The Commonwealth of Massachusetts

DEPARTMENT OF PUBLIC UTILITIES

D.P.U. 16-156-A July 6, 2017

Investigation by the Department of Public Utilities on its own Motion to Establish Interim Guidelines for Competitive Supply Investigations and Proceedings.

ORDER ESTABLISHING FINAL INTERIM GUIDELINES FOR COMPETITIVE SUPPLY INVESTIGATIONS AND PROCEEDINGS

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ORDER OF RIGHT OF DELEGATION 3

III. SECTION 1 – PURPOSE AND SCOPE 3
A. Introduction 3
B. Summary of Comments 4
C. Analysis and Findings 4

IV. SECTION 2 – DEFINITIONS 8
A. Introduction 8
B. Summary of Comments 8
C. Analysis and Findings 9

V. SECTION 3 – INFORMAL REVIEW AND REMEDIAL PLANS 10
A. Introduction 10
B. Summary of Comments 11
C. Analysis and Findings 11

VI. SECTION 4 – COMMENCEMENT OF FORMAL PROCEEDINGS 12
A. Introduction 12
B. Initiating a Formal Proceeding 13
1. Summary of Comments 13
2. Analysis and Findings 14
C. Notice of Probable Violation 15
1. Summary of Comments 15
2. Analysis and Findings 16
D. Respondent's Response and Right to Hearing 17
1. Summary of Comments 17
2. Analysis and Findings 17

VII. SECTION 5 – ADJUDICATORY HEARING 19
A. Introduction 19
B. Summary of Comments 20
C. Analysis and Findings 20

VIII. SECTION 6 – ORDER FINDING NO VIOLATION AND REMEDIAL ORDERS 22
A. Introduction 22
B. Summary of Comments 23
C. Analysis and Findings 23

IX. SECTION 7 – CONSENT AGREEMENTS AND CONSENT ORDERS 24
A. Introduction 24
B. Summary of Comments 25
C. Analysis and Findings 25

X. SECTION 8 – PENALTIES 26
A. Introduction 26
B. Summary of Comments 26
1. Attorney General 26
2. NCLC 28
3. Suppliers/RESA 28
C. Analysis and Findings 29

XI. OTHER ISSUES 35
A. Public Access to Documents 35
1. Introduction 35
2. Summary of Comments 35
a. Attorney General and Compact 35
b. Suppliers/RESA 35
3. Analysis and Findings 36
B. Relationship between Department Investigations and Attorney General Investigations 38
1. Introduction 38
2. Summary of Comments 38
a. Suppliers/RESA 38
b. Attorney General 39
3. Analysis and Findings 40
C. Issues Outside the Scope of this Proceeding 41

XII. CONCLUSION 42

XIII. ORDER 42

I. INTRODUCTION

The Department of Public Utilities ("Department") licenses electric and gas competitive suppliers, electricity brokers, and gas retail agents (hereinafter referred to as "competitive supply companies" or "competitive supply company") pursuant to G.L. c. 164, § 1F, and a Rulemaking to Establish Rules Governing the Unbundling of Services Related to the Provision of Natural Gas, D.T.E. 98-32-E (2000). The Department is also responsible for addressing consumer complaints and ensuring that competitive supply companies comply with Department regulations. G.L. c. 164, § 1F; 220 C.M.R. §§ 11.07, 14.06(5), 25.00. Further, after conducting a hearing that complies with G.L. c. 30A ("Chapter 30A"), the Department is authorized to investigate and take licensure action or levy civil penalties against a competitive supply company that has significant consumer issues or has committed violations of Department regulations. G.L. c. 164, § 1F; 220 C.M.R. §§ 11.07, 14.06(5), 25.00.[1]

On September 12, 2016, the Department opened this investigation to develop interim guidelines for competitive supply formal investigations and proceedings that will comply with Chapter 30A. Investigation to Establish Interim Guidelines for Competitive Supply Formal Investigations and Proceedings, D.P.U. 16-156, Vote to Open Investigation (2016). In that Order, the Department proposed interim guidelines detailing the processes and procedures to be (1) applied to all competitive supply proceedings that require compliance with Chapter

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[1] "Licensure action" includes suspension or revocation of a competitive supply company's license, denial of an application for license renewal, or implementation of a probationary period. See, e.g., 220 C.M.R. § 11.05(2)(e).

30A, and (2) uniformly implemented when a competitive supply company has allegedly violated our regulations. D.P.U. 16-156, Attachment A – Competitive Supply Proposed Interim Guidelines ("Proposed Interim Guidelines").

On October 11, 2016, the Department received initial comments on the Proposed Interim Guidelines from: (1) the Attorney General of the Commonwealth of Massachusetts ("Attorney General"); (2) the Cape Light Compact ("Compact"); (3) Choice Energy, LLC d/b/a 4 Choice Energy, North American Power and Gas, LLC, Town Square Energy, LLC, Verde Energy USA, and the Retail Energy Supply Association ("Suppliers/RESA");[2] and (4) the National Consumer Law Center ("NCLC"). The Department received reply comments on the Proposed Interim Guidelines from: (1) the Attorney General; (2) the Compact; and (3) the Suppliers/RESA on October 25, 2016.

In this Order, the Department sets forth the final version of the Interim Guidelines that will be (1) applied to all competitive supply proceedings that require compliance with Chapter 30A, and (2) uniformly implemented when a competitive supply company has allegedly violated our regulations. See Attachment A – Competitive Supply Interim Guidelines ("Interim Guidelines").[3]

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[2] RESA is an organization that represents a broad group of more than 20 competitive supply companies (Suppliers/RESA comments at 1 n.1). Thus, the Suppliers/RESA comments submitted in this docket may not represent the views of all RESA member companies (Suppliers/RESA comments at 1 n.1).

[3] For reference purposes, the Department has included a redline comparison of the Proposed Interim Guidelines and the Interim Guidelines as Attachment B.

II. ORDER OF RIGHT OF DELEGATION

Concurrent with the issuance of this Order, the Department issued an Order of Right of Delegation, D.P.U. 16-156-B, which authorizes the Chairman to delegate to a single commissioner ("Delegated Commissioner") authority to take certain actions related to the processes set forth in this Order and the Interim Guidelines. Pursuant to D.P.U. 16-156-B, the Delegated Commissioner will have authority to (1) initiate and conduct an informal review of a competitive supply company, and (2) resolve such an investigation by entering into an informal remedial plan with the competitive supply company, as set forth in Section V, below. In addition, D.P.U. 16-156-B delegates to the Delegated Commissioner authority to (1) issue a notice of probable violation ("NOPV") that initiates a formal proceeding of a competitive supply company, (2) participate in the formal proceeding, which includes but shall not be limited to, presenting evidence in support of the allegations contained in the NOPV, and presenting final arguments on the record, and (3) enter into a consent agreement with the competitive supply company, as set forth in Sections VI, VII, and IX, below. As outlined below, the Department has amended the Interim Guidelines to correspond with the delegation of authority and directives established in D.P.U. 16-156-B.

III. SECTION 1 – PURPOSE AND SCOPE

A. Introduction

As noted therein, the purpose of the Proposed Interim Guidelines was to set forth the rules and procedures for competitive supply formal investigations and proceedings pursuant to G.L. c. 30A and 220 C.M.R. §§ 11.07, 14.06(5), 25.00. Proposed Interim Guidelines,

Section 1(1). Further, the Proposed Interim Guidelines are intended to apply to all competitive supply companies that participate in the electric and gas retail markets in the Commonwealth of Massachusetts and are licensed by the Department. Proposed Interim Guidelines, Section 1(2). In general, the commenters supported the concept of the Interim Guidelines as a means of providing clarity to the Department's review of competitive supply companies (see, e.g., Attorney General Comments at 1; Suppliers/RESA Comments at 1-2). The Department addresses issues associated with the scope of the Interim Guidelines below.

