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INTRODUCTION

In the ten-year period from 1973 to 1983, San Diego Gas and Electric Company’s (SDG&E) residential rates increased over 400%.1 OPEC’s control over oil prices and the increasing costs of cultivating alternative sources of energy may partially explain the increase. Yet, around the nation, people began to question whether state regulatory authorities, despite their public interest mandates, might be rubber-stamping utility rate increase requests.2 Could this be the reason for SDG&E’s drastic rate increase?

To suggest that the California Public Utilities Commission (PUC) actually rubber-stamps SDG&E’s utility rate increase requests is an oversimplification. Rate hearings are anything but simple. Often, reams of documents and months of hearings must be synthesized before the PUC reaches a decision.

Nevertheless, the PUC itself recognizes that its decisionmaking process has shortcomings.3 For instance, the PUC must base its decisions on information which tends to be biased toward utilities rather than ratepayers. Utilities generally have extensive legal and technical representation in PUC matters, while ratepayers are unorganized and underrepresented. The Commission created a Division of Ratepayer Advocates (DRA) to help represent the ratepayer perspective.4 But, according to the California Supreme Court, with whom the PUC agrees, the effectiveness of the DRA is limited: “the staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations such as lack of standing to seek either rehearing...or judicial review...of Commission decisions.”5 Because of these limits on the DRA, participation by organized consumer groups is essen-
tial if ratepayer interests are to be properly represented in PUC proceedings.6

But the expertise and preparation required for meaningful participation in PUC proceedings is costly, and consumer groups often face severe budgetary constraints. Even so, after a decade of rate increases, SDG&E residential ratepayers were encouraged when, in 1983, the PUC approved a proposal which enabled the creation of Utility Consumers’ Action Network (UCAN)—a consumer group that would represent the interests of SDG&E ratepayers.7 The PUC gave UCAN limited access to SDG&E’s billing envelopes for the purpose of communicating to consumers and soliciting funds to elect a board of directors from the ratepayer community and finance legal representation for ratepayers in PUC proceedings.8 With this advantage, UCAN got off to a fast start.

However, three years after the creation of UCAN, the U.S. Supreme Court disallowed consumer group access to utilities’ billing envelopes in Pacific Gas & Electric Company (PG&E) v. California Public Utilities Commission.9 Accordingly, the PUC has stopped allowing UCAN and other consumer groups to use utility billing envelopes, and is now experimenting with a much more conservative insert plan.10 Anticipating the PUC’s review of its current insert plan—scheduled for the end of 1988—this article analyzes PG&E v. PUC, the PUC’s response to the case, and recommends a comprehensive plan aimed at promoting greater representation of the consumer perspective in PUC proceedings.

THE BILLING INSERT IDEA

To address the problem of rising rate increase rates in the 1970s, Ralph Nader and other consumer advocates began to suggest statewide institutional changes. Nader “conceived of having state legislatures create independent, self-supporting groups to represent the consumer in utility issues.”12 In 1980, Wisconsin formed the first of these citizen utility boards (CUBs), followed by Illinois and a handful of other states.13 California took a slightly different approach. The California legislature rejected the statewide CUB concept.14 Instead, the PUC adopted the plan that allowed for the creation of UCAN—a regional ratepayer advocacy group dedicated to representing consumer interests in state regulatory proceedings involving a single utility.15

The California approach and the CUBs in other states had important common characteristics: both approaches authorized consumer group access to utilities’ billing envelopes, so that consumer groups could more easily communicate to consumers and solicit funds. Allowing access to billing envelopes seemed to make sense. Only use of excess space in the envelopes was authorized, so utilities incurred no additional costs.16 Moreover, the PUC had found on several occasions that the extra space belonged to the ratepayers, “since the cost of envelopes and postage is included in the development of the utility’s revenue requirement.”17 Thus, according to the PUC, equity suggests that the extra space should be used to consumers’ benefit.18

The PUC found the UCAN proposal to be a particularly appealing way of using excess space in utility billing envelopes because democratic principles are central to UCAN’s structure.19 UCAN’s corporate board of directors is elected by voting members. At the time UCAN was created, the only membership requirements were (1) status as an SDG&E residential or small business ratepayer; (2) a yearly contribution of $4; and (3) a member must be at least sixteen years of age. The PUC determined that these democratic principles would likely “benefit the greatest number of ratepayers and not just certain individuals or interest groups. The best way this society has devised for arriving at such a result is the democratic election process.”20

SDG&E decided against challenging

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UCAN's access to its billing envelopes in the courts. Thus, for the time being, UCAN flourished.

**PG&E v. PUC**

In 1980, a northern California consumer group—Toward Utility Rate Normalization (TURN)— intervened in a PG&E ratemaking proceeding before the PUC. TURN urged the PUC to forbid PG&E from including *Progress* in its monthly billing envelopes to ratepayers.21 *Progress*, a newsletter containing information ranging from political editorials to tips on energy conservation, had been published regularly by PG&E for 62 years.22 The PUC declined to order a stop to *Progress'* distribution. Instead, it determined that *Progress* occupied excess space in the billing envelopes and that this excess space belonged to ratepayers. So, in 1983, in an effort to apportion the extra space between PG&E and its customers, the PUC granted TURN limited access to PG&E's billing envelopes four times per year for two years—just as it had done previously in the plan that created UCAN.23

