BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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 LOCAL GOVERNMENT SUSTAINABLE ENERGY COALITION ON WORKING GROUP REPORT

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I. Introduction

In accordance with the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), and with the Rulings of Administrative Law Judge Sullivan, the Local Government Sustainable Energy Coalition ("LGSEC")[1] submits these reply comments on the Working Group Report ("Report"). The opening comments show a range of opinion on the many issues addressed in the Report. The Commission must balance public policy objectives with privacy concerns, a task made more challenging by laws that can be interpreted to conflict with one another.

The LGSEC continues to advocate for the Commission to provide access to data that local governments, sometimes working with academic researchers, need to comply with federal, state, and local laws. The LGSEC described in our opening comments how local government plans, ordinances, and related policies directly support California's AB 32, AB 758, SB 375, and AB 1103. The comments from other parties reveal that the LGSEC is not alone in recommending that the Commission modify the definition of "primary purpose;" require the utilities to timely provide data in a consistent format that can be manipulated electronically; include a range of stakeholders in any advisory group that is formed; require utilities to provide data to entities such as local governments who need those data to implement Commission-authorized energy efficiency programs; and use non-disclosure agreements, with appropriate recourse and penalties, to preserve customer privacy.

In these reply comments the LGSEC: elaborates on statutory authorities related to local governments and data, including franchise agreements granted by local governments to utilities; identifies objectives for non-disclosure agreements; provides more insight on the rules governing

[1] Across California, cities, counties, associations and councils of government, special districts, and non-profit organizations that support government entities are members of the LGSEC. Each of these organizations may have different views on elements of these comments, which was approved by the LGSEC's Board.

data aggregation and summation; and emphasizes that the Commission must use this opportunity to compel the exchange of data needed to implement Commission authorized energy efficiency programs.

II. The Commission Controls What Is Considered a "Primary Purpose"

The Commission, in D.11-07-056 in an earlier phase of this proceeding, developed a definition of primary purpose. This current phase of the proceeding has made clear that the definition needs to be modified, an action that is within the Commission's jurisdiction.

A. Statute Anticipates Sharing of Data with Local Governments

The LGSEC has made clear that local government policies and programs operate synergistically with state and federal laws. In some instances, local governments take actions that set the bar for state laws, for example, a few local governments adopted commercial building benchmarking ordinances, and then the State adopted AB 1103, a statewide benchmarking requirement. Now other local governments are determining strategies they will use to comply with AB 1103. The same synergy holds true for AB 32 and climate change policies, and a host of other issues.

One of the arguments put forward regarding restrictions on data that can be released is that Public Utilities Code Section 8380(e) prohibits the utilities from providing energy usage data to local governments and others unless under very specific orders from the CPUC.[2] This is based on a particular interpretation of the statute. A close reading of the statue identifies data about energy efficiency programs as data that should be shared. A close reading also reveals that what is prohibited is the use of data for a secondary commercial purpose *not related to the*

[2] See, for example, Opening Comments of Southern California Edison, p. 4-5.

primary purpose of the contract without the customer's prior consent to that use.[3] The statute anticipates the use of non-disclosure agreements when it refers to contracts that put the burden on the entity requesting the data that are "appropriate to the nature of the information."

Subsection (e)(3) makes clear that the Commission has the authority to require disclosure of information, citing "state or federal law *or* an order of the commission."

B. Local Governments Exempted Under California Civil Code

A key resource for parties to the Working Group has been a memo from the Samuelson Clinic at U.C. Berkeley and the Electronic Frontier Foundation on privacy laws. The memo lists some, but not all, of the exceptions for the authorization of an individual's personal information. Of note for situations where local governments require energy usage data, California Civil Code Section 1798.24 includes the following exemptions:

> d) To those officers, employees, attorneys, agents, or volunteers of the agency that has custody of the information if the disclosure is relevant and necessary in the ordinary course of the performance of their official duties and is related to the purpose for which the information was acquired.
>
> (e) To a person, or to another agency where the transfer is necessary for the transferee agency to perform its constitutional or statutory duties, and the use is compatible with a purpose for which the information was collected and the use

[3] Public Utilities Code 8380(e):
(2) This section *shall not preclude* an electrical corporation or gas corporation from disclosing a customer's electrical or gas consumption data to a third party for system, grid, or operational needs, or the implementation of demand response, energy management, or *energy efficiency programs*, provided that, for contracts entered into after January 1, 2011, the utility 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 prior consent to that use*.
(3) This section shall not preclude an electrical corporation or gas corporation from disclosing electrical or gas consumption data as required or permitted under state or federal law *or by an order of the commission*.
(emphasis added)

or transfer is accounted for in accordance with Section 1798.25. With respect to information transferred from a law enforcement or regulatory agency, or information transferred to another law enforcement or regulatory agency, a use is compatible if the use of the information requested is needed in an investigation of unlawful activity under the jurisdiction of the requesting agency or for licensing, certification, or regulatory purposes by that agency.

(f) To a governmental entity when required by state or federal law.

(h) To a person who has provided the agency with advance, adequate written assurance that the information will be used solely for statistical research or reporting purposes, but only if the information to be disclosed is in a form that will not identify any individual.

Local governments fall clearly within these exemptions.

