

COMMONWEALTH OF PENNSYLVANIA



OFFICE OF CONSUMER ADVOCATE

555 Walnut Street, 5th Floor, Forum Place  
Harrisburg, Pennsylvania 17101-1923  
(717) 783-5048  
800-684-6560 (in PA only)

IRWINA. POPOWSKY  
Consumer Advocate

FAX (717) 783-7152  
consumer@paoca.org

August 4, 2010

Rosemary Chiavetta  
Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

RE: Interim Guidelines for Eligible Customer  
Lists  
Docket No. M-2010-2183412

Dear Secretary Chiavetta:

Enclosed for filing are the Comments of the Office of Consumer Advocate, in the above-referenced proceeding.

Should you have any questions, please contact our office at the number above.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Candis A. Tunilo".

Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. # 89891

Enclosures

cc: Kirk House, Office of Special Assistance  
Patrick B. Shaughnessy, Bureau of Conservation, Economics and Energy Planning  
Office of Competitive Market Oversight ([ra-OCMO@state.pa.us](mailto:ra-OCMO@state.pa.us))

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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Interim Guidelines :  
For Eligible Customer Lists : Docket No. M-2010-2183412

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COMMENTS OF THE  
OFFICE OF CONSUMER ADVOCATE

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The Office of Consumer Advocate (OCA) files these Comments pursuant to the Pennsylvania Public Utility Commission (Commission) directive in the Tentative Order entered on July 15, 2010, at the above docket and Vice Chairman Christy's Statement of July 15, 2010, at the same docket.

I. INTRODUCTION

On July 15, 2010, the Commission issued a Tentative Order regarding the release of private customer information to Electric Generation Suppliers (EGSs) through the posting of Eligible Customer Lists (ECLs) by Electric Distribution Companies (EDCs). The Tentative Order stems from a recommendation by the Commission's Office of Competitive Market Oversight (OCMO)<sup>1</sup> for more uniformity in the information provided by EDCs in their ECLs made available to EGSs. The issue of creating a uniform ECL was raised through the Committee Handling Activities for Retail Growth in Electricity (CHARGE) during the OCMO meeting of

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<sup>1</sup> The Commission formed the OCMO in January 2009 in order to oversee the development and functioning of the competitive retail natural gas market. The OCMO is made up of a group of legal, technical and policy staff members from various Commission bureaus and offices. In December 2009, the Commission expanded the role of OCMO to include service as the Commission's electric retail choice ombudsman, where the OCMO generally acts in advisory and informal mediation roles.

April 8, 2010. Thereafter, a team was assigned the task of determining which ECL issues could be solved by consensus between EDCs and EGSs and which issues would need Commission guidance for resolution. The team held two conference calls, which included representatives from Allegheny Power, FirstEnergy Company, PECO Energy Company, PPL Electric Utilities, ConEd Solutions, BlueStar Energy Services, Exelon Energy, IGS Energy, and the Retail Electric Supply Association (RESA). The results of the conference calls were then reported to the CHARGE on April 29, 2010. The team reported that the primary issue was ensuring uniformity of information provided on ECLs. Commission Staff took the team ECL report and April 29th CHARGE discussion under advisement and later prepared a recommendation for the Commission's consideration. After consideration of the Staff's recommendation, the Commission issued a Tentative Order on July 15, 2010, and Vice Chairman Christy issued a Statement on the same date.

The OCA submits these Comments in response to the Commission's Tentative Order and the Statement of Vice Chairman Christy. The OCA commends the Commission and the OCMO and CHARGE Commission Staff for bringing this matter forward and for proposing to develop a consistent set of data that will be included on customer lists for all EDCs and EGSs and for recommending a process through which such customer lists can be accurately maintained and updated. The OCA, however, does not support the substance of the Tentative Order in at least two critical respects.

