

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: January 23, 2013

To: The Commission
(Meeting of January 24, 2013)

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

Subject: **Proposed Legislation on Excavation Penalties**

RECOMMENDED POSITION: SUPPORT

SUMMARY OF BILL:

The proposed legislation would:

- 1) Cap existing civil penalty amounts for negligent violations of GC 4216 at \$100,000 and those for knowing and willful violations at \$250,000;
- 2) Classify all failures to notify one-call centers, per GC 4216 requirements, as knowing and willful violations and provides the Attorney General or district attorney to consider willful and knowing violations as misdemeanor or an infraction;
- 3) Require the California Public Utilities Commission (CPUC) excavation incident investigation reports to include certain required elements; CPUC investigation reports would be considered public record for use in enforcement actions that may be brought against an operator or excavator by the Attorney General, district attorney, or a local or state agency issuing a permit;
- 4) Provide that any penalty amounts collected would be apportioned among only the prosecuting agencies taking the enforcement action;
- 5) Not provide the CPUC with any additional legal authority or ability to receive reports from violators of GC 4216, one-call centers, or entities non-jurisdictional to the PUC;
- 6) Not provide the CPUC with additional compensation for costs related to excavation incident investigations or the preparation of costs.

CURRENT LAW:

GC 4216 permits the Attorney General, district attorney, and permitting agencies to take enforcement action against violators of the law, but does not discuss how any penalty amounts collected are apportioned among agencies;

GC 4216 provides for penalties for violations; however, the penalties are capped at \$10,000 for any negligent violations of GC 4216 and at \$50,000 for any knowing and willful violations;

GC 4216 does not require the CPUC to conduct investigations of excavation incidents or provide investigation reports to any other agencies;

AUTHOR'S PURPOSE:

It is accepted by most stakeholders in California's excavation community that enforcement of GC 4216 is woefully inadequate. This almost complete lack of enforcement is contributing to violations of GC 4216 which, in turn, are contributing to damages to subsurface facilities, discontinuances in utility services, injuries, and in some instances fatalities.

The lack of enforcement by agencies is due primarily to the fact that only the California Attorney General, district attorneys, or local permitting agencies can take action to enforce the civil penalties codified in GC 4216, Section 4216.6(a)(1), and these entities do not prosecute violations of GC 4216 due to their need to allocate resources toward prosecuting cases involving what are considered more serious violations of law. In addition, the penalty amounts provided in GC 4216 may be viewed as insufficient to cover the necessary investigation and prosecutorial costs associated with enforcing the law. The proposed bill seeks to increase existing penalty amounts for violations of GC 4216 in an effort to increase the potential for agencies currently authorized to enforce GC 4216 to take enforcement actions against violators of the regulations. Moreover, the author believes that having incident investigations performed, evidence gathered, and reports prepared by the CPUC, could eliminate the need for the prosecuting agencies to allocate resources towards these activities, to further serve as an incentive for agencies to start prosecuting violations of GC 4216.

The Safety and Enforcement Division (SED) believes that the CPUC is the proper agency to perform incident investigations related to subsurface utilities. Also, there exists a definite need for some form of legislation to address the problem of the lack of enforcement of GC 4216. However, the bill would only resolve a small portion of the overall problem and may not result in additional enforcement. Furthermore, even if the bill results in some enforcement action, this action would most likely only be taken for significant incidents, and would be largely reactive and not proactive in addressing safety.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

This bill should be supported for the following reason:

- (1) It is possible that the proposed enforcement regime could encourage better compliance with excavation standards and thus lead to less damage to subsurface facilities and improved public safety.

SUMMARY OF SUGGESTED AMENDMENTS:

None.

DIVISION ANALYSIS (Safety and Enforcement Division):

The CPUC's natural gas safety program is funded by a combination of user fees on natural gas utility bills and annual grant support from the federal Department of Transportation through the state certification agreement and overseen by the Pipeline and Hazardous Materials Safety Administration (PHMSA). PHMSA has recently begun basing eligibility for certain grants on the state having an effective enforcement program that cites violators of the state's one-call program and damage, or create the potential for damaging, gas and hazardous liquid pipelines covered by PHMSA's regulations.

The bill's provisions, in some cases and with some proper amendments, could assist the CPUC in meeting its practice and policy of complying with the provisions of its certification agreement with PHMSA as well as the objective, both PHMSA and the CPUC share, to reduce service disruptions, damages and injuries resulting from failure to comply with regulations codified in GC 4216. However, because the decision to take enforcement action is left to the discretion of agencies other than the CPUC, and because the proposal lacks several other elements considered essential by PHMSA, PHMSA would most likely continue to consider California's enforcement program, as proposed by the bill, an ineffective enforcement program. Moreover, since the bill does not expand the CPUC's authority to enforce violations of the law, the CPUC would have very limited ability to have violators of GC 4216 prosecuted for damaging facilities of operators jurisdictional to the CPUC.

PROGRAM BACKGROUND:

The CPUC currently has enforcement authority over public utilities subject to its jurisdiction, but it does not have the ability to enforce against other actors responsible for dig-in damage.

