

2015

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Recommended Citation

Dorit R. Reiss, *The Eye of the Beholder: Participation and Impact in Telecommunications De(Regulation)*, 62 *William & Mary Pol'y Rev.* 56 (2015).

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THE EYE OF THE BEHOLDER: PARTICIPATION AND IMPACT IN TELECOMMUNICATIONS DE(REGULATION)¹

Dorit Rubinstein Reiss²

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

¹ The *William & Mary Policy Review* Editorial Board would like to thank Professor Reiss for her scholarship and her insight. In the interest of providing the most discerning research, the author relied on interviews in which participants wished to remain anonymous, even from the Editorial Board. For this reason, the Board cannot vouch for the complete accuracy of the quotations.

² Associate Professor, University of California, Hastings College of Law. The author would like to thank the participants at the Wake Forest University School of Law Forum on Asymmetry of Administrative Law for their comments. The author would also like to thank David Jung, David Levine, Adam Scales, and Reuel Schiller, for comments and input into this project, and Annie Daher, Alicia Jovais, Svetlana Matt and Jonathan Trunnell for superb research assistance.

I. INTRODUCTION

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

This article examines two decisions by the California Public Utilities Commission (CPUC). The first decision largely deregulated the California telecommunications market in terms of prices, removing most price controls and reporting requirements from the incumbent telecommunications carriers, or incumbent local exchange carriers (ILECs).³ The second decision changed several important aspects of the California LifeLine Program, the program providing subsidized telecommunications service to low-income consumers.

The article does not try to evaluate the substance of CPUC's decisions or determine whether they were correct or desirable. That is an important project, but it is not this one. Rather, this article addresses participation and input into the process. The article asks why, in the first case, the CPUC's decision was in line with the ILECs' preferences on almost every issue, and why, in the second case, it accepted the consumer organizations' preferences on several issues. The article examines three possible explanations. First, it examines and rejects the argument that in the first proceeding the CPUC was captured by the ILECs. Second, it partly accepts the argument that the preferences of the assigned commissioner affected the result, but qualifies it by emphasizing the role of the staff. Third, it examines the hypothesis that the type of issue was critical to the different results and concludes that this is the most powerful explanation. The commission considered the expertise of consumer groups more important on the second issue than on the first. Further, the higher level of conflict in the first decision meant that the commission pretty much had to choose between positions, while on the second decision, it could find a middle point. This suggests that, in these cases, regulators' approaches to input mattered a lot, and regulators saw consumer organizations' input as much more important in areas in which they thought those organizations have special expertise.

³ An incumbent local exchange carrier is a company that was in place when AT&T was broken up. A local exchange carrier is basically a telecommunications provider. *See* Telecommunications Act of 1996 §3(44).

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

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

II. BACKGROUND

The California Public Utilities Commission (CPUC) is an unusual agency in that it is a constitutional agency. In 1911, the California Senate proposed a constitutional amendment giving the newly created Railroad Commission constitutional status; the electorate ratified the amendment.⁴ In 1946, this became the California Public Utilities Commission.⁵ Today, the CPUC regulates multiple areas,⁶ but this article focuses on its regulation of communications, with an emphasis on voice telephony.

The CPUC’s procedures can be found partly in the California Public Utilities Code.⁷ The CPUC has created additional procedures itself, including classification of decisions and assignment of roles.⁸ Major decisions are handled by a team consisting of at least one assigned Administrative Law Judge (ALJ) and one commissioner. The ALJs are part of the CPUC’s professional staff. Usually, they have substantial expertise and

⁴ *CPUC History & Structure*, CALIF. PUB. UTILITIES COMM’N., www.cpuc.ca.gov/puc/aboutus/puhistory.htm (last visited on May 14, 2012).

⁵ *Id.*

⁶ *Id.* The CPUC also regulates communications, energy, transportation and water.

⁷ Cal. Pub. Util. Code §§ 1 *et seq.*, <http://www.leginfo.ca.gov/cgi-bin/calawquery?codesection=puc>. Especially important for our purposes are §§ 1701-1710, which govern hearings.

⁸ Agencies regularly create regulations that limit their own powers and add accountability mechanisms. Dorit Rubinstein Reiss, *Account Me In: Agencies in Quest of Accountability*, 19 J. OF L. AND POL’Y 611(2011); Elizabeth Magill, *Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859 (2009). The Constitution formally gives the commission the power to determine its own procedures on matters not settled by statute. California Constitution, Article XII, § 2, <http://www.leginfo.ca.gov/const-toc.html>.

experience in at least one area of utility matters. They may have a background in law, engineering, public policy or other related disciplines. Often, though not always, they specialize in the subject matter of the proceeding. One ALJ explained to me that expediency and caseload sometimes lead to deviations from expertise; for example, the CPUC has a lot more energy matters on its plate these days than communication matters, so ALJs with a communications expertise find themselves handling energy cases frequently.⁹ Even when that is the case, however, they draw on one another's expertise. A former ALJ described the ALJs as a very collegial group and explained that they regularly consult one another when handling cases that require special expertise.¹⁰

The five commissioners are political appointees, selected for a set term by the governor and confirmed by the senate.¹¹ They may have a utilities background,¹² and naturally, their political leanings factor into their appointments. When discussing the different commissioners, interviewees regularly comment on their party (not always correctly) and on their background.¹³

Both decisions addressed in this article fall into the category of "Quasi-Legislative" proceedings.¹⁴ There are three practical implications of this categorization.

⁹ Private Communication, ALJ.

¹⁰ Interview, ALJ. For example, he mentioned that there are Certified Public Accountants among the ALJs that are regularly consulted on matters requiring knowledge of accounting.

¹¹ California Constitution, Article XII, § 1, http://www.leginfo.ca.gov/.const/.article_12.

¹² Of the current commissioners: President Peevey used to work in the energy sector; Commissioner Simon was a "a former securities and banking industry attorney involved in financial products and services"; Commissioner Florio worked for The Utility Reform Network (TURN) for many years, specializing in energy issues; Commissioner Sandoval was an academic researching and writing on telecommunications issues; and Commissioner Ferron worked in several different positions in the banking industry. *About Us: Commissioners*, CALIF. PUB. UTILITIES COMM'N, <http://www.cpuc.ca.gov/PUC/aboutus/commissioners/> (last visited May 14, 2012).

¹³ One interview commented that "Commissioner Grueneich was the consumers' commissioner." Interview, Melissa Kasnitz, Legal Counsel, Center for Accessible Technology, Berkeley, California, March 7, 2012. Another commented that "Commissioner Chong and Kennedy were appointed by a Republican governor." Interview, Consumer Organization (this comment is mistaken in regards to Ex-Commissioner Kennedy – she was appointed by Governor Davis, a Democrat).

¹⁴ Other categories include Adjudicatory and Rate-setting proceedings. Cal. Pub. Util. Code § 1701.1. *See also* Philip Scott Weismehl, CPUC PROCEDURES 2 (Administrative Law Judge Assistant Chief ed., 2010) (hereinafter Weismehl manual) (internal report, on file with author). The CPUC has considerable discretion

First, quasi-legislative proceedings are, by definition, commissioner-run.¹⁵ In a manual prepared to explain to new staff members how the CPUC operates, ALJ Philip Weismehl explained that, for these decisions, “responsibility shifts to [the] commissioner with [the] ALJ assisting.”¹⁶ Second, unlike in rate-setting cases, in these proceedings, the assignment of a particular ALJ to the proceeding cannot be challenged. That was not an issue in either decision here. Finally, in a rulemaking decision, *ex parte* communications are permitted and do not have to be put on the record, which makes it almost impossible to know the extent of lobbying that went on. Even if we could talk to every participant, and could assume they were all telling the truth, they may not have a full memory of the off-the-record events that are more than six years old. Some of them openly stated that they had imperfect memories and recollections of the events. Lobbying is very much the norm in these kinds of proceedings. In fact, an interviewee from a consumer organization said of her biggest error in relation to the Uniform Regulatory Framework (URF) decision: “procedurally, I wish I had known more about the importance of *ex parte* earlier. I don’t think that I lobbied as effectively as I might have simply because I was a novice at working in front of the commission.”¹⁷

The two decisions addressed here are, in a sense, two sides of the same coin.¹⁸ Both of them are part of restructuring telecommunications regulation in a mode in which prices and services are determined, for the most part, by the market, and the CPUC’s involvement focuses on directly protecting social values in areas in which it believes the

in assigning matters to a category and determining whether hearings are required. Cal. Pub. Util. Code § 1701.1.

