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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In The Matter Of The Application Of Pacific Gas And Electric Company For Adoption Of Its Customer Data Access Project (U39E)	Application 12-03-002 (Filed March 5, 2012)
In The Matter Of The Application Of San Diego Gas & Electric Company (U902E) For Authority To Implement A Backhaul Program To Provide Authorized Third Parties Access To A Customer's Usage Data Based Upon Consent Of The Customer.	Application 12-03-003 (Filed March 5, 2012)
Application Of Southern California Edison Company (U338E) For Approval Of Proposal To Enable Automated Access Of Customer Usage Data To Authorized Third Parties And Approval Of Cost Recovery Mechanism.	Application 12-03-004 (Filed March 5, 2012)

JOINT IOU REPORT ON THE INFORMAL ALL-PARTY DISCUSSIONS REGARDING THE ISSUES IDENTIFIED IN THE ASSIGNED COMMISSIONER'S RULING AND SCOPING MEMO

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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE

STATE OF CALIFORNIA

In The Matter Of The Application Of Pacific Gas And Electric Company For Adoption Of Its Customer Data Access Project (U 39-E)	Application 12-03-002 (Filed March 5, 2012)
In The Matter Of The Application Of San Diego Gas & Electric Company (U 902-E) For Authority To Implement A Backhaul Program To Provide Authorized Third Parties Access To A Customer's Usage Data Based Upon Consent Of The Customer.	Application 12-03-003 (Filed March 5, 2012)
Application Of Southern California Edison Company (U 338-E) For Approval Of Proposal To Enable Automated Access Of Customer Usage Data To Authorized Third Parties And Approval Of Cost Recovery Mechanism.	Application 12-03-004 (Filed March 5, 2012)

JOINT IOU REPORT ON THE INFORMAL ALL-PARTY DISCUSSIONS REGARDING THE ISSUES IDENTIFIED IN THE ASSIGNED COMMISSIONER'S RULING AND SCOPING MEMO

In accordance with the May 25, 2012 *Assigned Commissioner's Ruling and Scoping Memo* ("ACR"), the three Investor-Owned Utilities ("IOUs") —Pacific Gas and Electric Company ("PG&E), San Diego Gas & Electric Company ("SDG&E"), and Southern California Edison Company ("SCE")— whose applications are currently pending before the California Public Utilities Commission ("Commission") in the above-captioned consolidated proceeding

hereby submit their consolidated "Joint Report" on the informal discussions intended to "resolve or clarify open issues"[1] identified in the ACR.

I.

INTRODUCTION

The ACR memorialized the outcome of the May 14, 2012 prehearing conference ("PHC") in which the parties who attended[2] agreed to conduct informal discussions with the intent of narrowing or eliminating differences between them with respect to the five categories of issues identified at the PHC[3] so that the Commission could then determine, among other things, whether evidentiary hearings or briefing are necessary on any outstanding issues.[4] Over the course of several weeks in June and July, the parties[5] engaged in telephone conferences to discuss the five categories of issues identified in the ACR:[6]

1. Cost – Whether the costs that are associated with the implementation of these programs are reasonable?

2. Pricing – What are the pricing issues for this service? What pricing issues arise concerning Community Choice Aggregators and Electric Service Providers?

3. Timing – What is the appropriate schedule for resolving the issues in this proceeding? Do all three utilities need to

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1 ACR, p. 6.

2 The parties who attended the PHC were: San Diego Gas & Electric Company (SDG&E), Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), the Division of Ratepayer Advocates (DRA), the Alliance for Retail Energy Markets (AReM), and Marin Energy Authority (MEA).

3 ACR, p. 5.

4 ACR, pp. 5-6.

5 After the PHC, the following entities' motions for party status were granted, and they—together with TechNet and the parties listed in Footnote 1—participated in some of the informal discussions summarized in this Joint Report: EnerNOC, Inc., Open Energy Network, and the City and County of San Francisco. The motions for party status filed by AT&T and Distributed Energy Consumer Advocates were granted relatively late in the discussion process, and SCE inadvertently overlooked the July 10th granting of DECA's motion in particular, but a draft of this Joint Report was provided to these two parties a few days before its filing. The IOUs welcome comments from all parties on this Joint Report, whether or not they participated in the informal discussions.

6 The five items below are quoted directly from page 5 of the ACR.

proceed at the same schedule, or can utilities that are ready [to] proceed [] act? Is coordination needed across these three applications?

4. Other Proceedings – What is the relationship between this proceeding and other tariff filings and rules development, particularly those arising from D.11-07-056?

5. Third Parties – What policies should apply to third parties receiving the data? What procedures should the Commission adopt to ensure third-party compliance with privacy safeguards adopted by the Commission? Is the self-certification process proposed by SCE adequate and is it reasonable?[7]

This Joint Report summarizes the outcome of the parties' informal discussions using, as an outline, the five issues as listed in the ACR. It also includes consensus about some details of the IOUs' ESPI platforms (in Section II.F below). While this Joint Report focuses on the positions of the IOU parties, it also endeavors to incorporate the positions of the non-IOU parties to the extent possible.[8] In the last section of this Joint Report, the IOUs propose next steps that take into account the results of the informal discussions, and the IOUs reserve the right to file opening and reply comments on the Joint Report that may outline additional next steps.

