

Decision 06-04-070 April 27, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking concerning
Broadband Over Power Line deployment by
electric utilities in California.

Rulemaking 05-09-006
(Filed September 8, 2005)

**OPINION IMPLEMENTING POLICY ON
BROADBAND OVER POWER LINES**

Table of Contents

Title	Page
OPINION IMPLEMENTING POLICY ON BROADBAND OVER POWER LINES.....	2
I. Summary.....	2
A. BPL Provides High Speed Digital Communications Over Existing Power Lines	3
B. Benefits of BPL	4
1. BPL Provides an Opportunity to Increase Broadband Competition.....	4
2. BPL Could Expand Broadband Access to More Californians	5
3. BPL Provides Reliability and Cost Savings to Electricity Consumers	6
C. Federal and State Agencies Have Recognized BPL’s Potential	6
D. Goal of Decision Is to Provide Regulatory Certainty to Attract BPL Investment.....	8
E. Proposed Regulatory Framework Protects Ratepayers and Aligns Investor Risks and Rewards	10
II. Procedural Background	10
III. Third Party and Affiliate Investment in BPL	13
A. Summary	13
B. Third-Party Investment	14
C. Utility Affiliate Investment.....	15
D. Ratepayer Investment in BPL	16
E. Affiliate Transaction Rules	18
IV. Safety and Reliability	22
V. Pole Attachment Fees and Access to Rights of Way	23
A. Pole Attachment Fees.....	23
B. Underground Attachments	24
C. Access to Rights of Way.....	25

Table of Contents

Title	Page
VI. Aligning Investor Risks and Rewards.....	27
VII. Use It Or Lose It	32
VIII. Electrical Equipment Repair and Maintenance.....	33
IX. Public Utilities Code Sections 851 and 853(b)	34
A. Party Positions	34
B. Discussion	36
1. Standard for Section 853(b) Exemption	36
2. Application of Section 853(b)	40
3. Terms and Conditions Placed on BPL Transactions	43
C. Commission Notification.....	47
X. Other Issues.....	48
A. Disabled Access.....	48
B. Health Effects.....	48
XI. Category and Need for Hearing.....	51
XII. Assignment of Proceeding.....	51
XIII. Comments on Draft Decision	51
FINDINGS OF FACT.....	49
CONCLUSIONS OF LAW.....	52
ORDER	62

OPINION IMPLEMENTING POLICY ON BROADBAND OVER POWER LINES

I. Summary

With this decision, we adopt a regulatory framework that fosters competition in the broadband market by giving regulatory certainty to companies seeking to provide broadband over power lines (BPL) in California. BPL can provide Californians with a new broadband pipe to the home, which can increase competition in the broadband market. Also, BPL has the potential to meet the goals of Section 706 of the Telecommunications Act of 1996¹ by promoting universal access to broadband services. Through new “smart grid” technologies, BPL also may improve reliability of electrical systems and decrease California consumers’ energy costs.

Specifically this decision: (1) allows third-parties or electric utility affiliates to invest in and operate BPL systems; (2) requires utilities to follow affiliate transaction rules for transactions between a utility and BPL affiliate; (3) maintains the safety and reliability of the electric distribution system; (4) requires companies installing BPL equipment on utility infrastructure to pay pole attachment fees; (5) aligns investors risks and rewards; and (6) pursuant to our authority under Pub. Util. Code § 853(b), adopts a policy of exempting BPL-related transactions, with conditions, from the requirements of Pub. Util. Code § 851.

¹ Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996), at Section 706.

A. BPL Provides High Speed Digital Communications Over Existing Power Lines

In this decision, we principally discuss what the Federal Communications Commission (FCC) calls “Access BPL” systems, which carry high speed data signals to neighborhoods from a point where there is a connection to a telecommunications network.² BPL data is transmitted at a much higher frequency than electricity, so the BPL signal can occupy the electric wires without interfering with electric transmission. The power delivery system, however, does potentially interfere with the BPL signal. A variety of BPL technologies have been developed to address these technical challenges.³

² “BPL” in this decision refers to “Access BPL” as defined by the FCC: “A carrier current system installed and operated on an electric utility service as an unintentional radiator that sends radio frequency energy on frequencies between 1.705 MHz and 80 MHz over medium voltage lines or low voltage lines to provide broadband communications and is located on the supply side of the utility service’s points of interconnection with customer premises.” *In the Matter of Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line Systems*, ET Docket No. 04-37, and *Carrier Current Systems, including Broadband Over Power Lines*, ET Docket 03-104, FCC No. 04-245, Report and Order, (rel. Oct. 28, 2004) at para. 29 (FCC R&O).

³ “Within a residential neighborhood, some system implementations complete the connection between the medium voltage lines and subscriber homes or businesses by using wireless links. Other implementations employ a coupler or bridge circuit module at the low-voltage distribution transformers to transfer the Access BPL signals across (thereby bypassing) these devices. In such systems, the BPL signals are brought into homes or businesses over the exterior power supply cable from the coupler/bridges, either directly, or via Access BPL adaptor modules. Typically, the medium voltage lines are carried overhead on transmission poles or tower mountings; however, in a large number of locations, and in newer subdivisions and neighborhoods, these lines are enclosed in underground conduits and the distribution transformers are mounted above ground on a pad, inside a metal housing.” (FCC R&O, at para. 6.)

B. Benefits of BPL

1. BPL Provides an Opportunity to Increase Broadband Competition

This Commission is taking the proactive step to set up a “BPL-friendly” regulatory framework because of our belief that BPL has the potential to bring valuable, additional competition to the California broadband market. At present, the California broadband market is principally dominated by digital subscriber line (DSL) service on conventional phone lines and cable modem services over upgraded cable television lines.⁴ This Commission believes that more broadband competition will bring lower prices, innovative services, and the potential for new rate plans to consumers.⁵

⁴ Other broadband competitors include dedicated high speed lines, unlicensed wireless Internet access services, and fixed and mobile radio services.

⁵ Another benefit to the broadband market that this Commission supports is consumer choice in communications and advanced services deployment. Specifically, at the Commission meeting of August 25, 2005, the Commission adopted a “Policy Statement that the CPUC Support the Principle of Consumer Choice in the Voice Communications Market.” This policy statement supported four principles which we will apply to BPL deployment. In particular, we will act to preserve and promote the open and interconnected nature of public Internet where consumers are entitled to: 1) to access the lawful Internet content of their choice, 2) run applications and services of their choice, subject to the needs of law enforcement, 3) connect their choice of legal devices that do not harm the network; and 4) the benefits from competition among network providers, application and service providers, and content providers. The Commission has pledged to promote this policy in communications with all Federal and state agencies and policymakers and will do so in our actions to facilitate the deployment of BPL.

2. BPL Could Expand Broadband Access to More Californians

BPL has the potential to provide a new broadband pipe to California's communities, because existing electrical wires run to each neighborhood, home, and business (the so-called critical "last mile"). Thus, the nation's power grid may be an untapped resource to provide another path for the delivery of broadband service to citizens.

Based on our review of current technology, technical and economic constraints may initially limit the potential of BPL to serve dispersed populations in rural areas.⁶ We believe, however, that technology advances where there is a need. New strides in BPL technology soon may bring additional advanced broadband services to underserved areas in California. In general, we believe that increasing the number of broadband delivery platforms and facilitating broadband competition is one of the best ways to extend broadband access to rural areas.⁷ While some broadband providers may focus on urban markets, it is conceivable that others may adopt a business plan to serve niche markets which may include rural or other underserved communities. The support given for rapid BPL deployment by rural electric and telephone utilities in the FCC's BPL rulemaking reaffirms this potential.⁸ By encouraging new facilities-based

⁶ See Report of the Broadband Over Power Lines Task Force, the National Association of Regulatory Utility Commissioners (Feb. 2005) (NARUC Report), at p. 13.

⁷ In addition to BPL, another method of getting broadband to Californians is via wireless broadband applications offered by current telecommunications providers, municipalities and others.

⁸ The National Rural Telecommunications Cooperative and the National Rural Electric Cooperative Association filed joint comments supporting the goal of rapid BPL development. (FCC R&O, at para. 14.)

broadband platforms in our state, the Commission will enable our state to continue as a technology leader.

3. BPL Provides Reliability and Cost Savings to Electricity Consumers

BPL technology also can provide benefits to electrical customers by enabling valuable “smart grid” applications that could improve electrical system reliability and support the implementation of money-saving energy management systems. Potential utility applications include automatic meter reading; voltage control; equipment monitoring; remote connect and disconnect; power outage notification; and the ability to collect data on time-of-day power demand.⁹ We strongly encourage electric utilities to study BPL as a way to provide “smart grid” applications to California consumers.

C. Federal and State Agencies Have Recognized BPL’s Potential

Federal regulatory agencies and a number of forward-looking state agencies have recognized BPL’s potential and adopted policies to address key regulatory issues. The FCC’s Report and Order noted that “this new technology offers the potential to give rise to a major new medium for broadband service delivery.”¹⁰ In its Report and Order, the FCC amended its Part 15 rules to “ensure that radio frequency (RF) energy from BPL signals on power lines does

⁹ NARUC Report, at 13-18. “The term ‘smart grid’ refers to an electricity transmission and distribution system that incorporates elements of traditional and cutting-edge power engineering, sophisticated sensing and monitoring technology, information technology, and communications to provide better grid performance and to support a wide array of additional services to consumers.” (NARUC Report, at 13.)

¹⁰ FCC R&O at para. 13.

not cause harmful interference to licensed radio services.”¹¹ The rules maintain the existing Part 15 emission limits for carrier current systems for BPL, require BPL devices to employ adaptive interference mitigation techniques, require BPL operators to provide information about where their systems are being installed, and establish specific measurement guidelines to determine compliance with the rules.¹²

On October 14, 2004, the Chairmen of the FCC and the Federal Energy Regulatory Commission (FERC) issued an unusual joint statement that maintained that “national policies should facilitate rapid deployment of all broadband technologies, including BPL.”¹³ The Chairmen agreed that “[p]olicymakers at all levels should coordinate their efforts to promote a minimally intrusive policy framework for such technologies.”¹⁴

The National Association of Regulatory Utility Commissioners (NARUC) convened a BPL Task Force in December 2003 to examine the potential of BPL and issued a report in February 2005. The NARUC BPL Task Force noted that “it will be primarily up to individual states to tailor appropriate regulatory

¹¹ *Id.*, at para. 2.

¹² *Id.* at para. 25.

¹³ Joint Statement on Broadband Over Power Line Communications Services by Chairman Pat Wood, III, of the Federal Energy Regulatory Commission, and Chairman Michael K. Powell of the Federal Communications Commission, FCC and FERC News Release, October 14, 2004. See http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-253128A1.pdf.

¹⁴ *Id.*

roadmaps and responses.”¹⁵ The Task Force members also agreed that the regulatory issues surrounding broadband technologies should be encouraged through a “minimally intrusive approach,” and that “the long term resolution of the various outstanding issues should not favor any technology over another.”¹⁶

Individual states have begun addressing the regulatory issues surrounding BPL. Recent legislation in Texas addressed many of the most important regulatory issues slowing BPL deployment in that state.¹⁷ Similarly, on January 25, 2006, the New York Public Service Commission initiated a proceeding to identify and address key regulatory issues.¹⁸ This Commission recognized the need to provide regulatory certainty to encourage the deployment of BPL to our citizens, and issued an Order Instituting Rulemaking (OIR) on September 8, 2005.¹⁹

D. Goal of Decision Is to Provide Regulatory Certainty to Attract BPL Investment

Electric Power Research Institute (EPRI) noted in its BPL White Paper that “regulatory action or inaction could have a significant impact on the business case for BPL, pointing to the need for a proactive approach with regulators on

¹⁵ NARUC Report, at 3.

¹⁶ *Id.* at 4.

