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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Smart Grid Technologies Pursuant to Federal Legislation and on the Commission's Own Motion to Actively Guide Policy in California's Development of a Smart Grid System	))))))	Rulemaking 08-12-009 (Filed December 18, 2008)

REPLY COMMENTS OF CALIFORNIA CABLE & TELECOMMUNICATIONS ASSOCIATION ON THE PROPOSED DECISION OF PRESIDENT PEEVEY

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), the California Cable & Telecommunications Association ("CCTA") respectfully submits these reply comments concerning the Proposed Decision of President Peevey ("PD") dated May 6, 2011.

In the initial comments, consensus emerged on several key issues. First, numerous parties expressed concerns that the PD's framework to regulate the relationship between consumers and their authorized third party providers not only exceeds the Commission's authority, but that it could also skew by regulations the early stage evolution of a market-driven approach to home energy management solutions. Further, CCTA is concerned that a state patchwork quilt of regulations may suppress innovation in this space. In light of these concerns, CCTA submits that Verizon's two-year sunset compromise proposal, if adopted, could stifle the smart grid industry at a critical juncture in its early days. Second, the comments confirm that virtually all parties agree that the concept of a "locked" home area network ("HAN") device is confusing at best and an arbitrary distinction between similarly-situated providers at worst. Finally, several commenters correctly note that the rules in the PD would favor utility demand response programs over non-affiliated third party programs without any valid policy rationale.

II. THE PD'S REGULATION OVER THIRD PARTIES EXCEEDS THE COMMISSION'S AUTHORITY, COULD HINDER INNOVATION AND MAY ULTIMATELY HARM CONSUMERS

The PD proposes a framework that would dramatically expand the Commission's jurisdictional authority over consumer-authorized third party providers. As commenters correctly noted, any attempt to impose California-specific, smart grid-specific data privacy rules on these providers (1) is "simply not permitted by law"[1] and "exceeds the Commission's limited jurisdiction;"[2] (2) could hinder innovation in this nascent marketplace;[3] and (3) may "ultimately harm the very consumers the PD seeks to protect."[4] We respectfully ask the Commission to rethink this over regulatory approach.

The PD's imposition of privacy rules beyond the scope of the Commission's jurisdictional authority would not only inject legal uncertainty into the market at a critical early juncture, it may be a case of a regulatory solution in search of a problem. As Verizon notes, the record does not demonstrate that California-specific, smart-grid-specific rules are necessary to fill any perceived gaps in existing privacy rules.[5] Indeed, a comprehensive body of federal and state laws exist that govern a third party's use and access of consumers' personally identifiable information.[6] Ultimately, CCTA believes that this anticipatory regulation of third parties will

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[1] Comments of CEERT to the Proposed Decision, at 5.

[2] Comments of Verizon California, Inc., MCI Communications Services Inc., and Verizon Wireless (collectively, "Verizon") on the Proposed Decision at 4. *See also* Comments of TechNet on the Proposed Decision at 9.

[3] *See, e.g.,* Comments of the Consumer Electronics Association ("CEA") on the Proposed Decision at 6; Comments of Pacific Bell Telephone Company d/b/a AT&T California ("AT&T") on the Proposed Decision at 1; Comments of Verizon on the Proposed Decision at 2.

[4] *See* Comments of Verizon on the Proposed Decision at 2.

[5] *Id.*

[6] In addition to the California regulations applicable to third parties highlighted by PG&E, see Opening Responses of PG&E to Assigned Commissioner's Ruling on Customer Privacy and Security Issues, App. A (Oct. 15, 2010), numerous federal regulations govern third parties' access and use of consumers' information. These include the Federal Trade Commission Act, 15 U.S.C. §§ 41-58; the Fair and Accurate Credit Transactions Act, 15 U.S.C. 1681 *et seq.*; Identity Theft "Red Flag" Rules, 15 U.S.C. § 1681m(e) and 16 C.F.R. Part 681; and the Red Flag Program Clarification Act of 2010, Pub. L. No. 111-319, among others.

likely harm innovation in this nascent marketplace and ultimately deprive consumers of technologies that could assist them in becoming more energy efficient and realize energy cost savings. Merely superimposing an additional set of industry-specific regulatory burdens does not guarantee that consumers will enjoy additional privacy protections.

