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California Energy Commission
Dockets Office, MS-4
1516 Ninth Street
Sacramento, CA 95814-5512

Re: Tenant Consent and Penalties for Non-Compliance
AB 1103 Nonresidential Building Energy Use Disclosure Program Rulemaking
Docket Number 14-EUDP-01

Commissioners:

I am a business and real estate attorney in Orange County, California, who represents an energy benchmarking consultant. When a utility balks at uploading the energy usage information for a building, he asks my help in persuading a utility to upload the relevant information. My comments are limited to two areas: Tenant consents and penalties for non-compliance.

The Utilities' Requirement of Tenant Consents. Notwithstanding the Energy Commission's clear directives that no tenant consents are required, my experience is that almost every utility requires an actual or implied consent from every tenant before the utility will upload that tenant's energy usage.

In order to comply with AB 1103, codified as section 25402.10 of the California Public Resources Code, owners of nonresidential buildings greater than 10,000 square feet must disclose to prospective buyers, lessees, and lenders[1] the building's energy use for the previous 12 months before the sale, leasing or financing of the entire building. Energy Providers are required to "upload all energy use data for the entire building from at least the most recent 12 months for the specified meters or accounts to the building owner's Portfolio Manager Account. If a building has a utility or energy provider account for which the owner is not the customer of record, the utility or energy provider shall aggregate or use other means to reasonably protect the confidentiality of the customer." 20 California Code of Regulations 1684(b).

In the California Energy Commission's Final Statement of Reasons, docketed on March 8, 2013 ("Statement of Reasons"), the Commission made clear that, despite the concerns of the Southern California Gas Company and Pacific Gas & Electric, the 15/15 Rule (California Public Utilities Commission Decision 97-10-031) does not apply to the AB 1103 regulations. Page 15. "To effectuate

[1] I understand that the Commission is contemplating deleting the requirement that energy usage be disclosed to lenders.

the purpose of the statute, the owner must have the entire building's energy use data." The Commission recognizes that *"it would be unduly burdensome . . . for the owner to collect consent from each tenant from the previous 12 months."* Pages 15-16. (Emphasis Added)

In the California Public Utilities Commission's "Decision Adopting Rules to Provide Access to Energy Usage and Usage-Related Data While Protecting Privacy of Personal Data," issued on May 5, 2014, the CPUC noted that,

> "The [Public Utilities] Commission recognizes the authority of the CEC [California Energy Commission] given to it, pursuant the Warren-Alquist Act and other laws, to set State energy policy and implement EE [Energy Efficiency] and other programs. . . . [¶] The Commission is aware that privacy issues raised in this proceeding are similar to issues that the CEC has addressed, and is addressing, in implementing the Non-residential Building Energy Use Disclosure Program (citation omitted). The Commission recognizes that implementation of that or any other program pertaining to the Public Resource Code—including handling privacy concerns as appropriate to carry out legislative intent—is *the responsibility of the CEC, not this Commission*. Even so, the Commission notes that *neither this decision nor the Public Utilities Code prohibits utilities from providing building owners and operators with the monthly energy use data required by Public Resources Code section 25402.10*." (Emphasis added.)

Lastly, at the July 2, 2014, Committee Hearing Before the Energy Resources Conservation and Development Commission of the State of California, Brian Stevens, Adviser to President Peevey of the Public Utilities Commission referred to the CPUC's Decision above and noted that the CPUC found that, "the Energy Commission has statutory rights to this data [for "transactions for large buildings"]. And . . . the rules surrounding disclosure are fully within the jurisdiction of the Energy Commission." Page 25, line 25; page 26, lines 1-4.

What we are left with is utilities are required by state law to upload energy data even without the consent of a tenant. The California Energy Commission found that, "utilities may use 'any' method to secure the data, but surely that flexibility is tied to reasonableness and compliance with the statute. . . . [¶] Finally, a subsequent law supports the release of data to fulfill the requirements of AB 1103. SB 1476 (2010, Padilla) allows utilities to release data to comply with state law. (Pub. Util. Code, §§ 8380, subd. (e)(3), 8381, subd. (e)(3).) *AB 1103 is state law and these regulations will become state law*." (Emphasis added.) Statement of Decision, page 16.

