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Privacy vs. Free Speech in the Information Age¹

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Introduction

The Information Commons conjures up an interesting kind of frontier- one which brings new implications for ancient concepts. One of the most central issues affected by the speed of thought pace of modern information technology is the basic concept of personal privacy. Invasion of the domain previously considered personal and private information has become one of the hallmarks of the information age! In states or countries where a geographically dispersed population makes telecommunication and technology based commerce more important, privacy protection is a central consideration. Public confidence in government, health and education services over electronic media depends on assurances of privacy protection. The concept of privacy protection from its inception has been a part of a counterpoint between individual rights and public needs regarding personal information.

To examine how a concept like free flow of information can have insidious unintended consequences, I would like to examine how introducing competition in utility services has affected privacy. In the days before deregulation, utility marketing concerned goodwill advertising and image promotion. The subject of advertisements mostly concerned safety, emergency preparedness, and other public service issues. The utility service area was local, and customer service was also local, neighbor to neighbor in tone.

Now, utilities engage in mergers and acquisitions to gain market position and capital advantages. The obligation to serve is not necessarily associated with the service providers, and customers seeking service face automatic voice messaging systems with eight item menus. Electronic commerce and the capabilities of internet technology have fundamentally changed both marketing and customer service. Many of these changes have been positive, but some unintended consequences have caused problems. One of these is the tension between the marketers' right to free speech and the customers' right to privacy.

Document the Problem

One of the unanticipated effects of introducing competition into former monopoly utility services is the change in the concept of customer privacy. A recent Harris Survey² reported that two thirds of the public (65%) say "protecting the privacy of consumer

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² 1996. Equifax/Harris Survey: Consumer Privacy. All data in this paragraph are from this survey.

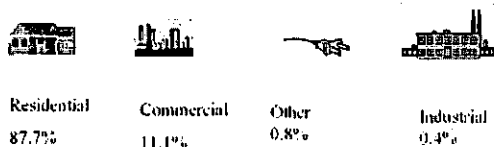
information” is very important to them. Today one in four people (24%) say they have personally experienced privacy invasion. However, most people (66%) feel the practice of compiling profiles of individual consumer purchasing practices is at least somewhat acceptable if the information is used to target offers of goods and services to people who appear likely to be interested in them.

As utilities seek to define a specific niche in the market, they use increasingly sophisticated marketing tools to define their unique position in the competitive array. Once consumers have the right to choose utility services, making the utility stand out from the crowd is important. It is even more important for the utility to attract customers whose use profile generates the most profits.

Three kinds of privacy issues relate specifically to utility services: identity theft, price discrimination, and electronic redlining. Each of these practices pose concerns to regulators and to utilities, and a large number of industry and congressional initiatives are under consideration to address some of these problems.

The Federal Trade Commission reports that 50% of identity theft cases are related to theft of utility service.³ Most incidents of identity theft are fairly low tech operations. People sort through discarded bills and simply lift the name and account information for their own use. The Federal Trade Commission reports that 43 percent of all complaints they received in 2002 were about identity theft. A total of 161,800 complaints on identity theft were filed in 2002, up 88 percent from the year before. The United States Postal Inspector is planning a “Know Fraud” campaign to help consumers understand this issue and how to protect sensitive information from misuse. Information about identity theft and how to prevent it is available on the U. S. Postal service web site, and also from the California Office of Privacy Protection. California and Alaska are two states with specific privacy protection provisions in the state constitution.

Electric Utility Customers by Class



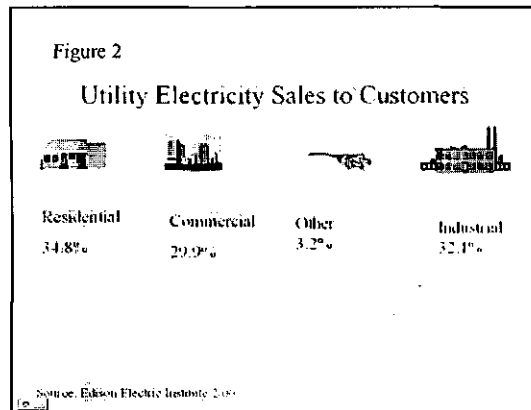
Source: Edison Electric Institute 2000

Competition brings winners and losers. The winners know how to position their product separately from the pack.

³ Rob Kuykendall, personal communication. U.S. Postal Inspector Office.

All customers are not equal in their profile of utility service use. Some cost less to serve than others. See Figure 1. Among electricity consumers nationwide, industrial customers comprise less than 1% of the total customers, compared to 88% residential and just over 11% commercial, but the industrial customers account for one third of sales⁴. Profits are better if you can sell lots of product to a few customers at a single point of contact. Among residential and commercial customers, the most likely ones to be interested in bundles of associated services are the building owners and higher income customers, whether they are businesses or households.⁵ Renters, low income customers, or frugal users are not attractive for profitability. Such customers are discriminated against by default; services are not targeted to them. Or they are deliberately denied price breaks and promotions extended to more lucrative customers⁶. These customers become the primary responsibility of the default provider or the carrier of last resort.

