

STATE OF CALIFORNIA

Public Utilities Commission  
San Francisco

**M e m o r a n d u m**

**Date:** December 8, 2011

**To:** The Commission  
(Meeting of December 15, 2011)

**From:** Office of Governmental Affairs (OGA) — Sacramento

**Subject:** **AB 1197 (Hill) – Public utility employees: whistleblowers**  
**Pending amendment**

**LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: SUPPORT IF AMENDED**

**SUMMARY OF BILL:**

AB 1197 is currently a bill dealing with jail facility construction funding that the author's office has indicated will be amended in January to match the language attached at the end of this memo. The amended bill would help ensure that whistleblowers do not receive retaliation from management by requiring utilities to file completed reports within 30 days after any final judgment, arbitration award, or settlement in excess of \$50,000 in any civil action brought by an employee or former employee of the utilities. The bill would further require the CPUC to adopt and enforce rules, which would subject the public utilities to a civil penalty of not more than \$1 million for willful failure to comply with this requirement or \$500,000 for negligent failure to comply with this requirement.

**SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:**

AB 1197 should be supported if amended for the following reasons:

**(1) The bill addresses a very serious problem that has been the subject of discovery by the Consumer Protection and Safety Division and Legal Division, as well as the subject of a motion by the Utilities Workers Union of America (UWUA).** However, unless amended, the bill would not resolve the problem, because the utility can too easily circumvent the reporting requirements.

**(2) The bill has benchmarks for utilities' reports of retaliation, which could be easily circumvented by the utilities.** By drawing a line at \$50,000 or more for final judgments against the utilities for the utilities to report civil actions brought by employees for retaliation (\$50,000 benchmark), such a benchmark could provide a perverse incentive which could allow the utilities to circumvent the legislation and to retaliate against employees and not report such retaliation by settling for less than

\$50,000, by litigating the case all of the way up to U.S. Supreme Court (with ratepayer dollars) so that the employees would not receive any judgment, at least for a long period of time, or by retaliating against employees in other ways, which are not actionable (such as not terminating the employees, but transferring the employees to lower paying and less satisfying jobs). By the same token, this bill would only apply to employees, who are whistleblowers, but would not apply to contractors, subcontractors or other third party whistleblowers.

### **SUMMARY OF SUGGESTED AMENDMENTS:**

Any limitation, such as the application only to employees or former employees, should be removed from the bill so that contractors, subcontractors or other third parties can be included.

Additionally, the \$50,000 benchmark should be eliminated from the bill and replaced by a requirement that a public utility be required to file a report with the CPUC whenever any civil action is brought against it. In addition to the report, the public utility should further be required to provide the CPUC with a copy of the legal documents relevant to the civil action brought against it. A second notification should be required to be filed with the CPUC following any final judgment, arbitration award, compromise or settlement.

### **DIVISION ANALYSIS (Legal Division):**

The bill would impact CPUC programs, practice and policy in the following ways:

- In its Order Instituting Rulemaking (OIR) R.11-02-019, the CPUC is already considering whistleblower protections with regards to retaliation against natural gas employees in the aftermath of the San Bruno tragedy. This is already listed as an issue in the OIR, but the CPUC has not yet taken any formal action. Moreover, CP&SD and Legal Division staff have been conducting discovery on this subject to become better informed of the nature of the problems and the solutions, before proposing any regulation in this subject area.
- If the existing bill were enacted, it could limit the situations in which the CPUC could learn about safety matters that are unreported, rather than wait to see the program which the Commission finally adopts in the OIR.
- In its current form, the utilities could attempt to utilize this bill as a restriction on the CPUC's authority by claiming that the Legislature has acted on this matter. Therefore, the utilities could argue that this bill limits any action by the CPUC to address utility management retaliation of employees for reporting safety violations, which did not result in a final judgment or settlement in excess of \$50,000.