¹⁷ See TX S.B. No. 5, Use of Electricity Delivery System for Access to Broadband and Other Enhanced Services, Including Communications, § 43.001(c) (2005).

¹⁸ New York State PSC, Case 06-M-0043, Proceeding on Motion of the Commission to Examine Issues Related to the Deployment of Broadband over Power Line Technologies, effective January 25, 2006.

¹⁹ Order Instituting Rulemaking concerning Broadband Over Power Line Deployment by Electric Utilities in California, Rulemaking (R.) 05-09-006 (September 8, 2005).

this issue.”²⁰ At present, the Commission is only aware of several small BPL pilot programs in California.²¹ This limited deployment is in contrast to greater levels of activity within states where policymakers have addressed the regulatory issues surrounding BPL.²² We have heard from utilities and BPL providers that the cloud of regulatory uncertainty may be causing them to decide not to initiate projects in California.

When Governor Schwarzenegger recently proposed his comprehensive infrastructure investment plan, he emphasized that “[o]ur plan must not only expand the concrete highways that connect Los Angeles to San Francisco and Stockton – but the digital ones that connect Stockton to Shanghai, Sydney and Seoul.”²³ To that end, today this Commission is taking the initiative to establish a BPL-friendly regulatory framework to ensure that we have the most advantageous regulatory climate to attract major infrastructure investment in California’s broadband infrastructure.

²⁰ Broadband Over Power Line 2004: Technology and Prospects. EPRI White Paper, November 2004, p. 3.

²¹ Los Angeles Department of Water and Power, SCE and SDG&E are each engaged in small BPL pilots.

²² TXU and Current Communications to Create Nation's First Multipurpose Smart Grid, TXU Corp. and Current Communications Group News Release, December 19, 2005. See <http://www.txucorp.com/media/newsrel/detail.aspx?prid=916>.

²³ State of the State Speech by California Governor Arnold Schwarzenegger, January 5, 2006. See http://www.governor.ca.gov/state/govsite/gov_htmldisplay.jsp.

E. Proposed Regulatory Framework Protects Ratepayers and Aligns Investor Risks and Rewards

The regulatory framework in this decision protects ratepayers from the business risks associated with investment in BPL and protects the reliability and safety of the electric system. At the same time, we align risks and rewards so that third parties and/or utility shareholders will be willing to take the financial risks associated with developing BPL systems.

II. Procedural Background

The Commission adopted an OIR concerning Broadband Over Power Line Deployment by Electric Utilities in California on September 8, 2005. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) were identified as Respondents. Parties were ordered to file opening comments on the issues identified in the OIR by October 6, 2005 and reply comments by October 17, 2005. The Commission also preliminarily determined that there was no need for evidentiary hearings in this proceeding. Parties that believed evidentiary hearings were required had to file a motion requesting such a hearing by October 6, 2005.

On September 29, 2005, The Utility Reform Network (TURN) filed a motion requesting that the deadline for comments be extended by at least four weeks, and that the deadline for requesting evidentiary hearings be changed from concurrently with initial comments to concurrently with reply comments. The assigned Administrative Law Judge (ALJ) issued a ruling that granted these requests and extended the deadline for opening comments to November 3, 2005, and extended the deadline for reply comments to November 15, 2005. The deadline for requesting evidentiary hearings was moved to November 15, 2005.

Opening comments were received on November 3, 2005. The parties that filed comments in this proceeding are Ambient Corporation (Ambient), California Cable and Telecommunications Association (CCTA), the California ISP Association (CISPA), Californians for Renewable Energy (CARE), the City of Cerritos, the City and County of San Francisco (San Francisco), Current Communications (Current), CTIA – The Wireless Association (CTIA), Disability Rights Advocates (DisabRA), Division of Ratepayer Advocates (DRA) (formerly Office of Ratepayer Advocates), Greenlining Institute (Greenlining), PG&E, SDG&E, SCE, TURN, Time Warner Telecom of California (Time Warner Telecom), the United States Department of Defense and All Other Federal Executive Agencies (DOD/FEA), and the Utility Consumers' Action Network (UCAN).

PG&E, SCE, CCTA, and Current filed a joint motion requesting a 20-day extension of time to file reply comments. TURN supported the joint motion, and SDG&E opposed the motion. The ALJ extended the deadline for filing reply comments and requests for evidentiary hearings to November 22, 2005.

Parties filed reply comments on November 22, 2005. CARE, DisabRA, DRA, Greenlining, and TURN filed motions requesting evidentiary hearings.

On November 21, 2005 the ALJ issued a Notice of a Prehearing Conference (PHC) to be held on December 8, 2005, to determine the parties, positions of the parties, issues, and other procedural matters.

One important procedural issue is whether evidentiary hearings are necessary in this proceeding. Pub. Util. Code § 1701.1(a) provides that the Commission, "consistent with due process, public policy and statutory requirements, shall determine whether a proceeding requires a hearing." After reviewing the issues relevant to this decision, we hold that evidentiary hearings

are not needed in this proceeding. This conclusion is supported by the ALJ and Assigned Commissioner.

Our decision not to hold evidentiary hearings is consistent with our decision in *In Re Competition of Local Exchange Service*, 61 CPUC2d 597, 601 (1995). In that decision, the Commission addressed the issue of whether and when due process considerations require evidentiary hearings:

Due process is the federal and California constitutional guarantee that a person will have notice and an opportunity to be heard before being deprived of certain protected interests by the government. Courts have interpreted due process as requiring certain types of hearing procedures to be used before taking specific actions.

The California Supreme Court has laid down a simple rule regarding the application of due process. According to the Court, if a proceeding is quasi-legislative, as opposed to quasi-judicial, there are no vested interests being adjudicated, and therefore, there is no due process right to a hearing. (Citing *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 901; *Wood v. Public Utilities Commission* (1971) 4 Cal.3d 288, 292.)

Pursuant to this analysis, the Commission in *In Re Competition of Local Exchange Service* decided that evidentiary hearings were not required, because the proceeding at issue was quasi-legislative. Similarly, this proceeding is not a quasi-judicial matter which requires a hearing.

We do not part from our preliminary categorization, and maintain that this proceeding is quasi-legislative proceeding. No vested interests of any party are

being adjudicated. Also, no party other than TURN challenged the Commission's preliminary categorization.²⁴

Furthermore the record provides no persuasive reason to depart from our preliminary conclusion that there is no need for evidentiary hearings. The issues in this proceeding, for the most part, involve policy and legal conclusions that have been addressed in briefs. Also no party has demonstrated a disputed material issue of fact that would affect our deliberations. (PHC transcript, pp. 15-16.)

III. Third-Party and Affiliate Investment in BPL

A. Summary

In the OIR we proposed to allow third parties and utility affiliates to invest in BPL. We now adopt that preliminary conclusion. The OIR also recognized that if utility affiliates are investing in BPL, inappropriate cross-subsidization from ratepayers to utility affiliates should be prevented through the application of an appropriate set of affiliate transaction rules. The rules we adopt must protect against improper shifting of costs, but must not impose a regulatory burden that is unrelated to any potential harm.

²⁴ TURN objected to a preliminary determination exclusively deeming this proceeding as quasi-legislative, suggesting instead a bifurcated proceeding in which policy issues would be deemed quasi-legislative in a first phase of the proceeding and any issues related to pole attachment or lease fees be resolved in a subsequent ratesetting proceeding. We disagree that the proceeding should be subdivided into multiple phases or proceedings; a quasi-legislative proceeding is the appropriate forum for considering ratemaking policy issues such as the ones we have review here. We find that categorizing the proceeding as quasi-legislative is most suitable, pursuant to Rule 6.1(b). Accordingly, we decline to adopted TURN's suggestion.

To achieve these goals we order utilities to apply the affiliate reporting requirement adopted in D.93-02-019 (the Affiliate Reporting Requirements) to transactions between a utility and BPL affiliate. We do not apply the affiliate transaction rules contained in D.97-12-088, modified by D.98-08-035, and further clarified by D.98-11-027 (the Energy Affiliate Transaction Rules).

B. Third Party Investment

A BPL business model in which an independent third party builds, owns and operates a BPL system has sometimes been referred to as the “landlord-tenant” model, with the electric utility acting as the landlord by allowing a third party to install and operate a BPL system on the utility’s facilities (i.e., the power lines, poles, and transformer enclosures). The utility and third-party BPL provider would negotiate a contractual arrangement by which the BPL provider would obtain access to the necessary utility infrastructure in exchange for some form of value flowing to the utility.

Ambient, Current, DOD/FEA, PG&E, SCE, SDG&E, and TURN endorse authorizing the electric utilities to allow third parties to invest in BPL. SCE states the following: “We also agree with the Commission’s decision to promote a ‘landlord’ model for electric utilities. At this point, SCE lacks the personnel and expertise to become a BPL provider itself. . . . The ‘landlord’ model allows SCE to concentrate on its core business activities and shift responsibility and risk from the company to third parties.” (SCE Opening Comments, p. 1.) As TURN points out, the landlord-tenant model offers a number of advantages, including alignment of ratepayer and shareholder incentives, access to BPL providers’ technical and marketing expertise, true arms-length contract negotiations, a decrease in the need for regulatory oversight, and provision of the greatest potential ratepayer benefits. (TURN Opening Comments, pp. 5-8.)

UCAN, on the other hand, argues that allowing third parties to provide BPL services could complicate the utilities' ability to realize the "smart grid" benefits of BPL. Instead UCAN directs the Commission to further investigate the potential for direct utility provision of BPL with an emphasis on utility operational benefits. (UCAN Opening Comments, pp. 2 and 20.) Greenlining also prefers direct utility investment in BPL, rather than third-party investment, because it believes that the regulated utilities are better positioned to extend broadband to underserved communities. (Greenlining Reply Comments, pp. 4-5.)

We agree with SCE, TURN, and other parties that argue that companies unaffiliated with an electric utility should be permitted to invest in BPL. Third parties may have the risk appetite and operational experience that are most conducive to a successful roll-out of BPL. We also believe that allowing third party investment will be the most effective way to realize BPL's utility benefits and to extend broadband to underserved communities. Accordingly, we authorize an electric utility to allow an unaffiliated third party to own and operate a BPL system on its electric utility delivery system.

C. Utility Affiliate Investment

A second issue is whether a utility affiliates should be allowed to own and operate a BPL system. Concerns about utility affiliate provision of BPL services were advanced by CISPA, DisabRA, DRA, Time Warner Telecom, TURN, and UCAN. Most of these parties are concerned with the potential for improper cross-subsidization of the BPL affiliate by the utility. TURN argues that if the BPL vendor was a utility affiliate, that the "incentive compatibility between ratepayers and shareholders" that exists under the landlord-tenant model would be lost. (TURN Opening Comments, p. 8.) DRA also describes the "inherent

conflicts of interest” between regulated public utilities and their affiliates. (DRA Opening Comments, pp. 15-16.)

Ambient, Current, PG&E, SCE, and SDG&E generally support allowing affiliate participation, and argue that cross-subsidization concerns are addressed by affiliate transaction rules. As PG&E states, “forbid[ing] utility affiliates from offering BPL, or impos[ing] severe restrictions on BPL affiliates, will unnecessarily restrict the pool of available companies that might offer BPL to Californians who might find it valuable.” (PG&E Reply Comments, p. 13.)

In the past, the Commission has chosen to allow regulated utilities to have unregulated affiliates, and to address concerns about the relationship between the regulated and unregulated sides via affiliate transaction rules. We follow this precedent and authorize an electric utility to allow an affiliated company to own and operate a BPL system on its electric utility delivery system, subject to affiliate transaction rules.

D. Ratepayer Investment in BPL

Greenlining was the only party that advocated that the Commission investigate direct ratepayer investment in BPL for the purposes of providing broadband service. (Greenlining Reply Comments, pp. 4-5.) UCAN endorsed ratepayer investment primarily to achieve the “smart grid” benefits. (UCAN Opening Comments, p. 32.)

