

COMMONWEALTH OF PENNSYLVANIA



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May 15, 2024

Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street  
Harrisburg, PA 17120

Re: Guidelines for Eligible Customer Lists Final  
Order Entered October 23, 2014  
Docket No. M-2010-2183412

Dear Secretary Chiavetta:

Attached for electronic filing please find the Office of Consumer Advocate's Comments in the above-referenced proceeding.

Respectfully submitted,

/s/ Patrick M. Cicero  
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Enclosures:

cc: Office of Special Assistants (ra-osa@pa.gov)  
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BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Guidelines for Eligible Customer Lists Final : Docket No.: M-2010-2183412  
Order Entered October 23, 2014 :  
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COMMENTS OF THE  
OFFICE OF CONSUMER ADVOCATE

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On January 18, 2024, the Public Utility Commission issued an Opinion and Order (*January 18, 2024 Order*) at this docket regarding Duquesne Light Company’s (Duquesne) Petition for Clarification of Interim Guidelines for Eligible Customer Lists Final Order entered October 23, 2014 (Order entered October 23, 2014) (*Interim Guidelines*). In its *January 18, 2024 Order*, the Commission granted Duquesne’s request to serve the 2024 triennial solicitation for Eligible Customer List (ECL) opt-out through electronic means for customers who have consented to receive electronic communications from the Company. In addition, at the request of our office, the Office of Consumer Advocate (OCA), the Commission agreed that it “should initiate a proceeding to investigate the efficacy of email solicitation during the triennial ECL periods on a statewide basis and consider amendments to the current *Interim Guidelines* to better address consumers preferences during future ECL solicitation periods.” *January 18, 2024 Order* at 8. Subsequently, on March 1, 2024, the Commission issued a Secretarial Letter seeking comments from interested parties on electronic solicitation and on the guidelines generally. The Secretarial Letter was published in the *Pennsylvania Bulletin* on Saturday, March 16, 2024. 54 Pa. B. 1460. These comments are filed in response.

## I. Background on the ECL

On July 15, 2010, the Commission issued a Tentative Order regarding the release of private customer information to Electric Generation Suppliers (EGSs) through the posting of ECLs by Electric Distribution Companies (EDCs). The Tentative Order stems from a recommendation by the Commission's Office of Competitive Market Oversight (OCMO)<sup>1</sup> for more uniformity in the information provided by EDCs in their ECLs made available to EGSs. The issue of creating a uniform ECL was first raised through the Committee Handling Activities for Retail Growth in Electricity (CHARGE) during the OCMO meeting of April 8, 2010. The 2010 changes to the ECL were modifications to the procedures established in a 1999 generic order regarding the release of customer information. *Procedures Applicable to Electric Distribution Companies and Electric Generation Suppliers During Transition To Full Retail Choice*, Docket M-00991230, Final Order (May 18, 1999) (*1999 Enrollment Procedures Order*). In the *1999 Enrollment Procedures Order*, the Commission stated:

While our customer information disclosure regulations at 52 Pa. Code §54.8 provide that customers may restrict the release of their telephone numbers to third parties, we are taking the additional step by this Order of protecting consumers' privacy by concluding the telephone numbers will not be included on the eligibility lists furnished by EDCs to EGSs. Further, we agree with the concerns raised by several commentors about the need for customers to be able to indicate that they do not want any information supplied to EGSs, even if that means that their participation in the competitive market is limited.

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Therefore, we conclude that subject to the ability of customers to prevent the disclosure of 1) load data, or 2) all information, EDCs

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<sup>1</sup> The Commission formed the OCMO in January 2009 to oversee the development and functioning of the competitive retail natural gas market. The OCMO is made up of a group of legal, technical and policy staff members from various Commission bureaus and offices. In December 2009, the Commission expanded the role of OCMO to include service as the Commission's electric retail choice ombudsman, where the OCMO generally acts in advisory and informal mediation roles.

should release to licensed EGSs the name, billing address, service address, rate class, rate sub-class (if available), account number and load data for all eligible customers. Customers shall have the ability to restrict the release of either their load data or all information by placing a notation in the correct check-off box that clearly indicates what information is being restricted.

*1999 Enrollment Procedures Order* at 22, 24-25.

