**COMMONWEALTH OF MASSACHUSETTS**
**DEPARTMENT OF PUBLIC UTILITIES**

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| **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** |

**JOINT CONSUMER ADVOCATES' REPLY COMMENTS IN RESPONSE TO STAKEHOLDERS' COMMENTS FILED JANUARY 11, 2021, REGARDING THE DEPARTMENT'S D.P.U. 19-07-A PROPOSALS**

## I. INTRODUCTION

On January 11, 2021, several stakeholders submitted comments in reply to a Hearing Officer Memorandum by the Department of Public Utilities ("the Department") dated November 19, 2020 (the "November 19 Memo") in Docket No. 19-07 (the "Docket"), setting forth staff proposals and requesting comments relating to such proposals. The Office of the Attorney General ("AGO"), Alternatives for Community and Environment ("ACE"), the National Consumer Law Center ("NCLC"), Greater Boston Legal Services ("GBLS"), and Lawyers for Civil Rights ("LCR") (collectively, the "Consumer Advocates") jointly submit the following comments in reply to comments submitted by other parties in response to the November 19 Memorandum.

The undersigned organizations jointly submitted their own comments on January 11, 2021, which anticipated and addressed many of the arguments made in other stakeholders' initial comments. Accordingly, the Consumer Advocates submit comments only to the extent that they are necessary in response to other parties' comments as described below but do not reiterate their original comments as set forth in their January 11, 2021 filing.

## II. LICENSE RENEWAL APPLICATION REQUIREMENTS AND PROCESS

### *A. The Department Should Expand the Summary of Any History of Bankruptcy, Dissolution, Merger, Acquisitions, or Regulatory Action from a One- to a Five-Year Period.*

The Consumer Advocates agree with and join in the Distribution Companies' recommendation to expand the time period for the summary of any history of bankruptcy, dissolution, merger, acquisition, or regulatory actions taken against the applicant from one year to five years. *See* Distribution Companies' Comments, at 3–4. When licensees default, declare bankruptcy, or otherwise become financially insolvent, customers experience confusion and financial hardship as the licensees typically provide insufficient notice. Moreover, any costs associated with the Distribution Companies switching customers unexpectedly are ultimately paid by all ratepayers and therefore should be limited to the greatest extent possible. The Department should require suppliers to provide this information before granting a supplier a license.

Similarly, the Department should require additional information concerning supplier dissolutions, mergers, and acquisitions, because these acts could obscure the supplier's relationship with a related entity that had engaged in unlawful or unethical conduct. For example, a supplier with a reputation for such conduct in one state could simply merge with another corporate entity or dissolve and reform with a new name. The new entity may appear to have a clean record, but it may be a rebranded version of the former entity with a history of unethical and / or unlawful conduct. A one-year lookback is too short a period for the Department to assess whether such corporate reshuffling or significant regulatory action has occurred and whether it might conceal potentially concerning activity in the past.

Both the Department and consumers should have ready access to historical financial information—including a history of a supplier exercising these bankruptcy and insolvency strategies—to make informed and reasoned decisions about electric suppliers in the Commonwealth. The Department should have ready access to this information to support its process of reviewing and approving electric suppliers' license applications. Consumers also need this transparency to make informed decisions about whether to enter into a contract with a particular supplier. Neither the Department nor the Consumer Advocates (nor the consumers themselves) should have to resort to gathering this important and relevant information from other publicly available sources scattered across the country, particularly while it would impose a most minimal burden for suppliers to provide this vital information. Requiring the suppliers to report regulatory actions and any and all restructuring history will also assist stakeholders in identifying problematic supplier conduct in other states, which alerts those stakeholders that similar conduct may also be occurring in the Commonwealth.

For these reasons, the Consumer Advocates recommend that the Department adopt the proposal to require a summary of any history of bankruptcy, dissolution, merger, or acquisition of the entity in license renewal applications and expand the history from a one to a five-year period.

### *B. The Department Should Address the Issue of Suppliers Who Apply for a Renewal While Not in Compliance with Their RPS/APS Obligations.*

The Consumer Advocates agree with the Department of Energy Resources ("DOER") regarding its concern that the coincident date of July 1 for competitive suppliers to renew their licenses and file DOER compliance materials creates a problematic timeline wherein competitive suppliers could operate for a full year despite a failure to comply with their RPS/APS

compliance obligations.[1] *See* DOER Comments, at 3–4. Allowing suppliers to continue to serve customers while out of RPS/APS compliance runs contrary to the Commonwealth's clean energy goals and creates a debt to the Commonwealth that is unlikely to be paid in full, either because the supplier disappears or seeks to discharge its financial obligations through bankruptcy.

The Consumer Advocates do not take a specific position on whether DOER's proposed process[2] is the most efficient and effective way to prevent competitive suppliers from operating while knowingly not in compliance with DOER regulations. However, they would support a process which would effectively prevent competitive suppliers from serving customers while failing to comply with its RPS/APS obligations.

