being registered with DMV, or a new vehicle that will be substantially altered or modified by a converter, which the bill would define, prior to resale.

Existing law requires DMV to furnish an autobroker's registration certificate to a dealer who registers with DMV as an autobroker. This bill would, instead, require DMV to furnish the dealer with an autobroker's endorsement to the dealer's license. [S. Trans]

**AB 1218 (Sher).** Existing law makes it unlawful for a licensed dealer, as defined, to, among other things, advertise that the selling price of a vehicle is above, below, or at, among other things, the manufacturer's or distributor's invoice price to the dealer. As introduced February 23, this bill would make it unlawful for any person to use the terms "invoice," "dealer invoice," or "dealer cost" in an advertisement relating to the sale or lease of a vehicle. The bill would make conforming changes in the existing provisions governing dealer advertising. [S. Trans]

**LITIGATION**

In Roulette Dealership Group of California, Inc. v. American Honda Motor Co., Inc., No. H010858 (Sixth District Court of Appeal), Honda is challenging a jury verdict of nearly $7 million in favor of Roulette on claims of breach of contract, bad faith denial of existence of contract, and conspiracy to interfere with prospective economic advantage arising out of Honda's termination of a letter of intent to purchase a Mazda dealership in San Jose. In an *amicus curiae* brief, NMVB contends that the judgment should be reversed because Roulette failed to exhaust its administrative remedies before the Board. At this writing, the Sixth District has not yet scheduled oral argument.

**Mark K. Edward, et al. v. Mazda Motor of America, Inc., et al.,** No. CV736159 (Santa Clara County Superior Court), arises from the plaintiffs' failed attempt to purchase a Mazda dealership. Plaintiffs claim that the defendants wrongfully interfered with the purchase; specifically, the plaintiffs' claims against Mazda and its agents involve alleged intentional and negligent interference with economic relations, breach of implied covenant of good faith and fair dealing, and violation of Vehicle Code section 11713.3. In February 1994, NMVB submitted an *amicus curiae* brief supporting Mazda's demurrer based on the plaintiffs' failure to exhaust administrative remedies before the Board; the trial court sustained the demurrer with leave to amend on the ground that the plaintiffs failed to exhaust their administrative remedies, and sustained a second demurrer on plaintiffs' amended complaint. The plaintiffs have appealed to the Sixth District Court of Appeal, where the matter is now pending.

**RECENT MEETINGS**

At its January 25 meeting, NMVB unanimously elected Manning Post to serve as President and Lucille Mazeika to serve as Vice-President for 1995.

**FUTURE MEETINGS**

September 7 in Sacramento.

**OSTEOPATHIC MEDICAL BOARD OF CALIFORNIA**

**Executive Director:** Linda Bergmann

(916) 322-4306

In 1922, California voters approved a constitutional initiative which created the Board of Osteopathic Examiners; 1991 legislation changed the Board's name to the Osteopathic Medical Board of California (OMBC). Today, pursuant to Business and Professions Code section 3600 et seq., OMBC regulates entry into the osteopathic profession, examines and approves schools and colleges of osteopathic medicine, and enforces professional standards. The Board is empowered to adopt regulations to implement its enabling legislation; OMBC's regulations are codified in Division 16, Title 16 of the California Code of Regulations (CCR). The 1922 initiative, which provided for a five-member Board consisting of practicing doctors of osteopathy (DOs), was amended in 1982 to include two public members. The Board now consists of seven members, appointed by the Governor, serving staggered three-year terms.

At this writing, OMBC is functioning with two vacancies—one professional member and one public member. Additionally, the term of Richard Bond, DO, is scheduled to expire on June 1.

**MAJOR PROJECTS**

Board's Budget Woes Appeased, But Not Abated. At this writing, OMBC has exhausted its budget for fiscal year 1994-95. At OMBC's March 3 meeting, staff reported that it has requested a deficiency appropriation of $60,000 so that the Board may continue its enforcement functions until June 30. OMBC has also benefited from the license fee increase authorized by AB 3732 (Takasugi) (Chapter 895, Statutes of 1994). [15:1 CRLR 163; 14:4 CRLR 196] AB 3732 contained an urgency clause, enabling OMBC to immediately seek the fee increase, which it did in October by adopting amendments to section 1690, Title 16 of the CCR. On January 26, the Office of Administrative Law (OAL) approved the fee increase (see below); OMBC has been collecting the increased licensing fees and using them to support its ailing enforcement program since that date. At this writing, OMBC is also awaiting response on a budget change proposal it submitted seeking additional funds of $150,000 for fiscal year 1995-96.

Infection Control Regulations Approved. On January 26, OAL approved OMBC's adoption of new section 1633, Title 16 of the CCR, which sets forth minimum standards for infection control in the practice of osteopathy through reference to U.S. Centers for Disease Control documents. [15:1 CRLR 164] The standards are aimed at preventing the transmission of bloodborne pathogens, especially HIV and hepatitis. The Board is currently considering the most cost-efficient method of distributing the standards to its licensees.

**Regulatory Package Approved.** Also on January 26, OAL approved OMBC's amendments to sections 1609, 1610, 1630, 1635, 1636, 1641, 1646, 1647, 1650, 1651, 1669, 1670, 1673, 1678, 1681, and 1690, Title 16 of the CCR. Among other things, these amendments change annual fees to biennial fees and raise specified fees; add chiropractors to the list of those authorized to be included in osteopathic medical corporation registration; provide that a license will not be renewed if there is a continuing education deficiency at the time of biennial renewal; raise fees for restoration of forfeited certificates; and delete required forms contained in an appendix. [15:1 CRLR 163-64]

**RECENT MEETINGS**

At its March 3 meeting, OMBC noted the number of applicants for the osteopathic examination has declined.

**FUTURE MEETINGS**

July 22 in Sacramento.

**PUBLIC UTILITIES COMMISSION**

**Executive Director:** Neal J. Shulman

**President:** Daniel Wm. Fessler

(415) 703-1487

The California Public Utilities Commission (PUC) was created in 1911 to regulate privately-owned utilities and ensure reasonable rates and service for the
public. Today, under the Public Utilities Act of 1951, Public Utilities Code section 201 et seq., the PUC regulates the service and rates of more than 43,000 privately-owned utilities and transportation companies. These include gas, electric, local and long distance telephone, radio-telephone, water, steam heat utilities and sewer companies; railroads, buses, trucks, and vessels transporting freight or passengers; and wharfingers, carloaders, and pipeline operators. The Commission does not regulate city- or district-owned utilities or mutual water companies.

It is the duty of the Commission to see that the public receives adequate service at rates which are fair and reasonable, both to customers and the utilities. Overseeing this effort are five commissioners appointed by the Governor with Senate approval. The commissioners serve staggered six-year terms. The PUC’s regulations are codified in Chapter 1, Title 20 of the California Code of Regulations (CCR).

The PUC consists of several organizational units with specialized roles. The major divisions include the Advisory and Compliance Division (ACCD), which implements the Commission’s decisions, monitors compliance its orders, and advises it; the Division of Ratepayer Advocates (DRA), which represents the long-term interests of all utility ratepayers; the Division of Strategic Planning, which helps the Commission to plan future policy; and a unified Safety Division covering all regulated entities.

Members of the Commission include PUC President Daniel Wm. Fessler, P. Gregory Conlon, Jessie J. Knight, Jr., and Henry M. Duque. Commissioner Duque was appointed on April 3, replacing former Commissioner Norman Shumway, who resigned in March. Duque is a Republican and Boalt Hall School of Law graduate who most recently served as vice-president and senior marketing officer for the San Francisco office of Trust Services of America, Inc., a subsidiary of California Federal Bank. The vacancy created by the resignation of Patricia M. Eckert in December 1994 remains unfilled at this writing.

**MAJOR PROJECTS**

**Commission Majority Alters Plan to Restructure California Electric Service Delivery.** The PUC continues to consider various proposals to substantially restructure the delivery of electricity. [115:1 CRLR 164-66; 14:4 CRLR 197; 14:2&3 CRLR 215]

The PUC’s original restructuring plan, advanced in April 1994, anticipated “retail wheeling,” whereby large industrial users, then commercial consumers, and finally households (in separate stages) would be permitted to contract directly with power producers, and the utilities would simply collect a fee for use of the grid to transmit the power to the user. Consumers could also choose to remain users of the utility’s own power generation, and would be subject to PUC rate review protection.

The Commission also proposed to initiate another policy called “performance-based rat ratesetting,” which could be implemented together with or separately from retail wheeling. Here, the utility’s maximum rates would be set based on the average price of electricity. To the extent the utility is able to produce (or purchase from others) cheaper electricity and beat the average price, the savings would be divided between ratepayers and stockholders. If the utility becomes less efficient, the losses are also split between ratepayers and stockholders.

