

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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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)

And Related Matters.

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

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

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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 this reply to comments on the Proposed Decision ("PD"), in the above-noticed dockets.

II. DISCUSSION

A. **It is reasonable to reduce the 21-day resolution period recommended by SCE to allow immediate suspension for egregious actors.**

In opening comments, SCE argues that upon a third party's suspected tariff violation, the PD make clear that Energy Division "has authority to reduce or eliminate the 21-day resolution period, at its discretion, in cases where the initial IOU notice of a third party's violation of the tariff rules is readily apparent and egregious on its face."¹ DRA agrees, in part.

It is reasonable for the Commission permit an expedited process to immediately terminate the transmission of customer data when a "third party's violation of the tariff rules is readily apparent and egregious on its face."² DRA agrees with SCE that it is "beyond dispute that the Commission has all of this authority at any stage in the process."³ However, as DRA emphasized in comments, the Proposed Decision commits legal error when it delegated authority to Energy Division to settle disputes, which is prohibited by D.12-11-025.⁴ DRA's comments proposes changes to Findings of Fact #45, 47, 48, Conclusion of Law #11, and Ordering Paragraph #20 as an easy solution to remedy the PD's legal error.⁵

¹ SCE Comments, p. 3.

² SCE Comments, p. 3.

³ SCE Comments, p. 3.

⁴ D.12-11-025, p. 36. See DRA Comments, p. 3.

⁵ DRA Comments, pp. 5-7.

B. The Commission should reject PG&E’s arguments that the PD’s processes are too “cumbersome” because the processes ensure adequate consumer protection measures.

PG&E states the PD’s proposed dispute resolution process is too cumbersome and that the Privacy Rules and the Commission’s existing complaint procedures already provide sufficient guidelines.⁶ PG&E explains D.11-07-056 states that “[I]t is not reasonable to require utilities to police privacy policies of those entities who receive information pursuant to Commission requirement or customer wishes.”⁷ PG&E suggests revising Ordering Paragraph 20 to provide that when a utility reasonably suspects a third-party has violated the privacy rules, the utility shall inform the third-party and the affected customer regarding the suspected tariff violation.⁸ Upon this notification, PG&E would have fulfilled its duty and would not be deemed to have made a “reckless” transmission of data “from the time of notice until Commission action resolving the matter.”⁹ DRA disagrees.

PG&E’s proposal dilutes the definition of “reckless,” rendering its significance in the Privacy Rules as completely irrelevant.¹⁰ A utility’s intentional failure to act upon knowledge of facts of a third party’s suspected violation—beyond customer notice—should be considered “reckless.” According to the main tenets of tort liability,

[A]n actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is

⁶ PG&E Comments, p. 2.

⁷ PG&E Comments, p. 2.

⁸ PG&E Comments, p. 2. PG&E states that a customer and third party may: a) resolve it informally between themselves; b) the customer can revoke the third-party’s access to customer-specific energy usage data under the privacy rules; c) the customer and third-party can seek informal resolution by contacting the Commission staff, as often occurs in informal complaint or enforcement cases; and d) the customer or third-party can file a formal complaint for relief under existing Commission complaint procedures.

⁹ PG&E Comments, Attachment A, p. 2, proposed redlines to FOF #47.

¹⁰ D.11-07-056, Attachment D. With customer consent, once data transmission is complete, utilities are not liable for third party violations of the privacy rules unless the utility is found to be “reckless.”

substantially greater than that which is necessary to make his conduct negligent.¹¹

Witkin Summary of California Law provides further explanation, stating:

Reckless conduct, as distinguishable from negligence, occurs if (1) the person knows of the risk created by his or her conduct (or knows facts making the risk obvious to another in the person's situation), and (2) the precautions that would eliminate or reduce the risk involve burdens that are so slight relative to the magnitude of the risk that the failure to adopt them demonstrates the person's indifference to the risk.¹²

PG&E disregards the fact that the burden to the utility is slight in comparison to the customer, and the magnitude of risk—the customer’s continued transmission of data to a potential bad actor—is extremely high. Should a utility have reasonable suspicion of a potential rules violation, the utility—not the customer—possesses all of the facts and reasons (which may be technical in nature) that can lead to customer harm.¹³ Simply giving customer notice to resolve the problem informally with the third-party or to bring forth a complaint at the Commission puts residential or small commercial customers in the burdensome position of becoming a fact finder and detective. The customer unreasonably assumes all responsibility and risk to determine the proper steps to protect his or her own security. Utilities are sophisticated entities and the Commission has an affirmative duty to ensure proper enforcement mechanisms for consumer protection purposes. In D.10-12-060, the Commission stated, “If we decide consumer protections are warranted, we expect that regulation would be limited to possible registration, and/or consumer protections of IOU residential and small commercial retail customers that receive DR services from DRPs.”¹⁴ Based on this duty, the PD is correct to keep the utilities liable under a “reckless” standard provided specific steps—including notification to the Commission for further action—are taken. Notification to the customer is simply not enough for consumer protection purposes.

¹¹ 57A Am Jur 2d Negligence § 279

¹² 6 Witkin Sum. Cal. Law Torts § 870, quoting from Rest.3d, Torts: Liability for Physical and Emotional Harm §2.

¹³ PG&E Comments, p. 2.

¹⁴ D.10-12-060, p. 6; citing consumer protection authority under Pub. Util. Code §§ 451, 701, and 394, et seq.

Further, PG&E misinterprets D.11-07-056 in saying that the PD’s notification procedures are burdensome because “it is not reasonable to require utilities to police privacy policies of [third parties].”¹⁵ The PD’s process to define whether a utility acted “reckless” does not require the utilities to actively police third-party activities or their privacy policies to verify whether they are conforming to the tariff and/or the Privacy Rules. Rather, the PD’s process—which DRA supports subject to modifications—ensures the utilities’ *actions* conform to an appropriate “reckless” standard, which has not yet been defined or interpreted by the Commission.

III. CONCLUSION

Based on the arguments set forth above, and in comments filed on August 6, 2013, DRA recommends the following modifications:

MODIFY FINDING OF FACTS:

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.

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,~~ if appropriate.

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

¹⁵ PG&E Comments, p. 2.

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 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 facilitated 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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