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[7] Like the IOUs' respective applications, this Joint Report operates on the premise that the ESPI platforms need only provide to third parties "access to a customer's *usage data*" consistent with Ordering Paragraph #5 of D.11-07-056.

[8] The IOUs shared a previous draft of this Joint Report with the non-IOU parties in an effort to capture the other parties' positions as accurately as possible in advance of filing the Joint Report. However, because the IOUs may not have had time to collect or incorporate all edits to the draft, pursuant to the schedule outlined in the ACR, other parties may submit comments on this Joint Report by August 20, 2012. Reply comments are due August 27, 2012.

II.

REPORT

A. Cost – Whether the costs that are associated with the implementation of these programs are reasonable?

The only party to raise an issue relating to the IOUs' projected costs for implementing their respective Energy Service Provider Interface (ESPI) platforms was DRA. In its protest, DRA stated that "[i]t is reasonable for the Commission to question why PG&E is requesting $10 million more than SCE's proposal,"[9] and it asked the Commission to order SDG&E to "augment its application to incorporate the cost estimates it provides in its TY 2012 GRC Application."[10] During informal discussions, DRA stated that it had reviewed the IOUs' testimony regarding costs and determined that it no longer planned to dispute the costs associated with the implementation of the ESPI platforms.[11] Thus, the IOUs propose that the three cost proposals be adopted.

B. Pricing -- What are the pricing issues for this service? What pricing issues arise concerning Community Choice Aggregators and Electric Service Providers?

None of the IOUs propose to charge fees for use of their ESPI platforms, and this basic feature of the IOUs' applications applies equally to IOU customers wishing to obtain automated usage data and to third parties who have obtained the requisite customer authorization to receive such data. No non-IOU party to this consolidated proceeding has proposed that customers or authorized third parties should be charged a fee to use the ESPI platform. Thus, the parties have reached consensus that no fees should be assessed for using the ESPI platform.

However, the IOU parties disagree about the relationship, if any, between the *lack of fees* proposed in this proceeding, and the existence of rate schedules that impose fees pursuant to

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[9] DRA Protest, p. 9.
[10] *Id.*
[11] DRA reserves the right to comment on this statement in the August 20, 2012 comments on this Joint Report.

prior Commission decisions in the Community Choice Aggregator (CCA) and Direct Access (DA) contexts. The IOU parties' differences are summarized as follows:

1. **PG&E, Marin Energy Authority (MEA) and AReM:**

In their protests to the IOUs' applications, AReM (representing DA electric service providers (ESPs) and Marin Energy Authority (a CCA) alleged that the applications provided unfair and inequitable treatment of ESPs and CCAs because the applications would allow third parties to obtain customer energy usage data without paying a fee, while ESPs and CCAs requesting the same usage data would be required to pay fees to obtain that same data under the IOUs' DA and CCA tariffs. In response to these concerns and after further discussions with AReM and MEA, PG&E has agreed to modify its proposal in this proceeding and its applicable DA and CCA tariffs to provide consistency as follows:

If the Commission's decision in this proceeding results in customer usage data being provided to ESPs/Community Choice Aggregators at no cost and that provision of data is largely analogous to the services provided as part of the IOUs' DA and CCA fee tariffs for Meter Data Management Agent (MDMA) services, the DA and CCA MDMA fee shall be reset consistent with the outcome of this proceeding; that is, only the cost of incremental services, if any, above and beyond the services provided at no cost under the decision in this proceeding shall be collected as part of the DA and CCA MDMA fee.

In return for this modification of the PG&E application, AReM and MEA will support the PG&E application as modified.

PG&E, AReM and MEA do not agree with SCE that this modification to the applications in this proceeding conflicts with any other Commission order, decision or proceeding, because the IOUs are permitted to file advice filings to implement changes in tariffs approved or mandated by the Commission in proceedings such as this one. Alternatively, the Commission in this proceeding could achieve the same result as proposed by PG&E, AReM and MEA without requiring modifications to the DA or CCA tariffs, by authorizing the IOUs to

provide the customer energy usage data authorized in this proceeding to ESPs and CCAs without charge and (for CCAs) without the need for customer authorization to the extent that the provision of data is largely analogous to the services provided as part of the IOUs' DA and CCA fee tariffs for Meter Data Management Agent (MDMA) services.

2. SCE and SDG&E:

SCE and SDG&E decline to join PG&E's agreement with AReM and MEA, which agreement unnecessarily links the outcome of this consolidated proceeding with DA/CCA issues pending or set for resolution in unrelated proceedings. Specifically, for substantive and procedural reasons, SCE urges the Commission to focus its decision in this proceeding on one narrow, undisputed consensus among all parties—that no customers or authorized third parties should be charged fees for using the ESPI platform to obtain usage data from the IOUs.

Equally importantly, SCE's and SDG&E's declining to join PG&E's proposal/agreement with AReM and MEA does not give rise to an issue that can or should be litigated in this proceeding, through evidentiary hearings or otherwise, because neither those fees nor their reasonableness was within the scope of Ordering Paragraph #5 of D.11-07-056, which is the basis on which the ESPI applications were filed. (SCE also notes that the reasonableness of its CCA and DA fees is in fact, currently being litigated in SCE's pending Phase 1 General Rate Case 2012-2014.)