The California Public Utilities Commission punted on the issue of privacy concerns regarding disclosure of energy data to comply with AB 1103 so utilities can no longer take cover in the folds of CPUC privacy rules.

As the Energy Commission has said, it is wholly impractical for a landlord to obtain the consent of every tenant. The tenant has no incentive to comply. If the tenant has vacated the property, has

declared bankruptcy, or is a national chain, it is almost impossible to get that tenant's consent. If an existing tenant simply refuses to consent, there is almost no down side for the tenant.

Requiring a landlord to provide a utility with the tenant's customer account number or the last four digits of taxpayer identification number is simply another way of requiring a tenant's consent. Again, there is no incentive for a tenant to provide the landlord with this information.

On the other hand, the law is quite clear that a landlord cannot use the tenant's data for any purpose other than complying with AB 1103. Assuming that (a) the owner divulged a tenant's data, and (b) the tenant suffered actual damages as a result of the disclosure, the tenant has both a legal and public relations remedy. The landlord can be sued and the tenant can make it known through social media that the landlord cannot be trusted with confidential data.

The utilities are concocting this fear-of-disclosure danger. Landlords often require a potential tenant to disclose confidential financial information before agreeing to lease to that tenant. Gross leases require that a tenant provide confidential financial information at least annually to the landlord. We do not have a flood of lawsuits against landlords for disclosure of this very private and confidential information.

Which is worse? What data is more useful to a competitor? Disclosure of confidential financial information or disclosure of confidential energy usage? If we do not have a significant problem with the former, why would one think we would have a significant problem with the latter?

Utilities' response that a building owner can simply estimate the data misses the point of benchmarking. The point is to be able to provide accurate energy performance scores for buildings. In some cases, such estimates are merely wild guesses. Remember the adage, "Garbage in, garbage out." The Commission's goal should be to minimize the number of estimates as much as possible in order to ensure the integrity of the data.

Therefore, no tenant consent, explicit or implied, should be required by the utilities.

Penalties. There are almost no penalties for non-compliance with AB 1103. At best, one could file a complaint with the Commission and go through an administrative hearing. Assuming the Commission adopts the administrative judge's decision against the non-complying entity, the only way to enforce the decision is to file a lawsuit with the superior court to have the non-complying entity held in contempt. This process is hardly an effective remedy against a non-complying entity.

Building Owners. If a building owner fails to provide a buyer, lessee or lender with an energy usage disclosure, there is no penalty. A buyer, for instance, would have a hard time suing a seller for non-disclosure because the energy usage report provides very little additional data, if any, which a buyer would not have discovered from the buyer's own due diligence. Therefore, there probably would not be any misrepresentation because there would be no reliance.

Real Estate Brokers. If a building owner fails to provide the disclosure, it would be difficult to hold the real estate broker liable for damages unless other data were concealed or misrepresented.

Utilities. If a utility fails to upload the data to the building owner's Portfolio Manager Account, the building owner has no effective remedy. Why would a building owner want to spend time and money on an administrative claim when the building owner could just "estimate"—read "guess"—with no serious consequences?

To be effective, penalties ought to be self-executing. The consequences ought to be immediate and not require the intervention of a governmental agency. The following are broad, simple examples. If put in place, they would need refinement to take into account unusual or mitigating circumstances.

Penalties for Building Owners. The energy usage disclosure could be a condition of closing escrow. Escrow or title companies could refuse to close escrow if there were no energy usage disclosure. By law or regulation, buyers could have a statutory right to rescind if there were no energy usage disclosure. Lessees could be entitled to free rent, for say up to three months, for failure to disclose energy usage disclosure.

Penalties for real estate brokers. Real estate brokers could lose their right to all or a portion of their commission if they had not demanded in writing that the building owner make the energy usage disclosure.

Utilities. Utilities could be prohibited from charging for a building's energy usage for some meaningful period of time. The dollar value would have to be large enough to motivate the utility to take notice. Three months of gas for a single family residence without a pool during the summer would be too minimal whereas three months of utilities for a large building might be enough.

To make this benchmarking program work, there need to be incentives or disincentives. Self-executing penalties will go a long way towards making the benchmarking program function the way it was designed.

Should you have any questions, do not hesitate to call or email me. Thank you for your allowing me to make these comments.

Very truly yours,

JOHN H. BAKER

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