Decision **PROPOSED DECISION OF COMMISSIONER PEEVEY**
(Mailed November 20, 2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Pursuant to Senate Bill No. 790 to Consider and Adopt a Code of Conduct, Rules and Enforcement Procedures Governing the Conduct of Electrical Corporations Relative to the Consideration, Formation and Implementation of Community Choice Aggregation Programs.	Rulemaking 12-02-009 (Filed February 16, 2012)

DECISION ADOPTING A CODE OF CONDUCT AND ENFORCEMENT MECHANISMS RELATED TO UTILITY INTERACTIONS WITH COMMUNITY CHOICE AGGREGATORS, PURSUANT TO SENATE BILL 790

Table of Contents

Title **Page**

DECISION ADOPTING A CODE OF CONDUCT AND ENFORCEMENT MECHANISMS RELATED TO UTILITY INTERACTIONS WITH COMMUNITY CHOICE AGGREGATORS, PURSUANT TO SENATE BILL 790 1
1. Summary 2
2. Background 2
   2.1. Procedural Background 4
3. Code of Conduct and Guiding Principles 6
   3.1. Summary of the Code of Conduct 6
4. Code of Conduct 8
   4.1. Marketing and Lobbying 8
      4.1.1. Restrictions on Marketing and Lobbying 9
      4.1.2. Marketing and Non-Marketing Utility Designations 12
   4.2. Rules for Utility Communications With Customers and CCAs 16
      4.2.1. Rule 3: Joint Information for Customers 18
      4.2.2. Additional Restrictions on Utility Communications 21
   4.3. Responsiveness to CCA Requests 24
      4.3.1. Non-discrimination Provisions 25
   4.4. Audit provisions 27
      4.4.1. Audit Funding 28
5. Expedited Complaint Procedure: Rules 25 through 30 30
6. Additional Party Proposals 32
   6.1. GPT Billing Proposal 32
   6.2. Advertising in or on Billing Envelopes 32
   6.3. Affiliate Transaction Rule 34
7. Comments on Proposed Decision 35
8. Assignment of Proceeding 36
Findings of Fact 36
Conclusions of Law 38
ORDER 39

Attachment 1 - Code of Conduct and Expedited Complaint Procedure

DECISION ADOPTING A CODE OF CONDUCT AND ENFORCEMENT MECHANISMS RELATED TO UTILITY INTERACTIONS WITH COMMUNITY CHOICE AGGREGATORS, PURSUANT TO SENATE BILL 790

1. Summary

This decision adopts a Code of Conduct governing the treatment of Community Choice Aggregators by electrical corporations, and establishes an expedited complaint procedure applicable to complaints filed by Community Choice Aggregators against such corporations. These new rules and procedures are intended to provide Community Choice Aggregators with the opportunity to compete on a fair and equal basis with other load serving entities, and to prevent investor-owned electric utilities from using their position or market power to undermine the development or operation of aggregators. This Code of Conduct will also assist customers by enhancing their ability to make educated choices among authorized electric providers. The Code of Conduct and complaint procedure contained in Attachment 1 to this decision have been developed in compliance with Senate Bill 790, (Leno), Stats 2011, ch. 599, which was adopted by the California State Legislature in 2011. With the adoption of these new rules, this proceeding is closed.

2. Background

2.1. History of Community Choice Aggregator Development

Community Choice Aggregators (CCAs) are governmental entities formed by cities and counties to serve the energy requirements of their local residents and businesses. The state Legislature expressed the state's policy to permit and facilitate development of CCAs by enacting Assembly Bill (AB) 117, Stats 2002,

ch. 838, which was signed into law in 2002.[1] AB 117 authorizes the creation of CCAs, describes essential CCA program elements, requires the state's utilities to provide certain services to CCAs, and establishes methods to protect existing utility customers from liabilities that they might otherwise incur when a portion of the utility's customers transfer their energy services to a CCA.

AB 117 confers on the California Public Utilities Commission (Commission) general jurisdiction over CCA program implementation, but requires the Commission to take certain actions to protect utility bundled customers and assure reasonable service to CCAs, actions that are incidental to our regulatory oversight of public utilities. The Commission developed its initial policies and procedures related to CCAs in Rulemaking (R.) 03-10-003. Specifically, Decision (D.) 04-12-046 in Phase 1 of that proceeding addressed rates and certain tariff and cost allocation issues. That order stated the Commission's intent to protect bundled utility customers from the possible cost impacts of CCA programs, while seeking to establish reasonable costs for any utility services CCAs and their customers would require. D.05-12-041 in that same proceeding addressed implementation issues, including CCA notification to a utility of its intention to serve customers within a particular area, procedures for initial enrollment of customers, and other implementation issues. That decision also addressed some aspects of the services that utilities are required to provide to CCAs. Other decisions in that Rulemaking proceeding address other CCA-related issues.

In 2011, Senate Bill (SB) 790 was enacted, which directs the Commission to consider and adopt a code of conduct, rules and enforcement procedures

[1] Pub. Util. Code §§ 218.3, 331.1, 366.2, 381.1, and 394.25. Unless otherwise stated, all references are to the California Public Utilities Code.

governing the conduct of electrical corporations relative to the consideration, formation and implementation of CCAs. This decision adopts a formal Code of Conduct governing the ongoing interactions between CCAs and modified draft rules, and establishes a complaint procedure for issues related to CCA and utility interactions, as required in SB 790.

2.2. Procedural Background

On February 16, 2012, the Commission adopted an Order Instituting Rulemaking (OIR) initiating this proceeding, R.12-02-009, to implement SB 790. The OIR proposed initial draft rules of conduct and enforcement procedures pursuant to the direction in SB 790, and provided the opportunity for parties to comment on those initial draft rules and procedures. Seventeen parties[2] individually or jointly filed a total of eight sets of timely opening comments on March 26, 2012, and 15 parties[3] individually or jointly filed a total of six sets of timely reply comments on April 16, 2012. The OIR also established a due date of April 23, 2012, for parties to file motions for hearing. One party, WEM, filed a timely motion for hearing on a limited set of issues related to the effect of utility Energy Efficiency (EE) marketing on CCAs. In addition, two parties suggested that workshops might be useful in resolving the issues raised in the OIR.

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[2] Eight sets of opening comments were filed by 17 parties: The Marin Energy Authority, City of Santa Cruz, The Climate Protection Campaign, Direct Energy LLC, Direct Access Customer Coalition, South San Joaquin Irrigation District, Constellation NewEnergy Inc, San Joaquin Valley Power Authority, Alliance for Retail Energy Markets, and Noble Americas Energy Solutions LLC (filing jointly as the CCA Alliance); Women's Energy Matters (WEM); Southern California Edison Company (SCE); San Diego Gas & Electric Company (SDG&E); Pacific Gas and Electric Company (PG&E); Shell Energy North America L.P. (Shell); the City and County of San Francisco (CCSF); Local Power, Inc. (Local Power).

[3] Six sets of reply comments were filed by 15 parties or groups: Coalition of California Utility Employees (CCUE); PG&E, CCSF; SCE; SDG&E; CCA Alliance (made up of 10 parties listed in footnote 2).

The Scoping Memo issued in this proceeding on August 9, 2012, confirmed the preliminary conclusion of the OIR that hearings will not be needed in this case because the issues on which hearings were requested are outside of the scope of this proceeding, and established that neither a pre-hearing conference nor workshops would be required.[4] The Scoping Memo included a set of draft rules based on those included in the OIR and modified to address parties' earlier comments, and provided for development of a record through an additional set of filed comments and replies.

Parties filed a total of seven sets each of timely opening[5] and reply[6] comments on the modified draft rules included in the Scoping Memo. These comments included discussions of the merits of many of the modified rules included in the rules attached to the Scoping Memo, though in some cases the comments also repeated arguments made by parties in their earlier filings on the OIR. Through this comment process, we have developed a full record on which to base our adoption of the Code of Conduct, rules, and enforcement procedures attached to this decision as Attachment 1.

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[4] We affirm these and all other rulings made by the assigned Commissioner and Assigned Administrative Law Judge in this proceeding.

[5] Opening Comments on the Scoping Memo were filed on August 24 and 27, 2012, by Gas and Power Technologies, Inc. (GPT), CCA Alliance, CCSF, CCUE, PG&E, SCE and SDG&E. WEM also submitted Opening Comments for filing on August 27, 2012, but this filing was rejected for technical deficiencies and was never re-filed and re-served as directed by the Commission's Docket Office. For this reason, WEM's Opening Comments served on August 27, 2012, are not a part of the formal record for this proceeding.

[6] Reply Comments were filed on September 7 and 10, 2012, by the CCA Alliance, CCSF, CCUE, PG&E, SCE, SDG&E, and WEM.

