

COMMONWEALTH OF PENNSYLVANIA



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July 13, 2011

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 "Tanya J. McCloskey".

Tanya J. McCloskey
Senior Assistant Consumer Advocate
PA Attorney I.D. # 50044

Enclosures

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Interim Guidelines	:	
For Eligible Customer Lists	:	Docket Nos. 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	:	P-2009-2135500
Period January 1, 2011 through May 31, 2013	:	

COMMENTS OF THE
OFFICE OF CONSUMER ADVOCATE

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I. INTRODUCTION

On June 13, 2011, the Pennsylvania Public Utility Commission (Commission) issued a Notice of Reconsideration seeking comments on the Commission's stated intent to reconsider its November 12, 2010 Order (November 12th Order) in the above-captioned docket. The November 12th Order directed each electric distribution company (EDC) to maintain an Eligible Customer List containing personal information about its customers for access and use by licensed electric generation suppliers (EGSs) to foster retail competition. The November 12th Order contained a list of 23 data items that were to be included on the Eligible Customer List (if available) including, *inter alia*, such information as the customer's name, billing address, service address, telephone number, account number, historical usage, monthly on and off peak usage, monthly peak demand, load factor, and transmission obligations. Of the 23 items of information included on the Eligible Customer List, customers could only restrict access to three pieces of information –the service address, the historical billing data and telephone number. Unless the customer qualified under a special exception developed for victims of domestic violence or other similarly endangered victims, the EDC was required to post all other information about the customer on the ECL for access by EGSs even if the customer objected to the release of such information. Domestic violence victims and other similarly endangered victims, could restrict all of their information from the ECL by contacting the EDC and identifying themselves as such a victim.

The OCA respectfully submits that the Commission's November 12th Order failed to provide adequate protection to all consumers in a number of significant respects. In the OCA's view, the November 12th Order failed to strike the right balance, significantly compromising the privacy rights of electric utility customers throughout the Commonwealth.

The OCA and the Pennsylvania Coalition Against Domestic Violence (PCADV) filed Petitions for Review of the Commission's Order with the Commonwealth Court. The OCA specifically challenged the Commission's decision in the November 12th Order to require the release of significant personal information about a customer even over a customer's objection. The OCA had argued in its Comments leading up to the Commission's November 12th Order that *all* customers should have the right to restrict the release of *all* information from the ECL. The OCA also argued in its Comments that the ECL contained smart meter data about customers that could not be released without the express affirmative consent of the customer under Pennsylvania's new statute governing the deployment of smart meters by EDCs.

While not discussing the merits of the OCA's appeal or the PCADV appeal, the Commonwealth Court granted PCADV's request for a Stay of the November 12th Order. Following the Stay, the Commission filed an Application for Remand with the Commonwealth Court asking that the case be returned to the Commission for further consideration of these issues. The Court granted the request and remanded the matter back to the Commission. The Commission then issued its Notice of Reconsideration.

The OCA welcomes the Commission's decision to reconsider the November 12th Order so that a careful balance can be crafted between a customer's fundamental right to privacy of personal information and the Commission's goal of fostering a retail competitive market. The OCA also welcomes the Commission's determination to include Duquesne Light Company and PPL Electric Utilities in its reconsideration of this issue. Duquesne and PPL have been operating pursuant to Commission Orders that also may have not provided adequate protection of a customer's private information. Establishing uniformity for all EDCs in both the items

included on the Eligible Customer List and in the procedures for protecting that information will benefit EDCs, EGSs, and customers throughout the Commonwealth.

The OCA urges the Commission to return to first principles in protecting customer privacy. As the OCA stated in its initial Comments in this matter, the concern for the privacy of personal information is particularly critical when it involves electric service. OCA Comments at 6. Electric service is an essential service. Customers have no choice but to sign up for this essential service and provide certain private information to their monopoly EDC when establishing electric service. Given this situation, a customer's fundamental right to privacy and confidentiality of this information cannot be taken lightly. Indeed, customers have a constitutional right to such privacy under Article 1, §§ 1 and 8 of the Pennsylvania Constitution.

Since the inception of retail competition, the Commission has recognized the importance of the privacy of customer information. In 1999, the Commission issued an Order regarding the release of information to EGS that provided for the release of limited information and the right of all customers to prevent any information from being placed on an eligible customer list that is provided to EGSs. 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). The Commission established a limited list of information consisting of six items – customer name, account number, address, utility rate class, load curve and historic 12-month usage. Enrollment Procedures Order at 21. The customer could restrict the release of all of this information, or just the usage information, through an opt-out process. Id. at 22. The customer was provided a postage pre-paid card where they could check off any opt-out preference and return the postcard

to the EDC. This procedure was upheld by the Commonwealth Court. As stated by the Commonwealth Court:

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 1196, 1201 (Pa. Cmwlth. 2000).

