

PENNSYLVANIA UTILITY LAW PROJECT

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August 4, 2010

Via E-Filing

Rosemary Chiavetta
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Pa. Public Utility Commission
400 North Street, 2nd Floor North
PO Box 3265
Harrisburg, PA 17105-3265

**Re: Interim Guidelines for Eligible Customer Lists for Electric Distribution
Companies
Docket No. M-2010-2183412**

Dear Secretary Chiavetta:

Enclosed for filing and pursuant to the Pennsylvania Public Utility Commission's Tentative Order in the above-captioned proceeding, please find the Comments of the Pennsylvania Utility Law Project. All parties of record have been served according to the attached Certificate of Service.

Please contact me directly if you have any questions. Thank you.

Respectfully submitted,


Julie George, Esq.

Cc: Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interim Guidelines for Eligible Customer :
Lists for Electric Distribution Companies : Docket No. M-2010-2183412

CERTIFICATE OF SERVICE

I hereby certify that I have today served a true copy of the foregoing document upon the parties of record in this proceeding listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Via E-Filing

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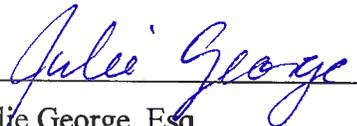
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Dated: August 4, 2010

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interim Guidelines for Eligible Customer :
Lists for Electric Distribution Companies : Docket No. M-2010-2183412

**COMMENTS OF THE
PENNSYLVANIA UTILITY LAW PROJECT**

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I. INTRODUCTION

The Commission's Office of Competitive Market Oversight has submitted a proposal to provide for more uniformity in the information provided by Electric Distribution Companies' ("EDCs") Eligible Customer Lists ("ECLs"), which are made available to Electric Generation Suppliers ("EGSs") and marketers. The Pennsylvania Public Utility Commission ("Commission") has requested comments in regard to this proposal.

Throughout April 2010, a team from the Committee Handling Activities for Retail Growth in Electricity ("CHARGE") discussed and debated various issues related to the ECL. On April 29, 2010, after several meetings and conference calls, the team reported back to the larger CHARGE group and to Commission staff with the results of their discussions. Commission Staff took the team ECL report and the CHARGE discussion under advisement and prepared the present recommendations contained in this Tentative Order for the Commission's consideration.

The Pennsylvania Utility Law Project ("PULP") submits these comments pursuant to the Commission's Tentative Order. PULP provides information, assistance, and advice about residential utility and energy matters affecting low-income consumers. PULP is the designated statewide project of the Pennsylvania Legal Aid Network of civil legal aid programs. PULP acts in coordination with PLAN programs and their clients, other nonprofit agencies and community groups that serve the low income. PULP thanks the Commission for this opportunity to provide these comments.

II. MAINTAINING CONSUMER PROTECTIONS

Electric generation rate caps are coming to an end, and many consumers will want access to information about wholesale electricity markets so they can make informed choices about securing an alternative generation supplier. The Commission has taken an active role in promoting a competitive wholesale electric generation market in the hopes of providing lower cost options to Pennsylvania consumers. The Commission should be commended in its efforts to provide consumers with low cost electric generation options. However, PULP respectfully recommends that the Commission proceed cautiously in order to ensure that the development of a competitive market does not come at the expense of other important concerns, such as the desire of consumers to protect the integrity of their personal information and their privacy.

As proposed, the Tentative Order will continue the practice of requiring EDCs to provide private consumer information to EGSs and marketers. Consumers will be forewarned of this information sharing by the EDC and given the ability to opt out by choosing to either withhold their names or their historical billing information.¹ PULP submits that this interim policy, which maintains Section 54.8 in its current form, errs in favor of fostering competition at the expense of a consumer's interests in maintaining the security and privacy of personal information. PULP submits the Commission can make minor revisions to its current policies that will address and correct this imbalance.

Consumers have a reasonable expectation that their private, personal information will not be shared by an EDC with a commercially-oriented third party unless the consumer gives prior, affirmative consent. In this context, the Commission's current opt-out methodology of securing consumer consent to information sharing provides insufficient protection to consumers' private, personal information. Since there are satisfactory, alternative methods to securing consumer

¹ 52 Pa. Code § 54.8.

consent to information sharing that do not conflict with consumer privacy concerns, the desire to promote competition need not trump the consumers' reasonable right to and expectation of privacy.

