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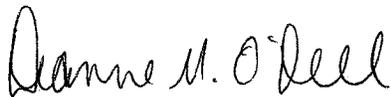
July 28, 2011

Via Electronic FilingRosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265Re: Interim Guidelines for Eligible Customer Lists, Docket No. M-2010-2183412
PPL Electric Utilities Retail Markets, Docket No. M-2009-2104271
Petition of Duquesne Light Company for Approval of Default Service Plan for the Period
January 1, 2011 through May 31, 2013, Docket No. P-2009-2135500

Dear Secretary Chiavetta:

On behalf of the Retail Energy Supply Association enclosed for filing is the original of its Reply Comments along with the electronic filing confirmation page with regard to the above-referenced matter.

Sincerely yours,



Deanne M. O'Dell, Esq.

DMO/lww
Enclosure

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interim Guidelines	:	
For Eligible Customer Lists	:	Docket No. M-2010-2183412
	:	
PPL Electric Utilities Retail Markets	:	Docket No. M-2009-2104271
	:	
Petition of Duquesne Light Company for	:	
Approval of Default Service Plan for the	:	Docket No. P-2009-2135500
Period January 1, 2011 through	:	
May 31, 2013	:	

**REPLY COMMENTS OF
RETAIL ENERGY SUPPLY ASSOCIATION**

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I. INTRODUCTION

The Eligible Customer List (“ECL”) is an important tool for enabling consumers to receive the benefits of a fully functional and workably competitive retail market as mandated by the Electricity Generation Customer Choice and Competition Act (“Choice Act”).¹ The ECL provides a mechanism for electric distribution companies (“EDCs”) to provide useful and necessary consumer information within their control to electric generation suppliers (“EGSs”) for the purpose of facilitating the ability of EGSs to offer competitive generation supply to consumers, and then to switch and supply the customer if he or she chooses to switch suppliers.

The Commission established final interim guidelines governing the ECL in its November 12 Order.² The Retail Energy Supply Association (“RESA”),³ a trade association of EGSs, has been an active participant in the development of these guidelines. In this reconsideration proceeding, the Commission is focusing on whether changes need to be made to the final interim guidelines to address privacy concerns. Comments were received by a wide variety of stakeholders including EDCs, EGSs, industrial consumers and consumer advocacy groups. Notably, the general consensus among all of these stakeholders is that a reasonable balance between privacy concerns and the continued viability of the retail electricity market would result from revising the interim guidelines to permit all customers to restrict the disclosure of all their

¹ 66 Pa.C.S. § 2801 et. seq.

² *Interim Guidelines For Eligible Customer Lists*, Docket Number M-2010-2183412, Opinion and Order entered November 12, 2010 (“November 12 Order”).

³ RESA’s members include: Champion Energy Services, LLC; ConEdison *Solutions*; Constellation NewEnergy, Inc.; Direct Energy Services, LLC; Energetix, Inc.; Energy Plus Holdings, LLC; Exelon Energy Company; GDF SUEZ Energy Resources NA, Inc.; Green Mountain Energy Company; Hess Corporation; Integrys Energy Services, Inc.; Just Energy; Liberty Power; MC Squared Energy Services, LLC; Mint Energy, LLC; MXenergy; NextEra Energy Services; Noble Americas Energy Solutions LLC; PPL EnergyPlus, LLC; Reliant Energy Northeast LLC and TriEagle Energy, L.P.. The comments expressed in this filing represent the position of RESA as an organization but may not represent the views of any particular member of RESA.

information on the ECL. To be clear, RESA fully supports modification to the interim guidelines to permit all customers to fully restrict disclosure of their information on the ECL through an opt-out process.

While some parties also advocate that various elements on the ECL should be eliminated or receive greater restrictions, the core point of disagreement among the parties is the manner by which consumers should be permitted to restrict the disclosure of their information. RESA, other EGSs, the Office of Consumer Advocate (“OCA”), PPL Electric Utilities Corporation (“PPL”), and Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (collectively, “FirstEnergy EDCs”) all support continuation of the current mechanism of customer choice whereby information is disclosed on the ECL unless and until a consumer “opts-out” of the disclosure. The other parties recommend that the Commission convert the current mechanism to one whereby the only way customer information is disclosed on the ECL is after the customer takes some type of affirmative action to permit the disclosure, i.e. an “opt-in” mechanism.

RESA strongly opposes requiring consumers to opt in before permitting their information to be disclosed on the ECL. Such a result would have a severely negative impact on the relatively nascent retail market in Pennsylvania by erecting potentially insurmountable barriers to the ability of EGSs to get information necessary to facilitate a functioning competitive market whereby all customer classes have real options to choose a competitive generation supplier. Importantly, having access to the information on the ECL is not, as some commentators suggest, merely about enabling EGSs to market to consumers. The information enables EGSs to complete the process of enrolling a customer, to develop accurate pricing offers for customers, and to maximize efficiency in providing service to a customer once he or she is enrolled. Without access to this information, the process of switching a customer to the electric service of

an EGS, as requested by the customer, will be extremely impaired. In some cases, the ECL provides the only administratively efficient means for an EGS to obtain certain data elements necessary to provide generation service to its customers.

Such a result is unjustifiable and unnecessary. While many concerns have been raised about how the information on the ECL may lead to the release of private customer information that could potentially result in harm to the consumer, there has been no evidentiary showing of how the specific data elements contained on the ECL may expose a consumer's private and personal information or why the current opt-out process is an insufficient means of protecting consumer privacy. Likewise, there is nothing to support concerns that the EGSs' access to and use of this information is somehow more suspect or threatening than the EDCs' maintenance and use – by them and their agents -- of the same information.

