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*Via Electronic Mail<sup>1</sup>*

January 11, 2021

Mark D. Marini, Secretary  
Commonwealth of Massachusetts  
Department of Public Utilities  
One South Station, 5<sup>th</sup> Floor  
Boston, Massachusetts 02110

**Re: D.P.U. 19-07 – Investigation into Initiatives to Promote and Protect Consumer Interests in the Retail Electric Competitive Supply Market**

Dear Mr. Marini:

Vistra Corp.<sup>2</sup> (“Vistra”) appreciates the opportunity to provide these comments on the Tier 1B initiatives described in the Hearing Officer’s November 19, 2020 Memorandum (“November 19 Memorandum”) in the above-referenced proceeding. In offering these comments, Vistra notes that its concerns stem from thinking through the implementation and customer experience of these proposals. As currently drafted, suppliers would be required to implement, describe and/or adhere to dynamic data that the supplier does not control – including municipal boundaries, renewable energy percentages, and utility basic service rates. Vistra fears suppliers would be subject to claims that they are out of compliance or cause customer confusion when in fact suppliers are making good faith efforts to be in compliance. It is with this in mind that Vistra offers many of its comments. Ultimately, Vistra urges the Department of Public Utilities (the “Department”) to strike the right balance between what information a supplier is required to provide on the one hand and the level and detail of that information on the other hand so that potential customers can make informed decisions.

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<sup>1</sup> Pursuant to the Department’s March 12, 2020 notice regarding Temporary Changes to Filing Requirements, and the November 19 Memorandum, at 22, these comments are being provided electronically only.

<sup>2</sup> Vistra Corp. is the parent company for, and filing on behalf of, Massachusetts licensed suppliers Ambit Northeast, LLC; Dynegy Energy Services (East), LLC; Public Power, LLC; Viridian Energy, LLC; Everyday Energy, LLC d/b/a/ Energy Rewards; and Massachusetts Gas & Electric, Inc.

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Door-to-Door Marketing

Vistra supports the various commenters' proposal that the Department impose the five-municipality limit on a utility service territory basis, rather than on a statewide basis.<sup>3</sup> Vistra reiterates that providing suppliers with the flexibility to react and adapt to daily circumstances is important to allow for a positive customer experience.<sup>4</sup>

When engaging in door-to-door marketing, suppliers need flexibility to change their marketing plans as new information comes to light, including on the same day that the supplier is marketing. For instance, upon beginning to market door-to-door in a certain municipality, a supplier may learn that several other suppliers have recently covered the same area. Canvassing the same municipality recently covered by other suppliers will not provide a good experience for customers or a positive result for the supplier. In such a situation, the supplier needs the flexibility to pivot to a new municipality, and the five-municipality limit statewide may not allow for that. Expanding the five-municipality limit to each utility territory provides suppliers with more alternatives and allows them to create a better experience for customers, while still meeting the Department's goals of transparency and information sharing.

Because the five-municipality limit will provide a better customer experience if applied per utility territory rather than statewide, the Department should not defer implementation of this approach.<sup>5</sup> Furthermore, because this approach is more customer friendly, the ability to utilize it should not be limited by conditioning it on use of global positioning system and/or geo-tracking technology to track the location of employees and vendor agents. While such technology may be useful, use of this technology should be voluntary and should provide added leniency with regard to marketing restrictions over the standard requirements.

For the same reason that Vistra supports the expansion of the five-municipality limit to utility service territories, Vistra does not support the Department's proposal to go to neighborhood level regions in additional municipalities. While this approach makes sense in Boston, the state's most populous municipality by far, it is of little added benefit in other, smaller municipalities and only increases the likelihood of confusion and unintentional non-compliance. As the November 19 Memorandum states, Worcester and Springfield are significantly smaller in population than

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<sup>3</sup> See November 19 Memorandum, at 6.

<sup>4</sup> See Vistra Comments (Mar. 5, 2020), at 3-5.

<sup>5</sup> See November 19 Memorandum, at 7 ("As part of these comments, staff seeks input from stakeholders on whether the Department should defer consideration of such an approach until such time that we gain more information and experience on the application of the five-municipality limit on a statewide basis.").

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Boston, with populations near a quarter the size of that in Boston.<sup>6</sup> More granularity within these smaller population centers is not needed.

