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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  
(Filed December 18, 2008)

**COMMENTS OF THE FUTURE OF PRIVACY FORUM ON THE PROPOSED  
DECISION ADOPTING RULES TO PROTECT THE PRIVACY AND SECURITY OF  
THE ELECTRICITY USAGE DATA OF THE CUSTOMERS OF PACIFIC GAS AND  
ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND SAN  
DIEGO GAS & ELECTRIC COMPANY**

Dated: June 2, 2011  
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**INTRODUCTION**

The Future of Privacy Forum (“FPF”) respectfully files these comments in response to the California Public Utility Commission’s (“Commission”) May 6, 2011 Proposed Decision Adopting Rules to Protect the Privacy and Security of the Electricity Usage Data of the Customers of Pacific Gas and Electric Company, Southern California Edison Company, Southern California Edison Company, and San Diego Gas & Electric Company (“Proposed Decision” or “Proposed Rules”).<sup>1</sup> We hope that our experience with consumer privacy issues

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<sup>1</sup> The Future of Privacy Forum is a think tank that seeks to advance responsible data practices. It is led by privacy leaders Jules Polonetsky and Christopher Wolf. Its Advisory board is comprised of Chief Privacy Officers, privacy scholars, and consumer advocates.

FPF is recognized as a thought leader and expert resource on smart grid privacy issues. FPF convened the first smart grid privacy conference last year in Washington, DC. With the Privacy Commissioner of Ontario, it published a White Paper entitled “Smart Privacy for the Smart Grid: Embedding Privacy into the Design of Electricity Conservation.” FPF also operates a smart grid privacy resource center at [www.smartgridprivacy.org](http://www.smartgridprivacy.org).

The views expressed herein are not necessarily those of the supporters and Advisory Board of FPF.

generally, and smart grid privacy in particular, is useful for the Commission. Smart meters and advanced metering infrastructure present the prospect of allowing consumers to more efficiently control their energy usage and lower their bills, increasing consumers' ability to use and manage smart appliances and new and innovative applications, fostering a reliable electricity grid, and helping to reduce carbon emissions, all of which present tremendous consumer benefits. However, smart meters, advanced metering infrastructure, and associated energy usage applications and services also raise the prospect of the use of consumer information in a manner harmful to individual privacy. Because of that prospect, FPF applauds the Commission for its focus on smart grid privacy concerns and its embrace of Fair Information Practice (FIP) principles.

FPF strongly endorses all companies in the smart grid ecosystem utilizing FIP principles to empower consumers with control over their data usage and privacy preferences. The Commission's Proposed Decision is an excellent starting point and has many laudable aspects. FPF cautions, however, against a set of rules that might inadvertently hinder the new and innovative services that smart grid technologies may offer. In particular, the Commission should carefully consider the extent to which its proposed rules might inadvertently impede advances and innovations by third parties that are developing smart grid services on a national scale. Because the Commission's proposed rules cover only some third parties offering consumers energy management and related services, FPF instead favors flexible, national standards based on FIP principles that address customer privacy consistently across all parties and that create an environment that enables new smart grid technologies to flourish.

To achieve this goal, FPF is continuing to work with a coalition of interested parties to develop privacy guidelines applicable to third party and utility use of smart grid data for new and

innovative services. Other groups, such as the North American Energy Services Board (“NAESB”) and the National Institute of Standards and Technology (“NIST”) Smart Grid Privacy Sub-group are also working on comparable guidelines.<sup>2</sup> As smart grid technologies are in their infancy, FPF favors allowing these standards to develop on a national basis before state-specific requirements are imposed, especially for non-utility third parties. To the extent that flexible national guidelines based on FIP principles subsequently prove lacking, FPF suggests the Commission revisit the issue of applying its rules to third parties with direct customer relationships.