3. Code of Conduct and Guiding Principles

In SB 790, the legislature directed the Commission to develop rules and procedures that "facilitate the development of community choice aggregation programs, … foster fair competition, and … protect against cross-subsidization paid by ratepayers."[7] In developing the Code of Conduct and enforcement mechanisms adopted here, our goal, consistent with this statute, is to provide CCAs with the opportunity to compete on a fair and equal basis with other load serving entities (LSEs), and to prevent utilities from using their position or market power to gain unfair advantages. Ultimately, we believe that such a Code of Conduct should benefit customers by preserving their ability to make educated choices among authorized electric providers. Unfair practices by any market participant, and particularly one with market power, may result in a reduction in customer choices, contrary to the public interest.

We have endeavored to craft rules that accomplish the goals of SB 790 without placing more restrictions than necessary on any LSE. This approach maintains an appropriate balance between the needs of different electricity providers, thereby preserving customer choice. This section describes the revised rules contained in Attachment 1 and adopted in this decision, and explains the rationale for changes from the modified draft rules on which the parties commented earlier in this proceeding.

3.1. Summary of the Code of Conduct

As directed in SB 790, the attached Code of Conduct, rules, and enforcement procedures provide basic rules for interactions of electric corporations relative to the consideration, formation, and implementation of CCAs. The rules adopted here are based on the modified draft rules contained in

[7] SB 790, § 2(h), and § 707(a)(4)(A).

the Scoping Memo, which have been refined to address the comments of parties. The Code of Conduct is designed to foster fair competition by limiting utility activities that would disadvantage CCAs, and by ensuring that customers receive complete, accurate, and balanced information.

In summary, the rules adopted in this decision do the following:

- Define basic concepts relevant to electric utility actions with respect to CCAs, including "marketing," "lobbying," "promotional or political advertising," and "competitively sensitive information."
- Require preparation and distribution of a neutral comparison of the tariffs of the utility and any CCA within that utility's service territory.
- Require a separation between a utility's marketing division and its other functional divisions, such as billing and customer service, for any utility that intends to market against actual or potential CCAs within its territory.
- Require utilities to provide access to information to CCAs on the same terms as it does for its independent marketing division.
- Prohibit utilities from speaking on behalf of a CCA or making any untrue or misleading statement about a CCA's service.
- Require modified draft rules to apply tariff provisions in the same manner to similarly situated entities.
- Institute reporting and other documentation requirements for utilities related to their interactions with CCAs and with their independent marketing divisions.
- Require periodic audits of utilities to assess their compliance with the Code of Conduct.
- Establish a complaint procedure for use by CCAs in the event that they believe a utility is not meeting its obligations under this Code.

Some aspects of the Code of Conduct, such as the prohibition against utilities making available a mechanism by which customers may opt out of a CCA, repeat policies adopted by the Commission in previous decisions, and other aspects have been developed specifically to comply with SB 790. The rationale for the overall approach taken in these rules, along with the specific rationales for the adoption of some new provisions that were the subject of disagreement among parties, are discussed below.

4. Code of Conduct

The Code of Conduct contained in Attachment 1 to this decision includes definitions of and limits on marketing and lobbying activities, restrictions on utility funding of and information sharing with divisions that market against CCAs, provisions to ensure equal treatment of CCAs by utilities, and mechanisms for enforcing the behavior required in the code of conduct, including through a complaint procedure as defined in SB 790. This section describes the rules adopted through this decision and highlights changes in these rules from the modified draft rules on which parties commented in this proceeding.

4.1. Marketing and Lobbying

SB 790 finds that "[e]lectrical corporations have inherent market power derived from, among other things, name recognition among customers, lonstanding relationships with customers, … [and] access to competitive customer information."[8] Due to such concerns about utilities' potential to use their market power, and especially their well-developed relationship with customers within their service territories, to undermine the formation or

[8] SB 790, § 2(c).

operation of CCAs, one major focus of both SB 790 and these rules is to prevent utilities from using their structural advantages to influence customers or local governments against investigation of or participation in CCAs. Towards this end, the Code of Conduct adopted in this decision defines and places limits on utility marketing and lobbying activities that could discourage exploration of or interest in a CCA.

Specifically, Rules 1 and 2 define and place limits on a utility's ability to communicate with customers (marketing) or with public officials and government agencies (lobbying) to influence against participation or enrollment in a CCA. Rule 1 defines the terms "marketing," "lobbying," "promotional advertising," and "competitively sensitive information," to clarify the limits of allowable communications by utilities relative to CCAs. Rule 2 specifies that utilities may not use ratepayer funding to market or lobby against a CCA program. Additional Rules, including rules 4, 5, 6, 8, 10, 11, 16, and 23 describe the requirements for organization and funding of utilities' independent marketing divisions and clarify the limits on marketing utilities.

4.1.1. Restrictions on Marketing and Lobbying

The definitions of marketing and lobbying in Rule 1 (a) and (b) were the subject of significant comment in this proceeding. In general, the definitions contained in the modified draft rules define the types of utility communications related to CCAs that utilities must avoid, or fund only through special shareholder-funded divisions. Such communications include written or oral contacts to customers or governments that attempt to discourage participation in a CCA. As included in the modified draft rules, these definitions contain specific exceptions that allow utilities to provide customers in a CCA (or prospective CCA) area with information under certain circumstances. The modified draft

rules distributed with the Scoping Memo in this proceeding included three exceptions that define situations in which a utility may communicate information to customers in the area of an existing or potential CCA. Under Rule 1(a), which defines marketing, utilities may communicate about energy supply services and rates to customers if that information is being provided throughout the utility's service territory and it does not specifically reference any CCA program. This exception essentially provides that utilities do not need to specifically remove customers in CCA areas from territory-wide communications that are not specifically related to CCA issues. The marketing definition also provides that utilities may provide customers with Commission-approved communications related to specific programs offered by the utility. In addition, this rule allows utilities to provide factual answers to specific questions from individual customers.

The CCA Alliance in particular disputes the need for these exceptions to the marketing and lobbying definitions, and recommends that if exceptions are adopted, changes should be made to the wording of some of these provisions in order to strengthen the CCA protections offered in the rules. For example, the CCAs and related parties suggest that the exemption for communications related to Commission-approved programs be revised to ensure that covered communications are narrowly defined and include only specific activities approved by the Commission as part of existing programs. WEM also asserts that the prohibition on lobbying contained in the modified draft rules is not strong enough. In addition, CCA Alliance claims that the exemption allowing utilities to provide factual answers to questions from customers or government representatives creates an opening for abuse by utilities. CCA Alliance asserts that it is "legally impossible" for a utility to provide unbiased analysis because

its market power would have an anticompetitive influence on customers.[9] Similarly, parties expressed concerns that utilities could prompt their customers to ask questions about the relative merits of the utilities and a CCA in order to answer those questions in ways that would benefit the utility.[10] SCE responds that utilities must be able to respond to questions, including questions about the differences between utility and CCA service, in order to provide its customers with adequate customer service.[11]

In response to these comments, we have modified the exemption for utility communications related to specific programs to clarify that the exemption covers only formal communications related to Commission-authorized programs. At the same time, we expect the prohibition on lobbying, along with the non-discrimination provisions and the complaint and enforcement procedures discussed below, will be sufficient to identify and deter lobbying activities, and we do not see a need for changes to the exception that allows the utilities to answer customer or government agency questions. Not allowing utilities to provide factual answers about its service relative to CCA service, or to provide factual information to government agencies, not only interferes with the ability of customers to be informed about their options, but could interfere with the ability of government agencies to explore the formation of a new CCA.

Based on these definitions, offers of special services to a local government within the territory of a CCA or prospective CCA, or providing a government agency or representative with information other than factual representations of utility services, would violate these rules (*see* Rule 17). Prompting a customer to

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[9] CCA Alliance Opening Comments dated August 27, 2012, at 6-7.

[10] WEM Reply Comments dated September 10, 2012, at 2-3.

[11] SCE Reply Comments dated September 10, 2012, at 2.

ask about the advantages of a utility's services or rates compared to those of a CCA would similarly violate these rules. This is true whether or not such interactions contain an explicit message discouraging participation in a CCA, or even a specific mention of a CCA. Under these rules, the main enforcement procedure for breaches of the Code of Conduct is the filing of a complaint using the expedited process adopted in this decision. As provided in Rule 23(c), it is not necessary to prove a violation in order to initiate a complaint under those procedures. Indeed, the expedited complaint procedure is the venue in which it will be determined whether a violation has taken place, and the complaint process provides parties with due process and the opportunity to make their case about whether a violation has taken place. At the same time, as in other Commission complaint proceedings, the complainant bears the burden of proof, and must consider the expedited timeframe and procedures established for these complaints in making its case.

4.1.2. Marketing and Non-Marketing Utility Designations

Rule 2 allows utilities to market or lobby against CCAs only through an independent shareholder-funded division that does not have access to customer-sensitive information collected by the utility. This rule is consistent with the requirements of SB 790, which states in relevant part:

> Ensure that an electrical corporation does not market against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporations shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions.[12]

[12] § 707(a)(1).

