**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held November 10, 2011

Commissioners Present:

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| Robert F. Powelson, Chairman  John F. Coleman, Jr., Vice Chairman |
| Wayne E. Gardner  James H. Cawley |
| Pamela A. Witmer, Statement |

Interim Guidelines Docket No.

For Eligible Customer Lists M-2010-2183412

PPL Electric Utilities Corporation Retail Markets M-2009-2104271

Petition of Duquesne Light Company for

Approval of Default Service Plan for the P-2009-2135500

Period January 1, 2011 through May 31, 2013

**final order on reconsideration**

**BY THE COMMISSION:**

By order adopted June 13, 2011 (June 13 Order), we gave notice pursuant to section 703(g), 66 Pa. C.S. § 703(g), that we intended to reconsider our November 12, 2010 order (November 12 Order), in this proceeding. By the November 12 Order, the Commission had established **interim guidelines** designed to produce more uniformity in the type of customer information provided by Electric Distribution Companies (EDCs) in their Eligible Customer Lists (ECL) which are then made available to Electric Generation Suppliers (EGSs).

Moreover, in order to achieve statewide uniformity in our resolution of the various issues regarding the ECL, we also provided notice of our intention to reconsider our earlier orders that established ECL parameters for PPL Electric Utilities Corporation (PPL Electric) and Duquesne Light Company (Duquesne) in the context of individual adjudications.[[1]](#footnote-1)

Finally, consistent with our commitment to the Commonwealth Court and the parties to the appeal, we have maintained the stay imposed by the court so as to maintain the *status quo* pending a final order on reconsideration. Now that we have adopted a final order on reconsideration, the pendency of the stay shall end 30 days following the entry of this order.

**HISTORY OF THE PROCEEDING**

**The November 12 Order – Interim Guidelines for ECL**

The key determinations regarding the ECL interim guidelines adopted in the November 12 Order were described in our subsequent June 13 Order as follows:

In the November 12 Order, we acted upon a recommendation from our Office of Competitive Market Oversight (OCMO) regarding uniformity in the information provided by EDCs in the form of ECLs to EGSs who are licensed to market to consumers in the Commonwealth. Reasonable access by EGSs to customer information held by EDCs is an essential component to implementation of the retail market authorized by the Legislature in Chapter 28 of the Public Utility Code. 66 Pa. C.S. §§ 2801, *et seq.* EGSs, in turn, are obligated to honor the confidentiality of any customer information that they receive. 52 Pa. Code §§ 54.8(a) and 54.43(d). The proposal had been the result of discussions held by different stake-holder committees under the auspices of OCMO. November 12 Order at 1-3. The November 12 Order followed our July 15, 2010, Tentative Order regarding the ECL. The July 15 Tentative Order proposed adoption of specific elements to be contained within a uniform, statewide ECL and called for comments on those elements.

With respect to release of customer information, we addressed two issues raised by the commenters. The first related to the treatment of EDC customers who were victims of domestic violence and wished to protect themselves from potential harm by abusers. With regard to such customers, the Commission stated that “victims of domestic violence or customers that are similarly endangered should have the unfettered ability to restrict all of their customer information.” November 12 Order at 7. Second, we addressed the consumer protections available to the general public pursuant to our existing regulation. In particular, we provided guidance, consistent with our regulations and precedent, that a customer may restrict the release of (1) customer telephone number, (2) customer address, and (3) historic billing data.

Moreover, we repeated our caveat that the protection provided by the Commonwealth’s “do not call” list remained in place and that existing regulations required all EGS firms that receive customer information to maintain the confidentiality of that customer information, citing 52 Pa. Code § 54.43(d).[[2]](#footnote-2)

June 13 Order at 2-3.

The November 12 Order also contained guidelines regarding the minimum list of customer information and data points that should be included in the ECL. The list included, among other things, customer account number, customer name, customer telephone number, service address, billing address, tariff rate class and schedule, rate sub-class and sub-code, meter read cycle, load profile group, monthly consumption, on-peak and off-peak consumption, monthly peak demand.

**Appeals of the November 12 Order**

Both the Office of the Consumer Advocate (OCA) and the Pennsylvania Coalition Against Domestic Violence (PCADV) sought review of the November 12 Order with Commonwealth Court. OCA stated that the November 12 Order prevented customers from restricting all “personal and private customer information” from release to EGSs, even if customers object to such release. OCA Petition for Review at No. 2641 C.D. 2010, p. 5. OCA claimed this violated the Pennsylvania Constitution and the Public Utility Code. *Id.* The PCADV raised similar privacy concerns in its cross-petition and, in particular, stated that requiring customers to identify themselves as victims of abuse in order to restrict the release of customer information violated the constitutional right to privacy of those customers. PCADV Statement of Issues at No. 2712 C.D. 2010, p. 2. PCADV also objected to the manner of obtaining customer consent, alleging that the opt-out program for information disclosure violates individuals’ right to privacy. *Id.*

PCADV filed an Application for Supersedeas, supported by OCA, seeking to stay the November 12 Order. The Commission and some intervenors opposed the request for stay. Following a hearing, the court issued an order granting the request for a stay, stating that the supersedeas “is granted to the extent that the requested supersedeas will maintain the *status quo*.”

