

Contested Places, Utility Pole Spaces; Safety-Centric Utility Pole and Infrastructure Regulation and Competition



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The humble wooden utility pole, first used in America in 1844 by Samuel Morse, is both a workhorse and an increasingly contested competitive resource for electric, telephone, cable, and Internet Service Providers (ISPs)

* Utility poles form the scaffold for modern technology, our economy, and public safety

Photo: **Communications equipment on old pole connected to new pole in Tier 3 High Wildfire Danger Zone, Los Gatos, CA**

Photo by Professor Catherine Sandoval, May 2019.

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

Telephone Poles. John Updike

Intertwined Regulatory Objectives: Promote Safety, Competition, and Reliability.

CPUC Pole Safety Rules include General Order 95, per 47 USC 224; CPUC
General Order 128 Governs Underground Electric and Utility Facilities,
Applies to Communications and Electric Infrastructure

STATE OF CALIFORNIA

RULES

FOR

Overhead Electric Line Construction



Prescribed by the
PUBLIC UTILITIES COMMISSION

OF THE

STATE OF CALIFORNIA

GENERAL ORDER No. 95

Theme: Universal Service, Utility Service Expansion, 1850



To Present; Infrastructure and Rights-of-Way

*California Statutes of 1850 “authorized the construction and maintenance of telegraph lines in the roads, highways and other public places.”

California Civil Code 536 was adopted in 1905 to encourage expansion of telegraph and telephone facilities and services

CA Pub. Utilities Commission founded 1911,
Successor to CA Railroad Commission

Incumbents form Pole Associations, Joint Pole Committees (JPCs)

*Southern California Joint Pole Committee (SCJPC),
founded 1906.

*Northern California Joint Pole Association,
founded in 1913 (NCJPA)

AT&T settled federal antitrust suit in 1913 through
Kingbury Commitment



Photo: Tier 3 High Wildfire Danger Area, Los Gatos, CA, Photo by Prof. Catherine Sandoval, May 2019

Theme: Safety, Competition, Reliability and Universal Service Goals for Utility Regulation

- In the U.S. investor-owned utilities (IOUs) expanded and operated service in many areas, regulated by state Public Utilities Commissions, and after 1935 by the Federal Power Act for electric transmission which regulates reliability and rates.
- State PUCs require safe, reliable service at just and reasonable rates with adequate facilities.
- Beginning in 1915 California adopted laws promoting competitive access to utility poles and Rights-of-Way (ROW), updated in 1998 in CPUC Decision 98-10-058.



Photo: “Peg” Old pole tied to new pole by rope, San Jose, CA, Photo by Prof. Catherine Sandoval, April 2018

Theme: *Safety is Paramount!*

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

Telephone Poles, John Updike

- Since 2015 equipment owned by California's three largest investor-owned utilities sparked more than 2,000 fires!
- Source: Governor Newsom's Strike Force, WILDFIRES AND CLIMATE CHANGE, CALIFORNIA'S ENERGY FUTURE, EXECUTIVE SUMMARY, 1, April 12, 2019
- To protect public and worker safety the CPUC under CA PU Code §§ 8002, 8037, and 8056 has "jurisdiction to regulate publicly-owned electric transmission and distribution facilities for the purpose of protecting worker and public safety under
- Infrastructure regulation creates safety risks
- Utility infrastructure, maintenance, access, and management require transparent and accountable rules and enforcement



Photo: Tier 3 High Wildfire Danger Area, Los Gatos, CA, Utility pole wrapped with dead vegetation, Photo by Prof. Catherine Sandoval, May 2019

Principles for Utility Pole and Infrastructure

Regulation, Proposed by: Professor Catherine Sandoval



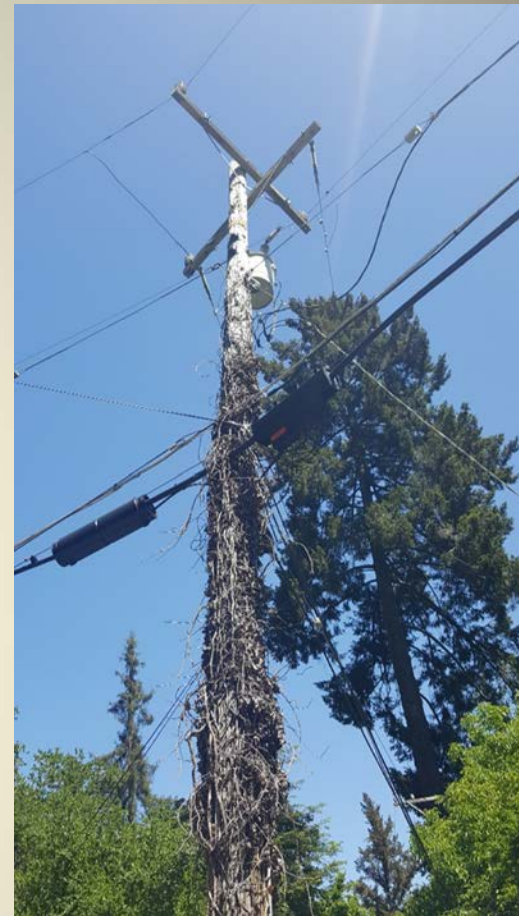
Theme: JPCs Raise Utility Infrastructure Safety, Competition, Reliability, and Oversight Issues