The difficulty for utilities under both of these proposals is the fate of existing and inefficient powerplants. The utilities seek a return on existing sunk investment, which gives them a bias to use their present power sources even where they create higher costs passed on to consumers. Retail wheeling and performance-based ratemaking are each intended to provide a market incentive to generate (or find) sources of power more cheaply. Thus, the PUC’s initial proposals won the backing of Pacific Gas & Electric (PG&E) by requiring ratepayers to pay much of the costs of retiring its markedly uneconomic nuclear powerplants.

In contrast, the other two major electricity utilities—Southern California Edison (SCE) and San Diego Gas & Electric (SDG&E)—opposed the original plan and advanced an alternative termed “PoolCo.” This variation simply establishes an independent wholesale purchaser of power statewide. All power is bought by PoolCo; in turn, PoolCo sells that power to the utilities. This arrangement is intended to separate power generation from transmission and to assure the lowest possible production of energy since no utility will be able to pass on high-cost electricity to its customers: PoolCo will not buy it; only power generated at low cost will be purchased. Publicly owned utilities, such as the Sacramento Municipal Utility District (SMUD), would have the option of buying from PoolCo or contracting directly with power generators. After two years, individual consumers could bypass PoolCo and buy power directly from suppliers.

On May 24, the Commission voted 3–1 to shift from its more flexible original plan which would have allowed direct pur-
reaching change in electricity provision rules without either legislative changes or formal rulemaking required under the Administrative Procedure Act (APA). Although "rate-setting" by the PUC does not require APA rulemaking, the restructuring proposals at issue appear to involve much more than the setting of rate levels, and the procedural course chosen—an alleged "policy change"—may be later voided as unlawful "underground rulemaking."

In its May 24 announcement, the PUC requested written comments on the two proposals by July 24, and reply comments by August 23.

Congress Considering Telephone/Cable Deregulation. At this writing, the Congress continues to consider a series of bills to alter telephone and cable television regulation. The major current vehicle is H.R. 1555 (Cox), the Communications Act of 1995, with 26 co-sponsors (18 Republican, 8 Democrat). The Senate companion bill is S.652 (Pressler), the Telecommunications Competition and Deregulation Act of 1995. This Act will ease national broadcast ownership restrictions, limit rate regulation for many cable television markets, accelerate the ability of Bell regional operating company monopolies to compete for long distance phone service, and allow telephone company entry into cable television service. At this writing, the House bill has passed out of the House Judiciary Committee and is scheduled for May 22 mark-up by the House Commerce Committee; the Senate bill has passed out of the Senate Subcommittee on Antitrust, Business Rights, and Competition, and will be on the Senate floor before the end of June.

Note that cable regulation is not within the purview of PUC jurisdiction. The Cable Act of 1992 creates a two-tiered system of rate regulation, supervised either by a local government franchisor with Federal Communications Commission (FCC) approval, or by the FCC directly. However, the entry of telephone companies into the cable television market, and the possible entry of cable firms into data transmission and interactive communications, creates a complex system of monopoly/market competition over which the PUC may have partial jurisdiction.

FCC Adopts National Rules for Caller ID: Per Line Blocking Allowed If Requested. On May 4, the Federal Communications Commission (FCC) adopted national standards for Caller ID. The rules are scheduled to become effective on December 1, and will preempt state rules. Caller ID allows the receiver of a telephone call to identify the number placing the call, allowing possible identification prior to picking up. While such identification protects the privacy of the call receiver, the same mechanism allows any person—or business or agency—receiving a consumer's calls to record and identify the number and, from the number, the name and address of the caller. Hence, the privacy of those making calls is somewhat compromised.

In 1992, the PUC adopted intrastate Caller ID regulations requiring telephone companies to offer three blocking options at no cost: per-call blocking, per-line blocking, and per-line blocking with per-call enabling. Consumers argue that per-line blocking is essential to allow unlisted phone numbers to retain their privacy, as per-call blocking requires the entry of a code to prevent disclosure of a caller's number every time a call is made. The PUC's Caller ID rules also require the utilities to engage in an extensive consumer education program on the new service prior to its introduction. [13:1 CRLR 135]

In April 1994, the FCC adopted interstate Caller ID rules which did not require a per-line blocking option, accepting the argument that if a phone had a per-line block, a caller might forget to disenable the block during an emergency call and delay emergency response teams. [14:4 CRLR 203] Consumer advocates argue that "911" could be exempt from blockage to solve such a problem. Thereafter, the federal standards came under vigorous attack from California and other states, as well as consumer and privacy rights groups. Contrary rules allowing per-line blocking had been adopted by 30 states. The FCC required interstate Caller ID to operate under these new rules by April 12, 1995, but the new requirements were postponed "until further notice" as a result of this opposition. The revised rules announced on May 4 now permit per-line blocking. However, unlike the California rule (which automatically presumes a request to block by any person with an unlisted number), the federal rules makes no such presumption. Hence, anyone who does not request per-line blockage will have his/her number revealed with every call—even those with unlisted numbers.

Notwithstanding the growth of Caller ID through much of the nation, California telephone utilities have declined to provide it under the California rules. Pacific Bell and GTE have argued that the extensive consumer education requirements required by the PUC's regulations and the fact that California has a high proportion of unlisted residential numbers (over 40%) makes the federal alteration particularly important. A large number of that 40% may not request per-line blockage, resulting in greater revenue for the telephone companies. With this additional assurance of a large universe of numbers revealed, PacBell and some smaller firms have announced that they will begin offering the service early in 1996. Initial charges are expected to be $6.50 per month for residences and $7.50 for businesses. Consumers contend that a large percentage of residential users with unlisted numbers will be legitimately upset when they discover that their unlisted number will be widely available unless and until they affirmatively act—which for many will be long after the cat is out of the bag and their name, address, and phone number are in the mailing/phone list merchandising universe.

PUC Continues Telecommunications Deregulation. In December 1993, the PUC issued a report to the Governor entitled Enhancing California's Competitive Strength: A Strategy for Telecommunications Infrastructure, targeting January 1, 1997, as the date for opening all telecommunications markets to competition. [14:1 CRLR 168–69; 13:4 CRLR 205-06] This date was legislatively affirmed last year by AB 3606 (Moore) (Chapter 1260, Statutes of 1994). [14:4 CRLR 206] Toll call competition, which started on January 1, 1995, and proposed competition in the provision of local phone service are critical steps in reaching the deregulation model.

IntraLATA Competition Begins. On January 1, intraLATA toll calls (initiated and received within the same Local Access Transport Area or "LATA") were opened to competition. Traditionally, these have been referred to by consumers as "local toll calls." Due to competition, rates for intraLATA toll calls dropped approximately 40%, but basic monthly rates increased. [14:4 CRLR 200] The new rate structure is intended to be revenue-neutral for telecommunications companies, and is designed to bring basic service rates closer to the costs of the respective services provided. Critics contend that the new rate design is not revenue-neutral, and that it particularly impacts elderly, low-income, and minority customers. The PUC predicts the median residential customer of GTE will pay 16% more in 1995, and the median Pacific Bell customer will pay 2% more.

Critics contend that the intraLATA competition ordered by the PUC gives Pacific Bell and GTE an advantage over their competitors because customers must enter a five-digit access code ("10XXX") in order to choose a competitor's service. Nineteen states allow a consumer to presubscribe with a competitor, allowing ac-
cess to the service with a single number dialed. [15:1 CRLR 168]

During early 1995, competitor MCI complained that PacBell was failing to route its customers' local toll calls to other companies as required by tariffs. Allegedly, users of PacBell-controlled Centrex office-phone systems had to manually dial the five-digit access code of the local distance company they wished to use before each intraLATA call, or use an autodialer or reprogram their Centrex system on a number-by-number basis (entering all prefixes which are local toll calls and interjecting the code number). Most office systems can be programmed to enter automatically the five-digit access code for each intraLATA call; however, PacBell refused to offer the reprogramming on its Centrex systems. That refusal covers 15% of the PacBell business market. Allegedly, PacBell was using the market power it had in providing Centrex services to businesses to impede customer access to its competitor MCI in the intraLATA market. Such use of monopoly power in one market to gain advantage in markets for other products or services was the basis of the original AT&T decision of U.S. District Judge Harold Greene requiring the monopoly's divestiture of the seven Bell regional operating companies, including PacBell.

