

**BEFORE THE CALIFORNIA ENERGY COMMISSION**

California Energy Commission

**DOCKETED**

**14-EUDP-01**

TN # 75329

MAR 06 2015

In the matter of:

Nonresidential Building Energy Use Disclosure  
Program

California Code of Regulations, Title 20, Sections  
1680 through 1684

Docket No. 14-EUDP-01

**COMMENTS OF THE NATURAL RESOURCES DEFENSE  
COUNCIL ON PROPOSED CHANGES TO REGULATIONS FOR  
THE NONRESIDENTIAL BUILDING ENERGY USE DISCLOSURE PROGRAM**

**March 6, 2015**

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## **I. INTRODUCTION**

The Natural Resources Defense Council (NRDC) respectfully submits these comments on the California Energy Commission's proposed changes to the *Nonresidential Building Energy Use Disclosure Program*. NRDC is a non-profit membership organization, representing nearly 80,000 California members with an interest in receiving affordable energy services and reducing the environmental impact of California's energy consumption. These comments are provided in support of NRDC's position that electricity and gas customers and the environment will be well served by the California Energy Commission (CEC or Commission) providing a process for utilities to deliver information to building owners about the energy usage of their buildings, at least sufficient to engage in basic energy management and the monthly benchmarking required under AB 1103.

## **II. SUMMARY**

AB1103 was enacted in 2007 and is codified at Section 25402.10 of the California Public Resources Code. AB 1103 requires electric and gas utilities to deliver energy usage information to building owners, thereby enabling owners to track the energy use of their property and compare to other properties. Section 1 of the Act declares the Legislature's findings and what must be understood as the purpose of the legislation: "Facilitating a benchmarking system that provides energy consumption information for all nonresidential buildings in the state would allow building owners and operators to compare their building's performance to that of similar buildings and to manage their building's energy cost." AB1103 also requires building owners to disclose certain energy-related information in purchase and lease transactions.

The California Energy Commission, under the authority granted in the California Public Resources Code and as directed by AB 531, began a proceeding to revise regulations to implement the requirements of Section 25402.10. The Commission published the proposed regulations February 10, 2015 for consideration at a workshop held February 20, 2015. The proposed regulations are drafted as Sections 1681 to 1685 of California Code Regulations, Title 20, Division 2, Chapter 4, Article 9 (the "Proposed Regulations").

We appreciate this opportunity to provide the Commission with our comments on the Proposed Regulations. In summary, our comments and recommendations include:

- 1. We strongly encourage the Commission to make clear in the Proposed Regulations that the requirement for utilities to deliver energy usage information to building owners, stated in 25402.10(b), is not conditioned on a building owner having a pending or imminent transaction that will trigger the owner’s obligation to disclose certain information under Section 25402.10(d)(2). Any final regulations should state that building owners may make a request for whole-building usage information at any time.**
- 2. We recommend the Commission either define the phrase “tenant energy use data,” found in Proposed Regulations Section 1683(b), or if used inadvertently, change the phrase to refer to whole building usage information as delivered by a utility under Section 25402.10(b).**
- 3. AB 1103 expressly permits a building owner to use whole-building energy usage information obtained from a utility under Section 25402.10(b) for the purpose of energy management, benchmarking, and for routine operation of the owner’s building. The Commission’s Regulations should make clear that owners may use the information for these purposes.**
- 4. We encourage the Commission to further develop the rulemaking record as to facts on the level of risk of identifying the usage of a specific tenant from an aggregated sum of monthly usage information.**
- 5. We encourage the Commission to find there is a reasonable basis for different standards for preserving customer confidentiality when delivering information to a building owner as opposed to sharing information with the general public or other parties.**
- 6. We encourage the Commission to define terms and conditions that apply to utility delivery of whole building usage information to building owners with heightened confidentiality concerns.**
- 7. We encourage the Commission to make a finding of fact as part of any decision or prior to any decision, that delivery of whole-building energy usage information to a building owner, subject to the kinds of terms and conditions set forth above, preserves the privacy and confidentiality of included customers.**
- 8. The process utilities use to enable owners to obtain information is very important – a cumbersome paper-based, and lengthy processes with the utility would be a significant impairment of the “right” to obtain the information under Section 25402.10(b).**