B. Summary of Comments

The Suppliers/RESA argue that the Interim Guidelines should apply to both competitive supply companies and distribution companies, stating that the distribution companies are not immune from complaints and issues that require regulatory intervention and oversight (Suppliers/RESA Reply Comments at 2). In addition, the Attorney General states that the Department should clarify whether the Interim Guidelines apply to unlicensed entities that provide the types of services provided by licensed competitive supply companies (Attorney General Comments at 2). The Suppliers/RESA further assert that the Department should provide for express enforcement authority of unlicensed competitive supply companies in the Interim Guidelines (Suppliers/RESA Reply Comments at 2).

C. Analysis and Findings

To alleviate any confusion, and on its own initiative, the Department has revised the purpose section to specifically state that the Interim Guidelines cover both informal reviews and docketed formal investigations. Interim Guidelines, Section 1(1). In addition, the

Department declines to expand the scope of the Interim Guidelines to cover distribution companies in Massachusetts. Simply stated, distribution companies are subject to well-established processes and procedures that examine regulatory violations, service quality, consumer service, complaints, and billing disputes. Comparatively, these Interim Guidelines are explicitly intended to provide clear oversight and guidance to the competitive supply domain, which currently has much less oversight than distribution companies. For example, the Department's consumer regulations outline a processes and procedures for consumers to dispute electric, gas, and water charges or terminations from distribution companies. 220 C.M.R. § 25.00. In addition, pursuant to G.L. c. 164, §§ 1E and 1I, all electric and gas distribution companies in Massachusetts are required to file annual service quality reports with the Department.[4] Further, within the context of a rate case the Department may adjust a distribution company's return on equity based on both quantitative and qualitative factors, which includes, among other factors, management performance and customer service. See, e.g., Boston Edison Company v. Department of Public Utilities, 375 Mass. 1, 11, cert. denied, 439 U.S. 921 (1978); Boston Gas Company v. Department of Public Utilities, 359 Mass. 292, 305-306 (1971); Fitchburg Gas and Electric Light Company, D.P.U. 11-01/D.P.U. 11-02, at 424 (2011); Aquarion Water Company of Massachusetts, D.P.U. 08-27, at 134-138 (2009). None of this regulatory or statutory oversight applies to the

[4] The service quality reports compare each distribution company's performance with the Department's service quality standards. Service Quality Guidelines, D.P.U. 12-120-D, Attachment A (2015) ("SQ Guidelines"). The Department reviews each service quality report and determines, based on the performance metrics found in the SQ Guidelines, whether to apply penalties.

competitive supply market. Thus, the Department finds that there is a well-established framework for investigating regulatory violations and consumer issues involving distribution companies in Massachusetts and subjecting the distribution companies to additional process would be duplicative and unnecessary.

While appreciative of the goals of their suggestions, the Department further declines to adopt the Attorney General's and the Suppliers/RESA's argument that the Interim Guidelines should apply to both licensed and unlicensed competitive supply companies operating in Massachusetts. The Department's regulations and controlling statute permit the Department to take licensure action and levy civil penalties against a competitive supply company that has consumer issues or has committed violations of Department regulations. G.L. c. 164 § 1F(7); 220 C.M.R. §§ 11.07, 14.06(5). Further, the Department's regulations explicitly define a competitive supplier as an entity licensed or certified by the Department to sell electricity or gas and related services. 220 C.M.R. §§ 11.02, 14.02. Thus, to be considered a competitive supplier in Massachusetts, that competitive supply company must hold a valid license issued by the Department and, as a result, the Interim Guidelines and penalty provisions of 220 C.M.R. §§ 11.07, 14.06(5), shall only apply to licensed competitive supply companies.

In addition, regarding the Department's jurisdictional authority in this space, an entity must be licensed by the Department before it can act as a competitive supplier and participate in the purchase and sale of electric and gas supply. Department regulations state that distribution companies are prohibited from providing competitive supply services

(i.e., customer enrollments and billing) to unlicensed entities. 220 C.M.R. §§ 11.04(14), 14.03(10). The distribution companies comply with this requirement by stating in their terms and conditions for competitive supply companies that, "[e]ach competitive supplier must meet the registration and licensing requirements established by law or regulation" (see, e.g., Massachusetts Electric Company/Nantucket Electric Company, M.D.P.U. 1201, Section 3.C). Therefore, given that absent the distribution companies providing customer enrollments and billing services, an unlicensed entity attempting to "sell" competitive supply services to electricity consumers in Massachusetts could not legally participate in the competitive supply market, it is unclear to the Department how an unlicensed competitive supply company could be operating in the Commonwealth under the Department's regulations. Rather, the Department finds that such unlicensed entities would be committing fraud or misrepresentation, with enforcement actions against them available to unwitting customers that are outside the scope of the Department's jurisdiction.

The Department also finds that its jurisdiction to take licensure action or levy civil penalties against an electricity broker or gas retail agent is limited to those that are licensed or certified by the Department. As with the competitive supply companies, the Department's gas regulations require that a gas retail agent be certified by the Department. 220 C.M.R. § 14.02. While the Department's regulations do not explicitly define electricity brokers as those licensed or certified by the Department, the regulations prohibit competitive suppliers from doing business with unlicensed or unauthorized electricity brokers. 220 C.M.R. § 11.05(5). Thus, and consistent with our findings above regarding the causes

of action associated with the pursuit of false or misleading business practices, the Department finds it to be more appropriate to place the onus on competitive suppliers to comply with our regulations and only contract with licensed electricity brokers or gas retail agents. Therefore, if a competitive supplier uses the services of an unlicensed electricity broker or gas retail agent, the Department will consider the supplier to be in violation of our regulations and subject to the processes and procedures outlined in the Interim Guidelines.

As stated above, pursuant to Department regulations and the practical functionality of the competitive supply market, an unlicensed entity attempting to sell electricity or gas supply cannot be considered a competitive supply company. Thus, the Department finds that we lack jurisdiction over unlicensed entities that attempt to participate in the competitive supply market, and we decline to expand the scope of the processes and procedures outlined in the Interim Guidelines to cover unlicensed entities.

IV. SECTION 2 – DEFINITIONS

A. Introduction

In Section 2 of the Proposed Interim Guidelines, the Department provided definitions that would apply to each section of the Interim Guidelines. As discussed below, Commenters raised several concerns with respect to these definitions.

B. Summary of Comments

The Suppliers/RESA state that the Department should clarify the roles of the Prosecuting Officer and Presiding Officer to preserve the confidential nature of communications between a competitive supply company and the Prosecuting Officer at the

informal stage of a proceeding (Suppliers/RESA comments at 4). The Suppliers/RESA also argue that the terms "Competitive Supply Company" or "Competitive Supply Companies" be changed to "Competitive Retail Company" or "Competitive Retail Companies" because electricity brokers and gas retail agents covered in the definition do not actually "supply" electricity or natural gas to consumers (Suppliers/RESA comments at 7).

