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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.

R.08-12-009 Phase 2
(Filed December 18, 2008)

**REPLY COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES**

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	DISCUSSION	1
	A. THE COMMISSION HAS CLEAR JURISDICTIONAL AUTHORITY TO REQUIRE ESP AND CCA ADOPTION OF THE PRIVACY RULES	2
	1. Energy Service Providers (ESPs).....	2
	2. Community Choice Aggregators (CCAs)	3
	B. THE COMMISSION SHOULD EXERCISE ITS JURISDICTIONAL AUTHORITY TO REQUIRE ALL ENTITIES TO ADOPT THE PRIVACY RULES FOR CONSUMER PROTECTION PURPOSES	10
	1. The Privacy Rules Should Be Preserved in a General Order	10
	2. The IOU Tariffs Need Continuity	11
	3. The Interaction Between the Privacy Rules and Public Records Act Requests Are Not Clear	11
	4. Designating ESPs and CCAs As Third Party “Covered Entities” May Be Problematic	13
	5. Southwest Gas Corporation.....	14
III.	CONCLUSION	16

I. INTRODUCTION

Pursuant to two Administrative Law Judge's rulings¹ issued on January 11, 2012 and January 30, 2012, the Division of Ratepayer Advocates hereby submits this reply in the above captioned docket. On February 3, 2012, parties² submitted opening comments on the January Smart Grid workshops. Several parties also provided supplemental material pertaining to the security of existing and planned Advanced Metering Infrastructure ("AMI") and Automatic Meter Reading ("AMR") installations, as well as an explanation of existing privacy and security and strategies and what information is available to customers.³ Further, the January 30 ALJ Ruling ordered parties "to provide an analysis of Decision (D.) 11-07-056 and Attachment D ("Privacy Rules") that explains whether or not the [parties'] existing privacy practices are currently in accordance with the Privacy Rules."⁴ ALJ Sullivan extended the date for reply comments to February 17, 2012; thus, this filing is timely.

II. DISCUSSION

In general, DRA believes the Commission should apply the Privacy Rules equally to all entities that handle customer energy usage data to the extent possible, and that, in addition to clearly having authority over the electrical and gas corporations, the Commission has full regulatory authority over Energy Service Providers (ESPs) and

¹ *Administrative Law Judge's Ruling Seeking Additional Information*, filed January 11, 2012; and *Administrative Law Judge's Ruling Memorializing the Grant of Party Status to Additional Intervenors and Modifications to Phase 2 Schedule*, filed January 30, 2012.

² Comments were filed by the following parties: Pacific Gas and Electric Company ("PG&E"), Southern California Gas Company ("SoCalGas"), San Diego Gas and Electric Company ("SDG&E"), the Utility Reform Network ("TURN"), The Alliance For Retail Energy Markets ("AREM"), Southwest Gas Corporation ("Southwest Gas"), Marin Energy Authority ("MEA"), and the City and County of San Francisco ("CCSF").

³ January 11, 2012 ALJ Ruling, p. 1.

⁴ *Id* at 1.

Community Choice Aggregators (CCAs) to do so. From a policy perspective, the Commission should exercise this jurisdictional authority broadly for consumer protection purposes, to ensure that California’s electric and gas customers are safeguarded from mismanagement and misuse of energy usage data.

A. The Commission Has Clear Jurisdictional Authority To Require ESP and CCA Adoption Of The Privacy Rules

1. Energy Service Providers (ESPs)

In comments, both PG&E and TURN assert that the Commission should apply its jurisdictional authority over ESPs,⁵ summarily agreeing to the October 7, 2011 Scoping Ruling, in which ALJ Sullivan states,

“Concerning the question of which entities should be subject to privacy rules adopted by the Commission, there was no consensus among the parties as to whom the rules should apply. As noted above, AReM argued that SB 1476, which explicitly addresses gas and electric utilities, does not apply to ESPs. Pub. Util. Code § 394.4, however, gives the Commission broad authority to protect confidential customer data provided to ESPs.”⁶

In opening comments, the Alliance for Retail Energy Markets (“AReM”) concedes that the Commission may apply the rules with respect to ESPs serving residential and small commercial customers pursuant to Section 394.4,⁷ but AReM argues for exemption of medium and large commercial customers.