In granting TURN access to PG&E billing envelopes, the PUC apparently abandoned its preference for democratically operated consumer groups. TURN lacked the democratic safeguards that were built into UCAN; instead of membership election of the group's directors, TURN's Executive Director, Sylvia Siegel, personally selected its board of directors.24

Unlike SDG&E's response to the PUC's order regarding UCAN, PG&E responded to the order granting TURN access to billing envelopes by appealing to the California Supreme Court, primarily on first and fifth amendment grounds.25 After the California court denied discretionary review, PG&E took its appeal to the U.S. Supreme Court. The Court noted probable jurisdiction and accepted the case for review on the merits.26

In a 5-3 plurality decision, the U.S. Supreme Court vacated the order of the PUC and remanded the case to the California Supreme Court. Justice Powell stated the question of the case for the four-member plurality as follows: "whether the California Public Utilities Commission may require a privately owned utility company to include in its billing envelopes speech of a third party with which the utility disagrees."27

In reversing the PUC, the plurality drew analogy to the precedent of *Miami Herald Publishing Co. v. Tornillo*.28 In that case, the Court struck down a Florida right-to-reply statute which enabled political candidates to respond when their characters or records had been assailed in newspaper articles. Like the Florida right-to-reply statute, the plurality reasoned, the PUC's order imposed a content-based penalty on PG&E's speech.29 Since the order only allowed access to those who disagreed with PG&E's speech, PG&E would be less likely to speak out for fear of the inevitable rebuttal. The likely result, according to the plurality: a reduction in the overall flow of information to the consumer.30

The plurality also determined that, as would be true if the *Miami Herald* were required to print a candidate's response, the PUC's order would force PG&E to be associated with speech with which it disagrees.31 The plurality found that the PUC's order, rather than limiting TURN to explaining its program and soliciting donations, "leaves TURN to use the billing envelopes to discuss any issues it chooses. Should TURN choose, for example, to urge [PG&E]'s customers to vote for a particular slate of legislative candidates, or to argue in favor of legislation that could seriously affect the utility business, [PG&E] may be forced either to appear to agree with TURN's views or to respond."32

The plurality also relied on *Wooley v. Maynard*.33 In that case, the Court ruled that New Hampshire could not require citizens to display the slogan "Live Free or Die" on their license plates. Even though the license plates belonged to the state, the citizens' vehicles actually distributed the New Hampshire slogan. Similarly the plurality did not deny that the excess space in the billing envelopes belonged to ratepayers, but disposed of the PUC's equity argument by stating that even if the extra space in the billing envelopes belonged to the ratepayers, the PUC's order improperly required PG&E to use its envelopes and workers to distribute TURN's message.34

The plurality distinguished *Prune Yard Shopping Center v. Robins*.35 In that case, the Court held that a shopping center owner could not deny access to a group of students who wished to hand out pamphlets in a "peculiarly public" area of the shopping center.36 The plurality decided that the PUC's order negatively impacted PG&E's exercise of its right to speak because it would impermissibly force PG&E to speak when it may prefer to refrain from speaking; but allowing access in *Prune Yard* had no similar impact on the shopping center owner.37

In *Prune Yard*, the shopping center owner apparently did not allege that he objected to the content of the pamphlets or that his own expression was hindered; the access right was not content-based; and the owner's business was already open to public access.

After determining that PG&E's constitutionally protected speech had been burdened, the plurality then applied traditional first amendment standards to determine whether the PUC order was a narrowly tailored means of serving a compelling state interest.38 The PUC asserted two compelling state interests for its order: its desire for needed consumer input for effective ratemaking proceedings, and the need to broaden the spectrum of information available to consumers. According to the plurality, both of these asserted state interests could be served by less restrictive alternatives.39

In summary, the plurality ruled that the PUC's order authorizing access to PG&E's billing envelopes by a third party violated the utility's first amendment rights. PG&E v. PUC may be interpreted as extending "negative free speech" rights to corporations. Apparently, like individuals and newspapers, publicly regulated monopoly corporations now have a right to refrain from speaking.

However, two limits to such a broad statement are found within the decision. First, the plurality's footnote 12 distinguishes the PUC's order allowing access to TURN from those orders requiring utilities to carry various legal notices in their billing envelopes:

The Commission's order is thus readily distinguishable from orders requiring appellant to carry various legal notices, such as notices of upcoming Commission proceedings or of changes in the way rates are calculated. The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.40

Second, Justice Marshall, in concurrence, was unwilling to say that corporations have speech rights which are coextensive with those of individuals.41 At most, only four justices went that far.

**CRITICISM**

The dissenting opinions are logical points for beginning an examination of the shortcomings of the plurality's opinion. Justice Rehnquist and Justice Stevens both filed dissents.
Justice Rehnquist, while apparently satisfied with the plurality's statement of the issue in the case, disagreed with its analysis. He said that because a candidate's right to reply in Tornillo depended on the newspaper's own adverse speech, it was a content-based penalty.42 However, the right of access granted to TURN was not conditioned upon PG&E's speech. TURN was given access to PG&E's envelopes four times per year, no matter what PG&E said. TURN's access was not a penalty for adverse PG&E speech.43 Moreover, Rehnquist suggested that allowing a right of access to TURN would not hinder PG&E's speech. Unless TURN is a purely reactive organization—and unlikely to address controversial topics without prompting from PG&E—PG&E would not be induced to temper its own speech.44

