



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED

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Order Instituting Rulemaking To Revise
and Clarify Commission Regulations
Relating to the Safety of Electric Utility
and Communications Infrastructure
Provider Facilities.

R.08-11-005
(Filed November 6, 2008)

**MOTION OF THE CONSUMER PROTECTION AND SAFETY DIVISION,
THE UTILITY REFORM NETWORK, AND THE DIVISION OF RATEPAYER
ADVOCATES TO EXCLUDE PROPOSED RULE CHANGES CONCERNING
UTILITY LIABILITY FROM PHASE 2 AND THE PHASE 2 WORKSHOP
REPORT; DECLARATION OF COUNSEL IN SUPPORT OF MOTION**

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June 8, 2010

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Pursuant to Rule 11 of the Commission’s Rules of Practice and Procedures (“Rules”), the Consumer Protection and Safety Division (“CPSD”), The Utility Reform Network (“TURN”) and the Division of Ratepayer Advocates (“DRA”) (collectively referred to as “Moving Parties”) hereby move to exclude from consideration in this proceeding a proposed rule change (“PRC”) that is intended to limit utilities’ legal liability in civil courts, and more specifically, to have this proposed rule change excluded from the Phase 2 Workshop Report.

I. INTRODUCTION

The November 5, 2009, Assigned Commissioner’s Ruling and Scoping Memo For Phase 2 of this Proceeding (“Scoping Memo”) clearly and specifically states that “the scope of Phase 2 excludes matters that are focused on reducing utilities’ legal liability.” (Scoping Memo, p. 8.) The Scoping Memo further provides that “[a]ll PRCs considered in the Phase 2 workshops must be within the scope of this proceeding.” (Scoping Memo, p. 12.) Despite these clear directives, on what was the eve of the last set of workshops in this proceeding,¹ the electric utilities and communication infrastructure providers

¹ The proposal to add this language to General Order 95 first arose at the May 5-7, 2010 workshops. On
(continued on next page)

(“CIPs”) attempted to introduce the following PRC designed specifically to limit utilities’ legal liability in civil courts:

These rules shall not be interpreted to create any private right of action, to form the predicate for a right of action under any other state or federal law, or to create liability that would not exist absent the foregoing rules.

This PRC is intended to defeat rights provided by Section 2106 of the California Public Utilities Code, which provides liability for and permits damage actions against public utilities for their unlawful acts, including acts in contravention of Commission orders or decisions.² This proposal so obviously and blatantly contradicts the Scoping Memo that it should be excluded from consideration in this proceeding on that basis alone. However, in addition to violating the directives of the Scoping Memo, the introduction of this PRC at this late stage in the game also contravenes basic notions of due process. A review of the PRCs filed on December 16, 2009, reveal that no party raised this proposal for consideration in this proceeding. There accordingly has been no notice that the issue of abridging rights provided by the Public Utilities Code would be

(continued from previous page)

May 7, 2010, the Assigned ALJ issued a ruling extending the schedule to allow extra workshops to allow for the development and discussion of fire-threat maps.

² Public Utilities Code Section 2106 provides:

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

addressed in this proceeding. Nor have the Moving Parties nor any other interested party had the opportunity to file comments on this proposal.

Finally, as the Scoping Memo states, the “overarching objective of Phase 2 is to consider measures to reduce the fire hazards associated with utility facilities.” This proposal has nothing to do with reducing fire hazards associated with utility facilities. Instead, it would remove a powerful incentive for utilities and CIPs to adhere to Commission safety rules. Freeing the utilities from liability and stripping a person’s right to seek damages in cases where utilities fail to adhere to Commission safety rules would have a serious impact on safety.

For these reasons, and for reasons discussed more fully below, this PRC should be excluded from the scope of this proceeding and should not be included in the Workshop Report for consideration by the Commission.

