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VIA ELECTRONIC FILING

Public Service Commission of Utah
Heber M. Wells Building, 4th Floor
160 East 300 South
Salt Lake City, UT 84114

Attention: Gary Widerburg
Commission Secretary

RE: Docket Nos. 18-R460-01, 18-035-40, and 18-057-19
Proposed Rulemaking Concerning Utility/Customer Relations regarding Third Party Solicitations.

On October 12, 2018, the Public Service Commission of Utah (the "Commission") opened the above referenced docket with its notice of proposed rulemaking ("NOPR") to address the proper use of utility customer lists, appropriate utility-related solicitation communications, the use of monopoly utility branding, and other issues. Subsequently, in the November 7, 2018, scheduling conference for the rulemaking, the interested parties requested an opportunity to submit comments, reply comments and to later hold a technical and an additional scheduling conference where the parties could discuss their positions and determine if a collaborative approach to drafting proposed rules would be feasible given each party's position.

On December 18, 2019, the Division of Public Utilities ("DPU"), Dominion Energy Utah ("DEU") and the Office of Consumer Services ("OCS") all provided initial comments. Rocky Mountain Power ("RMP") elected not to provide initial comments, given that its involvement in third-party service offerings is currently limited, and also that it does not currently allow access to customer lists to third parties unrelated to its provision of utility service. However, RMP is interested in this rulemaking insofar as the rules may impact its current business, and could have material impacts on future opportunities to expand its customers' ability to access new markets offering beneficial goods and services. Accordingly, RMP offers these reply comments with the goal of encouraging rules that avoid unintentional compliance risks and costs for utilities, and that strike the right balance between protecting utility customers and not overly restricting or eliminating future market opportunities that may benefit Utah customers.

1. Introduction

The electric utility industry, and the utility industry in general, is in the midst of a period of transformation. In many areas of the country, load growth is flat or declining, the types of resources used to generate power are changing, and technological innovations are opening up new opportunities to support core utility functions and provide new goods and services that go beyond them. Many utilities, faced with flat or declining load growth, are looking for ways to continue to provide affordable, reliable utility service to customers, even as cost pressures are increasing. At a high level, two ways utilities can address these challenges are 1) to find more

efficient ways to deliver service; and 2) to find additional potential sources of revenue outside of typical regulated services. Fortunately, technological innovations are increasingly providing new ways to do both.

As smart appliances, electric vehicle charging, and other new technologies slowly work their way into customers' homes and businesses, they will enable greater efficiencies that could benefit utilities and their customers. The billing and service platforms of utilities present opportunities to support markets for these new products through faster development of infrastructure and more effective marketing of goods and services that are not rate regulated. Access to these new technologies will benefit customers, and the potential revenue streams to utilities resulting from the sale of utility related products and services could buffer some of the impacts of stalled load growth, and provide natural incentives for utilities help provide customers access to new products. A report from Berkeley Labs addressing this same topic notes that, "[o]ne job of the regulator is to ensure the best economic outcome for all customers. Allowing both electric companies and third-party providers to compete to provide these services provides the greatest potential benefit to customers. Rules and regulations can be put in place to facilitate this."[1]

This rulemaking docket provides the Commission an opportunity to set up an initial structure that guides utilities and other stakeholders as they explore how to bring the benefits of new technologies forward to Utah customers. At the same time, many of these technologies are only just coming into use, and many others are not yet widely available. If the Commission sets out overly prescriptive rules, it risks hampering these nascent markets to Utah's detriment. RMP's reply comments are delivered from this perspective. What are the best ways to protect customer information without diminishing market opportunities for utility related goods and services that could provide benefits to customers, additional revenues to the utility, and bring new businesses to the state in the form of third party (including affiliates) providers of those goods and services?

