

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

DPUC DECLARATORY RULING : **DOCKET NO. 07-01-21**
RE: RELEASE OF CUSTOMER :
INFORMATION PURSUANT TO :
GEN. STAT. § 16-245o : **March 23, 2007**

COMMENTS OF RETAIL ENERGY SUPPLY ASSOCIATION

Introduction and Summary of Argument

This proceeding was initiated by the Department of Public Utility Control (“Department”) to address the request of Constellation New Energy, Inc. (“Constellation”) that the Department authorize electric distribution companies (“EDCs”) to release customer ICAP tag information to competitive electricity suppliers. The Department is treating Constellation’s filing as a request for a declaratory ruling as to whether Section 16-245o(a) of the General Statutes (“Section 16-245o(a)” or “Statute”) allows the release of customer ICAP tags to electricity suppliers and, if it does, whether such release requires customer consent. The Retail Energy Supply Association (“RESA”) intervened in this proceeding on February 15, 2007.

On March 13, 2007, the Department issued a Notice of Request for Written Comments (“Notice”) seeking stakeholder input on specific questions pertaining to the scope of Section 16-245o(a), the Department’s prior interpretations of the Statute and temporary solutions that would facilitate exchange of the ICAP tag data pending completion of electronic interfaces. RESA submits these written comments to respond to those questions.

RESA is a nonprofit organization and trade association that represents the interests of its members in regulatory proceedings in the New England, New York, Mid-Atlantic and Great Lakes regions. RESA’s members include providers of competitive supply products to electricity

and gas consumers in the five New England states – including Connecticut – that have restructured their electric markets.¹ RESA members therefore bring an informed perspective regarding the importance of ICAP tag information to retail competition and the electronic data exchange practices of EDCs in other states.

The ICAP tag is the capacity value assigned to each customer by the EDCs based on the customer's contribution to the system-wide coincident peak load for the previous calendar year. The ICAP tag is valid for a power year, which spans June 1 through May 31, and is used to allocate installed capacity charges computed by the ISO New England, Inc. ("ISO-NE") to load serving entities. Competitive suppliers require individual customer ICAP tag information for two purposes. First, the ICAP tag allows them to price their services to prospective commercial and industrial ("C&I") customers in an informed fashion and to communicate the total charges that such customers may incur under different pricing structures. Second, the ICAP tag allows competitive suppliers to accurately bill their enrolled C&I customers for installed capacity charges under contracts that call for separate billing of such costs. To the extent that a supplier needs the ICAP tag in order to price future services to prospective customers, RESA has no objection to obtaining the customers' consent, just as it does for historical kilowatt hour ("kWh") usage. But existing customers are an entirely different matter.

The title and plain language of Section 16-245o(a) make clear that the purpose of the Statute is to protect customers against unwanted solicitation by electric suppliers for marketing purposes. Obtaining ICAP tag information for a supplier's existing customers is an essential

¹ RESA member companies include Consolidated Edison Solutions, Inc., Direct Energy Services, LLC, Hess Corporation, Reliant Energy Retail Services, LLC, Sempra Energy Solutions, Strategic Energy, LLC, SUEZ Energy Resources NA, Inc. and U.S. Energy Savings Corp. The opinions expressed in this filing represent the position of RESA as an organization but may not represent the views of all members of RESA.

element of billing and has nothing to do with marketing to prospective customers. Consequently, Section 16-245o(a) does not apply to the release of customer information to a supplier for the purpose of serving its enrolled customers.

To support this conclusion and others contained herein, RESA first addresses Questions Nos. 2 and 3 in the Notice, which require an examination of the language of Section 16-245o(a) to determine whether it applies to a supplier's existing customers and to certain types of information described in the Notice. RESA then proceeds to review the Department's interpretations of Section 16-245o(a) in light of the Statute's language, which is the subject of Question No. 1. Finally, RESA concludes these comments with a brief discussion of interim solutions that could provide for the exchange of ICAP tag data pending completion of electronic interfaces, as directed by Question No. 4. RESA looks forward to discussing these and other approaches at the technical meeting scheduled for April 5, 2007 ("Technical Meeting").