⁵ PG&E Opening Comments, p. 2; TURN Opening Comments, p. 4.

⁶ Scoping Ruling, dated October 7, 2011, p. 6. Section 394.4, states, “The commission or the governing body may adopt additional residential and small commercial consumer protection standards that are in the public interest.”

⁷ AReM Opening Comments, p. 5.

Because medium and large commercial customers are in a better position to protect their business interests, including privacy interests, the Commission should be able to exempt ESPs that exclusively serve large and commercial customers. However, what happens when an exempted ESP later decides to serve residential or small commercial customers or if a “medium” commercial business downsizes and becomes a “small” business? In situations like these, the ESP should be made to comply with the Commission’s Privacy Rules. As TURN notes, “P.U.Code §§394-396 establishes very specific rules for ESPs including detailed consumer protections and particularly rules to protect the confidentiality of customer information (see, §394.4(a)).”⁸ The Commission’s final decision should reflect this concern, and require all ESPs to conform to the Privacy Rules when serving residential and small customers.

2. Community Choice Aggregators (CCAs)

The January 11, 2012 ALJ Ruling also invited parties to comment on whether the Privacy Rules should be made applicable to CCAs. Earlier in the proceeding, an October 7, 2011 Scoping Ruling stated,

Pub. Util. Code § 366.2(c)(4)(D) gives the Commission broad authority to establish rules pertaining to CCAs. Although a more detailed analysis of this authority can await parties’ comments, there is no basis at this time to doubt that the Commission has authority to adopt privacy rules for either ESPs or CCAs.

DRA agrees with the Scoping Ruling and PG&E that the Commission’s jurisdiction authority does, in fact, extend to CCAs.² TURN takes no position on jurisdiction, but comments, “Whether or not the Commission has jurisdiction to require

⁸ TURN Comments, p. 4.

² PG&E Comments, p. 2.

CCAs to adopt particular privacy rules, TURN would encourage CCAs to adopt the D.11-07-056 rules for the benefit of their customers.”¹⁰ DRA agrees.

a) CCA Customers Remain Customers of the Distribution Utility and Should Be Treated Equally As Bundled Customers

The AMI data subject to the Privacy Rules comes from meters owned by the distribution utility, which is clearly under Commission jurisdiction. So aside from whether the Commission has jurisdiction over CCAs, CCA customers essentially remain customers of the distribution utility, and are entitled to the same privacy protections as any other investor-owned utility (“IOU”) customer. A number of questions thus arise regarding the IOU’s responsibility to the CCA’s customer regarding AMI data collected via the IOU’s distribution system. For example, PG&E owns the meters of Marin Energy Authority’s (“MEA”) customers, and sends the customer data to MEA. In comments, MEA did not explain how its customers might be able to access their AMI data. Would a customer need a PG&E account to see AMI data, or is MEA planning to provide that access? If PG&E provides AMI data access to MEA’s customers, would PG&E be responsible for providing privacy notices? Who would be responsible for the integrity of the data, and fulfilling Commission auditing requirements? If the Privacy Rules are broadly applied to CCAs and ESPs, as DRA and other parties recommend, these questions are moot. If the Commission decides to extend the Privacy Rules by including CCAs in the definition of “covered entities” or through third party contractual compliance, as discussed below, these questions will need to be resolved.

¹⁰ TURN Comments, p. 4.

b) Public Utilities Code Gives Commission Jurisdictional Authority Over CCAs on The Terms and Conditions of Service

In opening comments, the City and County of San Francisco (“CCSF”) assert the Commission has no jurisdictional authority to apply the Privacy Rules to CCAs. Instead, CCSF recommends the Commission consider CCAs as third parties, and designate them as “Covered Entities” under the Privacy Rules. DRA comments on whether CCAs should be designated “covered entities” in Section B.3., below.