Further, Rehnquist complained about the plurality's first amendment “negative free speech” analysis on two grounds. First, he cited the PruneYard case, which held that an effective disclaimer was sufficient to eliminate infringement of one's right not to speak. According to Rehnquist, nothing in the record suggested that the PUC-mandated disclaimer on TURN's inserts was not sufficient to protect PG&E from being associated with TURN's speech.45 Second, he emphasized that natural persons have negative free speech rights because of their interest in self-expression. Extension of individual freedom of conscience cases (such as Wooley) to corporations strains the rationale of those cases. Corporate free speech rights do not arise because corporations have any interest in self-expression. Such rights are recognized as a means of furthering the first amendment purpose of fostering a broad forum of information to facilitate self-government. The PUC's order allowing TURN access to PG&E's billing envelopes would be consistent with such a policy; allowing corporations negative free speech rights has no basis in policy, according to Rehnquist.46

Justice Stevens' dissent took a somewhat different approach. He viewed the facts and the issue in the case much more narrowly than did the plurality, and framed the issue as whether a state public utility commission may require a fundraising solicitation by consumer groups to be carried out through utility billing envelopes as analogous to the PUC's actual order, which granted TURN's petition to include inserts for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of the PUC involving PG&E.48 Because the PUC confined the insert to including an explanation of its program, a list of upcoming PUC proceedings likely to affect PG&E ratepayers, and a solicitation for voluntary donations,49 Justice Stevens doubted whether the “propagandizing and sloganizing” and “free-wheeling political debate” feared by the plurality was even authorized by the PUC's order.50

Thus, Stevens saw little difference between the inserts of TURN and those legal notices which the plurality would apparently permit to be included in utility billing envelopes.51 Also, Stevens viewed the PUC-authorized access to utility billing envelopes as analogous to the Securities and Exchange Commission's requirement, which is apparently constitutional, that incumbent directors transmit proposals of minority shareholders.52

For the most part, the few commentators who have addressed the Court's treatment of PG&E v. PUC have echoed and expanded upon the themes in the dissents—particularly the flawed first amendment analysis. One commentator, Mitchell Tilter, has argued in favor of applying the “rational basis” standard to the PUC's order rather than the stricter “compelling state interest” standard because, as Justice Rehnquist suggested, the plurality failed to explain how the regulation would result in a direct suppression of PG&E's speech.53 While the PUC order may compel PG&E to speak, it would not seem to pose any risk of suppression or self-censorship. The compulsion should be upheld if it “rationally relates to any legitimate end of government.” Had the plurality applied such a test, the result may well have been to uphold the PUC's order.

In addition, Tilter points out two other situations where government has compelled a corporation to publish speech it would probably not publish, and where federal law is in apparent conflict with the plurality's decision. Cigarette manufacturers, for example, must include on their product's package a statement containing objectionable statements of a third party—the U.S. Surgeon General.44 Also, Congress has authorized cable franchise authorities to require cable television operators to allocate channel capacity for public education or governmental use.55

Another commentator, although unwilling to go quite as far as Justice Rehnquist and reject the notion of corporate “negative free speech” rights, would uphold the PUC's order because of PG&E's monopoly status—an issue avoided by the plurality.56 A natural monopoly provides services most efficiently when it is the only supplier operating in a market. However, free from the constraints of competition and if left unchecked, a monopoly could take unfair advantage of its captive market by overpricing. State regulatory authorities act as a substitute for competition.57 In theory, the state prevents oppressive pricing while enabling a monopoly to exist, and thus optimizes economic efficiency through regulation. A monopoly has made a bargain with government. In exchange for protection from competition and a guarantee of a fair rate of return on its investment, the monopoly submits to regulation.

Along with the other advantages of being a sole supplier, a monopoly has an advantage when it comes to disseminating its views. Not only does it have a captive audience, but the potential exists to pass the costs of the monopoly's communication on to the ratepayer audience. Moreover, because the monopoly is necessarily the only speaker of its type in the market, it stands out almost like a government entity; what the monopoly says may be taken as authoritative because of its inherently advantageous position.

Arguably, the threat of monopoly control over the marketplace of ideas suggests that limited regulation of monopoly speech may be a good idea. In a 1969 case, Red Lion Broadcasting Co. v. FCC, the Supreme Court upheld the FCC's fairness doctrine, which required television and radio stations to provide fair coverage of opposing views on public issues and equal time to all qualified political candidates.58 Potentially, it seemed, this case could be used as precedent justifying regulation of monopoly speech. But the Red Lion decision's potential never materialized. In fact, the FCC no longer employs the fairness doctrine as part of its regulatory scheme.59

Public utility speech rights were first discussed by the Supreme Court in Consolidated Edison v. Public Service Commission of New York.60 Fearful of compromising first amendment principles, the Court refused to expand the Red Lion decision outside broadcast situations. The Court held that state regulatory authorities could not prohibit utilities from using excess space in billing envelopes to advocate nuclear power. One commentator, Jeffrey Harrison, has criticized a trend which he
claims began with Consolidated Edison and carried over to PG&E v. PUC. The Burger Court, in its zeal to promote an agenda of defining first amendment rights in terms of property ownership, has not heeded the important distinction between regulated public utilities and other corporate speakers.41

Finally, one noteworthy point—which the plurality, dissent, and commentators have missed—is that PG&E v. PUC is actually a poor test case. TURN differs from other organizations which have used the bill insert idea. While UCAN and the CUBs were created by state action and modeled on strong principles of democracy and equity, TURN is of outside origin, private, and independent.