Responses to Questions in the Notice

I. THE SCOPE OF SECTION 16-245o(a)

A. The Applicability of Section 16-245o(a) to Enrolled Customers

The Department inquires in its Question No. 2 of the Notice whether Section 16-245o(a)'s prohibition on the release of customer data without written consent "applies to the release of customer information to an electric supplier for the purpose of serving its enrolled customers."² The Statute has no such effect.

² Notice, p. 1.

Section 16-245o was enacted as a part of Public 98-28, An Act Concerning Electric Restructuring. It is entitled, in pertinent part, “Restrictions on the use of customer information for marketing.”³ Subsection (a) of the Statute reads:

To protect a customer’s right to privacy from unwanted solicitation, each electric company or electric distribution company, as the case may be, shall distribute to each customer a form approved by the [Department] which the customer shall submit to the customer’s electric or electric distribution company in a timely manner if the customer does not want the customer’s name, address, telephone number and rate class to be released to electric suppliers. On and after July 1, 1999, each electric or electric distribution company, as the case may be, shall make available to all electric suppliers customer names, addresses, telephone numbers, if known, and rate class, unless the electric company or electric distribution company has received a form from a customer requesting that such information not be released. Additional information about a customer for marketing purposes shall not be released to any electric supplier unless a customer consents to a release by one of the [means set forth in the Statute].

The plain language of the Statute evinces the unambiguous intent of the Legislature – to protect customers from unwanted solicitations from electric suppliers who were then expected to flock to Connecticut and contact customers for marketing purposes. The language of Section 16-245o(a) does not reach the provision of usage and load data to retail suppliers for the purpose of billing their enrolled customers, which cannot be deemed “marketing” under any stretch of the imagination.

The Legislature’s exclusion of enrolled customers from Section 16-245o(a) is perfectly rational. When a customer voluntarily enters into a contract with a competitive electricity supplier, it necessarily and implicitly authorizes release of any usage and load data the supplier may need to serve the customer’s load and render bills in accordance with the contract terms. Otherwise, the supplier could not perform its obligations under the contract. Indeed, it is a fundamental principle of contract law that every contract contains an implied duty of good faith

³ Conn. Gen. Stat. § 16-245o (emphasis added).

and fair dealing which requires, among other things, that a party must cooperate to enable the other party to perform.⁴ Consistent with this doctrine, the Legislature presumably concluded that the customer's right to privacy of its usage and load data simply is not implicated in a voluntary contractual relationship with its electricity supplier. It also likely concluded that requiring customer consent in this circumstance could increase the cost of retail offerings and hinder the efficient delivery of service, all to the detriment of the customer.

RESA's reading of the Statute comports with Section 16-244h-4(a)(1) of the Department's Regulations, which addresses the EDCs' release of customer information to their generation entities or affiliates. Patterned after Section 16-245o(a), the regulation reads:

Unless the electric distribution company has received a form from a customer requesting that the customer's name, address, telephone number and rate class not be released, the electric distribution company may release such information to its generation entities or affiliates without customer consent, so long as such information is released only on a strictly non-discriminatory basis pursuant to the provisions of section 16-245o(d) of the Connecticut General Statutes. Customer consent is not required for an electric distribution company to provide load data concerning existing customers of its generation entities or affiliates necessary for customer billing and load reporting to the regional independent system operator . . .⁵

Thus, the Department's own regulations recognize that Section 16-245o(a), which applies to generation affiliates of EDCs that are functioning as competitive retail suppliers, does not require customer consent to provide data to electric suppliers for the purpose of billing their enrolled customers.

B. The Types of Customer Information to which Section 16-245o(a) Applies

In Question No. 3, the Notice seeks comments on the types of customer information that are protected by Section 16-245o(a):

⁴ Restatement 2d of Contracts, § 205 (Duty of Good Faith and Fair Dealing).