C. Analysis and Findings

As stated in Section II above, D.P.U. 16-156-B, provides the Delegated Commissioner with authority to: (i) initiate and conduct informal reviews; (ii) enter into informal remedial plans; (iii) issue an NOPV; (iv) participate in a formal proceeding before the Department, which includes but shall not be limited to, presenting evidence in support of the allegations contained in the NOPV, and presenting final arguments on the record; and (v) sign and seek approval of a consent agreement. This authority is also defined in Section 2(1) of the Interim Guidelines. As a result of the delegation in D.P.U. 16-156-B, we have revised the Interim Guidelines to clarify that the Prosecuting Officer is the hearing officer to whom the Delegated Commissioner may further delegate the authority to (i) conduct informal reviews, and (ii) participate as a party in a formal proceeding. Interim Guidelines, Section 2(11). The Presiding Officer remains the hearing officer designated by the two remaining Commissioners ("Nondelegated Commissioners") to conduct formal adjudications. Interim Guidelines, Section 2(10).[5]

[5] The separate and distinct roles of the Prosecuting and Presiding Officers are discussed below in Section VII.

Further, the Department declines to change the terms "Competitive Supply Company" and "Competitive Supply Companies" to "Competitive Retail Company" or "Competitive Retail Companies" when collectively referring to Electricity Brokers, Competitive Suppliers, Gas Suppliers, and Gas Retail Agents. To maintain consistency when referring to the broad range of companies that participate in the natural gas and electric competitive supply markets in Massachusetts, the Department finds that the use of terms "Competitive Supply Company" and "Competitive Supply Companies" is appropriate. In addition, to eliminate any confusion regarding the types of companies licensed by the Department, the Department includes separate definitions for "Electricity Broker," "Electric Competitive Supplier," "Gas Supplier," and "Gas Retail Agent." Interim Guidelines, Section 2(4)-(7). Finally, the Department revises the Interim Guidelines to remove the word "competitive" from gas suppliers. Such a change is consistent with 220 C.M.R. § 14.00 et seq. as well as each of the gas company's terms and conditions tariffs.

V. SECTION 3 – INFORMAL REVIEW AND REMEDIAL PLANS

A. Introduction

Section 3 of the Proposed Interim Guidelines set forth the process by which the Department may commence an informal review of a competitive supply company's suspected or alleged violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder. Proposed Interim Guidelines, Section 3. This section also outlined how the Prosecuting Officer and a competitive supply company could agree to an informal remedial plan, and the conditions attached to any such plan. Proposed Interim Guidelines,

Section 3.

B. Summary of Comments

The Suppliers/RESA state that the Department should clarify that an informal conference may be held via telephone because not all competitive supply companies have a physical presence in Massachusetts (Suppliers/RESA Comments at 7). The Suppliers/RESA also argue that the word "evidence" in Section 3 should be replaced with the word "information" because in order for information to be designated as evidence, it must meet certain threshold requirements (Suppliers/RESA Comments at 8). Further, the Suppliers/RESA argue that Section 3 should include a sentence that reads, "[t]he informal remedial plan need not contain an admission that a violation has occurred and, without such a term, does not constitute an admission" (Suppliers/RESA Comments at 7). Finally, the Suppliers/RESA argue that the approved Interim Guidelines should state that a competitive supply company and the Prosecuting Officer may agree to an informal remedial plan at any point in the informal review process not only at the conclusion of the informal review (Suppliers/RESA Comments at 5).

C. Analysis and Findings

The Department finds that the Suppliers/RESA's recommendations regarding: (1) a clarification that the informal conference may be by telephone; (2) the use of the term "information" in place of "evidence"; (3) the inclusion of language stating that a remedial plan need not contain an admission that a violation has occurred; and (3) the ability of a competitive supply company to enter into a remedial plan at any point in the informal review

process (rather than only at the conclusion of the informal review), clarify the manner in which the Department intends to implement the informal review process. Therefore, the Department incorporates these recommendations into its Interim Guidelines. Interim Guidelines, Section 3.

As stated above, pursuant to the Order of Right of Delegation, the Delegated Commissioner has the authority to initiate and conduct informal reviews of competitive supply companies, and where applicable, enter into informal remedial plans. The Delegated Commissioner may not, however, further delegate such authority to enter into an informal remedial plan. D.P.U. 16-156-B, at 2-3. The Department amends the Interim Guidelines to reflect the Delegated Commissioner's delegated authority to conduct informal reviews and agree to informal remedial plans. Interim Guidelines, Section 2.[6]

VI. SECTION 4 – COMMENCEMENT OF FORMAL PROCEEDINGS

A. Introduction

Section 4 of the Proposed Interim Guidelines provided that the Department may initiate a formal proceeding after an informal review, or without an informal review where appropriate, by issuing an NOPV within 60 days after a report of a suspected or alleged violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder. Proposed Interim Guidelines, Section 4(1)-(3). Section 4 also provided the information that needs to be included in an NOPV, which includes, among other things,

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[6] Comments regarding public access to informal remedial plans are addressed in Section XI.A below.

(1) the requirement that the competitive supply company named in the NOPV ("Respondent") must respond to the allegations within 30 days from the date of the NOPV, and (2) that other parties may petition the Department to intervene in the proceeding. Proposed Interim Guidelines, Section 4(4). Finally, Section 4 of the Proposed Interim Guidelines stated that the Respondent must respond to an NOPV with a written statement, and if the Respondent fails to appear at the formal conference, the Respondent shall be deemed to have admitted to the accuracy of the allegations and legal conclusions contained in the NOPV. Proposed Interim Guidelines, Section 4(5)-(6).

B. Initiating a Formal Proceeding

1. Summary of Comments

The Attorney General states that the Department should clarify whether consumers, the Attorney General, or other interested parties may file a petition with the Department requesting a formal investigation into the conduct of a competitive supply company (Attorney General Comments at 3).

The Suppliers/RESA state that the Department should consider making the Interim Guidelines more flexible and allow for an extension of the 60-day period within which the Department must initiate a formal proceeding, by adding the phrase "unless the Respondent agrees to a reasonable extension of this timeframe" to the end of Section 4(2) of the Proposed Interim Guidelines (Suppliers/RESA Comments at 9).

2. Analysis and Findings

Pursuant to the Order of Right of Delegation, the Delegated Commissioner has the authority to initiate a formal proceeding by issuing an NOPV if the Delegated Commissioner has reason to believe that a violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, has occurred or is continuing to occur. D.P.U. 16-156-B, at 2-3. The Delegated Commissioner may not further delegate this authority. D.P.U. 16-156-B, at 2-3. Consistent with the Order of Right of Delegation, the Department amends the Interim Guidelines to reflect the Delegated Commissioner's authority to initiate a formal proceeding by issuing an NOPV. Interim Guidelines, Section 4.

The Attorney General asserts that the Department should clarify whether the Attorney General and other interested parties may file a petition with the Department requesting a formal investigation (Attorney General Comments at 2). The Department anticipates that the majority of investigations will be opened on our own motion as a result of consumer complaints filed with the Department's Consumer Division. However, the Department recognizes that there may be instances in which an investigation will be the result of a petition from the Attorney General or another interested person. Upon receipt of such a petition to initiate an investigation, the Delegated Commissioner will determine whether such an investigation is appropriate, and if so, whether the investigation should commence in the form of an informal review or a formal proceeding.[7] As such, the Department amends the Interim Guidelines to state that the Delegated Commissioner may initiate an informal review

[7] The Department will notify the third-party petitioner in writing of our decision.

or formal proceeding either on its own initiative or on the petition of a third party. Interim Guidelines, Sections 3(1), 4(1).

