

1861.02(a), 10 CCR section 2632.8 permits insurers to use individual optional factors that have a greater impact in the determination of rates and premiums than one or more of the three mandatory factors....” The matter is currently pending before the First District Court of Appeal.

On March 17, the California Supreme Court declined to review the Second District Court of Appeal’s decision in *Arthur Andersen LLP v. Superior Court (Charles Quackenbush, Real Party in Interest)*, 67 Cal. App. 4th 1481 (Nov. 24, 1998). In that matter, the Second District held that certified public accountants owe a duty to the Insurance Commissioner to adequately disclose the financial condition of insurance companies, and may be liable to the Commissioner (as liquidator on behalf of the company’s policyholders and creditors) for negligently-prepared audits of insurance companies. *Bily v. Arthur Young & Company*, 3 Cal. 4th

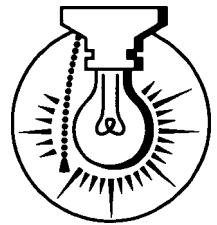
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370 (1992), limits CPA liability for negligently-prepared audits to those with whom the CPA has privity of contract and certain other persons “who act in reliance upon those misrepresentations in a transaction which the auditor intended to influence.” The Second District determined that the Insurance Commissioner—to whom audits of insurance companies must be submitted and who has the statutory responsibility of monitoring insurance companies to ensure their ability to pay insurance claims—“is within the universe of persons to whom an auditor in [Andersen’s] position may be li-

able for negligent misrepresentation in an audit report pursuant to...*Bily*.” The Second District decided only the legal issue of whether Andersen owed a duty to the Commissioner under *Bily*, not whether Andersen was negligent in auditing Cal-American’s financial statements; that issue has been remanded for trial in superior court.

Public Utilities Commission

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The California Public Utilities Commission (PUC) was created in 1911 to regulate privately-owned utilities and ensure reasonable rates and service for the public. Today, under the Public Utilities Act of 1951, Public Utilities Code section 201 *et seq.*, the PUC regulates more than 470 privately-owned and operated gas, electric, telephone, water, sewer, steam, and pipeline utilities, as well as 4,300 truck, bus, railroad, light rail, ferry, and other transportation companies in California. The Commission grants operating authority, regulates service standards, and monitors utility operations for safety.

It is the duty of the Commission to see that the public receives adequate services at rates which are fair and reasonable both to customers and utility shareholders. Overseeing this effort are five commissioners appointed by the Governor with Senate approval. The commissioners serve six-year staggered terms.

The Commission has quasi-legislative authority in that it establishes and enforces administrative regulations, some of which are codified in Chapter 1, Title 20 of the California Code of Regulations (CCR). The Commission also has quasi-judicial authority; like a court, it may take testimony, subpoena witnesses and records, and issue decisions and orders. The PUC’s Administrative Law Judge (ALJ) Division supports the Commission’s decisionmaking process; PUC ALJs

preside over evidentiary and other types of hearings and forward recommended decisions to the Commission, which makes all final policy, procedural, and other decisions. In its decisionmaking, the Commission attempts to balance the public interest and need for reliable, safe utility services at reasonable rates with the need to ensure that utilities operate efficiently, remain financially viable, and provide stockholders with an opportunity to earn a fair return on their investment. The PUC encourages ratepayers, utilities, consumer, and industry organizations to participate in its proceedings.

PUC staff—which include economists, engineers, ALJs, accountants, attorneys, administrative and clerical support staff, and safety and transportation specialists—are organized into twelve major divisions and offices, including industry-specific divisions addressing energy, telecommunications, rail safety and carriers, and water. The Commission’s Consumer Services Division attempts to resolve consumer complaints regarding utility service, safety, and billing problems; its various branches provide consumers with information, analysis, conflict resolution, and advocacy services to help them make intelligent decisions about utility purchases. The San Francisco-based Public Advisor’s Office and the Commission’s outreach offices in Los Angeles and San Diego provide procedural information and advice to individuals and groups who

want to participate in formal PUC proceedings. Under Public Utilities Code section 309.5, the Office of Ratepayer Advocates independently represents the interests of all public utility customers and subscribers in Commission proceedings in order to obtain "the lowest possible rate for service consistent with reliable and safe service levels." The Strategic Planning Division analyzes emerging policy issues and changes in the regulatory environment caused by economic, financial, institutional, and technological trends, and helps the Commission plan future policy.

Members of the Commission currently include PUC President Richard A. Bilas and Commissioners Henry M. Duque and Josiah L. Neeper. The terms of Commissioners Jessie J. Knight and P. Gregory Conlon expired in early 1999; at this writing, Governor Davis has yet to appoint their replacements.

MAJOR PROJECTS

Power Utility Regulation

The PUC continues to implement its precedent-setting December 1995 decision to deregulate California's \$23 billion electricity industry. The PUC intends to maintain regulation of the power distribution grid (*e.g.*, the rights of way and wiring which bring power into homes and businesses), but subject power generation to competition. Hence, maximum rate regulation remains in place for the natural monopoly function of power distribution, but for functions (such as power generation) which can accommodate multiple competitors, a managed competition scheme will allow market forces to decide entry, allocation and prices.

In 1996, the California legislature confirmed most of the PUC's initiative by enacting AB 1890 (Brulte) (Chapter 854, Statutes of 1996). The statute authorized creation of an "Independent System Operator" (ISO) which—effective March 1, 1998—assumed control of the power grid that transmits electricity statewide between the respective utilities controlling local delivery. A second agency, the Power Exchange (PX), functions like a stock exchange, enabling sellers and buyers to bargain for the best price for electricity. The new law creates governing boards for each of these agencies that must be "broadly representative of California electricity users and providers," and also creates a five-member Oversight Board consisting of three gubernatorial appointees subject to Senate confirmation and two non-voting legislators.

AB 1890 authorizes "direct access"—direct transactions can occur between electricity suppliers and end use customers without effective interference from the utility carrying the electricity. AB 1890 also outlined a general plan to accomplish the "unbundling," or separation, of the three distinct functions of electricity service: (1) generation, (2) transmission, and (3) distribution (including the unbundling of

maintenance of electricity lines, metering, and billing). Under the new scheme, the traditional local utility—now called a "utility distribution company" (UDC)—will continue to transmit electricity to end users, but generation and some aspects of distribution (such as metering and billing) are being removed from direct private utility control and placed under a competitive format managed by the ISO or the PUC. [16:1 CRLR 158-62; 15:4 CRLR 234-37]

The new law required an immediate 10% rate reduction for residential and small business consumers through March 31, 2002, and an "anticipated result" of a "no less than 20% reduction" in those rates at that point. The former has not occurred,

as explained below; and the latter is problematical.

The electric rates of the UDCs are frozen at June 10, 1996 levels during a "transition period" which lasts until each has respectively recovered all "uneconomic generation costs" subject to AB 1890. Many of the utilities have sought to sell these assets, or place them in other entities, to end the freeze expeditiously.

Unfortunately for the PUC and consumers, the first quarter of 1999 has been characterized by problems in the new scheme which have failed to yield either the promised rate decreases or the benefits of competition; utility requests for rate increases and new ratemaking mechanisms under which rates will be set after the transition period; and the PUC's scheduling of a series of fragmented and uncoordinated proceedings which inherently favors the utility participants.

◆ *Electrical Service Deregulation Problems Continue.*

The use of competition to allocate resources and set prices in areas outside the (currently) unalterable natural monopoly in power transmission has the support of economists and consumer advocates. However, the details of California's deregulation scheme have raised controversial issues, including the following:

- the imposition of a special charge to repay bonds which—it turns out—is financing the 10% reduction during the transition period at close to comparable consumer cost in another part of the utility bill;
- substantial new charges to pay for utilities' uneconomic nuclear and other generation facilities which are not viable in a competitive market;
- the inclusion of socially important incentives (*e.g.*, energy conservation programs, cross-subsidies to assure basic heat for the poor or elderly, and programs aimed at avoiding the depletion of natural resources or the imposition of external costs on others from pollution) in a competitive pricing setting which may consider only short-term profit impact;
- the function of transmitting electricity into homes remains a natural monopoly utility but—instead of subjecting it to "fair rate of return" maximum price regulation—the PUC

will implement "performance-based ratemaking" (PBR), which calculates rates from existing levels while allowing the utility to share the gain from cost savings above normally allowed profit. PBR is criticized by consumer groups as an opportunity for accounting gamesmanship to achieve an effectively unmonitored excessive rate of return; and

- given the controversial decision to allow utilities transmitting power to remain as power generators, the difficulty in preventing them from favoring their own generated electricity—either through cross-subsidies from their remaining natural monopoly assets, or through customer communications and billing.

Additional factors have complicated the implementation of the new system, including continued confusion and inertia impeding consumer and small business use of alternative power generation, and questionable marketing practices by some of the newly-authorized power generation providers seeking subscribers.

Consumer groups have complained in particular about the publicly-financed bond "bail-out" of billions of dollars worth of uneconomic power-generating assets by ratepayers as the apparent political price of obtaining utility acquiescence to state deregulation. Proposition 9, a consumer-sponsored initiative to reverse these and related policies, was defeated during 1998. [16:1 CRLR 161]

In November 1997, the new deregulated system was set for substantial roll-out for an intended transition period lasting until April 1, 2002, after which the PUC intends full implementation. During 1998–99, however, the transition has encountered complications beyond the five generic objections listed above. Additional factors have complicated the implementation of the new system, including continued confusion and inertia impeding consumer and small business use of alternative power generation, and questionable marketing practices by some of the newly-authorized power generation providers seeking subscribers.