If the Commission proceeds with enacting rules despite these concerns, FPF has some specific comments on the Proposed Rules. Our comments are focused and targeted primarily on improvements or clarifications to the notice and choice provisions of the Proposed Rules. Our comments are designed to help ensure consumer-beneficial and innovative uses of data in a manner that will still enable strong protections for consumer privacy.

## **I. FIP-BASED NATIONAL PRINCIPLES ARE PREFERABLE FOR THIRD PARTIES**

In our December 6, 2010 comments to the Commission,<sup>3</sup> FPF noted that the key to encouraging innovation and engaging consumers to utilize the smart grid is creating a privacy framework that is guided by firm but flexible principles that can develop as an understanding of customer needs develops. We believe that the Commission should be commended for

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<sup>2</sup> See, e.g., NAESB third party sharing proposal, available at [http://www.naesb.org/pdf4/r10012\\_rec.doc](http://www.naesb.org/pdf4/r10012_rec.doc); NIST Smart Grid Homepage, available at <http://www.nist.gov/smartgrid/>.

<sup>3</sup> Reply Brief Of The Future of Privacy Forum To The Responses To September 27, 2010 Assigned Commissioner’s Ruling Regarding Privacy and Security, December 6, 2010.

developing its privacy rules based on the time-tested FIPs, which provide much of the needed flexibility for smart grid privacy.

We also commend the Commission for using the rules recommended by the Center for Democracy and Technology (“CDT”) and the Electronic Frontier Foundation (“EFF”) as the foundation for California’s proposed smart grid privacy regulations. CDT and EFF have a demonstrated record of tirelessly working to protect customer privacy. Where the Commission has made adjustments to the CDT/EFF proposal, they are well-reasoned and serve to balance the interests of covered entities seeking to promote innovative uses of smart grid data with customer privacy concerns.

FPF has concerns, however, that discretionary state-based rules applicable to non-utility third parties are premature when FPF and others are actively developing FIP-based guidelines designed to be national in scope. Many of the services third parties are offering are designed to be national offerings, not just state-based or utility-specific. Exemplifying our concerns, the Commission differentiates between third parties that obtain covered information (1) directly from a utility through contract; (2) through home area network (HAN) devices “locked” to the smart meter for automatic transfers of data to third parties; through independent arrangements with customers; and (3) through independent arrangements with customers. Because of the Commission’s jurisdictional concerns, the third parties in group (1) would be directly subject to the Proposed Rules, those in group (2) would be subject to the rules through tariffs; and those in group (3) would not be subject to the rules at all.

Because the flexible national guidelines contemplated by FPF and possibly others would apply to all third parties, the Commission’s approach appears arbitrary, especially since the services the three different groups offer consumers could in some circumstances be virtually

identical. Rather than develop a new regime at that time that imposes rules on some third parties while excluding others, FPF recommends the Commission allow national FIPs-based guidelines to develop for all third parties, except where a statutory mandate applies.<sup>4</sup> A regime such as that proposed by the Commission could result in competitively harmful consequences for third parties subject to the rules as compared to those not covered.

FPF does not believe a disparate approach to third parties is appropriate in a nascent, developing industry that offers the promise of tremendous consumer benefits. FPF favors allowing national standards applicable to third parties to take effect. If such efforts prove ineffective in protecting customer privacy, then the Commission can and should revisit the issue.

## **II. SPECIFIC PROVISIONS OF THE PROPOSED RULES SHOULD BE CLARIFIED TO HELP FOSTER INNOVATION WHILE STILL PROTECTING PRIVACY**

Notwithstanding our concerns in Part I, to the extent the Commission proceeds with enacting rules, we offer some targeted comments focused on various aspects of the Proposed Rules' treatment of consent, notice, and the use of aggregate information. Our comments are designed to maintain strong privacy protections for customers while also preserving flexibility for innovative customer engagement to unfold.