- PG&E, an NCJPA Member described the Association’s purpose to “facilitate pole ownership transactions among members under the terms of the NCJPA Routine Handbook.” PG&E, Testimony, CPUC Application, 17-04-010, Sept. 22, 2017)
- CA PU Code 851 requires CPUC approval for utility pole or asset transfers. JPCs are not exempt.
- NCJPA and SJCPC Member comments to the CPUC in 2019 indicate association functions affect safety, competition, and reliability. Association members also share costs and information.



Theme: Safety and Competition meet on Utility Poles and Attached Infrastructure and ROW

- *JPCs operate without CPUC Supervision.* JPCs adopt “routine handbooks” for pole access and maintenance without CPUC approval, raising safety, reliability, and competition issues.
- CPUC ALJ Miles emphasized in her Jan. 2019 Final Arbitrator Report that the CPUC owes no deference to JPC agreements, policies or procedures
- IOUs must comply with CPUC rules.
- CPUC Jurisdiction over utility pole and infrastructure public and workers safety extends to Public Owned Utilities and IOU Transmission



**Photo: Tier 3 High Wildfire Danger Area, Los Gatos, CA,
Utility pole wrapped with dead vegetation,
Photo by Prof. Catherine Sandoval, May 2019**



NCJPA Presentation to the CPUC, March 2017:

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 JP# 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.

Source: Tina Simms, Northern California Joint Pole Association (NCJPA), Panel 1 Presentation, CPUC Pole and Conduits Database and Applications Workshop, 6 (March 17, 2017), <http://www.cpuc.ca.gov/WorkArea/DownloadAsset.aspx?id=6442453009>

JPCs Lack Government Oversight or Non-Profit Status; Safety, Competition, and Transparency Concerns

***Neither NCJPA nor SCJPC is a non-profit per the California Secretary of State in December 2018**

- NCJPA's 1998 Agreement defines the organization as "The 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 NCJPA reported to the CPUC in March 2017:

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



****Representations about NCJPA non-profit status raise violation issues about CPUC Rule 1.1 which requires those appearing before the Commission never to mislead the Commission or its staff by an artifice or false statement of fact or law**

**** Misrepresentations raise issues under California Unfair Competition Law, 17200.**

NCJPA Corporate Status, Not a Registered Non-Profit



*The City of San Francisco's 2007 ordinance, 243-07 approved joining the NCJPA's 1998 amended agreement



*SF's resolution characterized NCJPA as a “non-profit association of electric 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.”

The representation that NCJPA is “formed to be formed” as non-profit, though it has not done so in the 21 years since its 1998 member agreement said it would be formed as a non-profit, may induce public entities to join NCJPA.

By joining NCJPA municipalities put pole assets under NCJPA rules including supermajority voting requirements that require a quorum and approval of $\frac{3}{4}$ of incumbents to admit new members

NCJPA Agreement, Rules, Guidelines

Claimed as Proprietary

[Copy of Slide Submitted at CPUC Pole Safety En Banc, 2017]

- Agreement [including Amendments]
- By-Laws
- Routine Handbook
- Friend Database



Northern California Joint Pole Association

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Welcome to
Northern California Joint Pole
Association

