

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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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.

Rulemaking 08-12-009  
(Filed December 18, 2008)  
Phase III Energy Data Center

**REPLY COMMENTS  
OF THE DIVISION OF RATEPAYER ADVOCATES**

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**I. INTRODUCTION**

Pursuant to the July 10, 2013 *Administrative Law Judge's Ruling Revising Schedule for Filing Use Cases, Comments and Replies; Adding Use Case to the Record, and Inviting Comments and Replies* ("Revised Ruling"),<sup>1</sup> the Division of Ratepayer Advocates ("DRA") hereby replies to comments filed on the Working Group Report ("Report") submitted on July 10, 2013.<sup>2</sup> Comments on the Report were submitted July 29, 2013; thus, DRA's replies are timely filed in accordance with the Revised Ruling.

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<sup>1</sup> On May 29, 2013, parties were notified via email of an additional one month extension. In response to a subsequent request from the Local Government Sustainable Energy Coalition, and after consultation with the assigned office, a further one-week delay in the filing of open and reply comments was adopted. On June 20, 2013, parties were notified via e-mail of this additional extension. (Revised Ruling, pp. 2-3).

<sup>2</sup> Report, p. 1.

## II. SUMMARY OF DRA’S REPLY COMMENTS

The following summarizes DRA’s points in response to parties’ opening comments on the Report.

- It is procedurally improper to challenge or recommend revisions to the California Public Utilities Commission’s (“Commission’s”) Privacy Rules in these comments.
- The Commission should grant energy use data access for building benchmarking under Assembly Bill 758/1103 based upon current statutory guidelines.
- Southern California Edison Company’s (“SCE’s”) proposed nondisclosure agreement (“NDA”) is reasonable.
- The Commission should institute a ratesetting proceeding to address the costs associated with implementing any new energy usage data access program.
- The Commission should permit the utilities to charge data requesters user fees.

DRA explains its recommendations in further detail, below.

## III. DISCUSSION

### **A. It is procedurally improper to challenge or recommend revisions to the Commission’s Privacy Rules in these comments.**

Data requests made for a “primary purpose,” as defined in Public Utilities Code section 8380 and interpreted by the Commission’s Privacy Rules, do not require customer consent prior to release.<sup>3</sup> Local Government Sustainable Energy Coalition (“LGSEC”) argues the Commission must modify the definition of “primary purpose” to include local government activity undertaken in response to State or Federal legislation or State

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<sup>3</sup> *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 and Electric Company* D.11-07-056, p. 157, Attachment D, Rule 1(c)(4).

General Plan requirements, or in response to local ordinances and policies. LGSEC proposes the following redline modifications to the Report:

(3) [to] provide services as required by local, state or federal law or policy, or as specifically authorized by an order of the Commission.<sup>4</sup>

LGSEC also recommends “[t]he Commission may also find that there are other situations that would benefit from an expanded definition of primary purpose.”<sup>5</sup>

Similarly, in joint comments, California Center for Sustainable Communities at UCLA and the Energy Institute at Haas (collectively, “CCSC/EI”) states,

We recommend that the CPUC’s primary-purpose language be amended to include a broader definition of energy public policy research, and to state that this research can be done by university-affiliated researchers not under contract with any entity to do so.<sup>6</sup>

CCSC/EI indicates eligibility for energy usage data access under “public interest provision should include, at a minimum, researchers associated with an accredited institute of higher education, a 501(c)(3) or (c)(4)<sup>7</sup> nonprofit organization, a ratepayer advocacy group, or an industry group working on policy and advocacy initiatives.<sup>8</sup> Both LGSEC and CCSC/EI arguments lack merit and should be dismissed.

First, LGSEC and CCSC/EI’s request to modify the definition of “primary purposes” is procedurally improper. The comments requested by the Scoping Memo are limited to the transfer of data to third-parties as laid out in the Report; comments are not

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<sup>4</sup> LGSEC Comments, p. 3.

<sup>5</sup> LGSEC Comments, p. 3.

<sup>6</sup> CCSC/EI Comments, p. 2.

