

WILLIAM D. TAYLOR
PARTNER
DIRECT DIAL (916) 551-2939
DIRECT FAX (916) 551-3391
E-MAIL wtaylor@hansonbridgett.com



October 26, 2020

VIA E-MAIL
rachel.peterson@cpuc.ca.gov

Rachel Peterson
Acting Executive Director
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Re: Comments of Hanson Bridgett LLP on Draft Enforcement Policy
and Draft Resolution M-4686

Dear Ms. Peterson:

In accordance with Public Utilities Code Section 311(g) and Rule 14.5 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, Hanson Bridgett LLP provides the following comments on Draft Resolution M-4686 and the Draft Enforcement Policy ("Draft Policy") therein. The stated goal of the Commission's Draft Policy is to better serve the residents of California through nimble, meaningful and transparent, enforcement of statutes, rules, orders, and regulations over the entities the Commission regulates. Hanson Bridgett supports the Commission's underlying goal. However, Hanson Bridgett has several concerns with certain aspects of the Draft Policy as discussed below.

Over recent years, Hanson Bridgett has represented a number of clients that have been the subject of enforcement actions instituted by Commission staff. Accordingly, these comments highlight the serious implications that would and do adversely affect and disadvantage these and other similarly situated clients if the Draft Policy were adopted. One such type of client is the senior living industry, whose residents are dependent on the transportation function to accommodate daily life and medical needs. The residents are physically, financially and environmentally vulnerable, and these communities have been a primary target of the Commission's Consumer

Protection and Enforcement Branch (“CPED”) over the last few years.¹ We have defended a number of these communities against citations issued by Commission field investigators for operating without charter-party carrier authority.

By way of background, in 2018, by enacting SB 19 (Hill), the California Legislature transferred jurisdiction over private carriers from the Commission to the California Department of Motor Vehicles (“DMV”).² Our position has been that these communities operate exclusively private transportation services under duly issued DMV Private Carrier of Passengers Certificates, while the CPED contends that these are charter-party carriers (TCPs) under the jurisdiction of the Commission. In each enforcement case, we have had to individually appeal the citations with Commission staff and argue identical issues on a fragmented basis, based on Commission staff’s interpretation and misunderstanding of the applicable law. Contrary to the interests that the Commission seeks to advance by adopting this Draft Policy, the process to which the senior living communities have been subject is neither “efficient” nor an “effective use of available resources”.³ Furthermore, the Draft Policy is inconsistent with statutory requirements because the ostensible justification for prosecuting these cases against the senior living communities has never been presented to the full Commission. Legal judgments about whether a particular carrier service is, or is not, likely to be subject to the Passenger Charter-Party Carriers Act, should be made by the Commission rather than the staff. As Commission precedent has shown, Commission staff can be wrong on this issue, requiring the affected entities to endure burdensome proceedings for no justifiable reason.⁴

The Draft Policy proposes to empower Commission staff to settle a case through an Administrative Consent Order or through issuing a proposed Administrative

¹ See CPED Monthly Data Reports and Monthly Activity Reports, available at: <https://www.cpuc.ca.gov/cpedreports/>. We note that Transportation was removed from the Monthly Data Report beginning in June 2019.

² See Private Carriers of Passengers Registration Act (2018); Cal. Veh. Code § 34680 *et seq.*

³ Draft Policy, p. 5.

⁴ See Res. ALJ-371 (February 6, 2020); see *also* D.18-07-024 (July 12, 2018) (Order vacating TL-19125).

Enforcement Order instead of issuing a citation, both of which would be subject to a vote by the full Commission. The Administrative Enforcement Order is an alternative to a citation and could be issued if a case does not necessitate an OII.⁵ Here, we believe that a formal OII or, better yet, an OIR conducted before the full Commission, is warranted to fairly and comprehensively evaluate the merits and legality of classifying the transportation provided by these communities at the Commission level, rather than at the staff level. Doing so would alleviate the administrative burden of the Commission to enforce individual citations, and would protect the rights of these communities to argue their position before the full Commission at the onset rather than on a one-off basis in response to individual citations issued at the community level. Importantly, these communities, and all of their attendant features such as transportation, are subject to oversight and regulation by the California Department of Social Services as Residential Care Facilities for the Elderly (RCFE). Under Title 22 of the California Code of Regulations, each RCFE is required to provide directly or arrange for transportation of their residents.