On the contrary, it has been well demonstrated that enabling EGSs to have reasonable access to this information is important to the competitive retail market. Further, the use of the current opt-out mechanism, revised to provide all customers with the ability to restrict the disclosure of all their information on the ECL, reasonably satisfies customer privacy concerns. This method of customer choice has already been approved by the Pennsylvania courts, is consistent with how Caller ID has been implemented, and meets federal standards of constitutionality. For all these reasons, the Commission should reject recommendations to convert the current opt-out process into an opt-in process which could result in eviscerating residential competition in the Commonwealth.

Rather, the Commission should: (1) permit all customers the right to restrict all of their information by opting out of having their information (or any portion of their information) included on the ECL; (2) reaffirm that all the elements currently listed on the ECL will continue to be subject to the opt-out process; (3) require EDCs to notify customers of the change in their

next scheduled customer solicitation; (4) ensure that the customer notices explaining the opt-out process are uniform and reflect an accurate explanation of retail choice and the implications of opting off of the list; (5) after the initial customer-wide notice issued in response to the promulgation of this order, determine that no additional mass customer solicitations will be necessary; and, (6) update the ECL elements to include those recommended by various parties.

II. THE IMPORTANCE OF THE ECL IN FOSTERING A COMPETITIVE RETAIL ELECTRICITY MARKET AS MANDATED BY THE CHOICE ACT

In 1996, Pennsylvania emerged as a national leader in electricity policy with the passage of the Choice Act which is intended to give the Commonwealth's residents and businesses the opportunity to free themselves from their decades long need to rely exclusively on the EDCs for their electricity generation service.⁴ Instead, the Choice Act envisions consumers receiving their generation from the competitive market through EGSs.

The reason for transitioning away from the traditional monopoly supply approach is clear – “competitive market forces are more effective than economic regulation in controlling the cost of generating electricity.”⁵ The legislature implicitly recognized that a well functioning, robust competitive market is the best way to provide the most innovative products and services at the most reasonable prices. Recognizing that breaking the well established monopoly would take time, the Choice Act set forth a transition plan which the Commission has been dutifully implementing for almost a decade and a half now – first through EDC restructuring plans, then through the adoption of regulations implementing the Choice Act and, more recently, through the approval of default service plans for the EDCs as well as numerous retail market opening initiatives and rulemakings.

⁴ 66 Pa. C.S. § 2806(a).

⁵ 66 Pa. C.S. § 2802(5).

Implementing guidelines addressing the ECL has been an important part of this process of implementing customer choice, mandated by the Choice Act. The ECL provides information to EGSs that is fundamentally necessary to ensure a proper functioning competitive retail market in Pennsylvania which is required by Chapter 28 of the Public Utility Code.⁶ The following examples illustrate the benefits and uses of the information on the ECL to facilitate customer choice:

- The customer list provides EGSs with usage and account attribute data that allows EGSs to continually refine their offers and provide the most competitive prices to customers. The availability of historical usage data for a large set of customers enables suppliers to refine their load forecasting assumptions which can result in more economic wholesale purchase decisions and lower retail offers for customers.
- The customer list provides information necessary to allow suppliers to complete the enrollment process. Operational protocols in Pennsylvania require EGSs to have a customer account number to effectuate an enrollment through the use of electronic data exchange transactions sent to the EDC. Customers enrolling with an EGS often mistakenly present an incorrect account number or an account number with a missing digit. The ECL is an essential quality control tool that EGSs utilize to verify account numbers provided by customers to ensure accurate and timely enrollment.
- The customer list provides necessary information to enable suppliers to efficiently provide service to customers. In addition to customer contact information and historical usage data, the ECL contains other vital information that EGSs need in order to continue to provide service to customers. For example, in some cases the ECL is the sole source of existing and future capacity and network service Peak Load Contribution values associated with

⁶ See, eg, 66 Pa.C.S. § 2802(7) (“This Commonwealth must begin the transition from regulation to greater competition in the electricity generation market to benefit all classes of customer”); (12) (The purpose of this chapter is to modify existing legislation and regulations and to establish standards and procedures in order to create direct access by retail customers to the competitive market for the generation of electricity. . .); (13) (“ . . . The procedures established under this chapter provide for a fair and orderly transition from the current regulated structure to a structure under which retail customers will have direct access to a competitive market for the generation and sale or purchase of electricity.”)

customer accounts. These data values are used to determine wholesale capacity and transmission cost obligations attributable to individual customer accounts and are a necessary data element used in EGS business operations.⁷

Requiring that customers consent via an affirmative action before any of this information is disclosed on the ECL is not only contrary to the Commission's longstanding rule, but would drastically reduce the number of customers who would authorize the release of the information and would similarly reduce the efficacy of any information provided to EGSs. Generally, requiring an affirmative action (rather than consenting by lack of action) reduces the number of participating customers substantially due to a behavioral phenomenon known as "status quo bias." It has been estimated that requiring affirmative action can reduce the number of participating customers from around 90% to 25-30% or less. Such a reduction in the number of customers releasing their data would not only seriously hamper residential and small business customer switching, but will rob customers remaining on the default service provided by the EDC of the ability to save money on their electric bill by electing to receive, or in many cases failing to even become aware of competitively priced service offers from EGSs. The lack of availability of this information could lead to service disruptions for customers that have already chosen to take supply from an EGS, and could drive up costs for all customers by making it more costly and cumbersome for EGSs to obtain the data necessary to run their operations.

Such a result is neither reasonable nor necessary as adopting the consensus of all stakeholders to permit all consumers to restrict the disclosure of all their information on the ECL strikes the appropriate balance between privacy concerns and the requirements of the Choice Act.