<sup>7</sup> Internal Revenue Code 26 U.S.C. § 501(c)(3) and 26 U.S.C. § 501(c)(4).

<sup>8</sup> CCSC/EI Comments, p. 2.

meant to re-litigate issues from the Privacy Rules decision. If LGSEC and CCSC/EI took issue with the final Privacy Rules, they should have—pursuant to the Rules of Practice and Procedure—submitted an application for rehearing or petition for modification when the Commission issued D.11-07-056. Neither LGSEC nor CCSC/EI attempted to do so, and cannot challenge a final decision through the “backdoor” via workshop comments.

Second, as noted by SCE’s opening comments, the Privacy Rules adopted by the Commission were meant to implement, not to broaden, the statutory directive codified in Public Utilities Code section 8380.<sup>9</sup> While the Commission has discretion to interpret the Public Utilities Code, the statute explicitly states that utilities “shall not share, disclose, or otherwise make accessible to any third party a customer’s electrical or gas consumption data, except as provided in subdivision (e) or upon consent of the customer.” DRA agrees with SCE that Subsection (e) does not carve out a categorical exception for university researchers, local governments performing energy efficiency work, building owners complying with environmental mandates or any of the third-party entities who submitted use case templates in this proceeding.<sup>10</sup> Thus, both LGSEC and CCSC/EI’s proposal to expand the primary purposes definition to include local governments and researchers goes beyond the explicit language of the statute.

Finally, the Privacy Rules “primary purposes” definition excludes the implementation and management of energy management and energy efficiency programs by governmental entities unless they are authorized or under the direction of the Commission or contracted with the utilities. San Diego Gas and Electric Company (“SDG&E”) does not take a position on whether Assembly Bill (“AB”) 1103 constitutes

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<sup>9</sup> SCE Comments, p. 4.

<sup>10</sup> SCE Comments, p. 5.

a primary purpose, but rather defers to the Commission to make the final determination. SDG&E states,

With respect to the first question, if the information is classified as a “primary purpose,” because it is either (i) required by state law or (ii) is for purposes of implementing an energy management program or energy efficiency program conducted by a governmental entity, this issue requires no further discussion.<sup>11</sup>

SDG&E misinterprets the meaning of “primary purpose.” While SDG&E correctly notes that a primary purpose is one that is required by state law, SDG&E incorrectly references that a primary purpose is “for purposes of implementing an energy management program or energy efficiency program *conducted by a governmental entity.*” Neither Public Utilities Code § 8380(1)(2) nor the Commission’s Privacy Rules indicate that the programs are primary purposes if they are “generally” conducted by governmental entities. By itself, SDG&E’s reading of the “primary purposes” definition appears broader than the actual text. For energy management or energy efficiency programs, a “primary purpose” under the Commission’s Privacy Rule 1(c)(4) occurs under the following circumstances:

- i. under contract with an electrical corporation,
- ii. under contract with the Commission,
- iii. or as part of a Commission authorized program conducted by a governmental entity under the supervision of the Commission.<sup>12</sup>

With the last option, it is clear that energy management or energy efficiency programs must be “authorized” or “under the direction” of the Commission. In order for this to happen, a final Commission decision or resolution must have authorized or approved Commission oversight of the program. Further, the Commission has

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<sup>11</sup> SDG&E Comments, p. 7.

<sup>12</sup> D.11-07-056, Attachment D, Rule 1(c)(4).

interpreted “primary purpose” to exclude *independent services* that third parties provide directly to utility customers.<sup>13</sup> Thus, if a local government conducts an energy management or energy efficiency program independent of the utility and/or is also independent of Commission oversight, that activity does not fall under the definition of “primary purposes.” As DRA states in opening comments, the Commission’s final decision should explicitly specify independent programs conducted by local governments for a secondary purpose.

