

RE-REGULATION AT THE CPUC AND CALIFORNIA'S NON-DELEGATION DOCTRINE: DID THE CPUC IMPERMISSIBLY CONVEY ITS POWER TO INTERESTED PARTIES?

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I. Introduction

A. The Problem: CPUC Revised Electric Utility Regulations Using Problematic Procedures

The California Public Utilities Commission (CPUC) has been planning to reform regulations governing the electricity industry for most of a decade. Pressure for these changes emanated from industrial consumers fed up with the high cost of electricity in California. They wanted the CPUC to reduce costs.¹ The CPUC responded with various proposals for regulatory and structural reforms of the electricity industry.² These reforms were part of a trend at the CPUC to deregulate public utilities. In 1988, the CPUC announced that it would reevaluate how it regulated public utilities such as electricity, telecommunications, and transportation.³ The CPUC began by re-regulating telecommunications in California. In 1994, the CPUC turned its attention to reforming regulations for electricity.⁴

In the beginning, the CPUC adopted a very considered, deliberate stance on regulatory reforms of the electricity utilities, criticizing piecemeal attempts at regulatory reforms as short-sighted, incomplete, and often creating internal inconsistencies within a regulatory scheme.⁵ It determined to develop a long-term strategy before charging into the actual reforms. Initially, this deliberative process fostered thoughtful, well-reasoned reform proposals and accommodated greater public understanding and participation. In other words, it provided a healthy balance between a purely tech-

nical solution devised by agency staff and a political compromise worked out through participation of interested persons and the public.

About half-way through the process, however, the CPUC announced it would devise reform regulations using reform procedures. It rejected the formal adversarial processes that it previously adopted as "incompatible with policymaking."⁶ In place of adversarial processes, the CPUC "intend[ed] to rely significantly on alternatives to traditional procedures for establishing broad policies for the restructuring of the electric services industry and regulations governing it."⁷ Despite this assertion, the CPUC's stated policymaking procedures were to be remarkably formal and adversarial. The CPUC announced that written comments and reply comments would be accepted and that a full panel hearing would be held for presentation of oral argument.⁸ The CPUC expected to issue a final policy statement in August 1994.⁹

These conflicting assertions reveal that the CPUC does not understand the principles of informal, cooperative decisionmaking ("consensual processes"). Consensual processes are a rejection of the adversarial model of decisionmaking. They often are said to reject formal procedures as well. This is a fallacy. Consensual processes reject the adversarial model of decisionmaking but retain formal rules for protecting the interests of the participants and the integrity of the process.¹⁰ Formal procedures in the adversarial system have developed over a period of years to protect the integrity of the process and participants in the process from unfairness. When these formal procedures are removed along with the adversarial process, then other safeguards must be adopted in their place. Unless such care is taken, consensual processes can be pirated by more powerful players, resulting in skewed and unfair decisions.

It is important to note that the CPUC did not restrict itself to the formal procedures it initially announced. The process engaged in by the CPUC became more and more "consensual" or familiar as it wore on in the sense that the regulated entities participated increasingly informally in the policymaking. In the end, the procedure engaged in by the CPUC was ad hoc,¹¹ unstudied, and entirely inconsistent with the highly structured process envisioned by advocates of consensual processes. Because the CPUC did not understand how to (or chose not to) devise an effective and fair consensual process, it did not create and adopt a studied set of rules to guide the process. Such rules, for example, might have included a means to identify and include all stakeholders and procedures to ensure a level playing field for all participants. Instead, the formalities of the process adopted by the CPUC evolved or more accurately disintegrated as the process wore on. Correspondingly, the regulated entities seemed to gather strength as the process wore on and increasingly controlled the outcome of the process.

This paper will consider whether the processes engaged in by the CPUC was impermissible or merely unsound. The CPUC has broad authority under the Constitution to establish its own procedures.¹² However, the CPUC does not have unlimited discretion. Like other branches of government, it is constrained by the limits of its constitutional and statutory authority and by concepts of separation of powers and

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nondelegation. The thesis of this paper is that during the process of formulating its new policies for regulatory reform, the CPUC may have crossed the line between permissibly acting consensually and impermissibly delegating legislative policymaking authority to persons with financial stakes in the outcome.

It is permissible and reasonable for regulators to consult with the regulated industry when they create policy. The regulated industry is familiar with its internal workings and the problems it confronts, and it is in the best position to advise the agency on these technical matters. Also, there are those who claim that consensual rulemaking results in more compliant regulated entities and helps avoid perverse reactions often unintentionally evoked in response to command-and-control regulations.¹³

A problem arises, however, if the CPUC lacked constitutional or statutory authority to act consensually in the manner adopted since the CPUC must have external authority for all its actions. Without such authority, the process was impermissible. Additionally, absent constitutional, statutory, or regulatory provisions guiding this process, the process lacked formal structure and was subject to abuse by participants. Under the strain of abuse, the consensual process may have finally succumbed to complete capture by the interested parties.

Finally, even if the procedures adopted by the CPUC were not completely without constitutional authority, the legislature should act to constrain the CPUC's future use of unconstrained "consensual processes." The "consensual process" that informally evolved was unstructured, unconstrained, and unsound. Even boosters of cooperative, consensual decisionmaking agree that the consensual processes must be devised with care. They agree that "unless care is taken, the process can be subject to horrible abuse."¹⁴ The legislature should require more structured consensual processes such as those provided for in the Negotiated Rulemaking Act.¹⁵

B. Analysis Planned

On December 20, 1995, the CPUC adopted its final, long-term policy for regulatory reform of the electricity industry. This final adopted policy was very different from the initial policy the CPUC devised after two years of debate, which the CPUC published only the preceding year. The intervening changes were exceedingly favorable for the regulated entities and exceedingly unfavorable for the general public. Below, I review California's non-delegation doctrine and discuss how this doctrine retains more vitality in California than in the federal sphere so that it continues to check delegations of rulemaking authority. I then describe in detail the CPUC's recent policy reforms—how they came about and what alternatives were considered and rejected. Finally, I apply the analytical framework of the non-delegation doctrine to the facts of the CPUC's recent reforms. I conclude that the CPUC impermissibly delegated its authority to the regulated industry.

II. Analytical Framework

A. Impermissible Delegation of Legislative Authority: The Non-Delegation Doctrine

1. Background: Philosophical Underpinnings of the Non-Delegation Doctrine

The non-delegation doctrine limits the legislature's delegation of its inherent powers. The doctrine mandates that the legislature alone exercise the law making powers assigned it in the constitution. Initially, this doctrine proscribed almost all delegations of legislative power;¹⁶ however, the practical impossibility of creating legislative rules for every facet of the government has tempered the court's initial *per se* rule.¹⁷

The modern non-delegation doctrine recognizes that constitutional niceties must give way to the complex, practical needs of modern society. The modern doctrine proscribes only *unfettered* delegation of legislative powers. The legislature may loan out its powers to others, typically administrative agencies, so long as the loan includes substantive standards, safeguards, or other mechanisms to prevent the abuse of the power. Standards are generally substantive in nature. In other words, the legislature has provided an 'intelligible principle' or 'primary standard' for the agency to follow when it exercises the delegated power. That is to say that the legislature has made the fundamental policy choices and the agency has been delegated the power to implement those policy choices.¹⁸ In contrast to substantive standards, safeguards are more procedural in nature. For example, the availability of judicial review is a commonly cited as one of the most important and effective safeguards.¹⁹

Some commentators have suggested that the non-delegation doctrine is, for all

practical purposes, moribund. Their conclusions are mostly based on the U.S. Supreme Court's virtual silence on the doctrine since its 1936 decision in *Carter v. Carter Coal*.²⁰ However, I contend, and I am in company here,²¹ that the non-delegation doctrine is alive and well in California.²²

David Lawrence²³ argues that the non-delegation doctrine may be based on four express and implied constitutional theories: (1) due process, (2) "constitutional supremacy," (3) power vesting clauses, and (4) fundamental concepts of representative democracy. First, Mr. Lawrence's greatest due process concern seems to be procedural due process limitations on private parties exercising adjudicatory authority, which is outside the scope of this paper. This paper is confined to analysis of limits on delegation of legislative authority.²⁴

Second, Lawrence, reviewing arguments made by Sotirios Barber,²⁵ suggests that there need not be some underlying theory justifying a constitutional provision. Provisions of the constitution are not enforced simply because they secure some societal goal such as informed, participatory democracy. The Constitution, in other words, is not entirely instrumental, not just a means to an end. Constitutional provisions sometimes must be "respected . . . simply because they are constitutional."²⁶ Thus if the Constitution entrusts powers to a named agency "that agency must, and only that agency may, exercise that responsibility . . ."²⁷

Third, simply stated, most constitutions diffuse governmental power by dividing it among different entities to avoid power concentrations. This is the notion of separation of powers. Thus constitutions "vest" legislative power in a legislative body, executive power in a chief executive, and judicial power in courts. Delegation, the argument goes, is inconsistent with these provisions because it can function to reconcentrate power in conflict with constitutional intent and in a manner that is subject to abuse.²⁸

Finally, fundamental concepts of representative democracy are inconsistent with delegation. "[T]he political power which the people possess and confer on their elected representatives is to be exercised by persons responsible . . . and accountable to the people through the normal processes of representative democracy."²⁹ For some theorists, these concepts are not inconsistent with administrative delegations in that the administrative bodies are generally headed by appointed officials indirectly accountable to the people via the appointment process. On the other hand, these concepts are entirely inconsistent with delegations to private persons, who are not accountable to the people and who are not vulnerable to the electoral process.³⁰

Although all of these theories may combine to ultimately justify constraints imposed on delegation of legislative authority, most California courts cite only due process and power vesting concerns in their non-delegation opinions.

2. California's Non-Delegation Doctrine

Like the federal courts, California courts have denounced delegation of uncontrolled legislative power. Unlike the federal courts, the California courts continue to rely on and enforce the doctrine: "[W]e note that the doctrine prohibiting delegation of

legislative power . . . is well established in California. . . . The power to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it."³¹ There is no explicit federal or state constitutional bar against delegation of legislative powers,³² no dictate "Thou shalt not delegate." If non-delegation is truly a constitutional doctrine, it must be an indirect constitutional doctrine grounded in some other explicit or implicit constitutional provision.

Unfortunately, the California courts are unclear on the basis of the doctrine. Early in the development of the doctrine, the California Supreme Court merely set forth the rule and did not attempt to articulate a cohesive theory underlying it: "The legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the 'power to fill up the details' by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect, and provisions of the legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating legislative function."³³ Later cases openly cited *Carter Coal*,³⁴ rooting the doctrine in notions of substantive due process.³⁵

Substantive due process requires that government behave rationally when its actions affect life, liberty, or property. Such absolute limits cannot be avoided by delegating. The person or organization exercising the delegated power must similarly act reasonably. The courts thus will allow delegation to an administrative agency as long as the delegation contains a standard or a safeguard such as proscribed procedural processes or judicial review.³⁶ The court distinguishes between private and public delegations of legislative power and more narrowly proscribes delegations to private parties.

*State Board of Dry Cleaners v. Thrift-D-Lux*³⁷ ("*Thrift-D-Lux*") illustrates. The supreme court reviewed a statutory scheme in which a State Board of Dry Cleaners was created to fix minimum price levels to be charged for services rendered. The Board was composed primarily of industry participants. Defendant was accused of underpricing its services, charging 69¢ to clean and press a man's suit instead of the Board established minimum price of \$1.00. Defendant claimed, inter alia, that the delegation of governmental authority in this statutory scheme was improper.

The court said that in order to save such a delegation of legislative authority the legislature must "establish an ascertainable standard to guide the administrative body." Here, the court found two possible standards in the statute and concluded both were inadequate:

(1) The "board shall investigate and ascertain those minimum prices that will enable cleaners . . . in that . . . area to furnish modern, proper, healthful and sanitary services, using such appliances and equipment as will minimize the danger to the public health and safety incident to such services."³⁸

(2) "At the conclusion of an investigation, therefore, the board may establish a reasonable and just minimum price schedule conforming to the requirements of this article."³⁹

The court found that these standards amounted to absolute discretion. The

Thrift-D-Lux court was more critical of this standard than most courts would have been. Generally, most courts would find most any standard sufficient.⁴⁰ The *Thrift-D-Lux* court, in requiring a more constraining standard, may have been particularly influenced by the Board's composition, i.e., those subject to their own rules, because it concluded by citing *Carter Coal*: "[O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an *intolerable and unconstitutional interference with personal liberty and private property*. The delegation is so clearly *arbitrary*, and so clearly a denial of rights safeguarded by the *due process* clause of the 5th Amendment, that it is unnecessary to do more than refer to discussions of this court which foreclose the question."⁴¹ The court's holding is confusing. It both appears to impose a higher standard on delegations to private parties and suggests that such delegations are never proper. Perhaps the court meant that, if ever proper, such delegations must be extremely limited.

