

The Energy Daily

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Court rejects challenge to smart meter data collection

BY JEFF BEATTIE

A federal appeals court ruled last week that collection of detailed data on home energy use by smart meters is a “search” of people’s homes under the 4th Amendment of the Constitution, but is still permissible because it is a “reasonable” exercise of government power that provides broad benefits to society and is not linked to law enforcement.

In a 3-0 decision issued Thursday, a panel of the U.S. Court of Appeals for the 7th Circuit refused to let smart meter critics bring additional claims against the municipal utility of Naperville, Ill., that the collection of energy data by its smart meters violated town

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Perry order curtails DNFSB oversight at DOE sites; board cuts staff in reorganization

BY GEORGE LOBSENZ

With no apparent prior consultation with the public or Congress, Energy Secretary Rick Perry has quietly issued an order curtailing the Defense Nuclear Facilities Safety Board’s oversight of DOE sites and asserting extraordinarily broad DOE authority to deny DNFSB requests for department and DOE contractor documents on nuclear safety issues.

Perry’s order was disclosed Friday by antinuclear activists who also revealed that an internal reorganization announced by the DNFSB last week included a roughly 33 percent staff reduction—from 117 authorized positions to 79. That reduction in authorized positions was not disclosed by the board in

its August 15 reorganization announcement, which focused on a big increase in its field inspector force from 10 to 18.

In response to the alleged staff reductions, the acting chairman of the DNFSB told *The Energy Daily* Monday that staff reductions at the board were due to attrition, and not to any job cuts ordered by the board.

In addition, acting Chairman Bruce Hamilton, a Republican appointee to the DNFSB, indicated the five-member board—which has one vacancy—voted 3-1 in favor of the reorganization, meaning at least two of the three Democratic board members voted in favor of the reorganization.

“This was a bipartisan initiative,” he said, adding that the board this week would post formal statements by board members ex-

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California lawmakers drop utility liability reform from wildfire bill

BY ERIC LINDEMAN

Any hope of near-term relief from California’s strict wildfire liability rules for the state’s three large investor-owned utilities evaporated over the weekend as the co-chairman of a joint legislative conference committee on wildfire prevention and liability issues said he was dropping efforts to revise the existing liability regime to ease costs on utilities.

State Sen. Bill Dodd, a Democrat who chairs a committee brought together by Gov. Jerry Brown (D) at the end of June to deal with wildfire prevention and liability, told reporters Saturday he was taking liability

reform off the table because it had clearly become a “distraction” preventing action on other pressing issues facing the panel.

A spokesman for the senator Monday confirmed that statement, but provided no further explanation of the decision by Dodd, who represents counties in the Napa region that were particularly hard hit by wildfires last October.

Dodd’s announcement is a major blow to the state’s investor-owned utilities (IOU)—Pacific Gas & Electric (PG&E), Southern California Edison (SCE), and San Diego Gas & Electric (SDG&E)—which were desperately pushing for wildfire liability reform before the legislature’s current session ends

August 31.

The utilities say they face billions of dollars in potential liability due to California’s unique “inverse condemnation” law, under which the IOUs can be held liable for property damage, personal injury and the costs of battling the blazes if their power lines or other equipment are found by state fire experts to be a substantial cause of the fire.

Under the law, those costs are recoverable in rates, but only if the California Public Utilities Commission (CPUC) determines that the utility followed all inspection and safety rules for its power lines, such as vegetation management.

However, the utilities are quick to point out that last year, the CPUC ruled against SDG&E on recovery of costs for a 2007 wildfire. In addition, PG&E al-

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Perry order curtails DNFSB oversight at DOE sites... *(Continued from p. 1)*

plaining their votes on the reorganization.

Hamilton also said the board was trying to “better understand” Perry’s order reducing the scope of the DNFSB’s oversight of DOE facilities and its access to department and DOE contractor documents. He declined to comment on Perry’s order, saying the board had scheduled an August 28 hearing to hear from senior DOE officials about the purpose of the new order, known as Order 140.1, which was adopted by the department three months ago without any announcement to the public.

While the board appears to have known about the order for some time, Hamilton said he did not know how the board might respond to Perry’s order.

“We scheduled the hearing so that we better understand the intention of the Department of Energy,” he said. “We want to understand where they are coming from.

“I don’t know why they are doing this,” he added. “That is why we are having the hearing.”

The new DOE order on “interface” with the DNFSB was developed in response to an October 13, 2017, secretarial memorandum by Perry on the department’s “relationship” with the DNFSB.

