

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 6379

Investigation into Dispute Regarding the Provision)
of Customer Information to Efficiency Vermont by)
the Village of Hyde Park Electric Department, the)
Morrisville Water and Light Department, the)
Barton Village Inc. Electric Department, and the)
Vermont Marble Power Division of OMYA, Inc.)
)

Hearing at
Montpelier, Vermont
May 3, 2000

Order entered: 6/23/2000

I. INTRODUCTION

This proceeding concerns the transfer of customer information to the Energy Efficiency Utility ("EEU") by the Village of Hyde Park Electric Department ("Hyde Park") and the Village of Morrisville Water & Light Department ("Morrisville"). Hyde Park and Morrisville are referred to collectively as the "Two Municipals".¹ The central issue under contention is how to meet the statutory obligation to acquire cost-effective energy efficiency resources, while still protecting customers' rights of privacy at least as effectively as it has been protected in the past. This information (referred to herein as "Customer Information") does not include customers' payment history or billing amounts. It consists only of:

- (1) customer-specific information (e.g., customer's address, phone number and utility account number);
- (2) usage data (customer's historic electric demand characteristics); and
- (3) measure data (efficiency measures already provided to the customer by the local utility).²

1. Originally, this proceeding also concerned the transfer of customer information to Efficiency Vermont by the Vermont Power Division of OMYA, Inc. ("Vermont Marble") and Barton Village Inc. Electric Department ("Barton"). Vermont Marble and Barton have since agreed to procedures that the Department finds acceptable.

2. This categorization was developed by the Information Technology Transition Working Group, with the participation of the Department of Public Service and Vermont's electric utilities.

In this Order, we reaffirm our long-standing policy that a utility should treat all information it maintains on its customers as confidential, but that such information may be shared (under appropriate confidentiality protection) when disclosure of the information is necessary to serve a valid public purpose. In this case, we find that the release of the requested Customer Information to the EEU will serve such a public purpose – it will enable customers throughout Vermont to have the same access to, and information about, the energy efficiency programs and services offered by the statewide energy efficiency utility.³ In addition, it will enable the EEU to obtain the maximum energy efficiency savings in the most cost-effective manner possible, thereby indirectly benefitting all Vermonters.

Pursuant to 30 V.S.A. § 209(d) and a competitive bidding process, the Public Service Board ("Board") has retained Vermont Energy Investment Corporation ("VEIC") to serve as the EEU.⁴ The Board's contract with VEIC includes provisions governing the treatment of confidential information. These provisions require VEIC to keep all customer information confidential. The contract also prohibits VEIC from using the information for purposes other than providing Board-approved energy efficiency utility services. Therefore, we find that given the confidentiality requirements we have imposed on VEIC, the public benefits that will result from release of the requested Customer Information to the EEU outweigh the potential benefits to individual customers of confidentiality.

Accordingly, this Order requires the Two Municipals to provide the EEU with all the requested Customer Information that is currently in their possession by July 10, 2000, and to provide updates of such information on a schedule to be agreed upon with VEIC.⁵

II. PROCEDURAL HISTORY

On March 17, 2000, Michael Wickenden, the Contract Administrator charged with oversight of the Board's contract with VEIC, informed the Board of a dispute between VEIC and some electric distribution utilities regarding the interpretation of Paragraph 15 of the Memorandum of Understanding

3. *See*, 30 V.S.A. § 209(d).

4. VEIC operates the EEU under the name Efficiency Vermont.

5. We recognize that utilities may not currently possess all the Customer Information for each of their customers. This Order does not require the Two Municipals to collect any additional information from their customers, but merely to transfer any Customer Information currently in their possession to the EEU.

("MOU") approved by the Board in its September 30, 1999 Order in Docket 5980 ("Order").⁶ In his letter to the Board, the Contract Administrator stated that some municipal utilities have interpreted Paragraph 15 to mean that Customer Information would only be released to the EEU upon prior consent of the account holder. The Board instructed the Contract Administrator to try to resolve the dispute within thirty days.

On April 13, 2000, the Department of Public Service ("Department" or "DPS") filed a request that the Board take "immediate action" to enforce the Board's Order. In its filing, the DPS asserted that the Two Municipals were in violation of Paragraphs 15 and 66 of the MOU⁷ because they had not provided VEIC with the Customer Information it had requested.⁸ In addition, the DPS asserted that this failure to provide VEIC with customer data was a violation of some of the utilities' Bilateral Agreements with the Department which were approved by the Board in its Order.⁹

On April 14, 2000, the Board responded to the DPS's April 13th filing by declining to address the issue while there still remained the potential for resolution of the dispute. However, the Board stated its willingness to act expeditiously, including issuing injunctive relief if necessary, to maintain the status quo until this issue was finally resolved. Also on April 14, 2000, the Board received a filing from Vermont Marble responding to the DPS's filing in which it stated that the DPS misconstrued Vermont Marble's position.

