The Eye of the Beholder: Participation and Impact in telecommunications (De)Regulation

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Dorit Rubinstein Reiss

Abstract:

The California Public Utilities Commission addressed both pricing deregulation and universal service in telecommunications during the last decade. Both decisions had a similar cast of characters, and similarly elaborate processes. In relation to price deregulation, the utilities positions were accepted on every issue addressed; in relation to universal service, consumer organizations’ positions were accepted in about 60% of the issues. This article tells the story of how those decisions were made, and examines the reasons for the difference in impact. The article examines and reject an explanation of capture; accepts in part a focus on the influence of the commissioner in charge of the decision; and suggests that the most important factor in determining impact was the perceptions and expectations of CPUC Commissioners and staff, reminding us of the importance of agency personal and their profound impact on regulatory results.

1 Associate Professor, UC Hastings of the Law. I would like to thank the participants at the Wake Forest University School of Law forum on Asymmetry of Administrative Law for their comments. I would also like to thank David Jung, David Levine, Adam Scales, Reuel Schiller, and … for comments and input into this project, and Annie Daher, Alicia Jovais, Svetlana Matt and Jonathan Trunnell for superb research assistance.
Part I: Introduction:

Are regulators more likely to heed consumer organizations purely redistributive issues than on more general regulatory issues, even if those more general issues may have redistributive consequences?

This article examines two decisions by the California Public Utilities Commission (CPUC). The first decision largely deregulated the California Telecommunications market, at least in terms of prices, removing most price controls and reporting requirements from the incumbent telecommunications carriers (ILECs). The second decision changed several important aspects of the California Lifeline program, the program providing subsidized telecommunications service to low-income consumers.

The article does not try to evaluate the substance of CPUC’s decisions, whether they were correct or desirable. That is an important project, but it is not this one. Rather, it addresses participation and input into the process. The article asks why in the first case, the CPUC’s decision was in line with the ILECs’ preferences on almost every issue, and on the second, it accepted the consumer organizations’ preferences on several issues. The article examines three possible explanations. First, it examines and rejects the argument that in the first proceeding the CPUC was captured by the ILECs. Second, it partly accepts the argument that the preferences of the assigned commissioner affected the result, but qualifies it by emphasizing the role of the staff. Third, it examines the hypothesis that the type of issue was critical to the different results, and concludes that is the most powerful explanation – that the expertise of consumer groups was considered more important on the second issue than on the first, and that the higher level of

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2 “Incumbent Local Exchange Carrier” – a company that was in place when At&T was broken up. A local Exchange Carrier is basically a telecommunications provider (see Telecommunications Act, 1996 §3(44).
conflict in the first decision meant the commission pretty much had to choose between positions, while on the second decision it could find a middle point. Accordingly, it suggests that in these cases regulators’ approaches to input mattered a lot, and that regulators see consumer organizations’ input as much more important in areas where they think those organizations have special expertise.

The article only has two cases studies, and it does not claim they are representative of regulatory behavior. Nonetheless, the close inspection of the process shed interesting light on the role of consumer advocates and the role of regulators in the process.

The article proceeds as follows. Part II describes the background to the decisions, providing a short description of the CPUC and of each decision, and setting out the boundaries of the conflict. Part III sets out the process the CPUC used and explains it, addressing criticisms of the proceeding. Part IV than describes “winners” in each proceeding, and how they are identified. Part V addresses the three explanations for the differences, rejecting the capture hypothesis, partly confirming the assigned commissioner hypothesis, and accepting the type of issue hypothesis.

**Part II: Background**

The California Public Utilities Commission (CPUC) is an unusual agency. It is a constitutional agency: in 1911 the California Senate proposed a constitutional amendment giving the newly created Railroad Commission constitutional status; the electorate ratified the amendment.³ In 1946 this became the California Public Utilities Commission.⁴ Today the CPUC

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³ [www.cpuc.ca.gov/puc/aboutus/puhistory.htm](http://www.cpuc.ca.gov/puc/aboutus/puhistory.htm) (last visited on May 14, 2012).
⁴ id.
regulates multiple areas, but this article focuses on its regulation of communications (with an emphasis on voice telephony).

The CPUC’s procedures can be found partly in the California Public Utilities Code. Additional procedures have been created by the CPUC itself, including classification of decisions and assignment of roles. Major decisions are handled by a team consisting of at least one assigned Administrative Law Judge (ALJ) and one Commissioner. The ALJs are part of the CPUC’s professional staff. Usually they have substantial expertise and experience in at least one area of utility matters. They may have a background in law, engineering, public policy or other related disciplines. Often, though not always, they specialize in the subject matter of the proceeding (one ALJ explained to me that expediency and caseload sometimes lead to deviations from expertise; for example, the CPUC has a lot more energy matters on its plate, these days, than communication matters, so ALJs with a communications expertise find themselves handling energy cases frequently). Even when that is the case, however, they draw on each other’s expertise: a former ALJ described the ALJ as a very collegial group, and explained they regularly consult each other when handling cases that require special expertise.

The five Commissioners are political appointees, appointed for a set term by the governor and confirmed by the senate. They may or may not have a utilities background, and naturally

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5 Including communications, energy, transportation and water.
6 Especially important for our purposes are sections 1701-1710, which govern hearings.
7 Agencies regularly create regulations that limit their own powers and add accountability mechanisms. Dorit Rubinstein Reiss, Account Me In: Agencies in Quest of Accountability, 19 JOURNAL OF LAW AND POLICY 611(2011);Elizabeth Magill, Agency Self-Regulation, 77 GEORGE WASHINGTON LAW REVIEW 859(2009). The constitution formally gives the commission the power to determine its own procedures on matters not settled by statute. California Constitution, Article 12, section 2.
8 Private Communication, ALJ.
9 Interview, ALJ. For example, he mentioned that there are for Certified Public Accountants among the ALJs that are regularly consulted on matters requiring knowledge of accounting.
10 Constitution of California, Article 12, section 1.
their political leanings are considered in their appointments. When discussing the different commissioners, interviewees regularly comment on their party (not always correctly) and on their background.12

Both decisions addressed in this paper fall into the category of “Quasi-Legislative” proceedings.13 The practical implications of that are three. First, quasi-legislative proceedings are by definition commissioner-run.14 In a manual prepared to explain to new staff members how the CPUC operates ALJ Philip Weismehl explained that for these decisions, “responsibility shifts to Commissioner with ALJ assisting”.15 Second, unlike in rate-setting cases, in these proceedings, the assignment of a particular ALJ to the proceeding cannot be challenged. That was not an issue in either decision here. Finally, in a rulemaking, ex-parte communications are permitted, and do not have to be put on the record, which makes it almost impossible to know the extent of lobbying that went on (even if we could talk to every participants, and not all wanted to talk to us, and could assume they were all telling the truth, they may not have a full memory of off-the-records events more than six years old; some of them openly stated that they had imperfect records and recollections of the events). And lobbying is very much the norm in these kinds of

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11 Of the current commissioners, to give a thumbnail sketch, President Peevey used to work in the energy sector, working for various companies; Commissioner Simon was a “a former securities and banking industry attorney involved in financial products and services”; Commissioner Florio worked for The Utility Reform Network (TURN) for many years, specializing in energy issues; Commissioner Sandoval was an academic researching and writing on telecommunications issues; and Commissioner Ferron worked in several different positions in the banking industry. This information has been taken from the CPUC’s website at: http://www.cpuc.ca.gov/PUC/aboutus/commissioners/ (last visited May 14, 2012).

12 “Commissioner Grueneich was the consumers’ commissioner” Interview, Melissa Kasnitz, Berkeley, CA, March 7 2012). “Commissioner Chong and Kennedy were appointed by a Republican governor” (Interview, Consumer Organization) (that comment is mistaken in regards to Ex-Commissioner Kennedy – she was appointed by Governor Davis, a Democrat).

13 Other categories are Adjudicatory and Ratesetting proceeding. Cal Pub. Util. Code §1701.1. See also the internal report: Philip Scott Weismehl, CPUC PROCEDURES (Administrative Law Judge Assistant Chief ed., 2010). (on file with author) (Hereinafter Weismehl manual), p. 2. The CPUC has considerable discretion in assigning matters to category and determining whether hearings are required. §1701.1.

14 CAL PUB. UTIL. CODE §1701.4: “The assigned administrative law judge shall act as an assistant to the assigned commissioner in quasi-legislative cases.”

