

# PENNSYLVANIA UTILITY LAW PROJECT

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**Via E-Filing**

Secretary Rosemary Chiavetta  
Pennsylvania Public Utility Commission  
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PO Box 3265  
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing and pursuant to the Pennsylvania Public Utility Commission's June 13, 2011 Notice of Reconsideration in the above-captioned proceeding, please find the Comments of the Pennsylvania Utility Law Project, AARP, Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia.

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

Respectfully submitted,



Julie George, Esq.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

COMMENTS OF  
PENNSYLVANIA UTILITY LAW PROJECT  
AARP  
ACTION ALLIANCE OF SENIOR CITIZENS OF GREATER PHILADELPHIA  
TENANT UNION REPRESENTATIVE NETWORK

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## I. INTRODUCTION

The Pennsylvania Public Utility Commission's Office of Competitive Market Oversight submitted a proposal to establish more uniformity in the information provided by Electric Distribution Companies' ("EDCs") Eligible Customer Lists ("ECLs"), which are made available to Electric Generation Suppliers ("EGSs") and marketers. The proposal was incorporated in the July 15, 2010 Tentative Order ("Tentative Order").<sup>1</sup> The Pennsylvania Public Utility Commission ("Commission") requested comments in regard to this Order.

Throughout April 2010, a team from the Committee Handling Activities for Retail Growth in Electricity ("CHARGE") discussed and debated various issues related to the ECL. On April 29, 2010, after several meetings and conference calls, the team reported back to the larger CHARGE group and to Commission staff with the results of their discussions. Commission Staff took the team ECL report and the CHARGE discussion under advisement and prepared the recommendations contained in the July 15, 2010 Tentative Order for the Commission's consideration. Comments from EDCs, EGSs, marketers, and consumer advocates were filed, and by Opinion and Order adopted November 12, 2010, the Commission established interim guidelines that determined the minimum requirements of the ECL to include: revision date, meter read cycle, customer name, customer account number, service address, billing address, utility rate class, load profile group indicator, and usage.<sup>2</sup> There were twelve additional elements to be included depending on the availability of the information and at the discretion of the EDC.<sup>3</sup>

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<sup>1</sup> *Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412, Order entered July 15, 2010 (*Tentative Order*).

<sup>2</sup> *Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412, Order entered November 12, 2010 (*Opinion and Order*) at 10.

<sup>3</sup> *Id.*

The Commission narrowly interpreted 52 Pa. Code §54.8 to allow customers to restrict only their telephone numbers and historical billing data.<sup>4</sup> Customer phone numbers were to be included on the ECL, except in accordance with 52 Pa Code §54.8 and the “Do Not Call” list.<sup>5</sup> EGSs must be compliant with the “Do Not Call” list.<sup>6</sup> The Commission followed two determinations it had recently made involving PPL Electric Utilities Corporation and Duquesne Light Company which stated that customer are only allowed to restrict their telephone number, service address and historical billing data.<sup>7</sup> The Commission made an exception in the case of domestic violence victims. Stating “victims of domestic violence or customers that are similarly endangered should have the unfettered ability to restrict all of their customer information.”<sup>8</sup> The Commission decided against providing the same ability to all consumers.

On December 13, 2010, Irwin A. Popowsky, Consumer Advocate (“OCA”), filed a Petition for Review with the Commonwealth Court, and on December 27, 2010, the Pennsylvania Coalition Against Domestic Violence (“PCADV”) filed a cross-appeal which was subsequently consolidated with OCA’s appeal.

On December 29, 2010, PCADV filed an Application for Supersedeas seeking to stay the November 12, 2010 Order. The Application was granted by order of the court on January 28, 2011.

Taking into account these developments, the Commission requested the court remand jurisdiction back to the Commission to reconsider its determinations and “produce a new order that strikes an appropriate and lawful balance between customer privacy rights and the

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<sup>4</sup> *Id.* at 4, 7.

