
Catherine J.K. Sandoval

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Cover Page Footnote
Catherine J.K. Sandoval, Associate Professor, Santa Clara University School of Law. Former Commissioner, California Public Utilities Commission (CPUC). Thanks to Santa Clara University’s Faculty Scholarship Fund for their support of this work. Thanks to the Loyola University Antitrust Colloquium and the Center for Research in Regulated Industries Eastern Conference for the opportunity to present and engage in dialogue about this work. Thanks to SCU Law Librarian Eli Edwards and to SCU Law Students Robert Murillo and Hannah Ford-Stille for their research that contributed to this article. Special thanks to the Commissioners and staff of the CPUC for their dedication to public safety and work on utility pole safety and competitive access. Thanks to my husband Steve Smith for his support during the 2018 utility pole tour and for his daily encouragement and good cheer.

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CONTESTED PLACES, UTILITY POLE SPACES:
A COMPETITION AND SAFETY FRAMEWORK FOR
ANALYZING UTILITY POLE ASSOCIATION RULES,
ROLES, AND RISKS

Catherine J.K. Sandoval

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They blend along small-town streets
Like a race of giants that have faded into mere mythology.1

- John Updike, “Telephone Poles”

I. SAFETY, COMPETITION, RELIABILITY, RATE, AND ENVIRONMENTAL RISKS
  POSED BY UTILITY POLE ASSOCIATION RULES AND ROLES

The humble wooden utility pole, first deployed in America in 1844 to extend
telegraph service,2 forms the twenty-first century’s technological scaffold. Many states adopted laws in the mid-nineteenth through the early twentieth
centuries granting rights-of-way (ROW) to construct utility poles, wires, and
facilities to transmit electric and communications signals.3 First telegraph, then
telephone, electricity, cable, wireless, and Internet Service Providers (ISPs)

1. JOHN UPDIKE, TELEPHONE POLES AND OTHER POEMS (1963).
2. See April Mulqueen & Marzia Zafar, A Brief Introduction to Utility Poles, CAL. PUB.
   UTIL. COMM’N 5 (2014), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/
   [hereinafter Mulqueen, Brief Introduction to Utility Poles].
   West LLC v. City & Cty. of S.F., 438 P.3d 239, 244 n.9 (2019) (“The predecessor of Public Utilities
   Code section 7901, Civil Code section 536, was first enacted in 1872 as part of the original Civil Code.”).
sought to attach facilities to wooden, and later steel or composite, utility poles. As the twentieth century dawned, several California electric and telephone companies formed Joint Pole Committees (JPCs) that stand sentry over utility pole access through private governance and standard-setting. This article argues that JPC standard-setting outside of regulatory supervision creates a safety gap in utility pole maintenance and operation and constrains competitive access to critical utility facilities and ROW. This Article offers a framework to put safety, competition, and accountable governance at the forefront of utility pole, conduit, and ROW regulation.

This article lifts the veil JPCs have maintained for more than a century over their function and rules. JPCs have effectively guarded their rules as member secrets by not registering as non-profits and operating largely without government supervision. JPC members include investor-owned utilities (IOUs), municipal utilities, irrigation districts, and some municipalities that have formed associations to “share expenses regarding ownership, maintenance, use, setting, replacement, relinquishment or removal of jointly owned poles.” The California Public Utilities Commission (CPUC) and competition authorities owe no deference to JPC standards, rules, functions, or decisions. Scrutiny of JPC rules, roles, and risks is long overdue.

The CPUC’s 2016 Competition Order Instituting Investigation (OII)—which my colleagues and I unanimously voted to adopt when I served as a CPUC Commissioner—observed that “utility poles, whether owned by electric utilities or legacy phone companies or jointly, and corresponding rights of way are areas where safety and competition goals, and asserted property rights, meet and potentially clash.” The CPUC concluded that “[i]f a pole association had


8. Decision Analyzing the California Telecommunications Market And Directing Staff To Continue Data Gathering Monitoring And Reporting On The Market in the Order Instituting Investigation into the State of Competition Among Telecommunications Providers in California, and to Consider and Resolve Questions raised in the Limited Rehearing of Decision 08-09-042, Decision 16-12-025, Investigation 15-11-007, CAL. PUB. UTIL. COMM’N 110 (Dec. 1, 2016),
internal policies, membership rules, or other standards that effectively operated to exclude new members or make their pole access onerous, that would raise concerns about barriers to market entry.”

In 2017, the CPUC initiated a Utility Pole Census and Competitive Access OII and Order Instituting Rulemaking (OIR) (I.17-06-027, and R.17-06-028) to analyze JPC functions, utility pole safety, competition, and maintenance issues, and to consider ordering a utility pole census. The CPUC explained that “[c]ompetitive carriers like Sonic and Google Fiber/Webpass have complained about difficulties they have experienced in trying to attach to poles and access underground conduit.”

The CPUC’s proceedings seek to determine whether the JPCs, the Northern California Joint Pole Association (NCJPA) or the Southern California Joint Pole Committee (SCJPC), “have policies, membership rules, or other standards in effect that operate to exclude new members or make access to poles onerous or even impossible.”

Neither JPCs nor their members enjoy immunities from federal antitrust or state unfair competition laws. Nor are JPCs exempt from tort laws for operation and maintenance policies and practices that contribute to hazards or unduly interfere with prospective business advantage. JPCs are not privileged to undermine CPUC rules and policies designed to promote safety and competitive utility pole access, twin policies that are often intertwined.

My research found no academic articles examining the role, rules, and risks of utility pole associations in pole access and management. This Article fills that academic and regulatory analysis gap by examining JPCs’ history and function as California faces climate change, higher safety and fire risks, and an altered competitive landscape.

Analyzing utility governance and infrastructure safety risks is a top priority as climate change and drought fuel California’s fire risk. In California, “[f]ifteen
of the 20 most destructive wildfires in the state’s history have occurred since 2000; ten of the most destructive fires have occurred since 2015.”\textsuperscript{14} California Governor Newsom’s Energy and Wildfire Strike Force reported in 2019 that “[i]n the past four years, equipment owned by California’s three largest investor-owned utilities sparked more than 2,000 fires.”\textsuperscript{15} Longer fire seasons make utility-caused fires even more likely.

In 2014, the Union of Concerned Scientists identified several consequences of climate change for the energy sector including the following: accelerating sea level rise; increasing wildfires; more frequent and intense heat waves; droughts and reduced water supplies; and elevated water temperatures.\textsuperscript{16} As Governor Newsom’s Strike Force advised, “[h]ardening the electrical grid is thus a critical component to overall wildfire risk management.”\textsuperscript{17} Further, “[m]easures commonly used to harden the electrical grid include using insulated electrical lines in high-risk areas, replacing wood poles with steel, installing specialized monitoring equipment, and using new technologies that can reduce sparks or undergrounding lines when necessary in extreme high-fire areas.”\textsuperscript{18} Utility pole, infrastructure, and ROW governance is critical to grid hardening, safety, reliability, competition, and the achievement of climate change mitigation strategies.\textsuperscript{19}

\section*{A. Article Organization}

Part II of this Article traces the historical development of utility rights-of-way rules in California. It examines JPC formation at the turn-of-the twentieth century, followed by California state policies to promote competition and safety. Part III examines interrelated principles that animate state and federal regulation


\textsuperscript{17} Governor Newsom’s Strike Force, supra note 14, at 2.

\textsuperscript{18} Id. at n.9.

of utility pole access: competition and reliability, along with state focus on safety.

Part IV analyzes the NCJPA’s restrictive membership rules that confer incumbents with effective veto power over potential competitors whom the CPUC authorizes to attach to utility poles. It also examines NCJPA’s 2017 representations to the CPUC about its status as a “non-profit formed to be [sic] formed.” NCJPA’s 1998 Agreement states that it will be formed as a non-profit, a fact that indicates NCJPA’s 2017 representation of its status to the CPUC is more than a typo. If JPCs were registered non-profits, their bylaws, articles of incorporation, and more information about their work would be publicly available. JPC characterization of their organization as a non-profit is material to attracting members to join and put their poles under JPC control.

Research for this Article reveals the absence of public records of NCJPA federal or state tax filings or filing for non-profit status in the State of California despite its operation in the state for more than one hundred years. The SCJPC has filed federal taxes as a non-profit association 501(c)(12), but public records neither show that SJPC has filed for non-profit status in California, nor has it filed California taxes as of December 26, 2020.

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22. NCJPA Agreement, supra note 20, § 2(b), at 2.


24. See sources discussed in supra note 23; see sources discussed in infra note 25.

California law requires charities including non-profits operating in the State of California to register with the State. This Article urges the CPUC and the California Attorney General’s Office to examine whether NCJPA statements about its non-profit status constitute an unfair business practice or violate CPUC rules requiring candor in dealing with the Commission. It recommends that the California Attorney General’s Office examine the NCJPA and SCJPC’s non-profit and tax status, determine whether these JPCs have made the requisite state non-profit registration and tax filings or are exempt, and refer federal tax filing issues as appropriate.

Part V examines the role and function of utility pole associations and their competitive significance. Part VI examines competitive barriers erected by JPC rules and roles focusing on Google’s attempts to deploy fiber services in California. It analyzes whether utility pole asset transfer transactions facilitated by the JPC circumvent California Public Utilities Code (CA PUB Code) § 851, which requires the CPUC to approve the sale or transfer of utility assets.

Part VII examines the network effects of utility pole management. This section argues that California’s policies to promote access to utility poles for competitors eliminate a potential antitrust defense under Colgate and Trinko that would otherwise defer to a competitor’s option to choose with whom to deal. It contends that JPC restrictive membership agreements merit scrutiny under the Sherman Anti-Trust Act, 26 Stat. 209, 15 U.S.C. § 1 and California’s Cartwright Act. Part VIII argues that the state action antitrust exemption does not apply to JPCs. The State of California’s utility pole access policies are designed to promote, not displace, competition and neither the CPUC, nor any state entity, actively supervise the JPCs. Part IX concludes with recommendations that the CPUC, as well as state and federal competition authorities, examine JPC rules and roles to protect competition.

PG&E’s January 2019 bankruptcy filing following a series of devastating wildfires linked to utility infrastructure underscores the imperative of utility pole and infrastructure safety, maintenance, and competitive access. Effective energy and communications markets depend on sound infrastructure to deliver...
power and communications services. To promote competition, consumer choice, affordability, reliability, and safety, this Article sheds light on JPC rules, roles, and risks.

II. AS THE CENTURIES TURN; HISTORICAL AND LEGAL ANACHRONISMS OF JPC FORMATION

What other tree can you climb where the birds’ twitter;
Unscrambled, is English?28

- John Updike, “Telephone Poles”

A. California Utility Rights of Way Authorization; From the State’s 1850 Admission to the Union through the Dawn of the Twentieth Century

Development of California’s utility pole network, first used for telegraph, then for telephone, electric, cable, wireless, and Internet services, traces to California’s Statutes of 1850 adopted shortly after California’s admission to the Union. “Since 1850, the State of California has authorized the construction and maintenance of telegraph lines in the roads, highways and other public places in this state”29 by statute.

In 1850, the California legislature adopted a statewide franchise allowing telegraph companies to use roads and highways in the state to erect infrastructure necessary to facilitate telegraph deployment.30 California’s 1850 statute authorized telegraph companies operating under Congress’ 1866 statute, which granted a nationwide franchise for the development of telegraph services, to use California roads and highways.31

With its admission to statehood, California sought to encourage expansion of the telegraph consistent with its new state authority. For telegraph associations, the Statutes of 1850 provided

Such association is authorized to construct lines of telegraph along and upon any of the public roads and highways, or across any of the waters within the limits of this State, by the erection of the necessary fixtures, including posts, piers, or abutments, for sustaining the cords

28. JOHN UPDIKE, TELEPHONE POLES AND OTHER POEMS, supra note 1.
31. See W. Union Tel. Co. v. Hopkins, 116 P. 557, 558–60 (Cal. 1911) (citing Act of Congress approved July 24, 1866, (chapter 230, 14 Stat. 221) (“An act to aid in the construction of telegraph lines, and to secure to the government the use of the same for postal and military and other purposes.”)).
or wires of such lines: *Provided*, the same shall not be so constructed as to incommode the public use of said roads and highways, or injuriously interrupt the navigation of said waters; nor shall this Chapter be so construed as to authorize the construction of any bridge across any of the waters of this State.32

The statute authorized telegraph construction including erection of poles to support wires in a manner so as not to “incommode the public” use of roads and highways and was codified with minor amendment in 1872 as § 536 of the Civil Code.33 The California Supreme Court determined in 1911 that California Civil Code § 536

\[
\ldots \text{constituted a grant to telegraph companies of rights in regard to the streets of cities, in addition to the rights given by the act of Congress, which to the extent that they were accepted and availed of by any company, constituted a franchise granted by the state and accepted by the company.} \]

This franchise included the use of bridges as part of the state highway system.35 The California Supreme Court characterized the franchise as “an inducement to the companies [to whom] the State offered the use of roads and highways, without which there would probably have been no company able or willing to enter the State. The franchise cost the State nothing. The rewards were great.”36 Telegraph facility construction commenced shortly thereafter and in “1853 a telegraph line was built from San Francisco to the entrance to the Golden Gate, and this was the first telegraph in California.”37

California ratified its state constitution in 1879, thereby establishing and conferring on the California Railroad Commission authority to regulate utilities.38 That constitutional provision divested municipalities of regulatory power over utilities but left in place local “control over public utilities as relate[d] to the making and enforcement of local, police, sanitary and other regulations, other than the fixing of rates . . .”39

In 1911, the California legislature adopted an act to “regulate[] the erection and maintenance of poles, wires, etc., employed in overhead electric line construction.”40 In 1915, the California legislature required the California

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33. Id.
34. W. Union Tel. Co., 116 P. at 562.
35. See Cty. of Los Angeles, 57 Cal. Rptr. at 808.
36. Id.
37. Id.
38. CAL. CONST. art. XII, § 23 (1879) (repealed 1974).
40. Rules for Overhead Electric Line Construction General Order No. 95, CAL. PUB. UTIL. COMM’N x (Jan. 2015), http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M146/
Railroad Commission to “inspect all work affected by the provisions of the act, and to make such further additions and changes as it might deem necessary for the protection of employees and the general public.”

While telegraph service was being extended across the United States, patents were granted to Alexander Graham Bell in 1876 and 1877 for “improvements in telegraphy,” the telegraph, and “improvements in electric telephony,” now known as the telephone. The same year Bell’s first telephone patents were granted, the Supreme Court, in Munn v. Illinois, recognized the authority of states to regulate common carriers and public utilities. State regulation enabled the growth of telephone service and telephone companies by facilitating access to rights-of-way and telegraph poles to string wires carrying telephone signals.

California Civil Code § 536 was adopted in 1905 to encourage expansion of telegraph and telephone facilities and services. In 1906, a year after the State of California extended rights-of-way franchises to telephone as well as telegraph companies, AT&T, Southern California Edison (SCE), and others formed the SCJPC, California’s first known JPC.

Three years later in 1909, AT&T bought a controlling share of Western Union, the nation’s largest telegraph company. Through its purchase of 30,000 Western Union stock shares, AT&T “effectively [gained] working control of Western Union.” Professor Susan Crawford recounts AT&T’s and Western Union’s April 1910 “joint traffic agreement” that allowed users to send from any telephone a message “to any part of the world by the joint use of telephone, telegraph, and cable wires.” The joint traffic agreement

K646/146646565.pdf [hereinafter CPUC General Order 95] (citing the Act passed by the California Legislature on April 22, 1911, Ch. 499, Stat. of 1911, regulating overhead utility lines).

41. Id. (citing The Statues [sic] of 1915, Ch. 600, amending Ch. 499).

42. Dolbear v. Am. Bell Tel. Co., 126 U.S. 1, 456, 456 (1888). See also Pfaff v. Wells Elecs., 525 U.S. 55, 55 (1998) (noting that The Telephone Cases upheld several patents issued to Alexander Graham Bell "even though he had filed his application before constructing a working telephone.").


44. CAL. CIV. CODE § 536 (1986) (repealed 1997). See also Petaluma v. Pac. Tel. & Tel. Co., 282 P.2d 43, 46 (1955) (“Section 536, tendered to all [telephone and telegraph] corporations a franchise to use the highways for their lines, an acceptance of which is signified by their act in constructing the same over the highways so offered.”).


47. Id.

48. Id. (quoting Wire Companies’ Merger: Western Union and Telephone Officer Discuss Joint Traffic Agreement, N.Y. TIMES, Apr. 1, 1910, at 6).
sought to enable “an answer received promptly at the sending point without the necessity of the sender moving from his office or his home.”