More recently, in its 2007 Policy Statement regarding Default Service and Retail Markets, the Commission stated:

The public interest would be served by common standards and processes for access to retail electric customer information and data. This includes customer names and addresses, customer rate schedule and profile information, historical billing data, and real time metered data. Retail choice, demand side response and energy conservation initiatives can be facilitated if EGSS, curtailment service providers and other appropriate parties can obtain this information and data under reasonable terms and conditions common to all service territories, that give due consideration to customer privacy, provide security of information and provide a customer an opportunity to restrict access to nonpublic customer information.

52 Pa.Code §69.1812.¹

The OCA submits that the Commission's procedures regarding Eligible Customer Lists prior to the November 12th Order (and prior to the Duquesne and PPL Orders) struck a more reasonable balance and should guide the Commission's determination in this matter.

¹ The OCA would note that since the implementation of this Policy Statement, the General Assembly enacted Act 129 of 2008 that, inter alia, addresses the deployment of smart meters and access to smart meter data such as the real time meter data referenced in this section. Section 2807(f)(3) now specifically requires customer consent for access to such meter data by third parties. 66 Pa.C.S. §2807(f)(3).

Following a review of these prior procedures, the OCA summarizes below its recommendation for moving forward with the Eligible Customer List:

- All customers must be given the right to restrict the release of any and all information on the Eligible Customer List;
- The Eligible Customer List should only contain information that is necessary to EGS marketing efforts for the customer class and must specifically exclude in all instances a customer's telephone number and any smart meter data held by the EDC;
- All customers must be provided a meaningful, educated, and simple opportunity to restrict the release of any and all of the information on the Eligible Customer List;
- An annual "opt-out" process that properly informs and educates the customer about the information contained on the ECL, the use of the ECL, the dissemination of the information on the ECL, and the potential benefits of the ECL to the customer could be used as one means of allowing a customer to restrict the release of any or all of their information;
- A continuing process that allows a customer to change his/her preference regarding the release of information on the Eligible Customer List at any time through both a website and a telephone contact with a customer service representative must be provided;
- Periodic education about the Eligible Customer List and the methods for changing preferences outside of the annual notification and opt-out process should be accomplished through bill inserts or bill messages.

With these steps, the OCA submits that a more reasonable balance can be struck between the customer's right to privacy of this personal information and the goal of fostering the development of a more competitive retail market.²

² The OCA would note that the process outlined above concerns the Eligible Customer List only. A customer always has the option of affirmatively authorizing an EGS that it has selected for service, or is considering for service, to receive data and information on the customer's behalf to initiate that service.

While the OCA suggests here that an informed and meaningful opt-out process may be workable for information that is not associated with smart meters, the OCA comes to this position with some concern as more information comes to light about the use and possible dissemination of the information on the Eligible Customer List. Since the OCA filed its original Comments in this docket, more EGSs have been licensed by the Commission. By the OCA's last count, over 200 licensed entities could have access to the ECL. Additionally, it now appears that the information on the ECL may be disseminated beyond the licensed EGS to agents and contractors that are performing marketing services for the EGS. This could potentially include a large legion of door-to-door marketers. The further and further this information is disseminated, the greater the chances for security breaches, misuse of data, or the improper release of data.

It is not clear to the OCA that the regulations or Commission's Orders contemplated such broad release of this sensitive customer information and it is not clear to the OCA that the regulations and Orders adequately address these possibilities. As such, the OCA strongly recommends that the Commission take this opportunity to make it clear that any EGS that receives information from the ECL (no matter the process used) is fully accountable for any security breach, improper release of data, or any misuse of data by any of its staff, agents or contractors – no matter how far down the line. As it has done with regard to its Marketing Guidelines, the Commission should take this opportunity to notify EGSs of a zero tolerance policy for any breach of security, improper release of information, or any misuse of information by an EGS, its staff, its agents, or its contractors that the EGS provides this information to. The Commission should make clear that such violations of privacy will result in the revocation of the EGS license just as the Commission has made clear that violations of the Marketing Guidelines will be met with such enforcement. Interim Guidelines on Marketing and Sales Practices for

Electric Generation Suppliers and Natural Gas Suppliers, Docket M-2010-2185981, *slip op.* at 7 (November 5, 2010).

The OCA urges the Commission to vacate its November 12th Order as well as its Orders in Duquesne and PPL. The Commission should make clear that customers have a right to privacy in their personal information and that the Commission intends to provide necessary and adequate protection of this information through the adoption of procedures that allow all customers a meaningful and informed opportunity to restrict the release of any or all of the information on the Eligible Customer List.

II. COMMENTS

- A. Utility Consumers Have A Constitutional Right To Privacy Of Personal Information That Can Only Be Adequately Protected By Affording All Customers The Opportunity To Restrict The Release Of All Information From the Eligible Customer List.

