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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.

(U39E)

Rulemaking 08-12-009
(Filed December 18, 2008)

**PACIFIC GAS AND
ELECTRIC COMPANY (U 39 E) BRIEF ON JURISDICTION**

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BRIEF ON JURISDICTION**

I. INTRODUCTION

Pursuant to the October 29, 2010, Administrative Law Judge's Ruling, Pacific Gas and Electric Company ("PG&E") hereby provides its opening brief on jurisdictional issues relating to entities that receive information on a consumer's energy usage. PG&E's brief addresses each of the Ruling's questions in sequence below.

II. COMMISSION JURISDICTION OVER ENTITIES THAT RECEIVE INFORMATION ON A CONSUMER'S ENERGY USAGE FROM A UTILITY

The ALJ's Ruling asked the following questions regarding customer energy usage information provided by a utility to third parties:

What authority does the Commission have over entities that receive information on a consumer's energy usage from the utility? What actions, if any, can the Commission take in response to misuse of data by such an entity?

The answer to these questions begins with the basic jurisdiction conferred upon the Commission by the Legislature pursuant to Article XII, Section 5 of the California Constitution, and whether that jurisdiction includes the authority to directly regulate entities that are not public utilities where the regulation is "cognate and germane" to the regulation of public utilities.

Hillsboro Properties v. Public Utilities Com. (2003) 108 Cal. App. 4th 246; *PG&E Corp. v.*

Public Utilities Com. (2004) 118 Cal. App. 4th 1174.

A. Direct Jurisdiction Over Non-Utilities Which Have Been Provided Consumer Usage Information from a Utility

In *Hillsboro*, the Court of Appeal affirmed a CPUC order that a mobilehome park owner must refund to tenants portions of rent paid by the tenants that improperly contained sums related to submetered utility service. The actions and services provided by the mobilehome park owner were clearly not public utility functions, but the Court nonetheless affirmed the Commission's assertion of jurisdiction over the non-utility park owner, on the grounds that the Legislature by statute (Public Utilities Code section 739.5) expressly mandated that mobilehome park owners take certain actions relating to services by public utilities. *Hillsboro*, at 258.

Likewise, in *PG&E Corp.*, the Court revisited examples where the Legislature has conferred jurisdiction on the Commission to directly regulate non-utilities, such as under Public Utilities Code Section 394.1 (electric service providers), Section 99152 (public transit), and Section 739.5 (mobilehome parks). However, in doing so and affirming the Commission's jurisdiction to enforce certain utility-related conditions on the non-utility parent companies of the utilities, the Court distinguished cases in which the courts had interpreted the Commission's jurisdiction as not extending to particular types of non-utilities. *PG&E Corp.*, at 1199- 1201, citing *Television Transmission v. Public Util. Com.* (1956) 47 Cal. 2d 82 (cable television company) and *Hartwell Corp. v. Superior Court* (2002) 27 Cal. 4th 256 (non-utility water companies). The distinction among these cases, the Court said, was that the Commission's assertion of jurisdiction over non-utility holding companies, unlike that over cable TV companies and non-utility water companies, was limited to the relationship of the holding companies to jurisdictional utilities, and thus the regulation in question was "cognate and germane" to the regulation of public utilities:

We do not suggest that the PUC has enforcement authority over entities other than public utilities simply because it has the power to approve certain transactions involving public utilities subject to conditions. The conditions and the PUC's interest in their enforcement must directly relate to some aspect of utility regulation. In these actions, there is little doubt that the disputed holding

company conditions are germane to aspects of the PUC's authority over the subsidiary utilities.

PG&E Corp., at 1201.

Hillsboro and *PG&E Corp.* are consistent with a finding that the Commission has jurisdiction to regulate non-utilities which receive consumer energy usage information only if the Legislature has conferred such authority directly on the Commission or the authority is “cognate and germane” to the Commission’s authority over public utilities generally. The factual situation posed by the ALJ’s Ruling involves a non-utility that has obtained the consumer usage information directly from a utility, and thus the regulation of the third party’s use and access to the information is arguably “cognate and germane” to the jurisdictional activities of the utility itself. If the non-utility is under contract to the utility for a utility purpose, and thus an agent of the utility, direct regulation of the non-utility would appear to be within the Commission’s jurisdiction over public utility activities and functions generally under Public Utilities Code Sections 216 and 218 and thus consistent with the “cognate and germane” test in *PG&E Corp.*

This conclusion finds support in Public Utilities Code Sections 2109, 2110 and 2112, which impose criminal and civil liability on “agents” of public utilities for violations of the Public Utilities Code generally. In particular, Section 2109 expressly provides that “the act, omission, or failure of any officer, *agent*, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility.” (emphasis added.)