2. Customer Lists, and Customer Data Protections

a. Third Party Access to Customer Lists and Information

In their comments, the OCS and the DPU propose rules preventing utilities from selling customer lists, and other customer information. RMP does not currently have, and has no future plans, to sell this data to third parties and therefore agrees with this aspect of the OCS and DPU proposals. However, while RMP does not believe that customer lists should be used as a profit center for utilities, there are situations where allowing utilities to make this information available to approved third party companies may be in the public interest. Because it does not appear that the DPU and the OCS fully considered these situations, RMP is concerned with another related aspect of the OCS and the DPU proposals on customer lists. The DPU and OCS propose that, before third party companies are granted access to customer lists, utilities must have affirmative

[1]Lawrence Berkeley National Laboratory, Future Electric Utility Regulation; "Value-Added Electricity Services: New Roles for Utilities and Third Party Providers"; Report No. 9 at p.7 (Oct. 2017).
("Berkley Value-Added Services Report"); available at https://escholarship.org/uc/item/3sn8x1jd.

consent from their customers. This is in contrast with granting access to approved third party companies by default, and then allowing customers to opt-out of or request removal of their information from such lists. Rules on whether and how customer lists are shared should be more flexible. Opt-in only sharing may be the right approach for certain things, such as sharing customer lists with third party companies that offer products largely unrelated to utility services. For example, granting access to lawn-care or magazine sale companies. Granting access to customer lists for these type of businesses may provide a benefit to a few customers that learn about services they would not have otherwise found on their own. On the other hand, it is likely that the harms, in the form of customer annoyance and complaints, would outweigh these limited benefits. The DPU raises this prospect in its comments, and RMP agrees that it could be a problem if access to customer lists is broadly granted without due consideration of why third party companies are being given that access.

On the other hand, sharing customer lists with third parties through a Commission approved program for smart appliances, electric vehicle charging units, or other programs enabled by new technologies could be the most efficient way to encourage the development of markets for these new products. Product providers could benefit from access to customer lists, which would allow them to make informed decisions to invest in Utah, and better target the marketing of their products when they do. On the customer side, granting access to customer lists, while allowing customers to opt-out if they wish, can help to bridge information divides and encourage market growth, because customers are unlikely to affirmatively consent to sharing their information with companies offering new products that the customers are not yet aware of. Third party providers of these products, to the extent they cannot gain access to high quality information to help them understand the market opportunity, will also have less incentive to invest in Utah if lists are opt-in only. For markets that the Commission finds it is in the public interest to encourage, providing controlled access to needed customer information on an opt-out basis can be a powerful tool. On the other hand, putting the onus on customers to affirmatively elect to share information with third party companies offering products that customers are unlikely to know even exist would likely discourage those markets. [2]

These rules should not impose unnecessary regulatory constraints on the growth of new markets, but RMP acknowledges that it is difficult to develop effective rules based solely on hypothetical examples. Fortunately, states that deregulated retail energy supply years ago provide real world examples. In those states regulators were faced with new markets that many customers knew little about, but that the regulators believed it was in the public interest to encourage further development of. Whether deregulation itself has actually been beneficial to customers and served that end continues to be debated, but if you replace “deregulated energy supply” with “innovative home vehicle charging units” or some other prospective value-added utility related product or service, then the analogy is reasonably apt.

Regulators in most states with retail deregulation developed mechanisms to allow qualified third party gas or electric suppliers’ access to utility customer lists as a way to

[2] Berkley Value-Added Services Report at p.14, “Electric companies are uniquely positioned to spur market growth and development, but are often constrained by regulatory processes.”

encourage the growth of these newly enabled markets. The information in those lists varied to some extent by state, but these lists were predominantly opt-out rather than opt-in. Commissions were motivated to allow customer list access on an opt-out basis because most customers were not accustomed to having a choice of gas or electric supplier, and therefore would not have known that they needed to opt-in to anything to learn about their new options. Suppliers too would have been more hesitant to enter into and invest in developing those markets if they only had limited information on the scope of the opportunity and no information beyond the phone book to base their sales and marketing plans on.

