

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Investigation on the Commission's Own Motion into the California's One Million New Internet Users Coalition's Misuse of California Advanced Services Fund Grant Funds; and Order to Show Cause Why the Commission Should Not Impose Penalties and/or Other Remedies for Violating Terms of Their Grant and for Refusing to Return Funds Previously Demanded by the Commission's Division.

Investigation 18-07-009

**MOTION OF THE CONSUMER PROTECTION AND ENFORCEMENT
DIVISION COMPELLING RESPONSES TO DATA REQUESTS
FROM LARRY ORTEGA AND COMMUNITY UNION INC.
AND SHORTENING TIME FOR RESPONSE; [PROPOSED] ORDER**

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I. INTRODUCTION

The California Public Utilities Commission's Consumer Protection and Enforcement Division (CPED) respectfully submits this *Motion of the Consumer Protection and Enforcement Division to Compel Responses to Data Requests from Larry Ortega and Community Union Inc. and Shortening Time for Response* (Motion) pursuant to Rule 11.3 of the Rules of Practice and Procedure (Rules) of the California Public Utilities Commission (Commission). CPED requests that the Commission order Larry Ortega and Community Union Inc. (Respondents) to respond to CPED's second set of discovery, served on February 21, 2020, no later than April 6, 2020.

This discovery dispute arises out of Larry Ortega's refusal to provide responsive information to CPED's data requests. The data requests at issue sought information related to the courses offered by Community Union Inc. and Larry Ortega in furtherance

of fulfilling California Advanced Services Fund (CASF) grant activities in addition to information relating to their revenues and expenses.¹ These issues are central in this proceeding where the Commission will decide on issues such as, whether the California's One Million New Internet Users Coalition (NIU Coalition) spent CASF grant funds on items or expenses that were not allowable or authorized and whether, and to what extent, the NIU Coalition was reimbursed from Respondents' other funding sources for the same expenses. On July 21, 2017, CPED propounded data requests which Mr. Ortega initially agreed to provide responses to, but then vehemently opposed producing responsive documents and information challenging CPED's underlying authority for issuing such data requests.² After the conclusion of alternative dispute resolution (ADR), CPED gave notice to Mr. Ortega in the presence of Judge MacDonald its plan to issue a data request for the factual information related to Respondents' expenses and revenues that it provided during ADR.³ At the time, Mr. Ortega did not object or mention Respondents' concerns relating to CPED's authority or any financial challenges posed in responding. However, about two weeks later, after CPED issued a second set of discovery, Mr. Ortega refused to respond claiming that it is "premature"⁴ and that there is no authority for the 2017 or 2020 data requests issued to Respondents.⁵

Respondents continued refusal to provide responses and information relating to its revenues, expenses, and CASF related activities is prejudicial to CPED because it prevents the Commission's enforcement arm, CPED, from analyzing information relevant to the Commission's OII and ultimately obstructs the Commission from enforcing its laws. Furthermore, Respondents' stalling tactics have forced CPED to take

¹ Community Union Inc. is a member of California's One Million New Internet Users Coalition (NIU Coalition) and Mr. Larry Ortega is the founder of both Community Union, Inc. and the NIU Coalition. OII, p. 2.

² OII, Exh. 21, Email from Larry Ortega to Brian Hom dated August 4, 2017.

³ Attachment A, Declaration of CPED's counsel dated March 24, 2020.

⁴ Attachment B, Email from Larry Ortega to ALJ Zhang dated February 28, 2020.

⁵ Attachment C, Email from Larry Ortega to CPED's counsel dated March 7, 2020.

time away from analyzing the factual issues in dispute in this case to instead drafting discovery motions.

