

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

FILED
PUBLIC UTILITIES COMMISSION
September 8, 2005
SAN FRANCISCO OFFICE
RULEMAKING 05-09-006

ORDER INSTITUTING RULEMAKING**I. Summary**

The Commission initiates this proceeding to encourage the deployment of Broadband Over Power Line (BPL) in California. The Broadband Deployment in California report (Broadband Report) recently adopted by the Commission in D.05-05-013 recommended that “California should encourage deployment of BPL by its electric utilities by providing regulatory certainty” (Broadband Report, p. 82). The report identifies significant potential for BPL development, finding that “BPL may be the broadband technology that proves most effective in bringing affordable broadband to lower-use communities” (p. 71). The report further recognizes that BPL could increase the competitiveness of the broadband market. BPL technology can also be used to provide a range of benefits to electric customers by improving electric service and reliability through functions such as remote meter reading, detailed identification of equipment failures, diagnostic monitoring and other applications.

In this proceeding the Commission proposes to establish sufficient regulatory certainty to encourage the investor-owned electric utility companies to deploy BPL projects. At this time BPL deployment is necessary to understand the potential of this promising new technology. The Commission intends to encourage BPL deployment in a manner that does not harm ratepayers, that promotes accessibility to broadband networks and that contributes to California's competitive broadband market.

Any conclusions reached in this OIR are tentative in nature and will be subject to the Commission's comment process.

II. Background

In April 2005, the CPUC submitted a report on broadband deployment to the California Legislature in response to Senate Bill (SB) 1563. SB 1563 directed the CPUC to develop a plan that will:

“... encourage the development and deployment of new technologies and the equitable provision of services in a way that efficiently meets consumer need and encourages the ubiquitous availability of a wide choice of state-of-the-art services.”¹

In the U.S. broadband market today, two technologies dominate the market: DSL and cable modem. According to FCC data, these two technologies comprise more than 90% of the broadband market.² One major reason for the dominance of these two technologies is the fact that cable TV and telephone services are either present in or readily available to virtually every home in the nation. Their ubiquitous presence gives cable companies and phone companies a critical advantage when they utilize their existing infrastructure to offer broadband services.

¹ R.03-04-003, p. 3.

² FCC Form 477 data, December 2004.

Among the new broadband technologies discussed in the Commission report,³ BPL stood out as a technology that has the potential to compete head-to-head against the two dominant broadband technologies because, similar to cable TV and telephones, the electricity distribution network reaches virtually every home in the state with the potential to offer high-capacity bandwidth.

BPL is the provision of broadband service over existing electricity distribution wires using the higher frequency bandwidth which is dedicated by the FCC for this purpose. In addition to offering a broadband Internet connection, BPL also gives electric utilities a more robust capability to monitor and manage the electric grid and distribution system. The potential capabilities include automatic meter reading, demand monitoring management such as remote shut-off, and real-time identification of outage locations.⁴

Despite the 90% market dominance and presence of DSL and cable modem service in many communities throughout California, many communities are without broadband services or the benefits (lower prices, better services and more innovations) of a competitive broadband market. As noted in the Broadband Report, although many communities have access to either DSL or cable modem, not all are served by both.⁵ Satellite broadband service is expensive and somewhat limited, and wireless technologies such as WiMax and WiFi are still in the protocol development stage or not widely available. BPL has the potential to fill these gaps by providing broadband service in communities not served by either DSL or cable modem, and it can establish a more

³ The other new broadband technologies discussed in the Broadband Report are Fiber-to-the-Premises (FTTP), Wi-Fi, Wi-Max and 3G.

⁴ para. 3-6, FCC 04-245.

⁵ p.6, Broadband Report, Broadband Report maps 1-4.

competitive broadband market in communities currently served by only one of the two dominant broadband technologies.

The Federal Communications Commission (FCC) has also taken notice of the potential BPL offers as a viable and widely available broadband service option. The FCC sought comments and issued a Report and Order⁶ on BPL technologies, addressing technical questions such as interference and other technical specifications and standards questions. This action by the FCC is a similar effort to create a regulatory framework for electric utilities to conduct tests and roll out commercial BPL deployments.