CCTA member companies understand the importance of protecting their consumers' energy usage information and they remain fully committed to educating consumers about the uses and potential abuses of their usage and other personally identifiable information. We understand that consumers should be given an opportunity to consent to any secondary uses of this information. Therefore, CCTA believes it would be more appropriate for the Commission to champion consumer education campaigns and encourage voluntary industry participation in ongoing efforts to work toward national industry privacy practices that incorporate Fair Information Practice principles.[7]

For the foregoing reasons, CCTA also cannot support Verizon's proposal that if the Commission nonetheless subjects third parties to the proposed rules, a two-year sunset should apply.[8] The extension of Commission authority over third parties for any amount of time would be jurisdictionally flawed; a "compromise" solution limiting the rules' application to two years cannot cure this legal infirmity.

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[7] For example, many CCTA members have obtained a TrustE privacy seal. TrustE subjects web sites to annual privacy audits, allows users to submit complaints, and requires the web site owner to demonstrate that it has responded effectively to all complaints. *See* http://www.truste.com.

[8] *Id.* at 3.

III. THE COMMISSION SHOULD ELIMINATE THE "LOCKED" HAN DEVICE CONCEPT AND TREAT ALL HAN DEVICES EQUALLY

Numerous commenters emphasized that the proposed rules would create regulatory disparities between providers of similar services without any policy justification for this artificial distinction. CCTA shares these concerns.

As a prime example, CCTA supports the near uniform-consensus that the concept of a "locked" HAN device is confusing,[9] technologically flawed,[10] inappropriate for the HAN marketplace[11] and could inadvertently lead to market structures based on regulatory avoidance instead of technological merit.[12] Commenters note that this regulatory construct was not introduced for consideration during the workshop process,[13] is not supported by the record,[14] and is not based on any sound policy justification articulating why locked devices present more harm to consumers.[15] Further, SDG&E's and Consumer Electronic Association's ("CEA") comments highlight the potential confusion that real world application of the "locked device" definition will cause.[16] We urge the Commission to abandon this artificial distinction.

Ultimately, CCTA believes that HAN-enabled devices must be deployed through a market-driven process in order to gain consumer acceptance. A pre-existing overhang of what is locked, what is unlocked, where a given device fits in this vague taxonomy, and what regulatory

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[9] Comments of Utility Consumer Action Network ("UCAN") on the Proposed Decision at 3.

[10] Comments of San Diego Gas & Electric ("SDG&E") on the Proposed Decision at 7.

[11] *Id.*; Comments of CEERT on the Proposed Decision at 5-6.

[12] Comments of CEA on the Proposed Decision at 9.

[13] Comments of TechNet on the Proposed Decision at 11.

[14] Comments of SDG&E on the Proposed Decision at 6.

[15] Comments of CEA on the Proposed Decision at 9. Indeed, as noted by CEERT, the distinction between locked and unlocked HAN devices appears to be aimed at expanding Commission jurisdiction over third parties where such authority does not existing. *See* CEERT Comments on the Proposed Decision at 6.

[16] Comments of SDG&E on the Proposed Decision at 8 (trying to apply the definition to a HAN-enabled washer); Comments of CEA on the Proposed Decision 10 n. 22 (trying to apply the definition to providers of mobile applications).

burdens attach from that distinction threatens to stifle a market before it emerges, or, equally bad, create technology aimed at gaming regulatory distinctions rather than benefiting the consumer.

IV. THE DEFINITION OF PRIMARY PURPOSE FAVORS UTILITY-SPONSORED DEMAND RESPONSE PROGRAMS OVER THIRD PARTY PROGRAMS

CCTA further supports the concerns expressed by AT&T, CEA, and the Demand Response and Smart Grid Coalition ("DRSG")[17] that the proposed definition of "primary purpose" arbitrarily favors electric corporations and their service providers over third party entrants without any valid policy justification. The definition of a primary purpose under the proposed rules extends to "demand response, energy management, or energy efficiency programs operated by, or on behalf of and under contract with, *an electrical corporation*."[18]

Electric corporations should not be given preferential treatment. This rule would inhibit competition and skew the market toward the monopoly utilities and their service providers. As noted by AT&T, the PD gives electric corporations the ability to serve as gatekeepers to the market and may dissuade innovative companies from entering the California smart grid marketplace.[19] The home energy marketplace can become a vibrant, innovative and competitive marketplace, and the Commission rules should not prematurely pick winners and losers. CCTA therefore supports commenters' recommendations to modify the definition of primary purpose to apply more broadly regardless of the entity that implements the demand response program.

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[17] *See, e.g.*, Comments of AT&T on the Proposed Decision at 6; Comments of CEA on the Proposed Decision at 10; Comments of DRSG on the Proposed Decision at 6-7.

[18] Section 1(d) of the Proposed Rules (emphasis added).

[19] Comments of AT&T on the Proposed Decision at 6-7.

V. CONCLUSION

CCTA appreciates the opportunity to reply to other parties' comments on the PD.

Respectfully submitted,

California Cable and Telecommunications Association

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