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March 5, 2020

Mark D. Marini, Secretary
Department of Public Utilities
One South Station, 5th Floor
Boston, MA 02110

Re: Investigation by the Department of Public Utilities into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market, D.P.U. 19-07

Dear Secretary Marini:

On February 5, 2020, the Department of Public Utilities (the "Department") issued a Hearing Officer Memorandum ("HO Memorandum") in the above-referenced matter, requesting comments on various Department staff proposals regarding "Tier One" initiatives by March 5 and comments on Department staff's proposals regarding "Tier Two" initiatives by March 19. The Attorney General's Office (the "AGO") and the National Consumer Law Center ("NCLC") hereby submit comments on Department staff's proposals for "Tier One" initiatives. [1]

I. Introduction: Enforcement is Essential to Success of the Tier One Initiatives

Department staff's "Tier One" proposals generally reflect a desire to exercise more rigorous oversight of suppliers' actions in the competitive supply market in Massachusetts. The AGO and NCLC agree that it is appropriate and necessary to exercise greater oversight of the competitive suppliers. However, the "Tier One" initiatives proposed in the HO Memorandum will only be as effective as the Department's willingness and ability to enforce compliance. Many suppliers operating in Massachusetts brazenly violate the basic consumer protection laws and regulations that already exist. It is unlikely that suppliers who succeed in enrolling customers using unfair or deceptive practices will pro-actively comply with the Department's additional requirements unless the Department shows that failure to comply will result in substantive licensure action that would jeopardize the suppliers' (and their vendors') revenue

[1] Discussion by the AGO of any business practice by competitive suppliers in the context of the Department's investigation, or the silence of the AGO as to any such practice, should not be interpreted as an admission that such practice complies with G.L. c. 93A or the regulations promulgated thereunder.

streams.

Accordingly, if the Department adopts the "Tier One" initiatives, it should also revise its Interim Guidelines, issued at D.P.U. 16-156-A, to require an automatic initiation of a formal investigative proceeding against any supplier for whom the Department acquires *prima facie* evidence of non-compliance with the "Tier One" initiatives. To further motivate compliance, the Department should also make clear what the consequences will be for any findings of non-compliance with "Tier One" initiatives. We recommend that an initial finding of non-compliance with "Tier One" initiatives should result in probationary status for the supplier's license; a second finding of non-compliance should result in an automatic one-year suspension of the supplier's license; and any subsequent findings of non-compliance should result in a revocation of the supplier's license for five years or more. These proposals, if enacted, would ensure that the Department's "Tier One" initiatives will be enforced and therefore deliver the Department's intended results for customers.

II. License Application Review

The Department proposes to post the redacted version of a new license application in order to allow for potential comments from interested stakeholders to assist the Department in its review of the application on its website. HO Memorandum, at 4–5.

First, the Department should make available on the Department's website the new and renewal license applications for *all* suppliers, including those who have already gained license approval. A supplier's license application includes basic information that should be easily attainable for consumer advocates and consumers who interact with the dozens of suppliers who are already licensed to do business in the Commonwealth. The current lack of publicly available information about specific suppliers means that the AGO (and presumably others) must go to the website of another state's PUC to find key information about a supplier, such as information regarding its corporate structure and regulatory contacts. The information found on license applications for active, licensed suppliers should, therefore, be posted on the Department's website.

Second, the Department should post on its website any informal remedial plans or informal orders, pursuant to the Interim Guidelines issued in D.P.U. 16-156-A, with any license application materials for each supplier. Although an interested consumer or agency could discover these remedial plans and informal orders through a public records request, they are not made available as a matter of course. *See* D.P.U. 16-156-A, at 37–38. It unnecessarily burdens the Department, the public, and other stakeholders to require interested parties to serve public records requests to discover these documents, which are official acts of the Department undertaken pursuant to its guidelines in D.P.U. 16-156-A. Moreover, making these documents freely available would allow better coordination between stakeholders, allow the public to more easily understand which suppliers might be the most problematic, and provide an important incentive for suppliers to avoid conduct that would result in an informal remediation plan in the first instance. Accordingly, the Department should revise its Interim Guidelines to state that any informal remedial plans and/or informal orders will be posted with the relevant supplier's license application materials on the Department's website.