### **PROGRAM BACKGROUND:**

- Effective October 1, 2011, CPSD established a more accessible way by which whistleblowers can report a complaint with the CPUC. In addition to establishing a Frequently Asked Question (FAQ) page on the CPUC website to answer questions of interest to potential whistleblowers, whistleblowers are now provided two means by which to report a matter to the CPUC: (1) by calling the Commission Fraud Hotline at 1-800-649-7570 or by sending an email to [fraudhotline@cpuc.ca.gov](mailto:fraudhotline@cpuc.ca.gov). Whistleblower calls are directly transferred to a CPSD enforcement staff and all emails sent to the fraud hotline mailbox are also handled by CPSD enforcement staff. The anonymity provided by this process alone is probably an insufficient incentive for employees to come forward with claims of unsafe conditions. For this reason, it is imperative that the CPUC address the whistleblower protection issue more comprehensively in the OIR and announce its policies against management retaliation.
- CPSD has received only 2 whistleblower contacts since the inception of the enhanced whistleblower intake process on October 1, 2011. However, if and when the CPUC adopts whistleblower protections in the current OIR, which provides meaningful protection for employees who report unsafe conditions, there should be a significant increase in the number of reports of unsafe conditions, which will impact the resources of this agency by requiring follow-up investigations, but in a very focused and effective manner. It will also impact the CPUC, by requiring some screening to be done so as to protect the CPUC from employees, who have no useful information to provide but try to exploit the program, in order to protect themselves from warranted terminations from the utilities.
- The bill, unless amended, would either significantly increase the reports to the CPUC or, in all likelihood, increase the length of litigation by utilities to preclude reports to the CPUC, or cause the utilities to conduct their retaliatory practices in other ways that preclude the reports.

**LEGISLATIVE HISTORY:**

None.

**FISCAL IMPACT:**

As a result of this bill, the fiscal impacts on the CPUC could be very significant. By requiring the CPUC to adopt a comprehensive whistleblower protection program regarding unreported safety issues, the Commission needs additional resources not only to protect the employees (with useful information) from various forms of retaliation from management, but also to prevent other employees (without useful information) from exploiting the program. Moreover, in order for the Commission's program to be effective, the Commission would have to enforce the penalties or other measures to protect employees (with useful information) from retaliation. Simply put, if the

Commission regulation or program is adopted, but it is not enforced, the utility may not change its behavior, but could eventually succeed in making an example of the whistleblower to deter others from becoming whistleblowers.

Therefore, if the legislation were to pass, there could be significant fiscal impacts, requiring at least 3 PYs for PU Counsel III and 3 PYs for CPSD (most likely 2 PURA IVs and 1 Senior Utility Engineer). The 3 PU Counsel III positions are necessary for developing the comprehensive program, protecting the employees from retaliation and enforcing the law by proving that the utilities are retaliating against the employees, which requires extensive discovery due to the obstacles that the utilities use in covering up their retaliation; the 2 PURA IVs and 1 Senior Utility Engineer would be needed to review the reports/filings that come in on an ongoing basis. CPSD will also need staff for investigation and enforcement.

The fiscal impact of AB 1197 is the same as that for AB 1160. Should both bills pass the Legislature and be signed by the Governor, there would not be a need for double the number of positions listed above.

**STATUS:**

AB 1197 is currently awaiting action in the Assembly Public Safety Committee and will be re-referred upon amendment.

**SUPPORT/OPPOSITION:**

None on file.

**STAFF CONTACTS:**

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**BILL LANGUAGE:**

Proposed language:

*SECTION 1. Section 8291 is added to the Public Utilities Code , to read:*

8291. (a) (1) Every public utility shall file a completed report with the commission within 30 days as to any final judgment, arbitration award, compromise, or settlement in excess of fifty thousand dollars (\$50,000) in any civil action brought by an employee or former employee of the utility against the utility.

(2) It is the intent of the Legislature that the commission be informed of any significant payment made by a public utility to an employee or former employee where there may be any claim of management retaliation for bringing information to the commission or other public entities regarding unreported safety issues, and the commission may limit the duty to report pursuant to paragraph (1) to those particular types of claims that the commission determines are likely to involve claims of retaliation, or to exclude from the duty to report particular claims that the commission determines are highly unlikely to involve claims of retaliation.

(3) The commission shall develop and adopt a report form to be used by a public utility to comply with the requirements of paragraph (1). Until the commission adopts a report form, the report shall include a copy of the complaint or claim made by the employee or former employee and any written judgment, arbitration award, or agreement for the compromise or settlement of an action or claim.

(b) (1) The commission shall assess a penalty of not more than one million dollars (\$1,000,000) against a public utility for a willful failure to comply with the requirements of subdivision (a).

(2) The commission shall assess a penalty of not more than five hundred thousand dollars (\$500,000) for a negligent failure to comply with the requirements of subdivision (a).

(3) The commission may enforce and collect a penalty pursuant to Chapter 11 (commencing with Section 2100) of Part 1 of Division 1.