The court in *Blumenthal v. Board of Medical Examiners*⁴² confronted another delegation to private persons. The *Blumenthal* opinion reflects a general trend permitting delegations to executive agencies and private parties when there is a discernible guiding standard. Petitioner was denied registration as a dispensing optician, despite 20 odd years of experience in other jurisdictions, after the Board of Medical Examiners found that he had not shown that he met the statutory criteria, which required a five-year apprenticeship with a registered optician in California. Registered opticians were under no compulsion to take apprentices, and therefore they had unlimited and unguided power to exclude from the profession all new competitors. Justice Traynor, writing for the court, found there was impermissible delegation because the statute "contain[ed] *no guidance whatever* for the . . . persons to whom the power is delegated."⁴³ In his opinion, he indicated that he would uphold future delegations, even to private parties, where sufficient standards were in place.⁴⁴

In *Kugler v. Yokum*,⁴⁵ the court considered an ordinance proposed via initiative to link salary levels of firefighters in the City of Alhambra to those of firefighters in Los Angeles. The City Council of Alhambra refused to submit the validly proposed ordinance to the voters on grounds that it constituted an impermissible delegation of legislative authority to those parties who establish salaries for Los Angeles firefighters. The court found the proposed ordinance was sufficiently constrained and upheld it.

The court analyzed the purposes of the delegation doctrine, suggesting that it served to force the legislature to formulate policy instead of shirking-off the sometimes painful and politically charged process onto an administrative agency.⁴⁶ This suggests that the doctrine helps insure that the agency's actions have a rational basis in that it provides guidelines to constrain the agencies use of the power.

These cases create a sense that unguided delegations either risk arbitrary governmental action or they are in themselves arbitrary governmental actions. The *Kugler* court concluded that this delegation was permissible. It found that when acting via initiative the voters were acting as legislators and were adopting policy. It was per-

missible for them to decide, as policymakers, that Alhambra firefighters should be paid as much as Los Angeles firefighters. In this way, for instance, Los Angeles would not be able to hire away all the best firefighters by offering a superior salary. The scheme did not fail simply because private parties had a role in it.⁴⁷

As stated above, in *Kugler* the court found that the voters, in approving the proposed ordinance, established policy and this policy sufficiently constrained the grant of power to make it permissible. In upholding the delegation, the court agreed with noted commentator Professor Davis,⁴⁸ who has suggested that the saving constraint on legislative delegation need not be an established standard. The legislature may instead impose some procedural safeguard to protect against governmental arbitrariness. Relying on Davis's treatise, *Kugler* court held that either a standard or procedural safeguards may be sufficient to save the delegation.⁴⁹

Substantive due process generally involves two questions: is the end legitimate and are the means rationally related to achieving that end?⁵⁰ In most delegation cases, the legitimacy of the end is not in question.⁵¹ Therefore, only the rationality of the means is likely to be raised in any substantive due process review of a delegation.⁵² Without clearly articulating its rationale, the California courts seem to imply that delegations lacking safeguards are irrational and arbitrary governmental actions.

Most courts, however, hold private delegations to a higher standard, requiring additional safeguards or a more detailed policy statement or explicit standard.

As implied above, not all delegations are equal. After 1937, delegations to administrative agencies proliferated, and litigation challenging these delegations exploded. By and large, delegations to these neutral administrative bodies were upheld when the most minimal safeguards or broadest standards were in place. Only when the delegation contains no guidance whatsoever have such delegations to administrative agencies been questioned by the courts. On the other hand, the courts are much more suspicious of delegations to private parties because when unconstrained powers are conferred on parties with a vested financial interest in the outcome "too great a strain is imposed on human frailty."⁵³ Almost every recent successful challenge to delegations of legislative authority in California involved private parties with a financial stake in the regulations they create.

Some courts, in dicta, suggest that these private delegations are barred altogether,⁵⁴ but most permit both public and private delegations when appropriate standards or safeguards are in place. Most courts, however, hold private delegations to a higher standard, requiring additional safeguards or a more detailed policy statement or explicit standard. "When the power which the legislature purports to confer is the

power to regulate the business of one's competitors . . . or in the power to exclude potential competitors from an entire industry or occupation . . . , a real danger of abuse arises and the courts accordingly insist upon stringent standards to contain and guide the exercise of delegated power."⁵⁵

B. When Has There Been a Delegation?

In *Compton College Federation of Teachers v. Compton Community College District*⁵⁶ the governing board of the community college was conferred power to prescribe and enforce rules. At issue was the board's referral of an employee benefits dispute to a Professional Relations Committee (PRC) in accordance with established board rules. When the PRC returned an opinion favoring the employees in conflict with the board's position, the board's officer⁵⁷ overruled the PRC. The court approved the officer's actions. The statute vested authority in the board and did not give the board permission to redelegate the authority. Here, the written policy of the board could be read to suggest that there was a redelegation to the PRC. The employees' argument that the board could not overrule the PRC depended on this reading of the board's rules. Rather than interpret the board's rules in a way that would make them unconstitutional, the court read the rules narrowly to preserve their constitutionality. It found that the referral to the PRC was merely for advice and consent and the board retained the authority to overrule any findings of the PRC. Because the board exercised discretion the court found no delegation.

All of this analysis presupposes there is a delegation in need of safeguards, standards, or authority. As the *Compton College* analysis suggests, when an agency fails to exercise discretion the courts are more likely to find there has been a delegation.

Independent Roofing Contractors v. Department of Industrial Relations,⁵⁸ sheds light on how such discretion must be exercised. In *Independent Roofing*, the court considered whether an agency had made an impermissible delegation to private parties. At issue was a California statute that requires workers on public works projects to be accorded the same wages and conditions that prevail in private industry. Under the statute, the Department was to determine the prevailing wage by considering collective bargaining agreements and other information such as rates set for federal public works projects. Two contractors' associations contested this method. The statute specifically requires, not merely allows, the Department to consider such private agreements when determining the prevailing wage. They argued that the statutory scheme effectively delegated to parties of collective bargaining agreements the power to determine the "prevailing" wages and conditions under the statute.

The court disagreed. Although the statute and regulations required that collective bargaining agreements be considered when the Department determined prevailing wages, it also provided that if the Department reasonably found that the agreements did not reflect the true prevailing wage then they were not to rely solely on the agreements and were to seek other data to determine the true prevailing wage.⁵⁹ The court found that merely considering data contained in private agreements to determine pre-

vailing wages did not constitute a delegation. In other words, the underlying statute included safeguards to preclude improper delegation. It required that the Department reasonably determine that the agreement represents the true prevailing wage. The statute thus contemplates a certain level of discretion that the Department must exercise. “[A]bsent some showing of an actual failure to exercise such discretion, the Department’s decision to rely [on such private terms] does not establish an improper delegation of its authority to private parties.”⁶⁰

As *Independent Roofing* instructs, the courts will find no impermissible delegation to private parties where the agency entrusted with the authority is required to exercise discretion and actually does so. Implicit in *Independent Roofing* is an understanding that the agency must exercise more than a mere scintilla of discretion prevent an impermissible delegation.⁶¹ Rather, an agency must exercise the discretion contemplated under the statute. In *Independent Roofing*, this meant that the Department had to either find that the collective bargaining agreement represented the true prevailing wage or it had to establish the prevailing wage from other sources.

III. History of the CPUC’s Electric Utility Reforms

Traditionally, investor owned utilities (IOUs)⁶² have been treated as naturally monopolistic entities⁶³ subject to intrusive and detailed regulation by public utilities commissions and by the federal government.⁶⁴ Utilities were granted a franchise area in which to act as the monopoly supplier of vertically-integrated electricity service. Vertically-integrated service includes generation, transmission, and distribution of electricity to consumers.⁶⁵ See Figure 1. In exchange for a monopoly franchise, utilities submitted to intrusive, minute oversight and regulation of their internal operations and rate structures. This exchange created a relationship commonly referred to as the regulatory compact.

Beginning in 1978 with the Public Utility Regulatory Policies Act (PURPA),⁶⁶ competitive elements began creeping into one of the electric utilities traditional, naturally-monopolistic habitats—generation. Before PURPA, utilities were basically the only private entities engaging in power generation, transmission, and distribution. Congress enacted PURPA to encourage development of alternative generation sources.⁶⁷ After PURPA, non-utility, private entities began generating power typically using alternative generation methods such as solar and hydro power or unique use methodologies such as cogeneration.⁶⁸ Under PURPA section 210, utilities were required to purchase this power to supplement their own power production and generators called Qualifying Facilities (QFs)⁶⁹ could only sell their power to utilities.⁷⁰ Because these QFs are sometimes able to produce energy more cheaply than utilities, particularly in California where the utilities’ energy production is so costly, large consumers wanted to buy power directly from the QFs⁷¹ and other independent power producers (IPPs) popping up since PURPA. The problem was that under existing regulations only wholesale power purchasers can buy power directly from QFs and IPPs. In other words, wholesale purchases but not retail purchases were allowed. Large, *retail* con-

sumers began pressuring regulators to allow them to purchase power from QFs and other IPPs.⁷²

This new competition among generators has challenged traditional assumptions about the natural monopolistic tendencies of utilities. Both state and federal regulators began reassessing their views on the monopolistic status of utilities. Emerging from this reassessment, regulators are making greater commitments to incorporate market-based mechanisms into regulations. Below is a description of how these events played out in California and the end result—a long-term policy for re-regulation⁷³ and industry restructuring.

A. The Yellowbook: The CPUC Begins a Dialogue on Electric Utility Reform

In 1988, an increasingly republican CPUC began its near-decade-long crawl toward a more market-based regulatory scheme, announcing they would begin to re-evaluate the way they regulate utilities including the electric industry.⁷⁴ The Commission's actions were deliberate. It began its great experiment by de-regulating the telecommunications industry. Then, in March 1992, with that experience under its belt, it directed its Division of Strategic Planning to prepare a report reviewing the "conditions the electric industry currently confronts, as well as the future trends likely to influence the industry."⁷⁵

Nearly a year later, in February 1993, the Division of Strategic Planning released its report packaged in yellow binding and entitled "California's Electric Service Industry: Perspectives on the Past, Strategies for the Future."⁷⁶ The "Yellowbook," as it came to be known, told a tale of changing conditions in the electricity industry, marked by increased competition and technological change and stifled by a regulatory scheme designed "under [monopolistic] circumstances which no longer persist."⁷⁷ The Division of Strategic Planning predicted that the inappropriateness of the regulations would grow in the coming decades.⁷⁸

CPUC maintained a cautious and studied stance on reform. It did not promote the Yellowbook as the solution to these troubling predictions. The CPUC made clear that the Yellowbook was intended to inspire industry-wide comments and suggestions, declaring in its first words, "[t]his study begins a dialogue."⁷⁹ It suggested, as a starting point for discussions, four possible strategies for reform.

Strategy A—Limited Reform

Under Strategy A, the traditional utility and regulatory structures would remain unchanged. Utilities would remain full-service, vertically-integrated companies providing generation, transmission, and distribution services to all consumers. The reforms would focus on streamlining the regulatory process and introducing minor competitive elements within the existing regulatory framework.

Strategy B—The Price Cap Model

As with Strategy A, with Strategy B the basic utility and regulatory structures

would remain unchanged. The reforms would focus principally on ratemaking, where the CPUC would “regulate rates rather than utility expenses.”⁸⁰ In other words, the CPUC would replace cost-based ratemaking with performance-based ratemaking.⁸¹

Strategy C—Limited Customer Choice—Core/Non-core

With Strategy C, utilities would continue to offer full, vertically-integrated service to core customers only. Non-core customers, i.e., large industrial customers, would have direct access to competitive markets if they so chose. The utility would provide transmission access to non-core customers.

Strategy D—Restructured Utility Industry

In this final Strategy, the Division of Strategic Planning envisioned more fantastic reforms. Utilities would divest all generating facilities. Instead of producing power, utilities would purchase power at competitive markets for delivery to core customers. Core customers would continue to receive “bundled” electric services from the utility.⁸² See Figure 2. This “bundled” service would be subject to CPUC regulation. Non-core customers could elect direct access to competitive generation markets, and, again, the utility would provide transmission access to these customers. See Figure 3.

B. The Bluebook: The CPUC Proposes Model For Reform

After the release of the Yellowbook, the Commission ruminated over the problem for over a year. During this year, the CPUC collected comments from dozens of organizations and individuals and held three public hearings on the matter. Finally, in April 1994, it released a tentative document, clad in blue, entitled “Order Instituting Rulemaking, and Order Instituting Investigation.”⁸³ Although CPUC had been discussing reforms for six years, the Bluebook, for short, was the beginning of the *official* rulemaking proceeding to consider a restructuring of California’s electric services industry, a process that would drag on for another year and a half.

The Bluebook admitted that the comments following the release of the Yellowbook evidenced both a broad consensus favoring regulatory reform and much disagreement on whether industry restructuring ought to accompany that reform.⁸⁴ The CPUC, in its Bluebook, advocated both. The Bluebook envisioned a much changed electricity world. Viewed externally, all consumers would choose between receiving full-service, “bundled” energy delivery provided by utilities and seeking “direct access” to the competitive power market through generators or third party brokers, alternative service providers, and the like. (See Figures 2 and 3 *supra*.) Viewed internally, the CPUC would replace the traditional regulatory framework with the disciplines of market forces in areas where monopolistic attributes were fading or gone and institute performance-based ratemaking where monopolistic attributes still existed. In essence, generation would be governed by market forces and distribution and transmission would be governed by performance-based standards.

