

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: March 19, 2013

To: The Commission
(Meeting of March 21, 2013)

From: Lynn Sadler, Director
Office of Governmental Affairs (OGA) – Sacramento

Subject: **AB 415 (Garcia) – Public utilities: Public Utilities Act: violation: defense.**
As introduced: February 15, 2013

RECOMMENDED POSITION: OPPOSE

SUMMARY OF BILL

This bill would establish as a matter of law that “a reasonable good faith reliance” upon statements of California Public Utilities Commission (CPUC) staff is a defense to an enforcement action brought by the CPUC. This would not apply to enforcement actions directly related to actions alleging a violation that led or could have directly led to harm of humans.

CURRENT LAW

There is no specific statute on this point. In general, relevant statements of CPUC staff are already admissible in enforcement proceedings under CPUC Rule of Practice and Procedure 13.6 (re evidence) and Public Utilities Code section 1701.

AUTHOR’S PURPOSE

This bill is sponsored by TracFone. TracFone is the subject of an ongoing enforcement proceeding (I.09-12-016) for failing to pay user fees and public purpose surcharges. TracFone has claimed that it relied on statements of a Communications Division staff member who no longer works for the Commission as its argument that it did not need to pay those required fees and surcharges. TracFone has argued in numerous states, including Washington, Texas, Kentucky, Idaho and others, that it does not need to pay various fees or taxes, and has been very willing to litigate those issues.

The bill itself does not identify a specific problem that the bill is intended to address. In fact, utilities have argued reliance upon statements of staff as a defense (or more commonly in mitigation of potential penalties) in Commission enforcement proceedings,

and may do so in the future. Accordingly, on a general level the bill is unnecessary. On a more specific level, it is intended to benefit TracFone by bolstering its (previously rejected) legal argument against paying user fees and public purpose surcharges.

DIVISION ANALYSIS

This bill would primarily affect how CPUC staff interacts with utilities and the public, and would discourage informal communications between CPUC staff and the utilities and the public. CPUC staff would provide less information and advice to utilities and the public, and would require the use of more formal processes.

The bill may deter or prevent the CPUC from commencing or maintaining certain enforcement actions. The extent to which this would occur is not clear, as the applicable language of the bill is unclear.

Because the language of the bill is unclear, implementation of the bill could result in increased litigation risk to the CPUC. As written, the bill is inconsistent with legal principles relating to defenses, including the burden of proof, as described below in more detail.

SAFETY IMPACT

Because this bill is likely to discourage or impede informal communications between CPUC staff and utilities relating to safety, and may discourage or impede enforcement actions relating to safety, this bill may have an adverse impact on the safety of California citizens.

The bill states that it does not apply to enforcement actions: “directly related to an action alleging a violation that led, or could have directly led, to harm of humans.” (Emphasis added.) Accordingly, the bill would apply to violations that indirectly led to harm. For example, failure to keep adequate maintenance records for gas pipelines does not directly lead to harm, but it could indirectly lead to harm. Improper disconnection of phone service may not lead directly to harm, but if the phone is unavailable in an emergency because it was improperly disconnected, it could indirectly lead to harm.

RELIABILITY IMPACT

Because this bill is likely to discourage or impede informal communications between CPUC staff and utilities relating to reliability, and may discourage or impede enforcement actions relating to reliability, this bill may have an adverse impact on reliability of service.

RATEPAYER & CONSUMER IMPACT

This bill does not appear to have a direct impact on the rates charged to consumers, although it may allow utilities to evade consumer protection statutes by asserting individual staff members' interpretations of those statutes.

FISCAL IMPACT

The bill does not directly require an expansion of CPUC workload. However, to the extent that the bill encourages the use of formal, rather than informal, methods of communication with utilities, and to the extent there is litigation relating to the implementation and interpretation of the bill language, there could be substantial costs to the CPUC.

