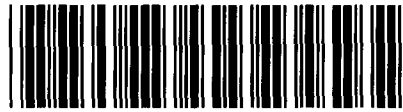




Control Number: 47472



Item Number: 110

Addendum StartPage: 0

**SOAH DOCKET NO. 473-18-0708**

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THE STATE CLERK

<b>COMMISSIONS STAFF'S</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>PETITION TO DETERMINE</b>		
<b>REQUIREMENTS FOR SMART</b>	<b>§</b>	<b>OF</b>
<b>METER TEXAS</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**BRASOVAN ENERGY'S ELECTRICITY USER COALITION  
BRIEF WITH REGARDS TO THE REMAINING CONTESTED ISSUE**

**FEBRUARY 7, 2018**

**SOAH DOCKET NO. 473-18-0708**

**PUC DOCKET NO. 47472**

**COMMISSIONS STAFF'S § BEFORE THE STATE OFFICE  
PETITION TO DETERMINE § OF  
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METER TEXAS § ADMINISTRATIVE HEARINGS**

**BRIEF WITH REGARDS TO THE REMAINING CONTESTED ISSUE**

**BRASOVAN ENERGY'S ELECTRICITY USER COALITION**

As of December 28, 2017, parties in this contested case reached a stipulated settlement in which all parties agreed, except for one issue. Simply put, the remaining issue is whether small customers should have to:

- 1 a) Positively affirm third party access, otherwise known as competitive serve providers ("CSP"),
- 2 and then also positively reaffirmed once every 12 months or
- 3 b) Positively affirm the CSP access once every 36 months with notices to the customer every 12
- 4 months. Said notice would contain an option for the customer to be able to cancel the
- 5 agreement with essentially a click of the mouse.

6 First, it should be noted that there is very little difference in these two positions. ARM and OPUC have  
7 both taken the position that significantly more harm it done if the positive response is not required.  
8 BEEC on the other hand asserts that customers rights to enter into a third party agreement should not be  
9 infringed by the arbitrary imposition of a 12 month re-affirmation requirement. BEEC believes that  
10 customers, that share data with third parties in a multitude of business every day – data that is much more  
11 sensitive than SMT data – are savvy enough to know what they are doing and, especially when they are  
12 given an annual notice, they should be trusted to control access to the data they own.

13 The Alliance for Retail Markets ("ARM") submitted a joint brief with the Texas Energy Association for  
14 Marketers ("TEAM") opposing BEEC's position. For purposes of brevity, we refer to this brief as ARM's  
15 brief. In the first paragraph on page 4 of ARM's brief, four statements are made regarding the grounds  
16 for its position. The first three are founded in law. The fourth is a conjecture interspersed with statements  
17 of fact. ARM opines with no objective support:

1 “...(4) no party to the usage data sharing agreement is unreasonably impacted by the maximum  
2 12-month term...”<sup>1</sup>

3 This is conjecture and should be rejected. Additionally, it should be noted that it’s not imposition to the  
4 REP that has continuous access to the data when they have a customer and no positive response is needed  
5 for that access to continue.

6 For a CSP the imposition and cost can be significant when serving a customer for one to two dollars per  
7 month month in income. If you have to reach out to a customer and inquirer about an email they were to  
8 receive and ask them to go find it and click on an affirmation button, those costs are real. And it can  
9 make serving the residential market segment wholly untenable. Hence, ARM is WRONG in there  
10 conjecture.

11 Second, customer protection rules are often cited as the reason for needing the 12 month positive  
12 affirmation. This is not accurate. The whole process is premised on the agreement being positively  
13 affirmed in the first place. Hence, BEEC argues that the customer protection requirements have been met  
14 and the additional requirements of an annual positive affirmation are extraneous and unnecessary and  
15 offer no greater level of protection compared to the annual notice that is agreed to by BEEC.

