

STATE OF CALIFORNIA

Public Utilities Commission
San Francisco

M e m o r a n d u m

Date: January 30, 2012

To: The Commission
(Meeting of February 1, 2012)

From: Office of Governmental Affairs (OGA) – Sacramento

Subject: **SB 1000 (Yee) – Public Utilities Commission: public records
Pending introduction**

**LEGISLATIVE SUBCOMMITTEE RECOMMENDATION: SUPPORT WITH
TECHNICAL AMENDMENTS**

SUMMARY OF BILL:

SB 1000 is a proposed bill that the author's office has indicated will be introduced soon to match the language attached at the end of this memo. The bill would amend Public Utilities Code § 315 to require the CPUC to make available to the public any accident report filed with the CPUC pursuant to CPUC requirements, as well as any order or recommendation made by the CPUC pursuant to its investigation of an accident. The bill would also repeal Public Utilities Code § 583 and replace it with a new Public Utilities Code § 583 that would provide that the California Public Records Act (Government Code § 6250 et seq.) shall apply to all records of, and records filed with, the CPUC, unless expressly exempt from disclosure by the Public Utilities Code or the California Public Records Act. Finally, the bill would require the CPUC to immediately conduct a hearing to amend General Order 66-C to be consistent with the new Public Utilities Code § 583.

SUMMARY OF SUPPORTING ARGUMENTS FOR RECOMMENDATION:

SB 1000 should be supported with technical amendments for the following reasons:

(1) The bill would provide the public with more immediate access to accident reports filed with the CPUC and records of the CPUC's investigation of such accidents. Current rules and practices dictate that the CPUC prepare, circulate for public comment and then act on routine draft resolutions authorizing staff to disclose records of completed CPUC accident investigations. These rules and practices represent an unnecessary procedural barrier to the prompt disclosure of records to the public. Under SB 1000, those barriers would be removed while preserving the CPUC's authority to protect from disclosure records subject to codified exemptions.

(2) The bill would eliminate the threat of criminal sanctions for the CPUC's public disclosure of information furnished by utilities, their subsidiaries and their affiliates.

Current Public Utilities Code § 583 makes it a misdemeanor to disclose information provided by utilities unless the Public Utilities Code specifically requires the information to be public, or disclosure has been authorized by an order of the CPUC, or by the CPUC or a commissioner in the course of a hearing or proceeding. Under current law, in many cases the only way to remove the threat of criminal prosecution against CPUC employees is for the CPUC itself, or in some instances an individual commissioner, to issue an order authorizing public disclosure. The threat of criminal charges is an impediment to public disclosure. Under SB 1000, the misdemeanor provision in Public Utilities Code § 583 would be removed.

SUMMARY OF SUGGESTED AMENDMENTS:

A 'Support with Technical Amendments' position, rather than a straight 'Support' position, is recommended for three reasons. First, the proposed amendments to Public Utilities Code § 315 should be revised to clarify certain disclosure ambiguities and mandate the disclosure of additional safety records. Second, the new Public Utilities Code § 583 should be revised to be less redundant with current California Public Records Act requirements. Third, the subsection of the new Public Utilities Code § 583 should be revised to avoid the procedural delays and inefficiencies that could result from the requirement that the CPUC immediately conduct a hearing to amend General Order 66-C.

(1) The proposed amendments to Public Utilities Code § 315 should be revised to clarify certain disclosure ambiguities and mandate the disclosure of additional safety records. The language should provide clear guidance, and thus greater practical public access, to CPUC safety investigation reports that do not result in “orders or recommendations”, as well as to other safety records of interest to the public, with any specific redaction or infrastructure confidentiality issues being resolved in the legislation itself, rather than through a series of CPUC decisions, orders, resolutions or rulings.