¹⁵ Cal Pub. Util. Code § 1701.4 (“The assigned administrative law judge shall act as an assistant to the assigned commissioner in quasi-legislative cases.”).

¹⁶ Weismehl manual, *supra* note 14, at 4.

¹⁷ Interview, Member of consumer organization, March 8, 2012.

¹⁸ Telecommunications regulation is an ongoing process, and almost any decision is closely connected to many other decisions. This article only focuses on two decisions, acknowledging that by doing so, it is presenting a static view of what is a dynamic, ongoing process and inevitably presenting just one step in the intricate dance of many stakeholders. However, examining the process of all of them at the level of detail done here is extremely resource and time consuming, on one hand, and extremely important on the other: as this article demonstrates, there are important insights to be learned from this close analysis of the process which cannot be found from an examination of decisions alone.

market does not operate well.¹⁹ The first decision, the URF, was chosen for two reasons – first, it is an extremely important decision, discussing the complete removal of price controls from the California telecommunications market. Second, when I started this project, the decision was described as a classic case of regulatory capture. Since my interest was in capture, it seemed like a perfect case study. I selected the second decision because it is the latest decision to address an issue the URF explicitly left unresolved, the LifeLine Program. It was close in time and involved the same main actors – sometimes the very same people – as the URF decision, but it addressed a different issue and was handled by a different commissioner. There are, therefore, some important similarities that allow for meaningful comparison – both address telecommunications, both affect affordability, especially for vulnerable groups, and both involve the same constellation of actors. There are differences in terms of the subject matter and leading commissioner that can help explain why the commission came to different conclusions.

The URF decision is certainly not a routine decision and hence not representative of everyday matters in the CPUC. Still, as an important struggle, it can shed light on the interaction of interests and influence.

The Uniform Regulatory Framework decision (URF),²⁰ handed down in August 2006, radically altered the regulatory framework governing ILECs. In the CPUC's words, the URF decision:

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

¹⁹ As will be explained, many of the debates surrounding these decisions reflect divergent views of how well markets can actually regulate the behavior of the carriers, especially the ILECs, and what the appropriate role is for the regulator.

²⁰ Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of Telecommunications Utilities (2006), Calif. Pub. Utilities Comm'n, Dec. No. 06-08-030, at 151, http://docs.cpuc.ca.gov/published/Final_decision/59388.htm (last visited May 1, 2012) (hereinafter The URF Decision).

restrictions, we permit carriers to add services to “bundles” and target services to specific geographic markets.²¹

The decision also removed many of the California-specific reporting requirements previously imposed on ILECs, bringing those requirements in line with the Federal Communications Commission’s (FCC) requirements.²² It removed special accounting requirements placed on the utilities, requirements that, in the words of a lawyer working for AT&T, “required us to keep three sets of books” (one for the CPUC, one for the FCC, and one for the SEC).²³ The decision did put in place a price cap on basic residential services until 2009 and froze the basic residential service prices for customers living in high cost areas that were covered by a special subsidy program.²⁴ In short, the decision represented a substantial change in the way incumbent telecommunications carriers were regulated. It gave them substantial freedom to set prices and was thus fairly described as a big step towards “deregulation” of telecommunications.

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

²¹ The URF Decision, *supra* note 20, at 2.

²² The URF Decision, *supra* note 20, at 3 (“We eliminate all monitoring reports tied to the now outdated New Regulatory Framework (NRF) governing the incumbent local exchange carriers affected herein. Instead, we standardize our reporting requirements so that they are consistent with comprehensive reports provided by all carriers to the Federal Communications Commission (FCC).”).

²³ Interview, AT&T. The URF Decision, *supra* note 20, at 3

(“We reduce and eliminate many of the vestiges of rate-of-return regulation, such as “accounting adjustments” and other rules that cause regulatory accounts to diverge from financial accounts. These regulatory adjustments no longer serve a ratemaking purpose. We instead, therefore, base our requirements on Generally Accepted Accounting Principles (GAAP) accounting standards and FCC accounting rules, and consequently streamline our audit practices. We eliminate the price cap index, price cap filings, earnings “sharing,” and gain-onsale distributions, all of which are no longer appropriate in the competitive voice communications market.”).

²⁴ The URF Decision, *supra* note 20, at 2. The CHCF-B fund, which provides subsidies to ensure that customers living in relatively remote areas would have access to communications services at affordable prices, is beyond the scope of this article.

dramatically. Mobile, cable, and voice over internet protocol (VoIP) challenged the dominance of the traditional landline operators.²⁵ These changes led to a state and nationwide move towards reducing command-and-control regulation and relying on the market as much as possible, as reflected in statutory change at the state and national levels.²⁶ The previous regulation was untenable in the new reality, hobbling competition by preventing ILECs from competing and making the whole market inefficient. According to proponents of this view, the existing regulatory regime simply did not make sense. They argued that it had to be changed, and the CPUC, by enacting the URF Decision, simply stepped up to the line and did its job.

Opponents vehemently disagreed. They saw the decision as an abdication of the CPUC's responsibilities to protect consumers. In their view, the decision sacrificed the interests of consumers in general and vulnerable consumers in particular.²⁷ They did not agree that the market was competitive because the technological substitutes were not available for important segments of the population, such as low income consumers, the elderly, disabled consumers, and some rural populations. These consumers have to rely on landline as their primary service, and, as opponents argued it, the landline market was not competitive because the ILECs dominated that market. Through mergers and acquisitions that market had become increasingly consolidated. Claims of competition, they say, were based on a partial view of the market, a view focusing on young, well-off, savvy consumers with access to technical alternatives, who were able to take advantage of promotions offered by the ILECs and their competitors. The ILECs' market power allowed them to mistreat consumers and manipulate the market by removing controls that then allowed them to hike prices and harm consumers.²⁸ The CPUC should continue to closely regulate the ILECs. If it has to do this horrible thing and remove price controls, it must at least keep in place reporting requirements, so that it can catch the inevitable

²⁵ *Id.* at 4 (“The market is far more competitive. It now includes multiple wireless carriers; competitive local exchange carriers (CLECs); cable television companies that have added Voice over Internet Protocol (VoIP) telecommunications products to yield a “triple play” of voice, video and data offerings; and pure-play VoIP providers, such as Vonage or Packet8, that will add a voice communications service to any broadband connection.”) (footnotes omitted).

²⁶ *Id.* at 32-36. *See also* CHARLE F. JR PHILLIPS, *THE REGULATION OF PUBLIC UTILITIES* (Public Utilities Reports, Inc. 1993).

²⁷ Interviewees used very vehement language to describe the decision and express their disagreement.

²⁸ Interviews, TURN, DisabRA.

problems early and respond to them.²⁹ The URF did not even do that; it instead loosened reporting requirements.

The URF decision generated much controversy, discussion, and argument. Feelings still run strong about it on both sides. As will be discussed in the next section, the parties' views of the process are strongly affected by their views of the decision. Everyone agrees the decision was initiated by the CPUC and driven by a result the CPUC thought desirable. However, proponents see the CPUC's process as open, believe it provides multiple opportunities for input, and considers the decision strongly evidence-based. Opponents see the CPUC as entering the process with its decision already made, unwilling to consider the evidence and ignoring the record. I want to reiterate that this article is not reexamining the URF decision to see whether the CPUC "got it right." Its focus is on this much-debated process and input.

The other decision examined here is one in a line of decisions relating to California's LifeLine Program. The decision in question is the one handed down in November 2010.³⁰ California's LifeLine Program is its universal service program, providing qualifying low-income consumers with subsidized telecommunications service. In at least one sense, LifeLine can be seen as a complement to URF. The justification for removing price controls is that for those consumers who still need protection because the market will fail to serve them, there are social policy programs protecting them, LifeLine being one such program.

There were many other decisions relating to LifeLine,³¹ but this is an important one. It changed the way the program worked from a preset rate. LifeLine participants paid only a maximum amount set by the commission, and the carrier (the telecommunications operator) was compensated for the difference from a fund. The

²⁹ As Sir Humphrey said to Jim Hacker in "Yes, Minister": "If you are going to do this damn silly thing, don't do it in this damn silly way." YES, MINISTER: THE WRITING ON THE WALL (BBC Two 1980).