First, the OCA shares the concern expressed in the Statement of Vice Chairman Christy that the Tentative Order appears to deny individual customers the right to restrict the release of all their private customer information, even if those customers explicitly request to restrict that information. The Commission provided all customers with the right to restrict the release of all

customer information in its 1999 generic order regarding the release of customer information, and that Order was affirmed by the Commonwealth Court. Procedures Applicable to Electric Distribution Companies and Electric Generation Suppliers During Transition To Full Retail Choice, Docket M-00991230, Final Order (May 18, 1999) (Enrollment Procedures Order), affirmed sub nom Mid-Atlantic Power Supply Association v. Pa. P.U.C., 746 A.2d 1196 (Pa. Cmwlth. 2000). In affirming the Commission's Order, the Commonwealth Court recognized that the Commission had reached a delicate balance regarding the release of information and the right to privacy, and stated:

In order to comply with the terms of the Electric Choice Act it was necessary that the PUC followed the Electric Choice Act without violating a customer's basic rights. The PUC's Final Order addressed these issues and determined that the customer should enjoy the option whether to participate. ...

The PUC's Final Order enabled the customer to restrict any information from being divulged to Suppliers, at the same time it afforded the customer the opportunity to participate in the program. The PUC properly exercised its discretion and preserved the delicate balance between a viable and competitive marketplace and customer privacy.

Mid-Atlantic Power Supply Association v. Pa. P.U.C., et al., 746 A.2d at 1201.

In his separate Statement in the current proceeding, Vice Chairman Christy has properly asked "whether customers should be given the right to restrict the release of all of their private customer information if they so choose." (Statement of Vice Chairman Christy, July 15, 2010) (Emphasis in the Original). The OCA submits that the answer to that question is the same as the one reached by the Commission in 1999 and upheld by the Commonwealth Court – Yes.

Second, the Commission's Tentative Order raises new concerns regarding the use of private customer information that was not previously available for residential customers, but is now (or will soon become) available through the use of "smart meter" technology. Specifically,

for the first time under the Tentative Order, EDCs would provide information on such matters as on-peak and off-peak usage and individual customer load factor for residential customers. This type of information was not previously available for most residential customers and is still not available for those customers with traditional meters that only report overall kwh usage on a monthly basis.

The Commission's Tentative Order fails to consider the current national debate over the release of residential smart meter data and the effects of that release on customer privacy. Before extending the routine release of residential smart meter data on an opt-out basis, the Commission should carefully consider the unique issues related to such data that are currently being debated at both the state and federal level.

The basis for the OCA position on these and related issues is set forth below.

## II. COMMENTS

### A. The OCA Supports The Proposal To Develop Uniform Eligible Customer Lists And To Maintain And Update Those Lists On A Current Basis.

The OCA fully supports and commends the OCMO, CHARGE and Commission on their work regarding uniformity of ECLs, and the OCA supports the concept of uniform ECLs. EGSs should have the same access to information, and consumers should have the same right to privacy protections regarding the use of customer information, regardless of the EDC service territory in which they serve or reside. In addition, the OCA agrees that this information should be accurately maintained and updated on a consistent basis in order to provide the maximum benefit to all concerned.

The EDCs and EGSs that participated in the OCMO process reached consensus among themselves that certain information should be included in all ECLs and that certain other information be provided at the discretion of the individual EDCs. The EGSs and EDCs failed to

reach consensus on certain other issues. With the exception of requesting comments regarding restriction of service address in domestic violence situations, in the Tentative Order, the Commission generally accepts the EDCs' and EGSs' consensus items. Id. at 5.

The OCA appreciates this opportunity to submit comments on the Tentative Order. While the OCA agrees that a uniform approach to these issues is appropriate and timely, the OCA does not agree with the positions proposed in the Tentative Order in certain critical respects.

B. Customers Should Have the Final Decision Regarding Whether Any of Their Personal Information Will Appear in Eligible Customer Lists.

