UNITED STATES OF AMERICA

BEFORE THE

FEDERAL TRADE COMMISSION

FCRA Risk-Based Pricing Rule Amendments ) Project No. R411009

**COMMENTS OF THE AMERICAN PUBLIC POWER ASSOCIATION AND THE AMERICAN PUBLIC GAS ASSOCIATION**

The American Public Power Association ("APPA") and the American Public Gas Association ("APGA") submit their comments in response to the Federal Trade Commission's ("FTC" or "Commission") proposed rule, "Fair Credit Reporting Risk-Based Pricing Regulations," published in the *Federal Register* on March 15, 2011.[1]

## I. INTERESTS OF THE PARTIES

APPA and APGA member utilities are not-for-profit utility systems that were created by state or local governments to serve the public interest. Many of these publicly owned utilities provide customers with more than one utility service, and these may include electricity, natural gas, water, sewer, or wastewater, for example. These utilities serve several large communities, but most publicly owned utilities are small. For example, over 70 percent of APPA's members serve communities with fewer than 10,000 residents.

APPA is the national service organization representing the interests of not-for-profit, publicly owned electric utilities throughout the United States. More than 2,000 public power systems provide over 15 percent of all kilowatt-hour sales to ultimate customers, and do business in every state except Hawaii. APPA utility members' primary goal is to provide customers in the

[1] 76 *Fed. Reg*. 13,902 (March 15, 2011).

communities they serve with reliable electric power (and, in some cases, other utility services) at the lowest reasonable cost, consistent with good environmental stewardship. This orientation aligns the interests of these utilities with the long-term interests of the residents and businesses in their communities.

APGA is the national association for publicly owned natural gas distribution systems. There are approximately 1,000 public gas systems in 36 states, and over 700 of these systems are APGA members. Publicly owned gas systems are not-for-profit, retail distribution entities owned by, and accountable to, the citizens they serve. They include municipal gas distribution systems, public utility districts, county districts, and other public agencies that have natural gas distribution facilities. The purpose of a publicly owned natural gas system is to provide reliable, safe and affordable natural gas (and in some cases, other utility services) to the community it serves.

## II. COMMENTS

The Fair Credit Reporting Act ("FCRA") requires entities that use risk-based pricing in setting credit terms to provide customers with a risk-based pricing notice if the entity uses information from a consumer report as a factor in setting terms that are "materially less favorable than the most favorable terms available to a substantial portion of consumers."[2] The currently-required risk-based notice provides the consumer with practical, basic information: that a credit report was used to establish the credit terms, and how to get in touch with the consumer reporting agency ("CRA") for a copy of the report or to dispute information in the report.[3] (The three

[2] 15 U.S.C. §1681m (h).

[3] The required notice includes statements to the effect that the entity has used information from a credit report to make the credit decision; that the terms offered are less favorable than terms offered to consumers with better credit histories; that the consumer can obtain a free copy of the credit report from the CRA; and that the consumer has the right to dispute inaccurate information in the credit report. The notice also provides contact information for the CRA (or CRAs, if the entity uses more than one).

major CRAs are Equifax Credit Information Services, Trans Union LLC, and Experian Information Solutions, Inc.)

The Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") amended the FCRA to require additional information in the risk-based notice if the entity develops risk-based credit terms using credit scores from the credit report. The entity must report the consumer's credit score, the range of possible credit scores under the model used, key factors that adversely affected the credit score, the date on which the credit score was created, and the name of the person or entity that provided the credit score.

These additions are significant, and they will substantially increase the burden of compliance for many entities. Currently, an entity can comply by using one or more model form letters to notify all of its affected customers. However, in order to include the new information related to credit scores in the notice, the entity will have to send an individually-tailored form letter to each affected customer. For many entities, this will be a fundamental change in their risk-based notice process. Thus, in implementing these new provisions, the Commission must consider the additional costs involved in changing this process, and as required under the FCRA, consider providing exceptions to the notice requirement. The FCRA requires the Commission to address in its rules "exceptions to the notice requirement under this subsection for classes of persons or transactions regarding which the agencies determine that notice would not significantly benefit consumers."[4]

Generally, utilities are subject to the FCRA's risk-based notice provisions if they use reports from a CRA to determine which residential customers must make security deposits in order to receive utility service. Publicly owned utilities require customer deposits to ensure payment for services and as a means to reduce uncollectible customer accounts. Since publicly

[4] 15 U.S.C. §1681m (h)(6)(B)(iii).

owned utilities are units of state and local government, there are no shareholders to absorb any losses. Thus uncollectible accounts, as well as any increases in costs associated with billing administration, ultimately have to be paid for by revenues collected from a publicly owned utility's remaining customers.

APPA conducts surveys of its member utilities' customer service policies. The most recent survey[5] shows that 86 percent of the utility respondents collect deposits from residential customers that rent their residences, and 63 percent collect deposits from residential customers that own their residences. Approximately 25 percent of the respondents that collect security deposits consider the credit history of their residential customers when setting the amount of the deposit.

In setting deposit levels, it is each individual utility's policy decision to collect a fixed deposit amount from all customers or to base the deposit on credit history. There are good reasons for choosing either of these policies. Requiring a security deposit from all customers eliminates the need for credit assessments, risk analysis, and risk-based notices. On the other hand, publicly owned utilities are directly accountable to their customer-owners, and risk-based deposit policies benefit their customers that have good credit profiles.

APPA and APGA member utilities believe there will be significant costs to comply with the proposed rules requiring that information on credit scores be included in the risk-based notice to customers. In general, publicly owned utilities do not have their customers' credit scores, and, those that do, do not know how the credit scores were developed or what key factors affected a consumer's score. It is unreasonable to ask publicly owned utilities to report on information that they do not have.