Substantively, AReM's concern—that imposing no fees on authorized third parties in the ESPI context discriminates against CCA and DA customers—is meritless. CCA and DA customers, like any IOU customer, can authorize any registered third party, including CCAs and DA Energy Service Providers (ESPs) to obtain automated usage data, free of charge, on the customer's behalf. The ESPI platform is a customer offering, regardless whether the customer is bundled service, Direct Access, or served by a CCA, and is designed, in part, to realize the promise of the IOU ratepayers' investment in smart meters. The relevance of CCA and DA fees to ESPI fees erroneously assumes that the data for which DA customers and CCAs

are charged is the same as ESPI data, which it is not. ESPI data is pulled from the IOUs' back-office systems and transmitted one day after the usage is incurred; it is not the same "billing quality" data that DA and CCA customers receive on a monthly basis for customer billing and settlement purposes.

Procedurally, it would be improper for the Commission to adopt a finding in *this* proceeding, applicable to all parties, that is linked to the recently filed settlement between PG&E and AReM in a wholly unrelated proceeding to which neither SCE nor SDG&E is a party. If PG&E and AReM wish to settle in that unrelated proceeding about a contingency or outcome in this one, the settlement terms between them arguably belong there and not here. For example, as SCE noted above, SCE's cost recovery proposal with respect to CCA and DA-related fees is currently pending in Phase I of its 2012-2014 General Rate Case. Evidence is now closed in that case, and the merits of SCE's cost recovery proposal will be examined in light of the record in that proceeding. To the extent PG&E came to an agreement with AReM and others who are not parties to the instant proceeding, the terms of their settlement are appropriately reviewed—in light of the reasonableness of the entire record—in *that* proceeding and should not be thrust inappropriately into this one.

C. Timing

1. What is the appropriate schedule for resolving the issues in this proceeding?

Parties agree that the issues in this proceeding should be resolved in an expedited manner. SDG&E has already begun to develop its ESPI platform and intends to implement it by the end of 2012, but SCE and PG&E do not intend to begin building their respective ESPI platforms until a Final Decision is issued in this proceeding authorizing cost recovery. Thus, to enable all three IOUs to offer a third-party data access solution, the Commission should aim to issue a Final Decision in this proceeding in the third quarter of 2012. Such a schedule would allow SCE and PG&E to implement their proposed platforms consistent with, or close to, the

schedules proposed in their Applications, and will minimize the gap between their implementation and SDG&E's.

2. Do all three utilities need to proceed at the same schedule, or can utilities that are ready to proceed act?

Parties agreed that while it is preferable to have the three IOUs proceed on the same schedule, as a practical matter, that is not possible in light of the fact that each IOU currently employs different systems, each at a different state of development, which requires dissimilar updates and enhancements depending on the IOU. Thus, unavoidable differences in the timeframes by which the IOUs plan to implement their respective ESPI platforms are acceptable.

The IOUs request that the Commission adopt the following schedule. SDG&E has begun project planning to implement its Customer Energy Network (CEN) ESPI platform with a potential implementation date of late 2012.[12] SCE does not plan to begin developing its ESPI platform until the Commission issues a Final Decision in this proceeding. SCE will be able to deploy its EPSI platform within approximately 12 months of a Final Decision. (In its Application, SCE assumed a Final Decision in the third quarter of 2012, resulting in an implementation date in July 2013.[13]) PG&E assumed a Final Decision in the first quarter of 2013, which would enable implementation of Phase 1 of PG&E's Customer Data Access (CDA) ESPI platform in the third quarter of 2014.[14]

Some parties participating in the informal discussions expressed an interest in understanding the timeframes by which each IOU will make usage data available for each IOU customer class via the ESPI platforms. The table below identifies the timeframe for when SCE's and SDG&E's usage data will be available for each customer class. PG&E does not differentiate

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[12] A.12-03-003Prepared Direct Testimony of Ted M. Reguly, p. 7.
[13] A.12-03-004 Testimony, p. 32.
[14] A.12-03-002 Prepared Testimony, pp. 1-2 – 1-3.

between customer classes as to when data would be available through its ESPI platform. If the data is in the Customer Data Warehouse, the platform will 'pull' the data.

IOU	Timing of Implementation By Customer Class		
	Residential	**Small / Medium Non-Residential (< 200 kW in demand)**	**Large Non-Residential (≥ 200 kW in demand)**
SCE	July 2013	July 2013	TBD (July 2013 or later)[15]
SDG&E	December 2012	December 2012**	TBD

** System enhancements to select third parties via an on-line interface will be made in SDG&E's My Account platform. If a customer does not have My Account access, they can call SDG&E and utilize the paper authorization process.

D. Other Proceedings -- What is the relationship between this proceeding and other tariff filings and rules development, particularly those arising from D.11-07-056?

The parties agreed that the following advice filings, ordered in D.11-07-056, need not be resolved before issuance of a Final Decision in this proceeding:

- Advice Letters on the Provision of Price, Usage and Cost Information, and results of "methodological discussions [with CAISO] and a proposal for providing wholesale prices" (OP # 5, 6, and 7 of D.11-07-056); and
- Home Area Network (HAN) Implementation Plan Advice Letters (OP # 11).

