

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)

**OPENING BRIEF OF ENERNOC, INC., TECHNET,  
CONTROL4 CORPORATION, AND TENDRIL NETWORKS, INC.,  
ON COMMISSION JURISDICTIONAL QUESTIONS**

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November 22, 2010

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## **SUMMARY OF RECOMMENDATIONS**

Rule 13.11 of the Commission’s Rules of Practice and Procedure requires a “summary of the briefing party’s recommendations following the table of authorities.” In summary, it is the position of EnerNOC, Inc. (EnerNOC), TechNet, Control4 Corporation (Control4), and Tendril Networks, Inc. (Tendril) that the Commission’s jurisdiction is defined and limited by the California Constitution and statute. No basis exists in current law to conclude that this Commission has jurisdiction to regulate the “entities” described in the Administrative Law Judge’s (ALJ’s) Ruling of October 29, 2010, for any purpose. In the case of protecting the privacy of energy consumption data, Senate Bill (SB) 1476 defines the Commission’s jurisdiction, which extends to regulation of investor-owned energy public utilities.

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Order Instituting Rulemaking to Consider  
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**OPENING BRIEF OF ENERNOC, INC., TECHNET,  
CONTROL4 CORPORATION, AND TENDRIL NETWORKS, INC.,  
ON COMMISSION JURISDICTIONAL QUESTIONS**

EnerNOC, Inc. (EnerNOC), TechNet, Control4 Corporation (Control4), and Tendril Networks, Inc. (Tendril) respectfully submit this Opening Brief on the jurisdictional questions posed in the Administrative Law Judge's (ALJ's) Ruling issued in this proceeding on October 29, 2010 (October 29 ALJ's Ruling). This Opening Brief has been filed and timely served pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure and the October 29 ALJ's Ruling.

**I.**

**THE QUESTIONS POSED BY THE OCTOBER 29 ALJ'S RULING  
MUST BE ANSWERED IN THE CONTEXT OF THE CONSTITUTIONAL  
AND STATUTORY LIMITATIONS ON COMMISSION JURISDICTION.**

The October 29 ALJ's Ruling poses two questions for briefing:

- “a) What authority does the Commission have over entities that receive information on a consumer's energy from the utility? What actions, if any, can the Commission take in response to misuse of data by such an entity?
- “b) What authority, if any, does the Commission have over entities that receive information on a consumer's energy usage from sources other than the utility (from a Home Area Network device or from the customer, for example)? What actions, if any can the Commission take in response to misuse of data by such an entity?”<sup>1</sup>

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<sup>1</sup> October 29 ALJ's Ruling, at p. 2.

These questions can only be answered in the context of the Commission's constitutionally and legally prescribed regulatory jurisdiction. Put simply, the Commission does not regulate every company doing business in California or private individuals, but rather was established to regulate only a specific category of California business. Thus, the Commission's regulatory jurisdiction does not exist in a vacuum, but is constitutionally limited to investor-owned public utilities as defined by the California Legislature in the California Public Utilities (PU) Code.<sup>2</sup> Further, it is only the Legislature that can "prescribe that additional classes of private corporations or other persons are public utilities."<sup>3</sup>

Under these circumstances, interpretation of applicable statute is critical to determining the extent of this Commission's jurisdiction. For purposes of statutory construction, the courts have adopted and applied well-established principles, which, in turn, have been routinely followed by the Commission in its own decisions.<sup>4</sup> Those principles include (1) ascertaining the intent of the legislature so as to effectuate the purpose of the law,<sup>5</sup> (2) giving words used in a statute a plain and common sense meaning consistent with the statute's "legislative purpose,"<sup>6</sup> and (3) construing "a statute in context, keeping in mind the nature and purpose of the legislation," including reference to "the legislative history of the statute and the wider historical circumstances of its enactment."<sup>7</sup> These principles stem from a clear understanding of the "judicial role" in a democratic society, which is "to interpret laws, not to write them," a power reserved to the legislative branch, and, in turn, to interpret statutes in accordance with the

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<sup>2</sup> See, Cal. Const. Art. XII, Sections 3 and 5.

<sup>3</sup> Cal. Const., Art. XII, Section 5.

<sup>4</sup> See, e.g., Decision (D.) 01-11-031, at p.6.

