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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Rulemaking 97-04-011 (Filed April 9, 1997)
Order Instituting Investigation to Establish Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates.	Investigation 97-04-012 (Filed April 9, 1997)

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OPINION ADOPTING STANDARDS OF CONDUCT GOVERNING RELATIONSHIPS BETWEEN UTILITIES AND THEIR AFFILIATES

Summary

This order adopts rules governing the relationship between California's natural gas local distribution companies and electric utilities and certain of their affiliates. For purposes of a combined gas and electric utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity, or the provision of services that relate to the use of gas or electricity, unless otherwise exempted by these rules. For purposes of an electric utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity, unless otherwise exempted by these rules. For purposes of a gas utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or the provision of services that relate to the use of gas, again unless otherwise exempted by these rules.

Our adopted rules are quite detailed and are attached to this order as Appendix A. The rules address nondiscrimination, disclosure and information, and separation standards. They also address to what extent a utility should be required to have its nonregulated or potentially competitive activities conducted by its affiliate.

I. Background

A. Procedural Background

On April 9, 1997, the Commission issued its Order Instituting Rulemaking/Order Instituting Investigation (OIR/OII) to establish standards of conduct governing relationships between California's natural gas local distribution companies and electric utilities and their affiliated, unregulated entities providing energy and energy-related services. This Commission directed that this proceeding should also determine whether the utilities should be required to have their nonregulated or potentially competitive activities conducted by their affiliate companies.

The Commission issued the OIR/OII together with Decision (D.) 97-04-041. In this decision, we granted the motion of Enron Capital and Trade Resources Corp. (Enron), New Energy Ventures, Inc., the School Project for Utility Rate Reduction and the Regional Energy Management Coalition, The Utility Reform Network (TURN), Utility Consumers' Action Network (UCAN), and XENERGY, Inc. for such a rulemaking. The purposes of this proceeding are discussed more fully below.

In the order, we identified the rulemaking and investigation as candidate proceedings to be processed under the Commission's Resolution ALJ-170, which sets forth an experimental implementation of procedures that will become mandatory for our proceedings effective January 1, 1998, pursuant to Senate Bill (SB) 960 (Ch.96-0856).[1] In the OIR/OII, we also preliminarily categorized the rulemaking as "quasi-legislative," and the investigation as "ratesetting," as those terms are defined in Experimental Rules 1.e and 1.d, respectively.

On April 21, 1997, Assigned Commissioners Bilas and Knight, and Administrative Law Judge (ALJ) Econome, held a prehearing conference. On May 1, 1997, the Assigned Commissioners issued a ruling and scoping memo (scoping memo) as required by, inter alia, Experimental Rules 2.e and 5. The scoping memo determined that the rulemaking and investigation will be included in the sample of proceedings handled by the Commission under the Experimental Rules. The scoping memo also

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[1] The Experimental Rules and Procedures adopted in Resolution ALJ-170 establish the rules and procedures for the experiment and the creation of the sample of proceedings to which the experimental rules will apply. All further references to the Experimental Rules are to these rules.

categorized the rulemaking as "quasi-legislative" and the investigation as "ratesetting" as those terms are defined in Experimental Rules 1.e, and 1.d and 4.e, respectively. The scoping memo also confirmed that the scope of the proceeding is as set forth in the OIR/OII and D.97-04-041. Finally, the scoping memo set forth an aggressive procedural schedule leading to a Commission decision by December 31, 1997.

The OIR/OII encouraged the parties to work cooperatively to develop proposals for our consideration, and recognized that there are a number of good models from the Federal Energy Regulatory Commission (FERC) and other states for California utility-affiliate transaction rules.

On June 2, 1997, various parties submitted proposals and comments on those proposals pursuant to the OIR/OII. Parties filing proposals or comments include the Joint Utility Respondents (sometimes referred to as Respondents);[2] the Joint Petitioners Coalition (sometimes referred to as Petitioners);[3] the National Association of

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[2] The Joint Utility Respondents include Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (Edison), and Southern California Gas Company (SoCalGas). The Joint Utility Respondents filed their recommendations in the form of a motion requesting adoption of a settlement, presumably because the OIR/OII stated that the proposed rules should be developed pursuant to the Commission's settlement and stipulation rules, and should be filed accompanied by a motion. By so stating, we did not require that each June 2 filing be in the form of a settlement, but rather that the parties follow the procedural structure of our settlement rules in working cooperatively in attempting to reach an agreement involving a wide range of interests. The all-utility "settlement" represents a narrow, rather than wide-range, set of interests. These respondents also fail to agree on key elements of the "settlement," such as the definition of affiliate. We therefore treat the Joint Utility Respondents' filing as a joint proposal, similar to that of the Joint Petitioners Coalition and of other parties filing jointly.

[3] The Joint Petitioners Coalition includes Enron; New Energy Ventures, Inc.; The School Project for Utility Rate Reduction and the Regional Energy Management Coalition; TURN; UCAN; XENERGY, Inc.; Amoco Energy Trading Corporation; the Southern California Utility Power Pool, whose members include the Los Angeles Department of Water and Power and the Cities of Burbank, Glendale and Pasadena, California; the Imperial Irrigation District; the Alliance for Fair Energy Competition and Trading, whose members include the California Association of Sheet Metal and Air Conditioning Contractors National Association, Calpine Corporation, the Institute of Heating and Air Conditioning Industries, the Electric & Gas Industries Association, H2O Plumbing & Heating, Inc., Mock Energy Services, NorAm Energy Services, Inc., and the

Footnote continued on next page

Energy Service Companies (NAESCO); the Office of Ratepayer Advocates (ORA); Texaco Inc. and Texaco Natural Gas Inc. (Texaco); and TURN. Additionally, Pacific Enterprises, Enova Corporation, SDG&E and SoCalGas jointly (SDG&E and SoCalGas) and Edison submitted comments.

On June 2, 1997, several parties filed separate motions or petitions addressing their concerns. PacifiCorp, Washington Water and Power Company and Sierra Pacific Power Company (PacifiCorp et al.) jointly filed a motion for exemption from general rules on utility/affiliate standards of conduct. Southern California Water Company (SCWC) also filed a motion seeking exemption from the affiliate transaction rules. Additionally, the Joint Petitioners Coalition filed a Petition for Modification of the OIR/OII to expand its scope to cover all utility affiliates instead of only affiliates providing energy and energy-related services.

The scoping memo required parties to file comments on the proposals by July 2, 1997. Upon the request of both the Joint Utility Respondents and the Joint Petitioners Coalition for an extension of time, and upon the representation that the parties appeared near agreement on many issues, the Assigned Commissioners and ALJ extended the due date for comments until July 31. We appreciate the time and effort the parties expended in an attempt to achieve consensus, and their ability to reach agreement on some less contentious issues. The July 31 comments demonstrate that, even with the additional month of negotiation, the parties were unable to agree on many controversial issues.

On July 31, 1997, many parties submitted comments to the June 2 proposals and responded to the motions and petitions. Proponents of proposed rules also used the July 31 comments to modify their proposed rules in response to the parties' negotiations. Several proponents also proposed some new rules. We address these items more specifically in the discussion below. On August 15, 1997, the parties

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Plumbing, Heating & Cooling Contractors of California; the City of San Diego; Pan-Alberta Gas Ltd.; and the City of Vernon.

filed replies. In addition to the parties who filed the June 2 proposals, the following parties filed comments or replies: The California Association of Plumbing-Heating-Cooling Contractors (CAPHCC); the California Energy Commission (CEC); Cogeneration Association of California (CAC); Department of General Services, University of California, and California State Universities, jointly (DGS/UC/CSU); Edison Electric Institute (EEI); Mock Energy Services; PG&E; PG&E Energy Services (PG&E ES); Pacific Gas Transmission Company (PGT); and the Southern California Utility Power Pool and Imperial Irrigation District (SCUPP/IID).[4]

On August 14, 1997, SDG&E and SoCalGas filed a joint motion requesting the Commission to immediately clarify that this proceeding excludes transactions between utilities and utility affiliates and between utilities and their parent companies, except to the extent that parent companies directly engage in the marketing of products and services to customers. On September 3, ORA filed a motion requesting the Commission to consider in this proceeding a PG&E audit prepared by ORA in PG&E's holding company case.

Pursuant to Experimental Rule 9, several parties made timely requests for oral argument. Experimental Rule 9 gives a party to a ratesetting or quasi-legislative proceeding the right to make final oral argument before a quorum of the Commission if that party so requests within the time and in the manner specified in the final scoping ruling or later ruling. The Commission held oral argument on September 4, 1997, at which all Commissioners were present.

B. The OIR/OII

In the OIR/OII, the Commission recognized that the fundamental changes underway in the California electric and gas markets create a need for these rules.

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[4] The following motions to accept comments out of time are granted: (1) Edison's June 2 motion to accept its June 2 supplemental comments one day out of time; (2) SCWC's August 20 motion to accept its reply comments out of time; and (3) PacifiCorp's August 14 motion to accept its reply comments out of time.

"We acknowledged in our Updated Roadmap decision (D.96-12-088) [in our Electric Industry Restructuring proceeding] that it may be appropriate to review our affiliate transaction rules to determine whether they must be modified given potential self-dealing and cross-subsidization issues that may arise as a result of electric utility restructuring. We recognize that the existing rules governing utility relations with affiliates differ among the companies, and that the present rules may not address the manner in which electric and gas utilities and their affiliates may market services and interact in a marketplace now characterized by increasing competition. Utility entities competing to provide energy services should face uniform rules so that no advantage or disadvantage accrues to a player simply because of differing regulations. It is therefore necessary to develop new rules or standards of conduct which will govern energy utility relations with their energy affiliates. We open a rulemaking and companion investigation for this purpose. The standards of conduct or rules should (1) protect consumer interests, and (2) foster competition." (OIR/OII, slip op. at p. 2.)

The purpose of the rulemaking and investigation is to establish standards of conduct for utilities and their affiliates providing gas and electric services, both those affiliates in existence today and those that may be created after the adoption of final rules. In the OIR/OII, we intended the standards of conduct to cover interactions between utilities and their affiliates marketing energy and energy-related services. Examples of covered activities listed in the OIR/OII include utility interactions with an affiliate that (1) markets gas or electric power, or that provides (2) power plant construction and permitting services, (3) energy metering services, (4) energy billing services, (5) energy products manufacturing, or (6) demand-side management services.

The OIR/OII also directed that parties could address whether energy utilities should be required to conduct unregulated or potentially competitive activities through affiliate companies and if so, under what rules and criteria.

The OIR/OII also set forth basic standards that the rules should contain.

"*Nondiscrimination Standards* The proposed rules should provide that preference should not be accorded to customers of affiliates, or requests for service from affiliates, relative to nonaffiliated suppliers and their customers.

Disclosure and Information Standards The proposed rules should prohibit disclosure of utility and utility customer information with the exception of customer-specific information where the customer has consented to disclosure. The proposed rules should address whether the utilities should be prohibited from providing leads to marketing affiliates, and whether there should be a prohibition on affiliates trading upon, promoting, or advertising their affiliation with utilities.

Separation Standards The proposed rules should provide for the utility's and the affiliate's operations to be separate to prevent cross-subsidization of the marketing affiliate by the utility customers. The proposed rules should require the utility and affiliate to maintain separate books of accounts and records." (OIR/OII, slip op. at p. 5.)

In addition to the above standards, we also gave the following additional policy guidance.

"*Uniformity of rules is appropriate in a competitive market.* It is in the public interest to establish rules which ensure utility affiliates do not gain unfair advantage over other market players, and to ensure utility ratepayers are not somehow subsidizing unregulated activities. Utility affiliates competing with other utility affiliates to provide energy services should face substantially uniform rules so that no advantage or disadvantage accrues to an affiliate simply because of differing regulations.

Utility affiliates should not be disadvantaged relative to competitors. The purpose of the standards of conduct is to ensure utility affiliates do not gain unfair advantage over other market players, and to ensure utility ratepayers are not somehow subsidizing unregulated activities. Within this framework, the rules should foster confidence among market players that competitors have equal opportunities to gain market share.

Proposed rules should be within the power of the Commission to enforce. We recognize that enforcement is critical to fostering competition. The Commission should not be asked to adopt rules which it is not lawfully able to enforce.

Proposed rules should not conflict with the Federal Energy Regulatory Commission's (FERC's) standards, and, when taken together with the FERC's rules, should create seamless regulation. FERC has adopted

> rules applicable to energy companies and their affiliates consistent with its jurisdictional responsibilities. Any rules proposed for this Commission's consideration should not conflict with these FERC standards. Rules proposed to this Commission should pick up where FERC's rules and jurisdiction leave off so that the federal and state rules applicable to affiliate transactions leave no gaps in regulation. Rules proposed for this Commission's consideration should also create no overlap with or duplication of the FERC's standards." (OIR/OII, slip op. at pp. 6 - 7.)

C. *The Rules*

The rules we adopt are attached to this decision as Appendix A. The following sections summarize the parties' positions and discuss the reasoning behind our conclusions. Since the filings in this proceeding are quite voluminous, we concentrate on the chief points of contention and do not try to summarize every nuance in individual positions. In that regard, we concentrate on the proposals of the Joint Utility Respondents and Joint Petitioners Coalition, since most parties focused their comments and replies on these two competing sets of proposals. For ease of reference, we attach a comparison exhibit jointly prepared by the parties for the oral argument as Appendix B. This exhibit summarizes the various parties' proposals.

II. Discussion

A. *Overview*

The OIR/OII sets forth two objectives which guide our formation of the appropriate rules: (1) to foster competition and (2) to protect consumer interests. In this proceeding, we are concerned with the behavior of the Commission-regulated utilities, not the affiliates, in order to meet these objectives.

Given the current and past structure of the electric and gas industries and the obvious advantage of the incumbent utility as we move toward increasing competition, there is a clear need for these rules to promote a level playing field which is vital for competition to flourish. We consider the adoption of these rules as one of our most critical decisions in the electric industry restructuring process as we lay a solid foundation for competition.

The investor-owned utility's affiliates may be targeting the same customers that the investor-owned utility is currently serving or they might be offering services which the utility does not offer to the utility's customers. The presence of the investor-owned utility in the same service territory as a utility's affiliate raises market power concerns because of their ownership ties and the preexisting market dominance of the monopoly utility. We previously recognized that the development of competitive markets would be undermined if the utility were able to leverage its market power into the related markets in which their affiliates compete. (See D.97-05-040, slip op. at pp 64-67.)

We also articulated these concerns in SoCalGas' Performance-based Ratemaking Decision, D.97-07-054, slip op. at p. 63. "By the very nature of SoCal's monopoly position in the energy and energy services market, its access to comprehensive customer records, its access to an established billing system, and its 'name brand' recognition, it may be that SoCal enjoys significant market power with respect to any new product or service in the energy field."

We have faced the issue of enacting appropriate affiliate transactions rules before, such as when we determined appropriate conditions in the formation of a utility's holding company, or in determining appropriate rules for certain areas of the telecommunications industry. In adopting holding company structures for the investor-owned utilities when markets were much less competitive, we largely relied upon the corporate separation of the regulated and unregulated entities and some cost accounting measures to protect against anticompetitve behavior within the new markets. With the advent of a marketplace characterized by increasing competition, we wish to ensure that the utilities' market power does not discourage competition, and does not foreclose the entrance of or disadvantage electric service providers and other businesses that are unaffiliated with the utilities. Rules focusing primarily on corporate separation and cost accounting may not be adequate to overcome the incumbent's advantage.

Moreover, affiliate transaction rules for the telecommunications industry may not be appropriate to transpose wholesale to this proceeding. The nature of the telecommunications industry and the pace at which it has undergone changes toward competition are significantly different than in the electric industry. Also, when we first developed rules for the telecommunications industry as it was becoming more competitive, we still regulated the telecommunications industry primarily under cost-of-service regulation. In the energy industries, we are moving away from cost-of-service regulation, and Edison, SDG&E, and SoCalGas are regulated under some form of performance-based ratemaking.

Therefore, at the infancy of implementation of electric industry restructuring, we choose to adopt rules that generally require more separation between a utility and its affiliate, rather than rules that rely almost exclusively on tracking costs. The fewer the transactions between the utility and its affiliate, the greater confidence we have that the affiliate lacks market power. In an ideal world, the utility would treat the affiliate as it would other, nonaffiliated firms. As highlighted by our discussion of the individual rules, rules that rely more on separation, and less on cost accounting solely, can minimize the likelihood of abuses. At the same time, rules that rely on separation are easier to monitor than rules that primarily rely on reporting requirements.

The CEC described the tensions between the benefits of integration (economies of scope) and encouraging market competition. It explains that electric industry restructuring was undertaken under the assumption that the benefits of market competition would outweigh the forgone benefits of scope or scale inherent in the integrated utilities. It argues that it is essential that we maintain our commitment to creating an efficient competitive marketplace and accept that some near-term scope and scale economies may be forgone to achieve this end.

We agree with the CEC. We also note that it is not clear that the near-term savings that result, for example, from joint utility and affiliate procurement, would actually translate into lower prices for consumers or ratepayers. The interaction of supply and consumer demand in the competitive market will determine the prices of the goods sold by the affiliates and their competitors. However, the assumption that competition would require a single firm to pass along cost savings must assume the corollary that most competing firms obtain comparable cost savings. A firm which has a singular competitive advantage, for whatever reason, may retain extraordinary profits for some period rather than pass them through in the form of lower prices. Or, if an affiliate's costs are lower than other market participants or potential entrants, it could use this cost difference to undercut bids to drive out incumbents or to prevent other potential competitors' entry. Also, we question whether the ratepayers would benefit from the utility's joint purchases with affiliates until after the rate freeze is lifted. Even then, the utilities have significant market power by themselves; it is unclear to what degree ratepayers would benefit further from joint utility/affiliate purchases.

The consumer interests we seek to protect go hand in hand with promoting competition. For example, we wish to prevent cross-subsidization, so that a utility's customers will not subsidize the affiliate's operation. This is especially important in our transition to a competitive market, since such leveraging, together with a utility's market power, could inefficiently skew the market to the detriment of other potential entrants. As product promotion and advertising become more intense, we also believe it important to craft rules which prevent consumer confusion, such as the representation or implication that the affiliate assumes all the attributes of the Commission-regulated utility, merely because of its corporate connection. We also recognize that customer-specific information can become quite valuable to businesses in a competitive environment, and we wish to protect the utility's release of customer-specific information, except where the customer has consented in writing to the disclosure.

Finally, we note that several parties, primarily the Joint Utility Respondents and EEI, urge us to consider that the utilities' primary competitors will be large corporations that may be subject to few or no affiliate transaction guidelines. These parties warn that we should adopt rules which will provide a level playing field so the utilities can effectively compete against such large corporations that have few guidelines from regulators, if any.

Other parties responding to the OIR/OII indicate that competition in a variety of areas where the utility affiliates plan to compete should include more than the Joint Utility Respondents and a few large corporations. More importantly, it is this

Commission's duty to adopt rules it deems necessary to protect the public interest in California, and not to abdicate that duty because it is alleged that several potential competitors are not subject to the same rules. Also, many of the large potential competitors do not own or are not affiliated with monopoly facilities. Our role is not to promote a monopoly's competitive operations but to protect a monopoly's customers.

Significantly, the Joint Utility Respondents recognize our role in their arguments on another issue. In opposition to PacifiCorp et al.'s motion for exemption from these rules, Respondents recognize that other states' standards cannot protect California consumers because other states cannot enforce compliance in California and other states' standards may not reflect what this Commission deems necessary to protect the public interest in California.

B. *Petition for Modification*

On June 2, 1997, the Joint Petitioners Coalition filed a Petition for Modification. The petition requests that the Commission modify the OIR/OII so that the rules adopted in this proceeding cover not only utility transactions with affiliates engaged in energy-related businesses, but also utility transactions with affiliates engaged in businesses unrelated to energy.

The Joint Petitioners Coalition states that similar risks of cross-subsidization and anticompetitive transactions arise in all utility-affiliate transactions, including those involving affiliates that engage in businesses unrelated to energy. As an example, the Coalition states that a utility may allow an affiliated telemarketing company to use its phone center, and not charge the affiliate for that use. Or, a utility may insert marketing materials of an affiliated appliance repair company in the utility's customer bill, while refusing to provide the same service to the affiliate's competitors. The Coalition further argues that it is difficult to draw a clear line separating energy-related and non-energy-related services. The Joint Petitioners Coalition lists several activities which it believes fall within the definition: the manufacturing of earthquake shut-off valves, providing internet and computer repair services, heating, ventilation and air conditioning (HVAC) maintenance and installation, power quality, energy management, energy auditing, and in-home security systems. The CAPHCC echoes these concerns. Finally, the Coalition argues that since at least two sets of joint parties propose rules that are intended to apply to utility relations with all unregulated affiliates, the Commission can best economize its resources by considering and adopting rules that govern all utility-affiliate transactions.

In its June 2 proposal, the Joint Utility Respondents proposed rules that would apply to transactions between the utilities and their affiliates, regardless of the goods and services that those affiliates provide.

In their July 31 response to the petition for modification, Respondents support the concept of expanding the scope of the rulemaking and investigation, but not for the reasons advocated by the Petitioners. Rather, they believe that the scope of the rules should be expanded if the Commission adopts their proposal, which they believe is fair and balanced. However, the scope should not be expanded if the Commission adopts what Respondents describe as Petitioners' unnecessarily restrictive rules. The CEC and DGS/UC/CSU recommend that the Commission grant the Petition for the reasons set forth in the Petition. The CAPHCC concurs because of the difficulties in articulating a working definition of affiliates providing energy-related services.

The EEI maintains that the adopted rules should apply to activities involving the sale of power to jurisdictional retail customers and should not apply to other services or market segments unless the Commission affirmatively finds that market power significantly prevents entry or results in higher prices for consumers. Similarly, PacifiCorp does not support broadening the proceeding's scope.

We originally narrowed the scope of the proceeding, in part, so we could adopt rules by December 31, 1997. We wanted to address the types of affiliate transactions over which we have the most concern in the near term. We did not indicate whether or not another proceeding would follow to address utility transactions with affiliates who provide services other than energy or energy-related services. Furthermore, the current rules regarding affiliate transactions remain in place for the other types of transactions. Because the comments in this proceeding primarily discuss the market power concerns with a utility marketing energy and broadly defined energy-related services, we continue to limit the applicability of the rules we adopt. Although no party has defined energy or energy-related services, our adopted rules do so. Our definition is broad in scope, given the incumbent's general advantage and because we want to ensure that there is robust and fair competition in the affected markets.

For purposes of a combined gas and electric utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity, unless otherwise specifically exempted in these rules. In the case of an electric utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity, unless otherwise specified in these rules. For a gas utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or the provision of services that relate to the use of gas, unless otherwise specified by these rules. As we stated, we intend this definition to be interpreted broadly, and to include, for example, the services delineated in the OIR/OII as well as the selling and repair of appliances, home repair services involving electricity or gas, etc. In light of this discussion, the Joint Petitioners Coalition's petition to modify the OIR/OII is denied. In the discussion below addressing the definition of "affiliate," we address other issues bearing on the scope of the rules.

C. TURN's and ORA's Motions

On June 2, TURN filed a motion requesting a provisional ban on marketing by the affiliate of a gas or electric utility distribution company (UDC) within the utility's service territory. TURN recommends that after two years, the Commission should review whether sufficient competition has developed to justify lifting the ban. Although TURN joins the Joint Petitioners Coalition's proposal, TURN believes those proposed rules are the second-best alternative to its requested provisional ban. TURN believes that the potential harms of anticompetitive self-dealing, information sharing, cross-subsidization and other abuses in the increasingly competitive energy services markets are manifest, and far outweigh the potential benefits of one more competitor in what it believes will be a highly competitive market. Moreover, TURN believes specific rules, as opposed to a ban, will be much more difficult for the Commission to enforce. TURN believes that the Commission has the jurisdiction to institute this provisional ban under, inter alia, Public Utilities (PU) Code § 701.

On June 2, ORA also filed a motion for adoption of its proposed rules. ORA proposes that the Commission adopt one rule: Effective immediately, for the next three years during the implementation of the Commission's direct access plan outlined in D.97-05-040, customers of the natural gas local distribution companies and electric utility distribution companies shall not receive products or services from unregulated affiliates of the gas and electric utilities from which they receive distribution services.[5] ORA believes that market power concerns are much too great at this time to allow the marketing affiliate of the local utility access to the customer to offer energy or energy-related services. ORA believes its proposed rule would foster competition by encouraging new entrants, and would also be fair to the utilities, since their affiliates could do business in other service territories within or outside the state. ORA also believes that its proposal is more enforceable than specific detailed rules. ORA supports the Joint Petitioners Coalition's proposal as the best alternative to its proposed rules. ORA also supports TURN's proposal, which is similar to ORA's.

The Joint Utility Respondents oppose both TURN's and ORA's motion. They argue that the Commission considered and rejected these recommendations in D.97-05-040, slip op. at pp. 66 and 89-90, Conclusions of Law 62 and 64, and furthermore, that the Commission does not have the requisite jurisdiction to adopt such a ban. The utilities also believe they would be disadvantaged by either of these two

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[5] Alternatively, ORA suggests that the customers not be able to receive products or services from unregulated affiliates of the gas or electric utility until each utility files revised Affiliate Policies and Guidelines which the Commission finds comply with D.97-05-040.

proposals, which would adversely affect customer choice. PG&E ES also opposes TURN's and ORA's motions for largely the same reasons as those of Respondents.

In D.97-05-040, issued this past May in our Electric Industry Restructuring Proceeding (Rulemaking (R.) 94-04-031/Investigation (I.) 94-04-032), we stated:

> "We will not prohibit affiliated marketers of a UDC, or other retailers, from competing in a UDC's service area. While such a prohibition would prevent the affiliated marketer of the UDC from leveraging the market power of the UDC to its advantage, the fact that we are not adopting a phase-in of direct access will limit to some extent the market power of the UDC. By permitting all customers the ability to choose direct access, all competitors can offer their services to these customers. Allowing full implementation makes it less likely that the affiliated marketer, together with the UDC, can dominate the market." (Id., slip op. at p. 66.)

Given that we recently addressed and resolved the issue raised by TURN and ORA in the context of developing policies and rules for the new competitive energy marketplace, we do not at this time revisit our conclusions in D.97-05-040 on this issue. In D.97-05-040, in lieu of adopting the proposal now advocated by TURN and ORA, we adopted 11 interim affiliate transaction guidelines that required much greater separation of utility and affiliate operations than had occurred in the past, to address our market power concerns. We deny TURN's and ORA's motions here with the understanding that we choose at this time to facilitate open and fair competition by appropriate affiliate transaction rules.

D. *Motions for Exemptions to the Adopted Rules*

On June 2, PacifiCorp et al. and SCWC moved that they be exempted from the adopted utility/affiliate rules. PacifiCorp et al. argue that the moving utilities' presence in California is not of such magnitude as to permit them to exercise sufficient market power to influence the supply, demand, or price of electricity in California. They do not believe that their small customer base raises cross-subsidization issues, and they assert that their customers (and indeed all utility customers) are protected from cross-subsidization by existing provisions of the PU Code addressing affiliate transactions. Moreover, they stress that other Commissions that regulate these utilities have established procedures to avoid cross-subsidies from wholesale business operations. They therefore request exemption from the adopted rules in this proceeding, and propose modified standards for multi-jurisdictional utilities serving fewer than 50,000 customers. These brief, modified standards concern the sharing of information and separate accounting for marketing and sales expense associated with seeking direct access customers outside their distribution service territory.

SCWC also requests an exemption, arguing that it does not plan to market energy or energy-related products through an affiliate, and that it is primarily a water serving utility deriving only 8% of its revenues from sales of electricity. It believes compliance with these rules would pose an administrative burden, and compliance would not provide benefits of the type the Commission intends as a result of the new rules.

ORA and the Joint Utility Respondents oppose these motions. ORA believes that such motions are unnecessary. If a utility serving California does not have an affiliate governed by Commission rules, the rules would not affect the utility; however, if the utility has an affiliate engaged in activities covered by the rules, then the rules should apply, regardless of the size of the utility, affiliate, or the parent company.

Respondents do not believe that the Commission should adopt a *de minimis* standard for any jurisdictional energy utility, which in effect would compromise the protections that are owed to the customers of the utilities seeking the exemption because of their small number. They also believe that the goal of protection against cross-subsidization is furthered by a uniform application of the adopted rules, notwithstanding the size of the utility. Respondents state that standards other states may have adopted cannot protect California consumers because other states cannot enforce compliance in California, and the other states' standards may not reflect what this Commission deems necessary to protect the public interest in California.

However, the Respondents state that if the Commission limits the scope of the proceeding to affiliates providing energy and energy-related services, then SCWC would not be bound by the rules, since its affiliate provides water services. In that instance, Respondents recommend that the Commission provide a utility that does not have an affiliate addressed by the rules an opportunity to seek exemption from the application of the rules. The utility would file a motion for exemption with the Commission within 30 days after the effective date of the order adopting the rules attesting that (1) no affiliate of the utility provides energy or energy-related services within California and (2) if an affiliate is subsequently created which provides such services, then the utility would so notify the Commission and abide by the rules in their entirety. SCWC agrees to Respondents' recommendation.

General exemptions are not appropriate for the moving utilities. We are not only concerned about market power and its effect on competition, but also about the opportunity for cross-subsidization, and how that cross-subsidization might affect monopoly customers' rates and competition. We also wish to achieve uniformity in application of these rules. We therefore deny these requests for general exemptions from our rules.

As we state elsewhere in this decision, we are regulating the California utility here, not the affiliate. However, we recognize that in the case of a California utility which is also a multi-state utility and subject to the jurisdiction of other state commissions, the corporate structure of the utility may not be such that utility activities conducted wholly outside of California are separated into a separate corporate entity. Therefore, we provide that such a multi-state utility that is covered by these rules may file an application, served on all parties to this proceeding, requesting a limited exemption from these rules or a part thereof, for transactions between the utility solely in its capacity serving its jurisdictional areas wholly outside of California, and its affiliates. The applicant has the burden of proof. We stress that this is an opportunity for a limited, not wholesale, exemption to these rules.

To the extent that a utility does not have an affiliate as defined by these rules, the rules do not apply to that utility.[8] We also adopt the Joint Utility Respondents' proposal regarding a request for exemption from application of these rules if a utility believes one or more of its affiliates is not covered by the rules. (See Rule II G.) However, the filing will be by advice letter instead of by motion in this docket. All advice letters should be served on the service list of this proceeding.

E. Other Motions

On September 3, 1997, ORA filed a motion to consider in this proceeding an ORA audit of PG&E which is being conducted in Phase 2 of PG&E's holding company case, A.95-10-024. ORA argues that the report will provide the Commission with real and practical information about affiliate transactions with utilities, and will be available in early October. We appreciate ORA alerting us to this recent development, but we articulated our desire to issue a decision in this proceeding by the end of the year. Consideration of the audit would require, at the least, another round of comments from the parties and could delay the issuance of this decision. Therefore, we deny the motion without prejudice to raise it at a later time if conditions warrant. We also note that nothing in this proceeding prevents us from issuing other utility-specific rules in this area in another proceeding if we believe it is necessary. (See Rule II E.)

Under similar rationale, we also strike on our own motion a survey appended as Attachment 1 to EEI's November 17, 1997 comments, as well as all references to the survey in the comments. EEI seeks to introduce this California Electric Deregulation Survey for the first time in comments to which other parties have not had the opportunity to reply, and after the record has been developed. The procedural fairness concerns which underlie our decision to deny ORA's motion also lead us to

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[8] This ruling is consistent with the August 8, 1997 Assigned Commissioners' Ruling (ACR) addressing Kirkwood Gas & Electric Company's (Kirkwood's) motion to be exempted from participating in this proceeding. There, the ACR granted Kirkwood's motion provided that Kirkwood recognized that the failure to participate was at its own risk, and that it may be bound by the adopted rules if the rules apply to Kirkwood's situation.

strike this survey, since the schedule in this case does not afford other parties an opportunity to reply.

We address SDG&E's and SoCalGas' August 14 motion below.

F. Proposed Rules

1. Definitions

The parties have agreed on many of the definitions used in the rules. These definitions are fairly straightforward and do not require further comment. The main points of dispute regarding definitions are the definitions of "affiliate" and "utility services."

a) "Affiliate"

The first half of the Joint Petitioners Coalition's proposed definition of "affiliate" follows the definition adopted by the Commission in D.93-02-019, 48 CPUC2d 163, 173, Appendix A, paragraph G(e). The second half, describing the meaning of "control," tracks the FERC Standards of Conduct for Interstate Pipelines with Marketing Affiliates set forth at 18 CFR § 162.(a) and (b). This definition includes transactions between Commission-regulated utilities and utilities, such as gas pipelines, that are independently regulated by FERC. It also includes qualifying facilities (QFs), if the QF otherwise meets the definition of affiliate.

The Joint Utility Respondents' definition changes the percentage of control set forth in D.93-02-019's "affiliate" definition from 5% to 10% without explanation. We do not adopt Respondents' change in this respect.

Respondents disagree among themselves whether FERC-regulated entities or two Commission-regulated utilities should be included within the scope of "affiliate." SDG&E, SoCalGas, and PG&E believe that both items should be excluded from the purview of these rules. They argue that the Commission is addressing issues regarding the interaction of two regulated utilities in the Pacific Enterprises/Enova merger proceeding, while Edison and the Petitioners argue that transactions between two regulated utilities potentially raise the same concerns that justify Commission regulation here: cross-subsidization and anticompetitive conduct.

We agree, and include transactions between a Commission-regulated utility and another affiliate utility within the ambit of the rules. In the context of reviewing a merger application, the Commission has the authority to make specific modifications to the application of these rules, or to apply additional rules as appropriate.

SDG&E, SoCalGas and PG&E argue that we should also exempt FERC-regulated affiliates from the ambit of these rules. These parties state that FERC has established standards of conduct for these affiliates, and further regulation is unnecessary. PG&E also notes that the Commission currently is conducting Phase 2 of its holding company application, and any further concerns would be addressed in that proceeding. Finally, the parties are concerned that the information disclosure standards adopted in this proceeding would interfere with the flow of information to the pipeline necessary to transport natural gas.