⁷ These facts as well as all the other factual averments in these Reply Comments are supported by the attached verification of Richard J. Hudson, Jr the Pennsylvania State Chairperson for RESA.

III. THE CONSENSUS AMONG ALL PARTICIPANTS TO PERMIT ALL CUSTOMERS TO RESTRICT THE RELEASE OF ALL THEIR INFORMATION ON THE ECL FULLY ADDRESSES ANY PRIVACY CONCERNS

Some commentors advocate that the Commission must make significant revisions to the current interim guidelines to address concerns regarding privacy.⁸ Generally, these parties advocate that: (1) the information contained on the ECL exposes private and personal information about the consumer; and, (2) there are insufficient safeguards to protect the information contained on the ECL. As explained further below, there has been no showing of how an opt-out process would insufficiently protect customer privacy or create risks for customers. In contrast, the need for the elements to ensure a functioning and workably competitive retail market consistent with the requirements has been explained above in Section II. Similarly, there is nothing to support the accusations that including the data elements on the ECL and permitting EGSs to access those data elements for legitimate purposes poses any greater risk to consumers than the current status quo. Nonetheless, to the extent concerns remain, adopting the general consensus of all the commentors to permit all customers to restrict the release of all information is the best way to balance the privacy/release concerns of the consumer advocacy groups with the statutory requirement of the Choice Act to give all consumers direct access to the retail market.

A. There Has Been No Evidentiary Showing Of How An Opt-out Process Would Insufficiently Protect Customer Privacy Or Create Risks For Customers

According to the consumer advocacy groups, releasing data to the ECL could increase the risk of harassment, stalking, and potentially lethal physical violence to the consumers by

⁸ Pennsylvania Utility Law Project, AARP, Action Alliance of Senior Citizens of Greater Philadelphia, Tenant Union Representative Network (collectively, PULP et al.); American Civil Liberties Union (“ACLU”); Pennsylvania Coalition Against Domestic Violence (“PCADV”); OCA; Industrial Customer Groups; Duquesne Light Company (“DLC”); and, Citizens’ Electric Company of Lewisburg, PA and Wellsboro Electric Company (collectively, “Citizens/Wellsboro”).

revealing “an individual’s habits, associations, activities and details into his/her private life.”⁹

However, no evidence has been presented showing that any person to date has been harmed – or even threatened -- by the existence of the ECL even though the ECLs produced under the current process have been in place for PPL and DLC for over a year now and prior versions of the ECL have been available since the EDCs’ initial restructuring plans.¹⁰

Moreover, nothing has been offered to explain how a nefarious person – assuming he or she could gain access to the data on the ECL which is only available to EGSs – would be able to effectively utilize the information to harm, threaten or harass a domestic violence victim or to violate any other customer’s sensitive personal information. While RESA recognizes that certain customer-specific information contained on the list, such as phone number and service address, could be utilized by ill intentioned individuals for nefarious purposes, the theoretical possibility that someone may illegally obtain this information for illegal purposes is not sufficient reason to discontinue use of the ECL or to eliminate the current opt-out process. If this were the applicable standard for the compilation and release of any form of customer information, then many well established information sources would present the same level of harm as the ECL. The publication of phone books, on-line white pages, state and county real estate databases, and countless other sources of information all present certain customer-specific information that

⁹ PCADV Comments at 4; ACLU Comments at 6.

¹⁰ The order governing PPL was entered in October 2009. Implementation of this order began promptly because the generation rate caps for PPL’s service territory ended December 31, 2009. Thus, the operating rules and guidelines related to PPL’s ECL have been in place for approximately eighteen months. *PPL Electric Utilities Corporation Retail Markets*, Docket No. M-2009-2104271, Final Order entered October 22, 2009. Likewise, the order governing Duquesne was entered on July 30, 2010. Implementation began immediately in preparation for the default service plan implementation date of January 1, 2011. *Petition of Duquesne Light Company for Approval of Default Service Plan for the Period January 1, 2011 through May 31, 2013*, Docket No. P-2009-2135500, Order entered July 30, 2010.

could theoretically be used for unlawful purposes, but this is not reason alone to discontinue the publication of this information.

Regarding additional data contained on the list, such as account and usage details, the overwhelming majority of the data on the ECL would require some specialized knowledge of how to read and analyze the data or even to understand it, much less to gain some personal insight. Consider the items about which concerns are being raised: transmission obligation, on peak/off peak consumption, monthly peak demand, load factor, billing country code and loss factor. The Commission can easily take administrative notice that most individuals would be hard pressed even to define the meaning of these terms, let alone glean information about a person from the release of this type of data. No attempt is made by the opponents releasing this information to explain how a person could take the next step and actually harm or threaten someone, or impact another person in any way.

Likewise, nothing has been offered to substantiate the concerns of the Industrial Customer Groups that competitive harm may result if certain usage information is illegally given to business competitors by affiliated EGSs.¹¹ Moreover, large industrial customers are sophisticated businesses that have controls in place necessary to safeguard their own data, to understand the purpose of the ECL and the consequences of not permitting the company's data to be disclosed on the ECL. If any of these entities have a concern about the disclosure of their data, then permitting them to restrict the release of all their information fully addresses any concern in this regard.

The lack of evidence presented here is in stark contrast to the evidence before the Commission in the Caller ID proceeding cited by some of the commentators as support for their

¹¹ Industrial Customer Groups Comments at 5.

position. In that case, many private customers testified that Caller ID violated their privacy expectations in maintaining private telephone numbers. Here no such showing – except broad generalizations – has been made. The courts have made clear many times that “mere bald assertions, personal opinions or perceptions do not constitute evidence.”¹² As there is no evidentiary basis to show why the current opt-out process should be revised, the Commission should not alter the status quo.

