

APR 10 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to Establish Rules For Enforcement
of the Standards of Conduct Governing
Relationships Between Energy Utilities and Their
Affiliates Adopted By the Commission In
Decision 97-12-088.

ORIGINAL

FILED

PUBLIC UTILITIES COMMISSION

APRIL 9, 1998

SAN FRANCISCO OFFICE

R.98-04-009

ORDER INSTITUTING RULEMAKING

We recently adopted rules governing the relationship of California's natural gas local distribution and electric utilities to their affiliates (see Appendix A to Decision (D.) 97-12-088). At the same time, we asked our staff to prepare proposed rules providing special complaint procedures and special penalties that may be appropriate to improve our enforcement of these new affiliate transactions rules. With this order, we begin a rulemaking to consider new enforcement rules.

We invited interested parties to send a letter to the Chief Administrative Law Judge (ALJ), no later than January 30, 1998, outlining their suggested enforcement rules. Seven parties submitted timely letters. Several of those letters contained specific proposed rules. We have used these letters as a starting point for drafting the proposed rules that are attached to this order as Appendix A. We seek comments on the proposed rules and offer the following thoughts and questions for consideration.

Goals

In D.97-12-088, we adopted new rules governing transactions between gas and electric companies and their affiliates because the rules in place prior to that time differed among the companies and did not address that manner in which

the utilities and their affiliates may market services and interact in a marketplace characterized by increasing competition. We determined that utility entities competing to provide energy services should face uniform rules so that no advantage or disadvantage accrues to a competitor simply because of differing regulations. Several participants in the proceeding that led to the new rules proposed special procedures to ensure that the affiliate transaction rules would be effectively enforced. We chose not to adopt new enforcement procedures in that decision, but to initiate a separate inquiry to explore the need for and the terms of any such new enforcement procedures.

In anticipating this new rulemaking process, we stated that any specific penalties for violations of the affiliate transactions rules should be strong enough to prevent violations from occurring in the first place, rather than present utilities and their affiliates with an 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 stated that we may consider such penalties as not allowing a utility affiliate to switch any new customers to itself for a specified period, or we may consider penalties for severe or recurring violations such as revocation of an affiliate's registration. The complaint process and other methods used to enforce the affiliate transaction rules also must enable this Commission to act in time to preserve the flow of competition while protecting the due process rights of all parties.

In its letter commenting on the nature of any new enforcement rules, Pacific Gas and Electric Company (PG&E) suggested several goals for this rulemaking:

- "The rules should deter violation in the first place.
- "The rules should prescribe mechanisms to address concerns expeditiously. A utility might accomplish this by establishing an

internal complaint resolution procedure whereby the utility would investigate perceived violations quickly and address a party's concerns informally, at minimal cost to that party.

- "The rules should encourage utilities and complainants to resolve informally cases in which actual violations have occurred. The goal should be to remedy problems as expeditiously and inexpensively as possible for all parties concerned. For example, parties could submit complaints to a neutral [third party] for mediation or arbitration, or to the Administrative Law Division:
- "In cases that cannot be resolved informally, the rules should provide for an expeditious complaint resolution procedure at the Commission that remediates actual damage a utility's conduct has caused, but accords all parties appropriate due process rights throughout the adjudication process. Ideally, the complaint and penalty rules should be such that they minimize the instances in which parties must resort to the Commission to resolve a dispute or alleged violation. The rule should safeguard and stimulate competition, not litigation."

We share many of these goals, with the exception of PG&E's suggested emphasis on the remediation of actual damages. Often, the Commission may not be able to assess actual damages with any precision, or may be able to act before a violation has led to damage. For these and other reasons, including our desire to protect the public interest by safeguarding competition itself through enforcement of affiliate rules, measurable damages may understate the seriousness of a violation.

A Ranking of Prohibitions and Remedies

The prohibitions set forth in the affiliate transaction rules fit into several broad categories:

- Preferential Treatment
- Tying Arrangements

- Failure to Perform Audits
- Failure to Provide and Preserve Adequate Books and Records
- Shared Business Development
- Shared Personnel
- Shared Costs or Facilities
- Shared Information
- Inappropriately-Shared Identity

We wish to consider whether there are aspects of the categories of prohibition that suggest the appropriate means of enforcement in each instance. In addition, the Office of Ratepayer Advocates (ORA) proposes a three-tiered approach to violations of the rules.

