

**STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH  
DOCKET NO. E-100, SUB 161**

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of	)	
Commission Rules Related to Electric	)	REPLY COMMENTS OF THE
Customer Billing Data	)	ATTORNEY GENERAL'S OFFICE

The North Carolina Attorney General's Office ("AGO") respectfully submits these Reply Comments concerning the rules proposed to address electric customer billing data access and customer privacy. These comments will primarily address the following points raised by the proposed rules designated R8-51 and comments of parties submitted on February 10, 2020:

- First, a rule is needed that *both* provides customers with effective access to their data and protects the privacy and security of those data. Privacy issues are heightened by the detailed data collected by electric utilities about customer usage patterns, and it is important to address privacy expectations through adequate consumer protection measures.
- Second, the rule needs to provide for standards that give customers sufficient access to their data so that customers may use innovative technologies and work with authorized third parties to save energy and shift demand to off-peak times. Duke Energy appears to have adopted plans that will fall short of this important objective. Duke should be redirected so that customers will be able to take advantage of applications that fit their needs and so that customers will not be limited or steered only to options available from Duke.

These comments will also briefly discuss the Public Staff's proposed revisions for R8-7 and R8-8.

1. Provisions Addressing Privacy.

The Commission initiated this proceeding to create rules that provide customers or an authorized third party with access to customer data while protecting the privacy and security of those data,<sup>1</sup> and the AGO's Proposed Rule reflects the Commission's acknowledgement, here and in prior dockets and proceedings, that both objectives need to be addressed.<sup>2</sup>

The AGO circulated a draft proposal last fall, met with other parties, and incorporated their input. The AGO's proposed rule is the same as the proposed rule submitted by Mission:data, except for five limited redline edits, and reflects extensive collaboration.<sup>3</sup> The AGO and Mission:data agree that their proposals providing both access and privacy protections offer the approach that will best protect and serve the needs of North Carolina utility customers.<sup>4</sup>

The comments filed in February by the North Carolina Sustainable Energy Association are supportive of the AGO/Mission:data rule as written,<sup>5</sup> and likewise, the

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<sup>1</sup> [Order Requiring Information, Requesting Comments and Initiating Rulemaking](#), Docket Nos. E-100, Sub 153, 157 and 161 at 3 (Feb. 4, 2019).

<sup>2</sup> See, e.g., 2016 Smart Grid Technology Plans Order at 23 (March 29, 2017) (recognizing "customer privacy" among the factors that stakeholders must consider for "rule changes to provide easy access to granular energy consumption data") (emphasis added).

<sup>3</sup> As noted by Mission:data, its edits were added after Mission:data reached consensus with the AGO, and the February 10, 2020 filing deadline prevented us from further discussion of those minor changes.

<sup>4</sup> Comments and Proposed Rules by Mission:data Coalition, Docket No. E-100, Sub 161 at 3-5 and n.2 (Feb. 10, 2020) ("Mission:data Comments").

<sup>5</sup> NCSEA's Comments and Request for Reply Comments, Docket No. E-100, Sub 161 at 2-3 (Feb. 10, 2020) ("NCSEA Comments").

Environmental Defense Fund comments support the Mission:data version of the rule language.<sup>6</sup> The comments filed by the City of Asheville do not address the AGO/Mission:data proposed rule, but indicate support for an approach that provides access and protects privacy.<sup>7</sup>

Adopting an approach in the new rule that comprehensively addresses both access and privacy is consistent with the approaches taken in national guidelines and standards. The Guidelines for Smart Grid Cybersecurity, developed in 2014 by the National Institute of Standards and Technology (“NIST”) within the U.S. Department of Commerce (hereinafter “NIST Report”), recommend the implementation of core privacy protections as addressed in Fair Information Practices for the collection, use and disclosure of smart meter data.<sup>8</sup> NIST “recommend[s] that utilities and state agencies implement comprehensive privacy and data security measures to protect [customer-specific energy usage data] made available through smart meters.”<sup>9</sup> The NIST Report’s recommended privacy practices for smart grid data obtained by third

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<sup>6</sup> Comments of Environmental Defense Fund, Docket E-100, Sub 153, 157 and 161 (Feb. 10, 2020) (“EDF Comments”).

<sup>7</sup> Letter from Mayor Esther E. Manheimer to Chief Clerk Kim Jones regarding Docket No. E-100 Sub 161 (July 24, 2019). The AGO has not conferred with the City of Asheville but notes that the City’s comments filed on December 18, 2019 support data access and protection of customer privacy, and do not appear to conflict with the AGO proposal.