We do not adopt the exemption for FERC-regulated affiliates. First, we make clear that the standards of conduct we adopt today apply to the Commission-regulated utility, not to the FERC-regulated pipelines. Second, we adopt an exemption to allow the utility to exchange certain operating information with these affiliates without the necessity of disclosure. (See Rule II D.) Furthermore, SDG&E's and SoCalGas' August 14 motion requesting an early determination of the definition of "affiliate" is denied.

Similarly, we do not adopt a QF exclusion, as advocated by the CAC. We are not regulating QFs by adopting these rules. Rather, the rules we adopt today apply to the regulated utility

Our adopted definition of "affiliate" largely tracks the definition set forth in D.93-02-019 with Petitioners' clarification regarding control. The Joint Utility Respondents propose that these rules should not apply to transactions between a utility and its holding company unless the parent engages in marketing activities and then only to transactions pertaining to such marketing activities. The Joint Petitioners Coalition and DGS/UC/CSU believe that this exemption could create a loophole since it is unclear what types of transactions would be covered by "marketing activities." Although Petitioners' comments and other proposed rules assume utility holding companies are covered by the proposed rules, their proposed definition of "affiliate" does not include a utility's holding company.

We include a holding company within the definition of "affiliate" only to the extent the holding company is engaged in the provision of products and services as set out in Rule II B. However, for holding companies and other utility affiliates not covered by these rules, the utility shall demonstrate in its compliance plan both the specific mechanism and procedures that the utility and holding company have in place to assure that the utility is not utilizing the holding company or any of its affiliates not covered by these rules as a conduit to circumvent any of these rules. Examples include but are not limited to specific mechanisms and procedures to assure the Commission that the utility will not use the holding company or another utility affiliate not covered by these rules as a vehicle to (1) disseminate information transferred to them by the utility to an affiliate covered by these rules in contravention of these rules, (2) provide services to its affiliates covered by these rules in contravention of these rules or (3) to transfer employees to its affiliates covered by these rules in contravention of these rules. In the compliance plan, a corporate officer from the utility and holding company shall verify the adequacy of these specific mechanisms and procedures to ensure that the utility is not utilizing the holding company or any of its affiliates not covered by these rules as a conduit to circumvent any of these rules.

Respondents propose to exclude Commission-regulated subsidiaries from the ambit of these rules. This exclusion is consistent with our Affiliate Transaction Reporting Decision, D.93-02-019, 48 CPUC2d 163, 165, and we adopt it. However, we modify Respondents' definition of regulated subsidiary to be consistent with our prior definition. Also, all interactions a regulated subsidiary has with other affiliated entities are covered by these rules.

b) Utility Services

While the parties have agreed on a limited definition of "utility services," the Joint Petitioners Coalition believes that this term should include other services provided by the utility which do not fall under the definition. We address this issue in our discussion on nondiscrimination standards below. Since we adopt Petitioners' broader definition, it is not necessary to include a definition of "utility services" in these Rules.

2. Applicability

We addressed the types of affiliates covered by our standards of conduct in our discussion above on the Petition for Modification and Exemptions, and in the discussion of the definition of affiliate.

We realize that we cannot anticipate every circumstance to which these rules may be applicable, and these rules will need to be applied to these unanticipated circumstances as they arise. It is our intent that these rules be interpreted broadly, to effectuate our stated objectives of fostering competition and protecting consumer interests. Furthermore, if any provision of these rules, or the application thereof to any person, company, or circumstance, is held invalid, the remainder of the rules, or the application of such provision to other persons, companies, or circumstances, shall not be affected thereby. (See Rule II I.)

3. Civil Relief

The parties agree that the adopted rules should not preclude or stay any form of civil relief, or rights or defenses thereto, that may be available under state or federal law. This rule is reasonable and we adopt it. By adopting these rules, we do not wish to preclude the application of certain state or federal laws (i.e., California Business and Professions Code § 17500 et seq.) designed to promote and protect fair competition. For that reason, nothing in these rules should be construed to confer immunity from state and federal Antitrust Laws or to detract from the Attorney General's prosecution of antitrust violations.

4. Nondiscrimination Standards

The OIR/OII stated that the new rules should contain nondiscrimination standards: the rules should provide that preference should not be accorded to customers of affiliates, or requests for service from affiliates, relative to nonaffiliated suppliers and their customers.

The Joint Utility Respondents and Joint Petitioners Coalition generally agree on a number of rules in this category. The main disputes center on rules concerning the offering of discounts, and whether a discount rule (if adopted) and the other consensus nondiscrimination rules should only apply to what Respondents define as "utility services," as opposed to all services offered by a utility.[7]

a) Offering of Discounts

Except for certain defined transactions allowed to realize scale economies, shared corporate support, or the utility provision of new products, the Joint Petitioners Coalition proposes that all utility transactions with affiliates be limited to tariffed products and services, or that the utility offer the same goods or services to all market participants through an open, competitive bidding process. Petitioners propose that a utility should offer access to information, services, unused capacity or supply, and discounts on the same terms to all market participants, including affiliates.

Petitioners argue their proposal is consistent with the Commission's interim rules adopted in the electric industry restructuring proceeding.[8] However, rather than limiting utility-affiliate transactions solely to tariffed items, this provision allows for non-tariffed transactions to occur if the items subject to such

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[7] The Joint Utility Respondents define "utility services" as "regulated gas and electric energy sales, transportation, generation, transmission, distribution or delivery, and other related services, including but not limited to: administration of Demand Side Management, scheduling, balancing, metering, billing, gas storage, standby service, hookups and changeovers of service to other suppliers."

[8] See D.97-05-040, slip op. at 67, paragraph 2: "Transactions between the regulated UDC and the unregulated affiliated provider shall be limited to the purchase of tariffed items generally available to other similarly situated electric service providers."

transactions are available to all competitors under competitive bidding. Petitioners believe that the rules making access to utility information and supply available to the affiliate only if available to all market participants are consistent with and extend the Commission's Rules for Gas Utility Procurement.[9]

Finally, Petitioners believe that this rule should apply to all services a utility offers, not only "utility services." Petitioners list a number of services that do not meet the utilities' definition of "utility services," such as appliance sales and repair, home warranties, security services, and HVAC installation or repair. Petitioners describe the providers of these services as small family-owned businesses, which are not equal to the utilities with respect to assets, financial strength, or marketing acumen. Petitioners are concerned that, given this advantage, the utilities will grant their affiliates preferential treatment which would allow their affiliates to link "utility services" with activities outside the narrow definition of utility services. As an example, they state that Pacific Enterprises and Enova recently announced a proposal to provide air conditioning service to the Los Angeles Unified School District if the school district would sign a long-term energy purchase contract with these companies. Pacific Enterprises and Enova dispute this, saying that the preliminary electricity proposal was not submitted by these affiliates or by their affiliated utilities, but by the Los Angeles Department of Water and Power, and there was no linkage, i.e., the customer was free to negotiate one deal without agreeing to the other.

Although the Joint Utility Respondents originally proposed a rule providing that the utility should make any discounts regarding "utility services offered to its affiliate available to similarly situated, non affiliated suppliers," their final rules are silent with respect to discounts. Respondents presumably believe that such a rule is not necessary. However, Respondents also maintain that utilities should be required to

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[9] D.91-02-022, 39 CPUC2d 321, 332, Appendix A: "Employees of the gas utilities shall not perform any functions for utility affiliates except those services which they offer to others on an equal basis, and utilities shall not share employees with marketing affiliates."

offer discounts and other benefits provided to affiliates to the non-affiliated competitors only when the competitors are "similarly situated." They believe that this restriction is supported by past Commission and FERC decisions. They also argue that the underlying costs of providing service vary for different customers, making differential discounts appropriate and economically efficient.

The Joint Utility Respondents also propose limiting these rules (and all of the rules adopted to prevent non-discrimination) to "utility services" provided to affiliates. If these standards are applied to all services performed by a utility, the utility would be at a serious competitive disadvantage with respect to other large companies, such as Enron, that have affiliated interstate pipeline companies. They argue that rules governing the pipelines do not address discounts utilities might give their affiliates for items that are not related to their tariffed services. Respondents make the additional argument that it is a difficult practical problem to determine the actual amount of a discount if the price is not a published tariff, as there may not be a standard price with which to compare. They state that existing transfer pricing guidelines governing services utilities provide for affiliates will prevent abuse.

PG&E ES states that proposals should be adopted to require a utility to duplicate its preferential treatment to an affiliate only to all "similarly situated" competitors, which it believes is generally consistent with Commission and FERC standards. EEI states that "similarly situated" customers should face the same prices, terms, and conditions for distribution service.

In D.97-05-040, we limited transactions between the regulated utility distribution company and the unregulated affiliate provider to the purchase of tariffed items generally available to other similarly situated electric service providers. Here, we agree with Petitioners to expand the scope of the interim rule to permit nontariffed transactions between utility and affiliates, provided the same goods or services are offered to all competitors under competitive bidding. (Rule III B.) However, we modify Petitioners' proposal to provide that if a utility provides supply, capacity, services or information to an affiliate, it should do so to all other similarly situated market participants on the same terms. (See discussion below.) This approach is consistent with D.97-05-040, which utilizes "similarly situated" language.

Petitioners propose a rule limiting the provision of discounts and other services to particular situations, where Respondents do not propose any rules other than to prevent any potential abuse through the use of transfer pricing guidelines. We do not agree that transfer pricing rules are adequate to prevent potential abuse in this area, because such rules attempt only to eliminate cross-subsidization, and do not address market power concerns.

We adopt a specific rule on discounts. (Rule III B 2.) We believe that Respondents', PG&E ES', and EEI's argument that discounts should reflect cost differentials is a good one in theory, if they do so in fact. For example, one competitor might be located in a city and another in a rural area, where service or commodity delivery costs might be very different. Requiring equal treatment of these two competitors may discourage discounts, and to the extent these discounts reflect actual cost differentials, this would encourage inefficient behavior. The difficulty from our point of view is discerning if these special treatments, discounts, or terms are actually cost-based, or if they are being used to give affiliates cost advantages in their competitive markets. Therefore, although we modify Petitioners' proposal to include "similarly situated" language, we also require the utility to document the cost differential underlying the discount in the affiliate discount report. Respondents' argument that it is difficult to know what the discount is, or even if there is one, if the good or service is not tariffed conflicts with a joint consensus rule regarding affiliate discount reports, in which the utility agrees to report certain discount information on an electronic bulletin board. We caution that the utilities should not use the "similarly situated" qualification to create such a unique discount arrangement with their affiliates such that no competitor could be considered similarly situated. <u>All</u> competitors serving the <u>same</u> market as the utility's affiliates should be offered the same discount as the discount received by the affiliates.

Finally, we apply this rule to all services provided by the utility. Respondents' definition of "utility services" is too narrow, and does not address all of the interactions between the utility and its affiliates that are covered by these rules. Furthermore, Respondents have not stated which type of services are appropriate to discount only to their affiliates (or which non-utility services are appropriate to tie to the provision of utility services, since they propose to limit the rule prohibiting tying in the same fashion.) Respondents state that they would be competitively disadvantaged with respect to large corporations such as Enron that have interstate pipeline company affiliates, since FERC rules regulating interstate pipeline companies do not address discounts provided to an affiliate that are unrelated to the pipeline's tariffed gas transportation service. However, we are regulating the utilities, not the affiliates, here. Moreover, Respondents do not address the anticompetitive concerns raised by Petitioners with respect to small businesses and their perceived market disadvantage if the utilities were able to provide discounts for some services only to their affiliates.

b) Other Nondiscrimination Consensus Rules

As stated above, the Joint Utility Respondents and Joint Petitioners Coalition generally agree on a number of nondiscrimination rules. The major difference is that Respondents believe the rules should be limited to "utility services," whereas Petitioners believe that the rules should embrace all services provided by a utility. For the reasons set forth above, we apply these rules to all services provided by a utility, unless otherwise stated. With that clarification, the following consensus rules are reasonable and we adopt them: Rule III A: No preferential treatment regarding services provided by a utility; Rule III B 3: Tariff discretion; Rule III B 4: No tariff discretion; Rule III B 5: Processing requests for services provided by the utility; Rule 3 C: Tying of services provided by the utility prohibited; Rule 3 D: No assignment of customers; and Rule III F: Affiliate discount reports.

5. Disclosure and Information Standards

The OIR/OII states that the rules should prohibit the disclosure of utility and utility customer information with the exception of customer-specific information where the customer has consented to the disclosure. The OIR/OII also provides that the rules should address whether the utilities should be prohibited from providing leads to marketing affiliates, and whether there should be a prohibition on affiliates trading upon, promoting, or advertising their affiliation with utilities. (OIR/OII, slip op. at p. 5.)

a) Customer Information

The Joint Utility Respondents and Joint Petitioners Coalition initially proposed similar rules regarding customer information. These parties now agree to a rule which specifies that a utility must obtain the customer's affirmative consent before releasing customer information to an affiliate, and that information shall be provided to affiliates and non-affiliated parties on a strictly nondiscriminatory basis.

NAESCO and EEI propose variations of this rule. NAESCO recommends making available certain marketing and operating information through a centralized clearinghouse. NAESCO further recommends that to the extent any affiliate requests customer-specific information at the behest of the customer, the utility can share that information with the requesting affiliate on an exclusive basis. EEI believes that customer-specific information should be disclosed only to those whom the customers has so designated. CAPHC believes that a utility should not provide an affiliate customer-specific information. The consensus rule is reasonable and we adopt it, subject to the following modification and discussion. (See Rule IV A.)

Our adopted rule provides that a utility must receive the customers' affirmative written consent before releasing this information. We interpret this phrase to mean the customers' written affirmative informed consent, freely given. For example, we would not view affirmative customer consent to mean a "default" mechanism of consent, so that customers are deemed to have consented to the release of such information unless they state otherwise.

Petitioners also propose a rule that a utility shall not request authorization from its customers to pass on customer information to its affiliate. Respondents believe that the consensus rule regarding customer information addresses the matter and that no additional rule is required.

We see merit to Petitioners rule, provided that it is amended to prevent the utility from requesting customer authorization to pass on customer information exclusively to its affiliate. If a utility were allowed to do so, it could circumvent the intent of the consensus customer information rule. However, we do not have the same concerns if a utility solicits customer consent to pass on information to its affiliates and non-affiliates alike, in a nondiscriminatory manner, provided that customer consent is written, affirmative, informed and freely given. We therefore adopt Petitioners' proposed rules as modified. (See Rule III E 5.)

b) Operating, Marketing, and Proprietary Information

The Joint Utility Respondents' rules prohibit disclosure of marketing or operating information to affiliates on an exclusive basis, but expressly allow transfer of proprietary information on an exclusive basis if the utility is properly compensated. The proposed rules further state that a utility should not provide information to its holding company for ultimate transfer to its affiliates in contravention of the rules.[10] Respondents' rules do not impose restrictions on transfers of non-confidential information exclusively to an affiliate. Respondents argue that the utility acquires operating and marketing data as a result of its monopoly function, so dissemination of this information may properly be restricted. However, they do not

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[10] Respondents define "operating information" as "Gas Utility Operating Information consisting of non-public information and data concerning daily deliveries, storage inventory levels, injection/withdrawal information, and receipts. Electric Utility Operating Information consists of that information and data specified by FERC Order No. 889."

Respondents define "marketing information" as "Non-public information and data concerning Customer-segment-specific market assessments, analyses, and marketing studies which the Utility has acquired or developed in the course of its provision of utility services."

Respondents define proprietary information as "patents, trade secrets (as defined in California Civil Code, Section 3426.1(d)), copyrights, other marketable technologies and the like, which the Utility has acquired or developed in the course of its provision of Utility Services."

believe there is justification to prevent the utility from sharing non-confidential information freely with its affiliates on an exclusive basis.

Respondents also believe that providing proprietary information to affiliates, with proper compensation, does not confer an unfair competitive advantage on the utility's affiliates, but rather reflects the benefits of affiliation with a diversified enterprise. The utilities cite past Commission holding company decisions and allude generally to certain FERC rules which place no restriction on the transfer of proprietary information, provided that appropriate compensation is paid.

The Joint Petitioners Coalition finds Respondents' proposal flawed primarily because the defined terms of operating and marketing information are too narrow, and may create loopholes regarding items that are not specifically listed. To avoid this problem, Petitioners propose a broader rule encompassing all non-customer-specific information. They give illustrative, but not inclusive, examples of what may be included within the ambit of the rule (i.e., information about a utility's natural gas or electricity purchases, sales, or operations or about the utility's gas or electric-related goods or services or other utility-related goods or services.) This proposed rule further provides that the utility can make the information available to its affiliate only if the utility makes it available contemporaneously to other service providers and keeps the information open to public inspection. SCUPP/IID propose a rule similar to that of petitioners, with which the CAPHCC concurs. NAESCO proposes that the utility should publish marketing or operating information which it shares with its affiliate through a centralized information clearinghouse.

The Petitioners oppose the Joint Utility Respondents' proposed rule allowing exclusive exchange of proprietary information between a utility and its affiliate. They believe that this rule permits utilities to offer a competitive advantage to their affiliates at ratepayer expense. Under this proposal, since copyrights are relatively easy to obtain, the utilities would be allowed to share certain computer software programs developed at ratepayer expense with their affiliates on an exclusive basis. Petitioners argue that this rule would permit the very type of activity this rulemaking was designed to prevent. DGS/UC/CSU also oppose this rule, but add that if the Commission does permit such transfers, the transfers should be limited to circumstances in which the utility can demonstrate that the proprietary information was developed exclusively from shareholder resources and providing the information does not give rise to competitive concerns. NAESCO believes that sharing of proprietary information related to strategic planning or retail markets for energy services should not be permitted. Only sharing of proprietary information developed exclusively at shareholder expense should be permitted.

We adopt a modified version of the Joint Petitioners Coalition's recommended rule, since Petitioners' recommendation better assures us that the OIR/OII's goal that the rules should "prohibit disclosure of utility...information" is met. (OIR/OII, slip op. at p. 5.) However, we agree with Respondents that Petitioners' proposal is too broad in that it seems to address all non-customer information, including publicly available information. We therefore limit the application of this rule to non-public information. Based on some utilities' concerns that the rule will interfere with the flow of information necessary to transport natural gas on the gas pipeline, we also note an exception to this rule to permit the exchange of certain operational information between a utility and its FERC-regulated affiliate, to the extent the affiliate operates an interstate natural gas pipeline. (See Rule II D and discussion at Section II F 1 above.) We also permit the exchange of proprietary information on an exclusive basis, provided the utility follows all Commission-adopted pricing and reporting guidelines for such transactions, and it is necessary to exchange this information to provide the types of corporate support services permitted in Rule V E. We also permit the exchange of information pursuant to D.97-10-031.

We do not adopt Respondents' broad proposed rule permitting an exchange of all proprietary information with appropriate compensation. It is certainly not clear on this record that all, or any, proprietary information was supported exclusively from shareholder resources. Even if that were the case, there are competitive concerns raised by a blanket approval to share proprietary information with affiliates, for instance, to the extent that the opportunity for development of the information arises from the provision of monopoly regulated utility services. The Joint Utility Respondents' definition of proprietary information is that which the utility has acquired or developed in the course of providing utility services. By definition, Respondents' proposal would afford affiliates an unfair competitive advantage because it would give them exclusive access to information developed by the utility in the provision of its monopoly services. For example, other competitors not affiliated with a regulated utility would not have the opportunity to benefit from information that can be developed only by an entity providing regulated monopoly services.

c) Customer Referrals

The Joint Utility Respondents' proposed rule prohibits utilities from providing leads to their affiliates. They define a lead as customer information provided without the customer's consent. However, under the category of referrals, Respondents' proposal would permit the utilities to inform customers who inquire about non-utility services that their affiliates offer such services, provided that the utility first informs the customer that similar services are available from non-affiliated suppliers, and that the provision of utility services is not contingent upon or tied to the customer's taking the affiliate's goods or services. Respondents' proposal also requires that, unless the customer declines, the utility will also provide that customer with a then-current list of energy marketing providers when it makes the referral to its affiliate. Respondents argue that their proposals facilitate customer choice, and that customers will be aware that their choice of a competitor will not adversely affect the utility's provision of regulated service. They argue that proposed rules that prohibit utilities from providing this information are anticonsumer. Moreover, Respondents state that Commission precedent in the telecommunications area permits local exchange companies to advise customers of the availability of competitive enhanced services from their affiliates. Respondents further believe that there is no justification to prohibit referrals to affiliates that offer services other than direct access (i.e., internet access and home security) where competition is already robust. EEI supports Respondents and believes Respondents' proposed rule facilitates customers' choice.

The Joint Petitioners Coalition proposes three separate rules. Petitioners' proposal prohibits the utility from giving any leads to an affiliate. Petitioners state that a lead includes all sharing of customers' information with an affiliate, whether or not the customer provides consent or whether or not the utility solicited the consent. This proposed rule would also prohibit a utility from (1) soliciting business on behalf of its affiliate; (2) acquiring or providing information to its affiliate; (3) sharing certain marketing information with its affiliate; (4) requesting customer authorization to pass on customer information to its affiliate; (5) giving any appearance that the utility speaks for the affiliate or that the customer will receive preferential treatment from the utility if it conducts business with the affiliate; and (6) giving any appearance that the affiliate speaks for the utility. Petitioners argue that this detailed enumeration of prohibitions is necessary to ensure that affiliates compete with other market participants on an equal basis, without special assistance being provided, either directly or indirectly, from the utility.

When the customer asks the utility about alternative suppliers, Petitioners would require the utility to give the customer a Commission-approved list of all providers of the particular goods or services at issue. If maintaining this list would be a burden due to the number of service providers, the utility could refer customers to a generally available listing of service providers, such as the Yellow Pages. Petitioners believe that if the Commission adopts Respondents' proposal, Respondents will interpret their proposal to permit a utility to solicit customer consent for a referral.

The Joint Petitioners Coalition's proposal also would restrict the utilities from providing advice or assistance to consumers regarding its affiliates and other service providers. Petitioners believe that this rule is necessary to prevent discrimination and promote fair competition. For example, this rule would prevent "consulting" types of services which tend to promote the affiliate over other service providers. CAPHCC concurs with Petitioners' proposals. Respondents do not believe this rule is necessary.

DGS/UC/CSU support a prohibition against providing leads to utility affiliates. NAESCO believes that to the extent that an affiliate requests such information from a utility at a customer's behest and in conjunction with a marketing effort initiated by the affiliate and directed to that customer, the utility is not required to make that information public to other providers. However, to the extent the utility receives such a request from a non-affiliated provider, the utility should not share with its affiliate the fact that it has received such a request.

PG&E ES believes that the Petitioners' recommendation overreaches in that it would prevent a utility from acknowledging its affiliate. The requirement that utilities provide the customer with a list of service providers for electricity and gas is a useful way of dealing with referrals in a nondiscriminatory manner. However, PG&E ES believes that Petitioners' rule would prevent even casual conversation between customers and a utility representative, for example, when a utility answers a customer's inquiry about to which affiliate a utility employee has been transferred. However, the Respondents' proposal is too lenient, and permits unlimited referrals as long as there is a disclaimer and the referral is accompanied with a list of all service providers. The list would in all likelihood be faxed or mailed after the initial referral is made. PG&E ES notes that this practice is too permissive: once the referral to an affiliate is made, any list becomes irrelevant. This practice would give the utility affiliate an unfair advantage which it would find hard to overcome in other states. PG&E ES does not offer its own suggested language changes to the proposals.

With respect to rules on leads, all parties agreed with the general concept that a utility should not provide leads to its affiliates. However, the Joint Petitioners Coalition's proposed language more thoroughly enumerates the specific situations in which a utility should not favor its affiliate. We find the detailed language preferable at this stage of electric industry restructuring and adopt it, subject to our discussion in Section II 5 a above. (See Rule III E.)

With respect to referrals, we agree that permitting the utility to act as its affiliate's referral service would give affiliates an unfair advantage which is hard to overcome. Once the utility has made the referral to its affiliate, any subsequently provided list is irrelevant. This rationale applies equally to all affiliates covered under these rules. We adopt Petitioners' proposal as modified to provide that the Commission will authorize a list of service providers, or approve an alternate procedure for referrals, in response to the utilities' advice letter filings. (See Rule IV C.)

While we recognize PG&E ES' concern that the rule might prevent casual conversation about a utility and its affiliate, it is more important to adopt a rule addressing all the problems we perceive, rather than to create loopholes to exempt an isolated instance from the rule's coverage. We note that PG&E ES did not propose any alternative language.

Respondents argue that their proposal is consistent with our treatment of referrals in the telecommunications area. However, many of the cases they cite deal with the proper amount of a referral fee to impose upon the utility. Moreover, referrals are more tightly restricted in some areas of telecommunications. (See e.g., 47 U.S.C. § 274 (c) (1) and (2), which permits only inbound referral services between a Bell operating company and its affiliate providing electronic publishing, provided that such services are available to all electronic publishers on nondiscriminatory terms.)

The Joint Petitioners Coalition also requests a rule requiring approval by this Commission of any material distributed by a utility as part of its consumer education program. The utilities are preparing consumer education materials as a part of our electric industry restructuring, and we will address issues concerning the content of that information in the restructuring proceeding.

d) Recordkeeping

The Joint Petitioners Coalition propose a rule requiring the utility to maintain contemporaneous records documenting all tariffed and non-tariffed transactions with its affiliates, such as waivers of tariff or contract provisions, and all discounts. Such records should be maintained for three years and made available to third parties upon 24 hours' notice.

Respondents believe that the Commission's existing reporting requirements for affiliate transactions are adequate, and that Petitioners proposed rule is unnecessary and burdensome. For example, Respondents believe that 24 hours is too short of a time to have a full accurate record of a transaction prepared, given the lag time in recording and the possible delay in determining the transfer price. Respondents are also concerned with providing possibly competitively sensitive information to any third party, without knowing why they want the information. Respondents also object to the rule including tariffed services. They argue, without specific reference, that existing mechanisms are sufficient to police the provision of service in a manner in variance with an effective tariff.

Respondents do not point to an existing rule that requires detailed, contemporaneous documentation of affiliate transactions. Our Affiliate Transaction Reporting Requirement Decision, D.93-02-019, 48 CPUC2d 163, provides that certain annual reports be filed with the Commission detailing a utility's interaction with its affiliates and these requirements are not superseded by our adoption of this rule. We agree with Petitioners that detailed recordkeeping and reporting rules are necessary to reasonably enforce these rules. Although the requirements of the Affiliate Transaction Reporting Requirement Decision and the annual audit adopted in this decision are monitoring tools to ensure compliance, these mechanisms will not ensure effective compliance because they are generated on an annual basis. We therefore adopt Petitioners' proposal, with the following modifications. (See Rule IV F.)

We provide that the information should be made available for third party review upon 72 hours', instead of 24 hours', notice, or at a time mutually agreeable to the utility and third party. This is a compromise between utility personnel restraints and our desire for effective monitoring in a timely fashion. Respondents also state that they should have the prerogative to assert, subject to Commission oversight, that certain information is competitively sensitive and private, without giving any examples of what types of transactions should be kept confidential. Petitioners give one example. They state that D.97-06-110 adopted certain rules in compliance with PU Code § 489.1, which exempts from public inspection certain contracts negotiated by a gas corporation. Petitioners note that D.97-06-110 deferred the affiliate issue to this proceeding, and argue that disclosure of all utility-affiliate contracts is necessary to help discipline the utility-affiliate relationship.

We do not modify D.97-06-110 in this decision. Moreover, since that decision sets forth a detailed method for a utility to seek to exempt certain contracts from public disclosure, the utility should follow the procedure set forth in D.97-06-110 if applicable. However, the utility should serve the third party making the request in a manner that ensures the third party receives the utility's D.97-06-110 request for confidentiality within 24 hours.

e) Other Consensus Rules

The Joint Utility Respondents and Joint Petitioners Coalition agree to a rule that permits release of non-public information from suppliers to affiliates or non-affiliated entities only if authorized by the supplier. The Petitioners initially did not propose such a rule, but agreed on it for this proceeding. CAPHCC believes that if a supplier does not seek to provide information to third parties, the utility may not provide that information to the affiliate only. This rule provides some protection of supplier-provided information in that such information would be released only upon the supplier's consent. Furthermore, it permits information to be released to non-affiliated parties with the supplier's consent, and permits the supplier to designate to whom the information should be released. However, a utility should not actively solicit the release of such information to its own affiliate in an effort to keep such information from other non-affiliated entities. The supplier's consent should be affirmative and written. We adopt the rule as so clarified. (See Rule IV D.)

Respondents and Petitioners agree to a rule that requires a utility to maintain affiliate contract and bid information for at least three years. This is a compromise from Petitioners' original proposal, which required disclosure. We find this rule reasonable and adopt it with the following modification. The utilities should maintain this information for no less than three years, and longer, if this Commission or another government agency so requires. (See Rule IV G.) This is consistent with a consensus rule, which we adopt as Rule IV H. This rule provides that to the extent that FERC requires more detailed information or more expeditious reporting than the rules adopted in this proceeding, nothing in our rules should be construed to modify the FERC rules.

6. Separation Standards

The OIR/OII also requires the rules to address separation standards. We stated that the rules should provide for the utility's and the affiliate's operations to be separate to prevent cross-subsidization of the marketing affiliate by the utility customers. The proposed rules should require the utility and affiliate to maintain separate books of accounts and records. (OIR/OII, slip op. at p. 5.) We also recognized that interested parties may differ on how extensively each of these standards should be applied, and urged the parties to attempt to craft joint rules. This area proved to be the most contentious among the parties, and they were unable to reach agreement on a number of key issues.

The CEC described the tensions between the benefits of economies of scope and scale and market competition that we face on all separation issues.

> "In determining an appropriate separation between competitive firms or activities and a regulated monopoly, the Commission must consider the inevitable tension between allowing benefits of affiliation (economies of scope) and market competition. Electric industry restructuring was undertaken on the assumption that the benefits of market competition would outweigh the foregone benefits of scale and scope that were inherent in the integrated utilities. It is absolutely essential that the Commission maintain its commitment to creating an efficient competitive marketplace and accept the fact that some near-term scale and scope economies may need to be foregone in order to achieve this end. Consequently, limitations on utility and affiliate transactions are necessary to create a level playing field that produces greater market efficiencies. The question facing the Commission is the extent of the structural separation of

> the utility and its affiliate." (CEC July 31 Comments at p. 8, footnote omitted.)

We adopt rules in this area to protect against cross-subsidization and to promote competition. Also, as stated in Section II A above, it is not clear that the near-term savings that some parties state would result from scope or scale economies would actually translate into lower prices for the benefit of consumers or ratepayers. The adopted rules strike an appropriate balance and will prevent cross-subsidization and promote future competition.

a) Name and Logo

This issue sharply divides the parties. Joint Utility Respondents' proposed rule states that there are no restrictions on the ability of affiliates to use, trade upon, promote, and advertise their affiliation with a utility, or to use the utility or corporate brand, name and logo. EEI and PG&E ES generally agree with Respondents. The parties advocating no restrictions on the affiliate's ability to use the utility's name and logo make the following arguments: (1) the Commission does not have the authority to regulate the utility name and logo because they are shareholder, not ratepayer, assets; (2) prohibiting the affiliate's use of the utility's name and logo would violate the utility's First Amendment right to commercial speech; (3) consumers benefit, in the form of lower costs, more product innovations, and higher service quality, from permitting affiliates to use the utility's logo; and (4) there are other, less onerous ways to resolve and mitigate market power issues.

PG&E ES states that to the extent that those opposing an affiliate's use of the utility's name and logo base their concerns on customer confusion, it is amenable to suggested rules avoiding such confusion. Although it supports Respondents' rule, PG&E ES believes that utilities should require their affiliates to clearly state that they are not regulated by the Commission and that the affiliates' products and services are completely separate from those of the local utility. Neither the utility nor the affiliate should indicate that dealing with the affiliate will provide any advantage with the utility.

The Joint Petitioners Coalition propose a rule which prohibits: (1) a utility's name, logo, trademark or other form of corporate identification to resemble that of the affiliate; (2) the utility's and affiliate's logo, trademark, or other form of corporate identification to appear on documents, property, or merchandise sold by the other; (3) the utility from trading upon its affiliate's affiliation with the utility and using the utility's name in material circulated by the affiliates; and (4) the utility from representing that the affiliate will receive any different treatment than other service providers as a result of the affiliate's affiliation with the utility. CAPHCC supports Petitioners' proposal. Parties advocating that use of the utility's name and logo be prohibited or strictly limited make the following arguments: (1) The issue of whether the utility name and logo is a shareholder or ratepayer asset should be reassessed in a competitive environment; (2) PU Code § 701 gives the Commission broad authority to restrict the use of a utility's assets, regardless of the outcome of the ownership issue; (3) past experiences with an affiliate's use of a utility's name and logo demonstrate that the utility "name brand" resulted in an affiliate's unfair competitive advantage, and created in customer's minds an implied warranty either that the utility is standing behind the affiliate's products and services or that an affiliate's products and services are regulated and are therefore more reliable; and (4) market power concerns require strict limitations on the affiliate's use of the name and logo.

DGS/UC/CSU are concerned that unlimited affiliate usage of the utility's name and logo could create an improper implication that the provision of regulated services will be related to taking of competitive services from the affiliate. NAESCO believes that unlimited usage by an affiliate of a regulated utility name and reputation raises the same concerns it believes exist with joint marketing: customer confusion, opportunities for subtle forms of tying, and difficulties in enforcing prohibitions against tying. Both DGS/UC/CSU and NAESCO believe that at a minimum affiliates making use of the regulated utility name and reputation must be required to indicate clearly that the provision of regulated services is in no way related to accepting services from the unregulated affiliate.

We agree with Petitioners that the issues surrounding the affiliate's use of the utility's logo in this case do not revolve around ownership, and do not revisit that issue here. Nor do we believe that the First Amendment precludes us from prohibiting the affiliate's use of the utility's name and logo, if we believed that course of action to be appropriate to further our interest in a competitive market. (See e.g., *Friedman et al. v. Rogers*, 440 U.S. 1 (1979).

We are concerned about competition, and must determine whether permitting the affiliate to use the name and logo of the utility is anticompetitive by virtue of its name brand recognition and by causing customers to be confused or misled. We articulated our general concerns regarding market power in this situation in SoCalGas' Performance-based Ratemaking Decision, D. 97-07-054, slip op. at 63:

> "By the very nature of SoCal's monopoly position in the energy and energy services market, its access to comprehensive customers records, its access to an established billing system and its 'name brand' recognition, it may be that SoCal enjoys significant market power with respect to any new product or service in the energy field."