The CPUC planned a gradual phase-in of direct access to the generation market. Initially, direct access would only be available to large energy consumers. By 2002,

however, all consumers would be able to elect direct access. Customers would be free to try out direct access without utility discrimination. That is to say, utilities could not exclude customers from bundled service because they had previously elected direct access.

In a major change from the Yellowbook's version of direct access, Strategy D, the Bluebook provided that utilities need not divest all of their generation assets. However, those utilities that choose to compete in the generation market would not be able pass on the risks of that activity to consumers. Shareholders would fully bear the risks and reap the benefits of generation investment.

The CPUC intended to compensate utilities for costs sunk in long-term assets acquired and projects entered into during the age of regulation. Regulators recognized that many of these liabilities would not have been incurred were the utility always operating in a competitive market. Because of this, it would be unfair to saddle the utility with the full burden of these costs and at the same time shove it handicapped into a newly competitive market.⁸⁵

It is this last provision that has generated the greatest debate (and possibly behind-the-scenes maneuvering). While most commentators recognize that it would be unfair to saddle utilities with the entire cost of these entanglements, commentators disagree on how the burden should be distributed: should either consumers or utilities bear the great weight of the burden or should it be shared evenly? One commentator⁸⁶ estimated that \$250 billion was on the line. Understandably, if not fairly, utilities wanted customers instead of investors to shoulder all of the sunk cost. The Bluebook did not specify what portion of "stranded cost" would be paid by consumers.⁸⁷ After nearly a decade of deliberation, the CPUC was scheduled to arrive at a final policy statement on March 22, 1995. However, this was not to be. A CPUC sponsored "working-group" comprised of stakeholders began meeting January 3, 1995.⁸⁸ The stated purpose of the group was to provide "expert" advice to the Commissioners. Observers speculated that the group was actually established to undermine the bluebook.⁸⁹ In other words, the Commissioners backed away from their role as initiators of policy and handed it off to stakeholders. This accusation seemed to be confirmed when the "experts" hired a facilitator to assist them in devising policy.⁹⁰

C. Commissioner Fessler's Alternate Proposal: The PoolCo Model

When March 22 rolled around, the CPUC postponed release of the final policy statement indefinitely. It began to look as if the Bluebook, a product of over two years of consideration and public input, built on six years of experience of regulatory reforms in telecommunications, would be jettisoned while just on the brink of adoption. On May 24, 1995, the CPUC released a new proposal. The new document actually contained divergent proposals: Bluebook, defended by Commissioner Knights, and a new, scaled-back model called PoolCo, which was advocated by Southern California Edison and Commissioner Fessler.⁹¹ PoolCo was similar to strategy C of the Yellowbook whereas Bluebook was more akin to the more radical strategy D of the Yellowbook.⁹²

The CPUC evaluated both Fessler's and Knight's draft decisions and designated one, Fessler's "PoolCo" model, as *the* proposed policy decision. Now, PoolCo was to be the "primary focus of further inquiry, hearings, and comment."⁹³

Under PoolCo, there would be a "transparent wholesale pool under the control of an independent system operator (ISO)".⁹⁴ The ISO would operate a power auction, would provide information on the market prices set at the auction, and would control and operate transmission lines, insuring open, non-discriminatory transmission access.⁹⁵ See Figure 4.

The proposal recognized that because of their long-term market domination utilities possess both vertical and horizontal market power, which could contort the emerging competitive market if not addressed.

Vertical market power: Traditionally utilities have engaged in vertically-integrated service—generation, transmission, and distribution. They owned and controlled each part of the monopoly service. Even in a more competitive system, utilities would continue to operate as a monopoly in transmission and distribution. If they were to enter the emerging generation market vertically integrated—that is to say controlling transmission and distribution—they would have a huge advantage over other generators.

Horizontal market power: Investor owned utilities own most of the existing generation assets in California. They will enter the new competitive generation market holding most of the marbles.

The PoolCo proposal advocates unbundling utility assets as a means of diluting utilities' market power. Utilities would continue to own the assets—but control would be managed to limit power abuses. In contrast, recall that the Yellowbook had suggested that utilities would sell off their generation assets. The investor owned utilities weren't satisfied with that simple, yet drastic solution. Because of this, a much more complicated solution is required if market power is to be fully diffused.

The ISO will address some market power problems. Transmission assets would continue to be owned by utilities but would be operated by the Independent System Operator. Utilities would have to seek transmission access for their electricity from the ISO just like every other generator.⁹⁶ CPUC would impose performance-based mechanisms to control costs for consumers with no access to competitive markets.⁹⁷ PoolCo created no other mechanisms to control horizontal market power.⁹⁸ The majority proposal said that it would "monitor the evolving market for the presence of excessive concentration of ownership of these generation units and devis[e] appropriate or remedial strategies."⁹⁹ The CPUC suggested that if problems with excessive concentration of ownership of generation assets emerged the CPUC would consider remedial measures such as requiring utilities to spin off generation assets to corporations owned by utility shareholders or divesting assets altogether. This would leave unresolved huge questions about the reform and is contrary to the CPUC's initial strongly-stated intention of avoiding piecemeal approaches to reform.¹⁰⁰

Under PoolCo bilateral contracts would not be initially allowed.¹⁰¹ Under certain

circumstances, bilateral contracts would be allowed after PoolCo had been operating for two years. PoolCo would allow "contracts for differences," which is a term borrowed from reforms in England. Contracts for differences essentially are insurance policies against unexpected increases in electricity costs.

D. The Memorandum of Understanding: Industry Players Seize the Game

Reviews of the majority PoolCo plan were mixed. Ironically, Southern California Edison, rumored to have been the author of the PoolCo concept, withheld support. Its spokesperson, Tom Higgins, said in July 1995 "we're strongly supportive, obviously, of the principles. . . . We just didn't sign on because we didn't want the thing to seem so imbalanced, as utility driven."¹⁰² Only a month later, Southern California Edison was reported as the ringleader in a private-sector coalition designing a whole new plan to replace PoolCo.

These private negotiations gave birth to the Memorandum of Understanding (MOU).¹⁰³ The MOU parties gathered the lifeless remains of Fessler's and Knight's discarded proposals and sewed them together to form a new creature. The parents of this new species of reform were Southern California Edison, California Manufacturer's Association, California Large Energy Consumers Association, and Independent Energy Producers. On September 13, 1995, the MOU parties unveiled the reigning new proposal before the CPUC.

The MOU added to previous models a voluntary short-term spot market to provide an auction for the daily sale of power. The market would be operated by an independent Power Exchange not the ISO. Bilateral contracts for long-term power supply predictability would be allowed immediately. Direct access will be phased in gradually. At first, only a few hundred customers would have direct access to the spot market and bilateral contracts. Gradually, more and more customers would have access. Eventually, by 2003, all customers would be eligible to participate.¹⁰⁴

An ISO would remain part of the reform plan; however, as stated above, its role would be much scaled back. It would not participate in the sale of power. Its role would be confined to coordinating transmission of electricity on a non-discriminatory basis.¹⁰⁵ The ISO would be regulated by the FERC.¹⁰⁶ See Figure 5.

The MOU proposes that as a means of dealing with market power problems CPUC and FERC would impose performance-based rate mechanisms. Also, initially, utilities would have to offer all their generated power, with certain exceptions, for sale through the spot market although they would not have to buy through the spot market. After a transitional period, all market participants would be free to sell their power at the spot market or through bilateral contracts.

Finally, all consumers would be subject to a non-bypassable Competitive Transition Cost (CTC) charge. Non-bypassable means that even if consumers elect direct access they would still have to pay a share of the CTC. Under the MOU utilities would

recover 100% of the CTCs. The CTC charge was the means by which utilities would be compensated for "stranded costs."

E. Grand Finale: CPUC Adopts a Final Rule

On December 20, 1995 maneuvering ceased when the CPUC adopted its final policy decision.¹⁰⁷ In less than a year, the CPUC scrapped the policy it devised though a highly deliberative, near decade long public debate and adopted in its stead the policies devised by stakeholders in closed-door proceedings lasting mere weeks. In its final policy decision, the CPUC accepted most of the MOU's innovations. For instance, the final reform blueprint included a spot market operated by an independent Power Exchange. The spot market will be introduced immediately. Direct access through bilateral contracts will be phased in; some customers may seek direct access through bilateral contracts immediately. Gradually, the option would become available to more consumers. The ISO will provide non-discriminatory transmission of electricity for generators.

As proposed in the MOU, utilities will be required to sell all their power into the spot market during the first five years of the new system's operation. Thereafter, all generators will operate on equal footing.

For utility functions not subject to competition, the CPUC will adopt performance-based ratemaking. Performance-based ratemaking will be applied to distribution services and, during the transitional period, to utilities' generation activities. This latter imposition, recall, was advocated in the MOU as the sole means of controlling horizontal market power. The CPUC announced that it expects that the "operational unbundling" of generation and transmission assets and services will sufficiently serve to diffuse market power.

The CPUC asked utilities to consider possibly spinning off their generation assets to wholly-owned subsidiary corporations. In addition to imposing performance-based ratemaking mechanisms to control market power, the CPUC might consider financial incentives for utilities to voluntarily spin off their generation assets. The CPUC is considering adopting a CTC mechanism to encourage this action. As in the MOU, CTCs will be charged of all retail customers whether they continue to receive bundled utility service or not. Under the CPUC's proposed incentive program, utilities who divest some of their fossil-fuel generation assets would collect 100% of the CTCs and utilities who do not divest these generation assets would collect 90% of the CTCs.

In short, with just a few tweaks and considerably more details, the CPUC adopted the MOU's terms wholesale.

IV. Analysis

A. Has there been a delegation?

*Compton College*¹⁰⁸ and *Independent Roofing*¹⁰⁹ tell us that the first step toward answering that question is to determine the role of the agency within the statutory framework—how much discretion did the legislature, in creating the statutory scheme, intend to be exercised by the agency. In our case, we must ask how much discretion the statutory and constitutional schemes anticipate will be exercised by the CPUC. What role did the founders and the legislature envision for the CPUC? Was the CPUC to be a technically wise, truth-seeking administrative body that would operate within the regulatory compact to seek the best system of oversight of utilities, maximizing the benefits for the people of California, while assuring that utilities receive a fair and reasonable compensation for their services? Or, was the CPUC intended to act as a mediator in a struggle among competing interest groups? I maintain that statute and constitution dictate a CPUC that falls somewhere closer to the former of these two models, that the CPUC has abandoned its role in favor of something like a mediator, and that in doing so it both delegated policymaking power to stakeholders and ceded its duties under the statutory and constitutional scheme to interested parties.¹¹⁰

1. What do the relevant provisions of the constitution and statute instruct on the CPUC's role and the scope of the CPUC's discretion?

The CPUC is a unique entity in that it is a creature of both statute and constitution. The California Constitution commits to the CPUC a broad duty to establish policy regarding public utilities. Section 6 describes the constitutional powers and duties of the Commission:¹¹¹ “The CPUC may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.”¹¹²

Sections 1 through 8 impliedly commit these powers and duties solely to the CPUC.¹¹³ Section 1 states that the commissioners will be appointed by the Governor and approved by the Senate.¹¹⁴ Section 6 confers broad powers and duties on those commissioners.¹¹⁵ Section 2 establishes the procedural framework within which the CPUC must act.¹¹⁶ Section 7 evinces a large distrust of utilities and a concern that utilities will attempt to capture or unduly influence the CPUC.¹¹⁷ It says that no commissioners may have a financial interest or hold official relation to utilities subject to its authority and that commissioners may not accept gifts or even discounts from utilities. Together these provisions create a constitutional duty in the CPUC alone to be the active driving force behind policy development and implementation with an eye toward protecting the public from the destructive consequences of monopoly power.¹¹⁸

Statutory provisions parallel constitutional ones, echoing and expanding powers

and duties granted therein. Section 701 of the California Public Utilities Code confers broad powers on the CPUC to regulate public utilities: "The CPUC may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."¹¹⁹ Section 701 authority is broad indeed. The legislature sought to shield this broad power from undue influence. California Public Utilities Code section 303 reiterates the constitutional prohibitions against conflict of interest among the commissioners. The prohibitions of both Article XII, section 7 of the constitution and 303 of the Public Utility Code are complete and absolute. When commissioners possess a conflict of interest barred by these provisions they may not sit on the CPUC. There are no cleansing procedures, such as voting abstention, to allow such an interested commissioner to remain on the CPUC. This absolute bar is an expression of deep concern and distrust.

There is only one major limit on the CPUC's power—it may not delegate it beyond its staff. California Public Utilities Code section 7 grants the CPUC authority to delegate power to "deputies" under limited circumstances.¹²⁰ The maxim of *expressio unius est exclusio alterius* is applicable here.¹²¹ Because the legislature might have provided for broader authority to delegate,¹²² but chose not to, this provision should be read as an exclusive list of situations in which power may be delegated by the CPUC. This list, notably, does not include private parties, and the CPUC has apparently not deputized any stakeholders such as Southern California Edison or PG & E. Public Utilities Code sections 7 and 303 go hand in hand. Through them the legislature constrained the CPUC's ability to delegate to those who possess a conflict of interest.

