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MAIL DATE
9/30/97

Decision 97-09-124 September 24, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Southern California Gas Company, GTE California, Inc. and Pacific Bell, for Rehearing of Resolution L-258.

Application 97-08-043

ORIGINAL

ORDER MODIFYING RESOLUTON NO. L-258 AND GRANTING INTERESTED PARTIES 20 DAYS TO FILE COMMENTS

In Resolution L-258, the Commission adopted a revised method for dealing with discovery requests by various state and federal law enforcement agencies involving records not generally open to public inspection. Previously, such requests were resolved by the Commission at a regular meeting, which proved cumbersome, time-consuming and inimical to the confidentiality often required by law enforcement agencies, particularly in the preliminary stages of investigations.

Under the new procedure, the Executive Director or General Counsel or their designates are given authority to release these records with certain safeguards. These include a written request for the information and an agreement that the requesting agency not make the information public and an express reservation of the Commission's authority to determine whether information kept confidential under GO 66-C should be disclosed to the public by the law enforcement agency.

Five major utilities have filed Applications for Rehearing or Responses thereto. A preliminary matter to consider -- which none of the Applicants address -- is whether these utilities have standing to apply for rehearing. The Order only sets up a methodology for the Commission's staff to deal with requests by law

enforcement agencies for information that is not otherwise available to the public. It neither requires nor forbids the utilities from doing anything. It would therefore appear that the Applicants are not entitled to appeal under Code of Civil Procedure § 902, which provides:

> "Any party aggrieved may appeal in the cases prescribed in this title..."

This statute has been interpreted by the courts to mean that "to be sufficiently aggrieved to qualify for standing to appeal, a person's rights or interests must be injuriously affected by the judgment or order, and those rights or interests must be immediate, pecuniary, and substantial and not nominal or a remote consequence of the judgment or order." Marsh v. Mountain Zephyr, Inc. (1996) 43 Cal.App.4th 289, 50 Cal.Rptr.2d 493.

The only arguable interest the utilities could claim is the confidentiality of proprietary information or "trade secrets" on file with the Commission. However, the Resolution specifically provides that such information shall not be provided to the public without specific Commission approval. As discussed below, none of the various California statutes discussed by the Applicants forbids providing of such information to law enforcement agencies. Only public disclosure is forbidden. It is therefore difficult to understand how the Resolution has "aggrieved" the Applicants.

The Applicants first argue that the Resolution is in violation of Pub. Util. Code § 583, which provides:

> "§ 583. Disclosure of information furnished to commission; Misdemeanor
>
> 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 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 misdemeanor."

The argument made is that providing of confidential information to law enforcement agencies is the same as providing it to the public, and is therefore a violation of the statute. The Resolution, in Conclusion of Law 2, specifically states:

> "... A law enforcement agency is not the public."

Applicants complain at page 7 that there is no citation of authority for this assertion, implying that there is none. However, the federal courts have specifically held that police officers are not members of the "public" as protected by Hawaii's disorderly conduct statute Cornell v. Grimm (1992) 872 F.Supp. 746, 753. See also State v. Jandrusch (1977) 562 P.2d 1242.

And the California Courts have defined public to mean "pertaining to a whole community," Crane v. Arizona Republic (1969) 972 Fd 1511 and "the community at large," Goldberg v. Barger (1973) 37 Cal App.3d 987, 112 Cal.Rptr. 827, 833. Finally, Black's Law Dictionary, revised Fourth Edition (1968) defines "public" as follows:

> "The whole body politic, or the aggregate of the citizens of a state, district, or municipality... the community at large ... all the inhabitants of a particular place." (citations omitted)

Law enforcement agencies are not the "public" within any of the available definitions and Applicants' argument is without merit. The Resolution does not violate Section 583.

Applicants' next complaint is that the result of the Resolution will be to compromise the security of trade secrets and other proprietary information

provided to the Staff pursuant to Pub.Util.Code § 314. However, as pointed out above, no information will be made "public" pursuant to the Resolution .

PG&E in its Response argues that providing such information would be a violation of the California Public Records Act § 6254.7(d), which protects trade secrets from public disclosure.

However, § 6252(f) provides as follows:

> "(f) "member of the public" means any person, except a member, agent, officer or employee of federal, state or local agency acting within the scope of his or her membership, agency, office or employment."

Because law enforcement agencies obviously fall within the above exclusion, providing them with proprietary information does not violate the California Public Records Act. Further, the confidentiality of the information will be protected by the Resolution's requirement of an agreement with the requesting party that the information be kept confidential. The argument is therefore without merit.

Applicant's next argument is that the Resolution does not protect the individual utility customers' privacy rights. The argument has merit.