Currently, there are more than two dozen BPL test projects taking place throughout the US. California lags behind these pioneering programs, but at least one is scheduled to commence here later this year. In addition to these trials, there are several commercial BPL deployment projects around the nation. In the City of Manassas, Virginia, the municipal utility district is rolling out commercial BPL deployment. In Ohio, the investor-owned electric utility, Cinergy, is also rolling out commercial BPL deployment in parts of that state.⁷

The Commission recognized the importance of BPL when it adopted its far-reaching Broadband Report in May 2005. The Commission intends to encourage the development of BPL technology.

III. Regulatory Discussion

BPL is a new technology that has not been explicitly addressed by existing Commission rules and past precedents. A discussion of how a BPL project might be treated by current rules and recent precedents is helpful to understand if existing rules will simultaneously encourage BPL deployment, avoid harm to

⁶ FCC 04-245, released on October 28, 2004.

⁷ p.30-32, Broadband Report.

ratepayers, promote accessibility to broadband networks and ensure competition in the state's developing broadband market.

A BPL project would likely involve a lease or other arrangement allowing a BPL company to access utility property. In particular, a BPL company would need access to a utility's power lines and to utility poles and buried conduit to attach equipment. Before allowing a BPL company to lease or access utility property, the utility must seek authorization from the Commission under Public Utilities Code §851.⁸ The primary question considered by the Commission within a §851 proceeding is "whether the proposed transaction is adverse to the public interest."⁹ In the case of BPL projects, the Commission is guided by past decisions that have concluded "the public interest is served when utility property is used for other productive purposes without interfering with the utility's operation or affecting service to utility customers."¹⁰ The Commission could also consider the public benefits of increased competition within the broadband market and increased access to broadband provided by BPL. The Commission may also evaluate if the transaction is giving BPL projects any unfair competitive advantage relative to other broadband technologies.

The Commission also typically considers whether the utility is receiving an appropriate level of compensation from the transaction and whether any financial proceeds are being distributed reasonably between shareholders and

⁸ Public Utilities Code §851 states 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." Assuming that the property being used by a BPL project is "necessary or useful", §851 authorization would be required.

⁹ D.02-01-058.

¹⁰ Ibid.

ratepayers. The Commission's decisions regarding sharing of proceeds between ratepayers and shareholders have typically been made on an ad hoc basis and have been inconsistent. These determinations are often very contentious and time consuming.¹¹ Because so many issues are subject to Commission scrutiny, a §851 application to allow a BPL company to access a utility's electric delivery system could significantly delay BPL deployment. Time delays and uncertainties could discourage BPL investment and unnecessarily delay the substantial public benefits that BPL deployment could generate.

As an alternative to §851, under §853(b) the Commission can "exempt any public utility or class of public utility from [§851] if it finds that the application thereof...is not necessary in the public interest." Furthermore, "the commission may establish rules or impose requirements deemed necessary to protect the interest of the customers or subscribers of the public utility." If the Commission believes that the public interest is achieved through rapid deployment of BPL projects rather than through time-consuming §851 applications, the Commission can rule that BPL projects as a class should be exempt from §851 under §853(b). Uniform rules could be created in advance to address the treatment of any financial proceeds, affiliate transactions, compliance with relevant PUC and FCC rules and other issues. A section 853(b) exemption may be the best way to encourage timely BPL deployment while avoiding adverse effects on the public.

IV. Preliminary Scoping Memo

In this proceeding the Commission proposes to establish sufficient regulatory certainty to encourage the investor-owned electric utility companies to deploy BPL projects. The Commission intends to concurrently avoid harm to

¹¹ For example, a §851 application filed by Southern California Edison to lease communication facility sites and equipment placements to Pacific Bell Mobil Services took four years to resolve (see D.00-07-010).

ratepayers, promote accessibility to broadband networks and promote competition in California's broadband market.

This OIR lays out one possible set of rules to guide utilities implementing BPL over their power lines. We invite parties to comment on the following questions which we believe are central to BPL policy development:

- Do the draft rules provide sufficient regulatory certainty to encourage the rapid deployment of BPL projects?
- Are the draft rules appropriate to ensure that BPL projects do not have an adverse effect on the public interest?
- Are the draft rules sufficient to avoid ratepayer harm?
- Will the draft rules promote accessibility to broadband networks?
- Will the draft rules contribute to competitiveness in California's broadband market?
- Are the draft rules consistent with a policy of maintaining regulatory neutrality toward different broadband technologies? Do these rules unfairly advantage or disadvantage any competitor in the broadband market?
- What actions can or should the Commission take to prevent non-BPL broadband providers from acquiring the rights to BPL networks with the intention of idling them for anti-competitive purposes?
- Will the draft rules provide sufficient safeguards to avoid cross-subsidization without creating a regulatory burden that harms the public interest?
- Are the draft rules sufficient to ensure fair lease payments or fees for the use of utility assets? Given the uncertain technological and financial potential of BPL, can this rulemaking adequately address the question of what constitutes fair lease payments or fees for the use of utility assets by BPL companies?