<sup>5</sup> *California Teachers Assn. v. Governing Bd. of Rialto United School Dist.* (1997) 14 Cal.4th 627, 632; *Dyna-Med, Inc. v. Fair Employment Housing Com.* (1987) 43 Cal.3d 1379, 1386.

<sup>6</sup> *California Teachers Assn.*, *supra*, 14 Cal.4th at 633; *People v. Valladoli* (1996) 13 Cal.4th 590, 597, 599, 602.

<sup>7</sup> *Dyna Med, Inc.*, *supra*, 43 Cal. 3d at 1387, *People V. Valladoli*, *supra*, 13 Cal. 4th at 602; *Squaw Valley Ski Corp. v. Superior Court*, (1992) 2 Cal. App. 4th 1499, 1511.

“expressed” intention of the Legislature.<sup>8</sup> In fact, administrative regulations that seek to alter a statute or “enlarge” its scope are void.<sup>9</sup>

Thus, those “entities” subject to Commission jurisdiction must meet the statutory definitions governing “public utility” (Public Utilities (PU) Code §216(a)) and, in the case of electric or gas service, the statutory definitions of an “electrical corporation” (PU Code §218) and “gas corporation” (PU Code §222) or an “additional class” of “public utility” providing such service if expressly added to the code by the Legislature.<sup>10</sup> It is only these “entities” that are subject to Commission jurisdiction.<sup>11</sup>

The interpretation and application of these statutes also requires accounting for the purpose for which this Commission was established. Among other things, the Commission’s regulatory authority creates an exception from anti-trust laws for public utilities it oversees, permitting them to operate as *monopolies* within described service territories to the extent that they provide an “essential service” required by the public convenience and necessity and have dedicated plant to that use.<sup>12</sup> Thus, to even meet the “plain meaning” of a public utility electrical corporation under the PU Code, an “electrical corporation” must, by definition, own, control, operate or manage “electric plant for compensation,” which plant must “facilitate the production, generation, transmission, delivery, or furnishing of electricity.”<sup>13</sup>

Further, courts have long interpreted this language to require as a prerequisite of public utility regulation an unequivocal intention to *dedicate* such property to public use, not just to

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<sup>8</sup> *California Teachers Ass’n, supra*, 14 Cal.4<sup>th</sup> at 633.

<sup>9</sup> *Dyna Med, Inc., supra*, 43 Cal.3d at 1389.

<sup>10</sup> Cal.Const., Art. XII, Section 5.

<sup>11</sup> An entity can also provide electric service and *not* be a public utility (e.g., “Electric Service Providers” (ESPs). In that case, where additional consumer protection was deemed warranted, the Legislature was required to expressly extend the Commission’s authority in that regard by statute. (See, PU Code, §§218.3; 394, et al.)

<sup>12</sup> *Re California Western Railroad, Inc.* (1998) 78 CPUC 2d 292, 295 (“public utilities are ordinarily understood as providing essential services, the kind that other industries and the public generally require”); *Western Travel Plaza, Inc.* (1982) 9 CPUC 2d 681, 687.

<sup>13</sup> PU Code §§217, 218.

particular individuals or customers, with a concomitant right by the public to demand such service.<sup>14</sup> In fact, “the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a government entity than like a private corporation,” with the prices it charges for service and standards for that service “established by the state.”<sup>15</sup>

Today, the California Legislature has *not* “added” to the definition of “public utility,” “electrical corporation,” or “gas corporation” those “entities” only vaguely identified by the October 29 ALJ’s Ruling as “entities that receive information on a consumer’s energy from the utility” or “entities that receive information on a consumer’s energy usage from sources other than the utility.”<sup>16</sup> To the contrary, the Legislature has spoken on “privacy protections” for energy “consumption data” in SB1476 (see below), and has expressly *not* extended the Commission’s regulatory jurisdiction to any such “entity.” Instead, this law enacts privacy rules that are to be implemented consistent with this Commission’s existing jurisdiction over energy IOUs.

In addition, the terminology used in the October 29 ALJ’s Ruling does not suggest that the “entities” at issue here are ones that provide electric or gas service, have plant dedicated to that purpose, or either are “natural monopolies” or have been granted enforceable monopolies. In fact, the converse is true. Entities that assist customers with *the customer’s* usage data are seeking to reduce the customer’s energy usage or costs. If that data is provided directly by the customer to the “entity,” the Commission has no authority to “regulate” the customer’s private

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<sup>14</sup> *Richfield Oil Corp. v. Public Util. Com.* (1960) 54 Cal.2d 419, 428-429; *Ocean Park Etc. Corp. v. Santa Monica* (1940) 40 Cal.App.2d 76, 81-82 (“the devotion to public use must be of such character that the public generally... has the right to demand that that service shall be conducted, ...with reasonable efficiency under reasonable charges.”)