II. BACKGROUND

The proposal to add language limiting CIP and electric utilities’ liability in civil courts to GO 95 first arose at the May 5-7, 2010, workshops. (*See* Declaration of Kimberly J. Lippi in Support of Motion, ¶ 2.) During the workshop, a CIP representative suggested that the following language contained in General Order 168, the “Consumer Bill of Rights Governing Telecommunications Services,” could be adapted for GO 95 and inserted as the last sentence in Rule 16’s “Saving Clause”³:

These principles shall not be interpreted to create any new private right of action, to form the predicate for a right of action under any other state or federal law, or to create liability that would not exist absent the foregoing principles.

(*See* Decl. of Kimberly J. Lippi, ¶ 3.) Representatives for CPSD and TURN both objected to this new proposal being introduced and discussed at the workshops. (*Id.*, ¶

³ General Order 95, Rule 16 provides: “The Commission reserves the right to change any of the provisions of these rules in specific cases when, in the Commission’s opinion, public interest would be served by so doing. Compliance with these rules is not intended to relieve a utility from other statutory requirements not specifically covered by these rules.”

4.) The discussion on this proposal came up at the very end of the day on May 7, 2010, and there was no further discussion on this proposal. (*Id.*)

The issue arose again during the next set of workshops scheduled for May 26-28, 2010. (*Id.*, ¶ 5.) Only now the proposal was presented as an “alternate” to the Joint Electric Utilities’ proposal on Rule 31.1. At that point, noting that there was a previous objection to the introduction of this proposal, the workshop facilitators, Jean Vieth and Angie Minkin, suggested that the group take a vote on the proposal, with the understanding that the issue could then be submitted to the Assigned ALJ for decision as to whether the issue is outside the scope of the proceeding, and whether it should be excluded from the Workshop Report. There was a general consensus at the workshops agreeing to this approach. (*Id.*) The proposal was voted on,⁴ and Moving Parties accordingly seek a decision on whether this proposal may be included in the Phase 2 Workshop Report for consideration by the Commission. As the Workshop Report is currently due on August 13, 2010, Moving Parties respectfully request a ruling on this matter prior to that date.

III. DISCUSSION

A. This Proposed Rule Change is Specifically Excluded by the Scoping Memo.

As stated above, the Phase 2 Scoping Memo clearly excludes matters that are focused on reducing utilities’ legal liability. (Scoping Memo, p. 8.) The proposal utilities and CIPs are now attempting to introduce is aimed at doing exactly that. Specifically, the proposed language provides:

These rules shall not be interpreted to create any private right of action, to form the predicate for a right of action under any other state or federal law, or to create liability that would not exist absent the foregoing rules.

⁴ A true and correct copy of the proposal that was voted on is attached as “Attachment A” to the accompanying Declaration of Kimberly J. Lippi.

There is no other purpose behind this proposed rule change. According to the utilities and CIPs at the workshops, incorporating text previously adopted by the Commission in GO 168 into GO 95 is intended to prevent a violation of GO 95 from forming the predicate for civil liability in conjunction with Public Utilities Code section 2106 or other state or federal statutes. A number of statutes in the Public Utilities Code, including section 2106, expressly authorize the filing of civil actions in superior court against public utilities. *See, People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1144-1145. Section 2106 provides that any public utility that violates the laws of this state, or that violates an order or decision of the Commission, shall be liable to persons and entities damaged by such conduct. The statute also provides for exemplary damages, and explicitly states that an action to recover damages caused by a public utility “may be brought in any court of competent jurisdiction by any corporation or person.”

Introducing the above language into GO 95 is simply an attempt to nullify the rights provided by the Public Utilities code, including the right of an injured party to seek damages against a public utility for violations of Commission decisions and safety rules. As this proposal is focused on “reducing utilities’ legal liability,” it is specifically excluded from the scope of Phase 2 by the Scoping Memo.