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 7.

Commission's obligations under Chapter 28 of the Public Utility Code.”<sup>9</sup> The Commonwealth Court granted the application and remanded jurisdiction back to the Commission on April 28, 2011.

On June 13, 2011, the Commission issued a Notice of Reconsideration regarding the November 12, 2010 Order concerning the ECL, as well as those portions of earlier PPL Electric and Duquesne Light orders that address ECL issues.<sup>10</sup> The Notice asserts that pending its reconsideration, the *status quo* as established by the July 15, 2010 Tentative Order is in effect.

The Pennsylvania Utility Law Project, AARP, Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“PULP et al.”) submit these comments pursuant to the Commission's June 13, 2011 Notice of Reconsideration. PULP provides information, assistance, and advice about residential utility and energy matters affecting low-income consumers. PULP works exclusively on energy and utility issues affecting low-income Pennsylvanians and is the designated statewide project of the Pennsylvania Legal Aid Network of civil legal aid programs on these issues. PULP works in coordination with other PLAN programs and their clients, other nonprofit agencies and community groups that serve low-income residents throughout the Commonwealth.

AARP is a nonprofit, nonpartisan membership organization that helps people ages 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. AARP has members residing in each of Pennsylvania's counties and representing all segments of the socio-economic scale. Moreover, a substantial percentage of

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<sup>9</sup> *Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412, Order entered June 13, 2011 (*Notice of Reconsideration*).

<sup>10</sup> *Id.*

AARP's members live on fixed or limited incomes and depend on reliable electric service for adequate heating and cooling, lighting, and powering life-saving medical devices.

Tenant Union Representative Network ("TURN") is a not-for-profit advocacy organization composed of moderate and low-income tenants, all either customers of PECO Energy or dependent on PECO electricity service and all residing in Philadelphia, PA. TURN is located at 1315 Walnut Street, Philadelphia, PA 19107.

Action Alliance of Senior Citizens of Greater Philadelphia ("Action Alliance") is a not-for-profit membership organization of senior citizens who are customers of PECO Energy or rely on PECO service for their electricity needs, including heating and cooling. Action Alliance is located at 1319 Locust Street, Philadelphia, PA 19107.

PULP et al. thank the Commission for this opportunity to provide these comments.

## **II. STRIKING THE PROPER BALANCE BETWEEN PROMOTING COMPETITION AND MAINTAINING CONSUMER PROTECTIONS**

The Commission has taken an active role in promoting a competitive electric generation market in the hopes of providing lower cost options to Pennsylvania consumers. However, PULP et al. respectfully recommend that the Commission should proceed cautiously concerning the release of private customer information to unregulated third parties in order to ensure that the development of a competitive market does not come at the expense of other significant concerns, such as the desire of consumers to protect the integrity of their personal information and their privacy.

As proposed, the Tentative Order requires the unprecedented release of private customer information by EDCs to EGSs and marketers. The sole protection for consumers provided by the Commission's order is the ability to opt out of the sharing of a very limited subset of

information, specifically, their telephone numbers or their historical billing information.<sup>11</sup> PULP et al. submit that this interim policy, which maintains Section 54.8 in its current form, sacrifices consumers' privacy interests to benefit the suppliers' interest in marketing. This exchange has a very minimal impact in encouraging competition and presents a large violation of consumers' privacy rights. PULP et al. submit the Commission can make minor revisions to its current policies that will address and correct this imbalance.

A. The Desire for Competition Need Not Trump the Consumer's Right to Privacy

The Commission has invested a considerable amount of effort into informing consumers about their ability to shop for alternative generation suppliers as a means of helping the competitive market to grow and prices to drop. The Commission has repeatedly expressed its commitment to foster competition, but it cannot ignore issues of privacy.