16 BEEC submits that after 15 years of participation in the deregulated ERCOT market, customers of all  
17 types and sizes are informed decision makers. Additionally, customers of all types and sizes regularly  
18 allow third parties access to personal and private data. These third parties include social media, banks,  
19 credit card companies, REPs, utilities and CSPs. Furthermore, in previous BEEC testimony, it was  
20 demonstrated that customers are well accustomed to electricity contracts extending beyond 12 months.  
21 For example, on January 29, 2018, on the Power to Choose webpage, Retail Electric Providers offered 58  
22 plans with 36-month terms in the zip code area 77098.<sup>2</sup> Thus, it is not uncommon for customers to  
23 engage in contracts greater than 12 months.

24 It should also be noted that smaller customers are often represented by unregistered third parties in  
25 electricity negotiation. According to the Direct Testimony of Marilyn J. Fox, “58% of all load was  
26 brokered by third parties. Also, 71% of non-residential sales [this figure includes smaller business  
27 customers] and 33% of residential sales are contracted for by customers using third party representation.”<sup>3</sup>  
28 These figures come a from a scientific survey of Texas REPs conducted by a well-respected consulting  
29 firm who regularly surveys REPs. No parties to this case disputed this testimony.

30 Thus, it is not uncommon for small customers to be represented by third parties. This is important because  
31 it indicates a level of trust in third parties.

32 urthermore, ARM’s testimony states:

33 “The Stipulation and proposed SMT 2.0 Business Requirements increase the current 12-  
34 month maximum term for all usage data sharing agreements to a 36-month maximum term for

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<sup>1</sup> Alliance For Retail Markets And Texas Energy Association For Marketers' Joint Brief On Contested Issue, page 4 lines 24-30

<sup>2</sup> Brasovan Energy’s Electricity User Coalition Brief With Regards To The Remaining Contested Issue,

<sup>3</sup> Direct Testimony of Marilyn J Fox, The Energy Professionals Association, October 19, 2017, page 4, lines 20-25 and page 5, lines 1-2

1 those agreements executed by large business customers that meet or exceed the 15,000 kWh  
2 threshold in recognition of: (1) *those customers relative level of general sophistication in*  
3 *electricity purchasing matters, including their use of dedicated energy managers;* [emphasis  
4 added] (2) the general length of their long-term retail electric contracts from three to five years;  
5 and (3) their financial ability and technical expertise to pursue legal actions to protect their  
6 interests.”<sup>4</sup>  
7

8 Since 71% of non-residential customers prefer third parties negotiate on their behalf with REPs, this  
9 indicates that there is a greater level of trust in third parties than with REPs. In addition, it indicates that  
10 many large customers are also represented by third parties. BEEC submits that this is, in part due to a lack  
11 of energy management or energy procurement staff at most large companies. If customers, large and  
12 small trust CSPs with multi-year electricity contracting, what objective rationale is there to interfere with  
13 that contractual relationship by limiting access by CSPs to 12 months, while not limiting access by REPs.  
14 After all REPs only directly interact with 29% of the non-residential market?  
15

16 SMT portal has 100,695 residential accounts representing 1.4% of active meters on SMT. This small  
17 number of active accounts must annually reaffirm their data sharing agreement with CSPs.<sup>5</sup> Will keeping  
18 this 12-month restriction on ownership rights improve, worsen or have no effect on this participation rate?

19 The Commission’s “Report to the 85<sup>th</sup> Texas Legislature” (“Report”) points out that as of March 2016,  
20 92% of all customers had exercised the ability to switch. This includes over 6.1 million residential  
21 customers who have switched.<sup>6</sup> Over 2 million of these residential customers are represented by CSPs.  
22 We submit that these 2 million residential customers made an informed decision to be represented by  
23 CSPs.

24 As previously discussed, millions of Texans regularly grant access to data far more private than electricity  
25 usage. This indicates relative sophistication on the part of small customers with regards to data sharing  
26 and privacy. Thus, the statements by ARM (and others) in their briefs that smaller customers lack  
27 sophistication about Texas power markets and consumer data privacy requires a level of suspension of  
28 disbelief.