As noted by Vice Chairman Christy, the Commission's Tentative Order appears to adopt the position that customers will not have the option – even on an explicit opt-out basis – to object to the release of any of the wide array of customer data that would be given to all EGS's under the Commission's proposed Order, other than the customer's telephone number and billing data. The only additional exception discussed in the Tentative Order would be the ability of domestic violence victims to restrict access to their service address. The OCA certainly supports the right of domestic violence victims to restrict the release of their service address in order to protect their privacy and safety. But the OCA does not believe that these individuals should have to identify themselves to the Commission and or the EDC as domestic violence victims in order to receive this basic protection. All consumers, including but not limited to domestic violence victims, should have this right. Vice Chairman Christy is correct in suggesting that the right to restrict the release of private information should be extended to all consumers who choose to exercise that right.

Since the commencement of retail choice in Pennsylvania, the Commission has encouraged the use of eligible customer lists, posted on a secure website by an EDC for use by

EGSs, as a means to facilitate the provision of offers to customers. These initial lists contained necessary, but limited information such as name, address, account number, rate class and load data. While the Commission has encouraged the use of these lists, the Commission also has been concerned with the privacy of customers in this situation. This concern for privacy is particularly critical when it involves electric service. Electric service is an essential service. Customers have no choice but to sign up for this essential service and provide certain information to their monopoly EDC when establishing electric service. Given this situation, customers have a fundamental right of privacy and confidentiality to this information and have a right to restrict the release of some, or all, of this information.

The Commission first promulgated regulations in 1998 to protect consumer privacy and permit customers to restrict release of their personal information. Specifically, Section 54.8 of the Commission's regulations state:

(a) An EDC or EGS may not release private customer information to a third party unless the customer has been notified of the intent and has been given a convenient method of notifying the entity of the customer's desire to restrict the release of the private information. Specifically, a customer may restrict the release of either the following:

- (1) The customer's telephone number.
- (2) The customer's historical billing data.

(b) Customers shall be permitted to restrict information as specified in subsection (a) by returning a signed form, orally or electronically.

...

52 Pa. Code § 54.8 (August 8, 1998).

Importantly, the Commission's regulation was **followed** by a generic order in 1999 that made it clear that customers would be permitted to restrict the release of **all** personal customer information, not just the telephone number and historical billing data that were specifically

referenced in the 1998 regulation. Indeed, that 1999 Order prohibited the release of customer telephone numbers with or without customer consent. See Procedures Applicable to Electric Distribution Companies and Electric Generation Suppliers During Transition To Full Retail Choice, Docket M-00991230, Final Order (May 18, 1999) (Enrollment Procedures Order). As stated by the Commission in that Order:

While our customer information disclosure regulations at 52 Pa. Code §54.8 provide that customers may restrict the release of their telephone numbers to third parties, we are taking the additional step by this Order of protecting consumers' privacy by concluding the telephone numbers will not be included on the eligibility lists furnished by EDCs to EGSs. Further, we agree with the concerns raised by several commentors about the need for customers to be able to indicate that they do not want any information supplied to EGSs, even if that means that their participation in the competitive market is limited.

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Therefore, we conclude that subject to the ability of customers to prevent the disclosure of 1) load data, or 2) all information, EDCs should release to licensed EGSs the name, billing address, service address, rate class, rate sub-class (if available), account number and load data for all eligible customers. Customers shall have the ability to restrict the release of either their load data or all information by placing a notation in the correct check-off box that clearly indicates what information is being restricted.

Enrollment Procedures Order at 22, 24-25.

As noted above, the Commission's Enrollment Order was appealed to the Commonwealth Court. In an en banc Opinion written by Judge McGinley, the Court quoted from the Commission Order at length, and concluded that:

The PUC's Final Order enabled the customer to restrict any information from being divulged to Suppliers, at the same time it afforded the customer the opportunity to participate in the program. The PUC properly exercised its discretion and preserved the delicate balance between a viable and competitive marketplace and customer privacy.

Mid-Atlantic Power Supply Association v. Pa. P.U.C., et al., 746 A.2d at 1201.