The parties also agreed that the Commission need not approve the wholly unrelated Rule 24 (which has not yet been fully drafted or litigated, and which awaits resolution in Phase IV of the Demand Response Order Instituting Rulemaking, R.07-01-041) before it issues a Final Decision

[15] SCE's initial deployment will include usage data for its Edison SmartConnect® smart meters, which covers the majority of SCE's residential and small/medium non-residential customers. Soon thereafter, SCE will be able to include data for large non-residential customers, who primarily have Real Time Energy Meters (RTEMs), in its ESPI platform

in this proceeding. Finally, the Parties agreed that the question whether the privacy rules adopted by the Commission in D.11-07-056 apply to ESPs and CCAs is being determined in Phase 2 of R.08-12-009, not in this proceeding.[16] It is unclear whether the result of that proceeding will have an impact on this one.

However, all of the Parties other than EnerNOC[17] agreed that the only filings upon which the outcome of this proceeding *may* be dependent are the Advice Letters each IOU filed on October 27, 2011 ("Data Privacy Advice Filings")—pursuant to Ordering Paragraph ("OP") #1 of D.11-07-056—to implement the privacy and security rules for customer usage data obtained from the IOUs' Advanced Metering Infrastructure (AMI) systems.[18] Because the IOUs' ESPI platforms will be used to transmit AMI usage data (i.e., "Covered Information") to customer-authorized third parties (i.e., "Covered Entities"), the tariff rules proposed in the Data Privacy Advice Filings[19] are relevant to this proceeding, even if those proposed rules do not specifically address additional tariff requirements that are implicated in the context of *automated* data transmission, including third-party eligibility and "registration" with the IOUs, etc. Moreover, to the extent that the new tariff rules resulting from resolution of this proceeding—regarding automated data transmission—refer to, or are based on, the final tariff rules adopted in the pending Data Privacy Advice Filings, it would, as a practical matter and from an efficiency perspective, be beneficial for the Commission to have resolved the first set of Advice Filings before it considers the next.

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[16] The IOUs note that President Peevey issued on July 24, 2012 a Proposed Decision extending privacy protections to customers of gas corporations and community choice aggregators, and to residential and small business customers of electric service providers.

[17] EnerNOC notes that it and another party (Tendril) protested the Data Privacy Advice Filings because each IOU had a slightly different approach to the implementation and, in some instances, EnerNOC viewed the drafts as not complying with the decision. Therefore, EnerNOC maintains that each utility could have a different interpretation of compliance with the Privacy Decision.

[18] SCE Advice 2644-E, SDG&E Advice Letter 2297-E, and PG&E Advice 3251-G/3934-E

[19] SCE proposed a new Rule 25 (Protecting the Privacy and Security of Customer Usage Information and Data) and modifications to Rule 9 (Rendering and Payment of Bills). SDG&E proposed a new Rule 33 (Protection of Energy Usage Data) and modifications to Electric Rule 9 (Payment and Rendering of Bills). PG&E proposed modifications to Rule 9 (Rendering and Payment of Bills).

Notwithstanding the above, the parties concluded that it may *not* necessarily be improper or unwise for the Commission to issue a Final Decision in this proceeding without first resolving the pending Data Privacy Advice Filings. Rather, a Final Decision in this proceeding could simply direct that the IOUs' ESPI platforms be consistent with the privacy rules adopted in D.11-07-056, as implemented in the Data Privacy Advice Filings. This is because OP #1 of D.11-07-056 *already* adopted Attachment D to the same decision, i.e., the Rules Regarding Privacy and Security Protections for Energy Usage Data, which rules already govern the treatment of Covered Information by the ESPI platforms proposed in this proceeding. The purpose of the Data Privacy Advice Filings was to identify tariff changes and make certain clarifications necessary to implement the rules. Thus, while the Commission has not yet ruled on the proposed tariffs, Attachment D of D.11-07-056 establishes, among other things, the notice rules regarding the accessing, collection, storage, use, and disclosure of Covered Information; data minimization; use and disclosure limitations governing when Covered Information may be collected, used, stored, accessed and/or shared; data security to protect Covered Information including notification and annual reporting of breaches; and accountability. This proceeding will further establish rules and tariff changes related to the IOUs' ESPI platforms (and automated data transmission in particular).

In summary, while it would be preferable for the IOUs to file tariff changes resulting from a Final Decision in this proceeding that refer to, or are based on, *final* tariff rules adopted in connection with the Data Privacy Advice Filings, and while the IOUs support expeditious resolution of those filings, it is not necessary to hold up resolution of the applications at the heart of this consolidated proceeding until such time as the Data Privacy Advice Filings have been approved.

E. Third Parties

1. What policies should apply to third parties receiving the data?

Parties agreed that the following policies and principles should apply to customer-authorized third parties receiving data via the IOUs' ESPI platforms:

- Third-party eligibility criteria should be common across the IOUs;[20]
- For purposes of the privacy rules, Conclusion of Law #9 of D.11-07-056 establishes that the Commission has oversight over "any third party, when authorized by the customer, that accesses, collects, stores, uses, or discloses covered information relating to 11 or more customers who obtains this information from an electrical corporation";
- Consistent with the Commission's oversight of Covered Entities, a third party will not be "eligible" to receive automated data from the IOUs' ESPI platforms to the extent that the Commission directs the IOU(s) to stop transmitting data to that third party;
- The Commission, not the IOUs, bears responsibility for exercising regulatory oversight of Covered Entities to resolve formal complaints or conduct investigations into allegations or suspicions of potential or actual misuse of customer data by Covered Entities.