SAFETY IMPACT:

The bill has the potential to enhance the safety of California citizens by disincentivizing dig-in damages and thus decreasing the likelihood of dig-in events that could cause harm either to the general public or to workers involved at an excavation site.

RELIABILITY IMPACT:

The bill has the potential to enhance reliability of service to California citizens by helping ensure that gas and electric lines do not go down, thus preserving natural gas access, electricity, and access to phone lines.

RATEPAYER IMPACT:

There is insufficient data to determine any impact on customer's rates. Utilities report only partial success in receiving compensation from entities that cause damage to their subsurface facilities. As such, ratepayers could potentially see a slight decrease in their rates in enforcement leads to less dig-in damage.

FISCAL IMPACT:

The CPUC currently performs investigations of reported incidents involving subsurface gas, electric, and some communications facilities. However, many inspections into incidents that do not result in injury, death, or significant impact are limited. This bill

may require more thorough investigations related to these facilities in some cases. The bill would also require that investigative reports prepared for submittal to the enforcement agencies provide additional and more detailed information than the information prepared for many current investigations. Obtaining this information could expand the workload and may require additional legislative authorization to obtain data from non-jurisdictional entities or individuals. Also, any investigations for incidents involving PUC jurisdictional facilities where investigations are not currently performed (i.e., water pipelines) would entail additional resource needs.

ECONOMIC IMPACT:

Sufficient data is not available to quantify the economic effect on businesses or the regulated community, including local government. However, subsurface damages resulting from excavation activities performed in violation of GC 4216 are estimated to be the millions of dollars. In addition to damage to property, system reliability impacts result in loss of service to the public. Most importantly, each violation of GC 4216 creates great potential for injuries and fatalities to workers and the general public.

LEGAL IMPACT:

Unknown.

OTHER STATES' INFORMATION:

Unknown.

LEGISLATIVE HISTORY:

AB 1514, was introduced by Assemblymember Bonnie Lowenthal during the 2011-2012 legislative session. As originally authored, AB 1514 sought to add the PUC to the list of enforcement agencies included GC 4216. However, AB 1514 received strong opposition from telecommunications companies and contractors. Reasons offered by the opposition included additional costs that could potentially be borne by ratepayers as well as a lack of emphasis on education over fines for first time offenders of GC 4216 and the amount of fines being too large for subsequent offenders. The opposition was successful in defeating AB 1514.

STATUS:

Not applicable.

SUPPORT/OPPOSITION:

None on file.

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

SECTION 1. Section 4216.6 of the Government Code is amended to read:

4216.6. (a) (1) ~~Any~~ Except as provided in paragraphs (2) and (3), and in addition to all other penalties, an operator or excavator who that negligently violates a requirement of this article is subject to a civil penalty in an amount not to exceed ten thousand dollars (\$10,000) for the first violation, and not to exceed one hundred thousand dollars (\$100,000) for each subsequent violation.

(2) ~~Any~~ In addition to all other penalties, an operator or excavator who that knowingly and willfully violates any of the provisions a requirement of this article is subject to a civil penalty in an amount not to exceed fifty thousand dollars (\$50,000) for the first violation, and not to exceed two hundred fifty thousand dollars (\$250,000) for each subsequent knowing and willful violation.

(3) Any violation of paragraph (1) of subdivision (a) of Section 4216.2 shall be considered a knowing and willful violation.

(3)

(4) ~~Except as otherwise specifically provided in this article, this section is not intended to~~ does not affect any civil remedies otherwise provided by law for personal injury or for property damage, including any damage to subsurface installations, nor ~~is~~ does this section ~~intended to~~ create any new civil remedies for those injuries or that damage.

(4)



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~~(5) This article shall does not be construed to limit any other provision of law granting governmental immunity to state or local agencies or to impose any liability or duty of care not otherwise imposed by law upon any a state or local agency.~~

~~(b) An~~

~~(b) (1) Upon receipt of an investigation report prepared by the Public Utilities Commission, an action may be brought by the Attorney General, General or the district attorney, or attorney in the name of the people of the State of California for the enforcement of the civil penalty pursuant to this section. Alternatively, the Public Utilities Commission may provide an investigation report to the local or state agency which that issued the permit to excavate, for the enforcement of the excavate and the local or state agency may take action to assess a civil penalty pursuant to this section. If penalties are collected as a result of a civil suit brought by the Attorney General, a district attorney, or a state or local agency that issued a permit to excavate, for collection of those civil penalties, the penalties imposed shall be paid to the general fund of the prosecuting agency. If more than one agency is involved in enforcement, the penalties imposed shall be apportioned among them by the court in a manner that will fairly offset the relative costs incurred by the state or local agencies, or both, agencies in collecting these fees.~~

~~(2) (A) An investigation report documenting any violation determined by the Public Utilities Commission to warrant possible enforcement pursuant to this section shall include, but is not limited to, all of the following:~~

~~(i) The facts and evidence establishing the violation.~~

~~(ii) A list of witnesses to the violation and contact information for the witnesses.~~



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