

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking on the)
Commission's Own Motion to Develop)
Standard Rules and Procedures for) R.09-04-012
Regulated Water and Sewer Utilities)
Governing Affiliate Transactions and the)
Use of Regulated Assets for Non-Tariffed)
Utility Services.)
_____)

**AMENDED COMMENTS OF THE UTILITY REFORM NETWORK (TURN)
ON THE STAFF REPORT TO COMMISSIONER BOHN AND JUDGE GAMSON
RE OIR.09-04-012 AND RELATED WORKSHOPS**

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I. INTRODUCTION

Pursuant to the November 4, 2009 *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge Determining the Scope, Schedule, and Need for Hearing in this Proceeding* (“Scoping Memo”), and the subsequent *Administrative Law Judge’s Ruling Modifying the Schedule* (“Ruling”), The Utility Reform Network (TURN) hereby submits its Comments on the *Staff Report to Commissioner Bohn and Judge Gamson re OIR.09-04-012 and Related Workshops* (“Staff Report”).

This proceeding is crucial to the Commission’s ability to effectively regulate the operations of investor-owned water utilities. Previously affiliate transaction rules were developed and applied separately for individual companies and their enforcement overlapped and sometimes conflicted with rules and requirements governing the provision of non-tariffed products and services (NTP&S). The purpose of this proceeding is to develop a generic set of rules for both types of activities that will provide clarity to the Commission, its staff, the water utilities and interested parties so that the Commission may ensure that affiliate transactions and the provision of non-tariffed products and services by water utilities are undertaken consistent with the public interest.

The need for and the objectives of the rules were clearly spelled out by both ALJ Gamson and Commissioner Bohn at the February 23, 2010 Pre-Hearing Conference. ALJ Gamson noted that the rules “should be pro-consumer choice. They should be anti-market power abuse, and they should be pro-fair and reasonable rates.”¹ Commissioner Bohn stated that the Commission wishes to be fair to the consumer and fair to the competitive landscape. He pointed out that regulated water companies have important inherent capabilities such as access to bills, access to customer information and proximity “that can if not carefully dealt with overwhelm any other

¹ R.09-04-012, February 23, 2010 PHC, p. 62, L. 4-7.

kinds of competition.” At the same time, he noted, these capabilities can also benefit customers without being anticompetitive. That, in a nutshell, is the goal of these rules.

The draft rules initially contemplated by the OIR have been significantly modified, as have the revised draft rules circulated by staff on December 31, 2009. Thanks to the efforts of staff and parties during the workshops, the rules were further revised and streamlined. There are, nonetheless, areas of disagreement among parties. TURN’s comments focus on those issues that we believe are crucial to the goals of protecting customer interests and deterring anti-competitive behavior.

II. AFFILIATE TRANSACTION RULES

Affiliate transaction rules should ensure that regulated water utilities pay only a reasonable share of the costs associated with operations and assets (including, for example, personnel, equipment and intellectual property) used by both the regulated company and any affiliates, including out-of-state affiliates. The rules must also ensure that the regulated utilities are adequately compensated for services, including the use of personnel, plant, and operating support (e.g., billing) that they may provide to their affiliates. Finally, the rules should guard against anti-competitive behavior by the affiliates of regulated utilities.

A. Jurisdiction and Applicability to Utility Affiliates (Affiliate Rule I – opening paragraph, Rule 1.A)

- **Should the Affiliate Transaction Rules Supersede Prior Commission Decisions?**

At the workshop, parties discussed the application of these rules in instances where prior Commission decisions, mostly from rate cases, would also cover affiliate transaction issues. CWA proposes to delete language that would have made it a rebuttable presumption that existing Commission rules for each utility or parent company would still apply except where those rules

conflict with the Affiliate Transaction Rules. TURN disagrees with this proposed change. It is not controversial to suggest that these proposed affiliate transaction rules should take precedence over existing rules where there is a conflict. However, the controversy comes in discussing the rule of those existing rules as complementary to the new affiliate transaction rules or if those existing rules should be superseded and have no effect. TURN prefers to use the Commission's previous work on these issues by applying the utility-specific rules where appropriate. The rules adopted in General Rate Cases (GRCs) can be used to fill in any gaps with the affiliate transaction rules if necessary to properly deal with a specific utility and its corporate structure.