No parties to this proceeding object to the basic requirement of Rule 2 that these activities must be shareholder-funded, but several parties comment on the rules applicable to marketing and non-marketing utilities. In general, the utilities do not object to the rules applicable to the independent marketing divisions of companies that choose to market against CCAs, but dispute the need for self-identified non-marketing utilities to undergo regular audits or meet other requirements.[13] In contrast, the CCAs and other parties such as WEM and CCSF argue that neither the rules for marketing utilities nor the process for becoming a non-marketing utility are sufficient to ensure that utilities do not use their market power to undermine CCA formation or operation.[14] The rules for marketing and non-marketing utilities are discussed in the following sections.

4.1.2.1. Structure of Utilities' Independent Marketing Divisions

Rules 2, 4, 5, 6, 8, 10, 11, 12, 13, 16, and 23, address the structure of utilities' independent marketing divisions and their interactions with the other divisions of the utility. As noted above, Rule 2 provides that utilities may only market against CCAs through an independent marketing division funded by shareholders. Rules 4, 6, 10, 11, 12, 13, and 15, expand on this separation requirement, providing rules to ensure that such marketing divisions remain functionally and financially separate from other utility divisions. Rules 5 and 8 protect against the possibility that a company's independent marketing division could benefit from access to information collected or supported by a utility's ratepayers. According to Rules 12 and 13, a utility and its independent

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[13] *See, for example*, SDG&E Opening Comments filed August 27, 2012 at 6-7, SCE Opening Comments at 6, PG&E Opening Comments at 4.

[14] WEM Reply Comments at 2-3, CCSF Opening Comments at 3, CCAA Opening Comments at 3-5.

marketing division may share certain corporate functions such as support staff and corporate governance, as long as doing so does not result in the subsidization of marketing and lobbying activities by ratepayers or the transfer of sensitive information to the marketing division. In addition, the rules require that any movement of employees between a utility and its independent marketing division must be tracked and reported to the Commission,[15] and may not result in the transfer of competitively sensitive information.[16] The underlying purpose of these requirements is to ensure that no ratepayer funds are used to support marketing or lobbying against CCAs. Rule 23 requires marketing utilities to file their compliance plans via Tier 2 advice letter; such an advice letter must describe how the utility intends to comply with the separation requirements adopted in the rules. Rule 23 allows utilities that do not intend to market or lobby against CCAs to declare this intention through a Tier 1 advice letter. The rules related to the structure of marketing utilities were generally non-controversial, and are adopted in this decision with only minor changes to the modified draft rules.

In contrast, WEM and CCA Alliance express concerns about the requirements applicable to self-identified non-marketing utilities. Specifically, these parties argue that non-marketing utilities should be required to file compliance plans. The CCA Alliance recommends that non-marketing utilities should file a detailed plan containing specific information, including how they intend to avoid activities prohibited under the rules, naming an individual responsible for the utility's compliance with the rules, and providing a plan for

[15] Rule 16 (a), (b), and (c).

[16] Rules 5 and 13.

evaluating and verifying compliance with the rules.[17] The utilities suggest that this proposed addition is problematic. SDG&E, for example, asserts that this requirement would go beyond the requirements of SB 790, and notes that it would impose costs for development, training, and other activities that would then be funded either by shareholders or ratepayers, expending scarce resources for little if any established benefit.[18] SDG&E also states that such a rule would "require a Non-Marketing Utility to expend limited resources to adopt and implement a detailed compliance plan in anticipation of a future event," such as a violation of the non-marketing rules.[19] SCE also argues that WEM and the CCA Alliance fail to establish that a compliance plan would be more effective than the Tier 1 advice letter required in the modified draft rules.[20]

We find that a requirement that self-declared non-marketing utilities file a compliance plan is unnecessary at this time. Parties have not established that a compliance plan beyond the requirement for a Tier 1 advice letter declaring non-marketing status is necessary in order to allow utilities to abide by the Code of Conduct rules applicable to non-marketing utilities. At the same time, as noted by SCE, the compliance plan requirements recommended by WEM and CCA Alliance could be expensive and time-consuming to implement. In the absence of evidence that filing a compliance plan is necessary for utilities to avoid breaches of this Code of Conduct, and given the other safeguards established by these rules, it would not be reasonable to impose the costs needed to develop and file such a plan. The audit requirement, which we retain for non-marketing

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[17] CCA Alliance Opening Comments at 5.

[18] SDG&E Reply Comments at 5.

[19] SDG&E Reply Comments at 6.

[20] SCE Reply Comments at 4.

utilities, along with the complaint procedure adopted here, should be sufficient to identify violations of this Code (whether intentional or accidental) and provide an opportunity to impose appropriate penalties or remedies, without the additional expense of a detailed compliance plan.

At the same time, we expect utilities to put in place sufficient procedures and training to assist their employees in avoiding Code violations, and such activities may be documented through the Tier 1 advice letter, to support the utility's self-designation as non-marketing. If a CCA believes that a self-declared non-marketing utility has violated the requirements that qualify it for that non-marketing status, it is free to file a complaint under the expedited procedure. In the absence of arguments or evidence establishing that a compliance plan is necessary or would be more effective than the Tier 1 advice letter requirement, we decline to adopt this suggestion or revise the rules related to declaring non-marketing status. The rules related to establishing non-marketing status are adopted with only minor modifications from the wording contained in the modified draft rules.

4.2. Rules for Utility Communications With Customers and CCAs

Rules 3, 9, 17, and 19 in the modified draft rules govern the ways in which utilities (both marketing and non-marketing) may communicate with customers, CCAs, local governments and their representatives, and others about CCA-related issues. The proposed Rule 3 requires a utility to work with any CCA(s) within its territory to prepare and distribute to customers within a CCA's area of operation a comprehensive, neutral comparison of the utility's and CCA's rates. Rules 9, 17, and 19 build on the prohibitions from marketing and lobbying to limit the types of communications that utilities may use in their interactions with

customers and local governments with respect to CCAs or CCA issues. Rule 9 provides that an electrical corporation may not speak on behalf of or appear to speak on behalf of a CCA, or make misleading or false statements about CCA services. Rule 22 requires the utility to maintain a log of complaints related to CCAs or CCA customers that are submitted to the company in writing, and indicates specific information that must be kept as part of this log. These rules govern certain aspects of utility communications with CCAs and their customers, to ensure both that customers receive neutral and accurate information about their electric service options and that specific issues identified by customers or CCAs are tracked over time, providing parties with information about outstanding issues and documenting the responsiveness of both parties. Parties made many suggestions for the modification of these provisions, some to make the rules more workable by limiting the burden that they impose on both utilities and CCAs, and others to minimize the statements of both marketing and non-marketing utilities to customers about CCA service. For example, in comments on the proposed decision, PG&E, SCE, and SDG&E all requested that the types of contacts to be included in the log required in Rule 21 should be narrowed to avoid the tracking of routine communications between utilities and CCAs. In order to clarify that it is not necessary to track routine interactions related to operational functions, we have narrowed this rule to require the tracking of written complaints only. In addition, SCE requests that it not be required to share confidential customer information with a CCA via this log without a customer's consent. As noted by MEA, D.12-08-045 requires utilities to grant CCAs access to customer usage information without the need for customer consent, as long as the CCA signs an appropriate non-disclosure agreement.[21]

[21] MEA Reply Comments filed December 17, 2012, at 4.

We find that the existing standards for sharing of confidential information adopted in D.12-08-045 will protect customer information, and it is not necessary to adopt new confidentiality standards applicable only to this log.

We believe that the rules in Attachment 1 related to communications between a utility and a CCA provide important limits on utility activities as well as an avenue through which complaints may be tracked. As a result, we adopt these rules with only slight modifications from earlier draft rules.

4.2.1. Rule 3: Joint Information for Customers

Several parties commented on the specific requirements of the proposed Rule 3, which requires utilities and CCAs to prepare joint comparisons of their rates, services, and generation mix to assist customers in making educated choices about their electric provider. Because the original wording of this proposed rule required that the tariff comparison contain comprehensive information about the rates for all customers classes, parties assert that the adoption of this rule would lead to preparation and distribution of a voluminous and costly information packet, much of which would not be relevant to any given recipient within the CCA territory. To reduce this burden and minimize customer confusion, parties suggest that only summary information should be mailed to customers, and more complete information should be accessible through a Web site.[22] SDG&E, for example, suggests that Energy Division take on leadership of the process of compiling comparative information, and also handle the posting of the complete data.[23] In addition, the CCA Alliance states that the timing for distribution of this information contained in the proposed rule would be problematic for the Marin Energy Authority (MEA), the only CCA

[22] *See, for example,* CCA Alliance Opening Comments at 8.

