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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.

R08-12-009
(Filed December 18, 2008)

REPLY COMMENTS OF TECHNET AND THE STATE PRIVACY AND SECURITY COALITION TO OPENING RESPONSES TO SEPTEMBER 27, 2010, ASSIGNED COMMISSIONER'S RULING REGARDING PRIVACY AND SECURITY

I. Introduction

Pursuant to the Administrative Law Judge's October 29, 2010 Ruling extending the deadline for Reply Comments, TechNet and the State Privacy & Security Coalition hereby provide joint reply comments concerning the Commission's September 27th, 2010 ruling regarding data access and privacy issues.

1. Big Picture: The Need for a Measured Approach to in the Early Days of the Smart Grid Industry.

Smart Grid is a critical, strategic technology for California's environment and economy. Global warming remains a vital environmental problem. Improved energy efficiency is a major state and national priority and a way to make a dent in California's

budget deficit. California continues to battle a serious recession. Smart grid technology is a fledgling industry. Yet it holds promise in addressing all of these problems, and given California's world-leading technology economy, offers a promising avenue for growth and innovation in this.

In this context, it is important that if the Commission adopts additional regulations beyond the requirements of SB 1476, it do so in a balanced way that protects consumers without singling out the young Smart Grid industry for heavier privacy regulation than applies to established industries, and avoids raising the costs of utility service paid by California rate payers. California has too great a stake in the success of Smart Grid to treat it as a "privacy guinea pig" before the market is more robust and the course of this sector is better understood.

As other comments accurately point out, Smart Grid is a very new technology. It is far from clear how a rigid privacy regime would affect growth, development, implementation, and innovation in this space, and whether it can keep up with additional services that consumers request. The privacy practices of the industry will need to adapt to innovations in order to continue to provide important services and robust privacy protections.

It is important to keep in mind that the collection of detailed electricity information and the sharing of it by utilities to third parties with customer authorization is not new. Such collection and sharing has occurred for at least two decades with no significant data breaches and no known major or even minor events causing harm to any electricity end user. Utilities have a very good track record, as have the third parties who have received and used the data. The collection of detailed data has involved all

customer classes in the context of load research, while the sharing has been predominantly for commercial customers. This record has been achieved under the existing regime of rules and regulations.

Our comments respond in particular to comments from CDT and EFF and a presentation from the Samuelson Clinic suggesting that the Commission require “the full set of FIPS [Fair Information Practices] for Smart Grid” and asserting that their proposed rules are “a reasonable, balanced and effective approach to privacy that will work across a variety of business models.”¹ While we agree completely that it is important to protect consumer privacy in the Smart Grid context, we urge the Commission to do so in a balanced way that is consistent with treatment of comparable industries.

2. TechNet and the State Coalition Support Privacy Rules Based on SB 1476 but Believe that Some of the Proposals Presented to the Commission Would Unduly Burden Innovation.

TechNet and the State Coalition are encouraged that many parties have expressed support for developing a framework to protect residential consumers built on a single set of privacy principles established at the national level. The Smart Grid industry is still largely in its infancy. Simple, clear rules – across the 50 states will provide meaningful control and protection for consumers without interfering with innovation – creating an environment that allows young companies with limited resources the latitude to develop products and applications most useful to consumers.

¹ Jennifer Urban, Director, Samuelson Law, Technology & Public Policy Clinic, UC-Berkeley, *Implementing Smart Privacy: Addressing Privacy Concerns in the California Smart Grid* (Presentation to the California Public Utilities Commission), October 25, 2010 (“CDT Presentation”)

The FTC Fair Information Practice Principles currently encompass five (5) areas as the foundations of a comprehensive privacy policy: (1) notice/awareness; (2) choice/consent; (3) access/participation; (4) security/integrity of data; and (5) enforcement.²

In practice, all five of the elements of this traditional FTC FIPs framework are *rarely* contained in privacy laws and regulations in the United States, with the exception of those regarding medical privacy and the Children’s Online Privacy Protection Act (COPPA). However, TechNet and State Coalition members generally agree with the thrust of these principles – that consumers should be provided very clear, easy-to-understand notice about why their information is being collected and how that information will be used, that consumers should have real choices and the opportunity to prevent the use of data for purposes such as marketing different products and services, that consumers should have access to personal data that is being maintained about them where that personal information may be used to make material adverse decisions about the consumer, and that all parties who receive this personal information must use reasonable efforts to protect the security and integrity of the data.