Following the imposition of the stay, the Commission asked the court to remand jurisdiction back to the PUC. The Commission stated that the public interest would be served by allowing it to reconsider its determinations and, after notice and opportunity to be heard, produce a new order that struck an appropriate and lawful balance between customer privacy rights and the Commission’s obligations under Chapter 28 of the Public Utility Code, 66 Pa. C.S. §§ 2801-2815. The Commonwealth Court granted the application and remanded jurisdiction back to the Commission on April 28, 2011.

**The June 13 Order – Notice of Reconsideration**

In our June 13 Order, we gave notice that it was our intention to reconsider the November 12 Order and its interim guidelines for the ECL. As noted above, we stated that our main concern has been that EDCs begin to operate as much as possible in a uniform manner throughout Pennsylvania in order to facilitate the retail market for electric generation service. June 13 Order at 5. For that reason, we gave notice that our final order on reconsideration would also apply to PPL and Duquesne. June 13 Order at 6. Each of these companies is a major EDC and each had been subject to separate orders dealing with the composition and operation of their customer lists.

We gave notice that we would reconsider the determinations in our November 12 Order and, in particular, the customer privacy issues raised in the OCA and PCADV petitions for review regarding the release of customer information and the extent of customer information that can be withheld. Interested parties were provided with an opportunity to file comments with regard to reconsideration of the November 12 Order and the prior orders applicable to PPL and Duquesne. Nineteen (19) parties have filed comments including five (5) agencies advocating on behalf of residential customers, six (6) EGSs or EGS organizations and six(6) EDCs or groups of EDCs filing together. Nine (9) parties have filed reply comments.

Additionally, we stated that we were maintaining the stay as imposed by Commonwealth Court until such time as we issued a final order on reconsideration. June 13 Order at 7-8. During this period, all customers who were affected by the November 12 Order and its ECL guidelines would have the option to restrict the release of all customer information. *Id.* We did note, however, that the stay did not affect other portions of the November 12 Order that were not the subject of the PCADV appeal or application for stay. These included the inclusion in the ECL of specific types of customer information for those customers who do not choose to restrict their information, and the frequency of ECL updates. We also noted that, although we intend that our final order on reconsideration to include PPL and Duquesne, the stay of the November 12 Order did not affect the customer information protocols contained in our previously adopted orders concerning those companies in that those orders were not appealed and, therefore, were not subject to the stay issued by the court. *Id.*

Also in relation to this matter, on August 25, 2011,we granted a petition filed by PPL seeking an extension of time in which to conduct its next solicitation of customers with regard to the release of individual customer information.[[3]](#footnote-3) It stated that its next solicitation was due in September 2011 and asked that it be delayed so that it would not have to conduct another solicitation after we issued our final order on reconsideration in this matter. In our order approving PPL’s petition we directed that the company conduct the next solicitation of its customers regarding the release of customer information to EGSs within 120 days of our final order here and every two years thereafter unless changed by subsequent Commission order. PPL Petition Order at 4.

**DISCUSSION**

1. **Ability of Customers to Restrict the Release of Account Information**

**Comments of the Parties**

OCA filed comments in which it argued for the unlimited right of residential customers to restrict the release of their personal account information to EGSs. OCA Comments, pp. 1-11. OCA maintains that a right to privacy found in the Pennsylvania and United States Constitutions includes personal information such as an individual’s name, address, telephone number and other identifying information. OCA Comments, pp. 8-11, citing U.S. Const. Amends. IX, XIV and Pennsylvania Const., Art. 1, §§ 1 and 8. The OCA comments explain that:

The individual has no choice but to provide this information as the EDC must have a name, a billing address, and a service address to be able to provide the service. Once an individual is a customer, the EDC also obtains personal information about the customer that is necessary to continue to serve the customer.

OCA Comments, p. 8. OCA states further that by observing when a customer uses electricity it is possible to determine, for example, when the customer is away on vacation and not at home. *Id.* Moreover, OCA argues that as EDCs install “smart meter” technology, the ability to learn about customer behavior through usage data collected by EDCs becomes all the more greater. *Id.* OCA urges us to vacate our earlier orders in these proceedings and to establish reasonable procedures for the release of information which give customers a “meaningful” opportunity to block the transfer of personal customer data to EGSs. OCA Comments, pp. 11, 19-23.

The PCADV, filing on behalf of its claimed 60 member domestic violence prevention programs, also maintains that privacy rights give customers an absolute right to prevent the release of personal customer information. PCADV Comments, pp. 1-18. Its comments are supported by statements of 28 member and related organizations.[[4]](#footnote-4) The PCADV argues that the provision in the November 12 Order which allows victims of domestic violence to prohibit the release of their personal customer data by informing their EDC that they are so endangered is well-intentioned, but inappropriate to the ends its seeks to established. PCADV Comments, pp. 3-7. PCADV states that the mere identification of persons at risk of violence to an EDC places them at even greater risk. *Id.* Moreover, PCADV claims that the PUC’s current regulations protecting customer information are “insufficient” to prevent unauthorized access to personal data. PCADV Comments, pp. 7-9. Like OCA, PCADV argues that customers have a Constitutional right to the expectation that their personal information is private and will be protected. PCADV Comments, pp. 10-14. It does not believe that the November 12 Order sufficiently protected these rights to privacy. *Id.*

The American Civil Liberties Union of Pennsylvania (ACLU) also takes strong exception to the procedures adopted through the November 12 Order. It maintains that the customers’ rights and expectations to privacy are firmly rooted in both the U.S. and Pennsylvania Constitutions. ACLU Comments, pp. 2-5. This is particularly true with respect to our state Constitution which provides a “heightened” level of privacy protection, according to the ACLU. *Id.* Therefore, the ACLU posits, the Commission must have specific safeguards in place to prevent the “potential re-distribution” of sensitive customer information. ACLU Comments, pp. 5-8.

