

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO**

IN THE MATTER OF THE PROPOSED RULES
RELATING TO SMART GRID DATA PRIVACY FOR
ELECTRIC UTILITIES, 4 CODE OF COLORADO
REGULATIONS 723-3

Docket 10R-799E

COMMENTS OF THE FUTURE OF PRIVACY FORUM

INTRODUCTION

The Future of Privacy Forum (“FPF”) respectfully submits these comments regarding the proposed rules relating to smart grid data privacy.¹ FPF applauds the Commission for its focus on privacy concerns and appreciates the opportunity to provide this input. We believe that flexible national standards that address consumer privacy will be needed to foster an environment that enables new smart grid technologies and uses to flourish.

We hope that our experience with consumer privacy issues generally, and smart grid privacy in particular, is useful for the Commission. Specifically, we provide comments herein on the notice and choice proposals which, in light of more modern notice and choice mechanisms, are overly-restrictive and use a static mechanism that has been proven to be ineffective in informing consumers and empowering their choices. We also comment on the third party

¹ The Future of Privacy Forum (“FPF”) is a think tank that promotes improvements in data privacy. It is led by privacy leaders Jules Polonetsky and Christopher Wolf. Its Advisory Board is comprised of Chief Privacy Officers, privacy scholars, and consumer advocates.

FPF is recognized as a thought leader and expert resource on smart grid privacy issues in particular. FPF convened the first smart grid privacy conference last year in Washington, DC. With the Privacy Commissioner of Ontario, it published a White Paper entitled “Smart Privacy for the Smart Grid: Embedding Privacy into the Design of Electricity Conservation.” FPF also operates a smart grid privacy resource center at www.smartgridprivacy.org.

The views expressed herein are not necessarily those of the supporters and Advisory Board of FPF.

sharing prohibition that, as we explain, is overly restrictive and can deprive consumers of benefits.

CONSUMER TRANSPARENCY AND CONTROL ARE IMPERATIVES

The success of the smart grid will depend on the development of a robust, workable privacy framework. This privacy framework must be the product of “privacy by design,” or to put it another way, “baked in” to the smart grid ecosystem, and it must allow consumers to make meaningful choices about how their data is used and must otherwise respect consumers’ privacy interests.

Not all utilities customers will focus on the issue of data collection and use the same way, due to education levels, interest in the subject, and time demands. Accordingly, companies collecting the data must be guided by principles that allow them flexibility to empower the entire range of consumers with respect to the protection of personal data. The time-tested Fair Information Practices (FIPs) will provide the needed flexibility for smart grid privacy.

FIPs reflect widely accepted principles to assure that businesses’ handling of personal data is fair and respectful of individuals’ privacy interests. These principles have been adopted by government and industries around the world and include: notice/awareness; choice/consent; access/participation; integrity/security; and enforcement/redress.² Notice and choice are the two foundational FIPs as they stand for both transparency to consumers about how businesses utilize their personal information and consumer control over such usage. We commend the proposed consensus rules for addressing both of these important issues. However, we suggest

² For a description of Fair Information Practices, see Ctr. For Democracy & Tech., Comments of the Center for Democracy & Technology on the Staff Discussion Draft of Consumer Privacy Legislation 1-2 (June 4, 2010), available at http://cdt.org/files/pdfs/20100604_boucher_bill.pdf.

modifications of the notice and choice proposals that, based on our experience, will make them more useful and will not stymie innovation.

FPF URGES THE ADOPTION OF A MORE FLEXIBLE NOTICE AND CHOICE PRIVACY FRAMEWORK THAN THE CONSENSUS RULES PROPOSE

FPF believes that new and innovative features coming with the development of the smart grid will be critical to engaging consumers and helping to manage energy use. This innovation will come not only from electrical utilities, but also from third-party companies who will use newly available data to manage consumer energy use and provide additional value-added services to consumers. Because of the innovations the smart grid may afford, electric utilities and third-party companies must have flexibility, subject to transparent practices and consumer control, to put newly available data streams to innovative and beneficial uses.

The consensus rules rely on traditional notions of notice and choice. Regarding notice, they would require electric utilities to post a static privacy policy online and to mail it annually to customers. This static, boilerplate approach does not work and is almost universally criticized as not providing meaningful notice. Very few consumers read website privacy policies or annual mailings.³

³ See, e.g., FEDERAL TRADE COMMISSION, PRELIMINARY FTC STAFF REPORT, PROTECTING CONSUMER PRIVACY IN AN ERA OF RAPID CHANGE: A PROPOSED FRAMEWORK FOR BUSINESSES AND POLICYMAKERS 19-20 (Dec. 2010), available at <http://www.ftc.gov/os/2010/12/101201privacyreport.pdf> (“[C]onsumers face a substantial burden in reading and understanding privacy policies and exercising the limited choices offered to them.”); FELICIA WILLIAMS, INTERNET PRIVACY POLICIES: A COMPOSITE INDEX FOR MEASURING COMPLIANCE TO THE FAIR INFORMATION PRINCIPLES 17-18 (2006), available at <http://www.ftc.gov/os/comments/behavioraladvertising/071010feliciawilliams.pdf> (examining privacy policies of Fortune 500 companies and finding that only one percent of the privacy policies were understandable for those with a high school education or less and thirty percent required a post-graduate education to be fully understood); Aleecia McDonald and Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, I/S: J. L. AND POL. FOR THE INFO. SOC’Y, (2008), available at <http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf> (finding that the national opportunity cost for just the time to read privacy policies is approximately \$781 billion).

