COMMOMWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities	**)**	
On its own Motion into Initiatives to Promote and	**)**	**D.P.U. 19-07**
Protect Consumer Interests in the Retail Electric	**)**	
Competitive Supply Market	**)**	

COMMENTS OF THE NATIONAL CONSUMER LAW CENTER, THE MASSACHUSETTS ENERGY DIRECTORS ASSOCIATION, GREATER BOSTON LEGAL SERVICES (FOR ITS LOW INCOME CLIENTS), AND THE PUBLIC UTILITY LAW PROJECT OF NEW YORK

I. INTRODUCTION

Pursuant to the Notice of Investigation and Request for Comments dated January 23, 2019, the National Consumer Law Center (NCLC)[1] submits the following comments on behalf of its low-income clients, the Massachusetts Energy Directors Association (MEDA),[2] Greater Boston Legal Services on behalf of its low-income clients,[3] and the Public Utility Law Project of New York.[4]

In this investigation, the Department has announced that it will consider initiatives to "(1) increase customer awareness of the electric competitive supply market and the value these markets can provide, thus allowing customers to make well-informed decisions; (2) improve the

[1] Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and other disadvantaged people, including older adults, in the U.S.

[2] MEDA is the organization of the directors of offices throughout the Commonwealth that administer fuel assistance benefits to eligible low-income households.

[3] The mission of Greater Boston Legal Services is to provide free legal assistance to as many low-income families as possible to help them secure some of the most basic necessities of life. GBLS plays a unique role in the social service delivery system. It is the agency to which other providers refer clients when no one else can help and legal assistance is needed.

[4] The Public Utility Law Project of New York is a non-profit organization with a mission to educate the public about its legal rights as utility consumers; engage in research and advocacy; and provide legal representation for low-income utility consumers in electric, natural gas, telephone, and other utility related matters.

Department's ability to oversee and investigate competitive suppliers' marketing practices; and (3) investigate initiatives that would improve the operational efficiency of the electric competitive supply market to optimize the value that the market provides to customers." The Department posed twenty-one questions in its Vote and Order Opening Investigation, issued on January 18, 2019.[5]

II. EXECUTIVE SUMMARY

NCLC appreciates the work of the Department and welcomes this investigation as part of the Department's continuing efforts to strengthen consumer protections. However, from the outset it is unfortunately clear that the Department's proposals alone cannot go far enough to end the frequent abuses in this market. Consumers, especially low-income consumers, are being deceived and harmed.[6] The documented financial harm to consumers is significant and disproportionately impacts low-income households.[7] In light of the financial harm to the large majority of competitive supply customers, the Department's focus should shift from expanding access to this dysfunctional market to more closely overseeing and regulating the market in order to protect consumers.[8]

NCLC agrees with the recommendation of the Attorney General to end individual retail competitive supply sales in the electricity market.[9] We recommend a similar approach to the growing residential competitive gas supply market. Further, in light of the financial harm,

[5] Dept. of Public Utilities, D.P.U. 19-07, "Vote and Order Opening Investigation" (Jan. 18, 2019).
[6] Mass. Office of the Attorney General, *Are Residential Consumers Benefiting from Electric Supply Competition? An Analysis of the Individual Residential Electric Supply Market in Massachusetts* (March 2018).
[7] Id.
[8] Lowering rates, or at least avoiding financial harm, has been a Department priority since the beginning of restructuring, e.g., "Reducing costs, over time, for all consumers of electricity is the primary objective of the Department's efforts in restructuring the electric industry." Mass. Department of Public Utilities, *In Re Elec. Indus. Restructuring*, Docket No. D.P.U. 95-30, 163 P.U.R.4th 96 (Aug. 16, 1995).
[9] National Consumer Law Center, *Competing to Overcharge Consumers: The Competitive Electric Supplier Market in Massachusetts* (April 2018), available at bit.ly/2H3ORJJ.

rampant deception, and continuing illegal activity,[10] we urge the Department to halt individual retail sales to low-income consumers while this investigation proceeds.[11]

While we urge an end to individual retail sales, we offer these comments to the Department's mitigation proposals. Of the Department's specific proposals, some have the potential to protect consumers, but others would be likely to have the opposite effect and would compound the confusion and financial harm suffered by consumers. The Department's proposal to "increase customer awareness" (by conducting a general education campaign for consumers, distributing information about the competitive supply website, and placing marketing information about the competitive supply website on customers' utility bills) is particularly concerning. If implemented, this proposal would effectively provide free advertising for the competitive supply industry, does not appear to provide any protection or benefit for consumers, and may further harm consumers by giving them the false impression that the Department or the consumer's utility company endorses particular competitive energy supply products or companies.