A. Consumers have a Reasonable Expectation that Their Private, Personal Information will not be Shared by an EDC

American citizens value their privacy and are concerned about the erosion of privacy. The Electronic Privacy Information Center maintains information about a number of polls that clearly indicate consumers worry about their privacy, anonymity, and the theft of their identity.² This concern for privacy is heightened in this instance because EDC customers have no reason to expect their private information, given to an EDC pursuant to receiving service, will be shared with any third party. Private consumer information is given to the EDC under the belief that it is provided only to a company subject to Commission regulation for the purpose of receiving regulated electric service. Consumers would have no reason to anticipate that an EDC would either of its own volition or under the direction of the Commission give private consumer information to a third party, commercial entity. Consumers should not have to, nor would they reasonably expect to need to, "be on the look out" for warnings from their EDC that personal, private information is at risk of being shared with a commercial third party. Quite the contrary, consumers reasonably should expect to have heightened protections for their private information precisely because EDCs fall under the jurisdiction of a governmental watchdog.

² See <http://epic.org/privacy/survey/#polls>. Accessed on 7/29/10. Also see *Testimony by Lillie Coney, Associate Director of the Electronic Privacy Information Center Before the House Committee on Science and Technology Subcommittee on Technology and Innovation*, July 1, 2010. Retrieved on 7/29/10 from http://epic.org/privacy/smartgrid/Smart_Grid_Testimony_2010-07-01.pdf.

Consumer fears about the integrity of private information are well grounded and can be addressed by limiting the sharing of private consumer information, thus decreasing the chances that the information will be misappropriated or misused. A brief sampling of the kinds of misuses of personal information highlights the reasonable basis of consumer concerns.

(1) *Identity Theft*

Identity theft is a clear and growing problem as more personal information is stored and shared among public and private databases. The Commission found the problem sufficiently worrisome to initiate an investigation in 2004 to review identity theft and issue guidance to utilities.³ The problem of identity theft surely has not diminished over the last five years since the Commission's investigation, and the Commission's earlier caution in regard to identity theft should be maintained and strong privacy rules enacted in this proceeding.

(2) *Slamming and Cramming*

In Pennsylvania, long distance and local telephone companies engaged in a number of different unethical practices during the mid-1990s as the telecommunications industry experimented with deregulation: adding unauthorized charges to customers' local phone bills, adding unauthorized charges to customers' long distance bills, switching customers' long distance carrier without prior authorization, etc. So prevalent were these practices that the Commission promulgated regulations prohibiting them on a local level,⁴ and the Federal Communications Commission enacted Federal protections.⁵ A highly effective way to safeguard consumers from this kind of unethical business activity in the electric power market is to increase the strength of protections for private consumer information.

³ *In re: Identity Theft*, Docket No. M-00041811, (Order entered September 21, 2005).

⁴ 52 Pa. Code § 64.23.

⁵ 47 CFR §§ 64.1100-1195.

(3) *Rule Violations*

It is reasonable for consumers to want their personal information to remain private because, even where rules to protect consumer privacy have been enacted, some companies continue to break those rules and infringe on consumer privacy. For example, here in Pennsylvania,

A Rhode Island home security alarm company, a Florida-based septic system company and a New York porcelain company must pay investigation costs and fines to resolve complaints from consumers who received solicitation calls while enrolled on Pennsylvania's Do Not Call list.⁶

Given that some companies will break consumer protection rules even when they are in place, the Commission should enact strong, effective privacy rules up front, rather than promulgating rules designed to foster competition which may have the effect of failing to protect consumer privacy adequately.

As shown above, consumers have reasonable grounds on which to be concerned about the safety and integrity of their personal, private information. This valid concern deserves serious consideration by the Commission. PULP respectfully submits that the opt-out methodology adopted by the Commission in the Tentative Order fails to address valid consumer concerns about privacy and fails to balance privacy protections with competition concerns.