<sup>8</sup> National Institute of Standards & Technology, Interagency Report: Guidelines for Smart Grid Cybersecurity, NISTIR 7628, rev. 1, vol. 2 (Sept. 2014), available at [nvlpubs.nist.gov/nistpubs/ir/2014/NIST.IR.7628r1.pdf](http://nvlpubs.nist.gov/nistpubs/ir/2014/NIST.IR.7628r1.pdf).

<sup>9</sup> Dana Rosenfeld and Sharon Kim Schiavetti, Third Party Smart Meter Analytics: The FTC’s Next Enforcement Target?, Antitrust Source (Oct. 2012) at 5 (hereinafter “Rosenfeld and Schiavetti”). NIST’s “August 2010 Guidelines for Smart Grid Cybersecurity . . . concluded that an effective ‘full suite of fair information practices protections was necessary to protect consumers against the unauthorized collection and use of [customer energy usage data] by [customer energy usage data] management services.’” Rosenfeld & Schiavetti at 5 (quoting National Institute of Standards & Technology, Interagency Report: Guidelines for Smart Grid Cybersecurity, NISTIR 7628 vol. 2 at 36 (original edition, Aug. 2010), available at [nvlpubs.nist.gov/nistpubs/ir/2010/NIST.IR.7628.pdf](http://nvlpubs.nist.gov/nistpubs/ir/2010/NIST.IR.7628.pdf)).

parties, like the AGO's Proposed Rule, are based on the Fair Information Practices, which are privacy principles that inform most of the privacy laws and regulations in the United States and the European Union.<sup>10</sup> The North American Energy Standards Board (NAESB) has also affirmatively incorporated privacy and security provisions in its standard for smart meter information.<sup>11</sup>

In its Initial Comments, the AGO explained how broad access to smart meter data can create privacy risks for consumers, Section I, pp. 6-10; described approaches to these risks taken by federal agencies, industry groups, and other states, Sec. II, pp. 10-18; identified gaps in the current system that can leave customers' data at risk unless this Commission pairs access with privacy protections in this rule-making, Sec. III, pp. 19-26; and addressed how the AGO Proposed Rule would pair access with privacy protection, Sec. IV, pp. 26-29.

The AGO's Proposed Rule would allow utilities to use customer data to provide regulated utility service, but require utilities to get the customer's consent before using or sharing customers' data for any other purpose. See id. § (d). Further, the Proposed Rule would provide the framework to give customers the choice to share their data with third parties, but require that any third-party data-sharing be limited to a specific, stated purpose and use.<sup>12</sup>

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<sup>10</sup> See NIST Report § 5.7 at 57 (providing a concise overview of NIST's recommendations) and NIST Report Appendix D ("Recommended Privacy Practices for Customer/Consumer Smart Grid Energy Usage Data Obtained Directly by Third Parties"). For more discussion of the Fair Information Practices see the discussion in the Attorney General's Office Proposed Rule R8-51 and Initial Comments, at pages 9-13 and footnote 9.

<sup>11</sup> Req. 22 "Third Party Access to Smart Meter-based Information," Version 3.2 (July 14, 2017) (reviewed in July 2019 with permission from NAESB).

<sup>12</sup> See AGO Proposed Rule (Appendix A to the AGO's initial comments) §§ (e), (f).

The Public Staff has proposed a rule that provides important requirements about data access<sup>13</sup>, but does not situate those access provisions in a privacy and security framework that will fully protect the interests of North Carolina consumers.<sup>14</sup> Instead, the Public Staff draft rule addresses privacy concerns by broadly directing utilities to “protect customer data in its possession or control, to maintain the privacy of its public utility customers, while providing those customers reasonable access to their own customer data.” Public Staff Rule § (b). This instruction is a step in the right direction, but does not provide specific substantive direction or requirements for the collection, use, and disclosure of data. These specific directions or requirements are required to effectuate the privacy protections needed for utilities and authorized third parties to access detailed personal energy usage data about customers.

*a. Use and Disclosure*

The rights and responsibilities relating to accessing private customer data necessarily vary substantially based on which party is using or seeking access to the data and the purpose for which that party is using it. Purpose specification and use limitation are two concepts included in the Fair Information Practices that operationally protect the privacy of consumer data. Importantly, the Public Staff draft does not

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<sup>13</sup> While the parties generally refer to this rule as one authorizing access, the proposals submitted by the parties in this matter more accurately provide for access, portability and interoperability. From a privacy perspective, access traditionally pertains to a customer’s right to see or learn about his or her own information held by an entity. Portability in this case refers to a customer’s ability to download that information to share his or her data with an authorized third party. Interoperability, which can be understood as a form of portability, refers to two entities’ ability to share a customer’s data with each other directly – in this case, a utility and an authorized third party.

