

ORIGINAL

Decision No. 92753 MAR 3 1981

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's
own motion into the regulation of
employment practices of PACIFIC
TELEPHONE AND TELEGRAPH COMPANY,
PACIFIC GAS AND ELECTRIC COMPANY,
GENERAL TELEPHONE COMPANY,
SOUTHERN CALIFORNIA GAS COMPANY,
SAN DIEGO GAS & ELECTRIC
COMPANY, CALIFORNIA WATER SERVICE
COMPANY, SOUTHERN CALIFORNIA
WATER COMPANY, SIERRA PACIFIC
POWER COMPANY, CP NATIONAL
CORPORATION, SOUTHWEST GAS
CORPORATION, CITIZENS UTILITIES
COMPANY OF CALIFORNIA, and
CONTINENTAL TELEPHONE COMPANY OF
CALIFORNIA.

Respondents.

Case No. 10308
(Filed April 12, 1977;
amended June 30, 1980)

INTERIM ORDER DENYING MOTION FOR CONFIDENTIALITY OF RESPONSES
TO THE STAFF DATA REQUEST DATED JULY 18, 1980

I. PRELIMINARY STATEMENT

On July 18, 1980 the staff of the Public Utilities Commission (staff) served its initial data request on each respondent to the above-captioned matter. The data request asked for information in eleven major categories as listed below:

- I. Affirmative Action Program
- II. Complaints and Litigation
- III. Data Summaries
- IV. Recruitment/Applicant Flow
- V. Selection/Testing
- VI. Promotion Section
- VII. Form and Policies
- VIII. Contracting with Minority and Women-Owned Business
- IX. Complaints and Litigation Concerning Contracting
- X. Recruitment
- XI. (no heading - substance concerned with Minority Business Enterprises)

The data request was modified by letter dated September 2, 1980 to permit exclusion of actual case names from Items II and VI above and to substitute language contained in Item VIII above.

On September 8, 1980, Southern California Edison Company (Edison) filed a motion for an order requiring confidentiality of the information furnished in response to categories III, IV, V, VI, and VII above. On September 15, 1980, the Administrative Law Judge issued a ruling requiring responses to this motion by October 15, 1980.

The following parties filed responses supporting the motion for confidentiality: Southern California Gas Company (SoCal), The Pacific Telephone and Telegraph Company (PT&T), General Telephone Company (General), San Diego Gas & Electric Company (SDG&E), and Citizens Utilities Company of California (CUC). The response of SoCal requested that confidentiality be ordered with regard to all portions of the data request and not be limited to the sections Edison identified.

The following parties filed responses in opposition to the motion: the Commission staff (staff), and a group of ten interested parties calling themselves the Minority Group Interested Parties (Minority Group). The Minority Group requests submission of employment and contract data into the public record of these proceedings within fifteen days and requests an award of attorneys' fees and costs pursuant to Decision No. 91909 dated June 17, 1980. Public Advocates, Inc. representing the Minority Group also filed a separate request for a finding of eligibility for compensation on December 9, 1980. The issue of compensation will be addressed in a separate ruling on that motion.

II. ARGUMENTS OF PARTIES

Edison

Edison addresses the portions of the data request pertaining to employment practices in response to Sections III, IV, V, VI, and VII in its motion for confidentiality. It makes three basic arguments in support of its motion.

1. That the information concerning employment practices furnished to the Commission should be held in strict confidence by the Commission and its staff as a matter of policy under the spirit of the federal mandate prohibiting disclosure of information given to the Equal Employment Opportunity Commission (EEOC) and under the California Fair Employment Practices Act;
2. That General Order No. 66-C should be interpreted as closing to public inspection the employment practices data furnished on the ground that it is not information specifically required to be open to public inspection. In the alternative, Edison recommends that to the extent that any information furnished by respondent utilities and disclosed in the interests of a full and fair hearing be coded to protect disclosure of the particular utility with respect to such information; and
3. That nothing contained in the California Public Records Act requires that any information pertaining to respondents' employment practices furnished in these proceedings be made public.