The most important of these principles are notice (transparency), choice, and, in the case of sensitive personal data, security of the data. The critique that “notice and choice” are no longer taken seriously rests principally upon the real problem that many consumers cannot easily understand current privacy policies which can be lengthy and very detailed. This is a function of the absence of short-form, clear notices. We suggest

² See Fair Information Practices Principles available at <http://www.ftc.gov/reports/privacy3/fairinfo.shtm> (last visited Nov. 4, 2010).

that the Commission address this problem by requiring clear, short-form notice of use and disclosure practices that consumers can read quickly and understand.

Rather than fixing the “non-transparent notice problem”, the Appendix to the CDT-EFF comments and Jennifer Urban’s presentation to the Commission on October 25th advocate “specific” and “comprehensive” notice, which will in fact be harder for consumers to read.³ More fundamentally they argue for a significantly expanded and updated version of the 5-pronged Fair Information Practices. It is true that the Federal Trade Commission staff is widely expected to announce a new version of the FIPs. But these principles are still under development, will not be law even after announced, and have not been implemented in *any* privacy regime in the U.S., much less applied in the Smart Grid sector. In fact, a significant number of features suggested by CDT and EFF (and others) were considered and specifically rejected by the California Legislature in response to opposition.

Because of its environmental and economic importance and its positive benefits for California ratepayers, Smart Grid technology should not be subject to the bold, 4 single-spaced-page experiment in privacy regulation proposed by CDT and EFF.

Following TechNet’s participation in the workshops on October 25-26, 2010, TechNet and the State Coalition became concerned that some of the proposals presented to the Commission, while well intentioned, could hamper innovation and California’s leadership in this critical sector. First, they go well beyond the current FTC FIPs.

³ “Disclosures are now written by lawyers. They’re 17 pages long... I’m a lawyer. I’ve been practicing law for 33 years. I can’t figure out what the hell these consents mean anymore. And I don’t believe that most consumers either read them, or, if they read them, really understand it.” Interview by Stephanie Clifford with David Vladeck, Director of Bureau of Consumer Protection, Federal Trade Commission (August 5, 2009), available at http://mediadecoder_blogs.nytimes.com/2009/08/05/an-interview-with-david-vladeck-of-the-ftc/ (last visited Nov. 8, 2010)

Second, they have never been implemented in U.S. legislation outside the health care sector or COPPA. Third, they risk making the existing patchwork of regulation even more complicated and confusing. Fourth, they risk unduly burdening smaller companies in California whose innovation is critical to the development of new products and the creation of new jobs. Finally, they are so detailed that they would work against the goal of national privacy principles in this sector.

TechNet and the State Coalition urge the Commission to consider carefully not only the letter of SB 1476 but also the Legislature's intent, which was to develop a careful construct to protect privacy while preserving the state's leadership in clean technology and job creation.

a. **We Urge the Commission to Adopt a Less Burdensome Requirement of Transparency and Purpose Specification.**

While we agree that data collection policies must be transparent and provide full notice to consumers, the proposed requirements on transparency and purpose specification go well beyond these requirements.

