

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**COMMENTS OF THE
PENNSYLVANIA UTILITY LAW PROJECT**



Elizabeth R. Marx, Esquire
Patrick M. Cicero, Esquire
Harry S. Geller, Esquire
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
717-236-9486
pulp@palegalaid.net

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I. INTRODUCTION

The Pennsylvania Utility Law Project is a statewide project of the Pennsylvania Legal Aid Network (PLAN) of civil legal aid programs. PULP is dedicated to protecting economically vulnerable Pennsylvanians' ability to access and maintain utility service at affordable rates. In representing the interests of economically vulnerable Pennsylvanians, PULP collaborates with local civil legal aid programs and their clients as well as nonprofit agencies and community groups that provide services to low income individuals. PULP thanks the Public Utility Commission ("Commission") for the opportunity to comment on the important issues raised in the Commission's June 19, 2014 Tentative Order at this docket.,

Throughout the underlying proceedings on the Eligible Customer List ("ECL"), PULP has urged the Commission to use caution and restraint regarding disclosure of any customer information, as the exposure of private customer data poses a distinct risk of financial and/or physical harm to consumers. Caution and restraint continue to be necessary, especially in light of continued, substantial data breaches plaguing the energy industry and other similar industries across the country.¹ In January, 2012, for example, two New York State utility companies – New York State Electric & Gas and Rochester Gas and Electric – experienced a massive data breach, effecting 1.8 million utility customers, when a data processing service center employee shared log-in credentials with an unauthorized subcontractor.² A recent survey conducted by the

¹ See FTC, 2014 Privacy and Data Security Update, http://www.ftc.gov/system/files/documents/reports/privacy-data-security-update-2014/privacydatasecurityupdate_2014.pdf (outlining the most recent cases prosecuted by the FTC for substantial breaches in personal data by data brokers and private companies). Visit https://www.privacyrights.org/data-breach?order=field_breach_total_value&sort=desc, the Privacy Rights Clearinghouse Data Breach Database, to find information about the occurrence of data breaches – whether it be due to unintended disclosure, hacking, malware, insider disclosure, physical loss of data, or loss of a portable or stationary device.

² Borgis Degalis & Nihar Shah, Information Law Group, *Data Breach at New York Utility Prompts Enforcement Action and Industry-Wide Data Security Review* (August 24, 2012), <http://www.infolawgroup.com/2012/08/articles/data-privacy-law-or-regulation/data-breach-at-new-york-utility-prompts-enforcement-action-and-industrywide-data-security-review/>.

Ponemon Institute³ of 291 IT security practitioners at energy companies and utilities found that 76% of energy companies surveyed experienced a data breach in the prior year, 56% of which involved disclosure of information in the company's database.⁴ Yet 71% of those surveyed reported that information security is not valued or prioritized by their management, and just 38% identified compliance with regulatory and legal mandates as part of the technology department's objective or mission.⁵ The report found that breaches were most often the result of an employee's negligence or malicious acts (43%), insecure web applications (40%), and system glitches (36%).⁶

From the information provided above, it is clear that data breaches are undeniably commonplace. And unfortunately, customers bear the brunt of the resultant harm. PULP refers the Commission to its prior comments at this docket, as well as the Comments of the Pennsylvania Coalition Against Domestic Violence, the ACLU-PA, AARP, Action Alliance of Greater Philadelphia, and the Tenant Union Representative Network in both the initial proceeding and the proceeding on reconsideration, which outlined the substantial risks associated with the creation and maintenance of the ECL and questioned the sufficiency of an opt-out procedure to address those concerns. As these comments point out, the right to personal data privacy is a critical aspect to prevailing law and policy at both the state and federal level.

Notwithstanding our comments below regarding the proposal to implement a triennial ECL refresh, we urge the Commission to postpone pursuit of its TO in order to allow for an evidentiary proceeding to factually explore the benefits and risks of the ECL. With several years

³ Ponemon Institute, <http://www.ponemon.org/> Ponemon Institute is the leading research institute for privacy, data protection and information security policy in the United States.