However, Sections 2109, 2110 and 2112 do not themselves confer jurisdiction, but depend upon the underlying substantive provisions of the Public Utilities Code that do confer jurisdiction. This is exemplified by Section 2112.5 of the Public Utilities Code, which imposes criminal liability on “any person” who violates Section 588 of the Code, which itself confers jurisdiction on the Commission to regulate the access of District Attorney staff to customer specific information possessed by a public utility. By analogy, the Commission would seem to have jurisdiction to directly regulate the non-utility “agents” of public utilities – such as third

parties accessing consumer energy usage information – if the Commission has the authority to regulate the utilities’ use and control of the energy usage information directly, as it now does under Public Utilities Code Section 8380. On the other hand, the Commission would appear to lack jurisdiction to regulate such non-utilities if they obtain the consumer energy usage data for a purpose that is not within the scope of, or related to, the public utility services provided by the utility and subject to direct regulation by the Commission.

Despite the reach of the Commission’s “cognate and germane” regulation, the recent enactment of Public Utilities Code Section 8380 by the California Legislature calls into question whether that reach extends to non-utilities even when they receive consumer energy usage information directly from a utility. Under the canon of statutory construction *expressio unius est exclusio alterius*, the fact that Section 8380 confers authority on the Commission to directly regulate utilities but not their non-utility agents and contractors, arguably would support a conclusion that the Legislature intends the Commission to only regulate utilities on these matters. This argument is strengthened by Sections 8380(c), (e)(2), and (f), each of which prescribes the conduct of utilities in relationship to their contractors and third parties, but which do not in any way address the conduct of the contractors and third parties themselves.^{1/} This level of regulatory detail in Section 8380 would appear to “trump” the general authority of the Commission to regulate such non-utilities as part of its “cognate and germane” jurisdiction.

The analysis of Commission jurisdiction over access of non-utilities to consumer energy usage information does not end with the Commission’s “cognate and germane” jurisdiction, however. This is because there are other laws and statutes, both state and federal, that may directly regulate non-utilities that obtain consumer energy usage information from utilities. Examples include the federal “red flag” laws that regulate disclosure of consumer information generally, as well as the California laws that govern or create causes of action related to breaches

^{1/} Compare, Section 8380(b)(3), which does directly regulate discounts and incentives provided by utility contractors.

of privacy generally. *See, e.g., 15 U.S.C. Sections 45, 52- 53; 18 U.S.C. Section 2511, et seq., California Civil Code Sections 1798.81, .81.5, .82 and .84.* To the extent these non-CPUC laws and regulations may conflict with direct Commission regulation of non-utilities in this area, a court may construe and reconcile the conflicting laws and regulations in a manner that strips the Commission of jurisdiction altogether, even though the Commission’s regulation may be “cognate and germane” to its public utility regulation generally.^{2/}

In particular, non-utilities may be expected to argue that direct Commission regulation would conflict with portions of California Civil Code Sections 1798.81 - .85, which apply customer privacy protections to California businesses generally. Non-utilities could also argue that when the Legislature intended to confer jurisdiction on the Commission to regulate non-utilities directly, it has done so expressly, including in specific privacy statutes such as Public Utilities Code Section 394.4 (electric service providers), Section 588 (District Attorneys), and Section 6354(e) (municipalities).

PG&E believes that these arguments would be likely to be strongest where the non-utility is not formally under contract with a public utility or otherwise acting clearly as an agent of the utility for the provision of utility services (and thus the non-utility activity is not “cognate and germane” to the regulation of the utility itself). Where the non-utility is under contract or acting as the agent of the utility in providing basic utility services, the Commission’s jurisdiction is more credibly argued to be “cognate and germane” to utility regulation and thus justified in prevailing over more general consumer privacy laws and regulations. On the other hand, where the non-utility access to the information is not contractual or is for a purpose that is more peripheral and less related to direct services provided by the utility or already regulated by the Commission, the Commission’s jurisdiction is arguably more duplicative and supplemental to other general consumer privacy statutes, and thus may fall. This approach would obtain support

^{2/} But where a local ordinance conflicts with a general law under the Public Utilities Code, the general law prevails. *Hillsboro*, at 258, citing Calif. Const. art. XII, Section 8.

from the Court in *PG&E Corp.*, which drew the following distinction:

The mere fact the holding companies do business with their utility subsidiaries is not the basis for the PUC asserting jurisdiction. Unlike the holding companies, most entities that have business dealings with public utilities have not agreed to PUC-imposed conditions embodied in orders approving the entity's formation. In addition, the holding companies are much more than just entities "doing business with" public utilities. Concerns about potential abuse in the relationship between a holding company and its utility subsidiary led to the imposition of holding company conditions.

PG&E Corp., at 1201.

Under this factual scenario and assuming that the Commission meets the criteria for jurisdiction discussed above, the Commission may regulate a non-utility directly, such as through certification and bonding requirements, as a condition of the non-utility obtaining access to consumer energy usage information from a utility as a contractor or agent of the utility. In addition, the Commission would have authority to directly enforce such rules against non-utilities, including imposing civil and criminal penalties and seeking injunctive relief under Public Utilities Code Sections 2100- 2119.