<sup>14</sup> Initial Comments and Proposed Draft Rules of the Public Staff, Docket E-100, Sub 161, App. II (Feb. 10, 2020)(“Public Staff’s draft rule”).

distinguish between rules applicable to uses of energy usage data for primary and secondary purposes. In the AGO Proposed Rule, primary purposes are those necessary to the provision of electrical power, as described at § (a)(6),<sup>15</sup> and secondary purposes include any purpose that is not a primary purpose, § (a)(7). This distinction is integral to the AGO Proposed Rule: the disclosure prohibitions, the use limitations, and the customer consent requirements are specifically tied to the party using the data and the purpose for which the data is being used. The additional specificity in this foundational concept is a key benefit of the AGO Proposed Rule.

The Public Staff Rule also does not provide sufficient specifics about delineation of the responsibilities of utilities to limit contractors' use of customer data through contractual provisions. Paragraph (c) of the Public Staff draft suggests that utilities may disclose data to third parties (in its provision of regulated utility service and consistent with the code of conduct) to the extent necessary to provide the service and "upon written agreement by that third party to protect the confidentiality of such customer data." This paragraph sounds like the AGO Proposed Rule requirement that entities contracting with utilities for primary purposes be contractually bound to protect customer data in accordance with this Rule. However, the Public Staff's draft rule

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<sup>15</sup> The Public Staff draft rule's references to the use of "customer data to provide regulated utility service as provided for in N.C. Gen. Stat. § 62-3(23)" seems similar to the idea of primary purpose. However, the definition is very broad and lengthy, and it is unclear how it applies as a limiting principle in this context. Also the Public Staff's draft does not indicate whether there is a ban on utilities' use of customer data for any purpose other than that identified in § 62-3(23) or whether utilities must obtain consent from customers for such uses. The single paragraph about "use" (which also contains a sentence about disclosure), § (b), and the single paragraph about "disclosure," § (c), read together with the definition of "third party," § (a)(5), are confusing and fail to provide a coherent framework and direction for the use and disclosure obligations that pertain to utilities, affiliates, utility contractors, authorized third parties and customers themselves.

§ (a)(5) defines “third party” as a term that excludes “a contracted agent of the utility,” so it is unclear how these provisions work together. The AGO Proposed Rule’s use of the primary and secondary purpose framework together with its use and definition of the terms “utility” as defined in Rule R8-2, “utility contractor” and “authorized third party” more clearly describe who can access customer data, who can disclose customer data to whom, and for what purpose.<sup>16</sup>

In addition, the Public Staff’s draft provision regarding contractors could provide more robust protection. Under the AGO Proposed Rule, utilities must require utility contractors to agree in a contract to abide by “policies, practices and notification requirements no less protective than those under which the utility itself operates as required under this rule.” § (d)(4)(ii). The Proposed Rule also requires utilities to contractually require any of those contractors to provide similar protections in the context of the contractors’ own subsequent disclosures of customer data. See § (d)(4)(ii). These protections are stronger and more specific than the Public Staff proposal’s direction to a third party to “protect the confidentiality” of customer data.

*b. Authorized Third Party Access and Eligibility*

The AGO Proposed Rule requires utilities to apply a set of criteria designed to protect both privacy and security when determining whether to authorize third parties to access customer data upon customer request. See § (f)(9). Among other requirements, a utility shall require a third party to “adopt and comply with the most updated version of the 2015 Department of Energy’s Voluntary Code of Conduct Final Concepts and Principles for Data Privacy and the Smart Grid (the ‘DataGuard Seal’)

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<sup>16</sup> See AGO Proposed Rule §§ (d)(1-4), (6) and (9) for purposes of comparison.

or a similar nationally accepted eligibility standard approved by the Commission . . . .”  
See § (f)(9). The Public Staff Rule, by contrast, does not include any eligibility criteria for third parties. Requiring adoption of the DataGuard Seal or similar commitment is the only privacy restraint on any commercial third party’s use of energy usage data beyond the limitations such third parties undertake at their own discretion in their privacy policies.

Companies that adopt the DataGuard standard agree to use personal data only for the purpose for which it was obtained, unless they obtain consent for additional uses. Accordingly, a company that obtains consent to access a consumer’s data for the purpose of helping the consumer conserve energy should not also sell those data to a data broker without obtaining consent. Indeed, a third party’s violation of the Voluntary Code of Conduct after adoption would arguably constitute an unfair or deceptive trade practice under Section 5 of the FTC Act and of North Carolina’s Unfair or Deceptive Trade Practices Act, thus providing the consumer with an avenue of redress.