On May 10, the PUC issued a decision ordering PacBell to route Centrex customers' local toll calls to competing phone companies and requiring PacBell to alter its tariff accordingly by May 31. The order admonishes PacBell for its failure to connect intraLATA calls through Centrex, finding that it violated its "duty to serve" the public as required by Public Utilities Code section 451.

**PUC to Allow Competition in Local Phone Service.** As noted above, the PUC announced in December 1993 its intention to deregulate telecommunications in stages. In late 1994, the PUC challenged the telecommunications industry to negotiate a settlement of continuing issues impeding competition not only in long distance and intraLATA toll calls, but for local calls as well, with deregulation of the latter anticipated by 1997. Cable and long distance companies would like to compete for local phone service, but basic issues such as pricing, number portability, and phone book listings have yet to be decided. The PUC gave parties until March 31 to issue a progress report. [15:1 CRLR 168]

Notwithstanding the optimistic expectations of Commissioners, industry negotiations have not produced agreement. On March 31, PacBell offered to cap basic phone rates for three years; guarantee Universal Lifeline phone service (discounted rates for low-volume use by those otherwise unable to afford phone service); allow competitors access to local switching at "reasonable rates"; allow consumers to switch from PacBell and still keep their existing phone number; and allow local competition in January 1996. In return for these concessions, the utility requested the elimination of maximum mark-up regulation—so that it may charge whatever it wants. Toward Utility Rate Normalization (TURN) telecommunications analyst Regina Costa commented: "[PacBell] is trying to portray itself as the great friend of consumers, but it's not...[It is] asking to be unleashed." Antitrust experts noted that the wide breadth of PacBell's market hold would allow it enormous advantage to extract high rates where there is no competitive challenge, and undermine matching prices in areas where there is a new entrant—stopping even a more efficient challenger.

Note that the Commission recently announced its intent to cover in its ongoing Open Access and Network Architecture Development (OANAD) proceeding the definition of the monopoly elements of the phone network in order to break out (or "unbundle") specific costs. This would allow competition in providing these unbundled services, and prevent the local exchange carriers (LECs) from abusing their monopoly position through discriminatory pricing and cross-subsidies from the market sector where they retain monopoly power into newly competitive sectors. [15:1 CRLR 168] However, the maintenance of PacBell as a competitor of new entrants, while at the same time it possesses monopoly power over any sector (even if theoretically amenable to competition), historically creates "price discrimination" and "predation" abuses impeding fair competition.

Consumer critics of the Commission contend that it is manipulable by the utilities, and that regulators supervising deregulation rarely police closely anticompetitive practices which commonly accompany monopoly/competition interaction. Groups such as TURN, the Utility Consumers' Action Network (UCAN), the Center for Public Interest Law (C PIL), and others generally advocate a "clean" system, where a monopoly utility is confined to the monopoly power sector alone and has its rates set through cost-of-service maximum ratesetting, while the benefits of competition are enhanced from expanded competition from numerous entities operating on a level playing field and with lowered barriers to entry.

On April 26, the PUC issued interim rules providing that—beginning in June—new firms may compete in local phone markets. However, consumers are unlikely to have actual choices until next year. The proposed rules would manage competition between new players in the local phone market (called "competitive local carriers" or "CLCs") and existing local exchange carriers (LECs) such as PacBell and GTE. Once the Commission issues final rules later this year, CLCs will be able to apply for authority to provide local service. The guidelines that will govern CLC entry are much the same as those governing toll call competition within the state.

Under the PUC rules, CLCs will be able to offer certain parts of local phone calls, or handle the entire call from start to finish. Hence, packages or combinations of service providers are possible. The Commission enumerated six components of the local phone network that competitors must purchase in order to offer local phone service, including subscriber loops, signaling links, and dedicated network access connections. Pricing and availability of these components will be determined in a future PUC proceeding. Still unresolved are whether customers can be charged (perhaps up to $3 per month) when they switch to another provider without changing their number; how much LECs may charge their competitors to use their network; whether customers who make a local call to a person with another provider will have a per-minute charge; and how to ensure that everyone has access to service when the market is fully competitive.

PacBell is concerned that the new rules will allow the CLCs to "cherry-pick" the best (high-volume) customers, which would lower utilization of PacBell's fixed-cost assets and lead to higher costs and prices for those remaining in its system. Given the utility's obligation to provide service to all who request it, the result could harm universal service aspirations by creating more expensive instead of less expensive prices for those remaining with PacBell. The state could potentially lose some of the considerable external benefits of having almost all of its citizenry accessible by phone.

Under the interim rules, consumer protections—such as complaint procedures, service connections, billing, and other practices—reflect current standards followed by LECs. Universal Lifeline Telephone Service will continue to be provided by the local phone companies until certain issues are resolved next year in a separate, ongoing proceeding. These interim rules only apply to PacBell and GTE; local rules for small and mid-sized phone companies will be addressed later.

**PUC Orders More Intrastate Call Competition.** On April 26, the Commis-
sion ordered PacBell and GTE to offer expanded interconnection—that is, to allow rival companies called competitive access providers (CAPs) to carry the intrastate portion of long distance and local toll calls between the phone utilities’ central offices and long distance carriers. Because many CAPs are companies which have already laid fiber optic networks in most large metropolitan areas, they are technically capable of running their own cable between the utilities’ central offices. Following the Commission’s ruling, CAPs will be able to connect lines either near the LEC’s offices or within their premises.

**PUC Takes Action on Long Distance Carrier Sonic Communications.** On February 8, the PUC revoked the authority of Sonic Communications (Sonic) to provide phone service in California, effective March 8. Sonic was ordered to notify its customers of its inability to serve them. A PUC investigation determined that since receiving operating authority in November 1993, Sonic failed to file user fees, Universal Lifeline Telephone Service fees, and annual financial reports as required by PUC rules. The company had been issued a warning in July 1994 concerning the fee delinquencies. In addition, and in a separate action, the Commission ordered a formal investigation into claims that Sonic “slammed” customers in violation of Public Utilities Code section 2889.5 (see below).

Pending the outcome of the investigation, local phone companies who bill for Sonic are required to keep $2 million in monthly revenue they would normally remit to Sonic to determine whether its customers are legitimate.

On February 22, the PUC restored Sonic’s authority to provide phone service. However, the firm may not sign up new customers pending the conclusion of the inquiry concerning more than 1,000 consumer complaints of “slammed” switches to Sonic. Sonic challenged the PUC’s order to impound its revenue in federal court, but the order was upheld on March 9. On March 16, the PUC ordered local phone companies which provide billing services for Sonic to warn customers of pending PUC and state Attorney General legal proceedings which may lead to revocation of Sonic’s operating authority in California.

**Slamming Complaints Continue.** “Slamming” refers to the practice by some long distance phone companies of switching a consumer to its service without permission—a growing problem among the 180 long distance phone companies now providing service in California and extending beyond the Sonic case discussed above. The problem is exacerbated by (1) unified billing by PacBell and separate entry of long distance charges in a sometimes confusing format; (2) the existence of many different long distance firms billing on a customer’s statement because pay phones, business phones, and others used by a consumer often have different carriers each separately charging; (3) the obligation of PacBell to accept the representation of a carrier that it has been selected by the customer to handle long distance from his phone; (4) vigorous marketing between competitors; and—most importantly—(5) a lack of reliable sanction in an amount above enrichment from the practice.

Last year, the PUC received more than 3,000 slamming complaints. A typical month (January 1995) yielded 174 complaints, involving the following firms: Sonic (115), ICT (19), MCI (15), AT&T (9), CTS (7), Sprint (6), and LD Services (3). Firms found to have violated the Public Utilities Code’s prohibition on slamming could face fines of $500 to $20,000 per violation and suffer permanent operating authority revocation. Consumer critics contend that only decisive and severe action by the PUC will end this burgeoning practice.

**PUC Changes Cellular Tie-in Policy.** On April 5, the PUC reversed a longstanding ban on cellular phone equipment (the phones themselves) “tie-ins” with cellular service. The “tie-in” violation is a well-established antitrust offense where a firm uses market power in one market to unfairly leverage advantage for another service or product.

Public prosecutors had been examining growing unfair competition abuses in the cellular sales area for possible action. These practices involved the following: (1) the devolution of cellular service into a “duopoly” (a shared monopoly of two service providers); and (2) the use of cellular phones themselves as “bait and switch” devices. The commonly advertised cost of cellular phones is often substantially below their out-of-pocket cost. Dealers draw customers into the store with token equipment prices, and then sign them up with one of the two service providers—receiving a secret rebate for doing so, and making money off the back end (a portion of later monthly subscriber charges). Hence, the consumer is unaware that there may be a competitive choice with another service provider, and is unknowingly advised as to payment plans by someone with a hidden interest in those payments. Adding to the problem, some contend that both service providers in each geographic area are following this same tactic, and have effectively “allocated territories” between themselves with dealers.

