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## Recommendation

**To:** Utah Public Service Commission

**From:** Utah Division of Public Utilities

Chris Parker, Director

Artie Powell, Energy Section Manager

Marialie Wright, Customer Service Section Manager

Douglas Wheelwright, Utility Technical Consultant

Eric Orton, Utility Technical Consultant

**Date:** June 28, 2018

**Re:** **Division Recommendation**, Docket No. 18-057-07, Dominion Energy – Gas Line Coverage Letter

**Recommendation: Revoke third-party billing tariff; impute revenue credit to ratepayers; add privacy language to Dominion Energy Utah Tariff; impose penalty.**

Dominion Energy Utah's (DEU or Gas Utility) tariff Section 8.08 Billing for Other Entities (third-party billing tariff) should be revoked because it can no longer be administered fairly consistent with Utah Code Section 54-3-8 and Commission order. It is not in the public interest. The Public Service Commission (Commission) should also require changes to DEU's unwinding plan for the third-party billing tariff. Furthermore, the amount of compensation the

Gas Utility's affiliate Dominion Products and Services (DPS) has received or will receive from its agreements with HomeServe should be imputed as revenue to the Gas Utility in future filings, at least until the unwinding plan is complete. The Commission should also consider imposing a penalty on DEU for violating the Commission's November 20, 2017 order requiring DEU to administer the third-party billing tariff in a non-discriminatory manner.

### **Background**

In 2017, DEU sought to add the third-party billing tariff to its Utah tariff, which it claimed "would be beneficial to its customers." (Docket No. 17-057-T04, Application at 3) DEU was candid with regulators and others that DPS was likely to be one of the service contract providers authorized to use the third-party billing tariff. Consequently, regulators and others were candid with DEU that the tariff must be fairly administered and should not give undue advantage to DPS. Indeed, DEU's assurances of equitable administration played a large part in the Division of Public Utilities' (Division) decision to support the third-party billing tariff. In pleadings styled as a Petition for Declaratory Ruling and motions to reconsider, various interested groups expressed their fears of unfair treatment given that the Gas Utility's affiliate was poised to take advantage of the third-party billing tariff. In fact, although HomeServe provides the service contracts at question in this matter, DPS is the entity that has agreed with the Gas Utility to be the third-party biller. There is a secondary relationship between DPS and HomeServe. Thus, although service contracts are ultimately provided by HomeServe, the only entity to avail itself of the third-party billing tariff to date is DPS.

The Commission's order concerning the petition and motion filings disposed of the filings but cautioned the Gas Utility that "in rolling out and administering this program, Dominion must comply with all statutory requirements and act in a non-discriminatory manner." (Docket No. 17-057-T04 November 20, 2017 Order, at 7.) Thus, DEU was on notice that it must ensure non-discrimination. Given the nature of the concerns addressed by various parties at various stages of that docket and the Commission's admonitions in its order, the Gas Utility should have exercised caution in all of its conduct concerning administration of the third-party billing tariff. It did not do this.

The Gas Utility gave its customers' names and addresses to its affiliate DPS. The Gas Utility received no compensation for the information. DPS then, in effect, sold that customer information to HomeServe, a service contract provider, and agreed to solicit utility customers on HomeServe's behalf. That solicitation initially took the form of mailings<sup>1</sup> with Dominion's registered trademark, some in a Dominion envelope resembling a Gas Utility billing envelope. "The commercial purpose of a trademark or trade name is to identify, and provide customers assurances regarding the nature and quality of, the marked goods or services."<sup>2</sup> The mailings

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<sup>1</sup> The Division notes that multiple versions of mailings were sent to and received by customers. For candor, the Gas Utility should have included all versions of mailings in its comments filed on May 21, 2018. The Division received multiple versions from customers, some of which are included with these comments. They are labeled as Exhibit A and Exhibit B.