The AGO Proposed Rule thus provides distinct privacy parameters around each of the following:

- Utilities’ and their affiliates’ use and disclosure of data for primary purposes;
- Utility contractors’ use and disclosure of data for primary purposes; and
- Use of data for all secondary purposes by utilities, affiliates, utility contractors, and authorized third parties.

All of these measures are accomplished under the AGO Proposed Rule only by virtue of the Commission’s jurisdiction over utilities themselves. The Commission does not



need to exercise jurisdiction over any entity other than utilities to accomplish this comparatively substantial level of privacy and security for consumer energy usage data.

To explain this process using the eligibility determinations as an example, under the AGO Proposed Rule a utility's obligation is to apply the rule's eligibility criteria to determine which third parties can access customer data. If the third party satisfies the criteria, the utility authorizes access, and the utility's obligation is satisfied. Any potential liability on the part of a utility would be premised only on its own conduct: whether it failed to apply the eligibility criteria. If it comes to the attention of a utility that an authorized third party is not acting in compliance with the DataGuard Seal or similar standard, the utility would have the option to terminate that third party's access pursuant to AGO Proposed Rule §§ (h)(3)-(4). A utility is not required to monitor the conduct of authorized third parties, however, and would in no event be liable for that third party's conduct. AGO Proposed Rule § (g). The Commission would not be required to exercise jurisdiction over any party other than the utility to resolve any such complaint.

Other provisions of the AGO Proposed Rule further support this limitation of liability, requiring utilities to notify customers in a general "Notice of How We Gather, Use and Disclose Your Information" about the privacy risks associated with allowing third parties to access their data and about the fact that utilities are "not responsible for the privacy and security of the data after it has been transferred successfully to the customer or to an authorized third party." See §§ (b)(4) and (5)(vii)-(ix). The AGO Proposed Rule also requires that a similar notice be provided to customers at the time

they choose to authorize disclosure to a third party, clarifying that “following access or transfer, the utility shall not be responsible for monitoring or ensuring that the third party to whom the data is disclosed is maintaining the confidentiality of the data or using the data as intended by the customer.” § (f)(4)(v). This additional time and context-sensitive notification is important because consumers often fail to read general privacy policies and thus miss important privacy related information contained therein. While it is important to relieve utilities from potential liability for protecting privacy and security of data they can no longer control, it is equally if not more important to create a system in which customers are notified and understand—prior to authorizing access to data—that energy usage data reveals personal information and that utilities will not have the ability or obligation to protect their data once it has been transferred to a third party.

The AGO Proposed Rule makes clear that utilities’ responsibilities and potential liability with respect to use, disclosure and authorization of third parties are limited to those actions within the control of the utilities themselves: compliance with the obligations and responsibilities imposed by the Proposed Rule. One of the primary ways the utilities can exercise control in this area in accordance with the Proposed Rule is by complying with the eligibility determination requirements at § (f)(9). A utility can protect the privacy and security of customer data by limiting the third parties who are allowed access to data to those who meet the criteria established in § (f)(9).

*c. Codes of Conduct*

The Public Staff noted in its Initial Comments that in “previous stakeholder discussions on data access, the [utilities’] Codes [of Conduct] were seen as a barrier

to providing customer access.”<sup>17</sup> Accordingly, the Public Staff has made efforts to ensure the draft rule is not inconsistent with the codes of conduct. Similarly, the AGO is unaware of any aspect of the AGO Proposed Rule’s provisions that require utilities to take actions in violation of the Codes of Conduct. The AGO Proposed Rule is more protective than the Codes of Conduct because the AGO Proposed Rule explicitly addresses privacy and includes privacy protective measures; these are additional to, and not inconsistent, with the codes. Also, the AGO Proposed Rule requires access and data sharing on a non-discriminatory basis, as required by the Codes.

The Public Staff comments that the Codes contain “numerous provisions relating to customer information and privacy.”<sup>18</sup> However, the Duke Code of Conduct is a document designed primarily to deal with cost and competition issues. While the Duke Code of Conduct makes a start at protecting the confidentiality of customer data in limited circumstances, it does not mention privacy. Nor does it protect consumers’ privacy interests effectively or comprehensively from an access, portability, or interoperability perspective. Moreover, the Code does not appear (1) to limit a utility’s own use of “Customer Information” to primary purposes, except with consent; (2) to require a utility to obtain consent to use customer information for secondary purposes; or (3) to provide privacy protective provisions or detailed guidance for a utility’s disclosure of customer data to third parties. The AGO Proposed Rule, in contrast, would (1) require utilities to obtain customer consent before they use customers’ data for a purpose unrelated to electric service, see AGO Proposed Rule § (d)(6); (2) limit

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<sup>17</sup> Initial Comments and Proposed Draft Rules of the Public Staff at 4. See also, e.g., Order Approving Merger Subject to Regulatory Conditions and Code of Conduct, Docket No. E-2, Sub 1095, No. E-7, Sub 1100, and No. G-9, Sub 682, Appendix A (Sept. 29, 2016).

