Decision **ALTERNATE PAGES OF COMMISSIONERS KNIGHT AND BILAS**
(Mailed 10/31/97)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

1. On page two of the draft decision, after the heading "**Summary,**" the following sentence should be added before the first sentence in the draft:

> "This order adopts a provisional prohibition on transactions between an electric utility and any affiliate offering direct access service within a utility's service territory. This provisional prohibition should be for two years, and we will reevaluate it at that time. In the case where this limited prohibition does not apply, our adopted rules should apply."

2. Section II C of the draft decision should be deleted and the following Section II C should be added:

"C. TURN's and ORA's Motions

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

On June 2, ORA also filed a motion for adoption of its proposed rules. ORA proposes that the Commission adopt one rule: Effective immediately, for the next three years during the implementation of the Commission's direct access plan outlined in D.97-05-040, customers of the natural gas local distribution companies and electric utility distribution companies shall not receive products or services from unregulated

affiliates of the gas and electric utilities from which they receive distribution services.[1] ORA believes that market power concerns are much too great at this time to allow the marketing affiliate of the local utility access to the customer to offer energy or energy-related services. ORA believes its proposed rule would foster competition by encouraging new entrants, and would also be fair to the utilities, since their affiliates could do business in other service territories within or outside the state. ORA also believes that its proposal is more enforceable than specific detailed rules. ORA supports the Joint Petitioners Coalition's proposal as the best alternative to its proposed rules. ORA also supports TURN's proposal, which is similar to ORA's.

The Joint Utility Respondents oppose both TURN's and ORA's motion. They argue that the Commission considered and rejected these recommendations in D.97-05-040, slip op. at pp. 66 and 89-90, Conclusions of Law 62 and 64, and furthermore, that the Commission does not have the requisite jurisdiction to adopt such a ban. The utilities also believe they would be disadvantaged by either of these two proposals, which would adversely affect customer choice. PG&E ES also opposes TURN's and ORA's motions for largely the same reasons as those of Respondents.

We grant in part and deny in part TURN's and ORA's motion, and adopt a provisional prohibition on transactions between an electric utility and an affiliate offering direct access services within the utility's service territory. This provisional prohibition will be for two years, and we will reevaluate it at that time. In the case where this limited prohibition does not apply, our adopted rules should apply.

We agree with TURN and ORA that we have the jurisdiction to take this action. The investor-owned utilities have an exclusive franchise over their service territory. Except for the case of a municipal utility, we have plenary authority to regulate the utilities in the public interest. PU Code § 701 provides that we may "supervise and

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

regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Here, we believe that this provisional prohibition is the only practical and effective means to ensure effective competition in the direct access market within each utility's service territory. Our market power concerns are heightened with respect to electric utility affiliates offering direct access services within the service territory of the electric utility. Entities offering direct access service to customers must acquire access to essential facilities over which the utility has monopoly or near monopoly control. For example, every energy service provider (ESP) must have its Direct Access Service Requests (DASRs) processed by the utility, and the utilities distribution system is used to deliver electricity to direct access customers. This control of bottleneck facilities by the UDC heightens market power concerns unrelated to the generation market and market power concerns that go beyond the concerns raised by the actions of affiliates in other markets. We are concerned that the control of essential facilities by the utility would allow it to favor its own affiliate at the expense of the others competitors. We do not extend the prohibition of affiliates offering direct access within a service territory for natural gas only companies. These companies do not have control of the essential services needed to complete a direct access transaction.

We are also concerned that in the case of electric utility affiliates offering direct access, the unregulated affiliate would be competing against the regulated utility. We are concerned that this would enable a utility to transfer customers, business and profits from a regulated firm to a unregulated firm and could impede the ability of this Commission to set reasonable rates. To put this in the proper context, we note that we have yet to allow affiliates of Pacific Bell or GTEC to offer local exchange service within the service territories of the local telephone utility.

Because the utilities' affiliates are not already involved in the offering of direct access to end-use customers within the service territory of their affiliated electric utilities, we can prohibit such activity without requiring massive changes in existing utility and affiliate operations. This is not the case for many other energy related

activities that the utilities are involved in. It would be unreasonably disruptive of existing markets and unduly burdensome to prohibit all affiliates covered by these rules, as defined in this decision, from offering service within the affiliated utility's service territory.

Our objectives in this proceeding are to foster competition and to protect consumer interests. Although the utilities argue that this rule is anticompetitive because it forecloses a competitor from the marketplace, we do not agree. Adopting this provisional prohibition narrowly tailored to utility direct access affiliates will encourage competition as it begins in the direct access market by promoting a level playing field which is vital for competition to flourish. Our provisional prohibition will encourage ESP's to get a footing in the marketplace and thus promote competition and consumer choice which may be foreclosed if the incumbent utility leverages its market power within its service territory to make it difficult or impossible for other ESP's to enter and compete. This rule is limited in scope. At the end of two years, when we anticipate competition should be more fully established, we will revisit this rule to determine if sufficient competition exists so that this rule is no longer necessary.

The utilities argue that we do not have the jurisdiction to adopt this rule, citing inter alia, D.91-02-022, 39 CPUC2d 321, 324-325, where we modified an earlier prohibition on new utility marketing affiliates, finding that we lacked jurisdiction. However, here we are adopting a temporary prohibition on transactions between a utility and an affiliate offering direct access within the service territory of the utility, not a ban on the formation of utility affiliates. Under, inter alia, § 701, we have the authority to prohibit all transactions between regulated utilities and their unregulated affiliates within the utility's service territory. Our adopted rule is a method to achieve this result.

The utilities also argue that we rejected this proposal in D.97-04-050, and should not revisit this issue again. However, we made it clear that the affiliate rules adopted in D.97-04-050 were interim and would be superseded by rules adopted in this proceeding."