³⁰ Rulemaking on the Commission's own Motion to review the telecommunications public policy programs (2010) Cal. Pub. Util. Comm'n., Nov. No. 10-11-033, http://docs.cpuc.ca.gov/PUBLISHED/FINAL_DECISION/127062.htm (last visited May 1, 2012) (hereinafter The LifeLine decision).

³¹ A description of the important ones can be found in Appendix B to the LifeLine Decision. Melissa Kasnitz, a lawyer representing the interests of disabled customers, sees the 2005 decision (D. 05-04-026) as the real problem with the program. The decision was intended to implement the FCC requirements as to verification, but the process it adopted was strongly criticized, eventually by the CPUC itself. See Report on Strategies to Improve the California LifeLine Certification and Verification Processes (2007).

decision changed this to a preset support amount, in which the carrier was given a set subsidy for each eligible customer and deducted that amount from its usual rate.³² To offer additional protections to consumers, the decision also capped the rate a participating carrier may offer at 50 percent of its basic rate, capped this rate for most customers, and allowed carriers to change the rate only once a year.³³ The decision also allowed carriers offering wireless or voice over internet protocol (VoIP) to participate in LifeLine.³⁴ Finally, it stopped payment to carriers for administrative costs,³⁵ explaining that since most regulatory requirements associated with ratemaking had been removed in URF and further simplified in this proceeding, there was less justification for reimbursement.³⁶

In contrast to the URF decision, which completely changed the structure of regulation, the parties to this decision were not arguing about the justifications for the LifeLine Program itself, about its existence, about its funding or about a complete overhaul but only about the details of the program. These were important details, but the discussions did not reach the same level of controversy.

III. PROCEDURES AND PARTICIPATION

This section examines the process the CPUC used to arrive at both decisions, with a focus on the opportunities for the parties – especially consumer groups – to be heard. One common criticism of many regulatory processes is that they are structured so that it is much easier for regulated entities to have impact and voice than for consumer organizations.³⁷ On this issue the article concludes the CPUC process was generally open

³²The LifeLine decision, *supra* note 30, at 3 (determining “that a Specific Support Amount methodology is the best option to continue to meet the goals of the Moore Act and our overall universal service goals. Sets a Specific Support Amount at 55 percent of the highest basic rate of the State’s URF carriers of last resort.”).

³³ *Id.*

³⁴ *Id.* at 4.

³⁵ *Id.*

³⁶ *Id.* at 85-86.

³⁷Marissa Martino Golden, *Interest Groups in the Rule-Making Process: Who Participates? Whose Voices Get Heard?*, 8 J. OF PUB. ADMIN. RESEARCH & THEORY 245, 259-264 (1998); Jason Yackee Webb & Susan Yackee Webb, *A Bias Towards Business? Assessing Interest Group Influence on the U.S. Bureaucracy*, 68 J. OF POLITICS 128, 133-135 (2006); CORNELIUS M. KERWIN, *RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY* 183 (3d ed., 2003) (“Businesses...are involved in rulemaking more often

with multiple opportunities for parties to be heard, and that several extremely capable consumer groups took advantage of those opportunities. This is important because there is evidence that participation from consumer groups can have substantial impact on results,³⁸ and some commentators suggested that the ability of such groups to handle technical complexity would be a barrier.³⁹

The process the CPUC used was elaborate, mostly transparent (with one big exception,—ex parte communications), and provided multiple access points and ample opportunities for the parties to submit their points of view. Nonetheless, the process of one of those decisions – the decision to remove price controls – was strongly criticized by consumer groups. Those groups admittedly face a problem, as challenging an agency’s decision on substantive grounds is a very hard proposition, and they are unlikely to win on a claim that the decision is unreasonable. Challenging the process, therefore, is one route to attack what those groups sincerely believe is a wrong result, and it can be a strategic step. However, the fact that attacking the CPUC on process has strategic advantages does not mean that the groups’ criticisms of the process are insincere. Certain aspects of the process generated extremely heartfelt criticisms. The criticisms especially focused on the lack of hearings and, more specifically, on the lack of hearings in relation to one issue, geographic deaveraging. The CPUC is not required to provide hearings on rulemakings, and often has reasons for not doing so, but the groups saw the lack of hearings on this issue, and the limited hearings on other issues, as leading directly to a lack of an evidentiary record supporting the CPUC’s decision.

Scholars and policymakers occasionally voice the concern that “public interest groups lack the resources to participate in all but a few administrative proceedings and are overwhelmed by regulated interests in the proceedings in which they do participate,

than are other groups, and they devote to it greater slices of their likely larger budgets and staffs.”); Dorit Rubinstein Reiss, *The Benefits of Capture*, 47 WAKE FOREST L. REV. no. 3, 569-610_(2012). *But see* Mariano-Florentino Cuéllar, *Rethinking Regulatory Democracy*, 57 ADMIN. L. REV. 411, 435-459, 497-99 (2005) (finding, in three rulemakings, substantial participation by lay people and public interest groups, and finding the sophistication of the comments, rather than the identity of the commentator, to determine whether they influence the agency’s decision).

³⁸ William D. Berry, *An Alternative to the Capture Theory of Regulation: The Case of State Public Utility Commissions*, 28 AM. J. OF POLITICAL SCI. 524, 542-547 (1984).

³⁹ William T. Gormley, Jr., *Policy, Politics, and Public Utility Regulation*, 27 AM. J. OF POLITICAL SCI. 86, 89-90 (1983).

leading to a domination of the process by these interests.”⁴⁰ That is not what I see in either of these proceedings; in both proceedings, there was strong and capable participation by at least three consumer interest groups of the grassroots variety,⁴¹ and the Division of Ratepayers Advocate (DRA),⁴² which can be defined as a proxy-advocacy group.⁴³ The DRA, while an “in-house” organization, is tasked with representing consumers and is strongly devoted to that goal.⁴⁴

In the URF decision, there was evidence of the influence of those groups on the procedures. At the request —demand— of DRA and The Utility Reform Network (TURN), the commission agreed to hold hearings on the issue of competition: “In URF, the commission didn’t see a need for hearing at all. We fought and got a hearing.”⁴⁵ “At the same time, consumer organizations felt that the final decision downplayed their concerns and the evidence they brought.”⁴⁶

In the second decision, there was clear evidence of the influence of those groups on the final result, as described in Table 4 in Section III.

⁴⁰ Symposium, *The Asymmetry of Administrative Law*, 47 WAKE FOREST L. REV. (2012).

⁴¹ Gormley defines grass-roots as “private organizations that promote interests unrelated to their members’ occupation.” Gormley, *supra* note 39, at 87. Representatives of at least three consumer organizations participated in this proceeding: The Utility Reform Network, TURN, <http://www.turn.org> (hereinafter: TURN); Disability Rights Advocate (DisabRA), <http://www.dralegal.org>; and Greenlining, <http://greenlining.org/index.php>.

⁴² The Division of Ratepayers Advocate is an in-house consumer watchdog. It is a branch of the CPUC whose mission is “to obtain the lowest possible rate for service consistent with reliable and safe service levels.” Division of Ratepayers Advocate, DRA.CA.GOV, <http://www.dra.ca.gov/default.aspx> (last visited May 1, 2012). The few empirical studies examining this kind of representation found it effective, at least on some issues. William T. Gormley, Jr., *Alternative Models of the Regulatory Process: Public Utility Regulation in the States*, 35 WESTERN POLITICAL Q. 297 (1982).

⁴³ Gormley defines proxy-advocacy groups as “government organizations that represent residents of a particular jurisdiction in another government organization’s proceeding.” Gormley, *supra* note 39, at 87. The DRA is part of the CPUC, but its independence is protected. *Id.*

⁴⁴ My interviews with DRA and others strongly suggest they see more eye-to-eye with each other—at least in the two telecommunications decisions covered in this paper—than with the rest of the commission or the telecommunications carriers, whether ILECs or CLECs.

⁴⁵ Interview, TURN. This will be elaborated on below.

⁴⁶ Interviews TURN, DisabRA.

