

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Expedited
Rulemaking to Consider Repeal of
General Order 105-A, General Order
106, and General Order 144-A.

R. _____

ALTERNATE ORDER INSTITUTING EXPEDITED RULEMAKING**1. Purpose of Proceeding**

We open this expedited rulemaking to consider the proposed repeal of three General Orders (GOs): GO 105-A, adopted in 1959, which sets forth rules for the filing of tariffs reflecting rates charged by air transportation companies for intrastate service; GO 144-A, adopted in 1978, which sets forth rules concerning compensation for airline passengers with confirmed boarding passes who are denied boarding; and GO 106, adopted in 1958, which sets forth rules concerning chemical toilets in railroad cabooses.

There appears to be no current justification for these three GOs, as explained further below. Moreover, we do not anticipate any safety implications from their repeal.

Because we anticipate little or no opposition to this proposed repeal of these three GOs, we undertake this rulemaking on an expedited basis by issuing a proposed decision for comment concurrent with the issuance of this rulemaking. The assigned Commissioner may elect to sponsor the proposed decision as issued or as revised in response to comments, or alternatively,

withdraw the proposed decision from the Commission's consideration and conduct further proceeding on the matter as appropriate.

2. Background

Governor Brown designated Commissioner Michael Picker as the assigned Commissioner responsible for overseeing a review and assessment of the Commission's existing organization, processes, and procedures, to identify areas in which improvements may be possible, and recommending constructive changes for modernizing and reforming them. In furtherance of these goals, staff undertook an initial review of the Commission's existing GOs and reporting requirements in order to identify those that may be out of date and ripe for updating via amendment or deletion due to, e.g., changes in technology and markets, changes in state and federal jurisdiction, changes in the Commission's mission, and changes in circumstances due to the passage of time.

On January 28, 2015, Commission staff (staff) released a Solicitation for Input (SFI)¹ inviting informal input from the public on what revisions, if any, should be made to certain rules and requirements applicable to public utilities in California. The SFI is a new process initiated by the Commission as a pilot program to see whether providing notice and opportunity for informal input from the public concerning certain proposed changes in Commission policy, procedure and regulation can provide a less time-consuming and expensive means for the public to participate in Commission proceedings and for streamlining some of our existing processes.

¹ The Solicitation for Input can be found at:
<http://www.cpuc.ca.gov/PUC/hottopics/7other/sfi.htm>

Under the SFI pilot process, industry division staff have been allocated increased responsibility and authority to initiate informal consultations with a broad range of community groups, members of the public and other interested stakeholders to evaluate public concerns and pertinent technical issues and formulate appropriate, technically sound solutions, prior to initiation by the Commission of a formal rulemaking. We anticipate that this process should enhance the Commission staff's ability to develop more specific and better targeted improvements to existing policies, programs, rules and requirements than has sometimes been possible under traditional Commission rulemaking practice. Following the conclusion of the informal SFI consultation process, we anticipate technical staff will work in collaboration with an assigned Commissioner, to determine whether to recommend any changes to existing Commission policy, practice, rules or requirements and, if so, to develop an appropriate resolution or Order Instituting Rulemaking (OIR) and specific proposed changes for consideration and later approval by the full Commission. If a formal OIR is determined warranted, we anticipate incorporating informal comments received by technical staff through the SFI process into the Commission's record of the OIR so that all input from any member of the public can be taken into account and given the consideration it deserves without the necessity of the parties who participated in the informal SFI process having to file further written pleadings.

In addition, potentially providing a less expensive and time consuming means for public participation in certain proceedings before the Commission may enhance utility safety by permitting the Commission to respond more swiftly to safety-related issues. Enhancing the industry division staff's

responsibility and authority to initiate changes in Commission rules through an expedited rulemaking based upon information and analysis initially obtained through informal means via an SFI and confirmed through an expedited rulemaking, as we are proposing in this pilot program, may provide a procedural vehicle for driving safety-critical remedial measures from concept to implementation more quickly than is possible under current Commission rulemaking practice.

In the SFI, staff identified dozens of reporting requirements and GOs that appear out of date and proposed revising or repealing each such rule and requirement. Among the GOs staff proposed repealing are GO 105-A and GO 144-A. Staff also proposed that GO 106 be reviewed for relevance and possibly repealed.

The SFI was published on the Commission website, and was sent electronically utilizing the service lists from the following proceedings: investor-owned utility rate cases, Application (A.) 13-11-003, A.13-12-012, and A.12-11-009; water action plan update Rulemaking (R.) 11-11-008; residential rate design Rulemaking, R.12-06-013; electric and communications infrastructure safety Rulemakings, R.08-11-005 and R.14-08-012; California High Cost Fund-A Rulemaking, R.11-11-007; and communications service quality Rulemaking, R.11-12-001.

