State of Utah

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Comments

To: Utah Public Service Commission

From: Utah Division of Public Utilities
Chris Parker, Director
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Date: December 18, 2018

Re: **Division of Public Utilities Comments: Proposed Rulemaking Concerning Utility/Customer Relations regarding Third-Party Solicitations,** Docket Nos. 18-R460-01, 18-057-19, and 18-035-40

The Division of Public Utilities (Division) makes the following recommendations concerning the proposed rulemaking regarding utility customer information with respect to third-party solicitations. The Division's comments at this stage represent the principles we recommend be used to guide the drafting of the rules; we will have more detailed and specific comments regarding particular proposed rules as they are drafted.

Issue

The Public Service Commission of Utah (Commission) is seeking comments regarding proposed rules about utility customer information in the above-captioned rulemaking dockets.

Background

On October 4, 2018, the Commission issued a Report and Order in Docket No. 18-057-07, regarding Dominion Energy Utah (DEU) and a letter that was sent to its customers by DEU

affiliate Dominion Products and Services (DPS) and a third-party provider (HomeServe).[1] The Commission stated in its Report and Order that:

> We find the public interest is served by rulemaking that can address proper use of utility customer lists, appropriate utility-related solicitation communications, use of monopoly utility branding, and other issues that may arise in that docket which we will initiate shortly after the issuance of this order.[2]

The three above-captioned dockets were created to address these issues so that the Commission can receive comments regarding these rules. The Division outlines its suggested guiding principles for the proposed rules below.

Due to Utilities' Monopoly Power, Higher Standards of Care Regarding Customer Information Privacy Are Appropriate

A utility's monopoly status makes the appropriate standard of privacy for personal customer information higher than it would otherwise be if a mere "regular" business were involved. The monopoly status of the utility implicates the public interest in ways that are not implicated by other private companies. Utility customers have no choice other than to entrust their personal information with the utility in order to receive service; customers cannot go elsewhere for service if they are dissatisfied with the utility's privacy policy. This monopoly is created and sanctioned by the state, which therefore shares the burden of ensuring that a higher standard of privacy is used.

Several Western states and utilities have recognized that a higher standard of privacy is appropriate for public utilities. For example, the State of Washington has a "bright-line" statute regarding the privacy of electric utility customer information:

> (1) An electric utility may not sell private or proprietary customer information.

[1] See *Dominion Energy's Gas Line Coverage Letter* (Report and Order, issued Oct. 4, 2018), Docket No. 18-057-07.

[2] See *id.* at 15.

(2) An electric utility may not disclose private or proprietary customer information with or to its affiliates, subsidiaries, or any other third party for the purposes of marketing services or product offerings to a retail electric customer who does not already subscribe to that service or product, unless the utility has first obtained the customer's written or electronic permission to do so.[3]

California's statutes are similar to Colorado's in many ways and are discussed in a later section of these Comments. Utilities such as Pacific Gas & Electric have adopted privacy rules that reflect these statutes; sample utility rules will also be referenced in a later section. The principles behind these privacy rules relate to the utility's monopoly status, which results in a higher appropriate standard of care. This principle is expressed in a 2015 Colorado administrative decision recommending the adoption of new CO utility privacy regulations:

> The foundation of a public utility's relationship with its customer is the essential nature of public utility service. Particularly as an essential service, the customer does not generally choose to provide information about themselves to the utility for dissemination to others. Information may be used when the customer consents to appropriate disclosure in accordance with these rules. However, even where some customers find value in a non-regulated service provided by a utility, permitting use of information about all customers for non-regulated purposes (e.g. including those not finding value) is not appropriate. Additionally, permitting non-regulated use of regulatory information by a non-regulated affiliate of a utility creates a slippery slope for others seeking to use the same information.[4]

[3] Revised Code of Washington 19.29A.100(1)-(2). The statutes also provide that "'[p]rivate customer information' includes a retail electric customer's name, address, telephone number, and other personally identifying information." Revised Code of Washington 19.29A.010(25). Some standard exceptions apply; these are discussed below.

[4] Colorado PUC Proceeding No. 14R-0394EG, Decision No. R15-0406, *Recommended Decision of Administrative Law Judge G. Harris Adams Amending Rules*, p. 12.

Utah utility customers' expectations are in line with the principles quoted above; Utah customers do not "generally choose to provide information about themselves to the utility for dissemination to others." This is evidenced by the numerous complaints received by the Division in response to the DPS/HomeServe mailing.