The focus of the OIR is not direct utility provision of BPL so no other parties commented on the possibility of utility investment in BPL as a rate base investment. Nonetheless, we briefly address these positions.

In the OIR, we stated that “the Commission intends to encourage BPL deployment in a manner that does not harm ratepayers.” (OIR, p. 2.) We find that allowing rate base investment in BPL is inconsistent with this objective.

Several parties note that the ultimate commercial success of any particular BPL deployment is uncertain. (See e.g., SDG&E Opening Comment, pp. 2-3.) SCE, for one, notes the “very real potential [cable modem, DSL, and wireless broadband technologies] have to preempt BPL technology from ever developing into a new source of price and service competition.” (SCE Reply Comments, p. 3.)

Even before commercial deployment, BPL faces technological challenges. Investors in BPL will face these competitive and technological risks. If BPL is commercially unsuccessful, a BPL company could lose significant sums of money. To the extent ratepayers pay for the incremental costs of deploying and operating a BPL network, ratepayers are assuming these financial risks.

Consequently we hold that a utility shall not make rate base investments in BPL if the BPL will be used for commercial broadband deployment. A utility may, however, invest in assets that make use of a BPL system provided that the investments can be justified on the basis of utility benefits.

The Commission will have the opportunity to review utility investments in assets that make use of a BPL system in General Rate Cases and in relevant proceedings. For example, any utility proposal to use BPL-based technology for advanced metering will be subject to review in the Commission’s advanced metering proceedings.

A utility may purchase services from a BPL company provided that the costs can be justified by utility benefits. Such purchases would also be subject to review in General Rate Cases and through relevant proceedings. Additionally, any purchases of services from a BPL affiliate would be subject to affiliate transaction rules as discussed below.

E. Affiliate Transaction Rules

We decided above that we need rules to prevent inappropriate cross-subsidization from ratepayers to utility BPL affiliates. In the OIR that created this proceeding, we indicated that the Affiliate Reporting Requirements, as set forth in D.93-02-019, provide the necessary protections:

“To ensure that transactions between a utility and its affiliate do not harm ratepayers or subsidize BPL affiliates to the detriment of broadband competition, utility transactions with BPL affiliates would be subject to the same rules as a telephone utility’s transactions with a DSL affiliate, as set forth in D.93-02-019. Transactions between the utility and its BPL affiliate would not be subject to the Affiliate Transaction Rules governing conduct between energy utilities and their energy affiliates since BPL is a communications platform that does not provide products that use electricity, or services that relate to the use of electricity.^{25,26} (OIR at 11.)

The Affiliate Reporting Requirements are rules governing the reporting of transactions between electric, gas, and telephone utilities and their affiliates.

Ambient, AT&T California (AT&T), CCTA, and SDG&E support the OIR’s preliminary conclusion that the Affiliate Reporting Requirements should apply to a utility’s transactions with a BPL affiliate, and that the Energy Affiliate Transaction Rules should not be applied. SDG&E argues that the Affiliate Reporting Requirements lay out clear and understandable rules that provide for

²⁵ The Commission adopted Affiliate Transaction Rules in D.97-12-088, modified by D.98-08-035, and further clarified by D.98-11-027.

²⁶ This is consistent with D.00-06-019, in which the Commission concluded that the energy Affiliate Transaction Rules did not apply to transactions between a communications utility affiliate and the regulated utility since the communications affiliate did not offer “energy-related” products or services.

separate accounting and prevent cross-subsidization (SDG&E Opening Comments p. 23; SDG&E Reply Comments p. 21.) SDG&E proposes that affiliate transactions should occur on the basis of fair market value (SDG&E Opening Comments, p. 22).

SDG&E, in response to a question from the assigned ALJ at the PHC, also identified a specific and practical concern regarding the use of the Energy Affiliate Transaction Rules. Counsel for SDG&E stated the following:

SDG&E has spent and is spending several million dollars of shareholder money upon on a pilot. Now at this point in time, that's a risky thing to do because the rules are uncertain. Under some interpretations of the affiliate transaction rules that apply in the energy industry, the investment that is now being made by shareholders within the utility, the fruits of that investment could not be utilized by a BPL affiliate if the Commission decides to authorize such a business endeavor. (PHC Transcript, pp. 35-36.)

SDG&E, more generally, notes that many of the concerns related to interactions between a utility and energy affiliate do not apply to relationships between a utility and BPL affiliate. (SDG&E Opening Comments on Draft Decision, p. 8.)

SDG&E adds that applying the Energy Affiliate Transaction Rules to a potential BPL affiliate would place that affiliate at a competitive disadvantage in the broadband market. The affiliate would not only be a new entrant, but also would be subject to different rules than DSL providers. (SDG&E Reply Comments, pp. 20-21.)

SDG&E also notes that irrespective of which affiliate transaction rules the Commission applies, the Commission has the ability to scrutinize the

relationships between a utility and BPL affiliate through other Commission rules.²⁷ (SDG&E Opening Comments on Draft Decision, p. 8.)

Ambient, AT&T, and CCTA similarly maintain that applying the Affiliate Reporting Requirements is appropriate from a competitive parity standpoint, since the telephone utilities must follow these rules with any transactions with a DSL affiliate. The telephone utilities are not subject to the Energy Affiliate Transaction Rules.

PG&E and SCE, on the other hand, argue that the Energy Affiliate Transaction Rules should apply to utility transactions with a BPL affiliate. PG&E and SCE maintain that, as energy utilities, they are familiar with the Energy Affiliate Transaction Rules, have employees trained to comply with those rules, and have compliance and reporting systems in place under those rules. (See, e.g., PG&E Reply Comments, pp. 13-14.) They also disagree with the conclusion of the OIR that the Energy Affiliate Transaction Rules are inapplicable because BPL is a communications platform, and is not a service “that relates to the use of electricity.” (SCE Opening Comments, p. 8; PG&E Reply Comments, p. 14.)

²⁷ For example, Pub. Util. Code § 314 states, in relevant part, that “The commission, each commissioner, and each officer and person employed by the commission may, at any time, inspect the accounts, books, papers, and documents of any public utility. . . . [This rule] also applies to inspections of the accounts, books, papers, and documents of any business which is a subsidiary or affiliate of, or a corporation which holds a controlling interest in, an electrical, gas, or telephone corporation with respect to any transaction between the electrical, gas, or telephone corporation and the subsidiary, affiliate, or holding corporation on any matter that might adversely affect the interests of the ratepayers of the electrical, gas, or telephone corporation”; see also § 451 requiring that all charges demanded by a public utility be just and reasonable, § 587 requiring the reporting of affiliate transactions, § 701.5 limiting the pledging of utility assets, and § 797 requiring the Commission to periodically audit affiliate transactions.

DRA advocates for using the Energy Affiliate Transaction Rules too, but argued that parties should be permitted to present further testimony on the benefits and deficiencies of each set of rules, or a hybrid of the two. (DRA Reply Comments, p. 13.) DRA also recommends that if the Commission concludes that the Affiliate Reporting Requirements are the most appropriate set of rules, then additional rules should be adopted, such as those applied to Pacific Bell in D.87-12-067. (DRA Opening Comments, p. 15.)

The rules we adopt must protect against improper shifting of costs, but should not impose a regulatory burden that is unrelated to any potential harm. The choice before us cannot be over-simplified as a choice between a strict set of rules and a lax set of rules. The Commission has at different times applied the Energy Affiliate Transaction Rules or the Affiliate Reporting Requirements to protect ratepayers from subsidizing utility affiliates. The task before us is to choose the set of rules best suited for transactions with a BPL affiliate.

After reviewing these comments, we conclude that we should apply the Affiliate Reporting Requirements to transactions between a utility and BPL affiliate. The Affiliate Reporting Requirements provide strong ratepayer protections without imposing an unnecessary regulatory burden. Affiliate transactions will be subject to a “fair market value” standard. When reporting affiliate transactions pursuant to the Affiliate Reporting Requirements, utilities shall report the methodology used to calculate fair market value. The Commission will apply this standard when reviewing such affiliate transactions in a General Rate Case.

Application of the Affiliate Reporting Requirements will enable the Commission to exercise significant oversight over transactions between a utility and BPL affiliate. The Commission has found this to be the case in prior

decisions including D.94-02-046, in which the Affiliate Reporting Requirements were applied to Time Warner AxS of California.

The Energy Affiliate Transaction Rules, on the other hand, were established to address a much broader range of concerns related to interactions between a utility and energy affiliate. We agree with SDG&E and other parties that to create a regulatory environment that does not place an unnecessary regulatory burden on BPL companies, the Energy Affiliate Transaction Rules should not be applied.

While PG&E and SCE prefer the Energy Affiliate Transaction Rules due to their familiarity with those rules, neither has shown current interest in creating an affiliate to provide BPL services. Thus, the choice of affiliate rules is of less immediate consequence to these companies.

IV. Safety and Reliability

The safety and reliability of the electric delivery system is a principal concern of the Commission. Parties observe that BPL poses unique safety issues, since it is attached directly to energized electric wire. (PG&E Opening Comments, pp. 3-4; SDG&E Opening Comments, p. 5; SCE Opening Comments, pp. 4-5).

No party calls for BPL companies to be granted mandatory access rights to utility rights of way, and PG&E and SCE explicitly oppose any such requirement (PG&E Opening Comments, p. 8; SCE Reply Comments, p. 15.) We agree that mandatory access rights are not appropriate in this situation.

Since the electric utilities continue to be responsible for maintaining high standards of safety and reliability, the utilities should determine whether or not BPL equipment can be installed on their system, who can install the equipment, and how the equipment should be installed and operated.

Electric utilities also must continue to comply with the rules, requirements, and standards promulgated by the Commission's General Order (GO) 95, which applies to the construction of overhead lines, and GO 128, which applies to the construction of underground electric supply and communication systems. Utilities shall ensure that their compliance with the Commission's GO 95 and GO #128 and their setting and application of additional safeguards and conditions is performed in a competitively neutral manner with respect to other communications and information providers who seek similar access. (OIR, p. 12.)

Moreover, as previously noted in D.98-10-058, these General Orders provide minimum standards, and the utilities may require additional safeguards and conditions as necessary to ensure safety and service.

If in the course of implementing BPL projects utilities identify a need to revise applicable Commission rules or General Orders, the utilities are encouraged to request appropriate relief from the Commission. The Commission will address the request expeditiously. No parties disagreed with this approach.

We do not intend to preempt any State law regarding electrical safety.

V. Pole Attachment Fees and Access to Rights of Way

A. Pole Attachment Fees

While we do not mandate access to a utility's network, we must address how much a BPL company should be required to pay if and when it attaches an electric utility's pole. D.98-10-058, Appendix A, referred to as the "ROW Order," contains rules governing telecommunications carriers' and cable TV companies' access to public utility rights of way and support structures. In the OIR, we supported using these rules so that they also determine the minimum terms which BPL providers will pay for pole attachments. In this section, we discuss

mandatory pole attachment fees. The possibility of additional access or lease fees is discussed in a subsequent section.

Current, PG&E, and SDG&E argue that applying existing pole attachment fees to BPL pole attachments is appropriate to compensate utilities for the cost of BPL attachments. (Current Opening Comments, pp. 18-19; PG&E Reply Comments, pp. 7-8; SDG&E Opening Comments, pp. 9-10.) DRA and TURN are not opposed to requiring a utility to charge pole attachment fees to a BPL company, but argue that a BPL company should also pay the utility for use of the electric wires (DRA Reply Comments, p. 10; TURN Opening Comments, pp 26-27.) TURN and UCAN contend that the existing pole attachment fees are out-of-date. (TURN Opening Comments, pp. 28-30; UCAN Opening Comments, p. 29.)