The Contract Administrator tried to resolve the dispute regarding the appropriate interpretation of Paragraphs 15 and 66 of the MOU. The thirty-day period ended on April 17, 2000. His efforts were unsuccessful, and on April 18, 2000, the Contract Administrator referred this dispute to the

6. Paragraph 15 of the MOU requires electric distribution utilities to "cooperate in good faith with the EEU...including, providing customer information to the EEU in a reasonable manner and under appropriate provisions to prevent disclosure to unauthorized entities and personnel."

7. Paragraph 66 of the MOU states that "The Parties agree to take no action intended or reasonably likely to undermine the approval, establishment, funding, and implementation of the EEU in accordance with this MOU."

8. The DPS's filing also stated that Barton and Vermont Marble had not provided VEIC with the Customer Information. See footnote 1 for more information.

9. The provision of the Bilateral Agreements referred to by the DPS in its filing requires any municipal utility that uses postcard or "printed through the envelope" billing to "make its list of customer names and addresses available to the EEU for mailings by the EEU."

Board for review, and provided the Board with a report on the negotiations (Exhibit Board-1).¹⁰

On April 19, 2000, the Board opened this investigation. On April 28, 2000, Barton and the Two Municipals submitted a letter in response to the Department's April 13th filing. On May 1, 2000, Vermont Marble filed notice that it had transferred the requested information to the EEU, and that all issues between the Department of Public Service and Vermont Marble in this Docket were resolved.

The Board held a technical hearing on May 3, 2000. Appearing at the hearing for the Department was Aaron Adler, Esq. Trevor Lewis, Esq., appeared for Barton and the Two Municipals. On May 16, 2000, the Two Municipals filed a post-hearing brief and proposed findings of fact. Also on that date, the Department filed its proposal for decision. On May 19, 2000, the Department filed responsive comments on the Two Municipals' brief and proposed findings.

Barton moved for permission to withdraw and substitute counsel on June 6, 2000; that motion was granted by Order of June 7, 2000. On June 20, 2000, the Department filed a stipulation between itself and Barton.¹¹ In its filing, the Department requests that the Board allow withdrawal of the Department's allegations in this Docket to the extent, and only to the extent, that such allegations apply to Barton.¹² The Department further requests that the Board approve the stipulation in its entirety. Barton's stipulation is consistent with the Department's request.

III. PARTIES' POSITIONS

A. The Department

The Department takes the following position in this matter. It notes that the Two Municipals are required by law to acquire all cost-effective energy efficiency resources and that, rather than doing so by their own activities, they are relying on the EEU to perform this task for them. Since the Two Municipals signed an MOU that the EEU's ongoing activities to acquire cost-effective energy

10. Paragraph 5.b.ii of the MOU and the Board's contract with the Contract Administrator authorizes the Contract Administrator to resolve disputes that arise regarding the EEU's performance under its contract with the Board. The Board's contract with the Contract Administrator states that if the Contract Administrator is unable to resolve a dispute within 30 days, he will refer the dispute to the Board for review and will provide the Board with a summary of the actions he has taken to try to resolve the complaint.

11. The filing also contains a copy of Exhibit DPS-1 (Attachment A) and a copy of a letter from Barton to its customers to inform them that Barton will be transferring Customer Information to the EEU (Attachment B).

12. We accept the Department's request to withdraw its allegations against Barton in this Docket.

efficiency resources should be deemed to satisfy the Two Municipals' own demand-side management ("DSM") obligations, then the EEU should be allowed to use the same Customer Information that the Two Municipals used in their own prior efforts to perform those obligations. Furthermore, any such Customer Information will be provided to an entity performing an essential utility service obligation, the acquisition of cost-effective DSM resources.¹³

The Department rejects the position that some Customer Information should be provided to the EEU only after customer consent. It notes that the Two Municipals did not apply such a prior consent hurdle to the use of that information by other parties in the past. The Department requests that the Board order the Two Municipals promptly to provide to VEIC the Customer Information requested in the Contract Administrator's March 1, 2000 memorandum to electric utilities, and the attachments thereto (Exh. DPS-1), to the extent that such information is in their possession. This provision should include the link(s) between customer name, account number, and usage information. While the Department does contend that the evidence supports a finding that the Two Municipals have violated the MOU and the Order, the Department asks the Board to grant its requests regardless of whether the Board reaches this conclusion or even decides the issues concerning violations of the MOU.¹⁴

The Department rejects the claim that protection of customer privacy is threatened in this Docket. The Department notes that, as with all customer information it receives as a result of its activities, VEIC will be required to treat Customer Information in accordance with the non-disclosure provisions and procedures contained in VEIC's contract with the Board.¹⁵ While the Department is generally concerned about the issue of customer confidentiality and protecting customer-specific information, it recognizes the need for a specific situation-by-situation review. Because the matter at hand is a specific situation in which VEIC is acting under clearly defined confidentiality guidelines to deliver an essential utility service, the Department does not believe that this situation is at odds with its general policy.¹⁶

The Department also requests that the Board prohibit the Two Municipals from: (1) using or

13. DPS proposal for decision ("PFD") at 1-2.

14. PFD at 1-2.

15. *Id* at 1.

