ALJ/SAW/tcg

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Decision 98-12-075 December 17, 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.	R.98-04-009 (Filed April 9, 1998)

FINAL OPINION ADOPTING ENFORCEMENT RULES

In Decision (D.) 97-12-088, we adopted rules governing the relationship of California's energy utilities to their affiliates (see Appendix A to that decision). 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. By creating this docket, we began a process to consider new enforcement rules. We created this docket on April 9, 1998, when we issued proposed rules for comment. The Assigned Commissioner and Administrative Law Judge held a prehearing conference on April 30, 1998. Various interested parties filed opening comments on May 12, 1998 and reply comments on June 5, 1998. In this decision, we add to the rules governing affiliate transactions specific provisions concerning enforcement of those rules.

The enforcement provisions that we adopt today differ in some ways from the proposed rules that we issued in April. The most significant changes are summarized as follows:

1. We provide a specific penalty scheme to apply to enforcement of the affiliate transaction rules.

2. In the proposed rules, we defined "standing" to include "whistleblowers" who choose to remain anonymous throughout a complaint proceeding. Here, we specify that if a whistleblower chooses to remain anonymous, the matter will be heard by the Commission only if the Commission concludes that there is enough corroborating information available to merit the opening of a formal investigation.

3. We remove a proposal that the Consumer Services Division be allowed to file a Request for Investigation when it believes that a violation has occurred.

4. We provide further criteria to explain how the Commission determines the appropriate fine to impose in a specific situation.

5. We add to the rules a procedure allowing for a quick response to potential ongoing violations that appear likely to result in irreversible harm.

In the order initiating this process, we invited parties to comment on the proposed rules and on certain other specific topics. Here, we will speak to the proposed rules and the changes we are making today by first addressing the specifically identified topics and then discussing each portion of the proposed and adopted rules.

A Ranking of Prohibitions and Remedies

We invited parties to consider the merits of dividing the affiliate transaction rules into various categories and assigning an appropriate enforcement mechanism to each category. The reviews were mixed. Various commenting parties agreed that it would be reasonable to create such categories, but no one has proposed a comprehensive and effective way to assign an appropriate enforcement approach to each category. Some, such as the Joint Petitioners Coalition,[1] oppose the use of this type of ranking as too hard to

[1] Members of the Joint Petitioner Coalition include the Alliance for Fair Energy Competition and Trading members of which 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, members of which 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.

implement. The Office of Ratepayer Advocates (ORA) had initially proposed a three-tiered approach to assessing the nature of a violation, but later withdrew its proposal. Pacific Gas and Electric Company (PG&E) suggests that penalties be imposed in a manner that takes into account the utility's motivation – whether rules violations were inadvertent, intentional, or blatant. We will address this approach below, when we discuss the guidelines we will apply to assessing the appropriate fine in a given situation. However, we will not adopt a broad set of categories for the purposes of assigning enforcement mechanisms.

"Traffic Ticket" Strategies

The question raised here is whether we should empower our compliance or enforcement staff to issue citations for some types of violations, with specific penalties attached. ORA generally supports the idea, but suggests that the Commission should learn more about the way that the utilities are acting pursuant to the affiliate transaction rules before determining which rules could be enforced in a ministerial manner. PG&E and the Southern California Edison Company (Edison) see merit in developing such a mechanism, while emphasizing that normal due process protections must apply, such as the right to appeal the issuance of a citation. QST Energy Inc. and the Energy Users Forum[2] (QST/Energy Users) conceptually endorse traffic tickets as a useful enforcement tool, but point out that such a procedure will not be effective unless it represents only the first step in a discipline process that progressively penalizes further or continuing violations of the rules. The Joint Petitioners Coalition emphasizes that if the Commission were to adopt such a procedure, it should limit its use to

[2] Energy Users Forum describes itself as an informal, ad hoc group currently consisting of Hewlett Packard, Mervyn's California, Target Stores and TRW, Inc.

violations, such as failure to file a report on time, the discovery of which is a ministerial process.

We are persuaded that a "traffic ticket" or ministerial citation process may be useful if the Commission faces a need to respond to offenses such as the failure to meet certain filing deadlines. However, we agree with ORA that we would benefit from observing the behavior of parties in compliance with the affiliate transaction rules before identifying appropriate infractions to be subject to such a procedure and the fines that should apply. Thus, we will not adopt a "traffic ticket"-style procedure at this time.

Higher Fines

Public Utilities (PU) Code § 701 empowers this agency to "do all things, whether specifically designated [in the code] or in addition thereto, which are necessary and convenient in the exercise of its powers and jurisdiction." It is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules. As part of its enforcement efforts, the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance. A question raised by this rulemaking proceeding is what boundaries the Commission should establish for fines it may impose when faced with a violation of the affiliate transaction rules.

Section 798 establishes a fine to apply to one particular type of inappropriate affiliate transaction: when a utility attempts to pass on to its ratepayers costs resulting from a "less than reasonable payment" from an affiliate, the Commission may levy a penalty equal to three times the required or prohibited payment. The code provides no specific formula for assessing

penalties in response to other types of affiliate transactions that are in violation of our rules.

Section 2107 states that, "in a case in which a penalty has not otherwise been provided," penalties shall be not less than $500 nor more than $20,000 for each offense. Parties in this proceeding have focused their debate on whether this provision limits the Commission's discretion in assessing fines, or simply states the framework for fines in circumstances where neither the Commission nor the Legislature has established a different penalty scheme.

Those arguing that § 2107 limits the Commission's power to impose penalties rely on cases such as Assembly v. Public Utilities Commission, 12 Cal.4th 103, 48 Cal. Rptr.2d 54 (1995) in which the California Supreme Court stated that § 701 does not "confer upon the Commission powers contrary to other legislative directives, or to express restrictions placed upon the Commission's authority by the Public Utilities Code." However, the specific framework for penalties included in the proposed rules represents neither of these things. The Legislature has directed us in two ways: (1) where improper affiliate transactions are of one specific type, apply the penalties provided in § 798; and (2) where no other penalty scheme has been established, apply the penalties provided in § 2107.

We do not wish to test the limits of our authority by attempting to expand our ability to impose penalties for the matters discussed in this decision. Aside from legal considerations, we are not convinced it is good policy to broaden the range of fines. Our current system provides a range of penalties that allow us broad parameters within which we can use our discretion to impose a proper penalty based on the specifics of the circumstances. We have in fact imposed varying penalties, both in absolute level and per-incident, for various violations. Assuming that we do have legal authority to increase the range of penalties, and that it would be good policy to do so, it still may be better to consider the issue more comprehensively; that is to say, to consider whether the range of penalties

should be increased across the board. These considerations lead us back to the fact that, if we determine that the limits of Section 2107 are too confining, we may choose to ask the Legislature to expand its range.