The next two tables summarize the formal process, excluding ex parte communications, which are discussed separately afterwards. This is a list of the opportunities to participate, but all of the parties I spoke to report taking advantage of these opportunities, and in addition, engaged in extensive ex parte communications with the CPUC:

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

Date	Event
April 14, 2005	Order Instituting Rulemaking (OIR) issued by CPUC.
June 3, 2005	One-day workshop on procedural issues.
June 27, 2005	En banc informational hearing on procedural issues (specifically the structure of the OIR).
August 31, 2005	Parties filed opening comments re: OIR.
September 2, 2005	Parties filed reply comments re: OIR.
September 20-22, 2005	Three-day workshop in which the parties presented their proposals. Contained question and answer sessions.
October 31, 2005	DRA submitted a matrix comparing the proposals of the different parties (various parties met to generate this document, and all parties endorsed it).
December 16, 2005	CPUC issued a ruling setting dates for evidentiary hearing for late January 2006.
January 30-February 2, 2006	Four-day evidentiary hearing regarding market competition.
March 6, 2006	Parties filed opening briefs on topics addressed so far in the proceeding. The central focus was competition.
March 24, 2006	Parties filed reply briefs.
July 25, 2006	<i>Proposed</i> decision of Commissioner Chong.
August 15-22, 2006	Parties filed comments on proposed decision.
August 24, 2006	Final decision issued by CPUC.

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

Date	Event
March 25, 2006	Order Instituting Rulemaking (OIR) issued by CPUC.

July 20, 2006	ALJ Bushey's ruling scheduling public participating hearings.
July 28, 2006	Opening comments.
July 31-August 4, 2006	Submission of opening comments.
August 11, 2006	Deadline for Verizon and AT&T (California) to file and serve to all of the parties a summary of the "Affordability of Telephone Services – A Survey of Customers and Non-Customers" (Field Research Corporation, 2004).
September 14-15, 2006	Reply comments filed.
September 15, 2006	Deadline for carriers to notify their customers about hearings.
September 25, 2006	Public participation hearing.
October 26, 2006	Public participating hearing.
November 3, 2006	Public participating hearing.
August 15 - September 7, 2007	Comments filed re: LifeLine Program questions as stated in the scoping memo
September 7 - 28, 2007	Reply comments filed.
May 12, 2008	Proposed decision.
June 1-9, 2008	Comments filed in response to proposed decision.
September 19, 2008	Ruling by ALJ to Reopen the Record in Light of Transition Plan for Basic Local Service Rates
October 1-3, 2008	Comments filed.
October 8-16, 2008	Reply comments filed.
October 8, 2008	DRA & TURN file motion for public notice and input and stay on the lifeline increase.
October 23, 2008	Responses filed to DRA & TURN's motion.
March 6, 2009	Workshop to provide an opportunity for clarification regarding numerical representations in the Proposed Decision prior to

	submitting comments and replies.
May 10, 2010	Scoping ruling.
May 28, 2010	Opening comments on scoping ruling.
June 18, 2010	Reply comments.
August 16, 2010	Motion by TURN for the clarification of treatment of lifeline rates.
August 31, 2010	Responses filed to TURN's motion.
September 10, 2010	Reply filed by TURN to responses to TURN's motion.
September 28, 2010	Revised proposed decision.
October 18, 2010	Opening comments.
October 25, 2010	Reply comments.
December 22, 2010	Rehearing request filed by TURN and others.
January 6, 2011	Responses to TURN's application for rehearing.
February 22, 2011	Another proposed decision.
March 14, 2011	Comments on proposed decision.
March 21, 2011	Reply comments.

A. EX PARTE COMMUNICATIONS

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

lot,” and that both consumer organizations and carriers took advantage of these opportunities.

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

B. CRITICISMS OF THE PROCESS

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

However, the impressions of participants on the dialogue differed between the two decisions. Participants describe the URF proceeding as “adversarial.”⁴⁷ Most of the parties said there was not really dialogue or negotiation between stakeholders, and there was not really an attempt to settle differences because there was very little common ground--the CPUC had a clear position going in.⁴⁸ In the LifeLine decision, there were discussions and dialogues, and parties mentioned many negotiations and back and forth.⁴⁹

Most of the criticisms of the process were raised in the context of the URF decision and are intimately connected to a party’s view of the result. As already explained, a procedural argument may have a better chance of success in a challenge against an administrative decision, since courts may hesitate to replace the agency’s expertise with its own,⁵⁰ but courts know procedures.⁵¹ Especially against the CPUC, the

⁴⁷ Interview, CLEC.

⁴⁸ Interviews, AT&T, TURN, DisabRA.

⁴⁹ *Id.*

⁵⁰ See, e.g., Nicholas J. Leddy, *Determining Due Deference: Examining When Courts Should Defer to Agency Use of Presidential Signing Statements*, 59 ADMIN. L. REV. 869 (2007); Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of the New Deal Administrative Law*, 106 MICH. L.

court is hesitant to challenge the agency's substantive decisions. Criticisms centered on at least three issues. First, some parties felt there were insufficient evidentiary hearings. Second, there was criticism of the decision to include geographic deaveraging in the final decision. Third, some parties argued the decision generally ignored the record and the parties' evidence. I address each in turn.

1. Hearings

While everyone acknowledged that the CPUC provided multiple opportunities to submit written materials, the situation is somewhat different for evidentiary hearings. At least in the case of URF, several parties believed that the commission did not provide sufficient hearings.

Subject to judicial review, the CPUC is not actually required to provide hearings,⁵² and they are pretty unusual in rulemakings.⁵³ Interviewees noted that the tendency over the years had been to decrease oral hearings, though the interpretation of that tendency varied according to the speaker's point of view, from positive to neutral. Positive views connected this reduction of hearings to an increase in efficiency:

[I]n the last half dozen years or so there has definitely been a bit of a change to be more efficient in hearings and to make sure that hearings are really used to resolve factual issues rather than to make policy arguments or to present witnesses who provide an additional method of arguing legal issues. I think that's an appropriate shift in efficiency.⁵⁴

Other interviewees explained that the tendency to move away from hearings was especially strong in rulemakings and connected it to the requirement that commissioners be present when there is a hearing on a rulemaking.⁵⁵ Commissioners do not want to

REV. 399 (2007); David C. Vladeck, *The FDA and Deference Lost: A Self-inflicted Wound or the Product of a Wounded Agency? A Response to Professor O'Reilly*, 93 CORNELL L. REV. 981 (2008).

⁵¹ See generally SIMON HALLIDAY, *JUDICIAL REVIEW AND COMPLIANCE WITH ADMINISTRATIVE LAW* (Hart Publishing, 2004).

⁵² Cal. Pub. Util. Code § 1701.1 ("The commission, consistent with due process, public policy, and statutory requirements, shall determine whether a proceeding requires a hearing.").

⁵³ Interview, TURN; Interview, CPUC.

⁵⁴ Interview, CLEC.

⁵⁵ Interview, CPUC

spend their time in a hearing room, so they would rather not have hearings on a rulemaking if they are required to preside over them.⁵⁶

In contrast, other interviewees saw it as a move away from due process, and a move that prevented issues from being sufficiently discussed and analyzed.⁵⁷ For example, one interviewee explained:

You can see this as either more and more subtle and smarter, or sloppier and sloppier, accepting processes like that. I see it the latter way. There is no one there who is really keeper of flame on what due process looks like. The ALJs care, but the commissioners dominate.⁵⁸

As this quote demonstrates, interviewees traced this to the increasing influence of commissioners over proceedings as opposed to ALJs. They explained, "ALJs really value a fact-based record and want to decide on it. Commissioners have ideologies. They're political appointees."⁵⁹

In the specific context of the URF, several interviewees criticized the hearings. Criticism targeted two aspects: the brevity of the hearings on competition and the lack of hearings on other issues. In their brief, Cox, a competitor, criticized the commission on this issue, explaining that "competition issues were addressed in only 'four short days of hearings' and gave the commission 'minimal insights into the state of competition.'" Cox argued that the "limited and rushed nature of the hearings did not allow for any realistic analysis to take place." They also noted that Dr. Debra J. Aron filed 200 pages of "dense written testimony," but the parties got only two hours to cross-examine. Cox was allotted less than fifteen minutes. They criticized the "severely limited scope" of the hearings.⁶⁰

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

The existing regulatory framework was developed following extensive consideration, over sixty days of evidentiary hearings,

⁵⁶ Interview, CLEC

⁵⁷ Interview TURN; interview DRA.