<sup>2</sup> 118 A.L.R. Fed. 211. The use of the Dominion mark on the mailings promoting a product sold by HomeServe may also have further effects outside of the Commission context. For example, 15 USCA § 1125 states in relevant part that false designations of origin that "in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities" is a cause of civil action for consumers who may be confused or misled by such false or misleading designations of origin.

made no effort to identify DPS or distinguish it from the Gas Utility. Among Dominion entities, the letters referred to only “Dominion Energy.” The mailings endorsed HomeServe’s products.

Hundreds of DEU’s customers contacted the Division or the Gas Utility because they were confused by the mailings and frustrated that their information was used by the utility for marketing other services. Proceeds of the DPS and HomeServe transactions apparently remained with DPS, including ongoing proceeds the contract grants DPS. The value DPS has obtained and will obtain from the transaction with HomeServe was almost completely dependent on the fact that the transactions gave HomeServe access to the Gas Utility’s customers in a targeted marketing that strongly implied utility endorsement. In other words, a monopoly utility’s captive customer base was leveraged as the primary value in a transaction between the utility’s affiliate and a third-party. This was done with the Gas Utility’s knowledge and approval or acquiescence. For this, the Gas Utility received little or no compensation and its name and brand were used to endorse a specific service contract provider in mailings. The Gas Utility reviewed the mailings, which made no effort to distinguish the Gas Utility from DPS. The failure to distinguish between the Gas Utility and DPS is central to the confusion in this matter, in part because the third-party agreement for billing is between the Gas Utility and DPS, not HomeServe. The Gas Utility’s conduct resulted in a number of problems that should have been avoided and now demand the following correction.

First, the third-party billing tariff should be revoked because it can no longer be administered in a non-discriminatory manner. Second, the Commission should adopt new tariff provisions protecting DEU’s customers’ information from sharing, including with affiliates. Third, the Commission should impute revenue to the Gas Utility in amounts equal to the

compensation DPS receives from HomeServe. Fourth, the Commission should impose a penalty under Utah Code Section 54-7-25 on the Gas Utility for violating the Commission's November 20, 2017 order in Docket No. 17-057-T04, requiring non-discriminatory administration of the third-party billing tariff.

### **Tariff Revocation**

The Commission approved the third-party billing tariff after the Gas Utility made promises it has not kept and cannot keep going forward. Whether intentionally or not, the third-party billing tariff has been administered unfairly and should be revoked. From the initially filed testimony in Docket No. 17-057-T04 to the Commission's final order in that docket, it was clear there would be concerns about fairness in administration of the tariff. At the first opportunity, the Gas Utility failed to ensure the fairness it promised. The Gas Utility reviewed the confusing mailing that endorsed one vendor's product in a way any reasonable consumer would understand as the utility's endorsement. Both DEU's past conduct and its future inability to grant the same preferences it gave DPS and HomeServe result in discrimination that is not in the public interest and is likely to deprive utility customers of robust competition for service contracts. Further, leaving the third-party billing tariff in place after assurances of non-discrimination failed would not provide proper incentives for utility conduct, allowing DEU to break promises it made to ensure approval because a small portion of its customers might be inconvenienced by having to pay HomeServe's bill to HomeServe.

Judd Cook, at that time Dominion Energy Questar Corporation Director of Business Development, testified on behalf of DEU supporting the application in Docket No. 17-057-T04.

He testified, “the bill and the third-party’s marketing materials must clearly distinguish between Dominion Energy and the third party to ensure that customers are aware that the third party’s services are not required in order to receive utility services.” (Docket No. 17-057-T04, June 1, 2017 Testimony of Judd Cook, at 3.) Note that “Dominion Energy” in this context was defined as the Gas Utility. Later in Mr. Cook’s testimony he separately describes DPS and gives it the label of DPS. The gas line coverage letters giving rise to the current docket make no effort to distinguish the Gas Utility, branded as Dominion Energy, from DPS, which is the third-party accessing the gas bill on HomeServe’s behalf. Indeed, the letter’s language refers to only “Dominion Energy.” While Mr. Cook’s testimony was also clear that DPS was anticipated to seek third-party billing status, DPS was not carved out as an exception to the clear distinction standard his testimony promised would inform customers. Furthermore, while his testimony identifies the need for distinction as part of the need to alert customers to the services’ optional nature, it need not and should not be so limited. The mailings make it evident that no clear distinction between the Gas Utility and DPS was attempted.

