strict procedures laid out in § 588, and even if it were, we have no authority to penalize entities other than public utilities for failure to follow such procedures.

D.90-12-121 at the time of its issuance, CNOA does not contend that it was unaware of the PG&E tariff changes that resulted from D.90-12-121, which went into effect in December of 1991.[14] With respect to the period since then until the filing of its petition to modify[15], CNOA merely asserts that D.90-12-121 has "constrained law enforcement's ability to investigate criminal activity in a timely manner." (Petition To Modify, p. 3.)

This assertion is inadequate for two reasons. First, as both Edison and Verizon point out, it does not satisfy the requirements of Rule 47(d), which requires any party who does not submit its petition to modify within one year after a decision is issued to "explain why the petition could not have been presented within one year of the effective date of the decision." Second, as Verizon puts it, "the severe staleness of [CNOA's] petition casts serious doubt on the very rationale for modification. . . If indeed the problem [for law enforcement] were as pressing as stated, CNOA would have sought relief sooner." (Verizon Response, p. 2.)

Finally, we note that PG&E – while urging denial of the specific relief sought by CNOA – argues that it is time to reconsider our rules on the circumstances under which customer information can be provided to law enforcement agencies. While PG&E has offered some justifications for doing so,

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[14] The tariff changes did not go into effect until December of 1991 because of the petition that PG&E filed seeking modification of D.90-12-121. Although that petition was denied in D.91-10-036, the ordering paragraph in D.91-10-036 effectively gave PG&E until early December of 1991 to file the necessary tariff changes.

[15] It should be noted that CNOA first attempted to file its petition for modification in December of 1999. However, because such a long period of time had elapsed between the issuance of D.90-12-121 and the petition to modify, the assigned Commissioner and assigned Administrative Law Judge directed the Narcotic Officers, pursuant to Rule 47(c), to serve their petition on a special augmented service list.

it is clear that the task would be a time-consuming one, and that substantial Commission resources would have to be invested at precisely the time when the electricity crisis is, of necessity, consuming the lion's share of our attention. Because neither CNOA nor PG&E has demonstrated that the current rules are not working adequately, we decline the suggestion that we should reconsider these rules in the near future.

Comments on Draft Decision

The draft decision of the ALJ in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Rules of Practice and Procedure. CNOA submitted comments on June 28, 2001. The significant points raised in these comments are discussed at appropriate places in the text.

Findings of Fact

1. The requirement that telecommunications utilities not release customer information to law enforcement agencies in the absence of legal process (i.e., a warrant or subpoena) was imposed in D.92860.

2. By the time D.90-12-121 was issued, all energy utilities in California except PG&E had also adopted the practice of not releasing customer information to law enforcement agencies in the absence of legal process.

3. On March 8, 1991, PG&E filed a petition for modification of D.90-12-121, which sought permission to release customer information to law enforcement agencies without legal process in emergency situations.

4. PG&E's petition for modification of D.90-12-121 was denied in D.91-10-036.

5. No law enforcement agency or group other than CNOA has contended before the Commission that its work has been significantly impaired by the requirement of D.90-12-121 that customer information not be released to law enforcement agencies in the absence of legal process.

6. In recent years, the California Legislature has enacted a number of measures that protect the privacy of customer information held by both electric and telecommunications utilities.

7. In view of the Commission's other responsibilities, it would not be a good use of our scarce resources in the near future to conduct a proceeding to reconsider the circumstances under which customer information should be provided to law enforcement agencies.

Conclusions of Law

1. The practical effect of Proposition 8, the relevant part of which is set forth in Article I, § 28(d) of the California Constitution, has been to eliminate the exclusionary rule in criminal proceedings for evidence seized in violation of California law but not federal law.

2. Proposition 8 does not authorize searches and seizures that violate California law; it merely makes the fruits of such searches and seizures admissible in criminal proceedings, provided that federal law is complied with.

3. Few if any courts have been willing to give effect to Proposition 8 outside the context of criminal proceedings.

4. In view of the decisions referred to in Conclusion of Law (COL) 3, it would be unwise for this Commission to give Proposition 8 a broader effect than the effect described in COL 1.

5. CNOA has failed to demonstrate that the prohibition on releasing utility customer information to law enforcement agencies in the absence of legal process has significantly impaired such agencies from carrying out their duties.

6. CNOA has not satisfactorily explained why it waited at least eight years to file its petition for modification of D.90-12-121.

7. CNOA's petition for modification of D.90-12-121 should be denied.

O R D E R

IT IS ORDERED that:

1. The petition for modification of Decision 90-12-121 filed on August 30, 2000 by the California Narcotic Officers' Association is denied.
2. This proceeding is closed.

This order is effective today.

Dated July 12, 2001, at San Francisco, California.

LORETTA M. LYNCH
President
HENRY M. DUQUE
RICHARD A. BILAS
CARL W. WOOD
GEOFFREY F. BROWN
Commissioners