Marketing as Part of Competition



Under competitive market conditions, segmenting the market to identify profitable target customers is essential. See Figure 2. For this, utilities have engaged in advertising and specific product formation to attract customers and to maximize profits:

Freedom of speech is protected by the Constitution, and has been tested through the courts. There are different standards for "commercial speech" and for "political speech". Commercial speech is held to the test of truth in advertising and a

prohibition against deceptive practices in wording of advertisements. Political speech is less constrained, limited only by the boundary with slander⁷.

Many states have controlled access to customer information in the statutes deregulating telecommunication or electric service. For the most part, these statutes have been concerned with allowing competing utility service suppliers to have access to the incumbent utility data regarding customer accounts such as names, addresses, telephone numbers, prior use and rate class. Bill collection data and prior payment history is protected by the Federal Fair Credit Reporting Act. There have been few reported

⁴ Edison Electric Institute www.eei.org Profile of Electricity Customers. February, 2000.

⁵ James Howard, COE Northern States Power, interview in *Restructuring Today*, March 29, 1999

⁶ Eugene Coyle. Price Discrimination, Electronic Redlining, and Price Fixing in Deregulated Electric Power. American Public Power Association. 2000. Page 101-106

⁷ Sattinger, Oscar C, J.D. "Privacy" 62 Am Jur 2d page 676.

incidences of utility suppliers as primary violators of customer privacy. Such violations are usually the result of inadvertent transmittal of data among affiliated companies.

Utility marketers may use customer information to aggregate customers for specific promotion packages. This allows them to target customers most likely to respond to a specific approach. Homeowners may be better candidates for promotions that include insurance, or that have services for energy conservation bundled with their basic service. Data that is mined from a variety of sources to reveal purchasing patterns that identify groups of customers with common characteristics such as: high reliability or quality requirements, homeowners, seasonal load profiles, or calling patterns. By segmenting the market, utilities can also combine utility services with other services that specific groups of customers would be willing to pay more for. For example, a risk averse business may be willing to pay for weather fluctuation insurance or fuel price variation insurance.

Consumer Trust in Utility Transactions

The electronic age poses new challenges to the concept of personal privacy. Unlike the freedom of speech for commercial or political purposes, the right to privacy is not specifically defined in the Constitution. The people who originally inhabited Williamsburg in Colonial times would have been shocked to know that general information about their personal interests and attributes would be publicly available! In 1890, the "right to privacy" was defined as a separate principle from contract or property rights.⁸ Over the years, the right to privacy has been tested through the courts mostly in the context of unwanted publicity surrounding celebrities or intrusion into private correspondence.

Consumers do not expect their interactions with a utility to result in disclosure of personal information. However, the process of distinguishing utility services that are basically all the same depends on customized service. In addition to information generally available through utility data sources, profiles of customers are available through public sources, or for a fee. Companies send out promotions and leaders that help identify people with specific interests or buying patterns, even "your ten best friends." You send \$5.00 to receive information, or a catalogue, or something that seems totally innocuous, and your name ends up on a "sucker list". Marketers receive up to \$5,000 per name for a qualified list of customers.⁹ Data mining is big business.

The internet generates a browsing pattern that can be retrieved for specific marketing purposes. There are "cookies" attached to searches that provide feedback about what sites a person visits. This is the electronic age version of the video scanner in the department store. These videos have been the staple of advertisers and retailers efforts to make their wares more appealing to customers. The internet "cookies" serve much the same function. But, they allow outreach based on a person's interests. Utilities can easily obtain information allowing them to track down and target discrete markets.

⁸ *Ibid* sections 26 and 27

⁹ Rob Kuykendall. Personal communication.

So can a wide range of vendors of dubious services, which leads to an inundation of SPAM.

Utilities also may dispense customer data either deliberately or through affiliates by failing to protect data from falling into the public domain. California's Constitution protects a right to privacy for all citizens. The Caller ID Program became the subject of an intense consumer information campaign in advance of the offering to educate customers about the privacy implications of various options. The utilities involved discovered that the High Call Blocking plan produced lower profits, and so focused their advertising on the Selective Blocking Plan. The result was a \$44 million judgment against Pacific Bell for failing to provide truth in advertising.¹⁰

These practices by utilities, in their attempt to capture a larger share of more lucrative customers have significant implications for universal service and default providers. One of the benefits of having a public utility under regulation was that the diversity of the customers within a class allowed sharing of costs. The competition version is that the market will be segmented into finer and finer sub-sets to allow those with the highest potential for revenue to receive the most service. Those with higher costs to serve receive minimum service, or no service. The default provider and the carrier of last resort retain the obligation to serve even the non-profitable customers, and thus have limitations on their ability to maximize profits.

