



**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 CTIA -THE WIRELESS ASSOCIATION®
ON THE PROPOSED DECISION ADOPTING RULES TO PROTECT
THE PRIVACY AND SECURITY OF ELECTRICITY USAGE DATA**

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Pursuant to Rule 14.3 of the Rules of Practice and Procedure of the California Public Utilities Commission (Commission) CTIA - The Wireless Association® (CTIA) replies to certain of the comments submitted on the Proposed 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 & Electric Company (PD) filed in the above captioned proceeding on June 2, 2011.

I. INTRODUCTION

As has been highlighted throughout this proceeding, Smart Grid implementation has the potential to bring enormous benefits to the American public in areas such as improved reliability and power quality, reduction in peak demand, reduction in transmission congestion costs, increased energy efficiency, and the ability to increase reliance on renewable energy sources and plug-in hybrid electric vehicles. To ensure these innovations in energy management services – and the energy savings they will enable - CTIA concurs with the comments of certain parties that a vibrant, open, and competitive market is essential. The existence of such a market in California, however, rests in part on the Commission refraining from promulgating cumbersome and granular California-specific regulations.¹

Like the wireless industry which developed around a nationwide model, the developers of smart grid technology are envisioning a national market. State specific regulation creates a barrier to the entry of competitors which find that the conformance of their business model to state specific requirements is too costly and/or complex. This, however, does not mean that

¹ Opening Comment of Pacific Bell Telephone Company d/b/a AT&T California on the Proposed 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, R. 08-12-009 (June 2, 2011) (AT&T Comments) ,at p.1; *see also*, Comments of Future Privacy Forum on the Proposed 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, R. 08-12-009 (June 2, 2011) (FPF Comments) at pp. 4-5; Comments of Verizon California Inc., MCI Communications Service Inc. and Verizon Wireless on the May 6, 2011 the Proposed Decision of President Peevey Adopting Rules to Protect the Privacy and Security of the Electricity Usage Data , R. 08-12-009 (June 2, 2011) (Verizon Comments) at pp.2-3.

consumer privacy rights will go unprotected. To the contrary, in light of the nationwide construct, industry stakeholders and privacy advocates are actively engaged in a collaborative effort to develop industry best practices and meaningful enforcement mechanisms that could be adopted nationwide.² Such would avoid the jurisdictional constraints and harm to investment and innovation associated with a prescriptive, state-by-state approach to privacy regulation.

CITA favors allowing standards to develop on a national basis before state specific requirements are considered, especially for non-utility third parties.³ To the extent that national guidelines subsequently prove lacking, the Commission could then revisit the issue of applying its rules to third parties with direct customer relationships.

II. ABSENT A SHOWING OF EXPRESS NEED, ADOPTING NEW CALIFORNIA-SPECIFIC, SMART-GRID PRIVACY RULES WILL HINDER INVESTMENT AND INNOVATION AND ULTIMATELY HARM THE VERY CONSUMERS THAT THE PD SEEKS TO PROTECT.

A. Prescriptive Regulations Could Forestall Competitors from Entering California Market

Given the relative infancy of the smart grid market, the Commission should be mindful of the fact that the promulgation of regulation absent a clear showing of need will have negative rather than positive effect on consumers. Regulation often creates a barrier to market entry. Third-party companies with nationwide operations will hesitate to participate in a market governed by prescriptive regulation given the high costs and complexity of doing such. The regulatory construct thus results in the unintended consequence of reducing the number of competitors in the market, and thus decreasing service offerings and increasing prices⁴ -- i.e.,

² See FPF comments at pp. 2-3; AT&T comments at p. 5; Verizon Comments at p 3.

³ The fact that the industry has a proven track record for addressing privacy issues is illustrated by CTIA's Best Practices and Guidelines for Location-Based Services (LBS). The Guidelines rely on two fundamental principles: user notice and consent.

- First, LBS Providers must ensure that users receive meaningful notice about how location information will be used, disclosed and protected so that users can make informed decisions whether or not to use the LBS and thus will have control over their location information.
- Second, LBS Providers must ensure that users consent to the use or disclosure of location information, and LBS Providers bear the burden of demonstrating such consent. Users must have the right to revoke consent or terminate the LBS at any time.

See http://www.ctia.org/business_resources/wic/index.cfm/AID/11300

⁴ See AT&T Comments at pp. 2-3, Verizon Comments at pp. 2-3; FPF Comments at p.2.

harming rather protecting consumers. Indeed, the Commission has acknowledged that prescriptive regulatory schemes can be detrimental to consumers in its determination not to enact prescriptive consumer protection regulations.⁵

B. Prescriptive regulations could have the effect of suppressing advances in Smart Grid technologies being available to California Consumers.

Complex, expensive regulatory schemes can forestall the creation of a market. Innovative products and services often generate from start up companies. As noted by TechNet, the PD's regulatory scheme is unnecessarily complex and burdensome for a small company that is trying to win customers to provide energy efficiency, energy management or demand response services.⁶ As a result, such a company would, more likely than not, determine not to try its luck in the California market. Even a more established company with a national presence may determine that compliance with a prescriptive state regime may be too technically difficult or prohibitively expensive to warrant entry into the California market.