[10] See, e.g., Press Release, Competitive Electricity Supplier to Pay $5 Million Over Claims of Deceptive Sales Tactics, Overcharging Residents -- Payment Includes Millions in Restitution to Electric Customers (March 28, 2018), available at https://www.mass.gov/news/competitive-electricity-supplier-to-pay-5-million-over-claims-of-deceptive-sales-tactics (last visited Feb. 12, 2019); Dept. of Public Utilities, "Customer Complaints of Competitive Suppliers Spreadsheet" and "Customer Complaints of Competitive Suppliers Spreadsheet 2" (Sept. 20, 2018) (spreadsheets of consumer complaint data to Department from Aug. 1, 2017-July 31, 2018; hereinafter, "DPU Complaint Data 2017-2018"). Department complaint data 2015-2017, Dept. of Public Utilities, Letter to NCLC and Data Summary attachment (Oct. 13, 2017) (hereinafter, "DPU Complaint Data 2015-2017"); National Consumer Law Center, *Issue Brief: Still No Relief for Massachusetts Consumers Tricked by Competitive Electric Supply Companies* (Oct. 2018).

[11] There is precedent for such actions in other states with competitive supply markets. For example, the state of New York has imposed strict rules on companies that sell competitive electric supply to low-income consumers in New York to mitigate the financial harm to these households. N.Y. Pub. Svc. Commission, Case Nos. 12-M-0476, 98-M-1343, 06-M-0647, and 98-M0667, "Order Adopting a Prohibition of Service to Low-Income Customers by Energy Service Companies (Dec. 16, 2016), available at http://www.dps.ny.gov, upheld by Nat. Energy Marketers Assn. v. N.Y. State Pub. Svc. Commn., 2017 NY Slip Op 27223, Supreme Court of N.Y., Albany County (June 30, 2017).

While the Department is examining notice requirements for automatic renewal of contracts, automatic renewal itself is problematic for consumers and should not be permitted if the renewal price is higher than the prices offered in customer's original contract.

Disclosures and access to information can assist consumers, though these measures cannot address or repair the fundamental problems in the residential competitive supply market. However, given their potential to provide at least some improved transparency for consumers, we support adding information about the customer's existing competitive supply contract on the monthly utility bill, including information that compares the price of competitive energy supply with the utility price, explains how to contact the competitive supply company and lists the date when the contract will end (similar to the bill format used in Connecticut). This information should not include a company logo or other materials that advertise the competitive supply company.

The Department's proposals include the possibility of new rules of conduct for door-to-door marketers, telemarketers and direct mail marketers. While stricter standards are welcomed, they are also unlikely to make a significant difference for consumers. Massachusetts already has strong consumer protections[12] that are routinely ignored by competitive supply marketers. One measure that could possibly assist consumers and provide greater transparency would be a rule to limit direct marketing sales to those products that are also listed on the Department's competitive supply website at http://www.energyswitchma.gov.

New requirements for third-party verification (TPV) phone calls are also unlikely to provide significant protection since consumers frequently report that the TPV process is confusing and may be abused. However, we urge the Department to take this opportunity to

[12] M.G.L. c. 93A; 940 CMR 19.00 *et seq.*

make clear that TPV calls are not valid unless they are conducted in the customer's preferred language.

As recommended in NCLC's report on competitive electric supply,[13] we support the Department's proposal for increased data collection and public reporting about complaints and prices. This information would provide valuable information to consumers, and to regulators and policymakers who monitor competitive supply companies

The Department's consideration of a proposal to switch consumers to competitive suppliers before the next billing cycle does not appear to be in the interest of consumers, and may be harmful. Switching customers to competitive supply more quickly could make it more difficult for consumers to get out of unwanted contracts

"Slamming" or involuntary switching to competitive supply continues to be a frequently reported problem among residential customers.[14] Allowing competitive supply companies to sign up customers without the customer account number would likely exacerbate the problem, allowing an even easier route to switching without permission. In its effort to combat involuntary switching, we support the Department's proposed creation of a "Do Not Switch" list which should not expire and should include strong penalties for unauthorized switching.

The Department clearly has the authority to take strong steps to protect consumers. The legislature has provided that "[t]he department shall promulgate rules and regulations to provide retail customers with the utmost consumer protections contained in law," including but not limited to licensing, regulation, and other powers enumerated at M.G.L. c. 164, §1F.

[13] NCLC, *Competing to Overcharge Consumers: The Competitive Electric Supplier Market in Massachusetts* (April 2018).
[14] See DPU Complaint Data 2017-2018; National Consumer Law Center, *Issue Brief: Still No Relief for Massachusetts Consumers Tricked by Competitive Electric Supply Companies* (Oct. 2018).

III. COMMENTS ON QUESTIONS POSED BY THE DEPARTMENT

Below are our comments in response to the Department's questions. Other than Question 20 regarding small commercial and industrial customers, we offer comments on each of the Department's questions.

1. What types of general education activities would be most effective to increase customer awareness of the value that the Competitive Supply Website can provide (see Section II.B)? For each type of activity, identity the appropriate role of the Department, the distribution companies, the competitive suppliers, and other stakeholders.

The Department has already expended public funds to create and maintain its website, and the Competitive Supply Website ("website") does provide a user-friendly tool for comparing some offers. However, as the Department notes in its Vote and Order Opening Investigation, "competitive suppliers are not currently required to list their supply product on the Website[.]"[15] Adding such a requirement may help to increase transparency for consumers, and would also provide a simple mechanism for the Department and other regulators and policymakers to monitor the initial offers being made to consumers (although data on these initial offers would not provide adequate data to compare the prices actually paid by customers when a contract renews or when variable price rates change).