Remedies and Cautions

Clearly, customers may benefit from having more choices and innovations may flow from an increase in competition. But the very technologies that have enabled much of the innovation in utility service bear the potential for an unimagined level of privacy invasion. One could characterize the concept of personal privacy as a casualty of the electronic age. Protecting your own personal information from public access now requires a sophisticated level of attention.

The Consumer Affairs Committee and the Finance and Technology Committee of NARUC sponsored a resolution on privacy protection to highlight the concerns of consumers and utilities in this area.¹¹ Various approaches have been tested in different states. The Opt-In approach requires a customer to provide written notice of affirmative participation in a program or service. The Opt-Out approach requires a customer specifically to request not to be included in a promotion. Pennsylvania has adopted a negative option approach to the release of some customer information, allowing release of a mass customer list to some suppliers. Licensed suppliers receive a copy of residential and small commercial customer lists with only name, address, usage and account number unless the customer responds to a mailing from the utility which allows

¹⁰ Utility Consumers Action Network. www.ucan.org. Charles Carbone.

¹¹ Privacy Resolution. Adopted Summer 1999. See www.naruc.org/resolutions

the customer not to be included on the list.¹² An example of this is the “Black Dot” or “do not call” list that prevents telemarketers from calling a home.

Section 222 of the Telecommunications Act of 1996 regulates customer privacy interests in information held by their telecom carriers, known as the Customer Proprietary Network Information (CPNI). This includes information regarding the phone numbers an individual calls, the duration of calls, calling patterns, and the services and features a customer uses. The Telecommunications Act requires that this kind of information not be used or disclosed without the customers’ approval. The FCC initially took the requirement of the Act literally, and required that utilities obtain the express written approval of customers before using or disclosing their CPNI data, but this was appealed to the Tenth Circuit Court of Appeals, and their ruling stated that this approach violated the First Amendment provision for free speech. Therefore, the customer’s tacit approval is assumed unless the customer explicitly requests their CPNI data not be used... called “opt out” approach. Effective July 1, the national No Call List has been implemented to allow customers to block telemarketing calls from their personal telephone numbers. Each company now ranging from utilities to credit card issuers and banking institutions and health care providers now must provide a privacy protection policy. Customers MUST read these materials carefully to be sure they are not waiving their rights to privacy protection by failing to send back a request for non-disclosure of their information.

Regulators and utilities must balance the need for marketing data against the rights of customers to have personal information protected. To protect advertiser’s freedom of speech, the individual must assume a greater degree of active diligence to protect their own interests. In the end, each person will bear an increased burden to protect their own privacy. It is a subjective matter without rigid standards. What is a privacy invasion to one person may be perfectly unobjectionable to another.

Utility mergers and acquisitions offer another arena for consideration of protecting customer privacy. Customers should have an opportunity to understand what data about them will become available to new affiliates of their utility and what that information will be used for. A bigger, better utility may offer more services, more choices and better prices for some customers, but the hidden or unintended consequences may include worse service or more costly service for other customers.

The Consumer Protection Association reports that the United States is first in technology and last in privacy among industrialized nations. As technology continues to push the edge of what is possible in obtaining and spreading information about individuals or individual companies, we must all take to heart the obligation to respect the rights of privacy by convention and practice through the exercise of ethical behavior. As the information highway becomes more widely traveled, the ethical constraints against privacy invasion need to be more finely honed, and the rules defined better. Common courtesy between individuals is easy to ignore in the impersonal distant

¹² PUC Order dated May 18, 1999, Procedures Applicable to Electric Distribution Companies and Electric generation Suppliers During Transition to Full Retail Competition. Order challenged by PECO was upheld by the Commonwealth Court in Order No. 1538 C.D. 1999 dated February 25, 2000.

medium of telecommunications and electronic commerce. As these become increasingly critical for connecting dispersed people with a global economy, the protocol for courtesy and privacy protection must become embedded in the process. A new digital divide in a Palm Pilot short hand is emerging to widen the gulf.

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Patricia DeMarco received a Bachelor of Science degree (1968) and a Doctorate in Biology (1971) from the University of Pittsburgh, Pittsburgh, Pennsylvania and Postdoctoral Fellowships at Yale University and Boston University School of Medicine. Dr. DeMarco has published academic research based on her work in biochemical mutation mechanisms and cellular regulation.

She has worked in the field of energy and environmental public policy in government and private positions since 1975. As an entrepreneur, she has started and sold her own business, and established several non-profit corporations in Connecticut prior to coming to Alaska in 1995. She held the position of President of the Anchorage Economic Development Corporation from 1996 to 1999 when she was appointed a Commissioner of the Regulatory Commission of Alaska for a term ending in January 2003. Her current academic interest lies in the area of energy policy, and sustainable development.

She serves on the Board of Directors of the Anchorage Rotary Club and the Anchorage Symphony Orchestra.