15 Weismehl manual, p. 4.
proceedings. In fact, an interviewee from a consumer organization said that her biggest error she made in relation to the URF decision was “procedurally, I wish I had known more about the importance of ex parte earlier. I don’t think that I lobbied as effectively as I might have simply because I was a novice at working in front of the commission.”

The two decisions addressed here are, in a sense, two sides of the same coin. Both of them are part of restructuring telecommunications’ regulation in a mode in which prices and services are determined, for the most part, by the market, and the CPUC’s involvement focuses on directly protecting social values in areas in which, in its view, the market does not operate well.

The Uniform Regulatory Framework decision (URF), handed down in August 2006, radically altered the regulatory framework governing ILECs. In the CPUC’s words, the URF decision:

Grant[s] carriers broad pricing freedoms concerning almost all telecommunications services, new telecommunications products, bundles of services, promotion, and contracts. We make contracts effective when executed, and thereby end the necessity of post-signing reviews by this Commission. With few restrictions, we permit carriers

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16 Interview, Member of consumer organization, on March 8, 2012.
17 Telecommunications regulation is an ongoing process, and almost any decision is closely connected to many other decisions. This paper only focuses on two decisions, acknowledging that by doing that, it is presenting a static view of what is a dynamic, ongoing process and inevitably presenting just one step in the intricate dance of the many stakeholders. However, examining the process of all of them at the level of detail done here is extremely resource and time consuming, on one hand, and extremely important on the other: as this article demonstrates, there are important insights to be learn from this close analysis of the process which cannot be found from an examination of decisions only.
18 As will be explained in the next pages, many of the debates surrounding these decisions reflect divergent views of how well markets can actually regulate behavior of the carriers, especially the ILECs, and what is the appropriate role of the regulator.
19 Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities (2006) Cal.P.U.C. Dec. No. 06-08-030, p. 156 (Decision 06-08-030).(available at: http://docs.cpuc.ca.gov/published/Final_decision/59388.htm, last visited on May 1, 2012; copy on file with author) (Hereinafter: The URF decision; while that name is not the title of the decision, that is how the stakeholders and those involved refer to it).
to add services to “bundles” and target services to specific geographic markets.”

The decision also removed many of the California-specific reporting requirements previously imposed on ILECs, bringing those requirements in line with the Federal Communications Commission’s (FCC) requirements. It removed special accounting requirements placed on the utilities, requirements that, in the words of a lawyer working for At&T, “required us to keep three sets of books” (one for the CPUC, one for the FCC, and one for the SEC).

The decision did put in place a price cap on basic residential services until 2009 and froze the basic residential service prices for customers living in high cost areas, covered by a special subsidy program.

In short, the decision is a substantial change in the way incumbent telecommunications carriers are regulated, giving them substantial freedom to set prices, and is hence fairly described as a big step towards “deregulation” of telecommunications.

There are two completely divergent views of the decision. Supporters of the decision see it as the natural result of the vast technological and structural changes in the communications sector. New competitors entered the market. With the rise of alternatives to landline

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20 The URF Decision, p. 2.
21 The URF Decision, p. 3: “We eliminate all monitoring reports tied to the now outdated New Regulatory Framework (NRF) governing the incumbent local exchange carriers affected herein. Instead, we standardize our reporting requirements so that they are consistent with comprehensive reports provided by all carriers to the Federal Communications Commission (FCC).
22 Interview, At&T. Id, p. 3: “We reduce and eliminate many of the vestiges of rate-of-return regulation, such as “accounting adjustments” and other rules that cause regulatory accounts to diverge from financial accounts. These regulatory adjustments no longer serve a ratemaking purpose. We instead, therefore, base our requirements on Generally Accepted Accounting Principles (GAAP) accounting standards and FCC accounting rules, and consequently streamline our audit practices. We eliminate the price cap index, price cap filings, earnings “sharing,” and gain-onsale distributions, all of which are no longer appropriate in the competitive voice communications market.”
23 Id, p. 2. The CHCF-B fund, which provides subsidies to ensure that customers living in relatively remote areas would have access to communications services at affordable prices, is beyond the scope of this paper.
telecommunications services, competition in the market increased dramatically. Mobile, cable, and VOIP challenge the dominance of the traditional landline operators. These changes led to a state and nation wide move towards reducing command-and-control regulation and relying on the market as much as possible, as reflected in statutory change at the state and national level. The previous regulation was untenable in the new reality, hobbling competition by preventing ILECs from competing and making the whole market inefficient. The existing regulatory regime, argue proponents of this view, simply did not make sense, it had to be changed, and the CPUC, by enacting the URF Decision, simply stepped up to the line and did its job, and about time too.

Opponents vehemently disagree. They see the decision as an abdication of the CPUC’s responsibilities to protect consumers. In their view the decision sacrifices the interests of consumers in general and vulnerable consumers in particular. They do not agree that the market is competitive. That is because the technological substitutes are not available for important segments of the population (such as low income consumers, the elderly, disabled consumers, and some rural populations). These consumers have to rely on landline as their primary service, and the landline market is not competitive: the ILECs dominate that market. Through mergers and acquisitions that market had become increasingly consolidated. Claims of competition, they say, are based on a partial view of the market, a view focusing on young, well-off, savvy consumers, able to take advantage of promotions offered by the ILECs and their competitors, and with access to technological alternatives. The ILEC’s market power allows them to mistreat

24 Id, p. 5: “The market is far more competitive. It now includes multiple wireless carriers; competitive local exchange carriers (CLECs); cable television companies that have added Voice over Internet Protocol (VoIP) telecommunications products to yield a “triple play” of voice, video and data offerings; and pure-play VoIP providers, such as Vonage or Packet8, that will add a voice communications service to any broadband connection”. (footnotes omitted).
26 I am not overstating; interviewees used very vehement language to describe the decision and express their disagreement.
consumers and manipulate the market, and removing controls will allow them to hike prices and harm consumers. The CPUC should continue to closely regulate the ILECs. If it has to do this horrible thing (remove price controls), it must at least keep in place reporting requirements so that it can catch (the, in the view of opponents, inevitable) problems early and respond to them. The URF did not even do that: it loosened reporting requirements.

The URF decision generated much controversy, discussion and argument. Feelings still run strong about it, on both sides. As will be discussed in the next section, the parties’ view of the process is strongly affected by their view of the decision. Everyone agree the decision was initiated by the CPUC and driven by a result the CPUC thought desirable. But proponents see the CPUC’s process as open and providing multiple opportunities to provide input, and the decision strongly evidence based. Opponents see the CPUC as entering the process with its decision already made, as not being willing to consider the evidence and as ignoring the record.

I want to reiterate that this article is not reexamining the URF decision to see whether the CPUC “got it right”. Its focus is on process and input.

The other decision examined here is one in a line of decisions relating to California’s Lifeline program. The decision in question is the one handed down in November 2010. California’s Lifeline program is its universal service program, providing qualifying consumers – those with low income – subsidized telecommunications service. In at least one sense, it can be seen as a complement to URF: the justification for removing price controls is that for those

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27 Interviews, TURN, DisabRA.
28 As Sir Humphrey said to Jim Hacker in Yes, Minister: “If you are going to do this damn silly thing, don't do it in this damn silly way.” The Writing on the Wall.
consumers who still need protection because the market will serve them ill, there are social policy programs protecting them, Lifeline being one.

There were many other decisions relating to Lifeline, but this is an important decision. It changed the way the program works from a pre-set rate (Lifeline participants only paid a maximum amount set by the commission, and the carrier – the telecommunications operator was compensated for the difference from a fund) to a preset support amount (the carrier is given a set subsidy for each eligible customer, and deducts that amount from its usual rate). To offer additional protections to consumers, the decision also capped the rate a participating carrier may offer at 50% of its basic rate, set a cap for most customers, and allowed carriers to change the rate only once a year. The decision also allowed carriers offering wireless or VOIP to participate in Lifeline. Finally, it stopped payment to carriers for administrative costs (explaining that since most regulatory requirements associated with ratemaking have been removed in URF and further simplified in this proceeding, there is less justification for reimbursement).

In contrast to the URF decision, which completely changed the structure of regulation, the parties to this decision were not arguing about the justifications for the Lifeline program.
itself, about its existence, about funding it or about a complete overhaul, but about the details of the program. Important details, but the discussions were not at the same level of controversy.

