

# APPENDIX B

## CPSD's April 25, 2011 Addendum

CALIFORNIA PUBLIC UTILITIES COMMISSION  
CONSUMER PROTECTION & SAFETY DIVISION



**ADDENDUM TO**  
**December 24, 2009, Staff Report on**  
**Personal Electronic Device**  
**Use on Rail Transit Systems**  
**Report for R.08-10-007**

PREPARED BY THE  
CONSUMER PROTECTION & SAFETY DIVISION

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### Acknowledgements

I would like to acknowledge and express my appreciation to the following staff members for this report and for their efforts in facilitating the negotiations leading up to the settlement: Paul King, Steve Artus, Anton Garabetian, and Don Filippi.

I also want to acknowledge and express my appreciation to the negotiating parties for their professionalism and efforts, and also for the open-mindedness that prompted and enabled successful negotiations.

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April 25, 2011

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## SUMMARY

The Commission's Consumer Protection and Safety Division (CPSD) staff supports the personal electronic device (PED) use general order (GO) for rail transit operations as proposed in a settlement motion filed by the parties on April 19, 2011.<sup>1</sup> CPSD staff (Staff) facilitated the negotiations that led up to this settlement and understands the parties' positions and recommendations in the settlement to be genuine and reasonable. Staff believes the GO proposed in the settlement motion (Settlement GO)<sup>2</sup> will likely be more effective than the one originally proposed in the December 24, 2009, staff report (Staff Report).

Staff believes the most notable element of the Settlement GO is the parties' agreement to include requirements for in-cab inward-facing video camera installation and monitoring. Staff believes that these video provisions are essential for this proposed GO to satisfactorily address the concerns giving rise to this safety proceeding. Staff also believes that because the Settlement GO was developed through a collaborative process through which the parties reached a consensus and agreement, it will likely experience substantially less resistance and better compliance, safer behavior, and greater acceptance of this new technology. Additionally, staff believes the negotiations enabled parties to improve and refine many other provisions as specified in the Settlement GO.

## BACKGROUND

On September 12, 2008, a Metrolink locomotive engineer was sending and receiving text messages while alone at the controls of a passenger train. His inattention caused him to miss a red signal and thus caused a multiple-fatality head-on collision with a Union Pacific freight train. Prompted by this tragedy, within days the Commission issued a temporary emergency order prohibiting use of PEDs by crews on railroad and rail transit trains. On October 16, 2008, the Commission issued an order instituting rulemaking (OIR, R.08-10-007) to develop a permanent regulation. As the Federal Railroad Administration had

<sup>1</sup> Parties served their settlement motion to the service list and submitted it for filing on April 5, 2011, but because of technical issues, the filing was rejected. A re-submission was accepted as filed on April 19, 2011.

<sup>2</sup> The Settlement GO is included in the settlement motion as *Attachment A* to that motion.

subsequently issued an emergency order for the nation's railroads, the Commission's OIR was directed solely to rail transit operations in the state.

After initial discussions and workshops, Staff issued the Staff Report encompassing PED use distraction and inattention research, proposed a comprehensive GO, and provided the rationale for its proposal. Parties subsequently provided comments to the Staff Report and noted several objections and concerns. In informal contacts, the rail transit agencies (RTAs) indicated they believed informal negotiations might result in improved or otherwise refined GO provisions that could receive support and agreement from the parties.

Being alerted to the fact that the RTAs were willing to engage in discussion toward improving the provisions of the Staff's proposed GO, the Staff attempted to contact all parties on the proceeding service list to facilitate initial exploratory discussions and determine the level of interest in such collaborative discussions.

Staff facilitated several meetings between October 2010 and January 2011 with the parties that expressed interest in such discussions. By February 22, 2011, Staff received notice from all participating parties that they had come to a consensus on a new draft Settlement GO which was agreed to by and acceptable to all those parties.

On March 16, 2011, the settling parties held a settlement conference. That conference is described in the April 19, 2011, Settlement Motion. All parties to this proceeding were served notice of this conference and were invited to participate. At the settlement conference, all participating parties agreed to accept the Settlement GO and to present it to the Commission for consideration by filing it with the Settlement Motion.

## DISCUSSION

Staff supports the parties' Settlement GO as filed in the April 19, 2011, Settlement Motion. This addendum to CPSD's December 24, 2009, Staff Report describes the reasoning behind Staff's decision to support the parties' Settlement GO instead of the December 24, 2009, draft General Order.

Highlights of the differences between the original Staff-proposed GO and the settlement and Settlement GO are as follows, including the reasoning for Staff's support of the revisions or changes reflected in the Settlement GO.

