

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



FILED

08-06-13
04:59 PM

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)

And Related Matters.

Application 12-03-003
Application 12-03-004

**COMMENTS OF DIVISION OF RATEPAYER ADVOCATES
ON PROPOSED DECISION TO CUSTOMER DATA ACCESS**

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August 06, 2013

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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)
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**COMMENTS OF DIVISION OF RATEPAYER ADVOCATES
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I. INTRODUCTION

Pursuant to Rule 14.3 of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, the Division of Ratepayer Advocates (“DRA”) submits these comments on the *Proposed Decision Authorizing Provision of Customer Energy Data to Third Parties Upon Customer Request* (“Proposed Decision”) issued on July 17, 2013. The Proposed Decision authorizes the utilities to provide third party access to energy usage data upon customer consent through the “utility back haul.” Parties must file comments within 20 days of the date of the proposed decision’s date of service; thus, DRA’s filing is timely.

Rule 14.3(c) states comments shall “focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law.” DRA identifies one area in which the Proposed Decision commits legal error—regarding the process for suspending a third party’s customer data access to the Energy Service Provider Interface (“ESPI”) platform upon a utility’s “reasonable suspicion.” To correct the legal error, DRA proposes redlines to Findings of Fact #45, 47, 48, Conclusion of Law #11, and Ordering Paragraph #20.

II. DISCUSSION

A. The Proposed Decision Errs By Delegating Authority to Energy Division for Dispute Resolution of Privacy Rules Violations

The Proposed Decision attempts to resolve the dispute whether utilities can unilaterally suspend a third party's access to the ESPI platform based on "reasonable suspicion" that the third party violated terms of the data privacy tariffs.¹ Parties' positions largely relied on the ambiguity of the term "reckless."² The Proposed Decision clarifies a utility would not be found to have acted "recklessly" under the Commission's Privacy Rule 6(c)(4)³ if the utility follows a specific process:

A utility... will be absolved of liability under its tariffs if it continues to transmit data to the authorized third party provided that the utility expeditiously informs the third party and Commission's Energy Division with a notice of the suspected tariff violation along with any information regarding possible wrongdoing and that the utility seeks to resolve the suspected tariff violations with the third party. At its discretion, Energy Division staff may facilitate resolution of the issues between the utility and the third party, and may grant an additional 21-day for resolving the matter. If the matter is not resolved during the period set for resolution, the utility shall file an [sic] Tier 2 advice letter that seeks to move the third party to the list of entities ineligible to receive customer data. Notice of this filing should also be provided to all customers who have selected that third party to receive their usage data. The utility will continue transmission of data until Commission action resolves the

¹ On July 30, 2012, PG&E, SCE, and SDG&E filed and served a *Joint IOU Report on the Informal All-Party Discussions Regarding the Issues Identified in the Assigned Commissioner's Ruling and Scoping Memo* (Joint Report). Parties submitted comments on August 20 and 28, 2012.

² Proposed Decision, p. 38; p. 52.

³ D.11-07-056, Attachment D. The Rule states, "Nothing in this section shall be construed to impose any liability on an electrical corporation relating to disclosures of information by a third party when i) the Commission orders the provision of covered data to a third party; or ii) a customer authorizes or discloses covered data to a third party entity that is unaffiliated with and has no other business relationship with the electrical corporation. After a secure transfer, the electrical corporation shall not be responsible for the security of the covered data or its use or misuse by such third party. This limitation of liability does not apply when a utility has acted *recklessly*." (emphasis added)

matter. A utility who acts in this fashion will be deemed not to have made a reckless transmission of data.⁴

While DRA finds it constructive to further clarify the meaning of “reckless,” the Proposed Decision’s suggested process commits legal error.

In D.12-11-025, the Commission stated,

While we recognize the need for expediency in resolving these matters, it is not the role of the Utilities or Energy Division staff to determine disputes. As such, we adopt the Commission’s current formal Complaint Process where the Commission would resolve disputes...The formal Complaint Process provides the options of the Expedited Complaint Procedure as well as Alternative Dispute Resolution.⁵

Based on the above, the Proposed Decision inappropriately delegates Energy Division the authority to determine the resolution of disputes. Energy Division primarily deals with ratesetting proceedings and policy issues, and its staff is not trained to deal with the privacy complaints or legal disputes contemplated by the parties in the instant proceeding.

Furthermore, the Proposed Decision likely intended to use the Tier 2 advice letter as an efficient process— mostly ministerial—to move third-parties to an “ineligible list.” However, in doing so, the advice letter process⁶ will likely operate as the utilities’ forum to seek findings against third parties—but this again inappropriately assigns the Energy Division with the task to resolve primarily legal disputes. According to General Order 96-B,

The primary use of the advice letter process is to review a utility's request to **change its tariffs** in a manner previously authorized by statute or Commission order, **to conform the tariffs** to the requirements of a statute or Commission order,

⁴ Proposed Decision, pp. 52-3.

⁵ D.12-11-025, p. 36.

⁶ Advice Letters are governed by GO 96-B, which are delegated to Energy Division.

or to get Commission authorization to deviate from its tariffs.⁷

According to General Order 96-B, the advice letter process is reserved specifically for non-controversial tariff changes. There should be no question the Commission retains authority to address disputes, investigate issues on its own motion, and address complaints by the customer; however, it should do so utilizing its existing expedited complaint processes.