Several independent telephone companies developed in the late 1800s through the early 1900s complained to the U.S. Department of Justice (DOJ) about AT&T’s allegedly anti-competitive conduct following the adoption of Sherman Anti-Trust Act in 1890. In 1913, the DOJ brought an antitrust case against AT&T under § 2 of the Sherman Act alleging that AT&T abused its market power. The DOJ complaint alleged that the Bell system telephone companies AT&T controlled had “harassed” independent telephone companies “by refusing to interconnect Bell lines through with those of the independents, by lowering competitive rates, by furnishing poor service when ordered to interconnect their lines, and by otherwise acting in an illegal manner.” AT&T’s December 1913 “Kingsbury Commitment” led to the settlement of the DOJ’s antitrust suit. AT&T agreed to dispose of its Western Union stock, to “refrain from acquiring competing telephone companies, and [to] offer toll-line connections to qualified independent telephone companies.”

That same year in 1913, AT&T and incumbent electric providers, including the predecessors of PG&E, formed the NCJPA. The Kingsbury Commitment did not address control of utility pole facilities, conduits, and rights-of-way critical to telegraph, telephone, as well as electric deployment and competition. NCJPA helped AT&T and the forerunners of PG&E extend telephone and electric service and consolidate market power in the utility pole and ROW

49. Id. (quoting Wire Companies’ Merger: Western Union and Telephone Officer Discuss Joint Traffic Agreement, N.Y. TIMES Apr. 1, 1910, at 6). See also id. at 251 (reporting that AT&T and Western Union emphasized that they were not merging. As the article explained, “[t]he telegraph and the telephone companies will continue separate and distinct organizations. There has been no absorption, no merging, no consolidation. Each has its own field, but there are certain points where they may meet on common ground and by mutual traffic arrangements increase their opportunities for public service.”).


51. Peters, supra note 50, at 254 (citing Original Petition, United States v. AT&T (D. Or. 1913) (suit terminated by consent decree Mar. 26, 1914)).

52. Id. (citing Original Petition, United States v. AT&T (D. Or. 1913) at 16-19, 26).

53. Id.


market, expanding beyond the construction rights and utility franchise rights granted under California Civil Code § 536.56

As states and later the federal government increased regulatory oversight following Munn v. Illinois in 1876,57 and adopted the Sherman Antitrust Act of 1890 to restrain anti-competitive conduct,58 JPCs formed outside of the government’s purview. In 1911, the California Constitution was amended to vest the California Railroad Commission with “exclusive jurisdiction to supervise and regulate public utilities and to prescribe the character and quality of the service and fix the compensation therefor.”59 The SCJPC was formed in 1906, and the NCJPA in 1913, but some of their members have argued that they are not subject to state public utility regulation as a private association.60

JPCs have operated in a jurisdictional fissure by arguing that the association is not subject to utility regulation despite the fact that many of their members are investor-owned utilities and use or control utility assets. Subsequent California legislation conferred the CPUC with “jurisdiction to regulate . . . electric transmission and distribution facilities of publicly owned utilities . . . for the limited purpose” of protecting worker and public safety.61 JPCs have adopted rules and standards outside of CPUC purview, even as the CPUC adopted regulations to promote safety, competitive telecommunications access, and reliability. JPCs remain historical and legal anachronisms that increasingly clash with state competition and safety rules, laws, and policies.

57. Munn v. Illinois, 94 U.S. 113 (1876).
60. Comments of California Municipal Utilities Association on Administrative Law Judge’s Ruling Requesting Comments on The Role of Joint Pole Associations in Acting as Clearinghouses for Pole Location, Ownership, Attachment, and Access Information, Investigation 17-06-027 (Rulemaking 17-06-028), CAL. PUB. UTIL. COMM’N (Feb. 15, 2019) http://docs.cpuc.ca.gov/PublishedDocs/Edfile/G000/M273/K147/273147232.PDF [hereinafter CMUA Comments].
61. Decision Adopting Regulations to Enhance Fire Safety in the High Fire-Threat District in the Order Instituting Rulemaking to Develop and Adopt Fire-Threat Maps and Fire-Safety Regulations, Decision 17-12-024 (Rulemaking 15-05-006), CAL. PUB. UTIL. COMM’N 14 (Dec. 14, 2017) (citing CAL. PUB. UTIL. CODE §§ 8002, 8037, & 8056) [hereinafter CPUC D.17-12-024] http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M200/K976/200976667.PDF; Decision Adopting Regulations To Reduce Fire Hazards Associated With Overhead Power Lines And Communication Facilities, Decision 12-01-032 (Rulemaking 08-11-005), CAL. PUB. UTIL. COMM’N 11 (Jan. 12, 2012), http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/157605.PDF.

In 1911, through a voter-approved constitutional amendment, the California Railroad Commission was added to the California Constitution. In 1915, soon after the NCJPA was founded, and nearly a decade after the SCJPC’s organization, California adopted a law authorizing the California Railroad Commission to order access to another utility’s poles, conduits, and rights-of-way to facilitate competition and service. For more than a century, California law has recognized the competitive significance of utility pole and right-of-way access to the deployment of utility services, and authorized the CPUC to order joint use of poles.

In 1951, California updated the law authorizing access to rights-of-ways to expand telephone and telegraph service and infrastructure. Shortly after the conclusion of World War II, in 1946, the California legislature renamed the Railroad Commission as the California Public Utilities Commission. The 1915 law authorizing the Railroad Commission to order access to other utilities’ facilities was updated in 1951 through CA PU Code § 767. That legislation allows the CPUC to direct the joint use of “all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility,” where “such use will not result in irreparable injury to the owner or other users of such property or

62. CAL. CONST. art. XII, § 1–6; Anchor Lighting v. S. Cal. Edison Co., 47 Cal. Rptr. 3d 780, 784 (2006) (citations omitted) (“The CPUC is constitutionally empowered to regulate utilities and to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures, and legislatively empowered to do “all things . . . necessary and convenient in the exercise of such power and jurisdiction.”’); CA PU Code 701; CPUC History & Organizational Structure, CAL. PUB. UTIL. COMM’N, http://www.cpuc.ca.gov/history/ (last visited May 10, 2019).


64. Id.

65. CAL. PUB. UTIL. CODE § 7901 (1951) (“Telegraph or telephone corporations may construct lines of telegraph or telephone lines along and upon any public road or highway, along or across any of the waters or lands within this State, and may erect poles, posts, piers, or abutments for supporting the insulators, wires, and other necessary fixtures of their lines, in such manner and at such points as not to incommode the public use of the road or highway or interrupt the navigation of the waters.”).


67. CAL. PUB. UTIL. CODE § 767 (1951) (“Whenever the commission, after a hearing had upon its own motion or upon complaint of a public utility affected, finds that public convenience and necessity require the use by one public utility of all or any part of the conduits, subways, tracks, wires, poles, pipes, or other equipment, on, over, or under any street or highway, and belonging to another public utility, and that such use will not result in irreparable injury to the owner or other users of such property or equipment or in any substantial detriment to the service, and that such public utilities have failed to agree upon such use or the terms and conditions or compensation therefor, the commission may by order direct that such use be permitted, and prescribe a reasonable compensation and reasonable terms and conditions for the joint use.”).
equipment or in any substantial detriment to the service . . . .” CA PU Code § 767 entitles the utility facility or conduit owner to “reasonable compensation and reasonable terms and conditions for the joint use.”

Decades before multiple providers of wireless, wireline, Internet, and electric service contested utility pole access, California adopted policies to promote competitive access to poles and rights-of-way.


Federal law sought to promote utility competition and service to the American public through utility pole access beginning in the 1970s. Congress expanded utility pole access to cable companies in 1978 through the Pole Attachments Act (47 U.S.C. § 224).

The Telecommunications Act of 1996 expanded pole attachment rights under § 224 to telecommunications carriers. The 1996 Telecommunications Act requires that “[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.” 47 U.S.C. § 224 “gave the Federal Communications Commission (FCC) jurisdiction to regulate the rates, terms, and conditions of attachments by cable television operators to the poles, conduit or ROW owned or controlled by utilities in the absence of parallel state regulation.”

Congress allowed states to exercise reverse “preemption” through 47 U.S.C. § 224(c)(1) over FCC jurisdiction of communications infrastructure access. After a state adopts its own utility pole access rules, the FCC loses “jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f) . . . for pole attachments in any case where such matters are regulated by a State.” Under 47 U.S.C. § 253, states may adopt “on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” Furthermore, “section 253 specifically recognizes the authority of state and local

68. Id.
69. Id.
71. Id.
72. Id.
74. 47 U.S.C. § 224(c)(1).
75. Id.
76. CPUC Decision 98-10-058 or ROW Decision, supra note 73, at 10.
governments to manage public ROW and to require fair and reasonable compensation for the use of such ROW."\footnote{77}{Id.}

The CPUC 1998 ROW Decision 98-10-058 exercised reverse preemption of FCC communications infrastructure jurisdiction. Through the rules adopted in Decision 98-10-058, the CPUC “certif\[ied\]" to the FCC that [it] regulate[s] the rate, terms, and conditions of access to poles, ducts, conduits, and ROW in conformance with §§ 224(c)(2) and (3).\footnote{78}{Id. at 12.}

The CPUC’s 1998 ROW Decision 98-10-058 seeks to promote competition and allows CLECs to access investor-owned utility poles.\footnote{79}{Id. at 1.} That decision authorized CLECs, competitors to telephone companies, and cable television corporations to attach their facilities to jointly or singly owned utility poles. The CPUC’s ROW decision provides “facilities-based competitive local communications carriers (CLCs) and cable television (TV) corporations with nondiscriminatory access to utility poles, ducts, conduits, and rights-of-way."\footnote{80}{Decision Denying Google Fiber Inc.’s Petition to Modify Decision 07-03-014, Rulemaking 06-10-005, CAL. PUB. UTIL. COMM’N 2–3 (May 7, 2015) [hereinafter CPUC Decision 05-05-002] (discussing the scope of the CPUC’s 1998 ROW decision).} The CPUC has since expanded ROW access to other types of services such as video providers and commercial mobile radio services.

The 1998 ROW decision mandates access to certain types of utility infrastructure including poles and rights-of-way “owned or controlled by (1) large and midsized incumbent local exchange carriers, and (2) major investor-owned electric utilities."\footnote{81}{Id. at 3.} Parties may also enter into voluntary attachment arrangements under CA PU Code § 767.7(a)(3).\footnote{82}{Id. at 23.} Decision 98-10-058 authorizes the CPUC to arbitrate access disputes.\footnote{83}{See, e.g., CPUC Final Arbitrator’s Report, Crown Castle PG&E Arbitration, supra note 7, at 3 n.9.}

A utility pole attacher is “any person, corporation, or other entity or their agents or contractors seeking to permanently or temporarily fasten or affix any type of equipment, antenna, line or facility of any kind to a utility pole in the right of way or its adjacent ground space."\footnote{84}{BellSouth Telecomm., LLC v. Louisville/Jefferson Cty. Metro Gov’t, 275 F. Supp. 3d 833, 835 (W.D. Ky. 2017) (citation omitted).} A “Pre–Existing Third Party User” is “the owner of any currently operating facilities, antenna, lines or equipment on a pole or its adjacent ground space in the right of way,” while a “Pole Owner” is “a person, corporation or entity having ownership of a pole or similar structure in the right of way to which utilities . . . are located.”\footnote{85}{Id. (citation omitted).}
The CPUC’s Rights of Way decision promotes competition, service, and safety by increasing access to utility infrastructure and the property rights necessary to reach those facilities. This decision eliminates the utility pole owner’s freedom to refuse to deal with a third party whom the CPUC authorizes to attach to a pole. The CPUC’s competitive access policies limit a trader’s freedom to choose with whom to deal, while the lack of state supervision of the JPCs eliminate an antitrust law defense to any allegedly anticompetitive activities.

The CPUC Pole Census OII describes utility poles as contested spaces with significant safety implications. The Competition OII Decision recognized that “lack of access to poles and conduit is a critical obstacle to making the telecommunications market fully competitive.” The CPUC’s Competition OII Decision found that “[c]ompetitive bottlenecks and barriers to entry, including lack of access to poles, conduit and other legacy network infrastructure, limit new entrants and may raise prices for some telecommunications services above efficiently competitive levels.” It expressed concern about utility pole associations as a potential competitive bottleneck underscoring “the possibility that pole owners, individually or in pole associations, may be in position to exercise a type of bottleneck control that has the potential to exclude competitors.”

CPUC Administrative Law Judge (ALJ) Miles’ January 2019 Final Arbitrator’s Report regarding CLEC Crown Castle’s petition for CPUC arbitration of the dispute about its request to buy utility pole space from PG&E observed that, “by virtue of their incumbent status and control over essential ROW and bottleneck facilities, ILECs [incumbent local exchange carriers] and incumbent electric utilities have a significant bargaining advantage in

86. See CPUC Decision 98-10-058 or ROW Decision, supra note 73, at 1. See also United States v. Colgate & Co., 250 U.S. 300, 307 (1919) (“In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.”); cf. United States v. Parke, 362 U.S. 29, 45 (1960) (“The program upon which Parke Davis embarked to promote general compliance with its suggested resale prices plainly exceeded the limitations of the Colgate doctrine and under Beech-Nut and Bausch & Lomb effected arrangements which violated the Sherman Act . . . . Parke Davis used the refusal to deal with the wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers’ adherence to its suggested minimum retail prices.”).


88. CPUC Pole Census OII, supra note 10, at 14–18, 35.

89. CPUC Competition OII Decision 16-12-025, supra note 8, at 110.

90. Id. at 189.

91. Id. at 181.
comparison to CLCs [Competitive Local Exchange Carriers].” She emphasized that “a key principle of the [CPUC 1998] ROW Decision is that CLCs should have rights to obtain access to utility poles and support structures . . .” The CPUC is empowered to protect employee and public safety arising from use of utility distribution and transmission poles, including those owned by Publicly-Owned Utilities (POUs).

The CPUC adopted a decision in June 2020 in the utility pole census OII requiring the five major utility pole owners in California, Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Electric Company, Frontier Communications, and AT&T, to submit data on utility pole characteristics by June 2021.

The pole census and competition OII and OIR, 1. 17-06-027 and R. 17-06-028 remain open to consider remaining issues such as competitive access concerns including JPCs. This Article urges the CPUC to promptly use its authority to examine JPC rules, roles, and risks to public safety, competition and reliability.

III. SAFETY, RELIABILITY, AND COMPETITION; INTERTWINED VALUES FOR UTILITY POLE GOVERNANCE

Each a Gorgon’s head, which, seized right, Could stun us to stone.

- John Updike, “Telephone Poles”

On utility poles, safety, reliability, and competition meet. In 1922, the California Railroad Commission adopted General Order (GO) No. 64, regulating and authorizing inspection of overhead electric line construction.

Those rules have been revised several times and form part of the CPUC’s rules, orders, decisions, and resolutions.

92. CPUC Final Arbitrator’s Report, Crown Castle PG&E Arbitration, supra note 7, at 6; Decision 19-10-037, supra note 7, at 8 (“A key principle of D.98-10-058 (ROW Decision) is that CLCs [competitive local exchange carriers] should have rights to obtain access to utility poles and support structures at reasonable terms and prices which do not impose a barrier to competition.”)

93. Id.


98. CPUC Competition OII Decision 16-12-025, supra note 8, at 109–10.

99. CPUC General Order 95, supra note 40, at x (citing California Railroad Commission General Order 64, adopted May 1, 1922).
California Public Utilities Code § 451, first adopted in 1951, vests in the CPUC the duty to promote safe, reliable service, at just and reasonable rates, and to ensure that regulated entities operate with adequate facilities.100 CA PU Code § 701, also adopted in 1951, vests the CPUC with authority to “supervise and regulate every public utility in the State” and provides that the CPUC “may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”101

The CPUC’s rule governing overhead electric lines, GO 95, also applies to communications lines, utility poles, and attachments.102 GO 95 includes “standards for pole ‘loads,’ i.e., the weight and stress on utility poles from attachments and weather conditions (e.g., heat, wind), and inspection requirements for communications providers.”103 The CPUC adopted GO 95 to promote public safety, service reliability, and facilitate competition, as well as just and reasonable rates.104

Utility pole association members include cities, counties, municipal utilities, and several investor-owned utilities. The California Municipal Utilities Association (CMUA) argued that the CPUC “does not have broad generalized authority beyond public [investor-owned] utilities, and JPAs, such as NCJPA and SCJPC, are not public utilities.”105

The CPUC has broad jurisdiction over investor-owned utilities including jurisdiction over IOU electric transmission facilities to protect worker and public safety.106 Utility pole attachment, maintenance, access, and administration affect safety, competition, reliability, affordability, and achievement of California’s environmental and climate change objectives.