With respect to the Commission’s jurisdiction over CCAs, CCSF’s arguments should be dismissed.¹¹ CCSF takes too narrow an interpretation of the Commission’s authority under to regulate CCAs. CCSF’s opening comments first take issue with the Commission’s preliminary determination¹² that Section 366.2(c)(4) of the Public Utilities Code requires CCAs to comply with the AMI customer Privacy Rules adopted in D.11-07-056. CCSF argues Section 366.2(c)(4) references only a statement of intent. Thus, CCSF concludes, “[t]his language cannot be read to mean that the Commission can impose any kind of requirement on CCAs.”¹³ However, CCSF ignores the full text of the statute. Section 366.2(c)(4) states:

(c) A community choice aggregator establishing electrical load aggregation shall prepare a statement of intent with the implementation plan. Any community choice load aggregation established pursuant to this section shall provide for the following:

¹¹ In comments, MEA states CCA cannot be classified as an “electrical or gas corporation,” for the purposes of showing that legislature purposefully excluded CCAs from SB 1476. (MEA Comments, p. 4.) DRA is not arguing that a CCA is an electrical corporation under SB 1476. Rather, DRA asserts the Privacy Rules should be adopted by CCAs through the Commission’s existing regulatory authority in other statutes, mainly, P.U. Code § 366.2, et seq., as a matter of consumer protection.

¹² Scoping Ruling, dated October 7, 2011, p. 6.

¹³ CCSF Comments, p. 2.

...

(4) Any requirements established by state law or by the commission concerning aggregated service, including those rules adopted by the commission pursuant to paragraph (3) of subdivision (b) of Section 8341 for the application of the greenhouse gases emission performance standard to community choice aggregators.¹⁴

The plain language of Section 366.2(c)(4) is clear. CCAs must adhere to any requirements established by the commission regarding aggregated service.

MEA's argument that the statute is irrelevant also fails. MEA points out that Section 366.2(c)(4) is not relevant to data security and privacy, "[r]ather, it specifically relates to matters that are to be contained in a CCA's statement of intent and its implementation plan."¹⁵ MEA further argues, "[T]he only reference in the cited statute to a substantive issue before the Commission pertains to greenhouse gas emission standards and their applicability to CCAs."¹⁶ These arguments should be dismissed.

DRA agrees with the Scoping Ruling that Section 366.2(c)(4) gives the Commission broad authority to condition the implementation of aggregated service. In general, an agency's interpretation of statutes within its administrative jurisdiction is given presumptive value as a consequence of the agency's special familiarity and presumed expertise with satellite legal and regulatory issues. *Yamaha Corp. of America v. State Bd. of Equalization*, (1968) 19 Cal. 4th 1, 11. Therefore, the Commission's "interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." *Pacific Bell Wireless, LLC v. Public Utilities Com.* (2006) 140 Cal.App.4th 718, 729; *Greyhound Lines, Inc. v. Public*

¹⁴ Cal Pub Util Code § 366.2(c)(4), *emphasis added*.

¹⁵ MEA Comments, p. 3.

¹⁶ *Id.*

Utilities Com. (1968) 68 Cal.2d 406, 410-411; *Southern Pac. Co. v. Public Utilities Com.* (1953), 41 Cal.2d 354, 367.

The plain language of Section 366.2(c)(4) clearly does not limit the Commission to requiring CCAs to adhere to greenhouse gas emission standard since the legislature prefaced this phrase with the word “including.” DRA interprets the clause (“including those rules adopted by the commission...for the application of the greenhouse gas emission performance standard”) to be explanatory and inclusive, and not limiting the scope of requirements that the Commission may impose concerning aggregated service. Moreover, compliance with the statute is not simply a ministerial exercise for CCA certification, as MEA suggests. By submitting to the CPUC a statement of intent and implementation plan pursuant to Section 366.2(c)(4), the CCA *affirms* that it will, among other things, abide by and conform to the requirements established by state law *or by the commission*.