II. Procedures and Participation

This section examines the process the CPUC used to arrive at both decisions, with a focus of the opportunities for the parties – especially consumer groups – to be heard. One common criticism of many regulatory processes is that they are structured so that it is much easier for regulated entities to have impact and voice than for consumer organizations. On this issue the article concludes the CPUC process was generally open with multiple opportunities for parties to be heard, and that several extremely capable consumer groups took advantage of those opportunities. This is important – there is evidence that participation from consumer groups can have substantial impact on results, and the ability of such groups to handle technical complexity was raised as a barrier.

I will start by saying the process used by the CPUC was elaborate, mostly transparent (with one big exception: ex parte communications), and provided multiple access points and ample opportunities for the parties to submit their points of view. Nonetheless, the process of one of those decisions – the decision to remove price controls – was strongly criticized by consumer


groups. Those groups, admittedly, face a problem: challenging the decision on substantive grounds in the courts is a very hard proposition. Challenging the process, therefore, is one route to attack what those groups sincerely believe is a wrong result: it can be seen as a strategic step. However, the fact that attacking the CPUC on process has strategic advantages does not mean that the groups’ criticisms of the process are insincere. Certain aspects of the process generated extremely heartfelt criticisms. The criticisms especially focused on the lack of hearings, and more specifically on the lack of hearings in relation to one issue, geographic deaveraging. The CPUC is not required to provide hearings in rulemakings, and has reasons for not doing so often, but the groups saw the lack of hearings on this issue and the limited hearings on other issues as leading directly to a lack of evidentiary record supporting the CPUC’s decision.

A concern occasionally voiced by scholars and policy makers is that “public interest groups lack the resources to participate in all but a few administrative proceedings and are overwhelmed by regulated interests in the proceedings in which they do participate, leading to a domination of the process by these interests.” That is not what I see in either of these proceedings: in both proceedings there was strong and capable participation by at least three consumer interest groups of the grass-roots variety, and the Division of Ratepayers Advocate (DRA), which can be defined as a proxy-advocacy group. The DRA, while an “in-house” organization, is taxed with representing consumers and is strongly devoted to that goal.

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41 The Division of Ratepayers Advocate is an in-house consumer watchdog. It's a branch of the CPUC whose mission is “to obtain the lowest possible rate for service consistent with reliable and safe service levels”
In the URF decision, there is evidence of the influence of those groups on the procedures: at the request – demand – of DRA and TURN, the commission agreed to hold hearings on the issue of competition: “In URF the commission didn’t see a need for hearing at all. We fought and got a hearing.” At the same time, consumer organizations felt their positions were not listened to and the concerns they raised and the evidence they brought downplayed.

In the second decision, there is clear evidence of the influence of those groups on the final result, as described in table 4 in section III.

The next two tables summarize the formal process, excluding ex parte communications, which are discussed separately afterwards:

**Table 1: Opportunities to Participate in the URF Decision, by Date:**

<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>4/14/05</td>
<td>Order Instituting Rulemaking (OIR) issued by CPUC.</td>
</tr>
<tr>
<td>6/3/05</td>
<td>1-day workshop on procedural issues.</td>
</tr>
<tr>
<td>6/27/05</td>
<td>En banc informational hearing on procedural issues (specifically the structure of the OIR).</td>
</tr>
<tr>
<td>8/31/05</td>
<td>Parties filed opening comments re: OIR.</td>
</tr>
<tr>
<td>9/2/05</td>
<td>Parties filed reply comments re: OIR.</td>
</tr>
<tr>
<td>9/20/05-9/22/05</td>
<td>3-day workshop in which the parties presented their proposals.</td>
</tr>
<tr>
<td></td>
<td>Contained Q &amp; A sessions.</td>
</tr>
<tr>
<td>10/31/05</td>
<td>DRA submitted a matrix comparing the proposals of the different parties (various parties met to generate this document, and all parties endorsed it).</td>
</tr>
</tbody>
</table>


42 Gormley defines proxy-advocacy groups as “government organizations that represent residents of a particular jurisdiction in another government organization's proceeding”. Gormley, *American Journal of Political Science*, 87 (1983). The DRA is part of the CPUC, but there are protections of its independence.

43 My interviews with DRA and others strongly suggest they see more eye-to-eye with each other – at least in the two telecommunications decisions covered in this paper – than with the rest of the commission or the telecommunications carriers, whether ILECs or CLECs.

44 Interview, TURN. This will be elaborated on below.

45 Interviews TURN, DisabRA.
CPUC issued a ruling setting dates for evidentiary hearing for late January 2006.  

- 4-day evidentiary hearing re: market competition.

3/6/06 Parties filed opening briefs on topics addressed so far in the proceeding. Central focus = competition.

3/24/06 Parties filed reply briefs.

7/25/06 Proposed decision of Commissioner Chong.

8/15/06 – 8/22/06 Parties filed comments on proposed decision.

8/24/06 Final decision issued by CPUC.

Table 2: Opportunities to Participate in the Lifeline Decision, by Date:

<table>
<thead>
<tr>
<th>DATE</th>
<th>EVENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 25, 2006</td>
<td>Order Instituting Rulemaking (OIR) issued by CPUC.</td>
</tr>
<tr>
<td>July 20, 2006</td>
<td>ALJ Bushey’s ruling scheduling public participating hearings etc’</td>
</tr>
<tr>
<td>July 28, 2006</td>
<td>Opening comments</td>
</tr>
<tr>
<td>July 31, 2006 to August 4</td>
<td>Submission of opening comments.</td>
</tr>
<tr>
<td>August 11, 2006</td>
<td>Deadline for Verizon and AT&amp;T (California) to file and serve to all of the parties a summary of the “Affordability of Telephone Services – A Survey of Customers and Non-Customers” (Field Research Corporation, 2004).</td>
</tr>
<tr>
<td>September 14-15, 2006</td>
<td>Reply comments filed</td>
</tr>
<tr>
<td>September 15, 2006</td>
<td>Deadline for carriers to notify its customers about hearings</td>
</tr>
<tr>
<td>September 25, 2006</td>
<td>Public participation hearing</td>
</tr>
<tr>
<td>October 26, 2006</td>
<td>Public participating hearing</td>
</tr>
<tr>
<td>November 3, 2006</td>
<td>Public participating hearing</td>
</tr>
<tr>
<td>August 15 - September 7, 2007</td>
<td>Comments filed Re: Lifeline Program questions as stated in the scoping memo</td>
</tr>
<tr>
<td>September 7 - 28, 2007</td>
<td>Reply comments filed</td>
</tr>
<tr>
<td>May 12, 2008</td>
<td>Proposed decision</td>
</tr>
<tr>
<td>June 1-9, 2008</td>
<td>Comments filed in response to proposed decision</td>
</tr>
<tr>
<td>September 19, 2008</td>
<td>Ruling by ALJ to Reopen the Record in Light of Transition Plan for Basic Local Service Rates</td>
</tr>
<tr>
<td>October 1-3, 2008</td>
<td>Comments filed</td>
</tr>
<tr>
<td>October 8-16, 2008</td>
<td>Reply comments filed</td>
</tr>
<tr>
<td>October 8, 2008</td>
<td>Motion of the division of ratepayer advocates (DRA) and the utility reform network (TURN) for public notice and input and stay on the lifeline increase</td>
</tr>
<tr>
<td>October 23, 2008</td>
<td>Responses filed to DRA &amp; TURN’s motion</td>
</tr>
<tr>
<td>March 6, 2009</td>
<td>Workshop to provide an opportunity for clarification regarding numerical</td>
</tr>
</tbody>
</table>
representations in the Proposed Decision prior to submitting comments and replies

<table>
<thead>
<tr>
<th>Date</th>
<th>Event Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>May 10, 2010</td>
<td>Scoping ruling</td>
</tr>
<tr>
<td>May 28, 2010</td>
<td>Opening comments on scoping ruling</td>
</tr>
<tr>
<td>June 18, 2010</td>
<td>Reply comments</td>
</tr>
<tr>
<td>August 16, 2010</td>
<td>Motion by TURN for the clarification of treatment of lifeline rates</td>
</tr>
<tr>
<td>August 31, 2010</td>
<td>Responses filed to TURN’s motion</td>
</tr>
<tr>
<td>September 10, 2010</td>
<td>Reply filed by TURN to responses to TURN’s motion</td>
</tr>
<tr>
<td>September 28, 2010</td>
<td>Revised proposed decision</td>
</tr>
<tr>
<td>October 18, 2010</td>
<td>Opening comments</td>
</tr>
<tr>
<td>October 25, 2010</td>
<td>Reply comments</td>
</tr>
<tr>
<td>December 22, 2010</td>
<td>Rehearing request filed by TURN and others</td>
</tr>
<tr>
<td>January 6, 2011</td>
<td>Responses to TURN’s application for rehearing</td>
</tr>
<tr>
<td>February 22, 2011</td>
<td>Another proposed decision</td>
</tr>
<tr>
<td>March 14, 2011</td>
<td>Comments on proposed decision</td>
</tr>
<tr>
<td>March 21, 2011</td>
<td>Reply comments</td>
</tr>
</tbody>
</table>

### III. 1 Ex Parte Communications

What is not reflected in these tables are the informal, behind the scenes contacts referred to in official parlance as ex parte communications and unofficially by many of the parties as lobbying. The rulemakings were, as already mentioned, characterized by substantial amounts of lobbying decision makers. These contacts are completely legal in a CPUC rulemaking, and there is no requirement that such contacts be recorded. Six years after the first and two years after the second decision none of the parties I spoke to actually had details of who they met when. I was told – pretty much by everyone – that they lobbied intensively. The lobbying focused on the Commissioners and their policy advisors (referred to as “the fifth floor”): several parties pointed out the norm is not to lobby the ALJ. I cannot say how often each party got to express its views in addition to the formal process, except to say “a lot”, and that both consumer organizations and carriers took advantage of those opportunities.