- Blatant Abuse by Affiliates
- Marketplace Violations
- Non-Marketplace Violations

ORA suggests that the procedures and remedies be tailored to fit the tier in which a particular violation is most appropriately categorized. PG&E suggests that the penalties distinguish among (1) inadvertent conduct, (2) intentional conduct that in effect violates the rules, and (3) conduct intended to violate the rules or harm competition. We seek comments on all of these distinctions, as well.

"Traffic Ticket" Strategies

One means of expediting enforcement would involve empowering our compliance or enforcement staff to issue citations for some types of violations, with specific penalties attached. This approach, if suitable at all, may work best in situations where a violation appears likely on the basis of readily discernible

facts. Such circumstances may include a failure to provide required lists or notices, a failure to file reports or other required compliance items, or a failure to provide witnesses. We seek the thoughts of parties as to whether the use of such an approach appears promising, the types of situations in which it should be used, and the appropriate procedure for appeals.

Higher Fines

Under Public Utilities Code § 2107, a utility is subject to a penalty of not less than \$500 and not more than \$20,000 for each instance in which it has violated the Commission's rules. In addition, under § 798, the Commission can impose a penalty of three times the dollar amount of any unreasonable transaction between a utility and its affiliate when the utility has sought recovery of funds related to the transaction in a Commission proceeding. In its letter to the Chief ALJ, the Joint Petitioner Coalition (the "Coalition") has proposed providing for penalties that would exceed these statutory amounts.¹ The Coalition would include the following language in the enforcement rules:

"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 rules, 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

¹ Members of the Joint Petitioner Coalition include the Alliance for Fair Energy Competition and Trading, whose members include Calpine Corporation, the Institute of Heating and Air Conditioning Industries, and the Electric & Gas Industries Association, Inc.; Amoco Energy Trading Corporation; Enron Corporation; the Imperial Irrigation District; New Energy Ventures, Inc.; the Plumbing, Heating and Cooling Contractors of California; the City of San Diego; the School Project for Utility Rate Reduction and the Regional Energy Management Coalition; 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; Utility Consumers' Action Network; The Utility Reform Network (TURN); and XENERGY.

shall be subject to a penalty of no less than \$50,000 nor more than \$500,000 for each separate violation.”

In another instance, the Coalition proposed a penalty of \$25,000 for each day in which an unlawful act in taking place.

We seek the legal analysis of all interested parties as to the Commission’s authority to impose monetary penalties in excess of those set forth in specific statutory provisions. Parties may also address the use of other fine mechanisms, such as rate of return penalties. Assuming that the Commission has such authority, or assuming that the authority is enhanced through future legislation, we would like to know what parties think of the proposal to impose penalties of the magnitude proposed by the Coalition.

Temporary Restraining Orders

A tool that may be valuable in the event of an ongoing violation that is causing irreparable harm would be the issuance of a temporary restraining order to stop an activity while the Commission considers the merits of a more permanent restraint. A temporary restraining order is most useful when it can be issued at the earliest possible date. We encourage all interested parties to provide legal analysis of the Commission’s ability to delegate the issuance of a temporary restraining orders to an ALJ, the Director of the Energy Division, or the Executive Director, and to provide proposed rules where appropriate.

Divestiture as a Remedy

TURN is a member of the Coalition and expresses general support for the Coalition’s proposal. It offers one change. TURN argues that only divestiture is a severe-enough penalty to ensure strict compliance with the affiliate transaction rules and would use the following language in place of that found in Section VIII.D.4 of the proposed rules we issue today:

"The Commission shall require the utility to divest the involved affiliate(s) if the Commission determines that the utility or its affiliate(s) knowingly violated any provision(s) of Sections III, IV, or V of these rules, and the violation resulted or had the potential to result in substantial injury to consumers of regulated or unregulated products or services, or to competition."