♦ **Few Customers Have Switched Electric Service Providers.** As of 1999, PUC statistics show the following percentage of customers buying power from new power companies, or "electric service providers" (ESPs): residential—1.2%, small commercial—3.4%, medium commercial—13.6%, large industrial—29.3%, and agricultural—6.6%, for a total of 12.4%. In certain localities, the switching percentages are even more tepid; as of March 1999, only 2% of customers of all types of San Diego Gas & Electric Company (SDG&E) had switched to any other provider (24,000 of 1.2 million customers).

Related to the lack of information problem noted above, the new competitive marketplace is hampered by unfair marketing practices and misleading advertising practices.

Consumer advocates contend that competitive failure is ascribable to market barriers to the new ESPs, the inherent power of consumer inertia, cross-subsidies that give UDCs unfair market advantage, and potential manipulation of PX prices. Consumer groups in particular point to AB 1421 (Wright), currently pending in the legislature, which

would legislatively mandate the existing utility as the default provider and statutorily lock in many of the advantages currently impeding new entry and competitive choice (see LEGISLATION).

After three years, only 37 new ESPs remain of the 300 that initially registered to compete.

♦ **Information about Competitive Choice.** In order to stimulate consumer information about power source choices, private consumer groups have started to publish ratings and comparative information. In the January 1999 edition of *Consumer Action News*, the San Francisco-based group Consumer Action published a survey of ESPs, based on rates and terms of service. The results indicated available choices at lower prices than are currently charged by local utilities. Similarly, the Utility Consumers' Action Network (UCAN), based in San Diego, has published detailed comparative information about ESPs, focusing on those promising environmental benefits.

The PUC's 1999–2000 Business Plan acknowledges an agency role in providing consumer education about electric power deregulation to stimulate informed competitive choice. The Consumer Affairs Branch of the Commission's Consumer Services Division (CSD) oversees consumer education programs designed to alert the consumer and facilitate awareness in competitive markets. CSD works with the PUC's Office of Ratepayer Advocates (ORA) to disseminate restructuring pamphlets through its governmental outreach program.

However, because the information thus far disseminated relates to the PUC process rather than to competitive options, and has not mitigated public confusion, numerous private organizations (e.g., the California Small Business Association and the California Small Business Roundtable) have asked the PUC to provide its own neutral comparative information, including a database for comparative pricing on a real-time basis. At this writing, the PUC has yet to respond substantively to these requests.

♦ **Alternative Power Providers: Marketing Problems.** Related to the lack of information problem noted above, the new competitive marketplace is hampered by unfair marketing practices and misleading advertising practices. To the extent these practices undermine the credibility of alternative power utility claims, they can seriously impede meritorious new entrants. Where consumers are confused or believe competitive challengers are not accurately describing their offerings, the familiar utility name benefits from consumer desire to avoid risk.

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competitors. Initial marketing abuses acknowledged by the PUC include "slamming" (the illegal switching of consumers by an ESP to its account), "cramming" (billing for additional services not requested), "bait and switch" (attracting customers with cheap service, followed by the substitution of a more expensive and profitable arrangement), high-pressure sales techniques, and long-term contracts that lock customers into a static price notwithstanding possible price declines due to future competition.

The form of the electric utility bill mandated by SB 477 (Peace) (Chapter 275, Statutes of 1997) requires an itemization (the "unbundled" breakdown of all of the separate charges that go into the kilowatt/hour rate). [16:1 CRLR 160] These itemized disclosures allow a consumer to see more clearly the savings which may come from a new power generator. The utility bill must include the following separate components: (1) the state-mandated 10% reduction, (2) the charge for electric energy (the UDC's cost of buying power from the PX); (3) the transmission charge, (4) the distribution charge, (5) the "public purpose programs" assessment (e.g., for low-income ratepayer assistance and alternate energy sources development), (6) a nuclear decommissioning charge, (7) the "competition transition charge" (CTC) (a state-authorized charge against ratepayers enabling utilities to recoup their investments in uneconomic power plants), and (8) the "trust transfer amount" (TTA) (the cost of the bonds that are financing the state-mandated 10% "reduction" which assisted the passage of the deregulation statute). The controversial CTC and TTA are nearing payoff in 1999.

PUC Decision 98-03-072 implemented other consumer protection mandates of SB 477. It requires ESP registration with the PUC, which in turn requires proof of financial viability, proof of technical and operational abilities, security deposit or financial guarantee bond, and extensive background information on managers, directors, and officers. Each ESP is required to provide a copy of all of its agreements with its scheduling coordinators (entities that schedule deliveries of the ESP's power to the ISO-controlled power grid), or declarations from each scheduling coordinator with which the ESP has an agreement. Each ESP is also required to submit a copy of its notice of terms and conditions. Public Utilities Code subsections 394(a)(9) and (10) contain the standards for proof of financial viability and proof of technical operational ability, respectively.

However, the PUC's implementation of this marketing protection effort focuses on viability and performance, similar to the regulatory concerns of the Insurance Commissioner in ensuring that companies receiving premiums will be able to pay claims. Consumer groups have urged the agency to turn its attention to the marketing abuses listed above, to use its rulemaking powers for preventive purposes, and to engage in licensure discipline against violators.

♦ **"Green Power" Claims.** Consumer groups have red-flagged for the PUC one particular marketing abuse: the possibly misleading use of environmental advantage claims. To be certified to use a "Green-e" logo, a power company must

certify that: (1) at least 50% of its electricity is generated using renewable resources; (2) any nonrenewable part of the product has lower air emissions than the traditional mix of electricity; and (3) the company agrees to undergo an annual audit to verify its purchases of renewable energy. The certification process is supported by the California Energy Commission (CEC), which gives a 1.5-cent-per-kilowatt/hour customer rebate for qualified customers. Under a separate program, the legislature allocated \$54 million to help install photovoltaic cells and other types of emerging renewable technologies; this is a small allocation.

A "green power" label has powerful advertising appeal, but environmental and consumer groups contend that the current tracking and certificate systems are inadequate and may mislead consumers, noting that most companies that have survived in the green power market are subsidiaries of existing electric companies that focus on profiting from non-green sources.

♦ **Complicated Rate Proceedings Initiated.** On January 15, 1999, all three major utilities (SDG&E, Pacific Gas & Electric (PG&E), and Southern California Edison (SCE)) filed applications for the establishment of post-"transition period" rates. Although the statute sets an April 1, 2002 outside date for termination of the transition period (as well as the rate freeze), it does not preclude earlier transition completion.

These proceedings will decide important rate design features, including treatment of the controversial power "cost recovery" accounts, and exactly how the PUC's novel "performance-based ratemaking" (PBR) will work in a part monopoly/part competitive deregulated setting. The Commission has created two phases to make these seminal decisions: Phase 1 will consider when and how to end the rate freeze, while Phase 2 will decide post-transition rate regulation.

The following schedules have been adopted. In Phase 1, ORA must file its direct testimony by March 30; any intervenors in the proceedings must file their opening testimony by April 18; the utilities' rebuttal testimony is due by April 29; the hearings before a PUC ALJ begin on May 10; after the hearings have concluded, opening briefs are due on June 1; the ALJ's proposed decision is scheduled for July 5; and the PUC's final decision is scheduled for August 5. In Phase 2, ORA must file its direct testimony by July 2; any intervenors in the proceedings must file their opening testimony by July 30; the utilities' rebuttal testimony is due by August 11; the hearings before a PUC ALJ are scheduled to begin on August 23; after the hearings have concluded, opening briefs are due on September 25; the ALJ's proposed decision is scheduled for December 14; and the PUC's final decision is scheduled for January 14, 2000.

The new PBR methodology rejects the traditional "fair rate of return" on equity concept historically applied to monopoly utilities. Instead, the rate structure is intended to share cost savings from enhanced efficiencies achieved by the utility, just as the marketplace rewards those who outperform their competitors with a higher rate of return. Critics point to the

“Catch-22” problem of starting with current costs (which may be the product of inefficiencies) and the failure to calculate the traditional rate of return on used and useful equity. Consumer advocates generally favor augmenting the fair rate of return system to provide incentives to improve, but argue that rejection of the fair rate of return calculation of prudent costs plus a fair rate of return on invested capital invites abuse. The regulator will not know precisely how much of an incentive over market “return on investment” levels is being provided.

This problem has crystallized with the utilities’ proposal to apply PBR to their “electric procurement” decisions. Traditionally, under fair rate of return review, costs must be “prudent” if assessed against ratepayers, and capital acquisition must be “used and useful” to allow a return on the invested funds which financed it. Consumer groups contend that utilities are now attempting to profit from naturally occurring efficiencies from outside technology and expanded volume. That is, with high fixed plant costs, business volume increases allow more efficient use of that large plant—unit costs decline as plant utilization improves. Such factors have little to do with utility performance, and the marketplace would not reward them were it functioning normally. Hence, the purpose of PBR—to provide an incentive to enhance efficiency and performance as does a competitive market—does not apply.