*W*e will provide more explicit guidance as to how fines will be assessed. We have reviewed the comments offered by various parties and consulted our senior managers to craft a set of principles that reflect the past practices of this and similar regulatory agencies. In establishing the appropriate fine, the principles call for the Commission to take into account the severity of the offense, the conduct of the utility (before, during and after the offense), the financial resources of the utility and the totality of circumstances related to the violation. The resulting fine should also be considered in the context of past Commission decisions. These principles appear as Rule VII.D.2.b. and its subparts.

Temporary Restraining Orders

We asked parties to consider the merits of the Commission delegating to administrative law judges, the Director of the Energy Division, or the Executive Director the authority to issue a temporary restraining order to stop an ongoing violation that is causing irreparable harm. This is a temporary remedy, intended to temporarily prevent further harm while the Commission considers whether to impose more permanent restraint.

Most parties appear to recognize the Commission's general authority to issue orders enjoining utilities from doing specified things. The Commission has issued injunctive relief in past cases and its authority to do so has been recognized by the California Supreme Court (Consumers Lobby Against Monopolies v. Public Utilities Commission, 25 Cal. 3d 891, 907 (1979); Motor Transit Co. V. Railroad Commission, 189 Cal. 573, 582 (1922)).

From time to time, administrative law judges have issued temporary restraining orders in complaint cases (see, e.g., Systems-Analysis & Integration,

Inc. v. Southern California Edison, D.96-12-023). At issue is whether it is lawful for the Commission to delegate the issuance of temporary restraining orders to administrative law judges or others, and whether it is advisable to expressly delegate such authority to aid in the enforcement of the affiliate transaction rules.

San Diego Gas & Electric Company and Southern California Gas Company (SDG&E/SoCalGas) state that temporary restraining orders should be adopted as the preferred remedy in appropriate cases, arguing that the proper use of temporary restraining orders will tend to diminish utility liability and reduce fines. SDG&E/SoCalGas suggest that the determination of the need for a temporary restraining order be delegated to an administrative law judge, since it is necessary to make a preliminary legal and factual determination. Since requests for such relief are most likely in the context of complaint proceedings, which are normally assigned to administrative law judges, SDG&E/SoCalGas suggest that they are the most appropriate personnel to handle the requests. The Joint Petitioners reach similar conclusions.

Southwest Gas argues that, despite the Commission's broad delegation of equitable powers and remedies, it cannot apply them without taking official action in the form of a vote of a majority of the commissioners. Therefore, the company asserts, the authority to issue a temporary restraining order cannot be delegated to any one individual. While we agree that final decisions of the Commission require an affirmative vote of the Commission in the presence of a quorum, this requirement does not preclude the Commission from making a reasonable delegation of authority to other officers of the Commission. For example, the Commission has delegated to its Executive Director the authority to grant extensions of time to comply with Commission orders (Rule 48(b) of the Commission's Rules of Practice and Procedure). This delegation is a practical necessity, since requests for time extensions often must be processed very

quickly. Parties face potential sanctions for noncompliance if they fail to receive an extension on a timely basis. By its very nature, a temporary restraining order is a quick response that is applied when timing is a critical factor. In some instances, it may be necessary to issue a temporary restraining order to preserve the Commission's decision-making options.

Section 2102 directs the Commission to have its attorney seek injunctive relief in superior court when a utility refuses to comply with a Commission order. PG&E cites this section to support its position that the only person to whom the Commission can delegate injunctive powers is its attorney. PG&E's argument confuses two different needs. One is the need to instruct a regulated utility as to the things it can and cannot do. This must on occassion include the ability to instruct a utility to stop doing something it already has begun. These decisions are the Commission's responsibility, in the context of its constitutional and statutory authority. The other is the need to gain enforcement of such a Commission order when a utility refuses to comply with it. These enforcement actions must be brought before the superior court. It is the latter action that must be initiated by the Commission's attorney, pursuant to § 2102.

Edison points out that in several places, the PU Code refers to the Commission's authority to issue "cease and desist" orders. The company then concludes that the Legislature must have meant for the terms "cease and desist" and "temporary restraining order" to have different meanings, otherwise it would not have used these different terms in different parts of the code. The implication is that the Legislature envisions the Commission issuing cease and desist orders, but not issuing temporary restraining orders. However, the Legislature has not explained the difference between these terms, and neither has Edison.

It is important to emphasize that the remedy we are discussing here may not precisely resemble the equitable chain of remedies applied in the civil context, running from temporary restraining orders, through preliminary injunctions to permanent injunctions. And it may not precisely resemble whatever option goes by the name of "cease and desist." Simply, we are stating that the Commission is empowered to direct a utility to stop doing something that is inconsistent with the law or our rules. Without this authority, the Commission would barely be in the business of regulating utilities or otherwise protecting the public interest. We use a term such as "temporary restraining order" because it identifies a point in time: when a likely violation has been uncovered and it is necessary to temporarily prevent further harm. We rely on standards similar to those usually applied to the consideration of a request for a temporary restraining order in civil court because those standards require sober reflection before granting such a request. In undertaking our responsibilities, we will try to avoid stumbling over language and focus on responsibly achieving outcomes.

It remains for the Commission to develop the best and fairest method for identifying time-sensitive, inappropriate activities and ensuring that they are quickly remedied. In most instances, the Commission can respond directly to problems raised in formal complaints. There may be circumstances, however, in which the time that it would take to get a matter on a regular agenda or to bring together an emergency meeting of the Commission is too great to preserve the rights of the parties. In those instances, we look to our assigned administrative law judges to take the steps necessary to preserve those rights by issuing a notice of temporary restraining order. With such a ruling, the administrative law judge will provide notice to the utility that he or she will ask the Commission to issue a temporary restraining order or preliminary injunction at its next meeting. The

utility will thereby be informed that if it continues to pursue the questioned behavior, it does so at its own risk.

As SDG&E/SoCalGas points out, there is a firm body of law establishing the appropriate test for the issuance of a temporary restraining order. This standard should be applied to a request for a temporary restraining order whether the request is considered by an administrative law judge or by the full Commission:

1. The moving party must be reasonably likely to prevail on the merits.
2. Such relief must be necessary to avoid irreparable injury.
3. A temporary restraining order must not substantially harm other parties.
4. Such relief must be consistent with the public interest.