The Commission initially implemented the ECL via Order entered November 12, 2010, at Docket No. M-2010-2183412, outlining interim guidelines for EDCs' provision of ECLs. That Order provided for uniform categories of customer information to be made available to EGSs by EDCs and addressed customers' ability to restrict the inclusion of their information in the ECL. On November 10, 2011, the Commission entered a Final Order on Reconsideration updating the interim ECL guidelines.

Following subsequent processes, including informal and formal comments, on October 23, 2014, the Commission established the *Interim Guidelines*. The *Interim Guidelines* are the current rules that apply today. Pursuant to the *Interim Guidelines*, every three years EDCs must inform their customers that the customers' information is included in the ECL, is made available to EGSs, and that the customer can opt-out of having their information included in the ECL. The triennial reminder must be performed through paper solicitation, unless the customer is enrolled in electronic billing (e-billing) with the EDC, in which case it can be performed via email. *Interim Guidelines* at 13. These solicitations provide customers an opportunity to restrict the inclusion of their information in the ECL that is provided to EGSs. Customers who do not respond to a solicitation are automatically included in the ECL unless they otherwise request to be excluded. Under current rules, even if a customer has indicated in a prior solicitation that they do not want their information released, if they do not opt-out when re-solicited, they will be included in the ECL and have their information released to EGSs.

On August 15, 2013, the Commission entered a Final Order at Docket No. M-2012-2324075 establishing analogous ECL requirements for Natural Gas Distribution Companies (NGDCs). Like the EDC-related *Interim Guidelines* described above, the NGDCs were directed to conduct a solicitation every three years to update their ECLs and to provide customers an opportunity to restrict the inclusion of their information that is provided to NGSs. Like the ECL for EDCs, under current rules, even if a customer has indicated in a prior solicitation that they do not want their information released, if they do not opt-out when re-solicited every three years, they will be included in the ECL and have their information released to EGSs.

In summation, under the current rules for EDCs and NGDCs, the onus is on the customer to opt out of the ECL every three years upon being re-solicited by the customer's EDC/NGDC.

## **II. Comments**

*A. Given the data available about the overall economic harm caused to consumers by the competitive electric market, the Commission should no longer require EDCs and NGDCs to provide an ECL to EGSs and NGSs.*

A lot has changed over the last 25 years since the Commission first entertained the notion that distribution utilities should provide lists of their customers' information to suppliers to allow suppliers to market products and solicit business. Most significantly, has been the development of the internet over this period, access to education about competitive electric and natural gas supply, and the ability for consumers to compare their options clearly and fairly using tools overseen by the Commission, such as the PaPowerSwitch and PaGasSwitch websites, or the residential electric and natural gas shopping guides provided and published on the OCA's website, both state-hosted and monitored resources. One thing that has remained consistent over the years is the number of residential and small business customers being served by competitive electric or gas suppliers.

Broadly speaking, this hovers around 25% for electric customers<sup>2</sup> and 15% for gas customers.<sup>3</sup> The inverse of this means that there are more than 75% of customers who are choosing to remain on default service provided by their EDC and more than 85% of customers who are choosing to remain on default service provided by their NGDC. This choice by consumers is both reasonable and responsible given that EDCs are required by law to provide service to customers who are not served by an EGS at least cost over time,<sup>4</sup> and NGDCs are required to provide natural gas service to customers who are not served by an NGS a least cost.<sup>5</sup>

Moreover, we know from recent data collected in the EDCs' default service proceedings that customers who have been served by EGSs have paid, in aggregate, significantly more for electric supply service than if those same customers had remained on default service. The most recent publicly available information, presented in Table 1 below, demonstrates that since 2015 Pennsylvania's residential electric shopping customers **have been charged over \$1.5 billion more than what they would have been charged on default service.** The data in Table 1 was competitive market pricing statistics compiled through litigation in each of the EDCs' most recently completed default service plan proceedings, where competitive market issues are addressed. The data is all part of the public record and is available at the below cited dockets in footnote 8. Currently, there are pending default service proceedings for PECO, PPL, and Duquesne Light that the OCA reasonably believes will show the continuation of this pernicious and pervasive trend of higher prices for customers served by EGSs. While the OCA does not have similar data about customers being served by NGSs, in large part because of the difference in the nature of purchased gas cost<sup>6</sup> procurement

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<sup>2</sup> See OCA Electric Switching Statistics available at: <https://www.oca.pa.gov/electric-shopping-guide-2/>

<sup>3</sup> See OCA Gas Switching Statistics available at: <https://www.oca.pa.gov/natural-gas-shopping-statistics/>

<sup>4</sup> 66 Pa.C.S. § 2807(e)(3.4).

