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August 27, 2004

U.S. Department of Transportation
Central Docket Office
PL-401, 400 Seventh Street. S.W.
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DEPT OF TRANSPORTATION
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Reference: Docket No. FTA-2004-17196 - 30

Re: Comments of the California Public Utilities Commission Submitted June 4, 2004

Dear Sir/Madam:

The Los Angeles County Metropolitan Transportation Authority (Metro) submits these responses to the comments of the California Public Utilities Commission (CPUC) because of the significance of the issue. Metro acknowledges that the comment period ended June 7, 2004. Had Metro been made aware by the CPUC that it was intending to submit comments regarding an issue dealing with the release of certain rail accident documents that had been in discussion between Metro and the CPUC for over a year, Metro would have submitted the response presented in the following sections of this letter and attachments thereto.

In fact, the CPUC participated in a meeting with Metro and other transit agencies throughout the state to discuss comments to the very same FTA proposed regulation revisions which the Metro response addresses. While the transit agencies discussed their collective comments that they planned on submitting to the FTA, the CPUC did not share with the transit agencies its own comments for discussion, instead stating that it would be making its own comments at a later date. (It should be noted that prior to these discussions, Metro and CPUC had exchanged extensive correspondence with regard to certain documents which might be generated in a rail accident investigation which were of concern to Metro for privilege reasons).

Furthermore, Metro had provided the CPUC with suggested rule changes that would moot the issue and, as a result, Metro had every reason to believe the CPUC understood Metro's position fully and, therefore, did not include comments on this issue in the collective comments submitted by the transit agencies. It appears that Metro's belief was reasonable but mistaken.

The concern of Metro is the incomplete description of the issue which was raised to Mr. Richard W. Clark, Director, Safety and Enforcement Division, in our letter of September 17, 2002 (attached for your reference). Of particular concern is that the CPUC comments do not address fully the issues of attorney/client and self-critical evaluation privileges, nor its violation of its own notification provision set forth in its current rules with regard to public record requests for information submitted to it. Specifically, while CPUC Code §315 prohibits the admission into evidence of "any accident report filed with the Commission as evidence in any action for damages," its General Order 164-C, §6.6, allows its staff discretion to release the same information in response to a public records request. That discretion is supposed to be exercised only after notification of the request is given to the transit agency which submitted the information.

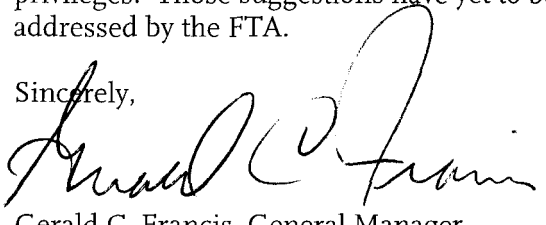
In a recent instance, the CPUC, prior to notifying Metro, released accident reports and related information for a location at which an accident occurrence was currently being litigated, resulting in needless expansion of the discovery process and its attendant additional cost. This action did not afford any opportunity for Metro to be heard in opposition to the release of certain information and, if necessary, to seek judicial review of the CPUC's decision. After explaining its concerns regarding the potential waiver of its litigation privileges by providing the information sought by the CPUC, Metro recommended to the CPUC that the entire issue of inadvertent disclosure could be resolved by amending its General Order 164-C, §6.6, by adding the following language:

> "...Commission staff shall not be discoverable and/or admissible as evidence nor shall they be used in any civil action for damages based on or arising out of matters covered therein. If a subpoena and/or public information request is received by the Commission or its staff, it will be declined, and the transit agency whose documents are being sought will be immediately notified of the subpoena or request. Only an order from a California Superior Court or Federal District Court will be sufficient to require compliance with such subpoena or request."

Metro has received no response from the CPUC in terms of whether the suggested language would resolve the concerns of Metro and meet the needs of the CPUC. Nevertheless, the CPUC continues to seek the information which Metro has explained that it cannot provide without compromising its privileges against discovery and admissibility in lawsuits brought against its rail operations.

We provide this background information to the FTA to demonstrate that the CPUC's proposed recommendation to require transit agencies to provide "all relevant accident investigation information and data to permit adequate safety oversight" be specifically defined and limited so as not to destroy an individual transit agency's privileges against improper discovery/admission of information provided to the CPUC and through that agency to the FTA. Metro has suggested alternative methods of investigating which it believes will provide the CPUC with the accident information it needs without compromising these privileges. Those suggestions have yet to be addressed by the CPUC. Hopefully, they will be addressed by the FTA.

Sincerely,



Gerald C. Francis, General Manager
Rail Operations

cc: S. Carnevale
A. Terakawa
V. Khawani

Attachment

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Reply to:
TRANSPORTATION DIVISION
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September 17, 2002

Richard W. Clark, Director
Safety and Enforcement Division
Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3298

Re: CPUC Investigations of LACMTA Accidents of March 16, 2002 and April 2, 2002

Dear Mr. Clark:

The Office of the County Counsel serves as the General Counsel to the LACMTA. In that capacity we are submitting this letter which will serve as the formal response of the LACMTA to your correspondence and request for information of May 21, 2002 and the discussion of the same with CPUC General Counsel Pat Berdge on August 5, 2002.