### III. COMMENTS

- 1. We strongly encourage the Commission to make clear in the Proposed Regulations that the requirement for utilities to deliver energy usage information to building owners, stated in 25402.10(b), is not conditioned on a building owner having a pending or imminent transaction that will trigger the owner's obligation to disclose certain information under Section 25402.10(d)(2). Any final regulations should state that building owners may make a request for whole-building usage information at any time.**

The CEC's Proposed Regulations at Section 1684 could be read to imply that a utility is only required to deliver energy usage information to a building owner in connection with a transaction in which the owner must disclose the information to others according to proposed section 1683. That would be an incorrect reading of AB 1103. It would contradict the plain language of the Act and it would thwart the stated legislative purpose of the Act by substantially impairing the ability of building owners to manage the energy use of their valuable assets. It would also cause utilities to devote resources to a process to verify whether an owner had a pending or imminent transaction.

In California Public Resources Code Section 25402.10(b), utilities are directed to deliver whole-building energy usage information to building owners' Portfolio Manager accounts upon request. Paragraph (d) of 25402.10 states the building owner's obligation to share certain information in certain transactions. This legislative directive for utilities to deliver information to building owners is stated in paragraph (b) simply and with clarity. The Act does not suggest that owners may only request information in preparation for a prospective transaction. The Act does not tie the utility's obligation to deliver information to the owner having an imminent disclosure obligation. Nothing in 25402.10(a), (b), or (c) references the building owner's obligations to share the information in a potential transaction.

Nothing in paragraph (d) (describing the owner's obligation to share information in a transaction) suggests or implies that the obligation on utilities to deliver the information to owners (stated in the preceding paragraphs (a), (b), and (c)) is limited to or somehow tied to the owner's disclosure obligation. Nothing in paragraph (d) requires the owner to use the information only for transactional disclosure, and nothing in the text imposes any limits on the owner's use of the information for the purpose of building operations, or any other purposes.

Section 1 of AB1103 states legislative findings and declares that obtaining energy usage information and benchmarking will enable owners and operators to "manage their building's

energy cost.” No sentence could be clearer about the Legislature’s intention for building owners to have the information to use in their routine operational decisions. Section 1 of AB 1103 continues, “Benchmarking scores could motivate building operators to take actions to improve the building’s energy profile.” Again, this sentence plainly indicates the Legislative intention for building owners and operators to use the information in the operation of the building. Nothing in Section 1 references the owner’s disclosure obligations. There is a strong basis to conclude that the central purpose of AB1103 is to require utilities to deliver information to building owners to enable benchmarking and energy management, and that the transactional disclosure requirement of paragraph (d) is ancillary.

One must also consider that the legislature specifically directed owners to use the EPA Portfolio Manager system (“PM”). For the transactional disclosure, the legislature could have, but did not, direct owners to disclose the underlying energy usage information obtained from a utility. An essential function of PM is to track usage over time, to give the building owner information to improve the building score, and to support operational decisions.

It is an uncomplicated matter of legislative drafting to make the utility’s obligation to deliver energy usage information to an owner tied to or triggered by the owner having a purchase agreement or lease application. It is also uncomplicated to state that the owner may only use the information delivered by the utility for the purpose of disclosure. The California legislature did neither in AB 1103. The CEC should not fabricate any such conditions and should protect against any such misreading of the Proposed Regulations.

**2. We recommend the Commission either define the phrase “tenant energy use data,” found in Proposed Regulations Section 1683(b), or if used inadvertently, change the phrase to refer to whole building usage information as delivered by a utility under Section 25402.10(b).**

Section 25402.10(b) requires utilities to deliver whole-building energy usage information to building owners. Nothing in section 25402.10 requires utilities to deliver tenant-specific energy usage information to a building owner. A whole building sum is not “tenant energy use data.” To the extent an owner has or obtains energy usage information of specific tenants, it is likely governed by the terms of a contract between the parties, such as a lease agreement or a separate disclosure agreement.

**3. AB 1103 expressly permits a building owner to use whole-building energy usage information obtained from a utility under Section 25402.10(b) for the purpose of energy management, benchmarking, and for routine operation of the owner’s building. The Commission’s Regulations should make clear that owners may use the information for these purposes.**

Proposed Regulation 1683 (b) states that an owner may only use whole-building energy usage information obtained under section 25403.10 for purposes of “compliance with P.R.C. Section 25402.10.” The Commission should make clear that an owner may use the information in its routine management and operation of the building, subject to terms and conditions related to sharing the information with outside parties.