The Pennsylvania Utility Law Project (PULP) filed comments on its own behalf, as well as on behalf of AARP (formerly the American Association of Retired Persons), the Tenant Union Representative Network and the Action Alliance of Senior Citizens of Greater Philadelphia urging the Commission to protect customer privacy rights. PULP Comments, pp. 4-9. PULP argues that many consumers are not even aware of the amount of information that an EDC has stored on the pattern of their use of electricity. PULP Comments, p. 7. Nonetheless, PULP argues that these customers have an expectation that personal information provided to a government-regulated business like an EDC will be protected. *Id.* PULP states that many lower income persons do not understand how to buy electricity from an EGS or are risk averse to shopping on the open market. PULP Comments, pp. 15-18. It maintains that customers should be able to block the release of their information to EGSs.

PPL Electric Utilities Corp. (PPL), Duquesne Light Company (Duquesne), PECO Energy Co. (PECO), as well as Citizen Electric and Wellsboro Electric Companies filing jointly are in agreement with OCA, PCADV and other groups that all customers should have the right to restrict the release of all of their customer information. PPL Comments, pp. 3-6; Duquesne Comments, pp. 4-5; PECO Comments, pp. 2-4; Citizen Electric/Wellsboro Electric Comments, pp. 3-4. PPL states that it is administratively burdensome on EDCs to allow some customers (those at risk of domestic violence) to restrict release of all information, but not other customers. PPL Comments, pp. 5-6. PECO notes that it currently allows all customers the ability to restrict release of their customer data. PECO Comments, p. 3. Moreover, PPL does not believe allowing all customers to prohibit release of their information will negatively impact retail competition. PPL Comments, p. 4.

The FirstEnergy operating EDCs – Metropolitan Edison, Pennsylvania Electric, Pennsylvania Power and West Penn Power Companies (FirstEnergy EDCs) – filing joint comments state that they allow any customer, regardless of circumstance, to restrict the release of all personal data. FirstEnergy EDC Comments, pp. 1-4. They also note the administrative burden of keeping track of some customers who may restrict release of information while other customers cannot. *Id.*

The Retail Electric Supply Association (RESA) commented that allowing customers to restrict all information is acceptable to its members provided that the Commission continues use of the “opt-out” process for securing customer consent, as described below. RESA Comments, p. 2. Other energy marketers and related associations agreed with the position that all customers should be able to restrict the release of their information regardless of their personal circumstances. *See*, Washington Gas Energy Services, Inc. (Washington Gas Energy) Comments, p. 2; Pennsylvania Energy Marketers Coalition (Pennsylvania Marketers) Comments, p. 3; National Energy Marketers (NEM) Comments, pp. 4-5.

RESA and the other marketers believe that the privacy concerns of OCA and the other advocate groups are misplaced. RESA states that customer information data is not widely publicized or distributed. RESA Comments, pp. 3-6. Moreover, EGSs are prohibited, by Commission regulation, from releasing such information to third parties. *Id.* FirstEnergy Solutions Corp. likewise points out that EGSs are legally bound to honor Commission regulations protecting customer privacy.[[5]](#footnote-5) FirstEnergy Solutions, pp. 3-7. If they violate those regulations, they may be subject to license suspension or revocation per 52 Pa. Code §§ 54.42 and 54.43(d). *Id.* RESA notes that PPL and Duquesne have had procedures in place for more than a year for the provision of this information to EGSs without any reports of violations. RESA Comments, pp. 4-6.

**Resolution**

Based on our review of the comments, it is apparent that the commenters overwhelmingly favor allowing customers to restrict the release of all personal information regarding their account with an EDC. The consumer advocates and most of the EDCs favor this approach and even some of the EGSs believe it to be in their ultimate interest to allow customers to prohibit the release of information. Some, like RESA, stated that they did not oppose it so long as the Commission continues the practice of allowing customers to exercise their choice to an EDC via an “opt-out” process.

Accordingly, we agree that EDC customers should be permitted to withhold all of their account and usage information. Many customers have valid reasons for not wanting to disclose their customer information and, in terms of reasonable privacy expectations, customers should have the right and a reasonable means to maintain the confidentiality of their account information. Moreover, in the Commission’s view, customers need not specify a reason or explanation to exercise that right.

In addition, we agree with the observation that allowing customers to withhold all account information will not have a significant adverse effect on retail electric competition since, as noted by PPL, customers who would elect total non-disclosure would likely be unhappy about the disclosure of that information to marketers and, thus, not receptive to competitive offers. PPL Comments, p. 4. Rather, to the extent that the ECL contains only the account information of customers who have not elected to withhold their account and usage information from disclosure to marketers, the ECL is likely to be a more efficient and valuable tool for marketers.