Language should be included specifying that safety-related records be made available to the public either by directly posting the records on the CPUC's website, or by posting links to the websites of other governmental agencies that receive and maintain such records. However, an exception should clarify that the CPUC may redact records, or portions of records, that it determines are exempt or prohibited from disclosure pursuant to the California Public Records Act or other applicable law, where the exemption or prohibition is mandatory and/or where the CPUC has carefully weighed the arguments for and against disclosure and determined that the public's interest in nondisclosure clearly outweighs its interest in disclosure.

Safety records of interest should include the following:

- All natural gas pipeline safety reports filed by gas utilities pursuant to federal law or regulations, where copies of such filings are also provided to the CPUC

and the filings are not designated as confidential by federal statute or regulation. Such documents include, but are not limited to, documents filed with the United States Department of Transportation Pipeline and Hazardous Materials Safety Administration.

- All natural gas pipeline safety reports filed by gas utilities with the CPUC pursuant to state law, regulation or CPUC decision, regulation, order or ruling, where the state law, regulation or CPUC decision, regulation, order or ruling, does not expressly designate the records, or limited portions of such records, as confidential. Such documents include, but are not limited to documents filed with the CPUC pursuant to General Order 112-E.
- All electric utility safety-related reports filed by electric utilities with the CPUC pursuant to state law, regulation or CPUC decision, regulation, order or ruling, where the state law, regulation or CPUC decision, regulation, order or ruling, does not expressly designate the records, or limited portions of such records, as confidential.
- All railroad safety-related reports filed by railroads pursuant to federal or state laws or regulations, or CPUC decisions, regulations, orders or rulings, where the federal or state law, regulation or CPUC decision, regulation, order or ruling, does not expressly designate the records, or limited portions of such records, as confidential.
- All CPUC-generated reports regarding gas and electric safety conducted by the CPUC, and related correspondence between the CPUC and the audited entity, with the exception of any portions of such reports or correspondence that may be subject to a California Public Records Act exemption and/or CPUC-held privilege prohibiting or limiting disclosure.
- All CPUC-generated reports regarding electric and gas incident investigations completed by the CPUC, and related correspondence between the CPUC and any regulated entity directly or indirectly involved in the incident, with the exception of any portions of such reports or correspondence that may be subject to a California Public Records Act exemption and/or CPUC-held privilege prohibiting or limiting disclosure.

(2) The new Public Utilities Code § 583 should be revised to be less redundant with current California Public Records Act requirements. While the repeal of current Public Utilities Code § 583 will almost certainly improve the public's opportunities for reviewing CPUC records, the new Public Utilities Code § 583 erroneously assumes that the California Public Records Act does not currently apply to all records of, and records filed with, the CPUC. In fact, the California Public Records Act already requires the CPUC to disclose records to the public unless the CPUC can justify withholding the records "by demonstrating that the record in question is exempt under express provisions of this chapter (the California Public Records Act) or that on the facts of the particular case, the

public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.” (Government Code § 6255.)

Language should be included to make Public Utilities Code § 583 less redundant with current California Public Records Act requirements by adding language that specifies the following:

- The California Public Records Act (CPRA) (Chapter 3.5 (commencing with § 6250) of Division 7 of Title 1 of the Government Code) applies to all records of, and filed with, the CPUC.
- In accord with the CPRA, the CPUC must justify withholding any record by demonstrating that the record in question is exempt under express provisions of the CPRA or that, on the facts of a particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record (Government Code § 6255).
- In accord with Article 1, § 3(b) of the California constitution, statutes, court rules, and other authority must be broadly construed if they further the people’s right of access to government records, and narrowly construed if they limit the right of access.
- In applying these laws and principles, the CPUC shall refrain from making public records and information subject to statutory or other prohibitions against disclosure, shall ensure public access to records and information where disclosure is required by statute or other provision of law, and to carefully balance the public’s interests for and against disclosure in contexts where disclosure is neither expressly prohibited, or expressly mandated, by statute or other provision of law.