16. Tr. 5/3/00 at 138-41 and 151 (Parker).

instituting customer consent procedures in regard to data transfer to VEIC or withholding Customer Information from VEIC on the basis of customer non-consent; and (2) issuing notification to customers stating or suggesting that customers may object to transfer of information to VEIC and/or that such transfer will not occur if a customer objects.¹⁷

B. The Two Municipals

The Two Municipals assert that the MOU is a contract with a number of ambiguous provisions and that, under Vermont law, all ambiguous provisions must be construed against the drafter. The Two Municipals then contend that the Department was the drafter of those provisions of the MOU that govern the transfer of data. Specifically, the Two Municipals take the position that Paragraph 15 is ambiguous because it does not spell out exactly what data must be transferred, and the exact terms and manner of transfer; it only provides for data to be transferred in a "reasonable manner." The Two Municipals understood the transfer to be required on an "as needed" basis only and not "mass transfer of data."¹⁸

Another central position of the Two Municipals is that the use of Customer Information for marketing or other purposes without the customer's knowledge or consent is inconsistent with privacy principles. The Two Municipals propose two options that they consider preferable to the data transfer requirements sought by the Contract Administrator: (1) an "opt-in" provision requiring affirmative customer consent prior to data transfer (the Two Municipals' preferred approach); or (2) an "opt-out" provision requiring customer notification prior to the transfer of any data – with Customer Information being provided to VEIC for all customers except those who object to such transfer. Given their concerns, the Two Municipals have proposed to provide VEIC with the following information only: (1) a list of names and addresses; and (2) a set of all other data, but listed only by account numbers. The link between customer name/address and all other data would not be provided unless the customer chose to provide the account number directly to VEIC.¹⁹

17. PFD at 1-2.

18. Two Municipals' brief at 1-3.

19. Two Municipals' proposed findings of fact ("PFF") at ¶ 3-5. We note here that there is some ambiguity in the record as to Hyde Park's position. At the hearing, Hyde Park's witness stated that it would not be willing to provide customer names, addresses, and phone numbers without prior customer consent. Tr. at 84-86 (Harvey).

The Two Municipals point to the treatment of customer information in California and Pennsylvania to buttress their position on privacy. They also cite a number of Vermont and Federal laws that deal with privacy issues.²⁰ While recognizing that "none of these laws are directly applicable to the issue presently before the Board" the Two Municipals believe that their position, that customer specific data must not be shared with third parties without the knowledge and consent of the customer, is supported by the policies embodied in such laws.²¹

Under the terms of the stipulation between Barton and the Department, Barton agrees to transfer Customer Information to VEIC to the extent that such information is in Barton's possession within two weeks of the date of the stipulation. Barton will also provide the links between customer name and address, customer account number and usage information. Prior customer consent will not be sought by Barton, but Barton is not barred from notifying customers that Customer Information is being provided to the EEU; however, such notice must be in a form appended to the stipulation as Attachment B. The DPS agrees not to pursue specific allegations it has raised in this Docket with respect to Barton's alleged non-compliance with the MOU, and the Department further agrees not to seek penalties or sanctions relative to any increased costs allegedly imposed on the EEU due to Barton's failure to provide VEIC with data prior to, and through the date of, transfer of Customer Information as agreed upon in the stipulation. Since this stipulation resolves all issues in this Docket between Barton and the Department, we accept the stipulation in its entirety.

IV. FINDINGS OF FACT

A. Docket 5980 Memorandum of Understanding

1. The Board opened an investigation (Docket 5980) to consider whether to establish an energy efficiency utility. After extensive litigation over DSM performance and implementation, the

However, both Morrisville and Hyde Park did join in the Two Municipals' brief; therefore, we accept Hyde Park's final position as that included in its brief and proposed findings of fact.

20. The Two Municipals cite VEIC's failure to register its name as a failure to comply with "one of the most basic of consumer-protection and information-related laws." We are not persuaded that registration of the EEU name is material to the matter at hand.

21. Two Municipals' brief at 2-6.

parties to Docket 5980 entered into a Memorandum of Understanding in which they agreed to support implementation of an energy efficiency utility. In return for their support of the EEU, the MOU provided that (1) electric utilities' past DSM failings would be "forgiven"; and (2) the EEU's activities would be judged to fulfill utilities' future obligations to provide system-wide DSM services. Under the terms of the MOU, the EEU is to deliver energy efficiency programs in Vermont and to help utilities comply with their obligations under 30 V.S.A. § 218c.²²

2. The Board approved the MOU, thereby deciding that implementation of energy efficiency programs by the EEU would satisfy the utilities' ongoing legal obligations to provide system-wide DSM services under 30 V.S.A § 218c. Therefore, the EEU, although not under the direct contractual control of the electric utilities, is providing an essential utility service.²³

B. The EEU Contract and its Confidentiality Provisions

3. The Board awarded the contract for the EEU to the Vermont Energy Investment Corporation ("VEIC") and that firm now is performing EEU services. The project of VEIC charged with EEU responsibilities is currently operating under the name of Efficiency Vermont.²⁴

4. VEIC's contract with the Board includes a requirement that VEIC must follow confidentiality procedures with respect to customer information.²⁵

5. VEIC's contract with the Board requires its subcontractors to maintain the same confidentiality arrangements as EVT.²⁶

6. The Board's contract with VEIC also incorporates a portion of its response to the Board's request for proposal that includes VEIC's provisions for the treatment of confidential information.²⁷

22. Tr. at 135-136 (Parker).

23. *Id.* at 136 (Parker).