⁴ Ponemon Inst., *State of IT Security: Study of Utilities and Energy Companies*, at 3-4 (April, 2011), http://www.ponemon.org/local/upload/file/Q1_Labs%20WP_FINAL_3.pdf.

⁵ *Id.* at 3.

⁶ *Id.* at 6.

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of experience in creating and disseminating the ECL, EDCs, NGDCs, the Commission, and the public are now privy to substantial information and experience about the creation and maintenance of the ECL, as well as whether the opt-out provision is a meaningful protection against potential customer harms. While PULP recognizes that the Commission referred the issue to a Collaborative work group, such a process is not a substitute for an evidentiary proceeding because it relies on unconfirmed stakeholder positions, not findings of fact. Referring this proceeding to the Office of Administrative Law Judge would allow the Commission to fully explore the benefits and risks and to make factual determinations about the need for the ECL – compared to the inherent risks – before moving forward with ordering the institutionalization of additional costly and time consuming procedures.

II. BACKGROUND

From the start of the ECL proceedings, PULP and others have continually raised substantial concerns about the content and dissemination of an ECL.⁷ Rather than provide access to confidential data as the default position, we urged the Commission to more closely examine alternatives that may achieve similar market enhancement goals while preserving customer privacy and safety. In particular, we argued that the Commission’s proposal to include an opt-out provision allowing customers to affirmatively seek protection of their information was insufficient to address our concerns. We proposed use of an opt-in provision that would allow customers to provide affirmative consent to disclose their information, rather than having to affirmatively assert their desire to maintain privacy. However, after litigation in the

⁷ Relevant comments were submitted at the Tentative Order, Final Order, and Final Order on Reconsideration phases of the proceeding by PULP, the Pennsylvania Coalition Against Domestic Violence, the Office of Consumer Advocate, AARP, ACLU-PA, Action Alliance of Greater Philadelphia, and the Tenant Union Representative Network.

PULP Comments, *Interim Guidelines for Eligible Customer Lists*, Tentative Order, M-2010-2183412 (June 19, 2014).

Commonwealth Court over specifics of the opt-out provision, the Commission ordered on final reconsideration that EDCs provide customers “the right to withhold all customer account and usage data from the [ECL] that is made available to the Commission-licensed Electric Generation Suppliers” through an opt-out process.⁸ EDCs were ordered to inform customers of this right in the first quarter of 2012 during their next scheduled solicitation and to “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.” *Id.* In preparing customer communications, EDCs were ordered to consult with the Commission’s Office of Communications to be sure the information provided clear information on how the ECL may be used, what it means to opt out, and the procedure for doing so.

On March 6, 2012, Dominion Retail, Inc., Interstate Gas Supply, Inc., and Shipley Choice, LLC, collectively petitioned the Commission for a declaratory order obliging natural gas distribution companies (NGDCs) to provide an ECL to competitive Natural Gas Suppliers (NGSs) free of charge.⁹ The Commission declined to issue a declaratory order but, on September 27, 2013, issued a Tentative Order clarifying requirements for a natural gas ECL.¹⁰ The Commission unanimously adopted a Final Order regarding an ECL for the natural gas market that was substantially similar to the terms for the electric market ECL.¹¹ Consistent with a unanimously passed Joint Motion of Commissioners

⁸ November 2011 Final Order at 26 (emphasis in original)

⁹ *Petition of Dominion Retail, Inc. et al., for Declaratory Order*, Opinion and Order, Docket No. P-2012-2291983 (Sept. 27, 2014).

¹⁰ *Interim Guidelines for Natural Gas Distribution Company Eligible Customer Lists*, Tentative Order, Docket No. M-2012-2324075 (Sept. 27, 2012).

¹¹ *Interim Guidelines for Natural Gas Distribution Company Eligible Customer Lists*, Final Order, Docket No. M-2012-2324075 (Sept. 23, 2013).

PULP Comments, *Interim Guidelines for Eligible Customer Lists*, Tentative Order, M-2010-2183412 (June 19, 2014).