<sup>15</sup> *Western Travel Plaza, Inc., supra*, 9 CPUC 2d at 687, quoting from *Gay Law Students Assn. v. PT&T* (1979) 24 Cal.3d 458, 469-470.

<sup>16</sup> October 29 ALJ’s Ruling, at p. 2.

actions. If that data is provided by the IOU, then SB 1476 governs and controls as described below.

Further, these “entities” are subject to all of the perils of competition and all of the legal requirements that govern non-utility companies doing business in California, including liability for any fraudulent behavior or other legally proscribed service or product abuses. Such “entities,” therefore, are subject to a wide range of existing California law and oversight, including consumer complaints. These laws extend from statutes embodied in the California Business and Professions Code to oversight by the Department of Consumer Affairs, the Attorney General’s Office, and local District Attorneys, all of whom are dedicated to protecting consumers from fraudulent or bad business practices. In these circumstances, any legislative basis or rationale for Commission jurisdiction over such “entities” pursuant to the Public Utilities Code for consumer protection or any other purpose is simply nonexistent.

The “entities” identified in the October 29 ALJ’s Ruling are not now, nor have they been “added” by the Legislature, as a “public utility” subject to Commission regulation nor do they meet the definition of an electric service provider (ESP) subject to Commission consumer protection oversight.<sup>17</sup> There is simply no legal, factual, or rational basis offered for extending or requiring Commission-imposed “consumer protection” regulation of non-utility “entities” engaged by customers to review or receive their data with the customer’s consent.

Further, no evidence has been presented establishing that “consumer protection” regulations imposed *by this Commission* on these “entities” is even warranted in the first place. Instead, the Legislature has specifically prescribed how this energy consumption data is to be

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<sup>17</sup> From the inception of ESPs in the mid-90’s to the Commission’s implementation of the consumer protection provisions of PU Code §§394, et al., and finally to its suspension and now partial return, ESP “service” has been defined as providing for the *sale* to and *purchase of electric power* by customers from ESPs through “direct access” transactions. See, PU Code §218.3; D.98-03-072; D.01-09-060; Senate Bill 695 (Stats.2009, Ch. 337). Thus, an ESP is in the business of “procur[ing] the electricity in order to satisfy its load.” (D.98-03-072, at p. 28.)

treated *when provided by the IOUs* to ensure and protect customer privacy. It is this mandate and regulatory direction *to the IOUs* that this Commission has the jurisdiction to implement and enforce.

**II.**  
**SB 1476 DEFINES AND LIMITS THE COMMISSION’S**  
**REGULATORY JURISDICTION WITH RESPECT TO**  
**“PRIVACY PROTECTIONS FOR ENERGY CONSUMPTION DATA.”**

In comments filed in this rulemaking on Smart Grid privacy, consumer advocates, such as The Utility Reform Network (TURN), Division of Ratepayer Advocates (DRA), and the Utility Consumers Action Network (UCAN), have argued for limiting customer access, either directly or through an authorized third party, to their usage data based on allegations of “potential uses and abuses of these data.”<sup>18</sup> The Legislature, however, has now spoken on how “privacy” related to Smart Grid data is to be handled by this Commission in terms of its regulatory authority. While the Commission could direct its jurisdictional investor-owned utilities (IOUs) to provide additional educational materials to its customers on smart meters, the Legislature has not expanded this Commission’s jurisdiction to regulate customers or authorized third parties with respect to data access or their use of non-utility devices within the privacy of their homes or businesses.

Specifically, on September 29, 2010, Senate Bill (SB) 1476 became law.<sup>19</sup> SB 1476 adds Chapter 5 to Division 4.1 of the California Public Utilities (PU) Code, entitled: “Privacy Protections for Energy Consumption Data.” This chapter contains two added sections to the PU Code, one dealing with Commission jurisdictional electrical or gas corporations (Section 8380) and the other addressing non-Commission jurisdictional “local publicly owned electric utility[ies]” (Section 8381).

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<sup>18</sup> TURN Opening Comments on September 27 ACR, *supra*, at p. 4.,

<sup>19</sup> Stats. 2010, Ch. 497 (September 29, 2010).