24. Exh. Board-2; tr. at 25 (Hamilton). The testimony discusses the contract between the Board and VEIC. As the contract speaks for itself (tr. at 26), we include it in the evidentiary record as Exhibit Board-2. Alternatively, under 3 V.S.A. § 810(4), we could take administrative notice of this document.

25. Tr. at 26 (Hamilton).

26. Exh. Board-2 at A-3.

27. Tr. at 26, 66 (Hamilton); exh. Board-2, Attachment G.

7. The provisions and procedures governing protection of customer information incorporated in the Board's contract with VEIC are appropriate.²⁸

8. VEIC is acting under very clearly defined confidentiality guidelines to deliver an essential utility service.²⁹

C. Customer Information to be transferred to the EEU

9. An Information Technology Working Group ("IT Group") that included representatives of electric utilities, DPS staff, and other participants, met from at least July, 1999, through January, 2000, to discuss the nature and format of information that would likely be transferred to the EEU. The IT group meetings were attended by many parties to Docket 5980, including a representative of the Vermont Public Power Supply Authority ("VPPSA"), of which the Two Municipals are members. The VPPSA representative repeatedly raised the issue of the confidentiality of customer information. Vermont electric utilities had notice, prior to the Contract Administrator's memorandum of March 1, 2000, of the types of information that would be provided to the EEU.³⁰

10. On March 1, 2000, the Contract Administrator issued a memorandum to all electric utilities stating that they should begin immediately to transfer Customer Information to VEIC. The Customer Information to be transferred consists of data described in three attachments to the Contract Administrator's memorandum. The attachments seek data, to the extent available, in three overall categories: (1) customer-specific information such as account number, service location, name, address, phone, rate class, etc.; (2) usage data with account number, location, kWh, meter readings, etc.; and (3) measure data with account number, location, program code, end use, date of installation, kWh saved, etc. The data requested in the attachments to the memorandum include the information VEIC is seeking from all electric utilities. The attachments to the Contract Administrator's memorandum of March 1, 2000, were developed by the IT Group.³¹

28. *Id.* at 137 (Parker).

29. *Id.* at 138-41 and 151 (Parker).

30. *Id.* at 101 (Currier); 144-145 (Parker); 116-117 and 121-123 (Gibbons); 144-146 (Parker); 27 (Hamilton).

31. Exh. DPS-1; tr. at 27 (Hamilton).

D. The Proposals and Transfer of Customer Information to Date

11. The proposal of Morrisville is to supply the Customer Information to VEIC in two separate files: (1) a list of names and addresses; and (2) a set of all other data listed only by account number. Morrisville does not intend to provide the link between files. At the hearing, Hyde Park proposed to give VEIC a file with account number and usage information, but, at that time, took the position that it would only be willing to provide VEIC with customer name, address, and phone number and the link to the account number on an individual case-by-case basis, with the prior consent of the customer.³² However, in the Two Municipals' brief, Hyde Park proposes to supply VEIC with two files, one of which would include a list of names and addresses.³³

12. In order to obtain the links between the files, VEIC would have to contact the customer or utility and obtain consent on a customer-by-customer basis.³⁴

13. As of the hearing date, Hyde Park had not transferred any Customer Information to VEIC.³⁵

14. As of the hearing date, Morrisville had supplied VEIC with incomplete Customer Information, although Morrisville had provided VEIC with some consumption data and account numbers. No customer name or address information has been supplied to VEIC.³⁶

E. Impact of the Lack of Customer Information on the EEU

15. The lack of Customer Information has to date, and will in the future, have negative repercussions on the EEU's ability to achieve cost-effective energy efficiency resources. This has been true particularly in the commercial sector where VEIC plans include making special efforts to recruit commercial customers to participate in VEIC's programs. In the future, VEIC may also want to recruit high-use residential customers.³⁷

32. Tr. at 85-6 (Harvey).

33. Exh. Board-1; tr. at 154, 172-173 (Arnold); tr. at 199-200 (Corse); PFF at 3.

34. Tr. at 53-4, 75-7, and 154 (Hamilton); exh. Board-1 at 2.

35. *Id.* at 90 (Harvey); exh. DPS-2.

36. *Id.* at 200 (Corse); exh. DPS-2.

37. *Id.* at 33-37 (Hamilton).

