

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to determine whether the temporary measures adopted in Resolution SX-88 or other measures banning personal use of electronic devices by rail transit personnel should be adopted on a permanent basis.

FILED
PUBLIC UTILITIES COMMISSION
XX-XX-XXXX
SAN FRANCISCO, CALIFORNIA
RULEMAKING XX-XX-XXXX

**ORDER INSTITUTING RULEMAKING
ON COMMERCIAL MOBILE RADIO SERVICE AND DEVICE USE
IN RAIL TRANSIT VEHICLE OPERATIONS****1. Summary**

This order initiates a Rulemaking to determine whether the temporary measures adopted in Resolution SX-88 or other measures restricting personal use of electronic devices by rail transit personnel should be adopted on a permanent basis. The Commission adopted Resolution SX-88 on September 18, 2008, as an interim emergency order to restrict personal use of Commercial Mobile Radio Services (CMRS) and devices (i.e., cell phones, satellite phones, pagers, personal communications services) by certain railroad and rail transit employees.¹ The Resolution was adopted in response to three recent accidents, including the

¹ On October 7, 2008, the Federal Railroad Administration (FRA) published Emergency Order 26 covering CMRS and other electronic devices used by railroad employees. *See* 73 FR 58702 (October 7, 2008). The order will go into effect on October 27, 2008, for railroads that are under the FRA's jurisdiction, and should make Resolution SX-88's and this Rulemaking's prohibitions on CMRS use by such railroad personnel unnecessary.

September 12, 2008, multiple-fatality Metrolink collision, where preliminary investigations implicated personal cell phone use as a factor in the accident. This Order Instituting a Rulemaking (OIR) will consider whether the temporary prohibition should be made permanent and whether the scope of the prohibition should be broadened.

2. Background

On September 12, 2008, a Metrolink passenger train collided with a Union Pacific Railroad train, resulting in twenty-five fatalities and more than 100 other injuries. While the accident investigation is not complete, initial investigation indicates that the Metrolink train's engineer failed to stop for a red signal and was using his personal cell phone throughout his on-duty shift until seconds before the collision occurred.²

Other evidence indicates that accident risk increases when those who control vehicles use personal wireless devices. For example, personal wireless device usage appears to have played a role in collision of two light rail vehicles in San Francisco on June 14, 2008, which sent 13 people to the hospital.

Additionally, preliminary investigation has implicated cell phone use as a likely distraction in the July 24, 2008, fatality of a track worker struck by a Sacramento Rapid Transit District light rail vehicle. Many fatalities over the last few years have been at least in part attributed to cell phone use by railroad employees.³

² NTSB Advisory, National Transportation Safety Board Washington, DC, October 1, 2008. Update: NTSB's Investigation of the Metrolink, Union Pacific Accident in California. <http://www.nts.gov/Pressrel/2008/081001.html>

³ See 73 FR 58702 (October 7, 2008).

Further, the National Highway Traffic Safety Administration reports that “the inattention and distraction created by the use of a cellular telephone while driving is similar to that associated with other distractions in increasing crash risk.” Considerable research indicates that conversation decreases a driver’s situational awareness,⁴ and new evidence is emerging that cell phone conversation has a greater effect on such awareness.⁵

In view of this evidence, on September 18, 2008, the Commission adopted Resolution SX-88, adopting an interim rule that prohibited:

Personal use of commercial mobile radio services and devices by on-duty railroad engineers, brakemen, conductors, or rail transit vehicle operators...except for personal communications which take place when the train or transit vehicle is stopped and with the approval of the appropriate management personnel.

The prohibition applies to Commercial Mobile Radio Services (CMRS), including mobile telephone and paging services as defined by state and federal law.⁶ The

⁴ For example, see An Investigation of the Safety Implications of Wireless Communications in Vehicles, National Highway Traffic Safety Administration (1997), available at <http://www.nhtsa.dot.gov/people/injury/research/wireless/>. See also, Strayer, D.L., Drews, F.A., and Johnston, W.A., Cell Phone-Induced Failures of Visual Attention during Simulated Driving, *Journal of Experimental Psychology: Applied*. Vol. 9(1), 2003: pp. 23-32. See also, Mack, A. and Rock, I., Inattentive Blindness. Cambridge, MA: The MIT Press, 1998, pp. 13-15, 227-250.