Witmer and Cawley, the Commission noted that it “failed to institute any sort of dedicated solicitation to ‘refresh’” the lists, and referred the issue to its Office of Competitive Markets Oversight (OCMO) to “explore the **necessity** of such a requirement for EDCs.”¹² OCMO then conducted a conference call with stakeholders and solicited informal comments on which it based recommendations to the Commission.

Based on OCMO’s findings and recommendations, the Commission set forth the current TO at this docket on June 19, 2014, in which it seeks comments from stakeholders on its proposal to require electric distribution companies (EDCs) and Natural Gas Distribution Companies (NGDCs) to “refresh” their Eligible Customer Lists (ECLs) on a triennial basis, beginning in the first quarter of 2015.¹³ The TO proposes to first require EDCs and NGDCs to perform a solicitation every three years of all customers providing detailed information about the ECL and informing customers of their ability to “opt out” of disclosing their information.¹⁴ In addition, the Commission proposed to require EDCs and NGDCs to allow customers to reply to the solicitation through direct mail, website processes, electronic mail, and/or phone contacts.

III. DISCUSSION

As a threshold matter, PULP notes that there has been no showing of the need to institute an additional solicitation or periodic refreshing of the ECL. Not one of the parties providing informal comments to OCMO indicated any necessity for such a procedure. To the contrary, OCA and PPL each specifically noted that additional solicitation or periodic refreshing is “unnecessary.” Therefore, in addition to our request for an evidentiary proceeding to factually

¹² Joint Motion of Commissioners Pamela A. Witmer and James H. Cawley, *Interim Guidelines for Natural Gas Distribution Company Eligible Customer Lists*, Docket No. M-2012-2324075 (Aug. 15, 2013 Public Meeting) (emphasis added) (hereinafter Joint Motion).

¹³ *Interim Guidelines For Eligible Customer Lists*, Tentative Order, Docket No. M-2010-2183412 (June 19, 2014).

¹⁴ *Id.* at 8-9.

PULP Comments, *Interim Guidelines for Eligible Customer Lists*, Tentative Order, M-2010-2183412 (June 19, 2014).

explore the underlying issue regarding the benefits and risks of the ECL, we respectfully add a request that the underlying issues of the necessity for, potential benefits of, and the costs of a triennial refresh be referred to the office of the Administrative Law Judges for specific findings.

Previously, the Commission has held that ongoing solicitation is needlessly costly and complicated for consumers:

Annual company-wide solicitations are costly and may be more confusing to customers than the alternative approach.... 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 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.¹⁵

In proposing a triennial refresh of the ECL, the Commission explains that modification of its earlier position was out of a desire to make the natural gas and electric ECL procedures consistent, stating that such consistency is "beneficial to all parties."¹⁶ However, as the OCA and PPL noted in their informal comments, the level of competitive development of the two industries is not parallel. Thus, the virtue of consistency between the two lists may be illusory if it results in the imposition of an unnecessary and costly process that is likely to cause customer confusion.

¹⁵ November 2011 Final Order on Reconsideration at 23.

¹⁶ *Id.*

PULP Comments, *Interim Guidelines for Eligible Customer Lists*, Tentative Order, M-2010-2183412 (June 19, 2014).

- A. THE COMMISSION SHOULD MAKE IT CLEAR THAT CUSTOMERS WHO PREVIOUSLY OPTED OUT WILL NOT NEED TO REASSERT THEIR DESIRE TO KEEP THEIR INFORMATION PRIVATE.

In its TO, the Commission explains that triennial solicitations “will provide a reminder to those customers who have not opted out of including their information from the ECL that they have the ability to do so.” As to customers who have already exercised their right to opt out, the Commission explains, “we believe it is also beneficial to remind those customers who have opted out of including information that they have the ability to include their information on future ECLs.” (TO at 7). PULP interprets this statement to contemplate that customers who initially opted out will remain in that status **without taking further affirmative action**, and that the triennial solicitation will merely serve as a reminder to those customers that they can opt back in to the list at any time. But, in the absence of a direct statement by the Commission that a customer who has already opted out need take no further action to remain in that status, an alternate interpretation could be that the triennial refresh cleans the slate and reminds all customers that they need to affirmatively reassert their preference to opt-out.