The Proposed Interim Guidelines also included a 60-day period within which the Department must initiate a formal proceeding. Proposed Interim Guidelines, Sections 4(2). The Suppliers/RESA recommend that the Department provide additional flexibility to this requirement and allow an extension of time when circumstances warrant and the extensions are approved by the Department (Suppliers/RESA Comments at 9). The Department notes that Section 9 of the Interim Guidelines includes a waiver provision that allows the Department to deviate from the requirements set forth in the Interim Guidelines where good cause is shown. Thus, where appropriate, the Department will extend the time requirement to initiate a formal proceeding. Nonetheless, the Department finds that a 60-day deadline to issue an NOPV from the initial complaint may not provide sufficient time for investigation and negotiation. As a result, the Department amends the Interim Guidelines to state that the Delegated Commissioner shall initiate a formal proceeding by issuing an NOPV within 90 days after a report of a suspected or alleged violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder. Interim Guidelines, Section 4(3).

C. Notice of Probable Violation

1. Summary of Comments

The Suppliers/RESA state that the Department should allow for an extension of the 30-day period by which Respondents must submit written responses, by adding the phrase "unless circumstances warrant an extension to such response period and such extension is

approved by the Department" to the end of Section 4(4)(h) of the Proposed Interim Guidelines (Suppliers/RESA Comments at 9). The Suppliers/RESA also state that the Department should clarify the procedural rules regarding intervention that will apply in formal proceedings, by adding the phrase "subject to the requirements of 220 C.M.R. § 1.03" to the end of Section 4(4)(j) of the Proposed Interim Guidelines.

2. Analysis and Findings

The Proposed Interim Guidelines required the NOPV to include a statement that a Respondent must provide written responses to the allegations set forth in the NOPV within 30 days. The Department finds that 30 days is sufficient to provide written responses to the allegations in an NOPV, and therefore declines to extend the 30-day period within which a Respondent must provide written responses to the allegations set forth in the NOPV. As stated above, Section 9 of the Interim Guidelines includes a waiver provision that allows the Department to deviate from the requirements set forth in the Interim Guidelines. Thus, where applicable, and upon a showing of good cause, the Department has adequate discretion to grant a competitive supply company an extension of the 30-day response time.

The Proposed Interim Guidelines stated that parties may petition the Department to intervene in a formal proceeding. Proposed Interim Guidelines, Section 4(4)(j). The Suppliers/RESA commented that the Department should make clear that petitions to intervene will be subject to the requirements of 220 C.M.R. § 1.03 (Suppliers/RESA Comments at 6, 9-10). The Department agrees with the Suppliers/RESA's comments and finds that petitions to intervene must meet the requirements of 220 C.M.R. § 1.03, and the Department's

precedent on intervention. Therefore, the Department amends the Interim Guidelines to reflect this requirement. Interim Guidelines, Section 4(4)(j).

D. Respondent's Response and Right to Hearing

1. Summary of Comments

The Suppliers/RESA argue that a Respondent should be allowed to waive its right to a hearing if it believes that the issue can be adequately presented to and acted on by the Department without a hearing (Suppliers/RESA Comments at 9). Thus, the Suppliers/RESA recommend adding the phrase "and the Respondent's right to waive an adjudicatory hearing" to the end of Section 4(4)(f) of the Proposed Interim Guidelines (Suppliers/RESA Comments at 9). The Suppliers/RESA also argue that the Department should make clear that in formal proceedings involving more than one Respondent, the lack of responsiveness of one Respondent will not be impugned to other Respondents (Suppliers/RESA Comments at 9-10). Further, the Suppliers/RESA state that the Department should clarify that the term "formal conference" used in Section 4(6) of the Proposed Interim Guidelines means "hearing" (Suppliers/RESA Comments at 10).

2. Analysis and Findings

The Suppliers/RESA argue that the Interim Guidelines should permit a Respondent the ability to waive its right to an adjudicatory hearing if it determines that the issue can be adequately presented to and acted on by the Department without a hearing (Suppliers/RESA Comments at 9). The purpose of the adjudicatory hearing is to ensure that there is sufficient evidence on the record to allow the Presiding Officer to make recommendations to the

Nondelegated Commissioners on the issues being addressed in the formal proceeding.[8] Thus, while the Respondent may waive its right to an adjudicatory hearing, that unilateral waiver does not necessarily mean that the hearing will be canceled. For an adjudicatory hearing to be canceled, the Respondent, the Delegated Commissioner, any full-party intervenors, and the Presiding Officer would all need to waive their rights to an adjudicatory hearing. If each party to the proceeding states that they do not require an adjudicatory hearing, the Presiding Officer may request final arguments (i.e., briefs or comments) from the parties pursuant to Department regulations. 220 C.M.R. §§ 1.11(3)-(5). Thus, the Department declines to adopt the Suppliers/RESA' recommendation and include a clause in the Interim Guidelines permitting the waiver of a Respondents' right to an adjudicatory hearing. Instead, the Department reiterates that the adjudicatory hearings will be conducted by the Presiding Officer pursuant to the Department's procedural regulations. Interim Guidelines, Section 5(1), (2).

The Suppliers/RESA also raise concerns regarding the impact on a Respondents' formal proceeding when another competitive supply company or potential witness is not forthcoming and causing delays or issues during the formal proceeding. As an initial matter, the Department finds it is unlikely that the nature of these investigations will lend themselves to a review of multiple Respondents in the context of a single formal proceeding. In addition, pursuant to our regulations and Chapter 30A, the Department has authority to

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[8] In this context the Presiding Officer would be making his or her recommendations to the Nondelegated Commissioners.

subpoena witnesses and compel discovery responses. 220 C.M.R. §§ 1.06(5)(c)4; 1.10(9). The Department also notes that the Presiding Officer and Nondelegated Commissioners, in determining the final outcome of a formal proceeding, will consider all factors and information presented throughout the proceeding, including the Respondent's and any third party's unwillingness to cooperate in the investigation. See G.L. c. 30A, §§ 11, 14. Therefore, the Department need not amend the Interim Guidelines to address the impact on a Respondents' formal proceeding when another competitive supply company or potential witness is not forthcoming and causing delays or issues during the formal proceeding.

Finally, the Department agrees with the Suppliers/RESA that the term "formal conference" used in Section 4(6) of the Proposed Interim Guidelines should refer to the adjudicatory hearing. Therefore, the Department hereby amends the Interim Guidelines to reflect that change. Interim Guidelines, Section 4(6).

VII. SECTION 5 – ADJUDICATORY HEARING

A. Introduction

Section 5 of the Proposed Interim Guidelines described the adjudicatory hearing process, including the requirements that the hearing shall be a de novo hearing, an adjudicatory hearing as defined in G.L. c. 30A, and conducted pursuant to the Department's regulations, 220 C.M.R. § 1.00. Proposed Interim Guidelines, Section 5(1). Section 5 of the Proposed Interim Guidelines also stated that (1) the adjudicatory hearing will be conducted by a Presiding Officer that will not be the same person assigned as the Prosecuting Officer, (2) the Respondent must be represented by an attorney, and (3) if the Department

finds that a Respondent has violated G.L. c. 164, § 1F, or any regulation promulgated or Order issued thereunder, the Department may issue a Remedial Order. Proposed Interim Guidelines, Section 5(2)-(4).

B. Summary of Comments

The Suppliers/RESA support the Department's proposal to assign different staff to serve as Prosecuting Officer in an informal review and a Presiding Officer in a formal proceeding (Suppliers/RESA Comments at 4). The Suppliers/RESA recommend, however, that the Department clarify the role of the Prosecuting Officer by expressly stating that a Prosecuting Officer may not serve as Department staff or otherwise participate in any way (including engaging in any substantive discussions with appointed Department staff), in the ensuing formal proceeding involving the same supplier (Suppliers/RESA Comments at 4). The Suppliers/RESA also argue that their ability to engage in an open and frank dialogue with the Prosecuting Officer during the informal review process would be adversely impacted if the role of the Prosecuting Officer is not clarified (Suppliers/RESA Comments at 4).