[23] SDG&E Opening Comments at 4.

currently operating within the state.[24] In addition, the CCA Alliance objects to the cost-sharing provision included in this proposal. The CCA Alliance argues that this cost-sharing provision would subject a CCA to costs beyond its control, because the utilities in general have significantly more resources than CCAs and could spend a disproportionate amount in the mailing.[25] The CCA Alliance, all three major utilities, and WEM all argue that it would be unnecessarily costly to produce and distribute the large volume of information required in the proposed rule. To address this concern, SCE and other parties recommend that instead of a comprehensive mailing to all customers, this rule should require mailing of a rate summary,[26] and SDG&E recommends that the comprehensive information should be made available to customers via the internet, rather than through a costly direct mailing.[27] PG&E suggests that the rule should include a process for resolving any disagreements between the utility and the CCA on the content of the comparative information mailing.[28]

We are persuaded by the parties' comments that mail or other direct distribution of a complete set of tariff and rate comparisons to individual customers would be overly costly and impose an unnecessary burden on CCAs and utilities. As a result, we have modified this provision to require that all customers in a CCA's territory directly receive a comparison of average rates for all customer classes served by the CCA and utility, along with a comparison of at least one sample residential bill for an average level of usage agreed on by the

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[24] CCA Alliance Opening Comments at 8-9.

[25] CCA Alliance at 8.

[26] SCE Opening Comments at 2-4.

[27] SDG&E Opening Comments at 8.

[28] PG&E Opening Comments at 7-8.

CCA and utility. Additional tariff and rate comparisons for all customer classes will be posted on the Web sites of both the utility and the CCA, and on additional Web sites, as appropriate. This adopts elements of the SCE proposal, by simplifying the information sent directly to customers while ensuring that complete information is available.

Scaling back the scope of the information distributed directly to customers should significantly reduce the costs of this rule, which largely addresses the CCA Alliance's concern about sharing the costs of this joint notice. It is our intention that a CCA and utility cooperate in the design and production of this notice, and as an aspect of that cooperation, we expect them to work together to limit the costs of this notice to a level that can be sustained by both the CCA and the utility. Consistent with this, we have maintained the requirement that the CCA and utility share the costs of this notice equally. Similar, we require the CCA and the utility to work together and share the costs for preparing the complete tariff comparison, but each entity will pay the costs of posting the comparison to its Web own site. Rule 3 has also been revised to provide that the Commission's Public Advisor's office, which reviews many utility messages to customers, especially bill inserts, will have final approval of the wording of these materials, and by this final approval may resolve any disputes that the CCA and utility cannot resolve informally.

In response to the concerns expressed by the CCA Alliance about the date of distribution of this comparison, this rule has been modified to change the distribution date to be more consistent with MEA's timing for implementation of new rates. At the same time, we remind existing or future CCAs that if the schedule adopted here is not consistent with a particular CCA's schedule for implementing rate changes, a CCA or utility may request an extension to the

dates adopted in the rules included with this decision from the Commission's Executive Director through existing Commission procedures.

4.2.2. Additional Restrictions on Utility Communications

Rules 9, 17, and 19 supplement the general rules against marketing and lobbying by establishing specific limitations on utility communications with customers, local governments and their representatives. These rules apply to both marketing and non-marketing utilities. Under Rules 9 and 19, the utility is expressly precluded from speaking on behalf of or seeming to speak on behalf of a CCA or making untrue statements about CCA services, including by offering customers a mechanism to opt out of CCA service, a task that past Commission decisions leave solely to CCAs. Rule 19 was not controversial among the parties to this proceeding, but the CCA Alliance suggests that Rule 9 should be strengthened to preclude non-marketing utilities from providing any analysis about CCA rates or programs. The CCA Alliance further argues that a non-marketing utility that offers any analysis of a CCA rate or program, "even if prompted by questions from customers or government officials," should immediately be reclassified as a marketing utility.[29] This extends the argument made by the CCA Alliance that there should not be an exception to the definition of marketing to allow utilities to provide factual responses to customer requests for rate analyses or other information about utility tariffs and services.

As noted above, the purpose of these rules is to provide CCAs with the opportunity to compete on a fair and equal basis with other LSEs, and to prevent utilities from using their position or market power to gain unfair advantages over CCAs. We find that the ability to answer specific customer questions in a

[29] CCA Alliance Opening Comments at 6.

factual way is necessary in order for a utility to provide adequate customer service. A prohibition against a utility providing factual information in response to questions is not in the interests of California consumers. For these reasons, we find that Rule 9 as adopted here protects both customers and CCAs from the possibility that a utility would misrepresent CCA rates or programs, without unfairly limiting the ability of utilities to provide appropriate service to their customers.

Rule 17 prohibits utilities from offering special services or deals to local government agencies, their representatives, or customers within a specific area conditioned on the community taking service from the utility rather than a CCA. This rule contains an exception that would still allow for a utility to offer Commission-approved programs available only to bundled customers, who receive both distribution and generation service from the utility. The CCA Alliance objects to the inclusion in Rule 17 of this exception for Commission-approved programs only available to bundled customers, and also argues that this rule should be strengthened to include clear enforcement provisions or penalties connected to this rule. In support of their request for specific enforcement provisions or penalties, both the CCA Alliance and WEM assert that PG&E has in the past offered special services to localities in an effort to undermine support for creation of or participation in a CCA.[30] In response, PG&E notes that these allegations have been considered previously by the Commission, and argues both that these allegations are false and that they are not relevant to the consideration of a Code of Conduct governing future activities.

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[30] CCA Alliance Opening Comments at 9-10, and WEM Reply Comments at 4-6.

We find that the specific prohibition on offering special services to government agencies, their representatives or members of a specific community, combined with the lobbying and marketing rules and audit and complaint processes adopted here, provides adequate protection against the possibility that a utility would offer an incentive to a local agency in an effort to unfairly compete with or undermine consideration of a CCA. The specific allegations about PG&E's past actions, which took place before SB 790 and the development of these Codes of Conduct, do not change this conclusion. We expect that Rule 17, along with the audit requirements and complaint procedures adopted in this decision, should act as deterrents against a utility taking action prohibited under this rule, and will provide CCAs with an avenue to enforce this rule and apply appropriate penalties if such a violation is proven.

We understand the concerns expressed by the CCA Alliance and WEM about the exception contained in this rule allowing utilities to offer government agencies Commission-approved programs available to bundled customers. It is possible that the availability of such programs could influence an agency's choice to maintain bundled utility service rather than receive some service through a CCA. Still, we find that the elimination of this exception would not be in the interests of California ratepayers. The programs covered by this exception have been approved by this Commission to apply to bundled customers based on considerations explored in the approval of those programs. Eliminating this exception could have the effect of denying access to these programs to customers within a CCA's territory that chose to receive service from an electrical corporation rather than a CCA. This would amount to discriminating against these customers by denying them access to programs available to similarly situated customers in other parts of a utility's service territory.

For these reasons, we find that Rule 17, as proposed in the draft Code of Conduct included with the Scoping Memo, is in the public interest, and should be adopted. As with other provisions adopted with this Code of Conduct, if a CCA believes that a utility is violating or abusing this provision, it is free to file a complaint under the expedited complaint procedures adopted in this decision. If in the future we find that the exception included in this rule has anticompetitive effects, we may reconsider the rule at that time.

4.3. Responsiveness to CCA Requests

Rules 7 and 22 require electric utilities to respond to CCA requests and to provide CCAs with specific services on a non-discriminatory basis. Rule 7 requires utilities to provide CCAs with access to utility information, rates, and services on the same terms as that information is available to its independent marketing division. Rules 22 requires that utilities keep a log of all issues submitted to the utility in writing by either a CCA or a CCA customer, and makes this log available for inspection by the CCA and the Commission. These rules are intended to ensure that utilities remain responsive to CCA requests for information and do not interfere with or withhold their assistance from CCAs. While no party objects to modified draft Rule 7, the CCA Alliance suggests that Rule 22 should be expanded to provide that issues included in the issue log would become "actionable" if they are not resolved within "a reasonable period of time."[31] SDG&E appears to interpret this suggestion to mean that the Commission would initiate an inquiry into the facts and timing of an unresolved issue before a related complaint could be filed.[32] In contrast, PG&E assumes that the term "actionable" in the CCA Alliance proposal refers to the imposition of a

[31] CCA Alliance Opening Comments, at 10.

[32] SDG&E Reply Comments at 5.

fine if an issue is not resolved in a timely way.[33] In general, the utilities argue that this proposal is "unnecessary and unworkable."[34]

We agree that this proposal is both unclear and unnecessary. Not only is the suggested wording of this provision vague in failing to define the word "actionable" and the phrase "within a reasonable period of time," but these suggested modifications appear to create an additional enforcement process beyond the expedited complaint procedure. Such a process would consume Commission resources without providing an obvious benefit to any party. As noted by SDG&E, a CCA has the option to file a complaint under the expedited process if it believes that an issue has not been addressed appropriately, and penalties may be assessed through the complaint process described below if the Commission determines that doing so would be appropriate in a specific case. For these reasons, we see no need to modify Rules 7 and 19, and adopt them as proposed in the Scoping Memo.

4.3.1. Non-discrimination Provisions

Rules 14, 18, and 20 in the modified draft rules address the possibility that utilities could place CCAs at a disadvantage by discriminating against them or their customers. Specifically, Rule 14 requires utilities to apply tariffs in the same manner to similarly situated entities. Rule 18 prohibits discrimination against CCAs, for example by refusing to provide products or services to CCAs or their customers. This rule essentially extends more broadly to customers the provisions in Rule 17, which prohibit utilities from offering products or services to local governments conditioned on their participation or non-participation in a CCA. Like Rule 17, this rule contains an exception for Commission-approved

[33] PG&E Reply Comments at 5.