The role of the Department could include an initial review of contracts offered on the website, to verify whether the terms are accurately explained and are in compliance with applicable laws.

[15] Dept. of Public Utilities, D.P.U. 19-07, "Vote and Order Opening Investigation" (Jan. 18, 2019).

2. Would it be reasonable and appropriate for the Department to require competitive suppliers to provide customers with information regarding the Competitive Supply Website through their marketing materials/scripts (see Section II.B)? If no, explain why not. If yes, identify the information (e.g., Website URL, number of participating suppliers, number of products listed) that would be most effective to increase customer awareness of the value that the Competitive Supply Website can provide.

Requiring suppliers to provide information about the website is reasonable but should not be prioritized over other proposals, since this action would not be likely to provide significant protection or benefits to consumers. While the website provides reasonably clear information, it is not at all certain that providing a referral to the website would encourage customers to take the additional step of consulting the website before signing a competitive supply contract offered by a door-to-door marketer or telemarketer, or that marketers would encourage customers to consult the website (particularly if doing so would mean the marketer would lose a commission in the process).

Providing information about the website would probably not harm consumers, but it should not be seen as a significant consumer protection or improvement.

3. Would it be reasonable and appropriate for the Department to require the electric distribution companies to put information regarding the Competitive Supply Website on their bills (see Section II.B)? If no, explain why not. If yes, identify the information (e.g., Website URL, number of participating suppliers, number of products listed) that would be most effective in increasing customer awareness of the value that the Competitive Supply Website can provide.

It would be completely inappropriate and inadvisable for the Department to require information about the website to be included on bills from the distribution utilities. The Department should not take this step.

Including this information on utility bills would be likely to harm consumers. If this information were included on bills, it would play into the hands of competitive supply marketers who intentionally blur the relationship between their companies and the regulated utility. As consumers report to the Department's Consumer Division[16] and elsewhere, door-to-door marketers and telemarketers frequently state that they are "working with" the customer's utility company. This problem has persisted for years, despite the existence of the Massachusetts Unfair and Deceptive Trade Practices law[17] and regulations[18] that were intended to address this very problem by specifically stating:

> "It is an unfair or deceptive act or practice for a retail seller of electricity to make any material representation to the public or to any consumer, either directly or through any type of marketing or agreement, or through the use of any misleading symbol or representation, which the seller knows or should know has the capacity or tendency to deceive or mislead a reasonable consumer, or that has the effect of deceiving or misleading a reasonable consumer, in any material respect, including but not limited to representations relating to:
> . . . .
> (b) the **business relationship between any retail seller of electricity and any distribution company**."

If the competitive supply website information were included on the utility company's bill, consumers could reasonably be further confused about the relationship between the utility company, the competitive suppliers and the Department. Consumers might also interpret the appearance of the website information on the bill as an endorsement of competitive supply

[16] See, e.g., DPU Complaint Data 2017-2018.
[17] M.G.L. c. 93A.
[18] 940 CMR 19.04 (emphasis supplied).

companies by the utility company or even by the Department. They may misinterpret the information and believe that they were required to choose a competitive supply company instead of utility supply service.

This proposal is strongly similar to informal proposals by the competitive supply industry to provide additional "education" about their products to consumers. This would amount to free advertising for the competitive supply industry, at the expense of useful consumer information that could be included on the bill instead.

4. What other steps could the Department take to increase customer awareness of the value that the Competitive Supply Website can provide?

If the Department required that all offers made in the commonwealth of Massachusetts be listed on the website, then the website itself would become more useful, and customer awareness and use of the website would likely follow.

5. Would it be reasonable and appropriate for the Department to establish uniform requirements by which competitive suppliers would notify customers of the automatic renewal provision in their supply contracts (see Section II.C, above)? If no, explain why not. If yes,

a. What information should competitive suppliers be required to provide to customers (e.g., the date on which the automatic renewal will take effect, the price and pricing structure to which the contract will automatically renew)?

b. How long before the automatic renewal takes effect should competitive suppliers be required to provide such notification to customers?

c. What method(s) should competitive suppliers be allowed to use to provide the notification (e.g., direct mail, e-mail)?

d. If the contract would renew to a monthly-priced product, should competitive suppliers be required to notify customers on an ongoing basis regarding the price that will be in effect during the upcoming month? If no, explain why not.

e. What state(s) have established automatic renewal notification requirements? For each state, discuss the manner in which the state implements such a requirement.

In order to protect consumers, it would be far preferable to prohibit automatic renewal of contracts when the price of energy supply would be higher than the price that the customer paid under the original contract. However, if the Department retains the ability of competitive energy suppliers to bind consumers to an auto-renewed contract, then strong notification requirements should be established. At a minimum, the Department should include the following information in these notification requirements.

a. What information should competitive suppliers be required to provide to consumers?

Notification should be written in at least 12-point font, and in the customer's preferred language (which should have been determined at the time of the TPV).

Notification should include a copy of the original contract, in both hard copy and electronic form. The notification must also clearly explain the new contract terms (e.g., price, cancellation fees).