SoCal

SoCal supports Edison's motion for confidentiality and recommends in addition that all material furnished in response to the data request be kept confidential. SoCal argues that both the Congress of the United States and the Legislature of California have expressed a clear statutory intention to maintain the confidentiality of employment information obtained during

investigations by governmental agencies of employment practices, and that the Commission should give strong consideration to this fact in making its decision. It further argues that the Commission's own procedures under Public Utilities Code Section 583 and General Order No. 66-C provide for maintaining the confidentiality of the employment and contracting data.

SoCal goes on to state that release of the information would serve no interest that outweighs the detriment of disclosure to SoCal. It states that the material will include highly confidential information about salaries, pay schedules, hiring, promotions, testing (including the names of tests), contracting, goals, timetables, and internally developed employment practices and procedures, all of which could be used for disruptive or harassment purposes, for fueling private lawsuits, and possibly for the competitive advantage of others especially through release of precise salary information for certain positions. SoCal, together with Edison, stresses that in the interests of candid and open communication between the Commission and the respondents, the responses to the data request should be kept in confidence by the Commission.

SDG&E

SDG&E argues that when the power to investigate employment practices is legislatively granted to a government agency, it is accompanied by limitations on the use of the power, and that since there is no specific grant of power to the California Public Utilities Commission (CPUC), there were no limitations put on the power. It argues that limits must be imposed on CPUC because refusal to do so will contravene clear legislative intent to limit the investigatory power into employment practices and because if limits are not imposed, utilities will be subject to a greater burden than other, nonutility companies, without justification for the increased burden.

SDG&E makes essentially the same arguments with respect to disclosure under federal statute relating to EEOC and under General Order No. 66-C as do Edison and SoCal. In addition, SDG&E has an extensive discussion of the California Fair Employment Practices Act, Labor Code Sections 1410-1433, which applies specifically to the Department of Industrial Relations' Fair Employment Practices Division and which prohibits disclosure of anything which transpired in the course of any endeavors to eliminate the unlawful employment practice through conference, conciliation, and persuasion. SDG&E argues that by this requirement, the Legislature clearly intended to prevent disclosure of facts gathered in fair employment practices investigations. To allow the power to investigate employment practices to be assumed by the CPUC without similar safeguards would be to permit an end run around the Fair Employment Practices Act. Further, it would subject the utilities' employment information to greater public scrutiny than that of other employers who are subject only to the jurisdiction of the Division of Industrial Relations.

General

General adopts Edison's points and authorities in support of its motion and goes on to point out that General Order No. 66-C, Section 2.5, exempts personnel records "from any public disclosure". It argues that the employment information requested by the staff constitutes, in effect, "personnel records" and should, therefore, be kept confidential.

General also makes the argument that respondents' privacy rights entitle their employment data to confidentiality except in cases of compelling public interest. General maintains that it treats the employment data as private and confidential and, moreover, has had a firm expectation that such data would remain private because both the state and federal laws specifically dealing with employment practices guarantee confidentiality

absolutely. General suggests that the public interest can be served by associating appropriate experts with the staff to evaluate the data supplied rather than by throwing the respondents' confidential records open to the public.

PT&T

PT&T agrees with the arguments made by Edison which direct our attention to the confidentiality provisions of the Public Utilities Code and the federal and state equal employment opportunity scheme. PT&T emphasizes the important role that confidentiality plays in achieving the ultimate goal of equal employment opportunity in the federal scheme and the reasons why confidentiality will aid the Commission in achieving this same goal. It argues that the Commission should follow, rather than destroy, the confidentiality requirements of the federal scheme.

CUC

CUC argues that disclosure of the information contained in the data request would violate the Trade Secrets Act (18 USC 1905). CUC acknowledges that the Commission is not an agency or department of the United States and is therefore not subject to the Trade Secrets Act, but argues that the California Public Records Act specifically exempts from its disclosure requirements records which are exempt or prohibited from disclosure pursuant to provisions of federal or state laws. It argues that the information sought is exempt from mandatory disclosure under the federal Freedom of Information Act and prohibited from discretionary disclosure by the provisions of the Trade Secrets Act and therefore is exempt from disclosure under California Government Code Section 6252(k).

CUC also points out that the stated nonadversarial nature of this proceeding militates against disclosure of the requested information, much of which it fears will be used against it by interested parties with their own particular ax to grind.