[34] SDG&E Reply Comments at 4.

programs available only to bundled customers. Rule 20 prohibits utilities from refusing to sell excess electricity to a CCA. Taken together, these rules provide some assurance that CCAs and their customers will receive treatment from utilities that is equivalent to the treatment of similarly situated entities, and prohibits utilities from refusing to deal with CCAs or their customers simply on the basis of their association with a CCA. No parties objected to these provisions as they were included in the Scoping Memo, and we adopt them here without modification.

4.4. Elimination of Modified Draft Rule 21

Modified draft Rule 21 would have required utilities to bill any charges received from a CCA on the subsequent bill issued by the utility unless other arrangements are made in writing. In their comments on the modified draft rules, all three utilities note that their existing CCA tariffs[35] already have provisions that address the timing of billing for CCA charges.[36] In response, the CCA Alliance states that despite these tariffs, charges may go unbilled due to technical errors by the utility or for other reasons beyond the control of a CCA, and that this rule is necessary to ensure that CCAs are made whole for their purchases of electricity on behalf of their customers.[37]

We find that the provisions of modified draft rule 23 could in some circumstances conflict with the utilities' existing Commission-approved CCA tariffs, and this draft rule should not be adopted. If parties have concerns about the way the existing tariffs are written or the implementation of these tariffs,

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[35] SCE Tariff Rule 23, SDG&E Tariff Rule 27, and PG&E Tariff Rule 23.

[36] SCE Opening Comments at 4, SDG&E Opening Comments at 5, and PG&E Opening Comments at 5.

[37] CCA Alliance Reply Comments at 6.

those concerns should be addressed directly through reconsideration of the tariff or related utility procedures. Adopting a rule in this proceeding that addresses issues already governed in utility tariffs is likely to lead to confusion. For these reasons, we have deleted modified draft rule 21 from the Code of Conduct in Attachment 1, and we have renumbered the final rules accordingly.

4.5. Audit Provisions

Modified draft Rule 24 requires audits for all utilities every two years to ensure compliance with the Code of Conduct. This audit provides an independent procedure, not initiated by a CCA, to ensure that both marketing and non-marketing utilities abide by the rules adopted in this proceeding. For marketing utilities, this audit ensures that marketing and lobbying activities are funded by shareholders, and that the rules requiring separation between a utility's independent marketing unit and the other aspects of the utility are followed. For non-marketing utilities, this audit ensures that the company is abiding by the limitations on marketing and lobbying activities that qualify a company for non-marketing status.

No parties object to the audit provision as applicable to marketing utilities. All three utilities, however, argue in their opening comments on modified draft Rule 24 that it is unnecessary to require non-marketing utilities to undergo audits, and inappropriate for such audits, if required, to be funded by utility shareholders. The utilities also assert that the complaint procedure provides a venue for identifying and addressing concerns about non-marketing utilities, if needed. CCAs respond that such audits provide an independent means of identifying violations by non-marketing utilities.

We find that it is consistent with SB 790 to provide an independent means of identifying potential violations of this Code of Conduct by non-marketing as

well as marketing utilities. While the complaint procedure gives CCAs recourse to stop inappropriate conduct of which it becomes aware, and to request penalties or compensation for such conduct, it is a reactive process that on its own does not ensure the identification of violations. It is not reasonable to assume that either a CCA or this Commission could be immediately aware of all utility actions that might constitute a violation of this Code of Conduct, or to place the burden on a CCA to attempt to do so. The audit procedure provides a mechanism for detecting Code violations that may not be obvious to people outside of the utility, but could still undermine the fair competition that these rules, and SB 790, are intended to promote. The prospect of a future audit that may detect violations may also deter prohibited conduct. For these reasons, we retain the audit requirement for both marketing and non-marketing utilities, which is adopted as final Rule 23.

4.5.1. Audit Funding

No parties object to the requirement that the audits of marketing utilities be conducted at the expense of the utility's shareholders. In contrast, however, SCE, SDG&E, and PG&E all argue that any audit of a non-marketing utility should not be shareholder funded because the utility has already committed itself to avoiding breaches of this Code of Conduct, and using shareholder money to audit their conduct would be unnecessary and unfair. This argument is only persuasive to the extent that we assume that any non-marketing utility will successfully avoid all conduct prohibited under these rules, whether intended or unintended.

We agree that it is not necessary for a standard compliance audit of a non-marketing utility that abides by the Code of Conduct and does not engage in any prohibited marketing, lobbying, or other activities to be supported by

shareholder funding. At the same time, we agree with the CCA Alliance and others that a utility that improperly claims non-marketing status should be subject to serious consequences. Such consequences will motivate utilities to take care in implementing and abiding by these rules. In order to ensure that each utility takes seriously the responsibilities of this Code and consistently upholds its obligations under the non-marketing designation, it is appropriate for a self-identified non-marketing utility's shareholders to pay the costs of any audit that shows a violation of the rules applicable to non-marketing utilities. Additional penalties for breaches of this Code of Conduct revealed in an audit of a marketing or non-marketing utility may also be assessed via the complaint procedure adopted in this decision and described below. Possible penalties for breach of these rules may include the removal of a utility's status as a non-marketing utility, making the company subject to the rules for marketing utilities, or other penalties determined to be appropriate through the complaint procedure.

Consistent with these determinations, final Rule 23 as adopted in this decision maintains the requirement that both marketing and non-marketing utilities will undergo bi-annual compliance audits, but has been slightly modified to provide for ratepayer funding of audits for non-marketing utilities only. Such funding may be requested in each non-marketing utility's next General Rate Case or other appropriate proceeding. The Commission's Executive Director shall oversee independent audits of both marketing and non-marketing electrical corporations to be performed every two years, with the first audits, covering 2013 and 2014, to begin not later than 2015.

5. Expedited Complaint Procedure: Modified Draft Rules 25 through 30

In addition to requiring the Commission to adopt a Code of Conduct, SB 790 requires the adoption of an expedited complaint procedure for disputes related to possible violations of an electrical corporation's violation of its obligations to CCAs under state law. SB 790 specifies that complaints filed by CCAs under the expedited procedure must be resolved within 180 days of the complaint's filing, with the possibility of one 60-day extension by Commission order, if necessary. Parties' comments on the modified draft rules contained in the OIR and Scoping Memo for this proceeding suggested several slight modifications to the proposed complaint procedures. The complaint procedures adopted in this decision comply with the requirements of SB 790, and are designed to provide parties with due process opportunities while developing a sufficient record on which to decide the merits of a complaint.

Parties provided a range of comments on the modified draft rules for expedited complaints contained in the Scoping Memo. Two parties, the CCA Alliance and WEM, express concerns about the amount of time it could take to resolve complaints under this new procedure. For example, the CCA Alliance suggests that utilities could act to delay the processing of complaints by refusing to meet and confer with a CCA before a complaint is filed, as required in the modified draft rules contained in the Scoping Memo. WEM recommends shortening the 180-day timeframe established in SB 790 for resolving the complaints, contending that incurable damage could be done during the six-month processing period for the complaint. These and other parties also suggest that the rules should provide the flexibility for parties to avail themselves of existing dispute resolution channels before or simultaneous with the filing of a complaint.

In response to these comments, we have revised the meet-and-confer requirement in the complaint procedure to require a CCA to provide a sworn declaration that it has at least attempted to meet and confer with the utility about the subject of the complaint before making a formal filing. This avoids the potential for a utility to attempt to delay the filing of a complaint by refusing to confer with a CCA, while still ensuring that the utility is notified of any problems before formal action is initiated. It is not necessary for us to specify in the rules that parties may attempt other methods of dispute resolution before the filing of a complaint or concurrent with the processing of a complaint. The rules do not prohibit any existing dispute resolution activities, and the Commission in general encourages parties to resolve disputes informally rather than filing a complaint, which is a resource-intensive process and imposes burdens on all parties as well as on the Commission. Not only do the rules and procedures adopted here allow such informal solutions, the requirements that parties attempt to meet and confer before a complaint is filed under this procedure and that parties prepare a joint case management statement before hearings are intended to encourage informal dispute resolution activities. We also remind parties that mediation under the Commission's Alternate Dispute Resolution Program may be available for both formal Commission proceedings and, in certain cases, to disputes expected to lead to formal Commission proceedings. The Rules contained in Attachment 1 provide appropriate flexibility to allow the Commission to process complaints efficiently and expeditiously, while ensuring that the due process rights of parties are preserved.

Similarly, we decline to include with the rules adopted here any specific penalties for breaches of the Code. The complaint procedure provides the appropriate venue in which to determine whether there was a violation of the

Code of Conduct and the penalty for such a violation. Each complaint will be assessed on its own merits, and penalties, when appropriate, will be assessed based on the facts of the specific case.