Because Section 8380 specifically governs Commission-jurisdictional investor-owned utilities (IOUs), it is relevant and controlling here. Significantly, this statute does not distinguish between types of customers, but rather is intended to apply to data access and privacy related to the dissemination *by the IOU* of “electrical or gas consumption data” of *all* IOU customers, whether residential or commercial, institutional, and industrial (CI&I). In this regard, its measures are thorough and detailed and cover every intersection in the handoff of that data from the IOU to the customer or *authorized* third party.

It is this law that is intended to guide and, in fact, dictates the rules that this Commission is to adopt to govern customer data access and privacy in the use of smart meters. Straying outside or beyond the limits of this law or giving it an unsupported expansive construction is not appropriate, especially where such steps serve to create barriers to the expected efficiencies to be gained through the use of smart meters.

In this regard, not only does Section 8380 define and identify how this Commission is to treat “energy consumption data,” but, in doing so, specifically does not extend the Commission’s jurisdiction to customers or “third parties.” Instead, the privacy rules adopted by SB 1476 are directed at the IOUs subject to Commission regulation.<sup>20</sup> For purposes of any “abuses” by third parties or even consumers related to electric usage data, redress must be sought through otherwise applicable legal challenge for fraud or theft. In fact, the Legislature has made clear that limitation on the Commission’s rules as follows:

“(f) 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.”<sup>21</sup>

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<sup>20</sup>See, e.g., PU Code §8380 (b) – (f).

<sup>21</sup> PU Code §8380(f).

In terms of Commission authority, Section 8380 makes clear that the Commission is to focus and adopt rules limited to what the jurisdictional *IOU* can or cannot do with a customer's data, as follows:

- An IOU cannot share, disclose, or otherwise make accessible to any third party a customer's electrical or gas consumption data except (1) in using customer "aggregate" data for analysis, reporting, or program management with "all information" removed regarding the "individual identity of a customer" or (2) "upon the consent of the customer."<sup>22</sup>
- An IOU cannot sell a customer's electrical or gas consumption data or any other personally identifiable information for any purpose.<sup>23</sup>
- An IOU cannot provide an incentive or discount to the customer for accessing the customer's electrical or gas consumption data "without the *prior consent* of the customer."<sup>24</sup>
- An IOU must allow a customer *the option* to access its electrical and gas consumption data without being required to agree to the sharing of his or her personally identifiable information, including such data, with a third party.<sup>25</sup>
- An IOU that contracts with a third party for a service that allows a customer to monitor its usage and the third party uses the data for a secondary commercial purpose, the contract between the IOU and third party must require the third party to "prominently" *disclose* that secondary commercial purpose to the customer.<sup>26</sup>
- An IOU must use reasonable security procedures and practice to protect a customer's unencrypted electrical or gas consumption data from "*unauthorized* access, destruction, use, modification, or disclosure."<sup>27</sup>

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<sup>22</sup> PU Code §8380(b) (1) and (e); emphasis added.

<sup>23</sup> PU Code §8380(b)(2).

<sup>24</sup> PU Code §8380(b)(3).

<sup>25</sup> PU Code §8380(b)(4).

<sup>26</sup> PU Code §8380(c).

<sup>27</sup> PU Code §8380(d); emphasis added.

- An IOU can use customer aggregate data if a customer’s “individual identity” information has been removed.<sup>28</sup>
- An IOU can *disclose* a customer’s electrical or gas consumption data to a third party for system need or program implementation as long as the IOU “has required by contract that the third party implement and maintain reasonable security procedures and practices appropriate to the nature of the information, to protect the personal information from unauthorized access, destruction, use, modification, or disclosure, and prohibits the use of the data for a secondary commercial purpose not related to the primary purpose of the contract without the customer’s consent.”<sup>29</sup>
- The IOU may disclose electrical or gas consumption data as required by law or order of the Commission.<sup>30</sup>

This law does not seek to *regulate* either customers or “entities” with whom they consent to share their data or from whom they have purchased a non-utility device for home or business to monitor or track their energy usage. Instead, SB 1476 provides for “disclosures” and “consent” at strategic points where the *IOU* provides access to or shares customer “electrical or gas consumption data” and does so in a manner where the customer is at all times informed by the IOU as to the decisions that the customer is required to make. SB 1476 represents the law and directions to this Commission as to the limits of its authority in establishing these rules.