1. No Data Elements Should Be Eliminated From The ECL

The two types of data that appear to raise the most concern for parties are telephone numbers and data that may become more individualized and revealing when “smart meters” are installed. As explained further below, the identified data elements are necessary to fulfill the goals of the Choice Act and the privacy/release concerns raised by the parties are either non-existent or premature. Therefore, these elements should not be removed from the ECL.

a. Telephone numbers

OCA seeks to remove telephone numbers, of residential customers, from the ECL under any circumstances.¹³ Some of the EDC commentors also raise this issue and ask the Commission to clarify their obligations. Specifically, DLC comments that it provides the telephone number on the ECL unless the customer seeks to restrict it.¹⁴ PECO, on the contrary, comments that it does not include a customer’s telephone number on the ECL regardless of

¹² See, eg, *Mid-Atlantic Power Supply Association v. Pa. P.U.C. et al.*, 746 A.2d 1196, 1200 (Pa. Cmwlth. 2000) (“MAPSA”).

¹³ OCA Comments at 16.

¹⁴ DLC Comments at 7.

whether a customer takes action to restrict it.¹⁵ RESA's position is that the telephone number should be provided on the ECL unless the customer chooses to opt-out of providing it.

Clarification of this issue is unnecessary. The Commission made clear in its July 15, 2010 Tentative Order, which was confirmed by the November 12, 2010 Final Order, that telephone numbers are to be included on the ECL unless the customer opts-out. Specifically, the Commission stated:

Customer Telephone Number – The EGSs requested that the ECL include customer telephone numbers for all accounts. Some EDCs expressed concern with providing this information due to customer privacy issues. While recognizing the importance of customer privacy concerns, the EGSs stated that this information would be important for marketing purposes.

We tentatively find that customer telephone numbers should be included on the ECL, except when restricted by customers in accordance with our Regulations at 52 Pa. Code § 54.8. In this context, we note that most, if not all, EDCs are in the process of refreshing their customer lists and giving their customers opportunities to restrict their information, including telephone numbers. Once an EDC has completed the customer refresh action, that constitutes sufficient notice under Section 54.8 and non-restricted telephone numbers may then be placed on the ECL. We encourage all EDCs which do not currently have plans to refresh their customer lists with a current opt-out opportunity to do so within eighteen months.

Subject to additional comments, we find that this information is important to the marketing efforts of the EGSs and is necessary to reduce barriers to competition. Our finding here is bolstered by the ability of customers to restrict this information if they choose to do so. We also emphasize that EGSs are responsible for compliance with the requirements of Pennsylvania's "do not call" list. *See* 73 P.S. § 2242 (relating to the "do not call" list).¹⁶

¹⁵ PECO Comments at 3. *See also* Energy Association of Pennsylvania ("EAPA") Comments at 3.

¹⁶ *Interim Guidelines For Eligible Customer Lists*, Docket Number M-2010-2183412, Tentative Order entered July 15, 2010 at 5-6.

In addition, the Commission made clear in its November 12, 2010 Order that EGSs are required to comply with the prohibitions of the “do not call” statute and rules regardless of whether or not the customer’s telephone number appears on the ECL.¹⁷ While OCA claims that this is “likely to cause confusion as to the permissible use of the telephone number,”¹⁸ OCA offers nothing to explain why EGSs, who have access to this information and are licensed by the Commission, are likely to be confused. As explained below in Section III.A.2, the release of this information for the ECL is not the same as broadcasting it publicly or giving it to entities intending to do harm. EGSs, including their employees and agents, are required to safeguard the confidentiality of the information received through the ECL and the Commission maintains the jurisdiction and authority to redress any unlawful conduct.

OCA also argues that customers without landline telephones relying on their mobile numbers as the point of contact for purposes of electricity utility services may have a “particularly negative reaction to receiving unsolicited cell phone calls that may use up precious minutes of service under a cell phone plan.”¹⁹ This issue, however, is fully addressed by permitting customers to choose to exclude their information on the ECL (by opting out). According to DLC and PECO, when their customers were presented with the option of opting out of having their information disclosed on the ECL, there was a “very high response rate” from customers seeking to exercise their right to opt-out.²⁰ Thus, there is no reason to assume that consumers not opting out of having their telephone numbers listed on the ECL and not listing

¹⁷ November 12, 2010 Order at 8.

¹⁸ OCA Comments at 17.

¹⁹ OCA Comments at 17.

²⁰ DLC Comments at 5 (“Approximately 16.5% of all Duquesne customers [or about 89,000] elected that they wanted Duquesne to withhold all or some information.”) PECO Comments at 3 (Of PECO’s 1.6 million customers, 8,000 customers including 5,760 residential customers, requested that their data be restricted.)

their number on the “Do Not Call” list would have a negative reaction to receiving calls from EGSs. Of course, the Commission, the EDCs and the EGSs can and should engage in consumer education to increase consumer awareness of their rights.

On the contrary, as the Commission stated in its *Tentative Order*, a customer’s telephone number provides EGSs important information which assists in their ability to reach consumers and offer competitive generation supply consistent with the goal of the Choice Act, to give consumers direct access to the competitive market. Moreover, permitting customers to choose to not have their telephone number transmitted is fully consistent with the solution ultimately endorsed by the Commission consistent with the court’s directions regarding the transmission of telephone numbers electronically via Caller ID. To that end, a customer not wishing to have his or her number transmitted through Caller ID must “opt-out” by blocking their number either for all or individual calls.²¹ Therefore, OCA’s recommendation that telephone numbers be removed from the ECL under all circumstances must be rejected.

b. Smart Meter Data

The consumer advocacy groups express concerns about how information now on the ECL may – in the future – become much more granular and individualized as the EDCs implement smart meters in their service territories.²² To that end, OCA recommends that the following elements be eliminated from the ECL for residential customers as this information could potentially lead to the release of identifying personal information when smart meters are more widely deployed:

²¹ See Verizon Pennsylvania, Inc., Pa P.U.C. Tariff No. 500, Section 25C(A)(15) at First Revised Sheet 10.