Individuals have a constitutional right under both the United States Constitution and the Pennsylvania State Constitution to privacy in their personal information. U.S. Const. Amends. IX, XIV; Pennsylvania Const., Art. 1, §§ 1 and 8. Personal information encompasses an individual's name, address, telephone number and other personal identifying information. Paul P. ex rel. Laura L. v. Verniero, 170 F.3d 396, 401, 404 (3d Cir. 1999)(citing Fraternal Order of Police v. City of Philadelphia, 812 F.2d 105, 112-17 (3d Cir. 1987)). See also, Barasch v. Pa. PUC, 576 A.2d 79 (Pa. Commw. Ct. 1990), *affirmed on other grounds sub nom*, Barasch v. Bell Telephone Co., 605 A. 2d 1198 (Pa. 1992). This right to privacy of personal information takes on heightened importance in the context of the electric utility industry. Electric service is an essential service that all individuals require in our modern society as a basic necessity of life. When an individual establishes electric service, the individual must give certain personal information to the monopoly electric distribution company. The individual has no choice but to provide this information as the EDC must have a name, a billing address, and a service address to be able to provide the service. Once an individual is a customer, the EDC also obtains personal information about the customer that is necessary to continue to serve the customer. In particular, usage information is obtained through the metering process on all customers so that the EDC can render proper bills to customers for the service provided. This usage data can provide details about a customer, such as whether a customer spends a given month (such as a winter month) away from home. For commercial and industrial customers, usage information can reveal competitively sensitive information about their operations and processes.

As far back as 1980, the National Association of Regulatory Utility Commissioners (NARUC) recognized the importance of privacy regarding utility customer information. NARUC issued a resolution in 1980 that provided that “to the extent practical, customers should be permitted to choose the degree of privacy protection.” See 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).³ NARUC further resolved:

That unless a customer grants explicit, affirmative informed consent, customer-specific information about his or her utility service should only be used in connection with rendering or billing for that service or other services requested by the customer, and that such information should not be otherwise available to affiliates or third-parties, unless by Commission order.

Id. NARUC’s resolution preceded by many years the development of smart meters that are now being deployed throughout Pennsylvania and the Nation. These smart meters are capable of capturing even more data about a customer.

As smart meters are more widely deployed in Pennsylvania, the usage information obtained by the EDC on its customers will become more granular, and more revealing, about customers. A Report by the Department of Energy summarized the information that can be determined about customers through smart meter data. The DOE Report states:

Such information could reveal personal details about the lives of consumers, such as their daily schedules (including times when they are at or away from home or asleep), whether their homes are equipped with alarm systems, whether they own expensive electronic equipment such as plasma TVs, and whether they use certain types of medical equipment. Consumers rightfully expect that the privacy of this information will be maintained. The

³ http://www.naruc.org/Resolutions/privacy_principles.pdf

proprietary business information of non-residential customers could also be revealed through the release of energy consumption data, resulting in competitive harm. Studies conducted by utilities and consumer advocates have consistently shown that privacy issues are of tremendous import to consumers of electricity.

Dep't of Energy, Data Access and Privacy Issues Related to Smart Grid Technologies, Report at 2 (October 5, 2010).⁴

There can be no doubt that under these circumstances, the information held by the EDC about its customers is private customer information and customers have a reasonable expectation of privacy in this information. Paul P., 170 F.3d at 401, 404. There can also be no doubt that as technology advances, concerns with the release of this private information become even more important to customers. Private information can be used in many ways to the detriment of customers – from identity theft to compromising the customer's safety to revealing competitive business information.⁵ As to residential customers, in its prior Comments in this Docket, PCADV provided compelling examples of compromises to the safety of domestic violence victims that resulted from security breaches or misuse of personal customer information. Comments of the Pennsylvania Coalition Against Domestic Violence, Docket M-2010-2183412 (August 4, 2010). These examples highlight the importance of all customers having knowledge of, and control over, the use of their private customer information.

In light of the constitutional right of a customer to the privacy of their personal information held by the EDC, the OCA submits that in considering the development and release of customer information through the Eligible Customer List, the Commission must assure that *all*

⁴ http://www.gc.energy.gov/documents/Broadband_Report_Data_Privacy_10_5.pdf

⁵ In 2005, the Commission addressed concerns about identity theft due to utility's possession of private customer information. In Re: Identity Theft, Docket No. M-00041811 (Sept. 21, 2005). The Commission recommended preventative measures that companies should use to protect customer information and prevent identity theft. Some of those measures included employee screening, training, ethics policies, management training, and employee technology safeguards. Id. at 22-27. The Commission may wish to review these preventative measures for best practices that should apply to this confidential, personal information.

customers have the right to restrict the release of any and all of their personal customer information.⁶ The Commission previously recognized this principle in its 1999 Enrollment Procedures Order, but moved away from it in its November 12, 2010 Order and in its Duquesne and PPL Orders. The OCA submits that the November 12th Order, and the PPL and Duquesne Orders, that required the release of private customer information even over the objection of the customer, must be vacated. Forcing the release of private customer information cannot pass constitutional muster.