The Tentative Order does not identify any problems that have arisen under this longstanding policy, nor does it explain the basis for altering the balance of competitive needs and privacy rights that it adopted in 1999. It is important to note that the “default” option under the Commission’s 1999 Order was that customer information will in fact be released. The customer must take the affirmative step of requesting that this information be protected in order to prevent the information from being released. It is not clear why the Commission has tentatively concluded that the ability of customers to exercise that option should no longer be permitted.

While some may argue that time has passed since the Commission’s prior Orders and it is time to release more information, in fact, the passage of time, and the development of new technologies since the Commission’s 1999 Order argues for even more privacy and caution, not less. Not only have automated systems for marketing given rise to federal and state laws protecting consumers, such as the “Do Not Call Lists” that are part of federal and state statutes, but, as noted below, the development of smart metering and the smart grid raise significant new issues regarding the protection of, and use of customer data.

The OCA submits that it is imperative that customers be given the opportunity to keep some or all of their personal information private and restrict its dissemination if they so choose. Although the Commission has suggested carving out a special exception for the release of service address information by victims of domestic violence, the OCA submits that all customers should be given the choice to restrict dissemination of all of their personal information. Domestic violence victims should not have the burden of demonstrating that they fall within a special class in order to obtain an additional layer of protection from dissemination of personal information by EDCs. That protection should be provided to all consumers as a matter of course.

The OCA strongly urges the Commission to answer Vice Chairman Christy's question in the affirmative. That is, all customers should have the right to restrict the release of all personal information by their regulated electric distribution companies.

C. Data Produced By Residential Smart Meters Raise Additional Privacy Concerns That Have Not Been Addressed By The Commission In The Tentative Order.

In contrast to the undifferentiated historical monthly usage data provided by traditional meters, smart meters and their new technological capabilities have given rise to a national discussion regarding whether new privacy protections for customer information are now necessary. That is, while dissemination of historical monthly billing data may have justified a certain level of privacy protection, the information provided about residential customers through smart meter technology may justify a whole new level of protection that has not yet been considered by this Commission. To the extent that the Tentative Order permits the release of any new types of residential data made possible by smart meters, the OCA would urge the Commission to refrain from including such data in its Final Order at this time.

As a result of Act 129, Pennsylvania is in the forefront of the national debate regarding smart meters and the Smart Grid, but this Commission has not yet thoroughly addressed the privacy concerns that are raised by these new technologies. The Pennsylvania General Assembly did address this issue briefly in Act 129 when it stated that:

Electric distribution companies shall, **with customer consent**, make available direct meter access and electronic access to customer meter data to third parties, including electric generation suppliers and providers of conservation and load management services.

66 Pa.C.S. § 2807(f)(3). (Emphasis added). In requiring "customer consent" for the release of any customer information to EGSs, the General Assembly did not indicate whether that consent must be expressed explicitly or whether it is sufficient for a customer to not object to such

release. In any case, the customer must certainly have the right under this law to prevent the release of such smart meter information if he or she so chooses.

This set of issues is being actively considered at both the state and federal levels in a number of proceedings and studies across the Nation. For example, the United States Department of Energy (DOE) recently issued a Request for Information (RFI) seeking comments to assist the Department in understanding the current and potential uses of customer information obtained through the smart grid and smart meters. 75 Fed. Reg. 26203 (May 11, 2010) (RFI). According to the DOE:

[T]he Smart Grid also presents new challenges. In particular, many of its benefits could be reduced or delayed and avoidable harms caused unless the Smart Grid adequately respects consumers' reasonable—and often widely differing—expectations of privacy, expectations that could be compromised if detailed household energy consumption data is made too readily available, too inaccessible, or incorrectly anonymized.

RFI at 26203. The DOE conducted a preliminary review of ongoing efforts to implement Smart Grid-related legislation and then issued the RFI, noting that:

Smart Grid technologies should ensure that both states and consumers retain the flexibility to strike a range of reasonable compromises between the benefits of data collection and access, and the protection of personal privacy.

RFI at 26205. According to the DOE RFI, national standards and protocols are currently being developed for the Smart Grid. See RFI at 26204.