- **Should the term “transactions” be substituted for the term “dealings and transactions”?**

At the workshop, the language contained in the opening paragraph was edited. The language originally stated that the rules set forth the practices and restrictions that shall be observed when water and sewer utilities regulated by the Commission have “dealings and transactions” with their affiliates. One proposal suggested by CWA and agreed to by DRA, was the deletion of the term “dealings” so that the rules would only apply to transactions. Upon further consideration, TURN does not support this proposed revision. The term “dealings” is broader than the term “transactions.” For example, if employees routinely provide important information verbally to an affiliate, and the information allows the affiliate to receive a competitive advantage, such actions may not be deemed transactions and thus would not fall under these rules unless the broader term of dealings was included.

- **Should the Affiliate Transaction Rules Apply Only to Unregulated Affiliates?**

CWA argues that the draft rules should be modified to stipulate that the affiliate transaction rules should only apply to transactions between the regulated utility and unregulated

affiliates.² An argument put forth to support this proposal is that the operations of regulated affiliates will be examined in GRCs and, therefore, their inclusion in the rule is unnecessary.

Following the workshops, TURN further considered the issue and now believes this proposal should not be adopted. Under the proposed language, it appears that parties could argue that the requirements in these rules would not apply to transactions between the regulated utility and regulated affiliates. Presumably, different rules and conditions would be developed for those transactions within a GRC. There is no dispute that GRCs can be the forum for application and enforcement of the affiliate rules to specific transactions and scenarios; however, the framework and rules themselves should be the same for all affiliate transactions regardless of whether both parties are regulated. One of goals of this proceeding is to streamline the application of affiliate transaction rules and make the process more standardized. Pushing the review of such transactions, and the rules applicable to such transactions, into rate cases would defeat the purpose of the goal. If the affiliate transaction rules apply to all regulated and non-regulated affiliates, in a GRC the Commission can quickly and easily verify whether the regulated utility and the regulated affiliate are complying with the rules, but there would be no need to develop individualized rules. This would streamline the process of regulatory review. Moreover, not all interests who are affected by affiliate transactions are parties to GRCs, so keeping track of different rules for each regulated affiliate would be time consuming and difficult. Applying the affiliate transaction rules consistently to all transactions will increase the transparency of the process for the public as well as the Commission.

² Results from Workshops held for R.09-04-012, staff notes, Affiliate Transaction Rules, Rule 1.

- **Should the Affiliate Transaction Rules Apply Only to Affiliates With Operations in California? (Affiliate Rule I.A., I.K.)**

As noted by staff, parties did not reach agreement on this issue. TURN believes that the Affiliate Transaction Rules should apply to transactions with all affiliates, regardless of their location. While the Commission does not have the authority to regulate the operations of utilities and their affiliates in other states, it does have the authority to adjust rates and review proposed projects for regulated California services to account for transactions with out-of-state affiliates.

For this reason, Rule 1.K. should be retained and the edit suggested by DRA should be incorporated. Rule 1.K. permits a multi-state utility, subject to the jurisdiction of other state public utility commissions, to file an application requesting a limited exemption from the affiliate rules. DRA's proposed amendment would stipulate that an application might be filed "if such out-of-state transactions do not affect the utility's operations and operating costs inside California." Under the rule as originally written, the applicant would have the burden of proof and this provision should be retained.

- **Should the Affiliate Transaction Rules Apply Only to Affiliates Offering Services in Competitive Markets? (Rule I.A.)**

No. The Affiliate Transaction Rules should apply to transactions between a regulated utility and all of its affiliates regardless of location or market status. While guarding against the risk of anti-competitive behavior is one element to these rules, the rules serve other purposes including ensuring the financial health of the regulated utility and prevention of cross-subsidy. These later considerations exist for transactions between regulated companies even in non-competitive markets.

- **Should staff have “sole authority” to decide whether to apply these rules to Class B, C, D utilities? (Rule I.A.)**

DWA should not have sole authority to decide whether to apply these rules to Class B, C, and D utilities. A determination should be made and then the Commission could consider exceptions for individual smaller water companies in Class C and D. One possible mechanism would be a requirement that Class C and D companies be permitted to request an exemption through a Tier 3 Advice Letter, subject to review by DWA, open for comment to all parties and approved by the Commission. TURN agrees with DRA that further discussion is needed about the process and the criteria that would be considered when deciding whether or not to grant an exemption.