Accordingly, upon reconsideration, we shall revise our **interim guidelines** to provide that EDCs should allow customers the option to withhold the disclosure of all customer account and usage information from the ECL. Moreover, the option should be presented, in the EDC customer solicitation process, in a manner that discloses clearly what information is to be released to Commission-licensed marketers; namely, name, address, and historic usage data. In this fashion, customers will be able to make an informed choice regarding whether their account and usage information held by the EDC can be disclosed. In addition, we shall direct that the *PPL* and *Duquesne* orders subject to reconsideration be amended in this same fashion to allow their customers the option to withhold all customer information.

1. **Use of the Opt-Out Process**

**Comments of the Parties**

The November 12 Order continued use of the “opt-out” process by which customers can restrict the information that would be included on the ECL and shared with marketers. In an opt-out process, customers are able to restrict the release of information by affirmative customer action through a postal card check-off which identifies the information to be restricted. November 12 Order at 8. Thus, if the customer is informed of the option to withhold information and takes no action, the customer account information will be released and included on the ECL.

PCADV, however, strongly supports the use of a program whereby information may not be released to EGSs absent the affirmative consent of the customer through an “opt-in” process. PCADV Comments, pp. 14-17. Under this approach, if the customer fails to take any action, that customer’s information is not included on the ECL. Additionally, the PCADV urges the Commission to adopt standards governing the access and use of customer information by employees of both EDCs and EGSs. *Id.*

The ACLU maintains that, although the PUC has rules directing EGSs to protect the confidentiality of customer information, it “does not have direct jurisdiction over EGSs in this context.” ACLU Comments, p. 6. In order to afford customers a meaningful opportunity to restrict release of their personal information, it should limit the release of data to an opt-in policy whereby the customer indicates his or her affirmative consent before ECL information can be transferred to an EGS. ACLU Comments, pp. 8‑10.

A customer may not receive, understand, or notice language in their electric bill that private information will be disclosed unless the customer affirmatively objects. With hectic schedules, the breadth of mail disseminated and received, and the fact that many companies today “go paperless,” most electric consumers do not scrutinize the fine print in their electric bills.

ACLU Comments, p. 9. The ACLU posits that the state interest does not warrant the intrusive use of the opt-out procedure and that the opt-in method will accomplish the same goal without violating the customer’s privacy. ACLU Comments, pp. 10-11.

PULP states that although 52 Pa. Code § 54.8 (Privacy of customer information)[[6]](#footnote-6) authorizes an opt-out procedure where it is assumed customer use and, potentially, contact information will be shared with EGSs subject to PUC oversight, it nevertheless opposes that methodology and favors the use of an opt-in policy only. PULP Comments, pp. 9-10. It argues that there is a danger that EGSs will not follow regulations restricting use of customer information and notes that commercial companies have been prosecuted for calling persons on the Pennsylvania Do Not Call List. *Id.* Therefore, PULP states, information should only be released after a customer has given an affirmative response.[[7]](#footnote-7)

OCA states that, if the ECL is limited to include only those items it proposes to remain on the list, it would not object to an opt-out system to protect customer privacy rights. OCA Comments, p. 20. However, in the event an opt-out process is utilized, it advocates that the Commission adopt the following on-going procedures:

* Customers should be given a notice annually affording them the opportunity to opt-out via returning a postcard, using an on-line Internet website or a toll-free telephone number to indicate their choice to the EDC and/or indicate what items of information may be released to EGSs.
* The notice should contain clear instructions on how to opt out and to what use the EGSs would put the information.
* EDCs should be directed to maintain an on-going process whereby customers may change their status regarding the ECL through a web site or contact with an EDC customer service representative.
* Customer education should be an on-going process with the EDCs providing information on the opt-out process through bill inserts or messages.

OCA Comments, pp. 20-23. When the ECL is expanded to include smart meters data, OCA states that such information should be treated differently and that it should only be released to EGSs on an opt-in basis requiring affirmative customer consent. OCA Comments, pp. 23-25.

PPL strongly supports the continued use of an opt-out process because to do otherwise would likely result in a broad exclusion of customers from the ECL. In particular, PPL states the following:

PPL Electric recommends that the Commission continue its current practice of permitting customers to withhold information through an opt out process. Under the opt out process, customers must take some action, e.g., return a post card or call a toll free telephone number, in order to withhold their information from the ECL. Conversely, under the alternative “opt in” process, customers’ responses to mailings of this type are very low. Therefore, under an opt in process, it is likely that very few customers would respond and the ECL would contain very little customer data. The opt in process would result in an overly broad exclusion of customer information from the ECL, because many customers are indifferent as to whether or not their information is released. A customer who is indifferent will not take any action with regard to a bill insert or other notice, whether it is to opt in or to opt out. Therefore, if the Company uses an opt in process many customers who have no concern with having their information released will not be included on the ECL.

PPL Comments, p. 6. *See also,* RESA Reply Comments, pp. 4-6 (Opt-in 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”). PPL states that it believes customers’ privacy concerns will be adequately protected, particularly if the Commission allows those customers the opportunity to withhold the release of all information. PPL Comments, p. 7. The FirstEnergy EDCs also support the use of the opt-out process. FirstEnergy EDCs Comments, p. 4.