We seek comments on this draft framework, recommendations for modification as needed or alternative proposals. Parties may comment that the draft framework contains unnecessary elements, or that additional features need to be added. In addition, we invite parties to comment on specific issues noted below.

Draft Rules

The Commission is considering rules that provide for the following:

- An electric utility may elect to allow an affiliate or an unaffiliated entity to own or operate a BPL system on the electric utility's electric delivery system.
- An electric utility may elect to allow an affiliate or an unaffiliated entity to provide Internet and other broadband services over a BPL system.
- §853(b) of the Public Utilities Code allows the Commission to determine that the application of §851 "is not necessary in the public interest."¹² BPL projects allow the utility to provide system benefits to electric users and promote broadband competition and access, which are in the public interest. Furthermore, state policies support increased deployment of broadband service. The actual installation of BPL on existing utility poles or underground facilities is virtually identical to the installation of current communication uses (e.g. phone, cable television). Installation of BPL equipment involves only minor alterations to the existing structure within existing rights-of-way.

A full §851 process could discourage or delay the achievement of significant public benefits. §853(b) authorizes the Commission to address the important issues that would come up in a §851 process in advance. That is one of the goals of this rulemaking. So far as such BPL projects do not interfere with the utility's operation of its electric system and do not harm the utility's ratepayers, we propose that any

¹² Public Utilities Code §853(b).

lease or other agreement providing access to an electric utility's power lines, poles and/or buried conduits for the purpose of a BPL project be exempt from the requirements of Public Utilities Code §851 under §853(b).¹³ We request that parties comment on the appropriateness of an exemption from the requirements of §851 and explain specifically why the application of §851 "is not necessary in the public interest". We furthermore request that parties comment as to whether the transactions included under the proposed exemption are sufficiently broad or narrow to achieve the goals of this OIR.

Parties who do not believe that an exemption from §851 is appropriate are requested to explain what if any additional protections §851 review provides to utility ratepayers and actual or potential competitors in the broadband market. Additionally, we seek comment as to whether §851 review should be required before a utility grants the right to an affiliated or unaffiliated BPL provider to utilize utility assets in the provision of BPL. Those that propose that §851 reviews should be utilized in any fashion should also provide details as to how this can be done as efficiently and effectively as possible and in a fashion that does not hinder the development and/or deployment of BPL or the initiation of BPL related activities. Furthermore, parties must also describe why such protections could not alternatively be provided during this or any other proceeding that seeks to consider granting exemption to §851 under §853(b) with respect to BPL deployment.

¹³ If BPL projects are exempt from the requirements of §851 under §853(b) then CEQA will not be triggered. However, if CEQA were triggered we believe BPL activities would qualify for a "categorical exemption". We envision that BPL deployment can be accomplished by the use of existing facilities, such as the use of existing electrical underground or overhead lines, or the placement of antennas and equipment on existing poles or in existing buildings. In such cases, we believe that under CEQA no review will be required because the activities do not result in any direct or reasonably foreseeable indirect effect on the environment. This is consistent with our practices in granting limited facilities-based authority to communications carriers. It is also consistent with our conclusion in D.04-04-014 which authorized a Class I categorical exemption from CEQA for the placement of fiber optic cable on existing electric transmission facilities (Title 14 of the California Code of Regulations §15301). The categorical exemption does not apply in specified situations where exceptions apply according to §15300.2.