<sup>5</sup> 66 Pa.C.S. § 1318.

<sup>6</sup> 66 Pa.C.S. § 1307(f).

cases and electric default service procurement<sup>7</sup> cases. There is little reason to believe that the facts are different on the natural gas side.

Table 1: Aggregate Residential Shopping Charges in Excess of Default Service<sup>8</sup>

<u>EDC</u>	<u>Dates Analyzed</u>	<u>Amounts Billed in Excess of PTC*</u>
PECO	Jan. 2015 – April 2020	\$733,197,940
PPL	Jan. 2015 – May 2020	\$295,828,735
Duquesne	Jan. 2017 – May 2020	\$102,869,316
FirstEnergy	Aug. 2017 – Dec. 2021	\$431,152,822
Total		\$1,563,048,813

\*Aggregate amounts billed to customers served by an EGS in excess of what would have been billed to these same customers if they were on default service.

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<sup>7</sup> 66 Pa.C.S. § 2807(e).

<sup>8</sup> See *Petition of PPL Electric Utilities Corp. for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025*, Testimony of Harry Geller on Behalf of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), Pa. PUC Docket No. P-2020-3019356, at p. 8 & Exhibit 1 (dated June 25, 2020).

See *Petition of PECO Energy Co. for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025*, Testimony of Harry Geller on Behalf of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), Pa. PUC Docket No. P-2020-3019290, at p. 10 & Exhibit 1 (dated June 16, 2020).

See *Petition of Duquesne Light Company for Approval of a Default Service Program for the Period of June 1, 2021 through May 31, 2025*, Testimony of Harry Geller on Behalf of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), Pa. PUC Docket No. P-2020-3019522, at p. 10 & Exhibit I (dated July 17, 2020).

See *Joint Petition of Metropolitan Edison Company, Pennsylvania Electric Company, Pennsylvania Power Company, and West Penn Power Company for Approval of their Default Service Programs for the Period of June 1, 2023, through May 31, 2027*, Testimony of Harry Geller on Behalf of the Coalition for Affordable Utility Service and Energy Efficiency in Pennsylvania (CAUSE-PA), Pa. PUC Docket Nos. P-2021-3030012, -13, -14, -21, at p. 7 & Exhibit 1 (dated February 25, 2022).

The information presented above is relevant to the question of whether the ECL should continue for several reasons. First, the OCA submits that EDCs and NGDCs should not readily be providing access to its customer lists to EGSs and NGSs so that retail suppliers can market offers and contracts to customers that, in aggregate and on net, are not economically beneficial to their customers. Distribution utilities all purchase the receivables for these supplier contracts and have been required to bill customers at least \$1.5 billion more than they otherwise would have had to bill their customers. Second, the OCA has significant concerns about the effect that these excessive contract costs have on the utilities' uncollectible account balances, termination rates for customers served by these contracts, and costs that are being paid for by other ratepayers. While eliminating the ECL would by no means remedy the impact of excessive supplier pricing, it would eliminate the role that the distribution companies have in allowing suppliers to solicit customers for contracts that produce egregious and excessive costs to customers. These costs are not just paid for by those customers shopping and paying more than the PTC because, to the extent that these customers cannot pay their bills, it results in loss of service and higher uncollectible expenses for all customers.

In the OCA's view, the distribution companies should not participate in the marketing or solicitation process for suppliers. While customers have a statutory right to receive direct access to the retail market in both the electric and gas contexts, there is no statutory obligation for EDCs and NGDCs to provide personal contact information to suppliers. And given the data above, the OCA sees no good reason why EDCs and NGDCs should be required (or even permitted) by the Commission to provide EGSs and NGSs with lists of customers who are eligible to receive solicitations and marketing.