C. Analysis and Findings

With respect to the Suppliers/RESA's concerns regarding the role of the Prosecuting Officer, the Department has revised the Interim Guidelines, Section 2, to clarify the roles of the Delegated Commissioner, Nondelegated Commissioners, the Presiding Officer, and the Prosecuting Officer. As a result of these defined roles, the Delegated Commissioner and Prosecuting Officer will be specifically excluded from running a formal proceeding or participating in the development or issuance of a final Order at the conclusion of a formal

proceeding. These obligations will remain within the purview of the Presiding Officer and the Nondelegated Commissioners. The Delegated Commissioner and Prosecuting Officer will be responsible for, among other things, negotiating a consent agreement with the competitive supply company consistent with the Department's use of Settlement Intervention Staff in other proceedings. See, e.g., Sheffield Water Company, D.P.U. 09-142 (2010); East Northfield Water Company, D.T.E. 98-127 (1999).

The Department also notes that once a formal investigation is initiated, all parties to the proceeding, including the Delegated Commissioner, Prosecuting Officer, the competitive supply company, intervenors, the Presiding Officer, and the Nondelegated Commissioners will all be bound by the Department's procedural regulations, which include all relevant ex parte provisions and practices. 220 C.M.R. § 1.00 et seq.; 1.02(9); Interim Guidelines, Section 5(1). The Department's ex parte rules specifically prohibit the Delegated Commissioner, the Prosecuting Officer, and their support staff from having substantive discussions outside of the formal proceeding with the Presiding Officer or the Nondelegated Commissioners that may be responsible for issuing a final Order at the conclusion of the formal proceeding. Further, because an informal review may lead to a formal investigation, the Delegated Commissioner, the Prosecuting Officer, the competitive supply company and any possible intervenors will be precluded from having any substantive discussions with the Nondelegated Commissioners or other Department staff not specifically involved in the informal review.

Regarding the Suppliers/RESA's comments that a competitive supply company's willingness to engage in open and frank dialogue during an informal review process may be hindered if the Prosecuting Officer's role is not clearly defined, the Department notes that an adjudicatory hearing will be conducted by the Presiding Officer de novo. Thus, if a Prosecuting Officer seeks to introduce information gathered through the course of an informal review as evidence in the formal adjudication, the Prosecuting Officer would need to obtain that evidence through discovery or witness testimony and, as a result, that evidence would be subject to cross-examination. Further, while the Department is not bound by the Massachusetts rules of evidence, we follow the rules of evidence when practicable. 220 C.M.R. § 1.10. As a result, unless relevant for some other purpose (e.g., to prove bias or a prejudice), furnishing, promising, or offering a compromise or attempting to comprise a claim, or conduct or a statement made during compromise negotiations is not admissible as evidence. Proposed Mass. R. Evid. 408; see also Massachusetts Guide to Evidence, § 408.

VIII. SECTION 6 – ORDER FINDING NO VIOLATION AND REMEDIAL ORDERS

A. Introduction

Section 6 of the Proposed Interim Guidelines explained the process of issuing a Remedial Order if the Department finds that a competitive supply company has violated G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder. See Proposed Interim Guidelines, Section 6. Section 6 of the Proposed Interim Guidelines also stated that (1) a Remedial Order is a final decision of the Department, (2) a Respondent has the right to appeal a Remedial Order to the Supreme Judicial Court, and (3) the

Department may waive the requirement for notice and hearing before issuing a Remedial Order if failure to do so would result in serious harm to life or property. Proposed Interim Guidelines, Section 6(3)-(5).

B. Summary of Comments

The Suppliers/RESA recommend that the Department allow a Respondent to enter into an informal remedial plan after a formal proceeding has been initiated (Suppliers/RESA Comments at 5). The Suppliers/RESA also state that the Department should appoint settlement staff to help mediate among the Department, the competitive supply company, and other parties (Suppliers/RESA Comments at 6).

In response to the Suppliers/RESA's recommendation, the Attorney General argues that once the Department has determined that allegations are sufficiently serious to warrant a formal proceeding, the Department should not allow a Respondent to resolve outstanding issues with an informal remedial plan (Attorney General Reply Comments at 3). Instead, the Attorney General states that once a proceeding is initiated pursuant to G.L. c. 30A, any resolution should be in the form of a legally binding Department Order (Attorney General Reply Comments at 3-4).

C. Analysis and Findings

All competitive supply formal proceedings will be docketed by the Department on the Delegated Commissioner's issuance of an NOPV. Interim Guidelines, Section 4(4)(a). In addition, the Department will treat competitive supply formal proceedings in the same manner as all other docketed proceedings conducted pursuant to G.L. c.30A. Thus, the

Department agrees that any initiated formal proceeding may only be resolved through a legally binding final Order of the Department (i.e., a Consent Order, Remedial Order, or Order Finding No Violation, as discussed below). Therefore, the Department declines to adopt the Suppliers/RESA's recommendation that would allow a respondent to enter into an informal remedial plan after initiation of the formal proceeding.[9]

To address instances where, after the conclusion of a formal proceeding, the Department finds that there was no violation of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, the Department includes in the Interim Guidelines the authority to issue an Order Finding No Violation. Interim Guidelines, Section 6(1). With respect to the Suppliers/RESA's request that the Department appoint settlement staff, the Delegated Commissioner, the Prosecuting Officer, and their staff will serve as settlement intervention staff consistent with their prosecutorial responsibilities. Thus, the Delegated Commissioner and Prosecuting Officer will be responsible for negotiating and presenting any consent agreements to the Presiding Officer for Department approval. Therefore, we find that there is no need to assign additional settlement staff.

IX. SECTION 7 – CONSENT AGREEMENTS AND CONSENT ORDERS

A. Introduction

Section 7 of the Proposed Interim Guidelines described how the Department may, by issuing a Consent Order, approve a consent agreement between the Delegated Commissioner

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[9] The Department notes, however, that once a formal proceeding has been initiated a Respondent may enter into a consent agreement with the Delegated Commissioner that contains a remedial plan and seek Department approval.

and a Respondent that resolves outstanding enforcement issues or investigations. See Proposed Interim Guidelines, Section 7.

B. Summary of Comments

The Attorney General states that the Department should make clear whether (1) parties granted intervenor status can enter into a settlement with a Respondent, (2) a Department-approved settlement is an acceptable means of resolving outstanding issues in a formal proceeding, and (3) settlements would be treated in the same manner as a Consent Order (Attorney General Comments at 4).

C. Analysis and Findings

As noted in Section II, above, the Interim Guidelines include a description of the Delegated Commissioner's delegated authority, including the fact that a consent agreement must be signed by the Respondent and the Delegated Commissioner, and may be signed by any full-party intervenor in the proceeding. Interim Guidelines, Sections 2(1), (7)(1). In addition, the Department clarifies that a consent agreement is intended to act as a settlement and, subject to Department approval in a Consent Order, is an acceptable means of resolving outstanding issues in a formal proceeding (see Attorney General Comments at 4). Further, the Department amends Section 7 of the Interim Guidelines to include instructions on the form of a consent agreement and the process of filing a motion for approval with the Department. Interim Guidelines, Section 7(1)-(2). As such, the Department clarifies that a consent agreement need not contain an admission that a violation has occurred, and has removed that language from the section describing the Consent Order. See Interim

Guidelines, Section 7(1), (3). The signatories to a consent agreement shall file a motion to approve the consent agreement with the Presiding Officer. Any full-party intervenor in the proceeding that did not sign the consent agreement may file comments in opposition or support of the motion and consent agreement. After hearing arguments on the motion, the Department will review the entire record to ensure that the consent agreement is consistent with Department precedent and public policy and either grant or deny the motion to approve the consent agreement.