Informal comments on the SFI were received on March 27, 2015, and reply comments on April 17, 2015. The following entities submitted comments: AT&T California; California Water Association; California Cable & Telecommunications Association; Consumer Federation of California; Frontier Communications Company of California; Pacific Gas and Electric Company; Southern California

Edison Company; Southern California Gas Company; San Diego Gas & Electric Company; The Utility Reform Network (TURN); The Small Local Exchange Carriers (Small LECs); and Verizon Communications. None of the comments opposed or otherwise concerned the staff proposals for repeal of GO 105-A, GO 144-A, or General Order 106. Several concerned the SFI pilot program process and were generally supportive of the new process.

3. Proposed Repeal of General Orders

3.1. General Orders 105-A and 144-A

The federal Airline Deregulation Act of 1978 (the Act) preempts states from regulating airline prices, routes, and service. The Act's preemption provision, 49 U.S.C § 41713, provides in relevant part:

(b) Preemption.

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

GO 105-A requires airlines to file their rates with the Commission, and GO 144-A requires airlines to pay compensation to passengers under certain circumstances. Both of these GOs are "...related to a price, route or service of an air carrier" as provided in 49 U.S.C. § 41713(b)(1) and are therefore preempted by the Act.

In addition, GO 144-A applies, by its own terms, to airlines "...certificated pursuant to Division 1, Part 2, Chapter 4, of the Public Utilities Code[.]" This

portion of the Public Utilities Code has been repealed, and the Commission no longer grants operating authority to airlines.

Under California Constitution, Article III, Section 3.5, the Commission is precluded from declaring a statute unenforceable or refusing to enforce a statute on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.

In *Hughes Air Corp v. Pub. Util. Comm'n* 644 F.2d 1334 (1981) the U.S. Court of Appeals for the 9th Circuit held that the Commission and the State of California are precluded from regulating intrastate airlines by the federal Aviation Deregulation Act of 1978. The 9th Circuit is an appellate court with authority to declare intrastate airline regulation by the Commission preempted. The Commission thus no longer has any jurisdiction or justification for retaining GOs 105-A or 144-A.

Repealing GOs 105-A and 144-A will have no effect on safety, as they pertain to airline tariffs and terms of service that do not pertain to or affect safety and have not been enforced for decades.

3.2. General Order 106

GO 106 sets forth rules for chemical toilets in railroad cabooses in considerable detail, including, e.g.: the construction of the toilet enclosure; the finish of the walls, ceilings, and floors; and the presence of toilet paper and a toilet paper holder.

The use of railroad cabooses has declined sharply as technological advancements in train-mounted devices and trackside monitoring and train control electronics have reduced the size of train crews, curtailing the reach and continued relevance of the caboose toilet rules in GO 106. Furthermore,

employee toilet facilities are regulated under the authority of the California Department of Industrial Relations under Cal/OSHA Title 8 of the California Code of Regulations.

There thus appears to be no further justification or need for Commission regulation of toilet facilities in cabooses.

Repealing GO 106 will have no effect on safety, as employee toilet facilities will continue to be subject to the authority of the California Department of Industrial Relations.

4. Expedited Process

As a result of the SFI process, which allowed interested parties to submit informal comments with staff, we received no comments on the proposed repeal of GOs 105-A, 144-A or 106. Comments on the SFI pilot were generally supportive of the new process. Therefore, we anticipate little or no opposition to this expedited rulemaking proposing repeal of these GOs. Accordingly, we are issuing a proposed decision for additional formal comment, concurrent with the opening of this rulemaking, which proposes repeal of these GOs on the grounds stated above. Following consideration of any additional comments and reply comments, the assigned Commissioner may propose adoption by the Commission of the proposed decision, with or without revisions, at the next available business meeting of the Commission, or may withdraw the proposed decision and refer the matter for further proceedings in this rulemaking, as may be determined appropriate under the circumstances.

5. Assigned Commissioner

President Michael Picker is hereby designated as the assigned Commissioner for this proceeding. (Pub. Util. Code Section 1701.1 and Rule 13.2.)

6. Category

The category of the proceeding is preliminarily determined to be quasi-legislative. Accordingly, *ex-parte* communications are permitted without restriction or reporting requirement until and unless the category of the proceeding and/or applicable *ex parte* rules are changed in an assigned Commissioner scoping memo or assigned Commissioner or Administrative Law Judge ruling. (See Rules 7.3 and 8.3(a).)

7. Need for Hearing

It is preliminarily determined that evidentiary hearings will not be needed in this proceeding.

8. Preliminary Scoping Memo

The preliminary scope of issues and schedule of the proceeding are set forth below, and may be changed by the assigned Commissioner's scoping memo. (See Rule 7.3.)