♦ **SDG&E Folds Rate Increase Request Into Post-Freeze Methodology Proceedings.** As of early 1999, SDG&E contends that it has recovered its uneconomic generation costs, and has applied for termination of its transition period. If granted, both the rate freeze and the CTC would terminate. SDG&E is expected to achieve such transition termination eligibility in May 1999. Anticipating release from the rate freeze, SDG&E has applied for a post-transition rate increase, to be effective on July 1, 1999. Essentially, SDG&E is proposing to replace the temporary CTC with a permanent rate increase. David Fukutome, ORA project supervisor, calculates the allocation of transition payment revenues through the course of the 20 months of SDG&E’s transition period (September 1997 to May 1999) as follows: utility shareholders \$142 million, ratepayers \$7 million. Hence, funds collected from this account have not ended up paying for costs incurred from competition-related change, but have ended up as extra profit for utility stockholders. SDG&E contends that long-term alternative-energy contracts and long-term power purchase contracts explain the need for continuing CTC charges after the legislative rate cap ends.

UCAN submitted briefs in the case, objecting to the procedural tactics of SDG&E (failure to consolidate proceedings to allow effective ratepayer presentation; failure to seek information or views outside the utility). UCAN recommends a series of PUC-ordered workshops, with all interested

stakeholders participating as a prelude to evidentiary hearings before the Commission.

In their ruling dated March 1, PUC ALJs Malcolm and Minkin consolidated SDG&E’s rate increase request with its post-transition period PBR application. At a March 12 prehearing conference, the parties were encouraged to meet and resolve the issues on an interim basis. The parties filed a proposed settlement on April 15; hearings on the settlement occurred on April 20 and, at this writing, a decision is expected before the end of May.

♦ **Performance-Based Ratemaking.** Separate from the above, all three utilities have filed proceedings pursuant to the present PBR system in place during the transition period. These proceedings are complicated by their interaction with post-transition proceedings, and by their fragmentation into stages or parts.

♦ **Revenue Adjustment Proceedings.** In addition, all three utilities will apply for their first annual revenue adjustments allowed under the new statute. Revenue requirements are to be adjusted annually, involving a review of the accounting methods used for each. In addition, the proceedings may “consider rate design and revenue allocation issues,” although the proceedings under way (discussed above) would limit their significance.

♦ **Annual Transition Cost Proceedings.** Complicating further the rate determinations of the power utilities are annual rate adjustments during the term of the “transition” period (potentially up to April 1, 2002) based primarily on cost changes. On September 1, 1998, PG&E, SCE, and SDG&E filed their first applications for this annual review. The purpose of these “annual transition cost proceedings” is to adjust the “transition cost balancing account” as new developments require. In other words, the PUC will adjust the utility

portion of consumers’ bill given the costs and revenues from the new ISO and PX agencies now arranging for competitive choice. Adjustments must be made as costs change, as the utilities sell many of their powerplants (which necessarily affects depreciation

accounts), as contracts are bought out and employees are shifted, and as other changes occur.

The current schedule for these proceedings (for all three utilities) is as follows: ORA will file initial direct testimony by April 20; by May 7, the Workshop Report on Rate Reduction Bond Issues will be issued; by May 11, intervenor testimony must be filed; hearings will begin by June 21; the proposed ALJ decision is expected by November 16; and the PUC’s final decision is expected by December 16.

These proceedings are particularly important to the extent they establish precedents which may influence the post-transition permanent rate mechanism discussed above.

♦ **PG&E Transitional Rate Increase Request Particularly High.** Of particular note is PG&E’s request for a rate

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increase which would apply during the transition period. PG&E seeks to increase rates by \$1.2 billion beginning in 1999. The proposal would raise average natural gas bills by 25% and electric bills by 30%. PG&E based its estimates on its highest base year costs (1996), and reasoned that the high rates are needed because of the revised economy, customer growth, and desire for greater reliability. On April 20, ORA countered with a recommended increase of between \$100–\$200 million—approximately 10% of the amount requested. ORA produced studies indicating that PG&E is not operating its system efficiently, and has cited reductions of base margins by other utilities.

UCAN, TURN, and other consumer groups contend that the legislative promises of a 10% immediate rate reduction and a 20% subsequent reduction at the conclusion of the transition period will be “honored in the breach.” Notwithstanding the bail-out of the uneconomic power generation facilities of all three utilities, PG&E in particular seeks not decreases, but substantial increases above inflation. At this writing, a decision is expected from ALJ Wetzell in November, consistent with the scheduled decisions above for all three utilities.

♦ *Competition Transition Charge (CTC) Proceedings.*

Finally, a separate set of proceedings considering the adequacy of the CTC is indicative of the fragmentation problem in current PUC rate proceedings. In A.96-08-001, a transition cost proceeding is addressing CTC terms and conditions in two phases and over what has been, thus far, five decisions. On December 17, 1998, the Commission issued D.98-12-067, relating to CTC charges allowed as to “new customer” loads (see Public Utilities Code section 369).

As to the CTC charge allowed for Southern California Edison, ORA and intervenor testimony have been filed, hearings were conducted from October 21 to November 3, 1998, and a final decision is due before the end of June 1999. As to SDG&E and PG&E, settlement proposals were reached with parties in consolidated proceedings by November 3, 1998; hearings on the agreements were held in January 1999; and the settlements are now final.

♦ *Unbundling and Direct Access Continues.* The PUC seeks to facilitate direct access between competitors and consumers wherever feasible. The agency also continues to separate out business activities not required for the natural monopoly “delivery loop” of wires into homes and businesses. In three separate decisions in late 1998, the PUC voted 5-0 to approve “revenue cycle unbundling,” a “universal node identifier system” (UNIS), and “permanent standards for metering and metering data,” respectively. These three decisions affect PG&E, SCE, and SDG&E.

Although jargon-rich, these proceedings open the way for competition in billing and meter reading by specifying standards to allow more than one firm to participate. The term

“revenue cycle unbundling” is the PUC’s term for “metering, billing, and related services.” “Unbundling” is its term for separating out those activities from the existing utilities’ services to allow competitive choice. One motivation for this unbundling may be to end possible utility favoritism for its own power generation. Another rationale is to dispel some of the confusion for consumers who are told there is competitive choice, but who continue to receive bills and have their meters read by the existing utility. Given the possibility of electronic transmission of meter levels showing

electricity or gas use, the previous economy of scale of having a single meter reader from one company ride a route house to house may no longer apply. But to accomplish multiple firm functioning, the PUC must allow “open architecture” and multiple access to such information. At the same time, that opening up raises issues of accuracy, unilateral diversion of customers to a company without consumer consent, cost shifting from one group of customers to favored customers with bargaining power (e.g., residential to large industrial), and accountability for meter or billing errors. These decisions begin the process of pricing these services, and their management in a possible “unbundled” competitive environment. The UNIS decision is related to this effort, providing an identifying label or number to every service delivery point on an electric utility’s distribution system, allowing its proper identification between multiple providers. Hence, the same label will be available to identify power to a given home by the electric utility delivering the power, and a possibly separate power generating company providing it, as well as a possibly separate meter reading and billing company. The utilities are given until May 1999 to develop and assign a numbering/identification system consistent with its specifications.

Telecommunications Utility Regulation

Telecommunications deregulation has preceded California’s electricity deregulation by several decades. The seminal 1982 consent decree in *United States v. AT&T* divested the defendant of its existing national telephone monopoly, spinning out the so-called “Baby Bells” to substantial regulation by state public utilities commissions, and introducing competitive choice in long distance service, telephone equipment manufacture, inside wiring of homes, and other aspects of telephone service then subject to AT&T control.

The decision has meant greater efficiency, enhanced technological advances, and lower prices, but has produced many of the regulatory problems now being encountered in electricity deregulation, as described above. The role of the PUC has been to regulate Pacific Bell’s (PacBell) provision of local telephone service, and to otherwise act under FCC guidelines as a kind of “competition manager” (which the PUC’s ten-year business plan terms “a referee in a multi-player environment”). The developing problems include many of those

which attend vigorous competition: marketing abuses, misleading advertising, and allegations of price discrimination or unfair practices by the Baby Bells that retain monopoly power over the so-called "local loop" (the wires bringing phone service into homes and businesses). Problems also include the maintenance of cross-subsidies considered socially beneficial (such as universal service and aid for the disabled) in a manner which is "competitively neutral."

Three factors distinguish evolving telephone regulation from its electricity counterpart. First, federal (Federal Communications Commission) jurisdiction versus state PUC jurisdiction remains somewhat unclear and has been subject to the federal Telecommunications Act of 1996.

Second, the introduction of cable competition has complicated the picture, including imminent cable-based interactive voice communications. The cable industry is not subject to state PUC jurisdiction. On February 22, Consumers Union (CU)—the nation's largest and most respected consumer organization—issued a 53-page report entitled *The Digital Divide Confronts the Telecommunications Act of 1996*. The report points out that, under the 1996 Act, the cable television industry will begin to enjoy "a marketplace environment that has absolutely no controls on its pricing for anything other than broadcast channels" (i.e., basic service) on March 31, 1999. Very few homes receive only basic service, and the cable industry now calls the more advanced and unregulated levels of service "basic." The report points out that even before this change, cable television rates have been increasing at more than four times the inflation rate. CU recommended a series of reforms to regulate the cable monopoly in lieu of the absent marketplace, and also covered the changing long distance and local phone markets in its analysis.