II. BACKGROUND

Before issuance of this OII, on July 21, 2017, CPED propounded data requests requiring responses and documentation to fourteen questions ranging from all supporting documentation for expenses claimed from the CASF fund and Respondents' revenues and expenses, to a description and details about all courses Respondents offered and all other grants it received. After hearing no response, CPED staff contacted Mr. Ortega on July 28, 2017.⁶ Mr. Ortega responded to the data request by including a link to the State Controller's Office's Audit Report and without providing any further documentation, asserted that this "sufficiently responded to the request"⁷ and proceeded to challenge CPED's authority "on the grounds that KCCD . . . nor our organization are utility companies" and that "there is [no] formal Proceeding."⁸

In response, CPED issued a Notice of Violation informing Respondents of their failure to comply with the data request and explaining that "[a]s a grantee (or Consortia grantee) of the California Advanced Services [sic] Fund (CASF) program, NIU has submitted itself to the jurisdiction of the Commission. As provided in Resolution T-17233 which adopted application requirements and guidelines for non-telephone corporations, 'The Commission has an obligation to oversee not only those it has regulatory authority over but also . . . over any organization who will benefit from ratepayer monies.'"⁹ CPED further explained that the Commission requires that "all Consortia receiving CASF grant funds recognize and acknowledge that by receiving a

⁶ OII, Attachment A, CPED Staff Report, p. 11.

⁷ OII, Attachment A, CPED Staff Report, p. 11.

⁸ OII, Exh. 22, *Notice of Violation to California's One Million New Internet Users Coalition (NIU) for Failing to Provide Information and Responses Pursuant to Data Request 1.0*, dated August 23, 2017.

⁹ OII, Exh. 22, *Notice of Violation to California's One Million New Internet Users Coalition (NIU) for Failing to Provide Information and Responses Pursuant to Data Request 1.0*, dated August 23, 2017, p. 1 (citing Commission Resolution T-17233, p. 5.).

CASF grant from the Commission, the Consortia members agree to comply with the terms, conditions, and requirements of the grant and thus submit to the jurisdiction of the Commission.”¹⁰ Pursuant to the Commission’s authority under the Public Utilities Code and specifically, Decision (D.) 11-06-038, CPED informed Respondents that they were required to provide information responsive to its data requests.¹¹ As a recipient of CASF funds, the NIU Coalition is under the Commission’s jurisdiction and is obligated to respond to UEB’s data request.¹² The Notice of Violation made Respondents aware that they could be subject to a penalty of up to \$50,000 per day for failing to comply with CPED’s data request.¹³

Despite having the opportunity to respond to the Commission’s OII, Respondents failed to do so. Respondents were not heard from until the prehearing conference. The parties to the proceeding agreed to ADR to attempt to informally resolve the disputed issues. At the conclusion of ADR, CPED reached an agreement with all of the parties except for Respondents.

After the conclusion of ADR, CPED raised with Mr. Ortega its intention to issue a data request for the factual information related to Respondents’ expenses and revenues that it received in mediation.¹⁴ Mr. Ortega did not object or protest nor did he mention Respondents’ concerns relating to CPED’s authority at that time.¹⁵ Shortly following the conclusion of ADR, CPED propounded a data request on Respondents that contained

¹⁰ OII, Exh. 22, *Notice of Violation to California’s One Million New Internet Users Coalition (NIU) for Failing to Provide Information and Responses Pursuant to Data Request 1.0*, dated August 23, 2017, p. 1.

¹¹ OII, Exh. 22, *Notice of Violation to California’s One Million New Internet Users Coalition (NIU) for Failing to Provide Information and Responses Pursuant to Data Request 1.0*, dated August 23, 2017, p. 1.

¹² OII, p. 14.

¹³ OII, Exh. 22, *Notice of Violation to California’s One Million New Internet Users Coalition (NIU) for Failing to Provide Information and Responses Pursuant to Data Request 1.0*, dated August 23, 2017, p. 1.

¹⁴ Attachment A, Declaration of CPED’s counsel dated March 24, 2020.