ECONOMIC IMPACT

This bill does not appear to have a significant direct effect on businesses or local governments. To the extent this bill discourages or impedes informal communications between CPUC staff and utilities, it may have an adverse effect on the regulated community by requiring more costly and time-consuming formal processes.

LEGAL IMPACT

As written, this bill is inconsistent with fundamental legal concepts.

The bill's stated intent is to allow for a defense to an enforcement action. But the language of the bill states that: "The commission shall not commence or maintain an adjudication or other enforcement action or proceeding against a public utility" if that public utility has relied on the "advice or direction" of CPUC staff. In other words, the utility's reliance *on any staff statement* could act as a bar to the CPUC bringing an enforcement action.

This is not workable in practice. For example, if a CPUC staff person told PG&E they could dispose of gas pipeline maintenance records, the CPUC could be precluded from even conducting an investigation of PG&E's maintenance records in the wake of the San Bruno accident. This is not consistent with the basic idea of a defense, which generally is an argument presented in a formal proceeding. There can only be a defense presented when there is an enforcement action. Absent an enforcement action, there is no need for a defense. There needs to be a forum, such as an enforcement action, in which the defense is offered.

While some defenses may act as a total bar to prosecution, those tend to be more purely legal ones, such as immunities. Here the defense is based on reliance upon whether there was "reasonable good faith reliance" by the utility. This raises factual questions, including: 1) whether the utility's reliance was reasonable or not; 2) whether the reliance was in good faith or not; and 3) whether the utility's actions were in fact consistent with that advice. Those factual questions can only be properly addressed in the context of the enforcement proceeding.

Because the utility would be asserting “reasonable good faith reliance” as a defense against an enforcement action, under the general rules of evidence, the utility would have the burden of proof “as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.” (Cal. Evidence Code section 500.) This means that, absent any other provision of law, the utility would need to provide evidence to support its assertion of “reasonable good faith reliance.” (See, 1 Witkin on Evidence, Burden of Proof and Presumptions §§7 and 9, (5th Edition, 2012).)

Preventing the CPUC from commencing or maintaining an enforcement action is inconsistent with this basic concept that the utility must prove that its assertion is true in response to the enforcement action. It is unclear how the utility would otherwise prove the validity of its assertion of “reasonable good faith reliance.”

Finally, this bill is contains very complex language, particularly subsection (b), which consists of a single sentence of over 100 words. Not surprisingly, the precise meaning of the bill is unclear, which would likely lead to litigation over interpretation of the bill’s language.

LEGISLATIVE HISTORY

There is no known related legislation from past legislative sessions.

PROGRAM BACKGROUND

The CPUC has undertaken numerous enforcement actions, resulting in significant penalties and customer restitution: <http://www.cpuc.ca.gov/NR/rdonlyres/E36E1107-020F-45F6-B85E-20510C76F5B7/0/FinesandRestitution021712.pdf>

In those past enforcement actions, utilities have argued that their reliance on the direction and advice of CPUC staff should be taken into consideration, particularly on the issue of the appropriate penalty. The following are a number of examples.

In D.02-08-063, the CPUC found that Pacific Fiber Link began constructing a fiber-optic network without proper CPUC authorization, but also found that Pacific Fiber Link reasonably relied upon communications from staff that this deficiency would be readily corrected. As a result, the CPUC reduced the penalty imposed on Pacific Fiber Link from \$275,000 to \$25,000. (Id., pp. 22-24.)

http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/18758.PDF

In D.04-04-068, Metromedia Fiber Network Services similarly began constructing a fiber-optic network without proper CPUC authorization. The CPUC found that Metromedia was in violation of CPUC rules and decisions by using the wrong registration process, but Metromedia reasonably relied upon the advice of CPUC staff, and accordingly no penalty was imposed. (Id. at 16-17.)

http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/36257.PDF

In D.07-09-041, the CPUC found that PG&E had violated its tariff rules relating to billing and backbilling of customers, and ordered refunds. But the CPUC declined to impose a penalty in part because PG&E had received copies of letters sent to customers by CPUC staff that appeared to support PG&E's practice. (Id. at 42-47.)
http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/73124.PDF

On the other hand, there are examples of the CPUC increasing a fine where the utility ignored explicit staff statements.