Antitrust law prohibits a cellular service from requiring a person to purchase a phone from a particular manufacturer or dealer as a precondition to using its service. Such a practice is sometimes called “forcing” or “bundling.” In addition to its antitrust problem, the practice also violates Public Utilities Code section 532, which requires a utility to abide by its tariff price on file with the PUC. The discount on the phone—where tied into a tariffed service—may be an unlawful evasion of tariffed prices.

The new PUC order allows “bundling” if three conditions are met: (1) the buyer must be offered the option of purchasing the cellular service without the phone; (2) the cellular service must be tariffed; and (3) retail stores must “abide by antitrust law” which prohibits below-cost pricing. Critics contend that these conditions do not reach the consumer abuse most at issue. “Below-cost pricing” is difficult to prosecute and “meeting the price” of a competitor is a defense.

Consumers argue that the option of buying the cellular service without the phone is of little relevance when it is the phone which is being used to draw the consumer in and it is worthless without subscription to a service. Critics ask whether the phone can be purchased without the cellular service at the advertised price. If it can, and if consumers can obtain service with their own phones, and if they are aware of that fact, the marketplace is likely to moderate abuse. But the PUC’s order allegedly leaves a hole which constitutes the brunt of a violation and has led to widespread loss-leader, bait and switch, and secret rebate marketing in cellular sales.

A number of consumer fraud public prosecutors were considering the filing of unfair competition civil suits under section 17200 of the Business and Professions Code based on the above-described practices; however, those plans have been halted as a result of the PUC’s permissive order.

**PUC Gives Final Awards from TET Fund.** On March 16, the PUC awarded the last $176,500 in its Telecommunications Education Trust (TET) to the Center for Public Interest Law (CPIL) and Consumer Action. The Disbursements Committee advising the PUC recommended that CPIL’s Privacy Rights Clearinghouse receive $91,000 to continue its operations for an additional year—particularly its highly-utilized hotline and consumer advisory services on informational privacy issues. The Committee also recommended that the remaining $85,000 be expended on the permanent TET repository admin...
The future of the TET and the PUC’s educational work depends upon the fate of an additional restitutionary fund assessed by the PUC which could be administered for similar purposes, and which is now under court challenge (see LITIGATION).

PUC Studies Universal Telephone Service. On January 24, the PUC announced a study to determine how the Commission can fulfill its goal of “universal service” in light of new technologies and increasingly competitive markets, as required by AB 3643 (Polanco) (Chapter 278, Statutes of 1994). [14:4 CRLR 207] The statute sets forth five general questions the PUC must address, including the determination of (1) goals for universal service, (2) current extent and recent evolution, (3) how basic telecommunications will be kept affordable, (4) the fate of existing Universal Lifeline Telephone Service rates, and (5) reconciling competitive change with universal service goals. AB 3643 requires the PUC to submit a formal report of findings and recommendations to the legislature by January 1, 1996.

By way of background, “universal service” is a term of art referring to the cross-subsidy of low-income users—the encouragement of universal access to the state and nation’s communication grid because of its general benefit to society as a whole. Regulatory cross-subsidies are numerous, and range from heating oil subsidies to low-income seniors in the Northeast to massive historical investment in rural electrification. In California’s telecommunications, this goal has taken the form of “lifeline” rates, allowing the poor to obtain service at close to the marginal cost of providing it. Such a rate design actually may improve efficiency (apart from the external benefit of universality) because if other payers have financed the fixed cost structure of rights of way and wire, the addition of poor subscribers at lower cost—who would otherwise not use the system—may improve its utilization and efficiency. There may actually be no cross-subsidy so long as the poor user, or the occasional user, is charged the out-of-pocket costs his use imposes.

The “Universal Service Alliance” (USA) has been formed to represent the broad public interest in extensive access to the state’s communication grid. Members of USA include organizations representing those with disabilities, and consumer groups such as UCAN, TURN, Consumers First, and others. Two experienced experts on PUC policy—former PUC Commissioner Don Vial and former administrative law judge, PUC senior staffer, and public interest attorney Carl Oshiro—are advising the Alliance. At this writing, the PUC is scheduled to issue proposed rules as a “starting point” on July 19, and will receive public comments thereafter, leading to a series of public participation hearings from September 20 to October 4, including a full panel hearing in San Francisco on September 29. Comments must be filed by December 1. The AB 3643 report will be submitted to the legislature by January 1, 1996, and final rules for universal service are scheduled for adoption in June 1996.

The thrust of the Alliance’s advocacy will be to preserve or enhance universal access through retention of lower rates for poor or low-volume users (lifeline “basic” service), required volume amplification or other hardware features for the hearing-impaired, and—of particular import to these advocates—the enhancement of access beyond basic voice service (including the important major features of the “telecommunications superhighway”). These advocates argue that the interactive, shopping, and data features (among others) now being implemented should be structured to include the maximum number of citizens for societal integration and efficiency.

PUC Continues Examination of All Low-Income Programs. The PUC is continuing an examination of all of its programs which assist low-income ratepayers in securing basic services from public utilities, including Lifeline service and the California Alternate Rates for Energy (LIRA) program. Currently, only income is used to determine program eligibility; Lifeline customers are not required to show proof of their income, but CARE customers must do so. The Commission will consider whether to evaluate both income and assets when assessing eligibility, and whether to continue to allow Lifeline service applicants to self-certify.

Southern Pacific Granted Stay of Penalties. On February 8, the PUC granted Southern Pacific Transportation Company’s (SP) application for a stay of prior PUC-assessed penalties over the 1991 railroad accidents at Dunsmuir and Seacliff. In its November 1994 order, the Commission assessed penalties against SP totalling almost $500,000. In the Seacliff incident, the Commission found that SP had failed to advise the Office of Emergency Services of the spill of hazardous materials in a timely manner, and lacked emergency handling procedures on the train. In the Dunsmuir accident, SP failed to provide the Office of Emergency Services with a system map and copies of emergency handling guidelines. [15:1 CRLR 169]

On January 3, SP applied for rehearing of the Commission’s decisions and for a stay of the penalties assessed. SP agreed to implement the safety-related portions of the PUC order, but objected to the payment of penalties to the State Treasury before its petitions for rehearing had been decided. The Commission granted the requested stay, with President Fessler dissenting. The majority found that it would be difficult for SP to obtain a refund from the state’s general fund if the decisions were to be later modified.

In a related matter, on May 1 a PUC administrative law judge (ALJ) ordered SP to comply with pending data requests from the Commission’s Railroad Safety Branch concerning technical information relating to SP’s Shasta Line at Cantara Loop, the site of the Dunsmuir spill. The staff seeks the information to formulate Commission rules to enhance safety at Cantara Loop. SP has claimed that the data requested is not discoverable because a final decision has been issued, pending only a request for rehearing on the existing record. More dubiously, SP contends that staff is not entitled to the documents because it is a “party” to the litigation and the information is privileged. However, the contentions of SP were rejected by the assigned ALJ, who ruled that the staff had continuing responsibilities to assure public safety independent from pending Commission adjudications, and that the Public Utilities Code (and available protective orders) protects any sensitive material which might be received by staff.

PUC Responds to Federal Law Re-Regulating Trucking. In January, the PUC issued a resolution directing additional regulatory changes in response to federal Public Law No. 103-305. This federal statute generally preempts state regulation of the price, route, or service of motor or air carriers transporting property (with the exception of household movers). The new law, which took effect on January 1, does not affect the state’s authority to regulate safety and financial responsibility of these carriers. [15:1 CRLR 169; 14:4 CRLR 203-04]

The resolution purports to clarify PUC policies in several areas. For example, the PUC will not enforce any “state standard transportation practices.” That is, the
Commission had specified uniform cargo liability rules, uniform bills of lading or receipts, uniform credit rules, and antitrust immunity for joint line rates or routes, classifications, and mileage guides. These terms and conditions guiding transportation liability had been substantially formulated by regulated carriers and imposed on shippers uniformly with the force of law. Economists supporting deregulation note that this practice is a form of "product fixing" which is a violation of antitrust law in the normal course. Small business and consumer advocates argue that the purpose of regulation is to inhibit market abuse by regulated interests, not the facilitation of combinations in restraint of trade which the law would prohibit without regulation.

