

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

**Interim Guidelines for Eligible
Customer Lists for Electric
Distribution Companies**

**Public Meeting – November 12, 2010
2183412-DIR
Docket No. M-2010-2183412**

DISSENTING STATEMENT OF VICE CHAIRMAN TYRONE J. CHRISTY

I am voting today against the adoption of these Interim Guidelines because, with the exceptions of telephone numbers and historic usage data, the Interim Guidelines do not allow customers to restrict the release of their customer information to the numerous EGSs that have been licensed by the Commission.¹ In other words, the Commission is mandating that EDCs release most customer information to all EGSs even if the customer strenuously objects. This is the first instance of which I am aware in which a State utility commission has decreed that there will be neither an opt-in requirement nor an opt-out right before private customer information is released to third parties.

In my view, a government agency should work to protect the confidentiality of customer information, and *at a minimum* this means that customers must be given the right to affirmatively restrict the release of all of their personal information if they so choose. Preferably, affirmative customer consent should be obtained as a necessary precondition to the release of any customer information. Today's Order falls far short of these objectives. Any marginal increase in shopping statistics as a result of the mandatory release of customer information will be accompanied by the loss of consumer privacy protections – an unacceptable trade-off.

Currently, our regulations at 52 Pa. Code § 54.8 provide that an EDC may not release “private customer information” unless customers are given the right to restrict its release. The regulation then states that customers may restrict the release of their telephone number and historic billing data. Rather than interpreting this language as examples of the type of information that a customer can protect, the Commission of late has interpreted this regulation as one that *prevents* a customer from restricting the release of the balance of his or her private customer information. Under this interpretation, the two enumerated items (telephone number and billing data) are exceptions to the general rule that an EDC must release private customer information to EGSs regardless of customer preference.

This interpretation of 52 Pa. Code § 54.8 by the Commission has been both recent and inconsistent.² In an Order issued *after* this regulation was promulgated, the Commission held

¹ Approximately 150 EGSs have been licensed by the Commission to date, and the number of licensed EGSs is increasing steadily as the expiration of rate caps for the majority of customers approaches.

² PECO states that it currently does not provide any customer telephone numbers to EGSs, and does not require affirmative customer action to prevent the release of telephone numbers. PECO states that its recent bill inserts informed customers that their telephone numbers would not be released (without any required action on the part of

that all customers would be permitted to restrict the release of all personal customer information, not just the telephone numbers and historic billing data specifically mentioned in the regulation. The Commission agreed with privacy concerns that had been expressed by several parties, and decided that customers would be given the ability to restrict the release of all of their information. The Commission's Order also prohibited the release of customer telephone numbers in all instances, without requiring customers to affirmatively "opt-out." The Commission's Order states that "telephone numbers will not be included on the eligibility lists furnished by EDCs to EGSs." *Procedures Applicable to Electric Distribution Companies and Electric Generation Suppliers During Transition to Full Retail Choice*, Docket No. M-00991230, Final Order (May 18, 1999) (*Enrollment Procedures Order*) at 22.

It is not clear to me precisely when the Commission reinterpreted 52 Pa. Code § 54.8 and effectively rescinded its 1999 *Enrollment Procedures Order*, apparently without the notice or opportunity to be heard that seemingly should have been provided pursuant to Section 703(g) of the Public Utility Code, 66 Pa. C.S. 703(g). Nevertheless, today the Commission is expanding its current interpretation of 52 Pa. Code § 54.8 by allowing customers who are victims of domestic violence, or who are similarly endangered, to restrict the release of *all* of their customer information. This is an important expansion of the Commission's current interpretation of its privacy rules, which was supported by the majority of the parties, including the Pennsylvania Coalition Against Domestic Violence (PCADV), that filed comments in response to the Commission's Tentative Order. I strongly support this aspect of today's Order.

Unfortunately, the Commission has decided that the vast majority of customers will not have the right to restrict the release of their private customer information, with the exception of their telephone number and historic usage data. The Statement that I issued in conjunction with the Commission's Tentative Order of July 15, 2010, invited comments on whether all customers should be given the right to restrict the release of all of their private customer information if they so choose. The majority of the parties supported the right of customers to restrict the release of all of their private customer information, including PECO Energy Company (PECO), PPL Electric Utilities Corp. (PPL), Duquesne Light Company (Duquesne), Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company (FirstEnergy), the Office of Consumer Advocate (OCA), the Pennsylvania Utility Law Project (PULP) and the PCADV.

PECO stated that it currently has an approved process that provides customers three options regarding the release of their information, one of which is the option of not providing *any* information to EGSs. PECO stated that its preference is to maintain the current three options for its customers, including Option 2, "Do not provide any information."

PPL stated that it supports giving all customers the option to restrict the release of all of their information. PPL stated that it has been contacted by various customers who, for one reason or another, including identity theft and general privacy concerns, are extremely concerned about the release of *any* of their information.

the customer) and were approved by the Commission. Metropolitan Edison Company, Pennsylvania Electric Company and Pennsylvania Power Company currently provide all customers the option of not providing any customer information to third party EGSs.