Pennsylvania has consistently supported heightened protection for individual privacy as reflected in *Barasch v. Pennsylvania Public Utility Commission*.<sup>12</sup> In *Barasch*, the Pennsylvania Commonwealth Court overturned an order of the Commission that approved Bell of Pennsylvania's "Caller\*ID" service, which did not provide a blocking mechanism for most customers, on the basis that the Commission's order violated privacy rights protected by the Federal and State Constitutions.<sup>13</sup> The Court concluded that unauthorized disclosure of one's telephone number "poses a substantial invasion of [citizens'] personal privacy rights," and that,

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<sup>11</sup> 52 Pa. Code § 54.8.

<sup>12</sup> 576 A.2d 79 (Pa. Commw. Ct. 1990), *aff'd on other grounds sub nom. Barasch v. Bell Telephone Co.*, 605 A.2d 1198 (Pa. 1992).

<sup>13</sup> *Barasch*, 576 A.2d at 90-91.

in a democratic society, the right to privacy is “much too fundamental to be compromised or abridged” by the Commission’s order authorizing Caller\*ID.<sup>14</sup>

In so finding, the Court rejected the Commission’s argument that “by implementing Caller\*ID, lives can be saved; annoying, harassing, abusive, obscene and terroristic telephone calls can be curtailed; [and] false bomb threats to public schools, false fire alarms and other harassing and life threatening prank calls may be eliminated or reduced.”<sup>15</sup> The Court ruled that such “nominal advantages” did not outweigh the “grave intrusions of privacy threatened against the people of this Commonwealth.”<sup>16</sup> The Court concluded that “consumers of telephone service should not suffer an invasion, erosion or deprivation of their privacy rights to protect the unascertainable number of individuals or groups who receive nuisance, obscene or annoying telephone calls which can already be traced or otherwise dealt with by existing services provided by Bell.”<sup>17</sup>

The information that consumers are required to disclose under the November 12 order is much broader than the isolated telephone number in *Barasch*. The Order delineates a long list of “minimum requirements” for the ECL.<sup>18</sup> This “minimum” list provides broad and detailed information about each consumer, including, *inter alia*, his/her location, account number, and on-peak and off-peak consumption data. The Order also rejects a suggestion for the Commission to impose a moratorium on changes to the ECL until 2013, and concludes that all EDCs should update their ECL on a monthly basis to facilitate competition.<sup>19</sup> Given modern data mining techniques and advances in technology, the sheer breadth and type of information to

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<sup>14</sup> *Id.* at 88-89.

<sup>15</sup> *Id.* at 82.

<sup>16</sup> *Id.* at 88-90.

<sup>17</sup> *Id.* at 89.

<sup>18</sup> *Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412, Order entered November 12, 2010 (*Opinion and Order*) (hereinafter, “November 12 Order”), at 10.

<sup>19</sup> *Id.* at 9-10.

be disclosed in the ECL could yield significant insight into an individual's private and personal activities.<sup>20</sup>

B. Consumers have a reasonable expectation that their private, personal information will not be shared by an EDC.

Consumers have a reasonable expectation that their private, personal information will not be shared by an EDC with a third party unless the consumer gives prior, affirmative consent. In this context, the Commission's current opt-out methodology of securing consumer consent to information sharing provides insufficient protection to consumers' private, personal information. American citizens value their privacy and are increasingly concerned about its erosion. The Electronic Privacy Information Center maintains various polls that clearly indicate consumers are concerned about their privacy, anonymity, and the theft of their identity.<sup>21</sup> This concern for privacy is heightened in this instance because EDC customers have no reason to expect their personal information, given to an EDC pursuant to receiving service, will be shared with any third party. In fact, many consumers are not aware of the vast amount of information that an EDC retains about their electric usage given that the majority of information is collected tacitly through the customer's usage rather than affirmatively through the customer providing the information to the EDC. Regardless of the awareness of the amount of information collected, consumers no doubt provide the information to the EDC under the belief that it is provided only to a company subject to Commission regulation for the purpose of receiving regulated electric service.