### ***PED possession***

The original Staff-proposed GO would have prohibited possession of PEDs by on-duty operators unless inward-facing video cameras were installed and utilized to monitor

operator compliance. If no cameras were installed and monitored, operators could not bring PEDs on board the vehicle. If cameras were installed and monitored, PEDs were to be stowed, not on the operator, and turned off.

The majority of the parties did not support this provision. The RTAs generally objected to this provision, accepting the union position that employees should be allowed to bring cell phones on-board rail transit vehicles, and asserting that the camera requirement was infeasible as proposed and too costly. The unions generally objected to this provision because they did not want their members to be prohibited from bringing their cell phones along on the vehicle in the case that no cameras were installed, and because they did not want the invasion of privacy if cameras were installed. Both the RTAs and unions raised the issue of the ubiquitous dependency on cell phones in today's society and the absence of pay phones. The unions sought to find a solution that would allow operators to bring their phones with them for family communications when such communications would not interfere with work duties and safety.

The Settlement GO allows PED possession if the device is turned off and stowed not on the operator. Operational in-cab inward-facing video cameras are required within three years of the effective date of the Settlement GO. In the interim, supervisory observations for compliance are required and must meet or exceed a minimum number of observations on a quarterly basis.

Staff supports this Settlement GO provision most importantly because it will result in video cameras being installed and video footage being monitored. Staff believes video monitoring is the only effective means to prevent PED use in this environment where it is otherwise difficult to effectively supervise operator behavior in these vehicles. Staff also recognizes the importance of cell phone communication in today's society and believes that this Settlement GO provision will allow for prudent and safe possession and use of PEDs while at the same time providing better protections from behaviors that could affect safety.

While the time it will take for installation of these cameras is unfortunate, Staff realizes that obtaining funding, funding cycles and constraints, installation time, and testing all take considerable time. Through lengthy discussions with the RTAs, Staff has come to believe that this delay is reasonable and will be worth the wait. Staff notes that California will be the first state to have a requirement for in-cab inward-facing cameras on any rail vehicle, including both railroad and rail transit systems.

### ***Discipline***

In Staff's original proposal, specific minimum disciplinary consequences were required. Employees who violated the PED use provisions at a minimum would be suspended from rail transit service for thirty days for a first offense. Employees would be terminated from rail transit service for a second offense or for a first offense that resulted in an accident.

The unions asserted that such specific provisions interfered with their collective bargaining rights and pledged to go to court to overturn any GOs adopting such provisions. They also

were concerned that the proposed GO would not allow for employee reassignment to a non-rail-transit job, which they believe should be subject matter for collective bargaining process and beyond the scope of the CPUC's safety mandate.

The RTAs also raised the collective bargaining issue, and raised the concern that all violations would be treated the same, even though some might be intentional and dangerous, while others might be inadvertent and relatively benign.

In the Settlement GO, discipline latitude is granted to the RTAs, with specificity left up to them. The Settlement GO's provision requires discipline "up to and including discharge." The Settlement GO's provisions would require that each RTA adopt and file a "zero tolerance policy" with serious consequences based on an effectiveness criterion:

"The RTA's zero-tolerance policy and program shall include actions sufficiently serious to be reasonably expected to prevent violations of this General Order."  
(Settlement GO, Section 5.2a.)

The Settlement GO provisions allow for a range of negative consequences to match the infraction, from relatively non-punitive for inadvertent and low-impact non-compliance, to suspension and/or removing an operator from rail transit vehicle operation through a discharge from employment for more serious or repeat violations.

In the Settlement GO, each RTA is required to keep records of any violation of the Settlement GO and to make such record available to Staff upon request.

Staff supports the new provisions regarding discipline in the Settlement GO since they embrace the fundamental principle that operators must expect negative consequences from non-compliant and unsafe use of PEDs. Additionally, Staff believes that along with the improvements to other critical GO provisions, the Settlement GO discipline provisions will be better received and more effective than the original Staff proposed GO, while also avoiding the potential litigation that might have hampered implementation of this important safety GO.

### ***RTA-issued devices***

In the Staff Report, Staff originally proposed different provisions for personal versus RTA-issued device use. At that time, the information available to Staff indicated that cell phone use desired by the RTAs might be best addressed by different requirements. For example, unlike personal cell phones, an RTA would have unrestricted access to use records and thus would be able to discern whether an operator used the phone while prohibited. Also, the RTA could program the phone to only be useable for certain operationally important numbers while the use for personal numbers could be blocked or restricted.