Petitioners point to several affiliate marketing campaigns as examples of why we should not permit utilities to share their name and logo with affiliates. One case involves Pacific Enterprises Energy Services, a unit of SoCalGas' parent company. In that instance, despite SoCalGas' representations to this Commission that it would no longer sell earthquake shut-off valves, the SoCalGas logo appeared prominently in advertising for the shut-off valves, and on the shut-off valves themselves, even though the valves are manufactured by an unregulated affiliate. For instance, a brochure for these valves states that the valves are "brought to you by Pacific Enterprises, the people who bring you The Gas Company." (Petitioners' 7/31 Comments, Exhibit E.) As a result, Petitioners state that Pacific Enterprises Energy Services captured 83% of the shut-off valve market. In Exhibit F to Petitioners' Comments, an article notes that Pacific Enterprises Energy responded to accusations of unfair competition by noting that their competitors did not actively market their valve, while competitors argued that it was futile to go up against a manufacturer that has the imprimatur of the gas company.

Petitioners also point to a brochure for Edison On Call, an Edison affiliate which provides home appliance repair service which uses the Edison logo liberally. At the bottom of the last page of a multipage brochure, under the title of "what our lawyers make us say," the brochure states that Edison On Call is offered by Select Home Warranty Company, a subsidiary of Edison International. However, the main body of the brochure assures prospective customers that the bill will be on their Southern California Edison electric bills. (Petitioners 7/31 Comments, Exhibit I.)

Finally, Exhibit H of Petitioners' comments contains a brochure from PG&E ES, where PG&E ES states that it is a strong national company backed by the depth, experience and resources of PG&E Corporation. The PG&E logo is used throughout the brochure. On the next page is a statement that "more than 21,000 men and women of PG&E provide natural gas and electric services ..." Although there may be 21,000 PG&E employees, the implication from this advertisement is that 21,000 people work for PG&E ES, or that the utility somehow stands behind PG&E ES. (When asked about this advertisement at oral argument, PG&E's representative agreed he was not comfortable with it, and noted that PG&E has taken steps to remedy this type of presentation in its current marketing materials.) (See Transcript of 9/4/97 oral argument, pp. 139-141.)

Based on these concerns, Petitioners believe that a prohibition of the affiliates' use of the utilities' name and logo is the only effective means to ensure that the utility does not gain an unfair advantage by virtue of its affiliation with a monopoly utility. We agree that given these examples, and the incentive for all affiliates to mount aggressive advertising campaigns as competition develops, these rules must address the terms and conditions of a utility's and affiliate's shared use of name and logo.

Although it is a very close question, we are not firmly convinced at this time that it is an appropriate remedy to prohibit the utility from sharing its name and logo with its affiliate. Our other rules mandate separation between most of a utility's and affiliate's activities, and we prefer to address our competitive concerns on the name and logo issue at this time through appropriate disclaimers, to provide the customer with more information, not less. This is consistent with our statement in D.97-05-040, slip op. at p. 67, where we recognized that "the shared use of a utility's name is but one example of the need for the utilities and their unregulated affiliates to demonstrate that the operations of the affiliate is sufficiently and genuinely separate from that of the utility to prevent the use of utility resources and its attendant market advantages." Again, we emphasize that prohibiting the shared use of the name and logo is one means to achieve this separation, which we may have adopted if our other rules addressing separation were different.

However, Respondents do not assist us in developing appropriate rules, but merely assert that shared use of the name and logo should not be a concern. EEI believes that regulating the use of brand names by utility affiliates should be guided by what is best for consumers. The use of brand names generally permits companies to diversify into new or related market segments at a lower cost (resulting in lower consumer prices), engage in aggressive product development and innovation, reduce transaction costs, and offer a certain level of reliability. However, the EEI has not effectively explained why there are no market power concerns.

Respondents contend that the affiliate's right to use the utility's name promotes consumers' interests because the corporate family, particularly the utility, will have an incentive to maintain high standards for all services. However, it is unreasonable to assert that the corporate family has no incentive to maintain high-quality services if there were no common name or logo, or that consumers would not realize the corporate relationship without a common name and logo. Also, the Commission has required the high service level for the regulated utility. Respondents then point to their proposed Rule 5.O as adequate customer disclosure. Proposed Rule 5.O, however, addresses only coordinated responses to customer requests, and not what disclosures generally should be required. Customers should not be required to ask questions to clarify a confusing or possibly misleading promotion. They should not be confused or misled to begin with.

Therefore, we require that a utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

- the affiliate "is not the same company as [i.e., PG&E, Edison, the Gas Company, etc.] the utility;
- the affiliate is not regulated by the California Public Utilities Commission; and
- "you do not have to buy [the affiliate's] products to continue to receive quality regulated services from the utility." (See Rule V F.)

The application of the name/logo disclaimer is limited to the use of the name or logo in California.

This means that the disclaimer must appear clearly and legibly the first time in an advertisement that the name or logo appears, even if the logo is used alone (i.e., stamped on a particular good.) If the disclaimer is not clearly legible, then the promotion should not be used.

Furthermore, we adopt the rule that the utility, through its actions or words, should not represent that its affiliates will receive any different treatment than other service providers as a result of the affiliates' relation to the utility.

b) Joint Marketing

Parties' Positions

The issue of joint marketing, similar to the logo issue, sharply divides the parties. The Joint Utility Respondents believe that, under certain conditions, a utility and its affiliates may coordinate their respective service offerings to the same customers. Such coordination includes joint responses to requests for proposals, joint trade show booths, and "the like." Respondents' proposed conditions include requirements that: (1) utility representatives must inform the customer that they work for the utility, not the affiliate; (2) utility representatives must inform customers that the affiliate offers competitive services and about the customers' ability to receive utility services without taking the affiliates' services; (3) utility and affiliate offerings must be separately priced so that a customer may select one without the other; and (4) the utility and affiliate may not participate in unsolicited sales calls to customers in the utility's service territory.

Respondents argue that utility affiliates would be disadvantaged if the utility can attend meetings between the customers and non-affiliated service providers but cannot attend such meetings between the affiliate and the customer, especially when many customers have questions regarding direct access and how utilities and energy service providers interact in the new competitive market. They also believe that customers should be able to request a joint proposal. Respondents believe that their proposed rules protect customers because of the required disclosures regarding the separation of the entities. They also briefly state that restricting a utility's ability to engage in coordinated responses would violate the utility's First Amendment rights.

Edison believes that the use of space in the billing envelope is a legitimate way of informing customers of the connection between the utility and its unregulated affiliates. Nonutility affiliates can reach customers through their own direct mailing campaigns. Edison maintains that the First Amendment prevents the Commission from imposing undue restrictions on its ability to engage in truthful commercial speech that promotes its affiliates' offerings. Edison also argues that conditioning a utility's right to engage in speech relating to affiliates on its agreement to carry similar promotional materials developed by nonaffiliate competitors is inappropriate, since the state cannot force a utility to associate itself with speech that it considers repugnant. EEI also supports Respondents' proposal, arguing that Petitioners' proposed rules are overbroad.

The Joint Petitioners Coalition's proposes that the utility shall not (1) provide its affiliates advertising space in the utility billing envelopes or in any other form of utility communication and (2) participate in joint advertising or marketing with its affiliate. The proposed rule enumerates but does not limit prohibited activities, including joint sales calls and joint requests for proposals, any joint activity (such as trade shows, conferences, or other marketing events held in California or contiguous states), and joint correspondence, communications, and meetings with any existing or potential customer. Petitioners propose that at a customer's unsolicited request, the utility may participate on a nondiscriminatory basis with its affiliate to discuss technical or operational subjects regarding the utility's provision of service to the customer.

Petitioners believe that permitting the utilities to promote their affiliates in a bill insert contravenes the principle that utilities should not subsidize affiliates' activities. They believe that a rule prohibiting joint advertising or marketing is appropriate and consistent with D.97-05-040, slip op. at p. 68, "Joint marketing of electrical services shall be prohibited." Petitioners also believe that it is inappropriate for a utility and its affiliate to make a joint sales call or to negotiate with the same customer at the same time. They support the provision permitting the utility to meet jointly with the affiliate regarding operational matters, since these are the types of meetings that the utility would have routinely with other entities. Petitioners believe that this provision meets PG&E ES' concerns on this issue. However, they believe that the joint activities proposed by Respondents are unreasonable and that the proposed disclaimer language will not avoid customer confusion.

DGS/UC/CSU are concerned about joint offerings by the utility and its affiliates in light of the potential for consumer confusion and improper subtle suggestions that the provision of regulated services will be related to taking service from the utility's affiliate. DGS/UC/CSU believe that joint marketing significantly hampers enforcement of anti-tying requirements and creates a need for much more ongoing Commission vigilance in enforcing the rules. NAESCO opposes proposals for the utilities to make joint offerings and to jointly market for the same reasons as DGS/UC/CSU. Additionally, NAESCO believes that such joint actions could have the effect of making competitive information that should be equally available to all energy service providers, available only to utility affiliates. ORA opposes Respondents' proposal, arguing that it would give the affiliate an unfair advantage compared to non-utility service providers, since the non-utility service providers would not have access to the utility's transmission and distribution staff. The CAPHCC believes that the rules should not permit utilities to jointly market with affiliates, including through the billing envelope.

PG&E ES believes both proposals are flawed. Petitioners' original proposal does not distinguish between solicited and unsolicited meetings with customers. PG&E ES also argues that Petitioners' proposal stigmatizes the affiliate and makes it the only entity with which a utility cannot appear in a joint meeting. Although not proposing specific language, PG&E ES believes that the utility should be available to meet with customers at the customer's request regardless of whether the marketer attending the meeting is an affiliate or an affiliate's competitor, provided that the utility treats all in a nondiscriminatory fashion. However, PG&E ES believes that utilities and affiliates should be able to jointly market in trade shows, so long as it is clear which entity is which, and customers are told there will not be a benefit from the utility for taking the affiliate's competitive services. PG&E ES believes this exception is appropriate, since trade shows present all competitive options at the same time and target more sophisticated large corporate customers.

Discussion

In light of our determination on the issues of joint use of name and logo, we believe that Petitioners' rule, as modified, strikes an appropriate balance by allowing the utilities to respond to customer inquiries without allowing the utilities to provide preferential treatment to their affiliates. Petitioners have addressed one of PG&E ES' concerns by proposing that a utility may participate in joint meetings with its affiliate on a nondiscriminatory basis, in non-sales meetings to discuss technical or operational subjects regarding the utility's provision of transportation service to the customer. Because the utility's attendance at these types of joint meetings would be nondiscriminatory, it would be fair to affiliates and unaffiliated competitors alike.

Joint marketing by a utility and affiliate creates opportunities for cross-subsidization, and also has the strong potential to mislead the consumer, for example, by implying that taking affiliate services is somehow related to the provision of the monopoly utility service. Joint marketing opportunities, especially when coupled with the joint use of a name and logo, will promote customer confusion by allowing affiliates to capitalize on the public perception that their products are closely associated with the regulated utility's. For example, the utility advertisements set forth in our discussion on the use of name and logo, above, demonstrate that juxtaposing discussions about the affiliates and utility's services, even if factually correct, inappropriately blurs the separation between the affiliate and utility.

Especially since we permit joint use of the name and logo, we believe that our adopted rule is narrowly tailored to protect against cross-subsidization and to promote competition. The few disclaimers proposed by the utilities at worst are inadequate, and at best are extremely difficult to enforce. For example, as stated above, in Edison's On Call electrical repair service brochure, Edison imparted requisite disclaimers and other types of customer information in a column whose title reads "What the Lawyers Make Us Say." (See Exhibit I to Petitioners' July 31 Comments.) Oral joint marketing would be virtually immune from effective oversight and regulation. For example, it would be quite difficult to monitor whether joint calls were solicited or not, or whether effective oral disclaimers were made. One of our goals is to adopt rules that are clear and easy to monitor. Petitioners' proposal, not Respondents', meets this criteria. However, we modify Petitioners' proposed rule to limit joint utility/affiliate participation in trade shows, conferences, and other marketing events to those joint marketing events which occur in California. We believe that Petitioners' proposal here is too broad, since it includes all of California and its contiguous states within its purview. (See Rule V F 4.)

We also agree with DGS/UC/CSU that the adoption of Respondents' proposal, which would permit the utility and affiliate an almost unrestricted ability to make unsolicited joint presentations to customers in requests for proposals, trade shows, billing envelopes and "the like" (subject to certain disclaimers), would make our adopted rules against tying, with which both Respondents and Petitioners agreed, very difficult to enforce. Personnel making joint marketing presentations are likely to focus on the products' benefits to the consumer, not the niceties of disclaimers they are required to provide by regulators.

In addition to our other concerns set forth above, permitting the utility to grant its affiliate exclusive access to the utility's billing envelope to promote the affiliate's services would violate the basic concept underlying the nondiscrimination rules -- that a utility should not grant its affiliates a preference vis a vis other unaffiliated competitors. Granting a utility's affiliate exclusive access to the billing envelope also conflicts with the rule prohibiting a utility from exclusively providing its affiliate with customer information, since the utility would be supplying the affiliate (either directly or indirectly) with the exclusive use of its customer lists.

However, we modify Petitioners' proposal to provide that utility affiliates may have access to the billing envelopes if other competitors are offered the same access on the same terms and conditions. (See Rule V F 3.)

We note that our rule is not a blanket prohibition against affiliate advertising. A utility's affiliate is free to use the billing envelopes to advertise under the conditions we impose. This is similar to provisions in the Telecommunications Act of 1996, which permit a Bell Operating Company to offer certain services to its affiliate provided that such services are made available to other providers under the same terms and conditions. (See, e.g., 47 U.S.C. §272 (e).) Also, rather than obtaining an exclusive advantage based on its affiliation with a monopoly service provider, in order to compete effectively, the utilities' affiliates can also conduct direct mailing campaigns, like other competitors.

c) Joint Purchases

Parties' Positions

Over the course of negotiations, the Joint Petitioners Coalition and Joint Utility Respondents agreed that the rules should permit the utilities to share certain cost savings derived from scale economies with their affiliates. However, other parties disagree with this proposal.

One of the principles which the Joint Utility Respondents advocate is that utility affiliates should be allowed to take advantage of corporate synergies and economies of scale. They say this is consistent with the statement in the OIR/OII that affiliates should not be disadvantaged relative to other competitors. Respondents' proposed rule would allow capture and sharing of economies of scale in joint purchases of goods and services, excluding the purchase of natural gas and electric supplies intended for resale, provided that the purchases are priced in a way that permits clear identification of the utility and affiliate portion. They stress that the benefits of joint procurement derive from the combined entities' size, and that joint procurement would benefit ratepayers by allowing the utility to negotiate lower prices due to the additional volume resulting from the affiliate's purchases. They state that these volumes are available not only to any large company, but also to members of large trade associations such as CAPHCC.

EEI supports Respondents, stressing that the Commission rules should not deny utilities and their affiliates the opportunity to achieve economies that would lower costs and thereby benefit consumers. EEI suggests that such restrictions could hurt the economy, leading to job losses. Capturing scale or scope economies through sharing resources and jointly purchasing intermediate goods and services is a legitimate function which the Commission should encourage. PG&E ES agrees, saying that the rules should permit the combined entities to purchase everything from paper clips to computers or trucks, adding that this type of purchasing is available to large corporations. PG&E ES would, however, extend Respondents' restriction on purchase of gas and electricity to upstream pipeline capacity.

The Joint Petitioners Coalition is willing to accept the general concept of capturing scale economies, but would further restrict Respondents' proposed rule by excluding those economies associated with the traditional utility merchant functions, such as gas transportation and storage capacity and electric transmission capacity. Respondents find these further restrictions reasonable.

The CEC believes that Commission should weigh the benefits of short-term scope economies against the long-term goal of fostering a robust and competitive marketplace. The CEC generally argues that allowing joint purchasing, employee sharing, corporate support and offerings of services produces the possibility of cross-subsidization or transfer pricing which the CEC points out could be anti-consumer and anticompetitive. Nevertheless, the CEC points out that forgone economies of scope could lead to substantial cost and price increases to customers. It argues, however, that it is possible that the synergies of market competition will encourage larger economies of scope in the long term compared to the economies offered by the utility-affiliate relationship in the short term. If the Commission decides to allow the utilities and their affiliates to capture these scope economies, the CEC believes that the ratepayers should share in these savings. Additionally, the CEC argues that this issue should be revisited four years from now at the expiration of the rate freeze imposed by AB 1890, when the desired competitive market may be more fully developed.

The CAPHCC argues for complete separation. Since the utilities' scale economies were built up during a period of monopoly operation, paid for by the ratepayer, the CAPHCC argues that that no economies of scale related to the utility or affiliate function may be shared by a utility with an affiliate. NAESCO echoes the concerns of CAPHCC by stressing the potential for cross-subsidy and thus the abuse of market power retained by the utilities. NAESCO advocates that if joint purchases are permitted, the Commission should impose a dollar limit, although it does not propose a specific dollar amount. DGS/UC/CSU also believe that joint utility/affiliate purchases to capture economies of scale are inappropriate. They believe that ongoing joint purchases just extend and exacerbate the need for monitoring and enforcement.

Discussion

Increased competition in the energy markets is one of our primary goals. The presence of any particular cost advantage for the affiliates, if derived from their association with the utility and not from their own internal efficiencies, engenders market power and entry barrier concerns. We do not want the utility to use its market power to impede competition by giving its affiliate a clear cost advantage not available to competitors. This would occur if the utility were able to depress the price it pays for goods and services due to the utility's status as a monopoly, and in turn pass that price advantage to the affiliate. Both the Respondents and Petitioners believe it is inappropriate for the utilities and affiliates to exploit this market power in areas related to the utilities' traditional merchant functions. However, they believe joint purchases are appropriate in such areas as purchasing office supplies and telephone service.

While Respondents argue that all other purchasers in the market are either large firms or would have access to lower prices for the services and goods in question through their trade associations, the record is unclear that this is the case. Although there might be other large firms in some markets in which the affiliates compete who can exercise monopsony power in their purchase of products and services, the record is unclear on whether sufficient firms in the market will have access to such power. For example, individual firms would not have this advantage. Those firms belonging to a trade association do not automatically have this power and would, at a minimum, have to form a purchasing cooperative to take advantage of their combined size, if possible. This represents an additional transaction cost not borne by the utilities and their affiliates.

Nonetheless, given most parties' agreement on this issue, and the fact that, if enough competitors are able to leverage their combined size in such purchases, they may be able to secure lower prices in the competitive market, we will adopt Petitioners' proposal, to which Respondents agree. (See Rule V D.) We are also persuaded by the fact that these purchases are limited to general office supplies and support, and are not associated with the traditional utility merchant functions, where the affiliate would gain a clear price advantage not available to competitors. We also expect that when the utility accounts for the costs between the utility and the affiliate, the utility will properly account for all costs including but not limited to the time an employee spends in procuring the supplies, carrying costs (warehousing, finance charges, etc.), as well as all transactional costs.

d) Corporate Support

Parties' Positions

The Joint Utility Respondents propose permitting a utility and its affiliates to use joint corporate support on an exclusive basis, as long as it is priced and reported according to the Separation and Information Standards proposed elsewhere in the rules. Examples of such services include payroll, taxes, engineering, legal, insurance, financial reporting or shareholder services. Respondents propose to permit either the utility or the parent holding company to provide these corporate support services.

Respondents argue that joint corporate support permits the utilities and their affiliates to increase efficiency and reduce costs by sharing corporate functions, and these reductions will translate into lower prices for the affiliates' goods and services in the marketplace. Also, Respondents argue that since other large firms have the incentive and ability to share corporate support functions among their various business lines, Respondents should not be competitively disadvantaged vis a vis these other large firms. They argue that the distinctions set forth in Petitioners' rules as to what types of corporate support are appropriate to share are arbitrary. Petitioners point out, for example, that umbrella insurance policies that cover all entities in a corporate family for risks are less expensive than purchasing separate coverage for each entity. Consolidation of financial reporting is necessary to comply with legal requirements to prepare consolidated financial information such as annual reports. They also argue that diversified enterprises commonly share legal and engineering services. Respondents point out that FERC has approved the shared use of computer systems by interstate pipelines and their gas marketing affiliates, as long as confidential information is protected from disclosure through the use of passwords or identification codes.

Respondents also object to Petitioners' proposal because it would require that the holding company, not the utility, provide the shared corporate services. Respondents do not see the difference between the same employees providing the same types of services, whether they are employees of the holding company or the utility.

PG&E ES agrees with Respondents, as does Washington Water Power Company. NAESCO believes that utilities and affiliates may share administrative or support services (i.e., for accounting or legal services) where the utility allocates the costs of such staff time to the affiliate.

The Joint Petitioners Coalition proposes that as a general principle, a utility and its affiliate may use joint corporate support provided by the parent or holding company, or by a separate affiliate created to perform shared corporate services. They agree with Respondents that the shared support should be properly accounted for pursuant to other provisions of the proposed rules. Petitioners also provide a detailed list of the types of support services that can and cannot be shared.[11]

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[11] For example, sharing payroll, taxes, shareholder services, insurance, financial reporting, corporate accounting and security, human resources (compensation, benefits, employment policies) employee records, corporate legal unrelated to marketing or regulatory issues (such as labor, civil litigation and general corporate areas) and pension management is appropriate; sharing state and federal regulatory affairs, regulatory legal and lobbying, employee recruiting, other financial planning and analysis, hedging and financial derivatives and arbitrage services, gas and electric purchasing for resale, purchasing of gas transportation and storage capacity, purchasing of electric transmission, system operations, and marketing is not.

Petitioners argue that their detailed rule is preferable, because it not only provides a list of what services are permissible, but what services are not. They believe that their compromise proposal which permits, for example, the shared use of corporate legal services unrelated to marketing or regulatory issues while prohibiting shared legal service relating to marketing and legal affairs, is appropriate to protect and prevent the exchange of market-sensitive and regulatory strategy information that could significantly benefit a utility affiliate while disadvantaging its competitors. The other categories listed include instances where the sharing of corporate support could provide a means to transfer confidential information, create the opportunity for preferential treatment, lead to customer confusion or create significant opportunities for cross-subsidization of affiliates. They argue that D.97-05-040, slip at p. 68, paragraph 7, provided that the affiliated entity should have, among other things, separate computer systems.

Discussion

It is unclear that permitting the utilities and affiliates to share corporate support will actually translate into a competitive market. However, such sharing of centralized functions generates scope economies and as such can increase production efficiency. As pointed out by the CEC in the previous section, we must weigh the benefits of short-term scope economies against the long-term goal of fostering a robust and competitive marketplace. We believe that the correct balance is captured by the Petitioners' proposal, which places clear limitations on corporate support in areas where this would give the affiliate an unfair competitive advantage, as modified to better ensure adequate corporate governance and oversight.

We also provide for the utility to demonstrate in its compliance plan the adequacy of specific mechanisms and procedures in place to ensure the utility follows the mandates of the rule and does not use joint corporate support services as a conduit to circumvent these rules.

e) **Plant, Facilities and Office Equipment**

The Joint Utility Respondents propose that to the extent practicable, affiliates should acquire, operate, and maintain their own facilities and equipment. Respondents' proposal provides that facilities should not be shared if the sharing would enable the affiliates to access information that the utility could not otherwise provide to the affiliates under the rules. However, the rule does not prevent sharing for economies or efficiencies.

Respondents argue that its proposed rule is appropriate since the Commission should restrict the sharing of facilities only where there is a tangible risk of compromising another principle underlying affiliate transaction rules. They believe that Petitioners' proposal is too broad in that it precludes an affiliate from taking advantage of economies of scale when there is no risk of information sharing. Respondents prohibiting sharing to the extent practicable is intended to address unusual situations where sharing is needed as practical matter. Respondents also argue that shared computer systems is appropriate provided the appropriate password protections and firewalls are in place. They point to FERC's rule governing the sharing of computer systems by natural gas pipelines and their marketing affiliates.

EEI agrees that shared facilities represent potential sources of economies that the Commission should permit, provided there is appropriate cost allocation.

Petitioners object to Respondents' proposal because the requirement to maintain separate facilities and equipment "to the extent practicable" creates an enormous loophole in the rules. They urge adoption of a rule which prohibits a utility and affiliate from sharing office space, equipment, or access to computer or information systems. Petitioners' proposal states a preference for physical separation of offices, but permits shared office space if the entities use separate elevator banks or security controlled access. The proposal states that it does not preclude a utility from realizing certain economies of scale or sharing certain corporate support provided by the holding company, discussed in other sections.

Petitioners argue that sharing office space and equipment creates a potential for the unauthorized transfer of information between a utility and affiliate which could be used to unfairly advantage a utility's affiliate in a competitive market. They state that Edison's and PG&E's energy marketing affiliates are located in separate buildings, so that the proposed building /office separation requirement should not be problematic. They also point out that sharing of computer systems (which the Commission prohibited in D.97-05-040) raises the additional concern of sharing billing services. The affiliate's ability to use the utility's billing services creates the perceived threat that if those services are not also paid for by the due date, utility service would be discontinued. Petitioners argue that this would result in a lower bad debt rate for affiliates, which is a key advantage in a competitive market. Also, it would permit the affiliate to charge less for these services than its competitors. Petitioners argue that if joint billing is permitted, it should be permitted as a non-discriminatory unbundled tariff service available for all market participants.

PG&E ES believes Petitioners' prohibition on sharing computer systems is overbroad with respect to accounting, reporting, and other corporate services. However, it believes that Respondents' proposal permitting sharing for economies and efficiencies is an exception that would swallow the rule since services would not be shared unless that was the most economic way of providing them.

Petitioners' proposal better guarantees that the affiliates should acquire, operate and maintain their own facilities and equipment. The language in Respondents' rule requiring separation "to the extent practicable," combined with the language permitting "resource sharing for economies and efficiencies" could indeed swallow the general rule requiring separation.

However, we modify Petitioners' proposal in light of our rule regarding corporate support. We permit the utility, the holding company, or a separate affiliate created solely to perform corporate support services, to provide such support. We view this exception as narrow, and it does not encompass services related to marketing, such as a utility offering joint billing services exclusively to an affiliate. However, the utility can still offer joint billing services pursuant to D.97-05-039, where we permitted the distribution company to bill for the energy service provider, provided that this service is available to all energy service providers. This exception is in keeping with the general spirit of this rule, because it does not permit the utility to leverage its monopoly status in the distribution area solely for the benefit of its affiliate. (See Rule V C.)

f) Employees

The rules addressing employee issues elicited much comment. In addition to the Joint Utility Respondents and Joint Petitioners Coalition, a number of parties including the CEC, DGS/UC/CSU, NAESCO, Washington Water Power, PG&E ES, CAPHCC, Texaco, and ORA commented on the area of employee movement, and in particular, proposals addressing the temporary sharing of employees between the utility and its affiliates. The main issues in this category are the (1) separation and use; (2) transfer; (3) tracking; and (4) transfer periods of employees.

Separation and use of employees

Respondents and Petitioners differ with respect to the class of employees these rules should apply to. In a rule on the separation of employees, Respondents propose that a utility employee may not concurrently be the employee of the affiliate. Respondents exclude the board of directors from this rule. However, in a rule on the use of employees, Respondents propose that utilities can "temporarily" share an employee's time with an affiliate for less than one year continuously, or for less than 50% of an employee's time intermittently, with certain documentation requirements.

Respondents argue that a prohibition on shared directors of a utility and affiliate constitutes an unwarranted intrusion on corporate governance. Directors would be bound by rules restricting the transfer of utility information. Respondents also support their proposal for temporary or intermittent employee assignments as mutually beneficial to a utility and its affiliate in allowing each to obtain specialized expertise for a limited period, and allowing the utility and affiliate to more fully use their personnel. Such temporary assignments also allow employees to gain a variety of employment experiences. Respondents argue that possible ratepayer harm is ameliorated by the compensation provisions of their proposed rule, by the loaned employee's agreement not to transfer information, by not using marketing employees in a similar fashion, and by requiring a temporarily assigned employee to execute a nondisclosure agreement. Respondents also believe that Edison's holding company decision is consistent with its proposal.

Petitioners believe allowing joint utility/affiliate board members invites the potential for improper information sharing and other problems that restrictions on employee sharing are designed to prevent. They also believe that the proposed conditions for temporary or intermittent assignment of employees are unenforceable, vague and difficult to monitor. Petitioners point out that their proposal, which does not permit a utility to make temporary or intermittent assignments or rotations to its affiliates, is clear, enforceable, and consistent with D.97-05-040, slip op. at 67, which prohibits shared employees and is similar to the rules the Commission adopted for gas utility procurement in D.91-02-022, 39 CPUC2d 321, 332, Appendix A, para. 2.[12]

PG&E ES believes that Petitioners' proposal is too harsh on employees and would deny them promotional opportunities. However, PG&E ES also finds Respondents' rule "troubling" because it allows for the constant movement of employees from utility to affiliate. NAESCO believes that utility employees concerned with marketing or the provision of energy services should not be shared with an affiliate in the business the utility is conducting in the utility's service territory. DGS/UC/CSU and CAPHCC reject the concept of shared employees. ORA is concerned that no safeguards exist to prevent a utility employee performing vital utility

[12] "Employees of the gas utilities shall not perform any functions for utility affiliates except those services which they offer to others on an equal basis, and utilities shall not share employees with marketing affiliates."

work to be diverted to work for the affiliate. The CEC comments that allowing a utility employee to spend a little less than half a year working for an affiliate is hardly a "temporary" assignment. They also note that ratepayer funds would pay for the employee costs, and believe that allowing these assignments would create a ratepayer subsidy of the utility affiliate.

We want our adopted rules to be clear and enforceable. Respondents' proposal defines "temporary" with a broad brush, and essentially nullifies their rule prohibiting shared employees. We agree with the CEC that allowing an employee to work for an affiliate a little under a year at one time, or intermittently for a little under 50% of an employee's time, is hardly a temporary assignment. Moreover, our adopted rules, particularly regarding nondisclosure and separation, will be almost impossible to monitor with this provision. For example, our adopted rule regarding separate facilities would prove to be meaningless if many employees could intermingle between the utility and affiliate. As another example, Respondents' proposal would not permit a utility marketing employee with access to customer information to be used in a similar capacity by an affiliate within a utility's service territory. But that utility employee could still be used by the affiliate in another capacity that has contact with marketing employees of an affiliate. Such a situation would make enforcement of this rule problematic. Moreover, the incentive underlying Respondents' proposal could also work against the best interest of the ratepayer. There is little incentive under Respondents' proposed rule to keep an employee who is vital to the operations of the utility from being loaned to the affiliate at a time when that employee is needed by both companies.

We sympathize with the concept that employees would want the widest promotional opportunities available to them. However, our adopted rule (see Rule V G) provides the best balance between this concern and our concerns regarding cross-subsidization, competition, and inappropriate transfer of information. If an employee wants a varied employment history, that employee has the opportunity to permanently transfer to the affiliate pursuant to our adopted rules.

Edison's holding company decision does not support Respondents' position. In that decision, the Commission permitted the sharing of utility personnel with the holding company in performing certain corporate functions, and the sharing of certain support personnel in instances where it is not practical for the subsidiary to have its own administrative staff. (D.88-01-063, 27 CPUC2d 347, 387, Appendix C, II-D.) D.88-01-063 does not stand for the broad proposition that all employees should be shared, or "temporarily" loaned, to the utilities' affiliates. Moreover, the Commission issued this decision in 1988, well before we determined to open the electric industry to competition. Petitioners' proposal, which we adopt, permits the sharing of employees to the extent permitted in the rule on shared corporate support.

We also adopt Petitioners' recommendation, as modified, prohibiting joint utility/affiliate board members and also extend it to joint corporate officers. Our concern with information sharing underlies this area as well. Although both officers and board members would undoubtedly do their professional best to abide by any nondisclosure rules and nondisclosure agreements, it is difficult to monitor against inadvertent information sharing. In instances when this rule is applicable to holding companies, we will allow any board member or corporate officer to serve on the holding company and with either the utility or affiliate (but not both). In cases where the utility is a multi-state utility, is not a member of a holding company structure, and assumes the corporate governance functions for the affiliates, the prohibition against any board member or corporate officer of the utility also serving as a board member or corporate officer of an affiliate shall only apply to affiliates that operate within California. This exemption is needed to allow for the holding company board, or in the case of multi-state utilities, the utility board, and its officers to ensure adequate governance and oversight. In the case of shared directors and officers, a corporate officer from the utility and holding company shall verify in the utility's compliance plan the adequacy of the specific mechanisms and procedures in place to ensure that the utility is not utilizing shared officers and directors as a conduit to circumvent any of these rules.

Transfer of Employees

The Joint Utility Respondents propose that the utility may transfer employees from the utility to the affiliate if it pays a transfer fee of 25% of the employees' utility base annual salary, unless the utility can demonstrate that some lesser percentage (equal to at least 15%) is appropriate for the class of employee. Respondents propose this fee should not apply to (a) non-management employees; (b) employees hired by an affiliate because the utility function they perform has been eliminated or substantially curtailed as a result of electric industry restructuring; or (c) employees moved to the parent holding company or an affiliate that provides only corporate support services. They propose that the transaction be reported consistent with Commission reporting requirements. Respondents believe that these requirements are in large part consistent with their past holding company decisions, are reasonable, and are designed to remove unwarranted and perverse incentives that could result in the utilities terminating employees because of the imposition of uneconomic fees. They also believe that as services are unbundled and discontinued or moved to affiliates, utility employees should have the flexibility to move to an affiliate without triggering a transfer fee. They believe that if the transfer involves nonmanagement personnel, no "headhunter" cost is involved, so there is no additional ratepayer expense.

The Joint Petitioners Coalition would assess a 25% transfer fee for all utility employees transferred to the affiliate except for employees transferred to the parent holding company to provide corporate support services, if these services are solely provided by the parent. The transfer fee should apply to the employees' base annual compensation, instead of base annual salary as proposed by Respondents. Petitioners believe the 25% transfer fee is appropriate for all employees, including clerical employees or those whose function is eliminated due to restructuring. They note that the transfer of non-managerial employees, including secretaries, to the affiliate can result in enormous advantages to the affiliate for which the ratepayers should be compensated. Petitioners argue that Respondents' exceptions to the rule make it more complex and difficult to enforce.