The CPUC imposes few internal limits on its own discretion. The CPUC's procedural rules regarding rulemaking are quite sparse and appear to be purely discretionary. Rule 14.2 Scope of Rulemaking reads: "The CPUC *may* elect to apply rulemaking to the following types of formal proceedings: (a) Proceedings to establish rules, regulations, and guidelines for a class of public utilities or other regulated entities . . ."¹²³ The use of the word "may" suggests that what few constraints imposed by the regulations are optional.¹²⁴

In sum, the CPUC has broad authority, with very few limits, to regulate utilities. The Commission, under the statutory and constitutional standards that govern it, can regulate towards any policy end it sees fit in any manner it sees fit.¹²⁵ The single harshest limiting factor on the CPUC's power appears to be that the CPUC must exercise that power itself. Sections 7 and 303's constitutionally-rooted policy concerns constrain the CPUC's power to delegate. First, article XII specifically vests commissioners with the power to regulate utilities. While legislatures, with their plenary legislative power, have been found to possess power to delegate their rulemaking authority, it is not at all clear that the CPUC may similarly act.¹²⁶ Second, even if the CPUC may delegate power, Article XII, section 7 constrains to whom that power may be delegated. As stated above, section 7 prohibits commissioners from having a financial stake or official relation to a regulated entity. Delegation to stakeholders would essentially allow an exercise of power contrary to section 7.¹²⁷ Third, the CPUC has a responsibility un-

der the constitution to be the policymaking body.¹²⁸

2. Factors suggesting the CPUC delegated its power.

The CPUC's Rule 51.1 may be the formal basis of an impermissible delegation to private stakeholders in the recent policy reforms.¹²⁹ This rule provides that the parties to a dispute before the CPUC may stipulate to a settlement. The underlying assumption for this rule is that some disputes before the CPUC are purely private. However, this assumption lacks foundation since the CPUC lacks jurisdiction to hear purely private disputes, which should instead be heard in the courts.¹³⁰ Any disputes before the CPUC are imbued with the public purposes of the CPUC. Therefore, in essence, Rule 51.1 allows private parties to a dispute to establish the CPUC's public policy.

There was no stipulated settlement at the recent CPUC rulemaking. The dispute, in other words, was legislative not adjudicative. However, Rule 51.1 has been found to authorize more than stipulated settlements. This rule has been cited as authority for "joint resolutions," a kind of stipulated rulemaking.¹³¹ However, the MOU may constitute a "joint resolution." This "joint resolution" is less clearly a delegation than a stipulated settlement since it does not allow private parties to adopt final CPUC policy. In other words, the parties may propose the entire policy, but the CPUC must take the final step to adopt it. On the other hand, a joint resolution does provide a means for interested parties to manipulate or set the CPUC's agenda. To the extent that the CPUC allows others to exercise the discretion intended for it, this sort of "joint resolution" may be an exercise of CPUC power.¹³² Thus, Rule 51.1 may be the formal agency action that delegates authority to interested parties to control the policymaking agenda.¹³³

Since the CPUC has a duty to be the active driving force behind policymaking, it is contrary to this duty to allow interested parties to control reforms. In devising recent policy to deregulate utilities, a policy that will fundamentally change the CPUC's role with respect to utilities, the CPUC left the policymaking driver's seat to interested stakeholders.¹³⁴ Given its proper role within the statutory and constitutional scheme, the CPUC's abandonment of the driver's seat amounted to a de facto, informal delegation to stakeholders.¹³⁵

The following factors to support this assertion:

(1) The CPUC lacks jurisdiction over transmission lines and cannot order retail or wholesale wheeling. Therefore, the CPUC cannot implement all aspects of their final direct access order absent both FERC approval and voluntary compliance by the utilities. These factors suggests that the investor owned utilities were in an unusually strong bargaining position. The CPUC was eager to adopt a reform measure that the IOUs would be willing to comply with voluntarily. This situation was ripe for abuse.¹³⁶

(2) Throughout the reform process, in each CPUC proposal, the CPUC repeatedly solicited both comments on the proposals and submission of alternative proposals.¹³⁷ These requests, particularly the latter, reflect an unhealthy willingness to adopt

the proposals of interested parties.¹³⁸ The CPUC was nearly begging for a designated driver.

(3) The CPUC first began considering reforms for public utilities in 1988. After four years of experience reforming the telecommunications industry, the CPUC thoroughly analyzed the history of the electricity industry and its regulations and then devised proposals for reform. The direct access model in the highly thoughtful Yellowbook included provisions for the complete divestment of generation assets by the electric public utilities. These provisions were meant to diffuse IOU's market power. This provision was very unpopular investor owned utilities. The CPUC's final proposed policy statement included compromises addressing utility concerns. Its final decision, however, adopts the utilities position wholesale and no longer requires divestment of generation assets.

(4) The process of reform was a battle over the residual spoils of the crumbling regulatory compact. Recall that the initial driving force for reforms was consumer complaints about high electricity costs. Today, no one is claiming that residential rates will go down or even remain constant after reforms. Why? In part, because the high cost of electricity in California wasn't driven by excessively intrusive regulations stifling the creative genius of industry.¹³⁹ More importantly, the costs will not be decreasing because stakeholders, through their influence in reforms, have managed to capture most of the profits of reform. Investor owned utilities have consistently and successfully advocated 100% recovery of costs associated with these investments (CTCs). In the Commission's final proposal, consumers will pay between 90 and 100% of these costs.

The lack of procedural protections in the recent reform process to assure a fair rulemaking process, including the practical absence of judicial review,¹⁴⁰ the complete acquiescence by the CPUC to the demands of powerful IOUs are circumstantial evidence of an informal delegation.¹⁴¹ Concededly, the MOU proposal and the final decision of the CPUC are not identical. However, insubstantial changes made by the CPUC cannot substitute for true exercise of the full measure of discretion contemplated by the CPUC's organic laws.¹⁴² The CPUC adopted every major provision advocated by the MOU parties and abdicated its role as the lead in policymaking. In doing so it abandoned all hope of reaching the original goals behind the reforms—reducing consumers electricity rates.

B. Was the Delegation Permissible?

Recall that California's non-delegation doctrine permits delegations of rulemaking authority only when appropriate standards or safeguards constrain the delegation. Because the CPUC delegation to the MOU parties was informal, there were no stated standards to constrain the delegation. Neither the Yellowbook nor the

Bluebook can function as a guiding standard because the CPUC expressed a willingness consider policies not described therein.¹⁴³ In other words, they offered no constraints. The delegation also lacked safeguards to protect against abuse. As stated above, the CPUC established virtually no procedures to guide the process. It adopted procedures ad hoc.¹⁴⁴ One of the principal saving procedural safeguards of many delegations is the opportunity for judicial review.¹⁴⁵ Unfortunately, there is only very limited opportunity for judicial review at the CPUC. According to statutory provision applicable at the time of these dealings,¹⁴⁶ only the Supreme Court of California could review actions of the CPUC. Since the supreme court's jurisdiction is almost exclusively discretionary,¹⁴⁷ and since the court is overburdened with death penalty appeals as a matter of right, the opportunity for judicial review is in actuality de minimus.¹⁴⁸

V. Conclusions

The CPUC acted contrary to law and public policy. But its actions will not be censored because the opportunities for judicial review are rare and the legislature largely ratified the agency's actions, making a challenge moot. However, this analysis was not a senseless exercise. It demonstrates the need to anticipate potential and actual CPUC abuses of its powers. While the legislature is tinkering with electricity utility policy, it ought to make a few changes to works of the CPUC as well.

1. More Judicial Review of CPUC Actions Is Needed to Provide a Safeguard Against Impermissible Delegations

As stated previously, one of the principal saving procedural safeguards of many delegations is the opportunity for judicial review.¹⁴⁹ The legislature has just expanded the opportunity for judicial review of CPUC action by granting the courts of appeal discretionary jurisdiction to hear appeals in quasiadjudications.¹⁵⁰ However, judicial review remains completely discretionary. The legislature ought to provide judicial review as a matter of right for both CPUC adjudications and rulemakings.

2. The CPUC Needs Written, Formal Procedures to Constrain Its Informal Consensual Processes.

As stated previously, consensual processes are subject to gross abuses if not carefully designed.¹⁵¹ The preceding discussion illustrates that the CPUC's "consensual processes" are nothing more than an abdication of its duties. They do not contain provisions to guard against abuses. Therefore, formal, written procedures for CPUC informal actions ought to be adopted either by the CPUC or by the legislature. Such rules must take into account the unique position of the agency and the statutory and constitutional distrust of utilities.

Appendix 1: Figures

Vertically-Integrated Service

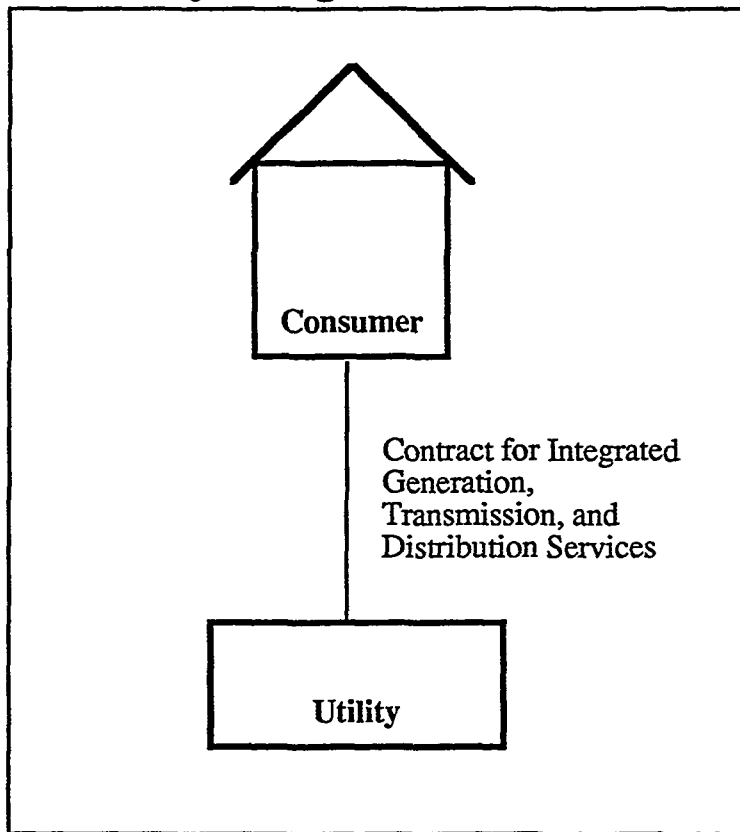


Figure 1. Utility provides a "one-stop shopping" service to its customers. The utility owns and controls generation, transmission, and distribution assets and uses those assets to provide vertically-integrated service.

Bundled Service

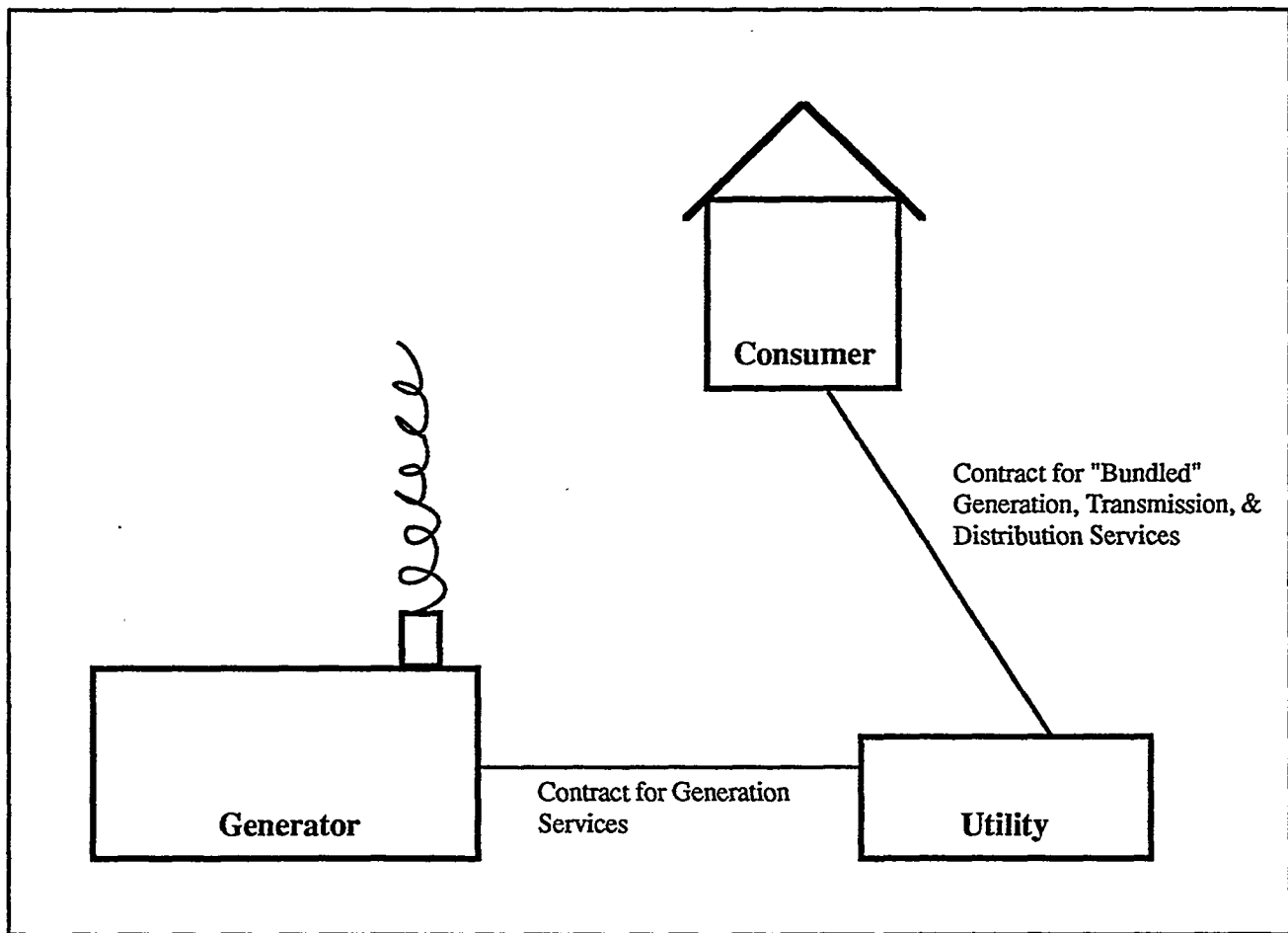


Figure 2. Under Strategy D, core customers would receive "bundled" services. Bundled service is still like "one stop shopping" from the consumer's perspective. Unlike vertically integrated service, however, the utility doesn't generate the power it sells to customers. It buys that power at a generation market.

