COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

INVESTIGATION BY THE DEPARTMENT OF PUBLIC UTILITIES ON ITS OWN MOTION INTO INITIATIVES TO PROMOTE AND PROTECT CONSUMER INTERESTS IN THE RETAIL ELECTRIC COMPETITIVE SUPPLY MARKET	)	D.P.U. 19-07

REPLY COMMENTS OF NRG RETAIL COMPANIES
IN RESPONSE TO HEARING OFFICER'S NOVEMBER 19, 2020
REQUEST FOR COMMENTS (TIER ONE ISSUES)

I. INTRODUCTION

Green Mountain Energy Company, Reliant Energy Northeast LLC d/b/a NRG Home and d/b/a NRG Business Solutions, Energy Plus Holdings LLC, XOOM Energy Massachusetts, LLC, and Direct Energy Services, LLC (collectively, the "NRG Retail Companies"), licensed competitive electricity and natural gas suppliers in Massachusetts, are pleased to provide its reply comments in response to the comments filed regarding the Hearing Officer's November 19th, 2020 request for comments regarding certain issues associated with Tier One initiatives adopted by the Department of Public Utilities ("Department" or "DPU") on May 22, 2020 in this docket.

As background, on February 5, 2020, the Hearing Officer in this docket issued a request for comments regarding the Department's proposed Tier One and Tear Two initiatives. As described by the Department, these initiatives were designed 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) facilitate the Department's adoption of a more pro-active approach toward its oversight of competitive supplier performance rather than reacting to third-party complaints or reports of alleged violations of statute/regulation; and (3)

improve the operational efficiency of the competitive market to optimize the value that the market can provide to customers. D.P.U. 19-07, at 4-5, 10

On May 22, 2020, the Department issued an order adopting certain Tier One initiatives (See D.P.U. 19-07-A). The NRG Retail Companies and others had expected that after months of collaborative discussions designed to build consensus regarding the Tier One initiatives and a wide array of comments submitted by a broad range of stakeholders in response to the Department's February 5, 2020 request,[1] the Department would have reached some closure regarding its first round of initiatives and proceeded to take on the important proposed Tier Two initiatives. However, this was not the case. Rather than issuing final Tier One initiatives and allowing a reasonable period of time to monitor and evaluate these consumer protection initiatives in practice, the Department's Order in D.P.U. 19-07-A was anything but final. Instead of moving forward with Tier Two, on November 19, 2020, after conducting a Zoom conference on August 6, 2020, the Hearing Officer issued a memorandum laying out significant proposed revisions to the Tier One initiatives approved by the Department in D.P.U. 19-07-A and asked stakeholders to provide comments and feedback on the proposed modifications ("November 19th Hearing Officer Memorandum").

On December 17, 2020 the NRG Retail Companies filed comments in response to the November 19th Hearing Officer Memorandum. Other stakeholders submitted comments on January 11, 2021.

It remains unclear why the Department is looking to modify the requirements associated with the Tier One initiatives that were approved less than a year ago on May 22nd and that only

[1] Comments on the February 5, 2020 draft initiatives were submitted by distribution companies, the Attorney General, the Department of Energy Resources, competitive suppliers, public interest groups and municipal aggregation communities.

recently took effect. New door-to-door marketing notifications went into effect on August 3, 2020, and suppliers began using the new contract summary form ("CSF") on September 8, 2020. Yet, only two months later, the Department proposed significant changes which would add to suppliers' administrative and cost burden and potentially sow confusion throughout the marketplace. Changing forms and reports – and training staff to use these forms – requires adequate time and resources for retail suppliers to adjust to these changes. Moreover, these changes and associated costs are not recovered from ratepayers, but instead are absorbed by retail suppliers and place the suppliers at a distinct competitive disadvantage. For many of these Tier One Initiatives, customers, suppliers, and others would be better served by allowing the Department and all stakeholders to gain real market experience over the next year or so before taking on the task of modifying and fine tuning these programs.