Two points deserve special emphasis. These opportunities for face to face unrecorded meetings were in addition to the many opportunities for above ground input from everyone, and
there is no indication that new things were said in those meetings – just that those meetings could
make things already said more memorable and convincing. Furthermore, the parties’ positions
were pretty consistent throughout the process in both decisions, and well known to all. Lobbying
was important, but did not mean, in this case, that any party did not get a chance to respond to
anyone else’s arguments.

III.2 Criticisms of the Process

In terms of the formal process, in both decisions, the CPUC provided ample opportunities
for the parties to express their position, at least in writing. There were several rounds of briefs
and decision drafts and opportunity to respond and comment in both decisions. Both also
included workshops, in which the parties met and got a chance to discuss their positions.

However, the impressions of participants on the dialogue differed between the two
decisions. The URF proceeding was described as “adversarial”.46 Most of the parties said there
was not really dialogue or negotiation between stakeholders, not really an attempt to settle
differences, because there was very little common ground and the CPUC had a clear position
going in.47 In the Lifeline decision there were discussions and dialogues, and parties mentioned
many negotiations and back and forth.48

Most of the criticisms of the process were raised in the context of the URF decision, and
are intimately connected to a party’s view of the result (as already explained, a procedural
argument may have a better chance of success in a challenge against an administrative decision,

46 Interview, CLEC.
47 Interviews At&T, TURN, DisabRA.
48 Id.
since courts may hesitate to replace the agency’s expertise with its own, but courts know procedures. especially against the CPUC, the court is hesitant to challenge the agency’s substantive decisions). Criticisms centered on at least three issues. Some parties felt there were insufficient evidentiary hearings; there was criticism of the decision to include geographic deaveraging in the final decision, and some parties argued the decision generally ignored the record and the parties’ evidence.

**Hearings:**

While everyone acknowledged that the CPUC provided multiple opportunities to submit written materials, and no one contested that, the situation is somewhat different for evidentiary hearings. At least for URF, several parties felt the commission did not provide sufficient hearings.

Subject to judicial review, the CPUC is not actually required to provide hearings, and they are pretty unusual in rulemakings. Interviewees noted that the tendency over the years had been to decrease oral hearings, though the interpretation of that tendency varied according to the speaker’s point of view, from positive to neutral. Positive views connected this reduction of hearings to an increase in efficiency:

…in the last half dozen years or so there has definitely been a bit of a change to be more efficient in hearings and to make sure that hearings

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50 SIMON HALLIDAY, JUDICIAL REVIEW AND COMPLIANCE WITH ADMINISTRATIVE LAW (Hart Publishing. 2004).


52 Interview, TURN. Interview, CPUC.
are really used to resolve factual issues rather than to make policy arguments or to present witnesses who provide an additional method of arguing legal issues. I think that’s an appropriate shift in efficiency.\textsuperscript{53}

Other interviewees explained that the tendency to move away from hearings was especially strong in rulemakings - and connected it to the requirement that commissioners be present when there is a hearing in a rulemaking.\textsuperscript{54} Commissioners do not want to spend their time in a hearing room, so would rather not have hearings in a rulemaking if they are to preside over them.

In contrast, other interviewees saw it as a move away from due process, a move that prevents issues being sufficiently discussed and analyzed.\textsuperscript{55} For example, one interviewee explained:

\textit{You can see this as either more and more subtle and smarter or sloppier and sloppier accepting processes like that. I see it the latter way. There is no one there who is really keeper of flame on what due process looks like. The ALJs care, but the commissioners dominate.}\textsuperscript{56}

As this quote demonstrates, interviewees traced this to the increasing influence of commissioners over proceedings as opposed to ALJ’s. They explained, “ALJs really value a fact based record and want to decide on it. Commissioners have ideologies. They’re political appointees.”\textsuperscript{57}

In the specific context of the URF, several interviewees criticized the hearings. Criticism targeted two aspects: the shortness of the hearings on competition, and the lack of hearings on other issues. In their brief, Cox, a competitor, criticized the commission on this issue, explaining that “competition issues were addressed in only "four short days of hearings" and gave the

\textsuperscript{53} Interview, CLEC.  
\textsuperscript{54} Add reference.  
\textsuperscript{55} Interview TURN, Interview DRA.  
\textsuperscript{56} Interview, TURN.  
\textsuperscript{57} Interview, TURN.
Commission "minimal insights into the state of competition." Cox argued that the "limited and rushed nature of the hearings did now allow for any realistic analysis to take place." They also noted that Dr. Aron filed 200 pages of "dense written testimony," but the parties got only two hours to cross-examine here. Cox was allotted less than 15 minutes. They criticized the "severely limited scope" of the hearings.\textsuperscript{58}

Similar, and even harsher, criticisms were raised by consumer organizations on this issue.

The existing [previous – the one developed under the New Regulatory Framework. D.R.] regulatory framework was developed following extensive consideration, over sixty days of evidentiary hearings, examining the issues raised by a complete overhaul of the regulatory regime, 13 public participation hearings and numerous rounds of comments and briefing. This may be evidence of some level of regulatory inefficiency, but it is also indicative of the fact that the Commission's responsibilities under the P.U. Code are important and complex and require a great deal of effort to implement. TURN does not advocate sixty days of hearings. However, in this proceeding, the Commission is attempting to revamp its entire regulatory scheme based on two rounds of comments and a very short set of evidentiary hearings addressing only one issue, and taking place in such a limited period of time that parties did not have an opportunity to fully cross-examine witnesses.\textsuperscript{59}

In URF the Commission didn’t see a need for a hearing at all. We fought, and got hearings, but they were truncated, not evidentiary hearing.\textsuperscript{60}

The extensive and lengthy process held before the passage of the New Regulatory Framework\textsuperscript{61} seemed to be part of the reason the CPUC was reluctant to add hearings, but TURN points out that having too much in case A should not automatically lead to too little in case B.

\textsuperscript{58} Reply Brief of Cox at 4, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005).

\textsuperscript{59} Opening Brief of the Utility Reform Network (TURN) at 5, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author). (Hereinafter Opening Brief, TURN).