The implications of the PG&E v. PUC decision are disturbing. On the one hand, the plurality appears to have broadly construed the facts of the case and has worded its opinion in sweeping language. Thus, it could have a drastic effect on all types of consumer groups interested in taking part in state regulatory proceedings. Such groups may be severely limited in their efforts to acquire adequate funding. Moreover, state regulatory proceedings may suffer as a result of diminished input from consumer groups.

On the other hand, the shortcomings of the plurality opinion—and the fact that it was only a plurality opinion—may eventually diminish its value as precedent. First, the plurality’s first amendment analysis is suspect, as pointed out in the dissents and commentaries. Second, the plurality fails to adequately analyze PG&E’s monopoly status and the related policy considerations. Third, the private and independent nature of TURN, compared with other consumer groups who have been granted access to billing envelopes, was not addressed by the Court. Each of these factors suggests that the legal rule in PG&E v. PUC is susceptible to a more narrow interpretation.

**REACTIONS**

**CUB Lower Court Challenge**

While the legal rule of PG&E v. PUC may eventually be more narrowly interpreted, so far it has not happened. In fact, opportunities to narrow the scope of the rule have already been missed by some lower courts.

In Central Illinois Light Co. v. CUB, portions of the Illinois statute creating that state’s CUB were challenged in federal court.63 Specifically, the two portions of the statute which enabled the CUB to gain access to the utilities’ billing envelopes came under fire.64 According to the utilities, PG&E v. PUC applied directly.65 The district court agreed.66 Apparently, the court viewed the CUB’s inserts to be private speech like TURN’s rather than governmental legal notices, which the Supreme Court would seemingly authorize.67 Interestingly, a government co-defendant argued that the CUB was a government speaker but the CUB disagreed.

The Seventh Circuit affirmed the district court’s decision.68 However, it did not address the issue whether the CUB was a governmental speaker or a private speaker. Instead, the court said:

The statutory scheme created by Section 9 of the Act, in conjunction with Section 10 of the Act, is in all material respects, constitutionally indistinguishable from the PUC order struck down by the Court in PG&E v. PUC. In both instances, the government has selected a speaker on the basis of its views, and the utilities are forced to disseminate the views of that speaker.

This case presented an opportunity to delve into the meaning of “legal notice.” The power to insert legal notices in utility billing envelopes is an aspect of government’s authority to regulate monopolies. If a CUB is considered an arm of government, then its inserts should be authorized as legal notices, consistent with government’s regulation of utilities. However, rather than defining “legal notices” so as to include the CUB’s speech (and distinguish it from TURN’s speech), the Central Illinois Light court viewed the two cases as indistinguishable.

Thus, instead of narrowing the legal rule of PG&E v. PUC, the opposite has occurred. Central Illinois Light has broadened the prior ruling so that now, in addition to independent consumer groups, CUBs can no longer gain access to utility billing envelopes.70 The significance of Central Illinois Light Co. v. CUB as a missed opportunity cannot be overemphasized.

**California’s Approach**

Following PG&E v. PUC, the California legislature and PUC began re-evaluating various methods of encouraging consumer group input on behalf of the underrepresented in PUC proceedings.

**Intervenor Compensation Program.** As noted previously, access to billing envelopes provided consumer groups with a productive method of securing funding. However, it should be pointed out that the PUC has another mechanism through which consumer groups may be able to obtain funding. In 1983, the California legislature passed a bill authorizing the PUC to award reasonable attorneys’ fees along with other participation costs to intervenors who are in need of financial assistance and who make a substantial contribution to PUC proceedings.71

Unfortunately, the intervenor compensation program is limited. First, it provides no funding to intervenors in the initial stages of their participation. For consumer groups, this front-end funding is crucial; without it, they cannot initiate participation.72 Second, even if a consumer group is able to participate, there is no guarantee of compensation. Requiring that the intervenor substantially contribute to an order of the PUC which benefits consumers can be a disincentive; a financially needy consumer group, uncertain whether its contribution will be deemed “substantial,” may be forced to refrain from participating.73 The PUC itself has indicated that the intervenor compensation program is inadequate: “while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize...that such opportunity may seem illusory to an individual ratepayer.”74

The legislature and PUC have recently considered a variety of proposals to supplement the intervenor compensation program.

**Legal Notice Inserts.** Footnote 12 of the PG&E v. PUC plurality opinion appears to authorize a variety of legal notice inserts in utility envelopes.75 The PUC has long required such legal notices in billing envelopes as part of its regulation of utilities. “Bill insert notices have been required concerning energy conservation programs, federal income tax changes, lifeline services for low income groups, third party designees for elderly and handicapped customers, telephone service options, area code changes, and refund entitlements.”76

Legal notice inserts—now favored by UCAN, TURN, and other consumer groups—would encourage the participation of consumer groups in PUC proceedings by directly providing a listing of such groups in a PUC insert, designating those seeking support, and notifying ratepayers that they may make inquiries or contributions to the group(s) of their choice. Putting the list in the form of a “consumer advocacy check-off” and pro-
viding a return envelope have also been suggested to make the system easy for ratepayers.77

But utilities object to the “consumer advocacy check-off” type of insert. Interpreting footnote 12 narrowly, utilities argue that a “consumer advocacy check-off” insert would be unconstitutional for the same reasons as the TURN billing insert discussed in PG&E v. PUC; utilities would be forced to carry messages with which they disagree, and would be discriminated against in favor of consumer groups on the basis of content.78 Utilities also contend that the footnote 12 exception applies only to notices about time, date, and place of rate hearings, or matters of public health, safety, and welfare; a “consumer advocacy check-off” notice—which is arguably broader than the parameters described in footnote 12—is not authorized by the footnote.79

Sale of Excess Space. A proposal which would clearly benefit consumers (if properly implemented) would involve the sale of extra space in utility billing envelopes to commercial advertisers. The PUC could auction extra billing envelope space to the highest reputable commercial bidder.80 Such use of the extra space has been employed with success in other states; in California, Pacific Bell Telephone Company is experimenting with a program of enclosing other carriers’ bills along with PacBell’s own bills.81 The revenue from the sale of the extra space could be used to lower utility rates.

