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VIA HAND DELIVERY AND E-MAIL

July 27, 2012

Fred Harris
Staff Counsel
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Draft Resolution L-436: Comments of California Water Association

Dear Mr. Harris:

In accordance with the schedule issued by Legal Division on July 6, 2012, California Water Association ("CWA") hereby respectfully submits its comments on the revised draft of Resolution L-436 (the "Revised Resolution"), which was issued July 13, 2012, and is intended to establish a new approach for the California Public Utilities Commission ("CPUC" or "Commission") to implement and comply with the California Public Records Act ("CPRA"). CWA is a statewide association that represents the interests of investor-owned water utilities subject to the Commission's jurisdiction. CWA previously submitted comments on the initial draft of Resolution L-436 on April 25, 2012, and it participated in the June 19 workshop regarding the draft Resolution.

CWA notes significant improvements in the draft Resolution, especially the provision for a standing resolution at each CPUC business meeting that will (1) list all pending requests for confidential treatment of documents, and (2) declare other recently received documents not accorded confidential status as public documents available for disclosure. CWA also is pleased to note that §3.1.2 of the proposed General Order ("GO") 66-D no longer would allow public review of information based on a preliminary staff determination that it is not confidential. However, CWA must express continuing concern about certain aspects of the Revised Resolution and of the new GO 66-D.

A. Revisions to the Draft Resolution Do Not Address CWA's Concerns About Transitional Issues, Formal Proceedings, and Confidential Commercial Information.

As the Commission shifts from a process favoring confidentiality to a process favoring disclosure, CWA is especially concerned about transitional issues, including the



treatment of documents previously submitted to the Commission under the protection of GO 66-C, and also about the treatment of documents submitted to the Division of Ratepayer Advocates (“DRA”) or other Commission staff in formal Commission proceedings. In addition, CWA is very concerned about the proposed general order’s failure to protect confidential commercial information provided to the Commission. The Revised Resolution does nothing to address these concerns.

As CWA previously noted, the Draft Resolution and proposed GO 66-D do not distinguish between information concerning or created by the Commission or its staff, and information provided by companies or persons subject to the Commission’s jurisdiction. While CPRA applies to both broad categories of information, there is a fundamental difference between them. Because of the Commission’s broad authority over the companies it regulates, those companies, and in certain cases their affiliates, must share their proprietary information and records with the Commission. The subject company retains a proprietary interest in these documents, which merits consideration when public disclosure of sensitive information in such documents is proposed. In a litigation context, including formal Commission proceedings, disclosure of such confidential records by a receiving party other than Commission staff would be limited by a non-disclosure agreement or a judge’s protective order. The same **should** be true for confidential documents produced to the Commission or Commission staff either in a formal proceeding or in the course of routine oversight and reporting.

B. Documents Submitted Prior to Adoption of the New General Order Should Remain Subject to the Procedures Set By GO 66-C.

In its prior comments, CWA emphasized that, in the context of Public Utilities Code §583 and GO 66-C, public utilities have submitted great volumes of commercial and financial information to the Commission with a well-justified expectation that the Commission and its staff would hold such information in confidence, absent a specific determination not to do so by the Commission or a Commissioner in the course of a proceeding. This expectation of confidentiality, while not absolute, has enabled utilities to be very open and responsive to inquiries from the Commission and Commission staff, and has expedited the provision of massive volumes of information in periodic reports and in responses to CPUC staff data requests in the context of formal proceedings, as well as in less formal contexts.

Without more protection in the adopted version of GO 66-D, public utilities will necessarily be much more cautious in responding to requests for information from the Commission and its staff, carefully assessing whether to assert a right of confidentiality as to all elements of such responses. As CWA noted in its prior comments, past submissions of information to the Commission have not been subject to such careful confidentiality review. It would be prejudicial and fundamentally unfair for the Commission to apply the new GO 66-D retroactively to information submitted to it or its staff while GO 66-C was in effect.

This is why CWA has urged the Commission to include in the Draft Resolution and in GO 66-D a “grandfathering” provision that continues to apply the rules and procedures of GO 66-C and §583 with respect to public release of documents or information provided



to the Commission by public utilities prior to the adoption of a new general order. The public utility concerned should be given timely notice of any request or intention to release such documents to the public or to any third party and should also be given a fair opportunity to oppose such release.

C. The Revised Resolution Fails Without Explanation to Respond to CWA's Request for Continuing Protection of Confidential Commercial or Market-Sensitive Information.