The third and related new development is the advent of the Internet as a forum for both free speech and commerce. The now unregulated cable mode currently allows continuous access to the Internet at much higher speeds than most telephone-based connections. Since cable providers are unregulated and face little competition from other cable providers in their respective relevant geographic markets, they possess effective monopoly control of Internet access, as well as cable service provision itself.

The anticompetitive structure of cable has led to controversy in late 1998 and 1999, as AT&T has entered the cable market, merging with and buying cable assets to the point that it now has a substantial interest in the providers reaching most U.S. homes with cable service. The only remaining and limited regulation remaining for cable occurs via the franchise agreements that each cable provider must sign with the cities and counties (local governments) whose rights of way their lines must traverse. AT&T contends that, in addition to possessing a cable monopoly in a given community, it can

specify an exclusive Internet service provider (ISP) through which all cable-accessed communications to the Internet must traverse. However, the City of Portland has attempted to require AT&T, its cable franchisee, to grant access to the Internet via any ISP selected by the consumer. That provision is consistent with the deregulation thesis that monopoly power should be confined as narrowly as possible to the natural monopoly aspect of a line of commerce. AT&T argues that Portland lacks the authority to impose such a requirement. Most troubling to consumer advocates has been the posture of the FCC, which now contends that (1) it may have exclusive jurisdiction over the Internet and (2) if so, it sides with AT&T and endorses its right to require exclusive control over access to the Internet information marketplace. The issue has been joined in *Portland v. AT&T*, now pending in the U.S. Ninth Circuit Court of Appeals.

The eventual impact of these developments on the PUC should be significant. Its constitutional charge is to regulate monopoly utilities. If the federal courts affirm local jurisdiction over cable through franchise agreements, then the state—
as sovereign—may specify to local governments what must be in those agreements, and monopoly power abuses may thus be checked, even if neglectful federal policies continue. Hence, the state may then fashion a role for the PUC in the regulation of cable

franchise arrangements, which have historically been drafted in boilerplate fashion by attorneys for the cable industry.

Beyond the cable regulatory vacuum, with its Internet access and first amendment implications, the PUC is affected by cable because of its increasing competitive posture *vis-a-vis* the telephone industry, where it exercises substantial jurisdiction. The telephone industry finds itself bound by regulatory constrictions not applicable to its new intermodal competitor. For example, it has long been FCC and local PUC policy that telephone companies must allow Internet access via any competent ISP chosen by the consumer.

Similarly, new competition is emerging within the telephone industry itself. The local exchange carriers (LECs) are now expected by the FCC to allow competition for "toll" calls, as well as the long distance calls now subject to competition. As the LECs seek to enter into the long distance market themselves as competitors, they are now instructed by the FCC that this permission is conditioned on toll call competition. The LECs note that their competitors for long distance provision have no such restrictions and object to the lack of a level playing field, which is allegedly the goal of deregulation.

♦ **PacBell Entry into Long Distance Dependent Upon Toll Call Competition.** In early 1998, PacBell applied to the PUC to become a long distance provider ("interLATA carrier") within California pursuant to section 271 of the federal Telecommunications Act of 1996. Section 271 of the 1996 Act permits Baby Bells to enter the long distance market, so

Since cable providers are unregulated and face little competition from other cable providers in their respective relevant geographic markets, they possess effective monopoly control of Internet access, as well as cable service provision itself.

long as they can prove that they have opened their respective local exchange markets to competition. To meet this requirement, a local Bell must demonstrate that it has complied with a 14-point "competitive checklist" and that "the requested authorization is consistent with the public interest, convenience, and necessity." In December 1998, the PUC issued a decision finding that PacBell has not yet fully opened its local market to competition. According to the Commission, PacBell has complied with only four of the required fourteen points on the checklist.

Meanwhile, the Baby Bells—including PacBell—have been seeking a court judgment eliminating the federal Act's requirement that they open up local phone service to competition before they can enter long distance service within states, or between states. However, in March 1998, the U.S. Court of Appeals for the District of Columbia Circuit ruled in *SBC Communications v. FCC*, 138 F.3d 410 (D.C. Cir. 1998), that the FCC could require the Baby Bells to open up their local phone markets (e.g., intrastate toll call competition) before they are allowed to compete for long distance services. That local competition facilitation depends upon state PUC facilitation. And on January 19, the U.S. Supreme Court denied review of a similar holding by the Fifth Circuit (see LITIGATION).

Notwithstanding these cases, PacBell reapplied to the PUC in February 1999 for authority to enter the long distance market. PacBell argued that GTE (and other long distance competitors which are not Baby Bell spin-offs) are able to offer their subscribers competitive intrastate toll call services separate from PacBell; in other words, there is viable local competition in California. Although the FCC does not consider existing non-PacBell choices to be real competition (because PacBell remains the default carrier, and any competitor must require the dialing of a special code before each call to receive credit for carrying it), PacBell contends that the California PUC's more liberal guidelines apply within the state. The PUC must decide during 1999–2000 whether or how it will arrange for more competitive local toll call conditions, or whether the utility will eschew long distance entry.

One of the most difficult aspects of local competition is the need for "number portability"—that is, the ability of consumers to keep their existing phone numbers if they shift to another local carrier. As of February 1999, the PUC authorized PacBell to charge 50 cents per month per line to finance what it contends will be its cost to provide number portability if customers shift to another local carrier. Although UCAN and other consumer groups have complained, PacBell contends that the charge is merely a "pass-through" cost and that the general financing of this cost by the entire system allows it to facilitate competition as consumers can switch more conveniently, as the FCC pro-competition policy commends. The

consumer groups contend that PacBell has succeeded in raising other barriers to competitive challenge (such as the extra dialing per call problem), such that little competition has occurred or is likely, and the extra charge therefor represents not a cost imposed because of number portability needs, but is simply a windfall for the utility.

♦ **PacBell Nationwide Listing Service.** In October 1998, PacBell filed Advice Letter No. 19795 seeking to establish a Nationwide Listing Service (NLS). The NLS would allow customers to dial 411 and ask not just for local directory assistance, but for directory assistance nationwide. The charge initially would be 95 cents per request (whether or not the number is found), with a ceiling of \$1.05. This effort is an

opening wedge into long distance service provision, and produced immediate protests from MCI Communications that it cannot be allowed without compliance with the 1996 Act's requirement to open up local competition, which it alleged PacBell has failed to do (see above). TURN, a San Francisco-based consumer group, protested the charge where no listing is found, and also questioned whether the "below the line" financing of the charge is appropriate. That is, if the revenues from these charges do not pay for the nationwide directory service, should all ratepayers subsidize its net cost? If the costs are allowed "below the line," that is the effect. That possibility could result in the use of PacBell's current monopoly power from ratepayer assessment (where it retains monopoly power) to give it an unfair advantage in this long distance-related service, giving it a competitive advantage in long distance carriage against MCI and others who do not have that assured revenue stream and cross-subsidy source.

In response, PacBell agreed that the service would be "above the line," meaning that if it is not compensatory, additional funds would come from profits (i.e., stockholders) rather than from ratepayers subject to monopoly power. With that major alteration, the PUC adopted Resolution T-16288 on April 22, approving the new charge and service. Its approval signals substantially greater support of PacBell's entry into long distance competition from the PUC than is currently extant at the FCC.

♦ **Rulemaking and Surcharges to Support Universal Telephone Service Goals.** In September 1998, the PUC opened a rulemaking proceeding to consider modifying California's Universal Lifeline Telephone Service (ULTS) Program and General Order (GO) 153. The ULTS program was initially created to implement the 1983 Moore Universal Telephone Service Act, which provides low-income households with access to basic telephone service at a discounted rate (generally 50% lower). The cost of the ULTS program is currently \$245 million, and it serves 3.1 million subscribers. Local phone companies recover the costs of providing ULTS from rates paid by ULTS phone customers, subsidies from

The Baby Bells—including PacBell—have been seeking a court judgment eliminating the federal Act's requirement that they open up local phone service to competition before they can enter long distance service within states, or between states.

federal universal service programs, and subsidies from the ULTS program. ULTS program costs are funded by the ULTS surcharge all customers pay on their intrastate charges. [16:1 CRLR 163]

The modifications to be considered would update the 1984 GO 153 (which defines the procedures for administering the program) to reflect ULTS program changes, make ULTS conform to similar federal programs, foster competition in providing ULTS, and require telecommunications providers to follow uniform ULTS procedures.

The Telecommunications Act of 1996 supports continuation of universal service cross-subsidies. Modifying California's ULTS program to conform to federal standards will enable ULTS customers to get discounted installation charges whenever they move to different residences. It will also give them the option of a deferred payment schedule for installation charges, enable them to receive toll calling control services without charge, and prohibit disconnection of an ULTS customer for non-payment of toll charges. Other proposed ULTS program modifications would enable all local phone service providers to recover their costs of providing ULTS service to the extent they are not reimbursed from the federal Lifeline and Link Up programs, and allow ULTS subscribers to pay discounted installation charges once per year when switching ULTS providers. The uniform procedures proposed in the rulemaking are intended to reduce ULTS program administrative costs and ensure that all carriers are treated equally and fairly. At this writing, the proceeding is scheduled to be concluded with Commission action by September 1999.