<sup>18</sup> Id.

unconsented disclosure to utility contractors who are using the data for a primary purpose and whose use of the data is governed by contractual provisions incorporating the rule's protections, see id. § (d)(4)(ii); and (3) provide a privacy protective framework in which to facilitate consented disclosure to authorized third parties, see id. § (f). While the AGO Proposed Rule adds privacy protections and obligations, and may require utilities to do more to ensure the protection of customer data, it is consistent with the utilities' Codes of Conduct.

Dominion Energy North Carolina comments that the Public Staff's draft rule conforms to DENC's Code of Conduct in terms of its treatment of customer data definition and protections, and notes in particular that the definition of customer data used by the Public Staff and its exclusion of personal information<sup>19</sup> align with the definition of "customer information" in the DENC Code of Conduct.<sup>20</sup> The AGO Proposed Rule definition of "standard customer data" is more detailed than—but substantially similar to—the Public Staff's category of "customer data,"<sup>21</sup> and the AGO Proposed Rule's concept of "unshareable personal data" and prohibition on disclosure

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<sup>19</sup> The Public Staff draft rule defines personal information by reference to the definition of "identifying information" in N.C. Gen. Stat. § 14-113.20, which includes: Social security or employer taxpayer identification numbers; Drivers license, State identification card, or passport numbers; Checking account numbers; Savings account numbers; Credit card numbers; Debit card numbers; Personal Identification (PIN) Code as defined in N.C. Gen. Stat. § 14-113.8(6); Electronic identification numbers, electronic mail names or addresses, Internet account numbers, or Internet identification names; Digital signatures; Any other numbers or information that can be used to access a person's financial resources; Biometric data; Fingerprints; Passwords; and Parent's legal surname prior to marriage. The AGO would not object to incorporating the majority of these data points into the AGO Proposed Rule's definition of "unshareable personal data" at (a)(9). The inclusion of "electronic identification numbers" however, could prove problematic if that term were construed to include utility account numbers, which are part of standard customer data.

<sup>20</sup> Initial Comments of Dominion Energy North Carolina, Docket E-100 Sub 161 at 5-8 (Feb. 10, 2020).

<sup>21</sup> See AGO Proposed Rule § (a)(8).

of such data to any party at any time is similar to the Public Staff's exclusion of personal information from the definition of "customer data."<sup>22</sup> The AGO Proposed Rule, like the Public Staff's draft, should thus align substantially with the DENC Code of Conduct.<sup>23</sup>

Dominion also comments that, in its view, the Public Staff's draft rule appropriately protects customer information while limiting liability for third party disclosures. First, for the reasons discussed above and more comprehensively in the AGO's Initial Comments, the AGO respectfully submits that the increased details about personal habits of customers collected using smart meters require more substantial consumer protections. With respect to liability for third party disclosures, however, the AGO Proposed Rule, like the Public Staff draft, explicitly limits utility liability for use or misuse of data by the authorized third party after a secure transfer of that data made at the customer's request. § (g). Other provisions of the AGO Proposed Rule further support this limitation of liability, requiring utilities to notify customers in a general "Notice of How We Gather, Use and Disclose Your Information" about the privacy risks associated with allowing third parties to access their data and the fact that utilities are "not responsible for the privacy and security of

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<sup>22</sup> See AGO Proposed Rule §§ (a)(9), (d)(9).

<sup>23</sup> It is worthy of note that the DENC Code of Conduct includes "credit history" in the definition of "customer information." The AGO Proposed Rule includes "credit reporting information" as an example of unshareable personal data that a utility is not at liberty to disclose to other parties. The Public Staff does not name credit history as an element of "customer data" and the definition of personal information relied on in the draft rule does not include credit history. A reasonable resolution of these discrepancies would be to interpret the DENC Code of Conduct to include a customer's payment history with respect to bills paid to the utility as an element of customer data, but to agree that a customer's broad credit history and credit report, generally speaking, would be personal and thus unshareable information. The DENC Code of Conduct should not be read to allow a utility to disclose a customer's general credit history or individual credit report.

the data after it has been transferred successfully to the customer or to an authorized third party.” See §§ (b)(4) and (5)(vii)-(ix).