²² PCDAV Comments at 6-7 (“Smart meters have the capability of revealing details about an individual’s private life by showing specific, real-time energy electricity consumption patterns in the homes.”); and, ACLU Comments at 6 (“Monitoring energy consumption on a monthly basis and measuring on-peak and off-peak consumption, the ECL records information about what transpires within the home and captures details on how people spend their days and nights.”)

- Transmission Obligation (Minimum Element 12)
- On Peak/Off Peak Consumption (Minimum Element 15)
- Monthly Peak Demand (Minimum Element 16)
- Load Factor (Optional Element 2)²³

RESA does not support this recommendation for several reasons. First, including these elements on the ECL today is necessary to enable EGSs to switch and serve customers. Each of these data elements are important. The transmission obligation is a number calculated by the EDC that represents a customer's contribution to the total system-wide "peak" and is used to determine that customer's share of the costs for transmission service. An EGS's costs to do business in the PJM market is based directly on sum of the transmission tags for all of an EGS's customers. An EGS cannot determine how much it will cost to provide service to a customer without this information. Thus, the transmission obligation is essential and, in some cases, the ECL is the only way an EGS can access this data even for existing/pending customers of the EGS. For example, currently the future transmission tag is not transmitted through EDI when a customer is enrolled with the EGS or the EGS requests historical usage pursuant to a Letter of Authorization ("LOA"). Therefore, the only way to access this information is to acquire it from the ECL. This information is necessary to accurately prepare a price for the customer. Likewise, on/off peak consumption data and monthly peak demand data are useful information for pricing purposes. Finally, the load factor provides average demand divided by peak demand over a period of time and is important because it allows a supplier to not only know the customer's demand but how the energy is consumed. Load Factor will allow a supplier to price accordingly for that customers type of consumption. Without Load Factor a supplier may make assumptions that could cost a customer more in the final price. The reverse is also true where those

²³ OCA Comments at 17-18.

assumptions could cost the supplier more to serve the customer. Either way Load Factor is a key component in finding the lowest cost service.

Second, smart meters are not widely deployed in Pennsylvania. Therefore, much of the information provided on the ECLs for residential customers is not customer-specific, but is generic data applicable for the entire residential class. Accordingly, providing data such as the transmission obligation or the loss factor for a residential customer cannot implicate privacy concerns because all residential customers would have the same value for this data element. Any privacy related concerns arising from the deployment of smart meters capable of generating more granular and customer-specific data can be adequately addressed in the future and are not a reasonable justification for removing data elements from the ECL today.

Third, the reference to Section 2807(f)(3) as requiring additional protections for smart meter data should be rejected.²⁴ As OCA correctly acknowledges, the statute does not specify the method by which a customer can consent to making available the customer meter data to third parties.²⁵ However, the Commonwealth Court has already determined that an opt-out procedure – which does not require “affirmative” action by a customer but permits consent by acquiescence – is consistent with very similar language in the Choice Act.²⁶ Therefore, there is no reason now to carve out any type of more stringent restriction option for information that may in the future be produced through smart meters.

For all these reasons, the Commission must not remove the elements characterized by the parties as information that may be provided by smart meters in the future from inclusion on the

²⁴ OCA Comments at 23-25; Industrial Customer Groups Comments at 3-5.

²⁵ OCA Comments at 23.

²⁶ *George v. Pa .P.U.C.*, 735 A.2d 1282, 1287-88 (Pa.Cmwth. 1999), *appeal denied*, 758 A.2d 1202 (Pa. 2000).

ECL today. To the extent the Commission has concerns about the information that may be available in the future from smart meters, RESA would support addressing those concerns through a new and separate process such as CHARGE or even a more formal investigation. For example, RESA would not object if the Commission required the EDCs to provide notice and obtain Commission approval when and if more granular and individualized data is available for residential customers on the ECL via smart meters. Such a requirement would provide the Commission and all interested parties a better opportunity to address the concerns raised and to make recommendations on the most appropriate way to proceed. Trying to address these concerns now is premature and unnecessary.

c. Billing Country Code and Loss Factor

OCA recommends that the Billing Country Code and Loss Factor be eliminated from the ECL for residential customers as not being applicable to residential customers or useful to EGSs.²⁷ The Billing Country Code is included on the ECL, to the extent it is available, based on the consensus of all participants during the CHARGE process.²⁸ RESA does not support removing it from the list. While most residential customers likely would not have a billing country code, it is possible that a customer may have a billing address outside of the country, so this information may be useful.

The Loss Factor is necessary because in many cases the loss factor does not accurately map directly to an EDC's rate code. For example, for some EDCs the line loss factor is based on service voltage classification so one customer may be a "GS" customer with line losses of 5% and another customer, who is also a "GS" rate code, has line losses of 1% because the customer

²⁷ OCA Comments at 18.

²⁸ Tentative Order at 4.

takes service at a higher voltage level. An EGS's metered load, which determines its energy supply cost obligation to PJM, is grossed up for line losses. So in order for an EGS to accurately generate a price, EGSs need to know whether they are responsible for the customer's metered load plus 1% or metered load plus 5%. The stakeholders reached consensus to require the FirstEnergy companies to provide this information on the ECL. RESA does not support removing it from the list.