Extending existing pole attachment fees to BPL attachments will ensure that ratepayers are compensated for an appropriate share of the pole costs. Applying existing pole attachment fees also ensures that BPL attachments and other attachments are treated in a nondiscriminatory manner. We therefore find that a BPL company attaching equipment to an electric utility's pole should pay the established pole attachment fee. We do not in this proceeding require that the established pole attachment fees be reviewed or changed since changing those fees has implications well beyond BPL attachments. The appropriateness of additional fees is discussed in a subsequent section.

B. Underground Attachments

SDG&E proposes that a cost-based formula should apply if installing a BPL system on underground power lines requires attachment of BPL equipment to the inside or outside of underground or surface transformer enclosures. SDG&E proposes a specific cost-based formula to calculate attachment fees for

the attachment of what it describes as a typical BPL electronics box to the exterior of a typical SDG&E transformer enclosure. (SDG&E Opening Comments, pp. 10-12 and Appendix A.)

SCE argues that the ROW Rules should not be extended to calculate attachment fees for underground transformers. Instead the use of any facilities other than poles should be addressed through negotiations between a utility and BPL company. (SCE Reply Comments, p. 15.) TURN argues that SDG&E's methodology is inconsistent and uses outdated data. (TURN Reply Comments, pp. 7-8.)

The SDG&E methodology reasonably allocates costs to set an attachment fee. Since SDG&E's cost-allocation methodology is reasonable and is the only detailed proposal in the record, for SDG&E, we adopt a rate of \$11.20 per year per underground attachment. Other utilities requiring such a rate should submit an advice letter using a cost-based methodology consistent with the ROW Order and similar to that described in SDG&E's opening comments, Appendix A.

C. Access to Rights-of-Way

CCTA notes that several specific rules in the ROW Order apply differently to telephone utilities and electric utilities.²⁸ CCTA goes on to state that "with the emergence of BPL into the marketplace, the Commission must now implement rules that ensure that electric utilities cannot favor their BPL affiliates or partners at the expense of other broadband providers." (CCTA Opening Comments,

²⁸ The rules identified by CCTA are Rule III.A. (p. *216), Rule IV.B.1. (p. *219), Rule IV.B.1. (pp. *219-220), Rule V.A. (pp. *222-223), and Rule VI.A.1. (p. *224), D.98-10-058, 1998 Cal. PUC LEXIS 879 (Cal. PUC 1998).

pp. 12-13.) Accordingly CCTA recommends changes to the Commission's existing rules. (*Id.*)

We recognize that CCTA provides good reasons for changing the ROW Order rules. We also recognize that disputes related to rights-of-way can be very time consuming and expensive for businesses as in the Daniels Cablevision case (C.00-09-025). Upon review of the comments, however, we decline to modify the ROW Order in this proceeding. The changes proposed by CCTA are outside of the scope of this proceeding. Instead CCTA could file a Petition to Modify D.98-10-058 or a Petition for a Rulemaking under Pub. Util. Code § 1708.5 if it wishes the Commission to review the ROW provisions in a more generic sense. We also invite parties to use the Commission's new Alternative Dispute Resolution process to address specific conflicts; the Commission has recognized that even those disputes that have not yet resulted in formal proceedings may benefit from ADR and that successful ADR will avoid the filing of formal matters (Resolution ALJ-185, date August 25, 2005).

Additionally, we note that the ROW Order, in its current form, already provides significant protection against discriminatory behavior. Rule VI.A.1. requires a utility to "grant access to its rights-of-way and support structures to telecommunications carriers or cable TV company and cable TV companies on a nondiscriminatory basis."²⁹ Thus, pursuant to this provision, the Commission is always available to investigate any specific instances in which an electric utility abuses the ROW Order for anticompetitive reasons.

²⁹ *Ibid.* p. *224.

VI. Aligning Investor Risks and Rewards

Third parties or shareholders will not assume the risks of pursuing BPL investment without some expectation of rewards. Since we stated above that we will allow BPL projects to be financed only with third party or shareholder funds, we, therefore recognize that all financial risks and rewards derived from a BPL project should accrue to the third party or shareholders investors. This section addresses these financial “rewards” and determines if and how value should flow from a BPL company to an electric utility.

A. Access or Lease Fees

Parties disagree about whether a utility should be permitted or required to charge a BPL company additional fees beyond pole attachment fees. PG&E, SCE, and TURN all argue that a utility should be encouraged to negotiate access or lease terms with a BPL company and should be permitted to charge additional access or lease fees. PG&E asserts that an adequate sharing mechanism is an essential component of encouraging utilities to enter into BPL transactions. (PG&E Reply Comments, p. 8; SCE Reply Comments, pp. 14-15; TURN Opening Comments, pp. 6-10; PG&E Comments on Alternate Draft Decision, p. 2.)

Current and SDG&E, in contrast, argue against allowing a utility to charge additional fees beyond the cost-based pole attachment fees. (Current Reply Comments, pp. 4-8; SDG&E Reply Comments, pp. 25-26.) SDG&E focuses on the need for a BPL company to clearly understand costs up-front. It maintains that leaving additional fees up for negotiation is a source of uncertainty.

SDG&E also highlights the regulatory risk that arises if the Commission grants the utilities discretion to negotiate access or lease fees. SDG&E predicts that this discretion could subject a utility’s agreement with a BPL company to a prudence review. To protect itself against a General Rate Case disallowance, a

utility might impose such high fees that a utility and BPL company will be unable to agree to access terms. The end result will be no investment in BPL. (SDG&E Opening Comments on Draft Decision, pp. 5-7.)

Current gives several reasons in support of its argument that we should prevent a utility from charging additional access or lease fees. First, it contends that permitting the utility to charge these fees could hamper the development of BPL and prevent the realization of important ratepayer benefits, such as those provided through “smart grid” utility applications. (Current Opening Comments, p. 5.) Second, Current emphasizes that BPL’s use of the wires imposes no additional cost on the electrical system, and the electric utility has already fully recovered the cost of the electrical system through rates. (*Id.* p. 3) Third, Current observes that a no-additional-fees regime may encourage investment in BPL. It notes that recent legislation in Texas prohibited a utility from charging fees beyond the pole attachment fees. Shortly after that legislation was signed, a major utility in that state announced a commercial BPL rollout. (Current Opening Comments on Draft Decision, p. 5.)

Given the polarization of views on this point, it appears unwise to dictate one access fee approach over the other. Indeed doing so may inadvertently discourage those BPL projects which will succeed under one approach but not the other; this will undercut our goal of creating an environment that fosters BPL deployment.

We believe the better public policy allows the utility a choice in its dealings with BPL companies (whether affiliated or unaffiliated). In such circumstances, we believe a utility should be free to decide whether to charge the pole access fee or to negotiate access fees which exceed the pole attachment fee. If it chooses to charge only the pole attachment fee, it will not be subject to further

reasonableness review by the Commission. If the utility opts to charge an access fee exceeding the pole attachment fee, it is completely free to do so under a shareholder/ratepayer revenue sharing mechanism as discussed in the subsequent section.

B. Shareholder / Ratepayer Sharing of Access or Lease Fees

Several parties proposed potential sharing mechanisms to be applied to lease payments or access fees received by a utility from a BPL company. We discuss the merits of parties' revenue sharing proposals in this section. The additional fees at issue in this section do not include standard pole attachment fees, which always flow through to ratepayers.

PG&E proposes to split the after-tax net revenues received by the utility equally between shareholders and ratepayers. (PG&E Opening Comments, pp. 9-11.) PG&E cites a past decision, D.99-04-021, which established that PG&E's after-tax "net revenue" from new non-tariffed products and services should be split 50/50 between ratepayers and shareholders. In the case of BPL, PG&E defines "net revenue" as "gross revenue (not including any revenue from providing service under Commission tariffs such as pole attachment fees) received from a BPL vendor under a contract, net of income taxes and net of incremental costs incurred by the utility in the course of developing, negotiating or performing its obligations under any contract with a BPL vendor." (PG&E Opening Comments, p. 9.) The decision that previously adopted this sharing mechanism also provided that "[s]hareholders would bear any losses resulting if these net revenues are negative."³⁰

³⁰ D.99-04-021, 1999 Cal. PUC LEXIS 228, 6 (Cal. PUC 1999).

SCE proposes applying its existing revenue-sharing mechanism for other operating revenues (OOR) as adopted in D.99-09-070. SCE's OOR sharing mechanism would allocate gross revenues based on a 90/10 shareholder/ratepayer split if the non-tariffed product or service is classified as "active," or based on a 70/30 shareholder/ratepayer split if the non-tariffed product or service is classified as "passive." SCE's provision of access to a BPL company would be classified as "active" if it involves incremental shareholder investment of at least \$225,000. (See, D.99-09-070 at p. 63.)

DRA proposed a mechanism that would set shareholders' share of BPL-related revenues at 10% of net revenues. (DRA Opening Comment, p. 12.) Ambient and TURN endorsed sharing mechanisms that are graded over time with a decreasing share of revenues going to shareholders as a BPL project progresses or as time passes following the adoption of this decision. (Ambient Opening Comments, p. 6 and TURN Opening Comments, p. 7.)

We have a wide range of proposals to consider, but the field is narrowed considerably by applying the criteria set forth in the OIR, which states that "[t]he allocation should provide shareholders a strong incentive to pursue BPL projects while also providing direct financial benefits to ratepayers." (OIR, p. 10.) On balance, we find PG&E's proposed revenue sharing mechanism to best satisfy this criteria.

PG&E's proposed 50/50 after-tax net revenue sharing mechanism provides a utility with a strong financial incentive to enter into negotiations with potential BPL companies. First, a utility will have an opportunity to recoup expenses it incurs when negotiating a BPL access arrangement and performing its obligations under such a lease. Second, the mechanism offers the potential for shareholder rewards. PG&E states that its sharing mechanism would provide

the utility “adequate incentives” to pursue BPL deployment (Opening Comments, p. 9.). PG&E’s mechanism also would provide direct financial benefits to ratepayers through the sharing mechanism if after-tax net revenues are positive.

SCE’s OOR mechanism also provides for potential shareholder rewards. By providing shareholders with ninety percent of gross revenues from “active” non-tariffed products and services, shareholders would receive a large fraction of revenues in return for the incremental risks they incur. For products and services classified as “inactive” shareholders would receive seventy percent of gross revenues, so the incentive would be weakened. Ratepayers would also receive direct financial benefits as long as gross revenues are greater than zero.

However, since the utility shareholders would also be liable for expenses associated with the leases, if the profit margin is slim, the ten or thirty percent of gross revenues going to ratepayers could significantly reduce or even eliminate shareholder profits.

We do not believe that the proposals of DRA, Ambient and TURN sufficiently align shareholder risks and rewards. DRA’s proposed sharing mechanism does not provide utility shareholders a strong incentive to pursue BPL projects. Ambient’s and TURN’s graduated sharing mechanisms introduce unnecessarily complexity and misalign shareholder risks and rewards by reducing shareholder rewards over time.

We find that PG&E’s proposed sharing mechanism best balances our policy goals by providing shareholders a strong incentive to pursue BPL projects while providing direct financial benefits to ratepayers. We, therefore, adopt this mechanism for the treatment of any access of lease fees that any electric utility receives from a BPL company.

VII. Use It Or Lose It

PG&E and SCE respond to the OIR's question regarding the possible idling of BPL facilities for anti-competitive purposes by recommending a "use it or lose it approach." As PG&E puts it, "The Commission should adopt rules that require entities that acquire rights to a utility's system for the express purpose of BPL provision to begin implementation and service of BPL within a certain period of time, or forego their rights to do so." (PG&E Opening Comments, p. 6.) In support of their proposal, PG&E and SCE cite a similar rule that requires a Competitive Local Carrier (CLC) to use space within nine months of the date when a request for access is granted, or be subject to reversion of access to the electric utility. (*Id.*; SCE Opening Comments, p. 7.) Ambient agrees with the recommendation of PG&E and SCE (Ambient Reply Comments, pp. 25-26).