The Commission is coextensively considering specific surcharges necessary to support related universal service goals. Current surcharge rates are based on Resolutions T-16234, T-16242, T-16244, T-16245, and T-16165 in December 1998. The pending September 1999 decision from ALJ Kenney may adjust these surcharges. In addition to assisting low-income consumers (as described above), these funds also help certain small independent telephone companies serving rural areas, and provide equipment for deaf and disabled consumers. The last account operates on a 1999 budget of \$52 million for the Deaf and Disabled Telecommunications Equipment and Service Programs pursuant to Public Utilities Code section 2881. The new rates to be authorized in September will likely take effect on November 1, 1999.

♦ **Running Out of Numbers: The Area Code Proliferation Problem.** New technology has generated a need for multiple lines into homes and businesses. Consumers increasingly have one line for the traditional phone, one for the fax, one for the Internet, and one or more for cellular phone connections. Further complicating the picture, the state has 190 competitive local phone companies and 56 wireless firms, all of which need to assign numbers. Numbers are assigned in blocks of 10,000 per rate center, with 800 such centers now in the state. As the numbering is now constituted, a new carrier seeking to offer its own services to unique numbers would have to find eight million numbers to begin service.

Adding these new lines beyond normal population growth means that numbers are used up; new neighborhood and then new area code numbers must be created. Each such alteration means substantial costs for residences, and especially for businesses which rely on telephone traffic. California has opened 25 area codes and will require 16 more by the end of 2002 at present growth rates.

AB 818 (Knox), as amended on April 28, would require policies aimed at preventing unnecessary area code alterations by ordering the PUC to seek authority from the FCC to use more numbers and to give the PUC greater flexibility (see LEGISLATION). The PUC, which does not require legislative approval to seek such authority, issued a press release on April 26 announcing that it is seeking an "FCC waiver on number allocations to help check area code proliferation." The waiver seeks authority to assign an area code to more than one technology or service (opening the way, perhaps, for cable telephony). The Knox bill also requires that new numbers be assigned to prefixes that are more than 25% used and prohibits assignment to area codes less than 25% used until numbers are otherwise unavailable. In other words, PacBell could not open up new area codes until its existing numbers are at capacity. PacBell opposes this measure as restricting its flexibility, and impeding its ability to anticipate the need for new area codes in advance of absolute need.

More substantively, in December 1998 the PUC instituted rulemaking on "Area Code Relief" (R.98-12-014). Current policy is guided by D.96-08-028, which requires a mandatory "1 + 10" number system (1, plus three-digit area code, plus seven-digit number) to be in place, and "full number portability" (as discussed above). Hence, if there is an area code change, the underlying seven-digit number must remain. In 96-12-086, the Commission decided that geographic splits (the splitting of an existing area code and designation of part under a new area code) must cause "the fewest negative impacts to consumers." Except for the Los Angeles 310 area code, all others must be split under the format described above. The decision also requires a twelve-month warning prior to implementation. Meanwhile, the FCC has been imposing its own requirements, including a 90-day period after a new code is in place during which a misdialed number will trigger a message explaining that a new area code applies and directing the caller to dial it (FCC Order 96-333).

The PUC's rulemaking is considering four policy options: (1) mandatory use of overlays for all new area codes; (2) mandatory use of overlays for specific regions only; (3) mandatory geographic splits; or (4) a case-by-case approach. As noted above, in a "split" of an existing area code, a new number is created for part of the existing area code; those fortunate to be in the territory whose area code remains unchanged do not alter their dialing practices at all. All persons dial seven numbers within their area codes in the old and in the new area code territories, respectively. They dial three extra numbers to reach another area code. However, under the "overlay" option, an area code is added to a geographic area; both

the new overlay area code and the existing code serve the same area simultaneously, and everyone dials eleven numbers (1 + 10) to reach everyone, no matter where geographically. Needless to say, this option has not been popular with consumers. However, it has been adjudicated for the Bay Area starting in 2000 (see discussion below).

The rationale behind the overlay option is to begin the process of an eleven-number system, thus opening up all the numbers in area codes which are not heavily used. The Commission believes that the proliferation of new area codes means that an increasing number of calls now have to be made by entering 1 + 10 numbers anyway. Indeed, in urban areas, a call more than ten to fifteen miles away may now require a 1 + 10 dial. Hence, the PUC believes that popular opposition may be declining for 11 numbers as a regular format. Many consumers disagree.

While this overarching rulemaking proceeds, the PUC continues to review specific numbering plans. On April 26, ALJ Pulsifier approved an overlay relief plan for the 650 numbering plan covering parts of San Mateo and Santa Clara counties (R. 95-04-043, I.95-04-044). The 650 area code was created when the 415 Bay Area code was split in 1997. It was projected to last until 2009, but is now projected to fill up by the third quarter of 2001. Much of the new competition in the local exchange market which has occurred is in this geographic area, and is one reason for the exhaustion of numbers.

Significantly, this decision for the first time will require all subscribers to use 1 + 10 dialing to reach another number, including one nearby. There will be no seven-number shortcut within the area. The decision is based on the policy of allowing competition, and the need to put all competitors on an even playing field. If PacBell customers are allowed to dial seven numbers but competitors must dial eleven, they suffer a disadvantage which impedes competitive challenge. Hence, because there is not room for all providers, especially with number portability, at the seven-number range, all must use eleven. This is the "overlay" model referred to above. At this writing, the new plan is proposed to begin on September 16, 2000 in San Mateo and Santa Clara.

♦ **Telecommunications Standards Proceedings: Marketing Abuses.** In June 1998, the PUC initiated a rulemaking proceeding "to determine the types of service quality standards that should be applicable to telecommunications carriers" (R.98-06-029). The effort is intended to ensure "that high levels of service quality will prevail" as competition takes hold. The PUC's inquiry follows General Order (GO) 133-B. Last revised in 1992, GO 133-B was issued "prior to the dramatic growth in consumer demand for additional telecommunications services and lines to customers' premises, and prior to all but the earliest stages of competition development." GO 133-B is applicable to all telephone utilities providing service within California; these utilities compile service quality data on a monthly basis and report to the PUC on a quarterly basis when any reporting unit does not meet the specified service level criteria for any month.

The Commission noted that the number of service quality complaints regarding telephone service made to its staff almost doubled between 1996 and 1997; for this same period, complaints relating to missed commitments increased from 30 to 502, while complaints related to delayed installations increased from 171 to 703. "It is the purpose of this rulemaking to propose for comment a set of service quality standards and compliance mechanisms intended to address these and other service quality problems and set minimal standards for all customers." In July 1998, the assigned ALJ agreed to requests from consumer advocates and telephone companies to hold a two-day workshop on the issues, and to extend the deadline for briefs and comments. [16:1 CRLR 164]

On March 29, UCAN submitted testimony in the rulemaking proceeding recommending standards and reporting requirements applicable to all competitors (not merely PacBell), and which provide for the counting of busy signal calls as one measure of quality. UCAN similarly advocated calculating time expended in navigating the automatic response unit phones. UCAN's submission surveyed related service industry quality standards for possible application to telecommunications, including banks which are prohibited from deductions for purchases not made or other errors, including timelines for correction, and the two-day limitation on the holding of local checks. UCAN also cites bill collectors, who are limited in their methods by federal and state law, credit card regulation, and other precedents which have some applicability, in terms of abuse and possible prophylactic standards, to telephone service. At this writing, the proceeding remains pending.

Related investigative proceedings have continued (R.97-08-001, I. 97-08-002) directed at the specific and well-documented abuses of "slamming" and "cramming." Hence, in June 1998, the PUC's Telecommunications Division released its Workshop and Third Party Compliance Report concerning "Unauthorized Transfer of Service and Billing." Called "slamming," new competitors simply shift a consumer's account to themselves without consumer permission, and begin billing. The new procedure now requires the transfer of a new account to be accompanied by "third party verification" that the consumer has consented to it. D.98-02-009 now requires such verification to address these "slamming" (and the related "cramming") abuses. The workshop report indicates substantial compliance with the order, but the problem continues; hence, staff recommends additional measures, including most importantly: (1) revoking the licenses of offenders, (2) expansion of the third-party verification to business (as well as residential) solicitations, (3) apart from verification, informing consumers when they have been switched, and (4) removal of the economic incentive for slamming (although it is unclear how). Staff also recommends disclosure of both the PUC's complaint number and its local service disconnect policy.

♦ **PacBell Seeks Substantial Increase in Service Charges.** In May 1998, PacBell applied to the PUC for rate increases on several services which remain within PacBell's

monopoly power and the Commission's rate regulation purview. Under the proposed rate hikes, emergency interruption charges would increase from \$1 to \$4; busy line verification from 50 cents to \$2; directory assistance from 25 cents to 50 cents, with an option to raise the rate to \$1.10; calling card calls from 35 cents to 60 cents; collect and bill-to-third-number calls from 95 cents to \$1.60; person-to-person calls from \$2.95 to \$4; and inside wiring charges from 60 cents per month to \$1.50 (A 98-05-038).

