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Confidential Data in a Competitive Utility Environment: A Regulatory Perspective

MASTER

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August 1996

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**A Report from the
Database on Energy Efficiency Programs (DEEP) Project**

**Confidential Data in a Competitive Utility Environment:
A Regulatory Perspective**

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August 1996

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ABSTRACT

Historically, the electric utility industry has been regarded as one of the most open industries in the United States in sharing information but their reputation is being challenged by competitive energy providers, the general public, regulators, and other stakeholders. As the prospect of competition among electricity power providers has increased in recent years, many utilities have been requesting that the data they submit to their utility regulatory commissions remain confidential. Withholding utility information from the public is likely to have serious and significant policy implications with respect to: (1) consumer education, the pursuit of truth, mutual respect among parties, and social cooperation; (2) the creation of a fair market for competitive energy services; (3) the regulatory balance; (4) regional and national assessments of energy-savings opportunities; (5) research and development; and (6) evaluations of utility programs, plans, and policies.

In a telephone survey of all public utility commissions (PUCs) that regulate electric and gas utilities in the U.S., we found that almost all PUCs have received requests from utility companies for data to be filed as confidential, and confidential data filings appear to have increased (both in scope and in frequency) in those states where utility restructuring is being actively discussed. The most common types of data submitted as confidential by utilities dealt with specific customer data, market data, avoided costs, and utility costs.

Most utility requests for confidentiality are typically honored (accepted) by PUCs and remain confidential unless appealed. However, there is no uniform policy on confidentiality of data: typically, each state regulatory commission determines confidentiality on a case-by-case basis, and there are procedures and guidelines for claiming and appealing confidentiality, although they are quite flexible. What seems lacking is an indepth evaluation by commissions of the weight to be given to public interest considerations that favor disclosure.

All regulatory commissions in our survey regarded the confidentiality of data as a serious issue. However, most regulatory commissions did not see the confidentiality of data as an urgent policy issue or as an issue that warranted immediate attention outside of normal activities. Existing regulatory procedures and guidelines were deemed to be adequate and sufficient to respond to utility submissions of confidential data.

Eight commissions, however, were very interested in the policy implications of increased utility submittals of confidential data: California, Illinois, Maine, Massachusetts, Utah, Vermont, Washington, and Wisconsin. Furthermore, some regulatory staff (particularly those actively considering utility restructuring) believed that the existing regulatory process for reviewing utility

requests for data to be filed as confidential was inadequate to protect the public's access to this information.

As more states experiment with restructuring, we expect the issue of confidentiality to become a more important public policy issue. In order for the electric utility industry to remain as one of the most open industries in the United States in sharing information, the regulatory community will need to be proactive (rather than reactive) in promptly developing specific policies and frameworks to protect the public's access to utility-held information. The lack of a regulatory framework and specific policies for information access may only make existing problems more severe.

In the next few years, as competition among electricity power providers draws nearer, public utility commissions will be asked to create information policies that will demonstrate the degree of their support for public access to utility-held information. These policies will likely have broad impacts affecting our social, political, and economic way of life.

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1. INTRODUCTION

Historically, the electric utility industry has been regarded as one of the most open industries in the United States in sharing information and conducting joint research and development activities (Hirsh 1989). As the prospect of competition among electricity power providers has increased in recent years, investor-owned utilities have become concerned that their competitors will desire access to energy-related data (particularly energy-efficiency data collected by utilities from their energy-efficiency programs).¹ Consequently, many utilities are requesting that the data they submit to their utility regulatory commissions remain confidential. As discussed below (Section 4), withholding utility information from the public is likely to have serious and significant policy implications with respect to: (1) consumer education, the pursuit of truth, mutual respect among parties, and social cooperation; (2) the creation of a fair market for competitive energy services; (3) the regulatory balance; (4) regional and national assessments of energy-savings opportunities; (5) research and development; and (6) evaluations of utility programs, plans, and policies.

In response to these concerns, we conducted a survey of regulatory commissions in the United States to assess: (1) the relative importance of the issue of confidential data in the regulatory arena; (2) the type of data filed as confidential with PUCs; and (3) the regulatory response to utility requests for confidentiality (e.g., formal policies, guidelines, rules and procedures, and decisions). We considered this project a scoping study to identify the current policies and procedures used by PUCs to respond to utility requests to keep data submissions confidential and to see if these procedures were going to be modified for a more competitive energy utility environment. As we delved deeper into this topic, we realized that the issue of confidentiality has broader sociopolitical dimensions than we first envisioned. Prior to discussing these aspects, we first describe our survey methodology and the scope of the study.

1.1. Methodology and Scope of Study

In late 1995 and early 1996, interviews were conducted by telephone of at least one staff person from each state utility regulatory agency in the U.S. (in many cases, two people were interviewed - one with

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¹ Energy-related data includes such items as costs and market information of particular energy efficiency technologies and programs (in contrast to energy supply information). In the future, disputes about confidentiality may focus more on these issues (as well as energy use and load data) than on energy-efficiency data. So far, the discussion has been limited to ratepayer-funded data, not shareholder-funded data.

DSM experience and one from the legal counsel's office). The types of specific questions used in the phone survey are listed in Table 1. The survey questionnaire focused primarily on electric utilities, and the questions on confidentiality were limited to energy efficiency and energy-related data that the utilities routinely submit to regulatory commissions (e.g., evaluations of energy-efficiency programs, annual report filings, integrated resource plans, and load forecasts). We relied on the willingness of experts in the field to respond to our questions and submit relevant material.

The project is qualitative in nature rather than quantitative. We did not review all past cases to see if utilities filed requests for data to be filed as confidential, so that a frequency distribution over time, for example, could be prepared. Instead, we relied on the views of our experienced interviewees to provide a qualitative assessment of the issue of confidentiality.

In addition to our interviews, we reviewed selected state statutes and judicial decisions (Appellate and Supreme Court), as well as PUC decisions, rules and procedures, protective orders, and interim policy documents. A thorough legal analysis of these issues would have been useful but would have been a major undertaking and, therefore, was not done due to resource constraints. Thus, we may have missed some important documents pertaining to the issue of confidentiality.² In fact, a full range of legal issues is likely to gradually emerge through a debate involving the spectrum of stakeholders. To our knowledge, this type of debate has not occurred in recent times with respect to energy efficiency data; however, some preliminary work has begun (e.g., see the draft report prepared by the Information Access Study Team (IAST) of the Energy Services Working Group on Consumer Choice which is studying similar issues in California (IAST 1996)).

We focused on the regulatory response to data filings made by investor-owned electric utilities. We did not examine the practices of municipal utilities, unregulated utility subsidiaries, or non-utility providers of energy or energy services not regulated by PUCs, even though these entities (particularly, the latter two) may become very significant providers of energy services in the near future and may be subject to some of the same scrutiny that IOUs are facing (see Section 3).³

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² We believe this is the first comprehensive assessment of the confidentiality of energy data in the regulatory arena. The author welcomes additional material for future revisions.

³ In some areas of the country this is already an issue. For example, in the Pacific Northwest, Bonneville Power Administration (a federal agency) has routinely refused requests by the staff of the Northwest Power Planning Council to release historical information on the conservation costs and savings of its wholesale customer utilities in operating Bonneville conservation programs and expending Bonneville funds (personal communication from Jim Nybo, Northwest Power Planning Council, June 3, 1996).

Table 1. Survey Questions

1. Have any utilities requested confidentiality for data submitted to the Commission?
  - a. If yes, what type of data?
  - b. Did the Commission grant the request?
  - c. Any written material on this case (Order?)?
2. Have there been any other cases where your Commission addressed questions regarding the confidentiality of utility data? If yes, please describe. [If no, skip to question 4.]
3. Does your Commission have a formal policy or decision regarding the confidentiality of utility data?
  - a. What kinds of data are allowed to be kept confidential and what data cannot be kept confidential?
  - b. When are data regarded as confidential?
  - c. For how long can data be kept as confidential?
4. Does your Commission have any short-term plans for discussing the confidentiality of utility data?
  - a. If yes, when?
  - b. If no, do you think confidentiality requests will become an issue in the near term?
5. Do you know of any state statutes that already address the issue of confidentiality of data? If yes, which ones?
6. Do you know of other state utility commissions that have addressed the issue of confidentiality of utility data? If yes, which ones?

We also did not examine the following related issues due to time and resource limitations: (1) information access in the deregulated telecommunications field (see below); (2) policies on information access developed by other state agencies; (3) individual's right to privacy (see below); (4) security of confidential data; (5) consumer education and protection from fraud; (6) availability and accessibility of consumer information from non-utility sources; (7) information access among deregulated gas utilities; and (8) the early history of electric utility regulation. At the end of this paper, we recommend further research in these areas.

In a few cases, we draw upon examples from the telecommunications field, but we did not have the time and resources to explore this field in detail. Telecommunication utilities seek protective orders for items ranging from traffic studies, cost information, cost of service studies (e.g., cost of individual phone services, such as call waiting or call forwarding), and network specific information (e.g., number of lines in a wire center, where fiber is deployed, etc.) (personal communication from Frank Shafer, Colorado PUC, Nov. 1995). For the restructured telecommunications industry (a combination of monopoly and competitive markets), policies have been adopted to guarantee competing providers equal access to customers, including fair access to monopoly-held customer information (within the limits of customer privacy restrictions) (IAST 1996). However, it is too early to conclude whether examples from the telecommunications field and other fields are applicable (or worthwhile) to the electric industry due to the different character and historical experience of these fields.

We did not examine the individual's right to privacy because individual rights are typically well protected, both formally and informally, by data collectors and providers, as well as by the regulatory and legal communities. Utilities typically have adequate provisions for confidentiality to protect customer privacy (as noted below, one exception is made for information on customers who negotiate special contracts that have been made public). Utilities may provide customer information to third persons, but only upon the written request or consent of the specified customer or under legal mandate. Similarly, research organizations and governmental agencies like the U.S. Office of Management and Budget have provisions for reviewing the questionnaires and surveys for which federal funds are expended to ensure that the individuals who participate in the studies do not have their rights violated. Also, most universities have human subject review panels that review survey instruments, questionnaires, and research designs to ensure that participants are not harmed by research. Finally, professional, social science organizations (e.g., American Psychological Association) have delineated ethical responsibilities of researchers for protecting individuals and causing them no harm (Peters 1995).

The primary purpose of this paper is to provide an overview of selected issues that arise in keeping information confidential. Thus, this is an informational report, not a policy document, although we realize that the technical background information can be used for public policy purposes. Consequently, we do not delineate detailed principles to guide policy makers in implementing access to specific customer information, nor identify rules and mechanisms for implementing fair access to information. Because of concerns about confidentiality, we present recommendations for encouraging access to utility information.

We try to be neutral and factual in showing how PUCs have responded to utility claims for confidential information. However, we do advocate widespread access to utility information (i.e., maintaining open records), unless there is significant competitive harm to customers or to the utility, as discussed in Section 5. In essence, our stance reflects the Freedom of Information Acts that are part of statutory law in all states in this country and represent “society’s need to know” (Peters 1995).

1.2. Organization of Paper

This paper is organized in the following way. In Section 2, we review the reasons why electric utilities are expected to provide public access to utility information, and in Section 3, we examine the current and future relevance of confidentiality by describing the key stakeholders and their information needs in a competitive utility environment. We discuss the policy implications of confidentiality in Section 4 and present the legal and regulatory context surrounding confidentiality in Section 5. We summarize the responses to our telephone survey in Section 6 by discussing the relative importance of confidentiality among state regulators, the types of energy data filed as confidential, challenges to utility requests for confidentiality (including the particular case of special contracts), and concerns about the regulatory process for handling utility requests for data to be filed as confidential. In Section 7, we propose several retrospective and prospective studies for increasing our understanding of confidentiality, and in Section 8, we recommend a number of activities that PUCs should promptly undertake to protect the public’s access to utility-held information. The last section summarizes the findings of this study.

2. PUBLIC ACCESS TO INFORMATION

Investor-owned electric utilities are regulated by public utility commissions (PUCs) and, therefore, have certain social responsibilities. Electric utilities are expected to provide public access to utility information for at least three reasons; the first two reasons are specific to the utility industry while the third reason is broader in nature. First, electricity is considered by many to be an essential commodity to modern life: "Electricity is a fundamental commodity of modern civilization. It is responsible, directly or indirectly, for the technological shape of society and the character of its economic base" (Kahn 1998). Decisions regarding the generation and use of electricity have substantial environmental and economic ramifications for society and, therefore, information relating to these decisions and ramifications should be available to the public.