In an ongoing enforcement proceeding (I.09-12-016), TracFone has argued that it relied on alleged statements of CPUC staff for its claim that it did not need to pay user fees and public purpose surcharges, citing "one, possibly two, telephone conversations with Commission staff." (See, D.12-02-031 at 13-14.) TracFone argued that staff's statements were equivalent to formal positions of the CPUC. *Id.* The CPUC noted that it had never formally adopted these statements. *Id.*; see also D.12-10-018, at 20 ("TracFone never filed a petition, application, motion, AL or other request to the CPUC to modify or otherwise change the terms of its [wireless registration] authorization. TracFone never received any written authorization to deviate from the terms of its [wireless] license").

In short, while the CPUC analyzes each case on its own merits, the general rule is that the CPUC only speaks through its decisions. See D.12-10-018, at 20 ("Commission acts by formal order or decision"); D.00-09-042, at 6 ("the Commission speaks only through its written decisions". Utilities subject to CPUC enforcement actions nevertheless can and do assert as a defense, or in mitigation of penalties, that they reasonably relied upon the direction and advice of CPUC staff. CPUC factfinding and dispute resolution is balanced as is, and there is no need for this legislation.

OTHER STATES' INFORMATION

No information relating to other states' processes are known, but the Federal Internal Revenue Service has a similar, but more clearly defined provision. The IRS approach distinguishes between written and oral advice, and is applicable only for abatement of penalties, not to the underlying violation itself.

The following is from the IRS website:

20.1.1.3.3.4.1 (11-25-2011) Written Advice from the IRS

1. The IRS is required by IRC 6404(f) and Treas. Reg. 301.6404-3 to abate any portion of any penalty attributable to erroneous written advice furnished by an officer or employee of the IRS acting in their official capacity.

2. If the taxpayer does not meet the criteria for penalty relief under IRC 6404(f), the taxpayer may qualify for other penalty relief. For instance, taxpayers who fail to meet all of the IRC 6404(f) criteria may still qualify for relief under reasonable cause if the IRS determines that the taxpayer exercised ordinary business care and prudence in relying on the IRS's written advice. *IRM 20.1.1.3.2.2.5 - Erroneous Advice or Reliance.*
3. Requests that qualify for penalty relief based on erroneous written advice from the IRS under IRC 6404(f) must be filed:
 - A. Within the period allowed for collection of the penalty or addition to tax, or
 - B. If the penalty or addition to tax has been paid, within the period allowed for claiming a credit or refund of such penalty or addition to tax.

20.1.1.3.3.4.2 (12-11-2009) Oral Advice from IRS

1. The IRS may provide penalty relief based on a taxpayer's reliance on erroneous oral advice from the IRS. The IRS is required by IRC 6404(f) and Treas. Reg. 301.6404-3 to abate any portion of any penalty attributable to erroneous **written** advice furnished by an employee acting in their official capacity. Administratively, the IRS has extended this relief to include erroneous oral advice when appropriate.
2. In addition to considering the criteria provided in Treas. Reg. 301.6404-3, *IRM 20.1.1.3.3.4, Advice*, and *IRM 20.1.1.3.3.4.1, Written Advice From the IRS*, consider the following:
 - A. Did the taxpayer exercise ordinary business care and prudence in relying on that advice?
 - B. Was there a clear relationship between the taxpayer's situation, the advice provided, and the penalty assessed?
 - C. What is the taxpayer's prior tax history and prior experience with the tax requirements?
 - D. Did the IRS provide correct information by other means (such as tax forms and publications)?
 - E. What type of supporting documentation is available?
3. The following is supporting documentation:
 - A. A notation of the taxpayer's question to the IRS,
 - B. Documentation regarding the advice provided by the IRS,
 - C. Information regarding the office and method by which the advice was obtained,
 - D. The date the advice was provided, and
 - E. The name of the employee who provided the information.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION

This bill should be opposed for the following reasons:

- (1) It is unnecessary.
- (2) It is legally and procedurally unworkable.
- (3) It is complex and unclear and likely to result in litigation.
- (4) It will hinder communication between CPUC staff and the utilities, including informal resolution of issues or problems.
- (5) It may discourage or impede enforcement actions relating to safety.