The PUC held public hearings on these proposed rate increases in several cities in late 1998, and evidentiary hearings on December 1998. PacBell argued that no significant rate hikes for these services have been imposed for several years, and that they are justified by labor cost increases. Consumer advocates countered that the increasing use of technology should more than offset increases in labor and that consumers should be given a rate rollback. Briefs were submitted in January and February 1999, and a proposed decision is expected by September 1999.

♦ **Other Pending Rate-Related Proceedings.** A series of additional proceedings may relate to PacBell prices under the new and fragmented method of utility ratesetting.

• **PacBell and Price Caps.** On January 20, the PUC adopted Resolution T-16265, ordering PacBell to reduce its annual revenue by \$244 million effective in February 1999, consistent with the utility's price cap index. Note that maximum rate regulation always sets rates based on revenue and cost factors from existing numbers projected forward. They are subject to necessary review and revision as the actual numbers appear. The new incentive-based ratemaking projects ratios forward from previous levels to measure whether revenue is too high or low, and allowing efficiency gains (per unit cost reductions) to be shared by the utility. The process uses terminology such as "net Z-factor adjustments" and the "productivity-less-inflation factor adjustment." Despite protests from ORA and AT&T that the reduction is inadequate, the Commission ordered the reduction as proposed by PacBell (in the amount of \$244 million), effective February 1, 1999. By July 1, PacBell must submit specific tariffs (itemized prices) which will yield the reduced allowable revenues.

Consistent with some of the protests, the PUC ordered the use of the GDP (gross domestic product) deflator to measure inflationary change in the value of money collected as rates, and required PacBell to use that measure and to include it in all future price cap filings.

• **ISP Decision Issued.** In October 1998, the PUC issued its final decision in Rulemaking 95-04-043, Investigation 95-04-044. This proceeding was initiated by the PUC following a March 1998 application from the California Telecommunications Coalition (MCI, Sprint, *et al.*) to determine jurisdiction and charges for calls that originate with PacBell and then go through a competitive carrier. The Commission affirmed its jurisdiction over such calls and their pricing, and held that reciprocal compensation agreements between PacBell and the connecting competitive carrier would apply. When a

customer's local call originates with one local exchange carrier's network and terminates in another's network, it is attributed to the carrier from which the call originated (by federal provision). Importantly, such "local" calls are distinct from long distance calls which merely pass through interexchange switches. They involve access charges, rather than reciprocal compensation fees. Hence, they are subject to the PUC schedule for such access charges.

The impetus for this proceeding and the decision is to draw lines which will facilitate fair competition and clear delineation of who pays what for what as consumers use a PacBell phone to hook into a local competitor, who in turn hooks a consumer into the Internet. The clarification prevents PacBell from getting extra funds based on where a call goes after it leaves the local "unbundled" network controlled by the utility. Although arcane, its impact is significant given the potential complication of FCC jurisdiction over the call based on its connection into an interstate network, particularly the Internet. Commissioners Duque and Neepser dissented, with the latter contending that Internet traffic is essentially interstate and cannot be bifurcated based on the allegedly artificial distinction of a preliminary local connection. Neepser argued that the FCC's exemption of access charges for Internet traffic is not a deferral of jurisdiction to state PUCs, but merely a reflection of its policy of assisting Internet growth, and that the FCC position therefore conflicts with the majority view.

• **Pending Structural Proceedings with Ratemaking Impact.** Rulemaking 93-04-003 pertaining to network architecture and "bottleneck services" has been combined with 93-04-002 pertaining to the PUC-initiated investigation into "Open Access and Network Architecture Development of Dominant Carrier Networks." This vaguely named proceeding will determine how much PacBell will charge competing carriers for the use of its facilities (called "unbundled network elements" or UNEs). What the PacBell charge should include, and whether it should include PacBell's overhead or fixed costs, are critical decisions where PacBell is also to compete against those very carriers it charges for the use of its facilities. The interim decision of the administrative law judge is expected in November 1999, and may well be affected by now-pending litigation.

Status of Utilities' Year 2000 Preparation

The Year 2000 (Y2K) problem arises when computers are unable to recognize the date 01/01/00 as January 1, 2000, and instead read the date as January 1, 1900. It is thought that without some sort of software fix to this problem, many computers will produce nonsensical results or shut down completely. The PUC recognizes that it does not have sufficient resources to audit and correct all of the systems of the regulated utilities to make them Y2K compliant. [16: 1 CRLR 166-67] The Commission is therefore focusing its efforts on a process to verify that utilities have (a) a correcting plan, (b) a schedule for remediation, and (c) a contingency plan in the event of unforeseen problems.

In November 1998, the Commission issued resolution M-4792 requiring utilities under the jurisdiction of the PUC to file a survey which outlines how they have and are currently addressing any Y2K problems for each of their operations. The survey requires the utilities to prioritize their Y2K efforts and to address safety and reliability of service delivery systems ahead of billing and other administrative systems. The Commission reports that "many" of the utilities have responded. The Commission is in the process of determining what compliance or enforcement actions will be taken against those who have failed to respond to the survey or otherwise comply with the Commission's orders.

Beginning in March 1999 through March 2000, utilities are required to provide the Commission with quarterly updates on the status of their efforts. Contingency plans must be developed and filed with the Commission by July 1, 1999. Each utility must certify that its systems are Y2K compliant or "Y2K ready" by November 1, 1999. A "Y2K ready" system will not recognize the year 2000, but is determined to be suitable for continued use in spite of the problem. In addition, energy utilities are required to participate in regional Y2K efforts.

On April 1, in response to strong public interest in how utilities are coping with the Y2K problem, the PUC issued a second Y2K resolution intended to clarify that the public interest in utility readiness outweighs utility desires for confidentiality in most cases. Resolution M-4793 declares that all information provided to the Commission about utility readiness is open to public scrutiny. Minor exceptions were made for several utilities that demonstrated to the PUC's satisfaction that previously provided information should be kept confidential. Utilities seeking to keep information confidential must demonstrate that the information they wish to keep confidential falls within a specific exemption in the California Public Records Act, and the public interest in nondisclosure must clearly outweigh the public interest in disclosure.

The Commission realizes that the Y2K issue, if not properly addressed, has the potential to cause serious disruptions in essential utility services to California ratepayers, which may affect the public health, safety and welfare. The Commission believes that there is a "reasonable probability" that some level of Y2K problems will occur, despite the best efforts of the Commission and the utilities.

LEGISLATION

AB 1421 (Wright), as amended April 26, would codify the notion that investor-owned utilities are the default providers of gas and electrical service. Specifically, this bill would (1) require the PUC to require gas corporations to provide basic service to all of their core customers unless a customer

affirmatively chooses another supplier; (2) require public utility gas corporations to be the exclusive provider of specified services, including meter reading, billing, leak investigation, pilot relighting, and inspecting customer piping and appliances; (3) require the PUC to require electrical corporations to provide basic electrical service, including metering, billing, and collection service, to all customers unless a customer affirmatively chooses another ESP (if another provider is chosen, that entity may also provide metering, billing, and collection services to the customer); (4) delete the PUC's existing authority to investigate further restructuring of natural gas services; and (5) delete the PUC's existing authority to investigate a process for establishing default electrical service. [A. *Appr*]

AB 1003 (Wright), as introduced on February 25, would fine-tune the ongoing restructuring of the electrical services industry under AB 1890 (Brulte) (Chapter 854, Statutes of 1996), which provides for the authorization of direct transactions between electricity suppliers and end use customers, and for the creation of an Independent System Operator (ISO) and Power Exchange (PX). AB 1890 also created a five-member Oversight Board to, among other things, oversee the ISO and PX, and to determine the composition and terms of service and to appoint the members of the governing boards of the ISO and PX. The Oversight Board is the appeal board for majority decisions of the ISO's governing board.

AB 1003 would revise specified provisions relating to the creation of the governing boards of the ISO and the PX, and to the duties of the Oversight Board. The bill would require the ISO and the PX to each be administered by a governing board appointed by the Oversight Board until an unspecified date, at which time the membership of those governing boards would be reconstituted to provide for members representing entities that comprise distinguishable interest groups in the bulk energy market and members appointed to protect the public interest. The bill would authorize the governing boards of the ISO and the PX to also appoint the president of the entity, as applicable, to be a member of the governing board.

AB 1003 would also authorize the Oversight Board to review an action or a proposed action of the ISO to determine whether the action or proposed action is in the public interest of this state, and would require the ISO and the PX to give notice and information to the Oversight Board regarding proposed actions likely to affect a significant public interest. The bill would authorize the Oversight Board to engage in specified actions relating to electric restructuring, including but not limited to directing the production of records, reports, or other information concerning the reliability, security, operation, or efficiency of the electric transmission system or of the markets administered by the ISO or the PX; investigating certain matters related to the electric transmission system or

The PUC issued a second Y2K resolution intended to clarify that the public interest in utility readiness outweighs utility desires for confidentiality in most cases. Resolution M-4793 declares that all information provided to the Commission about utility readiness is open to public scrutiny.

the electric generation market; requiring specified entities to produce specified verification materials; requiring the ISO and the PX to adopt or modify standards for the public notice and open conduct of meetings of the respective governing boards of those entities; and designating representatives to attend and monitor meetings of the governing boards and committees of the ISO and the PX. Except as specified, this bill would authorize the Oversight Board to treat as confidential information obtained by the Oversight Board, if the Oversight Board makes a specified determination.