The competitive supplier should provide clear instructions about how to terminate the contract, and providing all of the following options for terminating the contract: by mail, by phone, and electronically (e.g., email, text message, website, smartphone app).

The competitive supply company should be directed to include a statement in multiple languages to explain that this is an important legal document and providing a telephone number for the consumer to reach the company for its assistance with translation (using a valid interpretation service such as AT&T Language Line service).

b. When should notifications be sent?

Notifications should precede the renewal of the contract by a reasonable amount of time to allow the consumer to consider whether to renew or terminate the contract. Sending notice no fewer than 45 days prior to automatic renewal and no more than 60 days prior to automatic renewal should allow consumers adequate time to consider their options. If the notice is not sent to a correct address during this period of time, the contract should terminate automatically.

In addition, if the customer contacts the competitive supply company at any point during the contract term and asks to terminate the contract when it expires, then the competitive supply company must honor that request and may not automatically renew the contract. The competitive supply company should not be permitted to require that the customer make the request at a certain time, such as a period that is closer to the end date of the contract.

c. What methods should be used to provide notification?

As noted above, notification should be sent by both mail and by email, in at least 12-point font, and in the customer's preferred language (which should have been determined at the time of the TPV).

In addition to direct mail and email, consumers should be given the option to choose text message notifications or notifications through a smartphone app if applicable.

d. Should notification be provided each time the price changes?

Yes, notifications should be provided every time there is a material change to contract terms.[19]

e. Other states' requirements?

Connecticut requires the following notification:

> (g) (1) Between thirty and sixty days, inclusive, prior to the expiration of a fixed price term for a residential customer, an electric supplier shall provide a written notice to such customer of any change to the customer's electric generation price. Such residential customer shall select the method of written notice at the time the contract is signed or verified through third-party verification as described in subdivision (2) of subsection (f) of this section. Such selection shall include the option for written notice through United States mail, electronic mail, text message, an application on a cellular telephone or a third-party notification service approved by the authority. Such customer shall have the option to change the method of notification at any time during the contract.[20]

6. Would it be reasonable and appropriate for the Department to require the electric distribution companies use their monthly bills to provide information to competitive supply customers about the automatic renewal provision in their supply contracts (see Section II.C, above)? If no, explain why not. If yes,

a. What information should be provided through the bills (e.g., the date on which the automatic renewal will take effect, the price and pricing structure to which the contract will automatically renew)?

b. How often should the electric distribution companies be required to provide this information (e.g., on all bills to competitive supply customers for whom the supply contract includes an automatic renewal provision, only on the bill preceding the month in which the renewal takes effect)?

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[19] See, e.g., Connecticut law requiring such notice and agreement:

> (8) An electric supplier shall not make a material change in the terms or duration of any contract for the provision of electric generation services by an electric supplier without the express consent of the customer.

Conn. Gen. Stat. Ann. § 16-245o.

[20] Conn. Gen. Stat. Ann. § 16-245o.

c. What other supply product-related information should the electric distribution companies be required to provide to competitive supply customers through the bills (e.g., early termination fees)?

Massachusetts should use the same type of billing requirements that were recently adopted in Connecticut.[21] Connecticut requires the following information[22] on a "Supply Summary" portion of utility bills:

- The supplier's electric generation service rate;
- The term and expiration date of the supplier's rate;
- Any change to the supplier's rate effective for the next billing cycle;
- The cancellation fee, if applicable;
- Notification that the rate is variable, if applicable;
- The standard service (or basic service) rate;
- The term and expiration date of the standard service rate;
- The dollar amount that would have been billed for the electric generation services component had the customer been receiving standard service; and
- An electronic link or website address to the rate board website and the toll-free telephone number and other information necessary to enable the customer to obtain standard service.

This information should be provided to the customer on each bill, whether in paper or electronic format.

[21] Example available at https://www.eversource.com/content/ct-c/residential/my-account/billing-payments/about-your-bill/understanding-my-bill (last visited Feb. 12, 2019).

[22] Conn. Gen. Stat. Ann. § 16-245d; see also, Conn. Public Util. Regulatory Auth., *PURA Investigation into Redesign of the Residential Elec. Billing Format - Review of Summary Info., Implementation & Display*, No. 14-07-19RE05 (Dec. 19, 2018).

Additionally, information about the contract term and automatic renewal of the contract should be included on the bill along with the other information described above. The information provided should be sufficient to understand that the contract will automatically renew unless the consumer takes action, and should explain the steps that the consumer needs to take to stop the automatic renewal.

7. How could the presentation of competitive supply information on electric distribution companies' bills be revised to provide competitive supply customers with improved awareness of their competitive supplier and their competitive supply product (e.g., a separate page dedicated to the competitive supply component of customers' electric service, the insertion of competitive supplier logos on the bill)?

Please see the comment to Question 6. The only information about competitive supply should mirror the information listed in the Connecticut statute, or should provide information about automatic contract renewal. In order to avoid consumer confusion as described in the comment to Question 3, the utility company bill should not contain or be accompanied by supplier information such as logos, bill inserts, separate pages, advertisements, or other information that could have the effect of marketing or advertising to consumers.