The Commission should vacate its Orders and issue an Order that ensures that all customers have the right to restrict the release of any and all information from the Eligible Customer List. Anything less would violate individual customers' well-established right to privacy of their personal information and could compromise customer safety.

B. The Commission Must Establish Reasonable Procedures For The Development Of The ECL That Fully Respects Customers' Privacy Rights.

1. Introduction.

In that a customer's constitutionally protected right to privacy is implicated by the release of personal information through the Eligible Customer List, the Commission must take great care to ensure that the information released is only that information necessary to achieve a compelling state interest that the Commission is mandated to advance and that the procedures to effectuate the release of information provide a meaningful opportunity for the customer to restrict the release of any or all of his/her personal information. As noted above, the Commission has previously addressed this delicate balance and achieved a result that was upheld

⁶ In its November 12th Order, the Commission recognized this right to restrict the release of all information only for victims of domestic violence and other similarly endangered victims. While the OCA appreciated the Commission's concern in this regard, the requirement that a victim go through the process of identifying himself/herself to an EDC to obtain this protection raised as many problems as it solved. Moreover, limiting this right to only domestic violence victims failed to recognize that all customers have a fundamental right to privacy of personal and private customer information.

by the Commonwealth Court. 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), affirmed sub nom Mid-Atlantic Power Supply Association v. Pa. P.U.C., 746 A.2d 1196 (Pa. Cmwlth. 2000). The Commission should be guided by this approach here.

In the 1999 Enrollment Procedures Order, the Commission addressed the development of customer lists to be made available to EGSs to foster competition and adopted an order permitting customers the ability to restrict the dissemination of *all* personal customer information. This ability to restrict the release of data was not limited to the customer's telephone number and historical billing data, both expressly referenced in Section 54.8 of the Commission's regulations. Rather, the Commission allowed a customer to restrict all information from the customer lists that were made available to EGSs.⁷ See Enrollment Procedures Order at 22-25. The Commission concluded in that Order that:

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.

⁷ In addition, the Commission prohibited the release of customer telephone numbers under any circumstances. The Commission's Order stated that "telephone numbers will not be included on the eligibility lists furnished by EDCs to EGSs." Enrollment Procedures Order at 22.

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.

The Enrollment Procedures Order was appealed to the Commonwealth Court. The court quoted extensively from the Commission Order and held 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. In affirming the Enrollment Procedures Order, the Commonwealth Court applauded the Commission for reaching an appropriate balance with respect to the customer's right to privacy and the advancement of competition.

The OCA submits that the procedures contained in the 1999 Enrollment Procedures Order provide a good starting point for developing the procedures to govern the Eligible Customer List.

2. The ECL Must Only Contain Customer Information That Is Necessary To Advance The Interest Of Fostering The Development Of A Competitive Retail Market.

- a. The Information Contained On The ECL For Residential Customers Should Be More Limited Than Proposed By The Commission.

In Appendix A of its Notice of Reconsideration, the Commission provides the list of information that is to be provided through the ECL. The list contains 23 items, 17 of which are mandatory for all EDCs (referred to as Minimum Elements in Appendix A), and 6 which are either optional or apply to some EDCs (referred to as Optional Elements or EDC Specific Elements in Appendix A). As mentioned earlier, the 1999 Enrollment Procedures Order only provided for the dissemination of 6 items of information about the customer and allowed customers to restrict the release of all of those items. The PPL Order called for the release of 7 items with restriction allowed for 2 items, and the Duquesne Order called for the release of 8 items with restriction allowed for 3 items. PPL Electric Utilities Corporation Retail Markets, Docket M-2009-2104271, *slip op.* at 8 (October 22, 2009); Petition of Duquesne Light Company for Approval of Default Service Plan, Docket No. P-2009-2135500, *slip op.* at 7 (July 30, 2010). The list has now grown to 23 items under the November 12th Order, with only 3 items allowed to be restricted.

The OCA does not object to some expansion of the information provided through the Eligible Customer List. Given the wide dissemination of the information that the OCA has determined will occur and the introduction of smart meter data, however, the OCA submits that care must be taken to ensure that only that information necessary to serve the interest to be advanced by the Eligible Customer List is included on the list.

The OCA submits that the information proposed for inclusion on the ECL may be far too extensive for serving the purpose of fostering a competitive retail market while respecting a customer's fundamental right to privacy. Additionally, the information proposed for inclusion on the ECL includes smart meter data that must be addressed separately due to the enactment of Section 2807(f) of the Public Utility Code. See, OCA Comments of August 4, 2010 at 9-15 and below. For purposes of this discussion, the OCA will focus only on the residential customer class as the OCA anticipates that representatives of the other customer classes may have specific input on the contents of the ECL.