- **The Rules Should Specifically State the Commission’s Objectives (Affiliate Rule I.L.)**

CWA proposed editing Rule 1.L to alter the draft language describing the Commission’s intent to use the rules to foster its stated objectives. The original language described the objectives as “fostering competition and protecting consumer and ratepayer interests.” CWA proposes deleting that sentence and substituting “fostering the public interest, and as an element thereof, preventing anticompetitive conduct.”³ TURN believes that the rules should reflect the Commission’s objectives as described by both ALJ Gamson and Commissioner Bohn at the February 23 PHC. There will inevitably be disputes over the interpretation of these rules at some point, and the Commission’s goals should be crystal clear. Therefore, TURN believes Rule 1.L should specifically state that an objective is to “protect consumer and ratepayer interests.” It would be reasonable to change the term “fostering competition” to “preventing anti-competitive behavior.”⁴ The goal should be to prevent the abuse of market power on the part of regulated

³ Results from Workshops, Rule I.L.

⁴ February 23 PHC, p. 62, 65.

utilities, so that they do not enjoy an unfair competitive advantage. This has a slightly different meaning than the notion of an affirmative effort to foster, or generate, competition.

B. Definitions (Rule II)

- **Affiliate (Rule II.D.)**

The dual purpose of the affiliate transaction rules is to ensure rates charged by the utility are reasonable and ratepayers are not cross-subsidizing other operations, and also to prevent anti-competitive behavior. These two issues should be paramount in defining the term “affiliate” because this definition will determine which transactions are covered by the rules. The proposals for defining affiliate run the gamut from ownership or control, either directly or indirectly, by a utility of 5% (PURPA), 10% (Draft Rules) or 50% (CWA) of outstanding voting securities.

TURN believes the Commission should adopt the 10% standard. Utilities (and other corporations) enter into affiliate relationships for strategic purposes. A key concern of the Commission is to ensure that utilities cannot use their position in the marketplace to obtain an unfair competitive advantage. One benefit to being affiliated with a utility is the opportunity to gain access to customer information and data obtained through billing. As Commissioner Bohn noted, control of such information can confer an unwarranted competitive advantage.⁵ Under Rule III. B. a utility would be prohibited from assisting affiliates operating in competitive markets in California. Setting the threshold for being deemed an affiliate at 50% would be far too generous. The advantages conferred to an affiliate by virtue of having access to bills and customer information are the same regardless of the level of ownership. As contemplated in the

⁵ February 23 PHC, p. 65, l. 18-27.

revised draft rules, ownership of 10% or more outstanding voting securities in an entity would constitute a rebuttable presumption of substantial operational control.

- **Definition of Cost (Rule II.E., K.)**

The definition of “cost” and its associated concepts is probably one of the most contentious issues in public utility regulation. Of the definitions presented in draft rules and discussed at the workshop TURN is most comfortable with defining “costs” as:

direct costs plus all fully allocated capital and expense amounts, including all management, administration, overhead, and indirect allocations

We recognize that further word-smithing will be required. The definition of cost should incorporate:

- The costs that are brought into existence as a direct result of providing the service or group of services (direct costs)
- The costs that are avoided if the service or group of services is not provided.⁶
- The indirect costs that cannot be directly attributed to specific services or products, and are common to the entire firm or shared among a subset of products and services, some portion of which can reasonably be recovered through the regulated services offered by the utility.