In addition, the Scoping Memo also provides that the topic of reducing legal liability for fires may be considered in other proceedings, as appropriate. (Scoping Memo, p. 8.) This is occurring in the Wildfire Expense Balancing Account proceeding, A. 09-08-020, which is aimed at addressing utilities’ exposure to the risk of wildfire claims. In that proceeding, San Diego Gas & Electric Company, Pacific Gas and Electric Company, Southern California Edison Company, and Southern California Gas Company filed an application requesting Commission authorization to establish a balancing account to allow each utility to recover from ratepayers “all costs in respect of fires that would have been covered by insurance.” (*See* Application 09-08-020, p. 14.) On December 21, 2009, Assigned Commissioner Simon and the Assigned Administrative Law Judge issued a ruling directing the applicants to amend their application to more fully address essential

components of a more comprehensive wildfire risk management program. (*Ruling of the Assigned Commissioner and Assigned ALJ Directing Applicants to Amend Application and All Parties to Meet and Confer*, filed December 21, 2009 (“WEBA Ruling”).) The ruling further ordered parties to that proceeding to meet and confer to cooperatively develop ideas for addressing the financial impact of wildfires on the utilities. The ruling provided guidance to the parties on this matter, stating that “all facets of risk reduction and liability funding must be considered” and noting that “creating limitations on liability through contracts, tariffs, or other means” may be considered by public utilities to limit their potential financial exposure. (WEBA Ruling, p. 8.) Accordingly, any measures aimed at reducing utilities’ liability for fires should be addressed in that proceeding.

B. Allowing the Introduction of this Proposal at Stage of the Proceeding Violates Principles of Due Process.

In addition to being clearly excluded from the scope of this proceeding, the introduction of this proposal at this stage of the proceedings violates basic notions of due process. There has been absolutely no notice provided to interested parties either in the Scoping Memo or in any pleadings previously filed in this proceeding that this PRC in particular, or the issue of limiting utility liability generally, would be addressed in this proceeding. The standard for determining proper notice is whether the notice would “fairly appraise” interested persons of the subjects and issues the agency was considering. *See, United Steelworkers of America, etc. v. Schuylkill Metals Corp.* (5th Cir. 1987) 828 F.2d 314, 317-18. A court may inquire whether the notice given affords “exposure to diverse public comment,” “fairness to affected parties,” and “an opportunity to develop evidence in the record.” *Association of Am. Railroads v. Dept of Transp.* (D.C. Cir. 1994) 38 F.3d 582, 589. In this case, the utilities and CIPs cannot seriously contend that interested parties have been “fairly appraised” that the issue of reducing utility liability would be considered in this proceeding. In fact, quite the opposite is true: parties have been clearly and fairly appraised that this issue is specifically excluded from the scope of this proceeding.

Further guidance is provided by the California Court of Appeal for the Second Appellate District in *Southern California Edison Co. v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085 (*Edison*). In the underlying Commission proceeding, the OIR included a preliminary scoping memo describing the issues to be addressed as whether to adopt rules to prohibit “bid shopping” and “reverse auctions” consistent with rules governing state and federal public works contracts. Several months after opening comments were due, one party submitted late-filed comments with a new proposal that the Commission should require the payment of prevailing wages. Although the ALJ allowed the parties six business days to respond to the late-filed comments, the ruling did not suggest in any manner that those who were served with the original OIR or scoping memo were aware of the new proposal or that the ALJ intended to modify the scope of the issues in the proceeding to include the new proposal. The court found that the Commission erred by adding a late-filed proposal without amending the scoping memo. *Id.* at p. 1105, citing Pub. Util. Code § 1757.1, subd.(a)(2). Given the clear directive in the Scoping Memo that the issue of utility liability is excluded from the scope of this proceeding, it would constitute legal error for the Commission to allow consideration of this PRC without first amending the Scoping Memo.