⁵⁸ Interview, TURN.

⁵⁹ Interview, TURN.

⁶⁰ Reply Brief of Cox at 4, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005).

examining the issues raised by a complete overhaul of the regulatory regime, 13 public participation hearings and numerous rounds of comments and briefing. This may be evidence of some level of regulatory inefficiency, but it is also indicative of the fact that the Commission's responsibilities under the P.U. Code are important and complex and require a great deal of effort to implement. TURN does not advocate sixty days of hearings. However, in this proceeding, the Commission is attempting to revamp its entire regulatory scheme based on two rounds of comments and a very short set of evidentiary hearings addressing only one issue, and taking place in such a limited period of time that parties did not have an opportunity to fully cross-examine witnesses.⁶¹

Interviewees echo this opinion: "In URF the Commission didn't see a need for a hearing at all. We fought, and got hearings, but they were truncated, not evidentiary hearing."⁶²

The extensive and lengthy process held before the passage of the New Regulatory Framework⁶³ seemed to be part of the reason the CPUC was reluctant to add hearings, but TURN pointed out that having too much in case A should not automatically lead to too little in case B:

There were four days of hearings and the utilities put up their witnesses, and they have witnesses that have been talking about this stuff for years [Harris], saying same stuff for years, saying that there is almost competition, and so on, but there was not enough time in the hearing room. They only allowed 3-4 days, not because the Judge [i.e. ALJ Reed] didn't want to give time, because the assigned commissioner wanted to race the thing

⁶¹ Opening Brief of The Utility Reform Network (TURN) at 5, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author) (hereinafter Opening Brief, TURN).

⁶² Interview, TURN.

⁶³ Decisions D. 88-08-059, Alternative Regulatory Frameworks for Local Exchange Carriers, 33 CPUC.2d 43 (Cal. Pub. Util. Comm'n Oct. 12, 1989) (hereinafter the New Regulatory Framework or NRF).

too... they didn't allocate enough hearing time – there was a big push to get it out as soon as possible.⁶⁴

The second criticism was the lack of hearings on other issues, especially geographic deaveraging. On the lack of hearing for geographic deaveraging, TURN, for example, said in their brief, “the very limited hearings in this proceeding did not address the issue.”⁶⁵ Other interviewees also highlighted the lack of hearings.⁶⁶ Similarly, DRA said in its briefs that the proposals for geographic deaveraging “were not previously subject to comment, testimony, or vetting in the hearing process.”⁶⁷

2. *Geographic Deaveraging*

Several of the parties argued that the CPUC did not raise the issue of geographic deaveraging enough in the procedure and did not sufficiently develop it in the record. Lack of notice claims focused on two issues -- whether geographic deaveraging was properly within the scope of the proceeding, and whether parties had been notified sufficiently early of its inclusion. Criticisms of the record focused on the lack of a hearing on the topic and said that on the minimal record available, the CPUC was prevented from deciding on geographic deaveraging. In an application for rehearing, DRA and TURN said:

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

⁶⁴ Interview, DRA.

⁶⁵ Reply Brief of The Utility Reform Network (TURN) at 42, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author) (hereinafter Reply Brief, TURN).

⁶⁶ Interview, DRA; interviews, other consumer organizations.

⁶⁷ Reply Brief of the Division of Rate Payer Advocates (Redacted Version) at 24, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R.05-04-005 (April 7, 2005) (on file with author) (hereinafter Reply Brief, DRA).

cross-examination, based on proposals that did not include elimination of geographically averaged price ceilings.⁶⁸

There was no independent hearing on this topic. Parties disagreed on whether there should have been.⁶⁹

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

Commission rules require that the proceeding's scoping memo specify the issues to be considered. Due process also requires that parties to a proceeding receive proper notice of what matters are at issue in a proceeding and an opportunity to be heard on those matters. The Commission violated its own rules by failing to include the elimination of the geographic averaging requirement in the scoping memo and thus deprived the parties of the requisite notice and opportunity to be heard.⁷⁰

The scoping memo said:

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

And the CPUC officials interpreted this as including any aspect of communications regulation, including geographic deaveraging, as long as the parties raised it in comments, which I address below.⁷¹

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

⁶⁸ Application for Rehearing, Division of Rate Payer Advocates and The Utility Reform Network at 3, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (September 29, 2006) (on file with author) (hereinafter Application for Rehearing).

⁶⁹ Interviews DRA, TURN, Cox thought there should have been independent hearings; interviews with AT&T, CPUC thought there was plenty of opportunity for input on the topic.

⁷⁰ Application for Rehearing, *supra* note 68, at 3.

⁷¹ Interview, CPUC.

... the ILECs' failure to propose *upward* geographic deaveraging creates a potential legal infirmity in the decision resulting from this proceeding if the CPUC adopts the ILECs' proposal without further hearing. Indeed, since upward geographic deaveraging is *now* part of the ILECs' *competition* analysis and proposal, DRA argues that it should have been proffered much earlier in the proceeding. By proposing this element so late in the game, the ILECs have prevented other parties from responding to that proposal in the hearing phase, which was specifically designed to address *competition analyses*. In essence, DRA sees a due process problem if the CPUC adopts the ILECs' upward geographic deaveraging proposal without allowing other parties the opportunity to address this element in hearings.⁷²

TURN challenged the CPUC on this very issue before the Court of Appeals.⁷³ The Court of Appeals, however, had discretion whether to take cases involving the CPUC, and declined to take this one.⁷⁴

The issue of geographic deaveraging was included in the matrix prepared by DRA after the September workshop,⁷⁵ a matrix endorsed by all the parties but not officially included in the record.⁷⁶ This suggests that at least by October 2005, the issue was on the table. Several parties commented on it. For example, Cox objected in their brief to allowing the ILECs to geographically deaverage up or down, expressing concern about

⁷² Application for Rehearing, *supra* note 68, at n.58.

⁷³ California Courts, "Appellate Courts Case Information: The Utility Reform Network v. Public Utilities Comm.," available at: http://appellatecases.courtinfo.ca.gov/search/case/disposition.cfm?dist=1&doc_id=369331&doc_no=A116460 and last accessed on November 1, 2015.

⁷⁴ *Id.* In an interview, a participant explained: "Previously, appeals went to the Supreme Court, and then you could never get your case heard. Now they go to the Court of Appeals, so you can get your case heard once in a long while." See Interview, CLEC.

⁷⁵ Comparison of Proposals Prepared by Division of Ratepayers Advocate, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author)

⁷⁶ Interview, DRA.

potential predatory behavior by the ILECs. In August 2006—late in the process—DRA said, on this issue, when commenting on the Proposed Decision:

The huge rural rate hikes that would follow from the PD's combining of geographic deaveraging and a high implicit price floor almost certainly would violate a federal requirement that rural rates for telecommunications and information services must be reasonably comparable to urban rates for similar services.⁷⁷

It also said that:

The PD does not cite any record evidence presented in the context of geographic deaveraging to support its adoption of a major change to the pricing rules (upward geographic deaveraging) that was not explored in the hearings on competition. That is because the first mention of geographic deaveraging as the PD proposes it appeared in the opening briefs of some parties. Hence, granting unfettered geographic deaveraging would violate Rule 1.2.⁷⁸

TURN said:

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

⁷⁷ Comments of the Division of Ratepayer Advocates on the Proposed Decision of Commissioner Rachelle Chong at 2, Order Instituting Rulemaking on the Commission's Own Motion to Assess and Revise the Regulation of the Telecommunications Utilities, No. R. 05-04-005 (April 7, 2005) (on file with author).

⁷⁸ *Id.* at 19.

information, it is difficult to comprehend how issuing the ILECs a blank check constitutes ensuring that rates are just and reasonable.⁷⁹

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

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

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

For several decades, long distance companies had charged the same per minute rates no matter where the long distance calls went, despite the fact that states and parts of states varied substantially in access charges, the major cost component of a long distance call. This national experience suggested that there would not be major changes or a rush to deaveraged [sic] rates, particularly in light of the limitations on phone companies [sic] billing systems. The long distance companies had the best billing capabilities, and if they did not think it made sense to do it, it was hard to imagine that local companies could or would deaverage.