The OCA recommends that the following items, designated as "Minimum Elements" in Appendix A and using the number assigned to the element in Appendix A be included on the ECL:

1. ECL Revision Date
2. Customer Account Number
3. Customer Name
5. Service Address
6. Billing Address
8. Tariff Rate Class and Schedule
9. Rate Subclass/Rate Subcode (if available)
10. Meter Read Cycle
11. Load Profile Group per Tariff
13. POLR/Shopping Status (Y or N)
14. Monthly Consumption (each of 12 months)(KWH)(if available)
17. Interval Meter (Y or N)

The OCA submits that these 12 data elements, subject to the right of the customer to restrict the release of any or all of these elements, provide sufficient information regarding residential customers to enable EGSs to market their services to this customer class.

The OCA submits that the Eligible Customer List for residential customers should be limited to these 12 items. Of course, once a customer chooses to receive service from a specific EGS, or otherwise authorizes the release of additional information to an EGS, an EGS

may receive the further, more detailed information through the Commission's existing processes governing such initiation of service.

b. Certain Information Should Not Be Included On The ECL For Residential Customers.

As can be seen from the list above, the OCA does not endorse the release through the ECL of certain "Minimum Elements" contained in Appendix A (Minimum Elements 4, 7, 12, 15, and 16), and does not support the release through the ECL of the EDC Specific Elements or the Optional Elements found in Appendix A. The EDC Specific Elements and the Optional Elements do not appear to be necessary for marketing efforts directed at residential customers and would end up compromising the uniformity that the Commission seeks. The OCA details below the reasons that these elements should not be included on the ECL.

i. Customer Telephone Numbers Should Not Be Included On The ECL.

Of the Minimum Elements that the OCA would remove from the list, a customer's telephone number, Minimum Element 4, should not be included on the Eligible Customer List under any circumstance. The Commission has consistently protected a customer's telephone number from release by an EDC. *See, e.g., Enrollment Procedures Order* at 22. In this case, Commissioner Gardner in his dissent from the November 12th Order provided compelling reasons for not including a customer's telephone number on the ECL. Commissioner Gardner stated:

It is inappropriate as a government agency to require our regulated companies to release the telephone number of their customers to private, unregulated businesses. Many people guard their telephone numbers closely and would not want their numbers given to companies so that they can receive sales calls. Additionally, the provision in this Order requiring that customers' telephone numbers be released to EGSs without the customer's consent, could have the unintended consequence of harming

competition by leaving a negative impression of EGSs on those who receive sales calls from them. Finally, there is no legitimate reason to release customers' phone numbers. The purpose of the ECL is to provide information to EGSs that will assist them in preparing competitive offers to potential customers. A phone number is not needed to accomplish this as the EGSs will have access to sufficient information including the customer's name, billing address, usage information and other data that will allow them to market their products and services.

Partial Dissenting Statement of Commissioner Wayne E. Gardner, Docket No. M-2010-2183412 (Nov. 12, 2010).

A customer's telephone number should also be removed from the items included on the Eligible Customer List for additional reasons. While the Commission has stated that the telephone number on the Eligible Customer List cannot be used to contact a customer that has placed that number on the "Do Not Call List," the provision of the telephone number on the ECL is likely to cause confusion as to the permissible use of the telephone number. In addition, in this era where many customers have eliminated land lines and use only cell phones, customers can have a particularly negative reaction to receiving unsolicited cell phone calls that may use up precious minutes of service under a cell phone plan. Commissioner Gardner is correct that releasing telephone numbers can only result in a negative impression of EGSs.

As such, the OCA submits that the customer's telephone number should not be included on the ECL under any circumstance.

- ii. Transmission Obligation, On Peak/Off Peak Consumption, Monthly Peak Demand, And Load Factor Are Smart Meter Related Data And Should Not Be Included On The ECL For Residential Customers.

Data elements relating to Transmission Obligation (Minimum Element 12), On Peak/Off Peak Consumption (Minimum Element 15), Monthly Peak Demand (Minimum Element 16), and Load Factor (Optional Element 2) should not be included on the Eligible

Customer List for residential customers. For an individual residential customer, these elements require the use of smart meter data to either present or calculate. The General Assembly was cautious regarding access to smart meter data. While desiring to assure access to the data by third parties, the General Assembly made clear that such access may occur only with customer consent. Section 2807(f)(3) provides 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).

While the General Assembly did not provide explicit guidance on the type of customer consent necessary for the release of smart meter data, there is considerable activity at the national level regarding this issue. Given the sensitivity of this data and the privacy implications of such data, the discussion at the national level suggests heightened protection of this data. The OCA discusses this issue in more detail in Section II.C. below, but at this time, there is a need for further development of this issue at both the national and state level before such smart meter data should be considered for inclusion on the Eligible Customer List.

iii. The Billing Country Code And Loss Factor Seem Unnecessary For Residential Customers.

