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March 31, 2003

Ms. Josephine Scarlett
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NTIA
Room 4713
14th Street and Constitution Ave., NW
Washington, D.C. 20230

Re: Request for Comments on Cancellation or Termination of Utility Services Exception to the Electronic Signatures in Global and National Commerce Act
Docket No. 010222048-3014-08

Dear Ms. Scarlett:

These comments are submitted on behalf of the low-income clients of the **National Consumer Law Center**,¹ as well as **Consumers Union**, the **Consumer Federation of America**, and the **U.S. Public Interest Research Group**.² The Department of Commerce is required to evaluate the continued need for the

¹The **National Consumer Law Center** is a nonprofit organization specializing in consumer issues on behalf of low-income people. We work with thousands of legal services, government and private attorneys, as well as community groups and organizations, from all states who represent low-income and elderly individuals on consumer issues. As a result of our daily contact with these advocates, we have seen examples of predatory practices against low-income people in almost every state in the union. It is from this vantage point – many years of dealing with the abusive transactions thrust upon the less sophisticated and less powerful in our communities – that we supply these comments. We have led the effort to ensure that electronic transactions subject to both federal and state laws provide an appropriate level of consumer protections. We publish and annually supplement fourteen practice treatises which describe the law currently applicable to all types of consumer transactions, including *Consumer Banking and Payments Law* (2d Ed. 2002), which examines consumer rights in a variety of electronic transactions. These comments are written by Margot Saunders, Managing Attorney and Olivia Wein, Staff Attorney.

²The **Consumer Federation of America** is a nonprofit association of over 300 pro-consumer groups, with a combined membership of 50 million people. CFA was founded in 1968 to advance consumers' interests through advocacy and education.

Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and services, and from noncommercial contributions, grants, and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications and

exceptions contained in 15 U.S.C. § 7003(b)(2)(A) for notices relating to the cancellation or termination of utility services (including water, heat and power). As set forth in our comments, **it is essential that this exemption be continued to ensure that families poised to lose vital and essential utility services actually receive notice of their precarious position as well as potential legal remedies.**

By exempting the notices for cancellation or termination of utility services from the effect of E-Sign, Congress was requiring that these notices continue to be provided to consumers on paper. Despite Congress' strong intention to facilitate electronic commerce by passing E-Sign, these notices were excluded because of the recognition of both their importance to consumers and the inherent fallibility of electronic communication. Neither the essential quality of these notices, nor the uncertainties of access to electronic commerce, have sufficiently changed since June, 2000 when E-Sign was enacted.

There should be no misunderstanding about the importance of these exceptions. By exempting these notices from E-Sign's coverage, Congress simply requires paper writings for these notices. Electronic delivery of these notices is permitted in addition to the writing. However, electronic records do not satisfy the underlying requirement to provide these notices in writing. If this exception were to be dropped, then these essential notices about the pending loss of essential utility services could be delivered electronically, without a paper accompaniment, and many families would likely fail to receive them as a result. The notices provide crucial information to families about their legal status and legal rights to pursue to avoid the loss of utility services. Because of the high stakes involved, it is far better to require the safest method of delivery – paper in the physical world – and allow the additional delivery method via the Internet, as does the current structure.

The enactment of the Uniform Electronic Transactions Act in a majority of states does not change this analysis. First, E-Sign is not preempted in the vast majority of these states, leaving it the prevailing law. Secondly, in a significant number of states the exemption for these notices was specifically carried through and incorporated in state law.³

The Importance of this Exemption from E-Sign

Written notice requirements for disconnection or cancellation of utility services

services carry no outside advertising and receive no commercial support.

The **U.S. Public Interest Research Group** is the national lobbying office for state PIRGs, which are non-profit, non-partisan consumer advocacy groups with half a million citizen members around the country.

³See, Section on UETA, *infra*.

The Importance of this Exemption from E-Sign

Written notice requirements for disconnection or cancellation of utility services

The notices at issue – “the cancellation or termination of utility services (including water, heat and power)”⁴ – provide consumers with crucial information which consumers can *act* upon to protect their household from loss of basic, vital utility services. While notice of the disconnection of utility service is essential for all residential consumers, the analysis of the legality of the notice will differ depending on the type of service provider. In general, many providers of natural gas, electricity, water and in-state telephone services have traditionally been regulated by the state, through the state’s public utility commission. These utilities are usually private, investor-owned companies, but because they provide such essential services to the public, they are regulated to ensure adequate and universal service as well as reasonable prices. However, municipally-owned utilities (which are publicly-owned rather than privately-owned) have generally been exempt from state utility commission oversight. The rationale for this treatment is the underlying principle that local control over utility service is more responsive to user needs than state utility commission regulation. While adequate and proper notice is essential for customers of investor-owned utilities and municipal utilities so that a customer can attempt to work out a resolution with the utility and preserve vital services, the avenues of appealing a utility determination to disconnect service will vary depending on whether the utility is regulated by the utility commission or is a municipality. Users of investor-owned utilities can appeal to the utility commission and the courts to contest a disconnection notice. As described below, states often have very specific procedures for utility disconnection notices for regulated utilities. However, customers of municipal utilities can challenge the very constitutionality of the notice in court.

Investor-Owned Utilities: State statutes and utility commission rules impose very specific requirements about the provision of utility termination notices. The right to notice of utility disconnection is so important that it has been extended to protect non-account users of utility services in landlord-tenant situations,⁵ and some states allow for a third party to also receive notice of the disconnection where the customer is elderly or disabled.⁶ Often utilities are required to provide notice by first class mail or certified mail.⁷ Some states have been even more protective by requiring additional notice attempts through personal contact or by a phone call (such non-written requirements would not be affected by the E-Sign exception at issue in these comments).⁸ Furthermore, mailed notices of disconnections are often required to be in a format

⁴15 U.S.C. §7003(b)(2)(A).

⁵ See e.g., N.J. Admin. Code sect.14:3-7.14(a)(electric, gas, water and sewer public utilities shall provide tenants with 15 day written notice and opportunity for continued service under tenant’s name and condition of service to tenants shall not be conditioned upon payment of any outstanding bills due upon the account of another person.). See also, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) 4.2 Tenant Obtaining Service in Own Name Despite Landlord’s Delinquency; 11.5.3 Landlord-Tenant Termination Situations and 12.4 Landlord-Requested Utility Disconnections.

⁶See e.g., Code Colo. Regs 723-3-13(b)(4)(electric)(customers can designate a 3rd party to receive notices of disconnection. A survey of public utility commissions (PUCs) found that 60% of PUCs required utilities to issue 3rd party notices if customers requested such notice. Health and Human Services Report to Congress for FY 1990, App. K, p. 151. See also, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) 11.2.5 Method of Providing Notice

⁷See e.g., Michigan Rule 460.2163 (1) (utility shall not shut off service . . . unless it transmits a notice, by first-class mail, to the customer or personally serves the notice not less than 10 days before the date of the proposed shutoff); 4 Colo.Code Regs. Sect 723-3-13(b)(1). Some rules allow more leeway, see, e.g., Tex. Admin. Code, tit. 16, Rule 25.29(k) (disconnection for delinquent bills) (proper notice shall consist of a separate mailing or hand delivery). See also, National Consumer Law Center, “Access to Utility Service” (2nd edition and 2002 supplement), 11.2.5 Methods of Providing Notice and Appendix A State Regulation of Utilities.

⁸See e.g., Michigan Rule 460.2152(1) (time of shutoff), adopted in Re Consumer Standards and Billing Practices for Electrical and Gas Residential Service, Case No. U-9754, (Mich. P.S.C. Oct. 2, 1992). See also Cal. Pub. Util. Code § 10010.1(b) (publicly owned utilities) (public utility shall make reasonable attempt to contact adult

that readily stands out as a disconnection notice.⁹ As is discussed *infra*, the notice of utility service disconnections is so critical to the health and safety and welfare of residential households that state legislatures and utility commissions, as well as the courts, have attempted to ensure that meaningful and effective measures are taken to communicate a threat to these essential services through adequate notice. Opening the door to allow utilities to avoid paper notice by providing electronic notice of disconnections runs contrary to state and court intent to require meaningful and adequate notice. In the case of municipal utility services, as discussed below, this could subject the practice of electronic notice of utility disconnection to constitutional challenge.