- This OIR proposes that an electric utility that allows an affiliate or third party to own a BPL system on the electric utility's electric delivery system may charge the owner of the BPL system transaction fees for the use of the electric utility's electric delivery system.
 - The pole attachment fees as set forth in D.98-10-058, Appendix A, are just and reasonable compensation for the use of a utility's electric delivery system. We propose that one hundred percent of the pole attachment fees will go to ratepayers. These fees are intended to compensate ratepayers for a share of the annual cost of owning and maintaining the poles. This is consistent with the treatment of pole attachment fees from other uses such as fees paid by cable providers.
 - If the utility receives additional lease payments or access fees from an affiliated or unaffiliated BPL company, we propose that those proceeds be shared between shareholders and ratepayers based on a percentage allocation defined in this rulemaking. The allocation should provide shareholders a strong incentive to pursue BPL projects while also providing direct financial benefits to ratepayers. We request that parties recommend an appropriate percentage split and explain how that split will encourage BPL deployment.
- BPL projects should be financed only with shareholder and/or third party funds; therefore we propose that all financial risks and rewards derived from BPL projects, including any gain on sale, will accrue to the shareholder or third party investors. Ratepayers should receive payment through the transactions fees described in the prior draft rule, i.e. pole attachment fees, lease payments and access fees.
- Utilities should file an advice letter describing the terms of any lease or other financial arrangement with a BPL company, including a calculation of the pole attachment fees.

- An electric utility's costs for any electric utility applications that may be supported by BPL are proposed to be eligible for inclusion in the electric utility's rate base, and any utility operating expenses may be recoverable as operating expenses in the appropriate ratemaking proceeding, e.g., general rate case, to the extent deemed just and reasonable.¹⁴
- In the process of installing BPL, unrelated electric equipment problems may be identified. It is proposed 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.
- If the utility decides to deploy a BPL project through an affiliate, the regulated utility and BPL affiliate may want to engage in financial transactions. For example, the affiliate might want to contract for the use of the utility's equipment or personnel. Alternatively, the utility might want to purchase communications services from the BPL affiliate for the purposes of diagnostic monitoring or remote meter reading. 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.^{15,16} We request that parties comment on the

¹⁴ Electric utility applications may include automated metering, voltage control, remote equipment monitoring and energy management.

¹⁵ 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.

adequacy of the existing affiliate transaction rules to prevent cross-subsidization that could harm ratepayers or unfairly advantage BPL companies relative to other broadband providers.

- Although BPL projects will not use ratepayer funds, this OIR proposes that the utilities use GAAP accounting practices to establish separate accounts that will differentiate BPL development and operational costs.
- Federal Communications Commission (FCC) policy principles expressed recently in FCC 05-151 aim to encourage broadband deployment and to preserve and promote the open and interconnected nature of the public Internet.¹⁷ Future FCC activities will recognize that consumers are entitled to competition among network providers, application and service providers. Consumers demand this ability and broadband access providers will deliver it without rate regulation, as they must in a competitive marketplace. Consistent with adopted FCC policy and to advance choice and access to the Internet for California consumers, the CPUC will also not exercise ratesetting authority over broadband service provided through a BPL system.
- Electric utilities must continue to comply with the rules, requirements, and standards promulgated by the Commission's General Order #95, which applies to the construction of overhead lines, and General Order #128, which applies to the construction of underground electric supply and communication systems. As previously noted in D.98-10-058, these are 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 free to request appropriate relief

¹⁶ This is consistent with D.00-06-019 which 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.

¹⁷ Action taken by the FCC on August 5, 2005 by Policy Statement (FCC 05-151).

from the Commission and the CPUC will address the request expeditiously. 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.

- Utilities deploying BPL will adhere to all technical rules set forth by the FCC Report and Order 04-245 governing BPL deployments and use of equipment.¹⁸

V. Category of Proceeding

The Commission's Rules of Practice and Procedure require that an order instituting rulemaking preliminarily determine the category of the proceeding and the need for hearing.¹⁹ As a preliminary matter, we determine that this proceeding is quasi-legislative. We also preliminarily determine that there is no need for evidentiary hearings. The final determination on the need for evidentiary hearings will be made in one or more rulings issued by the Assigned Commissioner. Any party who believes that an evidentiary hearing is required shall file a motion requesting such a hearing no later than October 6, 2005. Any such motion must identify and describe (i) the material issues of fact, (ii) the evidence the party proposes to introduce at the requested hearing, and (iii) the schedule for conducting the hearing. Any right that a party may otherwise have to an evidentiary hearing will be waived if the party does not submit a timely motion requesting an evidentiary hearing.

¹⁸ FCC Report and Order 04-245 was released on October 28, 2004.

¹⁹ Rule 6(c)(2).