⁵ Strayer, David L. and Drews, Frank A. Cell-phone-induced driver distraction. *Current Directions in Psychological Science*. Vol. 16(3), 2007: pp. 128-131.

⁶ Commercial Mobile Radio Services are defined in Public Utilities Code § 216.8 as “‘commercial mobile services’ as defined in subsection (d) of Section 332 of Title 47 of the United States Code and as further specified by the Federal Communications Commission in Parts 20, 22, 24, and 25 of Title 47 of the Code of Federal Regulations, and includes ‘mobile data service,’ ‘mobile paging service,’ ‘mobile satellite telephone

Footnote continued on next page

Commission adopted the Resolution SX-88 immediately, waiving the usual 30-day comment period because of “the public interest of preventing significant harm to railroad and transit passengers and the general public...”⁷

The Commission directed its Consumer Protection and Safety Division to prepare this OIR for an October 2008 agenda, to enable the Commission to consider whether this interim measure, or other measures, should be adopted on a permanent basis.⁸

The Commission recognizes ongoing investigations by our staff and by the NTSB, and note that such investigations often require over a year to complete. While we believe it is in the public interest to consider revisions to the interim rule now, we will of course consider in this rulemaking any interim results from ongoing investigations. We may consider further revisions to rules when those investigations are complete.

On October 7, 2008, the FRA published Emergency Order 26, governing cell phone and other electronic device use on railroads.⁹ Upon the effective date of that order, those rules will preempt our rules for the carriers covered by FRA rules. However, since the FRA’s rules will not cover rail transit agencies, we need to complete this proceeding expeditiously.

service,’ and ‘mobile telephony service,’ as those terms are defined in Section 224.4” of the Public Utilities Code, as well as any other service included by the Federal Communication Commission in their annual CMRS Reports.

⁷ Rule 14.6(c)(9), Commission’s Rules of Practice and Procedure. All further references to Rules pertain to the Commission’s Rules of Practice and Procedure.

⁸ Resolution SX-88, Ordering Paragraph 3.

⁹ 73 FR 58702 (October 7, 2008).

3. Preliminary Scoping Memo

As discussed above, the Commission institutes this rulemaking in order to determine whether to adopt permanent rules restricting the use of electronic devices by certain employees of rail transit agencies while on duty.

Rule 7.1(d) requires that a rulemaking “shall attach a preliminary scoping memo” and that the assigned Commissioner shall rule on the scoping memo after the prehearing conference if one is held.

The scope of this rulemaking includes the following issues upon which we seek comments from respondents and interested parties:

- In which accidents, near misses, or other incidents has operator use of CMRS or other electronic devices been identified as a cause or contributing factor?
- Should the prohibition adopted in Resolution SX-88 be made permanent?
- Should the Commission issue a new General Order to implement these rules?
- Should the prohibition be extended the ban to all use of commercial mobile radio services and devices, personal and business-related, by any employee operating a transit vehicle?
- Should the prohibition adopted in Resolution SX-88 be broadened to include other employees such as those working in dispatching centers, or working along the right-of-way?
- Should the prohibition adopted in Resolution SX-88 be broadened to include other electronic devices?

- What rail transit activities should these restrictions cover?
- Should the rule allow use of specified services or devices while vehicles are stopped? If so, under what conditions?
- Should management approval be required for use of such devices?
- Should the rule allow the use of electronic devices in any other circumstances?
- To what extent do rail and transit operators use CMRS or electronic devices to perform their duties?
- Should provisions be made for business and/or operations use of these devices?
- Should the personal use of CMRS and other electronic devices while employees are on duty be prohibited?
- What provisions should be made for emergency use of CMRS and other devices?
- How can the transit agencies ensure compliance with CMRS and other electronic device use rules?

4. Category of Proceeding

Pursuant to Rule 7.1(d), we preliminarily determine this rulemaking to be quasi-legislative as that term is defined in Rule 1.3(d). The preliminary determination is not appealable, but shall be confirmed or changed by assigned Commissioner's ruling pursuant to Rule 7.3, and such ruling as to the category is subject to appeal under Rule 7.6.

