



M E M O R A N D U M

June 6, 2014

TO: CEUD WORKGROUP

FROM: ANDREW P. MORATZKA, SARA E. BERGAN

RE: Comments on May 16th Meeting and May 21st Telephone Discussion: PUC
Docket No. CI-12-1344

The Minnesota Large Industrial Group (“MLIG”), a continuing ad hoc consortium of large industrial end-users of electricity in Minnesota spanning multiple utilities and functioning to represent large industrial interests before regulatory and legislative bodies, submits the following thoughts in response to the discussion held at the May 16th customer energy usage data (“CEUD”) Workgroup meeting regarding liability and cost recovery, as well as the May 21st telephone conversation focused on a centralized CEUD repository (“Energy Data Center”).

I. INTRODUCTION

The MLIG appreciates the time and investment spent by all parties in the CEUD Workgroup. Since early fall of last year, the meetings have helped define the potential opportunities and challenges of increased CEUD sharing in Minnesota. The most recent proposal raised in the CEUD Workgroup is the creation of an Energy Data Center for Minnesota. Independent of any conclusion as to the merits of an Energy Data Center, the MLIG is still struggling to understand exactly how this data center would be structured and managed such that we can offer useful comments. While it was extremely helpful to have the City of Minneapolis submit a written comment after the last meeting detailing its proposal (the “Minneapolis Memo”), the MLIG simply believes that there has been insufficient time and attention paid to the

idea to even know whether workgroup participants are reacting to a relatively similar idea of an Energy Data Center.

We understand it is tempting to look to California's decision to utilize an Energy Data Center as a starting point for creating one in Minnesota. But the MLIG would prefer to back up and look a little closer before we leap. The following comments are simply initial thoughts based on the limited discussion thus far. The comments begin by questioning some potential assumptions the workgroup may be making in its significant turn toward the Energy Data Center concept and then go on to offer a few thoughts on the limited pieces of information it has on the general idea. It also addresses some of cost recovery and liability issues discussed at the last workgroup meeting. The MLIG reserves the right to offer additional comments on these subjects as parties' positions materialize and more information becomes available.

II. COMMENTS ON CALIFORNIA

A. **The Process for Developing a Data Center in California was the Result of Extensive Analysis over an Extended Period of Time Under a Specific Grant of Authority**

In August, 2012, a scoping memo and ruling began the California process of workshops and public comments focused on an Energy Data Center. Not quite two years later, the California Public Utilities Commission ("CPUC") issued a final decision which this group has looked to for guidance. The CPUC's May 2014 *Decision Adopting Rules to Provide Access to Energy Usage and Usage-Related Data While Protecting Privacy of Personal Data* ("California Decision") began by addressing the CPUC's jurisdiction to adopt rules regarding CEUD and involving an Energy Data Center. The MLIG appreciates the jurisdictional discussion in the California Decision and believes it is important to at least consider the overarching regulatory context in which such decisions can be made because it varies so greatly from state to state. We noted this in our March 2014 comment in this docket addressing questions of authority and jurisdiction but necessarily bring it up again as workgroup participants continue to look to California as a model for what we could or should do here in Minnesota.

Although the MLIG fully supports learning from first or early-adopters, it also believes it is unwise to draw upon the final details or outcome of a process without fully appreciating or understanding the larger context in which that detail evolved. That said, the MLIG also understands that consideration of all of the similarities and differences between the regulatory framework in Minnesota and California may not be practicable or functional. Far from an exhaustive review of the two regulatory frameworks, the discussion here aims to at least highlight some of the high-level similarities and differences such that they may inform our workgroup's deliberation on the use of an energy data center.

As an initial matter, MLIG takes note that the California process involved years of focused research, discussion and analysis on the topic of CEUD and the potential for a centralized data center. It also notes that the state began by taking a cautious approach until more was understood and by strictly limiting the release of data without consent except for a few very specific circumstances.¹

Beyond what appears to have been a fairly thorough and cautious process initially, California's regulatory framework that gives rise to the California Decision is different to that in Minnesota and should be at least taken into account. The two states, for example, have taken dramatically different approaches to electrical restructuring. Minnesota continues to be a system of highly regulated monopolies whereas California has a substantially restructured electric market. Furthermore, the general grant of authority by the California legislature to the CPUC to regulate public utilities remains broader than that in Minnesota. The California Public Utilities Code, Section 701 grants the CPUC authority to "supervise and regulate" every public utility and to do "all things, whether specifically designated in this part or in addition there to, which are necessary and convenient in the exercise of such power and jurisdiction." By contrast, the Minnesota Public Utilities Commission ("MPUC") is vested with the "powers, rights, functions, and jurisdiction" to regulate in accordance with the Public Utilities Act of 1974 whereby the Legislature found it in the public interest to regulate utilities in order to provide consumers with

¹ California Senate Bill 1476 (2010), Chaptered in the California Pub. Util. Code §8380 ("This bill would prohibit an electrical corporation or gas corporation from sharing, disclosing, or otherwise making accessible to any 3rd party a customer's electrical or gas consumption data, as defined, except as specified, and would require those utilities to use reasonable security procedures and practices to protect a customer's unencrypted electrical and gas consumption data from unauthorized access, destruction, use, modification, or disclosure.")