Since we did not think that geographic deaveraging would occur, if we lost this symbolic fight, that would be the extent of the loss. There would not be a real world outcome.⁸⁰

3. Drawing on the Record

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

The biggest issue with the URF decision was that they didn't look at the record properly. They had an outcome they wanted to reach regardless of the evidence before it. They just [the] made

⁷⁹ Reply Brief, TURN, *supra* note 65, at 44.

⁸⁰ Email from CPUC official provided under promise of confidentiality (part of sentence omitted to protect the sender's anonymity), received on May 9, 2012, on file with author.

decision they wanted (to have less regulation). TURN strongly felt like they didn't have the record to support that.⁸¹

Another consumer representative said:

The main problem with the decision was that it went completely counter to evidence. There was no evidence on real competition and even the industry advisors admitted there was none in the disabled market.⁸²

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

As explained in the next section, the CPUC did accept the ILEC's positions on most of the issues. For example, on the issue of market power, the CPUC said, "Verizon takes the most direct approach in analyzing its case."⁸³ The CPUC then detailed Verizon's analysis using such phrases as "Verizon detailed," "Verizon demonstrated," "Verizon reviewed," and "Verizon documented," all of which suggest that Verizon was very influential on the CPUC's conclusion regarding market power.⁸⁴ Similarly, other language in this section of the opinion also suggests Verizon's influence on the CPUC: "Verizon appropriately began by. . ."; "Verizon also successfully demonstrated. . ."; "Verizon produced evidence that. . ."⁸⁵ Much of this language illustrates that the CPUC relied heavily not only on Verizon's arguments but on the empirical evidence it presented as well. For example, "Verizon provided survey data that. . . Verizon established that. . ."⁸⁶; "Verizon's evidence, especially when coupled with data produced by AT&T

⁸¹ Interview, TURN.

⁸² Interview with Melissa Kasnitz, Disability Rights Lawyer, Berkeley, California, March 7, 2012.

⁸³ URF Decision, *supra* note 20, at 107.

⁸⁴ See generally, URF Decision, *supra* note 20.

⁸⁵ *Id.*

⁸⁶ *Id.* at 103.

(reviewed below), convincingly establishes that a competitive threat is offered by the new VoIP technologies. . . Verizon confirmed that. . . Verizon verified that. . . Verizon demonstrated that. . . Verizon documented that. . . ”⁸⁷. The CPUC concluded: “In summary, Verizon has developed a record in this proceeding that demonstrates that policy, technology, and market developments prevent it from exercising market power in its California service territories.”⁸⁸

The opinion also stated, “AT&T’s showing likewise demonstrated that policy and technology limit its market power.”⁸⁹ As with Verizon, the CPUC relied on evidence presented by AT&T in reaching its conclusion.⁹⁰

But while the decision did not mention all the evidence submitted—and the volume of submissions by the parties prevented it from doing so—it did not ignore evidence contrary to its conclusion. For example, on the same issue mentioned above, the CPUC stated that it was not persuaded by the analyses of the other parties.⁹¹ The CPUC stated: “These contrary arguments are not supported by the weight of the substantial record evidence, including the evidence that these parties themselves marshaled,”⁹² and explained at length why it was not persuaded by these arguments,⁹³ at times relying on evidence provided by Verizon:⁹⁴ “We find that the testimony of Aron, Verizon’s witness, convincingly demonstrated that VoIP has tremendous growth potential. . .”⁹⁵

One of my interviewees from the CPUC described Dr. Aron’s testimony as the “most factual”, in his view.⁹⁶

The CPUC clearly had a point of view going into the proceeding.⁹⁷ But it did address the parties’ submissions. Again, one can legitimately disagree with its

⁸⁷ *Id.* at 119.

⁸⁸ *Id.* at, 121.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 113-121.

⁹⁴ *Id.*

⁹⁵ *Id.* at 113-114, 118-119.

⁹⁶ Interview, CPUC.

⁹⁷ See *infra* Part IV. A subsequent article will address the effects of a pre-existing point of view of an agency.

conclusions (and it is beyond the scope of this paper to assess those conclusions), but that is not the same as saying they ignored the parties' evidence.

IV. WINNERS AND LOSERS IN THE PROCESS

For the purpose of this section, I compared the initial position of parties—in their briefs but also in the excellent summary of positions prepared by the DRA, a document accepted by the parties—to the CPUC's decision. I also looked for language in the decision that suggested that a party's position was accepted. For example, in the URF decision, the CPUC explained, in relation to the market definition, that "Verizon's logical analysis provides the Commission with a sensible guide for examining the California voice communications marketplace. Applying this systematic analysis, it is clear that the relevant market encompasses telecommunications broadly. Market participants include CLECs, cable companies, VoIP, and wireless service providers... The evidence provided by Verizon on the changing pattern of telecommunications use in California... suggests that landline and mobile services are substitutes, and not mere complements."⁹⁸ This would suggest that, on this issue, Verizon is a "winner."

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

provided the most comprehensive proposal for the Specific Support concept, which AT&T calls a 'fixed benefit' . . . AT&T proposed that the Commission set a fixed benefit amount structured to meet the needs of low-income customers, which would be credited on the customer's bill. Providers would seek reimbursement for the fixed amount from the claims process. Such an approach would simplify administration of the California LifeLine program because the reimbursement amount would no longer be calculated based on the provider's usual rate but rather

⁹⁸ The URF decision, *supra* note 20, at 67-68.

would be limited to the actual benefit distributed to customers. As explained more fully below, we adopt this option for setting the California LifeLine subsidy, with some modifications to only permit carriers to update their LifeLine rate once a year and to cap each carrier's LifeLine rate at 50 percent of its basic rate.⁹⁹

Similarly, in its intervenor compensation decisions, the CPUC explicitly credited DisabRA for its decision to cap the LifeLine rate for two years.¹⁰⁰

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

Table 3: Whose Position "Won" in the URF Decision

Issue	Whose position matched the final decision?
Removing price controls business	AT&T, Frontier and SureWest
Level of competition in the market	Verizon & AT&T
Geographic deaveraging	Verizon & AT&T
Basic residential rate	Verizon & AT&T
Bundling and promotion constraints`	Verizon & AT&T (mostly)

⁹⁹ The LifeLine Decision, *supra* note 30, at 43.

¹⁰⁰ The commission has a program to provide compensation for non-profit organizations when they make a substantial contribution to the proceeding (Intervenor Compensation Program Guide and Instructions, California Public Utilities Commission, Revised May 2014, Available at: <http://www.cpuc.ca.gov/NR/rdonlyres/A0BD21F9-7644-477E-94F4-85B504D43F66/0/UpdatedIntervenorCompensationProgramGuide.pdf>, last visited October 29, 2015). In this case, the commission compensated DisabRA, TURN and Greenlining. The relevant Intervenor Compensation for DisabRA is: *Decision Awarding Intervenor Compensation To Disability Rights Advocates For Substantial Contribution To Decisions 10-11-033 And 08-06-020*, Jul. 2011, Decision No 11-07-024 (copy on file with author). For TURN the decision is: *Decision Awarding Intervenor Compensation To The Utility Reform Network For Substantial Contribution To Decisions 10-11-033 And 08-06-020*, Jul. 2011, Decision No 11-07-023 (copy on file with author). For Greenlining: *Decision Awarding Intervenor Compensation To The Greenlining Institute For Substantial Contribution To Decision 10-11-033*, Apr. 2011, Decision No 11-04-029 (copy on file with author).

Grandfathering and withdrawal	Mixed: Verizon, AT&T and Greenlining
Monitoring, Auditing and Reporting requirements	AT&T, Verizon, SureWest and Frontier
Gain and Loss from Sale of property	Verizon, AT&T
Earning Sharing Mechanisms	AT&T, Verizon, SureWest and Frontier

Table 4: Whose Position “Won” in the LifeLine Decision?

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

V. EXPLAINING THE DIFFERING RESULTS

This Part will explain the difference between the two proceedings – specifically, why consumer organizations seemed to have substantially more success in getting their positions accepted in the LifeLine decision than in relation to URF. It considers three explanations: first, that the CPUC – either the commissioners or the Communications Division – were captured by the utilities in the URF decision and in sections of the

LifeLine decision, and whether the decision was a result of undue influence by some of the stakeholders; second, that it was the commissioner in charge who determined the result; and third, that the filter of the CPUC's perceptions and expectations was determinative – that the input of the parties had more influence when the CPUC expected it to be of value, and when its initial position was closer to the party's views.