CUC requests that if any portion of its response to the data request is released by the Commission, its identity with respect to any such information not be disclosed.

Minority Group

The Minority Group makes four arguments: that the Public Utilities Code allows public disclosure of employment data, that the California Public Records Act requires public disclosure, that the federal regulations applicable to the EEOC are not applicable to Commission hearings, and that constitutional due process requirements for public hearings require disclosure. It argues that denial of open access is a denial of the right to participate meaningfully in the Commission's hearings and that no attorney can prepare a case regarding discrimination or exclusionary employment practices without some form of discovery. It asserts that, unlike a private attorney seeking information to pursue a private action against an employer, it only seeks to participate in the hearings conducted by the Public Utilities Commission and its actions in support of disclosure are simply a part of a public agency's regulatory efforts. Minority Group states that it is impossible to comprehend how the current hearings could even approach the status of full and fair hearings without open and equal access to this data.

Minority Group asks that the Commission require the submission of employment and contract data into the public record of this proceeding within fifteen days.

Staff

The staff opposes Edison's motion for confidentiality on the grounds that Edison has not shown that the information which it has produced would be held confidential by the EEOC, that there is no legal impediment to permitting full disclosure, and that for policy reasons the Commission should exercise its discretion in favor of full disclosure. The staff points out that many minority

groups have intervened in this case and are participating actively and aggressively in the proceeding. It argues that if these groups are to participate in this case meaningfully, they must be given the means to inspect and evaluate information which relates to them.

Supplemental Statement

On November 25, 1980, Edison filed a supplemental statement to its motion taking issue with Minority Group's characterization of the proceedings in Case No. 10308 as a compliance review, rather than a cooperative effort to evaluate progress in the area of equal employment opportunities. It notes for the record that the Minority Group has made a misstatement of fact if it believes that the Public Utilities Commission has already ordered public disclosure of employment data in this case and requests that should there be any question about the reasonableness and propriety of Edison's motion, the Commission should order oral argument on the motion.

III. DISCUSSION

We are going to deny the motion for confidentiality and release the information submitted by respondents in response to the staff data request dated July 18, 1980 and amended September 2, 1980, subject to certain restrictions, for the reasons set forth below.

With respect to the federal statutes relating to disclosure, respondents concede that they do not apply to this Commission directly. They urge instead that the policy underlying these statutes be adopted by this Commission in support of a decision not to disclose. In urging us to adopt the underlying policies, respondents overlook some essential differences between our investigations and the proceedings before federal bodies such as EEOC. EEOC proceedings involve a specific complaint from an individual (or group) against an employer over specific acts of

alleged discrimination. The preferred enforcement scheme is comprehensive negotiation and settlement through conciliation, if possible, and by suit, if not. It is only during the period of negotiation and settlement that disclosure is prohibited, and it is prohibited for the purpose of encouraging settlement. Disclosure is not prohibited after suit has been initiated.

The stated purpose of the investigation in this proceeding is "to consider what joint efforts the respondents and this Commission can make to evaluate the progress to date...in implementing employment programs to ensure equal employment opportunities and to eliminate discrimination in employment..and to consider... what consideration may be given to the goals of equal opportunity and anti-discriminatory practices in the contracts and agreements respondents may enter into with other parties for the provision of goods and services". (Order Instituting Investigation in Case No. 10308 dated April 12, 1977.)

We are not concerned in this proceeding with providing specific relief to individuals or groups with claims of individual acts of discrimination. Accordingly, there is no need for a period of negotiation and settlement prior to further legal action since there is no individual claim to settle, and therefore no need for a policy of confidentiality on the grounds that disclosure would impair settlement efforts.

The case of Burroughs Corp. v Brown, 22 EPD ¶ 30,846 (ED Va 1980) has been cited by some respondents in support of their contention that disclosure would expose them to substantial competitive, financial, and commercial injury and should therefore not be permitted. They allege that the information in Burroughs which was to be disclosed included work force data, organizational and job function lists and charts, job descriptions, applicant flow data, promotion lists, Affirmative Action Programs, and EEOC

reports, and is substantially the same as information furnished pursuant to the staff data request. The court in Burroughs concluded as a matter of law that disclosure of the documents would violate the Trade Secrets Act, 28 USC 1905.