A similar proposal would require utilities to pay for their own use of the extra space in their envelopes, and the additional revenue could result in decreased rates. According to the SOR, “PG&E would at the very least have to pay fourth class bulk mail rates for Progress if it did not mail it with the customer bill. Thus, utility postage savings might be used to establish a fee. Or, a reasonable shareholder fee might be set at the amount commercial advertisers would be willing to pay to secure access to the extra space utilized for utility inserts.”82

Both these sale-of-excess-space proposals contain an element of poetic justice. Direct monetary benefit from commercial advertising through the sale of excess space is a nice addition to the economic formula that normally requires consumers to subsidize the advertising cost of producers by paying inflated purchase prices. Unfortunately, standing alone, these sale-of-excess-space proposals do nothing to promote the PUC’s primary objective—increased consumer group participation in PUC proceedings.

Consumer Group Participation Fund. Although the sale-of-excess-space proposals do not automatically promote ratepayer advocacy in PUC proceedings, it may be possible to remedy this deficiency. After all, the sale of excess space in utility billing envelopes would likely bring in substantial revenues.83 The legislature or PUC could earmark these revenues for uses which promote consumer group input into the PUC. This participation fund proposal would enable consumer groups to benefit indirectly from the sale of extra space in utility billing envelopes.84 In these days of government fiscal responsibility, the attractiveness of the participation fund proposal is enhanced because it could provide more money to consumer groups than is otherwise available through intervenor compensation, without decreasing the budgets of other needy government programs.

Senate Bill 437 (Rosenthal). In the 1987 session of California’s legislature, much of the debate over how best to achieve sufficient consumer advocacy in PUC proceedings centered around SB 437.

As amended, this bill called for PUC implementation of a trial one-year legal notice insert program. Four times per year, the PUC Public Advisor’s Office was to prepare legal notices for inclusion in utility billing envelopes. These notices would identify upcoming utility rate-setting proceedings likely to have the greatest effect on consumers, and inform consumers of their right to become intervenors or support a consumer group which intervenes regularly. The notices would also explain that consumers could contact the Public Advisor’s Office to learn more about the various consumer groups which regularly intervene. SB 437 also directed the PUC to investigate the feasibility of selling the extra space in utility billing envelopes for commercial advertising or charging the utilities for their own use of the extra space; the PUC was to report its findings to the legislature in January 1989.

As introduced, SB 437 called for a “consumer advocacy check-off” insert, which would have directly identified regular intervenors requesting financial assistance, and would have established a two-year trial period, rather than just one year. But these measures were removed in amended versions of the bill. Despite the amendments, the Assembly defeated SB 437.

The PUC’s Current Insert Plan. The reason for SB 437’s defeat in the Assembly is easily explained. The PUC had already begun taking steps to implement a plan substantially similar to that mandated by the amended version of the bill. Following PG&E v. PUC, TURN petitioned the PUC to initiate a “consumer advocacy check-off” insert in PG&E billing envelopes. Although the PUC did not completely reject the billing insert idea, it denied TURN’s petition in May 1987, and tentatively adopted a very conservative legal notice proposal—one which was favored by the utilities, and very similar to the amended version of SB 437 (then pending in the legislature). This plan compels utilities to include in their billing envelopes quarterly legal notice inserts which require interested consumers to contact the PUC’s Public Advisor’s Office to obtain a list of consumer groups which intervene in PUC proceedings.85

One commissioner, Donald Vial, supported the more directly-informative “consumer advocacy check-off” insert.86 In his concurring opinion, Commissioner Vial suggested that the majority had not chosen “the most effective legally permissible means of promoting ratepayer participation through intervenors.”87

The PUC will reevaluate its current legal notice insert plan at the end of 1988.88 The shape of any permanent plan is most likely to be determined after the PUC conducts this upcoming re-evaluation. To fully understand how the current legal notice plan has worked so far, it is necessary to examine how the plan was implemented. The Public Advisor’s Office has most of the responsibility for ensuring that the plan is carried out as intended.89 The Public Advisor’s Office writes the legal notices to be inserted in the utilities’ billing envelopes, and determines the list of intervenors which will be mailed to those consumers who request the list.90 To prepare this list, the Public Advisor’s Office sent letters to past intervenors notifying them of the plan and inviting them to apply to be included on the list. Those interested in being placed on the list were required to provide certain information, including name of organization; address and telephone number; tax status; number of members; group of ratepayers represented; prior, present, and future involvement of the organization in PUC proceedings; and purpose of the organization.91

The PUC authorized the Public Advisor’s Office to establish criteria for determining which consumer groups could be included on the list. But it also mandated that the list include as broad a spectrum of intervenors as possible, so
that consumers would be able to best choose for themselves which group(s) to contact and/or support. Several problems have developed regarding the list prepared by the Public Advisor's Office. First, because the PUC ordered the list to include a broad spectrum of intervenors, the Public Advisor's Office performed no screening whatsoever of the groups which requested inclusion on the list. As a result, the first list of intervenors distributed to requesting ratepayers included descriptions of several small special interest groups which do not, have never, and have no plans to represent the interests of ratepayers in PUC proceedings. And while some arguably undeserving groups were included, at least one consumer group which has successfully intervened in several PUC proceedings in the areas of both telecommunications and gas/electric utilities was not included on the list because the Public Advisor's Office lost its application.