B. The Opt Out Methodology of Securing Consumer Consent to Sharing Information Provides Insufficient Protection to Consumers.

The Commission's current policy toward information sharing espoused in the Tentative Order is expressed in 52 Pa. Code § 54.8:

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

⁶ *Attorney General Corbett announces fines against three businesses for "Do Not Call" Violations.* (July 22, 2010). Retrieved from <http://www.attorneygeneral.gov/press.aspx?id=5459>.

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.

Section 54.8 employs what is known as an opt-out methodology for acquiring consumer consent, in this instance consent to the sharing of personal information. Section 54.8 requires an EDC, prior to sharing private customer information with a third party, to notify the consumer of this sharing and provide the customer with a way to prevent, in part, the information sharing. This is accomplished by the customer contacting the EDC or EGS to express a desire to restrict private information; the customer must opt out of having his/her information shared.⁷ This effectively presumes a right of the third party with commercial interests to have access to private consumer information for commercial gain and places that right above the expectation of the customer to privacy.

PULP submits that this inverts the proper order of things. Section 54.8 should be revised so it presumes customer information is private and may not be shared with a commercially oriented third party. Only where the customer affirmatively opts in and agrees in writing to allow information to be shared with a third party commercial entity should the presumption of privacy be trumped. A customer should have to opt in, not opt out, of information sharing.

The opt-out methodology is insufficient for a number of reasons. First, there is always a possibility that a customer may not receive or read the notification from the EDC that private information is at risk of being shared. Second, even where a customer receives and reads

⁷ This method of securing customer consent where consent is deemed given unless the customer objects is variously termed an "opt out" or a "negative check off." In contrast, an opt in is where consent is presumed not to be given, unless the customer actively gives it.

a notice, there is a real chance that the customer will misunderstand some or all of the notice. For example, a consumer might not realize the importance of the notice, might misunderstand what steps they must take to either withhold or give consent, or might misunderstand the gravity of giving their consent. Finally, even where a consumer receives and understands the notice, they might fail to take proper action or any action at all. At any point in the process, where one of these problems occurs, the EDC may not receive the waiver and would mistakenly take that absence of feedback as an affirmative consent. The result will be a consumer's personal, private information is provided to a third party, commercial entity and runs the danger of being misused.

The insufficiency of the opt-out method is underscored by the fact that consumers often fail to grasp when they have released their own private information through a standard "notice and consent" model. David Vladeck, Director of the Bureau of Consumer Protection at the Federal Trade Commission, recently critiqued the "notice and consent" model of consumer protection by saying:

[The notice and consent model] may have made sense in the past where it was clear to consumers what they were consenting to, that consent was timely, and where there would be a single use or a clear use of the data. That's not the case today. Disclosures are now as long as treatises, they are written by lawyers— trained in detail and precision, not clarity—so they even sound like treatises, and like some treatises, they are difficult to comprehend, if they are read at all. It is not clear that consent today actually reflects a conscious choice by consumers.⁸

This misapprehension on the part of consumers supports the notion that the Commission should be strengthening privacy protections and limiting access to consumer information, rather, than as is the case in the Tentative Order, promoting a policy that makes it more likely that sensitive consumer information will be distributed to third parties without the full understanding and active consent of consumers.

⁸ Quoted from *Testimony by Lillie Coney, Associate Director of the Electronic Privacy Information Center Before the House Committee on Science and Technology Subcommittee on Technology and Innovation*, July 1, 2010. At pp. 15-16. Retrieved on 7/29/10 from http://epic.org/privacy/smartgrid/Smart_Grid_Testimony_2010-07-01.pdf.

C. There are Satisfactory, Alternative Methods for Securing Consumer Consent to Information Sharing.

PULP does not stand in opposition to the exchanging of consumer information, where appropriate, with a government agency for the purpose of enabling the efficient provision of benefits to eligible consumers. Nor does PULP oppose wholesale competition or proper marketing. Questioning the effectiveness of the opt-out methodology in this particular context does not equate to undermining the desire to foster a robust wholesale electric market. It simply requires the use of other effective communication methodologies which work in tandem with consumer protections, rather than working counter to them. PULP recommends the Commission consider opt-in methodologies of securing consumer consent to information sharing. PULP also recommends using public information channels that can direct consumers to relevant educational materials about competition.