“adequate and reliable services at reasonable rates. . .”² The grant of authority to the MPUC is broad with respect to public utilities, but remains closely linked to the *service* utilities provide to customers.³

Both states have prioritized energy efficiency and renewable energy in state policy, utility resource planning and facility permitting. There are surely differences in degree and approach that may be interesting to consider, but that would require more a more detailed analysis than is probably warranted at this time or by this memo.

Likewise both states have comprehensive data practices acts that add an additional layer of complexity to the regulatory framework in each state. The California Decision cited its Information Practices Act of 1977⁴ in determining the California Commission had authority to order the transfer of CEUD to certain requestors. Likewise the Minnesota Government Data Practices Act (“DPA”)⁵ will certainly inform any handling and data exchange involving Minnesota state agencies. The Minnesota DPA, for example, includes a set of provisions for energy and utilities data and provides that CEUD of “individual business customers of a public utility” is nonpublic data.⁶

Similarly and in each case the legislature has directed a state agency to collect energy statistics from public utilities for the purposes of sharing with other state agencies.⁷ In the case

² MINN. STAT. §216B.01 (“It is hereby declared to be in the public interest that public utilities be regulated as hereinafter provided in order to provide the retail customers of natural gas and electric services in this state with adequate and reliable services at reasonable rates, consistent with the financial and economic requirements of public utilities and their need to construct facilities to provide such services or to otherwise obtain energy supplies, to avoid unnecessary duplication of facilities which increase the cost of service to the consumer and to minimize disputes between public utilities which may result in inconvenience or diminish efficiency in service to the consumers. Because municipal utilities are presently effectively regulated by the residents of the municipalities which own and operate them, and cooperative electric associations are presently effectively regulated and controlled by the membership under the provisions of chapter 308A, it is deemed unnecessary to subject such utilities to regulation under this chapter except as specifically provided herein.”)

³ See Minn. Stat. §216B.09, subd. 1 (“The commission, on its own motion or upon complaint and after reasonable notice and hearing, may ascertain and fix just and reasonable standards, classifications, rules, or practices to be observed and followed by any or all public utilities with respect to the service to be furnished.”); Please also see MLIG Comment filed March 14, 2014.

⁴ Codified in Cal. Civ. Code §1798.

⁵ Codified in Chapter 13 of the Minnesota Statutes.

⁶ MINN. STAT. §13.68

⁷ In California, the California Energy Commission is vested with this authority under the California Public Resources Code §§25216. In Minnesota, the Department of Commerce is directed to collect and maintain energy statistics pursuant to Minn. Stat. §216C.17.

of Minnesota, that agency is the Department of Commerce and so “that the *state* may coordinate and cooperate with other governmental data collection and record-keeping programs.”⁸ It has recently come to the attention of the MLIG that the Department may be broadcasting nonpublic information in its Minnesota Utility Data Book in violation of the DPA.⁹ In California, the CPUC appears to have made determinations about how the Information Practices Act affected the CEC’s ability to share data it collected. In Minnesota, the Department must adhere to the DPA and ensure that nonpublic data is not released publicly (including CEUD), but it is not clear that a decision by the MPUC on aggregation thresholds for CEUD would necessarily reach the Department’s activities under Minn. Stat. §216C.¹⁰ Thus the MLIG remains concerned that a thorough assessment of jurisdiction and authority be done under Minnesota law as it pertains to CEUD sharing and aggregation thresholds. Until that analysis is complete, the MLIG respectfully requests that the ALJ’s report encourage the Department to (i) limit the use of energy statistics to coordinated efforts with other State agencies and (ii) coordinate with the Commission in creating and applying a CEUD aggregation threshold that cannot be reverse engineered.

Lastly, and perhaps most directly tied to CEUD, the California legislature amended the California Public Utilities Code to include specific guidance on the topic. It states that it is California policy to modernize the electrical transmission and distribution system and achieve a smart grid, which in part, includes the development and incorporation of cost-effective demand

⁸ MINN. STAT. §216C.17 (emphasis added).

⁹ Independent of our discussions in the CEUD Workgroup, the MLIG was unaware that the Department was publishing nonpublic CEUD data aggregated in groups as small as 2-3 industrial customers and at the county level. Generally small groupings are not MLIG members but are industrial customers that have orders of magnitude smaller energy usage. For reasons set forth in prior comments, the MLIG has significant reservations about aggregation at the county level. The MLIG is working to better understand how the Department complied its information and objects to the current practices of the Department in preparing and sharing the Minnesota Utility Data Book.