While there are other examples, Ohio and Pennsylvania are good examples of deregulated states that wrestled with this problem successfully and now have fairly well developed and well-functioning rules addressing access to utility customer lists. Both states also now have well developed retail gas and electricity supply markets. In both, utilities are required to provide third party suppliers, approved by the state commissions, with nondiscriminatory access to lists of customers eligible to shop for electricity supply.[3] Both states restrict the use of the eligible customer lists by those third party suppliers to the intended purpose of the lists, marketing and provision of electricity supply.[4] Ohio requires utilities to provide opt-out notices to customers four times per year to inform them of how to have their names taken off the list via telephone, mail, or, at the utility's option, electronically.[5] Pennsylvania also provides an opt-out mechanism whereby customers may, by request, restrict certain information from inclusion on the eligible customer lists, including service address, telephone numbers, and usage data.[6]

While there are differences in how Ohio and Pennsylvania manage access to utility customer lists, each are good examples of state commissions that sought to balance their desire to encourage nascent markets against the need to provide customers with reasonable protections and control over their information. A statement from, James H. Cawley, the chairman of the Pennsylvania commission at the time the PA Interim Guidelines for Eligible Customer Lists were adopted, recognized the need for such balancing stating, "We therefore should approve these [Eligible Customer List] guidelines that enable [Electric Generation Suppliers] to have critical information necessary to market and price their competitive supply products to electricity customers….It is equally important to emphasize what the [Eligible Customer List] guidelines do not provide. They do not provide access to any customer financial information, nor to real time meter data. Customers may restrict access to their phone numbers or customer usage data."[7] Ohio and Pennsylvania's approaches demonstrate that this Commission's rules can provide customers with adequate protection, while still allowing for the possibility of future programs to support new markets that would be beneficial to Utah's customers and utilities. Rules requiring affirmative consent to share customer data, *unless* pursuant to a Commission approved program

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[3] *See*, Ohio Administrative Code §4901:1-10-29 (E); and PA PUC Docket No. M-2010-2183412, "Interim Guidelines for Eligible Customer Lists" (Nov. 2010) ("PA Interim Guidelines"), available at http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=M-2010-2183412.
[4] Ohio Administrative Code §4901:1-21-10; and 52 Pa. Code § 54.43(d).
[5] Ohio Administrative Code §4901:1-10-24(F)(4).
[6] PA Interim Guidelines at p.8.
[7] Penn. Public Utilities Commission, Chairman Cawley Statement on Interim Guidelines for Eligible Customer Lists at pp. 1-2 (Nov. 2010) ("PA Interim Guidelines"), available at http://www.puc.state.pa.us/general/pdf/Cawley_Stmt_DIR2183412_111210.pdf.

or tariff, would protect customers without taking a potential tool to encourage certain beneficial markets off the table.

b. Non-Discriminatory Access

The DPU's comments express doubt that rules could ever provide truly nondiscriminatory (as between utility affiliated and unaffiliated third parties) access to customer information. Taking Ohio and Pennsylvania as examples again, both states allow utilities' commission approved retail energy supply affiliates to access customer data on a nondiscriminatory basis.[8] Other rule provisions establish standards of conduct that restrict the utilities from favoring their own affiliates through the provision of information or other services, and are akin to the Federal Energy Regulatory Commission's standards of conduct for transmission providers.[9] Because RMP does not have any affiliates operating in Utah markets in ways that currently put this at issue, it does not have any specific rule proposals to address affiliate issues at this time. However, it does support rules that provide the Commission the ability to address such concerns if they arise. DEU's recommendation that the rules allow Commission approved tariffs to establish how and when information is shared is one way to achieve this flexibility. Flexibility is necessary here, a market and its participants needs to be well defined to create effective rules to prevent utilities from unfairly favoring their affiliates or from being too cavalier in how customer information may be shared in that market. In RMP's case at least, what markets may benefit from access to customer lists or information on an opt-out basis are only prospective and hypothetical so clear definitions that would lend themselves to effective rules are lacking at this time.