3. Section II F 6 a of the draft decision should be deleted and the following Section II F 6 a should be added:

"a. Name and Logo

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

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

The Joint Petitioners Coalition propose a rule which prohibits: (1) a utility's name, logo, trademark or other form of corporate identification to resemble that of the affiliate; (2) the utility's and affiliate's logo, trademark, or other form of corporate identification to appear on documents, property, or merchandise sold by the other; (3) the utility from trading upon its affiliate's affiliation with the utility and using the utility's name in material circulated by the affiliates; and (4) the utility from representing that the affiliate will receive any different treatment than other

service providers as a result of the affiliate's affiliation with the utility. CAPHCC supports Petitioners' proposal. Parties advocating that use of the utility's name and logo be prohibited or strictly limited make the following arguments: (1) The issue of whether the utility name and logo is a shareholder or ratepayer asset should be reassessed in a competitive environment; (2) PU Code § 701 gives the Commission broad authority to restrict the use of a utility's assets, regardless of the outcome of the ownership issue; (3) past experiences with an affiliate's use of a utility's name and logo demonstrate that the utility "name brand" resulted in an affiliate's unfair competitive advantage, and created in customer's minds an implied warranty either that the utility is standing behind the affiliate's products and services or that an affiliate's products and services are regulated and are therefore more reliable; and (4) market power concerns require strict limitations on the affiliate's use of the name and logo.

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

We agree with Petitioners that the issues surrounding the affiliate's use of the utility's logo in this case do not revolve around ownership, and do not revisit that issue here.

We are concerned about competition, and must determine whether permitting the affiliate to use the name and logo of the utility is anticompetitive by virtue of its name brand recognition and by causing customers to be confused or misled. We articulated our general concerns regarding market power in

this situation in SoCalGas' Performance-based Ratemaking Decision, D. 97-07-054, slip op. at 63:

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

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

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

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

Based on these concerns, Petitioners believe that a prohibition of the affiliates' use of the utilities' name and logo is the only effective means to ensure that the utility does not gain an unfair advantage by virtue of its affiliation with a monopoly utility. We agree. Furthermore, the presence of any particular cost advantage for the affiliates, if they derive this advantage from their association with the utility and not from their own internal efficiencies, creates market power and entry barrier concerns. For example, the affiliate's use of the utility logo will lower its advertising cost, since, as PG&E ES recognizes, establishing and advertising a brand name is an entry cost. Yet, an affiliate's competitors will bear these advertising costs to establish and maintain a market share similar to that of the affiliate. In fact, given the cachet associated with a utility, whose price and service quality has been regulated for decades, the affiliate's competitors would have to make even greater expenditures with respect to advertising and brand name promotion to achieve equal standing in the eyes of consumers. The utilities' affiliates could use this cost advantage to create even greater entry barriers to unaffiliated competitors.

We therefore believe that Petitioners' proposal regarding the shared use of the name and logo is appropriate, narrowly tailored to address our competitive concerns, and we therefore adopt it. (See Rule V F.) The factual examples

on the record demonstrate the abuses which can result from the shared use of the name and logo.

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

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

Nor do we believe that the First Amendment precludes us from prohibiting the affiliate's use of the utility's name and logo. (See, e.g., *Friedman et al. v. Rogers*, 440 U.S. 1 (1979). *Friedman* involved a Texas state law which prohibited optometrists from operating under a trade name. The Court upheld the restriction, finding that "there is significant possibility that trade names will be used to mislead the public." (*Friedman*, 440 U.S. at 13.)"

4. Finding of Fact 12 and 24 are deleted. The following Findings of Fact 12 and 24 should be added:

"12. The provisional prohibition which we adopt in Section II C is the only practical and effective means to ensure effective competition in the direct access market within each utility's service territory. Our provisional prohibition will encourage ESPs to get a footing in the marketplace and thus promote competition and consumer choice which may be foreclosed if the incumbent utility leverages its market power within its service territory to make it difficult or impossible for other ESPs to compete."

"24. A prohibition of the affiliates' use of the utility's name and logo is the only effective means to ensure that the utility does not gain an unfair advantage by virtue of its affiliation with a monopoly utility."

5. Conclusion of Law 5 is deleted and the following Conclusion of Law 5 should be added:

"5. TURN's June 2, 1997 motion requesting a provisional prohibition on marketing by the affiliate of gas or electric distribution company within the utility's service territory and ORA's June 2, 1997 motion proposing that customers of the natural gas local distribution companies and electric utility distribution companies shall not receive products or services from unregulated affiliates of the gas and electric utilities from which they receive distribution services should be denied in part and granted in part, as more specifically discussed in this decision."

6. Ordering Paragraph 5 is deleted and the following Ordering Paragraph 5 is added:

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

unregulated affiliates of the gas and electric utilities from which they receive distribution services is denied in part and granted in part as more specifically discussed in this decision."

7. The following text should be added following Rule II B in Appendix A:

"A utility shall have no transactions with an affiliate that offers direct access to end-use customers within the utility's service territory. This provisional prohibition will be for two years, and the Commission will reevaluate it at that time. In the case where this limited prohibition does not apply, these Rules should apply."

8. Rule V F 1 in Appendix A should be deleted, and the following Rule V F 1 should be added:

"F. The following rules apply to corporate identification and advertising:

1. The name, logo, service mark, trademark, or trade name of a utility shall not resemble that of the affiliates.

2. Neither the logo, trademark, nor other corporate identification of the utility or affiliates shall appear on documents or property of the other, or goods and merchandise sold by the other.

3. A utility shall not trade upon, promote, or advertise its affiliate's affiliation with the utility, nor allow the utility name to be used in any material circulated by the affiliates."