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July 13, 2011

**Via Overnight Mail and eFiling**

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

RE: Interim Guidelines For Eligible Customer Lists. Docket No. M-2010-2183412;  
PPL Electric Utilities Corporation Retail Markets M-2009-2104271;  
Petition of Duquesne Light Company for Approval of Default Service Plan for the Period  
January 1, 2011 through May 31, 2010 M-2009-2135500

Dear Secretary Chiavetta:

In accordance with the Notice of Reconsideration entered June 13, 2011 in the above-referenced proceedings, please find enclosed for filing an original and five (5) copies of the Comments of FirstEnergy Solutions Corp.

Very truly yours,



Amy M. Klodowski  
Attorney

Enclosures

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interim Guidelines For Eligible Customer Lists	:	Docket No. M-2010-2183412
PPL Electric Utilities Corporation Retail Markets	:	M-2009-2104271
Petition of Duquesne Light Company for Approval of Default Service Plan for the Period January 1, 2011 through May 31, 2010	:	M-2009-2135500

**COMMENTS OF  
FIRSTENERGY SOLUTIONS CORP.**

FirstEnergy Solutions Corp. ("FES") respectfully submits these Comments in response to the Notice of Reconsideration issued by the Pennsylvania Public Utility Commission ("Commission") in its Order entered June 13, 2011 in the above-captioned proceedings ("June 13 Order"). FES, a subsidiary of FirstEnergy Corp., offers wholesale and retail energy and related products to customers located primarily in the Mid-Atlantic and Midwest regions. FES is a licensed Electric Generation Supplier ("EGS") in Pennsylvania, having been authorized at Docket No. A-110078 to serve all categories of retail customers throughout the Commonwealth.

**I. INTRODUCTION**

FES appreciates this opportunity to file comments, and thanks the Commission for its continuing support for effective and robust retail electric competition in Pennsylvania. FES filed comments in the Commission's Investigation of Pennsylvania's Retail Electricity Market at Docket No. I-2011-2237952 and participated in the *en banc* hearing held June 8, 2011 as well. As evidenced by its comments in that proceeding and the testimony presented

during the hearing, FES is fully committed to participating in the competitive retail electric service market available to all citizens of Pennsylvania and supports the Commission's efforts toward fostering that market opportunity for all suppliers. The Commission is to be commended for proactively exploring and implementing ways to foster competitive retail markets, including the work of the Committee Handling Activities for Retail Growth in Electricity ("CHARGE") working group and the Commission's Office of Competitive Market Oversight ("OCMO").

Following suggestions from a CHARGE working group, OCMO recommended to the Commission standards for uniformity in the information provided by Electric Distribution Companies ("EDCs") in the form of Eligible Customer Lists ("ECLs") to EGSs who, like FES, are licensed to market to customers in the Commonwealth. By Order adopted November 12, 2010, the Commission established interim guidelines for ECLs based on OCMO's recommendations ("November 12 Order"). For reasons stated in the June 13 Order, the Commission indicated its intention to reconsider the November 12 Order<sup>1</sup> regarding ECL issues so as to strike "an appropriate and lawful balance between customer privacy rights and the Commission's obligations under Chapter 28 of the Public Utility Code."<sup>2</sup> FES will attempt to address the Commission's concerns in these Comments, and in addition will propose that the Commission approve the addition of two items to the ECL list adopted in this proceeding.

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<sup>1</sup> The June 13 Order also gave notice of the Commission's intention to reconsider its earlier orders that established ECL parameters for PPL Electric Utilities Corporation and Duquesne Light Company in order to achieve statewide uniformity in its resolution of the various issues regarding the ECL.

<sup>2</sup> June 13 Order at p. 5.

## II. COMMENTS

### A. The Scope of FES' Comments

At the outset, FES wishes to state that it supports the parameters set forth in the November 12 Order for ECL information to be provided to EGSs with the addition of net metering and tax status information as discussed below; both of these items have been discussed at CHARGE meetings subsequent to the November 12 Order. FES also recognizes the ability of customers to restrict access to their historical billing data and telephone numbers as set forth in 52 Pa. Code §54.8. Further, FES currently fully complies with the restrictions set by customers who participate in the Commonwealth's "Do Not Call" program, and will continue doing so.

FES perceives that the Commission's primary concern in reconsidering the November 12 Order is so that parties will comment further on the privacy issues inherent in the release of customer information from EDCs to EGSs. Since FES has no objections to the ECL parameters the Commission approved in the November 12 Order other than to suggest the addition of net metering and tax status information as described below, it will primarily confine these comments to the privacy issues which gave rise to the June 13 Order.

