

PENNSYLVANIA UTILITY LAW PROJECT

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July 28, 2011

Via E-Filing

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor North
PO Box 3265
Harrisburg, PA 17105-3265


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

Dear Secretary Chiavetta:

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

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

Respectfully submitted,


Julie George, Esq.

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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

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Dated: July 28, 2011

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I. INTRODUCTION¹

On July 13, 2011, the Pennsylvania Utility Law Project, AARP, Tenant Union Representative Network and Action Alliance of Senior Citizens of Greater Philadelphia (“PULP et al.”)² filed Comments to the Commission’s Notice of Reconsideration dated June 13, 2011 of its November 12, 2010 Order (“November 12 Order”). Both orders dealt with what information is to be included on the Eligible Customer List (“ECL”) by Electric Distribution Companies, (“EDC”), as well as whether consumers had the right to restrict any or all of their personal information from appearing on the ECL and what method of release was most appropriate.

Comments were also filed by: the Pennsylvania Coalition Against Domestic Violence (“PCADV”); the American Civil Liberties Union of Pennsylvania (“ACLU”); the Office of Consumer Advocate (“OCA”); Energy Association of Pennsylvania (“EAP”); PECO Energy Company (“PECO”); Citizens’ Electric Company of Lewisburg, PA, and Wellsboro Electric Company (“Citizens/Wellsboro”); FirstEnergy Solutions, Corp (“FES”); Duquesne Light Company (“Duquesne”); PPL Electric Utilities Corporation (“PPL”); Washington Gas Energy Services (“WGES”); Dominion Retail, Inc. (“Dominion”); National Energy Marketers Associations (“NEM”); Pennsylvania Energy Marketers Coalition (“PEMC”); Retail Energy Supply Association (“RESA”); Constellation NewEnergy, Inc. (“CNE”) and Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company (“FirstEnergy companies”).

¹ For a more complete introduction of the procedural background of this proceeding, please see the Introduction to the Comments submitted by PULP et al. on July 13, 2011. That introduction is incorporated herein by reference.

² The descriptions of the organizations filing comments as PULP et al. can be found on pages 3-4 of the Comments filed July 13, 2011.

PULP et al. submit these reply comments to highlight areas of agreement and disagreement with the Comments filed by other parties. PULP et al. thank the Commission for this opportunity to provide these Reply Comments.

II. THE MAJORITY OF PARTIES SUPPORT THE RIGHT OF ALL CUSTOMERS TO RESTRICT ALL OF THEIR INFORMATION FROM BEING INCLUDED ON THE ECL

With the notable exception of FirstEnergy Solutions, all parties who took a position agree that the proper respect for an individual consumer's right to privacy requires that all customers be given the ability to restrict the release of all of their information. Parties that support a universal restriction include: PULP et al., PCADV, ACLU, OCA, WGES, Dominion, NEM, PEMC, the FirstEnergy companies, Duquesne, PPL, PECO, Citizens/Wellsboro, and RESA.³ This near unanimity is telling. These parties span the gamut from low-income advocates and state statutory advocates to electric distribution companies and electric generation suppliers. All agree that requiring customers to share personal information is not necessary. Accordingly, the Commission's Order in this proceeding should set forth a procedure that allows all customers to prohibit disclosure of all of their personal information.

PULP et al. agree with OCA's position that the Commission should return to first principles in protecting consumer privacy.⁴ Initially, when choice became available in Pennsylvania, the Commission recognized the right of all customers to restrict release of all of

³ EAP and CNE did not take a clear position on this issue and raised no objections to the ability of consumers to restrict all their information.

⁴ "Comments of the Office of Consumer Advocate" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

their information to competitive suppliers.⁵ As pointed out by OCA, the Commonwealth Court upheld the procedure employed by the Commission, which in the words of the Court, “preserved the delicate balance between a viable and competitive marketplace and customer privacy.”⁶ This same balance must be reached in this case, especially in light of the reasoned and nearly unanimous consensus that all customers should have the right to restrict access to their personal information.

FirstEnergy Solutions is the only party to argue that the Commission’s November 12 Order must remain unchanged, without providing consumers the ability to restrict any information beyond telephone number, billing address, and historical billing data.⁷ However, FES makes no attempt to address the concerns raised by OCA or PCADV in their respective appeals, which provided the impetus for the Commission’s Notice of Reconsideration.