To the extent the use restriction in 1683(b) is intended to protect for the confidentiality of included customers, the Commission should consider replacing it with more narrowly tailored provisions, specifically: (i) a provision that restricts when and how an owner may share the information with outside parties. Non-disclosure obligations of recipients of customer information are a key method of preserving customer confidentiality. And, (ii) a provision restricting owners from using the whole building summary for the purpose of discerning a specific tenant’s usage.

As drafted, proposed Section 1683 (b) appears open to being read to limit the owner’s use of the information to compliance with the disclosure obligations of Section 25402.10(d). AB 1103 does not require a building owner to use energy usage information to better manage its building, but the Act expressly permits it. The Commission’s regulations should also expressly permit it.

The purpose of AB1103 is stated in the Act: to enable owners to obtain energy usage information to better manage the energy use in the building. Section 1 of AB 1103 states that providing owners with energy usage information that enables benchmarking “would allow building owners and operators...to manage their building’s energy cost.” [emphasis added]. It is difficult to imagine a clearer or more conclusive authorization for owners to use whole-building energy usage information obtained under the Act in the operation and management of their buildings.

There is no language in the text of AB 1103 (Section 25402.10) even suggesting that building owners and operators may not use whole building usage information, or benchmarking information, obtained from the utility for any purpose, including the management and operating of their building. Consider again that the legislature specifically directed owners to use the EPA

Portfolio Manager (PM) system. The Legislature could have, but did not, direct owners to obtain the underlying monthly energy usage information and disclose that to the prospective purchaser, allowing the purchaser or lessee to make sense of it. The Legislature did not do this. A key function of PM is to enable the owner to track usage over time and to give the building owner information to improve the building score.

The CEC should not create a major limitation on the owner or operator's use of energy usage information that is not supported by any language of the Act and is expressly contrary to the purpose of AB 1103. The California Legislature was aware of the privacy and confidentiality issues that might be raised by enabling a building owner to obtain whole-building energy usage information. This is clear from the inclusion of the phrase in paragraph (b) "...in a manner that preserves the confidentiality of the customer." The legislature opted to not establish limits on how an owner uses the information delivered by a utility, but instead directed the parties to implement terms and conditions on sharing that are consistent with implementing the other terms of the Act.

**4. We encourage the Commission to further develop the rulemaking record as to facts on the level of risk of identifying the usage of a specific tenant from an aggregated sum of monthly usage information.**

In this proceeding and in other California proceedings on similar subjects, some stakeholders have raised the possibility that a building owner who receives whole-building usage information for a multi-tenant building would somehow be able to identify the usage of a specific customer within the building.

Our understanding of the facts strongly suggests this concern is a remote, theoretical risk. It appears to be very difficult if not practically impossible for a building owner to identify the electricity or gas usage of a single tenant from a monthly total usage -- number of kilowatt hours or therms occurring in a building -- aggregated of multiple tenants.<sup>1</sup> The only use case where the risk is a practical concern appears to be a building with a single tenant and one meter other than the owner's meter.

Nonetheless, it is essential that the Commission and all stakeholders take all customer confidentiality concerns very seriously. First, the text of AB 1103 requires that processes to deliver whole building information to building owners occurs "in a manner that preserves

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<sup>1</sup> See report of EFF.

customer confidentiality.” Second, utility companies have an exceptional record of protecting customer privacy.<sup>2</sup> We fully support a rulemaking process, development of a factual record, and final rules that will enable utilities to maintain their position of trust with their customers on this subject matter.

Perhaps the most instructive facts are to be found in the natural experiments being run by utilities in other states – many utilities have for several years delivered whole building usage information to owners of buildings using different “thresholds” for the minimum number of accounts.<sup>3</sup> We are aware of no reports of meaningful problems related to customer confidentiality. We encourage the Commission to examine and report on the results. The purpose of these facts is not to explore the legal basis for any other utility’s reporting function, or the law in other states, but rather to understand if any facts suggest that customer confidentiality has not been preserved by delivering whole-building usage information to building owners.