Because there has been no notice that this issue would be considered in this proceeding, parties that may be interested in the effects of this proposal have not had the opportunity to comment and participate in the workshops in this proceeding. For example, in the proceeding that adopted GO 168 (R.00-02-004), the California State Attorney General was an active party and took particular interest in the language on which this proposal is based, and its affect on private and public actions against public utilities. (*See, e.g.*, D. 06-03-013.) Although the discussion has focused so far on Section 2106, which provides the sole private remedy to redress violations of the law and of Commission decisions by public utilities, other provisions in the Public Utilities Code provide public remedies prosecuted in the name of the people of the state by the Attorney General or the appropriate district attorney. *See, e.g.* Pub. Util. Code § 2106. Although

the first part of the proposed language is limited to “private right of actions”, the remaining language is not so limiting and would apply to public actions as well. (“These rules shall not be interpreted to ... form the predicate for a right of action under any other state or federal law...”) There has not been appropriate notice to the Attorney General’s office or local district attorneys that their ability to bring public actions against utilities for violations of Commission decisions or rules would be limited.

In addition, there has been no opportunity even for the active participants in this proceeding to file comments on this particular PRC. This proposal was not raised in any of the Proposed Rule Changes filed by the parties on December 16, 2009. Nor did any party raise the issue generally of abridging rights provided under the Public Utilities Code. A review of the prehearing conference statements reveals that no party raised these issues. Although SCE raised liability issues in its PHC statement, it only specifically mentioned inverse condemnation and insurance purposes related to fires. Thus, parties have not had the opportunity to file comments on this proposal and “develop evidence in the record.”

The utilities and CIPs will undoubtedly claim that this proposal is a “logical outgrowth” of or has a “direct nexus” to an existing PRC in an attempt to argue that it is within the scope of this proceeding or does not require any new comment period. *See, e.g., Association of Am. Railroads v. Dept of Transp.* (D.C. Cir. 1994) 38 F.3d 582, 589 (If, after notice and comment, an agency alters a proposed rule, a new comment period will not be required so long as the modified rule is a “logical outgrowth” of the published proceedings.). In fact, in order to create this fiction, the utilities have fashioned this PRC as an “alternate” to the Joint Electric Utilities proposed rule changes to General Order 95, Rule 31.1. However, a review of Rule 31.1 and the changes originally proposed by the Joint Utilities in their December 16, 2009 filing demonstrates that this new proposal is not remotely related to the original proposal.

Rule 31.1 requires electrical supply and communication systems to be designed, constructed, and maintained for their intended use. It further provides that for particulars

not specified in General Order 95 rules, design, construction, and maintenance should be done in accordance with accepted good practice for the given local conditions known at the time. In their December 16, 2009, filing, Joint Electric Utilities proposed adding the following language to Rule 31.1:

Accepted Good Practice is defined as the practices, design and construction methods, or standards followed by a significant portion of the relevant industry during the time period in question.

A supply or communication company is in compliance with this rule if it designs, constructs and maintains a facility in accordance with the particulars of this Order or in accordance with Accepted Good Practices. This rule shall not be interpreted to create in and of itself a basis for a penalty or any other sanction that would not exist absent this rule.

In its January 11, 2010, reply comments, CPSD responded that this language would make that particular rule meaningless and unenforceable by CPSD. (CPSD's Reply to Proposed Rules filed January 11, 2010, p. 5.) CPSD objected to this rule as outside the scope of the proceeding because it was intended to reduce utilities' liability,⁵ but that was insofar as it appeared intended to limit CPSD's ability to cite this rule in formal investigations, and limit the Commission's ability to impose penalties on utilities for violating this rule. There was no discussion in the Joint Utilities' rationale for this PRC even hinting that it was intended to nullify the effects of 2106 or any other right provided under the Public Utilities Code or other state or federal laws. Rather, the Joint Electric Utilities gave the following rationale for revising Rule 31.1:

The general, non-specific statements as currently contained in GO 95, Rule 31.1 are high level principles, provide no specific guidance to the utilities, and cannot be

⁵ Moving Parties have objected to other PRCs proposed by the utilities and CIPs as outside the scope of this proceeding, and by filing this motion do not waive their right to raise these objections again. However, at least those proposals were presented early on in this proceeding and parties have had the opportunity to comment on and raise objections to them prior to the commencement of the workshops.

operationalized. As such, they neither ensure adequate service nor secure safety.