Our purpose is to solicit comments from interested parties regarding the appropriate rules regarding the use of electronic devices by on-duty employees of rail transit agencies. We contemplate that this proceeding will be conducted through a written record. An order will issue based on the record established in this docket. However, the Commissioner and ALJ assigned to this OIR may deem evidentiary hearings necessary.

5. Respondents

For purposes of this proceeding, we consider as respondents all California rail transit agencies as defined by General Order 164-D, Sections 2.15 and 2.16.

6. Service List

The Executive Director shall serve copies of this rulemaking on respondents to this proceeding and on CPSD staff. While all respondents identified in the OIR will be bound by the outcome of this proceeding, only those who notify us they wish to be on the service list will be accorded service by others until final rules are proposed and/or a final decision issued.

We invite broad participation in this proceeding. All persons or entities seeking to be added to the service list, including respondents, should inform the Commission's Process Office no later than 20 days after the mailing date of this rulemaking via email (Process_Office@cpuc.ca.gov) or by postal mail (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). To be included on the service list for this proceeding, the request to the Process Office must include pertinent information such as:

- Name and party represented, if any
- Address
- Telephone number

- Email address
- Request for party, state service or information only status.¹⁰

The initial service list will be posted on the Commission's website at www.cpuc.ca.gov. Parties should ensure they are using the most up-to-date service list by checking the Commission's website prior to each service/filing date.

We encourage electronic filing in this proceeding. Electronic filings should be made according to Rule 1.10 and Resolution ALJ-188. Consistent with those rules, a hard copy of all pleadings shall be concurrently served on the assigned ALJ.

7. Schedule

Following is the preliminary schedule for this rulemaking:

Responses to OIR	30 days after the issuance of this OIR
Replies	15 days after responses are received
Comments on Proposed Rule	30 days after Issuance of Proposed Rule
Reply Comments on Proposed Rule	10 days after Comments on Proposed Rule

As previously stated, we do not anticipate the need for evidentiary hearings, but any party who believes hearings are necessary may make that request in their Responses to the OIR. The request must identify the specific

¹⁰ Party status is for those planning to actively participate in this rulemaking through, at a minimum, submission of written comments on the questions raised in the Preliminary Scoping Memo. State service status is for employees of the State of California who will not be submitting comments. Information Only status is for those who wish to follow the proceeding and receive documents associated with it, but who will not be actively participating.

disputed evidence necessitating evidentiary hearings. The assigned Commissioner or assigned ALJ will determine the need for a prehearing conference or hearings and may alter the schedule or adopt further procedural processes as necessary. This proceeding should be completed within the 18-month statutory deadline.

8. Public Advisor

Any person or entity interested in participating in this rulemaking as a party who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco at (415) 703-2074 or (866)849-8390 or email public.advisor@cpuc.ca.gov.

9. Ex Parte Communications

Pursuant to Rules 8.4(b) and 8.2(a), ex parte communications are allowed in this proceeding without any restrictions or reporting requirements.

Therefore, **IT IS ORDERED** that:

1. A rulemaking is instituted to determine whether the temporary measures adopted in Resolution SX-88 or other measures prohibiting personal use of electronic devices by rail transit personnel should be adopted on a permanent basis.
2. All public transit agencies under the Commission's jurisdiction are made respondents to this proceeding.
3. The Executive Director shall serve a copy of this rulemaking on all respondents to this proceeding and CPSD staff.
4. This rulemaking is preliminarily determined to be a "quasi-legislative" proceeding as that term is defined in Rule 1.3(d).

5. No later than 20 days after the mailing date of this rulemaking, persons or entities seeking to be included on the service list for this proceeding may do so by informing the Commission's Process Office. Requests to be added to the service list should be sent via email (Process_Office@cpuc.ca.gov.) or by postal mail (Process Office, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, California 94102). The request should include the following information: (1) the full name, address and telephone number of the person or entity upon whom service should be made (if the participant is an entity, the full name of the entity's representative for service of process should also be included); (2) email address if available; and (3) request for party, state service, or information only status.

6. The assigned Administrative Law Judge, in consultation with the assigned Commissioner, may adjust the schedule, as necessary.

7. Responses to the Order Instituting Rulemaking and Comments shall conform to Rule 6.2 and shall be filed with the Commission's Docket Office and served in conformance with the schedule contained in Section 7 of this document.

This order is effective today.

Dated _____, at San Francisco, California.