With respect to common third-party eligibility criteria across the IOUs, parties agreed to the following:

- *Provision of basic company information*: The third party must provide to the utility basic information about its company and how to contact its company. This information should include: company name; mailing address; and the

[20] For further explanation, see the paragraph immediately following this list of bullets.

names, telephones numbers, mailing addresses, and email addresses for any key business and technical contacts at the company.

- *Demonstrate technical ability to connect to and access data from the utility's ESPI platform*: The third party will work with the utility to verify that the third party can technically access and obtain data from the utility's ESPI platform.
- *Acknowledge receipt of the utility's tariff(s) governing customer usage data privacy, and the automated transmission of usage data to customer-authorized third parties*: Parties expect that when the Commission resolves the Data Privacy Advice Filings, each utility will have a tariff rule governing customer usage data privacy. Parties also expect that upon the conclusion of this proceeding, each utility's tariff rules will be updated (either with a new rule or modifications to existing rules) to govern the provision of automated customer usage data to authorized third parties. Each utility will provide its relevant tariff rule(s) to any third party registering to access the utility's ESPI platform and the third party must acknowledge receipt of the tariff rules(s) before it can receive the automated data transmission.
- *Absence from Commission's prohibited list*: Should the Commission include a third party's name on a list of parties prohibited from receiving automated data, that party will not be "eligible" to receive data unless the Commission orders otherwise.

Regarding Commission oversight over the third-party *registration* process, the parties agreed to adopt SCE's "wait-and-see" proposal, which permits third parties to receive ESPI data provided that (a) they obtain the requisite customer authorization; (b) they meet the technical eligibility requirements; (c) they acknowledge receipt of the relevant tariff rule(s); and (d) they are not otherwise prohibited by the Commission from receiving such data. The parties recognize that the Commission may elect at a later date, in the exercise of its jurisdiction, to

revise this registration criteria in order to, among other things, "screen" or "certify" third parties for eligibility under appropriate information security and privacy standards should consumer protection or other concerns arise.[21]

2. What procedures should the Commission adopt to ensure third-party compliance with privacy safeguards adopted by the Commission?

Parties recommend that the Commission adopt three primary procedures to oversee third-party compliance with the Data Privacy Rules adopted by the Commission in D.11-07-056. First, the third parties must receive customer authorization to access the usage data, which authorization will be in the form of an abbreviated Customer Information Service Request (CISR) form that governs automated transmission of usage data to a third party. Second, the Commission should adopt the proposal that, as a condition of gaining access to the IOUs' ESPI platforms, all third parties must obtain and acknowledge receipt of the utilities' Commission-approved tariff rules related to customer data privacy. Third, the Commission should exercise oversight to resolve formal complaints and pursue investigations related to third parties reasonably suspected of violating the Commission's privacy rules and/or the IOUs' tariffs.

Parties discussed three scenarios that would cause an IOU to suspend or revoke a third party's access to data via the IOU's ESPI platform: (1) the customer requests that the IOU discontinue providing their data to the third party,[22] (2) the Commission orders one or more IOUs to suspend or revoke a third party's access to customer data via the ESPI platform, and (3)

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[21] OPEN and EnerNOC, however, believe that such pre-screening measures by the Commission are not necessary and could, if adopted, impose an undue burden on small companies wishing to connect to a customer that has already granted it authorization to receive energy data and provide service.

[22] Some parties also raised the concern that the IOUs' proposed authorization and revocation process may allow a commercial customer to revoke a third party's authorization in violation of a contract between the customer and third party. The IOUs should not be required to enforce contracts to which they are not party, and will not generally be aware of contract details between a customer and third party. Thus, the IOUs recommend that the tariffs and rules adopted by the Commission for the ESPI platform not extend to utility enforcement or interpretation of contracts between third parties and utility customers. The IOUs will terminate a third party's access to data upon a customer's request, and a third party that contends it has contractual rights to the data can pursue remedies available to it under the law.

the IOU reasonably suspects that the third party is or may be violating the Commission's data privacy rules.

Parties agreed that the first scenario necessitates that an IOU immediately terminate the third party's automated access to the data of the customer who revoked the authorization. Parties also agreed that in the second scenario, when the Commission orders one or all of the IOUs to suspend or revoke a third party's access to customer data via the ESPI platform, it would be appropriate and necessary for the IOU(s) to comply with the Commission's order if it has not been stayed or enjoined by the appropriate court or agency. Under both scenarios, parties agreed that the IOU should notify the third party of the suspension or revocation of access.