Sample Direct Access Schemes

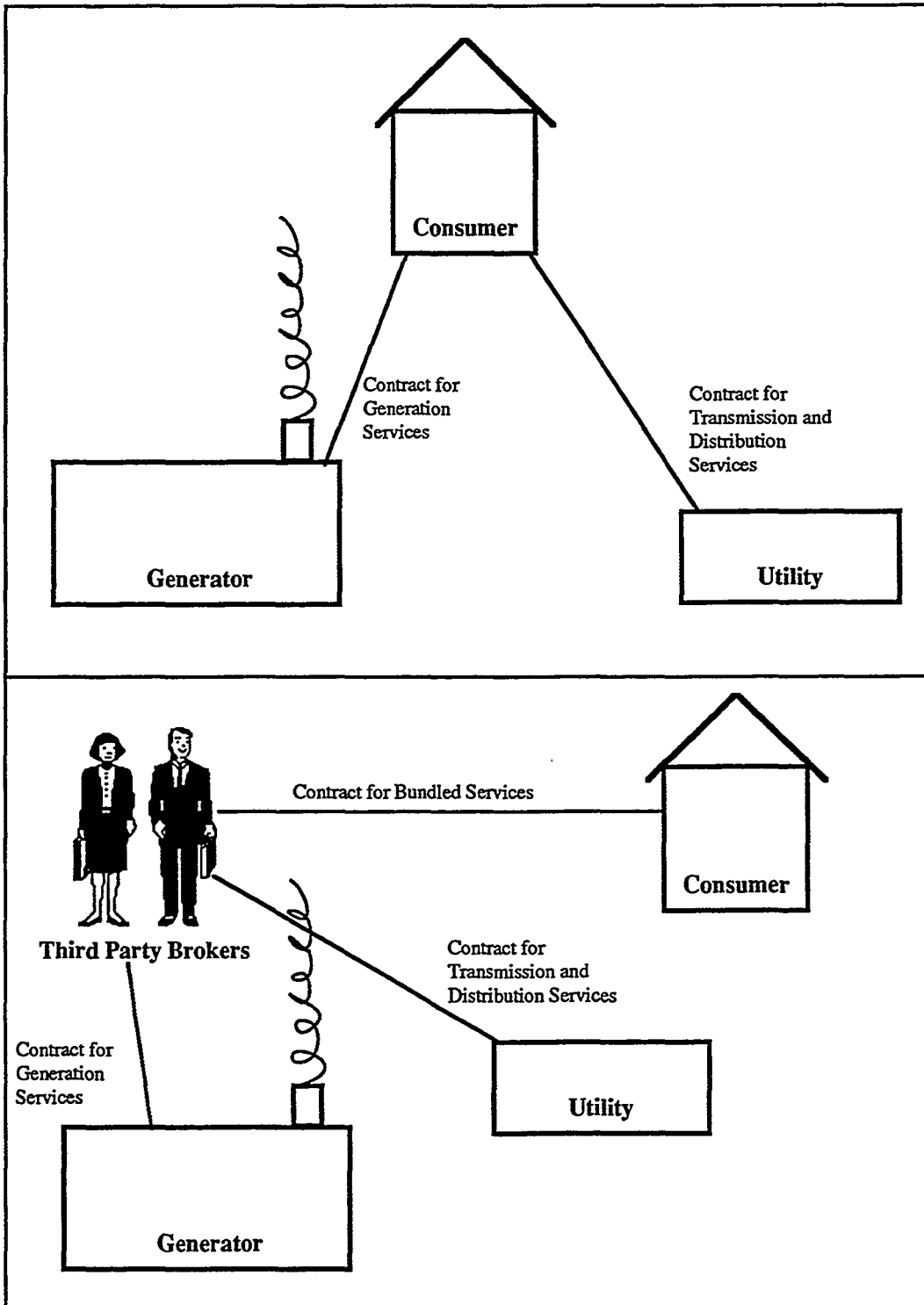


Figure 3. Those customers choosing to take advantage of direct access can either negotiate contracts individually or they can seek the services of a third party broker. Through this third party, the customer can purchase a sort of bundled service. The third party negotiates all the necessary contracts for this bundled service.

PoolCo Scheme

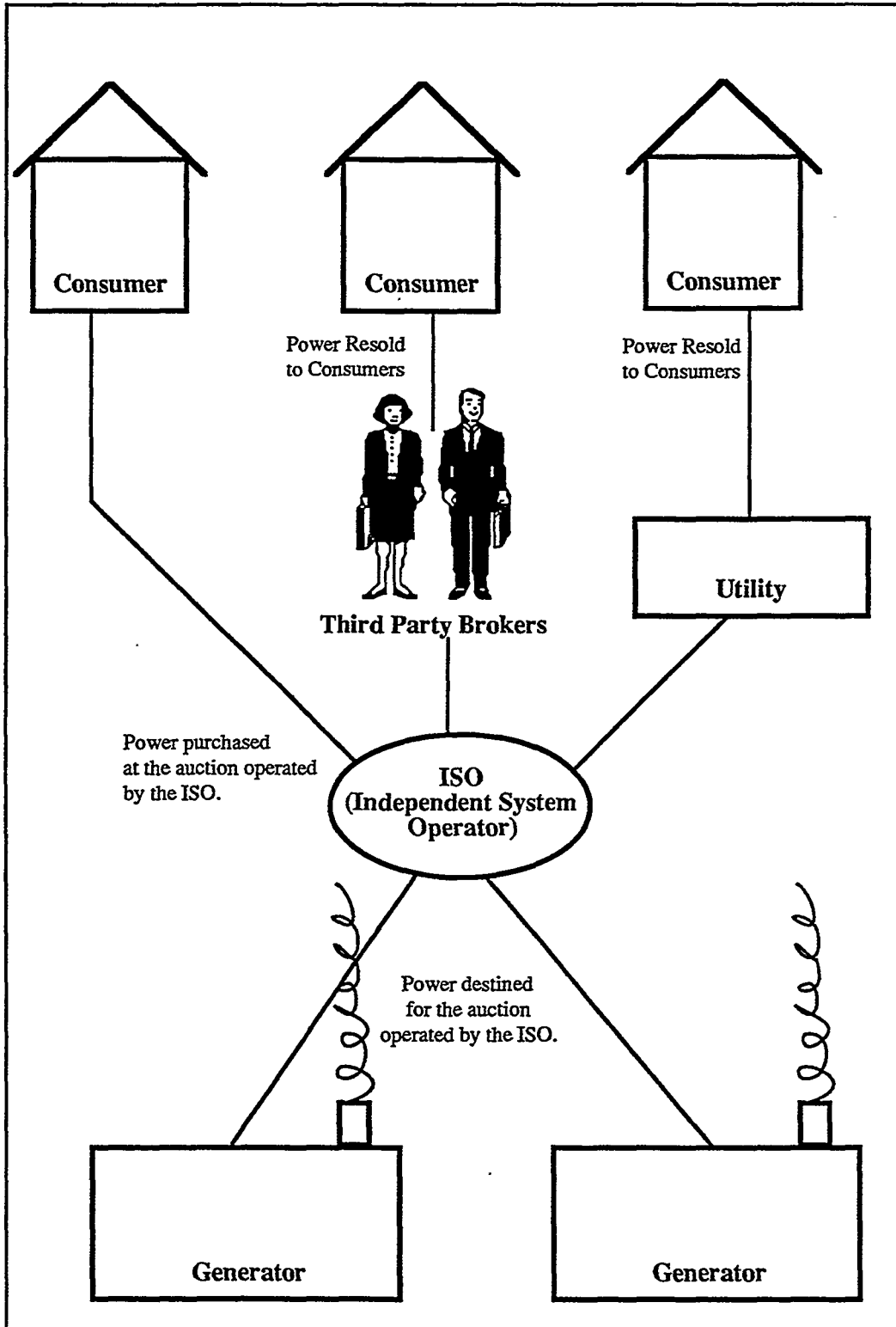


Figure 4. Generators sell electricity through a market operated by the ISO. The ISO also schedules and controls transmission of electricity to buyers. Initially, all power would be sold at the ISO's auction. Consumers would be able to purchase power directly at the market, from third party brokers, or from "bundled" service providers such as a utility or a third party, alternative service provider.

MOU Scheme

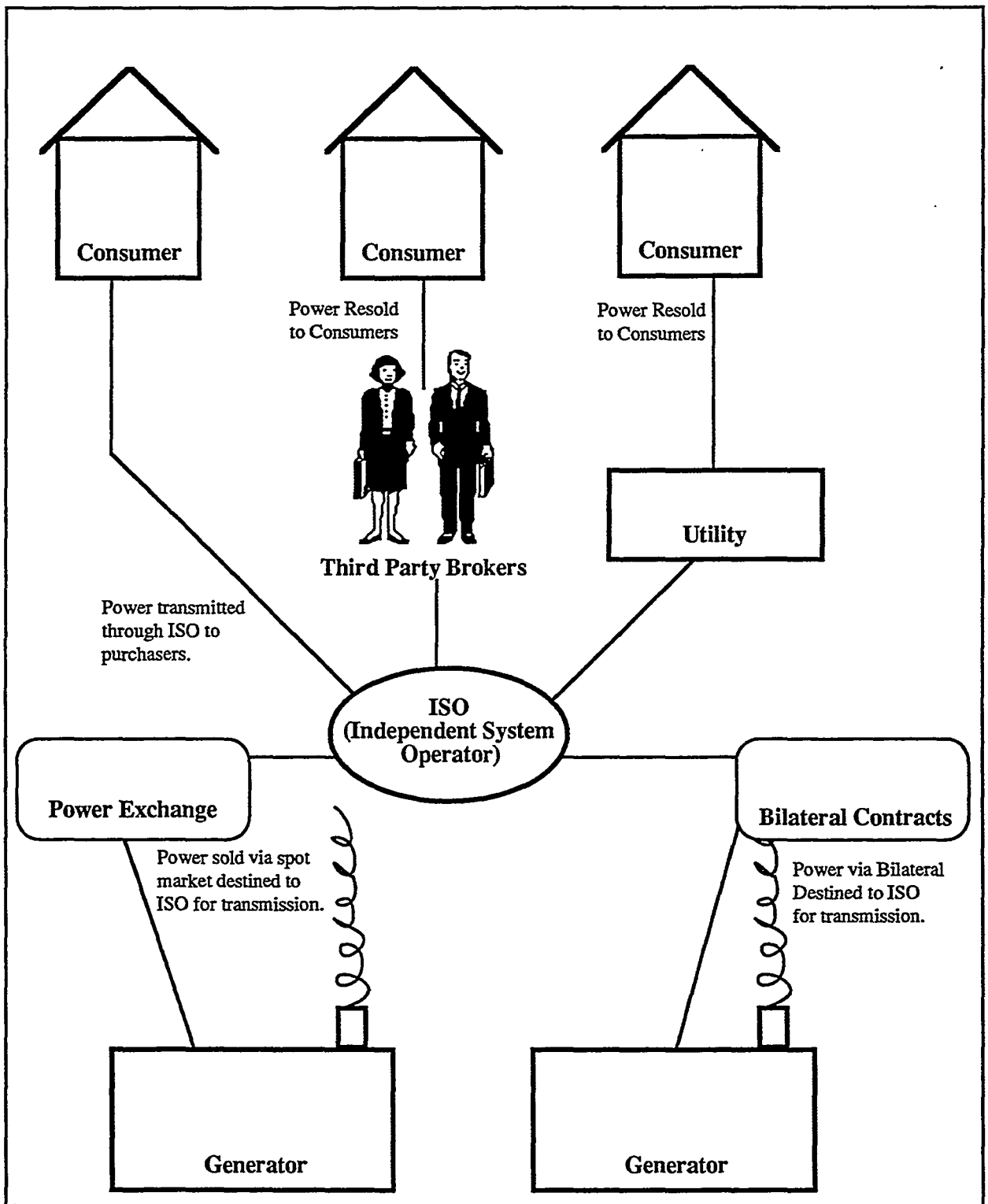


Figure 5. The MOU added a power exchange that would be separate from the ISO. The ISO would no longer control sales of power only the transmission of power. The Power Exchange would operate a spot market for the short term sale of power. The MOU would also immediately allow bilateral contracting for sales.