(3) The subsection of the new Public Utilities Code § 583 should be revised to avoid the procedural delays and inefficiencies that could result from the requirement that the CPUC immediately conduct a hearing to amend General Order 66-C. While General Order 66-C does indeed warrant a fresh look, the procedural vehicle of a hearing may result in slower progress, in a perhaps more contentious context, than a different procedural vehicle such as a CPUC Legal Division resolution.

Language should be included to replace the “immediately conduct a hearing” wording with language that does not specify a particular type of CPUC proceeding, but does require the CPUC to develop new regulations for posting on its website an index of the classes of records it receives and maintains, the records retention policies associated with each class of records, a list of the classes of records generally available to the public, a list of the records generally not available to the public with a description of the justification for such confidential treatment, a standard form to be used by anyone intending to request that records be filed under seal, or otherwise accorded confidential treatment, and so on.

DIVISION ANALYSIS (Legal Division):

SB 1000 would impact CPUC programs, practice and policy in the following ways:

(1) Public Utilities Code § 315 currently: 1) requires the CPUC to investigate the cause of accidents in California that take place on utility property or involve the maintenance or operation of the utility, and involve loss of life or injury to persons or property, when the CPUC judges that such an investigation is required; 2) authorizes the CPUC to make such order or recommendations regarding the investigations as in its judgment seem just and reasonable; 3) requires every public utility to file with the CPUC a report of each accident under rules prescribed by the CPUC; and 4) provides that “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admissible as evidence in any action for damages based on or arising out of the loss of life or injury to person or property.”

SB 1000 would amend Public Utilities Code § 315 to make a number of minor editorial changes, and add the following new requirement that:

“Any order or recommendation made by the commission pursuant to this section, and any accident report filed with the commission pursuant to this section, shall be made available and ready for public review in compliance with the California Public Records Act (Chapter 3.5) commencing with Section 2650 of Division 7 of Title 1 of the Government Code).”

The amended Public Utilities Code § 315 could reduce or eliminate the need for individual CPUC resolutions authorizing disclosure. By requiring that accident reports filed with the CPUC, and orders and recommendations of the CPUC, be made available to the public in compliance with the California Public Records Act, without specifying that disclosure will be delayed until the CPUC's investigation is complete, SB 1000 would ensure that accident reports are made available to the public within a reasonable time frame, even while the CPUC's investigation remains pending.

Although the California Public Records Act does not include a specific exemption for utility accident reports, it does include enough exemptions to permit the CPUC to redact from accident reports any truly confidential or sensitive information. Thus, SB 1000 would not eliminate the CPUC's ability to assert appropriate exemptions regarding limited portions of accident reports.

(2) Existing law (current Public Utilities Code § 583) makes it a misdemeanor for a present or former officer or employee of the CPUC to disclose information by a public utility or its subsidiaries and affiliates, unless disclosure is specifically required by Part 1 of the Public Utilities Code, or disclosure is authorized by an order of the CPUC, or by the CPUC or a commissioner during the course of a hearing or proceeding. Although Section 583 does not in itself actually limit the CPUC's authority to disclose record, the

misdemeanor language has a distinct chilling effect on the willingness of CPUC staff, and often commissioners, to consider questioning utility assertions of confidentiality.

As a practical matter, the misdemeanor language, coupled with the procedural delays associated with the public comment period required before the CPUC takes action on a draft decision or resolution addressing a specific confidentiality issues, results in the CPUC staff's initial denial of public access to any information even arguably subject to the Public Utilities Code § 583 misdemeanor warning.

Elimination of this intimidating language would create an atmosphere more conducive to a rigorous and sensible analysis of the reasonableness of a utility's confidential assertions, and thus result in greater and more immediate public access to CPUC records that are not clearly exempt under the California Public Records Act.

(3) The California Public Records Act requires state agencies to disclose records to any member who requests the records unless those agencies can justify withholding the records "by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record." (Government Code § 6255.)