Problems also exist concerning the Public Advisor's distribution of the list. First, because the list distributions require a mailing separate from the billing insert mailing, the current legal notice plan is probably more expensive than a plan that would simply include the list of intervenors directly in the billing insert. Second, the process of distributing the list is extremely slow. In several instances, it took over three months from the time an interested consumer sent a letter requesting the list to the time the list was received from the Public Advisor's Office.

The current legal notice plan requires patience and persistence on the part of consumers interested in having organized consumer groups represent them at PUC proceedings. Prior to PG&E v. PUC, bill inserts enabled ratepayers to write or contribute directly to consumer groups. Consumers could become involved without too much effort. The current legal notice plan requires consumers to first write to the Public Advisor's Office and then, after waiting six to twelve weeks, write again, this time directly to a consumer group. According to Commissioner Vial, the current legal notice plan makes it too difficult for interested consumers to "get involved." The extra burden placed on consumers also impacts consumer groups. Prior to PG&E v. PUC, the bill insert idea translated into substantial funding for consumer groups allowed access to utility billing envelopes. UCAN raised close to $500,000 in its first two years of existence. According to UCAN Executive Director Michael Shames, it would be much more difficult to start such a consumer group today. Under the PUC's current legal notice plan, UCAN receives fewer consumer inquiries and fewer membership contributions. UCAN has no choice but to cut back on its participation in PUC proceedings. Moreover, UCAN's shrinking budget has forced contemplation of other, less efficient means of funding, such as door-to-door solicitation. Nothing suggests that what has happened to UCAN is extraordinary.

The current legal notice plan undoubtedly meets the constitutional requirements set forth in footnote 12 of PG&E v. PUC, but whether it is a worthwhile exercise of the PUC's regulatory authority is another question. The current legal notice plan makes it difficult for ratepayers to contact consumer groups, resulting in decreased contributions to consumer groups, and diminished consumer group input into PUC proceedings. In short, the current legal notice plan does very little to further its stated purpose: to improve the record in PUC proceedings.

RECOMMENDATIONS

The purpose of this article is to advocate a comprehensive insert program which will best benefit consumers and withstand constitutional scrutiny. Ideally, the best use of excess space in utility billing envelopes would attempt to accommodate PG&E v. PUC (and the cases following it), be supported by the same strong principles as the PUC's original bill insert program, and benefit consumers more than the current legal notice plan. These three ideals are maximized in the following recommendations.

Primary Recommendation—Arm of Government. In Central Illinois Light Co. v. CUB, the appellate court decided that a utility's first amendment rights would be violated if it were required to include the messages of a CUB in its bill envelopes. The court passed up an opportunity to use the legal notice language in footnote 12 of PG&E v. PUC to validate the Illinois CUB inserts. However, in that case uncertainty surrounded the issue of whether the CUB spoke as a government speaker or as a private third party. If the statute had expressed a definite link between the CUB and state government, then the issue of the CUB's status would be more certain. The CUB would be an arm of government and, arguably, its inserts would be valid government legal notices.

Similarly, arms of government could be created by the California legislature, with the support and cooperation of the PUC—or by PUC rulemaking under its existing broad mandate to regulate monoply utilities. Rather than completely overhauling the current system by creating a statewide CUB, California's new arms of government could be modeled after UCAN, and naturally integrated with and supervised by the PUC's Division of Ratepayer Advocates and Public Advisor's Office. Such arms of government would separately represent the consumers of each of California's major utilities. Periodically throughout the year, these arms of government would be given access to utility bill envelopes to solicit funds and communicate to those represented.

The arm of government idea has many of the same advantages as the original UCAN-type bill insert program. The key to ensuring adequate input concerning consumer interests in PUC proceedings is front-end funding of the consumer groups, which represent those interests. The arm of government idea, like the original bill insert plan, would enable the fund solicitation necessary for front-end funding. Moreover, the arm of government idea, because of its government integration and supervision, actually provides a better assurance that consumers will benefit from the organizations' adherence to principles of democracy and equity.

Such a status for bill inserts might be accomplished by unusual legislative intervention in formulating a PUC adjunct. However, the PUC could, by formal rulemaking proceeding, adopt a formula to create "ratepayer representation vehicles" as arms of government. Such rulemaking is clearly within its jurisdiction. The rules, if properly framed, should create such an arm of government to which the strictures of PG&E v. PUC would not apply. Where such rulemaking enhances the quality of PUC decisionmaking, includes careful criteria regarding qualification for inclusion (democratic safeguards, open meetings, prior demonstrated PUC assistance and certification, and PUC review powers), limits message content, involves message content approval by the utility or the PUC, and clearly identifies its purpose and source, arm of government status may be achievable.

The courts' anticipated treatment of such a concept deserves consideration. After all, the arm of government idea is similar to the CUB idea, and Central Illinois Light appears to hold that CUB
Both of the above recommendations require that the excess space in utility billing envelopes periodically be used to distribute legal notice inserts. These legal notices would not be required in every month's bill. In all likelihood, the legal notices would be inserted approximately four times per year. This leaves eight months in which the valuable excess space either goes unused or is used freely by the utility for its own benefit.