8. Would it be reasonable and appropriate for the Department to establish door-to-door marketing standards of conduct for competitive suppliers related to the disclosure of supply product information (see Section III.B, above)? If no, explain why not. If yes,

a. What supply product information should door-to-door marketers be required to disclose to customers?

b. Should the Department establish uniform language (and a uniform format) that suppliers would be required to use to disclose this information?

Unfortunately, hundreds of consumer complaints reveal that door-to-door marketers violate existing state law on a regular basis. Marketers are reported to represent themselves as working with the customer's utility company or representing the utility company, to falsely claim that they can save consumers money, to harass consumers,[23] to attempt trespass or other unlawful activity,[24] and to switch consumers to competitive supply service without consent.[25]

Stricter standards of conduct may provide some small amount of increased consumer protection, but as long as marketers are allegedly prone to routinely violate long-standing state law[26] then even the best standards of conduct will not be adequate. A standard of conduct might

[23] See, e.g., DPU Complaint Data 2017-2018; NCLC, *Issue Brief: Still No Relief for Consumers Tricked by Competitive Electric Supply Companies* (Oct. 2018) (including the following complaint: "At 8:00 pm on Thursday, November 30th, I had a man pounding on my door telling me that he needed to speak with me about my utility rates. I told him that I was uninterested and that I would not open my door to him as it was 8:00 pm and I did not know him, but he persisted and would not go away. He continued to tell me that I needed to open up my door and show him my utility bill. I continued to tell him that I would not open the door but he continued to yell and scream at me through my door. Finally he gave up and yelled at me 'Enjoy paying your high rates' before leaving my doorstep. I proceeded to call the Somerville Police Department... This man was pounding on my door so hard, I felt as though he was trying to break it down.")

[24] See, e.g., Boston Globe, "Two Spark Energy employees charged with breaking into Hyde Park home" (Dec. 18, 2018), available at https://www.bostonglobe.com/metro/2018/12/18/two-spark-energy-employees-arrested-for-breaking-into-home-hyde-park/0ZBE0vAlfpK5U0A0w0YrcN/story.html (last viewed Feb. 12, 2019).

[25] For multiple examples of deceptive practices, including the following example from March 28, 2018, see DPU Complaint Data 2017-2018:

> "Liberty Power has twice sent representatives to my apartment building who enter the premises without permission, pose as representatives of National Grid, and state they need to see residents' latest electric bills. They then type personal information from resident electric bills into iPads that they carry with them, and attempt to swindle victims into switching power suppliers. This most recently occurred on 3/23/2018. It appears to be a scam and is particularly concerning as a potential method of targeting and taking advantage of non-native English speakers, of which there are several in my apartment building. On 3/23, the Liberty Power representative left the building when I requested that she do so, but I am concerned about this continuing to happen and will not hesitate to contact the police if it continues. Please advise as to other ways of preventing this from continuing to happen."
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> DPU Complaint Data 2017-2018 (complaint dated March 28, 2018).

See also, NCLC, *Issue Brief: Still No Relief for Massachusetts Consumers Tricked by Competitive Electric Supply Companies* (Oct. 2018).

[26] The Office of the Attorney General has reached settlements with several competitive supply companies who were investigated for possible violations of Mass. General Laws chapter 93A, and is currently pursuing legal action against another. See, e.g, *Commonwealth of Massachusetts v. Starion Energy, Inc*., Civ. Action No. 1884CV03199, Suffolk Superior Court, Commonwealth of Massachusetts (2018) (complaint available at

have some protective effect if violations were punished promptly and publicly with strong penalties such as large fines or license revocation for the supply company.

9. What other standards of conduct should the Department add to the door-to-door marketing standards of conduct established in D.P.U. 14-140-G?

On the Notice of Door-to-Door Marketing, suppliers should be required to publicly report the following information:

The location and dates of proposed door to door marketing campaigns should be publicly disclosed, to provide notice to households and communities regarding marketing campaigns. Location information is reported to utility commissions in other states.[27]

The name and contact information of any third-party marketing company that has been retained by the supplier to conduct door to door marketing should be included in the notice. Competitive supply companies do not generally hire employees to act as salespeople. Instead, they hire third-party marketing companies to do this work. Public reporting of the name of the marketing company should make it easier for consumers to report and for regulators to act on complaints. Reporting would also increase the accountability of competitive supply companies who hire third-party marketing companies.

Competitive supply companies and their marketers should certify prior to the marketing campaign that they will not solicit outside of government agencies, social services organizations,

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https://www.mass.gov/files/documents/2018/10/16/complaint.pdf, last visited Feb. 12, 2019); "Competitive Electricity Supplier to Pay $5 Million Over Claims of Deceptive Sales Tactics, Overcharging Residents, Payment Includes Millions in Restitution to Electric Customers," Office of Attorney General Maura Healey, Press Release (March 28, 2018), available at https://www.mass.gov/news/competitive-electricity-supplier-to-pay-5-million-over-claims-of-deceptive-sales-tactics; Mass. Office of the Attorney General, Press Release, "Electricity Supplier to Pay $4 Million Over Alleged Deceptive Marketing and Sales That Overcharged Consumers" (January 6, 2015).