\textsuperscript{60} Interview, TURN.
“There were four days of hearings and the utilities put up their witnesses, and they have witnesses that have been talking about this stuff for years (Harris), saying same stuff for years, saying that there is almost competition, and so on, but there was not enough time in the hearing room. They only allowed 3-4 days, not because the Judge [i.e. ALJ Reed] didn’t want to give time, because the assigned commissioner wanted to race the thing too… they didn’t allocate enough hearing time – there was a big push to get it out as soon as possible.62

The second criticism was the lack of hearings on other issues, especially geographic deaveraging. On the lack of hearing for geographic deaveraging, TURN, for example, said in their brief: “the very limited hearings in this proceeding did not address the issue.”63 Other interviewees also highlighted the lack of hearings.64

Similarly, DRA said in its briefs that the proposals for geographic deaveraging “were not previously subject to comment, testimony, or vetting in the hearing process.”65

Geographic Deaveraging:

Several of the parties argued that the issue of geographic deaveraging was not raised enough in the procedure and was not sufficiently developed in the record. Lack of notice claims focused on two issues - whether geographic deaveraging was properly within the scope of the proceeding and whether parties had been notified sufficiently early of its inclusion. Criticisms of the record focused on the lack of a hearing on the topic, and said that on the minimal record

62 Interview, DRA.
63 Reply Brief of the Utility Reform Network (TURN) at 42, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author) (Hereinafter Reply Brief, TURN).
64 Interview, DRA. Interview, other consumer organizations.
65 Reply Brief of the Division of Rate Payer Advocates (Redacted Version) at 24, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author) (Hereinafter Reply Brief, DRA).
available the CPUC is prevented from deciding to geographically deaverage. In an application for rehearing, DRA and TURN said:

…the Commission failed to follow its own rules and did not provide proper notice to the parties that geographic deaveraging was an issue in the proceeding. In particular, the Commission did not raise and no party proposed in its comments the possibility of allowing geographically deaveraged rate increases. As a result, the parties did not have the proper opportunity to be heard on this issue: they submitted comments and testimony, and conducted cross-examination, based on proposals that did not include elimination of geographically averaged price ceilings.66

There was no independent hearing on this topic. Parties disagreed on whether there should have been.67

In terms of the issue’s inclusion in the scoping memo, views diverged sharply. DRA and TURN said, in their application for rehearing, that

Commission rules require that the proceeding’s scoping memo specify the issues to be considered. Due process also requires that parties to a proceeding receive proper notice of what matters are at issue in a proceeding and an opportunity to be heard on those matters. The Commission violated its own rules by failing to include the elimination of the geographic averaging requirement in the scoping memo and thus deprived the parties of the requisite notice and opportunity to be heard.68

The scoping memo said:

Is there a uniform regulatory framework that can be applied to all providers of regulated intrastate telecommunications services? If so, every element of the uniform regulatory framework should be identified and described in detail. Any party that recommends a specific

66 Application for Rehearing, Division of Rate Payer Advocates and The Utility Reform Network at 3, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (September 29, 2006) (on file with author) (Hereinafter Application for Rehearing).
67 Interviews, DRA, TURN, Cox thought there should have been; Interviews At&T, CPUC thought there was plenty of opportunity for input on the topic.
68 Application for Rehearing, p. 3.
framework should provide adequate information for the Commission to implement the framework.

And the CPUC officials interpreted this as including any aspect of communications regulation, including geographic deaveraging, as long as the parties raised it in comments (that point will be addressed momentarily). 69

The question of whether there was proper notice was also hotly debated. DRA said:

… the ILECs’ failure to propose upward geographic deaveraging creates a potential legal infirmity in the decision resulting from this proceeding if the CPUC adopts the ILECs’ proposal without further hearing. Indeed, since upward geographic deaveraging is now part of the ILECs’ competition analysis and proposal, DRA argues that it should have been proffered much earlier in the proceeding. By proposing this element so late in the game, the ILECs have prevented other parties from responding to that proposal in the hearing phase, which was specifically designed to address competition analyses. In essence, DRA sees a due process problem if the CPUC adopts the ILECs’ upward geographic deaveraging proposal without allowing other parties the opportunity to address this element in hearings. 70

TURN challenged the CPUC on this very issue before the Court of Appeals. 71 The Court of Appeals, however, has discretion whether to take cases involving the CPUC, and declined to take this one. 72

The issue of geographic deaveraging was included in the matrix prepared by DRA after the September workshop, 73 a matrix endorsed by all the parties but not officially included in the record. 74 This suggests that at least by October 2005, the issue was on the table. Several parties

69 Interview, CPUC.
70 Id, at footnote 58.
71 Add reference.
72 Add reference. In an interview, a participant explained: “Previously, appeals went to the Supreme Court, and then you could never get your case heard. Now they go to the court of appeals, so you can get your case heard once in a long while”. Interview, CLEC.
73 Comparison of Proposals prepared by Division of Ratepayers Advocate, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author)
74 Interview DRA.
commented on it. For example, Cox objected in their brief to allowing the ILECs to geographically deaverage up or down, expressing concern about potential predatory behavior by the ILECs. In August 2006 – late in the process – DRA said, on this issue, when commenting on the Proposed Decision:75

The huge rural rate hikes that would follow from the PD’s combining of geographic deaveraging and a high implicit price floor almost certainly would violate a federal requirement that rural rates for telecommunications and information services must be reasonably comparable to urban rates for similar services.

It also said that:

The PD does not cite any record evidence presented in the context of geographic deaveraging to support its adoption of a major change to the pricing rules (upward geographic deaveraging) that was not explored in the hearings on competition. That is because the first mention of geographic deaveraging as the PD proposes it appeared in the opening briefs of some parties. Hence, granting unfettered geographic deaveraging would violate Rule 1.2.76

TURN said:

The 'record' on deaveraging in this proceeding, including all comments, briefs and workshop transcripts amounts to perhaps 5 double spaced pages, if that. The Commission has taken no evidence on the effects of deaveraging on rural communities and has not investigated the potential magnitude of price increases or the effect on the economies of the affected counties. The Commission has not undertaken to review data on the income levels of residential and business customers who would be affected by deaveraging. The Commission has no information about the impact of rate increases for telecommunications facilities used by local and county governments, including schools, hospitals, medical clinics, tribes, or monitoring water and sewage treatment facilities. In the absence of such information, it is difficult to comprehend how issuing

75 Comments of the Division of Ratepayer Advocates on the Proposed Decision of Commissioner Rachelle Chong at 2, Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author).
76 Id, p. 19.
the ILECs a blank check constitutes ensuring that rates are just and reasonable.\footnote{TURN Reply Brief, p. 44.}

In short, whether geographic deaveraging was appropriately covered by the proceeding was debated. When asked about this issue, a CPUC official explained:

Commissioner Chong was fully briefed on the issue, including the fact that geographic deaveraging would be controversial.

Geographic deaveraging, because of its controversial nature, provided a clear political marker that we were about change. Chong wanted the fight...

For several decades, long distance companies had charged the same per minute rates no matter where the long distance calls went, despite the fact that states and parts of states varied substantially in access charges, the major cost component of a long distance call. This national experience suggested that there would not be major changes or a rush to deaveraged\footnote{Email from CPUC official provided under promise of confidentiality (part of sentence omitted to protect the sender’s anonymity), received on May 9, 2012, on file with author.} rates, particularly in light of the limitations on phone companies billing systems. The long distance companies had the best billing capabilities, and if they did not think it made sense to do it, it was hard to imagine that local companies could or would deaverage.

Since we did not think that geographic deaveraging would occur, if we lost this symbolic fight, that would be the extent of the loss. There would not be a real world outcome.\footnote{Interview, TURN.}

**Drawing on the Record:**

Several parties strongly felt the CPUC decision was not based on the record and ignored their evidence. For example:

The biggest issue with the URF decision was that they didn’t look at the record properly. They had an outcome they wanted to reach regardless of the evidence before it. They just made decision they wanted (to have less regulation). TURN strongly felt like they didn’t have the record to support that.\footnote{Interview, TURN.}
The main problem with the decision was that it went completely counter to evidence. There was no evidence on real competition and even the industry advisors admitted there was none in the disabled market.\footnote{Interview with Melissa Kasnitz, Disability Rights Lawyer, in Berkeley on March 7, 2012.}

The parties clearly disagree on interpreting the evidence submitted and on the validity of CPUC’s conclusion. What is clear is that the decision took seriously the parties’ submissions, reflected their positions correctly, as best as I could tell, and referenced the record extensively. It cited heavily to the parties briefs and mentioned evidence relied on. Most of the decision is devoted to describing the parties’ positions. For example, pages 53-116 of the URF Decision are devoted to describing the parties’ positions on issues related to competition (what is the relevant market and who has market power, as well as the level of competition) and short explanation of why the CPUC decided as it did given the parties’ submissions.