In your May 21, 2002 letter, you had requested, in addition to the information provided in the rail accident report which follows a format mutually acceptable to the Safety and Enforcement Division and LACMTA, that LACMTA provide additional reports which were not included with the subject rail accident reports. These additional reports include:

1. Rail Incident/Accident Reports (which shall include the train operator's statement about the accident),

2. Supervisory Employees' Incident/Accident Investigation Forms,

3. Quality Assurance Post Accident Inspection Reports,

4. Controller's Unusual Occurrence Reports,

5. Preventive Maintenance Inspection Reports,

6. Coroners Reports, and

7. Police and Sheriff Reports.

The LACMTA wishes to cooperate in providing relevant information which would not be otherwise available to the CPUC through its own investigation and which would not compromise privileges provided under State law to the LACMTA in its defense of claims/lawsuits arising from rail accidents reported to the CPUC. To that end we are quite willing to provide and have provided copies of preventive maintenance inspection reports, coroner reports and police and Sheriff reports.

The LACMTA believes that it cannot provide the other reports that you have requested without compromising its defense privileges. We propose, instead of providing those reports, that your division staff be allowed to interview the LACMTA Train Operator and the LACMTA Supervisor about the accident in the presence of counsel for the LACMTA.

Your letter further stated that the LACMTA must make available to the CPUC all interview tapes and investigative reports developed by LACMTA staff or consultants, including Fu-Gen, Inc., when investigating any accident or hazardous condition in the LACMTA system. Without addressing the overbreadth of "any accident," LACMTA respectfully declines your demand as a direct violation of privileges provided by State law. This information is developed for the purpose of ascertaining potential liability in preparation for litigation. As such, it is prepared in the presence of or at the request of counsel assigned and retained to defend against potential or existing claims/lawsuits and constitute the most basic and essential attorney-client communications and attorney work product.

The same is true for Serious Accident Program meetings. The purpose of these meetings is to analyze potential liability and to determine defense strategy, should a claim/lawsuit be filed, including what investigation must be done, what experts need to be retained, and what defenses may be viable. Again, these meetings constitute classic attorney/client communications and are the foundation of attorney work product. Mr. Berdge agreed that the strongest argument for

preserving any information LACMTA believes it must withhold can be made for preserving the confidentiality of these meetings.

The LACMTA Accident Review Boards are held for the purpose of determining whether the operator involved in an accident followed LACMTA policy and procedure or was in violation of such policy and procedure sufficient to require that discipline be imposed. As such, an Accident Review Board is an after-occurrence remedial review and a confidential personnel proceeding. The reviewing board is comprised of persons without personal knowledge of how the accident occurred who form conclusions as to whether the accident is to be deemed "avoidable" or "unavoidable" according to the standards followed by the reviewing board. As such, what the Board considers may not be consistent with what would be discoverable and admissible in court, and its conclusions are subject to further review and may not be upheld. Nevertheless, if not withheld from the CPUC or other parties other than the LACMTA and the operator, what is reviewed by the Board and its conclusions could be deemed an admission of liability by the LACMTA, and the remedial purpose of the review would become second priority to the need to avoid such potential admissions of liability, thereby hampering LACMTA's ability to conduct truly self-critical evaluations and impose discipline effectively.

It should be noted that the Public Records Act exempts personnel information and actions from disclosure. The same rationale would seem to apply here.

The LACMTA understands the specific authorities granted to the CPUC and suggests that the CPUC adopt an amendment of its applicable Code Sections which would make all documents and information produced by any agency non-discoverable and inadmissable in any State Superior Court or United States Federal District Court. However, without the assurance that the documents and/or information requested by the CPUC will not be produced pursuant to a public records request and without specific provisions recognizing the non-discoverable nature and inadmissability of such documents and/or information, the LACMTA would be waiving all of its potential litigation related privileges by complying. It would jeopardize its ability to defend lawsuits arising out of the specific incidents investigated by the CPUC and would be disclosing confidential and private personnel information of LACMTA employees in violation of their personal and constitutional privacy rights.

One way of assuring the preservation of all transit agencies' litigation privileges is to revise your General Order 164-B, §6.6, as LACMTA has recommended:

> ". . .Commission staff shall not be discoverable and/or admissible as evidence nor shall they be used in any civil action for damages based on or arising out of matters covered therein. If a subpoena and/or public information request is received by the Commission or its staff, it will be declined, and the transit agency whose documents are being sought will be immediately notified of the subpoena or request. Only an order from a California Superior Court or Federal District Court will be sufficient to require compliance with such subpoena or request."

If LACMTA's recommended revision were adopted, there would be no necessity to withhold any documents or information related to rail accidents from the CPUC.

We would point out that LACMTA's concerns about timely notification of the potential release of rail accident information provided to the CPUC by the LACMTA under the expectation that LACMTA's privileges would be protected absent at least an opportunity to object to such release is not speculation. The release of such information involving an accident location at issue in a pending lawsuit has already occurred without any notice to the LACMTA, much less prior notice (see Resolution No. L-292, Cal. P.U.C., 2001 Cal. PUC LEXIS 102, 1/18/01). This release of information without notice to the LACMTA and without any opportunity for the LACMTA to prevent its release on privilege grounds led to a needless expansion of the discovery process and its attendant additional cost.

The LACMTA is committed to cooperating in good faith with the CPUC in its investigative capacity. In this regard, the LACMTA would invite the CPUC to redefine its request for information and request to attend certain meetings and/or hearings in order to allow the LACMTA to maintain the integrity of the applicable litigation privileges referenced above and its right to complete a full investigation of each and every aspect of all serious accidents which are subject to CPUC investigations.

We look forward to your cooperation in regard to LACMTA's desire to assist the CPUC in completing its rail investigations in a timely and efficient manner without threatening our litigation privileges.

Very truly yours,

LLOYD W. PELLMAN
County Counsel

By
STEVEN J. CARNEVALE
Assistant County Counsel

SJC/sg

c: Pat Berdge