CCSF further argues, “The Commission itself has recognized that it does not have authority to regulate the terms and conditions of CCA service,” citing D.10-03-021. In that decision, the Commission states:

Finally, this Commission has different responsibilities with respect to utilities, on the one hand, and ESPs and CCAs on the other. This Commission does not set the rates of ESPs or CCAs and has no responsibility to ensure that their charges to their customers are just and reasonable. If an ESP or CCA chooses to take the price risk associated with using TRECs rather than fixed-price bundled contracts for RPS compliance, that is a business decision whose consequences are borne solely by the ESP or CCA and its customers. ¹⁷

D.10-03-021 contains no reference to or acknowledgement by the Commission of any limitation over its authority over the terms and conditions of aggregator service. On the

¹⁷ D.10-03-021, p. 48 (*mimeo*).

contrary, D.10-03-021 only affirms that the Commission cannot set the rates for a CCA or ESP. Rate-setting authority is not what the Commission is exercising here; rather, what is at issue is the broad applicability of the privacy rules as a condition of service which the CCAs must observe in exchange for the customer information provided by the electrical corporations. Further, the limitation of setting terms and conditions of service is only relevant to ESPs—Section 394(f) states, “Nothing in this part authorizes the commission to regulate the rates *or terms and conditions of service* offered by *electric service providers*.”¹⁸ However, no statute in the Public Utilities Code limits Commission authority to **regulate the terms and conditions offered by CCAs**.

The clearest source of Commission jurisdictional authority over setting terms and conditions of CCA service is found in Section 366.2(c)(9). CCSF restates only portion of the text of the statute and MEA ignores it completely.¹⁹ Section 366.2(c)(9) states, in full:

(9) All electrical corporations shall cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs. Cooperation shall include providing the entities with appropriate billing and electrical load data, including, but not limited to, electrical consumption data as defined in Section 8380 and other data detailing electricity needs and patterns of usage, as determined by the commission, and in accordance with procedures established by the commission. The commission shall exercise its authority pursuant to Chapter 11 (commencing with Section 2100) to enforce the requirements of this paragraph when it finds that the

¹⁸ Cal. Pub. Util. Code § 394(f), *emphasis added*.

¹⁹ MEA alludes to Section 366.2(c)(11)—but never acknowledges —when it describes a “second jurisdictional facet [that] relates to the interaction between the CCA and the IOU as a regulated entity.” (MEA Comments, p. 5.) MEA states one example of this is the Non Disclosure Agreement between the CCAs and the IOUs, approved by the Commission. However, the Commission should dismiss these arguments as no further explanation is provided. MEA does not name other examples, nor cites to the source of this jurisdictional authority.

requirements of this paragraph have been violated. Electrical corporations shall continue to provide all metering, billing, collection, and customer service to retail customers that participate in community choice aggregation programs. Bills sent by the electrical corporation to retail customers shall identify the community choice aggregator as providing the electrical energy component of the bill. The commission shall determine the terms and conditions under which the electrical corporation provides services to community choice aggregators and retail customers.²⁰

This statute clearly gives authority to the Commission to establish procedures in order to facilitate the exchange of data between an electrical corporation and a CCA. As such, requiring adoption the Commission’s Privacy Rules as a condition of a CCA’s access to data would be best achieved in amending the IOUs’ CCA tariffs and service agreements. While CCSF analyzes a portion of the text of Section 366.2(c)(9), it fails to offer any credible arguments why the Commission is prohibited from using its jurisdictional authority to determine the terms and conditions of an IOU providing services to CCA and retail customers. Therefore, CCSF’s arguments should be rejected.

Finally, Section 366.2(c)(11) also provides Commission authority to condition CCA service in the interest of consumer protection: “The community choice aggregator shall register with the commission, which may require additional information *to ensure compliance with basic consumer protection rules and other procedural matters.*”²¹ Such “additional information” which the Commission may require for CCA registration is whether the CCA has complied with the Privacy Rules as established in D.10-07-056.

With jurisdiction over CCAs well established, whether and to what extent privacy rules should be made applicable to CCAs is a different question, and is at the discretion of the Commission. DRA agrees with CCSF that CCAs should not be required to comply

²⁰ Cal Pub Util Code § 366.2(c)(9), *emphasis added*.

²¹ Cal Pub Util Code § 366.2 (c)(11).

with other aspects of the Privacy Rules, in particular, those that require IOUs to make smart meter and other data available to customers.²² DRA’s policy positions—including whether to consider CCAs as a third-party “covered entity”—are discussed below.