The federal statute precludes any state imposition of a regulatory burden or competitive restriction beyond that which is authorized federally. However, the Commission—as has been its consistent practice—retains substantial protections for motor carriers contrary to the deregulatory direction of the federal statute. For example, although federal law prohibits collusive price-fixing by carriers, California has permitted motor carriers to meet and jointly fix prices, and to jointly propose tariffs. The advance notice feature of those tariffs facilitates private price-fixing enforcement of agreed-upon charges between competitors. The new resolution of the Commission provides that antitrust immunity will purportedly remain for "collectively set rates" which meet two conditions: (1) the collective (price-fixed) rate applies to traffic which was not deregulated or—even if deregulated—applies to joint line rates or routes or mileage guides; and (2) the rate bureau has requested immunity from the Commission.

Although the PUC has taken additional grudging steps in the direction of trucking deregulation, its clarification indicates the continuing viability of rate bureaus which collectively set rates. Consumer advocates and antitrust experts argue that these bureaus constitute felony criminal offenses under standard antitrust law doctrine applicable to business in general. They contend that federal efforts to narrow all regulation to safety and financial responsibility (outside household goods carriers) remain unfulfilled under the Commission's clarification. And they note that joint rates and routes are addressable by standard contract law principles, that agreements between carriers which enhance competition are not actionable under antitrust law, and that sought immunity is necessary only if the result of agreements is to unlawfully restrain trade.

A number of bills have been introduced by California legislators to implement or to limit application of the federal deregulation mandate (see LEGISLATION).

Enforcement Actions Target Local Motor Carriers. The PUC has an ongoing program to enhance the safety of airport shuttles, limousines, and household goods carriers. In April, the PUC placed Quality Limousine Service of San Francisco on probation for two years, revoked its passenger stage certificate, and fined it $2,000 for allegedly operating as a "taxi" service, failing to maintain workers' compensation insurance, using independent drivers, and failing to enroll drivers in the DMV's Pull Notice Program (which tracks the license status of drivers for employer use). The Commission undertook a similar enforcement action on February 9, suspending the permit of Bay Area Sedan and Limousine Service.

On March 16, the Commission alleged a particularly serious violation against Harrington Brothers, Inc., a San Francisco-based household goods carrier. The licensee was fined $9,000, ordered to pay damages of $4,000, was suspended for 45 days, and even ordered to place an advertisement in the San Francisco Chronicle of the PUC's disciplinary order. The allegations included failing to honor estimates—an endemic problem among household carriers—and "threatening clients."

PUC Amends Its Rules of Practice. On May 10, the PUC adopted Decision 95-05-019, revising its rules of practice in Title 20 of the California Code of Regulations. These rules specify format requirements for filings (from size of paper to type size to number of copies), set applicable fees, establish notice and service requirements, and authorize broad Commission power to investigate.

PUC Proposes Rule Changes Regarding Alternate Decisions and the Subpoena Process. Effective January 1, 1995, AB 2850 (Escutia) (Chapter 1110, Statutes of 1994) [14:4 CRLR 205-06] amended the Public Utilities Code to require the release of alternates to the proposed decision of a PUC ALJ for public review and comment prior to formal Commission adoption. The required step, generally unprecedented in administrative law, reflects a lack of confidence in the current process. At present, an ALJ employed by the Commission usually hears the evidence in a rate, adjudication, or rulemaking hearing. The ALJ then issues "proposed decision," which usually includes findings of fact, to the Commission as a whole. The Commission reviews the record and may alter the decision as it sees fit. Some critics, including the sponsors of AB 2850, contend that the ALJ decision narrowly circumscribes the issues before the Commission, and cedes excessive power to an unaccountable employee. To make certain that broad options are available for consideration, the Commission should consider alternatives and public comment thereon.

Defenders of the current process respond that the hearing process involves important due process protections for all concerned, including testimony under oath, opportunity for cross-examination, and—particularly for adjudications—the opportunity for the ALJ as the trier of fact to observe the demeanor of witnesses. The opening of the process for newly developed proposals, public comment, and possible rewrite after a hearing has been held and closed lowers the importance of the detailed gathering of facts and their measurement, and exalts private contacts, lobbying, and public rhetoric in derogation of a "fair process of hearing before a neutral adjudicator."

Note that both points of view may be reconciled by requiring that alternate decisions of commissioners be outlined in at least rudimentary form prior to the formal hearings. In this manner, the hearing can include evidence on point, and expert witnesses and the ALJ can comment on their implications. The process as it is developing allows an extensive record and proposed decision, with the post facto introduction of what may be an entirely new theory which will then be considered based on several days of "public comment" and possible private lobbying—and without the rigorous examination of those proposals at the hearing where they may not be on the table.

On March 6, the PUC requested comments on proposed amendments to its rules of procedure which would implement the legislation. Under the proposed amendments, if an alternate decision is available when the ALJ's proposed decision is issued, the alternate will be issued at the same time for an initial 20-day comment period, and a subsequent five-day reply comment period. Where no alternate decision has been prepared when the ALJ decision is issued, but one is presented thereafter, it must be issued at least 14 days prior to the Commission meeting at which it will be considered. In such a case, parties will have seven days to file comments, with no replies permitted. Under the proposed amendments, any commissioner may sponsor an alternate decision, which must be a different "substantive" option; the President of the PUC and the Chief ALJ may overturn a commissioner's
designation of an alternative where they deem it not to be “substantive.”

Most written comments on the proposed amendments have come from the utilities, with Pacific Bell suggesting a longer comment period of 30 days and an extension of the 14-day period for comment. San Diego Gas & Electric argued that replies should be allowed to the comments of other parties in all cases, including where a commissioner’s alternate is issued after the ALJ proposed decision. GTE commented that the proposed rules should have a clearer basis to determine what is a “substantive alternate.” And Southwest Gas proposed an appeal process if there is a dispute over whether an alternate decision is substantive or not.

The PUC proposal also includes changes to simplify the subpoena process in Commission proceedings. The revisions encourage parties to reach informal agreements to produce witnesses and documents. However, if agreements fail, the revisions attempt to incorporate the existing Public Utilities Code provisions with those applicable in civil courts.

The PUC received comments from consumer and utility parties until April 6; at this writing, staff are compiling and analyzing the comments.

**LEGISLATION**

**SCA 21 (Solis), as amended May 22, would eliminate the PUC and instead create an Energy, Utilities, and Communications Commission, which would consist of five members—the President to be appointed by the Governor and approved by the Senate, and the remaining members to be elected for staggered four-year terms, with the first elections occurring November 5, 1996. The four districts would coincide with those established for the Board of Equalization, with one commissioner to be elected to represent each district.**

Existing provisions of the California Constitution provide for the impeachment of state officers and appointment by the Governor to fill a vacancy in specified state offices. This measure would include in these provisions the members of the Energy, Utilities, and Communications Commission elected or created pursuant to this measure. [S. CA]

**SB 1322 (Calderon). Existing law provides that the California Supreme Court is the exclusive forum for judicial review of PUC proceedings. As amended May 10, this bill would express legislative intent to make changes necessary to eliminate the original review jurisdiction of the California Supreme Court, and would generally authorize judicial review of PUC proceedings to take place in either the Supreme Court or the Court of Appeal. [S. Floor]**

**AB 1576 (Escutia). Existing law requires the PUC, upon scheduling hearings and specifying the scope of issues to be heard in any proceeding involving an electrical, gas, telephone, railroad, or water corporation, or a highway carrier, to assign an administrative law judge to preside over the hearings, either sitting alone or assisting the PUC or Commissioners who will hear the case. As introduced February 24, this bill would prohibit ex parte communications by parties to specified PUC proceedings and PUC decisionmakers, as defined, and provide penalties for a violation of its provisions. [A. U&C]**

**AB 119 (Baca, Conroy). Existing law prohibits any person or corporation from acquiring or controlling, directly or indirectly, any public utility organized and doing business in this state without first securing authorization to do so from the PUC. Existing law also requires the PUC to consider certain criteria and to make certain findings, including that the proposal provides net benefits to the ratepayers, before authorizing the acquisition or control of an electric, gas, or telephone utility having revenues in excess of a specified amount. As amended May 16, this bill would remove the requirement that the PUC find that the proposal provides net benefits to ratepayers, and would instead require the PUC to find that the proposal reasonably allocates the short-term and long-term forecasted economic savings of the proposed merger, as determined by the PUC, between shareholders and ratepayers. This bill would specifically extend the operation of these provisions to the merger of public utilities, and state that the extension is clarification of existing law. The bill would also declare the intent of the legislature with respect to the allocation to ratepayers of forecasted economic savings resulting from a proposed merger, acquisition, or change in control. [A. Floor]**

**AB 118 (Conroy). Existing law requires various public utilities to file insurance documents with the PUC. As introduced January 11, this bill would make it a felony to file fictitious insurance documents. [A. Aprr]**

**SB 1142 (Peace), SB 742 (Alquist), SB 185 (Kopp), and AB 1683 (Conroy) all address the impacts of the enactment of the Federal Aviation Administration Authorization Act of 1994, which preempts state regulation of prices, routes, and services of motor carriers (except for household goods carriers). While prohibited from engaging in economic regulation, the state may continue to license and regulate the safety of these trucking enterprises (see MAJOR PROJECTS).**

**SB 1142 (Peace), as amended May 3, would clarify the enforceability of existing California safety statutes as they relate to for-hire carriers transporting property, by providing that if any provision of the Public Utilities Act or the Highway Carriers’ Act, as applied to specified carriers, is invalid, the application of the other valid provisions of those acts shall not be affected.**

The bill would also require that all moneys paid into the Transportation Rate Fund by highway common carriers, cement carriers, integrated intermodal small package carriers and highway permit carriers, except for moneys paid by household goods carriers, be used by the PUC solely for the purposes permitted by state and federal law, among which are the regulation of the safety and financial responsibility of carriers.

