

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL

DPUC DECLARATORY RULING : DOCKET NO. 07-01-21
RE: RELEASE OF CUSTOMER :
INFORMATION PURSUANT TO :
CONN. GEN. STAT. 16-245O : June 1, 2007

WRITTEN EXCEPTIONS OF RETAIL ENERGY SUPPLY ASSOCIATION

The Retail Energy Supply Association (“RESA”) submits these Written Exceptions to the May 24, 2007 Draft Decision (the “Draft Decision”) issued by the Department of Public Utility Control (the “Department”) in the above-captioned docket.¹ In the Draft Decision, the Department rules that Section 16-245o of the General Statutes (“Section 16-245o” or the “Statute”) requires the electric distribution companies (“EDCs”) to obtain customer consents before they may release ICAP Tag data to an electric supplier for the purpose of marketing to prospective customers.² RESA does not dispute the conclusion that Section 16-245o requires the consent of prospective customers in this instance. It disagrees, however, with the Department’s ruling that the EDCs must directly receive and maintain the consents. The Department should rule in the Final Decision that Section 16-245o can and should be construed to allow electric suppliers to perform this function. Any other approach will effectively preclude electric suppliers from gaining access to the ICAP Tag for pricing purposes, as contemplated by

¹ RESA’s members include Consolidated Edison Solutions, Inc; Direct Energy Services, LLC; Hess Corporation; Liberty Power Corp.; Reliant Energy Retail Services, LLC; Sempra Energy Solutions, LLC; Strategic Energy, LLC; SUEZ Energy Resources NA, Inc. and US Energy Savings Corp. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

² Draft Decision (May 24, 2007), pp. 5-6.

the Technical Agreement filed by Constellation NewEnergy, Inc., the EDCs and RESA in this proceeding (the “Technical Agreement”).

At the technical meeting conducted on March 27, 2007 (the “Technical Meeting”), the EDCs made it crystal clear that they would not be willing to provide the ICAP Tag to electric suppliers if they were required to obtain and maintain customer consents. That is so, because the EDCs’ systems are not configured to satisfy that requirement without undue administrative burden. Despite that reality, the Draft Decision rules that the EDCs must, in essence, police customer consents. It reaches that conclusion by elevating the Department’s April 19, 2000 Decision 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 “2000 Decision”), which interprets a prior version of the Statute, over the language of Section 16-245o in its present form. Indeed, the Draft Decision construes Section 16-245o as though it was never revised.

I. INTERPRETATION OF SECTION 16-245o

A. The 2000 Decision

In the 2000 Decision, the Department interpreted the then-existing language of Section 16-245o, which read in pertinent part:

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.³

Although the Statute did not dictate who must obtain the customer consents, the Department opined that this responsibility should be placed with the EDCs because they are the “custodian[s] of

³ Conn. Gen. Stat. 16-245o(a) (Rev. to 2003).

customer information and [are] entrusted with safeguarding it.”⁴ The revisions to Section 16-245o that were adopted by the Legislature in 2003 strongly suggest that the Department should now alter that ruling.

B. Section 16-245o in its Present Form

In 2003, the Legislature revised Section 16-245o to eliminate the absolute requirement that the customer must sign a release form in favor of a more flexible approach.⁵ The Statute now reads in pertinent part:

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 following: (1) An independent third-party telephone verification; (2) receipt of a written confirmation received in the mail from the customer after the customer has received an information package confirming any telephone agreement; (3) the customer signs a document fully explaining the nature and effect of the release; or (4) the customer’s consent is obtained through electronic means, including, but not limited to, a computer transaction.⁶

The present version of Section 16-245o, like its predecessor, does not specify whether the EDCs or the electric suppliers should obtain the customer consents. Instead, the Legislature chose language that affords the Department complete discretion to determine where this responsibility should lie based on its best judgment. But even if the Department must interpret Section 16-245o to definitively set forth the entity that must obtain and retain the customer consents, the language of the Statute construed in tandem with other statutory provisions, strongly suggests that the Legislature intended that it be the electric supplier.

Section 16-245o now allows customer consents to be obtained by third-party telephone verification. It is well established in the retail electricity industry that such verifications are

⁴ Decision (April 19, 2000), pp. 4-5, Docket No. 99-12-09.

⁵ Public Act 03-135, *An Act Concerning Revisions to the Electric Restructuring Legislation*, § 12.