**Resolution**

Based upon our consideration of this matter, we shall continue to permit EDCs to use the opt-out process for customers to withhold the release of customer account and usage information from the ELC. We find that the opt-out process is a reasonable and efficient means by which customers can exercise their right to withhold confidential information. In particular, we agree with the comments of PPL that use of an opt-in process would likely result in a broad exclusion of customers from the ECL; this in turn, would make it far more difficult for EGS firms to make efficient and effective offers to potential retail customers.

We also agree with RESA that the data provided to EGSs is fundamentally necessary to ensure a properly functioning competitive retail market in Pennsylvania, which is required by Chapter 28. As noted by RESA, in addition to marketing, the information on the ECL 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.” RESA Comments, p. 6. Indeed, without access to ECL information, the process of switching a customer to the electric service of an EGS would be extremely impaired.

PCADV, the ACLU, and PULP make claims as to the dangers to customer security of using an opt-out procedure. We find these warnings to be speculative in nature and not supported by examples of actual breaches of customer security by Pennsylvania EGSs. As one EGS pointed out:

There simply is no evidence to support any further change. That is, despite the voluminous nature of the PCADV’s comments, there is not even one credible suggestion that any customer in Pennsylvania has been harmed by the opt-out process currently employed in the Commonwealth. While there may be a number of additional commenters who join the PCADV in its cause, none can even suggest that there has been any harm as a result of the opt-out in Pennsylvania, where the process has been used successfully for more than 12 years.

Dominion Energy Solutions, Reply Comments, p. 2; *see also*, RESA Reply Comments, pp. 20-25. We agree. While the concerns of these parties, however sincerely held, they must be supported by a concrete basis that includes studies, objective testimony, or other concrete facts upon which those fears are based. Even OCA, which opposes the use of the opt-out process unless we eliminate certain items from the ECL, generally agrees that the current process is working.

The ACLU argues that we cannot protect customers if their account data is provided to EGSs because we do not have direct jurisdiction over EGSs. This argument is incorrect. Under the Public Utility Code, we have the jurisdiction and full authority to suspend or revoke an EGS’s license if it violates our regulations concerning its obligation to safeguard the privacy of customer information. *See*, 66 Pa. C.S. § 2809. The power to put an entity out of business altogether in one of the largest retail electric markets in the country is certainly not inconsiderable.

At this juncture, the opt-out process has been working well in Pennsylvania for many years, and we do not find that the proponents of opt-in have sustained a case that we should change our policy. Allowing customers the ability to prohibit their EDC from releasing account information to EGS and allowing them to do that through the opt-out procedure strikes an equitable balance between the interests at stake. The Commonwealth Court recognized this when it first approved our use of the opt-out process as a reasonable means for customers to provide consent more than 10 years ago:

In order to comply with the terms of the Electric Choice Act it was necessary that the PUC followed the Electric Choice Act without violating a customer's basic rights. The PUC's Final Order addressed these issues and determined that the customer should enjoy the option whether to participate. This Court has held that absent proof of fraud, bad faith or abuse of discretion, a decision of the PUC will stand.

The PUC's Final Order enabled the customer to restrict any information from being divulged to Suppliers, at the same time it afforded the customer the opportunity to participate in the program. The PUC properly exercised its discretion and preserved the delicate balance between a viable and competitive marketplace and customer privacy.

*Mid-Atlantic Power Supply Association v. Pa. PUC*, 746 A.2d 1196, 1201 (Pa. Cmwlth. 2000), *citation omitted*. The court agreed that the Commission had struck the appropriate balance between customer privacy and implementation of retail competition pursuant to Chapter 28 and, based on our review of the comments in this reconsideration proceeding, we shall continue that same balance and allow customers to withhold account information by means of the opt-out process.

While we are not altering our **interim guidelines** regarding the method by which customers are able to exercise their right to restrict disclosure of their account and usage information, in terms of opt-out process details, EDCs should take reasonable steps to make sure customers are aware of what their choice means, how the information would be used, and clear instruction on how to opt-out. Therefore, in the EDC’s customer solicitation and other customer contacts, it must be made clear that if a customer does not take affirmative action to opt-out, by return post card, via Internet website or by calling a toll free telephone number, the customer’s name, address, account number, and usage will be included on the ECL and made available to licensed EGSs.

Accordingly, on reconsideration, our **interim guidelines** on use of the opt-out process shall continue and, similarly, the *PPL* and *Duquesne* order shall remain unchanged in this regard.

1. **ECL Data Elements**

The November 12 Order also included **interim guidelines** regarding the minimum customer account and usage information that should be on the ECL and made available to Commission-licensed EGSs, in order to facilitate the transition to a competitive market for retail electric generation service under Chapter 28.

As explained in RESA’s comments, the information on the ECL provides EGSs with basic usage and account attribute data that allows EGSs to continually refine their offers and provide competitive prices to customers, in lieu of taking default service from the former monopoly provider. It also allows EGSs to complete the enrollment process efficiently and minimize errors in customer switching. Finally, the information on the ECL provides necessary information to provide efficient service to customers once he or she is enrolled. RESA Comments, pp. 6-7.

Appendix A to the November 12 Order sets forth each of the customer account and usage data elements that should be on the ECL.