Second, because electric utilities have been monopolies, utility regulatory commissions have been charged with the responsibility to request information from these companies to establish an acceptable rate of return to ratepayers and to monitor various activities, including investments by the utility, the location and operation of power plants and transmission and distribution lines, special contracts, rate setting, and treatment of customers. The balance of power between regulators and utilities (the "regulatory balance") is a function of the availability of utility information. Stringent regulation depends on information provided by utilities. The loss of this information would result in less regulation and a significant transfer of power from the regulatory community to utilities. In summary, the control of and access to information should be seen as an instrument of power. While we expect the type of state regulation of utilities to change in a more competitive utility environment, we anticipate that utilities and regulators will continue to debate about the proper regulatory balance.

Several philosophical questions are raised in a discussion of public access to utility information, such as (based on Hernon and McClure 1988):

1. Is a utility responsible for the provision of information?
2. Which information is the utility responsible to disseminate to the public?
3. To what extent is utility information: (a) a societal (public) good (because ratepayers supported the collection and organization of the information, ratepayers should have access to and use of the information), (b) a commodity to be bought or sold (where the marketplace determines the value and cost of information), or (c) a capital investment for the overall increased productivity of the market and society at large?
4. Should utilities profit from the sale of utility information?

The boundaries between what is considered to be public information and what is considered private have been, and will continue to be, moving targets for several generations (Branscomb 1994). As shown in this paper, these questions are being debated by the regulatory community, and no clearly defined answers are available. Furthermore, because general agreement is expected to be difficult, a framework for addressing these issues will be needed (see Section 8).

Third, the public's belief in democracy and the promotion of a common social welfare rests on several assumptions, including free speech, the ability for people to participate in shaping future resource decisions, and open access to (free flow of) information and data to attain social learning, pursuit of truth, mutual respect among parties, and social cooperation:⁴

Knowledge is power. . . . How freely and how equally citizens have access to knowledge determines how freely and how equally they can share in the governing of our society and in the work and rewards of our economy. . . . As our need for knowledge grows, our dependence on complex sets of institutions and mechanisms to supply it becomes greater. (Commission on Freedom and Equality of Access to Information 1986)

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⁴The definition of information as a positive force in a democratic society is not new and can be traced back to James Madison in 1822 during his incumbency as President when he stated the following:

A popular government, without popular information or the means of acquiring it, is but a Prologue to a Farce or Tragedy or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors, must arm themselves with the power knowledge gives. (quoted in Branscomb 1994)

3. THE PROSPECT OF COMPETITION

Information is an essential commodity in a competitive market: "Reliable information that is widely available to all market participants is essential to achieving efficient outcomes" (California Energy Commission 1996). Today's electric utilities have traditionally collected, processed, and maintained detailed information on their customers' energy use as part of the provision of electricity service. Electric power industry restructuring may alter who will be responsible for the collection, dissemination, and protection of that information, and changes in policies on information access will inevitably affect the type of electric utility restructuring that can be undertaken. Thus, many of the increased concerns regarding confidentiality are inextricably connected to pending competition among electric utilities as a result of PUC restructuring decisions. The questions raised regarding the confidentiality of utility-held data may one day be asked of organizations not currently regulated by PUCs (e.g., municipal utilities, utility subsidiaries, energy service companies, etc.).

As the prospect of competition among power providers has increased in recent years, the following stakeholders have started re-evaluating their information needs and responsibilities: investor-owned electric utilities, competitive energy and energy service providers,⁵ public utility commissions, customers, and public or private entities that perform energy assessments, conduct research and demonstration activities, and design, implement, and evaluate energy programs (e.g., government). In this section, we briefly highlight some of the information needs of some key stakeholders (investor-owned electric utilities, competitive energy and energy service providers, public utility commissions, customers, and government). At the end of this section, we provide an example of where one PUC has explicitly addressed the issue of access to customer information in a competitive utility environment. The main issues and viewpoints of stakeholders expressed in this paper should be helpful for making decisions related to utility information access in the advent of restructuring and also useful to those states not experiencing restructuring.

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⁵In this paper, competitive energy providers offer an alternative supply of electricity while competitive energy service providers provide a full range of services: assisting customers in assessing their consumption, identifying bill-reducing opportunities, recommending energy-efficiency products and brands, arranging for installation and financing, and conducting follow-up services on product performance. The latter may include other utility companies, power marketers, energy service companies, and municipalities. Some providers may be able to serve both functions.

3.1. Investor-owned Electric Utilities

Investor-owned electric utilities have become increasingly concerned that their competitors will desire access to utility data. Specifically, utilities are concerned about sharing customer data and other market research data on different types of energy services that may shape their future offerings. These concerns have changed the energy industry, as reflected in the following observations:

The energy utility industry is no longer the cozy community in which staff members at other utilities were considered more as colleagues than competitors. Utilities today are developing and refining their products and services to retain customers and surpass their competitors, whether gas companies, independent generators, ESCOs, or the neighboring electric utility. (SRC 1995)

When a . . . researcher recently called a utility representative to ask for DSM [demand-side management] data, she was asked why in the world she thought he would want to help any other utility save money or energy. The representative said that his utility had worked long and hard to design and implement a good set of DSM programs and that he had no desire to help his competitors. He appreciated that the researcher was trying to further the general understanding of how to save energy, but thought that her goal was no longer viable in the age of competition. He suggested that she would be wise to start looking for a new job. (Shawn 1995)

Integrated resource planning (IRP) helps utilities and state regulatory commissions consistently assess a broad range of demand and supply resources to cost-effectively meet customer energy-service needs (Hirst 1992). One study noted that utilities could improve the IRP process by involving interested stakeholders (e.g., state agencies, environmental groups, and customers) in developing IRP plans as well as in reviewing the draft and final plans, in order to achieve the following purposes:

The primary purpose of an IRP report is to help utility executives decide which resources to acquire, what amounts to acquire, and when to acquire those resources. The planning report documents the utility's decisions and helps the PUC and public to review and understand the basis for the utility's decisions. (Hirst 1992)

Many utilities believe that the current planning and regulatory rules regarding DSM assume an indefinite continuation of protected markets. As a result, regulatory policies, such as IRP, are seen as being disadvantageous to the utilities by exposing confidential data. Utilities perceive they have a right to protect their data and information as a trade secret (see Section 5.2). Furthermore, some utilities, such as the Southern California Gas Company (SoCalGas), see customer information as an exclusive corporate asset owned by shareholders: "In the case of an investor-owned utility such as SoCalGas, customer specific information is shareholder property, obtained by a long term investment in resources to develop it for the corporation" (Southern California Gas Company 1996). Similarly, in its 1995 IRP filing, PacifiCorp noted the following:

Increasing competition will create a need to keep competitive information confidential. The IRP process currently requires open disclosure of company plans and strategies. In a competitive market, some of this information must remain confidential. As competition increases, IRP requirements will need to balance the need for adequate regulatory review of company resource planning with the utilities' need to keep proprietary information confidential. (PacificCorp 1995)

As a result, utilities are reviewing all of their data to decide what should be filed as confidential with their PUCs. For example, in California, the Pacific Gas and Electric (PG&E) Company submits to the California PUC all of their process evaluations of DSM programs as confidential reports. This practice protects the utility from unintentionally revealing information about internal utility functions to those who have no need to know (according to PG&E). In Wisconsin, utilities file all evaluation reports (impact, market, and process) as confidential. The utilities contend that the Wisconsin Public Service Commission has a need to know this information, but other parties do not. Finally, utilities in some states are considering refraining from participating in what had been joint discussions of load forecasts for fear of disclosing competitive information (Peters 1995). These kinds of activities question whether the electric utility industry can remain an open industry in terms of access to utility information.

3.2. Competitive Energy and Energy Service Providers

As restructuring draws closer, competitive power providers will want access to utility customer data — claiming that otherwise utilities and their unregulated affiliates will have a competitive advantage (Fryer 1996). The competitors maintain that any information made available to the marketing affiliate of the former monopoly utility must be made available to all potential suppliers at the same time and at the same cost (ibid). The customer information in question represents an “asset” that contains such items of immediate interest as customer name, address, and how much energy each customer uses at what price. However, the utility-held information asset can be quite broad to help energy service providers to develop new products and services and to market these efficiently: e.g., data on energy audits, energy-efficiency measure adoption, customer decision making, energy-use patterns, and appliance saturation (Schultz 1996).

3.3. Public Utility Commissions

Although many of the issues associated with confidentiality predate the emergence of a competitive electric utility environment (Peters 1995), the trend of filing utility information as confidential is increasing and is associated with those areas where restructuring is being debated most vigorously. This

trend represents a serious concern for at least eight PUCs in the U.S., as described later in this paper and as demonstrated in the following statement:

In the recent past . . . the scope and volume of materials and information which parties have claimed is confidential has given rise to legitimate concerns that substantial amounts of information relevant to the decision making process are being excluded from public scrutiny. . . . The Commission has long recognized and continues to recognize that parties who practice before it often have justifiable claims to confidentiality. We also recognize that the public interest will not be served by the adoption of practices or policies which compromise in any way the confidentiality of commercially or otherwise sensitive information. However, the sheer volume of such information calls for a re-evaluation of our practices to assure that we are making every effort to keep the greatest amount of information available to the public without compromising the confidentiality of truly sensitive information. (Maine PUC 1994)

As a result, public utility commissions will be faced with making critical public policy decisions regarding information access in a competitive electric utility environment: decisions on who can access and use the information, the type of information that can be accessed, and how it can be used. In addition, they may have their own information needs for conducting the following activities: providing information to market participants; monitoring market performance; analyzing markets, system operations and trends; developing energy policies; and providing regulatory oversight (see Section 3.5). And during the transition to a competitive utility environment, public utility commissions will likely continue to support public access to utility documents, such as IRP plans (see Section 3.1).

3.4. Customers

Customers will need information about the different service providers, products and services available in a restructured electricity market to make informed choices. Customers will need to know what alternatives exist in the market and what these alternatives cost on a comparative basis. The utility company contains a wealth of information on energy efficiency products and services that will be requested by customers as well as other energy service providers. Finally, customers will need tools for assessing the adequacy of information for comparing and choosing services.

3.5. Government

Government's information needs will change as new competitive market structures emerge to perform its new or revised functions. Traditional sources of such information are shrinking: the large investor-owned utilities, under pressure to become competitive, have significantly reduced their collection of

energy use data and have at the same time become less willing to release data they continue to collect for fear of aiding competitors. Government will need to continue or initiate collection, compilation, analysis, reporting and dissemination of information to support the following activities: provide information to market participants; monitor market performance; analyze markets, system operations and trends; develop energy policies; and provide regulatory oversight (California Energy Commission 1996). The following types of information will be needed (California Energy Commission 1996):

1. Changes in total energy consumption and expenditures.
2. Short-term changes and possible long-term trends in energy use patterns.
3. Indicators of market competitiveness (e.g., diversity of firms and service offerings and relative penetration of energy-efficiency measures and technology innovations).
4. Consumer concerns (e.g., availability of products and services to meet specific end-use needs, and adequacy of information for comparing and choosing services).
5. Impacts of restructuring on the California economy (statewide and by sector).
6. Market performance with respect to environmental policies.
7. Information on market barriers preventing efficient energy use policies.
8. Energy use and information on the behavior of consumers and energy service providers.

3.6. Access to Customer Information

We are aware of only one commission, the California Public Utilities Commission (CPUC), that has explicitly addressed access to customer information in its recent restructuring proposal. On December 20, 1995, the CPUC adopted its Final Policy Decision relating to the structure of the electricity market. The CPUC's decision on electric power restructuring describes a new market structure that will allow greater competition among electricity generators (California PUC 1995). (In D.96-03-022, the CPUC launched a second phase of restructuring to examine unbundling of the distribution sector.) The decision clearly articulated the principle that for competing non-utility generation providers, current practices regarding access to customer energy-use information represent a potentially severe competitive disadvantage relative to the incumbent utilities:

As a monopoly provider of integrated generation, transmission, and distribution services, the incumbent utility has access to considerable information about its customers, including individual load profiles and billing histories. In a competitive arena, access to such information is quite valuable for marketing purposes. Because this information is not automatically available to the utility's competitors, the incumbent utility has a

major marketing advantage that could allow it to target and sign up preferred customers before its competitors can.

. . . We will require that *customer specific information necessary for the distribution (accounting and billing) functions of the utility* be made available on terms that are fair to all competitors in the generation sector. Because customer confidentiality concerns attach to this information, customer consent will be a prerequisite for all suppliers that obtain access. [emphasis added] (California PUC 1995)

Thus, the CPUC decision requires fair and equal access to customer information by competitors in the generation sector. At least for the generation market, the decision has been made that the utility's use of customer information for marketing purposes without allowing fair access to that data would constitute an unfair advantage and thus conflict with an explicit objective of the restructuring. However, the CPUC decision applies only to certain types of information (load profiles and billing histories) and certain types of energy providers (generators), in contrast to providers of energy efficiency services.