For example, while companies have adopted numerous methods, via the establishment of Internet communications, call centers, etc. to handle customer inquiries, Section 2(d)(4) of Appendix A could be interpreted to require establishment of a phone-based call-in operation. Large companies with significant customer interfaces have call centers, but such a requirement imposes a potentially enormous potential burden for smaller start ups focused on developing particular, specific applications. The requirement that a specific purpose be indicated for each category of information collected and that the specific identity of the third parties to which it is disclosed also be

indicated suggests that relatively minor changes in services or products could trigger long notices that customers do not pay attention to, or repeated, annoying notice and consent requests to consumers. Requiring an entity to provide new notice every time it collaborates with another entity, for example, to provide an updated service or to begin to work with a new third party, even if the service to the customer is the same, appears unduly burdensome. TechNet and the State Coalition do not believe that it is the proponents' intent, but we are concerned that under the language presented, the result could be to deluge consumers with lengthy notices, or repeated updates and consent requests that provide very little, if any, information of real use to the customer.

b. **The Commission Should Not Impose a Binding Data Minimization Requirement.**

CDT/EFF have urged the Commission to adopt data minimization requirements that utilities and third parties “collect, store, use and disclose only as much... information as is necessary to accomplish a specific primary purpose identified in the notice [to the customer] or for a specific secondary purpose authorized by the customer.”⁴ Information shall be maintained “only for as long as necessary”⁵

While we agree that a company should use information only for the purposes authorized by the customer, this framework goes a step further and imposes a separate, objective standard beyond that based on consumer consent, imposing potential liability on a company if a purpose was not “specific” enough or the information collected, stored, used or disclosed is not deemed “necessary” to a particular purpose or kept longer than

⁴ Proposed Smart Grid Privacy Policies and Procedures – Opening Response for the Center for Democracy & Technology and the Electronic Frontier Foundation to Assigned Commissioner’s Ruling of September 27, 2010 (Oct. 15, 2010), pg. 10; appendix pg 3.

⁵ Id.

necessary. As discussed at the workshops, the major investor-owned utilities maintain information for different lengths of time. Southern California Edison retains energy usage data for billing purposes for three (3) years⁶. PG&E retains data for up to seven (7) years⁷. San Diego Gas and Electric retains data for a number of specific purposes up to ten (10) years.⁸ It is not clear to us whether liability would attach in any of these cases under this standard, and the standard is not clear enough to provide sufficient certainty.

Consumers may be interested in products that give them the ability to compare their current and historic energy usage patterns or that enable them to compare their usage to similarly-situated customers. A company developing such energy management products in California – assuming that consent has been obtained from its customers – still faces a lack of clarity over whether it could retain and use energy data without incurring legal liability.

The Commission should take note of the fact that data minimization provisions were rejected by the Legislature on multiple occasions. The March 25, 2010 version of SB 837 proposed data minimization rules requiring that a “third-party demand response service provider shall collect or retain only that individual customer information that is directly relevant and necessary to accomplish a specified purpose” and that such data “only be retained for as long as necessary to fulfill the specified purpose.”⁹ Following objections, this requirement was deleted in the April 27, 2010 version of the SB 837. After being reinserted by the author in the May 12, 2010 version of SB 837, it was

⁶ Southern California Edison Comments, pg. A-3.

⁷ Pacific Gas & Electric Comments, pg. 3.

⁸ San Diego Gas & Electric Comments, pg. 6.

⁹ SB 837 (March 25, 2010), Section 7(e)(1)(D), p. 18. http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0801-0850/sb_837_bill_20100325_amended_sen_v98.pdf

deleted again in the June 1, 2010 version. After the author reinserted it a third time in the June 22, 2010 version of the bill, it was then finally stricken August 22, 2010.

TechNet and the State Coalition agree with the changes suggested by PG&E to the effect that the data minimization provisions be framed as best practices.

c. **The Commission Should Not Adopt Suggestions by CDT/EFF and Division of Ratepayer Advocates that a Customer's Consent to a Secondary Purpose be Deemed to Expire after Two (2) Years.**

This proposed requirement¹⁰ would create an arbitrary deadline that would require companies that provide successful services desired by customers to establish procedures to re-activate customer consent. Customers who have signed up for a service and continue to expect to receive it face potential interruption of service if they do not provide consent. Companies will face significant costs to keep track of, notify and obtain consent from a constantly evolving customer database. Even for a large company, this is burdensome and costly. For a small company this is an onerous expense, potentially diverting resources away from research and development.