The Commission has included items to be provided on the ECL entitled Billing Country Code (Minimum Element 7) and Loss Factor (EDC Specific Element 2). The OCA does not see these items as being particularly applicable to residential customers or useful to EGSs. The Loss Factor also only applies to FirstEnergy so it does not seem to have wide spread usefulness. The OCA sees no need to include these items on the Eligible Customer List.

c. Conclusion.

Given a customer's constitutional right of privacy of all of their information, the Commission should exercise caution regarding the elements to include on the Eligible Customer List. The ECL should include the minimum information necessary to further the goal of promoting a competitive retail market. For mass market customers, such as residential customers, where the same offer is generally available to all customers of a given class, the list of information recommended by the OCA would more than serve the needs of EGSs marketing such offers.

3. A Process Is Necessary That Provides Customers With A Meaningful Opportunity To Restrict The Release Of Any And All Information.

In its November 12th Order, the Commission adopted the use of an "opt-out" process to allow customers to restrict the release of the two items of information that could be removed from the ECL under that Order. The Commission also utilized an opt-out process to allow customers to restrict the release of all information or historic usage information from eligible customer lists in its Enrollment Procedures Order at the inception of retail competition. Enrollment Procedures Order at 24-25. The OCA has not objected to the use of an opt-out process as a means of providing the customer the opportunity to restrict any and all of the information on an eligible customer list so long as it is made clear to customers that they may restrict the release of all information and so long as the opportunity to restrict that information is a meaningful and allows for an informed decision on the part of the customer.

The question of whether an opt-out or an opt-in process should be utilized for determining whether customers wish to restrict the release of any and all information on the Eligible Customer List may, in part, be determined by the elements of information contained on

the list. If the list contains the more limited elements recommended by the OCA in Section II.B.2, and customers can opt out of providing any information, the OCA would not object to the continued use of an opt-out process here. This opt-out process, though, must be designed to provide a meaningful opportunity for the customer to make an informed decision based on the necessary information relevant to that decision and a simple method to implement the customer's choice. If the Commission intends to provide broader information to EGSs, including telephone numbers and smart meter data, the OCA submits that an opt-out process would no longer be appropriate or lawful.

If an opt-out process is found to be reasonable by the Commission, the OCA recommends that the Commission implement the following procedures:

- On an annual basis, each EDC should send a notice to customers regarding the Eligible Customer List, conspicuously marked that it contains important information regarding privacy. The process should provide customers the opportunity to restrict any and all information from release. The notice should include a postcard with check-off boxes for "Do Not Release Any Information" and "Do Not Release (name of element)." Customers should be instructed to return the postcard within a certain number of days, or directed to a website or toll free phone number where the same restriction options can be accomplished.
- The notice must clearly inform the customer about the information contained on the ECL, the use of the ECL, the dissemination of information on the ECL, and the potential benefits of the ECL to customers. The notice must also contain clear instructions as to how to complete the opt-out process and what will occur if the customer does nothing.
- Each EDC should be directed to maintain an on-going process that allows the customer to change preferences regarding the release of information on the ECL at any time. The on-going process should allow customers to change preferences through both a website process (if available to the EDC) and through a telephone contact with a customer service representative.

- During the year, each EDC should include education and information about the ECL and the methods to change preferences regarding the ECL, through either bill inserts or bill messages.

With these procedures, and with appropriate education, customers will have a better understanding of the Eligible Customer List and can make a more informed decision about whether to have information included on this list.

The OCA submits that both the annual process and the on-going process are necessary to ensure customer privacy. Customer's circumstances may change over time yet the ECL will continue to be available to EGSs and will be updated on a periodic basis by the EDCs. Information that a customer may not have chosen to restrict at one time under one set of circumstances may require a different choice under new circumstances. Similarly, after more experience with the retail market, a customer that previously restricted information may want to change that preference so that they can receive additional offers. This on-going process, and the on-going education, will allow customers to adapt to the ECL.

4. Adequate Customer Education And Easily Implemented Choices Are Necessary To Effectively Protect Private Customer Information.

As the OCA has noted, customers must be provided a meaningful opportunity to make their preference regarding their personal information known. The OCA outlined procedures above to achieve this purpose. Critical to those procedures, however, are two key concepts. First, customers must be fully educated about the Eligible Customer List and the information to be included on the list. Second, the procedures must be easy to implement for the customer.