As provided in Rule 6(c)(2), any person who objects to the preliminary categorization of this rulemaking as “quasi-legislative” or to the preliminary hearing determination, shall file and serve its objections with its opening comments.

VI. Schedule

The preliminary schedule is set forth below. We delegate to the Assigned Commissioner and the ALJ the authority to set other dates in the proceeding or modify those below as necessary.

Comments on Commission’s draft framework due	October 6, 2005
Reply Comments on Commission’s draft framework due	October 17, 2005
Draft Decision Issued	November 15, 2005
Commission Decision	December 15, 2005

This proceeding will conform to the statutory case management deadline for quasi-legislative matters set forth in Pub. Util. Code § 1701.5.

VII. Respondents

We name as respondents in this proceeding the three major electric investor owned utilities: PG&E, SDG&E, and SCE. These respondents shall file comments on the issues identified in this rulemaking. All other parties, including other electric utilities, may file comments.

VIII. Parties and Service List

Interested persons will have 15 days from the date of mailing to submit a request to be added to the service list for this proceeding. Since our order names PG&E, SDG&E, and SCE respondents to this rulemaking, by virtue of that fact, they will appear on the official service list.

We will also serve this order on those who are on the service lists for the following proceedings:

- A.04-06-024, PG&E Rate Design;
- A.04-12-014, SCE General Rate Case;
- A.02-12-027 and A.02-12-028, SoCalGas/SDG&E Cost of Service rate proceeding;
- R.04-04-003, Procurement rulemaking;
- R.03-04-003, Broadband rulemaking;
- R.05-04-005, Regulation of Telecommunications Utilities; and
- A.05-03-015, A.05-03-026 and A.05-06-028, Advanced Metering Infrastructure Deployment proceeding.

Within 15 days of the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in this rulemaking should send a request to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California, 94102 (or ALJ_Process@cpuc.ca.gov) asking that his or her name be placed on the official service list for this proceeding. The service list will be posted on the Commission's website, www.cpuc.ca.gov, prior to the time comments are filed pursuant to Ordering Paragraph 9.

Any party interested in participating in this rulemaking who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor in Los Angeles at (213) 649-4782 or in San Francisco at (415) 703-7074, (866) 836-7875 (TTY – toll free) or (415) 703-5282 (TTY), or send an e-mail to public.advisor@cpuc.ca.gov.

The Commission has recently adopted rules for the electronic service of documents related to its proceedings, Commission Rule 2.3.1, available on our website at http://www.cpsc.ca.gov/PUBLISHED/RULES_PRAC_PROC/44887.htm. All parties shall comply with the requirements of the new rule.

IX. Ex Parte Communications

Per Rule 7(d) of the Commission's Rules of Practice and Procedure, *ex parte* communications are allowed without restriction or reporting requirement in any quasi-legislative proceeding. Therefore, there are no such restrictions or reporting requirements applied to this proceeding.

O R D E R

Therefore, **IT IS ORDERED** that:

1. The Commission hereby institutes this rulemaking on its own motion to encourage the deployment of Broadband Over Power Line (BPL) projects in the state.
2. The issues to be considered in this proceeding are set forth in the Preliminary Scoping Memo as draft rules designed to encourage BPL projects in the state.

3. Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas & Electric Company (SDG&E) are Respondents in this proceeding.

4. The Executive Director shall cause this Order Instituting Rulemaking (OIR) to be served on Respondents and parties to the following service lists: A.04-06-024, A.04-12-014, A.02-12-027, A.02-12-028, R.04-04-003, R.03-04-003, R.05-04-005.

5. Within 15 days from the date of mailing of this order, any person or representative of an entity interested in monitoring or participating in this rulemaking shall send a request to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California, 94102 (or ALJ_Process@cpuc.ca.gov) asking that his or her name be placed on the official service list for this proceeding. This service list will be posted on the Commission's website, www.cpus.ca.gov, prior to the time comments are served pursuant to Ordering Paragraph 9.

6. All parties shall abide by the Commission's new electronic service rules contained in Rule 2.3.1 of the Commission's Rules of Practice and Procedure.

7. We preliminarily determine the category of this rulemaking to be "quasi-legislative" and preliminarily determine that hearings are unnecessary. Parties objecting to these determinations shall include their objections in their opening comments.