Municipal Utilities: Municipal utilities are often statutorily exempt from regulation by the state public service commission, but municipal utility terminations must comport with constitutional due process requirements.¹⁰ Receipt of utility service has been held to be a constitutionally protected property interest.¹¹ One key requirement for notice is that it be “*reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.*”(emphasis added)¹² As discussed *infra*, there are severe problems with reliance on electronic communications. Among other problems, residential Internet access is not universal and even in the limited circumstances where a household has residential Internet access, there is no guarantee that the household will continue to have access to or be accessible at a particular email address (as there is no universal system for forwarding email as there is with the US Postal Service). While a residential customer has one mailing address for traditional physical mail, consumers can have numerous email accounts which can result in less than daily monitoring of messages. Furthermore, in the case of electricity or phone service, if electronic notice of termination is not adequate to apprise the customer of the threatened termination of service (e.g., customer is unable to retrieve the message or disregards it as spam), the consumer may be disconnected and thus lose the ability to receive further electronic communications from the utility. There is a serious question whether electronic notice would be adequate to apprise customers of the threat of disconnection. Until email access is universally and reliably available in residential households, the notice of utility disconnection or cancellation should continue to be given by paper notice via 1st class mail, certified mail or personal delivery.

by phone or in person, at least 24 hours prior to termination, or if not possible, posting notice at least 48 hours prior to termination); Cal. Pub. Util. Code § 779.1(similar rule for electric, gas, heat or water corporations). *See also*, National Consumer Law Center, “Access to Utility Service” (2nd edition and 2002 supplement), 11.2.5Methods of Providing Notice and Appendix A State Regulation of Utilities.

⁹*See e.g.*, Kansas Corp. Comm., Electricity, Natural Gas and Water Billing Standards, sect. IV.E(3). *See also*, Tex. Admin. Code, tit. 16, sect. 25.29(k)(2).

¹⁰*See*, Memphis Light, Gas and Water Division v. Craft, 463 U.S. 1 (1978); Myers v. Alcoa, 752 F.2d 196 (6th Cir.1985); James v. City of St.Petersburg, 6 F.3d 1457 (11th Cir.1993); Frates v. City of Great Falls, 568 F.Supp 1330 (Dist. Ct. Mont. 1983).

¹¹*See*, Memphis Light, Gas and Water Division v. Craft, 463 U.S. 1 (1978); Myers v. Alcoa, 752 F.2d 196 (6th Cir.1985); James v. City of St.Petersburg, 6 F.3d 1457 (11th Cir.1993); Frates v. City of Great Falls, 568 F.Supp 1330 (Dist. Ct. Mont. 1983).

¹²Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

Special circumstances of tenants: Where a tenant is facing loss of utility service due to a landlord's failure to pay the account there are special notice provisions meant to apprise tenants of the threat to utility service and to provide an opportunity to place service in their own name.¹³ It is difficult to conceive of a way that utilities would be able to substitute electronic notice for paper notice in this circumstance.

Effect on consumers of the removal of the exception on current policies

Courts have held that the right to continue receiving utility service, such as electricity, is in the highest order¹⁴ and state landlord-tenant law often refers to gas, heat and electricity as "essential services."¹⁵ Utility services have been considered so essential for the sustaining of life that in many states the disconnection of utility service by a landlord is considered a constructive eviction.¹⁶ As recognized by many state utility regulations and rules, there are also certain populations, such as the elderly and household members experiencing illness or having disabilities, that are at greater risk from the loss of utility service and thus are provided special disconnection protections.¹⁷ The loss of essential utility services can be devastating, especially for poor families that can find themselves facing the dire choices of hypothermia in the winter, hyperthermia in the summer,¹⁸ eviction, property damage from frozen pipes, the use of dangerous

¹³See e.g., N.J. Admin. Code sect.14:3-7.14(a)(electric, gas, water and sewer public utilities shall provide tenants with 15 day written notice and opportunity for continued service under tenant's name and condition of service to tenants shall not be conditioned upon payment of any outstanding bills due upon the account of another person.). See also, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) 4.2 Tenant Obtaining Service in Own Name Despite Landlord's Delinquency; 11.5.3 Landlord-Tenant Termination Situations and 12.4 Landlord-Requested Utility Disconnections.

¹⁴Myers v. Alcoa, 752 F.2d 196(1985)

¹⁵Tenn. Code Ann.§ 66-28-502(a)(3)

¹⁶See e.g., Florida's Landlord and Tenant Act, Fla.Stat.ch 83;

¹⁷Special Protections for Ill and Disabled: See, e.g. Tex. Admin. Code, tit. 16, Rule 25.29(g) (disconnection of electricity service for ill and disabled). See also Michigan Rule 460.2153 (medical emergency) (notwithstanding any other provision of these rules, a utility shall postpone the shutoff of service for a reasonable time, but not for more than 21 days, if the customer produces a physician's certificate or notice from a public health or social services official stating that the shutoff of service will aggravate an existing medical emergency of the customer, a member of family or permanent resident of premises.); 52 Pa. Admin.Code § 56.111 (Pennsylvania emergency provisions) (no utility shall terminate, or refuse to restore, service to any premises when any occupant therein is certified by a physician to be seriously ill or affected with a medical condition which will be aggravated by a cessation of service or failure to restore service); Re Florida Power Corp., 1999 WL 397309 (Fla. PSC 1999) (medically Essential Service Customer procedures explained); Washington Ann. Code 480-110-355(2)(water)(medical emergencies); Washington Ann. Code 480-120-081(3)(telephone)(medical emergencies); N.Y. Pub. Serv. Law art.2, sect.5(a)(gas and electric)(medical emergencies) and sect.5(b)(special protections for elderly, blind and disabled). Consideration of such protections was mandated by Sec. 113 of PURPA, 16 U.S.C. § 2625(g). See also, Brooklyn Union Gas Company v. Richey, 123 Misc.2d 802, 475 N.Y.S.2d 981 (1984)(court denies utility's application to seize gas meters for nonpayment, in part because of the Legislature's unequivocal concern and establishment of special procedures to insure the continuation of utility services to particular classes of people in the winter). A 1990 survey of public utility commissions found 14% of commission had special termination protections for elderly, disabled and medically vulnerable people. Health and Human Services Report to Congress for FY 1990, App. K, p. 150.

¹⁸In 2000, approximately 68% of those with heat-related deaths were 60 years old or older. Office of Climate, Water and Weather Services, Heat Related Fatalities by Age and Gender for 2000.

alternative sources of heat,¹⁹ and the potential threat of the intervention of child welfare agencies.²⁰

Studies and newspaper articles²¹ have demonstrated the clear linkages between homelessness and utility disconnections, as well as connections between unaffordable utility service and the disruption to families and children's education. Surveys conducted by the Energy Coordinating Agency of Philadelphia and the Institute for Public Policy Studies of Temple University found that in homes where utility service was terminated, 32 percent of electric and 24 percent of gas terminations led to abandonment of the property within a year of the disconnection. The study also found a discernable relationship between utility terminations and homelessness.²² A similar study of homelessness in Northern Kentucky indicates that utility shutoffs were among the primary causes of homelessness in that region.²³ Another study found an interconnection between the unaffordability of home energy bills and frequent mobility in low-income populations.²⁴ The study also notes the correlation between frequent mobility in low-income households and poor elementary school performance.²⁵

There is such a recognized risk of harm to the health, safety and well being of households from the loss of vital utility services that until email access is universally and reliably available in residential households, the notice of utility disconnection or cancellation should remain the current practice of using *paper notice* via 1st class mail, certified mail or personal delivery. At this time, it would be premature to lift the consumer protections from the E-Sign exception for the cancellation or termination of utility services.

Adequate notice of disconnection of utility services is critical in order for customers to take necessary steps to preserve service

Under a constitutional analysis, notice of utility termination must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity

¹⁹In 1998 there were over 49,000 heating-equipment related home fires resulting in 388 deaths and 1,445 injuries and \$515 million in property damage. National Fire Protection Association Fact Sheets on Home Heating from the report, "US Home Heating Fire Patterns and Trends," John H. Hall, Jr., NFPA, June 2001.

²⁰Robert B. Swift, "Rising Costs for Home Heating Fuel Could Spawn More Problems," Sunbury (PA) Item, Jan.29, 2000.

²¹Lisa Perry, "Agencies Battle More and More Heatless Homes," Dayton News, Jan. 30, 2000 (Red Cross spokesperson notes that there is a bigger demand for emergency housing for families in the winter); "Maybe Seniors Can Burn Tax-Cut Dollars for Warmth," editorial, Peoria Journal Star, April 23, 2001.