It should also be noted that in expressing the principle quoted above, the Colorado decision explicitly rejected a Black Hills/Colorado Gas Utility Company, LP (Black Hills) proposal that an affiliate "be permitted to reach Black Hills' customers by telephone, mailing address, or email only and promptly honor customers' requests to cease marketing contacts when so notified."[5] The Division agrees with the Colorado decision—when it comes to utility customer information, the Division recommends that the default position be that utilities cannot share the information, but customers can opt-in to sharing the information (as opposed to making the customers choose to opt-out of sharing).

Lists of Name, Address, and Phone Number Should Be Included in the Definition of "Personal Information" (or Equivalent)

While any particular person's name, address, and phone number may not be considered "personal information" under Utah law if it is lawfully available to the public, a list of personal information of (for example) natural gas utility customers deserves stricter handling.[6] When a third party receives this list, it is getting more than the names, addresses, and phone numbers—it is getting the information that the person is a utility customer. In a typical residential household the utility customer is the person responsible for paying the utility bills. There is value in targeted marketing to this population. Similarly, the list has essentially been "curated" to identify customers of a utility type – such as natural gas users – and could be valuable to any number of

[5] *Id.* The affiliate in question was ServiceGuard, which is described on the ServiceGuard website as follows: "Service Guard appliance repair is a service of Black Hills Energy, a natural gas and electric utility." ServiceGuard repaired HVAC units, ACs, water heaters, and other appliances, and offered service plans for these appliances. https://www.serviceguard.com/service-options

[6] In the next section we suggest the use of the term "Utility Customer Information" in place of "Personal Information."

companies (e.g. a company that services natural gas appliances). It seems unlikely that a utility would hand out such a list to a non-affiliated random company requesting it and, if a utility did so, it presumably would charge for the information. Furthermore, handing out the list does not become any more appropriate if it is given or sold to an affiliate, along with the utility's branding—in a sense, this is even more inappropriate, because the utility and/or its affiliates are attempting to profit from the customers' information without their consent.

Based on the principles discussed above, the Division recommends that the Commission create rules that prevent utilities from providing any personal information to affiliates or third parties, unless specific permission is obtained. The rule should be opt-in to sharing information, not opt-out. There are some common exceptions that are typically made to such a prohibition; these are discussed in a later section.

Consider Using the Term "Utility Customer Information" in the Rules

Utah Code section 13-44-102(3)(b) provides that:

> "Personal information" does not include information regardless of its source, contained in federal, state, or local government records or in widely distributed media that are lawfully made available to the general public.

The Division recommends that names, addresses, and phone numbers of customers be protected, even if these technically may not count as "personal information" under a non-utility-specific section of Utah law. Once combined with information that a name, address, and phone number is a customer of a utility, it is no longer information that is contained in government records and/or in widely distributed media. The Division is unaware of any published media with lists of customers of specific utilities. To avoid confusion, a term such as "utility customer information" could be used. This term would also presumably include account number, energy usage, and other utility-specific information. Customer energy usage information (e.g. hourly load data) may be the subject of future rules, but that topic need not be addressed in the current docket.

The Rules Should Be Clear and Precise, so that Utilities and Customers Can Understand and Apply Them Efficiently

Pursuant to Utah Code section 54-4a-6(3), the Division recommends that the Commission create rules that are as clear and precise as possible, so as to make the privacy policy "as simple and understandable as possible" and "designed to minimize controversies over interpretation and application."

In the Division's view, features that will make the rules clear and concise include the following:

1. Have a "bright-line" rule—the default rule should be that no utility customer information may be sold to or shared with third parties unless specific permission is given by the customer.

2. Allow customers to opt-in to correspondence from affiliates and third parties (as opposed to allowing opt-out from a default of being on an affiliate/third-party mailing list).

3. Have a standard form used to opt-in, published online, with categories of third-party vendors to select.

4. Provide for certain standard exceptions to the bright-line rule.

5. Prohibit the use of a utility's trademark and the use of an affiliate's mark that is sufficiently similar so that a customer might be confused in matters that are not essential to the utility's function.

6. If customers do opt-in to receive affiliate or third-party materials, all correspondence should make clear that the utility is not requiring or promoting the service. Affiliate names that could be reasonably confused with the utility's name should come with a clear statement that the utility is not involved (in addition to the standard disclaimer).

Rules that incorporate the features above should help to minimize customer confusion and complaints, and should also help minimize questions by the utility about what is and is not allowed. A bright-line rule with the default being "no disclosure" will result in rules that are

clear and concise. In contrast, a long list of exceptions and special cases will result in utility uncertainty, customer confusion, and slippery-slope issues. However, there are some standard exceptions that should be made. The Division recommends at least the following categories of standard exceptions:

1. Operations directly related to the utility's function. This includes essential functions outsourced to third parties, such as billing, collection, credit checks, etc. The line can be drawn at regulated functions.