8. Any party who believes that an evidentiary hearing is required shall file a motion requesting such a hearing no later than October 6, 2005. Any such motion must identify and describe (i) the material issues of fact, (ii) the evidence the party proposes to introduce at the requested hearing, and (iii) the schedule for conducting the hearing. Any right that a party may otherwise have to an

evidentiary hearing will be waived if the party does not submit a timely motion requesting an evidentiary hearing.

9. Respondents shall, and other parties may, file opening comments on the issues identified in this rulemaking by October 6, 2005, and reply comments by October 17, 2005.

10. The Assigned Commissioner and Administrative Law Judge will set the schedule for this proceeding.

This order is effective today.

Dated September 8, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners

I reserve the right to file a concurrence.

/s/ GEOFFREY F. BROWN
Commissioner

R.05-09-006

**Broadband Over Power Lines
Order Initiating Rulemaking
Concurrence of Commissioner Geoffrey Brown**

Broadband Over Power Lines technology affords an opportunity to bring competition to a broadband market. The market now appears to be a functional duopoly with active competition for market share, before the inevitable unarticulated truce that generally occurs when there are only two major competitors in a discrete market. In our broadband report, we failed to consider the extent of broadband competition, notwithstanding our obligation under §709 and caselaw to do so.

This proposed order does not contemplate any hearings. I view this as a substantial error. Because this order contemplates permitting the unexamined and irrevocable conveyance of assets that might provide billions of dollars of rate relief to electricity ratepayers, hearings on the feasibility of both the technology and the business plans contemplated by the utilities are appropriate. To the extent that commentators on this OIR have opinions on the benefits, if any, of evidentiary hearings, I would hope they will articulate with particularity their reasons for so believing. Commentators should map out with some care what an intellectually honest inquiry would entail and how long it should take.

I view this order's proposal to abandon *in all cases* our §851 supervisory authority as appalling and recklessly imprudent. This order fails to distinguish between routine sales and leases and those that irrevocably give away a technology that may be worth billions. It fails to do so in order to falsely paint §851 as an impediment to progress. The evidence that §851 is an insuperable burden to BPL deployment is not just unpersuasive; it is non-existent.

§851 was enacted to prevent the imprudent or irregular disposition of assets that had been financed by captive ratepayers. The Legislature recognized the possibility that utility monopolies might attempt to remove regulated properties from regulatory control. For that reason the, the Legislature empowered the PUC to supervise any sale or transfer of useful assets. That we would now abdicate such authority when the utilities themselves have not asked to do so is simply incomprehensible. I would hope that commentators would comment on the scope of the waiver of §851 contemplated in this order. Similarly, I would hope that commentators would address the potential for abuse by affiliated entities of the utilities involved.

Perhaps, the point of this order is to allow a giveaway of valuable assets as a way to lower electricity. If that is so, we should say so clearly. The Legislature of Texas has authorized utilities to give away their broadband assets, but it has done so in clear, public view. What we have done at the PUC is to allow a transfer of ratepayer-financed assets without public vetting.

R05-09-006

Prior to this order, the utilities apprised us that they were going to conduct some experiments with a technology that may help in their operations and also may compete in telecommunications. However, as far as I know, no substantive business plan is even close to being considered. Nevertheless, we are already considering permitting the transfer of a potentially invaluable asset by eliminating §851 oversight on irreversible sales and licenses. I am apprehensive that this course is premature, ill-considered and imprudent. I would hope that commentators would deal with the potential abuses that might obtain if such oversight is eliminated.

We should examine this exciting technology, with evidentiary hearings and cross-examination of experts, and perhaps we should minimize scrutiny over short-term leases, licenses and the like. If evidentiary testimony is deemed unnecessary, I would hope that commentators would explain how we can get a comprehensive view on a new technology that apparently has never been used commercially without such inquiry.

Absent a clear and comprehensive understanding of the economic and technological implications involved, we should not permit utilities to irrevocably give away a license (or an analogous legal vehicle) to use BPL over their lines. I am afraid this order will do that. Commentators should address whether the particulars are known yet or can be known yet.

I encourage all parties to involve themselves in this proceeding, to comment fully, to use discovery processes as appropriate, and to do everything in their power to assure that there will be a full record. I am not optimistic that a rulemaking which does not contemplate hearings and anticipates its conclusion by the end of the year can provide such a record.

Dated September 8, 2005, at San Francisco, California.

/s/ GEOFFREY F. BROWN

Geoffrey F. Brown
Commissioner