c. Access by Third Parties Directly Related to Utility Service

The OCS and DEU specifically state in their comments, and the DPU implies that, utilities should be able to share customer information when the sharing is directly related to the provision of utility service to customers. To the extent customer information is shared with a vendor, requiring confidentiality provisions be in place is reasonable, and is already a standard provision in RMP vendor contracts. There are other circumstances where a utility may need to share customer information without a contract in place such as subpoenas from law enforcement. In yet other situations the customer may direct a third party to access the information on its behalf. The rules will need to be broadly applicable enough to provide utilities guidance in these varied circumstances, and potentially provide standard information release language so that the method of obtaining customer consent to release where a customer designee needs access is clear.[10]

d. Scope of Customer Information Subject to Protection

The DPU proposes creating a new defined class of information called "Utility Customer Information" that would not otherwise meet the definition of protected "personal information"

[8] *See*, Ohio Administrative Code §4901:1-10-24(F)(3); and 52 PA Code § 54.122(6) & (7).
[9] Ohio Administrative Code §4901:1-37-04, and, generally, 52 PA Code § 54.122.
[10] *See e.g.*, Ohio Administrative Code §4901:1-10-24(E)(4).

under current Utah law. As the DPU notes, Utah Code section 13-44-102(3)(b), a section of Utah's law more generally requiring companies to protect personal information, excludes information that is in public records or that is in a "widely distributed media made available to the general public" (e.g. a telephone book). The DPU proposes creating a different class of information that in addition to the utility account number, usage data, and other utility specific information, would make a customer's name, address, and phone number information that utilities have a duty to protect. The name, address, and telephone number of a customer does not typically constitute "personal information" under Utah Code 13-44-102(3)(b), and indeed can be found in a phone book or in other public records, but the DPU reasons that when such information is associated with being a utility customer, it somehow warrants giving that information heightened protection. Currently the names, addresses, and phone numbers of RMP's customers are not typically included in the customer information that it is legally obligated to protect. Imposing a new legal duty on utilities to protect such information when not combined with more sensitive information like passwords or bank account numbers could come at a substantial cost.

Given the headline grabbing data breaches that have occurred over the past few years, companies in all industries are devoting increasing resources to protecting their customer information from data breaches, theft, or accidental disclosure. Even in the absence of legal requirements, the potentially costly liability, and negative goodwill impacts on companies that are ill prepared to address data breach risks is profound. If the Commission were to accept the DPU's proposal to make customer name, address, and phone number non-disclosable, even though that information is already typically in the public record, then Utah utilities will be required to commit additional resources to protecting that data. This is true even though bad actors would not be able to use such information on its own (i.e. not in combination with account numbers, social security numbers, passwords, etc.) to commit crimes or otherwise harm customers.

Rules protecting customer billing data, and utility account numbers may be warranted. Rules requiring that customer usage data be anonymized if shared outside of any commission approved programs, may also be warranted. However, the bulk of DPU's concerns about commercialization of utility customer lists are better addressed through other rule provisions restricting utilities' and third party use of that customer information. Expanding utilities' obligations to customer names, addresses and phone numbers will increase the cost to utilities of keeping that data, with little corresponding benefit to customers.

3. Utility and Affiliated Third Party Branding and Logos

The DPU proposes rules that would institute a wholesale prohibition the use of utility logos by non-utility affiliates. Specifically, the DPU states that the rules should "[p]rohibit 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."[11] While the OCS does not go quite as far, it advocates for rules that require a non-utility to "clearly

[11] DPU Initial Comments at p.6.

distinguish its branding from the monopoly utility's branding."[12] In contrast, DEU proposes disclosure requirements that will ensure that customers are not mislead or confused by affiliate branding that may share characteristics with the utility. RMP has concerns very similar to those expressed by DEU. RMP, as a subsidiary of Berkshire Hathaway Energy, has elements of its logo in common with its parent. Other subsidiaries of Berkshire Hathaway Energy also have these common elements. Some of RMP's affiliates that use these common logo elements do business in Utah. Because of this corporate branding, any rules preventing corporations like Berkshire Hathaway Energy, or Dominion Energy from establishing branding across their corporate families would have immediate, and potentially very costly consequences for Utah customers. Rather than change their global branding, both parent corporations would be likely to change the branding of their Utah affiliates rather than that of their other subsidiaries, many of which operate in multiple states. A re-branding effort would come at a significant cost, because RMP and DEU would have to develop new logos and trademarks, which comes with changes to websites, to advertisements, to company vehicles, to signage and countless other things where the logos appear.