The bill would also require the Oversight Board to periodically evaluate inspection, maintenance, repair, and replacement standards adopted under existing law for the transmission facilities under its control, and to require the ISO to revise those standards if the Oversight Board makes a specified determination.

AB 1003 would also repeal Public Utilities Code section 360, which requires the PUC to ensure that existing and, if necessary, additional filings with the Federal Energy Regulatory Commission (FERC) request confirmation of certain electrical restructuring provisions, and seek the authority needed to give the ISO the ability to secure generating and transmission resources necessary to guarantee achievement of planning and operating reserve criteria no less stringent than those established by specified entities; and the portion of Public Utilities Code section 365 which requires the PUC to facilitate the efforts of the state's electrical corporations to obtain authorization from FERC for the creation and operation of an ISO and an independent PX, to participate fully in all proceedings before FERC in connection with the ISO and the PX, and to encourage FERC to adopt certain protocols and procedures. *[A. U&C]*

SB 96 (Peace). In addition to creating the ISO and the PX, AB 1890 (Brulte) stated legislative intent that California enter into a compact with western region states, and that the compact should require the publicly and investor-owned utilities located in those states that sell energy to California retail customers to adhere to enforceable standards and protocols to protect the reliability of the interconnected regional transmission and distribution systems. As amended March 11, SB 96 would repeal that intent provision and, instead, state the intent of the legislature to provide for the evolution of the ISO and the PX into regional organizations to promote the development of regional electricity transmission markets in the western states and to improve the access of consumers served by the ISO and the PX to those markets. The bill would state that the preferred means by which that voluntary evolution should occur is through the adoption of a regional compact or other comparable agreement.

If enacted, this bill would reflect legislative intent that the ISO and the PX evolve into organizations that would serve the western regional market and would be governed by members selected by participating states and overseen, jointly or separately, by those states. This change reflects FERC's position that the ISO and the PX, as corporations engaged in interstate

commerce of electricity transmission and wholesale power, may not be governed exclusively by California. *[A. U&C]*

AB 1393 (Wright), as amended April 15, would require specified electric corporations—on and after January 1, 2002—to collect a surcharge to support cost-effective energy efficiency and conservation programs, and require the PUC to allocate the funds in accordance with criteria established by the legislature. Specifically, this bill would: (1) require the PUC to order specified electrical corporations to collect and expend funds for cost-effective energy efficiency and conservation activities, and to allocate 35% of those funds to programs that affect residential energy use; (2) require specified electrical corporations, on and after January 1, 2002, to collect a surcharge of 1.5 mills (\$0.0015) per kilowatt hour to support cost-effective energy efficiency and conservation programs; (3) require the PUC to allocate the funds in accordance with administration and expenditure criteria established by the legislature; (4) require the PUC to order electrical corporations to collect and expend funds for targeted energy efficiency programs for low-income electricity customers in accordance with a prescribed schedule; and (5) state legislative intent that special emphasis be placed on programs to reduce electricity bills of customer groups that have been historically underserved by energy efficiency or conservation programs. *[A. Appr]*

SB 282 (Kelley), as amended April 20, would require the PUC to include in its annual work plan access guide a statement that specifies activities that it proposes to reduce the costs of, and rates for, energy, including electricity, and for improving the competitive opportunities for state agriculture and other rural energy consumers. SB 282 would also require the PUC to include in its annual report submitted to the Governor a statement that specifies its activities and achievements in reducing the costs of, and rates for, energy, including electricity, for state agriculture and other rural energy consumers. *[S. Appr]*

SB 427 (Peace), as amended April 7, would require the PUC to allow full-cost recovery by an electrical corporation for a specified tree trimming program, under which an electrical corporation may trim or remove any tree that grows naturally in the rights-of-way or easements of the corporation after documenting all trees and other major vegetation growing in its rights-of-way and easements. The bill would require the PUC to create a state advisory committee to select and list trees appropriate for each region of the state; require the Department of Fish and Game to assist electrical corporations in developing a plan to minimize the impact on nesting birds of tree trimming programs, and to review the plan every five years; and require the Department of Forestry and Fire Protection to develop and implement a program to minimize the risk of plant disease transmission in the conduct of tree trimming or removal by an electrical corporation. *[S. NR&W]*

SB 1159 (Sher), as amended April 21, would relax the current safeguards against "slamming," the unauthorized switching of a customer's electric service provider (ESP). The bill would

delete an existing third-party verification requirement for residential customers when the change is made via the Internet or via written transaction. The required verification would be preserved for telemarketing transactions. *[S. Appr]*

SB 1194 (Sher), as amended April 20, is a PUC-sponsored bill that would require the Commission to study the feasibility of administering the low-income and energy efficiency programs mandated by AB 1890 (Brulte) through a nonprofit public benefit corporation. Through 2001, these programs are being administered by the major electric utilities. Beyond 2001, however, the PUC has expressed a preference for independent administration of the programs, and created two independent organizations, the Low-Income Governing Board (LIGB) and the California Board for Energy Efficiency (CBEE), for that purpose. The proposed independent administration of these programs—that is, outside state government and civil service requirements—prompted labor interests to intervene and challenge the PUC's proposal. The challenge led to a State Personnel Board ruling rejecting the PUC's creation of the LIGB and CBEE as independent bodies. Thus, the PUC seeks legislative input on the issue and the authority to study the issue further. *[S. Appr]*

SB 1217 (Polanco), as amended April 21, is similar to SB 1194 (Sher). Existing law requires the PUC to administer six telecommunications programs, created pursuant to statute and paid for by consumers via their telephone bills; the PUC appoints advisory boards to each of these programs to assist in their administration. SB 1217 would codify the advisory boards for each of the six programs in statute, and create accounts in the state treasury to hold the program funds. Effective June 1, 2000, this bill would transfer administration of the low-income rate assistance program and the low-income energy efficiency program to the Department of Community Services and Development. SB 1217 would designate San Diego Gas & Electric Company, Southern California Edison Company, Pacific Gas & Electric Company, and Southern California Gas Company as administrators of the remaining programs through December 31, 2001, and require the PUC, by January 1, 2002, to study the feasibility of administering these activities through a nonprofit public benefit corporation. This bill is also somewhat similar to AB 2461 (Campbell), which was vetoed in 1998 by then-Governor Wilson. *[16:1 CRLR 168] [S. EU&C]*

AB 991 (Papan), as amended April 22, would enact the California High Speed Internet Access Act of 1999. The bill would require the PUC to monitor and participate in a specified proceeding of the Federal Communications Commission (FCC) addressing whether to require incumbent local exchange carriers (LECs) to permit interconnection by competitive data LECs at any technically feasible point, to permit those competitive LECs to provide high bandwidth data services over telephone lines with voice services provided by incumbent LECs.

If the FCC adopts an order on or before January 1, 2000, with regard to that federal proceeding, the bill would require

the PUC to comply with, and implement, as the PUC determines necessary, that order, consistent with state and federal law, within 90 days from the date the order becomes final. If the FCC does not adopt an order in that proceeding on or before January 1, 2000, the bill would require the PUC to examine the technical, operational, economic, and policy implications of interconnection and, if the PUC determines it to be appropriate, to adopt rules to require incumbent LECs in this state to permit competitive data LECs to provide high bandwidth data services over telephone lines with voice services provided by incumbent LECs.

This bill is intended to give California residential consumers a choice of high speed data providers using "digital subscriber line" (DSL) technology. DSL allows a high-speed data channel to run on higher frequencies above the frequency used to deliver analog voice signals. By separating the line into a voice channel and a high-speed data channel, a single telephone line can carry both voice and data services simultaneously and, potentially, each service could be provided by a different carrier. DSL provides residential users with the ability to connect to the Internet at speeds 50 times faster than modems. This bill is intended to ensure that customers can choose to receive DSL service from either the incumbent LEC or a competitive LEC at an affordable price. This bill does not affect the provision of high-speed Internet access by cable television companies. *[A. Appr]*

AB 365 (Wright), as amended April 28, would require the PUC to develop and place on the Internet information about local and long-distance telephone services offered by providers and other consumer information. The bill would prohibit the Commission from implementing the above requirement until July 1, 2001, unless otherwise authorized by the Department of Information Technology. *[A. Appr]*

AB 818 (Knox), as amended April 28, would require the PUC to develop and implement any measures that it determines to be available for telecommunications service providers that possess telephone number prefixes to efficiently allocate telephone numbers within those prefixes. The bill would require the PUC to immediately request the FCC to delegate to the state authority over telecommunications under specified federal communications law, to the extent that the delegation will permit the PUC to implement specified measures. The bill would require the PUC to request, and telecommunications providers to provide, certain information on telephone number use. The bill would require the PUC to impose certain requirements on telephone number assignments, and to prepare and submit to the legislature a report on that information on or before July 1, 2001.