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100. CAL. PUB. UTIL. CODE § 451 (1977) (amending ch.764, §451, 1951 Cal. Stat. 2036) (“Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”).
101. CAL. PUB. UTIL. CODE § 701.
102. CPUC General Order 95, supra note 40, at xi, III-16.
103. Mulqueen, Brief Introduction to Utility Poles, supra note 2, at 6.
104. CPUC General Order 95, supra note 40, at x, xii, xiv–xv, E-2.
105. CMUA Comments, supra note 60.
106. CAL. CONST. art. XII, §§ 1–9; CAL. PUB. UTIL. CODE §§ 451, 701; Utilities and Industries, CAL. PUB. UTIL. COMM’N, http://www.cpuc.ca.gov/utilitiesindustries/ (last visited Sept. 15, 2019) (“The CPUC regulates privately owned electric, natural gas, telecommunications, water, and transportation companies. The CPUC also regulates the safety of both publicly and privately owned railroad and rail transit companies/agencies, and rail crossings. The CPUC serves the public interest by protecting consumers and ensuring the provision of safe, reliable utility service and infrastructure at reasonable rates, with a commitment to environmental enhancement and a healthy California economy.”); CMUA Comments, supra note 60; CPUC D.17-12-024, supra note 61, at 14 (citing CAL. PUB. UTIL. CODE §§ 8002, 8037, 8056).
A. The Role of JPCs in Just and Reasonable Rates

JPCs also affect affordability and rates. SCE’s 2015 General Rate Case (GRC) application proposed to accelerate utility pole maintenance or replacement to improve safety and reliability.\(^\text{107}\) Proceeding participant, The Utility Reform Network (TURN) observed that the SCJPC, “of which SCE is one of 33 members,” plays a role “in setting the rates for pole replacement and other costs.”\(^\text{108}\) SCE’s GRC application forecasted “$20.083 million in credits from joint users” for utility pole replacement, approximately 10% of the cost of proposed replacements.\(^\text{109}\) The CPUC’s GRC authorization directed SCE to “negotiate with joint users to reach efficient sharing of joint poles and safely provide electric service.”\(^\text{110}\)

The CPUC’s 2015 SCE GRC decision emphasized

. . . SCE and joint owners and renters should all recognize that we believe the costs of remediating overloaded joint poles should be allocated approximately in proportion to the causes of the overloading. SCE should seek to quantify the causes of pole loading, and attribute those causes among SCE, joint owners, and renters.\(^\text{111}\)

The Commission directed SCE to “develop solutions to remediate overloading while avoiding an allocation of costs that results in SCE ratepayers bearing a disproportionate share” and encouraged “SCE and other interested parties to expeditiously address these issues.”\(^\text{112}\) The CPUC’s decision recognizes joint pole owners’ responsibility for safety and reliability, and the relationship of pole attachments and rule compliance to rates.

PG&E reported in September 2019 that it had not recovered any contribution from any NCJPA member for the $3.5 million in costs that PG&E incurred for the work on hazardous trees near jointly-owned poles.\(^\text{113}\) PG&E’s GRC witness William Pender explained that PG&E’s contract with AT&T for “cost recovery” for expenses related to jointly owned poles expired in 2011 and has not been renewed.\(^\text{114}\) Pender reported that “AT&T informally agreed in an email exchange to reimburse PG&E approximately $700,000 for certain hazardous

\(^{107}\) See Decision on Test Year 2015 General Rate Case for Southern California Edison Company, Decision 15-11-02, CAL. PUB. UTIL. COMM’N at 131-32 (Nov. 5, 2015) http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M155/K759/155759622.PDF [hereinafter 2015 General Rate Case].

\(^{108}\) Id. at 128.

\(^{109}\) Id. at 135.

\(^{110}\) Id. at 136.

\(^{111}\) Id. at 138.

\(^{112}\) Id.


\(^{114}\) Id. at 15-3.
As Pender indicated, “[b]ased on AT&T’s past practice of accepting its allocated share of hazard tree removal work, PG&E had an expectation that AT&T would continue to pay its allocated share for work performed upon receipt of an invoice.”

After years of waiting for payments from AT&T which never arrived, PG&E cancelled $3.5 million in aging unpaid invoices in 2017 for work it believed was attributable to joint pole ownership expenses “in accordance with accounting guidelines for ageing unpaid invoices.”

PG&E’s witness, Pender, reported that NCJPA “requires a special agreement between the joint owners for recovery for hazardous tree removal costs.”

CPUC General Order 95 provides rules governing electric lines, poles, and attachments. Vegetation management and clearance requirements adopted through CPUC General Order 95 apply to “all overhead electrical supply and communication facilities that are covered by this General Order.”

The CPUC’s 2006 Decision 06-08-030 ended rate regulation for incumbent telephone companies, except for designated rural telcos regulated through a separate framework and fund. That CPUC decision aspired to create incentives for competition and innovation through rate regulation repeal for large telecommunications carriers.

115. Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. CPUC General Order 95, supra note 40, at I-3.
121. Id. at III-19.
122. See id. at III-19–III-20.
123. See Opinion in Order Instituting Rulemaking on the Commission’s Own Motion to Assess and Revise the Regulation of Telecommunications Utilities, Decision 06-08-030, CAL. PUB. UTIL. COM’N at 2–3, 7 (Aug. 24, 2006), http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/59388.PDF.
124. Id. at 7 (“The new incentive-based regulatory framework proved superior to the traditional rate-of-return (ROR) method of setting rates for the ILECs [incumbent local exchange carriers].”). Regarding the theories advanced to support the end of telecommunications rate regulation see e.g., National Rural Telecom Ass’n v. F.C.C., 988 F.2d 174, 178 (D.C. Cir. 1993) (“[b]ecause a firm can pass any cost along to ratepayers (unless it is identified as imprudent), its incentive to innovate is less sharp than if it were unregulated.”) Id. (“Firms can gain [from rate-of-return regulation] by shifting costs away from unregulated activities (where consumers would react to higher prices by reducing their purchases) into the regulated ones (where the price increase will cause little or no drop in sales because under regulation the prices are in a range where demand is relatively unresponsive to price changes). See Policy and Rules Concerning Rates for Dominant Carriers,
Rate deregulation does not end the obligation of telecommunications companies to provide safe and reliable service at just and reasonable rates with adequate facilities under CA PUB Code § 451.125 CPUC General Order 95 specifically applies to communications as well as electric companies.126 Rate deregulation renders costs to comply with CPUC rules such as GO 95 not directly recoverable through rates. Instead, companies must absorb those costs or pass them onto consumers in prices.

Rate deregulation does not excuse failure to comply with CPUC rules. Neither does it justify shifting regulatory compliance and safety costs to electric companies and their ratepayers or shareholders.

This Article recommends the CPUC act to ensure that electric ratepayers are not saddled with bills attributable to other joint pole owners or attachers. PG&E’s bankruptcy underscores the imperative of examining the write-off of $3.5 million in shared utility pole compliance costs. The CPUC has the authority and duty to analyze rate-shifting and rule compliance to protect public safety and ensure that rates remain just and reasonable.

B. CPUC Utility Pole Safety Regulation and JPCs

CPUC regulation of utility poles and attachments has increased since utility infrastructure maintenance and operation caused several major wildfires in 2007.127 On “October 21, 2007, three wooden utility poles broke and fell to the ground, and the downed lines sparked . . . [a] vegetation fire" which became the Malibu Canyon fire.128 In its 2008 adoption of rules to reduce fire hazards associated with utility poles, attachments, and overhead wires, the CPUC stressed the urgency of addressing safety issues as recent “wildfires in California may have been linked to electric and communications facilities and have resulted in widespread destruction.” 129

The CPUC’s Safety and Enforcement Division (SED) reported that violations of CPUC rules contributed to the Malibu Canyon fire, emphasizing: “(1) the utility poles were not in compliance with GO 95; (2) if they had been in compliance with GO 95 they would have been able to withstand the wind gusts; and (3) that violations of GO 95 were the direct cause of the Malibu Canyon Fire.”130 The CPUC’s Malibu Canyon Fire investigation found “instances of

Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 2924 (1989). Third, rate-of-return regulation is costly to administer, as it requires the agency endlessly to calculate and allocate the firm’s costs.”.

126. CPUC General Order 95, supra note 40, at III-19.
127. Mulqueen, Brief Introduction to Utility Poles, supra note 2, at 5.
128. Id. at 14.
parties: placing attachments on poles after being denied permission by the pole owner; using SCJPC rules to evade compliance with GO 95; and failing to fully respond to Commission investigations.”

The CPUC’s 1998 ROW Decision prohibits unauthorized pole attachments, establishes a fine for unauthorized attachments, and provides notice that the Commission may impose additional sanctions. Fires associated with utility pole attachment, maintenance, and administration highlight the imperative of the CPUC’s safety function and regulations.

CPUC Decision 13-09-026 criticized respondent telecommunications carriers in the Malibu Canyon Fire investigation who used “SCJPC rules to evade compliance with GO 95.” CPUC’s SED alleged that “at least one of the poles which fell and ignited the Malibu Canyon Fire was overloaded in violation of General Order (GO) 95 and California Public Utilities Code Section 451 (Pub. Util. Code § 451).” According to the SED, the respondents’ interpreted SCJPC rules “in a way that neglected compliance with GO 95,” contributed to the substandard pole.

In its analysis of the Malibu Canyon Fire investigation, the CPUC approved a settlement that stipulated wireless carrier “NextG used SCJPC procedures to request permission to attach facilities to Pole 252E. SCE denied the request based on SCE’s determination that NextG’s proposed attachment would overload the pole.” Later, “NextG contested the determination. After additional communications between NextG and SCE over an 11-month period, SCE again denied the proposed attachment.” In response, NextG informed SCE that it could not deny the request per Section 18.1-D of the SCJPC Routine Handbook, which provides that a proposed attachment is automatically approved if no protest or other request for review is received within 45 days. The CPUC NextG Settlement Agreement “stipulates that the . . . chain of events [leading to the Malibu Canyon fire] supports “the conclusion that the SCJPC process . . . was not conducive to ensuring that the subject poles were GO 95 compliant.”

The CPUC’s Malibu Canyon fire investigation and NextG settlement did not evaluate the SCJPC’s role in safety, reliability, and the CPUC’s exercise of its

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131. Id. at 15.
132. CPUC Decision 98-10-058 or ROW Decision, supra note 73, Appendix A, Section VI.D (Unauthorized Attachments).
133. Mulqueen, Brief Introduction to Utility Poles, supra note 2, at 15.
135. Id.
136. Id. at 17–18.
137. Id. at 18.
138. Id.
139. Id. at 18 (citations omitted).
responsibilities. Neither did the CPUC examine whether JPC rules and functions were consistent with GO 95 or CPUC safety and competitive access rules. In a 2017 update of GO 95 rules to accelerate the required timeframe to address GO 95 violations, several JPC members commented that “rules prohibiting unauthorized attachments already exist in contracts between parties, the Commission’s Right-of-Way Rules (“ROW Rules”), the Northern California Joint Pole Association Routine Handbook, and the Southern California Joint Pole Committee Routine Handbook.”

JPC handbooks are not submitted for CPUC review. They neither provide a basis for assessing compliance with CPUC safety rules and standards, nor does the CPUC owe any deference to JPC handbooks, rules, or procedures. The CPUC’s NextG Decision highlights the safety and reliability risks of JPC rules and their unsupervised function. Analyzing whether the JPC’s role and rules protect safety requires public transparency about JPC rules and conduct.

In 2015, the CPUC’s SED issued a citation against PG&E for failing to maintain vegetation near overhead electric lines, a failure that CalFire found caused the Butte fire in Calaveras and Amador Counties in California on September 9, 2015. Situated in a high fire threat area ranked as Tier 2 fire risk, the Butte Fire “burned more than 70,000 acres (106 square miles), destroyed an estimated 921 structures, and resulted in two fatalities” in September 2015.

The CPUC updated GO 95 in December 2017 to protect public safety and promote prompt compliance with the CPUC’s rules by adding protocols and priority for utility infrastructure in high fire threat areas. Following the devastating wildfires in 2017, the CPUC imposed a 60 month timeline to address Level 3 risks—defined as an acceptable safety or reliability risk, but a violation of CPUC GO 95—a category that previously had no set deadline. In May 2018, following the destructive 2017 wildfire season that included the Wine Country and Ventura County fires, the CPUC adopted Decision 18-05-042 to shorten to 36 months the time allowed to address Level 2 safety or reliability

140. CPUC D.17-12-024, supra note 61, at 39.
141. Citation Issued Pursuant to Decision 16-09-055 to Pacific Gas and Electric Company, Citation # D.16-09-055 E.17-04-001, CAL. PUB. UTIL. COMM’N 1 (Apr. 25, 2017) https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/News_Room/E1704001 E2015091601Citation20170425.pdf.
142. CPUC D.17-12-024, supra note 61, at 58 n.50.
143. Id. at 2–3.
144. Id. at 2, 4.
issues for utility pole attachments (classified as non-immediate, high to low risk to safety or reliability).

The California Department of Fire and Forestry (CalFire) Investigation of the 2017 Wine Country fires found that PG&E infrastructure and operations caused 17 of those fires. CalFire found that the Sulfur Fire in Lake County was caused by utility pole failure, but has provided no public details to date on the pole failure cause.

My faculty blog post observed in January 2019 that “[n]either Cal Fire nor the CPUC’s reports to date have explained why the utility pole failed in Lake County. Neither have they explained the cause of the electric distribution issue in the Sonoma County “37 fire.” My blog recommended the CPUC “announce its process to examine the cause of these failures and take immediate steps to make sure they are not replicated” to avoid public safety threats such as Southern California Edison’s report that it appeared that a telecommunications lashing wire may have hit an electric line, sparking the Silverado fire in Orange County, California in October 2020. Such analysis and explanation by the CPUC and CalFire is urgently needed to ensure public safety as climate change lengthens fire season and ferocious fires threaten public safety.

Throughout my six-year term as a CPUC Commissioner from January 2011 to January 2017, I highlighted the imperative of CPUC action to promote utility pole and attachment safety, as well as competition, service reliability, affordability, access to utility service, and achievement of California’s

146. Decision Approving a Settlement Agreement That Amends Rule 18 of General Order 95, Decision 18-05-042 (Rulemaking 16-12-001), CAL. PUB. UTIL. COMM’N 2 (May 31, 2018) http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M215/K320/215830213.PDF.


148. CalFire Cause of 12 Fires, supra note 147.


150. Id. Letter from Southern California Edison to CPUC webmaster, Oct. 26, 2020, regarding Electric Safety Incident Reported- Company Incident No:201026-13677 (regarding the October 2020 Silverado fire in Orange County, California, Southern California Edison reported it “appears that a lashing wire that was attached to an underbuilt telecommunication line may have contacted SCE’s overhead primary conductor which may have resulted in the ignition of the fire.”), https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2020/Oct%2026%202020%20SCE%20Incident%20Report%20for%20Silverado%20Fire.pdf.
environmental goals. I led several utility pole tours during my service as a CPUC Commissioner and organized a pole tour in 2018 after rejoining academia. Ivan Penn, writing for the New York Times, described the utility pole tour I organized in the San Jose, California area in May 2018:

On a recent walking tour in San Jose, the state’s third-most populous city, a former state regulator showed the issues that are raised when the wooden poles that hold power lines and communication cables are not attended to. Some cable lines dangled in front of houses. Workers had tied some wires to the poles with rope—a violation noted by the tour’s guides. Power lines ran through thickets of trees to connect to houses. Some resembled odd Christmas trees, with wires, a street lamp, a cable box and ropes, all supported by a single pole. And even with the array of things connected to the poles, some lack proper support. A wire from one pole along the route had even caused a brush fire next to a home when it fell to the ground in April. ‘Overloaded poles have caused wildfires,’ said Catherine Sandoval, the former regulator who had organized the tour, Regulatory, academic, and public scrutiny of JPC standards, rules, and procedures is critical to public safety as “pegs,” or “buddy poles”—portions of old poles left attached to new poles—create safety hazards and thwart competitive access to utility poles.

CalFire determined that facilities on PG&E’s aging transmission pole, planted in 1919 when Woodrow Wilson was President of the United States, caused the Camp Fire that killed 84 people, caused grievous bodily injury to two other civilians and a fire fighter, and destroyed more than 18,800 structures in and

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151. Michelle Waters, Law Professor and Former CPUC Commissioner Catherine Sandoval to Lead Utility Pole Safety Tour in San Jose, SANTA CLARA UNIVERSITY SCHOOL OF LAW (May 17, 2018), https://law.scu.edu/faculty/profile/sandoval-catherine/.