Parties were not able to agree on the appropriate course of action under the third scenario, where the IOU elects to suspend a third party's access to customer data based on the IOU's reasonable suspicion that the third party may have violated the data privacy tariffs.

a) <u>SCE's and SDG&E's Position:</u>

SCE and SDG&E understand that pursuant to Public Utilities (PU) Code Section 8380(f), should a customer choose "to disclose his or her electrical or gas consumption data to a third party," as it would in the context of the ESPI platform, "the electrical or gas corporation shall not be responsible for the security of that data, or its use or misuse." This explicit statutory limitation of liability was recognized by the Commission in D.11-07-056 at page 35, but was subject to an important exception (underlined below):

> Still other third parties may acquire consumption data . . . from the utility via the "backhaul" with the customer's authorization and pursuant to tariff conditions . . . . In [this] situation[] [and in others not relevant to this proceeding], the utility is not liable for the third party's use of the usage data since the usage data is not provided to the third party pursuant to a contractual arrangement with the utility. <u>(This limitation on liability does not apply when the utility has acted recklessly</u>.)

In order to limit their liability for transmitting usage data "recklessly," SCE and SDG&E believe it is appropriate to temporarily suspend transmission of customer usage data to any third party reasonably[23] suspected of violating the utility's Commission-approved data privacy tariffs. This rare situation—which should not be overstated in the context of the other important issues in this Joint Report about which the parties have obtained broad consensus—might occur, for example, if a utility becomes aware of a news story exposing a third party for the unlawful practice of selling customer usage data without the customers' permission. To continue to transmit customer data in the face of this report may be deemed "reckless" under the standard quoted above, and would expose the IOUs to liability. It would be appropriate, in that example, and in the example where customer complaints to the IOU seem to point to the same potential pattern of third-party tariff violations, for the IOU to immediately suspend access of the third party and permit the Commission, in its exercise of oversight over Covered Entities, to conduct an investigation and/or adjudicate a case, as appropriate, to determine whether the third party's access should be reinstated.

SDG&E further believes that the utilities must have the discretionary ability to revoke the third party's access to the customer's data in the event of an obvious and egregious violation to assure compliance with other state and federal laws, which could impose liability or expose the IOUs to potential facilitation claims if the utility fails to take appropriate and timely corrective actions regarding any known violation of customer privacy. SDG&E proposes the IOUs should use reasonable efforts to investigate or collect the facts of any suspected violation on a case-by-case basis and in any case where only a mere suspicion exists the matter be promptly reported to the Commission for input before suspending transmission of customer usage data to any third party.

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[23] A "reasonable" suspicion is presumably one that is based on more than mere caprice or unsubstantiated one-off customer complaints.

b) Position of EnerNOC, Open Energy Network, and TechNet[24] ("Third Parties"):

The Third Parties understand and acknowledge that while the IOUs are not responsible for the use or misuse of customer data once it has been securely transferred to a customer-authorized third party, the Commission has indicated that the IOUs may still be liable, in instances undefined in D.11-07-056, for "reckless" transmission. The Third Parties appreciate the IOUs' desire to limit their potential liability by suspending or terminating data access while the fact-finding process is ongoing, but firmly believe that any suspension or revocation of data access must be Commission-directed after the third party has had an opportunity to respond to the concerns being raised by the customer, IOU, or Commission. The third party's opportunity to respond, and thus the path to resolution or curing any real or perceived breach, can only be accomplished before an adjudicatory or enforcement body, *i.e.*, the Commission, and not the IOUs who do not and cannot have adjudicatory responsibilities. The Third Parties maintain that if the IOUs suspend access to customer data upon a "suspicion," even if a reasonable one, that a third party may have violated the Commission's privacy rules, the IOUs would effectively be taking an "enforcement action" before the proper enforcement authority, the Commission, has done so. The Third Parties are also concerned that their access to customer data will be suspended without first having the opportunity to address complaints and suspicions, which they argue would amount to a denial of the third parties' due process rights. The Third Parties are also concerned that automatic IOU suspension would unfairly damage their businesses by virtue of the lack of any formalized or objective fact-finding process.

c) Proposal of SCE:

SCE proposes that when it reasonably suspects that a third party may be violating its tariffs, it will notify the affected customer(s) and the third party that data access will

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24 TechNet is "generally supportive" of the position of the Third Parties on suspension.

temporarily be suspended pending an order directing otherwise from the Commission. The third party may then challenge the IOU's decision at the Commission in an expedited proceeding before an assigned Administrative Law Judge (ALJ), to take place and conclude within five business days of the IOUs' decision to cut off data access, in which the third party bears the burden to demonstrate that: (1) there is a serious risk of irreparable harm to the customer(s) absent an order to reinstate transmission; (2) the third party is likely to prevail on the merits of the underlying controversy; and (3) a comparison of the harm to the customer(s) versus the harm to the third party, on balance, favors the third party. This standard, similar to that which civil courts use in assessing the merits of a preliminary injunction, is not without precedent at the Commission[25] and will result in a decision by the ALJ that either preliminarily (a) orders the utility to reinstate a third party's ability to receive customer data until such time as a full investigation or adjudication of a complaint has taken its course; or (b) sanctions the IOUs' decision to suspend data transmission if and until the Commission orders otherwise. By requiring the ALJ to come to a conclusion in the expedited proceeding within five business days, the IOU would still be able to provide data queued up during the short period of suspension should the ALJ determine preliminarily that the IOUs could reinstate the third party's access pending further investigation. SCE further proposes that should the Commission determine that this type of expedited proceeding is being invoked too frequently, and that its resources may be constrained as a result, it may reassess at that time whether it is appropriate for the Commission