For a customer to make an informed decision about whether to restrict the release of information on the ECL, the customer must have sufficient information and understanding about the ECL and about the information that is to be contained on the ECL. The OCA submits that at each annual opportunity for customers to determine their preference regarding the release of information through the ECL, customers should be provided information that explains what the ECL is, what information is to be included on the ECL, what the more detailed information (such as usage data) represents, how the information is to be used by EGSs, how the information is to be safeguarded by EGSs, how widely the information will be disseminated, and the potential benefits to the customer of having their information included on the ECL. For the periodic education throughout the year, reminder material can be developed that need not be as extensive as the annual mailing.⁸ The reminder material, though, should provide information about the ECL and the methods for a customer to change preferences regarding the ECL. The OCA suggests that the Commission and the interested parties work together to develop this basic educational package that can be used by each EDC so that the same educational information is being presented throughout the Commonwealth.

It is also important that the methods to notify the EDC of the customer's preference are simple for the customer to implement. The use of a postcard along with a toll free telephone number and a website method to identify or change one's preference should provide customers several methods to choose from. For almost all customers, one of these methods should be capable of easy implementation.

⁸ For new customers, each EDC may wish to include in the Welcome Package the annual education material on the ECL, the postcard, and the information on the other methods to restrict the release of information.

Customers will need to be fully educated to make an informed decision as to whether they wish to exercise their right to restrict the release of information on the ECL. Customers will also need simple and easily implemented methods to express their preference and to change their preference if circumstances warrant. The OCA has proposed procedures here that attempt to meet these two goals.

C. Any Release Of Smart Meter Data Requires Different Procedures Than Those Recommended By The OCA In This Case.

Smart meter data is a substantially different category of information than the kind provided by customers to obtain electric service or the historic monthly data obtained from the older watt-hour meters for billing purposes. Smart meter data poses significant privacy concerns due to the detailed information that can be revealed about a customer from this information. The Pennsylvania General Assembly addressed privacy concerns raised by the implementation of smart meters in Act 129 when it declared 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). While the General Assembly did not specify the method by which a customer can consent to making available the customer meter data to third parties, it did require customer consent. The OCA submits that due to the nature of this information, the potential for this information to reveal details about a customer's life and habits, and the General Assembly's explicit reference to customer consent, this information should not be released without the affirmative consent of the customer.

Appendix A of the Notice of Reconsideration (Appendix A) lists the ECL Customer Data Elements provided in the November 12 Order and contains several residential smart meter data elements. The OCA submits that smart meter data for residential customers, and data elements that are derived from smart meters, should not appear on the ECL, particularly if an opt-out process is used. The smart meter related data elements that that OCA has identified for individual residential customers include:

- Transmission Obligation (Minimum Element 12)
- On Peak/Off Peak Consumption (Minimum Element 15)
- Monthly Peak Demand (Minimum Element 16)
- Load Factor (Optional Element 2)

Appendix A, Minimum Elements 12, 15, and 16; Optional Element 2. Release of these data elements without affirmative customer consent would be contrary to Section 2807(f)(3) and would be inconsistent with the recent direction of national organizations addressing the protection of privacy for smart meter data.

The Commission's November 12th Order would include these smart meter data elements with no ability to restrict the release of this information.⁹ This outcome would be contrary to Section 2807(f)(3) and could not be sustained. But even an opt-out process such as that identified by the OCA for historic monthly usage data is not sufficient to permit the release of smart meter data. The OCA submits that even an opt-out process would be inconsistent with the statute and inconsistent with recent evaluations of smart meter data privacy issues completed

⁹ There may have been some confusion in the November 12th Order as to whether this information could be restricted under the Commission's direction that historic "billing" data be subject to restriction. The problem with the Commission's Order is that the smart meter data identified for inclusion on the ECL is *not* used for billing purposes for most customers, particularly most residential customers. Thus, even if the customer chose to restrict billing information under the November 12th Order, the other usage data not used in billing would still be provided.

by the Department of Energy (DOE) and the National Institute of Standards and Technology (NIST).

Both DOE and NIST have identified the significant privacy concerns with the collection and possible release of smart meter data. See Dep't of Energy, Data Access and Privacy Issues Related to Smart Grid Technologies at 9-10 (October 5, 2010) (Department of Energy Report); US Dep't of Commerce, Nat'l Inst. of Standards & Tech., Guidelines for Smart Grid Cyber Security Vol. 2, Privacy and the Smart Grid at 19-20 (Aug. 2010) (NIST Guidelines).¹⁰ The initial work of DOE and NIST highlighted some of the key issues regarding privacy and the smart meter data and is worth repeating here. For example, DOE 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.

