

EVALUATION IN A COMPETITIVE UTILITY ENVIRONMENT: THE THREAT OF CONFIDENTIALITY

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Introduction

Historically, the electric utility industry has been regarded as one of the most open industries in the United States in terms of inter-company sharing of information and conducting joint research and development activities.¹ But as the prospect of competition among electricity power providers has increased in recent years, utilities have become concerned that their competitors will desire access to energy-related data—including energy-efficiency data collected by utilities from their energy-efficiency programs—that they may regard as proprietary or confidential. In this paper, 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 costs and market information (as well as energy use and load data) than on energy-efficiency data per se. So far, the discussion has been limited to ratpayer-funded data, not shareholder-funded data.

Consequently, many utilities are now requesting that the data (including evaluation data) they submit to their utility regulatory commissions remain confidential. As discussed below, withholding utility information from the public is likely to harm the evaluation community that depends on the free flow of information for improving the practice of evaluation as well as for disseminating the lessons learned from particular program evaluations. Confidentiality will also have significant policy implications with respect to such matters as: (1) consumer education, the search for evidence, mutual respect among parties, and social cooperation; (2) creation of a fair market for competitive energy services; (3) the regulatory balance; (4) regional and national assessments of energy-savings opportunities; and (5) research and development.

In response to these concerns, in late 1995 and early 1996, we conducted a survey of state public utility commissions (PUCs) in the U.S. to assess: (1) the relative importance of the issue of confidential data in the regulatory arena; (2) the regulatory response to utility requests for confidentiality (e.g., formal policies, guidelines, rules and procedures, and decisions); and (3) the type of data filed as confidential with PUCs. In this paper, we focus on only the first two objectives of this study; a discussion of the type of data filed as confidential is found in Vine.² In addition to our interviews, we reviewed selected state statutes, judicial and PUC decisions, rules and procedures, protective orders, and interim policy documents. We believe that evaluators need to understand the context of con-

fidentiality as well as the response of the regulatory commissions to confidentiality, because evaluators will need to adapt to a new environment where energy-related data and information may be harder to obtain and distribute.

The Prospect of Competition

Information is an essential commodity in a competitive market. 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. 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 state and federal restructuring decisions. As the prospect of competition among power providers has increased in recent years, stakeholders have started re-evaluating their information needs and responsibilities. In this section, we briefly highlight information needs of some of these stakeholders.

Electric Utilities

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. Utilities perceive they have a right to protect their data and information as a trade secret (see below). Furthermore, some utilities see customer information—which may include not only customer use data but also cost and market information of particular technology, resource planning, business strategies, and marginal and avoided energy and capacity costs—as an exclusive corporate asset owned by shareholders.³

Competitive Energy and Energy Service Providers

Competitive power providers will want access to utility customer data. If they cannot secure it, they say, utilities and their unregulated affiliates will have a competitive advantage over them. These non-utility firms maintain that any information made available to marketing affiliates of a utility must be made available to all potential suppliers at the same time and at the same cost.

Public Utility Commissions

The regulatory balance of power between regulators and utilities is a function, in part, of the availability of utility information. Effective 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. Public utility commissions are faced with making critical public policy decisions regarding information access: decisions on who can access and use the information, the type of information available, and how it can be used. In addition, regulators may have their own information needs for conducting activities that are central to the role of government (see below).

Customers

At a fundamental level, 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 (and free flow of) information. To make informed choices, customers will need information about the different service providers, the products and services available in the market, and their cost. Utilities possess a wealth of information on energy efficiency products and services that will be requested by customers as well as other energy service providers. Also, customers will need tools for assessing the adequacy of information for comparing and choosing services. Finally, customers will have privacy concerns if information is released without their approval and might also feel "hassled" by repeated requests for information about their household.

Government

Government's information needs will change as competitive market structures emerge. With traditional sources of such information shrinking, depending on the role prescribed for utility regulatory bodies, government may need to continue or initiate collection, compilation, analysis, reporting and dissemination of information to support such activities as: providing information to market participants; monitoring market performance; analyzing markets, system operations, and trends; developing energy policies; and providing regulatory oversight.⁴

Policy Implications from Confidentiality

Withholding utility information from the public is likely to have at least six significant policy implications. First, confidentiality will limit the evaluations of utility programs, plans, and policies in terms of objectivity, usefulness, validity, and reliability.⁵ Lack of access to data may eliminate the ability of the public to fully oversee and review the work conducted by the utility, as is commonly done in rate proceedings and in reviews of energy-efficiency program filings. This body of work also serves

as a foundation for current and future energy-efficiency efforts: in developing evaluation methodologies, designing new programs, and improving existing programs. 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. For commissions lacking an adequate, knowledgeable, and experienced staff, capable of a thorough review of the reliability and validity of utility findings, increased confidentiality may further increase the risk of poor evaluations.