¹⁰ See, MINN. STAT. §216C.08 (“The commissioner [of Commerce] has sole authority and responsibility for the administration of sections 216C.05 to 216C.30. Other laws notwithstanding, the authority granted the commissioner shall supersede the authority given any other agency whenever overlapping, duplication, or additional administrative or legal procedures might occur in the administration of sections 216C.05 to 216C.30. The commissioner shall consult with other state departments or agencies in matters related to energy and shall contract with them to provide appropriate services to effectuate the purposes of sections 216C.05 to 216C.30. Any other department, agency, or official of this state or political subdivision thereof which would in any way affect the administration or enforcement of sections 216C.05 to 216C.30 shall cooperate and coordinate all activities with the commissioner to assure orderly and efficient administration and enforcement of sections 216C.05 to 216C.30.”)

response, demand-side resources, and energy-efficient resources.¹¹ Further, it includes express requirements for use and disclosure of CEUD, including to third parties, that are largely aimed at preventing unintended disclosure.¹² Independent of whether such requirements are strictly necessary, it is undisputed that Minnesota lacks direct statutory guidance on CEUD disclosure and smart grid development.

B. A Centralized Energy Data Center Will Not Necessarily Yield Efficiencies

The MLIG understands there may be efficiencies in developing a common clearinghouse for CEUD through an Energy Data Center - presumably by focusing on the development of one system as opposed to each individual utility figuring out how to handle separately. Because discussion of an Energy Data Center began late in the workshop proceeding, there is very little record to support or test this assumption. While it is often the case, it is not universally the case that efficiencies are gained by moving to a centralized system. Utilities may, for example, maintain their data in diverse ways that are not easily made uniform for the purposes of a single system. If the data sets are not easily integrated, additional work will either fall on the custodian or the utilities. Additionally, there might be other concerns that increase costs, such as heightened security concerns associated with centralizing the data collection in one location. If the report of the Administrative Law Judge ultimately recommends further inquiry into the use of a centralized Energy Data Center, the MLIG believes that any assumptions about costs and efficiencies must be thoroughly investigated.

III. COMMENTS ON A POTENTIAL MINNESOTA ENERGY DATA CENTER

A. Custodian

One of the most essential pieces of developing an Energy Data Center concept is agreement on who would be responsible for operating and maintaining the system. While it is too early to have reached an obvious conclusion, the CEUD Workgroup has at least discussed some

¹¹ California Pub. Util. Code. §8360 (“It is the policy of the state to modernize the state’s electrical transmission and distribution system to maintain safe, reliable, efficient, and secure electrical service, with infrastructure that can meet future growth in demand and achieve all of the following, which together characterize a smart grid: . . . (d) deployment and integration of cost-effective demand response, demand-side resources, and energy-efficient resources. . .”)

¹² California Pub. Util. Code. §8380-8381.

of the available options. The MLIG believes the Minnesota entity most suitable for the task may be the Department of Commerce - Division of Energy Resources (“Department”), though it is not entirely clear whether the Department has the resources or interest in maintaining and operating an energy data center.

In any event, the custodian of such a data center would need to be a Government Entity and thereby subject to the DPA.¹³ While it has not been discussed at great length, there has been at least some discussion of a non-profit entity or other non-governmental entity functioning as the home of a future Minnesota Energy Data Center. The Minneapolis Memo, for example, states that the Energy Data Center could be operated by a “state agency or other public entity, or a non-profit.” The MLIG opposes any entity managing the Energy Data Center that is not subject to the standards set forth in the DPA or lacks experience in managing data under the DPA.

B. General Thoughts on the Energy Data Center Concept

The MLIG appreciates the efforts by the City of Minneapolis to at least begin to put thoughts on the Energy Data Center concept to paper and thereby constructively focus the group’s limited opportunity to discuss the issue. In addition to the difficulties associated with reacting to a yet-to-be-formed idea, the MLIG also finds it difficult to discuss the Energy Data Center concept without rehashing concerns about aggregation thresholds, security and the potential for reverse engineering that the workgroup has long been involved in. Nevertheless, the MLIG attempts to limit these comments to opportunities and risks that may be enhanced by or unique to the Energy Data Center, specifically focusing on risks, disadvantages, and redress.

The MLIG understands that a well-designed system that publishes a data-set once annually could greatly reduce utility time spent responding to individual requests for data and could similarly reduce the response time for requesters. Without fully understanding the protections available through sophisticated coding, however, MLIG remains very concerned about the potential for reverse engineering and risks of hacking into the system. In fact, a centralized system may increase these risks in a number of ways. For example, at present we understand utilities may separately track personal account information from CEUD. A

¹³ Minnesota Statutes, Chapter 13.

centralized system would appear to pool data sets not otherwise combined even by a single utility. Thus a successful hacker may gain access to a combination of data that is more detrimental than its individual component parts. Further, it would centralize many data sets from various utilities making the risk of an unintended release or system compromise of the information that much greater.