The PUC has ruled that the excess space in utility billing envelopes belongs to consumers.101 Consumers should be entitled to benefit from their property throughout the year, rather than for just the four months when the legal notices are included in the utility billing envelopes. In the months between legal notice distributions, consumers could benefit by a sale of the excess space to commercial advertisers or by charging utilities a fee for their own use of the excess space. Ratepayers would certainly be pleased if the legislature or PUC required the application of revenues from the sale of excess envelope space toward a utility rate reduction.

But, instead of reducing rates, the legislature or PUC might decide that the revenues from a sale of excess space could be put to better use by creating a participation fund. If the arm of government recommendation is adopted, a portion of these participation fund revenues could be directly set aside for front-end funding of the arm of government. If the "consumer advocacy check-off" recommendation is instead adopted, the participation fund could be put to a similar use. The legislature or PUC would need to establish some fair method of distributing the participation fund between the various deserving consumer groups.

CONCLUSION

The PUC showed little initiative in its implementation of the current legal notice program. The analytical flaws and apparent loopholes in PG&E v. PUC have opened the door for state legislators and regulators to properly create legitimate UCAN-type organizations, whose creation and structure would be supervised by the regulator (as was UCAN's), and whose membership and funding could be accomplished through legal notice billing inserts sponsored by the regulator. Hopefully, upon reevaluation of its present program, the PUC will reconsider its unique opportunity.

The PUC's courage to experiment created a democratic ratepayer advocacy group which 75,000 San Diegans have joined. Funded by their voluntary contributions, UCAN has been given credit by the PUC for almost $250 million in SDG&E rate reductions based on its advocacy. It has given the PUC itself credibility and legitimacy in the eyes of the citizens served by a regulated utility. And, curiously, it has stimulated public discussion of utility issues—enhancing first amendment values.

It is unclear how the plurality found that a mechanism for message diversity is in violation of first amendment values. It is no more clear why the regulator, whose experiment succeeded beyond expectations, should abandon it where it may be salvaged by means not (ironically) as stimulating to public debate. But even without discussion of controversial or substantive issues in bill inserts, and even with the controls described, the arm of government approach should allow for regulatory process enhancement. In a political setting where utilities are organized for advocacy, "notices" for contributions allow raters to use the envelopes they pay for to voluntarily contribute to an entity providing more balanced advocacy—and better government.

FOOTNOTES

5. CPIL v. SDG&E, supra note 3, at 7 (quoting Consumers' Lobby Against Monopolies v. PUC, 25 Cal. 3d 891 (1979), and citing Public Utilities Code sections 1731 and 1756).
6. Id. at 7-9.
7. Id. at 23-25.
8. Id. at 24. The PUC's order specifically limited UCAN's access to "the inclusion of information aimed at soliciting contributions, funds sufficient to permit the holding of an election, and information about the election."
9. Interview with Michael Shames, Executive Director of UCAN (Nov. 3, 1987).
12. N.Y. Times, supra note 2.

14. In 1983, a number of bills calling for establishment of a California CUB were introduced but not passed by the state legislature. See, e.g., SB 399 (Rosenthal); SB 340 (B. Greene); and AB 45 (Chacon).

15. **CPIL v. SDG&E**, supra note 3. Initial prompting by Michael Shames, then a University of San Diego School of Law student and an intern at the school's Center for Public Interest Law, led to the plan's eventual adoption. Shames is currently Executive Director of UCAN.

16. Id. at 14-15.

17. See, e.g., id. at 2; and decisions cited therein.

18. Id. at 14-15.

19. Id. at 9.

20. Id.


22. Id.

23. Id. at 6. See also **CPIL v. SDG&E**, supra note 3, at 24.

24. See generally Amicus Curiae Brief of the Center for Public Interest Law in **PG&E v. PUC**, supra note 10, 475 U.S. 1 (1986). This brief points out the distinction between TURN and democratically-structured consumer groups granted access to utility billing envelopes, and suggests that the Court limit the scope of its determination to cover only consumer groups similar to TURN.


26. Interestingly, the Supreme Court accepted this case to review an order of a state regulatory agency even though no court of law had issued a written decision on it. See Note, supra note 25.


29. Id. at 9-14.

30. Id.

31. Id. at 15.

32. Id.; but see id. at 36-39 (Stevens, J., dissenting).


34. Id. at 17-18.


36. Id. at 12 n.8 (citing **Prune Yard**, supra note 35, at 83, 88).

37. See **PG&E v. PUC**, supra note 10, at 12.

38. Id. at 19-20.

39. Id. The plurality also noted that the PUC order failed as a time, place, or manner restriction because it was not content neutral. Id. at 20.

40. Id. at 15-16 n.12.

41. See id. at 25-26 (Marshall, J., concurring).

42. See id. at 28-31 (Rehnquist, J., dissenting).

43. Id.

44. Id. at 31.

45. Id. at 31-32.

46. Id. at 32-35.

47. Id. at 35-36 (Stevens, J., dissenting).

48. Id.

49. Id. at 36-37.

50. Id.

51. Id. at 36-40.

52. Id. at 39-40.


54. Id. at 502.

55. Id. at 503.


59. The FCC, which invented the fairness doctrine, has changed its policy with respect to the doctrine's constitutionality. In Meredith Corp. v. FCC, 809 F.2d 863 (D.C. Cir. 1987), the District of Columbia Court of Appeals held that the FCC acted unlawfully by enforcing the fairness doctrine without first determining whether the doctrine violates a broadcaster's first amendment rights. The court referred the matter back to the FCC for reconsideration. Upon reconsideration, the FCC ruled that "the fairness doctrine, on its face, violates the first amendment and contravenes the public interest." 