Duquesne stated that customers should have the right to restrict information about themselves and their account. Duquesne believes that it should honor the wishes of their customers with regard to the release of their customer information, even if that request is not to release any information to third parties.

First Energy currently provides all customers the ability to opt-out of providing any of their customer information to third party EGSs. FirstEnergy believes that customers should be able to opt-out of the Eligible Customer List completely, something that First Energy already allows. FirstEnergy stated that telephone numbers should not be included on the Eligible Customer List at all, and should not be released due to privacy issues.

The Office of Consumer Advocate (OCA) believes that all customers should have the right to restrict the release of all of their information, and stated as follows:

The OCA, however, does not support the substance of the Tentative Order in at least two critical respects. First, the OCA shares the concern . . . that the Tentative Order appears to deny individual customers the right to restrict the release of all of their private customer 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 No. 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. . . 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." 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. . . The Commission's Tentative Order fails to consider the current national debate over the release of 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.

* * *

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 EGS's under the Commission's proposed Order, other than the customer's telephone number and billing data. The only additional exception . . . 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 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.

* * *

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. . . . [A]s 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 . . . victims of domestic violence, the OCA submits that all customers should be given the choice to restrict dissemination of *all* of their personal information.

OCA Comments at 2-8. The OCA argues persuasively that the information provided about residential customers through smart meter technology justifies a whole new level of protection that has not been considered by the Commission.

The OCA also points out that mandating the release of customer meter data without affirmative customer consent may violate Act 129, which provides that EDCs shall “with customer consent” make available customer meter data to EGSs. 66 Pa.C.S. § 2807(f)(3). The Commission's Order today does not address the issue of whether the statutory requirement of “customer consent” is satisfied by an opt-out procedure limited to historic usage data. One could debate whether or not an “opt-out” procedure satisfies the statutory requirement that customers consent to the release of meter data, although it seems to me that the required customer consent can be established only through an affirmative “opt-in” agreement to release meter data. However, today's Order apparently requires that EDCs provide monthly on-peak and off-peak data and customer load factors to EGSs without even providing customers the right to restrict the release of this data through an opt-out procedure. In response to the concerns raised by OCA on this issue, the Commission's Order states that “[w]ith regard to OCA's concerns regarding the restriction of some data elements, we will not move further than our resolution of the general issue above. Subject to our resolution relating to domestic abuse victims and similarly

endangered customers, customers may choose to restrict telephone numbers, historic usage and service address.” Order at 12. Apparently customers will not be allowed to restrict the release of their monthly on-peak and off-peak usage and load factors; this data apparently is not included in the definition of “historic usage.” This is quite alarming. It also seems very clear that, if I am interpreting today’s Order correctly, the inability of customers to restrict the release of this data would violate 66 Pa.C.S. § 2807(f)(3).

OCA also points to a number of proceedings and studies regarding privacy issues that are being conducted at the national level, particularly with respect to the deployment of smart meter technology. A Draft Report on Smart Grid Cyber Security Strategy and Requirements was issued in February 2010 by the US Department of Commerce National Institute of Standards and Technology (NIST). The Draft Report points to the serious privacy risks created by the smart grid, and points out that frequent meter readings may provide a time-line of activities occurring within a customer’s home, as well as knowledge about specific appliance usage. The draft NIST privacy principles regarding the dissemination of private customer information include requirements governing Notice and Purpose; Choice and Consent (explicit consent should be required if possible); and Disclosure and Limiting Use (“personal information should not be disclosed to any other parties except for those identified in the notice, or with the explicit consent of the service recipient.”).

On July 21, 2010, the National Association of Regulatory Utility Commissioners (NARUC) passed a Resolution on Smart Grid. The Resolution notes that most States have policies to protect customer usage data, with the premise that the information is to be kept confidential absent customer authorization for its release. The NARUC Resolution states that smart grid technologies pose significant privacy issues “that need to be considered and resolved by regulators.” State Commissioners are urged to take steps to safeguard customer privacy and “to make every effort to give the highest priority to ensure that consumers are protected as the smart grid evolves.”