In PG&E's holding company decision, we adopted a transfer fee provision similar to that adopted in SDG&E's holding company decision, D.95-12-018, slip op. at 45, Ordering Paragraph 8. This condition recognizes the ratepayers' costs expended in hiring and training employees and in losing talented utility personnel to the holding company or the affiliates. (See D.96-11-017, slip op. at 38.) It provides for a 25% transfer fee of the employees' base annual compensation for all nonclerical personnel, unless the utility can demonstrate that some lesser percentage (up to 15%) is more appropriate for the class of employee.

Even in light of electric industry restructuring, it is still necessary to ensure that ratepayers are reimbursed for the costs incurred in hiring and training personnel. The transfer of these personnel can result in enormous advantages for the affiliate. The rule adopted in the holding company cases gives the utility an opportunity to demonstrate that a lesser percentage than 25% is appropriate in individual circumstances. We continue this flexibility in light of the personnel changes likely to occur as a result of restructuring. We also continue to exempt clerical personnel from this rule. We also exempt personnel transferred to a holding company or a separate affiliate performing corporate support functions, provided that that transfer is made in the initial implementation period of these rules or pursuant to a § 851 application or other Commission proceeding. The rule will apply to subsequent transfers of all covered employees at a later time. Finally, not only should the utilities report these transactions consistent with Commission reporting requirements, they should credit ratepayers in appropriate accounts to ensure that they receive the fees.

Tracking of Employees

The Joint Utility Respondents and Joint Petitioners Coalition agree regarding the tracking of employee movement. The rule requires a utility to track and report all employee movement between a utility and an affiliate. We interpret this rule to mean that utility should track this movement according to all existing Commission requirements. (See e.g., the Affiliate Transaction Reporting Decision, D.93-02-016, 48 CPUC2d 163, 171-172 and 180 [Appendix A, Section I and Section II H].) This rule is reasonable and we adopt it.

Transfer Periods of Employees

The Joint Petitioners Coalition proposes a rule requiring an employee transferred from the utility to the affiliate cannot return to the utility for two years. If that employee does return, the employee cannot transfer to the affiliate for three years. Petitioners state that one of the methods of transferring valuable and competitively advantageous information and experience between a utility and affiliate is through the repeated transfer of employees back and forth. Placing specific time limitations on transfers or rotating employment would prevent repeated or short-term transfers or hiring and re-hiring of certain personnel between the utility and affiliate.

Respondents oppose such a rule, and do not believe an additional rule is required in this area. The CEC believes that Petitioners' rule protects against utility employees moving back and forth between utility and affiliate, and providing critical market information to the affiliate. The CEC is concerned that Petitioners' proposal could cause potential hardship for an employee who might want to transfer back to the utility if the affiliate goes out of business during the restricted period, and suggests relaxing the provision if the affiliate goes out of business.

Respondents have not demonstrated how our adopted rules can address the "revolving door" concerns raised by Petitioners and CEC without some rule in this area. However, we modify Petitioners' proposal so that an employee who is transferred from the utility to the affiliate cannot return to the utility for one year, and that if that employee does return to the utility, the employee cannot then transfer to the affiliate for two years. We also agree with the CEC that the rules should accommodate the transfer of employees whose affiliate has gone out of business. We therefore modify Petitioners' proposal to provide that the rule should not apply if the affiliate that the employee transfers to goes out of business within the one -year period. We also adopt the clarification suggested by the CEC that employees transferred from the utility to the affiliate are expressly prohibited from using information gained from the utility in a discriminatory or exclusive fashion, to the benefit of the affiliate or to the detriment of its competitors.

Taking of Information

The Joint Petitioners Coalition propose a rule which prevents a utility employee hired by an affiliate from removing or otherwise providing the affiliate with proprietary property or information. Petitioners propose that to the extent that an affiliate possesses information or documents which an affiliate would otherwise be precluded from having pursuant to these rules, a rebuttable presumption should exist that the transferred employee improperly provided such information to the affiliate. Respondents do not believe this additional rule is required.

Even though the other rules appear to preclude such a transfer, we think it is useful to emphasize that a utility employee hired by the affiliate shall not remove any information or documents to the affiliate which the affiliate would be precluded from having according to these rules. However, we do not see a need to establish rebuttable presumptions at this time. Therefore, we adopt Petitioners' proposed rule as modified.

g) Research and Development

Petitioners propose that a utility shall not share or subsidize costs with its affiliates associated with research, development and demonstration (RD&D) activities. Petitioners argue that this prohibition is necessary to prevent ratepayer subsidization of affiliate activities. Respondents do not believe this rule is necessary. They argue that the Commission has removed most of the RD&D funding from utility control, and has transferred such funds to the CEC for administration and control. Remaining funding from ratepayer sources is modest and limited in scope. Respondents argue that if utilities decide to pursue corporate RD&D programs using discretionary funding, they should be able to do so in a cost-effective manner, which may include joint programs with affiliates. Respondents believe that their proposed rules regarding pricing and information sharing address this issue. Respondents also argue that this proposed rule cannot be reconciled with the Commission's recent decision adopting a Technology Commercialization Incentive Procedure for Edison in Resolution E-3484.

Petitioners' proposed rule addresses ratepayer funding of joint RD&D projects with an affiliate, to prevent ratepayer subsidization of affiliate activities. Petitioners' rule is more consistent with our preference for separating utility and affiliate functions, rather than merely tracking them through pricing mechanisms. Petitioners' rule is also more consistent with our adopted rule preventing the sharing of proprietary information except in limited circumstances. We do not see inconsistencies with Resolution E-3484, since that resolution did not address or permit joint funding of RD&D activities between a utility and its affiliate. We therefore adopt Petitioners' proposal. (See Rule V F 5.)

h) Affiliate Audit

Petitioners propose a rule which limits a utility's performance of audits of its affiliates to only the extent required to assure proper payment for or receipt of goods, products, or services consistent with these rules. Any other audits should be performed by independent auditors. Respondents believe this rule is inappropriate and unnecessary.

We do not adopt an additional rule here. Our adopted rule on corporate support provides for situations where a utility and affiliate can share joint corporate support activities. To the extent that audits fall within this rule, they are permitted. However, audits performed to ensure compliance with these rules should be performed by an independent auditor. (See compliance discussion below.)

i) Transfer of Goods and Services

Petitioners and Respondents agreed on a proposed rule regarding the pricing provisions of the transfer of goods and services. The consensus rule provides for transfers from the utility to affiliates at fair market value when the goods or services are produced for sale (using the regulated prices as fair market value where applicable) and otherwise at fully loaded cost plus a five percent adder to labor costs.[13] Respondents explain that this rule prevents cross-subsidization, since the affiliate will compensate a utility for its fully loaded costs, except where a utility offers the service generally. In that instance, affiliates will pay the same market price that unaffiliated parties pay.

Respondents also state that the proposed rule prevents cross-subsidization where the affiliate provides goods or services to the utility. If ratepayers receive the goods or services at market price, there is no affiliate cross-subsidization; the utility is not paying more for an affiliate's service than it is worth. If the affiliate does not offer the goods or services generally, respondents believe that no objective market price is available, and the utility will instead be charged cost.

This consensus rule is reasonable, but we add minor modifications to more fully prevent ratepayer subsidization and to add clarification. We clarify that a utility or affiliate may price at fair market value when it offers those goods and services on a nondiscriminatory basis. We also modify the proposed rules to provide that transfers from an affiliate to a utility of goods and services that the affiliate does not generally offer should be priced at the lower of fair market value or fully loaded cost. We intend this modification to address the situation in which a good or service may be offered on the open market and have a fair market value, but the affiliate does not offer such service generally. In that instance, to prevent cross-subsidization, the ratepayer should only pay the lower of the fair market value or fully loaded cost.

We also address PacifiCorp et al.'s concern that the proposed consensus rule is too narrow by providing that, for goods and services for which the price is regulated by the Commission or FERC, that regulated price should be deemed to be the fair market value. These parties believe that the rule should be modified to read "for goods or services for which the price is regulated by a state or federal regulatory agency" to reflect the fact that the price might be regulated by another state

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[13] The parties also agree to define fully loaded cost as the direct cost of goods or service plus all applicable indirect charges and overheads.

commission, FERC or the Federal Communications Commission. We adopt these parties' modifications, except to note that if more than one state commission regulates the price of goods or services, this Commission's pricing governs. (See Rule V H.)

j) Transfer of Assets

Respondents propose that transfers of assets or the right to use assets between a utility and its affiliate should be priced at fair market value, provided that transfers of assets valued at $250,000 or less may, at the transferor's option, be priced at net book value. Respondents argue that this proposal essentially restates existing Commission pricing policy, except that it increases the de minimus exclusion from $100,000 to $250,000. Respondents state that this higher monetary figure is appropriate in that it not only reflects today's higher costs, but also recognizes that hiring appraisers is expensive.

Petitioners do not believe this rule is necessary. They object to the increase from $100,000 to $250,000 as unjustified and unfair to ratepayers. Also, several holding company decisions require, the utility proposing such a transfer to provide 30 days' notice to the Commission. They believe this is a reasonable requirement which should be maintained. Finally, Petitioners argue that the existing rules recognize that in some instances, royalty payments from an affiliate may be required to adequately compensate ratepayers. DGS/UC/CSU do not support the rule, arguing that all transfers should be at fair market value.

Respondents' proposed rule adopts portions, but not all, of existing holding company rules in this area. We find Respondents' selective proposal in this area more difficult to enforce than abiding by the existing rules, and therefore do not adopt their proposed rule. Nor do we find it necessary to increase the de minimus exclusion from $100,000 to $250,000.

k) Separate Entities

Petitioners and Respondents agree to a consensus rule that the utility and its affiliates should be separate corporate entities. PacifiCorp et al. believe this rule is ambiguous or surplus to the definition of affiliate. They also state that the Commission should not prohibit utilities from directly marketing energy and energy-related products and services. We do not believe this rule is surplus; rather, it is in keeping with our desire to ensure separate operations to the extent practicable. We therefore adopt this consensus rule. (See Rule V A.)

l) Separate Books and Records

Petitioners and Respondents agree that a utility and affiliate should keep separate books and records, and that utility books and records should be kept in accordance with the applicable FERC Uniform System of Accounts (USOA) and Generally Accepted Accounting Procedures. We adopt the consensus rule, but note that its silence as to how affiliates should maintain their books does not supersede the directives of the utilities' individual holding company decisions.

The consensus rule also provides that the books and records of affiliates shall be open for examination by the Commission and its staff consistent with the provisions of PU Code § 314. This proposed rule restates and summarizes the provisions of § 314. By adopting this condition, we remind the utilities that we will interpret § 314 broadly, in a manner not necessarily limited by the principle of relevance to an open proceeding, since the Commission's inspection rights under § 314 are not limited to particular proceedings. (See D.96-07-059, slip op. at p. 23.) We also note that various Commission decisions addressing a particular utility's formation of a holding company address presumptions of validity of any Commission request for books and records under § 314. These particular rules remain in force since they are more detailed in scope and do not conflict with the rule we adopt today. (See Rule V B.)

We also note that under the Public Utility Holding Company Act, 15 U.S.C. § 79 et seq., in order to obtain an exemption from the Act, a utility's foreign affiliates rely on the Commission's certification to the Securities and Exchange Commission that we have the authority and resources to protect ratepayers subject to our jurisdiction. We therefore intend this rule and § 314 to apply to the books and records of a utility's foreign affiliates, which books and records should be made available at the utility's headquarters for our review upon request. Moreover, we note our authority under § 313 to require a public utility to produce within the state books, accounts, papers, or records kept by the public utility outside the state.

7. Regulatory Oversight

a) Existing Rules

Petitioners and Respondents propose a consensus rule that existing Commission rules for each utility and its parent holding company should continue to apply except to the extent they conflict with these rules. In cases of a conflict, the rules adopted today shall supersede prior rules and guidelines. However, nothing shall preclude a utility or its parent holding company from adopting other utility-specific guidelines, with advance Commission approval.

This rule is reasonable and we adopt it (see Rules II E), with the proviso that when existing utility-specific holding company rules are more detailed but harmonious with the rules we adopt today, the utility should abide by both rules. (See, for example, our discussion on the availability of a utility's and an affiliate's books and records to Commission staff under PU Code § 314, above.) We adopt the consensus rule, but do not supersede existing utility-specific rules which presume validity of Commission requests under § 314. (See Rule V B.) We also note that nothing in this rule prevents the Commission from adopting other utility-specific rules if appropriate. For example, Phase 2 of PG&E's holding company application is still in progress, and the Commission might deem it necessary to adopt other conditions in response to, inter alia, the ORA audit.

b) Witness Availability

Petitioners and Respondents propose a consensus rule that affiliate officers and employees shall be made available to testify before the Commission as necessary or required, consistent with the provisions of PU Code § 314. We agree this rule is reasonable, but clarify that it applies to utility holding company officers and employees, as well as affiliate officers and employees. This is consistent with the language of § 314, and the individual utility's holding company decisions. (See Rule VI D.)

c) Compliance Plans

Petitioners propose a rule stating that the utility should demonstrate to the Commission that there are adequate procedures in place that will prevent the sharing of information with its affiliate that is precluded by these rules. Petitioners propose that the utility should file a compliance plan within 30 days after the adoption of the rules and annually thereafter. Petitioners also propose that upon the creation of a new affiliate, a utility shall immediately notify the Commission and interested parties of the creation of the affiliate and file within 60 days a report to the Commission describing how the utility will implement these rules with respect to the new entity.

Respondents believe that the Commission order will require the filing of a compliance plan, and therefore no additional rule is necessary.

No later than December 31, 1997, the utilities should file a compliance plan demonstrating to the Commission that there are adequate procedures in place implementing the rules we adopt today. The utilities shall file these compliance plans as an advice letter with the Commission's Energy Division and serve them on the service list of this proceeding. The utilities' compliance plans will be in effect between their filing and a Commission decision on the advice letter. A utility shall file a compliance plan annually thereafter using the same advice letter process when there is some change in the compliance plan (i.e., a new affiliate has been created, or the utility has changed the compliance plan for any other reason). (See Rule VI A.) Moreover, utilities should immediately notify the Commission of the creation of a new affiliate which is covered by these rules. No later than 60 days after the creation of this affiliate, the utility shall file an advice letter with the Energy Division of the Commission, and serve it on the parties to this proceeding. The advice letter should demonstrate how the utility will implement these rules with respect to the new entity. (See Rule VI B.)

d) Annual Affiliate Audit

Petitioners recommend that the utility should have annual audits prepared by an independent auditor to verify compliance with these rules.

Respondents oppose this rule as both unnecessary and burdensome. We find merit to this proposal to verify compliance with these rules, and believe that the requirement for the utilities to have annual independent audits is appropriate. We are in a transition period to a competitive marketplace, and the utility's business will be undergoing changes in rapid fashion. An annual audit, at least in the first three or four initial transition years, is critical to ensure compliance with these rules. Once the utility's independent auditor performs the initial annual audit, subsequent annual audits should not be burdensome. These audits should be at shareholder expense. (See D.95-12-018, SDG&E Holding Company Decision, slip op. at p. 43, ordering paragraph 4.)

We therefore direct that no later than December 31, 1998, and each year thereafter, the utility should file with this Commission an audit prepared by an independent auditor which verifies compliance with the rules set forth herein. The auditors should have the same access to information as an auditor performing the review under, inter alia, PU Code §§ 313, 314 and 797. The utilities should file this audit with the Energy Division of the Commission and should serve it on all parties to this proceeding. The Commission and its staff should review this audit. By adopting this rule, we do not preclude the Commission from undertaking an independent audit pursuant to, inter alia, PU Code § 797. Nor do we preclude previously ordered audits in individual utility holding company decisions from proceeding as we have directed. (See Rule VI C.)

e) Reporting

Respondents propose that the Commission's existing general and utility-specific reporting requirements on Affiliate Transactions shall remain in force, except as modified in this decision. Petitioners state that the record keeping and compliance rules they propose elsewhere in their rules are necessary.

We address Petitioners' other proposals in this area elsewhere in this decision. Respondents' proposed rule here is consistent with the consensus rule that existing Commission rules should remain in effect except to the extent they conflict with these rules. We therefore adopt Respondents' recommended rule, with the explanation that the utility should comply with any other Commission reporting requirements that may appear in a decision or rule other than the Affiliate Transaction Decision, 48 CPUC2d 163, except to the extent that they are modified by this order. (See Rule II E.)

8. Utility Products and Services

The OIR/OII recognizes that all energy utilities and their affiliates should be on an equal footing with regard to entry into the unregulated market for energy products and services. The OIR/OII notes that SoCalGas had proposed flexibility in introducing new products and services in its performance-based ratemaking (PBR) application, A.95-06-002. The question of whether energy utilities, generically, should be required to conduct unregulated or potentially competitive activities, like the marketing of new products and services discussed in SoCalGas' proposal, through affiliate companies and if so, under what rules and criteria, should be addressed by the parties as they discuss utility/affiliate standards of conduct. Many parties addressed this issue, while only several made a specific proposal. We address the specific proposals below. Before so doing, it is helpful to summarize our directives in the SoCalGas' PBR decision (D.97-07-054, slip op. at 60-64) to put the parties' positions and our determination in this docket in better context.

SoCalGas PBR

In SoCalGas' PBR application, SoCalGas sought authorization to offer on a competitive and unregulated basis products and services that it has not previously offered. SoCalGas also sought authorization to provide support to its unregulated affiliates for their offering of new products and services. SoCalGas stated that these new products and services would be provided entirely at shareholder risk, and would not be funded by the rates charged for utility service. It asked us to agree that the prices, terms and conditions for new products and services would not be regulated; that the profits or losses should flow entirely to shareholders; and that existing products and services offered on an unbundled basis in the future would be treated the same as new utility-related products and services.

We declined to adopt SoCalGas' proposal on an interim basis, but did so without prejudice to SoCalGas renewing it or another proposal in this docket. We delineated a number of questions arising from the proposal that may need further consideration. This delineation provides guidance for our further deliberations in this docket.

First, SoCalGas did not clearly specify the types of products and services which it sought to offer on an unregulated basis. We noted that other parties raised legitimate concerns about the types of services SoCalGas would offer, particularly concerning the unbundling of traditional services.

Second, SoCalGas did not offer explicit criteria to define the relevant markets in which SoCalGas sought entry on an unregulated basis, i.e., the criteria and process the Commission should use to determine the relevant market, the degree of competition or the extent of SoCalGas' market power.

Third, SoCalGas did not propose the regulatory tools which would be used to prevent cross-subsidization between the services SoCalGas would continue to provide on a monopoly basis and those it would provide as competitive services.

When we permitted SoCalGas to renew its request in this proceeding, we also stated that the level of detail that we would expect of a proposal to offer new products and services is equivalent to that set forth when we adopted the three categories of services for telecommunication products and accompanying safeguards. (See D.89-10-031.) Finally, we recognized that if SoCalGas expands its current service offerings or gains approval for new products and services, it may be able to increase its net revenues. We viewed this as a type of productivity improvement consistent with the goals of PBR. We stated that under the PBR we adopted in D.97-07-054, returns above the target arising from either cost decreases or revenue increases will be shared between ratepayers and shareholders.

SoCalGas' and SDG&E's Proposal in this Proceeding

The Joint Utility Respondents did not submit an initial proposal on this issue, although they stated that they hoped to in the future. SoCalGas and SDG&E proposed separate rules on this subject. These rules allow utilities to provide both tariffed and nontariffed services. Descriptions of nontariffed services include non-energy, business to business, ancillary services and experimental technologies. The proposal provides that shareholders should fund the incremental cost of the nontariffed products and services, and should receive all of the revenues.

Edison stated its intent to develop rules in this area. Since that time, Edison filed A.97-06-021, a proposal for the treatment of revenues from new products and services offered by the utility. PG&E believes that there has not been sufficient time for the parties to explore this proposal, and recommends that the Commission defer ruling on this issue to another phase of this proceeding to commence as soon as possible after reply comments are filed.

SoCalGas' and SDG&E's proposal fails to address key issues set forth in the SoCalGas PBR decision. Although the proposal delineates four categories of potential products and services, they are broadly defined and do not set a meaningful limitation on the types of unregulated activities a utility can provide.

The proposal also does not offer specific criteria to define the relevant markets into which SoCalGas and SDG&E seek entry on an unregulated basis. For example, it does not answer the Commission's question as to what criteria and process the Commission should use to determine the relevant market, the degree of competition or the extent of the utility's market power. This proposal does not offer a way for the Commission to protect against cross-subsidization or anticompetitive effects. It is also contrary to our statement in the SoCalGas PBR decision that ratepayers as well as shareholders should share the revenues, since this proposal provides that shareholders should receive all the revenues from new products and services.

We have deferred resolution of this issue once in the SoCalGas PBR and will not do so again. The Assigned Commissioners' ruling and scoping memo did not provide for separate phases, and we do not alter that procedural schedule. We do not adopt this proposal because it does not address the points we set out in the SoCalGas PBR decision, and does not contain the level of detail set forth when we adopted the three categories of services for telecommunications products and accompanying accounting safeguards in D.89-10-031, 33 CPUC2d 43.

DGS/UC/CSU and NAESCO Proposals

DGS/UC/CSU and NAESCO recommend similar proposals. DGS/UC/CSU believe that allowing regulated utilities to offer competitive services raises issues of cross-subsidization, unfair competition, increased costs for ratepayers, and deteriorating services. DGS/UC/CSU are concerned that utilities might give priority to competitive services vis a vis regulated services for the use of assets. They also believe that utilities might be encouraged to acquire marginally necessary assets at the expense of ratepayers in order to have the ability to provide competitive services. Finally, even if shareholders fund these competitive services, DGS/UC/CSU are concerned that ratepayers might accrue the risks. Therefore, DGS/UC/CSU propose that utilities should not be allowed to provide a competitive service unless they can demonstrate that (1) such provision will not result in cross-subsidization or unfair competition, (2) there are clear benefits to ratepayers that substantially outweigh any potential decreases in service and increase in risks, and (3) the service could not be provided more appropriately by the utility's competitive affiliate. NAESCO believes that there should be a strong presumption against provision of competitive services by the utility and that competitive services should be transferred to an unregulated affiliate. It offers essentially the same proposal as DGS/UC/CSU.

Although both the DGS/UC/CSU and NAESCO raise serious and legitimate concerns, their proposal does not offer the utility specific procedural guidance regarding seeking permission to offer new products and services, nor does it meet the detailed criteria of the SoCalGas PBR. Moreover, it would be difficult to verify points 1 and 2 of their criteria, so point 3 would probably be the outcome in most cases.

Joint Petitioners Coalition Proposals and October 23 Joint Motion

In their June comments, Petitioners proposed that utilities should not provide unregulated or potentially competitive activities, but that affiliates should offer these activities. All products and services a utility offers to the public should be offered according to the terms and conditions set forth in Commission-approved tariffs or through an open, competitive bidding process. They reason that utility provision of unregulated or potentially competitive activities would result in improper ratepayer cross-subsidization and market power abuse. Examples of such an advantage are the preferential access to ratepayer-funded assets and the ability to charge for the new service on utility bills.

The Joint Utility Respondents opposed this initial proposal. They state that energy utilities have been engaged in the activities in question for decades. In an effort to enhance the use of utility assets and infrastructure, the utilities historically have sought uses for temporarily available capacity (e.g., space in utility fiberoptic cables) and compatible secondary uses (e.g., leasing land under transmission lines to nurseries). They state that this practice has generated substantial additional revenue, without referencing the amount or percentage of revenues. These additional revenues have reduced ratepayers' costs for utility service and have furthered efficient use of resources.

In their July comments, the Joint Petitioners Coalition proposed a new rule which modifies Petitioners' June filing. This proposal recognizes the potential benefits to ratepayers and shareholders from using excess utility capacity to provide new products and services on an untariffed basis and permits those benefits to be realized. Petitioners state this rule also recognizes the potential harm to both ratepayers and competitive markets if monopoly utilities have unfettered discretion to pursue unregulated activities.

Petitioners' proposed rule provides that a utility may offer for sale (1) tariffed products and services currently offered by the utility; (2) unbundled versions of currently-offered utility products and services on a tariffed basis; (3) new products and services offered on a tariffed basis; and (4) products and services offered on a nontariffed basis which use a portion of a utility asset, provided that use of that asset does not affect the quality of the tariffed product or service. Petitioners' proposal specifically prohibits a utility from offering natural gas or electricity commodity service on an untariffed basis. Their list of what products a utility may offer is flexible, but includes products and services which a utility can market with minimal or no incremental capital, business risk, and management control. Petitioners' rule lists the following examples: third parties' use of utility land for nurseries or mini-storage, lease of "dark" fiberoptic capacity, rental of available office space, third-party use of technical employees on an "as available" basis, or licensing of existing software or a patented product or process.

Petitioners' proposal also provides for advice letter approval of a nontariffed product and service and for Commission adoption and utility establishment of the following items before the utility could offer such services: (1) a mechanism for equitable sharing of benefits between ratepayers and shareholders; (2) accounting standards to prevent cross-subsidization; (3) periodic reporting and auditing requirements; and (4) a complaint resolution mechanism.

SCUPP/IID's proposal is similar to Petitioners', except that it would permit the utility to offer products and services for which it may require additional capital, and may incur additional business risk. Examples include land development, development of commercial applications for utility-developed software, third-party billing and phone services, equipment testing, meter repair, and calibration and consulting services. A utility would have to file an advice letter only to seek Commission approval to offer products and services that might require additional capital or incur additional business risk.

Respondents find the language of the proposals "generally acceptable," except for: (1) the limitation of nontariffed offerings to those that require no incremental investment, liability, or management control, since shareholders bear these costs and investments; (2) Commission preapproval, which could be time consuming and expensive, and require the release of competitively sensitive information; and (3) tariffing all unbundled services, which should be dealt with on a case-by-case basis. Respondents would not oppose a provision requiring advance Commission notification before a new category of nontariffed product or service (e.g., land licenses on transmission rights of way) is offered. In their comments and at oral argument, the parties stated that they were still negotiating this issue.

On October 23, 1997, ORA, TURN, SCUPP/IID, SDG&E, Edison, and SoCalGas (moving parties) filed a joint motion for adoption of a rule governing utility products and services. The ALJ permitted parties to respond to the joint motion no later than November 17. CAPHCC, Enron, and UC/CSU oppose the moving parties' proposal. The moving parties permit the utilities to offer products and services similar to those delineated in SCUPP/IID's proposal, except delineated by category instead of individual offering. The moving parties also provide for some other procedural proposal and reporting safeguards.

The SoCalGas PBR required any new proposal regarding a utility offering products and services to provide the level of detail and accounting safeguards set forth in D.89-10-031. In D.89-10-031, 33 CPUC2d 43 at 125-126, the Commission adopted three detailed categories of services for telecommunications products based on how competitive the services were, and categorized of numerous existing services.

All three proposals are more general in their category delineation. Also, none of the proposals include specific accounting safeguards. In D.89-10-031, the Commission required the telephone utilities to utilize a detailed cost methodology based on the Federal Communications Commission's cost allocation methods at 47 CFR § 64. (Id. at pp. 148-149.) Here, the proposals merely require the Commission to provide for and the utility to establish a mechanism or accounting standard for allocating costs to prevent cross-subsidization. The proposals are also not as detailed as D.89-10-031 with respect to delineating the degree of competition of various services.

Although we are not presented with any proposal that fully meets the criteria set forth in the SoCalGas PBR decision, we adopt the rule proposed by the moving parties in part, with modifications. We adopt the moving parties' proposed rule permitting a utility to offer existing or new products and services offered pursuant to tariff. We also note that while this rule does not grant the utility authority to offer a tariffed service outside of its service territory, it is not a limitation either.

With respect to nontariffed products and services, we modify the moving parties' proposal for the reasons set forth below.

In this proceeding, the Commission and the parties are spending a great deal of time and resources developing rules to prevent cross-subsidization and market power abuse between a utility and its affiliate. The specific concerns underlying the rulemaking and the rules adopted today are set forth in detail throughout this decision. As a result of the rules adopted in this decision, in combination with existing affiliate transaction rules, we have developed a body of regulation to prevent such abuses.

We do not wish to adopt a mechanism by which the utility can circumvent these rules by offering the products or services itself instead of through an affiliate, especially when the utility's offering is for a competitive or potentially competitive service and might interfere with the development of a competitive market. Significantly, we recognized in the SoCalGas PBR decision the utility's market power:

> "We also note SoCal's argument that the Commission should presume that if SoCal does not currently offer a service, it cannot have market power with respect to it, and it is therefore a competitive service. By the very nature of SoCal's monopoly position in the energy and energy services market, its access to comprehensive customer records, its access to an established billing system, and its 'name brand' recognition, it may be that SoCal enjoys significant market power with respect to any new product or service in the energy field." (Id. at p. 63.)

We recognize that in some limited instances it may be appropriate for a utility to offer new nontariffed products and services in lieu of requiring all such services to be offered by the affiliate. However, since we are not presented with a proposal that fully meets the criteria set forth in the SoCalGas PBR decision, we prefer to adopt a narrow rather than a broad rule regarding nontariffed products and services.

The utilities argue that they should be able to offer nontariffed products and services to use utility assets to their fullest. The rule we adopt permits a utility to offer new products and services on an untariffed basis provided the utility's offering is restricted to less than 1% of its customer base. This would address the circumstances which the utilities delineate, such as excess land. Although the utilities should still address the competitive market power issues in their advice letter filing, the rule we adopt should minimize competitive and market power concerns since the new product or service would not be offered to a large portion of the customer base. That in turn should minimize dispute and expedite advice letter approval. Additionally, in its advice letter filing, the utility should demonstrate that it has not received recovery in the Transition Cost Proceeding, A.96-08-001, or other applicable Commission proceeding, for the portion of the utility assets dedicated to the non-utility venture.

As stated above, no party adequately addressed the appropriate cost allocation methodology. However, we adopt the moving parties' proposal here, as it requires the Commission to approve and the utility to establish an appropriate cost allocation methodology before the utility can offer certain new products and services.

The rule we adopt incorporates the moving parties' proposal to delineate products and services by category instead of individual offering. We also adopt the moving parties' proposal permitting the utilities to offer tariffed or nontariffed products or services offered as of the effective date of this decision, but only for a limited time. The utilities must apply to the Commission by advice letter for continuing authorization in compliance with the criteria set forth in Rule VII. We also adopt, as modified, many of the moving parties' procedural proposals and reporting safeguards.

We do not adopt the moving parties' recommendation for the utility to establish a separate complaint resolution mechanism. However, we reject this portion of the proposal without prejudice to it being raised in a subsequent rulemaking on enforcement. (See Section 10 below.)

Finally, the moving parties' proposal provides that, before the utilities offer such products and services, the Commission should adopt a mechanism for equitable sharing of the benefits and revenues derived from offering such products and services between ratepayers and shareholders. As Respondents recognize, utilities historically have sought uses for temporarily available capacity and compatible secondary uses (e.g., leasing land under transmission lines to nurseries). The additional revenues have reduced the cost of utility revenues. Therefore, before the utility offers such products or services, the utility should demonstrate that the Commission has approved and the utility has established a reasonable mechanism for treatment of revenues derived from offering such products and services. Nothing in our actions approving this rule predetermines the disposition of these revenues. We also note that the Commission has adopted a PBR scheme for several of the utilities covered by these rules. To the extent those utilities seek to establish a different sharing mechanism than that provided for in their PBR, they should petition to modify their PBR decisions, where all risks and rewards of the PBR mechanism can be examined, not just specific portion the utility wants to change, or clearly justify why this procedure is inappropriate. This is consistent with our statement in the SoCalGas PBR decision:

> "If SoCal expands its current service offerings and/or gains approval for new products or services, SoCal may be able to increase net revenues. We see this as a type of productivity improvement that would be consistent with the goals of PBR. Under the PBR we adopt in this order, returns above the target arising from either cost decreases or revenue increases will be shared between ratepayers and shareholders." (D.97-07-054, slip op. at p. 64.)

9. Utility Merchant Function

In their July 31 comments, as opposed to their June filing setting forth proposed rules, Petitioners propose a new rule addressing the utility merchant function. Petitioners state that to the extent that a utility is engaged in the marketing of the commodity of electricity or natural gas to customers, as opposed to the marketing of transmission and distribution services, it shall be deemed, for purposes of the proposed rules, to be engaged in merchant functions. Petitioners propose rules to provide that the utility customers are placed in a position where no advantage or disadvantage is imposed on them based on whether they purchase their commodity services from the utility merchant function or from third parties, and to provide for fair competition. Respondents oppose this proposed rule since it involves intrautility relationships, not utility-to-affiliate relationships, and is therefore outside the scope of this proceeding.

We agree that Petitioners' proposal presents important issues. However, Petitioners made their initial proposal July 31, almost two months after the OIR/OII required the proposed rules to be filed. Moreover, this issue is not within the scope of the OIR/OII. We therefore decline to address Petitioners' proposal here, but do so without prejudice to Petitioners' or other parties' ability to raise this issue in another appropriate forum. We also note that one aspect of FERC's approval of market-based rate authority for the electric utilities is mitigation of market power and a monitoring plan. We anticipate that FERC's decision will provide further guidance on this issue on the electric side. Also, the Commission is about to issue a gas strategy plan on local distribution companies' market power that may provide guidance on this issue.

10. Enforcement

In their May 1 scoping memo, the Assigned Commissioners stated that it was important to have rules that can be enforced. However, as also noted by the scoping memo, D.97-04-041, issued with the OIR/OII, addressed the issue of whether the Commission should by this proceeding establish special penalties for violations of the rules. D.97-04-041 also addressed the issue of whether this proceeding should include special complaint procedures. In both instances, the Commission declined to include these issues within the ambit of this proceeding.

With respect to special complaint procedures, the Commission stated:

> "At this juncture, we are not convinced that a separate complaint procedure is needed for purposes of addressing marketing affiliate issues. Our present complaint procedure requires the utility to answer a complaint expeditiously (in 30 days) and formally. With the recent establishment of the Consumers Services Division, however, we emphasize that '[t]he Commission must ...be prepared to address both the new commercial relationships and the fair-dealing issues which are likely to arise with the continued movement toward greater competition in various markets.' (1997 Business Plan, pp. XIV-1-2.) Competitor complaints regarding utility-affiliate relations and transactions fall into this area of the Consumer Services Division's responsibilities.
>
> "New approaches for addressing informal complaints, outlined in our Business Plan, are available to all complainants. The proposal advanced by Petitioners suggests the complainant and the utility attempt to resolve the complaint informally prior to availing themselves of the Consumer Services Division's new approaches to informal resolution and the Commission's formal process. Nothing in

> our rules prohibits a complainant and utility from attempting to resolve a complaint informally. Absent a successful conclusion to such an attempt, our new approaches for addressing informal complaints provide sufficient Commission oversight of informal complaints to complainants who wish to take advantage of our resolution services." (D.97-04-041, slip op. at pp. 10-11.)