It is critical for the Commission to explicitly instruct EDCs and NGDCs to continue to exclude from the ECL any customer who previously opted out of inclusion on the list, regardless of whether she or he opts out of disclosure upon subsequent refresh of the ECL.

To our knowledge, the initial ECL solicitations did not provide any information to customers indicating that their decision to “opt-out” was in any way time-limited and, thus, it would be manifestly unreasonable to now impose a time limit on the customer’s privacy requests and would work to undermine consumers’ trust in the competitive market.

Such a mandate is consistent with provisions of the Gramm-Leach-Bliley Act and the regulations implementing that Act. Pursuant to title 15, section 6801 *et seq.* of the United States

Code and section title 17, section 248.7(g) of the Code of Federal Regulations, the duration of a consumer's choice to "opt out" of disclosure of nonpublic, personal information by a financial institution to an unaffiliated entity "is **effective until the consumer revokes it in writing** or, if the consumer agrees, electronically."¹⁷ Even if a consumer terminates their relationship with the financial institution, the consumer's affirmative decision to opt-out continues and only becomes inoperative if she or he later reestablishes her or his relationship with that financial institution, at which time the consumer must be presented with new information about how to opt out.¹⁸

Consumers who later change their mind and wish to be included in targeted, prescreened offers can affirmatively opt in at any time, but financial institutions are at no time authorized to presume that the passage of time revoked the consumer's choice to opt out.¹⁹ While the Gramm-Leach-Bliley Act is not directly applicable to the exchange of customer data by utility companies, it is instructive here. Customers of financial institutions – like utility customers – have a reasonable expectation of privacy, as these institutions are subject to governmental regulation because they provide essential services to customers. If a customer is told that their information is, in fact, subject to disclosure despite this reasonable expectation of privacy, and she or he takes an affirmative step to protect their information from disclosure, that customer should be confident that their information will remain private without further affirmation. PULP therefore strongly concurs with the OCA's informal comments that, "a customer's initial preference regarding opting out of the ECL should be maintained unless he or she chooses to change their preference rather than requiring customers to repeatedly opt out of the electric

¹⁷ 17 CFR § 248.7(g)(1) (Form of opt out notice to consumers; opt out methods) (emphasis added); *see also* 15 U.S.C. § 6801 *et seq.*

¹⁸ 17 CFR § 248.7(g)(2).

¹⁹ *Id.*

ECL.”²⁰ As the OCA points out, to its knowledge, no other industry requires such a repetitive assertion of a consumers desire for privacy. *Id.*

Changing course now, requiring customers to reassert their desire to protect their private information from disclosure, runs the distinct risk of undermining consumer confidence in the competitive market. Again, as the OCA noted: “**Customers who “opt-out” of the electric ECL do not shut out the retail electric market** – they merely restrict private account information they prefer to see restricted from being provided to marketers with which they have no relationship.”²¹ Indeed, there are a substantial number of alternative advertising campaigns that reach customers, and “[r]esources such as PaPowerswitch and the OCA Shopping Guide continue to gain traction among residential customers.”²²

Thus, consistent with Federal law and sound public policy, PULP urges the Commission to require that EDCs and NGDCs honor the customer’s initial request to opt-out of inclusion on the ECL. Only upon affirmative opt-in should a customer who initially opted out be included on the ECL in the future. Such an approach is critical to fulfill customers’ reasonable expectation of privacy and to ensure ongoing consumer confidence in the competitive marketplace.

B. THE COST OF REFRESHING AND DISTRIBUTING THE ECL MUST BE BORNE EXCLUSIVELY BY THE ELECTRIC AND NATURAL GAS SUPPLIERS THAT BENEFIT FROM CONTINUED MAINTENANCE OF THE LIST.

The Commission specifically asked in its TO for stakeholders to provide comment “regarding how EDCs should recover the costs associated with this triennial solicitation.” In response, PULP asserts that customers should not bear the cost of creating a list which discloses their personal information to marketers. In balance, the benefit to customers is too remote and

²⁰ OCA Informal Cmts. at 4.