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<sup>20</sup> See generally, Cheryl Dancey Balough, *Privacy Implications of Smart Meters*, 86 CHI.-KENT L. REV. 161 (2011) (examining privacy implications of smart meters).

<sup>21</sup> See <http://epic.org/privacy/survey/#polls>. Accessed on 7/12/11. Also see *Testimony by Lillie Coney, Associate Director of the Electronic Privacy Information Center Before the House Committee on Science and Technology Subcommittee on Technology and Innovation*, July 1, 2010. Retrieved on 7/12/11 from [http://epic.org/privacy/smartgrid/Smart\\_Grid\\_Testimony\\_2010-07-01.pdf](http://epic.org/privacy/smartgrid/Smart_Grid_Testimony_2010-07-01.pdf).

Consumers have no reason to anticipate that an EDC would either of its own volition or under the direction of the Commission give private consumer information to a third party, commercial entity. Consumers should not have to, nor would they reasonably expect to need to, “be on the look out” for warnings from their EDC that personal, private information is at risk of being shared with a commercial third party. Quite the contrary, consumers reasonably should expect to have heightened protections for their private information precisely because EDCs fall under the jurisdiction of a governmental regulatory agency.

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

(1) *Identity Theft*

Identity theft is a clear and growing problem as more personal information is stored and shared among public and private databases. The Commission found the problem sufficiently worrisome to initiate an investigation in 2004 to review identity theft and issue guidance to utilities.<sup>22</sup> The problem of identity theft surely has not diminished over the last six years since the Commission’s investigation, and the Commission’s earlier caution in regard to identity theft should be maintained and strong privacy rules should be enacted in this proceeding.

(2) *Rule Violations*

It is reasonable for consumers to want their personal information to remain private because, even where rules to protect consumer privacy have been enacted, some

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<sup>22</sup> *In re: Identity Theft*, Docket No. M-00041811, (Order entered September 21, 2005).

companies continue to break those rules and infringe on consumer privacy. For example, here in Pennsylvania,

A Rhode Island home security alarm company, a Florida-based septic system company and a New York porcelain company must pay investigation costs and fines to resolve complaints from consumers who received solicitation calls while enrolled on Pennsylvania's Do Not Call list.<sup>23</sup>

Given that some companies will break consumer protection rules even when they are in place, the Commission should enact strong, effective privacy rules up front, rather than promulgating rules designed to foster competition at the expense of adequately protecting consumer privacy.

PULP et al. respectfully submit that the opt-out methodology adopted by the Commission in the Tentative Order fails to address valid consumer concerns about privacy and fails to properly balance privacy protections with competition concerns.

C. The Opt-Out methodology of securing consumer consent to share information provides insufficient protection to consumers.

The Commission's current policy regarding the sharing of customer information is contained in the Tentative Order as expressed in 52 Pa. Code § 54.8:

an EDC or EGS may not release private customer information to a third party unless the customer has been notified of the intent and has been 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.

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<sup>23</sup> *Attorney General Corbett announces fines against three businesses for "Do Not Call" Violations.* (July 22, 2010). Retrieved from <http://www.attorneygeneral.gov/press.aspx?id=5459>.

Section 54.8 employs an opt-out method for acquiring consumer consent, in this instance consent to the sharing of personal information. That is, a customer is presumed to want to have his or her information shared with third-parties unless the customer affirmatively tells the company not to share the information. This is in contrast to what is known as an “opt-in” method. Under an opt-in method, the presumption is that the customer **does not** want his or her information shared with third-parties unless the customer tells the company to share the information.

Section 54.8 would require an EDC, prior to sharing private customer information with a third party, to notify the customer of this sharing and provide him/her with a way to prevent some of the disclosure. This is accomplished by the customer contacting the EDC or EGS to express a desire to restrict private information; the customer must opt out of having his/her information shared. This method effectively presumes a right of the third party with commercial interests to have access to private consumer information for commercial gain and places that right above the expectation of the customer to privacy because it requires disclosure absent customer objection.