152. See, e.g., Decision Granting Application Subject to Conditions and Approving Related Settlements, Decision 15-12-005, Cal. Pub. Util. Comm’n (Dec. 3, 2015) (Sandoval, concurring) (describing for the proceeding to evaluate the transfer of Verizon’s wireline assets to Frontier including the eleven workshops held in towns spanning 1,000 miles including utility pole tours. The proceeding highlighted the need for Verizon to come into compliance with the CPUC’s rules regarding maintenance of poles, wires, and conduits (General Order 95), and the CPUC’s operational service rules (GO 133-c), and ordering that compliance); see Catherine Sandoval, Comments for CPUC Utility Pole Census and Competitive Access Order Instituting Investigation, 17-06-027, California Public Utilities Commission Public Participation Hearing (May 21, 2018), https://1x937u16qca1vneji2hj4j-lwpengine.netdna-ssl.com/wp-content/uploads/CPUC-Pole-Census-OII-Professor-Sandoval-presentation.pdf [hereinafter Sandoval, Comments for CPUC Utility Pole Census OII].


154. See Sandoval, Comments for CPUC Utility Pole Census OII, supra note 152.
near Paradise, California in November of 2018.\textsuperscript{155} PG&E’s February 2019 Securities and Exchange Commission filing disclosed “it is probable that its equipment will be determined to be an ignition point of the 2018 Camp Fire.”\textsuperscript{156} PG&E reported “a broken C-hook attached to the separated suspension insulator that had connected the suspension insulator to a tower arm, along with wear at the connection point. In addition, a flash mark was observed on [the] Tower,” which is believed to be the Camp Fire’s ignition point.\textsuperscript{157} In May 2019, CalFire confirmed that PG&E’s electrical transmission lines caused the Camp Fire, California’s deadliest and most destructive fire.\textsuperscript{158} The magnitude of loss of life and destruction in the Camp Fire underscores the need for searching analysis of utility infrastructure governance and management, including examination of JPC rules and function.

PG&E’s Wildfire Safety Plan filed in February 2019 underscores the importance of utility poles and the facilities attached to them as drivers of wildfire risk and safety issues.\textsuperscript{159} PG&E identified the major drivers of 414 fire events between 2015-2017 and reported that vegetation contact with conductors (electric wires) attached to utility poles was the primary wildfire driver, causing 49% of ignitions.\textsuperscript{160} Conductor failure drove 11% of ignitions; failures of “line equipment, such as: poles, insulators, transformers, and capacitors” drove 11% of ignitions; while equipment failure including conductors, splices between segments of wire, and other connecting hardware drove 5% of ignitions.\textsuperscript{161} All of this equipment is attached to utility poles, and pole failures can cause fires and other hazards.

PG&E’s 2020 GRC application proposed to replace 940 overloaded poles between 2018 and 2022 at a projected cost of $15.6 million.\textsuperscript{162} PG&E Workpapers supporting this proposal did not explain why those poles were overloaded. PG&E stated that its proposal was “targeting poles that are

\begin{itemize}
  \item \textsuperscript{157} Id.
  \item \textsuperscript{158} CAL FIRE Investigators Determine Cause of the Camp Fire, CALIFORNIA DEP’T OF FORESTRY AND FIRE PROT. (May 15, 2019), https://calfire.ca.gov/communications/downloads/newsreleases/2019/CampFire_Cause.pdf.
  \item \textsuperscript{160} Id.
  \item \textsuperscript{161} Id.
  \item \textsuperscript{162} Pacific Gas & Electric Company 2020 General Rate Case Prepared Testimony Exhibit (PG&E-4) Electric Distribution Chapters 1–10 Volume 1 of 2, 8-20 (Dec. 13, 2018).
\end{itemize}
potentially overloaded or significantly degraded and not expected to pass their next intrusive inspection, based on increasing degradation discovered during the previous inspection.”

To address the confluence of high wildfire risk and overloaded poles PG&E proposed that Tier 3 High Fire Threat District areas “are the first priority for accelerated retirement, to minimize additional risk of these poles failing prematurely in-service.”

PG&E reported to the CPUC in 2018 that most of its utility poles are more than forty years old. In 2018 PG&E had 2.247 million wooden utility poles in its territory: 979,805 of which were under 40 years old; 1,151,768 were over 40 years old; and PG&E reported that no age information was available for 128,853 wooden poles.

The life of a distribution pole “is generally considered to be on the order of 40 years,” according to PG&E’s 2016 GRC testimony. Despite PG&E’s understanding of a distribution pole’s expected life of service, more than 1.2 million of PG&E’s poles were over 40 years old or lacked any age information.

In addition to pole age, pole overloading and maintenance can create safety and reliability risks. As the CPUC emphasized, “[o]verloaded poles present a significant safety hazard and reliability risk.” The CPUC’s 2015 unanimous approval of SCE’s GRC in Decision 15-11-021 found that “nearly 19%, of poles reviewed in SCE’s PLP [Pole Loading Program] study are overloaded, and specifically failed the bending analysis. The study suggests similar failure rates in SCE’s total population of poles. SCE proposes to replace these poles.”

Decision 15-11-021 noted that “3% of poles in the study are overloaded and could be repaired through addition or repair of guy wires.”

With increased fire risk in California due to climate change, and after more than 5 years of drought between 2012 and 2016 which fueled fires through

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163. Id. at 8-19.

164. Id.


166. Id.


168. PG&E Spending Accountability Report, supra note 165, at B3-44.

169. 2015 General Rate Case, supra note 107, at 142.


171. Id.

172. Governor Newsom’s Strike Force, supra note 14, at 1.

diseased trees and dry brush even after the drought ended, it is imperative that the CPUC review JPC roles and rules. The CPUC must examine the JPC process, its membership rules, unpublished handbooks, and function, and take appropriate steps to protect public and worker safety.

Lack of public access to JPC rules stymies competitive access, limits regulatory effectiveness, and creates public safety risks. The Competitive Telecommunications Association (CALTEL) commented in June 2019 that most of its members lease pole access and are not joint owners. 174 CALTEL emphasized that “while some of these members may have access to Joint Pole Association process and procedure documentation, this information is not publicly available.” 175 CALTEL argued that two years after the CPUC opened the utility pole census and competitive access proceeding “no progress has been made to improve competitive access to poles and conduits. CALTEL members continue to face significant delays and excessive costs in ways that both associations have explained extensively in prior comments.” 176

The JPCs’ lack of state or other government supervision creates safety risks the CPUC, insurance regulators, and California’s legislature and Governor must evaluate. PG&E’s insurance was insufficient to cover its 2017-2018 liabilities for fires associated with its infrastructure maintenance and operation. 177 Fire risks have driven up rates for homeowners and businesses in high wildfire danger areas, leading some companies to cancel homeowner policies. 178 JPCs erect barriers to regulation and utility operation, fueling safety and insurance risks.

A homeowner can clear the brush near her house to reduce fire risks to her home. A utility pole wrapped in dead vines stretching into the pole’s electric space such as a pole I observed in May 2019 in a Tier 3 high wildfire danger area of Los Gatos, California creates fire, electric, 9-1-1 and communications access risks a homeowner cannot mitigate. The utility pole tour I organized in May of 2018 with the CPUC revealed many more examples of poor utility pole maintenance, safety, and reliability risks in plain view on San Jose, California’s sidewalks. 179

175. Id.
176. Id.
179. See Sandoval, Comments for CPUC Utility Pole Census OII, supra note 152; Sandoval, Principles for Utility Regulation in the Face of Increasing Wildfire Risk, supra note 19.
Utility pole owners and users have a legal duty to address and mitigate safety. The CPUC, IOUs, JPCs and their members, California’s insurance commissioner, legislature, and Governor must promptly analyze and address these risks. That risk analysis should begin with examination of JPC functions and rules.

The following section analyzes public information about JPC roles and competitive significance. The CPUC’s request for comment on the JPC’s function and what, if any, role they should play in a utility pole census and database, accentuates the CPUC’s lack of supervision over the JPCs.

IV. JPC INCUMBENT VETO RULES ADOPTED BY THE NCJPA DURING THE CPUC 1998 RIGHTS-OF-WAY PROCEEDING

*Our eyes, washed clean of belief*[^180]  
- John Updike, “Telephone Poles”

A. NCJPA 1998 Agreement Adopts Supermajority Quorum and Voting Requirements to Consider New Members

During the pendency of the CPUC’s ROW proceeding and prior to the CPUC’s October 1998 ROW decision, the NCJPA adopted a new agreement in January 1998 replacing its 1960 “Black Book.”[^181] The 1998 NCJPA agreement imposed a supermajority quorum and voting requirement for consideration and approval of new members.[^182] NCJPA’s 1998 agreement ensured that incumbents could exercise veto power over prospective members regardless of any rules the CPUC adopted to foster competitive access in the ROW proceeding.

The City and County of San Francisco, a NCJPA member, posted the NCJPA 1998 Agreement on the internet through the City’s Bureau of Public Works.[^183] The SCJPC articles of incorporation, by-laws, and other governance documents have not been made public. The JPCs’ lack of non-profit status or government sanction for their role casts a veil over JPC rules and functions. Utility pole association members include several investor-owned utilities providing electric and communications services, local governments, and municipal utility districts.[^184] PG&E is a NCJPA member, SCE is a SCJPC member, while San Diego Gas & Electric (SDG&E) is not a JPC member.[^185] JPC members include

[^180]: JOHN UPDIKE, TELEPHONE POLES AND OTHER POEMS, supra note 1.
[^181]: NCJPA Agreement, supra note 20, at 1.
[^182]: Id. § 7(a), at 9.
[^183]: Id. at 21.
[^184]: Simms, supra note 21, at 4.
[^185]: Comments Of Southern California Edison Company (U 338-E) On ALJ Mason’s January 31, 2019 Ruling Requesting Comments On The Role Of Joint Pole Associations In Acting As Clearinghouses For Pole Location, Ownership, Attachment, And Access Information,
major telecommunications and internet carriers including AT&T, Frontier, and Comcast, and many CLECs. The CPUC’s 2020 decision in the utility pole census proceeding notes that “SDG&E, SCE, PG&E, Frontier, and AT&T are the five pole owners who, collectively, own between 85-90% of the 6+ million electric and communication utility poles in California.”

This Article contends that the NCJPA’s supermajority quorum and voting requirements, as well as other aspects of the JPC process and function, thwart the intent of the CPUC’s 1998 ROW decision to promote competitive access to utility poles. NCJPA and SCJPC member comments to the CPUC indicate that JPC membership is critical to utility pole access and maintenance necessary to offer communications and electric service. Analysis of the NCJPA’s quorum and voting rules, and JPC organizational function, highlight the JPCs’ competitive significance and concerns about their effect on competition, safety, and reliability.

B. NCJPA Supermajority Quorum and Rules to Consider New Members

To consider and approve a new membership application, NCJPA rules require a quorum of at least three fourths (3/4) of all the Parties of the Association and a vote in favor of the motion by at least three fourths (3/4) of all such Parties. The absence of enough incumbent members prevents formation of a quorum and stalls a new member’s application until a quorum is formed. The NCJPA agreement provides, “[e]ach Party shall have one representative on the Administrative Board, and each representative shall have one vote.”

The Association requires that a “[q]uorum must be present before the Association may conduct official business,” and defines a quorum for the consideration of new business as representation of at least 3/4 of all the association’s members. A majority vote is only available for matters noticed 10 days in advance of the meeting or if that “same matter was discussed at the last meeting and is being acted upon as unfinished business at a duly convened meeting, of the Administrative Board.”

Per the NCJPA agreement, “[n]ew business may be brought up at a meeting and finally passed upon at the same meeting unless at least three fourths (3/4) of
all the Parties of the Association are represented and at least three fourths (3/4) of all such Parties vote in favor thereof.** A membership application constitutes new business, triggering the requirement of a quorum of 3/4 of all of the parties to the agreement, unless discussed at the previous meeting. New business requires a vote in favor of admission by 3/4 of the members. The supermajority quorum and voting requirement pose high barriers to membership and utility pole access for NCJPA applicants.

NCJPA applies this supermajority standard to proposals to amend its agreement, including new membership criteria or administrative practices and policies.

The affirmative vote of at least three quarters (3/4) of the Parties, which may be by written consent delivered within six (6) months of the initial action of the Administrative Board on such matter, is required to amend this Agreement, adopt or modify the By-Laws, or make changes in the Membership or administrative practices and policies.** The requirement for a vote of three quarters of the members to change the by-laws, organization’s agreement, or voting procedure erects high barriers to making those changes.

CPUC Communications Division staff member Robert Wullenjohn reported to the CPUC in 2016 that major members of the NCJPA, including PG&E, AT&T, and NCJPA, agreed to change some of NCJPA’s membership forms to conform to CPUC eligibility rules for pole attachment.** Wullenjohn reported that the NCJPA had difficulty convening a supermajority quorum to hold a vote to consider changes the utilities’ regulator recommended.**

NCJPA membership is open only to “a Utility which conducts business within the Operating Boundaries . . . “** NCJPA’s 1998 agreement defines a utility as:

A governmental or private entity or federally regulated cooperative which uses poles in the provision of communications, electric power, transportation or other utility services for sale or resale to the public, directly or indirectly, and, if a private entity, holds all necessary federal, state or local authorizations, such as a Certificate of Public Convenience and Necessity (“CPCN”) from the California Public Utilities Commission (“CPUC”).**
NCJPA requires prospective new members to furnish NCJPA with “proof of federal, state or local authorization, such as a CPCN, if required.” NCJPA also requires new members to have appropriate insurance, agree to the membership rules upon admission, pay the application fee and assessments, and “[m]aintain the personnel, equipment and resources necessary for the repair, maintenance or replacement of its facilities on Jointly Owned Poles or furnish proof that it has contracted for such services, with an entity or entities approved by the Administrative Board.”

NCJPA limits membership to entities licensed by the state or federal government to offer utility services and occupy pole space. These criteria recognize the threshold role of government regulation in determining who can occupy utility pole space. Yet, NCJPA’s new membership quorum, voting requirements, and membership criteria subject prospective pole occupants to conditions created through incumbent pole owners’ and occupants’ agreement.

NCJPA’s rules and procedures can delay prospective members’ access to utility poles necessary to deploy competitive services. Delay or failure to grant JPC membership limits ability to participate in JPC cost and information sharing and the JPC standard-setting process. The requirement for JPC membership to access the information and procedures maintained and developed by the JPCs reveals their competitive significance. Through agreements between incumbent competitors, JPCs act as gatekeepers to California’s utility pole access market.

The CPUC should promptly examine whether such concerted action by incumbents is inconsistent with CPUC decisions promoting competitive access, safety, and reliability. State and federal competition authorities should examine whether these agreements and JPC functions violate state and federal antitrust and unfair competition laws.

C. Supermajority Quorum and Voting Requirements for Prospective New Members Restrict Pole Access, Raising Utility Regulation and Antitrust Concerns

CPUC rules create a duty for utilities who own utility poles, including telecommunications companies, to deal with rivals and third-parties the government deems eligible to attach to utility poles. Agreement between competitors to raise barriers to access for a competitive resource deemed open to competitors by the regulator raises antitrust concerns under Sherman Act Section 1 which prohibits conspiracies in restraint of trade. The CPUC and

197. *Id.* § 6(B)(4), at 8.
198. *Id.* §§ 6(a)–(b), at 6–8.
199. *Id.* § 2(x), at 3.
201. Pac. Bell Tel. Co. v. LinkLine Commc’ns, Inc., 555 U.S. 438, 448–50 (2009) (“[I]f a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous.”); Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 401–16 (2004) (where Verizon was required
the California Attorney General’s Office should examine whether JPC rules and
d function are inconsistent with California’s policies to promote competitive
access to utility poles, as well as CPUC safety rules.

Firms with a regulatory duty to deal with competitors cannot escape that duty
by placing assets under the veto power and effective control of an association of
incumbent competitors. Through competitors’ collective action, JPC
membership rules erect barriers to accessing an asset the utility regulator gives
them permission to use. Such conduct limits consumers’ ability to realize
competition’s benefits.

NCIPA’s supermajority voting requirements resemble terms recognized as so
anticompetitive that associations such as the Associated Press and Realty Multi-
List, Inc. dropped similar terms before a federal antitrust trial. Nearly one
hundred years after Samuel Morse first used wooden poles to support telegraph
lines and service, the by-laws of the Associated Press faced scrutiny under the
Sherman Antitrust Act adopted in 1890. The Associated Press by-laws gave
incumbent members “veto power over the applications of a publisher who was
or would be in competition with the old member,” a veto that could be
overridden only by a vote of four-fifths of all the members.

The Supreme Court’s 1945 Associated Press v. U.S. decision held that
“arrangements or combinations designed to stifle competition cannot be
immunized by adopting a membership device accomplishing that purpose.”
Associated Press condemned “restrictive clauses on admissions to membership”
and rules that “prevented service of AP news to non-members.”

Competitors and firms vying for access to the same critical competitive
resource—utility poles—face the barriers erected by NCIPA’s supermajority
quorum and voting rules. Concerted action to develop and implement those
rules raises questions about whether JPCs have violated Sherman Act § 1
through: (1) a combination and conspiracy in restraint of trade and commerce in
news among the states, or (2) an attempt to monopolize a part of that trade.

by statute to lease its network elements at wholesale rates, competitor’s allegations of Verizon’s
denial of access to interconnection support services which caused them insufficient assistance
abilities were not a violation under Section 2 of the Sherman Act because Verizon had no antitrust
duty to deal with rival services).