²²Energy Coordinating Committee and Institute for Public Policy Studies of Temple University, An Examination of the Relationship Between Utility Terminations, Housing Abandonment and Homelessness (June 1991).

²³*See*, Executive Summary, "Homelessness and Low-Cost Housing in Northern Kentucky: An Analysis and a Strategic Action Plan," prepared by the Northern Kentucky Coalition for the Homeless (July 1990).

²⁴Roger D. Colton, "A Road Oft Taken: Unaffordable Home Energy Bills, Forced Mobility and Childhood Education in Missouri," Fisher, Sheehan and Colton, June 1995.

²⁵*Id.* Citing US GAO (1994). Elementary School Children: Many Change Schools Frequently, Harming Their Education, Washington, D.C.

to present their objections.”²⁶ The actual, timely receipt of notice by the customer is critical in order for the customer to have any meaningful opportunity to preserve service. There are a variety of federal,²⁷ state,²⁸ local,²⁹ and utility-based programs³⁰ that can help customers with their utility bills. Customers need time to investigate these potential sources of assistance to avoid shutoff. Customers also need time to contact their utilities to negotiate a payment plan or to object to the disconnection.

Once customers are disconnected, it is far more difficult to get them reconnected because of the additional costs of a deposit, as well as disconnection and reconnection fees. The deposit requirement alone can be prohibitively expensive for a household in financial distress.³¹ If the door to using electronic notices of utility disconnections is opened, households could be put at risk of never receiving notice that a vital utility service may be cut off. As discussed *infra*, low income households are at greater risk of utility shut-off and are also the least likely to have Internet access at home. The consequences of a lost opportunity to secure payment assistance funds, to negotiate a payment plan with the utility, or to challenge the shut-off are severe, especially for low-income households.

At stake is the deprivation of essential utility services which could jeopardize the health and safety of members of a household, and in some dire cases, lead to the loss of custody of children (due to an uninhabitable dwelling) or homelessness. Regarding the threatened loss of utility service, the US Supreme Court has acknowledged, “The customer’s interest is self-evident. Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety. And the risk of an erroneous deprivation, given the necessary reliance on computers, is not insubstantial.”³² Later in dicta, the Supreme Court noted that, “Lay consumers of electric service, the uninterrupted continuity of which is essential to health and safety, should be informed clearly of the

²⁶Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

²⁷Two significant federal utility assistance programs are the Low Income Home Energy Assistance Program (42 USC § 8621 et seq) and the Federal Universal Services Lifeline and Link-Up program for discounted local phone service (47 USC § 254). See also, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) 2.3 Federal Affordability and Access Programs, and chapters 6, Payment Issues, 7 Low Income Home Energy Assistance Program and 9 Utility Affordability Programs; Ann McLarty Jackson, Christopher Baker, Robert Wilden, “Energy and Telephone Assistance in the States: Public Programs that Help Low-Income Households,” AARP Public Policy Institute, Washington (2002).

²⁸Some states have created low-income energy assistance funds through a system benefits charge or regular appropriation of state funds. See, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) chpt 9 Utility Affordability Programs.

²⁹Human services organizations also administer fuel funds, often in partnership with utilities to help low-income customers afford utility bills. See, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) chpt 9 Utility Affordability Programs.

³⁰Utilities may have discount programs and payment restructuring plans (which may include arrearage forgiveness) for low-income customers. See, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) chpt 9 Utility Affordability Programs.

³¹A common deposit requirement is up to two months average bills. See, NCLC Access to Utility Service (2nd ed. and 2002 Supp.) Chpt 3 Rights to Utility Service: Security Deposits and App A, State Regulation of Utilities.

³²Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1(1978) at 18. The reference to computers is explained in the Supreme Court’s footnote 20 regarding Congress’ concern of computer billing errors.

availability of an opportunity to present their complaint.”³³

In the US Supreme Court case, *Memphis Light, Gas and Water Division v. Craft*,³⁴ a case about the adequacy of a utility’s termination notice, the court discusses the inadequacies of the common-law remedies of a pretermination injunction, a post-termination injunction, and post-payment action for refund where there is the threat of the cessation of essential services for any appreciable time. The court found that “[e]quitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a lawsuit.”³⁵

Opening the door to electronic utility disconnection notices will hurt low-income consumers

While electronic notices of utility disconnections run the risk of endangering the health, safety, and welfare of all residential customers receiving such notice, clearly the most vulnerable customers are the ones likely not to have internet access at home. Low-income households are more likely to experience utility shut off than the rest of the population. National data reveal the inverse correlation between household income and the disconnection of utility services. The U.S. Department of Energy, Energy Information Agency’s 1997 Residential Energy Consumption Survey (*see* Appendix B) shows that households below 150% of the federal poverty level experienced electricity shut offs at a rate over 3 times that for households with incomes above 150% of the federal poverty level. The U.S. Census Bureau’s “Extended Measures of Well-Being: Meeting Basic Needs” publication also shows an inverse correlation with household income levels and disconnections of home energy services, with the households in the lowest quintile experiencing utility shutoffs at a level 10 times higher than for the highest quintile (*see* Appendix B).

Low income households are also least likely to have access to Internet service at home. A September 2001 survey of Internet use found that around 46 percent of the US population does not use the Internet.³⁶ The percentage of the population not using the internet is markedly higher for low-income households; 75 percent of people in households where income is less than \$15,000 and 66.6 percent of households with incomes between \$15,000 and \$35,000 do not use the Internet.³⁷

Based on these trends it is clear that low-income households, a population that is more likely to experience utility shutoffs, would be at great risk of harm from electronic notice of utility disconnection because they would be least likely to have Internet access at home. Congress recognized the absolutely essential nature of these notices prior to cancellation or termination of utility services by exempting them from coverage under E-Sign.

³³436 U.S. 1 at 15, footnote 15.

³⁴436 U.S. 1 (1978).

³⁵436 U.S. 1 at 19-22.

³⁶*See*, US Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, “A Nation Online: How Americans are Expanding Their Use of the Internet,” February 2002, Figure 4-4.

³⁷*Id* at chapter 8, page 73.

These Exceptions are Key Components of the Two Complementary Consumer Protections in E-Sign

The basic law of E-Sign – established in Section 7001(a)³⁸ – allows an electronic record to satisfy a legal requirement for a writing. Generally when the law requires that a notice or a contract be provided in writing to a consumer there has been a recognition that the consumer needs to receive the information in a form the consumer can *access* and can *keep*. State and federal requirements that certain information be given to consumers in writing have been adopted only after a finding of a pattern of harm to consumers when that information is *not* delivered in writing. Required paper notices and documents are critically important to ensure that consumers are informed of their rights and obligations and have the proof of the terms of their contracts to enforce these rights in court. In recognition of these historic elements of writings and the risks associated with replacing writings with electronic records, Congress established the two primary consumer protections in E-Sign: the consumer consent provisions in Section 7001(c) and the exception for certain notices in Section 7003(b).³⁹

Congress passed E-Sign in June, 2000 to facilitate electronic commerce. At the same time, however, it recognized that electronic communication was not at the time – nor likely to become in the near future – as ubiquitous and inexpensive a method of exchanging information as existing methods. The consumer consent provisions⁴⁰ included in E-Sign were a Congressional recognition of the difficulty that consumers might have on the *front* end of the transaction. The exceptions for certain consumer notices from coverage by E-Sign included in § 7003(b) was an attempt to protect consumers at the *tail* end of the transaction. The risk of lack of access to computers, the Internet, a particular e-mail account, or even a particularly important electronic record (such as notice of utility disconnection) still remains very real for over half of the households in the nation.

The two consumer protections in E-Sign – the consumer consent provisions and the exceptions from E-Sign in § 7003(b) – are different and each serve a distinct purpose. Preserving the consumer consent provisions does *not* protect consumers from the harm that can result if the exceptions are dropped, which is that consumers will not receive essential notices about the potential disconnection of critical utility services.

The consent provision requires an *electronic* consent -- a type of electronic handshake between the parties – that is a means to ensure that the electronic communication will in fact be successful. This electronic consent is also meant to emphasize to the parties the significance of the agreement to receive records electronically. As Senator Leahy said about the importance of the consumer consent provision:

Such a mechanism provides a check against coercion, and additional assurance that the consumer actually has an operating e-mail address and the other technical means for accessing the information.⁴¹

However, Congress was not able to design a similarly neat check to assure *ongoing* access to computers, the Internet and important e-mail. Rather than becoming mired in the sticky issues of when delivery of electronic records should be considered accomplished, Congress punted and simply extracted certain essential notices from E-Sign coverage altogether. The concern was that consumers in healthy

³⁸ 15 U.S.C. § 7001(a).