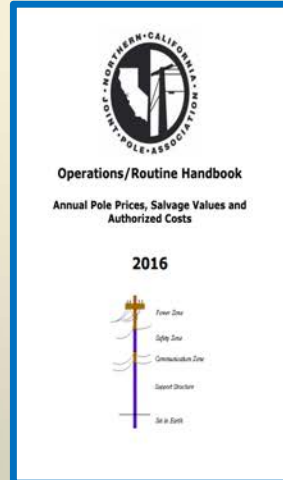
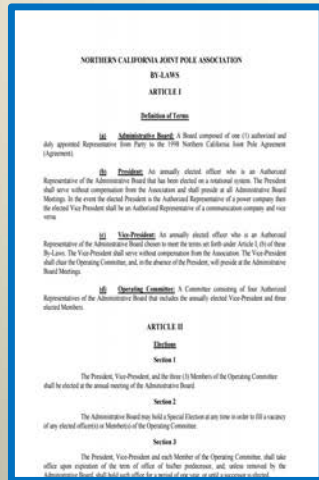
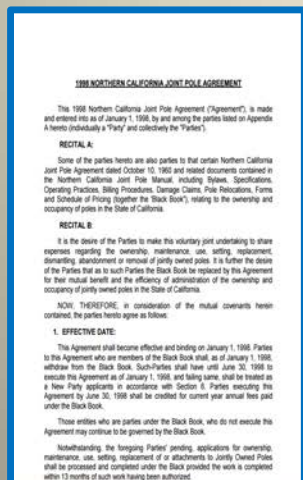


Our Mission

The Mission of the Northern California Joint Pole Association is to provide accurate and timely pricing for all joint pole transactions while providing ongoing support, ensuring a seamless experience for all joint pole member companies.

NCJPA Core Values

Compliance
Continuous Improvement
Service
Transparency
Accountability



Competition Issues under California Utility Law, Federal Antitrust, and California State Unfair Competition Law Raised by NCJPA Supermajority Voting Requirement for New Member Application & to Change Bylaws

NCJPA's 1998 agreement requires a quorum of three-quarters (3/4) of all members to consider an application for new membership, and an affirmative vote of three-quarters of the members to approve such an application.

To change the NCJPA Bylaws, a $\frac{3}{4}$ vote of the membership is also required.

Source: 1998 NORTHERN CALIFORNIA JOINT POLE AGREEMENT, §7(a) (January 1, 1998), <http://bsm.sfdpw.org/pics/14WR-0139/NCJPA%20Agreement.pdf> [*NCJPA Agreement*]. [permalink]

CPUC Decisions Require Competitive Access to Utility Poles and ROW for Service Providers CPUC Qualifies

CPUC Decision 98-10-058 determined in October 1998 that communications competitors (within certain license categories) are entitled to utility pole access (government-imposed duty to deal), consistent with government safety rules

The NCJPA 1998 agreement was adopted in January 1998 during the pendency of the CPUC rights of way proceeding.

Competition Concern: NCJPA's $\frac{3}{4}$ incumbent member quorum and voting requirements to consider new members, JPC rules and function appear to erect barriers to competitor access to utility poles and ROW approved through CPUC D. 98-10-058



Competition Concerns: Do JPCs Raise Barriers to Competition?

Google Sought Access to California Utility Poles to Build Google Fiber Internet Service in 2016



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 California Public Utility Code (CA PU Code) 767.5 such as utility poles.

The California Cable Association argued Google did not meet the federal definition of a cable company and was not entitled to Pole Access. The CPUC affirmed Google's right to attach.

Google sought to purchase pole space from PG&E. PG&E informed Google it should join the NCJPA to secure pole access.

In 2016 NCJPA reported to the CPUC that the NCJPA was having difficulty assembling a quorum to vote on Google's membership application

CPUC Utility Pole Census and Competitive Access OII 17-06-027 observed in 2017 that "Competitive carriers like Sonic and Google Fiber/Webpass have complained about difficulties they have experienced in trying to attach to poles and access underground conduit."

NCJPA Rules, Antitrust and Competition Concerns about Incumbent Member Veto

** Cf. Associated Press v. U.S (1945)* The U.S. Supreme Court held “arrangements or combinations designed to stifle competition cannot be immunized by adopting a membership device accomplishing that purpose.”

**Associated Press bylaws gave incumbents “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.*



**Tier 3 High Wildfire Danger Area, Los Gatos, CA, Overgrown vegetation compromises safety and utility pole access
Photo by Prof. Catherine Sandoval, May 2019**

Analytical Framework for Competition

Analysis of JPC Rules and Roles

- Incumbents are not entitled to stymie competitive access through concerted action such as membership association requirements.
- This is not a case where there is a debate about the duty to deal (*Colgate*; *Verizon/Trinko*; *Linkline*) as the CPUC requires competitive access.
- Competitors can't do through concerted action that which the state prohibits through unilateral action; incumbents are required to provide access to utility poles, consistent with safety requirements.



Tier 3 High Wildfire Danger Area, Los Gatos, CA, Utility pole wrapped with dead vegetation, photo by Prof. Catherine Sandoval, May 2019

The State Action Doctrine Does Not Shield JPCs from Federal Antitrust Law

The State of California's policy is to promote, not displace competition for utility pole access and utility service.