With respect to the issue of special penalties, we stated that since we have penalty authority in place and we want standards of conduct ready for implementation no later than January 1, 1998, we will not include penalty provisions specific to violations of the standards of conduct in this proceeding. (Id. at pp. 11-12.) In the May 1 scoping memo, the Assigned Commissioners elaborated that in their view, this statement does not preclude further inquiry into penalties at a later time, in the appropriate forum, if this inquiry is necessary. The scoping memo repeated this view.

Nonetheless, Petitioners propose special complaint procedures and remedies in this proceeding. We deny those proposals without prejudice. We further instruct Commission staff to prepare for our consideration an OIR or combined OIR/OII on both of these issues so that we may consider it no later than April 15, 1998. No later than January 30, 1998, interested persons may send a letter to the Chief Administrative Law Judge outlining their suggested rules on both of these issues. Parties who have proposed rules herein may suggest the same or modified rules in their letters.

In this new proceeding, any specific penalties for violations of the rules adopted in this proceeding should be strong enough to prevent violations from occurring in the first place, rather than present utilities and their affiliates with any incentive to violate the rules and simply accept the penalty. In other words, utilities and their affiliates should not perceive potential penalties as simply a cost of doing business. To this end, we may consider such penalties as not allowing a utility affiliate to switch any new customers to it for a specified period of time, or we may consider penalties for severe or recurring violations such as revocation of an affiliate's registration.

11. Review of Rules

As we move toward increasing competition in the electric and gas industries, we anticipate the market will be changing over time. As such, we believe it necessary to ensure that the Commission reviews these rules within a reasonable period of time to ensure that they are appropriate given the state of the marketplace. Therefore, we direct the Commission staff to prepare an OIR or combined OIR/OII, or other appropriate procedural vehicle, to review the rules adopted by this decision. This document should be prepared for our consideration no later than within three years, or by December 31, 2000, and sooner if conditions warrant.

We also believe that the utilities should report to the Commission additional information which could be useful in this review. Beginning with the January 1998 monthly report which the utility distribution company (UDC) is required to file pursuant to D.97-05-040, slip op. at p. 93, Ordering Paragraph 5(e)(5) and p. 30, the UDC shall also provide the Commission the following information in the report, separated into the customer classes already set forth in the report pursuant to item 5 at D.97-04-050, at p. 30:

(1) The total volume of kilowatt-hours provided under Direct Access contracts for that period; and

(2) The volume of kilowatt-hours provided under Direct Access contracts obtained by affiliates of the UDC.

(3) In the January report, the UDC should provide the above information for the November and December 1997 reporting periods as well.

12. Comments to the Draft Decision and Alternate Pages

Even though not required by the Commission's Rules of Practice and Procedure because the ALJ's draft decision is not a § 311 proposed decision, the draft decision of ALJ Econome and alternate pages of Commissioners Knight and Bilas were published on October 31, 1997, with parties' comments due no later than November 17, 1997. The alternate pages of Commissioner Conlon were issued on November 25, 1997 for comment although not required by the Commission's rules. We received comments from CAPHCC, California Large Energy Consumers Association, California Manufacturers Association, California Retailers Association, California Small Business Association, CAC, DGS, EEI, Edison International, Edison Source, Electric Clearinghouse and Natural Gas Clearinghouse, Enron Capital and Trade Resources, Joint Petitioners Coalition, Joint Utility Respondents, ORA, NAESCO, PacifiCorp, PG&E, PG&E Corporation, PG&E ES, PGT, Edison, SCUPP/IID, SDG&E and SoCalGas, jointly, Sierra Pacific, Southwest Gas Corporation, TURN, UC/CSU, and Washington Water Power Company.

In response to the parties' comments, we have made changes to the draft decision set forth below. We have also made other changes to the draft decision to improve the discussion, add references to the record, and correct typographical errors.

- We limit the application of the rules to holding companies engaged in the provision of products and services as set out in Rule II B, provided that the utility demonstrates in the compliance plan both the specific mechanism and procedures that the utility has in place to assure that the utility is not utilizing the holding company or any of its affiliates not covered by these rules as a conduit to circumvent any of these rules. In the compliance plan, a corporate officer from the utility and holding company shall verify the adequacy of these specific mechanisms and procedures. (See Section II F 1.)

- We provide that a California utility which is also a multi-state utility and subject to the jurisdiction of other state regulatory commissions, may file an application requesting a limited exemption from these rules or a part thereof, for transactions between the utility solely in its capacity serving its jurisdictional areas wholly outside of California, and its affiliates. (See Section II D.)

- We include transactions between a Commission-regulated utility and an affiliated utility within the scope of the rules, and provide that in the context of reviewing a merger application, the Commission can make specific modifications to the application of these rules, or apply additional rules as appropriate. (See Section II F 1.)

- We limit the application of the name/logo disclaimer to the use of the name or logo in California. (See Section II F 6 a.)
- We permit certain joint purchases. (See Section II F 6 c.)
- We modify our rule on corporate support to better ensure adequate corporate governance and oversight. (See Section II F 6 d.)
- We permit some shared joint utility/affiliate board members and corporate officers. (See Section II F 6 f.)
- We modify the employee transfer rule so that an employee who is transferred from the utility to the affiliate cannot return to the utility for one year, and that if the employee does return to the utility, the employee cannot then transfer to the affiliate for two years. This modification is instead of the two and three year limitations respectively in the draft decision. (Section II F 6 f.)
- We adopt additional clarification language regarding our intent in adopting these rules. (See Section II F 2.)
- We clarify that the utility can transfer information as previously authorized by the Commission in D.97-10-031. (See Section II F 5 b.)
- We modify the recordkeeping requirements. (See Section II F 5 d.)
- We modify our discussion and rule on new products and services primarily to address moving parties' October 23 motion. (See Section II F 8.)
- We strike an attachment from EEI's comments since it was offered too late in this proceeding to afford other parties a meaningful opportunity to reply. (See Section II E.)
- We modify the service requirement for New Affiliate Compliance Plans to permit that the utility's initial notification to be on the utility's electronic bulletin board. (See Rule VI.)
- We provide for a time certain for the Commission staff to prepare an OIR or joint OIR/OII addressing special complaint

procedures and remedies needed to enforce our adopted rules. (See Section II F 10.)

- We provide for an automatic review of these rules not later than in three years, and sooner if conditions warrant. We also require the utilities to provide us with additional information in their monthly reports required by D.97-05-040. (See Section II F 10.)

Findings of Fact

1. On April 11, 1997, this Commission issued an OIR/OII to establish standards of conduct governing relationships between California's natural gas local distribution companies and electric utilities and their affiliated, unregulated entities providing energy and energy-related services, and to determine whether the utilities should be required to have their nonregulated or potentially competitive activities conducted by their affiliate companies.

2. We identified the rulemaking and investigation as candidate proceedings to be processed under the Commission's Resolution ALJ-170, which sets forth an experimental implementation of procedures that will become mandatory for our proceedings effective January 1, 1998, pursuant to Senate Bill 960.

3. The Assigned Commissioners' scoping memo categorized the rulemaking as "quasi-legislative" and the investigation as "ratesetting" as those terms are defined in the experimental rules set forth in Resolution ALJ-170.

4. The OIR/OII set forth two objectives which guide our formation of the appropriate rules: (1) to foster competition and (2) to protect consumers' interests.

5. Given the current and past structure of the electric and gas industries and the obvious advantage of the incumbent utility as we move toward increasing competition, there is a clear need for these rules to promote a level playing field which is vital for competition to flourish.

6. Rules that rely more on separation, and less on cost accounting solely, can minimize the likelihood of abuses. At the same time, rules that rely on separation are easier to monitor than rules that primarily rely on a multitude of reporting requirements.

7. It is not clear that the near-term savings that result, for example, from joint utility and affiliate procurement would actually translate into lower prices for consumers or ratepayers.

8. It is this Commission's duty to adopt rules it deems necessary to protect the public interest in California, and not to abdicate that duty because it is alleged that several potential competitors are not subject to the same rules.

9. We originally narrowed the scope of the this proceeding, in part, so we could adopt rules by December 31, 1997. We wanted to address the types of affiliate transactions over which we have the most concern in the near term. Because the comments in this proceeding primarily discuss the market power concerns with a utility marketing energy and broadly defined energy-related services, we continue to limit the applicability of the rules we adopt.

10. Although no party has defined energy or energy-related services in its proposal, our adopted rules do so. Our definition is broad in scope, given the incumbent's general advantage and because we want to ensure robust and fair competition in the affected markets.

11. For purposes of a combined gas and electric utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity, unless otherwise specifically exempted in these rules. In the case of an electric utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity, unless otherwise specified in these rules. In the case of a gas utility, these rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or the provision of services that relate to the use of gas, unless otherwise specified in these rules.

12. We recently addressed and resolved the issue raised by TURN and ORA in their June 2 motions in the context of developing policies and rules for the new competitive marketplace.

13. To the extent that a utility does not have an affiliate as defined by these rules, the rules do not apply to that utility.

14. Nothing in this proceeding prevents us from issuing other utility-specific affiliate transaction rules in another proceeding if we believe it is necessary.

15. The rules we adopt today apply to the regulated utility, not the affiliate.

16. We caution that the utilities should not use the "similarly situated" qualification set forth in our nondiscrimination rules to create such a unique discount arrangement with their affiliates such that no competitor could be considered similarly situated. All competitors serving the same market as the utility's affiliates should be offered the same discount as the discount received by the affiliates.

17. Transfer pricing rules are not adequate to prevent potential abuse in the provision of discounts and other services, because such rules only attempt to eliminate cross-subsidization, and do not address market power concerns.

18. The argument that discounts should reflect cost differentials is a good one in theory, if they do so in fact. The difficulty from our point of view is discerning if these discounts or other special terms are actually cost-based, or if they are being used to give affiliates cost advantages in their competitive markets.

19. Respondents' definition of "utility services" is too narrow, and does not address all of the interactions between the utility and its affiliates that are covered by these rules.

20. We interpret the phrase "customer's affirmative written consent" to mean the customer's written affirmative informed consent, freely given.

21. There are competitive concerns related to a blanket approval for a utility to share proprietary information with affiliates, for instance, to the extent that the opportunity for development of the information arises from the provision of monopoly regulated utility services.

22. Permitting the utility to act as its affiliates' referral service would give affiliates an unfair advantage which is hard to overcome.

23. Detailed and timely recordkeeping and reporting rules are necessary to reasonably enforce these rules.

24. We prefer to address our competitive concerns on the name and logo issue at this time through appropriate disclaimers, to provide the customer with more information, not less.

25. Joint marketing between a utility and an affiliate creates opportunities for cross-subsidization, and also has the strong potential to mislead the consumer, for example, by implying that taking affiliate services is somehow related to the provision of monopoly utility service. Joint marketing opportunities, especially when coupled with the joint use of a name and logo, will promote customer confusion by allowing affiliates to capitalize on the public perception that their products are closely associated with the regulated utility's.

26. Oral joint marketing would be virtually immune to effective oversight and regulation.

27. Permitting the utility to grant its affiliate exclusive access to the utility's billing envelope to promote its services would also violate the basic concept underlying the nondiscrimination rules -- that a utility should not grant its affiliates preference vis a vis other non-affiliated competitors.

28. A utility's affiliate is free to use the billing envelopes to advertise under the conditions we impose.

29. Increased competition in the energy markets is one of our primary goals. The presence of any particular cost advantage for the affiliates, if derived from their association with the utility and not from their own internal efficiencies, engenders market power and entry barrier concerns.

30. Petitioners' proposal regarding corporate support, which places clear limitations on corporate support in areas where joint corporate support would more likely give the utility and affiliate an unfair competitive advantage, is appropriate with modifications.

31. The language in Respondents' separation rule requiring separation "to the extent practicable," combined with the language permitting "resource sharing for economies and efficiencies," could indeed swallow the general rule requiring separation.

32. Respondents' proposed rule regarding employees defines "temporary" with a broad brush, and essentially nullifies their proposed rules prohibiting shared employees. Allowing an employee to work for an affiliate a little under a year at one time, or intermittently for a little under 50% of an employee's time, is hardly a temporary assignment.

33. It is necessary to ensure that ratepayers are reimbursed for the costs incurred in hiring and training personnel. The transfer of these personnel can result in an enormous advantage for the affiliate.

34. Placing specific time limitations on transfers or rotating employment would prevent repeated or short-term transfers or hiring and re-hiring of certain personnel between the utility and affiliate. However, our rules should accommodate the transfer of employees whose affiliate has gone out of business.

35. We adopt the consensus rule regarding the application of existing affiliate transaction rules, with the proviso that when existing utility-specific holding company rules are more detailed but harmonious with the rules we adopt today, the utility should abide by both rules. Nothing in the adopted rules prevents the Commission from adopting other utility-specific rules if appropriate.

36. The requirement for the utilities to have an independent auditor prepare an annual audit to verify compliance with these rules is reasonable. We are in a transition period to a competitive marketplace, and the utility's business will be undergoing changes in rapid fashion. An annual audit, at least in the first three or four initial transition years, is critical to ensure compliance with these rules. The audit should be at shareholder expense.

37. Petitioners' proposal discussed in Section II F 9 regarding the utility merchant function presents important issues but is not within the scope of this proceeding.

38. This OIR/OII determined that since we have penalty authority in place and we want standards of conduct ready for implementation no later than January 1, 1998, we will not include penalty provisions specific to violations of the standards of conduct in this proceeding. The scoping memo stated that the Commission is not precluded from

further inquiry into penalties at a later time, in the appropriate forum, if this inquiry is necessary.

39. The SoCalGas PBR decision required that any new proposal provide the level of detail and accounting safeguards set forth in D.89-10-031, when we adopted the three categories of services for telecommunication products and requisite accounting safeguards.

40. We do not wish to adopt a mechanism by which the utility can circumvent the rules we adopt today by offering the products or services itself instead of through an affiliate, especially when the utility's offering is for a competitive or potentially competitive service and might interfere with the development of a competitive market.

Conclusions of Law

1. The affiliate transaction rules, attached to this order as Appendix A, are reasonable and should be adopted.

2. No later than December 31, 1997, the utilities should file a compliance plan demonstrating to the Commission that there are adequate procedures in place implementing the rules we adopt today. A utility should file a compliance plan annually thereafter using the same advice letter process when there is some change in the compliance plan (i.e., a new affiliate has been created, or the utility has changed the compliance plan for any other reason). No later than 60 days after the creation of a new affiliate, the utility should file an advice letter demonstrating how the utility will implement these rules with respect to the new entity.

3. Edison's June 2 motion to accept its June 2 supplemental comments one day out of time, SCWC's August 20 motion to accept its reply comments out of time, and PacifiCorp's August 14 motion to accept its reply comments out of time should be granted.

4. The Joint Petitioners Coalition's June 2, 1997 Petition for Modification of the OIR/OII should be denied.

5. TURN's June 2, 1997 motion requesting a provisional ban on marketing by the affiliate of gas or electric distribution company within the utility's service territory and

ORA's June 2, 1997 motion proposing that customers of the natural gas local distribution companies and electric utility distribution companies shall not receive products or services from unregulated affiliates of the gas and electric utilities from which they receive distribution services should be denied.

6. PacifiCorp, Washington Water Power Company and Sierra Pacific Power Company's joint motion and SCWC's motion to be exempted from the adopted utility/affiliate rules should be denied. The Joint Utility Respondents' proposal regarding a request for exemption from application of these rules if a utility believes one or more of its affiliates is not covered by the rules should be granted as more fully set forth in the adopted rules.

7. ORA's September 3, 1997 motion to consider in this rulemaking an upcoming ORA audit of PG&E which is being conducted in Phase 2 of PG&E's holding company application is denied without prejudice to raise it at a later time if conditions warrant. The California Electric Deregulation Survey, attached as Attachment 1 to Edison Electric Institute's November 17, 1997 comments to the draft decision and alternate, as well as all references to the survey in the comments, are stricken from the record.

8. SDG&E's and SoCalGas' August 14, 1997 motion requesting an early determination of our definition of affiliate in this proceeding should be denied.

9. The Commission staff should prepare for our consideration an OIR or combined OIR/OII on the special complaint procedures and remedies needed to enforce our adopted rules so that we may consider it no later than April 15, 1998. No later than January 30, 1998, interested persons may send a letter to the Chief Administrative Law Judge outlining their suggested rules on both of these issues.

10. The Commission staff should prepare for our consideration an OIR or combined OIR/OII or other appropriate procedural vehicle, to review the rules adopted by this decision. This document should be prepared for our consideration no later than within three years, or by December 31, 2000, and sooner if conditions warrant.

11. Beginning with the January 1998 monthly report which the utility distribution company (UDC) is required to file pursuant to D.97-05-040, slip op. at p. 93, Ordering Paragraph 5(e)(5) and p. 30, the UDC shall also provide the Commission the following

information in the report, separated into the customer classes already set forth in the report pursuant to item 5 at D.97-04-050, at p. 30:

(1) The total volume of kilowatt-hours provided under Direct Access contracts for that period; and

(2) The volume of kilowatt-hours provided under Direct Access contracts obtained by affiliates of the UDC.

(3) In the January report, the UDC shall provide the above information for the November and December 1997 reporting periods as well.

12. Because these rules should be implemented on January 1, 1998, this order should be effective immediately.

13. Because this order meets the objectives of the OIR/OII, this proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The affiliate transaction rules, attached to this order as Appendix A, are adopted.

2. No later than December 31, 1997, Respondent utilities Kirkwood Gas and Electric Company, PacifiCorp, Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Sierra Pacific Company, Southern California Edison Company (Edison), Southern California Gas Company (SoCalGas), Southern California Water Company (SCWC), Southwest Gas Company, and Washington Water and Power Company shall file a compliance plan demonstrating to the Commission that there are adequate procedures in place implementing the rules we adopt today. The utilities shall file these compliance plans as an advice letter with the Commission's Energy Division and serve them on the service list of this proceeding. The utilities' compliance plans will be in effect between their filing and a Commission decision on the advice letter. A utility shall file a compliance plan annually thereafter using the same advice letter process when there is some change in the compliance plan (i.e., a new affiliate has

been created, or the utility has changed the compliance plan for any other reason). Also, no later than 60 days after the creation of a new affiliate, the utility shall file an advice letter with the Energy Division of the Commission, which should also be served on the parties to this proceeding. The advice letter shall demonstrate how the utility will implement these rules with respect to the new entity. Any Respondent utility which applies for an exemption under Rule 2G does not have to comply with this Ordering Paragraph unless further ordered by the Commission or required by Rule 2G.

3. Edison's June 2, 1997 motion to accept its June 2 supplemental comments one day out of time, Southern California Water Company's August 20, 1997 motion to accept its reply comments out of time, and PacifiCorp's August 14, 1997 motion to accept its reply comments out of time are granted.

4. The Joint Petitioners Coalition's June 2, 1997 Petition for Modification of Order Instituting Rulemaking 97-04-011 and Order Instituting Rulemaking 97-04-012 is denied.

5. The Utility Reform Network's June 2, 1997 motion requesting a provisional ban on marketing by the affiliate of a gas or electric distribution company within the utility's service territory, and the Office of Ratepayer Advocates' (ORA) June 2, 1997 motion proposing that customers of the natural gas local distribution companies and electric utility distribution companies shall not receive products or services from unregulated affiliates of the gas and electric utilities from which they receive distribution services are denied.

6. PacifiCorp, Washington Water Power Company and Sierra Pacific Power Company's joint motion, and SCWC's June 2, 1997 motion to be exempted from the adopted utility/affiliate rules are denied.

7. ORA's September 3, 1997 motion to consider in this rulemaking an upcoming ORA audit of PG&E which is being conducted in Phase 2 of PG&E's holding company application, is denied without prejudice to raise it at a later time if conditions warrant. The California Electric Deregulation Survey, attached as Attachment 1 to Edison Electric Institute's November 17, 1997 comments to the draft decision and alternate, as well as all references to the survey in the comments, are stricken from the record.

8. Enova Corporation, Pacific Enterprises, SDG&E, and SoCalGas' joint August 14, 1997 motion for clarifying order is denied.

9. The Commission staff shall prepare for our consideration an Order Instituting Rulemaking (OIR) or combined OIR/Order Instituting Investigation (OII) on the special complaint procedures and remedies needed to enforce our adopted rules so that we may consider it no later than April 15, 1998. No later than January 30, 1998, interested persons may send a letter to the Chief Administrative Law Judge outlining their suggested rules on both of these issues.

10. The Commission staff shall prepare for our consideration an OIR or combined OIR/OII or other appropriate procedural vehicle, to review the rules adopted by this decision. This document should be prepared for our consideration no later than within three years, or by December 31, 2000, and sooner if conditions warrant.

11. Beginning with the January 1998 monthly report which the utility distribution company (UDC) is required to file pursuant to Decision (D.) 97-05-040, slip opinion at page 93, Ordering Paragraph 5(e)(5) and page 30, the UDC shall also provide the Commission the following information in the report, separated into the customer classes already set forth in the report pursuant to item 5 at D.97-04-050, at page 30:

(1) The total volume of kilowatt-hours provided under Direct Access contracts for that period; and

(2) The volume of kilowatt-hours provided under Direct Access contracts obtained by affiliates of the UDC.

(3) In the January report, the UDC shall provide the above information for the November and December 1997 reporting periods as well.

12. Because this order meets the objectives of the Orders Instituting this proceeding, this proceeding is closed.

This order is effective today.

Dated December 16, 1997, at San Francisco, California.

JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

I will file a concurring opinion.

/s/ JESSIE J. KNIGHT, JR.
Commissioner

I will file a written dissent.

/s/ P. GREGORY CONLON
President

APPENDIX A
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Affiliate Transaction Rules

I. Definitions

Unless the context otherwise requires, the following definitions govern the construction of these Rules:

A. "Affiliate" means any person, corporation, utility, partnership, or other entity 5 per cent or more of whose outstanding securities are owned, controlled, or held with power to vote, directly or indirectly either by a utility or any of its subsidiaries, or by that utility's controlling corporation and/or any of its subsidiaries as well as any company in which the utility, its controlling corporation, or any of the utility's affiliates exert substantial control over the operation of the company and/or indirectly have substantial financial interests in the company exercised through means other than ownership. For purposes of these Rules, "substantial control" includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management or policies of a company. A direct or indirect voting interest of 5% or more by the utility in an entity's company creates a rebuttable presumption of control.

For purposes of this Rule, "affiliate" shall include the utility's parent or holding company, or any company which directly or indirectly owns, controls, or holds the power to vote 10% or more of the outstanding voting securities of a utility (holding company), to the extent the holding company is engaged in the provision of products or services as set out in Rule II B. However, in its compliance plan filed pursuant to Rule VI, the utility shall demonstrate both the specific mechanism and procedures that the utility and holding company have in place to assure that the utility is not utilizing the holding company or any of its affiliates not covered by these Rules as a conduit to circumvent any of these Rules. Examples include but are not limited to specific mechanisms and procedures to assure the Commission that the utility will not use the holding company or another utility affiliate not covered by these Rules as a vehicle to (1) disseminate information transferred to them by the utility to an affiliate covered by these Rules in contravention of these Rules, (2) provide services to its affiliates covered by these Rules in contravention of these Rules or (3) to transfer employees to its affiliates covered by these Rules in contravention of these Rules. In the compliance plan, a corporate officer from the utility and holding company shall verify the adequacy of these specific mechanisms and procedures to ensure that the utility is not utilizing the holding company or any of its affiliates not covered by these Rules as a conduit to circumvent any of these Rules.

Regulated subsidiaries of a utility, defined as subsidiaries of a utility, the revenues and expenses of which are subject to regulation by the Commission and are included by the Commission in establishing rates for the utility, are not included within the definition of affiliate. However, these Rules apply to all interactions any regulated subsidiary has with other affiliated entities covered by these rules.

B. "Commission" means the California Public Utilities Commission or its succeeding state regulatory body.

C. "Customer" means any person or corporation, as defined in Sections 204, 205 and 206 of the California Public Utilities Code, that is the ultimate consumer of goods and services.

D. "Customer Information" means non-public information and data specific to a utility customer which the utility acquired or developed in the course of its provision of utility services.

E. "FERC" means the Federal Energy Regulatory Commission.

F. "Fully Loaded Cost" means the direct cost of good or service plus all applicable indirect charges and overheads.

G. "Utility" means any public utility subject to the jurisdiction of the Commission as an Electrical Corporation or Gas Corporation, as defined in California Public Utilities Code Sections 218 and 222.

II. Applicability

A. These Rules shall apply to California public utility gas corporations and California public utility electrical corporations, subject to regulation by the California Public Utilities Commission.

B. For purposes of a combined gas and electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or electricity or the provision of services that relate to the use of gas or electricity, unless specifically exempted below. For purposes of an electric utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses electricity or the provision of services that relate to the use of electricity. For purposes of a gas utility, these Rules apply to all utility transactions with affiliates engaging in the provision of a product that uses gas or the provision of services that relate to the use of gas.

C. These Rules apply to transactions between a Commission-regulated utility and another affiliated utility, unless specifically modified by the Commission in addressing a separate application to merge or otherwise conduct joint ventures related to regulated services.

D. These rules do not apply to the exchange of operating information, including the disclosure of customer information to its FERC-regulated affiliate to the extent such information is required by the affiliate to schedule and confirm nominations for the interstate transportation of natural gas, between a utility and its FERC-regulated affiliate, to the extent that the affiliate operates an interstate natural gas pipeline.

E. Existing Rules: Existing Commission rules for each utility and its parent holding company shall continue to apply except to the extent they conflict with these Rules. In such cases, these Rules shall supersede prior rules and guidelines, provided that nothing herein shall preclude (1) the Commission from adopting other utility-specific guidelines; or (2) a utility or its parent holding company from adopting other utility-specific guidelines, with advance Commission approval.

F. Civil Relief: These Rules shall not preclude or stay any form of civil relief, or rights or defenses thereto, that may be available under state or federal law.

G. Exemption (Advice Letter): A Commission-jurisdictional utility may be exempted from these Rules if it files an advice letter with the Commission requesting exemption. The utility shall file the advice letter within 30 days after the effective date of this decision adopting these Rules and shall serve it on all parties to this proceeding. In the advice letter filing, the utility shall:

1. Attest that no affiliate of the utility provides services as defined by Rule II B above; and

2. Attest that if an affiliate is subsequently created which provides services as defined by Rule II B above, then the utility shall:

   a. Notify the Commission, at least 30 days before the affiliate begins to provide services as defined by Rule II B above, that such an affiliate has been created; notification shall be accomplished by means of a

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letter to the Executive Director, served on all parties to this proceeding; and

b. Agree in this notice to comply with the Rules in their entirety.

H. Limited Exemption (Application): A California utility which is also a multi-state utility and subject to the jurisdiction of other state regulatory commissions, may file an application, served on all parties to this proceeding, requesting a limited exemption from these Rules or a part thereof, for transactions between the utility solely in its capacity serving its jurisdictional areas wholly outside of California, and its affiliates. The applicant has the burden of proof.

I. These Rules should be interpreted broadly, to effectuate our stated objectives of fostering competition and protecting consumer interests. If any provision of these Rules, or the application thereof to any person, company, or circumstance, is held invalid, the remainder of the Rules, or the application of such provision to other persons, companies, or circumstances, shall not be affected thereby.

III. Nondiscrimination

A. No Preferential Treatment Regarding Services Provided by the Utility: Unless otherwise authorized by the Commission or the FERC, or permitted by these Rules, a utility shall not:

1. represent that, as a result of the affiliation with the utility, its affiliates or customers of its affiliates will receive any different treatment by the utility than the treatment the utility provides to other, unaffiliated companies or their customers; or

2. provide its affiliates, or customers of its affiliates, any preference (including but not limited to terms and conditions, pricing, or timing) over non-affiliated suppliers or their customers in the provision of services provided by the utility.

B. Affiliate Transactions: Transactions between a utility and its affiliates shall be limited to tariffed products and services, the sale or purchase of goods, property, products or services made generally available by the utility or affiliate to all market participants through an open, competitive bidding process, or as provided for in Sections V D and V E (joint purchases and corporate support) and Section VII (new products and services) below, provided the transactions provided for in Section VII comply with all of the other adopted Rules.

1. **Provision of Supply, Capacity, Services or Information:** Except as provided for in Sections V D, V E, and VII, provided the transactions provided for in Section VII comply with all of the other adopted Rules, a utility shall provide access to utility information, services, and unused capacity or supply on the same terms for all similarly situated market participants. If a utility provides supply, capacity, services, or information to its affiliate(s), it shall contemporaneously make the offering available to all similarly situated market participants, which include all competitors serving the same market as the utility's affiliates.

2. **Offering of Discounts:** Except when made generally available by the utility through an open, competitive bidding process, if a utility offers a discount or waives all or any part of any other charge or fee to its affiliates, or offers a discount or waiver for a transaction in which its affiliates are involved, the utility shall contemporaneously make such discount or waiver available to all similarly situated market participants. The utilities should not use the "similarly situated" qualification to create such a unique discount arrangement with their affiliates such that no competitor could be considered similarly situated. All competitors serving the same market as the utility's affiliates should be offered the same discount as the discount received by the affiliates. A utility shall document the cost differential underlying the discount to its affiliates in the affiliate discount report described in Rule III F 7 below.

3. **Tariff Discretion:** If a tariff provision allows for discretion in its application, a utility shall apply that tariff provision in the same manner to its affiliates and other market participants and their respective customers.

4. **No Tariff Discretion:** If a utility has no discretion in the application of a tariff provision, the utility shall strictly enforce that tariff provision.

5. **Processing Requests for Services Provided by the Utility:** A utility shall process requests for similar services provided by the utility in the same manner and within the same time for its affiliates and for all other market participants and their respective customers.

C. **Tying of Services Provided by a Utility Prohibited:** A utility shall not condition or otherwise tie the provision of any services provided by the utility, nor the availability of discounts of rates or other charges or fees, rebates, or waivers of terms and conditions of any services provided by the utility, to the taking of any goods or services from its affiliates.

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D. No Assignment of Customers: A utility shall not assign customers to which it currently provides services to any of its affiliates, whether by default, direct assignment, option or by any other means, unless that means is equally available to all competitors.

E. Business Development and Customer Relations: Except as otherwise provided by these Rules, a utility shall not:

1. provide leads to its affiliates;

2. solicit business on behalf of its affiliates;

3. acquire information on behalf of or to provide to its affiliates;

4. share market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports, with its affiliates;

5. request authorization from its customers to pass on customer information exclusively to its affiliates;

6. give the appearance that the utility speaks on behalf of its affiliates or that the customer will receive preferential treatment as a consequence of conducting business with the affiliates; or

7. give any appearance that the affiliate speaks on behalf of the utility.

F. Affiliate Discount Reports: If a utility provides its affiliates a discount, rebate, or other waiver of any charge or fee associated with services provided by the utility, the utility shall, within 24 hours of the time at which the service provided by the utility is so provided, post a notice on its electronic bulletin board providing the following information:

1. the name of the affiliate involved in the transaction;

2. the rate charged;

3. the maximum rate;

4. the time period for which the discount or waiver applies;

5. the quantities involved in the transaction;

6. the delivery points involved in the transaction;

7. any conditions or requirements applicable to the discount or waiver, and a documentation of the cost differential underlying the discount as required in Rule III B 2 above; and

8. procedures by which a nonaffiliated entity may request a comparable offer.

A utility that provides an affiliate a discounted rate, rebate, or other waiver of a charge or fee associated with services provided by the utility shall maintain, for each billing period, the following information:

9. the name of the entity being provided services provided by the utility in the transaction;

10. the affiliate's role in the transaction (i.e., shipper, marketer, supplier, seller);

11. the duration of the discount or waiver;

12. the maximum rate;

13. the rate or fee actually charged during the billing period; and

14. the quantity of products or services scheduled at the discounted rate during the billing period for each delivery point.

All records maintained pursuant to this provision shall also conform to FERC rules where applicable.

IV. Disclosure and Information

A. Customer Information: A utility shall provide customer information to its affiliates and unaffiliated entities on a strictly non-discriminatory basis, and only with prior affirmative customer written consent.

B. Non-Customer Specific Non-Public Information: A utility shall make non-customer specific non-public information, including but not limited to information about a utility's natural gas or electricity purchases, sales, or operations or about the utility's gas-related goods or services, electricity-related goods or services, available to the utility's affiliates only if the utility makes that information contemporaneously available to all other service providers on the same terms and conditions, and keeps the information open to public inspection. Unless otherwise provided by these Rules, a utility continues to be bound by all Commission-adopted pricing and reporting guidelines for such transactions. Utilities are also permitted to exchange proprietary information on an exclusive basis with their affiliates, provided the utility follows all Commission-adopted pricing and reporting guidelines for such transactions, and it is necessary to exchange this information in the provision of the corporate support services permitted by Rule V E below. The affiliate's use of such proprietary information is limited to use in conjunction with the permitted corporate support services, and is not permitted for any other use. Nothing in this Rule precludes the exchange of information pursuant to D.97-10-031.

C. Service Provider Information:

1. Except upon request by a customer or as otherwise authorized by the Commission, a utility shall not provide its customers with any list of service providers, which includes or identifies the utility's affiliates, regardless of whether such list also includes or identifies the names of unaffiliated entities.

2. If a customer requests information about any affiliated service provider, the utility shall provide a list of all providers of gas-related, electricity-related, or other utility-related goods and services operating in its service territory, including its affiliates. The Commission shall authorize, by semi-annual utility advice letter filing, and either the utility, the Commission, or a Commission-authorized third party provider shall maintain on file with the Commission a copy of the most updated lists of service providers which have been created to disseminate to a customer upon a customer's request. Any service provider may request that it be included on such list, and, barring Commission direction, the utility shall honor such request. Where maintenance of such list would be unduly burdensome due to the number of service providers, subject to Commission approval by advice letter filing, the utility shall direct the customer to a generally available listing of service providers (e.g., the Yellow Pages). In such cases, no list shall be provided. The list of service providers should make clear that the Commission does not guarantee the financial stability or service quality of the service providers listed by the act of approving this list.

