

Decision **PROPOSED DECISION OF COMMISSIONER GRUENEICH**
(Mailed 4/3/2007)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Revise General
Order 164-C.

Rulemaking 06-10-004
(Filed October 5, 2006)

DECISION ADOPTING REVISED GENERAL ORDER 164

Introduction and Summary

This decision adopts certain revisions to General Order 164, Rules and Regulations Governing State Safety Oversight of Public Transit Guideway Systems (GO 164).

Section 99152 of the Public Utilities Code (Code) subjects any public transit guideway that was planned, acquired or constructed after January 1, 1979, to regulations by the Commission relating to safety appliances and procedures, and grants the Commission inspection and enforcement powers concerning these matters. In addition, section 99152 directs the Commission to develop an oversight program employing safety planning criteria, guidelines, safety standards, and safety procedures to be met by operators in the design, construction, and operation of transit guideways. The Commission carries out this oversight responsibility under GO 164.

Revision of GO 164 is necessary because of certain changes to Part 659 of Title 49 of the Code of Federal Regulations that were recently adopted by the Federal Transit Administration (FTA) of the United States Department of

Transportation (DOT). The current version of GO 164 is GO 164-C; this decision adopts a revised version, which we issue as GO 164-D.

Background

Title 49, section 5301 *et seq.*, of the United States Code establishes a statutory framework for federal assistance in developing improved mass transportation equipment, facilities, techniques, and methods with the cooperation of public and private mass transportation companies. This statutory framework provides assistance to state and local governments in financing local urban mass transportation systems operated by public or private mass transportation companies. (49 U.S.C. § 5301 (f)(3).) Federal financial assistance is administered by the DOT through either the Federal Railroad Administration or the FTA, both of which are agencies within DOT.

In addition to the delegation of federal regulatory authority embodied in these statutes, section 778 of the Code provides a mandate for the Commission to adopt rules and regulations relating to safety appliances and procedures for rail transit services operated at grade and in vehicular traffic, including provisions on grade crossing protection devices, headways, and maximum operating speeds. The Commission has carried out this mandate by including provisions on this subject in GO 164.

Title 49, section 5330, subdivision (b), of the United States Code authorizes the Administrator of the FTA to withhold up to five percent of FTA-administered financial assistance appropriated in a given fiscal year for state use for fixed guideway mass transportation systems, if the state failed in the previous fiscal year to meet federal requirements for establishing and carrying out a safety program plan for each system. Implementing regulations setting forth the specific safety program requirements are found in 49 CFR Part 659.

The federal statutory framework requires the state to establish a safety program, and to designate a state authority as having the responsibility to review, approve, and monitor the execution of each system's safety plan; investigate hazardous conditions and accidents on systems; and require corrective action to correct or eliminate those conditions. (49 U.S.C. §5330(c).) California has enacted a safety program implementing these requirements, and has designated this Commission to have oversight responsibility, in response to this federal directive.

On April 29, 2005, the FTA revised 49 CFR Part 659. Certain provisions in the new federal rule make it necessary for the Commission to revise GO 164-C to conform to the revised requirements. Accordingly, on October 13, 2006, the Commission issued Order Instituting Rulemaking 06-10-004 (the OIR), and sought comments on the revision of GO 164-C, the current version of the rule. A draft of the proposed revision of GO 164-C (which will be GO 164-D) was appended to the OIR. This decision adopts the final rule, GO 164-D, and closes the OIR.

Proposed GO 164-D

Proposed GO 164-D sets forth rail transit agencies' (RTAs') specific responsibilities for developing and implementing safety and security plans as an integral part of the Commission's overall safety oversight program. For each RTA, these responsibilities include the preparation of a written system safety program plan (SSPP) and separate system security plan (Security Plan), the conduct of periodic internal safety reviews, and investigations of incidents concerning these matters. These responsibilities are required under 49 CFR Part

659.17 *et seq.*, and much of the proposed GO 164-D closely tracks the language of related provisions of the new federal rule.¹ The proposal, for the most part, is a consensus document developed by the Commission staff members responsible for safety oversight of RTAs (Staff), with the participation of California RTAs.²

Staff mailed an initial draft of the proposal to the RTAs on December 15, 2005, and then conducted individual meetings with the RTAs to review the proposal and answer questions concerning the new federal rule. Staff also posted the proposal on the Commission's public website to enable members of the public to comment on it. On April 27, 2006, Staff conducted a workshop on the draft in Los Angeles to develop the proposed rule. California RTAs participated in the workshop, upon the conclusion of which Staff and the RTAs reached agreement concerning the language of the proposed rule. Santa Clara Valley Transportation Authority (VTA) indicated that it had objections to certain features of the proposal.