For these reasons, the Consumer Advocates recommend that the Department address the concerns raised by DOER, as described above, to ensure that the Department's licensure renewal process for competitive suppliers properly considers compliance with DOER regulations.

### *C. The Department Should Not Allow Suppliers to Sign Up New Customers While Their Renewal Applications Are Untimely.*

Several commenters objected to elements of the Department's proposal regarding the process for competitive suppliers to renew licenses and the consequences for competitive suppliers that do not renew licenses in a timely manner or fail to cure their untimely renewal within the specified grace period. *See* SFE Energy Comments, at 9–10; EDC Comments, at 15–16; Davis Malm Comments, at 24–26; CleanChoice Energy Comments, at 10–11. Comments ranged from concern regarding the consequences of barring competitive suppliers from enrolling

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[1] *See* DOER Comments, at 3 (competitive suppliers must file annual Renewable Energy Portfolio Standard ("RPS") and Alternative Energy Portfolio Standard ("APS") compliance filings with DOER).

[2] DOER proposes that the Department, during its renewal competitive supplier renewal process, consult with DOER to obtain a list of competitive suppliers not in compliance with RPS/APS regulations, and not renew those competitive suppliers' licenses.

new customers due to failure to renew licenses (*see* SFE Energy Comments, at 9) to concerns regarding the role of, and burden to, distribution companies in enforcing those consequences (*see* SFE Comments, at 10; EDC Comments, at 16; Davis Malm Comments, at 25). Many commenters suggested alternative notification or enforcement mechanisms. *See* SFE Energy Comments, at 9 (proposing a blanket email to all competitive licensees when a licensee fails to submit renewal); Davis Malm Comments, at 25 (proposing an informal review letter directing supplier to stop enrollments); CleanChoice Energy Comments, at 10 (proposing a "cease and desist" style letter).

The Consumer Advocates support the Department's proposals to enforce consequences for competitive suppliers that fail to renew licenses in a timely manner. The Department's proposals contain plenty of automatic notifications to licensees prior to the deadline and grant generous grace periods for suppliers who fail to heed those reminders to quickly renew or quickly reapply. G.L. c. 164, § 1F requires that all competitive suppliers have a license from the Department to serve customers, *see* G.L. c. 164, § 1F, and thus the license renewal process is important to protect Massachusetts consumers and ensure that companies seeking to serve those consumers are operating within the law. Suppliers receive ample reminders and plenty of flexibility under the Department's proposed plan, and a prohibition on enrolling new customers is appropriate when suppliers nevertheless fail to timely renew.

The Consumer Advocates take no specific position on which of the Department's two proposals for how to enforce a prohibition on enrolling new customers, or an alternative process, would be the best practice. The Consumer Advocates stress that whichever process is chosen must adequately protect consumers, avoid errors affecting service or billing, and ensure that suppliers that wish to serve those consumers are operating within the proper rules.

## III. DIRECT MAIL MARKETING

In its initial comments, the AGO expressed support for the staff proposal that suppliers share proposed direct mail solicitation materials with the AGO simultaneously with the Department.[3] Several parties expressed confusion as to the purpose of this proposal in their comments. *See* CleanChoice Comments, at §VI; Davis Malm Comments, at 21–22; RESA Comments, at 12–13. To clarify, the AGO supports this proposal because receiving the marketing material would be helpful for informational purposes and would assist the AGO in performing its enforcement function pursuant to the Consumer Protection Act, codified at G.L. c. 93A. Some commenters expressed concern that the Department's proposal could create unnecessary delays if suppliers have to wait to receive AGO feedback or approval before using the marketing material. However, the AGO will not "approve" any marketing materials or require suppliers to receive feedback prior to their use, which moots most, if not all, comments in opposition to the Department's proposal.

The AGO reiterates that its receipt or review of these materials should not be construed as an endorsement or approval of the materials. Neither would any Department decision to allow a competitive supplier or other entity to use a particular piece of direct mail marketing material immunize the material from action under G.L. c. 93A if the material ultimately proves to be misleading, deceptive, or otherwise contrary to law. Although the AGO strongly supports the Department's proposal because it could help proactively identify and prevent certain types of misleading direct marketing communications, it is ultimately each competitive supplier's responsibility, and not the AGO's or the Department's, to ensure that its direct marketing

[3] On this point, the AGO again writes separately for the sole reason that, among the Consumer Advocates, only the AGO can speak on its own authority.

materials are not misleading, deceptive, or otherwise violative of the law. The AGO reserves its right to challenge the use of any marketing materials or practices which do not comply with the law and which are misleading or deceptive in violation of Chapter 93A. Accordingly, the AGO strongly supports the Department's initiative to review direct mail marketing material, but also respectfully requests that the Department make the limitations of its review clear in its order.

## IV. CONCLUSION

Thank you for the opportunity to reply to comments in this docket. We respectfully request that the Department exercise its authority to implement ". . . 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 G.L. c. 164, §1F.

Respectfully submitted,


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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon the service list 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 4th day of February, 2021.

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