A notice of temporary restraining order issued by an administrative law judge will only stay in effect until the end of the day of the next regularly scheduled Commission meeting at which the Commission can issue a temporary restraining order or a preliminary injunction. The subject utility must have an opportunity to be heard prior to the issuance of a preliminary injunction. If the Commission declines to issue a temporary restraining order or issue a preliminary injunction, the notice of temporary restraining order will be immediately lifted. Whether or not a temporary restraining order or a preliminary injunction is issued, the underlying complaint may still move forward.

In assessing fines, SDG&E/SoCalGas would have the Commission take into consideration whether a party had evidence of recurring violations that it failed to bring to the attention of the utility or the Commission. In effect, a complainant would have the burden of explaining why it failed to seek injunctive relief, where appropriate. We will not adopt this suggestion because it

is the violating party, not the complainant, that bears full responsibility for the consequences of a violation of the rules.

Divestiture as a Remedy

We sought comments from all interested parties on the merits of adopting the following language as proposed by TURN:

> "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."

As an alternative, we sought comments on the potential of prohibiting 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.

Not surprisingly, PG&E, SDG&E/SoCalGas, Edison and Southwest Gas are vigorous in their opposition to the use of divestiture as a means of enforcement. And all argue that the Commission lacks the authority to pursue such a remedy. In opposition, TURN refers only to the broad authority granted to the Commission in § 701, suggesting that if an order to divest an affiliate is "necessary and convenient" to the Commission's primary duties and obligations, the Commission has all the authority it needs.

We would be ill-advised to state that no circumstance exists under which the agency could require a regulated entity to completely and permanently separate itself from an affiliated enterprise. TURN is correct in suggesting that the Commission must be willing to consider strong responses when a party knowingly violates a rule and thereby exposes a consumer or competitor to substantial injury. Where it would otherwise be appropriate, such a remedy

remains available to the Commission whether or not it appears in these rules. In the absence of a specific factual situation, we cannot say under what circumstances we would choose to impose such a severe remedy. For this reason, we will not expressly include this option in our rules.

Advisory Rulings

Edison proposes that the Commission create an advisory ruling process, under which a utility could receive an advance interpretation as to how the rules should be applied to a new program. A utility would send a written request to the chief administrative law judge for assignment to a designated administrative law judge. In Edison's original proposal, the judge would try to issue an advisory ruling within 30 days. The utility would be immune from prosecution for anything it did which was consistent with the ruling. We did not include an advisory ruling process in the proposed rules, but solicited comments on Edison's suggestion.

In its comments, Edison modified its proposal in several ways. It would require that the designated administrative law judge rule within ten days of the filing of a request for ruling. Failure to rule within 10 days would be "deemed approval of the request." A ruling (presumably, a "deemed approval," as well) would be binding in any complaint proceeding subsequently initiated by the Commission or its staff. The ruling would also be given the "highest evidentiary value" in any third-party complaint. Even if the Commission later found the utility's conduct to be inconsistent with the rules, the Commission would be prohibited from imposing a penalty on the utility, so long as it complied with the earlier ruling. Edison also proposes that the utility requesting the ruling pay a fee to cover the Commission's related costs.

Not surprisingly, each utility supports the creation of an advisory ruling process. So do the Edison Electric Institute and Questar. SoCalGas/SDG&E

would have a utility serve notice of a request for an advisory opinion on those on the service list in R.97-04-011/I.97-04-012 and would allow 20 days for comments. The administrative law judge's ruling would be treated as a proposed decision and submitted to the Commission for adoption. PG&E proposes that notice of the request appear in the Commission calendar, with other parties given an opportunity to get copies of the request and to make comments. PG&E further proposes that there be no hearings or discovery.

Those supporting the use of advisory opinions point to the added certainty that would benefit the utilities as they undertake new arrangements and enterprises, and argue that such a procedure is particularly appropriate because there are "gray areas" in the affiliate transaction rules, subject to various interpretations. Some argue that the use of advisory rulings would reduce the amount of litigation related to the affiliate rules.

The Joint Petitioner Coalition offers the most fervent opposition to the use of advisory rulings. First, the Coalition points out that in the absence of an actual case or controversy, the Commission would be dealing only with hypothetical issues which have been described and characterized only by the utility and not by any party that might be affected by the utility's conduct. Second, the Coalition argues that granting a utility immunity before it takes an action that other parties find objectionable would render the complaint process largely meaningless. Finally, the Coalition argues that this new procedure would impose a substantial burden on the Commission's resources.

There are good reasons to allow some type of advisory ruling process. We have allowed utilities to enter into affiliate lines of businesses within our rules. Our rules, while detailed, are not and cannot be so comprehensive that they encompass every possible situation. A utility wishing to enter into a new line of business, or to undertake a new affiliate activity, faces certain risks in the

regulatory arena should the activity later be found to fall outside the scope of our rules. Our intention is not to put up barriers to partaking in permitted affiliate activities. An advisory ruling process would take away some of this regulatory risk for activities that would in fact be permitted, while at the same time providing clear guidance to the utility that other activities fall outside the scope of what is permitted.

However, we decline to adopt any of the various utility proposals. Each has significant drawbacks. Edison's proposal does not provide notice to or an opportunity to comment by parties, and defaults to a "yes" answer after a very short amount of time. PG&E provides for comments and notice, but (as with Edison's proposal) would grant immunity to the utility without any Commission decision. SoCal/SDG&E's proposal cures these defects; essentially it is the application process that is currently available and will continue to be available.

We will not adopt any specific new approach today, but will endorse the idea of advisory rulings by the Commission (with appropriate due process) as a concept. We would like to seek further comments on an alternative approach using a variation on the existing Advice Letter Process. This alternative process would appear to have the benefits of the SoCal/SDG&E approach, but could streamline that process to allow greater flexibility and responsiveness.

Specifically, we will take further comments on using an Advice Letter approach with the following characteristics:

1. A utility would file an Advice Letter with the Commission's Energy Division following the Tier 4 guidelines in the proposed General Order (G.O.) 96(a) revisions for the purposes of only seeking clarifications of the affiliate transaction rules. Protests and comments would be allowed per provision of G.O. 96(a).
2. A Resolution would be required before the Advice Letter would be in effect. The Advice Letter would not be deemed approved without Commission approval of the Resolution.