The Commission has experience with such market-forestalling regulation. Specifically, the Commission found that its regulatory approach governing telecommunication carriers' billing for non-communications charges had, in fact, rendered it uneconomic for carriers to bill for such charges and as a result had stifled the creation of a market for the multitude of service offerings which relied on that ability:

“After reviewing the parties’ comments, we hold that the record developed in this proceeding indicates that there is good reason to repeal the Interim Non-Com Rules. We find it significant that in the four years that the Interim Rules have been in place, we have no evidence that a single carrier in California has elected to offer this billing service pursuant to requirements imposed by the Non-Com Rules. This lack of activity suggests that the Interim Rules do not work as intended and lends credence to the criticism that these are “extremely prescriptive rules that attempt to micromanage transactions concerning non-communications products and services.”⁷

The Commission should not make the same mistake with the development of the smart grid market.

⁵ Decision 06-03-013, at pp. 34-36.

⁶ Comments of the Technology Network (“TechNet”) Regarding the Proposed Decision of President Peevey Adopting Rules to Protect the Privacy and Security of Customer Usage Data Generated by Smart Meters, R. 08-12-009 (June 2, 2011) at p.11.

⁷ Decision 06-03-013, at p. 85.

C. Already Regulations/Policies in Place to Protect Privacy of Customer Usage Date

Absent a showing of need – which is assumed by the PD, but not demonstrated on the record – the Commission should forestall from layering state specific privacy regulation over that which already exists. Californians availing themselves of smart grid technology already have the privacy protections provided them by SB 1476 and Business and Professions Code sections 22575–22579. In addition, given the nationwide construct of many smart grid developers, the record of the proceeding highlights the federal authority to ensure that companies live up to their privacy policy commitments and the enforcement actions with respect thereto.⁸ There is no need for duplicative regulation. Again the Commission has previously determined that in light of the protections provided under existing law, the need to overlay additional prescriptive regulations is unnecessary.⁹

III. LEGAL AND POLICY ERRORS IN PROPOSED RULES

In the event the Commission proceeds to adopt the regulatory regime set forth in the PD certain changes are necessary in order to avoid errors of law and fact.

A. Commission’s Expansion of its Jurisdiction via Utility Tariffs is Improper.

The Proposed Decision establishes a regulatory construct which would apply to any third party that obtains electricity usage data from a utility or a smart meter. Several parties have already commented on the fact that by doing so, the PD has overstepped the Commission’s jurisdictional bounds.¹⁰ CTIA agrees with these comments. Absent a statutory mandate, of which there is none, the Commission can only exercise jurisdiction over third parties if the regulation is "cognate and germane" to its regulation of public utilities.¹¹ In this regard, Commission’s actions with respect to third parties must relate directly to the “PUC’s

⁸ See AT&T Comments at p. 3, *citing* Prepared Testimony of Federal Trade Commission before Senate Committee on the Judiciary, Subcommittee for Privacy, Technology and the Law, pp. 4-7 (May 10, 2011) (available at <http://www.ftc.gov/os/testimony/110510mobileprivacysenate.pdf>).

⁹ Decision 06-03-013 at p. 43.

¹⁰ See Comments of the Consumer Electronics Association on the Proposed Decision of President Peevey, R. 08-12-009 (June 2, 2010) (CEA Comments), pp. 4-5; AT&T Comments, pp.3-5; Verizon Comments at pp. 3-5.

¹¹ See *PG&E Corp. v. PUC*, 118 Cal. App. 4th 1174, 1197 (Cal. App. 1st Dist. 2004).

performance of its *regulatory* duties, duties which by constitutional mandate apply only to regulated utilities.” Regulation of consumer actions beyond the meter (which in essence is what the PD would do by regulating consumer interactions with third party developers) simply does not fall within that realm. As even noted by Pacific Gas & Electric, the Commission’s exercise of conditioning authority over third parties “might require a much broader assertion of jurisdiction than the courts would accept, because it would move the Commission into unprecedented direct regulation of consumer appliances owned or operated by consumers, as well as direct regulation of activities by customers themselves.”¹²

In short the Commission cannot adopt the PD absent clarification that non-utility vendor third parties that access usage data over the HAN (locked or unlocked) or from the smart meter via backhaul are not subject to the full scope of the proposed rules.

B. The Proposed Rules are not Competitively Neutral.

As noted by several parties, through the proposed definitions of “primary purpose” versus “secondary purpose” the rules would create a construct which is not competitively neutral.¹³ CTIA concurs with these parties. Specifically, as drafted, energy efficiency and management programs would only be a “primary purpose” if offered by a regulated utility corporation. If offered by a third party it would be a “secondary purpose” subject to several onerous notification and disclosure requirements that entities that provided “primary purposes” are not. Such skews the playing field towards offerings by regulated utilities as there is a built-in incentive in the proposed regulations for parties who want to avoid additional notice and disclosure requirements to contract with electric companies. The Commission should not be establishing rules for a new market in a manner which favors one player over another. Accordingly, the Commission should amend the definition of “primary purpose” to apply more broadly to energy efficiency and management efforts regardless of who implements the program.

¹² See Pacific Gas & Electric (U 39 E) Brief on Jurisdiction, R. 08-12-009 (Nov. 22, 2010), at p. 8.

¹³ See, e.g. Comments of the Center for Energy Efficiency and Renewable Technologies on the Proposed Decision of Commissioner Peevey on Smart meter Electric Usage Data and Data privacy and Security Rules, R.08-12-009 (June 2, 2011), at pp. 9-10; CEA Comments at pp. 7-8.

Respectfully submitted this June 8, 2011, at San Francisco, California.

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