³⁹ 15 U.S.C. § 7001(c) and § 7003(b), respectively.

⁴⁰ 15 U.S.C. § 7001(c).

⁴¹ 146 Cong. Rec. S5219-5220 (daily ed. June 15, 2000) (statement of Sen. Leahy).

economic times would agree to receive essential notices electronically, and then when hardship struck would no longer have the same type of easy access to electronic notices. As is noted in the Department of Commerce's reports on access to the Internet, significant numbers of consumers who have Internet access in one year drop off the system in subsequent years.⁴² This lack of *certain* access was noted by the Senators most involved in ensuring that consumer protections were included in E-Sign:

At the heart of these provisions is the concern – shared by many in the industry as well – that electronic communication, e-mail, is not as reliable or as ubiquitous as traditional first class mail. Until advances in electronic mail technology eliminate such concerns and until the vast majority of Americans are comfortable using the technology of the New Economy, consent to use electronic records requires special care and attention. *Because of such concerns, there are some areas where the use of electronic notice and records are simply not appropriate today.* Section 103 of the conference agreement recognizes this by continuing to require paper notice. These areas include *shutting off a consumer's utilities, canceling or terminating health insurance or benefits or life insurance benefits, foreclosing on someone's primary residence, recall of a product that risks endangering health or safety and documents required to accompany the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials. . . .* Is it fair to allow a mortgage lender to foreclose on someone's home just because their ISP went out of business and they weren't receiving their payment notices electronically? The exceptions we fought for in this section of the conference agreement will protect consumers. (Emphasis added.)⁴³

The Situation Has Not Changed from Enactment of E-Sign – These Notices Remain Essential and Electronic Communication Remains Uncertain

Congress has tasked the Department of Commerce to evaluate the question of whether the exceptions in Section 7003(b) continue to be necessary for the protection of consumers. For the notices at issue in this docket relating to the potential loss of the vital utility services, the answer is unequivocally “yes.” These exemptions were necessary two and half years ago when E-Sign was enacted, and they continue to be necessary today.

As it should be clear that the notices at issue remain essential, the next question to consider is whether the certainty of electronic communications has changed since E-Sign's enactment. While there are now more individuals who are connected to the Internet, still well over half of the nation is not connected to the Internet *at their home*.⁴⁴

⁴² In the current report, information is provided that 3.6 million households have discontinued Internet access at some time. U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"A Nation Online: How Americans Are Expanding Their Use of the Internet*, February, 2002, Chapter 8.

⁴³ 146 Cong. Rec. S 5216 (daily ed. June 15, 2000) (statement of Sen. Wyden).

⁴⁴ As the Department recognized in this report, access to the Internet through the home is still considered far superior to any other type of access – because of ease of availability. U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, *"A Nation Online: How Americans Are Expanding Their Use of the Internet*, February, 2002, Figure 4.4 shows that only **43.6%** of the

E-Sign recognizes that while electronic communication provides wonderful opportunities, it cannot be assumed to be as reliable a method to receive essential information as postal delivery for the general public – after all, that was the basis for these exceptions. The exceptions to the application of E-Sign for the essential notices about utility disconnections recognizes the very real dangers of relying on constant access to the Internet. Two years ago the Department of Commerce’s report indicated that there was a 10% drop off rate from Internet access.⁴⁵ The 2002 report indicates that 3.6 million of U.S. households have had Internet service in their home but discontinued it.⁴⁶ This represents over 6% of the households who are currently on line. Regardless of the exact statistics, the crucial point is that millions of Americans may have access one day and not the next. As the Department of Commerce noted, the drop off rate was higher among households at lower incomes. We can assume that households at lower incomes will continue to have less stable access to electronic commerce in the future. Also, the general penetration rate for Internet access is much lower for households with lower incomes.⁴⁷

It is very important that access to essential information not be determined by one's wealth. Receipt of mail through the U.S. Post Office has always been free. Until electronic commerce reaches the same degree of universal access as the U.S. Postal Service does, the law should treat electronic delivery and physical world delivery of records differently.

The differences between the ease – and lack of expense – to receive paper records in the physical world and receive electronic records via the Internet are substantial. The Department of Commerce must recognize the distinctions and appropriately protect consumers in light of these differences.

- A piece of paper handed to or mailed to a person can be read without any special equipment.
- A computer is required to access or read an electronic record.
- A written record can be received by the consumer at no cost to the consumer. The consumer pays nothing to maintain and open the mailbox to which the U.S. Post delivers the mail daily.
- The electronic record can only be accessed through a computer connected to a third party for whom payment is generally required on an ongoing basis – the Internet Service Provider, or ISP.
- If the consumer moves, U.S. Postal mail can be easily forwarded, at no cost to the consumer and with minimal difficulty – one notice to the Post Office suffices to forward all incoming mail for a year.
- ISPs generally do not forward electronic mail. Sometimes electronic mail will bounce back as undeliverable to the sender, but this is not automatic and not universal. So often even the sender will not know that the recipient has not received an essential notice.

people who live in the United States have Internet connections in the home.

⁴⁵See, U.S. Department of Commerce, “*Falling Through the Net: Toward Digital Inclusion*” A Report on Americans’s Access to Technology Tools,” October, 2000. Part One – Overall Household Findings. Id. in text accompanying Figure I-18.

⁴⁶ U.S. Department of Commerce, Economic and Statistics Administration & National Telecommunications and Information Administration, “*A Nation Online: How Americans Are Expanding Their Use of the Internet*,” February, 2002., Chapter 8.

⁴⁷ *Id.*

- A consumer can easily sort through paper mail and throw out the unsolicited junk mail without risking the loss of important notices.
- Spam has become such a problem for electronic mail that filters or other mechanisms to withstand the assault often wrongly delete important email messages. Even if a disconnection notice reaches the consumer's computer, it may be so buried in spam that the consumer never sees it.
- A paper writing does not require special equipment to hold on to, or to retain. A consumer need only put it in the drawer, or in a file, where it will remain until the consumer removes it.
- An electronic record can only be retained electronically. The consumer must have access to a computer with a hard disc to retain the record,⁴⁸ or access to a computer with a printer to retain a printed copy (although the printed copy may not be useful to prove the terms of the electronic record in court unless the paper representation of the electronic record includes some means of verifying that it is a true reflection of the actual electronic record received by the consumer.)
- A paper writing is by its nature tangible. Once handed to, or mailed, to a person it will stay on the table or in the drawer, wherever the consumer put it, until it is thrown out by the consumer.
- An electronic record can be provided in a form which will disappear after a period of time determined by the provider of the record. For example, E-Sign contemplates that a consumer could be provided notice of important information by providing a web-link to an internet posting. If the consumer does not access the internet web-link in time, the electronic record may no longer be there.
- The printed matter on the paper writing will not change every time someone looks at it, and the paper writing can be used at a later date to prove its contents in a court.
- The electronic record could be provided in a format which is not retainable by the consumer. And, even if the consumer is able to access and retain the electronic record, the record may not be printable in the same format in which it was viewed. To provide the same level of integrity to an electronic record that exists naturally with a paper writing, a special effort must be made: the electronic record must be deliberately preserved in a particular *locked* format (Adobe, XML, etc.) to prevent alterations by mistake or deliberately every time the document is read.
- The mission of the U.S. Postal Service is universal free delivery. Everyone in the country, regardless of wealth or poverty, and regardless of the remoteness of their location, can receive mail.
- Electronic mail delivery does not have the same mandate. Providers of Internet access and makers of computers have to make a profit. Their central mission is not universal free access.⁴⁹
- The U.S. mail is a public institution that has delivered the mail since the nation's early years. Americans can count on the U.S. Postal Service to continue delivering mail in the future. It is

⁴⁸ It is conceivable that the consumer without regular access to a computer with a hard disc could use a floppy disc or a CD to retain important electronic records. But this requires access to a computer on which to download the records on to the floppy when they are received, and access to a computer with similar capabilities to access the electronic records at a later time when they are needed.

⁴⁹This point was best made in NTIA's Report to Congress: Electronic Signatures in Global and National Commerce Act, Section 105(a) (June 2001), at 4.

unlikely to cease operations.

Internet Service Providers frequently go out of business, often with virtually no warning to subscribers.