Further, as EnerNOC correctly clarifies in comments, the exemption for obtaining customer consent under a primary purpose only applies to third parties who are also acting on behalf of the utility. Contractors, in general, are not agents for the utility and must therefore obtain customer authorization prior to the utility’s release of Covered Information.<sup>14</sup> Based on EnerNOC’s interpretation, governmental entities should be mindful that by extension, the Commission’s Privacy Rule 1(c)(4) limits primary purposes to those third parties in an agency relationship with the Commission (“*under contract with the Commission*”) or a governmental entity submitting to the Commission’s jurisdictional oversight (“*Commission authorized program conducted by a governmental entity under the supervision of the Commission.*”) Thus, governmental entities should, as a matter of caution, seek to gain consent from utility customers prior to accessing their energy usage data.

EnerNOC states that “[it] is important not to conflate definitions for Covered Information and energy usage data, which may or may not contain [Personally Identifiable Information (‘PII’)].”<sup>15</sup> EnerNOC recommends the Commission change the terminology in the Report to conform to the definitions in the Privacy Decision when

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<sup>13</sup> *Decision Adopting Policies for Demand Response Direct Participation* D.12-11-025, p. 41.

<sup>14</sup> EnerNOC Comments, p. 10, fn. 7.

<sup>15</sup> EnerNOC Comments, p. 10.

referencing Covered Information and the Report define energy usage data to mean that data does not contain PII.<sup>16</sup> DRA agrees, and similarly recommends no changes be made to the definitions for “primary purpose.”

**B. The Commission should grant energy use data access for building benchmarking under AB 758/1103 based upon current statutory guidelines.**

Regarding Use Case 7,<sup>17</sup> parties recommend a variety of alternatives for granting energy use data to landlords complying with AB 1103 obligations. In joint opening comments, the Natural Resources Defense Council and the Institute for Market Transformation (collectively, “NRDC/IMT”) ask the Commission to grant an exception to consent requirements under AB 1103, categorically circumventing AB 1103’s privacy protections.<sup>18</sup>

LGSEC also requests whole building usage for building owners regardless of tenant consent.<sup>19</sup> LGSEC goes further by requesting that utilities provide whole building monthly data directly to local governments for calculation of Energy Use Intensity (“EUI”), without landowner or tenant consent.<sup>20</sup> SCE and PG&E argue that the statute is clear on its face and does not require landlords to provide whole building energy usage data.<sup>21</sup> “Rather than circumvent the Privacy Rules,” SCE offers mechanisms that allow

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<sup>16</sup> EnerNOC Comments, p. 10.

<sup>17</sup> Use Case 7 considers the request of “[b]uilding owners and managers seeking monthly energy consumption by building to conduct building benchmarking analyses pursuant to AB 758 and AB1103, and publishing aggregate, non-PII results.” *Administrative Law Judge’s Ruling Setting Schedule to Establish Data Use Cases, Timelines for Provision of Data, and Model Non-Disclosure Agreements* (Feb. 27, 2013) p. 15.

<sup>18</sup> NRDC/IMT Comments, p. 15-17.

<sup>19</sup> LGSEC Comments, p. 12.

<sup>20</sup> *Id.* at 11.

<sup>21</sup> SCE Comments, p. 15-17; PG&E Comments, p. 6-7 (“AB 1103 makes clear that the confidentiality of customer-specific energy usage data must be protected under the Energy Commission’s program, and the

landowner compliance conforming with privacy protections under AB 1103, including: (1) reporting aggregate energy use data according to the 20/15 rule<sup>22</sup> for appropriate buildings, (2) “includ[ing] a term in future leases in which the customer authorizes IOUs to release the data directly to the landowner for purposes of AB 1103,” and (3) estimating energy use.

DRA agrees with PG&E and SCE’s analysis and urges the Commission to enforce privacy protections enshrined in AB 1103. On its face, the regulations do not require landlords to provide tenant energy use without consent, except in an “aggregate” form protective of consumer privacy or using a reasonable estimation of energy use. Since landlords have an ongoing relationship with their tenants, they can request consent from existing tenants at any time during their tenants’ occupancy. Thereby, if tenants refuse to grant consent to energy usage data, landlords can anticipate their inability to comply with building benchmarking regulations in a timely manner and proactively establish their building’s eligibility for aggregate data release or seek energy use approximations, if necessary.