The Commission’s Order does not address the NIST privacy principles or the NARUC Resolution, or other reports or privacy guidelines that have been issued at the national level by governmental agencies and national associations.³ I believe it is accurate to state that the Interim

³ NIST’s recent *Guidelines for Smart Grid Cyber Security: Vol. 2, Privacy and the Smart Grid* (August 2010) recommends that entities develop privacy policies drawn from the *Fair Information Principles* issued by the Organization for Economic Cooperation and Development (OECD). The OECD’s *Fair Information Principles* state that personal data should not be disclosed except with the informed consent of the subject or by the authority of law. It would be disingenuous to suggest that the Commission has adhered to this principle by first creating a mandatory disclosure requirement, and then arguing that the “law” requires disclosure of customer information. The US Department of Energy (DOE) recently issued a Report on *Data Access and Privacy Issues Related to Smart Grid Technologies* (October 5, 2010). The DOE Report states that both residential and commercial customers should be able to decide whether or not to grant access to their consumption data to third parties. “Commenters to this proceeding generally agree that these conditions should include a prohibition on the disclosure of consumer data to third parties in the absence of an affirmative consumer authorization.” The DOE Report recommends an “opt-in” procedure to obtain customer consent to the release of smart meter data. In addition to the NARUC Resolution cited by OCA, NARUC also adopted a *Resolution Urging the Adoption of General Privacy Principles for State Commission Use in Considering the Privacy Implications of the Use of Utility Customer Information* (1980). This NARUC Resolution resolved that, to the extent practical, customers should be permitted to choose the degree of privacy protection, and that unless a customer grants explicit, affirmative informed consent, customer information

Guidelines that the Commission is adopting today are inconsistent with the majority of the smart grid privacy principles and guidelines that have been adopted at the national level. The OCA urged the Commission to consider whether additional protections are required in light of the development of smart meter technology, such as requirements for affirmative customer consent, before starting down the path of releasing meter data such as on-peak and off-peak usage and customer load factor. OCA urged that these items should not be included on the eligible customer list. As stated above, the Commission has rejected the OCA's arguments.

The Pennsylvania Utility Law Project (PULP) similarly urged the Commission to proceed cautiously "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." PULP Comments at 2. PULP believes that the Interim Guidelines err in favor of fostering competition at the expense of consumer's interests in protecting the privacy of their data. PULP submits that the opt-out procedure that the Commission has adopted fails to balance privacy protections with competition concerns, and places the rights of third parties with commercial interests over the expectation of customers that their privacy will be protected. PULP argues strenuously for a presumption of customer privacy, and limiting the sharing of private customer information to instances where a customer has affirmatively consented to its release. PULP correctly points out that numerous channels for obtaining information about competitive supply offers are available to customers, none of which require the unauthorized release of customer information to third parties.

The Pennsylvania Coalition Against Domestic Violence (PCADV) argued that an affirmative opt-in mechanism should be used prior to the disclosure of any customer information. The PCADV states that, while it understands and respects the value of cultivating competition, "we believe that the value of protecting domestic violence victims' customer information, so as to prevent abusers from tracking and further harming victims, outweighs any potential benefits of broad disclosure of customer information for the purpose of fostering competition within the electricity generation market." PCADV Comments at 2. The PCADV states that utility records are a particularly rich source of information for the determined stalker, and while the theft or disclosure of private information can be devastating for the average individual who may have her identity stolen and credit destroyed, the disclosure of private information about a domestic violence victim can be fatal. According to the PCADV, the Interim Guidelines are insufficient to protect customers generally, and domestic violence victims specifically. Victims of domestic violence often are between and among addresses after fleeing abuse and whose mail commonly fails to reach them. The PCADV asserts that the Commission's Interim Guidelines are in stark contrast to concerted efforts at both state and federal levels to create privacy and confidentiality protections. The PCADV also notes that there is an analogy between the "notice and consent" opt-out model and the general tenet of contract law that holds that silence is not consent. The PCADV argues that the only way to ensure true informed consent is an opt-in mechanism. At

should not be made available to third parties unless by Commission order. With the increase in the amount of customer information collected by EDCs and the increased ease of disseminating data in the electronic age, this Resolution is even more compelling than it was when issued in 1980. Again, it would be disingenuous to suggest that the Commission has complied with this Resolution by first issuing a Commission order that mandates the release of customer information, and then arguing that the mandatory release of customer information is pursuant to Commission order.

the very least, the PCADV requests that customer names, billing addresses and service addresses be added to the categories of information that customers can restrict.

With the exception of the EGSs and their trade associations, nearly all of the parties that filed comments in this proceeding support giving customers the right to restrict the release of all of their information through an opt-out procedure. However, with virtually no analysis of the issues, the Commission summarily has rejected the comments filed by these parties. The Commission's analysis of the important privacy issues raised in this proceeding consists of a reference to a Commission Order in another proceeding pertaining to a single EDC, which was issued two weeks after the Tentative Order in this proceeding, and the bare conclusion that this Order should control. *Petition of Duquesne Light Company for Approval of Default Service Plan*, Docket No. P-2009-2135500 (July 30, 2010).

I am very disappointed in today's decision. It is contrary to the spirit of the Electricity Generation *Customer Choice* and Competition Act not to give customers the choice of what private customer information, if any, their EDC will release to the scores of EGSs that have been licensed in Pennsylvania. The mandatory release of customer information is most disturbing, and will cause serious problems for customers in the future.

11-12-10

DATE

Tyrone J. Christy

TYRONE J. CHRISTY, VICE CHAIRMAN