The restructuring decision in California has generated many questions about the confidentiality and value of data in a competitive market, such as the following (IAST 1996):

1. What information do market participants really need?
2. Is this information available only from investor-owned utilities, or can the information be obtained (or purchased) elsewhere?
3. What effect might a competitive market have on the development of other information sources?
4. How can this information be made available to market participants, without requiring the release of confidential or proprietary utility information?

The CPUC did not offer guidance on how to address these questions. CPUC-sanctioned working groups have been formed to address the immediate problem of implementing restructuring in the generation sector (only later does the CPUC plan to venture into the further unbundling of retail services) and to investigate information needs in the restructured electricity industry.

Although the federal government has not addressed these specific questions, the Federal Energy Regulatory Commission (FERC) is committed to making sure that there are provisions for openly accessible information for a smoothly operating marketplace. In April 1996, in conjunction with its general rulemaking on open access and stranded costs, FERC issued a rule on Open Access Same-Time Information System and Standards of Conduct (OASIS Final Rule) (FERC 1996a 1996b). This rule requires utilities to develop a system to electronically communicate information about their transmission systems and services to all potential customers at the same time.

Similarly, FERC noted their commitment to public access to utility data by stating that they would not:

. . . eliminate the public disclosure of allegedly competitively sensitive, proprietary, or otherwise confidential data submitted to the Commission on Form No. 1, as well as on other Commission forms. The information that we collect from public utilities is necessary to carry out our jurisdictional responsibilities and is used, among other things, to evaluate the reasonableness of cost-based rates subject to our jurisdiction and the operation of power markets. . . . As the industry becomes more competitive, we will monitor our reporting requirements to make sure that they are needed, fair to all segments of the industry, and consistent with the workings of a competitive environment. (FERC 1996a)

In conclusion, we expect both state and federal regulators to examine the types of information that are necessary for appropriate regulatory functions in a restructured electricity industry. During this review, the regulatory commissions will need to become aware of the policy implications of keeping data confidential, as discussed in the next section.

4. POLICY IMPLICATIONS FROM CONFIDENTIALITY

Utilities conduct many activities (supported by ratepayer funds) that result in the compilation, analysis, and publication of data that are useful to many stakeholders: for example, integrated resource plans, market and technology assessments, residential and nonresidential building surveys, evaluations of their DSM programs, etc. Withholding utility information from the public is likely to have significant policy implications with respect to: (1) the public's right to know; (2) the creation of a fair market for competitive energy services; (3) the regulatory balance; (4) regional and national assessments of energy-savings opportunities; (5) research and development; and (6) evaluations of utility programs, plans, and policies. This section briefly summarizes these policy implications as part of the public policy context for examining how the regulatory community is responding to utility confidentiality filings (Sections 5 and 6).

First, as described in Section 2, the public believe that the free flow of information and data is critical for consumer education, the pursuit of truth, mutual respect among parties, and social cooperation. Any significant limitations on access to utility information are seen by consumer advocates as detrimental to these activities. While the public recognizes that some data must be kept confidential (e.g., family court records, individual IRS taxpayer records, and hospital records), consumer advocates are concerned that too much utility data may be kept confidential.

Second, because utilities maintain full protection of privacy rights of their customers, it is very difficult for other entities to obtain access to customer information without the consent of the customer (see Sections 3.1 and 3.2). If utilities continue to file customer-related information as confidential (including, for example, ratepayer-funded market research studies), then access of non-utility providers of energy services to utility-held information will continue to be limited to: (1) customer-specific usage data for those customers who authorize access to their data by competitors; (2) customer-specific usage data provided by the utility to a contracting energy service company; and (3) aggregated market-segment data, without customer names and locations, from research studies. In contrast, unregulated utility subsidiaries (e.g., retail energy service companies) may use the utility ratepayer-funded assets (e.g., customer billing records) of their parent company to stifle competition with independent retail energy service providers in order to consolidate or increase their horizontal market power in retail energy service markets (Eto et al. 1996). Thus, there is considerable asymmetry of access to customer information between the incumbent utility and potential alternative providers of energy and energy-efficiency services, and this asymmetry may impede fair competition among generators and energy service providers (IAST 1996).

In addition to the equity arguments of competitors being unfairly disadvantaged, economic theory assumes that markets work better when the participants in the market are well informed: perfect information is seen as a prerequisite of perfect competition. When information is concentrated in a few hands, resulting in unequal bargaining power, there is "market failure" and it becomes more costly to obtain useful information (Ward 1979). Thus, requests for confidentiality are seen as mechanisms for increasing one's bargaining power, resulting in the inefficient allocation of resources. These market failures will not produce an optimal economic outcome, so that government intervention (e.g., regulatory standards of conduct and guidelines) is deemed necessary to preserve competition.

Third, utilities' desire to provide less information to regulators for competitive reasons negatively affects the balance of power between regulators and utilities (the "regulatory balance"). As noted before, stringent regulation depends on information provided by utilities, and the loss of this information would result in less regulation and a significant transfer of power from the regulatory community to utilities. Also, if a regulatory agency expects to provide information to market participants, monitor market performance, analyze markets, and provide regulatory oversight, then the agency will most likely have to spend significant resources to obtain the information that could not be obtained from the utility.

Fourth, regional and national energy-saving assessments (needed for energy resource development, technology development and dissemination, and private investment decision making) rely on utility data on customers, technologies, and programs. Without this real-world experience, many of these assessments will be regarded as questionable and problematic, particularly if utilities are seen as the main organizations responsible for capturing these energy savings.

Fifth, limiting access to utility data will significantly affect research studies and how research and development are accomplished:

If restructuring results, as I believe it will, in technology becoming an important competitive weapon, it follows that companies will want to limit access to it. The result will be to undermine the justification for government research, especially of an applied nature. (Fri 1995)

Limiting access to data may undermine the research efforts of national industry research organizations (e.g., the Electric Power Research Institute (EPRI) and the Gas Research Institute) and government/utility collaboratives (e.g., California Institute for Energy Efficiency, New York State

Energy Research and Development Agency, the North Carolina Alternative Energy Center, and the Energy Center of Wisconsin), further weakening consumer education activities.⁶

And sixth, the trend towards confidentiality will limit the evaluations of utility programs, plans, and policies in terms of objectivity, usefulness, validity, and reliability (Peters 1995). Evaluation research uses the scientific method for obtaining data, and the scientific method relies on critical observation, unbiased data collection, and the reproducibility of results (*ibid*). Lack of access to data may eliminate the ability of the public to fully oversee and review the work conducted by the utility, and this body of work does serve as a foundation for current and future energy-efficiency efforts (e.g., codes and standards, demonstrations of promising new technologies, and other market transformation efforts). As utilities begin to provide only confidential reports to their commissions, then the only review for reliability and validity will be conducted by commissions, their consultants, and intervenors. This change could also make the review of utility programs, plans, and policies more laborious and contentious. And for those commissions lacking a strong, knowledgeable, and experienced staff, capable of a thorough review of the reliability and validity of utility findings, the impact of increased confidentiality will be greater.

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⁶ On the other hand, some people may feel that limiting access to one type of data presents an opportunity for conducting work in another subject area: e.g., EPRI's Center for Electric End-Use Data (CEED) has expanded its focus to more general market information that might not have been developed without a more competitive utility environment (personal communication from Rich Gillman, CEED Project Manager, May 24, 1996).

5. THE LEGAL AND REGULATORY CONTEXT OF CONFIDENTIALITY

Prior to describing the specific types of policies and procedures developed by regulatory commissions in addressing the confidentiality of data, we discuss in this section the “open records” laws that form the basis for any discussion on confidentiality. These laws influence the actual policies and practices of PUCs by providing a general context for regulatory decision making. However, most state PUCs are given significant flexibility in balancing the differing interests of stakeholders on a case-by-case basis. For example, in Oregon, each of the conditional exemptions (e.g., trade secrets and public records pertaining to litigation) listed in the state’s public records exempts a specific type of record information “unless the public interest requires a disclosure in the particular interest;” for each of these exemptions, regulatory commissions “will need to apply a balancing test on a case-by-case basis” (Oregon Department of Justice 1995). Nevertheless, an understanding of state agencies’ responsibilities for promoting access to public information is critical for appreciating the complexities facing regulators when utilities wish to file their information as confidential. In response to these utility requests, regulators negotiate protective orders and confidentiality agreements that protect proprietary confidential business information and trade secrets from the public.

5.1. Freedom of Access (Freedom of Information, Open Records) Laws

All PUCs address the issue of confidentiality of utility data by first referring to existing laws dealing with the freedom of access to public information. For example, Maine’s Freedom of Access Law provides a clear statement of the legislative and regulatory policy in that state: the proceedings of public bodies such as the PUC should be conducted, so far as possible, in an open manner, so that all public records are open to public inspection (Section 401 of Title 1; Maine PUC 1994). The statute defines public records in the following way:

[T]he term “public records” shall mean any written, printed or graphic matter or any mechanical or electronic data compilation from which information can be obtained, directly or after translation into a form acceptable of visual or aural comprehension, that is in the possession or custody of an agency or public official of the state or any of its political sub-divisions and has been received or prepared for use in connection with the transaction of public or governmental business or contains information relating to the transaction of public or governmental business. (Section 402 of Title 1; Maine PUC 1994)

The Maine PUC states that almost any piece of paper that comes into the PUC in the course of any proceeding falls within the definition of a public record, including items that are outside the scope of

the "evidentiary record" in any given proceeding (e.g., data responses). The PUCs take their statutory obligations seriously, as expressed by the Maine PUC:

In recent years, we have made a concerted effort to make our processes accessible and understandable to the public and to increase public involvement in Commission proceedings. In order to be successful in these endeavors, we must continue to make every effort to make all relevant information available to the public. Without such information, meaningful public participation in Commission proceedings will be hindered. In addition, where relevant information is not available, the rationale for advocacy staff positions and Commission decisions may be misunderstood or unclear. (Maine PUC 1994)

In another example, staff from the Florida PSC assert that parties in their proceedings must meet a very high burden when requesting a protective order because Florida's "sunshine law" (freedom of information law - Public Records Law, Chapter 119, Florida Statutes) derives from the concept that the government should operate in the "sunshine" (Florida PSC 1994). Finally, PUCs typically follow the interpretations of legislative mandates that are contained in judicial decisions; for example, in Iowa, the Supreme Court of Iowa interpreted their open records law (Iowa Code Chapter 22) as "favoring public release of information and construing narrowly the statute's exceptions" (North Western Reporter, 2d Series, p. 150, Supreme Court of Iowa, No. 86-826, Aug. 19, 1987).

Despite a strong public records policy in most states, exceptions are made (sometimes frequently, other times rarely), particularly for those cases where data are harmful to a person or harmful to an organization for competitive reasons, as discussed in the next section.

5.2. Proprietary Confidential Business Information and Trade Secrets

The general policy of freedom of information is to allow as many public records as possible to be made available to the public. However, all states recognize that some information needs to be kept private and confidential and, therefore, have included provisions for confidential records in their statutes and administrative codes; these records are not open to inspection by the public (e.g., Alaska Administrative Code 3 AAC 48.040). Examples of confidential information include, but are not limited to: student information, hospital and medical records, attorney records, criminal identification files of law enforcement agencies, information concerning the location of certain archaeological or ecologically sensitive sites, etc. The list of records can also include records classified as confidential under a protective order of the PUC or the court, or records designated as confidential by written agreement among the parties to adjudicatory matters before the commission for the purpose of conducting discovery. In order to classify a record as confidential, one must show that:

. . . (1) disclosure of the record to the public might competitively or financially disadvantage or harm the person with confidentiality interest or might reveal a trade secret; and (2) the need for confidentiality outweighs the public interest in disclosure. (Alaska Administrative Code AAC 48.045)

Recognizing the needs of business for privacy of some information, all state legislatures have created an exception for "proprietary confidential business information," exempting them from disclosure:

Proprietary confidential business information means information . . . which is owned or controlled by the person or company, is intended to be and is treated by the person or company as private in that the disclosure of the information would cause harm to the ratepayers or the person's or company's business operations. . . . proprietary confidential business information includes, but is not limited to:

1. Trade secrets.
2. Internal auditing controls and reports of internal auditors.
3. Security measures, systems, or procedures.
4. Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the public utility or its affiliates to contract for goods or services on favorable terms.
5. Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.
6. Employee personnel information unrelated to compensation, duties, qualifications, or responsibilities (Florida Public Utility Records, Section 366.093.)

Some states have added to their list of proprietary confidential business information reports to governmental agencies "which, if released, would give advantage to competitors and serve no public purpose" (Iowa Code, Chapter 22, Section 22.7).