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Notes

¹ Large energy consumers criticized the CPUC for California's high electricity rates and pressured it to devise a scheme to reduce rates for industrial consumers. *California Firms Favor Non-Core Status for Power Service, with Line Access*, INDUSTRIAL ENERGY BULLETIN, March 26, 1993, (State Regulation) at 9.

² The CPUC contemplated various far-reaching reforms supposedly to rein in these high costs. All reforms focused on "deregulation." This strategy presumed that deregulation would automatically reduce costs. Commissioner Fessler has declared his faith in the creative "genius" of industry and wants to free it from its regulatory shackles. This presumption is faulty. Command and control regulations may drive up the cost of electricity, but it doesn't explain the differences in cost between California's rates and the rest of the nation where command and control regulations are also the norm.

More telling, perhaps, is PG&E's complaint that higher rates result from CPUC's rules. Ricardo Sandoval, *PUC, Utilities: Too Close for Comfort?*, SAN FRANCISCO EXAMINER, March 15, 1995, at B1. Which rules? Not the procedural rules of the CPUC. In fact, the higher costs of electricity in California are driven by substantive policy choices that the residents of California have supported. Such policy choices include relying more on clean burning gases to promote clean air and less on cheaper, dirtier burning coal like other states do. Other policy choices include the implementation of demand side management programs that encourage use of insulation and low-energy demanding appliances to reduce energy consumption in the state and programs to provide electricity to who cannot afford it. Finally, the higher costs of electricity in California flow from higher real estate costs and two boondoggle nuclear power plants that consumers are still paying for. Substantive policy choices are independent of reforms. They support programs that we will probably want to maintain whether we reform regulations are not. Even after reforms, utilities will still have to comply with existing, expensive long-term contracts with QFs. Also, California electricity consumers will remain saddled with paying for high cost electricity from nuclear power plants. The astronomical costs of construction and decommissioning is calculated into that price. These are things that reforms won't change.

Utilities now share the costs of these programs as part of the regulatory compact with the state and its citizens. It is arguable that utilities sought reforms to shift all these costs onto consumers. This is supported by the comments of Commissioner Conlon, made at the initiation of reforms: "The commission still strongly supports programs which strive to achieve broader social objectives, [but] we believe the time is ripe to reexamine the appropriateness of mandating that the utility act as the principal agent charged with designing, implementing, and bearing the costs of these programs." *Consumers Could Have Direct Access, AKA Retail Wheeling, Under CPUC Electric Restructuring Proposal*, CALIFORNIA ENERGY MARKET, April 22, 1994, at 10. Notably, this debate has not occurred. There is a very real concern that the CPUC and Utilities sought to hide, or at least successfully hid, policy these sorts of policy debates under ultra-technical economics-speak. *Restructuring Update: Utilities Split North-South Over Wholesale Market Structures*, CALIFORNIA ENERGY MARKET, August 5, 1994, at 10. In a sense, utilities sought to break out of the regulatory compact and enter the competitive market with all the benefits and none of the costs of the discarded compact. This appears to be the result obtained by the recent policy reforms. In contrast, early proposed reforms would not have achieved these results. This outcome supports my contention that the utilities had inappropriate influence in the process.

³ Clifford Carlsen, *PUC Likely to Ease Back and Reevaluate Its Role*, THE BUSINESS JOURNAL-SACRAMENTO, February 1, 1988, at 14.

⁴ The "Bluebook" signaled the beginning of official regulatory reforms. Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation (R. 94-04-031) and Order Instituting Investigation on the Commission's Restructuring California's Electric Services Industry and Reforming Regulation (I. 94-04-032) (Public Utilities Commission, State of California, April 20, 1994) [hereinafter *Bluebook*].

⁵ *Id.* at 8.

⁶ *Id.* at 7 - 8.

⁷ *Id.* at 7.

⁸ *Id.* at 5.

⁹ *Id.* at 6.

¹⁰ Consider, for instance, the detailed processes contained in the Negotiated Rulemaking Act., 5 U.S.C. §§ 561 - 570.

¹¹ By ad hoc I mean that the CPUC announced procedures governing the process as it went along. See J.A. Savage, *Restructuring Update, California Energy Markets*, Aug. 26, 1994, at 9 (CPUC did not develop a comprehensive timeline or procedures for restructuring investigation).

¹² See CAL. CONST. ART. XII, §2 (the CPUC is a unique constitutionally created agency with constitutionally enumerated powers and duties).

¹³ See, e.g., Philip J. Harter, *Symposium: The Washington College of Law Program for Advanced Studies in Federal Regulation Intensive Seminar Series: Collective Ratemaking and Consensual Decisionmaking, August 20, 1982: The Political Legitimacy and Judicial Review of Consensual Rules* 32 AM. U.L. REV. 471, 477 (1983) (suggesting that compliance rates are higher when rules are developed consensually).

¹⁴ Philip J. Harter, *Symposium: The Washington College of Law Program for Advanced Studies in Federal Regulation Intensive Seminar Series: Collective Ratemaking and Consensual Decisionmaking, August 20, 1982: The Political Legitimacy and Judicial Review of Consensual Rules* 32 AM. U.L. REV. 471, 476 (1983).

Any reforms considered by the legislature should be consistent with the constitutional distrust of utilities and intention to preclude regulatory capture of the CPUC. See *infra* notes 112 - 122 and related text.

¹⁵ Negotiated Rulemaking Act of 1990, 5 U.S.C. 561-70 (1994).

¹⁶ See, e.g., *Kugler v. Yocum*, 445 P.2d 303, 305-06 (Cal. 1968) ("The power to change a law of the state is necessarily legislative in character, and is vested exclusively in the legislature, and cannot be delegated by it").

¹⁷ *Id.* at 311 (commenting on the enormity of such an enterprise).

¹⁸ See *Federal Radio Commission v. Nelson Brothers*, 289 U.S. 266 (1933) (upholding FCC's rulemaking authority to act "as public convenience and necessity require"); *Yakus v. United States*, 321 U.S. 414 (1944) (affirming power of the Price Administration to fix prices which in its "judgment shall be generally fair and equitable and will effectuate the purposes of this Act" to prevent wartime profiteering); *People v. Wright*, 639 P.2d 267 (Cal. 1982) (holding that the legislature may not confer "unrestricted authority to make fundamental policy changes"); *Birkenfeld v. City of Berkeley*, 550 P.2d 110 (Cal. 1976) (the charter delegating authority to set rents contained a sufficient standards limiting the board's authority to charge "just and reasonable rent and no more"); *Kugler v. Yocum*, 445 P.2d 303, 306 (Cal. 1968) ("legislative power may properly be delegated if channeled by a sufficient standard").

¹⁹ See *Amalgamated Meat Cutters v. Connally*, 337 F.Supp. 737 (D.D.C. 1971) (reviewing presidential price fixing action and upholding it because of the short term of the delegation and the availability of ju-

dicial review); *McHugh v. Santa Monica Rent Control Board*, 777 P.2d 91, 7 (Cal. 1989) (upholding a delegation of adjudicative authority where judicial review was available); *Kugler v. Yokum*, 445 P.2d 303, 306 (Cal. 1968) (“[L]egislative power may properly be delegated if channeled by a sufficient standard”).

²⁰ This may not be strictly true. It is not uncommon to find the federal courts citing the delegation doctrine as support for a narrow reading of a statute. They assert that the statute must be read narrowly or it will constitute an unconstitutional delegation. *See, e.g., Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980); *Kent v. Dulles*, 357 U.S. 116 (1958); *Aranson, supra* note 17, at 12.

²¹ *Lawrence, infra* note 23, at 650.

²² *See, e.g., State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29 (Cal. 1953); *Blumenthal v. Board of Medical Examiners*, 368 P.2d 101 (Cal. 1962); *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*, 55 Cal.Rptr. 23 (Ct. App. 1966); *Kugler v. Yocum*, 445 P.2d 303 (Cal. 1968); *Bayside Timber Co. v. Board of Supervisors*, 97 Cal. Rptr. 431 (Ct. App. 1971); *Allen v. California Board of Barber Examiners*, 102 Cal.Rptr. 368 (Ct. App. 1972); *Antoine v. Department of Public Health*, 108 Cal.Rptr. 689 (Ct. App. 1973); *CEEED v. California Coastal Zone Conservation Com.*, 118 Cal.Rptr. 315 (Ct. App. 1974); *Simi Valley Recreation and Park Dist. v. Local Agency Formation Com.*, 124 Cal.Rptr. 635 (Ct. App. 1975); *Mandel v. Hodges*, 127 Cal.Rptr. 244 (Ct. App. 1976); *Southern Pacific Transp. v. Public Utilities Com.*, 556 P.2d 289 (Cal. 1976); *Chevrolet Motor Division v. New Motor Vehicle Bd.*, 194 Cal.Rptr. 270 (Ct. App. 1983), *cert. denied*, 465 U.S. 1102 (1984); *Independent Roofing Contractors v. Department of Industrial Relations*, 28 Cal.Rptr.2d 550 (Ct. App. 1994).

²³ *David M. Lawrence, Private Exercise of Government Power*, 61 IND. L. J. 647 (1986). Strictly speaking, Mr. Lawrence’s article analyzes constitutional limits on delegation to private parties.

²⁴ As will be discussed below, California cases root the doctrine, at least in part, in notions of substantive due process.

²⁵ S. Barber, *THE CONSTITUTION AND THE DELEGATION OF CONSTITUTIONAL POWER* (1975).

²⁶ *Lawrence, supra* note 23, at 663.

²⁷ *Lawrence, supra* note 23, at 663.

²⁸ *See Donald A. Dripps, Delegation and Due Process*, 1988 DUKE L. J. 657, 661. Donald Dripps points to a very graphic example of how delegation to other branches of government can lead to reconcentration of power and subsequent abuse. He points out that in 1933 the German Reichstag delegated all of its legislative power to Hitler, the then-elected chief executive. The abuses that followed, though certainly not all were attributable to the delegation, were immeasurable.

²⁹ *Lawrence, supra* note 23, at 669, citing *Dearborn Fire Fighters Union Local No. 412 v. City of Dearborn*, 231 N.W.2d 226, 235 (Mich. 1975).

Donald Dripps suggests that the requirement of a legislative policy or standard to guide the use of the delegated power stems from this requirement. The framers purposefully put obstacles in the way of legislative action—such as the requirements of bicameralism and presentment to the President. The requirement of a legislative policy or standard insures that the Congress does not subvert Article I requirements. “The intelligible principle requirement therefore has the object of ensuring that Congress makes important policy decisions according to the pluralistic constraints that the constitution imposed on congressional action.” In other words, if Congress delegated without a standard developed under Article I constraints, then neither the policy nor the implementing scheme would be subject to these Article I constraints. Such delegations would subvert the entire constitutional scheme. *Dripps, supra* note 28, at 662, 668-69.

³⁰ *Lawrence, supra* note 23, at 670.

³¹ *Kugler v. Yocum*, 445 P.2d 303, 305-06 (Cal. 1968).

³² This is not strictly true. Some states, including California, have constitutional bars against delegations of municipal powers. The scope of these bars is in all cases is very narrow and therefore they are

irrelevant for our purposes. See Lawrence, *supra* note 23, at 658 n.50 and articles cited therein.

³³ *First Industrial Loan Company v Daugherty*, 159 P.2d 921, 923 (Cal. 1945).

³⁴ *Carter v. Carter Coal*, 298 U.S. 238 (1936).

³⁵ See, e.g., *Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control*, 420 P.2d 735, 761 (Cal. 1966); *Allied Properties v. Department of Alcoholic Beverage Control of California*, 346 P.2d 737, 747 (Cal. 1959); *State Bd. of Dry Cleaners v Thrift-D-Lux Cleaners, Inc.*, 254 P.2d 29, 36 (Cal. 1953); *Miller v. Municipal Court of Los Angeles*, 142 P.2d 297, 302 (Cal. 1943); *Bayside Timber Co. v. Board of Supervisors of San Mateo Cty.*, 97 Cal.Rptr. 431, 438 (Ct. App. 1971).

³⁶ See *supra* note 18 and accompanying text discussing safeguards and standards.

³⁷ *State Board of Dry Cleaners v. Thrift-D-Lux Cleaners*, 254 P.2d 29 (Cal. 1953).

³⁸ *Id.* at 36.

³⁹ *Id.*

⁴⁰ See *supra* note 18 and broad standards discussed therein that have been upheld.

⁴¹ *Thrift-D-Lux Cleaners*, 254 P.2d at 36 [emphasis added].

⁴² *Blumenthal v. Board of Medical Examiners*, 368 P.2d 101 (Cal. 1962)

⁴³ *Id.* at 105 (emphasis added).