These are a lot of differences between paper writings and electronic records. One significant difference is that it *takes money and time to access and retain electronic records in a useable format*. It does not take money to access and keep and use the same information in a paper format.

While we want to encourage and facilitate electronic commerce, we must remember that over half of all Americans are still not connected to the Internet through the home. Only access at home can be considered a reliable method of receiving personal information. Use of a computer at work is frowned upon or considered grounds for disciplinary action by many employers. Public access computers have extensive waiting times and limitations on use.

The notices at issue in this proceeding are those provided to a family in the midst of a crisis – potential loss of vital utility services. Almost always, this crisis is precipitated by some event which has caused a devastating change in the household finances – a family member’s illness, disability or death, or job loss. Typically a family facing economic crises will drop those regular expenditures which are not essential. A monthly fee for access to the Internet is certainly a non-essential item which would be dropped. In 2003, and in the near future, the U.S. Mail is still considered the universal method of delivery for important information.

Passage of the Uniform Electronic Transactions Act Has Minimal Effect on E-Sign’s Exceptions.

Passage of the Uniform Electronic Transactions Act by a number of states does not change this analysis. First of all, it should be noted that E-Sign – and the exceptions from E-Sign – unequivocally applies to all notices required under federal law. Clearly, state law does not supersede E-Sign as to electronic records and signatures required by federal law because the displacement language in Section 7002 only refers to "State law."⁵⁰ Thus the E-Sign exemptions still apply to all of the federally required notices relating to cancellation or termination of utility services highlighted in Request for Comments in this proceeding.

While the majority of states have passed some version of the Uniform Electronic Transactions Act (UETA),⁵¹ E-Sign is still the prevailing law in all but a handful of states. It would be a *major* misunderstanding of the law to assume that just because a state has passed a version of UETA that E-Sign’s exceptions in Section 7003(b) do not still apply in that state.⁵²

⁵⁰ “(a) IN GENERAL- A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section [7001] *with respect to State law* only if such statute, regulation, or rule of law– . . . (Emphasis added). 15 U.S.C. § 7002(a).

⁵¹Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming.

⁵²The issue of whether the exemptions in § 7003(b) operate in a state is only of several important consumer protections in E-Sign that would be applicable if E-Sign is the prevailing law. There are other critical differences between UETA and E-Sign. A comparison of the uniform version of UETA and E-Sign is quite dramatic. Only E-Sign specifies a procedure for informed consent by consumers to electronic notices and disclosures. The consumer must first be sent certain disclosures and then must not only consent, but demonstrate an ability to receive the electronic records. Oral notices to consumers are prohibited, and consumers must be able to retain records and

E-Sign applies in states where there is no UETA. In the ten states which have *not* passed any version of the uniform law referred to as UETA, there can be no question that E-Sign is the operative law which allows parties to replace paper writing requirements with electronic records – thus specifically making the exceptions to E-Sign applicable.⁵³ These ten states make up a quarter of the nation’s population.

E-Sign exceptions apply in states which specifically adopted them. Fifteen states specifically restated the exceptions to electronic records found in E-Sign’s Section 7003(b): Alabama, Colorado, Connecticut, Hawaii, Louisiana, Maryland, Mississippi, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Tennessee and West Virginia.⁵⁴ Although these exceptions would still be effective in these states, the message that would be sent by a statement of the U.S. Department of Commerce that these are no longer necessary could have devastating consequences.⁵⁵

States cannot displace the protections in Section 7003(b). The analysis becomes more complex in the balance of the states and the District of Columbia.⁵⁶ Arguably, E-Sign’s exemptions are applicable in all of these states, regardless of whether the state law has successfully displaced E-Sign. This is because the states’ abilities to avoid the preemption of E-Sign applies only to the question of whether it can avoid Section 7001 – not whether the state can avoid the exemptions in Section 7003(b).

accurately reproduce them. Many key consumer notices are also exempted from E-Sign, meaning that state law can continue to require that they be in writing. The uniform version of UETA offers none of these protections.

Additionally, the framers of E-Sign felt the most important consumer protection was the provision which states that E-Sign does not "require any person to agree to use or accept electronic records or electronic signatures." Especially in transactions which are initiated face-to-face, this statutory provision--which has no counterpart in UETA--should prohibit a merchant from charging an unreasonable, inflated price for the delivery of paper copies of required records. However, nothing prohibits a merchant from offering a lower cost for the provision of electronic records, so long as the cost differential is reasonably related to the savings achieved by the merchant for providing the records electronically.

⁵³Alaska, Georgia, Illinois, Massachusetts, Missouri, New York, South Carolina, Vermont, Washington, and Wisconsin.

⁵⁴ Ala. Code § 8-1A-2 *et seq.*; Co Stat. § 24-71.3-102 *et seq.*; Ct 2002 PA 02-68 *et seq.*; HRS § 489-1 *et seq.*; La Rev. Stat. § 9:2601 *et seq.*; Md. Comm. Law Code Ann. § 21-101 *et seq.*; Miss. Code Ann. § 75-21-1 *et seq.*; Nev. Rev. Stat. Ann. § 719-010 *et seq.*; NH. Rev. Stat. Ann. § 294-E:1 *et seq.*; N.J. Stat. Ann. § 12A:12-1 *et seq.*; NM Stat. Ann. § 14-16-1 *et seq.*; N.C. Gen. Stat. § 66-311 *et seq.*; ORS 84.001 *et seq.*; Tenn. Code Ann. § 47-10-101 *et seq.*; W. Va. Code § 39A-1-1 *et seq.*

⁵⁵ States are continually revisiting the issue of which notices can be provided to consumers exclusively in an electronic format. Every time a particular consumer notice is addressed in state law, the question comes up whether it would be appropriate for that notice to be provided electronically. If a state law replaces a writing requirement with permission to provide the notice electronically then neither E-Sign’s consent provisions nor the exemptions in §7003(b) apply.

It is important for the Department of Commerce recognizes that in this evaluation it is sending a message to other policy makers regarding the importance of maintaining the requirement that certain essential notices to consumers continue to be in writing.

⁵⁶ Arizona, Arkansas, California, Delaware, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Montana, Nebraska, North Dakota, Oklahoma, Ohio, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Virginia, and Wyoming.

E-Sign generally preempts state laws.⁵⁷ In Section 7002 of E-Sign, Congress narrowly tailored two specific, but rigorous, methods by which states could avoid the preemptive effects of E-Sign. A state must comply fully with one of these methods in order to achieve displacement of a *portion* of the federal E-Sign law in favor of state law. Section 7002 only permits a state to avoid the application of Section 7001 of E-Sign. There is arguably no way for a state to avoid the application of all other sections of E-Sign:

(a) IN GENERAL- A State statute, regulation, or other rule of law may modify, limit, or *supersede the provisions of section[7001]* with respect to State law only if such statute, regulation, or rule of law— (Emphasis added).⁵⁸

Further, there is ample evidence that Congress did not intend for states to be able to avoid the essential consumer protections in Section 7003. As three Senators closely involved in the passage of E-Sign noted:

It is important to note that Section [7003](b) lists certain notices which are exempted from the coverage of section [7001](a) (such as notices of *cancellation of utility service* or insurance coverage). The legal result is that section [7001] simply does not apply to the notices listed in section [7003]. *Under section [7002](a) a state only has the authority to modify, limit or supercede the coverage of section [7001]. We specifically intend that a state may not use its authority under section [7002], to authorize solely electronic records of those notices listed in section [7003].* (Emphasis added.)⁵⁹

⁵⁷ “Notwithstanding any statute, regulation, or other rule of law (other than this title and title II), with respect to any transaction in or affecting interstate or foreign commerce— . . .” 15 U.S.C. § 7001(a)(1).

⁵⁸ 15 U.S.C. § 7002(a).

⁵⁹ 146 Cong. Rec. S 5229-5230 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

Under this interpretation – the rule throughout the nation is that regardless of whether it is the federal E-Sign law – or a state law – which permits electronic records to replace writings, no electronic records can ever replace writing requirements for those notices named in Section 7003.