6. Additional Party Proposals

In addition to the many comments received on the modified draft rules proposed in the Scoping Memo, parties made additional suggestions for additions and changes to the Code of Conduct. Three such suggestions are described in the following sections.

6.1. GPT Billing Proposal

In its comments on the Scoping Memo proposal, GPT recommends that the Commission extend to CCAs the three billing options that are available to other LSEs. The options include consolidated billing for utility services on a bill distributed by a utility or CCA, and separate billing for CCA and utility charges. GPT asserts that failing to provide these options to CCAs will put CCAs at a competitive disadvantage compared to other LSEs.[38]

No other parties support this request, and the three utilities note that § 366.2(c)(9) specifies the manner in which utilities shall provide billing to CCAs.[39] We find that the GPT proposal is contrary to state statute, and should not be adopted.

6.2. Advertising in or on Billing Envelopes

The CCA Alliance and WEM urge that the Commission reinstate a rule included in the OIR for this proceeding but removed in the Scoping Memo, which would have barred utilities from advertising their electric service in their

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[38] GPT Opening Comments at 2.

[39] *See* SCE Reply Comments at 5, SDG&E Reply Comments at 10, and PG&E Reply Comments at 6.

billing envelopes unless CCAs may also do so on the same terms. In their comments on the OIR proposal, and again in their reply comments on the Scoping Memo, the utilities claim that such a rule would be illegal because it would limit the free speech rights of the utilities.[40] SDG&E also states that the rule as proposed by CCA Alliance is too broad,[41] and SCE notes that this rule could prohibit the distribution of Commission-authorized information about approved programs.[42]

We find that the proposed rule banning advertising in or on utility billing envelopes is too sweeping and should not be adopted. As suggested by SCE, the adoption of this rule could preclude utilities from communicating in their bills information that would be allowable in a separate mailing, including information about Commission-authorized utility programs. In addition, this rule as proposed could restrict utility communications on issues unrelated to CCAs, which would not be in the interests of customers. For these reasons, the similar rule proposed in the OIR for the proceeding was removed from the revised rules included in the Scoping Memo.

Other rules adopted here already prohibit utilities from marketing against a CCA using ratepayer money, and from providing false or misleading information about utility programs. In the future, if a CCA or other group finds specific instances in which it believes that a communication in or on a billing envelope either violates the requirement that marketing against a CCA is fully shareholder funded or is otherwise in violation of the rules, the CCA may file an expedited complaint. In addition, if a CCA finds examples of information

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[40] *See, for example*, SCE Reply Comments at 3-4.

[41] SDG&E Reply Comments at 7-8.

[42] SCE Reply comments at 3.

included in or on a billing envelope that it believes is harmful to a CCA or creates a competitive disadvantage for a CCA, it may bring such instances to the Commission's attention and we may reconsider the need to add such a rule. At this time, however, we decline to adopt such a rule in the absence of a clear indication that it is needed.

6.3. Affiliate Transaction Rule

In its opening comments on the Scoping Memo, PG&E states that the modified draft rules in the Code of Conduct distributed with the scoping memo requires not only that any marketing conducted by a utility against a CCA must go through an "independent marketing division," but that the rules require that such marketing "must be done through a separate affiliate."[43] PG&E recommends instead that it is sufficient for marketing to be conducted through a functionally and physically separate division funded by shareholders, and describes the measures that it has taken to ensure proper accounting of such activities.[44] PG&E states that a requirement of a separate affiliate is both unnecessary and unfair. In reply comments, several parties question the basis of the PG&E claim that the rules require creation of a separate affiliate to conduct marketing against CCAs, noting that the modified draft rules do not require or even reference the creation of a separate corporate affiliate.

As noted in reply comments, the modified draft rules do not require the creation of an affiliate to conduct marketing. Instead, the rules require that marketing be conducted by an "independent marketing division that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded

[43] PG&E Opening Comments at 8.

[44] PG&E Opening Comments at 9.

divisions." This rule does not require creation of an affiliate, and in fact closely follows the wording of Public Utilities Code § 707(a)(1), contained in SB 790. For this reason, we do not see a need to make changes to the rules in response to PG&E's concern.

7. Comments on Proposed Decision

The proposed decision of the assigned Commissioner in this matter was mailed to parties in accordance with Pub. Util. Code § 311, and comments were allowed in accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on December 10, 2012, by CCSF, CCUE, MEA (on behalf of itself and the CCA Alliance), PG&E, SCE, SDG&E, and WEM. Reply comments were filed on December 17, 2012 by CCSF, CCUE, MEA (on behalf of itself and the CCA Alliance), PG&E, SCE, SDG&E, and WEM.

In comments on the proposed decision, many parties restated arguments made earlier in the proceeding. For example, CCSF, MEA/CCA Alliance, and WEM reiterate their recommendations that non-marketing utilities be required to submit compliance plans, and that CCAs not be required to share most production costs related to the distribution of tariff comparisons. Similarly, PG&E, SCE, and SDG&E request additional changes to lessen the amount of information that must be collected and shared under Rule 21. Minor clarifications have been made to the discussions on these issues.

In addition, several parties suggested small modifications to the complaint process. For example, parties suggest adding language to Rule 26 give the assigned Commissioner or Administrative Law Judge the ability to extend the deadline for filing of answers to complaint for good cause. This change will assist in the development of a complete record on which to decide CCA complaint cases without changing the 180-day deadline for issuance of a final

decision. The decision and accompanying rule have been modified accordingly. Similarly, minor changes have been made to this decision and Attachment 1 to clarify Rules 2, 3, 17, 19, and 21.

In addition, MEA and other CCA parties requested the elimination of the requirement that a CCA must make a good faith effort to meet and confer with a utility before filing a complaint under the expedited procedures adopted here. Given the expedited nature of the complaint process adopted in this decision, it is reasonable to ensure that all parties have an opportunity to understand and informally resolve issues before they are filed as formal complaints. As a result, we decline to make this requested change. MEA and the CCA Alliance also requested that the Commission add an ordering paragraph to this decision stating that the rules adopted here in no way limit the Commission's ability to make additional rules or take further action to ensure fair treatment of CCAs. Such an ordering paragraph is not necessary; the Commission has and retains the authority to modify the rules adopted here or establish new rules, as appropriate, consistent with Commission procedures, as well as SB 790 and other applicable laws.

Additional non-substantive changes to have been made throughout the draft to correct minor errors and improve clarity.

8. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Jessica T. Hecht is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. CCAs are governmental entities formed by cities and counties to serve the energy requirements of their local residents and businesses.

2. AB 117, which was signed into law in 2002, expresses the state's policy to permit and facilitate development of CCAs.

3. SB 790 directs the Commission to consider and adopt a code of conduct, rules and enforcement procedures governing the conduct of electrical corporations relative to the consideration, formation and implementation of CCAs.

4. A Code of Conduct will provide CCAs with the opportunity to compete on a fair and equal basis with other LSEs, and to prevent utilities from using their position or market power to gain unfair advantages.

5. A Code of Conduct will benefit customers by preserving their ability to make educated choices among authorized electric providers.

6. A prohibition against a utility providing factual information in response to questions is not in the interests of California consumers.

7. Parties have not established that a compliance plan beyond the requirement for a Tier 1 advice letter declaring non-marketing status is necessary in order to allow utilities to abide by the Code of Conduct rules applicable to non-marketing utilities.

8. The compliance plan requirements recommended by WEM and CCA Alliance would be expensive and time-consuming to implement.

9. The ability to answer specific customer questions in a factual way is necessary in order for a utility to provide adequate customer service.

10. The audit requirements and complaint procedures adopted in this decision should act as deterrents against a utility taking action prohibited under this rule and will provide CCAs with an avenue to enforce these rules and apply appropriate penalties if a violation is proven.

11. The exceptions allowed in the rules allowing distribution of information about Commission-approved programs available to bundled customers apply only to information about programs that were approved for bundled customers based on considerations explored in the adoption of those programs. Eliminating the exception allowing utilities to communicate with customers about such programs could have the effect of denying access to these programs to customers within a CCA's territory that chose to receive service from an electrical corporation rather than a CCA.

12. The audit requirement provides an independent means of identifying potential violations of this Code of Conduct by non-marketing as well as marketing utilities, consistent with SB 790.

13. The prospect of a future audit that may detect violations may deter conduct prohibited under the rules adopted here.

14. The rules and procedures contained in the Code of Conduct allow for alternative and informal dispute resolution mechanisms, and the meet and confer requirement in the expedited complaint procedure is consistent with such activities.

15. The attached rules constitute a code of conduct, rules and enforcement procedures governing the conduct of electrical corporations relative to the consideration, formation and implementation of CCAs.

Conclusions of Law

1. AB 117 confers on the Commission general jurisdiction over CCA program implementation.

2. SB 790 finds that electrical corporations have inherent market power derived from, among other things, name recognition among customers,

longstanding relationships with customers, and access to competitive customer information.

3. It is reasonable and consistent with SB 790 to require that marketing or lobbying against CCAs is supported by shareholder funds, not ratepayer funds.