⁵ Conn. Agencies Regs., § 16-244h-4(a)(1) (emphasis added).

Specifically, commenters should state whether [Section 16-245o(a)] actually or potentially applies to historical usage information, historical interval load data, ICAP tag information, or other information, and whether these types of information are relevant in a pre-enrollment marketing context (marketing for the purposes of obtaining and enrolling a customer), a post-enrollment context (on-going servicing of an existing customer), or both.⁶

The language of Section 16-245o(a) is clear as it pertains to the types of data that fall within the Statute's reach. The EDCs must obtain the customer's consent to release any customer information, other than the name, address, telephone number and rate class of the customer, if the electric supplier is seeking such information for marketing purposes.⁷ ICAP tag data, like kWh usage data, falls squarely within the category of data requiring consent from prospective customers.

Competitive suppliers need all information regarding a prospective C&I customer's electricity consumption, capacity and load requirements to reasonably price their products and recommend pricing options that best fit the customer's business needs. They also require the same range of data to accurately bill customers who opt for separate billing of capacity costs and other ISO-NE charges. As explained above, however, Section 16-245o(a) does not apply to the release of kWh usage, interval load data, ICAP tag and other information pertaining to enrolled customers. Therefore, the Department should not require EDCs to obtain written consents from these customers in order to release usage and load data to their suppliers.

II. THE DEPARTMENT'S PRIOR INTERPRETATIONS OF SECTION 16-245o(a)

In Question No. 1, the Notice asks stakeholders to comment on the Department's interpretations of the scope and meaning of Section 16-245o(a):

⁶ Notice, p. 1.

⁷ Conn. Gen. Stat. § 16-245o(a).

In pages 4 and 5 of its final Decision dated April 19, 2000 in Docket No. 99-12-09, DPUC Investigation Into The Connecticut Light and Power Company's Compliance With The Code of Conduct for Electric Distribution Companies, the Department stated its interpretation of [Section 16-245o]. The Department seeks comments on whether subsequent legal actions, statutory or otherwise, have disturbed the Department's conclusions in that Decision regarding the release of "information about a customer for marketing purposes."

In Docket No 99-12-09, the Department ruled that EDCs must: (1) receive prior written customer consent in order to release customer information, other than the data specifically allowed by Section 16-245o(a), to electric suppliers for marketing purposes; and (2) retain the customer consents in its records. This reading of the Statute is consistent with its language, and RESA could locate no subsequent decisions of the Department or other legal actions that alter these conclusions.

A. The Department's Decision in Docket No. 99-12-09

Docket No. 99-12-09 was initiated by the Department to investigate its concerns with respect to the release by The Connecticut Light and Power Company ("CL&P" or "Company") of customer information to Select Energy, Inc., an unregulated affiliate of the Company.⁸ During the course of the investigation, CL&P argued that certain types of customer information should be treated differently under Section 16-245o(a). Specifically, CL&P maintained that if an electric supplier sought billing history data, the EDC need only obtain verbal acknowledgement from the supplier that it has obtained a signed customer release. Conversely, if the information sought was load interval data, the electric supplier must provide the EDC with a signed release from the customer.⁹ The Department ruled that there is "no basis in [Section 16-245o(a)] to

⁸ Decision (Apr. 19, 2000), p. 3, Docket No. 99-12-09, DPUC Investigation into The Connecticut Light & Power Company's Compliance with the Code of Conduct for Electric Distribution Companies.

⁹ Id. at 4.

distinguish between the treatment of billing history and load interval data.”¹⁰ It therefore ordered CL&P to revise its procedures and obtain written consents from its customers before releasing any information not delineated in the Statute and to maintain such consents in its records.¹¹ The Department was careful to note, though, that its Decision applied only to the provision of information for marketing purposes. Specifically, it explained:

The Department’s analysis in this section relates solely to the release of customer information by an electric distribution company to an electric supplier for marketing purposes. Therefore, it addresses the release of customer information to an electric supplier with respect to prospective customers, and does not address the release of customer information with respect to an electric supplier’s existing customers.¹²

This language is wholly consistent with the interpretation of the Statute that RESA advocates in Section I of these comments.