PULP et al. submit that this methodology inverts the proper presumptions and places burdens on consumers that they should not have to bear. Section 54.8 should be interpreted so it presumes customer information is private and may not be shared with a commercially motivated third party absent affirmative customer consent. This principle was recognized by then-Commissioner Christy in his November 12, 2010 Dissenting Statement when he stated that “[a]ny 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.”<sup>24</sup> Only where the customer affirmatively opts in and agrees in writing to allow information to be shared with a third party commercial entity should the presumption of privacy be trumped. A customer should have to opt in, not opt out, of information sharing. The opt-out methodology is insufficient for a number of reasons. First, there is always a possibility that a customer may not receive or read the notification from the EDC that private information is at risk of being shared. Second, even where a customer receives and reads a notice, there is a real chance that the customer will misunderstand some or all of the notice. For example, a consumer might not realize the importance of the notice, might misunderstand what steps they must take to either withhold or give consent, or might misunderstand the gravity of giving their consent. Finally, even where a consumer receives and understands the notice, they might fail to take proper action or any action at all. At any point in the process, where one of these problems occurs, the EDC may not receive the waiver and would mistakenly take that absence of feedback as an affirmative consent. The result will be that a consumer’s personal, private information is provided to a third party without the knowledge or affirmative consent of the customer. The insufficiency of the opt-out method is further underscored by the fact that consumers often fail to grasp **when** they have released their own private information through a standard “notice and consent” model. David Vladeck, Director of the Bureau of Consumer Protection at the Federal Trade Commission, has criticized the “notice and consent” model of consumer protection by saying:

[The notice and consent model] may have made sense in the past where it was clear to consumers what they were consenting to, that consent was timely, and where there would be a single use or a clear use of the data. That’s not the case today. Disclosures are now as long as treatises, they are written by lawyers— trained in

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<sup>24</sup> “Dissenting Statement of Vice Chairman Tyrone J. Christy” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (November 12, 2010).

detail and precision, not clarity—so they even sound like treatises, and like some treatises, they are difficult to comprehend, if they are read at all. It is not clear that consent today actually reflects a conscious choice by consumers.<sup>25</sup>

When dealing with the distribution of an individual's personal identifying information, the Commission should strive to embody these concepts of "conscious choice" and "informed consent." Misapprehension on the part of consumers supports the notion that the Commission should be strengthening privacy protections and limiting access to consumer information, rather, than as is the case in the Tentative Order, promoting a policy that makes it more likely that sensitive consumer information will be distributed to third parties without the full understanding and active consent of consumers.

D. There are satisfactory, alternative methods for securing consumer consent to information sharing.

Questioning the effectiveness of the opt-out methodology in effectively securing private customer information does not equate to undermining the desire to foster a robust competitive electric market. To be sure, PULP et al. support competition to the extent that it drives down the price of providing reliable, safe electricity to residential consumers. Nonetheless, providing access to the treasure trove of information that the Commission proposes to make available on the ECL without ensuring that customers desire to have this information shared, will unduly jeopardize customer privacy without significant gains in customer shopping. Using an opt-in method would best serve the public interest by providing "reasonable terms and

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<sup>25</sup> Testimony by Lillie Coney, Associate Director of the Electronic Privacy Information Center Before the House Committee on Science and Technology Subcommittee on Technology and Innovation, July 1, 2010. At pp. 15-16, (citing David Vladeck, *Privacy: Where do we go from here?*, Speech to the International Conference of Data Protection and Privacy Commissioners, Nov. 6, 2009, available at <http://www.ftc.gov/speeches/vladeck/091106dataprotection.pdf>.) Retrieved on 7/12/11 from [http://epic.org/privacy/smartgrid/Smart\\_Grid\\_Testimony\\_2010-07-01.pdf](http://epic.org/privacy/smartgrid/Smart_Grid_Testimony_2010-07-01.pdf).

conditions...that give due consideration to customer privacy, provide security of information and provide a customer an opportunity to restrict access to nonpublic customer information.”<sup>26</sup>

PULP et al. recommend the Commission employ opt-in methodologies of securing consumer consent to information sharing. PULP et al. also recommend using already available public information channels that can direct consumers to relevant educational materials about competition.