RMP agrees with all three commenters on what it sees as the central point of rules regarding the risk of affiliate confusion—the goal is to prevent companies from inadvertently or deliberately misleading or confusing customers. A wholesale bar on the use of similar branding elements between the utility and its non-utility affiliates is not the only way to achieve this. First, corporate branding itself, when done correctly, provides customers with information that may be useful to them. That useful information would be lost if the rules prevent related branding elements across a corporate family. Similar branding elements inform customers that a non-utility affiliate is associated with either the utility or the parent and vice-versa. RMP uses its distinctive company name along with a logo that is shared across several Berkshire Hathaway Energy companies. While it is possible this could create confusion for a limited set of customers, it is also likely that the different company names would inform the average customer that, for example, Berkshire Hathaway Renewables is not the same company as RMP. That same customer would recognize the similarity between the logos and font and would be able to infer that there is a relationship between the companies, even if they are not one and the same. The problem only arises where there is not sufficient information in a given publication for the average customer to distinguish which company is which, and the context of the publication itself may also increase concerns that customers may be confused.

Other state commissions have addressed these issues, again in states with competitive retail electricity markets where competitive retail affiliates are allowed to market in the territories of the utilities they are affiliated with. Ohio rules define the failure to "conspicuously disclose an affiliate relationship with an existing Ohio electric utility" as a violation of its rules, which allows the commission there to impose fines on certified suppliers or potentially bar them from the market if they do not comply.[13] Pennsylvania goes a bit farther. It prohibits utility affiliates from stating or implying that their services are superior to other third parties in the market solely based on an affiliation with a utility. For affiliates with similar names or logos, the

[12] OCS Initial Comments at p.2.
[13] Ohio Administrative Code §4901:1-23-05(C)(8)(g).

Pennsylvania rules require utility affiliates to include disclaimers in all marketing materials (including radio and television) stating that the affiliate is not the same company as the utility, that its prices are not regulated by the commission, and that customers are not required to buy anything from the affiliate to continue receiving the same quality of utility services.[14] Maryland takes a broader approach and its rules simply foreclose any "marketing or trade practice that is unfair, false, misleading, or deceptive."[15]

While the context of this rulemaking is certainly different than any of the three states discussed above, these examples make clear there are more nuanced ways for regulators to prevent misleading marketing practices between utilities and their affiliates than a flat prohibition on the use of similar logos or trademarks. A more nuanced approach is in order here, given that RMP has already invested in its current corporate branding, and that branding has elements in common with that of its parent and sister companies. RMP would have to invest significantly to change that branding now. RMP's customers have not complained of any confusion or any misleading practices as between RMP and its existing, similarly branded affiliates. Requiring RMP to undo its branding would be an expensive fix to a problem that is, in RMP's case, only speculative. In that regard, a more general provision preventing misleading or deceptive marketing that relies on or refers to Utah's existing truth in advertising laws (Utah Code 13-11a-1, *et. al.*) would be a fairer course of action that would not have the costly consequences that a complete prohibition on similar logos would. RMP is also not opposed to rules that require additional disclosures where the risk of confusion may be heightened, such as a commission approved marketing program, or when a utility offers third party billing services for products or services offered by an affiliate.

4. Conclusion

RMP appreciates this opportunity to provide these reply comments, and looks forward to discussing with the other parties whether the few positions that are farther apart can be bridged through further discussions. Based on the initial comments, RMP sees room for compromise, and believes that additional discussions to develop proposed rule language will be worthwhile.

Questions about this filing can be addressed to Jana Saba at (801) 220-2823.

Sincerely,

Jacob A. McDermott
Senior Attorney

[14] 52 PA Code § 54.122(10).
[15] COMAR 20.53.07.07(A)(2).

CERTIFICATE OF SERVICE

Docket Nos. 18-R460-01, 18-035-40, and 18-057-19

I hereby certify that on January 11, 2019, a true and correct copy of the foregoing was served by electronic mail to the following:

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