8.1. Issues

- 1) Would retaining General Orders 105-A, 106, and 144-A serve any useful purpose?
- 2) Are there any safety implications from repeal of these three General Orders?
- 3) Should General Orders 105-A, 106, and 144-A be repealed as proposed in this Order Instituting Expedited Rulemaking?

- 4) Can the SFI process used in this pilot program provide a less time-consuming and expensive means for the public to participate in Commission proceedings and for streamlining some of the Commission's existing processes and, if so, should it be modified in any respect to better accomplish these objectives?
- 5) Should the SFI process be retained, modified or discontinued?

8.2. Schedule

As noted above, a proposed decision to repeal the three General Orders will be released concurrent with the issuance of this rulemaking. Interested persons may file additional formal comments on the issues raised in this rulemaking and associated proposed decision. Comments may be filed no later than 20 days after the date of issuance of this Order Instituting Expedited Rulemaking, and reply comments may be filed no later than five days thereafter. Comments may address: (1) any objections to or recommendations regarding this order's preliminary determinations as to category of the proceeding, the need for evidentiary hearing, issues to be considered, or scheduling (*See* Rule 6.2); (2) any factual, legal or technical errors in the proposed decision (*See* Rule 14.3 (c)); and (3) any objections to the SFI and/or expedited decision making process proposed for this proceeding. The requirements of Rule 14.3(b) and (d) are waived for this special purpose. (*See* Rule 1.2.)

Informal comments on the SFI previously provided by persons and organizations concerning the SFI pilot substance and process will be incorporated into the record of this rulemaking and need not be repeated or refiled to be considered by the Commission in its decision in this proceeding. For this limited purpose, the Commission is hereby waiving otherwise applicable

Rules of Practice and Procedure and requirements regarding the form, content and service of pleadings. (See Rules 1.2, and 1.3 through 1.11.) Copies of these comments are attached as ATTACHMENT A to this rulemaking.

Informal comments previously provided on the SFI meet the spirit, but not the technical requirements for conferring formal party status in this rulemaking on the persons or organizations who provided the comments. For purposes of this pilot program and reasons discussed above, the Commission is waiving the requirements of Rule 1.4 regarding participation in proceedings, and will confer full party status on these persons and organizations, unless they desire otherwise and inform the Process Office by e-mail (process_office@cpuc.ca.gov) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Please include the Docket Number of this rulemaking in the request to be removed as a party.

Following receipt and consideration of any additional comments, the assigned Commissioner may elect to sponsor the proposed decision as issued, or as revised in response to comments, or alternatively, withdraw the proposed decision from the Commission's consideration and conduct further proceeding on the matter, as appropriate.

9. Service of OIR

This Order Instituting Expedited Rulemaking (OIR) shall be served on the Official Service Lists for:

- 1) Roadway Worker Protection, R.09-01-020;
- 2) Overhead Electrification of High Speed Rail, R.13-03-009; and
- 3) Use of Personal Electronic Devices, R.08-10-007.

In addition, this OIR shall be served on all railroad carriers, commercial air carriers required to provide the Commission with proof of liability insurance pursuant to Public Utilities Code § 5503, and on the individuals and organizations who signed up for the SFI Listserv.

Service of the OIR does not confer party status or place a person who has received such service on the Official Service List for this proceeding, except as otherwise noted with regard to persons and organization who previously responded to the SFI.

10. Addition to Official Service List

Persons and organizations that previously provided informal comments on the SFI through the SFI Listserv, specifically AT&T California, California Cable and Telecommunications Association, California Water Association, Consumer Federation of California, Frontier Communications Company of California, Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, Southern California Gas Company, The Utility Reform Network, the Small Local Exchange Carriers,² and Verizon Communications, are hereby made parties to this proceeding and need not file any additional comments on the rulemaking to preserve party status. Additions to the official service list shall be governed by Rule 1.9(f) of the Commission's Rules of Practice and Procedure.

Any person will be added to the "Information Only" category of the official service list upon request, for electronic service of all documents in the

² The Small Local Exchange Carriers are Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., The

Footnote continued on next page

proceeding, and should do so promptly in order to ensure timely service of comments and other documents and correspondence in the proceeding.

(See Rule 1.9(f).) The request must be sent to the Process Office by e-mail (process_office@cpuc.ca.gov) or letter (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). Please include the Docket Number of this rulemaking in the request.