If the Department nevertheless decides to use neighborhood distinctions in Springfield and Worcester, Vistra stresses that providing suppliers with clarity on neighborhood boundaries so that they can ensure they are staying within a given neighborhood and adhering to the daily limits is paramount. The Department should provide a clear and definitive account of the neighborhood borders and boundaries, made publicly available, and updated as needed. Otherwise, there is likely to be widespread confusion regarding the exact borders between neighborhoods. Indeed, the November 19 Memorandum recognizes that the neighborhoods identified by the Department in its proposal are “consistent with, although not identical to, the neighborhoods identified by the Distribution Companies in their D.P.U. March 5, 2020 Comments,”<sup>7</sup> showing that there can be confusion and disagreement regarding the exact definitions and delineations of neighborhoods. While these comments are in the context of the proposal for Springfield and Worcester, Vistra requests this level of detail for Boston neighborhoods regardless of whether the Department ultimately requires neighborhood reporting in other cities. The Tier One Order and Department’s website only include a list of Boston neighborhoods without a sufficient level of detail to determine the exact borders.<sup>8</sup>

Absent a definitive and updated map maintained by the Department, suppliers may be left unaware of what future changes in the neighborhood boundaries to implement based on the criteria the Department used to create them. For instance, the Department proposes its neighborhood regions based in part on population size,<sup>9</sup> which can vary over time. Should shifts in populations over time impact the Department’s intended goals in creating the boundaries, suppliers will need clarity and certainty regarding if and how that might change the neighborhood boundaries, to ensure they are complying with the limits. Likewise, the Department’s proposal regarding Worcester includes an option based on City Council districts, which can also change over time. Should that option be used and the City Council district limits change, suppliers will need certainty regarding which boundaries apply.

For these reasons, definite maps of neighborhoods down to the street level should be available on the Department’s website and advance notice of at least thirty (30) days should be provided to suppliers prior to any change takes effect. Vistra makes this request for the Boston neighborhoods

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<sup>6</sup> See November 19 Memorandum, at fn. 18 (stating the populations of Boston, Worcester, and Springfield as 692,000, 185,428, and 153,606, respectively).

<sup>7</sup> November 19 Memorandum, at fn. 20.

<sup>8</sup> See, e.g., Order on Tier One Initiatives, 19-07-A (May 22, 2020) (“Tier One Order”), at Attch. B; Door-to-door marketing notification, available at <https://www.mass.gov/how-to/door-to-door-marketing-notification> (last visited Dec. 14, 2020).

<sup>9</sup> See November 19 Memorandum, at 9.

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as well as for Springfield and Worcester if the Department ultimately determines those two cities should be broken up into individual neighborhoods (which Vistra disagrees with). Vistra requests that the maps provide enough detail to allow suppliers certainty down to the street and address level. The maps provided in Attachments 3 and 6 to the November 19 Memorandum do not provide enough detail for suppliers marketing near the borders of the marked neighborhood to be certain that they are remaining within the same neighborhood and complying with the location requirements.

Similarly, there is a proposal in the November 19 Memorandum to provide notification of door-to-door marketing to municipal officials.<sup>10</sup> Vistra requests that if the Department decides to proceed with this concept, the Department consider aggregating the information for the municipality instead of having individual suppliers send the notification directly to the municipality. If the Department was to provide the municipal official with a single e-mail with the aggregate information of all door-to-door activity for a particular day, it may serve to alleviate confusion with the municipality, reduce concerns about the confidential nature of the information (as it would not include supplier details), and increase the effectiveness of those communications as it would give the municipal official a snapshot of activity within the municipality. After all, municipalities have their own regulatory oversight of door-to-door marketing activity through permit requirements.

Should the Department want to proceed with the proposal as outlined in the November 19 Memorandum, Vistra requests that any final determination provide a Department-managed website with municipal official contact information so that suppliers have clear direction for who to contact. The Department already acknowledges municipal officials need this clarity<sup>11</sup> and requests that the same certainty be provided to those suppliers to reduce any inadvertent non-compliance due to lack of timely information.

#### Contract Summary Form

Vistra appreciates and supports the Department's goal to ensure that the customer is educated prior to entering into an agreement for electric supply service. Vistra believes, however, that the current contract summary form adopted in the Tier One order<sup>12</sup> provides that consumer education without overly complicating the marketing and enrollment process. The Tier 1B proposals outlined in the November 19 Memorandum add to the previously approved contract summary language regarding renewable energy products and utility basic service that will likely cause more customer confusion

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<sup>10</sup> See November 19 Memorandum, at 5.

<sup>11</sup> See *id.* ("Under staff's proposal, municipalities that seek to be so notified would be required to provide to the Department contact information (i.e., name, email address) for a designated municipal official(s). The Department would make such information readily available on our website.").

<sup>12</sup> See Tier One Order, at 39-52.

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than benefit. This is especially true given that the Department requires the contract summary information to be presented verbally during in person and telephone sales.<sup>13</sup>

In the Tier One Order, the Department requires that the contract summary form include clear language about the renewable energy content of the offer. This information includes the state mandatory renewable portfolio standard requirements and, if a supplier offered a voluntary renewable energy product, the percentage of renewable energy resources that exceeds the minimum requirement.<sup>14</sup> The Tier 1B proposal would require a further breakdown of voluntary renewable energy products to information about whether the renewable energy resource is located outside New England, within New England but not from a RPS Class I source, and/or within New England and from a RPS Class I source.<sup>15</sup> The proposal would label the New England resources as “premium”.