We note that this burden applies to demand response, energy management, and energy efficiency programs not provided through a utility, but does not apply to similar programs provided by a utility, raising questions of fairness. Creating an unlevel playing field tilted against new market entrants is antithetical to the interests of consumers and efforts to strengthen California's innovation ecosystem generally.

We ask the Commission to take note of the fact that a *less stringent* provision – an arbitrary “re-up” every three years – was *rejected* by the Legislature. The April 15, 2010

¹⁰ CDT/EFF Comments, appendix pg. 4; Division of Ratepayer Advocates Comments, pg. 3.

version of SB 837 required that “[a] written authorization by an electrical end-use customer for the release of confidential information shall automatically terminate three years from the date of the written authorization, and any renewal shall be in writing.”¹¹. This section was stricken in the April 27, 2010 version.¹² This provision was added again May 12, 2010. It was stricken June 1, 2010. When privacy provisions were reinserted by the author June 22, he did not include this proposal.

The Commission should not impose requirements that were removed by the legislature.

3. **Customers Should Have the Right to Consent to the Use of Their Information for Services They Desire.**

The Division of Ratepayer Advocates (DRA) indicates its opposition to “any third party access to data – whether via customer consent or through the IOUs – if such data is not necessary to achieve California’s energy goals.”¹³ We believe that the Smart Grid sector must be given the freedom and flexibility to innovate and develop compelling offerings that consumers desire, without having to identify a particular statute, rule or policy advanced by that product. Moreover, customers should have the right to provide their energy usage data to any third party for whatever reason, provided they authorize the release of that information following clear notice.

¹¹ See SB 837, Section 9 (April 15, 2010), page 22, Lines 29-32. Available at .

http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0801-0850/sb_837_bill_20100415_amended_sen_v97.pdf

¹² http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0801-0850/sb_837_bill_20100427_amended_sen_v96.pdf

¹³ DRA Comments, Sections B and C

4. **It is Important for the Commission to Recognize that Written Consent Permits Consumers to Indicate Their Consent Through Use of Either Electronic or Digital Signatures.**

A number of proposals call generally for a customer to provide written consent. TechNet, the State Coalition and our member companies, to our knowledge, support and already embrace the concept of written or electronic consent, noting that under federal law and the California Uniform Electronic Transactions Act, an electronic signature satisfies written signature requirements. An authorization, acknowledgment, or consent should satisfy a requirement that it be “in writing” if made by an “electronic record” that includes either an “electronic signature” as these terms are defined in Civil Code Section 1633.1 or a “digital signature” as that term is defined in Civil Code Section 1633. Paper, which is antithetical to the environmental goals of the Smart Grid, should not be a requirement. A requirement that consent be evidenced exclusively through a digital signature, however, would impose additional requirements that would unnecessarily burden the adoption of Smart Grid technologies by consumers.

II. Conclusion.

TechNet and the State Privacy & Security Coalition urges the Commission to continue to proceed thoughtfully in this area, implementing the balance achieved by the legislature in SB 1476 and adopting a simpler framework that is clear for both consumers and those innovating new products. TechNet and the State Coalition stand ready to work with the Commission and other parties to develop such a framework in specific proposed regulatory language. While we understand the Commission’s need to move forward in a

compressed timeframe, we would be pleased to work with the Commission and other parties to develop an approach that reflects these objectives.

Dated: November 8, 2010

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing ***Reply Comments of Technet and the State Privacy and Security Coalition to Opening Responses to September 27, 2010, Assigned Commissioner's Ruling Regarding Privacy and Security*** on all parties of record in ***R.08-12-009*** by serving an electronic copy on their email addresses of record and, for those parties without an email address of record, by mailing a properly addressed copy by first-class mail with postage prepaid to each party on the Commission's official service list for this proceeding.

This Certificate of Service is executed on November 9, 2010, at DLA Piper U.S., LLP, 500 8th Street, NW, Washington, DC 20004

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