Persons who file responsive comments thereby become parties to the proceeding (See Rule 1.4(a)(2)) and will be added to the “Parties” category of the official service list upon such filing. *In order to assure service of comments and other documents and correspondence in advance of obtaining party status, persons should promptly request addition to the “Information Only” category as described above; they will be removed from that category upon obtaining party status.*

11. Subscription Service

Persons may monitor the proceeding by subscribing to receive electronic copies of documents in this proceeding that are published on the Commission’s website. There is no need to be on the official service list in order to use the subscription service. Instructions for enrolling in the subscription service are available on the Commission’s website at <http://subscribecpuc.cpuc.ca.gov/>.

12. Public Advisor

Any person or entity interested in participating in this rulemaking who is unfamiliar with the Commission’s procedures should contact the Commission’s

Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company and Winterhaven Telephone Company.

Public Advisor in San Francisco at (415) 703-2074 or (866) 849-8390 or e-mail public.advisor@cpuc.ca.gov. The TTY number is (866) 836-7825.

13. Intervenor Compensation

Intervenor compensation is not available in this rulemaking because the proceeding does not involve electric, gas, water, or telephone utilities, as required by Section 1801.3(a). Therefore, notices of intent to claim compensation should not be filed.

More generally, the Public Utilities Code and Commission regulations governing the intervenor compensation program do not specifically provide for compensation for informal consultations with staff through an SFI prior to initiation of formal rulemakings such as this. However, where such informal consultations ultimately result in the opening of a formal proceeding, a party responding to an SFI may be able to claim compensation when its earlier informal comments to staff are incorporated into the record of a formal proceeding. Similarly, time spent in informal consultations with staff may qualify as “reasonable costs of preparation for and participation in a proceeding” (PU Code Section 1802(a), emphasis added) if a formal proceeding is initiated as a result of those consultations.

ORDER

IT IS ORDERED that:

1. The Commission institutes this expedited rulemaking on its own motion to consider the proposed repeal of General Order 105-A, General Order 106, and

General Order 144-A, as set forth in a proposed decision to be released concurrently with this rulemaking.

2. Persons and organizations that previously provided informal comments on the Solicitation for Input (SFI) through the SFI Listserv, specifically AT&T California, California Cable and Telecommunications Association, California Water Association, Consumer Federation of California, Frontier Communications Company of California, Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, Southern California Gas Company, The Utility Reform Network, the Small Local Exchange Carriers (Calaveras Telephone Company, Cal-Ore Telephone Co., Ducor Telephone Company, Foresthill Telephone Co., Happy Valley Telephone Company, Hornitos Telephone Company, Kerman Telephone Co., Pinnacles Telephone Co., The Ponderosa Telephone Co., Sierra Telephone Company, Inc., The Siskiyou Telephone Company, Volcano Telephone Company and Winterhaven Telephone Company), and Verizon Communications are hereby made parties to this proceeding and need not file any additional comments on the rulemaking to preserve party status, and must contact the Commission's Process Office (process_office@cpuc.ca.gov) should they not want to maintain party status.

3. Any and all informal comments previously provided in response to the Solicitation for Input (SFI) on the SFI pilot substance and process through the SFI Listserv, copies of which are attached as ATTACHMENT A, are hereby incorporated into the record in this proceeding and need not be repeated or refiled to be considered by the Commission in its decision in this proceeding.

4. Additional comments may be filed on the issues raised in this rulemaking and the proposed decision released concurrently with this rulemaking no later

than 20 days after the date of issuance of this Order Instituting Expedited Rulemaking, and reply comments may be filed no later than five days thereafter. Comments should be served on Commissioner Michael Picker, with electronic mail service to ExpeditedOIR@cpuc.ca.gov. Comments may address: (1) any objections to or recommendations regarding this order's preliminary determinations as to category of the proceeding, the need for evidentiary hearing, issues to be considered, or scheduling (*See* Rule 6.2); (2) any factual, legal or technical errors in the proposed decision (*See* Rule 14.3 (c)); and (3) any objections to the Solicitation for Input and/or expedited decision making process proposed for this proceeding. The requirements of Rule 14.3(b) and (d) are waived for this special purpose. (*See* Rule 1.2.)

5. Participation in this rulemaking is not eligible for intervenor compensation because the proceeding does not involve electric, gas, water, or telephone utilities.

6. The Executive Director shall cause this Order Instituting Expedited Rulemaking (OIR) to be served on the service lists for:

- 1) Roadway Worker Protection, Rulemaking (R.) 09-01-020;
- 2) Overhead Electrification of High Speed Rail, R.13-03-009; and
- 3) Use of Personal Electronic Devices, R.08-10-007.

In addition, this OIR shall be served on all railroad carriers, commercial air carriers required to provide the Commission with proof of liability insurance pursuant to Public Utilities Code § 5503, and on the individuals who signed up for the Solicitation for Input (SFI) Listserv.

This order is effective today.

Dated _____, 2015, at San Francisco, California.