The MLIG also sees some potential disadvantages to an Energy Data Center. The workgroup has spent some time discussing how a third-party requester might register or submit at least some information to a utility upon the request. It is unclear whether this ability to track some minimum amount of information on requesters would be available through a centralized data center. Perhaps more importantly, the MLIG remains concerned that it is hard to envision in advance all of the potential unintended uses of information. In light of this, the MLIG is reluctant to agree to suppression of the utilities' discretion in answering requests and releasing the data. Once again, a way around these concerns is to take an early precautionary approach and not include the more sensitive and conspicuous large industrial data.

Lastly, the MLIG has had difficulty understanding how redress would be handled in various instances should an unintended release of CEUD occur. An Energy Data Center creates new risk and greater uncertainty as to who would be liable should the data reveal more about a particular customer than intended. Ultimately, without understanding more about the Energy Data Center envisioned, MLIG's concerns either remain or are generally heightened by the concept as we currently understand it.

IV. COST RECOVERY

Any further investigation into an Energy Data Center or into data sharing more broadly should also include analysis of how the costs of the system will be recovered and from whom. Whether Minnesota eventually moves toward the use of an Energy Data Center or not, the MLIG believes only those costs that can be reasonably justified as utility service should be borne by the ratepayers. In essence, some of the cost recovery issues stem directly from the jurisdictional issues raised in MLIG's prior comment filed March 14, 2014. Facilitating customer access to their own data, for example, may be reasonably related to utility service therefore eligible for cost recovery. Whereas requests made by third parties and for uses relatively distinct from utility

service (*e.g.*, academic purposes), may not. A centralized Energy Data Center may complicate that picture by putting considerable resources into a system that would serve multiple ends. The MLIG does not, at this time, attempt to comment on mechanisms for cost recovery for such a system other than to reserve its right to object to cost recovery when additional facts and intentions are made available.

V. REDRESS FOR WRONGS & UTILITY LIABILITY

At the most basic level, there is likely no redress for a large industrial customer who is subject to the misuse of its CEUD. The MLIG and its members query how any large industrial customer would come to know of an unauthorized release or its misuse by a competitor. It is only in the most egregious of cases that the industrial customer would come to find they are steadily losing market share to a competitor and by then it is almost certainly too late. Furthermore and even then, it would be very hard to trace to the competitor's use of the data to the detrimental activity (*e.g.*, predatory pricing). This risk is the principal reason we have taken a tremendously precautionary approach to the release of our data to third parties. Once the data is available and in the hands of a competitor that wants to misuse it, it is virtually impossible to catch before it is an irreversible problem and even then nearly impossible to detect the source of the problem. Further yet and to the extent it also involves a government-directed release of data, legal redress becomes extremely challenging.

There have been some discussions about pre-determining liability. Ultimately, a party that closely followed established rules in releasing data will have a strong legal defense. Whether any party has been negligent in the data release, however, is more likely to be a question of fact that merits close inquiry at the time and should not be prejudged. The MLIG does not believe this workgroup should make judgments or recommendations at this time that would potentially predetermine issues of liability. Given how difficult it is to ascertain what kind of risks could develop as a result of data sharing, the MLIG believes the workgroup should focus instead on the reduction of those risks rather than the elimination or assignment of liability for them.

VI. CONCLUSION

Admittedly, these comments contain repetition. But the MLIG feels obliged to emphasize that prior arguments and objections are not resolved by an Energy Data Center. Similarly and while it is open to further analysis on the topic, the MLIG is not yet sure whether it helps solve others' key concerns. We recognize that an Energy Data Center may serve a function in reducing utility liability in the case of a data breach and utility costs for responding to requests for information, but the critical interest to protect in this case must be that of the ratepayer, whose CEUD is the potential subject of release. Implementation of the Energy Data Center concept could increase the risk of inadvertent disclosure while potentially increasing costs ultimately passed on to customers. To date, the CEUD Workgroup has not had the opportunity sufficiently discuss, let alone resolve, these trepidations in the context of an centralized Energy Data Center. It is troubling that MLIG and other parties are now being made aware of the Department's internet release of the Minnesota Utility Data Book. It is not clear why the Department's practices, which the MLIG believes are arguably in violation of the DPA, are only now being discussed in the CEUD Workgroup. In any event, we respectfully request that the ALJ's report encourage the Department to (i) limit the use of energy statistics to coordinated efforts with other State agencies and (ii) coordinate with the Commission in creating and applying an CEUD aggregation threshold that cannot be reverse engineered.