As noted above and in CWA's prior comments, the Commission should recognize regulated companies' proprietary interest in much of the information they provide to the Commission. The Revised Resolution continues to note that the exemption in §2.2(b) of GO 66-C for "reports, records, and information requested or required by the Commission which, if revealed, would place the regulated company at a business disadvantage," does not match any specific CPRA exemption. Revised Resolution, at 7. CWA's prior comments responded in some detail to the Draft Resolution's criticism of this exemption and noted analogous protection afforded by the federal Freedom of Information Act and by CPRA's exemption for financial institutions.

CWA further noted that the Commission does not have to treat §583 as an all or nothing proposition, and could properly order that records including proprietary business information or market-sensitive information should be excluded from disclosure absent an express Commission order. The Revised Resolution does not provide that protection, and fails to explain why it does not respond to CWA's proposal. Considering that the primary purpose of the draft Resolution and GO 66-D is to ensure that documents related to accidents, safety and emergency preparedness are readily available to the Commission and the public, the Commission should recognize the continuing public (and ratepayer) interest in limiting disclosure of confidential commercial information, security-related information, market-sensitive information, personal data about employees and customers, and information about labor or union negotiations.

D. The Revised Resolution Does Not Respond to CWA's Concerns About the Burden and Delay the New Approach to Confidentiality May Impose on Complex CPUC Proceedings.

Submission and review of confidentiality claims under the new GO 66-D will add a new layer of complexity to many formal proceedings before the Commission. Confidentiality issues regarding the massive volumes of information routinely submitted both before and after the filing of GRC applications will significantly challenge parties' abilities to keep within currently mandated procedural schedules. For Class A water utilities, the Rate Case Plan imposed by D.07-05-062, App. A, requires submission of proposed applications accompanied by volumes of supporting data two months before a GRC application is filed and then imposes a 12- or 18-month schedule for reaching a decision on the filed application. In the context of the new GO 66-D, the proposed application, accompanying testimony, and supporting data all would have to be subject to confidentiality review by the applicant and elements that the applicant considers confidential would then have to be submitted for confidentiality review by the new Public



Records Office. The same process would have to be followed with respect to the numerous and voluminous responses to DRA data requests and further rounds of testimony that the applicant provides in the course of the proceeding.

The schedule for processing GRC applications under the Rate Case Plan for water utilities, noted above, is very constrained, and the time allowed for utility responses to DRA data requests is just one to two weeks. This tight procedural schedule is difficult to reconcile with the detailed confidentiality review, likely to require the active participation of legal counsel, that the present version of GO 66-D would require applicant utilities to pursue with respect to every data request, every piece of prepared testimony, and every filing with the Commission. It is even harder to see how a new process for review of confidentiality claims by DRA, the presiding ALJ, the assigned Commissioner, or the new Public Records Office can be inserted into the discovery process and the Rate Case Plan schedule.

The role of the presiding ALJ or the Law and Motion ALJ in mediating or resolving discovery disputes between utilities and DRA normally is very limited, with the vast majority of such disputes resolved short of involving the ALJ or the Commission. However, if every work paper submitted with a proposed or final application and every response to a DRA data request is to be treated as a public record subject to disclosure, then claims of confidentiality will have to be respected until a presiding officer – either an ALJ or an assigned Commissioner – or the Commission itself has reviewed and assessed those claims. To make such review effective, the revised general order should provide that all documents submitted to DRA under a claim of confidentiality, in the context of a formal CPUC proceeding, will be treated as confidential absent a ruling of the presiding officer or the Commission to the contrary.

Alternatively, and preferably, the Commission could avoid bogging down the processing of GRCs and other complex and time-sensitive proceedings by deferring the consideration of confidentiality issues with respect to documents submitted in the context of formal proceedings until a request for such documents is received from someone not subject to a non-disclosure agreement or a protective order in the subject proceeding. Absent such a request, Commission and parties' resources need not be expended on detailed and potentially contentious confidentiality reviews.

E. Conclusion

As indicated in the foregoing comments, some aspects of the Revised Resolution and proposed GO 66-D have been improved but others still require attention. Most important, CWA continues to urge the Commission to consider the fact that shifting from a system favoring confidentiality to one that favors disclosure need not be an all-or-nothing proposition. Rather, the Commission has discretion to define a protected category of confidential commercial and financial information, and CWA respectfully proposes that it do so. In addition, documents previously submitted to the Commission should remain subject to the confidentiality protections of GO 66-C and care should be taken not to disrupt the processing of tightly scheduled proceedings such as water utility GRCs.



In order to continue what has been a constructive process toward developing an appropriate GO 66-D, CWA recommends that the Commission pursue the workshops indicated in the Revised Resolution before adopting a new General Order.

Very truly yours,

A handwritten signature in blue ink that reads "Martin A. Mattes".

Martin A. Mattes
of Nossaman LLP

Attorneys for CALIFORNIA WATER
ASSOCIATION

MAM/jw

cc: John K. Hawks, CWA