It is essential for the Department to focus its attention on the important Tier Two issues that have inhibited the competitive electricity and natural gas markets in Massachusetts for years. Among others, the NRG Retail Companies have recognized the consumer protection issues that have plagued the low-income residential market and have urged the Department to both investigate and work with stakeholders to understand what is actually happening in that market as a means of establishing strong consumer protection measures that do not operate to deprive low-income customers access to robust energy markets and its benefits. In addition, the Department should work with utilities, suppliers, and other stakeholders to understand the ways in which reliance on customer account numbers at point of sale have inhibited a vibrant competitive market -- and develop appropriate alternatives that protect customer information while expanding customer choice.

The issues surrounding low-income residential customers and the continued use of customer account numbers for enrollment are significant and offer the Department and stakeholders a meaningful opportunity to effect changes that could significantly improve how residential markets operate. In contrast, some of the measures set forth in the November 19th Hearing Officer Memorandum come across as an attempt to micro-manage the market and the Department has presented no evidence that these measures will improve a single interaction between a supplier and customer.

Accordingly, the NRG Retail Companies urge the Department to move expeditiously to address the low-income market and customer account number look-up issues as part of its Tier Two efforts, and respectfully suggests that the Department's and all stakeholders' time is better spent over the coming months tackling important Tier Two issues rather than continuing to fine tune certain Tier One initiatives.

II. REPLY COMMENTS

In the sections that follow, the NRG Retail Companies provide brief reply comments on the initial comments filed in response to the November 19th Hearing Officer Memorandum.

A. Door-to-Door Marketing

- *Neighborhoods of Boston, Worcester, and Springfield*

The NRG Retail Companies are supportive of the comments filed by Davis, Malm that a working group be formed to hash out some of these specific neighborhood requirements (Davis, Malm Initial Comments at 13). Each neighborhood in Worcester and Springfield is a bit different and may require different treatment. In addition, Vistra Corp. suggested that the DPU provide definitive street maps of neighborhoods down to the street level for Boston, Springfield and Worcester if the Department determines these cities should be broken up into neighborhoods

(Vistra Initial Comments at 3). The NRG Retail Companies support this proposal because without clear, definitive street mapping, it will be difficult (if not impossible) for competitive suppliers to comply with the Department's requirements and know exactly which neighborhood representatives are selling in at a given point in time.

B. Contract Summary Form ("CSF")

- *Voluntary Renewable Energy Content*

While the NRG Retail Companies agree that the CSF should reflect the voluntary renewable energy content of the product purchased by a consumer, the proposal set out in the November 19th Hearing Officer Memorandum is unnecessarily cumbersome and is likely to confuse, rather than inform, consumers. The current protocol approved in D.P.U. 19-07-A is both straightforward and practical.

By contrast, the proposal set out in the November 19th Hearing Officer Memorandum is far more complicated with different text required in the CSF depending on whether the product includes (1) renewable resources located within or outside of the New England region, and (2) "premium" (*i.e.*, RPS Class I) resources. This is a level of detail that is clearly unnecessary and likely extends beyond many customers' reasonable understanding of what they are seeking with respect to an electricity product which includes a voluntary renewable component.[2] Indeed, the Consumer Advocates agree that the proposed premium language is likely not adequate for the average customer to gain an understanding of the product they are purchasing (Consumer Advocates Initial Comments at 7). However, the Consumer Advocates go on to suggest a labeling concept consisting of fourteen (14) different categories that a renewable product could

[2] The Department's proposed text also references "premium resources", a term that is undefined in the proposed CSF. While the Department explains that "premium resources" refer to RPS Class I resources (November 19th Hearing Officer Memorandum at 12, n.25), that definition is not part of the CSF text, and, even if it were, it would sow more customer confusion rather than provide clarification regarding the renewable product just purchased.

fall under. The Consumer Advocates suggest that competitive suppliers should inform consumers what percentage of each of these categories a customer is receiving. Providing that level of detail will only confuse the average customer and will not provide any meaningful information.

Further, the initiative currently in effect allows a competitive supplier that wishes to include additional language regarding a product's voluntary renewable energy content to submit a proposed CSF reflecting that additional text to the Department for review. *See* D.P.U. 19-07-A at 43-44. For those suppliers and consumers interested in working out the more granular details of electricity products with a voluntary renewable component, the current Department review process for CSFs offers an avenue to include that detail in the CSF without burdening and confusing those buyers and sellers who are comfortable moving ahead with enrollment based on more basic information on voluntary renewable energy products. In addition, information on renewable energy products can be provided more appropriately to customers through the Information Disclosure Label.