Combined, these three elements are essential to ensuring that ratepayers do not cross-subsidize the operations of the affiliate. A service must clearly pay all of its direct costs in order to avoid improper cross-subsidy. Avoided costs are a means of determining which costs should be considered common or indirect costs for which an affiliate service or product should pay some share. The avoided cost concept can be understood from the following hypothetical. Assume that a regulated utility has an affiliate offering a service utilizing trucks, information

⁶ The first two criteria are set forth in Title 83: Public Utilities, Illinois Administrative Code, Chapter 1, Illinois Commerce Commission, Subchapter f: Telephone Utilities, Part 791 Cost of Service, Section 791.30 Cost Causation Principle.

systems and personnel. The avoided cost concept is used to identify those assets that are necessary for the provision of the affiliate service. If the utility decided to stop providing the regulated service but its affiliate stayed in business, the affiliate would still need to use the trucks, information services and personnel. The same holds true if the affiliate ceased operations. Since those assets are used for provision of both utility and affiliate services, they are indirect, common or shared costs. Some portion of them should be recovered from both services, and it is not reasonable to recover the entire cost of any of the assets from only one of the services. The exact apportionment has to be determined in a rate case based on facts specific to the situation.

Ensuring that the cost standard takes into account some portion of the costs for assets used by an affiliate is equally important to the interests of ratepayers and fair competition. All of the parties agree that cross-subsidy is harmful to ratepayers. On the other side of the coin, failing to take such costs into account for affiliate services would provide the regulated utility with an unfair competitive advantage. Using the previous example, if a portion of the costs of trucks and information services and personnel were not taken into account the affiliate would receive their use free of charge, while a competitor would have to pay for these assets.

- **Customer Information (Rule II.J.)**

The definition of “customer information” as revised by CWA is unacceptably narrow. As drafted it limits the information covered by these rules to information that is both “non-public” *and* information acquired in the course of offering service. The original proposed definition only included “non-public” information that was specific to a customer. TURN suggests that the broader definition of “non-public” information be adopted here and CWA’s edits be rejected.

This will serve the goal of limiting any anticompetitive affects of information sharing among affiliates and regulated utilities in addition to providing broad privacy protection for customers.

TURN recognizes that these rules address the use of customer information in the context of providing affiliates with an unfair competitive advantage and not necessarily on the matter of customer privacy. However, if the Commission is going to develop a definition of customer information for the water industry it should include considerations of customer privacy so that the definition would be consistent across future regulations and enforcement and implementation would be facilitated. Therefore, considerations of customer privacy should be included in these rules.

Public Utilities Code §2891 protects customer information of telephone corporations. That statute provides broad protection not only for customer usage data but also credit information, demographic information that is specific to the customer, and services purchased from a third party, among other things. The concept of “non-public” information will need further clarification and should include any individually identifiable piece of customer information except perhaps zip code. If the goal of these rules is to limit anti-competitive impacts of information sharing, then even handing over a simple list of names and addresses of customers should be limited and subject to non-discrimination rules. The Legislature has made it a priority to protect the privacy of utility customers and this Commission should enforce that priority with a robust definition of customer information that will not only protect against anti-competitive affects but protect customer privacy.

- **Definition of Indirect Cost (Proposed Rule II.K.)**

At the workshop, CWA proposed adding this definition of “indirect costs” to the rules:

“Indirect Costs” mean those overhead costs that are shared by the utility and its affiliates and are so general in nature as to require proration based on a combination of several pertinent factors. The four factor test is one method of allocating indirect costs.

TURN does not support this definition. “Indirect Costs” are costs of production that cannot be assigned to a particular output. This is a more accurate and straightforward definition than that proposed by CWA. The definition of “indirect cost” should not include suggestions as to how such costs should be apportioned. The Four Factor test is one means of allocating indirect costs but it is not the only method and it may not be a reasonable method, depending upon the facts of a case. It would not be wise to include a particular method of allocating indirect costs in the rule because this could be taken to mean that utilizing that methodology would automatically be deemed reasonable when the facts in evidence may show otherwise.

C. Utility Operations/Service Quality (Rule III.)

- **Introductory Language (Rule III)**

The introductory language in Rule III describes the Commission’s intent in adopting these rules. Language developed at the workshop states, in part, that “[t]ransactions between a utility and its affiliates...shall not result in any degradation of the reliability, efficiency, adequacy, or cost of utility service.” CWA proposes inserting the word “material” before the term “degradation.” TURN opposes this suggestion. The proposed Rule already specifies that a “degradation” in service must have occurred, which should be sufficient to warrant Commission attention. The Rule should not have a further qualifier of “material” degradation. Further, it is not clear what the term “material” means. The language could be used to argue that an adverse impact on service resulting from affiliate transactions was not sufficiently “adverse” to matter. This is a slippery slope and the Commission should not adopt the proposal.