The Gas Utility has noted that the reason for its conduct in this matter is that it “believes that the services offered are very valuable and enhance energy services for customers in Utah.” (Dominion Energy Utah’s Comments, May 21, 2018, at 10) If it believes such services are valuable for its customers, the Gas Utility should seek robust and competitive markets that give its customers the choice of various products from various providers. Instead, the utility’s conduct allowed its affiliate to profit, obtained no monetary value for customers, and likely diminished the prospects for meaningful competition among service contract providers. It was not in the public interest for the Gas Utility to effectively foreclose the possibility that competing providers

could enter the market on equal footing by giving customer information for no consideration and failing to object to mailings that did not clearly distinguish between it and DPS.

As noted above, the mailings made no attempt to distinguish between the Gas Utility and DPS. It is not enough for DEU or DPS to claim that DPS was properly licensed to use the Dominion Energy trademark if the use of that mark confused customers, potentially violated federal trademark law, and violated the Gas Utility's promise to make clear distinctions between it and service contract providers. Furthermore, Gas Utility personnel reviewed the mailings and provided feedback on them, which apparently did not include clearly delineating the distinction between DPS and the Gas Utility. It is plain that the value HomeServe obtained from the agreements was access to the Gas Utility's customer's information, access to those customers and their bills, and a solicitation of those customers designed to appear as though it were from the customers' monopoly utility.

The Gas Utility knew, or should have known, the mailings would appear as though they were from the DEU. Even apart from the discrimination in HomeServe's favor, there are multiple types of confusion engendered by the mailings. The letters inadequately alert customers to HomeServe's independence and the service's optionality, they fail to distinguish the Gas Utility from DPS, and they are vague about what part of the line is covered by the service. In multiple respects, the Gas Utility failed to alert its customers to the differences required to avoid discrimination and confusion. Whether doing so by influencing DPS's and HomeServe's mailings or by making independent communication when it knew the mailings would be sent, the Gas Utility had a duty to do more to ensure its customers were fairly dealt with. Nevertheless,

the May 21, 2018 comments by the Gas Utility go to great lengths to highlight passages it argues adequately distinguish the entities. They are insufficient.

The Gas Utility's May 21 comments indicate that the language distinguishing HomeServe as an independent entity is in "the final paragraph of the letter." Although it is set off from the rest of the letter's main text by space and an unrelated heading in the version of the letter provided with the May 21 comments (Exhibit B), one could argue that it constitutes the letter's final paragraph. However, in the letter included as Exhibit A, the identified language follows the signature line, appearing more like an unannotated footnote of the type many readers skip or skim. The claim that the letter distinguished between "Dominion Energy" and HomeServe is not false but it is incomplete and obscures as much as it reveals. The effort to clearly identify the distinction between Dominion Energy and HomeServe was inadequate. It is legalistically appended in a way that could obscure the distinction. This view is supported by the notable lack of any HomeServe logo branding on any of the mailings. Typically, companies are eager to feature their branding.

Though language about the services' optional nature was included in the letters, it was a small portion of a much larger sales pitch. Given the rarity of a monopoly utility's solicitation of its customers for other companies' products, greater care should have been taken to prominently highlight the optionality. No care was taken to distinguish the utility appearing to send the letters from DPS, as evidenced by the fact that in the version included as Exhibit A, James L. Neal is listed as the General Manager of Dominion Energy, not DPS.



The mailings all refer to Dominion Energy. None refer anywhere to DPS. The Gas Utility's May 21 comments however, go to great lengths to both use and blur the distinctions between the Gas Utility and DPS. They ignore that DPS is the third-party biller. They ignore that the utility gave its customers' information to its affiliate for no compensation. They ignore that utility personnel were aware of the relationship between DPS and HomeServe. They ignore that the utility has specifically testified that clear distinction should be made in communications with utility customers between the utility and a third-party, especially DPS. They ignore that utility personnel approved of or acquiesced in the mailings that failed to clearly distinguish the utility from DPS, not mentioning DPS at all.