¹⁵ Attachment A, Declaration of CPED’s counsel dated March 24, 2020.

nearly identical requests to its July 2017 data request.¹⁶ However, Respondents again refuse to comply now claiming that it is “premature”¹⁷ to propound data requests.

In response, CPED clarified that since ADR has ended, it is appropriate to resume its discovery efforts and that it expects “full and complete responses to the data request by the deadline of March 6, 2020.”¹⁸ Nonetheless, Respondents continue to challenge CPED and the Commission’s authority for issuing data requests and on March 5, 2020 and March 7, 2020 made claims for the first time that requests would be an “immense financial burden”¹⁹ and that it is “experiencing extreme financial hardship.”²⁰ In the spirit of cooperation and without any date offered by Respondents to which it could comply, CPED allowed Respondents an additional week.²¹

III. The Commission Should Order Respondents to Produce Substantive Complete Responses and Materials to the Data Requests

A. CPED Made Good Faith Attempt at an Informal Resolution of the Discovery Dispute

Commission Rule 11.3 requires that, before a motion to compel discovery is filed, the parties must have previously met and conferred in a good faith effort to informally resolve the dispute. CPED made good faith attempts at an informal resolution of the discovery dispute with Respondents, as shown by the following:

- On July 28, 2017 CPED staff inquired into the status of Respondents’ response to the July 21, 2017 data request.²² Mr. Ortega responded with a list of eight questions to CPED ranging from the Commission’s jurisdiction and usage of the data requested in addition to indicating it would take 60 days to

¹⁶ Attachment L, Data Request to Larry Ortega and Community Union Inc. dated February 21, 2020.

¹⁷ Attachment B, Email from Larry Ortega to ALJ Zhang dated February 28, 2020.

¹⁸ Attachment D, Email from CPED’s counsel to ALJ Zhang and I.18-07-009 Service List, Response to ALJ Zhang’s February 26, 2020 Informal Status Statement, dated March 4, 2020.

¹⁹ Attachment E, Email from Larry Ortega to ALJ Zhang dated March 5, 2020.

²⁰ Attachment C, Email from Larry Ortega to CPED’s attorney dated March 7, 2020.

²¹ Attachment F, Email from CPED’s counsel to Larry Ortega dated March 6, 2020.

²² OII Exh. 22, Email from Brian Hom to Larry Ortega dated July 28, 2017.

provide their response.²³ CPED replied to Mr. Ortega answering each of his questions. In addition, CPED denied Respondents request for an extension reminding Mr. Ortega that the deadline for responses was August 4, 2017.²⁴ Then, Mr. Ortega asserted he “disagree[d] with your interpretation on the rules you cite granting you authority to make a data request” and “challenge[d] your authority on the grounds that KCCD . . . nor our organization are utility companies . . . Nor is there a formal Proceeding.”²⁵ CPED never received substantive responses to its data request.

- On August 23, 2017, CPED’s counsel issued Respondents a Notice of Violation citing Respondents for its failure to comply with CPED’s data request, citing the relevant legal authority for the Commission’s jurisdiction, and warning Respondents that their failure to cooperate subjects Respondents to penalties of up to \$50,000 per day of violation.²⁶
- After the conclusion of ADR on January 22, 2020, CPED gave informed Mr. Ortega of its intention to issue a data request for the factual information related to Respondents’ expenses and revenues that it received in mediation. Although ADR had concluded, ALJ MacDonald was present at the time CPED spoke with Mr. Ortega. Mr. Ortega did not object or mention Respondents’ concerns relating to CPED’s authority or any challenges posed in responding.
- After CPED propounded a second data request on Respondents on February 21, 2020 that contained nearly identical requests to its July 2017 data request, Respondents refused to comply, claiming on February 28, 2020 that the timing of such requests are “premature” and again questioning CPED’s authority on March 7, 2020. CPED attempted to explain to Mr. Ortega that the Commission and its staff have the legal authority to issue data requests at any time regardless of whether there is an open proceeding.

