July 27, 2012

VIA EMAIL

Mr. Fred Harris
Staff Counsel
California Public Utilities Commission
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RE: Comments of The Utility Reform Network on Revised Draft Resolution L-436

Dear Mr. Harris,

The Utility Reform Network ("TURN") submits these comments on the July 13, 2012 revision of Draft Resolution L-436, *Resolution Adopting New Regulations Regarding Public Access to Records of the CPUC and Requests for Confidential Treatment of Records* in accordance with a letter provided by Fred Harris, Staff Counsel of the California Public Utilities Commission ("Commission" or the "CPUC") which require comments to be submitted by July 27, 2012. TURN did not submit comments on the original draft resolution but did attend the workshop held on June 19, 2012. These comments address issues raised in the workshop as well as the revised draft resolution.

TURN is generally supportive of the Draft Resolution because it will bring the Commission's rules into better conformity with Section 3(b)(1) of the California Constitution and the California Public Records Act ("CPRA"), which require that most government records be available to the public. TURN agrees that the current GO 66-C is outdated and unduly hinders disclosures of public records. TURN also agrees that Public Utilities Code Section 583 should not be used as a substantive basis for withholding records from the public. TURN further agrees that parties seeking confidential treatment should have the burden of demonstrating that such treatment is warranted. However, TURN is concerned that the Draft Resolution does not fully address the potential for

conflict between Commission responses to public records requests and the disclosure of records in the course of formal Commission proceedings. In addition, while TURN is supportive of future workshops to further develop procedural issues and address confidentiality issues on an industry specific basis, TURN recommends that the Commission issue an Order Instituting Rulemaking to formally address the issues raised in this draft resolution.

1. **A determination that material is exempt from disclosure under CPRA should not preclude parties in subsequent CPUC proceedings from seeking a determination that the document in question does not warrant confidential treatment.**

The Draft Resolution and the proposed GO 66-D are clear that the provisions of the CPRA shall not be deemed in any manner to affect the rights of litigants, including parties to administrative proceedings, under the California laws of discovery.[1] The proposed GO 66-D further states, "CPUC responses to discovery may not base objections to disclosure on the existence of one or more applicable CPRA exemptions. Similarly, discovery objections in formal CPUC proceedings should not be based on the existence of applicable CPRA exemptions." TURN understands this discussion to mean that, as a party to a formal Commission proceeding, it may request material which is subject to CPRA exemptions and that the target utility cannot simply refuse to produce the material due to a previous determination of confidentiality under CPRA. TURN appreciates that the Draft Resolution makes it clear that confidentiality determinations based on CPRA exemptions will not insulate such records to disclosure in response to discovery requests.

At the workshop, however, TURN expressed concern over a potential conflict between the Commission's determination of confidentiality in response to a records requests and disclosure of material obtained in discovery. During the course of discovery in a formal proceeding, TURN is often provided material that the utility has deemed confidential. In some cases, TURN has argued that the public has a right to the information deemed confidential by the utility and that it would be in the public's interest for the information to be disclosed. TURN is concerned that a previous finding that the

[1] Revised Draft Resolution, Conclusion of Law 24; Draft General Order 66-D, section 2.2.3.3, p. 11.

material can be kept confidential will preclude TURN and other parties from arguing in a formal proceeding that the material should be disclosed to the public.

TURN and other regular litigants before the CPUC will not have the ability to monitor every request for confidential treatment and to contest unreasonable requests. Indeed, it is unclear whether entities like TURN would even obtain timely notice of such requests and have a meaningful opportunity to participate in the determination of confidentiality. If the document in question becomes relevant to a CPUC formal proceeding, and a party feels that it is important to seek a determination that the document be part of the public record, the previous determination outside of the formal proceeding should not preclude such a request. Without such a rule, parties that are regular litigants in CPUC proceedings may feel the need to make protective challenges to confidentiality requests. Even assuming that entities will have timely notice of utility requests for confidential treatment of material, it would not be a good use of CPUC or party resources to submit and decide such protective challenges.

TURN, therefore, recommends that the Draft Resolution and the proposed GO 66-D be modified to state that any staff or CPUC determination that is outside of a formal CPUC proceeding that grants confidential treatment to material should not preclude parties in a subsequent CPUC proceedings from seeking a determination that the material in question does not warrant confidential treatment.

2. Further exploration of issues raised by this Draft Resolution and the development of confidentiality matrices should be conducted in a Rulemaking.

The Draft Resolution contemplates future workshops to discuss potential further revisiosn to the proposed GO 66-D and workshops to address confidentiality and disclosure issues on a subject matter, or industry specific, basis.[2] TURN is supportive of additional workshops but is concerned that further revisions to the proposed GO 66-D and the development of the confidentiality matrices may involve complex policy questions and contentious, multi-party discussions that may need to be resolved with a formal record. TURN therefore recommends that the Commission issue an order

[2] Revised Draft Resolution, p. 29.

instituting rulemaking to provide a vehicle to comprehensively assess the Commission's policies regarding confidentiality with a formal record, as well as to create a formal service list of interested parties who may wish to participate.

3. Recommended Revisions

TURN recommends that the Commission amend the Draft Resolution as follows:

- **ADD** the following sentence to the end of Draft General Order 66-D, section 2.2.3.2 "Records Requests vs. Discovery":

  Any staff or CPUC determination that is outside of a formal CPUC proceeding that grants confidential treatment to material should not preclude parties in a subsequent CPUC proceedings from seeking a determination that the material in question does not warrant confidential treatment.

- **REVISE** Ordering Paragraph 7 to establish an order instituting rulemaking to resolve important policy questions raised by this Draft Resolution and the development of industry specific confidentiality matrices. TURN recommends the following revision:

  CPUC ~~staff~~ shall <u>open an order instituting a rulemaking to discuss issues raised by Draft Resolution L-436 and to</u> hold workshops regarding the following topics, as described earlier in this draft resolution: 1) procedures; 2) safety-related records; 3) communications related records; 4) energy-related records. Staff may choose to hold additional workshops to obtain further input regarding the procedural and substantive changes set forth in Draft Resolution L-436 and proposed General Order 66-D. The first workshop, regarding the first workshop, regarding procedural issues, shall be scheduled as soon as practical, so that we may consider additional modifications to the general order based on ideas discussed in the workshops.

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Respectfully submitted,

By: _____/S/_____

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