- **Restrictions on Utility Interaction with Affiliates (Rule III.B.)**

CWA proposed to narrow draft language limiting restrictions on utility interaction with affiliates. As originally drafted, the language read “Except as otherwise provided by these ATRs, a utility shall not....” CWA proposes modifying the rule as follows: “Except as otherwise provided by these ATRs, a utility shall not *assist an affiliate operating in a competitive market in California by....*” The Commission should reject this proposal. As discussed above, the existence or absence of a competitive marketplace is not the sole factor driving the need for these rules. Even if there were no potential for anti-competitive behavior, the need to ensure that ratepayers were not cross-subsidizing affiliates would still need to be addressed. Additionally, if the utilities are to be believed, they have no market power and do not have the ability to take any actions that could possibly be considered anti-competitive.⁷ There is no definition of “competitive market” in the rules and TURN is uncomfortable leaving the determination of where such markets exist to the judgment of the water utilities. Further, in instances where there may be competition for services provided by water utilities, that competition is mainly in the form of very small businesses, many of which are sole proprietors (e.g., plumbers) who would be harmed if the requirements in Section III.B. did not apply. It would be impossible to keep track of the extent of competition in each service territory.

Not only is the concept of “competitive markets” too subjective, it is also too limiting. Another purpose of these rules is to guard against cross subsidy and the use of captive customers to support affiliate operations regardless of the level of competition experienced by the affiliate. Any suggestion that these rules only apply to affiliates operating in a competitive market would

⁷ Staff Report, p. 2.

ignore this important objective. The original language is straightforward and offers less potential for confusion or gaming the system. CWA's proposal should be rejected.

- **Providing leads to affiliates (Rule III.B.1.)**

CWA proposes deleting this restriction. TURN believes it is important to ensure that the affiliates of regulated water utilities do not receive an unfair competitive advantage over small businesses offering the same services.

- **Authorization to Share Customer Information (Rule III.C./D.)**

Rule III.D. states that a utility shall provide customer information to its affiliates and unaffiliated entities on a non-discriminatory basis. CWA added language stipulating that this should be consistent with state law and the utility's policy on privacy. TURN opposes the proposed revisions. Previous language stating that such information could only be provided "with prior affirmative customer written consent" was deleted. The proposed revised language appears to assume that receiving customer consent is consistent with state law so that specifying the need to obtain consent would be duplicative. But that is not necessarily the case, especially for water utilities where this issue has not been addressed, to TURN's knowledge. The requirement to obtain customer consent is crucial to not only protecting customer privacy but ensuring affiliates are properly using the customer data. Such a requirement must be explicit in these rules. Further, the language proposed by CWA tacitly approves the utilities' privacy policies and it is not at all clear what those policies are. The rule should specify that affirmative customer consent is required.

In addition CWA suggests that this rule is not necessary because a previous, more generic rule, III.C., addressing the provision of "non-public or proprietary information" to an affiliate by

a utility would cover the sharing of customer information. TURN disagrees. Rule III. C. is directed toward data regarding the utility operations, not individual customer usage. Customer data is a unique type of proprietary data that should have its own specific rule due to the privacy interests of customers in addition to the anti-competitive elements of sharing that data with an affiliate.

D. Separation (Rule IV.)

- **Cost Allocation (Rule IV.B.)**

The proposed revised rule states:

The Utility and its parent and other affiliated companies shall allocate indirect costs amongst them in a manner consistent with cost causation principles, so that neither the ratepayers of the utility, nor the utility itself, shall subsidize any parent or other affiliate of the utility.

CWA proposes revising the last sentence to read “...shall subsidize any parent or other affiliate of the utility *not regulated by the Commission.*”

TURN opposes CWA’s proposed revision. Ratepayers should not be expected to cross-subsidize the services and products provided by any affiliate, regulated or not. In general TURN supports relying on cost causation principles provided that they incorporate the elements identified in our discussion of the definition of “cost” with regard to Rule I.:

- The costs that are brought into existence as a direct result of providing the service or group of services (direct costs)
- The costs that are avoided if the service or group of services is not provided.⁸

⁸ Title 83: Public Utilities, Illinois Administrative Code, Chapter 1, Illinois Commerce Commission, Subchapter f: Telephone Utilities, Part 791 Cost of Service, Section 791.30 Cost Causation Principle.