### B. 52 Pa. Code §54.8 Does Not Give Customers the Right to Restrict All Information and the Commission is Not Bound By Prior Interpretations to the Contrary

The Commission's regulation at 52 Pa. Code §54.8 reads in its entirety as follows:

#### **§ 54.8. Privacy of customer information.**

(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.

(c) Nothing in this section prohibits the EGS and EDC from performing their mandatory obligations to provide electricity service as specified in the disclosure statement and in the code.

FES recognizes that the Commission's May 18, 1999 Order in Docket No. M-00991230 (the "May 1999 Order") permitted residential customers to restrict the release of all of their account information from EDCs to EGSs, as noted by Commissioner Christy in his Dissenting Statement to the November 12 Order<sup>3</sup>. In its petition for review of the November 12 Order to the Commonwealth Court, the OCA claimed that the November 12 Order violated the Pennsylvania Constitution and the Public Utility Code by preventing customers from restricting the release of their information by the EDC. However, FES respectfully disagrees with the OCA's and Commissioner Christy's assertions that 52 Pa. Code §54.8 requires that customers be permitted to restrict all of their account information, and rather submits that 52 Pa. Code §54.8 on its face is not so restrictive. While customers may restrict access to their telephone number and historical billing data, there is no apparent requirement that customers should be able to restrict the release of all other account information to EGSs either by opting out of an information transfer as approved in the May 1999 Order, or through an even more restrictive opt-in process. Either type of restriction would seriously hinder, if not altogether thwart, the move to a fully competitive residential retail market in Pennsylvania.

Further, it is legally permissible for the Commission to change its interpretation of 52 Pa. Code §54.8 and order ECL information to be submitted to EGSs as set forth in the

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<sup>3</sup> Dissenting Statement of Vice Chairman Tyrone J. Christy, "Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies", Docket No. M-2010-2183412, Public Meeting of November 12, 2010.

November 12 Order. The United States Supreme Court so held in the case of Alstate Construction Company v. Durkin, 345 U.S. 13, 73 S.Ct. 565 (1953). Alstate involved a challenge to the Wage and Hour Administrator's interpretation of the Fair Labor Standards Act which was contrary to previous administrative rulings. In upholding the administrator's determination at issue, the Court stated:

“It is contended that we should not construe the [Fair Labor Standards] Act as covering the ‘off-the-road’ employees because it was given a contrary interpretation by its administrators from 1938 until 1945. During these first years after the Act’s passage the administrator did take such a position. But more experience with the Act together with judicial construction of its scope convinced its administrators that the first interpretation was unjustifiably narrow. He therefore publicly announced that off-the-road employees like these were protected by the Act.” 73 S.Ct. 565 at 566.

A construction of a statute by those administering it, even though contrary to past practice, is not binding on them or their successors if thereafter they become satisfied that a different construction should be given, or if the previous construction is no longer sound or appropriate. New York Tel. Co. v. F.C.C., 631 F.2d 1059 (2d Cir. 1980). Agencies have leeway to change their interpretations of laws, as well as of their own regulations, provided they explain the reasons for such change and provided that those reasons meet the applicable standard of review. Saint Fort v. Ashcroft, 329 F.3<sup>rd</sup> 191 (1<sup>st</sup> Cir. 2003). So long as the Commission's interpretation of its regulations is adequately explained based on substantial evidence, it is entitled to substantial deference and will not be disturbed. Popowsky v. Pennsylvania Public Utility Commission, 550 Pa. 449, 706 A.2d 1197 (1997).

Concerns about EGSs maintaining the confidentiality of the data received from EDCs are misplaced. EGSs are required to maintain the confidentiality of customer information in 52 Pa. Code §54.8, and are subject to license suspension or revocation for violating that obligation. 52 Pa. Code §§54.42 and 54.43(d).