Current and SDG&E, however, criticize the proposal made by PG&E and SCE. Current argues that such fears are unfounded (Current Opening Comments, pp. 22-23). SDG&E contends that imposition of an "artificial deadline" would provide the wrong basis for making decisions regarding BPL deployment. (SDG&E Reply Comments, p. 25.)

While we are not in favor of a competitor's acquiring access to utility infrastructure, only to idle it to gain a competitive benefit, we decline to adopt a rule that would explicitly prohibit this behavior at this time. The technology is changing and developing rapidly, and we do not want to preclude the choice of a slightly more moderate deployment of a significantly better BPL network. Further, communications networks are often deployed in stages depending on capital considerations and local issues; this kind of rule may give rise to unwarranted complaints about staged deployment plans.

Furthermore, the utilities are aware of the possibility of anti-competitive behavior, and can take it into consideration in their contract negotiations with any potential third party BPL providers. We prefer to allow this issue to be addressed in contract negotiations rather than through imposition of a new regulation. However, if it is clear that a utility has entered into a contract with a BPL provider with the intent to prevent BPL deployment we will take appropriate action. Furthermore, if a utility has entered into a contract with a BPL company to deploy a BPL system and no deployment has commenced within seven years, we will entertain a proceeding to examine the underlying circumstances of the deployment failure and take corrective action, if necessary.

VIII. Electrical Equipment Repair and Maintenance

We noted in the OIR that electric equipment problems may be identified in the process of installing a BPL system. The OIR goes on to propose that “costs directly related to the repair and maintenance of existing electrical equipment for the purposes of electric service reliability (e.g., cracked insulators) be allocated to electricity operations. Costs directly related to BPL installation or operation should be allocated to the BPL operator.” (OIR, p. 11.)

To the extent parties mentioned this issue, it was in the context of the affiliate transaction rules. Parties voice concerns that if BPL services are provided by a utility affiliate, this activity could create an incentive for mischaracterizing the work in order to attain cross-subsidization of BPL by utility ratepayers. Yet, our utility affiliate rules safeguard against any such possible abuses.

We adopt the OIR’s approach. Costs should be allocated on a cost causation basis.

IX. Public Utilities Code Sections 851 and 853(b)

In the OIR, we raised the possibility of exempting BPL transactions, pursuant to our authority under § 853(b), from the requirements of Pub. Util. Code § 851.³¹ (OIR, pp. 5-6.) Some parties applaud this approach, while others criticize it. We now confirm that we are adopting a policy of exempting certain BPL transactions from § 851.

A. Party Positions

PG&E supports exempting BPL transactions from § 851 review. It argues that such review is not necessary to protect the public interest and calls § 851 review an “unnecessary regulatory hurdle.” (PG&E Opening Comments, p. 14.)

SDG&E concurs. It argues that requiring a § 851 application “necessarily would result in delay and uncertainty.” (SDG&E Opening Comments, p. 20.)

Ambient and Current also support exempting BPL transactions from § 851. As Current puts it, “Sec. 851 proceedings can be contentious and time consuming. Such regulatory uncertainty would substantially hinder the development of BPL and would stand in stark contrast to the Commission’s

³¹ Pub. Util. Code § 851 states, in relevant part, that “No public utility...shall sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of its...line, plant, system, or other property necessary or useful in the performance of its duties to the public...without first having secured from the commission an order authorizing it so to do.” Section 853(b) reads: (b) The commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest. The commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility or class of public utility exempted under this subdivision. These rules or requirements may include, but are not limited to, notification of a proposed sale or transfer of assets or stock and provision for refunds or credits to customers or subscribers.

efforts to promote competition in communications by providing regulatory certainty through appropriate use of § 853 exemptions.” (Current Opening Comments, pp. 23-24.)

SCE does not oppose an exemption from § 851 for BPL. SCE, however, recommends that the Commission “consider a uniform approach to § 851 requirements for all communications providers regardless of the technology on which service is based.” (SCE Opening Comments, p. 6.)

TURN, on the other hand, vigorously contests the proposed exemption from § 851. It contends that an exemption is unnecessary, illegal, and inconsistent with the Commission’s expressly stated standards for granting § 853(b) exemptions. TURN argues that it is Commission policy to only grant exemptions in extraordinary circumstances. (TURN Opening Comments, pp. 18-26.)

CCTA opposes providing an exemption from § 851 when the exemption is solely for BPL projects. It argues that such an exemption would be discriminatory and inconsistent with federal law and policy, because the exemption would favor one technology over another. CCTA adds that an exemption is simply unnecessary, as compliance with § 851 will not hinder BPL deployment. (CCTA Opening Comments, pp. 2-8.)

Other parties opposing an exemption from the requirements of § 851 include CISPA, DisabRA, DRA, Greenlining, San Francisco, and UCAN. (CISPA Opening Comments, p. 5; DisabRA Opening Comments, p. 5; DRA Opening Comments, pp. 5-7; Greenlining Opening Comments, p. 6; San Francisco Opening Comments, pp. 2-4; UCAN Opening Comments, pp. 26-27.)

B. Discussion

Pub. Util. Code § 851 exists to protect the quality of utility service provided to ratepayers, and to protect ratepayers' investment in utility assets. While it serves an important purpose, § 851 application proceedings can sometimes be both contentious and time-consuming, and a full review of every transaction is not always necessary to protect the public interest. Here a lengthy § 851 proceeding would be inconsistent with our stated policy goal of not impeding the rapid deployment of BPL technology.

1. Standard for Section 853(b) Exemption

Although previously the Commission has expressed concerns that the granting of § 853(b) exemptions runs the risk that “would create an exception that swallowed the rule,”³² the plain language of § 853(b) does not limit its application to extraordinary circumstances. Section 853(b) provides that “the commission may from time to time by order or rule, and subject to those terms and conditions as may be prescribed therein, exempt any public utility or class of public utility from this article if it finds that the application thereof with respect to the public utility or class of public utility is not necessary in the public interest.”

Moreover a review of the specific use of § 853(b) to exempt transactions from § 851 shows that the Commission has employed a variety of policies and standards when applying § 853(b). Indeed, the Commission has granted a number of exemptions without any finding of extraordinary circumstances.

³² D.04-08-048, p. 7.

Often exemptions arise in circumstances that would be difficult to deem “extraordinary” under almost any standard. For example, in D.05-07-039, the Commission granted SDG&E an exemption from § 851 for any contract negotiated with solar photovoltaic or small wind project as long as (i) the contract is the result of an open solicitation, (ii) the agreement meets a least-cost best-fit test, (iii) the contract does not involve an affiliate of SDG&E, and (iv) the bidder has access to SDG&E property. In the decision, the Commission lists several reasons for granting the exemption. First, the Commission contends that a § 851 review could “delay implementation.” Second, the Commission maintains that the involvement of SDG&E property is “small.” Third, the Commission observes that the property would be used “to generate electricity for the utility’s customers.”

Similarly, in D.05-06-016, the Commission granted PG&E and SCE a § 853(b) exemption from a § 851 review of the transfer of emission reductions to the California Air Resources Board or local air districts. In reaching this result, the Commission simply noted that it has given exemptions in the past where review served no public interest. It further stated that “because PG&E and Edison will be obtaining the emission reduction from customers solely as a result of the conversion program and the assignment of these reduction will bring about permanent air quality improvements without having any impact on the ability of the two utilities to serve their customers, an exemption from the requirements of § 851, pursuant to § 853(b), is appropriate.”³³ This decision does not consider whether these circumstances are “extraordinary.”

³³ D.05-06-016, 2005 Cal. PUC Lexis 223, 50-51 (Cal. PUC 2005).

In D.04-03-020, the Commission granted an exemption from § 851 review to the assignment of accounts receivable by Lodi Gas Storage to securitize a short term line of credit. There the Commission observed that the authority granted to it by § 853(b) permitted such an exemption. It further stated that statutes urged the Commission to create competition for gas storage, and the Commission had adopted a “let the market decide” policy for gas storage as a further justification of an exemption.³⁴ Once again, the Commission did not discuss whether these are “extraordinary” circumstances.

In D.02-10-008, the Commission, pursuant to § 853(b), exempted PG&E’s sales of electric meters to customers. The Commission simply found that “it would be unduly cumbersome and uneconomic to require individual filings by utilities for each individual meter sale. Such a requirement would not serve the public interest.”³⁵ The decision did not consider whether these circumstances were “extraordinary.”

Given this brief review of past Commission decisions, it is clear that TURN is incorrect when it asserts that this Commission has in the past only granted exemptions from § 851 pursuant to § 853(b) in extraordinary circumstances. (See TURN Opening Comments, p. 19.) Instead, these decisions show that the Commission has granted exemptions in a number of matters where the circumstances are quite ordinary.

³⁴ D.04-03-020, 2004 Cal. PUC LEXIS 144, 5-7 (Cal PUC 2004).

³⁵ D.02-10-008, 2002 Cal. PUC LEXIS 636 (Cal. PUC 2002).

In other situations, even when the Commission could have reached a finding of an “extraordinary circumstances,” the Commission did not do so. For example, in D.05-10-013, the Commission granted a § 853(b) exemption from § 851 in order to eliminate the review of a proposed agreement that would allow encroachment on specified easements. Although this exemption was granted during an anticipated energy shortage and the exemption could have readily passed an “extraordinary circumstances” standard, the Commission simply invoked the language of § 853(b) and found that a § 851 approval was “not necessary in the public interest.” In addition to citing § 853(b), the Commission relied on D.01-06-006, which permitted SDG&E to lease space at substations during the energy crisis, once again without finding that “extraordinary circumstances” were present.

Moreover, even when one examines the specific cases in which the Commission cited “extraordinary circumstances” as warranting a § 853(b) exemption, it is clear that the Commission’s notion of “extraordinary” is highly elastic. In D.02-01-055, the Commission exempted the sale of six of PG&E’s electric distribution facilities to customers made 12 years earlier, citing PG&E’s mistake in failing to seek approval as creating an “exceptional circumstance.” The Commission found that the Commission’s implicit approval of the sale (in a prior decision ordering the sale), PG&E’s error, and the passage of time created “extraordinary circumstances.”³⁶ Likewise, in D.04-07-021, the Commission granted PG&E another exemption for 255 similar transactions that had failed to secure approval. After granting an exemption for the entire period preceding the

³⁶ D.02-01-055, 2002 Cal. PUC LEXIS 7-9 (Cal. PUC 2002).

decision, the decision then granted § 851 approval on a going forward basis for all the transactions.

The review of these decisions makes it clear that a § 853(b) exemption may be granted whenever the Commission makes a policy determination that application of § 851 is not necessary in the public interest. As made evident by the plain wording of § 853(b), the Commission need not establish that “extraordinary circumstances” are at issue.

2. Application of Section 853(b)

An exemption in this matter supports three important Commission policies: (i) encouragement of public access to broadband system; (ii) promotion of competition in the broadband market; and (iii) reduction of scrutiny for routine transactions. These Commission policies are consistent with goals set forth by the State legislature and are discussed in greater detail below.

First, granting an exemption in this matter is reinforces our policy of encouraging public access to advanced telecommunications services. This Commission policy is stated in § 882(a) of the Pub. Util. Code. The provision states that the Commission shall ensure that “advanced telecommunications services are made available as ubiquitously and economically as possible.”³⁷ It also declares that we should aspire “to provide all citizens and businesses with access to the widest possible array of advanced communications services.”³⁸

Second, granting exemption to BPL transactions from review under § 851 will further this Commission’s long-standing goal to promote competition in the

³⁷ Pub. Util. Code § 882(a).