3. Energy Division can reject the Advice Letter upfront if it is too vague and/or if it is incomplete.
4. Energy Division can require that a Petition for Modification be filed instead if the Advice Letter calls for exemptions to rules, rather than clarifications of the affiliate transaction rules.
5. All Advice Letters of this type must be served on the service list in R.97-04-011/I.97-04-012 (or their successors).
6. The Commission can change its opinion at any time, through any type of decision, including a Temporary Restraining Order or a Preliminary Injunction.
7. The Resolution would only apply to the utility's specific request and circumstances as proposed in the Advice Letter, and only to the utility filing the Advice Letter.
8. The Commission's decision would not be binding on third parties and would not prevent complaints from being filed on the utility's behavior.
9. The utility would be protected from penalties from the time the Advice Letter is approved through a resolution, but not from prospective remedies.
10. The Advice Letter process would be in effect for one year as an experiment.

Comments will be due 40 days after the effective date of this decision, with reply comments due 20 days later.

Amnesty

Edison also proposes that the rules be amended to provide for 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. PG&E would expand the amnesty period to two years. PG&E argues, "The utilities will require some time under these detailed rules to calibrate permitted and prohibited conduct. The constant and hairtrigger resort to adjudicatory proceedings by the [Joint Coalition] and TURN is a drain on resources that could better be put to use resolving problems and competing in

the marketplace." SDG&E/SoCalGas state that an amnesty period is only necessary if the Commission were to adopt unreasonable enforcement rules, something which, of course, we will not do.

Several parties oppose providing an amnesty period. Dynegy argues that, if anything, higher penalties should apply during the early years. ORA asserts that to provide an amnesty period would make a mockery of the affiliate transaction rules. The Joint Coalition pleads that the rules must be effective throughout the development of competitive markets.

We have the benefit of responding to this request after the rules have been in effect for more than nine months. Because of the passage of time, the notion of a one-year amnesty period is moot and a longer period appears unnecessary. During the time that the new rules have been in effect, the Commission has not experienced a rush of formal complaints. Moreover, we are concerned that during the transition to a competitive market, many critical affiliate transactions may occur. It would be particularly inappropriate to relax enforcement of the rules during this period. Therefore, we will not adopt an amnesty proposal.

Changes to Specific Sections of Proposed Rule VIII

A. Strict Enforcement of the Rules

Several parties have suggested adding language to this clause to specify that the Commission's determinations must be consistent with statutes and rules, or to define the word "transaction." References to the need to act consistently with the law are implied and need not be added. Efforts to define "transaction" are susceptible to problems if we were to inadvertently fail to mention a type of transaction. However, the language in this clause can be made clearer by avoiding ambiguous words such as "transaction" and "occurrence." PG&E

Energy Services has offered a revision, which we will adopt with one change as follows:

> "The Commission shall strictly enforce these rules. Each act or failure to act by a utility in violation of these rules may be considered a separate violation."

B. Standing

This clause, in proposed form, has three provisions: one allows any person or corporation to initiate a complaint; the second allows for complaints to be filed by "whistleblowers" who maintain anonymity; the third would allow the Consumer Services Division to utilize a new pleading, by filing a Request for Investigation.

Some parties would like to tighten the first provision, to allow only persons or corporations directly aggrieved by a rules violation to initiate a complaint. This would be inconsistent with Rule 9 of the Rules of Practice and Procedure, which allows "any corporation or person" to file a complaint. We have benefited in our enforcement efforts from the ability to entertain complaints from any person or entity that has discovered potential wrongdoing, regardless of the direct interests involved. We want to allow for input from any person or corporation to aid in the enforcement of these rules as well.

The "whistleblower" provision is an important tool in an environment where even one with a direct complaint about a utility's conduct may need to preserve a cooperative ongoing relationship with the company. However, some parties raise valid concerns about the difficulty of defending themselves in complaint proceedings in which they are unable to face their accusers. This would occur where a "whistleblower" elects to preserve his or her anonymity. We will revise this provision to state that where a "whistleblower" makes such a choice, the matter will only be further pursued if the Commission chooses to

initiate its own investigation into the matter. The new language will read as follows:

> "'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. When a whistleblower requests anonymity, the Commission will continue to pursue the complaint only where it has elected to convert it into a Commission-initiated investigation. Regardless of the complainant's status, the defendant shall file a timely answer to the complaint."

Because we have not addressed in this proceeding the exact procedures for a whistleblower complaint, such a potential complainant may wish to consult with the Public Advisor, who will maintain the confidentiality of the complainant's identity.

The third provision would enable the Consumer Services Division to file a Request for Investigation in reaction to audit results or other information that suggests that a violation may have occurred. Our intent here was to add this tool to the Division's current powers in order to require the utility to follow the same procedures that would apply to resolving complaints. We will remove this provision, as well as provision C.6., because these provisions are largely unnecessary. The Consumer Services Division can advise the Commission on the need to initiate investigations whenever it determines that there is a probable violation of the rules. In addition, we always expect the utilities to work cooperatively with the Division to explore any concerns that may arise. We remove these provisions in order to avoid confusion about the Division's ability to continue using its traditional approaches to uncovering, and responding to, potential violations of statutes, rules and orders.

C. Procedures

C.1 Filing Complaints

In its entirety, this provision states that "[a]ll complaints shall be filed as formal complaints with the Commission." As formal complaints, all of the normal rules of service and notice would apply. PG&E Energy Services proposes adding a clause that requires same-day service on the utility and any affiliate involved in the alleged violation. We will require the complainant to provide a copy of the complaint to the designated officer (discussed below) who should be in the best position to provide quick notice to relevant affiliate personnel. This provision is revised to state:

> "All complaints shall be filed as formal complaints with the Commission and shall provide a copy to the utility's designated officer (as described below) on the same day that the complaint is filed."

C.2. Dispute Resolution Process

This section describes the obligations and options available to parties involved in a dispute concerning compliance with the affiliate transactions rules. Many parties have suggested changes to this section.

Designated Officer

In the proposed rule, each utility would be required to designate an officer who is responsible for compliance with the rules and for receiving, investigating and attempting to resolve complaints. ORA seeks clarification of the Commission's intention that the same officer who is responsible for compliance with the affiliate rules generally would also be responsible for compliance with the complaint procedures and remedies. That is our intent. In order to clarify that intent, we will slightly modify the language. Edison, as well as SDG&E/SoCalGas, suggests giving this officer the title of Affiliate Compliance

Manager and allowing this officer to delegate responsibilities to one or more other officers and employees. These are reasonable suggestions, so long as the Affiliate Compliance Manager is an officer of the corporation and is ultimately accountable for compliance with these rules. We have modified the language in this section to read as follows:

> "Each utility shall designate an Affiliate Compliance Manager who is responsible for compliance with these affiliate rules and the utility's compliance plan adopted pursuant to these rules. Such officer shall also be responsible for receiving, investigating and attempting to resolve complaints. The Affiliate Compliance Manger may, however, delegate responsibilities to other officers and employees."

