

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission’s own motion, to commence a collaborative to consider issues related to further engagement, education, and participation of utility customers.

Case No. U-20959

**COMMENTS OF THE NATURAL RESOURCES DEFENSE COUNCIL
ON STAFF’S DRAFT DATA ACCESS AND PRIVACY RECOMMENDATIONS**

The Natural Resources Defense Council (NRDC) respectfully submits the following comments on the draft Data Access and Privacy Recommendations (hereafter, “Recommendations”) released by Michigan Public Service Commission (MPSC) Staff on January 19, 2022.¹ NRDC is an international environmental organization that works to safeguard the earth—its people, its plants and animals, and the natural systems on which all life depends. Our advocates have a history of active engagement in Michigan and at MPSC working groups and proceedings, including recent dockets related to energy waste reduction, utility rate cases and integrated resource plans, distribution planning, Covid-19 response, and more.

NRDC supports many of the goals that animate Staff’s draft Recommendations, including the goals of safeguarding consumer privacy, increasing transparency of utility data practices, improving public access to aggregated performance and affordability data, and facilitating third-party access to customer data with informed customer consent. However, NRDC is concerned that the data access framework proposed in the draft Recommendations will inhibit the ability of utilities and advocates to achieve the energy goals of the state of Michigan in a cost-effective and equitable manner. In particular, Staff’s proposal to require Michigan utilities to obtain prior, informed consent before collecting or using individualized customer data to pursue a wide range of regulated activities—including the development of programs related to energy assistance, demand response, energy management, energy efficiency, and renewable energy—is ill-advised and contrary to the public interest. As we describe below, the use of household-level data is critical to ensure that regulated energy services are delivered efficiently, effectively, and equitably. We urge Staff to revise the draft Recommendations to permit the use of individualized customer data for these purposes.

¹ MPSC Staff, Data Access and Privacy Recommendations (Jan 19, 2022) (hereafter, “Recommendations”), <https://www.michigan.gov/mpsc/-/media/Project/Websites/mpsc/workgroups/data-access/Data-Access-and-Privacy-Recommendations.pdf?rev=57d3b4145b654c2f82efc4450d9c3ea2&hash=D11EC902A2F47A873B351B7B7F706EF2>.

NRDC supports many other aspects of the draft Recommendations. We also offer several suggestions to strengthen Staff's proposals. Throughout, our failure to comment on any aspect of the Recommendations should not be construed as an indication of support or opposition.

I. Reclassification of regulated energy services as a "Secondary Purpose" (section 4.2)

In the draft Recommendations, Staff proposes to overhaul the Commission's customer data access rules as they pertain to Commission-regulated energy assistance, demand response, energy management, energy efficiency, and renewable energy programs (hereafter, "regulated energy services"). Under the Commission's current data access framework, regulated energy services are classified as a "primary" utility purpose—meaning that utilities and their contractors may freely use individualized customer data for the purpose of planning, implementing, or evaluating related programs.² (Third parties, by contrast, must obtain customer consent before accessing individualized customer data for these purposes.) Under the revised framework proposed by Staff, energy services would be reclassified as a "secondary purpose."³ The effect of this change would be to preclude Michigan utilities and their contractors from collecting or using household-level data for the planning, implementation, or evaluation of these programs without prior, informed consent from the customer. As Staff makes clear, the scope of this prohibition would be broad, encompassing "tailoring of services," "market research," "product development," and more.

NRDC is strongly opposed to Staff's proposed rule. Requiring utilities to obtain prior consent before using or even collecting customer data for the purpose of planning, implementing, or evaluating regulated energy services would erect major barriers to the achievement of the state's energy goals. In the energy waste reduction context, for example, the ability to leverage insights derived from analysis of household-level data is essential to ensure that utility-run programs are delivered cost-effectively and equitably. For example:

- Analyzing household-level usage information can allow utilities to identify and target the customers with the largest potential savings from energy-efficiency measures, as well as the greatest need for energy efficiency. This is important to enable to Commission, utilities, and advocates to ensure that efficiency programs are effectively targeting the largest and thus most cost-effective savings opportunities and the customers who stand to benefit most from an affordability perspective.
- As a best practice, household-level usage information should also be monitored before and after installation of energy efficiency measures, to evaluate program effectiveness, confirm installation quality and contractor performance, and inform the future development of the program.
- Customer billing data can be analyzed to target the marketing and delivery of bill-reducing energy efficiency measures to payment-troubled customers and customers with arrears. This allows energy efficiency programs to complement or supplant the need for conventional energy assistance programs and helps to reduce outstanding arrearages.