C. The Existence of Franchise Agreements Creates an Expectation that Utilities Will Provide Energy Usage Data

Organizing energy supplies is the responsibility of cities and unincorporated areas of counties, which issue franchises to organize the delivery of these services for the public good. The investor-owned utilities provide service in cities and counties under franchise agreements, most of which were entered into many decades ago. Franchises were created to reduce chaos in the marketplace, keep each city's infrastructure organized and allow utility companies enough certainty to develop and execute long-term plans. Under franchise agreements, local governments grant the utilities the right to provide commodities and build out infrastructure, an extension of the public trust that is held by the local government.

Today, local governments' very different planning obligations demand a different, enhanced, and enlightened approach to transacting the franchise for energy data. Circumstances

have changed over the decades. Since these franchise agreements were executed, communities have faced supply shortages and begun confronting climate change. Greenhouse gas emissions reduction obligations to the community and the State are found in the housing element of our General Plans. Cities' Climate Action Plans are created to complement the California Environmental Quality Act. New, clearer language is necessary from the Commission; otherwise cities must look to the State legislature for ways to facilitate local government's essential climate action and resource conservation work possible. Utility customers are also constituents of government agencies who have a reasonable need for data associated with greenhouse gas emission reduction and resource conservation.

III. More Work Is Required to Develop a Standard Non-Disclosure Agreement

The Working Group report and the comments make clear that the parties have not yet reached agreement on a standard non-disclosure agreement. Even between the utilities there is not agreement. Any non-disclosure agreement developed for the purposes of providing energy usage data must be practical and usable. The non-disclosure agreement should be standard – parties should not have to negotiate a new agreement every time they need data. And, as the LGSEC stated in opening comments, the default option for non-disclosure agreements should be that they are standardized and automated, and parties can access them online.

The goal should be to facilitate the exchange of information, appropriately aggregated and anonymized, in pursuit of effective program design and implementation and achieving policy goals. The LGSEC is not aware of any party to this proceeding, including commercial interests, which has not stated its commitment to protecting customer privacy. The LGSEC would refer the Commission to the Opening Comments of Solar City, pp. 12-13, and the discussion there of the distinction between "what is possible" and "what is reasonable." The

Commission would be well-advised to look at the protections recommended by the Federal Trade Commission and referenced by Solar City.[4] The Commission also should consider consulting with the U.S. Department of Energy about protections in the DOE's Building Performance Database.

IV. Rules Governing Data Aggregation and Summation

Particularly in the context of Use Case 7, data needed for compliance with building benchmarking laws, several other parties agree with the LGSEC that the 15/15 rule is not appropriate for discussions of energy usage data. This includes San Diego Gas and Electric, which states on p. 8 of its opening comments:

> With respect to the second question, if it is determined that AB1103 disclosure does not constitute a "primary purpose," SDG&E requires further guidance on what level of aggregation is sufficient to "reasonably protect the confidentiality of the customer." The oft-cited "15/15" rule was not intended or designed for this purpose. Moreover, SDG&E believes that less that 5% of the buildings subject to AB1103 in SDG&E's service territory have the necessary number of tenants to make 15/15 aggregation possible, whether or not that level of aggregation is deemed to be sufficient to protect the confidentiality of the customer's PII.

The LGSEC and several other parties in their opening comments provided ideas for the Commission on alternatives to the 15/15 Rule. The LGSEC also provided information on how this issue is handled in other states. The Commission should provide clear direction that utilities must provide building owners with the sum of monthly energy use for the purpose of benchmarking in compliance a state or local mandate. This can be done by supplying the data to the building owner's Portfolio Manager account.

Additionally, specific to Use Case 1, it is worth remembering that one meter for commercial buildings and one meter for multifamily buildings that have more than five units is a reasonable standard for summing and disclosure to the building owner. If the energy usage data

[4] http://www.ftc.gov/os/2012/03/120326privacyreport.pdf

disclosure required under AB 1103 is to occur, buildings with a single tenant would necessarily be affected. Staff from both Southern California Edison and Pacific Gas & Electric estimate that using a 15/15 rule would allow aggregation and disclosure for less than five percent of commercial buildings, potentially less than two percent. AB 1103 is explicitly directed at all commercial buildings, so a 15/15 or stricter standard is radically out of line with the direction provided by the Legislature.

V. Program Participation Data

In our opening comments, the LGSEC informed the Commission that local governments are having difficulty obtaining information about prior customer participation in utility energy efficiency programs. This information is critical to local governments that are implementing partnership programs or Regional Energy Network programs.

PG&E, at p. 11 of its opening comments, makes the point that what is important is not so much whether a particular individual has participated in an energy efficiency program, but whether a particular address has participated. PG&E provides this observation in the context of low-income weatherization programs. However, the point holds true for other energy efficiency programs. The utilities track which addresses have participated in energy efficiency programs. This information should be provided to local governments and other entities that require this information to ensure a particular building does not "double dip" in terms of incentives or rebates in Commission-authorized energy efficiency programs.

VI. Conclusion

Conditions have changed since decades-old practices were implemented for data access. Local governments have essential planning and action responsibilities that rely on energy consumption and program participation data. The current language and practices are inadequate for today's circumstances. The Commission must compel data sharing that will further

California's energy and environment policies, with reasonable protections for privacy, as described in this and related filings in this docket by the LGSEC.

Respectfully submitted,

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