The article suggests that this was not capture, and that although the role of the commissioner in charge cannot be discounted, the main determinative factor was the agency's expectation and perceptions. This fits in with research that highlights the importance of an agency's preferences¹⁰¹ and the autonomy agencies enjoy.¹⁰²

A. CAPTURE

There are several definitions of capture. Under one, industry members “persuade regulators to alter rules or be lenient in enforcing those rules.”¹⁰³ Braithwaite and Makkai made the concept of “capture” more nuanced by breaking it into three related behaviors – sympathy to industry (implying excessive sympathy), identification with industry's interest, and (unduly) lax enforcement.¹⁰⁴

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

¹⁰¹ STEVEN P. CROLEY, *REGULATION AND PUBLIC INTERESTS: THE POSSIBILITY OF GOOD REGULATORY GOVERNMENT* (2007); JOEL HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* (1986).

¹⁰² DANIEL P. CARPENTER, *THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928* (2001); COSMO GRAHAM, *REGULATING PUBLIC UTILITIES: A CONSTITUTIONAL APPROACH* (2000).

¹⁰³ Craig W. Thomas et al., *Special Interest Capture of Regulatory Agencies: A Ten-Year Analysis of Voting Behavior on Regional Fishery Management Councils*, 38 *POL'Y STUDIES J.* 447, 448 (2010). There is room in the literature for an article that identifies different types of behavior that fall under the definition of capture and addresses each of them separately. That is not this article. As the literature review here demonstrates, there is scholarship focusing on a specific type of capture, such as the revolving door (*see* Ernesto Dal Bó, *Regulatory Capture: A Review*, 22 *OXFORD REVIEW OF ECON. POL'Y* 203, 214-215 (2006), for a review of the literature). But much of the literature talks in much more general terms. MAKKAI & BRAITHEWAITE; AYRES & BRAITHEWAITE; STEVEN P. CROLEY, *Regulation and Public Interests: the Possibility of Good Regulatory Government* (2007); MALCOLM K. SPARROW, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (2000).

¹⁰⁴ T. Makkai & John Braithwaite, *In and Out of the Revolving Door: Making Sense of Regulatory Capture*, 12 *J. OF PUB. POL'Y* 61, 64-67 (1992).

...persistently serving the interests of regulated industries to the neglect or harm of more general, or 'public', interests... The accusation implies excessive regulated industry influence on regulatory agencies.¹⁰⁵

The first part of this definition is a little more problematic, since a decision can serve the interests of the regulated industry and still be in the public interest, or serve the interests of the regulated industry but not be the result of excessive influence.¹⁰⁶

In this case, the URF decision fits both definitions. The URF decision did indeed do what the ILECs (but not the CLECs) wanted – provide price flexibility. And it heavily cited their submissions. CPUC officials highlighted the substantial amount of data submitted by the utilities, focusing especially on the intensive report submitted by Debra Aron, Verizon's expert, a report which drew on national studies as well as California-level data Verizon submitted. But once again, being convinced by the data the utilities submitted – and rejecting the detailed reports of consumer organizations – does not by itself indicate regulatory capture.¹⁰⁷ At the end of the day, the CPUC was faced with two sets of diametrically opposed briefs and analyses and had to accept one. The recent Tobin project highlighted how problematic it is to actually prove capture,¹⁰⁸ and how even a situation that can be seen as classic capture – like the behavior of the Mineral Management Service, which waived the requirement of Environmental Impact Statements for many deep water oil drilling projects – may be due to something else.¹⁰⁹

The commission initiated the URF decision, and commission members discussed it for several years before passing it.¹¹⁰ It was strongly supported by the Communications Division staff, the same staff that worked on the LifeLine decision in which consumer organizations won on many of the issues. The same Communications Division engaged in enforcement against industry in other contexts, for example, in relation to verification

¹⁰⁵ PAUL J. QUIRK, *INDUSTRY INFLUENCE IN FEDERAL REGULATORY AGENCIES* 4 (1981).

¹⁰⁶ Daniel P. Carpenter, *Protection without Capture: Product Approval by a Politically Responsive, Learning Regulator*, 98 AM. POLITICAL SCI. REV. 613 (2004).

¹⁰⁷ *Id.*

¹⁰⁸ Daniel P. Carpenter & David Moss, *Introduction*, in *PREVENTING CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION, AND HOW TO LIMIT IT* (Daniel P. Carpenter & David Moss eds., 2014).

¹⁰⁹ Christopher Carrigan, *Minerals Management Service and Deepwater Horizon: What Role Should Capture Play?*, *See id.* at 239-297

¹¹⁰ *See infra* Part IV.2.

of LifeLine eligibility. As described in the next section, the Communications Division promoted verification for a time.

The Commission did evince a belief that the market can regulate the ILECs. After all, the decision was based on the existence of competition in the market and an underlying assumption that such competition will control the behavior of the ILECs and prevent abuses. But a pro-market philosophy – held by many people, in or out of regulatory agencies – is not capture.¹¹¹

Representatives of consumer organizations saw the decision as a result of a pro-market ideology, rather than direct influence by industry. A consumer organization interviewee also explained that “the Communications Division is captive not necessarily by industry but by an ideology. My perspective on [the] role of divisions is that they also should be objective, without particular ideology. [The Communications Division] has consistently been very much for free market, competition will save the world, we don’t need regulation. This is a myopic view, not supported by facts.”¹¹² This is an ideological divergence of views—whether the market work in this context—but it is not capture.

Commissioner Chong, the assigned commissioner who, by many accounts, had a strong influence on the process (see the next section), was criticized for her “pro-market views”,¹¹³ but several expressly said they do not see her as actually captured by industry, or even sympathetic to a specific company or group of companies: she simply, according to them, sincerely believes in the market.¹¹⁴

¹¹¹ B. GUY PETERS, *THE FUTURE OF GOVERNING* (2001) (describing the power of market ideology in today’s governance); *see also* THOMAS FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* (1999) (justifying market ideologies); Timothy A. Canova, *Financial Market Failure as a Crisis in the Rule of Law: From Market Fundamentalism to a New Keynesian Regulatory Model*, 3 HARV. L. & POL’Y REV. 369 (2009); Alexander Kouzmin, *Market Fundamentalism, Delusions and Epistemic Failures in Policy and Administration*, 1 ASIA-PACIFIC J. OF BUS. ADMIN. 23 (2009). *But see* D. Joseph Stiglitz, *Moving Beyond Market Fundamentalism to a More Balanced Economy*, 80 ANNALS OF PUB. & COOPERATIVE ECON. 345 (2009) (providing criticism). What this should suggest is that markets are subject to passionate debates beyond this specific case study, and trying to link a belief in the free market with regulatory capture is problematic. As explained in the text, that is not what consumer organizations are saying here.

¹¹² Interviews, consumer rights advocates.

¹¹³ Interviews, consumer rights advocates.

¹¹⁴ *Id.* One interviewee suggested that her post-CPUC employment with Comcast is indicative of her preferences. Even that interviewee, however, did not suggest undue influence on her decision.

As Dan Carpenter points out, it is often hard to distinguish between a captured regulator and one who sincerely believes the position supported by industry is preferable.¹¹⁵ The best evidence I have here—including the consistent views of the CPUC’s communications described in the next section—suggests sincere belief in the rightness of the policy due to belief in the market (and not necessarily sympathy to any specific company or group of companies) rather than capture.

B. ASSIGNED COMMISSIONER

Several consumer organizations expressed the view that the difference between the decisions was the result of the identity of the assigned commissioner. Basically, the argument was that Commissioner Rachel Chong was pro-market and promoted the utilities interests, and Commissioner Dian Grueneich was the “consumers’ commissioner” and took a more balanced view.¹¹⁶

In a CPUC rulemaking, the assigned commissioner is, by definition, the leader of the process. Even though, as emphasized by CPUC officials, this was a unanimous decision of all five commissioners,¹¹⁷ when dealing with a strong personality such as that of Commissioner Chong, it is unrealistic to ignore her influence on the proceeding. Commissioner Rachel Chong’s professional background includes working for several smaller (competitor) telecommunications carriers and serving on the Federal Communications Commission (FCC). She broke ground by becoming a telecommunications lawyer when there were very few women in the field and by being the first Asian American to serve on the CPUC. By all accounts,¹¹⁸ she has a powerful personality, sharp mind, and extensive knowledge in telecommunications. Her admirers describe her as “...very knowledgeable and smart. Knows history and context,”¹¹⁹ and as generally impressive.¹²⁰ Opponents see her as excessively harsh and domineering: “she

¹¹⁵ Carpenter, *supra* note 102.