C.2.a. Informal Resolution Period

This section gives the defendant utility three weeks from the date the complaint is filed to investigate and attempt to resolve the complaint. The resolution effort must include a meet-and-confer session with the complainant and, potentially, a Commission staff representative. PG&E would increase this initial period from three to six weeks. This would be inconsistent with our desire to allow the complaint process to move expeditiously, since it would lead to delaying the time for filing an answer to a complaint. The answer must normally be filed within 30 days. PG&E Energy Services proposes changing the language from "three weeks" to "15 business days." SoCalGas/SDG&E, however, recommend deleting the reference to three weeks, altogether. We will make this change to ensure that the parties can take full advantage of this expedited period for pursuing an informal resolution.

QST Energy and the University of California/California State University each ask for the addition of a provision allowing for the pursuit of a temporary restraining order, where appropriate, during the initial informal

resolution period. Such a provision is consistent with our intention to allow for the use of temporary restraining orders. We will modify language proposed by the University of California/California State University to indicate that an assigned commissioner or administrative law judge may also issue a notice of temporary restraining order, where appropriate.

Section C.2.a. is modified to read as follows:

> "The utility shall 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, participate in such meet-and-confer sessions and shall participate in the case of a whistleblower complaint.
>
> "A party filing a complaint may seek a temporary restraining order at the time the formal complaint is filed. The defendant utility and other interested parties may file responses to a request for a temporary restraining order within ten days of the filing of the request. An assigned commissioner or administrative law judge may shorten the period for responses, where appropriate. An assigned commissioner or administrative law judge, or the Commission shall act on the request for a temporary restraining order within 30 days. The request may be granted when: (1) the moving party is reasonably likely to prevail on the merits, and (2) temporary restraining order relief is necessary to avoid irreparable injury, will not substantially harm other parties, and is consistent with the public interest.
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> "A notice of temporary restraining order issued by an assigned commissioner or administrative law judge will only stay in effect until the end of the day of the next regularly-scheduled commission meeting at which the commission can issue a temporary restraining order or a

> preliminary injunction. If the commission declines to issue a temporary restraining order or a preliminary injunction, the notice of temporary restraining order will be immediately lifted. Whether or not a temporary restraining order or a preliminary injunction is issued, the underlying complaint may still move forward."

C.2.b. Complaint-Specific Reporting Requirements

Here, the utility is required to prepare a report on each complaint within four weeks of the filing of the complaint, providing relevant information about the complaint, any resolution achieved, and any steps taken to prevent further violations from occurring. PG&E asks to extend the time for filing the report to six weeks. For now, we prefer to retain the four-week requirement, so that this report will coincide with the filing of an answer to the complaint. We will revisit this deadline at a later time if it proves to create problems. Edison would change the language to state that the utility must only make a "reasonable effort" to supply the report within 30 days. This would make the deadline meaningless. We prefer to entertain formal requests for extensions of time in the event that unexpected circumstances make it impractical to provide the report within four weeks.

PacifiCorp proposes replacing the words "to prevent further violation" with the word "remedial," so that the report would include discussion of any remedial actions taken in response to the complaint. PacifiCorp does not explain what it sees as being the significance of this change. It is not clear that the proposed change would add precision to the rule, and we will not adopt it.

QST Energy proposes that the defendant utility be required to post each report on its web pages and that the Commission plan to post the report on its web pages, as well. We agree that it would be useful to preserve all

such reports and make them available on the Commission's web pages. However, we will ask the staff to pursue this approach in the context of its broader efforts to expand our on-line offerings. For the time being, we will simply modify the rule to require that the utility make electronic copies of its reports available to the Commission and to all parties that provide e-mail addresses. This section is modified to read as follows:

> "The utility shall prepare and preserve a report on each 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 and all parties within four weeks of the date the complaint was filed. In addition, to providing hard copies, the utility shall also provide electronic copies to the Commission and to any party providing an e-mail address."

C.2.c. Annual Report

This requirement was inadvertently omitted from the draft decision mailed for comment. We restore it here.

C.2.d. Commission Investigations

As proposed, this provision states that the Commission may always convert a complaint to an investigation and impose appropriate penalties if it finds that a utility violated a rule. Sierra "strongly objects" to this provision, arguing that after having satisfactorily resolved a complaint, there is no reason for the Commission to investigate further. Sierra seeks "some sort of objective limitation" on the Commission's discretion to investigate further. Dynegy "strongly supports" the proposal, arguing that the Commission must be able to

impose remedies that are not compromised by a settlement between the complainant and the utility.

The Commission always has the discretion to open an investigation into any matter related to its jurisdiction. Thus, we are not changing the status quo by including this option in the enforcement rules. Instead, we are notifying all of those affected by the rules that we will pursue this approach where appropriate. We will not place restrictions on our ability to exercise reasonable discretion. In addition, it would be misleading if we were to announce some limitation on the Commission's ability to initiate investigations, as Sierra proposes, because we cannot bind future Commissions.

PG&E Energy Services has proposed two changes to this section. The first would strike the reference to the Commission seeking a finding that the utility violated a rule, and instead state that the Commission would determine whether the utility violated the rules. We will adopt this change, since it more accurately reflects the Commission's neutral role in considering whether or not violations have occurred. However, PG&E Energy Services also proposes that the Commission impose on itself a limit of 30 days after the utility issues a complaint report in which to open an investigation. We will not adopt this change, since there is no apparent reason that the Commission should be unable to initiate an investigation at any time it appears necessary.

This section is modified to read as follows:

> "The Commission may, notwithstanding any resolution reached by the utility and the complainant, convert a complaint to an investigation and determine whether the utility violated these rules, and impose any appropriate penalties under Section VIII.D. or any other remedies provided by the Commission's rules or the Public Utilities Code."

C.3. Informing the Commission Staff of the Results of Dispute Resolution Efforts

There are no objections to the report requirements addressed in this subsection of the rule. PG&E offers one grammatical improvement, which we will adopt. The revised rule reads as follows:

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

C.4 Steps Taken When Informal Resolution Fails

The Joint Petitioners ask that the 180-period for resolving formal complaints set forth in this subsection be reduced to 120 days, because the timely resolution of complaints is an important element of an effective enforcement scheme. We agree that timely decisions are critical to this process. However, in an era in which even ex parte orders must be released for comment 30 days prior to a vote by the Commission, a 120-day decision deadline is not practical in most situations.

A utility answer is not required until 30 days after the complaint is served on the utility by the Process office. Because of the need to release a proposed decision for comment, the Commission would have at most 60 days in which to schedule and hold any necessary prehearing conference and hearings, receive and consider briefs, and release a proposed decision. Even where no other work demands intervene, this would be a very ambitious schedule.