29 Also in the Commission’s report, it is stated that a second rulemaking (now rolled into this contested  
30 case) was “... to determine the appropriate access for third parties, ensuring that customers have the  
31 *freedom to grant and give third parties access to their data* [emphasis added] if made knowingly while  
32 also securing customer privacy.”<sup>7</sup> By prejudicially restricting ownership rights and the ability to grant  
33 access to one group of organizations over another, we submit that the goal “...of freedom to grant and  
34 give third parties access to their data...” is being obstructed.

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<sup>4</sup> Alliance For Retail Markets And Texas Energy Association For Marketers' Joint Brief On Contested Issue. First paragraph, page 11

<sup>5</sup> Direct Testimony of Michele Gregg, page 7, lines 7-12, October 19, 2017

<sup>6</sup> Report to the 85<sup>th</sup> Texas Legislature, Scope of Competition in Electric Markets in Texas, section III.D.4., page 1, second paragraph, January 2017

<sup>7</sup> Ibid, section III.D.4., page 22, first paragraph

1 In its brief, the Office of Public Utility Counsel (“OPUC”) offers arguments for restricting customer data  
2 ownership rights. We will show that much of their argument is based on conjecture.

3 For example, OPUC states in its Post-Hearing Brief, that BEEC’s recommendation to extend the data  
4 sharing term up to 36 months, “...provides more opportunity for terms and conditions to change without  
5 customer knowledge or consent and provides more opportunity for unauthorized data sharing or misuse of  
6 the data.”<sup>8</sup> Yet nowhere in OPUC’s testimony does it offer quantitative evidence that extending a term of  
7 12 months to 36 months would make a significant difference.

8 OPUC also states that there are no prohibitions on how a third party can use customer data.<sup>9</sup> The lack of a  
9 specific PUC framework does not mean that a customer is unprotected. As an example, how many data  
10 sharing agreements (e.g., social media, online vendors, etc.) are signed with the promise from the vendor  
11 that “we do not sell or share your data with third parties”? This reflects that the broader consumer market  
12 for information contains well-informed consumers. Data companies *compete* by offering *not* to share data,  
13 because consumers have long been aware of this potentiality.

14 Next OPUC states that “As OPUC witness Ms. Gregg testified, SMT’s ability to protect the privacy of  
15 customer data ends once a customer has agreed to share his or her data with a third party.”<sup>10</sup> This is at best  
16 an oversimplification. The Terms clearly state that SMT may shut down access to SMT to a CSP if:

17 “...you [a CSP] engage in any unauthorized disclosure, use, modification, or utilization of private  
18 or confidential information or data in connection with, or obtained through, your access or use of  
19 this Website or the Web”<sup>11</sup>

20 As with all other online data agreements, federal and state laws also apply. Filing a complaint with SMT  
21 and with a state or federal agency hardly requires “financial wherewithal”, as stated by OPUC.<sup>12</sup> Several  
22 times in its testimony, OPUC stresses that expensive court proceedings are the only redress available,  
23 since the Commission does not yet have jurisdiction over unregistered CSPs. We have demonstrated that  
24 the is not the whole truth. It is conjecture.

25 On page 10, OPUC states that no enforcement actions were taken against violations, “(presumably  
26 because the Commission has no enforcement authority over entities it does to regulate)” However, no  
27 evidence to support the statement that this was because the Commission has no enforcement authority  
28 was presented by OPUC during the course of this case. This is conjecture.

29 OPUC also states that several parties testified that some parties were circumventing SMT protocols for  
30 accessing customer data.<sup>13</sup> Yet OPUC offers no objective evidence that a term limit of 12 months would  
31 stop this from happening. The current SMT portal has more restrictive requirement, including requiring

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<sup>8</sup> OPUC Initial Post-Hearing Brief, page 7, first paragraph, January 29, 2018

<sup>9</sup> OPUC Initial Post-Hearing Brief, page 7, second paragraph, January 29, 2018

<sup>10</sup> Ibid,

<sup>11</sup> Exhibit DRH-1, SMT Website Terms and Conditions version 2.0, Section 2.b.(vii)E., January 25, 2018

<sup>12</sup> OPUC Initial Post-Hearing Brief, page 7, third paragraph, January 29, 2018

<sup>13</sup> Ibid, page 9, second paragraph

1 the customer to register and a 12-month limit *for all customers* granting access, yet this hasn't stopped  
2 this type of circumvention.