One recent report from Pacific Northwest National Laboratory appears to have tested one’s ability to guess or estimate the “shape” of a tenant’s annual usage profile (that is, the curve made up of 12 individual monthly usage totals) by simply assuming a tenant’s usage profile curve is the same as the shape of the building’s annual usage curve made up of 12 monthly totals.<sup>4</sup> Our reading of the report suggest there are two important caveats to recognize. First, the research did not test whether the actual usage in kilowatt hours or therms of any tenant/customer could be discerned. Rather the research simply looked at the “shape” of the curve of specific tenants and whether it is “similar to” the shape of the curve of the whole building. Second, the research did not report any way a user (such as a building owner) could validate whether the guess was correct or close to correct.

In Comments submitted to the Commission in July, 2014, PG&E suggested that the President’s Council of Advisors on Science and Technology made a negative conclusion about “aggregation and anonymization techniques.” In the underlying report cited, however, the Council was referring ONLY to “anonymization” techniques where a data set about an

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<sup>2</sup> Reports of major data breaches and enforcement actions in recent years for privacy violations do not appear to indicate a pattern among utility companies. See, for example, reports of the Privacy Rights Clearinghouse, maintained on [www.privacyrights.org](http://www.privacyrights.org).

<sup>3</sup> For example, we understand that Consolidated Edison in New York delivers whole building usage information to owners of commercial and multifamily office buildings with 2 or more tenant accounts and Commonwealth Edison in Chicago for buildings with 4 or more.

<sup>4</sup> Livingston, et al., Commercial Building tenant Energy Usage Data Aggregation and Privacy, Pacific Northwest National Laboratory, October, 2014.

individual would be made available without a name or other identifying information.<sup>5</sup> It was not a reference to the kind of aggregation techniques in use in the present rulemaking.

Nothing in the record suggests there is any practical risk a building owner could “disaggregate” a monthly total kilowatt hours or therms to identify the usage of a particular tenant.

**5. We encourage the Commission to find there is a reasonable basis for different standards for preserving customer confidentiality when delivering information to a building owner as opposed to sharing information with the general public or other parties.**

Several important facts strongly suggest building owners are in a unique position with regard to whole-building energy usage information. These facts mean that customers who are tenants or occupants in the owner’s building do not endure any loss of confidentiality when owners obtain a whole building usage total.

First, an owner of a building is likely to have access to the meters for the building directly, enabling manual readings that would indicate monthly, or even daily, usage. In other words, in most cases they already could determine a tenant’s usage information without requesting a whole building summary from the utility and employing sophisticated “disaggregation” techniques.

Second, a building owner already has a contractual relationship with the tenant through a lease or occupancy agreement. In most cases, the owner is likely to have direct access to the building premises. In some cases, an owner may be able to install equipment to measure tenant usage directly. These facts further bolster the conclusion that a whole-building usage summary is unlikely to convey information about any tenant that the owner could not obtain in another way.

Third, building owners can be subject to processes to further reduce confidentiality risks, such as agreeing to terms of use for the information, and making any requests in a manner that is recorded by the utility.

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<sup>5</sup> See President’s Council of Advisors on Science and Technology, Report to the President. Bid Data and Privacy: A Technological Perspective, May, 2014. (Discussion at pages 38-39)

**6. We encourage the Commission to define terms and conditions that apply to utility delivery of whole building usage information to building owners with heightened confidentiality concerns.**

Section 25402.10(b) states electric and gas utilities “shall upload all of the energy consumption data for the account specified for a building...in a manner that preserves the confidentiality of the customer.” The statutory language shows the legislature was aware of the privacy questions that have been raised in connection with delivery of whole building usage information to building owners. The legislature did not include any exemptions in AB 1103, such as limiting a utility’s obligation to deliver usage information to buildings with more than a certain number of separate accounts. Instead, the legislature specifically directed utilities to deliver whole building usage information to owners, and in AB 1103 emphasized that the manner of delivery can protect customer confidentiality.

To provide greater assurance to stakeholders that customer confidentiality is preserved, the Commission should explore terms and conditions that could be applied to building owner requests for whole-building usage information for buildings with 3 or 4 or fewer accounts. Doing so should remove any reasonable argument that customer confidentiality is not fully preserved. For example:

- (i) A one-time registration process for the owner, including the building owner accepting a “terms of use” document in which the owner agrees to:
  - a. Not share the monthly energy usage information with any outside party, other than as directed by Section 25402(d), without the authorization of all included tenants.
  - b. Not use the information for any purpose other than customary building operation and management unless the owner obtains permission from all included tenants to do so.
  - c. Restrictions on use of information would not apply to disclosures required under section 25402.10 or on sharing the building’s Energy Star score.
- (ii) Utility delivery of an annual notice to all included customers indicating that their information is included in a whole building total delivered to the building owner.