Trade secrets are defined differently by each state, although there is some uniformity; for example, in West Virginia, trade secrets may include, but are not limited to:

. . . any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or *compilation of information which is not patented which is known only to certain individuals within a commercial concern* who are using it to fabricate, produce or compound an article or trade or a service or to locate minerals or other substances, having commercial value, and *which gives its users an opportunity to obtain business advantage over its competitors.* [emphasis added] (West Virginia Code, 29B-1-4 (1977))

In Idaho (as well as in California, Montana, and North Dakota), trade secrets are defined more broadly, but with similar intent:

Trade secrets . . . means information, including a formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in-progress research that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use.
2. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Idaho Code, Section 9-338)

Each state has certain procedures for determining the nature of a trade secret. For example, in Georgia, the affected party or utility must provide in writing the legal and factual basis for its assertion that the protected information is a trade secret and should not be disclosed, including the following:

1. Why the information derives economic value from not being generally known to others.
2. How others can obtain economic value from its disclosure.
3. Procedures utilized by the affected party or utility to maintain its secrecy. (Georgia Public Service Commission's General Rules, OCGA, Chapter 515-3-1-.11)

Similarly, Kansas statutes allow trade secrets and confidential information to be disclosed only after consideration of the following factors:

1. Whether disclosure will significantly aid the commission in fulfilling its functions.
2. The harm or benefit which disclosure will cause to the public interest.
3. The harm which disclosure will cause to the corporation, partnership, or sole proprietorship.
4. Alternatives to disclosure that will serve the public interest and protect the corporation, partnership, or sole proprietorship. (Kansas Statutes Annotated, Section 66-1220)

Some states apply a broad definition of trade secrets to include such data as contracts, prices in contracts, and operating characteristics of particular technologies (e.g., combustion turbines). For those wanting access to such data, protective orders are usually signed among the parties, as discussed in the next section. Regulatory commissions are not allowed to "release any trade secret information without a determination that the public interest requires disclosure, and without first consulting with an attorney authorized to give it legal advice" (Oregon Department of Justice 1995). It is a misdemeanor for PUC staff to release confidential information without the expressed consent of the provider of that information.

5.3. Protective Orders

Protective order provisions contain information on how confidential material should be marked, who can use such information and how it can be used, a nondisclosure agreement, procedures for challenges to confidentiality, and preservation of confidentiality (e.g., Montana PSC 1995a). Most PUCs require parties requesting a protective order to "specify as clearly as possible the scope of the material sought to be declared confidential and the reason such material is sensitive" (Maine PUC 1994). Protective orders that are drafted in broad terms (e.g., "certain commercially sensitive information") make it difficult for members of the public to understand what sort of information is being excluded from public scrutiny. For example, in the early 1990s, AT&T Communications of West Virginia petitioned the state PUC for a protective order covering all information contained in AT&T's annual report to the West Virginia PUC. The PUC refused to honor the utility's request for confidentiality. The telephone company appealed the PUC order. The West Virginia Supreme Court of Appeals held that (1) the phone company's blanket assertion of privilege was far too broad to entitle it to a protective order, and (2) the phone company must make a credible showing that information to be covered by protective order was a trade secret under the state Freedom of Information Act (423 S.E.2d 859 (W.Va. 1992)). Thus, all parties need to write requests for protective orders as concisely and narrowly as possible.

PUCs have written rules describing the grounds for entering a protective order. For example, the Pennsylvania PUC noted that a protective order to limit the disclosure of a trade secret or other confidential information on the public record should be issued ". . . only when a participant demonstrates that the potential harm to the participant of providing the information would be substantial and that the harm to the participant . . . outweighs the public's interest in free and open access to the administrative hearing process" (Pennsylvania Code, Title 52, Public Utilities, Chapter 5, Rules of Administrative Practice and Procedure). In Pennsylvania, the PUC considers the following factors prior to issuing a protective order (*ibid*):

1. The extent to which the disclosure would cause unfair economic or competitive damage.
2. The extent to which the information is known by others and used in similar activities.
3. The worth or value of the information to the participant and to the participant's competitors.
4. The degree of difficulty and cost of developing the information.
5. Other statutes or regulations dealing specifically with disclosure of the information.

The party seeking a protective order (the “movant”) bears the burden of establishing by a “preponderance of the evidence” that disclosure of the information would have one or more of the following consequences:

1. The movant could suffer material damage to its competitive or financial position.
2. A trade secret of the movant would be revealed.
3. The public interest would be impaired by release of the information.
4. The information has no relevance to deciding the issues in the case at hand.
(Arkansas PSC 1985)

In addition, the movant bears the additional burden of establishing that the information at issue has not already been disclosed, and that the information has been maintained as confidential previously while in their possession.

Commission practice with regard to the issuance of protective orders varies but, in general, most PUCs honor utility requests for confidentiality. For example, in 1993, the Maine PUC received 81 requests for protective orders and denied only four; it is not uncommon for all requests to be approved. Such practice reflects the PUC’s sensitivity to the concerns of utilities and others who want information of a commercially or otherwise sensitive nature to be protected. However, as noted in the introduction to this paper, these interpretations of public records laws may be changing as the number and scope of such requests to PUCs increases and the “gap between law and practice” widens (see Section 6.2).

5.4. Filing Requirements and Procedural Deadlines

Each PUC has established its own filing requirements and procedural deadlines. In general, these requirements contain the following provisions (examples taken from District of Columbia PSC (1992) and Maine PUC (1994)):

1. Requests for protective orders are filed 7 days prior to the filing of an application for a protective order.
2. Confidential materials need to be marked in a conspicuous and consistent manner that calls immediate attention to their confidential status.
3. Protected information is either destroyed (or returned) within 45 days after the issuance of a final, unappealed PUC decision that closes the docket.

4. Redacted (edited) versions of certain documents or other materials are filed with the PUC to be made available for public inspection.⁷ Redaction is typically accomplished by blacking or striking out only material of a sensitive nature.
5. Parties and persons who have signed an appropriate confidentiality or proprietary agreement with the party claiming its information is proprietary are allowed to review the material (usually for specific purposes such as preparation of: briefs, comments, documents and exhibits, data responses, cross-examination, other pleadings, petitions for reconsideration, or appeals in the regulatory proceeding in which the information was originally obtained).

All PUCs have provisions for opposing a petition for confidentiality as well appealing a PUC decision; these provisions are available from the PUCs and are not discussed in this paper.

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⁷ This is becoming more common. In the past, common practice was to stamp an entire document as confidential and exclude it in its entirety from public scrutiny. This has become problematic when only small portions of documents actually contain confidential material. For example, in the case of contracts between private parties, perhaps only prices or quantities are commercially sensitive, while all other provisions are not. This practice limits the ability of parties not privileged to access confidential information to gain a comprehensive view of the case or to effectively challenge the confidential classification of information.

6. THE REGULATORY RESPONSE TO CONFIDENTIALITY

In this section, we first provide an overview of the relative importance of the issue of confidential energy-related data. We next describe the types of energy-related data filed as confidential (along with specific examples), challenges to utility submittals of confidential data, and the unique case of "special contracts" that represent an increasingly popular strategy by investor-owned utilities in retaining key customers. We conclude this section by mentioning some concerns of regulatory staff about the adequacy of the existing regulatory environment in supporting public access to utility-held information.

6.1. Relative Importance of Confidentiality

Almost all of the PUCs we surveyed have received requests from utility companies to classify data filings as confidential. While utilities have filed information as confidential prior to California's Blue Book decision (April 1994) on restructuring (California PUC 1994), confidential data filings appear to have increased (both in scope and frequency) in those states where utility restructuring is being actively discussed. Thus, as other states begin to seriously consider the restructuring of the electric utility industry in their region, we expect more utilities to file information as confidential and, thereby, increasing the saliency of confidentiality as an important public policy issue.

In some states, utility requests for confidentiality occur frequently (weekly or monthly), while in other states, the requests are submitted periodically as part of proceedings, rate cases, or filings of integrated resource plans. In most cases, the data filed as confidential represent a small part of a utility's filing; however, as noted in the examples in Section 6.2, some requests for confidentiality affected a large amount of data. Also, as noted in the beginning of this paper, we did not try to quantify the number or type of requests for confidentiality submitted by each utility for each commission. A tracking system containing this type of information is absent, and the resources that would be needed to review past cases to acquire this information was beyond the means of this study.

Although there are many similarities across states, it is important to note that differences in state laws and in the facts of specific cases often result in different decisions on access to confidential information. For example, an Illinois statute *mandates* utilities to make all contracts and rates open to the public, while a Missouri statute grants the Missouri PSC the *discretion* to keep open to public inspection all forms of contract or agreement (Dottheim 1995). As noted in Section 5, there is no uniform policy on confidentiality of data in the states: typically, each state regulatory commission determines

confidentiality on a case-by-case basis, and there are procedures and guidelines for claiming and appealing confidentiality, although they are quite flexible.⁸

In most states, the party requesting confidentiality and the PUC staff negotiate what is confidential and what is not, and a confidential agreement or protective order (along with a nondisclosure agreement) is signed by the parties. In many states, the PUC honors (accepts) utility requests for confidentiality and grants protective orders without deliberating on the merits or legitimacy of the case and are seen as "gentleman agreements." Discussions of confidentiality are often held "off the record" in informal meetings in closed hearing rooms, for PUC staff to determine whether information should be kept confidential; in these situations, the information is not officially filed, and the staff cannot release the information. It is a misdemeanor for PUC staff to release confidential information without the expressed consent of the provider of that information. If the PUC staff proposes to release information submitted as confidential by a utility, the utility can appeal the staff proposal by first going to the commissioners of the PUC and then to the courts. Finally, time limitations are often placed on confidential data, since the data become dated after a period of time. However, the amount of time materials are held confidential is being extended (e.g., from one to five years) due to competitive concerns.

All regulatory commissions in our survey regard the confidentiality of data as a serious issue (Table 2). However, most regulatory commissions do not perceive the confidentiality of data as an urgent policy issue or as an issue that warranted immediate attention outside of normal activities. Most regulatory staff believe that (1) the PUC's procedures and guidelines already in place are adequate and sufficient to respond to utility submissions of confidential data, and (2) existing arrangements for parties to have access to protected information through confidentiality agreements are adequate to protect the public's need to review the validity and reliability of utility studies. As noted in one PUC document, existing PUC policies and guidelines on confidential data offer a framework for more efficient handling of Commission business, in the same manner as the development of prehearing practice guidelines for examiners (Maine PUC 1994). The guidelines establish a unified and consistent set of practices with regard to the issuance of protective orders and the obligations of parties requesting and/or subject to such orders. On the other hand, staff from some regulatory commissions expressed concerns about existing regulatory procedures; these concerns are described at the end of this section.

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⁸ In Mississippi, the PUC does not review requests for confidentiality. The Mississippi PUC regularly accepts utility requests, since they feel it is too time-consuming to review each utility request. If the confidentiality of data is challenged, the state judicial system decides on the merits of the case, not the PUC.

In contrast to the majority of the PUCs, eight commissions are very interested in the policy implications of increased utility submittals of confidential data: California, Illinois, Maine, Massachusetts, Utah, Vermont, Washington, and Wisconsin (Table 2). Most of these commissions (as well as utilities in those states with high energy costs) are starting to address the prospect of increased utility competition and utility restructuring and, therefore, are very concerned about the public's and competitive energy and energy service providers' access to utility data. In contrast, in states where utilities have low energy costs and are not threatened by future competition, data are less frequently filed as confidential, and the confidentiality of data is not an important policy issue in the regulatory arena. As more states embark upon utility restructuring, we expect the issue of confidentiality to become more important at the policy level.

In most states where there are challenges to the confidentiality of data, the PUC Hearing Officer (Examiner) is the key person in determining whether to honor the utility's request for confidentiality. PUCs rely upon Hearing Officers to see that the evidentiary record in any case is complete and adequate to support an informed decision. The public, therefore, must rely upon the Hearing Officers to protect, as far as possible, their access to all relevant non-sensitive information. However, one interviewee noted that Hearing Officers usually "err on the side of caution" and generally honor confidential data requests. One PUC noted that Hearing Officers could take a more active role in reviewing requests for protective orders in order to assure they are not overly broad or vague and, in general, to assure they are reasonable and necessary (Maine PUC 1994). In some states, Hearing Officers are encouraged to explore, where practical, alternative means of discovery or forms of information that may serve to decrease the amounts of protected information requested or submitted. Finally, in some states, the Office of Public Counsel (or Consumer Advocate) plays a critical role in advocating open records for the benefit of consumers, even if a protective order has been prepared in advance. Accordingly, states without such an independent person may not be as active in challenging the confidentiality of information.