Finally, as noted in the Department's proposal, the competitive suppliers claim that certain portions of their license application material are confidential and should be redacted in public documents. The Department should first consider, however, that almost all suppliers operate in other jurisdictions where most, if not all, of the information contained in the license application is posted onto a publicly available website.[2] Information provided to the Department is presumptively public information. *NSTAR Electric Company and Western Massachusetts Electric Company*, *each d/b/a Eversource Energy*, D.P.U. 17-05, Hearing Officer Ruling, at 6 (May 23, 2017).[3] Thus, any redaction of material contained in supplier applications should be carefully tailored to meet whatever confidentiality requirement that the supplier has proven is necessary. *See id.*, at 3.[4] Further, when a supplier requests that certain material be treated confidentially when the same, or similar, material was previously provided publicly in other jurisdictions, the Department should require that the supplier prove why the redaction is uniquely necessary for the Massachusetts market.

III. Marketing-Related Activities

A. Notification of Door-to-Door Marketing.

The AGO and NCLC agree that the previous door-to-door marketing notification requirements were inadequate to protect consumers. Department staff's proposed changes are reasonable and will improve the notification process.

The AGO and NCLC agree with the Department staff's proposal that suppliers identify, at least two business days in advance, in which neighborhoods or municipalities the supplier will conduct marketing on the applicable day. HO Memorandum, at 7. The current practice of submitting a blanket notification listing a large number of municipalities where marketing might

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[2] *See, e.g.,* Residential Suppliers, New Hampshire Public Utilities Commission, https://www.puc.nh.gov/Consumer/Residential%20Suppliers.html. This web page contains the name of each supplier licensed to serve residential customers. For each supplier, there are links to dockets with application materials as well as other relevant materials. In an effort to avoid singling out any one supplier, the AGO and NCLC refrain from providing a sample application here; however, we do encourage the Department staff to review this website and to observe that some applications also contain, in unredacted form, lists of third-party vendors.

[3] "[T]he fact that the requested information may be treated internally by the Companies as confidential or proprietary or may not be readily available to the public is not dispositive of the issue of whether the information warrants protective treatment. Rather, the information is presumed to be public and the Companies have the burden to prove the need for protective treatment. G.L. c. 25, § 5D." *Id.*

[4] "[T]he party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D; 220 C.M.R. § 1.04(5)(e)." *Id.*

or might not occur in the next 30-days clearly does not provide information that is actionable for the Department or for other entities with enforcement responsibilities. We agree with the Department staff that, in order to serve its intended purpose, each notification should cover no more than a single day of marketing.

Department staff's proposal to limit each notification to a maximum of three municipalities and/or neighborhoods similarly is reasonable, again to fulfill the purpose of the notification to provide the Department and other oversight authorities with useful information about the marketing campaigns of suppliers. We recommend that the Department consider limiting the number of notifications to a reasonable number, or at the very least reserve the right to impose limits if suppliers submit an over-inclusive and unreasonable number of notices. In this instance, "unreasonable" would mean identifying a number of towns that is disproportionately large relative to the number of towns in which the supplier actually conducts marketing campaigns, thereby undermining the effectiveness of the notifications.

More precise information about the location of the marketing campaign, including the identification of certain neighborhoods, should also improve oversight. As noted in previous comments, other states have more detailed reporting requirements. For instance, Pennsylvania and Maryland both require more information about the geographic area. *See* Md. Code Regs. 20.53.08.06; 52 Pa. Code §111.14(a).

Department staff has requested comments on whether neighborhood location should be required, in addition to identification of the city or town where the marketing campaign will take place. HO Memorandum, at 7–8, Because all Massachusetts cities have neighborhoods with large percentages of low-income residents, neighborhood-level reporting should improve the ability of the Department and other oversight authorities to determine if a given supplier has targeted in low-income neighborhoods, neighborhoods with large percentages of people with limited English proficiency, or other vulnerable communities. The largest cities in Massachusetts include Boston, Worcester, Springfield, Cambridge, Lowell, Brockton, Lynn, Quincy and New Bedford.[5] The ten municipalities with the highest net customer financial loss due to competitive supply prices that exceeded basic service prices, as reported in 2019, were Worcester, Springfield, Lowell, Brockton, Lynn, Fall River, Lawrence, Dorchester (Boston), Haverhill, and Weymouth.[6] Residents of each city have experienced significant financial losses compared with the prices that customers paid for basic service from their distribution utilities. We recommend that notifications identify neighborhoods in both the largest municipalities in Massachusetts, and in those reported to have experienced the highest net consumer financial losses as identified in the AGO's reports.

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[5] UMass Donahue Institute, Massachusetts Population Estimates by City and Town, at http://www.donahue.umassp.edu/business-groups/economic-public-policy-research/massachusetts-population-estimates-program/population-estimates-by-massachusetts-geography/by-city-and-town.