³⁸ Pub. Util. Code § 882(b)(1).

broadband market. Pub. Util. Code § 709 states that California's policy for telecommunications is "to remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice."³⁹

Exemption under § 853(b) of the application of § 851 to these BPL-related transactions is consistent with this policy enunciated by the legislature. BPL has the potential to bring competitive benefits in the broadband market, and our granting a § 853(b) exemption reduces barriers to BPL providers' encouraging open and competitive markets. Review under § 851 would create a regulatory mechanism where incumbent carriers could seek to delay entry by BPL providers and hence retard the growth of competition in the broadband market.⁴⁰ With this delay comes greater uncertainty that will further deter entry.

Third, a policy of the Commission is to reduce the level of scrutiny for routine transactions, such as those at issue in this proceeding. This policy is reinforced by the existence and language of § 853(b), which broadly allows the Commission to take a hands-off approach when the Commission determines that such a policy is in the public interest.⁴¹

Moreover such an exemption is consistent with the precedents established in D.02-10-008 (which exempted PG&E meter sales from review), D.05-07-039

³⁹ Pub. Util. Code § 709(g).

⁴⁰ For example, due process considerations may require evidentiary hearings in some cases.

⁴¹ For example, the Commission's GO 69-C creates an exemption from § 851 for revocable licenses of utility property that meet certain conditions, and does not require the existence of extraordinary circumstances.

(which exempted photovoltaic and small scale wind contracts from review), D.05-06-016 (which exempted the transfer of emission rights from review), and D.04-03-020 (which exempted the securitization of receivables by Lodi Storage from review).

These considerations lead us to the conclusion that the public interest is best served by rapid deployment of BPL technologies, rather than by a more rigorous but necessarily lengthy review process of individual BPL-related transactions. Conducting § 851 reviews in this context is not “necessary in the public interest,” and it is both reasonable and consistent with the statutory language of § 853(b) to exempt these transactions from § 851 review.

Even though a plain reading of the statute does not require that transactions meet a standard of “extraordinary” to merit an exemption, this transaction would meet a Commission “extraordinary” standard regardless. The possibility of bringing another broadband communications channel into the homes of Californians would clearly offer an “extraordinary” opportunity, which specific lengthy § 851 reviews would frustrate. We prefer to eliminate any such § 851 regulatory uncertainty and delay, and the additional barriers to deploy they create. These considerations, when reviewed in light of our expansive interpretation of “extraordinary” in past Commission decisions, establish that the proposed transaction would pass an “extraordinary” standard.

CCTA’s claim that the Commission would improperly discriminate in favor of BPL if it allowed BPL an exemption from § 851 is not well founded. Technologies competing with BPL are not identical: They do not provide advanced services in identical manners or by identically-situated entities. For example, Comcast did not need to file a § 851 application at this Commission to provide broadband advanced services over its cable infrastructure, nor did

Verizon Wireless need to file a § 851 application to provide wireless broadband service on its licensed radio spectrum. Also, given the head starts of other technologies such as DSL and cable modem service, reducing potential regulatory barriers to the deployment of BPL will actually do more to level the playing field than to tip it.

3. Terms and Conditions Placed on BPL Transactions

Contrary to the tenor of some opponents of the use of a § 853(b) exemption from § 851, the mere use of § 853(b) does not necessarily mean that utilities are given carte blanche to do as they please. Section 853(b) expressly provides that in granting an exemption from § 851 the Commission may prescribe terms and conditions and establish rules or impose requirements on that exemption.

In this context it is important to address whether, having exempted BPL transactions from Commission review, we should impose conditions to protect the environment. In particular, we must address the following question: Should we require a review for BPL transactions under the California Environmental Quality Act (CEQA)?

CEQA is a flexible statute, and broad activities associated with California's utility infrastructure already qualify for a categorical exemption from the requirement to conduct a CEQA review. In particular, CEQA Guideline 15301 grants a categorical exemption to a number of "Class 1" activities:

Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1.

The key consideration is whether the project involves negligible or no expansion of an existing use.

Examples include but are not limited to:

(b) Existing facilities of both investor and publicly-owned utilities used to provide electric power, natural gas, sewerage, or other public utility services;

and

(e) Additions to existing structures provided that the addition will not result in an increase of more than:

(1) 50 percent of the floor area of the structures before the addition, or 2,500 square feet, whichever is less; or

(2) 10,000 square feet if:

(A) The project is in an area where all public services and facilities are available to allow for maximum development permissible in the General Plan and

(B) The area in which the project is located is not environmentally sensitive.

These CEQA Guidelines establish categorical exemptions for the minor alteration of facilities used to provide utility service and minor additions to existing facilities, the exact situation that we will generally have as California deploys broadband over power lines.⁴²

Thus we recognize that if the Commission were to subject these individual transactions to a CEQA review, the result would be nothing more than a paper-

⁴² According to Current, "BPL deployments simply involve placements of equipment on existing utility infrastructure...BPL involves no trenching or other activities which might trigger CEQA." (Current Reply Comments, pp. 11-12.)

pushing exercise. The Commission would, after a review, inevitably conclude that these activities qualify for a categorical exemption.

We do not believe this paper-pushing exercise is necessary. So, pursuant to § 853(b), we exempt from § 851 and any further conditions those transactions that can be accomplished by the use or modification of “existing facilities,” such as the use of existing electrical underground or overhead lines, or the placement of couplers, load monitoring devices, and equipment on existing poles or in existing buildings. As a result of the use of § 853(b) exemption, this Commission will not be reviewing these individual transactions and the Commission’s requirement of a CEQA review is not triggered.

This exemption, however, will not alleviate utility companies’ responsibility to abide by our many existing environmental protections that relate to utility wires and infrastructure. BPL equipment must be installed in or on existing utility structures consistent with any and all applicable existing environmental mitigation measures, particularly those measures applicable to the utility infrastructure on which it is constructed or installed.

To complete our discussion of categorical exemptions, we note that grants of the CEQA exemptions have limits. Pursuant to CEQA Guideline 15300.2, categorical exemptions do not apply when any of the following conditions occur: 1) there is a reasonable possibility that the activity may have a significant effect on an environmental resource of hazardous or critical concern; 2) the cumulative impact of successive projects of the same type in the same place, over time, is significant; 3) there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances; 4) a project may result in damage to scenic resources; 5) a project is located on a hazardous

waste facility site; or 6) a project may cause a substantial adverse change in the significance of a historical resource.

In its Comments on the Draft Decision, PG&E points out that CEQA Guideline 15304(f) provides an exemption from CEQA for “minor trenching and backfilling where the surface is restored.” (*Id.*, p. 2.) Subject to the limitations set forth above in our discussion of CEQA Guideline 15300.2, we allow transactions which may result in minor trenching and backfilling where the surface is restored to be eligible for treatment under § 853(b). But such trenching and backfilling cannot be done, for example, in a waterway, wetland, or in an area with known cultural or biological resources, and cannot result in the removal of healthy, mature, scenic trees, nor in significant erosion or sedimentation of surface waters.⁴³

Pursuant to our § 853(b) authority, we will require parties to file an application seeking Commission approval of any transaction that does not qualify for a categorical exemption from CEQA.⁴⁴ The Commission will conduct a CEQA review, and based on that review and a public interest finding, will either approve or reject the proposed transaction. So while we continue to exempt these transactions from § 851, we will subject them to an application process, leading to a Commission decision, that requires our Staff to conduct a CEQA review and the Commission will reach a finding, based on that review, of whether the transaction is adverse to the public interest.

⁴³ 14 CCR 15300.2.

⁴⁴ Pursuant to § 701.

Finally, we find no reason to exempt the sale of utility assets related to any BPL transaction from § 851 under a § 853(b) exemption. All discussion of BPL transactions in the OIR and pleadings related to leases or other agreements for use of utility-owned infrastructure. No sale of utility assets was discussed. Should any utility wish to sell utility assets for BPL purposes, approval for such sales must be sought via a § 851 application.

C. Commission Notification

In the OIR, we discussed requiring a utility to use an advice letter to notify the Commission of agreements in which the utility allows a BPL company to install equipment on the utility's infrastructure. (OIR, p. 10.) We recognize, however, some problems with the use of an advice letter. For example, if an advice letter is protested, the matter may require the issuance of a Commission Resolution.⁴⁵ A contested advice letter resulting in a Commission Resolution raises a number of the same concerns raised by an application under § 851, such as triggering potentially lengthy revenue allocation and CEQA issues.

The Commission has no interest in further litigation and review if a utility grants a BPL developer access to its infrastructure in a manner that is consistent with this decision. Accordingly, we are not going to require the filing of an advice letter for approval of any utility/BPL contracts.

We do, however, believe it is important for this Commission to have notice when a utility permits a company to install a BPL system on its network. Accordingly we will require utilities to provide the Directors of the

⁴⁵ Given the number of parties and range of positions in this proceeding, it is quite possible that there may be protests to advice letters seeking approval of utility contracts with BPL providers.

Telecommunications Division and Energy Division notice of any lease or other financial arrangement with a BPL company, including the name of that company, the nature of the services to be provided, the date entered, and the applicable categorical exemption citation. Should any such lease or other contract not be disclosed, or otherwise be inconsistent with this decision, this Commission may open an OII for violation of this decision. Should any utility object to using this process for a particular transaction, the utility may submit an application to the Commission under Pub. Util. Code § 851.

X. Other Issues

A. Disabled Access

DisabRA argues that public rights-of-way need to remain accessible, and the Commission should ensure that BPL deployment does not result in obstruction of rights-of-way. (DisabRA Opening Comments, pp. 2-3.) As an example, DisabRA cites the digging up of sidewalks as an activity that obstructs a right-of-way.⁴⁶ We recognize that such obstructions can place a significant burden upon individuals with disabilities. Thus to the extent that a utility or a BPL company needs to access existing facilities, whether underground (e.g., vaults) or above ground (e.g., poles), the responsible companies must maintain rights of way or alternative paths of travel that are accessible for people with disabilities, as requested by DisabRA.

B. Health Effects

CARE's comments focus on the biological effects of radio frequency radiation, and possible health impacts of BPL. (CARE Opening Comments,

pp. 1-8.) CARE claims that there may be adverse health effects from BPL and that evidentiary hearings are therefore warranted. (*Id.* pp. 4-8.)

SDG&E and CTIA oppose these hearings. SDG&E notes that the FCC has exercised jurisdiction in the area of the potential health effects of radio frequency radiation, and argues that CARE should address its concerns to that agency. (SDG&E Reply Comments, pp. 15-17.) CTIA contends that the issues identified by CARE are subject to exclusive federal regulation by the FCC, and accordingly this Commission's ability to consider such issues is preempted by federal law. (CTIA Reply Comments, pp. 1-2.) CTIA adds that CARE's claims of adverse health effects are unfounded. (*Id.*, pp. 2-4.)

SDG&E and CTIA are correct that the health effects of radio frequency radiation is an issue subject to federal, rather than state, jurisdiction.⁴⁷ In particular, Section 704 of the Telecommunications Act of 1996 states that "No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's [FCC's] regulations concerning such emissions."⁴⁸ Moreover, "personal wireless services" and "personal wireless facilities" are defined in a particularly broad way that includes the facilities

⁴⁶ The record in this proceeding, however, does not support the need for the BPL provider to dig up sidewalks.

⁴⁷ CARE was provided an opportunity to respond to CTIA's jurisdictional arguments, but was largely unable to do so. (PHC Transcript, p. 25.)