Finally, the NRG Retail Companies note that no Department initiative should get in the way of competitive suppliers and consumers reaching an agreement on voluntary renewable energy products. The key term here is "voluntary" and if a consumer and supplier can reach an agreement that both meets the consumer's needs and advances environmental goals, regulators should be careful not to get in the way of that agreement by interjecting limitations or otherwise presuming to know the wants or needs of consumers seeking a voluntary renewable product. As discussed elsewhere in these comments, while the NRG Retail Companies strongly support Department initiatives that address consumer protection issues and increase consumer awareness

generally, the Department should avoid measures designed to "educate" consumers when those measures interfere with the ability of buyers and sellers to reach agreements.

- *Basic Service*

As stated in its initial comments, the NRG Retail Companies vigorously oppose the Department's proposal to require competitive suppliers to include basic service pricing of any kind on the CSF. In fact, more than any other proposal set forth in the November 19th Hearing Officer Memorandum, this requirement is antithetical to one of the Department's primary objectives in this proceeding, namely, to "improve the operational efficiency of the competitive market to optimize the value that the market can provide to customers."

In D.P.U. 19-07-A, the Department required Competitive Suppliers to provide customers with a CSF as part of the enrollment process, regardless of whether that enrollment takes place in person, by telephone, or on-line. D.P.U. 19-07-A at 51. The NRG Retail Companies are supportive of the CSF as a measure to enhance market transparency and enhance consumer protections.

In fact, almost all the information required in the CSF helps achieve consumer protection goals by ensuring that newly enrolled customers understand fully the product they have purchased, including price, term, renewable energy content, fees, and renewal term. Additionally, the CSF is required to include information regarding a customer's right to rescind or cancel the contract within three days of enrollment without a fee, thereby protecting customers who did not fully understand either the product purchased or the contract terms.

In contrast, a requirement that the CSF also include the electric distribution company's current basic service prices – and where available, the utility's upcoming basic service prices -- is plainly anti-competitive and does nothing to advance consumer protection goals. Rather, this

proposal appears intended to unwind enrollments that are fully compliant with all Department rules.[3] Indeed, in describing this requirement in the November 19th Hearing Officer Memorandum, the Department effectively states that the purpose of the CSF is just that:

> The Department stated that the purpose of the Contract Summary Form is not only to provide consumers with information that makes them sufficiently aware of the supply product being offered, but also to act as a vehicle to make consumers aware that alternate supply product options are available to them. The Department stated that identifying basic service prices on the Contract Summary Form would complement the statement from the Department "by providing consumers with a reference price against which they can evaluate the supply price being offered, thus potentially providing consumers with additional motivation to consult the information available on the Website *prior to purchasing a supply product*."

November 19th Hearing Officer Memorandum at 14 *citing* D.P.U. 19-07-A at 48-49 (emphasis added). And, while the NRG Retail Companies fully understand and accept that a newly enrolled customer can rescind a contract within three (3) days for any reason, including after learning of different options in the marketplace, there is fundamental disconnect when the Department deems a new enrollment – one that was effected by a supplier after fully complying with the Department's consumer protection requirements for marketing (including rules on telemarketing calls and marketing scripts) -- as a purchase not yet made.

As discussed throughout these comments, initiatives that interfere with customer choice in the name of "education" should be avoided. In this regard, a CSF that appropriately reflects an enrollment agreement, like other approved Tier One initiatives on automatic renewal notices, marketing materials, and recording telemarketing calls, appropriately guards against anti-consumer tactics. However, when suppliers are forced to include a utility's basic service prices in a CSF designed to reflect an enrollment agreement, the Department is taking an action that

[3] In addition to being anti-competitive, requiring Competitive Suppliers to include basic service pricing in the CSF will be expensive and difficult to implement, *i.e.*, requiring frequent changes to CSF text for multiple utilities, and ultimately confusing to customers.

does little to educate consumers, but instead operates to potentially undo enrollment decisions that were legally and appropriately made.

Indeed, the NRG Retail Companies are hard pressed to come up with another situation where a supplier in a competitive market is required to provide a customer with a competitor's pricing as part of the deal-making process. A customer's receipt from Macy's for a pair of shoes likely will describe the shoes, include the quantity and price, and set out the store's return policy, but it does not include the price offered by Shoes.com for the same pair of shoes. When a passenger reserves a flight with American Airlines, an e-mail confirmation includes the details of the flight, including departure and arrival cities, departure and arrival times, price, and change and cancellation fees, but it does not include United Airlines' price for flights between the same cities on the same date.