D. Supplier Information: A utility may provide non-public information and data which has been received from unaffiliated suppliers to its affiliates or non-affiliated entities only if the utility first obtains written affirmative authorization to do so from the supplier. A utility shall not actively solicit the release of such information exclusively to its own affiliate in an effort to keep such information from other unaffiliated entities.

E. Affiliate-Related Advice or Assistance: Except as otherwise provided in these Rules, a utility shall not offer or provide customers advice or assistance with regard to its affiliates or other service providers.

F. Record-Keeping: A utility shall maintain contemporaneous records documenting all tariffed and nontariffed transactions with its affiliates, including but not limited to, all waivers of tariff or contract provisions and all discounts. A utility shall maintain such records for a minimum of three years and longer if this Commission or another government agency so requires. The utility shall make such records available for third party review upon 72 hours' notice, or at a time mutually agreeable to the utility and third party.

If D.97-06-110 is applicable to the information the utility seeks to protect, the utility should follow the procedure set forth in D.97-06-110, except that the utility should serve the third party making the request in a manner that the third party receives the utility's D.97-06-110 request for confidentiality within 24 hours of service.

G. Maintenance of Affiliate Contracts and Related Bids: A utility shall maintain a record of all contracts and related bids for the provision of work, products or services to and from the utility to its affiliates for no less than a period of three years, and longer if this Commission or another government agency so requires.

H. FERC Reporting Requirements: To the extent that reporting rules imposed by the FERC require more detailed information or more expeditious reporting, nothing in these Rules shall be construed as modifying the FERC rules.

V. Separation

A. Corporate Entities: A utility and its affiliates shall be separate corporate entities.

B. Books and Records: A utility and its affiliates shall keep separate books and records.

1. Utility books and records shall be kept in accordance with applicable Uniform System of Accounts (USOA) and Generally Accepted Accounting Procedures (GAAP).

2. The books and records of affiliates shall be open for examination by the Commission and its staff consistent with the provisions of Public Utilities Code Section 314.

C. Sharing of Plant, Facilities, Equipment or Costs: A utility shall not share office space, office equipment, services, and systems with its affiliates, nor shall a utility access the computer or information systems of its affiliates or allow its affiliates to access its computer or information systems, except to the extent appropriate to perform shared corporate support functions permitted under Section V E of these Rules. Physical separation required by this rule shall be accomplished preferably by having office space in a separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. This provision does not preclude a utility from offering a joint service provided this service is authorized by the Commission and is available to all non-affiliated service providers on the same terms and conditions (e.g., joint billing services pursuant to D.97-05-039).

D. Joint Purchases: To the extent not precluded by any other Rule, the utilities and their affiliates may make joint purchases of good and services, but not those associated with the traditional utility merchant function. For purpose of these Rules, to the extent that a utility is engaged in the marketing of the commodity of electricity or natural gas to customers, as opposed to the marketing of transmission and distribution services, it is engaging in merchant functions. Examples of permissible joint purchases include joint purchases of office supplies and telephone services. Examples of joint purchases not permitted include gas and electric purchasing for resale, purchasing of gas transportation and storage capacity, purchasing of electric transmission, systems operations, and marketing. The utility must insure that all joint purchases are priced, reported, and conducted in a manner that permits clear identification of the utility and affiliate portions of such purchases, and in accordance with applicable Commission allocation and reporting rules.

E. Corporate Support: As a general principle, a utility, its parent holding company, or a separate affiliate created solely to perform corporate support services may share with its affiliates joint corporate oversight, governance, support systems and personnel. Any shared support shall be priced, reported and conducted in accordance with the Separation and Information Standards set forth herein, as well as other applicable Commission pricing and reporting requirements.

As a general principle, such joint utilization shall not allow or provide a means for the transfer of confidential information from the utility to the affiliate, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of affiliates. In the compliance plan, a corporate officer from the utility and holding company shall verify the adequacy of the specific mechanisms and procedures in place to ensure the utility follows the mandates of this paragraph, and to ensure the utility is not utilizing joint corporate support services as a conduit to circumvent these Rules.

Examples of services that may be shared include: payroll, taxes, shareholder services, insurance, financial reporting, financial planning and analysis, corporate accounting, corporate security, human resources (compensation, benefits, employment policies), employee records, regulatory affairs, lobbying, legal, and pension management.

Examples of services that may not be shared include: employee recruiting, engineering, hedging and financial derivatives and arbitrage services, gas and electric purchasing for resale, purchasing of gas transportation and storage capacity, purchasing of electric transmission, system operations, and marketing.

F. Corporate Identification and Advertising:

1. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name or logo to be used by the affiliate or in any material circulated by the affiliate, unless it discloses in plain legible or audible language, on the first page or at the first point where the utility name or logo appears that:

   a. the affiliate "is not the same company as [i.e. PG&E, Edison, the Gas Company, etc.], the utility,";

b. the affiliate is not regulated by the California Public Utilities Commission; and

c. "you do not have to buy [the affiliate's] products in order to continue to receive quality regulated services from the utility."

The application of the name/logo disclaimer is limited to the use of the name or logo in California.

2. A utility, through action or words, shall not represent that, as a result of the affiliate's affiliation with the utility, its affiliates will receive any different treatment than other service providers.

3. A utility shall not offer or provide to its affiliates advertising space in utility billing envelopes or any other form of utility customer written communication unless it provides access to all other unaffiliated service providers on the same terms and conditions.

4. A utility shall not participate in joint advertising or joint marketing with its affiliates. This prohibition means that utilities may not engage in activities which include, but are not limited to the following:

   a. A utility shall not participate with its affiliates in joint sales calls, through joint call centers or otherwise, or joint proposals (including responses to requests for proposals (RFPs)) to existing or potential customers. At a customer's unsolicited request, a utility may participate, on a nondiscriminatory basis, in non-sales meetings with its affiliates or any other market participant to discuss technical or operational subjects regarding the utility's provision of transportation service to the customer;

   b. Except as otherwise provided for by these Rules, a utility shall not participate in any joint activity with its affiliates. The term "joint activities" includes, but is not limited to, advertising, sales, marketing, communications and correspondence with any existing or potential customer;

   c. A utility shall not participate with its affiliates in trade shows, conferences, or other information or marketing events held in California.

5. A utility shall not share or subsidize costs, fees, or payments with its affiliates associated with research and development activities or investment in advanced technology research.

G. Employees:

1. Except as permitted in Section V E (corporate support), a utility and its affiliates shall not jointly employ the same employees. This Rule prohibiting joint employees also applies to Board Directors and corporate officers, except for the following circumstances: In instances when this Rule is applicable to holding companies, any board member or corporate officer may serve on the holding company and with either the utility or affiliate (but not both). Where the utility is a multi-state utility, is not a member of a holding company structure, and assumes the corporate governance functions for the affiliates, the prohibition against any board member or corporate officer of the utility also serving as a board member or corporate officer of an affiliate shall only apply to affiliates that operate within California. In the case of shared directors and officers, a corporate officer from the utility and holding company shall verify in the utility's compliance plan the adequacy of the specific mechanisms and procedures in place to ensure that the utility is not utilizing shared officers and directors as a conduit to circumvent any of these Rules.

2. All employee movement between a utility and its affiliates shall be consistent with the following provisions:

   a. A utility shall track and report to the Commission all employee movement between the utility and affiliates. The utility shall report this information annually pursuant to our Affiliate Transaction Reporting Decision, D.93-02-016, 48 CPUC2d 163, 171-172 and 180 (Appendix A, Section I and Section II H.).

   b. Once an employee of a utility becomes an employee of an affiliate, the employee may not return to the utility for a period of one year. This Rule is inapplicable if the affiliate to which the employee transfers goes out of business during the one-year period. In the event that such an employee returns to the utility, such employee cannot be retransferred, reassigned, or otherwise employed by the affiliate for a period of two years. Employees transferring from the utility to the affiliate are expressly prohibited from using information gained from the utility in a discriminatory or exclusive fashion, to the benefit of the affiliate or to the detriment of other unaffiliated service providers.

c. When an employee of a utility is transferred, assigned, or otherwise employed by the affiliate, the affiliate shall make a one-time payment to the utility in an amount equivalent to 25% of the employee's base annual compensation, unless the utility can demonstrate that some lesser percentage (equal to at least 15%) is appropriate for the class of employee included. All such fees paid to the utility shall be accounted for in a separate memorandum account to track them for future ratemaking treatment (i.e. credited to the Electric Revenue Adjustment Account or the Core and Non-core Gas Fixed Cost Accounts, or other ratemaking treatment, as appropriate), on an annual basis, or as otherwise necessary to ensure that the utility's ratepayers receive the fees. This transfer payment provision will not apply to clerical workers. Nor will it apply to the initial transfer of employees to the utility's holding company to perform corporate support functions or to a separate affiliate performing corporate support functions, provided that that transfer is made during the initial implementation period of these rules or pursuant to a § 851 application or other Commission proceeding. However, the rule will apply to any subsequent transfers or assignments between a utility and its affiliates of all covered employees at a later time.

d. Any utility employee hired by an affiliate shall not remove or otherwise provide information to the affiliate which the affiliate would otherwise be precluded from having pursuant to these Rules.

e. A utility shall not make temporary or intermittent assignments, or rotations to its affiliates.

H. **Transfer of Goods and Services:** To the extent that these Rules do not prohibit transfers of goods and services between a utility and its affiliates, all such transfers shall be subject to the following pricing provisions:

1. Transfers from the utility to its affiliates of goods and services produced, purchased or developed for sale on the open market by the utility will be priced at fair market value.

2. Transfers from an affiliate to the utility of goods and services produced, purchased or developed for sale on the open market by the affiliate shall be priced at no more than fair market value.

3. For goods or services for which the price is regulated by a state or federal agency, that price shall be deemed to be the fair market value, except that in cases where more than one state commission regulates the price of goods or services, this Commission's pricing provisions govern.

4. Goods and services produced, purchased or developed for sale on the open market by the utility will be provided to its affiliates and unaffiliated companies on a nondiscriminatory basis, except as otherwise required or permitted by these Rules or applicable law.

5. Transfers from the utility to its affiliates of goods and services not produced, purchased or developed for sale by the utility will be priced at fully loaded cost plus 5% of direct labor cost.

6. Transfers from an affiliate to the utility of goods and services not produced, purchased or developed for sale by the affiliate will be priced at the lower of fully loaded cost or fair market value.

VI. Regulatory Oversight

A. Compliance Plans: No later than December 31, 1997, each utility shall file a compliance plan demonstrating to the Commission that there are adequate procedures in place that will preclude the sharing of information with its affiliates that is prohibited by these Rules. The utility should file its compliance plan as an advice letter with the Commission's Energy Division and serve it on the parties to this proceeding. The utility's compliance plan shall be in effect between the filing and a Commission determination of the advice letter. A utility shall file a compliance plan annually thereafter by advice letter served on all parties to this proceeding where there is some change in the compliance plan (i.e., when a new affiliate has been created, or the utility has changed the compliance plan for any other reason).

B. New Affiliate Compliance Plans: Upon the creation of a new affiliate which is addressed by these Rules, the utility shall immediately notify the Commission of the creation of the new affiliate, as well as posting notice on its electronic bulletin board. No later than 60 days after the creation of this affiliate, the utility shall file an advice letter with the Energy Division of the Commission, served on the parties to this proceeding. The advice letter shall demonstrate how the utility will implement these Rules with respect to the new affiliate.

C. Affiliate Audit: No later than December 31, 1998, and every year thereafter, the utility shall have audits prepared by independent auditors that verify that the utility is in compliance with the Rules set forth herein. The utilities shall file this audit with the Commission's Energy Division beginning no later than December 31, 1998, and serve it on all parties to this proceeding. The audits shall be at shareholder expense.

D. Witness Availability: Affiliate officers and employees shall be made available to testify before the Commission as necessary or required, without subpoena, consistent with the provisions of Public Utilities Code Section 314.

VII. Utility Products and Services

A. General Rule: Except as provided for in these Rules, new products and services shall be offered through affiliates.

B. Definitions: The following definitions apply for the purposes of this section (Section VII) of these Rules:

1. "Category" refers to a factually similar group of products and services that use the same type of utility assets or capacity. For example, "leases of land under utility transmission lines" or "use of a utility repair shop for third party equipment repair" would each constitute a separate product or service category.

2. "Existing" products and services are those which a utility is offering on the effective date of these Rules.

3. "Products" include use of property, both real and intellectual, other than those uses authorized under General Order 69-C.

4. "Tariff" or "tariffed" refers to rates, terms and conditions of services as approved by this Commission or the Federal Energy Regulatory Commission (FERC), whether by traditional tariff, approved contract or other such approval process as the Commission or the FERC may deem appropriate.

C. Utility Products and Services: Except as provided in these Rules, a utility shall not offer nontariffed products and services. In no event shall a utility offer natural gas or electricity commodity service on a nontariffed basis. A utility may only offer for sale the following products and services:

1. Existing products and services offered by the utility pursuant to tariff;

2. Unbundled versions of existing utility products and services, with the unbundled versions being offered on a tariffed basis;

3. New products and services that are offered on a tariffed basis; and

4. Products and services which are offered on a nontariffed basis and which meet the following conditions:

    a. The nontariffed product or service utilizes a portion of a utility asset or capacity;

    b. such asset or capacity has been acquired for the purpose of and is necessary and useful in providing tariffed utility services;

    c. the involved portion of such asset or capacity may be used to offer the product or service on a nontariffed basis without adversely affecting the cost, quality or reliability of tariffed utility products and services;

    d. the products and services can be marketed with minimal or no incremental capital, minimal or no new forms of liability or business risk being incurred by the utility, and minimal or no direct management control; and

    e. the utility offering is restricted to less than 1% of the number of customers in its customer base.

D. **Conditions Precedent to Offering New Products and Services:** This Rule does not represent an endorsement by the Commission of any particular nontariffed utility product or service. A utility may offer new nontariffed products and services only if the Commission has adopted and the utility has established:

    1. A mechanism or accounting standard for allocating costs to each new product or service to prevent cross-subsidization between services a utility would continue to provide on a tariffed basis and those it would provide on a nontariffed basis;

2. A reasonable mechanism for treatment of benefits and revenues derived from offering such products and services, except that in the event the Commission has already approved a performance-based ratemaking mechanism for the utility and the utility seeks a different sharing mechanism, the utility should petition to modify the performance-based ratemaking decision if it wishes to alter the sharing mechanism, or clearly justify why this procedure is inappropriate, rather than doing so by application or other vehicle.

3. Periodic reporting requirements regarding pertinent information related to nontariffed products and services; and

4. Periodic auditing of the costs allocated to and the revenues derived from nontariffed products and services.

E. Requirement to File an Advice Letter: Prior to offering a new category of nontariffed products or services as set forth in Section VII C above, a utility shall file an advice letter in compliance with the following provisions of this paragraph.

1. The advice letter shall:

   a. demonstrate compliance with these rules;

   b. address the amount of utility assets dedicated to the non-utility venture, in order to ensure that a given product or service does not threaten the provision of utility service, and show that the new product or service will not result in a degradation of cost, quality, or reliability of tariffed goods and services;

   c. demonstrate that the utility has not received recovery in the Transition Cost Proceeding, A.96-08-001, or other applicable Commission proceeding, for the portion of the utility asset dedicated to the non-utility venture; and

   d. address the potential impact of the new product or service on competition in the relevant market.

2. In the absence of a protest alleging non-compliance with these Rules or any law, regulation, decision, or Commission policy, or allegations of harm, the utility may commence offering the product or service 30 days after submission of the advice letter.

3. A protest of an advice letter filed in accordance with this paragraph shall include:

   a. An explanation of the specific Rules, or any law, regulation, decision, or Commission policy the utility will allegedly violate by offering the proposed product or service, with reasonable factual detail; or

   b. An explanation of the specific harm the protestant will allegedly suffer.

4. If such a protest is filed, the utility may file a motion to dismiss the protest within 5 working days if it believes the protestant has failed to provide the minimum grounds for protest required above. The protestant has 5 working days to respond to the motion.

5. The intention of the Commission is to make its best reasonable efforts to rule on such a motion to dismiss promptly. Absent a ruling granting a motion to dismiss, the utility shall begin offering that category of products and services only after Commission approval through the normal advice letter process.

F. Existing Offerings: Unless and until further Commission order to the contrary as a result of the advice letter filing or otherwise, a utility that is offering tariffed or nontariffed products and services, as of the effective date of this decision, may continue to offer such products and services, provided that the utility complies with the cost allocation and reporting requirements in this rule. No later than January 30, 1998, each utility shall submit an advice letter describing the existing products and services (both tariffed and nontariffed) currently being offered by the utility and the number of the Commission decision or advice letter approving this offering, if any, and requesting authorization or continuing authorization for the utility's continued provision of this product or service in compliance with the criteria set forth in Rule VII. This requirement applies to both existing products and services explicitly approved and not explicitly approved by the Commission.

G. Section 851 Application: A utility must continue to comply fully with the provisions of Public Utilities Code Section 851 when necessary or useful utility property is sold, leased, assigned, mortgaged, disposed of, or otherwise encumbered as part of a nontariffed product or service offering by the utility. If an application pursuant to Section 851 is submitted, the utility need not file a separate advice letter, but shall include in the application those items which would otherwise appear in the advice letter as required in this Rule.

H. Periodic Reporting of Nontariffed Products and Services: Any utility offering nontariffed products and services shall file periodic reports with the Commission's Energy Division twice annually for the first two years following the effective date of these Rules, then annually thereafter unless otherwise directed by the Commission. The utility shall serve periodic reports on the service list of this proceeding. The periodic reports shall contain the following information:

1. A description of each existing or new category of nontariffed products and services and the authority under which it is offered;

2. A description of the types and quantities of products and services contained within each category (so that, for example, "leases for agricultural nurseries at 15 sites" might be listed under the category "leases of land under utility transmission lines," although the utility would not be required to provide the details regarding each individual lease);

3. The costs allocated to and revenues derived from each category; and

4. Current information on the proportion of relevant utility assets used to offer each category of product and service.

I. Offering of Nontariffed Products and Services to Affiliates: Nontariffed products and services which are allowed by this Rule may be offered to utility affiliates only in compliance with all other provisions of these Affiliate Rules. Similarly, this Rule does not prohibit affiliate transactions which are otherwise allowed by all other provisions of these Affiliate Rules.

(END OF APPENDIX A)

R.97-04-011/I.97-04-012

Exhibit No. __________

JOINT COMPARISON EXHIBIT
PURSUANT TO
ASSIGNED COMMISSIONERS' RULING
DATED AUGUST 8, 1997

Before the

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

August 26, 1997

Joint Comparison Exhibit of Proposed Rules

Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
1. <u>Definitions</u> For the purposes of these Rules, the terms listed below shall have the following definitions:	1. <u>Definitions</u> *Agree with Consensus Statement.*	II. DEFINITIONS *Agree with Consensus Statement.*	
Affiliate: *See individual comments of parties.*	**Affiliate:** Any company [not regulated as a Utility by the Commission or as a Natural Gas Company by the FERC] [1], ten percent (10%) or more of whose outstanding securities are owned, controlled, or held with power to vote, directly or indirectly either by a Utility or any of its subsidiaries, or by that Utility's controlling corporation and/or any of its subsidiaries as well as any company in which the Utility, its controlling corporation, or any of the Utility's affiliates exert substantial control over the operation of the company and/or indirectly have substantial financial interests in the company exercised through means other than ownership. Subsidiaries of the Utility whose expenses and revenues are subject to regulation by the Commission or are included by the Commission in establishing rates for the Utility, shall not be considered Affiliates.	II.C. "Affiliate" means any person, corporation, Utility, partnership or other entity five percent (5%) or more of whose outstanding securities are owned, controlled, or held with power to vote, directly or indirectly, either by a Utility or any of its subsidiaries, or by that Utility's controlling corporation and/or any of its subsidiaries as well as any company in which the Utility, its controlling corporation, or any of the Utility's affiliates exert control over the operation of the company and/or indirectly have financial interests in the company exercised through means other than ownership. For purposes of these Rules, "control" includes, but is not limited to, the possession, directly or indirectly and whether acting alone or in conjunction with others, of the authority to direct or cause the direction of the management of policies of a company. A direct or indirect voting interest of five percent (5%) or more by the Utility in an entity's company creates a rebuttable presumption of control.	**National Association of Energy Service Companies (NAESCO) -** **Affiliate:** Any related entity to the LDC either owned in full or in part, or subject to common control as a function within the LDC, or as part of a separate entity including a joint marketing partnership or formal alliance. (See NAESCO Guidelines Definition of Related Affiliate.) **PacifiCorp/WWP/Sierra Pacific -** Change the beginning of the JUR proposal to read: "Any company engaged in marketing energy or energy-related products or services in the state of California … " **Cogeneration Association of California -** Any adopted definition of affiliate should include the following exemption: "Affiliate does not include Qualifying Facilities (QFs) that produce and sell power to a public utility electrical corporation under a power purchase agreement or produce or sell power for any of the purposes specified in Section 218 of the Public Utilities Code."
Commission: The California Public Utilities Commission or its succeeding state regulatory body.	**Commission:** *Agree with Consensus Definition.*	**II. B. Commission:** *Agree with Consensus Definition.*	

1 Bracketed language supported by SoCalGas, SDG&E, and PG&E. Not supported by Edison.

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Customer: Any person or corporation, as defined in Sections 204, 205 and 206 of the California Public Utilities Code, that is the ultimate consumer of goods and services.	**Customer:** *Agree with Consensus Definition.*	**II.D. Customer** *Agree with Consensus Definition.*	
Customer Information: Non-public information and data specific to a Utility Customer which the Utility acquired or developed in the course of its provision of Utility Services. *[See note under definition of Utility Services]*	**Customer Information:** *Agree with Consensus Definition.*	**II. E. Customer Information** *Agree with Consensus Definition*	
	Energy Marketing Affiliate: An affiliate that engages in retail energy (gas or electric) marketing in the state of California.	**Energy Marketing Affiliate:** *The JPC believe that the rule proposed by the JUR is unnecessary.*	
FERC: Federal Energy Regulatory Commission.	**FERC:** *Agree with Consensus Definition.*	**II.F. FERC.** *Agree with Consensus Definition.*	
Fully Loaded Cost: The direct cost of goods or service plus all applicable indirect charges and overheads.	**Fully Loaded Cost:** *Agree with Consensus Definition.*	**II.G. Fully Loaded Cost** *Agree with Consensus Definition.*	
	Marketing Information: Non-public information and data concerning Customer-segment-specific market assessments, analyses, and marketing studies which the Utility has acquired or developed in the course of its provision of Utility Services.	**Marketing Information.** *The JPC believe that the rule proposed by the JUR is unnecessary.*	**NAESCO -** **Marketing and Operating Information:** Includes information regarding customer energy service needs, loads and use devices, industrial processes, costs, prices or any other information related to strategic planning or retail markets for energy services. See NAESCO Guidelines 2(a).
	Operating Information: Gas Utility Operating Information consists of non-public information and data concerning daily deliveries, storage inventory levels, injection/withdrawal information, and receipts. Electric Utility Operating Information consists of that information and data specified by FERC Order No. 889.	**Operating Information.** *The JPC believe that the rule proposed by the JUR is unnecessary.*	**NAESCO -** See comments above.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
	Proprietary Information: Patents, trade secrets (as defined in California Civil Code, Section 3426.1(d)), copyrights, other marketable technologies and the like, which the Utility has acquired or developed in the course of its provision of Utility Services.	**Proprietary Information.** *The JPC believe that the rule proposed by the JUR is unnecessary.*	**NAESCO -** **Proprietary Information:** Must not include marketing and operating information as defined above. See 7/31 NAESCO Comments at 3-4.
	Supplier Information: Non-public information and data a non-affiliated supplier has provided to a Utility to obtain Utility Services for itself or its Customers.	**Supplier Information.** *The JPC believe that the rule proposed by the JUR is unnecessary.*	
Utility: Any public utility subject to the jurisdiction of the Commission as an Electrical Corporation or Gas Corporation, as defined in California Public Utilities Code Sections 218 and 222.	Utility: *Agree with Consensus Definition.*	II.A. Utility. *Agree with Consensus Definition.*	Southern California Water Company (SCWC) - SCWC filed motion on June 2, 1997 for amending definition of utility and for exemption from affiliate rules. Reply of SCWC to JUR comments on that motion dated August 20, 1997 adopted and endorsed the Conditional Exemption proposal of the JUR. See JUR "Responses for Request for Exemption" rule 12.
Utility Services: Regulated gas and electric energy sales, transportation, generation, transmission, distribution or delivery, and other related services, including, but not limited to: administration of Demand Side Management, scheduling, balancing, metering, billing, gas storage, standby service, hookups and changeovers of service to other suppliers. *[NOTE: The parties have not agreed whether the definition of Utility Services should also include other services that may be offered by the Utility, but which are expressly not included in the statement above. In light of the lack of consensus on the latter issue, parties reserve the right to*	Utility Services: *The JUR agree with the Consensus Definition as written. The JUR do not feel the definition needs to include other services that may be offered by the Utility.*	II.H. Utility Services. *The JPC disagrees with the limits imposed by the Consensus Definition. The JPC submits that the term "Utility Services" should also include other services provided by the utility which do not fall under the definition. Where the term is used, the JPC has inserted additional rules covering other services provided by the utility.*	PacifiCorp/WWP/Sierra Pacific - Agree with the JUR comment.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
modify or supplement those rules herein which use the term 'Utility Services'.]			
2. Applicability of Rules	2. Applicability of Rules	I. APPLICABILITY	
2.A. Applicability: *See individual comments of parties.*	**2.A. Applicability:** These Rules apply to transactions between a Utility and its Affiliate(s). These Rules shall apply to transactions between a Utility and its parent holding company only to the extent that the parent holding company engages in marketing activities to Customers, and only to transactions pertaining to such marketing activities. These Rules become applicable on the effective date specified in the Commission decision which adopts them.	I.A. These Rules shall apply to California public utility gas corporations and California public utility electrical corporations, subject to regulation by the California Public Utilities Commission. I. B. These Rules shall apply to all transactions between a Utility and its Affiliate(s), except those specifically exempted herein.	**California Department of General Services, The University of California, and the California State University (DGS/UC/CSU) -** **Applicability:** Affiliate rules must be applicable to interactions between Utilities and all Affiliates. Before limitations on the application of Affiliate rules to utility holding companies are adopted, the Commission should 1) explore the extent to which Utilities and their Affiliates could circumvent the affiliate rules by filtering transactions through the holding company and 2) establish mechanisms to prevent such filtering. See 7/31 DGS/UC/CSU Comments at 3. NAESCO - **Applicability:** Rules apply to all affiliates as described above. Applicability to the utility's parent holding company was not addressed. See NAESCO Guidelines. **PacifiCorp/WWP/Sierra Pacific -** **Applicability:** "A utility that meets the following criteria shall be subject to these Rules only to the extent specified under 'Modified Standards for Exempt Utilities': (1) the utility is a multi-jurisdictional utility serving less than 50,000 customers in the state of California; and (2) the Utility elects not to market energy, directly or through

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
			affiliates, on a non-tariffed basis to contestable customers within its California service territory." See, Rule __, "Modified Standards for Exempt Utilities."
2.B. Civil Relief: These rules shall not preclude or stay any form of civil relief, or rights or defenses thereto, that may be available under state or federal law.	**2.B. Civil Relief:** *Agree with Consensus Rule.*	**I.D. Civil Relief** *Agree with Consensus Rule.*	
3. Non-Discrimination Standards	**3. Non-Discrimination Standards**	**III. NON-DISCRIMINATION**	
3.A. No Preferential Treatment Regarding Utility Services: Unless otherwise authorized by the Commission or the FERC, or permitted by these Rules, a Utility shall not: (i) represent that its Affiliate(s) or Customers of its Affiliate(s) will receive any different treatment with regard to the provision of Utility Services than other, unaffiliated service providers as a result of affiliation with the Utility; or (ii) provide its Affiliate(s), or Customers of its Affiliate(s), any preference (including but not limited to terms and conditions, pricing, or timing) over non-affiliated suppliers or their Customers in the provision of Utility Services. *[See note under definition of Utility Services]*	**3.A. No Preferential Treatment Regarding Utility Services:** *Agree with Consensus Rule. The JUR believe that the additional rule proposed by the JPC is unnecessary.*	**III.A. No Preferential Treatment Regarding Utility Services.** *Agree with Consensus Rule with the addition of the following rule:* **III.A.1 No Preferential Treatment Regarding Other Services Provided by the Utility.** Unless otherwise authorized by the Commission or the FERC, or permitted by these Rules, a Utility shall not: (i) represent that is Affiliate(s) or Customers of its Affiliate(s) will receive any different treatment than other, unaffiliated service providers as a result of affiliation with the Utility with regard to the provision of other services which do not fall within the definition of Utility Services; or (ii) provide its Affiliate(s), or Customers of its Affiliate(s), any preference (including but not	**NAESCO -** **No Preferential Treatment Regarding Utility Services:** In matters relating to ratepayer funds, the LDC may deal with its affiliate on a non-preferential basis. See NAESCO Guidelines 1. **Edison Electric Institute (EEI) -** It does not constitute preferential treatment to recognize the legitimate, cost-based differences in serving different loads at the distribution level.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		limited to terms and conditions, pricing, or timing) over non-affiliated suppliers or their Customers in the provision of other services which do not fall within the definition of Utility Services.	
3.B. Tariff Discretion: If a tariff provision allows for discretion in its application, a Utility shall apply that tariff provision in the same manner to its Affiliate(s) and other market participants and their respective Customers.	**3.B. Tariff Discretion:** *Agree with Consensus Rule.*	**III.B.3. Tariff Discretion.** *Agree with Consensus Rule.*	
3.C. No Tariff Discretion: If a Utility has no discretion in the application of a tariff provision, the Utility shall strictly enforce that tariff provision.	**3.C. No Tariff Discretion:** *Agree with Consensus Rule.*	**III.B.4. No Tariff Discretion.** *Agree with Consensus Rule.*	
3.D. Offering of Discounts: *See individual comments of parties.*	**3.D. Offering of Discounts:** *The JUR believe that no additional rule is required for Offering of Discounts. See comments on Rule 7, "Utility Products & Services".*	**III.B. Affiliate Transactions.** Transactions between a Utility and its Affiliate(s) shall be limited to tariffed products and services, the sale or purchase of goods, property, products or services made generally available by the Utility or Affiliate to all market participants through an open, competitive bidding process, or as provided for in Sections V.E., V.F., or VII. 1. A Utility shall provide access to Utility information, services, and unused capacity and/or supply on the same terms for all market participants. If a Utility provides supply, capacity, services or information to its Affiliate(s), it shall contemporaneously make the offering available to all market	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		participants. 2. If a Utility offers a discount or waives all or any part of any other charge or fee to its Affiliate(s), or offers a discount or waiver for a transaction in which its Affiliate(s) is involved, the Utility shall contemporaneously make such discount or waiver available to all market participants.	
3.E. Affiliate Discount Reports: If a Utility provides its Affiliate(s) a discount, rebate, or other waiver of any charge or fee associated with Utility Services, the Utility shall, within 24 hours of the time at which the Utility Service is first provided, post a notice on its electronic bulletin board providing the following information: (i) the name of the Affiliate involved in the transaction; (ii) the rate charged; (iii) the maximum rate; (iv) the time period for which the discount or waiver applies; (v) the quantities involved in the transaction; (vi) the delivery points involved in the transaction; (vii) any conditions or requirements applicable to the discount or waiver; and (viii) procedures by which a nonaffiliated entity may request a comparable offer. A Utility that provides an Affiliate a discounted rate, rebate, or other waiver of a charge or fee associated with Utility	**3.E. Affiliate Discount Reports:** *Agree with Consensus Rule. The JUR believe that the additional rule proposed by the JPC is unnecessary.*	**IV.G. Affiliate Discount Reports** *Agree with Consensus Rule with the addition of the following rule:* **IV.G.1. Affiliate Discount Reports Regarding Other Services Provided by the Utility.** If A Utility provides its Affiliate(s) a discount, rebate, or other waiver of any charge or fee associated with services other than Utility Services, the Utility shall, within 24 hours of the time at which the service is first provided, post a notice on its electronic bulletin board providing the following information: (i) the name of the Affiliate involved in the transaction; (ii) the rate charged; (iii) the maximum rate; (iv) the time period for which the discount or waiver applies; (v) the quantities involved in the transaction; (vi) the delivery points involved in the transaction; (vii) any conditions or requirements	