### **A. The Concept of Consent Should be Consistent, But Flexible**

Under section six of the proposed rules, we believe that the concept of consent for primary purposes should be simplified, streamlined, and made consistent. The Proposed Rules

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<sup>4</sup> For example, California's recently enacted S.B. 1476's requirements that utilities who contract with third parties for services that enable consumers to monitor energy usage to require the third party contractually to make prominent disclosures to consumers if using the data for secondary purposes, still govern. Cal. Pub. Utility Code § 8380(c).

contemplate two separate consent requirements applicable to third parties.<sup>5</sup> To use covered information for primary purposes, non-utility covered entities would need to receive “prior customer consent.”<sup>6</sup> To use or disclose covered information for secondary purposes, a covered entity must receive “prior, express, written authorization.”<sup>7</sup> The Proposed Rules do not define either “prior customer consent” or “prior express written authorization.” We recommend the Commission employ consistent terminology if it intends the terms to have the same meaning. If the Commission intends that the terms have different meanings, it should make its specific expectations more clear. For example, it is actually sensible that something less than “express written” authorization for a non-utility third party to utilize covered information for primary purposes might be appropriate, but under the Proposed Decision it is unclear what the Commission intends.

Moreover, because “prior express written authorization” is undefined, FPF is concerned the term could be subject to an unduly restrictive interpretation. The Commission should create a definition or provide in commentary a concept of consent that would be flexible enough to allow for a wide spectrum of mechanisms to obtain customer consent. This is especially important to account for new and innovative services and applications where specific mechanisms, such as a signed paper, would be too rigid and would actually serve only to stifle consumer choice.

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<sup>5</sup> Under the Proposed Rules, electrical corporations do not need prior consent to use customer information for primary purposes. Moreover, third parties acting for a utility do not need prior consent to use customer information for primary purposes either. FPF has no objection to these provisions as they are consistent with consumer expectations.

<sup>6</sup> See Proposed Rules Section 6(b).

<sup>7</sup> See Proposed Rules Section 6(d).

The Commission appears to partially achieve the goal of flexibility through its embrace of undefined “convenient mechanisms” for authorizing secondary uses of customer information.<sup>8</sup> Whether for primary or secondary purposes, any approach to consent should ensure that customer consent can be accomplished through various mechanisms, including electronically, like allowing the customer to check an online box. We believe that the Commission should adopt one iteration of consent that is flexible enough to account for all potential uses and disclosures of covered information. For example, the Commission could amend the proposal to require “informed and knowing consent” from a customer. The Commission could then define “informed and knowing consent” in a manner that enables covered entities to tailor the consent to the proposed data usage or disclosure – providing a spectrum of potential consent mechanisms that a covered entity could use, including some non-exhaustive examples.

**B. Separate Authorizations May Not Be Necessary In Every Instance**

It is unclear what the Commission intends, or what purpose is served, by require a “separate authorization” from a consumer for “each secondary purpose.”<sup>9</sup> An absolute necessity of “separate authorization” negates flexible approaches to consumer consent. FPF wholeheartedly favors and embraces informed and knowing consent in all instances. However, informed and knowing consent does not necessarily require a standalone separate authorization for every use.

To the extent a covered entity may obtain a consumer’s informed and knowing consent to the use of covered information for multiple purposes through a single authorization, that should

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<sup>8</sup> See Proposed Rules Section 4(b). Notably, the reference to “convenient mechanisms” for authorizations is not in Section 6, the choice/consent provisions.

<sup>9</sup> See Proposed Rules Section 6(e).

alleviate privacy concerns. There may be situations where a covered entity must obtain separate authorizations for consent to be informed and knowing, but that may not be the case in every instance. Covered entities should have the flexibility to obtain consents appropriate to the circumstances.

### **C. Customer Consent Should Work in Tandem with Customer Notice**

We applaud the Commission’s Proposed Rule for seemingly embracing a flexible approach to how the content of the required notice can be presented to consumers. The Proposed Rules call for “meaningful, clear, accurate, specific, and comprehensive notice regarding the collection, storage, use and disclosure of covered information.”<sup>10</sup> The Proposed Rules require notice when confirming a new account and twice a year. While some specific notice content requirements are specified, FPF generally finds those requirements to be reasonable (except see Section D below).