Second, the public believe that the free flow of information and data is critical for consumer education and for the benefits noted above. Any significant limitations on access to utility information are seen as detrimental to these activities.

Third, because utilities tend to insist on maintaining full protection of privacy rights of their customers—whether or not they are charged by law or regulation with that duty—other entities will be unable to obtain access to much customer information without the consent of the customer. If utilities continue to treat customer-related information as confidential, then access to this information by non-utility providers of energy services will continue to be limited. Furthermore, the utility or its unregulated utility subsidiaries (e.g., retail energy service companies) may potentially use this ratepayer-funded information (e.g., customer billing records) to gain an edge in their competition with independent retail energy service providers, thus consolidating or increasing their market power in retail energy service markets. Thus, there is considerable potential asymmetry of access to customer information between the incumbent utility and potential alternative providers of energy and energy services, which may impede fair competition among generators and energy service providers.⁶

Fourth, utilities' desire to provide less information to regulators for competitive reasons damages the balance of power between regulators and utilities (the "regulatory balance"). Effective regulation depends on information provided by utilities, and the loss or restricted use of this information would result in less effective 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.

Fifth, 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.

And sixth, limiting access to utility data will significantly affect 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.”⁷

The Legal and Regulatory Context of Confidentiality

“Open records” laws influence the actual policies and practices of regulators 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.

Freedom of Access Laws

Regulators 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). Despite this policy, common in most states, exceptions are sometimes made where disclosure of information would be harmful to a person or organization for competitive reasons, as discussed below.

Proprietary Confidential Business Information

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. Recognizing the needs of business for privacy of some information, all state legislatures have created an exception for “proprietary confidential business information,” such as: trade secrets; 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; and information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information (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, and Protective Orders

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))

Each state has certain procedures for determining the nature of a trade secret. For example, 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. Protective orders may 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. 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.”⁸ 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. All

parties need to write requests for protective orders as concisely and narrowly as possible.

Commission practice with regard to the issuance of protective orders varies but, in general, most commissions 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.

The Regulatory Response to Confidentiality

The Majority Approach

Almost all of the PUCs surveyed have received requests from utility companies to classify data filings as confidential. While utilities have filed information as confidential prior to California's initial decision on restructuring in April 1994, such requests appear to have increased in both scope and frequency in those states where utility restructuring is being actively discussed.⁹ 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. All of this increases the saliency of confidentiality as an important public policy issue.

There is no uniform policy on confidentiality of data in the states. Although there are many similarities among states, differences in state laws 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.¹⁰ In sum, most state regulatory commissions determine confidentiality on a case-by-case basis.

All commissions in our survey said they regard the confidentiality of data as a serious issue. However, most do not perceive the confidentiality of data as an urgent policy issue or one that warranted immediate attention outside of normal activities. Commissions gave these as the principal reasons why they accept utility submissions of confidential data:

1. Release of the data would competitively or financially harm or disadvantage the utility and its customers.
2. The data involve proprietary confidential business information (e.g., trade secrets) that need to be protected.
3. There is no convincing showing of public interest in disclosure of the data.
4. The need for keeping data confidential outweigh the public interest in disclosing it.
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.

The Minority Approach

Unlike most PUCs, eight commissions have indicated real interest in the policy implications of increased utility submittals of confidential data: California, Illinois, Maine, Massachusetts, Utah, Vermont, Washington, and Wisconsin. These commissions, as well as those with high-cost utilities, 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. As more states embark upon utility restructuring, we expect the issue of confidentiality to become more important at the policy level.

The Critical Role of the PUC Hearing Officer

In most states where there are challenges to the confidentiality of data, the PUC hearing officer or 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 a case is 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. 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.

Challenges to Utility Requests for Confidentiality

Utility requests for confidentiality are typically honored by PUCs and remain confidential unless appealed. Cases where the utility requests for confidential data were denied by the commission revealed the following reasons for rejection:

1. Because a "restructured and competitive electric power industry" has not yet occurred, denying access to utility data for "future competitive reasons" is not warranted.
2. Competition is 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 rely-

- ing on the opinions of one or two people) and show how release of the information would harm the utility.
3. The information is already available to the public from other sources.
 4. The information is dated.
 5. The reasons for maintaining data as confidential are too broad or vague.
 6. Keeping the data confidential would give the utility an unfair competitive advantage over its competitors.
 7. Keeping demand-side management (DSM) data confidential would hurt commission efforts to enhance the public's awareness of, and support for, DSM.
 8. The DSM data in question are 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.

Regulatory Concerns

Several regulatory staff expressed concerns that the existing 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. First, several regulatory staff members assert that there is a "gap between law and practice." Regulatory law places the burden of proof on those who claim confidentiality, but common practice is exactly reverse: confidentiality proposals are routinely accepted unless challenged and the challenger demonstrates that they are inappropriate. Consequently, the burden of proof is on the party challenging confidential treatment rather than the reverse. 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 commission procedures.