² See Case No. U-17102, Order on June 28, 2013, Appendix A; Case No. U-17102, Order on October 17, 2013.

³ Recommendations § 4.2.

The ultimate effect of precluding these practices would be a higher cost to ratepayers to achieve the utility energy savings targets, and therefore higher rates for all customers.

The ability to analyze individualized customer data is also essential for the effective delivery of regulated energy services beyond energy waste reduction. For example, one major benefit of geographically-targeted energy efficiency and demand response programs is the potential to serve as a “non-wires alternative,” replacing the need for expensive investments in grid infrastructure. However, this use case depends on utilities’ ability to use AMI data to market geographically-targeted efficiency and demand response programs to those customers contributing the most to peak demands on distribution system infrastructure. Staff’s proposed rule would effectively preclude such an analysis, eliminating or significantly reducing the opportunity for substantial cost savings. Again the result will be higher costs and rates for all customers.

Indeed, Staff’s proposal would seem to preclude many of the most promising uses of AMI-enabled infrastructure in which Michigan utilities have made substantial investments at ratepayer expense.

Alarming, Staff’s proposed rule even appears to preclude the use of customer payment history to target-market utility-administered energy assistance programs, absent affirmative consent. This could inhibit utilities from pro-actively reaching out to payment-troubled customers to provide critical resources such as discount rates or other financial supports. Given the importance of assistance programs in getting customers back on track with payments, the proposed rule would also have the corresponding effect of increasing utility uncollectibles, to the detriment of all ratepayers.

We further note that Staff’s proposed rule would undercut ongoing efforts by other MPSC workgroups and advocates to encourage Michigan utilities to better leverage customer data to improve administration of regulated energy services programs and deliver deep, targeted savings to lower-income customers. The Energy Affordability and Accessibility Workgroup, for example, is engaged in ongoing discussions around the benefits of target-marketing energy efficiency programs to payment-troubled customers and better aligning the delivery of energy assistance and energy waste reduction services.⁴ In addition, the 2022-2023 DTE EWR Plan and Settlement approved by the Commission at the end of January includes new, innovative targeting and data collection in order to better deliver EWR services to energy burdened customers.⁵

Staff offers several justifications for the proposed rule. First and foremost, Staff argues that the rule is necessary to remedy the “information asymmetry” between utilities / utility contractors and third parties, which they claim “skews the competitive market’s effectiveness” in providing energy services. This argument overlooks the fact that many of the programs covered by the rule are not competitive products offered in a “free market” for the benefit of utility

⁴ See, e.g., Energy Affordability & Accessibility Collaborative, Presentation (October 20, 2021), page 30, https://www.michigan.gov/mpsc/-/media/Project/Websites/mpsc/workgroups/eaac/EAAC_Mtg_7_PPT.pdf.

⁵ See Case No. U-20876, Order Approving Settlement Agreement (January 20, 2022), <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/0688y000001noqBAAQ>; Case No. U-20881, Order Approving Settlement Agreement (January 20, 2022), <https://mi-psc.force.com/sfc/servlet.shepherd/version/download/0688y000001nouXAAQ>

shareholders. Rather, they are Commission-regulated activities undertaken by utilities pursuant to mandates enshrined in Michigan law for the benefit of the public. For example, Michigan utilities are required to achieve specific levels of energy savings pursuant to legislation and Commission orders. Precluding the use of household-level data in the planning, implementation, and evaluation of energy waste reduction programs will not reduce utilities' market share—it will simply increase the cost of achieving the savings targets for all ratepaying Michiganders. If the level of utility engagement in regulated energy services raises competition-related concerns, the proper (and only effective) means of addressing those concerns is at the relevant Commission proceeding.

Staff also cites unspecified “unnecessary risks” to a customer’s private data under the current framework. Without further information, it is difficult to respond to this concern. We are not currently aware of concerns with respect to the use of customer data in utility-run energy waste reduction programs, and encourage Staff to bring any such concerns to our attention. We note that under the current framework, utility contractors must abide by data protection protocols that are at least as rigorous as those employed by the utility.

Of course, utilities may also choose to offer unregulated energy services on a competitive basis. The term of art for such services is “value-added services.”⁶ Under Michigan law, utilities may offer unregulated value-added services, but only “if those programs or services do not harm the public interest by unduly restraining trade or competition in an unregulated market.”⁷ In addition, utilities offering value-added services must:

- Abide by a code of conduct designed to prevent cross-subsidization, preferential treatment, and information sharing between their regulated and unregulated programs and services.⁸
- Notify the Commission of their intent to provide such services, maintain separate books for the services, and report annually to the Commission on its value-added activities.⁹
- Abstain from marketing value-added services through materials included with a customer’s energy bills.¹⁰
- Share with competitors a list of customers receiving value-added services within 5 business days, upon request and subject to Commission rules.¹¹
- Inform prospective customers that the service is not regulated and may be available from another supplier.¹²

⁶ See M.C.L. 460.10ee § 16(b).