**C. SCE’s proposed NDA is reasonable.**

SCE submitted a model NDA for use in energy data requests over which “the IOU asserts a proprietary or trade secret right;” or arises from a Commission order.<sup>23</sup> SCE’s

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Energy Commission’s regulations in turn make clear that a utility must not disclose customer-specific data without customer consent, but instead must aggregate the usage data or use other means to reasonably protect the confidentiality of the customer.”)

<sup>22</sup> Under the proposed 20/15 rule, whole building energy use data would be aggregated to a level protective of consumer privacy if there were at least 20 tenants in a building and “no tenant represented more than 15 percent of the whole building usage.” Report, p. 76.

<sup>23</sup> SCE Comments, Appendix A-1.

proposed NDA was submitted in addition to the PG&E Strawperson NDA, which SCE considered appropriate “for utility services and other ‘primary purposes.’”<sup>24</sup>

In opening comments, PG&E “did not disagree that there has been confusion in this proceeding between the use of a model NDA for utility services and other ‘primary purposes,’ and the use of an NDA for third-party access that may be authorized by the CPUC and may not be for utility ‘primary purpose.’”<sup>25</sup> However, PG&E stated it “submitted its model NDA with the understanding that it would be used for third party access arrangements where customer-specific energy usage data is being disclosed or derived” in order to protect consumer information “from unauthorized use or disclosure through reasonable security procedures.”<sup>26</sup>

DRA reviewed SCE’s proposed NDA and finds it reasonable for requests under Commission Order or for the release of aggregate data containing proprietary or trade secret information. To the extent that cybersecurity requirements conflict with the protocol in the PG&E NDA, DRA requests that utilities align their requirements so third-parties do not have to go through separate cybersecurity screenings for each utility. DRA also requests SCE clarify what information is subject to “a proprietary or trade secret right” for increased transparency in the data request process.<sup>27</sup> Additionally, DRA clarifies that SCE’s proposed NDA does not replace the NDA-light proposed in DRA’s opening comments for use by landlords complying with building benchmarking requirements.<sup>28</sup>

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<sup>24</sup> PG&E Comments, p. 5.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 5-6.

<sup>27</sup> SCE Comments, Appendix A-1.

<sup>28</sup> DRA Comments, p. 25.

**D. The Commission should institute a ratesetting proceeding to address the costs associated with implementing any new energy usage data access programs.**

In opening comments, parties agree that it is necessary to address all cost issues prior to requiring the utilities to implement any new energy usage data policies, but note that this current quasi-legislative rulemaking is not appropriate to consider ratesetting matters. DRA agrees with the other parties and recommends the Commission open up a ratesetting proceeding to address the costs associated with implementing the data access programs.

While parties recommend the Commission address cost issues in a ratesetting proceeding, parties differ on the proposed approach to institute a ratesetting proceeding and what cost issues should be addressed. PG&E states that the Commission may authorize the utilities to track and record incremental costs in a memorandum account, subject to Commission review in a separate proceeding.<sup>29</sup> CCSC/EI argue that cost recovery should be conducted through a rate-making proceeding, but state that incremental costs should be recovered “through a tariff rather than through a charge on data access.”<sup>30</sup>

SCE does not propose a method to examine costs but offers additional suggestions. As SCE points out, the proceeding under A.12-03-002 et al. already establishes a platform providing third party access with customer consent and “[l]everaging a platform that facilitates access to data *after* customer consent has been obtained is preferable to devising rules that *bypass* customer consent entirely.”<sup>31</sup> DRA

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<sup>29</sup> PG&E Comments, pp. 11-12 (“The CPUC may amend the scope of the proceeding to consider ratesetting matters, and in doing so may authorize the utilities to track incremental costs of their data access programs in memorandum accounts, subject to recovery of the reasonable, incremental costs in a future GRC or other application in accordance with general cost recovery criteria adopted in this proceeding.”).

<sup>30</sup> CCSC/EI Comments, p. 8.