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**Peace Council v. Television Station WTVH Syracuse, 2 F.C.C. Red. 5043, 63 Rad. Reg. 2d (P &F) 541 (1987).**

60. 447 U.S. 530 (1980).


65. **Central Illinois Light**, supra note 63, at 1475.

66. Id. at 1478-81. See also Consolidated Edison v. Public Service Comm'n of New York, 119 A.D.2d 850, 500 N.Y.S.2d 423 (1986). This New York state court opinion also invalidated a CUB's inserts in utility billing envelopes based on **PG&E v. PUC**.


68. **Central Illinois Light Co. v. CUB**, 827 F.2d 1169 (7th Cir. 1987).

69. Id. at 1174.

70. As a result, CUBs have been forced to come up with other methods of fund solicitation. In Illinois, the legislature recently authorized a novel plan that enables that state's CUB to include inserts in the excess space of statewide government mailings—such as those sent by the Department of Motor Vehicles and those sent for tax purposes. 1987 Ills. Laws P.A. 83-943. The Wisconsin CUB has relied on door-to-door solicitation, newsletters, and renewal notices. Telephone interview with Robert Nikola, staff member of Wisconsin CUB (April 19, 1988).

71. Public Utilities Code section 1801 et seq. (West Supp. 1988). Incidentally, some suggest that the intervenor compensation program is really a disservice to the ratepayers whom it is supposed to represent. Not only are utility rates increased to cover the legal costs and fees incurred by the utility in defending its position, but rates also increase to cover the costs of compensating the intervenor when it has substantially contributed. Although it is true that ratepayers would rather pay $60,000 to an intervenor group than $3 million in rates to a utility (when the group intervenes to
secure an order slashing rates by $3 million, assessing the ratepayers for the costs of intervenor compensation does nothing to encourage the utility to make reasonable rate requests in the first place. Some critics argue that intervenor compensation awards should be assessed directly against the utility's shareholders to provide the utility with an incentive to formulate defensible rate requests—an incentive which does not exist under the current system.


73. See generally id.

74. CPIL v. SDG&E, supra note 3, at 8.

75. PG&E v. PUC, supra note 10, at 15-16 n.12; see supra text at n.40.

76. SOR Issue Brief, supra note 72, at 18.

77. Id. at 16. According to Shapiro, UCAN proposed the "consumer advocacy check-off" idea.

78. Id. at 18-19.

79. Id. at 19. Interestingly, according to the SOR, at least one utility concedes that another legal notice insert would be permissible under PG&E v. PUC. This type of legal notice would explain to ratepayers that the PUC has found that its record in rate cases is not as complete as it would like, and therefore would encourage contact with either listed consumer groups which have appeared in past proceedings, or the PUC's Public Advisor's Office. This type of insert would not include descriptions of the views or arguments of consumer groups, nor would fund solicitations or return envelopes be included.

80. Id. at 20-21.

81. See id. at 21-22.

82. Id. at 26.

83. See generally id. at 27-28.

84. Id.

85. TURN v. PG&E, supra note 11, at 11. Shortly after the denial of TURN's petition, UCAN submitted a similar petition with respect to SDG&E's billing envelopes; the PUC denied UCAN's petition, favoring instead the more conservative legal notice proposal, just as it had done earlier with the TURN petition. Thus, the proposal adopted in the TURN v. PG&E proceeding is, for all practical purposes, a plan that applies to all utilities.

86. Id. (Vial, Comm'r, concurring).

87. Id. at 1 (Vial, Comm'r, concurring). Commissioner Vial's concurring opinion is separately paginated.

88. TURN v. PG&E, supra note 11, at 12.

89. Id. at 10.

90. Id.

91. Letter from PUC Advisor Robert Feraru to past intervenors (June 16, 1987).


93. Letter and List from PUC Public Advisor Robert Feraru to interested PacBell customers (Sept. 1, 1987).

94. Although the Center for Public Interest Law submitted the required information to the Public Advisor's Office in a timely manner, it was not included in the first wave of mailings to requesting ratepayers.

95. The Center for Public Interest Law has tested the response time of the Public Advisor's Office. Five Center staff members sent personal requests to receive intervenor lists on 10/10/87, 10/10/87, 10/10/87, 2/7/88, and 3/7/88. The minimum response time was six weeks; in two instances, CPIL staff waited twelve and fourteen weeks, respectively.

96. TURN v. PG&E, supra note 11, at 1 (Vial, Comm'r, concurring).

97. Interview with Michael Shames, Executive Director of UCAN (Nov. 3, 1987).

98. Id.

99. Id.

100. San Diego Reader, supra note 1.

101. Central Illinois Light, 827 F.2d at 1174.

102. Central Illinois Light, 645 F. Supp. at 1484 n. 11; see supra note 63 and text at note 67.

103. See generally SOR Issue Brief, supra note 72, at 27-28.

104. Central Illinois Light, 827 F.2d at 1174.

105. TURN v. PG&E, supra note 11, at 2-3.

106. Id.

107. Id. at 2-3.

108. Id. at 3.

109. Id. at 3-4.

110. Id. at 4.

111. CPIL v. SDG&E, supra note 3, at 14-15.