⁷ M.C.L. 460.10ee § 2.

⁸ M.C.L. 460.10ee § 1.

⁹ M.C.L. 460.10ee §§ 4, 5(c), 15.

¹⁰ M.C.L. 460.10ee § 2.

¹¹ M.C.L. 460.10ee § 10(a).

¹² M.C.L. 460.10ee § 10(c).

If the Commission is concerned that a utility's value-added services may harm the public interest by restraining competition, it may open an investigative hearing and if necessary order corrective action.¹³

Oddly, Staff's Recommendations do not acknowledge the existing legal framework for value-added services. Instead, Staff bases the proposed rule on an altogether new distinction between "voluntary" or "elective" energy services (such as energy efficiency or demand response) and utilities' "core" service obligation of safely and reliably delivering of electricity and gas to customers' homes. It is unclear from the Recommendations why Staff believes that this distinction provides a relevant or reasonable basis for the Commission's data access rules.

In our view, the existing legal distinction between non-competitive, regulated energy services and competitive, unregulated value-added services provides a more appropriate starting point for the Commission's data access rules. There are undoubtedly real concerns with utilities' capacity to leverage their state-granted monopoly rights to outcompete third parties in the market for unregulated value-added services. However, those concerns are simply not applicable to regulated energy services, such as energy waste reduction, demand response programs, and energy assistance. For regulated energy services, the Commission's and Staff's main concern should be to ensure that utilities fulfill their obligations in a manner that is cost-effective, equitable, and maximally beneficial to the public. Staff's proposed rule would cut directly against these objectives by increasing the cost of providing regulated energy services and impeding utilities' ability to ensure equitable program participation by underserved customers.

Drawing the line between regulated/unregulated programs would also be consistent with best practices from other states. Although NRDC has not attempted a comprehensive survey of state practices, every other state of which we are aware allows utilities to collect and use individualized customer data to plan, implement, and evaluate regulated energy services, for the reasons identified above. For example:

- *California*. Utilities may collect, use and disclose to contractors customer information for primary purposes. "Primary purposes" expressly includes to "plan, implement, or evaluate demand response, energy management, or energy efficiency programs under contract with an electrical corporation, under contract with the Commission or as part of a Commission authorized program conducted by a governmental entity under the supervision of the Commission."¹⁴
- *Colorado*. Utilities may collect, use, and disclose to contractors customer information for the purpose of providing regulated products and services, but not for a "secondary commercial purpose."¹⁵
- *Virginia*. The Virginia State Corporation Commission has convened a Data Access and Privacy Work Group to study data access and privacy issues and report to the General

¹³ M.C.L. 460.10ee § 5.

¹⁴ CPUC Decision 11-07-056, 151, 156-60,

<https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M090/K845/90845985.PDF>.

¹⁵ 4 Colo. Code Regs. § 723-3:3030; see also Xcel Energy Privacy Policy,

<https://www.xcelenergy.com/staticfiles/xcel/Admin/Xcel%20Online%20Privacy%20Policy.pdf> (noting that customer data may be used to "Operate, evaluate and improve our business and the regulated products and services we offer").

Assembly. The work group’s initial report suggested that “a distinction be made whereby the primary purpose of data sharing is for the delivery of a regulated utility service, or Commission-approved program, and secondary purpose, which is any other reason for data sharing.”¹⁶

- *Wisconsin*. Under a recent customer data privacy law, municipal utilities need not obtain customer consent before disclosing customer information to “agents, vendors, partners, or affiliates of the municipal utility that are engaged to perform any services or functions for or on behalf of the municipal utility.”¹⁷ There are no restrictions on collection and use by the utility itself.
- *Washington*. Utilities may “disclose customer information without written customer consent to an affiliate, subsidiary, or parent organization ... to the extent necessary for the utility to perform duties directly related to the utility's primary purpose.”¹⁸ “Primary purpose” is defined as “a business need to provide regulated utility services as required by state or federal law, or as specifically authorized in the utility's effective tariff or by the commission.”¹⁹

Finally, we share Staff’s concerns about the adequacy of the existing process for third party providers to obtain access to individualized customer data. However, Staff’s proposal to exclude regulated energy services from Primary Purposes for data access purposes will not address this problem. The proper remedy is to streamline the process for third-party data access, as Staff proposes elsewhere in the Recommendations.²⁰

In sum, NRDC believes that Staff’s proposed rule prohibiting the collection or use of individualized customer data for the purpose of planning, implementing, or evaluating regulated energy services is inappropriate and unjustified. Household-level data is essential to the effective design and delivery of utility-administered energy service programs. The Commission’s data access framework should permit the use of individualized customer data for this purpose.