Table 2. Confidentiality Priority and Key Decisions on Confidentiality

State	Confidentiality Priority (1)	Confidential Data in Question	Decision Reference
Alabama	L		
Alaska	L		
Arizona	L	Resource planning	Arizona Corporation Commission 1994
Arkansas	L		
California	H		
Colorado	L		
Connecticut	L		
Delaware	L		
District of Columbia	L		
Florida	L	Program evaluation data	Florida PSC 1994
Georgia	L		
Hawaii	L		
Idaho	L		
Illinois	M	Special contract	Illinois Commerce Commission 1994, Dottheim 1995, Illinois Court of Appeals 1995
Indiana	L		
Iowa	L		
Kansas	L	Special contracts	Kansas SCC 1995
Kentucky	L	Resource planning, customer survey, special contracts	Kentucky PSC 1992a 1992b 1992c
Louisiana	L		
Maine	M	Avoided and marginal costs	Maine PUC 1995
Maryland	L		
Massachusetts	H	DSM impact evaluations	Massachusetts DPU 1993
Michigan	L		
Minnesota	L		
Mississippi	L		
Missouri	L	Resource planning	Missouri PSC 1995
Montana	L	Market share	Montana PSC 1995b
Nebraska	NA (2)		
Nevada	L		
New Hampshire	L		
New Jersey	L		
New Mexico	L		
New York	L		
North Carolina	L		
North Dakota	L		
Ohio	L		
Oklahoma	L		
Oregon	L		
Pennsylvania	L		

Table 2 continued. Confidentiality Priority and Key Decisions on Confidentiality

State	Confidentiality Priority (1)	Confidential Data in Question	Decision Reference
Rhode Island	L		
South Carolina	L		
South Dakota	L		
Tennessee	NA (3)		
Texas	L		
Utah	M	Resource planning	Utah PSC 1994
Vermont	M	Avoided energy and capacity costs	Vermont PSB 1995
Virginia	L		
Washington	M		
West Virginia	L		
Wisconsin	M		
Wyoming	L		

Notes: (1) Confidential priority refers to the relative importance (priority) of confidentiality on the PUC agenda: low (L), medium (M), or high (H); (2) Nebraska does not regulate gas and electricity utilities; (3) Tennessee does not regulate electric utilities (except for one small distributor)

6.2. Types of Energy Data Filed As Confidential

The type of energy and energy-related data submitted as confidential is varied (Table 3). The most common types of DSM data that utilities want to keep confidential deal with specific customer data, market data, avoided costs (current and projected), and utility costs (see question 1a in Table 1). However, there is no consensus among PUCs: some types of data were granted confidentiality in one state (Table 3) while they were not granted confidentiality in another state (Table 4). For example, while some PUCs permitted utilities to keep their avoided costs confidential, others did not. This same discrepancy is apparent for special contracts, load shapes, IRP cost data, inputs and outputs of computer models, DSM program evaluation reports and data, and IRP plans.

The following examples describe the type of data (resource planning, business strategies, avoided energy and capacity costs, and marginal and avoided energy costs) that have been filed as confidential by utilities and granted by the regulatory commission in that state. The examples are for illustrative purposes only and do not reflect the diverse type of requests made by utilities.

6.2.1. Resource planning data

In its submittal to the Arizona Corporation Commission, the Arizona Public Service (APS) Company filed as confidential resource planning information for the historical year 1993. In its submittal, the list of documents included the following types of confidential data: existing customer appliance saturation estimates, appliance saturation data by dwelling type and income level, description of end use data base, appliance efficiency data, connected load estimates of existing customers and new construction, and data related to segmented energy sales, customers, and prices. APS asserted that the release of such information to its competitors and suppliers, or to potential competitors and suppliers of APS, would "irreparably harm" APS and its customers (Arizona Corporation Commission 1994). Their request was honored by the Arizona Corporation Commission.

6.2.2. Business strategies

The Missouri PSC approved Kansas City Power and Light Company's request that parts of its Utility Resource Planning Compliance Filing be confidential (Missouri PSC 1995). The PSC agreed that discussions related to specific business strategies pertaining to competitive markets were confidential

Table 3. Data Types For Which Commissions Have Honored Confidential Data

Specific Customer Data

- Rates
- Load factors and load shapes
- Customer names and addresses
- Billing records
- Service received (e.g., equipment installed with a rebate)
- Special contracts
- Operating characteristics of particular technologies

DSM Market Data

- End-use saturation survey data
- Usage patterns
- Market potential
- Market research
- Promotional practices for retaining customers

Avoided Costs

- Utility's avoided costs
- Customer's avoided costs
- Avoided cost data for a third party
- Breakdown of avoided costs - energy and capacity
- Inputs to avoided cost and marginal cost calculations

Costs

- Marginal cost studies for determining special rates
- Gas pricing studies
- Cost for producing power
- Cost for purchasing power
- Conservation cost recovery data
- IRP cost data
- Parts of annual reports dealing with stranded costs
- Wholesale prices
- Purchased energy adjustments
- Cost of service data

Computer Models

- Source codes of computer models
- Computer runs/output
- Sensitive economic studies dealing with proprietary models

Competitive Bidding

- Evaluation of proposals in competitive bidding programs
- Competitive bidding information
- Bids for purchased power and CT plants

DSM Program Evaluation

- Program evaluation data
- Allocation of expenses to energy efficiency programs

Table 3 continued. Data Types For Which Commissions Have Honored Confidential Data

IRP

Capacity production (resource development) and expansion plans and models
Inputs to capacity production (resource development) and expansion scenarios and models
Forecasts - fuel costs, fuel supplies, loads, prices, market conditions
IRP contracts
IRP scenarios dealing with price of contracts
IRP plans

Other

Emission inventory of emission allowance management strategy
Power plant security

Table 4. Data Types For Which Confidential Status Has Been Denied

Specific Customer Data

- Special contracts
- Load shapes
- Load forecasts

Avoided Costs

- Utility's avoided costs

Costs

- Rate case information
- Detailed IRP cost data

Computer Models

- Inputs and outputs of computer models

DSM Program Evaluation

- DSM program evaluation reports
- Savings estimates

IRP

- IRP filings

Other

- Data bases

because they contained market-specific information relating to services offered in competition with others.

6.2.3. Avoided energy and capacity costs

In Vermont, the Citizens Utility Company requested a protective order from the Vermont Public Service Board (PSB) for protecting the following information as confidential: the utility's avoided energy costs and capacity costs, and total avoided costs (Vermont PSB 1995). The primary reason given for their request was that in a restructured and competitive electric industry their avoided costs would be useful to a competitor. The PSB granted this request, but did not concur with the utility regarding its main argument because the Commission felt it was premature to anticipate utility restructuring by restricting the flow of utility information. However, the PSB did agree with the utility's other argument: because large industrial customers wanted to reduce electric rates, the release of avoided cost information could be used by industrial customers to increase the total value of the special discounts they received through special contracts (see Section 6.4). Therefore, the PSB believed that reducing the availability of avoided cost information was appropriate.

In a similar example, in 1995, the Central Maine Power Company requested a protective order that would limit the distribution of avoided and marginal cost information, and the Maine PUC granted the utility's request shortly after their request (Maine PUC 1995). The key findings from this decision were the following:

1. Federal law (PURPA) did not preclude state law trade protection of marginal cost data.
2. Federal regulations (issued pursuant to the Federal Power Act) did not preclude state law trade secret protection of the avoided cost information.
3. The marginal and avoided energy cost information were trade secret information and would receive trade secret protection until the information became "stale." (Maine PUC 1995)

6.3. Challenges to Utility Requests for Confidentiality

As noted in Section 6.1, utility requests for confidentiality are typically honored by PUCs and remain confidential unless appealed. However, we came across a few examples of “controversy” where the utility request for confidentiality was challenged by an outside party or denied by the PUC (Table 5). The detailed examples below were submitted by the interviewees as good examples of the type of confidentiality issues being disputed in their state. We provide brief descriptions of these examples to illustrate the types of issues that PUCs must consider when deliberating on confidentiality.

6.3.1. Questionable commercial value of selective utility information

In its submittal to the Florida Public Service Commission (PSC), the Florida Power and Light (FPL) Company filed as confidential the following type of information: FPL’s SO₂ allowance auction bid price strategy, graphs that indicate the cost of FPL’s SO₂ reduction measures, a summary of residential and commercial options data for reducing SO₂, and results from its 1992 residential DSM program evaluation baseline study (Florida PSC 1994). The first two data types were accepted as confidential by the Florida PSC, but the last two types of data (concerning residential water heating conservation measures) were not accepted as confidential. FPL argued that although the information may not be in and of itself confidential, it was gathered or obtained at great expense. Therefore, they argued, they should have the opportunity to realize the commercial value of the information through its sale to others. FPL asserted that it was “simply not fair for one utility to obtain information at its own expense and then be expected to share the information gratis with other utilities or intervenors who may find it useful” (Florida PSC 1994). The Florida PSC determined that the confidentiality justification for the submitted information did not meet the burden set forth in the statutes regarding trade secrets. In addition, the Florida PSC found that the overall commercial value of the information was questionable at best:

The resale market for the information may be limited because the data is extremely specific to FPL’s service territory and may be valid for Florida utilities only. Other Florida utilities have been gathering similar information in their efforts to meet the aims outlined in FEECA [Florida Energy Efficiency and Conservation Act]. . . . Because FPL spent money to get these reports is not sufficient justification for keeping the results confidential. The major reason that the utilities are required to pursue conservation is that they are uniquely positioned to remove or lessen market barriers and create a competitive energy efficiency market. . . . I find that this information is not proprietary business information and its disclosure will not cause harm to the ratepayers or the company’s business operations. FPL’s competitors will derive no perceptible economic advantage from such disclosure. (Florida PSC 1994)

Table 5. Challenges to Utility Requests for Confidentiality

Type of Data	Reasons for Not Granting Confidentiality (Report Section #)	Decision Reference
Summary of residential and commercial options data for reducing SO ₂ , and results from 1992 residential DSM program evaluation baseline study	Questionable commercial value of selective utility information (6.3.1.)	Florida PSC 1994
Integrated resource plan	Inadequate description of competitors and use of competitive information and problematic confidentiality of data (6.3.2.)	Kentucky PSC 1992a
Annual conservation and load management filings and individual program reports	Stale data, monopoly advantage of utility data, and negative impact on public policy (6.3.3.)	Massachusetts DPU 1993
Market share types of information	No standard for measuring trade secrets (6.3.4.)	Montana PSC 1995b
IRP filings	Need to address confidentiality on a case-by-case basis (6.3.5.)	Utah PSC 1994
Avoided and marginal cost information	Need to maintain public access to utility data (6.3.6.)	Maine PUC 1995
Special contracts	Need to file rates with regulatory commission (6.4.1.)	Kansas SCC 1995
Special contracts	Inadequate description of competitors and harmfulness of information (6.4.2.)	Kentucky PSC 1995a
Special contracts	Did not show how publication of retail rates results in competitive injury (6.4.3.)	Kentucky PSC 1995b
Special contracts	Lack of evidence in supporting competitive injury (6.4.4.)	Kentucky PSC 1995c
Special contracts	Public review needed to prevent price discrimination or other unfair practice (6.4.5.)	ICC 1994

6.3.2. Inadequate description of competitors and use of competitive information and problematic confidentiality of data

In Kentucky, the Union Light, Heat and Power Company wanted certain materials within its integrated resource plan to be confidential on the grounds that disclosure of such information would likely cause the utility competitive injury (Kentucky PSC 1992a). The Kentucky PSC denied the utility's petition because it had not identified competitors who would benefit from the information, nor did it establish how such information could be used by competitors to the detriment of the utility. Furthermore, the PSC noted that the information the utility wished to be confidential was derived primarily from a report by the Electric Power Research Institute which was available and regularly used by utilities, consultants, federal and state governmental agencies, ratepayer advocates, etc. Thus, the information was not confidential and not entitled to protection.

In contrast to this decision, the Kentucky PSC accepted as confidential the utility's residential customer survey data containing detailed information on end-use appliance saturation, energy use, and customer-specific information (Kentucky PSC 1992b). The PSC argued that competing energy use providers could use this information to devise market strategies to more effectively compete against the utility. Thus, disclosure of this information would likely cause competitive injury to the utility. They applied the same line of reasoning for keeping the following reports confidential: a business retention and loss study, an advertising effectiveness research study, and selected market research studies.

6.3.3. Stale data, monopoly advantage of utility data, and negative impact on public policy

In June 1993, the Boston Edison Company filed a request that the Massachusetts Department of Public Utilities (DPU) issue a protective order to protect from public disclosure information contained in Boston Edison's Second Annual Reconciliation Report as well as individual program reports (Massachusetts DPU 1993). One month later, Boston Edison also requested that its annual Conservation and Load Management filing be confidential. Boston Edison argued that public disclosure of this information would permit its competitors to determine the utility's program costs by component (e.g., customer costs, utility installation costs, evaluation costs, and administrative costs) and its costs per kilowatt-hour to deliver various DSM programs.

