

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)

**REPLY COMMENTS
OF THE DIVISION OF RATEPAYER ADVOCATES
ON THE MAY 6, 2011 PROPOSED DECISION**

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I. INTRODUCTION

The Division of Ratepayer Advocates (DRA) hereby submits these reply comments in response to comments on the Proposed Decision (PD) issued on May 6, 2011. Pursuant to Administrative Law Judge Sullivan’s ruling on June 7, 2011 by electronic mail, reply comments are due filed June 8, 2011; thus, this reply is timely. Over 20 separate parties served comments on the PD, addressing a myriad of issues. While it is impossible to respond to all parties’ filings, DRA offers some comments on a few key issues, noted below.

II. DISCUSSION

A. Jurisdiction

1. “Locked” vs. “Unlocked”

Similar to DRA, all three of the major investor-owned utilities (IOUs)¹ agree that the PD’s distinction between a “locked” vs. “unlocked” device does not have any practical application in the Smart Grid context, especially since it is impossible for the utility to know whether a device is locked or not.² Where parties begin to disagree is the PD’s conclusion that the Commission’s authority ends where the customer uses an “unlocked” device to transfer information to a third-party. In that situation, customers must “proceed with caution.” Certain third-parties, such as CEERT³, argue Commission jurisdiction does not extend to *any* third-party, irrespective of the locked/unlocked distinction, as any barrier “limit[s] competition in favor of a monopoly utility with no legal or factual basis.”⁴ CEERT’s arguments should be dismissed. The Customer Representatives⁵ brief provides a legal and factual basis to assert authority over third-parties based on the Commission’s broad power to regulate public utilities under Public Utilities Code Section 701, as Smart Grid services are “cognate and germane” to the regulation of the electric grid.⁶

The Commission should not adopt disparate treatment between third-parties, based on whether a HAN-enabled device is “locked” or “unlocked.” Rather, the Commission should

¹ Pacific Gas and Electric Company (PG&E), Southern California Edison Company (SCE), and San Diego Gas and Electric Company (SDG&E).

² SCE Comments, filed June 2, 2011, p. 13.

³ Center for Energy Efficiency and Renewable Technologies

⁴ CEERT Comments, filed June 2, 2011, p. 6.

⁵ Customer Representatives include: DRA, The Utility Reform Network (TURN), and Utility Consumers’ Action Network (UCAN).

⁶ See Brief of The DRA, TURN and UCAN on The Commission’s Jurisdiction to Protect Consumer Privacy (“Customer Representatives Brief”), filed November 22, 2010.

adopt simple, straightforward rules across all third-parties, as advocated by DRA.⁷ Application of the rules to *all* third-parties is easier for customers to understand, and can be easily monitored and enforced. DRA also notes that drawing the line of Commission jurisdiction at the “unlocked” device is similar to setting boundaries for regulatory authority at the demarcation point, which the Commission rejected as irrelevant in D.10-06-047.⁸

2. Chain of Responsibility

PG&E, SCE, and SDG&E raise compelling arguments describing the risks⁹ associated with third-party non-compliance of the privacy rules. Because of these risks, SCE argues an IOU should not be held responsible for a third-party’s breach of the privacy and security rules absent a business relationship, nor should an IOU have a duty to investigate alleged customer-authorized third-party violations.¹⁰ DRA agrees it is unreasonable for an IOU to be held liable for a third-party’s bad actions when no contractual relationship exists between the two entities. Senate Bill 1476 also supports this position.¹¹ These risks cause the Commission to acknowledge that a huge gap exists in the privacy rules. This reinforces the argument that *all third-parties* who seek access to customer information *need to be regulated, monitored and enforced* by the Commission. To ignore this gap in customer protection is a disservice to ratepayers, who look to the Commission to cover such lapses in legislation. The Commission may approach this problem in two ways, either by: (1) direct regulation, or (2) indirect regulation.

a) Direct Regulation

UCAN offers the most straightforward approach to consumer protection—that the Commission assert jurisdiction over third-party providers, regardless of a contractual

⁷ DRA Comments, filed June 2, 2011, pp. 5-7.

⁸ *Decision Adopting Requirements For Smart Grid Deployment Plans Pursuant To Senate Bill 17 (Padilla), Chapter 327, Statutes Of 2009* [D.10-06-047], R.08-12-009, p. 109.

⁹ SCE lists many reasons, including “The IOU is mandated to disclose data to a third party of the customer’s choosing upon receiving the customer’s written authorization. The IOU is not permitted to investigate or required to investigate the third party prior to allowing access to customer usage data upon customer consent.” (SCE Comments, pp. 6-7.)

¹⁰ SCE Comments, p. 6.

¹¹ Senate Bill (SB) 1476 states, in pertinent part, “If a customer chooses to disclose his or her electrical or gas consumption data to a third party that is unaffiliated with, and has no other business relationship with, the electrical or gas corporation, the electrical or gas corporation **shall not be responsible** for the security of that data, or its use or misuse.” (Emphasis added.)

arrangement with the IOU.¹² As demonstrated in the Customer Representatives' November 22, 2010 brief, the Commission has authority to assert regulatory authority, should it choose to do so. UCAN also raises some very important points, that even if a privacy violation were to occur in breach of a contractual agreement between the customer and third-party, the only recourse for that customer is to litigate the breach of contract claim, which can be a costly and time-consuming endeavor.¹³ At the same time, the privacy violation is unretractable once disseminated. Without Commission oversight, UCAN states, "The only recourse available to the utilities is to revoke eligibility to customer data. Any damages caused to individuals by the breach of the tariff are not recoverable by the utilities. Nor is there any legal basis upon which customers could recoup any damages caused by breach." DRA agrees, and adds the utilities' refusal to acknowledge any liability caused by third-parties absent a business relationship with the IOU, reinforces this concern.