⁴⁸ Codified as 47 U.S.C. § 332(c)(7)(B)(iv).

associated with the deployment of BPL.⁴⁹ In addition, concerning the radio waves used in the transmission of the BPL within the electric wires, the FCC has jurisdiction over this service. The FCC has stated that “As Access BPL systems use radio frequencies for interstate communications purposes over wire, this Commission has full jurisdiction over such transmissions.”⁵⁰

We note that the FCC, as the agency that authorizes and licenses transmitters and facilities that generate radio frequency radiation, has addressed the potential biological effects of radiofrequency electromagnetic fields through technical bulletins.⁵¹ Accordingly, we do not address the issue here, and we do

⁴⁹ 47 U.S.C. § 332(c)(7)(C) states that:

C DEFINITIONS. For the purposes of this paragraph:

- (i) the term “personal wireless services” means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services;
- (ii) the term “personal wireless service facilities” means facilities for the provision of personal wireless services; and
- (iii) the term “unlicensed wireless service” means the offering of telecommunications service using duly authorized devices which do not require individual licenses, but does not mean the provision of direct-to-home satellite services (as defined in section 303(v)).

Thus, this Commission cannot regulate the placement of these devices based on the effects of radio frequency emissions to the extent that such facilities and devices comply with FCC regulations.

⁵⁰ See *In the Matter of Amendment of Part 15 regarding new requirements and measurement guidelines for Access Broadband over Power Line System*, ET Docket No. 04-37; *Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-104, Report and Order, October 28, 2004 (Final rule; 70 FR 60742; October 19, 2005; Effective date 10/19/2005; Eff. date; 70 FR 56856, September 29, 2005; Eff. date 7/22/05).

⁵¹ For example, see *Evaluating Compliance with FCC Guidelines for Human Exposure to Radiofrequency Electromagnetic Fields*, OET Bulletin 65, Edition 97-01, (rel. August 1997) and *Questions and Answers about Biological Effects and Potential*

Footnote continued on next page

not reach the substantive issue of whether there are potential health effects from the deployment and use of BPL because it clearly lies outside our jurisdiction.

On March 6, 2006, CARE filed a motion seeking CEQA review of the effects of radio frequency emissions. As this discussion makes clear, we lack jurisdiction over this matter. Accordingly, CARE's March 6 motion is denied.

XI. Category and Need for Hearing

The Commission preliminarily categorized this proceeding as quasi-legislative, and preliminarily determined that hearings were not necessary. Based on the record, we affirm that this is a quasi-legislative proceeding, and that hearings are not necessary.

XII. Assignment of Proceeding

Commission President Michael R. Peevey was the Assigned Commissioner for this proceeding, but as of January 19, 2006, Commissioner Rachelle B. Chong became the Assigned Commissioner for this proceeding. ALJ Peter Allen is assigned to this proceeding.

XIII. Comments on Draft Decision

The draft decision of Commissioner Chong in this matter was mailed to the parties in accordance with Pub. Util. Code § 311(g)(1) and Rule 77.7 of the Commission's Rules of Practice and Procedure. Comments were filed on March 2, 2006 by CCTA, CARE, Coalition of California Utility Employees (CUE), Current, DisabRA, DRA and TURN (jointly), Greenlining, PG&E, SDG&E, SCE, Time Warner Telecom, and UCAN. Reply comments were filed on March 7, 2006 by AT&T; Current; DRA, TURN and DisabRA (jointly); Greenlining; PG&E;

Hazards of Radiofrequency Electromagnetic Fields, OET Bulletin 56, Fourth Edition, (rel. August 1999).

SDG&E, and TURN (individually). SCE filed a joinder in the reply comments of PG&E.

In response to the comments, we have made several clarifications, corrections and changes to the draft decision. SCE points out that the Draft Decision failed to recognize its small BPL pilot program. (SCE Opening Comments on Draft Decision, p. 2.) We corrected the decision accordingly.

Multiple parties commented on our choice of affiliate transaction rules. DRA and Time Warner Telecom argue that the Energy Affiliate Transaction Rules are more appropriate than the Affiliate Reporting Requirements, because BPL can support energy-related functions. (DRA Opening Comments on Draft Decision, pp. 10-11; Time Warner Telecom Opening Comments on Draft Decision, pp. 2-4.) PG&E also repeats its argument that the Energy Affiliate Transaction Rules are easier to implement than the Affiliate Reporting Requirements. (PG&E Opening Comments on Draft Decision, pp. 2-3.) AT&T disagrees with DRA, PG&E, and Time Warner and supports the conclusion reached in the Draft Decision. (AT&T Reply Comments on Draft Decision, p. 3.) SDG&E notes that in the past the Commission has found that the Affiliate Reporting Requirements effectively protect against improper transactions. (SDG&E Opening Comments on Draft Decision, pp. 9-14.) We do not change our conclusion regarding affiliate transaction rules, but have revised the discussion to clarify our reasoning.

TURN expresses a concern that SDG&E will use its advanced metering proposal to subsidize BPL for the benefit of a BPL affiliate. (TURN Reply Comments on Draft Decision, pp. 4-5.) We clarify in this decision that a utility shall not make rate base investments in BPL if the BPL will be used for commercial broadband deployment. However, a utility may invest in assets that

make use of a BPL system provided that the investments can be justified on the basis of utility benefits. Furthermore, any utility proposal to invest in assets that make use of a BPL system for the purposes of advanced metering must receive the necessary approvals through the appropriate advanced metering proceeding.

Multiple parties commented on access fees too. Current and SDG&E argue that utilities should not be permitted to charge access fees beyond the cost-based pole attachment fees. Current contends that such fees disadvantage BPL companies relative to their competitors and points out that the electric utilities have already recovered the cost of their wires through rates. (Current Opening Comments on Draft Decision, pp. 2-5.) SDG&E highlights the danger that such fees could be subject to prudence review by the Commission, and that this regulatory risk would discourage a utility from negotiating terms that a BPL company finds reasonable. (SDG&E Opening Comments on Draft Decision, pp. 6-7.) AT&T disagrees with SDG&E and Current. It argues that allowing for negotiated access fees will best support BPL deployment. (AT&T Reply Comments on Draft Decision, pp. 1-3.) We have changed our discussion of access fees based on the comments.

CUE requests that we clarify that the Commission does not intend to preempt State law regarding electrical safety. (CUE Opening Comments on Draft Decision, p. 5.) We provide that clarification in the decision.

CCTA repeats its prior argument that the ROW Order must be amended so that electric utilities follow the same requirements as telephone utilities. (CCTA Opening Comments on Draft Decision, pp. 2-4.) We have clarified the language in the decision to make it clear that the issue raised by CCTA concerns us, but modifying the ROW Order falls outside the scope of this proceeding.

Current requests that the decision not require all utilities to adopt SDG&E's methodology for calculating underground attachments fees. (Current Opening Comments on Draft Decision, p. 6.) We find Current's request to be reasonable and modify the decision accordingly.

CCTA argues that the Draft Decision errs, because it grants utility transactions with BPL providers an exemption from the requirements of § 851 under § 853(b). According to CCTA, all broadband providers must be given identical treatment. It reasons that if BPL providers get a § 853(b) exemption from § 851 for the use of electric utility property, so must cable and telecommunications providers. (CCTA Opening Comments on Draft Decision, pp. 4-7.)

CCTA conflates non-discriminatory treatment with identical treatment. BPL differs significantly from other broadband systems in a number of ways, including its uses existing power lines. BPL's use of power lines means that installation of BPL generally will have a significantly lower environmental impact than installation of new fiber optic cables.

CCTA's claim that: "the Commission has found that the construction of wireline facilities, like BPL, attaching to utility poles are exempt from CEQA" (*Id.*, p. 7) is misleading.⁵² New wireline facilities, such as fiber optic cables, are frequently installed underground in existing utility rights-of-way. Trenching for fiber optic installation in existing utility rights-of-way can result in disturbance of cultural heritage sites, and boring or directional drilling can result in pollution of

⁵² CCTA also provides no citation for this claim.

waterways due to “frac-outs” of drilling fluid.⁵³ BPL, however, does not appear to have the potential to have these types of impacts.

Even in the case of above-ground poles, BPL has less environmental impact than other wireline forms of broadband service. Fiber optic cables must be physically strung – requiring trucks, equipment, supplies, and workers to follow the existing power lines, which may cross waterways, wetlands, and other sensitive habitats. This level of intrusion is not required for BPL. Thus, with respect to environmental issues, it is reasonable to provide a reduced level of scrutiny for installation of BPL compared to installation of new wireline facilities.

SDG&E, in its Reply Comments, points out additional differences between BPL and existing technologies. The manner in which equipment is installed and operated on utility facilities is a particularly important difference. (*Id.*, p. 2, fn. 3.)

DRA and TURN, filing joint Comments, object to the granting of an exemption to a § 851 review. They argue, among other things, that the § 853(b) is unjustified and inconsistent with past precedent. In particular, they argue that alternative advice letter processes would be timely, and such review would not discourage investment. They also maintain that the opportunity offered by BPL is not “extraordinary” and that the grant of exemption from § 851 should not be made so “categorically.” (*Id.*, pp. 4-5.)

We do not find the arguments of DRA and TURN to be compelling. The Commission is more familiar with the operations of our regulatory processes than parties, and we know well the uncertainties that it can impose. With respect to the argument of DRA and TURN concerning the use of “extraordinary,” they

⁵³ See D.02-08-063.

themselves admit that the Commission need not make a finding of extraordinary to invoke § 853(b). Finally, we note that § 853(b) permits the Commission to grant an exemption to “any public utility or *class of public utility* from this article.” Thus, our exemption is explicitly permitted under the statutory language, for we are exempting this class of utility from one particular type of § 851 review.

PG&E notes that the Draft Decision’s discussion of CEQA is unnecessarily restrictive. (PG&E Opening Comments on Draft Decision, p. 2.) We have made changes to the decision in this regard.

DisabRA requested further clarifications related to a utility or BPL company’s obligations to ensure right-of-way accessibility. (DisabRA Opening Comments on Draft Decision, pp. 2-3.) We believe this issue was already adequately addressed in the Draft Decision.

CARE requests that the Commission require CEQA review for individual BPL projects to investigate whether BPL would have detrimental health effects. We believe that the Draft Decision sufficiently addresses this issue by noting that the FCC and related federal health agencies exercise jurisdiction in this area.

In addition to revisions made in response to comments, we have made other minor corrections and clarifications to the draft decision.

Findings of Fact

1. BPL systems use electric power lines to carry high-speed data signals to neighborhoods.

2. BPL data transmit at a much higher frequency than electricity, so the BPL signal can occupy the electric wires without interfering with electric transmission.

3. A variety of BPL technologies have developed to avoid the potential for the power delivery system interfering with the BPL signal.

4. BPL has the potential to provide many benefits, including increased broadband competition, additional access to broadband, and cost savings to electric customers through “smart grid” applications.

5. The FCC October 14, 2004 Report and Order on BPL encouraged “rapid development of all broadband technologies, including BPL.”

6. The NARUC BPL Task Force in a February 2005 report encouraged states to tailor appropriate regulatory roadmaps for the implementation of BPL.

7. An EPRI BPL White Paper notes regulatory action or inaction could have a significant impact on the business case of BPL.

8. Three small BPL pilot projects are ongoing in California.

9. In a landlord-tenant model for BPL, an energy utility acts as the landlord by allowing a third party to install and operate a BPL system on the utility’s facilities.

10. Under the landlord-tenant model, a utility and a third-party BPL provider negotiate a contractual arrangement in which the BPL provider obtains access to the utility infrastructure.

11. The Commission has chosen to allow regulated utilities to have unregulated affiliates subject to affiliate transaction rules.

12. The Commission will have the opportunity to review utility investments in assets that make use of a BPL system in General Rate Cases and in relevant proceedings

13. The rules adopted by the Commission in D.93-02-019 are rules governing the reporting of transactions between electric, gas, and telephone utilities and their affiliates.

14. The Commission found in D.94-02-046 that application of the affiliate reporting requirements in D.93-02-019 will enable the Commission to exercise significant oversight over transactions between a utility and BPL affiliate.

