


Memorandum

Date: March 22, 2013
To: REGULATORY AFFAIRS
From: LAW – CHRISTOPHER J. WARNER

INTRODUCTION AND QUESTION PRESENTED



Per Energy Division's request, here is a preliminary analysis of the legal question on which PG&E seeks clarification from the CPUC regarding Marin Energy Authority's (MEA's) request for customer-specific SmartMeter energy usage data from PG&E for MEA's energy efficiency programs:

May PG&E provide MEA with customer-specific interval energy usage data without the consent of customers where the customers are not current customers of MEA for any purpose?

This legal analysis is preliminary and may be subject to change based on informal discussions with CPUC staff, including CPUC Legal Division. Please note that this legal question is narrow and does not cover the following types of customer data access for which PG&E understands there is no legal dispute between MEA and PG&E and no pending legal question for the CPUC to clarify: (1) Customer-specific energy usage data of existing Community Choice Aggregation (CCA) customers of MEA; (2) Customer-specific energy usage data of customers who have authorized MEA to access their private data generally; (3) Customer-specific energy usage data of customers who are energy efficiency customers of MEA and have authorized MEA to access their private data for purposes of providing energy efficiency services; (4) Electrical consumption data provided to MEA in order for MEA to implement CCA services to new CCA customers under CCA tariffs.

This legal question also does not cover MEA's obligations when it receives customer-specific energy usage data directly from its own customers, whether from existing CCA customers or existing energy efficiency customers. PG&E agrees with MEA that customer-specific energy usage data that MEA receives directly from its customers is protected directly by MEA under the CCA privacy rules adopted in D.12-08-045, and PG&E will not be "auditing" MEA's compliance with the CCA privacy rules regarding this energy usage data.

DISCUSSION

The sole legal question needing clarification is what are PG&E's obligations under the California Constitution, Public Utilities Code and CPUC privacy rules if MEA requests customer-specific energy usage data relating to *PG&E electric or gas customers who are not currently customers of MEA for any MEA services and have not expressly authorized MEA to access their customer-specific energy usage data.*

The answer to this legal question requires review of three related California legal requirements on privacy.

First, Article I, section 1 of the California Constitution establishes the over-arching legal

standard that each citizen has a constitutional “right to privacy.” This constitutional standard applies broadly to protect every citizen’s reasonable expectation of privacy, and therefore PG&E is obligated to take this constitutional right into account whenever it considers disclosing personal information about its customers to third-parties, including to governmental entities such as MEA.

Second, in 2010, after PG&E and other energy utilities had begun implementing so-called “Advanced Metering Infrastructure” (“AMI”) or “SmartMeters” that collect interval data about their customers’ energy usage, the Legislature enacted SB 1476 (Padilla) to impose additional privacy restrictions on disclosure of customer energy usage data collected by PG&E and other utilities using AMI. Public Utilities Code 8380, enacted by SB 1476, prohibits PG&E and other energy utilities from disclosing to any third-party any customer energy usage data collected by the utility’s AMI system, except if (1) the customer consents to the disclosure, or (2) the disclosure is for the purpose of providing utility services, such as utility operations or demand response, energy management or energy efficiency programs, or (3) the disclosure is required or permitted under state or federal law or a CPUC order. (Public Utilities Code Section 8380(e).)

Public Utilities Code Section 8380(e)(2) also expressly requires PG&E, if it is disclosing customer energy usage data for purposes of an “energy efficiency” program, to require that the third party “by contract...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.” Separately, Public Utilities Code Section 8380(d) requires PG&E and other energy utilities to use “reasonable security procedures and practices to protect a customer’s unencrypted electrical or gas consumption data from unauthorized access, destruction, use, modification, or disclosure.”

Under these Public Utilities Code Section 8380 requirements, PG&E routinely performs “third part security reviews” of the privacy and security controls and programs of its third party contractors, including local governments partnering with PG&E to offer energy efficiency services to customers. For example, the County of Marin, a member of MEA, completed its third party security review as part of its “local government partnership” energy efficiency contract with PG&E. Similarly, PG&E and the Association of Bay Area Governments (ABAG) recently completed negotiation of a standardized contract to use for “Regional Energy Network” energy efficiency programs conducted by local governments, and the standard contract terms include privacy and security requirements if the local REN governments wish to access customer energy usage data to implement their energy efficiency programs.

The third legal requirement that needs to be taken into account is CPUC D.11-07-056 adopting privacy rules applicable to the collection, use and disclosure of customer energy usage data by PG&E and other energy utilities. The privacy rules in D.11-07-056 implement the requirements of Public Utilities Code Section 8380, but also go further in generally

implementing in California public utility regulation the Fair Information Practice Principles, a comprehensive set of “best practices” recognized nationally and internationally for protecting privacy and information security.