[6] Office of Attorney General Maura Healey, *Are Residential Consumers Benefiting from Electric Supply Competition? 2019 Update*, Table 3.2 (Aug. 2019), at https://www.mass.gov/doc/2019-ago-competitive-electric-supply-report.

Under Department staff's proposal, suppliers would not be required to attach a physical copy of a door-to-door marketing permit from the municipality; additionally, suppliers would indicate if a permit is not required or cannot be obtained in advance. HO Memorandum, at 7. The AGO and NCLC recommend that the Department staff also require that each supplier submit, with each marketing notification, an attestation, signed by an individual employee with management responsibilities, that verifies that the supplier has complied with municipal permitting requirements. The Department should also require that the supplier produce a copy of any such permit to the Department or the AGO upon request.

B. Identification of Third-Party Marketing Vendors

Department staff proposes to require competitive suppliers to provide the Department, on an ongoing basis, with updated lists of all of their third-party door-to-door and telemarketing vendors marketing in Massachusetts. The lists also would include information related to background checks and standards of conduct that competitive suppliers currently provide through their door-to-door notifications pursuant to D.P.U. 14-140-G (2018). Department staff proposes that the AGO also receive this information, but on a confidential basis. HO Memorandum, at 9.

The AGO and NCLC's original proposal envisioned that suppliers would provide a list of third-party vendors for posting on the Department's website. We strongly believe that information regarding third-party vendors should be public and easily accessible. The Department could post this information with the license application materials for each supplier.

The AGO and NCLC acknowledge that the Department previously granted confidential treatment of third-party vendor information in the context of door-to-door notices. D.P.U. 14-140-G, at 24. However, recent events have shed light on how important the identity of these third-party marketers can be to the public-at-large. *See, e.g.,* Commission Letter to Suppliers re: Deceptive Telemarketing Campaign (Feb. 28, 2020) (seeking to identify suppliers on whose behalf misleading phone calls are being made). Moreover, current Massachusetts law requires the disclosure of the identity of a third-party vendor during the first minute of any telemarketing solicitation. G.L. c. 159C, § 5A(a)(ii). This requirement reflects a significant public interest in making available the identity of the vendors working on behalf of a supplier. Indeed, employees or agents of third-party vendors come into direct contact with Massachusetts consumers every day through the telephone or at a resident's doorstep. The identity of the company who pays these individuals should no longer be treated confidentially.

The AGO and NCLC also believe that each supplier should provide the third-party vendor lists with its new or renewal license applications; thereafter, the supplier should update the list within thirty (30) days of adding or removing a vendor. This requirement will help ensure that the Department and the AGO can identify problematic vendors in a timely manner. Additionally, any information regarding third-party marketing vendors should include information regarding: (1) the marketing channel (door-to-door, telemarketing, etc.) the vendor will use; and (2) the owner, manager, or member of the vendor (*e.g.*, names the vendor has listed on its registration as a limited liability company). The last requirement will help track

problematic vendors who change company names.

The AGO and NCLC do not support Department staff's proposal to "develop a process by which we could pro-actively identify potentially problematic marketing vendors." This proposal would require significant resources and the potential for success is uncertain. For example, third-party marketing vendors are often limited liability companies who can easily change their name, especially if doing so would allow the vendor to avoid accountability for unscrupulous marketing tactics. The resources required to develop the process would be better spent enforcing laws and regulations governing the conduct of suppliers and their third-party marketing vendors. Enforcement combined with greater transparency regarding the vendors used by each supplier, as proposed above, would more effectively deter problematic marketing vendors.

C. Disclosure of Product Information

Department staff proposes to require that competitive suppliers use a contract summary form with a prescribed template and language. HO Memorandum, at 10. Below, the AGO and NCLC suggest that the Department modify the proposed contract summary form in several areas to improve accuracy, clarity, and consumer protection.[7]

First, the automatic renewal information should be placed immediately after the price information on the form, since it is directly relevant to the price that customers will eventually pay. Instead of saying that the contract "will automatically renew to a new price," the language used should make it clear that the new price could be higher than the current price and higher than the utility company's basic service price. Also, the existing language could be read to mean that the contract will automatically renew only one time, though that is not clear. A limit of one renewal would be very helpful information for customers and should be clearly described.