¹⁰ http://www.gc.energy.gov/documents/Broadband_Report_Data_Privacy_10_5.pdf;
http://www.nist.gov/smartgrid/upload/nistir-7628_total.pdf

After completing its review, the DOE Report noted that “it is the energy usage data itself *and* the ability to tie that data to an individual or household that makes the data particularly sensitive.” Department of Energy Report at 9. The Department of Energy Report then summarized what it termed “fairly broad consensus on some core principles.” The DOE Report states:

Commenters certainly agreed that this is one of the most important and difficult issues inherent in deploying and regulating Smart Grid technologies. The question of how consumers authorize utilities to disclose CEUD [consumer-specific energy-usage data] to third parties thus raises difficult questions on which there seems to be fairly broad consensus on some core principles, but less agreement on how best to implement those principles. In general, there seems to be substantial consensus on the following principles:

First, Utilities should not disclose CEUD to third parties unless a given consumer has consented to such disclosure affirmatively, through an opt-in process that reflects and records the consumer’s informed consent. Often, the use of such an opt-in authorization process will have to comply with existing laws that prohibit utilities from disclosing customer data to third parties without a particular customer’s informed consent. In any case, commenters were virtually unanimous that an opt-in authorization process predicated on informed consent should be required before utilities disclose CEUD to third-party service providers.

Department of Energy Report at 15 (emphasis in original). The Report went on to note that Texas currently requires consumers to submit a written letter of authorization for the release of smart meter data and California has an online authorization process. *Id.* at 16.

In February 2010, the United States Department of Commerce National Institute of Standards and Technology (NIST)¹¹ issued a Draft Report on Smart Grid Cyber Security Strategy and Requirements. *See* DRAFT NISTIR 7628 (NIST Requirements).¹² 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

¹¹ NIST is responsible for developing standards and guidelines for providing adequate information security for all federal agency operations and assets.

¹² http://csrc.nist.gov/publications/drafts/nistir-7628/draft-nistir-7628_2nd-public-draft.pdf

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 NIST 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.

NIST issued general privacy principles based upon the findings and conclusions of the privacy subgroup’s PIA. See NIST Requirements at 104 *et seq.* Upon consideration of the Draft Report, NIST issued an August 2010 Report on Guidelines for Smart Grid Cyber

Security. In its August 2010 Guidelines, NIST confirmed the basic principles and practices in its Draft Report. In relevant part, the August 2010 Report then provides:

Notice and Purpose. An organization should provide consumers with meaningful, clear, and full notice in advance of the collection, use, retention, or sharing of energy usage data and personal information. Such notice should provide a detailed description of all purposes for which consumer data will be used, including any purposes for which affiliates or third parties will use the data. The notice should also include how long the data will be maintained by the organization and which third parties the data will be shared with. Clear, full, and accurate notice prior to data collection is essential to enabling other principles.

Choice and Consent. An organization should clearly, fully, and accurately describe the choices available to individuals, and to the extent practicable, obtain explicit approval for the collection and use of their personal information. Consumers should have the option to forgo data collection and services that are not related to the core services provided by the organization.

Disclosure and Limiting Use. Personal information should only be used for the purposes for which it was collected. Personal information should not be disclosed to any other parties except those identified in the notice for purposes identified in the notice, or with the explicit consent of the service recipient. Unless disclosure is compelled by subpoena, warrant, or court order, organizations should seek prior consumer approval for disclosure of consumer data to third parties.

NIST Report of August 2010 at 41.

Finally, the National Association of Regulatory Utility Commissioners (NARUC) passed a Resolution on Smart Grid on July 21, 2010. See NARUC Resolution on Smart Grid (NARUC Resolution).¹³ The NARUC Resolution provides 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:

¹³ <http://www.naruc.org/Resolutions/Resolution%20on%20Smart%20Grid1.pdf>

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 further resolved to “make every effort to give the highest priority to ensure that consumers are protected as the smart grid evolves.” Id. NARUC emphasized that state regulatory commissions should take steps to hold third parties responsible to protect private customer information. Id.

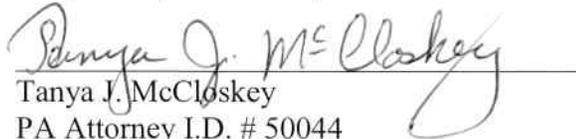
As can be seen from the above discussion, privacy concerns with the release of smart meter data are still being addressed throughout the Nation. The OCA submits that until a better understanding is gained about smart meter data and the appropriate means of protecting that data, smart meter related information should not be considered for inclusion on the ECL. Such smart meter data should not be released to third parties without the express, affirmative consent of a customer.

III. CONCLUSION

The OCA appreciates the Commission’s action to reconsider its November 12th Order to determine if a more reasonable balance can be struck between the customer’s constitutional right to privacy and the goal of fostering the development of a competitive retail market. The OCA urges the Commission to provide all customers with the meaningful opportunity to restrict the release of all information that is properly included on the Eligible Customer List, as recommended by the OCA. The OCA does not object to the use of an opt-out process to accomplish this restriction if the ECL contains the data elements recommended by the OCA, and if customers are fully educated, provided an easy method to implement their choice, and provided an on-going opportunity to change their preference. The OCA further submits that residential usage information from smart meters that goes beyond the historical monthly usage

data used to bill customers should not be included on the ECL. The privacy implications of this smart meter data require further consideration and different procedures than those recommended by the OCA here.

Respectfully Submitted,



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