The specific D.11-7-056 privacy rules most relevant to the MEA legal question are Rules 1(c) and 6(c). Rule 1(c) includes as “primary purposes” for disclosure of customer energy usage data the following activities: (1) “energy efficiency programs under contract with an electrical corporation, under contract with the Commission, or as part of a Commission authorized program conducted by a governmental entity under the supervision of the Commission.” In turn, Rule 6(c)(1) provides that PG&E and other energy utilities “may” (but not required to) disclose customer energy usage data “without customer consent...to a governmental entity for the purpose of providing energy efficiency or energy efficiency evaluation services pursuant to an order or resolution of the Commission.” Thus, Rule 6(c)(1) permits, but does not require, PG&E to disclose customer energy usage data to a “governmental entity” (e.g. MEA) without customer consent “pursuant to an order or resolution of the Commission” (e.g. the CPUC energy efficiency decision and resolution authorizing MEA’s energy efficiency program.)

Notably, Rule 6(c)(1) specifies no terms or conditions under which PG&E may disclose customer energy usage data to a governmental entity. However, D.11-07-056 itself describes how the CPUC intends to deal with access to energy usage data by governmental entities in situations not covered by the Privacy Rules:

“To the extent other governmental entities, such as the California Energy Commission or local governments, may seek [customer energy usage data] in a manner not provided in these rules, the Commission will determine such access in the context of the program for which information is being sought absent specific Legislative direction. ... Firms and government agencies provide energy programs pursuant to Commission authorization who received [customer energy usage data] from the utilities are subject to these rules unless specifically exempted by the Commission or by law.”

(D.11-07-056, pp. 47- 48.) Public Utilities Code Section 8380(e)(2) provides “specific Legislative direction” in that it requires a utility to contractually apply “reasonable security procedures and practices” to any third party which receives customer energy usage data for implementation of “energy efficiency programs.” Moreover, the CPUC energy efficiency decision and resolution do not expressly permit or authorize PG&E to share customer energy usage data with MEA for purposes of MEA’s energy efficiency programs, and therefore there is no Commission order or state or federal law “requiring or permitting” disclosure to MEA on which PG&E can rely under the alternative authority in Public Utilities Code Section 8380(e)(3). (See D.12-11-015; CPUC Resolution E-4518.)

In this situation, in the absence of an express order of the Commission authorizing PG&E to disclose customer energy usage data to MEA without contractual privacy protections, it may be useful to consider the Fair Information Practice Principles (FIP Principles) and what a reasonable customer would expect regarding protection of their privacy. Among the FIP

principles included in D.11-07-056 are two threshold principles that utilities are expected to follow: (1) **Individual Participation**, under which PG&E's customers themselves can choose whether to disclose their customer energy usage data to a third party; and (2) **Purpose Specification**, under which PG&E's customers should be fully and currently informed regarding the purposes for which their energy usage data may be used, before the data is disclosed without their consent for the purpose of PG&E utility services or programs.

These two FIP principles align with the likely reasonable expectations of two different categories of PG&E customers subject to MEA's request for customer data:

(1) PG&E customers who are already existing customers of MEA for either CCA or energy efficiency services: These customers should reasonably expect that PG&E would disclose their current energy usage data to MEA without their consent in order for MEA to continue serving them, as long as PG&E or MEA has specified the purpose to them in advance;

(2) PG&E customers who are *not* current customers of MEA for either CCA or energy efficiency services, such as PG&E's gas customers or PG&E's electric customers who have "opted out" of MEA CCA service: These customers, who have no current relationship with MEA and are currently obtaining no current services from MEA, should reasonably expect that PG&E will *not* disclose their energy usage data to MEA unless PG&E obtains their consent or PG&E is contracting with MEA to provide utility programs or services to those customers under terms and conditions that protect the privacy of their customer energy usage data.

CONCLUSION

Based on this legal analysis, PG&E has offered to MEA two options for accessing the energy usage data of PG&E's customers for MEA's energy efficiency program, without the need for customer consent:

(1) Enter into a contract with PG&E under Public Utilities Code Section 8380(e)(2) solely for the purpose of ensuring that MEA provides reasonable privacy and security controls to protect the customer energy usage data from unauthorized use and disclosure; or

(2) Obtain a CPUC order or resolution authorizing PG&E to disclose to MEA the energy usage data of gas and electric customers who are not currently customers of MEA, and expressly exempting PG&E from any legal requirement to protect from unauthorized use or disclosure that customer energy usage data.

PG&E has recommended the first option to MEA as more efficient and more consistent with the CPUC's privacy rules, the Fair Information Practice Principles and the expectations of customers. However, PG&E seeks clarification on the legal issue presented in this memorandum in order that it and MEA may move forward to share the customer energy usage data consistent with the Commission's legal interpretation and guidance, and also consistent with the reasonable privacy expectations of PG&E's customers.

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