In the Settlement GO, no distinction is made between personal and RTA-issued devices; they are treated equally with the same strict use prohibitions. The Settlement GO provisions appear to indicate that the RTAs do not envision that the need to use RTA-

issued cell phones would be different from the use of personal cell phones; thus the two categories of devices should be subject to the same strict use prohibitions. Staff supports this new provision since while distractions might be limited more easily for RTA-issued phones, any distraction at all presents a safety detriment. It is far better to rely on the dedicated-channel two-way radios on rail transit vehicles for operational and business communications. Therefore, all the provisions protecting against distraction with use of personal cell phones should also be in place to protect against distraction with use of RTA-issued phones. RTA-issued cell phones should only be used under the same conditions as allowed for personal cell phones. For example, a cell phone could be used in an emergency, and only when “the rail transit or on-track vehicle is stopped and the person is not in the controlling compartment of the rail transit vehicle (Settlement GO, Section 3.2.).

### ***Video storage requirements***

Staff originally proposed that the RTAs be required to retain video footage for all cameras for 60 days. Comments by the RTAs, although lacking specific quotes or documentation, noted that the 60-day storage requirement would be prohibitively expensive while adding only marginal benefit.<sup>3</sup>

The Settlement GO requires that cameras have an eight-day continuous loop recording so that any time it is downloaded, the most recent eight days are available on the recording. The Settlement GO does not require storage of all recordings. Instead, it requires storage based on need. Recordings must be stored if they show an operator violating the Settlement GO. The Settlement GO also requires that the recordings be reviewed after any derailment, impact, death or injury, complaint, or observation of a violation, and for the purposes of a testing program to ensure compliance with the GO. The Settlement GO also requires that each RTA have a video-based enforcement and random monitoring program designed to ensure compliance with the GO, and requires that each RTA submit its program for review and approval by the CPSD Director or Deputy Director.

Staff supports this more cost-effective approach since the most important benefit from video camera use is that it enables observation of operator compliance with the GO. Staff believes that the critical components of this Settlement GO are the provisions that an eight-day segment of operator behavior is captured at all times, must be subject to random review, and must be retained under specific conditions that promote the underlying purpose of this rulemaking – preventing distraction from PED use. The fundamental principle described in the Staff Report was that operators must have the expectation that non-compliance will be observed and will have negative consequences. Staff believes that the eight-day video capture provision, along with the specific retention and random review requirements, will create this expectation at a fraction of the cost of the originally proposed GO provision.

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<sup>3</sup> For example, in its comments to the original staff proposal, the Los Angeles County Metropolitan Transportation Authority estimated that their costs would total \$55 million to install and service the video storage during the first year.

### **Other changes**

Other changes were made primarily to clarify and/or update definitions where terms were no longer needed or used in the proposed Settlement GO due to the substantive changes to its provisions. In general, the parties worked to make revisions for internal consistency and simplicity without impacting, and often enhancing, clarity and effectiveness. A critical component to the process was the professional participation of different parties advocating for the different interests of their properties or memberships while embracing the need for safety. Such participation ensured that provisions with little or no affect on safety, but which imposed costs or complexities, or which could have created inadvertent consequences, were modified or eliminated.

## **CONCLUSION**

Staff supports the parties' settlement and proposed Settlement GO in that it will be more effective than Staff's original proposal. Staff believes it will be more effective in preventing the unsafe behaviors that the new technologies of PEDs have enabled and encouraged, while at the same time providing a sense of fairness and avoiding litigation and resistance to this important regulatory program. One of the best statements on this subject was made by the NTSB's chairperson at the NTSB hearings on the tragic Chatsworth collision. Her statement was at the end of the hearings where the NTSB recommended inward-facing camera installation:

“Technology has the ability to increase the number of distractions, but it also has the ability to increase safety in the cab. Technology’s a game changer. It’s already changing the way we do business. When it comes to using technology, enforcement and oversight can’t be left behind. It has to advance along with everything else that we’re relying on technology to improve.”<sup>4</sup>

“I hope that the rail regulators, industry, and labor will work together towards solutions, and take a chance on leading when it comes to safety and distractions, and not be the last mode to address this important issue.”<sup>5</sup>

We have done so, and believe that the Settlement GO, if adopted, will be an important step up in the level of safety in the rail transit industry.

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<sup>4</sup> Chairman Deborah A. P. Hersman’s closing remarks at the January 21, 2010, NTSB Board meeting adopting the final report and recommendations regarding the September 12, 2008, Chatsworth Metrolink-UPRR collision.

<sup>5</sup> Ibid.