Notice of the OIR was published in the Daily Calendar on October 18, 2006, and was served on the seven RTAs and other public transit guideway operators in California, as well as other interested persons. The OIR sought written comments or alternative recommendations on the proposed language. VTA filed comments in response to the OIR, and Staff filed a written rebuttal to those comments. This matter was submitted on January 30, 2007.

Proposed GO 164-D includes general provisions; definitions; and requirements for SSPPs; for Security Plans; for internal safety and security audits;

¹ Proposed GO 164-D is reproduced in this decision as Appendix A.

² One RTA, Santa Clara Valley Transportation Authority (VTA), objects to certain features of the proposal.

for a hazard management process; for reporting accidents; for investigating accidents; and for corrective action plans. In addition to these provisions, which correspond to the subject matter of the new federal rule, the proposal includes requirements for at-grade rail crossings, a safety certification plan (SC Plan), and a safety certification verification report (SCVR), and procedures for obtaining formal Commission approval and for protesting, commenting upon, and appealing “initial Staff or Director determinations” relating to matters under these rules.

Discussion

Because the only comments we received in response to the OIR are from VTA, this decision principally resolves conflicts between proposed GO 164-D and the position of VTA on certain matters. Except for those VTA concerns, the proposal is not controversial. The uncontested provisions are mostly verbatim adaptations of the federal rule, and they are rationally related to the subject matter they address. Apart from making some minor corrections and editorial changes, we adopt the uncontested portions of the proposed rule without further discussion.

VTA objects to two specific features of the proposed rule. First, it objects to language that would delegate to Staff the functions of reviewing and approving three types of reports that are required pursuant to 49 CFR Part 659, on the grounds that the federal rule requires formal agency approval. Second, it objects to allowing public disclosure of investigative reports and corrective action plans.

VTA asserts that formal Commission approval (rather than simply Staff approval) is required for three types of reports: Internal Safety and Security Annual Reports under section 5.5 (d); Final Accident Investigation Reports under

section 8.3 (e); and Corrective Action Plans under section 9.4. In each instance the federal rule specifies that the report to be adopted (or approved) formally by the oversight agency. (49 CFR Part 659.35 (e) (“A final investigation report must be formally adopted by the oversight agency for each accident investigation.”); 49 CFR Part 659.27 (i) (“The oversight agency must formally review and approve the annual [internal safety and security review] report.”); 49 CFR Part 659.37 (c) (“The corrective action plan must be reviewed and formally approved by the oversight agency.”).) The wording of these provisions implies that formal action is required, and only the Commission has the power to take such action.³

We recognize that real expertise in rail safety matters resides with Staff. Particularly in matters involving highly technical questions about safety and service of the entities we regulate, we rely on the recommendations of staff personnel who are trained as engineers and other experts. The proposed GO 164-D identifies the requirements of reports and plans the RTAs must submit which provides clear guidance to Staff upon which to evaluate compliance.⁴ When Staff and the RTA are in agreement on the contents of the reports and plans, we delegate to Staff authority to approve these reports and plans by formal letter. Such delegation is appropriate when the oversight agency provides, as we do here, clear guidance to Staff in the exercise of that delegated authority and where such delegation serves the further purpose of supporting system safety and security. Furthermore, as part of the record to this proceeding,

³ VTA does not assert that formal Commission approval is required for any other report that may be prepared under 49 CFR Part 659.

⁴ See proposed GO 164-D, specifically sections 3.2, 4.3, 5.5, 8.3, and 9.2 for the Commission’s clear guidance to staff.

staff submitted a March 12, 2007 letter from FTA concluding that the staff delegation provisions in the proposed GO 164-D are consistent with Part 659.

In order to facilitate informal discussion and action by Staff, we have fashioned our rules to encourage Staff and the RTAs to engage in discussion of controversial reports as much as possible before such reports are presented to the Commission for a vote of approval. We should only be called upon to intervene actively where the parties simply cannot come to agreement. In such instances we have no alternative but to consider the record and make a formal decision based upon our best judgment. We expect that such instances will be exceedingly rare.

The question VTA has raised about the confidentiality of investigation reports and security plans relates to 49 CFR Part 659.11, which states:

- (a) A state may withhold an investigation report that may have been prepared or adopted by the oversight agency from being admitted as evidence or used in a civil action for damages resulting from a matter mentioned in the report.
- (b) This part does not require public availability of the rail transit agency's security plan and any referenced procedures.