Existing law states legislative findings and the purposes for the Passenger Carrier-Party Carriers’ Act. This bill would add to those purposes the promotion of carrier and public safety through transportation agencies’ safety enforcement regulations. [S. Floor]

• SB 742 (Alquist), as introduced February 23, would state the intent of the legislature to permit the PUC to fully re-deploy positions and employees to programs directly connected with enforcing laws, rules, and regulations which advance the level of safety for the people of California, utilizing employees who were engaged in highway carrier rate regulation prior to the enactment of the Act, and whose services are no longer required for rate regulation. The bill would make findings and declarations in that regard. [S. EU&C]

• SB 185 (Kopp), as amended March 28, would revise various provisions of state law to reflect the federal preemption. This bill would also remove the regulation of safety with respect to motor carriers of property from the PUC and would confer the power to regulate the carrier registration insurance requirements and safety of motor carriers of property on the California Highway Patrol and the Department of Motor Vehicles. This bill would impose an excise tax on diesel fuel, and would impose fees on motor carriers of property to cover the costs of the regulation. [S. EU&C]

• AB 1683 (Conroy), as amended May 8, would also revise various provisions of state law to reflect the federal preemption; transfer authority for the regulation of safety with respect to motor carriers of property, as defined by the bill, from the PUC to the California Highway Patrol; and impose an excise tax on diesel fuel, to cover the costs of the regulation. [A. U&C]

AB 689 (McPherson). Under the existing Household Goods Carriers Act, no
household goods carrier may engage in that business for compensation by motor vehicle over any public highway unless it has been issued a permit to operate by the PUC. As introduced February 21, this bill would require the PUC to annually investigate every business listed in every classified directory of telephone subscribers as advertising or holding out to the public to perform households goods carrier services and determine which businesses are engaging in that business without a permit in violation of law; require the PUC to institute certain civil or criminal proceedings against those businesses; require a telephone utility to refuse service to a new customer and disconnect service of an existing customer upon receipt of a writing signed by a magistrate finding that probable cause exists to believe that the customer is in violation of that Act, as prescribed; and establish proceedings of the PUC at which a person may seek relief from such actions of the telephone utility. [A. Appr]

AB 559 (Archie-Hudson). Existing law requires every highway carrier who engages subhaulers or leases equipment from employees to file with the PUC a bond, the amount of which shall be determined by the PUC but shall not be less than $2,000. As introduced February 17, this bill would increase the maximum amount of the bond to $10,000. [A. U&C]

AB 877 (Conroy). Under existing law, the PUC is required to establish or approve just, reasonable, and nondiscriminatory maximum or minimum or maximum and minimum rates to be charged by household goods carriers for the transportation of specified property. The PUC is also required, in establishing or approving these rates, to account for specified costs of providing the service. As amended May 15, this bill would require the PUC, in establishing or approving the maximum rates, to use a specified index number methodology.

Existing law prohibits a household goods carrier from charging, demanding, collecting, or receiving for the transportation of property, or service in connection therewith, rates or charges less than the minimum rates and charges greater than the maximum rates and charges applicable to the transportation established or approved by the PUC. This bill would remove that prohibition.

Existing law prohibits a household carrier from paying any commission or refund, or remitting any portion of those rates or charges, except upon authority of the PUC. This bill would instead prohibit the carrier from paying any commission to a shipper, consignee, or the employee thereof, or to the payer of the transportation charges, or refund, or remit to those persons, any portion of the rates or charges, except upon authority of the PUC. [A. Appr]

AB 202 (Conroy). Under existing law, the PUC sets rates and performs other regulatory functions for various service providers, including telephone corporations. As introduced January 26, this bill would exempt from the definition of a telephone corporation one-way paging services utilizing facilities that are licensed by the Federal Communications Commission, and would require the Director of the Department of Consumer Affairs to receive complaints from consumers concerning those services. [S. EU&C]

AB 828 (Conroy). Under existing law, every public utility other than a common carrier is required to file with the PUC, and to print and keep open for public inspection, all rates, tolls, rentals, charges, and classifications, and all rules, contracts, privileges, and facilities as they relate to rates, tolls, rentals, charges, classifications, or services, and to comply with rules and regulations adopted by the PUC with respect to rate changes. Existing law, until January 1, 1998, authorizes the PUC, by rule or order, to waive for certain classes of telephone corporations the above filing requirements, in full or in part, for telephone services defined as enhanced services by the PUC. As amended April 24, this bill would permit the PUC, by rule or order, to partially or completely exempt telecommunications services offered by telephone or telegraph corporations from the above rate change requirements if the PUC determines that the provider of the service lacks significant market power in the market for that service or that sufficient consumer protections exist, and to revoke any exemption so granted. The bill would require the PUC to establish enumerated consumer protection rules for the exempted services, and require the PUC to report to the legislature by January 1, 1997, on its consumer protection rules and implementation procedures to allow telephone corporations to be exempted from the tariffing requirements. [A. Floor]

SB 665 (Russell, Kopp, Monteleth). Existing law requires a public utility, including a telephone and telegraph corporation, to obtain a certificate of public convenience and necessity from the PUC in order to construct or extend a line, plant, or system. As amended April 17, this bill would permit the PUC by rule or order, to exempt certain telecommunications services offered by telephone and telegraph corporations that have been found not to have monopoly power or market power in a relevant market or markets by the PUC from these certification requirements and instead subject them to registration as the PUC may determine. [A. U&C]

AB 1465 (Morrissey). Existing law prohibits a telephone corporation from authorizing a different telephone corporation to make any change in a residential telephone subscriber's presubscribed long-distance carrier unless specified requirements have been met. As amended April 24, this bill would extend the application of these provisions to all subscribers, and would include within the requirements to be met if a subscriber is solicited by a method other than contact in person that the telephone corporation seeking to make the change obtain the subscriber's signature on a document that fully explains the nature and extent of the action. This bill would also make the provisions applicable to any telephone service rather than the subscriber's presubscribed service. [A. Appr]

AB 1575 (K. Murray). Existing law authorizes counties to impose a utility user tax on the consumption of telephone services in the unincorporated area of the county. Under existing law, charter cities, if authorized by their charter, may impose a utility tax. As amended April 5, the bill would require any city, county, or city and county that imposes any tax on the consumption of telephone services to provide the PUC the tax rate, the manner of the tax collection, and the frequency of the collection. The bill would also require the PUC to provide that information to any person or entity that requests the information and would authorize the PUC to charge a fee for that service. [A. Appr]

SB 664 (Russell, Ayala, Hurt, Kelley, Watson). Existing law provides that the PUC has no jurisdiction and control over the billing and collection practices of a telephone corporation for services rendered to or for an information service that contains "harmful matter," as defined, through a specified prefix or access code (e.g., 900 or 976 numbers), and that these are matters for contractual arrangement between the telephone corporation and the information provider, except that the PUC may reassess jurisdiction and control over these matters under certain circumstances. Existing law directs the PUC to report to the legislature annually on any anticompetitive effects resulting from these provisions, any significant proposals made to the PUC for further deregulation, and its recommendations concerning the effectiveness and continuing need for these provisions. Existing law specifically permits the PUC to investigate and consider, for purposes of establishing telephone rates, revenues and ex-
penses related to any billing and collection services a telephone corporation may perform for an information provider. Existing law generally regulates unfair trade practices, including within those provisions billing and collection practices, as specified. The above provisions are scheduled to become inoperative on July 1, 1995, and to be repealed on January 1, 1996.