One option is to direct utilities to implement a policy consistent with the above terms within a certain period. In addition, the Commission should consider directing utilities to develop a process applicable all requests for whole-building usage information (i.e., for any building), including:

- (i) A mechanism to reasonably assure the requesting entity is the building owner, such as information already obtained for the “owner’s meter” account, or matching supplied information with records of property tax office.
- (ii) Keeping a record of the request and delivery of whole building usage information to the requesting entity.

For situations where delivering whole building usage information is the effective equivalent of delivering a tenant’s usage information, such as a building with a single customer account other than the owner’s account, the Commission should consider expressly requiring the owner to obtain the tenant/customer’s permission to obtain the whole-building usage information.

**7. We encourage the Commission to make a finding of fact as part of any decision or prior to any decision, that delivery of whole-building energy usage information to a building owner, subject to the kinds of terms and conditions set forth above, preserves the privacy and confidentiality of included customers.**

Utilities must be provided with regulatory certainty for delivering whole building usage information to building owners. Providing utilities and their customers with greater certainty about confidentiality and privacy will aid all stakeholders. There is a strong basis in fact for a conclusion that customer confidentiality and privacy is preserved, and is not compromised or impaired, by delivering whole building usage information to building owners in the manner described here. Second, it would be difficult for any individual (such as a building owner) to use a whole building monthly total energy use (e.g., 20,000 kwh) to identify the usage of any individual customer.

To the extent that there are very limited fact-patterns where an owner might deduce a specific tenant’s usage from a whole-building total (such as in a building with one meter in the tenant’s name, in addition to any meter or meters in the owner’s name), we suggest the Commission address these specific instances with additional terms and conditions as set forth above. There is no evidence in the record, or that we are aware of, showing how any individual customer’s identity and utility usage could be determined by unravelling the total whole building usage for aggregated meters.

Some have argued that a building owner might make a better guess at a tenant’s usage levels by having the whole-building total. This is unpersuasive for the reasons stated above – a building owner already has information that would enable a reasonable guess at a tenant’s

monthly usage, including square footage of the leased space, the configuration of heating and cooling, occupancy, the presence of energy-intensive equipment in the premises, number of computers, and more. There is no evidence that a whole-building total gives the building owner any greater ability to discern a tenant's usage totals.

In sum, allowing building owners to obtain a whole building usage sum does not diminish included customers' confidentiality or privacy. To the extent that one identifies specific fact patterns that deserve additional attention (such as in buildings with one customer account other than the owner), customer privacy can be protected with additional terms and conditions as set forth above, such as requiring owners of those buildings to obtain customer permission.

**8. The process utilities use to enable owners to obtain information is very important – a cumbersome paper-based, and lengthy processes with the utility would be a significant impairment of the “right” to obtain the information under Section 25402.10(b).**

We encourage the Commission to include in its rules terms establishing the Commission's expectation that utilities will work with building owners and operators to implement processes to deliver whole building usage information that are consistent with information exchange processes used in commercial transactions, such as by using electronic “signatures” and acceptances, not requiring manual approval processes, and reasonable fulfillment time periods.

#### **IV. CONCLUSION**

The Bill Analysis accompanying AB 1103 states: “benchmarking will allow building owners and managers to compare their buildings' energy efficiency performance in two ways: against the performance of similar buildings, and as a baseline to demonstrate changes in building performance over time. This tool will not reduce energy use; its purpose is to inform building managers about energy performance and to motivate them to make their buildings more energy efficient. It can also help establish investment priorities to take advantage of energy efficiency opportunities.”<sup>6</sup> NRDC appreciates the opportunity to offer these comments on the Commission's proposed regulation changes and encourages the Commission to consider the legislative intent and plain language of AB 1103, as elaborated on above, in addition to the

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<sup>6</sup> California Bill Analysis, A.B. 1103 Assem., 3/29/2007.

Governor's ambitious energy goals to double the amount of energy efficiency savings currently being achieved in order to reduce greenhouse gas emissions.

Dated: March 6, 2015

Respectfully submitted,

A handwritten signature in cursive script that reads "Maria Stamas". The signature is written in black ink and is positioned to the right of the date.

PHILIP HENDERSON

MARIA STAMAS

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