Respondents concede that the Commission is not subject to the Trade Secrets Act but argue that California Government Code Section 6252(k) exempts from disclosure all those records which are exempted or prohibited from disclosure under the provision of federal law. However, no respondent has made a showing that individual documents contain the same information, including the specificity, that the documents in Burroughs did, nor has any showing been made as to specific competitive, financial, and commercial injury, with the possible exception of SoCal's assertion that release of salary data could lead to employee raiding by others. We have examined a sampling of the responses and find them, for the most part, to be information of a general, rather than of a specific nature. Accordingly, we do not have any basis by analogy to Burroughs to prevent disclosure of the responses to the data request, subject to certain restrictions discussed later.

The state statutes, particularly The Fair Employment Practices Act, have restrictions similar to those under the federal scheme. For example, California Labor Code Section 1422 prohibits disclosure of what has transpired in the course of any endeavors to eliminate the unlawful employment practice through conference, conciliation, and persuasion; but Section 1425.5 provides that only the contents of discussions or endeavors at conciliation are excluded from evidence if the matter goes to hearing. Here again the purpose of the nondisclosure provision appears to be facilitation of settlement of individual matters prior to more formal action.

Our investigation, albeit nonadversarial in nature, is simply not one which addresses individual specific fair employment or contracting matters, seeking to settle them first by conciliation

and then by adjudication. Thus, the statutes and considerations that bind EEOC and the California Fair Employment and Housing Commission in the interests of conciliation are not applicable to our proceedings.

This Commission clearly has the authority under Public Utilities Code Section 583 to disclose information furnished to it.^{1/} General Order No. 66-C sets forth certain public records which are not open to public inspection, including records or information of a confidential nature furnished to or obtained by the Commission; records or information specifically precluded from disclosure by statute; records, reports, and information requested or required by the Commission which, if revealed, would place the regulated company at an unfair business disadvantage; and personnel records, other than present job classification, job specification, and salary range.

Specific showings, relating to individual documents contained in the response to the data request, have not been made to justify placing any of the responses in the above-mentioned categories exempting them from disclosure under General Order No. 66-C. We have, instead, wholesale assertions by respondents that all or major portions of the responses are confidential, are specifically prohibited by statute from disclosure, and/or if revealed would place the respondents at an unfair business disadvantage. Balanced against these general assertions, we have assertions that failure to disclose will hamper third party participation in the investigation, inhibit assessment of the progress made by respondents toward the objectives of the investigation, and effectively deny third parties the right to a full and fair hearing process.

^{1/} P.U. Code Section 583: "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 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..." (Emphasis added.)

A balance must be struck between the potential hazards of complete disclosure and the rights of the parties to a full and fair hearing. After consideration of all the arguments, we find that good cause has not been shown for refusal to disclose the documents submitted in response to the staff data request dated July 18, 1980 and amended September 2, 1980, and the motion of Edison and SoCal to require confidentiality should be denied.

We are concerned, however, with the potential use of such documentation outside of this proceeding. We wish to encourage full participation and resolution of the generic issues facing us with respect to employment and contracting practices in this proceeding and to pursue the application of our decision in this matter to specific utilities in subsequent rate proceedings. We will make disclosure of the responses to the data request contingent on prior certification in writing to our Executive Director by any party to this proceeding that none of this material will be disclosed to others not a party to Case No. 10308, and that it will not be used in any other proceeding before this Commission unless or until it shall be entered in the public record of this proceeding as written evidence or testimony. ✓

We will deny Minority Group's request that the documentation be entered into the public record within fifteen days. Such a request should be renewed at hearing if the specific document or documents are required for cross-examination or are shown to be relevant in support of a position.

We will also deny respondent Edison's request for oral argument at this time. At such time as specific documents are offered in evidence, after a showing of relevance, respondents may again argue that the specific document should not be disclosed on the public record.