Boston Edison further argued that this information, which details the strengths and weaknesses of its present programs, would place the utility at a competitive disadvantage in providing low-cost DSM services both in its own and in other electric utility company service territories, particularly in bidding programs. Similarly, Boston Edison claimed that information such as participation rates (absolute and percentage of market) and energy and demand savings estimates provide a baseline as to the participation and savings the utility would expect to achieve in DSM programs that would be competitively bid. Boston Edison argued that the information in these reports (e.g., present value of savings for energy, capacity, and transmission and distribution) could lead to the discovery of the utility's avoided costs; assuming the avoided costs were the ceiling of bid prices, the utility believed that there would be a high probability that competitor bids would gravitate toward this level, regardless of actual costs, thus raising the overall cost of DSM.⁹

The DPU Hearing Officer did not find the utility's arguments persuasive for the following reasons: (1) the information contained in the reports was old (for programs implemented in 1992) and would not be useful to competitors who would need up-to-date information when bidding to provide DSM services in 1995; (2) monopoly utility companies had a competitive advantage over other companies who would be bidding to provide services in the utility's service territory (e.g., detailed knowledge of customers, including billing data and usage patterns; ongoing, direct relationships with customers; and established DSM programs in the field); (3) participation rates and energy and demand savings estimates were required in the company's initial resource portfolio that must be provided to bidders when an IRP is issued under the DPU's IRP regulations; (4) Boston Edison's reluctance to make this type of information available to the public might undermine the efforts of the DPU to enhance the public's awareness and support for DSM; (5) providing avoided cost information before preparation of bids could assist bidders in making their proposals more cost-effective - without such information, Boston Edison would have an unfair competitive advantage; and (6) the avoided cost information that was used to determine the present value of savings benefits for Boston Edison's 1992 programs was negotiated by the settling parties in 1992 and did not represent current or projected avoided costs. Finally, the DPU indicated their concern with protecting the public's right to full and accurate knowledge of utility DSM programs:

The contractors who implement programs for the utility companies need access to the process and impact evaluations if they are to improve their performance and provide better value to ratepayers for the price. Disclosure of the information contained in the reconciliation filing is critical to the public's ability to monitor the cost-effectiveness and general level of competence exhibited in a company's implementation of its DSM programs. This information is critical to the ongoing assessment of any market transformation due to utility company-sponsored DSM programs, and to the continuing

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⁹This result would not occur in a competitive market where bidders would be competing with each other for providing energy to a customer at the lowest cost.

evolution and improvement of DSM evaluation and program design. (Massachusetts DPU 1993)

The Hearing Officer concluded that there were significant public policy reasons, including the provision of more cost-effective DSM programs, for the disclosure of the disputed information, while protecting specific customer and vendor information and, therefore, did not allow the utility to keep the information confidential.

6.3.4. No standard for measuring trade secrets

In 1995, in their submittal to the Montana PSC, several telephone companies (e.g., AT&T, MCI, and Sprint) filed as confidential certain market share types of information (Montana PSC 1995b). The carriers asserted the information was confidential because the carriers' competition could use the information to the carriers' detriment:

... the information on market share and supporting details and data is trade secret as it includes information and compilations of information which derive independent economic value, potential or actual, by not being generally known or readily ascertainable by proper means by others who can benefit from its disclosure and use. (Montana PSC 1995b)

The carriers testified that the information could demonstrate trends of interest to competition and be useful in determining whether particular marketing strategies were useful or not (i.e., the increases and decreases in market share were viewed as "business intelligence" that could be used to verify the success or failure of marketing strategies allowing competition to change, eliminate, or mimic strategies). The Montana PSC ruled that certain market share type of information should be protected from the public (*ibid*). However, one Commissioner who dissented from the ruling noted that citizens should be able to evaluate the soundness of their government's decisions:

There is no question that trade secrets must be protected. . . . However, when information becomes relevant to evaluating a public decision, the Commission and parties must more carefully scrutinize whether the information does derive "independent economic value . . . from not being generally known" . . . and if it does, whether it is possible to make some parts of it known without diluting that value. . . . The Commission should better articulate the standard by which it will measure trade secrets. (Montana PSC 1995b)

6.3.5. Need to address confidentiality on a case-by-case basis

As noted at the beginning of this paper, utilities have expressed concerns that their bargaining position might be compromised during the IRP process: analyses that detail the value of particular resources to a utility (e.g., the cost of providing power to particular customers) can give potential energy marketers a competitive advantage when bargaining for prices and terms of energy supplies. In response to these concerns, the Utah PSC indicated their concern about the loss of bargaining power but noted that the IRP process would be open to the public in all of its stages of development and that the PSC would address the issue of the dissemination of competitively sensitive information on a case-by-case basis and would restrict access to such information only when appropriate (Utah PSC 1994).

6.3.6. No maintenance of public access to utility data

As noted in Section 6.2.3, the Maine PUC granted, in 1995, Central Maine Power Company's request for a protective order that would limit the distribution of avoided and marginal cost information (Maine PUC 1995). However, the Chairman of the Commission dissented and argued that the value of maintaining public access to the utility data outweighed the risk of harm to the utility:

... The value of public scrutiny of these data, and public confidence that the underlying data upon which the Commission is likely to base its decision is not being concealed, is as important at this point in the proceeding as at the conclusion. I do not mean to suggest that there is no possibility of harm to CMP (and ultimately to CMP's ratepayers) from disclosure of such information. ... But, especially where the commission is engaged in important realignments of the manner in which we regulate utilities, we should err on the side of ensuring that the public is fully informed as possible about the material submitted to the Commission. (Maine PUC 1995)

6.4. Special Contracts

Special contracts are a concern for both the utility industry and regulatory commissions. The term "special contract" is generally used for a contract that contains pricing provisions and terms that are different from those terms found in the general applicability tariff under which a particular customer would otherwise take service. The pricing provisions in a special contract may provide more favorable terms or may provide for a different form of service to the customer than in a utility's tariffs that are generally available to customers similarly situated. Properly determined special contracts meet the needs of special contract customers and the utility. Certain types of customers may be targeted – for example, customers with a contract demand exceeding 1 MW, interruptible power for at least 80% of

contract demand, or subject to hourly changes in energy prices.¹⁰ The primary reason for the special contracts is that large customers, in particular, need more flexible service and pricing provisions to better match their operational and business circumstances. For example, customers with fixed time-of-day pricing rates cannot take into account the utility's day-to-day changes in variable electric production costs. The provisions of a special contract permit the customer to engage in evaluating its hour-to-hour operating decisions at its production facility.

In recent years, utility companies have been particularly concerned with the possible loss of large commercial and industrial customers from their service area (e.g., through cogeneration, fuel switching, or moving to other service areas). Utilities are also afraid of losing customers to lower cost providers if retail wheeling were to occur. In response to these concerns, utilities have signed special contracts with these large customers, offering them significant rate discounts (10-20%) as well as other special considerations (see Appendix A for an example of a state where most of the major industrial customers have signed special contracts). Typically, the utility has asked that the information contained in the special contracts be filed as confidential. As shown below, most commissions uphold the utility requests for confidentiality because they contain commercial or financial information that is exempted from the open records laws if the disclosure of such information would "cause substantial harm to the competitive position of the person from whom the information was obtained" (*Miami Herald Publishing Co. v. United States Small Bus. Admin.*, 670 F.2d 610 (5th Cir. 1982)). Some regulatory commissions have modified their administrative statutes: for example, New Hampshire's Code of Administrative Rules includes special contract information ("details of special contracts relating to pricing and incremental cost information for competitive services not reflected in tariffs of general application") as evidence in filing for confidential treatment (New Hampshire PUC 1990). However, there are examples where the regulatory commissions have denied utility requests for confidentiality, as shown in the following cases.

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¹⁰ In this paper, we do not examine the validity of special contracts. Most of the regulatory commissions allow special contracts, as long as they meet certain evaluation criteria. For example, in Missouri, the Missouri PSC staff believe that a basic standard for evaluating a special contract is that it produces revenues that are at least as great as the utility's incremental (avoided) cost (Dottheim 1995). The concept of special contracts is not in conflict with the requirement of "just and reasonable rates," since individual customers can be in situations different than those assumed and addressed by tariffs of general applicability, resulting in differences in the cost of providing service to particular customers.

6.4.1. Did not file rates with regulatory commission

In June 1994, the staff of the Kansas State Corporation Commission (SCC) notified all jurisdictional utilities that effective August 1, 1994, the SCC would not accept for filing any special contract or flexible tariff filing marked confidential (Kansas SCC 1995). In addition, all special contracts or flexible tariff filings which were currently on file with the SCC as confidential would be treated as public information (as of Aug. 1, 1994). In this situation, "special contracts and flexible tariff filings" referred only to those documents that indicated the rate at which a utility service was being provided to a particular customer. While the staff agreed that the law recognized the right of common carriers and public utilities to enter into private contracts with their customers concerning services to be rendered by them, such contracts were subject to the law that required all rates to be filed with the SCC and prohibited the charging of unpublished, secret rates. Staff argued that unless all rates were open and available, there was no way that other ratepayers could determine if a utility was offering a discriminatory or preferential rate.

In response to this proposal and pressure from interest groups that would benefit from special contracts, state legislation was introduced on Jan. 18, 1995 which addressed the confidentiality of certain matters filed with the SCC by electric, gas, and telecommunications public utilities and common carriers. The legislation was signed into law on March 8, 1995, and allowed the SCC to:

... prescribe reasonable rules and regulations, as it determines reasonable and appropriate, regarding form and filing of all schedules of rates and all rules and regulations of such utilities, including such protection of confidentiality as requested by the utility or carrier, and its suppliers and customers, for contracts entered into by such utility or carrier. (Kansas SCC 1995)

6.4.2. Inadequate description of competitors and harmfulness of information

The Kentucky PSC has faced numerous requests for confidential protection of billing information contained in special contracts with industrial customers. In one case, the Louisville Gas and Electric Company wanted information in its special contract with an industrial customer to be confidential because disclosure would likely cause competitive injury to both parties to the agreement (Kentucky PSC 1995a). To qualify for an exemption from Kentucky's Open Records Act (KRS 61.872(1)), the utility had to demonstrate actual competition and a likelihood of substantial competitive injury if the information was disclosed. Competitive injury occurs when disclosure of the information gives competitors an unfair business advantage. The Kentucky PSC noted that the utility's petition did not identify any competitors who would benefit from the information, nor did it establish how information

could be used by competitors to the utility's disadvantage. The Kentucky PSC also noted that the industrial customer had not intervened in the proceedings nor filed a petition for confidential protection of information, even though the utility had argued that unless the confidentiality of the information was protected, the customer would suffer competitive injury. Therefore, the Kentucky PSC denied the petition for confidentiality.

6.4.3. Did not show how publication of retail rates results in competitive injury

In another case considered by the Kentucky PSC, the Western Kentucky Gas Company requested confidentiality status of its special contracts because: (1) the contracts had not previously been disclosed to the public, (2) such company-specific energy purchase contracts represented the equivalent of a trade secret, (3) the disclosure of the contracts would give competitors and other industrial customers an unfair advantage, and (4) the customers have a interest in protecting the confidentiality of the contracts (Kentucky PSC 1995b). The Kentucky PSC denied the petition for confidentiality because they rarely found that the publication of a utility's retail rates would result in competitive injury warranting confidential protection. In addition, Western did not allege that disclosure of retail rates would lead to the threat of the customer physically bypassing its system (a reason for competitive injury).

6.4.4. Lack of evidence in supporting competitive injury

In a third case considered by the Kentucky PSC, the Union Light, Heat and Power Company argued that the disclosure of contract information would cause competitive injury to itself: if the information were disclosed, the utility's competitors in other states might reduce their charges and rates to the industrial manufacturer's competitors in other states, possibly causing the industrial manufacturer to close its Kentucky facility. The Kentucky PSC denied the petition for confidentiality, stating that this line of reasoning was based on the testimony of one utility person without any other evidence to support its validity and, more importantly, ". . . even if the contention is accepted as valid, the potential injury from disclosure described in the affidavit is not the type that the exemption is intended to protect against" (Kentucky PSC 1992c).