²³ OII, Exh. 22, Email from Larry Ortega to Brian Hom dated July 28, 2017.

²⁴ OII, Exh. 22, Email from Brian Hom to Larry Ortega dated July 28, 2017.

²⁵ OII, Exh. 22, Email from Larry Ortega to Brian Hom dated August 4, 2017.

²⁶ OII, Exh. 22, *Notice of Violation to California’s One Million New Internet Users Coalition (NIU) for Failing to Provide Information and Responses Pursuant to Data Request 1.0*, dated August 23, 2017.

- In light of Respondents claims that responding to the data requests would be an “immense financial burden” and Mr. Ortega’s request for additional time to respond, CPED allowed Respondents an additional week or until March 13, 2020 to respond and warned Respondents that their continued failure to comply would require CPED to file a discovery motion compelling Respondents’ compliance.²⁷
- As of the date of this Motion to Compel, Respondents have not provided the information requested in the data requests.

At this point, even if CPED were to receive the requested answers and documents today, CPED’s financial experts would have less than four weeks, based on the ALJ’s proposed deadline for the end of discovery, to review and analyze the information, conduct another round of discovery as needed, and to draft additional testimony to include in this proceeding. Respondents claim of financial hardship lacks merit where a majority of the data requests responses should have already been prepared and available because such information was requested nearly three years ago from Respondents. Moreover, Respondents’ claims that it is costly to provide paper copies²⁸ does not justify their withholding responsive documents. Respondents could have offered to produce its documents electronically, but they did not. In sum, CPED made good faith attempts at informal resolution of the discovery disputes and given the time constraints, CPED requests that the Commission order Respondents to produce the requested responses.

B. CPED is disadvantaged by not receiving the requested materials

The State Controller’s Office (SCO) previously evaluated whether Respondents’ reimbursement claims against the CASF grants were for allowable program activities pursuant to the terms of the grant. The State Controller’s Office concluded that \$182,801

²⁷ Attachment F, Email from CPED’s counsel to Larry Ortega dated March 6, 2020.

²⁸ In an improper ex parte communication to ALJ Zhang, Larry Ortega mentions, “[t]he copies for which CPED will ask for will fill-up about 8 large boxes measuring 4’ x 2’. We estimate the costs to reproduce this evidence to amount to \$3,000 in labor and materials. This is a cost to which we have no access to cover.” Attachment G, Email from Larry Ortega to ALJ Zhang dated March 3, 2020.

of CASF funded activities could not be verified as not already charged against the Respondents' other available grants.²⁹ Moreover, in consideration of the Communications Division's Demand Letter requiring Respondents to return \$35,760, CPED believes the issue of determining the dollar amount of CASF-funded activities that was charged to Respondents' other grants is a term of the grant that requires further information and review.

Where Respondents sought broadband-related grants from AT&T, Verizon, Southern California Edison, and Sempra Utilities,³⁰ a complete showing of Respondents' revenues and expenses is necessary to determine how much of the CASF-funded activities Respondents recouped from other grants. This task has been made nearly impossible because Respondents have failed to produce any substantive response to the information requested for since 2017. Both the 2017 and 2020 data requests also asked Respondents to clarify the facilities used for their training activities, the details of the courses offered, as well as a list of all NIU Coalition staff. Such information is necessary to verify the nature and extent of Respondents' CASF-related activities. Furthermore, for the Commission to assess a penalty, Respondents' ability to pay is a consideration, albeit not determinative, factor. Respondents' delays prejudice CPED by preventing its investigation into the legitimacy of the reimbursements Respondents sought from the Commission and CPED's ability to continue its investigation into further violations of California law.

C. Respondents previously refused to provide accounting records and source documents to the State Controller's Office

When the SCO commenced its audit, it requested from Respondents accounting records such as a general ledger as well as source documents such as time sheets to substantiate their claimed CASF costs for the time period from July 1, 2011 through

²⁹ OII, Attachment B, *California's One Million New Internet Users Coalition Audit Report Consortia Program March 1, 2012 through March 1, 2015*, California State Controller, dated November 2015, p. 5.