X. SECTION 8 – PENALTIES

A. Introduction

Section 8 of the Proposed Interim Guidelines sets forth the type of licensure action and civil penalties that the Department may choose to apply to a competitive supply company should the Department find a violation of any provision of G.L. c. 164, §§ 1A through 1F, or any Department-promulgated regulation or Order issued thereunder. Proposed Interim Guidelines, Section 8.

B. Summary of Comments

1. Attorney General

The Attorney General asserts that to promote consistency and clarity, the Department should list in the Interim Guidelines all three of the specific instances in which the Department has the authority to impose civil penalties (Attorney General Comments at 4). The Attorney General states that the Department has authority to impose penalties for the following circumstances: (1) violations of the Department's code of conduct; (2) violations

of any rule or regulation promulgated by the Department pursuant to G.L. 164, §§ 1A – 1H; or (3) violations of G.L. c. 93A relating to arbitration or mediation rules established by the Department pursuant to authority granted in G.L. c. 164, § 102C(b) (Attorney General Comments at 4, citing Fitchburg Gas & Electric Light Company, D.P.U. 09-01-A, at 182, 186–188 (2009)).

The Attorney General also argues that the Department should increase the maximum amount for civil penalties from $1 million to $5 million, in order to bring the Department's Interim Guidelines in line with the current version of the statute (Attorney General Comments at 4, citing G.L. c. 164, § 1F(7)). The Attorney General disagrees with the Suppliers/RESA's proposal to make the civil penalties discretionary because she notes the language in the Proposed Interim Guidelines tracks the mandatory language found in G.L. c. 164, § 1F(7) (Attorney General Reply Comments at 4).

In addition, the Attorney General agrees with NCLC's recommendation that license revocation should be mandatory for repeat violations of G.L. c. 164, §§ 1A-1F, because it may act as a further deterrent for competitive supply companies and could help create a safe and competitive marketplace (Attorney General Reply Comments at 5). Finally, the Attorney General disagrees with the Suppliers/RESA's request to make a remedial plan available to a competitive supply company once it has been formally found in violation of G.L. c. 164, §§ 1A through 1F (Attorney General Reply Comments at 4). The Attorney General argues that a remedial plan is not a sanction, and should not be used as a means of disposing formal proceedings (Attorney General Reply Comments at 4).

2. NCLC

NCLC argues that the Department should raise the maximum civil penalty to $5 million stating that this amount is set by the relevant statute (NCLC Comments at 2, citing G.L. c. 164 § 1F(7)). NCLC also argues that the Department should add language to Section 8 of the Interim Guidelines requiring mandatory license revocation for repeat violations of G.L. c. 164, §§ 1A-1F (NCLC Comments at 2).

3. Suppliers/RESA

Suppliers/RESA state that Section 8 of the Interim Guidelines should provide the Department with the flexibility to fashion appropriate remedies given the facts of a particular situation, and that the penalties provided in the Interim Guidelines should be discretionary rather than mandatory (Suppliers/RESA Comments at 11). The Suppliers/RESA further disagree with NCLC's proposal that license revocation for repeat violations of G.L. c. 164, §§ 1A-1F should be mandatory (Suppliers/RESA Reply Comments at 7). The Suppliers/RESA argue that NCLC's proposal for mandatory license revocation for repeat violations would violate both procedural and substantive due process (Suppliers/RESA Reply Comments at 7, citing Accord Kewley v. Department of Elementary and Secondary Educ., 86 Mass. App. Ct. 154, 161 (2014), Konstantopoulos v. Whately, 3784 Mass. 123, 132 (1981)). The Suppliers/RESA support a case-by-case analysis by the Department in order to determine the appropriate sanctions (Suppliers/RESA Reply Comments at 8).

The Suppliers/RESA also argue that the Department should add the term "remedial plan" to Section 8 of the Interim Guidelines as a potential penalty to which a competitive

supply company may be subject to for violations of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder (Suppliers/RESA Comments at 11-12). The Suppliers/RESA further argue that the Department should replace the word "shall" with "may" in Sections 8(1) and 8(3)(a) of the Interim Guidelines (RESA/Supplier Comments at 11-12).

In addition, the Suppliers/RESA state that competitive supply companies should be encouraged to identify and resolve potential problems independently without the need for agency intervention. Thus, the Suppliers/RESA request that the Department include a clause in Section 8 of the Interim Guidelines that provides competitive supply companies with "a credit for self-reporting the matter at issue" (Suppliers/RESA Comments at 12). Finally, the Suppliers/RESA state that the maximum civil penalty should remain at $1 million until the Department's regulations addressing the maximum fine are amended to reflect the statutory change (Suppliers/RESA Reply Comments at 3).

C. Analysis and Findings

The Attorney General asserts that to promote consistency and clarity, the Department should list in the Interim Guidelines the three specific instances in which the Department has the authority to impose civil penalties (Attorney General Comments at 4). The Proposed Interim Guidelines stated that each competitive supply company found to have violated G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder, shall be subject to licensure action or civil penalties, or both. Proposed Interim Guidelines, Section 8(1). This description provides the Department with a reasonable amount of

flexibility in determining what actions by a competitive supply company warrant licensure action or civil penalties, and will still apply if there are changes to the statutory framework. In addition, the three specific violations described by the Attorney General are covered within this description. Therefore, the Department declines to list the specific instances provided by the Attorney General and adopts the original language from the Proposed Interim Guidelines. Interim Guidelines, Section 8(1).

The Attorney General and NCLC argue that the Department should increase the maximum civil penalty from $1 million to $5 million, while the Suppliers/RESA argue that the maximum fine should remain at $1 million (Attorney General Comments at 4, NCLC Comments at 2, Suppliers/RESA Reply Comments at 3). The Department agrees that its regulations and the controlling statute differ in the maximum amount of fines that may be levied against a competitive supply company for any related series of violations. Compare G.L. c. 164 § 1F(7) with 220 C.M.R. §11.07(4)(c)(2). When reviewing an agency's interpretation of a statute it administers, well-settled administrative law employs a two-part test. Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-843 (1984). First, the test explores whether the legislature has directly spoken to the precise question at issue. If the intent of the legislature is evident, that is the end of the matter and the agency must give effect to the unambiguously expressed intent of the legislature. Second, if the statute is silent or ambiguous with respect to the specific issue, the test reviews whether the agency's interpretation is based on a permissible construction of the statute. Regarding the maximum fine the Department may levy against a competitive supply

company, the Department finds that the legislature has directly spoken to the issue and the statute is clear and unambiguous in permitting a maximum fine of up to $5 million. G.L. c. 164, § 1F(7). As a result, with the satisfaction of the first prong of the Chevron test on the basis that the legislature has unambiguously addressed this issue, we need not determine if the Department's regulations are a permissible construction of the statute and will adhere to the legislature's intent to permit a fine of up to $5 million. Therefore, the Department amends the Interim Guidelines to reflect a maximum fine of up to $5 million for any related series of violations. Interim Guidelines, Section 8(3)(a).