Whenever a public utility is engaged in providing multiple services using the same equipment, systems and personnel, cost causation must take into account the fact that such costs should not be solely recovered from one service or a subset of the totality of products and services that utilize the same assets.

One issue that arose in the workshop with respect to this rule is the substitution of the term “indirect” cost for “common cost.” Common costs are a type of indirect cost. “Indirect cost” is a broader term than “common cost” that also encompasses the concepts of “joint” and “shared” costs. TURN does not oppose the use of either term.

- **Transfer of Employees (Rule IV.E.)**

The language discussed at the workshop reads as follows:

E. Employees transferring from the utility to an affiliate are expressly prohibited from using non-public, proprietary utility information gained from the utility to the detriment of unaffiliated competitors.

CWA proposed the following revisions to the language:

E. Employees transferring from the utility to an affiliate *not regulated by the Commission* are expressly prohibited from using non-public, proprietary utility information gained from the utility to the detriment of unaffiliated competitors.

TURN opposes the inclusion of the caveat that the rule only applies to those affiliates that are not regulated by the Commission. The purpose of the rule is to prevent monopoly utilities and their affiliates from having an unfair competitive advantage. This is true whether the affiliate is regulated or not. The fact that the information was shared with a regulated affiliate would not change the fact that harm could be done to competitors. If CWA is proposing the caveat because this issue has been addressed previously regarding regulated utilities, then it should provide support for that assertion. Staff’s spreadsheet setting forth the Workshop Results includes language referring to “a discriminatory or exclusive fashion to the benefit of the affiliate,” that

was taken from the deleted section IV.E.2. TURN supports the inclusion of this language in the revised Section IV.E. The rule would then read:

IV.E. Employees transferring from the utility to an affiliate are expressly prohibited from using non-public, proprietary utility information gained from the utility ~~to the~~ in a discriminatory or exclusive fashion to the benefit of the affiliate or to the detriment of unaffiliated competitors.

E. Pricing of Goods and Services Between the Utility and its Affiliates (Rule VI)

• Transactions From the Utility to the Affiliate (Rule VI.1)

Rule VI.1 stipulates that transactions from the utility to its affiliates of goods and services produced, purchased or developed for sale on the open market by the utility will be priced at fair market value. TURN supports this rule. It ensures that the ratepayers who funded the production of such goods and services are fairly compensated. It also ensures that a utility's affiliate will pay the same price as any competitors who purchase the service.

• Fully Loaded v. Fully Allocated Cost (Rule VI.5)

CWA suggests changing the term “fully loaded cost plus 5% of direct labor cost” to fully allocated cost. TURN does not object to using the term “fully allocated cost” in lieu of “fully loaded cost.” Consistent with the principles of cost causation, the true percentage of work performed on behalf of the affiliate by utility employees should be reflected in the application of fully allocated costs. This may be more or less than five percent. The precise allocations will have to be addressed in GRCs.

F. Regulatory Oversight (Rule VIII)

• Requirement that Officers and Employees of the Utility and Affiliated Companies be Available to Testify in PUC Proceedings (Rule VIII.A)

Rule VIII requires the officers and employees of a utility and its regulated affiliates to be available to appear and testify before the Commission involving any transaction between the

utility and the affiliate in connection with the provisions of products and services. CWA objects to this provision and considers this requirement a “Bucket 3” request such that alternative dispute resolution may be necessary to come to a compromise, or no compromise is possible at all.

CWA’s recalcitrance on this issue is puzzling. The Commission has imposed this requirement as part of conditions it has recently applied in the approval of a transfer of control under Public Utilities Code §854 involving Valencia Water and its affiliated companies. In that docket, the Commission imposed several conditions on the approval of the transfer including,

Access to Officers and Employees: the officers and employees of Valencia and its affiliated companies shall be available to testify in any proceeding before the Commission involving Valencia.