Neither the CPUC, nor any state entity, actively supervise JPCs

The NCJPA and SCJPC flunk the *Phoebe Putney* state action antitrust immunity test

Agreements between incumbents who vie for utility pole access are subject to antitrust and competition law scrutiny



Vegetation too close to pole and wires in Tier 3 High Wildfire Danger Zone, Los Gatos, CA, Photo by Prof. Catherine Sandoval

Networks in Regulated Industries

Cooperation and sharing expenses and information about work on shared utility pole assets may create economies of scale that promotes service and affordability.

Cooperation between competitors is subject to antitrust laws.

Regulatory asymmetry may drive poor maintenance. Communications companies (except for rural telcos in California are not rate-of-return) regulated, while electric and gas providers are rate regulated.

Lack of rate-of-return regulation for telcos, cable, and Internet does not excuse any violations of CPUC safety, reliability, competition, or just and reasonable rates rules.



Tier 3 High Wildfire Danger Area
Utility pole trapped in vegetation
Photo by Prof. Sandoval, May 2019

Safety First for Utility Infrastructure

*Utility infrastructure access and maintenance must promote safety, competition, reliability, just and reasonable rates, and CA's environmental goals.

*Private standard setting for utility pole access and maintenance outside of CPUC supervision raise safety concerns. Pole Association "handbook" not public available. CPUC has found some handbook practices inconsistent with CPUC rules.

CPUC infrastructure rule enforcement must be vigilant.

At the CPUC's April 2019 *en banc* on PG&E's Safety Culture I highlighted concerns that some utility pole owners or attachers attempt to evade regulatory rules by characterizing a practice as not a safety issue such as classifying severely leaning poles as not a safety issue, failing to timely address safety issues or report hazards caused by other utility pole owners or attachers



Tier 3 High Wildfire Danger Area
Utility pole trapped in vegetation
Photo by Prof. Sandoval, May 2019

CPUC OII 17-06-027 examines whether to require a utility pole census, as well as steps to promote competitive access to poles.

Question: Do JPCs promote or undercut safety, reliability, and competition through their non-transparent rules and function, lack of state oversight, and role in utility pole maintenance, work, and transactions

Photo: "Buddy Pole," created by PG&E when new utility pole planted to replace leaning pole, Nov. 2016, Campbell CA.
Photo by Catherine Sandoval, Nov. 2016



Professor Sandoval recommends the CPUC should protect safety, reliability, and competition:

- Protect community and worker safety by examining JPC functions, rules, roles and risks, including JPC private standard setting.
- Use risk principles applied to energy cybersecurity: *It is not up to an individual firm to decide to assume safety risk that affect the community and network*
- Initiate census to track utility pole attachments, ownership, and authorization
- Ensure pole ownership transactions comply with CPUC utility asset transfer rules
- Consider a 3rd party administrator subject to CPUC oversight for utility pole access and maintenance transactions to protect safety, reliability, and competition.



*Our eyes, washed clean of belief,
Lift incredulous to their fearsome
crowns of bolts, trusses, struts, nuts,
insulators, and such Barnacles as
compose
These weathered encrustations of
electrical debris
Telephone Poles, John Updike*

Utility Infrastructure Regulation to Protect Competition and Service: Incumbents are not entitled to raise competitive barriers through concerted agreements

Examine Utility Pole association supermajority quorum and voting requirements, rules, and function under California's Cartwright Act.

Examine: Sherman Act Section 1 issues raised by JPC competitor agreements

The California Attorney General's Office should evaluate JPC representations about non-profit status, JPC function, and barriers to competition under California Unfair Competition law, CA B&P Code 17200, and The Cartwright Act, CA B&P, 16700, 16755

*The CPUC should issue an Order to Show Cause to determine whether NCJPA violated CPUC Rule 1.1 regarding NCJPA's corporate or non-profit status, and examine risks posed by JPC rules and function without oversight



Buddy Pole with bottom Cut off, San Jose, CA, March 2018.

Put Safety at the Center of Utility Pole and Infrastructure Regulation!

Utility Infrastructure Regulation must protect SAFETY, RELIABILITY, AND COMPETITION

Utility pole association lack of transparency undermines public safety, reliability, and competition.

Photo on the right: CPUC Commissioner Sandoval with Tuolumne County Supervisor Randy Hanvelt, next to low Telecom Line strung to dead and dying trees, abutting the site of the fire-fighters' camp site at Drew Meadows for the 2013 Rim Fire

Trees dead or dying from bark beetle infestation in the background.

Photo by Bill Johnston, 2016