203. Associated Press v. United States, 326 U.S. 1, 10–11 (1945); United States v. Realty
Multi-List, Inc., 629 F.2d 1351, 1354, 1358, 1366 (5th Cir. 1980).

204. Mulqueen, A Natural History of the Wooden Utility Pole, supra note 4, at 5 (Morse’s
partners suggested that the quickest way to complete the [Congressionally-funded demonstration
project to construct telegraph service from Washington D.C. to Baltimore] would be to string
telegraph wires overhead on trees and wooden poles.”).

(1890)).


207. Id. at 19

208. Id. at 21.
NCJPA’s rules do not expressly prevent dealing with non-members as AP’s rules did. NCJPA rules, however, allow a minority of incumbents to block new competitors from joining by failing to attend a voting meeting so a quorum is not formed and the voting requirement for new member admission is not met. Neither public utility law nor competition law entitle JPCs or its members to thwart CPUC competitive access policies and safety rules. NCJPA and SCJPC rules merit scrutiny under state public utility law, federal antitrust and state competition law that prohibits unfair business practices.  

**D. JPCs Lack Non-Profit Status, Are Not Government Agencies, and Are Not Actively Supervised by the CPUC or Any State Agency**

The rules and function of the JPCs have been difficult for non-members and regulators to discern since the JPCs operating in California are not incorporated as non-profits whose bylaws and reports are publicly accessible. Neither are the JPCs government run or supervised. NCJPA’s 1998 Agreement defines the organization as “[t]he 1998 Northern California joint Pole Association: A non-profit organization to be formed and supported by the Parties to accomplish the purposes set forth herein.” The City of San Francisco adopted an ordinance on October 29, 2007 joining the NCJPA’s 1998 agreement. That ordinance described the NCJPA as a “non-profit association of electrical utilities, telephone companies, cable television providers, irrigation and utility districts, and municipal utilities whose sole purpose is to administer the shared ownership, maintenance, use, setting, replacement, dismantling, abandonment or removal of jointly owned utility poles.”

More than twenty-three years after the 1998 NCJPA’s agreement’s adoption, the NCJPA has not submitted a public filing with any state to form a non-profit. A search of the ProPublica database, the California Secretary of the State’s Office website, and the California Attorney General’s website in December 2018, September 2019, and June and December 2020, and February 2021 found no non-profit organizations in the name of NCJPA, nor SCJPC, with or without abbreviation. If JPCs were non-profits their by-laws and other reports would be publicly available to provide operational transparency and tax-exemption eligibility.

SCJPC has filed federal taxes for several years, and links to its returns since 2004 are available on the ProPublica database. ProPublica reports that SCJPC

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209. See CAL. BUS. & PROF. CODE § 16700 (commonly known as the Cartwright Act); CAL. BUS. & PROF. CODE § 17200 (prohibiting unlawful, fraudulent, or unfair business acts or practices).
210. NCJPA Agreement, supra note 20, § 2(b), at 2.
211. Sandoval, Contested Places, Utility Pole Spaces, supra note 55.
213. ProPublica NCJPA search finding no such non-profit, supra note 23; Search Query for Northern California Joint Pole Association, supra note 23.
214. ProPublica Southern California Joint Pole Committee search, supra note 23.
filed taxes as a non-profit under tax code designation 501(c)(12), applicable to “irrigation companies, telephone companies, etc., which have a mutually beneficial nature.” Yet, a search of the California Attorney General’s and California Secretary of State’s Office websites found no non-profit registration for SCJPC, a prerequisite to a non-profit tax exemption for state taxes. The absence of state non-profit status raises a question about whether the SCJPC owes California state taxes, or claims some other exemption from filing and reporting requirements.

No federal or state tax filings were found for NCJPA or under the name of the Northern California Joint Pole Association through a search of the ProPublica website on September 9, 2019 and on June 11, 2020, December 26, 2020, and February 6, 2021. Since NCJPA does not appear to be registered as a non-profit with the State of California, a prerequisite to non-profit tax-exempt status for California taxes, the absence of such filings raises questions about whether NCJPA owes federal and state taxes.

NCJPA represented itself to the CPUC in March 2017 as a “non-profit organization formed to be formed,” though the NCJPA had not filed for non-profit status. NCJPA Interim Operations Manager, Tina Simms stated in her remarks and PowerPoint presentation in March 2017 at the CPUC workshop on utility poles that NCJPA was “[a] non-profit organization formed to be formed and supported by the Parties [Members] to accomplish the purposes [Cost Sharing] set forth within the Agreement.” Simms’ characterization of the NCJPA as “formed to be formed” as a “non-profit organization,” raises an issue about whether the NCJPA misrepresented itself before the CPUC and to the public.

215. Id.


217. ProPublica NCJPA search finding no such non-profit, supra note 23; Search Query for Northern California Joint Pole Association, supra note 23.


220. Id.; see infra Table A.

221. Id.
Table A: Presentation by Tina Simms, NCJPA Interim Operations Manager to the CPUC

Key NCJPA Purpose Descriptions

**Northern California Joint Pole Association (NCJPA):** A non-profit organization formed to be formed and supported by the Parties [Members] to accomplish the purposes [Cost Sharing] set forth within the Agreement.

**Authorization - Joint Pole Authorization – (Form JPA 2-1) [aka “JPA, Intent, Form 2”]:** A document used for proposing and approving work [and associated cost of work] on Jointly Owned Poles, or used to propose the placement of jointly owned Poles or their apparatus or equipment, or to propose joint Ownership of a solely owned pole.

**Billing Cycle’ (Form #2-1 Final):** The time period during which JPA Authorizations are accepted for billing at the Association, as set by the Association. The end of one Billing Cycle is also the beginning of the next Billing Cycle.

This Article recommends the CPUC issue an Order to Show Cause to the NCJPA and its members to determine whether NCJPA misled the Commission and the public about its legal status in violation of CPUC Rules of Practice and Procedure 1.1. That rule requires respect for the CPUC and that those who appear before the CPUC never “mislead the Commission or its staff by an artifice or false statement of fact or law.” A misrepresentation or artifice to deceive the CPUC would violate CPUC Rule 1.1. The CPUC should take appropriate steps to protect the integrity of the Commission’s proceedings and respect for its rule, orders, decisions, and resolutions.

Simms’ characterization of the NCJPA as “formed [sic] be formed” as a “non-profit organization” when it has not applied for or obtained non-profit status appears to be more than a typo in light of the 1998 Agreement’s statement that NCJPA will be formed as a non-profit. NCJPA may have also represented itself to the City and County of San Francisco as a non-profit, as evidenced by San Francisco’s ordinance adopting the 1998 Agreement upon NCJPA’s insistence that doing so was necessary to maintain membership.

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222. Id.

223. Cal. Code Regs. tit. 20, § 1.1 (“Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.”).

224. NCJPA Agreement, supra note 20, § 2(b), at 2.

Representing NCJPA as “formedto [sic] be formed as a non-profit” has competitive significance. Asserted non-profit status may induce public or private entities to join NCJPA since non-profits have reporting and accountability mechanisms and do not pay taxes. Municipalities may be attracted to NCJPA because of the revenues that can be produced by attachers and deals NCJPA may facilitate. Desire for a municipal revenue source does not entitle public entities to erect barriers to competition that violate state and federal antitrust and unfair competition laws, and CPUC rules and policies to promote competitive utility pole access.

JPC public and private sector members should examine the JPCs’ lack of non-profit status and the organizations representations about their non-profit status. Representations about NCJPA’s planned or actual non-profit status may have been intended to deter more robust oversight of NCJPA and to attract government and utility members.

Persuading pole owners including municipalities and POUs to join NCJPA puts utility poles, including those owned by municipal and irrigation district members, under NCJPA rules including its incumbent member veto rules. Google was able to gain access to poles in Palo Alto in 2016 when it planned to deploy Google Fiber because the Palo Alto municipal utility district was not a NCJPA member.226 In areas where utility poles are put under NCJPA or SCJPC control, prospective utility pole attachers or owners face the gauntlet of JPC membership requirements and rules. JPC members who are competitors in the utility pole access market could delay or block access to IOU or publicly owned poles by not attending meetings to consider new members or voting to deny membership.

Several JPC members characterized the organization as producing benefits such as cost and information sharing and coordinating pole access and maintenance work.227 Yet, NCJPA membership by municipalities such as the City and County of San Francisco puts its infrastructure under the veto power of other NCJPA members and subjects pole access to NCJPA rules that have not been publicly vetted.

JPC rules to access membership benefits remain opaque, without government supervision, and without immunity to utility, unfair competition, or antitrust regulation. The risks to safety and competition JPCs create merits further analysis under antitrust law and unfair competition law, and CPUC review of inconsistency between JPCs rules and function and CPUC safety and competition decisions. The City of San Francisco offered to buy PG&E’s

226. Ethan Baron, Google Fiber Suspended in San Jose and ‘Most’ Other Planned Cities; Alphabet Unit CEO Quits, SAN JOSE MERCURY NEWS (Oct. 26, 2016), https://www.mercurynews.com/2016/10/26/google-fiber-suspended-in-san-jose-and-most-other-planned-cities-alphabet-unit-ceo-quits/ (“Planning in San Jose had advanced to the point that Google Fiber had in May received final permits for a three-year construction project, to start two months later in July.”).

227. See discussion infra Section V.
electric infrastructure assets in the city to increase local control over utility operations, a proposition PG&E rejected. As San Francisco and other areas served by PG&E evaluate their options following PG&E’s emergence from bankruptcy in summer 2020, they should examine the role of the NCJPA in safety and competitive access.

This Article recommends that the California Attorney General’s Office examine the NCJPA’s representation to the public, the CPUC, prospective and current members about their non-profit status. Representing itself as a non-profit “formed to [sic] be formed” as NCJPA did at the CPUC’s March 2017 workshop provides false comfort to public entities and the public that NCJPA operates in a neutral and accountable manner. Those representations may have induced municipalities and utilities to join NCJPA and put more poles under NCJPA’s control, rules, and opaque procedures.

The California AG’s Office should determine if NCJPA’s representations about its alleged impending non-profit status over the past twenty-three years constitutes an unfair, deceptive, or fraudulent practice under California Business and Professions (“B&P”) Code § 17200. NCJPA representations about its non-profit status despite the lack of any such filing and its rules should also be examined under the Cartwright Act Cal. Bus. & Prof. Code § 16700, which prohibits unfair competition.

V. THE ROLE OF UTILITY POLE ASSOCIATIONS

*They will outlast the elms.*

- John Updike, “Telephone Poles”

A. JPC Roles, Function, and Competitive Significance

As part of the CPUC investigation and rulemaking initiated in June 2017 to determine whether to order a utility pole census to protect safety and competition, the CPUC has been examining the function of JPCs. In January


232. CPUC Pole Census OII, *supra* note 10, at 6–7, 41 (“[W]e will consider the question of pole and conduit management more generally, including (a) rules specifically related to conduit access; (b) procedures to facilitate data sharing; (c) the role played by the Southern California Joint Pole Committee (SCJPC) and the Northern California Joint Pole Association (NCJPA) in acting as a clearinghouse for pole location, ownership, attachment, and access information; and (d) possible
2019, CPUC ALJ Mason issued a ruling requesting comment on JPC functions and their role as a clearinghouse for utility pole records. Analysis of JPC roles and risks is important to assessment of JPCs’ competitive significance and effect on safety and reliability.

JPCs put themselves at the heart of utility pole access, maintenance, and information markets. The California Appellate Court for the Sixth District noted in 2018 that “the Northern California Joint Pole Association controlled access to the utility poles, and access was available only if all of those using the pole agreed and the pole would not be overloaded by additional equipment.”

JPC members described the organization as an “administrator of records involving the sale and purchase of equity interest, and shared maintenance costs, in jointly owned poles.” As NCJPA’s website states, “[m]embers of the Association make a voluntary joint undertaking to share expenses regarding ownership, maintenance, use, setting, replacement, dismantling, relinquishment or removal of jointly owned poles.” NCJPA explains that its function “is to calculate the values of each transaction based on each year’s authorized costs agreed upon by all members.”

PG&E’s characterization of the NCJPA’s role cited the Association’s cost-sharing function described in the 1998 NCJPA agreement. Yet, PGE admitted in September 2019 that it had written off $3.5 million debts attributable to NCJPA member AT&T for joint ownership vegetation management and other expenses due to non-payment, though AT&T had agreed via emails to reimburse those costs. PG&E’s testimony about its $3.5 million write-off of vegetation management costs it attributed to AT&T calls into question the effectiveness of adjustments to timelines, responsibilities, and third-party contractor provisions of our ROW Rules.”

233. Administrative Law Judge’s Ruling Requesting Comments on the Role of Joint Pole Associations in Acting as Clearinghouses for Pole Location, Ownership, Attachment, and Access Information, Investigation 17-06-027 (Rulemaking 17-06-028), CAL. PUB. UTIL. COMM’N 1–2 (Jan. 31, 2019), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M261/K783/261783011.PDF.


235. Reply Comments of Crown Castle Fiber on Administrative Law Judge’s Ruling on The Role Of Joint Pole Associations In Acting As Clearinghouses For Pole Location, Ownership, Attachment, And Access Information, Investigation 17-06-027, CAL. PUB. UTIL. COMM’N 1 (Feb. 25, 2019), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M273/K390/273390827.PDF.

236. About the NCJPA, supra note 6.

237. Id.

238. PG&E, Opening Comments to January 31, 2019 Ruling, Investigation 17-06-027, CAL. PUB. UTIL. COMM’N 1 (Feb. 15, 2019), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M266/K859/266859750.PDF [hereinafter PG&E Comments, ALJ Utility Pole Census OII Ruling].

NCJPA as a cost-sharing facilitator and highlights the need for CPUC enforcement of vegetation management responsibilities for all joint pole owners and attachers.

As a member of both the SCJPC and the NCJPA, AT&T informed the CPUC that “AT&T’s understanding is that neither Association currently acts as a clearinghouse for pole location, ownership, attachment, or access information.”\(^{240}\) AT&T characterized the JPCs’ principle function as providing “a framework for the calculation and sharing of costs and expenses relating to the sale and purchase of joint pole equity interests. In other words, the Associations administer joint pole ownership and billing between and among members.”\(^{241}\)

PG&E, as well as NCJPA Interim Operations Manager Simms, described NCJPA as “a voluntary joint undertaking to share expenses regarding the ownership, maintenance, use, setting, replacement, dismantling, abandonment or removal of jointly owned poles.”\(^{242}\) “As such,” PG&E explained, “the NCJPA retains records of transactions, pole space, and grade owned by its members, but any pole location, attachment, or access information in the NCJPA’s records would be quite limited. Thus, PG&E would not characterize the NCJPA as a ‘clearinghouse’ for such information.”\(^{243}\) CMUA asserted “the JPCAs [Joint Pole Associations] do not obtain, maintain, or provide access to pole data. Rather, such data and access to this data lies with the individual utilities that have the data.”\(^{244}\)

CMUA further explained that “SCJPC and NCJPA simply administer records involving the sale and purchase of equity interest in jointly owned poles, and establish guidelines for pole values and the sharing among owners of authorized costs.”\(^{245}\) Moreover, “[t]hese guidelines may include agreement on how, what, and when joint owners may communicate about pole related activity.” \(^{246}\)

Describing the NCJPA and SCJPC role in the sale of pole space, CMUA stated that “JPAs do not get involved in decisions related to, or the process of, selling or buying space on poles; JPAs only get involved at the end of transactions at the point when money is exchanged between parties.”\(^{247}\) NCJPA and SCJPC

\(^{240}\) AT&T Comments on the Role of Joint Pole Associations in Acting as Clearinghouses for Pole Location, Ownership, Attachment, and Access Information, Investigation 17-06-027 (Rulemaking 17-06-028), CAL. PUB. UTIL. COMM’N 1–2 (Feb. 15, 2019), http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M273/K391/273391841.PDF [hereinafter AT&T Comments].

\(^{241}\) Id.

\(^{242}\) PG&E Comments, ALJ Utility Pole Census OII Ruling, supra note 238, at 2 (quoting NCJPA Agreement, supra note 20, at 1); Simms, supra note 21, at 2.

\(^{243}\) PG&E Comments, ALJ Utility Pole Census OII Ruling, supra note 238, at 2.

\(^{244}\) CMUA Comments, supra note 60.

\(^{245}\) Id.

\(^{246}\) Id.

\(^{247}\) Id.
possess “only that data as is provided by the pole owners necessary for it to exercise its financial function.”