In response to Perry’s memo, DOE officials established an “integrated project team” that included several DOE contractor officials to flesh out the order, which was formally approved by Deputy Energy Secretary Dan Brouillette May 14. Among the contractors on the integrated project team with input on Order 140.1 development were officials from Los Alamos National Laboratory, (LANL), which has been a focus of DNFSB oversight because of chronic seismic, nuclear criticality and fire prevention deficiencies at aging LANL facilities.

DOE never announced Perry’s memo and did not respond Monday to requests to release the memo or explain why the secretary issued it.

However, the DNFSB has come under increasing pressure in recent years from some DOE officials who have quietly complained that the board has been too aggressive in raising safety issues, unnecessarily delaying and raising the cost of the department’s cleanup and weapons operations. Some DOE contractors are particularly unhappy with DNFSB oversight because its recommenda-

tions for safety upgrades can prevent them from meeting contractually set deadlines for progress on key projects, depriving them of bonuses or triggering penalties.

But while frequently bridleing at DNFSB oversight—including resisting board recommendations for safety upgrades at facilities—the department also has reluctantly endorsed the technical validity of the vast majority of DNFSB analyses pinpointing safety weaknesses in DOE operations.

Pressure on the DNFSB increased last year when former DNFSB Chairman Sean Sullivan—a Republican named to that post by President Trump—proposed to the White House that the DNFSB be abolished or greatly reduced in size. While the board has no regulatory power over DOE, Sullivan argued that many board recommendations for safety improvements were unnecessary and burdensome on DOE. Sullivan abruptly departed the DNFSB in February after other board members and DNFSB staff objected strongly to his recommendations to the White House.

Hamilton denied allegations by some antinuclear activists that the newly revealed DNFSB reorganization is designed to achieve Sullivan’s downsizing plan for the agency, noting that some Democratic members of the board voted for the reorganization.

While DOE officials have remained mum about Order 140.1, the Los Alamos Study Group (LASG), a LANL watchdog group based in New Mexico, Friday released an internal DOE briefing paper on Perry’s order that revealed many details about the new policies established by the DOE order on DNFSB oversight.

In general, the briefing paper said the purpose of Perry’s memo was to “emphasize line management accountability and establish clear requirements and responsibilities when working with the DNFSB.”

However, much of Order 140.1 is aimed at limiting the DNFSB’s oversight and access to DOE documents.

Most notably, the briefing paper says DOE has unilaterally decided to exempt all Hazard Category 3 (HC-3) nuclear facilities—the least dangerous of three categories of DOE facilities—from oversight by the DNFSB. The paper appears to argue that such an exemption is warranted because potential accidents at HC-3 facilities would affect only DOE workers, not communities near DOE sites,

and thus those facilities are beyond DNFSB’s mandate from Congress to conduct oversight necessary to assure adequate protection of public health and safety.

The order itself says DNFSB oversight “does not apply to nuclear facilities or activities at DOE defense nuclear facilities, as defined in this order, that do not adversely affect or have the potential to adversely affect public health and safety.”

The order defines “public health and safety” as “health and safety of individuals located beyond the site boundaries of DOE sites with DOE defense nuclear facilities”—thus excluding DNFSB oversight of facilities with safety issues only affecting DOE workers.

In explaining the exemption of HC-3 facilities from DNFSB oversight, the DOE briefing paper on Order 140.1 notes that “DOE co-located workers are not members of the public.

“Hazard Category 3 or below nuclear facilities have the potential for only localized risks to the workers, as opposed to risks to the public,” the paper adds.

The paper says Order 140.1 specifies that DNFSB officials may “access the information” that supports any determination by DOE categorizing a facility as HC-3 or below so the board can independently verify such a classification.

The paper also says that safety issues raised by the board regarding worker protection “should be taken under consideration as appropriate” by DOE officials.

However, DOE’s attempt to wall off DNFSB oversight over worker safety issues appears to clash with long-standing precedent under which the DNFSB has made many recommendations to DOE primarily aimed at protecting workers—a practice that DOE has never before objected to.

And in his interview with *The Energy Daily*, Hamilton noted the 1988 enabling statute passed by Congress creating the DNFSB made no such distinctions limiting safety oversight and recommendations by the board.

Notably, the exemption for HC-3 facilities would eliminate DNFSB oversight of DOE’s effort to convert a new radiological lab at LANL for plutonium pit production—a major priority for DOE under the Trump administration.

Despite the new mission for the facility—
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California lawmakers drop utility liability reform... (Continued from p. 1)

ready has booked \$2.5 billion in liabilities for the 2017 wildfires—with some analysts suggesting the utility's costs could go much higher.

The failure of lawmakers to act on wildfire liability reform also is a setback for Brown, who has expressed concern that financial damage to the IOUs could undermine the state's planned shift to clean energy.