TURN states that it modeled this proposal on electric restructuring legislation recently passed in Maine (see § 3205 of 1997 Maine Chapter 316). A variant on this approach may be to prohibit the utility from allowing the use of its name and logo by its affiliate(s), either on a temporary or permanent basis if the abuse is related to an inappropriately shared identity between the utility and its affiliate(s). We seek comments from all interested parties on the merits of adopting such rules and on our legal authority to do so in the absence of further legislation.

Advisory Ruling Process

The Southern California Edison Company (Edison) proposes to create an advisory ruling process, which it describes as follows:

"Any Utility covered by these Affiliate Transaction Rules may seek advance Advisory Rulings from a Designated Administrative Law Judge concerning proper interpretation of the rules with regard to specific situations or circumstances.

- 1. A Utility may seek Advisory Rulings by sending a written Request for Advisory Ruling to the Chief Administrative Law Judge, who shall disseminate such request to a Designated Administrative Law Judge. Such requests shall provide sufficient specificity to describe fully the situation or circumstances in question and the rule or rules at issue. The Designated Administrative Law Judge may request from the utility, in writing or verbally, such other information as he or she may deem necessary to issue an Advisory Ruling.**

2. The Designated Administrative Law Judge shall make best efforts to issue an Advisory Ruling within 30 days of the receipt of a Request for Advisory Ruling.
3. Although the Commission is not bound by such Advisory Rulings, the Commission intends to afford them the highest evidentiary value. In any case, any Utility that has acted in accordance with an Advisory Ruling shall not be in violation of the rule(s) at issue and shall not be liable for any remedies as set forth in this Article, with regard to the matter which was the subject of the Advisory Ruling."

While we have not included this proposal as part of our proposed rules, we seek comments from all parties on its merits. Among other things, we seek legal analysis as to the appropriateness of the commission issuing advisory opinions in the absence of a case and controversy. We also seek proposals for appropriate rules of notice and comment if such a process were adopted.

Amnesty Period

Edison also proposes the creation of an amnesty period for one year after the effective date of the rules during which the only remedy that could be applied in response to a violation of the rules would be injunctive relief. Edison describes the proposal as follows:

"In light of utility restructuring and the lack of data concerning operations of newly competitive markets, there shall be a transition period of one year from the effective date of the Rules during which no remedies other than injunctive relief,...shall be imposed upon a Utility for any violation of the new affiliate transaction Rules, provided that the utility can demonstrate that during the transition period the utility has taken reasonable steps with due diligence and in good faith to implement the portion(s) of its affiliate transaction compliance plans that are relevant to the alleged violation. During the transition period, the complaint and advisory ruling processes described in this Article shall nevertheless be in effect, except for the imposition of remedies as discussed herein."

While we have not included this provision as part of our proposed rules, we seek comments on the merits of this proposal, as well.

The Process for Adopting Final Rules

We have included, in this order, a proposed rule in order to expedite the decisionmaking process. We provide an opportunity for opening and reply comments. The opening comments should address the merits of the proposed rule, address the other issues raised in the above discussion, and propose alternative rules as necessary. Pursuant to Rule 6(c)(2), any person filing opening comments shall state in the comments any objections to this order regarding the category, need for hearing and preliminary scoping memo, as set forth below. The reply comments should respond to arguments, statements and proposals contained in the opening comments. The reply comments are not a vehicle for offering new proposals. After reviewing both sets of comments, the Commission will consider the merits of making changes to the proposed rule. If the Commission intends to adopt rules that represent a significant departure from those contained in Appendix "A" to this order or those proposed by a party to which others have had the opportunity for comment, then we will release those rules for a single round of comments prior to issuing a final decision. We encourage parties to seek a universally acceptable proposal and will offer staff resources as requested and appropriate and as available to support such an effort.

SB 960

We preliminarily determine the categorization of this proceeding to be quasi-legislative, and preliminarily find that evidentiary hearings will not be needed. In this proceeding, we will consider comments on the proposed rules as well as additional proposals for rules governing the enforcement of the affiliate transaction rules issued in D.97-12-088. We hope to issue enforcement rules

before the end of this year. However, in no event will we exceed the 18-month target set forth in SB 960. Commissioners Knight and Bilas and ALJ Steven Weissman are assigned to this proceeding.