The proposed changes are designed to provide specific guidance for design, construction and maintenance of utility facilities. The changes improve the meaning of the rule, making it clear that a utility that operates according to the particulars of the GO 95 requirements is in compliance with the General Order. They also provide guidance and clarity to a utility on how to design and construct its facilities in cases where there are no particulars in the rules (by specifying design and construction according to Accepted Good Practices).

There is absolutely no mention of the need or intent to reduce utilities' liability in civil courts. The proposal to insert the language from GO 168 has nothing to do with providing guidance to utilities on how to design and construct their facilities in cases where there are no particulars in the rules. Accordingly, this proposal is not a "logical outgrowth" of any proposal set forth in the December 16, 2009 filings, nor does it have any "nexus", either direct or indirect, to any PRC previously submitted by the parties.

C. The Proposed Rule Change is Inconsistent With the Overarching Goal of This Proceeding.

The Commission has made clear that the overarching goal of this proceeding is to promote public safety and mitigate the risk of catastrophic fires. As the Order Instituting Rulemaking (OIR) stated, this proceeding was initiated "to consider revising and clarifying the Commission's regulations designed to protect the public from potential hazards, including fires, which may be caused by electric utility transmission or distribution lines or communications infrastructure providers' facilities in proximity to the electric overhead transmission or distribution lines." (OIR, p. 1.) The Phase 2 Scoping Memo specifically states that "the overarching objective of Phase 2 is to consider measures to reduce the fire hazards associated with utility facilities." (Scoping Memo, p. 8.) Thus, rules which would do more harm than good as far as safety is concerned are not within the scope of this proceeding.

This PRC does nothing to enhance safety generally, nor is it specifically aimed at reducing fire hazards. To the contrary, it would remove incentive to adhere to Commission safety rules. California courts have long recognized the well known dangerous character of electric supply lines and the need to safely construct, inspect and maintain the lines. *See, e.g., Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 523. For more than sixty years the courts have also recognized that Commission safety rules establish a standard of care which is commensurate with and proportionate to that danger. *Id.*, at 542 (“[T]he Legislature has conferred upon the commission the duty of making safety rules and regulations applicable to privately owned public utilities, and it is clear that such rules and regulations establish the standard of care required of such utilities.”). By inserting this proposed language into GO 95, the utilities and CIPs are essentially saying Commission safety rules should no longer provide such a standard of care. Moreover, prohibiting rights of action against public utilities for violations of Commission safety rules creates a perverse incentive whereby utilities, no longer facing potentially large damage payouts, will not need to maintain their systems in a safe and reliable manner.⁶ Eliminating GO 95 as a standard of care and freeing utilities from liability for failing to adhere to those standards would have a serious impact on safety and is antithetical to the goals of this rulemaking. The parties, and the Commission, should be focused on enhancing safety, not coming up with ways to disincentivize utility compliance with safety rules.

⁶ The electric utilities and CIPs are likely to argue, as they did in the WEBA proceeding, that they do not need financial incentives to maintain safe and reliable systems because providing such service is their “core mission” and their “reputations” would suffer if they failed to mitigate safety risks. However, this argument was rejected by the Assigned Commissioner and Assigned ALJ in the WEBA Ruling, which states, “Financial incentives for prudent risk management and safety regulation compliance are substantially undermined by the presumption of recovery from ratepayers.” (WEBA Ruling, p. 7.) Financial incentives for safety regulation compliance are similarly undermined by reducing utilities’ legal and financial liability in civil courts.

IV. CONCLUSION

For the reasons stated above, the Moving Parties request that the attached PRC be excluded from the Workshop Report and excluded from consideration in Phase 2 of this proceeding. Because the Workshop Report is currently due on August 13, 2010, the Moving Parties respectfully request a ruling on this matter prior to that date so parties will know whether or not this PRC may be included in the Workshop Report.