SCE argued that the SCJPC “should continue in its current role as an administrator of records involving the sale and purchase of equity interest in jointly owned poles and also the agreed upon shared cost of maintenance of jointly owned poles among its members.” SCE “relies on SCJPC records for pole locations, ownership and equity interest information, and the processing of financial transactions.” SCE argued “[a]ccess information” about poles “is correctly limited to SCJPC members.”

At the CPUC’s November 2018 Pole OII Workshop, SCE’s representative described SCJPC as “essentially just [an] escrow company[.]” that uses paper records to record utility pole transactions. SCE explained that this “information isn’t easily upload[ed]” as it is recorded in the pole association’s offices so that “we do not have unique information as to every single type of attachment whether it was just steel strand, whether it’s fiber optic cable, steel strand with fiber or steel strand with conductive cable, coax or what have you.”

The California Cable and Telecommunications Association (CCTA) stated that “cable companies typically are not pole owners, and while a cable company may join the NCJPA to gain access to mapping and related access information, cable companies generally do not own shares of poles.” CCTA reported that cable companies “typically have entered into pole attachment agreements” with ILEC “NCJPA members pursuant to Pub. Util. Code § 767.5 and the Commission’s Rights-Of-Way Decision (D.98-10-058).”

CLEC ExteNet “places its equipment on jointly owned utility poles through membership in the Northern and Southern Joint Pole Associations, and through bi-lateral pole attachment agreements with electric utilities.”

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248. Id.
249. SCE Comments, ALJ Ruling, Pole Census OII, supra note 185, at 1–2.
250. Id. at 2.
251. Id.
252. Id.
253. Id.
254. Reply Comments of the California Cable and Telecommunications Association on the Role of Joint Pole Associations in Acting as Clearinghouses for Pole Location, Ownership, attachment, and access information, Investigation 17-06-027 (Rulemaking 17-06-028), CAL. PUB. UTIL. COM’N 2 (Feb. 25, 2019), http://docs.cpuc.ca.gov/PublishedDocs/ Efile/G000/M273/K390/273390826.PDF [hereinafter CCTA Reply Comments, ALJ Ruling, Pole Census].
255. Id.
256. ExteNet Systems (California), LLC (U-6959-C) Comments on Administrative Law Judge’s Ruling Requesting Comments on the Role of Joint Pole Associations in Acting as Clearinghouses For Pole Location, Ownership, Attachment, and Access Information, Investigation 17-06-027
“occasionally places its own poles in the public rights-of-way when there are no existing utility poles, or existing poles are fully loaded and cannot be replaced or modified to accommodate additional equipment.”

The City and County of San Francisco in 2017-2018 analyzed potential deployment of an Internet fiber backbone to support local gigabit speed services. Parties wishing to attach to utility poles "may become joint owners or tenants, if the pole owners agree to make space accessible, and allow the party to purchase an interest in a pole through the [NCJPA]." San Francisco’s Budget and Legislative Analyst’s Office noted. That memo observes that many “utility poles in California are subject to joint ownership arrangements; the NCJPA has 40 members, including the City and County of San Francisco." San Francisco reported that “[b]esides handling billing issues, the NCJPA has established procedures and protocols for aspects of joint pole ownership not addressed by GO 95, such as joint pole planning practice, pole replacement and removal, identification of poles and attachments for record-keeping purposes.”

CMUA argues that SCJPC and NCJPA “serve the interests of their members and were not established to serve as information clearinghouses for non-members who desire access to poles or information about poles." CMUA urged that the CPUC “must acknowledge that JPAs are governed by their members, and any obligation accepted by a JPA must be voted on by its members. Therefore, the Commission could not unilaterally decide to alter the roles and functions of SCJPC or NCJPA.” CMUA characterized NCJPA and SCJPC as “valuable industry organizations that provide essential services that reduce costs and administrative burdens for their members.”

CMUA described JPCs as “voluntary associations comprised of publicly owned utilities (“POUs”), investor owned utilities (“IOUs”), telephone...
companies, wireless companies, and cable providers.”

As CMUA clarified, “some of these entities are regulated by the [California Public Utilities] Commission, and some of them are not.” CMUA argues the CPUC “does not have broad generalized authority beyond public utilities, and JPAs, such as NCJPA and SCJPC, are not public utilities,” and contends that “regulating these voluntary organizations is outside the scope of the Commission’s authority.”

CPUC ALJ Miles observed that “NCJPA is comprised of municipalities, irrigation districts, electric utilities, telephone companies, wireless companies and cable providers, some of which are entities regulated by the Commission, and some of which are nonregulated entities.”

CMUA argues that the CPUC “should not attempt to alter the roles of these longstanding organizations. Imposing any amount of Commission regulation over these organization[s] could threaten the very existence of the JPAs and the vast number of associated agreements between its members.” Further, CMUA argued, “any attempt by the Commission to regulate NCJPA or SCJPC would set a troubling precedent, potentially exposing any trade or industry group that involves a public utility to direct regulation by the Commission.”

NCJPA Interim Operations Manager Simms explained at a CPUC 2017 workshop that each “member has or desires to hold joint equity in utility poles in and around Northern California.”

NCJPA describes its mission as providing “accurate and timely pricing for all joint pole transactions while providing ongoing support, ensuring a seamless experience for all joint pole member companies.”

NCJPA calculates “the values of each transaction based on each year’s authorized costs agreed upon by all members. At the end of each month, the Association prepares monthly Bills of Sales (Form 44) by which each member can then make their monetary settlement.”

To do so, NCJPA maintains “records, for the work connected with recording and pricing of transactions for the joint use of poles and their appurtenances” and prepared “Assessments, Bills of Sale (Form 44) to members, and related joint use activities.”

NCJPA performs “the pricing and billing of physical construction work as directed by the constructing utility and in accordance with the Routine Handbook.” The Association also reacts to “[j]oint Pole billing information

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265.  Id.
266.  Id.
267.  Id.
268.  CPUC Final Arbitrator’s Report, Crown Castle PG&E Arbitration, supra note 7, at 2 n.5.
269.  CMUA Comments, supra note 60.
270.  Id.
271.  Simms, supra note 21, at 2.
272.  Id. at 3.
273.  Id.
274.  Id. at 7.
275.  Id. at 11.
provided by member(s) on Routine Handbook Forms 2, 7, 44, 48—submission of one of these Forms triggers an NCJPA pricing or billing update to the Friend database” which contains information about pole locations, ownership, and features.276

NCJPA effectively acts as a private standard setting organization (SSO) outside of the purview of CPUC rulemaking or review. Simms reported to the CPUC that through its committees NCJPA adopts standards designed to promote utility pole safety and reliability.277 This private standards-setting role increases the JPCs’ competitive significance.

The Supreme Court recognized in Allied Tube v. Indian Head, Inc., that standards adopted through an association’s process that undermine competition can disadvantage competitors, erect barriers to competition and service, and add costs.278 Utility pole attachment, maintenance, and other standards adopted outside of the CPUC’s purview pose risks to public safety and reliability and erect competitive barriers.

Lack of CPUC review of JPC rules and standards highlights the safety gap created by JPC private standard-setting. Electric and communications wires, antennas, transformers, and other assets that may pose safety risks and are necessary to competitive service, attach to utility poles JPCs have made subject to their rules. Fire and utility infrastructure safety, reliability, and competition risks demand rigorous analysis of JPC rules, roles, risks, function, and conduct.

B. The Competitive Significance of the JPCs Function, Structure, and Membership Rules to Competition, Safety, and Reliability

Comments submitted to the CPUC about JPCs’ function, CPUC workshops, the NCJPA Agreement, and other public documents indicate that JPCs perform five main competitive and safety functions. JPCs facilitate: 1) utility pole space sales by providing members with cost calculation and information; 2) sharing of “expenses regarding the ownership, maintenance, use, setting, replacement, dismantling, abandonment or removal of jointly owned poles”279; 3) sharing utility pole information including “mapping and related access information.”280

276. See AT&T Panel 2 Presentation, CPUC Pole Safety En Banc Panel 2, 5 (April 28, 2016), https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Safety/Utility%20Pole%20En%20Banc%20Agenda%20030716.pdf (“NCJPA/SCJPC [Southern California Joint Pole Committee] requirements are more stringent than but not contradictory with GO 95 rules in some areas. For example, for electric lines exceeding 60 KV, NCJPA Routine Handbook: Safety Factor of 4.0, GO 95 requires a minimum Safety Factor of 2.67.”).

277. CPUC Competition OII Decision 16-12-025, supra note 8, at 181 (citing Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 509 (1988) (observing that for standards-setting organizations “hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition.”)).

278. Id.; NCJPA Agreement, supra note 20, at 1.

279. Id.; CCTA Reply Comments, ALJ Ruling, Pole Census, supra note 254, at 2.
about “pole locations, ownership and equity interest information;”\textsuperscript{281} 4) calculating and sharing information about maintenance or compliance costs,\textsuperscript{282} and; 5) establishing standards through procedures members observe for the conduct of pole work as described in the unpublished “Agreement and Operations Handbook” and other documents.\textsuperscript{283}

JPCs limit information exchange, cost sharing, standard-setting development and access to JPC members. Neither prospective members who compete with JPC members for pole space and to offer a range of services, nor regulators have had ready access to information JPCs gather and guard.

JPC development of utility pole and attachment procedures and standards outside of the CPUC’s review raises safety risks. The CPUC’s 2013 approval of the settlement regarding the Malibu Canyon Fire stated that reliance on SCJPC procedures does not create a defense to violations of GO 95 or other CPUC rules.\textsuperscript{284}

CPUC ALJ Miles’ Arbitrator’s Report on the Crown Castle-PG&E Pole ownership access dispute concludes that “although PG&E and Crown Castle voluntarily participate in the Northern California Joint Pole Association (NCJPA), we [the CPUC] are not required to give deference to the provisions of agreements, policies or procedures of that association.”\textsuperscript{285} CPUC further explained that “[t]ransactions concerning the sale or lease of utility property (such as the transaction at issue between PG&E and Crown Castle here), are already within the Commission’s jurisdiction under Public Utilities Code Section (Pub. Util. Code §) 815.\textsuperscript{286}

NCJPA’s stated purpose, CPUC ALJ Miles notes, “is to share expenses regarding the ownership, maintenance, use, setting, replacement, dismantling, abandonment or removal of jointly owned poles.”\textsuperscript{287} CPUC ALJ Miles adds that “the NCJPA Agreement and the NCJPA Operations Handbook go beyond accounting for expenses and deal with many terms and conditions of joint pole transfer and usage.”\textsuperscript{288} The CPUC’s report on the history of utility poles states that the SCJPC Handbook contains procedures and protocols for issues such as: “1) Joint pole planning practice; 2) Pole replacement; 3) Transferring, rearranging, or changing facilities; 4) Removal, abandonment, or relinquishment of a pole; 5) Rights of way; 6) Correcting the record or cancelling a joint pole agreement; and 7) Identification of poles and attachments for record-keeping

\textsuperscript{281} SCE Comments, ALJ Ruling, Pole Census OII, supra note 185, at 2.
\textsuperscript{282} Id. at 1–2.
\textsuperscript{283} CPUC Final Arbitrator’s Report, Crown Castle PG&E Arbitration, supra note 7, at 2, 8–9.
\textsuperscript{284} See CPUC NextG Settlement, 2007 Malibu Canyon Fire, supra note 134, at 7.
\textsuperscript{285} CPUC Final Arbitrator’s Report, Crown Castle PG&E Arbitration, supra note 7, at 2.
\textsuperscript{286} Id.
\textsuperscript{287} Id. at 2 n.5.
\textsuperscript{288} Id.
purposes.” These standard-setting and record-keeping procedures require antitrust and unfair competition analysis, and examination for their consistency with CPUC safety, reliability, competition, and other regulations.

CPUC ALJ Miles recommended that “if NCJPA is going to continue to facilitate sale and purchase transactions pertaining to public utility poles among its member entities,” the CPUC should “require NCJPA to submit (before implementation) for Commission review and approval under Pub. Util. Code § 851, its agreements, forms, procedures and handbooks which concern the transfer, sale, lease, assignment, mortgage, or encumbrance of public utility poles.” She added that “[s]uch transactions, which are being handled by NCJPA on behalf of its members, are clearly within the Commission’s jurisdiction.”

California Public Utilities (CA PU) Code 313 allows the CPUC plenary access to utility records. The CPUC can order utilities and entities under the Commission’s jurisdiction to produce records of correspondence with the JPC and their members.

In addition to safety functions, the information and cost-sharing functions that JPCs perform are important to competition. CCTA reported that although its cable company members generally lease rather than buy utility pole space, CCTA members join the NCJPA and SCJPC to “gain access to mapping and related access information.” CMUA’s characterization of the JPCs as “valuable industry organizations that provide essential services that reduce costs and administrative burdens for their members” underscores the competitive advantages JPCs give to their members. JPC information, cost-sharing, and technical functions mediate access to competition, cost-competitiveness, and utility safety and reliability.

JPCs’ role in “calculation and sharing of costs and expenses relating to the sale and purchase of joint pole equity interests,” raises questions about whether JPCs erect barriers to competition authorized in the 1998 ROW agreement and subsequent CPUC decisions. Mulqueen’s report for the CPUC’s Policy and Planning Division providing an introduction to utility poles states that “[p]arties wishing to become joint owners may purchase an interest in a pole through the Northern California Joint Pole Association (NCJPA) or the Southern California Joint Pole Committee (SCJPC), which track ownership of and activity on jointly owned poles and invoice members for their activities.” No CPUC decision requires prospective pole owners to conduct those transactions through

291. Id.
293. CMUA Comments, supra note 60, at 3.
294. AT&T Comments, supra note 240, at 2.
295. Mulqueen, Brief Introduction to Utility Poles, supra note 2, at 12.
the JPCs. Mulqueen’s report highlights the JPC practice of serving as an intermediary to complete those transactions.296

JPC membership appears to be open to pole space renters such as members of CCTA. Mulqueen reported that renters authorized to attach facilities to utility poles may “lease space from a pole owner without purchasing an interest in the pole. Pole owners perform the necessary pole loading calculations to determine whether it is safe for a Renter to attach to a pole; SCE reports that it has 160 active renters on its poles” as of 2014.297

Southern California Edison (SCE) stated in 2016 that “California’s electric utilities have established processes for other parties to obtain access to poles, including joint pole entities,”298 SCE clarified that 70% of Southern California Edison (SCE) poles are joint use, which does not equate to jointly owned.299 It is not clear whether poles that are not jointly owned, but may interconnect to jointly owned poles, are also subject to JPC information and cost-sharing, standards, or procedures.

Based on JPC member descriptions,300 JPC membership is a substantial competitive advantage in the utility pole ownership and maintenance market. JPC functions such as its standards setting process and administration implicate the CPUC’s safety jurisdiction. JPC functions, rules, and risks require immediate review as California works to mitigate climate change, wildfire danger, and public safety risks.

VI. INFRASTRUCTURE ACCESS, GOOGLE AND THE CPUC FACE THE NCJPA SUPERMAJORITY QUORUM AND NEW MEMBER VOTING REQUIREMENTS

Lift incredulous to their fearsome crowns of bolts, trusses, struts, nuts, insulators, and such Barnacles as compose... 301

- John Updike, “Telephone Poles”

A. Google and the CPUC Confront JPC Membership Barriers

Google’s attempts to join the NCJPA in 2014-2016 as part of its efforts to provide Google Fiber service in California including in San Jose, California’s third largest city and the tenth largest city in America, highlight the competitive

296. See id. at 12–13, 23.
297. Id. at 13.
299. 2015 General Rate Case, supra note 107, at 103.
300. S.F. Policy Analysis Report, supra note 259, at 60.
301. John Updike, Telephone Poles and Other Poems, supra note 1.
barriers erected by the NCJPA’s membership rules.\textsuperscript{302} CPUC Decision 15-05-002 determined in 2015 that Google is a franchised Video Service Provider (VSP) that transmits television programs by cable to subscribers for a fee and thus is a cable television corporation that has a right to access utility infrastructure under CA PU Code 767.5 such as utility poles.\textsuperscript{303}

Google’s Communications Law Director, Austin Schlick, complained to the CPUC that the NCJPA’s rules created barriers to building Google Fiber service through utility pole access.\textsuperscript{304} As Schlick stated, “[g]aining access” to utility infrastructure “in a timely manner,” “bears on Google Fiber’s decisions whether to build new networks, as well as enables it to serve customers more quickly.”\textsuperscript{305}

The CPUC Communications Division staff reported in September 2016 that NCJPA was having trouble convening a quorum of three-quarters of the members to vote on Google’s membership application to facilitate its pole access and deployment of Google Fiber.\textsuperscript{306} At the CPUC’s September 29, 2016 Commission Voting Meeting, I stated that as a Commissioner “who’s also an antitrust law professor, I’m really concerned about . . . whether the rules are sufficiently pro-competitive. . . . [W]e want to encourage competition and choice, and we expect the pole safety committees to respect and facilitate that.”\textsuperscript{307} I concluded, “I would also urge the [utility pole] committees to also not force us to go down the enforcement route.”\textsuperscript{308} CPUC Commissioner Randolph stated at that meeting,

If we are going to meet the policy goals of ensuring broadband and ensuring competition and customer choice, entities are going to need to be able to attach, they’re going to need to be able to attach safely


\textsuperscript{303} CPUC Decision 15-05-002, \textit{supra} note 80, at 39–41 (finding that “Google Fiber Inc. is a state-franchised VSP,” concluding that a “state-franchised VSP that transmits television programs by cable to subscribers for a fee is a ‘cable television corporation’ as defined by Pub. Util. Code § 216.4,” and determining as a conclusion of law that “[a]n entity that has dual status as a state-franchised video service provider under Public Utilities Code Section 5800 et seq. and a cable television corporation under Section 216.4, may access public utility infrastructure as a cable television corporation in accordance with Section 767.5 and the right-of-way Rules.”).