⁴⁴ *Id.*

⁴⁵ *Kugler v. Yocum*, 445 P.2d 303 (Cal. 1968).

⁴⁶ In some sense, this is a "constitutional supremacy" argument; those assigned the legislative powers in the constitution must exercise the bulk of that power vested. It is also a separation of powers argument since the abdication of power would serve to reconcentrate power in the executive branch. The court cited neither rationale explicitly however.

⁴⁷ The court also noted that safeguards in place in Los Angeles would afford protection in Alhambra. In other words, Los Angeles decisionmakers did not want to overpay firefighters any more than Alhambra decisionmakers did.

⁴⁸ *Kugler*, 445 P.2d at 309 (citing 1 Davis, ADMINISTRATIVE LAW TREATISE (1958) §2.15).

⁴⁹ *Id.* at 310.

⁵⁰ Lawrence, *supra* note 23, at 678.

⁵¹ Delegations to private parties, however, may bring into question whether the "end" was legitimate.

⁵² Lawrence, *supra* note 23, at 679.

⁵³ *Bayside Timber Company v. Board of Supervisors*, 97 Cal.Rptr. 431, 438 (Ct. App. 1971). The *Bayside Timber* court also noted that "[i]t is against public policy to permit any person occupying fiduciary relations to be placed in such a position that he may be tempted to betray his duty as a trustee." *Id.* at 439. The California Constitution, Article IV, section 5, contains provisions to keep legislators from being so tempted. The *Bayside Timber* court suggested that this policy should apply to those receiving delegated authority as well. *Id.* at 439. In other words, it is inconsistent with this constitutional provision to allow legislators to delegate their authority to those who may likewise be tempted to betray their duty

⁵⁴ See, e.g., *Kugler v. Yocum*, 445 P.2d 303, 305-06 (Cal. 1968) ("The power to change the law of the state is necessarily legislative in character and is vested exclusively in the legislature, and cannot be delegated"); *Southern Pacific Transp. v. Public Utilities Com.*, 556 P.2d 289 (Cal. 1976).

⁵⁵ *Wilke and Holzheiser, Inc. v. Department of Alcoholic Beverage Control*, 420 P.2d 735, 747 (Cal. 1966).

⁵⁶ *California School Employees Ass'n v. Personnel Com. of the Pajaro Valley Unified School Dist.*, 474 P.2d 436 (Cal. 1970).

⁵⁷ It is important to note that subdelegations to agency staff are distinguishable from subdelegations to private parties. In *Chevrolet Motor Division v. New Motor Vehicle Bd.*, 194 Cal.Rptr. 270 (Ct. App. 1983),

cert. denied, 465 U.S. 1102 (1984), the court distinguished between agency staff and private parties with a financial stake in the dealings of the agency: "Unlike agency staff, the dealer Board members have a financial stake in every dealer-manufacturer dispute which comes before the Board. . . . [T]he presence of biased members on the Board presents a substantial probability that decisions on dealer-manufacturer disputes will be made on the basis of inappropriate considerations. . . ." *Id.* at 275.

⁵⁸ *Independent Roofing Contractors v Department of Industrial Relations*, 28 Cal.Rptr.2d 550, 557 (Ct. App. 1994).

⁵⁹ *Id.* at 557.

⁶⁰ *Id.*

⁶¹ *Bayside Timber Co. v Board of Supervisors*, 97 Cal.Rptr. 431 (Ct. App. 1971) supports this reading. In that case, the court found that a statutory scheme unconstitutionally delegated legislative authority to interested parties. The parties did not have power to enact the law. Under the scheme they only had power to write proposed laws and a board appointed by the governor had power to adopt or reject the proposals. This simple exercise of discretion was not sufficient to save the delegation.

⁶² IOUs are corporations generally owned by stockholders and traded on the stock market; hence the term investor owned utilities. Donald N. Zillman & Lawrence H. Lattman, *ENERGY LAW* 642 (1983). IOUs should be distinguished from publicly owned municipal utilities.

⁶³ "A natural monopoly occurs when a firm is able to grow larger and reduce prices simultaneously until it is the only firm on the market." Jan G. Laitos & Joseph P. Tomain, *ENERGY AND NATURAL RESOURCES LAW IN A NUTSHELL* 511 (1992). Utilities are typically characterized as natural monopolies. "They are seen as 'natural' because of their structure—large and capital intensive, and their product—a social necessity." *Id.* at 511. Some of their services such as transmission lines are not well suited for competition because a second, competitive set of lines could not be supported by the market and therefore would be a waste of resources. In this situation there is a market failure, and regulators must step in to replace the controls that a properly functioning market would impose with regulations and price controls.

⁶⁴ "Regulation of the electricity industry is divided between the states and the federal government. State public utilities commissions establish the utility's franchise and set its retail rates. The federal government, through the FERC, sets wholesale and interstate rates. *Mississippi Power & Light Co. v Mississippi* (1988); *Nantahala Power and Light Co. v Thornburg* (1986)." Laitos & Tomain, *supra* note 64, at 511.

⁶⁵ The fuel cycle begins with some energy resource, such as coal, sunlight, wind, or natural gas, being converted into electricity. This is *generation*. The electricity is then *transmitted* from the source of generation at high voltages to areas where the electricity will be used. Finally, the utility will either deliver the power at a high voltage to large consumers such as an industrial manufacturing plant or reduce the electricity's voltage and *distribute* it to smaller consumers such as residences. Laitos & Tomain, *supra* note 64, at 508. Vertically-integrated service means that the utility owns and controls the whole process—generation, transmission, and distribution—and consumers need only contract with a utility to receive all three services.

Historically, regulators have treated the entire vertically-integrated service as a natural monopoly. This treatment is being challenged. It has become clear in recent years that generation is not truly a naturally monopolistic service. If it can be severed sufficiently from transmission and distribution—which are still considered natural monopolies—then a competitive market for generation services can be created. There is some concern that since utilities control distribution and transmission assets they will have an unfair advantage in the new generation market. In other words, there is concern that utilities will have an abnormal amount of "market power," which will distort the emerging competitive generation market.

⁶⁶ The Public Utility Regulatory Policy Act of 1978 (PURPA), 16 U.S.C. § 2601 et seq.

⁶⁷ 16 U.S.C. §2611(b) (to encourage efficient use of resources by utilities).

⁶⁸ Cogeneration is the production and use of both electricity and heat. Zillman & Lattman, *supra* note 63, at 642. A manufacturer, for instance, can operate a small generation plant, using the heat to run a boiler and electricity to power other operations.

⁶⁹ The Public Utility Regulatory Policy Act of 1978 (PURPA), 16 U.S.C. § 2601, required FERC to promulgate rules requiring utilities to purchase power from certain small generators. Generators who meet the qualifying characteristics set forth in the statute are called Qualifying Facilities or QFs. These provisions were upheld to challenge by a utility in *FERC v. Mississippi*, 456 U.S. 742 (1982).

Qualifying facilities are a subset of non-utility power producers called Independent Power Producers or IPP. Independent Power Producers are merely non-utility power generators. Not all IPPs are QFs and therefore not all are entitled to special treatment under PURPA section 210.

⁷⁰ The law did not require QFs to sell their power to utilities. In fact, many small energy producers are large manufacturing plants supplying power to themselves. These QFs only wish to sell excess generation. The reality is that there are few other buyers for the power since utilities control the transmission lines. Other regulatory constraints exist as well.

⁷¹ At this point, many QF contracts are costly because they were entered into when energy prices as a whole were high. However, excess power generated by QFs and IPPs, not currently committed to contract, may be less expensive than that generated by IOUs.

⁷² In almost every state, utilities control transmission lines. Without access to transmission lines, QFs and IPPs can't get the power they produce to willing buyers. Federal regulators have the power under certain circumstances to order utilities to transmit power for a non-utility generator. In the industry, it is called "wheeling" when a utility transfers power for a non-utility generator. Since FERC only has jurisdiction over commercial activities in interstate commerce, FERC "wheeling" regulations at least at this point only extend to wholesale transactions. In other words, FERC can only order wholesale wheeling and not retail wheeling. Therefore, only those entities who meet the federal definition of wholesaler have access via FERC to transmission lines.

⁷³ Professor Arturo Gandara, University of California at Davis School of Law, prefers the term "re-regulation" to the more common term "deregulation" to describe the sorts of regulatory reforms being adopted. He feels that this term is more accurate given that regulators have not reduced their interactions with or control of utility actions. In other words, regulators' role in the regulatory scheme has not shrunk. Instead, their roles have merely changed. Arturo Gandara, Lecture, Energy Law course at UC Davis, Fall Semester, 1995. I agree with Professor Gandara. The term "deregulation" sounds more like a populist appeal to public dissatisfaction with government in general than an accurate description of the regulatory trend.

⁷⁴ Clifford Carlsen, *PUC Likely to Ease Back and Reevaluate Its Role*, THE BUSINESS JOURNAL-SACRAMENTO, February 1, 1988, at 14.

⁷⁵ Jeffrey Dasovich *et al.*, California's Electric Services Industry: Perspectives on the Past, Strategies for the Future ("Yellowbook"), California Public Utilities Commission, Division of Strategic Planning (1993).

⁷⁶ *Id.*

⁷⁷ *Id.* at 1.

⁷⁸ *Id.* at 4.

⁷⁹ *Id.* at 1.

⁸⁰ *Id.* at 172.

⁸¹ Cost-based ratemaking compensates utilities for prudently incurred costs. On the hand, performance-based ratemaking is less positive and more normative. It seeks to introduce market-type incentives to encourage utility efficiency. The regulator imposes a price cap, unrelated to costs, and allows the utility to capture as profit the difference between the price cap and actual cost.

⁸² "Bundled" is functionally like vertically-integrated from the perspective of the consumer. It means

that the utility would sell a service to its core customers that includes generation, transmission, and distribution. Core customers would not have to contract separately for each of these services. The primary difference between "bundled" service and vertically-integrated service is that with the former the utility would itself have to contract for generation services since it would no longer own generation assets.

⁸³ Bluebook, *supra* note 4.

⁸⁴ *Id.* at 5

⁸⁵ Apparently, this provision was necessary to avert utility opposition to reforms. PUC Splices the Plug, CALIFORNIA JOURNAL WEEKLY, May 9, 1994. Under the regulatory scheme, utilities would sometimes make less than profitable investments necessary to provide the type of service the public demanded. Under the traditional, highly regulated scheme, utilities were just about guaranteed a reasonable profit. That is to say, they were shielded from much of the risk of investments, but were limited to a reasonable return on their money. Because these investment entanglements were long-term, they would persist even as utilities moved into a newly competitive market. Utilities would be unfairly handicapped, so the argument goes, if they were forced to shoulder all of these costs. It would be fair and consistent with the implied promises of the traditional regulatory scheme to split these costs, sometimes referred to as competitive transition costs or CTCs, between consumers and utility shareholders. Commentators are more critical of proposals that advocate one side or the other absorbing 100% of the CTCs. J.A. Savage, *CPUC Promises Legislature to Slow Electric Industry Restructuring Program*, CALIFORNIA ENERGY MARKETS, May 24, 1994, at 8 ("Everyone [should have] to share the pain of transition costs, including shareholders.")

Some critics pointed out that calculating "stranded costs" based only on generation assets is unfair to consumers. The regulatory compact treated all parts of the vertically integrated system as a whole. These critics pointed out that it is widely believed that transmission assets are undervalued. That is to say that more of the benefits of the regulatory compact were captured in transmission assets than in generation assets. That captured costs should be used to offset losses sustained by utilities when they enter the competitive market with uncompetitive generation assets in place of charging consumers for these losses. To act other wise is to give the utility a windfall bonus. Arthur O'Donnell, *Restructuring Update*, CALIFORNIA ENERGY MARKETS, December 2, 1994, at 9-10.

⁸⁶ Bernard S. Black, *A Proposal for Implementing Retail Competition in the Electricity Industry*, THE ELECTRICITY JOURNAL, October 1994 at 58.

⁸⁷ Certain long-term entanglements have been entered into by utilities under the regulated system that were appropriate in the regulated sphere and that might not be appropriate in the a competitive market. These entanglements called stranded assets, stranded liabilities, and stranded benefits need to be dealt with before utilities can enter on equal footing into the competitive sphere.

(a) Stranded Assets

Stranded assets are those which have a market value in excess of book value.

(b) Stranded Liabilities

Stranded liabilities are those obligations imposed by regulation that would not have been voluntarily assumed in a competitive marketplace. The primary stranded liabilities identified were long-term contracts with Qualifying Facilities.

(c) Stranded Benefits

Stranded benefits are such things as investment in demand side management and programs to provide electricity service to those who can't afford it. Many of the stranded benefits are statutorily mandated so the CPUC can't cancel them unilaterally. No proposal has explained how these will be handled in the long-term.