16. The lack of Customer Information will have a negative impact on VEIC's ability to perform its contractual obligations to the Board. For example, VEIC's performance will be judged, in part, on its delivery of services geographically across the state, and by service territory. The lack of Customer Information from some utilities creates inequities in service delivery that are beyond VEIC's control and will affect its ability to target program delivery to certain areas of the state.³⁸

17. The lack of Customer Information also raises the costs of meeting VEIC's contractual obligations.³⁹

18. VEIC's contract includes reporting requirements, both to the Board and the state's electric distribution utilities. VEIC's ability to meet these requirements could be compromised by a lack of Customer Information.⁴⁰

19. Without Customer Information, VEIC will be unable to provide the same level of customer service to all customers who have paid for that service through the energy efficiency charge. For example, when a customer calls the EEU through the toll-free number (published on the electric bills of the Two Municipals' customers), a customer representative will call up the customer's account on a data screen so as to more effectively address the customer's concerns and needs without any undue delay. Without Customer Information, it will be more difficult to direct that customer towards the appropriate efficiency program for his or her needs.⁴¹

20. The lack of Customer Information will also affect customer service since VEIC's business development specialists plan to make field visits to identify projects that have the potential for significant energy efficiency savings. They cannot target such projects without appropriate Customer Information.⁴²

21. VEIC is projecting that in the Efficient Products Program, over 30,000 customer purchases will require rebate verification in the year 2000. In order to perform this rebate verification, VEIC must supply Customer Information to its subcontractor, Energy Federation, Inc. ("EFI"). VEIC

38. *Id.* at 35-40 (Hamilton).

39. *Id.* at 40 (Hamilton).

40. *Id.* at 55-57 (Hamilton).

41. *Id.* at 55-56 (Hamilton).

42. *Id.* at 41 (Hamilton).

has already supplied some Customer Information to EFI, as did many of the state's electric utilities when they were implementing this program.⁴³

22. There have already been significant negative impacts on the Efficient Products Program from the lack of Customer Information. VEIC is unable to provide verification for customer rebates (which are submitted to EFI after a customer purchases a product) without Customer Information. VEIC must then incur significant extra costs to try to verify the customer's purchase and provide the customer with the rebate.⁴⁴

23. In the Single-Family Low-Income Program, the lack of Customer Information will significantly impact VEIC's ability to perform energy audits for all eligible customers. Without Customer Information, it will be more difficult to identify customers for whom the audit should be performed. Without Customer Information such as billing history, it will also be more difficult to do an effective on-site analysis.⁴⁵

24. Differences between utility service territories, including diverse treatment of Customer Information, is what the EEU was intended to avoid when it was charged with the delivery of a consistent set of programs and services statewide.⁴⁶

25. The Board addressed the issue of distributional equity in its Order, concluding that "the settlement can achieve a reasonable level of distributional equity in the delivery of efficiency services among Vermont's customers – indeed, a greater equity than the current multi-utility programs have given us, because of variations in programs and program designs across the many service territories."⁴⁷

F. Customer Notification, Customer Consent, and Customer's Right to Not be Contacted

26. Customer consent is not appropriate for the transfer of Customer Information from the utilities to VEIC. A customer consent requirement is likely to lead to the same negative impacts as the lack of Customer Information detailed in the findings above.⁴⁸

43. *Id.* at 42 (Hamilton).

44. *Id.* at 41-45 (Hamilton).

45. *Id.* at 51-52 (Hamilton).

46. *Id.* at 142 (Parker).

47. Order at 50.

48. Tr. at 136, 141 (Parker).

27. If customer consent is required prior to when an efficiency service (demand-side service) is offered, but is not required before a power plant service (supply-side service) is offered, then this creates a competitive disadvantage for efficiency.⁴⁹

28. In the March 1, 2000 memorandum, the Contract Administrator informed all electric utilities that VEIC will maintain a "no-contact" list for customers who object to being contacted by VEIC. VEIC will mark any such customer's file as a "no-contact" in VEIC's database.⁵⁰

29. The Department has already agreed, in negotiations with Vermont Marble, on specific language that will be sent to Vermont Marble's customers after the transfer of data to VEIC, informing them that their Customer Information has been provided to VEIC. Upon notification, they may request, if they choose, to have their names put on a no-contact list.⁵¹

G. Reasonableness of the Request to Transfer Customer Information to the EEU

30. All electric utilities were notified via a letter from the Board dated February 9, 2000 (also referenced in the Contract Administrator's memorandum of March 1, 2000), that the Board considered "the confidential information that the state's electric utilities have been asked to provide to the Contract Administrator and VEIC is appropriately protected from disclosure during this critical transition period."⁵²

31. The request for Customer Information to be transferred to the EEU is narrowly defined, specific in its purpose, and consistent with the way utilities have had access to the same information in the past when they were responsible for the delivery of energy efficiency programs.⁵³

32. It is reasonable for the EEU to have access to the same information that the utilities had in the past when they were responsible for delivery of energy efficiency programs.⁵⁴

33. It is not reasonable to provide information in a way that negatively affects the efficiency of

49. *Id.* at 150 (Parker).