Comparing the utility's basic service rate to the rate charged by a competitive supplier is also not an accurate comparison. Competitive suppliers may have other value-add products they are providing to customers (ex. voluntary renewable products, home warranty products, products that are bundled with airline miles, etc.). The utility's basic service rate does not include any add-ons thus preventing a true apples-to-apples comparison.

Moreover, the requirement that competitive suppliers include a distribution company's basic service pricing on the CSF may violate the First Amendment. Here, the Department's proposal appears to compel commercial speech -- requiring competitive suppliers to speak when they would rather not. In *Zauderer v. Office of Disc. Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), the Supreme Court held that the state may compel commercial speech to include "purely factual and uncontroversial information" as long as the disclosure requirements are reasonably related to the state's interest in preventing consumer deception. The Department

has made no allegation of consumer deception to be remedied by compelling commercial speech here. On the contrary, the requirement to include basic service pricing in the CSF is designed to "make consumers aware that alternate supply product options are available to them". D.P.U. 19-07-A at 49. This statement presumes that consumers are unaware that such options are in fact available to them, when there is nothing in any record to suggest this is the case.

While information about basic service rates may be factual, a competitive supplier should not be required to publish its competitors' rates, where there is no "consumer deception" to be prevented or remedied.[4] Any harm to be remedied by compelling such commercial speech must be actual, rather than hypothetical. *NILFA v. Becerra*, 138 S.Ct. 2361, 2377 (2018). Here, the Department's reasoning posits, hypothetically, that consumers are unaware of competitive options, or at the very least, might be interested in learning the basic service rates. However, "consumer curiosity alone" is not a strong enough basis to sustain regulatory compulsion of "even an accurate, factual statement." *International Dairy Foods Ass'n. v. Amestory*, 92 F.3d 67, 73 (2nd Cir. 1996).

Finally, the NRG Retail Companies agree fully with other competitive suppliers that have stated that including basic service rates in the CSF would be confusing, difficult for suppliers to administer and make the CSF overly lengthy. *See* Davis, Maim Initial Comments at 19; Vistra Initial Comments at 7; Clean Choice Initial Comments at 6. And, it is notable that the

[4] While including the basic service rate in the CSF may involve a "factual" statement, using the basic service rate as a point of comparison for competitive offerings in any context, much less on the summary of a contract a customer has already agreed to, is far from "noncontroversial." For many years, suppliers have vigorously opposed the idea that the basic service rate is an appropriate measure of the value of competitive offerings on important substantive grounds. These include the view that the cost of providing basic service is subsidized by delivery rates and that the goal of restructuring was not, as some claim, to allow customers to save money versus basic service, an offering which did not even exist at the time the Restructuring Act was enacted. In fact, the idea that competitive prices should be compared to basic service rates in any context is sufficiently controversial that it may well cross the line from mere commercial speech to political speech, which would have far greater First Amendment implications.

Distribution Companies are opposed to including prospective basic service prices on the CSF, raising valid concerns over the timing in which rates are reviewed, approved, and subsequently become effective (Distribution Companies Initial Comments at 10). While the NRG Retail Companies oppose including basic service rate information of any kind in the CSF, a requirement to include prospective basic service rates in the CSF would be particularly egregious as it would make updating the CSFs extremely cumbersome, with little to no turnaround time in some cases.

C. Recording of Telemarketing Calls

In D.P.U. 19-07-A, the Department directed competitive suppliers, effective August 3, 2020, to record and retain all telemarketing calls of one minute or more regardless of whether the call results in an enrollment. The suppliers are also required to retain these recordings for a minimum of two years. D.P.U. 19-07-A at 57.

In the November 19th Hearing Officer Memorandum, the Department asks stakeholders to comment on its proposal to require competitive suppliers to provide recordings of telemarketing calls within 72 hours of a Department request. In that same memorandum, the Department noted that the issue of "real time" access to telemarketing recordings will be addressed as a Tier Two initiative. November 19th Hearing Officer Memorandum at 16-17.