While the Commission acknowledged that these conditions may be revised as a result of this docket, clearly the Commission found that it had the jurisdiction and legal authority to require the appearance of officers of any affiliate, regulated or not.⁹ The Court of Appeals has supported the Commission on this issue. In *PG&E Corp. v. Public Utilities Comm.*, the Court of Appeals rejected claims of the holding companies involved in the case that the Commission’s authority was limited to the regulation of public utilities. Instead, the Court stated that “the PUC’s authority to do all things “necessary and convenient” [Section 701] in the exercise of that power is not expressly limited to actions against public utilities.” The Court also ruled that as long as the Commission exercised its power to protect ratepayers in a way that directly relates to some aspect of utility regulation, then it can impose conditions on the holding company of the utility.¹⁰ These cases and Commission decisions demonstrate that CWA is incorrect in its assertion that the Commission has no authority over unregulated or out-of-state affiliates of

⁹ D.10-02-015, March 2, 2010, in A.09-10-024, Appendix C. See also, D.08-01-018 (January 10, 2008), in A07-07-025, at Appendix wherein the Commission imposed an identical conditions on a request from Lodi Gas Storage, L.L.C for transfer of control to Buckeye Gas Storage. In that Decision the Commission required that the officers of the six entities involved in the transaction be made available to testify.

¹⁰ *PG&E Corp. v. Public Utilities Comm.*, 118 Cal.App. 4th, 1171, 1199.

regulated utilities. Naturally, the scope and manner of authority that the Commission can assert over these entities is limited. However, that authority must allow for rules to require officers and employees of those affiliates to appear before the Commission on specific matters.

- **Requirement to Provide the Commission, its Staff and its Agents with Access to Relevant Books and Records (Rule VIII. B)**

TURN supports this rule. CWA argues that P.U. Code Section 314(b) does not permit this rule, because Section 314(b) specifically authorizes CPUC inspection of accounts, books, papers and documents of electrical, gas and telephone corporations and does not mention water. CWA is mistaken. The inspection of water affiliate books and records is squarely within the CPUC's implied powers, as described in P.U. Code Section 701.

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

The Commission has the power to implement this requirement and it should do so.

- **Compliance Plan (Rule VIII.C)**

The Commission should require each utility that has affiliates and is therefore subject to these rules to file a compliance plan. The plan should include a list of all affiliates, specifying for each affiliate its purpose and activities, and whether, in the utility's view, the utility engages in transactions or dealings that are subject to these rules. The plan should explain the procedures in place to ensure compliance with the rules. The plan could be included in a company's annual report. The plan should provide sufficient detail for a Commission staff (DWA and DRA) to verify that the utility has complied with these rules.

III. NON-TARIFF PRODUCTS AND SERVICES (NTP&S) RULES

A. General Applicability (Rule X, Rule X.C.1, Rule X.C.3)

There was extensive discussion of this rule in the workshop. TURN opposes the revisions proposed by CWA. In particular, we prefer the terms “unused” and “excess capacity”, contained in the original draft, to the term “available” proposed by CWA. Capacity that is “available” could also be necessary for provision of the regulated service. Conflicts could then arise if the “available” capacity was tied up in the provision of Non-tariffed products or services and was, thus, unavailable for the provision of essential service offered by the utility. Further, as noted by staff, TURN agrees with DRA that if excess capacity is used by affiliates to provide non-tariffed products or services, or if the utility provides such services to its affiliate, those activities should be subject to the affiliate transaction rules.

TURN shares DRA’s view that employees should not be treated as “excess capacity” for the purpose of offering non-tariffed products or services. DRA’s point that “excess capacity” refers to assets that are carried on a company’s books is well taken. As a general matter, we do not object to a portion of an executive’s time being allocated to affiliate operations or to non-tariffed products or services because, by necessity, officers such as CEOs, CFOs and regulatory directors are responsible for overseeing the operations of the firm as a whole and it does not make sense to have multiple employees occupying those positions, when none of them is a full-time job. However, we have concerns about the utilization of the staff who are directly involved in the day-to-day activities necessary to provide and maintain regulated services, such as the employees responsible for building and maintaining plant. Referring to such employees as “excess capacity” may invite situations where the assignment of an employee to unregulated services may trigger the need to hire additional, un-trained or lesser-trained employees for the

regulated business, to the detriment of ratepayers. The stipulation in Rule X.C.3. that the unused portion of an asset or resource may only be used to offer the non-tariffed product or service without affecting the cost, quality or reliability of tariffed utility products or services provides some comfort, but may be difficult to enforce in practice. TURN does not have an additional proposal at this time, but may expand on its position in reply comments.