**Comments of the Parties – Telephone Numbers**

In its comments, OCA argues that some elements of the ECL are inappropriate or unnecessary for residential customers and, therefore, should be eliminated from the ECL data points which can be released to EGSs.

OCA argues that the ECL should not include customer telephone numbers. OCA Comments, pp. 16-17. It states that it is inappropriate for the Commission to require EDCs to release customer telephones to “private, unregulated businesses.” *Id.*, quoting Commissioner Gardner’s partial dissent of our November 12 Order. OCA also states that, even though the Commission stated that an EGS was not to call a customer whose number was on the “Do not call” list, the release of that number through the ECL was likely to cause confusion as to its permissible use. *Id.*, p. 17. Additionally, OCA argues that since many customers use their cell telephone numbers as their primary number, these customers may be charged by their cell service providers for the minutes used when receiving an unsolicited call from an EGS.[[8]](#footnote-8) *Id.;* *see* OCA Reply Comments, pp. 1-5.

OCA also opposes the inclusion of Transmission Obligation, On Peak/Off Peak Consumption, Monthly Peak Demand and Load Factor data points on the ECL for residential customers. OCA Comments, pp. 17-18. It maintains that these are smart meter data and should be subject to different rules regarding the release to EGSs.[[9]](#footnote-9) Finally, OCA state that the Billing Country Code and Loss Factor elements are unnecessary for residential customers and should be removed from the ECL. OCA Comments, p. 18.

Sen. Robert M. Tomlinson has filed comments stressing that the Commission should ensure that customers are fully informed as to their rights to restrict release of their data and that, in any event, the ECL should not contain customer telephone numbers. Letter from Sen. Robert M. Tomlinson of August 9, 2011.

PPL suggests adding elements in the future, but states that the Commission should refrain from making any further changes in the near-term. PPL Comments, pp. 8-12. It envisions an on-going process whereby customers would be notified once a year through a flyer or bill insert about the ECL process and would have the ability to opt out at any time through the return of a form, a telephone call or on the company web site. *Id.*

Duquesne also opposes the inclusion of a customer’s telephone number in the ECL due to privacy concerns. Duquesne Comments, p. 7.

**Resolution**

We find the arguments made by OCA, PCADV and other parties in support of removing the customer telephone from the list of ECL data points compelling and shall remove that element from the ECL. We continue to believe that the Commission has the legal authority to include the customer telephone number on the ECL. However, in weighing the policy concerns of promoting competition and the EGSs’ need for obtaining those numbers directly from the EDCs against the privacy concerns and expectations of customers, we believe that the benefits to suppliers are now outweighed by the detriments of releasing what many customer may consider personal information.

We are also concerned that customers may be more inclined to restrict the release of all information released in order to protect their phone numbers. So if the telephone numbers are on the ECL, fewer customers may elect to prohibit the sharing of other account information – information that EGSs may need to tailor offers – simply to protect the confidentiality of their telephone numbers. We do not think the EGSs need the telephone numbers on the ECL.

The historical purpose of the ECL has been to provide information to EGSs that otherwise would only be available to the EDCs. However, published telephone numbers are now available via Internet white pages and other services. Conversely, unpublished numbers are typically associated with customers that do not wish to receive sales calls. The other information on the ECL regarding customer identity and usage is typically not available elsewhere.

Finally, we caution that customer telephone numbers remain subject to the protection of Pennsylvania’s “Do not call” list. *See* 73 P.S. § 2242. If an EGS is able to obtain a customer’s telephone number from another source, and that customer’s telephone number is on the “Do not call” list, the EGS and every other potential marketer is subject to sanctions if that number is called.

**Comments of the Parties – Other ECL Data Elements**

OCA and other advocacy groups have urged the removal of certain customer usage information from the ECL, arguing that as more granular and individualized data becomes available via smart meters, further customer privacy concerns are presented. In particular, the OCA argues that the ECL should not include:

* Transmission Obligation
* On Peak/Off Peak Consumption
* Monthly Peak Demand
* Load Factor

OCA argues that these elements are equivalent to smart meter data under Section 2807(f)(3) of the Public Utility Code[[10]](#footnote-10) and, as such, require customer consent. OCA Comments, pp. 17-18.

**Resolution**

The OCA’s argument is misplaced in that the ECL does not provide “direct meter access” to EGSs; the ECL is a list, not direct meter access. Thus, none of the information to be released is within the scope of Section 2807(f)(3). PPL Reply Comments, p. 6. Also, customer consent is provided via the “opt-out” process before any EGS may access the ECL. Nor do these data points represent the type of real time data that pose a privacy risk to individual consumers via direct meter access. Rather, as explained by RESA, each of these elements is necessary to prepare an accurate price for the consumer based on load factor, peak consumption and peak demand. Moreover, where smart meters are not deployed the data is generic for the entire class. RESA Reply Comments, p. 14.

On the other hand, we do acknowledge the concern of the OCA and other consumer advocates regarding the potential threat to privacy associated with real-time “direct meter access” to the customer consumption and usage data that can be provided by smart meters. The treatment and customer protections necessary for direct access smart meter data will be the subject of another proceeding. *See*, *Smart Meter Procurement and Installation*, Docket No. M-2009-2092655, Implementation Order entered June 24, 2009.