\textsuperscript{304} \textit{See Letter from Austin Schlick, Director, Communications Law, Google Inc., to Dr. Timothy Sullivan, Executive Director, CAL. PUB. UTIL. COMM’N} 2 (Feb. 5, 2016), http://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/Utilities_and_Industries/Communications_-_Telecommunications_and_Broadband/Service_Provider_Information/Video_Franchising/Google%20Fiber%20Letter%20to%20Executive%20Director.pdf [hereinafter Schlick letter to CPUC, Feb. 5, 2016].

\textsuperscript{305} \textit{Id.} at 2.

\textsuperscript{306} CPUC 2016 Voting Meeting, NCJPA Report, \textit{supra} note 193, at 2:07:00–2:17:11.

\textsuperscript{307} \textit{Id.}

\textsuperscript{308} \textit{Id.}
and they’re going to need to be able to attach in an expeditious manner.\textsuperscript{309}

Google announced in October 2016 that it was slowing deployment of Google Fiber.\textsuperscript{310} To date, Google has not constructed fiber service in San Jose, California and many other cities where it had envisioned expansion. Google estimated that to deploy fiber for high-speed Internet in San Jose, “60 percent of its [fiber] cable would be underground and 40 percent aerial,” the later depending on access to utility poles.\textsuperscript{311} NCJPA membership association rules and conduct may have lengthened time to market and erected hurdles to competition.

Google sought to become an NCJPA member and to own utility poles space to deploy Google Fiber.\textsuperscript{312} The CPUC’s Competition OII Decision noted that “AT&T in May, 2015 announced that it was discontinuing its practice in Northern California of buying space on a pole for third-party attachers when AT&T itself did not own sufficient surplus space on that pole to accommodate the attacher.”\textsuperscript{313} Although “AT&T has a 2014 agreement with Google that allows the Internet giant to access AT&T poles anywhere in the U.S.,”\textsuperscript{314} for poles not solely owned by AT&T and subject to the NCJPA’s management, NCJPA membership was critical for Google’s pole access. As the East Bay Times reported, “[i]n San Jose, where Google and city officials are actively planning for citywide fiber rollout, the pole association controls most utility poles and only members can access those, according to Michael Liw, the city’s deputy director of public works.”\textsuperscript{315}

PG&E spokesperson Tamar Sarkissian said that while its “agreement with Google provides access to PG&E poles, we have discussed with Google it needs to contact the communications utility for access to jointly owned poles.”\textsuperscript{316} PG&E’s statement indicates that utility pole owners such as PG&E made JPCs an intermediary for access to the utility pole ownership, access, and maintenance market.

CPUC Communications Division staff member Robert Wullenjohn reported at a Commission voting meeting about the importance of NCJPA membership to the pole attachment process and the provision of competitive communications

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310. Baron, supra note 226.
311. Id.
312. Blum, supra note 309.
313. CPUC Competition OII Decision 16-12-025, supra note 8, at 114 (citation omitted).
315. Id.
316. Id.
services. NCJPA “Association members are able simply to purchase pole space for their attachments themselves, rather than going through a much more complicated leasing and contract process,” he explained to the Commission Voting Meeting. Wullenjohn continued, “[m]embership in the [NCJPA] would allow companies like Google to bypass difficulties in the leasing process that have been impossible to surmount in the three or four months that CD has been trying to facilitate the process.”

As the East Bay Times reported, “Google’s plan to bring ultrahigh-speed Internet service to the Bay Area has run into a decidedly non-tech hurdle: utility poles” and in order to “roll out Google Fiber in five Silicon Valley cities, the tech giant needs access to the poles for stringing up fiber cable. But in several cities a who’s who of Google competitors are standing in the way.” By contrast, in Palo Alto, California, “the pole association controls only 5 percent of the utility poles. Some 90 percent are jointly owned by the city and AT&T. ‘No problems to report,’ city spokesperson Catherine Elvert said, regarding the city’s work with the two companies on Google Fiber pole access.”

A municipality’s or irrigation district’s decision to join NCJPA or SCJPA brings their utility pole assets within the governance of JPC rules. NCJPA governance creates an effective member veto that allows incumbents to block or delay access by failing to forum a quorum or approve a new member. Neither do NCJPA rules require any public explanation, or communication of information to the proposed member, attacher, or the CPUC, about the reasons for failing to forum a quorum or approve a new member’s application.

JPCs erected these requirements despite the CPUC’s 1998 Row Decision and subsequent CPUC decisions to promote competitive access to utility poles for attachers. The CPUC determines who is qualified to attach to utility poles and maintains its safety jurisdiction over utility poles, overhead lines, and underground facilities. JPCs intermediate the CPUC’s regulatory function.

Google Fiber’s February 5, 2016 letter to the CPUC stated “PG&E and the Northern California Joint Pole Association were ‘resisting their duty of providing nondiscriminatory access’ afforded under D.15-05-002.” Google alleged that video service providers “like Google Fiber continue to be excluded from membership from the Northern California Joint Pole Association if they do not possess a certificate of public convenience and necessity (CPCN),” despite the CPUC’s 2015 Decision 15-05-002 authorizing VSPs utility pole

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318. Id.
319. Id.
320. Baron, supra note 314.
321. Id.
322. CPUC Competition OII Decision 16-12-025, supra note 8, at 113.
323. Comments of Google Fiber Inc. On Proposed Decision of ALJ Bemesderfer, Investigation 15-11-007, CAL. PUB. UTIL. COMM’N 8 (Nov. 5, 2015), docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M169/K916/169916572.PDF.
access. Google continued, “because state-franchised VSPs do not need a CPCN to deploy infrastructure in the public rights of way or to offer service to consumers, this membership requirement lacks any reasonable basis for these providers.”

Google’s membership application could not be approved under NCJPA’s rules without a supermajority quorum to consider and approve a new member application. As Google argued, “[u]ntilities should not be able to use their own internal policies or joint associations to avoid obligations to provide access to infrastructure and thereby delay deployment of competitive broadband infrastructure.” Google argued that “utilities obligated to provide access should not be allowed to avoid those obligations by establishing unreasonably slow or cumbersome working arrangements with other utilities that are involved in pole-access processes, or by failing to establish arrangements that are needed to effectuate third parties’ access rights.”

Neither the CPUC nor any statute authorize the JPCs or their members to make JPC membership a threshold for utility service offering and competition that requires utility pole access. As an agreement among competitors for utility pole access necessary for increasingly convergent and co-dependent communications and electric services, the JPCs and their members are subject to state and federal antitrust and unfair competition laws.

B. CPUC Jurisdiction Over Disposition of Utility Assets

California law confers on the CPUC authority to determine whether to approve the disposition of a utility asset. California Pub. Util. Code § 851 requires a CPUC order to approve the sale, lease, assignment, mortgage, or encumbrance of utility assets valued at $5 million or more. California PU Code 851 prohibits disposition of utility assets valued under $5 million unless the Commission approves that transaction through the CPUC’s Advice Letter process, following staff-level review and recommendation, or, for uncontested advice letters, the CPUC’s Executive Director or the appropriate division director issues such an approval.

No CPUC order has granted the NCJPA or SCJPC or its members exemption from the CPUC’s requirements for approval of the disposition of utility assets. The 1998 NCJPA agreement describes Appendix A as “Commission confirmation that § 851 does not apply,” though no such document is posted in the NCJPA agreement available through the City of San Francisco website.

No such Commission documentation of an NCJPA § 851 exemption is available

324. Id.
325. Id. at 7.
326. Id. at 7–8.
327. CAL. PUB. UTIL. CODE § 851 (1951).
328. Id.
329. NCJPA Agreement, supra note 20, at 19.
in the public record. Even if a CPUC staff member had issued such a letter in 1998 or earlier, it would not hold the weight of a Commission order or decision. No CPUC order, decision, or resolution relieves regulated utilities of the duty to comply with the CPUC’s statutory asset transfer approval process under CA PU Code 851.

The CPUC should issue a data request to the utilities it regulates who are NCJPA and SCJPC members to ask if they have transferred assets through the JPC without first obtaining CPUC approval. Records kept by JPC members and JPCs can facilitate analysis of whether utility assets have been disposed of through JPCs without CPUC approval. California law grants the CPUC with authority to ask for and inspect utility records and facilities under Cal. Pub. Util. Code § 313 and § 314(a).

Failure to comply with CA PU Code § 851 should be identified and the CPUC should determine whether any penalty or remedy is appropriate if CPUC authorization was not obtained prior to transfer. The JPC’s role in the utility asset sale process underscores the need for CPUC analysis of whether JPCs and their members operate in accordance with CPUC rules and California law.

VII. NETWORK EFFECTS OF UTILITY POLE JOINT MANAGEMENT AND REGULATION OF COMPETITIVE ACCESS AND SAFETY

*These weathered encrustations of electrical debris* \(^\text{331}\)

- John Updike, “Telephone Poles”

Communications and electricity are classic network industries that become more valuable as more people connect and additional facilities are built to support a range of services. Statutes adopted to promote expansion of telegraph and telephone networks reflect universal service objectives “founded on the concept that all subscribers to a telephone company’s basic service network benefit when another person joins that network. Therefore, the entire network is more valuable because of the addition of the new subscriber.” \(^\text{332}\)

Regardless of the device through which we connect to communications, video, or electric services, the infrastructure supporting those services is composed of a vast, interconnected network of utility poles, wires, conduit, and other physical facilities. Utility poles form the scaffold that supports the wires, antenna, power sources, and means of power distribution and transmission.


\(^{331}\) John Updike, Telephone Poles and Other Poems, supra note 1.

services. This platform enables communications, cable, Internet and electric services that power our modern economy, democracy, and way of life. Utility pole associations share many characteristics of a network joint venture, but NCJPA’s 1998 agreement section 21 states that it is not a joint venture or partnership. Utility pole joint use with CPUC authorization and oversight, could reduce costs, increase competition and service deployment, and promote safety and reliability. For these reasons, the California legislature adopted laws in 1915, updated in 1951, allowing the CPUC to order joint use of utility poles with appropriate compensation. Sharing costs of accessing and maintaining utility poles reduces capital and operations costs, burdens on communities from multiple poles, and enables the provision of a variety of consumer services at lower costs than if the network had to be duplicated.

State policy to promote joint pole use reduces burdens on rights-of-way that cross communities, towns, rural areas, and forests by limiting the need to build additional infrastructure. A utility pole access and management process that favors incumbents and thwarts regulatory supervision undermines competition, innovation, public service, and safety.

The CPUC, not the pole association, determines the legal right to access poles and the standards for utility infrastructure maintenance. CPUC rules curb the trader, or utility pole owner’s freedom to choose with whom to deal. The Supreme Court under United States v. Colgate & Co., recognized that absent an anticompetitive purpose, federal antitrust law does not limit a trader’s freedom to choose with whom to deal. CPUC rules delineate the type of entity, licensee, or authorization holder who has a legal right to utility pole access. CPUC Decision 98-10-058 requires pole owners to deal with competitors who wish to buy or lease pole space (subject to certain technical and safety limitations and CPUC decisions about who can attach). The CPUC’s decisions eliminate a potential antitrust defense running from Colgate through Trinko to Linkline that limits the duty of competitors to deal with rivals.

333. See Catherine J.K. Sandoval, Energy Access is Energy Justice: The Yurok Tribe’s Trailblazing Work to Close the Native American Reservation Electricity Gap, in ENERGY JUSTICE: U.S. AND INTERNATIONAL PERSPECTIVES 166, 206 (Raya Salter et al. eds., 2018) (“Grid-electricity access will enable Internet and communications buildout as they are interconnected infrastructures increasingly dependent on electricity.”).

334. NCJPA Agreement, supra note 20, at 18.


337. CAL. PUB. UTIL. CODE § 767.


339. CPUC Decision 98-10-058 or ROW Decision, supra note 73, at 2.

340. Id.

341. Pac. Bell Tel. Co. v. LinkLine Commc’n, Inc., 555 US 438, 448 (2009) (“As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms,
Brett Frischmann and Spencer Weber Waller note that the Supreme Court’s *Verizon v. Trinko* 2004 opinion states that “essential facility claims should be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.”\(^{342}\) They argue that a “viable essential facilities doctrine of necessity exists in the vast economic canyon between fully competitive markets and fully regulated ones. Fully regulated markets come with extensive regulatory oversight and accompanying antitrust immunities.”\(^{343}\)

The CPUC’s lack of direct regulation of JPCs indicates that the market is not so comprehensively regulated as to confer antitrust immunities under *Trinko*.\(^{344}\) Neither does the CPUC actively supervise utility pole associations and adopt a policy of displacing competition as required under *Phoebe Putney* to confer antitrust immunity.\(^{345}\) The CPUC has a policy to promote competition, not to displace it.

*Trinko* is a Sherman Act Section 2 case alleging that the telephone company defendant abused or attempted to abuse monopoly power.\(^{346}\) For JPCs, supermajority voting rules for prospective new members, their agreements about information and cost sharing, their standard setting with no oversight, and other aspects of their function raise concerns about harms to competition from competitors’ concerted action. This Article urges antitrust and unfair competition law analysis of California JPC rules and roles to examine potential Sherman Act Section 1 violations involving agreements between competitors that harm competition.

Analysis of the JPCs’ potential pro- and anticompetitive benefits and harms under antitrust and unfair competition law is beyond this article’s scope. Such an analysis should examine any benefits in the context of the NCJPA agreement which says it is not a joint venture, distinguishing it from other cases that argued the joint venture’s benefits merited rule-of-reason standard of review.\(^{347}\)

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\(^{342}\) Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 7 (2008) (quoting Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 411 (2003); *Colgate Co.*, 250 U.S. at 307 (“In the absence of any purpose to create or maintain a monopoly, the [Sherman] act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell.”)).

\(^{343}\) *Id.* at 18.

\(^{344}\) *Trinko*, 540 U.S. at 411 (“essential facility claims should be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms.”). *See also Pac. Bell*, 555 U.S. at 448–50.

\(^{345}\) *See infra* Section VIII (discussing state supervision under *F.T.C v. Phoebe Putney Health Sys.*, 568 U.S. 216, 233 (2013)).

\(^{346}\) *Trinko*, 540 U.S. at 407.

\(^{347}\) *NCJPA Agreement*, *supra* note 20, at 18. *Cf.* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 23 (1979) (“Joint ventures and other cooperative arrangements are also not usually
Comments submitted to the CPUC indicate that JPCs create non-price barriers to competition that may raise rivals’ costs, and affect utility service affordability.

NCJPA rules allow incumbents to raise rivals’ costs through delayed voting, not voting, or a no vote, even when the rival is authorized by the CPUC to have access to utility poles. This process tends to decrease output, reducing the supply and range of services offered competitors offer. Such concerted action decreases and delays competition, contrary to the State of California’s policy to promote competition in the communications field. NCJPA’s membership rules erect hurdles that give incumbents effective veto power over new members.

Antitrust law has long condemned this type of concerted agreement, leading the organizations in Associated Press and Realty Multi-List to drop several provisions in their agreements before their antitrust trials began. The CPUC and competition authorities should not allow JPCs and their members to raise rivals’ costs, deter competition, or create and maintain safety and reliability risks. Antitrust law, unfair competition law, and public utility law should not countenance barriers to competition unduly erected through agreements between incumbent competitors.

VIII. STATE ACTION ANTITRUST EXEMPTION DOES NOT APPLY TO NCJPA SUPERMAJORITY VOTING REQUIREMENTS

True, their thin shade is negligible,
But then again there is not that tragic autumnal
Casting-off of leaves to outface annually.

- John Updike, “Telephone Poles”

A. The Legal Standard for the State Action Immunity Doctrine

Immunity from federal antitrust liability under the State Action Doctrine requires both a state policy to displace competition and active supervision by the state. The state must articulate a purpose for its program that supplants competition, intent to displace competition, and actively supervise the

unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.”).