Foremost among those concerns is requiring domestic violence victims and similarly endangered individuals to identify themselves in order to gain the right to restrict disclosure of all their personal information. As pointed out in the Comments by PULP et al. and PCADV, requiring victims of domestic violence to self-identify is a threat to safety and an invasion of

⁵ See Procedures Applicable to Electric Distribution Companies and Electric Generation Suppliers During Transition to Full Retail Choice, Docket No. M-00991230, Final Order (May 18, 1999), affirmed sub nom Mid-Atlantic Power Supply Assoc. v. Pa. P.U.C., 746 A.2s 1196 (Pa. Commw. 2000). (Hereafter referred to as “May 1999 Order”)

⁶ Mid-Atlantic Power Supply Assoc. v. Pa. P.U.C., 746 A.2d 1196, 1201 (Pa. Commw. 2000).

⁷ “Comments of FirstEnergy Solutions Corp.” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

privacy.⁸ As to these individuals, any benefits of being included on the ECL are clearly outweighed by safety concerns.⁹

The Commission's stated goal for this Reconsideration is to "strike an appropriate and lawful balance between customer privacy rights and the Commission's obligations under Chapter 28 of the Public Utility Code."¹⁰ The vast majority of the commentors state that allowing all consumers the right to restrict all their information does not create an unlawful balance. PULP et al. submit that the Commission should explicitly recognize this right and conclude that any release of private information to a third party may occur only with the explicit consent of the consumer. "The policy of retail competition is furthered by a customer list rule that is accurate and includes sound procedures to protect all customers' right to privacy, including the right not to be on a list."¹¹

While the majority of parties agree that customers should have the right to restrict the release of all information, there is not consensus on whether this right should be protected through an opt-out or an opt-in method. Despite past Commission-approved methods, "it should not be automatically accepted that opt-out is the process to use."¹² An opt-in method is supported by PULP et al., PCADV, ACLU, and Citizens/Wellsboro. As stated in its Comments, PULP et

⁸ "Comments of Pennsylvania Utility Law Project, AARP, Action Alliance of Senior Citizens of Greater Philadelphia and Tenant Union Representative Network" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 20.; "Comments of Pennsylvania Coalition Against Domestic Violence" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011).

⁹ "Comments of Washington Gas Energy Services, Inc." *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011).

¹⁰ *Interim Guidelines for Eligible Customer Lists*, Docket No. M-2010-2183412, Order entered June 13, 2011 (*Notice of Reconsideration*).

¹¹ "Comments of Washington Gas Energy Services, Inc." *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011).

¹² "Comments of Duquesne Light Company" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 4.

al. submit that the only proper balance of privacy rights and marketplace interests is through an opt-in method.

III. AN OPT-IN METHOD IS THE ONLY APPROPRIATE METHOD TO ADMINISTER THE ECL

A. Opt-in allows for a competitive marketplace to work properly and efficiently

A properly functioning marketplace brings together suppliers of competitively priced products and services with individuals who want to purchase them. This is exactly the environment that an opt-in ECL creates. All parties have access to the marketplace and control over their choice to participate.

Electric Generation Suppliers (“EGSs”) have access to consumers through traditional methods of advertising and marketing. The costs of advertising and marketing are incorporated into the suppliers’ cost of doing business in most other industries. These costs are properly the responsibility of an entity that wishes to enter the market. To enhance and expedite the exchange of information in the marketplace, the Commission has developed the ECL. ECLs make it easier for EGSs to create individually tailored products for consumers, and an opt-in ECL allows the consumer a convenient way to indicate that he or she desires this information and is therefore willing to permit non-EDC third parties access to the data needed to get it. With an opt-in method, the ECL maintains the balance of control for each party to participate in the exchange. An opt-in ECL gives EGSs the ability to reach potential customers, and more effectively reach the consumers that are most likely to switch. This saves the EGSs the cost of marketing to many consumers who are not interested in the services of an EGS but, for a variety of reasons, may not have opted out. An opt-in ECL promotes efficiency in that it allows the EGS to devote resources

to creating individually tailored products only for the customers who specifically want this information.