Further, contractual relationships between such “entities” and either the customer or the IOU does not transform that “entity” into an IOU or even an “agent” of the IOU. Instead, the obligations that will govern the terms of the agreement are dictated by SB 1476 and directed at the Commission-jurisdictional IOU. Any failure to include such terms in the contract by the IOU

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<sup>28</sup> PU Code §8380(e)(1).

<sup>29</sup> PU Code §8380(e)(2).

<sup>30</sup> PU Code §8380(e)(3).

could be actionable by the Commission with respect to the IOU; but any failure to “perform” under the contract by the third party is actionable by the IOU in court.<sup>31</sup>

SB 1476, construed in context with other PU Code provisions expressly defining the Commission’s jurisdiction, governs how the Commission is to address and develop rules governing access, security, and privacy of *all IOU customers*’ “electrical and gas consumption data.” The Commission should focus on implementing SB 1476 as simply and as quickly as possible. As to issues not specifically addressed in SB 1476, other parties throughout this proceeding have pointed to a broad range of privacy rules – generally applicable to all players in this sector – that already exist with respect to California businesses and serve as a robust regulatory framework to protect consumers.

**III.**  
**THE COMMISSION HAS NO REGULATORY JURISDICTION OVER  
NON-UTILITY DEVICES OR “SOURCES” OF “ENERGY CONSUMPTION DATA.”**

What is clearly apparent is that the Commission should not be engaging in, and has no authority to restrict, even for “consumer protection” purposes, customers exercising private choices within their homes or with respect to their businesses. The Commission must avoid adopting inappropriate or unnecessary rules or barriers to effective and efficient Smart Grid deployment, especially those that improperly seek to extend Commission regulatory jurisdiction to govern the private behavior of individuals. The limits on the Commission’s jurisdiction simply cannot be ignored in replying to positions taken by parties on the rules and policies that should govern customer access and privacy.

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<sup>31</sup> As an example, in the case of IOU procurement contracts with qualifying facilities (QFs), not only are QFs not public utilities and not subject to Commissions regulatory jurisdiction, but the fact of their contracting with IOUs does not alter that status or make them an agent of a public utility. Instead, the Commission’s jurisdiction is limited to setting the terms of that procurement for the regulated IOU. Contract damages for non-performance are left to the courts.

As an example, if the Commission believes that *residential* customers require more information or education regarding the uses and effects of a smart meter or the smart grid, the Commission can certainly *direct the IOUs* to provide bill inserts or other materials to those customers. However, the Commission cannot adopt rules that seek to constrain or control the private behavior of individuals. In fact, overreaching by the Commission with respect to either regulation or jurisdiction without a sound basis in law or fact will have the effect of creating artificial barriers to smart grid deployment and innovation and will, in turn, limit the efficiencies that a smart grid is intended to achieve. The Commission's focus should, therefore, be on implementing that law as written and in a manner that is consistent with the Commission's jurisdiction and is as transparent and simple as possible.

#### **IV. CONCLUSION**

As supported by this brief, it is the position of EnerNOC, TechNet, Control4, and Tendril that the Commission's jurisdiction is defined and limited by the California Constitution and statute. No basis exists in current law to conclude that this Commission has jurisdiction to regulate the "entities" described in the October 29 ALJ's Ruling for any purpose. In the case of

protecting the privacy of energy consumption data, Senate Bill (SB) 1476 defines the Commission's jurisdiction, which extends to regulation of investor-owned energy public utilities.

Respectfully submitted,

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November 22, 2010

**CERTIFICATE OF SERVICE**

I, Sara Steck Myers, am over the age of 18 years and employed in the City and County of San Francisco. My business address is 122 - 28<sup>th</sup> Avenue, San Francisco, California 94121.

On November 22, 2010, I served the within document **OPENING BRIEF OF ENERNOC, INC., TECHNET, CONTROL4 CORPORATION, AND TENDRIL NETWORKS, INC., ON COMMISSION JURISDICTIONAL QUESTIONS**, in R.08-12-009, with service on the service list for R.08-12-009 in compliance with the Commission's Rules of Practice and Procedure and separate and additional delivery of hard copies by U.S. Mail to Assigned Commissioner Ryan and Assigned ALJ Sullivan, at San Francisco, California.

Executed on November 22, 2010, at San Francisco, California.

          /s/ SARA STECK MYERS          

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**November 22, 2010**

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