A prehearing conference will be held at 10:00 a.m., on April 30, 1998, at the Commission Courtroom, State Building, 505 Van Ness Avenue, San Francisco, California. At this conference, we will establish a service list. Interested party status will be limited to those who demonstrate an intent to actively participate in this proceeding. Others will be provided with access to all materials related to this matter through e-mail delivery or posting on the Commission's web site.

Interested parties should file prehearing conference statements with the Commission Docket Office no later than April 24, 1998. Copies should also be served on the assigned Commissioner and the ALJ that day. All parties filing statements should bring 30 extra copies to the prehearing conference.

IT IS ORDERED that:

1. A rulemaking is instituted to establish rules concerning the enforcement of the affiliate transaction rules adopted by the Commission in Decision 97-12-088.
2. Pacific Gas and Electric Company, San Diego Gas & Electric Company, Southern California Edison Company, and Southern California Gas Company are respondents.
3. Proposed rules are attached to this order as Appendix A. Opening comments as described in this order shall be filed with the Commission and served on all parties no later than May 12, 1998. Reply comments as described in this order shall be filed and served no later than June 5, 1998.
4. A prehearing conference will be held at 10:00 a.m., on April 30, 1998, at which time the service list for the proceeding will be established. Interested parties should file prehearing conference statements with the Commission Docket Office no later than April 24, 1998. Copies should also be served on the

assigned Commissioner and administrative law judge that day. All parties filing statements should bring 30 extra copies to the prehearing conference.

5. We preliminarily determine that this is a quasi-legislative proceeding and that evidentiary hearings will not be required.

6. The Executive Director shall cause a copy of this order to be immediately served on all respondents and on all interested parties in Rulemaking 97-04-011 as consolidated with Investigation 97-04-012.

This order is effective today.

Dated April 9, 1998, at San Francisco, California.

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

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Proposed as an extension of the rules adopted by the Commission in
D.97-12-088:

VIII. Complaint Procedures and Remedies

A. The Commission shall strictly enforce these rules. Each transaction in violation of these rules shall be considered a separate occurrence.

B. Standing:

1. Any person or corporation as defined in Sections 204, 205 and 206 of the California Public Utilities Code may complain to the Commission or to a utility in writing, setting forth any act or thing done or omitted to be done by any utility or affiliate in violation or claimed violation of any rule 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.

3. The Consumer Services Division may file a Request for Investigation in reaction to audit results or other information that suggests that a violation may have occurred.

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C. Procedure:

1. All complaints shall be filed as formal complaints with the Commission.

2. Each utility shall designate an officer who is responsible for compliance with these rules and the utility's compliance plan adopted pursuant to these rules. Such officer shall be responsible for receiving, investigating and attempting to resolve complaints.

a. The utility shall have three weeks from the date the complaint is filed to investigate and attempt to resolve the complaint. The resolution process shall include a meet and confer session with the complainant. A Commission staff member may, upon request by the utility or the complainant, be present at such meet-and-confer sessions and shall participate in the case of a whistleblower complaint.

b. The utility shall prepare and preserve a report on each complaint, including but not limited to the specific allegations contained in the complaint, all relevant dates, companies, customers, and employees involved, and, if applicable, the resolution reached, the date of the resolution, and any actions taken to prevent further violations from occurring. The report shall be provided to the Commission within four weeks of the date the complaint was filed.

c. Each Utility shall file annually with the Commission a report detailing the nature and status of all complaints and requests for investigation filed in the previous year.

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d. The Commission may, notwithstanding any resolution reached by the utility and the complainant, convert a complaint to an investigation and seek a finding that the utility violated these rules, and in that event impose any appropriate penalties under Section VIII.D or any other remedies provided by the Commission's rules or the Public Utilities Code.

3. The utility will inform the Commission's Energy Division and Consumer Services Division of the results of this dispute resolution process. If it was resolved, the utility shall inform the Commission staff of the actions taken to resolve the complaint and the date the complaint was resolved.