²¹ OCA Informal Cmts. at 2

²² *Id.*

the risk to customers too high to justify imposition of the cost on ratepayers. Rather, the costs associated with the ECL should be recovered solely from competitive suppliers that benefit financially²³ from creation, maintenance and distribution of the ECL – just as in any other profitable competitive industry – as it provides ready access to every possible customer, along with individualized information about the customer’s consumption habits.

The Commission has explained throughout this lengthy proceeding that production of an ECL is necessary to strengthen competition in the electric and gas markets, thereby driving down costs and promoting innovation to the benefit of all consumers. Given the initial uphill battle to advertise in a formerly regulated market, the Commission has found that the benefit of an ECL to balancing the market outweighed the inherent risks to consumer safety and wellbeing that ECL disclosure presents.

The issue of cost recovery for both the electric and gas ECL, however, was not definitively established in the prior proceedings. The Commission noted in relation to the natural gas ECL that “the incremental costs ... would be subject to recovery.”²⁴ Just as the Commission did when it ordered production of private information on the ECL, the Commission must balance the relative interests and risks at stake when determining how to allocate the cost of refreshing the ECL in a just, reasonable manner.

²³ Pennsylvania offers competitive suppliers a forum in which to make substantial profits. For example, from 2008-2012, NiSource and NextEra Energy – two leading competitive energy suppliers in Pennsylvania – showed profits exceeding 2.4 and 11.4 billion dollars, respectively. CITIZENS FOR TAX JUSTICE AND THE INST. ON TAXATION AND ECONOMIC POLICY, WHAT FORTUNE 500 FIRMS PAY (OR DON’T PAY) IN THE USA AND WHAT THEY PAY ABROAD – 2008 TO 2012, at 4-5 (Feb. 2014), *available at* <http://www.ctj.org/corporatetaxdodgers/sorrystateofcorptaxes.pdf>. In 2012 alone – after expiration of Pennsylvania rate caps – NiSource and NextEra Energy reported a substantial margin of those profits: approximately 692 million and 2.5 billion dollars, respectively. *Id.* at 12. While these were profits reported from a national market, it is instructive that Pennsylvania’s rate caps expired just before companies reported a large margin of their four year earnings. As a nationally-recognized leader in competitive energy markets, the Commission can hardly deny that Pennsylvania’s electric market presents a substantial portion of the overall market.

²⁴ TO at 10 (*citing* September 23, 2013 Natural Gas ECL Order).

PULP Comments, *Interim Guidelines for Eligible Customer Lists*, Tentative Order, M-2010-2183412 (June 19, 2014).

In weighing the relative interests and risks to suppliers, consumers, and distribution companies, it is clear that suppliers have the most to gain and the least to lose. And, as such, it is just and reasonable for suppliers to assume the full cost of refreshing the ECL. In examining the relative interests, suppliers stand to gain a significant financial advantage from ongoing ECL maintenance. Access to potential customer information is one of the key components to establishing a market share. Customers conceivably have a similar, though much more general financial interest in maintaining the ECL. As the Commission has pointed out, it has the potential to expand the market, and may ultimately reduce energy costs.

The risks to consumers are both financial and physical in nature. Maintenance of an ECL opens the door to fraud, abuse, and theft if the customer's information is obtained by the wrong person. Indeed, the scope of risks inherent in disclosure of personally identifying information to hundreds of competitive suppliers and their contractors includes identity theft, home invasion, interpersonal violence, and the commission of further crimes against crime victims. For the sake of brevity and to avoid duplication of its previous lengthy comments here, PULP refers the Commission to its previous comments at this docket, and the comments of the Pennsylvania Coalition Against Domestic Violence, the Office of Consumer Advocate, the ACLU-PA, AARP, Action Alliance of Greater Philadelphia, and the Tenant Union Representative Network, which outline in detail and cite examples of the palpable danger that the ECL poses to customers.