(1) *Opt-In Methodologies*

Opt-in methodologies afford the opportunity to encourage consumer participation in choosing an alternative supplier while simultaneously protecting consumer privacy. An opt-in methodology presumes consumer information is private and prohibits its release by an EDC. Only when the consumer affirmatively chooses to allow the release of that information may this initial presumption of privacy be trumped. Opt-in methodologies better protect consumer information because they require an affirmative, informed response from the consumer prior to the sharing of this private information with a commercial third party. Opt-in methodologies are superior because they make it much harder for a customer to accidentally or mistakenly give their consent to sharing sensitive information. Finally, the opt-in method is superior because there is less chance for a customer to “miss the notice” and have their information shared without their consent.

Additionally, using an opt-in methodology would comport with practice before the Commission, which historically has rejected the use of the negative check off as being unnecessarily burdensome to the consumer and as prone to being overlooked.<sup>27</sup> The use of an

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<sup>26</sup> 52 Pa. Code § 69.1812.

<sup>27</sup> Re: PPL Electric Utilities Corporation Retail Markets, Docket No. M-2009-2104271, Order entered August 6, 2009, (*Dissenting Statement of Vice Chairman Tyrone J. Christy*), at p. 3.

opt-in methodology for securing active buy-in and consent from utility customers has served as a successful model for the obtainment of consumer support. For example, when PPL sought approval of its Rate Stabilization Plan, one of the key issues was to to secure consumer participation. Only when PPL agreed to use an opt-in methodology for customer participation, rather than their originally proposed opt-out methodology, did the matter settle.<sup>28</sup> This opt-in method, which was the subject of a Commission approved Settlement Agreement in that case, serves as an appropriate model for the Commission's consideration here.

(2) *Public Information Channels*

In addition to using an opt-in method, there are several other methods the Commission can use to foster competition without the associated risks to consumer information. The Commission can engage in its own public education initiative that directs consumers to information about electric choice. For example, the Commission-sponsored website, <http://www.papowerswitch.com/>, has a wealth of excellent information about switching generation suppliers. The Commission can direct consumers to the Office of Consumer Advocate's website for its excellent section on shopping for an electricity provider: <http://www.oca.state.pa.us/Industry/Electric/Default.htm>. Furthermore, the Commission can encourage the EGSs and marketers to use the variety of marketing tools at their disposal, such as internet, radio, and television, to inform consumers about their services. Advertising and marketing are basic costs of competing. There is no need for the Commission to subsidize commercial entities in this effort to reach consumers. The Commission's obligation lies in the benefits the consumers will gain in accessing this information, not the benefits EGSs will have

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<sup>28</sup> *Petition of PPL Electric Utilities Corporation For Approval Of A Rate Stabilization Plan*, Docket No. P-2008-2021776, Order entered Aug. 7, 2008.

with access to potential customer information. This appropriate prioritization regarding the use of consumers' personal identifying information is achieved with an opt-in method.

In sum, there are a number of methods the Commission can use that provide a viable communication vehicle for marketers without the associated risks to consumer privacy rights. Most importantly, both the use of an opt-in methodology and the use of alternative communications channels significantly reduce the chances of private consumer information being shared while still enabling a robust marketing effort to take place. Opt-in methodologies do not preclude consumers from gaining information about new suppliers in a competitive electric retail market. The opt-in methodology shows that both consumer protection and competition can receive balanced treatment.

E. There are reasonable grounds for consumers to elect to remain with their EDC and thus not have their information shared with EGSs or marketers.