15. The safety and reliability of the electric delivery system is a principal concern of the Commission.

16. BPL poses unique safety issues since it is attached directly to energized electric wires.

17. Utilities must determine whether BPL equipment can be installed on their system and the manner in which it will be installed and operated.

18. Electric utilities are required to comply with the rules, requirements, and standards promulgated by the Commission's General Order (GO) 95, which applies to the construction of overhead lines, and GO 128, which applies to the construction of underground electric supply and communication systems.

19. In D.98-10-058, Appendix A, the Commission has established rules governing access to public utility rights of way and support structures by telecommunications carriers and cable TV companies.

20. The ROW Order describes the methodology for determining fees for pole attachments.

21. An essential element of the ROW Order is the requirement that a utility not discriminate in its fees for pole attachments.

22. Shareholders and third parties will not assume the risks of pursuing BPL deployment without some expectation of rewards.

23. Electrical equipment problems, unrelated to BPL, may be identified in the process of installing a BPL system.

24. Pub. Util. Code § 851 protects the quality of utility service provided to ratepayers and protects ratepayers' investment in utility assets.

25. A lengthy § 851 proceeding would be inconsistent with our stated policy goal of not impeding in the rapid deployment of BPL technology.

26. A § 851 review is not necessary in the public interest.

27. The plain language of § 853(b) does not limit its application to extraordinary circumstances.

28. The Commission has granted a number of § 853(b) exemptions without any finding of extraordinary circumstances. In the following cases, the granting of an § 853(b) exemption results from a policy determination from this Commission: D.05-07-039, D.05-06-016, D.04-03-020, D.02-10-008, D.05-10-013, D.02-01-055, and D.04-07-021.

29. The public interest is best served by rapid deployment of BPL technologies, rather than by a lengthy review process of individual BPL-related transactions

30. Section 853(b) provides that in granting an exemption from § 851 the Commission may prescribe terms and conditions and establish rules or impose requirements on that exemption.

31. CEQA Guidelines 15301 grants a categorical exemption for the minor alteration of and additions to existing facilities of utilities and additions to existing structures, the exact situation that we will have as California deploys broadband over power lines.

32. If appropriate alternatives are present, there is no need to require filing of an advice letter for approval of utility/BPL contracts.

33. The FCC, as the agency that authorizes and licenses transmitters and facilities that generate radio frequency radiation, has addressed the potential biological effects of radiofrequency electromagnetic fields through technical bulletins.

Conclusions of Law

1. It is reasonable to authorize an electric utility to allow an unaffiliated third party to own and operate a BPL system on its electric delivery system.
2. It is reasonable to authorize an electric utility to allow a utility affiliate to own and operate a BPL system on its electric delivery system.
3. A utility should not make rate base investments in BPL if the BPL will be used for commercial broadband deployment.
4. A utility may invest in assets that make use of a BPL system provided that the investments can be justified on the basis of utility benefits.
5. A utility may purchase services from a BPL company provided that the costs can be justified by utility benefits.
6. Any purchases of services from a BPL affiliate would be subject to affiliate transaction rules.
7. The affiliate reporting requirements adopted by the Commission in D.93-02-019 should be applied to transactions between an electric utility and BPL affiliate.
8. Transactions between an electric utility and BPL affiliate should not be subject to the Commission's existing Energy Affiliate Transaction Rules adopted in D.97-12-088, modified by D.98-08-035, and further clarified by D.98-11-027.
9. We do not intend to preempt any State law regarding electrical safety.
10. A BPL company attaching equipment to an electric utility's pole should pay the established pole attachment fee.
11. It is reasonable to allow utilities the option of assessing 1) only pole attachment fees on BPL companies, or 2) access or lease fees in addition to pole attachment fees, on BPL companies, under the terms discussed in this decision.

12. A revenue-sharing mechanism for allocation of revenues received by a utility from a BPL provider should provide shareholders a strong incentive to pursue BPL projects while also providing direct financial benefits to ratepayers.

13. It is reasonable to apply the revenue-sharing mechanism for new non-tariffed products and services adopted in D.99-04-021.

14. The Commission should not at this time adopt rules requiring entities that acquire BPL rights on a utility system to begin implementing BPL service within a certain period of time. However, if it is clear that a utility has entered into a contract with a BPL provider with the intent to prevent BPL deployment we will take appropriate action. Furthermore, if a utility has entered into a contract with a BPL company to deploy a BPL system and no deployment has commenced within seven years, we will entertain a proceeding to examine the underlying circumstances of the deployment failure and take corrective action, if necessary.

15. Pursuant to Pub. Util. Code § 853(b), it is reasonable to exempt BPL projects and transactions from Pub. Util. Code § 851 because a § 851 review is not necessary in the public interest.

16. Under Pub. Util. Code § 853(b), it is lawful for the Commission to subject BPL projects to specific conditions, even when exempted from Pub. Util. Code § 851.

17. As a result of the use of § 853(b) exemption, this Commission will not be reviewing individual BPL transactions and the Commission's requirement of a CEQA review is not triggered.

18. CEQA guideline 15301 grants a categorical exemption to those limited BPL transactions where equipment is installed in or on existing utility structures as long as all the BPL-related construction and installation is performed consistently with any and all applicable existing environmental mitigation measures,

particularly those measures applicable to the utility infrastructure on which it is constructed or installed.

19. It is reasonable to require parties to file an application seeking Commission approval of any transaction that does not qualify for a categorical exemption from CEQA.

20. No sale of utility assets with respect to a BPL transaction should be permitted under this § 853(b) exception.

21. Since it is important for this Commission to have notice of the existence of a BPL contract and its general terms, we will require utilities to provide the Telecommunications Division Director and Energy Division Director, notice of any lease or other financial arrangement with a BPL company, including the name of that company, the nature of the services to be provided, the date entered, and the applicable categorical exemption citation.

22. To the extent that a utility or BPL provider needs to access existing facilities, the responsible companies should be required to maintain rights of way or alternative paths of travel that are accessible for people with disabilities.

23. This Commission may not regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the FCC's regulations concerning such emissions.

O R D E R

IT IS ORDERED that:

1. It is the policy of this Commission to encourage development and competition in the broadband market by providing regulatory certainty to companies seeking to provide broadband over power lines (BPL) in California.

2. Any electric utility regulated by the California Public Utilities Commission (CPUC) is authorized to enter into contracts that would allow an unaffiliated third party to own and operate a BPL system on its electric delivery system.

3. Any electric utility regulated by the CPUC is authorized to enter into contracts that would allow an affiliated company to own and operate a BPL system on its electric delivery system.

4. Electric utilities are prohibited from making rate base investments in BPL if the BPL will be used for commercial broadband deployment. A utility may invest in assets that make use of a BPL system provided that the investments can be justified on the basis of utility benefits. A utility may purchase services from a BPL company provided that the costs can be justified by utility benefits.

5. Transactions between an electric utility and BPL affiliate shall at all times be subject to the Commission's affiliate reporting requirements in Decision (D.) 93-02-019 as modified by any subsequent Commission decisions.

Transactions between an electric utility and BPL affiliate, other than a BPL affiliate's payment of pole attachment fees, are subject to a standard of fair market value. When reporting affiliate transactions pursuant to D.93-02-019, utilities shall report the methodology used to calculate fair market value.

6. Utilities shall ensure that their compliance with the Commission's General Order (GO) 95 and GO 128 and their setting and application of additional safeguards and conditions is performed in a competitively neutral manner with respect to other communications and information providers who seek similar access. If in the course of implementing BPL projects utilities identify a need to revise applicable Commission rules or General Orders, the utilities are encouraged to request appropriate relief from the Commission.

7. An electric utility may opt to charge a BPL company the established pole attachment fee, or assess lease or access fees in addition to the established pole attachment fee, under the conditions discussed in this decision.

8. Any access or lease fees that an electric utility receives from a BPL company are subject to a 50/50 shareholder/ratepayer after-tax net revenue sharing mechanism, as adopted in D.99-04-021.

9. A BPL company attaching equipment to a surface transformer enclosure owned by San Diego Gas & Electric Company (SDG&E) is required to pay an attachment fee of \$11.20 per year per attachment. Other utilities requiring such a rate should submit an advice letter using a cost-based methodology consistent with D.98-10-058, Appendix A and similar to that described in SDG&E's Opening Comments, Appendix A.

10. Costs directly related to the repair and maintenance of existing electrical equipment for the purposes of electric service reliability shall be allocated to electricity operations, while costs directly related to BPL installation or operation shall be allocated to the BPL operator.

11. Pursuant to Pub. Util. Code § 853(b), we exempt from the requirements of Pub. Util. Code § 851 all BPL transactions except for transactions involving the sale of utility assets. Transactions subject to this exemption may only be accomplished by the use or modification of "existing facilities," such as the use of existing electrical underground or overhead lines, or the placement of couplers, load monitoring devices, and equipment on existing poles or in existing buildings. BPL equipment must be installed consistent with any and all applicable existing environmental mitigation measures, particularly those measures applicable to the utility infrastructure on which the BPL equipment is constructed or installed. Parties are required to file an application seeking

Commission approval of any transaction that does not qualify for a categorical exemption from California Environmental Quality Act (CEQA). The Commission will conduct a CEQA review, and based on that review and a public interest finding, will either approve or reject the proposed transaction.

12. Utilities shall provide the Telecommunications Division Director and Energy Division Director notice of any lease or other financial arrangement with a BPL company, including the name of that company, the nature of the services to be provided, the date entered, and the applicable categorical exemption citation.

13. To the extent that a utility or a BPL company needs to access existing facilities, whether underground or above ground, the responsible companies are directed to maintain rights of way or alternative paths of travel that are accessible for people with disabilities.

14. Californians for Renewable Energy's March 6, 2006 motion is denied in accordance with the previous discussion.

15. All rulings issued in this proceeding are hereby affirmed.

16. Rulemaking 05-09-006 is closed.

This order is effective today.

Dated April 27, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners

I reserve the right to file a dissent.

/s/ GEOFFREY B. BROWN
Commissioner

R.05-09-006

D.06-04-070

**Dissent of Commissioner Geoffrey F. Brown
On BPL OIR**

Our decision makes a determination that should have been left to the legislature. In our haste to encourage a new technology, this Commission has overstepped its authority and created a permanent market imbalance in the broadband market. By today's decision, we subsidize in perpetuity Broadband Over Powerlines (BPL) technology over all other modes of broadband in the competitive market.

It is the market that should be deciding the winners and losers in broadband technology, not regulators. Our decision effectively picks a winner by creating the mechanism by which parent company shareholders maximize profits by getting the regulated utility to subsidize the unregulated BPL venture.

Moreover, by abusing the Public Utilities Code § 853 exemption to avoid our legally-mandated § 851 review of asset transfer, this Commission has prevented a proper calculation of the value of the affiliate's permanent free ride on top of a subsidized network that we have enabled.

This subsidized entity, the BPL affiliate, will be competing against a cable industry that is not rate-regulated, a wireless industry that is not rate-regulated, and a telecommunications industry that is rapidly moving away from rate regulation.

Finally, whatever concerns this Commission may have about preventing anti-competitive action in the broadband market are effectively mooted, given that this decision authorized the permanent transfer of Investor Owned Utility assets to an unregulated affiliate at a non-Commission approved price. What is particularly galling is that if the assets turns out to be worth the billions of dollars that many predict, the utility ratepayers can never get it (or even a part of it) back.

This Commission, in overstepping its bounds and acting as if we were the legislature, has injured both electricity market ratepayers and the broadband market.

Certainty of expectations in the marketplace is a desirable thing, except where the only certainty is permanently distorted market. This decision creates just that.

Dated April 27, 2006, at San Francisco, California.

/s/GEOFFREY F. BROWN

Geoffrey F. Brown
Commissioner