At various times the May 21 comments refer to "the Company" to indicate the utility; "Dominion Energy" to refer to the utility, the parent company, or something else that is not clear; or "Dominion Products and Services." The lack of clarity in labels obscures the discussion. One example of this is found in the May 21 comments concerning disparate treatment, beginning on page 7.

Though the letters all referred to only Dominion Energy, the comments in the discrimination section of the May 21 comments refer to "the Company" to create distance between the utility and the mailings, which it attributes to DPS. Of course, that distance was invisible to utility customers. Even the proposed letters filed as exhibits to the unwinding plan on June 5, 2018 continue to exclude any mention of DPS and still suggest the Gas Utility is HomeServe's partner. This is discouraging because it is this lack of clear distinction between Dominion entities that is at the heart of this matter. Indeed, the most essential fact in this matter

is that, from a Gas Utility customer's perspective, its monopoly utility endorsed and marketed another company's product after first instilling the fear of large expenses in the customer.

The May 21 comments assert that the utility has not "granted any unlawful preference with respect to third-party billing to HomeServe." Had the comments used the label "Dominion Energy" here, they would be plainly false because the letters themselves used the "Dominion Energy" mark and clearly endorse HomeServe's business. In other words, the mark and label often used to refer to the utility in the May 21 comments and used in the letters is not applied in the disparate impact section. The utility seems to have realized in drafting its May 21 comments that use of the Dominion Energy label in the disparate impact section might confuse readers and suggest that it was the entity sending the letter endorsing HomeServe's products. It chose to use the different "Company" label to avoid that confusion. It uses the "Dominion Energy" label to refer to the Gas Utility earlier in the comments on page three when it says, "Dominion Energy believes the letter properly distinguished between Dominion Energy and HomeServe."

Here, the "Dominion Energy" label is apparently used to refer to the utility, as it is defined in the comments' introductory paragraph. What the Gas Utility either missed, or avoided saying, is that if the letter plainly identifies the distinction between the utility and HomeServe, it also plainly identifies the utility's endorsement of one specific vendor. In the absence of any distinction between the Gas Utility and DPS, it cannot be otherwise. This is especially the case given that DPS is the actual third-party for whom the Gas Utility has agreed to bill.

In response to concerns of disparate treatment, the Gas Utility disclaims responsibility for the letter, suggesting it was a DPS endeavor and proclaiming that it cannot have discriminated

because no one else has yet asked for access to customer bills. Nevertheless, the Gas Utility also claims that the letter clearly distinguishes between the utility and HomeServe. Because of the lack of distinction between the Gas Utility and DPS, the mailings did not adequately identify the sender and avoid discrimination. If the letter's use of the Dominion Energy mark and label without a separate DPS mark or label is meant to refer to DPS's endorsement of HomeServe, the only entity it distinguishes from HomeServe is DPS. If, on the other hand, the Dominion Energy mark and label is meant to refer to the utility, it lightly distinguishes the Gas Utility from HomeServe but implies the utility's endorsement of HomeServe's products. If DEU or its affiliates continue to use such confusing materials, the Division is likely to seek rebranding of the Gas Utility's name to protect utility customers from ongoing confusion from the broad use of the Dominion brand. Admittedly, that is a drastic remedy and one that can likely be avoided with due care to making proper distinctions.

The failure to make proper distinctions is the fundamental confusion that cannot be undone in this case. It was likely also the central value in the transactions that led to the mailing. The endorsement, implied or actual, directly violates the Commission's anti-discrimination command from its November 20, 2017 order. It also violates the clear distinction DEU promised in its testimony in the third-party billing docket. Given the Gas Utility's skill with proper labeling in its May 21 comments, the failure to distinguish between Dominion Energy entities in the mailings cannot be ignored. The Gas Utility should have taken the same care when it reviewed the mailing materials that it did when it defended itself in the May 21 comments. The lack of clear distinction and other confusion in the mailings outweighs the inclusion of mildly exculpatory language in them.