As explained in the next section, the CPUC did accept the ILEC’s positions on most of the issues. For example, on the issue of market power, the CPUC said, “Verizon takes the most direct approach in analyzing its case.”\footnote{URF Decision, p. 107.} The PUC then details Verizon’s analysis using such phrases as “Verizon detailed,” “Verizon demonstrated,” “Verizon reviewed,” and “Verizon documented,” all of which suggest that Verizon was very influential on the PUC’s conclusion regarding market power. \textit{Id.} Other language in this section of the opinion also suggests Verizon’s influence on the PUC: “Verizon appropriately began by . . . ”; “Verizon also successfully demonstrated . . . ”; “Verizon produced evidence that . . . .” \textit{Id.} Much of this language illustrates that the PUC relied heavily not only on Verizon’s arguments but on the empirical evidence it presented as well. For example, “Verizon provided survey data that . . . Verizon established that . . . \footnote{Id, p. 108.} “Verizon’s evidence, especially when coupled with data produced by AT&T (reviewed below), convincingly establishes that a competitive threat is
offered by the new VoIP technologies . . . Verizon confirmed that . . . Verizon verified that . . .
Verizon demonstrated that . . . Verizon documented that . . .”83. The PUC concluded, “In
summary, Verizon has developed a record in this proceeding that demonstrates that policy,
technology, and market developments prevent it from exercising market power in its California
service territories.”84

The opinion also states, “AT&T’s showing likewise demonstrated that policy and
technology limit its market power.”85 As with Verizon, the PUC relied on evidence presented by
AT&T in reaching its conclusion. 86

But while the decision did not mention all the evidence submitted, and given the volume
of submissions by the parties could not do so, it did not ignore evidence contrary to its
conclusion. For example, on the same issue mentioned above, the CPUC stated that it was not
persuaded by the analyses of the other parties.87 The CPUC stated, “These contrary arguments
are not supported by the weight of the substantial record evidence, including the evidence that
these parties themselves marshaled.”88 and explained at length why it is not persuaded by these
arguments,89 at times relying on evidence provided by Verizon:90 “We find that the testimony
of Aron, Verizon’s witness, convincingly demonstrated that VoIP has tremendous growth
potential . . .”.

83 Id, p. 109.
84 Id, p. 110.
85 Id.
86 Id.
87 Id.
88 Id.
89 Id, pp. 113-121.
90 Id pp. 113-114, 118-119.
One of my interviewees from the CPUC described Dr. Aron’s testimony as the “most factual”, in his view.\footnote{Interview, CPUC.}

The CPUC clearly had a point of view going into the proceeding.\footnote{See part IV. A subsequent article will address the effects of a pre-existing point of view of an agency.} But it did address the parties’ submission. Again, you can legitimately disagree with its conclusions (and it is beyond the scope of this paper to assess those conclusions), but that’s not the same as saying they ignored the parties’ evidence.

### III. Winners and Losers in the process

Note on methodology. For the purpose of this section, we compared the initial position of parties – in their briefs but also in the excellent summary of positions prepared by the DRA, a document accepted by the parties – to the CPUC’s decision. We also looked for language in the decision that suggested that a party’s position was accepted. For example, in the URF decision, the CPUC explained, in relation to the market definition, that “Verizon’s logical analysis provides the Commission with a sensible guide for examining the California voice communications marketplace. Applying this systematic analysis, it is clear that the relevant market encompasses telecommunications broadly. Market participants include CLECs, cable companies, VoIP, and wireless service providers… [t]he evidence provided by Verizon on the changing pattern of telecommunications use in California . . . suggests that landline and mobile services are substitutes, and not mere complements.”\footnote{The URF decision, pp. 67-68.} This would suggest that on this issue, Verizon is a “winner”.

What this methodology does not do is provide a causal analysis on each issue, i.e., I am not claiming that the CPUC adopted a certain position necessarily because of a stakeholder’s
input. Sometimes, I have pretty strong evidence supporting impact, for example, the language quoted above from the URF decision, and in those cases I mention that and treat it seriously. Similarly, when it comes to the Lifeline decision, on the question of whether to use a set price for Lifeline subscribers or a set support amount, the CPUC said that AT&T:

“provided the most comprehensive proposal for the Specific Support concept, which AT&T calls a ‘fixed benefit.’ . . . AT&T proposed that the Commission set a fixed benefit amount structured to meet the needs of low-income customers, which would be credited on the customer’s bill. Providers would seek reimbursement for the fixed amount from the claims process. Such an approach would simplify administration of the California LifeLine program because the reimbursement amount would no longer be calculated based on the provider’s usual rate but rather would be limited to the actual benefit distributed to customers. As explained more fully below, we adopt this option for setting the California LifeLine subsidy, with some modifications to only permit carriers to update their LifeLine subsidy once a year and to cap each carrier’s LifeLine rate at 50 percent of its basic rate.”

Similarly, in its intervenor compensation decisions, the CPUC explicitly credited DisabRA for its decision to cap the Lifeline rate for two years.

However, as developed below, there is also good evidence that the parties’ stated positions were not the only, or possibly even the main, influence on the decision. Therefore, the data below demonstrates winners, but a more nuanced discussion of impact and why the parties who won won will be in the next section.

**Table 3: Whose Position “won” in the URF Decision**

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94 The Lifeline Decision, at 43.
95 The Commission has a program to provide compensation for non-profit organizations when they made a substantial contribution to the proceeding add reference. In this case, the commission compensated DisabRA, TURN and Greenlining (doublecheck). The relevant Intervenor Compensation for DisabRA is: Decision Awarding Intervenor Compensation To Disability Rights Advocates For Substantial Contribution To Decisions 10-11-033 And 08-06-020, Jul. 2011, Decision No 11-07-024 (available at: [add link], last accessed on: , copy on file with author).
### Table 4: Whose Position “won” in the Lifeline Decision?

<table>
<thead>
<tr>
<th>Issue</th>
<th>Whose position matched the final decision?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Form of subsidy</td>
<td>AT&amp;T, Frontier, Cox, Sprint Nextel and T-Mobile</td>
</tr>
<tr>
<td>Freeze &amp; Cap rate</td>
<td>TURN, DisabRA, Greenlining</td>
</tr>
<tr>
<td>How often can carriers change rate?</td>
<td>TURN, DisabRA, Greenlining</td>
</tr>
<tr>
<td>Affordability &amp; Affordability study</td>
<td>Partly TURN, DisabRA, Greenlining</td>
</tr>
<tr>
<td>Reimbursing administrative cost and bad debt</td>
<td>TURN, DisabRA, Greenlining</td>
</tr>
<tr>
<td>Bill transparency</td>
<td>Partly TURN, DisabRA, Greenlining</td>
</tr>
<tr>
<td>Expanded Eligibility</td>
<td>Verizon and other carriers; nod to consumer organizations</td>
</tr>
<tr>
<td>Consumer Education</td>
<td>Partly TURN, DisabRA, Greenlining</td>
</tr>
<tr>
<td>Including Wireless?</td>
<td>AT&amp;T, Greenlining, Cox, Sprint Nextel, T-Mobile</td>
</tr>
</tbody>
</table>

**IV. Explaining Differing Results**

This section will explain the difference between the two proceedings – specifically, why consumer organizations seemed to have substantially more success in getting their positions accepted in the lifeline decision than in relation to URF. It considers three explanations. First, whether the CPUC – either the commissioners or the communications division – were captured
by the utilities in the URF decision and in sections of the Lifeline decision. Second, that it was the commissioner in charge who determined the result. Third, that the filter of the CPUC’s perceptions and expectations were determinative – that the input of the parties had more influence when the CPUC expected it to be of value, and when its initial position was closer to the party’s views.

The article suggests that this was not capture, and that although the role of the Commissioner in charge cannot be discounted, the main determinative factor was the agency’s expectation and perceptions. This fits in with research that highlights the importance of agency’s preferences and the autonomy agencies enjoy.

IV.1 capture

There are several definitions of capture. Under one, industry members “persuade regulators to alter rules or be lenient in enforcing those rules.” Braithwaite and Makkai made the concept of “capture” more nuanced by breaking it into three related behaviors –

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99 There is room in the literature for an article that identifies different types of behavior that fall under the definition of capture and addresses each of them separately. That is not this article. As the literature review here demonstrate, there is scholarship focusing on a specific type of capture, such as the revolving door (see Dal Bo, supra note #, at 214-215, for a review of the literature). But much of the literature talks in much more general terms. MAKKAI & BRAITHWAITE;AYRES & BRAITHWAITE;STEVEN P. CROLEY, Regulation and Public Interests: the Possibility of Good Regulatory Government (Princeton University Press. 2007); MALCOLM K. SPARROW, The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance (Brookings Press. 2000).
sympathy to industry (implying excessive sympathy), identification with industry’s interest, and (unduly) lax enforcement.\textsuperscript{100}

Another definition emphasizes the consequences, suggesting that captured regulatory agencies are

\[\text{…persistently serving the interests of regulated industries to the neglect or harm of more general, or ‘public’, interests…} \]

The accusation implies excessive regulated industry influence on regulatory agencies.\textsuperscript{101}

The first part of this definition is a little more problematic, since a decision can serve the interests of the regulated industry and still be in the public interest, or serve the interests of the regulated industry but not be the result of excessive influence.\textsuperscript{102}

In this case, the URF decision on its face fits both definitions. The URF decision did indeed do what the ILECs (but not the CLECs) wanted – provide price flexibility. And it heavily cited their submissions. CPUC officials highlighted the substantial amounts of data submitted by the utilities, focusing especially on the intensive report submitted by Debra Aron, Verizon’s expert, a report which drew on national studies as well as California-level data submitted by Verizon. But once again, being convinced by the data submitted by the utilities – and rejecting the detailed reports of consumer organizations – does not by itself mean capture.\textsuperscript{103} At the end of the day, the CPUC was faced with two sets of diametrically opposed briefs and analyses and had to accept one. The recent Tobin project highlight how problematic it is to actually prove


\textsuperscript{102} Daniel P. Carpenter, \textit{Protection without Capture: Product Approval by a Politically Responsive, Learning Regulator}, 98 \textit{American Political Science Review} 613(2004).