B. The Commission Should Exercise Its Jurisdictional Authority And Require All Entities Adopt The Privacy Rules For Consumer Protection Purposes

1. The Privacy Rules Should Be Preserved in a General Order For Customer Ease

In its opening comments, PG&E proposed developing a General Order specific to the Privacy Rules in the interest of “administrative efficiency and customer convenience purposes. PG&E explains,

This streamlining is particularly important in the area of information security standards that should be applied consistently among all utilities and third parties exchanging or sharing customer-specific information as part of carrying out regulated primary purpose services each provides.²³

DRA agrees. It would be much easier for consumers to locate the Privacy Rules in a General Order than through a Commission decision, which may be amended in subsequent decisions. In D.11-07-056, the Commission required each IOU to file Tier 2 Advice Letters to identify whatever changes are necessary to conform its corporate policies concerning customer usage data to the Privacy Rules.²⁴ Following review of those filing, it became apparent that the IOUs interpreted and constructed their policies inconsistently. As a result, DRA protested and the Energy Division subsequently suspended the Advice Letters. DRA submits that establishing a General Order, which

²² CCSF Comments, p. 6.

²³ PG&E Opening Comments, pp. 1-2.

²⁴ D.11-07-056, OP 2, p. 163.

would be dedicated to the application of the Privacy Rules in a consistent manner among the various entities relevant to customer energy usage data management, would alleviate most incongruities and provide a normalized Privacy Rules policy. At this point, DRA does not propose specific language with respect to General Order instituting the Privacy Rules. DRA recommends that the three IOUs jointly prepare a preliminary draft of a General Order, with a subsequent review and comment by all parties. DRA anticipates the construction of a General Order would rely heavily on the current Privacy Rules with leave to adapt to future amendments as needed.

2. The IOU Tariffs Need Continuity

As noted above, the IOUs' Tier 2 Advice Letter filings, which identify changes to their corporate policies concerning customer usage data to comply with the Privacy Rules, were not uniform. If the Commission refrains from establishing a General Order specific to the Privacy Rules, then DRA recommends that the Commission ensure that there is not only a consistent application of the Privacy Rules, but also consistent implementation.²⁵ Certainly, DRA anticipates that there will be instances that necessitate divergences from uniformed language and applications; however, in general, the tariffs should follow a standardized template that is based primarily on the existing language provide in Attachment D of D.11-07-056.

3. The Interaction Between the Privacy Rules and Public Records Act Requests Is Not Clear

Requiring the adoption of the Commission's Privacy Rules by CCAs is especially a concern due to the potentially incongruent application of Public Records Act requests.

²⁵ See DRA's November 16, 2011 Protest to Pacific Gas and Electric Company's Advice Letter 3251-G/3934-E, San Diego Gas & Electric Company's Advice Letter 2297-E, and Southern California Edison Company's Advice letter 2644-E.

MEA seeks exemption from the rules, explaining that it is already subject to other privacy rules: “Specifically, Government Code Section 6254.16 exempts utility customer information, including usage data, from disclosure under the Public Records Act, except under specific circumstances.”²⁶ However, MEA does not state what those “specific circumstances” are, and does not make clear how it will handle any discrepancies regarding the exemption from the Public Records Act. At workshops last year, MEA was questioned about such discrepancies, and was unable to respond. Thus, it is unclear exactly what privacy rules MEA would abide by, or how MEA would handle requests by law enforcement for customer information. In opening comments, MEA states:

To the extent MEA receives a request for customer data, MEA will respond by closely evaluating the requirements set forth in the Public Records Act, the CCA Non-Disclosure Agreement, and the rules and policies promulgated by MEA’s Board of Directors to ensure that both customer information is appropriately protected and that MEA is compliant with the law applicable to it.²⁷

MEA does not describe its Board of Directors rules and policies, though it states “MEA sees the significant value in the concepts set forth in D.11-05-056 [sic] as guidance for its own best practices in conformance with the laws applicable to it.”²⁸ MEA provided no plausible reason why it should not adopt the Privacy rules, and is essentially saying, “trust us.” For consumer protection purposes, that excuse simply is not good enough.

CCSF provides additional clarification, stating:

There is a difference, however, between § 6254.16 and the Privacy Rules. Section 6245.16 allows the City to refuse to

²⁶ MEA Opening Comments, p. 6.

²⁷ MEA Opening Comments, p. 7.