B. The Department’s Decision in Docket No. 00-06-19

Nine months after the Department issued its Decision in Docket No. 99-12-09, it revisited the customer consent requirements of Section 16-245o(a). In a January 3, 2001 Decision in Docket No. 00-06-19, Petition for a Declaratory Ruling of The United Illuminating Company Regarding its Customer Information (the “2001 Decision”), the Department properly ruled that: (1) Section 16-245o(a) governs only the release of customer information to electric suppliers with respect to prospective customers for marketing purposes; and (2) the Statute does not apply to the provision of customer information to electric suppliers with respect to their enrolled customers.¹³ The Department nonetheless exercised its inherent authority to rule that written

¹⁰ Id.

¹¹ Id. at 5.

¹² Id. at 5 n. 2.

¹³ Decision (Jan. 3, 2001), pp. 9-10, Docket No. 00-06-19, Petition for a Declaratory Ruling of The United Illuminating Company Regarding its Customer Information.

consents are also required when a supplier seeks information about its existing customers.¹⁴

RESA urges the Department to reverse this holding of the 2001 Decision because a requirement of express customer consent in this circumstance: (1) conflicts with Section 16-244h-4(a)(1) of the Department's Regulations; (2) would require customer consent for the delivery of enrolled customers' kWh usage to suppliers; and (3) fails to recognize that, to the extent customer consent is required, it is implicit in the executed contract between the enrolled customer and its supplier as a matter of contract law.

The issue in Docket No. 00-06-19 was whether The United Illuminating Company ("UI") could release information to an electric supplier if the supplier provides UI with the customer's 13 digit-UI account number and 4-character customer name key in lieu of a signed release form.¹⁵ UI's argument hinged on the sentence in Section 16-245o(a) which provided that "additional information about a customer for marketing purposes shall not be released to any electric supplier unless a customer signs a release which shall be made available by the [Department]"¹⁶ UI claimed that this language leaves open the possibility that either UI or the electric supplier could receive and retain the customer release.¹⁷ In rejecting that argument, the Department stated that the sentence at issue must be read in context with the purpose of the Statute – that is, to protect customers' right to privacy against unwanted solicitation.¹⁸ Because the EDCs are the custodians of customer usage and load information, the Department opined that

¹⁴ Id. at 10.

¹⁵ Id. at 4.

¹⁶ Id.

¹⁷ Id.

¹⁸ Id.

the Statute requires EDCs to collect and review written consents; customer account and character numbers are not an adequate substitute.¹⁹

The Department then proceeded to determine whether Section 16-245o(a) governs the release of customer information to an electric supplier of record and answered that question in the negative:

Because § 16-245o(a) exists to prevent unwanted solicitation from electric suppliers, it is clear that its limitation on releasing customer information “for marketing purposes” extends no further than the customer acquisition process, and is inapplicable to the customer’s supplier of record.²⁰

Despite this accurate reading of the Statute, the Department stated that it would exercise its “inherent authority” to “extend the requirement for a written [consent] prior to releasing customer information to a supplier of record as well.”²¹ In so ruling, the Department stated that the real purpose of Section 16-245o(a) was to codify the practice of EDCs that pre-existed electric restructuring, when most customer information requests were made by conservation contractors.²² Because EDCs were required to obtain written customer consent irrespective of whether these contractors were interested in serving prospective or existing customers, the Department concluded that the same requirement should apply in the restructured era.²³

This language in the 2001 Decision cannot be reconciled with Section 16-244h-4(a)(1) of the Department’s Regulations, which explicitly states that EDCs need not obtain customer consent to release information to generation affiliates with respect to their enrolled customers. It

¹⁹ Id. at 4-7.

²⁰ Id. at 9-10.

²¹ Id. at 10.

²² Id.

²³ Id.