\textsuperscript{103} Id.
capture,\textsuperscript{104} and how even a situation that can be seen as classic capture – like the behavior of the Mineral Management Service, which waived the requirement of Environmental Impact Statement for many deep water oil drilling projects – may be due to something else.\textsuperscript{105}

The URF decision was initiated by the Commission, and was talked about by commission members for several years before it was passed.\textsuperscript{106} It was strongly supported by the Communications Division staff, the same staff that worked on the Lifeline decision in which Consumer organizations won on many of the issues. The same Communications Division engaged in enforcement against industry in other context, for example, in relation to verification of lifeline eligibility. As described in the next section, it was promoted by that division for a while.

It did evince a belief that the market can regulate the ILECs. After all, the decision was based on the existence of competition in the market and an underlying assumption that such competition will control the behavior of the ILECs and prevent abuses. But a pro-market philosophy – held by many people, in or out of regulatory agencies – is not capture.\textsuperscript{107}

Representatives of consumer organizations saw the decision as a result of a pro-market ideology, rather than direct influence by industry. A consumer organization interviewee also

\textsuperscript{104} Daniel P. Carpenter & David Moss, \textit{Introduction, in PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION, AND HOW TO LIMIT IT} (Daniel P. Carpenter & David Moss eds., Forthcoming).

\textsuperscript{105} Christopher Carrigan, \textit{Minerals Management Service and Deepwater Horizon: What Role Should Capture Play?}, see id. at (\textsuperscript{106} See section IV.2.

\textsuperscript{106} B. GUY PETERS, \textit{THE FUTURE OF GOVERNING} (University Press of Kansas. 2001). Describes the power of market ideology in today’s governance. See also THOMAS FRIEDMAN, \textit{THE LEXUS AND THE OLIVE TREE} (Farrar, Straus, Giroux. 1999). for a passionate justification, and see: Timothy A. Canova, \textit{Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model}, 3 \textit{HARVARD LAW AND POLICY REVIEW} 369(2009); Alexander Kouzmin, \textit{Market fundamentalism, delusions and epistemic failures in policy and administration}, 1 \textit{ASIA-PACIFIC JOURNAL OF BUSINESS ADMINISTRATION} 23(2009); D. Joseph Stiglitz, \textit{MOVING BEYOND MARKET FUNDAMENTALISM TO A MORE BALANCED ECONOMY*}, 80 \textit{ANNALS OF PUBLIC AND COOPERATIVE ECONOMICS} 345(2009). for just as passionate criticisms. What this should suggest is that markets are subject to passionate debates beyond this specific case study, and trying to say a belief in the market is capture is problematic. As explained in the text, that is not what consumer organizations are saying here.
explained that “the communications division is captive not necessary by industry but by an ideology. My perspective on role of divisions is that they also should be objective, without particular ideology. [The Communications Division] has consistently been very much for free market, competition will save the world, we don’t need regulation. This is a myopic view, not supported by facts.” This is an ideological divergence of views – can the market work in this context – but it’s not capture.

In relation to Commissioner Chong, the assigned commissioner who – by many accounts – had a strong influence on the process (see the next section), most of the people who criticized her emphasized her “pro-market views”, but several expressly said they do not see her as actually captured by industry, or even sympathetic to a specific company or group of companies: she simply, according to them, sincerely believes in the market.

As pointed out by Dan Carpenter, it is often hard to distinguish between a captured regulator and one who sincerely believes the position supported by industry is preferable. The best evidence I have here – including the over time consistent views of the CPUC’s communications described in the next section – suggest sincere belief in the rightness of the policy due to belief in the market (and not necessarily sympathy to any specific company or group of companies) rather than capture.

**IV.2 Assigned Commissioner**

The view of several consumer organizations was that the difference between the decisions was the result of the identity of the assigned commissioner. Basically, the argument

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108 Interviews, consumer rights advocates.
109 Id. One interviewee suggested that her post-CPUC employment with Comcast is indicative of her preferences. Even that interviewee, however, did not suggest undue influences on the decision.
was that Commissioner Rachel Chong was pro-market and promoted the utilities interests, and Commissioner Dian Grueneich was the “consumers’ commissioner” and took a more balanced view.\textsuperscript{111}

In a CPUC rulemaking the assigned commissioner is, by definition, the leader of the process. Even though, as emphasized by CPUC officials, this was a unanimous decision of all five commissioners,\textsuperscript{112} when dealing with a strong personality such as that of Commissioner Chong, it is unrealistic to ignore her influence on the proceeding. Commissioner Rachel Chong’s professional background includes working for several smaller (competitor) telecommunications carriers and serving on the Federal Communications Commission (FCC). She broke ground by becoming a telecommunications lawyer when there were very few women in the field and by being the first Asian American to serve on the CPUC. By all accounts,\textsuperscript{113} she has a powerful personality, sharp mind, and extensive knowledge in telecommunications. Her admirers describe her as “…very knowledgeable and smart. Knows history and context,”\textsuperscript{114} and as generally impressive.\textsuperscript{115} Opponents saw her as excessively harsh and domineering: “she was a bulldog. Threatened people, browbeat people, mean to the staff;”\textsuperscript{116} “[she was] very aggressive, a strong personality. Would scream at people.”\textsuperscript{117}

\textsuperscript{111} This is a paraphrasing of sentiments voiced by TURN, DRA, Melissa Kasnitz, but I think is a fair reflection of those sentiments. In her concurrence to the Lifeline Decision, Commissioner Grueneich said: “A top priority of my office has been protecting customers—especially at risk customers” (Lifeline Decision, p. 158).
\textsuperscript{112} Interviews, CPUC Officials.
\textsuperscript{113} I.e. all accounts I collected for the purpose of writing this paper. Thank you, Frederick Reiss, for making sure I add this qualification.
\textsuperscript{114} Interview, CPUC.
\textsuperscript{115} Interview, CPUC. Interview, Cox.
\textsuperscript{116} Interview, CPUC. Interview, Cox.
\textsuperscript{117} Interview under conditions of confidentiality.
In either case, she was not the kind of person to be only a nominal leader, and she clearly participated heavily in the decision making. One CPUC official described her involvement in these terms:

> It was her decision. She read everything. She worked like a legal editor. Wanted every argument addressed. She made sure the decision was heavily footnoted, tied to the record. It was her editorial choice – she was very involved. Copy edited the whole thing.\(^{118}\)

The decision was voted on by the other commissioners, all experienced in many areas (though not necessarily in utilities), but it was written under the guidance of Commissioner Chong. An interviewee convincingly suggested the other commissioners deferred to Commissioner Chong’s known expertise in telecommunications.\(^{119}\)

People did not describe the same level of involvement from Commissioner Grueneich, but the second decision, too, was her decision. Commissioner Grueneich wrote a separate concurrence to the decision.

However, a focus on the commissioner’s personality as the leading factor in the URF decision ignores the fact that this decision was part of a long saga of development in telecommunications regulation. A CPUC official explained that:

> The URF and 2010 Lifeline decisions reflect an evolution of [Communications] policy that reflects changing regulations to accommodate evolving competitive market conditions. That evolution primarily starts with the New Regulatory Framework (NRF) decisions 88-09-059 and 89-10-031 that established the structure, and 89-12-048 that adopted a start-up revenue requirement.

4. The Implementation Rate Design (IRD) decision 94-09-065 permitted toll competition, rate decreases and basic service rate increase. This

\(^{118}\) Interview, CPUC.
\(^{119}\) Interview, DRA.
formula of basic rate rebalancing is an outgrowth of decreasing toll revenues. The IRD cost of stand alone basic service was much greater than the adopted rates. The New Regulatory Framework would not protect rates from going up if revenues continued to decline.