50. Exh. DPS-1; tr. of 5/3/00 at 140 (Parker).

51. Tr. at 140 (Parker).

52. Exh. DPS-1.

53. Tr. at 137 (Parker).

54. *Id.* at 147 (Parker).

VEIC's delivery of programs, the quality of customer service, and its ability to implement programs effectively.⁵⁵

V. CONCLUSIONS OF LAW

1. 30 V.S.A. § 209 authorizes the Board to appoint an entity to perform energy efficiency programs and empowers the Board to specify that implementation of energy efficiency programs by such an entity is deemed to satisfy all or part of a utility's ongoing legal obligations under 30 V.S.A. § 218c. 30 V.S.A. § 218c requires Vermont electric utilities to deliver comprehensive energy efficiency programs.⁵⁶

We conclude, based on the record evidence, that since EEU programs are satisfying the obligations of the utilities to deliver system-wide energy efficiency programs, the EEU is providing an essential utility service.

2. Paragraph 15 of the MOU states as follows:

DUs⁵⁷ shall support and cooperate in good faith with the EEU to achieve the effective delivery of, and savings from, the programs implemented by the EEU in accordance with this MOU, including: providing customer information to the EEU in a reasonable manner and under appropriate provisions to prevent disclosure to unauthorized entities or personnel; customer referrals and contacts to EEU programs; and coordination of customer service, power quality, and any other DU functions which may intersect with EEU activities. In connection with such cooperation, coordination, and provision of information, the EEU and each DU shall provide reasonable notice and shall act in good faith to accommodate the reasonable considerations of the EEU and the DU.⁵⁸

We conclude that effective delivery of EEU programs requires the utilities to provide the EEU with Customer Information. Without such information, VEIC's ability to perform its contract responsibilities will be impaired. We further believe that the evidence shows that the Contract Administrator's request to provide the EEU with Customer Information is reasonable; the information

55. *Id.* at 149 (Parker).

56. 30 V.S.A. § 209; 30 V.S.A. § 218c.

57. Distribution Utility ("DU")

58. Order, Appendix A at A-11.

has been used for similar purposes in the past and should be available to the EEU so that it can adequately perform its role in the fulfillment of the utilities obligations under 30 V.S.A.

§ 218c.

3. Paragraph 12 of the MOU states as follows:

The Parties agree to the transition planning framework document appended as Attachment A, which sets out a strategy and process to plan for and accomplish the transition to the EEU from current DU DSM efforts. The Parties agree that the goals of such transition shall be: (a) to preserve effective program delivery, infrastructure and expertise related to Core Programs and DUP; (b) to restrain rate impacts of the transition caused for some DUs by changing from past DSM accounting and rate treatment to a pay-as-we-go approach; and (c) to enable an EEU which, as soon as possible, effectively delivers and attains savings from the Core Programs and other System-wide Programs as may be approved by the Board. The Parties shall work in good faith to accomplish these goals and an effective transition to the EEU.⁵⁹

The evidence shows that Customer Information is needed by VEIC to support a smooth transition to the EEU structure. The provision of Customer Information from the Two Municipals to VEIC is consistent with the utilities' obligation to support a smooth transition to the EEU.

4. The MOU at ¶ 5.c.ii states as follows:

The Board's contract with the EEU shall include appropriate terms to ensure that confidential information provided to the EEU, including but not necessarily limited to customer-specific information supplied by a DU, is not disclosed by the EEU to unauthorized entities or personnel.⁶⁰

The evidence in the record shows that the Board's contract with VEIC includes appropriate terms for the treatment of confidential customer information. Further, the record indicates that VEIC has agreed to procedures that address the confidentiality of Customer Information.

5. The MOU at ¶ 66 states as follows:

Before the Board, the General Assembly, and the public, and in communications with DU customers, the Parties agree in good faith to support the approval, establishment, funding, and implementation of the EEU in accordance with this MOU. The Parties agree to take no action intended or reasonably likely to undermine the approval, establishment, funding, and implementation of the EEU in accordance with this MOU.⁶¹

59. Order, Appendix A at A-10.

60. *Id.* at A-4.

61. *Id.* at A-27.

Similarly, the bilateral agreements between the Two Municipals and the Department, approved by the Board in its Order in Docket 5980, each have language that creates a parallel obligation. The relevant language from the bilaterals reads as follows:

. . . [T]he provisions of paragraph 66 of the MOU shall not create an obligation on the part of the Municipal Utility to take action, but shall apply when the Municipal Utility chooses to act or communicate or is otherwise acting or communicating with respect to or concerning matters which reasonably could affect the approval, establishment, funding and implementation of the EEU in accordance with the MOU and this bilateral agreement.⁶²

We conclude that it is not reasonable to provide for customer consent prior to the transfer of Customer Information to the EEU. The evidence shows that requiring customer consent prior to the transfer of Customer Information to VEIC is reasonably likely to undermine the successful establishment of the EEU. The withholding of Customer Information pending customer approval of the transfer could reasonably have a negative affect on program implementation.