Respectfully submitted,

/s/ CLEVELAND W. LEE

s/ KIMBERLY J. LIPPI

Cleveland W. Lee

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**DECLARATION OF
COUNSEL SUPPORTING MOTION**

I, Kimberly J. Lippi, hereby declare:

1. I am an attorney licensed since 1996 to practice law before all Courts of the State of California. I am employed by the California Public Utilities Commission (CPUC) as staff counsel, and in that capacity represent the Consumer Protection and Safety Division (CPSD) in the above captioned rulemaking. I have participated in all aspects of CPSD's involvement in this proceeding and have attended all of the all-party workshops that have occurred in this proceeding. As such, I have first-hand knowledge of the facts recited herein.

2. At the workshops held in this proceeding on May 5, 2010, a communications infrastructure provider (CIP) representative suggested that language limiting private rights of action contained in General Order (GO) 168 (the "Consumer Bill of Rights Governing Telecommunications Services") could be adapted for GO 95. This suggestion came up after parties had discussed whether to use the term "violation" or the term "nonconformance" in revisions made to Rule 18A of GO 95.

3. On the evening of May 5, 2010, the CIP representative sent workshop participants an email suggesting that the following language from GO 168 could be revised and inserted as the last sentence in Rule 16 “Saving Clause”:

These principles shall not be interpreted to create any new private right of action, to form the predicate for a right of action under any other state or federal law, or to create liability that would not exist absent the foregoing principles.

4. At the end of the May 7, 2010, workshop, the proposal to add the language from GO 168 into GO 95 was raised again. Both CPSD and The Utility Reform Network objected to this new proposal being introduced and discussed at the workshops, as it was outside the scope of this proceeding. There was no further discussion on this proposal.

5. The issue arose again during the next set of workshops scheduled for May 26-28, 2010. Only now the proposal was presented as an “alternate” to the Joint Electric Utilities’ proposal on Rule 31.1. At that point, noting that there was a previous objection to the introduction and discussion of this proposal, the workshop facilitators, Jean Vieth and Angie Minkin, suggested that the group take a vote on the proposal, with the understanding that the issue could then be submitted to the Assigned ALJ for decision as to whether the issue is outside the scope of the proceeding, and whether it should be excluded from the Workshop Report. There was a general consensus at the workshops to this approach. The proposal was voted on at the May 26, 2010 workshop. A true and correct copy of the proposal that was voted on (excluding the voting template) is attached hereto as “Attachment A.”

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the full extent of my own knowledge.

Executed this 8th day of June, 2010, in San Francisco, California.

/s/ KIMBERLY J. LIPPI

Kimberly J. Lippi

ATTACHMENT A

Proposed revision to GO 95, Rule 16

New (underlined) verbiage mirrors existing verbiage adopted by the Commission in General Order 168 (Consumer Bill of Rights Governing Telecommunications Services. Market Rules to Empower Telecommunications Consumers and to Prevent Fraud) and serves as an alternative proposal to JEF-2 (proposal to revise GO 95, Rule 31.1).

16 Saving Clause

The Commission reserves the right to change any of the provisions of these rules in specific cases when, in the Commission's opinion, public interest would be served by so doing.

Compliance with these rules is not intended to relieve a utility from other statutory requirements not specifically covered by these rules.

These rules shall not be interpreted to create any private right of action, to form the predicate for a right of action under any other state or federal law, or to create liability that would not exist absent these foregoing rules.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of **MOTION OF THE CONSUMER PROTECTION AND SAFETY DIVISION, THE UTILITY REFORM NETWORK, AND THE DIVISION OF RATEPAYER ADVOCATES TO EXCLUDE PROPOSED RULE CHANGES CONCERNING UTILITY LIABILITY FROM PHASE 2 AND THE PHASE 2 WORKSHOP REPORT; DECLARATION OF COUNSEL IN SUPPORT OF MOTION** to the official service list in **R.08-11-005** by using the following service:

E-Mail Service: sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

U.S. Mail Service: mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **June 8, 2010** at San Francisco, California.

/s/ ALBERT HILL

Albert Hill

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