The OCA understands that eliminating the ECL may impact access to some data available to suppliers, but, on balance, the OCA submits that this would be a reasonable and responsible step for the Commission to take given the high costs imposed on customers by shopping, the costs paid by customers for the EDCs and NGDCs to solicit customers, and the availability of commercial alternatives for suppliers, such as commercially available consumer demographic and consumer data that can be purchased by suppliers for marketing purposes. Moreover, from a customer perspective, there is no actual benefit derived by allowing the EDCs and NGDCs to provide this information to suppliers. It subjects them to the very real possibility of targeted marketing by suppliers without their consent or permission (the OCA does not consider the current opt-out process to be consent-based) and does not provide any more meaningful opportunity for customers to explore their options than are otherwise available on the PaPowerSwitch and PaGasSwitch websites or that is provided by the OCA through its shopping guides.

The OCA also reminds the Commission that over the years, the ECL and access to it has been abused by suppliers to engage in unlawful conduct such as unauthorized switching (slamming) and other marketing abuses.<sup>9</sup> While many suppliers use the information obtained from the ECL to engage in legitimate marketing and only switch customers when authorized, these legitimate actors in the market would not be deprived of the ability to solicit customers or obtain the information they need to tailor their offers; they would simply not receive the information from the distribution companies.

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<sup>9</sup> See, e.g., *BI&E v. Verde Energy USA, Inc.*, Docket No. C-2020-3017229, Formal Complaint (Non-Proprietary Version) at ¶ 14 (Jan. 30, 2020) (“PPL alerted OCMO to Verde’s potential use of the Eligible Customer List to employ deceptive practices and access approximately 4,000 customer accounts on PPL’s website without the customer’s knowledge or authorization.”); *BI&E v. Green Mountain Energy Co.*, Docket No. M-2021-3009235, Settlement at ¶ 15 (July 9, 2021) (complaints alleged that customer was enrolled with Green Mountain without customer consent and “Green Mountain acknowledged that the switch was unauthorized, occurred at an in-person location and used information obtained from the ECL.”)

The reality is, many customers are aware of their ability to choose an alternative supplier if they would like to. The distribution utilities, the Commission, the OCA, and others all discuss this with consumers during educational and outreach events. Suppliers are constantly and consistently sending mail, making outbound calls, and soliciting customers in public spaces as well as going directly to customer via door-to-door marketing. Customers have access to robust sources of information about the market through all these efforts as well as through the internet.

In the OCA's view, there simply is no good reason why distribution utilities should continue to be required to provide ECLs to suppliers and the Commission should take this opportunity to phase out the ECL in its entirety. If the ECL is eliminated, customers will not be shut out of the retail electric or gas markets – the Commission would merely be recognizing the maturity of the market, would be ensuring the distribution utilities remain neutral actors instead of implicitly encouraging switching through the release of private account information, and would be saving all customers the ongoing administrative costs associated with the current triennial solicitation process. The OCA submits that the Commission should vacate its prior ECL orders and open a process to orderly ensure that the ECL is eliminated in a timely manner.

*B. If the Commission retains the ECL and the opt-out process, it should not require a customer to reaffirm their opt-out every three years; rather, the request to opt-out should remain in place until or unless a customer opts-in to receive solicitations.*

If the Commission determines to retain the ECL, it should consider whether to change its current position and require the distribution companies to only release customer names who have affirmatively consented to opt-in. Under the current paradigm, distribution companies are sharing customer information without their consent based on the premise that a customer can restrict this sharing by opting out. The OCA has concerns about this process. Rather than continuing to perpetuate the illusion that customers who have not opted out of having their information released

have consented to this release, the Commission should implement a process whereby the default would be customer privacy and only if a customer consents (opts-in) would a distribution company include the customer on the ECL. This would be a much clearer signal that the customer wants access to be marketed to by both EGS and NGS than mere silence.