E-Sign applies in all states which have not successfully displaced E-Sign. Some may disagree with our characterization of the ability of states to avoid the application of sections of E-Sign other than Section 7001. Even so, it is clear that Congress intended that states avoid federal preemption only by specifically following one of two different standards. In the majority of states which have passed E-Sign, and have failed to specifically restate the exceptions to electronic records found in Section 7003(b), displacement of federal law has not been achieved. This is because the rules for displacement of the federal E-Sign law are quite strict. E-Sign's provision in Section 7002 allows a state to "modify, limit, or supersede" certain E-Sign provisions only if one of two tests are met.⁶⁰ Either the state must adopt UETA *specifically* as approved by NCCUSL in 1999 or it must adopt legislation on the enforceability of electronic records and signatures that is *consistent* with E-Sign, technologically neutral, and references E-Sign if enacted after June 30, 2000.⁶¹

E-Sign applies in states that enacted UETA prior to E-Sign. Eighteen states enacted some version of UETA prior to E-Sign's enactment date of June 30, 2000: Arizona, California, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Minnesota, Nebraska, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and Virginia.⁶² These UETA enactments cannot be construed to supersede E-Sign.

E-Sign indicates that a state statute "may" modify, limit or supersede.⁶³ It does not say "shall." Because it is discretionary, the state must somehow evidence an intent to supersede E-Sign, which is clearly lacking in a statute adopted before E-Sign even existed.

E-Sign's legislative history also clearly establishes that state statutes passed prior to E-Sign do not displace the federal law. Statements by the bill sponsors and other members closely involved with the passage of the E-Sign bill indicate it was Congress' intent that E-Sign could be displaced *only* by a post-E-Sign state statute:

A state which passed UETA before the passage of this Act could not have intended to displace these federal law requirements. These states would have to pass another law to supersede or displace the requirements of [§ 7001].⁶⁴

⁶⁰ 15 U.S.C. § 7002. For an extensive discussion on the preemption and displacement issues relative to E-Sign and UETA, see Gail Hillebrand & Margot Saunders, *E-Sign and UETA: What Should States Do Now?* September 2000 available at www.consumerlaw.org/e_sign.html; Shea C. Meehan and D. Benjamin Beard, *What Hath Congress Wrought: E-Sign, the UETA, and the Question of Preemption*, 37 Idaho L. Rev. 389 (2001).

⁶¹ 15 U.S.C. § 7002(a). See also Shea C. Meehan and D. Benjamin Beard, *What Hath Congress Wrought: E-Sign, the UETA, and the Question of Preemption*, 37 Idaho L. Rev. 389 (2001).

⁶² Ariz. Rev. Stat. § 44-7001 *et seq.*; Cal. Civil Code §§ 1633.1-1633.17; Col. Stat. § 24-71.3 *et seq.*; Fla. Stat. Ann. § 668.50 *et seq.*; Haw. Rev. Stat. § 489-1 *et seq.*; Idaho Code § 28-50-101 *et seq.*; Ind. Code Ann. § 26-2-8-101 *et seq.*; Iowa Code § 554D.101 *et seq.*; Kan. Stat. Ann. § 16-1601 *et seq.*; Ky. Rev. Stat. Ann. § 369.101 *et seq.*; Me. Rev. Stat. Ann. tit. 10, § 1 9401 *et seq.*; Minn. Stat. § 325L.01 *et seq.*; Neb. Rev. Stat. § 86-2101 *et seq.*; Ohio Rev. Code Ann. § 1306.01 *et seq.*; Okla. Stat. tit. 12A, § 15-101 *et seq.*; Pa. Stat. Ann. tit. 73, § 2260.101 *et seq.*; S.D. Codified Laws § 53-12-1 *et seq.*; Utah Code Ann. § 46-4-101 *et seq.*; Va. Code Ann. § 59.1-476 *et seq.*

⁶³ 15 U.S.C. § 7002(a).

⁶⁴ 146 Cong. Rec. S5229/-/30 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

Congressman Bliley, the original sponsor of the E-Sign bill in the House,⁶⁵ and the Chair of the Conference Committee on E-Sign, emphasized that prior passage of a state law does not eliminate the application of E-Sign in a state:

[A] State could not argue that [§ 7001] does not preempt its statutes, regulations, or other rules of law because they were enacted or adopted prior to the enactment of this Act. . . .⁶⁶

In addition, fourteen of these eighteen states that enacted UETA before E-Sign's enactment date also adopted a non-uniform version of UETA.⁶⁷ The fact that a state adopted a non-uniform version of UETA provides another basis to find that the statute does not supersede E-Sign.

E-Sign applies in states that adopted a non-uniform version of UETA. E-Sign provides that a state's version of UETA can supersede E-Sign if it constitutes an adoption of UETA "as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999."⁶⁸ By definition, a non-uniform adoption of UETA fails to meet this standard. This is made clear by the statements in Congress by E-Sign's chief sponsor:

It is intended that any State that enacts or adopts UETA in its State to remove itself from Federal preemption pursuant to subsection (a)(1) shall be required to enact or adopt UETA without amendment. Any variation or derivation from the exact UETA document reported and recommended for enactment by NCCUSL shall not qualify under subsection (a)(1).⁶⁹

Consequently, the non-uniform version of UETA must meet E-Sign's other test for reverse preemption, that it be technologically neutral, makes specific reference to E-Sign, and must be consistent with E-Sign.⁷⁰ Whether an enactment of UETA makes reference to E-Sign must be determined on a state-by-state basis. In any event, an enactment of UETA will not qualify under this test if it does not adopt E-Sign's consumer consent and other consumer protection provisions, because allowing electronic records without these protections is not "consistent" with E-Sign.⁷¹

⁶⁵ H.R. 1714, 106th Cong., 1st Sess (1999).

⁶⁶ See 146 Cong. Rec. H4352/-/53 (daily ed. June 14, 2000) (statement of Rep. Bliley).

⁶⁷ Arizona, California, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Maine, Minnesota, Oklahoma, Ohio, South Dakota, and Virginia.

⁶⁸ 15 U.S.C. § 7002(a)(1).

⁶⁹ 146 Cong. Rec. H4352/-/4353 (daily ed. June 14, 2000) (statement of Cong. Bliley).

⁷⁰ 15 U.S.C. § 7002(a)(2).

⁷¹Of critical import is the question whether a state law which displaces the requirements of sections 7001(a) (dealing with the general validity of electronic records and signatures) also displace 7001(c), (d), and (e) (providing important consumer protections). While E-Sign's actual language is not a model of clarity (what is meant by the phrase "with respect to State law?"), and there was on Congressional Conference Report for E-Sign, the legislative history that does exist indicates that displacement was intended to reach only the general rule of validity, and not to the consumer protections:

Of course, the rules for consumer consent and accuracy and retainability of electronic records

E-sign applies in states that adopted a uniform version of UETA without intent to displace E-Sign. E-Sign indicates that a state statute "may" modify, limit or supersede.⁷² It does not say "shall." Because it is discretionary, the state must somehow evidence an intent to supersede E-Sign, which is lacking in the Mississippi and Rhode Island enactments. Six additional states and the District of Columbia may fall within this category, although with the caveat that the UETA enacted in those states is not strictly uniform.⁷³ A state legislature need not add a clause to UETA that specifies this intent,⁷⁴ but should indicate an intent to override E-Sign in the preamble to UETA, in official comments, in a legislative resolution, or in a companion statute.

The legislative history is somewhat unclear on this point,⁷⁵ but seems to indicate that there must be an intent to supersede E-Sign, at least as to the consumer protection provisions.⁷⁶ There was no conference report on the bill and conflicting language between the Democratic and Republican managers.⁷⁷

E-Sign is unclear as to whether it authorizes states to supersede E-Sign's consumer consent and other consumer protection provisions, or only the provision dealing with the general validity of electronic records and signatures. Because of this ambiguity and the ambiguity in the legislative history, courts should take at least a middle position that a state does not intend to supersede E-Sign's consumer protection provisions if there is no stated intent to do so.

Displacement of federal consumer protections is a rare event, and one that should not simply be

under this Act shall apply in all states that pass the Uniform Electronic Transactions Act or another law on electronic records and signatures in the future, unless the state affirmatively and expressly displaces the requirements of federal law on these points.

146 Cong. Rec. S5229/-/30 (daily ed. June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes).

⁷² 15 U.S.C. § 7002(a).

⁷³ District of Columbia (omits severability clause); Michigan (omits severability clause); Montana (omits severability clause); New Mexico (omits severability clause); North Dakota (omits definition of "person"); Texas (omits definition of "person"); Wyoming (adds definition of "this act" and omits severability clause).

⁷⁴ Under 15 U.S.C. § 7002(a)(2)(B), a statute other than UETA will override E-Sign only if it makes specific reference to E-Sign. E-Sign does not impose such a requirement for a state that wishes to override E-Sign by adopting UETA, so a state may indicate such an intent in any number of ways.

