

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI**

In the Matter of the Establishment of a Working)
Case for the Writing of a New Rule on the)
Treatment of Customer Information by) File No. AW-2018-0393
Commission Regulated Electric, Gas, Steam)
Heating, Water, and Sewer Utilities and Their)
Affiliates and Non-Affiliates.)

COMMENT OF MISSOURI ATTORNEY GENERAL JOSHUA D. HAWLEY

Missouri Attorney General Joshua D. Hawley respectfully submits the following comment regarding the Public Service Commission’s consideration of a new rule relating to regulated utilities’ use and disclosure of consumer information. The Attorney General has made protecting consumer privacy and data security a top priority. From investigating the privacy practices of tech giants like Google, to prosecuting high-profile data breaches like those experienced by Uber, to assisting consumers in the wake of identity theft, the Attorney General’s Office (“AGO”) is on the front lines of these issues. We are pleased to have the opportunity to weigh in on the Commission’s proposed privacy rule.

Utilities regulated by the Commission present particularly sensitive consumer-privacy concerns. Unlike with most goods and services, consumers often cannot choose from among competing utilities. Thus, competition and market pressures may provide limited incentive for utilities to provide robust protections for consumer data. Moreover, in light of the advent of “smart meter” technology, utilities may have access to particularly sensitive information about consumers and their household activities. For these reasons, the Attorney General welcomes the Commission’s decision to explore more extensive consumer-privacy protections. The Attorney General respectfully submits the following comments regarding the proposed new rule in Title 4, Division 240, Chapter 10 of the Code of State Regulations.

I. Disclosure of Consumer Information for Utility-Related Services (Section (2))

Section (2) of the proposed rule governs the disclosure of consumer information by a regulated utility to a third party for the purpose of providing “utility related service.” The Attorney General submits the following comments and recommendations regarding Section (2):

(a) The Commission should require utilities to notify consumers when consumer information is shared with third parties. Under the proposed rule, utilities can disclose consumer information to third parties, without consumer consent, for the purpose of providing utility-related services. While consumers cannot prevent utilities from sharing their information with third parties for utility-related purposes under the proposed rule, consumers should at least know when that information sharing takes place. The Commission should require utilities to notify consumers that the utility may share customer information with third parties. This notification should include the identity of the third parties with whom the utility shares customer information and the reason for the information sharing. This notification should occur before the

utility disclosures customer information to a third party, except that in the case of an emergency the utility may provide prompt post-disclosure notification. These disclosures empower consumers to protect their personal information. For example, if a third party that has received customer information experiences a data breach, the disclosures can alert consumers that their personal information may be at risk. Absent the proposed disclosures, utility customers may be unaware that the third party's data breach affects their personal information.

(b) The Commission should require utilities to obtain pre-disclosure certifications from third parties that the third parties can comply with the provisions of Section 3(A)(5). Section 3(A)(5) provides important protections to consumers by requiring that third parties return or destroy all customer information if requested by the utility. Successful implementation of this requirement can reduce the likelihood that customer information will be misused by a third party, accessed during a data breach, or inadvertently disclosed. However, it is possible that the ordinary data-storage practices of some third parties may make compliance with this mechanism difficult or impossible. The Commission should require utilities to receive a certification from a third party—*before* the utility discloses customer information to that third party—that the third party can comply with Section 3(A)(5), along with an explanation of how the third party would implement any request for return or destruction under Section 3(A)(5).

(c) The Commission should require utilities to make a request for return or destruction under Section 3(A)(5) when a third party's access to customer information is no longer necessary. Section 3(A)(5) requires a third party to return or destroy customer information upon a written request from the utility, but the proposed rule imposes no requirements on when a utility must make such a request. To ensure that consumers have the benefit of the protections provided by Section 3(A)(5), the Commission should require utilities to make a Section 3(A)(5) request when the third party's continued access to customer information no longer advances the provision of utility-related services.

(d) The Commission should require utilities to obtain pre-disclosure certifications from third parties that the third parties have implemented appropriate data-security measures to protect customer information. No matter how robust a utility's data-security systems may be, as soon as customer information passes to a third party, consumers have only as much protection as that third party can provide. To ensure that disclosures to third parties do not substantially increase the risk that customer information will be improperly accessed or used, the Commission should require utilities to obtain pre-disclosure certifications from third parties that the third parties have implemented appropriate data-security measures to protect customer information. Because data-security systems are constantly evolving and because the Commission does not necessarily have expertise in data security, the Commission should consider adopting a flexible standard rather than prescribing precisely what measures a party must take. Other jurisdictions have enacted flexible data-protection laws that can provide helpful guidance on crafting an appropriate framework. *See, e.g.*, Ind. Code § 24-4.9-3-3.5(c), (d); Md. Commercial Law § 14-3503; Kansas Stat. § 50-6.139b; Utah Code § 13-44-201.