In the alternative, if the Commission retains the opt-out process, it should allow customers who have previously opted out to remain opted out unless they affirmatively decide to opt back in to being included on the ECL. The current paradigm whereby customers are solicited to opt-out and elect to do so, and must do so again every three years, is inconsistent with mainstream consumer protections rules, including those of the federal “Do Not Call” list which never expires,<sup>10</sup> and consumers’ ability to opt-out of pre-screened credit card offers permanently.<sup>11</sup> The OCA recognizes that this issue was addressed previously by the Commission, most recently in 2014, but the fact remains that from a policy perspective, consumers should not have to act every three years to protect their interest in ensuring that their information remains protected from disclosure. Especially when such a process directly conflicts with how commonly known consumer protections work (*i.e.*, Do Not Call and pre-screened credit card offers). To be clear, it remains the OCA’s position that the utility should inform customers every three years what their then current status is, either they have elected to opt out or they have not done so and that their information is being shared with alternative suppliers for purposes of marketing. For customers who have elected to opt-out previously, they should be informed that they need not take any action to remain opted-out. They also can change their designation and request to be placed back on the ECL. Conversely,

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<sup>10</sup> See Federal Trade Commission FAQs regarding the Do Not Call List, available at: <https://consumer.ftc.gov/articles/national-do-not-call-registry-faqs>

<sup>11</sup> See Consumer Financial Protection Bureau’s FAQ regarding opt-out of Prescreened credit card offers, available at: <https://www.consumerfinance.gov/ask-cfpb/can-i-make-issuers-stop-sending-me-credit-card-offers-in-the-mail-en-1377/>

a customer who has not opted out of the ECL should be provided the opportunity to opt out if they so desire, but if they take no action then their information would remain in the ECL. In this way, regardless of their designation their prior designation should remain the default until or unless they choose differently.

*C. The Commission should implement a “Do Not Switch” list.*

In addition to needed changes to the ECL, the OCA submits that the Commission should require utilities to maintain a “Do Not Switch” list<sup>12</sup> whereby customers could contact their utility so as to allow them to be placed on a list that does not allow for them to be switched to a competitive supplier absent the customer calling the EDC or NGDC and verifying that they wish to enroll. This additional protection will ensure that customers would not be switched without their consent and would be particularly useful for vulnerable customers, including elderly households or those who have a power of attorney or guardian appointed.

*D. The Commission should allow for solicitations that are by electronic means for all customers who have consented to receive communication from their utility electronically.*

The OCA supports an overall approach of reducing costs for ratepayers and increasing customer engagement during the triennial ECL solicitations and submits that it is far more likely that customers who are engaged with their utility through electronic means such as e-billing and email communications would be more likely to respond to a triennial solicitation electronically than through the mail. Many consumers, including low-income consumers, have transitioned from receiving all important notices by mail and now routinely receive notices via text message and email. In the early 2000s, when the ECL was developed, smart phones did not exist. In 2021, 85% of all adults in the U.S. reported that they owned a smart phone and 77% of adults have access to

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<sup>12</sup> The OCA notes that HB2027, currently before the House Consumer Protection, Technology and Utilities Committee, would require the establishment of such a list.

home broadband,<sup>13</sup> although the level of ownership varied significantly depending on income and age. Even so, according to Pew, some 76% of households with income less than \$30,000 per year and 61% of persons over the age of 65 owned a smartphone in 2021.<sup>14</sup>

While the OCA supports adopting communication methods that consumers are likely to prefer, the OCA submits that the most appropriate approach would be to allow customers to elect to opt to receive communications electronically before sending ECL-related communications by electronic means. Thus, the OCA submits that a utility seeking to solicit ECL-related communications from customers by text or email should be required to first send a solicitation to these customers informing them that they will be sending these communications electronically and allow them to opt to continue to receive them by mail if they so desire.

### **III. CONCLUSION**

The OCA appreciates the opportunity to respond to the Commission's Secretarial Letter soliciting improvements to the ECL process. As outlined herein, the OCA submits that the Commission should develop a process to wind down any future ECL solicitations and end the process of requiring the distribution companies to provide information to suppliers about their customers. To the extent that the Commission determines that the ECL should continue, the OCA submits that, where a triennial update is required, customers that have already opted-out of the ECL should not be required to respond to additional solicitations to maintain the customer's stated preference. Additionally, the OCA submits that the Commission should adopt a Do Not Switch list that would allow customers to designate that they do not want their accounts switched to an

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<sup>13</sup> Mobile Technology and Home Broadband 2021 | Pew Research Center (Pew), available at: <https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021> (Last visited 5/04/24)

<sup>14</sup> *Id.*

alternative supplier without them first calling the utility to confirm. Finally, the OCA supports the use of electronic solicitation of the ECL where it has been confirmed that this is the customer's stated preference to receive communications from the utility.

Respectfully Submitted,

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May 15, 2024

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