2. Information On The ECL Is Sufficiently Safeguarded

Because the record is devoid of any evidence showing that the release of information on the ECL has resulted in harm to consumers, the proponents of opt-in information restrictions spend their time speculating about why harm may occur. None of these speculations, however, are based in fact as explained below.

a. EGSs, like EDCs, are required to safeguard the information on the ECL

Some commentors have tried to create the impression that once the information is placed on the ECL, and “in the hands” of the EGSs, it will expose the consumer to greater risk. As explained by RESA and other parties, the information on the ECL is not widely publicized or distributed, and is not released to employees or agents of the EGSs unless and until such persons agree to adhere to information restriction rules and is used for purposes beyond marketing.²⁹ Moreover, in the same way that EDCs are so required, EGSs are also required by law to ensure the confidentiality of the information contained on the ECL.³⁰ Indeed, the information at issue is already being disseminated to EDCs and their agents employees and representatives and has been for a very long time. There has not been any showing that the EDCs have failed to

²⁹ RESA Comments at 3-5, 6.

³⁰ 52 Pa. Code §§ 54.8(a) and 54.43(d).

safeguard the confidentiality of the information. Likewise, there is no evidence to suggest that an EGS's call center employee is any less trustworthy than an EDC's call center employee, both of whom could even be working for the same customer service firm.

RESA and its members take their legal obligations to safeguard consumer information just as seriously as the EDCs. While there is simply no evidence to support the claim that making this information available to EGSs will harm consumers and no reason to question the Commission's diligence in ensuring compliance with the law and its regulations, to the extent the Commission deems it necessary to quell concerns of various commentors, RESA would support OCA's recommendations that the Commission take this opportunity to reiterate and clarify those obligations.³¹

b. Information on the ECL is only accessible by EGSs that have completed EDC specific requirements to become EDI certified

Both OCA and PCADV express concerns about the number of EGSs they claim have access to the ECL.³² The numbers relied upon in their comments – the number of licensed EGSs in Pennsylvania – is misleading as the only licensed EGSs with access to an EDC's ECL are those who have been certified by the EDC to operate on that EDC's system. Each EDC has specific requirements that EGSs must satisfy before gaining access to the utility's system. As an example, PPL requires the following of EGSs who wish to become EDI certified on their system:

1. The EGS needs to be licensed as an EGS in Pennsylvania.
2. In order to supply electricity for retail use within the PJM Control area, suppliers must become a PJM member and also become signatory to the PJM Operating Agreement.

³¹ OCA Comments at 6-7.

³² OCA Comments at 6, PCADV at 6.

3. Once the EGS has a PA PUC license and is a member of PJM, the EGS must sign PPL's "Individual Coordination Agreement" rider of the Electric Generation Supplier Coordination Tariff.
4. EGS must complete a Credit Application form and return it to PPL. Upon approval, the EGS will be requested to complete the Credit Application Supplement form.
5. Upon authorization by PPL to use its Licensed Supplier website, an EGS will get a User ID and password.
6. Once the above five requirements have been met, EDI test dates and expectations are discussed with PPL. PPL requires a 30-day notice prior to the start of testing. When this notification is provided, the EGS must also furnish all trading partner information as requested in the EDI trading partner worksheet.
7. Once EDI testing is completed and the EGS is Level 2 EDI certified, the PPL EU Alternative Supplier Coordination (ASC) Group is responsible for entering a contract for each alternate Supplier using its distribution system for retail sales into PJM Interconnection's "eSchedules." The "eSchedules" is PJM's supply/reconciliation electronic tracking system accessed with a password on the Internet.³³

Only after an EGS has met all of the above requirements can it gain access to PPL's ECL. Similar requirements are also in place for the other EDCs. The implication that an entity need only be licensed in Pennsylvania as an EGS to gain access to the ECL is mistaken. Only entities that have satisfied both federal and state legal requirements and have received approval from the EDC are permitted access to the ECL.

In Pennsylvania, the number of EGSs with the ability to access the ECL does not correlate with the total number of EGSs licensed because Pennsylvania requires three discrete types of business entities to become licensed:

- Supplier – an entity that sells electricity to end-use customers utilizing the jurisdictional transmission and distribution facilities of an EDC.

³³

See
<http://www.pplelectric.com/Business+Partners/Electric+Generation+Suppliers/initiating+edi+test+process.htm>

- Aggregator - an entity that purchases electric energy and takes title to electric energy as an intermediary for sale to retail customers.
- Broker/Marketer - an entity that acts as an intermediary in the sale and purchase of electric energy but does not take title to electric energy.

While Broker/Marketers are required to be licensed by the Commission, they do not have a need to become EDI certified on an EDC's system and; therefore, would not have access to the ECL. Thus, the true number of EGSs with access to the ECLs of the EDCs is less than the number of licensed EGSs in Pennsylvania.

B. Permitting All Customers To Restrict All Information From Inclusion on The ECL Fully Addresses Any Privacy Concerns

Regarding the ability of consumers to restrict the information contained on the ECL, the general consensus among the commentors is that all consumers should be permitted to restrict the release of all, some, or none of their information. As discussed further below, implementing this change – which gives the consumers a reasonably tailored way to safeguard the disclosure of their information on the ECL – fully addresses all expressed concerns about privacy. To change the current opt-out mechanism to an opt-in mechanism as suggested by some commentors is neither practical nor legally required.

1. Opt-out Restrictions Are Sufficient To Address Privacy Concerns And Are Consistent With Other Utility Data Privacy Schemes, Including Caller ID

Even if the record supported the fears and privacy concerns expressed by the consumer advocacy groups, which it does not, adopting the general consensus among all commentors to permit all customers to restrict the disclosure of all information on the ECL through an opt-out procedure is the most reasonable way to address them and it is consistent with how concerns related to Caller ID were addressed.