D. Annual Report of NTP&S Projects (Rule XIII)

TURN supports retaining the requirements in Rule XIII.E., F. and G. pertaining to reporting of information about non-tariffed products and services essential to ensuring that ratepayers are receiving a fair apportionment of revenue. CWA proposes to delete these requirements from the list of items that must be included in an annual report.

Rule XIII.E. would require reporting of revenue allocated to ratepayers and shareholders. Rule XIII.F. would require reporting of all costs associated with NTP&S, including direct costs, allocated directs and overheads, and any additional income tax liability associated with provision of this service, along with a detailed description of how these costs are determined. Rule XIII.G. would require a complete identification of all regulated assets used in the transaction.

This information is necessary to evaluate whether the revenue splits between regulated services and NTP&S are reasonable, and to ensure that tariffed services are not cross-subsidizing non-tariffed products and services. If this information is not required to be provided in an annual report, the rules should specify that it be required as part of a GRC so that the Commission has sufficient data to evaluate the reasonableness of revenue apportionment. However, review of this data in the GRC is not ideal because the three-year gap between GRCs is too long to ensure that NTP&S are being offered in a fair and reasonable manner.

E. Provision of New Non-tariffed Products and services (Rule XV)

- **Accounting Mechanism (Rule XV.B.)**

The original draft language read:

B. A description of the accounting mechanism to be used to allocate costs between tariffed services and the NTP&S.

CWA proposes to modify the rule to read:

B. A description of the method to be used to track the incremental costs caused by the NTP&S.

TURN supports retaining the original language. Simply tracking incremental costs associated with non-tariffed products and services does not give the Commission an accurate picture of the financial impact that offering these services has on the utility, and their relationship to the provision of tariffed services. For example, “incremental costs” would not include corporate overheads. Nor would there be any indication of how the common costs associated with resources used by both tariffed and non-tariffed services were allocated. The term “incremental costs” does not capture the costs that should be partially paid by both tariffed and non-tariffed products and services. Including that term in the rules implies that only incremental costs should be considered when evaluating cost recovery for non-tariffed products and services. The Commission needs an understanding of how all relevant costs are allocated to make informed decisions on a going-forward basis.

- **Market Analysis (Rule XV.L.)**

As originally drafted, Rule XV.L would require utilities to provide a market analysis, containing a description of the market to be served by the proposed project, a list or description of current incumbents in that market and an analysis of how the utility’s entry into the market

will affect the market's competitiveness. CWA proposes deleting this section. TURN believes the requirement should be retained.

It is unlikely that a utility will venture to provide a new non-tariffed product or service without undertaking a market analysis. Such an analysis would include the first two elements of the rule – a list/description of current incumbents and analysis of how well the utility will fare in the marketplace. Providing this information to the Commission would not be burdensome. Nor should it be burdensome for the utility to provide an explanation of it will guard against engaging in predatory pricing. One of the Commission's key objectives is to ensure that the entry of regulated utilities into competitive markets does not unfairly harm small competitors. Information about the projected impact on the market is important for the Commission to consider in the course of monitoring the developments in the water industry. The requirement should be retained.

IV. CONCLUSION

For the reasons set forth above, we ask the Commission to adopt the positions advocated herein.

Dated: June 3, 2010

Respectfully submitted,

/s/ Regina Costa
Regina Costa
Telecommunications Research Director
TURN

CERTIFICATE OF SERVICE

I, Larry Wong, certify under penalty of perjury under the laws of the State of California that the following is true and correct:

On June 4, 2010, I served the attached:

**AMENDED COMMENTS OF THE UTILITY REFORM NETWORK (TURN)
ON THE STAFF REPORT TO COMMISSIONER BOHN AND JUDGE GAMSON
RE OIR.09-04-012 AND RELATED WORKSHOPS**

on all eligible parties on the attached lists **R.09-04-012** by sending said document by electronic mail to each of the parties via electronic mail, as reflected on the attached Service List.

Executed this June 4, 2010, at San Francisco, California.

/S/
Larry Wong

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