In more than a decade of competitive retail electric service in Pennsylvania, EDCs and EGSs have established an excellent record of keeping customer data secure. Accordingly, upon reconsideration, our **interim guidelines** regarding these minimum data points for the ECL shall remain unchanged.

**Comments of the Parties – Frequency of Companywide Solicitations**

PPL and other EDCs have suggested that the Commission direct all EDCs to solicit their customers once in January 2012 to choose options for withholding their customer account and usage information, but not require any subsequent companywide solicitations.

PPL states that its customer solicitation process costs the company approximately $800,000 per solicitation. In lieu of further annual solicitations, PPL proposes to actively notify customers of their withholding options through announcements in customer bill inserts, e-mail where available, or a separate announcement included in the customer’s paper bill or electronic notification, if available. The information would provide guidance on how to make the selection through company-provided form, written letter, telephone or PPL website. PPL Comments, p. 9.

After the January 2012 solicitation, PPL proposes to present all new customers with the opt-out option as part of the welcome package. PPL Comments, p. 10. FirstEnergy Solutions and RESA also support this approach. FirstEnergy Solutions Reply Comments, p. 4; RESA Reply Comments, p. 26.

**Resolution**

Upon consideration of PPL proposal, we find that it has merit and should be adopted. Annual company-wide solicitations are costly and may be more confusing to customers than the alternative approach recommended by PPL. Therefore, we shall direct all EDCs to make a single companywide ECL solicitation during the first quarter of 2012, which shall provide a variety of options for customers to notify the EDC of his or her desire to withhold account and usage information from the ECL. These options shall include, but are not limited to: pre-paid post cards, company-provided forms, e-mails, toll-free numbers, and the EDC website.

In lieu of annual companywide solicitations, EDCs shall actively notify customers of their withholding options through each new customer’s welcome package and through periodic announcements in customer bill inserts, e-mail, or a separate announcement included in the customer’s paper bill or electronic notification, if available. The welcome package for new customers and periodic announcements for all customers shall also provide guidance on how to make the selection through company-provided form, e-mails, written letter, toll-free numbers, or the EDC website.

Moreover, we agree with the RESA suggestion that all future communications regarding the ECL should be uniform among all EDCs, and should be designed 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. RESA Reply Comments, p. 26. To ensure uniformity in these communications, we will direct EDCs to consult with our Office of Communications on their mailings and communications before the solicitation is made to their customers.

**Comments of the Parties – Additions to the ECL**

FirstEnergy Solutions suggests that two additional data elements be included on the ECL. First, it recommends that the ECL include a **net metering flag**, stating that this information would alert EGS firms that the customer has a net metering arrangement with the EDC that should continue. Second, it recommends that the ECL include a **tax status flag**, in order to indicate whether the customer is obligated to pay sales tax. FirstEnergy Solutions Comments, pp. 7-8.

PPL suggests that with regard to the minimum ECL elements that item 12, Transmission Obligation (PJM), be expanded to include current and future Capacity and Transmission Peak Load Contributions, as such information would be useful and important to marketers. In regard to optional elements, PPL suggests the addition of (1) **Reverse flow or generation** indicator, and (2) **Net metering-renewable** indicator, stating that these additional elements will provide useful information to EGS firms in designing offers to customers. PPL Comments, p. 8.

RESA supports these additions to the ECL. RESA Reply Comments, p. 27.

**Resolution**

Upon consideration of these suggestions by FirstEnergy Solutions and PPL for additions to the minimum and options ECL data elements, we believe that they should be adopted. Each of these data points is useful to EGS firms in making efficient and appropriate offers to customers. Nor does this information implicate the type of direct access data that will be addressed separately by the Commission in the context of smart meters. Therefore, the **interim guidelines** for ECL data elements are amended to include these minimum and optional items.

**CONCLUSION**

On reconsideration of our **interim guidelines** for the ECL set forth in the November 12 Order, as well as our reconsideration of the *PPL* and *Duquesne* orders regarding their ECLs, we shall affirm in part and amend in part those orders to provide: (1) that customers shall have the right to withhold all customer account and usage date from the ECL, (2) that EDCs will continue to use the “opt-out” process to secure customer consent to the disclosure of customer information to Commission-licensed EGSs, (3) that the ECL will include the additional elements recommended by First Energy and PPL, (4) that all EDCs shall make their next solicitation during the first quarter of 2012, and (5) that EDCs shall, in consultation with our Office of Communications, make sure that customers are aware of what their choice means, how the information would be used, and clear instruction on how to opt-out.

In the Commission’s judgment, providing customers with a clear and easily exercised means by which they can choose to withhold all of their customer account and usage information from the ECL, with no obligation to provide any reason or justification, strikes the appropriate balance between the privacy expectations of customers and the sharing of information between EDCs and Commission-licensed EGSs that is vital to a fully functional retail market for electric generation service in Pennsylvania; **THEREFORE,**

**IT IS ORDERED:**

1. That, on reconsideration, all Electric Distribution Company (EDC) customers shall have the right to withhold all customer account and usage date from the Eligible Customer List (ECL) that is made available to Commission-licensed Electric Generation Suppliers (EGSs).

2. That, on reconsideration, EDCs shall continue to use the “opt-out” process to secure customer consent to the disclosure of customer information to Commission-licensed EGSs.