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[5] The *2010 APPPA Customer Service Policies Survey* was conducted in August 2010. There were 236 utility respondents to the survey.

In many cases, the utility's contract with a CRA provides for abbreviated reports that simply tell the utility whether or not a customer is above or below the score used by the utility to determine whether a deposit is required. The utility's customer service representatives only see the deposit decision, and do not have access to the credit report or credit score. Typically, utilities use this method both to save money and to protect customer privacy.

In order to comply with the proposed rules, such a utility would have to renegotiate its contract with the CRA. Presumably a utility could obtain full reports and scores and make its own determination of the "key factors" affecting each customer's credit score. But this, too, is unreasonable, as it would be costly (requiring additional personnel) and fraught with peril, as potentially, a utility could be liable for misinterpreting a report's key factors. The other option would be to obtain credit scores and key factors as part of a new contract with the CRA. Undoubtedly, the agency would charge more for this additional, more detailed information.

Next, the utility would have to develop new processes for using and storing the detailed information. A utility would have to modify its computer systems to flow through the information to a customer-specific notice, or given the July 2011 compliance date, produce the notices manually. One of APPA's larger members currently has select information from a CRA integrated into its customer service computer systems. This utility estimates that it would take a full year, and cost from $500,000 to $750,000, to re-program its systems to handle the new information and produce customer-specific notices. And this assumes that the CRA will develop a tool to provide data to the utility in a useful format. As a result of the costs and diversion of resources from other projects, the utility expects to change its policies to require deposits of all residential customers if the proposed rules go into effect. Another APPA utility would have to use a manual process to add the required information to the new risk-based notices, and because

of the volume of new turn-on orders each month, would have to add employees to accomplish this task. These higher employee costs would be passed on to the publicly owned utility's customers.

Moreover, at least some CRAs have designed a separate credit scoring system for use by their utility and telecommunications clients. These scores are designed to predict if the customer will pay the utility bill. They are not a measure of the consumer's overall credit standing. If the utility reported this "CRA utility" score to the consumer, it would only create confusion, as the score does not at all resemble the FICO® scores[6] that are the standard measure of consumer credit risk. The primary purpose of the risk-based pricing notice is to "improve the accuracy of consumer reports by alerting consumers to the existence of negative information in their consumer reports so that consumers can, if they choose, check their consumer reports for accuracy and correct any inaccurate information."[7] Providing notice of the specifically tailored credit score developed by CRAs for use by utilities is not the best way to advance this purpose.

Publicly owned utilities will incur substantial costs in implementing the proposed rules. Potential costs include higher fees to consumer reporting agencies, expenditures to modify computer processes, wages of additional employees, and the opportunity cost of resources diverted from other projects. These costs will be passed on to customers. Rather than incur these costs, utilities may simply decide to eliminate their risk-based deposit policies and require deposits from all residential customers.

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[6] FICO scores (so named because they were developed by the Fair Isaac Corporation) are the most widely used credit scores. FICO scores are based on five factors: payment history, amounts owed, length of credit history, new credit, and types of credit used. Consumers can obtain a FICO score for each of the CRAs at www.myfico.com. More information is available at these links: http://www.myfico.com/crediteducation/WhatsInYourScore.aspx and http://www.bestcredit.com/credit-repair/improve-credit-scores.html.

[7] 76 *Fed. Reg*. 13,903 (March 15, 2011).

It is difficult to see the benefits. The current risk-based notice provides consumers with the "why" and the "how" of getting in touch with the CRA, who is the source of their credit report information. Reporting credit scores developed specifically for the utility sector will provide little information on a consumer's overall credit report. And any benefits must be weighed against the higher costs to those customers with good credit if a utility decides to implement a uniform deposit requirement rather than incur compliance costs.

For all of these reasons, APPA and APGA ask the Commission to exempt publicly owned utilities from the new FCRA requirements to provide credit score and key factor information on their risk-based notices to customers.

In the alternative, the Commission should allow these utilities to provide only the information they have. In some cases, this could include the relevant credit scores. In other cases, it could include information on the range of scores subject to deposit requirements. It could also include a generic list of key factors used in the CRA's scoring system, if the CRA were agreeable to providing such a list. Publicly owned utilities' personnel, however, should not be placed in the untenable position of having to explain to customers the details of a CRA-specific utility scoring system they had no hand in developing.

Compliance With The Regulatory Flexibility Act ("RFA")

The Commission is required under the RFA to assess the effect that its regulations will have on small entities. The RFA in turn refers to the Small Business Act ("SBA") for the definition of "small entity." In accordance with the SBA, the Small Business Administration publishes a table of small business size standards. In regard to electric utilities, "[a] firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did

not exceed 4 million megawatt hours."[8] Ninety-eight percent of public power utilities meet the definition of small entity under this definition.

In regard to natural gas distribution systems, an entity is small if it has less than 500 employees. Nearly all of APGA's members have fewer than 500 employees and thus meet the definition of small entity.

Given that publicly owned utilities will incur significant costs to implement the proposed rules, APPA and APGA request that the Commission conduct a full RFA analysis, including consideration of ways to mitigate the adverse impact of the proposed requirements, if the Commission is not willing to provide publicly owned utilities with an exemption from these proposed rules.

[8] U.S. Small Business Administration, "Table of Small Business Size Standards Matched to North American Industry Classification System Codes," footnote 1, available at: http://www.sba.gov/sites/default/files/Size_Standards_Table.pdf.

WHEREFORE, APPA and APGA submit these comments for the FTC's consideration in this docket.

Respectfully submitted,

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