Second, the form that Department staff has proposed, at Attachment 2, omits the customer's three-day right to cancel the contract. Instead, Attachment 2 only addresses the "Early Cancellation Fee," which would erroneously lead the customer to conclude that they cannot cancel the new contract unless the customer pays any cancellation fee. The contract summary form should include the three-day right to cancel, the date when the contract was signed, and the last day when the customer can exercise the three-day right to cancel. For example:

> You signed the attached contract to buy electric supply from [Supplier name] on [Date].
>
> You have three days to cancel this contract for free, without paying any early cancellation

[7] We note that the most valuable information to consumers is not included in Department staff's proposal: a disclosure of the current and most recent prior basic service rate for the customer's utility, and a disclosure of any future basic service rates, along with the effective date, if known. In both the fixed price and variable price disclosures, the price information should be immediately followed with disclosures regarding the basic service prices for the customer's utility.

fee.

The last day to cancel this contract without paying any early cancellation fee is [Date].

Third, for suppliers who elect to use language to describe the renewable resources that comprise the "voluntary" component of the product, the Department should require, at minimum, a disclosure of whether the supplier obtains renewable energy certificates from outside ISO-NE in order to provide the "voluntary" component.

Fourth, the language in the final part of the form states that the Department "recommends" that consumers visit the Energy Switch website to learn about "the broad range of available electric supply products." This sentence would likely be read by consumers to mean that the Department *promotes* competitive electric supply over basic service. We recommend more value-neutral language, such as "For more information about introductory offers from electric supply companies, visit www.energyswitch.com." The Department should also include the following: "For more information about your utility's basic service rates, visit https://www.mass.gov/info-details/basic-service-information-and-rates."

Fifth, 10-point font will be difficult for customers with visual impairments, and many older customers, to read. The Department should consider a larger minimum font size and consider consulting with state government experts, such as the Massachusetts Office on Disability, on accommodations for people with visual impairments.

Finally, the Department should make clear that compliance with the contract summary form requirement, as well as the Department's approval or silence as to any contract summary forms submitted to the Department for review, will not absolve suppliers and their agents from the responsibility to comply with G.L. c. 93A, and the regulations promulgated thereunder, throughout the sales and marketing process. Furthermore, if the Department adopts this proposal, enforcement will be essential to ensuring its effectiveness, as described in more detail in the Introduction, *supra*.

D. Door-to-Door and Telemarketing Scripts

The AGO and NCLC take no specific position as to this proposal. The Department should make clear that compliance with these scripts does not absolve suppliers and their agents from the responsibility to comply with G.L. c. 93A, and the regulations promulgated thereunder, throughout the marketing process. Furthermore, if the Department adopts this proposal, enforcement will be essential to ensuring its effectiveness, as described in more detail in the Introduction, *supra*.

E. Recording of Marketing Interactions

We agree with the Department staff's proposal that suppliers record[8] telemarketing calls, in addition to third-party verification calls. HO Memorandum, at 12. Such recordings should be

[8] Any recordings must be made in compliance with G.L. c. 272, §99.

made available promptly and without a fee to the Department, the AGO, and the customer upon request to the supplier. Suppliers and their agents should be required to maintain call recordings for at least five years. Suppliers are ultimately responsible for the conduct of their agents and should require call recording as a matter of course to ensure compliance.

Although the recording of door-to-door marketing interactions may create an additional responsibility for suppliers and their marketers, as the Department is aware, door-to-door marketing interactions continue to be a significant source of consumer complaints about aggressive marketing and deceptive sales practices. Without recordings of a supplier's actual door-to-door marketing presentations, the Department will not be able to effectively enforce its door-to-door marketing script requirements, which would result in a series of "he said, she said" disputes between a complaining consumer and the marketer.

F. Marketing Materials

Department staff proposes that competitive suppliers submit updated versions of their direct mail marketing materials for Department review prior to the use of such materials. HO Memorandum, at 14. If the Department does not respond within ten business days, the competitive supplier would be able to proceed with the mailing as-is. *Id*.

The AGO and NCLC continue to believe the suppliers should provide all customer-facing marketing material to the Department and that the Department should post the marketing material publicly on its website with the supplier's license application materials. Making this information public would increase transparency and would make it much more difficult for problematic suppliers to hide from accountability. For example, if a supplier contemplates using a telemarketing script or an internet advertisement that borders on misleading, it will be much more difficult for the supplier to move forward if it knows it must also provide the script or internet advertisement on a public website monitored by the Department, the AGO, and others.

The purpose of this requirement, as proposed by the consumer advocates, was to achieve transparency and accountability. We did not envision the Department taking on the burdensome task of review and approval of the marketing materials before circulation. If the Department were to adopt this proposal without revision, the Department should make clear that Department approval or silence as to the marketing materials submitted does not absolve suppliers and their agents from the responsibility to comply with G.L. c. 93A, and the regulations promulgated thereunder, throughout the marketing process.