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[25] In D.10-05-050, the Commission concluded that ALJs or presiding officers have the authority to hear and grant a preliminary injunction pending confirmation or rejection of the order by the full Commission. In its Order Modifying Decision 10-05-050, the Commission stated that "[i]t is a well-established practice in Commission proceedings that an assigned Commissioner or ALJ may issue a TRO or preliminary injunction in order to preserve the status quo, subject to its ratification or reversal by the full Commission" and listed several examples of this practice. In determining that ALJs may issue preliminary injunctions, the Commission relied, in part, on (a) Public Utilities Code section 701 (authorizing the Commission to "do all things, whether specifically designed in [the Public Utilities Act] or in addition thereto, which are necessary and convenient" in the supervision and regulation of every public utility in California), (b) PU Code Section 309 (authorizing the Executive Director to employ ALJs "to carry out the provisions of [the Public Utilities Act] or to perform the duties and exercise the power conferred by the commission by law"), and (c) Rule 9.1 of the Commission's Rules of Practice and Procedure, which authorizes an ALJ to "rule upon all objections or motions which do not involve final determination of proceedings".

to undertake a registration process for third parties before they will be permitted to receive automated usage data via the ESPI platform.

d) <u>Proposal of PG&E:</u>

PG&E agrees with SCE and SDG&E that if the IOUs under the CPUC's privacy rules are liable for unauthorized disclosure of customer energy data by a third party when the IOU "has acted recklessly" in overseeing the activities and behavior of the third party, then the IOU must have the ability to revoke the third party's access to the customer's data when the IOU reasonably believes that the third party may be using or misusing the data in an unauthorized manner. However, PG&E is also concerned that the Commission's "reckless utility" standard adopted in D.11-07-056 may have inadvertently and unintentionally adopted a standard that conflicts with the "safe harbor/customer authorization" standard in Public Utilities Code Section 8380(f), which places the responsibility for protecting customer-authorized third-party access squarely on the customer and the third party, consistent with customer choice.

PG&E is also concerned that a utility suspension right may hinder the goal of customer choice and convenience in accessing and using new third-party energy management applications and services that rely on continuous, uninterrupted, customer-approved third-party access to customer energy usage data. The risk of unilateral utility suspension of third party access could deter the development of valuable and convenient new energy services to customers "beyond the meter."

For this reason, PG&E would support deleting the utility suspension right proposed by SCE if the Commission modifies D.11-07-056 to remove the liability of the utility for "reckless" actions where the customer has authorized the third party to access customer energy usage data via the utility's backhaul consistent with Public Utilities Code Section 8380(f). If, on the other hand, the Commission declines to clarify the "reckless" standard in D.11-07-056 in this way, it is essential that the IOUs have the unilateral ability to suspend third-party access to customer energy usage data where they have a reasonable suspicion that the third-party may be

misusing or using the data in an unauthorized manner. PG&E takes no position on SCE's proposal for an "expedited proceeding" at the Commission for challenges to the utility's suspension of third-party access,[26] because PG&E believes that the CPUC already has both formal and informal authority and procedures to expedite its consideration of such a challenge.

e) <u>Third Parties' Proposal:</u>

Consistent with the ordering language in the Privacy Decision, the Third Parties want the Commission to be the authority that determines whether third parties are acting in violation of the Privacy Decision and whether data access should be rescinded. Third Parties believe they will be given an opportunity to review any allegations and either have an opportunity to refute or to remedy the allegations. It is critically important to the Third Parties that they have an opportunity for due process prior to the imposition of an appropriate remedy, which may be the suspension or termination of data access. Otherwise, such remedial actions would impair third parties' business operations and relationships with customers without the appropriate factual findings.

The Third Parties proposed that if an IOU timely submits a documented claim or concern to the Commission, the third party, and the customer, then the IOU should not be deemed to have acted "recklessly" in continuing to transmit data to the third party. This principle could be included in the IOUs' tariffs governing rules for automated data exchange to customer-authorized third parties. The Third Parties are hopeful that the Commission will establish a process for reviewing such claims, including an opportunity for response by the third party, within a short period of time. Under the Third Parties' proposal, the IOU would not be in a position to suspend transmission of data to a customer-authorized third party unless and until the Commission orders the IOU to suspend the third party's access.

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[26] SDG&E is also neutral about SCE's proposal that the Commission handle challenges to the utility's suspension of third-party access in an "expedited proceeding."