Although the Commission does not maintain on a regular basis records pertaining to individual customers, it does have access on a limited basis to this information, as in the case of informal complaints. It is clear that such records are protected by California's privacy law.

California courts have held that a customer has a constitutional right of privacy in his records. The test, stated in Burrows v. Superior Court, (1974) 13 Cal.3d 236 is whether a person has exhibited a reasonable expectation of privacy, and if so, whether that expectation has been violated by government intrusion. In People v. McKunes (1975) 651 Cal.App.3d 487, the court held that a district attorney's having obtained a defendant's toll records from the telephone company without having first secured a subpoena or other court order, violated the state

constitutional right to privacy because of the reasonable expectation that toll records will only be used for accounting purposes. People v. Blair (1979) 25 Cal.3d 640, 653-659, 159 Cal.Rptr. 818 found that this right of privacy extended to utility customers and to credit card holders.[1]

The Commission considered this issue in Cause v. PT&T (1981) D.92860, 5 Cal.P.U.C.2d 745. That decision reflected the California privacy law as enunciated by the Courts and held that telephone companies may not release any personal customer records other than name, address and telephone number. People v. Elder (1979) 63 Cal.App.2d 731, 737, 134 Cal.Rptr. 579.

In People v. Chapman (1984) 36 Cal. 3d 98, 201 Cal.Rptr. 628, 629, the Supreme Court took privacy rights a step further by holding that a utility customer has a privacy expectation in his unlisted telephone number and address maintained by the telephone company. The Court held that the action of the police, in seizing unlisted information without a warrant, consent, or exigent circumstances, violated the Article I, Section 1 of the California Constitution.

The Resolution should be clarified to reflect compliance with the above case law. Pursuant to Ordering Paragraph 1, the Commission staff is precluded from releasing customer records other than these which are already public information, such as those contained in formal filings with the Commission.

Finally, Applicants argue that the Resolution is of no effect because it was issued without compliance with the California Administration Procedure Act (APA).

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[1] In Blair, the California Supreme Court considered, inter alia, the release to the prosecuting attorney by the Diner's Club of certain charge records made by a suspect with his credit card. The prosecution had issued a subpoena duces tecum returnable to the trial court, but the Diner's Club released the records directly to the prosecution in advance of the date they were returnable. This release was illegal. The Supreme Court observed: "The issuance of a subpoena duces tecum pursuant to Section 1326 of the Penal Code ... is purely a ministerial process 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 review them. (Citation)" 25 Cal.3d at p. 651.

The APA is contained in the California Government Code beginning at Section 11,340. The almost impenetrable legislation requires that state administrative agencies comply with certain requirements in adopting or changing rules of practice and procedure. The flaw in Applicants' argument is that the Resolution does not change any rule of procedure affecting Applicants or any other party that practices before the Commission. The Resolution merely changes the method that the Commission staff uses to process requests for information by law enforcement agencies. It does not require Applicants to perform any act nor change their interaction with the Commission or its staff. In fact, GO 66-C, which previously governed the method used by the Staff in releasing information, and which is amended by The Resolution, was itself not issued pursuant to the APA. The argument is without merit.

All five parties have requested the opportunity to comment further on the Resolution. Such comments are not required by the APA. Further, it is difficult to imagine what further comments Applicants might have other than those contained in the Applications for Rehearing and Responses thereto. Nevertheless, in the interest of fairness and due process, any interested party should be given the opportunity to offer their comments on the Resolution. However, the Resolution should not be stayed.

CONCLUSION

For the reasons given above, we are not convinced that the Applicants have standing to bring this action. However, they have raised issues that should be addressed, and this decision accomplishes that.

While we tentatively conclude that rehearing of the Resolution should be denied, all parties have requested an opportunity to comment on it pursuant to the APA. As discussed above, we find that the APA is not applicable to the instant case. However, in the interest of fairness and due process, we will allow all interested parties to comment on the Resolution within 20 days. However,

Applicants are advised that they should not submit comments which are merely redundant to the arguments already made in their applications for rehearing. Comments should be filed in Docket A.97-08-043. The Commission will issue its final ruling on the application for rehearing following the reception of comments.

IT IS ORDERED:

1. Resolution L-258 is modified as follows:

   No member of the Commission staff shall release any customer information, other than that which is on file in formal proceedings and therefore open to public inspection other than pursuant to appropriate judicial process.

2. Any interested party may file written comments on Resolution L-258 within 20 days of the effective date of this order.

3. Resolution L-258 is not stayed.

This order is effective today.

Dated September 24, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

President P. Gregory Conlon being necessarily absent, did not participate.