Some of the parties do not agree that affirmative consent is needed. For instance, Dominion Retail asserts that affirmative consent by the consumer should not be required and takes issue with the concerns of OCA and PCADV regarding the wide distribution of personal consumer information to EGSs.¹³ FES argues that allowing all consumers the right to restrict all their information, or moving to an opt-in method “would seriously hinder, if not altogether thwart, the move to a fully competitive residential retail market in Pennsylvania.”¹⁴

The concerns raised by these parties are not well founded. Opt-in does not make the marketplace a less efficient one, nor does it discourage competition in the new electric retail market. When desired by the individual consumer, the provision of tailored products may be a beneficial outcome. Through an opt-in methodology, the consumer is able to indicate his or her desire to receive this information by affirmatively choosing to release personal data. “This will lead to informed decisions by customers and avoid inadvertent disclosure of information.”¹⁵ Moreover, inclusion on the ECL is not the only way for electric retail consumers to receive information. The Commission, OCA, EDCs and others often supply customers with information to assist them in shopping.¹⁶

In its Comments, the Pennsylvania Energy Marketers Coalition asserts that opt-out is preferable because it gives EGSs the “ability of competitive suppliers to reach all consumers

¹³ “Comments of Dominion Retail, Inc.” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 2.

¹⁴ “Comments of FirstEnergy Solutions Corp.” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 4.

¹⁵ “Comments of Citizens’ Electric company of Lewisburg, Pa and Wellsboro Electric Company” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 4.

¹⁶ “Comments of PPL Electric Utilities Corporation to Notice of Reconsideration Order” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 8, 2011) at 5.

with detailed information and offers that *may* be of interest.”¹⁷ While this is a legitimate benefit to the supplier, and has some benefit to a subset of consumers, this is not the appropriate balance for the marketplace given the importance of consumer privacy. For one, it would be overly inclusive. There are a great many consumers who would not opt-out simply because they did not pay attention to the literature provided. Their inclusion on the ECL, therefore, would not be indicative of their desire to receive marketing materials.

The touted benefits of the ECL are facilitating enrollment, developing accurate pricing offers for customers, and providing the most efficient service once a customer is enrolled.¹⁸ These are all benefits that can also be achieved with an opt-in method. Opt-in allows those Pennsylvanians who want to switch suppliers, or to receive information about the implications to them of switching, to receive all the benefits of the ECL. Opt-in facilitates the process for EGSs to provide information and to switch the consumer when he or she desires that to happen. Having consumers directly provide or affirmatively release their information to their EGS, as they did with their EDC, does not present a hardship worthy of infringing on one’s right to privacy.

Furthermore, opt-in allows for all the appropriate functions of a thriving competitive market. EGSs seek to “design products and pricing options that satisfy a person’s individual desires and budgets.”¹⁹ This legitimate goal should be a transaction that occurs at the behest of the customer.

B. An opt-in ECL protects the reasonable assumption of privacy, control and informed consent

¹⁷ “Supplemental Comments of Pennsylvania Energy Marketers Coalition” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 8, 2011) at 3. (emphasis added).

¹⁸ “Comments of Retail Energy Supply Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 6.

¹⁹ “Comments of Retail Energy Supply Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 2.

1. Reasonable Assumption of Privacy

PULP et al. argued in their Comments that the reasonable assumption of the consumer is that his or her private information is kept private unless he or she takes some affirmative action to change that. For its part, the FirstEnergy companies concede that “maintenance of customer confidentiality may be a reasonable expectation held by all customers.”²⁰ This expectation of privacy should not be treated lightly. It is a fundamental right, and as such should be treated with the appropriate deference. This is particularly so in light of the fact that, although creating a functioning competitive market is a legitimate agency goal, that goal may be achieved without the invasion of privacy and potential risk to personal safety that an opt-out method creates. An opt-in method allows for suppliers to provide tailored pricing and administratively easy enrollment to those customers who seek it out. In addition, EGSs have the option of presenting service and product information to the public at large in a known geographic service territory.

2. Direct Consumer Control over Personal Information

An integral element of ensuring Pennsylvanians’ right to privacy is the individual’s ability to retain immediate control over personal information. PEMC states it is “critical that these Interim Guidelines are approached with a continued commitment to empower consumers so that they have the ability to take control of their energy purchases with products that they believe best fit their individual needs.”²¹ PULP et al. agree. However, it is an opt-in method, not opt-out, which achieves this. Opt-in allows consumers to easily solicit individually

²⁰ “Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

²¹ “Supplemental Comments of Pennsylvania Energy Marketers Coalition” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 8, 2011) at 5.

tailored products for their energy needs and smooth the transition from EDC to EGS. This approach truly empowers consumers with the control to decide when they want to enter the marketplace. In contrast, opt-out removes this control from the consumer and requires an individual consumer to affirmatively act to regain control over his or her own personal information.