II. Other comments

¹⁶ HB 2332 Data Access And Privacy Stakeholder Report, <https://www.scc.virginia.gov/getattachment/95eb387b-6749-4f7c-905b-66afaa2895c7/H2332DataAccess.pdf> (“The benefit of the primary/secondary distinction is that it makes clear that utilities may share customer data with their contractors – payroll services, customer service/billing providers, cloud computing providers, demand response and energy efficiency programs, and for electric cooperatives, applicable affiliated entities to include wholesale power suppliers and related organizations, administrators (all of which constitute "primary" purpose services) – without customer consent so long as it is in the service of a regulated utility service or Commission-approved program. The Virginia General Assembly and the Commission should consider a similar distinction, with clearly defined terms, so that utilities are not inadvertently constrained in their use of vendors contractors to efficiently deliver regulated services”)

¹⁷ Wis. Stat. Ann. § 196.137 (West).

¹⁸ Wash. Admin. Code 480-90-153 § 4.

¹⁹ Wash. Admin. Code 480-90-023.

²⁰ Recommendations § 4.6.

NRDC supports many other aspects of Staff's draft Recommendations. We offer the following comments and suggestions to strengthen the proposals in the Recommendations.

A. Uniform standards for aggregated and anonymized data (sections 4.3.1 and 4.3.5)

NRDC supports the adoption of uniform standards for data aggregation and anonymization. Improving public access to utility-generated data is essential to promote transparency and enable robust public debate on energy-related policies. At the same time, it is non-negotiable that the Commission's data access rules must adequately protect sensitive customer information. The adoption of uniform aggregation standards will promote consistency of data practices across utilities and facilitate increased data access while ensuring the protection of personal customer information.

We also strongly support Staff's proposal to include a separate, more lenient data aggregation standard for data requests by owners of multifamily properties. The inability of building owners to access building-level usage information for purposes of benchmarking and estimating savings potential is a key barrier to the adoption of energy waste reduction measures in multifamily buildings. Experiences from other jurisdictions indicate that a 15/15 standard is unnecessarily stringent and may discourage participation by multifamily building owners in energy savings programs. The 4/50 standard proposed by Staff strikes a more appropriate balance between tenant privacy and the need to facilitate adoption of energy waste reduction measures in multifamily properties.

B. Public reporting of geographic performance, equity, and affordability data (section 4.3.4)

NRDC strongly supports Staff's proposal for the Commission to begin publicly reporting aggregated datasets concerning utility system performance, investment equity, and affordability on a geographic basis. As Staff rightly notes, increased data transparency is essential to facilitate informed public participation and enable robust third-party analysis of utility performance trends. It is also important that data be provided on a sufficiently granular geographic basis to enable observers to understand how utility practices may differentially impact various populations, such as low-income communities or communities of color. With this in mind, NRDC urges Staff to recommend reporting on a more granular basis than zip code. While zip code data can be useful for certain purposes, it is insufficiently detailed to enable meaningful analysis of the demographic impacts of utility practices and investment decisions. Staff should consider recommending disclosure of data at *both* zip code level and at either "zip plus 4" or census block level, with census block preferred. Disclosed data sets should comply with accepted aggregation standards (such as the 15/15 standard proposed by Staff), to eliminate any privacy concerns.

C. Staff review of special data requests (section 4.4)

NRDC supports Staff's proposal to increase Staff oversight of special data requests through an independent review process. The current approach of requiring aggrieved parties to appeals data request denial through a formal complaint is not tenable. Providing a neutral third-party review process will help ensure a timely and fair decision-making process. It will also promote consistency across Michigan utilities and allow Staff to identify and rectify systematic problems related to data access.

D. HAN pilot program (section 4.6)

NRDC supports Staff's proposal that the Commission require AMI-enabled utilities to pilot home area network (HAN) and in-home displays for low-income, pre-pay, and senior customers. As Staff notes, many energy-burdened customers are unable to afford the technologies required to fully benefit from the deployment of AMI infrastructure. Providing access to these technologies can help these customers to strategically reduce their energy burdens through more timely access to usage and billing information.

NRDC appreciates the opportunity to comment on Staff's draft Recommendations. Our staff are available to discuss any aspect of these comments.

Sincerely,

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