⁷⁵ Patricia Brumfield Fry, "A Preliminary Analysis of Federal and State Electronic Commerce Laws UETA Online" at www.uetonline.com/docs/pfry700.html; Shea C. Meehan and D. Benjamin Beard, *What Hath Congress Wrought: E-Sign, the UETA, and the Question of Preemption*, 37 Idaho L. Rev. 389, 2001.

⁷⁶ See 146 Cong. Rec. S.5230 (June 15, 2000) (statement of Sens. Hollings, Wyden and Sarbanes) ("In a state which enacts UETA after passage of this Act, without expressly limiting the consent, integrity and retainability subsections of 101, those requirements of this Act would remain in effect. The general provisions of UETA, such as the requirement for agreement to receive electronic records in UETA are not inconsistent with and do not displace the more specific requirements of section 101, such as the requirement for a consumer's consent and disclosure in section 101(c).") *But see* 146 Cong. Rec. H4346/-/47 (June 14, 2000) (statement by Rep. Bliley); 146 Cong. Rec. S5281/-/06 (June 16, 2000) (statement by Senator Abraham).

⁷⁷ 146 Cong. Rec. S5215/-/02 (June 15, 2000) (remarks of Sen. Wyden) regarding the fact that there was no conference report on E-Sign, because the committee made a calculated decision not to produce one given the contentious negotiations leading to the final passage.

implied in the absence of a clear legislative statement of intent to do so. If this is lacking, the argument should be that E-Sign is not superseded unless the legislature clarifies its intent. Mississippi and Rhode Island adopted a uniform version of UETA after E-Sign's enactment date, but without an express intent to displace E-Sign.⁷⁸

Uniform UETA with intent to displace. Arkansas alone adopted a uniform version of UETA after E-Sign's enactment date, and specifically indicated an intent to override E-Sign, without specifically requiring any of the consumer protections and other provisions of E-Sign.⁷⁹ Consequently, in this one state, UETA supersedes E-Sign to the maximum extent allowed by E-Sign. Even in Arkansas, though, E-Sign still applies to record requirements established by federal law, and there is still the question whether the intent of E-Sign was to allow limited displacement or to allow state law to also displace E-Sign's consumer protection, including the exceptions in section 7003(b).

Conclusion

The question is whether consumers still need the protections offered by E-Sign's exemption to electronic records for notices relating to the loss of one's utility services. The answer can only be that these protections are needed now just as much as they were when E-Sign was passed – a situation which is likely to remain stable for the foreseeable future. Not only do these exemptions currently govern all federally required notices relating to the loss of one's utility services, they also govern those required by state law in *every state* except Arkansas. Surely the case is clear that these exemptions to E-Sign's electronic records must be maintained.

Attached as an Appendix is a list of all the states with an explanation of the applicability of the E-Sign's exemptions.

Thank you for considering these comments. Please contact me for any further information.

Sincerely,

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⁷⁸ Miss. Code Ann. § 75-21-1 *et seq.*; R.I. Gen. Laws § 42-127.1-1 *et seq.* (adopted after E-Sign's enactment date, but before E-Sign's effective date).

⁷⁹ Ark. Code Ann. § 25-32-101 *et seq.*

Appendix A

Applicability of Exemptions to E-Sign by State

Alabama: Exemptions apply by specific state action.

Alaska: E-Sign applies because no UETA.

Arizona: Exemptions apply because UETA enacted before E-Sign.

Arkansas: E-Sign exemptions may not apply because uniform UETA enacted with intent to displace E-Sign.

California: E-Sign exemptions apply because UETA enacted before E-Sign.

Colorado: E-Sign exemptions apply by specific state action.

Connecticut: E-Sign exemptions apply by specific state action.

Delaware: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

District of Columbia: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

Florida: E-Sign exemptions apply because UETA enacted before E-Sign.

Georgia: E-Sign exemptions apply because no UETA.

Hawaii: E-Sign exemptions apply by specific state action.

Idaho: E-Sign exemptions apply because UETA enacted before E-Sign.

Illinois: E-Sign exemptions apply because no uniform version of UETA and because the state law was enacted before E-Sign.

Indiana: E-Sign exemptions apply because UETA enacted before E-Sign.

Iowa: E-Sign exemptions apply because UETA enacted before E-Sign.

Kansas: E-Sign exemption apply because UETA enacted before E-Sign.

Kentucky: E-Sign exemption apply because UETA enacted before E-Sign.

Louisiana: E-Sign exemptions apply by specific state action.

Maine: E-Sign exemptions apply because UETA enacted before E-Sign.

Maryland: E-Sign exemptions apply because of specific state action.

Massachusetts: E-Sign exemptions apply because no UETA.

Michigan: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

Minnesota: E-Sign exemptions apply because UETA enacted before E-Sign.

Mississippi: E-Sign exemptions apply by specific state action.

Missouri: E-Sign exemptions apply because no UETA.

Montana: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

Nebraska: E-Sign exemptions apply because UETA enacted before E-Sign.

Nevada: E-Sign exemptions apply by specific state action.

New Hampshire: E-Sign exemptions apply by specific state action.

New Jersey: E-Sign exemptions apply by specific state action.

New Mexico: E-Sign exemptions apply by specific state action.

New York: E-Sign exemptions apply because no UETA.

North Carolina: E-Sign exemptions apply by specific state action.

North Dakota: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

Ohio: E-Sign exemptions apply because UETA enacted before E-Sign.

Oklahoma: E-Sign exemptions apply because UETA enacted before E-Sign.

Oregon: E-Sign exemptions apply by specific state action.

Pennsylvania: E-Sign exemptions apply because UETA enacted before E-Sign.

Rhode Island: E-Sign exemptions apply because uniform UETA enacted with no intent to displace E-Sign.

South Carolina: E-Sign exemptions apply because no UETA.

South Dakota: E-Sign exemptions apply because UETA enacted before E-Sign.

Tennessee: E-Sign exemptions apply by specific state action.

Texas: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

Utah: E-Sign exemptions apply because UETA enacted before E-Sign.

Vermont: E-Sign exemptions because no UETA.

Virginia: E-Sign exemptions apply because UETA enacted before E-Sign.

Washington: E-Sign exemptions apply because no UETA.

West Virginia: E-Sign exemptions apply by specific state action.