3. That, on reconsideration, the ECL shall include the additional elements recommended by First Energy Solutions and PPL, as set forth in revised Appendix A.

4. That all EDCs shall make their next solicitation during the first quarter of 2012 and, thereafter, shall provide all customers with a variety of further options for customers to withhold their customer account and usage information including, but not limited to: welcome packages for new customers, bill inserts, company-provided forms, e-mails, and the EDC website.

5. That in preparing their ECL solicitations and further customer communications regarding the ECL, all EDCs shall, in consultation with our Office of Communications, make sure that customers are aware of what their opt-out choice means, how the customer account and usage information would be used, and clear instruction on how to opt-out.

6. That this order on reconsideration amends the **interim guidelines** regarding the ECL set forth in the November 12 Order in this docket, as well as our previous orders for PPL at Docket Nos. M-2009-2104271 and Duquesne at Docket No. P-2009-2135500 to extent they differ from the procedure approved here.

7. That the stay of our November 12 Order providing **interim guidelines** for the ECL is hereby lifted 30 days from the date of entry of this order.

8. That this order shall be served on all parties of record in this proceeding and all participants in the PPL Retail Markets proceeding at Docket No. M-2009-2104271 and the Duquesne Default Service proceeding at Docket No. P-2009-2135500.

9. That the Office of Competitive Market Oversight (OCMO) shall electronically send a copy of this order to all persons on the contact list for the Committee Handling Activities for Retail Growth in Electricity (CHARGE), and to all persons on the contact list for the *Investigation of Pennsylvania’s Retail Electricity Market*, order entered April 29, 2011 at Docket No. I-2011-2237952.

10. That a copy of this order shall be posted on the Commission’s website at the OCMO’s web page and on the web page for the *Investigation of Pennsylvania's Retail Electricity Market.*

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: November 10, 2011

ORDER ENTERED: November 15, 2011

**APPENDIX A**

**ECL Customer Data Elements**

**Minimum Elements**

1. ECL Revision Date
2. Customer Account Number
3. Customer Name
4. Service Address
5. Billing Address
6. Billing Country Code (if available)
7. Tariff Rate Class and Schedule
8. Rate Subclass/Rate Subcode (if available)
9. Meter Read Cycle
10. Load Profile Group per Tariff
11. **Transmission/Capacity Obligation (PJM) (Current/Future**)
12. POLR/Shopping Status (Y or N)
13. Monthly Consumption (each of 12 months)(KWH)
14. On Peak/Off Peak Consumption (each of 12 months)( KWH) (if available)
15. Monthly Peak Demand (each of 12 months) (KW) (if available)
16. Interval Meter (Y or N)
17. **Net Metering (Y or N) (new)**
18. **Sales Tax Status (Y or N) (new)**

**EDC Specific Elements**

1. Meter Flag (PECO)
2. Loss Factor (First Energy)
3. Procurement Classification Indicator (certain EDCs)

**Optional Elements**

1. Revenue Code
2. Load Factor
3. Fixed Price Election
4. **Reverse flow or generation (new)**

1. *PPL Electric Utilities Corporation Retail Market,* Docket No. M-2009-2104271, Order entered October 22, 2009 and *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. [↑](#footnote-ref-1)
2. “A licensee shall maintain the confidentiality of a consumer's personal information including the name, address and telephone number, and historic payment information, and provide the right of access by the consumer to his own load and billing information.” 52 Pa. Code § 54.43(d). [↑](#footnote-ref-2)
3. *Petition of PPL Electric Utilities Corporation for an Extension of Time to Conduct Its Next Customer Solicitation Regarding Release of Customer Information to Electric Generation Suppliers*, Docket No. P‑2011-2255163, Opinion and Order entered August 25, 2011 (PPL Petition Order). [↑](#footnote-ref-3)
4. These statements are attached to PCADV’s Comments with the exception of the Domestic Violence Services of Lancaster County which filed separately. [↑](#footnote-ref-4)
5. FirstEnergy Solutions also comments that customers should be able to restrict only their telephone numbers and historical billing data from release to EGSs, per 52 Pa. Code § 54.8. FirstEnergy Solutions Comments, pp. 3-5. It is the only party to take such a position. [↑](#footnote-ref-5)
6. 52 Pa. Code § 54.8 reads, in pertinent part: 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. 52 Pa. Code § 54.8(a). [↑](#footnote-ref-6)
7. The Industrial Customer Groups also support the use of only an opt out procedure with respect to the release of customer data. Industrial Customer Groups Comments, pp. 3-5. [↑](#footnote-ref-7)
8. Seven coalitions of industrial customers filing jointly as the Industrial Customer Groups argue that customers should be able to restrict release of their load data including eight items in the ECL (Industrial Customer Groups Comments, pp. 5-7), but did not propose eliminating these items from the ECL. [↑](#footnote-ref-8)
9. Procedures regarding the release of ECL data are discussed in the next section. [↑](#footnote-ref-9)
10. Section 2807(f)(3) states that:

    (3) Electric distribution companies shall, with customer consent, make available direct meter access and electronic access to customer meter data to third parties, including electric generation suppliers and providers of conservation and load management services.

    66 Pa. C.S. § 2807(f)(3). [↑](#footnote-ref-10)