²⁸ *Id.* DRA assumes that MEA is referring to D.11-07-056.

respond to a request under the Public Records Act for this type of information, but it does not prohibit the City from disclosing the information like the Privacy Rules are intended to do. In addition, both the Public Records Act and the Privacy Rules require the City to comply with proper requests from law enforcement agencies. There does not appear to be a conflict between the two in this regard.

To the extent there is no conflict with state law, the adoption of the Commission's Privacy Rules appears to be a clear solution in which to ensure consistent application of the rules to Public Records Act requests.

4. Designating ESPs and CCAs As Third Party “Covered Entities” May Be Problematic

As discussed above, the Public Utilities Code gives the Commission statutory authority to apply the Privacy Rules directly to ESPs and CCAs. DRA firmly believes broad application of the Privacy Rules is the best course of action.

In opening comments, CCSF recommends the Commission instead “treat CCAs as third parties that receive smart meter data from the IOUs” and “similarly restrict a CCA’s use of that data as it does with electrical corporations and other third parties.”²⁹ CCSF further recommends that CCAs be included in the definition of “Covered Entity” in the Privacy Rules. However, it is uncertain that all of the Privacy Rules would apply in this instance. Rule 6.c.1.b states:

the covered entity disclosing the data shall, by contract require the third party to agree to access, collect, store, use, and disclose the covered information under policies, practices and notification practices no less protective than those under

²⁹ CCSF Opening Comments, p. 3.

which the covered entity itself operates as required under this rule.³⁰

Under this structure, it is unclear whether the data security (Rule 8) and accountability and auditing (Rule 9) requirements would apply. Further, it opens the question of what kind of enforcement power the Commission would hold to ensure compliance with the Privacy Rules.

In its proposed redlines of the Privacy Rules, CCSF recommends that only Rules 5 through 8 would apply.³¹ As a result, that proposal would place fewer requirements on the CCAs than if they were treated as third parties. And these lesser requirements would only serve to weaken the Privacy Rules by reducing notification to customers and customer control of their own data, making it more difficult for the Commission to determine whether customers' data is being mistreated, making it unclear what legal circumstances would dictate disclosure of customer data, and creating inconsistency in the application of the Rules which would likely confuse customers.

5. Southwest Gas Corporation

While DRA advocates for broad application of the Privacy Rules, Southwest Gas may prove an exception since it does not have an AMI system. At present, Southwest Gas operates the Automated Meter Reading (“AMR”) system, which lacks the complexity of the more prevalent AMI networks, and does not collect data at the same granularity of AMI. As previous pleadings have argued, it is the granularity of AMI data that invokes privacy concerns because of the intimate information it can reveal.

³⁰ D.11-07-056, Attachment D, p. 8.

³¹ CCSF Opening Comments, p. 5. Rules 5 through 8 include: Rule 5 – Data Minimization, Rule 6 – Use and Disclosure Limitation, Rule 7 – Legal Quality and Integrity, and Rule 8 – Data Security. The remaining Privacy Rules include: Rule 2 – Transparency (Notice), Rule 3 – Purpose Specification, Rule 4 – Individual Participation (Access and Control), and Rule 9 – Accountability and Auditing.

Since Southwest Gas' AMR is seemingly simplistic with regards to its production of customer usage data, and the manner in which that data is collected and stored, DRA does not object to conditionally exempting Southwest Gas' from the Privacy Rules requirements. However, DRA recommends that the Commission stipulate, in its Phase II decision, that if Southwest Gas transitions to AMI or adopts an alternative technology at a future date then it must inform the Commission of its intention to do so and implement the Privacy Rules as part of its AMI business plan application. Southwest Gas was amenable to this proposal in its Opening Comments, stating that if it "were to seek to implement an AMI system in the future, Southwest Gas' application would be required to address how the Privacy Rules would apply to that system at that time."³² DRA supports Southwest Gas' proposal and requests that the Commission incorporate it in the Phase II decision.

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³² Southwest Gas' Opening Comments, p. 9.

III. CONCLUSION

DRA recommends the Commission adopt the recommendations set forth in the discussion above. The final decision should also adopt PG&E's recommendation to preserve the final Privacy Rules in a General Order, and order the IOUs to collaborate and submit a draft proposal via a Tier 3 advice letter with an opportunity for review and comment by the parties.

Respectfully submitted,

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