In February 2010, the United States Department of Commerce National Institute of Standards and Technology (NIST)<sup>2</sup> issued a Draft Report on Smart Grid Cyber Security Strategy

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<sup>2</sup> NIST is responsible for developing standards and guidelines for providing adequate information security for all federal agency operations and assets.

and Requirements. See DRAFT NISTIR 7628 (NIST Requirements).<sup>3</sup> NIST formed a privacy subgroup to perform a privacy impact assessment (PIA) for the consumer-to-utility portion of the Smart Grid. NIST Requirements at 100. The focus of the privacy subgroup was narrowed to what specific data may be collected or created that can reveal information about customers and their activities in their own residences and how these types of information could be exploited. The subgroup also was given the task of determining policies and procedures for identifying and mitigating these risks. Id. Regarding the potential privacy risks of the Smart Grid, the Draft NIST Requirements specifically state:

While the evolving Smart Grid will present societal benefits in the form of energy efficiency and grid reliability, it also presents potential privacy risks. The ability to access, analyze and respond to much more precise and detailed data from all levels of the electric grid is critical to the major benefits of the Smart Grid, and it is also a significant concern from a privacy viewpoint, especially when this data, and data extrapolations, are associated with individual consumers or locations. Some media articles have raised serious concerns about the type and amount of billing, usage, appliance and other related information flowing throughout the various components of the Smart Grid.

... Frequent meter readings may provide not only a detailed timeline of activities occurring inside a metered location (see Figure 4.1 [NIST Requirements at 101]), they could also lead to knowledge being gained about specific equipment usage or other internal business processes.

See NIST Requirements at 100. (Citations omitted).

After completing its PIA, the privacy subgroup concluded that “significant areas of concern remain to be addressed within each localized domain of the Smart Grid. ... there may be opportunities to develop processes and practices to identify and address privacy risks.” Id. at 103. The PIA concluded that “while some states have examined the privacy implications of the Smart Grid, most states have little or no documentation available.” Id.

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<sup>3</sup> [http://csrc.nist.gov/publications/drafts/nistir-7628/draft-nistir-7628\\_2nd-public-draft.pdf](http://csrc.nist.gov/publications/drafts/nistir-7628/draft-nistir-7628_2nd-public-draft.pdf)

NIST issued general privacy principles based upon the findings and conclusions of the privacy subgroup's PIA. See NIST Requirements at 104 *et seq.* Of note for purposes of these ECL Comments, the Draft NIST privacy principles regarding the dissemination of private smart grid information included the following:

2. **Notice and Purpose:** A clearly-specified notice should exist and be shared in advance of the collection, use, retention, and sharing of energy usage data and personal information.

...

3. **Choice and Consent:** The organization should describe the choices available to individuals and obtain explicit consent if possible, or implied consent when this is not feasible, with respect to the collection, use, and disclosure of their personal information.

...

7. **Disclosure and Limiting Use:** Personal information should be used only for the purposes for which it was collected. Personal information should not be disclosed to any other parties except for those identified in the notice, or with explicit consent of the service recipient.

NIST Requirements at 105, 107.

Finally, on July 21, 2010, the National Association of Regulatory Utility Commissioners (NARUC) passed a Resolution on Smart Grid. See NARUC Resolution on Smart Grid (NARUC Resolution).<sup>4</sup> The NARUC Resolution noted that “most States and electric utilities have policies to protect customer energy usage data (CEUD) with the premise that such information be kept confidential absent customer authorization for its release” and that:

While the deployment of smart grid technologies may empower the consumer and provide more options, it also poses significant privacy issues that need to be considered and resolved by regulators.

NARUC resolved that State regulatory commissions should take steps to provide that utilities make cost effective decisions and safeguard customers' privacy and that authorized third parties have responsibilities to protect the information and privacy of customers. Id. Further, NARUC

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<sup>4</sup> <http://summer.narucmeetings.org/2010SummerFinalResolutions.pdf>

resolved to “make every effort to give the highest priority to ensure that consumers are protected as the smart grid evolves.” Id.