(4) Current CPUC rules are to an extent inconsistent with the California Public Records Act and result in utility assertions of confidentiality for records that may not easily fall within one or more California Public Records Act exemptions. The frequent absence of a clear match between regulated entity assertions of the existence of an applicable California Public Records Act exemption and/or the public's interest in not having access to certain information, and any actual California Public Records Act exemption, has two negative results. First, CPUC rulings on such confidentiality issues may be difficult to justify if reviewed carefully. Second, the varying contexts in which confidentiality is asserted or requested, the varying quality and specificity of such assertions or requests and the absence of uniform CPUC-wide approach for analyzing and processing such requests tend to confuse staff and the public and impede the ability of the CPUC to confidently make confidentiality determinations and provide prompt access to records disclosable under the California Public Records Act. Clear legislative guidance and CPUC-specific disclosure mandates could help alleviate some of the existing confusion regarding common disclosure issues and thus improve public access.

PROGRAM BACKGROUND:

General Order 66-C currently provides that records of CPUC audits or investigations not be disclosed except to the extent disclosed in a hearing or by formal CPUC action. As a result, most requests for accident reports and investigation records are initially denied, with the denial letter indicating that the staff has initiated the process through which the CPUC authorizes disclosure. This process requires circulation of a draft CPUC resolution authorizing disclosure at least 30 days before the CPUC takes action, thus

ensuring that most accident reports and investigation records are not disclosed for at least a month or two. Further, the CPUC's current practice is to refrain from providing records until the CPUC has completed its investigation, a process which has in some cases taken several years.

LEGISLATIVE HISTORY:

SB 1000 is similar to a prior bill, SB 1488 (Bowen), which was introduced in 2004 as a similar attempt to modify Public Utilities Code § 583 to increase public access to CPUC records but was subsequently amended to simply require that the CPUC consider its disclosure practices. In response to SB 1488, the CPUC in D.06-06-066 considered a number of its disclosure practices and adopted a matrix establishing categories of mainly energy procurement-related information available to the public and categories of information to remain confidential for specified periods of time. The CPUC stopped short of replacing or amending General Order 66-C after reviewing party comments regarding certain exemptions in the General Order. The CPUC's history associated with this prior legislative effort suggests the potential benefits of further direct legislative mandates regarding a variety of disclosure issues.

Another bill from the 2011-12 legislative session, AB 1541 (Dickinson), also addresses the issue of public access to CPUC records.

FISCAL IMPACT:

As written, implementing the provisions of the bill using the procedural vehicle of a hearing would result in a temporary addition of .5 PY for the work of an ALJ II. If the procedural vehicle used were a CPUC Legal Division resolution, costs would be minor and absorbable.

STATUS:

SB 1000 is currently pending introduction.

SUPPORT/OPPOSITION:

None on file.

STAFF CONTACTS:

Nick Zanjani, Legislative Liaison, OGA (916) 327-3277

nkz@cpuc.ca.gov

BILL LANGUAGE:

SECTION 1. Section 315 of the Public Utilities Code is amended to read:

315.

(a) The commission shall investigate the cause of all accidents occurring within this ~~State~~ *state* upon the property of any public utility or directly or indirectly arising from or connected with its maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it, and may make ~~such~~ *any* order or recommendation with respect thereto as in its judgment seems just and reasonable. ~~Neither the order or recommendation of the commission 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.~~ Every public utility shall file with the commission, under ~~such~~ *as* the commission prescribes, a report of each accident so ~~occurring~~ *occurring* of ~~such~~ *the* kinds or classes as the commission from time to time designates.

(b) *Any order or recommendation made by the commission pursuant to this section, and any accident report filed with the commission pursuant to this section, shall be made available and ready for public review in compliance with the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code). Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of the loss of life or injury to person or property.*

SEC. 2. Section 583 of the Public Utilities Code is repealed.

583.

~~No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.~~

SEC. 3. *Section 583 is added to the Public Utilities Code, to read:*

583.

(a) *The California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) shall apply to all records of, and records filed with, the commission unless expressly exempt from disclosure by this code or the California Public Records Act.*

(b) *The commission shall immediately conduct a hearing to amend General Order 66 to be consistent with this section.*