As amended May 16, this bill would remove the requirement for the annual report to the legislature, and extend the other provisions indefinitely. This bill would require every telephone corporation and provider of information-access telephone services providing messages that constitute harmful matter to provide for a one-time waiver of all charges for the calling party associated with a collect call when the call contains harmful matter and the person accepting the call is a minor. This bill would prohibit a telephone corporation or provider of information-access telephone services from charging the calling party for a call made to a telephone number with an "800" prefix unless the telephone number with an "800" prefix is an information service complying with specified presubscription requirements imposed by the Federal Communications Commission. [A. U&C]

AB 1588 (Conroy). The Public Utilities Act sets forth the findings and declarations of the legislature that a policy for telecommunications in California is, among other things, to remove the barriers to open and competitive markets and promote fair product and price competition in a way that encourages greater efficiency, lower prices, and more consumer choice. As introduced February 24, this bill would find and declare that an additional policy is to open all telecommunications markets to competition by 1997 and to aggressively streamline regulation to accelerate the pace of innovation. [A. Appr]

AB 1770 (Kuykendall), as amended May 4, would declare that a policy for telecommunications is to remove the regulatory barriers hindering fair, unbiased, competition and foster an open, free, competitive marketplace in the wireless industry. [A. Floor]

AB 1889 (Conroy). Existing law, with specified exceptions, directs the PUC to require any call identification service offered by a telephone corporation, or by any other person or corporation that makes use of the facilities of a telephone corporation, to allow the caller, at no charge, to withhold, on an individual basis, the display of the caller's telephone number from the telephone instrument of the individual receiving the call. As amended April 24, this bill would require the PUC to permit telephone corporations to offer call identification services, and would require the withholding of the display of the caller's telephone number on a per call basis unless the caller elects the option to have per line blocking.

Existing law requires that the PUC direct every telephone corporation to notify its subscribers that their calls may be identified to a called party thirty or more days before the telephone corporation commences to participate in the offering of those services. This bill would instead require that every telephone corporation offering these services conduct a program, approved by the PUC, notifying subscribers that their calls may be identified to a called party. It would permit the PUC to impose specified requirements on connection with the program. [A. Appr]

SB 135 (Maddy). The Warren-911 Emergency Assistance Act provides for the establishment of a single, primary three-digit emergency number through which emergency services, may be quickly and efficiently obtained. Existing law also sets forth extensive provisions regulating the liability, and exemption from liability, of public entities and public employees, and certain individuals who provide assistance to others in emergency situations, as specified. As introduced January 24, this bill would provide that no public agency or emergency 911 telecommunications system or service provider, as specified or any of their employees, directors, officers, or agents, except in cases of wanton and willful misconduct or bad faith, shall be liable for any damages in a civil action for injuries, death, or loss to persons or property incurred by any person as a result of any act or omission while provisioning, adopting, implementing, maintaining, or operating an emergency 911 telecommunications system or service. The bill would also provide that a public utility or other supplier of emergency 911 telecommunications systems or services shall not be liable for damages caused by an act or omission of the public utility or supplier in the good faith release of information not in the public record, including unpublished or unlisted subscriber information to public agencies responding to calls placed to a 911 or enhanced 911 emergency service. The bill would also set forth the findings and declarations of the legislature in this regard. [S. Jud]

SB 621 (Peace). Existing law permits telegraph or telephone corporations to construct telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within the state, and to erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines. As amended May 3, this bill would express the intent of the legislature that municipalities shall have the right to exercise reasonable control, pursuant to specified criteria, as to the time, place, and manner in which roads, highways, and waterways are accessed. [A. Desk]

SB 1035 (Peace), as introduced February 24, would require the PUC to ensure that a modern communications infrastructure is available to all Californians on a nondiscriminatory and timely basis. [A. U&C]

SB 1090 (Russell). Existing law makes a legislative finding and declaration that a policy for telecommunications in California is to promote lower prices, broader consumer choice, and avoidance of anti-competitive conduct. As amended May 8, this bill would state the intent of the legislature that cellular resale continue in order to promote competition in the provision of cellular service in California. [A. U&C]

SB 1140 (Peace). Existing law requires the PUC to require competitive intrastate interexchange telecommunications service, subject to specified conditions, among which is if federal legislation or court action allows open competition in that service. As introduced February 24, this bill would condition that requirement on federal legislation or court action allowing fully open competition in that service. [S. EU&C]

AB 807 (Conroy). Under existing law, commissions or rebates regularly earned by the retailers of cellular telephones may be used to reduce cost, as specified, but in no event may the reduction exceed the greater of 10% of cost, as defined, or $20. As amended May 15, this bill would instead provide that these commissions or rebates may be used by a retailer of cellular telephones to reduce costs consistent with the PUC's April 5 decision permitting the "bundling" of cellular phones with cellular phone service (see MAJOR PROJECTS).

Under existing law, in each retail location, a retailer of cellular telephones is required to post a large conspicuous sign, in lettering no smaller than 36-point type, that states that activation of cellular telephone is not required and the advertised price of any cellular telephone is not contingent upon activation, acceptance, or denial of cellular service by any cellular provider. This bill would instead provide that the sign state that the advertised price of cellular equipment may be contingent upon activation of cellular service with a specific carrier and upon other reasonable terms and conditions established by the seller.
REGULATORY AGENCY ACTION

Existing law expresses the support of the legislature for the PUC's policy that makes illegal the act or practice of bundling, as defined, and authorizes the PUC to adopt rules and regulations to implement and enforce these prohibitions against the use of commissions or rebates and bundling. This bill would repeal these provisions.  [A. Jud]

AB 1121 (Conroy), as amended April 24, would remove an existing requirement that the PUC compel every telephone corporation furnishing cellular radio telephone service to establish specified pricing systems, and instead make that requirement permissive.  [A. Appr]

SB 207 (Russell, Ayala), as amended April 5, would direct the PUC to prohibit telephone corporations furnishing cellular telephone service from charging a disconnection fee.  This bill would require every telephone corporation furnishing cellular telephone service to bill its subscribers for calls placed in increments of no more than 10 seconds per incremental charge if the PUC fails to issue a specified report, and would prohibit a subscriber from being charged for calls received on a cellular telephone without his/her consent.  The bill would also require every cellular subscriber in California to have free access to emergency 911 telephone service through any cellular telephone corporation operating within the state.  [S. Floor]

SB 551 (Campbell), Existing provisions of the Unfair Practices Act prohibit any person engaged in business within this state from selling any article or product at less than the cost thereof, for the purpose of injuring competitors or destroying competition; the term “cost” is defined for these purposes. Existing law provides that notwithstanding the definition of “cost” in the Act, commissions or rebates regularly earned by the retailers of cellular telephones may be used to reduce cost not to exceed the greater of 10% of cost, as defined, or $20. As amended May 1, this bill would remove those limitations on the amount that may be used to reduce cost for those purposes and would extend the application of the provisions to all cellular equipment. Existing law provides that a retailer of cellular telephones shall not refuse to sell a cellular telephone to any customer based on the customer’s refusal to activate the telephone with a specified provider, and contains a statement of legislative intent in that regard. This bill would delete those provisions.  [S. B&P]

SB 1032 (Calderon), as amended April 4, would require the PUC to study and report to the legislature no later than January 1, 1998, on the effects of disparate state regulation of commercial mobile radio services as defined in the Omnibus Budget Reconciliation Act of 1993.  [A. U&C]

SB 1139 (Peace), as amended May 16, would state the intent of the legislature with respect to a competitive electric generation market. Specifically, the bill would state that the legislature's intent that all residential, commercial, agricultural, and industrial customers should have the ability to obtain the benefits of a competitive electric generation market at the same time; that the reliability of California's electric system shall not be compromised through the degradation of human and capital infrastructure, or otherwise; that no electric customer be required to shop for an electricity supplier or be economically disadvantaged from cost-shifting by not shopping for a supplier; that mandating utilities to maintain the traditional obligation to serve would be inconsistent with a retail access market; that California consumers and utilities have fair and comparable treatment vis-a-vis consumers and utilities of other states and jurisdictions; that the costs of all social, economic, renewable technology, and environmental obligations that meet state policy by shared all electricity consumers and shall not be bypassable; and that current obligations for the recovery of past-incurred investments and commitments shall be honored and not bypassed. This bill would become operative only if SB 1141 is enacted (see below).  [S. Floor]

SB 1141 (Peace), as amended May 24, would state the intent of the legislature to reduce electric rates to all consumers at the earliest possible time, to simplify regulation of the electric industry, to preserve the safety and reliability of the electric system, and to preserve environmental protection. In pursuit of these goals, this bill articulates the intent of the legislature to address a specific set of issues, including the costs of a transition from a monopoly electric utility market to a competitive market, the future structure of the transmission and distribution lines, the viability and continued funding for public policy programs, and the separation between federal and state jurisdiction in this area. SB 1141 will not take effect unless SB 1139 is also passed and signed (see above).  [S. Floor]