We did note in our review of some of the responses to the data request that individual names had been furnished together with salary information in response to certain questions. It is not our intent to explore individual cases in this investigation. Since we recognize that this information may be sensitive to the individuals involved and since the information was not requested with this degree of specificity, the names may be deleted prior to furnishing the documents to other interested parties. Similarly, some salary information has been provided together with specific positions which are held by so few persons that individual salary information becomes readily apparent. In this case the positions may be coded in such a way that individual salaries are not revealed. We have not provided for further coding as requested by some respondents because in our opinion this would be unwieldy and would render much of the data meaningless. We believe that we have provided sufficient safeguards by restricting use of the data to this proceeding and by requiring nondisclosure beyond the parties to this proceeding.

The request of the Minority Group for compensation is denied. This issue is discussed fully in our decision on Public Advocates' motion for a finding of eligibility for compensation, signed concurrently with this order.

We do note for the record that Minority Group's response to Edison's motion contains a misstatement of fact on page 4, where it states: "The requirements of Section 583 have been followed by this Commission in the current proceeding, and an order to make employment data part of the public record has been issued", and again on page 6 where it states: "In ordering public disclosure of utility employment data, the Public Utilities Commission has acted in compliance with the provisions of its own regulations." The Commission has not previously ordered that employment data be included in the public record in these proceedings

and does not do so now. Our order herein will make the respondents' responses to the staff data request available, with certain limitations, to other parties in this case solely for their use in the course of their participation in this investigation.

Findings of Fact

1. Release of the responses to the staff data request dated July 18, 1980 and amended September 2, 1980 is a matter within the Commission's discretion and is not prohibited by either state or federal statute.

2. The rights of all parties to this proceeding to full and fair participation in the investigation outweigh the interests of respondents in nondisclosure of the responses and therefore compel the disclosure of the responses to such parties.

3. Coding the responses to eliminate the identity of the respondent defeats the purpose of making the information available to all parties, that is, full and fair participation in the proceedings.

4. Certain respondents have provided specific names and/or positions together with salary information which, if disclosed, could be sensitive to the individuals involved, and should therefore be deleted or coded to preclude disclosure of this specific information.

5. The information in the data request responses is presently relevant only to Case No. 10308 and therefore should not be made available for use in Commission proceedings other than this one. ✓

6. Entry of all the responses into the record of this proceeding at this time is premature since there are as yet no witnesses to be cross-examined and no testimony to support or rebut, and hence no showing of relevance of specific documents.

7. No good cause has been shown for further oral argument on the issue of confidentiality.

8. No good cause has been shown to justify an award of attorneys' fees and costs pursuant to Decision No. 91909 dated June 17, 1980.

Conclusions of Law

1. The motion for an order requiring confidentiality of the responses to the staff data request dated July 18, 1980 and amended September 2, 1980 should be denied.

2. The request for further oral argument should be denied.

3. The request for attorneys' fees and costs should be denied.

4. The request to code the responses to eliminate the identity of respondents should be denied, but responses containing salary information identifiable with a specific individual may be coded to preclude identification of the individual.

5. The request to enter the responses into the public record of this proceeding should be denied as premature.

6. Certain limitations on the availability of the responses should be and are incorporated in the order set forth below.

IT IS ORDERED that:

1. The motion of Southern California Edison Company and Southern California Gas Company for an order requiring confidentiality of the responses to the staff data request dated July 18, 1980 and amended September 2, 1980 is denied.

2. Upon certification in writing to the Executive Director that the information is for use only in Case No. 10308 and will not be disclosed to others not a party to this proceeding, any party to Case No. 10308 may request of any respondent a copy of that respondent's response to the staff data request dated July 18, 1980 and amended September 2, 1980. ✓

3. After such certification and upon request, each respondent shall furnish a copy of its response in the same form as that provided to the Commission staff except that where individual names were furnished together with salary information, the names may be deleted and where information concerning positions and salary information

would lead to identification of an individual's salary, the positions may be coded so as to not disclose this information.

4. The requests for further coding of the responses, for further oral argument on the motion and for attorneys' fees and costs are denied.

The effective date of this order shall be thirty days after the date hereof.

Dated MAR 3 1981 , at San Francisco, California.

John E. Bay
President
Richard M. Shapelle
Samuel W. Jones
Walter C. ...
Commissioners