Second, hearing officers responsible for reviewing utility requests for confidentiality are limited in their review. Typically, they do not have the time to investigate a confidentiality request. Furthermore, the hearing officer is normally conservative in handling utility requests for confidentiality. Because state laws make it illegal to release confidential information without the expressed consent of the utility, hearing officers often choose 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 often unable 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 hearing officers.

Third, the lack of a consistent framework for dealing with confidentiality often leads to subjective decision-

making on granting utilities' requests for confidentiality. Because of broad policy directives, 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 conclusion, the lack of guidelines and procedures for evaluating utility requests for confidentiality 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 concern. 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. How the pricing issue is determined will have very different consequences for public access to information. High charges can probably be absorbed by most businesses but may be an insuperable barrier to individuals and groups with little income. In some cases, such charges may also increase the barriers to entry for other potential market actors. As a result, competition would potentially be stifled and society would not gain the promised benefits of deregulation.

Defining the Regulatory Agenda

In order for the electric utility industry to remain one of the most open industries in the U.S. in sharing information, the evaluation and regulatory communities will need to be proactive (rather than reactive) in developing specific policies to protect the public's access to utility-held information. We believe that the free flow of utility information is vital to the conduct of high quality evaluations of utility programs—in the development of advanced evaluation methodologies as well as in comparing the effectiveness of programs among utilities.

We propose that regulators conduct the following activities, some of which overlap, as soon as possible:

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

Commission decisions on confidentiality have not, until now, been based on utilities using their data for commercial purposes. With retail competition on the horizon, utilities will likely be making commercial use of the data to secure their market shares. Therefore, regulators need to become aware of the implications of keeping data confidential and of utility information pricing proposals. They will also need to make sure that their own reporting requirements and policies are consistent with the workings of a competitive environment. In view of this, regulators should carefully examine the types of information that are necessary for appropriate regulatory functions in a re-

structured electricity industry, assess the adequacy of information currently available to regulators, and determine what information in the future should be required from utilities. As part of this deliberation, PUCs will need to consider what type of data need to be made public to limit the market power of utilities, their subsidiaries, or their successors. 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.

Regulators need to review whether the processes for handling confidentiality claims work well. Are challenges to confidentiality burdensome? Is the burden of proof on the proper party? The guidelines should define “proof of harm” to the utility and encourage specific requests by utilities when claiming data to be confidential. 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.

Regulators 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 should 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.

Regulators need to develop a process to identify data that are significant to policy issues and that, if not provided, could significantly compromise competition. Commissions should develop specific guidelines to determine confidentiality and to identify unreasonable requests for confidential status.

5. Develop standards of conduct.

Regulators need to develop standards of conduct (basic principles) to ensure that a utility does not share information with its marketing or independent power affiliate, to the detriment of all other providers. The standards of conduct would govern the use of monopoly-held information for commercial purposes by competitive divisions or affiliates of the monopoly.

6. Hold workshops on confidentiality.

Although the above activities could be done internally by the PUC, regulators should sponsor workshops on these activities, in order to receive input from key stakeholders who need to recognize the importance of ensuring broadly based and effective access to utility information. We believe that the participation of key stakeholders (e.g., evaluators) in workshops will provide an excellent opportunity for everyone to become more aware of the key issues involving the confidentiality of utility data.

7. Design and implement a pilot project.

Regulators 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 commission to evaluate the success of these rules.

8. Establish and support consumer advocates.

In most states, budgets are being reduced, agencies are being reorganized and downsized, and the role of the consumer advocate is in a precarious position. Regulators should support consumer advocates’ role in 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.

9. Support more research on confidentiality.

Regulators need to support more research on the need for data confidentiality. The role of information in the energy sector is in its infancy, and many questions need to be answered.² Retrospective studies would include, for example, an analysis of how confidentiality has been addressed by other state agencies, and a review of confidentiality in restructured natural gas and telecommunications industries. Prospective studies would include, for example, an analysis of the impact of confidentiality on consumer education, and an evaluation of the availability and accessibility of energy information from nonutility sources.

Conclusions

Utilities will be reluctant to support these activities and develop 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. For that reason, regulators need to be more proactive and 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 issue of confidentiality has broad sociopolitical dimensions. In the next few years, as competition among electricity power providers draws nearer, 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.”¹¹

Finally, in all likelihood, evaluators will need to adapt to an environment where utility data will be more difficult to obtain and disseminate. It is premature to see how increased confidentiality will affect the objectivity, usefulness, validity, and reliability of evaluations. If the evaluation community wishes to maintain the high quality of its work, creative solutions will most likely be needed.

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