In light of procedural constraints resulting from SB 960 and the recent SB 779, it is not practical to commit to a 180-day schedule either. Instead, we will retain a goal of deciding such cases within 180 days whenever possible. We will

make three other small changes to make the language more precise. The revised subsection reads as follows:

> "If the utility and the complainant cannot reach a resolution of the complaint, the utility 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 of 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 strive to resolve the complaint within 180 days of the date the instructions to answer are served on the utility."

C.5. Web-Based Log of Complaints

This subsection would require the Commission staff to maintain, on its web page, a public log of all new, pending and resolved complaints. This appears to be a reasonable way to ensure that information about affiliate transaction complaints will be available in one central location. The log would include information about the allegations contained in the complaint, a description of any similar complaint at the Commission, and information about the resolution of any similar complaints. Sierra objects to including any reference to similar complaints or any information about the resolution of the complaint. Sierra argues that such information can prejudice the parties. Since all of this information is otherwise available, it is not clear how its posting on the Commission's web site would be prejudicial. We will direct the staff to provide this information on the web site as part of our continuing efforts to improve access to relevant information.

PG&E Energy Services would add dismissed cases to this list. Since dismissal is one way to resolve a case, we see no need to specifically add it to the

list. PG&E suggests that the information in the log include the date the complaint was resolved, as well as how it was resolved. This a useful addition, and we will make this change to the rule.

The revised subsection reads as follows:

> "The Commission shall maintain on its web page a public log of all new, pending and resolved complaints. The Commission shall update the log at least once every week. The log shall specify, at a minimum, the date the complaint was received, the specific allegations contained in the complaint, the date the complaint was resolved and the manner in which it was resolved, and a description of any similar complaints, including the resolution of such similar complaints."

C.6 Consumer Services Division Procedures

As discussed above, in the section of this decision that addresses Standing, we are removing this proposed subsection.

Other Proposed Procedures

Further Delegation to the Executive Director

As mentioned above in our discussion of temporary restraining orders, the Commission has delegated to its Executive Director the authority to grant extensions of time to comply with Commission orders (Rule 48(b) of the Commission's Rules of Practice and Procedure). Pursuant to Rule 48(a), requests for extensions of time related to the Commission's rules are to be directed to the administrative law judge. PG&E proposes enlarging the delegation to the Executive Director to include the authority to grant extensions of any time limits set forth in these enforcement rules. That would include the time to file answers to complaints and to file other reports.

In order to avoid confusion and unnecessary inconsistency, we will not enlarge the delegation to the Executive Director for extensions of time related to

these rules. Otherwise, participants will have to learn different rules for seeking extensions of time in different cases. For instance, for most complaints, a motion to accept the late filing of an answer to a complaint would be directed to the administrative law judge assigned to the case. In complaints related to affiliate rules, the request would be directed to the Executive Director. There is no apparent benefit to having such inconsistent rules.

An Option to Avoid Seeking Informal Dispute Resolution

The University of California/California State Universities (Universities) agree with the requirement, contained in the proposed rules, that the utilities cooperate with informal efforts to resolve disputes. However, the Universities ask for complainants to have the option of forgoing informal efforts when a violation is particularly egregious and it may be inappropriate to wait a month before litigating a formal complaint. The change proposed by the Universities does not appear to be necessary to resolving their concerns. Where time is of the essence, our rules allow complainants to pursue a temporary restraining order without waiting for the informal dispute resolution period to expire. In any event, this requirement does not add time to the processing of a complaint, since the negotiations must occur during the time while an answer to the complaint is pending and the report on the efforts to resolve the dispute is due no later than the day that the answer is filed. For these reasons, we decline to adopt the Universities' proposal.

Preliminary Discussions Prior to Filing a Complaint

ORA proposes adding a section to the rules facilitating informal contacts between utilities and potential complainants prior to the filing of a formal complaint. It is consistent with the entire thrust of these enforcement rules to encourage such contacts. We will adopt the portions of ORA's proposed

language that ensure that utility representatives will be responsive to informal inquiries, while emphasizing that a potential complainant is not required to exercise this option before filing a formal complaint. The new subsection C.6 will read as follows

"C.6. Preliminary Discussions

> "a. Prior to filing a formal complaint, a potential complainant may contact the responsible utility officer and/or the Energy Division to inform them of the possible violation of the affiliate rules. If the potential complainant seeks an informal meeting with the utility to discuss the complaint, the utility shall make reasonable efforts to arrange such a meeting. Upon mutual agreement, Energy Division staff and interested parties may attend any such meeting.
>
> "b. If a potential complainant makes an informal contact with a utility regarding an alleged violation of the affiliate transaction rules, the utility officer in charge of affiliate compliance shall respond in writing to the potential complainant within 15 business days. The response would state whether or not the issues raised by the potential complainant require further investigation. (The potential complainant does not have to rely on the responses in deciding whether to file a formal complaint.)"

D. Penalties

Several parties have suggested renaming this section "Remedies," mostly likely to reflect the fact that the section encompasses more than just monetary penalties.We will make this change in an effort to encompass the range of steps the Commission may take in response to a violation, including penalties.

D.1. Overview of Enforcement Options

This section outlines seven steps the Commission may take in response to a violation. Sierra would eliminate all seven steps and have the rules simply state that the Commission may impose any or all penalties allowed by statute. This statement would be true, of course, whether or not it was stated in the rules. We do not see an advantage to including such a statement. Similarly, others have proposed that the rules cite the code sections pursuant to which the Commission may impose fines. There is no apparent illumination that would result from repeating or citing statutes in these rules. We do, however, see a purpose to identifying the types of steps we may consider when faced with a violation, so that all parties will understand the potential consequences of violating the rules. We will look at each of the steps individually and consider any proposed changes.

D.1.a. Terminate any transaction that is the subject of the complaint

PG&E proposes striking this provision, arguing it raises abrogation of contract issues and is not authorized by statute. Edison would simply rewrite the provision to read: "The Commission may order the Utility to cease and desist from engaging in practices that the Complainant has proven violate the Rule(s)." PG&E Energy Services PacifiCorp and SoCalGas/SDG&E would leave the language unchanged. No other party has recommended changes to this subsection.