From the Gas Utility's customer's perspective, its monopoly utility sent a mailing strongly endorsing HomeServe's products. The letters were sent using utility customer information. They came in Dominion-branded envelopes resembling billing envelopes to the addresses on file with the utility. There is no way for even a savvy reader to distinguish the mailing between the Gas Utility and DPS, who is the third-party billing entity. The mailings do note that HomeServe is distinct from the utility but that information is not prominent and hundreds of customers missed it. The picture one is left with is one of confusion. Momentarily ignoring any confusion about the optionality or extent of the product offering, the mailing was plainly designed to appear as though it was from the Gas Utility.

After these mailings, the only way to ensure non-discrimination in tariff administration for the third-party billing tariff is a method the confused and upset customers are unwilling to accept and the Division is unwilling to endorse: broad sharing of customer information and utility-branded mailings advertising or endorsing other providers. As noted above, the mailings make no attempt to distinguish DPS from the Gas Utility and they used utility customer information. It is not possible or in the public interest to allow other service contract providers the same access to customers and utility support through use of its trademarks that the DPS/HomeServe mailings gave DPS and HomeServe in this case. The confusion the mailings engendered and the customers' plainly expressed privacy preferences answer the question about whether similar privileges should be granted to other service contract providers in the negative. This is true whether or not the Gas Utility had anything to do with the letters. The effect of the mailings was the same whether they were done by the Gas Utility or DPS: utility customers were led to believe their gas utility endorsed a third-party's product.

The third-party billing tariff should be revoked because the Gas Utility's promises of equitable administration have not been, and cannot be, kept. These promises were essential to the third-party tariff's approval and they were violated in the very first instance of a third-party using the tariff. Although some customers will be inconvenienced by the discontinuance of the joint billing arrangement, the utility's behavior should not be excused and no other consequence can adequately remedy the inequity created by the endorsement of HomeServe's product in the confusing mailings.

On June 5, 2018, the Gas Utility filed its unwinding plan in the event the third-party billing tariff is revoked. The Division generally supports the plan as reasonable, with a few changes and clarifications. The plan as filed maintains some of the confusion created by the original mailings. The proposed notifications do not identify the relevant entities clearly. DEU, DPS, and HomeServe should all be distinctly identified. It must be clear to recipients what is coming from whom and which entities occupy which positions. An average reader should know that DEU is his gas utility and that the utility is not recommending, forcing, providing quality assurances, or advocating anything with regard to DPS or HomeServe. The language making this clear should be prominent and the primary purpose of a communication from the utility at its own expense, independent of other mailings from DPS or HomeServe to customers of the HomeServe services. As they stand, the letters proposed in the unwinding filing are not clear on who is sending them, use the word "we" liberally, in a way that does not clarify, and they continue to endorse HomeServe. In other words confusion remains. The Commission should order notice that clearly identifies all relevant entities. Other clarifications should be made as well.

The Division understands the notification timelines suggested do not imply the third-party billing tariff will remain in place until the notification and response periods are complete. Rather, those timelines should affect how the non-utility parties treat billing, payment, and continuation of coverage in the immediate post-revocation period. Additionally, the Division notes the cost of letters, phone calls, and other contact contemplated in the plan should not be borne by the utility's customers. It is not clear whether the unwinding plan calls for the actions to be taken by the Gas utility, DPS, or HomeServe. If the utility takes actions related to the unwinding, they should be reported, along with evidence those actions have not resulted, or will not result, in costs appearing in rates.

### **Privacy Tariff**

The Commission should consider changes to DEU's tariff to prevent sharing customer information with affiliates. At the heart of this matter is the use of utility customer information by DEU's affiliate. Even if third-party service contracts were a valid reason for sharing this information, as DEU asserts, the information should not be handed over so freely. Utility customers should be able to opt out of such information sharing and should have more ready knowledge of that option. Even if Utah Code does not designate the information as private, the information should not be freely shared by a utility. Customers should be able to limit the utility's use of their information because they have little or no choice but to deal with a monopoly utility.