¹¹⁶ This is a paraphrasing of sentiments voiced by TURN, DRA, and Melissa Kasnitz, but I think it fairly reflects those sentiments. In her concurrence to the LifeLine Decision, Commissioner Grueneich said: “A top priority of my office has been protecting customers—especially at risk customers.” LifeLine Decision, *supra* note 30, at 158).

¹¹⁷ Interviews, CPUC Officials.

¹¹⁸ I.e. all accounts I collected for the purpose of writing this paper. Thank you, Frederick Reiss, for making sure I add this qualification.

¹¹⁹ Interview, CPUC.

¹²⁰ Interview, CPUC; Interview, Cox.

was a bulldog. Threatened people, browbeat people, mean to the staff;”¹²¹ “[she was] very aggressive, a strong personality. Would scream at people.”¹²²

In either case, she was not the kind of person to be only a nominal leader, and she clearly participated heavily in the decision-making. One CPUC official described her involvement in these terms:

It was her decision. She read everything. She worked like a legal editor. Wanted every argument addressed. She made sure the decision was heavily footnoted, tied to the record. It was her editorial choice – she was very involved. Copy edited the whole thing.¹²³

The decision was voted on by the other commissioners, all experienced in many areas (though not necessarily in utilities), but it was written under the guidance of Commissioner Chong. An interviewee convincingly suggested the other commissioners deferred to Commissioner Chong’s known expertise in telecommunications.¹²⁴

People did not describe the same level of involvement from Commissioner Grueneich, but the second decision was as much Grueneich’s decision as the URF was Chong’s.

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

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

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

¹²¹ Interview under conditions of confidentiality.

¹²² Interview, TURN.

¹²³ Interview, CPUC.

¹²⁴ Interview, DRA.

increase [sic]. This formula of basic rate rebalancing is a [sic] outgrowth of decreasing toll revenues. The IRD cost of stand alone basic service was much greater than the adopted rates. The New Regulatory Framework would not protect rates from going up if revenues continued to decline.

Local competition was granted in 1996 with decision 96-02-072. It is my view that the continual decrease in toll, ancillary services and basic service lines would in a NRF regulatory environment potentially result in large basic service rate increases. The URF decision avoids such further rate rebalancing proceedings by declaring the residential telephone market competitive. Even if the URF decision did not cite competitive market specifics as TURN would like, the common knowledge of industry trends were [sic] evident.¹²⁵

An interviewee asked about this confirmed that URF was, indeed, a culmination of a long process of streamlining the regulatory framework and removing controls supported (or even driven by) the communications division of the CPUC.¹²⁶ This important role of the staff fits with previous studies of utility regulators.¹²⁷

Interviewees place the beginning of the real push towards what became the Uniform Regulatory Framework at Commissioner's Susan Kennedy's tenure on the CPUC. Commissioner Kennedy expressed the need for deregulation in multiple speeches. For example, in 2004, two years before Commissioner Chong joined the CPUC, in a speech to the Telecommunications Association, an organization of operators, then-Commissioner Kennedy laid out the principles that would later be included in URF. While highlighting the need for preserving certain social programs,¹²⁸ she suggested that "the current intercarrier compensation system must be scrapped and replaced with something more simple and rational." She also urged that "regulators should not be wasting one more minute on enforcing anachronistic regulations that no longer serve any

¹²⁵ Email to author by CPUC official.

¹²⁶ The official cited was the first to mention this story, and previous interviewees were not asked about it.

¹²⁷ Gormley, *supra* note 42.

¹²⁸ Stating that they must include a broad-based system of support for high cost areas, lifeline service, and access for the disabled. Susan P. Kennedy, "You Say You Want A Revolution?", Remarks to California Telephone Association, Monterey, California, February 17, 2004 (on file with author).

useful purpose...regulators should approach the entire panoply of existing telecommunication regulation from a blank slate... No regulation should be adopted unless it meets a threshold question: “Is this really necessary?”¹²⁹

According to interviewees, the issue had been on the table for a while but there were always more pressing things to do. Commissioner Kennedy pushed the issue forward – she was described by one interviewee as “a go-getter”¹³⁰ and by another as “brilliant, the most intellectual of commissioners”.¹³¹

Commissioner Kennedy left the CPUC in December 2005 to become chief of staff to Governor Schwarzenegger and – according to one interviewee, due to Commissioner Kennedy’s influence¹³² -- Commissioner Chong was appointed for three years to complete the term.

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

C. TYPE OF ISSUE

Although the literature on this topic is limited, different agencies can and do act differently on different issues.¹³³ That is because different issues vary in the level of technological complexity they require and the level of conflict they generate.¹³⁴ This article suggests that in these decisions, at least, agencies also approached the two issues with different expectations as to the importance of participation of consumer groups.

¹²⁹ *Id.*

¹³⁰ Interview, AT&T.

¹³¹ Interview, CPUC.

¹³² Interview, CPUC.

¹³³ Gormley, *supra* note 39; Dorit Reiss, *Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden*, 31 L. & POL’Y 111 (2009).

¹³⁴ Gormley, *supra* note 39; Reiss, *supra* note 133.

In the two decisions in question here, expertise was more at issue in the URF decision. That decision required sophisticated understanding of the telecommunications market and its regulatory framework as well as economic concepts. Groups without the ability to use the language of efficiency were at a disadvantage.¹³⁵ There were, however, at least two groups with considerable sophistication and knowledge of utility matters speaking on the consumer side – TURN and DRA. They both provided extensive briefs. It was not, therefore, just their ability to speak to the matter.

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

So in theory, the difference in expertise should not have affected the proceeding. But it did. Examining the process suggests the level of expertise affected the CPUC's view of consumer groups' submissions – but not in the way Gormley suggests, under which consumer groups could not participate in high-expertise areas because of their lack of resources and specialization. It seems that expertise worked the other way. In the URF decision, the consumer groups were treated as another party, and a party with an agenda, at that: the opposition to the initial goal of the proceeding. But in the LifeLine decision they were seen as an expert group on consumer issues. Since the goal of the LifeLine program is to protect vulnerable consumers, and since the consumer organizations—and especially those focusing on more vulnerable groups, like DisabRA and Greenlining—have substantial knowledge about the problems and issues of those groups and direct access to their voices, their comments were taken extremely seriously. The CPUC openly acknowledged that these groups suggested some things that regulators had not thought of, and influenced some of their decisions. This is confirmed by comparing the initial proposals, the briefs and the final proposals. For example, the CPUC directly attributed its decision to freeze LifeLine rates at their then-current levels to submissions by

¹³⁵ See generally BRONWEN MORGAN, *SOCIAL CITIZENSHIP IN THE SHADOW OF COMPETITION: THE BUREAUCRATIC POLITICS OF REGULATORY JUSTIFICATION* (2003) (theorizing that knowing how to speak the language of economic rationality is critical to interest groups that want to participate in administrative policy making).

DisabRA and Greenlining.¹³⁶ The commission also attributed to those groups the decision to allow carriers to change the rates only once a year.¹³⁷

The other aspect of Gormley's typology, the level of conflict, also actually worked here the other way from his analysis: Gormley expected conflict to be particularly high around LifeLine issues, since that pits certain groups of consumers against others.¹³⁸ However, the tension between consumer groups was actually higher in the URF decision. Consumer groups in the URF decision worried that there were certain groups of consumers who would be disproportionately harmed by the decision: those dependent on basic residential service and unable to take advantage of alternatives or bundles. In contrast, in the LifeLine decision in question, eligibility questions had already been determined. The existence of the program had already been settled, the discussion around what form the subsidy would take had already occurred and, as important as it was, it was less controversial than whether there should be a program and who should be eligible. Therefore, the level of conflict was higher in URF.

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

¹³⁶ Intervenor Compensations. *Supra* note 100.

¹³⁷ *Id.*

¹³⁸ Gormley, *supra* note 39.

VI. CONCLUSION

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

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

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

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