For its part, RESA argues that “supplying the information to EGSs is no different than permitting the EDC to possess the data – both types of regulated companies are under the same legal restrictions in terms of use and release.”²² This is a mischaracterization. Although they do so with affirmative consent, customers have little choice but to transmit information to an EDC. Furthermore, a customer reasonably expects that this information will not be transferred to third parties without consent. With an opt-out method, the customer may or may not be aware of the transmission and may or may not desire it.

EDCs and EGSs are not regulated by the Commission in the same way. The level and type of regulation by the Commission of an EDC is markedly greater than the authority the Commission possesses over an EGS. There are more remedies and options available to the Commission should an EDC mishandle consumer information, among which include the ability to levy fines and order changes in policy or procedures. PULP supports OCA’s zero tolerance proposal of revoking the license of any EGS that improperly uses consumer information.²³ The zero tolerance policy should extend to violations of any agents or subcontractors of an EGS that the Commission has no direct authority over. While EGSs are the entities explicitly given access to the information on the ECL, the dissemination of consumer information reaches beyond them

²² “Comments of Retail Energy Supply Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 4.

²³ “Comments of the Office of Consumer Advocate” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 6.

to any parties they engage to further their business goals. Given the narrow jurisdiction the Commission has over electric generation suppliers and their agents, consumers should have the ability to opt-in to dealings with competitive entities. Consumers should engage in the same affirmative and direct relationship with an EGS as they do with an EDC.

3. *Informed Consent*

The FirstEnergy companies describe an opt-out process where “customer information should be made available on the ECL if the customer *elects* to take no action.”²⁴ This assumes that the decision to not opt-out was just that, a decision. Some consumers may not understand the full ramifications of the opt-out notice and of being included on the ECL. Many customers will be unaware of the comprehensiveness of the information to be distributed. Some may dismiss the opt-out notice as junk mail. Some may lose track of the opt-out form or simply forget to send it back to the EDC. “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’.”²⁵ RESA cites this phenomenon to argue the Commission should not allow opt-in because too few customers would do so. This argument assumes that the Commission has the responsibility to support and promote a specific level of customer participation in competition. This is clearly not correct and the setting of any quotas or minimum levels of customer participation would be beyond the Commission’s statutory charge. Now that choice is readily available, the market will determine the level of consumer involvement. Opt-out would be overly inclusive. The “status quo” argument made by RESA

²⁴ “Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 4. (emphasis added).

²⁵ “Comments of Retail Energy Supply Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 7.

implies that many Pennsylvanians, who may not desire their personal information to be so widely distributed, may nonetheless fail to opt-out. This makes it clear that an opt-out method does not properly balance privacy rights with competition interests. To take this lack of action as a conscious decision or an informed choice is disingenuous. In arguing for an opt-out method, RESA states “the customer’s lack of action would not constitute consent to restrict information”²⁶ But a lack of action constituting consumer consent is exactly what the opt-out must assume in order to justify the infringement on privacy. EGSs rationalize that if consumers are provided a mailing describing an opt-out process and don’t act on it, this is equivalent to choosing to have their information released. This may not be true. A consumer may very well not understand the ramifications of any solicitation or information sent to them.²⁷ Given the privacy rights at stake, an opt-in method is the only appropriate method that provides consumers with agency over their own personal information and guarantees that the consumer has made a conscious decision to allow its widespread distribution.

C. An opt-in method maintains uniformity amidst a breadth of (ever-growing) information on the ECL

Uniformity “is an essential feature for efficient operation of the retail markets in each EDC service territory.”²⁸ Currently, smart meter data is included on the ECL. As pointed out by OCA, EDCs have a regulatory requirement to obtain affirmative consent from customers before releasing this information to third parties.²⁹ Given this statutory requirement to obtain customer consent before smart meter data is released, it would be inefficient and costly for the

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ “Notice of Reconsideration” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412, (Order entered June 13, 2011) at 6.

²⁹ See 66 Pa. C.S. § 2807(f)(3); “Comments of the Office of Consumer Advocate” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 23.

Commission to not require affirmative consent for the other data points and to allow two different processes for the handling of information included on the ECL. Uniformity is appropriately desired by the Commission to avoid confusion on the part of consumers, EDCs and EGSs and, thus, affirmative customer consent should be the protocol used for the whole ECL.