First and foremost, Vistra believes that renewable energy information should be as clearly provided to customers as possible so that the customer understands the benefit of supporting renewable energy development. The proposed language, however, would require the disclosure of three statistics – the minimum clean energy resource percentage, what amount of that minimum percentage is required to be from “premium” resources, and then the total percentage of renewable energy resources in the product. With so many amounts being disclosed during the sales and enrollment process, this level of detail may leave customers confused as to what they are actually purchasing.

To make matters worse, the proposal uses the term “premium” to refer to RPS Class I resources. This is unnecessarily imprecise and confusing to consumers. Consumers may not have any idea what would make renewable content “premium” and have no reason, based on the language provided, to know or assume that “premium” refers to RPS Class I resources. Indeed, even consumers who are familiar with RPS Class I resources have no reason to assume that “premium” renewable resources are the same as RPS Class I resources as the regulations defining RPS Class I resources do not ever refer to them as “premium” resources or use the word “premium” in any manner.<sup>16</sup> While a supplier could educate a customer on what a “premium” resource is, as the Department recognized in the context of using an electric distribution company’s name – the more

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<sup>13</sup> See Tier One Order, at 51 (“For enrollments that take place in person, competitive suppliers shall provide the information orally, and then provide consumers with a hard copy of the Contract Summary Form that is included as the first page of the contract/terms of service that are provided to consumers during in-person enrollments. For enrollments that take place by telephone, competitive suppliers shall provide the information orally, followed by a copy of the Contract Summary Form that is included as the first page of the contract/terms of service that are mailed (or emailed) to consumers.”).

<sup>14</sup> See Tier One Order, at 11.

<sup>15</sup> See November 19 Memorandum, at 12-13.

<sup>16</sup> See 225 CMR 14.00.

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times you say something, the more a customer may think it applies to their offer.<sup>17</sup> Therefore, if a supplier needs to educate customers on “premium” resources, Vistra is concerned it could inadvertently mislead customers as to the product they are selecting when that voluntary renewable energy product may not include “premium” resources. Customer confusion as the sales agent tries to explain may lead to the customer electing a product other than a voluntary renewable energy product.

There are other methods for communicating additional information about a voluntary renewable energy product to customers. A supplier offering a voluntary renewable energy product would likely provide additional marketing information to describe the in-state or in-region benefits of the offer to customers. The contract summary form should be a high-level summary of that product information so that it can be used as a reference for customers. However, adding such detailed information along with use of ambiguous terms like “premium” makes the contract summary form more like marketing material than a reference guide. Should the Department want to require suppliers to provide specific information to customers about voluntary renewable energy products, Vistra suggests that a stakeholder group be formed to discuss additions to the information disclosure label.

In addition to customer confusion, the new proposal could ultimately work to undercut the Department’s clean energy goals. The proposal regarding language describing the voluntary renewable energy product would in effect require suppliers to know in advance from where they will source the RECs in order to describe the product as being outside or inside New England and “premium” or not “premium”. In many cases, suppliers simply do not know at the time the contract summary is created and provided to a customer where it will source its voluntary renewable content. This will lead suppliers to over-select the first option, which states that the voluntary content “may be located outside of the New England region,” to allow maximum flexibility. Ultimately this is a voluntary product, which is designed to offer customers with additional ways to support renewable energy. To that end, Vistra cautions against making it too difficult or administratively burdensome to provide customers with these products as fewer suppliers may decide to continue offering them. If there are fewer suppliers offering voluntary renewable energy products, it would likely reduce choice for customers and may increase the prices of the remaining products in the market to the detriment of customers.

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<sup>17</sup> See Tier One Order, at 54 (“The Department recognizes that there may be legitimate reasons for a competitive supplier to identify a customer’s distribution company during telemarketing calls and door-to-door marketing visits - for example, in response to a customer’s request for this information, to ensure the competitive supplier is quoting the correct price, or to assist a customer in locating the account number on the distribution company bill. As such, while the Department will not prohibit a marketing vendor from identifying the name of a consumer’s distribution company, the Department emphasizes that such identification must be done in the spirit of providing consumers with useful and accurate information and not to suggest or imply that the marketing vendor or competitive supply company is or has a connection to the distribution company.”) (internal citations omitted).