6.4.5. Public review needed to prevent price discrimination or other unfair practices

In October 1993, Commonwealth Edison Company filed with the Illinois Commerce Commission (ICC) a proposed load retention tariff targeted to existing large commercial and industrial customers in order to retain their electric loads from loss to bypass (ICC 1994 and Dottheim 1995). Commonwealth Edison asserted that developers of cogeneration projects and other independent cogeneration facilities posed a serious threat of competition to Edison's service area, so that the proposed tariff would induce customers to remain with Edison through discounted rates in special contracts rather than utilize an alternate source of energy. In order to qualify for these rates, customers would have to file a written application with Edison as well as an affidavit stating the customer's intent to bypass Edison's system. As part of this proposal, Edison would file each contract with the ICC for informational purposes, but would not require ICC approval of each separate contract. Finally, and most importantly for this paper, as part of the utility's request, the ICC would:

. . . automatically treat both the contract and the supporting work papers on a proprietary basis regardless of content. Thus, any rates or charges set forth in the contract, and the information used in determining these rates or charges, would not be published or open to public inspection. (Illinois Court of Appeals 1995)

Commonwealth Edison argued that filing the information as confidential would allow it to negotiate the highest possible rate with each customer without having to divulge the prices charged to other customers. It would also prevent Edison's competitors from gaining an unfair advantage from the unnecessary disclosure of service and pricing information. The ICC approved the proposed tariff subject to certain modifications because it found the tariff to be consistent with its long-standing policy to discourage uneconomic bypass of a utility's system.

In August 1995, the Illinois Court of Appeals reversed the ICC's decision (Illinois Court of Appeals 1995). The Court stated that the proposed load retention tariff contravened the Illinois Public Utilities Act for: (a) failing to set forth a schedule of rates and charges (including contracts); (2) failing to provide 45 days notice to the ICC and the public prior to changing rates and charges; (3) charging rates different from the published rates; and (4) providing services at less than the published rates. The Court was also very concerned about how the proposed tariff violated the state's public records law; the filing of the proprietary contracts "for informational purposes" and the failure to keep the same open for public inspection contravened the language of the law:

In fact, the public is prevented from undertaking any meaningful examination because the contracts containing the rates will be filed on a proprietary basis. Under these circumstances, the public cannot intelligently determine whether or not Edison has engaged in price discrimination or other unfair practices. . . . Indeed, it is impossible to verify whether Edison has granted a particular customer any unreasonable preferences

or advantages under Rate CS since the actual charges, and the supporting papers used in calculating these charges, will be insulated from public scrutiny. (Illinois Court of Appeals 1995)

6.5. Regulatory Concerns

Several interviewees expressed concerns that the existing regulatory process for reviewing utility requests for data to be filed as confidential is inadequate to protect the public's access to this information. They raised four concerns: (1) the burden for examining data filed as confidential initially rests with the individual requesting to look at the confidential data rather than the data provider, (2) the limitations of PUC Hearing Officers and Consumer Advocates in providing sufficient monitoring of utility requests for confidentiality, (3) the absence of a consistent framework for dealing with confidentiality, and (4) the possible negative impacts of utility information pricing proposals.

First, several regulatory staff members assert that there is a "gap between law and practice." As noted in Section 5, regulatory law (i.e., the freedom of information laws and the issuance of protective orders) places the burden of proof on those who claim confidentiality. However, common practice is exactly reverse: confidentiality proposals are routinely accepted unless someone challenges them and successfully demonstrates that they are inappropriate. Consequently, the burden for examining data filed as confidential initially rests with the individual requesting to look at the confidential data rather than the data provider.¹¹ Access to utility information requires a "sophisticated information-gathering public, one that can pursue alternatives and know the full range of search options" (Hernon and McClure 1988). Also, access to information costs time and money. Thus, the onus is on the parties who know what they want, and it will be particularly burdensome for those not familiar with PUC procedures.

As a result, utilities often file for protection of contracts, data responses and other information, while parties not directly involved in a case do not even know what is being sequestered. Intervenors, who might need to see the documents to prepare their own cases, can see the documents only after signing confidentiality agreements (protective orders). However, outside parties are unaware when a data provider submits data as confidential and will not know what is being discussed. In conclusion, while there is a process for challenging utility data submittals (discovery disputes), the process is rarely used and open only to active parties in a case. As we enter into the "information age," utility requests for

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¹¹Once challenged, PUCs typically have regulations that require a utility to demonstrate why their data should be filed as confidential.

confidentiality and the expected hassle of formally appealing the confidential status of data will ensure that broad segments of the American public will be "information poor."

Second, PUC Hearing Officers who are given the primary responsibility for reviewing utility requests for confidentiality are limited in their review process. They are typically very busy and do not have the time to individually investigate a provider's submittal of data as confidential. Furthermore, the Hearing Officer is normally conservative in handling utility requests for confidentiality. In particular, state laws make it illegal to release confidential information without the expressed consent of the utility. Therefore, it is better to err on the side of caution in keeping the data confidential. Finally, many Hearing Officers normally accept the utility point of view about confidentiality (unless someone objects) because the Hearing Officer assumes that the utility knows best what should be marked as confidential.

Consumer Advocates are also resource constrained and are not able to monitor utility requests for confidentiality. Furthermore, Consumer Advocates are not active in all states, so that the public has to rely more heavily on PUC Hearing Officers.

Third, the lack of a consistent framework for dealing with confidentiality leads to subjective decision making on granting utilities' requests for confidentiality. Decisions and rules on confidentiality established by the PUCs are based on the decisions and statutes created by their state appeals court, state supreme court, and state legislature. Nevertheless, because of the broad policy directives issued by these bodies, many commission staff indicated that it is very difficult to evaluate the alleged confidentiality of data, and characterized their PUC's decisions on particular cases as very subjective and discretionary. In fact, one interviewee noted that decisions on the confidentiality of data depend on how the PUC staff person who is to make the decision on confidentiality feels on that particular day. In conclusion, the lack of detailed guidelines and procedures for responding and evaluating utility requests for data to be filed as confidential leads to a very uncertain environment that may not be consistently supportive of public access to utility data.

Fourth, while not yet addressed by regulators, utility proposals for compensation for providing their data to other users has raised some concern about the impact of these proposals on public access. For example, some utilities would like to be able to charge a reasonable price for competitively sensitive information which would compensate the utility for the development and production of the data (Pacific Gas and Electric 1996). How the pricing is determined will have very different consequences for public access to information. The price to be charged for access to data may be for the incremental cost of providing the data, or may be for the economic value of the data. High charges can probably be absorbed by most businesses but may be an insuperable barrier to individuals and groups with little

income. The mechanism by which utility information will be distributed to those without financial resources to pay high costs is uncertain but will be an issue that regulators need to address.

7. FUTURE TOPICS TO ADDRESS

Based on our scoping study, we have identified several retrospective and prospective topics that should be addressed for further examining the issue of confidentiality (Table 6). The retrospective studies are designed to inform stakeholders about how confidentiality has been treated in the past – by the courts, regulators at the beginning of utility regulation, other state agencies, and other industries. Two types of prospective studies are needed to learn about confidentiality: (1) the first five studies seek to clarify the issue of confidentiality under the present regulatory system (prior to a more competitive utility environment) – examining confidentiality in performance-based ratemaking and special contracts, evaluating the availability and accessibility of utility information from unregulated utility subsidiaries and nonutility sources, and examining the impact of confidentiality on consumer education; and (2) the last study evaluates confidentiality in a more competitive utility environment where the collection of data is funded by a nonbypassable systems benefit charge.

Table 6. Retrospective and Prospective Confidentiality Studies

Retrospective Studies

1. Legal analysis of the issue of confidentiality.
2. Review of the early history of electric utility regulation.
3. Analysis of how confidentiality has been addressed by other state agencies.
4. Review of confidentiality in restructured natural gas and telecommunications industries.

Prospective Studies

1. Evaluation of the availability and accessibility of utility information from nonutility sources.
2. Analysis of confidentiality in performance-based ratemaking.
3. Evaluation of confidentiality and special contracts.
4. Analysis of the impact of confidentiality on consumer education.
5. Analysis of confidentiality for unregulated utility subsidiaries (including municipal utilities): should these entities be covered under the same or different rules than those for regulated utilities?
6. Evaluation of confidentiality under a scenario where the collection of data is funded by a nonbypassable systems benefit charge.

8. ASSURING PUBLIC ACCESS TO UTILITY INFORMATION

Utilities' filing of data as confidential is most worrisome to the regulatory community in those states that are actively moving towards the restructuring of the electric utility industry (for a list of regulatory concerns, see Section 6.2). As more states experiment with restructuring, we expect the issue of confidentiality to become a more important public policy issue. In order for the electric utility industry to remain as one of the most open industries in the United States in sharing information, the regulatory community will need to be proactive (rather than reactive) in developing specific policies and frameworks to protect the public's access to utility-held information. Accordingly, we propose that PUCs conduct the following activities (some of which overlap) as soon as possible:

1. Assess information needs and sources and revise existing policies.

Past PUC decisions on confidentiality were based on utilities not using their data for commercial purposes. With competition on the horizon, utilities will likely be making commercial use of the data to secure their market shares. Therefore, PUCs need to become aware of the implications of keeping data confidential and of utility information pricing proposals and make sure that their own reporting requirements and policies are consistent with the workings of a competitive environment. Hence, PUCs should carefully examine the types of information that are necessary for appropriate regulatory functions in a restructured electricity industry, assess the adequacy of information currently available to regulators, and determine what information in the future should be required from utilities. Information and related pricing policies should have as their primary objective a user perspective guaranteeing effective access to, and dissemination of, utility information.

2. Review process for handling confidentiality claims and revise existing policies.

PUCs need to review whether the process for handling confidentiality claims works very well. For example, are challenges to confidentiality burdensome? The burden of

proof should be placed on the utility when the utility files information as confidential, not on the challenger.

3. Monitor restructuring activities.

PUCs should carefully monitor restructuring activities to ensure that information is available and useful and is provided in a cost-effective manner to all interested parties, and to assure that the emerging competitive market is both efficient and fair. PUC oversight is needed for defining the rules and protocols that will be necessary to prevent or alleviate potential market failures and abuses. PUCs may want to monitor utility compliance with requests for utility data from the public, competitive energy providers, and other stakeholders (e.g., in terms of timeliness and completeness of response and data format).

4. Develop framework and specific guidelines.

PUCs need to develop a framework (or process) to identify data, where possible, that are significant to policy issues and that significantly compromise competitive businesses. PUCs should develop specific guidelines on what is considered to be confidential and for identifying unreasonable requests for confidential status. The guidelines should define "proof of harm" to the utility and encourage specific requests by utilities when claiming data to be confidential.

5. Develop standards of conduct.

PUCs need to develop standards of conduct (basic principles) to ensure that the former monopoly utility does not share information with its marketing affiliate, to the detriment of all other providers.¹² The standards of conduct would govern the use of

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¹²Several states (including Maryland, Massachusetts, Minnesota, New York, Ohio, and Wisconsin) are in the process of considering standards of conduct for governing the relationship between natural gas local distribution companies regulated by the PUCs and their marketing affiliates. The standards were developed as a response to the perception that the relationship between the regulated entity and an unregulated marketing affiliate carries the potential for undue preference and favorable treatment of the affiliate and its customers. The appearance of favoritism can interfere with the development of the competitive marketplace (see Federal Energy Regulatory Commission Order No. 497). On the gas side, the standards of conduct require all suppliers of gas subject to the same rules and have access to the same information: e.g., if a local distribution company (LDC) provides to a marketing affiliate information related to the transportation, sales or marketing of natural gas, the LDC must provide this information contemporaneously to all potential shippers, affiliated and nonaffiliated, on its system (see Massachusetts DPU 1996).

monopoly-held information for commercial purposes by competitive divisions or affiliates of the monopoly.

The absence of standards will be costly: it will be more difficult to attain a competitive playing field the longer utilities are allowed to use ratepayer assets for competitive purposes (Fryer 1996). Moreover, because the rules governing such uses are not yet clarified, there will likely be complaints by ratepayer advocates, non-utility competitors and other stakeholders, leading to costly litigation over the allocation of profits earned by competitive utility activities that utilize ratepayer assets (personal communication from Lorenzo Kristov, California Energy Commission, May 28, 1996).

6. Hold workshops on confidentiality.

Although the above activities could be done internally by the PUC, PUCs should sponsor workshops on these activities, in order to receive input from key stakeholders: investor-owned electric utilities, competitive energy and energy service providers (e.g., other utility companies, power marketers, energy service companies, and municipalities), customers, and public or private entities that perform energy assessments, conduct research and demonstration activities, and design, implement, and evaluate energy programs. These stakeholders need to recognize the importance of ensuring broadly based and effective access to utility information. We believe that the participation of key stakeholders in workshops will provide an excellent opportunity for everyone to become more aware of the key issues involving the confidentiality of utility data.

The workshops could be structured as part of broader discussions on integrated resource planning, utility restructuring, special contracts (three areas in which confidentiality of data has been an issue), or utility performance-based ratemaking (an area in which confidentiality had not yet been discussed by a public utility commission). In addition to addressing specific questions related to these areas, the stakeholders will be contributing to the vision of how an information society should function. As an example, California's Energy Services Working Groups are investigating information needs in the restructured electricity industry as part of implementing restructuring in the generation sector.