4. At this time, it is not reasonable to require self-identified non-marketing utilities to develop a detailed compliance plan.

5. The expedited complaint procedures in Attachment 1 provide appropriate flexibility to allow the Commission to process complaints efficiently and expeditiously, while ensuring that parties' due process rights are preserved.

6. The attached rules fulfill the mandate of SB 790 that the Commission consider and adopt a code of conduct, rules and enforcement procedures governing the conduct of electrical corporations relative to the consideration, formation and implementation of CCAs.

7. The rules included in Attachment 1 should be adopted for all electrical corporations.

O R D E R

IT IS ORDERED that:

1. The rules contained in Attachment 1, governing the treatment of Community Choice Aggregators by electrical corporations and establishing an expedited complaint procedure for use by Community Choice Aggregators, are adopted. These rules constitute a Code of Conduct, rules, and enforcement mechanisms applicable to electrical corporations relative to the consideration, formation and implementation of CCAs.

2. These Rules contained in Attachment 1 shall apply to all electrical corporations within the state of California, as defined in Public Utilities Code § 218.

3. The expedited complaint procedure defined in Rules 24 through 29 of Attachment 1 shall apply to complaints filed by Community Choice Aggregators against electrical corporations, including complaints alleging violations of the rules adopted in this decision.

4. The Commission's Executive Director shall oversee independent audits of all electrical corporations to ensure compliance with the rules adopted in this decision. Audits of each corporation shall be performed every two years, with the first audit of 2013 and 2014 activities to begin not later than 2015.

5. Rulemaking 12-02-009 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

Attachment 1

Code of Conduct and Expedited Complaint Procedure

8.1. Rules of Conduct for Electrical Corporations Relative to Community Choice Aggregation Programs

1) The following definitions apply for the purposes of these rules:

   a) "Market" means communicate with customers, whether in oral, electronic, or written form, including but not limited to letters, delivery of printed materials, phone calls, spoken word, emails, and advertising (including on the Internet, radio, and television), regarding the electrical corporation's and community choice aggregators' energy supply services and rates. Marketing under this definition does not include the following:

      i) Communications provided by the electrical corporation throughout all of its service territory to its retail electricity customers that do not reference community choice aggregation programs.

      ii) Communications that are part of a specific program that is authorized or approved by the California Public Utilities Commission (CPUC), including but not limited to customer energy efficiency, demand response, SmartMeter™, and renewable energy rebate, or tariffed programs such as the California Solar Initiative and other similar CPUC-approved or authorized programs. (*See* Decision (D.) 08-06-016, Appendix A.

      iii) Provision of factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to the questions of individual customers.

b) "Lobby" means to communicate whether in oral, electronic, or written form, including but not limited to letters, delivery of printed materials, phone calls, spoken word, emails, and advertising (including on the Internet, radio, and television), with public officials or the public or any portion of the public for the purpose of convincing a government agency not to participate in, or to withdraw from participation in, a community choice aggregation program. (Cf. D.08-06-016, Appendix A.)[1] Lobbying under this definition does not include

i) Provision of factual answers about utility programs or tariffs, including but not limited to rate analyses, in answer to questions from a government agency or its representative.

ii) Provision of information to potential Community Choice Aggregators related to Community Choice Aggregation program formation rules and processes.

c) "Promotional or political advertising" means promotional or political advertising as defined in 16 U.S.C. Sec. 2625(h).

d) "Competitively sensitive information" means non-public information and data specific to a utility customer which the utility acquired or developed in the course of its provision of utility services. This includes, without limitation, information about which customers have or have not chosen to opt out of community choice aggregation service. (*See* D.97-12-088, App. A, Part I.D.)

[1] The language from D.08-06-016, Appendix A has been modified to cover the conduct of electrical corporations relative to consideration and formation of community choice aggregation programs, as required by Cal. Pub. Util. Code § 707(a). All statutory references are to the California Public Utilities Code unless otherwise stated.

2) No electrical corporation shall market or lobby against a community choice aggregation program, except through an independent marketing division that is funded exclusively by the electrical corporation's shareholders and that is functionally and physically separate from the electrical corporation's ratepayer-funded divisions.[2] (*See* Pub. Util. Code § 707(a)(1).)

3) Not later than July 1, 2013, and annually thereafter, each electrical corporation and any community choice aggregator (CCA) or CCAs within its service territory shall prepare and distribute jointly to the customers within the CCA boundaries a neutral, complete, and accurate written comparison of their average tariffs for each customer class, sample bills for a mutually agreed amount of usage under residential tariffs, and generation portfolio contents. This comparison shall be distributed to all customers within the CCA boundaries. In addition, the CCA and electrical utility shall prepare a neutral, complete, and accurate comparison of all their tariffs, sample bills under those tariffs, and generation portfolio contents, and post these comparisons on their Web sites. The information posted on these Web sites containing will be updated within 60 days after any tariff changes. The comparison of average tariffs will refer customers to this Web site for more complete information.

    a) The electrical corporation and CCA(s) shall share equally the costs of the design, preparation, and distribution of the notice to customers, as well as the design and preparation of the detailed tariff comparison to be posted on their Web sites. Each entity will be responsible for its own costs for posting the detailed tariff comparison in its Web site.

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[2] In the case of a holding company that owns two or more regulated utility entities (e.g., Sempra Energy), one regulated utility cannot market or lobby against a CCA in the service area of the other utility, except as provided for in this paragraph (e.g., through an independent marketing division funded exclusively by shareholders and separate from ratepayer-funded divisions).

b) The Commission's Public Advisor's office must review and approve the wording of the comparison before it is distributed to customers, and by this final approval shall resolve any disputes about the contents of the written notice or Web site contents that the CCA and utility cannot resolve informally.

4) The cost of an electrical corporation's independent marketing division's use of support services from the electrical corporation's ratepayer-funded divisions shall be allocated to the independent marketing division on a fully allocated embedded cost basis, supported by detailed public reports of such use. For this purpose, fully allocated embedded cost basis means a fully loaded cost basis (i.e., the sum of all direct costs and all appropriately allocated indirect costs and overhead costs; transfers from the utility to its independent marketing division of goods and services not produced, purchased or developed for sale by the utility will be priced at fully loaded costs plus 5% of direct labor cost). These calculations shall be supported by public reports of such use. These reports shall be filed quarterly with the Commission's Energy Division as an information only filing, no later than one month after the end of each quarter, and shall be made available on the utility's website at the same time. (*See* § 707(a)(2), D.97-12-088, App. A, Part V.H.5.)

5) An electrical corporation's independent marketing division shall not have access to competitively sensitive information. (*See* § 707(a)(3).)

6) No electrical corporation shall recover the costs of any direct or indirect expenditure by the electric utility for promotional or political advertising, including advertising distributed in billing envelopes or by other means, from any person other than the shareholders or other owners of the utility. (*See* Pub. Util. Code § 707(a)(5).)

7) An electric corporation shall provide access to utility information, rates and services to community choice aggregators on the same terms as it does for its

independent marketing division. (*See* D.97-12-088, App. A, Part III.B.1.)

8) An electrical corporation shall not provide access to market analysis reports or any other types of proprietary or non-publicly available reports, including but not limited to market, forecast, planning or strategic reports, to its independent marketing division. (*See* D.97-12-088, App. A, Part III.E.)

9) An electrical corporation shall refrain from: 1) speaking on behalf of CCA a program; 2) giving any appearance of speaking on behalf of any CCA program; or 3) making any statement relating to the community choice aggregator's rates or terms and conditions of service that is untrue or misleading, and that is known, or that, by the exercise of reasonable care, should be known, to be untrue or misleading.

10) An electrical corporation and its independent marketing division shall keep separate books and records. (*See* D.97-12-088, App. A, Part V.B.)

11) An electrical corporation shall not share office space equipment, services, and systems with its independent marketing division, nor shall an electrical corporation access the computer or information systems of its independent marketing division or allow its independent marketing division to access its computer or information systems, except to the extent appropriate to perform shared corporate support functions. Physical separation required by this rule shall be accomplished by having office space in a separate building, or, in the alternative, through the use of separate elevator banks and/or security-controlled access. (*See* D.97-12-088, App. A, Part V.C.)

12) An electrical corporation and its independent marketing division may make joint purchases of goods and services, other than purchases of electricity for resale. The electrical corporation shall ensure that all joint purchases are priced,

reported, and conducted in a manner that permits clear identification of the portions of such purchases made by the utility and its independent marketing division, and in accordance with these rules. (*See* D.97-12-088, App. A, Part V.D.)

13) As a general principle, an electrical corporation may share with its independent marketing division joint corporate oversight, governance, support systems and support personnel; provided that support personnel shall not include any persons who are themselves involved in marketing or lobbying. Any shared support shall be priced, reported and conducted in accordance with applicable Commission pricing and reporting requirements. As a general principle, such joint utilization shall not allow or provide a means for the transfer of competitively sensitive information from the electrical corporation to the independent marketing division, create the opportunity for preferential treatment or unfair competitive advantage, lead to customer confusion, or create significant opportunities for cross-subsidization of the independent marketing division. (*See* D.97-12-088, App. A, Part V.E.)