<sup>31</sup> SCE Comments, p. 9.

agrees, and urges the utilities to leverage costs as much as possible so that ratepayer impact for both programs is minimized.<sup>32</sup>

At this time, the Commission has not required nor have the utilities provided any information necessary to estimate the costs of implementation. DRA agrees with The Utility Reform Network's ("TURN's") observation that a basic issue is "determining what costs are truly 'incremental,' especially given that the utilities have been authorized cost recovery of substantial amounts (in rate cases as well as in smart meter deployment cases) associated with smart meter data collection, processing and determination."<sup>33</sup> DRA also supports TURN's recommendation to audit prior cost recovery authorizations in order to take advantage of existing database infrastructure related to Smart Meters.<sup>34</sup> DRA raised this argument in opening comments.<sup>35</sup>

**E. The Commission should permit the utilities to charge data requesters user fees.**

DRA disagrees with CCSC/EI's recommendation that "any incremental costs incurred by utilities be recovered through a tariff rather than through a charge on data access, and established at a reasonable rate."<sup>36</sup> CCSC/EI argue that ratepayers should absorb all of the costs for data access because public-interest energy research generates

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<sup>32</sup> Proposed Decision in A.12-03-002, et al., (issued July 17, 2013), p. 27, states: "This decision finds that the undisputed consensus between all parties – that no customers or authorized third parties be charged fees for using the ESPI platform to obtain usage data from PG&E, SCE or SDG&E is a reasonable policy and consistent with the filings in this proceeding." Instead, the Proposed Decision approves PG&E's and SCE's proposals to recover costs from ratepayers for implementing the third party data access programs as required by Ordering Paragraph 8 of Decision 11-07-056. The Commission previously authorized cost recovery for SDG&E in its General Rate Case application, A.10-12-005.

<sup>33</sup> TURN Comments, p. 2.

<sup>34</sup> TURN Comments, p. 2 (An "audit of prior costs authorizations and spending is necessary to assess the costs and recovery associated with data access.")

<sup>35</sup> DRA Comments, p. 27.

<sup>36</sup> CCSC/EI Comments, p. 8.

ratepayer benefits.<sup>37</sup> DRA believes CCSC/EI's arguments lack merit and should be rejected. Nebulous benefits to ratepayers are insufficient to justify burdening ratepayers with the costs of third-party data access when research institutions benefit tangibly from energy use data by gaining research topics for graduate students, publishing papers and using their publications to secure grants for future research. If the Commission allows third parties access to customer usage data for the third parties' benefit, third parties should pay for it.

Allowing fees to pay for data access which directly benefits data requesters is distinguishable from prior Commission decisions allowing tariffs to fund data access directly benefitting ratepayers. For example, in A.12-03-002 et al., the utilities filed applications to include tariff changes to provide third party access to a customer's usage data via the utility's backhaul when authorized by the customer pursuant to Commission order.<sup>38</sup> In those applications, the utilities addressed and/or requested cost recovery from ratepayers to implement their third party data access programs. In A.12-03-002, et al., it was reasonable for ratepayers to fund the programs because those data access programs directly benefitted ratepayers by allowing third parties access to energy usage data at *the request of the ratepayer*. However, in this proceeding, third party data access is without customer authorization and it is not the customer who directly benefits from data access. Therefore, ratepayers should not shoulder the burden of funding third parties' access to energy usage data; it should be the third party.

The Consumer Federation of California ("CFC") recommends the Commission recover costs from information requesters before it authorizes the utilities to recover costs

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<sup>37</sup> CCSC/EI Comments, p. 8.

<sup>38</sup> D.11-07-056, Ordering Paragraph 8, p. 165.

from ratepayers.<sup>39</sup> DRA agrees. The Commission should seek cost recovery from data requesters prior to considering recovery from ratepayers for utilities’ “reasonable costs of implementation.”<sup>40</sup> User fee policies, processes and rates should be considered along with the overall cost issues through the application process DRA recommended in opening comments.<sup>41</sup>

#### IV. CONCLUSIONS

For the reasons stated above, the Commission should adopt the DRA recommendations in Section II-Summary of DRA Reply Comments, discussed above.

Respectfully submitted,

/s/ LISA-MARIE SALVACION

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<sup>39</sup> CCSC Comments, p. 4.

<sup>40</sup> CFC Comments, p. 4.

<sup>41</sup> DRA Comments, p. 27.