4. If the utility cannot reach a resolution of the complaint, it will so inform the Commission's Energy Division. It will also file an answer to the complaint within thirty days of the issuance by the Commission's Docket Office instructions to answer the original complaint. Within ten business days of notice of failure to resolve the complaint, Energy Division staff will meet and confer with the utility and the complainant and propose actions to resolve the complaint. Under the circumstances where the complainant and the utility cannot resolve the complaint, the Commission shall resolve the complaint within 180 days of the date the complaint was first filed with the utility or the Commission.

5. The Commission shall maintain on its web page a public log of all new, pending, and resolved complaints. The Commission shall update the log once every week at a minimum. The log shall specify, at a minimum, the

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date the complaint was received, the specific allegations contained in the complaint, and a description of any similar complaints, including the resolution of such similar complaints.

6. The Consumer Services Division may initiate a formal inquiry by filing with the Commission, and serving on the subject utility a Request for Investigation, setting forth an alleged violation of the affiliate transaction rules. The Commission shall provide notice of any such filing in the Daily Calendar. The utility shall file a response to the Request for Investigation and undertake informal dispute resolution efforts using the procedures and adhering to the time frame set out above for resolving complaints. If the utility and the Consumer Service Division are unable to informally resolve the concern that prompted the filing of the Request for Investigation, the Commission shall consider both the request and the response and determine whether or not to issue an Order Instituting Investigation.

D. Penalties:

1. When enforcing these rules or any order of the Commission regarding these rules, the Commission may do any or all of the following:

a. Terminate any transaction that is the subject of the complaint;

b. Prospectively limit or restrict the amount, percentage, or value of transactions entered into between a utility and its affiliate(s) as a remedy for a violation of these rules;

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c. Assess such damages and penalties as described in Paragraphs 2 and 3 below;

d. Enjoin conduct in alleged violation of these Rules if the conduct indicates a potential pattern of abuse or if the conduct could significantly affect market decisions;

e. Apply any other remedy available to the Commission.

f. Prohibit the utility from allowing its affiliate(s) to utilize the name and logo of the utility, either on a temporary or permanent basis.

2. Penalties shall reflect the actual and/or potential injury to ratepayers and competitors and the gravity of the violation and shall be significant enough to provide incentives to utilities to prevent violations of these rules. Repeated violations will require proportionately more severe penalties. A separate violation shall be deemed for each day on which a violation occurred and for each day on which a violation described herein continues. Alternatively, if the penalty is imposed on an incident by incident basis, the Commission shall impose penalties up to \$10,000,000. In addition, the Commission may issue penalties pursuant to § 798 of the Public Utilities Code.

3. Fines and penalties collected under the Rules shall be paid to the General Fund of the State of California.

4. Each violation of any provision of Sections III, IV, or V of these Rules shall count as a point against the utility. In the event that a utility accumulates three or more points, the Commission shall impose a one (1) year

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prohibition, to go into effect immediately, on the utility entering into any transactions (including sales of any tariffed or non-tariffed services) with any of the affiliate(s) involved in such violations. After the one-year ban is concluded, the utility shall file a formal application with the Commission before resuming transactions with any of the involved affiliates. The application shall demonstrate the utility's compliance with all of the provisions of these rules, and shall specify what measures the utility has taken to prevent further violations of these rules from occurring.

In the event that a utility violates a temporary affiliate transaction ban imposed by the Commission, the Commission shall impose additional penalties, including but not limited to: (i) extensions of the prohibition period as appropriate, including permanently precluding the Utility from dealing with the affiliate(s) in the utility's service area; (ii) levying fines of up to \$20,000 per day for unlawful affiliate operation in restricted areas to be paid within ten (10) days of the Commission's action, in addition to any other applicable penalty or fine; or (iii) requiring divestiture of the involved affiliate(s).

5. Each violation of any provision of Section VII of these rules shall count as a point against the utility. In the event that a utility accumulates three or more points, the Commission shall impose a ban on the offering of any non-tariffed products and services for a period of one year. After the one-year prohibition is over, the utility shall file a formal application with the Commission before resuming offering non-tariffed products and services. The application shall specify what measures the utility has taken to prevent further violations of these rules from occurring.

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6. If Sections VIII.D.4 and 5 do 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.

(END OF APPENDIX A)