⁸⁸ J.A. Savage, *Restructuring Update*, CALIFORNIA ENERGY MARKETS, January 6, 1995, at 12.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Commissioners and utilities denied improper influence from industry Jonathan Marshall, *PUC Debate Stalls Electricity Deregulation: Regulators Deadlocked*, SAN FRANCISCO CHRONICLE, April 25, 1995, at D1. When a commissioner regularly played racquetball with utility representatives and several commissioners traveled to England on a fact-finding tour with utility representatives, one wonders what the CPUC and utilities would find amounted to improper influence. Certainly industry representatives have been spending "quality time" with commissioners in relaxed, ex parte settings. Ricardo Sandoval, *PUC, Utilities: To Close for Comfort*, THE SAN FRANCISCO EXAMINER, March 26, 1995, at B-1. Such junkets call into question the purposes and effectiveness of open meeting practices that Commissioner Fessler so prickly cited as evidence of fair procedures in a letter to the editors of the Los Angeles Times. Commissioner Fessler, *Electricity Deregulation*, LOS ANGELES TIMES, March 30, 1995, at B-6.

⁹² Most large energy consumers and independent power producers backed the Knight plan because they feared utilities would dominate the PoolCo provisions of Commissioner Fessler's plan. Jonathan Marshall, *PUC Debate Stalls Electricity Deregulation: Regulators Deadlocked*, SAN FRANCISCO CHRONICLE, April 25, 1995, at D1.

⁹³ Order Instituting Rulemaking on Commissions' Proposed Policies Governing Restructuring of California's Electric Services Industry and Reforming Regulation (94-05-045; 94-04-031); Order Instituting Investigation on Commissions' Proposed Policies Governing Restructuring of California's Electric Services Industry and Reforming Regulation (94-04-032) ("PoolCo") (1995).

⁹⁴ *Id.*

⁹⁵ One critic of PoolCo has noted that "[m]ost of the time PoolCo wont be very busy. The seven nuclear power plants [in Arizona and California, which would be exempt from PoolCo] plus the high-cost independent power plants already under contract with the state's investor owned utilities produce enough electricity to meet most of the state's power needs for much of the year." Ed Smeloff, *PUC's New Plan to Give Utilities Windfall Profits*, SACRAMENTO BEE, August 6, 1995, at F01.

⁹⁶ The CPUC expected that the FERC would fix transmission rates.

⁹⁷ PoolCo, *supra* note 92.

⁹⁸ The plan admitted that ownership concentration of generation assets created problems in England when they privatized their electricity system. But the CPUC argued that because ownership is not so concentrated here as in England (where two corporations controlled all the generation assets) so perhaps similar problems would not arise. PoolCo, *supra* note 92. For instance, in California there are three large investor owned utilities many municipal owned utilities, and many independent power producers that could compete in a generation market.

⁹⁹ PoolCo, *supra* note 92.

¹⁰⁰ See *supra* note 5 and related text.

¹⁰¹ The term bilateral contracts is used by the CPUC to distinguish these new contracts from the traditional utility unilateral contracts. In traditional, unilateral contracts, consumers promise to pay for the electricity they consume upon utilities' performance—delivery of power as needed. In a bilateral contract, generators promise to deliver a certain amount of power in exchange for a promise to pay a certain price for that power.

¹⁰² Michael Parrish, *Draft Electricity Plan to Get Endorsement*, LOS ANGELES TIMES, July 10, 1995, at D-3.

¹⁰³ Letter from California Manufacturers Association, California Large Energy Consumers Association, Southern California Edison, and Independent Energy Producers, to California Public Utilities Commission (September 11, 1995) ("MOU").

¹⁰⁴ MOU, *supra* note 104, at 6.

¹⁰⁵ The ISO's "principal responsibilities will be the scheduling of power transactions, managing transmission congestion in an equitable and efficient manner, and providing non-discriminatory and comparable access to the transmission grids of California's IOUs and other transmission grids under the con-

trol of the ISO." MOU, *supra* note 104, at 4.

¹⁰⁶ MOU, *supra* note 104, at 4.

¹⁰⁷ Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation. (D 92-12-063), California Public Utilities Commission (1995).

¹⁰⁸ *Compton College Federation of Teachers v. Compton Community College District*, 183 Cal.Rptr. 341 (Ct. App. 1982).

¹⁰⁹ *Independent Roofing Contractors v. Department of Industrial Relations*, 28 Cal.Rptr.2d 550 (Ct. App. 1994).

¹¹⁰ See *People ex rel PUC v. City of Fresno*, 62 Cal.Rptr. 79, 82 (1967) (the CPUC "is constitutionally constructed to protect the public from consequences of monopoly in public services industries"). *Sale v. Railroad Commission*, 104 P.2d 38 (Cal. 1940), confirms this understanding. The *Sale* court compared the commission [now the CPUC] to a judicial tribunal. It concluded that the latter was a passive entity relying on the parties to determine the scope of the inquiry and to submit data supporting certain findings. In contrast, the Commission was "an active instrument of government charged with supervising and regulating" public utilities." *Id.* at 41. The commission, continued the court, had a "right and duty" to "control the scope and method of inquiries." *Id.* at 41.

¹¹¹ Article XII of the California Constitution governs Public Utilities. The relevant provisions for the purposes of this paper are:

Section 1: The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. . . . CAL. CONST. ART. XII, § 1 (West Supp. 1996).

Section 2: Subject to statute and due process, the commission may establish its own procedures. . . . CAL. CONST. ART. XII, § 2 (West Supp. 1996).

Section 6: The commission may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction. CAL. CONST. ART. XII, § 6 (West Supp. 1996).

Section 7: *A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission* CAL. CONST. ART. XII, § 7 (West Supp. 1996) (emphasis mine).

¹¹² CAL. CONST. ART. XII, § 6 (West Supp. 1996).

¹¹³ See CAL. CONST. ART. XII, §§ 1 - 8 (West Supp. 1996); *Barnett v. Delta Airline, Inc.*, 187 Cal.Rptr. 219 (Ct. App. 1982) (CPUC has exclusive jurisdiction over regulation and control of utilities and the courts cannot invade exercised jurisdiction); *Bagley v. City of Manhattan Beach*, 553 P.2d 1140, 1141 (Cal. 1976) ("When the legislature has made clear its intent that one public body or official is to exercise a specific discretionary power, the power is in the nature of a public trust and may not be exercised in the absence of statutory authorization"); *Harmon v. Pac. Tel. & Tel. Co.*, 6 Cal.Rptr. 542 (Ct. App. 1960) (CPUC has exclusive jurisdiction over conditions under which a public utility may render service).

¹¹⁴ CAL. CONST. ART. XII, § 1 (West Supp. 1996).

¹¹⁵ CAL. CONST. ART. XII, § 6 (West Supp. 1996). See *supra* note 114 regarding entrusting of powers to a named agency.

¹¹⁶ CAL. CONST. ART. XII, §§ 2, 6-7 (West Supp. 1996).

¹¹⁷ CAL. CONST. ART. XII, § 7 (West Supp. 1996).

¹¹⁸ See *supra* note 111.

¹¹⁹ CAL. PUB. UTIL. CODE § 701 (Deerings 1990).

¹²⁰ "Authority of deputies. Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person autho-

rized, pursuant to law, by the officer, unless this code expressly provides otherwise." CAL. PUB. UTIL. CODE § 7 (Deerings 1990).

¹²¹ See *So. Cal. Gas Co. v. CPUC*, 596 P.2d 1149, 1152 (Ca. 1979) (holding that an express statutory provision of a permissible DSM program precluded a mandatory program authorized under the CPUC's general powers).

¹²² The legislature may have provided for broader authority to delegate, but only within the constitutional constraints of Article XII, section 7. CAL. CONST. ART. XII, § 7 (West Supp. 1996).

¹²³ CAL. CODE REGS. tit 20, § 14.2 (1995) (emphasis mine).

¹²⁴ Because the regulations impose almost no mandatory duties on the CPUC, I cannot contend that these regulations were not complied with.

¹²⁵ But see *supra* note 110 regarding purposes of monopoly regulation.

¹²⁶ See *supra* notes 16 and 113.

¹²⁷ This would thwart the entire purpose of the CPUC—to protect the public from the control of those with monopoly power.

¹²⁸ See *supra* note 110. The legislature has entrusted the CPUC with even broader powers than granted under the constitution. Under the circumstances, this trust would be abused by delegation.

¹²⁹ CAL. CODE REGS. tit 20, § 51.1 (1988).

¹³⁰ But see e.g. Arturo Gandara, *Contracts in Wonderland: A Fable Regarding the Administrative Adjudication of Qualifying Facilities in California*, 31 SAN DIEGO L. REV. 307 (1994).

¹³¹ Jo Shaffer, CALIFORNIA PUBLIC UTILITY PRACTICE AND PROCEDURES, § 10.1 (1993)

¹³² The scope of this discretion is discussed above in section IVA.1.

¹³³ CAL. CODE REGS. tit 20, § 51.1 (1988).

¹³⁴ Throughout the recent policy debates, the CPUC deferred to stakeholders in devising a policy that the stakeholders would acquiesce to. See, e.g., J.A. Savage, *CPUC Promises Legislature to Slow Electric Industry Restructuring Program*, CALIFORNIA ENERGY MARKETS, May 27, 1994, at 8 (the CPUC was pressured into slowing and changing the focus of reforms by two Assembly members and by a host of stakeholders); Libby Brydolf, *Restructuring Update*, CALIFORNIA ENERGY MARKETS, October 29, 1994, at 7 (Fessler asked whether utilities would accept a hybrid system and was encouraged by stakeholder movements toward a compromise); J.A. Savage, *Restructuring Update*, CALIFORNIA ENERGY MARKETS, January 6, 1995, at 13 (CPUC created a working group of stakeholders to work out a compromise policy proposal); J.A. Savage, *Restructuring Update*, CALIFORNIA ENERGY MARKETS, February 3, 1995, at 12 (working group devises a new restructuring plan not based on or conceived in Bluebook); Arthur O'Donnell, *Bottom Lines*, CALIFORNIA ENERGY MARKETS, May 26, 1995, at 8 (CPUC has stated goal of protecting IOU shareholders from all financial harm); Cyril Penn, *CPUC Majority Proposes Wholesale Pool as Competitive First Step*, CALIFORNIA ENERGY MARKETS, May 26, 1995, at 11 (Southern California Edison said that any CPUC policy that did not allow for full recovery of investments would be "unacceptable"); J.A. Savage, *Commissioners Express Interest in Direct Access at Pasadena Restructuring Hearing* CALIFORNIA ENERGY MARKETS, August 25, 1995, at 9 (small faction of stakeholders devise in secret a "compromise" proposal that it will "present" to the CPUC); Cyril Penn, *Consumer Groups Demand End to Rampant Utility Lobbying, Release Study of Ex Parte Contacts*, CALIFORNIA ENERGY MARKETS, September 15, 1995, at 14 (1,177 ex parte contacts, mostly from IOU's, logged in a seven month period).

¹³⁵ To the extent that Rule 51.1 facilitated this, the delegation had a formal basis as well.

¹³⁶ See *supra* note 134.

¹³⁷ Bluebook, *supra* note 4, at 1 (CPUC expressed openness to substitute proposals).

¹³⁸ I suggest that such coziness is unhealthy because the constitution and statute are suspicious of close ties between commissioners and members of the regulated communities. Also, the CPUC has a duty to protect the public from monopoly utilities. See *supra* note 110 regarding this duty. The current CPUC

seems to have gotten it backwards. *See supra* note 134.

¹³⁹ The high cost of electricity was driven by long-term contracts for electricity, entered into by utilities when energy costs were very high, and from costs associated with the construction and decommissioning of nuclear power plants. To reduce the cost of electricity in California, one commentator suggests that consumers would have to find away to get out of paying for these investments. Audrie Krause, *Consumers Will Lose With PoolCo*, THE SAN DIEGO UNION-TRIBUNE, June 22, 1995 at B11.

¹⁴⁰ *See infra* note 146.

¹⁴¹ *See supra* note 134.

¹⁴² *See supra* notes 108 - 10. Cf. *Chevrolet Motor Division v. New Motor Vehicle Bd.*, 194 Cal.Rptr. 270 (Ct. App. 1983), *cert. denied*, 465 U.S. 1102 (1984) (even if board members with a financial state in the outcome had no voting right there was an impermissible delegation of adjudicatory authority because their participation on the board could inject elements of inappropriate consideration).

¹⁴³ *See supra* note 137.

¹⁴⁴ *See supra* note 11 and related text discussing the few procedures established and their ad hoc nature.

¹⁴⁵ *See supra* note 35 and related text.

¹⁴⁶ CAL. PUB. UTIL. CODE §§ 1756 - 1767 (West Supp. 1996). These provisions were recently amended to allow for discretionary review by the Courts of Appeals in matters of quasi-adjudications. It remains to be seen whether this additional avenue for appeal will appreciably increase judicial review of CPUC actions. In any case, it will not provide a greater check on abuses of the rulemaking process.

¹⁴⁷ Only death penalty appeals are of right. CAL. CONST. art. VI., § 11.

¹⁴⁸ Stephen R. Barnett, *In Pursuit of Justice: Reflections of a Supreme Court Justice*, 78 CALIF. L. REV. 247, 251 (1990) (book review) (the court is burdened with a "debilitating load of death penalty cases"); Robert S. Gerstein, *Law By Elimination: Depublication in the California Supreme Court*, 67 JUDICATURE 293, 294 (1984) (the court only reviews a total of about 100 cases each year).

¹⁴⁹ *See supra* notes 35 and 146 and related text.

¹⁵⁰ *See supra* notes 146 and related text.

¹⁵¹ *See supra* note 13 and related text.