⁶ Conn. Gen. Stat. § 16-245o(a) (Rev. to 2007).

orchestrated by electric suppliers, not by the EDCs. The description of third-party verification in Section 16-245s of the General Statutes (“Section 16-245s”), which addresses customer switching, underscores that point. It states in pertinent part:

Third-party telephone verification shall be in accordance with the following procedures: (1) the *electric supplier seeking to verify the change* shall do so by connecting the customer by telephone to the third-party verification company or by arranging for the third-party verification company to call the resident to confirm the sale; and (2) the third-party verification company shall obtain the customer’s oral confirmation regarding the change, and shall record that confirmation by obtaining appropriate verification data. The record shall be available to the customer upon request. *The verification procedure in this section shall not apply when a residential customer directly calls an electric distribution company to make changes in electric supplier service, provided an electric supplier shall not avoid the verification procedure by asking a residential customer to contact an electric distribution company directly to make changes in electric supplier service.*⁷

This statutory provision does not require that the electric supplier or the third-party verifier submit a recording of the customer consent or confirmation to the EDCs. Rather it relies on electric suppliers to obtain the verification through a third party in accordance with the law. This form of consent would have virtually no purpose if electric suppliers were also required to obtain a written consent from the customer for review by the EDCs as the Draft Decision seemingly requires for release of the ICAP Tag.

A reading of the second and fourth methods of consent in Section 16-245o further bolsters the view that the Legislature intended for electric suppliers to obtain and maintain the consents because a customer’s written confirmation of a telephone agreement or email message would most likely be directed to the electric supplier, not the EDCs. If the Legislature had intended for proof of customer consents to also be forwarded to the EDCs it would have said so. It did not. Instead, the Legislature crafted language that warrants the conclusion that

⁷ Conn. Gen. Stat. § 16-245s(b) (emphasis added).

electric suppliers would obtain and maintain consents from their prospective customers, or at the very least, that the Department has the discretion to make that determination.

C. RESA's Proposed Interpretation Does Not Undermine the EDCs' Custodian Role

The Department's 2000 Decision was based principally on the fact that the EDCs are charged with protecting customers' privacy to their electricity data.⁸ The interpretation of Section 16-245o advanced by RESA and every other participant in this proceeding, including the EDCs, does not alter that role. Rather, it simply allows the EDCs to rely on electric suppliers to follow the law and obtain consents from prospective customers through one of the means set forth in Section 16-245o.

Electric suppliers have every incentive to adhere strictly to the statutory consent requirements because failure to do so can culminate in monetary sanctions, suspension or revocation of the supplier's license and significant damages under the Connecticut Unfair Trade Practices Act ("CUTPA").⁹ The Draft Decision places particular emphasis on the CUTPA penalty and concludes that its reference in Section 16-245o is yet another justification for the Department's ruling that EDCs must directly obtain customer consents. RESA believes, however, that the existence of the CUTPA penalty actually undermines the interpretation advanced by the Draft Decision because if the EDCs were required to examine each customer consent before they release information to electric suppliers, the latter could never run afoul of CUTPA in this context.

⁸ Decision (April 19, 2000), pp. 4-5, Docket No. 99-12-09.

⁹ See Conn. Gen. Stat. § 16-245o(h) ("Any violation of this section shall be deemed an unfair or deceptive trade practice under subsection (a) of section 42-110b").

II. THE DRAFT DECISION IS UNWORKABLE FOR THE EDCs AND IS DISADVANTAGEOUS TO CUSTOMERS

The Draft Decision is unfortunate not only because it is at odds with the language of Section 16-245o and its companion statutes, but also because it undermines the joint efforts of the EDCs and competitive suppliers to resolve the ICAP Tag problem in a manner that is workable for the EDCs and beneficial to Connecticut's emerging retail market. The Draft Decision ignores the importance of this collaboration and provides no deference at all to the Technical Agreement.

RESA appreciates the EDCs' diligent efforts to establish an interim process to provide electric suppliers with the ICAP Tag data pending completion of their electronic interfaces. The EDCs candidly stated at the Technical Meeting, however, that it would not be feasible for them to adopt the interim process embodied in the Technical Agreement if they were required to obtain and maintain customer consents. Furthermore, even if the EDCs were to agree to provide the ICAP Tag under these circumstances, delivery of it would take far more than the ten (10) days contemplated in the Technical Agreement. Thus, the value of the ICAP Tag data to electric suppliers would be significantly diminished because customers demand price quotes in a timely fashion.

Electric suppliers and the EDCs will not be the only losers if the Draft Decision stands. One of the key public policy objectives of electric restructuring is to provide customers with competitive, efficient pricing. The Draft Decision, however, is contrary to this policy goal and disadvantageous to customers because the pricing of retail offerings will be less precise and informed than it otherwise would be if electric suppliers were afforded timely access to the ICAP Tag. Simply put, timeliness and transparency of information are key ingredients to any

successful retail electricity market. The Draft Decision disregards these attributes that will directly benefit customers in favor of an unduly constrained reading of Section 16-245o.

III. CONCLUSION

For all of the foregoing reasons, RESA respectfully requests that the Department rule in the Final Decision that Section 16-245o permits electric suppliers to obtain and maintain consents from their prospective customers and approve the Technical Agreement without modification.

Respectfully submitted,

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