Many of the consumer advocacy groups expressed concern about the inability of some consumers (i.e. non victims of domestic abuse) to restrict the release of some of their

information. Likewise, concerns were expressed about the earlier requirement that a person needed to identify him/herself as a victim to avail him/herself of the ability to restrict additional information. Implementing a “restrict all” ability for all consumers fully addresses these concerns and enables all consumers to restrict the release of their information to the ECL. Moreover, implementation of various and on-going consumer education efforts as described by PPL will provide continuous education to consumers and give them a continuing ability to restrict their information.³⁴ As explained by DLC and PECO, consumers have taken action when presented with the option of restricting the disclosure of their information on the ECL.³⁵ Therefore, changing the restriction options consistent with the general consensus of the parties is a reasonable way to provide consumers with the ability to exercise their own personal desires regarding the disclosure of their information on the ECL.

Moreover, implementation of this approach is consistent with the implementation of other utility data privacy programs, including Caller ID. As noted by several commentors, the Commission’s initial approval of implementing Caller ID with only limited and costly blocking options was rejected by the Commonwealth Court.³⁶ At that time, Verizon proposed that all calls would be identified through Caller ID and that no consumer would have the ability to block the number from appearing. Ultimately, the Commission accepted Verizon’s proposal to implement Caller ID but created limited “blocking” options to enable consumers to prevent the release of their telephone number through Caller ID. These limited blocking options were offered to private, nonprofit, tax-exempt domestic violence intervention agencies; the home telephones of staff members of such agencies whose personal safety may have been at risk if blocking was not

³⁴ PPL Comments at 9-10.

³⁵ DLC Comments at 5, PECO Comments at 3.

³⁶ *Barasch v. Pennsylvania Public Utility Com.*, 576 A.2d 79 (Pa. Commw. Ct. 1990).

provided and who were certified as requiring blocking service by the agency head; federal, state and local law enforcement agencies; and persons for whom a duly authorized representative of federal, state and local law enforcement agencies have certified a need for blocking to mitigate the risk of personal injury.³⁷ In finding these limited blocking restrictions to be illegal and unconstitutional, the Commonwealth Court did not determine that Caller ID could not be implemented.

In fact, Caller ID exists today and the telephone numbers of consumers are transmitted through Caller ID unless the consumer takes action to block the transmission.³⁸ This affirmative blocking option has never been challenged as an untoward personal privacy intrusion, even though the same arguments that have been made here with respect to an opt-out mechanism for inclusion on the ECL could be made about Caller ID blocking. Customers can forget or not understand how to “block” their phone number. Yet the Commission, consistent with precedent, reasonably concluded that this “opt-out” option adequately balanced customers’ legitimate privacy concerns with the benefits of having a caller’s telephone number transmitted.

The same result would be achieved here by giving all consumers the ability to restrict the disclosure of all information on the ECL unless the consumer acts to restrict it. Like the transmission of a consumer’s telephone number through Caller ID, the ECL information of consumers will be disclosed on the ECL unless the consumer takes action to restrict the disclosure. Such result reasonably balances any privacy concerns with the Commission’s statutory duty to implement the Choice Act and should be adopted.

³⁷ *Id.* at 82.

³⁸ *See* Verizon Pennsylvania, Inc., Pa P.U.C. Tariff No. 500, Section 25C(A)(15) at First Revised Sheet 10.

2. Opt-out Program Meets Federal And Pennsylvania Standards Of Constitutionality

a. Opt-out program meets federal standards of constitutionality

The federal standards for testing the validity of the regulation of commercial speech require that the speech must “at least concern lawful activity and not be misleading;” “government interest [must be] substantial;” the regulation must “directly advance [] the governmental interest asserted;” and the regulation must not be “more extensive than is necessary to serve that interest.”³⁹ There appears to be agreement among the parties that the speech in question concerns lawful activity and that the government interest is substantial. Furthermore, the parties would most likely agree that the Commission’s November 12, 2010 Order is intended to advance government interest in promoting competition in the market for electricity while protecting consumer privacy rights. However, the parties disagree over the fourth requirement of the test: extensiveness of the regulation. The PCADV argues that rather than being more extensive than necessary to protect consumers’ right to privacy opt-out provisions, such as those set forth in the November 12 Order, are not sufficiently extensive and; therefore, fail to protect consumer privacy.⁴⁰ However, precisely because the November 12 Order is not more extensive than necessary to protect the government interest in balancing privacy and competition, the opt-out mechanism passes the federal test of constitutionality as set forth in *Hudson*.

³⁹ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L.Ed.2d 341 (1980).

⁴⁰ PCADV Comments at 2.

The Supreme Court further analyzed the “less restrictive” prong of *Hudson*, making clear that it did not require a regulation to be the “least restrictive” possible means of achieving the desired result. Instead, the Court explained that,

What our decisions require is a ‘fit’ between the legislature's ends and the means chosen to accomplish those ends, - a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but, as we have put it in the other contexts discussed above, a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.”⁴¹

Consistent with this guidance, the Commission has reasonably concluded that an opt-out mechanism appropriately balances the protection of consumer privacy and the promotion of competition in the retail electricity market. The holding in *State University* directs the courts to leave it to the discretion of governmental decisionmakers, such as the Commission, to determine the most appropriate method of regulation. As the Commission has done so here, the federal standards of constitutionality have been satisfied and the mechanism must not be disturbed.

b. Opt-out program is constitutional under Pennsylvania law

The Commonwealth Court has previously reviewed the Commission’s opt-out mechanism for electricity consumers and found it constitutional.⁴² In *MAPSA*, the Commonwealth Court held that no constitutional rights were violated by the Commission’s 1999 order establishing enrollment procedures. The order was entered following extensive evidentiary hearings and provided for the release of information by EDCs to EGSs, unless restricted by the

⁴¹ *Board of Trustees of State University of New York v. Fox* 492 U.S. 469, 480, 109 S.Ct. 3028 (U.S.N.Y.,1989)(internal quotations and citations omitted).