## 2. Provisions Addressing Access

The AGO’s Proposed Rule incorporates the substantive provisions to address customer access that are advocated by the Public Staff and other intervenors. These parties agree that customers should be able to realize the full benefits of smart meters where they are installed not only through energy-saving programs offered by their utility, but also by having the opportunity to access their data for use in innovative applications offered by authorized third parties. To that end, the proposed rules would require electric utilities to maintain data and make it available to customers and customer-authorized third parties in an electronic machine-readable format that conforms to nationally-recognized standards and best practices. Duke opposes this approach and states that it has made plans that will not put Duke in a position to implement the recommended standard for some years, even though Duke has already installed smart meters throughout much of North Carolina and is building Customer Connect as an advanced customer information system to make use of the advanced metering infrastructure. Duke should be required to redirect its efforts so that it incorporates functionality that complies with the national standards for data access. The proposed rules would make this change.

### *a. Adopting the NAESB Standard*

The Public Staff’s proposed rule requires utilities to adopt an electronic consent process and to implement standards for the provision of data in a machine readable

format.<sup>24</sup> It provides,

Customer data shall be maintained and made available to customers and customer-authorized third parties in electronic machine-readable format that conforms to the latest version of the North American Energy Standard Board's (NAESB) Req. 21, the Energy Services Provider Interface (ESPI), or a Commission approved electronic machine-readable format that conforms to nationally-recognized standards and best practices.<sup>25</sup>

Similarly, EDF argues that the Commission should require utilities to follow industry standards for data access promulgated by NAESB and the National Institute of Standards and Technology (NIST), both of which have approved the Green Button Connect (GBC) protocol.<sup>26</sup> Specifically, EDF recommends that the rule should explicitly require utilities to implement the methodology for electronic exchange of energy usage data that is set forth in the most recent version of the applicable industry national standard as approved by NAESB or an equivalent national standards organization.<sup>27</sup> NCSEA proposes that the standard should come into effect six months after the Commission's order in this rulemaking comes into effect.<sup>28</sup>

The AGO agrees that the Green Button Connect standard, as recommended by NIST and NAESB, incorporates functionality, standardization and customer-driven authorization protocols and reflects the current best practice for data sharing. Here, a standardized, nationally recognized approach is superior to a system in which different utilities craft discrete access regimes. If different utilities craft different access regimes, they will most likely fail to be interoperable and readily accessible to commercial

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<sup>24</sup> Public Staff's Draft Rule at 4.

<sup>25</sup> Public Staff's Draft Rule R8-51(d) (effective Jan. 1, 2022).

<sup>26</sup> EDF Comments at 3-5.

<sup>27</sup> EDF Comments at 5.

<sup>28</sup> NCSEA Comments at 2

entities offering energy conservation products and services. The AGO also agrees with EDF and other parties that the Commission should require utilities to implement the methodology set out in NAESB Req. 21 or its equivalent, and this requirement is built into the AGO Proposed Rule.<sup>29</sup> This requirement ought to apply to Duke in particular, given that Duke has already invested extensively in smart meters throughout North Carolina. Where smart meters have been installed, NAESB Req. 21 or a similar nationally recognized standard should be effectuated as quickly as possible to permit customers to benefit from the access provisions in the rule.<sup>30</sup>

*b. Duke's non-standard approach*

Initial Comments submitted jointly on behalf of Duke Carolinas and Duke Progress oppose the requirement that they implement a format for data access that conforms to the requirements recommended by other parties. Duke asks that the provision be struck from the rule proposed by the Public Staff.<sup>31</sup> Duke states that it has implemented a plan that will offer a different functionality, one that is non-standard and is modeled on an older standard called Green Button Download (rather than the newer Green Button Connect). When asked to compare the approach it has adopted to the Green Button Connect approach, Duke explained that its approach will allow customers to download their data in a standardized format comparable to Green

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<sup>29</sup> AGO Proposed Rule §§ (e)(2), (f)(1).

<sup>30</sup> See AGO Proposed Rule §§ (e)(2), (f)(1) (requiring that access be provided “in conformity with nationally recognized standards and best practices concerning form and frequency, such as the latest version of the North American Energy Standard Board’s (NAESB) Req. 21, the Energy Services Provider Interface (ESPI), and in a manner that ensures adequate protections for the utility’s system security and the continued privacy and security of the customer data during transmission.”).

<sup>31</sup> Initial Joint Comments of Duke Energy Carolinas, LLC and Duke Energy Progress, LLC, Docket No. E-100, Sub 161 at 3-6.