It appears unnecessary to use contract-related words such as "termination" in stating that the Commission may order a utility to stop doing something that violates the rules. Edison suggests language that would avoid such words, but it proposed changes that go further, including a reference to a complainant's burden of proof. There is nothing that we are doing in these rules

that changes the traditional burden of proof that applies in complaint cases. What we are trying to do here is simply recite the enforcement options available to the Commission. We also will refrain from using the phrase "cease and desist" because it is not clear whether it has particular meaning in this context. Instead, we will revise this subsection to read as follows:

> "Order a utility to stop doing something that violates these rules;"

D.1.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

The prior subsection addresses the need to stop the activity causing a current violation. This subsection addresses the need, in some circumstances, to respond to a violation by placing restrictions on future interactions. Edison proposes revising the language to state "[t]he Commission may prospectively limit or restrict the amount, percentage, or value of a transaction between the utility and its affiliate(s) which violates a Rule, so as to prevent the utility from benefiting from such a violation." PacifiCorp proposes revising the language to focus the restrictions only on a particular affiliate involved in the transaction. PG&E Energy Services would limit the restrictions to a period of one year. PG&E and Sierra would eliminate this subsection in its entirety, while SDG&E/SoCalGas would leave it unchanged.

The changes proposed by Edison, PacifiCorp and PG&E Energy Services would place limits on the use of this enforcement option that may be appropriate in specific cases. The Commission must apply these rules in a manner that is reasonable in light of the facts underlying a specific complaint. However, we would make the rule unnecessarily rigid if we were to add restrictions on the time or manner of its application. We will, however, tighten

the language by removing the reference to the use of this approach as a remedy for a violation. All of the options in this category are provided as potential remedies in response to violations of the rules. This subsection now reads as follows:

> "Prospectively limit or restrict the amount, percentage, or value of transactions entered into between the utility and its affiliate(s);"

D.1.c. Assess such damages and penalties as described in Paragraphs 2 and 3 below

The purpose of this subsection is to include, in the list of potential remedies, the imposition of fines and penalties. We will modify this section to remove the extraneous reference to "damages" and to remove the reference to other paragraphs. It is unnecessary to refer to Paragraph 2 in the context of the rules. As discussed below, we are deleting Paragraph 3 in its current form. In its revised form, this subsection reads as follows:

> "Assess fines or other penalties;"

D.1.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

We will eliminate this subsection, because this option is already reflected in subsection D.1.a.

D.1.e. Apply any other remedy available to the Commission.

This subsection serves as a reminder that the we do not intend, with these rules, to constrain the Commission's ability to use any remedy that may be within its powers. We will retain this section, but place it at after the current subsection D.1.f. It will still be labeled as subsection (e).

D.1.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.

PG&E , Edison, and PacifiCorp would delete this provision. PG&E Energy Services would restrict its application to "affected" affiliates. SDG&E/SoCalGas would leave it unchanged. However, other than offering proposed language in which this section would be deleted or changed in its proposed revisions to the rules, no party has offered arguments as to why this provision should not be included. We see this option as one that should be employed only with great caution and only where less onerous options do not appear adequate in response to a violation or series of violations. While we do not anticipate turning to this solution, it should be available if ever it is needed. Thus, we will retain this subsection in the rules, although we will refer to it as subsection (d), since we are eliminating the subsection that previously bore that letter.

D.2. Principles to Apply to the Imposition of Fines

In its current form, this subsection describes some factors that would influence the Commission's determination of the appropriate fine to impose in the event of a violation. In addition, it states that the Commission shall impose penalties up to $10,000,000 if the penalty is determined on an incident-by-incident basis. The inclusion of this subsection in the proposed rules prompted extensive comment on the appropriate range for fines and on standards that should apply to the determination of an appropriate fine. As discussed above, we believe that we should establish a specific range of fines for use in the enforcement of the affiliate transaction rules. We will set forth that range in this revised subsection. In addition, we have considered the comments offered by parties on appropriate standards in light of the Commission's past practices in

imposing fines, and in the context of standards employed by other agencies. As a result, we have developed principles that would apply to fines in response to violations of the affiliate transaction rules. We will adopt the principles in these rules in lieu of subsection D.2. Moreover, because these principles distill the essence of numerous Commission decisions concerning penalties in a wide range of cases, we expect that we will look to these principles as precedent in determining the level of penalty in the full range of Commission enforcement

proceedings, and not just in affiliate transaction matters. The new subsection will read as follows:

> "Any public utility which violates a provision of these rules is subject to a fine of not less than five hundred dollars ($500), nor more than $20,000 for each offense. The remainder of this subsection distills the principles that the Commission has historically relied upon in assessing fines and restates them in a manner that will form the analytical foundation for future decisions in which fines are assessed. Before discussing those principles, reparations are distinguished.
>
> D.2.a. Reparations
>
> Reparations are not fines and conceptually should not be included in setting the amount of a fine. Reparations are refunds of excessive or discriminatory amounts collected by a public utility. Public Utilities Code § 734. The purpose is to return funds to the victim which were unlawfully collected by the public utility. Accordingly, the statute requires that all reparation amounts are paid to the victims. Unclaimed reparations generally escheat to the state, Code of Civil Procedure § 1519.5, unless equitable or other authority directs otherwise, e.g., Public Utilities Code § 394.9.
>
> D.2.b. Fines
>
> The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims.
>
> Effective deterrence creates an incentive for public utilities to avoid violations. Deterrence is particularly important against violations which could result in public harm, and particularly against those where severe consequences could result. To capture these ideas, the two general factors used by the Commission in setting fines are: (1) severity of the offense and (2) conduct of the utility. These help guide the

Commission in setting fines which are proportionate to the violation.

D.2.b.i. Severity of the Offense

The severity of the offense includes several considerations. Economic harm reflects the amount of expense which was imposed upon the victims as well as any unlawful benefits gained by the public utility. Generally, the greater of these two amounts will be used in establishing the fine. In comparison, violations which caused actual physical harm to people or property are generally considered the most severe, with violations that threatened such harm closely following.

The fact that the economic harm may be difficult to quantify does not itself diminish the severity or the need for sanctions. For example, the Commission has recognized that deprivation of choice of service providers, while not necessarily imposing quantifiable economic harm, diminishes the competitive marketplace such that some form of sanction is warranted.

Many potential penalty cases before the Commission do not involve any harm to consumers but are instead violations of reporting or compliance requirements. In these cases, the harm may not be to consumers but rather to the integrity of the regulatory processes. For example, compliance with Commission directives is required of all California public utilities:

"Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees." Public Utilities Code § 702.

Such compliance is absolutely necessary to the proper functioning of the regulatory process. For this reason, disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.

The number of the violations is a factor in determining the severity. A series of temporally distinct violations can suggest an on-going compliance deficiency which the public utility should have addressed after the first instance. Similarly, a widespread violation which affects a large number of consumers is a more severe offense than one which is limited in scope. For a "continuing offense," Public Utilities Code § 2108 counts each day as a separate offense.