The Commission should, however, more expressly permit companies to provide meaningful notice in tandem with consent mechanisms that provide meaningful choices to customers. Accordingly, the timing of initial notice – now only when confirming an account – could be more flexible, and the Commission could clarify that notice can occur contemporaneous with consent. For consent to be knowing and informed, some level of notice must be provided.

Covered entities should be able to develop user interfaces, dashboards, and Internet widgets that allow for customer interaction/choice about how data is used. The proposed rules should more explicitly allow for innovative notice practices, including just in-time notices, such

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<sup>10</sup> See Proposed Rules Section 2(a).

as the use of self-regulatory seals and symbols that convey useful information to customers<sup>11</sup> even if more detailed notice content is available through a link to an enhanced disclosures. For example, a covered entity might develop a dashboard that can display energy usage for a customer and give the customer the ability to see and decide within the application exactly what data the customer is willing to share, with whom the customer is willing to share this data, and for what specific purposes the consumer is willing to share the data.<sup>12</sup> We believe that any rules (or associated commentary) could be clarified to allow for more creative approaches to notice and choice. If the Proposed Rule is not modified, accompanying commentary could provide non-exhaustive examples of how notice might be given to customers.

**D. Detailed Disclosures About Service Providers Should Not Be Included in Customer Notices**

It is unnecessary to require detailed information to consumers about the number of service providers with whom an entity shares covered information. The notice provided to customers is required to have “an explicit description of each category of covered information that is disclosed to third parties, and, for each such category, (i) the purposes for which it is

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<sup>11</sup> For example, a group of media and marketing associations – including the Better Business Bureau (BBB), the Direct Marketing Association (DMA), and the Interactive Advertising Bureau (IAB) – recently introduced the “Advertising Option Icon.” The icon appears on online advertisements and allows a consumer to find out about online behavioral advertising, learn about the data practices associated with advertisements he receives, and opt out of receiving certain targeted advertisements. *See* <http://www.aboutads.info/participants/icon/>. Another example of just in-time notice is used by Microsoft and many other software developers to help receive information from consumers after software crashes. When a computer program crashes and restarts, the software company often sends the user a message asking if the user would like to share a report regarding the crash with the software company in order to help the software company improve its products.

<sup>12</sup> *See, for example*, the Google “dashboard” that offers consumers a view into the data associated with their accounts. It is designed to offer transparency and control by summarizing the data associated with each product used when a user signs in, and it provides links to control personal settings, *available at* <https://www.google.com/accounts/ServiceLogin?service=datasummary&continue=https://www.google.com/dashboard/&followup=https://www.google.com/dashboard>.

disclosed, and (ii) the number and categories of third parties to which it is disclosed.”<sup>13</sup> We believe this provision will be unduly burdensome as it relates to the sharing of information between a covered entity and the covered entity’s service providers.

Covered entities will be constantly sharing certain smart grid data with other companies who operate to help the covered entities provide services to customers. The number of service providers an entity utilizes may change as new and innovative services develop. Accordingly, providing the number of service providers at a given time could be problematic.

The overarching concern is that service providers access the data only by contract, and that they be contractually required to maintain the confidentiality of this data and not use the data for their own purposes. The Proposed Rules already contemplate this.<sup>14</sup> Otherwise, this sort of sharing is widely accepted and should be considered a commonly accepted practice, which should require customer notice generally about sharing with service providers and the reason for doing so, but not the level of detailed notice proposed by the Commission.<sup>15</sup>

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<sup>13</sup> See Proposed Rule Section 3(a)(2).

<sup>14</sup> See Proposed Rule Section 6(c)(1).