VI. DISCUSSION

The parties' positions in this matter have been quite divergent. On the one hand, the Department raises allegations that because the Two Municipals have been unwilling to provide all Customer Information to VEIC, they have not acted in good faith to support the EEU and have breached some of the terms of the MOU. The Two Municipals counter that the terms of the MOU are ambiguous and, thus, they are entitled to the benefit of the doubt in interpretation of the language of the MOU. Furthermore, their unwillingness to provide all requested information to VEIC is driven by their concerns over customer privacy.

As to the interpretation of the language of the MOU, paragraph 15 sets out a "reasonableness" standard.⁶³ In dealing with this issue, we must balance the goals of the EEU with customer privacy concerns. The Board has long maintained a policy favoring privacy protection for customer-specific information, which we reiterate here. However, given the evidence at hand, providing the customer

62. Order, Appendix G at A-54; Appendix L at A-74; Appendix W at A-120.

63. The Board rejects the Two Municipals' assertion that the DPS drafted the MOU and that, therefore, any interpretation must be construed in favor of the Two Municipals. The Two Municipals offered no evidence as to who drafted the MOU.

information to VEIC in the manner requested by the Contract Administrator is reasonable. The evidence shows that, if the Two Municipals were not to provide the complete set of Customer Information requested by the Contract Administrator to VEIC, the risk of negative impacts on VEIC's performance would be great. Since VEIC is acting to satisfy utility obligations under 218c, including those of the Two Municipals, VEIC is performing an essential utility obligation and should have access to the Customer Information under the same conditions as utilities have always had access in the past.⁶⁴

Under the Order, EEU implementation of system-wide energy efficiency programs will satisfy the obligations of the Two Municipals under 30 V.S.A. § 218c. The Board entered into a contract with terms and conditions necessary for VEIC to fulfill this commitment and ensure that the EEU will meet those goals. We are concerned that VEIC's obligations under the terms of its contract with the Board, and thus the statutory obligations, cannot be satisfactorily fulfilled without all available Customer Information. The evidence shows that there are many contractual and policy goals that could be affected if VEIC is unable to gain access to all available Customer Information. The level of energy efficiency savings may be affected, the number of customers served by the EEU programs may be affected, and progress in providing uniformity of energy efficiency services across the state could be thwarted by the lack of Customer Information.

For reasons noted below, the Board believes the record shows that there are adequate measures in place to protect customer confidentiality. The evidence shows that inappropriate disclosure of the Confidential Information will not result from our conclusion that the Two Municipals must provide the information since the Board's contract with VEIC includes provisions that require the confidential treatment of customer information. No one presented evidence that showed that these provisions are inadequate.⁶⁵ The Board concludes that these requirements are sufficient to prohibit VEIC from using the information for other than Board-sanctioned purposes.

64. The Two Municipals would be unable to effectively acquire all cost-effective energy efficiency resources without the Customer Information that they seek to keep confidential. As the EEU is performing the same function in lieu of the utilities, the EEU needs access to the same information.

65. The Two Municipals cite Hamilton testimony that VEIC has already released customer information to a third party, Energy Federation, Inc. as underscoring the Two Municipals' concern that information will be shared without customer consent. However, we note that EFI is a subcontractor to EVT and is performing a validation function for EVT just as it has for many of the state's electric utilities when they were implementing this program in the past. Two Municipals brief at 5; finding 22, *supra*.

The Board agrees with the Department that the provision of Customer Information is consistent with the utilities' obligation to support a smooth transition to the EEU. However, the Board does not find that there has been a violation of the MOU. The Board rejects the Department's claim that the failure to provide Customer Information is, in and of itself, evidence of a lack of good faith on the part of the Two Municipals. We accept that the Two Municipals have serious concerns about confidential treatment of Customer Information; they have not acted in bad faith.

We reject the request of the Two Municipals to notify customers prior to the transfer of Customer Information to the EEU. The evidence shows that prior customer consent for release of this information will hamper the EEU's performance and impinge on its ability to achieve all cost-effective demand-side resources. We are also concerned that it could put demand-side resources at a disadvantage with respect to supply-side resources. It is a long-standing policy of this Board and the state that energy efficiency resources must be treated on par with supply-side resources. These policy goals could be negatively impacted by granting the request of the Two Municipals for prior customer notification.

Furthermore, under paragraph 66 of the MOU, the utilities agreed not to undermine the implementation of the EEU. The evidence shows that customer notification prior to the transfer of Customer Information could undermine the implementation of programs by VEIC. The Board concludes that notification restrictions are appropriate; utilities will be prohibited from providing notice containing customer consent procedures or options for customers to object to the data transfer.