The Suppliers/RESA argue that the Department should replace the word "shall" with "may" in sections of the Interim Guidelines that relate to the imposition of civil penalties (RESA/Supplier Comments at 11-12). The Attorney General disagrees with RESA/Suppliers' proposal, noting the language in the Proposed Interim Guidelines tracks the mandatory language found in G.L. c. 164, § 1F(7), which states that a competitive supply company "shall" be subject to a civil penalty for violations (Attorney General Reply Comments at 4). While G.L. c. 164, § 1F states that a competitive supply company found to have violated the statute or regulations shall be subject to a civil penalty, the statute also gives the Department flexibility by stating that in determining the amount of the penalty, the Department shall consider the size of the business, the gravity of the violation, and the good faith of the company in attempting to achieve compliance after notification of a violation. Therefore, the Department declines to replace the word "shall" with "may" in the Interim Guidelines, Section 8. The Department will, however, consistent with G.L. c. 164, § 1F(7), assess civil

penalties on a case-by-case basis, following a review of the facts and circumstances surrounding the alleged violation.

The Suppliers/RESA argue that the Department should add the term "remedial plan" to Section 8 of the Interim Guidelines as a potential penalty to which a competitive supply company may be subject to for violations of G.L. c. 164, §§ 1A through 1F, or any regulation promulgated or Order issued thereunder (Suppliers/RESA Comments at 11-12). The Attorney General argues that a remedial plan should not be available in a formal proceeding (Attorney General Reply Comments at 4). The Department finds that if a competitive supply company is found to have violated an applicable statute or regulation, imposing a remedial plan may be a valid penalty measure by itself or in conjunction with civil penalties or licensure action. Civil penalties and licensure action are punitive measures that the Department may impose through a final Order after a hearing pursuant to Chapter 30A. These measures do not, however, address the underlying action of a competitive supply company that has violated the Departments statute and regulations. Requiring a competitive supply company to comply with a remedial plan and take specific actions that address the violations is consistent with Department's consumer protection role in the deregulated electric and gas markets. Thus, the Department amends Section 8 of the Interim Guidelines to include remedial plans as a potential penalty measure. Interim Guidelines, Section 8(2).

The Attorney General and NCLC recommend that the Department add language to the Interim Guidelines stating that license revocation will be mandatory for repeat violations of

G.L. c. 164, §§ 1A-1F (Attorney General Comments at 5; NCLC Comments at 2). The Suppliers/RESA argue that mandatory license revocation would violate both procedural and substantive due process (Suppliers/RESA Reply Comments at 7). Due to the authority granted to the Department to review and make findings relative to these issues, the Department agrees with Suppliers/RESA. The Department declines to adopt language requiring mandatory license revocation for repeat violations of G.L. c. 164, §§ 1A-1F, because such language would eliminate any flexibility for the Department in determining sanctions. There may be instances where a competitive supply company has repeat violations of G.L. c. 164, §§ 1A-1F, and fines or a reporting requirement are more appropriate than license revocation, in which case the Department has the authority to and should exercise it to take that action. In contrast, however, there may be instances where one violation of G.L. c. 164, §§ 1A-1F would require license revocation.[10] As such, the Department declines to include language requiring mandatory license revocation in the Interim Guidelines. Similarly, the Department declines to adopt mandatory fines for particular violations and will assess civil penalties on a case-by-case basis, following a review of the facts and circumstances surrounding the alleged violation and consistent with the intent of the statute.

The Suppliers/RESA also advocate for adding additional language to Section 8 of the Interim Guidelines that provides competitive supply companies with "a credit for self-reporting the matter at issue" (Suppliers/RESA Comments at 12). In approving a

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[10] The Department notes that, throughout the course of a formal proceeding, the parties may argue the type and severity of the penalties that are appropriate based on the facts of a particular case.

competitive supply company's license, the Department recognizes that the applicant possesses the requisite technical and financial ability, and will provide consumers with customer service consistent with G.L. c. 164, §§ 1A through 1F, or any Department-promulgated regulation or Order. The Department, therefore, expects that competitive supply companies will identify and resolve problems, and report those issues to the Department as part of their routine operations. Self-reporting problems is an action expected of competitive supply companies, and not one that should warrant some form of automatic credit in order to mitigate violations of G.L. c. 164, §§ 1A through 1F, or any Department-promulgated regulation or Order. Nonetheless, as part of its review, the Department will take into consideration circumstances in which a competitive supply company identifies and self reports in a timely manner, and makes the necessary efforts to expeditiously resolve those problems. Similarly, the Department will also consider as part of its review, a competitive supply company's failure to report problems to the Department or actions taken that appear to cover up those same problems from the Department. Thus, when the Department determines the ultimate culpability of a competitive supply company and the extent of the penalties to be imposed, the Department will weigh the competitive supply company's actions after we become aware of a potential issue or violation, along with any other mitigating or extenuating circumstances. As such, the Department declines to establish a formal mechanism for crediting a competitive supply company's self reporting.

XI. OTHER ISSUES

A. Public Access to Documents

1. Introduction

Some commenters raised additional concerns regarding the public accessibility or confidentiality of certain documents associated with potential remedial actions or rulings on violations pursuant to the Interim Guidelines. We address each of these concerns below.

2. Summary of Comments

a. Attorney General and Compact

The Attorney General recommends that the Department take efforts to ensure that the public is aware of any remedial actions undertaken to address the conduct of a competitive supply company by: (1) prominently posting any remedial plans or remedial Orders on the Department's Shopping for Competitive Supply website; (2) providing copies of any remedial plans or remedial Orders to members of the public on request; and (3) requiring competitive supply companies to notify affected customers of any violation that results in a remedial Order (Attorney General Comments at 3). Additionally, the Compact states that the Department should ensure that consumers have access to these documents, as well as NOPVs and consent Orders issued in the context of formal proceeding (Compact Comments at 2).

b. Suppliers/RESA

The Suppliers/RESA argue that providing consumers with increased information about a competitive supply company's informal remedial plans is outside the scope of this proceeding (Suppliers/RESA Reply Comments at 8). The Suppliers/RESA also argue that NOPVs should not be released to the public under any circumstances as they are "probable"

violations (Suppliers/RESA Reply Comments at 10). Additionally, the Suppliers/RESA argue that it may be appropriate to afford confidential treatment to some or all information included in a complaint, NOPV, remedial plan or consent Order to protect consumers or trade secret information (Suppliers/RESA Reply Comments at 9-10).

3. Analysis and Findings

As an initial matter, there is a general statutory mandate and presumption that all documents and data received by the Department are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. General Laws c. 25, § 5D, however, permits the Department, in narrowly defined circumstances, to grant exemptions from public disclosure. Thus, Respondents concerned with preserving the confidentiality of information provided to the Department pursuant to our jurisdictional review may comply with typical Department practice and file motions for protective treatment of confidential information, to be determined on a case-by-case basis as facts and circumstances so warrant, consistent with our controlling statute, regulations, and standard of review. G.L. c. 25, § 5D; 220 C.M.R. § 1.04(5)(e).[11]

Regarding documents and information filed with the Department during formal investigations and proceedings, the issuance of an NOPV itself initiates a formal docketed proceeding. Interim Guidelines, Section 4(4)(a). As such, the public will have access to all NOPVs and any filings made during the course of the formal proceeding (e.g., responses to

[11] Competitive supply companies that wish to protect competitively sensitive materials in the course of an informal review must also follow the Department's procedures for seeking protective treatment.

information requests, briefs) through the Department's online file room. http://web1.env.state.ma.us/DPU/FileRoom/dockets/bynumber.