Pursuant to the November 12 Order, there are 17 minimum elements required for the ECL with three optional elements and three EDC-specific elements.³⁰ These elements provide an intimate picture of a consumer's location, life, and habits. EGSs use the information on the ECL to create individually-tailored energy products because of the knowledge it provides them about a consumer's life and energy needs. For example, PEMC includes a list of elements that should be included "at a minimum," the implication being that elements could be added at a later time.³¹ First Energy Solutions requests Commission approval to add net metering and consumers' tax status as elements to the ECL via this proceeding, which was limited to privacy concerns.³² Given the increasing appetite by EGSs for additional information to be added to the ECL, PULP et al. submit an opt-in method provides the only appropriate method of protecting consumer privacy.

The ECL contains information that can determine customers' personal activities and habits, when they come home from work, when they go on vacation, and whether there may be a medical condition in the house. This is the knowledge that can be gained from the information that is currently gathered on the ECL. As elements are potentially added in the future, no one can be certain what intimate insights into a consumer's life they may provide. This potential for the

³⁰ "Opinion and Order" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412, (Order entered November 12, 2010).

³¹ "Supplemental Comments of Pennsylvania Energy Marketers Coalition" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 8, 2011) at 4.

³² *Id.* at 3. "Notice of Reconsideration" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412, (Order entered June 13, 2011) at 5

distribution of additional personal information acts to raise even further the burden which a business interest should meet to justify making opt-out a reasonable or appropriate method.

IV. PARTIES' REASONS FOR OPT-OUT ARE INSUFFICIENT TO TRUMP PRIVACY CONCERNS

In their various comments, the parties list multiple reasons why an opt-out method is preferable. None of these reasons is sufficiently compelling to permit the Commission to sacrifice consumers' privacy.

A. Ease of marketing is not a compelling justification for an opt-out ECL

Among the parties, PEMC, NEM, FES, RESA, WGES, CNE and PPL argue that a more inclusive ECL would facilitate marketing and an opt-out method would create a more inclusive ECL. The repeated claim that a comprehensive opt-out ECL facilitates marketing and "competitive pricing" is a distinct result from creating a competitive marketplace. An efficient EGS is not the equivalent of an efficient marketplace; to say so is to set up a false paradigm. The goal of an efficiently functioning competitive marketplace is to supply information to those interested in receiving the information, it is not to make life as easy as possible for the suppliers. In fact, it could readily be argued that the ECL itself creates market inefficiencies by providing a benefit to suppliers that they did not have to pay for while extracting a cost from consumers that they may not have chosen to pay. First Energy Solutions characterizes the Commission's efforts as "fostering that market opportunity for all suppliers."³³ NEM's stated rationale is that the ECL provided on an opt-out basis is "a means to reduce costs of doing business and thereby enable

³³ "Comments of FirstEnergy Solutions Corp." *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 2.

marketers to make more competitive energy products available in the marketplace.”³⁴

Minimizing the cost of entry is not an end goal of an efficient marketplace.

While PULP et al. understand that, theoretically, when companies lower their costs, they are able to pass those savings onto customers, this is not guaranteed, nor should it come at the expense of maintaining individual privacy. “With accurate customer lists, EGSs can better target their marketing efforts, reduce their marketing costs and increase the number of competitive offers they can make to customers.”³⁵ WGES asserts that a “significant value” of the ECL is that it currently provides up-front load data that allows products to be tailored to customer usage. However, this value is not lost with an opt-in method, it is simply narrowed to consumers who have chosen to have their information released and have a higher likelihood of taking advantage of EGS services.

NEM argues four benefits in support of the opt-out method:

- Allowing marketers to more cost-effectively target consumers to whom they can deliver competitive offerings;
- Allowing marketers access to data elements that permit them to validate enrollments and therefore prevent customer slamming
- Reducing customer acquisition costs
- Encouraging competitive marketers to continue to engage in their own outreach and education of consumers.³⁶

All of these listed benefits are primarily benefits for the suppliers. Rather than encouraging EGSs to engage in their own outreach and education of consumers, providing the ECL on an opt-out basis subsidizes this appropriate cost of doing business. PULP et al. acknowledge there may

³⁴ “Comments of the National Energy Marketers Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 1.

³⁵ “Comments of Washington Gas Energy Services, Inc.” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011).