³⁰ OII, Exh. 6, *California's One Million NIU (New Internet Users) Coalition Action Plan*, p. 7.

March 1, 2015.³¹ The SCO made numerous attempts to obtain the relevant documents. For instance, the SCO noted that “[d]uring our initial visit to NIU site, during our follow-up phone conference on Wednesday, February 11, 2015, and through an e-mail that was sent to him, we reaffirmed with Larry [Ortega] the data request; for which, his response has been, ‘what records are you requesting’. We explained to him that routine records for audits include: accounting records and source documents, such as financial statements, general ledger, time records, vendor invoices, canceled checks, etc.”³² Mr. Ortega “insists that accounting records and vendor prepared invoices and source documents, such as time records are maintained but not readily available” and “are located in several storages away from the office” and consists of “thousands of pages of documents.”³³ However, the California State Controller never received the requested accounting records and source documents to verify the extent of CASF grant-related services and costs.

The credibility and reasonableness of Respondents’ latest excuses for failing to provide timely responses should be viewed in light of the Respondent’s prior and continued refusal to produce information to both SCO and CPED staff.

IV. The Time Period to Respond to CPED’s Motion Should be Shortened to No More Than Seven Days

CPED respectfully requires that the Commission shorten the time period for filing responses to the Motion to no more than seven businesses days. Mr. Ortega has been on notice since July 2017 that CPED is in need of the information requested in the data requests issued by CPED. Finally, and most egregiously, back in 2017, Mr. Ortega agreed to provide the requested information by or before October 2017,³⁴ yet as of the submission of this Motion, Respondents production is nowhere to be seen. Respondents’

³¹ Attachment H, California State Controller: *Audit Engagement Letter for California One Million New Internet Users Coalition*, dated February 6, 2015.

³² Attachment K, California State Controller, Engagement Planning Memorandum Audit ID S15-SAA-0003, dated January 29, 2015, p. 6; Attachment I, Email from Nick McCarty to Larry Ortega dated February 12, 2015.

³³ Attachment J, Email from Chris Prasad to Andy Finlayson dated May 11, 2015.

³⁴ OII, Exh. 21, Email from Larry Ortega to Brian Hom dated July 28, 2017.

delay in providing the requested information can only be viewed as another attempt by Respondents to unnecessarily delay production of the requested information to a point where it would be impossible for CPED to properly analyze and address it in its reply testimony.

Respondents have had ample time to consider the merits of CPED's Motion and to formulate a response, and have in fact already put forward their objections in email correspondence to Mr. Hom on August 4, 2017³⁵ and again to ALJ Zhang on February 28, 2020.

V. CONCLUSION

For the reasons set forth in this Motion, CPED respectfully requests that the Commission order Respondents to produce all information and documentation requested in CPED's February 21, 2020 data request.

Respectfully submitted,

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³⁵ OII, Exh. 21, Email from Larry Ortega to Brian Hom dated August 4, 2017.

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[PROPOSED] ORDER

In accordance with its Rules of Practice and Procedure, the California Public Utilities Commission (Commission) and having considered the Consumer Protection and Enforcement Division's (CPED) March 25, 2020 Motion for an Order Compelling Discovering Responses and Shortening Time for Response from Mr. Larry Ortega and Community Union, Inc. (Respondents) filed in the above captioned proceeding, and the arguments and supporting authority and evidence cited therein;

And, GOOD CAUSE APPEARING THEREFOR, the Motion of the Consumer Protection and Enforcement Division is GRANTED. Respondents shall provide complete and full responses to the discovery requests propounded by the CPED no later than April 6, 2020.

IT IS SO ORDERED.

Dated _____, 2020 at San Francisco, California.

Administrative Law Judge