On November 27, 2020, the Hearing Officer sent an e-mail to stakeholders in this proceeding indicating that the issue of "real time" access to telemarketing recordings would be addressed at the December 16, 2020 Zoom conference on Tier Two issues,[5] and asked Competitive Suppliers to be prepared to address a number of questions at this conference regarding suppliers' processes for retaining such recordings, including whether suppliers

[5] The Department postponed the December 16th Zoom conference because of a winter storm and rescheduled it to January 7, 2021.

delegate the responsibility for recording an retaining telemarketing calls to third party vendors; how suppliers ensure third party vendors' compliance with recording requirements; how suppliers access vendors recordings of said calls; whether the supplier or vendor is the custodian of these recordings; and whether such recordings are retained in the cloud. Indeed, the Competitive Suppliers made a presentation on these issues at the January 7, 2021 Zoom conference and the discussion around these Tier Two issues is expected to continue over the course of this proceeding.

Until the Department and the stakeholders fully understand the processes that both competitive suppliers and third party vendors employ to record and retain telemarketing calls, the ability of suppliers to access such recordings from third party vendors, and, importantly, whether different suppliers use different processes for recording and retaining calls, it is premature for the Department to make any determinations regarding a 72-hour turnaround of a request for a recorded call. Accordingly, a final determination regarding the appropriate turnaround time for responding to a request for a recording is appropriately addressed in Tier Two as part of the Department's larger discussion of recording telemarketing calls. Of course, during this interim period, competitive suppliers will continue to record and retain recorded calls as directed by the Department in D.P.U. 19-07-A.

Finally, the NRG Retail Companies oppose the Consumer Advocates' proposal that telemarketing and TPV call recordings should be accompanied by a signed affidavit attesting to the accuracy and completeness of the recording (Consumer Advocates Initial Comments at 16). If required by the Department, it will be challenging for competitive suppliers to provide a recording and affidavit within 72 hours. Are the Consumer Advocates suggesting that competitive suppliers would doctor the recordings and alter them, so they are incomplete and

inaccurate? Imposing an additional requirement to provide a signed affidavit with each recording is completely unnecessary and would make it extremely difficult for competitive suppliers to meet a 72-hour turnaround requirement.

D. Definition of Small Commercial & Industrial Customer

The NRG Retail Companies support the Department's proposed definitions of natural gas small commercial and industrial ("C&I") consumer (a non-residential consumer whose annual gas usage does not exceed 7,000 therms) and electric small C&I consumer (a non-residential consumer whose annual electric usage does not exceed 15,000 kilowatt hours) as reasonable, appropriate, and practical.

Accordingly, the NRG Retail Companies oppose the Distribution Companies' recommendation to define small C&I customers based on each utility's tariff-based definition (Distribution Companies Comments at 12). Requiring competitive suppliers to use each utility's specific tariff-based definition in order to identify small C&I customers would cause confusion, require hours of system programming, and likely result in errors. One uniform definition used across the state – as proposed by the Department -- will make it easier for all competitive suppliers to identify these customers and ensure they obtain the protections they require.

III. CONCLUSION

The NRG Retail Companies appreciate the opportunity to reply to comments filed in response to additional Tier One proposals set forth in the November 19th Hearing Officer Memorandum. While the NRG Retail Companies understand and appreciate that the Department is interested in the further refinement of the Tier One initiatives approved in D.P.U. 19-07-A, the more prudent course for now would be for all stakeholders to obtain more market experience regarding how these newly established Tier One initiatives -- and, in particular, how enhanced

consumer protection measures -- are working in practice. Moreover, many of the proposals set forth in the November 19th Hearing Officer Memorandum are unnecessarily cumbersome, unworkable and interfere with the ability of competitive suppliers and customers to reach agreement.

Accordingly, the NRG Retail Companies respectfully urge the Department to turn its attention to the important work to be done with respect to Tier Two Initiatives.

Respectfully submitted,

/s/ *Angela Schorr*
Angela Schorr
Director
Regulatory Affairs
NRG Energy, Inc.
Angela.Schorr@nrg.com

/s/ *Christopher A. Kallaher*
Christopher A. Kallaher
Senior Director
Corporate & Regulatory Affairs
Direct Energy Services LLC
Chris.Kallaher@directenergy.com

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