7. Design and implement a pilot project.

PUCs should design and implement a pilot project in which the PUC would specify an interim set of rules of access and conduct adequate monitoring to enable the PUC to evaluate the success of these rules.

8. Establish and support Consumer Advocates.

PUCs need to establish and support Consumer Advocates for monitoring utility data filings and requests for protective orders to assure they are not overly broad or vague and, in general, to assure they are reasonable and necessary. In most states, state budgets are being reduced, state agencies are being reorganized and downsized, and the role of the Consumer Advocate is in a precarious position.¹³

9. Support more research on confidentiality.

PUCs should lend their support (either directly or indirectly) for conducting studies on the topics listed in Section 7. The study of confidentiality in the energy sector is in its infancy, and many questions need to be answered.

Utilities will be reluctant to participate in progress toward supporting these activities and developing the new rules of the game, when they know they benefit more from a lack of resolution of these issues than from any of the various potential resolutions. Thus, PUCs need to conduct the above activities promptly in order to avoid paralysis and inertia and to maintain the regulatory balance. The lack of a regulatory framework and specific policies for information access may only make existing problems more severe:

. . . the longer that the development of a policy on confidential information drifts, the more difficult it will be to modify or abandon existing practices and policies. (Hernon and McClure 1988)

In conclusion, if the above activities are not adequate for maintaining public access to utility-held information, an independent third party may be needed for controlling and distributing the data. In the telecommunications field, for example, the California PUC has asked the local exchange carriers and competitive local carriers to consider whether customer data bases should be controlled by an

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¹³ In California, the Division of the Ratepayer Advocates, an organization established to protect the public's interests, was recently eliminated by the California Public Utilities Commission.

independent third party in order to ensure reciprocal access to data (California PUC 1996). The California Energy Commission is also considering other organizational models for storing and distributing customer data: multiple custodians of records and a public or non-profit clearinghouse that is charged with optimizing the use of the information it is storing (California Energy Commission 1996).

9. SUMMARY

Historically, the electric utility industry has been regarded as one of the most open industries in the United States in sharing information but their reputation is being challenged by competitive energy providers, the general public, regulators, and other stakeholders (Sections 2 and 3). As the prospect of competition among electricity power providers has increased in recent years, many utilities have been requesting that the data they submit to their utility regulatory commissions remain confidential. Withholding utility information from the public is likely to have serious and significant policy implications with respect to: (1) consumer education, the pursuit of truth, mutual respect among parties, and social cooperation; (2) the creation of a fair market for competitive energy services; (3) the regulatory balance; (4) regional and national assessments of energy-savings opportunities; (5) research and development; and (6) evaluations of utility programs, plans, and policies (Section 4).

In a telephone survey of all PUCs that regulate electric and gas utilities in the U.S., we assessed: (1) the relative importance of the issue of confidential data in the regulatory arena in the U.S.; (2) the type of data filed as confidential with PUCs; and (3) the regulatory response to utility requests for confidentiality (e.g., formal policies, guidelines, rules and procedures, and decisions) (Section 1).

In our survey, we found that almost all PUCs have received requests from utility companies for data to be filed as confidential, and confidential data filings appear to have increased (both in scope and in frequency) in those states where utility restructuring is being actively discussed (Section 6). In some states, these requests occur routinely, while in other states, the requests are submitted periodically as part of proceedings, rate cases, or filings of integrated resource plans. The most common types of data submitted as confidential by utilities dealt with specific customer data, market data, avoided costs, and utility costs.

Most utility requests for confidentiality are typically honored (accepted) by PUCs and remain confidential unless appealed. However, there is no uniform policy on confidentiality of data: typically, each state regulatory commission determines confidentiality on a case-by-case basis, and there are procedures and guidelines for claiming and appealing confidentiality, although they are quite flexible. What seems lacking is an indepth evaluation by commissions of the weight to be given to public interest considerations that favor disclosure.

The six stated principal reasons why PUCs accept utility submissions of confidential data were the following (Sections 5 and 6):

1. The release of utility data would competitively or financially harm or disadvantage the utility and its customers (assumes that utility competition and/or customer bypass are real).
2. The data involved proprietary confidential business information (e.g., trade secrets) that needed to be protected.
3. There was no (or unconvincing) showing of public interest in the disclosure of the data.
4. The need for keeping data confidential (as expressed in the first two reasons) outweighed the public interest in disclosing the data.¹⁴
5. The administrative burden of evaluating each request for confidentiality is high.
6. The protective order mechanism affords reasonable access for parties that desire access to the data.

On the other hand, the stated principal reasons why utility requests for confidential data submissions were rejected were the following (Sections 5 and 6):

1. Because a "restructured and competitive electric power industry" had not yet occurred, denying access to utility data for "future competitive reasons" was not warranted.
2. Competition was too broadly defined. In addition to identifying competitors and how specific information could be used by competitors to the detriment of the utility, the utility must provide empirical evidence of competition (instead of relying on the opinions of one or two people) and how the release of the information would harm the utility.
3. The information in question was already available to the public from other sources.
4. The information in question was dated.
5. The reasons for maintaining data as confidential were too broad or vague.
6. Keeping the data confidential would give the utility an unfair competitive advantage over its competitors.
7. Keeping DSM data confidential would hurt PUC efforts to enhance the public's awareness of, and support for, DSM.
8. The DSM data in question were needed to protect the public's right to full and accurate knowledge of utility DSM programs.
9. Keeping rate data confidential would limit the public review needed to prevent price discrimination and other unfair practices.

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¹⁴ A utility's analysis of the cost of providing power to an industrial customer would fall in this category.

All regulatory commissions in our survey regarded the confidentiality of data as a serious issue. However, most regulatory commissions did not see the confidentiality of data as an urgent policy issue or as an issue that warranted immediate attention outside of normal activities. Existing regulatory procedures and guidelines were deemed to be adequate and sufficient to respond to utility submissions of confidential data. However, eight commissions were very interested in the policy implications of increased utility submittals of confidential data: California, Illinois, Maine, Massachusetts, Utah, Vermont, Washington, and Wisconsin. Most of these commissions are starting to address the prospect of increased utility competition and utility restructuring and, therefore, are very concerned about the public's and competitive energy and energy service providers' access to utility data. As more states embark upon utility restructuring, we expect the issue of confidentiality to become more important at the policy level.

The existing regulatory process for reviewing utility requests for data to be filed as confidential was asserted by some regulatory staff to be inadequate to protect the public's access to this information (Section 6). They raised four concerns: (1) the burden for examining data filed as confidential initially rests with the individual requesting to look at the confidential data rather than the data provider, (2) the limitations of PUC Hearing Officers and Consumer Advocates in providing sufficient monitoring of utility requests for confidentiality, (3) the absence of a consistent framework for dealing with confidentiality, and (4) the possible negative impacts of utility information pricing proposals.

Based on our scoping study, we identified several retrospective and prospective topics that should be addressed for further examining the issue of confidentiality (Section 7). The retrospective studies are designed to inform stakeholders about how confidentiality has been treated in the past – by the courts, regulators at the beginning of utility regulation, other state agencies, and other industries. The prospective studies are primarily needed to clarify the issue of confidentiality under the present regulatory system (prior to a more competitive utility environment) – examining confidentiality in performance-based ratemaking and special contracts, evaluating the availability and accessibility of utility information from unregulated utility subsidiaries and nonutility sources, and examining the impact of confidentiality on consumer education. Another prospective study would evaluate confidentiality in a more competitive utility environment where the collection of data is funded by a nonbypassable systems benefit charge.

As more states experiment with restructuring, we expect the issue of confidentiality to become a more important public policy issue. In order for the electric utility industry to remain as one of the most open industries in the United States in sharing information, the regulatory community will need to be proactive (rather than reactive) in developing specific policies and frameworks to protect the public's

access to utility-held information. Accordingly, we proposed that PUCs conduct the following activities (some of which overlap) as soon as possible (Section 8):

1. Assess information needs and sources and revise existing policies.
2. Review process for handling confidentiality claims and revise existing policies.
3. Monitor restructuring activities.
4. Develop framework and specific guidelines.
5. Develop standards of conduct.
6. Hold workshops on confidentiality.
7. Design and implement a pilot project.
8. Establish and support Consumer Advocates.
9. Support more research on confidentiality.

PUCs need to conduct the above activities promptly in order to avoid paralysis and inertia and to maintain the regulatory balance. The lack of a regulatory framework and specific policies for information access may only make existing problems more severe. If the above activities are not adequate for maintaining public access to utility-held information, an independent third party may be needed for controlling and distributing the data.

In conclusion, the issue of confidentiality has broad sociopolitical dimensions. In the next few years, as competition among electricity power providers draws nearer, public utility commissions will be asked to create information policies that will demonstrate the degree of their support for public access to utility-held information. These policies will be important since they can "profoundly affect the manner in which an individual in a society, indeed a society itself, makes political, economic and social choices" (Mason 1983).

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Appendix A

Special Contracts in Michigan

Requests for special contracts (as well as for their confidential treatment) are expected to increase in selected states where these contracts are viewed as an alternative to providing traditional DSM services. In this appendix, we present examples of special contracts in Michigan to show how utilities in one state are using them to retain their customers. These contracts did not include any requests for, nor granting of, confidentiality (and, therefore, were not included in the main text of this report). In August 1994, the Detroit Edison Company filed an application for approval of three special manufacturing contracts that it signed with Chrysler Corporation, Ford Motor Company, and General Motors Corporation (Michigan PSC 1995a). Each of the contracts called for Detroit Edison to be the sole supplier of electricity through the year 2000 to the customers' facilities located within the Detroit Edison's service territory for a total of about 1,000 MW of connected load. Over the next ten years, Edison would supply a combination of firm and interruptible power, with charges discounted from current tariff rates. The customers were required to restrict their use of existing self-generation capacity to emergency backup or as a replacement for utility interruptions (i.e., load currently being served through self-generation would be recaptured as sales for Detroit Edison). As part of the contract, Detroit Edison would provide service quality guarantees and onsite engineering expertise to identify and implement energy savings programs.

The automotive facilities covered by the proposed contracts represented approximately 9% of the utility's retail electric revenues. Detroit Edison asserted that the special contracts were needed for the following reasons: (1) these customers had unique energy needs that were better served through targeted, negotiated solutions; (2) the potential for competitive change in the electric industry created risks for it, particularly the risk that large customers would take advantage of alternative means of procuring power, including self-generation, municipalization, and retail wheeling; and (3) the contracts were important as a mechanism for promoting economic development and job growth.

In March 1995, the Michigan PSC approved the contracts between Detroit Edison and the automobile companies, although it noted that some of the support for Detroit Edison's position was not as precise or quantified as they would have liked:

Even though it not now clear whether and to what extent each of the customers' individual facilities is actually at risk of leaving the system for other power alternatives, the consequences of losing part of the overall load used to serve the customers' numerous facilities could well be significant, with adverse effects for remaining ratepayers. Although it is unclear at the present to what extent economic development would be furthered by the contracts, the positive effect on utility service

to the automotive sector of the economy should act as a stimulus to economic activity in Michigan. (Michigan PSC 1995a)

The Michigan PSC noted that the primary benefit of the contracts was the value in retaining sales and revenues that would otherwise be at risk of leaving the system. The PSC concluded that both Detroit Edison and its ratepayers shared an interest in retaining those customers' revenue contribution.

In a similar case, in October 1995, the Consumers Power Company filed an application for approval of a special manufacturing contract for the supply of retail electric service to the General Motors (GM) Corporation (Michigan PSC 1995b). GM is Consumers' largest electric customer, having a total demand in excess of 400 MW and accounting for more than 9% of its retail sales. Consumers asserted that GM was experiencing fierce competition and that the utility itself was severely threatened by increasing competition, requiring the use of innovative and customer-specific pricing initiatives to meet competitive threats. As a result, Consumers signed a 10-year special manufacturing contract with GM, offering "competitive and predictable" prices for electricity, and assuring Consumers a "stable and predictable customer base." As part of the contract, Consumers would provide service quality guarantees and onsite engineering expertise to identify and implement energy savings programs (GM decides which energy savings proposals to fund and install). Consumers asserted that its reduction in prices was justified because the reduction: (1) furthered the goal of better aligning the price of electricity with the cost to serve, (2) customer retention would ensure the continued contribution by this customer to meet system fixed costs, (3) reduces the company's business risk and strengthens its financial planning, (4) improves Consumers' ability to attract new load and promote economic development within its service territory, and (5) demonstrates to the financial community Consumers' commitment to meet competitive challenges. One week later, the Michigan PSC approved Consumers' proposal, reaffirming the reasons mentioned by the utility.