(1) *Opt In Methodologies*

Opt in methodologies afford the opportunity to encourage consumer participation in choosing an alternative supplier while simultaneously protecting consumer privacy. An opt-in methodology presumes consumer information is private and prohibits its release by an EDC. Only when the consumer affirmatively chooses to allow the release of that information may this initial presumption of privacy be trumped. Opt in methodologies better protect consumer information because they require a more affirmative, informed response from the consumer prior to the sharing of private information with a commercial third party. Opt in methodologies are superior because they make it much harder for a customer to accidentally or mistakenly give their consent to sharing sensitive information. Finally, the opt-in method is

superior because there is less chance for a customer to “miss the notice” and have their information shared without their consent.

Additionally, using an opt-in methodology would comport with historical practice before the Commission, which historically has rejected the use of the negative check off as being unnecessarily burdensome to the consumer and as prone to being overlooked.⁹ Various parties have repeatedly noted the superiority of an opt-in methodology for securing active buy in and consent from utility customers. For example, when PPL sought approval of its Rate Stabilization Plan, how to secure consumer participation was a key issue. The issue was resolved and became part of the Commission approved Settlement Agreement when PPL agreed to use an opt-in methodology for customer participation, rather than their originally proposed opt-out methodology.¹⁰

(2) *Public Information Channels*

In addition to using an opt-in method, there are several other methods the Commission can use to foster competition without the associated risks to consumer information. The Commission can engage in its own public education initiative that directs consumers to information about electric choice. For example, the Commission’s own website, <http://www.papowerswitch.com/>, has a wealth of excellent information about switching generation suppliers. The Commission can direct consumers to the Office of Consumer Advocate’s website for its excellent section on shopping for an electricity provider: <http://www.oca.state.pa.us/Industry/Electric/Default.htm>. Furthermore, the Commission can encourage the EGSs and marketers to use the variety of marketing tools at their disposal, such as

⁹ *Re: PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271 (Order entered Aug. 6, 2009), Dissenting Statement of Vice Chairman Tyrone J. Christy, at p. 3.

¹⁰ *Petition of PPL Electric Utilities Corporation For Approval Of A Rate Stabilization Plan*, Docket No. P-2008-2021776 (Order entered Aug. 7, 2008).

internet, radio, and television, to inform consumers about their services. In sum, there are a number of methods the Commission can use that provide a viable communication vehicle for marketers without the associated risks to consumer privacy rights.

Most important, the use of an opt-in methodology or the use of alternative communications channels significantly reduces the chances of private consumer information being shared while still enabling a robust marketing effort to take place. The opt-in methodology shows that both consumer protection and competition can receive balanced treatment.

D. The Desire for Competition Should Not Trump the Consumer's Right to Privacy.

The Commission has invested a considerable amount of effort into informing consumers about their ability to shop for alternative generation suppliers as a means of helping the wholesale market to grow and prices to drop. This is good and appropriate. However, it is important for the Commission to recognize that there are reasonable grounds on which consumers can elect to remain with their EDC as their default service supplier, to elect not to shop for an alternative supplier, and to want to avoid solicitations from alternative suppliers and marketers.

(1) *Risk Aversion*

It is reasonable for consumers to elect not to shop for an alternative generation supplier because shopping leaves a consumer open to potential risks and is not always certain to reduce costs. A consumer who disagrees with the cost-saving projections or is concerned about the potential risks inherent in shopping may choose to remain with the EDC as the preferred provider of generation purchasing services. These customers should not have to suffer the annoyance of calls and visits from EGSs and marketers, and they should not have to keep a watch for notices that their personal information is going to be shared with third parties.

(2) *Vulnerable, Low-Income Customers*

It is reasonable for vulnerable low-income customers to elect not to shop for an alternative generation supplier because of the potential risks and volatility of the market. Low-income households have little or no room for error in their budgets, usually living from paycheck to paycheck with no spare money left at the end of the month. While the promised savings in a lower electric bill may seem a perfect fit for such a household, this is not necessarily the case. The volatility in the electric markets to which shopping customers will be exposed can mean a fluctuating electric bill, much more so than traditionally experienced by consumers. This kind of ambiguity would not help a low-income family with a fixed or limited budget. It would simply expose them to the unwanted risk of higher bills. These families reasonably may choose to stay with the EDC they know and trust.