The Commission should make rules to enable customer control of information sharing for all regulated utilities but may wish to adopt new tariff language for DEU until those rules are

completed. The language should include a general prohibition on sharing without compensation, except for routine billing and collection using shared corporate resources. Below is language that may be adequate.

“Dominion Energy may not share customer information with any other entity without compensation, except for purposes of billing and collection for the customer’s gas usage. Compensation for customer information shall be a revenue credit in rate proceedings. A customer may opt out of any information sharing other than sharing ordinary billing and collection information. At least once in each calendar year, Dominion Energy shall include a notice with each customer’s bill that the customer may opt out of information sharing. Once a customer opts out of information sharing, the customer’s permission is required before information may be shared, other than for purposes of billing and collection for the customer’s gas usage.”

### **Revenue Imputation**

Revenue equaling amounts generated by the DPS agreements with HomeServe should be credited to ratepayers. Note that the Division expresses no opinion on whether DPS should make any payments to the Gas Utility. The Division’s recommendation is merely a revenue imputation to the regulated utility.

The value of the agreements to HomeServe primarily exists because the agreements gave HomeServe privileged access to utility customers and the utility’s implicit or explicit endorsement. In other words, it is not evident that DPS added any value for HomeServe. Aside from the question of whether it was permitted to, the Gas Utility could have earned similar revenues by negotiating a similar deal with HomeServe. Though HomeServe would have had to register as a third-party biller under the third-party billing tariff, its access and benefits with regard to Utah gas customer-related benefits would not have varied significantly because they came through the Gas Utility instead of DPS. Thus, the revenue generated for DPS from the

agreements is likely a reasonable proxy for the value of what the utility gave its affiliate without compensation. That revenue should be the measure of the Gas Utility's compensation to utility customers for their information. Leaving customers uncompensated would allow the monopoly utility's parent to profit from the customers' information and would violate the public trust granted to a utility. DEU is entitled to earn a return on investments to serve utility customers, not to earn a return by trading upon those captive customers' information. If utility customer information is to be traded, the utility customers deserve compensation for it.

If the third-party billing tariff is revoked, perhaps the imputation of revenue could equitably cease at some time after the revocation is complete. This determination could be made at a later date based on a factual inquiry into the on-going relationship, if any, between DPS and HomeServe. To the extent the payments to DPS from HomeServe cease to primarily reflect the value of privileged access to utility customers, imputing that revenue to the Gas Utility would be unwarranted. However, given the nature of this matter's inception, the burden for proving that cessation should rest with the Gas Utility.

### **Penalty**

Violating the Commission's November 20, 2017 order should lead to a penalty for the Gas Utility under section 54-7-25. Under that statute, a utility may be fined between \$500 and \$2,000 for each separate violation of a Commission order. Arguably, that fine could apply to each instance of a utility customer receiving a mailing that failed to distinguish the Gas Utility from DPS or endorsed HomeServe's products. It might also apply to each day that mailings went out. However, if the revenue imputation above is made, the Commission should impose only a



single \$2,000 penalty on the Gas Utility. Combined, those consequences will adequately indicate the utility engaged in conduct that violated a Commission order and compensate customers for that violation. If the revenue imputation is not made, the Commission should consider what the proper measure of the penalty should be.

### **Conclusion**

The Gas Utility has violated its own promises and the Commission's order to administer its third-party billing tariff fairly. The third-party billing tariff is no longer in the public interest and should be revoked as other remedies are insufficient. The Commission can help prevent future instances of similar conduct by imposing limitations on utilities' sharing of customer information through rulemaking or imposing the suggested language in these comments. It should do so. Further, the Commission should order the imputation of revenue to the Gas Utility in an amount matching the revenues DPS receives from HomeServe to reflect the value of customer information and other services the Gas Utility gave DPS without compensation. The Commission should also impose a penalty against DEU under Section 54-7-25.

cc: Michele Beck, Office of Consumer Services  
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