The proposed consensus rules thus are too rigid and rooted in historical and ineffective practices to protect consumers or to enable valuable uses of data to benefit consumers.

The consensus rules would create a complicated process for a consumer to give his or her consent for the sharing smart grid data with third-parties. The consumer would have to complete a lengthy document with a level of detail that no reasonable consumer could be expected to read. Further, this document would either be formally *notarized* or electronically signed by a customer. We know of no other privacy regime which requires a consumer consent to be notarized, even for sensitive personally identifiable health or financial data.

Additionally, the process for consumers even to obtain this form would be onerous, as the customer or third party would need affirmatively to ask for and receive the consent form from a utility company. Again, we know of not other privacy regime that limits the opportunity for notice and choice in this way. In addition, the proposed consent form contemplates one-time sharing of data for a specific purpose delineated on the consent form, with no flexibility for subsequent innovations where data sharing could occur. This would limit third parties from accessing data on an ongoing basis and would require multiple additional consent forms to be requested and completed if a third party wanted to make any changes to its use of consumer data to which the consumer originally agreed.

This entire process is cumbersome and burdensome to consumers, and it does not provide flexibility to businesses to obtain prompt and timely consent for new and innovative services. A workable consent mechanism should be made available to consumers in the setting in which they are likely to be making privacy decisions and fit the circumstances of the transaction. Especially with the advent of new communication technologies, the idea that notice and choice would be restricted to a static online posting and postal mail is antiquated.

Electric utilities and third-party companies should be able to develop user interfaces, dashboards, and Internet widgets that allow for consumer interaction and in-time notice about how data is used. A company might develop a dashboard that can display energy usage for a consumer and give the consumer the ability to see and decide within the application exactly what data the consumer is willing to share, with whom the consumer is willing to share this data, and for what specific purposes the consumer is willing to share the data.⁴ The current consensus rules lack sufficient flexibility to allow for this sort of creative approach to notice and consent.

In sum, we believe the proposed notice and choice framework will prevent consumers both from understanding how their data is collected and used and realizing the potential benefits of the smart grid by making information sharing with third-party companies unduly burdensome. We urge the Commission to encourage electric utilities and third parties meaningfully to engage users and receive permission for information sharing. Notice should not be a static document consumers ignore, and choice should not involve overly burdensome mechanisms. Instead, any guidance should provide enough flexibility for companies to tailor creative notice to consumers at appropriate times.

AN OUTRIGHT PROHIBITION ON INDUCEMENTS FOR DATA SHARING IS NOT CONSUMER FRIENDLY

The Commission should also revisit the blanket prohibition on allowing third parties to provide an inducement for the disclosure of smart grid data. We applaud the Commission's focus on consumer protection, and we believe that prohibitions on certain types of inducements would be appropriate. However, a complete ban on inducements for consumers will stifle

⁴ See, for example, the Google "dashboard" that offers consumers a view into the data associated with their accounts. It is designed to offer transparency and control by summarizing the data associated with each product used when a user signs in, and it provides links to control personal settings, available at <https://www.google.com/accounts/ServiceLogin?service=datasummary&continue=https://www.google.com/dashboard/&followup=https://www.google.com/dashboard>.

innovation. As third-party companies begin to innovate and create business models around smart grid data, consumers should be able to reap some of the benefits of this business innovation – whether it is in the form of discounts or even payments for the use of their data.

What consumers need to be protected from, and what should be prohibited, are *deceptive* inducements or inducements not fully transparent to consumers. An outright prohibition on inducements to consumers may discourage companies from developing new, innovative, and consumer-friendly uses for the smart grid as consumers will have less incentive to share smart grid data. FPF is developing best practices for third party handling of smart grid data that would provide guidance to businesses on acceptable practices.

CONCLUSION

The Future of Privacy Forum commends the Colorado PUC for taking the initiative to tackle the difficult privacy issues associated with transitioning to a smart grid. One of the major privacy issues across every industry today is how to provide consumers with notice of how their data is being collected and used and then how to allow consumers to exercise meaningful choices about this collection and use. In many industries, notice/consent models are stuck in the past – providing inflexible, complex paper or online notice and requiring consumers to either complete an online form (often a simple tick box) or submit a paper form to signal consent.

As Colorado’s electrical infrastructure transitions from the past to the future, it is vital that the accompanying privacy regime transition as well. We urge the Commission to support a standard that will protect consumers, but that will also allow electric utilities and third-party companies to communicate, interact, and engage with consumers. Both goals can be met through a regime that requires businesses to provide consumers with clear and relevant notice at key moments and meaningful choices that are not unnecessarily onerous for either consumers or

businesses. We do not believe the consensus rules achieve this goal. FPF would be pleased to work with the Commission and other parties to assist further in the development of privacy guidance that will help the smart grid reach its potential.

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Respectfully submitted,

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