The Draft Policy delegates considerable authority to the Commission staff. We recognize that such delegation may be appropriate where the staff would be acting in a ministerial fashion, such as suspending the operating authority of a TCP carrier that has failed to submit evidence of adequate liability insurance or issuing a cease-and-desist order to a TCP carrier operating with expired TCP authority. In both instances, Commission staff would be operating after proper TCP classification has been determined and authorized by the Commission. Many of the questions our clients face, however, involve the staff reaching a legal conclusion on an unsettled legal question regarding the proper construction of the Public Utilities Code, as compared to the Vehicle Code following the enactment of SB 19. Yet, those conclusions may prove to be erroneous as was the case in the GoGo Technologies appeal.⁶ A higher level of review must be undertaken, at the Commission level, before entities are subjected to the disruption and the expense of being required to defend such an enforcement. To this

⁵ *Id.*

⁶ Res. ALJ-371 (February 6, 2020).

end, we wholeheartedly support and endorse the earlier comments on the Draft Policy filed by the Goodin, MacBride, Squeri & Day law firm which noted that the Commission may not impose a fine without first initiating an adjudicatory proceeding pursuant to Sections 1701.1-1701.2 of the Public Utilities Code.

The Draft Policy states, “[a]s the Commission discussed in Resolution ROSB-002, this ability to seek an evidentiary hearing removes the concern that a private interest could be erroneously deprived of property (e.g., fine), nor are the fiscal or administrative burdens on the private interest significant. (See Resolution ROSB-002, pp.7-8.)”⁷ For the reasons discussed herein, we disagree. In addition to the fines arbitrarily imposed by Commission staff through the issuance of citations, there have been significant legal costs associated with protecting the rights of these communities during a particularly difficult time when they have been devastated by COVID-19 outbreaks and mandatory evacuations throughout California due to the wildfires. Each of these communities is required to develop and implement emergency plans in such situations that include transportation of residents. Lastly, the cease-and-desist orders issued by Commission staff threaten that any such carrier, which operates without CPUC authority, is guilty of a misdemeanor, which is punishable by a fine of up to \$5,000 or by imprisonment in the county jail for up to three months, or both. In no way can this be considered an “insignificant” burden on the private interest.

The real-world effect of the Draft Policy, and of the Commission staff’s current practice, is that the recipient of a citation and a cease-and-desist order is effectively deemed guilty of violating the Public Utilities Code even when it is not at all clear that any such violation has occurred. While the recipient of the citation has a right to a hearing upon appeal of a citation, the absence of any Commission or court precedent with regard to the conduct at issue often leaves the recipient with the burden of proving that its activity is lawful when the Commission itself has never reached any judgement that the activity is, or is likely to be, unlawful. As a result, the provider of the transportation is left with having to prove a negative, ultimately faced with the Hobson’s choice of either paying a penalty, or trying to defend itself in a truncated but costly

⁷ Draft Res. M-4846, p. 9.

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administrative process after the recipient has already acted in good faith to comply with the law by obtaining applicable operating authority from another administrative agency.

In order to resolve these significant and industry-wide matters equitably and efficiently, we urge the Commission to institute either an OII or OIR⁸ as the appropriate, comprehensive regulatory mechanism, to address which authority it is delegating to its staff is truly “ministerial” and which continues to require the exercise of discretion by the Commission at the outset of any matter in which fines or cease-and-desist orders are contemplated.

Respectfully submitted,

Hanson Bridgett LLP



William D. Taylor
Partner



Matthew H. Lewis
Associate

cc: Service List, General Order 96-B
Service List, Commission’s Rules of Practice and Procedure

⁸ We also fully support and endorse the earlier comments on the Draft Policy filed jointly by San Diego Gas & Electric Company and Southern California Gas Company urging the Commission to initiate a formal rulemaking to consider this Draft Policy.