<sup>15</sup> See, e.g., FEDERAL TRADE COMMISSION, PRELIMINARY FTC STAFF REPORT, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS 54-55 (Dec. 2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf>. (“[Other practices], including the use of consumer data exclusively for fraud prevention, legal compliance, or internal operations, are sufficiently accepted – or necessary for public policy reasons – that companies do not need to request consent for them. . . . This is also true where companies share consumer information with service providers acting at their direction for the purposes enumerated above, provided there is no further use of the data.”); Julie Brill, Commissioner, Fed. Trade Comm’n, Address at the Computer and Communications Industry Association (May 4, 2011), available at <http://www.ftc.gov/speeches/brill/110504ccias.pdf> (“[W]e call for simplified privacy policies that consumers can understand without having to retain counsel. The [December Privacy Report] suggests that one way to simplify notice is to exempt “commonly accepted” practices from the first layers of notice, to help remove the clutter. There is probably a group of practices that we can all agree are “commonly accepted” – such as sharing data with the shipping company that will deliver the product that you just ordered. By removing disclosures relating to these commonly accepted practices, consumers can focus their attention on more unexpected uses of data.”)

### **E. Aggregate Usage Data Should Not Be Limited**

FPF suggests the Commission consider broadening the scope of potential uses of aggregated usage data. The Proposed Rules state that covered entities limit the use of aggregated usage data for “analysis, reporting or program management.”<sup>16</sup> While “analysis, reporting, or program management” is arguably broad, FPF is concerned that without further clarification, it could be subject to unduly narrow interpretation. To fall under this section of the proposed regulation, this data must be anonymous and “not disclose or reveal specific customer information.”<sup>17</sup> We favor requiring covered entities to fully disclose the uses they make of this aggregated data in their privacy policies. Assuming a covered entity properly anonymizes and aggregates data, the use of this data should not pose a privacy risk, and there are many varied and innovation-friendly uses to which such data can be put.

### **Conclusion**

The Future of Privacy Forum commends the Commission for taking the initiative to tackle the difficult privacy issues associated with transitioning to a smart grid. One of the major privacy issues across every industry today is how to provide consumers with notice of how their data is being collected and used and then how to allow consumers to exercise meaningful choices about this collection and use. In many industries, notice/consent models are stuck in the past – providing inflexible, complex paper or online notice and requiring consumers to either complete an online form (often a simple tick box) or submit a paper form to signal consent.

As California’s electrical infrastructure transitions from the past to the future, it is vital that the accompanying privacy regime transition as well. We applaud the groundwork that the

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<sup>16</sup> See Proposed Rules section 6(g).

<sup>17</sup> *Id.* See also Proposed Rule section 1(c).

Commission has laid by using the CDT/EFF FIP-based proposal as a foundation. We urge the Commission to consider our comments and comments by others that seek to make the proposed rules protective of customer privacy while also allowing covered entities to communicate, interact, and engage with consumers.

THE FUTURE OF PRIVACY FORUM

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June 2, 2011

**CERTIFICATE OF SERVICE**

I hereby certify that, pursuant to the Commission’s Rules of Practice and Procedure, I have this day served a copy of COMMENTS OF THE FUTURE OF PRIVACY FORUM ON THE PROPOSED DECISION ADOPTING RULES TO PROTECT THE PRIVACY AND SECURITY OF THE ELECTRICITY USAGE DATA OF THE CUSTOMERS OF PACIFIC GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, AND SAN DIEGO GAS & ELECTRIC COMPANY on all required parties identified on the attached official service list for Proceeding: R08-12-009. Service was completed by serving an electronic copy on the email address of record, and by mailing paper copies to persons who appear in the “Parties” and “State Service” categories of the official service list and have not provided an e-mail address for the official service list.

Executed this 2<sup>nd</sup> day of June, 2011 at Washington, DC.

THE FUTURE OF PRIVACY FORUM

*/s/ Jules Polonetsky*  
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