14) An electrical corporation shall apply tariff provisions in the same manner to the same or similarly situated entities if there is discretion in the application of the provision.

15) Except as permitted in Rule 13 of this Code of Conduct, employees of an electrical corporation's independent marketing division shall not otherwise be employed by the electrical corporation. (*See* D.97-12-088, App. A, Part V.G.1.)

16) All employee movement between the independent marketing division and other divisions of the electrical corporation shall be consistent with the following provisions:

    a) An electrical corporation shall track and report to the Commission all employee movement between the

independent marketing division and other divisions of the electrical corporation. The electrical corporation shall report this information annually pursuant to our Affiliate Transaction Reporting Decision, D.93-02-016, 48 CPUC2d 163, 171-172 and 180 (Appendix A, Section I and Section II H.).

b) Once an employee of an electrical corporation becomes an employee of the independent marketing division, the employee may not return to another division of the electrical corporation for a period of one year. In the event that such an employee returns to another division of the electrical corporation after the one year period, such employee cannot be retransferred, reassigned, or otherwise employed by the independent marketing division for a period of two years. Employees transferring to the independent marketing division are expressly prohibited from using competitively sensitive information gained from the electrical corporation, to the benefit of the electrical corporation or to the detriment of community choice aggregators. Any electrical corporation employee transferring to the independent marketing division shall not remove or otherwise provide information to the independent marketing division which the independent marketing division would otherwise be precluded from having pursuant to these rules. An electrical corporation shall not make temporary or intermittent assignments, or rotations to its independent marketing division. (*See* D.97-12-088, App. A, Part G.)

c) When an employee of a utility is transferred, assigned, or otherwise employed by the independent marketing division, the independent market division shall make a one-time payment to the utility in an amount equivalent to 25% of the employee's base annual compensation, unless the utility can demonstrate that some lesser percentage (equal to at least 15%) is appropriate for the class of employee included. This

transfer payment provision will not apply to clerical workers. (D.97-12-088, App. A, Part V.G.2.c.)

17) Neither electrical corporations nor their marketing divisions can offer to provide, or provide, any goods, services, or programs to a local government or to the customers within a local government's jurisdiction on the condition that the local government not participate in a community choice aggregation program, or for the purpose of inducing the local government not to participate in a community choice aggregation program. This restriction applies regardless of whether the goods, services, or programs are funded by ratepayers or shareholders. This restriction also applies to any plan whereby the utility would pay someone else to provide such goods, services, or programs. (*See* Resolution E-4250, Ordering Paragraph 4.) This restriction does not apply to optional rates, programs, and services authorized or approved by the Commission that are only available to bundled service customers.

18) An electrical corporation shall not, through a tariff provision or otherwise, discriminate between its own customers and those of a CCA in matters relating to any product or service that is subject to a tariff on file with the Commission. An electrical corporation shall not condition or tie the provision of any product, service, or rate agreement to a customers' participation or non-participation in a CCA program. This restriction does not apply to optional rates, programs, and services authorized or approved by the Commission that are only available to bundled service customers.

19) Electrical corporations shall not make available to their customers any mechanism for opting out of community choice aggregation programs unless requested to do so by the CCA. (*See* D.10-05-050, Ordering Paragraph 1.)

20) Electrical corporations may not refuse to make economic sales of excess electricity to a community choice aggregation program, nor refuse in advance to deal with

any community choice aggregation program in selling electricity because it is a community choice aggregation program. (*See* Resolution E-4250, Ordering Paragraph 5.)

21) The electrical corporation shall maintain a log of all new, resolved, and pending complaints submitted in writing relating to services provided for the CCA and CCA customers. The log shall be subject to review by the CCA and the Commission, and shall include the date each issue was received; the customer's name, address, and Service Account ID number if the issue is in relation to a specific customer; a written description of the complaint; and the resolution of the complaint, or the reason why the complaint is still pending.

22) No later than March 31, 2013, each electrical corporation that intends to market or lobby against a CCA shall submit a compliance plan demonstrating to the Commission that there are adequate procedures in place that will preclude the sharing of information with its independent marketing division that is prohibited by these rules, and is in all other ways in compliance with these rules. The electrical corporation shall submit its compliance plan as a Tier 1 advice letter to the Commission's Energy Division and serve it on the parties to this proceeding. The electrical corporation's compliance plan shall be in effect between the submission and Commission disposition of the advice letter.

    a) An electrical corporation shall submit a revised compliance plan thereafter by Tier 2 advice letter served on all parties to this proceeding whenever there is a proposed change in the compliance plan for any reason. Energy Division may reject the Tier 2 advice letter and require resubmission as a Tier 3 advice letter if Energy Division believes the change requires an additional level of review.

    b) An electrical corporation that does not intend to lobby or market against any community choice aggregation program shall file a Tier 1 advice letter no later than

March 31, 2013, stating that it does not intend to engage in any such lobbying or marketing.

(i) If such an electrical corporation thereafter decides that it wishes to lobby or market against any community choice aggregation program, it shall not do so until it has filed and received approval of a compliance plan as described above, with its compliance plan filed as a Tier 2 advice letter with Energy Division. (*See* D.97-12-088, App. A, Part VI.A.)

c) Any CCA alleging that an electrical corporation has 1) violated the terms of its filed compliance plan or 2) has engaged in lobbying and/or marketing after filing an advice letter stating that it does not intend to conduct such activities, may file a complaint under the expedited complaint procedure authorized in § 366.2(c)(11).

23) Beginning in 2015 and every other year thereafter, the Commission's Executive Director shall have audits prepared by independent auditors verifying that each electrical corporation was in compliance with the rules set forth herein during the preceding two years. The Commission shall have the auditor serve a copy of the audit report on each party to this proceeding, and publish the audit at the same time on the Commission's website. The Energy Division shall send an invoice to each electrical corporation for payment of auditor expenses. The cost of audits of utilities that form an independent marketing division according to these rules shall be at shareholder expense. Audits of non-marketing electrical corporations shall be at ratepayers' expense, but audit costs will be charged to shareholders if the audit finds a violation of the restrictions on their operations. (*See* D.06-12-029, App. A-1, Part VI.C.)

8.2. Rules Regarding Enforcement Procedures

24) A complaint filed pursuant to § 366.2(c)(11) by an existing or prospective community choice aggregator or community choice aggregation program alleging a violation of an electrical corporation's obligation to cooperate fully with community choice aggregators or community choice aggregation programs, or any other provision of § 366.2 or § 707, shall be resolved in no more than 180 days following the filing of the complaint. This deadline may only be extended under either of the following circumstances:

    a) Upon agreement of all of the parties to the complaint.

    b) The commission makes a written determination that the deadline cannot be met, including findings for the reason for this determination, and issues an order extending the deadline. A single order pursuant to this subparagraph shall not extend the deadline for more than 60 days.

25) The complaint shall be filed pursuant to Commission rules for complaints (Article 4 of the Commission's Rules of Practice and Procedure), except to the extent provided otherwise herein. The complainant shall serve the complaint on the defendant electrical corporation, and the complaint shall be accompanied by documentary evidence, prepared testimony supporting the complaint, and a declaration affirming that the complainant has made a good faith attempt to meet and confer with the defendant electrical corporation in an attempt to resolve the dispute informally.[3] In the caption under the blank docket number, the complaint shall specifically state that the expedited procedures adopted in these rules are applicable

[3] Service by complainant will help expedite the proceeding. The Commission will also perform service, as required by Pub. Util. Code § 1704. (*See* also Rule 4.3 of the Commission's Rules of Practice and Procedure.).

to the case by the following language: (Subject to CAA expedited complaint procedures).

26) Unless otherwise specified by the assigned Commissioner or Administrative Law Judge, answers to complaints filed by a CCA under these procedures shall be filed and served within 15 days of the date the complaint is filed, and shall be accompanied by documentary evidence and prepared testimony supporting the answer. All parties to the complaint shall respond to related discovery requests on an expedited basis.

27) The assigned Commissioner or Administrative Law Judge (ALJ) shall set the matter for evidentiary hearing for 30 to 45 days after the initiation of the proceeding or as soon as practicable after the Commission makes the assignment.

28) Unless otherwise directed by the assigned ALJ, three business days before the scheduled beginning of hearings, parties shall file a joint case management statement. This statement shall include any agreements or stipulations by the parties that narrow the issues since the filing of testimony, an updated discussion of the issues to be resolved, a proposed order of witnesses for hearing, any other information parties believe the Commission would find useful for the efficient disposition of the case, and any other information that may be required by the assigned ALJ.

29) In its expedited adjudication of the complaint, the Commission may impose fines, injunctive relief, or grant any other appropriate remedy without the initiation of a separate Order Instituting Investigation. (§ 366.2(c)(9), § 366.2(c)(10), §§ 366.2(c)(11), 701, 702, 2100-2109.)

(End of Attachment 1)