5. Local competition was granted in 1996 with decision 96-02-072.

6. It is my view that the continual decrease in toll, ancillary services and basic service lines would in a NRF regulatory environment potentially result in large basic service rate increases. The URF decision avoids such further rate rebalancing proceedings by declaring the residential telephone market competitive. Even if the URF decision did not cite competitive market specifics as TURN would like, the common knowledge of industry trends were evident.  

All the interviewees asked about this confirmed that URF was, indeed, a culmination of a long process of streamlining the regulatory framework and removing controls supported (or even driven by) the communications division of the CPUC. This important role of the staff fits with previous studies of utility regulators.

Interviewees place the beginning of the real push towards what became the Uniform Regulatory Framework at Commissioner’s Susan Kennedy’s tenure on the CPUC. Commissioner Kennedy expressed the need for deregulation in multiple speeches. For example, in 2004, two years before Commissioner Chong joined the CPUC, in a speech to the Telecommunications Association, an organization of operators, then Commissioner Kennedy already set out the principles included in URF. While highlighting the need for preserving certain social programs (It must include a broad-based system of support for high cost areas, lifeline service, and access for the disabled), she suggested that “the current intercarrier compensation system must be scrapped and replaced with something more simple and rational.” And that “regulators should

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120 Email to author by CPUC official.
121 The official cited was the first to mention this story, and previous interviewees were not asked about it.
122 Gormley, Western Political Quarterly, (1982).
not be wasting one more minute on enforcing anachronistic regulations that no longer serve any useful purpose… regulators should approach the entire panoply of existing telecommunication regulation from a blank slate. … No regulation should be adopted unless it meets a threshold question: “Is this really necessary?”

According to my interviewees, the issue had been on the table for a while but there were always more pressing things to do. Commissioner Kennedy pushed the issue forward – she was described by one interviewee as “a Go-getter” and by another even as “brilliant, the most intellectual of commissioners”.

Commissioner Kennedy left the CPUC in December 2005 to become chief of staff to Governor Schwarzenegger of CA, and – according to one interviewee, due to Commissioner Kennedy’s influence - Commissioner Chong was appointed for three years (with the option of reconfirmation after, which did not materialize) to complete the term.

What this discussion suggests is that while Commissioner Chong was certainly on board with the goals of the URF decision and firmly believed in the need to radically move away from the previous regulatory framework, the decision was strongly supported and promoted by the CPUC’s staff in the communications division and was the result of a process over time and cannot be attributed only to Commissioner Chong’s views. That is not to discount Commissioner Chong’s powerful influence over the process and the content of the final decision, but the end

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124 Interview, At&T.
125 Interview, CPUC official.
126 Interview, CPUC official
result, while partly attributable to her support of deregulating prices, was not solely because of her personal position.

IV.3 Type of Issue

Although the literature on this topic is limited, different agencies can and do act differently on different issues.\textsuperscript{127} That is because different issues differ in the level of technological complexity they require and the level of conflict they generate.\textsuperscript{128} This paper suggests that in these decisions, at least, agencies also approached the two issues with different expectations as to the importance of participation of consumer groups.

In the two decisions in question here, expertise was more at issue in the URF decision. That decision required sophisticated understanding of the telecommunications market and its regulatory framework as well as economic concept. Groups without the ability to use the language of efficiency were at a disadvantage.\textsuperscript{129} There were, however, at least two groups with considerable sophistication and knowledge of utility matters speaking on the consumer side – TURN and DRA. They both provided extensive briefs. It was not, therefore, just their ability to speak to the matter.

The Lifeline decision was conducted in less economic terms. The discussion was about how to protect consumers. The more professional aspect was conducting the affordability study, and that was finished at the beginning of the process. And here, too, the same sophisticated consumer groups – and others – participated.

\textsuperscript{128} \textit{Id} (both sources).
\textsuperscript{129} SeeBronwen Morgan, \textit{Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification} (Ashgate Publishing Limited. 2003), for the thesis that knowing how to speak the language of economic rationality is critical to interest groups that want to participate in administrative policy making.
So in theory, the difference in expertise should not have affected the proceeding. But it did. Examining the process suggests the level of expertise affected the CPUC’s view of consumer groups’ submissions – but not in the way Gormley suggests, under which consumer groups could not participate in high-expertise areas because of their lack of resources and specialization. It seems that expertise worked the other way. In the URF decision, the consumer groups were treated as another party, and a party with an agenda, at that: the opposition to the initial goal of the proceeding. But in the Lifeline Decision they were seen as an expert group, an expert on consumer issues. Since the goal of the Lifeline program is to protect vulnerable consumers, and since the consumer organizations – and especially those focusing on more vulnerable groups, like DisabRA and Greenlining – have substantial knowledge about the problems and issues of those groups and direct access to their voices, their comments were taken extremely seriously. The CPUC openly acknowledged that they suggested some things that the CPUC had not thought of, and influenced some of the decisions. This is confirmed by comparing the initial proposals, the briefs and the final proposals. For example, the CPUC directly attributed its decision to freeze Lifeline rates at their (then) current levels to submissions by DisabRA and Greenlining.\footnote{Intervenor Compensations.} The commission also attributed to those groups the decision to allow carriers to change the rates only once a year.\footnote{Id.}

The other aspect of Gormley’s typology, the level of conflict, also actually worked here the other way from his analysis: Gormley expected conflict to be particularly high around Lifeline issues, since that pits certain groups of consumers against others. However, in this decision, the tension between consumer groups was actually higher in the URF decision. The concern of consumer groups in the URF decision was that there were certain groups of...
consumers who would be disproportionally harmed by the decision: those dependent on basic residential service and unable to take advantage of alternatives or bundles. In contrast, in the Lifeline decision in question, eligibility questions have already been determined; the existence of the program had already been settled; the discussion as around what form should the subsidy take, and as importance as this was, it was less controversial than whether there should be a program and who should be eligible. Therefore, the level of conflict was higher in URF.

Again, if seen through the lenses of expectations, the level of conflict has a different meaning. The focus in addressing conflict here is, again, on the role of the agency in facilitating the process and promoting a more or less adversarial one. The CPUC expected Consumer Advocates – TURN, DisabRA, and so on - to oppose its position on the URF. As mentioned above, Commissioner Kennedy expressed support for deregulation in 2005. The process was the continuing of a trend, and the direction was suggested early on. The organizations expressed their views – opposing price deregulation – early in the process. This open opposition made the CPUC less receptive to their positions (though not less attentive – as seen by the fact that the CPUC addressed their positions in its detailed decision). It expected two contrasting positions, and although it worked to get all the parties’ positions clarified and to workshop them together, it anticipated and accepted an adversarial process. In contrast, in relation to lifeline, the CPUC, as explained, expected the consumer organizations to make a valuable contribution – and got what it expected.

**Conclusion**

This article highlights the important role of agency members and their point of view on the regulatory process and regulatory outcomes. It demonstrates two types of difficulties relating to the subject matter: the challenges in designing an appropriately open and yet efficient
administrative process, and the challenges of identifying impact and its connection to a certain result in an administrative proceeding. The CPUC’s process provided multiple access points and ample opportunities for the parties to submit written views. Nonetheless, in the URF proceeding, it was criticized as having several procedural problems. Some of the criticisms stem from dissatisfaction with the result, and suggesting this was partly due to faulty process; nonetheless, several stakeholders passionately criticized the problem and strongly believed it did not provide sufficient opportunity to be heard and to challenge the other side’s views. The CPUC was aware of potential criticisms of its decision not to have additional hearings, but decided to prefer a rapid process over one that will provide the parties the hearings they sought, because it believed that delay would be harmful to the participants in the market and that the issues can be handled through written submissions.

In terms of impact, a simple examination of which parties’ positions were accepted would lead the reader to think the URF decision was a situation of substantial influence by the utilities, or even capture. But a closer examination of the process of making the decision suggests that the reasons behind the decision were different. While a certain world philosophy – a belief in the effectiveness of competitive markets to control corporate behavior – and a view of the telecommunications market as having competition that will do so – affected the result, it was not simply a product of the regulator doing what the utilities wanted. Instead, it was the result of a view developed over a long time by the professional staff in the regulator and accepted by one Commissioner, then held by another.

Two insights can derive from this: the importance of the agency’s staff and the need for a long term, nuanced study of regulation. Regulation in an area is a long-term process with many repeat players interacting again and again. It is best understood in context.


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