3 Further, OPUC states that the "... current term for sharing up to 12 months limits the time in which harm  
4 can occur."<sup>14</sup> No party to this case offered quantitative evidence that 12 months is safer than 36 months.  
5 One has to ask then, what is the appropriate time frame to stop this behavior? Surely 6 months access  
6 would reduce this risk. Or maybe 3 months would reduce it further. Or one month? To put it another way,  
7 will data fraud increase by a factor of three times or more if 36 months access is granted? A truly "bad  
8 actor" only needs access for short period of time to do damage.

9 Additionally, and much more importantly to the issue at hand, is requiring an affirmative response at 12  
10 and 24 months offering measurably more protection than just notifying the customer at 12 and 36  
11 months? With notice, a customer is reminded that data sharing arrangement exists. They are given the  
12 opportunity to cancel the agreement. The only difference is that if they don't reply – give an affirmative  
13 response - the agreement will continue for up to 36 months.

14

15 In addition, let's put this in perspective. Which would "bad actors" prefer to hack – Target, Experian, the  
16 IRS or SMT? And if foreign hacker *were* to try to gain access to customer data, would they go after one  
17 small customer or try to hack the whole SMT system?

18 One more question needs to be asked. What would bad actors *actually do* with electricity interval data?  
19 The only answer presented by intervenors is a *hypothetical case* in which a bad actor could use the data to  
20 analyze and determine when a small customer is not present and then proceed to burglarize the property.  
21 No actual cases of this happening were submitted in any testimony or hearing in this case.

22 Let's analyze this question with a common-sense approach. It's fairly easy to determine if a small  
23 business is closed. It puts a "Closed" sign on the front door. Let's examine the idea that a burglar would  
24 use this data to determine when a residential customer isn't home. How much data is needed to make this  
25 determination? 12 months? A month? Or 36 months? Or would it be easier for a burglar to do it the old-  
26 fashioned way – observe the house for a few days, wait for the residents to leave and then break-in. By  
27 the way, analyzing a residential customer's SMT data does not tell the potential bad actor if a customer  
28 has a dog or a burglar alarm.

29 In summary, the majority (58%) of Texas electricity customer load is represented in the marketplace by  
30 CSPs. This indicates significant degree of trust in CSPs earned over the past 15 years. To this point in  
31 time, SMT is used by very few customers large or small. We submit that retaining the 12-month term  
32 limit on data sharing will not ease access nor improve customer participation rates nor significantly  
33 reduce data security risk. Since 92% of Texas electricity customers over 15 years have switched  
34 providers, this is further evidence of customers educated about the deregulated market. Furthermore,  
35 customers are well aware of the risks of data sharing. Customers share their data every day with vendors.  
36 Therefore, the 12-month term limits an unnecessary customer protection. We ask that the Commission

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<sup>14</sup> Ibid, page 10, first paragraph

- 1 change this one part of the stipulation to 36 months with an annual notice rather than requiring a 12
- 2 month positive reaffirmation of the already affirmed agreement..
- 3



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**I. Conclusion**

3

BEEC recognizes that all parties to this case have made sincere efforts and worked hard to arrive at a unanimous settlement. However, from the perspective of the overall view of small customer data privacy, ease of access and fairness to all organizations who compete in the Texas deregulated electricity market, we request that the Commission change only this one part of the settlement. We respectfully request that the Commission change the current 12-month time limit on data sharing for small residential and small commercial customers to 36 months.

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Respectfully submitted,

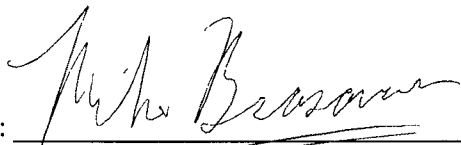
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Brasovan Energy's Electricity Users Coalition

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