⁴² *See Mid-Atlantic Power Supply Association v. Pa. P.U.C. et al.*, 746 A.2d 1196 (Pa. Cmwltth. 2000) (“*MAPSA*”).

customer. Customers could restrict the release of all their information – customer name, account number, address, utility rate class, load curve and historic 12-month usage – or only the usage information through an opt-out process. At that time, the opt-out process involved the use of pre-paid postage forms that enabled customers to restrict the release of their data by placing a notation in the correct check-off box and returning the form in the mail to the EDC.⁴³ The court concluded that “subject to the ability of customers to prevent the disclosure of 1) load data, or 2) all information, EDCs [Distributors] should release to licensed EGS [Suppliers] the names, billing address, service address, rate class, rate sub-class (if available), account number and load data for all eligible customers.”⁴⁴ While recognizing customers’ right to privacy, particularly with respect to telephone numbers, the Court concluded that, “the PUC followed the Electric Choice Act without violating a customer’s basic rights.”⁴⁵ The Commission’s decision here to implement an opt-out process is fully consistent with this precedent and should not now be altered.

C. Consumer Education And Implementation Of New Restriction Options

RESA recognizes the need for effective consumer education regarding both the importance of enabling EGSs to access information on the ECL and the options available to restrict the disclosure of information on the ECL. PPL recommends that the Commission direct all EDCs to solicit their customers in January 2012.⁴⁶ RESA’s position is that changes to the current status quo should be effectuated through the next regularly scheduled customer solicitation date. Requiring the EDCs to undertake an additional solicitation of all its customers

⁴³ *Id.* at 1199.

⁴⁴ *Id.*

⁴⁵ *Id.* at 1201.

⁴⁶ PPL Comments at 9.

– especially if the solicitation occurred recently – may be confusing and unnecessarily costly as acknowledged by several of the EDC commentors.⁴⁷ Moreover, consumers likely will not understand the difference between the solicitation they recently received and any new one. Thus, coordinating the changes with the EDC specific next regularly scheduled customer solicitation date appears to be the most reasonable way to effectuate any changes.

PPL also recommends that after the initial customer-wide notification no other general customer solicitations should be required.⁴⁸ RESA supports this recommendation as adopting the process outlined by PPL will provide consumers with meaningful and sufficient communications regarding this issue. PPL highlights in its comments all the ways available to EDCs to provide continuing notice to consumers of their withholding options through a variety of mechanisms to include new customer packets, bill inserts, e-mails, and separate flyers. PPL also sets forth a variety of ways that consumers will be able to change their preferences at any time and PPL commits to refreshing the ECL information on a monthly basis.⁴⁹

Finally, RESA supports the recommendation of FES that future communications regarding the ECL should be uniform among the EDCs and structured so as to fully inform customers of their options for supplier choice, without any negative implications to a customer's decision to receive service from an EGS.⁵⁰ Likewise, the EDCs should include language in their opt-out notices to customers informing them of the impact of opting out of the list to include the fact that removal from the list will prevent them from receiving potential money-saving or other innovative supply offers from EGSs.

⁴⁷ FirstEnergy EDC Comments at 4; PECO Comments at 3-4; PPL Comments at 9.

⁴⁸ *Id.*

⁴⁹ *Id.* at 9-11.

⁵⁰ FES Comments at 7.

IV. RESA SUPPORTS INCLUSION ON ECL ADDITIONAL ITEMS SUGGESTED BY PARTIES

FES recommends inclusion of net metering and tax status flags on the ECL.⁵¹ PPL recommends expanding the Transmission Obligations (PJM) to include current and future Capacity and Transmission Peak Load Contributions and to add two more “optional” elements of (1) reverse flow or generation indicator and (2) Net metering-renewable indicator.⁵² RESA supports these suggestions.

V. CONCLUSION

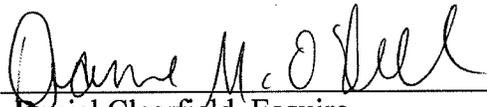
For all the reasons discussed above, RESA recommends that the Commission: (1) permit all customers the right to restrict all of their information by opting out of having their information (or any portion of their information) included on the ECL; (2) reaffirm that all the elements currently listed on the ECL will continue to be subject to the opt-out process; (3) require EDCs to notify customers of the change in their next scheduled customer solicitation; (4) ensure that the customer notices explaining the opt-out process are uniform and reflect an

⁵¹ *Id.* at 7-8.

⁵² PPL Comments at 8.

accurate explanation of retail choice and the implications of opting off of the list; (5) after the initial customer-wide notice issued in response to the promulgation of this order, determine that no additional mass customer solicitations will be necessary; and, (6) update the ECL elements to include those recommended by various parties.

Respectfully submitted,



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Date: July 28, 2011

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Interim Guidelines	:	
For Eligible Customer Lists	:	Docket No. M-2010-2183412
	:	
PPL Electric Utilities Retail Markets	:	Docket No. M-2009-2104271
	:	
Petition of Duquesne Light Company for	:	
Approval of Default Service Plan for the	:	Docket No. P-2009-2135500
Period January 1, 2011 through	:	
May 31, 2013	:	

VERIFICATION

I, Richard Hudson state that I am the State Chairperson for the Retail Energy Supply Association and that as such I am authorized to make this verification on its behalf. I hereby state that the facts contained in the preceding Reply Comments are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.

Date: 7/28/11


Richard Hudson
State Chairperson
Retail Energy Supplier Association