(3) *Buying Electricity is Hard and Confusing*

It is reasonable for consumers to elect not to shop for an alternative generation supplier because shopping for electricity is hard and confusing. Even with the highly specialized training and experience at the Commission and at EDCs, it is hard for the Commission or utilities to estimate correctly what the future price of electricity will be. But that is exactly what a customer must do when s/he signs a multi-year contract for generation supply, only without the same kind of technical expertise at his or her disposal.¹¹ In the face of that complexity, a customer reasonably can choose to rely on their EDC to continue to provide both distribution service and the service of purchasing generation.

Customers who make a choice not to shop will not want to be exposed to the marketing efforts of EGSs and marketers, nor will they want to have to take added steps to secure their

¹¹ The only parties who seem absolutely certain shopping will result in better prices for consumers are the EGSs and marketers. Given their vested interests, it seems unwise to rely on EGSs and marketers for an unbiased opinion in this matter.

private information. The desire to enjoy the solitude and seclusion of one's own home is an important and valid interest with a long tradition in America. Where the Commission can recognize and protect this legitimate desire, it should do so. The Commission can support this legitimate desire by promulgating strong rules to protect consumer privacy, rules which presume privacy but permit consumers to affirmatively waive that privacy.

III. COMMENTS IN RESPONSE TO SPECIFIC ITEMS IN THE TENTATIVE ORDER

A. Vice Chairman Tyrone J. Christy's Statement

In a statement issued concurrently with the Tentative Order, Vice Chairman Tyrone J. Christy requested parties' comments on the broader issue of whether customers should have the right to restrict the release of all of their customer information. PULP endorses the right of customers to strict privacy in commercial transactions regarding all of their customer information, not just their telephone numbers and historical billing information. PULP submits that, because the preservation of customer privacy is so important, the de facto approach in a commercial context to sharing any customer information is that it should be presumed private and should not be released by an EDC to any third party, commercial entity without the prior, written, affirmative consent of the customer on an opt-in basis.

B. Treatment of Customers Who are Victims of Domestic Violence

PULP strongly supports the adoption by the Commission of guidelines and rules designed to protect victims of domestic violence. PULP supports the Commission's inclusion of the Pennsylvania Coalition Against Domestic Violence ("PCADV") in this proceeding. PCADV

is a clear leader in protecting the rights of domestic violence victims in Pennsylvania, and its expertise in this matter will be invaluable. At a minimum, no specific rules regarding the ECL treatment of customer information of victims of domestic violence should be adopted without PCADV either drafting or commenting upon them.

For the initial fast tracked guidelines, PULP recommends a conservative approach. Whenever a company has information which reveals that a customer has been or is a victim of domestic violence, then no information should be revealed. In developing regulations, the Commission should work directly with the PCADV and similar organizations to develop a policy which places maximum emphasis on protection as opposed to the interests of competition.

C. Customer Telephone Numbers

PULP supports the adoption of guidelines and rules that would limit the sharing of customers' telephone numbers without the customers' prior affirmative consent to the sharing of this information. See Section II, supra, for a full discussion.

D. POLR Indicator

PULP supports the adoption of guidelines and rules that would limit the sharing of customers' POLR status without the customers' prior affirmative consent to the sharing of this information. See Section II, supra, for a full discussion.

IV. CONCLUSION

While fostering competition in the electric generation market is important, this goal should not be pursued in isolation or at the expense of equally important consumer concerns.

Where both competition and consumer protections can be pursued in tandem, then it is incumbent upon the Commission to do so. In this situation, PULP contends that by replacing its current opt-out policy with an opt-in policy, the Commission can encourage competition successfully while protecting valid consumer interests in the integrity of their privacy and their personal private information.

Respectfully submitted:

A handwritten signature in blue ink that reads "Julie George". The signature is written in a cursive style and is positioned above a horizontal line.

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