348. See CALTEL Reply Comments, ALJ Ruling, ROW, supra note 174, at 3.
352. JOHN UPDIKE, TELEPHONE POLES AND OTHER POEMS, supra note 1.
program.\textsuperscript{353} When it applies, “[t]he doctrine of state action immunity exempts some state policies, legislation, and regulatory programs from federal antitrust liability on federalism and state sovereignty grounds.”\textsuperscript{354}

The Supreme Court’s 2015 decision in \textit{North Carolina State Bd. of Dental Examiners v. F.T.C.} recognizes that since the Court’s 1943 \textit{Parker v. Brown}\textsuperscript{355} decision, federal antitrust laws have been interpreted “to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity.”\textsuperscript{356} The Supreme Court in \textit{Parker v. Brown} noted, “[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.”\textsuperscript{357}

The Court “has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken.”\textsuperscript{358} Congress’ purpose to respect the federal balance and to “embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution”\textsuperscript{359} underlays the state action immunity doctrine from federal antitrust law. To qualify for state action immunity, “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’” and “the policy must be ‘actively supervised’ by the State itself.”\textsuperscript{360} The Court has declined to find state-action immunity where the state did not have a “clearly articulated and affirmatively expressed” state policy “designed to displace unfettered business freedom . . . .”\textsuperscript{361}

\textsuperscript{353} Justice v. Town of Cicero, 577 F.3d 768, 775 (7th Cir. 2009) (quoting Town of Hallie v. City of Eau Claire, 471 U.S. 34, 39 (1985)) (“Under the Parker doctrine, the actions of municipalities fall outside the reach of the federal antitrust laws if the municipality can ‘demonstrate that [its] anticompetitive activities were authorized by the State “pursuant to state policy to displace competition with regulation or monopoly public service.”’); Reid Allison & Adam Duhlberg, \textit{Antitrust Violations}, 49 AM. CRIM. L. REV. 403, 424–25 (2012).

\textsuperscript{354} Allison & Duhlberg, supra note 353, at 423 (citing Parker v. Brown, 317 U.S. 341, 351 (1943) (noting that state policy to displace competition and actively supervise cooperation confers immunity from federal antitrust laws under the State Action Doctrine)).

\textsuperscript{355} Parker v. Brown, 317 U.S. 341, 368 (1943).


\textsuperscript{357} Parker v. Brown, 317 U.S. 341, 350–51 (1943) (“In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.”).

\textsuperscript{358} Id. at 360 (citation omitted).


In 2013, the Court in *F.T.C. v. Phoebe Putney Health System, Inc.* found that the anticompetitive effect must have been the “‘foreseeable result’ of what the State authorized.”  

362 In evaluating the actions of a Hospital Authority established by a state, the Court in *Phoebe Putney* determined that the “state-action immunity defense fails under the clear-articulation test because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership.”  

363 As the Court explained, “[m]ore is required to establish state-action immunity; the Authority must show that it has been delegated authority not just to act, but to act or regulate anticompetitively.”  

Active state supervision that confers federal antitrust immunity must include state authority to approve or disapprove private participants’ actions.  

365 The Supreme Court’s 2015 decision in *North Carolina State Bd. of Dental Examiners v. F.T.C.* emphasized that an “entity may not invoke Parker immunity unless the actions in question are an exercise of the State’s sovereign power.”  

366 The Sherman Act “confers immunity on the States’ own anticompetitive policies out of respect for federalism,” but, the Court emphasized “it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor.”  

367 As the Court explained, “[f]or purposes of Parker, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself.”  

368 The Court clarified that “[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.”  

369 Moreover, “[i]mmunity for state agencies,” the Supreme Court emphasized in 2015 “requires more than a mere facade of state involvement, for it is necessary in light of Parker’s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control.”  

370 A program “does not meet the second requirement for Parker immunity” where, as in *Midcal*, the “State simply authorizes price setting and enforces the prices established by private parties.”  

371 The Court emphasized that the “national policy in favor of competition cannot be thwarted by casting such a
gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”

As the Supreme Court has stressed, “[t]he mere presence of some state involvement or monitoring does not suffice . . . The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” The mere potential for state supervision is not an adequate substitute for a decision by the State.

B. No State Action Immunity for the NCJPA’s Supermajority Voting Requirements

The State of California’s policies to promote access to utility poles and lack of active supervision of the JPCs indicate that neither the JPCs nor their members, public or private, enjoy state action immunities to federal antitrust laws. NCJPA’s Supermajority Voting Requirements and rules that contradict CPUC policies find no antitrust shield under the State Action doctrine.

California state policy is to promote competition for communications services through access to utility poles, not to displace it.

Following passage of the Telecommunications Act of 1996, the CPUC adopted several decisions to promote communications competition including through utility pole access. To promote competition, the CPUC’s 1998 ROW decision, 98-10-058, expanded and defined the categories of communications providers who could attach to utility poles.

CPUC Decision 16-01-046 adopted rules promoting non-discriminatory utility pole access for Commercial Mobile Radio Service (CMRS) providers by allowing pole owners to charge the same fee for attachment as charged to CLECs and cable television corporations. That decision contained the same language as the CPUC’s 2007 GO 95 update requiring memorialization of the agreements approved in the order “in separate, private agreements with affected utilities, companies or municipalities or in the Northern California Joint Pole Association’s Operating Routine.” The CPUC’s reference to the NCJPA’s agreement as “private” underscores that the CPUC does not actively supervise

372. Id. at 106.
374. Id.
375. See generally id. at 100.
377. CPUC Decision 98-10-058 or ROW Decision, supra note 73, at 22–24.
378. CPUC Decision 16-01-046, supra note 376, at 24–30, 130 (Conclusions of Law 8).
379. Id. at 40.
380. Id. at 66, 85.
the NCJPA. State policies to promote utility pole competitive access demonstrate that JPCs do not meet the first prong of the Phoebe Putney test for state action federal antitrust immunity.

“The active supervision prong of the Midcal test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” The State of California does not actively supervise JPCs. The NCJPA and SCJPCs do not report to the CPUC. JPC decisions are not subject to CPUC review.

The CPUC has invited NCJPA to send representatives to CPUC workshops, and CPUC staff members have discussed concerns with NCJPA staff and members. These workshop invitations and informal staff discussions are insufficient to constitute active state supervision of JPCs. Lacking active state supervision, the second prong of the Phoebe Putney test is not met.

Nor are JPCs state agencies. Although several CPUC decisions recognized that the NCJPA and SCJPC adopt procedures and standards in the handbooks they developed outside of the CPUC’s purview, the CPUC description of these “private” agreements underscore the lack of state sanction.

While some municipalities are members of California JPCs, municipalities are subdivisions of the state, not state sovereigns entitled to antitrust immunity under the U.S. federalist system of government. Neither are municipally-owned utilities or irrigation districts state sovereigns under the U.S federalist structure.

Failing both prongs of F.T.C. v. Phoebe Putney Health System, Inc., state action immunity is not available to JPCs or their members. JPC functions, including their standard-setting outside of CPUC supervision, their membership rules, cost and information sharing, and maintenance processes and standards raise competition, safety, reliability, affordability, and other concerns. JPCs have no immunities from federal or state antitrust or unfair competition scrutiny. State and federal antitrust and unfair competition scrutiny of JPCs is merited to protect competition.

This Article urges the CPUC to promptly examine JPC rules and functions, and take steps to protect safety, reliability, competition, affordability, and to help achieve state environmental goals. Such an examination would not, however,

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384. CPUC Decision 16-01-046, supra note 376, at 40; Opinion Adopting Proposed Rule 94 in General Order 95 Dealing with Installation of Wireless Antennas on Utility Poles, Decision 07-02-030, CAL. PUB. UTIL. COMM’N 19 (Feb. 15, 2007), http://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/64657.PDF.
385. See CAL. CONST. art. XI, § 2.
be sufficient to confer antitrust immunity on JPCs as they are neither state instrumentalities, nor supervised by the state. Utility pole associations remain subject to federal antitrust and unfair competition laws, state competition laws such as the Cartwright Act, and California B&P Code § 17200.388

IX. RECOMMENDATIONS AND CONCLUSIONS

Yet they are ours. We made them.

- John Updike, “Telephone Poles”

Proper utility pole and infrastructure management can reduce devastating wildfires, prevent loss of life, reduce property damage and destruction, and forestall wildfire carbon emissions.389 Achieving climate change solutions increasingly depends on electric and communications services, many of which are attached to utility poles. Like layers of bark that make a tree into a strong utility pole, safety, reliability, competition, and service are intertwined values manifested in infrastructure and ROW regulation. Improving utility pole and ROW governance increases safety, enhances reliability and competition, and speeds deployment of innovative energy and communications services that support climate change solutions.

The CPUC owes no deference to JPCs, their rules, or the functions JPCs have assumed. Climate change and the acceleration of utility-caused fires demand more enforcement of utility pole violations. Searching analysis of JPCs’ role in pole access and maintenance must be part of that safety and reliability examination. The CPUC, antitrust and unfair competition authorities, must concurrently examine JPCs’ role in erecting barriers to competition and raising rivals’ costs.

This Article offers a five-point framework for utility pole, conduit, row (PCR) access regulation in California. These principles may also serve as a model for other states and jurisdictions:

1. Protect Safety First!
   - Promptly address hazards and CPUC rule violations on PCR before they fuel safety or reliability problems.
   - Do not allow incumbents to undermine safety and reliability, or delay or thwart competition by violating CPUC pole and PCR rules, e.g., not moving facilities to new poles within 60 days.

388. CAL. BUS. & PROF. CODE § 16700 (commonly known as the Cartwright Act); Sandoval, Contested Places, Utility Pole Spaces, supra note 55.

- Do not allow incumbents to engage in private, unsupervised standard-setting. Standards for PCR work must be decided in an open process administered by the CPUC.

2. **Foster competition for utility PCR access for those authorized by the CPUC to attach**
   - Enforce CPUC, antitrust, and unfair competition laws to protect competition. Do not allow incumbents to veto competitors or raise barriers to access through concerted agreements.

3. **Develop situational awareness about PCR to protect safety and reliability and promote competition**
   - Map PCR including attachments, owners, lessors, location, and other data through a comprehensive database accessible to the CPUC, authorized attachers, and pole owners.

4. **Administer PCR access and maintenance through a neutral, 3rd party non-profit overseen by the CPUC, not incumbents**

5. **Robust, prompt, and well-equipped enforcement and inspection protects safety, reliability, and competition**
   - Give the CPUC enforcement mechanisms including personnel, communications, and information tools necessary for PCR analysis, inspection, and enforcement.

These principles put safety at the forefront of utility pole and ROW regulation.\footnote{390}{See Sandoval, *Contested Places, Utility Pole Spaces*, supra note 55, at 7 (proposing a safety-centric utility infrastructure regulation framework that promotes competitive access and neutral administration).}

At the CPUC’s April 2019 workshop examining PG&E’s Governance, Management, and Safety Culture, I observed that some utilities and regulated entities have attempted to evade regulatory oversight or rules by characterizing a practice as not a safety issue.\footnote{391}{Catherine Sandoval, *Public Discussion on Pacific Gas and Electric Forums on Governance, Management, and Safety Culture Part II: Forum on Governance, Management, and Safety Culture*, ADMINMONITOR Timestamp 9:25-10:30 (April 26, 2019), http://www.adminmonitor.com/ca/cpuc/workshop/20190426/} I cited examples where utility pole owners classified leaning poles as not a safety issue, and failed to take action on or report hazards caused by other utility pole owners or attachers.\footnote{392}{Id. at 1:31:00–1:32:40.} Instead, pole owners and attachers should lean toward classifying CPUC utility pole rule violations as safety issues and promptly repair hazards. JPC private standard-setting, lack of CPUC oversight of JPCs, and delayed compliance with safety rules such as GO 95 create unacceptable safety risks.

The CPUC must promptly address joint pole owner and attacher attempts to evade regulatory responsibility for complying with utility pole safety rules. Through swift enforcement action the CPUC must end the practice of shifting...
millions from joint pole owners to electric ratepayers or shareholders by not paying bills such as $3.5 million for joint pole vegetation management costs.\textsuperscript{393}

The CPUC should examine whether a different system for utility pole governance, access, and maintenance would better serve the state’s safety, competition, and service goals. The CPUC should consider whether an independent non-profit administrator, instead of a membership association of incumbent pole owners and some pole attachers, would better facilitate pole access and administration of pole transactions consistent with CA PU Code 851. A pole database, like a multiple listing service for pole attachment and space availability, if properly and neutrally managed and secured, can facilitate safety, competition, and reliability.

The CPUC should examine whether JPC rules and roles are inconsistent with the CPUC’s competitive access policies, and act to remove undue barriers to competition erected by agreements between regulated entities and JPC members. Supermajority voting requirements allow incumbents to raise rivals’ costs and delay competition by not attending the voting meeting so no quorum is formed to consider a prospective member’s application. JPC rules permit tactics that protect incumbents, harm competition, and limit consumer choice.

The NCJPA proffered no justification for its restrictive membership process and supermajority quorum and voting rules. The CPUC determines who is eligible to attach to utility poles, not a private association of incumbent attachers. NCJPA’s supermajority quorum and voting requirements limit access to competitor information and cost sharing benefits, technical routines and procedures. These rules and JPC functions appear to unduly delay competition, raise rivals’ costs, and reduce competition’s benefits to consumers.

The CPUC determines which entities are eligible to access utility poles and thus limits the freedom of the trader (the utility pole owner) to choose with whom to deal. JPC supermajority voting requirements effectively act as an improper refusal to deal by utilities who have a regulatory duty to grant access to competitors qualified to attach by CPUC decisions. Competitors are not entitled to erect barriers to utility pole attachment through industry association agreements and concerted action.

NCJPA would be well-advised to drop supermajority quorum and membership rules. State and federal antitrust authorities should examine NCJPA’s supermajority quorum and voting requirements as potential violations of the Sherman Act or state unfair competition law.

The CPUC should promptly examine the anticompetitive effect of JPC rules and roles in its utility pole census and competition OII and OIR. The CPUC should use its jurisdiction over utility records under CA PU Code 313 to obtain information about JPC agreements, rules, and procedures. The CPUC should issue an order to investor-owned utility members of JPCs to ensure that JPCs do

\textsuperscript{393} See PG&E, Pender GRC Testimony, supra note 113, at 15-2.
not impede competitive access the CPUC authorizes or the CPUC’s safety rules, standards, and procedures.

NCJPA has failed to file as a non-profit, despite representing that it would do so for more than twenty-three years. The lack of non-profit status for either JPC keeps their activities behind a veil of unpublished rules and procedures, contributing to lack of transparency or oversight. The CPUC should issue an Order to Show Cause to examine whether the NCJPA violated rule 1.1 by representing to the CPUC that it is “formed to [sic] be formed” as a non-profit. Representing the NCJPA as a non-profit may have deterred more rigorous government oversight into their operations. Those representations may have induced POUs and IOUs to join and put their poles under JPC rules. These representations have competitive consequences.

The California AG should examine whether representations about JPCs’ non-profit status are false or misleading or constitute unfair competition under California B&P Code § 17200. The California AG’s office should also examine NCJPA and SCJPC state tax liability, filing requirements, any asserted exemptions, and the lack of any filings for non-profit or other corporate status.

The CPUC has the authority and duty to examine whether regulated entities are circumventing the CPUC’s asset transfer approval process CA PU Code § 851 requires through JPC-facilitated transactions. Utility poles are a regulated asset whose disposition affects the public interest. The CPUC must ensure that regulated utilities are not selling or disposing of utility assets through JPCs without complying with California statute and CPUC rules.

“They blend along small-town streets, Like a race of giants that have faded into mere mythology,” John Updike observed in his poem Telephone Poles. These humble poles, first used more than 176 years ago for telegraph lines, remain the backbone of modern communications and electric systems. Utility poles are so ubiquitous that we often fail to see them. We take for granted the multi-billion-dollar inventory of utility poles, wires, and facilities lining our streets. Yet, our modern economy, Internet, telephone service, cable and many video services, electricity, and the activities these services empower, all depend on access to the utility pole.

The CPUC has the authority to do “all things . . . necessary” to carry out its authority, and to ensure that utilities provide safe, reliable service, with adequate facilities, consistent with just and reasonable rates and the state’s

394. Simms, supra note 21, at 6.
398. Mulqueen, supra note 2, at 5–6.
399. Cal. Pub. Util. Code § 451; Cal. Pub. Util. Code § 701 (“The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.”).
environmental goals. The CPUC’s duty to protect public safety is paramount. Competition, safety, reliability, and service are intertwined values that govern utility pole access and administration. The CPUC must promptly act to protect competition, public safety, affordability and access, and mitigate climate change by adopting utility pole governance that safeguards these values.