Joint Comparison Exhibit of Proposed Rules

Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
Services shall maintain, for each billing period, the following information: (ix) the name of the entity being provided Utility Services in the transaction; (x) the Affiliate's role in the transaction (i.e., shipper, marketer, supplier, seller); (xi) the duration of the discount or waiver; (xii) the maximum rate; (xiii) the rate or fee actually charged during the billing period; and (xiv) the quantity of products or services scheduled at the discounted rate during the billing period for each delivery point. All records maintained pursuant to this provision shall also conform to FERC rules, where applicable. *[See note under definition of Utility Services]*		applicable to the discount or waiver; and (viii) procedures by which a nonaffiliated entity may request a comparable offer. A Utility that provides an Affiliate a discounted rate, rebate or other waiver of a charge or fee associated with service shall maintain, for each billing period, the following information: (ix) the name of the entity being provided services in the transaction; (x) the Affiliate's role in the transaction (i.e., shipper, marketer, supplier, seller); (xi) the duration of the discount or waiver; (xii) the maximum rate; (xiii) the rate or fee actually charged during the billing period; and (xiv) the quantity of products or services scheduled at the discounted rate during the billing period for each delivery point. All records maintained pursuant to the provision shall also conform to FERC rules, where applicable.	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
3.F. Processing Requests for Utility Services: A Utility shall process requests for similar Utility Services in the same manner and within the same period of time for its Affiliate(s) and for all other market participants and their respective Customers. *[See note under definition of Utility Services]*	**3.F. Processing Requests for Utility Services:** *Agree with Consensus Rule.*	**III.B.5. Processing Requests for Utility Services.** *Agree with Consensus Rule.*	
3.G. Tying of Utility Services Prohibited: A Utility shall not condition or otherwise tie the provision of any Utility Services, nor the availability of discounts of rates or other charges or fees, rebates, or waivers of terms and conditions of any Utility Services, to the taking of any goods or services from its Affiliate(s). *[See note under definition of Utility Services]*	**3.G. Tying of Utility Services Prohibited:** *Agree with Consensus Rule. The JUR believe that the additional rule proposed by the JPC is unnecessary.*	**III.C. Tying of Utility Services Prohibited.** *Agree with Consensus Rule with the addition of the following rule:* **III.C.1 Tying of Other Services Provided by the Utility Prohibited.** A Utility shall not condition or otherwise tie the provision of any other services it provides which do not fall within the definition of Utility Services, nor the availability of discounts or rates or other charges or fees, rebates, or waivers of terms and conditions of any service, to the taking of goods or services from its Affiliate(s).	NAESCO - **Tying of Utility Services Prohibited:** An LDC shall not condition or tie any offer to, or agreement with, a customer in exchange for the customer agreeing to engage the Related Affiliate or evaluate preferentially a Related Affiliate's business proposal. See NAESCO Guideline 6.
3.H. No Assignments of Customers: A Utility shall not assign Customers to which it currently provides Utility Services to any of its Affiliate(s), whether by default, direct assignment, option or by any other means, unless that means is equally available to all potential competitors. *[See note under definition of Utility Services]*	**3.H. No Assignments of Customers:** *Agree with Consensus Rule. The JUR believe that the additional rule proposed by the JPC is unnecessary.*	**III.D. No Assignment of Customers.** *Agree with Consensus Rule with the addition of the following rule:* **III.D.1. No Assignments of Customers Regarding Other Services Provided by the Utility.** A Utility shall not assign Customers to which it currently provides services other than Utility Services to any of its Affiliate(s), whether by default, direct	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		assignment, option or by any other means, unless that means is equally available to all potential competitors.	
4. <u>Information Standards</u>	4. <u>Information Standards</u>	IV. DISCLOSURE AND INFORMATION	
4.A. Customer Information: A Utility shall provide Customer Information to its Affiliate(s) and non-affiliated entities on a strictly non-discriminatory basis, and only with prior affirmative Customer consent.	**4.A. Customer Information:** *Agree with Consensus Rule.*	**IV.A. Customer Information** *Agree with Consensus Rule.*	NAESCO - **Customer Information:** To the extent the Utility provides to a Related Affiliate any marketing or operating information which is not readily available or generally known to other energy service providers, a Utility shall use best efforts to make that information to all non-affiliated energy service providers available through a centralized information clearing spot. In an instance where the reque[illegible] for information pertaining to a specific identified customer is being made by the Related Affiliate, at the behest of a specific identified customer and in conjunction with a marketing effort initiated by the Related Affiliate directed toward that customer, the Utility is not required to make such information available to other providers. To the extent the Utility receives a request for such information from a non-affiliated energy service provider, the Utility shall not share the fact that it has received such a request with its Related Affiliates. See NAESCO Guideline 2. EEI - Confidentiality of customer information should be maintained, unless the customer has agreed to disclosure, in which case the information should be made available to only those suppliers to

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
			whom the customer has authorized disclosure. **California Association of Plumbing-Heating-Cooling Contracts (CAPHCC)** - A utility is prohibited from providing affiliate information to a utility customer who specifically requests information on the affiliate only.
4.B. Utility Solicitation of Customer Consent: *See individual comments of parties.*	**4.B. Utility Solicitation of Customer Consent:** *The JUR believe that Rule 4.A. addresses this matter, thus no additional rule is required.*	**III.E. Business Development and Customer Relations.** Except as otherwise provided by these Rules, a Utility shall not...(5) request authorization from its customers to pass on customer information to its Affiliate(s)...	
4.C. Operating Information: *See individual comments of parties.*	**4.C. Operating Information:** A Utility shall not provide Operating Information to its Affiliate(s) unless such information is provided to third parties contemporaneously. A Utility shall not provide Operating Information to its parent holding company for ultimate transfer to its Affiliate(s) in contravention of these Rules.	**IV.B. Non-Customer Specific Information** Non-customer-specific information, including but not limited to information about a Utility's natural gas or electricity purchases, sales, or operations or about the Utility's gas-related goods or services, electricity-related goods or services, or other utility-related goods or services, shall be available to the Utility's Affiliate(s) only if the Utility makes that information contemporaneously available to all other service providers and keeps the information open to public inspection.	**NAESCO** - See Customer Information rule above. **SCUPP/IID** - **Operating Information:** A Utility may provide its Affiliate(s) with information concerning the Utility's operations, including but not limited to information about the Utility's natural gas or electric purchases, sales or operations, the Utility's gas- or electricity-related goods and services, and other utility-related goods or services, only if the Utility makes the same information contemporaneously available to all other service providers and keeps the information open to public inspection. A Utility shall not provide operating information to its parent or holding company for ultimate transfer to an Affiliate in contravention of this Rule.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
			CAPHCC - Concurs with the proposed additional rule of SCUPP/IID.
4.D. Marketing Information: *See individual comments of parties.*	**4.D. Marketing Information:** A Utility shall not provide Marketing Information to its Affiliate(s) unless such information is provided to third parties contemporaneously. A Utility shall not provide Marketing Information to its parent holding company for ultimate transfer to its Affiliate(s) in contravention of these Rules.	*The JPC does not believe that the JUR distinction between operating and marketing information is necessary. See Rule IV.B. above.*	**NAESCO** - See Customer Information rule above. **CAPHCC** - Should be no joint marketing or promotion of its affiliate by the utility, including through the billing envelope.
4.E. Leads: *See individual comments of parties.*	**4.E. Leads:** A Utility shall not provide leads to its Affiliate(s). A lead is the provision of Customer Information to an Affiliate without the Customer's consent.	**III.E. Business Development and Customer Relations.** Except as otherwise provided by these Rules, a Utility shall not (1) provide leads to its Affiliate(s); (2) solicit business on behalf of its Affiliate(s); (3) acquire information on behalf of or to provide to its Affiliate(s); (4) share market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports, with its Affiliate(s); (5) request authorization from its customers to pass on customer information to its Affiliate(s); (6) give any appearance that the Utility speaks on behalf of its Affiliate(s) or that the customer will receive preferential treatment as a consequence of conducting business with the Affiliate(s); or (7) give any appearance that the Affiliate speaks on behalf of the Utility.	**DGS/UC/CSU** - Support a prohibition against providing leads to Utility Affiliates. See 7/31 DGS/UC/CSU Comments at 6. **NAESCO** - **Leads:** In an instance where the request for information pertaining to a specific identified customer is being made by the Related Affiliate, at the behest of a specific identified customer and in conjunction with a marketing effort initiated by the Related Affiliate directed toward that customer, the LDC is not required to make such information available to other providers. To the extent the LDC receives a request for such information from a non-affiliated energy service provider, the LDC shall not share the fact that it has received such a request with its Related Affiliates. See NAESCO Guideline 2(b) ; (c).

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4.F. Referrals: *See individual comments of parties.*	**4.F. Referrals:** A Utility may inform Customers who inquire about non-utility services that its Affiliate(s) provide various services, but only after informing the Customer that similar goods and services are available from non-affiliated suppliers, and that the provision of Utility Services is not in any way contingent upon or tied to the Customer's taking of an Affiliate's goods or services. If the Utility refers the Customer specifically to the Utility's Energy Marketing Affiliate, it shall also provide that Customer (unless the Customer declines) with a then-current list of energy marketing providers. Such a list will be maintained and made available to the Utility by the Commission or a Commission-authorized third-party provider.	**IV.C. Service Provider Information.** Except upon request by a customer or otherwise authorized by the Commission, a Utility shall not provide its customers with any list of service providers, which includes or identifies the Utility's Affiliate(s), regardless of whether such list also includes or identifies the names of unaffiliated entities. 1. If a customer requests information about any affiliated service provider, the Utility shall provide a list of all providers of gas-related, electricity-related or other utility-related goods and services operating in its service territory, including its Affiliate(s). The Commission shall authorize and either the Utility or the Commission shall maintain on file with the Commission a copy of the most updated list(s) of service providers which have been created to disseminate to a customer upon a customer's request. Any service provider may request that it be included on such list, and, barring Commission direction, the Utility shall honor such request(s). Where maintenance of such list would be unduly burdensome due to the number of service providers, subject to Commission approval, the Utility shall direct the customer to a generally available listing of service providers (e.g., the Yellow Pages). In such cases, no list shall be provided. 2. Any information or list distributed by the Utility as part of a consumer education program shall be authorized by the Commission with	EEI - Because a customer's interests are best served by having full information and full choice, if a customer inquires about a service the regulated utility does not provide but which its affiliate does, the utility should be allowed to refer that customer to its affiliate.

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		materials approved in advance by the Commission to ensure that such information or lists do not promote the Affiliate(s).	
4.G. Supplier Information: A Utility may provide non-public information and data which has been received from non-affiliated suppliers to its Affiliate(s) or non-affiliated entities only if the Utility first obtains authorization to do so from the supplier.	**4.G. Supplier Information:** *Agree with Consensus Rule.*	**IV.D. Supplier Information.** *Agree with Consensus Rule.*	**CAPHCC -** Supplier information can only be provided on a nondiscriminatory basis, and if a supplier does not seek to provide information to third parties, the utility may not provide that information to the affiliate only.
4.H. Maintenance of Affiliate Contracts and Related Bids: A Utility shall maintain a record of all contracts and related bids for the provision of work, products, or services to and from the Utility to its Affiliate(s) for no less than a period of three (3) years.	**4.H. Maintenance of Affiliate Contracts and Related Bids:** *Agree with Consensus Rule.*	**IV.H. Maintenance of Affiliate Contracts and Related Bids.** *Agree with Consensus Rule.*	
4.I. FERC Reporting Requirements: To the extent that reporting rules imposed by the FERC require more detailed information or more expeditious reporting, nothing in these Rules shall be construed as modifying the FERC rules.	**4.I. FERC Reporting Requirements:** *Agree with Consensus Rule.*	**IV.I. FERC Reporting Requirements.** *Agree with Consensus Rule.*	
4.J. Affiliate Related Advice: *See individual comments of parties.*	**4.J. Affiliate Related Advice:** *The JUR believe that no additional rule is required.*	**IV.E. Affiliate-Related Advice or Assistance.** Except as otherwise provided in these Rules, a Utility shall not offer or provide customers advice or assistance of any kind with regard to its Affiliate(s) and/or other service providers.	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
4.K. Record Keeping: *See individual comments of parties.*	**4.K. Record Keeping:** *The JUR believe that no additional rule is required.*	**IV.F. Record-Keeping.** A Utility shall maintain contemporaneous records documenting all tariffed and non-tariffed transactions with its Affiliate(s), including but not limited to, all waivers of tariff or contract provisions and all discounts. Such records shall be maintained for three years and be made available for third party review upon 24 hours notice.	
	4.L. Proprietary Information: A Utility may provide Proprietary Information to its Affiliate(s) on an exclusive basis, but are bound by all Commission-adopted pricing and reporting guidelines for such transactions.	*The JPC believe that the JUR rule is inappropriate and should not be included in the final rules.*	DGS/UC/CSU - **Proprietary Information:** Transfers of proprietary information between the regulated Utility and its competitive Affiliates should be prohibited. If such transfers are permitted at all, they should be limited to circumstances in which the Utility can demonstrate: 1) the proprietary information was developed exclusively from shareholder resources and 2) the provision of the information does not give rise to competitive concerns. See 7/31 DGS/UC/CSU Comments at 4-6. NAESCO - **Proprietary Information:** Proprietary information related to strategic planning or retail markets for energy services should not be provided to a Utility's Affiliate. A Utility may only share proprietary information developed exclusively at shareholder expense; information developed with ratepayer support cannot be provided. See 7/31 NAESCO Comments at 3.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
5. Separation Standards	5. Separation Standards	V. SEPARATION	
5.A. Separate Entities: A Utility and its Affiliate(s) shall be separate corporate entities.	5.A. Separate Entities: *Agree with Consensus Rule.*	V.A. Separate Entities: *Agree with Consensus Rule.*	PacifiCorp/WWP/Sierra Pacific - Separate Entities: This rule is ambiguous or surplus to the definition of Affiliate. The Commission should not prohibit Utilities from directly marketing energy and energy-related products and services. CAPHCC - Their should be a complete separation of the utility and its affiliate, with no shared assets whatsoever.
5.B. Separate Books and Records: A Utility and its Affiliate(s) shall keep separate books and records. Utility books and records shall be kept in accordance with the applicable Uniform System of Accounts (USOA) and Generally Accepted Accounting Procedures (GAAP). The books and records of Affiliates shall be open for examination by the Commission and its staff consistent with the provisions of Public Utilities Code Section 314.	5.B. Separate Books and Records: *Agree with Consensus Rule.*	V.B. Separate Books and Records: *Agree with Consensus Rule.*	NAESCO - Separate Books and Records: A Utility must maintain its books of account and records separately from those of its Affiliate. See NAESCO Guidelines 5.
	Affiliate Audits: *The JUR believe that the JPC rule is inappropriate and is not necessary.*	V.C. Affiliate Audits. A Utility shall not perform internal, tax or independent audits of its Affiliate(s), except as required to assure proper payment for or receipt of goods, products, or services and to assure compliance with these Rules.	

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5.C. Separate Facilities and Office Equipment: *See individual comments of parties.*	**5.C. Separate Facilities and Office Equipment:** To the extent practicable, Affiliates shall acquire, operate and maintain their own facilities and equipment. A Utility and its Affiliate(s) shall not share any facilities or equipment that would enable Affiliates to access information that the Utility could not provide to its Affiliate(s) under these Rules. This Rule does not prohibit resource sharing for economies and efficiencies.	V. D. **Sharing of Plant, Facilities, Equipment or Costs.** A Utility shall not share office space, office equipment, services, and systems with its Affiliate(s), nor shall a Utility access the computer or information systems of its Affiliate(s) or allow its Affiliate(s) to access its computer or information systems. Physical separation required by this rule shall be accomplished preferably by having office space in separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. This provision does not, however, preclude a Utility from realizing certain economies of scale or sharing certain corporate support services provided by its parent or holding company as provided for in the Rules below.	**DGS/UC/CSU - Separate Facilities and Office Equipment:** Only limited sharing of payroll, tax, or shareholder services should be allowed provided that these are properly priced and disclosed. See 7/31 DGS/UC/CSU Comments at 6. **EEI** - Shared facilities and office equipment (5.C) and shared employees (5.D) represent potential sources of economies that the CPUC should allow in the public interest, provided that affiliates pay their fair share and utility information is appropriately protected. Affiliates' costs can be addressed in the agreed-to methodology for allocating common and joint costs.
5.D. Separate Employees: *See individual comments of parties.*	**5.D. Separate Employees:** A Utility employee may not concurrently be the employee of an Affiliate. This Rule does not apply to Board Directors.	**V.H. Employees.** 1. Except to the extent permitted in Section V.F., a Utility and its Affiliate(s) shall not jointly employ the same employees, except for corporate officers shared between the Utility and its parent holding company	**DGS/UC/CSU** - See comments below. **NAESCO - Separate Employees:** Employees of the Utility having direct responsibility for the day-to-day operations related to the marketing or provision of energy services shall not be shared with the Affiliate on business the Affiliate is conducting in the service territory of the Utility. This limitation is not intended to apply to administrative or support services staff time where the costs of such staff time are allocated by the Utility to the Affiliate. See NAESCO Guideline 3. **EEI** - See comments above.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
5.E. Use of Employees: *See individual comments of parties.*	**5.E. Use of Employees:** Employees of a Utility may be used on a temporary basis (less than one year of continuous use) or intermittent basis (less than 50% of an employee's chargeable time in any calendar year) by Affiliates only if: (i) All such use is documented, priced and reported in accordance with these Rules and existing Commission reporting requirements for each Utility; (ii) Utility needs for Utility employees always take priority over any Affiliate requests; (iii) Utility employees agree, in writing, that they will not disclose Customer, Marketing, Operating, or Proprietary Information to an Affiliate, except as permitted in these Rules; (iv) Affiliate use of Utility employees must be conducted pursuant to a written agreement approved by appropriate Utility and Affiliate officers; and (v) Utility marketing employees with access to Customer Information are not used in a similar capacity by Affiliates within the Utility's service territory. The foregoing requirements shall apply to rotational, cross-training, or employee development assignments of Utility employees to an Affiliate. If an Affiliate's use of a Utility employee exceeds the limitations set forth above on temporary or intermittent use, that employee shall be	**V.H. Employees.** 2.e. A Utility shall not make temporary or intermittent assignments, or rotations to its Affiliate.	**DGS/UC/CSU -** **Use of Employees:** Sharing of employees raises concerns related to customer confusion and indirect tying, improper cost allocation, and improper transfer of information from the regulated utility to the affiliate. Temporary sharing of employees should be rejected. See 7/31 DGS/UC/CSU Comments at 6. **NAESCO -** **Use of Employees:** Sharing, including temporary sharing, of employees having direct responsibility for marketing and the provision of energy services should be prohibited. See 7/31 NAESCO Comments at 4.

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	deemed to be transferred to the Affiliate for purposes of the payment of the transfer fee described in 5.F. below. Except for these conditions and the payment of an employee transfer fee as specified in 5.F. there shall be no restrictions on the use of Utility employees by Affiliates.		
5.F. Transfer of Employees: *See individual comments of parties.*	**5.F. Transfer of Employees:** A Utility may transfer employees to an Affiliate only if: (i) The Affiliate pays the Utility a one-time fee of 25% of the employee's Utility base annual salary, unless the Utility can demonstrate that some lesser percentage (equal to at least 15%) is appropriate for the class of employee included. The transfer fee shall not apply to: (a) non-management employees; (b) employees hired by an Affiliate because the Utility function they perform has been eliminated or substantially curtailed as a result of industry restructuring; or (c) personnel changes related to the transfer of a general corporate support function from the Utility to its parent holding company or to an affiliated company providing only corporate	V.H.2.c. When an employee of a Utility is transferred, assigned, or otherwise employed by an Affiliate, the Affiliate shall make a one-time payment to the Utility in an amount equivalent to twenty-five percent (25%) of the employee's base annual compensation. The transfer payment provision applies to all employees regardless of employee position.	

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	support services to the Utility and its Affiliate(s) exclusively; and (ii) The transaction is reported in accordance with existing Commission reporting requirements.		
5.G. Tracking of Employee Movement: A Utility shall track and report all employee movement between the Utility and its Affiliate(s).	**5.G. Tracking of Employee Movement:** *Agree with Consensus Rule.*	**V.H.2.a. Tracking of Employee Movement.** *Agree with Consensus Rule.*	
5.H. Transfer Periods: *See individual comments of parties.*	**5.H. Transfer Periods:** *The JUR believe that no additional rule is required.*	**V.H.2.b.** Once an employee of a Utility becomes an employee of an Affiliate, the employee may not return to the Utility for a period of two (2) years. In the event that such employee returns to the Utility, such employee cannot be retransferred, reassigned, or otherwise employed by the Affiliate for a period of three (3) years.	
5.I. Taking of Information: *See individual comments of parties.*	**5.I. Taking of Information:** *The JUR believe that no additional rule is required.*	**V.H.2.d.** Any Utility employee hired by an Affiliate shall not remove or otherwise provide proprietary property or information to the Affiliate. To the extent that an Affiliate possesses information or documents to which the Affiliate would otherwise be precluded from having pursuant to these Rules, a rebuttable presumption shall exist that the transferred employee improperly provided such information to the Affiliate.	

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5.J. Transfer of Goods and Services: To the extent that these Rules do not prohibit transfers of goods and services between a Utility and its Affiliate(s), all such transfers shall be subject to the following pricing provisions: (i) Transfers from the Utility to its Affiliate(s) of goods and services produced, purchased or developed for sale by the Utility will be priced at fair market value. (ii) Transfers from an Affiliate to the Utility of goods and services produced, purchased or developed for sale by the Affiliate shall be priced at no more than fair market value. (iii) For goods or services for which the price is regulated by the Commission or the FERC, that price shall be deemed to be the fair market value. (iv) Goods and services produced, purchased or developed for sale by the Utility will be provided to its Affiliate(s) and non-affiliated companies on a non-discriminatory basis, except as otherwise required or permitted by these Rules or applicable law. (v) Transfers from the Utility to its Affiliate(s) of goods and services not produced, purchased or developed for sale by the Utility will be priced at Fully Loaded Cost plus 5% of direct labor cost. (vi) Transfers from an Affiliate to the Utility of goods and services not	**5.J. Transfer of Goods and Services:** *Agree with Consensus Rule.*	**V.I. Transfer of Goods and Services** *Agree with Consensus Rule.*	NAESCO - **Transfer of Goods and Services:** A Utility must charge the Affiliate the fully allocated costs for any general and administrative as well as support services provided by the Utility to the Affiliate. See NAESCO Guideline at 4. **PacifiCorp/WWP/Sierra Pacific - Transfer of Goods and Services:** The language "For goods and services for which the price is regulated by the Commission or the FERC" should be changed to read "For goods or services for which the price is regulated by a state or federal regulatory agency..." Depending on the scope of these Rules, the price may be regulated by another state commission, FERC or the FCC.

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produced, purchased or developed for sale by the Affiliate will be priced at not more than Fully Loaded Cost.			
5.K. Transfers of Assets: *See individual comments of parties.*	5.K. Transfers of Assets: Transfers of assets or the right to use assets between a Utility and Its Affiliate(s) shall be priced at fair market value, provided that transfers of assets valued at $250,000 or less may, at transferor's option, be priced at net book value.	*The JPC believe that the JUR rule is unnecessary.*	**DGS/UC/CSU -** **Transfer of Assets:** All transfers to Affiliates should be at fair market value. DGS/UC/CSU do not support a "de minimis" exemption. See 7/31 DGS/UC/CSU Comments at 6-7. **CAPHCC -** Proprietary information, if it is to be shared at all, must be priced at the fair market value of the information.
5.L. Economies-of-Scale: *See individual comments of parties.*	5.L. Economies-of-Scale: A Utility and its Affiliate(s) may capture economies of scale in joint purchases of goods and services (excluding the purchase of natural gas and electric supplies intended for resale). The Utility must ensure that all joint purchases are priced in a manner that permits clear identification of the Utility and Affiliate(s) portions of such purchases.	V.E. Economies of Scale. To the extent not precluded by any other Rule, Utilities and their Affiliates may capture economies-of-scale in joint purchases of goods and services, but not those associated with the traditional utility merchant function. Examples of permissible economies-of-scale include joint purchasing of office supplies and telephone services. Examples of economies-of-scale not permitted include the purchase of natural gas and electric supplies intended for resale, gas transportation and storage capacity, and electric transmission capacity. The Utility must ensure that all joint purchases are priced in a manner that permits clear identification of the Utility and Affiliate portions of such purchases.	**DGS/UC/CSU -** **Economies-of-Scale:** Joint Utility/Affiliate purchases to capture economies of scale are inappropriate. Ongoing joint purchases just extend and exacerbate the need for ongoing monitoring and enforcement. See 7/31 DGS/UC/CSU Comments at 7. **NAESCO -** **Economies of Scale:** Joint purchases could raise market power concerns. At a minimum, if allowed, there should be a dollar limitation on joint purchases and joint purchases should be prohibited with regard to assets that would be used for marketing and energy service related activities. See 7/31 NAESCO Comments at 5. **EEI -** The JUR properly distinguishes between cost-shifting and economies realized through integration of supply

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			activities; compelling separation to the extent that dis-economies are incurred and the cost of serving the public increases would be contrary to the public interest. Joint offerings are an example of the kind of economies that can be achieved through integration. Economies of integration also reflect cost complementarities. **CAPHCC** - No economies of scale related to the utility or affiliate function may be shared with an affiliate.
5.M. Corporate Support: *See individual comments of parties.*	**5.M. Corporate Support:** A Utility and its Affiliate(s) may use joint corporate oversight, governance, support systems and personnel (such as payroll, taxes, engineering, legal, insurance, financial reporting or shareholder services, whether conducted by the Utility or the parent holding company), on an exclusive basis, but such shared support shall be priced, reported and conducted in accordance with the Separation and Information Standards set forth herein.	**V.F. Corporate Support.** As a general principle, a Utility and its Affiliate(s) may use joint corporate oversight, governance, support systems and personnel provided by their parent or holding company, or a separate affiliate created to perform shared corporate services. Such joint utilization, however, shall not in any way allow or provide a means for the transfer of confidential information, create the opportunity for preferential treatment, lead to customer confusion, or create significant opportunities for cross-subsidization of Affiliates. Any shared support shall be priced, reported and conducted in accordance with the Separation and Information Standards set forth herein. Examples of services that may be shared include: payroll, taxes, shareholder services, insurance, financial reporting, corporate accounting, corporate security, human resources (compensation, benefits, employment policies), employee records,	**NAESCO** - **Corporate Support:** Utilities and Affiliates may share administrative or support services staff time, e.g., for accounting or legal services where the costs of such staff time are allocated by the Utility to the Affiliate. See NAESCO Guidelines 3.

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		corporate legal unrelated to marketing or regulatory issues (such as labor, civil litigation and general corporate areas), and pension management. Examples of services that may not be shared include: state and federal regulatory affairs, state and federal regulatory legal, state and federal lobbying, employee recruiting, other financial planning and analysis, hedging and financial derivatives and arbitrage services, gas and electric purchasing for resale, purchasing of gas transportation and storage capacity, purchasing of electric transmission, system operations, and marketing.	
5.N. Name and Logo: *See individual comments of parties.*	**5.N. Name and Logo:** These Rules place no restrictions on the ability of Affiliates to use, trade upon, promote and advertise their affiliation with a Utility, or to use the Utility or corporate brand, name and logo in their business pursuits.	**V.G. Corporate Identification and Advertising (Name and Logo)** 1. The name, logo, service mark, trademark, or trade name of a Utility shall not resemble that of the Affiliate(s). 2. Neither the logo, trademark, nor other corporate identification of the Utility or Affiliate(s) shall appear on documents or property of the other, or goods and merchandise sold by the other. 4. A Utility shall not trade upon, promote, or advertise its Affiliate's affiliation with the Utility, nor allow the Utility name to be used in any material circulated by the Affiliate(s). 6. A Utility, through action or words, shall	**DGS/UC/CSU -** **Name and Logo:** At a minimum, Affiliates making use of the regulated utility name and reputation must be required to always indicate clearly that the quality provision of regulated services is in no way related to accepting services from the unregulated affiliate. See 7/31 DGS/UC/CSU Comments at 7. **NAESCO -** **Name and Logo:** At a minimum, an affiliate trading upon, or otherwise making use of, it affiliation with a regulated utility must be required to always clarify that the provision of quality regulated services is completely unrelated to acceptance of the customer of competitive services offered by the Affiliate. See 7/31 NAESCO comments at 5.

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		not represent that its Affiliate(s) will receive any different treatment than other service providers as a result of the Affiliate's affiliation with the Utility.	**EEI** - Brand names help consumers save time by identifying affiliated companies. Brand names support aggressive product development and innovation and encourage product and service quality. Moreover, use of brand name is a clearly form of commercial speech protected under the First Amendment. **CAPHCC** - CPUC may restrict the use of the name and logo of the utility by the affiliate.
5.O. Joint Marketing: *See individual comments of parties.*	**5.O. Coordinated Responses to Customer Requests:**[2] A Utility and its Affiliate(s) may coordinate their respective service offerings to the same Customers (e.g., joint responses to Requests for Proposals, trade show booths and the like) under the following conditions: (i) Representatives of the Utility must inform the Customer that they work for the Utility, not the Affiliate; (ii) Representatives of the Utility must inform Customers of the competitive nature of Affiliate products and the ability to receive Utility Services without regard to the taking of Affiliate services (as specified in 4.E. above); and (iii) Utility and Affiliate offerings must be distinctly and separately identified and priced so that Customers may select one without the other.	**V.G. Corporate Identification and Advertising (Joint Marketing)** 5. A Utility shall not offer or provide to its Affiliate(s) advertising space in Utility billing envelopes or any other form of Utility customer communication. 7. A Utility shall not participate in joint advertising or joint marketing with its Affiliate(s). This prohibition means that Utilities may not engage in activities which include, but are not limited to the following: (a) A Utility shall not participate with its Affiliate(s) in joint sales calls or joint proposals (including RFPs) to existing or potential Customers. At a customer's unsolicited request, a Utility may participate, on a non-discriminatory basis, in non-sales meetings with its Affiliate(s) or any other market participant to discuss	**DGS/UC/CSU** - **Joint Marketing:** Joint offering by the regulated Utility and its Affiliates create the potential for consumer confusion and improper subtle suggestions that the provision of regulated services will be related to taking service from the Utility's competitive Affiliate. This contravenes the Commission's goal to create rules that can be easily avoided. See 7/31 DGS/UC/CSU Comments at 4, 8. **NAESCO** - **Joint Marketing:** Joint offerings and marketing make significantly more difficult the adequate enforcement of requirements for non-discriminatory sharing of information and the prohibition against tying. Joint offerings and marketing should be prohibited. See 7/31 NAESCO comments at 3.

[2] The Consensus Rules identify this rule number as "Joint Marketing." The JUR do not believe this title properly reflects the intent of the JUR proposed rule.

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	A Utility and its Affiliate(s) shall not jointly participate in unsolicited sales calls to Customers in the utility's service territory.	technical or operational subjects regarding the Utility's provision of transportation service to the Customer; (b) Except as otherwise provided for in these Rules, a Utility shall not participate in any joint activity with its Affiliate(s). The term "joint activities" includes, but is not limited to, advertising, sales, marketing, communications and correspondence. (c) A Utility shall not participate with its Affiliate(s) in trade shows, conferences, or other information or marketing events held in California or contiguous states. 8. A Utility shall not engage with its Affiliate(s) in joint correspondence, communications, or meetings with any existing or potential customer.	CAPHCC - Should be no joint marketing or promotion of its affiliate by the utility, including through the billing envelope.
	Research and Development: *The JUR believe that the JPC rule is inappropriate and is not necessary.*	**V.G. 3. Research and Development.** A Utility shall not share or subsidize costs, fees, or payments with its Affiliate(s) associated with research and development activities or investment in advanced technology research.	
6. Regulatory Oversight Standards/Compliance	6. Regulatory Oversight Standards/Compliance	VIII. COMPLIANCE	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
6.A. Existing Rules: Existing Commission rules for each Utility and its parent holding company shall continue to apply except to the extent they conflict with these Rules. In such cases, these Rules shall supersede prior rules and guidelines, provided that nothing herein shall preclude a Utility or its parent holding company from adopting other Utility-specific guidelines, with advance Commission approval.	**6.A. Existing Rules:** *Agree with Consensus Rule.*	**I.C. Existing Rules.** *Agree with Consensus Rule.*	
6.B. Witness Availability: Affiliate officers and employees shall be made available to testify before the Commission as necessary or required, without subpoena, consistent with the provisions of Public Utilities Code Section 314.	**6.B. Witness Availability:** *Agree with Consensus Rule.*	**VIII.D. Witness Availability.** *Agree with Consensus Rule.*	
6.C. Compliance Plans: *See individual comments of parties.*	**6.C. Compliance Plans:** *The JUR expect that the Commission order in this proceeding will require a filing of a compliance plan, thus no additional rule is required.* *The JUR believe that the JPC rule on Annual Affiliate Audit is both unnecessary and burdensome.*	**VIII.A. Compliance Plans.** A Utility shall demonstrate to the Commission that there are adequate procedures in place that will preclude the sharing of information with its Affiliate(s) that is prohibited by these Rules. A Utility shall file an implementation/compliance plan with the Commission within 30 days after the adoption of these Rules, and annually thereafter. **VIII.B. Annual Affiliate Audit.** A Utility shall, on an annual basis, have audits prepared by independent auditors that verify that the Utility is in compliance with the rules set forth herein.	**NAESCO -** **Compliance Plans:** Written procedures must be established to ensure arm's length transactions as between the Utility and its Affiliate. See NAESCO Guideline 7.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
6.D. New Affiliate Compliance Plans: *See individual comments of parties.*	6.D. New Affiliate Compliance Plans: *The JUR believe that no additional rule is required.*	VIII.C New Affiliate Compliance Plans. Upon creation of a new Affiliate, a Utility shall immediately notify the Commission, and interested parties of the creation of such Affiliate and file within sixty (60) days a report with the Commission describing how the Utility will implement these Rules with regard to the new entity.	
	6.E. Reporting: The Commission's existing general and Utility-specific requirements for reporting of Affiliate Transactions shall remain in force, except as modified herein.	*The JPC believe that the record keeping and compliance rules set forth elsewhere in the JPC rules are necessary.*	
7. <u>Utility Products and Services:</u> *See individual comments of parties.*	7. <u>Utility Products and Services:</u> *While the JUR have not submitted a specific Rule regarding Utility provision of non-tariffed products and services, the JUR have commented extensively on the JPC's proposed Rule in the JUR Joint Reply Comments filed August 15, 1997. As noted therein, the JUR and JPC have agreed on a significant number of concepts regarding this issue, but continue to have some significant differences. The JUR and several members of the JPC are continuing to work earnestly to attempt to develop a consensus proposed Rule concerning this area. The JUR is hopeful that this effort will result in a recommendation to the Commission in the near future.*	Utility Products and Services I.E. A Utility shall only engage in the provision of new products and services as specifically provided for in Section VII of these Rules. VII. NEW PRODUCTS AND SERVICES. **Except as provided for in these rules, new products and services shall be offered through affiliates.** A Utility may only offer for sale the following products[3] and services: 1) Products and services that are currently offered by the Utility pursuant to tariff;[4]	DGS/UC/CSU - **Utility Products and Services:** Utilities should not be allowed to provide a competitive service unless it can be clearly demonstrated that 1) such provision will not result in cross-subsidization or unfair competition, 2) there are clear benefits to ratepayers that substantially outweigh any potential decreases in service and increases in costs and risks; and 3) the service could not be provided more appropriately by Utility's competitive Affiliate. See 7/31 DGS/UC/CSU Comments at 3. NAESCO - **Utility Products and Services:** There should be a strong presumption against provision of competitive services by the

[3] As used herein, "products" includes use of real, intellectual, and personal property.