Button Download, but will not allow data to be automatically provided to approved third parties under the newer Green Button Connect standard.<sup>32</sup> Duke's plan uses an access regime discrete to Duke. Because the system will not be interoperable, Duke's plan will effectively limit the energy conservation opportunities available to North Carolina customers. Duke's plan would likely steer customers to Duke's programs and applications based on the difficulty of accessing other options, not based on the merits of the programs offered by Duke.

Duke indicates that it has surveyed its customers and believes that their level of interest in Green Button Connect functionality does not justify the projected costs to implement that approach.<sup>33</sup> However, this claim would suggest that a relatively small investment by Duke in the component that would give customers ease of access to innovative applications and programs offered by third parties would be unreasonably costly, even while Duke contends that its much larger investment in advanced meter infrastructure and new customer information systems is money well spent because of the opportunities that AMI and new information systems will afford Duke's customers. The investment in AMI and new information systems heightens the need to ensure that customers have access to innovative energy conservation programs from any provider, not just Duke.

Duke states that it is far along in the process of implementing its Customer Connect Program and, if required to implement the NAESB Req.21 standard by January 2022 as proposed by the Public Staff, that requirement will risk delays in the deployment of the Customer Connect Program planned for Duke Carolinas by April

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<sup>32</sup> See Duke's response to Public Staff data request 1-9 in this docket, attached.

<sup>33</sup> Duke Comments at 5-6.

2021 and for Duke Progress by April 2022. Duke claims that its plan is sufficient because customers with smart meters can already view and download their electric usage data from the Companies' websites using a standardized format, and can view and download their information from the online customer portal and through mid-cycle notifications with the Usage Alerts program.<sup>34</sup> Duke's plan does not offer the ease of portability and interoperability available under the national standards that apply best practices, however, and will limit the options available to its customers.

*c. Reasonableness of Duke's plan to use a non-standard approach*

Duke's plan to use older, Duke-specific standards for customer data access raises concerns about reasonableness. Duke's claims that its large investment in Advanced Metering Infrastructure offers reasonable benefits for customers sufficient to justify the cost, but those claims are based in large part on the opportunities that will be provided to customers to use their data in energy saving programs. If customers' ability to use the full range of energy conservation programs is curtailed, the AMI investment is not producing its full value.

The reasonableness of Duke's decision to deploy AMI meters across Duke's system—relative to the benefits of the investment—was a concern discussed by the Commission in the June 22, 2018 Order in the last Duke Carolinas rate case.<sup>35</sup> In the majority decision, the Commission found that Duke Carolinas' cost/benefit analysis was unreliable as support for the reasonableness of deploying AMI meters throughout

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<sup>34</sup> Duke Comments at 5.

<sup>35</sup> Order Accepting Stipulation, Deciding Contested Issues, and Requiring Revenue Reduction in Docket No. E-7, Sub 1146 issued June 22, 2018 Commission ("2018 DEC Rate Case Order"), at 115-125.

the system, and the Commission cautioned that the cost of the AMI meters might not be considered reasonable in the next rate case unless the benefits to customers are substantiated by detailed proposals to maximize the potential of the new meters.<sup>36</sup> Further, the Commission directed Duke to continue working with other parties to develop guidelines for access to customer usage data, and referenced in particular the well-established interest in facilitating access using Green Button Connect functionality.<sup>37</sup> Duke was also expressly directed to work with other parties on customer access, specifically with regard to the use of Green Button Connect, in the Commission's March 7, 2018 Order in Docket No. E-100, Sub 147, on review of Duke's Smart Grid Technology Plan. That does not mark the beginning of interest in the need for adequate customer access, however, as is evident in comments filed in early 2015 regarding the first Smart Grid Technology Plans filed for North Carolina electric utilities.<sup>38</sup>

Thus, this Commission has put Duke on notice that it should work with other parties on Green Button Connect technology—not the older, limited Green Button Download standard—and this Commission has noted that Duke must substantiate how it is maximizing the potential of its AMI meters. The next consistent step is for this Commission to adopt rules that would implement a best-practice national standard.

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<sup>36</sup> 2018 DEC Rate Case Order at 124; see also concerns discussed in the Clodfelter partial dissent at 54-56, joined by the Brown-Bland partial dissent at 3-4.

<sup>37</sup> 2018 DEC Rate Case Order at 124, 127.