D.2.b.ii. Conduct of the Utility

This factor recognizes the important role of the public utility's conduct in (1) preventing the violation, (2) detecting the violation, and (3) disclosing and rectifying the violation. The public utility is responsible for the acts of all its officers, agents, and employees:

"In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his [or her] official duties or employment, shall in every case be the act, omission, or failure of such public utility." Public Utilities Code § 2109.

(1) The Utility's Actions to Prevent a Violation

Prudent practice requires that all public utilities take reasonable steps to ensure compliance with Commission directives. This includes becoming familiar with applicable laws and regulations, and most critically, the utility regularly reviewing its own operations to ensure full compliance. In evaluating the utility's advance efforts to ensure compliance, the Commission will consider the utility's past record of compliance with Commission directives.

(2) The Utility's Actions to Detect a Violation

The Commission expects public utilities to monitor diligently their activities. Where utilities have for

whatever reason failed to meet this standard, the Commission will continue to hold the utility responsible for its actions. Deliberate, as opposed to inadvertent wrong-doing, will be considered an aggravating factor. The Commission will also look at management's conduct during the period in which the violation occurred to ascertain particularly the level and extent of involvement in or tolerance of the offense by management personnel. The Commission will closely scrutinize any attempts by management to attribute wrong-doing to rogue employees. Managers will be considered, absent clear evidence to the contrary, to have condoned day-to-day actions by employees and agents under their supervision.

(3) The Utility's Actions to Disclose and Rectify a Violation

When a public utility is aware that a violation has occurred, the Commission expects the public utility to promptly bring it to the attention of the Commission. The precise timetable that constitutes "prompt" will vary based on the nature of the violation. Violations which physically endanger the public must be immediately corrected and thereafter reported to the Commission staff. Reporting violations should be remedied at the earliest administratively feasible time.

Prompt reporting of violations furthers the public interest by allowing for expeditious correction. For this reason, steps taken by a public utility to promptly and cooperatively report and correct violations may be considered in assessing any penalty.

D.2.b.iii. Financial Resources of the Utility

Effective deterrence also requires that the Commission recognize the financial resources of the public utility in setting a fine which balances the need for deterrence with the constitutional limitations on excessive fines. Some California utilities are among the largest corporations in the United

States and others are extremely modest, one-person operations. What is accounting rounding error to one company is annual revenue to another. The Commission intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility's financial resources.

D.2.b.iv. Totality of the Circumstances in Furtherance of the Public Interest

Setting a fine at a level which effectively deters further unlawful conduct by the subject utility and others requires that the Commission specifically tailor the package of sanctions, including any fine, to the unique facts of the case. The Commission will review facts which tend to mitigate the degree of wrongdoing as well as any facts which exacerbate the wrongdoing. In all cases, the harm will be evaluated from the perspective of the public interest.

D.2.b.v. The Role of Precedent

The Commission adjudicates a wide range of cases which involve sanctions, many of which are cases of first impression. As such, the outcomes of cases are not usually directly comparable. In future decisions which impose sanctions,the parties and, in turn the Commission will be expected to explicitly address those previously issued decisions which involve the most reasonably comparable factual circumstances and explain any substantial differences in outcome.

D.3. Fines are paid to the General Fund

This statutory requirement is now discussed in rule D.2. Thus, we will delete this subsection.

D.4. and D.5 Multiple Violations

These provisions would establish a point system under which each offense would count as a point. After a utility accumulated three points, the

Commission would impose an immediate one-year prohibition on transactions between the utility and any affiliate or affiliates involved in the violations. In their comments, many have referred to these provisions as the "three strikes" rules.

Those who support these rules see them as a vital part of a program to ensure due diligence on the part of the utilities to comply with the rules. Those who oppose them characterize the rules as too rigid, excessive, punitive, and unfair.

The opponents point out that the rules, as drafted, do not distinguish between inadvertent or minor violations and more severe violations. The implication is that a one-year prohibition of this sort would be an excessive reaction to minor offenses. The rules do not take into account whether all three violations occurred as a result of a single act, such as an ongoing violation, or whether they occurred as a result of three separate acts. It would be unfairly punitive to apply such a severe sanction in response to most single acts. The rules are also criticized because they would appear to apply even if the three violations occurred many years apart, in which case it could be argued that they do not represent a pattern of consistent malfeasance. Another concern is that, as written, the sanctions could be applied to a utility that did not have notice that it had two points against it, and that it was in jeopardy of facing a one-year prohibition. This could occur because of the sequence in which violations are discovered, or cases are litigated. Without such notice, it is argued, the three-point rule would have little deterrent effect.

We are convinced that it is important to maintain an option to impose such sanctions in response to repeated violations. However, we agree with each of the criticisms discussed above. We wish to reserve such a stern response for

situations where the repeated violations are of a serious nature and reflect a disregard for the importance of following the rules. In the rule's current

simplified version, there are many ways that it could be applied to circumstances that do not fit this description.

In addition, a written provision of this type may serve to unnecessarily restrict the Commission's options in the face of particularly severe violations. For both of these reasons, we will delete any specific reference to this remedy from the rules.

D.6. Other Penalties or Fines

This subsection is duplicative of D.1.e. and will therefore be deleted.

Conclusions

With these changes, we are prepared to adopt the enforcement section of the affiliate transaction rules. Attached as Appendix A to this decision are the adopted rules. Appendix B provides a comparison of the adopted rules to the proposed rules.

Findings of Fact

1. The rules attached to this decision as Appendix A are reasonable.
2. It is reasonable for the Commission to provide some type of process to clarify gray areas in our affiliate transaction rules.

Conclusions of Law

1. The rules attached to this decision as Appendix A should be adopted and added to the affiliate transactions rules originally adopted in D.97-12-088.
2. Parties should be allowed an opportunity to comment on the specific process to be used to clarify gray areas in our affiliate transaction rules.

FINAL ORDER

IT IS HEREBY ORDERED that:

1. The rules attached to this decision as Appendix A are hereby adopted.

2. Parties may comment on the proposed process referenced herein to provide for a way to clarify gray areas in our affiliate transaction rules.

This order is effective today.

Dated December 17, 1998, at San Francisco, California.

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

I will file a partial dissent.

/s/ JESSIE J. KNIGHT, JR.
Commissioner

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ADOPTED RULES

(PLEASE SEE FORMAL FILES FOR APPENDICES A AND B)

or

they can be accessed by

PC DOCS No. **34951** for Appendix A

and

PCDOCS No. **35165** for Appendix B