[27] Pennsylvania and Maryland both require a notification that includes a general description of the geographic area. Md. Code Regs. 20.53.08.06; 52 Pa. Code §111.14(a).

food pantries, community action agencies, fuel assistance offices, and other locations where low-income consumers, elders, and people with limited English language proficiency seek services and where these consumers may be confused by the presence of competitive supply marketers. This is not a speculative concern. NCLC has received anecdotal reports of marketers who stand near the entrances of assistance programs as a way of targeting low-income consumers. Similar activity has been reported outside of Massachusetts as well:

> "In Baltimore, third-party suppliers also market in places frequented by low-income citizens accessing government assistance. Direct sales agents sell energy at the steps to Baltimore City's Social Services office on North Avenue, the Housing office on Pratt Street, and the OHEP office on York Road. Suppliers can often be found marketing at the city's larger MTA bus transfer stations and even next to soup kitchens."[28]

10. Would it be reasonable and appropriate for the Department to establish standards of conduct for marketing channels such as telemarketing and direct mail (see Section III.B, above)? If no, explain why not. If yes, identify the marketing channels for which the Department should establish standards of conduct and, for each marketing channel, discuss how the standards of conduct should differ from the standards of conduct for door-to-door marketing.

Yes, the Department should establish standards of conduct for all marketing activities. However, it is unlikely that stronger standards of conduct would provide any real benefit to consumers, since marketers regularly engage in deceptive practices that are already prohibited by law. Marketers appear to violate federal and state law on a routine basis by making unwanted telemarketing calls and robocalls to consumers who have signed up for the "Do Not Call" list. For example, a supply company has recently been using the Eversource customer service phone

[28] Laurel Peltier and Arjun Makhijani, Ph.D., Abell Foundation, *Maryland's Dysfunctional Residential Third-Party Energy Supply Market: An Assessment of Costs and Policies* (Dec. 2018), available at https://www.abell.org/sites/default/files/files/Third%20Party%20Energy%20Report_final%20for%20web.pdf (last visited Feb. 12, 2019).

number as a false caller ID number and placing unauthorized robocalls to Massachusetts households.[29]

A standard of conduct could have some protective effect if violations were punished promptly with strong penalties such as large fines or license revocation for the supply company.

11. Would it be reasonable and appropriate for the Department to expand the role of TPV to include confirmation that a competitive supplier has complied with the marketing standards of conduct (see Section III.C, above). If no, explain why not. If yes, should the Department establish uniform language that TPV service providers would be required to use to confirm that suppliers have complied with the marketing standards of conduct?

As noted earlier, consumers regularly complain that the TPV process is confusing. Consumers have reported being coached to answer the TPV questions correctly, whether they understand or not.[30] Consumers with limited English proficiency report TPV calls that are conducted in English.

The Department could strengthen the TPV process by clarifying and formalizing the requirement that the verification call must be conducted in the preferred language of the consumer. Subregulatory guidance issued by the Massachusetts Department of Energy and Environmental Affairs set forth the rule that the TPV must be conducted in the consumer's

[29] Actual experiences of NCLC staff attorney.

[30] See DPU Complaint Data 2017-2018, including, for example, the following complaint from Nov. 28, 2017: "COR's daughter called. Said mother has elec in her name, they live together. Mother is home during day, gets visited by solicitors for suppliers often. A Rep from DIRECT Energy came by, told her of coming rate increases, offered to protect against them by signing up. She signed up, had a TPV recorded. Daughter said that mother later maintained she was being coached by the rep through the TPV call, and was confused about the process. Daughter noticed mother was paying higher bills, but then saw a mailing from Direct and then went over the bills herself. She saw Direct on the bill and called them. After speaking to a rep, she realized rate was .1229, higher than the Natl Grid rate at the time. She thinks that there is no way her mother would sign up for a higher rate and must have been manipulated."

language.[31] The subregulatory guidance does not currently appear on the agency's new website, but the Department should take this opportunity to immediately strengthen this requirement and place the requirement in its regulations.

12. Would it be reasonable and appropriate for the Department to require competitive suppliers to periodically provide the Department with data on the types of marketing channels through which they have signed up customers (see Section III.D, above)? If no, explain why not. If yes,

a. What data should competitive suppliers be required to provide the Department?

b. How often should competitive suppliers be required to provide this data to the Department?

It would be preferable to both adopt a requirement that all plans sold in Massachusetts must also be listed on the Department's competitive supply website, and a requirement that competitive suppliers report data on the types of marketing channels through which they have signed up customers to the Department, along with data about the communities in which different types of contracts that were sold. Suppliers should, at a minimum, report the following information:

- Name of the third party marketing company
- Zip code of customer

[31] Competitive Supplier and Electricity Broker Frequently Asked Questions, http://www.mass.gov/eea/energy-utilities-clean-tech/electric-power/electric-market-info/frequently-asked-questions.html#22 (website updated Jan. 28, 2016) ("22**. Are there any special requirements regarding enrolling customers who do not speak English?** Yes. If a customer does not speak English, the TPV [third party verification] or LOA [Letter of Authorization] must be completed in the customer's language and the customer must sign a contract in that same language.") (bold in original). The information was posted on the website of the Massachusetts Department of Energy and Environmental Affairs, and an archived copy is available by searching for the prior web address at https://archive.org/web/.