B. The Commission Needs to Correct the Proposed Decision’s Legal Error by Stating It is The Administrative Law Judge Division’s Duty to Resolve Complaints

DRA does not oppose the Proposed Decision’s requirement that the utilities notify the Commission and third-parties of alleged violations of privacy. However, the method with which the Commission must resolve the dispute lacks sufficient formality for the findings needed to stop transmission of customer data. DRA does not oppose continued transmission so long as a speedy resolution of the Commission’s investigation can be accomplished. DRA provides redline edits to the proposed Findings and Fact, Conclusions of Law, and Ordering Paragraph, below. Additionally, DRA supports the additional notification to the customers affected so that customers may seek immediate revocation of their data upon a Commission finding of wrongdoing.

Upon reasonable suspicion of a Privacy Rules violation, utilities should immediately seek guidance through an Advisory Letter to the Administrative Law Judge Division⁸ or—for more serious inquiries requiring immediate suspension of data transmittal—request injunctive relief from the appropriate agency or court on suspected activities. Appropriate due process measures should be followed, which means that just like advice letter filings, third parties should be have an opportunity to respond. Third-

⁷ GO-96-B, Rule 5.1 (emphasis added).

⁸ The “Advisory Letter” can result in a formal resolution by the Commission, for example. As discussed above, an Advice Letter filing, under the processes to be resolved by Energy Division under GO 96-B, is inappropriate.

parties who may need to address disputes with the utilities regarding data access may utilize the Commission’s Expedited Complaint Process:²

The Expedited Complaint Process is a procedure for quickly handling formal complaint cases. This process ensures a hearing, without a court reporter, within 30 days after an answer to a complaint is filed. Only the complainant and the answer are heard; the parties represent themselves. An ALJ prepares a Draft Decision, and the final decision is made by the full Commission.¹⁰

Using the Expedited Complaint Process is reasonable and an already existing procedure that allows the Commission to resolve disputes by third parties against the utilities.¹¹

III. CONCLUSION

Based on the discussion above, DRA respectfully requests the Commission adopt the following modifications in the final decision:

MODIFY FINDING OF FACT #45

45. It is reasonable to require that if a utility reasonably suspects that a third party has violated the Commission’s privacy rules, that the utility expeditiously informs the customers affected, the third party, and the Commission’s Energy Administrative Law Judge’s Division with a notice of the suspected tariff violation, along with any information regarding possible wrongdoing and that the utility seeks to resolve the suspected tariff violations with the third party.

² Rules of Practice and Procedure, p. 41-42, http://docs.cpuc.ca.gov/WORD_PDF/AGENDA_DECISION/143256.PDF.

¹⁰ D.12-11-025, p. 35.

¹¹ Rules of Practice and Procedure, Rule 4.1(a)(1) states that a complaint may be filed by “any corporation or person, chamber of commerce, board of trade, labor organization, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, setting forth any act or thing done or omitted to be done by any public utility including any rule or charge heretofore established or fixed by or for any public utility, in violation, or claimed to be in violation, of any provision of law or of any order or rule of the Commission.”

MODIFY FINDING OF FACT #47

47. It is also reasonable that Administrative Law Judge's Energy Division staff, at their discretion, work to facilitate resolution of the issues between the utility and the third party, ~~and for Energy Division staff to grant an additional 21-day for resolving the matter.~~

MODIFY FINDING OF FACT #48

48. If the matter is not resolved during the period set for resolution, it is reasonable to require the utility to submit an advisory letter to the Administrative Law Judge's Division for a Commission finding to file a Tier 2 advice letter that seeks to move the third party to the list of entities ineligible to receive customer data. Notice of this filing should also be provided to all customers who have selected that third party to receive their usage data.

MODIFY CONCLUSION OF LAW #11

11. A utility that responds to indications of tariff abuses by a third party consistent with the procedures adopted in this decision is not reckless. Specifically, a utility has not acted recklessly if it provides notice to the customers affected, the third party and the Commission, seeks to resolve the matter with the third party, and, absent a resolution, files an advisory advice letter with the Administrative Law Judge's Division seeking to move the third party to the list of entities ineligible to receive customer data.

MODIFY ORDERING PARAGRAPH #20

20. Any utility providing the tariff services approved in this decision must, if the utility reasonably suspects that a third party has violated the Commission's privacy rules and/or the terms of this tariff to inform the customer, the third party, and Commission's Administrative Law Judge's Division~~Energy Division~~ with a notice of the suspected tariff violation along with any information regarding possible wrongdoing. The utility shall seek to resolve the suspected tariff violations with the third party. The utility and the third party will have a 21-day period in which to resolve the suspected violations, during which time the utility will continue transmission of data. At its discretion, Administrative Law Judge's Energy

Division staff may facilitate resolution of the issues between the utility and the third party, ~~and may grant an additional 21-day for resolving the matter.~~ If the matter is not resolved during the period set for resolution, the utility shall ~~file a Tier-2 advice~~ submit a advisory letter to the Administrative Law Judge's Division for a Commission finding that seeks to move the third party to the list of entities ineligible to receive customer data. Notice of this filing should also be provided to all customers who have selected that third party to receive their usage data. The utility will continue transmission of data until Commission action resolves the matter. A utility who acts in this fashion will be deemed not to have made a reckless transmission of data.

Respectfully submitted,

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August 6, 2013