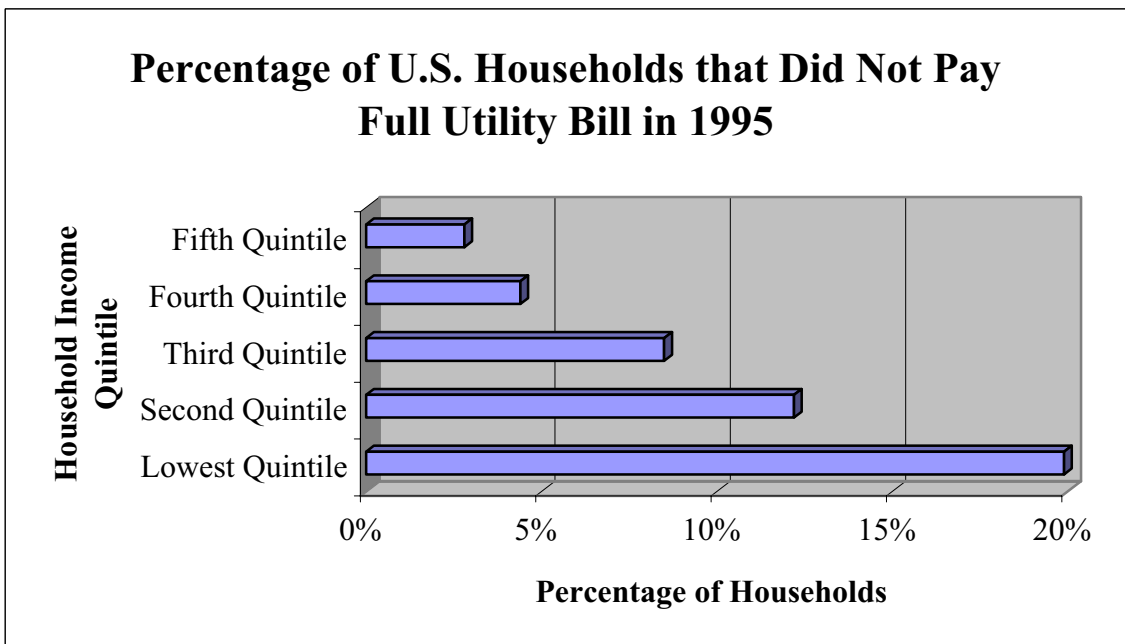
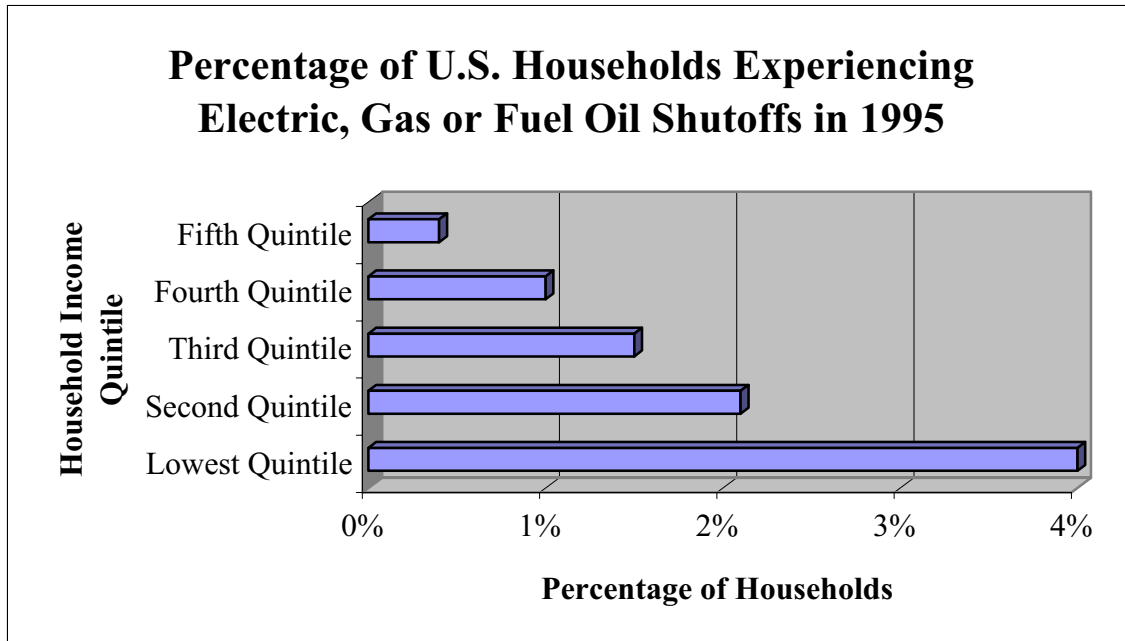
Wisconsin: E-Sign exemptions apply because no UETA.

Wyoming: E-Sign exemptions apply because non-uniform UETA not comparable to E-Sign.

Appendix B

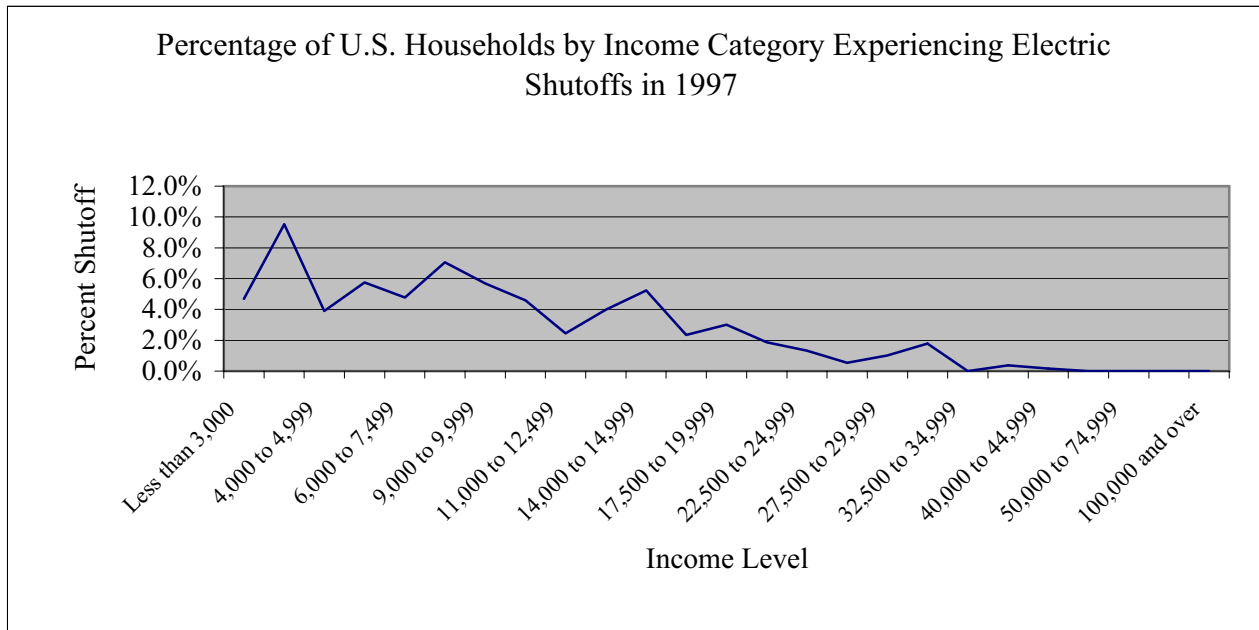
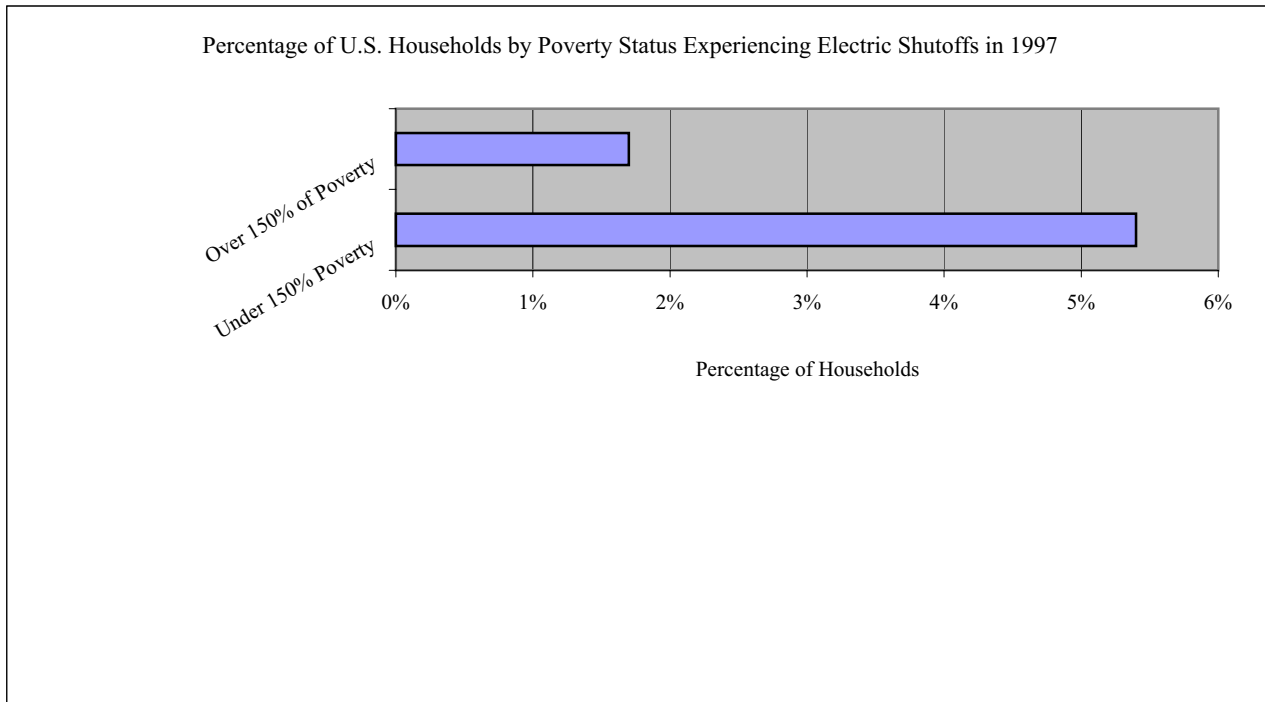
Utility Bill Payment and Shutoff Difficulties: U.S. Households by Income Quintile in 1995

National Consumer Law Center



Electric Utility Service Shutoffs by Poverty Status and Income in 1997

National Consumer Law Center



Source: U.S. Department of Energy-Energy Information Administration, 1997 Residential Energy Consumption Survey