- Details of plan sold to customer (price, variable or fixed rate, length of contract term, length of introductory period before price would change, cancellation fees if any, and any incentives or bonuses offered to the customer)
- Whether the customer pays the R-1 or R-2 rate for electric service (or pays a discounted rate for natural gas service)
- The language spoken by the customer

13. How else could the Department improve its ability to investigate suppliers' marketing activities?

As noted, the Department has broad authority to protect consumers in the energy supply market. The legislature has directed that "[t]he department shall promulgate rules and regulations to provide retail customers with the **utmost consumer protections** contained in law,"[32] including but not limited to licensing, regulation, and other powers enumerated at M.G.L. c. 164, §1F. The Department has jurisdiction over licensing of competitive supply companies. It can take any of the following actions: revoking or suspending the license of a competitive supply company, prohibiting the company from signing up new customers for a specified period of time, placing the company on probationary status, or imposing a remedial plan on the company.[33] The Department has the statutory authority to suspend the license for up to one year for "slamming," i.e., if the supplier has intentionally, maliciously or fraudulently switched more than 20 customers to its service within a 12 month period.[34]

Investigations could be facilitated if the Department required regular reporting by competitive supply companies of data such a prices actually paid by consumers (not just the

[32] M.G.L. c. 164, §1F.
[33] 220 CMR 11.07; D.P.U. 16-156-A – Competitive Supply Interim Guidelines, Section 8.
[34] M.G.L. c. 164, §1F(8)(e).

initial “teaser” offers), complaints received by the competitive supply companies, percentages of low-income customers enrolled, and other relevant information. The Department could also require more information in licensing applications, including but not limited to records of any enforcement actions, private legal action, or other relevant proceedings against the company in each application and renewal.

Strong enforcement, and notice to the public of enforcement activities and outcomes, is a vital missing component that could bolster the effectiveness of investigations.

14. Would it be reasonable and appropriate for the Department to make competitive supplier complaint and/or performance information available to customers and other stakeholders? If no, explain why not. If yes,

a. Identify other state(s) that make this information publicly available; and for each state, discuss the usefulness of (1) the information that is provided and (2) the manner in which that information is presented.

b. Based on your response to (a), identify best practices for (1) determining which competitive supplier complaint and/or performance information should be made publicly available, and (2) presenting that information (stakeholders are welcome to provide a visual representation of such best practices).

Yes, the Department should promptly increase public reporting of prices actually paid and of complaints against competitive supply companies.

Companies should be required to report actual prices paid and this information should be publicly available. Shopping websites describe initial offers for potential customers, but consumers and stakeholders need data that shows how much customers actually pay for

competitive energy supply and how those prices compare to the prices charged by public utility companies.

Similarly, suppliers should be directed to turn over data about consumer problems and complaints involving competitive energy supply customers to the Department. The Department could improve transparency by publicly reporting this information along with its own complaint data, and complaint data obtained from the Office of the Attorney General and the distribution utility companies. This complaint data must be made easily accessible to consumers. Consumers, regulators, and policymakers should have ready access to a published database of complaints against both competitive energy supply companies and their agents including third-party marketers.

Complaint data and price data are publicly reported in Connecticut, and the Connecticut Public Utilities Regulatory Authority (PURA) makes this information available on a website.[35] The Connecticut Office of Consumer Counsel (OCC) produces consumer-friendly quarterly reports that compare the prices that consumers pay to competitive supply companies with the prices paid to distribution utility companies for standard service.[36] The Department should adopt the same practices, recognizing that even this detailed reporting has not brought an end to consumer complaints or a continuing trend of consumers paying higher prices for competitive electric supply, and the OCC has joined Attorney General Maura Healey in calling for an end to individual residential sales of competitive electric supply.[37]

[35] Conn. Dept. of Energy & Environmental Regulation, Public Utilities Regulatory Authority, Complaints Scorecard, available at www.ct.gov/pura.
[36] Conn. Office of Consumer Counsel, "OCC Fact Sheet: Electric Supplier Market, December 2017 Through November 2018" (Jan. 19, 2019), available at https://www.ct.gov/occ/lib/occ/fact_sheet_electric_supplier_market_november_2018.pdf (last visited Feb. 13, 2019).
[37] Conn. Office of Consumer Counsel, "OCC Press Release: Time to End the Third-Party Residential Electric Supply Market" (Feb. 4, 2019).

15. Would it be reasonable and appropriate for the Department to direct the electric distribution companies to initiate competitive supply service during a customer's meter read cycle (see Section IV, above)? If no, explain why not. If yes,

a. Discuss how this would improve the value that the market can provide customers.

b. Identify other states that allow the initiation of supply service during a customer's meter read cycle. For each state, describe the manner in which the state implements such an approach.