SUMMARY OF SUGGESTED AMENDMENTS

The bill can be amended to retain its primary purpose, which is to allow statements of staff into evidence in enforcement proceedings, while avoiding the potential problems with the bill. This can readily be done by clarifying the proposed subsections 2120 (a) and (b), and eliminating subsections (c) and (d). The clarifications would make it so utility reliance upon staff statements would be admissible as mitigation of potential penalties, rather than completely barring enforcement actions. (This would be consistent with the IRS approach described above.) One clarification to subsection (b) would make it applicable only to communications made directly to the utility, and not to communications made to customers or third parties. With these amendments, the bill would simply read:

Evidence of a reasonable good faith reliance upon advice directly provided by commission staff may be considered only for purposes of determining the appropriate penalty to be imposed in an enforcement action brought by the commission pursuant to this part or pursuant to an order, decision, rule, direction, demand, or requirement of the commission.

STATUS

AB 415 is pending hearing in the Assembly Utilities and Commerce Committee on April 8th, 2013.

SUPPORT/OPPOSITION

None on file.

VOTES

Not applicable.

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BILL LANGUAGE

BILL NUMBER: AB 415 INTRODUCED
BILL TEXT

INTRODUCED BY Assembly Member Garcia

FEBRUARY 15, 2013

An act to add Section 2120 to the Public Utilities Code, relating to public utilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 415, as introduced, Garcia. Public utilities: Public Utilities Act: violation: defense.

Under existing law, the Public Utilities Commission has regulatory authority over public utilities and can establish its own procedures, subject to statutory limitations or directions and constitutional requirements of due process. The Public Utilities Act regulates specified public utilities. A violation of the Public Utilities Act or an order, decision, rule, direction, demand, or requirement of the commission is a crime.

This bill would establish a reasonable good faith reliance defense, as specified, to an enforcement action by the commission pursuant to the act or an order, decision, rule, direction, demand, or requirement of the commission. The bill would prohibit the commission from commencing or maintaining an adjudication or other enforcement action or proceeding against an entity if that entity has relied, in good faith, on the advice or direction of the staff of the commission. The bill would provide that this defense does not apply to an action alleging a violation of the act that led, or could have directly led, to harm of humans.

Vote: majority. Appropriation: no. Fiscal committee: no.
State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 2120 is added to the Public Utilities Code, to read:

2120. (a) A reasonable good faith reliance upon the direction and advice of commission staff is a defense to an enforcement action brought by the commission pursuant to this part or pursuant to an order, decision, rule, direction, demand, or requirement of the commission.

(b) The commission shall not commence or maintain an adjudication or other enforcement action or proceeding against a public utility, or other person or corporation over which the commission has or claims authority or jurisdiction, to fine, hold in contempt, or otherwise punish or issue an order against the public utility, or other person or corporation for a violation of this part, or a rule

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or order adopted by the commission pursuant to this part, if the public utility, or other person or corporation that has relied, in good faith, on the advice or direction of staff of the commission to whom the public utility, or other person or corporation was directed, in writing, to consult on behalf of the commission.

(c) For the purpose of this section, "reasonable good faith reliance" means a reasonable belief that the action of an entity, acting on the direction and advice of the staff of the commission, is legal and consistent with the direction and advice provided.

(d) This section does not apply to an enforcement action that is directly related to an action alleging a violation that led, or could have directly led, to harm of humans.