Regarding public access to informal remedial plans and Remedial Orders, the Department recognizes that making these documents available to the public may present a disincentive to competitive supply companies to pursue and agree to informal remedial plans. Notwithstanding the general statutory mandate and presumption discussed above that all documents and data received by the Department are to be viewed as public records and, therefore, are to be made available for public review, there are, however, additional benefits associated with making informal remedial plans and Remedial Orders available to the public. For example, making such information generally available to the public would ensure that consumers have access to information regarding a competitive supply company's behavior and consumer relations when evaluating supply products. As such, making informal remedial plans and Remedial Orders available to the public may provide an incentive for competitive supply companies to avoid the types of behavior that may lead to Department investigations.

Nonetheless, pursuant to the Interim Guidelines, the Department does not intend for informal reviews to be docketed and, thus, the information or documents exchanged during an informal review will not be actively posted on the Department's website. Absent modifications to technology that the Department is not prepared to undertake at this time, such a practice would be administratively burdensome to the Department. Thus, informal remedial plans and Remedial Orders will be available to the public pursuant to public record

requests consistent with the Department's obligations and responsibilities under public records law.

B. Relationship between Department Investigations and Attorney General Investigations

1. Introduction

Commenters raised concerns regarding the possibility of duplicate investigations conducted by the Department and the Attorney General, and raise the question of whether the Guidelines should include a requirement that the Department refrain from initiating a formal proceeding against a competitive supply company if the Attorney General has an outstanding enforcement action against the same company for the same issue. The Department addresses this issue below.

2. Summary of Comments

a. Suppliers/RESA

The Suppliers/RESA state that the Department and the Attorney General should take measures to avoid duplicate and potentially inconsistent investigation and enforcement activities relative to the same supplier actions (Suppliers/RESA Comments at 2-4). In particular, the Suppliers/RESA recommend that the Department: (1) allow a Respondent to respond to an NOPV by seeking a "stay or termination" if the competitive supply company is in "active litigation" with the Attorney General over the same conduct; and (2) urge the Attorney General to refrain from commencing an investigation or litigation involving action against a competitive supply company already subject to a Department informal review or formal proceeding (Suppliers/RESA Comments at 3-4). In addition, the Suppliers/RESA

state that, if the Attorney General is participating in an informal or formal review proceeding conducted by the Department, she should not seek to initiate a duplicative investigation or litigation if not fully satisfied by the Department's resolution (Suppliers/RESA Reply Comments at 4-5).[12] Finally, the Suppliers/RESA disagree with the Attorney General's recommendation that the Department add a provision to the Interim Guidelines authorizing the Department to refer investigations to the Attorney General (Suppliers/RESA Reply Comments at 4). The Suppliers/RESA assert that any such rule should be undertaken when the Department formally amends the regulations rather than in the context of Interim Guidelines (Suppliers/RESA Reply Comments at 4).

b. Attorney General

The Attorney General opposes the Suppliers/RESA' recommendation that the Department implement measures to avoid duplicate investigations between the Attorney General and the Department (Attorney General Reply Comments at 2-3). The Attorney General argues that: (1) the Department's authority to investigate competitive supply companies and take remedial action is separate and distinct from the Attorney General's investigative authority under G.L. c. 93A and enforcement authority under G.L. c. 164, § 102C(a); and (2) the existence of parallel proceedings on the same conduct does not necessarily raise due process or fundamental fairness concerns (Attorney General Reply Comments at 2-3, citing United States v. Kordel, 379 U.S. 1, 11 (1970)). The Attorney

[12] Specifically, RESA/Suppliers state that the Attorney General should be bound by the ensuing resolution under res judicata/collateral estoppel principles, subject to appeal rights (Suppliers/RESA Reply Comments at 4-5).

General also states that she has no intention of refraining from exercising her authority under G.L. c. 93A for the sole reason that the Department may also be conducting an investigation (Attorney General Reply Comments at 2). The Attorney General, however, recommends that the Department add a new provision to the Interim Guidelines stating that the Department may refer certain complaints to the Attorney General pursuant to G.L. c. 164, § 1F(3)(v), including but not limited to, complaints alleging potential violations of G.C. c. 93A (Attorney General Comments at 3).

3. Analysis and Findings

As an initial matter, the Department emphasizes that it is not within our jurisdiction, nor is it our appropriate role, to dictate (or even provide guidance) to the Attorney General regarding the conduct of her office. Further, there are clearly plausible circumstances in which the Attorney General's review and the Department's review, while potentially overlapping on the actions of a competitive supplier, may warrant simultaneous enforcement actions by the two separate entities. While each have charges that are related in this area of oversight, their control and dominion in this space are discrete and separate. As such, the Department declines to include language in the Interim Guidelines stating that the Attorney General and Department may not initiate simultaneous proceedings against a supplier. In contrast, pursuant to G.L. c. 164, § 1F(3)(v), it is appropriate for the Department to refer certain complaints to the Attorney General if we conclude that the underlying behavior may be more appropriately dealt with by the Attorney General's office. Thus, we have amended the Interim Guidelines to include language referencing such referral. Interim Guidelines,

Section 4(7). The Attorney General must then determine whether to initiate her own investigation.

Finally, if the Respondent is in active litigation with the Attorney General over the same conduct that is the subject of a Department investigation, the Interim Guidelines do not preclude the Respondent from responding to an NOPV by seeking a stay or termination of the proceeding. The Department declines, however, to completely bar concurrent investigations by the Department and Attorney General, and will consider requests for stays or terminations of proceedings on a case-by-case basis.

C. Issues Outside the Scope of this Proceeding

The Attorney General and the Compact each separately raised issues associated with: (1) developing a code of conduct that would include standards regarding the level and type of complaints that would lead to informal or formal reviews of a competitive supply company's conduct, as well as standards for categories of behavior that could lead to licensure action of civil penalties; and (2) maintaining and tracking consumer complaint data, and making such data available to the public (Attorney General Comments at 2, Attorney General Reply Comments at 4-5; Compact Comments at 2, Compact Reply Comments at 2). The Suppliers/RESA argue that these issues are outside the scope of this proceeding (Suppliers/RESA Reply Comments at 8-9).

The purpose of the Interim Guidelines is to establish processes and procedures that will be implemented when a competitive supply company has allegedly violated the Department's regulations. See D.P.U. 16-156, at 2. The Department agrees with the

Suppliers/RESA that issues associated with (1) the development of a competitive supplier code of conduct, and (2) the manner in which the Department maintains and tracks consumer complaint data fall outside the scope of this proceeding. Therefore, the Department declines to address these issues in this Order.

XII. CONCLUSION

As discussed in D.P.U. 16-156, at 2 n.3, the Department will initiate a rulemaking designed to codify the Interim Guidelines and update the electric and gas competitive supply regulations. The Department intends on initiating such rulemaking after sufficient time has passed to assess the implementation of the Interim Guidelines set in place by this Order. At that time, the Department will determine, with input from interested parties and consistent with established rulemaking procedures, whether changes are required to the Interim Guidelines before they are codified in our regulations.

XIII. ORDER

After due notice and consideration of the comments received, it is

ORDERED: That the Competitive Supply Interim Guidelines adopted in this Order shall be uniformly implemented when a competitive supply company has allegedly violated our regulations; and it is

FURTHER ORDERED: That all competitive supply companies shall comply with all directives contained herein.

By Order of the Department,

/s/
Angela M. O'Connor, Chairman

/s/
Robert E. Hayden, Commissioner

/s/
Cecile M. Fraser, Commissioner