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The broadly written language adopted in the Tier One Order strikes the right balance by providing customers enough information to make an informed decision without overly complicating or confusing the customer with multiple statistics and phrases. The broadly written language in the Tier One Order also provides suppliers flexibility on where to purchase and retire RECs. As such, Vistra recommends that the Department keep the contract summary language regarding renewable energy as was adopted in the Tier One Order and not make further revisions at this time. The Department can always re-evaluate in the future if additional information is necessary.

The Department's proposal to include the basic service price to compare ("PTC") on the contract summary will similarly increase customer confusion and frustration. The current general statement in the contract summary adopted in the Tier One Order pointing customers to the Energy Switch MA website is useful and will provide customers with easy access to current PTC data (rate, term, and renewable energy content) at any time.<sup>18</sup> The Energy Switch MA website also provides consumers with access to other competitive offers. In a competitive landscape, it is more appropriate to provide consumers with access to information to a wide variety of offers in the marketplace, rather than to single out a particular competitor's offer to highlight. In addition, providing the fixed rate PTC for comparison may cause confusion if the consumer is currently receiving service from a different supplier, or is receiving service under the utility's variable rate.

The proposal itself recognizes that customers are better served by being directed to the Department's website for detail on the PTC. "While staff recognizes the value of providing consumers with information regarding the cyclical nature of basic service/gas supply rates, we conclude that the difficulty of conveying such information on the Contract Summary Form in a concise and useful manner outweighs the benefits that such information would provide to consumers. Staff concludes that consumers are better served by being directed to the Department's website to better understand this dynamic...."<sup>19</sup> Nevertheless, the proposal goes on to suggest adding dynamic data regarding the current and upcoming PTC to the contract summary form.

It is overly complicated to add more than the website reference for similar reasons to the discussion regarding voluntary renewable energy products above. Having the current and upcoming PTC and the month and year of the various changes adds more amounts and data that a customer needs to digest and understand that may not even be a useful reference point at a later point during the term of the contract. And to educate the customer regarding basic service would require a sales agent to spend time focused on the utility. The Department has warned against the implication that a supplier represents a utility<sup>20</sup> and the amount of information a supplier would need to summarize if this proposal was adopted could inadvertently lead a customer to that conclusion.

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<sup>18</sup> See Tier One Order, at 48.

<sup>19</sup> November 19 Memorandum, at 14.

<sup>20</sup> See *supra* at fn. 17.

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Furthermore, the requirement to include the current and upcoming PTC could cause suppliers to inadvertently run afoul of the Massachusetts Attorney General's ("AG") advertising requirements.<sup>21</sup> Specifically, the regulations make it an unfair or deceptive trade practice for a seller to compare its price to a price offered for a comparable product if that price is not "being offered for sale as of the Measurement Date" or has not "previously been offered for sale".<sup>22</sup> As the utility's upcoming PTC is not being offered at the time the contract summary is provided to customers,<sup>23</sup> and has not been offered in the past, suppliers may be improperly forced to select either compliance with the Department's requirements for PTC disclosure or compliance with the AG's regulations for price comparisons.

Relatedly, it is an unfair or deceptive trade practice under the AG's advertisement requirements for a seller to compare its price to a price offered for a product where there are "substantial differences in quality" between the products.<sup>24</sup> If a supplier offers a voluntary renewable energy product or other value-added offer, there is a substantial difference in quality between the product represented by the current PTC and the supplier's product. Again, a supplier could find itself inadvertently pushing up against the AG's advertising regulations by providing a comparison to the current PTC. As such, Vistra recommends that the Department keep the contract summary language as was adopted in the Tier One Order regarding the general statement and reference to Energy Switch MA and not make further revisions at this time.

For the reasons described above, Vistra urges the Department to allow the five municipal limit for door-to-door sales to apply for each service territory, defer adoption of specific neighborhoods within Springfield and Worcester until additional data is collected, and retain the current requirements from the Tier One Order for Contract Summaries without the proposed Tier 1B additions regarding renewable energy and basic service.

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<sup>21</sup> See 940 CMR 6.05.

<sup>22</sup> 940 CMR 6.05(9)(a).

<sup>23</sup> The Measurement Date is the "Dissemination Date" or the "Submission Date". The Dissemination Date is "the *earlier* of: (a) the first date an advertisement is disseminated; or (b) the first date an advertisement takes effect." 940 CMR 6.01 (emphasis added). The Submission Date is the "means the *most recent* of: (a) the date an advertisement is submitted for publication or dissemination; or (b) the last date upon which changes can be made to the advertisement prior to publication or dissemination." *Id.* (emphasis added). In either case, the Measurement Date would be prior to any disclosure of a future PTC.

<sup>24</sup> 940 CMR 6.05(9)(b).



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Please do not hesitate to contact me if you have any questions or require additional information.  
Thank you.

Sincerely,



Erick M. Sandler<sup>25</sup>

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<sup>25</sup> Admitted in Massachusetts, Connecticut, and New York.