<sup>38</sup> See, e.g., Comments of NCSEA and EDF filed January 9, 2015 in Docket No. E-100, Sub 141, In the Matter of 2014 Smart Grid Technology Plans.  
<http://starw1.ncuc.net/NCUC/ViewFile.aspx?Id=8e3dccc6-7e9e-4508-a829-ebf7016eba89>

In summary, the rules proposed by the AGO and Mission:data will facilitate customer access to applications and programs that help them save energy, and are consistent with the substantive provisions recommended to facilitate access in the Public Staff's proposal. Duke's request, which seeks to eliminate the requirement that it use the more recent NAESB standard to facilitate access, will limit the options that are available to its customers and should be denied.

### 3. Other Provisions

The Public Staff also submitted draft rules for R8-7 and R8-8. The AGO did not submit its own versions of revisions to those rules and is substantially in agreement with the Public Staff's drafts, with one small suggestion. Draft R8-7(b) provides that each utility shall annually provide its customers, either by mail or electronically, instructions on how to access their individual usage data pursuant to Rule R8-51. Draft R8-8(a) includes a list of information that must be conveyed to customers on their bills. Given the importance of the goals underlying R8-51, including both conservation and cost-savings, which are enabled by customer access, it would be useful to provide a link or Internet URL on customers' monthly bills that they could use to locate instructions about how to access their individual usage data. Monthly bills are undoubtedly reviewed and retained more often than annual notices, and monthly bills would be a reasonable place for customers to seek information about access. The AGO accordingly recommends that the provision regarding instructions for access included in R8-7(b)(2) be duplicated and included as a sub-paragraph under R8-8(a) as an item of information to be included on a bill for metered service.

## **Conclusion**

The AGO recommends that the Commission adopt a rule governing data access, portability and interoperability, as well as privacy, that:

- Establishes access rules and procedures within a framework designed to protect the privacy and security of energy usage data and customer information;
- Clearly defines and limits authorized and unauthorized access to disclosure and use of customer data; and
- Permits customers to understand the privacy risks posed by smart meter data and the various obligations (or lack thereof) of the different parties who can access and use those data.

The AGO, working together with Mission:data and other interested parties, has crafted a comprehensive access and privacy rule designed to protect North Carolina consumers. This proposal directly responds to the Commission's request that Sub 161 be used to "create rules that would provide customers or a third party with customer permission appropriate access to customer data, while protecting customers and their personal and energy consumption data." Order Initiating Rulemaking at 3.

The Commission, utilities, North Carolina businesses, and North Carolina consumers will realize the following benefits as a result of the implementation of the AGO Proposed Rule:

1. The rule will establish a baseline set of privacy rights and obligations, minimizing the risks associated with issues of access, portability and interoperability.

2. The rule's protections will serve to guide companies' practices as smart grid technologies develop and expand, building consumer trust and confidence necessary for the successful adoption of new technologies and innovations to flourish.
3. The rule will enable customer and authorized third-party access to usage data, which promise to promote energy efficiency, conservation, and cost savings for customers within a privacy framework.
4. The rule is consistent with the Fair Information Practices and national guidance provided by the National Institute of Standards and Technology, the Department of Energy, the Department of Commerce, and the Federal Trade Commission. Moreover, it reflects the primary and secondary purpose paradigm included in rules adopted by California and Colorado and incorporated in the DataGuard Voluntary Code of Conduct. It will contribute to a uniform regulatory approach that will be advantageous for utility companies operating in multiple states.

Mission: data, NCSEA and EDF support the AGO Proposed Rule, and the Rule is consistent with the concerns expressed in comments filed by the City of Asheville. The Rule incorporates the substantive access provisions suggested by the Public Staff. Accordingly, the AGO respectfully requests that the Commission adopt the AGO's Proposed Rule R8-51 and instruct all of the parties to work together to resolve any differences regarding that version of R8-51 and file a conforming version within 30 days of the Commission's order .

If the Commission is inclined to pursue a different path forward, the AGO respectfully asks that, prior to making a final determination, the Commission issue an order that permits the AGO to file reply comments to respond to any submission that addresses the AGO Proposed Rule, as the comments filed by Public Staff, Duke, Dominion, and Asheville in February did not address the AGO's proposal.

Respectfully submitted this the 17th day of July, 2020.

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<sup>39</sup> Our colleague Jolynn Dellinger, Special Counsel for Privacy Policy & Litigation, performed crucial work on this brief; however, Ms. Dellinger is on prescheduled leave as of the filing date. The AGO wishes to highlight Ms. Dellinger's essential contributions to the text.

CERTIFICATE OF SERVICE

The undersigned certifies that she has served a copy of the foregoing REPLY COMMENTS OF THE ATTORNEY GENERAL'S OFFICE upon the parties of record in this proceeding by email this the 17th day of July, 2020.

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/s/  
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