(e) The Commission should prohibit the disclosure of certain categories of particularly sensitive customer information to third parties without customer consent, even when the disclosure relates to utility-related services. Under the proposed rule, utilities can

disclose *any* customer information to third parties, *without customer consent*, for the purpose of providing utility-related services. The proposed rule defines customer information broadly to include a wide range of information about consumers. Thus, customer information includes certain information—such as names, addresses, and telephone numbers—that customers might reasonably expect to be shared as part of the ordinary provision of utility services. But the proposed rule’s definition of “customer information” also includes more personally sensitive information, such as consumers’ “medical information[] and health insurance information.” And it includes “utility service usage,” which—in the era of “smart meters”—can entail detailed information about consumers’ daily lives. The Commission should prohibit the disclosure of especially sensitive categories of personal information to third parties absent customer consent.

II. Disclosure of Consumer Information for Non-Utility-Related Services (Section (3))

Section (3) of the proposed rule governs the disclosure of consumer information by a regulated utility to a third party for purposes other than providing utility-related services. The proposed rule permits utilities to share customer information with third parties for non-utility purposes *only* with customer consent to the disclosure. The Attorney General submits the following comments and recommendations regarding Section (3):

(a) The Commission should impose requirements to ensure that utilities provide customers with appropriate information about non-utility information disclosure to enable customers to make an informed decision regarding consent. The Attorney General agrees with the Commission that utilities should not be permitted to share customer information with third parties for non-utility purposes unless customers consent to the disclosure. The Attorney General further believes that customers should receive sufficient information about the nature of those disclosures to enable customers to make an informed decision whether to give their consent. For example, customers should receive information about who will receive their information, the rationale for disclosing customer information to those third parties, and how the third parties will use and store the information. Moreover, customers should be expressly notified that withholding their consent will not interfere with their access to utility services. The Commission should require that any request for consent under Section (3) include disclosure of all material information, including the information described in this paragraph.

(b) The Commission should require that requests for customer consent be structured as “opt in” requests rather than “opt out” requests. Research from the field of behavioral economics suggests that where consumers are presented with the default option to authorize disclosure of their personal information, many consumers may be less likely to “opt out” of that disclosure even if they otherwise would prefer to keep their information confidential. Requiring requests for consumer consent to be structured as “opt in” decisions helps ensure that consumers make a conscious choice about whether to consent to the sharing of their personal information.

(c) The Commission should subject non-utility-related information disclosures to all privacy protections that apply to utility-related information disclosures. Section (2) of the proposed rule imposes several important requirements on utility-related disclosures of

customer information that provide important protections for consumers. However, Section (3) does not expressly apply those same critical protections to information disclosures for non-utility purposes. The Commission should apply the protections set forth in Section (2)—as well as the Attorney General’s additional recommendations described in Part I of this Comment—to disclosures made under Section (3).

III. Disclosures of Customer Information in Violation of the Rule (Section (5))

Section (5) of the proposed rule prescribes procedures that a utility must follow when it learns of possible violations of the proposed rule. The Attorney General submits the following comments and recommendations regarding Section (5):

(a) The Commission should eliminate or clarify the *de minimis* exception to Section (5)’s reporting requirement. As written, the proposed rule does not require a utility to take any action where “an immaterial amount of its confidential customer information” has become public or has been accessed by an unauthorized person. The Attorney General believes that no public disclosure or unauthorized access of *confidential* consumer information is “immaterial.” The Commission should consider eliminating this *de minimis* exception to Section (5)’s reporting requirements. Alternatively, the Commission should clarify that the “materiality” of a disclosure or breach depends on the nature of the information disclosed or accessed, not simply on the volume of data disclosed or accessed. For example, *any* access to customers’ social security numbers or financial information should be considered material, even if only a handful of customers are affected.

(b) The Commission should require utilities to notify affected consumers in the event of violations of the rule. As written, where a utility discovers that confidential customer information may be made public or may have been accessed by an unauthorized person, the proposed rule requires the utility to provide notice to the Staff Counsel’s Office and the Public Counsel. However, the proposed rule does not require utilities to provide any notification to the consumers whose personal information may have been disclosed or stolen. Providing consumers with prompt notice that their personal information may have been compromised is essential to minimizing the harm that consumers suffer from a data breach. The Commission should require utilities to promptly notify customers whose information may have been made public or may have been accessed by an unauthorized party. At a minimum, the Commission should require consumer notice where disclosures or breaches involve sensitive customer information such as social security numbers, driver’s license numbers, financial information, or health information.

(c) The Commission should require utilities to notify the Attorney General’s Office in the event of a violation of the rule. The Attorney General is the chief law-enforcement officer of the State of Missouri. Under Chapter 407 of the Missouri Revised Statutes, the Attorney General has broad authority to enforce the State’s consumer-protection laws, including laws relating to data breaches. Data breaches or disclosures that violate the Commission’s rule may also violate laws that the Attorney General enforces. In addition, the AGO’s consumer advocates can serve as important resources for consumers whose personal information may have been compromised. For these reasons, notice of possible violations of the proposed rule can enable the Attorney General to assist consumers and ensure that culpable

parties are held accountable. Thus, the Commission should require utilities to notify the AGO of potential violations of the rule.

The Attorney General appreciates the opportunity to provide input on this important matter. Protecting consumer privacy is among our highest priorities, and we are pleased that the Commission has prioritized this critical issue as well.

Respectfully submitted,

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