DRA urges the Commission reconsider asserting jurisdiction over third-parties. By doing so, the Commission will send a clear message to consumers that strong consumer protections are in place to safeguard against unauthorized and/or fraudulent access and use of their personal information.

b) Indirect Regulation

In the absence of direct regulation, the next best approach is one promulgated by the utilities—that the Commission *indirectly* regulate through its powers to regulate electrical service and tariffs. SCE states, "To the extent the Commission wishes to assure compliance before permitting third-party access to customer data, it can impose a registration requirement to certify third-parties, similar to what is in place for electric service providers (ESPs) today."¹⁴ DRA discusses this issue extensively in comments.¹⁵ DRA disagrees, however, with SCE's alternative:

Instead of conditioning device registration, the PD can simply require that *all* customers making use of third party services through HAN devices—whether locked or not—should be provided information concerning risks associated with the misuse of energy usage data.

¹² UCAN Comments, filed June 2, 2011, p. 4.

¹³ UCAN Comments, p. 4.

¹⁴ SCE Comments, p. 14.

¹⁵ See DRA Comments, pp. 3-9.

As DRA argued, customer education, by itself, is not an effective deterrent against bad actors, and can be extremely costly.¹⁶ Rather than using an “at the customer’s own risk” approach, the Commission should affirmatively set forth rules and regulations conditioning third-party access to data based on a registration process, that requires establishing a contract/service agreement between the third-party and the IOU, that ensures privacy protections equivalent to the electrical corporation’s own obligations. A third-party, once registered, should have complete access to customer information by the same measures as an electrical corporation, unless that third-party’s registration or certification is removed for whatever reason, or the customer revokes authorization. DRA agrees with UCAN, at a minimum, the process should “preclude access to data by entities with a history of civil, criminal, or regulatory violations of consumer rights; entities lacking financial resources or bonding; and entities without legitimate plans for use of the data or expertise to carry out those plans.”¹⁷ As described in DRA’s comments, the IOU-proposed Rule 24 for third-party aggregators sets forth a starting framework to enable this process.

B. Primary/Secondary Purposes

EDF¹⁸ argues to expand the meaning of “primary purposes.” EDF states the Proposed Decision grants the IOUs “priority standing” in the Smart Grid data market in excess of that suggested by SB 1476.¹⁹ EDF also asserts the third-parties should be able to obtain and use customer data without consent because they can play a large role in achieving the “primary purposes” set forth in SB 1476 and the PD. DRA disagrees, and notes this is the type of misunderstanding that supports *narrowing* of the meaning of “primary purpose.”

The term, “primary purpose” applies to the electrical corporations’ legal obligation to provide adequate, efficient, just and reasonable service to ratepayers.²⁰ EDF’s argument assumes third-parties hold the same relationship with consumers as IOUs. The IOU-consumer relationship is distinct from a customer’s relationship with a third-party because an IOU’s obligations to ratepayers are held to a much higher standard.²¹ The California Supreme Court observed,

¹⁶ DRA Comments, pp. 4-5.

¹⁷ UCAN, p. 5.

¹⁸ Environmental Defense Fund

¹⁹ EDF Comments, filed June 2, 2011, p. 12. *See also, e.g.*, AT&T Comments, p. 6; CEA Comments, p. 10; DRSG Comments 6-7.

²⁰ Cal. Pub. Util. Code § 451.

²¹ *See* PD, Attachment B, “List of Current Statutes, Regulations, Decisions and Protocols Related to Customer

In California a public utility is in many respects more akin to a governmental entity than to a purely private employer. In this state, the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities. (See generally Cal. Const., art. XII, §§ 1-9; Pub. Util. Code, *passim*.) Moreover, the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation.²²

IOU contractors are similarly held to a higher standard regarding privacy by its contract with the IOU, and thus get the same privileges afforded to an IOU when operating for a primary purpose.²³ Third-parties have no such legal or statutory obligations to customers, and should therefore be required get consent to access customer information, absent an IOU relationship. Thus, the definition of “primary purpose” should be limited to *essential activities by the electrical corporation* as needed for billing, operations, and other activities authorized by the Commission. Accordingly, the final decision should designate activities related to energy efficiency, demand response, and energy management as a “secondary purpose.” Any expansion of the definition for “primary purpose” should be denied.

C. Cost Recovery

Both PG&E and SCE request the PD state explicitly it may be necessary to seek cost recovery for incremental costs to implement the final decision.²⁴ DRA does not object to the use of a memorandum account to track expenses, subject to a reasonableness review in the utilities’ next GRC. However, DRA objects to the PD’s order to file advice letters for pilot studies on wholesale pricing and HAN—it is unnecessary, costly, and duplicative to other efforts in similar proceedings. Further, the advice letter process is inappropriate for review of any incremental costs, as any requests for costs would appear to be, at a minimum, over \$1 million.²⁵ Unless the IOU requests utilization of funds already authorized, the Commission should not employ such mechanisms to expedite implementation of the final decision, if it is potentially costly and contentious. Rather, recovery by separate application or in a GRC is appropriate, as IOUs will do upon approval of smart grid deployment plans.

Privacy Applicable to the California Energy Utilities.”

²² *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 469 (Cal. 1979).

²³ PD, Attachment D.

²⁴ PG&E Comments, filed June 2, 2011, p. 2; SCE Comments, pp. 19-20.

²⁵ PG&E Comments, p. 8; *See also* SDG&E Comments, p. 14, which describes its estimate in TY 2012 GRC of an additional \$1.6 million of direct capital costs required to develop the OpenADE/NAESP ESPI interfaces for third party accessibility.

Respectfully submitted,

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