The intent of this bill is to stall the introduction of new area codes (see MAJOR PROJECTS). The bill makes several findings: (1) the number of area codes in California has more than doubled since 1991; (2) the proliferation of area codes has caused undue hardship on citizens of California, who have begun to be forced into new area codes after years of having the same telephone number; (3) that proliferation

has substantially increased costs to businesses, individuals, and government agencies; (4) new area codes require the replacement of business cards and letterhead stationery, and companies must use employee time contacting their customers to ensure that those customers are able to continue to reach the affected company; (5) the proliferation of area codes has also reduced worker productivity as employees begin using new and unfamiliar area codes; (6) it is the policy of the legislature that existing area codes should be preserved for as long as possible; and (7) it is the further policy of the legislature that the hardship currently experienced by telecommunications customers as a result of the creation of new area codes should be alleviated. *[A. Appr]*

SB 932 (Bowen), as amended April 20, would require a telephone corporation that provides a new telephone service or feature to subscribers to immediately notify each subscriber in writing of that new service or feature. The bill would authorize a subscriber, within five days from the date that the subscriber receives such a notice, to request the telephone corporation to suspend the provision of any telephone service or feature described in that notice, and would require the telephone corporation, upon receipt of such a request, to suspend the provision of the specified telephone service or feature. The bill would prohibit a telephone corporation from imposing any charge for the suspension of a telephone service or feature; prohibit a telephone corporation from imposing any charge for any telephone service or feature that a subscriber does not use; and require a telephone corporation to reimburse a subscriber for any charge imposed by that corporation for the inadvertent or unauthorized use of a telephone service or feature.

SB 932 would also require a telecommunications service provider to provide a potential subscriber with clear information about a telecommunications service offered, prior to purchase, including but not limited to information about prices, service options, and the terms and conditions of service. The bill would require an advertisement for a telecommunications service to disclose price information. The bill would also require a telecommunications service provider that provides local telephone service to provide subscribers with telephone directories. The bill would prohibit a telecommunications service provider from requiring a subscriber to deposit a sum of money with the provider prior to establishing an account and furnishing service that exceeds a specified amount, or from disconnecting the local telephone service of a subscriber for nonpayment of charges imposed by a third party. The bill would authorize a telecommunications service provider to require the social security number of a subscriber to establish creditworthiness only if the provider determines that no other reasonable means is available. Finally, SB 932 would require the Commission to create a means by which a telecommunications service subscriber may compare prices among telecommunications service providers. *[S. Appr]*

AB 1263 (Thomson), as amended April 7, would create the California Wireless 911 Task Force, consisting of speci-

fied representatives of the wireless telecommunications industry and state and local government. The task force would be charged with reviewing and recommending improvements to local emergency telephone services for wireless telecommunications end users. *[A. Appr]*

SB 177 (Peace and Burton), as amended April 21, would limit the eminent domain power of public utilities. Existing law explicitly permits public utilities, with the exception of cable television corporations, to exercise the power of eminent domain. This bill would prohibit telephone corporations from condemning property unless that telephone corporation is a carrier of last resort to provide telecommunications services to unserved areas, and establish a process by which a public utility may condemn property for the purpose of competing with another public utility. This process would require a finding by the PUC that either (a) the public utility is providing services as a provider of last resort to unserved areas, or (b) the public interest requires the project, the property is necessary for the project, if the property is not acquired the hardship to the public utility outweighs any hardship to the property owners, and the project is located in a manner most compatible with the greatest public good and least amount of private injury.

The bill's authors maintain that in this era of deregulated and proliferating utilities, the eminent domain power that was established in the nineteenth century is due for revision. The authors believe that it is appropriate to allow the PUC to more closely regulate the condemnation power of utilities. *[S. EU&C]*

AB 1658 (Committee on Utilities and Commerce), as introduced March 18, is a technical clean-up bill sponsored by the PUC. It conforms the Public Utilities Code to name changes of PUC divisions and to federal preemption in the regulation of railroads and trucking, among other technical changes. The bill is largely copied from AB 1605 (Committee on Utilities and Commerce), which was vetoed by Governor Wilson in 1998 because it conflicted with another bill and because it made changes to the PUC's Deaf and Disabled Telecommunications Program of which Wilson disapproved. *[16:1 CRLR 168] [A. Appr]*

AB 1352 (Longville), as introduced on February 2, would create the California Trucking Commission to educate motorists on the importance of the trucking industry, topics relating to highway safety, and sharing the road with trucks. The Commission would be authorized to publish and disseminate materials, develop educational programs, and perform any other activities required to educate the public concerning highway safety in relation to motor vehicle interactions with trucks. The Commission would be funded by an assessment on trucking companies, and the bill would not become effective until trucking companies vote by referendum in favor of the bill. *[A. Trans]*

AB 301 (Wright), as amended April 13, would require the PUC to permit interested parties to petition the Commission to adopt, amend, or repeal a regulation. If a petition is

filed, the Commission must consider it and, within six months from the date of receipt of the petition, either deny the petition or institute a proceeding to adopt, amend, or repeal the regulation at issue. If the PUC denies such a petition, it must include a statement of reasons for the denial in its decision. The bill would require the Commission to amend its rules, on or before July 1, 2001, to provide more specific procedures for handling a petition. [A. Appr]

SB 310 (Peace), as introduced on February 4, would prohibit the PUC from enacting or implementing any decision, order, or rule that interferes with the rights and obligations of the directors of a corporation, including a utility holding company, to efficiently and effectively discharge their fiduciary obligations to the corporation's shareholders.

The bill is apparently intended to supercede the PUC's affiliate transaction rules, which are intended to facilitate the establishment of a competitive energy marketplace by ensuring that utilities do not engage in anticompetitive behavior with affiliated companies. The bill finds that "the adoption and enforcement by the Commission of rules against self-dealing, cross-subsidization, market power, and other anticompetitive activities, however, must not interfere with the ability of a utility holding company to efficiently and effectively discharge its fiduciary responsibilities to its shareholders." [S. EU&C]

SB 33 (Peace), as amended April 5, would change the way the PUC President is chosen. Currently, the members of the PUC elect one of their number as President of the Commission; this bill would require the Governor to appoint the President of the PUC. The bill would also subject the Commission's Executive Director and General Counsel to the direct control of the PUC President; currently, the Executive Director and General Counsel are hired, fired, and directed by the Commission as a whole. The bill would also permit the Governor to appoint up to four advisers for each Commissioner. [S. Appr]

SB 531 (Baca), as amended April 20, would require the PUC—by July 1, 2000—to establish a procedure to permit the filing of complaints via e-mail and over the Internet. The electronic filing method would be available only for complaints where the amount in controversy does not exceed the jurisdictional amount of small claims court (currently \$5,000). [S. Jud]

LITIGATION

On January 19, the U.S. Supreme Court denied *certiorari* in *SBC Communications, et al. v. FCC, et al.*, leaving intact the decision of the Fifth Circuit Court of Appeals at 154 F.3d 226 (1998). In this case, and in related cases in other circuits, SBC challenged a provision of the federal Telecommunications Act of 1996 under which the "Baby Bells" (Regional Bell Operating Companies or "RBOCs") divested from AT&T may not enter into long distance competition unless and until each allows viable competition within its respective local telecommunications markets. The case attracted

numerous parties, including PacBell, as well as more than 30 *amici curiae* contributions.

The Telecommunications Act of 1996 included a number of "special provisions" applicable only to the twenty RBOCs. Under the Act, a RBOC may not enter into long distance competition without prior approval of the FCC, which is to grant approval to a RBOC only after certifying that local competition exists; even then, long distance service must be provided through a separate affiliate. Similar restrictions apply to manufacture of telephone equipment. Finally, the RBOCs may not engage in electronic publishing or alarm monitoring services until February 8, 2001 unless by separate affiliate or joint venture, and—in the case of alarm monitoring—only if they were so engaged prior to November 30, 1995. These provisions were challenged by the Baby Bells in this case, and in a related case filed in the D.C. Circuit, which upheld the statute on March 20, 1998. *SBC Communications v. FCC*, 138 F.3d 410 (D.C. Cir. 1998). In both cases, the RBOCs alleged that the special provisions violate their first amendment rights, constitute a bill of attainder (unconstitutional legislatively imposed punishment without judicial due process), and breach equal protection standards under the fourteenth amendment. The Fifth Circuit similarly upheld the statute and its special provisions, rejecting the claims by the RBOCs, and is of special importance because of the denial of *certiorari* by the Supreme Court applicable to it.

The RBOCs' bill of attainder argument contends that the RBOCs were legislatively separated out for punitive treatment due to their association with AT&T and its anticompetitive wrongdoing, that such attribution is unfair guilt by association, and is not constitutionally determinable by legislative (political) act. The district court agreed, striking the restrictions on this basis. The Fifth Circuit reversed. The court did not reach the interesting issue of whether bill of attainder objections can apply to corporations (as opposed to individuals). However, it rejected the bill of attainder argument because while legislation may single out one or a group for disparate treatment (rather typically done in the case of tax loopholes), it must also impose "punishment," which is not the intent here. Rather, the special provisions are designed prophylactically to prevent a problem. The RBOCs argued that such a motivation should compel similar treatment of their competitors, which are now arrayed within the long distance market and remain free to impede competition within the constraints of antitrust law, while the RBOCs are compelled to affirmatively guarantee competition. The problem with the RBOCs' arguments, as the court found, is that the history and remaining quantum of monopoly power in the RBOCs make them functionally different and appropriate for disparate regulatory treatment, including special obligations to stimulate competition (see MAJOR PROJECTS).

FUTURE MEETINGS

The full Commission usually meets every other Thursday in San Francisco.