2. Information used in or required by court proceedings and orders, warrants, subpoenas, Commission requests, and other valid legal or governmental proceedings.

3. In emergency situations when there is an imminent threat to life or property.

There may be other common-sense exceptions that are appropriate. However, the Division recommends that exceptions be kept to a minimum.

Utility Branding and Logo Should Not Be Used in Affiliate and Third-Party Mailings

The Division recommends that the proposed rules prohibit the use of utility logos or branding by third parties and affiliates who send correspondence to utility customers for ancillary products and services. This recommendation applies whether the customer list is opt-in or opt-out. The reason is expressed in an earlier section—any use of the logo will make some customers think the service is an "official" utility product and is required for utility service. Thus to minimize controversies, a bright-line rule is best—no utility logos should be allowed.

If logos and/or the utility name were allowed, although written disclaimers would perhaps reduce this confusion, some customers will be confused even with disclaimers. This would be made worse when an affiliate has a similar name to the utility. For example, a third-party correspondence with the Dominion logo, combined with the name "Dominion Products and Services" might confuse customers more than the logo alone. The combination of the logo and the word "Dominion" would make many customers think it is a utility product, thus putting other

third parties at a disadvantage. If an affiliate chooses to use a logo or mark that causes confusion among consumers, upon a finding of confusion, the Commission should consider prohibiting the continued use of that logo or mark going forward. Ultimately, this could require the utility to rebrand if its affiliate persists in a confusing use of the logo.

If the Commission does allow utility branding and logo on these types of marketing correspondence, the Division recommends that the logo not be at the top of the page. Furthermore, there should be a clear disclaimer, prominently and separately displayed in large and bold type that gives the following information:

1. The product or service is not endorsed or required by the utility.
2. The affiliate or third party offering the product or service is a separate entity from the utility.
3. A utility number to call if the customer has questions.

The Division recommends that this disclaimer should be used even if the utility logo and branding is not allowed to be used in the correspondence—but in the event the logo is allowed to be used, the disclaimer should be even more prominently displayed.

Furthermore, if utility branding and logo usage is allowed on third-party correspondence, the utility should have a published process that describes the steps that a third-party must take to access the usage of the branding (see subsequent section for more on the third-party process). Affiliates and third parties should access usage through the same process.

Non-Discriminatory Access Is Probably Not Feasible

As stated above, the Division does not believe that utility customer names and addresses should be made available to affiliates or third parties without specific permission from each customer. The default should be that customers are not on any mailing lists; they can opt in to specific mailings if they choose.

If the Commission does decide that this information should be made available to third parties even if the customers have not specifically permitted it, it should be made available in a non-

discriminatory fashion. Any third party (with certain to-be-specified qualifications) should be able to access the customer names and addresses, not just utility affiliates. This would be the only way to ensure the neutrality of the process—this was the original intent of the DEU tariff Section 8.08. Any affiliate or third party that met the required qualifications would be able to access the list of names and addresses, by means of a standardized process.

However, this description of how a non-discriminatory process would work is essentially a *reductio ad absurdum* of allowing third parties unrestricted access to the list of names and addresses. If it is allowed, there is no convenient way to restrict how many third parties can access the information. Unfettered access to these lists (with or without utility branding) is not in the public interest, and would inevitably result in numerous customer complaints and calls. Pricing the information is one method to restrict access. If access to customer lists is allowed but limited, there would need to be rules regarding which third parties could access the address lists. This would invite controversies over interpretation and application—and there would still be customer complaints. Thus, at this point the Division finds non-discriminatory access of this sort to be laudable in theory, but unlikely to work in practice.

One way that access could be non-discriminatory while still respecting customer privacy is that all third-parties who meet certain basic requirements could be listed on an opt-in form. For example, the utility can send out a form to customers with a box to check if they desire certain third-party services (for example, the services that HomeServe offers). Any third party, whether an affiliate of the utility or not, could be listed as a provider of that service. The Commission could simply specify some basic requirements needed in order to be listed on the opt-in form (e.g. any company up to date with the Utah Division of Corporations). On the opt-in list, the utility would make it clear that it is not recommending or endorsing any particular third party.