### **C. The Electricity Generation Customer Choice and Competition Act Clearly Favors Retail Choice for All Pennsylvania Customers**

When the Pennsylvania legislature passed the Electricity Generation Customer Choice and Competition Act<sup>4</sup> (the Electric Competition Act) in 1996 it made its intent for the reach of the Electric Competition Act very plain:

“This Commonwealth must begin the transition from regulation to greater competition in the electricity generation market to benefit all classes of customers and to protect this Commonwealth’s ability to compete in the national and international marketplace for industry and jobs.”<sup>5</sup>

Beginning with the passage of the Electric Competition Act, the Commission has presided over a substantial restructuring of the electric industry in Pennsylvania. With the expiration of the final EDC rate caps, the legislature’s mandate of fifteen years ago can finally be realized. Obviously, a basic necessity for EGSs to successfully solicit customers into purchasing electric generation supply from them rather than default service from the EDC is to know who those customers are, where they are located and their account information. As Commissioner Cawley said in his Statement following the vote on the Interim Guidelines adopted in the November 12 Order:

“We therefore should approve these ECL guidelines that enable EGSs to have critical information necessary to market and price their competitive supply products to electricity customers...*Providing this information enables EGSs to provide lower prices tailored to an individual customer’s usage profile and service type...*

In order to promote electric choice, as the Public Utility Code requires, this Commission must balance the needs of consumers and EGSs. Under the Commission’s supervision, customer information must be responsibly used by licensed and bonded suppliers for the ultimate benefit of customers, while EGSs must be given adequate information to make accurate competitive supply offers to those customers. These ECL Guidelines appropriately maintain this balance.” (Emphasis in original.)

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<sup>4</sup> 66 Pa.C.S. §§2801-2812.

<sup>5</sup> 66 Pa.C.S. §2802(7) (Emphasis added)

Allowing customers to opt-out of providing their data to EGSs, or requiring customers to opt-in to retail choice, will frustrate the legislature's mandate that all electric customers in the Commonwealth benefit from competition for their patronage. As stated above, customer privacy is being protected because EGSs are obligated under the Public Utility Code and the Commission's regulations to maintain the confidentiality of any information obtained through the ECLs. Simply providing EGSs with this critical customer information does not effect a switch of customers from EDC to EGS service. However, it serves the very beneficial purpose of enabling EGSs to develop a better array of competitive supply offers for customers to consider.

Finally, while the Commission has recognized that the ECL guidelines should be uniform among all EDCs, the communications to customers from EDCs should also be standardized. The communications should be structured so as to fully inform customers of their options for supplier choice, without any negative implications to a customer's moving from EDC service to an EGS.

**D. In addition to the ECL components listed in the November 12 Order, the ECL should include flags for net metering and tax status**

FES did not participate in the CHARGE working group discussions that resulted in the development of the ECL parameters adopted in the November 12 Order. However, it is FES' understanding that the inclusion of net metering and tax status flags were not contemplated at the time.

The net metering<sup>6</sup> issue was first discussed by the CHARGE working group in February, 2011. While EDCs are required to offer net metering to customer-generators on a

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<sup>6</sup> 52 Pa.Code. §75.12 defines net metering as: "The means of measuring the difference between the electricity supplied by an electric utility or EGS and the electricity generated by a customer-generator when any portion of the electricity generated by the alternative energy generating system is used to offset part or all of the customer-generator's requirements for electricity."

first come, first served basis, this is an optional service for EGSs.<sup>7</sup> At least one incident was reported in which a customer who had a net metering arrangement with an EDC switched to an EGS without first making similar net metering arrangements with the EGS. Staff encouraged both the EDCs and the EGSs to educate customers on this issue. FES supports the efforts of the Electronic Data Exchange Working Group to include this information through the proposed EDI Change Control #85, but believes it is critical that a net metering flag be added to the ECL so that this information can be factored into all customer contracts from the beginning. Further, an EGS cannot comply with Staff's request to properly educate customers on the issue if the supplier is unaware the situation exists.

Another topic of recent interest is the issue of residential customers being improperly charged state sales tax. On May 27, 2011, the Commission issued a Secretarial Letter reminding EGSs of the Pennsylvania Department of Revenue rules regarding the application of sales tax. FES understands that it is ultimately the supplier's responsibility to obtain the appropriate information from the customer to determine whether or not the customer is obligated to pay sales tax; however, FES submits that it would be a lot simpler from an administrative standpoint if EDCs would add a flag to the ECL indicating a customer's tax status. The EDCs already have this information in their records, and including it in the ECL would help minimize errors and ensure that customers are properly charged or not charged sales tax.

### **III. CONCLUSION**

FES fully supports the Commission's efforts to expand retail competition so all electricity customers can obtain the benefits competition provides. The guidelines adopted

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<sup>7</sup> 52 Pa.Code. §75.13(a)

by the Commission on November 12, 2010 in Docket No. M-2010-2183412 with the additions noted above will further that goal.

Respectfully submitted,

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