B. Indirect Jurisdiction Through Utility Tariffs Over Non-Utilities Which Have Been Provided Consumer Usage Information from a Utility

Even if the Commission were determined to lack direct jurisdiction over non-utilities obtaining consumer information from utilities, the Commission retains broad indirect authority over such entities through its regulation of utility tariffs. For example, as supplemented by newly-enacted Public Utilities Code Section 8380, the Commission has extensive authority to establish and regulate the terms and conditions under which utilities provide third parties with access to consumer energy usage information the utilities themselves obtain and possess in providing tariffed utility services to those consumers. As summarized in Appendix A to PG&E's October 15, 2010, comments in this proceeding, for nearly twenty years, CPUC-jurisdictional utilities have implemented specific tariffs and other restrictions on access to customer-specific information under Commission rules and orders. To the extent these tariffs and underlying Commission rules and orders dictate the terms and conditions of non-utility

access to consumer energy usage information, any breach of those access restrictions can be remedied by a Commission order enjoining a utility from continuing to provide such information to the non-utility. Unless the Legislature chooses to constrain this broad Commission authority, it is unlikely that the exercise of that authority would be vulnerable to challenge by non-utilities. *See PG&E Corp.*, at 1201.

III. COMMISSION JURISDICTION OVER ENTITIES THAT RECEIVE INFORMATION ON A CONSUMER'S ENERGY USAGE FROM SOURCES OTHER THAN A UTILITY

The ALJ's Ruling also asked parties to brief the following questions relating to non-utility access to consumer energy usage information generally:

What authority, if any, does the Commission have over entities that receive information on a consumer's energy usage from sources other than the utility (from a Home Area Network device or from the customer, for example)? What actions, if any, can the Commission take in response to misuse of data by such an entity?

Under the California Constitution and *Hillsboro* and *PG&E Corp.*, this factual scenario is more straightforward: A customer who has no formal relationship with a utility other than being a customer, is the source of the consumer energy usage information provided to a third party, either directly by themselves or indirectly through a Home Area Network (HAN)-enabled or other device that the customer or a third-party owns or operates. The only relationship with the utility is that the information is provided by a customer of the utility or through a HAN-enabled or other device that is authorized to access the utility's advanced metering infrastructure on behalf of the customer.

Under these facts, it is much less likely that the Commission could assert direct jurisdiction over either the customer's use of the information, or a third-party non-utility's use of the information that it has obtained from the customer willingly or unwillingly. This is because the customer is not an agent or contractor of the utility, nor is the third party which obtains the information from the customer, and thus the Commission's attempt to regulate the

customer or third party is much less “cognate and germane” to the regulation of public utilities generally.

One might argue that the customer and third-party do have a ‘cognate and germane’ relationship with the utility because the consumer energy usage data is obtained through a HAN-enabled device that is linked (“registered”) with the utility’s Home Area Network and advanced metering infrastructure. However, under the decisions authorizing utility Home Area Networks, the Commission has endorsed the ability of third-parties to link their commercially-available HAN devices to utility Home Area Networks without directly regulating that customer/third party relationship. See, e.g., D.09-03-026, *mimeo*, pp. 12- 14, Ordering Paragraph 5, p. 196. To the extent that the customer makes a decision to use a commercially-available HAN device to obtain energy usage information, or even if a third-party misuses or “hacks” such a HAN device to obtain the information without the customer’s consent, the Commission’s interest and jurisdiction to regulate that appears more attenuated than other utility-related regulations. That said, the Commission could attempt to indirectly regulate the privacy of information generated by HAN-enabled or other commercially-available consumer devices “beyond the meter” through conditions applied to a utility’s registration of such devices on its Home Area Network. However, this exercise of conditioning authority might require a much broader assertion of jurisdiction than the courts would accept, because it would move the Commission into an unprecedented direct regulation of consumer appliances owned or operated by customers, as well as direct regulation of activities by customers themselves. For these reasons, it is less likely that the courts would sustain an assertion of Commission jurisdiction over access to consumer energy usage information obtained directly from sources other than the utilities themselves, such as from customers or third-parties using HAN-enabled or other devices.

IV. CONCLUSION

PG&E appreciates the opportunity to brief these important legal issues concerning Commission jurisdiction over customer privacy and third party access issues.

Respectfully Submitted,

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Dated: November 22, 2010

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CERTIFICATE OF SERVICE BY ELECTRONIC MAIL

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is 77 Beale Street, San Francisco, California 94105.

I am readily familiar with the business practice of Pacific Gas and Electric Company for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, correspondence is deposited with the United States Postal Service the same day it is submitted for mailing.

On November 22, 2010, I served a true copy of:

PACIFIC GAS AND ELECTRIC COMPANY (U 39 E) BRIEF ON JURISDICTION

[XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service list for **R.08-12-009** with an email address.

[XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service list for **R.08-12-009** without an e-mail address.

I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed in San Francisco, California on November 22, 2010.

/s/
MARTIE L. WAY

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