³⁶ “Comments of the National Energy Marketers Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

be some benefit to consumers of receiving unsolicited information indicating the availability of less expensive and/or individualized prices for energy services, but that potential benefit should not come through diminishing Pennsylvania electric customers' reasonable assumption that their private information will not be distributed by a commercial party without their affirmative consent.

Suppliers assert that they prefer an opt-out ECL because the “cost of contact [with a potential customer] is minimized.”³⁷ However, this commercial benefit to suppliers is not sufficient reason to subvert the obligation the Commission has to ensure the privacy of Pennsylvania electric consumers. Easing the ability of EGSs to identify potential customers and tell them about available products is repeatedly the stated goal of suppliers.³⁸

B. Ease of enrollment is not a compelling justification for an opt-out ECL

Another asserted benefit of the ECL is that it facilitates customer enrollment and validation. However, an opt-out method is not required for this benefit to accrue. PEMC purports that the benefit of an opt-out ECL is to reduce errors and confusion with regards to enrollment and validation.³⁹ NEM also specifically includes the easier validation of enrollment and reduction in customer acquisition costs as reasons for the ECL to be opt-out.⁴⁰ However, should a customer decide to switch suppliers and enroll with an ECL, they can *at that point* choose to release their information. Opt-out has the negative consequences of permitting distribution of customer information *prior* to any decision on the customer's part to switch suppliers. Should the

³⁷ “Supplemental Comments of Pennsylvania Energy Marketers Coalition” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 8, 2011) at 3.

³⁸ “Comments of Retail Energy Supply Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 2.

³⁹ “Supplemental Comments of Pennsylvania Energy Marketers Coalition” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 8, 2011) at 3.

⁴⁰ “Comments of the National Energy Marketers Association” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

customer later decide to switch, their personal information has already been distributed to EGSs beyond their new chosen supplier.

NEM states the elements of telephone number, billing address and historic usage are used for validations purposes without which the ECL would have limited usefulness.⁴¹ This only reinforces the argument that the opt-in is more appropriate. Customers can provide their information when they chose to switch suppliers. This benefit of opt-out, even combined with the limited other benefits, does not outweigh the expectation of Pennsylvanians that their personal information remain private unless they give permission for its distribution. Furthermore, when enrollment does occur, the customer can enable the exchange of information at that time. This mirrors the direct affirmative relationship consumers have with their EDC. The enrollment process for EDCs is reliable and manageable; there's no need to invade privacy for a marginal increase in administrative ease for EGSs.

V. CONDITIONS OF THE MAY 1999 ORDER NO LONGER APPLY

Some parties have relied on the May 1999 Order as support for the appropriateness of an opt-out method.⁴² They assert that a return to May 1999 opt-out standards would be preferable to the current policy articulated in November 2010. However, PULP et al submit that, although preferable to having no recourse at all, opt-out is neither needed to promote the development of a competitive environment nor appropriate as a method to protect consumer interests. The level of individual privacy concerns and the health of the competitive Pennsylvania electric retail market

⁴¹ *Id.* at 5.

⁴² “Comments of the Office of Consumer Advocate” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 4.; “Comments of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company and West Penn Power Company” *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 2.

are both significantly more robust today than in 1999. Today, there are substantially more EGSs, far more customers shopping, and significantly greater energy load delivered by alternate suppliers, as well as far more information readily available about pricing and other competitive options. There are also far more instances of identity theft and opportunities for misuse of and inappropriate dissemination of private information. The combination of fewer marketers, fewer customers shopping, fewer instances of identity theft and lack of readily available information for consumers made the opt-out decision, in 1999, an arguably acceptable approach. This is no longer the case, and therefore opt-out no longer represents the appropriate balance between competition and privacy.

A. There are more marketers in the current electric retail market

In 1999, the number of marketers and therefore the amount of marketing a consumer would be subjected to was significantly less than it is now. At that time, the Commission and Commonwealth Court came to a decision that the appropriate balance between interest in competition and privacy had been struck. Part of that decision was, no doubt, the substantially smaller number of parties to whom consumer information would be distributed. By OCA's last count, there are already over 200 EGSs licensed in Pennsylvania.⁴³ The opt-out ECL encourages supplier entry.⁴⁴ Consumers will be inundated with marketing from the portion of the 200 plus and growing number of EGSs that compete in their territory. In arguing for an opt-out method, RESA argues that the information on the ECL isn't widely distributed or publicized.⁴⁵ This is incorrect. As the Commission continues to support the development of a competitive

⁴³ "Comments of the Office of Consumer Advocate" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 6.