Many consumers may not want to shop for electricity, preferring instead to remain with their EDC, and thus not want to have their information shared with third parties for marketing purposes. These customers have legitimate reasonable grounds for electing to remain with their EDC as their default service supplier, to elect not to shop for an alternative supplier, and to want to avoid solicitations from alternative suppliers and marketers.

(1) *Risk Aversion*

It is reasonable for consumers to elect not to shop for an alternative generation supplier because shopping leaves a consumer open to potential risks and is not always certain to reduce costs. A consumer who disagrees with the cost-saving projections or is concerned about the potential risks inherent in shopping may choose to remain with the EDC as the preferred provider of generation purchasing services. Older consumers are also often leery of unsolicited callers and offers from any entity, as older consumers are often the target of

deceptive marketing and scams. These customers should not have to suffer the calls and visits from EGSs and marketers, and they should not have to keep a watch for notices that their personal information is going to be shared with third parties.

(2) *Vulnerable, Low-Income Customers*

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

The development of Customer Assistance Programs (“CAPs”) pursuant to the Electric Choice Act shields low-income customers from unaffordable price volatility and enables participating customers to maintain electric service at rates which are affordable in relationship to household income and size. However, electric distribution companies have disparate policies regarding CAP customers and shopping. A company may prohibit shopping, or remove the customer from CAP, or require the CAP customer to assume the burden of any increase of rates above the default cost. The effect of these uncertain or negative outcomes provides ample reason for these households to choose not to shop.

(3) *Buying Electricity is Hard and Confusing*

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

Customers who make a choice not to shop will not want to be exposed to the marketing efforts of EGSs and marketers, nor will they want to have to take added steps to secure their private information. The desire to enjoy the solitude and seclusion of one's own home is an important and valid interest with a long tradition in America. Where the Commission can recognize and protect this legitimate desire, it should do so. The Commission can support this legitimate desire by promulgating strong rules to protect consumer privacy, rules which presume privacy but permit consumers to affirmatively waive that privacy.

(4) *Familiarity with Provider and Choice*

The competitive electric retail market is still relatively new to Pennsylvanians. It is only natural that consumers may be wary of a system they are not used to or companies they are not yet familiar with. There is a comfort and trust that has been built between electric consumers and their regulated EDCs. As consumers throughout the Commonwealth become more familiar with the competitive electric market and the various EGSs, it is likely that even more households will shop. However, there is no need to subvert the

privacy of Pennsylvania residents in an effort to unnecessarily rush this result. On the contrary, being inundated with marketing materials that were not affirmatively solicited may make consumers reluctant to wade through all the unrequested information and may cause consumers to have an unfavorable opinion of the companies that are now contributing to what consumers may consider “junk mail.” In a statement made at a Public Meeting, Commissioner Gardner, referring to the opt-out method that was to be employed in regards to consumer telephone numbers, states that a provision “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.”<sup>29</sup> This same unintended consequence could reasonably occur if the opt-out methodology is used for other personal information, such as names and addresses.

F. The Reasonable Assumption of Privacy Should be the Basis for the Default

An opt-out method presumes a default of commercial entities allowed access to personal consumer information. An opt-in method presumes a default of an individual retaining active control over the dissemination of his personal information. With an opt-out method, silence is interpreted as consent. It is a faulty presumption that consumers reasonably expect their personal information to be shared and assume that is the default situation. Implicit consent, as determined by the absence of an objection, is inappropriate in these circumstances.

EDC customers have no reason to expect their personal information, given to an EDC pursuant to receiving service, will be shared with any third party. Private consumer information is given to the EDC under the belief that it is provided only to a company subject to Commission regulation for the purpose of receiving regulated electric service. Electric service is hardly a

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<sup>29</sup> *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, Docket No. M-2010-2183412, Order entered November 12, 2010 (*Partial Dissenting Statement of Commissioner Wayne E. Gardner*).