No, it would not be reasonable or appropriate for the Department to take this step. Although the competitive supply industry would prefer to switch consumers to their services more quickly,[38] this change would present problems for consumers and would further erode consumer protections. First, there is ample data that Massachusetts consumers are likely to overpay for electricity when they switch to competitive supply.[39] Switching more quickly would merely provide an earlier start to this overpriced service after the expiration of the teaser rate. Second, switching customers more quickly would make it more difficult for consumers to undo involuntary switching or switching that was the result of deception or coercion, and to ameliorate the consequences of the unlawful switching. Involuntary or coerced switching, particularly of older consumers, is well-documented in the Department's own complaint data.[40] Changing the rules to allow faster switching would contradict the Department's efforts to impose stronger consumer protections.

[38] Comments of National Energy Marketers Assoc., D.P.U. 19-07 (Feb. 15, 2019).
[39] Mass. Office of the Attorney General, *Are Residential Consumers Benefiting from Electric Supply Competition? An Analysis of the Individual Residential Electric Supply Market in Massachusetts* (March 2018).
[40] DPU Complaint Data 2017-2018; NCLC, *Issue Brief: Still No Relief for Massachusetts Consumers Tricked by Competitive Electric Supply Companies* (Oct. 2018).

16. Would it be reasonable and appropriate for the Department to eliminate the customer account numbers as required information on an enrollment transaction (see Section IV, above)? If no, explain why not. If yes:

a. Discuss how this would improve the value that the market can provide to customers.

b. Identify alternate piece(s) of information that could be required on enrollment transactions in order to provide the same level of customer protection that a customer's account number provides.

No, it would not be reasonable or appropriate, and the Department should retain the customer account numbers as required information on enrollment transactions. Removing the account number from information required in an enrollment transaction would make it easier for marketers and competitive supply companies to switch consumers to their service without consent, and would probably lead to a spike in consumer problems and complaints. While marketers and competitive supply companies might prefer an easier route to switching consumers to their service, the Department should instead prioritize the creation of a "Do Not Switch" list with strong penalties for noncompliance.

17. What other rules may act as barriers to a more efficient competitive market? For each answer, propose ways to mitigate those barriers.

A lack of transparency about prices (other than some initial offers) and consumer experiences are barriers, and increased reporting of prices and complaints would help to address these deficiencies.

Unlawful and deceptive practices also impede meaningful customer choice, and such practices must be penalized.

18. In what ways could the electric distribution companies better inform customers of their ability to prevent distribution companies from providing their account information to competitive suppliers and electricity brokers?

Electric distribution companies could be encouraged to share information with consumers about having their households removed from the Eligible Customer List. This information could be provided as a brief note on other communication from the electric distribution companies to customers (e.g., a short sentence with a phone number and link to the company's website), and could be distributed regularly through social media channels. Utility companies should not be penalized or otherwise discouraged from sharing this information with consumers.

19. Would it reasonable and appropriate for the Department to require the electric distribution companies to establish a "do not switch" list, which would preclude a company from switching a customer to a competitive supplier? If no, explain why not. If yes,

a. Discuss the manner in which the "do not switch" list should be implemented.

b. Identify other states that have established such a list, and, for each state, describe the manner in which the state has implemented the list.

The Department should establish a consumer-friendly "do not switch" list. Clear instructions, and links and phone numbers for enrolling, should be added to the Department's website and the shopping website.

Others states have created mechanisms for consumers to opt out of marketing or switching. For example, New York[41] and Rhode Island[42] allow consumers to block competitive

[41] http://www3.dps.ny.gov/W/PSCWeb.nsf/All/DAA1CF3080DA35F685257FCB004EBB59.
[42] http://www.ripuc.org/utilityinfo/electric/compfaq.html

supply companies from switching their accounts from distribution utility service. Consumers contact their utility companies to ask to be placed on a do not switch list. In Illinois, Ameren customers can call the utility to ask for their information to be added to a "do not market" list.[43] Note that this is not an exhaustive list of state protections.

21. The issues raised in this NOI, and the questions presented above, relate solely to the electric competitive supply market for residential customers (see Section I, above). Would it be reasonable and appropriate for the Department to investigate any (or all) of these issues as they relate to the competitive gas market for residential customers? If no, explain why not. If yes, identify the issues that the Department should investigate, and for each issue, discuss whether the Department's resolution of the issue should differ between the electric and gas markets, and why.

While less information about competitive gas supply companies is available, some complaints have surfaced,[44] and it is likely that the same problems will continue to emerge in this market. The Department should apply the same consumer protection rules to the competitive gas supply market.

IV. CONCLUSION

Individual retail sales of competitive energy supply should be ended in Massachusetts. Consumers usually pay prices that exceed the basic service price, the promised benefits have never emerged even more than twenty years after restructuring, and strong consumer protections

[43] https://www.pluginillinois.org/ConsumerRights.aspx.
[44] See, DPU Complaint Data 2017-2018.

in Massachusetts and in other states have failed to solve the pervasive problems in the residential competitive supply market.

As an interim measure, stronger consumer protection measures paired with rigorous enforcement and strict penalties may help mitigate harm to consumers.

Thank you for the opportunity to submit these comments.

Respectfully submitted,

National Consumer Law Center, on behalf of our low-income clients
Massachusetts Energy Directors Association
Greater Boston Legal Services on behalf of its low-income clients
Public Utility Law Project of New York

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