IV. Automatic Renewal

A. Customer Notification

The AGO and NCLC take no specific position as to this proposal. The Department should make clear that compliance with the notification requirement does not absolve suppliers and their agents from the responsibility to comply with G.L. c. 93A, and the regulations promulgated thereunder, throughout the sales and marketing process. Furthermore, if the Department adopts this proposal, enforcement will be essential to ensuring its effectiveness, as

described in more detail in the Introduction, *supra*.

B. Competitive Supplier Reports

Department staff proposes to require competitive suppliers to report, on a quarterly basis, information connected to the automatic renewal of customer contracts. HO Memorandum, at 16.

In order to be able to comment more meaningfully, the AGO and NCLC request that Department staff provide more information regarding staff's intended objective of this reporting requirement. As an initial matter, we believe that the Department should provide information collected under this requirement in an aggregated form to other stakeholders as part of a more detailed, public process to develop policy regarding the automatic renewal of customer contracts.

V. Competitive Supplier Enrollment Reports

Department staff proposes to require competitive suppliers to report, on a quarterly basis, information regarding the sales channels used to enroll residential and low-income customers. HO Memorandum, at 17.

The AGO and NCLC propose that the enrollment reports include additional key information, such as the number of residential and low-income customer enrollments by vendor, per sales channel, as well as the number of residential and low-income enrollments by zip code, per sales channel. This requirement will allow the Department to monitor whether the supplier or its vendor targets particular zip codes; it will also allow the Department to monitor whether a particular vendor or sales channel is problematic. Additionally, the Department should release the enrollment information it collects in an aggregated form to other stakeholders in order to inform future policy discussions.

VI. Energy Switch Website

As noted in earlier comments,[9] if the Department required that the terms of every offer 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.

Regarding the Department staff's proposal, we support the voluntary listing of municipal aggregation terms and prices, and also support the placement of this information directly below the basic service rate listed at the top of the page.

Also, Department staff note that price and "estimated monthly cost" are listed on the Commonwealth's Energy Switch website. However, this information is only accurate for fixed rate contracts. Variable price information and estimated costs after the expiration of introductory

[9] D.P.U. 19-07, *Investigation into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market,* Comments of National Consumer Law Center, Massachusetts Energy Directors Association, Greater Boston Legal Services, and the Public Utility Law Project of New York, at 19 (Feb. 19, 2019).

or “teaser” rates are not included. Accordingly, the “estimated monthly costs” are misleading for variable rate products because in most cases they will grossly understate the actual monthly costs for the customer.

The AGO and NCLC do not object to including the terms of municipal aggregation contracts, when this information is provided voluntarily by the municipality or aggregating entity.

Similarly, including the municipal aggregation contracts and their voluntary renewable energy content, according to the parameters proposed by the Department staff, may improve transparency for consumers. Department staff proposes to include information regarding renewable energy content for municipal aggregation products on the Energy Switch website “if the voluntary renewable energy resources: (1) are composed entirely of RPS Class I resources, and (2) represent at least five percent of the product’s total resources.” HO Memorandum, at 19. We do not object to including this information about municipal aggregation.

The Department asks for comments about whether these renewable energy disclosure rules should similarly apply to other competitive supply products, presumably those sold to individual residential customers by competitive supply companies or their marketers. We request that the Department defer this question to be considered at a later date, to allow for time to seek information from suppliers about the renewable energy content in their products. Specifically, what types of renewable resources do the suppliers procure, what is the mix of Class I and other resources, how do the suppliers verify this information, and how would the suppliers demonstrate to the Department that the information about the renewable energy content is accurate for each offer posted on the Energy Switch website? This heightened transparency already exists for municipal aggregation contracts, which are subject to more disclosure requirements than are the offers made by suppliers in the individual residential market.

If the Department determines that it should begin to allow suppliers to post the same type of information about renewable energy content as municipal aggregators at this time, we recommend that the Department concurrently examine whether the information posted by suppliers is accurate, and that it require suppliers to provide independent verification of claims about renewable energy content to the Department and the AGO.

Respectfully submitted,

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COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

Investigation by the Department of Public Utilities Regarding the Retail Electric Competitive Supply Market	**D.P.U. 19-07**

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding in accordance with the requirements of 220 C.M.R. 1.05(1) (Department's Rules of Practice and Procedure). Dated at Boston this 5th day of March, 2020.

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