The governor offered a legislative proposal in July that would have replaced the strict liability of inverse condemnation with a requirement for state courts to assess whether utilities had acted "reasonably" in determining whether they should pay damages for fires caused by their equipment. The bill also would have required courts to balance the considerable "public good" provided by the electric equipment against damage caused by fires. At the same time, it would have increased fines and prohibited utilities from recovering costs through ratepayers.

Local governments and consumer groups vocally opposed Brown's bill and other attempts to loosen the state's liability rules, warning that giving utilities more leeway would mean drawn-out and costly litigation.

A spokeswoman for The Utility Reform Network, a consumer group, objected to Brown's bill, adding: "What we're most concerned about is PG&E passing more costs onto consumers."

Even Dodd, who supported efforts to reach a compromise on liability reform, said of Brown's liability plan: "It just felt like the ultimate bailout of the utilities." The senator also said a compromise on liability didn't seem to have urgency right now because the largest and deadliest wildfires this summer

do not appear to have been caused by utility equipment.

Dodd said the conference committee now will focus on legislation aimed at reducing the amount of "fuel" for wildfires and on non-liability parts of Brown's proposal, including regulations for vegetation management around power lines.

"We are still trying to achieve the underlying goals of the governor's plan," Dodd told *The Los Angeles Times* Saturday.

Brown's office declined comment on Dodd's decision to drop wildfire liability reform.

PG&E has the largest potential wildfire liability among the three California IOUs and has even hinted at possible bankruptcy and reorganization unless it gets liability relief.

Still, the utility scored a significant legal victory last month that could set a precedent for thousands of outstanding claims against it. A three-judge panel of a California appeals court reversed an earlier decision that found PG&E could be held liable for punitive damages stemming from its responsibility for the massive and lethal Butte wildfire in 2015.

The Superior Court of Sacramento County said in its July 2 decision that the 2,050 plaintiffs who brought suit against PG&E did not present any "triable issues of fact" supporting their effort to get punitive damages from the utility. In particular, the judges said the plaintiffs failed to show there was any malice in PG&E's risk management controls and fire mitigation efforts—a key finding needed to support punitive damages, according to the ruling.

The decision is particularly important to

PG&E because it comes in advance of legal action on more than 20,000 claims stemming from the wildfires last October, some of which were ignited by the utility's power lines and equipment, state fire officials have concluded.

Indeed, citing "probable" losses from mounting litigation over its alleged liability for the fires, PG&E took a charge of \$2.5 billion for the quarter ending June 30, which the utility said is the lower end of the range of its "reasonably estimated" losses from wildfire liability.

Analysts estimate PG&E could be facing total liabilities of \$10 billion to \$15 billion for the wildfires that started last October and burned through 245,000 acres in northern California.

In January, the California Department of Insurance said insurers at that time had received nearly 45,000 insurance claims totaling more than \$11.79 billion in losses, of which about \$10 billion is related to claims from the northern California wildfires.

PG&E and SCE declined to comment Monday on the conference committee decision to drop liability reform. PG&E stock, which has been battered by the liability issue since October, closed down 1.04 percent Monday. The utility suspended its dividend in December to conserve cash in the face of pending wildfire liabilities.

"We will continue to work with the legislature to approve an appropriate risk and cost allocation structure to ensure that the investor-owned utilities can be financially stable as they continue to provide service to California," an SDG&E spokeswoman told *The Energy Daily*.

Perry order curtails DNFSB oversight at DOE sites... (Cont'd from p. 2)

which includes plutonium processing operations for which the lab was not designed—DOE has said the converted lab should remain classified as an HC-3 facility and needs no other safety upgrades.

Order 140.1 also would give DOE extraordinarily broad authority to reject information or DOE and contractor documents requested by the DNFSB.

For example, DOE officials could deny such a request if "the person requesting the information does not need such access in connection with his/her duties," according

to the order, which provides no further guidance on how such determinations will be made.

DOE could also deny DNFSB requests if they are seeking "pre-decisional or otherwise privileged records, for example, attorney-client, attorney work product, procurement-sensitive, or deliberative process draft documents that have not been approved for release..."

In addition, DOE could deny requests from the DNFSB if "the requested information does not have a reasonable relationship

to the functions of the DNFSB as enumerated in the Atomic Energy Act..." Again, no specifics are provided on how such determinations should be made.

The language of Order 140.1 giving DOE discretion to decide on what documents the DNFSB legitimately needs appears to clash with language in the DNFSB's enabling statute, which says DOE must "fully cooperate with the board and provide the Board with ready access to such facilities, personnel, and information as the board considers necessary to carry out its responsibilities..."