The Third Parties considered SCE's and SDG&E's proposal and oppose it on three grounds: First, such a default position in favor of suspension or termination could lead to frequent interruptions to third parties' businesses, even when those interruptions may be later found by the Commission to be without merit, and cause irreparable financial harm. Second, the Commission may not have sufficient resources to decide "expedited" proceedings within five days, leaving the duration of interruption unknowable or interminable. Furthermore, reporting all "reasonable suspicions" to the Commission might unnecessarily burden Commission staff with cases that are poorly substantiated or the result of customer misunderstandings. Related to this concern, Third Parties worry that excessive reporting of suspicion of data misuse by a particular third party that is ultimately found to be unsubstantiated could damage that third party's reputation. Third, the Third Parties believe that, if governed by unclear notions of what constitutes "recklessly" transmitting customer usage data (left unclarified by the Commission) or "reasonable suspicion" (left unclarified by the IOUs), the IOUs will err on the side of caution, suspending or terminating data access in most instances to avoid the imposition of liability. This would result in an unworkable framework that puts the third parties' businesses at risk at all times.

f) <u>Next Steps:</u>

Based on the parties' informal discussions, it seems that there are two options for the Commission and parties to consider with respect to suspension and revocation of authorized third party access to automated data exchange when an IOU reasonably suspects that the third party is violating the Commission's privacy rules:

- **Option #1**: Permit the IOUs to temporarily suspend a third party's access to the ESPI platform if the IOUs have a *reasonable suspicion* that the third party may have violated the Commission's privacy rules, unless and until the Commission orders otherwise. A secondary consideration for this Option #1 is whether the Commission could

implement an expedited (5-day) process for resolving the threshold question about whether transmission should resume pending a fuller investigation into the allegations. Under this Option #1, the IOUs would notify the customers and the third party about its intention to suspend the third party's access to the ESPI platform.

- **Option #2**: If an IOU reasonably suspects that a third party may have violated the Commission's privacy rules, it will be absolved of liability under its tariffs if it continues to transmit data to the authorized third party *provided that* the IOU expeditiously informs the customer and the third-party of any information regarding possible wrongdoing so that either can seek remedies under their contract or at the Commission. In other words, the Commission should clarify the IOUs' potential liability for acting "recklessly" and affirmatively state that continuing to transmit data to a third party after prompt notification of a potential violation of the Commission's privacy rules to the Commission will ***not*** be deemed a reckless transmission of data. The Commission retains authority at all times to investigate the issue on its own motion or pursuant to a complaint by the customer, consistent with evidentiary and other procedures that preserve the third party's due process rights, to determine the appropriate remedy, if necessary.

3. Is the self-certification process proposed by SCE adequate and is it reasonable?

As described in Section E.1 above, the parties agreed that SCE's proposed third-party eligibility and registration criteria are adequate and reasonable.

F. Additional Details About The ESPI Platforms

- The customer will initiate authorization by selecting a registered third-party from a drop-down list and indicating the accounts for which it is providing data access;
- After the customer submits the appropriate written authorization (hard copy or online), the IOUs will begin to provide third-party access within anywhere from 24 hours to 5 days. Such access will include up to 13-24 months of historical data, depending upon the utility;
- Subsequent access will include updates of data on a lagged basis of up to 24 hours with the prescribed interval information (either hourly for residential or 15-minute for non-residential);
- Depending upon whether the customer has a smart meter or an IDR (MV-90) meter, and depending on the utility, the data transmission could be either validated, estimated, and edited (VEE'd) for billing or not.
    - SCE will provide 13 months of customer/service account data usage history (if available) within a matter of days from receipt of written customer authorization and expects to be able to provide data for all customers by 2013 on a 24-hour lagged, interval basis. The data will not be VEE'd.
    - PG&E will provide 24 months of historical history within 5 days of receipt of a correct customer authorization form. For smart meters and some MV-90s, data will be transmitted within 24 hours and will be VEE'd. Other MV-90s will not be VEE'd until the end of the billing cycle. For those that are VEE'd, the data will also be available in Green Button format.
    - SDG&E will provide 13-months of historical data within 24 hours, as well as access to interval data on a 24-hour lagged basis.

III.

CONCLUSION AND PROPOSED NEXT STEPS

The IOUs appreciate the opportunity to provide a summary of the outcome of the parties' fruitful informal discussions. As described above, there is an appreciable degree of consensus on many important issues in this proceeding, including cost recovery, third-party eligibility and registration, timing of implementation of the IOUs' ESPI platforms, the relationship between resolution of the underlying applications and other privacy-related filings, and some architectural details of the ESPI platforms themselves. The two issues that need resolution are: (1) whether and how the CCA and DA fee schedules should be modified consistent with the "no fee" structure agreed upon here, and (2) the process by which the IOUs can reasonably mitigate their liability for reckless transmission of customer data. These issues can likely be resolved by the Commission with reliance on this Joint Report and on the opening and reply comments filed thereto, but the IOUs reserve the right to request evidentiary hearings, if necessary, in their reply comments.

The IOUs and Third Parties wish to emphasize the importance of developing and implementing the ESPI platforms to effectively enable customers to take advantage of their usage data measured by smart meters. Thus, all parties encourage the Commission to issue a Proposed Decision in this proceeding in an expedited fashion to enable a Final Decision by the early third quarter of 2012.

Respectfully submitted,

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July 30, 2012

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I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of **JOINT IOU REPORT ON THE INFORMAL ALL-PARTY DISCUSSIONS REGARDING THE ISSUES IDENTIFIED IN THE ASSIGNED COMMISSIONER'S RULING AND SCOPING MEMO** on all parties identified on the attached service list(s**) A.12-03-002.** Service was effected by one or more means indicated below:

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Executed this **Monday, July 30, 2012,** at Rosemead, California.

*/s/ Meraj Rizvi*_____
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