[4] As used herein, "tariff" or "tariffed" refers to Commission-approved terms and conditions of service, whether by traditional tariff or by approved contract or other such approval process as may be deemed appropriate by the Commission.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		2) Unbundled versions of currently-offered Utility products and services, with the unbundled versions being offered on a tariffed basis; 3) New products and services that are offered on a tariffed basis; and 4) Products and services which are offered on a non-tariffed basis and which utilize a portion of a Utility asset or capacity where (i) such asset or capacity has been acquired for the purpose of and is necessary and useful in providing tariffed Utility services and (ii) the involved portion of such asset or capacity may be utilized for the purpose of offering a product or service on a non-tariffed basis without adversely affecting the cost, quality or reliability of tariffed Utility products and services. In no event, however, shall Utilities offer natural gas or electricity commodity service on a non-tariffed basis. Examples of products and services which may be offered on a non-tariffed basis include the following: Products or services which can be marketed with minimal or no incremental capital, little or no new forms of liability or business risk being incurred by the Utility,	Utility; competitive services should be transferred to unregulated Affiliates. Before a Utility is allowed to provide a competitive service it should have the burden of demonstrating that: 1) provision of the competitive service by the Utility will not result in cross-subsidization or unfair competition, 2) there are clear benefits to ratepayers, and 3) the competitive service could not be provided more appropriately by the Utility's unregulated affiliate. See 7/31 NAESCO Comments at 2-3. **SCUPP/IID -** **Utility Products and Services:** A Utility may only offer for sale the following products[5] and services: 1) Products and services that are currently offered by the Utility pursuant to tariff[6]; 2) Unbundled versions of currently-offered Utility products and services, with the unbundled versions being offered on a tariffed basis; 3) New products and services that are offered on a tariffed basis; and 4) Products and services which are

[5] As used herein, "products" include use of property, both real and intellectual.

[6] As used herein, "tariff" or "tariffed" refers to Commission-approved terms and conditions of service, whether by traditional tariff or by approved contract or other such approval process as may be deemed appropriate by the Commission.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		and little or no direct management control (e.g., use of Utility land by third parties for nurseries or mini-storage, lease of "dark" fiberoptic capacity, rental available office space, the use of technical employees on an "as-available" basis by third parties, or licensing of existing software or a patented product or process). Before offering a nontariffed new product or service, a Utility shall submit an advice letter stating its intention to offer such new product or service. The advice letter shall demonstrate compliance with these rules. In order to ensure that a given product or service does not threaten the provision of utility service, the Utility shall include information on the amount of utility assets dedicated to the non-utility venture. Consistent with the approach adopted in D.89-10-031, the advice letter shall address the potential impact of the new product or service on competition in the relevant market. In the absence of a protest alleging irreparable harm or non-compliance with these rules, the Utility may commence offering of the product or service 30 days after submission of the advice letter. If such a protest is filed, offering of the product or service shall commence only after Commission approval through the normal advice letter process. Further, products and services may be offered on a non-tariffed basis only if the offering of such product or service by the Utility would not constitute an unfair competitive advantage and only if the	offered on a non-tariffed basis and which utilize a portion of a Utility asset or capacity where (i) such asset or capacity has been acquired for the purpose of and is necessary and useful in providing tariffed Utility services and (ii) the involved portion of such asset or capacity may be utilized for the purpose of offering a product or service on a non-tariffed basis without adversely affecting the quality or reliability of tariffed Utility products and services. In no event, however, shall Utilities offer natural gas or electricity commodity service on a non-tariffed basis. Examples of products and services which may be offered on a non-tariffed basis include the following categories: a) Products or services which can be marketed with minimal or no incremental capital, little or no new forms of liability or business risk being incurred by the Utility, and little or no direct management control (e.g., use of Utility land by third parties for nurseries or mini-storage, lease of "dark" fiberoptic capacity, rental of available office space, the use of technical employees on an "as-available" basis by third parties, or licensing of existing software or a patented product or process); b) Products for which additional capital may be required,

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		Commission has adopted and the Utility has established (1) a mechanism for equitable sharing of the benefits and revenues derived from offering such products and services between ratepayers and shareholders; (2) a mechanism or accounting standard to be followed in allocating costs to each new product or service to assure the prevention of cross-subsidization between the services the Utility would continue to provide on a tariffed basis and those would provide on a non-tariffed basis; (3) periodic reporting of the costs allocated to and revenues derived from marketing such new products and services; (4) periodic auditing of the costs allocated to and revenues derived from marketing such new products and services; and (5) a mechanism for the resolution of complaints regarding alleged anti-competitive practices or impacts associated with Utility offerings of such products and services, with such mechanism providing for the discovery that is necessary and appropriate for the complainant to pursue such a complaint in a timely manner. A Utility that is offering nontariffed products and services, as of April 9, 1997, may continue to offer such products and services until such time as the further mechanisms and reporting requirements specified above are adopted by the Commission, provided that such existing offerings of products and services on a non-tariffed basis have been approved by the Commission through a general rate case, application, advice letter, or other	additional liability or business risk may be incurred, or direct management control may be required in order for the product or property to be marketed (e.g., land development or development of commercial applications for utility-developed software); and c) Services for which additional capital may be required, additional liability or business risk may be incurred, or direct management control may be required in order for the product or property to be marketed (e.g., billing and phone center services for third parties, equipment testing, meter repair and calibration services, and consulting services). Products and services may be offered on a non-tariffed basis only if the Commission has provided for and the Utility has established (1) a mechanism for equitable sharing of the benefits and revenues derived from offering such products and services between ratepayers and shareholders; (2) a mechanism or accounting standard to be followed in allocating costs to each new product or service to assure the prevention of cross-subsidization between the services the Utility would continue to provide on a tariffed basis and those would provide on a non-tariffed basis; (3) periodic reporting

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		similar Commission procedure. Within 30 days of the adoption of these rules by the Commission, each Utility shall submit an advice letter describing the existing products and services currently being offered by the Utility. A Utility must continue to comply fully with the provisions of Public Utilities Code Section 851 when necessary or useful utility property is sold, leased, assigned, mortgaged, disposed of, or otherwise encumbered as part of a non-tariffed product or service offering by the Utility. If an application pursuant to Section 851 is submitted, the Utility need not file a separate advice letter, but shall include in the application those items which would otherwise appear in the advice letter.	of the costs allocated to and revenues derived from marketing such new products and services; (4) periodic auditing of the costs allocated to and revenues derived from marketing such new products and services; and (5) a mechanism for the resolution of complaints regarding alleged anti-competitive practices or impacts associated with Utility offerings of such products and services, with such mechanism providing for the discovery that is necessary and appropriate for the complainant to pursue such a complaint in a timely manner. However, a Utility that is offering products and services as of April 9, 1997, on a non-tariffed basis may continue to offer such products and services until such time as the further mechanisms and reporting requirements specified above are adopted by the Commission, provided that such existing offerings of products and services on a non-tariffed basis have been approved by the Commission through a general rate case, application, advice letter, or other similar Commission procedure. A Utility must continue to comply fully with the provisions of Public Utilities Code Section 851 when necessary or useful utility property is sold, leased, assigned, mortgaged, disposed of, or otherwise encumbered as part of a non-tariffed product or service offering by the Utility. In the absence of

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
			an application pursuant to Section 851, a Utility shall use the appropriate application or advice letter process to seek the Commission's approval to offer new products and services of the types specified in paragraphs 4(b) and 4(c) above. **PacifiCorp/WWP/Sierra Pacific - Utility Products and Services:** Add "Utilities may directly market energy and energy-related products and services."
8. <u>Utility Merchant Function:</u> *See individual comments of parties.*	8. <u>Utility Merchant Function:</u> *The JUR believe that no additional rule is required because this issue involves intra-utility relationships, not utility-to-affiliate relationships, and therefore is outside the scope of this proceeding.*	**VI. Utility Merchant Function.** To the extent that a Utility is engaged in the marketing of the commodity of electricity or natural gas to customers, as opposed to the marketing of transmission and distribution services, it shall be deemed, for purposes of these Rules, to be engaging in merchant functions. Merchant function activities include, but are not limited to, the marketing or offering of bundled electric or natural gas service (including discounted rates pursuant to existing tariffs) by Utility customer account representatives, customer service employees or customer inquiry telephone operators, to customers which have the ability to purchase commodity services from a non-utility source in a competitive market. Under such circumstances, the Utility is in a similar relationship with its own merchant function as with its Affiliate(s). Thus, in order to provide that the Utility customers are placed in a position where no advantage or	**DGS/UC/CSU - Utility Merchant Function:** See comments above. **PacifiCorp/WWP/Sierra Pacific - Utility Merchant Function:** Agree with the JUR comment.

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		disadvantage is imposed based on whether such customers purchase their commodity services from the Utility merchant function or from a third party and to provide for fair competition, the Utility and its merchant function shall be subject to the following rules: (a) A Utility shall not provide any preferential treatment to its merchant function and shall take steps necessary to maintain complete neutrality regarding customer supply choice; (b) A Utility shall not offer, nor imply that it will offer, any preferential treatment in the provision of Utility electric or natural gas distribution or transmission service to the Utility merchant function or to a customer which purchases commodity service from the Utility; (c) A Utility shall not provide any discount of distribution or transmission charges, CTC charges, or other Utility charges, such as economic development or anti-bypass discounts, to its merchant function, except to the extent that such discounts are provided to non-affiliated entities on a non-discriminatory basis; (d) A Utility shall not offer or provide any waiver or modification of any rate, term or condition of a tariffed service to its merchant function, except to the extent such waivers or modifications are offered on a non-discriminatory basis;	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		(e) A Utility shall file to modify any current tariffs that limit discounts to bundled services so as to include a specific non-discrimination provision and to make such discounts available on a non-discriminatory basis to providers of commodity services or their customers; (f) A Utility shall not provide waiver of connection or construction fees to its merchant function unless such waiver is provided on to non-affiliated entities on a non-discriminatory basis; (g) A Utility shall require its merchant function to make available its offer or provision of a discount, waiver, or modification under (c), (d) or (f) to non-affiliated entities by posting it on the respective bulletin board; (h) A Utility shall, to the extent possible, provide merchant services using staff that is separate and independent from the staff providing transportation services; in particular, any Utility customer account representative performing merchant duties or any other person performing merchant duties for the Utility that includes face-to-face customer contact shall not perform transportation duties for the Utility; (i) Rules regarding information sharing and non-discrimination, as set forth in Sections III and IV hereto, apply to	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		those persons and those subdivisions of the Utility which engage in merchant functions to the same extent as if those persons were employees of an Affiliate, and as if those subdivisions engaged in the merchant function were themselves Affiliates; (j) A Utility shall unbundle all costs associated with the merchant function from the transportation functions; (k) A Utility shall credit benefits from joint use of either Utility employees or facilities to the respective transportation revenue requirement; and (l) A Utility shall require its merchant function to request transportation services on the same basis as non-affiliated entities.	
9. <u>Compliance/Enforcement</u>: *See individual comments of* parties.	9. <u>Compliance/Enforcement</u>: *The Commission has reserved the examination of this topic for a separate phase of the OIR/OII.*	**Compliance/Enforcement.** *The JPC included exemplary complaint procedures and remedies as Exhibit C to the JPC July 31, 1997 Comments. These provisions are as follows:* COMPLAINT PROCEDURES AND REMEDIES A. The Commission shall strictly enforce these Standards. Each transaction in violation of the Standards of Conduct is considered a separate occurrence. B. Standing: 1. Any person or business may complain to the Commission in writing.	**DGS/UC/CSU - Compliance/Enforcement:** DGSUC/CSU recommend that enforcement issues be considered by the Commission shortly after it implements affiliate rules. See 7/31 DGS/UC/CSU Comments at 8. **NAESCO - Compliance/Enforcement:** A Utility shall establish and publicly file with the Public Utilities Commission, a complaint procedure for alleged violations of any of these standards. See NAESCO Guideline 8.

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		setting forth any act or thing done or omitted to be done by any Utility or Affiliate in violation or claimed violation of any Standard set forth in this document. 2. "Whistleblower complaints" will be accepted and the confidentiality of complainant will be maintained until conclusion of an investigation or indefinitely, if so requested by the whistleblower. Where the latter is invoked, the Commission has the authority to convert an anonymous complaint into a Commission-initiated investigation. **C. Documentation:** 1. A Utility shall establish a complaint procedure that preserves the privacy rights of the complainant. All complaints, whether written or verbal, shall be referred to the Utility's "ombudsperson" designated by the Utility as having sufficient authority to investigate and resolve complaints within thirty (30) days. The "ombudsperson" shall notify such complaint to the complainant that she or he has received such complaint in writing within five (5) working days of receipt. The ombudsperson shall, within thirty (30) days after receiving the complaint, conduct an investigation of the complaint, take action to resolve it, and send a written report to the complainant, including the specific claim, all relevant dates, companies involved, Employees involved, and a description of any course of action taken. The written report will be subject to	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		public inspection by the Commission and other parties if related to an investigation conducted pursuant to Section VII.D. 2. A Utility shall maintain a public log of all new, resolved and pending complaints. The log shall include, at a minimum, the date the complaint was received, the nature of the complaint, the actions taken to resolve the complaint, and the date the complaint was resolved or the reason why the complaint is still pending. **D. Investigate:** The Commission shall establish a complaint resolution procedure presided over by Commission-appointed personnel for expedited resolution. The expedited complaint resolution procedure shall be established by the Commission and in effect no later than November 1, 1997 and shall call for a resolution of the complaint within sixty (60) days of receipt. **E. Penalties:** 1. When enforcing these Standards or any order of the Commission regarding these Standards, the Commission may do any of the following: (a) Terminate the transaction; or (b) Prospectively limit or restrict the amount, percentage, or value of transactions entered into between a Utility	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		and its Affiliate(s) as a remedy for a violation of these Standards; (c) Assess such damages and penalties as described in Paragraphs 2 and 3 below; or (d) Apply any other remedy available to the Commission. 2. Penalties shall reflect the actual and/or potential injury to ratepayers and competitors and the gravity of the violation. Repeated violations will require disproportionately severe penalties. Specifically, in addition to any other penalties provided for in the Public Utilities Code (e.g., §§ 798, 2107), if any Utility is found by the Commission to have violated these Standards, fails to perform a duty imposed on it, or fails, neglects, or refuses to obey an order, regulation, directive, or requirement of the Commission, such Utility shall be subject to a penalty of no less than $5,000 nor more than $20,000 for each separate violation. A separate violation shall be deemed for each day a violation described herein continues. 3. Fines and penalties collected under the Standards shall be paid to the Commission for the operating expenses of the complaint resolution process. Annual excesses will be used as determined by the Commission. 4. If the Commission finds that a	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
		Utility has violated these Standards more than twice in a twelve (12) month period, such finding will trigger an immediate review by the Commission to be completed within thirty (30) days of a determination under Section VII.D that a third violation has occurred. (a) If three violations in any twelve-month period are of any provisions in Sections ___, ___, ___, or ___, the Commission shall require a one (1) year prohibition, to go into effect immediately, on the Utility entering into any transactions (including sales of any tariffed or non-tariffed services) with the Affiliate(s) involved in such violations. In the event that such prohibition is not honored, (I) the Commission may consider extensions of the prohibition period as appropriate or may permanently preclude the Utility from dealing with the Affiliate(s) in the Utility's service area, and (ii) Utilities will be subject to a fine of up to $25,000 per day of unlawful Affiliate operation in restricted areas to be paid within ten (110) days of the Commission's action, in addition to any other applicable penalty or fine. (b) If Section VII.E.4(a) does not apply, the Commission shall use its discretion to determine the amount of any additional penalty or fine to be paid by the Utility and the restrictions it wishes to impose on Utility and Affiliate transactions.	

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
10. <u>In-Service Territory Marketing By Unregulated Affiliates:</u> *See individual comments of parties.*	10. <u>In-Service Territory Marketing By Unregulated Affiliates:</u> *The JUR believe that the proposed affiliate marketing ban by ORA and TURN should be rejected, as an impermissible attack on Decision 97-05-040, and for other reasons.*		**10. In-Service Territory Marketing By Unregulated Affiliates:** **ORA:** Effective immediately, for the next three years during the implementation of the Commission's direct access plan outlined in D.97-05-040, customers of the natural gas local distribution companies and electric utility distribution companies shall not receive products or services from unregulated affiliates of the gas and electric utilities from which they receive distribution service. **ORA Alternative Rule:** Until each gas and electric utility files revised Affiliate Policies and Guidelines and the Commission finds they comply with Decision 97-05-040, customers shall not receive products or services from unregulated affiliates of the gas or electric utility. **TURN:** In-service territory marketing by a utility's unregulated affiliates shall be prohibited for a period of two years, effective with the start of direct access. At the end of the two-year prohibition, the Commission shall consider whether in-service territory marketing by utility affiliates should be permitted.

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11. Modified Standards for Exempt Utilities: *See individual comments of parties.*			11. Modified Standards for Exempt Utilities: **PacifiCorp/WWP/Sierra Pacific** - Exempt Utilities shall be subject to the following standards of conduct regarding transactions with its Affiliates and shall otherwise be exempt from these Rules: (1) Information Standard - Exempt Utility distribution personnel shall not share information with energy sales and marketing personnel of another division or an Affiliate of the Utility; and (2) Separation Standard - Exempt Utilities shall separately account for marketing and sales expenses associated with seeking direct access customers outside the Utility's distribution service territory.
12. Responses for Request for Exemption: *See individual comments of parties.*	12. Responses for Request for Exemption: **JUR response to SCWC request for exemption:** If the Commission retains its stated scope of applicability for its affiliate transaction rules, the JUR support insertion of the following language in Section B, Applicability. A Commission-jurisdictional Utility may be exempted from these Rules if it files a Motion for Exemption with the Commission, within 30 days after the effective date of the Commission's order adopting such Rules, that: a) Attests that no Affiliate of the Utility provides retail energy or energy-related services within the State of		

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Jointly Recommended Consensus Rules	Joint Utility Respondents	Joint Petitioner Coalition	Other Parties
	California; and b) Attests that if an Affiliate is subsequently created which provides energy or energy-related services within the State of California, then the Utility shall: 1) Notify the Commission, at least 30 days before the Affiliate begins to provide energy-or energy-related services, that such an Affiliate has been created; notification shall be accomplished by means of a letter to the Executive Director, with copies to all parties to this OII/OIR; and 2) Agree in this notice to comply with the Rules in their entirety. **JUR response to PacifiCorp/WWP/Sierra Pacific request for exemption:** *The JUR believe that there is no legal or public policy basis for an exemption from the rules.*		

(END OF APPENDIX B)

R. 97-04-011 / I. 97-04-012
D. 97-12-088

Commissioner Jessie J. Knight, Jr., Concurring:

Without a doubt, this decision to govern standards of conduct between California's monopoly gas and electric utilities and their unregulated energy related affiliates is one of the Commission's most critical decisions in the agency's march toward realizing successful electric restructuring and the development of robust competition in converging energy markets. The need for rules that allow competition to flourish is of paramount importance to the future marketplace when one considers the fundamental changes underway within California's gas and electric markets. A regulatory misfire in the creation of the rules in the initial stages of restructuring could have negative consequences for many years to come, as the ability of the incumbent monopolies to exert market power would be enhanced. Furthermore, stringent enforcement of the provisions of this order will bolster the Commission's commitment to promoting competition. Failure in the creation of the rules, or failure to enforce the rules, promises to severely handicap the embryonic maturation of competitive forces. The manifest destiny of such a circumstance would be the loss of millions of dollars of economic benefits that can only be achieved through real competition in the industry.

Throughout this proceeding, I have been convinced that this Commission must fashion strict, enforceable standards of conduct between energy utilities and their affiliates in order to prevent potential market power abuses that may doom any dream of vibrant competition in California. The order adopted today focuses tightly on this objective, and in so doing, the resultant rules achieve the dual objective of fostering competition and protecting consumer interests.

The rules contained in this order are especially meaningful in that they are the initial set of rules applicable to the fledgling direct access market for electricity. Crafting and enforcing appropriate rules in the infancy stages of this market will provide a significant inducement for entry by the greatest number of potential competitors. My goal as co-assigned Commissioner on this case has been to fashion rules that increase the nominal number of players in competitive energy markets from day one, both small and large. And although much of my focus has been on competition and the curbing of market power abuses in the direct access market for electricity, I am equally concerned that these same potential abuses may become evident in other less glamorous, but equally strategic energy related markets, such as earthquake valves, gas heating and cooling, metering, billing etc.

This order and the accompanying rules embrace and endorse the concept that some sacrifices are necessary for the Commission to exercise against the scope and scale economies that are naturally inherent within the confines of integrated utilities and their affiliates to achieve the full benefits of market competition. In the spirit of maintaining the Commission's commitment to an efficient competitive marketplace, I wholeheartedly support the logic espoused in the decision that these sacrifices are essential.

The second critical element of these rules is the focus on consumer protection through provisions that prevent cross subsidization, protect the privacy of consumer information, and avoid customer confusion through adequate disclosure of utility affiliate relationships. In crafting rules designed to deliver these important consumer protections, the Commission has achieved a dual purpose by also providing critical reassurance to potential entrants that a utility cannot readily leverage its access to ratepayer dollars, information, or brand name to skew the market without restriction.

For example, the disclaimer rules contained in this order regarding the use of a utility name and logo by energy affiliates will benefit consumers by ensuring full disclosure of the true affiliations of the companies from which they buy. The restrictions on the use of the utility's name and logo in these rules gracefully accomplish a disclosure of corporate parentage, while at the same time notifying consumers that the affiliated company is not regulated and a purchase is not required to maintain service from the utility.

It is important to highlight the fact that these rules <u>do not</u> regulate the affiliates of the utilities, but instead regulate the behavior of the parent utility in its transactions with affiliates. The rules rely on structural separations wherever possible in order to limit the number of transactions between the utility and its sister affiliates. This is a superior strategy to simple transaction reporting and cost allocation requirements. It is indisputable that the fewer transactions that take place, the less regulation and government intervention will occur over time. This is the market and regulatory model which I prefer. Furthermore, when intervention by regulators is necessary, it can be focused on appropriate enforcement and penalty action.

I hasten to point out that the rules set forth in the decision do not prohibit the utilities' energy related affiliates from participating in markets within the parent utility's service territory. Although I seriously considered prohibiting utility affiliate involvement in the direct access segment of the market within a utility's service territory for two years, I abandoned that notion in favor of stricter rules which limit the transactions between a utility and its affiliates, but do not limit the choices available to consumers.

The decision to allow affiliates to operate in their parent utility's territory involved a delicate trade-off between completely preventing anti-competitive conduct and taking the risk of allowing utility affiliated competitors into the market, thereby enlarging the choices available to consumers. Given the trade-off necessary to achieve this expanded range of choices for consumers, this Commission must remain extraordinarily vigilant in enforcing these affiliate conduct rules, thereby curbing market power abuses before they terminally damage fledgling energy markets.

And although I do not support any form of a prescriptive cap on the direct access market share for utility affiliates, the decision emphasizes that the Commission can reexamine the rules and the underlying issue of affiliate participation in the parent utility's service territory, if the Commission finds troubling market share statistics at any point in the future.

I am heartened that although this particular rulemaking is now at an end, another separate rulemaking will be issued in the Spring of 1998 that will address special complaint procedures and remedies to enforce these adopted rules.

As I reflect on the crucial aspects of this decision, I realize that the rules detailed in this order will be for nought unless the Commission moves swiftly to identify and prosecute offenders and thereby dull any incentive for repeat violations. In my remaining tenure at the Commission, I will strive to establish meaningful penalties and expedited complaint procedures for aggrieved competitors with the hope that future Commissions will apply these penalties and procedures with a full understanding of what the rules adopted today are envisioned to achieve.

Dated December 16, 1997 in San Francisco, California.

/s/ Jessie J. Knight, Jr.

Jessie J. Knight, Jr.
Commissioner

R.97-04-011, I.97-04-012
D.97-12-088

Commissioner P. Gregory Conlon, Dissenting:

Throughout the entire debate over electric restructuring my main concern has always been ensuring a competitive market place and preventing the abuse of market power. The potential for market power abuse is particularly a problem in the electric industry, where almost 100 years of regulation has resulted in the incumbent utilities controlling almost all of the existing generation, transmission, and distribution assets within their service territory. The incumbent utilities also start out with a captive customer base of 100% of the market. It is this captive market that Direct Access will now open up to full competition.

One of the major issues[1] in today's decision on affiliate transactions addresses our concern over a potential for market power abuse in the direct access market we are creating; that is the advantages that an affiliate of an incumbent utility has in marketing to customers in the new competitive marketplace. This includes the ability of the affiliate to use the name, logo, and goodwill of the utility. My goal has been to maximize the number of competitors in the new direct access market that we are creating. In my mind, it does not make sense to open up the electric market to competition if the newly created direct access market itself could be dominated by the affiliates of the incumbent utilities.

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[1] Today's decision also addresses rules governing local natural gas distribution companies and electric utilities' relationships with affiliates covering a broad range of energy services, as more specifically defined in the rules. This dissent focuses solely on the potential advantages of utility affiliates in the direct access market.

Concern over the problem of market power has been an important factor throughout our electric restructuring process. To address the market power problem in generation, our Commission successfully encouraged the incumbent utilities to divest themselves of significant portions of their generation capacity. The creation of the Independent System Operator ensures that the incumbent utilities' monopoly transmission system will be made available – on an open non-discriminatory basis – to all market participants, while the creation of the Power Exchange similarly removes the incumbent utilities' control over the purchase of energy.

The decision we adopted today contains a large number of structural and procedural safeguards designed to prevent market power abuses that may be caused by an incumbent utility's relationship with its affiliates. These safeguards address potential abuses not only in the direct access market but also in numerous other energy related markets as defined by the decision. The decision contains numerous safeguards designed to eliminate the ability of an incumbent utility to either cross-subsidize or confer any undue advantage to its affiliates in these competitive markets.

I support the safeguards contained in the decision except I am strongly concerned that the adopted decision does not go far enough in recognizing the inherent advantages that an affiliate of a utility has in the direct access market. These advantages may come from the utility's control of essential bottleneck facilities such as the processing of Direct Access Service Requests (DASRs). Even more important, the utility affiliate can use the brand name, logo, and goodwill that is built up by the sister utility to market its unregulated services within the utility's service territory.

Results from other states which have allowed a utility affiliate to market within the utility's service territory show how powerful this advantage can be. In this proceeding, the Joint Petitioners Coalition submitted exhibits showing that in pilot direct access programs in a number of states the utility affiliate routinely gathered the lion's share of the marketplace. Their exhibit shows that it was not uncommon for the utility's affiliate to gain market shares as high as 80% of the direct access market. Even more interesting, in states which did not allow the utility's affiliate to use the name and logo of the utility, the affiliate's market share was significantly less.

The only reason I can see for the affiliate's better success than its competitors is the ability of the affiliate to piggy-back off of the brand name, logo, advertising and name recognition of the sister utility. As Commissioner Bilas noted, referring back to the textbook on microeconomics that he authored as a college professor in 1971, brand name identification is a barrier to entry and if significant could lead to market power abuse.

With approximately one month's worth of data on the number of direct access service requests (DASRs) to examine, it is clear that California has not yet seen an "Oklahoma land rush" of customers signing up for direct access. I believe this will change as restructuring begins and marketers advertise their products; the Power Exchange price becomes visible; and consumers evaluate their new options. Nonetheless, I am concerned that with the advantages of brand name recognition that the utility affiliate has in this marketplace, many marketers may be deterred from competing against the affiliate and withdraw from the market over time. This is not a result we want to encourage but should deal with up-front in a pro-active manner.

My proposed alternate decision in this proceeding recognized the advantages that a utility affiliate may have, and sought to prevent the utility from exploiting those advantages to obtain an undue market share. My proposal would have limited a utility from processing the direct access requests of its affiliates if the affiliates' market share exceeded 20% of the direct access market (by volume of kilowatt hours sold) within the utility's service territory. This 20% "competitive cap" would be applied separately for each class of customer—residential, commercial, agricultural, and industrial. This competitive cap would not have prohibited the affiliates from competing, but at the same time would have permitted entry of enough additional marketers to ensure a competitive market. The application of the competitive cap by market segment would have prevented the utility's affiliate from "cream-skimming" the more lucrative markets and ensure that customers in all markets enjoyed the benefits of competition.

My proposal would have allowed for two exemptions from this 20% cap. First, it would not have applied to the sale of renewable energy to residential customers. It appears to date that only a few marketers will be offering this service and this segment of the marketplace should be encouraged. Second, it would have "grandfathered" contracts entered into prior to the adoption of this decision. This provision recognized that some affiliates may have relied on our pre-existing affiliate rules in developing their market strategy, even though we clearly stated that those rules were interim in nature.

A number of parties to this proceeding – consumer groups, end users, and the new competitors that we hope to bring into the marketplace-- supported a complete ban on the use of the utility's name and logo by its affiliate, as well as a complete prohibition against an affiliate offering service within the territory of its sister utility. The utilities and their affiliates, by contrast, wanted no limitations for their affiliates. I believe my proposal struck a fair balance. It would have allowed a utility's affiliates to compete in the marketplace, thus promoting competition, but it would have prevented the affiliates from unfairly controlling the market through the advantages that they may have as utility affiliates. My proposed rules would have been in effect for 2-years, at which time the Commission could have revisited the rules to see if they should have been extended until the end of the transition period.

The order adopted by the majority provides for monthly reporting of the volumes of energy sold by the utilities' affiliates. Our office will monitor and study these results and encourage further action by the Commission if it is clear that the utilities' affiliates are gaining a disproportionate share of the market.

/s/ P. Gregory Conlon
P. Gregory Conlon

San Francisco, California
December 16, 1997

R. 97-04-011 / I. 97-04-012
D. 97-12-088

Commissioner Jessie J. Knight, Jr., Concurring:

Without a doubt, this decision to govern standards of conduct between California's monopoly gas and electric utilities and their unregulated energy related affiliates is one of the Commission's most critical decisions in the agency's march toward realizing successful electric restructuring and the development of robust competition in converging energy markets. The need for rules that allow competition to flourish is of paramount importance to the future marketplace when one considers the fundamental changes underway within California's gas and electric markets. A regulatory misfire in the creation of the rules in the initial stages of restructuring could have negative consequences for many years to come, as the ability of the incumbent monopolies to exert market power would be enhanced. Furthermore, stringent enforcement of the provisions of this order will bolster the Commission's commitment to promoting competition. Failure in the creation of the rules, or failure to enforce the rules, promises to severely handicap the embryonic maturation of competitive forces. The manifest destiny of such a circumstance would be the loss of millions of dollars of economic benefits that can only be achieved through real competition in the industry.

Throughout this proceeding, I have been convinced that this Commission must fashion strict, enforceable standards of conduct between energy utilities and their affiliates in order to prevent potential market power abuses that may doom any dream of vibrant competition in California. The order adopted today focuses tightly on this objective, and in so doing, the resultant rules achieve the dual objective of fostering competition and protecting consumer interests.

The rules contained in this order are especially meaningful in that they are the initial set of rules applicable to the fledgling direct access market for electricity. Crafting and enforcing appropriate rules in the infancy stages of this market will provide a significant inducement for entry by the greatest number of potential competitors. My goal as co-assigned Commissioner on this case has been to fashion rules that increase the nominal number of players in competitive energy markets from day one, both small and large. And although much of my focus has been on competition and the curbing of market power abuses in the direct access market for electricity, I am equally concerned that these same potential abuses may become evident in other less glamorous, but equally strategic energy related markets, such as earthquake valves, gas heating and cooling, metering, billing etc.

This order and the accompanying rules embrace and endorse the concept that some sacrifices are necessary for the Commission to exercise against the scope and scale economies that are naturally inherent within the confines of integrated utilities and their affiliates to achieve the full benefits of market competition. In the spirit of maintaining the Commission's commitment to an efficient competitive marketplace, I wholeheartedly support the logic espoused in the decision that these sacrifices are essential.

The second critical element of these rules is the focus on consumer protection through provisions that prevent cross subsidization, protect the privacy of consumer information, and avoid customer confusion through adequate disclosure of utility affiliate relationships. In crafting rules designed to deliver these important consumer protections, the Commission has achieved a dual purpose by also providing critical reassurance to potential entrants that a utility cannot readily leverage its access to ratepayer dollars, information, or brand name to skew the market without restriction.

For example, the disclaimer rules contained in this order regarding the use of a utility name and logo by energy affiliates will benefit consumers by ensuring full disclosure of the true affiliations of the companies from which they buy. The restrictions on the use of the utility's name and logo in these rules gracefully accomplish a disclosure of corporate parentage, while at the same time notifying consumers that the affiliated company is not regulated and a purchase is not required to maintain service from the utility.

It is important to highlight the fact that these rules do not regulate the affiliates of the utilities, but instead regulate the behavior of the parent utility in its transactions with affiliates. The rules rely on structural separations wherever possible in order to limit the number of transactions between the utility and its sister affiliates. This is a superior strategy to simple transaction reporting and cost allocation requirements. It is indisputable that the fewer transactions that take place, the less regulation and government intervention will occur over time. This is the market and regulatory model which I prefer. Furthermore, when intervention by regulators is necessary, it can be focused on appropriate enforcement and penalty action.

I hasten to point out that the rules set forth in the decision do not prohibit the utilities' energy related affiliates from participating in markets within the parent utility's service territory. Although I seriously considered prohibiting utility affiliate involvement in the direct access segment of the market within a utility's service territory for two years, I abandoned that notion in favor of stricter rules which limit the transactions between a utility and its affiliates, but do not limit the choices available to consumers.

The decision to allow affiliates to operate in their parent utility's territory involved a delicate trade-off between completely preventing anti-competitive conduct and taking the risk of allowing utility affiliated competitors into the market, thereby enlarging the choices available to consumers. Given the trade-off necessary to achieve this expanded range of choices for consumers, this Commission must remain extraordinarily vigilant in enforcing these affiliate conduct rules, thereby curbing market power abuses before they terminally damage fledgling energy markets.

And although I do not support any form of a prescriptive cap on the direct access market share for utility affiliates, the decision emphasizes that the Commission can reexamine the rules and the underlying issue of affiliate participation in the parent utility's service territory, if the Commission finds troubling market share statistics at any point in the future.

I am heartened that although this particular rulemaking is now at an end, another separate rulemaking will be issued in the Spring of 1998 that will address special complaint procedures and remedies to enforce these adopted rules.

As I reflect on the crucial aspects of this decision, I realize that the rules detailed in this order will be for nought unless the Commission moves swiftly to identify and prosecute offenders and thereby dull any incentive for repeat violations. In my remaining tenure at the Commission, I will strive to establish meaningful penalties and expedited complaint procedures for aggrieved competitors with the hope that future Commissions will apply these penalties and procedures with a full understanding of what the rules adopted today are envisioned to achieve.

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