Further, recovering the cost of an ECL refresh from customers will threaten the ability for low and fixed income customers to pay the cost of utility service. Low- income Pennsylvanians already face energy burdens in excess of 15% of their after-tax income, as compared to an

average of 4% for non-low-income households.²⁵ Any increase in that burden may tip the scale further from affordability. To be certain, the cost of refreshing the customer list is substantial,²⁶ and recovery from customers through a rate case will either raise rates for all customers or detract from prioritization of other shared costs – such as Universal Service program costs – which are also recovered through the rate making process. Either way, allowing recovery of costs from consumers through the rate making process will impact the ability of economically vulnerable customers to continue to afford utility service in Pennsylvania.

In weighing these interests and risks, it is clear that consumers have a lot to lose, but little to quantifiably gain from the ECL refresh. Indeed, given the lack of measureable data showing how consumers benefit from refreshing the list – and the risk of harm to consumers inherent in developing the list in the first place – it would be patently unreasonable and unjust for the cost of refreshing the list to be imposed on customers. Suppliers, however, stand to gain considerable and quantifiable profits as a result of an ECL refresh, but have little risk in shouldering the cost. PULP therefore strongly urges the Commission to place the cost of the triennial ECL refresh solely on the electric and natural gas suppliers that receive the benefit from the marketing tool.

C. CUSTOMERS RECEIVING BOTH NATURAL GAS AND ELECTRIC SERVICE FROM THE SAME DISTRIBUTION COMPANY SHOULD BE ABLE TO OPT OUT OF INFORMATION DISCLOSURE FOR BOTH ACCOUNTS WITH A SINGLE AFFIRMATION.

The Commission proposed in the TO to allow dual suppliers (natural gas and electric) to provide a single solicitation, and asked for comments on whether a single solicitation could feasibly allow a customer to restrict portions of their information on the natural gas ECL, but

²⁵ Penn State Univ., *Long Term Study of Pennsylvania's Low Income Usage Reduction Program*, <http://aese.psu.edu/research/centers/csis/publications/long-term-study-of-pas-low-income-usage-reduction-program>.

²⁶ In the initial electric ECL proceedings, PPL estimated that a company-wide solicitation would cost an excess of \$800,000, which led the Commission to conclude that the cost of refreshing the list was too high to justify an ongoing list refresh requirement. November 12, 2012 Electric ECL Temporary Order at 22.

PULP Comments, *Interim Guidelines for Eligible Customer Lists*, Tentative Order, M-2010-2183412 (June 19, 2014).

disclose that information on the electric ECL, and visa versa. PULP is not per se opposed to this approach, but we note that as a practical matter, it may be confusing for customers, costly for distribution companies, and subject to significant error – both by the customer and by the individual entity tasked with compiling consumer responses.

Regardless of how the Commission resolves the specifics of its proposed multi-level opt-out for dual suppliers, PULP urges the Commission to require dual suppliers to provide an option for customers to restrict their information from disclosure in both accounts with a single affirmation. It is critical that the option to restrict information in both accounts be clear and prominent on the solicitation to both minimize customer confusion and promote confidence in the security of the marketplace.

III. CONCLUSION

While fostering competition in the electric generation market is important, this goal should not be pursued in isolation or at the expense of equally important consumer concerns. Where both competition and consumer protections can be pursued in tandem, then it is incumbent upon the Commission to do so. PULP asserts that the ECL continues to present a risk to customers that is greater than its benefit. However, we acknowledge that the Commission has not asked for comments on or indicated a willingness to explore the merits of the ECL in this proceeding. Thus, in response to the Commission's specific requests for comment, PULP urges the Commission to ensure that (1) the original requests of customers to opt out of information disclosure be honored and continued without additional reaffirmation, (2) costs be borne solely by the suppliers, as they stand to benefit financially with little to no risk, and (3) customers with

dual electric and gas service from the same company be able to exercise their right to opt out of information disclosure for both accounts in a single affirmation.

Respectfully submitted:



Elizabeth R. Marx, Esquire
Harry S. Geller, Esquire
Patrick M. Cicero, Esquire
Pennsylvania Utility Law Project
118 Locust Street
Harrisburg, PA 17101
Tel. 717-236-9486
pulp@palegalaid.net

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