Revenue Imputation Should Be Applied

The Division recommends that revenue from customer lists be imputed to the utility in question. This should occur whether or not there is an opt-in list or an opt-out list. The amount of the revenue should be based on the estimated revenue from any third-party mailings. A prudent utility should attempt to maximize the revenue from the sale of these lists, and if the use of the

lists is not compensated, or is compensated under market value, the extra missed revenue should be imputed to the utility. The information and its availability to the utility is value created by customers, not shareholders.

Sample Privacy Statute/Rules/Policies from Western States and Utilities

Utah will have its own needs, but the Commission can look to neighboring states and utilities for sample guidelines regarding privacy policies. Following are examples of some salient policies from Western states and utilities.

Washington

The Washington statutes are discussed above. There is a clear and concise rule, followed by some common-sense exceptions.

California

California Public Utilities Code § 8380 provides:

> (a) For purposes of this section, "electrical or gas consumption data" means data about a customer's electrical or natural gas usage that is made available as part of an advanced metering infrastructure, and includes the name, account number, or residence of the customer.
>
> (b) (1) An electrical corporation or gas corporation shall not share, disclose, or otherwise make accessible to any third party a customer's electrical or gas consumption data, except as provided in subdivision (e) or upon the consent of the customer.
>
> (2) An electrical corporation or gas corporation shall not sell a customer's electrical or gas consumption data or any other personally identifiable information for any purpose.

This section is similar in scope to the Washington statute. Subdivision (e) deals with: (1) aggregate usage data; (2) system, grid, and operational needs (including energy efficiency and

demand response with the third parties also bound); and (3) cases where state or federal law or commission order requires the disclosure of the data.

Sample Privacy Policy: PG&E Privacy Policy (last Updated August 23, 2017)[7]

Utilities operating in California and Washington have adopted privacy policies that reflect the statutes. For example, Pacific Gas and Electric (PG&E) defines "Personal Information" to include names, addresses, phone numbers, etc.:[8]

> "Personal Information" means any information that, when used alone or combined with other personal or identifying information, can be used to distinguish or derive the identity of an individual, family, or household who is or which includes a customer of PG&E. Such information is subject to confidentiality requirements.

PG&E's policy regarding the release of Personal Information is as follows:[9]

> PG&E does not release a customer's Personal Information to any other person or business entity without your prior consent, except as necessary for PG&E to:
>
> - Provide energy services to you
> - Operate and maintain PG&E's electric or gas system
> - Comply with a valid warrant, subpoena, or court order
> - Comply with a valid California Public Utilities Commission ("CPUC") request or request from other state or federal governmental agencies with legal authority to obtain the data from PG&E

[7] PG&E Privacy Policy, at https://www.pge.com/en_US/about-pge/company-information/privacy-policy/privacy-policy/privacy-policy.page

[8] *Id.*

[9] *Id.*

- Enable Third Parties to provide energy-related services on behalf of PG&E—but only if necessary to render the service and subject to confidentiality and security requirements[10]

- Notify credit reporting agencies and collection agencies if your account is assigned for collection

- Assist emergency responders in situations of immediate threat to life or property

Other than for the exceptions noted above, it is PG&E's policy to not release Personal Information to any other person, business, or entity without your prior written consent, unless necessary to provide energy services to you. Written consent may be obtained electronically.

These exceptions do not allow the release of information in cases where an affiliate is partnering with a third party to sell products or services that are not necessary to PG&E's energy services. The only exception that mentions a third party is the fifth bullet point, but if (for example) HomeServe offered coverage to PG&E customers through a PG&E affiliate, that coverage would clearly not be "necessary to render the service" and so release of Personal Information would require customer consent. Other utilities such as San Diego Gas & Electric and Xcel Energy have similar policies.[11]

Conclusion

To summarize the Division's recommendations for a principled framework for utility customer privacy rules:

[10] According to the Privacy Policy: "'**Third Parties**' means vendors, agents, contractors, or affiliates that provide service to or on behalf of PG&E." *Id.*

[11] For SDG&E, see *Privacy Policy*, at https://www.sdge.com/more-information/our-company/customer-privacy/privacy-policy

For Xcel Energy, see the *Xcel Privacy Policy*, at https://www.xcelenergy.com/staticfiles/xe/Admin/Xcel%20Online%20Privacy%20Policy.pdf

- We recommend a bright-line rule of no sharing utility customer information (including name and address) without specific permission from the customer.
- Standard exceptions can be made.
- Use a standard opt-in form with categories of third-party vendors, with third parties having equal access to be listed on the form.
- Utility logos should not be allowed on any third-party mailings.
- All third-party correspondence should have clear disclaimers that the product is not endorsed or required by the utility.
- Revenue imputation should be applied.

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