AB 1667 (Olberg, Baca, Conroy, Martinez). Under existing law, the PUC is required, until January 1, 1996, to establish the rates for gas used in a solar electric generation station technology project, as defined, at rates not higher than the rates for gas used in an electric plant for the generation of electricity. As amended May 15, this bill would limit this provision to solar electric generation station projects in operation on January 1, 1995, and extend it indefinitely.  [A. Appr]

AB 1852 (Sher), as amended April 26, would provide that notwithstanding any provision of law, the PUC may issue decisions to facilitate competition in the production, transmission, and distribution of electricity.  [A. U&C]

AB 622 (Conroy). Existing law requires the PUC to set electric and gas rates for master-meter customers at a level that enables the master-meter customer to recover the costs of operating its submeter system at a cost to the users of the electric or gas service no greater than if the corporation furnished service directly through individual meters. As amended April 24, this bill would create a master-meter task force consisting of representatives of utilities, mobilehome park owners, mobilehome park residents, the PUC, and the Department of Housing and Community Development, to research and recommend a phase-in, shared-cost program for the takeover by utilities of manufactured housing community and mobilehome park gas and electric systems.  [A. U&C]

AB 993 (Escutia), as amended April 25, would require the PUC—in any proceeding that restructures the provision of electrical services—to provide for a more competitive market and to follow specified guidelines.  [A. U&C]

AB 648 (Cannella), as amended April 26, would require electrical corporations to make available to qualifying food processors the option of transmission and distribution service for electricity purchased from the food processor’s choice of supply. The transmission and distribution service option would commence January 1, 1996, and continue until December 31, 1999, or until the PUC approves nondiscriminatory transmission and distribution service access and reasonable rates for food processors, or otherwise approves rates that effectively lower the cost of electric services to food processors to a level at or below the average cost of similarly situated customers in the United States, whichever occurs first.  [A. U&C]

AB 1095 (Martinez). Existing law requires the PUC to require every public utility other than a common carrier to print and keep open to public inspection, schedules showing all rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected or enforced, together with all rules, contracts, privileges, and facilities that in any manner affect or relate to rates, tolls, rentals, classifications, or service. Existing law also requires that public records of a state or local agency be
open for public inspection. As amended May 23, this bill would provide that a gas corporation shall not be required to make available for public inspection, nor shall the PUC make available for public inspection, a contract negotiated by the gas corporation for service subject to the PUC's jurisdiction with rates, terms or conditions differing from the schedules on file with the PUC, except under specified conditions. This bill would also provide that a local agency shall not be required to make available for public inspection a contract negotiated by the local agency for the provision of gas, but may disclose the contract information under specified conditions. [A. Aprpr]

SB 25 (Leonard, Peace), as amended May 23, would prohibit the PUC from requiring utilities to purchase specific "resource additions" from alternative independent power producers; this bill would abolish the Biennial Resource Plan Update procedure implemented by the PUC through which alternative energy producers bid for the right to sell their energy to utilities at a PUC-determined price. [15:1 CRLR 166-67] [S. Floor]

LITIGATION

In San Diego Gas & Electric v. Superior Court (Covalt), 36 Cal. App. 4th 1461 (Feb. 28, 1995), the Fourth District Court of Appeal dismissed a homeowner's suit against an electric utility for damages from electromagnetic field (EMF) emissions. The court issued a peremptory writ of mandate ordering the trial court to uphold the utility's demurrer, ruling that the PUC has exclusive jurisdiction and precluded a private suit for damages. The complaint alleged causes of action for trespass, nuisance, and inverse condemnation. The Covalts argued that the utility "upgraded" power lines near their home to emanate extremely high voltage without adequate shielding, and that public fear of EMF danger necessarily lowers the property value of their home from that added hazard.

The decision of the court is deeply troublesome to consumer advocates and legal scholars, as property damage claims against utilities have not been historically barred based on PUC jurisdiction. The purpose of regulatory intervention is to restrain monopoly power abuse, not to provide protection to utilities from private civil suits generally applicable to businesses.

The court found that the PUC has considered EMF hazards, has not found a clear health hazard, and has directed further research and education on the subject. [12:4 CRLR 227-28; 12:2&3 CRLR 260] The court concluded that to permit the Covalt litigation to proceed would "frustrate the PUC's express policies and interfere with its supervisory and regulatory powers." Consumer advocates respond that there is no express PUC policy on damage from EMFs, no judgment that damage cannot occur, and no consideration whatever of limiting private damage suits if causation is demonstrable. The PUC has never indicated that EMFs cannot create a hazard, nor attempted to limit any other party's effort to demonstrate one. The court has suggested that the Covalts complain to the PUC, which—to its probable surprise—has been designated the exclusive remedy.

On April 7, the Covalts filed a petition for review to the California Supreme Court; on May 11, the high court granted it.

On May 18, the California Supreme Court decided to review the PUC's 1994 decision to assess $49 million from Pacific Bell to compensate ratepayers for research and development costs for wireless and cellular systems financed through phone rates between 1974 and 1983. The Commission decided that when PacBell spun off Pacific Telesis's wireless operations into the extensive cellular enterprise "Airtouch," it took with it into the competitive market sector that sum in research and development derived from ratepayer contribution. Accordingly, in order to repay the ratepayers and preclude the unjust enrichment of the spin-off for-profit enterprise, the PUC created a "spin-off" fund to benefit the ratepayers who provided the development funding. The Commission ordered that $7.9 million be allocated to PacBell ratepayers through a surcharge on monthly bills; $40 million should be used for telecommunications programs and facilities in public schools statewide; and $2.1 million should be used to continue the PUC's Telecommunications Education Trust (see MAJOR PROJECTS).

However, Assembly Speaker Willie Brown petitioned the California Supreme Court on behalf of the State Assembly to review the PUC's disposition of the $49 million, arguing that all of the money should either be refunded to ratepayers or revert to the state general fund. In a separate petition, TURN argued that all of the funds should be credited to ratepayers. The only court empowered to review the PUC is the Supreme Court, which has discretion to review, or not to review, petitions challenging PUC actions. [15:1 CRLR 172; 14:4 CRLR 201-02] In a rare move, the court has now accepted review of the challenge to the PUC's proposed disposition of the fund.

A prospective settlement of the litigation was planned during May 1995; it would have committed $1 million to continue the TET, with the remaining $48 million to be divided between ratpayer refund and capital improvements for public education—including building and technology upgrades. The plan envisioned an author from one party introducing a budget resolution in the Assembly and an identical measure introduced in the Senate by a leader of the other party. However, the arrangement was precluded by a series of unrelated personality and territorial disputes between Democrats and Republicans, and between the Assembly and Senate. The disposition of the funds is in suspension until the court issues a final decision; at this writing, the date for oral argument has not been set.

Litigation continues over the legality of 47 U.S.C. section 533(b), the 1984 Cable Act's prohibition on telephone/cable "cross-ownership." As previously reported, in US West v. United States, 48 F.3d 492 (Dec. 30, 1994), the Ninth Circuit ruled that the prohibition violates the first amendment as an unnecessarily broad restriction on speech. [15:1 CRLR 171] At this writing, it is believed likely that the U.S. Supreme Court will accept review of this issue by June 1995, probably from a similar ruling of unconstitutionality by the Fourth Circuit in United States v. Chesapeake & Potomac Telephone Co., 42F.3d181 (1994).

On December 30, 1994, Oklahoma City U.S. District Judge David Russell upheld the Federal Aviation Administration Authorization Act of 1994, Public Law No. 103-305, which preempts state regulation of prices, routes, and services of motor carriers (except for household goods carriers) (see MAJOR PROJECTS). In Oklahoma Corporation Commission v. U.S., No. CIV94-1999-R, the plaintiff was joined by Kansas, Montana, and Michigan in contending that federally required competition contravene the right of states to regulate more restrictively than is federally mandated.

It is standard interstate commerce law that where a federal policy is intended to apply nationwide, it is entitled to "supremacy" over state statutes where state practices affect "interstate commerce," a broadly defined concept. However, states are entitled to go further than federal policy goes if in the same direction. Here, the federal jurisdiction is mandating competition (less regulation), and the Oklahoma State Corporations Commission argued that the federal law violates states' tenth amendment rights to govern themselves. Judge Russell rejected the claim; plaintiffs have announced their intention to pursue appellate remedies.