The OCA raises this issue here because the Tentative Order appears to include information that will be obtained from residential customers through the use of smart meters. Specifically, this information includes on-peak kwh usage, off-peak kwh usage, and load factor. While this information is provided on a monthly, rather than an hourly or real-time basis, the OCA submits that, before the Commission starts down the path of requiring the release of this type of information on residential customers, it should consider whether some additional protections, such as requirements for explicit prior consent are needed. More generally, the OCA urges the Commission through its Committee processes and formal proceedings to address the issue of what additional privacy protections are needed in Pennsylvania as our EDCs smart meter plans are implemented.

D. The Commission Should Amend The List Of Information To Be Provided And Establish Procedures That Allow Customers To Restrict The Release Of Some Or All Of Their Personal Information.

Given the concerns discussed above, the OCA submits that the Commission should further consider the list of information to be provided on the eligible customer lists and should develop procedures that allow customers to restrict some or all of the information on the list. These steps are necessary to preserve the delicate balance between the basic right of customer privacy and facilitating the development of a competitive market that both this Commission and the Commonwealth Court found to be required.

As to the information contained on the eligible customer list, the OCA submits that the following data should not be included on the list:

- On Peak kWh Period 1 ...12 (monthly)

- Off Peak kWh Period 1 ... 12 (monthly)
- Load Factor

The OCA submits that release of the above information as a standard practice for the eligible customer list raises significant questions that are just beginning to be discussed at the national level.

The OCA submits that the Commission should also develop procedures that will allow customers to restrict some or all of their information. The procedures should allow for periodic notice and information to customers about their right to restrict the release of information as well as the on-going ability to restrict information through a contact with an EDC's customer service representative or through the EDC's website. As an initial matter, the Commission should ensure that each EDC has provided proper notice to customers about the new Eligible Customer List and has provided the customer with the opportunity to restrict some or all of their information. This initial notice should include a postage pre-paid postcard (as well as website and telephone contact information) that would allow the customer to opt out of providing some or all of their information.

Just as the eligible customer lists are being periodically refreshed, the OCA submits that the Commission should refresh this specific notice procedure on a periodic basis. The purpose of this periodic notification is to continue to inform customers of the eligible customer list, their right to opt out, and to ascertain if the customers have changed their preferences. The OCA suggests that the Commission may wish to forward to the OCMO or the Retail Markets Working Group the question of how often this notification should be sent and what its content should be.

Finally, the Commission should direct each EDC to have procedures in place, both through telephone contact with a customer service representative and through the EDC's

website, where a customer can change their preference regarding the release of their information at any time.

The OCA urges the Commission to make these modifications to its Tentative Order to ensure that the customer's right to privacy is adequately protected as the EDCs move forward with the development and posting of uniform Eligible Customer Lists.

### III. CONCLUSION

The OCA appreciates this opportunity to comment on these important issues. The OCA urges the Commission to re-evaluate the items identified in the Tentative Order for inclusion in the ECLs as detailed in these comments. The OCA also urges the Commission to provide all customers with the opportunity to restrict the release of all such information on an opt-out basis before the Eligible Customer Lists are posted, and on an on-going basis. The OCA further submits that residential usage information from smart meters that go beyond the type of historic monthly usage that has previously been released by Pennsylvania EDCs should not be included in the ECLs at this time. The privacy implications of the release of smart meter data should be the subject of further Commission consideration.

Respectfully Submitted,



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Candis A. Tunilo  
Assistant Consumer Advocate  
PA Attorney I.D. # 89891  
E-Mail: CTunilo@paoca.org

Tanya J. McCloskey  
Senior Assistant Consumer Advocate  
PA Attorney I.D. # 50044  
E-Mail: TMcCloskey@paoca.org

Counsel for:  
Irwin A. Popowsky  
Consumer Advocate

Office of Consumer Advocate  
555 Walnut Street  
5th Floor, Forum Place  
Harrisburg, PA 17101-1923  
(717) 783-5048

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