We note that the Department has already agreed, in negotiations with both Barton and Vermont Marble, on specific language that will be sent to the customers of these two utilities after the transfer of Customer Information has occurred so that customers may request to have their names put on a no-contact list. We will require the Two Municipals to work with the Department on appropriate language for such notification and to obtain approval from the Clerk of the Board before issuing such after-the-fact notification of the transfer of data to their customers. We believe that this narrowly tailored restriction on the commercial notification to customers is appropriate since it is designed to enforce the agreed-upon obligation of the utilities not to undermine the implementation of the EEU. We applaud VEIC for agreeing to a no-contact policy for customers who make such a request. This will help ensure the privacy of those individuals who do not want to receive any marketing outreach from the EEU.

Finally, we do not believe that customer privacy is a material issue in the statutory requirement that utilities obtain all cost-effective DSM. While the Board reaffirms its longstanding policy that customer information should be treated as confidential, the facts show that customer privacy is no more an issue for VEIC (acting as the EEU) than it has traditionally been for the state's utilities. We are not persuaded that examples of right to privacy laws cited by the Two Municipals in California and Pennsylvania are relevant in Vermont since we have not yet opened any of our service territories to retail competition as have those two states. However, if and when retail competition arises in any Vermont service territory, the Board will revisit this issue.

VII. CONCLUSION

This Order affirms that all of the available historical Customer Information requested by the Contract Administrator shall be provided to the EEU as shall all similar information requested by the Contract Administrator or the EEU itself in the future. The Board concludes that the Two Municipals must transmit all the Customer Information sought by the Contract Administrator as detailed in Exh. DPS-1, to the extent that such information is in their possession. This Customer Information must include the link between customer name, account number, and usage information. The evidence demonstrates that VEIC needs the requested Customer Information, including the link(s) between customer name, account number, and usage information, in order to effectively and efficiently deliver the Core Programs and acquire energy efficiency resources on behalf of ratepayers throughout the state. It is reasonable under, consistent with, and necessary to fulfillment of the MOU and Order to require the provision of such information to VEIC, given its need for the information, the confidentiality provisions in VEIC's contract with the Board, and the relationship between the EEU and the DSM obligations of the utilities.

The benefits to the public of release of this information to the EEU outweighs any potential cost to individual customer privacy. Any such cost to an individual is minimized by the confidentiality protections in place and the agreement of VEIC to respect any individual's request not to be contacted through VEIC's marketing outreach efforts.

We also conclude that there is great value to uniformity around the state for the provision of Customer Information to the EEU. We are concerned about potential inequities in the provision of energy efficiency services among utility territories which are otherwise likely to result if we do not

apply consistency in the treatment of Customer Information. In this case, of Vermont's 22 electric utilities, 20 utilities serving approximately 317,000 customers have joined in an agreement to provide Customer Information to the EEU; two utilities with approximately 4,500 customers request special treatment of Customer Information. The implication of granting the request of these two utilities is that demand-side resources will be unfairly disadvantaged and customers in those two service areas may be disadvantaged as well if they are dissuaded from partaking of the services that the EEU will bring to the rest of the state. This is an unsatisfactory outcome and one that we will not endorse.

However, there is a distinction between (1) providing customer information to an energy efficiency utility that is satisfying the regulated monopolies' obligation to provide energy efficiency services and is also under contract to the state's regulatory authority; and (2) providing customer information to unregulated entities in a competitive market. The Board reaffirms its longstanding policy that customer information should be treated as confidential. If the state moves to a competitive market for the provision of retail energy services, then, at that time, we will examine what the appropriate rights of consumers are under a competitive market and what, if any, protections should be afforded to those consumers.

VIII. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The Two Municipals each shall, by July 10, 2000, transfer to VEIC all of the Customer Information sought by the attachments to the Contract Administrator's memorandum of March 1, 2000, to the extent such information is in their possession. The Customer Information shall be transferred in electronic format where available. This requirement explicitly includes providing the links between customer name and address, on the one hand, and customer account number and other data such as usage information, on the other hand.
2. The Two Municipals shall not institute or use customer consent procedures with respect to data transfer to VEIC or withhold information from VEIC on the basis that a customer does not consent to provision of the customer's information.
3. The Two Municipals shall not, either individually or collectively, issue a notice to customers concerning data transfer to VEIC which states or suggests that customers may object to transfer of

information to VEIC and/or that such transfer will not occur if a customer objects.

4. The Two Municipals shall consult with the Department and get approval of the Clerk of the Board before issuing any after-the-fact notification of the transfer of data to their customers.

5. The stipulation between Barton and the Department is approved in its entirety.

So Ordered.

Dated at Montpelier, Vermont, this 23rd day of June, 2000.

<u>s/Michael H. Dworkin</u>)	
)	PUBLIC SERVICE
)	
_____)	BOARD
)	
)	OF VERMONT
<u>s/David C. Coen</u>)	

OFFICE OF THE CLERK

FILED: June 23, 2000

ATTEST: Judith C. Whitney
Deputy Clerk of the Board

Notice to Readers: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or mail) of any technical errors, in order that any necessary corrections may be made. (E-mail address: Clerk @psb.state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.