Entergy replaces head of New Orleans utility

Entergy Corp. announced Friday that Charles Rice, president and CEO of Entergy New Orleans, will transition to a new role in Entergy's legal department and will be replaced on an interim basis

by Rod West, currently Entergy's group president for utility operations.

The management change comes a few months after Entergy confirmed that a public relations firm that it hired paid actors to

support a controversial proposed Entergy New Orleans natural gas plant at a city meeting, according to local media accounts, which said Entergy was unaware that the actors had been hired.

Court rejects challenge to smart meter data collection... (Continued from p. 1)

residents' privacy rights and represented a violation of the 4th Amendment's prohibition on unreasonable search and seizure.

The court agreed with critics that smart meters provide "rich" data about electrical use in each home, thus revealing details about activities and patterns of life within the home.

Nonetheless, the judges said collection of the data provides sufficient benefits to both homeowners and society that such searches could be deemed reasonable on constitutional grounds.

"Smart meters allow utilities to reduce costs, provide cheaper power to consumers, encourage energy efficiency, and increase grid stability," the court said. "We hold that these interests render the city's search reasonable, where the search is unrelated to law enforcement, is minimally invasive, and presents little risk of corollary criminal consequences."

Nevertheless, the court also suggested that Naperville's smart meters, which download data to the city every 15 minutes, were close to the line of what was acceptable under the 4th Amendment.

"We caution...that our holding depends on the particular circumstances of this case," said the court. The judges said "our conclusion might change" if the city collected data in shorter intervals, or if the residential energy-use data were shared with law enforcement or other city officials.

The judges also rapped Naperville for failing to give residents a way of opting out of the smart meter program, as most utilities have in rolling out advanced smart meter programs over the last decade or so. Controversially, some utilities have charged customers fees to reject smart meters and stay with their old analog meters, both to encourage use of smart meters and offset the continued cost of manual meter-readings that smart meters eliminate.

But Naperville residents have no such

choice. Their only option to the default wireless smart meter is to choose a non-wireless smart meter, an apparent concession to some residents' concerns about health threats posed by exposure to radio frequency transmissions from smart meters. However, the non-wireless meters still collect the same data, and the only difference is that the data must be retrieved by the utility manually.

"Naperville could have avoided this controversy—and may still avoid future uncertainty—by giving its residents a genuine opportunity to consent to the installation of smart meters, as many other utilities have," said the court. "Nonetheless, Naperville's warrantless collection of its residents' energy-consumption data survives our review in this case."

However, the litigants in the case, a group of concerned citizens called Naperville Smart Meter Awareness (NSMA), have indicated they may take the case still further.

"NSMA is dedicated to winning this case, even if we must petition the Supreme Court of the United States to do so," says the group's Web site.

Like numerous smart meter programs around the country, the Naperville deployment was funded by the American Recovery and Reinvestment Act of 2009, also commonly known as the Obama stimulus plan.

Smart meters are generally designed to cut utility costs in reading meters; allow for quicker storm response and recovery; and provide customers more data about their energy usage so they can cut costs with time-of-use and other advanced rate programs.

NSMA sued Naperville over the smart-meter program in 2011, alleging that the meters reveal "intimate personal details of the city's electric customers such as when people are home and when the home is vacant, sleeping routines, eating routines, specific appliance types in the home and when used, and charg-

ing data for plug-in vehicles that can be used to identify travel routines and history."

A federal district court rejected the groups' two claims in 2016, and subsequently denied NSMA's petition to add a third complaint.

In reviewing the case on appeal, the 7th Circuit court was clearly struck by the amount of data that the smart meters collect. In fact, the panel said the meters appear to collect more data than the Supreme Court ruled was improper in another case involving the use of thermal imaging to see if residents were growing marijuana.

"In fact, the data collected by Naperville could prove even more intrusive," said the court.

"By analyzing the energy consumption of a home over time in concert with appliance load profiles for grow lights, Naperville law enforcement could 'conclude' that a resident was using the [marijuana grow] lights with more confidence than those using thermal imaging could ever hope for. With little effort, they could conduct this analysis for many homes over many years."

But the Naperville program is nevertheless legal because the city utility does not share smart meter data with law enforcement, and because the meters produce considerable public good, the court said, saying it reached that decision "by balancing [the smart meter program's] intrusion on the individual's 4th Amendment interests against its promotion of legitimate government interests."

While NSMA lost again last week in its overall attack on the smart meters, it has won at least one ancillary battle. In 2015, the Naperville City Council agreed to pay an NSMA member, Malia Bendis, \$117,500 to settle a lawsuit she filed after getting arrested after she filmed policemen who accompanied city utility workers as they installed a smart meter in home against her will, according to local media accounts.

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