The purport of this rule is twofold: First, to preclude the use of investigation reports prepared or adopted by the Commission as evidence in litigation in the courts; and second, to permit an RTA to shield its security plan and referenced procedures from public view. VTA expresses concern about the likelihood that both of these types of documents may become public under the terms of the proposed rule, and states that problems which have arisen in the industry require their confidentiality to be preserved.

The issue of limiting the use of investigative reports in the state's courts is a jurisdictional one. As VTA correctly observes, the Commission, an

administrative agency of the state, lacks the power to bind either state or federal courts. That power is vested generally in the legislative branch of the government or, on a case-by-case basis, in the judiciary. We cannot issue a rule that would limit the use of investigative reports in court, because we lack the power to do so. However, in these rules we reiterate the proscription against the admissibility of accident investigations and recommendations of the Commission, and of accident reports filed with the Commission, contained in an existing statute. Public Utilities Code section 315 states in pertinent part:

Neither the order or recommendation of the commission [relating to investigation of an accident on the property of an RTA or connected with its maintenance or operation, resulting in loss of life or injury to person or property] nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.

We believe this addresses VTA's concerns.

The Commission does have the additional power to maintain the confidentiality of security plans and procedures, and frequently does so, in the exercise of its plenary power to control its proceedings. We invoke this protection most frequently to maintain the confidentiality of proprietary information of parties that come before us, but there is ample reason to protect the documents about which VTA is concerned as well. In the wrong hands these documents could provide valuable intelligence about the vulnerabilities and defenses of entire transit systems, making California vulnerable to acts that could cause catastrophic damage and loss of life.

Rule 11.4 of the Commission's Rules of Practice and Procedure (Rules) provides:

- (a) Motions to file documents or portions of documents under seal shall attach a proposed ruling that clearly indicates the relief requested.
- (b) Responses to motions to file documents, or portions of documents, under seal shall be filed and served within 10 days of the date that the motion was served.

This rule provides an effective procedure to enable parties to seek and obtain protection for highly sensitive documents filed in Commission proceedings. In the event that a party's request to file a document under seal is contested, the matter is resolved by an administrative law judge (ALJ) under the Commission's law and motion rules. Rule 11.5 provides a similar procedure for sealing the evidentiary record, or portions of the record, if the matter is decided after a hearing.

These provisions in the Commission's Rules sufficiently ensure that an RTA seeking to maintain the confidentiality of this class of documents will be able to do so effectively and expeditiously. We have revised the proposed rule to address this concern.

Conclusion

Our order resolves several issues arising from VTA's objections to proposed GO 164-D and adopts the final rule in the form attached to the order as Appendix B.

Comments on Proposed Decision

The proposed decision of Commissioner Grueneich in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and Rule 14.2(a) of the Commission's Rules of Practice and Procedure. Timely comments were filed by VTA. VTA's comments are addressed in the final decision. No reply comments were filed.

Assignment of Proceeding

Dian M. Grueneich is the assigned Commissioner and Victor D. Ryerson is the assigned ALJ in this proceeding.

Findings of Fact

1. The proposed revision of GO 164-C was attached to the OIR as an appendix, and is reproduced as Appendix A to our order.
2. Appendix A was developed as a consensus document in a noticed public workshop held at the Commission's office in Los Angeles on April 27, 2006.
3. Appendix A was published in the Commission's Daily Calendar on October 18, 2006, as part of the OIR, with notice of the period during which the Commission would receive public comments thereon. Comments were permitted to be filed with the Commission for a period of 60 days following publication of the notice.
4. One comment was filed in response to publication of the notice of issuance of the OIR.
5. Appendix B to the Order addresses all of the issues raised in the comments received in response to the OIR.

Conclusions of Law

1. Appendix B to the Order addresses all of the issues currently required to be addressed under 49 CFR Part 659.
2. Appendix B to the Order addresses each issue raised by the comments received in response to the OIR.
3. Each provision of Appendix B to the Order is rationally related to the subject matter addressed by its substance.
4. The Commission should adopt Appendix B to the Order as its final rule in this proceeding.

O R D E R

IT IS ORDERED that:

1. Appendix B to the Order is adopted as Commission General Order (GO) 164-D, and supersedes any previous version of GO 164.
2. Rulemaking 06-10-004 is closed.

This order is effective today.

Dated _____, at San Francisco, California.