“take it or leave it” service. It is a necessity in our daily lives that few would choose to go without. Consumers provide their personal information as a requirement of getting electric service with the reasonable assumption that that information will go no further than the company they have supplied it to. Consumers would have no reason to anticipate that an EDC would either of its own volition or under the direction of the Commission give private consumer information to a third party, commercial entity. Consumers should not have to, nor would they reasonably expect to need to, “be on the look out” for warnings from their EDC that personal, private information is at risk of being shared with a commercial third party.

### **III. ADDITIONAL ISSUES**

#### **A. Responses to Commissioner Statements**

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

Former Commissioner Christy voiced strong concerns with requiring EDCs to share private consumer information with commercial third parties in his dissent from the November 12, 2010 Order. He reiterated his concerns concurrently with the Notice of

Reconsideration stating, “[a]ffirmative customer consent should be obtained as a necessary precondition to the release of any customer information.”<sup>30</sup>

Although no specific changes were proposed in the Notice of Reconsideration, PULP et al. believe the balance of fostering competition and maintaining consumer privacy must be readjusted. Then-Chairman Cawley supported the current balance between competition and privacy by stating the “ECL essentially provides a mailing list to EGSs so that they may market their products to consumers in the same fashion that EDCs offer their basic default service and other supply products to consumers.”<sup>31</sup> PULP et al. acknowledge an EGS’s right to market to Pennsylvania consumers. However, EDCs market through print and television ads to the public at large. They are contacted directly by a consumer when that consumer wants to initiate a relationship. This is the method PULP et al. advocate through the opt-in methodology. This allows customers to choose to engage in information gathering from EGSs, similar to the way they currently engage with their EDCs. The opt-in method provides the balance and uniformity that Former Chairman Cawley desires. It nurtures the competitive retail market, while protecting consumers from the excessive dissemination of their personal information.

#### B. Treatment of Customers Who are Victims of Domestic Violence

PULP et al. strongly support the adoption by the Commission of guidelines and rules designed to protect victims of domestic violence. Given the potential harm to individuals from mass distribution of consumers' private information, some of whom will be victims of domestic violence, PULP et al. recommend a conservative approach. Whenever a company has information which reveals that a customer has been or is a victim of domestic violence, then no

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<sup>30</sup> *Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412, June 9, 2011 (*Statement of Commissioner Tyrone J. Christy*)

<sup>31</sup> *Interim Guidelines for Eligible Customer Lists (ECLs) for Electric Distribution Companies*, Docket No. M-2010-2183412, Order entered November 12, 2010 (*Statement of Chairman Cawley*)

information should be revealed. However, requiring a domestic violence victim to identify herself as such in order to prevent release of her personal information, beyond §54.8, is unreasonable. Domestic violence victims are heavily invested in securing their personal identifying information. Beyond an interest in privacy, which is one of all consumers, there is an immediate interest in their personal safety and that of their families. In order to prevent the distribution of this personal information to numerous commercial third parties, that the individual has no current relationship with, a domestic violence victim must identify himself/herself as a victim to a commercial entity that provides a basic necessary service. Having to provide private information would not foster a sense of safety and security for a domestic violence victim. Failure to obtain affirmative consent for information disclosure would heighten the risk of physical harm for those victims who, for whatever reason – be it lack of time or resources, tumultuous transition, or simple failure to read the notice – did not opt out of the information disclosure.

#### C. Customer Telephone Numbers

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

#### D. Provider of Last Resort (POLR) Indicator

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

#### IV. CONCLUSION

While fostering competition in the electric generation market is important, this goal should not be pursued in isolation or at the expense of equally important consumer concerns. Where both competition and consumer protections can be pursued in tandem, then it is incumbent upon the Commission to do so. In this situation, PULP, AARP, TURN and Action Alliance contend that by replacing its current opt-out policy with an opt-in policy, the Commission can encourage competition successfully while protecting valid consumer interests in the integrity of their privacy, their personal information, and their choice not to shop.

Respectfully submitted:



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