⁴⁴ "Comments of the National Energy Marketers Association" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

⁴⁵ "Comments of Retail Energy Supply Association" *Interim Guidelines for Eligible Customer Lists for Electric Distribution Companies*, M-2010-2183412 (July 13, 2011) at 3.

marketplace, the number of EGSs will grow. Many of those EGSs will employ agents and subcontractors who will have access to the ECL. Information on the ECL will be widely distributed around the state to licensed, but mainly unregulated entities. For a consumer to choose to distribute his information, via an informed opt-in method, to gain access to the information, products and services EGSs have to offer is appropriate and right. For consumers to have to affirmatively take steps to protect their private, confidential information is not.

B. There is currently more information in marketplace

The knowledge base of the public was substantially smaller when the Commission made the decision to have an opt-out ECL. Rate caps were still in effect. At the time of the Commission's 1999 Order, consumer access to information on electric shopping or the products and services of EGSs was not as readily obtainable. Additionally, there was less information collected *about* consumers and its transmission was not as straightforward. At that time it was more justifiable that the Commission would facilitate provision of that information without first obtaining informed consumer consent.

The availability of information and the methods used to disseminate information are now significantly greater and less expensive than in 1999. The current level of ability to access information has fundamentally changed. Consumers now have other resources to get information on competing suppliers. EGSs can and should engage in these now traditional marketing practices. These practices have proven exceptionally effective as, in only half a year since the last rate caps expired, there are a significant number of Pennsylvanians who have chosen an alternative generation supplier.⁴⁶ The Commission has done an excellent job of widely

⁴⁶ As of July 27, 2011, according to www.papowerswitch.com, 1,245,829 Pennsylvania residents have switched electric suppliers.

publicizing the electric retail market through press releases, community relations, and their website, www.papowerswitch.com. Consumers are now aware of what shopping is and more likely to opt-in and choose to get more information. The opt-out method that may have been justified in the past, no longer properly balances market interests with privacy concerns.

VI. CONCLUSION

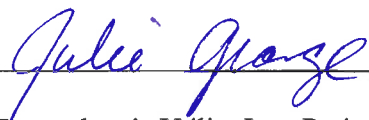
In this proceeding the central goal is to achieve the proper balance between enabling the competitive electric retail market to develop efficiently while respecting the individual's right to privacy and security of personal information. The core issues are whether consumers have the right to restrict any or all of their personal information from appearing on the ECL and (a) whether permission to release that information may be assumed unless explicitly restricted or (b) whether permission to release that information must be affirmatively stated. All parties who took a position, with the exception of FES, agree that customers should be given the ability to maintain the privacy of all of their personal information. PULP et al support that position and assert that an opt-in methodology for releasing information which allows for all the proper functions of an efficient marketplace, i.e. distribution of information, competitive pricing, access to customers or suppliers, without compromising the customer's privacy, should be implemented by the Commission. Only through opt-in is the customer assured agency over his or her information, while still being provided a simple way to get information regarding the competitive choices, products and services in their territory.

The effects of new technologies on individual privacy and the growing number of competitive entities have new implications to the balance of privacy rights and marketplace interests which require greater safeguards of consumer information. The expiration of the rate

caps has enabled more competitive entities to be able to enter the competitive market in Pennsylvania. These new entrants extend far beyond just EGSs; they include marketers, brokers and their related agents and subcontractors, all of whom will have access to this data. The EGS and these other entities are each progressively more remote from direct Commission oversight and regulatory authority. Together, these factors render an opt-out process no longer an appropriate option.

An opt-in ECL would both allow all parties to have access to the electric retail marketplace and control over their decision to participate. Affirmative action is properly the only way to determine customer consent, and with an opt-in method, the consumer's reasonable assumption of privacy is protected. Given the statutory requirement for affirmative consent for the release of smart meter data, an opt-in ECL also minimizes cost and confusion, while maintaining the statewide uniformity that the Commission desires. The Commission's stated goal for this Reconsideration is to strike an appropriate and lawful balance between customer privacy rights and the Commission's obligations under Chapter 28 of the Public Utility Code. PULP et al. submit that the only proper balance of these interests is through an opt-in method.

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Dated: July 28, 2011